

EXECUTIVE SUMMARY

There is a clear and compelling public interest need for Commission action that will provide full and fair access to all mobile wireless services – including non-interconnected data services – for all Americans. Data roaming serves several important public interest needs by promoting economic development and providing seamless connectivity for – and ubiquitous access to – increasingly vital mobile data services, particularly for consumers who live or work in rural or underserved areas, members of underserved populations, and persons with disabilities. Data roaming also promotes competition, investment, and new entry in the wireless and broadband services markets. The Commission should therefore act immediately to extend the scope of its automatic roaming rule to include non-interconnected mobile wireless services.

Specifically, SouthernLINC Wireless urges the Commission to amend Section 20.12(a)(2) of its Rules, 47 C.F.R. § 20.12(a)(2), to explicitly extend the scope of its automatic roaming rule to apply to all mobile services that are provided without interconnection to the public switched network, including data services. Consistent with Section 20.12(d) of the Commission’s Rules, 47 C.F.R. § 20.12(d), automatic roaming for non-interconnected services, including data services, should be provided “to any technologically compatible, facilities-based CMRS carrier on reasonable and not unreasonably discriminatory terms and conditions, pursuant to Sections 201 and 202 of the Communications Act, 47 U.S.C. Sections 201 and 202.” As with voice roaming, the Commission should presume that a request for data roaming by a technologically compatible carrier is reasonable.

The Commission possesses ample legal authority to extend its automatic roaming requirements to mobile data services. The sources of the Commission’s statutory authority over data roaming include the Commission’s plenary authority under Title III of the Communications Act over radio communication in general, the Commission’s Title II authority over transmission

services such as wholesale automatic roaming, as well as the Commission's ancillary jurisdiction under Title I. Each of these titles serves as a separate and independent basis for Commission action on data roaming that is entirely consistent with case law and Commission precedent.

In summary, and as discussed in more detail in these comments:

- Automatic roaming for *all* wireless services – including data services – is subject to regulation pursuant to Title III of the Communications Act, which grants the Commission plenary authority over all radio transmission, regardless of whether it is a “telecommunications” or an “information” service, whether it is being provided on a common carrier or private carrier basis, or whether it is interconnected with or otherwise “touches” the public switched network;
- Automatic roaming is a wholesale carrier-to-carrier transmission service that is a telecommunications service subject to the provisions of Title II of the Act, regardless of the nature or regulatory classification of the retail service that is ultimately provided to the retail end user; and
- Automatic roaming for all wireless services may also be regulated pursuant to the Commission's authority under Title I of the Act, regardless of how that service may otherwise be classified.

Not only does the Commission have ample statutory authority over automatic roaming services, but the Commission's exercise of this authority would also be fully consistent with federal court and Commission precedent – including the US Supreme Court's decision in the *Brand X* case – as well as the Commission's previous rulings on broadband Internet access services over wireless and other platforms.

The *National Broadband Plan* recognized that access to automatic roaming for mobile data services is essential for competitive entry and network deployment. Mobile data services are highly valued – and relied on – by consumers, and consumers expect seamless connectivity and ubiquitous access to these services when traveling outside their home service area. Existing service providers and new entrants alike must therefore be able to provide consumers with this seamless connectivity even before the deployment of their own advanced network infrastructure is complete.

Moreover, the incentives for investment in advanced data services are even higher than for voice services, and these incentives would be increased even further by the adoption of data roaming obligations. Accordingly, there is even greater justification for the Commission to reach the same conclusion regarding investment incentives for data services as it did regarding voice services and recognize that a data roaming obligation will in fact *increase* the incentives to invest in advanced data networks and services.

A sound policy for data roaming is especially important for consumers in rural and underserved areas, many of whom have few wireless service provider options. These consumers often rely on the services they receive from smaller regional and rural carriers. Without access to automatic roaming for all mobile wireless services, including data services, consumers in rural and underserved areas will be without coverage any time they find themselves outside their home carrier's service area and may also be left without access to advanced data services even within their local area. As a result, these consumers will be effectively isolated and cut off from the social and economic benefits these services are bringing elsewhere in the nation, thus creating a "wireless divide" similar to (and compounding) the "digital divide" that the *National Broadband Plan* was designed to overcome.

For these reasons, the Commission should act immediately to extend its automatic roaming requirements to mobile data services. In so doing, the Commission can achieve its stated goal of ensuring that consumers have access to seamless coverage nationwide, fulfill its statutory charge of "promoting safety of life and property through the use of wire and radio communication," and ensure that changing technologies and industry consolidation do not result in a "wireless divide" in the United States.

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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In the Matter of)

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

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To: The Commission

COMMENTS OF SOUTHERNLINC WIRELESS

Southern Communications Services, Inc. d/b/a SouthernLINC Wireless (“SouthernLINC Wireless”) hereby submits its comments in response to the Commission’s *Second Further Notice of Proposed Rulemaking (Second FNPRM)* in the above-captioned proceeding on the roaming obligations of providers of commercial mobile radio services (CMRS) and other providers of mobile data services.¹

There is a clear and compelling public interest need for Commission action that will provide full and fair access to all mobile wireless services – including non-interconnected data services – for all Americans. Broadband deployment is a key priority for the Commission,² and the availability of data roaming services will most definitely

¹ / *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. April 21, 2010) (“*Roaming Recon Order*” and “*Second FNPRM*” respectively).

² / *See, e.g., Second FNPRM* at ¶ 51.

“play a major role in the future development of the broadband data market.”³ Moreover, mobile data services – including, but not limited to, mobile broadband services – confer significant societal benefits through the promotion of economic productivity and development, public safety, and nondiscriminatory access to advanced communications services for all segments of the population. Commission action on data roaming is therefore essential to ensuring that these benefits are available to all US consumers.

As demonstrated herein, the Commission possesses ample legal authority to adopt a clear, coherent, and “future-proof” roaming policy that will make these services available to all US consumers at reasonable rates and under reasonable and nondiscriminatory terms and conditions.

Specifically, SouthernLINC Wireless urges the Commission to amend Section 20.12(a)(2) of its Rules, 47 C.F.R. § 20.12(a)(2), to extend the scope of its automatic roaming rule to apply to all mobile services that are provided without interconnection to the public switched network (“non-interconnected services”), including data services. Consistent with Section 20.12(d) of the Commission’s Rules, 47 C.F.R. § 20.12(d), automatic roaming for non-interconnected services, including data services, should be provided “to any technologically compatible, facilities-based CMRS carrier on reasonable and not unreasonably discriminatory terms and conditions, pursuant to Sections 201 and 202 of the Communications Act, 47 U.S.C. Sections 201 and 202.”⁴

³ / *Second FNPRM* at ¶ 52; *See also* FEDERAL COMMUNICATIONS COMMISSION, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, March 2010 (“*National Broadband Plan*”) at 49 (Recommendation 4.11)

⁴ / 47 C.F.R. § 20.12(d) (effective May 28, 2010). *See* 75 Fed. Reg. 22263-76.

In so doing, the Commission can achieve its stated goal of ensuring that consumers have access to seamless coverage nationwide,⁵ fulfill its statutory charge of “promoting safety of life and property through the use of wire and radio communication,”⁶ and ensure that changing technologies and industry consolidation do not result in a “wireless divide” in the United States.

I. THERE IS A CLEAR AND COMPELLING PUBLIC INTEREST NEED FOR COMMISSION ACTION ON DATA ROAMING

Wireless data services have rapidly become a highly valued and indispensable aspect of the wireless world, and consumer use of – and reliance on – mobile data services continues to grow exponentially. A recent article by the New York Times stated:

For many Americans, cellphones have become irreplaceable tools to manage their lives and stay connected to the outside world, their families and networks of friends online. But increasingly, by several measures, that does not mean talking on them very much ... Instead of talking on their cellphones, people are making use of all the extras that iPhones, BlackBerrys and other smartphones were also designed to do – browse the Web, listen to music, watch television, play games and send e-mail and text messages ... [a]nd for the first time in the United States, the amount of data in text, e-mail messages, streaming video, music and other services on mobile devices in 2009 surpassed the amount of voice data in cellphone calls, executives and analysts say.⁷

Information compiled by the Commission as part of its *Fourteenth Report* on mobile wireless competition further confirms the explosive growth in mobile data services in recent years and demonstrates that the need for access to mobile data service

⁵ / *Second FNPRM* at 50.

⁶ / 47 U.S.C. § 151.

⁷ / Jenna Wortham, *Cellphones Now Used More for Data Than for Calls*, N.Y. TIMES, May 14, 2010, at B1 (New York edition), available online at <http://www.nytimes.com/2010/05/14/technology/personaltech/14talk.html?scp=1&sq=Cellphones%20now%20used%20more%20for%20data&st=cse>. (last visited June 10, 2010).

through automatic roaming already meets – if not exceeds – the need for voice roaming services.⁸

A. Consumers Expect Seamless Connectivity for Mobile Data Services

In its *2007 Roaming Order*, the Commission adopted automatic roaming obligations for mobile voice telephony services, finding that the adoption of these obligations “serve[s] the public interest and safeguard[s] wireless consumers’ reasonable expectations of receiving seamless nationwide commercial mobile telephony services through roaming.”⁹ The Commission also found that “it would be in the public interest to extend automatic roaming obligations” to push-to-talk services and short text messaging services (SMS) as well, since “such offerings are typically bundled as a feature on the handset with other CMRS services” and consumers “expect the same seamless connectivity with respect to these features and capabilities as they travel outside their home network service areas.”¹⁰

In the recently-released *Fourteenth Report* on mobile wireless competition, the Commission found that “consumers are increasingly substituting among voice, messaging, and data services, and, in particular, are willing to substitute from voice to

⁸ / 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 Report*”) at ¶ 4 (discussing revenue and ARPU) and ¶¶ 181 – 184.

⁹ / *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817, 15819 ¶ 3 (2007) (“*2007 Roaming Order*” and “*2007 Further Notice*” respectively).

¹⁰ / *Id.* at 15837 ¶¶ 54 – 55.

messaging or data services for an increasing portion of their communications needs.”¹¹

The Commission further found that:

[C]onsumers typically receive mobile voice and data services on a single end-user device and purchase these devices from a single provider. Although mobile data services are not always offered in conjunction with mobile voice service ... mobile wireless subscribers who use their handsets for data services typically purchase these services as either an add-on to voice services or as part of a bundled voice and data plan; in some cases, they may not be able to purchase data services independent of voice services.¹²

As with mobile voice telephony, push-to-talk, and SMS, wireless consumers expect the same seamless connectivity with respect to all mobile data services offered by CMRS carriers. For example, millions of consumers who use (and rely on) mobile devices such as BlackBerrys, Android-based devices, and other “smart phones” to send and receive e-mails expect to have access to e-mail communication capabilities whenever they travel, even if they are outside their home carriers’ service area, just as they have access to mobile voice or SMS. Consumers likewise expect seamless access and connectivity to other data services and applications that they utilize as well, including, but not limited to, instant messaging (IM), mapping and navigation services, web browsing, Internet access, and so forth.

B. The Availability of Data Roaming is Essential to Bringing the Economic and Societal Benefits of Mobile Data Services to All Consumers

1. The Economic Benefits of Data Roaming

The Commission has long recognized that “[b]roadband technology is a key driver of economic growth” and that “[w]ireless service is becoming an increasingly

¹¹ / *Fourteenth Report* at ¶ 8.

¹² / *Fourteenth Report* at ¶ 22.

important platform for broadband access.”¹³ The Commission’s views are supported by industry studies that consistently demonstrate that wireless data services will have a significant impact on the US economy. For example, in 2009, CTIA and Harris Interactive surveyed nearly 700 American businesses of all sizes and found that “almost half, 45%, of business decision makers state that wireless applications are important or absolutely essential to remaining competitive in today’s highly competitive marketplace.”¹⁴ In addition, a 2008 report by industry research firm Ovum projected that the productivity gains resulting from the deployment and use of wireless broadband services “will generate almost \$860 billion in additional GDP over the next decade”¹⁵ and that “small businesses and the health care sector in particular are realizing significant benefits from the implementation and use of wireless broadband.”¹⁶ The same report

¹³ / *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; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010; Declaratory Ruling on Reporting Requirement under Commission’s Part 1 Anti-Collusion Rule*, WT Docket No. 06-150, CC Docket No. 94-102, WT Docket Nos. 01-309; 03-264; 06-169, PS Docket No. 06-229, WT Docket Nos. 96-86; 07-166, Second Report and Order, 22 FCC Rcd 15289, 15362 ¶¶ 196 – 197 (2007) (“700 MHz Order”).

¹⁴ / “National Study Reveals American Businesses Bullish on Wireless Technology,” CTIA – The Wireless Association, April 2, 2009, <http://www.ctia.org/media/press/body.cfm/prid/1813> (last visited June 9, 2010).

¹⁵ / Roger Entner, Ovum, *The Increasingly Important Impact of Wireless Broadband Technology and Services on the U.S. Economy: A Follow-up to the 2005 Ovum Report on the Impact of the U.S. Wireless Telecom Industry on the U.S. Economy: A Study for CTIA – The Wireless Association*, 2008 (“2008 Ovum Report”) at 4.

¹⁶ / *Id.* at 2.

also projected that, “by 2016, the value of the combined mobile wireless voice and broadband productivity gains to the US economy – \$427 billion per year – will exceed today’s motor vehicle manufacturing and pharmaceutical industries combined.”¹⁷

However, one of the key factors underlying these staggering economic and productivity benefits is the mobility inherent in wireless technology. Consumers in rural and underserved areas should not lose these mobility aspects because they cannot avail themselves of roaming for data services when traveling outside their service provider’s network. Without access to automatic roaming for all mobile wireless services – including data services – these consumers will be effectively isolated and cut off from the social and economic benefits these services are bringing elsewhere in the nation, thus creating a “wireless divide” similar to (and compounding) the “digital divide” that the National Broadband Plan was designed to overcome.

2. Advancing Public Safety

Moreover, as the Commission well knows, access to mobile data services can save lives. In emergency situations when voice networks may not be available due to traffic congestion or other factors, wireless data services offer a critical, even live-saving, alternative means of communication. The Katrina Panel established by the Commission in 2006 recognized that emergencies can result in significant disruption to PSTN-based communications services, and thus it recommended that readiness checklists should include, among other things, the identification of “alternate communications channels, such as alpha pagers, Internet, satellite phones, VoIP, private lines, BlackBerry devices,

¹⁷ / *Id.*

etc.”¹⁸ Without access to data roaming, the value of such “alternate” communications channels is significantly diminished.

The life-saving capabilities of mobile data services are not limited to large-scale emergencies, however, as these services can – and have been – used in individual emergencies when voice services are not accessible. Without access to roaming for mobile wireless data services, people caught in emergencies may be cut off from potentially life-saving communications.

3. Providing Access for Key Segments of the Population

In addition, certain segments of the population, such as the hearing impaired, depend to a greater degree on wireless data services, thus making these services an indispensable communications tool. The Commission has long placed the utmost importance on the ability of persons with disabilities to access and utilize communications, as demonstrated by the Commission’s 2007 Order extending Section 255 and Telecommunications Relay Service (TRS) obligations to interconnected VoIP service providers.¹⁹

In its 2007 *Hearing Aid Compatibility Report*, the Commission found that “[t]oday, modern text and wireless video communication technology fills a void by

¹⁸ / Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, *Report and Recommendations to the Federal Communications Commission*, June 12, 2006, at 31.

¹⁹ / *IP-Enabled Services; Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, WC Docket No. 04-36; WT Docket No. 96-198; CG Docket No. 03-123; CC Docket No. 92-105, Report and Order, 22 FCC Rcd 11275 (2007) (“*VoIP Disabilities Access Order*”).

providing much needed mobility and freedom for the deaf and hard of hearing community.”²⁰ According to the Commission, wireless data services that provide accessibility go beyond text messaging (which is already covered by the new automatic roaming rule) to include “deaf-friendly instant messaging and relay” applications, real-time messaging services with a web interface to wireless phones, and IP relay, which “functions like a TTY-based call except that the Internet functionality allows the deaf or hard of hearing caller to use a web-enabled mobile device instead of a TTY.”²¹ The Commission also reported that “[t]he deaf and hard of hearing community highly values video communication” and that “researchers are currently developing technologies to incorporate video communication into the wireless world.”²²

However, unless the Commission extends its automatic roaming obligations to cover all mobile wireless data services, deaf and hard of hearing persons and those with other disabilities – especially those who live or work in rural or underserved areas with few wireless service provider options – could well find that their ability to access such important services is significantly restricted, or entirely unavailable, if they should travel outside of their home carrier’s service area. While the *National Broadband Plan* states that broadband services enable people with disabilities to “live more independently, wherever they choose,”²³ the lack of data roaming would deny this benefit to a number of these people based solely on where they live. The Commission should thus ensure that

²⁰ / Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones, WT Docket Nos. 01-309, 06-203, Report on the Status of Implementation of the Commission’s Hearing Aid Compatibility Requirements, 22 FCC Rcd 17709, 17733-34 ¶ 57 (2007) (“*Hearing Aid Compatibility Report*”).

²¹ / *Id.* at 17735 ¶¶ 62, 64.

²² / *Id.* at ¶ 64.

²³ / *National Broadband Plan* at 21.

a lack of roaming for data services does not become another barrier to the ability of persons with disabilities to communicate.

II. THE COMMISSION SHOULD EXTEND THE SCOPE OF ITS AUTOMATIC ROAMING RULE TO INCLUDE NON-INTERCONNECTED DATA SERVICES

In order to provide seamless connectivity for mobile data services for all US consumers, particularly those who live or work in rural and underserved areas, and promote the deployment of advanced wireless data networks and competition, investment, and new entry in the wireless and broadband services markets, the Commission should act immediately to extend the scope of its automatic roaming rule to include non-interconnected mobile wireless services. In the *Second FNPRM*, the Commission has asked parties “to be specific regarding the rule that the Commission should adopt, if any, regarding data roaming.”²⁴

SouthernLINC Wireless submits that the Commission should amend Section 20.12(a)(2) of its Rules, 47 C.F.R. § 20.12(a)(2), to explicitly extend the scope of its automatic roaming rule to apply to mobile services that are provided without interconnection to the public switched network, including data services. Consistent with Section 20.12(d) of the Commission’s Rules, 47 C.F.R. § 20.12(d), automatic roaming for non-interconnected services, including data services, should be provided “to any technologically compatible, facilities-based CMRS carrier on reasonable and not unreasonably discriminatory terms and conditions, pursuant to Sections 201 and 202 of the Communications Act, 47 U.S.C. Sections 201 and 202.”²⁵ As with voice roaming,

²⁴ / *Second FNPRM* at ¶ 63.

²⁵ / 47 C.F.R. § 20.12(d) (effective May 28, 2010). *See* 75 Fed. Reg. 22263-76.

the Commission should presume that a request for data roaming by a technologically compatible carrier is reasonable.

III. THE COMMISSION POSSESSES AMPLE LEGAL AUTHORITY TO ADOPT DATA ROAMING OBLIGATIONS

In the *Second FNPRM*, the Commission properly recognizes that, “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.”²⁶

As SouthernLINC Wireless has described in detail in previous filings in this docket,²⁷ the sources of the Commission’s statutory authority over data roaming include the Commission’s plenary authority under Title III of the Communications Act over radio communication in general, the Commission’s Title II authority over transmission services such as wholesale automatic roaming, as well as the Commission’s ancillary jurisdiction under Title I. Each of these titles serves as a separate and independent basis for Commission action on data roaming that is entirely consistent with case law and Commission precedent.

In summary, and as discussed in more detail in these comments:

- Automatic roaming for *all* wireless services – including data services – is subject to regulation pursuant to Title III of the Communications Act, which grants the Commission plenary authority over all radio transmission, regardless of whether it is a “telecommunications” or an “information” service, whether it is being provided on a common carrier

²⁶ / *Second FNPRM* at ¶ 65.

²⁷ / Comments of SouthernLINC Wireless (filed Oct. 29, 2007) at 22 – 47; Reply Comments of SouthernLINC Wireless (filed Nov. 28, 2007) at 12 – 25; Letters from Christine M. Gill, Counsel for SouthernLINC Wireless, to Marlene H. Dortch, Secretary, FCC, dated July 2 and July 24, 2007, and Feb. 1, 2008; *See also* Reply Comments of SouthernLINC Wireless in WT Docket No. 09-66 (filed Oct. 22, 2009) at 7 – 16.

or private carrier basis, or whether it is interconnected with or otherwise “touches” the public switched network;

- Automatic roaming is a wholesale carrier-to-carrier transmission service that is a telecommunications service subject to the provisions of Title II of the Act, regardless of the nature or regulatory classification of the retail service that is ultimately provided to the retail end user; and
- Automatic roaming for all wireless services may also be regulated pursuant to the Commission’s authority under Title I of the Act, regardless of how that service may otherwise be classified.

Not only does the Commission have ample statutory authority over automatic roaming services, but the Commission’s exercise of this authority would also be fully consistent with federal court and Commission precedent – including the US Supreme Court’s decision in the *Brand X* case²⁸ – as well as the Commission’s previous rulings on broadband Internet access services over wireless and other platforms.²⁹

A. The Commission’s Authority Under Title III of the Communications Act

SouthernLINC Wireless agrees with the analysis in the *Second FNPRM* regarding the Commission’s authority under Title III of the Communications Act.³⁰ This analysis demonstrates that the Commission has ample authority to take action regarding

²⁸ / *Nat’l Cable Telecomms. Ass’n v. Brand X Internet Services*, 545 U.S. 967 (2005) (“*Brand X*”).

²⁹ / *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 (2007) (“*Wireless Broadband Internet Access Ruling*” or “*WBIA Ruling*”); *See also Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4823 (2002); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (full caption omitted); *In the Matter of United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006).

³⁰ / *Second FNPRM* at ¶¶ 66 – 67.

roaming for all mobile wireless services pursuant to its Title III authority to regulate the use of radio spectrum, regardless of the nature or classification of the service being provided.³¹ Indeed, as the Commission correctly noted in the *Second FNPRM*, it is irrelevant under Title III whether the service being provided is voice or data, whether it is a “telecommunications” or “information” service, whether it is being provided on a common carrier or private carrier basis, or even whether it is interconnected with or otherwise “touches” the public switched network.³²

1. Specific Provisions of Title III Regarding the Commission’s Authority

As stated in the *Second FNPRM*, Section 301 provides the Commission with the general authority to regulate “radio communications” and “transmission of energy by radio.”³³ In addition to this general grant of authority, Title III also contains numerous provisions that further reinforce the scope of the Commission’s authority over all wireless services.

For example, Section 303 of the Act authorizes the Commission, “as public interest, convenience, or necessity requires,” to “[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class”³⁴ and to “[s]tudy new uses for radio, provide for experimental use of frequencies, and generally encourage the larger and more effective use of radio in the public interest.”³⁵ Section

³¹ / *Second FNPRM* at ¶¶ 66 – 67.

³² / *Second FNPRM* at ¶ 66 (citing *Wireless Broadband Internet Access Ruling* at ¶ 36); *See also* Reply Comments of SouthernLINC Wireless in WT Docket No. 09-66 (filed Oct. 22, 2009) at 9 – 12.

³³ / *Second FNPRM* at ¶ 66; 47 U.S.C. § 301.

³⁴ / 47 U.S.C. § 303(b); *See also Second FNPRM* at ¶ 66.

³⁵ / 47 U.S.C. § 303(g).

303 further authorizes the Commission to – as public interest, convenience, and necessity require – “[m]ake 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.”³⁶ Additional sources of Commission authority under Title III include:

- 47 U.S.C. § 309(j)(3) – “[R]equiring that, ‘in specifying eligibility and other characteristics of ... licenses [to be issued by competitive bidding] ... and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in Section 1 of this Act an [in six] ... objectives [enumerated in subsection (j)(3)(A)-(F)’. ”; and
- 47 U.S.C. § 309(j)(3)(A) and (D) – “[L]isting as subsection (j)(3) objectives ‘(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public ... without administrative or judicial delays; ... [and] (D) efficient and intensive use of the electromagnetic spectrum’.”³⁷

In addition to the provisions of Title III described above, Section 307(a) of the Act authorizes the Commission to issue licenses for the use of radio spectrum if doing so will serve the public interest, convenience, and necessity,³⁸ while Section 316 authorizes the Commission to adopt new conditions on existing licenses if it determines that such action “will promote the public interest, convenience, and necessity.”³⁹

³⁶ / 47 U.S.C. § 303(r); *Second FNPRM* at ¶ 66 (citing *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043 1048 (7th Cir. 1992) for the proposition that the “Communications Act invests [the] Commission with ‘enormous discretion’ in promulgating licensee obligations that the agency determines will serve the public interest.”); *See also 700 MHz Order*, 22 FCC Rcd at 15365 ¶ 207.

³⁷ / *700 MHz Order*, 22 FCC Rcd at 15365-66 note 471 (all edits in original).

³⁸ / 47 U.S.C. § 307(a); *Second FNPRM* at ¶ 66.

³⁹ / 47 U.S.C. § 316; *Second FNPRM* at ¶ 66 (citing *WBEN, Inc. v. United States*, 396 F.2d 601 (2d Cir. 1968) for its holding that the Commission may modify conditions of a license class under Section 316 through a rulemaking process).

These statutory provisions make clear the broad scope of the authority granted to the Commission through Title III of the Communications Act over the use of radio spectrum and firmly establish the Commission’s legal authority to adopt automatic roaming obligations for all mobile wireless services, including data services.

2. The Touchstone for Commission Action Under Title III is the Public Interest

As described above, Title III contains numerous provisions regarding the Commission’s authority over wireless services. Significantly, none of these provisions make any distinction based on whether the service being provided is a “telecommunications” or “information” service under the Communications Act or under any relevant federal court or Commission precedent.⁴⁰ Rather, these statutory provisions firmly establish that the touchstone for Commission action under Title III is the public interest.⁴¹ As stated in the *700 MHz Order*, the Commission “has pursued a balanced spectrum policy that recognizes that, in certain instances, it may be necessary to vary the regulation of spectrum use to achieve certain critical public interest objectives.”⁴²

⁴⁰ / See, e.g., *Second FNPRM* note 198 (citing *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, First Report and Order, 11 FCC Rcd 18455 (1996) (relying on Title III authority to impose resale obligations on non-Title II services) and *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, Memorandum Opinion and Order and Order on Reconsideration, 14 FCC Rcd 16340 (1999) (expressly rejecting “[a]rguments that the scope of the resale rule is overbroad because it extends to non-Title II services,” reaffirming that Title III provided a basis for imposing the rule)).

⁴¹ / See, e.g., Comments of SouthernLINC Wireless (filed Oct. 29, 2007) at 25 – 29.

⁴² / *700 MHz Order*, 22 FCC Rcd at 15363-64 ¶ 202 (citations omitted). The Commission further stated that, while it “strives to apply a consistent regulatory framework to like services, that does not obligate us to treat all spectrum-based services identically.” *Id.*

In no event does the Commission’s ability to exercise its Title III authority require a finding regarding the sufficiency of market forces or competition. To the contrary, the Commission has stated “we have also recognized that with different policy goals – or under different circumstances – we may come to different conclusions regarding the extent of competition.”⁴³ This latter principle was most recently illustrated by the Commission’s recognition of the need to adopt automatic roaming obligations for mobile voice, SMS, and push-to-talk services in order to ensure that important public interest needs are met, even though the broader CMRS market had been found at the time to be “effectively competitive.”⁴⁴

3. Commission Action on Data Roaming Under Title III is in the Public Interest

As discussed in Section I of these comments, data roaming serves several important public interest needs by promoting economic development and providing seamless connectivity for – and ubiquitous access to – increasingly vital mobile data services, particularly for consumers who live or work in rural or underserved areas, members of underserved populations, and persons with disabilities.⁴⁵ As discussed in more detail in Section IV.B. of these comments, data roaming obligations would also promote competition, investment, and new entry in the wireless and broadband services markets.⁴⁶ Accordingly, the adoption of data roaming obligations as a condition on

⁴³ / 700 MHz Order, 22 FCC Rcd at 15365 note 469 (citing *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 7988, ¶ 14 (1994)).

⁴⁴ / See generally *2007 Roaming Order*, 22 FCC Rcd 15817.

⁴⁵ / See Section I.B.3., *supra*.

⁴⁶ / See, e.g., *Second FNPRM* at ¶ 67.

existing licenses would “promote the public interest, convenience, and necessity” under Section 316 of the Act.

Moreover, as required under Section 309(j)(3), the adoption of data roaming obligations would enable the Commission to “protect the public interest in the use of spectrum” and to “promote the purposes specified in section 1 of this Act” – namely, “to make available, so far as possible, to all people of the United States ... a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges ... for the purpose of promoting safety of life and property through the use of wire and radio communication.”⁴⁷ The adoption of data roaming obligations would also enable the Commission to fulfill its responsibilities under additional provisions of Section 309(j)(3), including its responsibilities to promote “the development and rapid deployment of new technologies, products, and services for the benefit of the public ... without administrative or judicial delays”⁴⁸ and the “efficient and intensive use of the electromagnetic spectrum.”⁴⁹

In addition, the adoption of data roaming obligations would encourage the greater deployment of advanced communications infrastructure and advanced communications services not only in rural areas, but throughout the nation, thus supporting the purposes of Section 303(g) to “generally encourage the larger and more effective use of radio in the public interest.”⁵⁰

⁴⁷ / 47 U.S.C. § 151.

⁴⁸ / 47 U.S.C. § 309(j)(3)(A).

⁴⁹ / 47 U.S.C. § 309(j)(3)(D).

⁵⁰ / 47 U.S.C. § 303(g).

Finally, SouthernLINC Wireless agrees with the Commission’s preliminary conclusion in the *Second FNPRM* that the adoption of data roaming obligations would “further the goal under Section 1302 of encouraging new deployment of advanced services to all Americans by promoting competition and by removing barriers to infrastructure investment, including the barriers to new entrants resulting from incumbents’ ‘head start’ advantages.”⁵¹

B. The Commission’s Authority Under Title II of the Communications Act

In addition to its direct Title III authority over the use of radio spectrum, the Commission has separate and independent authority to take action regarding automatic roaming for all mobile wireless services under Title II of the Communications Act as well.

As SouthernLINC Wireless has previously explained in this docket, automatic roaming is a wholesale carrier-to-carrier transmission service.⁵² As such, automatic roaming is a telecommunications service subject to the provisions of Title II of the Communications Act. This conclusion is fully supported by the statutory provisions of the Communications Act and Commission precedent. It is also consistent with the Commission’s prior decisions on cable modem and wireline and wireless broadband Internet access services, as well as the Supreme Court’s decision in the *Brand X* case.⁵³

⁵¹ / *Second FNPRM* at ¶ 67.

⁵² / Comments of SouthernLINC Wireless (filed Oct. 29, 2007) at 32 – 43; Reply Comments of SouthernLINC Wireless (filed Nov. 28, 2007) at 14 – 17 and 21 – 22; Reply Comments of SouthernLINC Wireless in WT Docket No. 09-66 (filed Oct. 22, 2009) at 12 – 14.

⁵³ / As an initial matter, SouthernLINC Wireless clarifies that its analysis of the Commission’s Title II authority is limited to the specific context of data roaming and is not intended to address the potential applicability of Title II to broadband services in

1. Automatic Roaming is a Wholesale Carrier-to-Carrier Service

As the Supreme Court held in *Brand X*, the definition of a service or product being offered by a company is determined by “what the consumer perceives to be the integrated finished product” that is being provided.⁵⁴ In the case of automatic roaming – whether for voice or data services – the “consumer” is the requesting wireless service provider, and the “integrated finished product” that is being provided to and received and paid for by the consumer – *i.e.*, the carrier customer – is transmission and nothing more.

Specifically, through a roaming agreement, the requesting carrier – *i.e.*, the carrier that is purchasing the automatic roaming service – specifies that traffic be transmitted between its network and the roaming subscriber’s device. The host carrier does not change the form or content of the information sent or received by the roamer, nor does the host carrier provide additional services or functionalities.⁵⁵ Rather, any functionality (beyond transmission) that the retail roaming end user may receive is supplied not by the

general, an issue on which SouthernLINC Wireless takes no position at this time. In particular, SouthernLINC Wireless emphasizes that data roaming is a distinct wholesale service with a distinct market, and the Title II analysis it has presented in this docket is based on well-established and long-standing factual circumstances, market and industry practices, and consumer expectations that are unique to data roaming.

Accordingly, this analysis must be considered independently and should not be viewed as predictive of or reliant on the Commission’s recently-announced proceeding on a legal framework for the regulation of the separate broadband Internet services market or other proposals regarding broadband services in general. *See* “FCC Announces Tentative Agenda for June 17th Open Meeting,” FCC News Release (rel. May 27, 2010).

⁵⁴ / *Brand X*, 545 U.S. at 990.

⁵⁵ / As the Commission stated in its *2007 Roaming Order*, “[R]oaming is a common carrier service, because roaming capability gives end users access to a foreign network in order to communicate messages *of their own choosing*.” *See 2007 Roaming Order*, 22 FCC Rcd at 15827 ¶ 25 (emphasis added). The Communications Act defines “telecommunications” as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43).

host carrier, but by the roamer's home carrier, either directly or through a third party service provider. Accordingly, automatic roaming meets the statutory definition of a telecommunications service.

In the *Second FNPRM*, the Commission notes that some parties have argued that even where data are simply transmitted back to the home carrier's network, this will often involve capabilities that they contend go "beyond mere transmission" and are thus "information services."⁵⁶ However, the statutory definition of an "information service" explicitly excludes "any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service" – *i.e.*, signaling and routing information, billing information, etc.⁵⁷

Rather, the functions described by these parties as necessary for the provision of data roaming services – including the use of Simple IP ("SIP") and Mobile IP ("MIP") in conjunction with Layer 2 Tunneling Protocol ("L2TP") – are essentially addressing, registration, and authentication functions such as those used in the routing of any roaming call, whether voice, data, or push-to-talk/dispatch, and thus fall within the "management exception" in the "information service" definition.⁵⁸

⁵⁶ / *Second FNPRM* at 68.

⁵⁷ / 47 U.S.C. § 153(20) (emphasis added).

⁵⁸ / As noted above, the plain language of the statute focuses not on any specific technology or capability, but on the *function* of that technology or capability. Where the function of a particular application or protocol is to manage or control a transmission (such as by routing it), the use of that application or protocol falls squarely within the management exception of 47 U.S.C. § 153(20).

2. The Retail Service Provided to the Ultimate End User is Separate and Severable from the Transmission Component Provided by Automatic Roaming

From both an operational perspective and – more importantly for purposes of the *Brand X* analysis – from the perspective of the roaming end user, any retail service or application that the roaming end user receives and pays for is provided by or through the roamer’s home carrier, not by the host carrier. The roaming retail end user in fact does not have any relationship with the host carrier – there is no contract between them, no billing relationship, no marketing relationship, and no customer care or service. All of these relationships exist exclusively between the roamer and his or her home carrier.

The distinction between retail mobile data services – such as retail mobile broadband Internet access service – and wholesale automatic roaming service is also evident in the manner in which roaming access is ultimately provided to the retail end user. In the *WBIA Ruling*, the Commission observed that “an end user subscribing to wireless broadband Internet access service expects to receive (and pay for) a finished, functionally integrated service that provides access to the Internet, rather than receive (and pay for) two distinct services – Internet access service and a distinct transmission service.”⁵⁹

However, retail subscribers of mobile wireless services understand and expect that, when they are roaming, they will generally pay a separate roaming charge to their home carrier in addition to the fee they pay for Internet access or other data services.⁶⁰ In

⁵⁹ / *WBIA Ruling*, 22 FCC Rcd at 5913 ¶ 31.

⁶⁰ / Alternatively, retail subscribers who are not charged for roaming are generally subscribed to service packages that explicitly include “no roaming charges” as one of their features, thus indicating that the convention of paying separate charges for roaming service is well-understood by wireless consumers.

other words, when using a service while roaming, the retail end user subscriber expects to receive and pay for two distinct services – Internet access or other data services (through the home carrier) and a distinct transmission service (*i.e.*, through roaming).

3. The Classification of a Retail Service is Irrelevant to the Classification of the Separate Underlying Wholesale Service

Finally, it is irrelevant that a carrier customer which purchases wholesale automatic roaming service from another carrier may utilize this wholesale transmission service as a component of a functionally integrated, finished information service that it provides to its own retail customers. As the Commission has previously held, the classification of any retail service “has no bearing” on the classification of the underlying wholesale transmission service used to provide that service.⁶¹

By the same token, the classification of the underlying wholesale automatic roaming service as a Title II transmission service would have no bearing on the regulatory classification or treatment of any Internet access or other data services being provided at the retail level. To the extent such retail services are determined to be information services, these determinations would be unaffected.

Accordingly, the Commission’s exercise of its Title II authority to extend automatic roaming obligations to all mobile wireless services would not result in any inconsistencies or tensions with any of the determinations that the Commission has already made regarding broadband Internet access service provided over wireless, cable modem, wireline, or other platforms.

⁶¹ / See *Time Warner Order*, 22 FCC Rcd 3513, 3520-21 ¶ 15 (2007).

C. The Commission’s Authority Under Title I of the Communications Act

Finally, the Commission may also take action regarding the provision of automatic roaming for all wireless services, including all non-interconnected services, pursuant to its ancillary authority under Title I of the Communications Act. This authority allows the Commission to impose special regulatory obligations, including certain common carrier obligations, on the provision of a service regardless of how that service may otherwise be classified under the Act – *i.e.*, as a “telecommunications service” or as an “information service.”⁶²

1. The Basis of the Commission’s Title I Ancillary Authority

The Commission may exercise its ancillary jurisdiction when: (1) Title I of the Act gives the agency subject matter jurisdiction over the service to be regulated; and (2) the assertion of its jurisdiction is “reasonably ancillary” to the effective performance of its statutorily mandated responsibilities.⁶³ As noted in the *Second FNPRM*, Sections 1, 2(a), and 3(33) of the Act make it clear that the Commission has subject matter jurisdiction over “non-interconnected” wireless services and features.⁶⁴ Thus, the question becomes whether the Commission’s assertion of its Title I jurisdiction is reasonably ancillary to the effective performance of its responsibilities under other provisions of the Communications Act.

⁶² / *See, e.g., Brand X*, 545 U.S. at 996 (stating that the Commission “remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction”).

⁶³ / *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-73 (1968); *See also American Library Ass’n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005); *Comcast Corp. v. FCC*, No. 08-1291, at 7 (D.C. Cir. Apr. 6, 2010).

⁶⁴ / *Second FNPRM* at ¶ 70.

The most recent – and arguably the most relevant – case to address the Commission’s assertion of its Title I ancillary authority is *Comcast Corp. v. FCC*, in which the U.S. Court of Appeals for the District of Columbia Circuit ruled that the Commission’s effort to impose network management regulations on Comcast’s cable-based broadband Internet access service exceeded the scope of its Title I authority.⁶⁵ In particular, the court in *Comcast* found that the Commission had failed to link its exercise of Title I ancillary authority to any “express delegations of regulatory authority” under the Communications Act.⁶⁶ However, as discussed below, the Commission’s ability to exercise its Title I authority with respect to data roaming is clearly distinguishable from the facts and circumstances of the *Comcast* case.

2. The Exercise of Title I Authority is Reasonably Ancillary to Express Delegations of Authority Under Title III and Sections 201 and 202 of the Communications Act

First, the adoption by the Commission of automatic roaming obligations for data services would be reasonably ancillary to several express delegations of statutory authority under the Act, including the various provisions of Title III discussed above in these comments.⁶⁷

In addition to the express delegations of authority set forth in Title III, the Commission’s exercise of Title I authority to adopt data roaming obligations would be reasonably ancillary to the Commission’s statutory obligations under Sections 201 and 202 of the Act, which impose upon the Commission the responsibility of ensuring that all

⁶⁵ / *Comcast Corp. v. FCC*, No. 08-1291, at 7 (D.C. Cir. Apr. 6, 2010).

⁶⁶ / *See Id.* at 24.

⁶⁷ / *See* Section III.A.1., *supra*; *See also Second FNPRM* at ¶ 70 (citing to the Commission’s discussion of its Title III authority in ¶¶ 66 – 67 of the *Second FNPRM*)

charges and practices for and in connection with common carrier services – such as mobile voice telephony – be just, reasonable, and nondiscriminatory.⁶⁸ Specifically, because mobile data services are generally provided by the same service providers over the same handsets (predominantly on a bundled basis) as mobile voice telephony services,⁶⁹ unreasonably high wholesale data roaming rates or the denial of access to data roaming services would act to increase the cost of and/or place additional burdens on CMRS carriers in their provision of Title II voice services to consumers. Furthermore, the absence of data roaming discriminates against consumers with few service provider options, such as those in rural areas, by denying them access to bundled voice and data service plans that would enable them to access these services through a single handset when traveling outside their home territory.⁷⁰

The scenario described above is not hypothetical. In fact, a real-world example of the direct impact that a lack of data roaming can have on the provision of Title II voice services can be found in the record of this very docket. Specifically, in comments filed with the Commission in response to the *2007 Further Notice*, MTA Wireless, a rural cooperative based in Alaska, described how ACS Wireless – its long-standing partner for voice roaming – “bluntly informed” MTA Wireless that it does not consider extending

⁶⁸ / 47 U.S.C. §§ 201(b), 202(a).

⁶⁹ / See *Fourteenth Report* at ¶ 22.

⁷⁰ / See, e.g., *Fourteenth Report* at ¶ 355, Table 39 and Chart 48 (showing that 70 percent of the US rural population lives in areas served by two or fewer mobile broadband providers, and 38 percent of the US rural population has either one mobile broadband provider option or no mobile broadband provider option whatsoever).

data roaming services to MTA Wireless “to be in its competitive interest.”⁷¹ According to MTA Wireless:

Given ACS Wireless’ refusal to deal with it for such services, MTA Wireless was forced to find another roaming partner capable of and willing to provide roaming access to broadband data services pending MTA Wireless’ ability to deploy its own facilities-based system utilizing its newly acquired AWS spectrum. The cost to MTA Wireless for reaching terms with its only other CDMA-based competitor was high. Digitel required MTA Wireless, in consideration for providing non-switched data roaming privileges, to move all of its voice roaming traffic from ACS Wireless to Digitel. The best rate that Digitel would agree to was double the voice rate currently charged by ACS Wireless for this service. Moreover, the Digitel network is not as robust as that of ACS Wireless in the Eagle River-Anchorage market. As MTA Wireless had no leverage to bring ACS Wireless to the table to negotiate, it was forced to accept Digitel’s terms, and was grateful they were even made available.⁷²

MTA Wireless’ experience provides a graphic example of how the absence of any data roaming obligation can spill over to undermine a carrier’s ability to obtain just and reasonable roaming for mobile voice services as well, effectively nullifying the very regulatory and statutory rights under Sections 201 and 202 of the Communications Act that the Commission sought to clarify and reinforce through its *2007 Roaming Order* and subsequent *Roaming Recon Order*. This real-world example therefore demonstrates that the Commission’s exercise of its Title I authority to adopt data roaming obligations would be reasonably ancillary to the effective performance of its statutorily mandated responsibility to ensure that the just, reasonable, and nondiscriminatory charges and practices called for in Sections 201 and 202 of the Act are made available “to *all* the

⁷¹ / Comments of MTA Wireless (filed Oct. 29, 2007) at 3.

⁷² / *Id.* at 8.

people of the United States,”⁷³ not just to people in major metropolitan areas and highway corridors.

3. The Exercise of Title I Authority is Reasonably Ancillary to the Commission’s Statutory Responsibilities Under Section 255 of the Communications Act

The adoption of measures that would make automatic roaming available for all mobile wireless services would also satisfy “the Commission’s responsibility to implement section 255 [of the Act] and to give full effect to the accessibility policies embodied in section 255.”⁷⁴

For example, the Commission has already recognized the significant benefits of mobile data services for the deaf and hard of hearing community.⁷⁵ As discussed above in Section I.B.3. of these comments, unless automatic roaming obligations are extended to cover all mobile wireless data services, deaf and hard of hearing persons – especially those who live or work in rural or underserved areas with few wireless service provider options – could well find that their ability to access such important services is significantly restricted, or entirely unavailable, if they should travel outside of their home carrier’s service area. The exercise of its Title I authority to adopt data roaming obligations would therefore be reasonably ancillary to the Commission’s statutorily mandated responsibility under Section 255 of the Act to ensure that a lack of roaming for data services does not become another barrier to the ability of persons with disabilities to communicate.

⁷³ / 47 U.S.C. § 151 (emphasis added).

⁷⁴ / *VoIP Disabilities Access Order*, 22 FCC Rcd at 11288-89 ¶ 24.

⁷⁵ / *Hearing Aid Compatibility Report*, 22 FCC Rcd 17733-34 ¶ 57.

4. Other Provisions of the Communications Act Provide Additional Support to the Commission’s Exercise of its Title I Ancillary Authority

In addition to these express delegations of regulatory authority, the Act also contains several provisions setting forth policy goals that, while themselves insufficient to serve as the basis for the exercise of Title I ancillary authority, have nevertheless been recognized by the courts as useful in determining whether the use of ancillary authority is appropriate in a particular situation.⁷⁶ As the court clarified in *Comcast*, while policy statements are not delegations of regulatory authority, “statements of congressional policy can help delineate the contours of statutory authority.”⁷⁷ Provisions describing policy goals that would be advanced by the adoption of data roaming obligations pursuant to the Commission’s exercise of Title I ancillary authority include:

- Section 1, which establishes the Commission’s authority and responsibility to make available “to all people of the United States ... a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges ... for the purpose of promoting safety of life and property through the use of wire and radio communication.”⁷⁸
- Section 7(a), which states that it “shall be the policy of the United States to encourage the provision of new technologies and services to the public.”⁷⁹; and
- Section 706 of the Telecommunications Act of 1996, which directs the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”⁸⁰

⁷⁶ / See, e.g., *Comcast* at 22.

⁷⁷ / *Comcast* at 22.

⁷⁸ / 47 U.S.C. § 151.

⁷⁹ / 47 U.S.C. § 157(a).

⁸⁰ / 47 U.S.C. § 157 nt.

While these statements of policy do not themselves provide the Commission with ancillary authority under Title I, they nevertheless provide valuable guidance as to when such authority should be exercised.

5. The Exercise of Title I Authority to Adopt Automatic Roaming Obligations is Supported by Established Precedent

In the *Second FNPRM*, the Commission notes the argument raised by some parties that the use of Title I authority to impose roaming obligations on services that have been classified as information services would be inconsistent with Section 153(44) of the Act.⁸¹ SouthernLINC Wireless submits that, as discussed above in these comments, it is not entirely clear that automatic data roaming is an “information service” in the first place.⁸² That said, the argument presented by these parties is contradicted by the well-established precedent provided by the Commission’s treatment of interconnected VoIP services, whereby the Commission has consistently exercised its Title I authority to impose certain, discrete Title II regulatory obligations on interconnected VoIP services and service providers – including obligations regarding Enhanced 911 services,⁸³ universal service contributions,⁸⁴ customer proprietary network information (CPNI),⁸⁵

⁸¹ / *Second FNPRM* at ¶ 71.

⁸² / *See* Section III.B., *supra*.

⁸³ / *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, WC Docket Nos. 04-36, 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (2005), *aff’d sub nom. Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006).

⁸⁴ / *Universal Service Contribution Methodology*, WC Docket No. 06-122; CC Docket Nos. 96-45, 98-171, 90-571, 92-237, NSD File No. L-00-72; CC Docket Nos. 99-200, 95-116, 98-170; WC Docket No. 04-36, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006), *aff’d in relevant part, Vonage Holdings Corp. v. FCC*, 2007 WL 1574611 (D.C. Cir. June 1, 2007).

and disability access and TRS⁸⁶ – even though no determination has yet been made as to whether these services are information services or telecommunications services under the Act. It should further be noted that these decisions have been upheld by the U.S. Court of Appeals for the District of Columbia Circuit.⁸⁷

For the reasons set forth above, it is clear that the Commission has ample and independent legal authority under Title III, Title II, and Title I of the Communications Act to adopt automatic roaming obligations for all mobile wireless services – including data services – and that the exercise of this authority would be in the public interest.

IV. THE IMPORTANCE OF DATA ROAMING

A. Data Roaming Requirements Are Necessary to Ensure Coverage and Access for Consumers to Mobile Data Services

The Commission has requested comment on the importance of roaming for non-interconnected data services and the effect that the absence of data roaming requirements has on consumers, particularly in rural areas.⁸⁸

A sound policy for data roaming is especially important for consumers in rural and underserved areas, many of whom have few wireless service provider options. These consumers often rely on the services they receive from smaller regional and rural carriers. Without access to automatic roaming for all mobile wireless services, including data services, consumers in rural and underserved areas will be without coverage any time

⁸⁵ / *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, CC Docket No. 96-115; WC Docket No. 04-36, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927 (2007).

⁸⁶ / *See VoIP Disabilities Access Order*, 22 FCC Rcd at 11286-89 ¶¶ 21 – 24.

⁸⁷ / *See Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006); *Vonage Holdings Corp. v. FCC*, 2007 WL 1574611 (D.C. Cir. June 1, 2007).

⁸⁸ / *Second FNPRM* at 72.

they find themselves outside their home carrier’s service area and may also be left without access to advanced data services even within their local area. As a result, these consumers will be effectively isolated and cut off from the social and economic benefits these services are bringing elsewhere in the nation, thus creating a “wireless divide” similar to (and compounding) the “digital divide” that the *National Broadband Plan* was designed to overcome.

1. Rural and Underserved Consumers Have Fewer Service and Service Provider Options

In the *Fourteenth Report*, the Commission found that, based on data and coverage maps provided by American Roamer, 70 percent of the US rural population lives in areas served by two or fewer mobile broadband providers, while 38 percent of the US rural population has either one mobile broadband provider option or no mobile broadband provider option whatsoever.⁸⁹ However, as the Commission itself has acknowledged, these figures likely overstate the amount of coverage and number of service providers effectively available to consumers in rural areas, since the Commission considers a rural census block to be “covered” by a service provider even when only a portion of the block – such as a highway corridor – has coverage.⁹⁰ Moreover, the *National Broadband Plan* states that the coverage figures from American Roamer “likely overstate the coverage actually experienced by consumers, since American Roamer reports *advertised* coverage as reported by many carriers who all use different definitions of coverage. In addition, these measures do not take into account other factors such as signal strength, bitrate or in-

⁸⁹ / *Fourteenth Report* at ¶ 355.

⁹⁰ / *Fourteenth Report* at note 940. The Commission also acknowledged that different service providers may provide coverage in different areas within a census block, which would result in over-counting of coverage within a block – a problem that “may be accentuated in rural areas where census blocks are larger.” *Id.*

building coverage, and may convey a false sense of consistency across geographic areas and service providers.”⁹¹

As described above in these comments, numerous studies demonstrate the importance of access to mobile data services for businesses of all sizes,⁹² with wireless applications described as “important or absolutely essential to remaining competitive in today’s highly competitive marketplace.”⁹³ However, according to the *National Broadband Plan*, “nearly 9 % of rural business sites still do not have access [to mobile wireless broadband], compared to less than 1% of business sites in urban or suburban areas.”⁹⁴ The *National Broadband Plan* further cautions that, “while a business location may have coverage, the value in mobile broadband comes when employees can access applications everywhere, which limits the importance of this particular coverage metric.”⁹⁵ This latter point is especially relevant for businesses in rural areas, which may have an office or primary location in a town or along a major highway corridor with coverage, but whose employees live or work outside of this coverage area.

2. The Absence of Data Roaming Affects Rural Consumers Even Within Their Local Service Areas

The absence of a data roaming obligation also affects those consumers in rural or underserved areas who seldom, if ever, travel outside of their home carrier’s service area. As discussed in more detail below,⁹⁶ the lack of any data roaming obligation has actually

⁹¹ / *National Broadband Plan* at 22. (emphasis in original)

⁹² / Section I.B.1., *supra*.

⁹³ / *See* note 14, *supra*.

⁹⁴ / *National Broadband Plan* at 22.

⁹⁵ / *Id.*

⁹⁶ / *See* Section IV.B., *infra*.

inhibited the build out of advanced networks and facilities by regional and rural carriers that are often the sole source of wireless service in these areas. Wireless consumers, including those in rural areas, expect to have access to wireless services wherever they go. If they cannot be assured of such access through data roaming, they are unlikely to subscribe to new data services, thus reducing the ability of smaller carriers to recover the costs of investing in the deployment of advanced data networks and services. The strong investment and deployment disincentive created by the lack of data roaming therefore affects *all* of the local carrier's subscribers, regardless of whether they travel outside their local coverage area.

3. The Absence of Data Roaming Affects All Consumers, Not Just Those in Rural Areas

The absence of data roaming obligations does not affect just consumers in rural areas, but also affects consumers throughout the United States. Many regional carriers, such as SouthernLINC Wireless, provide service not only in rural regions, but also in larger major metropolitan areas in direct competition with the nationwide carriers. Nevertheless, thousands of consumers in these areas view SouthernLINC Wireless as their only real wireless service alternative for a variety of reasons, such as its comprehensive coverage throughout the metropolitan areas and remote rural regions that comprise its multistate service territory; the availability of voice, data (including BlackBerry service), and iDEN-based push-to-talk and digital dispatch service over a single handset; and the service quality and reliability of the SouthernLINC Wireless network, which was constructed from the ground up to meet rigorous and demanding utility-level standards for reliability and survivability.

For example, a number of local and statewide government and public safety agencies, public utilities, hospitals and ambulance companies, and enterprises in a variety of sectors such as transportation and construction highly value – and depend on – SouthernLINC Wireless’ comprehensive urban and rural coverage and network reliability. However, because the absence of a data roaming obligation has prevented SouthernLINC Wireless from being able to obtain a data roaming arrangement, these subscribers are without access to data services (such as BlackBerry) whenever they travel outside of SouthernLINC Wireless’ service area. Therefore, in order to obtain access to mobile data service while traveling, these subscribers would be compelled to either switch service providers and forego the local coverage and network reliability they depend on or to subscribe to a second service provider and carry a second device for use when traveling. Either option would impose a significant cost or burden on the subscriber in exchange for seamless data connectivity.

B. Access to Data Roaming Will Promote Competitive Entry, Network Deployment, and Investment in Advanced Data Networks

In this *Second FNPRM*, the Commission is seeking additional comment on the effect that a data roaming requirement would have on competitive entry and network deployment⁹⁷ and on the incentives of providers to invest in advanced data networks.⁹⁸

Access to automatic roaming for mobile data services is essential for competitive entry and network deployment.⁹⁹ As discussed above in these comments, mobile data services are highly valued – and relied on – by consumers, and consumers expect

⁹⁷ / *Second FNPRM* at ¶ 72.

⁹⁸ / *Second FNPRM* at ¶¶ 75 – 76.

⁹⁹ / *National Broadband Plan* at 49.

seamless connectivity and ubiquitous access to these services when traveling outside their home service area. Existing service providers and new entrants alike must therefore be able to provide consumers with this seamless connectivity even before the deployment of their own advanced network infrastructure is complete.

Moreover, the incentives for investment in advanced data services are even higher than for voice services, and these incentives would be increased even further by the adoption of data roaming obligations.¹⁰⁰ Accordingly, there is even greater justification for the Commission to reach the same conclusion regarding investment incentives for data services as it did regarding voice services and recognize that a data roaming obligation will in fact *increase* the incentives to invest in advanced data networks and services.

1. Data Roaming is Essential for Competitive Entry and Network Deployment and Will Increase Incentives to Invest

An automatic roaming requirement for data services would not only promote, but is essential, to innovation and the investment in and deployment of advanced wireless technologies and networks. Contrary to the assertions of the nation's two largest carriers, the extensive record that has been developed in this docket clearly indicates that the *lack* of any data roaming obligations has in fact *inhibited* the build out of advanced networks and facilities, and will continue to do so unless and until the Commission takes action.

¹⁰⁰ / The Commission noted that the record currently encompasses competing claims regarding the impact that a data roaming obligation would have on investment and observed that “these arguments are similar to the arguments presented to the Commission with regard to automatic roaming for voice services.” *Second FNPRM* at ¶¶ 75 – 76. The Commission has therefore asked whether or how the investment incentives would differ for non-interconnected data services. *Id.* at ¶ 76.

The *National Broadband Plan* found that “[d]ata roaming is important to entry and competition for mobile broadband services.”¹⁰¹ According to the *National Broadband Plan*, few, if any, mobile broadband service provider networks “will provide ubiquitous nationwide service through their own facilities, particularly in the initial stages of construction and in rural areas.”¹⁰²

Similarly, in its *Fourteenth Report*, the Commission stated:

[R]oaming on competitors’ networks can offer entrants access to greater network coverage while they are deploying their own networks. Providers, including new entrants to a mobile wireless market that typically deploy their planned networks gradually, may seek access to networks besides their own in order to achieve a competitive level of coverage while their network is being built out.¹⁰³

The Commission further observed in the *Fourteenth Report* that “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.”¹⁰⁴ This ability to meet customer expectations of nationwide coverage in turn provides smaller regional and rural carriers with greater assurance that they will be able to attract a sufficient number of mobile data service subscribers to justify the deployment of advanced network infrastructure and technologies.

Specifically, if a regional or rural carrier is unable to obtain data roaming in order to provide subscribers with the seamless connectivity they expect and require, then subscribers will be far less likely to buy data service from that carrier. With fewer potential subscribers, the regional or rural carrier has far less opportunity to recover any

¹⁰¹ / *National Broadband Plan* at 49.

¹⁰² / *Id.*

¹⁰³ / *Fourteenth Report* at ¶ 63.

¹⁰⁴ / *Fourteenth Report* at ¶ 125.

investment in advanced data networks or services, and thus less incentive (or even ability) to make the necessary investment in the first place. On the other hand, the adoption of data roaming obligations would provide regional and rural carriers with the certainty they need to move forward with these much-needed investments.

The Commission has long recognized the importance of roaming in promoting investment, the construction of all-new networks, and the entry of new wireless competitors. For example, when broadband PCS was first being licensed and deployed nearly fifteen years ago, the Commission stated “we conclude that the availability of roaming on broadband wireless networks is important to the development of nationwide, ubiquitous, and competitive wireless voice telecommunications, and that, during the period in which broadband personal communications services (PCS) systems are being built, market forces alone may not be sufficient to cause roaming to be widely available.”¹⁰⁵ At this time, broadband PCS was a new, advanced wireless service that was expected to compete with existing cellular services and to bring new and innovative advanced communications services to the public. However, the first broadband PCS systems were just starting to be built, and the Commission recognized not only that these licensees would need access to roaming as they deployed their new networks, but also that incumbents would have ample incentive to impose additional costs and burdens on the new entrants by charging them unreasonably high roaming rates or denying them access to roaming altogether. The same situation exists now with mobile data services as

¹⁰⁵ / *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, Second Report and Order and Third Notice of Proposed Rulemaking, 11 FCC Rcd 9462, 9464 at ¶ 2. (1996).

existed in 1996 with broadband PCS, and the Commission's conclusion should be no different.

2. The Commission Should Not Adopt Any Restrictions or Other Measures to “Preserve” Investment Incentives

The Commission has requested comment on whether it should adopt any measures or restrictions to help preserve incentives to invest in advanced data networks and services.¹⁰⁶ As discussed below, the adoption of data roaming obligations will not affect many of the strong incentives carriers already have to invest in advanced data networks and services, and no special action by the Commission is necessary to “preserve” these incentives. To the contrary, any such action by the Commission would be far more likely to frustrate and discourage additional investment, just as the “home roaming exclusion” did.¹⁰⁷

a. The Commission Has Already Recognized that Roaming Obligations Do Not Discourage Investment

In its *Roaming Recon Order*, the Commission explicitly rejected AT&T's contention that an automatic roaming obligation would mean that competitors would have no reason to build out their own networks in areas where roaming service is available.¹⁰⁸ The Commission found that, to the contrary, “[c]arriers deploying next generation networks will still have incentives to build out to ensure that their subscribers

¹⁰⁶ / *Second FNPRM* at ¶ 76.

¹⁰⁷ / *See Roaming Recon Order* at ¶ 18 (“Upon reconsideration, we conclude that the up-front categorical home roaming exclusion adopted by the *2007 Report and Order* would in many circumstances discourage, rather than encourage, the facilities-based competition it sought to promote.”)

¹⁰⁸ / *Roaming Recon Order* at ¶ 32.

receive all of the benefits of the carriers' own advanced networks.”¹⁰⁹ The Commission further found that, “as a practical matter, the relatively high price of roaming compared to providing facilities-based service will often be sufficient to counterbalance the incentive to ‘piggy-back’ on another carrier’s network.”¹¹⁰ The Commission’s findings in the *Roaming Recon Order* apply with equal, if not greater, weight to its analysis of the potential impact of a data roaming obligation on competitive entry and network deployment in the data services market.

b. Carriers Will Continue to Have Significant Incentives to Invest in Advanced Data Networks and Services

First, carriers have a significant incentive to deploy facilities in order to meet the build-out requirements of their licenses. If a carrier fails to meet the applicable build-out requirements and deadlines for its licensed area, it will lose its license. It is difficult to imagine a greater incentive for a carrier to invest in the deployment of network facilities than the prospect of losing part or all of a license that likely cost tens, if not hundreds, of millions of non-refundable dollars to acquire. Carriers thus already have ample incentive to deploy advanced mobile wireless broadband networks, as well as to develop and deploy innovative new services that take full advantage of these networks and facilities.

In addition, while the initial cost of deploying new facilities and services can be high, the costs of relying on roaming can be significantly higher.¹¹¹ Few companies have been able to successfully build businesses in the wireless industry that have lasted long-term without building their own networks. The recent implosion of the once red-hot

¹⁰⁹ / *Id.*

¹¹⁰ / *Id.*

¹¹¹ / *See, e.g., Roaming Recon Order* at ¶ 32.

MVNO sector – including the shuttering of Disney Mobile and Mobile ESPN,¹¹² the collapse of Amp’d Mobile, and the acquisition of Virgin Mobile by Sprint Nextel (coupled with Sprint Nextel’s recent decision to terminate service to its remaining Virgin Mobile/Helio customers)¹¹³ – clearly illustrates this point. In each of these cases, even backing by companies with deep pockets and extensive marketing experience was not enough to overcome the inherent obstacles to successfully selling a service that runs over someone else’s network.

Carriers also have significant economic and business incentives to continue to deploy new facilities and services in order to compete effectively. There is no rational business or economic basis to believe that Verizon Wireless or AT&T – with well over 80 million customers each and in stiff retail competition with each other – would forego investment in broadband networks and services for fear that a small number of roaming customers might travel onto their systems on any given day. Unlike in the wholesale market for automatic data roaming services, there is vigorous competition for customers at the retail level in many areas of the United States. Each company – no matter how large or small – has too much to lose with regard to its competitive position to forego investment out of fear of roamers.

Given the competitiveness of the wireless market at the retail level, carriers also have every incentive to continue providing their subscribers with the best wireless

¹¹² / See, e.g., Dan Meyer, *Mouse Trap*, RCR Wireless News, Oct. 6, 2007, <http://www.rcrnews.com/apps/pbcs.dll/article?AID=/20071006/SUB/71006003> (last viewed June 10, 2010) (“The departure of Disney from the MVNO space, along with the fantastic explosion of Amp’d Mobile and continued struggles of Helio, seem to be marking the death knell for the MVNO market.”).

¹¹³ / Sascha Segan, *Virgin Mobile Finally Hanging Up on Helio Customers*, PCMag.com, March 2, 2010, <http://www.pcmag.com/article2/0,2817,2360854,00.asp> (last visited June 10, 2010).

experience and services possible. If subscribers find that they receive better service when roaming on another carrier's network than they receive from their own carrier, they are likely to take one of two steps: (1) forego service altogether by cancelling their service with their home carrier because they discover that the value proposition is a poor one (yet they lack alternatives from competitors); or (2) become a customer of the other carrier if that carrier offers service in the areas where the customer lives, works, and plays. Carriers therefore have an ongoing incentive to continue to deploy innovative, advanced services in order to remain competitive.

As demonstrated above, the adoption of data roaming obligations will not change or affect the numerous strong incentives providers will have to continue to invest in advanced data networks and services. To the contrary, the adoption of any measures or restrictions to "preserve" these incentives would impose unjustified and unnecessary burdens on further investment, undermine the incentives outlined above, and – like the erstwhile "home roaming exclusion" – discourage rather than encourage the investment and facilities-based competition that the Commission is seeking to promote.

V. CONCLUSION

In order to provide seamless connectivity for all consumers – particularly those who live or work in rural or underserved areas – and to promote the deployment of advanced wireless data networks and competition, investment, and new entry in the wireless and broadband service markets, the Commission should act immediately to extend the scope of its automatic roaming rule to include non-interconnected mobile wireless services.

As demonstrated above and throughout the record of this proceeding, the Commission possesses ample legal authority to implement a clear, coherent, and "future-

proof” roaming policy that encompasses all mobile wireless services, including data services, and ensures that these increasingly vital services are available to all consumers. In so doing, the Commission can achieve its stated goal of ensuring that consumers have access to seamless coverage nationwide, fulfill its statutory charge of “promoting safety of life and property through the use of wire and radio communication,” and ensure that changing technologies and industry consolidation do not result in a “wireless divide” in the United States.

WHEREFORE, THE PREMISES CONSIDERED, SouthernLINC Wireless respectfully requests the Commission to take action in this docket consistent with the views expressed herein.

Respectfully submitted,

SOUTHERNLINC WIRELESS

/s/ Shirley S. Fujimoto

Shirley S. Fujimoto
David D. Rines
FISH & RICHARDSON, P.C.
1425 K Street, N.W.
11th Floor
Washington, D.C. 20005
T: 202.783.5070
F: 202.783.2331

Michael D. Rosenthal
Director of Legal and External Affairs
SouthernLINC Wireless
5555 Glenridge Connector, Suite 500
Atlanta, GA 30342
T: 678.443.1500

Its Attorneys

Holly Henderson
External Affairs Manager
SouthernLINC Wireless
5555 Glenridge Connector, Suite 500
Atlanta, GA 30342
T: 678.443.1500

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