

**Before the
Federal Communications Commission
Washington, DC 20554**

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

REPLY COMMENTS OF
UNITED STATES CELLULAR CORPORATION

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Summary

United States Cellular Corporation ("USCC") has demonstrated that "data roaming" is essential to the customers of small and mid-sized wireless carriers and to the survival of wireless competition itself. We have also shown that an FCC rule protecting data roaming would be entirely lawful under Titles I, II, and III of the Communications Act.

These points have been powerfully reinforced by the overwhelming majority of other commenters in this proceeding. The comments demonstrate that in light of the continuing consolidation and concentration in the wireless industry and the exponential growth of wireless data as a percentage of carrier usage and revenues, the only way that competition can be preserved and enhanced is through an FCC rule requiring seamless data roaming among technologically compatible carriers.

The FCC should implement such a mandate firmly, but flexibly, taking appropriate account of technological complexity, but not allowing such complexity to be a barrier to the achievement of nationwide data roaming. Data roaming should be provided, on request, within a reasonable time, or reasonable terms and conditions.

The comments also support the FCC's authority to require data roaming under either Title I of the Communications Act as ancillary to its Title II authority over voice roaming or pursuant to its authority over common carriers under Title II directly or pursuant to its authority over the radio spectrum under Title III.

The argument offered by Verizon Wireless and AT&T to the affect that data roaming is not a common carrier service and thus cannot be regulated under Title II fails to take into account the inapplicability of Section 332(2)(2) of the Act to the carrier to carrier relationship involved in data roaming.

The FCC possesses full authority to act in this proceeding and should exercise that authority to mandate data roaming and protect the public interest.

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REPLY COMMENTS

United States Cellular Corporation ("USCC") hereby files its reply comments concerning the Second Further Notice of Proposed Rulemaking in the above-referenced docket.¹ In these Reply Comments, USCC reaffirms its support of a rule requiring data roaming on reasonable terms and conditions and urges the FCC to adopt such a rule at the earliest opportunity.

Introduction

In its comments, USCC urged the FCC to affirm and codify a right to roam that incorporates non-inter-connected services and features, including information services. USCC demonstrated that "data roaming" has become vital to the customers of small and mid-sized wireless carriers and is essential to the survival of wireless competition itself. Lastly, USCC also argued that an FCC rule protecting data roaming would be entirely lawful under Titles I, II or III of the Communications Act.

These points have been powerfully reinforced by other comments filed in this proceeding. It should be noted that data roaming has been endorsed by the overwhelming majority of commenters.² Those comments reflect a consensus among almost all wireless

¹ See, In the Matter of Roaming Obligations of Commercial Mobile Radio Service Providers and other Providers of Mobile Data Service, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, FCC 10-59, released April 21, 2010 ("FNPRM").

² See, e.g., Comments of Blooston Rural Carriers, filed June 14, 2010 ("Blooston Carrier Comments"); Comments of the Organization For The Promotion and Advancement of Small Telecommunications Companies and The

carriers, except the two largest, that data roaming will be essential to their survival, and thus to the survival of wireless competition itself. The FCC should consider the full weight of these comments, filed by diverse wireless competitors, and the virtual unanimity they reflect concerning this vital issue.

I. Data Roaming Is Essential To the Survival of Wireless Competition and Will Serve the Public Interest

Two trends are central to today's wireless industry. The first is what Commissioner Michael Copps has called "the continuing consolidation and concentration in our wireless markets."³ The growing dominance of the wireless market place by AT&T and Verizon Wireless is undisputed and has had negative consequences for wireless competition and wireless consumers.⁴ The second trend is the exponential growth of wireless data as a percentage of carriers' network usage and revenues.⁵ After assessing these trends, USCC and a majority of other carrier/commenters in this proceeding have concluded that the only way that competition in the wireless industry can be preserved and enhanced is through an FCC rule requiring seamless data roaming among technologically compatible carriers. If the customers of small and mid-sized carriers cannot obtain wireless Internet connectivity on a comparable basis both inside and outside their home markets, they will cease to be the customers of their present carriers and will

National Telecommunications Cooperative Association, filed June 14, 2010 ("OPASTCO-NTCA Comments"); Comments of Free Press, filed June 14, 2010 ("Free Press Comments"); Comments of NTELOS, Inc., filed June 14, 2010 ("NTELOS Comments"); Comments of Skyterra Subsidiary LLC, filed June 14, 2010 ("Skyterra Comments"); Comments of Rural Cellular Association, filed June 14, 2010 ("RCA Comments"); Comments of Bright House Networks, filed June 14, 2010 ("Bright House Comments"); Comments of Leap Wireless International, Inc. and Cricket Communications, Inc., filed June 14, 2010 ("Leap Comments"); Comments of T-Mobile USA, Inc., filed June 14, 2010 ("T-Mobile Comments"); Comments of MetroPCS Communications, Inc., filed June 14, 2010 ("MetroPCS Comments"); Comments of Cellular South, Inc. filed June 14, 2010, ("Cellular South Comments"); Comments of SouthernLinc Wireless, filed June 14, 2010 ("SouthernLinc Comments"); Comments of Rural Telecommunications Group, Inc. filed June 14, 2010 ("RTG Comments"); Comments of Cincinnati Bell Wireless, filed June 14, 2010 ("Cincinnati Bell Comments"); Comments of Clearwire Corporation filed June 14, 2010, ("Clearwire Comments").

³ Quoted in RTG Comments, p. 10.

⁴ See, e.g., T-Mobile Comments, pp. 7-8; RCA Comments, pp. 14-15; Free Press Comments, pp. 10-11; RTG Comments, pp. 10-11.

⁵ See, e.g., NTELOS Comments, pp. 4-6; SouthernLinc Comments, pp. 3-5; Sprint Comments, pp. 6-7.

inevitably migrate to the dominant carriers. That would only accelerate the trend toward concentration and consolidation rightly decried by Commissioner Copps.

The only way to prevent this is for the customers of small and mid-sized carriers to have access to data roaming on reasonable terms. This is not really disputed by the opponents of a data roaming mandate. Rather, they argue that data roaming agreements are already being arrived at without FCC regulation and that there is now "seamless nationwide roaming for data connectivity."⁶ These points, however, are strongly disputed by smaller carriers, who describe their difficulties in negotiating roaming agreements with the two largest carriers.⁷ Without commenting on individual negotiations to which USCC is not a party, those comments certainly suggest the danger of leaving the fate of data roaming to be determined solely by the economic interests of the largest wireless carriers, who may be motivated in the future by self-interest to no longer enter into such agreements or who may use their market power to dictate the terms of such agreements.

The comments also demonstrate that a data roaming mandate would be commercially beneficial to the wireless industry as a whole and to the economy of the United States. RCA, for example, demonstrates that, far from deterring investment in rural areas, a data roaming requirement would promote such investment, by helping carriers serving such markets retain and expand their customer bases. RCA has also shown how a data roaming requirement would benefit consumers and public safety, as well as spur competition with the national carriers from both existing carriers and new entrants.⁸ New wireless carriers entering the wireless marketplace today face far more daunting prospects than did their predecessors of decades ago. They must

⁶ See, Comments of AT&T, filed June 14, 2010 ("AT&T Comments"), p. 54; Comments of Verizon Wireless, filed June 14, 2010, ("Verizon Wireless Comments"), pp. 7-9.

⁷ See, e.g. OPASTCO/NTCA Comments, pp. 4-5; RCA Comments, pp. 14-15; Cellular South Comments, pp. 21-23; Cincinnati Bell Comments, pp. 8-10.

⁸ RCA Comments, p. 8.

compete with established carriers with twenty-five year "headstarts" and a substantial number of revenue producing customers. They must build sophisticated and capital intensive 3G and 4G networks and they have to deal with an increasing number of complex local, state and federal regulations, many of which also directly affect the cost of network construction. Unless they can offer their customers both voice and data roaming on a seamless nationwide basis, they will be unable to gain or maintain a foothold. It really is that simple.

Moreover, the commenters have also demonstrated that the effect of data roaming will not be to create "permanent resale" market structures. All carriers will continue to have the strongest possible incentives to build out their own service areas to the maximum extent feasible so as to provide the best and most sophisticated service they can, all the while facing formidable competition from all fronts, including the national carriers.⁹

II. The FCC Should Implement A Data Roaming Mandate Firmly But Flexibly

As USCC and other proponents of data roaming have repeatedly acknowledged, implementing a data roaming arrangement is not simple. Various commenters have helpfully spelled out what is involved, which should be useful to the Commission in formulating appropriate policies.¹⁰ However some degree of technical complexity is not a legitimate reason for refusing to protect customers' rights to data roaming or to stand by while the wireless market devolves to a duopoly.

USCC agrees that automatic data roaming should be required irrespective of the services being offered in a carrier's home market.¹¹ A customer's right to data roaming should not be denied because his or her "home" carrier does not offer every service which the host carrier offers on a given air interface or because it provides those services on different, albeit compatible

⁹ RTG Comments, pp. 9-12; SouthernLine Comments, pp. 39-40.

¹⁰ See, MetroPCS Comments, pp. 8-18; AT&T Comments, pp. 27-28.

¹¹ See, MetroPCS Comments, pp. 49-53.

handsets. Requiring exact technical compatibility between "requesting" and "host" carriers is disingenuous and would be a formula for the routine denial of roaming requests.

USCC concurs with RCA that host carriers should provide data roaming on reasonable terms and conditions.¹² This would involve a presumption that a request for data roaming by a technologically compatible carrier is reasonable and a requirement that all terms and conditions be just and reasonable, in accordance with Sections 201 and 202 of the Communications Act. USCC also agrees with RCA that the FCC should consider the adoption of "shot clock" time limits for roaming negotiators to limit the opportunity for host carrier delay in negotiating roaming agreements.

In the FNPRM, with respect to voice roaming, the FCC adopted a non-exclusive set of "factors" that the FCC may consider when resolving "reasonableness" disputes.¹³ USCC believes that the FCC could adopt a similar set of factors to consider in dealing with data roaming disputes, which could include legitimate host carrier concerns about network capacity and undue expense to modify host networks. But, as with voice roaming, a request for data roaming by a technologically compatible carrier would be considered presumptively reasonable and the burden would be on the host carrier to demonstrate why it could not reach a reasonable data roaming agreement with a requesting carrier.

USCC believes that with such ground rules and oversight by the FCC, data roaming will become a non-controversial part of the wireless landscape, from which all carriers would benefit.

¹² RCA Comments, pp. 15-17.

¹³ FNPRM, ¶ 39.

III. The Comments Demonstrate That The FCC May Act Under Titles I, II, or III of the Communications Act To Implement Data Roaming

In our Comments, USCC argued that the FCC has ample authority under Titles I, II, or III to adopt a data roaming mandate.¹⁴ The FCC's authority under each of those titles has received substantial support in many comments.

A. A Data Roaming Mandate Would Be "Reasonably Ancillary" To Other Statutory Grants of Jurisdiction To The FCC

In our comments, USCC argued that the FCC would certainly have Title I "ancillary" jurisdiction over data roaming in light of its undoubted Title II jurisdiction over "voice" roaming.¹⁵ SouthernLinc offers a strong additional argument for ancillary jurisdiction. It demonstrates that FCC adoption of a data roaming obligation would also be reasonably ancillary to the FCC's statutory obligations under Sections 201 and 202 of the Act, which require just, reasonable and non-discriminatory practices by common carriers. SouthernLinc explains how a refusal on the part of a carrier to offer data roaming could undermine that carrier's undoubted Title II obligation to provide voice roaming on just and reasonable terms, citing an actual instance where that has already occurred.¹⁶

The relevant court cases make it clear that there is no hard and fast rule for determining the validity of an FCC exercise of ancillary jurisdiction. The Comcast case reiterates that there must be an "express delegation of regulatory authority" to the FCC, to which the FCC's assertion of additional jurisdiction is legitimately "ancillary."¹⁷ In this instance, voice and data roaming are both types of roaming. In terms of both logic and actual customer practice in relation to their own handsets, voice and data roaming are ancillary to each other. Thus, since the FCC has

¹⁴ USCC Comments, pp. 6-11.

¹⁵ USCC Comments, pp. 6-8.

¹⁶ SouthernLinc Comments, pp. 24-26.

¹⁷ Comcast Corp. v. FCC No. 08-1291, at 7. (D.C. Cir. April 6, 2010).

undisputed jurisdiction over voice roaming, it should certainly be able to assert ancillary jurisdiction over data roaming.

In their comments, AT&T and Verizon Wireless argue that the FCC cannot assert Title II jurisdiction over data roaming because it is a private mobile service (i.e. a service not interconnected with the public switched telephone network) which cannot be treated as a common carrier service under Section 332(c) of the Act.¹⁸ As we discuss below, USCC does not agree that Congress' 1993 determination to exempt "private land mobile service" from common carrier regulation forbids Title II regulation of the CMRS carrier-to-carrier data roaming relationship, which was not considered when Section 332(c) was adopted. However, even if the FCC does consider Section 332(c) to be an obstacle to direct regulation of data roaming under Title II, it can still be regulated under Title I as ancillary to Title II because of the inarguably complementary relationship of the two types of roaming to each other.¹⁹

B. The FCC Can Mandate Data Roaming Under Either Titles II or III of the Communications Act As Well

Various commenters have joined USCC in arguing that "data roaming" is a "telecommunications service" which can be regulated under Title II of the Act.²⁰ Central to all those commenters' arguments is the point that while the Internet access service provided to the end user customer by his home carrier is undoubtedly an information service, the "transmission service" provided by the "host" carrier to a "requesting" carrier constitutes "telecommunications" and can be regulated under Title II as a "telecommunications service."

¹⁸ AT&T Comments, pp. 12-19; Verizon Wireless Comments, pp. 19-32.

¹⁹ One of the definitions of "ancillary" in Webster's Seventh New Collegiate Dictionary is "auxiliary, supplementary."

²⁰ See, e.g., MetroPCS Comments, pp. 17-42; Leap Comments, pp. 18-24; SouthernLinc Comments, pp. 18-23; Cellular South Comments, pp. 7-9.

MetroPCS persuasively explains how such reasoning is entirely compatible with prior Commission and court precedent.²¹ Its discussion of the Brand X case is especially valuable.²² It demonstrates that crucial to the Supreme Court's upholding of the FCC's classification of cable modem service as an information service was the determination by the Court that the telecommunications portion and information service portion of cable modem service were part of one "integrated finished product."²³ Here, by contrast, the data roaming transport service provided by the host carrier is logically separate and distinct from the Internet access service provided by the requesting carrier to its own customer when that customer is using the facilities of the requesting carrier while in his or her "home" market. Similar reasoning, we believe, casts doubt on AT&T's and Verizon Wireless' discussion of the FCC's alleged inability to regulate data roaming under Title II on account of its not being a common carrier service.²⁴

Section 332(c)(2) of the Communications Act forbids any "person" engaged in a "private mobile service" from being treated as a common carrier for any purpose under the Communications Act. Both Verizon Wireless and AT&T argue that the provision of data roaming is such a private mobile service, chiefly because the Act defines a private mobile service as "any mobile service which is not a commercial mobile service."²⁵ A commercial mobile service, in turn, is defined as "any mobile service ... that is provided for profit and makes interconnected services available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public."²⁶ Based on its lack of "interconnection" with the public switched telephone network, Verizon Wireless and AT&T

²¹ MetroPCS Comments, pp. 19-25.

²² Ibid, pp. 28-29. National Cable & Telecommunications Association et al. v. Brand X Internet Services et al., 545 U.S. 967, 990 (2005) ("Brand X").

²³ Brand X, p. 990.

²⁴ See, Footnote 19 above.

²⁵ 47 U.S.C. Section 332(d)(3).

²⁶ 47 U.S. C. Section 332(d)(1).

maintain that data roaming cannot be a commercial mobile service, and therefore is not a common carrier service, and thus cannot be regulated under Title II.

However, we would submit that data roaming can and should be considered to be a CMRS service. It is provided for profit, and is provided to a broad class of eligible users. And, while the service is not "interconnected" with the PSTN, it is "interconnected" between the two carriers, which themselves are interconnected with the PSTN.

Moreover, mobile to mobile communications are not interconnected through the PSTN, but no one would contend that they are not subject to common carrier obligations. Also, the voice roaming traffic covered under Title II will one day be carried over IP facilities. Section 332(c) should not be interpreted to eliminate common carrier regulation in those circumstances.

Congress' intent in 1993, when it adopted Section 332(c)(2), was to:

"clarif[y] that a party engaged in private land mobile service shall not be treated as a common carrier. (emphasis added).²⁷

In 1993, private land mobile radio services were licensed separately under Part 90 of the FCC's Rules, which regulated private radio services not connected with the PSTN.²⁸ Neither the Congress nor the FCC at that time envisaged that Section 332(c)(2) would be read to cover a transmission relationship between CMRS carriers which were then and are now regulated under Part 22 of the FCC's Rules, albeit to connect "roaming" customers to the Internet, which barely existed in 1993. We submit that Section 332(c) need not be read that way and should be confined to its actual purpose, namely protecting entirely private radio systems from common carrier regulation.

²⁷ Conference Report Concerning Budget Reconciliation Act, P.L. 103-66. 1993 U.S. Code and Admin News, p. 1181.

²⁸ See, 47 CFR Section 90 et seq., revised as of October 1, 1993.

The comments also demonstrate that Title III would be a solid basis for FCC action to regulate data roaming.²⁹ Those comments enumerate the multiple provisions of Title III which authorize the FCC to regulate "radio communications" in the public interest. Leap, for example, points to past FCC actions utilizing Title III to ensure that "consumers have seamless connectivity access wireless networks," including the analog compatibility standard in the early eighties and wireless resale obligations in the nineties.³⁰ The Leap comments are particularly insightful in pointing to the broad Title III powers the FCC possesses to regulate the use of the radio spectrum in the wireless context, including the provision of wireless broadband Internet access.³¹ There is no logical reason why those powers over spectrum should become inoperative when wireless customers "roam" from their home markets.

This is a critically important proceeding. The FCC should construe its own powers broadly and have confidence in its ability to serve the public interest. By mandating data roaming it will preserve wireless competition and help millions of Americans who need wireless Internet access away from home. Such an action by the FCC would also be entirely consistent with the Communications Act.

²⁹ See, e.g., SouthernLine Comments, pp. 12-16; T-Mobile Comments, pp. 16-18; Cellular South Comments, pp. 4-7; Leap Comments, pp. 11-18; USCC Comments, pp. 9-10.

³⁰ Leap Comments, pp. 14-16.

³¹ Ibid., pp. 16-8.

Conclusion

For the foregoing reasons and those given previously, the FCC should adopt a data roaming mandate.

Respectfully submitted,

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