

**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)

REPLY COMMENTS OF CELLULAR SOUTH, INC.

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SUMMARY

The record has provided a clear and convincing answer to the question of whether the Commission should adopt a data roaming obligation. There is near unanimity among commenters that such an obligation should be imposed because it would advance the Commission's broadband policies and would serve the following consumer welfare and competitive goals:

- *Consumer Welfare.*—The use of mobile data services by consumers is growing rapidly, and consumers increasingly expect that they will have access to these data services whenever they are traveling or working outside their carriers' home service areas. Numerous commenters demonstrate that a data roaming mandate would benefit consumers by providing this access, giving them the opportunity to utilize their mobile data services on a nationwide basis. Data roaming is particularly important for residential and business customers in rural areas and small regional markets, and a data roaming mandate would not only give these customers access to data services outside their home service areas but would also enhance the quality and availability of data services in their home areas by enabling greater deployment of advanced broadband networks by rural and small regional carriers.

- *Investment.*—The record demonstrates that broadband infrastructure investment in rural and small regional areas is being harmed by the absence of a data roaming requirement. The inability of rural and small regional carriers to provide their customers with nationwide access to advanced data services is hindering the carriers' efforts to obtain investment capital, because potential investors are concerned that this inability will affect the carriers' competitiveness. A data roaming obligation would help to cure this problem, promoting facilities-based investment in advanced broadband networks in rural and small regional markets.

- *Competition.*—Several commenters, ranging from Sprint and T-Mobile to numerous rural and small regional carriers, have documented difficulties they have encountered in their at-

tempts to secure data roaming agreements with reasonable rates and terms from AT&T and Verizon Wireless. These difficulties are a product of the growing market power of the Big Two, which, in turn, has resulted from the significant degree of consolidation in the wireless industry and the massive spectrum holdings of the Big Two. AT&T and Verizon have the incentive to decline to enter into data roaming agreements, or to impose unreasonable terms and inflated rates on roaming partners, because these actions will further consolidate their market power. The current level of concentration in the wireless marketplace enables the Big Two to act on these incentives, and also makes it evident that the marketplace itself cannot be expected to produce any cures for the competitive imbalances that are inhibiting the ability of rural and small regional carriers to obtain data roaming agreements. In these circumstances, there are compelling reasons for the Commission to take action by adopting a data roaming mandate.

Given the overwhelming evidence in the record that a data roaming obligation would play a key role in advancing Commission policies regarding broadband deployment, consumer welfare, infrastructure investment, and competition, the only remaining question is whether the Commission can draw upon its statutory authority in the Communications Act of 1934 to adopt a data roaming mandate.

The record provides ample demonstration that the prescription of a data roaming requirement is well within the Commission's statutory authority. Because data roaming is a wholesale, carrier-to-carrier transmission service, that does not involve any change in the form or content of the transmitted information, data roaming is properly classified as a telecommunications service and thus is subject to the Commission's regulatory authority under Title II of the Act.

Numerous commenters also explain convincingly that several specific provisions in Title III of the Act provide the Commission with a sufficient and independent basis for its authority to

impose a data roaming obligation on spectrum licensees, regardless of whether data roaming is classified as a telecommunications service or an information service, and regardless of whether it is offered on a common carriage or private carriage basis. In addition to exercising its direct statutory authority under Title II or Title III to adopt a data roaming requirement, the record demonstrates that the Commission also has the option of exercising its ancillary authority under Title I of the Act. A data roaming obligation would meet the test for exercising Title I ancillary jurisdiction because the Commission's action would be consistent with, and would advance, numerous relevant responsibilities established in Title III of the Act.

Finally, the efforts of AT&T and Verizon to throw up Section 332(c)(2) of the Act as a roadblock preventing adoption of a data roaming mandate should be turned aside by the Commission. Notwithstanding the asserted strictures of Section 332(c)(2), there is a basis for the Commission to conclude that it may regulate data roaming under Title II because data roaming is the functional equivalent of a commercial mobile radio service, and that it may regulate data roaming under Title III because doing so would not result in treating a private mobile service provider as a common carrier.

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Cellular South, Inc. (“Cellular South”), by its attorneys, hereby submits these Reply Comments in response to a rulemaking notice issued by the Commission regarding the extension of roaming obligations to mobile broadband services and other data services that are provided without interconnection to the public switched network.¹ Cellular South, the largest privately-held wireless carrier in the country,² is a regional carrier serving more than 800,000 customers, primarily in rural markets.

I. INTRODUCTION.

The actions the Commission is considering in this proceeding take on heightened importance because these actions will occur against the backdrop of several significant and ongoing developments in the wireless marketplace.

¹ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, FCC 10-59 (rel. Apr. 21, 2010) (“*Reconsideration Order*” and “*Second Further Notice*”) at para. 3. Reply comments are due on or before July 12, 2010. FCC, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 75 Fed. Reg. 22338 (Apr. 28, 2010).

² Cellular South was the second largest privately-held wireless carrier prior to consummation of the merger between Alltel Corporation and Verizon Wireless (“Verizon”).

First, the record in this proceeding shows that consumers' use of mobile data services is increasing dramatically and is likely to spike even higher as Long Term Evolution ("LTE") and other 4G technologies are deployed by wireless carriers.

Second, the wireless marketplace is becoming increasingly concentrated, leading to growing concerns that AT&T and Verizon (jointly, the "Big Two") are able to exert market power in ways that do not serve the interests of consumers or promote competitive wireless markets.

And, *third*, this increased market concentration, coupled with the disproportionate market power of AT&T and Verizon, is likely to affect the competitiveness of rural and small regional carriers and, consequently, interfere with the opportunities of consumers in rural and small regional markets to access advanced broadband services.

As the record in this proceeding demonstrates, the adoption of a data roaming mandate would be an important step in addressing these marketplace developments. A data roaming requirement would be directly and effectively responsive to all consumers' reasonable expectation that they will be able to access advanced data services when they are traveling or working outside their home service areas.

Such a requirement would also be a realistic and appropriate response to the growing concentration that is skewing the wireless marketplace and endangering the Commission's policies aimed at protecting and promoting consumer welfare. There are numerous examples in the record of cases in which carriers seeking data roaming arrangements with AT&T or Verizon have been rebuffed or have been presented with proposed agreements with inflated rates and unreasonable terms and conditions. A data roaming obligations would curb these activities, for the benefit of consumers.

Finally, a data roaming mandate would help to right the competitive balance between the Big Two and rural and small regional carriers. While the competitive strength of these carriers is centered on their ability to be responsive to the service needs of rural and smaller market consumers who often are ignored by the Big Two and other large national carriers, the ongoing competitiveness of rural and small regional carriers is threatened to the extent they are unable to provide nationwide data service footprints for their customers, through the use of data roaming arrangements.

A data roaming requirement would respond to this threat, enabling rural and small regional carriers to remain competitive and to continue investing in the deployment of advanced broadband networks to serve rural America.

II. DISCUSSION.

The two central questions raised by the Commission in the *Second Further Notice* are whether a data roaming mandate would be good public policy, and whether the Commission has statutory authority to impose such an obligation.

The record provides answers to each of these questions. A substantial majority of the parties filing comments present a convincing case that numerous Commission policies would be well-served by the adoption of a data roaming mandate, and that the Communications Act of 1934 (“Act”) provides the Commission with several avenues for exercising its authority to adopt such a mandate.

AT&T and Verizon, in claiming that a data roaming obligation would be too risky, too premature, and too likely to harm competition, investment, and the deployment of advanced broadband networks, paint a picture of the wireless marketplace, and of the role that a data roaming mandate would play, that lacks any convincing factual or logical basis. Moreover, the efforts of the Big Two to make a case for the legal impediments standing in the path of a data roaming

obligation are dependent on an unpersuasive and overly narrow view of the scope of the Commission's authority under the Act.

A. The Record Provides Overwhelming Evidence That a Data Roaming Requirement Would Serve the Public Interest and Advance Various Commission Policies.

In the following sections Cellular South demonstrates that there is strong support in the record for the conclusion that a data roaming mandate would benefit consumers—especially those residing in rural and small regional markets—by enhancing their access to advanced data services when they are away from their home service areas. In addition, a data roaming agreement would benefit consumer welfare by strengthening the ability of rural and small regional carriers to attract the investment capital necessary for their deployment of advanced broadband networks in their service areas.

The record also shows that a data roaming mandate would help to serve as an antidote to the increasing market power of AT&T and Verizon. This market power—a product of the extensive consolidation and concentration occurring in the wireless industry—is tipping the competitive balance in the direction of a market structure that would undermine the position of virtually all other wireless carriers, and would have particularly sobering implications for rural and small regional carriers. Documentation provided in the record illustrates that the Big Two are not hesitant to use their expanding market power to stand in the way of reasonable data roaming arrangements, because doing so would fuel their drive to an even more commanding position in the wireless marketplace.

1. A Data Roaming Mandate Would Benefit Consumers.

A principal impetus for requiring host carriers to provide automatic data roaming to requesting carriers is that consumers of wireless services will benefit.³ Numerous commenters agree with Cellular South that consumers expect to have full access to their wireless services when they roam outside their home service area,⁴ and that the provision of roaming promotes seamless coverage and reduces inconsistent coverage and service quality.⁵

Several commenters also agree with Cellular South that mobile data traffic is increasing dramatically,⁶ and SouthernLINC also points out that consumers are increasingly substituting data usage for voice usage.⁷ This dramatic and ongoing shift in wireless consumers' usage from voice to data underscores the importance of a data roaming mandate.⁸ As Leap Wireless points

³ See, e.g., Free Press Comments at 7 (stating that “[b]y expanding the access to current 3G and 4G data networks and bringing new competitors into the market, data roaming agreements help promote affordable Internet access and achieve the goals of the National Broadband Plan. In particular, data roaming can bring many of the benefits of broadband to the low-income and rural communities that wireline broadband has been slow to reach.”).

⁴ Cellular South Comments at 13; Blooston Rural Carriers (“Blooston”) Comments at 2; Bright House Networks (“BHN”) Comments at 6; Free Press Comments at 11; Leap Wireless International and Cricket Communications (“Leap Wireless”) Comments at 3; NTCH Comments at 2; NTELOS Comments at 6; Rural Cellular Association (“RCA”) Comments at 8, 13; Rural Telecommunications Group (“RTG”) Comments at 9; SkyTerra Subsidiary LLC (“SkyTerra”) Comments at 4; SouthernLINC Comments at 5; Sprint Comments at 7, 9; T-Mobile Comments at 6 (citing *Reconsideration Order* at para. 34).

⁵ Leap Wireless Comments at 3; Organization for the Promotion and Advancement of Small Telecommunications Companies and National Telecommunications Cooperative Association (“OPASTCO & NTCA”) Comments at 2, 3; Sprint Comments at 8-9.

⁶ Cellular South Comments at 13; BHN Comments at 5; SouthernLINC Comments at 4-5; T-Mobile Comments at 5; U.S. Cellular Comments at 2.

⁷ SouthernLINC Comments at 3 (noting that, in 2009, cellular phones were used more for data than for voice transmissions).

⁸ See BHN Comments at 6 (stating that “[w]ithout the ability to roam, consumers’ ability to use their wireless broadband ubiquitously will be thwarted and the use of broadband services through wireless devices—the fastest growing method of Internet access—will be unnecessarily restricted”).

out, the Commission itself has observed that it would be incongruous for the agency to impose a roaming requirement for voice telephone calls and not for mobile data services.⁹

President Obama recently highlighted the importance of wireless broadband in rural America, declaring that “[e]xpanded wireless broadband access will . . . provide cost-effective connections in rural areas . . . and allow for the development of mobile telemedicine, telework, distance learning, and other new applications that will transform Americans’ lives.”¹⁰ A data roaming mandate would help to achieve these goals. The record supports Cellular South’s position that consumers in rural and small regional markets will benefit from data roaming arrangements because a data roaming mandate would deliver data services to these consumers when they travel outside their home service areas, and because the mandate would promote competition and the deployment of advanced broadband networks and services in these consumers’ home service areas.¹¹

SouthernLINC, for example, explains that the absence of an automatic data roaming requirement has inhibited the build out of advanced networks and facilities by regional and rural carriers,¹² and T-Mobile draws attention to the fact that customers of small and rural carriers are disadvantaged when they cannot use their mobile data devices outside their home areas.¹³ In ad-

⁹ Leap Wireless Comments at 4-5 (citing Omnibus Broadband Initiative, FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN (Mar. 16, 2010) (“Broadband Plan”) at 47-48). In addition, T-Mobile observes that, “[v]oice services themselves are becoming just another data application in Internet Protocol (‘IP’) format, . . . making data roaming necessary to ensure the continued availability of voice roaming.” T-Mobile Comments at 7.

¹⁰ Presidential Memorandum on Unleashing the Wireless Broadband Revolution (June 28, 2010).

¹¹ Cellular South Comments at 13; *see* Free Press Comments at 7-8.

¹² SouthernLINC Comments at 32-33.

¹³ T-Mobile Comments at 8-9 (citing *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 09-66, Fourteenth Report, FCC 10-81 (rel. May 20, 2010) (“*Fourteenth Wireless Competition Report*”) at para. 125); *see* OPASTCO & NTCA Comments at 3 (explaining that the absence of data roaming forces many rural consumers to choose be-

dition, SouthernLINC points out that data roaming is important “for businesses in rural areas, which may have an office or primary location in a town or along a major highway corridor with coverage, but whose employees live or work outside of this coverage area.”¹⁴

Cellular South also agrees with Leap Wireless’s argument that a data roaming mandate would benefit under-served segments of the U.S. population, such as lower-income consumers, by promoting growth of pre-paid wireless services,¹⁵ and with SouthernLINC’s observation that a data roaming requirement would provide economic and societal benefits.¹⁶ T-Mobile has cogently and comprehensively captured the link between a data roaming mandate and consumer welfare:

T-Mobile initially opposed a data roaming requirement on the ground that it was premature. In response to its customers’ increasing demands and expectations for data services, however, and the impact of market consolidation and changing competitive dynamics in the wireless industry, T-Mobile now believes that the automatic roaming rules should be extended to data so that a requesting carrier’s customers have access to the same services while traveling as they do at home. As data traffic grows to become a critically important part of mobile communications, data roaming is needed to spur wireless carriers’ investment in their networks while enabling them to offer seamless coverage for their customers.¹⁷

tween the services of a national carrier, which often provides “spotty” services in areas where the rural consumers live and work, or to choose a local rural wireless carrier, which provides excellent service in areas where the rural consumers live and work but cannot provide any roaming service to the consumers outside their home service area).

¹⁴ SouthernLINC Comments at 32.

¹⁵ Leap Wireless Comments at 7.

¹⁶ SouthernLINC Comments at 5-8 (indicating, for example, that a data roaming mandate would benefit public safety as well as hearing impaired individuals); *see* Blooston Comments at 7 (explaining that a data roaming mandate would ensure that public safety users in rural areas would not be denied access to compatible commercial networks).

¹⁷ T-Mobile Comments at 5-6 (footnotes omitted); *see* Cincinnati Bell Wireless (“CBW”) Comments at 5 (noting that “[d]ue to the consolidation within the industry over the past several years, the remaining small and regional carriers are currently in a situation where they are slowly being squeezed out of the market”).

2. Investment in Advanced Broadband Networks Would Be Spurred by a Data Roaming Requirement.

There is agreement in the record that, as Cellular South has argued,¹⁸ if the Commission declines to adopt a data roaming requirement, then investment in broadband infrastructure will be adversely affected, particularly in rural and small regional markets. As MetroPCS explains, in order to compete effectively, wireless carriers must provide their customers with nationwide voice and data service. If a customer cannot obtain data services from a carrier when the customer is roaming, then “it is unlikely the customer will buy service from that carrier. This simple restriction will deter small, rural and mid-tier carriers from investing in broadband at the exact time such investment is sorely needed to meet the objectives of the *National Broadband Plan*.”¹⁹

The antidote for this problem, of course, is for the Commission to adopt a data roaming mandate.²⁰ T-Mobile explains this in concrete terms, indicating that a data roaming requirement would enable it to make informed investment decisions, “and would likely promote facilities-based investment in rural areas. T-Mobile also would be more inclined to build out in rural areas if it could be assured that reasonably priced data roaming would be available for all of its services in adjacent areas.”²¹

AT&T’s contrary view of the impact of a data roaming obligation on broadband infrastructure investment in rural and small regional areas is unconvincing. AT&T argues that “companies of all sizes and types[,] including companies like Leap, MetroPCS, [and] Cellular

¹⁸ Cellular South Comments at 20; *see* Blooston Comments at 4 (noting that a data roaming mandate would further the objective of expanding the availability of broadband in rural America, consistent with goals articulated in the Broadband Plan).

¹⁹ MetroPCS Comments at 42-43; *see id.* at 39, 46-47; CBW Comments at 6; NTELOS Comments at 5, 7; RCA Comments at 8-9; SkyTerra Comments at 3.

²⁰ Cellular South Comments at 14.

²¹ T-Mobile Comments at 10; *see* Leap Wireless Comments at 6; MetroPCS Comments at 47; SouthernLINC Comments at 34, 35-36, 37; OPASTCO & NTCA Comments at 5; Sprint Comments at 10.

South,”²² are making significant investments in 3G networks, but that a data roaming mandate “would almost certainly reduce the scale and pace of these investments.”²³

The fact is that rural and small regional carriers that have made investments in spectrum have strong incentives to build out infrastructure, since this is a critical step in bringing service to customers and realizing a return on the carriers’ spectrum investments.²⁴ While AT&T may believe that a data roaming requirement would freeze the build-out incentives of these carriers, Cellular South has explained that, in fact, the ability of these carriers to obtain data roaming arrangements with larger carriers is an important element in their being able to attract investment capital to fund their network deployment efforts.²⁵

MetroPCS further demonstrates that AT&T’s evaluation of the investment incentives of rural and small regional carriers is off the mark. Because a data roaming requirement would apply *only* to transmission provided by host carriers, and *not* to any data or information services provided by host carriers, “small, rural and mid-tier carriers will remain incented to build out their networks in order to deploy their own information services. If small, rural and mid-tier carriers fail to do so, they will cease to be competitive.”²⁶ MetroPCS concludes that, “even with a right to automatic wireless data roaming, the Commission can and should expect that small, rural

²² AT&T Comments at 43.

²³ *Id.* at 44.

²⁴ *See* Blooston Comments at 8-9 (indicating that CMRS licensees have incentives to broadband data networks); Clearwire Corporation Comments at 6; OPASTCO & NTCA Comments at 5-6. *See also* SkyTerra Comments at 3-4 (indicating that a data roaming mandate would not diminish SkyTerra’s strong incentives to complete the build-out of its mobile satellite service terrestrial network).

²⁵ Cellular South Comments at 20.

²⁶ MetroPCS Comments at 49.

and mid-tier carriers will remain incented to build out their facilities wherever they hold licenses.”²⁷

AT&T also professes concerns regarding the “piggy back” effects of a data roaming requirement that would discourage investment,²⁸ but the Commission has already put these concerns to rest. In assessing the impact of an automatic home roaming requirement, the Commission concluded that “[c]arriers deploying next generation networks will still have incentives to build out to ensure that their subscribers receive all of the benefits of the carriers’ own advanced networks[,]”²⁹ and that “as a practical matter, the relatively high price of roaming compared to providing facilities-based service will often be sufficient to counterbalance the incentive to ‘piggy back’ on another carrier’s network.”³⁰ Cellular South agrees with SouthernLINC that these findings made by the Commission “apply with equal, if not greater, weight to its analysis of the potential impact of a data roaming obligation on competitive entry and network deployment in the data services market.”³¹

Finally, Verizon advances a view of investment incentives that does not withstand scrutiny. Verizon claims that investors can perceive regulation, in the form of a data roaming requirement, as increasing risk, and that this perception “could limit the availability of capital for necessary infrastructure improvements.”³² As Cellular South has discussed, it is more likely that the *absence* of data roaming arrangements will reduce the availability of capital investments for rural

²⁷ *Id.*; see SouthernLINC Comments at 39-41.

²⁸ AT&T Comments at 44 n.124 (citing *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, 15835 (para. 49) (2007) (“2007 Report and Order”)); see ACS Wireless Comments at 4.

²⁹ *Reconsideration Order* at para. 32 (footnote omitted).

³⁰ *Id.* (footnote omitted).

³¹ SouthernLINC Comments at 39.

³² Verizon Comments at 14-15 (footnote omitted).

and small regional carriers. In addition, Sprint explains that there is a positive correlation between data roaming arrangements and network investments. Sprint notes that, while in 2007 it emphasized “monetizing its network investment[,]”³³ since then “Sprint has recognized that roaming in fact increases the value of its network investments and has openly embraced data roaming agreements.”³⁴

3. A Data Roaming Mandate Would Protect and Promote Wireless Competition.

AT&T and Verizon paint a surreal picture of the state of competition in the wireless marketplace, and of the effects that a data roaming obligation would have on competition. Their claims that competition currently is robust, and that a data roaming mandate would impair competition, are not persuasive.

MetroPCS sums up the real situation succinctly: “[T]he market for wireless data roaming is broken, and market forces are not working to foster the ubiquitous availability of wireless data roaming.”³⁵ Market consolidation has exacted a huge toll on competition,³⁶ and, in particular, has

³³ Sprint Comments at 11.

³⁴ *Id.*

³⁵ MetroPCS Comments at 26; *see* Free Press Comments at 9 (noting that the Commission must create a data roaming obligation because the lack of competition in the wireless industry, the misalignment of incentives in the industry, and the lack of adequate roaming agreements make it clear that “the wireless industry will not reach a solution on its own”).

³⁶ T-Mobile explains that this consolidation has adverse effects even for the larger carriers:

AT&T and Verizon have purchased a number of regional wireless carriers, significantly reducing (and in many areas, eliminating) T-Mobile’s choice of data roaming partners. Data roaming is critical to ensuring that T-Mobile can be competitive with its much larger rivals who have an incentive to deny it roaming for just that reason.

T-Mobile Comments at 8; *see* Blooston Comments at 6-7; BHN Comments at 7; Media Access Project (“MAP”) Comments at 6; NTELOS Comments at 8; RCA Comments at 12; RTG Comments at 3 (stating that rapid consolidation in the mobile wireless sector has “greatly diminished the number of viable roaming options and overall competition”).

hampered the ability of rural and small regional carriers to obtain data roaming agreements.³⁷ MetroPCS observes that the broken state of the data roaming market “has the potential to adversely affect . . . market competition as a whole.”³⁸ MetroPCS explains that the Big Two are able to exert substantial control over the rates and terms of data roaming agreements, in large part because “AT&T and Verizon Wireless each have dominant positions in their respective air interfaces”³⁹ (GSM in the case of AT&T, and CDMA in the case of Verizon).

The Big Two’s grip on the wireless marketplace as a result of this industry consolidation portends problems for all other wireless carriers. As U.S. Cellular points out, if the Big Two’s competitors are “to survive and compete with the largest carriers, they must be able to offer customers a full suite of services, including data roaming.”⁴⁰ If these carriers are not able to offer these services, then “they will be greatly hampered in their attempts to provide bona fide and sustainable competition to the national carriers and the anticompetitive trends discussed in the [Fourteenth Wireless Competition Report] will only become more pronounced.”⁴¹

³⁷ See Cellular South Comments at 17; RCA Comments at 14.

³⁸ MetroPCS Comments at 43-44 (citing *Fourteenth Wireless Competition Report* at para. 9).

³⁹ *Id.* at 44 (footnotes omitted).

⁴⁰ U.S. Cellular Comments at 5; see BHN Comments at 7-8; MAP Comments at 5 (indicating that “smaller carriers must be able to provide seamless, nationwide coverage options to their customers even to compete in their own ‘home’ markets”) (footnote omitted).

⁴¹ U.S. Cellular Comments at 5; see CBW Comments at 7 (indicating that, “due to the limited availability of nationwide roaming partners for 3G and 4G services, Cincinnati Bell is seeing a steady defection of its customers to the national carriers even though Cincinnati Bell offers a superior network in its operating area and attractive rate plans that are available without a long-term contract. If this trend continues, Cincinnati Bell will no longer possess the financial wherewithal to continue to upgrade its network and invest in the spectrum needed to offer the most up-to-date broadband services to customers in its service area, leading to a downward spiral in its ability—even in its local market—not only to compete with but to exceed the service standards of the nationwide carriers.”); MetroPCS Comments at 52 (explaining that the lack of automatic data roaming harms the ability of small, rural, and mid-tier carriers to compete, because it “forces these carriers to put forth an ‘incomplete’ service offering to their customers, as compared to the Big-4 who all possess the ability to offer wireless data roaming nationwide over their own spectrum”).

The Big Two’s market dominance, and the potential consequences of this dominance, are on full display in the 700 MHz spectrum. Cellular South agrees with MetroPCS’s assessment that AT&T and Verizon have been able “to corner the market for 700 MHz spectrum—eliminating yet another avenue for new entrants and existing carriers to secure spectrum that would put them on [a] more even footing with the two largest carriers.”⁴² Cellular South has explained how the business strategies being followed by the Big Two with respect to their vast 700 MHz spectrum holdings threaten to adversely affect the availability of roaming arrangements for advanced broadband services.⁴³

Verizon begs to differ with this assessment of wireless competition, arguing that mobile broadband services are developing and growing without any intervention by the Commission,⁴⁴ and that the majority of consumers have considerable choice regarding their purchase and use of mobile broadband services.⁴⁵ Verizon also contends that the strength of wireless competition is also reflected by the levels of investment being made by the national carriers and by smaller regional carriers such as Cellular South,⁴⁶ and concludes that there is no basis for Commission intervention.⁴⁷

These arguments understandably reflect the view of the wireless marketplace from the perspective of a carrier that holds a commanding—and expanding— position in that marketplace. The state of competition is much more tenuous from the perspective of rural and small re-

⁴² MetroPCS Comments at 48; *see* Free Press Comments at 3 (stating that “the recent 700 MHz auction resulted in a substantial increase in the spectrum holdings of AT&T and Verizon—which were already the two largest providers. Overall, \$16 billion of the \$19 billion in spectrum sold went to these two largest carriers.”) (footnote omitted).

⁴³ Cellular South Comments at 18-19 & n.62.

⁴⁴ Verizon Comments at 3.

⁴⁵ *Id.* at 4, 18.

⁴⁶ *Id.* at 4-5, 18; *see* AT&T Comments at 49 & n.134.

⁴⁷ Verizon Comments at 7.

gional carriers,⁴⁸ and there can be little doubt that this perspective has a sound basis in the “clear and ominous” trends⁴⁹ reflected in the *Fourteenth Wireless Competition Report*:

Over the past five years, concentration has increased in the provision of mobile wireless services. The two largest providers, AT&T, Inc. (AT&T) and Verizon Wireless, have 60 percent of both subscribers and revenue, and *continue to gain share* (accounting for 12.3 million net additions in 2008 and 14.1 million during 2009). The two next-largest providers, T-Mobile USA (T-Mobile) and Sprint Nextel Corp. (Sprint Nextel), had a combined 1.7 million net loss in subscribers during 2008 and gained 827,000 subscribers during 2009. One widely-used measure of industry concentration indicates that *concentration has increased 32 percent since 2003 and 6.5 percent in the most recent year for which data is available*.⁵⁰

It is difficult to embrace Verizon’s optimism regarding the health of wireless competition in the face of these numbers. Consumer choice, and the availability of diverse and affordably priced broadband services, are difficult to establish and sustain in light of this significant market concentration and the market power it bestows upon the Big Two. While it is true that some competitors of the Big Two have made considerable investments in spectrum and network infrastructure, this is not a reliable bellwether of wireless competition and cannot sustain Verizon’s assertion that there is no need for data roaming mandate.

⁴⁸ See, e.g., Free Press Comments at 11 (noting that “without an automatic data roaming requirement, incumbent providers can use their control over existing infrastructure and spectrum to create significant obstacles for smaller competitors”).

⁴⁹ U.S. Cellular Comments at 5.

⁵⁰ *Fourteenth Wireless Competition Report* at para. 4 (emphasis added); see Free Press Comments at 10 (observing that “[t]he wireless industry as a whole lacks meaningful competition, and data [service] is one of its least competitive segments” and that “incumbent providers can now seek supracompetitive profits without fear that a new entrant will undercut their prices”). See also Ex Parte Letter from David L. Nace, Counsel for Cellular South, to Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 09-66 and 05-265, GN Docket Nos. 09-157, 09-51, and 09-137, RM Nos. 11497 and 11592 (filed Mar. 9, 2010) at 2 (footnote omitted) (“noting that “[d]uring the fourth quarter of 2009, AT&T and Verizon Wireless accounted for the vast majority of postpaid customer additions in the wireless industry, each with over one million net additions. The movement toward a wireless duopoly not only continued but accelerated during the fourth quarter of 2009. Postpaid customers are the most significant measure of a wireless carrier’s success and the basis upon which financing is available to most wireless carriers, including Cellular South.”).

There are many rural and small regional carriers whose ability to attract investment capital, which is needed for these carriers to remain competitive, is being jeopardized by their lack of bargaining power and the resulting difficulties in their efforts to obtain data roaming arrangements from larger carriers. Further, as Cellular South has pointed out, even a wireless company as large as T-Mobile views a data roaming mandate as critically important to offset the incentives of the Big Two to block T-Mobile from obtaining roaming arrangements with reasonable rates and terms.

There is abundant support in the record for the conclusion that data roaming is important for the promotion of wireless competition. As several commenters observe,⁵¹ the Commission concluded in the Broadband Plan that “data roaming is important to entry and competition for mobile broadband services and would enable customers to obtain access to email, the Internet and other mobile broadband services outside the geographic regions served by their providers.”⁵² The record also strongly supports Cellular South’s view that data roaming will especially benefit competition in rural and small regional markets.⁵³ MetroPCS defines the issue in stark terms:

[N]ew entrants and small, rural and mid-tier carriers simply must be able to provide their customers with meaningful access to wireless data roaming, including next-generation broadband services such as LTE, at reasonable rates. Absent an improved ability to provide their customers with this necessary wireless data roaming service, new entrants and small, rural and mid-tier carriers may not be able to compete effectively, and may well vanish from the marketplace over time, to the detriment of consumers nationwide.⁵⁴

⁵¹ See, e.g., Leap Wireless Comments at 5.

⁵² Broadband Plan at 49; see SouthernLINC Comments at 34, 35; T-Mobile Comments at 7.

⁵³ See Cellular South Comments at 14; Free Press Comments at 6 (noting that, “[b]y allowing smaller carriers to offer nationwide service to their regional customers and to expand into new territories over time, data roaming creates new competitors and greater potential for price competition on a variety of service offerings”).

⁵⁴ MetroPCS Comments at 40-41; see Leap Wireless Comments at 5-6, 23; SouthernLINC Comments at 36-37.

AT&T takes a different view, contending categorically that “common carrier regulation of data roaming would clearly harm competition, especially in rural areas.”⁵⁵ AT&T’s support for this claim boils down to a rehash of its contention that a data roaming mandate would impair investment in rural areas. AT&T argues that “the pace of deployment of next-generation networks is especially likely to be reduced in rural areas” because carriers will be more likely to take advantage of Commission-mandated data roaming agreements as a means of avoiding the expense of deploying their own networks. Such a result, according to AT&T, would reduce facilities-based competition.⁵⁶ Cellular South has already discussed why AT&T’s assertions are not persuasive.⁵⁷

Finally, AT&T suggests that the Commission’s pro-competitive policies would not be advanced by a data roaming mandate because “there is simply no marketplace *need* for common carrier treatment of data roaming.”⁵⁸ AT&T’s arguments in support of this assertion fall well short of the mark.

First, AT&T claims that consumers already “effectively enjoy” seamless data roaming, pointing to roaming arrangements for 2G networks and international roaming agreements for 3G data services.⁵⁹ “What is more,” AT&T asserts, “AT&T is currently in the process of developing a domestic 3G roaming policy that it intends to make available. After 4G service has been deployed, it is likely that the marketplace will develop roaming alternatives for 4G services as well.”⁶⁰ These gossamer assurances can hardly substitute for a data roaming mandate. Given

⁵⁵ AT&T Comments at 47.

⁵⁶ *Id.*

⁵⁷ See Section II.A.2., *supra*.

⁵⁸ AT&T Comments at 54 (emphasis in original).

⁵⁹ *Id.*

⁶⁰ *Id.*

AT&T's dominant control of the GSM platform, AT&T has little incentive to develop a 3G roaming policy that will promote a competitive wireless marketplace.⁶¹ Nor is there any reason to expect that the broken data roaming marketplace would produce 4G roaming alternatives that advance the Commission's competitive objectives and policies.

Second, AT&T argues that a data roaming mandate is not needed because wi-fi hotspots enable mobile broadband data customers "to obtain data connectivity outside of their home areas apart from roaming."⁶² Again, it cannot be seriously maintained that the Commission's competitive policies, and the ability of consumers to access a nationwide footprint for their data services, should be made to rest on a foundation of wi-fi hotspots.⁶³ MetroPCS provides a much more realistic vantage point for assessing the need for the Commission to establish a data roaming obligation:

[A]ccess to nationwide mobile data service is fast becoming table stakes in the wireless marketplace. As the Internet increasingly goes mobile, the ability to use data services while roaming will determine whether a carrier can compete for or retain customers. As a result, new entrants and small, rural and mid-tier carriers simply must be able to provide their customers with meaningful access to wireless data roaming, including next-generation broadband services such as LTE, at reasonable rates.⁶⁴

⁶¹ See, e.g., NTCH Comments at 3; RCA Comments at 14.

⁶² AT&T Comments at 55.

⁶³ See Blooston Comments at 3 (observing that "many wireless handsets do not have Wi-Fi capability, so consumers who use these devices must rely on a commercial wireless network to access non-interconnected data. Moreover, when consumers travel away from home, they may be unfamiliar with the location of public Wi-Fi access points (if public Wi-Fi access is even available in those areas), they may need to access data from a vehicle (e.g., consulting a mapping service), or they may want to avoid paying additional charges for by-the-hour or by-the-day commercial Wi-Fi service.").

⁶⁴ MetroPCS Comments at 40.

4. Rural and Small Regional Carriers Are Not Able To Obtain Data Roaming Arrangements with Reasonable Terms and Prices in the Absence of a Data Roaming Mandate.

Verizon argues that there is no need for the Commission to adopt a data roaming mandate because “[c]arriers 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.”⁶⁵ The record suggests, however, that the picture is not as encouraging as Verizon claims.

Cellular South has provided specific examples in its Comments of cases in which service providers have encountered difficulties in obtaining roaming agreements from the large national carriers,⁶⁶ leading Cellular South to conclude that “the wireless marketplace cannot be relied upon to produce data roaming agreements between the large national carriers and other service providers, because the large carriers do not perceive these agreements as furthering their business plans.”⁶⁷ Other commenters have voiced similar problems. For example, SouthernLINC indicates that “the absence of a data roaming obligation has prevented [it] from being able to obtain a data roaming arrangement”⁶⁸

⁶⁵ Verizon Comments at 9.

⁶⁶ Cellular South Comments at 21.

⁶⁷ *Id.* at 22; *see* CBW Comments at 6.

⁶⁸ SouthernLINC Comments at 34; *see* Blooston Comments at 7; CBW Comments at 8 (noting that it has had standard reciprocal 2G data roaming agreements in place with multiple domestic carriers for years, but that “[t]he one glaring exception has been Cincinnati Bell’s agreement with a major nationwide wireless provider who has scorned the standard terms for such arrangements and has instead insisted upon its own terms and conditions as a take-it-or-leave-it condition of providing roaming to Cincinnati Bell”); Free Press Comments at 12 (stating that “[t]he Commission should act because market forces have not generated enough reasonably priced data roaming services to meet consumer demands[,]” and that “[s]maller and rural carriers have repeatedly demonstrated that they are unable to reach data roaming agreements with larger wireless companies that meet their needs”); NTELOS Comments at 7; OPASTCO & NTCA Comments at 2, 4 (noting that one national carrier charges a rate of \$1 per megabit of mobile data usage for its 3G roaming service); RCA Comments at 12 (indicating that “[b]ecause there is no data roaming mandate, the Big Two and other national carriers can act with impunity in blocking rural and small regional carriers from obtaining data roaming arrangements with reasonable terms and conditions”); Letter

If there was some degree of competitive balance in the wireless marketplace, with market power distributed relatively evenly among a number of service providers, then Verizon's claim that data roaming agreements from host carriers are readily available would be more credible. But the wireless marketplace is dominated by the Big Two, and AT&T and Verizon have little incentive to accommodate the data roaming needs of any of the other players in the marketplace.⁶⁹ The accuracy of this observation is demonstrated by the fact that Sprint and T-Mobile are now advocating the adoption of a data roaming mandate as a means of protecting and enhancing their competitive interests.

The problems faced by Sprint and T-Mobile are amplified in the case of rural and small regional carriers. It is a matter of common sense that these carriers—who find themselves at the lower end of the playing field in comparison to the Big Two—are not in a position to obtain roaming agreements with reasonable terms and rates from the large national carriers in the absence of a data roaming mandate.⁷⁰ Moreover, as MetroPCS explains, “the disappearance of a number of former small, rural and mid-tier roaming partners as a result of the recent market con-

from Carl W. Northrup, Counsel for MetroPCS, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, filed Jan. 6, 2010, at 9:

MetroPCS has pursued several roaming initiatives and has found it to be extremely difficult to negotiate acceptable new roaming arrangements for either voice or data roaming beyond those mandated by merger conditions. The difficulties have been particularly acute in those areas where the FCC declined to acknowledge that MetroPCS has common carrier rights protected by Sections 201 and 202 (e.g. in-market roaming and data roaming). Multiple carriers have taken inflexible hardline stances, and . . . MetroPCS expects carriers to become even more emboldened once existing contracts and transaction-related obligations expire. Nationwide carriers in particular have proposed exorbitantly high rates for in-market roaming and voice and data roaming, to the extent such roaming rights are offered at all.

⁶⁹ See, e.g., Blooston Comments at 7; BHN Comments at 8 (pointing out that “industry consolidation has made it more likely that the national carriers can use unfavorable roaming rates as an anti-competitive tool against non-national carriers”); Free Press Comments at 6; T-Mobile Comments at 10-11.

⁷⁰ See Free Press Comments at 5 (pointing out that “many small providers seeking data roaming agreements [from national incumbent carriers] face extraordinarily lopsided negotiating dynamics”) (footnote omitted).

solidation has made it much more difficult for small, rural and mid-tier carriers to negotiate reciprocal wireless data roaming agreements.”⁷¹

Verizon also optimistically predicts that “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[,]”⁷² and advances this as another reason to avoid adoption of a data roaming requirement. Verizon argues that this prediction is reasonable because the number of technologically compatible providers will increase as carriers move to LTE, carriers will want to put more and more users on the network in order to recoup their investment, and, as more providers implement a common technology, carriers will be competing even more for roaming business.⁷³

Verizon makes this argument despite the fact that its own actions in developing and deploying carrier-specific LTE equipment are undercutting this possibility. As detailed in a separate proceeding,⁷⁴ Verizon and AT&T are preparing to deploy LTE equipment that works only on the portions of the 700 MHz spectrum that they each own rather than across the entire range of 700 MHz spectrum. The latter approach has been the standard practice in the industry since its inception. This means that requesting carriers will not be able to roam on Verizon’s or AT&T’s spectrum unless the requesting carriers somehow acquire devices that work on their own spectrum as well as that spectrum owned by Verizon and AT&T. Furthermore, customers of Verizon and AT&T will not have the ability to roam on other carriers’ networks when they leave their home

⁷¹ MetroPCS Comments at 45 (footnote omitted).

⁷² Verizon Comments at 17.

⁷³ *Id.* at 18.

⁷⁴ *Wireless Telecommunications Bureau Seeks Comment on Petition for Rulemaking Regarding 700 MHz Band Mobile Equipment Design and Procurement Practices*, Public Notice, RM No. 11592, DA 10-278 (Feb. 18, 2010), 75 FR 9210 (Mar. 1, 2010).

areas. Without Commission action to require interoperability in the 700 MHz space, Verizon's aforementioned solution is unworkable and, therefore, disingenuous.

The problems currently faced by rural and small regional carriers seeking to utilize their 700 MHz spectrum illustrate how Verizon's predictions can easily go off the rails. Even though LTE will be the principal platform used for advanced broadband services in the 700 MHz band, and even though 700 MHz spectrum is ideal for the deployment of advanced broadband services in rural areas, there currently is a likelihood (as discussed in the previous paragraph and as Cellular South has explained in its Comments) that roaming across 700 MHz spectrum blocks will not be possible. As a result of business strategies being pursued by the Big Two, "a service provider's potential pool of data roaming partners in the 700 MHz band may very well turn out to be zero."⁷⁵

B. The Record Establishes That the Commission Has Ample Statutory Authority To Adopt a Data Roaming Requirement.

AT&T and Verizon attempt to make up for ground lost in the policy debate by advancing legal theories that, in their view, bar any adoption of a data roaming obligation. Numerous parties demonstrate, however, that the Commission need not subscribe to the narrow view of its powers under the Act advanced by the Big Two. These parties explain convincingly that the Commission's authority under Title III, and its authority under Title II, provide sufficient, independent bases for a data roaming mandate. In addition, the Commission may rely on its ancillary jurisdiction under Title I to adopt such a mandate.

⁷⁵ Cellular South Comments at 23 (footnote omitted); *see* MetroPCS Comments at 45 (indicating that "the coming of LTE will only magnify the extant market failure. As LTE becomes the nationwide standard for next-generation data services, smaller, rural and mid-tier carriers will be faced with a tough decision about whether or not to invest in this important new technology. An inability to offer nationwide LTE data services would serve as a substantial impediment to investment for these carriers.").

1. The Commission Has Authority Under Title III of the Act.

Cellular South explains in its Comments that the Commission’s plenary authority under Title III of the Act to regulate radio spectrum provides a sufficient basis for the agency “to require any entity utilizing radio spectrum to make automatic data roaming services available to other wireless service providers.”⁷⁶ There is wide support in the record for Cellular South’s position. Leap Wireless, for example, concludes that the Commission’s “clearest and most robust legal authority emanates from Title III”⁷⁷ and U.S. Cellular indicates that the “provisions [of Title III] provide various reasonable bases for FCC jurisdiction over data roaming.”⁷⁸

A number of commenters have joined Cellular South⁷⁹ in endorsing the Commission’s analysis of its Title III authority in the *Second Further Notice*, as well as the Commission’s tentative conclusion that it “has statutory authority to require automatic roaming. . . .”⁸⁰ SouthernLINC notes, for example, that the Commission’s analysis “demonstrates that the Commission has ample authority to take action regarding roaming for all mobile wireless services pursuant to its Title III authority to regulate the use of radio spectrum, regardless of the nature or classification of the service being provided.”⁸¹

SouthernLINC also provides a useful framework for assessing the scope of the Commission’s Title III authority and concluding that this authority provides a sound basis for the adoption of a data roaming requirement. Specifically, SouthernLINC indicates that “Section 301 [of

⁷⁶ Cellular South Comments at 5.

⁷⁷ Leap Wireless Comments at 9.

⁷⁸ U.S. Cellular Comments at 9; *see* Blooston Comments at 1-2; BHN Comments at 10-13; Media Access Project Comments at 8; OPASTCO & NTCA Comments at 7-9; RTG Comments at 5-6; SouthernLINC Comments at 13; T-Mobile Comments at 16-17.

⁷⁹ Cellular South Comments at 7.

⁸⁰ *Second Further Notice* at para. 65; *see id.* at paras. 66-67.

⁸¹ SouthernLINC Comments at 12-13 (footnote omitted).

the Act] provides the Commission with the general authority to regulate ‘radio communications’ and ‘transmission of energy by radio.’ In addition to this general grant of authority, Title III also contains numerous provisions that further reinforce the scope of the Commission’s authority over all wireless services.”⁸²

SouthernLINC and other commenters supporting the position that the Commission may utilize its Title III authority to impose a data roaming requirement rely principally on the following specific provisions in Title III:

- *Section 303(b)*.—Gives the Commission express authority to impose obligations on licensees. This includes the authority to prescribe the nature of services provided by each class of licensees.⁸³

- *Section 303(f)*.—Authorizes the Commission to “[m]ake such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of [the] Act”⁸⁴

- *Section 303(g)*.—Provides broad authority to the Commission to “encourage the larger and more effective use of radio in the public interest.”⁸⁵

- *Section 303(r)*.—Grants authority to the Commission to “[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 [the] Act”⁸⁶

⁸² *Id.* at 13 (footnote omitted).

⁸³ 47 U.S.C. § 303(b); *see* BHN Comments at 11; Leap Wireless Comments at 11-12; RCA Comments at 5; SouthernLINC Comments at 13; T-Mobile Comments at 17.

⁸⁴ 47 U.S.C. § 303(f); *see* Leap Wireless Comments at 12.

⁸⁵ 47 U.S.C. § 303(g); *see* BHN Comments at 11; Leap Wireless Comments at 12; RCA Comments at 5.

⁸⁶ 47 U.S.C. § 303(r); *see* Blooston Comments at 2; BHN Comments at 11; Leap Wireless Comments at 13; RCA Comments at 6; RTG Comments at 6.

■ *Section 307(a)*.—Gives the Commission authority to issue licenses “if the public convenience, interest or necessity will be served thereby”⁸⁷

■ *Section 309(j)(3)*.—In connection with the Commission’s administration of the competitive bidding process (1) requires the Commission to “include safeguards to protect the public interest in the use of the spectrum” in connection with specifying “eligibility and other characteristics of . . . licenses”;⁸⁸ and (2) requires the Commission to take actions to promote “the development and rapid deployment of new technologies, products, and services for the benefit of the public” as well as “efficient and intensive use of the electromagnetic spectrum.”⁸⁹

■ *Section 316(a)(1)*.—Gives the Commission authority to modify station licenses “if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act . . . will be more fully complied with.”⁹⁰

Three points emerge from the discussion in the record of the Commission’s Title III authority. First, Congress has given the Commission broad and extensive licensing powers, as a means of “maintain[ing] the control of the United States over all channels of radio transmission”⁹¹ Second, these powers may be exercised regardless of whether the service involved is a telecommunications service or an information service, and regardless of whether it is offered on a common carriage or private carriage basis.⁹² And, third, in deciding whether and how to exercise

⁸⁷ 47 U.S.C. § 307(a); *see* BHN Comments at 12; SouthernLINC Comments at 14.

⁸⁸ 47 U.S.C. § 309(j)(3); *see* Cellular South Comments at 6; Leap Wireless Comments at 13; SouthernLINC Comments at 14.

⁸⁹ 47 U.S.C. § 309(j)(3); *see* Leap Wireless Comments at 13; RCA Comments at 6; SouthernLINC Comments at 14.

⁹⁰ 47 U.S.C. § 316(a)(1); *see* BHN Comments at 12-13; Leap Wireless Comments at 12; T-Mobile Comments at 17; SouthernLINC Comments at 14.

⁹¹ 47 U.S.C. § 301, *quoted in* Cellular South Comments at 4 n.10.

⁹² *See, e.g.*, Cellular South Comments at 6; SouthernLINC Comments at 15.

its licensing powers, the Commission must determine if action is necessary to achieve public interest objectives.⁹³

Commenters also have explained that there is precedent for the Commission to rely on its Title III authority to adopt a data roaming obligation. As Leap Wireless observes, “[f]rom the inception of modern wireless service, the Commission has utilized Title III to ensure that consumers have seamless connectivity across wireless networks.”⁹⁴

For example, nearly 15 years ago the Commission exercised its Title III licensing authority to “condition existing and future cellular, broadband PCS and covered SMR licenses upon compliance with [the Commission’s] resale rule”⁹⁵ The Commission determined that this exercise of its licensing authority with respect to these non-Title II services⁹⁶ was necessary “in order to promote competition”⁹⁷

AT&T had argued in the resale proceeding that any resale obligation imposed by the Commission “should apply only to services that are regulated under Title II; thus, a provider should not be obligated to offer a reseller the same package . . . that it offers to other large cus-

⁹³ See *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands; Revision of the Commission’s Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones; Biennial Regulatory Review—Amendment of Parts 1, 22, 24, 27, and 90 To Streamline and Harmonize Various Rules Affecting Wireless Radio Services; Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; and Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010*, WT Docket Nos. 06-150, 01-309, 03-264, 06-169, 96-86, 07-166, CC Docket No. 94-102, PS Docket No. 06-229, Second Report and Order, 22 FCC Rcd 15289, 15363-64 (para. 202) (2007) (“700 MHz Second Report and Order”), cited in SouthernLINC Comments at 15.

⁹⁴ Leap Wireless Comments at 14.

⁹⁵ *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, First Report and Order, 11 FCC Rcd 18455, 18459 (para. 7) (1996) (“Wireless Resale Order”), cited in Leap Wireless Comments at 14.

⁹⁶ See SouthernLINC Comments at 15 n.40.

⁹⁷ *Id.*

tomers.”⁹⁸ The Commission rejected this argument and confirmed its Title III authority to impose resale obligations, noting that “excluding from the resale rule all bundled packages that include non-Title II components would potentially offer carriers an easy means to circumvent the rule.”⁹⁹

At about the same time it imposed resale obligations through the use of its Title III authority, the Commission cited Sections 303(r) and 309 of the Act as providing it with “authority to impose a roaming requirement in the public interest” on cellular, broadband PCS, and covered SMR licensees.¹⁰⁰ The Commission determined that its imposition of roaming obligations would serve the public interest because “the availability of roaming on broadband wireless networks is important to the development of nationwide, ubiquitous, and competitive wireless voice communications, and [because] market forces alone may not be sufficient to cause roaming to become widely available.”¹⁰¹

More recently, the Commission has relied on its Title III authority to impose common carrier-type obligations on 700 MHz C Block licensees.¹⁰² The open platform rules adopted by the Commission require C Block licensees “to allow customers, device manufacturers, third-party application developers, and others to use or develop the devices and applications of their choosing in C block networks”¹⁰³ The Commission cited numerous sources of authority in

⁹⁸ *Wireless Resale Order*, 11 FCC Rcd at 18471 (para. 31) (citing comments filed by AT&T at 26 n.56).

⁹⁹ *Id.*

¹⁰⁰ *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, Second Report and Order and Third Notice of Proposed Rulemaking, 11 FCC Rcd 9462, 9469 (para. 10) (1996).

¹⁰¹ *Id.* at 9464 (para. 2); *see Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services*, WT Docket No. 00-193, Notice of Proposed Rulemaking, 15 FCC Rcd 21628, 21630 (para. 5) (2000).

¹⁰² *See* RCA Comments at 5.

¹⁰³ *700 MHz Second Report and Order*, 22 FCC Rcd at 15365 (para. 206).

Title III as a basis for establishing these requirements.¹⁰⁴ Leap Wireless points out that the Commission adopted the open-platform requirement as part of its balanced spectrum policy “and a recognition that ‘it may be necessary to vary the regulation of spectrum use to achieve certain critical public interest objectives.’”¹⁰⁵

These precedents illustrate the fact that the Commission has not hesitated to invoke the sweeping scope of its Title III authority to condition licenses and take other actions to further public interest objectives. Although Cellular South does not believe that the Commission’s Title III authority is unbounded (for example, the Commission’s imposition of obligations must be shown to have a reasonable public interest basis—a requirement that is easily satisfied in the instant case by acknowledging the public’s interest in being able to access compatible wireless networks when outside their home carrier’s service area), the Commission’s powers under Title III are sufficient to serve as a basis for adopting a data roaming mandate.

AT&T and Verizon attempt to cast doubt on the scope of the Commission’s Title III authority by advancing arguments along two fronts. They contend, first, that basing a data roaming mandate on the public interest standard of Title III would essentially give the Commission limitless authority, and, second, that the specific sections of Title III referenced by the Commission in the *Second Further Notice* do not add up to a sufficient basis for prescribing a data roaming requirement.¹⁰⁶ Their arguments are not persuasive.

¹⁰⁴ *Id.* at 15365-66 (para. 207 & nn.470-471) (citing Sections 303(b), 303(g), 303(r), and 309(j)(3) of the Act).

¹⁰⁵ Leap Wireless Comments at 17 (quoting *700 MHz Second Report and Order*, 22 FCC Rcd at 15364 (para. 202)).

¹⁰⁶ The Big Two also contend that, in any event, any invocation of Title III by the Commission as a basis for a data roaming obligation is trumped by the restrictions of Section 332(c)(2) of the Act. This argument is addressed separately in Section II.B.3., *infra*.

AT&T criticizes any reliance upon the Commission’s licensing authority in Section 301 and Section 307(a) because “these provisions are far too general to be construed to authorize the imposition of common carrier obligations under Title III on even new licensees.”¹⁰⁷ AT&T continues in this vein, declaring that “[i]f Title III’s licensing and auction provisions, including sections 301, 307, 309, and 316, provide the Commission with general authority to adopt any regulations for wireless providers that the agency deems to be in ‘the public interest,’ then that authority is completely unbounded.”¹⁰⁸

AT&T’s proclamations overstate its case. As Cellular South has discussed, the Commission would not be venturing into new territory by using its licensing authority to establish a data roaming mandate: It has already relied on its Title III licensing powers to impose resale and voice roaming obligations. The fact that the Commission’s authority is “general” does not circumscribe the scope of that authority when the Commission invokes the authority to adopt specific requirements, so long as the Commission explains the public interest basis for its use of its Title III authority. While Cellular South agrees with SouthernLINC that the public interest standard is the touchstone for Commission action under Title III,¹⁰⁹ AT&T is wrong in implying that the Commission cannot draw upon specific provisions in Title III to couple with its public interest findings in support of a data roaming obligation.

Before turning to these specific provisions, it also should be noted that, regardless of AT&T’s concerns regarding the scope of the Title III public interest standard, Congress has in fact provided the Commission with expansive powers in Title III. As Cellular South has ex-

¹⁰⁷ AT&T Comments at 23.

¹⁰⁸ *Id.* at 25.

¹⁰⁹ *See* SouthernLINC Comments at 15-16.

plained in its Comments,¹¹⁰ the courts have held that Congress has given the Commission “broad authority” to regulate the use of radio spectrum,¹¹¹ as well as “enormous discretion” in prescribing radio spectrum license obligations.¹¹² Although the agency’s licensing authority is bounded by its need to show a public interest basis for its actions, nonetheless this authority is intended to be expansive, and it is reasonable to conclude that promulgation of a data roaming requirement is within the scope of this authority.

The Big Two principally focus on two provisions in Title III in their arguments that the specific sections of Title III do not provide a sufficient basis for prescribing a data roaming requirement. First, Verizon argues that the Commission’s authority under Section 303(b) to “[p]rescribe the nature of the service to be rendered” by each licensee should be read narrowly.¹¹³ Verizon argues that this phrase should be read only to confer authority to designate types of services offered by various classes of radio stations, and does not grant authority to the Commission to determine “how licensees *offer* a particular service to their customers.”¹¹⁴

Cellular South agrees with the Commission, however, that Section 303 gives the Commission “the authority to establish *operational obligations* for licensees that further the goals and requirements of the Act if the obligations are in the ‘public convenience, interest, or necessity’ and not inconsistent with other provisions of law.”¹¹⁵ The narrow reading favored by Verizon

¹¹⁰ Cellular South Comments at 4-5.

¹¹¹ *United States v. Southwestern Cable*, 392 U.S. 157, 1568 (1968).

¹¹² *Schurz Communications v. FCC*, 982 F.2d 1043, 1048 (7th Cir. 1992).

¹¹³ Verizon Comments at 40.

¹¹⁴ *Id.* (emphasis in original); see AT&T Comments at 5.

¹¹⁵ *Second Further Notice* at para. 66 (footnote omitted) (emphasis added).

would unduly circumscribe the Commission’s responsibility pursuant to Section 301 “to maintain the control of the United States over all the channels of radio transmission”¹¹⁶

If the Commission cannot exercise its licensing authority to ensure that licensees provide their licensed services in a manner that comports with the Commission’s competitive, public safety, consumer welfare, and other policy goals and objectives, then the Commission could not meet its Title III public interest responsibilities. Cellular South thus agrees with Leap Wireless that Section 303(b), combined with other provisions of Section 303, provides a basis for establishing data roaming obligations:

Such obligations would constitute a regulation of “radio communications,” and in particular the Commission may implement data roaming obligations as a determination of the “nature of the service to be rendered” by licensees, and as a condition of licensing, in a manner that would encourage the more effective use of radio.¹¹⁷

Second, Verizon contends that the provisions of Section 309(j)(3) should be read as being linked to specific competitive bidding design tasks listed in Section 309, and should not be construed to provide any authority to impose obligations on spectrum licensees.¹¹⁸ Verizon misreads Section 309(j)(3). The statute provides that:

in specifying eligibility and other characteristics of . . . licenses[,] the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the . . . development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas¹¹⁹

These statutory provisions make it clear that the Commission, in establishing eligibility criteria, and in specifying other license characteristics, has authority to regulate *the use of the spectrum* to

¹¹⁶ 47 U.S.C. § 301.

¹¹⁷ Leap Wireless Comments at 12. Leap Wireless also refers to Section 303(f) and Section 303(g). *Id.*

¹¹⁸ Verizon Comments at 39; *see* AT&T Comments at 22-23.

¹¹⁹ 47 U.S.C. § 309(j)(3).

protect the public interest and to ensure that the public benefits from new technologies, products, and services.¹²⁰ This is precisely what the Commission would seek to accomplish in prescribing a data roaming mandate. The mandate would require that host carriers, in using their licensed spectrum, must enter into arrangements with requesting carriers to ensure the availability of roaming for customers of the requesting carriers. For all the reasons presented in the record of this proceeding,¹²¹ the mandate would safeguard the public interest and would facilitate the deployment of advanced broadband infrastructure and services throughout the Nation, and particularly in rural areas.

Finally, Cellular South agrees with Leap Wireless that, “[t]o the extent that imposing automatic data roaming obligations may be viewed as a modification of existing license conditions, the Commission may implement such modifications during this rulemaking proceeding, without the need for individual licensee hearings.”¹²² It is well settled that, although the Commission may not use its rulemaking authority to “avoid the adjudicatory procedures required for granting and modifying *individual* licenses[,]”¹²³ the Commission may revise requirements applicable to *all* licensees through a rulemaking proceeding that results in generally applicable rules.¹²⁴ The revised requirements “are *not* . . . invalid because they will result in the modification of existing licenses”¹²⁵

¹²⁰ Verizon is incorrect in arguing that Section 309(j)(3) “empowers the Commission only to design the competitive bidding system [and to] address[] bidding rules” Verizon Comments at 39. The plain language of Section 309(j)(3) extends beyond the limited scope claimed by Verizon.

¹²¹ See the discussion in Section II.A., *supra*.

¹²² Leap Wireless Comments at 12-13.

¹²³ *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1318 (D.C. Cir. 1995) (“*Committee for Effective Cellular Rules*”) (emphasis in original).

¹²⁴ *Id.* at 1319.

¹²⁵ *Id.* (emphasis added).

2. The Commission Has Authority Under Title II of the Act.

Cellular South agrees with SouthernLINC that Title II of the Act provides the Commission with “separate and independent authority to take action regarding automatic roaming for all mobile wireless services”¹²⁶

The Big Two attempt to attack the Commission’s authority to impose a data roaming mandate pursuant to Title II by arguing, first, that data roaming is not a telecommunications service, and second, that, even if it were, it is not offered on a common carriage basis.¹²⁷ Their attack does not have enough ammunition.

Verizon maintains that data roaming is not a stand-alone offering of telecommunications, because, in many instances, data roaming involves information and content being provided by the host carrier.¹²⁸ Verizon claims that there are instances in which “the host carrier provides Internet access and other information directly to the roaming subscriber,”¹²⁹ and that, in such cases, “the host carrier is ‘making available information via telecommunications’ to the subscriber. Providing such information directly to the subscriber therefore can only properly be classified as an information service.”¹³⁰

The proper interpretation, however, is that data roaming is nothing more nor less than a wholesale, carrier-to-carrier transmission service, which places it squarely within the statutory

¹²⁶ SouthernLINC Comments at 18.

¹²⁷ As with their arguments concerning Title III, the Big Two also maintain that the Commission cannot use its Title II authority a basis for a data roaming obligation because of the restrictions of Section 332(c)(2) of the Act. As previously noted, this argument is addressed separately in Section II.B.3., *infra*.

¹²⁸ Verizon Comments at 25; *see* AT&T Comments at 27.

¹²⁹ Verizon Comments at 25.

¹³⁰ *Id.* at 25-26.

definition of “telecommunications.”¹³¹ As Cellular South has explained in its Comments:

The fact that data roaming is provided at the wholesale level means that, even though the retail service provided to the end-user customer may be classified as an information service, this classification has no bearing on the regulatory treatment of the wholesale service provided by the host carrier to the carrier whose customer is roaming in the host carrier’s service area.¹³²

MetroPCS has presented a detailed technical description of how wireless data roaming works for a CDMA service provider.¹³³ In describing roaming data sessions, MetroPCS demonstrates that the “foreign agent” component of the host carrier’s packet data switching node (“PDSN”) “transmit[s] the customer’s data traffic—*unchanged*—back to the [requesting carrier’s] PDSN [Home Agent (“HA”) component]. This transmission from the handset to the PDSN HA is a pure transmission service that is virtually indistinguishable from the manner in which roaming transmissions occur during a voice roaming session.”¹³⁴

MetroPCS explains that its technical description demonstrates that the host carrier “transmits the customer’s data to and from the [requesting carrier’s] network; the data is only acted upon, or the content is only provided by, the [requesting carrier].”¹³⁵ MetroPCS further explains that “[t]he point at which the customer’s data is acted upon by the [requesting carrier] is when the provided service becomes an information service[,]”¹³⁶ and that “[t]his important distinction removes much of the controversy from the wireless data roaming discussion—the send-

¹³¹ The Act defines “telecommunications” as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43).

¹³² Cellular South Comments at 7; *see* Leap Wireless Comments at 20; SouthernLINC Comments at 18-20.

¹³³ MetroPCS Comments at 8-17. MetroPCS notes that it is its understanding that the process described in its comments also applies to other air interface technologies, including 4G systems such as LTE. *Id.* at 8-9.

¹³⁴ *Id.* at 13.

¹³⁵ *Id.* at 21.

¹³⁶ *Id.*

ing of unaltered data from the handset to the [requesting carrier] by the [host carrier] is telecommunications.”¹³⁷

Although Verizon attempts to posit circumstances in which it claims the host carrier provides Internet access and other information directly to the roaming customer, making the host carrier’s data roaming service an information service, SouthernLINC correctly recognizes that the functions involved “are essentially addressing, registration, and authentication functions such as those used in the routing of *any* roaming call, whether voice, data, or push-to-talk/dispatch, and thus fall within the ‘management exception’ in the ‘information service’ definition.”¹³⁸

Cellular South therefore believes that there is more than sufficient information in the record to support a reasonable and informed conclusion by the Commission that data roaming service is a wholesale transmission service correctly classified as “telecommunications” pursuant to the statutory definition.

In order to conclude that data roaming is subject to regulation under Title II of the Act, it next must be determined whether data roaming is a “telecommunications service” as defined by the Act.¹³⁹ Both AT&T and Verizon argue that data roaming cannot be classified as a telecommunications service, but their arguments are not convincing.

AT&T contends that data roaming cannot be regulated under Title II unless it is offered on a common carriage basis, which, according to AT&T, it is not. To support its claim, AT&T

¹³⁷ *Id.* AT&T has described data roaming in a similar manner. *See* AT&T Comments at 16 (explaining that “[d]ata roaming is . . . a wholesale, provider-to-provider service that facilitates the offering of . . . wireless broadband Internet access. Data roaming is a service that directs Internet traffic back to the home provider’s non-interconnected data network, where the home provider then completes a connection allowing its customers to communicate with servers and other computers”).

¹³⁸ SouthernLINC Comments at 20.

¹³⁹ The Act defines the term to mean “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” 47 U.S.C. § 153(46).

first indicates that it offers data roaming only on an individual, case-by-case basis,¹⁴⁰ and that, overall, “the marketplace is already responding [to data roaming needs] with private carriage contracts”¹⁴¹ AT&T then argues that the only way the Commission could regulate data roaming pursuant to Title II would be to compel its offering on a common carriage basis, but that there is no basis for doing so under the terms of the *NARUC I* test.¹⁴² AT&T rests this argument on its claim that a legal compulsion imposed by the Commission requiring host carriers to provide data roaming on a common carriage basis would not be appropriate because the wireless marketplace is functioning on its own.¹⁴³

Verizon supports AT&T’s conclusion, quoting the *NARUC I* test that “[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[,]”¹⁴⁴ and then observing that it “does not hold itself out as providing data roaming indifferently to all potential requesting carriers at a standardized price.”¹⁴⁵ Verizon concludes that “[t]here is no legal compulsion to provide data roaming as a common carrier service, and Verizon Wireless does not provide the service on that basis.”¹⁴⁶

¹⁴⁰ AT&T Comments at 29 (noting that “AT&T today offers data roaming only on a private carriage basis and only to other wireless data providers. AT&T does not have a standing roaming offer to all similarly situated providers, but rather negotiates specific contracts on an individualized, case-by-case basis.”).

¹⁴¹ *Id.*; see ACS Wireless Comments at 1 (noting that it has negotiated roaming agreements with larger and smaller carriers, and “[n]ot once has a larger provider refused to negotiate a data roaming arrangement with ACSW”).

¹⁴² AT&T Comments at 29 (citing *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) (“*NARUC I*”). The court in *NARUC I* adopted a two-pronged test for deciding whether a service must be treated as a common carriage service: (1) The service provider’s actions demonstrate that the provider intends to serve the public indifferently; or (2) the Commission determines that the public interest requires that the service must be offered indiscriminately to the public (the “legal compulsion” prong). *NARUC I*, 525 F.2d at 642.

¹⁴³ *Id.*

¹⁴⁴ *NARUC I*, 525 F.2d at 641, quoted in Verizon Comments at 30.

¹⁴⁵ Verizon Comments at 31.

¹⁴⁶ *Id.*

Cellular South agrees with MetroPCS that a more reasonable way of assessing whether the data roaming offerings of a host carrier meets the first prong of the *NARUC I* test is to examine the host carrier's offerings to its own customers. MetroPCS concludes that "a carrier who offers wireless data roaming services to its own customers when they roam out of the local market where they are based is serving a sufficient class of customers to effectively be deemed to be serving the public."¹⁴⁷ Both AT&T and Verizon offer data roaming on a common carriage basis pursuant to this test, since each of them offers the service to millions of their customers.

There also is a basis for concluding that there is a legal compulsion for data roaming to be offered on a common carriage basis, pursuant to the second prong of the *NARUC I* test, because there are compelling public interest reasons supporting such a conclusion. A legal compulsion that data roaming must be offered indiscriminately to all requesting carriers would be justified because, as Cellular South has demonstrated, consumers would benefit from the availability of data roaming on a common carriage basis, investment in advanced mobile broadband infrastructure, especially in rural and small regional markets, would be promoted, and wireless competition would be enhanced.¹⁴⁸

Finally, it is important to note that treating data roaming as a telecommunications service subject to regulation under Title II is consistent with the decision of the Supreme Court in the *Brand X* decision.¹⁴⁹ In that case, the Court indicated that the definition of a service or product is dictated by "what the consumer perceives to be the integrated finished product."¹⁵⁰ As MetroPCS explains, the finished product being acquired from the ghost carrier by the requesting carrier is a

¹⁴⁷ MetroPCS Comments at 24 (footnote omitted).

¹⁴⁸ See Sections II.A.1, II.A.2, and II.A.3, *supra*.

¹⁴⁹ *National Cable & Telecom. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005) ("*Brand X*").

¹⁵⁰ *Id.* at 990.

simple transmission service, and therefore is correctly defined as a telecommunications service for purposes of Title II.¹⁵¹

3. Section 332(c)(2) of the Act Does Not Bar Imposition of a Data Roaming Mandate.

The Big Two contend that the provisions of Section 332(c)(2) of the Act¹⁵² constitute a bar to the imposition of any data roaming obligation.¹⁵³ Their arguments are unavailing.

Section 332(c)(1) of the Act provides that:

A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this Act, except for such provisions of title II as the Commission may specify by regulation as inapplicable to that service or person.¹⁵⁴

Section 332(c)(2) provides that “[a] person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this Act.”¹⁵⁵ Section 332(d)(1) of the Act defines “commercial mobile service” to mean “any mobile service . . . that is provided for profit and makes interconnected service 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, as specified by regulation by the Commission[.]”¹⁵⁶ Section 332(d)(2) defines “interconnected service” to mean, in pertinent part, “service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission)[.]”¹⁵⁷ and Section 332(d)(3) defines “private mobile service” to mean “any mobile

¹⁵¹ MetroPCS Comments at 28; *see* Cellular South Comments at 9.

¹⁵² 47 U.S.C. § 332(c)(2).

¹⁵³ *See* AT&T Comments at 12-19; Verizon Comments at 19-23.

¹⁵⁴ 47 U.S.C. § 332(c)(1).

¹⁵⁵ 47 U.S.C. § 332(c)(2).

¹⁵⁶ 47 U.S.C. § 332(d)(1).

¹⁵⁷ 47 U.S.C. § 332(d)(2).

service . . . “that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.”¹⁵⁸

AT&T argues that roaming requirements are “quintessential common carrier obligations”¹⁵⁹ and that Section 332(c)(2) bars the Commission from imposing these common carriage obligations—in the form of a data roaming mandate—“on mobile data services that do not offer interconnection with the public switched networks and that therefore are not CMRS services.”¹⁶⁰

AT&T maintains that, even if the Commission were to determine that data roaming is a telecommunications service, it could not treat data roaming as a common carrier service because data roaming, which is a non-interconnected service, does not fall within the Section 332(d)(1) definition of CMRS.¹⁶¹ Finally, AT&T argues that the Commission has already determined that common carrier obligations cannot be imposed on non-CMRS private mobile services.¹⁶²

The Commission’s application of either its Title II or Title III authority to prescribe a data roaming obligation need not be deflected by the Big Two’s arguments regarding the supposedly categorical prohibitions of Section 332(c)(2).

If the Commission decides to adopt a data roaming mandate through the exercise of its Title II authority, the Commission can reasonably conclude that data roaming is subject to Title II regulation because it is the functional equivalent of CMRS. Therefore, a carrier providing data roaming would not be subject to any Section 332(c)(2) prohibition and instead would be treated as a common carrier pursuant to Section 332(c)(1). Since data roaming facilitates both voice and

¹⁵⁸ 47 U.S.C. § 332(d)(3).

¹⁵⁹ AT&T Comments at 12; *see* Verizon Comments at 19-20.

¹⁶⁰ AT&T Comments at 13; *see* Verizon Comments at 20.

¹⁶¹ AT&T Comments at 13.

¹⁶² AT&T Comments at 17 (citing *2007 Report and Order*, 22 FCC Rcd at 15839 (para. 60)).

data communications, it can be viewed as functionally equivalent to CMRS even though it is not an interconnected service.

Interconnection to the public switched network need not be treated as the *sine qua non* for establishing functional equivalency. Although AT&T argues that data roaming and CMRS are not functional equivalents because data roaming is not an economic substitute for CMRS and data roaming is not similar to traditional telephone service,¹⁶³ a more salient point is that, from the perspective of consumers, data roaming services can be used both for voice and data communications:

Customers obtain voice and data roaming by using the same devices and commonly buy service plans which incorporate both features. The migration of networks to an all IP world, which will be hastened by the introduction of LTE, means that soon even conventional voice traffic will look more like data traffic so that the distinction, to the extent there is any, between the two will be hopelessly blurred.¹⁶⁴

In addition, as Leap Wireless points out, messaging and other data services are being used increasingly by consumers as substitutes for traditional voice services.¹⁶⁵ The ongoing convergence of voice and data services, illustrated by consumers' substitution of VoIP service for traditional

¹⁶³ *Id.* at 17-18; *see* Verizon Comments at 22.

¹⁶⁴ U.S. Cellular Comments at 7. The Commission has determined that customer perception plays a central role in the application of the functional equivalency test:

An important aspect of the [functional equivalency] test, as it has evolved, involves reliance upon customer perception to help determine whether the services being compared provide the same or equivalent functions. The test asks whether the services at issue are “different in any material functional respect” and requires the Commission to examine both the nature of the services and the customer perception of the functional equivalency of the services. *The test presumes that not all differences between services make them a priori unlike.* Rather, the differences must be functionally material or, put another way, of practical significance to customers.

Beehive Tel. v. Bell Operating Cos., File No. E-94-57, Memorandum Opinion and Order, 10 FCC Rcd 10562, 10567 (para. 28) (1995) (footnotes omitted) (emphasis added).

¹⁶⁵ Leap Wireless Comments at 25 & n.84; *see* NTELOS Comments at 4.

voice service,¹⁶⁶ is leading to a growing expectation by consumers “that their devices and providers will seamlessly handle both voice and data communications.”¹⁶⁷ Indeed, the evolution to 4G services such as LTE is rapidly moving the industry toward the day when *all* voice traffic will be IP-based. By some predictions, 4G voice traffic may be transmitted as VoIP service as early as the end of 2011 or early 2012.

Alternatively, if the Commission rests its prescription of a data roaming requirement on the Commission’s Title III authority, there are ample grounds for concluding that Section 332(c)(2) would not somehow constrain the scope of the Commission’s authority.

A linchpin of AT&T’s argument that Section 332(c)(2) bars the invocation of Title III to adopt a data roaming mandate is that the Commission has already determined that Title III authorizes the Commission “only to establish license conditions and operational obligations that ‘will further the goals of the Communications Act without contradicting any basic parameters of the agency’s authority.’”¹⁶⁸

AT&T claims that Section 332(c)(2) is such a “basic parameter” of the Commission’s authority, in that Section 332(c)(2) prohibits treating a private mobile service carrier as a common carrier for any purpose under the Act. AT&T’s analysis is flawed, however, because the imposition of an automatic data roaming obligation on host carriers (assuming *arguendo* for purposes of this discussion that host carriers are private mobile service providers for purposes of

¹⁶⁶ See Om Malik, “417 Billion Mobile VoIP Minutes by 2015,” GIGAOM (July 1, 2010), accessed at <http://gigaom.com/2010/07/01/mobile-voip-forecast/> (reporting that “[a] UK-based research group says the total number of mobile VoIP minutes will jump from 15 billion in 2010 to 470.6 billion by 2015, thanks to the proliferation of 3G and 4G networks. Juniper Research says the biggest boost will come from the U.S., which will account for 135 billion mobile VoIP minutes by 2015. Juniper recently forecasted that there will be 100 million mobile VoIP users by 2012.”).

¹⁶⁷ Leap Wireless Comments at 25 (footnote omitted).

¹⁶⁸ AT&T Comments at 25-26 (quoting *700 MHz Second Report and Order*, 22 FCC Rcd at 15365 (para. 207)).

Section 332) would not amount to treating host carriers as common carriers and would not subject them to the full panoply of Title II regulations.

In establishing operational obligations on host carriers, the Commission would be basing its action on the fact that the carriers are licensees and are subject to the full scope of the Commission's Title III authority. The operational obligations would be imposed based on the Commission's Title III authority, they would be grounded in public interest findings made by the Commission as required by Title III, and they would serve as common carrier-type requirements. That is, the Commission would prescribe the duty to provide service upon reasonable request; the provision of service with reasonable rates and on reasonable terms; the provision of service free from any unreasonable discrimination. The Commission may impose these obligations without treating host carriers as Title II common carriers.

An instructive analogy involves the Commission's application of enhanced ("E911") requirements to VoIP service providers.¹⁶⁹ In adopting rules requiring providers of interconnected VoIP service to supply E911 capabilities to their customers, the Commission in the *VoIP E911 Order* invoked its Title I authority and determined that "regardless of the regulatory classification, the Commission has ancillary jurisdiction to promote public safety by adopting E911 rules for interconnected VoIP services."¹⁷⁰ In taking this action, the Commission underscored the fact that its action "in no way prejudices how the Commission might ultimately classify these [VoIP] services. To the extent that the Commission later finds these services to be telecommunications services, the Commission would have additional authority under Title II to adopt these rules."¹⁷¹

¹⁶⁹ *IP-Enabled Services*, WC Docket No. 04-36, *E911 Requirements for IP-Enabled Service Providers*, WC Docket No. 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (2005) ("*VoIP E911 Order*").

¹⁷⁰ *Id.* at 10261 (para. 26).

¹⁷¹ *Id.*

In the *VoIP E911 Order* the Commission acted to impose public safety obligations typically applied to telecommunications service providers to entities that the Commission had not classified as telecommunications service providers. Thus, the obligations applied even though VoIP providers were not treated as telecommunications service providers. The Commission concluded that, although it was committed to allowing VoIP services “to evolve without undue regulation in accord with our nation’s policies for Internet services,”¹⁷² it was nonetheless taking action based on its “obligation to promote safety of life and property and to encourage and facilitate the prompt deployment throughout the United States of a seamless, ubiquitous, and reliable end-to-end infrastructure for public safety.”¹⁷³

Similarly, in the case of data roaming, the Commission may use its Title III licensing authority to impose Title II-type common carrier obligations—in the form of a data roaming mandate—on host carriers without treating host carriers as common carriers for purposes of Section 332(c)(2).

4. The Commission Has Ancillary Authority Under Title I of the Act.

Verizon would have the Commission believe that it lacks ancillary authority to adopt a data roaming mandate because it cannot meet the three-pronged test for the use of ancillary jurisdiction. The test requires the Commission to (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.¹⁷⁴ AT&T declaims in similar fashion, emphasizing its view that a data roaming obligation is “flatly barred by Section 332(c)(2)’s prohibition on the imposition of

¹⁷² *Id.* at 10246 (para. 4).

¹⁷³ *Id.* (internal quotation marks and footnotes omitted).

¹⁷⁴ Verizon Comments at 37.

common carrier obligations on non-interconnected services under any provision of the Act.”¹⁷⁵ These arguments can be dismissed as irrelevant.

The Big Two’s contentions regarding the limits of the Commission’s ancillary jurisdiction have no application because, as Cellular South has indicated in its Comments, the Commission has direct statutory to impose a data roaming obligation under Title II and Title III of the Act.¹⁷⁶ In addition, the Commission’s establishment of a data roaming obligation would be reasonably ancillary to the performance of its responsibilities under the Act, because the obligation would advance numerous responsibilities set forth in Title III.¹⁷⁷ Moreover, as the record also demonstrates and as Cellular South has explained in the previous section, the Commission’s reliance on its Title I authority would not be inconsistent with the Act because, contrary to AT&T’s assertions, Section 332(c)(2) does not prevent the Commission from imposing a data roaming requirement on host carriers.

Moreover, as Leap Wireless explains, the Commission’s use of its Title I ancillary authority to adopt a data roaming mandate would not conflict with the recent *Comcast* decision¹⁷⁸ because in *Comcast* the court itself recognized that the Commission has “express and expansive authority to regulate” radio transmissions, including cellular telephony.¹⁷⁹

Finally, Cellular South agrees with U.S. Cellular that an additional ground supporting the Commission’s Title I authority is the fact that “[a]ncillary jurisdiction under Title I would be ap-

¹⁷⁵ AT&T Comments at 30.

¹⁷⁶ Cellular South Comments at 10.

¹⁷⁷ See Section II.B.1., *supra*.

¹⁷⁸ *Comcast Corporation v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (“*Comcast*”).

¹⁷⁹ *Id.* at 645.

plicable to data roaming as a logical outgrowth of the FCC’s undoubted Title II jurisdiction over voice roaming.”¹⁸⁰

5. Constitutional Arguments Raised by Verizon Lack Merit.

Verizon expresses concern that the imposition of a data roaming obligation on existing licensees would run afoul of the U.S. Constitution because such an obligation would interfere with the property rights of network operators and would amount to a physical taking.¹⁸¹

Verizon hinges its argument on its claim that the Commission “lacks authority to adopt rules that raise a substantial constitutional issue absent a clear statutory mandate to do so[.]”¹⁸² and that, “[i]n this case, the Act does not provide express statutory authority to impose data roaming rules on existing licenses.”¹⁸³

As the record shows, and as Cellular South has discussed,¹⁸⁴ there is no basis for Verizon’s argument. There is convincing support in the record for the conclusion that the Commission does have express statutory authority in Titles II and III, and ancillary authority in Title I, to adopt a data roaming requirement. Moreover, the Commission has authority to impose this requirement on existing licensees.¹⁸⁵ Consideration of Verizon’s constitutional arguments need proceed no further.

C. The Commission Should Adopt a Presumption That Requests for Data Roaming Are Reasonable.

Cellular South supports commenters who advocate that, if the Commission adopts a data roaming requirement, then it should establish a presumption that a request to a host carrier, made

¹⁸⁰ U.S. Cellular Comments at 7.

¹⁸¹ Verizon Comments at 43-44. According to Verizon, a physical taking would follow in the wake of a data roaming mandate as a result of the fact that “[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.” *Id.* at 44 (footnote omitted).

¹⁸² *Id.* at 42.

¹⁸³ *Id.* at 43.

¹⁸⁴ See Section II.B.1., *supra*.

¹⁸⁵ See *Committee for Effective Cellular Rules*, 53 F.3d at 1318-19.

by a requesting carrier that uses, or proposes to use, a technologically compatible network, is a reasonable request.¹⁸⁶ The presumption should be rebuttable, which would provide the host carrier with ample opportunity to provide information to the Commission for its use in determining whether the presumption should be sustained. The presumption would safeguard the practical effectiveness of the data roaming mandate by ensuring that host carriers would respond promptly to roaming requests, and by “avoid[ing] actions that unduly delay or stonewall the course of negotiations regarding [the roaming] request.”¹⁸⁷

AT&T opposes a reasonable request presumption, but its arguments lack merit. AT&T claims that a presumption should not be established because “[t]here is no one-size-fits-all presumption . . . the reasonableness of a data roaming request will vary greatly depending on the technologies, frequency bands, devices, and services involved. . . . The simple fact is that not all data roaming requests will be reasonable.”¹⁸⁸ These observations provide no support for AT&T’s objection to a presumption. If a particular roaming request is not reasonable, the host carrier can make that showing and the presumption will not apply. Cellular South agrees with the Commission’s conclusion in the *Reconsideration Order* that the presumption serves a public policy purpose by deterring stonewalling by recalcitrant host carriers.

AT&T also maintains that a reasonable request presumption would “straightjacket negotiations [and] skew providers toward accepting harmful requests in order to avoid Commission litigation.”¹⁸⁹ It is difficult to understand how the presumption would handicap negotiations any more than a rule that required the requesting carrier to prove the reasonableness of its request in

¹⁸⁶ See, e.g., Leap Wireless Comments at 28; RCA Comments at 16; SouthernLINC Comments at 10-11; Sprint Comments at 5-6; T-Mobile Comments at 20.

¹⁸⁷ *Reconsideration Order* at para. 38 (footnote omitted).

¹⁸⁸ AT&T Comments at 59.

¹⁸⁹ *Id.* at 60.

the first instance. It is more reasonable to conclude that the substantial majority of data roaming negotiations—assuming good faith on both sides and a mutual commitment to comply with the Commission’s data roaming mandate—would proceed in a manner unaffected by the presumption. In disputed cases, however, the better means of advancing a data roaming mandate is to apply the presumption in favor of the requesting carrier. As to AT&T’s apparent timidity regarding the prospect of Commission litigation, Cellular South is confident in predicting that neither of the Big Two would shrink from the pursuit of litigation if it found it necessary to fend off “harmful” requests.

Finally, AT&T contends that adoption of a reasonable request presumption “would face a high legal hurdle.”¹⁹⁰ There is, however, direct precedent for establishing a presumption that a data roaming request is reasonable: The *2007 Report and Order* established the same presumption in the case of roaming requests involving voice services.¹⁹¹ That precedent should be applied here because, as Cellular South has discussed, the presumption would advance the Commission’s data roaming policies by curbing the ability of host carriers to stonewall data roaming requests. At the same time, if the Commission makes the presumption rebuttable (as it did in the case of voice roaming), then host carriers are protected against being required to comply with unreasonable data roaming requests.

D. A Data Roaming Requirement Should Apply to LTE and Other 4G Services.

Cellular South has advocated in its Comments that the Commission, in establishing a data roaming mandate, should not treat LTE and other 4G networks any differently than any other air

¹⁹⁰ *Id.* at 56.

¹⁹¹ *2007 Report and Order*, 22 FCC Rcd at 15831 (para. 33).

interface platforms that are made subject to the mandate.¹⁹² Arguments against this approach are unpersuasive.

AT&T cries wolf on several fronts in attempting to support its conclusion that “the Commission clearly should not apply any new common carrier data roaming rules to 4G services.”¹⁹³ First, AT&T claims that, because there is no real-world experience with 4G services, there is no way to know whether 4G roaming would cause congestion or other problems. Next, AT&T worries that requiring host carriers to consider the impact of 4G roaming “would add a layer of complexity and expense that could only slow down the deployment of 4G services.”¹⁹⁴ Finally, AT&T argues that, since LTE 4G networks will carry both voice and data traffic over the same data network, “any action that increases congestion would thus harm voice services in addition to data services.”¹⁹⁵

In Cellular South’s view, all of these issues can be addressed and resolved in the context of applying a roaming mandate to 4G services. If AT&T’s arguments are taken to their logical conclusion, it would be impossible ever to establish a roaming requirement in the case of a new technology. But adopting AT&T’s prophylactic approach to the decision whether to impose data roaming requirements would not be sound public policy. As MetroPCS has explained, too much is at stake:

[C]ustomers are not inclined to select a carrier that provides them with only limited data coverage – when a customer selects a provider based on that provider’s LTE offering, you can be certain that such a customer expects that service to work nationwide. . . . In order for the Commission to have LTE deployment now by small, rural and mid-tier carriers they need to know that they will have access to

¹⁹² Cellular South Comments at 23.

¹⁹³ AT&T Comments at 66 (footnote omitted).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

[other carriers'] LTE [networks] once they have upgraded. Until they have that assurance, any decision to deploy LTE will inevitably be delayed.¹⁹⁶

Cellular South agrees with U.S. Cellular that a “can do” approach is warranted in addressing whatever technological issues may be posed in connection with applying a roaming requirement to LTE and other 4G technologies. U.S. Cellular stresses that “the FCC [must make] it clear *now* that any data roaming requirements will apply to 3G, 4G and all future improvements in wireless technology.”¹⁹⁷ Only such action by the Commission would ensure that the necessary actions to resolve technological problems will be taken.¹⁹⁸ Cellular South shares U.S. Cellular’s belief “that carriers should meet each other halfway and thus serve the interests of their customers, which are, of course, synonymous with the public interest.”¹⁹⁹

III. CONCLUSION.

The record provides abundant support for the conclusion that a data roaming obligation is a reasonable, necessary, and legally defensible extension of the Commission’s voice roaming
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¹⁹⁶ MetroPCS Comments at 45-46.

¹⁹⁷ U.S. Cellular Comments at 4 (emphasis in original); *see* CBW Comments at 10-11 (discussing several reasons why it is unlikely that the deployment of LTE will alleviate the need for a data roaming mandate).

¹⁹⁸ U.S. Cellular Comments at 4.

¹⁹⁹ *Id.*

requirement that has served wireless consumers well. Cellular South respectfully urges the Commission promptly to adopt a data roaming mandate.

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