

**Before the
Federal Communications Commission
Washington, DC 20554**

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

COMMENTS OF UNITED STATES CELLULAR CORPORATION

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Summary

The FCC should extend the roaming requirement to non-interconnected services and features, including data roaming, which will be vital to the customers of small and mid-sized wireless carriers and essential to the survival of wireless competition.

The policy case for protecting data roaming has only grown stronger in recent years, as data use has increased with each new generation of wireless technology and the deployment of broadband has become central to federal telecommunications policy. Moreover, wireless competition is decreasing, making it even more important that the remaining small and mid-sized wireless carriers be able to provide nationwide data roaming to their customers.

A rule protecting data roaming would also be lawful under either Titles I, II or III of the Communications Act. Under the principles set forth in the relevant Supreme Court cases, for the FCC to require data roaming would be "ancillary" under Title I to the FCC's undoubted Title II jurisdiction over voice roaming. Or, the FCC could assert Title II jurisdiction directly as roaming can itself be considered a carrier to carrier transmission service, that is, a wholesale common carrier service, for the purposes of regulatory classification.

Lastly, various sections of Title III, dealing with FCC regulation of the radio spectrum and with wireless auctions, could also serve as a basis for jurisdiction. Those grants of jurisdiction are broad in nature and stress the public interest, which data roaming certainly serves.

We ask for expeditious action in this proceeding.

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COMMENTS

United States Cellular Corporation ("USCC") hereby files its comments concerning the Second Further Notice of Proposed Rulemaking in the above-referenced docket.¹ USCC strongly supports a right to roam that incorporates non-interconnected services and features, including information services. "Data roaming" will be vital to the customers of small and mid-sized wireless carriers and is essential to the survival of wireless competition. A rule protecting this right would also entirely be lawful under either Titles I, II, or III of the Communications Act.

I. The FCC Should Extend The Roaming Requirement To Non-Interconnected Services and Features, Including Information Services

In 2007, in this docket, the FCC extended the automatic roaming requirement to services offered by CMRS carriers "that are real-time two way switched voice or data services that are interconnected with the public switched network and to push to talk and text messaging."²

In the Further Notice attached to that Roaming Order, the FCC sought comment on whether the automatic roaming requirement "should be extended to non-interconnected services

¹ See, In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and other Providers of Mobile Data Service, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, FCC 10-59, released April 21, 2010 ("FNPRM").

² See, 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) ("Roaming Order" and "Further Notice"), ¶54.

and features, including information services" and the legal and policy basis for doing so.³ The present FNPRM renews and broadens that inquiry.⁴

USCC has supported the broadest possible inclusion of data in the FCC's roaming mandate and renews that endorsement now.⁵ Indeed, with every passing year and each successive "generation" of wireless technology, wireless data capabilities continue to develop. The reliance on these services by wireless consumers becomes ever greater and the need for FCC action on data roaming grows more urgent. Indeed the FCC itself has recently focused on the need for nationwide broadband deployment, in which the provision of broadband services by wireless carriers will be a crucial element. In a recent interview with Wall Street Journal reporter Walt Mossberg, FCC Chairman Genachowski underscored the importance of mobile broadband. Commenting on ways to unleash the country's innovative capacity, the Chairman said, "There are things that we can do to drive more investment, more competition, more transparency to consumers. Unleashing mobile broadband is one of the most important, if not the most important thing we can do."⁶

The policy case for a data roaming requirement has not changed in any fundamental respect during the years the FCC has considered the issue, except to grow stronger. It is undisputed that there has been "enormous growth" in the market for "data service" as well as SMS.⁷ The 2007 Carrier Group Ex Parte filing cited an authoritative report projecting that wireless data services will "generate over \$600 billion in productivity gains for the US over the

³ Further Notice, ¶77.

⁴ See, FNPRM, ¶¶50-88.

⁵ See, e.g., USCC Comments in the WT Docket No. 05-265, filed October 29, 2007, pp. 7-8; USCC Comments in GN Docket No. 09-157 et al., filed September 30, 2009; USCC Reply Comments in GN Docket No. 09-157 et al., filed October 27, 2009. See, also Carrier Group Joint Letter Ex Parte in W.T. Docket 05-265 filed July 18, 2007, 1-2 ("Carrier Group Ex Parte").

⁶ Wall Street Journal, June 7, 2010, p. R4.

⁷ Carrier Group Ex Parte, p. 1

next decade."⁸ The carrier Group Ex Parte also noted the functional "bundling" of all data services with voice services in the same wireless handsets and described the combination of information and voice services provided by such devices as Blackberry and its competitors.⁹ Those trends have only accelerated since 2007. Indeed, the FNPRM itself notes "a dramatic increase in use of data services."¹⁰

The pace of those data service developments makes it appropriate for the FCC to act now. USCC, for example, currently offers many wireless data products, through CDMA, 1xRTT and 1xEV-DO technology. The majority of USCC customers now have either smart phones, feature phones, or wireless modems that can download multiple applications, including games, news, sports information, ring tones and stock quotations. Other carriers are developing their own wireless data products. Such products represent a significant and rapidly growing component of wireless usage and revenues today. Thus, it is urgently necessary that all wireless carriers, and especially the national carriers, be required to facilitate the use of such data applications by roamers. The Commission should make it clear that it believes carriers must work to develop appropriate interfaces to ensure that data roaming can take place alongside voice roaming. USCC currently has 1 x RTT data roaming arrangements with two of the national carriers and has negotiated an EV-DO roaming arrangement with one of them.

The FNPRM seeks comment once again on the various arguments which have been made against adoption of a broad data roaming requirement. Opponents maintain that there is no "market failure" with respect to data roaming, that a data roaming requirement would create investment disincentives by encouraging "free riding" and would force carriers to incur

⁸ Ibid.

⁹ Ibid.

¹⁰ FNPRM, ¶61 n. 178.

unnecessary costs to expand their networks.¹¹ It has been suggested that a carrier requesting a roaming arrangement be required to first offer all the services it seeks from a "host" carrier on its own network and that data roaming may cause "network capacity exhaustion."¹²

We urge the FCC to reject those arguments, which have not been supported by any facts or reasoned argument. USCC and other carriers endorsing data roaming have never argued that carriers should not maintain control of their systems or that they should be forced to undertake expensive reconfigurations of their networks to accommodate roamers. What we ask are reasonable network adjustments to accommodate data roaming. Put simply, we believe that carriers should meet each other halfway and thus serve the interests of their customers, which are, of course, synonymous with the public interest. Technological problems should not be regarded as excuses for not providing roaming but as obstacles to be overcome, again within reason. Overcoming technological problems can be facilitated by developing necessary industry standards and USCC supports and will participate in that process. But the necessary actions will not be taken unless the FCC makes it clear now that any data roaming requirements will apply to 3G, 4G and all future improvements in wireless technology.

Two recent developments give this proceeding a special urgency. First, in March, 2010 the FCC released the National Broadband Plan, which discussed the importance of data roaming "to broadband competition and innovation policy."¹³ Without a data roaming requirement, the promise of wireless broadband access will not be kept for customers of small and mid-sized carriers when traveling outside their home markets. Second, adoption of a data roaming requirement is crucial to the preservation of wireless competition. The most recent wireless

¹¹ FNPRM ¶57.

¹² FNPRM ¶63.

¹³ FNPRM ¶59. National Broadband Plan, 4.11, at 49.

competition report notes the loss of mid-sized wireless competitors and an increase in "concentration" in the provision of mobile wireless services, as measured, for example, by the Herfindahl-Hirschman Index, while simultaneously calling attention to the transition underway to a "data centric market."¹⁴ For the first time in seven years, the FCC did not conclude that there is "effective competition" in the wireless industry.

The meaning of these trends for small and midsized wireless carriers (indeed for all wireless carriers except the two largest) is clear and ominous. For such carriers to survive and compete with the largest carriers, they must be able to offer customers a full suite of services, including data roaming. If they cannot do so, they will be greatly hampered in their attempts to provide bona fide and sustainable competition to the national carriers and the anticompetitive trends discussed in the 2010 Competition Report will only become more pronounced.

Moreover, it should be noted, in relation to the "investment" and "free riding" arguments referred to previously, that any remaining midsized or small CMRS carrier still standing has already met severe competitive tests and obviously wishes to do what is necessary to remain in the wireless business. As an example, USCC has constructed approximately 1,467 base stations since the beginning of 2007, demonstrating its commitment to remain part of the wireless ecosystem. A right to data roaming on reasonable terms is not too much for USCC and similarly situated carriers to ask.

¹⁴ In the Matter of Implication 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 Service, Fourteenth Report, FCC 10-81, WT Docket No. 09-66; ¶4, ¶¶50-55. ("2010 Competition Report").

II. The FCC Has Authority Under Title I, Title II or Title III of the Communications Act To Require Data Roaming

Much of the FNPRM is devoted to discussion of the possible legal bases for FCC jurisdiction over data roaming, particularly in light of the recent Comcast case.¹⁵ We believe that the FCC is free to act under Titles I, II or III of the Communications Act to require data roaming and that Comcast does not preclude it from doing so.

A. The FCC Has Ancillary Title I Jurisdiction Over Data Roaming

Comcast held that the FCC had failed to demonstrate that its exercise of "ancillary" authority under Section 4(i) of the Communications Act¹⁶ to regulate Comcast's practices as an Internet Service Provider was sufficiently connected to an express delegation of authority to the Commission in the Act.¹⁷ The FCC's task was made more difficult by its 2002 ruling that cable Internet access service was an "information service," and not a "telecommunications service" covered by Title II of the Communications Act.¹⁸ The court ruled that the alternative statutory bases for ancillary jurisdiction cited by the FCC, namely Sections 1, 230(b), 706(a), 256, 257, and 623 of the Act, were either mere "statements of policy" or did not themselves authorize the FCC's action banning certain of Comcast's network practices.¹⁹

Though the FCC has also declared wireless broadband Internet access to be an information service,²⁰ we believe that Comcast does not preclude FCC ancillary jurisdiction over data roaming. As is noted in the FNPRM, the FCC has not yet made "any classification

¹⁵ FNPRM, ¶¶64-71; Comcast Corporation v. FCC, No. 08-1291 (D.C. Cir. April 6, 2010) ("Comcast")

¹⁶ 47 U.S.C. Section 154(i) (the FCC may "perform any and all acts, make such rules and regulations and issue such orders, not inconsistent with this chapter as may be necessary in the execution of its functions.")

¹⁷ Comcast Slip Opinion, p. 19.

¹⁸ Comcast Slip Opinion, p. 5.

¹⁹ Ibid., pp. 17-24, 30-36.

²⁰ See, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, WT Docket No. 07-53, 22 FCC Rcd 5901 (2007) ("Wireless Broadband Internet Access Order").

determinations regarding any service or application provided over these [wireless] Internet access connections."²¹

Ancillary jurisdiction under Title I would be applicable to data roaming as a logical outgrowth of the FCC's undoubted Title II jurisdiction over voice roaming. Customers obtain voice and data roaming by using the same devices and commonly buy service plans which incorporate both features. The migration of networks to an all IP world, which will be hastened by the introduction of LTE, means that soon even conventional voice traffic will look more like data traffic so that the distinction, to the extent there is any, between the two will be hopelessly blurred. Moreover, as shown above, data roaming will be essential in the future to fulfilling the FCC's central goal in regulating the wireless industry, namely the promotion of wireless competition.

The FCC has ancillary jurisdiction over a service when asserting such jurisdiction enables the FCC to better regulate another, related service over which it has undisputed jurisdiction. This principle was explained in the crucial cases in which the Supreme Court articulated FCC ancillary jurisdiction principles.²² In both cases, the Court upheld FCC rules imposing certain requirements on cable television systems, even though the Communications Act then gave the FCC no express authority to regulate such systems. The Court held that the FCC regulations, which dealt with carriage of distant signals and with local program production, were properly ancillary to the FCC's regulation of television broadcasting. Voice and data roaming provided to the same customer with same wireless device are certainly as close conceptually, if not closer, than television broadcasting and cablecasting were. And the convergence of voice and data over IP networks only makes this more so. Under the principles enunciated in those cases, the courts

²¹ FNPRM, ¶65.

²² See, United States v. Southwestern Cable Company, 392 U.S. 157 (1968); United States v. Midwest Video Corp., 406 U.S. 649 (1972).

would certainly uphold an FCC requirement that data roaming be required, on reasonable terms, as being ancillary to its power to regulate voice roaming and promote wireless competition.

Comcast is not to the contrary. A central problem in that case was that there was no FCC regulatory structure to which the FCC's "Bit Torrent" ruling was properly ancillary. Here there are such regulations, namely those requiring and regulating voice roaming.

B. Data Roaming Can Also Be Sustained Under Title II of the Communications Act

We also believe that there is a solid basis to sustain a data roaming requirement under Title II of the Communications Act. The FCC, in the Broadband Internet Access Order, held that broadband wireless Internet access is an information service, but that ruling did not deal with the wireless roaming relationship. Roaming is a carrier to carrier transmission service that can and should be treated as a wholesale common carrier service for the purposes of statutory and regulatory classification. The classification of the service being provided to the end user, whether it is a telecommunications service or an information service, is not relevant to the determination of the nature of the relationship between the two carriers. Data roaming between carriers is arguably a telecommunications service properly subject to Title II regulation in that the service that roaming carrier receives from the "host" carrier is "transport" by the host carrier of "communications" over its network to the "requesting" carrier's customer.

This carrier to carrier relationship is fundamentally different from basic Internet access, in that Internet access is a functionally integrated information service to end users, while data roaming is a relationship between carriers. The basic point of deregulating wireline, cable and wireless Internet access was to free this new and competitive service from common carrier regulation, in order to spur innovation and competition. It should not be turned on its head to

undermine wireless competition by being applied to the fundamentally different roaming relationship between wireless carriers.

Recently, Chairman Genachowoski and the FCC's General Counsel have tentatively proposed an alternative "Third Way" by which the FCC may assert jurisdiction over Broadband Internet access by finding that there is a Title II "transport" component to Internet access.²³ If the FCC were to adopt that approach, there would be no doubt that data roaming could also be regulated under the same principles.

Lastly, we would note that if the FCC adopts this Title II approach as its statutory basis for requiring data roaming, it should not be construed as a justification for limiting the degree of cooperation required between data roaming partners to basic data connectivity under the category of "transport." On the contrary, the roaming partners would still have to cooperate in the delivery of advanced data services, such as, for example, the delivery of location information to support an LBS offering, in order to make the right to data roaming meaningful.

C. Title III of the Communications Act Would Also Be A Reasonable Basis For FCC Jurisdiction Over Data Roaming

Title III of the Communications Act deals with FCC regulation of the radio spectrum. Its provisions provide various reasonable bases for FCC jurisdiction over data roaming. For example, Section 301²⁴ provides for FCC jurisdiction over all radio transmissions. Obviously, data roaming involves radio transmissions. Section 303²⁵ grants authority to the FCC to prescribe the nature of the services to be provided by each class of FCC-licensed radio stations, to study new uses for "radio," provide for experimental uses of frequencies and generally to serve the public interest. Data roaming would be considered a "class of service" for wireless

²³ See, e.g., Statement "A Third Way Legal Framework For Addressing The Comcast Dilemma," Austin Schlick, General Counsel, Federal Communications Commission, May 6, 2010.

²⁴ 47 U.S.C. Section 301.

²⁵ 47 U.S.C. Section 303.

licensees and would certainly serve the public interest. And Section 303(r) expressly grants to the FCC authority to make rules concerning use of the radio spectrum.²⁶ Control over the radio spectrum is a core responsibility of the FCC. Spectrum, wireless or otherwise, was not an issue when FCC deregulated the provision of Internet access to end users, underscoring the unique character of the roaming context. The FCC can certainly regulate data transmissions made over the public airwaves, just as it regulates voice transmissions, pursuant to Title III, regardless of whether such transmissions are considered a "telecommunications service."

The auction provisions of Title III provide additional bases for jurisdiction. Section 309(j)(3)²⁷ provides that auction eligibility rules must promote the public interest. And subsections 309(j)(3)(A) and (D)²⁸ enumerate among those public interest objectives "the development and deployment of new technologies, products and services for the benefit of the public" as well as "efficient and intensive use of the electromagnetic spectrum." Again, those goals are broad in nature, stress the public interest and make no distinctions between "telecommunications" and "information" services. We consider data roaming "a service for the benefit of the public."

In 2007, in the Wireless Internet Broadband Order, the FCC stated that its classification of wireless broadband as an information service would not affect the possible applications of other Title III obligations to the service precisely because wireless Internet access uses the radio spectrum.²⁹ That Order leaves ample authority for the FCC to act now in light of its central Title III public interest responsibility to require data roaming.

²⁶ 47 U.S.C. Section 303(r)

²⁷ 47 U.S.C. Section 309(j)(3).

²⁸ 47 U.S.C. Sections 309(j)(3) and 309(j)(3)(D).

²⁹ Wireline Broadband Internet Access Order ¶¶ 35-36.

Conclusion

For the foregoing reasons, the FCC should adopt rules mandating data roaming under any or all of the bases identified above.

Respectfully submitted,

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