

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 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 VERIZON WIRELESS**

John T. Scott, III  
Vice President and Deputy General  
Counsel - Regulatory Law

Andre J. Lachance  
Assistant General Counsel

Verizon Wireless  
1300 I Street, N.W.  
Suite 400-West  
Washington, DC 20005  
(202) 589-3760

Dated: July 12, 2010

## TABLE OF CONTENTS

<b>I. THE FACTS DO NOT SUPPORT A FINDING THAT A DATA ROAMING REQUIREMENT IS NEEDED TO PROTECT CONSUMERS.....</b>	<b>4</b>
A. The Record Demonstrates that Broadband Services Are Growing to the Benefit of Consumers without FCC Intervention. ....	4
B. Commenters Fail to Establish that Consumers Will Be Harmed Absent a Data Roaming Requirement. ....	7
1. Speculative harms are not sufficient to justify a data roaming requirement.....	9
2. Competitive forces are working to deliver data roaming arrangements to carriers that want them. ....	10
C. Claims that the Largest Carriers Exert Market Power for Roaming Services Are Incorrect. ....	17
D. A Data Roaming Regulation Will Have Negative Market Consequences. ....	20
<b>II. THE COMMISSION LACKS AUTHORITY TO IMPOSE A DATA ROAMING OBLIGATION. ....</b>	<b>23</b>
A. Section 332(c)(2) Prohibits a Data Roaming Rule and Trumps All Other Potential Bases for Legal Authority.....	24
B. Section 153(44) Also Prohibits a Data Roaming Rule, Because Data Roaming Is Not a Telecommunications Service. ....	27
1. Data roaming is not a telecommunications service.....	28
2. Data roaming is not offered on a common carrier basis. ....	31
3. Section 153(44) bars common carrier regulation of services, like data roaming, that are not telecommunications services under the Act.....	36
C. Title III Does Not Authorize the Commission to Impose Automatic Roaming Obligations on Data Services.....	37
D. Title I Does Not Authorize the Commission to Impose Automatic Roaming Obligations on Data Services.....	40
<b>III. CONCLUSION .....</b>	<b>44</b>

## SUMMARY

Since the inception of the commercial wireless industry, the FCC has exercised a light regulatory touch that has allowed the industry to flourish and has brought near ubiquitous and innovative wireless voice services to consumers. Even if it had the authority to adopt a data roaming mandate – which it does not – the Commission would be wise to stay its regulatory hand once again with respect to what is, after all, a nascent market for wireless data services.

The comments filed in this proceeding, and the announcements made on a daily basis by carriers, handset manufacturers, and others, make clear that carriers and others are investing billions of dollars to bring mobile broadband to American consumers. As a result, consumers today benefit from an ever-increasing array of wireless broadband services, devices and capabilities – all in the absence of a data roaming mandate.

Those who supported a data roaming mandate argued that data roaming benefits consumers. However, the Commission has consistently held that because any regulation imposes costs and other harms on the competitive marketplace, regulation should only be imposed where it can be demonstrated that the absence of such regulation will cause consumer harm. Proponents have failed to make that showing.

In an effort to show some harm in need of a regulatory fix, some commenters argued that a data roaming mandate is needed because, due to market consolidation, large carriers have little incentive to offer carriers data roaming agreements on reasonable terms and conditions. Speculative harms, however, are not sufficient to warrant regulation. There is no specific, concrete evidence that carriers are being denied reasonable access to data roaming agreements – let alone that conditions in roaming arrangements are harming consumers – the showing that proponents of new rules must make. To the contrary, the record contains many examples that

carriers are negotiating data roaming agreements with parties that request them and that many regional, small and rural providers have nationwide broadband roaming agreements in place. Of the handful of commenters that argued they have either been denied access to data roaming agreements, or that the terms and conditions offered were unreasonable, closer scrutiny of these alleged harms reveals that the claims are stale or are unsupported by specific facts, or that the carrier making the allegation already has nationwide broadband data roaming arrangements in place.

Some regulatory proponents argued that regulation is needed because AT&T and Verizon Wireless have market power in their respective – GSM and CDMA – technologies, citing to language in the most recent Wireless Competition Report finding that upstream inputs can affect competition in wireless services. The Commission, however, did not find that roaming was an upstream input, and has consistently found both that roaming is not a separate product market and that roaming cannot be analyzed by technology type. Nor did the Commission make any finding that any wireless service provider has market power.

Finally, commenters argued that a data roaming mandate will not affect carrier investment decisions and therefore will not harm the competitive marketplace. AT&T and ACS Wireless, however, demonstrated in their comments that a data roaming mandate will have a significant impact on broadband investment and implementation, particularly in rural areas where build-out is needed most.

Comments filed in this proceeding also failed to overcome the significant legal obstacles that prohibit the Commission from extending automatic roaming obligations to data services. In short, no provision of the Act supplies a basis for imposing this requirement, and several provisions prohibit it. No party disputed that data roaming is not an interconnected service,

which means, therefore, that section 332(c)(2) precludes the FCC from imposing common carrier obligations on these services.

Parties claiming that the FCC has authority to mandate data roaming whether or not data roaming is a telecommunications service failed to address how the FCC can do so given section 153(44)'s bar on imposing common carrier obligations on non-telecommunications services. They did not account for those forms of data roaming where the roaming customer accesses information directly from the host carrier, in which cases the host carrier is clearly providing an information service. They also did not prove that data roaming is offered on a common carriage basis – a prerequisite to imposing a data roaming mandate, which the Commission acknowledged is a common carrier obligation.

Last, parties failed to demonstrate that the Commission can adopt a data roaming requirement under Title I or III of the Act. With respect to Title III, the D.C. Circuit has held that section 303(r), which grants the Commission authority to adopt rules “not inconsistent with law, and as may be necessary to carry out the provisions of this Act,” cannot be the source of Commission authority unless the Commission otherwise has the authority to promulgate the regulations at issue. Yet proponents of regulation were unable to point to any specific provision in Title III or otherwise that conveys the necessary regulatory authority. Moreover, given the Act's express limit on the Commission's authority to impose common carrier duties on wireless providers, Title III cannot supply the basis for a data roaming mandate.

Likewise, with respect to Title I, courts, most recently in the D.C. Circuit's *Comcast* decision, have repeatedly held that the Commission may promulgate rules only if they are incidental to and contingent on specifically delegated powers under the Act and only if the rules adopted are necessary to the execution of a separate statutorily mandated responsibility. Yet,

proponents were not able to cite any specific statutory responsibility to which a data roaming requirement would be ancillary.

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 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 VERIZON WIRELESS**

Verizon Wireless hereby submits these reply comments in response to the Second Further Notice of Proposed Rulemaking released by the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned proceeding.<sup>1</sup>

The market for wireless services in the United States is undergoing a revolution as carriers deploy ever-faster, more sophisticated networks and devices to make the promise and potential of mobile broadband a reality for American consumers. Having completed its nationwide 3G EV-DO network just last year, Verizon Wireless plans to bring its 4G LTE network to 285 million Americans by 2013, and it recently announced its Rural LTE Initiative, designed to bring mobile broadband services to rural areas outside its footprint. But it is only one of many firms investing in jobs and infrastructure to deliver broadband – and broadband choices – to the public. The services provided over 3G and 4G

---

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

networks will transform how America communicates, works, educates its children, provides healthcare to its citizens, and more.

Since the inception of the commercial wireless industry, the FCC has exercised a light regulatory touch that has allowed the industry to flourish and has brought near ubiquitous and innovative wireless voice services to consumers. Even if it had the authority to adopt a data roaming mandate – which it does not – the Commission would be wise to stay its regulatory hand once again with respect to what is, after all, a nascent market for wireless data services. The comments filed in this proceeding make clear that carriers are investing billions of dollars to bring mobile broadband to their subscribers, and carriers of all sizes already advertise nationwide coverage for data services – all in the absence of a data roaming mandate. These are hardly the conditions that call for regulatory intervention, with its attendant costs, drags on innovation and investment, and regulatory lags that produce rules that are inevitably over-inclusive, under-inclusive, or both. Instead, the FCC should take heed of its past successes, tread cautiously, and resist the urge to fix what is not broken. The far better course for the FCC is to monitor the wireless data revolution and act if and only if it detects a market failure that warrants regulation.

All signs indicate that such a failure is unlikely. The record indicates that carriers that want roaming agreements today are able to get them. The convergence of 4G technology around the LTE standard means that carriers will have more – not fewer – potential roaming partners in the future and that, moreover, carriers deploying 4G networks will look to roaming revenues as a means of recovering some of their network investment.

Commenters were in accord that the accelerating growth of broadband services is leading to more consumer choices, innovative new technologies and services, and lower prices for American consumers, all without regulatory intervention. Parties that supported a data roaming mandate made general claims as to its potential benefits and argued that industry consolidation has diminished the incentives for large carriers to enter into data roaming agreements. These commenters failed to establish, however, that regulation is needed to ensure that consumers have access to broadband services when they travel outside their home markets. Indeed, despite the Commission's request for information regarding examples of requests for data roaming requests that have been denied, the record shows that data roaming agreements are readily available to those that request them, and it contains no concrete evidence that agreements are being denied or offered on unreasonable terms. In light of these facts, there is no basis for the Commission to find that a data roaming requirement is necessary to protect consumers.

Advocates of new regulation also cannot overcome the multiple legal obstacles that prohibit the Commission from extending automatic roaming obligations to data services. Most simply ignore them. Because the provision of data roaming is neither an interconnected service nor a telecommunications service, two provisions of the Communications Act -- sections 332(c) and 153(44), respectively -- proscribe the automatic roaming obligation the Commission here contemplates. No party advocating such an obligation addressed these legal bars. Regulation of data roaming services is also not authorized under any other part of the Act. Because these services are neither telecommunications services nor common carrier services, they are not subject to the Commission's Title II authority. Moreover, advocates of regulation fail to demonstrate

how either Title I or any provision of Title III provides a jurisdictional basis for data roaming requirements.

**I. THE FACTS DO NOT SUPPORT A FINDING THAT A DATA ROAMING REQUIREMENT IS NEEDED TO PROTECT CONSUMERS.**

**A. The Record Demonstrates that Broadband Services Are Growing to the Benefit of Consumers without FCC Intervention.**

In its comments, Verizon Wireless pointed to several sources of information, including the Commission's most recent Wireless Competition Report, that demonstrate the explosive growth in the broadband services market. The data cited showed continued and consistent growth in the number of broadband service providers making services available to consumers across multiple technology platforms. The data also revealed that carriers of all sizes are providing broadband services to their customers. This competition is being fueled by billions of dollars invested annually by companies in 3G and 4G technologies to bring the benefits of broadband services to American consumers.<sup>2</sup>

Indeed, some of the same parties who insist that a data roaming mandate is needed have offered compelling evidence that broadband services are growing at explosive rates -- in the absence of regulation. For example:

- MetroPCS commented that "it is estimated that global mobile data traffic grew at a rate of 157 percent between 2008 and 2009. And, based on information provided by domestic carriers, the United States seems to be outstripping even this prolific growth rate."<sup>3</sup>
- US Cellular commented "[i]t is undisputed that there has been 'enormous growth' in the market for 'data service' as well as SMS."<sup>4</sup>
- T-Mobile cited to data showing that "smartphones offering mobile broadband are the fastest growing segment of the mobile phone market,

---

<sup>2</sup> Verizon Wireless Comments at 3-9. *See also* AT&T Comments at 49-52.

<sup>3</sup> MetroPCS Comments at 40 (internal citations omitted).

<sup>4</sup> US Cellular Comments at 2 (internal citation omitted).

and smartphone users generate ten times the amount of traffic as non-smartphone users.” T-Mobile also stated it “is rolling out its HPSA+ service, which delivers 4G speeds and will cover 185 million people by the end of 2010.”<sup>5</sup>

- SouthernLinc said that “[w]ireless data services have rapidly become a highly valued and indispensable aspect of the wireless world, and consumer use of – and reliance on – mobile data services continues to grow exponentially.”<sup>6</sup>
- SkyTerra stated it “is constructing a fourth-generation (“4G”) wireless broadband network that will provide coverage to at least 260 million people in the United States by the end of 2015.”<sup>7</sup>
- OPASTCO and NTCA claimed that a recent survey of NTCA members reveals that 54 percent of their members offer mobile services and 32 percent offer mobile broadband. “Eighty-eight percent of those survey respondents currently offering wireless service indicated they had plans to deploy next generation technology in the next 1-2 years.”<sup>8</sup>
- NTELOS said that in order to update its network to EV-DO Rev. A technology, it “undertook the largest capital expenditure in its 112-year history.”<sup>9</sup>

The staggering pace of innovation and growth for broadband services, all without regulatory intervention, is also manifest in the announcements made on a daily basis by carriers, handset manufacturers, and others. For example, each of the following announcements or press reports has been made since the beginning of June:

- CellSouth confirmed that it would become the first U.S. carrier to offer the HTC Desire Android-based smartphone.<sup>10</sup>
- US Cellular confirmed that it will begin selling the Samsung Acclaim Android-based smartphone on July 9.<sup>11</sup>

---

<sup>5</sup> T-Mobile Comments at 5 (internal citations omitted).

<sup>6</sup> SouthernLinc Comments at 3.

<sup>7</sup> SkyTerra Comments at 2.

<sup>8</sup> OPASTCO and NTCA Comments at 2 (internal citations omitted).

<sup>9</sup> NTELOS Comments at 3.

<sup>10</sup> See “Cellular South confirms HTC Desire,” *electronista.com*, June 16, 2010, available at: <http://www.electronista.com/articles/10/06/16/cellular.south.to.get.htc.desire.smartph one/>.

- Clearwire expanded its portfolio of devices capable of operating on its 4G WiMAX network by introducing the Clear Spot 4G and 4G+ personal wireless hot spot devices (the 4G+ device also works on Sprint's 3G network).<sup>12</sup>
- Clearwire raised an addition \$291 million towards the construction of its WiMAX network in a rights offering.<sup>13</sup>
- Sprint introduced its first 3G/WiMAXX handset.<sup>14</sup>
- T-Mobile launched HSPA+ service in Los Angeles and 24 other cities.<sup>15</sup>
- A Wall Street Journal article detailed recent efforts by carriers to make improvements to their networks in an effort to provide consumers with the fastest data download speeds.<sup>16</sup>

These comments, data and press reports confirm that competition among wireless services providers has led to explosive growth of broadband services, investment in new technologies and services, and innovation, all to the benefit of American consumers. And they belie any claim that a data roaming mandate must be in place before carriers will make the investments necessary to offer wireless broadband data services. Given these

---

<sup>11</sup> See "US Cellular to ship Android-based Samsung Acclaim July 9," *electronista.com*, June 21, 2010, available at: <http://www.electronista.com/articles/10/06/21/samsung.acclaim.due.at.us.cellular.on.july.9th/>.

<sup>12</sup> See Brian Santo, "Clearwire launches 3G-4G devices for Macs," *CedMagazine.com*, June 17, 2010, available at: <http://www.cedmagazine.com/News-Clearwire-3G-4G-devices-Macs-061710.aspx>.

<sup>13</sup> Phil Goldstein, "Clearwire raises \$291M in rights offering," *FierceWireless*, June 23, 2010, available at: <http://www.fiercewireless.com/story/clearwire-raises-another-290m/2010-06-23>.

<sup>14</sup> See Brian Santo "Sprint's 4G phone sells out," *CedMagazine.com*, June 7, 2010, available at: <http://www.cedmagazine.com/News-Sprint-4G-phone-sells-out-060710.aspx>.

<sup>15</sup> See Mark Milian, "T-Mobile rolls out faster wireless Internet in L.A. and 24 other cities," *Los Angeles Times*, June 15, 2010, available at: <http://latimesblogs.latimes.com/technology/2010/06/tmobile-hspa-plus.html>.

<sup>16</sup> See Walter S. Mossberg, "Carriers Go To Battle Over Faster Networks," *Wall Street Journal*, July 1, 2010, available at: [http://online.wsj.com/article/SB20001424052748703426004575339032914588628.html#mod=todays\\_us\\_personal\\_journal](http://online.wsj.com/article/SB20001424052748703426004575339032914588628.html#mod=todays_us_personal_journal).

facts, there is no requisite record basis for the Commission to impose regulation on any aspect of mobile broadband services.

**B. Commenters Fail to Establish that Consumers Will Be Harmed Absent a Data Roaming Requirement.**

Commenters that support a data roaming requirement argued the increasing prevalence of broadband data services compels the Commission to adopt a data roaming requirement in order to ensure that customers can use data services when they travel outside the reach of their home markets. They tout the benefits of seamless data coverage to consumers and to public safety interests as the primary reason why a data roaming mandate is in the public interest.<sup>17</sup>

Arguments that data roaming benefits consumers, however, fail to establish that a data roaming requirement is either necessary or justified. As the Commission itself has noted, Congress amended Section 332 of the Act to impose a deregulatory policy for wireless that "places *on us* the burden of demonstrating that regulation will promote competitive market conditions," consistent with Congress' "general preference in favor of reliance on market forces rather than regulation. ... Finally, Congress delineated its

---

<sup>17</sup> See, e.g., Sprint Comments at 9 ("As consumers use these [data-centric] devices and rely upon mobile wireless data services for their business and personal needs, they expect to be able to access all of these services to perform a wide range of functions anywhere they go."); Leap Comments at 3 ("as consumers become increasingly reliant on mobile and portable wireless devices, it is more critical than ever that the continuity of services be preserved across networks and geographic regions"); SouthernLinc Comments at 30-31 ("Without access to automatic roaming for all mobile wireless services, including data services, consumers in rural and underserved areas will be without coverage any time they find themselves outside their home carrier's service area and may also be left without access to any advanced data services even within their local area."); MetroPCS Comments at 41 ("There can be no doubt that public safety is enhanced when consumers and first responders are able to access their data networks and the Internet from wherever they travel.")

preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states *could demonstrate a clear cut need*. The public interest goal of this Congressional plan is readily discernable. Congress intended to promote rapid deployment of a wireless telecommunications infrastructure."<sup>18</sup> It is likewise well-established that regulations adopted in the absence of market failure or regulations not narrowly tailored to redress identifiable harms only serve to impose costs, alter incentives, and distort competition to the detriment of consumers.<sup>19</sup>

Consistent with Commission precedent, therefore, in order to establish that a data roaming mandate is warranted, advocates must establish not that data roaming is beneficial (because data roaming exists without a mandate), but rather that the absence of a data roaming *rule* will cause consumer harm, *and* that the benefits of such a rule outweigh the societal costs and the drag on the workings of the competitive market that

---

<sup>18</sup> *Petition of the Connecticut Dep't of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut, Report and Order*, 10 FCC Rcd 7025, 7031-32 (1994) (emphasis added).

<sup>19</sup> *See, e.g., Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1419 ("OBRA Implementation Second Order") ("In deciding whether to impose regulatory obligations on service providers under Title II, we must weigh the potential burdens of those obligations against the need to protect consumers and to guard against unreasonably discriminatory rates and practices. In making this comparative assessment, we consider it appropriate to seek to avoid the imposition of unwarranted costs or other burdens upon carriers because consumers and national economy ultimately benefit from such a course."); *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, First Report and Order, 11 FCC Rcd 18455, 18463 ("Resale Order") ("It is consistent with these decisions to hold that, under different conditions, the costs of a resale rule might outweigh the benefits . . . In particular, as markets become more competitive, the benefits to be attained through a resale rule generally diminish because carriers have less opportunity and incentive anticompetitively to restrict resale. At the same time, the resale rule, like all regulation, necessarily implicates costs, including administrative costs, which should not be imposed unless clearly warranted.")

regulation would cause. Proponents of data roaming regulation have failed to meet this standard for justifying new regulation.

**1. Speculative harms are not sufficient to justify a data roaming requirement.**

Proponents of data roaming regulation argued that a rule is necessary because due largely to consolidation, large carriers no longer need roaming agreements with other providers and therefore lack the incentive to enter into data roaming agreements with carriers that request them.<sup>20</sup> These arguments are entirely speculative.

For years now, the same entities have predicted that consolidation *will* result in unreasonable roaming practices by the largest carriers, because these carriers will have filled out their footprints and will thus lack the incentive to offer reasonable agreements to requesting carriers.<sup>21</sup> Clearly now, more than a year and a half after the Alltel-Verizon merger closed (and more than five years after the Cingular-AT&T merger closed), proponents of a data roaming rule can no longer rely on speculative allegations of harms that might result from consolidation as the basis for regulation. If consolidation were going to have the adverse effects on roaming that parties had predicted, surely there would be significant evidence of that harm by now. Yet, the record contains only a

---

<sup>20</sup> See RCA Comments at 14-15; Blooston Rural Carrier Comments at 7; NTELOS Comments at 8; Media Access Project at 5-6; Cellular South Comments at 21.

<sup>21</sup> See, e.g., Letter from Public Service Communications, NTCA and OPASTCO to Marlene H. Dortch, Secretary, FCC, WT Docket No. 04-70, filed September 9, 2004 (arguing that the Cingular/AT&T merger will result in the combined company charging rural carriers a premium to roam on the combined company network); RTG Petition to Deny, WT Docket No. 08-95, filed August 11, 2008, at 9-12 (arguing that if Verizon Wireless is allowed to merge with Alltel, it will control the CDMA roaming marketplace and have both the incentive and the ability to restrict access to roaming); Petition of MetroPCS Communications, Inc. and NTELOS Inc. to Condition Consent or Deny Application, WT Docket No. 08-95, filed August 11, 2008, at 17-28.

handful of allegations of actual harm (discussed below) and much stronger evidence that competitive forces are working to deliver data roaming agreements to those that want them. Because proponents of regulation have failed to show actual harm, for that reason alone there is no basis for the Commission to adopt a data roaming requirement.

**2. Competitive forces are working to deliver data roaming arrangements to carriers that want them.**

Despite the Commission's request for "specific information" regarding requests for data roaming that have been refused,<sup>22</sup> the record shows many carriers are meeting their data roaming needs and, conversely, scant evidence that carriers cannot obtain data roaming agreements.

**a) The record contains concrete evidence that carriers are able to obtain data roaming agreements.**

When the Commission last considered a data roaming mandate, Verizon Wireless forecast that market forces would work to ensure that data roaming agreements for advanced new technologies are available to carriers that want them.

When a carrier decides to invest in advanced services or new capabilities, there is a considerable incentive to preserve the benefit of the new service or capability for the carrier's own customers in order to provide additional value that will help to retain existing customers, attract new customers, and competitively differentiate its service. This incentive is substantially diminished if the services and features must be shared with competitors. As a carrier's customers use the new services and features made possible by the investment, however, those customers begin to expect those services and features to be available to them as they travel outside of their home markets. Accordingly, carriers have significant incentives to negotiate roaming agreements with other carriers to enable customers to use the services and features when they travel. Carriers will inevitably reach a cross-over point where the benefits of enabling ubiquitous access to advanced services and features outweigh the benefits of preserving

---

<sup>22</sup> Notice at 39, ¶ 78.

access to those services and features for their own customers. Once that cross-over point is reached, carriers will negotiate automatic roaming agreements with other carriers.<sup>23</sup>

As predicted, data roaming agreements have become much more common. This is both because carriers want to ensure their customers can use data services when they travel and because carriers want to put data users on their networks to defray part of the costs of their investments.

The record reflects this evolution. Verizon Wireless stated in its comments that, as of this April, more than a third of its 60 active roaming partners have data roaming agreements, and about half of those have 3G (EV-DO) agreements. Among parties that do not have data roaming agreements, more than half either have not requested data roaming or have only made initial inquiries without taking the steps necessary to move forward. Other roaming partners are currently engaged in negotiations with Verizon Wireless for data roaming.<sup>24</sup> Since the beginning of April, the company has entered into two additional roaming agreements for both 2G and 3G data services and others are being negotiated. Verizon Wireless also provided several examples of regional and smaller providers (Leap, Cell South, MetroPCS, Bluegrass Cellular and Cellcom) that advertise nationwide 3G roaming coverage.<sup>25</sup>

A number of other carriers, many of whom argued that a data roaming requirement is needed, made statements demonstrating that data roaming agreements are readily available. US Cellular, for example, immediately after commenting that a data

---

<sup>23</sup> Verizon Wireless Comments, WT Docket No. 05-265, filed October 29, 2007, at 9-10.

<sup>24</sup> Verizon Wireless Comments at 7-8 (citing letter from Tamara Preiss to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, filed April 13, 2010).

<sup>25</sup> Verizon Wireless Comments at 8-9.

roaming requirement is “urgently necessary,” stated that “USCC currently has 1 x RTT data roaming arrangements with two of the national carriers and has negotiated an EV-DO roaming arrangement with one of them.”<sup>26</sup> Likewise, NTELOS stated “[w]ithout data roaming on reasonable terms and conditions, NTELOS cannot survive and thrive,” but in the next paragraph conceded it “has been able to obtain EVDO roaming through NTELOS’ relationship with Sprint.”<sup>27</sup>

Other carriers commented that they either currently make data roaming agreements available or will make them available in the future. Sprint Nextel, for example, indicated that its data roaming practices have evolved from 2007 when it emphasized “monetizing its [EV-DO] network investment.”<sup>28</sup> It stated that it “now has more than 40 data roaming agreements and is willing to enter into discussions with any carrier that seeks to implement data roaming on its network.”<sup>29</sup> SkyTerra said it “intends to make its [nationwide 4G network] available on a wholesale basis to retail distribution customers . . . , national retailers, service providers without wireless capacity, and retail mobile service providers.”<sup>30</sup> AT&T stated that it “is currently in the process of developing a domestic 3G roaming policy that it intends to make available.”<sup>31</sup>

Finally, ACS Wireless, a tier-III Alaskan carrier, commented, “it has not felt disadvantaged in the least in entering commercial roaming relationships in the last several years. It has never been refused an agreement where the arrangement was technically

---

<sup>26</sup> US Cellular Comments at 3.

<sup>27</sup> NTELOS Comments at 6-7.

<sup>28</sup> Sprint Nextel Comments at 11.

<sup>29</sup> *Id.*

<sup>30</sup> SkyTerra Comments at 2.

<sup>31</sup> AT&T Comments at 54.

feasible.”<sup>32</sup> It indicated that consolidation has made negotiating roaming even easier, since agreements need to address fewer peering points and networks are more robust. With respect to data roaming, it stated it has negotiated agreements with eight different small carriers in Kentucky, Wisconsin, Texas, Montana, California and Illinois, and is in negotiations for data roaming with US Cellular and others. It also stated it has EV-DO roaming arrangements in place with national wireless service providers in the U.S. and Canada.<sup>33</sup>

The facts submitted demonstrate that, as Verizon Wireless predicted in 2007, market forces are working to make data roaming, including 3G data roaming, available to carriers that request such services. There is every reason to believe that the same evolution will occur for future data roaming capabilities, such as 4G. In short, the record belies any factual predicate for new roaming regulation.

**b) There is no specific record evidence that carriers are unable to obtain data roaming agreements or being treated unreasonably.**

A handful of commenters made claims either that they have been denied access to data roaming agreements by a carrier or that they have been treated unreasonably. Each of these claims is addressed below. Many of these claims are mere allegations without any facts to support them. In every case it appears that the carrier making specific allegations of a denial of service or unreasonable terms has been able or should be able to meet its customers’ data roaming needs without regulatory intervention. Accordingly, there are no credible claims that customers have been harmed in any way.

---

<sup>32</sup> ACS Wireless Comments at 6.

<sup>33</sup> *Id.*, at 6-7.

RCA cited comments filed by Bright House Networks and Cricket Communications in the Commission's WT Docket 09-66 (14<sup>th</sup> Competition Report) proceeding. Yet, the comments Bright House filed contain no facts, only unsupported statements that roaming agreements at reasonable rates were not available.<sup>34</sup> RCA also cited allegations made by Cox Communications in the Commission's WC Docket No. 09-104 proceeding (considering Verizon Wireless' divestiture of former Alltel properties to AT&T) that it had been unsuccessful negotiating a roaming agreement with Verizon Wireless.<sup>35</sup> Verizon Wireless responded, however, that it was engaged in good faith negotiations with Cox,<sup>36</sup> and, in approving the transaction, the Commission found that its current roaming rules protected Cox from any unreasonable practices.<sup>37</sup>

Cell South pointed to two letters it filed in 2007 alleging that its roaming requests have been rebuffed by larger carriers for over a year.<sup>38</sup> As noted in Verizon Wireless' comments, however, Cell South currently advertises nationwide 3G roaming capability – a fact that strongly suggests that any alleged problems Cell South may have experienced in 2007 no longer exist today.<sup>39</sup> Surely, if Cell South had experienced any more recent issues, it would have so stated in its comments.

---

<sup>34</sup> RCA Comments at 15.

<sup>35</sup> *Id.*

<sup>36</sup> Letter from Tamara Preiss, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 09-104, filed June 10, 2010.

<sup>37</sup> *Applications of AT&T Inc. and Celco Partnership d/b/a Verizon Wireless For Consent To Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement*, Memorandum Opinion and Order, WT Docket 09-104, FCC 10-116, at 44, ¶ 100.

<sup>38</sup> Cell South Comments at 21.

<sup>39</sup> Verizon Wireless Comments at 8.

SouthernLinc claimed that the absence of a data roaming requirement has rendered it unable to obtain a data roaming agreement.<sup>40</sup> Although Verizon Wireless has no specific knowledge of SouthernLinc's experience, it is worth noting that SouthernLinc uses iDEN technology in its network, meaning that Sprint Nextel is the only national carrier deploying the same technology and therefore able to provide nationwide roaming to SouthernLinc. Yet Sprint Nextel, in its comments, stated that it "now has more than 40 data roaming agreements and is willing to enter into discussions with any carrier that seeks to implement data roaming on its network."<sup>41</sup> It would appear, therefore, that SouthernLinc should be able to meet its data roaming needs through Sprint Nextel.

T-Mobile cited a claim made by MetroPCS in the Commission's reconsideration of the 2007 Roaming Order, that MetroPCS found it difficult to negotiate acceptable new roaming arrangements for either voice or data.<sup>42</sup> MetroPCS' letter, however, contains no specific facts, and, tellingly, MetroPCS does not repeat the claim in its comments on the Notice.

Free Press, OPASTCO and NCTA alleged that some data roaming charges are unreasonable. Free Press cited a statement made last year in comments filed by NTELOS, from which Free Press inferred that Verizon Wireless' data roaming rates with

---

<sup>40</sup> SouthernLinc Comments at 34. *See also* Free Press Comments at 12 (citing to SouthernLinc's previously documented difficulties obtaining data roaming from Sprint Nextel).

<sup>41</sup> Sprint Nextel Comments at 11.

<sup>42</sup> T-Mobile Comments at 10 (citing Letter from Carl W. Northrup, counsel for MetroPCS, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, filed January 6, 2010, at 9).

NTELOS were not reasonable.<sup>43</sup> OPASTCO and NCTA stated that one NTCA member reported a data roaming rate of \$1 per megabit, but failed to document through economic analysis or otherwise why such a rate was unreasonable.<sup>44</sup> As an initial matter, Verizon Wireless notes that Free Press erroneously claimed that the NTELOS statement, which NTELOS does not repeat in its comments, applied to data roaming; in fact, it applied only to voice roaming rates. Moreover, NTELOS now claims to have nationwide 3G roaming on the Sprint network, a strong indication that a data roaming mandate is not necessary.<sup>45</sup> Verizon Wireless has seen a steady decline in rates for data roaming on both 2G and 3G networks. Indeed, the average per megabit rate Verizon Wireless charges for 3G roaming on its EV-DO network has declined 16 percent in the last year, while 2G roaming charges have declined by 27 percent over the last two years. This rate decline demonstrates that competition is working to deliver roaming benefits at increasingly lower rates and that no market failure exists.

Cincinnati Bell alleged that a national carrier at one time insisted on, but subsequently dropped, a primary carrier provision requiring Cincinnati Bell to send all of its roaming traffic to that carrier wherever that carrier has coverage, and that this same carrier has refused to negotiate 3G or 4G data roaming.<sup>46</sup> While Verizon Wireless is not in a position to comment on Cincinnati Bell's allegations, a recent article posted on the Cincinnati.Com website states that "[Cincinnati Bell] has inked a national data/3G roaming agreement with T-Mobile so the [Blaze Android] phone will work just about

---

<sup>43</sup> Free Press Comments at 13 (citing NTELOS Comments, WT Docket 09-66, filed September 30, 2009).

<sup>44</sup> OPASTCO and NTCA Comments at 4.

<sup>45</sup> NTELOS Comments at 7.

<sup>46</sup> Cincinnati Bell Comments at 8-9.

anywhere.”<sup>47</sup> It appears therefore that market forces have worked to enable the company to find a roaming solution for its customers.

In sum, the information submitted in this proceeding demonstrates that there is no market failure and no problem affecting consumers that the Commission needs to fix through regulation of data roaming. To the contrary, there is substantial evidence that carriers are making data roaming available to requesting providers and that customers of all carriers are increasingly available to use data services when they travel. There is no specific evidence that carriers are being denied access to reasonable data roaming agreements, let alone (and what would be critical to sustain regulation) that consumers are being harmed in any way. Accordingly, there is no factual basis for the Commission to adopt a data roaming requirement.

**C. Claims that the Largest Carriers Exert Market Power for Roaming Services Are Incorrect.**

MetroPCS argued that “[t]he market for wireless data services is broken and is experiencing substantial market failure.” It argued that “the separate markets for CDMA data roaming services, on the one hand, and for GSM data roaming services, on the other, reveals that AT&T and Verizon Wireless each have dominant positions in their respective air interfaces.”<sup>48</sup> MetroPCS’ argument is premised on language in the 14<sup>th</sup> Wireless Competition Report that upstream inputs have “the potential to affect competitive and

---

<sup>47</sup> James Pilcher, “New mobile devices feed on speed,” Cincinnati.Com, June 4, 2010, available at: <http://news.cincinnati.com/article/20100604/BIZ01/6050330/New-mobile-devices-feed-on-speed>.

<sup>48</sup> MetroPCS Comments at 43-44.

consumer outcomes in the mobile wireless services segment.”<sup>49</sup> MetroPCS then claimed that data roaming is an upstream input and segregated roaming into separate markets based on technology to reach its conclusion that two carriers separately hold market power.<sup>50</sup> MetroPCS’ reasoning is flawed in several respects.

First, the Commission did not identify roaming or data roaming as an upstream input. Rather, the upstream inputs it identified were spectrum, towers, network equipment and backhaul facilities.<sup>51</sup> Roaming was properly treated as a part of mobile wireless services.<sup>52</sup> Accordingly, MetroPCS’ attempt to classify data roaming as a separate market segment potentially affecting competitive and consumer outcomes is not supported by the very source MetroPCS cites.

Second, the Commission has consistently focused its competitive analysis of the mobile wireless services market on the retail market and has not considered roaming to

---

<sup>49</sup> *Id.*, at 43 (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, FCC 10-81, Fourteenth Report, released May 20, 2010 (“14<sup>th</sup> Wireless Competition Report”)).

<sup>50</sup> *Id.*, at 43-44.

<sup>51</sup> 14<sup>th</sup> Wireless Competition Report at ¶10.

<sup>52</sup> *Id.*, at ¶¶196-199.

be a separate product market.<sup>53</sup> The Commission has also previously rejected arguments that roaming services should be analyzed based on technology. In the AT&T-Cingular Order, the Commission stated that,

if any mobile telephony consumers – regardless of whether they are on GSM, TDMA, or analog-only plans – were to find that the roaming aspects of their wireless service plans became less favorable (whether in terms of price or in terms of coverage) as a result of this merger, they would always have the option not only to upgrade to a GSM plan (in the case of TDMA or analog customers), but to switch to a CDMA-based carrier altogether. Thus, the availability of service from Verizon Wireless, Sprint, ALLTEL, or smaller CDMA-based carriers that comes with favorable roaming arrangements should also act to constrain Cingular’s behavior in this regard.<sup>54</sup>

Accordingly, MetroPCS’ arguments that roaming services constitutes a separate product market and that roaming services can be further segregated into separate markets for CDMA- and GSM-based data roaming services, are inconsistent with past Commission precedent.<sup>55</sup>

---

<sup>53</sup> See *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements and Petition for Declaratory Ruling that the Transaction Is Consistent with Section 310(b) of the Communications Act*, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444, ¶179 (2008) (“Verizon-Alltel Order”); *Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager Leases*, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 12463, ¶88 (2008) (“Verizon-RCC Order”) (“The Commission has previously found that competition in the retail market is sufficient to protect consumers against potential harm arising from intercarrier roaming arrangements and practices.”); *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, Memorandum Opinion and Order, 19 FCC Rcd. 21522, ¶180 (2004) (“AT&T-Cingular Order”).

<sup>54</sup> AT&T-Cingular Order, at ¶180.

<sup>55</sup> MetroPCS’ efforts to segregate roaming into distinct product markets for CDMA and GSM technologies will become even less meaningful as carriers migrate to LTE.

Third, MetroPCS' unsupported and thus meritless claim that Verizon Wireless and AT&T have market power finds no support in the 14<sup>th</sup> Wireless Competition Report. Indeed, there the Commission stated, "this *Report* does not contain a summary estimate of market power – *i.e.*, a numerical estimate of price mark-up over cost – due to the complexities of estimating market power in an industry with high fixed costs that are recovered gradually over time, difficulties with analyzing pricing plans for bundles of services, and the difficulties in obtaining accurate and suitable cost data."<sup>56</sup>

For these reasons, MetroPCS' undocumented conclusion that "[t]he market for wireless data services is broken and is experiencing substantial market failure" is without any legal, analytical or evidentiary support. As demonstrated above, there is no market failure affecting consumers that the Commission needs to address by adopting a data roaming requirement.

**D. A Data Roaming Regulation Will Have Negative Market Consequences.**

The Commission has consistently found that regulation "necessarily implicates costs, including administrative costs, which should not be imposed unless clearly warranted."<sup>57</sup> In its comments, Verizon Wireless cited the works of numerous economists for the proposition that regulation, particularly in the absence of market failure, can impose significant costs and constraints and can discourage innovation and capital investments.<sup>58</sup> Proponents of a data mandate, on the other hand, argued that a new

---

<sup>56</sup> 14<sup>th</sup> Wireless Competition Report at ¶55.

<sup>57</sup> *Supra*, Section I.B (citing Resale Order, 11 FCC Rcd at 18463). *See also* OBRA Implementation Second Order, 9 FCC Rcd at 1419.

<sup>58</sup> Verizon Wireless Comments at 10-16.

rule will not slow the pace of investment, because market forces will spur investment and because large carriers have already made their investment decisions.<sup>59</sup> They also argued that absent a data roaming requirement, smaller carriers will be less likely to invest in new technologies.<sup>60</sup> A data roaming mandate, they contended, will not inhibit build-out, because carriers have incentives to build network facilities in new areas to avoid roaming costs.<sup>61</sup>

As an initial matter, proponents' arguments about investment incentives are inconsistent. On the one hand, they argue that market forces will provide incentives for carriers to invest even if a rule is adopted, yet apparently those same market forces are not sufficient to provide incentives for smaller carriers to invest in new technologies without a data roaming rule.

Proponents' arguments also discount entirely any costs or other ill effects of a data roaming rule. Both AT&T and ACS Wireless discuss the harmful impacts of data roaming regulation. AT&T listed a number of examples of how a data roaming requirement would produce far greater harms than the voice roaming rule. Among the harms listed were poor service quality as carriers seek to stretch capacity to accommodate data roaming traffic they would be required to host,<sup>62</sup> reductions in the scale and pace of broadband infrastructure in rural areas due to an increase in the cost of accommodating data roaming traffic in such areas,<sup>63</sup> and harm to competition due to a greater reliance on

---

<sup>59</sup> Blooston Rural Carrier Comments at 8-9; Cellular South Comments at 15-16; Leap Comments at 6.

<sup>60</sup> SouthernLinc Comments at 36-37; NTELOS Comments at 7.

<sup>61</sup> MetroPCS Comments at 46-47; OPASTCO and NTCA Comments at 5-6.

<sup>62</sup> AT&T Comments at 37-42.

<sup>63</sup> *Id.*, at 42-47.

roaming in areas – such as rural areas – where the costs of building network facilities is greatest.<sup>64</sup>

ACS Wireless likewise explained that a data roaming rule would inhibit build-out particularly in the sparsely populated areas in Alaska where it operates. According to ACS,

a provider that makes advanced wireless network investments will be forced to deal immediately with easy competition on its highest value service before having an opportunity to build its own customer base. No provider will be able to justify deployment because the already limited subscriber pool will be further reduced as customers are lost to competitors that can instantly offer roaming without having made any investment. No provider will be confident about recovering its investment, and therefore no provider will want to be the first to invest.<sup>65</sup>

ACS also explained that carrier investment costs for advanced data networks are significantly greater than voice, in part due to the additional backhaul facilities needed for data and the high cost of backhaul facilities, particularly in remote rural areas.<sup>66</sup> It argued that a data roaming rule would also harm competition because data roaming, much more so than voice, is seen as a differentiator in the eyes of customers and therefore has far greater market value. Thus, a mandatory data roaming requirement would inhibit its ability to differentiate itself from competitors in its home market.<sup>67</sup>

Contrary to the claims of data roaming rule proponents, AT&T and ACS made a compelling case that such a rule would impede competition and build-out, particularly in

---

<sup>64</sup> *Id.*, at 47-48.

<sup>65</sup> ACS Comments at 4.

<sup>66</sup> *Id.*, at 5-6.

<sup>67</sup> *Id.*

rural areas. For these reasons, and in the absence of demonstrable market failure and/or consumer harm, the Commission should not adopt any data roaming requirement.

## **II. THE COMMISSION LACKS AUTHORITY TO IMPOSE A DATA ROAMING OBLIGATION.**

Comments filed in this proceeding failed to overcome the significant legal obstacles that prohibit the Commission from extending automatic roaming obligations to data services. No party disputed that data roaming is not an interconnected service, which means, therefore, that section 332(c)(2) precludes the FCC from imposing common carrier obligations on these services. Parties claiming that the FCC has authority to mandate data roaming whether or not data roaming is a telecommunications service failed to address how the FCC can do so given section 153(44)'s bar on imposing common carrier obligations on non-telecommunications services. Nor did parties that claimed data roaming is a telecommunications service account for those forms of data roaming where the roaming customer accesses information directly from the host carrier, in which cases the host carrier is clearly providing an information service. Those parties advocating that the FCC should impose data roaming obligations under Title I or Title III likewise failed to overcome section 332(c)(2)'s and 153(44)'s bars on such regulation, or the fact that neither Title supplies the authority they claim it provides.<sup>68</sup>

---

<sup>68</sup> Verizon Wireless demonstrated in its comments that a data roaming mandate would also pose serious constitutional issues under the Takings Clause, both by authorizing third parties to occupy the limited physical space available on carrier networks and by interfering with licensees' reasonable expectations not to have common carrier regulations imposed on information services. Verizon Wireless Comments at 42-49. No other party addressed this issue in their comments.

**A. Section 332(c)(2) Prohibits a Data Roaming Rule and Trumps All Other Potential Bases for Legal Authority.**

Comments advocating automatic data roaming obligations fail to acknowledge the limitation imposed by section 332(c)(2) of the Act. As Verizon Wireless and AT&T explained, section 332(c)(2) bars the Commission from subjecting private mobile services like data roaming to common carrier regulation, regardless of any authority the Commission might otherwise have under the Act.<sup>69</sup> Under section 332(c)(2), persons providing private mobile services “shall not . . . be treated as a common carrier *for any purpose*” under the Act.<sup>70</sup> That limitation is dispositive of the proposed rulemaking.

There can be no doubt that data roaming is a private mobile service under the Act -- that is, it is “not a commercial mobile service or the functional equivalent of a commercial mobile service.”<sup>71</sup> A service qualifies as a commercial mobile service only if it 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.”<sup>72</sup> As several comments acknowledged -- and none disputed -- data roaming is not an interconnected service, for it is not itself “interconnected with the

---

<sup>69</sup> Verizon Wireless Comments at 21–23; AT&T Comments at 12–19. Verizon Wireless previously demonstrated that the Commission itself has found automatic roaming to be a common carrier obligation. Verizon Wireless Comments at 19-20.

<sup>70</sup> 47 U.S.C. §332(c)(2) (emphasis added).

<sup>71</sup> 47 U.S.C. 332(d)(3).

<sup>72</sup> *Id.*, §332(d)(1) (emphasis added).

public switched network,”<sup>73</sup> and it does not make interconnected services available. Indeed, the Commission has expressly held that wireless broadband internet access service is not a commercial mobile service, because it “does not give subscribers the capability to communicate with *all other users* on the public switched network.”<sup>74</sup> Thus, data roaming -- a means of facilitating the offering of a non-interconnected service -- is not a commercial mobile service.<sup>75</sup> These undisputed facts resolve that data roaming is a private mobile service and, as the Commission has correctly held for wireless broadband itself, must be “free from common carrier regulations.”<sup>76</sup> The inquiry into the Commission’s authority to mandate data roaming should end here.

Data roaming is a private mobile service for a second, independent reason: it is not offered to “the public” or “to such classes of eligible users as to be effectively available to a substantial portion of the public.”<sup>77</sup> As explained in Verizon Wireless’

---

<sup>73</sup> MetroPCS Comments at 34; T-Mobile Comments at 5; Leap Wireless and Cricket Communications Comments at 24–25. *See generally* 47 U.S.C. §332(d)(2) (defining “interconnected service” as “service that is interconnected with the public switched network . . . or service for which a request for interconnection is pending”); 47 C.F.R. §20.3 (defining “interconnected service” as “a service that is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network . . . .”); *id.* (defining “public switched network” as “[a]ny common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use the North American Numbering Plan in connection with the provision of switched services”).

<sup>74</sup> *Wireless Broadband Internet Access Classification Order*, 22 FCC Rcd 5901, 5902 ¶¶2, 5915–21 ¶¶41 (2007) (“*Wireless Broadband Order*”); Notice, at ¶50. *See* AT&T Comments at 13–16.

<sup>75</sup> MetroPCS acknowledges that data roaming is not commercial mobile service. *See* MetroPCS Comments at 34.

<sup>76</sup> *Wireless Broadband Order*, 22 FCC Rcd at 5920–5921, ¶¶53–56.

<sup>77</sup> 47 U.S.C. 332(d)(1).

comments and in more detail below, Verizon Wireless offers data roaming on a private carriage basis, making individualized decisions in each case regarding whether and on what terms to deal.<sup>78</sup>

Only Leap Wireless and Cricket Communications argued that data roaming might somehow be classified as the “functional equivalent” of a commercial mobile service. That argument is plainly unavailing. Data roaming services lack *both* characteristics that Congress deemed essential for commercial mobile services.<sup>79</sup> Leap’s assertion that consumers “view voice and data as increasingly substitutable” cannot overcome the presumption that non-interconnected services that are not offered to the public are private mobile services.<sup>80</sup> Although Leap’s assertion would not justify a functional equivalence finding even if it were supported, in fact there is no basis whatsoever -- let alone the detailed empirical findings the Commission requires<sup>81</sup> -- for the proposition that “changes in price for” data or voice roaming “would prompt customers to change from one service to the other.”<sup>82</sup>

---

<sup>78</sup> Verizon Wireless Comments at 23, 31–32; AT&T Comments at 18–19.

<sup>79</sup> As the Commission has recognized, Congress intended the hallmark of commercial mobile service to be the provision of interconnected service through use of the public switched network and the North American Numbering Plan. *See Wireless Broadband Order*, 22 FCC Rcd at 5916–5918; Verizon Wireless Comments at 23.

<sup>80</sup> 47 C.F.R. § 20.9(1)(14)(B); Verizon Wireless Comments at 23.

<sup>81</sup> *In the matter of Applications of Brookfield Development, Inc. and Colorado Callcom*, 19 FCC Rcd 14385 (2004) (holding that petitioner failed to overcome the statutory presumption of private mobile service where it did not provide “market-specific information or empirical data” regarding “the target market and consumer demand”).

<sup>82</sup> 47 C.F.R. § 20.9(1)(14)(B). Nor has any party come forward with “market research information identifying the targeted market for the service under review.” *See id.*

Because data roaming is a private mobile service, section 332(c) bars the Commission from imposing on it a common carrier obligation like automatic roaming. This bar is mandatory and overrides all other purported legal bases for the proposed rule. Even if other provisions of the Act could be read expansively enough to justify an automatic roaming obligation for non-interconnected data services -- which they cannot -- section 332(c)(2) prohibits such common carrier regulation. Moreover, section 332(c)(2)'s prohibition applies regardless of whether data roaming is classified as a telecommunications or information service. Section 332(c) must therefore be the starting and ending point for the Commission's consideration of the proposed data roaming rule.

**B. Section 153(44) Also Prohibits a Data Roaming Rule, Because Data Roaming Is Not a Telecommunications Service.**

Verizon Wireless' comments also established that data roaming is not a telecommunications service within the meaning of the Act, precluding the FCC from regulating data roaming under its Title II authority. As commenters and the Commission uniformly recognize, the Commission cannot regulate under its Title II authority any service that is not a telecommunications service.<sup>83</sup>

But the Act's restriction of Commission authority over information services goes further. As Verizon Wireless established in its comments, section 153(44) affirmatively prohibits the imposition of any common carrier obligations upon information services. Thus, the rule is not simply that the Commission cannot impose common carrier obligations on information services under Title II; rather, section 153(44) prohibits the

---

<sup>83</sup> Notice, at ¶¶64, 68; AT&T Comments at 26–30; MetroPCS Comments at 18; Leap Wireless and Cricket Communications Comments at 19; Cellular South Comments at 9; United States Cellular Corporation Comments at 8.

Commission from imposing the same common carriage regulations under any other Title of the Act. Because data roaming is not a telecommunications service, an automatic roaming rule -- a quintessential common carrier obligation -- cannot be imposed under color of *any* provision the Act.

**1. Data roaming is not a telecommunications service.**

As the Commission and the D.C. Circuit have recognized, “telecommunications service” and “information service” constitute mutually exclusive categories under the Act.<sup>84</sup> Verizon Wireless established that data roaming falls within the definition of information service, and is necessarily not a telecommunications service, because it involves the offering of functions beyond mere transmission of user-provided information.<sup>85</sup>

MetroPCS and others argued that data roaming is essentially the same as data sessions provided to subscribers in their home markets except that when roaming, the host carrier provides a path to transmit data from the home carrier to the subscriber.<sup>86</sup> They argued that data roaming involves two separate and distinct services – wholesale transmission services provided by the host provider and retail information services

---

<sup>84</sup> See, e.g., *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007); *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11520 ¶39 (1998).

<sup>85</sup> Verizon Wireless Comments at 25–28; AT&T Comments at 26–28.

<sup>86</sup> MetroPCS Comments at 9-17. See also Cellular South Comments at 7-8 (citing July 18, 2007 letter from David L. Nace, Counsel for Cellular South, to Marlene H. Dortch, Secretary, FCC, WT Docket 05-265); Leap Wireless and Cricket Communications Comments at 19-21; RTG Comments at 5; SouthernLINC Comments at 19-22; US Cellular Comments at 8-9.

provided by the home carrier.<sup>87</sup> MetroPCS argued that the transmission of data traffic from the customer handset to the home carrier does not involve generating, acquiring, storing, transforming, processing, retrieving, utilizing or making information available.<sup>88</sup> MetroPCS claimed its analysis is true whether the data session is provisioned via simple IP (“SIP”), mobile IP (“MIP”) or proxy mobile IP (“P-MIP”).<sup>89</sup>

As Verizon Wireless noted in its comments, the CDMA and LTE standards documents provide many different methods for provisioning data roaming. MetroPCS failed accurately to describe other methods by which carriers provision data roaming – methods that involve the information being provided to the subscriber directly by the host carrier.<sup>90</sup> One such method set forth in the CDMA standards is data roaming provided using SIP via direct connect:

The CDMA standards define SIP as ‘the [mobile subscriber] accessing the public Internet directly from the visited operator’s network.’ Among the benefits of SIP stated in the standards document are that ‘the roaming [mobile subscriber] may directly access the public Internet without tunneling to the home operator’s network,’ and ‘the roaming [mobile subscriber] may directly access application servers in the visited network without tunneling to the home operator’s network.’<sup>91</sup>

Although MetroPCS mentioned SIP in its comments, it incorrectly equated the use of a static IP address with SIP, and therefore did not accurately describe how carriers

---

<sup>87</sup> See SouthernLINC Comments at 21-22.

<sup>88</sup> MetroPCS Comments at 14.

<sup>89</sup> *Id.*, at 12.

<sup>90</sup> Indeed, the MetroPCS analysis and diagrams only portrayed mobile IP using 1xRTT technology; it does not describe or portray roaming on EV-DO or LTE networks or roaming provisioned by simple IP.

<sup>91</sup> Verizon Wireless Comments at 25 (*citing* “Wireless Data Roaming Requirements and Implementation,” CDG Document 79, Version 1.2, April 26, 2007, Section 4.1, at pp.9-10).

provision data roaming using SIP via direct connect.<sup>92</sup> Because static IP addresses must be assigned by the home network, by definition, the data session must be set up by the home network – which is only possible using either mobile IP or SIP via L2TP.<sup>93</sup> For this reason, when Verizon Wireless (and other carriers) provision data roaming using SIP via direct connect, it uses a dynamic IP address.<sup>94</sup> The use of dynamic assignment of IP addresses enables the IP address for a data session to be assigned by the host provider, which enables the roaming subscriber to access information *directly from the host carrier*.

MetroPCS and other commenters also failed to mention that data roaming on LTE networks can (and will) be provisioned using “non-local breakout” – which, like SIP via direct connect, enables the mobile subscriber to access information directly from the host carrier.<sup>95</sup> Because MetroPCS and other commenters failed to account for data roaming provisioned using SIP via direct connect and using non-local breakout, statements that data roaming involves two separate and distinct services – wholesale transmission services provided by the host provider and retail information services provided by the home carrier -- are not correct. Accordingly, the Commission cannot conclude that all

---

<sup>92</sup> MetroPCS Comments at 12 (“A SIP data session uses a static IP address for the handset. When a handset using static SIP for a data session moves from one path, for example within its home coverage area, to another path, *e.g.*, in a Roaming Partner network, the data session will be terminated.”).

<sup>93</sup> See Verizon Wireless Comments at 26.

<sup>94</sup> A dynamic IP address is a temporary IP address assigned to the subscriber from a pool of IP addresses. When the user terminates the data session, the IP address returns to the pool and can be assigned to another user. Dynamic IP addresses are favored because they are more efficient and because they enable IP addresses to be assigned by the host carrier network.

<sup>95</sup> See Verizon Wireless Comments at 26-27. While MetroPCS referred to LTE in its comments, it inaccurately stated that data roaming on LTE networks is “substantially similar” to the process described in its comments. MetroPCS Comments at 8, n.17.

data roaming services involve the mere transmission of information provided by the home carrier or that data roaming can properly be classified as a telecommunications service.

**2. Data roaming is not offered on a common carrier basis.**

Verizon Wireless' comments established a second and independent reason why data roaming is not a telecommunications service: it is not offered on a common carrier basis. Only services offered on a common carrier basis can be classified and regulated as telecommunications services.<sup>96</sup>

As the D.C. Circuit has explained, a finding that a carrier is “holding [it]self out to serve indiscriminately” is a “prerequisite” to common carrier status, and “[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.”<sup>97</sup> Some commenters argued incorrectly that data roaming is offered indiscriminately to the public. MetroPCS based this argument on the number of retail customers who receive data roaming service.<sup>98</sup> RTG similarly argued that data roaming is offered on a common carrier basis because “[a] carrier offering such service to its own customers . . . does so indiscriminately.”<sup>99</sup>

These comments used the wrong framework. An automatic roaming obligation would require providers to honor reasonable roaming requests from *other providers* and

---

<sup>96</sup> See *Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921, 925 (D.C. Cir. 1999); Verizon Wireless Comments at 28.

<sup>97</sup> *NARUC I*, 525 F.2d at 641–42. See Verizon Wireless Comments at 30.

<sup>98</sup> MetroPCS Comments at 8 (arguing that data roaming service is offered indiscriminately to the public because the two largest providers of wireless data services offer data roaming “to nearly two hundred million customers combined”).

<sup>99</sup> RTG Comments at 4.

to charge those providers just and reasonable rates in any such arrangement.<sup>100</sup> Where regulation would require a provider to serve a specialized subset of the entire population, the relevant question is whether the service is already offered indiscriminately to the “eligible user public” -- the subset of the public comprising the “clientele [the provider] is suited to serve.”<sup>101</sup> In other words, do host providers offer data roaming services indiscriminately, at the wholesale level, to potential roaming partners?

With respect to Verizon Wireless, the answer is decidedly no. As its comments established, Verizon Wireless makes “individualized decisions, in particular cases, whether and on what terms to deal” with potential roaming partners.<sup>102</sup> Assertions that Verizon Wireless offers data roaming indiscriminately at the wholesale level are factually erroneous.<sup>103</sup> Verizon Wireless makes all decisions regarding potential roaming arrangements on an individualized basis. Where data roaming is provided, it is provided on a discretionary basis, exclusively through individual negotiations between carriers.

---

<sup>100</sup> Notice, at ¶11.

<sup>101</sup> *NARUC I*, 525 F.2d at 641–42.

<sup>102</sup> Verizon Wireless Comments at 31–32. Although Verizon Wireless makes individualized decisions regarding data roaming agreements, the company’s policy is in no way intended to freeze out potential roaming partners, but instead reflects a commercially reasonable, market-based approach.

<sup>103</sup> RTG Comments at 4; MetroPCS Comments at 25. *See also* Leap Wireless and Cricket Communications Comments at 21–22 (suggesting that wholesale offerings necessarily constitute service to the public).

The terms of any agreement that may result are specifically tailored to the needs and circumstances of each relationship.<sup>104</sup>

MetroPCS and Leap Wireless further suggested that even if data roaming is not already offered on a common carrier basis, the Commission may require such an offering. But this is not the law.

Common carrier regulation is proper only for services the carrier has already chosen to offer on a common carriage basis – that is, services the carrier provides indifferently to the public.<sup>105</sup> This limitation is born of the common-law roots of common carrier status. “The original rationale for imposing a stricter duty of care on common carriers,” the D.C. Circuit has explained, “was that they had implicitly accepted a sort of public trust by availing themselves of the business of the public at large.”<sup>106</sup> Indeed, when price and service regulation of common carrier began in the late nineteenth century, the regulations were “upheld on the basis of the near monopoly power exercised by the railroads, coupled with the fact that they ‘exercise a sort of public office’ in the duties which they perform.”<sup>107</sup> The concept of a common carrier thus “developed as a sort of quid pro quo whereby a carrier was made to bear a special burden of care, in

---

<sup>104</sup> Verizon Wireless’ LTE in Rural America initiative is illustrative of this practice: Verizon Wireless is working with various carriers in order to increase access to more of the U.S. population living in rural areas, but any resulting negotiations occur on an individualized basis, and any resulting agreement will include specifically tailored terms. MetroPCS’ suggestion that the LTE in Rural America initiative reflects an indiscriminate offering of service is incorrect. MetroPCS Comments at 25.

<sup>105</sup> Verizon Wireless Comments at 30, n.82.

<sup>106</sup> National Ass’n of Regulatory Utility Com’rs v. F.C.C., 525 F.2d 630, 641 (D.C. Cir. 1975) (NARUC I).

<sup>107</sup> *Id.*, at 640-641 (quoting *Munn v. Illinois*, 94 U.S. (4 Otto) 113, 130 (1876)).

exchange for the privilege of soliciting the public's business.”<sup>108</sup> In harmony with the historical basis of common carriage, a finding that a carrier is “holding [it]self out to serve indiscriminately” is a “prerequisite” to common carrier status.<sup>109</sup> And courts have repeatedly stated that the two prongs of the common carrier analysis are “(1) whether the carrier ‘holds himself out to serve indifferently all potential users’; and (2) whether the carrier allows ‘customers to transmit intelligence of their own design and choosing.’”<sup>110</sup>

Although the Commission has occasionally claimed authority, based on *NARUC I*, to compel a carrier to offer service on a common carrier basis when the public interest so requires, that suggestion is inconsistent with the statutory text, *NARUC I* itself, and later cases.<sup>111</sup> The Act's text makes clear that common carrier status exists only when a

---

<sup>108</sup> *Id.*, at 642.

<sup>109</sup> *Id.* (emphasis added).

<sup>110</sup> *U.S. Telecom Ass'n v. FCC*, 295 F.3d 1326, 1329 (D.C. Cir. 2002); *Iowa Telecommunications Services, Inc. v. Iowa Utilities Bd.*, 563 F.3d 743, 746 (8th Cir. 2009); *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475, 1480 (D.C. Cir. 1994); *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608–09 (D.C. Cir.1976) (“*NARUC II*”).

<sup>111</sup> In *NARUC I*, the question “whether there will be any legal compulsion ... to serve [the public] indifferently” was part of the D.C. Circuit's empirical analysis of whether a service that was not yet operational would, in fact, be offered on a common carrier basis. The court had already defined common carrier status as hinging on whether a carrier's “practice is, in fact,” to “serve all indiscriminately.” 525 F.2d at 641. Moreover, the court went on to say that the Commission cannot simply order a carrier to act as a common carrier. *See id.* at 644 (“Further, we reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve. The common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications entities. A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so.”).

provider *is already* providing service to the public.<sup>112</sup> And the governing cases emphasize that “[w]hile the Commission may look to the public interest in fine-tuning its regulatory approach, it may not impose common carrier status upon any given entity on the basis of the desired policy goal the Commission seeks to advance.”<sup>113</sup>

Even if the Commission’s sought to compel common carriage, the Commission has held that it may not do so without, at an absolute minimum, a showing that the service provider has substantial market power.<sup>114</sup> No such showing can be made in the context of data roaming. As explained above, any claim that a data roaming provider possesses market power is unfounded as a matter of fact and is at odds with Commission policy, which analyzes the competitiveness of mobile wireless services based on the retail market.<sup>115</sup> Moreover, the record reflects that market forces are working to enable carriers that request data roaming agreements to obtain them.<sup>116</sup>

---

<sup>112</sup> A telecommunications carrier may be treated as a common carrier “only to the extent that it *is engaged in providing telecommunications services*,” 47 U.S.C. §153(44) (emphasis added), meaning that it is already offering communications to the public, 47 U.S.C. §153(46). Similarly, a person engaged in the provision of a private mobile service—a service that does not “make[] interconnected service available” to the public, 47 U.S.C. §332(d)(1) — “shall not, insofar as such person *is so engaged*, be treated as a common carrier for any purpose,” 47 U.S.C. §332(c)(2) (emphasis added). These prohibitions and definitions would be rendered meaningless if a common carrier service existed whenever the Commission so ordered.

<sup>113</sup> *Southwestern Bell Telephone Co.*, 19 F.3d at 1481.

<sup>114</sup> See, e.g., *AT&T Submarine Systems, Inc.*, 13 F.C.C.R. 21,585, 21,588-589 (1998) (the decision to impose common carrier treatment depends on whether “the public interest . . . require[s] the carrier to be legally compelled to serve the public indifferently” because the carrier “has sufficient market power”); *Cable & Wireless, PLC*, 12 FCC Rcd 8516, 8521-22 (1997).

<sup>115</sup> See *supra* Section I.C.

<sup>116</sup> See *supra* Section I.B.2.

Thus, under the correct legal standard, data roaming is not a telecommunications service for two independent reasons: it is an information service, and not a telecommunications service, under the Act's definitions; and it is an offering of private carriage service rather than common carrier service.

**3. Section 153(44) bars common carrier regulation of services, like data roaming, that are not telecommunications services under the Act.**

Several commenters asserted that, even if data roaming is not a telecommunications service, the Commission has authority to impose an automatic data roaming rule under Title I or Title III of the Act. They apparently reasoned that, although the Commission cannot regulate information services as common carrier services pursuant to its Title II authority, it may impose the very same obligations pursuant to its Title I or Title III authority.<sup>117</sup> Section 153(44) -- which these commenters did not cite, much less explain -- directly refutes this argument.

Section 153(44) is not limited to Title II; it broadly prohibits non-telecommunications services from being "treated as a common carrier."<sup>118</sup> Whether regulations amount to common carrier treatment depends on "the character of the regulatory obligations," not the label the Commission gives them.<sup>119</sup> Because automatic data roaming would obligate carriers to provide service to all comers on a

---

<sup>117</sup> T-Mobile Comments at 15; SouthernLINC Comments at 15; Rural Cellular Association Comments at 16–17; Leap Wireless and Cricket Communications Comments at 15; Cellular South Comments at 27.

<sup>118</sup> As Verizon Wireless explained in its comments, the Supreme Court's reasoning in *Midwest Video II*, 440 U.S. 689 (1979), confirms that section 153(44) limits the Commission's authority under all Titles of the Act, not just Title II. *See* Verizon Wireless Comments at 34.

<sup>119</sup> *Midwest Video II*, 440 U.S. at 702.

nondiscriminatory basis -- i.e., would constitute a common carriage obligation,<sup>120</sup> -- section 153(44) categorically prohibits the Commission from imposing such an obligation on an information service, regardless of the location within the Act of any provision from which the Commission may purport to derive authority to impose such an obligation.<sup>121</sup> This prohibition, like that in section 332(c)(2), is dispositive of the proposed rulemaking.

**C. Title III Does Not Authorize the Commission to Impose Automatic Roaming Obligations on Data Services.**

As described above, the prohibitions set forth in sections 332(c)(2) and 153(44) preclude the imposition of automatic roaming obligations on data services. In addition, even apart from these limitations, there is no basis for the proposed rule in any provision of Title III of the Act.

First, section 303(r) does not authorize a data roaming rule. SouthernLINC stated that the FCC's public-interest inquiry is the "touchstone" of Commission rulemaking, and suggests that the Commission may impose any rule that it concludes is in the public

---

<sup>120</sup> *Id.*, at 701–702.

<sup>121</sup> Several commenters cite the FCC's decision to extend resale obligations to services that it could not otherwise regulate under Title II as evidence that Title III confers authority to confer "common carrier-type obligations." Cellular South Comments at 27; *see also* T-Mobile Comments at 15; SouthernLINC Comments at 15; Rural Cellular Association Comments at 16–17; Leap Wireless and Cricket Communications Comments at 15. These citations refer to a terse statement in the Commission's Reconsideration Order in the resale rule proceedings. The Commission rejected arguments that the resale rule could not be extended to "non-Title II services" because the Commission had rejected that argument in the original order, and because "[n]o party had challenged" the Commission's "explicit invocation of Title III as a basis for imposing the resale rule." *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 16430, at ¶27 (1999). This assertion was never subjected to judicial review, and hardly reflects the sort of reasoning that would withstand challenge.

interest.<sup>122</sup> That is not the law. The public interest inquiry is necessary to, but not sufficient for, an exercise of FCC rulemaking. As Verizon Wireless established in its comments, rulemaking authority under section 303(r) exists only when necessary to implement a separate source of delegated authority under the Act.<sup>123</sup> This limitation is clear from the Act’s plain text -- which confers authority to make rules “*necessary* to carry out the provisions of the Act”<sup>124</sup> -- and has been explicitly emphasized by the D.C. Circuit: “The FCC cannot act in the ‘public interest’ [under section 303(r)] if the agency does not *otherwise* have the authority to promulgate the regulations at issue.”<sup>125</sup> SouthernLINC’s reading of the Act would run afoul of the courts’ repeated admonition, stressed most recently in the D.C. Circuit’s *Comcast* decision, that the Commission must stay within the bounds of the authority Congress has specifically delegated.<sup>126</sup>

A data roaming rule is not “necessary to carry out” any other provision of the Act. Some commenters cited section 303(g),<sup>127</sup> but the proposed data roaming rule has nothing to do with conducting a “study for new uses for radio” or providing for “experimental uses of radio spectrum.” Furthermore, as AT&T noted, section 303(g)’s stated policy of “encourag[ing] the larger and more effective use of radio” cannot be the basis for a data roaming rule; as *Comcast* recently held, such a “statement of policy” does not confer the

---

<sup>122</sup> SouthernLINC Comments at 15; *see also* Cellular South Comments at 6.

<sup>123</sup> Verizon Wireless Comments 37–38; AT&T Comments 24.

<sup>124</sup> 47 U.S.C. §303(r).

<sup>125</sup> *MPAA v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002) (emphasis added).

<sup>126</sup> Verizon Wireless Comments at 37–42 (citing *Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010)); AT&T Comments at 21–26; T-Mobile Comments at 18 & n.62.

<sup>127</sup> SouthernLINC Comments at 13–14; Rural Cellular Association Comments at 5; T-Mobile Comments at 14–15; Leap Wireless and Cricket Communications Comments at 12; Bright House Networks Comments at 11.

necessary “regulatory authority.”<sup>128</sup> Nor is a data roaming rule “necessary to carry out” section 303(b), which confers authority to “prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class.”<sup>129</sup> As Verizon Wireless explained in its opening comments, that provision refers specifically to the *type* of service a station renders, and under governing canons of statutory construction, cannot be read to provide boundless authority to regulate all aspects of service.<sup>130</sup> Similarly, section 309(j), which authorizes the Commission to design auction processes, has no bearing here.<sup>131</sup>

Apart from section 303, some commenters pointed to the FCC’s authority to issue and modify licenses under sections 307 and 316, but those provisions are plainly irrelevant. As a procedural matter, this is not a licensing proceeding, and when the Commission wishes to exercise its licensing authority, it must comply with the procedural limitations set forth in sections 307 and 316. More fundamentally, the Commission may not circumvent the clear limitations of section 303(r) by simply bootstrapping its authority to issue spectrum licenses. The FCC cannot, that is, override the requirement that any rule be “necessary to carry out” a delegation of substantive authority simply by referencing its separate authority to issue spectrum licenses. Such an approach would effectively void the carefully constrained grant of rulemaking authority set forth in section 303(r). Statutes must be construed to give meaning to each provision, and that rule applies with special force when the provision, like section 303(r), contains a

---

<sup>128</sup> *Comcast*, 600 F.3d at 658–59.

<sup>129</sup> 47 U.S.C. §303(b).

<sup>130</sup> Verizon Wireless Comments at 40–41.

<sup>131</sup> Verizon Wireless Comments at 38.

congressionally imposed restriction on agency authority. The Commission's licensing authority therefore cannot justify an automatic data roaming obligation.

Title III cannot be the source of legal authority for a data roaming mandate both because no substantive provision in Titles I or III provides the requisite basis and because sections 153(44) and 332(c)(2) independently bar adoption of the mandate. Moreover, attempting to rely on Titles I or III would run headlong into the non-delegation doctrine, which prevents Congress from delegating its lawmaking power over a subject to an agency without providing appropriate standards and principles such that the agency can fairly be said to be executing Congress' will.<sup>132</sup> Nothing in Titles I and III supply the Commission with any such standards or principles for regulating data roaming. Nothing in these Titles indicates a choice by Congress to grant the Commission authority to regulate in this area, much less to provide any intelligible principles for how to implement such authority.<sup>133</sup>

**D. Title I Does Not Authorize the Commission to Impose Automatic Roaming Obligations on Data Services.**

Some commenters asserted that the Commission may exercise its "ancillary authority" under Title I of the Act to extend automatic roaming obligations to data services. As the Notice stated, section 154(i) of the Act authorizes the FCC to promulgate rules only if they are "necessary to the execution of [the Commission's] functions." The courts have made clear that any exercise of ancillary authority is

---

<sup>132</sup> See generally *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001).

<sup>133</sup> "The FCC must act pursuant to *delegated authority* before any 'public interest' inquiry is made under Section 303(r)." *MPAA v. FCC*, 309 F. 3d at 806 (emphasis in original).

“incidental to, and contingent on, specifically delegated powers under the Act,” and must be necessary to the execution of a separate, “statutorily mandated responsibility.”<sup>134</sup> This requirement is strictly enforced, because the Commission does not have “untrammeled” regulatory authority, and the Act cannot be read to “free the Commission from its congressional tether.”<sup>135</sup> The Notice itself did not cite any specific statutory responsibility to which a data roaming rule would be reasonably ancillary for purposes of Title I.<sup>136</sup> No provision identified in the comments successfully fills this void.

SouthernLINC and T-Mobile asserted that a data roaming rule is necessary to the execution of sections 201 and 202 of the Act, which require that the rates and practices of common carriers be just, reasonable, and nondiscriminatory.<sup>137</sup> This link is attenuated and untenable. Unreasonably high data roaming rates, the theory goes, might so burden CMRS providers that they would be forced to charge consumers excessive rates for common-carrier voice services. But there is no evidence whatsoever supporting the existence of unreasonable data roaming rates, excessive voice charges, or any connection between the two.<sup>138</sup> Alternatively, SouthernLINC argued, the leverage of a host roaming provider in the absence of a data roaming rule could permit it to charge excessive rates for voice services.<sup>139</sup> But again, there is no evidence that voice charges are in fact excessive, and, in any case, excessive voice charges are independently prohibited by

---

<sup>134</sup> *NARUC II*, 533 F.2d at 612; *Comcast*, 600 F.3d at 644.

<sup>135</sup> *Comcast*, 600 F.3d at 655, 661.

<sup>136</sup> Notice, at ¶70 (“[A]utomatic roaming obligations may be reasonably ancillary to several provisions under the Act.”).

<sup>137</sup> SouthernLINC Comments at 24–27; T-Mobile Comments at 12–13.

<sup>138</sup> See Section I.B.2.b., *supra*.

<sup>139</sup> SouthernLINC Comments at 26.

sections 201 and 202 -- so no ancillary regulation of data services is necessary to avoid such charges.

T-Mobile asserted that a data roaming requirement may be ancillary to the fulfillment of common carriers' interconnection obligations under sections 201(a) and 251(a).<sup>140</sup> This assertion is baseless. Roaming, of course is not interconnection.<sup>141</sup> T-Mobile apparently reasoned that, absent a data roaming rule, a data service provider that also offers common carrier voice service could lose customers or face higher interconnection costs. But even if there were factual support for these concerns, T-Mobile failed to explain how such concerns implicate the Commission's authority to enforce common carriers' interconnection obligations. The existence of a duty to interconnect certainly does not mean that the Commission has authority to ensure that certain market participants stay in business, or retain a certain customer base or cost level.

Finally, Leap Wireless argued that data roaming is necessary to achieve the "public interest goals" of voice roaming.<sup>142</sup> Noting the Commission's previous finding that CMRS roaming is important to the development of "nationwide, ubiquitous, and competitive wireless voice communications," Leap posited that data roaming, too, could help achieve these goals.<sup>143</sup> This echoes the reasoning rejected in *Comcast*. As the D.C. Circuit there explained, the Act's general goal of nationwide access to communications

---

<sup>140</sup> T-Mobile Comments at 13–14.

<sup>141</sup> See, e.g., 47 C.F.R. §51.5 ("Interconnection is the linking of two networks for the mutual exchange of traffic.").

<sup>142</sup> Leap Wireless and Cricket Communications Comments at 26–27.

<sup>143</sup> *Id.*, at 26 (quoting *Interconnection and Resale Obligations Pertaining to CMRS*, Second Report and Order and Third Notice of Proposed Rulemaking, 11 FCC Rcd 9462, 9464, ¶2 (1996)).

services does not confer a “statutorily mandated responsibility” sufficient to support ancillary authority.<sup>144</sup>

---

<sup>144</sup> *Comcast*, 600 F.3d at 651–658 (rejecting the Commission’s assertion that §151, which identifies the statutory goal of “mak[ing] available . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service,” is a “statutorily mandated responsibility” sufficient to support ancillary authority).

### III. CONCLUSION

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

Respectfully submitted,

VERIZON WIRELESS

By: John T. Scott III  
John T. Scott, III  
Vice President and Deputy General  
Counsel – Regulatory Law

Andre J. Lachance  
Assistant General Counsel

Verizon Wireless  
1300 I Street, N.W., Suite 400-West  
Washington, D.C. 20005  
(202) 589-3760

Dated: July 12, 2010