Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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In the matter of:	)	
	)	
Reexamination of Roaming Obligations of	)	WT Docket No. 05-265
Commercial Mobile Radio Service Providers and	)	
Other Providers of Mobile Data Services	)	

COMMENTS OF FREE PRESS

SUMMARY

Mobile wireless data services have the potential to expand the adoption, utility, and affordability of mobile high-speed Internet access. As consumers embrace mobile data, they gain access to economic, health, education, environmental, and public safety information, as well as opportunities for civic engagement.

Consumers have welcomed these opportunities, rapidly adopting smartphones and increasing their use of data services on handheld devices—and expecting those devices and features to continue to work as they travel. While demand for mobile data has increased, competition and consumer choices in the wireless industry have not. Together, AT&T and Verizon provide service to more than 60 percent of subscribers.

Expanded access to wireless data networks through roaming agreements will benefit consumers immediately and in the future. The Commission must extend the automatic voice roaming obligation to data services to help promote badly-needed competition in the data market, drive down prices, and expand the adoption and utility of mobile broadband—especially among low-income and rural consumers.

Because two carriers dominate the wireless data market, these carriers lack the incentive to enter the kinds of reasonably priced data roaming agreements that will ultimately benefit consumers. The experiences of small and regional carriers show that the large incumbents have not entered into data roaming agreements adequate to meet consumer demand for roaming services, and a lack of competitive balance in the wireless market provides few incentives to create reasonable roaming agreements. As a result, the Commission should extend automatic roaming obligations to data services.

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I. INTRODUCTION

Mobile wireless data services have the potential to expand the adoption, utility, and affordability of high-speed Internet access—promoting the health, education, environmental, public safety, and civic engagement benefits outlined in the National Broadband Plan.[1] Consumers have welcomed these opportunities, rapidly adopting smartphones and increasing their use of data services on handheld devices.[2] At the end of 2008, more than 25 million Americans subscribed to mobile high-speed Internet access service.[3]

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[1] *See* FEDERAL COMMUNICATIONS COMMISSION, *Connecting America: The National Broadband Plan* (2010).
[2] *See Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless including Commercial Mobile Services*, *Fourteenth Report*, WT Docket No. 09-66 (May 20, 2010) (*"Fourteenth Report"*) ("Wireless handsets have evolved from the more traditional handsets that offer basic features such as voice and text messaging, to smartphones that offer Internet connectivity. Over the past two years, the industry has experienced an increase in smartphone adoption, led by the Apple iPhone. Smartphones accounted for 44 percent of total handsets sold in the third quarter of 2009, up from 27 percent in the second quarter of 2008.").
[3] *Id.* at 8.

But as demand for mobile data has increased, the wireless industry has grown more concentrated and less competitive. More than 60 percent of subscribers get their service from AT&T or Verizon.[4] And because consumers have grown to expect their devices to work as they travel, roaming on competitors' networks is essential to many plans' nationwide coverage.

Expanded access to wireless data networks through roaming agreements will benefit consumers immediately and in the long term. Roaming obligations will help introduce badly needed competition into the data market, drive down prices, and expand the adoption and utility of wireless broadband services—particularly among groups whose adoption of high-speed Internet access has lagged behind the rest of the nation.

As it is currently structured and regulated, the wireless market does not create sufficient incentives for incumbent carriers to enter into data roaming agreements with small and regional carriers, even though forming these agreements would promote competition and benefit consumers in the wireless market. As a result, the Commission should extend automatic roaming obligations to data services.

II. WIDELY AVAILABLE DATA ROAMING WILL PROMOTE COMPETITION AND BENEFIT CONSUMERS.

Roaming agreements benefit consumers in a variety of ways. Expanded data roaming will (A) increase competition in a highly concentrated market, (B) reduce prices, and (C) increase the use and adoption of mobile high-speed Internet access—particularly among groups whose adoption of broadband has been slow.

[4] *Id.* at 29.

A. Automatic data roaming promotes competition by reducing start-up expenses for competitive providers.

New and small wireless voice and data service providers must overcome many substantial barriers before entering new geographic areas or offering new services, resulting in a market environment that favors incumbent providers and deters meaningful competition. Coupled with other structural reforms,[5] an automatic data roaming obligation would reduce the anti-competitive effects of these barriers, generating more choices from consumers.

Gaining access to spectrum is one such barrier. This essential input into mobile wireless services is finite in nature, limited by a variety of technological and policy constraints, and overwhelmingly controlled by the major incumbent carriers. Without caps limiting the amount of spectrum controlled by the biggest mobile data service providers, which the Commission eliminated in 2003, AT&T and Verizon's current domination of available spectrum feeds future consolidation: Incumbents leverage their existing assets and financial resources to gain an advantage over smaller carriers in acquiring spectrum as it becomes available. For example, the recent 700 MHz auction resulted in a substantial increase in the spectrum holdings of AT&T and Verizon—which were already the two largest providers. Overall, $16 billion of the $19 billion in spectrum sold went to these two largest carriers.[6] Today, five providers hold more than 80

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[5] *See* Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New American Foundation and Public Knowledge, *In the Matter of Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993*, filed WT Docket No. 09-66 (June 15, 2009) ("*Fourteenth Report Comments*"). Commenters cite imposing roaming obligations along with reforming special access reform, eliminating handset exclusivity, and revisiting spectrum caps as policies that the Commission should consider when trying to promote competition in the wireless market.

[6] *Id*.

percent of all available commercial spectrum.[7] For these reasons, spectrum cost and availability continues to deter new competitors and expansion by smaller existing carriers.

Access to infrastructure poses a similar challenge for new and expanding wireless carriers. To provide facilities-based service in a new area, wireless companies must invest in cellular base stations and structures where those stations can be situated. There are practical limitations on the number of available sites for these towers: only a finite number of suitable places exist for placing the towers (including purpose-built communications towers and other existing structures that provide sufficient height); constructing new towers is costly; and complying with state and local laws regarding tower placement can introduce significant delays in the process. Of the 254,912 cell sites in use at the end of June 2009, 83 percent were controlled by the four major wireless providers.[8] While existing communications towers owned by independent companies (rather than the incumbent wireless providers) potentially offer new competitors a less capital-intensive solution, the most desirable antenna positions are often already occupied. As with spectrum, the realities of acquiring new facilities favor established incumbents, who possess significant resources to pay more for premium placement on existing towers and fund their own new construction.

Reasonably priced data roaming helps level the playing field by allowing would-be competitors to gain traction without making large initial capital investments in a new area and to gain access to markets where suitable spectrum may not be available. Data roaming would help increase competition not only in rural areas by bringing in new providers who may not have the resources to build facilities, but also in urban areas by enabling new providers to create a market

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[7] *Fourteenth Report*, at para. 266. The five carriers are Verizon Wireless, AT&T, T-Mobile, Sprint Nextel, and Clearwire.
[8] *Id.* at para. 248.

in the short-term by advertising and acquiring customers, securing an investment in spectrum and facilities to compete in the long-term.

Providers can also use data roaming to expand their advertised service area and market their services to new customers.[9] This exposure allows new and expanding carriers to generate revenue in new territory, which can fund the multimillion dollar investments[10] they will need to make in order to transition into a facilities-based service model. Data roaming allows carriers to test demand in a new market, determining based on the use of its roaming offerings how much its existing customers are likely to use data service in the new region before making significant capital outlays. Smaller, regional carriers can use data roaming to offer nationwide connectivity even in areas where the usage volume is so low as to eliminate the business case for direct investment.

B. Automatic data roaming obligations will drive down prices.

Automatic data roaming obligations will drive down prices for small carrier customers immediately and for all wireless data consumers over time. Because of the relatively small number of national incumbent carriers in any given region—a set of potential partners further limited by technological compatibility—many small providers seeking data roaming agreements face extraordinarily lopsided negotiating dynamics.[11] There may be only one, or at best a few,

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[9] *Fourteenth Report*, at para. 63 ("We note that roaming on competitors' networks can offer entrants access to greater network coverage while they are deploying their own networks. Providers, including new entrants to a mobile wireless market that typically deploy their planned networks gradually, may seek access to networks besides their own in order to achieve a competitive level of coverage while their network is being built out. Roaming can increase network coverage by allowing the entrant's customers to have network coverage when they travel outside of the range of the entrant's own network.").

[10] *Id.*

[11] *See* Statement of Commissioner Jonathan S. Adelstein Approving in Part, Concurring in Part, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers,* WT

carriers with whom they can partner to purchase wholesale data roaming services.[12] The incumbent carrier has little reason to subject itself to increased competition and downward pressure on prices by offering roaming at all, much less offering roaming at an objectively reasonable rate. By extending automatic roaming obligations to mobile data services, the Commission can create a framework for negotiations that will lead to reasonable rates and terms and a dispute resolution process for carriers that cannot reach an agreement.

A well-functioning framework for data roaming agreements will also put long-term downward pressure on the price of mobile wireless services for all customers—even those who do not need data service outside their home calling areas. Refusing to offer data roaming to smaller carriers, along with tactics like exclusive handset agreements and surprise contract extensions, allows incumbent wireless providers to use their current market power to secure their future domination of the industry. Without sufficient competition for new customers, large carriers have little incentive to attempt to undercut each other's prices (a situation illustrated by today's largely parallel pricing structures among the largest providers). By allowing smaller carriers to offer nationwide service to their regional customers and to expand into new territories over time, data roaming creates new competitors and greater potential for price competition on a variety of service offerings.

C. Automatic data roaming obligations will increase consumer access to and use of wireless broadband services.

Docket No. 05-26, *Report and Order and Further Notice of Proposed Rulemaking*, at 70 ("For example, it is difficult for a carrier who employs GSM technology to roam on a CDMA network. It is like a vegetarian dining at a restaurant with four options on the menu, but only having the choice of the one that does not have meat. Just because there are four or five wireless options for consumers doesn't mean that carriers have that many choices about with whom they can choose to roam.").

[12] *See* discussion *infra* Part III.A.

By expanding the access to current 3G and 4G data networks and bringing new competitors into the market, data roaming agreements help promote affordable Internet access and achieve the goals of the National Broadband Plan. In particular, data roaming can bring many of the benefits of broadband to the low-income and rural communities that wireline broadband has been slow to reach.

While home adoption of broadband among low-income households grew between 2008 and 2009, it continues to lag significantly behind higher income groups.[13] Only 52 percent of adults with incomes of less than $50,000 per year have high-speed Internet access at home; 87 percent of households earning more have adopted broadband.[14] Low-income families cite cost (including monthly service, computer expenses, and installation fees) and lack of digital literacy as the two dominant reasons they have not adopted residential broadband.[15]

Expanded access to affordable data roaming helps lower both of these barriers to broadband adoption. Smartphones are a low-cost, familiar alternative device to computers. Eighty-six percent of adults now own a cell phone.[16] Broadband access via upgraded handheld devices could build on that existing capacity, giving users access to some of the benefits of broadband without the separate purchase of a home computer.[17]

Rural communities are also well-positioned to benefit from more competition and lower prices for mobile data services. For rural Americans, small and local carriers may offer cheaper

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[13] John B. Horrigan, *Home Broadband Adoption 2009*, Pew Internet & American Life Project, at http://www.pewinternet.org/Reports/2009/10-Home-Broadband-Adoption-2009.aspx (June 17, 2009).
[14] John B. Horrigan, *Broadband Adoption and Use in America* (Federal Communications Commission, OBI Working Paper Series No. 1, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296442A1.pdf ("*Working Paper*").
[15] *Id.*
[16] *Working Paper*, at 13.
[17] *Id*. at 22.

plans or service that works better where they live. While these carriers may not offer nationwide data service, an automatic data roaming obligation would ensure rural Americans can subscribe to their preferred carrier and still take their data service with them as they travel.

Given the dearth of options available for these increasingly popular services, rural Americans also stand to benefit from lower barriers to entry and increased competition that data roaming can provide. Mobile wireless data users in rural areas currently have few options; only 10 percent of the U.S. population living in a rural area is served by four or more wireless providers, compared to 58 percent nationwide.[18] Even though there are fewer carriers with facilities in rural areas, all service providers could effectively offer service there through roaming agreements. Furthermore, fair and reasonable data roaming agreements will lead to increased competition and the development of more options for rural mobile wireless service.

Like low-income communities, rural areas have been slower to adopt home broadband service; according to the FCC's most recent survey, 50 percent of rural Americans have access to broadband at home.[19] In addition to reasons cited by non-adopters nationally, many rural non-adopters do not have broadband at home because it is simply not available where they live.[20] The expansion of wired broadband networks to rural areas remains an important goal. But given the slow pace and relative expense of infrastructure build-out to rural areas, increased access to

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[18] *Fourteenth Report*, at 19 ("Looking at mobile broadband service, the U.S. population in rural areas is not served by as many mobile broadband providers as other areas of the country. While 76 percent of the total U.S. population lives in census blocks with three or more mobile broadband providers, only 30 percent of the rural population is served by at least three broadband providers. In addition, 58 percent of the total U.S. population lives in census blocks with four or more mobile broadband providers; in rural areas, only ten percent of the population is served by four or more providers.").

[19] *Working Paper*, at 39.

[20] *Id.* ("Rural non-adopters are twice as likely as urban or suburban non-adopters to say broadband is not available where they live.").

mobile broadband can serve as a practical stopgap measure that brings some of the benefits of broadband to more rural communities while the Commission continues its efforts to expand the reach of wireline broadband.

III. THE FCC SHOULD CREATE AN AUTOMATIC DATA ROAMING OBLIGATION BECAUSE MARKET FORCES HAVE NOT MET CONSUMER MOBILE DATA NEEDS.

Americans expect more and more from the estimated 270 million mobile phones in use in the United States[21]—including mobile voice, text, and Internet access. Data service is an increasingly significant part of the revenue stream in the wireless market. While overall average revenue per user (ARPU) has been flat over the last several years, data revenues continue to climb and now amount to roughly 21 percent of total monthly ARPU.[22] This increase in spending on data services has not, however, been accompanied by growth in competitiveness or innovation. It is clear from (A) the lack of competition in the wireless industry, (B) the misalignment of industry incentives, and (C) the current lack of adequate roaming agreements that the wireless industry will not reach a solution on its own. To achieve the consumer benefits associated with widely available data roaming, the Commission must create an automatic data roaming obligation.

A. The failure to impose a data roaming obligation solidifies the dominance of two major carriers.

[21] *See* An Examination of Competition in the Wireless Industry: Hearing Before the U.S. House of Representatives Subcommittee on Communications, Technology, and the Internet, Committee on Energy and Commerce, 105th Cong. 2 (2008) (testimony of Chris Murray, Senior Counsel, Consumers Union).

[22] *Fourteenth Report*, at 11 ("In 2008, monthly ARPU for text and other data services accounted for approximately 21 percent of total monthly ARPU, up from approximately 16 percent in 2007, and compared to about 4 percent in 2004.").

A thorough evaluation of the four factors that the Commission considered in the *Fourteenth Report*—market structure, provider conduct, market performance, and consumer behavior—shows that the largest wireless companies exercise undue market power to the detriment of consumer choice and innovation.[23] The wireless industry as a whole lacks meaningful competition, and data is one of its least competitive segments.

In the *Fourteenth Report*'s analysis of market structure, the Commission found that the weighted national average of Herfindahl-Hirshman Indexes (HHIs) at the end of 2008 was 2848—a 6.5 percent increase in concentration over the previous year and far beyond 1800, the generally accepted threshold for "highly concentrated" markets.[24] Provider conduct, including parallel pricing, also demonstrates the lack of competition in the wireless market. For example, in 2009, Verizon and AT&T charged the same prices for a variety of combinations of data, text messages, and voice minutes.[25] Early termination fees and exclusive handset arrangements further hinder consumers who wish to "vote with their feet" for new services and pricing.

Finally, incumbent providers can now seek supracompetitive profits without fear that a new entrant will undercut their prices. This circumstance, too, clearly signals that the wireless market lack effective competition. Data prices in particular seem well removed from their actual cost, indicating a lack of price rivalry. For example, under AT&T's recently announced iPhone

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[23] See *Fourteenth Report Comments* for a more detailed discussion of competition in the mobile wireless market.

[24] HHI is an indicator of the amount of competition among firms in an industry. Department of Justice and Federal Trade Commission, *Merger Guidelines,* 1997, Section 1.5; *see also* Neil B. Cohen and Charles A. Sullivan, *The Herfindahl-Hirschman Index and the New Antitrust Merger Guidelines: Concentrating on Concentration,* 62 Tex. L. Rev. 453, 461 (1983).

[25] Bill Shrink.com, the Ultimate Cell Phone Plans Comparison, http://www.billshrink.com/blog/wp-content/themes/shrinkage/images/graphics/cell-phone-plans.png (last visited June 10, 2010).

data pricing structure, customers pay a $20 fee for tethering in addition to data-use charges.[26] Aside from increased data consumption (for which iPhone consumers already pay), AT&T has no additional costs from tethering that justify the monthly charge. AT&T's ability to extract this fee highlights the lack of effective competition in the mobile wireless broadband market. A data roaming obligation would serve as a good first step toward making the market more competitive.

B. Incumbent providers have little incentive to treat small carriers fairly.

Consumers have widely embraced mobile wireless data services—and expect those services to go anywhere their handsets can. Without an automatic data roaming requirement, incumbent providers can use their control over existing infrastructure and spectrum to create significant obstacles for smaller competitors. As discussed above,[27] in order to enter a new market or establish a new carrier, new competitors need to acquire spectrum rights and build infrastructure, incurring significant upfront costs—if the spectrum rights and tower access are available at all. For most companies, roaming agreements allow a new entrant to compete with those who offer with nationwide service, expand its consumer base, and begin generating revenue in the new market while setting up facilities-based service in a given area. Given that roaming agreements help facilitate increased competition, existing providers have no incentive to enter into such agreements on fair terms. The Commission noted that small and rural carriers had raised concerns about the increasing expense and scarcity of voice roaming agreements in the order clarifying that voice roaming is a "common carrier" service that must be provided on a

[26] *See* Posting of Josh Levy to FreeMyPhone, http://www.freepress.net/freemyphone (June 8, 2010).
[27] *See supra* Part II.A.

"just, reasonable, and non-discriminatory basis."[28] Because that order excluded non-interconnected services, including data services such as mobile Internet access, there remains a strong motivation for major providers to deny this needed service to would-be competitors.

C. Carriers currently do not enter into enough mutually beneficial data roaming agreements to facilitate competition.

While roaming obligations have virtually eliminated gaps in coverage for wireless calls as customers move around the country, smaller carriers' data coverage maps show that current agreements do not keep pace with consumers' expectations that their wireless handsets—and all their features—will work as they travel.[29] The Commission should act because market forces have not generated enough reasonably priced data roaming services to meet consumer demands.

Smaller and rural carriers have repeatedly demonstrated that they are unable to reach data roaming agreements with larger wireless companies that meet their needs. For example, in numerous filings, SouthernLINC has documented Sprint Nextel's ongoing refusal to provide them with any roaming data services in spite of repeated requests.[30] SouthernLINC also highlights the experience of MTA wireless, an Alaska-based rural cooperative: Before it would extend data roaming services, host carrier Digitel required MTA to ends its voice roaming agreement with another carrier and pay Digitel voice roaming costs twice as high as those

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[28] *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, *Report and Order and Further Notice of Proposed Rulemaking,* 22 FCC Rcd 15817 (2007). Carriers cannot charge unreasonable rates for voice roaming and cannot refuse to provide that service to other carriers when it is technologically feasible.

[29] *See*, *e.g*., Cricket, Broadband Coverage Maps, http://www.mycricket.com/coverage/maps/broadband (last visited June 10, 2010).

[30] *See, e.g.,* Comments and Reply Comments of SouthernLINC Wireless, WT Docket No. 05-265 (filed Nov. 28, 2005, and Jan. 26, 2006, respectively).

contained in their earlier agreement.[31] Having no other options, with no framework of rules at the Commission ensuring reasonable negotiations, MTA had to accept these terms.[32]

We cannot determine with certainty the precise prevalence of experiences like those of SouthernLINC and MTA. Incumbent carriers have obscured the data the Commission needs to develop a clear picture of the data roaming market. In its September 2009 comments on this issue, NTELOS, which "relies on reasonable roaming arrangements as a vital input to its national plans," noted that confidentiality provisions in its roaming agreement with Verizon prohibit NTELOS from revealing the rate they pay for data roaming service.[33] Beyond the terms of its existing agreements, Verizon has required that smaller carriers sign non-disclosure agreements that prevent them from revealing that they are even negotiating roaming or licensing agreements.[34]

Even with incomplete data, both the structure of the market and the limited number of existing agreements reveal that few competitors vie for the opportunity to sell badly needed data roaming services to the more than 100 mobile wireless carriers without national facilities-based

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[31] *Id.*

[32] SouthernLINC notes that by making unregulated data roaming conditional on accession to voice roaming terms and prices beyond what would have been reached under a common carrier regulated negotiation process, incumbents essentially nullify the Commission's automatic voice data roaming obligation requirements.

[33] Comments of NTELOS, WT Docket No. 09-66 (filed Sept. 30, 2009).

[34] Phil Goldstein, *Rural carriers open to Verizon's LTE licensing plans*, FIERCEWIRELESS, May 14, 2010, http://www.fiercewireless.com/story/rural-carriers-open-verizons-lte-spectrum-plans/2010-05-14#ixzz0puDpwoaF ("Nancy Stark, a Verizon spokeswoman, told *FierceWireless* Verizon has had talks with a number of rural carriers over the past several months, and has also seen interest from rural carriers since the *Journal* report. However, she declined to name any of carriers or say when any deals might be reached. Stark said the carriers Verizon has been talking with have signed non-disclosure agreements, meaning that associations would not know if they were in touch with Verizon.").

services. An FCC-mandated automatic data roaming obligation would ensure that interested smaller and rural carriers have a meaningful opportunity to negotiate on behalf of their customers for data roaming services on fair terms. This obligation should include an agreement disclosure requirement so that the Commission can adequately monitor the data roaming market and ensure that agreements are entered into on reasonable terms.

IV. CONCLUSION

Consumers have rapidly adopted mobile wireless data services that give them on-the-go access to the economic, health, education, public safety, and civic information they need. Data roaming allows those benefits to travel with consumers, generates competition, and creates new options for consumers—promoting the adoption, utility, and affordability of mobile high-speed Internet access. Given the benefits roaming offers to consumers, the Commission should extend automatic roaming obligations to data services because the wireless market as it is currently structured and regulated will not develop these agreements without regulatory intervention.

Respectfully submitted,

/s/

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