

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

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

COMMENTS OF MEDIA ACCESS PROJECT

Media Access Project (“MAP”) respectfully submits these comments in response to the Commission’s *Second Further Notice of Proposed Rulemaking* (the “*FNPRM*”) ¹ in the above-captioned docket. The *FNPRM* asks whether the Commission should “extend automatic roaming obligations to [] mobile data services...including mobile broadband Internet access, that are provided without interconnection to the public switched telephone network.”² MAP enthusiastically supports the adoption of such obligations. As MAP and other commenters, including public interest groups and all but the largest wireless carriers, have made abundantly clear – both in this docket and in comments submitted in advance of the Commission’s *Fourteenth Report on Mobile Wireless Competition*³ – automatic data roaming obligations are essential to promoting entry and growth by new entrants, thereby maximizing competition and consumer benefits.

¹ In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, WT Docket No. 05-265, *Order on Reconsideration and Second Further Notice of Proposed Rulemaking*, FCC 10-59, 25 FCC Rcd 4181 (rel. Apr. 21, 2010) (“*FNPRM*”).

² *Id.* ¶ 50.

³ In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 09-66, *Fourteenth Report*, FCC 10-81 (rel. May 20, 2010).

INTRODUCTION

The *FNPRM* correctly recognizes the importance of mobile data services generally, and data roaming specifically, for spurring broadband deployment; promoting entry, growth, and competition by smaller and newer providers of mobile services; facilitating seamless coverage for subscribers; and creating incentives for maximum use of spectrum and other resources.⁴ As the Commission rightly expects, improving the availability of data roaming at the outset of widespread rollouts of 4G networks “will likely play a major role in the future development of the broadband data market.”⁵

As MAP and other public interest groups demonstrated in comments filed for the Commission’s *Fourteenth Report*, mobile Internet access is the service most likely to drive growth for mobile wireless providers – meaning that the absence of automatic data roaming obligations creates substantial barriers to entry and growth for would-be competitors in the space.⁶ The lack of such obligations and the lessened availability of data roaming particularly harms regional and rural wireless carriers, new entrants, and new types of mobile data providers. However, even large national carriers other than AT&T and Verizon Wireless now recognize that the absence of Commission rules means such arrangements will be unreasonable or entirely unavailable to competitive providers.⁷

⁴ See *FNPRM* ¶¶ 50-51.

⁵ *Id.* ¶ 52.

⁶ See Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New America Foundation, and Public Knowledge, WT Docket No. 09-66, at 29-30 (filed Sept. 30, 2009).

⁷ See Comments of T-Mobile USA, Inc., WT Docket No. 09-66, at 4-5 (filed Sept. 30, 2009) (“T-Mobile Comments”). T-Mobile initially opposed but now supports automatic roaming obligations for non-interconnected data services. *FNPRM* ¶ 58. Sprint also recently indicated it is “reviewing its automatic data roaming position.” Letter from Maria L. Cattafesta, Sprint Nextel Corp., to Marlene H. Dortch, Federal Communications Commission, WT Docket No. 05-265, at 3 (filed Apr. 13, 2010).

The diminution in competition caused by unfair exploitation of these and other advantages is readily apparent in the disproportionate market share growth enjoyed by large carriers able to dictate data roaming terms for themselves and their competitors.⁸

The *FNPRM* discusses in detail the positions various stakeholders took on the question of data roaming in response to a previous *Further Notice*⁹ in this docket, noting that all but the largest national wireless carriers now support (or at least no longer oppose) the extension of roaming obligations to non-interconnected data services.¹⁰ MAP and other public interest commenters are on record supporting the same pro-competition and pro-consumer result. These comments briefly review arguments for the adoption of automatic data roaming requirements, discuss the Commission's authority to adopt them, and suggest that the Commission take a broad view of the entities and service providers eligible to enter into data roaming arrangements.

I. THE LACK OF AUTOMATIC DATA ROAMING OBLIGATIONS HARMS COMPETITION AND, ULTIMATELY, ALL MOBILE USERS.

In general comments on the state of the mobile wireless market, MAP joined with other public interest commenters to call for rules establishing automatic data roaming

⁸ See Comments of Cellular South, Inc., WT Docket No. 09-66, at 2 (filed Sept. 30, 2009) (“Cellular South Comments”) (“AT&T and Verizon Wireless together accounted for approximately 86 percent of the net customer additions by the largest U.S. carriers in the second quarter of 2009.”). Cellular South suggested that the Commission evaluate the market power of such carriers by examining, among other things, “the extent to which practices being engaged in by national wireless carriers regarding roaming agreements and interoperability are harming competition in the wireless marketplace.” *Id.* at 3.

⁹ See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-265, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 15817 (2007).

¹⁰ See *FNPRM* ¶¶ 56, 58.

obligations mirroring those for interconnected services.¹¹ Most wireless carriers, including T-Mobile and a broad range of smaller regional and rural mobile service providers, similarly have called for “targeted measures” addressing topics such as data roaming to “resolve market problems with [these] key inputs for wireless services.”¹² After coming to the realization that such measures are necessary in today’s mobile wireless market, T-Mobile called for the extension of automatic roaming requirements to data,¹³ acknowledging that “absent Commission oversight, roaming will not be provided at reasonable rates, terms, and conditions, or may be withheld altogether, diminishing competition at the retail level and harming consumers.”¹⁴

Other commenters submitting filings in the docket for the Commission’s *Fourteenth Report* agreed. For instance, cable operator Bright House Networks supported Commission adoption of automatic roaming obligations,¹⁵ explaining that such rules are necessary “to remove barriers to entry in the wireless market” and allow “new entrants [to] obtain roaming agreements for all services they may offer that facilitate the provision of wide-area and nationwide service.”¹⁶ Carriers and associations representing rural and regional carriers agreed, as did providers that rely on business models other than post-paid CMRS services.

¹¹ See, e.g., Reply Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New America Foundation, and Public Knowledge, WT Docket No. 09-66, at 6-9 (filed Oct. 22, 2009).

¹² T-Mobile Comments at 4.

¹³ See *id.*

¹⁴ *Id.* at 4-5.

¹⁵ See Comments of Bright House Networks, WT Docket No. 09-66, at 5-6, 11-15 (filed Sept. 30, 2009).

¹⁶ *Id.* at 11.

Cellular South,¹⁷ Cincinnati Bell Wireless,¹⁸ Cricket,¹⁹ MetroPCS,²⁰ NTCA,²¹ Ntelos,²² the Rural Cellular Association,²³ the Rural Telecommunications Group,²⁴ U.S. Cellular²⁵ and others all called upon the Commission to replace its current data roaming rules with regulations that ensure non-discriminatory access to this key input. These comments recognized that smaller carriers must be able to provide seamless, nationwide coverage options to their customers even to compete in their own “home” markets.²⁶ They also recognized that the current mobile wireless marketplace is not sufficiently

¹⁷ See Cellular South Comments at 18.

¹⁸ See Comments of Cincinnati Bell Wireless LLC, WT Docket No. 09-66, at 2-7 (filed Sept. 30, 2009) (“Cincinnati Bell Comments”).

¹⁹ See Comments of Cricket Communications, Inc., WT Docket No. 09-66, at 2 (filed Sept. 30, 2009) (“Cricket Comments”).

²⁰ See Comments of MetroPCS Communications, Inc., WT Docket No. 09-66, at 24-35 (filed Sept. 30, 2009) (“MetroPCS Comments”).

²¹ See Comments of the National Telecommunications Cooperative Association, WT Docket No. 09-66, at 3 (filed Sept. 30, 2009) (“NTCA Comments”).

²² See Ntelos Comments, WT Docket No. 09-66, at 6-7 (filed Sept. 30, 2009) (“Ntelos Comments”).

²³ See Comments of Rural Cellular Association, WT Docket No. 09-66, at 12 (filed Sept. 30, 2009) (“RCA Comments”).

²⁴ See Comments of the Rural Telecommunications Group, Inc., WT Docket No. 09-66, at 4-5 (filed Sept. 30, 2009).

²⁵ See Reply Comments of United States Cellular Corporation, WT Docket No. 09-66, at 2, 9-11 (filed Oct. 22, 2009). U.S. Cellular noted that the arguments made by the largest incumbents against data roaming are unresponsive to public interest concerns, because “such arguments do not deal adequately with the right to roam of the *customers* of small and mid-sized carriers and the importance to the survival of such carriers of being able to offer nationwide roaming.” *Id.* at 10 (emphasis in original).

²⁶ See MetroPCS Comments at 25 (“[T]he Commission has explicitly recognized the fundamental fact that that wireless carriers must provide their customers with nationwide service in order to compete effectively in today’s CMRS marketplace.”). As the *Fourteenth Report* noted, “[r]oaming can increase network coverage by allowing [a new] entrant’s customers to have network coverage when they travel outside of the range of the entrant’s own network.” *Fourteenth Report* ¶ 63.

competitive to provide for reasonable data roaming arrangements,²⁷ in large part due to consolidation in the industry.²⁸ These comments correctly asserted that the increased market power of especially the two largest carriers, and the various tools that these giants can use to wield that market power, allow the largest incumbent providers to exact higher prices from their subscribers and thereby harm consumers.²⁹

Finally, these various comments recognized, as does the current *FNPRM* itself,³⁰ that wireless broadband deployment and adoption depends on the availability of attractive mobile data options.³¹ Effective data roaming rules will spur mobile broadband deployment and adoption by facilitating greater competition, in turn generating increased consumer welfare. The absence of such rules only will exacerbate the problems of increased consolidation in the mobile wireless industry, in which the largest providers themselves no longer have as great a need for roaming, but in which they can starve their rivals of the ability to compete and serve such smaller companies' own customers.³²

²⁷ See RCA Comments at 13 (“[G]iven the fact that the mobile wireless marketplace is unable to sufficiently protect consumer welfare by generating reasonable automatic data roaming agreements among competing carriers, the Commission should step in to require such agreements.”).

²⁸ See *Fourteenth Report* ¶ 4 (summarizing evidence of “continued industry concentration” during the past five years).

²⁹ See Cricket Comments at 2 (“[T]he Commission has exposed consumers to harm from the nation’s largest carriers that have amassed a dominant position in many geographic areas of the country and have abused that market position to extract anticompetitive prices for wholesale services such as roaming.”).

³⁰ See, e.g., *FNPRM* ¶ 60 (referencing arguments that “the viability of data network deployments and the ability of consumers to access such services seamlessly will depend on the ability of providers to obtain data roaming arrangements.”).

³¹ See NTCA Comments at 3 (“Wireless broadband deployment is predicated on the availability of a network similar to the one available for voice. Automatic data roaming must be required.”).

³² See, e.g., Cincinnati Bell Comments at 3-4; Ntelos Comments at 6.

II. THE COMMISSION HAS THE STATUTORY AUTHORITY TO ADOPT DATA ROAMING REQUIREMENTS, AND SHOULD MAKE AUTOMATIC DATA ROAMING RIGHTS BROADLY AVAILABLE.

MAP supports the conclusion in the *FNPRM* that “regardless of whether the services a subscriber would access through [data] roaming arrangements are telecommunications services or information services, the Commission has statutory authority to require automatic roaming for them.”³³ As the *FNPRM* notes, if the services that mobile wireless subscribers use to access the Internet or receive other data transmissions qualify as “telecommunications services, they are subject to roaming obligations pursuant to [Commission] authority under Title II and Title III” of the Act.³⁴

As MAP has shown in other proceedings, and will demonstrate again in response to the Commission’s upcoming inquiry on the classification of broadband Internet access transmission, the Commission can and should construe such data transport offerings as telecommunications services. There is no need to repeat these arguments here, so near to the opening of the docket that the Commission intends to establish specifically for the consideration of this very issue. Yet, it is worth repeating that commenters in earlier proceedings on mobile wireless competition have described data roaming as just such a transmission service.³⁵ MAP concurs with these assertions, and also with others cited in the *FNPRM* that routine addressing and routing functions associated with such data transmission do not change the nature of the telecommunications service offered.³⁶

³³ *FNPRM* ¶ 65.

³⁴ *Id.*

³⁵ *Id.* ¶ 68 (citing SouthernLINC Reply Comments, WT Docket No. 09-66, at 13-14 (filed Oct. 22, 2009)). According to the *FNPRM*, “SouthernLINC describe[d] the function of the host provider as ensuring that data are transmitted without change between the subscriber and the subscriber’s home network.” *Id.*

³⁶ *See id.* (citing 47 U.S.C. § 153(43)).

Even if the Commission were to determine that not all non-interconnected data services are telecommunications services, it would have ample authority to adopt automatic data roaming obligations pursuant to its Title III authority to adopt license conditions for wireless services. MAP concurs with the Commission’s analysis of its Title III authority, and with the assertion that “reasonable roaming obligations can serve the public interest by promoting competition, investment, and new entry while facilitating consumer access to ubiquitous service.”³⁷ The *FNPRM* provides a thorough if not exhaustive analysis³⁸ of statutory provisions in Title III under which the Commission could impose such public interest obligations both on new³⁹ and existing licensees.⁴⁰

Yet, while addressing its authority to adopt data roaming obligations for spectrum licensees, the Commission should ensure that new data roaming arrangements will be available to competitive providers regardless of the competitor’s mobile data service offerings or spectrum use methods. In short, the Commission should not needlessly narrow eligibility for automatic data roaming arrangements, but rather should seek to promote new entry and growth by a wide range of competitive mobile data providers. Therefore, the Commission should not require that entities requesting data roaming use licensed spectrum in the offering of their own services, nor that requesting entities provide interconnected services in addition to the non-interconnected data services for which they seek roaming rights. Any such restrictions could have the undesired effect of

³⁷ *Id.* ¶ 67. The *FNPRM* notes as well that such data roaming rules could aid the Commission’s achievement of several enumerated objectives and obligations imposed on the Commission’s design of license assignment mechanisms under Section 309(j) of the Act, 47 U.S.C. § 309(j).

³⁸ See *FNPRM* ¶¶ 66-67.

³⁹ See *id.* ¶ 66 (citing 47 U.S.C. § 307(a)).

⁴⁰ See *id.* (citing 47 U.S.C. § 316(a)).

limiting competition among mobile data service providers to a closed field of CMRS carriers. Instead, the Commission should foster competition in the market for mobile broadband services that “will increasingly be provided by entities that do not offer CMRS but that may nevertheless compete for mobile data service subscribers with companies that offer both mobile broadband and CMRS” interconnected voice services.⁴¹

CONCLUSION

For the foregoing reasons, MAP respectfully submits that the Commission should adopt automatic roaming obligations for non-interconnected data services, similar to the obligations it previously has adopted in this proceeding for voice roaming.

Respectfully Submitted,

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⁴¹ *Id.* ¶ 62; *see, e.g.*, Letter from Robert Martin, PC Management, Inc., to Marlene H. Dortch, Federal Communications Commission, WT Docket No. 05-265 (Feb. 26, 2010).