

**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)

**COMMENTS OF LEAP WIRELESS INTERNATIONAL, INC.
AND CRICKET COMMUNICATIONS, INC.**

Robert J. Irving Jr.
Senior Vice President and
General Counsel
Leap Wireless International, Inc.
10307 Pacific Center Court
San Diego, CA 92121

James H. Barker
Alexander Maltas
LATHAM & WATKINS LLP
555 11th St. NW
Suite 1000
Washington, DC 20004

June 14, 2010

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION AND SUMMARY	1
II. MANDATING AUTOMATIC WIRELESS DATA ROAMING OBLIGATIONS IS IN THE PUBLIC INTEREST	3
A. Automatic Wireless Data Roaming Will Promote the Goals of the National Broadband Plan	4
B. Automatic Wireless Data Roaming Will Promote Competition and Investment Incentives	5
C. Data Roaming Will Promote Growth and Innovation in Pre-Paid Wireless Services for the Benefit of Under-Served Communities	7
III. THE COMMISSION HAS AMPLE LEGAL AUTHORITY TO EXTEND WIRELESS ROAMING OBLIGATIONS TO DATA TRANSMISSION	9
A. The Commission Has Clear Authority Under Title III to Mandate Wireless Data Roaming Obligations.....	11
1. Title III Provides Numerous Bases of Authority to Support a Data Roaming Obligation.....	11
2. The Commission Consistently Has Relied on Title III to Ensure Seamless Interoperability and Communication Across a “Network of Networks,” Unconstrained by Regulatory Classification.....	14
B. The Commission Also Would Be On Sound Legal Footing To Invoke Authority Under Title II.....	18
1. Data Roaming Can Be Viewed as a Transmission Component that is “Telecommunications”	19
2. Data Roaming Can Be Characterized as a “Telecommunications Service”	21
C. The Commission Also Has Ancillary Authority Under Title I to Impose Wireless Data Roaming Obligations.....	25
IV. THE COMMISSION SHOULD IMPOSE AUTOMATIC DATA ROAMING OBLIGATIONS THAT ARE COMPARABLE TO AUTOMATIC VOICE ROAMING OBLIGATIONS.....	28
V. CONCLUSION.....	29

**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)

**COMMENTS OF LEAP WIRELESS INTERNATIONAL, INC.
AND CRICKET COMMUNICATIONS, INC.**

Leap Wireless International, Inc. and Cricket Communications, Inc. (together, “Leap”) submit these comments in response to the Commission’s Second Further Notice of Proposed Rulemaking regarding whether to extend wireless roaming obligations to data services.¹ Without question, the answer is yes.

I. INTRODUCTION AND SUMMARY

The Commission has recognized that automatic roaming serves the public interest because it enables “subscribers to receive service seamlessly”² and reduces “inconsistent coverage and service qualities.”³ In its companion Order on Reconsideration adopted in tandem

¹ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 75 Fed. Reg. 22338 (April 28, 2010) (“*Second FNPRM*”).

² *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 05-265, ¶28 (Aug. 16, 2007) (“*2007 CMRS Roaming Order*”).

³ *Id.* ¶27.

with the *Second FNPRM*, the Commission reaffirmed the need to “increase consumers’ access to seamless nationwide mobile services, wherever and whenever they choose.”⁴

Such goals simply cannot be achieved, however, if the Commission does not extend automatic roaming obligations to wireless data services. Less than one month ago, the Commission identified as a key trend in the wireless industry the fact that the voice segment of the mobile services market has matured. With consumers’ rapid increased adoption of smart phones and data applications, the United States’ wireless industry is in the midst of a transition to a “data centric market.”⁵ Today, interconnected mobile voice service has yielded to a far more complex and interrelated “mobile wireless ecosystem” that features an “array of voice, messaging, and broadband services provided on previous and next generation networks.”⁶ As the Commission has observed, “for more and more consumers, mobile devices are evolving from voice-only handsets to handheld computers with sophisticated operating systems capable of supporting many of the same functionalities and software applications of personal computers (e.g., Internet browsers, video players, and e-mail programs).”⁷

From a public interest perspective, the common-sense but critical takeaway from such developments is that the Commission must continue to exercise its regulatory authority to ensure that the richness of consumers’ experience with converging voice and data services on mobile and portable platforms is not artificially circumscribed by regulatory constructs that cannot keep pace with rapid technological innovation. The mere fact that smart phones get “smarter” – and

⁴ *Second FNPRM*, ¶1.

⁵ *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, ¶4 (May 20, 2010) (“*14th Wireless Competition Report*”).

⁶ *Id.* ¶9.

⁷ *Id.* ¶10.

that mobile and portable voice and data services continue to converge and multiply – does not and should not mean that a consumer’s enjoyment of those services is jeopardized when she roams off of her home wireless network. To the contrary, as consumers become increasingly reliant on mobile and portable wireless devices, it is more critical than ever that the continuity of services be preserved across networks and geographic regions.

The Commission has identified the “transformative importance of mobile wireless broadband.”⁸ Because “no sector of our economy holds more promise for 21st Century U.S. leadership in innovation and investment than wireless broadband,”⁹ and because automatic data roaming is essential to foster innovation and investment in this rapidly growing industry, Leap strongly urges the Commission to implement automatic data roaming obligations. As set forth below, implementing wireless data roaming obligations will further the goals of the National Broadband Plan; will promote competition and investment incentives; and will foster innovation and growth in the pre-paid wireless segment for the particular benefit of under-served communities. The Commission also has ample statutory authority to take this action.

II. MANDATING AUTOMATIC WIRELESS DATA ROAMING OBLIGATIONS IS IN THE PUBLIC INTEREST

The Commission has recognized that consumers expect to be able to have wireless services when they roam.¹⁰ With respect to voice roaming, the Commission found that “automatic roaming benefits mobile telephony subscribers by promoting seamless CMRS service around the country, and reducing inconsistent coverage and service quality,” and that automatic

⁸ *Id.* ¶2.

⁹ Statement of Chairman Julius Genachowski regarding 14th Annual Report on Mobile Wireless Competition, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-298308A2.pdf.

¹⁰ *2007 CMRS Roaming Order*, ¶27.

roaming obligations will serve the public interest.¹¹ Those observations apply equally to data roaming. In addition, data roaming has the potential to promote competition and innovation in the nascent and rapidly growing segment of wireless data services. Automatic data roaming also is essential to facilitate deployment of broadband to under-served communities, particularly low-income and minority communities.

A. Automatic Wireless Data Roaming Will Promote the Goals of the National Broadband Plan

The Commission’s National Broadband Plan recognized that “wireless broadband is poised to become a key platform for innovation in the United States over the next decade.”¹² The Commission also found that “wireless communications—and mobile broadband in particular—promises to continue to be a significant contributor to U.S. economic growth in the coming decade.”¹³ And the Commission recognized that ubiquitous data coverage is so crucial that one of its first goals in the National Broadband Plan is to “expedite action on data roaming to determine how best to achieve wide, seamless and competitive coverage, encourage mobile broadband providers to construct and build networks, and promote entry and competition.”¹⁴

The Commission also recognized the incongruity of having “wireless roaming policies vary based on the services offered.”¹⁵ Because “roaming is only required for voice telephone calls and not mobile data services ... mobile customers may not be able to use all functions of their Smartphone devices when roaming, even in situations where it is technically feasible for all

¹¹ *Id.*

¹² Federal Communications Commission, *Connecting America: The National Broadband Plan* 36 (2010), <http://www.broadband.gov> (“*National Broadband Plan*”), at 75.

¹³ *Id.*

¹⁴ *Id.* at xii.

¹⁵ *Id.* at 48.

of those functions to work.”¹⁶ The Commission cited this disconnect as a prime example of a situation in which competitors’ access to “critical inputs” “currently depends on factors that have little bearing on the economics of facilities-based competitive entry.”¹⁷

To address these problems, the National Broadband Plan specifically recommended as a goal that the Commission move forward promptly to address roaming obligations for data services.¹⁸ The Commission must do so because “data roaming is important to entry and competition for mobile broadband services and would enable customers to obtain access to e-mail, the Internet and other mobile broadband services outside the geographic regions served by their providers.”¹⁹

Mandating automatic data roaming will advance these goals. Doing so will foster wireless broadband as a platform of innovation and growth. It will also resolve the current incongruity between voice and data regulations that leaves consumers at risk of having only limited functionality while roaming.

B. Automatic Wireless Data Roaming Will Promote Competition and Investment Incentives

The Commission has found that “roaming on competitors’ networks can offer entrants access to greater network coverage while they are deploying their own networks. ... 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.”²⁰ Consumers now demand and expect seamless coverage of wireless services, including data services. Data roaming thus is

¹⁶ *Id.*

¹⁷ *Id.* at 47.

¹⁸ *Id.* at 49 (Recommendation 4.11).

¹⁹ *Id.*

crucial for all CMRS providers, regardless of the size of their footprints, because it fills gaps in coverage and thereby enables all providers to offer the services that consumers want. Smaller and mid-sized carriers in particular will benefit from the ability to offer nationwide service, and in doing so will become more vibrant competitors to the major national providers. Moreover, new entry simply is not feasible without data roaming because a new carrier would face an insurmountable barrier if it is unable to offer a service area of sufficient scale to attract subscribers, and a new carrier realistically could not achieve such scale without data roaming.

Data roaming also will promote providers' incentives to invest in expanding their facilities. The Commission already has recognized that automatic roaming provides "incentives for all carriers to invest and innovate by using available spectrum and constructing wireless network facilities on a widespread basis."²¹ Those incentives will not be diminished by extending roaming obligations to data services. Indeed, the incentives to invest in deployment will be affirmatively increased by extending roaming obligations to data services. Data roaming enhances the value of a carrier's facilities-based network to its services, and consumers increasingly view data services as a crucial bundled complement to voice services.²² Reasonable rates for data roaming will enable host providers to earn a profit from roaming users while incenting requesting carriers to lower their costs by building out their own networks. Data roaming thus will promote facilities-based competition rather than merely advancing roaming as an end in itself.

²⁰ *14th Wireless Competition Report*, ¶63.

²¹ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Final Rule, WT Docket No. 05-265, 75 Fed. Reg. 22262, 22263-64, ¶2 (April 28, 2010).

²² *See 14th Wireless Competition Report*, ¶22.

The need to fill gaps in coverage and provide incentives for deployment of new facilities and services is particularly acute when the services at issue are emerging, nascent services. In 1996, the Commission concluded that “the availability of roaming on broadband wireless networks is important to the development of nationwide, ubiquitous, and competitive wireless voice telecommunications.”²³ The Commission found that roaming obligations were particularly important during the early period in which facilities were being built, because new providers were entering, and service was expanding.²⁴ Just as wireless voice services still were relatively nascent in the mid-1990s, so the Commission has recognized that mobile data services now are rapidly growing services,²⁵ and that, in 2010, “wireless broadband is poised to become a key platform for innovation in the United States over the next decade.”²⁶ Extending roaming obligations to data services, particularly during this early period of promising growth, will promote the deployment of robust wireless broadband in the years to come.

C. Data Roaming Will Promote Growth and Innovation in Pre-Paid Wireless Services for the Benefit of Under-Served Communities

Data roaming obligations will have a particularly powerful impact in the growth of pre-paid wireless service providers and their emphasis on under-served communities. The Commission has recognized significant growth in pre-paid services.²⁷ These service offerings tend to target customers who cannot obtain traditional wireless plans, such as those who start and stop service intermittently due to budget pressures or who relocate to new areas, as well as

²³ *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Second Report and Order and Third Notice of Proposed Rulemaking, 11 FCC Rcd 9462, 9468-69 ¶2 (1996).

²⁴ *Id.* ¶¶2, 11.

²⁵ *14th Wireless Competition Report*, ¶¶181-184.

²⁶ *National Broadband Plan* at 75.

lower-income customers. Significantly, the drivers of the prepaid segment have not been major national providers such as Verizon and AT&T, but rather small and mid-sized carriers, including Leap and MetroPCS, which have focused their businesses on providing wireless services to underserved communities.

For example, Cricket’s business model historically has focused on tailoring service plans to meet the needs of consumers who cannot afford or qualify for services from other wireless providers. Cricket’s broadband service has been able to reach consumers who previously could not afford access to the Internet. Indeed, many of these customers do not even possess a wired connection to the PSTN or the Internet. Cricket’s wireless broadband service is thus the first and only connection these customers have to gain broadband access. In fact, nearly 50 percent of customers subscribing to Cricket’s wireless broadband service have never had Internet access at home – not even dial-up. Cricket’s experience is consistent with the Commission’s findings in the National Broadband Plan that adults who lack broadband at home are generally poorer and more likely to be a racial or ethnic minority.²⁸ The Commission also recognized that although home broadband adoption “is lower for African Americans and Hispanics, these groups are relatively heavier users of mobile Internet,” and “are more likely to have ever accessed the Internet on a mobile handheld device.”²⁹ Cricket targets precisely such customers and enables them to attain broadband service, often for the first time.

Automatic data roaming obligations are crucial to preserving and enhancing competition in the prepaid segment, for the benefit of under-served communities. Absent clear, non-

²⁷ *14th Wireless Competition Report*, ¶¶98-99.

²⁸ *See National Broadband Plan* at 168; *see also id.* at 265 (“broadband access and adoption by minority populations can further economic opportunities for all”).

²⁹ *Id.* at 180.

discriminatory data roaming obligations, larger providers will be able to exert control over this segment through discriminatory pricing. A major national provider that wishes to expand its own prepaid service offerings could use data roaming as a lever to impair rivals. A national provider facing a data roaming request from a smaller pre-paid provider could, for example, extort unreasonably high prices or offer to permit roaming only at lower speeds. In essence, the major national provider could exert its market power even in segments in which it is not a driver of growth by exploiting its larger footprint. Data roaming rules that require access to host networks on fair and non-discriminatory terms will help smaller and regional prepaid competitors to gain penetration and will facilitate their ability to provide meaningful competition to larger providers for the benefit of under-served communities.

III. THE COMMISSION HAS AMPLE LEGAL AUTHORITY TO EXTEND WIRELESS ROAMING OBLIGATIONS TO DATA TRANSMISSION

In the *Second FNPRM*, the Commission seeks comment on its tentative conclusion that it has the legal authority to implement wireless data roaming obligations.³⁰ The Commission's analysis is correct. The agency possesses the clear statutory authority to implement wireless data roaming rules.

The Commission's clearest and most robust legal authority emanates from Title III, which expressly gives the Commission a mandate to regulate radio communications; provides express authority for the Commission to prescribe the nature of radio services to be rendered by licensees and to establish conditions on licenses; and provides the mandate to impose consistency and parity and to establish appropriate levels of regulation for mobile radio services providers. Regardless of how wireless services are classified, the Commission always has possessed broad authority to condition licenses on terms that are in the public interest. And with

respect to resale and roaming obligations in particular, the Commission repeatedly has acted to promote consistent treatment of voice and data services, in express recognition of the fact that, in a converging wireless marketplace, it “would be imprudent to distinguish between voice and data services offered by” wireless providers.³¹ There is little question that implementing wireless data roaming obligations falls squarely within the Commission’s Title III authority.

The Commission also could invoke Title II. The Commission has already concluded in its voice roaming order that roaming is a common carrier service and that voice roaming is subject to common carrier obligations. There is no material difference as a policy matter between voice and data roaming, and as a technological matter it is clear that voice and data services are converging. As a matter of classification, data roaming relies on pure transmission offered by the host network that constitutes “telecommunications” under the Act. A subscriber’s home network provides an array of information services to its subscribers, such as email, data hosting, and other services. When roaming, however, the host network serves merely as a conduit that transmits content of the subscriber’s choosing to the home network. And applying the Commission’s traditional tests of common carriage, the Commission can determine that wireless data roaming is a “telecommunications service” that gives end users access to a foreign network to communicate messages of their choosing.

Finally, the Commission also could invoke ancillary authority under Title I. The authority to implement wireless data roaming obligations is ancillary to the Commission’s express mandate to prescribe rules for wireless service providers under Title III. It is also

³⁰ See *Second FNPRM*, ¶65.

³¹ *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 16340, 16367 ¶58 (1999) (“*Resale Reconsideration Order*”).

ancillary to the Commission’s just-adopted regulations regarding automatic wireless voice roaming.

A. The Commission Has Clear Authority Under Title III to Mandate Wireless Data Roaming Obligations

“Congress has given the Commission express and expansive authority to regulate ... radio transmissions, including ... cellular telephony, [47 U.S.C.] § 301 et seq.”³² At least since the advent of modern cellular telephony in the early 1980s, Title III has of the Act has grounded the Commission’s implementation of rules governing third party and consumer access to mobile wireless networks, from proceedings that periodically established resale and roaming requirements (encompassing *both* wireless voice and data services), to the Commission’s relatively recent imposition of an “open access” requirement on 700 MHz C Block licensees. Invoking Title III here to establish a data roaming obligation is a straightforward extension of such precedents. Relying upon Title III also has the virtue of being unhindered by esoteric questions of regulatory classification – it provides the Commission with broad and flexible power to address key segments of the spectrum-based mobile wireless ecosystem in a straightforward manner to ensure the continuity and reliability of consumers’ wireless service.

1. Title III Provides Numerous Bases of Authority to Support a Data Roaming Obligation

Section 301 of the Communications Act (“the Act”) authorizes the Commission to regulate “radio communications” and “transmission of energy by radio.”³³ The Commission has the express authority under section 303(b) of the Act to impose obligations on licensees, including the authority to “prescribe the nature of the service to be rendered by each class of

³² *Comcast Corp. v. FCC*, 600 F.3d 642, 645 (D.C. Cir. 2010).

³³ 47 U.S.C. § 301.

licensed stations and each station within any class.”³⁴ Section 303(f) provides that the Commission may “make such regulations not inconsistent with law as it may deem necessary ... to carry out the provisions of this chapter.”³⁵ Section 303(g), moreover, gives the Commission broad authority to “generally encourage the larger and more effective use of radio in the public interest.”³⁶ The Commission also may grant, revoke, or modify licenses, and may prescribe new conditions for licenses.³⁷ The Act’s broad mandate here “invests the Commission with an enormous discretion” to implement licensee conditions that the Commission determines will serve the public interest.³⁸ And the fundamental purpose of Section 332 of the Act is to bring “all mobile service providers under a comprehensive, consistent regulatory framework and give[] the Commission flexibility to establish appropriate levels of regulation for mobile radio services providers.”³⁹

Establishment of wireless data roaming obligations can flow directly from all of these provisions. Such obligations would constitute a regulation of “radio communications,” and in particular the Commission may implement data roaming obligations as a determination of the “nature of the service to be rendered” by licensees, and as a condition of licensing, in a manner that would encourage the more effective use of radio. To the extent that imposing automatic data roaming obligations may be viewed as a modification of existing license conditions, the Commission may implement such modifications during this rulemaking proceeding, without the

³⁴ *Id.* § 303(b).

³⁵ *Id.* § 303(f).

³⁶ *Id.* § 303(g).

³⁷ 47 U.S.C. §§ 307, 309, 312, 316.

³⁸ *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1048 (7th Cir. 1992).

need for individual licensee hearings. The entire purpose of this proceeding is to determine if rules should be implemented *en masse*, with application to various classes of wireless licenses. The D.C. Circuit has confirmed in this context that the Commission is well within its authority to implement such rules (as opposed to modifying individual licenses) through a rulemaking rather than adjudicatory proceeding.⁴⁰

Wireless data roaming obligations also are consistent with Congress's goals, set forth in Title III, with respect to competitive bidding on spectrum. Automatic data roaming obligations would satisfy the requirements of § 309(j)(3) that the Commission "include safeguards to protect the public interest in the use of the spectrum" when specifying "eligibility and other characteristics of ... licenses."⁴¹ They also would advance specific objectives of § 309(j)(3) to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public" as well as "efficient and intensive use of the electromagnetic spectrum."⁴² As explained above, wireless data roaming obligations will create positive incentives that will facilitate faster deployment of advanced wireless broadband services. Such obligations thus would promote Congress's objectives and would be consistent with the Commission's authority under § 303(r) to impose requirements "as may be necessary to carry out the provisions of this Act."⁴³

³⁹ *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1417, ¶12 (1994); see 47 U.S.C. § 332.

⁴⁰ *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1319 (D.C. Cir. 1995); see also *California Citizens Band Assn. v. United States*, 375 F.2d 43, 50-51 (9th Cir. 1967).

⁴¹ 47 U.S.C. § 309(j)(3).

⁴² *Id.*

⁴³ 47 U.S.C. § 303(r).

2. **The Commission Consistently Has Relied on Title III to Ensure Seamless Interoperability and Communication Across a “Network of Networks,” Unconstrained by Regulatory Classification**

From the inception of modern wireless service, the Commission has utilized Title III to ensure that consumers have seamless connectivity across wireless networks. In the early 1980s, a primary driver behind the Commission’s adoption of the analog AMPS compatibility standard for cellular systems was “to enable subscribers of one cellular system to be able to use their existing terminal equipment (*i.e.*, mobile handset) in a cellular market in a different part of the country (roaming).”⁴⁴ The Commission in the mid-1990s similarly implemented wireless resale obligations⁴⁵ and applied manual roaming rules to most CMRS providers,⁴⁶ again as a condition of licensing pursuant to Sections 303(r) and 309. The Commission determined during this period that “the availability of roaming on broadband wireless networks was important to the development of nationwide, ubiquitous, and competitive wireless voice telecommunications,” and in 2000, reiterated that ubiquitous roaming remained “important to the development of a seamless, nationwide ‘network of networks,’” and that it had the “authority to impose a roaming requirement in the public interest pursuant to [its] license conditioning authority under Sections 303(r) and 309 of the Act.”⁴⁷

⁴⁴ *Year 2000 Biennial Review – Amendment of Part 22 of the Commission’s Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and Other Commercial Mobile Radio Services*, Order on Reconsideration, 19 FCC Rcd 3239, 3241-42, ¶8 (2004); *see also An Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission’s Rules Relative to Cellular Communications Systems*, Report and Order, 86 FCC 2d 469, 508 ¶¶92-93 (1981).

⁴⁵ *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, First Report and Order, 11 FCC Rcd 18455, 18459 ¶7 (1996) (“*Resale Order*”).

⁴⁶ *Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services*, Notice of Proposed Rulemaking, 15 FCC Rcd 21628, 21630, ¶5 (2000).

⁴⁷ *Id.* ¶15.

Significantly, the Commission’s Title III authority to regulate spectrum-based services has always been broad and flexible enough to extend well beyond the reach of services that are regulated as common carriage under Title II. The *Second FNPRM* correctly observes that application of Title III’s licensing provisions “is not affected by whether the service using the spectrum is a telecommunications or information service under the Act.”⁴⁸ Indeed, the Commission’s experiences implementing the wireless resale and manual roaming rules are instructive in this regard.

Initially, the Commission expressly rejected as “inapt” the argument that the resale rule was “overbroad because it extends to non-Title II services.”⁴⁹ In so doing, the Commission observed that “[n]o party has challenged our explicit invocation of Title III as a basis for imposing the resale rule.”⁵⁰ With respect to wireless data services specifically, the Commission determined that it would be “imprudent to distinguish between voice and data services offered by broadband PCS and cellular providers and that both should be subject to the resale rule.”⁵¹ On reconsideration, the Commission noted that it continued to believe that a voice/data distinction was “imprudent,” and that “[s]uch a rule would be difficult to enforce because there are no usage restrictions applicable to CMRS licensees.”⁵² In fact, the Commission reversed its prior

⁴⁸ *Second FNPRM*, ¶66 (citation omitted).

⁴⁹ *Resale Reconsideration Order*, ¶27.

⁵⁰ *Id.* On the merits, the Commission noted that it was important as a policy matter for its resale rule to encompass bundled voice and enhanced services “in order to be meaningful in the present CMRS marketplace.” *Id.* ¶30. The Commission’s roaming rule here similarly cannot be meaningful if mobile data services are excluded, because it remains true that “consumers typically receive mobile voice and data services on a single end-user device and purchase these services from a single provider.” *14th Wireless Competition Report*, ¶22.

⁵¹ *Id.* ¶58.

⁵² *Id.* ¶59.

exemption of SMR data services from the resale rule, again noting the enforcement difficulty of determining “whether a carrier is offering voice or data services over digital transmission facilities.”⁵³

The Commission moved on to reject the same voice/data distinctions in the roaming context. When RAM Mobile Data argued that data-only SMR services should be excluded from the manual roaming obligation because “such services do not compete in the same market as traditional cellular and broadband PCS networks, for which roaming obligations were crafted,”⁵⁴ the Commission cited its rejection of that argument in the resale proceeding, and modified its roaming rule to cover SMR providers of data services, as well.⁵⁵

More recent proceedings have confirmed the reach of Title III, unhindered by Title II and other regulatory classifications. For example, the Commission has ruled that wireless broadband Internet access, even though classified as an information service, remains subject to the Commission’s Title III authority “because the service is using radio spectrum.”⁵⁶ Specifically, the Commission’s decision to classify wireless broadband Internet access service as an information service “does not affect the applicability of Title III provisions and corresponding Commission rules to these services.”⁵⁷ This makes sense because the defining feature of the Commission’s Title III authority is the medium of communications – “radio communications”

⁵³ *Id.* ¶60.

⁵⁴ *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Third Report and Order and Memorandum Opinion and Order on Reconsideration, 15 FCC Rcd 15975, 15979 ¶11 (2000).

⁵⁵ *Id.* ¶18.

⁵⁶ *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, ¶35 (2007) (“*Wireless Broadband Declaratory Ruling*”).

⁵⁷ *Id.* ¶36.

and “transmission of energy by radio” – rather than the particular services offered over that medium.

Similarly, and consistent with this understanding of Title III, the Commission adopted an open-platform requirement for the 700 MHz C Block based on its goal of pursuing “a balanced spectrum policy” and a recognition that “it may be necessary to vary the regulation of spectrum use to achieve certain critical public interest objectives.”⁵⁸ As the *Second FNPRM* notes, the Commission took this action “without regard to whether such licensees were providing telecommunications or information services,”⁵⁹ and simply invoked in a straightforward manner its statutory authority under Sections 303 and 309, including its authority under § 303(r) to “make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act.”⁶⁰

As set forth below, there are other jurisdictional bases for the Commission to take action with respect to data roaming, but in Leap’s view, Title III is the most appropriate based on the Commission’s recent observations about the state of the wireless marketplace:

Many providers of CMRS also offer a variety of mobile data services, including mobile broadband Internet access service, which is not classified as ‘CMRS,’ and other mobile data services whose regulatory status the Commission has not addressed. For the *Fourteenth Report*, our analysis of the mobile wireless services industry includes voice, messaging and broadband services because they often jointly use the same spectrum, network facilities, and customer equipment; and many mobile providers have integrated the marketing of these services, often offering them in bundles. Also, consumers are increasingly substituting among voice, messaging, and data services, and, in particular, are

⁵⁸ *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, WT Docket No. 06-150, Second Report and Order, FCC 07-132, ¶202 (Aug. 10, 2007) (“*700 MHz Order*”).

⁵⁹ *Second FNPRM*, ¶166.

⁶⁰ *700 MHz Order*, ¶207.

willing to substitute from voice to messaging or data services for an increasing portion of their communications needs.⁶¹

As a policy matter, these observations underscore the necessity of extending wireless roaming obligations beyond voice-only services – having just re-affirmed its commitment to “increas[ing] consumers’ access to seamless nationwide mobile services,” the Commission cannot as a matter of logic exclude the converging data services that it finds are becoming increasingly substitutable for voice services. As a legal matter, the Commission’s market analysis is in line with its traditional exercise of Title III authority, affirmed by the D.C. Circuit, which focuses “on CMRS spectrum as a whole” and the agency’s predictive judgment that services provided on the spectrum “will converge,” yielding new actual and potential competitors.⁶²

In light of the Commission’s express statutory authority, and the agency’s consistent history of using Title III to advance public interest obligations related to access to and usage of spectrum-based networks via conditions on licensing, the Commission can and should invoke its Title III authority here to implement wireless data roaming obligations.

B. The Commission Also Would Be On Sound Legal Footing To Invoke Authority Under Title II

The Commission has recently affirmed that wireless voice roaming is a common carrier service subject to Title II.⁶³ The Commission determined that “roaming is a common carrier service, because roaming capability gives end users access to a foreign network in order to

⁶¹ *14th Wireless Competition Report*, ¶8.

⁶² *BellSouth Corp. and BellSouth Wireless, Inc. v. FCC*, 162 F.3d 1215, 1223 (D.C. Cir. 1999).

⁶³ *2007 CMRS Roaming Order*, ¶¶1, 2, 27.

communicate messages of their own choosing.”⁶⁴ The same analysis can encompass data roaming. There is no sound reason as a matter of policy, technology, or law to distinguish between voice roaming and data roaming. The Commission has already found that voice and data are converging, and that consumers view wireless voice and data services as inextricably intertwined.⁶⁵ As consumers turn to data transmission at the expense of voice calls, there will be less and less basis to distinguish between the two.

More particularly, for the reasons explained below, data roaming may be viewed as both “telecommunications” and a “telecommunications service” subject to common carrier obligations.

1. Data Roaming Can Be Viewed as a Transmission Component that is “Telecommunications”

The Act defines “telecommunications” as “the transmission between or among points specified by the user, or information of the user’s choosing without change in the form or content of the information as sent and received.”⁶⁶

The Commission’s Title II authority to regulate wireless data roaming rests on the distinction between the functions of the host network and the functions of the subscriber’s home

⁶⁴ *Id.* ¶25.

⁶⁵ *See, e.g., Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Annual Report, WT Docket No. 09-66, FCC 10-81 ¶8 (2010) (finding that “consumers are increasingly substituting among voice, messaging, and data services, and in particular, are willing to substitute from voice to messaging or data services for an increasing portion of their communication needs”); *id.* ¶4 (“The decline in voice minutes-of-use, coupled with the increase in data use, suggests that although only about 40 percent of consumers currently use data services, these consumers may be substituting data services, such as text messaging, for traditional voice services.”); *IP-Enabled Services*, Report and Order, 24 FCC Rcd 6039, ¶12 (May 13, 2009) (finding that “[f]rom the perspective of a customer making an ordinary telephone call . . . interconnected VoIP service is functionally indistinguishable from traditional telephone service”).

⁶⁶ 47 U.S.C. § 153(43).

network during data roaming. The Commission has distinguished between wireless broadband Internet access service, which the Commission defines as an information service, and the “transmission component” of wireless broadband Internet access that is telecommunications.⁶⁷ In the context of data roaming, the home network provides a variety of data services and applications that may fall within the definition of “information service.” However, data roaming entails a functional and practical distinction between the pure transmission of data and any more complex information services because the central feature of data roaming is the *wholesale* provision of data transmission to other carriers. Carriers frequently establish roaming arrangements by which a host network serves primarily, or even exclusively, as a conduit that simply delivers data from the roaming subscriber to the home network. The host network facilitates transmission of the user’s information without change in the form or content of the information, thus constituting “telecommunications.”

Even to the extent that roaming arrangements are structured such that host networks provide some limited retail services in addition to data transmission, it is clear that those services are not inextricably intertwined with the pure data transmission that constitutes the central feature of the roaming arrangement. The Commission and the Supreme Court have focused their analysis on the experience of the consumer.⁶⁸ From the perspective of the home carrier (which is the “consumer” of the wholesale services), the primary service being offered is wholesale data transmission. Any *retail* information services offered to subscribers are separate from the wholesale offering of pure data transmission. From the subscriber’s point of view, the host network merely transmits the user’s data to the home network without alteration. Specifically, subscribers are purchasing communications functions from their home network, and they

⁶⁷ *Wireless Broadband Declaratory Ruling*, ¶¶ 25-27, 29-31.

experience roaming as simply a form of routing method that does not impact the functional data services (offered by the home provider) that the consumer experiences. Thus, wireless data roaming, which entails a transmission of user-chosen data, plainly can be characterized as “telecommunications.”

2. Data Roaming Can Be Characterized as a “Telecommunications Service”

The Act defines “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”⁶⁹ Under *NARUC I*, there are two components to the inquiry into whether a service is subject to common carriage obligations: a service is a common carrier service if (1) a carrier holds itself out to the public to serve indiscriminately, or (2) the Commission determines that the public interest requires the service to be offered indiscriminately to the public.⁷⁰ Data roaming can qualify as a “telecommunications service” subject to common carriage obligations under both prongs of the inquiry.

First, wireless data roaming can be viewed as a telecommunications service because host providers offer their services to the public. The relevant services here are wholesale services offered to other carriers. The Commission has held that “the definition of ‘telecommunications services’ is not limited to retail services, but also includes wholesale services when offered on a common carrier basis.”⁷¹ The Commission later observed that its conclusion that wholesale

⁶⁸ See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

⁶⁹ 47 U.S.C. § 153(46).

⁷⁰ *Nat’l Ass’n of Regulatory Utility Comm’rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) (“*NARUC I*”).

⁷¹ *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934 to Provide Wholesale Telecommunications Service to VoIP Providers*,

services are subject to common carriage rules “helped to ensure that new entrants have the ability to interconnect with incumbent LECs” and that “a contrary decision ... would impede the important development of wholesale telecommunications competition, facilities-based VoIP competition, and broadband deployment policies that the Commission had developed and implemented over the last decade by limiting the ability of wholesale carriers to offer service.”⁷² Here, host carriers are offering interconnection on a wholesale basis to home carriers, who then use the wholesale input to provide separate retail services to their own subscribers. Under Commission precedent, that constitutes offering service to the public.

Second, in any event, the Commission can order that wireless data roaming be subject to common carrier obligations because doing so is necessary to advance the public interest. As noted above, Title III plainly permits the Commission to implement conditions of licenses in the public interest.⁷³ And wireless carriers do, as a matter of practice, offer data roaming to one another. The only question under Title II is whether it is in the public interest to require automatic roaming to be offered indiscriminately to the public on a common carriage basis.

As discussed in Section I, *supra*, requiring automatic data roaming is essential to promote competition and greater facilities-based investments in wireless communications. Absent automatic roaming, the two largest nationwide providers, AT&T and Verizon, will gain greater ability to foreclose competition from smaller carriers and will solidify their market power in the nascent field of wireless broadband.

Memorandum Opinion and Order, 22 FCC Rcd 3513, 3517 ¶11 (Mar. 1, 2007); *see also id.* at 3518 ¶12 (discussing Commission and judicial precedent establishing that “telecommunications services” includes both retail and wholesale services).

⁷² *Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecomms. Act of 1996*, Fifth Report, 23 FCC Rcd 9615, 9636 ¶43 (June 12, 2008).

The Commission recently has recognized that AT&T and Verizon have 60 percent of both wireless subscribers and revenue, and that industry concentration has increased 32 percent since 2003.⁷⁴ Indeed, in light of this concentration, the Commission’s most recent competition report specifically declined to find that the wireless industry is subject to effective competition.⁷⁵ The Commission also has found that the opportunity to provide roaming is crucial because it 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,”⁷⁶ and that data 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.”⁷⁷ These market dynamics create incentives for dominant providers such as AT&T and Verizon to abuse their market power and maintain their dominant position by selectively refusing roaming to smaller competitors.⁷⁸ Requiring common carriage thus is essential to foster effective competition and prevent accumulation of market power in the hands of the two largest providers, and thus is strongly in the public interest.

⁷³ See, e.g., 47 U.S.C. § 303.

⁷⁴ *14th Wireless Competition Report*, ¶4.

⁷⁵ In fact, the Commission concluded that “CMRS competition has grown stronger by some of the measures previously considered, but weaker by others.” *14th Wireless Competition Report*, ¶6.

⁷⁶ *Id.* ¶63.

⁷⁷ *Id.* ¶125.

⁷⁸ The Commission has long recognized that large mobile service licensees that aggregate large amounts of spectrum “might exert undue market power or inhibit market entry” by, among other things, excluding efficient competitors, reducing the quality of service available to the public. *14th Wireless Competition Report*, ¶262. These same concerns are triggered by a large provider’s decision to refuse or heavily condition data roaming in order to exclude or impede smaller efficient competitors.

Treating data roaming as a telecommunications service is consistent with the Commission’s *Wireless Broadband Declaratory Ruling*. There, the Commission recognized that, although transmission of wireless data is “telecommunications,” it is not offered as a “telecommunications service” to the extent that it is part of a “functionally integrated service” that melds the transmission component with Internet access services.⁷⁹ Wireless data roaming, however, predominantly involves a separation of telecommunications and information services because there is a severance of any functional information services provided by the home network from the pure transmission conduit provided by the host service. In particular, data roaming involves a *wholesale* offering of data transmission to other carriers. Both the home carrier and host carrier may in turn offer additional *retail* information services, on top of that transmission component, directly to subscribers. But the central feature of data roaming is the provision of data transmission on a wholesale basis to other carriers, and that wholesale offering of data transmission can be declared a “telecommunications service.”⁸⁰

Finally, the Commission also has noted that the Title III regulations of commercial mobile services expressly import common carrier obligations from Title II.⁸¹ The Commission may impose common carrier obligations on host providers pursuant to this provision. To the

⁷⁹ *Wireless Broadband Declaratory Ruling*, ¶¶30, 31.

⁸⁰ Certainly to the extent that the host network performs minimal addressing and routing functions to transmit data to the home network, those functions are incidental and do not cause any meaningful “change in the form or content of the information as sent and received.” See 47 U.S.C. § 153(20) (definition of “information service” expressly excludes “the management, control, or operation of a telecommunications system or the management of a telecommunications service”); see also *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, WC Docket No. 02-361, 19 FCC Rcd 7547, ¶12 (April 14, 2004) (protocol conversions in connection with telecommunications service do not thereby transform the service into an information service). These functions merely enable the *home* provider to provide functionality that generates, processes, or stores the subscriber’s information.

extent that host providers are not strictly CMRS providers because they do not offer “interconnected service” in connection with data roaming, the Commission nonetheless may treat data roaming service as a “functional equivalent” of CMRS.⁸² The Commission has recently relied on carriers’ CMRS status to implement automatic voice roaming obligations.⁸³ The Commission also has recognized the increasing convergence between voice and data, with consumers increasingly substituting, for example, data-based VoIP service for traditional voice service, and expecting that their devices and providers will seamlessly handle both voice and data communications.⁸⁴ Consumers thus view voice and data as increasingly substitutable, and the Commission could reasonably conclude that data roaming is a functional equivalent of CMRS.

C. The Commission Also Has Ancillary Authority Under Title I to Impose Wireless Data Roaming Obligations

Although the Commission has sufficient authority under Title III and Title II to implement wireless data roaming obligations, it also has the ability to do so under Title I. The Commission has authority under Title I to implement regulations over a matter that otherwise falls within its statutory authority and the regulations are “reasonably ancillary to the ... effective

⁸¹ *Wireless Broadband Declaratory Ruling*, ¶26 (citing 47 U.S.C. § 332(c)).

⁸² *See* 47 C.F.R. § 20.9(a)(14).

⁸³ *2007 CMRS Roaming Order*, ¶¶26-28.

⁸⁴ *See, e.g., 14th Wireless Competition Report*, ¶8 (finding that “consumers are increasingly substituting among voice, messaging, and data services, and in particular, are willing to substitute from voice to messaging or data services for an increasing portion of their communication needs”); *id.* ¶4 (“The decline in voice minutes-of-use, coupled with the increase in data use, suggests that although only about 40 percent of consumers currently use data services, these consumers may be substituting data services, such as text messaging, for traditional voice services.”); *IP-Enabled Services*, Report and Order, 24 FCC Rcd 6039, ¶12 (2009) (finding that “[f]rom the perspective of a customer making an ordinary telephone call . . . interconnected VoIP service is functionally indistinguishable from traditional telephone service”).

performance of its statutorily mandated responsibilities.”⁸⁵ Wireless data roaming obligations satisfy these requirements, for two reasons.

First, such obligations are reasonably ancillary to the Commission’s effective management of radio spectrum and establishment of license conditions under Title III. As described above, numerous provisions of Title III give the Commission expressly delegated authority over wireless mobile communications. Data roaming obligations are necessary to the Commission’s ability to promote the public interest, convenience, and necessity in establishing “the nature of the service to be rendered” by radio spectrum licensees. They are also reasonably ancillary to the Commission’s ability to effectively manage “the nature of the service to be rendered by each class of licensed stations and each station within any class,”⁸⁶ or to advance “the development and rapid deployment of new technologies, products, and services for the benefit of the public” as well as “efficient and intensive use of the electromagnetic spectrum.”⁸⁷

Second, wireless data roaming obligations are reasonably ancillary to the Commission’s regulation of wireless voice roaming obligations. The Commission has already concluded that wireless voice roaming is a common carrier service and that “the availability of roaming on broadband wireless networks is important to the development of nationwide, ubiquitous, and competitive wireless voice communications.”⁸⁸ The Commission recognized that, as to voice services, “roaming capability gives end users access to a foreign network in order to

⁸⁵ *Comcast*, 600 F.3d at 646.

⁸⁶ 47 U.S.C. § 303.

⁸⁷ *Id.* § 309(j)(3).

⁸⁸ *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Second Report and Order and Third Notice of Proposed Rulemaking, 11 FCC Rcd 9462, 9464, ¶2 (1996).

communicate messages of their own choosing.”⁸⁹ The same is true for data. As voice and data increasingly converge, the Commission could reasonably conclude that implementing wireless data roaming obligations is ancillary to achieving the public interest goals of its wireless voice roaming regulations.

The D.C. Circuit’s opinion in *Comcast* affirmatively supports the Commission’s ability to invoke ancillary authority to impose wireless data roaming obligations. The Court in *Comcast* held that the Commission must identify “statutorily mandated responsibilities” in order to invoke ancillary authority.⁹⁰ The Court held that congressional policy statements did not create such authority, and that any relevant statutory provision must actually delegate regulatory authority.⁹¹

The D.C. Circuit in *Comcast* expressly contrasted the Internet services at issue, over which the Communications Act did *not* provide the Commission with “express authority to regulate,” with other services over which “Congress has given the Commission express and expansive authority to regulate” including most notably “radio transmissions, including broadcast television, radio, and *cellular telephony*.”⁹² Thus, the D.C. Circuit itself viewed the Commission’s Title III authority as quite different from regulation of the broadband network practices that it addressed in that case. Here, unlike in *Comcast*, it is clear that the Commission has express delegated authority to regulate wireless data roaming under multiple specific provisions including, for example, §§ 301, 303, and 309(j). The Commission properly relied on such provisions to establish wireless voice roaming obligations, and these same provisions amply support the Commission’s extension of similar rules to wireless data roaming.

⁸⁹ *2007 CMRS Roaming Order*, ¶25.

⁹⁰ *Comcast*, 600 F.3d at 646, 652-53 (emphasis supplied).

⁹¹ *Id.* at 652-56, 659-61.

⁹² *Id.* at 645 (emphasis supplied).

IV. THE COMMISSION SHOULD IMPOSE AUTOMATIC DATA ROAMING OBLIGATIONS THAT ARE COMPARABLE TO AUTOMATIC VOICE ROAMING OBLIGATIONS

The Commission should mandate automatic wireless data roaming that is comparable to its mandate for wireless voice roaming. Specifically, the Commission should establish a general presumption that a request for automatic roaming is reasonable if the requesting CMRS carrier's network is technologically compatible with the would-be host carrier's network. The Commission also should require the would-be host carrier to provide automatic roaming on reasonable and non-discriminatory terms and conditions.

Imposing data roaming obligations that largely parallel voice roaming obligations will be efficient for carriers and for consumers. Consumers use wireless devices to transmit both voice and data, and expect seamless coverage for both. It will also be more efficient for carriers to reach agreements on consistent terms without substantial variation between voice and data.

The Commission should order that a host carrier's obligations to permit data roaming on non-discriminatory terms and conditions should include the obligation to be non-discriminatory with respect to the particular types of technologies used by the home carrier, subject only to a requirement that the networks be technologically compatible. This obligation to remain "technologically agnostic" is crucial as the industry continues to evolve with faster, more capable technologies.

For example, several wireless providers now offer Evolution-Data Optimized (EV-DO) transmission of data, which supports greater data rates than 1xRTT transmission.⁹³ If a host

⁹³ 1xRTT, also known as CDMA2000 1xRTT, is a technology that allows peak data throughput rates of 307 kbps in mobile environments, and typical speeds of 40-70 kbps. EV-DO allows maximum data throughput rates of 2.4 Mbps, while EV-DO Rev. A allows data throughput rates of up to 3.1 Mbps. *See Annual Report and Analysis of*

provider is able to discriminate and only permit connection on a slower 1xRTT basis, then the host provider would have the ability to use technology as a lever to prevent effective competition by forcing a home provider to serve roaming customers at slower speeds, with less bandwidth. Similarly, as networks transition to 4G technology, the question should be whether two networks are technologically compatible, not whether the host network wants to discriminate against other providers by limiting roaming to slower speeds. Such technological discrimination would impair the roaming consumer's experience, and also reduce the deployment of next-generation services and applications.

V. CONCLUSION

For these reasons, Leap urges the Commission to implement wireless data roaming obligations under which a request for roaming is presumptively reasonable so long as there is technological compatibility. The Commission should specify that terms and conditions of such roaming should be non-discriminatory, including with respect to speeds and technologies.

Respectfully submitted,

- /s/ -

Robert J. Irving Jr.
Senior Vice President and
General Counsel
Leap Wireless International, Inc.
10307 Pacific Center Court
San Diego, CA 92121

James H. Barker
Alexander Maltas
LATHAM & WATKINS LLP
555 11th St. NW
Suite 1000
Washington, DC 20004

Counsel for Leap Wireless International, Inc.
and Cricket Communications, Inc.

June 14, 2010

Competitive Market Conditions with Respect to Commercial Mobile Services, Thirteenth Report, 24 FCC Rcd 6185, 6252 ¶132 (Jan. 16, 2009).