

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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 RURAL CELLULAR ASSOCIATION**

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## SUMMARY

Data roaming is the fundamental building block for bringing ubiquitous broadband to rural America. The Commission should exercise its statutory authority under Title III of the Communications Act to adopt a roaming obligation for mobile broadband Internet access. Title III of the Communications Act of 1934 provides the Commission with enormous discretion to regulate service providers that utilize radio spectrum in their provision of service. Further, the FCC has regulatory authority under Title III to adopt a roaming mandate regardless of whether the services involved are classified as telecommunications services or information services.

The FCC's data roaming mandate should include a presumption that a request for automatic roaming by a technologically compatible carrier is reasonable and a requirement that all data roaming terms and conditions must be just and reasonable. To promote the efficient and reasonable negotiation of automatic roaming agreements between carriers, the Commission should adopt a standardized roaming agreement negotiation process, including a 90-day "shot clock" for negotiation and a 180-day deadline for implementation of an automatic roaming agreement.

As a prerequisite to invoke Title III authority to prescribe a data roaming obligation, the Commission must conclude that the obligation serves the public interest. Data roaming will serve the public interest by facilitating and promoting investment in advanced broadband networks in rural and small regional service areas, by enhancing consumer and public safety access to advanced broadband services, by promoting competition, and by increasing rural and small regional carrier customer satisfaction through the provision of advanced data services while traveling or working outside their home service areas. The Commission must invoke its Title III authority to impose a data roaming mandate which will foster a robust competitive environment in the wireless marketplace.

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Rural Cellular Association (“RCA”),<sup>1</sup> by its attorney, hereby submits these Comments in response to the Commission’s rulemaking seeking comment on whether to extend roaming obligations to data services, including mobile broadband services, which are provided without interconnection to the public switched network.<sup>2</sup> RCA commends the Commission for undertaking a rigorous evaluation of the need for a data roaming mandate<sup>3</sup> and urges the Commission to adopt such a mandate. Data roaming is the fundamental building block for bringing ubiquitous broadband to rural America. The Commission not only has the authority to adopt a data roaming mandate, but must adopt a data roaming mandate to protect the interests of rural consumers and public safety.

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<sup>1</sup> RCA is an association representing the interests of nearly 100 regional and rural wireless licensees providing commercial services to subscribers throughout the Nation and licensed to serve more than 80 percent of the country. Most of RCA’s members serve fewer than 500,000 customers.

<sup>2</sup> *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, FCC 10-59 (rel. Apr. 21, 2010) (“*Reconsideration Order*” and “*Second Further NPRM*”) at para. 3. Comments are due on or before June 14, 2010. FCC, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 75 Fed. Reg. 22338 (Apr. 28, 2010).

<sup>3</sup> 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). RCA is optimistic that the FCC is committed to moving forward expeditiously to resolve data roaming issues.

## **I. DISCUSSION.**

RCA believes that the Commission's legal authority to adopt an automatic roaming mandate rests primarily in Title III of the Communications Act of 1934 ("Act"). Title III provides the Commission with sufficient legal authority to adopt a data roaming mandate whether the underlying services are telecommunications services or information services, whether the roaming services involve voice or data transmissions, or whether the roaming services are provided on a common carriage or private carriage basis.

In order to invoke its Title III authority, the Commission must show that its proposed rule, restriction, or condition will serve the public interest. Data roaming is critical to bringing ubiquitous broadband to rural America. Data roaming will serve the public interest by facilitating and promoting investment in advanced broadband networks in rural and small regional service areas, by enhancing consumer and public safety access to advanced broadband services, by promoting competition, and by increasing rural and small regional carrier customer satisfaction through the provision of advanced data services while traveling or working outside their home service areas.

A data roaming mandate is also necessary because the large national carriers have little incentive to enter voluntarily into data roaming arrangements with reasonable terms and conditions. Moreover, the national carriers have attempted to stonewall efforts of rural and small regional carriers to obtain data roaming agreements.

### **A. The Communications Act of 1934 Provides the Commission with Authority To Prescribe Data Roaming Requirements.**

The Commission has ample authority under Title III of the Act to establish an automatic roaming mandate. RCA supports the Commission's tentative conclusion in its *Second Further*

*NPRM* that it has authority under Title III to promulgate roaming requirements.<sup>4</sup> The FCC correctly noted that while wireless broadband Internet access has been classified as an information service,<sup>5</sup> the Commission has not made any determinations regarding the regulatory classification of any service or application that is provided through the use of Internet access connections.<sup>6</sup> RCA agrees with the Commission that “[s]everal provisions of [Title III] provide the Commission [with] authority to establish license conditions in the public interest.”<sup>7</sup>

Section 301 of the Act<sup>8</sup> states that any person utilizing the electromagnetic spectrum must do so in accordance with the provisions and requirements of the Act.<sup>9</sup> Further, Section 301 specifies that:

It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the

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<sup>4</sup> Because Title III provides a sufficient basis for the imposition of a data roaming requirement, RCA has chosen not to address in its Comments issues and questions raised by the Commission in the *Second Further NPRM* regarding the scope of the Commission’s authority under Title I and Title II of the Act to impose such a requirement. RCA has previously addressed, in pleadings submitted in this docket, the authority of the Commission under Title I and Title II of the Act to establish a data roaming obligation. See RCA 2007 Comments, WT Docket No. 05-265, filed Oct. 29, 2007, at 6-7; RCA 2007 Reply Comments at 6. RCA also notes that, since the Commission has direct statutory authority in Title III of the Act to require data roaming, it would not be necessary for the Commission to invoke its ancillary authority under Title I as a basis for such a requirement. Because of this direct authority pursuant to Title III, there is no need to address the interpretations recently expressed by the United States Court of Appeals for the D.C. Circuit regarding the criteria the Commission must satisfy in order to invoke its Title I ancillary authority.

<sup>5</sup> *Id.* at para. 65. See *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5909-10 (para. 22) (2007) (“*Wireless Broadband Internet Access Classification Ruling*”).

<sup>6</sup> *Second Further NPRM* at para. 65 (...regardless of whether the services a subscriber would access through roaming arrangements are telecommunications services or information services, the Commission has statutory authority to require automatic roaming for them. If these services are telecommunications services, they are subject to roaming obligations pursuant to our authority under Title II and Title III. If they are information services, we have the authority to promulgate roaming requirements under Title III and other provisions). *Id.*

<sup>7</sup> *Id.* at para. 66.

<sup>8</sup> 47 U.S.C. § 301.

<sup>9</sup> Specifically, Section 301 provides that “[n]o person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.” *Id.*

use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.<sup>10</sup>

In an ex parte letter, SouthernLINC Wireless (“SouthernLINC”) concluded that “pursuant to its statutory mandate under Section 301, the FCC is empowered to regulate mobile data service—including through the imposition of roaming obligations that encompass data as well as voice services—as a means of efficiently managing the use of the nation's radio spectrum.”<sup>11</sup> RCA agrees that the FCC has the power to regulate mobile data service under Title III to efficiently manage spectrum and spectrum resources.<sup>12</sup> Title III also grants the Commission general powers to regulate use of the spectrum, including authority to “[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class . . . .”<sup>13</sup> The Commission’s “control . . . over all the channels of radio transmission” and its authority to regulate services provided over licensed spectrum clearly provide the Commission with ample authority to adopt data roaming requirements.

Furthermore, the Commission has indicated that, regardless of whether wireless broadband Internet access is classified as a telecommunications service or an information service, the Commission may use its Title III authority to regulate broadband Internet services. Specifically,

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<sup>10</sup> *Id.*

<sup>11</sup> Ex Parte Letter from Christine M. Gill, Counsel for SouthernLINC, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265 (filed July 2, 2007) (“SouthernLINC 2007 Letter”) at 12.

<sup>12</sup> See SouthernLINC Comments, WT Docket No. 05-265, filed Oct. 29, 2007 (“SouthernLINC 2007 Comments”) at 23-24; RCA Reply Comments, WT Docket No. 05-265, filed Nov. 28, 2007 (“RCA 2007 Reply Comments”) at 6 (pointing out that, “[w]ithout need to determine that automatic roaming for non-interconnected services and features is a common carrier service, the Commission could choose to rely on its Title III authority to require CMRS carriers to negotiate in ‘good faith’ to enter into automatic roaming agreements on non-discriminatory and just and reasonable terms”).

<sup>13</sup> 47 U.S.C. § 303(b). See *Second Further NPRM* at para. 66 (stating that, under Section 303, “the Commission has the authority to establish operational obligations for licensees that further the goals and requirements of the Act if the obligations are in the ‘public convenience, interest, or necessity’ and not inconsistent with other provisions of law”).

the Commission has held that its classification of broadband Internet service as an information service “does not affect the general applicability of the spectrum allocation and licensing provisions of Title III and the Commission’s rules to this service. These provisions and rules continue to apply *because the service is using radio spectrum.*”<sup>14</sup>

Further evidence that the Commission has authority under Title III to mandate automatic roaming, the Commission relied on Section 303(b) to establish license conditions and operational obligations for the benefit of consumers. Thus, in the *700 MHz Second Report and Order*, the Commission adopted 700 MHz C Block open platform requirements aimed at promoting the development of innovative devices and applications, finding that Title III provided sufficient authority for the establishment of these requirements.<sup>15</sup> RCA agrees that the Commission has “enormous discretion” in establishing spectrum licensee obligations.<sup>16</sup>

In addition to Section 303(b), the below provisions in Title III provide the Commission with sufficient basis for its adoption of license requirements like automatic roaming:<sup>17</sup>

- The Commission has authority, as the public interest requires, to study new uses for radio, and “generally encourage the larger and more effective use of radio in the public interest . . . .” 47 U.S.C. § 303(g).

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<sup>14</sup> *Wireless Broadband Internet Access Classification Ruling*, 22 FCC Rcd at 5914 (para. 35) (emphasis added)

<sup>15</sup> *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands; Revision of the Commission’s Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones; Biennial Regulatory Review—Amendment of Parts 1, 22, 24, 27, and 90 To Streamline and Harmonize Various Rules Affecting Wireless Radio Services; Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; and Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010*, WT Docket Nos. 06-150, 01-309, 03-264, 06-169, 96-86, 07-166, CC Docket No. 94-102, PS Docket No. 06-229, Second Report and Order, 22 FCC Rcd 15289, 15365-66 (para. 207) (2007) (“*700 MHz Second Report and Order*”). See *Second Further NPRM* at para. 66.

<sup>16</sup> *700 MHz Second Report and Order*, 22 FCC Rcd at 15365-66 (para. 207) (citing *Schurz Communications v. FCC*, 982 F.2d 1043, 1048 (7th Cir. 1992)).

<sup>17</sup> See *id.* at 15365 (para. 207 nn.470-471), cited in SouthernLINC 2007 Comments at 24-25.

- Title III gives the Commission the general power to prescribe rules, restrictions, and conditions that are necessary to carry out the Act. 47 U.S.C. § 303(r).
- The Commission (in connection with its administration of the competitive bidding process established by the Act) is required to “include safeguards to protect the public interest in the use of the spectrum[,]” to promote the purposes specified in Section 1 of the Act, and to promote various other enumerated objectives, including “the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas” and the “efficient and intensive use of the electromagnetic spectrum.” 47 U.S.C. § 309(j).

The Commission has considerable regulatory latitude to manage and regulate spectrum licenses including imposing an automatic roaming mandate. As indicated above, the scope of this regulatory latitude is not limited based on whether data roaming is classified as a telecommunications or information service. Because data roaming involves use of the spectrum, the Commission can rely upon its Title III authority to develop rules, restrictions, and conditions to govern the manner in which data roaming is provided, as long as those rules serve the public interest.<sup>18</sup>

### **B. Automatic Data Roaming Serves Public Interest.**

Under Title III, the Commission must demonstrate that the rule, limitation, or condition it seeks to promulgate promotes the public interest. In addition, if the Commission seeks to rely upon its authority pursuant to Section 303(r),<sup>19</sup> then it must also show that the rule, limitation, or condition involved will advance statutory goals and requirements.<sup>20</sup> To satisfy the public interest test, the Commission must balance the benefits of the proposed rule against the potential nega-

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<sup>18</sup> See *Second Further NPRM* at para. 66 (finding that the application of Title III “is not affected by whether the service using the spectrum is a telecommunications service or information service under the Act”) (citing *Wireless Broadband Internet Access Classification Ruling*, 22 FCC Rcd at 5915 (para. 36)).

<sup>19</sup> 47 U.S.C. § 303(r).

<sup>20</sup> *Second Further NPRM* at para. 66 (finding that various provisions of Title III, as specified in the *Second Further NPRM*, “provide authority to establish roaming obligations over both telecommunications and information services, if such obligations are found to be in the public interest and, in the case of Section 303(r), the obligations would also further the goals and requirements of the Act”).

tive consequences or effects on the spectrum if the Commission were to adopt the rule. For example, if the Commission were to find that a proposed restriction would likely hinder investment in wireless networks, or would likely interfere with competitive entry or consumer choice, then the Commission would be compelled to reject the proposed restriction.

Data roaming is the fundamental building block for bringing ubiquitous broadband to rural America. Therefore, the public interest weighs heavily in favor of adoption of a mandate requiring host carriers to provide data roaming services. A data roaming obligation would facilitate investment in rural and small regional markets, benefit consumers by providing them with access to broadband Internet services when they work or travel away from home, and promote competition by enabling rural and small regional carriers to deploy advanced broadband networks. These benefits clearly show that establishing a data roaming requirement would serve the public interest and would further the goals of the Act.

**1. A Data Roaming Requirement Would Facilitate and Promote Investment in Rural and Small Regional Service Areas.**

Notwithstanding the strong incentive of rural and small regional carriers to deploy advanced broadband networks,<sup>21</sup> rural and regional carriers are challenged to generate revenues

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<sup>21</sup> The Broadband Plan has described in sweeping terms the important role of broadband in the American society:

Today, high-speed Internet is transforming the landscape of America more rapidly and more pervasively than earlier infrastructure networks. Like railroads and highways, broadband accelerates the velocity of commerce, reducing the costs of distance. Like electricity, it creates a platform for America's creativity to lead in developing better ways to solve old problems. Like telephony and broadcasting, it expands our ability to communicate, inform and entertain. Broadband is *the* great infrastructure challenge of the early 21st century.

Omnibus Broadband Initiative, FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN (Mar. 16, 2010) ("Broadband Plan") at 3 (emphasis in original). *See, e.g.*, Dan Fletcher, "How Facebook Is Redefining Privacy," TIME, May 20, 2010, accessed at <http://www.time.com/time/business/article/0,8599,1990582,00.html> (reporting that "[s]ometime in the next few weeks, Facebook will officially log its 500 millionth active citizen. If the website were granted terra firma, it would be the world's third largest coun-

and attract additional investment capital that is sufficient to achieve extensive deployment of advanced broadband networks. An automatic data roaming mandate would provide rural and regional carriers with another tool to meet that challenge.

The availability of data roaming is a critically important component in this investment equation in several respects. First, it is likely that customer demand for data roaming services will continue to increase as more advanced broadband networks are deployed. More advanced networks will further the development of more diverse and sophisticated features, functions, and applications to consumers. Seamless access to these capabilities will have growing importance for business travelers and for consumers who use wireless services while away from their home service areas. Second, because of this growing consumer demand, any wireless carrier that is not in a position to secure data roaming agreements will likely encounter increasing difficulty in attracting and retaining customers. Third, a rural or small regional carrier's inability to offer data roaming services causes its customer base to contract, affecting the carrier's revenue stream and likely diminishing its ability to attract investment capital. Finally, the absence of sufficient amounts of investment resources will likely hamper deployment of advanced broadband networks in rural and small regional markets. If the build-out of 3G, 4G and other advanced broadband networks in these markets fails to keep pace with the deployment of these facilities in other regions of the country, this will have devastating implications for rural America.

Commissioner Copps recognized this issue in his recent advocacy for a rural broadband strategy:

In rural areas . . . many Americans have no access to [broadband] applications and services, and by extension, to the global community. Rural communities have long been unserved or underserved by broadband technology, but the full implica-

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try by population, two-thirds bigger than the U.S. More than 1 in 4 people who browse the Internet not only have a Facebook account but have returned to the site within the past 30 days.”).

tion of this divide has only emerged as the Internet has become less and less a novelty, and more and more a necessity. The Obama administration and Congress recognize that broadband access will benefit all Americans in much the same way that the nation as a whole benefited from our past successes in overcoming infrastructure challenges. Bringing ubiquitous and affordable broadband services to rural America will improve the quality of education, healthcare, and public safety in rural America, among other benefits. On a larger scale, ensuring that all Americans, including those in rural areas, have access to such services will help to improve America's economy, its ability to compete internationally, and its unity as a nation.<sup>22</sup>

There is a cause-and-effect relationship between the lack of a data roaming obligation and dwindling prospects for investment in advanced broadband infrastructure in rural and small regional markets. Carriers that cannot effectively compete for, and retain, customers, will lose revenues and support from investors. Advanced broadband networks cannot be deployed without this investment.

In light of these dire risks associated with the inability of rural and small regional carriers to negotiate data roaming agreements with AT&T Mobility (“AT&T”), Verizon Wireless (“Verizon”) (collectively, the “Big Two”), and other large national carriers, adoption of a data roaming obligation will serve the public interest. Policies that encourage and enable investment in advanced broadband infrastructure throughout rural America are critical.<sup>23</sup> A data roaming requirement, by facilitating investment in rural and small regional markets, would “encourage more efficient and intensive use of spectrum in rural areas, [thus] support[ing] the direction of Section 303(g) to ‘. . . encourage the larger and more effective use of radio in the public inter-

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<sup>22</sup> Michael J. Copps, Acting Chairman, FCC, BRINGING BROADBAND TO RURAL AMERICA: REPORT ON A RURAL BROADBAND STRATEGY, 24 FCC Rcd 12792, 12802 (para. 15) (2009); *see* Broadband Plan at 5 (noting that broadband adoption lags considerably among persons who live in rural areas); *id.* at 22 (indicating that 9 percent of rural business sites lack any access to wireless broadband, compared to 1 percent of business sites in urban and suburban areas).

<sup>23</sup> *See, e.g.*, Broadband Plan at 49 (concluding that “[t]o achieve wide, seamless and competitive coverage, the FCC should encourage mobile broadband providers to construct and build networks”).

est[.]”<sup>24</sup> and would also further the statutory goals established in Section 1302 of Title 47, United States Code, by “encouraging new deployment of advanced services to all Americans . . . by removing barriers to infrastructure investment . . . .”<sup>25</sup>

## **2. Consumers and Public Safety Would Benefit from a Data Roaming Obligation.**

Wireless data services provide numerous benefits to consumers and public safety. The description of these benefits to consumers presented by SouthernLINC three years ago applies with even greater force today:

Wireless data services like text messaging and e-mail have rapidly become a highly valued and indispensable aspect of wireless services. Consumer use of and reliance on mobile data services—which are marketed primarily as an addition to or bundled with mobile voice services utilizing a single phone—is rapidly expanding. . . . [M]obile data is more than an indispensable business tool—as users of Blackberry and like services will attest—or a source of personal and economic productivity. It is also fulfilling an increasingly important, multi-faceted role in addressing vital public interest needs [such as public safety].<sup>26</sup>

The growing importance of wireless data services for consumers and public safety has underscored the importance of data roaming, which has obvious benefits for any wireless subscriber who travels outside his or her home service area.

For example, the Broadband Plan has explained that “[d]ata roaming . . . would enable customers to obtain access to e-mail, the Internet and other mobile broadband services outside the geographic regions served by their providers. Small rural providers serve customers that may be more likely to roam in areas outside their providers’ network footprints.”<sup>27</sup> In addition, all

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<sup>24</sup> *Second Further NPRM* at para. 67 (footnote omitted).

<sup>25</sup> *Id.*

<sup>26</sup> SouthernLINC 2007 Letter at 1-2.

<sup>27</sup> Broadband Plan at 49. *See* Ex Parte Letter from David L. Nace, Counsel for Cellular South, Inc. (“Cellular South”), to Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 05-265 and 09-66, GN Docket Nos. 09-51 and 09-137 (filed Dec. 14, 2009) at 2 (observing that “[t]he absence of . . . a [data roaming]

consumers—not just those residing in rural areas—would benefit from a data roaming mandate, because, for instance, such an obligation would facilitate the build-out of advanced broadband networks in rural and small regional markets, with attendant benefits for the national economy.

United States Cellular Corporation (“U.S. Cellular”) has also explained the importance of data roaming for consumers, pointing out that a majority of its customers “have phones, wireless modems or PDAs that can download multiple applications, including games, news, sports information, ring tones and stock quotations[,]”<sup>28</sup> leading U.S. Cellular to conclude that “it is urgently necessary that carriers, and especially national carriers, be required to facilitate the use of such data applications for roamers.”<sup>29</sup>

The Commission has determined that a roaming obligation that is not encumbered by a home roaming exclusion “protects consumers by facilitating their access to ubiquitous service.”<sup>30</sup> This finding applies with equal force to data roaming, both to consumers and public safety entities. Because consumer reliance upon wireless data services is likely to continue to grow,<sup>31</sup> consumers will benefit from the ability to access these services when they are away from their home service areas. Therefore, RCA urges the Commission to conclude that enhancement of this consumer benefit through the adoption of a data roaming requirement will serve the public interest.

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requirement is a serious problem for consumers who have a reasonable expectation of access to email and broadband data services when traveling outside the service area of regional and smaller carriers”).

<sup>28</sup> U.S. Cellular Comments, WT Docket No. 09-66, GN Docket No. 09-157, GN Docket No. 09-51, WT Docket No. 05-265, filed Sept. 30, 2009, at 17.

<sup>29</sup> *Id.*

<sup>30</sup> *Reconsideration Order* at para. 31.

<sup>31</sup> *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*, WT Docket No. 09-66, Fourteenth Report, FCC 10-81 (rel. May 20, 2010) (“*Fourteenth Wireless Competition Report*”) at para. 181 (indicating that “mobile data usage is growing significantly . . . in the United States” and that “[d]ata traffic is increasing with the growth in smartphone subscribers, who use the Internet and send and receive content more than average mobile wireless users”).

### 3. A Data Roaming Obligation Would Promote Competition and Encourage New Entry.

Competition in the wireless industry is being eroded by market concentration. For example, the Commission recently found that:

[o]ver the past five years, concentration has increased in the provision of mobile wireless services. The two largest providers, AT&T, Inc. (AT&T) and Verizon Wireless, have 60 percent of both subscribers and revenue, and continue to gain share . . . . One widely-used measure of industry concentration indicates that concentration has increased 32 percent since 2003 and 6.5 percent in the most recent year for which data is available.<sup>32</sup>

These developments are particularly perilous for rural and small regional carriers. As RCA observed three years ago, “a Commission decision to expand the automatic roaming requirement would eliminate a dark cloud over the survivability of some small and rural CMRS carriers”<sup>33</sup> Because there is no data roaming mandate, the Big Two and other national carriers can act with impunity in blocking rural and small regional carriers from obtaining data roaming arrangements with reasonable terms and conditions. RCA has previously explained that this problem is made worse by increased industry consolidation.<sup>34</sup>

The Big Two and other national carriers are in the driver’s seat with regard to data roaming and, so long as these carriers continue to flout the efforts of rural and small regional carriers to obtain data roaming agreements, the competitive status of these smaller carriers will be at risk. The Broadband Plan has recognized this problem, indicating that the Commission should “expe-

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<sup>32</sup> *Id.* at para. 4.

<sup>33</sup> RCA 2007 Reply Comments at 2.

<sup>34</sup> RCA Reply Comments, WT Docket No. 09-66, filed July 13, 2009 (“RCA 2009 Reply Comments”), at 11. Before the most recent wave of consummated and proposed acquisitions, companies like Alltel Communications, LLC, Dobson Communications Corp., and Centennial Communications Corporation were available as roaming partners. But now the Tier 1 companies are the only game in town. In addition, because the [large national] carriers do not use the same air interface technology, rural and smaller regional carriers are limited to one or two carriers as potential roaming partners in many markets.

dite action on data roaming to . . . promote entry and competition.”<sup>35</sup> Since success in the wireless marketplace is largely dependent upon a carrier’s ability to build, preserve, and extend its customer base, carriers cannot compete successfully if they are not able to provide services that consumers consider to be important and valuable.

As RCA has discussed, consumers are increasingly using wireless data services, especially since the advent of smartphones. As this reliance upon wireless data services continues to grow, so will consumers’ expectation of seamless access to these services when they travel outside their home service areas. If rural and small regional carriers cannot meet these expectations, they will lose customers, and this loss of customers will undercut the carriers’ ability to invest in the deployment of advanced broadband networks, which, in turn, will further erode the carriers’ competitive position.

The adoption of a data roaming obligation would change this discouraging dynamic. As a general matter, the Commission has recognized the importance of roaming for rural and small regional carriers:

[T]hrough roaming agreements with other mobile wireless providers, many of the non-nationwide providers are able to offer coverage and service plans that are national in scope. Accordingly, roaming can be particularly important for small and regional providers with limited network population coverage to remain competitive by meeting their customers’ expectations of nationwide service. Similarly, roaming may be important to new entrants who wish to begin offering service before they have fully built out their networks.<sup>36</sup>

For the reasons RCA has discussed, these general conclusions of the Commission regarding the importance of roaming agreements also apply to the specific case of data roaming.<sup>37</sup> The adop-

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<sup>35</sup> Broadband Plan at xii.

<sup>36</sup> *Fourteenth Wireless Competition Report* at para. 125 (footnotes omitted).

<sup>37</sup> See Broadband Plan at 49 (finding that “[d]ata roaming is important to entry and competition for mobile broadband services”).

tion of a data roaming obligation would serve the public interest by promoting competition in the wireless marketplace.

**C. A Data Roaming Requirement Is Necessary Because Large National Carriers Lack Any Incentive To Enter into Data Roaming Arrangements.**

After emphasizing the importance of data roaming agreements, the Broadband Plan optimistically suggests that “[t]he [wireless] industry should adopt voluntary data-roaming arrangements.”<sup>38</sup> Unfortunately, the Big Two and other national carriers have shown little interest in coming to the table. The Commission has recognized this problem, as evidenced in the Broadband Plan itself, which states “the FCC should move forward promptly with its open proceeding on roaming obligations for data services provided without interconnection with the public switched network.”<sup>39</sup>

Industry consolidation has given the Big Two and other large carriers license holdings with virtually nationwide footprints.<sup>40</sup> As a consequence, the national carriers are reluctant to enter into data roaming agreements with rural and small regional carriers, since such agreements would enhance the competitiveness of these carriers. For example, Cellular South advised the Commission three years ago that it had constructed EVDO facilities in some portions of its ser-

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* (footnote omitted).

<sup>40</sup> *See, e.g.*, 700 MHz Block A Good Faith Purchasers Alliance Reply Comments, RM No. 11592, filed Apr. 30, 2010 (“Alliance Reply Comments”), at 25 (indicating that “AT&T and Verizon hold dominant positions in the top 700 MHz markets across the country: (1) In the Lower A Block, Verizon holds 16 of the top 20 markets, and all of the top five markets. (2) In the Lower B Block, AT&T holds licenses for 87 of the top 100 markets, while Verizon holds 12 of the remaining 13 licenses in the top 100 markets—so that, together, the Big Two hold licenses in 99 percent of these markets. (3) In the Lower C Block, AT&T has licenses for 93 of the top 100 markets. (4) In the Upper C Block, Verizon holds licenses for the entire continental United States and Hawaii.”).

vice area “but, for over a year, has been rebuffed by larger carriers with compatible networks whenever an automatic roaming agreement has been requested.”<sup>41</sup>

There also is evidence that this stonewalling by the Big Two and other national carriers has persisted. For example, Bright House Networks has indicated that it is unable to secure roaming agreements at reasonable and non-discriminatory rates.<sup>42</sup> Also, Cricket Communications Inc. has advised the Commission that it and other carriers “have increasingly encountered abusive and anticompetitive business practices, such as the largest carriers’ refusal to provide wholesale automatic roaming on just, reasonable, and non-discriminatory terms.”<sup>43</sup> Similarly, Cox Communications has been unsuccessful negotiating data roaming arrangements with Verizon since August 2009 and “after eight months, the parties have yet to *begin* negotiating the provisions of [a] roaming agreement.”<sup>44</sup>

The cure for this recalcitrance on the part of the Big Two and other national carriers is the adoption of a data roaming obligation. As RCA demonstrates, numerous public interest benefits would result from data roaming. Commission action is necessary to secure these public interest benefits.

**D. The Commission Should Require That Host Carriers Must Provide Data Roaming with Reasonable Terms and Conditions and Adopt a Standardized Negotiation Process Applicable to All Roaming Agreement Requests.**

Regarding what specific terms, conditions, or restrictions the Commission should include in any rule requiring the provision of data roaming,<sup>45</sup> RCA believes that the data roaming obliga-

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<sup>41</sup> Ex Parte Letter from David L. Nace, Counsel for Cellular South, to Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 06-150, 06-169, 96-86, and 05-265, PS Docket No. 06-229 (filed June 26, 2007) at 3.

<sup>42</sup> Bright House Network Comments, WT Docket No. 09-66, filed June 15, 2009, at 2.

<sup>43</sup> Cricket Communications Inc. Comments, WT Docket No. 09-66, filed June 15, 2009, at 7.

<sup>44</sup> Letter from Michael H. Pryor, Counsel to Cox Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 09-104 (filed Apr. 28, 2010) at 2 (emphasis in original).

<sup>45</sup> *Second Further NPRM* at para. 87.

tion should have two principal components: (1) a presumption that a request for automatic roaming by a technologically compatible carrier is reasonable; and (2) a requirement that all data roaming terms and conditions must be just and reasonable and that host carriers may not include any unreasonably discriminatory terms or conditions in their data roaming arrangements. In addition, RCA recommends that the Commission adopt a standardized roaming agreement negotiation process to promote the efficient and reasonable negotiation of automatic roaming agreements between carriers.

First, similar to the dispute resolution process for home roaming,<sup>46</sup> the Commission should establish a presumption that a request for automatic roaming of covered services by a technologically compatible carrier is reasonable. This would require a host carrier receiving a request for data roaming to “respond promptly to the request and avoid actions that unduly delay or stonewall the course of negotiations regarding that request.”<sup>47</sup>

Second, the Commission should impose the Section 201(b)<sup>48</sup> obligation that all data roaming terms and conditions must be just and reasonable, and should also impose the Section 202(a)<sup>49</sup> prohibition that host carriers may not include any unreasonably discriminatory terms or conditions. Subjecting host carriers to these Section 201 and Section 202 requirements would serve to enforce the general data roaming obligation, ensuring that rural and small regional carriers would not be disadvantaged in negotiations. RCA agrees with SouthernLINC’s analysis that

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<sup>46</sup> See *Reconsideration Order* at para. 38.

<sup>47</sup> *Id.* (footnote omitted).

<sup>48</sup> 47 U.S.C. § 201(b).

<sup>49</sup> 47 U.S.C. § 202(a).

the Commission may use Title III to extend Section 201 and Section 202 obligations to data services.<sup>50</sup>

Because these two components are not enough to ensure reasonable and timely negotiation of a roaming agreement, RCA also recommends Commission adoption of a standardized negotiation process applicable. The FCC should consider the adoption of a 90-day “shot clock” for the negotiation of voice and data roaming agreements (including interoperability) and allow no more than 180 days for the parties to implement and effectuate the agreement, similar to the FCC’s interconnection requirements or current tower siting obligations. The FCC should also adopt a stalemate resolution process requiring participation in arbitration or mediation if roaming requests are ignored or stonewalled by the receiving carrier. RCA will provide the Commission with a detailed standardized roaming negotiation process proposal shortly.

**E. Requesting Carriers Should Be Entitled To Obtain Data Roaming Regardless of Whether They Offer the Underlying Service on Their Own Networks.**

The Commission should not adopt restrictions that will prohibit a requesting carrier from receiving a data roaming arrangement upon a reasonable request. In its *Second Further NPRM*, the FCC asks whether a host carrier should not be required to provide data roaming unless the requesting carrier offers the requested service or feature involved on its own home network.<sup>51</sup> Such a restriction would threaten to perpetuate the competitive imbalance faced by rural and small regional carriers, unfairly restricting consumers. The current controversy involving the deployment of advanced broadband networks in the 700 MHz band illustrates this point.

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<sup>50</sup> See SouthernLINC 2007 Letter at 12-14 (showing that the Commission’s decisions relying upon Title III to impose Title II resale obligations on data services provide valuable precedent with respect to the Commission’s regulation of data roaming).

<sup>51</sup> *Second Further NPRM* at para. 87.

In the 700 MHz Interoperability rulemaking,<sup>52</sup> various rural and small regional carriers have expressed concerns that the design of band classes through processes that were influenced by the Big Two are significantly impairing the ability of the small carriers to deploy advanced broadband networks on their licensed 700 MHz spectrum. These difficulties would be compounded if the small carriers' inability to deploy advanced broadband networks served as a bar to their eligibility for data roaming arrangements.

Additionally, the restriction described by the Commission would be unfair to consumers. A consumer may subscribe to a rural or small regional carrier that does not provide advanced broadband services, but still purchase a mobile device capable of utilizing advanced broadband services because the consumer places a premium on being able to access these services while traveling or working outside his or her home service area. It would be unfair to deprive the consumer of data roaming services because of a restriction that would make the roaming services unavailable unless the customer's home carrier also provides advanced data services.<sup>53</sup> To protect competition among larger and smaller carriers and rural consumers, the Commission should allow the requesting carrier to obtain data roaming regardless of whether the requesting carrier offers the underlying service.

## **II. CONCLUSION.**

Adoption of a data roaming obligation would serve the public interest by helping to meet consumers' expectations for seamless access to the Internet when they work or travel outside

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<sup>52</sup> The RM-11592 proceeding relates to a petition filed by the 700 MHz Block A Good Faith Purchasers Alliance (consisting of Cellular South, Cavalier Wireless, LLC, Continuum 700, LLC, and King Street Wireless, L.P.) asking the Commission to initiate a rulemaking proceeding to ensure that affordable mobile devices are developed that have the capability of operating in all paired commercial blocks in the 700 MHz band. *See* 700 MHz Block A Good Faith Purchasers Alliance, Petition for Rulemaking Regarding the Need for 700 MHz Mobile Equipment To Be Capable of Operating on All Paired Commercial 700 MHz Frequency Blocks, RM No. 11592, filed Sept. 29, 2009.

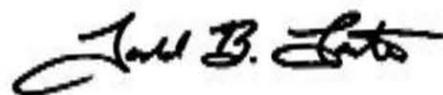
<sup>53</sup> *See* MetroPCS Communications, Inc., Comments, WT Docket No. 05-265, filed Oct. 29, 2007, at 16-17.

their home service areas, by enhancing the ability of rural and small regional wireless carriers to invest in and deploy advanced broadband networks, and by protecting and advancing the competitiveness of the wireless marketplace at a time when extensive consolidation and concentration in the industry threaten to undermine competition and harm consumers.

The Commission's general powers granted by Title III of the Act provide the agency with a sufficient basis to establish a data roaming requirement. This authority may be exercised regardless of whether the service using radio spectrum has been classified as a telecommunications service or an information service.

For all the reasons discussed above, RCA respectfully urges the Commission to prescribe a data roaming obligation, which should include establishment of a presumption that requests for data roaming services are reasonable, and should include a standardized negotiation process (including a 90-day "shot clock" and a 180 day deadline for implementation) applicable to all roaming agreement requests.

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June 14, 2010

**CERTIFICATE OF SERVICE**

I, Donna L. Brown, hereby certify that on this 14<sup>th</sup> day of June, 2010, copies of the foregoing Comments of Rural Cellular Association were sent via electronic mail to the following:

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