Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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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 FREE PRESS

As Free Press and others have argued at great length, and as the most recent report on the state of competition in the wireless industry demonstrated, competition policy reform is needed to correct growing problems with mobile broadband services.[1] An increasingly concentrated industry with numerous obstacles to effective competition, including disparities in spectrum holding, exclusive and restricted access to popular smartphones, and challenges in securing backhaul on reasonable terms,[2] has permitted a few dominant service providers to drive up the price of mobile broadband service as costs fall and profit margins soar. Consumers of mobile broadband services in the United States pay too much for poor service, and the market as a whole is beginning to suffer the consequences.[3]

The Commission's National Broadband Plan wisely included several recommendations to help improve mobile broadband policy. Among these, the plan identified data roaming

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[1] *See generally* Comments of Free Press at 10-11, *available at* http://www.freepress.net/node/74580.
[2] *See* Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New America Foundation, and Public Knowledge, WT Docket No. 09-66 (filed June 15, 2009), at 6.
[3] Broadband Expert, US Mobile Broadband is Massively Overprice, Claims Expert, http://www.broadbandexpert.com/broadband-news/mobile-broadband-news/us-mobile-broadband-is-massively-overpriced-claims-expert/77745 (last visited July 12, 2010).

specifically, stating that it is "important to entry and competition for mobile broadband services."[4] The Plan also called for the Commission to move forward in this proceeding.[5] Achieving this objective requires the Commission to evaluate whether voluntary practices produce adequate and reasonable data roaming agreements, or whether policy intervention would facilitate a more competitive and effective market. Although universal data roaming on reasonable terms will not by itself fix all of the problems that characterize the mobile broadband market, it is an essential component of effective reform.

The record in this proceeding confirms that automatic data roaming rules are needed. As initial comments show, the mobile broadband industry is not entering into reasonable data roaming agreements voluntarily – an unsurprising conclusion given the state of the industry. The vast majority of commenters support automatic data roaming rules, and those who do not, oppose them with motives to further obstruct competition. Although Commission policy is not, and should not be, determined by majority vote, the weight of evidence in favor of adopting rules greatly outweighs the asserted parochial interests of a few large, profitable carriers. The Commission should, therefore, adopt rules requiring automatic data roaming on reasonable terms.

I. Comments Establish the Need for Automatic Data Roaming Rules.

The Commission should extend its automatic roaming rules to data services to prevent further harm to consumers and competition. The records in this and past proceedings demonstrate numerous specific instances of harm, as well as the likelihood of substantial

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[4] *See* FEDERAL COMMUNICATIONS COMMISSION, *Connecting America: The National Broadband Plan* (2010), at 49.
[5] *Id.*

additional undisclosed harms hidden either by confidentiality obligations or by fear of reprisal from dominant market incumbents.

A. Smaller and Rural Carriers Demonstrate Refusals to Agree on Reasonable Terms.

Even before this proceeding, smaller and rural carriers have repeatedly demonstrated that they are unable to reach data roaming agreements with larger wireless companies on terms that meet their needs. For example, in numerous filings over multiple years, SouthernLINC has documented Sprint Nextel's ongoing refusal to provide them with any roaming data services despite repeated requests.[6] SouthernLINC also highlights the experience of MTA wireless, an Alaska-based rural cooperative: Before it would extend data roaming services, host carrier Digitel required MTA to ends its voice roaming agreement with another carrier and pay Digitel voice roaming costs twice as high as those contained in their earlier agreement.[7] Having no other options and no framework of rules at the Commission ensuring reasonable negotiations for all services, MTA had to accept these terms.[8]

Initial comments in this proceeding have revealed additional examples of similar circumstances. For example, Cincinnati Bell Wireless has experienced similar unreasonable and unproductive market pressures. As part of its original nationwide data roaming arrangement, Cincinnati Bell Wireless was forced to agree to a "primary carrier" provision that obliges to them to route all roaming to the nationwide carrier, wherever the nationwide carrier's service is

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[6] *See, e.g.,* Comments and Reply Comments of SouthernLINC Wireless, WT Docket No. 05-265 (filed Nov. 28, 2005, and Jan. 26, 2006, respectively).
[7] *Id.*
[8] SouthernLINC notes that by making unregulated data roaming conditional on agreement to voice roaming terms and prices beyond what would have been reached under a common carrier regulated negotiation process, incumbents essentially nullify the Commission's automatic voice roaming obligation requirements.

available—even if roaming through another regional carrier would be cheaper.[9] This contractual tying increases Cincinnati Bell Wireless's cost to provide nationwide coverage, directs revenue away from other regional carriers that could have provided cheaper roaming, and reduces any competitive pressure that might otherwise develop to keep data roaming prices low.[10] That carrier, which expanded its territory so that it no longer has much need for roaming itself, has now changed its strategy, refusing to negotiate for roaming on its high-speed data services at all[11] – leaving behind few options and negligible market pressure to create incentives to negotiate or reduce prices for data roaming services.

Other allegations in recent years of refusals to enter into data roaming agreements have been made public by Cellular South,[12] Bright House Networks,[13] Cricket,[14] and Cox.[15] In some of these cases, specific carriers were targeted; in others, the allegations were more general. In some disputes, agreements were eventually reached or other plans were arranged; in others, active harm persists. But in all of these cases, rules requiring reasonable negotiations with a Commission backstop would have increased the efficiency of the process and the fairness of the resulting agreements, and competition in the overall market.

B. Lopsided and Hidden Negotiations Conceal the Full Scope of Harm.

In addition to a developed record of harms resulting from the absence of sufficient oversight to promote competition, the Commission should also recognize that the dynamic of negotiations with dominant incumbents prevents many additional harms from surfacing. In fact,

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[9] *See* Comments of Cincinnati Bell Wireless at 8-9.
[10] *Id.* at 9.
[11] *Id.*
[12] Comments of RCA at 14-15.
[13] *Id.* at 15.
[14] *Id.*
[15] *Id.*

the anecdotes in this proceeding may well be the tip of the iceberg, indicating a wealth of further harms below the surface, including unfair or egregious terms in existing agreements.

Common contractual practices of incumbent carriers obscure information the Commission could use to develop a complete picture of data roaming agreements in the mobile broadband market. In its September 2009 comments on this issue, NTELOS noted that confidentiality provisions in its roaming agreement with Verizon prohibit NTELOS from revealing the rate they pay for data roaming service.[16] Beyond the terms of its existing roaming agreements, Verizon has also required that smaller carriers sign non-disclosure agreements that prevent them from revealing that they are even negotiating roaming or licensing agreements.[17]

Given the range of support for automatic roaming rules and the demonstrated evidence of weak competition in the mobile broadband market, in this context, secrecy concerning terms and negotiations of data roaming agreements seems likely to be hiding one-sided or even anti-competitive negotiating tactics and contractual terms. The concentrated market and the high (often insurmountable) costs of expanding into new markets result in very few possible partners for any carrier seeking data roaming, particularly at 3G speeds. Smaller carriers seeking roaming may choose to accept grossly unfair terms in roaming agreements, including nondisclosure provisions, as the alternative may be no roaming at all. And yet these carriers may be legally prohibited from complaint or may fear reprisal in future negotiations – Cincinnati Bell Wireless

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[16] Comments of NTELOS, WT Docket No. 09-66 (filed Sept. 30, 2009).

[17] Phil Goldstein, *Rural carriers open to Verizon's LTE licensing plans*, FIERCEWIRELESS, May 14, 2010, http://www.fiercewireless.com/story/rural-carriers-open-verizons-lte-spectrum-plans/2010-05-14 ("Nancy Stark, a Verizon spokeswoman, told *FierceWireless* Verizon has had talks with a number of rural carriers over the past several months, and has also seen interest from rural carriers since the *Journal* report. However, she declined to name any of carriers or say when any deals might be reached. Stark said the carriers Verizon has been talking with have signed non-disclosure agreements, meaning that associations would not know if they were in touch with Verizon.").

goes out of its way to avoid naming the "nationwide carrier" the company accuses of strong-arm tactics.[18] As the two largest national carriers also control a substantial portion of the special access market, the fear of reprisal may extend even beyond negotiations over data roaming into backhaul or other essential inputs.

II. Comments Reveal Near-Unanimous Support for Automatic Data Roaming Rules.

The Commission should make policy on the basis of its expert determinations on how best to serve the public interest and not by majority vote. But here, two major incumbents with dominant market positions stand on one side of an issue, and nearly everyone else stands on the other, including every significant competing wireless carrier.[19] The record in this proceeding paints a clear picture that failing to adopt automatic data roaming rules would lead to less competition – and thus less investment, fewer jobs, and higher consumer prices.

A. The Primary Opposition to Essential Competition Policy Reform Comes from Dominant Incumbents.

The primary opposition to the extension of automatic roaming to data services comes from two commenters: AT&T and Verizon. These carriers oppose every form of Commission intervention that could promote competition, for the simple reason that they currently enjoy dominant market power and employ that power in a variety of respects to produce higher profit margins, based on growing revenues and subscriber counts despite relative reductions in capital expenditures.

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[18] Comments of Cincinnati Bell Wireless at 8.

[19] *See, e.g.,* Comments of T-Mobile USA, Inc.; Comments of Sprint Nextel Corp.; Comments of SouthernLINC Wireless; Comments of NTCH, Inc.; Comments of Media Access Project; Comments of Cincinnati Bell Wireless; Comments of Bright House Networks; Comments of Blooston Rural Carriers; Comments of Rural Telecommunications Group, Inc.; Comments of Rural Cellular Association.

AT&T and Verizon have dominant market positions and enjoy the benefits of these positions, to the detriment of their competitors. Together, they have more than 60 percent of all wireless subscribers in the United States – and an even larger share of mobile broadband subscribers.[20] They alone are vertically integrated with backhaul networks.[21] They have disproportionate holdings of spectrum, particularly the spectrum considered ideal for mobile broadband services.[22] They have exclusive agreements for the most popular handsets, including those that drive mobile broadband service adoption.[23] As a result, AT&T and Verizon have substantially lower churn and higher profit margins than any of their competitors.

Like many other proceedings, the question of data roaming pits the promotion of competition against incumbent interests. For the Commission, the former should far outweigh the latter. Congress made the promotion of competition the central piece of its regulatory model for communications services. Effective competition creates market pressure that keeps prices low, investment high, and consumers well-served. In contrast, AT&T and Verizon focus on making money, by taking money from competitors, reducing costs (including investment), and increasing prices to the greatest extent the market and government oversight will permit. In the mobile broadband sector, AT&T and Verizon have secured advantages that allow them to raise prices,

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[20] *See Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless including Commercial Mobile Services*, *Fourteenth Report*, WT Docket No. 09-66 (May 20, 2010), at 29.

[21] *See* Press Release, Free Press, Data in FCC Wireless Report Reveals Need to Protect Consumers (May 20, 2010), *available at* http://www.freepress.net/press-release/2010/5/20/data-fcc-wireless-report-reveals-need-protect-consumers.

[22] *See* Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New American Foundation and Public Knowledge, *In the Matter of Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993*, filed WT Docket No. 09-66 (June 15, 2009).

[23] *See* Chris O'Brien, *We're Not Ready for the Mobile Revolution*, NEW YORK TIMES, June 27, 2010, *available at* http://www.mercurynews.com/breaking-news/ci_15370272?nclick_check=1.

reduce investment, increase profits, and starve competitors. They naturally seek to keep these advantages, and will thus oppose any attempts to level the competitive playing field. The Commission should set aside the parochial interests of AT&T and Verizon in favor of broadly-supported competition policy reform.

B. Opposition Motivated by the Clear Desire to Prevent Effective Competition Should be Dismissed.

The only other commenter filing in opposition to automatic data roaming rules states an anti-competitive, anti-consumer motive as its reason for opposition, and thus should be dismissed. ACS Wireless's objections are clearly motivated by its desire to obstruct competition for 3G mobile broadband service in Alaska—and possibly to maintain its relationship and agreements with Verizon. ACS Wireless offers only "basic roaming" to its competitors in Alaska, limiting their data transfer speeds to a theoretical maximum of 153 kbps[24] – a speed that has never met any definition of "broadband." ACS Wireless "preserves EvDO specially for its own customers."[25] ACS Wireless states that it "has not offered competitors advanced data roaming" services where their territories overlap[26] – but has established data roaming including specific performance guarantees with Verizon Wireless,[27] which does not compete with ACS Wireless in Alaska.[28] Likely, a substantial portion of ACS Wireless's data roaming agreements outside Alaska are with Verizon Wireless, creating a quid-pro-quo that looks more like a division of service territory and exclusion of other entrants than a pro-competitive arrangement.

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[24] Comments of ACS Wireless at 2 (noting that competitors are limited to roaming using 1xRTT, a standard with theoretical maximum speed of 153 kbps and commercial typical speeds ranging around 60-100 kbps).
[25] *Id.*
[26] *Id.* at 7.
[27] *Id.* at 8.
[28] *Id.* at 3 (listing ACS Wireless's competitors in Alaska as "other small wireless carriers," GCI/Digitel, and AT&T Wireless).

The motives demonstrated by ACS Wireless indicate a clear desire to prevent other carriers from expanding into the 3G market in Alaska, to the detriment of consumers and competition. Data roaming at broadband speeds is essential to allow a carrier to acquire customers and expand into new markets, which are necessary for the growth of a facilities-based service.[29] Automatic data roaming rules would ensure that all carriers have the opportunity to compete and grow their services. Yet, these rules would still result in ACS Wireless being well paid for the use of its facilities. They would not, in fact, harm the ability of ACS Wireless to "recoup its significant investment."[30] Nor would they result in substantial increases in demand on backhaul capacity absent a significant growth in mobile broadband usage; if such a significant growth in usage is possible, Commission oversight should encourage it and not permit narrow-minded exclusive business practices to restrict such growth.

The result of automatic data roaming rules would be better mobile broadband access for subscribers who choose to use devices exclusively available to other carriers, better mobile broadband access for visitors to other service territories who bring their devices with them, and greater competitive pressure on ACS Wireless and other incumbent service providers. The alternative is bad for consumers, bad for competition, and bad for broadband policy that is intended to encourage the deployment and adoption of mobile broadband services. Worse, if the practice of ACS Wireless of permitting competitive data roaming only at throttled, near-useless speeds is extended to fourth generation wireless networks as well – where the current market disparities of spectrum imbalance, uneven access to devices, and uneven access to backhaul services become even more important – the result would be a mobile broadband market with no possibility for effective competition.

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[29] Comments of Free Press at 2.
[30] Comments of ACS Wireless at 2.

Respectfully submitted,

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