Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

COMMENTS OF VERIZON WIRELESS

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SUMMARY

The Commission has consistently followed the principle that wireless regulation should be used sparingly and only to correct, in the narrowest effective way, a demonstrated problem that adversely impacts customers. In the case of data roaming, there is no demonstrated problem for the Commission to correct.

The Commission's recent 14th Competition Report confirms that mobile broadband data services are continuing to grow, providing more and choices to American consumers. Mobile broadband services providers are investing billions annually to expand 3G broadband coverage and to implement 4th generation technology in wireless networks. Competition for broadband data services comes from five nationwide providers, including Clearwire – which plans to reach 120 million customers by year's end with its 4G WiMAX network.

The national providers are not alone. The Commission noted that 22 smaller, regional and multi-metro CDMA operators have deployed 3G EV-DO technology in their networks, covering 113 million people -- 40 percent of U.S. population. Among regional providers, U.S Cellular, Leap, MetroPCS, and Cellular South advertise extensive 3G coverage not just in their home markets, but nationwide through extensive roaming agreements. MetroPCS plans to begin implementing 4G LTE technology in its network this year. Many smaller and rural providers, such as Cincinnati Bell Wireless, NTELOS, SouthernLINC, Corr Wireless, Pocket, Bluegrass Cellular, Cellcom, ACS, Golden State Cellular and more provide broadband data services to their customers, and many of these (such as ACS, NTELOS, Bluegrass Cellular, and Cellcom) advertise nationwide broadband coverage.

These examples make clear that mobile wireless providers of all sizes have invested and are providing American consumers with extensive choices for broadband services in their home

markets as well as when their customers travel -- coverage that is only possible through broadband data roaming agreements. Verizon Wireless, for its part, has numerous data roaming agreements, many of which include broadband data roaming services, that allow Verizon Wireless' customers as well as its roaming partners' customers to access data services nationwide. In Verizon Wireless' experience, some carriers do not have data roaming agreements because they either have not requested data roaming agreements or have not taken the steps necessary to implement data roaming.

The increasing choices American consumers currently enjoy exist in large part because the Commission has not regulated these new wireless data services. Economists agree that regulation can constrain wireless competition, innovation and investment. The Commission has repeatedly found that heightened regulatory obligations could discourage investment and innovation. Because the facts do not show that there is a market failure or that consumers are being harmed in any way, the Commission should continue its hands off approach to mobile data services and should not adopt a data roaming requirement.

In any event, the Commission lacks the authority to regulate data roaming services under any provision or title of the Communications Act. The Commission has acknowledged that automatic roaming is a common carrier obligation. As such, the Commission may only impose an automatic data roaming obligation on services that are properly classified as common carrier services or where imposition of the obligation is reasonably ancillary to some other specific provision of the Act and needed for the effective performance of that specific provision. Because the Commission cannot show that data roaming services are common carrier services or that imposing a data roaming requirement is necessary to carry out another specific provision of the Act, it lacks the authority to adopt a data roaming requirement.

Section 332(c)(2) forbids the Commission from subjecting non-interconnected services to common carrier obligations. Under this section, a person providing a "private mobile service" cannot be treated as a common carrier for any purpose. The Act treats any mobile service that is not a commercial mobile service as a private mobile service. Because data roaming services are not interconnected to the public switched network, they cannot be treated as commercial mobile services, and therefore cannot be subject to any common carrier obligation including automatic data roaming.

Section 153(44) of the Act prohibits the Commission from imposing common carrier regulations on any service that is not a "telecommunications service." Courts have held that the proscription in Section 153(44) applies not only to the Commission's authority under Title II, but also to its authority to impose obligations under any title of the Act. Data roaming cannot be considered a telecommunications service because in many cases, data roaming services are provisioned such that the host carrier provides Internet access, information and applications directly to the roaming subscriber. Accordingly, data roaming meets the Act's definition of an "information service" and cannot properly be classified as a telecommunications service.

Data roaming also cannot be classified as a telecommunications service for the independent reason that it is not offered on a common carrier basis. The Commission and courts alike have held that common carrier status is a prerequisite to telecommunications service classification. Verizon Wireless does not offer data roaming services indifferently to other wireless services providers. Rather, the company makes decisions regarding whether and on what terms to deal on an individual basis. As such, its provision of data roaming cannot be classified as a telecommunications service.

Regulation of data roaming also is not authorized under Titles I or III of Act. The Commission's ancillary authority to impose a data roaming mandate under these titles exists only where necessary to implement other specific provisions of the Act and only where such action is not otherwise inconsistent with the Act. In the case of data roaming, the Commission cannot tie its assertion of ancillary authority to any statutorily mandated responsibility.

Section 303(r) of the Act only authorizes rules that are "necessary to carry out the provisions" of the Act. Accordingly, this Section alone cannot be the basis of ancillary authority. Section 309(j)(3), which applies only to the design of the competitive bidding system, cannot be the basis of post-auction changes to licensees' duties. Likewise, Section 303(b), which authorizes the Commission to "prescribe the nature of the service to be rendered by each class of licensed stations and each station within each class," has been interpreted to authorize the Commission only to define the types of services to be offered on particular frequency bands as opposed to imposing regulatory conditions.

Finally, a data roaming obligation would raise serious constitutional issues under the Takings Clause. Data roaming would effect a physical taking of wireless carriers' property rights in their network infrastructure by authorizing third parties to occupy the limited physical space available on carrier networks. Data roaming would also constitute a regulatory taking because it would interfere with licensees' reasonable expectations not to have common carrier regulations imposed on information services. Because the Commission does not have the ability to compensate licensees for the proposed taking, a data roaming rule that forces licensees to dedicate portions of their networks to serve other carriers' customers would be unconstitutional.

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Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services	)	

COMMENTS OF VERIZON WIRELESS

Verizon Wireless hereby submits these comments in response to the Second Further Notice of Proposed Rulemaking released by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding.[1] In the Notice, the Commission seeks comment on the rules, if any, that should apply to roaming for mobile data services that are provided without interconnection to the public switched network, including mobile broadband service.

The Commission has consistently followed the principle that wireless regulation should be used sparingly and only to correct, in the narrowest effective way, a demonstrated problem that adversely impacts customers. In the case of roaming for non-interconnected mobile data services ("data roaming"), there is no problem affecting consumers for the Commission to correct. Data submitted in the Commission's proceeding examining competitive conditions in the mobile wireless services market

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1 *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 25 FCC Rcd 4181 (2010) (hereinafter "Reconsideration Order" or "Notice," where applicable).

demonstrates that wireless consumers today benefit from the most advanced wireless networks, the most choices, the most innovative devices and applications to run on those devices, and the lowest prices of any country in the world. Moreover, carriers are already voluntarily entering into data roaming as evidenced by the many national, regional and small carriers currently offering nationwide broadband coverage. Verizon Wireless previously explained that it has data roaming agreements in place with more than a third of its roaming partners; it is engaged in negotiations with another third; and the remaining third either have not requested data roaming or are not yet prepared to move forward with negotiations. Because neither the Commission nor proponents of data roaming regulation can demonstrate any consumer harm deriving from the lack of a data roaming requirement, no such requirement should be considered.

The FCC also lacks authority to impose rules on data roaming. Because the provision of data roaming is neither an interconnected service nor a telecommunications service, two provisions of the Communications Act -- sections 332(c) and 153(44), respectively -- proscribe the automatic roaming obligation the Commission here contemplates. Regulation of data roaming services is also not authorized under any other part of the Act. Because these services are neither telecommunications services nor common carrier services, they are not subject to the Commission's Title II authority. Moreover, neither Title I nor Title III provides a jurisdictional basis for data roaming requirements.

I. MOBILE DATA ROAMING REGULATION IS NOT NEEDED.

A. The Facts Show that Vigorous Competition Exists Among Mobile Broadband Services Providers without FCC Intervention.

The Commission states that the impetus for its examination into roaming for mobile data services is its desire "to foster competition and the development of mobile data services with seamless and ubiquitous coverage."[2] The facts, however, show that mobile broadband services are developing and growing without Commission intervention.

The most recent Wireless Competition Report[3] confirms that mobile broadband data services are continuing to grow, providing more and more choices to American consumers. In terms of number of competitors, the Report found that as of November 2009, 98.1 percent of the U.S. population (up from 92 percent in May 2008) was served by at least one mobile broadband service provider, 90 percent of the population (up from 72.5 percent in 2008) was served by two or more mobile broadband providers, and 76 percent of the population (up from 51 percent in 2008) was served by three or more mobile broadband service providers. Among individual technologies, EV-DO coverage expanded from 92.2 percent in 2008 to 97.9 percent in 2009; HSPA coverage grew from 42 percent to 76 percent, while WiMAX networks grew from virtually no coverage to covering 28 million people in the same time frame.[4] These data show a profound growth

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2 Notice, at 3 (¶ 3).

3 *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, FCC 10-81, Fourteenth Report (released May 20, 2010) ("14th Wireless Competition Report").

4 Id., at 39-40.

of broadband mobile data services and competition to American consumers, all without regulatory intervention.

Recently, in a Declaration prepared for the Commission's "Net Neutrality" proceeding, Michael Topper analyzed competition for wireless broadband services.[5] Mr. Topper found market structure evidence that "the majority of consumers have considerable choice in where and how they purchase and use mobile broadband services." Mobile broadband services are being provided by the four nationwide facilities-based service providers, by several large regional facilities-based providers (including MetroPCS, Leap and U.S. Cellular) and many smaller regional providers (such as Cincinnati Bell Wireless, NTELOS, Cellular South, SouthernLINC, Corr Wireless, and Pocket Communications). In addition, well-financed new entrants into the wireless broadband services arena, such as Clearwire and several cable companies, as well as MVNOs such as Virgin Mobile, Beyond Mobile and Credo Mobile, which also provide mobile broadband services, have further strengthened and enhanced the competitive landscape.[6]

The growth in mobile broadband services is being fueled by investment and innovation. The 14th Report devotes several pages to carrier developments during 2008 and 2009 to invest in and deploy broadband network technologies. Aside from the four national wireless carriers, the Commission notes that Clearwire launched its 4th

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5 "Broadband Competition and Network Neutrality Regulation," Declaration of Michael D. Topper, filed as Attachment C to Comments of Verizon and Verizon Wireless, *Preserving the Open Internet, Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52 (January 14, 2010) ("Topper Declaration").

6 *Id.*, at ¶ 51. Mr. Topper also cited evidence that mobile broadband prices have declined, that providers are promoting broadband services and quality, and that subscribers can and do switch providers. *Id.*, at ¶¶ 57-62.

generation WiMAX service in 2009 and plans to cover 120 million pops by the end of 2010.[7] In addition, 22 other smaller, regional and multi-metro CDMA operators have deployed EV-DO technology in their networks, covering 113 million people and 40 percent of the U.S. population as of November 2009.[8]

Mr. Topper states that since 2001, wireless providers have made an average combined investment of more than $22.8 billion per year in network upgrades to deploy 3G and 4G technologies, and another $32.7 billion in the last four years to acquire the spectrum necessary to implement these technologies.[9] Among individual providers, Verizon Wireless has averaged over $5.5 billion in infrastructure investment per year; AT&T has invested more than $38 billion in the past two years to upgrade its wireless and wireline networks; T-Mobile planned to spend $5 billion in 2009 to expand its 3G network; and Clearwire is spending billions on its WiMAX network.[10] Among regional providers, US Cellular planned to spend $575 million in 2009 to upgrade its 3G network; MetroPCS planned to spend $700 million in 2009 to upgrade its 3G network and plans to begin to deploy LTE in 2010; and Leap introduced 3G service in several new markets in 2009.[11] Several rural providers have also aggressively deployed broadband technologies in their networks. These include Cellular South, which planned to add 324 new 3G cell sites in Mississippi alone in 2009; Stelera Wireless, which planned to implement HSPA data services to 55 cities by the end of 2009; Alaskan carriers ACS and GCI, both of

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7 14th Competition Report at 67, 71-72.

8 *Id.*, at 69.

9 Topper Declaration at ¶ 64.

10 *Id.*, at ¶¶ 65-70.

11 *Id.*, at ¶ 71.

which launched EV-DO 3G services in 2008; and Bluegrass Cellular (rural Kentucky) and NTELOS (several mid-Atlantic and southern States), both of which have deployed 3G technology in their networks.[12] Indeed, data submitted by CTIA reveals that U.S. wireless providers invested more in 2009 than the wireless providers in the five largest European countries combined.[13]

Verizon Wireless submitted data showing that, in 2010, providers of all sizes continue to invest in new and expanded deployments in 3G and 4G technologies, including:

Continued 3G Deployment and Expansion

- Bluegrass Cellular added 3G high speed data service coverage in three additional Kentucky counties.
- Cellular South expanded its 3G mobile broadband network to six additional counties in Mississippi.
- Golden State Cellular announced the introduction of 3G service in central California.
- AT&T announced the completion of a software upgrade at 3G cell sites nationwide – deployment of High-Speed Packet Access (HSPA) 7.2 technology – that prepares its 3G network for faster speeds. AT&T has also expanded its 3G mobile broadband network in 14 states and has announced 2010 investment plans calling for the upgrade of approximately 6,500 additional cell sites to 3G in 37 states.
- T-Mobile unveiled plans to upgrade its national high-speed 3G service to the High Speed Packet Access Plus (HSPA+) technology by the end of 2010, covering more than 100 metropolitan areas and 185 million people.
- Verizon Wireless continued to invest in network upgrades to enhance its 3G capacity and coverage in 2010 with the construction of new cell sites in 30 states.

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12 *Id.*, at ¶ 72.

13 Letter from Christopher Guttman-McCabe, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 09-66, GN Docket No. 09-157, GN Docket No. 09-51 (filed April 29, 2010) at 16 (citation omitted).

4G Investment

- Clearwire announced plans to expand its 4G mobile broadband network in 2010 to 120 million people nationwide, including service in the following markets: Los Angeles, Miami, St. Louis, Cincinnati, Cleveland, Pittsburgh, Salt Lake City, New York City, Houston, Boston, Washington, D.C., Kansas City, Denver, Minneapolis and the San Francisco Bay Area.
- Clearwire also announced network enhancements to boost download speeds by up to 30 percent and increase backhaul capacity by 250 percent.
- Cox Communications announced the successful demonstration of voice calling and high definition video streaming over its wireless networks using 4G (LTE) technology.
- Sprint Nextel announced additional 4G WiMAX deployments (via its arrangements with Clearwire) in Atlanta, Houston, Las Vegas and Portland.[14]

These facts demonstrate that there is intense competition among wireless broadband services providers and that all classes of carriers are investing billions of dollars to implement broadband technology in their networks – all without regulatory intervention. Given these facts, there is absolutely no basis for the Commission to intervene to impose regulations on any aspect of mobile broadband services.

B. Data Roaming Agreements Are Occurring without Regulation.

The Commission seeks comment regarding the availability of data roaming agreements to carriers that request them.[15] Verizon Wireless informed the Commission that it considers each roaming request on a case-by-case basis, and that it has many agreements in effect. Verizon Wireless also noted that carrier advertisements and statements to investors indicate that they are able to obtain data roaming agreements.

In April of this year, Verizon Wireless stated that of its 60 active roaming partners, more than a third have data roaming agreements, and about half of those have

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[14] Letter from Kathleen Grillo, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 09-66 (filed May 11, 2010) at Attachment pp. 4-6 (citations omitted).

[15] Notice at 39, ¶¶ 77-78.

3G (EV-DO) agreements. Among carriers that do not have data roaming agreements, more than half either have not requested data roaming or have only made initial inquiries without taking the steps necessary to move forward.[16] The remaining roaming partners are currently engaged in negotiations with Verizon Wireless for data roaming.[17] This information indicates that some carriers do not have data roaming agreements because they either have not requested data roaming agreements or have not taken the steps necessary to implement data roaming.

Verizon Wireless also submitted a presentation made by Leap at an investor's conference on April 14, 2010. In this presentation, contrary to claims by the carrier that it cannot compete effectively without Commission regulation, Leap's presentation boasted that its "my broadband" service is available in all Leap coverage areas and its coverage map showed extensive 3G data coverage from coast to coast.[18]

Leap is not alone. CellSouth advertises nationwide broadband data coverage rivaling the coverage of any national carrier.[19] MetroPCS advertises unlimited Internet access services starting on its $40 per month rate plans and unlimited email access starting on its $50 per month rate plans. It touts its extensive nationwide coverage for its

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[16] These steps include, for example, implementing SMS roaming – which is necessary for picture messaging, a service enabled through data roaming, and exchanging technical information so that each carrier will have in place the network elements necessary to exchange data traffic.

[17] Letter from Tamara Preiss to Marlene H. Dortch, WT Docket No. 05-265, filed April 13, 2010.

[18] Letter from Tamara Preiss to Marlene H. Dortch, WT Docket No. 05-254, filed April 14, 2010, Attachment 1 at 6, 8.

[19] *See* http://www.cellularsouth.com/coverage/maps/data_coverage.pdf.

voice and data plans.[20] ACS Wireless advertises nationwide 3G roaming coverage.[21] NTELOS' website invites customers to "discover nationwide 3G coverage, no surprise billing and neighborly local service."[22] Bluegrass Cellular and Cellcom both advertise nationwide 3G coverage.[23]

These facts and examples demonstrate that the answer to the question posed by the Commission in the Notice -- "Will rural consumers, who may only have access to small, local providers, have no coverage beyond their local area?"[24] -- is an emphatic no. Carriers of all sizes that are interested in entering into data roaming agreements to provide nationwide data roaming service to their customers are able to do so today without Commission regulation. There is clearly no need for the Commission to adopt a data roaming mandate.

C. New Regulation Risks Harming Competition, Innovation and Investment.

Adopting data roaming requirements, particularly in the absence of compelling evidence that such regulations are needed, will harm rather than help competition for broadband mobile services. The mobile industry has revolutionized how consumers interact with one another, gather information, and view content, and these new paradigms are directly related to the deregulatory approach Congress and the FCC have undertaken. Reversing this successful regime by imposing new regulation would risk hindering the

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20 *See* http://www.metropcs.com/plans/default.aspx; http://www.metropcs.com/coverage/.

21 *See* http://www.acsalaska.com/.

22 *See* https://my.ntelos.com/ntelos/browse/zipCode.action.

23 *See* http://bluegrasscellular.com/network/maps; http://www.cellcom.com/personal/internet_plan_details.html?planid=2.

24 Notice at 38, ¶ 72.

further development of competition in the wireless market, deterring future investment and stifling innovation.

It is well-established that where there is no demonstrable market failure and/or consumer harm, there is no justification for regulation.[25] It is likewise well-established that regulations adopted in the absence of market failure or regulations not narrowly tailored to redress identifiable harms only serve to impose costs, alter incentives, and distort competition to the detriment of consumers.[26] Indeed, "it is by now well appreciated that even well meaning regulation is a blunt instrument, which can impose its

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[25] *See, e.g.*, Julian Epstein, *A Lite Touch on Broadband: Achieving the Optimal Regulatory Efficiency in the Internet Broadband Market*, 38 Harv. J. On Legis. 37 (Winter, 2001) ("Premature regulation where no market failure exists could prove counterproductive by deterring investment in competing networks, and by establishing inefficient price regulations whose terms would be subject to intense controversy and arbitrariness. Such a heavy-handed approach could also, ironically, create undesirable "network effects" by fostering a single industry standard in an industry where competing architectures are likely to spawn more innovation than a single standard."); Hahn, et al, The Economics of 'Wireless Net Neutrality' at 6, 9 (noting that "[i]n the absence of direct or indirect evidence of a market failure, it is generally not prudent to interfere with a well-functioning market" and that "[i]n dynamically competitive markets ... the government should be very reluctant to regulate"); *see also* Comments of Center for Technology Freedom, Institute for Policy Innovation, WC Docket No. 07-52, 3 (filed Feb. 13, 2008) ("Institute for Policy Innovation Comments") ("Regulatory bodies should restrain themselves to only those instances where public health and safety requires it, or rarely, to strengthen competition when new entry into the market is impaired by some factor other than normal costs, and perhaps in some other rare circumstances.").

[26] *See, e.g.*, William R. Drexel, *Telecom Public Policy Schizophrenia: Schumpeterian Destruction Versus Managed Competition*, 9 Va. J. L. & Tech. 5 (Spring, 2004) ("competition managed by regulation is handicapped by a regulatory lag driven both by traditional due process notions as well as a desire for accurate market data, the collection of which significantly lags market reality. This regulatory lag is particularly acute and imposes high societal costs in an environment of rapid technological change that has permeated the telecommunications industry since the adoption of the FTA in 1996.").

own considerable harm… [and] unacceptable collateral damage."[27] "Regulations create costs and constraints for market participants."[28] And "[r]egulation diminishes entrepreneurial incentives to lower costs, improve quality, and develop new products and services."[29] When compared with regulation, "[d]eregulation can achieve greater efficiency in entry and investment decisions, lower administrative costs, elimination of pricing distortions, increased innovation, and greater opportunities for customer choice."[30] Indeed, "regulation can discourage innovation and capital investments," whereas "[d]eregulation promotes innovation."[31]

Professor Thomas Hazlett has stated that "[t]o revive regulatory mandates long ago abandoned would disrupt the ability of wireless networks to craft their packages, organizing investments, technologies, infrastructure, equipment, applications, business models, and customer service."[32] He further noted that such regulation "would [indeed] render impossible the high degree of economic development that is on display in the wireless marketplace."[33]

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27 Marius Schwartz, Professor of Economics, Georgetown University, and Federico Mini, Senior Consultant, Bates White LLC, *Hanging up on Carterfone: The Economic Case Against Access Regulation in Mobile Wireless,* at 2 (May 2, 2007).

28 J. Gregory Sidak, and Daniel F. Spulber, *Deregulation and Managed Competition in Networked Industries*, 15 Yale J. On. Reg. at 117, 125 (1998).

29 Jerry Ellig, *Costs and Consequences of Federal Telecommunications Regulations*, 58 Fed. Comm. L. J. 37, 43 (2006) (explaining that regulation may not in practice deliver intended benefits to consumers and estimating that the total cost of regulation to providers and consumers is as much as $118 billion per year).

30 Sidak & Spulber, *Deregulation*, 15 Yale J. Reg., at 120.

31 *Id.,* at 121, 140.

32 *See, e.g.*, Thomas W. Hazlett, Professor of Law and Economics, George Mason University, *Carterphone: An Economic Analysis,* at 20-21 (April 30, 2007).

33 *Id.*

The Commission has long recognized these regulatory externalities. In the broadband context, the Commission has made clear that regulatory intervention may interfere with consumers' ability to access new and innovative offerings.[34] Indeed, the Commission has stated that imposing "heightened regulatory obligations could lead [broadband providers]... to raise their prices and postpone or forego plans to deploy new broadband infrastructure, particularly in rural or other underserved areas... [and] could also discourage investment in facilities."[35]

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[34] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4802, ¶ 5 (determining that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market") (quotation marks omitted); *Wireline Broadband Internet Access Order*, 20 FCC Rcd at 14855, ¶ 1 ("establish[ing] a minimal regulatory environment for wireline broadband Internet access services to benefit American consumers and promote innovative and efficient communications"); *BPL Internet Access Order*, 21 FCC Rcd at 13281, ¶ 2 ("establish[ing] a minimal regulatory environment for BPL-enabled Internet access service that promotes our goal of ubiquitous availability of broadband to all Americans"); *Wireless Broadband Declaratory Ruling,* 22 FCC Rcd at 5902, ¶ 2 ("establish[ing] a minimal regulatory environment for wireless broadband Internet access service that promotes our goal of ubiquitous availability of broadband to all Americans").

[35] Brief of the Federal Petitioners at 31, *Brand X*, 545 U.S. 967; *see also* Reply Brief of the Federal Petitioners at 18, *Brand X*, 545 U.S. 967 (emphasizing that the broadband market "has shown enormous growth under a hands-off regulatory regime"); *Wireless Broadband Declaratory Ruling,* 22 FCC Rcd at 5903, ¶ 4 (rejecting calls for imposing greater regulatory requirements because imposing them "could have slowed development of these broadband services"); *Wireline Broadband Internet Access Order,* 20 FCC Rcd at 14891, ¶ 72 (finding that reduced regulation of the wireline broadband industry will make it "more likely that wireline network operators will take more risks in investing and deploying new technologies than they are willing and able to take under the existing regime"). The Commission should be especially careful not to stifle investment in broadband Internet access services because doing so would be antithetical to Congress's and the FCC's desire to expand broadband services to unserved and underserved areas. *See, e.g.*, American Recovery and Reinvestment Act of 2009, § 6001(k)(2), Pub. L. No. 111-5, 123 Stat. 115 (2009) (charging the Commission with developing a national broadband plan that "shall seek to ensure that all people of the United States have access to broadband capability and shall establish benchmarks for meeting that goal"); Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All

In the wireless arena, the Commission has recognized that regulation can interfere with the deployment of advanced services and the ability of consumers to reap the benefits of robust competition. For example, the Commission concluded that "tariffs can harm consumers" because "in a competitive environment" tariffs can "(1) take away carriers' ability to make rapid, efficient responses to changes in demand and cost, and remove incentives for carriers to introduce new offerings; (2) impede and remove incentives for competitive price discounting, since all price changes are public, which can therefore be quickly matched by competitors; and (3) impose costs on carriers that attempt to make new offerings."[36] Indeed, the FCC has noted "Congress's recognition that the marketplace rather than extensive regulation would better promote continued investment in wireless infrastructure, while at the same time ensuring that consumers enjoy reasonable rates and high quality services."[37]

The obvious conclusion that regulation imposes costs is not new or unique to the wireless and Internet contexts. Decades ago, "the Commission determined that regulation imposes costs on common carriers and the public, and that a regulation should

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Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, *Notice of Inquiry*, 24 FCC Rcd 10505 (2009) (discussing Congress's directive that the FCC encourage the deployment of broadband offerings); *see also* A National Broadband Plan for Our Future, *Notice of Inquiry*, 24 FCC Rcd 4342 (2009); *Wireless Broadband Declaratory Ruling,* 22 FCC Rcd at 5911, ¶ 27 ("Through this classification, we provide the regulatory certainty needed to help spur growth and deployment of [wireless broadband] services. Particularly, the regulatory certainty we provide through this classification will encourage broadband deployment in rural and underserved areas, where wireless broadband may be the most efficient broadband option.").

36 *Orloff v. FCC* Respondents Brief, 2003 WL 25588065, at *7 (citing *CMRS Second Report and Order*, 9 FCC Rcd at 1479, ¶ 177).

37 *Id.*, at *5.

be eliminated when its costs outweigh its benefits."[38] The FCC has also made clear that "regulation imposes costs on consumers to the extent it denies [a provider the] ... flexibility it needs to react to market conditions and customer demands."[39]

Regulatory mandates can create highly counterproductive and unintended consequences, such as disincenting wireless carriers and others from investing in critical last-mile development. The FCC's failed D Block auction is a case-in-point. There, the many regulatory requirements to be imposed on the D Block licensee and uncertainty regarding possible additional regulatory requirements chilled interest in bidding for these licenses. Similarly, additional mandates on the wireless industry would risk stifling broadband expansion and would be antithetical to the FCC's oft-mentioned goal of ubiquitous broadband deployment, as well as the agency's charge to develop a national broadband plan.

Regulation can be perceived by investors as increasing risk, thereby undermining confidence that their investments will result in a reasonable and timely return, and could

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[38] Access Charge Reform, *Fifth Report and Order and FNPRM*, 14 FCC Rcd 14221, 14297, ¶ 144 (1999) (citing Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, *First Report and Order*, 85 FCC 2d 1, 3 (1980) ("*Competitive Carrier First Report and Order*")); *see also id.* ("[T]he new service rules currently in effect limit incumbents' incentives to innovate" and "respon[d] to market forces," thus "impos[ing] costs on society by perpetuating inefficiencies in the market for interstate access services."); *Competitive Carrier First Report and Order*, 85 FCC 2d at 5, ¶ 11 ("[E]nforcement of a system of regulation of business conduct imposes costs. These costs can be identified in two classes. There are the less significant administrative costs of compiling, maintaining, and distributing information necessary to comply with agency licensing and reporting requirements. More significant costs, however, are inflicted on society by the loss of dynamism which can result from regulation. Indeed, regulation sometimes creates what can only be called perverse incentives for the regulated firms.").

[39] Revisions to Price Cap Rules for AT&T Corp., *Report and Order*, 10 FCC Rcd 3009, 3018, ¶ 27 (1995).

limit the availability of capital for necessary infrastructure improvements.[40] Indeed, regulatory uncertainty of the type engendered by vague rules or the threat of changes in longstanding policy also imposes costs and harms competition.[41] As Professor Hazlett has written:

> Where firms – entrants or incumbents – have been allowed wide latitude in constructing new networks, robust investment incentives have resulted and consumer gains have been realized. Where regulators have, alternatively, ambitiously regulated incumbents through network sharing obligations designed to ease entry barriers, an unsustainable level of entry has occurred that has resulted in widespread losses across the industry without countervailing consumer benefits.[42]

Moreover, as the Commission under Chairman Hundt long ago noted, in the absence of "burdensome" regulations in the wireless industry, "investors will be able to make funding decisions based upon their assessment of market forces and their analysis of the strengths and weaknesses of the various telecommunications companies competing in the mobile services marketplace."[43] Lauding its de-regulatory treatment of CMRS, the

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40 Hahn, et al., The Economics of 'Wireless Net Neutrality,' at 9 ("The problem for regulators is that dynamic incentives to invest are important to wireless operators. Inefficient regulation threatens to jeopardize the investment needed to upgrade the existing third generation (3G) wireless platform to support broadband services and to launch the fourth generation (4G) network to support real-time applications such as mobile video, remote monitoring, and mobile commerce.").

41 *See, e.g.*, *AT&T Inc. v. FCC*, 452 F.3d 830, 836 (D.C. Cir. 2006) (noting that "even the Commission recognizes that 'regulatory uncertainty ... in itself may discourage investment and innovation'" (quoting *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4802 ¶ 5)); Amendment of the Commission's Space Station Licensing Rules and Policies, *First Report and Order and Further Notice of Proposed Rulemaking in IB Docket No. 02-34, First Report and Order in IB Docket No. 02-54*, 8 FCC Rcd 10760, 10781, ¶ 45, n. 115 (2003) ("The Commission has noted on several occasions that regulatory uncertainty can discourage investment, and so unnecessary regulatory uncertainty should be avoided.").

42 Thomas W. Hazlett, Professor of Law and Economics, George Mason University, *Carterphone: An Economic Analysis,* at 20-21 (April 30, 2007).

43 *Second CMRS Report and Order*, 9 FCC Rcd at 1421, ¶ 24.

FCC noted that it was creating "a stable and predictable federal regulatory environment ... [which] is conducive to continued investment in the wireless infrastructure"[44] and "minimiz[ed] regulatory uncertainty and any consequent chilling of investment activity."[45] Given the risk that regulation will stifle competition, stunt investment, and stymie innovation, Congress' deregulatory approach that wireless services, as well as the Internet, remain free from government regulation,[46] and the Commission's own holding that any regulation of the wireless industry be minimal and only adopted where there is a "clear-cut need,"[47] the FCC cannot justify new roaming regulation. Given the extensive evidence of robust and intensifying competition and innovation, there is, in any event, no reason for it to embark on a regulatory path.

D. The Availability of Data Roaming Partners Will Increase As Carriers Implement LTE.

In the Reconsideration Order, the Commission cited merger activities over the past two and a half years as one reason for the purported declining availability of home

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44 *Id*, at ¶ 25.

45 *Id.*

46 *See* 47 U.S.C. § 230(b). Congress "found that the Internet and interactive computer services 'have flourished, to the benefit of all Americans, with a minimum of government regulation.' Congress further stated that it is 'the policy of the United States ... to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or state regulation.' [...] Congress acted to *keep government regulation* of the internet *to a minimum* [...]." *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir.1997) (citing 47 U.S.C. Section 230(a)(3), (a)(4), and (b)(2)) (emphasis added); *see also America Online, Inc. v. GreatDeals.Net*, 49 F.Supp.2d 851, 856 (E.D. Va. 1999) (noting that "the Telecommunications Act sets forth Congress's explicit desire to have the Internet remain without regulation by federal or state government," and noting that "FCC Chairman William Kennard as well as other FCC representatives have all stated that the Internet will not be regulated by the FCC.") (citations omitted)).

47 *Hawaii Report and Order,* 10 FCC Rcd at 7874.

roaming agreements.[48] While Verizon Wireless disputes the Commission's finding that mergers have diminished the availability of roaming agreements, the ongoing implementation of LTE as the 4G technology of choice for most carriers will lead to more roaming (including data roaming) options for all carriers.

As the Commission noted in the Notice and in the 14th Wireless Competition Report, numerous carriers have announced plans to implement LTE as their 4th generation broadband technology.[49] According to a report published on the Fierce Wireless website, at least a dozen wireless operators will launch LTE networks in 2010. Verizon Wireless, MetroPCS and US Cellular will launch LTE service in the United States in 2010, while AT&T will follow suit in 2011.[50] More recently, CNet News reported that T-Mobile, which is currently upgrading its 3G network to increase throughput speeds, is in talks with Harbinger Capital to allow T-Mobile's customers to use Harbinger's 4G network. Harbinger plans to build a 4G wireless network using LTE that will cover most of the U.S. by 2015.[51] Verizon Wireless recently introduced plans to work with rural companies to collaboratively build and operate a 4G network in areas using the tower and backhaul assets of the rural company and Verizon Wireless' core LTE equipment and 700 MHz spectrum.[52]

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48 Reconsideration Order at 15-16, ¶ 29.

49 Notice at 31, n. 176; 14th Wireless Competition Report at 66-72.

50 *See* Fierce Wireless, "Report: 12 Operators Launching LTE in 2010," June 16, 2009, available at http://www.fiercewireless.com/story/report-12-operators-launching-lte-2010/2009-06-16.

51 CNet News, "T-Mobile Considers 4G Network Partnership," May 4, 2010, available at http://news.cnet.com/8301-30686_3-20004142-266.html.

52 *See* http://aboutus.vzw.com/rural/Overview.html.

The fact that two national carriers and at least two regional carriers, with more likely to follow suit, have announced plans to deploy a common 4G technology is significant for data roaming in three respects. First, to the extent that carriers seeking data roaming agreements in some markets currently have a limited number of technologically compatible data roaming partners, the number of technologically compatible providers will increase as carriers make the move to LTE.[53] Second, carriers implementing LTE will be looking to recoup their investment by putting more and more users on those networks. One way to increase usage is to enter into data roaming agreements with other providers. Third, as more and more providers implement a common technology, carriers will be competing even more for roaming business.

In short, wireless consumers have an increasing number of choices of mobile broadband services, carriers are investing billions in wireless broadband networks, broadband data roaming agreements are available to carriers that want them, and competition for data roaming agreements will increase as carriers implement LTE as their 4G network technology. Given these facts, there is no basis for a finding of a problem that is harming consumers. For these reasons, the Commission should not adopt a data roaming requirement.

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[53] Many carriers advocating roaming regulation have previously recognized that LTE implementation by a number of carriers will help to alleviate the perceived need for roaming regulation by providing more roaming options. For example, in October 2008, a contingent of regional, small and rural providers including MetroPCS, NTELOS, Leap, and the Rural Telecommunications Group ("RTG") advocated extending proposed roaming conditions in the Alltel-Verizon merger from 2 to 7 years on the theory that at the end of the 7-year period, LTE will be widely deployed. Letter from Jean L. Kiddoo to Marlene H. Dortch, Secretary, FCC, WT Dockets 08-95 and 05-265, October 28, 2008. Since that time, many carriers have announced plans to accelerate LTE deployment and LTE will be widely available in carrier networks by 2013. *See* Section I.A., *supra.*

II. THE COMMISSION HAS NO LEGAL AUTHORITY TO EXTEND AUTOMATIC ROAMING OBLIGATIONS TO INTERNET ACCESS SERVICES OR NON-INTERCONNECTED SERVICES AND FEATURES.

In the Notice, the Commission concluded that it has authority to impose a data roaming mandate. It stated that if the roaming arrangements are telecommunications services, they fall under the Commission's authority under Title II and Title III of the Act, and if they are information services, the Commission has authority to regulate under Titles I and III of the Act.[54]

Verizon Wireless disagrees that the Commission has the authority to regulate data roaming services. As an initial matter, two provisions of the Communications Act proscribe the automatic roaming obligation the Commission here contemplates, which amounts to a common carrier obligation. First, section 332(c)(2) of the Act forbids the Commission from subjecting non-interconnected services like data roaming to common carrier obligations. Second, section 153(44) prohibits the Commission from imposing common carrier obligations on services other than telecommunications services, and data roaming is not a telecommunications service. Regulation of data roaming services also is not authorized by other parts of the Act. Because these services are not telecommunications services or common carrier services, they are not subject to the Commission's Title II authority. Moreover, neither Title I nor Title III provides a jurisdictional basis for data roaming requirements.

A. Automatic Roaming Is A Common Carrier Obligation.

The Supreme Court has long held that an obligation to provide service to all comers on a nondiscriminatory basis constitutes the essence of common carrier

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[54] Notice at 33-38.

treatment.[55] The inquiry is functional: whether regulations impose common carrier duties depends on "the character of the regulatory obligations," not the label the Commission gives them.[56] Regulations "amount[] to common carrier obligations" when they require operation "on a nonselective basis" -- in other words, when they order a provider to "make no discrimination" in the provision of its services.[57] An automatic roaming obligation -- a requirement to honor all reasonable roaming requests on a nondiscriminatory basis -- is a quintessential common carrier obligation.

The Commission itself has recognized that an automatic roaming requirement amounts to a common carrier duty.[58]

B. Section 332(c)(2) Precludes the Commission from Subjecting Private Mobile Services to Common Carrier Regulation.

Section 332(c)(2) proscribes the proposed data roaming obligations. Under §332(c)(2), "a person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is engaged, be treated as a common carrier *for any purpose*" under the Act.[59] Accordingly, whatever authority the Commission might otherwise have, the Commission may not exercise that authority in a way that imposes a common carrier obligation on a private mobile service.

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55 *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701–702 (1979).

56 *Id.* at 702.

57 *Id.* at 705.

58 *See, e.g.*, *Reexamination of Roaming Obligations of Commercial Mobile Radio Services Providers*, Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 05-265, 22 FCC Rcd 15817, 15819 (2007) (2007 Roaming Order" or "2007 Further Notice," where applicable); Notice, at ¶ 64 ("[T]he Commission found that roaming is a common carrier obligation."); *see also* FCC Clarifies That Roaming is a Common Carrier Obligation for Commercial Mobile Radio Service Providers, News Release, Federal Communications Commission, Aug. 7, 2007.

59 47 U.S.C. §332(c)(2) (emphasis added).

Data roaming is a private mobile service. The Act defines a "private mobile service" as "any mobile service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service."[60] The Act defines a commercial mobile service as "any mobile service . . . that is provided for profit and *makes interconnected services available* (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public."[61] Through data roaming arrangements, host carriers make mobile wireless broadband Internet service and other non-interconnected data services available to roaming subscribers of other carriers. Accordingly, data roaming is neither a commercial mobile service as defined nor its functional equivalent. As the Commission itself has held, mobile wireless broadband Internet service cannot be a commercial mobile service "because it is not an 'interconnected service' within the meaning of section 332 of the Act and the Commission's 'commercial mobile radio service' rules."[62] Accordingly, the Commission has held that mobile wireless broadband Internet service is "free from common carrier

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60 47 U.S.C. 332(d)(3).

61 *Id.* §332(d)(1) (emphasis added).

62 *Wireless Broadband Internet Access Classification Order*, 22 FCC Rcd 5901, 5902 ¶2, 5915–21, ¶¶ 41 (2007) ("*Wireless Broadband Order*"). *See generally* 47 U.S.C. §332(d)(2) (defining "interconnected service" as "service that is interconnected with the public switched network . . . or service for which a request for interconnection is pending"); 47 C.F.R. §20.3 (defining "interconnected service" as "a service that is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network . . . ."); *id.* (defining "public switched network" as "[a]ny common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use the North American Numbering Plan in connection with the provision of switched services").

regulations."[63] Similarly, because data roaming service is not interconnected service, it too must be deemed free from common carrier regulations.

Because data roaming is not an interconnected service, it also cannot be the "functional equivalent" of commercial mobile service. As a procedural matter, "[a] mobile service that does not meet the definition of commercial mobile radio service is presumed to be a private mobile radio service," and this presumption can be overcome only through a rigorous petition process.[64] No petition has sought reclassification of data roaming as a "functional equivalent." More importantly, there would be no basis for such a petition. As the Commission has recognized, Congress intended the hallmark of commercial mobile service to be the provision of interconnected service through use of

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[63] *Id.* at 5920–5921 ¶¶53–56.

[64] 47 C.F.R. §20.9(a)(14).

the public switched network.[65] No service lacking this essential attribute could amount to a commercial mobile service equivalent.[66]

C. Section 153(44) Prohibits the Commission from Imposing An Automatic Roaming Obligation on Data Roaming Services or Mobile Wireless Broadband Services.

Section 153(44) of the Act prohibits the Commission from imposing a common carrier obligation like automatic roaming on any service that is not a "telecommunications service." This mandatory prohibition prevails over any general regulatory authority the Commission may otherwise have under various provisions of the Act. Neither mobile wireless broadband Internet services nor data roaming services constitute a telecommunications service under the Act. Accordingly, section 153(44) is dispositive of the proposed rulemaking: in light of this proscription, the Commission cannot impose the contemplated data roaming obligations under *any* Title of the Act.

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[65] *See Wireless Broadband Order*, 22 FCC Rcd at 5916–5918. In defining "interconnected service" and "public switched network" for purposes of §332, the Commission stated "that by using the phrase 'interconnected service,' Congress intended that mobile services should be classified as commercial services if they make interconnected service broadly available through their use of the public switched network." *Wireless Broadband Order* at ¶ 44 (quoting *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act* , 9 FCC Rcd 2156, 1434 (1994) (*332 Implementation*)). "Congress's purpose, the Commission concluded, was to ensure that a mobile service that gives its customers the capability to communicate to or receive communication from other users of the public switched network should be treated as a common carriage offering . . . ." *Id.* (quoting *332 Implementation*, 9 FCC Rcd at 1434). "[U]se of the North American Numbering Plan by carriers providing or obtaining access to the public switched network is a key element in defining the network. . . ." *Id.* (quoting *332 Implementation*, 9 FCC Rcd at 1437).

[66] Data roaming also does not meet the second part of the definition in 332(d). It is not offered to "the public" or "to such classes of eligible users as to be effectively available to a substantial portion of the public." This statutory requirement is equivalent to a requirement that the existing service is offered as common carriage. Data roaming is not. *See infra* Part II.C.1.b.

1. Data roaming is not a telecommunications service.

The Commission notes that while it has previously classified some non-interconnected data services, such as wireless broadband Internet access, as information services, it has not made any classification determinations regarding any service or application provided over these Internet access connections or regarding the use of data roaming to obtain access to an information service. It seeks comment on whether data roaming services can be defined as a "telecommunications service" subject to its Title II authority. The Commission notes that some parties have argued that data roaming involves the mere transmission by the host carrier of information provided by the subscriber's home carrier.[67]

Data roaming services cannot be classified as telecommunications service. Instead, data roaming is properly classified as an "information service," as that term is defined in the Act. In addition, data roaming is not offered on a common carrier basis, and as the Commission has held, only common carrier offerings can be classified as a "telecommunications service" under the Act.

a) Data roaming cannot be classified as a telecommunications service.

Data roaming is properly classified as an "information service," not a "telecommunications service," as those terms are defined by the Act. A telecommunications service is "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,

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[67] Notice at 33-34, 36-37.

regardless of the facilities used."[68] Conversely, an information service is defined in the Act as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes information publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[69] Both telecommunications services and information services thus involve "telecommunications": "the transmission, between or among points specified by the user, of information of the user's choosing without change in the form content of the information as sent and received."[70] As the Supreme Court has explained, whether a service is an information service or a telecommunication service depends on "whether the transmission component" of the service "is sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering."[71] In other words, is the service "a 'stand-alone' offering of telecommunications"?[72]

In the data roaming context, the answer to that question is decidedly no. In many instances, data roaming involves information and content being provided by the host carrier, and thus must be classified as an "information service." It is clear that where the host carrier provides Internet access and other information directly to the roaming subscriber, the host carrier is "making available information via telecommunications" to

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68 47 U.S.C. §153(46).

69 47 U.S.C. §153(20).

70 47 U.S.C. § 153(46).

71 *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 990 (2005).

72 *Id.* at 989.

the subscriber. Providing such information directly to the subscriber therefore can only properly be classified as an information service.

The standards for roaming on CDMA and LTE networks enable carriers to choose from among different protocols to enable data roaming with another carrier. One method of provisioning data roaming on CDMA networks is via simple IP or "SIP." The CDMA standards define SIP as "the [mobile subscriber] accessing the public Internet directly from the visited operator's network."[73] Among the benefits of SIP stated in the standards document are that "the roaming [mobile subscriber] may directly access the public Internet without tunneling to the home operator's network," and "the roaming [mobile subscriber] may directly access application servers in the visited network without tunneling to the home operator's network."[74] While carriers can also choose to provision data roaming by mobile IP ("MIP") or by SIP via Layer Two Tunneling Protocol ("L2TP"), both of which enable the mobile subscriber to obtain Internet access and access applications provided through the home carrier network,[75] carriers can and do use each of these protocols to provision data roaming.

Similarly, the LTE standards allow carriers to choose to provision roaming using "local breakout," enabling the mobile subscriber to access the application functions (including Internet access) either from the home provider or the host provider (commonly referred to as "non-local breakout").[76] Verizon Wireless is evaluating both of these

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[73] "Wireless Data Roaming Requirements and Implementation," CDG Document 79, Version 1.2, April 26, 2007, Section 4.1, p.9.

[74] *Id.*, at p.10.

[75] *Id.,* Sections 4.1 and 4.2, pp. 9-15.

[76] 3rd Generation Partnership Project; Technical Specification Group Services and System Aspects; General Packet Radio Service (GPRS) enhancements for Evolved

protocols for provisioning data roaming over its LTE network and currently plans to offer roaming for some services via non-local breakout only.

These standards for CDMA and LTE make clear that providers can choose to provision data roaming services in a way so that Internet access, information and applications are accessed directly through the host carrier's network. In such cases, carriers providing data roaming to mobile subscribers are providing information services directly to mobile subscribers. Accordingly, the Commission cannot properly conclude that all data roaming services involve the mere transmission of information provided by the home carrier or that data roaming can properly be classified as a telecommunications service.

No matter how data roaming services are provisioned, the Commission should not conclude that such services are telecommunications services. Even if the FCC were to conclude that data roaming provisioned so that Internet access and access to applications and other content come from the home provider constitutes a telecommunications service, classifying data roaming based on how it is provisioned would create an untenable regulatory regime whereby some but not all data roaming services would be subject to Title II authority. Such a regime would undoubtedly lead carriers to make choices about technology and provisioning services not based on carrier needs and efficiency, but rather on a desire to avoid regulation. For these reasons, the Commission cannot and should not classify data roaming services as telecommunications services.

Universal Terrestrial Radio Access Network (E-UTRAN) access, Technical Standard 23.401, released March 2010, at Sections 4.2.2-4.2.3, pp. 15-18.

b) Data roaming is not offered on a common carrier basis.

Data roaming is also not a telecommunications service for the independent reason that it is not offered on a common carrier basis. The Commission has repeatedly treated common carrier status as a prerequisite to telecommunications service classification.[77] The D.C. Circuit has affirmed the Commission's interpretation of "telecommunications service" as common carrier service as a reasonable reading of the Act.[78]

Common carrier classification is proper only for services the carrier has already chosen to offer on a common carriage basis -- that is, services the carrier provides indifferently to the public. This limitation is born of the common-law roots of common carrier status. "The original rationale for imposing a stricter duty of care on common carriers," the D.C. Circuit has explained, "was that they had implicitly accepted a sort of public trust by availing themselves of the business of the public at large."[79] The concept of a common carrier thus "developed as a sort of quid pro quo whereby a carrier was made to bear a special burden of care, in exchange for the privilege of soliciting the

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[77] *See, e.g.*, In re Inquiry Concerning High-Speed Access to Internet Over Cable and Other Facilities, 17 FCC Rcd 4798, 4860, n. 205 (2002) (Cable Modem Order) ("The Commission has repeatedly found in various contexts that the definition of 'telecommunications service' under the Act is equivalent to 'common carrier' service."); *id.* at 4830 ("To the extent that AOL Time Warner is making an offering of pure telecommunications to ISPs, it is dealing with each ISP on an individualized basis and is not offering any transmission service indiscriminately to all ISPs. Thus, such an offering would be a private carrier service, not a 'telecommunications service.'"); Cable Landing License, 12 FCC Rcd 8516, 8521, ¶13 (1997); AT&T Submarine Systems, Inc., File No. S-C-L-94-006, Memorandum Opinion and Order, 13 FCC Rcd 21585, 21587-88, ¶ 6 (1998), *aff'd, Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999).

[78] *See Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921, 925 (D.C. Cir. 1999).

[79] *National Ass'n of Regulatory Utility Com'rs v. F.C.C.*, 525 F.2d 630, 641 (D.C. Cir. 1975) (*NARUC I*).

public's business."[80] In harmony with the historical basis of common carriage, a finding that a carrier is "holding [it]self out to serve indiscriminately" is a "prerequisite" to common carrier status.[81]

In determining whether a service is offered on a common carriage basis, the Commission evaluates: "(1) whether the carrier 'holds himself out to serve indifferently all potential users'; and (2) whether the carrier allows 'customers to transmit intelligence of their own design and choosing.'"[82] The crux of the analysis -- "the primary sine qua

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80 *Id.,* at 642.

81 *Id.*

82 *U.S. Telecom Ass'n v. FCC*, 295 F.3d 1326, 1329 (D.C. Cir. 2002). Where a carrier has not offered service on a common carrier basis, the Commission has no authority to require the carrier to do so. Although the Commission has occasionally claimed authority, based on *NARUC I*, to compel a carrier to offer service on a common carrier basis when the public interest so requires, *see* Cable & Wireless, PLC, 12 FCC Rcd 8516, ¶¶ 14-15 (1997), that suggestion is inconsistent with *NARUC I* itself and later cases. In *NARUC I*, the question "whether there will be any legal compulsion ... to serve [the public] indifferently" was part of the D.C. Circuit's empirical analysis of whether a service was, in fact, being offered on a common carrier basis. The court had already defined common carrier status as hinging on whether a carrier's "practice is, in fact," to "serve all indiscriminately." 525 F.2d at 641. Moreover, the court went on to say that the Commission can*not* simply order a carrier to act as a common carrier. *See id.,* at 644 ("Further, we reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve. The common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications entities. A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so."). *Cf. State of Washington ex rel. Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207, 211 (1927) ("It is established that, consistently with the due process clause of the Fourteenth Amendment, a private carrier cannot be converted into a common carrier by mere legislative command."). Subsequent cases identify the two prongs of the common carrier test without reference to the possibility of compulsion by the Commission. *See, e.g.*, *U.S. Telecom Ass'n*, 295 F.3d at 1329; *Iowa Telecommunications Services, Inc. v. Iowa Utilities Bd.*, 563 F.3d 743, 746 (8th Cir. 2009).

non," in the words of the D.C. Circuit -- is whether the service in question is provided indifferently.[83] "A carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal."[84]

In addition, even if the Commission had authority to require common carrier provision of data roaming, there is no public interest justification for such a requirement. A common carriage requirement is not in the public interest where the carrier lacks market power. The market for data roaming is intensely competitive. *See supra* Part I.A.

83 *NARUC II*, 533 F.2d 601, 608 (D.C. Cir. 1976).

84 *NARUC I*, 525 F.2d at 641. *See Virgin Islands Telephone Corp.*, 198 F.3d at 927 ("[T]he key determinant whether a carrier is a common carrier is 'the characteristic of holding oneself out to serve indiscriminately.'") (quoting *NARUC I*, 525 F.2d at 642 (D.C. Cir. 1975))). *See also Sw. Bell Telephone Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (remanding FCC order finding that dark fiber communications services were offered on a common carriage basis because the "service contracts were individually tailored arrangements negotiated to last for periods of five to ten years" and therefore "were not like the indiscriminate offering of service on generally applicable terms that is the traditional mark of common carrier service"), *vacated on remand, Local Exchange Carriers' Individual Case Basis DS3 Service Offerings*, 23 FCC Rcd 569, ¶ 8 (2008) (vacating remanded orders regarding dark fiber offerings because "it is not possible to conclude either that the BOCs are under a legal compulsion to serve the public indifferently, or that the BOCs voluntarily are offering those dark fiber services indifferently to the public"); *Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1471, n.10, 1474 (D.C. Cir. 1984) (affirming FCC order authorizing sale of transponders located on domestic communications satellites on a non-common carrier basis because it is "unlikely that satellite operators engaging in transponder sales will hold themselves out indifferently to serve the user public" because the "terms [are] negotiated individually with selected purchasers"); *Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198, 210 (D.C. Cir. 1982) (affirming FCC's determination that customer premises equipment ("CPE") "is not a common carrier service within Title II" because "provision of CPE is based upon 'individualized decisions in particular cases, whether and on what terms to deal,' the hallmark of a non-common carrier service" (citation omitted)); *AT&T Submarine Systems Inc.*, 13 FCC Rcd 21585, ¶ 8 (1998) (AT&T's submarine cable operations were offered on a private carriage basis because "AT&T-SSI would have to engage in negotiations with each of its customers on the price and other terms which would vary depending on the customers' capacity needs, duration of the contract, and technical specifications"), *aff'd sub nom., Virgin Islands Telephone Corp.*, 198 F.3d at 925; *Cable & Wireless, PLC*, 12 FCC Rcd 8516, ¶ 14 (1997) (fiber optic submarine cable system may operate on a non-common carrier basis because "C&W has stated its intent to make individualized decisions, whether and on what terms to serve, and not to undertake to

Verizon Wireless makes precisely such "individualized decisions, in particular cases, whether and on what terms to deal" with other wireless providers. It does not hold itself out as providing data roaming indifferently to all potential requesting carriers at a standardized price. There is no legal compulsion to provide data roaming as a common carrier service, and Verizon Wireless does not provide the service on that basis. Rather, where data roaming is provided, it is provided on a discretionary basis, exclusively through individual negotiations between carriers. The Commission itself acknowledged the context-specific, fact-intensive nature of voice roaming arrangements in the Reconsideration Order.[85] The totality-of-the-circumstances test outlined by the Commission to adjudge the reasonableness of roaming requests is itself an acknowledgement that roaming is negotiated individually.[86]

Further, data roaming is not offered to "all potential users," *i.e.*, provided "directly to the public, or to such classes of users as to be effectively available to the public."[87] The service is offered only to a subclass of such carriers: automatic roaming is provided to other carriers only in those situations where it is technologically feasible to do so.[88] This sub-class of users is further limited because data roaming is typically

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carry for all people indifferently" (quotations omitted)); *NorLight Request for Declaratory Ruling*, 2 FCC Rcd 5167, ¶ 5 (1993) (interstate fiber optic system classified as a private carrier offering because NorLight "would negotiate with customers on an individualized basis").

85 Reconsider Order, at ¶ 25 (noting the "intensively fact-based nature" of roaming arrangements and the importance of "the individual circumstances" in each case).

86 *Id.,* at ¶ 39.

87 47 U.S.C. § 153(46).

88 The Commission's automatic roaming rule recognizes that roaming service is available only to "technologically compatible CMRS carrier[s]." 47 C.F.R. § 20.12(d).

offered on a particularized basis depending on the carrier's respective business interests. Thus, data roaming cannot be said to be either provided "directly to the public" or to be "effectively available to the public." For all these reasons, data roaming does not fall within the definition of a common carrier service, and cannot be classified as a telecommunications service.[89]

2. Section 153(44) forbids the Commission from subjecting non-telecommunications services to common carrier obligations and limits the Commission's authority under all titles of the Act.

Section 153(44) of the Act prohibits the proposed data roaming obligations. Under this section, a telecommunications carrier like Verizon Wireless "shall be treated as a common carrier" "*only* to the extent that it is engaged in providing telecommunications services."[90] As discussed above, data roaming services cannot properly be classified as telecommunications services. Moreover, the Commission has determined that broadband Internet access service, including mobile wireless broadband Internet access, is not a telecommunications service. Rather, it is an information service.[91] On the basis of that classification, the Commission has expressly held that wireless broadband Internet access cannot be subjected to common carrier

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[89] Although the Commission did not consider this related question, it is clear that data roaming also does not qualify as a commercial mobile service subject to common carrier regulation under Title II. *See supra* Part II.B; 47 U.S.C. § 332(d)(1).

[90] 47 U.S.C. §153(44) (emphasis added); *see* Notice, at ¶ 71.

[91] *See, e.g.*, *Wireless Broadband Order*, 22 FCC Rcd at 5902, ¶ 2, ¶¶ 37-56. *See also Cable Modem Order*, 17 FCC Rcd at 4832, ¶ 7; *Wireline Broadband Internet Access Order*, 20 FCC Rcd at 14855, ¶ 1 (2005) ("establish[ing] a minimal regulatory environment for wireline broadband Internet access services") ("Wireline Broadband Order").

regulation.[92] Because automatic roaming is a common carrier obligation, it is precisely the type of obligation that the Commission may not impose on data roaming services and broadband Internet access services.

The Notice suggests that classification of wireless broadband as an information service only "removed [it] from the category of common carrier services *under Title II.*"[93] This seems to imply that, while the Commission cannot regulate information services as common carrier services pursuant to its Title II authority, it could impose the very same obligations pursuant to its Title I or Title III authority. The statutory text and precedent refute this position.

Section 153(44) is not limited to Title II; it broadly prohibits a carrier that is providing non-telecommunications services from being "treated as a common carrier." Whether regulations amount to common carrier treatment depends on "the character of the regulatory obligations," not the label the Commission gives them.[94] Because automatic data roaming would obligate carriers to provide service to all comers on a nondiscriminatory basis -- i.e., would constitute a common carriage obligation,[95] -- §153(44) categorically prohibits the Commission from imposing such an obligation on an information service, regardless of the location within the Act of any statute from which the Commission may purport to derive authority to impose such an obligation.

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92 *See Wireless Broadband Order,* 22 FCC Rcd at 5903, ¶¶ 5, 50. The Supreme Court has echoed the understanding that information services are excluded from common carriage regulation. *See Brand X*, 545 U.S. at 975 ("[T]he Act regulates telecommunications carriers, but not information-service providers, as common carriers.").

93 Notice, ¶ 64 (emphasis added).

94 *Midwest Video II*, 440 U.S. at 702.

95 *Id.,* at 701–702.

Midwest Video II makes clear that §153(44) limits the Commission's authority under all Titles of the Act, not just Title II.[96] In *Midwest Video*, the Commission imposed certain access rules on cable operators. Section 153(10) of the Act, however, provides that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."[97] The Commission conceded that its access rules could be viewed as common carriage-type obligations, but believed that it nonetheless had authority to impose them pursuant to its "ancillary authority" so long as they promoted statutory objectives.[98] The Supreme Court rejected this view. The Court held that §153(10) "forecloses any discretion in the Commission to impose access requirements amounting to common-carrier obligations on broadcast systems."[99] Thus, the Commission was not merely precluded from imposing common carriage obligations under Title II, as the dissent had argued; the statutory definition barred the Commission altogether from imposing such obligations on broadcasting and cable systems.[100]

The Supreme Court's reasoning applies here. Section 153(44), like section 153(10), is a "mandatory" provision that "preclude[s] Commission discretion to compel" covered entities "to act as common carriers, even with respect to a portion of their total services."[101] As a result, the Commission may not impose data roaming obligations on broadband services under *any* of the Act's jurisdictional titles.

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96 440 U.S. 689 (1979).

97 47 U.S.C. §153(10).

98 *See* 440 U.S. at 702.

99 440 U.S., at 705.

100 *Id.,* at 705, n.15 (citing *id.* at 711 (Stevens, J., dissenting)).

101 440 U.S. at 705, n.15.

In sum, Sections 153(44) and 332(c)(2) constitute mandatory, overriding prohibitions of the type of regulation contemplated in the Notice. As in *Midwest Video II*, these two statutory commands are "unequivocal."[102] They "embod[y] a substantive determination" by Congress that wireless broadband services must not be placed "'under the hampering control of being a common carrier.'"[103] Accordingly, these statutory bars resolve the present inquiry. Regardless of the regulatory authority the Commission might otherwise possess, it cannot regulate in a way that imposes on wireless broadband or data roaming services "requirements amounting to common-carrier obligations."[104]

D. Regulation of Data Roaming Services Is Also Unauthorized Under Titles I, II, and III.

The contemplated data roaming obligations are not only prohibited by sections 153(44) and 332(c)(2), but also are unauthorized by other provisions of the Act. The Commission, as a creature of statute, must not act without an affirmative delegation from Congress. Instead, like other federal agencies, the Commission "literally has no power to act . . . unless and until Congress confers power upon it."[105] No provision of the Act confers upon the Commission authority to implement a data roaming requirement.

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[102] 404 U.S., at 705.

[103] *Id.* at 703, 705 & n.15 (quoting *Columbia Broadcasting System, Inc. v. Democratic Nat. Committee*, 412 U.S. 94, 106 (1973)).

[104] *Id.*, at 705.

[105] *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

1. Data roaming is not subject to the Commission's authority under Title II.

The Notice seeks comment on whether data roaming "is itself a telecommunications service" subject to the Commission's Title II authority.[106] In addition to the statutory prohibitions on the imposition of common carriage obligations on data roaming services, established doctrine makes clear that data roaming is not a common carriage service that the Commission has authority to regulate under Title II.

As the Notice acknowledges, the Commission's authority to regulate under Title II extends only to telecommunications services.[107] As discussed above, data roaming is not a telecommunications service for two independent reasons. First, it is an information service.[108] Second, it is not offered on a common carrier basis.[109] Because data roaming is not a telecommunications service, Title II authority cannot serve as a basis for the contemplated data roaming obligations.

2. The Commission's "ancillary authority" under Title I and Title III does not authorize data roaming obligations.

Neither Title I nor Title III provides a jurisdictional basis for data roaming requirements. The Commission's limited "ancillary authority" under these two titles --

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[106] Notice, at ¶ 68. .

[107] *Ibid.*; *see* 47 U.S.C. §153(44).

[108] *See supra* II.C.1.a.

[109] *See supra* II.C.1.b.

specifically, under §154(i) and §303(r) -- exists only to implement other specific provisions of the Act.[110] A data roaming requirement lacks the requisite statutory basis.

Because the Commission "literally has no power to act . . . unless and until Congress confers power upon it,"[111] the Commission's ancillary authority is necessarily limited.[112] The Commission may not simply take any action it wants by asserting a connection to communications and the public interest. Instead, to regulate under the ancillary authority set forth in §154(i), the Commission must (1) identify a "primary" substantive statutory provision to which the proposed action is ancillary, (2) demonstrate that the action is needed for the effective performance of that primary provision, and (3) ensure that the action is not otherwise inconsistent with the Act.[113] Similarly, §303(r) only authorizes rules for which the Commission has a separate, substantive grant of authority, and which are "not inconsistent with the law."[114] As the Notice itself accepts,

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[110] *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) ("[T]he authority which we recognize today under [now-§154(i)] is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission may, for these purposes, issue 'such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,' as 'public convenience, interest, or necessity requires.' 47 U.S.C. §303(r)."). 47 U.S.C. §154(i) provides that the Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U.S.C. §303(r) provides that the Commission may, "as public convenience, interest, or necessity requires," "[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 chapter."

[111] *La. Pub. Serv. Comm'n*, 476 U.S. at 374.

[112] *See Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010) (holding that the Commission had failed to show that its regulation of Internet service providers' network management practices was a valid exercise of ancillary authority).

[113] *See, e.g.*, *Southwestern Cable Co.*, 392 U.S. at 178; *Midwest Video II*, 440 U.S. 689.

[114] 47 U.S.C. § 303(r).

a rule promulgated under §303(r) must be "necessary to carry out the provisions" of the Act.[115] Moreover, because § 153(44) of the Act proscribes applying common carrier regulations – such as automatic roaming – to carriers not providing telecommunications services, a data roaming requirement cannot be based on §303(r) because it would be inconsistent with the law set forth in other provisions of the Act.[116]

In this case, just as in the recent *Comcast* decision, "the Commission has failed to tie its assertion of ancillary authority . . . to any 'statutorily mandated responsibility.'"[117]

a) Data roaming rules are not necessary to carry out §309(j)(3).

Acknowledging that §303(r) regulations must be rooted in another provision of the Act, the Notice identifies §309(j)(3) -- entitled "design of systems of competitive bidding" -- as the requisite grant of substantive authority.[118] The Notice notes that §309(j)(3) instructs the Commission to promote the purposes of Section 1 of the Act in specifying eligibility and characteristics of licenses available through competitive bidding; Section 1 sets forth a purpose, *inter alia*, of making available a "rapid, efficient, Nation-wide and world-wide wire and radio communication service"; and automatic

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[115] Notice, at ¶¶ 66–67. *See MPAA v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002) ("The FCC must act pursuant to delegated authority before any 'public interest' inquiry is made under § 303(r).").

[116] *See* Sections II.C.1 a. and b., *supra.*

[117] *Comcast Corp.*, 600 F.3d at 661 (quoting *American Library*, 406 F.3d at 692).

[118] The Notice mentions in passing §§301, 307(a), and 316(a), but does not even attempt to argue that a data roaming rule is "necessary to carry out" these provisions. Section 301 merely requires persons to obtain licenses for radio communication. Section 307(a) provides that the Commission shall grant a station license "if public convenience, interest, or necessity will be served thereby." Section 316 authorizes the Commission to modify existing licenses if the modification will promote "the public interest, convenience, and necessity" or compliance with the Act or ratified treaties.

roaming would help make such service available. In addition, the Notice posits that roaming "may advance enumerated objectives within Section 309(j)(3)," including "the development and rapid deployment of new technologies, products, and services for the benefit of the public;" and "efficient and intensive use of the electromagnetic spectrum."[119]

Section 309(j)(3) cannot support the imposition of data roaming obligations on existing licensees. As its title indicates, §309(j)(3) empowers the Commission only to *design* the competitive bidding system. The provision addresses bidding rules, not post-auction changes in the licensee's duties. The reference in §309(j)(3) to broad objectives such as the development and rapid deployment of new technologies is expressly linked to enumerated design tasks: identifying the classes of licenses to be issued, specifying eligibility requirements, and designing bidding methodologies. There is no basis in §309(j)(3) for free-floating Commission authority to impose obligations on spectrum licensees.

b) Data roaming obligations are not necessary to carry out section 303(b).

Nor are data roaming obligations necessary to carry out 47 U.S.C. §303(b).[120] Section 303(b) provides that, "the Commission from time to time, as public convenience, interest, or necessity requires, shall" "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class."

As the Commission has recognized, sections 303(a), (b), and (c) of the Act authorize it to identify spectrum for allocation, designate the nature of services for

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[119] Notice, at ¶ 67.

[120] *See id.,* at ¶ 66.

spectrum allocations in broad classes, and assign spectrum to various classes of radio stations.[121] However, this proceeding is not an allocation proceeding; rather, the Commission has posed the issue of the classification of data roaming in a rulemaking regarding specific types of services offered by licensees. Thus, Section 303(b) is not at issue, because the Commission is not deciding what spectrum to allocate to which services, but rather is considering how licensees *offer* a particular service to their customers.[122]

Construing section 303(b) to authorize the Commission to impose data roaming obligations would violate "one of the most basic interpretive canons, that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .'"[123] If §303(b)'s reference to "the nature of the service" were construed so broadly as to encompass data roaming obligations, there would be no need for the other provisions of section 303, which

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[121] *E.g., Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use*, 10 FCC Rcd 4769, 4791 (1995).

[122] In *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 441 (D.C. Cir. 1991), the D.C. Circuit found authorized under §303(b) the FCC's "exclusion of public correspondence traffic from the AMSS(R) classification." The court's reasoning highlights that §303(b) provides for the definitional task of classifying communications for a given frequency, as opposed to the regulatory task of imposing conditions on those communications. *See id.* (noting that "the NPR observed that the AMSS(R) frequencies had 'been allocated for distress and safety operations as part of a world-wide system,' described AMSS(R) as providing 'communications to support domestic and international air traffic, including air traffic control (ATC),' and stated that air traffic control "does not provide passenger communication (air-ground) service'"). *See also MCI Telecommunications Corp. v. FCC*, 561 F.2d 365, 373 (D.C. Cir. 1977).

[123] *Corley v. United States*, 129 S.Ct. 1558, 1566 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

authorize regulation of specific aspects of radio stations;[124] "the nature of the service" would provide for all types of regulation. Moreover, if §303(b) were a vehicle for imposing common carrier obligations on licensees that do not already hold themselves out as common carriers, the congressional limitations in sections 153(44) and 332(c) would be nullified. The *NARUC* line of cases, too, which establishes the test for common carriage, would be unnecessary and irrelevant. The Commission plainly cannot rely on Section 303(b) in this proceeding to mandate common carrier treatment of data roaming.

Furthermore, under the canon of *noscitur a sociis*, § 303(b) must be read as limited to defining the types of services offered, and not as an open-ended grant of authority to regulate the manner in which such services are provided. *Noscitur a sociis* "counsels that a word is given more precise content by the neighboring words with which it is associated."[125] The canon, "often wisely applied where a word is capable of many meanings in order to avoid giving unintended breadth to the Acts of Congress,"[126] indicates here that "the nature of the service" should be construed to confer authority to designate a type of service, just as the other provisions of §303 confer authority over station power, interference, and other matters relating to the type of services offered. This reading avoids attributing to §303(b) unreasonable, carte-blanche breadth.[127]

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[124] For example, §303(c) authorizes the Commission "to determine the power which each station shall use and the time during which it may operate," and §303(f) allows for regulations to avoid interference between stations. 47 U.S.C. §303(c), (f).

[125] *United States v. Williams*, 553 U.S. 285, 294 (2008).

[126] *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

[127] *See National Ass'n of Regulatory Utility Com'rs v. FCC*, 533 F.2d 601, 617–18 (D.C. Cir. 1976) (*NARUC II*) ("It has been repeatedly recognized that Commission power over the communications industries is not unlimited," even as to "activities clearly within its jurisdiction.").

In sum, data roaming obligations are not necessary to carry out any provision of the Act. Thus, as in *Comcast*, the data roaming obligations at issue here "would virtually free the Commission from its congressional tether,"[128] and the contemplated rules must fail for that reason.

E. The Commission Lacks Authority to Impose a Data Roaming Rule because It Raises Serious Constitutional Issues.

The Commission lacks authority to adopt rules that raise a substantial constitutional issue absent a clear statutory mandate to do so.[129] Moreover, the Commission does not receive deference when interpreting its authority in a constitutionally problematic way, because "the constitutional avoidance canon of statutory interpretation trumps *Chevron* deference."[130] In accordance with these principles, the Commission lacks authority under the Communications Act to impose

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[128] *Id.*, at 655.

[129] *See, e.g.*, *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 173–74 (2001).

[130] *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1340–41 (D.C. Cir. 2002).

rules that raise a substantial takings issue in an "identifiable class of cases," unless the rules are specifically authorized by Congress.[131]

In this case, the Act does not provide express statutory authority to impose data roaming rules on existing licenses. As explained below, applying a data roaming rule to existing licenses would raise substantial problems under the Takings Clause. The Act must therefore be construed not to authorize application of data roaming obligations to existing licenses.

1. Imposing automatic data roaming obligations on existing licenses would constitute a physical taking.

Imposing data roaming obligations on existing licenses would effect a physical taking. Network operators have a property right in the physical infrastructure of the networks that they spend billions of dollars to build, maintain, and modernize, and in the capacity to use that network for its intended purposes. Moreover, ownership of the infrastructure necessarily includes a property right in the use of the facilities to deliver content.

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[131] *Bell Atlantic Tel. Co. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994). As the D.C. Circuit has explained, Congress has exclusive power to appropriate funds from the Treasury, and the Commission's general authority to administer the Communications Act cannot be construed as a delegation to exercise discretion in a way that would "strike a blow at the power of the purse." *Id.* at 1445 (quoting *NBH Land Co. v. United States*, 576 F.2d 317, 319 (Ct. Cl. 1978)) (internal quotations omitted); *see also Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1510 (D.C. Cir. 1984) (en banc) ("When there is no authorization by an act of Congress or the Constitution for the Executive to take private property, an effective taking by the Executive is unlawful because it usurps Congress's constitutionally granted powers of lawmaking and appropriation."), *overturned on other grounds*, 471 U.S. 1113 (1985). Affording "*Chevron* deference to agency action that creates a broad class of takings claims, compensable in the Court of Claims, would allow agencies to use statutory silence or ambiguity to expose the Treasury to liability both massive and unforeseen." *Bell Atlantic*, 24 F.3d at 1445.

A data roaming obligation would invade that right, requiring network operators to permit third parties to place their data in the owner's network and compelling network operators to provide services as to those data. In a data roaming session, data is carried on the host carrier's physical infrastructure (including antennas, cables, and other transport facilities) to the roaming carrier or the roaming subscriber. The data is represented in electrons that occupy physical space on the host carrier's physical infrastructure. A roaming entity's occupation of the host network is "physical" because digital content is converted into electrons that tangibly occupy limited physical space on the network.[132] Accordingly, data roaming necessarily involves data that physically occupies the host carrier's network.

Under a regime of automatic data roaming, third parties would have the right to physically occupy carriers' networks at will: the obligation to allow access to other carriers would bind network owners indefinitely, and network owners would be powerless to control the volume and duration of each roaming connection by end users. As such, the physical occupation would be permanent.

Because an automatic data roaming obligation would authorize third parties to occupy the property of network owners, the rule would give third parties the equivalent

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[132] *See, e.g.*, *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1021 (S.D. Ohio 1997) ("Electronic signals generated and sent by computers have been held to be sufficiently physically tangible to support a trespass cause of action."); *Thrifty-Tel v. Bezenek*, 54 Cal. Rptr. 2d 468, 473, n.6 (Cal. Ct. App. 1996) ("[T]he electronic signals generated by the [defendants'] activities were sufficiently tangible to support a trespass cause of action."); *see Loretto v. Teleprompter Manhattan CATV Corp*, 458 U.S. 419, 450 (1982) (Blackmun, J., dissenting) (passing "electronic signal" through cable could constitute "physical touching"). Decisions suggesting that that "electrical impulses" and "electrons" have no physical presence are factually erroneous. *See Qwest Corp. v. United States*, 48 Fed. Cl. 672, 694 (Fed. Cl. 2001) ("electrical impulses"); *In re Pet'n of WRNN Lic. Co.*, 22 F.C.C.R. 21,054, 21,058, ¶ 8 (2007), *aff'd Cablevision Sys. Corp. v. FCC*, 570 F.3d 83 (2d Cir. 2009).

of a permanent easement on the network. As the Supreme Court has explained, permanent easements are a classic form of physical occupation.[133] A data roaming requirement, like other regulations amounting to easements, would deprive network owners of the "the right to exclude others," which is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[134]

Accordingly, application of a data roaming rule to existing licenses would amount to a per se physical taking under the rule of *Loretto v. Teleprompter Manhattan CATV Corp.*[135] As Judge Williams has observed, the "creation of an entitlement in some parties to use the facilities of another, gratis, would seem on its face to implicate *Loretto*."[136] Indeed, because a data roaming rule would require network owners to "turn over space" within their facilities for third party use, they would be directly analogous to the physical collocation rules that the D.C. Circuit, interpreting *Loretto* in *Bell Atlantic*, held the Commission lacked authority to implement.[137]

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133 *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987) ("'[P]ermanent physical occupation' has occurred . . . where individuals are given a permanent and continuous right to pass to and fro, so that the [] property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.").

134 *Kaiser Aetna v. United States*, 444 U.S. 164, 169 (1979).

135 458 U.S. 419, 435 (1982).

136 *Turner Broad. Sys., Inc. v. FCC*, 819 F. Supp. 32, 67 n.10 (D.D.C. 1993) (Williams, J., dissenting); *see also In re WXTV*, 15 F.C.C.R. 3308, 3320 (2000) (separate statement of Commissioner Furchtgott-Roth) ("[I]t would not be unreasonable to argue that when a broadcast station's signal is mandatorily carried over a cable system, that carriage constitutes a permanent, physical occupation of the cable operator's private property -- and thus a per se taking of that property.").

137 *See Bell Atlantic*, 24 F.3d at 1444–45.

2. Imposing automatic data roaming obligations on existing licenses would constitute a regulatory taking.

An automatic data roaming obligation imposed on existing licenses would also effect a regulatory taking under *Penn Central Transportation Co. v. City of New York.*[138] Under *Penn Central*, courts engage in "essentially ad hoc, factual inquiries" and consider three factors: (1) the extent to which the regulation interferes with the owner's reasonable investment-backed expectations, (2) the economic impact on the property owner, and (3) the character of the government action.[139] There is no "set formula" for how strong each factor must be to trigger a taking.[140]

First, a data roaming rule would interfere with licensees' reasonable, investment-backed expectations. Carriers have invested billions in acquiring spectrum and in building networks to operate on that spectrum under the Commission's policy, not to impose common carriage regulation on Internet access services. Service providers expended tremendous sums on network equipment and, in the case of spectrum acquired at auction, on spectrum licenses and development on the understanding that their licenses allowed them to make data roaming arrangements free from common carriage obligations. The *700 MHz Order* underscores the reasonable expectation that automatic roaming and other common carriage obligations would not apply to the use of auctioned licenses to provide Internet access services. The open platform obligations imposed in that proceeding were novel; the baseline understanding was that such obligations did *not*

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[138] 438 U.S. 104 (1978).

[139] 438 U.S. at 124.

[140] *Id.,* at 123.

apply.[141] The contemplated rules would be an abrupt *volte face*, subjecting operators to common carrier regulation.[142] Such a requirement would frustrate providers' substantial and reasonable investment-backed expectations.[143]

Second, a data roaming rule would have a substantial economic impact on licensees. A logical outgrowth of a data roaming mandate is that carriers will need additional network capacity to handle the influx of data usage by roaming subscribers. As a result, carriers will need to take steps to expand capacity by adding cell sites and network equipment, and possibly by acquiring additional spectrum resources. Each of these actions will require significant financial expenditure.

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141 *See In the Matter of Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Second Report and Order, 22 FCC Rcd 15289, 15361 (2007) (*700 MHz Order*) (noting that the Commission "generally prefer[s] to rely on marketplace forces as the most efficient mechanism for fostering competition"). In line with that understanding, the Statement of Commissioner Tate emphasized that the Order's new requirements were "narrowly tailored," would "not apply to any currently issued spectrum license," and that the spectrum block would be re-auctioned without any of these conditions" if the reserve price was not met. *Id.*, at 15570.

142 Indeed, the Commission's about-face after inducing auction bids would offend the fairness principles at the root of Takings jurisprudence. *Cf. Eastern Enterprises v. Apfel*, 524 US 498, 537 (1998) (plurality opinion) (federal statute requiring coal operators that had long since ceased operating to pay money into a fund used to help coal miners violated the "principles of fairness underlying the Takings Clause").

143 *See Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979) (requirement that marina owner provide public access after creating marina under expectation that it would be private property constituted taking); *United Nuclear Corp. v. United States*, 912 F.2d 1432, 1436 (Fed. Cir. 1990) (finding taking where mining company invested $5 million in developing mining plans based on reasonable expectation that agency would not change mining lease approval rules); *Maritrans Inc. v. United States*, 342 F.3d 1344, 1358 (Fed. Cir. 2003) (owner of single-hull oil barge fleet had reasonable expectation that government would not require double-hulled oil barges because such a requirement had been previously proposed and rejected). Although a regulated entity may be expected to anticipate that the existing regulatory framework may change, the highly regulated nature of an industry "does not mean that *all* regulatory changes are reasonably foreseeable or that regulated businesses can have *no* reasonable investment-backed expectations whatsoever." *See, e.g.*, *Chancellor Manor v. United States*, 331 F.3d 891, 906 (Fed. Cir. 2003).

Third, the character of a data roaming rule supports a finding of a taking because mandatory roaming is akin to a physical interference by the government. As explained above, mandatory data roaming arrangements deny "one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others."[144]

3. The proposed rule would provide no compensation for the taking.

Further, the proposed rule would provide no compensation for taking a licensee's property. In a competitive market, wireless providers, not the government, are responsible for the retail revenue they generate.[145] The government cannot take credit for revenue earned in a competitive environment. The revenue providers earn in that environment already belongs to them and cannot be deemed "compensation" for the government's taking.[146]

The only way the government could take credit for retail revenues would be if it were to impose rate regulations *and* prevent competitive entry into the market.[147] By

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[144] *Kaiser Aetna*, 444 U.S. at 169 (1979).

[145] William P. Barr et al., *The Gild That Is Killing The Lily: How Confusion Over Regulatory Takings Doctrine Is Undermining The Core Protections Of The Takings Clause*, 73 Geo. Wash. L. Rev. 429, 462 (2005) ("Revenues earned in a market open to competition are compensation for the risks the firm undertook when participating in the market. The extent of those returns, moreover, is a function of the competitive dynamic, not of regulatory action.").

[146] *See Brooks-Scanlon Co. v. Railroad Comm'n of Louisiana*, 251 U.S. 396, 399 (1920) ("The plaintiff may be making money from its sawmill and lumber business but it no more can be compelled to spend that than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for it.").

[147] *Cf.* Barr et al., 73 Geo. Wash. L. Rev. at 462 ("The regulator is 'responsible' for generating revenue from a supporting service only if the regulator sets the rate for that service above cost and prevents competitive entry.").

limiting competition, the government could take credit for at least some of the revenue the utilities generate. But the Commission is not even considering that option, because it issued the licenses to promote competition among providers. The proposed data roaming rule would be unconstitutional, and is therefore unauthorized, because it does not and cannot provide just compensation for the taking of private property.

Thus, application of the data roaming rule to existing licenses would raise substantial constitutional problems under the Takings Clause. Because this analysis would apply to all existing licensees, interpreting the Act to authorize such application would create "an identifiable class of cases in which application of [the] statute would necessarily constitute a taking."[148] Accordingly, the Commission lacks authority to apply a data roaming obligation to existing licenses.

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[148] *Bell Atlantic*, 24 F.3d at 1445 (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127–128 (1985)).

III. CONCLUSION

The Commission cannot and should not impose a data roaming requirement on wireless carriers. Given the rapid expansion of broadband data services by all classes of carriers and the number of choices American consumers have for such services, both in their home markets and when roaming, the Commission cannot show that a data roaming rule is necessary to correct a market failure or a demonstrated problem that adversely impacts customers. Moreover, the Commission lacks authority to impose a data roaming rule under Titles I, II or III of the Act.

Respectfully submitted,

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