

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

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

**REPLY COMMENTS OF AT&T INC.**

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July 12, 2010

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Pursuant to the Notice of Inquiry (“*Notice*”) released by the Commission on April 21, 2010,<sup>1</sup> AT&T Inc. (“AT&T”) submits the following reply comments.

**INTRODUCTION AND SUMMARY**

The proponents of new regulation all but concede that data roaming is a “private mobile service” within the meaning of Section 332(c) that cannot be subjected to common carrier regulation “for any purpose under this Act.”<sup>2</sup> They also acknowledge that both small and large providers have access to individually tailored data roaming agreements across the nation and in fact offer data roaming to their customers today. Accordingly, the question is no longer whether the Commission has authority to impose common carrier data roaming obligations – it does not. Nor is the question whether wireless broadband providers will be able to obtain data roaming in the absence of intrusive new regulation – they already do. Rather, the Commission’s focus should remain fixed on easing spectrum constraints and preserving, not infringing, providers’

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<sup>1</sup> Order on Reconsideration (“*2010 Roaming Order*”) And Second Notice Further Notice Of Proposed Rulemaking (“*Notice*”), *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, FCC 10-59, WT Docket No. 05-265 (rel. Apr. 21, 2010).

<sup>2</sup> 47 U.S.C. § 332(c)(2).

flexibility to adapt their arrangements and practices to meet their customers' needs in the face of exploding traffic demand.

First, and most importantly, it is quite clear that the Commission has no legal authority to impose common carriage on data roaming. Section 332 of the Act establishes two statutory categories of mobile wireless services: (1) CMRS services, which are defined as services that make available "interconnection" to the "public switched network" and are offered "to the public," and (2) private mobile services, which are defined as any mobile wireless service that is not CMRS or its functional equivalent. As the regulation proponents concede, data roaming is not CMRS, does not make available interconnection to the PSTN, is an individually negotiated carrier-to-carrier service that is not offered indiscriminately to all comers, and is in no respect functionally equivalent to CMRS. That is dispositive: "insofar as" a person provides a "service that is a private mobile service," that person "shall not . . . be treated as a common carrier for *any purpose under this Act.*"<sup>3</sup> Section 332(c)(2) thus flatly prohibits the proposed rules, which would force wireless broadband providers to offer data roaming to all comers and to provide such services on rates and terms governed by Sections 201 and 202.

Accordingly, the commenters' peripatetic wanderings through the Communications Act looking for other possible sources of authority are senseless – Section 332(c)(2) bars common carrier regulation "for any purpose under this Act." But these alternative theories would be meritless even in the absence of Section 332(c)(2). Many commenters, following the Commission's lead in the Notice, suggest that the Commission has authority to impose common carrier regulation under "Title III" – by which they mean seemingly every provision in Title III *except* Section 332. But neither the courts nor the Commission has ever found that the

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<sup>3</sup> *Id.* §§ 332(c)(2) & (d) (emphasis added).

Commission’s generic authority to issue licenses, to conduct auctions, and to manage spectrum carries with it the authority to import Title II wholesale into Title III and impose *common carrier* regulation on any wireless service. Indeed, that is why Congress enacted Section 332 in the first place – to specify which wireless services should (and should not) be subject to the common carrier standards of Title II.

Some commenters claim that data roaming is a telecommunications service subject to Title II, and they devote endless pages to technical descriptions of how data roaming is provisioned. These descriptions are irrelevant, because Section 332(c) establishes that the “CMRS”/“PMRS” definitions are controlling here, not the “telecommunications service”/“information service” distinction. In all events, there are numerous ways of provisioning data roaming, all of which require the performance of varying levels of information functions – any of which would require data roaming to be classified as an information service under existing law (and some of which the regulation proponents concede warrant information service classification).

Other commenters claim that that the Commission could adopt the proposed regulations under Title I, but here again, neither the courts nor the Commission has ever found that common carrier regulation could be imposed as an exercise of *ancillary* jurisdiction under Title I in such circumstances. Indeed, regulation proponents are unable to identify any connection whatsoever between the imposition of common carrier regulations on data roaming and the Commission’s ability to carry out its statutory responsibilities with respect to any service over which it has express authority.

The regulation proponents’ factual and policy case for common carrier regulation is equally meritless. There is an enormous disconnect between their rhetoric and the actual

marketplace facts. Simply parroting Commission statements made in the very different voice roaming context, they present a stark but false choice – *i.e.*, they claim that, without new rules, wireless broadband providers will be unable to obtain data roaming at all. But that is not true. The comments confirm that there is a vibrant, growing, and ever-evolving marketplace for individually negotiated data roaming agreements that are meeting the needs of providers and their customers.

Both large and small providers report that, in the absence of regulation, a wide variety of data roaming arrangements are available on flexible terms that continue to evolve as providers cope with rapid change in wireless technologies and the challenges presented by severe spectrum constraints and exploding demand. AT&T itself has recently offered 3G roaming arrangements to a number of wireless providers. One of the biggest complainers here, Cellular South, touts on its website that it has already obtained roaming arrangements that give it broader 3G coverage than AT&T. As detailed below, the “sky is falling” crowd in fact offer their customers robust nationwide data coverage today, are investing in the very network upgrades they claim are infeasible absent mandatory data roaming, and are reporting healthy financial and subscriber growth results that differ markedly from their predictions here of imminent extinction – all without a data roaming mandate. Indeed, data roaming arrangements are providing powerful benefits today precisely because providers remain free to structure their arrangements to fit their varying needs.

The opening comments also reveal an even more troubling side to the regulation proponents’ strategy: the pleas for new regulation are not really about access to data roaming; rather, the real aim is to induce the Commission to assume a rate-setting role, reinstate resale obligations that were abandoned as contrary to the public interest a decade ago, and, indeed,

micromanage virtually every aspect of wireless carrier arrangements, enmeshing the Commission and the industry in endless disputes and investment and innovation-killing uncertainty. Numerous commenters ask the Commission to estimate the costs of and set the rates for data roaming, which they claim are both too high (when they are roaming on larger carriers networks) and too low (when larger carriers are roaming on their networks). They want the Commission to determine if and when providers may take steps to protect the service quality provided to their own customers, in standardless, after-the-fact complaint proceedings. They seek blanket rights to resell other providers' data services when they have not risked their own capital to provide those services on their own networks.<sup>4</sup>

These forms of regulation would also go far beyond what the Commission has committed to do even in the more stable and predictable voice roaming context. The proposed application to the intensely competitive wireless industry of these most intrusive forms of common carrier regulation that were largely abandoned as counterproductive even in the monopoly context would create severe uncertainty, increase costs, and retard efforts to provide more efficient and secure wireless services for the nation's wireless consumers.

For all of these reasons, there would be no benefit and substantial costs to adding a layer of Commission "common carriage" regulation to this fully functioning marketplace. As Clearwire rightly warns (at 2-3), neither carriers nor the Commission can "fully anticipate the issues that may arise with regard to data roaming" and the Commission "should not presume that data roaming . . . will precisely mirror the legacy processes put in place for CMRS voice services." Given the far greater complexity of wireless data services and networks, the

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<sup>4</sup> Of course, these claims – and, indeed, this proceeding – take on a special irony given that the Commission has repeatedly pointed to its "hands off" approach to wireless regulation as justification of its "third way" proposal in the *Title II NOI* proceeding.

challenges presented by exploding demand for data services and the looming spectrum crisis, and the National Broadband Plan's goal of removing unnecessary regulatory obstacles to broadband investment, new common carrier regulation of wireless data providers would plainly disserve the public interest. It is no wonder that Congress affirmatively prohibited applying legacy common carrier regulation to non-interconnected wireless Internet services and rejected the regulation proponents' vision of government micromanagement of contractual arrangements between sophisticated broadband providers.

**I. THE COMMENTS OVERWHELMINGLY CONFIRM THAT THE PROPOSED REGULATIONS WOULD VIOLATE THE ACT.**

Section 332(c)(2) expressly provides that non-interconnected mobile wireless services cannot be treated as common carriage “for any purpose under this Act.”<sup>5</sup> That express statutory prohibition is the complete answer to this entire Notice, and none of the regulation proponents addresses this provision at all. Oblivious to Section 332(c)(2), the regulation proponents search far and wide throughout the rest of the Communications Act for some source of authority to impose common carrier obligations on data roaming, and their theories are all over the lot. For every commenter backing one theory, there is another expressing severe skepticism of that theory. Some commenters urge the Commission to rely on Title III but not Title II; some argue for Title II but not Title III.<sup>6</sup> Some argue that the Commission should rely primarily on Title I ancillary jurisdiction, while others urge the Commission not to rely on Title I in light of the D.C.

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<sup>5</sup> 47 U.S.C. §§ 332(c)(2) & (d).

<sup>6</sup> Compare OPATSCO at 7-8 (“[t]he Commission need not ground its authority to adopt data roaming rules under either Title I or Title II”) with MetroPCS at 17-39 (urging reliance on Title II but not Title III).

Circuit's *Comcast* decision.<sup>7</sup> Some say they cannot even offer any legal theory until the Commission concludes the broadband reclassification proceeding, while others tell the Commission that, whatever it does, it should not rely on “a novel theory that reverses years of Commission precedent” and would be subject to “protracted legal challenges and uncertainty.”<sup>8</sup> This collective mutual skepticism is well-founded, because even if Section 332(c)(2) did not already prohibit common carrier regulation here, *none* of these other theories would provide any sustainable basis for intrusive common carrier regulation on these non-interconnected wireless services.

**A. The Commenters' Concessions Confirm That The Statute Prohibits Common Carrier Obligations On These Services.**

As AT&T explained in its opening comments, Section 332 of the Act establishes a specific regulatory framework for mobile wireless services that precludes the imposition of common carrier obligations on data roaming. The statute divides mobile wireless services into two statutory categories: (1) CMRS services, which must be “interconnected” with the “public switched network” and offered indiscriminately “to the public,” and (2) “private mobile services,” which are defined as any mobile wireless service that is not CMRS or its functional equivalent.<sup>9</sup> Section 332(c)(2) expressly prohibits the Commission from treating private mobile services as common carriage.<sup>10</sup>

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<sup>7</sup> Compare T-Mobile, at 11-16 (Commission should rely on Title I ancillary authority) *with* MetroPCS, at 38 (urging Commission to avoid “the defects that dictated the reversal in *Comcast*”).

<sup>8</sup> Compare Sprint Nextel, at 4-5; Clearwire at 9 *with* MetroPCS, at 17-18, 35-37; SouthernLINC, at 22-23.

<sup>9</sup> 47 U.S.C. §§ 332(c) & (d); *see* AT&T, at 13-15; Verizon, at 20-23.

<sup>10</sup> 47 U.S.C. §§ 332(c)(1) & (2).

The proponents of data roaming rules uniformly concede – as they must – that data roaming does not provide a service that makes available “interconnection” with all other users of the public switched network; that it is not a CMRS service; that it is offered today through individually negotiated contracts rather than indiscriminately “to the public”; and that it does not have *any* of the characteristics of a CMRS service.<sup>11</sup> These concessions should remove any remaining doubt that data roaming is a “private mobile service.”<sup>12</sup> Section 332(c)(2) is clear and unequivocal: to the extent a provider is providing private mobile service, that provider “*shall not* be treated as a common carrier *for any purpose under the Act.*”<sup>13</sup> The proposals at the heart of this Notice, as the commenters also concede, would impose common carrier obligations on data roaming: they would mandate that wireless broadband providers offer data roaming indiscriminately to all comers, at “reasonable” and non-discriminatory rates and terms governed by Sections 201 and 202.<sup>14</sup> Section 332(c)(2), however, expressly bars the Commission from imposing any such requirements on data roaming “for any purpose under this Act.”

Not a single proponent of regulation addresses or even mentions the dispositive language in Section 332(c)(2). Although they do not discuss Section 332(c)(2), MetroPCS and Leap each

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<sup>11</sup> See, e.g., MetroPCS, at 33-34 (“[w]ireless data roaming, when used to provide wireless broadband Internet access, *is not CMRS since it is not interconnected with the PSTN*” (emphasis added)); Media Access Project at 8 (conceding that data services are “non-interconnected” and urging the Commission to extend roaming requirements to providers that offer only “non-interconnected” services); Leap, at 24-25 (acknowledging that providers of data roaming are “not strictly CMRS providers because they do not offer ‘interconnected service’ in connection with data roaming”); SkyTerra, at 5 (“Broadband data (including Internet access), however, is not interconnected with the public switched network” and seeking extension of data roaming rules beyond CMRS); SouthernLINC, at 23 (conceding that data roaming is non-interconnected); Sprint, at 3, 5 (conceding that data roaming facilitates “mobile non-interconnected data services (including wireless broadband Internet access service)”).

<sup>12</sup> 47 U.S.C. § 332(d)(3).

<sup>13</sup> *Id.* § 332(c)(2) (emphasis added).

<sup>14</sup> See, e.g., Sprint, at 5-6 (data roaming obligations would not be effective unless governed by the standards of sections 201 and 202).

argue more generally that the Commission could ignore Section 332(c)'s regulatory framework, but both commenters misread the statute.

First, MetroPCS argues that if a mobile wireless service satisfies the statutory definition of “telecommunications service” in Section 153(46), then the Commission may regulate that mobile wireless service as common carriage regardless of Section 332.<sup>15</sup> Thus, MetroPCS claims that the Commission could impose common carrier obligations on data roaming even if it is not CMRS, and indeed, it urges the Commission to “extend the automatic wireless data roaming mandate to *all* wireless carriers,” including providers like Clearwire that provide no CMRS services at all.<sup>16</sup>

Even if data roaming did satisfy the definition of “telecommunications service” – and, as explained below, it does not – MetroPCS has the statutory scheme backwards. With respect to whether mobile wireless services can be subjected to common carrier regulation, Congress has specified that it is the CMRS/private mobile service distinction that is dispositive, not the telecommunications service definition in Section 153(46). Section 332(c)(2) is clear that “insofar as” a person provides a “service that is a private mobile service,” that person “shall not be treated as a common carrier for *any purpose under this Act*” (emphasis added) – there is no exception for private mobile services that meet Section 153’s definition of “telecommunications service.”

Leap makes a perfunctory, two-sentence argument that data roaming might not be a private mobile service because the Commission could find it to be the “functional equivalent” of

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<sup>15</sup> MetroPCS, at 33-35 (“the Commission’s authority to mandate automatic wireless data roaming under Title II is based upon the status of the transmission as telecommunications, and the status of the service as telecommunications service, and not dependent on CMRS status at all”).

<sup>16</sup> *Id.* at 34 (arguing that reliance on the telecommunications service definition “does not require wireless data roaming to be CMRS in order to be regulated under Title II as a common carrier service”) (emphasis added).

CMRS within the meaning of Section 332(d)(3). Leap acknowledges that roaming providers “are not strictly CMRS providers because they do not offer ‘interconnected service’ in connection with data roaming,” and it acknowledges the Commission relied on voice carriers’ status as CMRS providers as the statutory basis for its voice roaming requirements. Leap asserts nonetheless that the Commission “could reasonably conclude” that data roaming is the functional equivalent of CMRS because there has been “increasing convergence between voice and data,” and it cites in particular the fact that end users use *separate* VoIP applications to make phone calls and may expect “devices and providers” to handle both types of traffic.<sup>17</sup>

Leap’s argument is unavailing for several reasons. First, Leap ignores the Commission’s stringent test for whether a service is functionally equivalent to CMRS. The Commission has made clear that, to be the “functional equivalent” of CMRS, a service must be a substitute (in the strict economic sense) for a CMRS service, and the Commission has demanded rigorous, empirical evidence that changes in price “would prompt customers to change from one service to the other.”<sup>18</sup> Given the stringency of this standard, the Commission has emphasized that “very few mobile services that do not meet the definition of CMRS will be a close substitute for a commercial mobile radio service” and thus qualify as a functional equivalent.<sup>19</sup> Indeed, as AT&T previously explained, the statutory language and the legislative history both indicate that the purpose of the “functional equivalence” test was actually to *narrow* the definition of CMRS – *i.e.*, “a service that fell within the *literal* definition of a commercial mobile service could

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<sup>17</sup> Leap, at 24-25.

<sup>18</sup> Report and Order, *Implementation of Sections 3(n) and 332 of the Commc’ns Act; Regulatory Treatment of Mobile Servs.*, 9 FCC Rcd. 1411, ¶ 12 (1994)) (“1994 Regulatory Treatment Order”); *see also, e.g.*, Memorandum Opinion and Order, *Application of Brookfield Development, Inc. and Colorado Callcom*, 19 FCC Rcd. 14385, ¶ 13 (2004).

<sup>19</sup> 1994 Regulatory Treatment Order, ¶ 79.

nonetheless be classified as private if we determined that it was not *functionally equivalent*”<sup>20</sup> – and although the Commission’s contrary view has never been judicially tested, the narrowing construction is the correct interpretation.

In any event, Leap does not attempt to show that data roaming is functionally equivalent to any CMRS service. Indeed, Leap prominently concedes (at 20) that the Commission’s focus should be on the provider-to-provider wholesale data roaming service, but it does not even attempt to explain how data roaming, a non-interconnected service that merely provides access to other non-interconnected networks, is functionally equivalent to any conceivable CMRS service. To the contrary, it simply argues that there has been “convergence” between voice and data at the *retail* end user level.<sup>21</sup> But the Commission has recognized that there is a crucial distinction between wireless broadband Internet access services and individual Internet applications like VoIP services. Interconnected VoIP services are provided by independent, third-party information service providers that have separately made arrangements (usually with CLECs) to provide connectivity to the public switched network in connection with a particular *application* that can be used in conjunction with wireless Internet access service. The Commission has expressly held – correctly – that the mere fact that VoIP applications provide connectivity to the public switched network does not transform wireless broadband Internet access service into an interconnected, CMRS service.<sup>22</sup> *A fortiori*, such applications cannot transform a data roaming

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<sup>20</sup> *Implementation of Sections 3(n) and 332(c) of the Communications Act; Regulatory Treatment of Mobile Services*, Notice of Proposed Rulemaking, 8 FCC Rcd. 7988, ¶¶ 29-30 (1993) (noting that, in the Conference Report, the Conference Committee included “a specific example of a service meeting the literal definition of a commercial mobile service that nevertheless might not be functionally equivalent”).

<sup>21</sup> *See, e.g.*, Leap, at 25 n.84.

<sup>22</sup> *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd. 5901, ¶ 45 (2007) (“*Wireless Broadband Internet Access Order*”).

service – a service that is one step further removed from the public switched network – into service that is a functionally equivalent to a CMRS service (*i.e.*, traditional dialed telephone service that allow communications with all users on the public switched network). Indeed, given that the home carrier’s wireless broadband Internet access service is physically *in between* the roaming provider and the public switched network, there is no rational theory under which the Commission could use the existence of services like VoIP to hold that data roaming is functionally equivalent to CMRS but maintain that the home carrier’s wireless broadband Internet access service is not.

**B. The Commission Would Not Have Authority To Impose Common Carrier Regulation on Data Roaming Even In The Absence of Section 332(c)(2).**

Although the proponents of regulation do not address the impact of Section 332(c) on their proposals, they have offered seemingly every *other* provision of the Communications Act as a possible statutory basis for authority to impose common carrier regulation on data roaming. None of these alternative legal theories has any merit.

**Title III.** Most pro-regulation commenters urge the Commission to rely on Title III for authority to impose common carrier obligations on data roaming. Notably, however, none of these commenters rely in any way on the only section in Title III that actually addresses the question of when the Commission has authority to treat mobile wireless services as common carriage – Section 332(c). Rather, the proponents of regulation simply recite the same litany of generic Title III licensing and other unrelated provisions that the Commission listed in the Notice, none of which has ever been used to justify imposing common carrier obligations on any service. Even if Section 332(c)(2) did not already prohibit common carrier obligations here, nothing in these commenters’ laundry list of generic Title III licensing provisions provides any such express authorization to impose common carrier obligations on data roaming services.

Indeed, many regulation proponents offer a sweepingly overbroad interpretation of the Commission’s regulatory powers under Title III, which only underscores how untenable these Title III theories are. Several commenters literally suggest that the mere fact that Commission has authority over “radio” in Section 301 and throughout Title III means that it can impose any obligation on wireless broadband providers that it believes to be in the “public interest.” A typical example is Cellular South, which asserts that “[t]he scope and extent of the Commission’s authority under Title III[] is bounded only by the statutory instruction that the Commission ground its action in the public interest.”<sup>23</sup> These unbounded views of the Commission’s authority “would virtually free the Commission from its congressional tether” and result in the same free-roving assertion of power that the D.C. Circuit found unlawful in *Comcast*.<sup>24</sup> As AT&T previously explained, any such assertion of open-ended authority based only on Title III’s licensing and auction provisions would not survive judicial scrutiny, especially given that the Commission would be erecting an entire regime of common carrier regulation on provisions that it has never interpreted or relied on in this manner before.<sup>25</sup>

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<sup>23</sup> Cellular South, at 6 (citing *Notice* ¶ 66); *see also* Leap, at 12 (arguing that the “broad mandate” of Title III gives the Commission “enormous discretion” to impose any regulation it believes is in the public interest); OPATSCO, at 8 (Commission can enact regulations in the public interest); RCA, at 2-6 (Title III authority is sufficient, as long as it is in the public interest); SouthernLINC, at 15 (“touchstone for Commission action under Title III is the *public interest*”) (emphasis added).

<sup>24</sup> *Comcast Corp. v. FCC*, 600 F.3d 642, 665 (D.C. Cir. 2010); *see also id.* (“Were we to accept [Commission’s theory of its authority], we see no reason why the Commission would have to stop” with regulating the network management practices of internet service providers because there would be “few examples of regulation[]” under Title II, Title III, and Title IV that the Commission would be “unable to impose”).

<sup>25</sup> *See also Motion Picture Association of America, Inc. v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002) (“The FCC must act pursuant to *delegated authority* before any ‘public interest’ inquiry is made under § 303(r)”).

Several regulation proponents argue that the Commission could impose common carrier regulation simply as a condition on existing licenses, and they cite the generic provisions in Title III authorizing the issuance of licenses.<sup>26</sup> In making these arguments, however, these commenters confuse two very different propositions. They cite cases for the proposition – which no party disputes – that the Commission may under certain circumstances use its rulemaking authority to issue rules of general applicability, even if the new rules will apply prospectively to existing licenses and thus, in some sense, will “modify” existing licenses.<sup>27</sup> In the cases they cite, however, the Commission had undisputed authority under *other* provisions of Title III to promulgate the rules at issue. Thus, for example, *Committee for Effective Cellular Rules* involved the Commission’s undisputed authority to establish the geographic scope and contours of a license’s service area,<sup>28</sup> and *WREN* involved the Commission’s undisputed authority to establish rules to prevent signal interference arising from pre-sunrise AM broadcast transmissions.<sup>29</sup>

Leap also insists that Sections 303(r) and 309 provide broad authority to ensure “seamless connectivity” among wireless services, but these sections are inapposite as well.<sup>30</sup> In that regard, Leap relies heavily on the Commission’s previous orders establishing a resale policy for various wireless services; it emphasizes that the Commission relied on Sections 303 and 309

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<sup>26</sup> See, e.g., Leap, at 12-13.

<sup>27</sup> See Leap, at 12-13 & n.40 (citing *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1319 (D.C. Cir. 1995)).

<sup>28</sup> See *Committee for Effective Cellular Rules*, 53 F.3d at 1312-15; 47 U.S.C. § 303(c).

<sup>29</sup> *WREN, Inc. v. FCC*, 396 F.2d 601, 605-06 (2d Cir. 1968); 47 U.S.C. §§ 303(c) & (f).

<sup>30</sup> As AT&T explained in its opening comments, it is well settled that Section 303(r) is not an independent grant of regulatory authority. The D.C. Circuit has held that “[t]he 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.” *Motion Picture Ass’n of Am., Inc. v. FCC*, 309 F.3d at 806 (emphasis added); see also Leap, at 14.

as authority and did not restrict its resale policy to CMRS.<sup>31</sup> But no one challenged the Commission's Title III authority to impose resale requirements and those orders therefore do not even address the Section 332 limits on Commission authority.<sup>32</sup> As such, these resale orders provide no support for the proposition that Sections 303 or 309 authorize the imposition of common carrier requirements on any wireless service.

Leap and other commenters cite various additional Commission precedents as establishing common carrier authority here, but they misread those orders. For example, numerous commenters emphasize the Commission's statement in the *Wireless Broadband Internet Access Order* that the provisions of Title III continue to apply to wireless broadband Internet access even though it is an information service, because such services use "radio spectrum."<sup>33</sup> Obviously the Commission retains its authority to issue licenses, to conduct auctions, and to make rules to minimize interference and the like notwithstanding the fact that the services to be offered over the spectrum are information services, but the Commission certainly did not claim authority in that order to regulate such services as common carriage – indeed, it held the exact opposite under Section 332, which is also part of Title III.<sup>34</sup> Leap also

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<sup>31</sup> See Leap, at 15-16.

<sup>32</sup> See, e.g., First Report and Order, *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, 11 FCC Rcd. 18455, ¶ 17 (1996). Memorandum, Opinion, and Order on Reconsideration, *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, 14 FCC Rcd. 16340, ¶ 27 (1999) ("No party has challenged our explicit invocation of Title III as a basis for imposing the resale rule").

<sup>33</sup> See *Wireless Broadband Internet Access Order*, ¶ 36 (the fact that wireless broadband Internet access service is an information service "does not affect the applicability of the Title III provisions and corresponding Commission rules to these services"); see also, e.g., *id.* ¶ 25 (same); Leap, at 16-17.

<sup>34</sup> *Wireless Broadband Internet Access Order*, ¶ 45.

claims that the Commission applied its manual roaming rules to both voice and data services,<sup>35</sup> but it fails to mention that the manual roaming rules were always expressly limited to CMRS services that were “interconnected” with the public switched network.<sup>36</sup>

Finally, some commenters place considerable weight on the Commission’s reliance on its Section 309 auctioning authority to justify open access requirements in the *700 MHz Order*, but that order is also irrelevant.<sup>37</sup> The Commission’s authority to impose such license conditions was never tested in court, but there is no doubt that the Commission has some authority, *prior* to an auction, to offer licenses subject to specified conditions not inconsistent with the Act, where potential bidders have the opportunity either to accept the conditions or to decline to bid. The Commission is not proposing to conduct an auction here, and no commenter has identified any source of authority in Title III that would permit the Commission to impose common carrier obligations on existing licensees that provide data roaming; to the contrary, any such license condition would be unlawful because it would flatly contravene section 332(c).

**Title II.** A number of commenters argue that data roaming is a “telecommunications service” because it is allegedly “just transmission.” MetroPCS includes a lengthy technical description of data roaming, and others provide shorter descriptions, all of which portray roaming providers as merely transmitting the information provided by the roaming end user

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<sup>35</sup> Leap, at 16 (citing Third Report And Order And Memorandum Opinion And Order On Reconsideration, *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, 15 FCC Rcd. 15975, ¶¶ 11, 18 (2000) (“*2000 Roaming Order*”).

<sup>36</sup> See *2000 Roaming Order*, ¶ 13 (manual roaming rule reaches only “those CMRS providers that offer real-time, two-way switched voice and data service that is interconnected with the public switched telephone network utilizing an ‘in-network’ switching facility”).

<sup>37</sup> See, e.g., Leap, at 17.

unchanged to the home carrier, and the home carrier as providing all of the functions of an Internet service provider.<sup>38</sup>

These commenters' descriptions are, as noted, irrelevant because Section 332 bars common carrier treatment of any private mobile service, regardless of whether that service is a telecommunications service.<sup>39</sup> But in all events, they leave out a critical fact: all data roaming services require, at a minimum, a DNS lookup and the creation and storage of specialized profiles, which means that data roaming is an information service.<sup>40</sup> The Commission held in the *Cable Modem Declaratory Ruling*<sup>41</sup> that the use of DNS, in conjunction with other applications often associated with broadband internet access, constitutes an information service under the Act, and the Supreme Court expressly upheld that conclusion in *Brand X*.<sup>42</sup> Indeed, although the Commission identified email, newsgroups, the ability to create a webpage, and DNS all as information functions that, together with transmission, could make broadband Internet access an information service, the Commission specifically recognized that in many cases a broadband provider is offering, or the broadband user is using, *only* the DNS lookup function in conjunction with transmission, but that even in those instances broadband Internet service would still be an information service.<sup>43</sup> Accordingly, there can be no question that data roaming, which includes

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<sup>38</sup> See MetroPCS, at 8-27; Leap at 19-21; SouthernLINC, at 19-20; US Cellular, at 8 (data roaming is “arguably” a common carrier service).

<sup>39</sup> As explained above, however, the commenters broadly concede that data roaming is not an interconnected service nor is it offered on a common carriage basis in the marketplace today.

<sup>40</sup> See AT&T, at 27-28.

<sup>41</sup> Declaratory Ruling and Notice of Proposed Rulemaking, *In re Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities*, 17 FCC Rcd. 4798, ¶¶ 37-38 (2002) (“*Cable Modem Order*”).

<sup>42</sup> See *Nat'l Cable Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 998-1000 (2005).

<sup>43</sup> *Cable Modem Order*, ¶ 38 & n.153 (cable modem service is an information service “regardless of whether subscribers use all of the functions provided as part of the service, such as e-mail or

DNS lookup (and other information storage functions) with telecommunications, is an information service.<sup>44</sup>

**Title I.** Other commenters argue that the Commission should rely primarily on ancillary jurisdiction as the basis for new data roaming rules. Notably, no party has cited any precedent in which the Commission has imposed common carriage obligations on previously unregulated services as a purported exercise of ancillary jurisdiction, and there is no statutory basis for any such assertion of authority in any context, much less in the context of mobile wireless services where Congress has expressly prohibited common carriage in Section 332(c)(2). Ancillary jurisdiction is appropriate *only* when it is necessary to prevent frustration of the Commission’s ability to regulate services over which it has clear statutory authority; it is not an all-purpose default source of regulatory authority that permits the Commission to impose any regulation it wants that is not provided for elsewhere.

Before reviewing the commenters’ specific arguments, it is important to review the standards governing the Commission’s ancillary authority. As the D.C. Circuit made clear in *Comcast*, the entire notion of the Commission having “Title I” authority is in reality a misnomer. Section 1 of the Act merely notes that the Commission was created for the purpose of regulating

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web-hosting, and regardless of whether every cable modem service provider offers each function that could be included in the service”; “[i]n this regard we note that some cable modem service users may choose not to use the e-mail or webhosting, for example, that is provided with their cable modem service. Nearly every cable modem service subscriber, however, accesses the DNS that is provided as part of the service.”).

<sup>44</sup> Moreover, there are a number of different ways of provisioning data roaming. As Verizon explains (at 26-27), both the 3G and LTE standards permit a wireless broadband provider to provision data roaming by providing the Internet service provider functions itself on its own network. All of the regulation proponents agree that the home carrier’s wireless broadband Internet access service is an information service. *See, e.g.,* MetroPCS, at 6 (“[b]ased upon prior Commission rulings, it is clear that wireless broadband Internet access service provided to the end-user customer by the home wireless carrier . . . is an information service”). *A fortiori*, if the roaming provider performs those functions itself instead of the home provider (as the standards permit), that data roaming service would indisputably be an information service as well.

interstate and foreign communication by wire and radio to make available rapid and efficient service, and the Commission itself conceded in *Comcast* that Section 1 is merely a “statement[] of policy that . . . delegate[s] no regulatory authority.”<sup>45</sup> As the D.C. Circuit reminded the Commission, courts upholding ancillary jurisdiction have relied on the Act’s statements of policy “not because, standing alone, they set out ‘statutorily mandated responsibilities,’ but rather because they did so in conjunction with an express delegation of authority to the Commission” elsewhere.<sup>46</sup> Indeed, as the court emphasized, it is “axiomatic” that the Commission “may [act] only pursuant to authority delegated to [it] by Congress,” and thus “it is Title[s] II, III, or VI to which the authority must ultimately be ancillary.”<sup>47</sup>

Moreover, since “ancillary” authority must be necessary to “prevent frustration of a regulatory scheme expressly authorized by statute,”<sup>48</sup> courts have upheld ancillary jurisdiction only when the regulation at issue was necessary to avoid disabling the Commission’s ability to regulate the services over which it had express statutory responsibilities. Thus, for example, in the seminal cases of *Southwestern Cable* and *Midwest Video*, the Supreme Court upheld regulations of cable television because cable systems *carried television broadcast signals*, over which the Commission had express statutory authority under Title III.<sup>49</sup> When the Commission attempted to extend its regulation of cable systems to non-video communications, the D.C. Circuit vacated those rules, because it was “difficult to see how any action which the Commission might take concerning two-way cable communications could have as its primary

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<sup>45</sup> *Comcast*, 600 F.3d at 652.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 654 (citing *Am. Library Ass’n v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005)).

<sup>48</sup> *Id.*

<sup>49</sup> *United States v. Sw. Cable Co.*, 392 U.S. 157, 168-69 (1968); *United States v. Midwest Video Corp.*, 406 U.S. 649, 662 (1972).

impact the furtherance of any broadcast purpose” pursuant to its Title III authority.<sup>50</sup> And when the Commission attempted to impose common-carrier-type public access regulation on cable systems, the Supreme Court reversed on the ground that the Commission’s ancillary authority derived solely from its authority under Title III to regulate television broadcasting, and Title III specifically prohibited the imposition of common carrier regulation on broadcasting (just as Section 332(c) prohibits common carrier regulation of data roaming).<sup>51</sup>

The commenters’ attempts to link data roaming to the Commission’s regulation of other services under Titles II or III are unavailing. Most regulation proponents’ primary argument is that imposing common carrier obligations on data roaming would be necessary to “prevent frustration” of the Commission’s rules mandating voice roaming.<sup>52</sup> As in *NARUC II*, however, whether data roaming is offered on a common carriage basis has no impact on the Commission’s ability to regulate voice roaming. Data roaming and voice roaming are mutually exclusive offerings; indeed, the commenters emphasize that some providers (like Clearwire) offer *only* data and no CMRS services<sup>53</sup> and that data roaming is an independent offering that is separately priced.<sup>54</sup> Congress established mutually exclusive regulatory regimes for wireless voice CMRS and broadband Internet data services, and those two regimes have coexisted for years without conflict. The test is whether the Commission’s legitimate regulations would be frustrated, but no

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<sup>50</sup> *NARUC v. FCC*, 533 F.2d 601, 615 (D.C. Cir. 1976).

<sup>51</sup> *FCC v. Midwest Video Corp.*, 440 U.S. 689, 700-03 (1979).

<sup>52</sup> See *T-Mobile*, at 12 (quoting *Comcast*, 600 F.3d at 656); *Leap*, at 26-27.

<sup>53</sup> See, e.g., *MetroPCS*, at 34; *Clearwire*, at 7-8.

<sup>54</sup> E.g., *SouthernLINC*, at 21.

party here can articulate any connection between common carrier obligations on data roaming and the Commission's ability to maintain or enforce its voice roaming rules.<sup>55</sup>

Similarly, the suggestion that common carrier obligations are necessary to fulfill the Commission's responsibilities under Section 201 and 202 to regulate traditional wireless voice CMRS services also fails.<sup>56</sup> Again, where the courts have upheld assertions of ancillary jurisdiction to facilitate regulation of services within the Commission's jurisdiction, the Commission has provided a robust explanation of how the ancillary measures were necessary to the fulfillment of those duties. There is no such connection here: data roaming arrangements are broadly available and wireless providers routinely offer nationwide data roaming today. Accordingly, whether data roaming is subject to common carriage has no impact on the Commission's minimal regime of CMRS rate "regulation."<sup>57</sup>

Finally, some parties assert that the Commission's orders relating to VoIP services demonstrate that the Commission has broad authority to invoke ancillary jurisdiction to impose "common carrier" regulations on services over which the Commission has no direct authority, such as information services.<sup>58</sup> That is not the case. The regulations at issue in those orders

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<sup>55</sup> T-Mobile claims (at 12) that "carriers that cannot obtain data roaming arrangements on just and reasonable terms will not be able to compete effectively," and that "[c]onsequently, their ability to obtain voice roaming . . . will be rendered largely meaningless." Even if this concern were valid – and as explained below, it is not – whether voice roaming becomes less important in the marketplace has nothing to do with the Commission's ability to regulate voice roaming.

<sup>56</sup> See, e.g., T-Mobile, at 12-13; SouthernLINC, at 24.

<sup>57</sup> Cf. *Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003). By contrast, in *CCIA* the Commission explained that – in the context of regulatory regime in which the old Bell System's interstate rates were subject to rate-of-return regulation – the Commission would be unable to ensure that such carriers would not attempt to recover the costs of enhanced services through regulated rates without structural separation and other measures aimed at enhanced services. *Computer and Comm'n's Indus. Ass'n v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982) ("*CCIA*"); *Comcast*, 600 F.3d at 655-56 (discussing *CCIA*).

<sup>58</sup> See, e.g., T-Mobile, at 16; SouthernLINC, at 28.

were not common carrier obligations (even though some may have derived from provisions that appear in Title II): (1) no party disputed that the Commission had authority to prohibit the sale of VoIP services without adequate access to E911;<sup>59</sup> (2) the Commission’s authority to require Universal Service Fund contributions is not limited to telecommunications carriers and the D.C. Circuit expressly found that such requirements were authorized under the Commission’s separate, permissive authority over “*provider[s] of interstate telecommunications*” under Section 254(d);<sup>60</sup> (3) the Commission found that extending the CPNI rules to providers of interconnected VoIP services was necessary to enforce Section 222, because otherwise the CPNI of wireline and wireless customers that call and receive calls from VoIP customers could be compromised;<sup>61</sup> and (4) the Commission held that disability access rules were necessary to enforce Section 255, which applies by its terms to all “customer premises equipment” as defined in Section 153(14) and where the Commission had held years earlier that it had ancillary jurisdiction to apply its Section 255 rules to information services.<sup>62</sup> None of those Commission orders or D.C. Circuit opinions remotely supports the notion that the Commission could now apply actual common carrier obligations on non-interconnected mobile wireless services like data roaming.

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<sup>59</sup> See *Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2007); *id.* 473 F.3d at 311 (Kavanaugh, J., concurring).

<sup>60</sup> *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1239-41 (D.C. Cir. 2007).

<sup>61</sup> Report And Order And Further Notice Of Proposed Rulemaking, *In re Implementation of the Telecommunications Act of 1996; Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, 22 FCC Rcd. 6927, ¶ 57 (2007).

<sup>62</sup> Report and Order, *In re IP-Enabled Services*, 22 FCC Rcd. 11275, ¶ 24 (2007).

## **II. COMMON CARRIER REGULATION OF WIRELESS DATA ROAMING ARRANGEMENTS WOULD PRODUCE LITTLE, IF ANY, BENEFIT WHILE HARMING CONSUMERS, REDUCING COMPETITION AND DISCOURAGING INVESTMENT AND INNOVATION.**

The majority of the comments offer the Commission a false choice – suggesting that, without new regulatory mandates, wireless broadband providers will not be able to obtain data roaming agreements. But that is not the issue at all, because the comments strongly confirm that data roaming agreements are widely available and commonplace throughout the industry. The real question in this proceeding is whether such agreements should be arrived at through commercial agreement in the marketplace or whether the Commission should dictate the terms and conditions through common carrier regulation. As to that question, the comments vividly confirm that mandatory data roaming obligations will provide no incremental public benefit while substantially diminishing the reliability of wireless data networks and the incentive of carriers to deploy next generation broadband networks, particularly in high cost rural areas.

Moreover, as explained below, the comments make clear that what the proponents of regulation *really* want is the sort of regulatory micromanagement of virtually every aspect of provider-to-provider relations that goes far beyond what the Commission has agreed to in the context of voice roaming. Common carrier regulation is needed, they claim, so that the Commission can estimate the costs of and set the rates for data roaming, which they claim are both too high (when they are roaming on larger carriers' networks) and too low (when larger carriers are roaming on their networks).<sup>63</sup> They also want the Commission on call to determine if and when carriers may protect the service quality provided to their own customers through case-by-case, after-the-fact adjudication that would stifle sound and flexible radio management practices.

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<sup>63</sup> Compare Sprint, at 5-6 with Blooston, at 7, 12.

The Commission has properly rejected that level of intrusive regulation even in the voice roaming context and should do so here as well. Not only is rate regulation administratively burdensome and costly, but, as the Commission has recognized, it “has the potential to deter investment in network deployment by impairing buildout incentives facing both small and large carriers.”<sup>64</sup> Moreover, Commission second-guessing of data-roaming-related network management decisions also threatens to impose substantial costs on wireless data providers and thus substantially diminish the incentives of providers to deploy next generation broadband networks – disincentives that would be particularly acute in rural areas where the costs and risks of deploying broadband wireless services are highest.

**A. The Comments Confirm That Supplanting Market-Based Arrangements With Common Carrier Regulation Would Do Substantial Harm.**

As AT&T outlined in its opening comments, data roaming presents very different issues than voice roaming. “The advanced mobile broadband services market is still nascent,”<sup>65</sup> and, as a result of innovation by wireless carriers and handset manufacturers, demand for these services is exploding.<sup>66</sup> Indeed, as T-Mobile notes, data traffic in 2014 could be as much as *50 times* the level of data traffic in 2009.<sup>67</sup> At the same time, the spectrum necessary to support increased demand is limited, requiring carriers to be increasingly proactive in planning and managing traffic on their networks.<sup>68</sup> To best accommodate these concerns, broadband data roaming agreements are negotiated on an individualized basis and providers typically do not offer

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<sup>64</sup> Report and Order and Further Notice of Proposed Rulemaking, *Reexamination Of Roaming Obligations Of Commercial Mobile Radio Service Providers*, 22 FCC Rcd. 15817, ¶ 40 (2007) (“2007 Roaming Order”).

<sup>65</sup> Notice, ¶ 53; see also *id.* ¶ 60 (mobile broadband service is still “at a critical early stage”).

<sup>66</sup> AT&T, at 37.

<sup>67</sup> T-Mobile, at 5.

<sup>68</sup> AT&T, at 37-39.

standardized, one-size-fits-all contracts indiscriminately to all comers. Although 4G should ultimately allow for more efficient use of spectrum, the standards and technology for 4G roaming service and the level of demand for 4G services are still not established.

In light of these developments, even proponents of roaming regulation recognize the need for caution. As Clearwire puts it, neither carriers nor the Commission can “fully anticipate the issues that may arise with regard to data roaming.” Thus, the Commission “should not assume that data roaming . . . will precisely mirror the legacy processes put in place for CMRS voice services;” indeed, “the voice-centric roaming issues of the past may in hindsight look relatively straightforward when compared to the data roaming world of the future where carriers will likely seek to deploy multi-mode handsets and secure agreements with a technologically diverse array of roaming partners.”<sup>69</sup>

This is an understatement. There is no way to reliably predict just how much damage common carrier regulation—whether application of the existing voice framework or the more extreme version proposed by some commenters—would do in the volatile and still developing broadband data environment. But there would be damage. Given exploding demand and spectrum and backhaul capacity constraints, it is critical that wireless carriers have flexibility to manage their networks.<sup>70</sup> As NTCH correctly notes (at 6), “[m]any carriers are justifiably concerned with the possibility that demand for roaming may swamp the capacity of their systems to handle the traffic . . . since carriers engineer capacity based on assumptions that do not necessarily include huge volume from non-subscribers.” Further, wireless carriers have no control over the customers of roaming carriers and cannot directly dictate the data plans, services

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<sup>69</sup> Clearwire, at 2-3; *see also id.* at 3 (“[T]he Commission should . . . be sensitive to the distinctions between voice-centric and data-centric networks.”).

<sup>70</sup> AT&T, at 37-42.

and options available to roamers that affect their demand for data. Nor do they know the historical usage pattern of roamers. These uncertainties will only grow as a larger number of data intensive wireless devices and applications become available to the public. Common carrier regulation, however, would impair wireless providers ability to put limitations on roaming traffic in real time that are necessary to ensure that their own customers' traffic is not subject to congestion or delay. As a result, common carrier roaming regulation could only result in lower service quality, higher costs from the need to maintain excess capacity, or both.<sup>71</sup>

Some regulatory proponents recognize that a roaming provider must be able to “retain control over its network and ensure that its network would not be overwhelmed by other carriers’ roaming customers,”<sup>72</sup> and would agree that providers could impose some limitations on roaming traffic.<sup>73</sup> But, remarkably, many proponents of common carrier regulation assert that mandatory roaming will have little impact on network management because roaming traffic will amount to only a small increase in a carrier’s total demand.<sup>74</sup> They offer no support for this proposition, and the available evidence suggests otherwise.

The Commission should also give no weight to commenters’ self-serving speculation as to how roaming will impact other carriers’ management of their networks. As explained above, it is undisputed that wireless carriers are already facing capacity constraints on their networks (related both to spectrum and to backhaul) and that these constraints will dramatically increase.

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<sup>71</sup> *Id.* at 45.

<sup>72</sup> T-Mobile, at 19; *see also* Clearwire, at 8; NTCH at 6.

<sup>73</sup> *See infra* Part II.C.

<sup>74</sup> Cincinnati Bell, at 12-13; RTG, at 8 n.27; SouthernLINC, at 40. Relatedly, RTG asserts without support that congestion will not be a problem for national carriers because they have more spectrum. RTG at 8 n.27. But this simplistic argument ignores that national carriers also have many more customers and carries much more data traffic than rural and regional carriers and thus face significant spectrum-related capacity constraints, notwithstanding larger absolute spectrum holdings.

As networks near or reach their capacity, even modest increases in demand degrade their reliability and speed. Further, it is not just the total demand that is relevant, but when and where that demand materializes. Unexpected demand that materializes at peak usage times can cause network congestion that the same level of demand would not at a different time of day. Likewise, because of the economics of backhaul, the density of cell towers, and spectrum availability, some portions of a provider's network will face more congestion than others.

In this regard, it is not sufficient to say that host carriers can impose "reasonable" restrictions on roamers.<sup>75</sup> Any regime that allows engineering judgments to be second-guessed in after-the-fact complaint proceedings is simply unworkable. As AT&T explained in detail in its opening comments,<sup>76</sup> the data management and congestion issues posed by roaming traffic require commercial flexibility to establish pricing that sends correct incentives, mechanisms to allow for accurate forecasting, and terms that give host carriers the ability to respond in real time to traffic imbalances.

Regulatory proponents, however, make clear they would likely contest virtually every action AT&T and other wireless carriers might take to manage efficiently their data networks. Regulatory proponents would have the Commission regulate the rates they pay for roaming and strictly limit the instances in which host carriers could limit roaming traffic or otherwise treat their own traffic differently than roaming traffic.<sup>77</sup> But wireless broadband providers simply have no way to predict what the Commission will, in an after-the-fact adjudication, deem to be a "reasonable" denial or limitation on roaming. And given the complexity of network operations,

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<sup>75</sup> *Notice*, ¶ 81; *see also* RTG, at 8-9 (advocating that carriers be allowed to limit roaming only when they "make public roaming agreements and network metrics").

<sup>76</sup> AT&T, at 40-42.

<sup>77</sup> *See infra* Part II.D.

there is also a real likelihood that the Commission would establish standards that would require inefficient traffic management. Even Commission decisions that were right at the time they were rendered may provide little meaningful guidance in light of the dynamic and changing nature of wireless technology and services. Common carrier regulation thus threatens to impose substantial costs on wireless data providers which, in turn, will necessarily affect the pace and scope of their deployment of next generation broadband networks.

Some commenters, nonetheless, claim that mandatory common carriage will not have any adverse impact on investment incentives. This is nonsense. It cannot be disputed that forced sharing reduces incentives to invest and innovate.<sup>78</sup> Indeed, even in the voice roaming context, the Commission did not dispute that as a general matter forced sharing arrangements such as roaming requirements will create disincentives to invest.<sup>79</sup> The Commission instead found that in the context of voice roaming, the magnitude of the disincentives to invest were outweighed by the benefits. In particular, the Commission was concerned that the negative impact that roaming would have on investment incentives was outweighed by the “‘head start’ advantage of larger carriers.”<sup>80</sup>

On that score, regulation proponents again ignore the substantial differences between voice and data services. As AT&T explained,<sup>81</sup> the whole notion of a “head start” makes little sense in today’s data services marketplace where all providers are still in the “build-out” phase, and rapidly evolving technologies provide opportunities for later entrants to “leap frog” first

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<sup>78</sup> See, e.g., *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

<sup>79</sup> Notice, ¶ 76; 2007 Roaming Order, ¶ 49; see also *id.* ¶ 40.

<sup>80</sup> 2010 Roaming Order, ¶ 21.

<sup>81</sup> AT&T, at 52; see also Part II.B.

movers and acquire their own head starts.<sup>82</sup> Indeed, new entrants are entering with 4G technologies and some established providers are leaping from 2G to 4G.<sup>83</sup>

Carriers are now investing billions of dollars to transform their networks to 4G standards.<sup>84</sup> Compared to voice networks “data networks require a significantly higher capital investment and carrying costs because providers must build or lease a much larger ‘pipe’ to the cell site.”<sup>85</sup> At the same time, this massive investment is risky given the number of carriers potentially vying to provide 4G services and the fact that there is no established customer demand for 4G-level service. As Sprint recognizes,<sup>86</sup> first mover carriers making such significant and risky investment must have the ability to “monetize[e]” that “network investment” or they will be deterred from doing so *ex ante*. Mandatory common carrier roaming—particularly the intrusive kind requested by many commenters—impedes the ability of carriers to “monetize” their enormous investment in broadband networks because it deprives them of the ability to compete on the basis of the scope and quality of their network coverage, and it would negatively affect both service quality and the flexibility to price roaming appropriately.

At the same time, mandatory data roaming will weaken the incentive of roaming carriers to build their own networks. Although many regulation proponents assert that they would use data roaming only as a transition to deploying their own networks,<sup>87</sup> the facts tell a different

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<sup>82</sup> *Cf.* Bright House, at 7; T-Mobile, at 8.

<sup>83</sup> AT&T, at 48-52.

<sup>84</sup> *Id.* at 42-43.

<sup>85</sup> ACSW, at 5.

<sup>86</sup> Sprint, at 11.

<sup>87</sup> Cellular South, at 15, 20; MetroPCS, at 45-46; RCA, at 8-9, 13; RTG, at 9-10; SouthernLINC, at 36-37.

story. Despite having spent billions to obtain AWS spectrum licenses, a consortium made up of Comcast, Bright House Networks, and Time Warner has decided not to build out because the companies can obtain wholesale data from existing facilities-based providers.<sup>88</sup> If such incentives exist in today's regime of private carriage, the disincentive to invest will be that much greater if wireless providers can obtain roaming upon regulated common carriage terms and conditions that they could not otherwise obtain in the marketplace.

The comments further confirm that common carrier obligations would undermine broadband deployment disproportionately in *rural* communities. MetroPCS, for example, makes clear that it views building to low density areas as too expensive and "redundant and unnecessary."<sup>89</sup> On the other hand, carriers that are actually building broadband networks to rural communities affirm that mandatory roaming obligations will deter such investment. As ACS Wireless explains:

If the FCC mandates data roaming, a provider that makes advanced wireless network investment 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. It will be much less risky to wait until another provider makes the investment, and then pay roaming charges to piggy back on the newly-deployed network.<sup>90</sup>

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<sup>88</sup> See Jeff Baumgartner, *Comcast Keeps Mobile Spectrum Sidelined*, Light Reading, Sep. 16, 2009, available at, [http://www.lightreading.com/document.asp?doc\\_id=181901&site=lr\\_cable](http://www.lightreading.com/document.asp?doc_id=181901&site=lr_cable); <http://www.televisionbroadcast.com/article/102044>.

<sup>89</sup> MetroPCS, at 54.

<sup>90</sup> ACSW, at 4.

In short, “[m]andatory data roaming will result in less, not more, mobile broadband investment in rural America. The more rural the area, the more risk, and therefore the less investment will be made.”<sup>91</sup>

**B. The Benefits The Commission Predicted for Common Carrier Regulation of Voice Roaming Simply Do Not Exist for Data.**

On the benefits side too, the comments confirm that voice and data are very different. Supporters of regulation claim otherwise, but their conduct in the real world cannot be reconciled with their rhetoric in this proceeding.<sup>92</sup>

**Seamlessness.** Although many commenters assert that common carrier regulation is necessary to ensure that data roaming agreements are available, no commenter claims that its requests for data roaming have been refused. Instead, most commenters simply assert in the abstract that larger carriers lack “incentive” to enter into data roaming agreements.<sup>93</sup>

The record refutes this claim. Wireless carriers that have built data networks clearly have an incentive to enter into data roaming agreements on appropriate terms, and providers including AT&T, are offering roaming arrangements in the marketplace.<sup>94</sup> Roaming services provide a carrier with an additional stream of revenue that helps defray the enormous cost of deploying and upgrading mobile data networks. This incentive is particularly strong in today’s dynamic and competitive marketplace. A refusal by a wireless carrier to offer roaming means it will likely

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<sup>91</sup> *Id.* at 5.

<sup>92</sup> Regulatory proponents’ claims that their position is supported by the *National Broadband Plan* likewise cannot be squared with the plan’s actual findings. See Blooston, at 4; Bright House, at 6-7; Leap, at 5, RCA, at 12-13. The plan merely recognized the uncontested point that data roaming agreements can be beneficial and that “[t]he [wireless] industry should adopt *voluntary* data-roaming arrangements,” *National Broadband Plan* at 49 (emphasis added), which is exactly what the wireless industry is currently doing and has been doing for years.

<sup>93</sup> See, e.g., Blooston, at 7; MetroPCS, at 45; NTELOS, at 8; NTCH, at 3.

<sup>94</sup> See also Sprint, at 11; Verizon, at 18.

lose those roaming revenues to another carrier while still facing stiff competition from multiple competitors in its home markets.

Thus, 2.5G data roaming is already available nationwide,<sup>95</sup> and AT&T routinely enters into such agreements. ACSW, a Tier III carrier, says “[n]ot once has a larger provider refused to negotiate a data roaming arrangement with ACSW or to include mobile data in the final agreement.”<sup>96</sup> Cincinnati Bell and T-Mobile both acknowledge that they have roaming agreements in place with multiple providers.<sup>97</sup> And although 3G networks are still under development, 3G roaming arrangements are becoming increasingly available too. AT&T has begun to offer 3G roaming arrangements. Verizon has data roaming agreements with more than 20 carriers, including about ten 3G agreements.<sup>98</sup> Sprint has entered into more than 40 data roaming agreements,<sup>99</sup> including an agreement to provide 3G roaming service to regulation proponents like NTELOS.<sup>100</sup>

Although regulation proponents claim that they will be unable to offer data roaming without common carriage, the marketplace evidence shows that they already offer 3G data services *today*. For example, NTELOS advertises nationwide 3G services (which must be provided outside its footprint through roaming) that it says are priced substantially below

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<sup>95</sup> *Notice*, ¶ 82 (“Data roaming arrangements are already established in the United States that provide roaming on 2.5G data networks.”).

<sup>96</sup> ACSW, at 1; *see also id.* at 4 (ACSW has found that it can enter commercial “data roaming arrangements for at least basic levels of data services and these commercial relationships encourage competition.”).

<sup>97</sup> Cincinnati Bell, at 8; T-Mobile, at 4.

<sup>98</sup> Verizon, at 7-8.

<sup>99</sup> Sprint, at 11.

<sup>100</sup> NTELOS, at 7.

AT&T's and Verizon's prices.<sup>101</sup> US Cellular<sup>102</sup> and Leap likewise offer wireless data services, including 3G data services, in many major markets throughout the United States.<sup>103</sup> Verizon's comments document that several other regional wireless carriers offer nationwide 3G data services.<sup>104</sup>

Although Cincinnati Bell suggests that AT&T has refused to negotiate for 3G roaming,<sup>105</sup> in fact, AT&T is currently in negotiations with a number of domestic carriers, including Cincinnati Bell, to provide them with 3G roaming arrangements. Cellular South actually asserts here that it has been rebuffed "whenever an automatic roaming agreement has been requested,"<sup>106</sup> but it cites as support for this claim filings it made to the Commission *three years ago*. What Cellular South fails to disclose is that it has since obtained 3G roaming and now

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<sup>101</sup> NTELOS website, <http://www.nteloswireless.com/promotions/2009/daretocompare/> (visited 6/18/10).

<sup>102</sup> U.S. Cellular website, <http://www.uscellular.com/uscellular/common/common.jsp?path=/coverage-map/coverage-indicator.html> (visited 6/18/10).

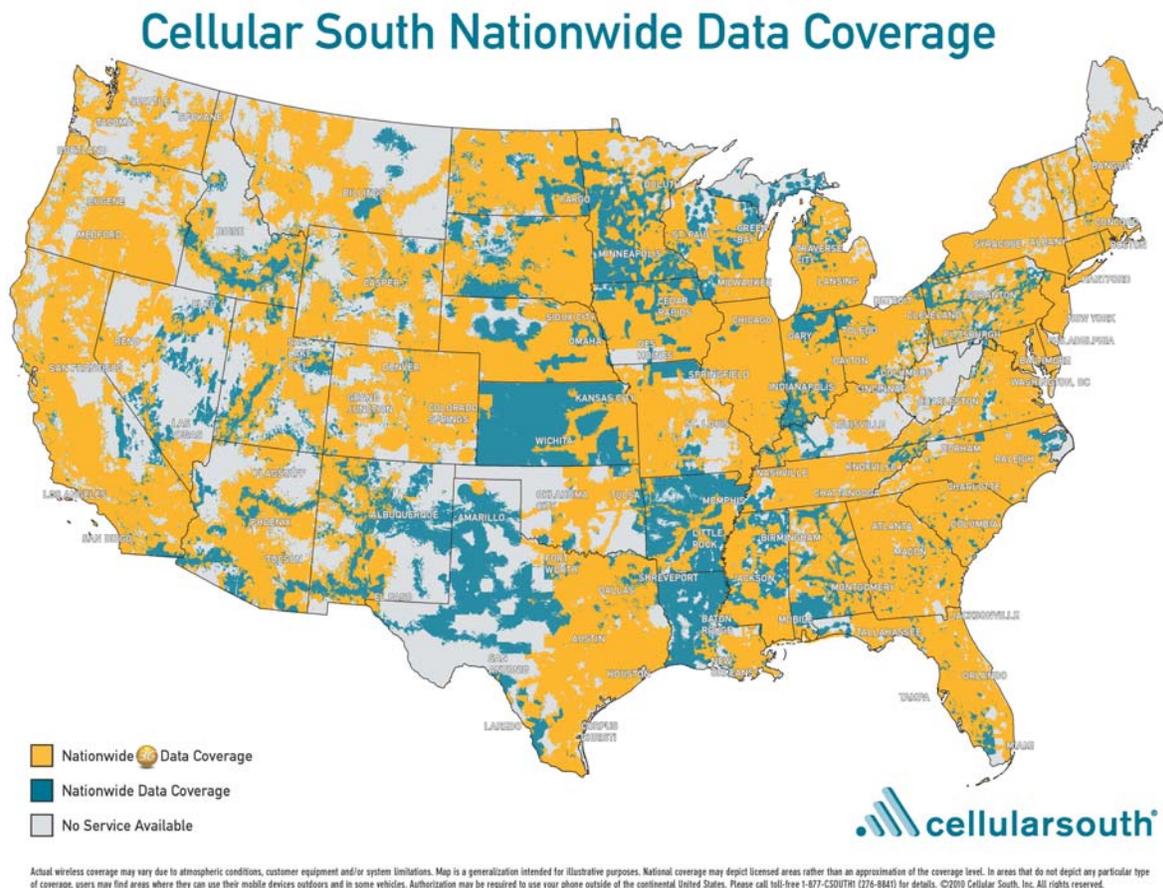
<sup>103</sup> Cricket website, <http://www.mycricket.com/coverage/maps/broadband?z=14&clat=38.8845126&clng=-77.0938583&addr=&city=Arlington&state=VA&zip=22201&persist=1> (visited 6/18/10).

<sup>104</sup> Verizon, at 8-9.

<sup>105</sup> Cincinnati Bell, at 9.

<sup>106</sup> Cellular South, at 21 n.67.

advertises that its network coverage is *better* than AT&T’s 3G coverage (see figure).<sup>107</sup>



The ability of carriers to obtain roaming agreements in the marketplace is only likely to increase with the ongoing deployment of technology.<sup>108</sup> First, two carriers—Clearwire and Harbinger/Skyterra—have announced nationwide wholesale 4G platforms that will be open to all

<sup>107</sup> Cellular South website, <http://www.cellularsouth.com/DiscoverCenter/why-cs/network.jsp> (“Why Cellular South? We have the best coverage. Better coverage than the other guys.”). Cellular South’s ability to obtain nationwide 3G roaming also refutes its speculation (at 17-18) that the recent consolidation and growing market share of larger carriers “enable them to continue to decline to enter into data roaming agreements with the smaller carriers.” Indeed, immediately before making this counterfactual claim, Cellular South admits (at 17) that “‘independent operators . . . [have] thrive[d] and flourish[ed]’” under the Commission’s existing polices.

<sup>108</sup> Verizon, at 16-18.

and that are specifically designed to carry “roaming” traffic. Second, implementing 4G will increase the number of compatible data partners by unifying air interfaces under a single standard.<sup>109</sup>

Finally, proponents of common carrier regulation largely ignore the increasing ability of their customers to obtain “seamless” access to wireless data services out-of-region without having to roam on another carrier’s wireless network.<sup>110</sup> Most 3G handsets today (and likely all 4G handsets) have Wi-Fi capability. That means customers can obtain access to wireless data services in tens of thousands of Wi-Fi hot spots located throughout the United States.<sup>111</sup> And the use of Wi-Fi is likely to increase as result of recent actions taken by the industry to permit the sharing of login credentials among operators of Wi-Fi networks. Customers of carriers that participate in the Wireless Broadband Alliance (“WBA”)—which includes AT&T and Verizon—will be able to log into another WBA member’s network using the same username and password as they do for their primary carrier.<sup>112</sup> Just as carriers are voluntarily reaching commercial agreements to provide data roaming for 3G services, so too are they reaching comparable arrangements with regard to Wi-Fi networks that they operate.

The Blooston Rural Carriers acknowledge that “consumers currently are able to access non-interconnected data via Wi-Fi connections,” but they nonetheless assert that some wireless consumers do not have Wi-Fi capable handsets.<sup>113</sup> But customers that care most about data

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<sup>109</sup> *Id.* at 18.

<sup>110</sup> AT&T, at 54-55.

<sup>111</sup> *Id.*

<sup>112</sup> Stephen Lawson, AT&T, Verizon join Wi-Fi roaming group, Network World, June 21, 2010, *available at*, <http://www.networkworld.com/news/2010/062110-att-verizon-join-wi-fi-roaming.html?hpg1=bn>.

<sup>113</sup> Blooston, at 3.

services are more likely to have 3G (or 4G) service, handsets for these services typically have Wi-Fi capability,<sup>114</sup> and adoption of such smart phones is rapidly increasing by consumers.<sup>115</sup> There are numerous services dedicated to providing the location of the tens of thousands of hot spots located throughout the United States.<sup>116</sup> And although the Blooston carriers are correct that some Wi-Fi providers charge for that service, there are tens of thousands of free hot spots in the United States<sup>117</sup> and, moreover, roaming is not “free” either.

**Head Start.** As explained above, mandatory common carrier roaming obligations are not necessary to offset a “head start” advantage by larger carriers. In the context of the rapidly evolving market for data services, carriers have the ability to leap frog competitors by deploying LTE technology regardless of their current network offerings. For example, MetroPCS is jumping directly from 2.5G technology to 4G.<sup>118</sup>

Thus, if certain wireless providers are behind today with regard to data deployment, it is not because of any barrier to entry but a reflection of their own business decision to not invest in facilities. Most notably, T-Mobile, which is owned by one of the largest telecom companies in the world, Deutsche Telecom, chose not even to participate in the 2007 700 MHz auction and thus has only itself to blame for any “head start” by competitors. “The Commission is not at liberty . . . to subordinate the public interest to the interest of equalizing competition among

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<sup>114</sup> AT&T, at 55.

<sup>115</sup> Cincinnati Bell, at 3; RCA, at 13; T-Mobile, at 5.

<sup>116</sup> See, e.g., JiWire website, [http://v4.jiwire.com/hot-spot-directory-browse-by-state.htm?country\\_id=1&provider\\_id=0](http://v4.jiwire.com/hot-spot-directory-browse-by-state.htm?country_id=1&provider_id=0) (providing search engine for over 70,000 hot spots in the United States); Wi-fihotspotlist.com website, <http://www.wi-fihotspotlist.com/> (providing search engine for over 55,000 free hot spots in the United States).

<sup>117</sup> *Id.*

<sup>118</sup> AT&T, at 52.

competitors”<sup>119</sup>—particularly when any “inequality” is due to the conscious decision of a competitor to refrain from deploying its own broadband network facilities. In all events, T-Mobile’s actions demonstrate that there can be no head start given the rapid evolution in wireless technology. Despite having sat on the sidelines, T-Mobile nonetheless is now in the process of rolling out a HSPA+ service to 185 million people by the end of 2010.<sup>120</sup>

**Competition.** Although commenters decry the “deteriorating posture of rural and small regional carriers” without common carrier roaming obligations,<sup>121</sup> the marketplace evidence again belies their assertions. The Commission reports that 22 smaller/regional carriers have now deployed EVDO to serve approximately 40% of the population.<sup>122</sup> This growth is reflected in the individual performance of these companies. MetroPCS has recently announced record subscriber additions, record EBITDA, and a substantial decrease in churn.<sup>123</sup> Leap reports increased revenues, increased OIBDA, and an increase in subscribership of approximately 25%

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<sup>119</sup> *SBC v. FCC*, 56 F.3d 1484, 1491 (D.C. Cir. 1995) (internal quotations omitted); *see also Applications of Craig O. McCaw, Transferor, and American Tel. & Tel. Co., Transferee*, 10 FCC Rcd. 11786, ¶ 9 (1995) (“[T]he Communications Act requires [the Commission] to focus on competition that benefits the public interest, not on equalizing competition among competitors”); *United States v. W. Elec. Co.*, 969 F.2d 1231, 1243 (D.C. Cir. 1992) (to the extent that parties contend that communications laws “should be interpreted to aid the minnows against the trout, such as AT&T and MCI (effectively devaluing the investments those companies have made in extending their CCS networks to more LATAs), they are simply wrong”).

<sup>120</sup> T-Mobile, at 5.

<sup>121</sup> Cellular South, at 20. Ironically, as noted, Cellular South elsewhere touts the fact that these very carriers are “thriv[ing].” Cellular South, at 17.

<sup>122</sup> *Id.* at 69.

<sup>123</sup> MetroPCS News Release, *MetroPCS Reports First Quarter 2010 Results: Record First Quarter Adjusted EBITDA and Net Subscriber Additions* (Mar. 6, 2010), available at <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NDQ4NDh8Q2hpbGRJRDR0tMXxUeXBIPtM=&t=1>.

over the prior year (including a net addition of nearly 200,000 broadband customers).<sup>124</sup> NTELOS shows increasing wireless revenues, subscribership and ARPU with decreasing churn.<sup>125</sup> US Cellular shows increased net customer additions and data revenues.<sup>126</sup> And rather than being “squeezed out of the market,”<sup>127</sup> Cincinnati Bell reports increased EBITDA, EBITDA margin, data ARPU and increasing numbers of smartphone customers while overall churn is decreasing.<sup>128</sup>

Wireless competition is thriving. Ninety percent of the population in 2009 was served by 2 or more mobile broadband providers—up from 73 percent in 2008.<sup>129</sup> Seventy-six percent of the population in 2009 was served by 3 or more mobile broadband providers—up from 51 percent in 2008.<sup>130</sup> Even regulatory proponents concede that the market for wireless service is “highly competitive.”<sup>131</sup>

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<sup>124</sup> Leap Press Release, *Leap Reports 446,000 Net Customer Additions for Cricket Services in First Quarter 2010* (May 6, 2010), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle&ID=1423804&highlight=>.

<sup>125</sup> Press Release, NTELOS, NTELOS Holdings Corp. Reports First Quarter 2010 Operating Results (Mar. 3, 2010), available at <http://ir.ntelos.com/Cache/1001152434.PDF?D=&O=PDF&IID=4110676&Y=&T=&FID=1001152434>.

<sup>126</sup> U.S. Cellular, 2009 Annual Report, available at <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9Mzc2NzIwfENoaWxkSUQ9Mzc1MzY4fFR5cGU9MQ==&t=1>.

<sup>127</sup> Cincinnati Bell, at 5.

<sup>128</sup> Cincinnati Bell First Quarter 2010 Review (May 6, 2010), available at <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NDQ5ODN8Q2hpbGRJRD0tMXxUeXBIPtM=&t=1>.

<sup>129</sup> Fourteenth Report, *Implementation Of Section 6002(B) Of The Omnibus Budget Reconciliation Act Of 1993*, WT Docket No. 09-66, ¶ 7, 39-40 (rel. May 10, 2010) (“*Fourteenth CMRS Competition Report*”).

<sup>130</sup> *Id.*

<sup>131</sup> MetroPCS, at 43 n.92; *see also* SouthernLINC, at 40.

**Investment.** Proponents of common carrier regulation assert they will not invest in broadband wireless networks absent regulation.<sup>132</sup> These claims collide with the reality that many small and rural carriers are already investing in next generation networks despite the absence of any data roaming mandate. “[D]uring 2008 and 2009, mobile wireless service providers continued to improve the coverage, capacity, and capabilities of their networks, focusing largely on the upgrade and expansion of mobile broadband networks to enable high-speed Internet access and other data services for their customers.”<sup>133</sup> Indeed, wireless carriers invested more than \$20.4 *billion* in 2009 to upgrade their networks.<sup>134</sup> Among those racing to upgrade their networks are many of the very commenters who are claiming in this proceeding that they lack incentives to invest in mobile broadband absent common carrier roaming regulation.<sup>135</sup> Investment in mobile networks will only intensify with the transition to 4G services and with the entry of cable companies into the market.<sup>136</sup>

Of particular importance to this proceeding are the network investments undertaken by Clearwire and Harbinger/SkyTerra. Clearwire has already deployed a WIMAX network and is currently providing *wholesale* WIMAX services to other retail carriers.<sup>137</sup> Similarly, Harbinger/SkyTerra has committed to an “aggressive and nationwide network deployment” of 4G service using a combination of satellite and terrestrial systems that it will offer “on a

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<sup>132</sup> Cellular South, at 15, 20; MetroPCS, at 45-46; RCA, at 8-9, 13; RTG, at 9-10; SouthernLINC, at 36-37.

<sup>133</sup> *Fourteenth CMRS Competition Report*, ¶ 105.

<sup>134</sup> AT&T, at 43 & n.117.

<sup>135</sup> *See* Verizon, at 5-7 (discussing investment in broadband mobile wireless technologies by US Cellular, MetroPCS, Leap, Cellular South, and NTELOS); AT&T, at 49-50; T-Mobile, at 5.

<sup>136</sup> AT&T, at 52; Verizon, at 7.

<sup>137</sup> Clearwire, at 4-5.

wholesale basis.”<sup>138</sup> As Clearwire notes, such wholesale arrangements may be “functionally superior” to traditional roaming arrangements.<sup>139</sup> This investment is occurring without common carrier regulation, even as these companies will offer additional, nationwide alternatives to wireless providers to offer broadband data services beyond their own networks.

More specifically, Clearwire has already deployed a mobile broadband network in two dozen cities and is expanding the network to reach 120 million people by the end of 2010.<sup>140</sup> Clearwire is currently offering WIMAX services at retail (both directly through its “Clear” brand and with its partner Sprint) and has entered into wholesale agreements with Comcast and Time Warner Cable.<sup>141</sup> And these services are growing rapidly: Clearwire’s revenues are up 72 percent this year as a result of “record breaking subscriber growth” of nearly 100% year-over-year.<sup>142</sup> Clearwire expects to end 2010 with 2 million subscribers.<sup>143</sup> Harbinger/SkyTerra has committed to provide mobile broadband to 100 percent of the U.S. population via its satellite component and 90 percent via its terrestrial component.<sup>144</sup> In approving SkyTerra’s transfer of control to Harbinger, the International Bureau stated that “[t]hrough Harbinger’s role as a

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<sup>138</sup> SkyTerra, at 2.

<sup>139</sup> Clearwire, at 8.

<sup>140</sup> AT&T, at 51; *see also* Verizon, at 7.

<sup>141</sup> Clearwire, at 4.

<sup>142</sup> Clearwire News Release, Clearwire Reports Strong First Quarter 2010 Results (May 5, 2010), *available at* <http://investors.clearwire.com/phoenix.zhtml?c=198722&p=irol-newsArticle&id=1422880>.

<sup>143</sup> *Id.*

<sup>144</sup> AT&T, at 50.

wholesale provider, it may be a catalyst for market-changing developments in the use and sale of innovative new mass-market consumer devices.”<sup>145</sup>

**Public Safety.** Unable to show common carrier roaming obligations are necessary as a matter of economic policy, some commenters suggest such obligations must be imposed to ensure that (i) public safety officials have seamless mobile access wherever there is coverage, regardless of the provider and (ii) the public itself can access public safety services wherever there is coverage, regardless of the provider.<sup>146</sup> This is nonsense.

A data roaming requirement would not affect existing public safety communications systems – *i.e.*, voice calling among public safety officials and public E911 services. AT&T already offers roaming services to public safety systems. The Commission also already requires carriers to provide automatic voice roaming and E-911 services, which means that customers can already access E-911 services when roaming, including identification of caller locations.<sup>147</sup> As to potential future uses of mobile broadband by emergency first responders, the Commission is already examining that issue in a separate proceeding, and those issues can and should be resolved in those proceedings.<sup>148</sup>

Moreover, the voice roaming rules already ensure access to Public Safety Answering Points (“PSAPs”), which today only have the capability to receive voice calls. To the extent that

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<sup>145</sup> *Transferor and Harbinger Capital Partners Funds, Transferee Applications for Consent to Transfer of Control of SkyTerra Subsidiary, LLC*, DA 10-535, IB Docket No. 08-184, ¶ 29 (rel. Mar. 26, 2010).

<sup>146</sup> *See, e.g.*, MetroPCS, at 41; SouthernLINC, at 7-8; Blooston, at 7.

<sup>147</sup> Other kinds of “emergency” calls – such as “a mother calling a father to come to the emergency room because their daughter had an accident,” MetroPCS at 41 n.88 – are also covered by the voice roaming rules.

<sup>148</sup> *See, e.g.*, Public Notice, *Public Safety And Homeland Security Bureau Seeks Comment On Interoperability, Out Of Band Emissions, And Equipment Certification For 700 Mhz Public Safety Broadband Networks*, PS Docket No. 06-229, DA 10-884, at 2 (rel. May 18, 2010).

PSAPs are eventually equipped with the capability to receive data transmissions, there are already industry 3G standards for wireless operators to accept emergency transmissions regardless of whether the user is the customer of a roaming partner or not. A data roaming requirement would not be necessary.

**C. If The Commission Does Adopt Mandatory Data Roaming Requirements, It Should Include Substantial Flexibility And Other Protections To Minimize The Harms.**

If, despite its lack of legal authority or a public interest case for common carrier roaming requirements, the Commission nonetheless seeks to impose such requirements, the comments confirm that the Commission cannot simply extend voice roaming rules to the data context because roaming presents fundamentally different issues that require different approaches. As even supporters of common carrier regulation explain, “the Commission should . . . be sensitive to the distinctions between voice-centric and data-centric networks.”<sup>149</sup>

*1. Host Providers Must Be Permitted The Flexibility To Manage Network Congestion, Implement Security Measures, And Prioritize Their Own Customers’ Traffic.* No commenter seriously disputes that host providers should retain the freedom to manage their network in the way they determine would best minimize congestion, provide appropriate security, and ensure that their own customers have priority. NTCH, for example, explains that “[m]any carriers are justifiably concerned with the possibility that demand for roaming may swamp the capacity of their systems to handle the traffic,” that “[t]his is a concern for large carriers as well as small ones since carriers engineer capacity based on assumptions that do not necessarily include huge volume from non-subscribers,” and that “[t]o alleviate these concerns, NTCH believes it is reasonable for carriers to be able to limit service to roamers when service to their own customers

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<sup>149</sup> Clearwire, at 3.

is imperiled.”<sup>150</sup> Cincinnati Bell explains that providers should be given the flexibility to “negotiate within their roaming agreements the means by which the host carrier could identify the roamers adding to the network’s congestion, under what circumstances the roamer’s traffic would be defined as burdensome to the host carrier’s network, and acceptable means of addressing the problem.”<sup>151</sup> And, ACSW explains that its practice is to give its own customers “first priority for constrained backhaul capacity.”<sup>152</sup>

Accordingly, any common carrier roaming rules for broadband should include a “safe harbor” that host providers are permitted to adopt methods to prioritize traffic for their own customers in times of congestion or where there are otherwise competing needs for bandwidth<sup>153</sup> (as is the case in many existing broadband data arrangements), including, but not limited to: (1) manual or dynamic packet prioritization at times and locations of congestion; (2) limiting roaming users to 2/2.5G networks at times and locations of congestion; (3) “bandwidth” limits on roaming users; and (4) congestion-based pricing.

It is not sufficient for the Commission merely to announce “that a host provider’s provision of data roaming is subject to reasonable network operations needs.”<sup>154</sup> Such a vague “reasonableness” standard will lead to constant second guessing of complex decisions that must be made in real time and will increase litigation and discourage investment and innovation in

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<sup>150</sup> NTCH, at 6.

<sup>151</sup> Cincinnati Bell, at 13.

<sup>152</sup> ACSW, at 7.

<sup>153</sup> This would include allowing host providers “to identify roaming users as a group and apply[ing] suitable network management protocols to such a group to address congestion issues.” *Notice*, ¶ 81.

<sup>154</sup> *Id.*

solving congestion and security issues.<sup>155</sup> Further, what is “reasonable” will be in constant flux as technology, services and applications continue to evolve.<sup>156</sup>

2. *Mobile Wireless Broadband Roaming Rules Should Clearly Prohibit The Use Of Roaming Arrangements As De Facto Resale Services.* Even regulation proponents agree that the Commission should continue to prohibit *de facto* resale of mobile wireless services. For example, Cincinnati Bell and T-Mobile both urge the Commission to “ensure[] that the requesting provider is not merely reselling the host provider’s services.”<sup>157</sup>

Accordingly, any common carrier rules for broadband roaming should clearly prohibit *de facto* resale, and, as AT&T previously demonstrated, that means, at minimum, providing would-be host providers with express authority to (1) deny mobile broadband data roaming to requesting providers that seek to sell service to individuals located outside of the requesting provider’s home mobile broadband service area;<sup>158</sup> (2) deny mobile broadband data roaming requests for areas where the requesting provider has already built out mobile broadband facilities or could reasonably be expected to do so; and (3) deny roaming to providers that do (or would) advertise that it offers its subscribers roaming on a particular carrier’s network absent a voluntary agreement by the host carrier.<sup>159</sup>

3. *Wireless Broadband Roaming Mandates Should Apply Only To Networks That Use The Same Radio Technologies And Air Interfaces And That Have Substantial Networks Of Their*

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<sup>155</sup> See AT&T, at 61-63.

<sup>156</sup> See *id.*

<sup>157</sup> See Cincinnati Bell, at 14-15; T-Mobile, at 19 (Commission should “ensure that the data roaming requirement does not become a broad resale obligation”).

<sup>158</sup> 2007 *Roaming Order*, ¶ 51 (“CMRS resale entails a reseller’s purchase of CMRS service provided by a facilities-based CMRS carrier in order to provide resold service within the same geographic market as the facilities-based CMRS provider.”).

<sup>159</sup> See AT&T, at 67-68.

*Own.* To preserve the proper incentives for investment, common carrier broadband roaming obligations should apply only to requesting providers that use the same air interfaces, spectrum bands and radio technologies, and where the requesting provider has already deployed a substantial network using that technology. The record shows that these requirements are necessary because, without such requirements, providers will have heightened incentives to scale back their own deployments and free-ride on the superior investments of others. They would also have less incentive to compete effectively because they would have reduced incentives to differentiate themselves with investments in better technologies (because others would have immediate access to those investments through roaming). Moreover, absent these restrictions, roaming would quickly become a one-way street, advantaging the competitors that do not invest in larger and better networks at the expense of those that do. All of this would clearly undermine the core goals of the *National Broadband Plan*.<sup>160</sup>

Regulation proponents agree, pointing out that permitting roaming by providers that have different radio technologies and air interfaces, or that lack substantial coverage, would quickly turn into *de facto* resale, with all of the attendant adverse affects on investment incentives and competition. Cincinnati Bell, for example, emphasizes that “[r]equiring that the requesting provider offer the same services for which it requests roaming ensures that the requesting provider is not merely reselling the host provider’s services and provides an incentive for the requesting provider to invest and upgrade its network to provide the most advanced services to customers.”<sup>161</sup> Likewise, T-Mobile points out that “[r]equiring the requesting provider to offer the underlying service for which roaming is sought would ensure that the data roaming

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<sup>160</sup> *See id.*

<sup>161</sup> Cincinnati Bell, at 14-15.

requirement does not become a broad resale obligation and would limit roaming requests by ‘free riders’.”<sup>162</sup>

Other proponents of regulation, however, insist that the Commission should permit this type of *de facto* resale by permitting providers to roam on networks with superior technology than they have been willing to deploy at home,<sup>163</sup> but their purported justifications for such a requirement are frivolous. Leap, for example, argues that it would harm competition if a host provider could “forc[e] a [roaming] provider to serve roaming customers at slower speeds” than those of the host provider.<sup>164</sup> But that argument is nonsensical. The speed available to roaming customers would remain solely within the control of the home carrier; if the carrier is not willing to compete with higher speeds in its home territory, it is hard to see how it could be competitively harmed if it is limited to the same lower speeds outside its home area.

MetroPCS argues that “[c]arriers have many different legitimate business and technological reasons for rolling out services” and that it may be unable to deploy higher speeds due to spectrum constraints in their home markets, or because it has made technology decisions that are incompatible with deploying higher speed networks.<sup>165</sup> But again, the choice as to how much spectrum to bid on and the types of technology to deploy over that spectrum are choices made by the *provider*. If the provider has made those choices as to how it will compete in its home area, there is no sound basis to give it access to more advanced technology out of region.

4. *There Should Be No Presumption That Any Mobile Wireless Broadband Roaming Request By A Technically Compatible Requesting Provider Is Reasonable.* A few regulation

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<sup>162</sup> T-Mobile, at 19.

<sup>163</sup> See Leap, at 28; MetroPCS, at 49; RTG, at 8 n.25.

<sup>164</sup> Leap, at 29.

<sup>165</sup> MetroPCS, at 49.

proponents ask the Commission to adopt a presumption, as it did in the voice context, that a mobile broadband roaming request is “reasonable” if it is made by a technically compatible provider.<sup>166</sup> Such a presumption would be inappropriate here.

As AT&T demonstrated, it is well established that the complainant bears the burden in Section 208 Complaint proceedings.<sup>167</sup> The circumstances under which the Commission found it was appropriate to shift this presumption in the context of voice do not exist in the context of broadband. When the Commission shifted the burden for voice roaming in 2007, it did so in the context of a mature and predictable marketplace, for a single discrete service (voice), based on more than a decade of experience, and in a context in which providers were not experiencing exponential increases in demand and a spectrum crisis.<sup>168</sup> The record confirms that the circumstances for broadband quite different. The broadband marketplace is rapidly evolving; it is not a single, discrete service, but is instead many different services; it is not based on relatively uniform device technology, but instead is fluid and currently supports many different devices; and it is not based on a generally uniform air interface technology, but instead relies on rapidly evolving technologies.<sup>169</sup>

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<sup>166</sup> See, e.g., Bright House, at 13; Leap, at 28; RCA, at 16.

<sup>167</sup> See, e.g., *Hi-Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781, 787 (D.C. Cir. 2000) (affirming that the complainant in a proceeding conducted under section 208 of the Act bears the burden of proof); *Am. Message Ctrs. v. FCC*, 50 F.3d 35, 41 (D.C. Cir. 1995) (stating, regarding a case brought under § 208, that “[t]he rules place the burden of pleading and documenting a violation of the Act on [the complainant]. They do not require [the carrier] to prove it has not violated the Act.”); *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1235 n.34 (D.C. Cir. 1980) (noting that the complaint procedure of §§ 206-209 “shifts the burden of proof onto the aggrieved party”); *Beehive Tel., Inc.*, 12 FCC Rcd. 17930, ¶ 23 (1995) (“it is well settled that complainants in Section 208 formal complaint proceedings bear the burden of proof”), *aff’d on other grounds*, 179 F.3d 941 (D.C. Cir. 1999). See also AT&T, at 56-57 (providing additional authority).

<sup>168</sup> *2007 Roaming Order*, ¶ 27.

<sup>169</sup> See, e.g., AT&T, at 58-59.

Accordingly, it would be arbitrary in the extreme for the Commission to reverse the standard statutory presumptions by deeming any request for broadband roaming presumptively reasonable. Even the most ardent proponents of regulation candidly concede that “neither [they] nor the Commission can fully anticipate the issues that may arise with regard to data roaming.”<sup>170</sup> “[T]he Commission should not assume that data roaming . . . will precisely mirror the legacy processes put in place for CMRS voice services.”<sup>171</sup> Indeed, “the voice-centric roaming issues of the past may in hindsight look relatively straightforward when compared to the data roaming world of the future where carriers will likely seek to deploy multi-mode handsets and secure agreements with a technologically diverse array of roaming partners.”<sup>172</sup> Not all data roaming requests will be reasonable, and the reasonableness of any particular agreement will depend on many factors.<sup>173</sup> The proper approach, therefore, is to preserve the negotiating parties’ freedom to find different solutions to varying problems, not forestall negotiations with “presumptions” that will skew providers toward accepting harmful requests in order to avoid litigation.

**D. Several Proposals Made By Regulation Proponents Have Already Been Rejected, Are Not Properly Raised In This Proceeding, Or Can Otherwise Be Summarily Rejected.**

In several respects, those supporting regulation go well beyond the *Notice* in proposing not only common carrier regulation, but also more onerous forms of *dominant* carrier regulation, such as rate regulation and resale requirements that the Commission has long recognized are inappropriate and counterproductive where, as even most regulation proponents concede is the

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<sup>170</sup> Clearwire, at 2.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 2-3.

<sup>173</sup> *See* AT&T, at 56-61.

case here, the retail marketplace is intensely competitive. A few commenters even suggest that the Commission begin second-guessing – and even overruling – decisions made by international standards bodies (which are comprised of many of the world’s most experienced network engineers and experts) relating to best practices for building devices for particular spectrum bands. Other commenters urge the Commission to mandate that various forms of dispute resolution processes be inserted into roaming arrangements, regardless of whether the parties want them or not. All of these proposals should be rejected.

*1. Rate Regulation Proposals.* What many regulation proponents are really after is intrusive *rate* regulation for data roaming services.<sup>174</sup> None of these commenters, however, provide any evidence of a market failure or excessive pricing, nor do they identify a single legitimate benefit that could outweigh the well-recognized and very substantial harms of rate regulation. Indeed, these commenters ignore the fact that the Commission expressly *rejected* proposals for rate regulation in the voice roaming context, because rate regulation can, among other harms, “distort” the incentives of carriers to invest in wireless networks.<sup>175</sup>

[R]egulation to reduce roaming rates has the potential to deter investment in network deployment by impairing buildout incentives facing both small and large carriers. By enabling smaller regional carriers to offer their customers national roaming coverage at more favorable rates without having to build a nationwide network, rate regulation would tend to diminish smaller carriers’ incentives to expand the geographic coverage of their networks. In addition, by reducing or eliminating any competitive advantage gained as a result of building out

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<sup>174</sup> For example, although MetroPCS disclaims (at 47) “any right to gain access at cost or at cost-based or TELRIC rate[s],” it nonetheless asks the Commission to limit wireless providers to “reasonable” roaming charges, *id.*; see also Bright House ,at 13 (“the Commission must also be willing to review a provider’s proposed rates to determine if they are reasonable and not unreasonably discriminatory” and should focus on “a provider’s retail yield”); Cincinnati Bell, at 6 (existing rates are not “cost-based” and Commission should “mandat[e] automatic data roaming at just and reasonable rates”); NTCH, at 5 (asking for rates based on “costs”).

<sup>175</sup> 2007 *Roaming Order*, ¶ 39.

nationwide or large regional networks, rate regulation would impair larger carriers' incentives to expand, maintain, and upgrade their existing networks.<sup>176</sup>

These conclusions apply with particular force in the context of next generation mobile broadband services where multi-billion-dollar upgrades are underway.

The intrusive rate regulation requested by commenters would also impose substantial burdens on the Commission and the industry. Any attempt to determine the appropriate measure of cost for telecommunications network services is fraught with difficulty, but that is especially true of data roaming costs. Many of the costs of providing data roaming are joint and common with the other services that carriers provide over their wireless networks and there is no theoretically valid way to attribute such costs to roaming services. Making matters even more difficult is the fact that the networks themselves are changing rapidly.

Some of these rate regulation proposals are particularly one-sided. According to the Blooston Rural Carriers, for example, the Commission should, on the one hand, force “nationwide carriers” to charge low roaming rates to others while at the same time forcing them to *pay* “fully compensatory” roaming rates to rural carriers to subsidize their buildouts.<sup>177</sup> This proposal represents the worst of all worlds. It would create disincentives for national carriers to invest because they would be undercompensated by roaming providers that use their networks; it would provide disincentives for roaming carriers to invest because they could take advantage of below-market roaming rates rather than building out; and, forcing national providers to pay excessive prices for roaming could only undermine their incentives to purchase roaming services at all, thus further reducing a significant revenue stream relied on by smaller providers and used to build out and expand networks in rural areas.

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<sup>176</sup> *Id.* ¶ 40. The courts have likewise recognized that “forced sharing” reduces incentives to invest and innovate. *See, e.g., USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

<sup>177</sup> *Compare* Blooston, at 7 with *id.* at 12.

2. *Resale Proposals.* The Commission should also reject proposals to resurrect mandatory resale requirements. SkyTerra, for example, argues that the Commission should permit it enter into roaming arrangements with multiple providers and then *resell* those services to other carriers in the wholesale marketplace.<sup>178</sup> This proposal is particularly curious coming from SkyTerra, as it calls into question SkyTerra’s merger commitment to deploy a *facilities-based* nationwide 4G network backed by nationwide satellite coverage. If such a network were, in fact, being deployed, SkyTerra would not need data roaming to provide the nationwide wholesale services it claims it wants to provide.

In all events, the Commission relied on resale requirements many years ago when there were only one or two facilities-based wireless providers, and they were quite properly abandoned as soon as facilities-based entry by multiple providers had occurred. The Commission expressly recognized that mandatory resale imposed significant “administrative costs,” and that the ability to “free-ride” on other networks effectively undermined investment incentives.<sup>179</sup> In the *2007 Roaming Order*, the Commission made clear that it therefore had no intention whatsoever of resurrecting such investment-killing incentives,<sup>180</sup> and reiterated that in the *2010 Notice*.<sup>181</sup> SkyTerra’s proposal should therefore be rejected.

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<sup>178</sup> See SkyTerra, at 2, 6 (arguing that “[i]t is more efficient to allow [it] to enter into umbrella roaming agreements with other facilities-based providers, rather than require multiple retailers to enter into their own individual agreements.”).

<sup>179</sup> First Report and Order, *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, 11 FCC Rcd. 18455, ¶¶ 14, 25 (1996).

<sup>180</sup> See, e.g., *2007 Roaming Order*, ¶ 51 (2007) (“We note that the Commission’s mandatory resale rule was sunset in 2002, and automatic roaming obligations can not be used as a backdoor way to create *de facto* mandatory resale obligations or virtual reseller networks.”).

<sup>181</sup> *Notice*, ¶ 35 (“[w]hile resale obligations are intended to offer carriers the opportunity to market a competitive retail service without facilities development, such a resale product would not serve our goals of promoting facilities-based competition, the development of spectrum resources, and the availability of ubiquitous coverage”).

3. *Micromanaging Technology Decisions.* Cellular South again asks the Commission to overrule international standards setting bodies' decisions relating to best practices for building devices for particular spectrum bands. Cellular South repeats its assertions, made elsewhere, that devices being developed for AT&T's and Verizon's B and C block 700 MHz spectrum are not compatible with its A Block 700 MHz spectrum, and that these decisions were driven by AT&T and Verizon to make it more difficult for A Block licensees to obtain handsets and to roam on the AT&T and Verizon Networks.<sup>182</sup> Cellular South, therefore, asks the Commission to intervene and require that AT&T and Verizon use only handsets with radios and other technologies that are compatible not only with the spectrum they use, but that are also compatible with Cellular South's spectrum.<sup>183</sup>

This precise issue is already being addressed in another Commission rulemaking, and is therefore not properly raised here.<sup>184</sup> As AT&T has previously explained, these standards were developed in the 3GPP international standards-setting process, and in fact were originally proposed to the 3GPP by Motorola in 2008 to address significant interference issues that are unique to the 700 MHz A Block spectrum.<sup>185</sup> And, contrary to Cellular South's assertions, it is well documented that Commission regulations forcing all 700 MHz devices to be capable of operating in the A Block spectrum could only *reduce* critical roaming capabilities; as LG Electronics (the second largest manufacturer of cellular phone handsets for the U.S.) recently

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<sup>182</sup> Cellular South, at 22-23.

<sup>183</sup> *Id.*

<sup>184</sup> See Public Notice, *Wireless Telecomm's Bureau Seeks Comment on Petition for Rulemaking Regarding 700 MHz Band Mobile Equipment Design and Procurement Practices*, RM No. 11592, DA 10-278 (Feb. 18, 2010).

<sup>185</sup> See Comments of Motorola, *Wireless Telecomm's Bureau Seeks Comment on Petition for Rulemaking Regarding 700 MHz Band Mobile Equipment Design and Procurement Practices*, RM No. 11592, at 3-4 (Mar. 31, 2010).

explained, “the requested regulatory intervention would, at a minimum, delay mobile broadband deployment at 700 MHz and reduce the ultimate utility of 700 MHz-capable devices with respect to interoperability and roaming.”<sup>186</sup>

4. *Arbitration Proposals.* Finally, a handful of commenters suggest that the Commission should mandate mediation (or arbitration) where there is a roaming-related dispute or, alternatively, that all roaming disputes be placed on the Commission’s accelerated docket.<sup>187</sup> Both ideas should be rejected.

With regard to mandatory mediation or arbitration, AT&T has no general objection to such dispute resolution procedures *when they are mutually agreed to by the parties*. But mandating such procedures would be counterproductive. The Communications Act requires that the Commission itself ultimately resolve all complaints brought pursuant to section 208 and the Commission cannot lawfully delegate that authority even to Commission staff, let alone an outside arbitrator.<sup>188</sup> Thus, to the extent that the Commission mandated mediation or arbitration on an unwilling participant, this would only serve to *delay* final resolution of the matter because the Commission would still need to ultimately decide the merits of the dispute *de novo*.

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<sup>186</sup> Letter from Alan K. Tse (LG Electronics MobileComms U.S.A. Inc.) to FCC, *Re: LG Opinion on 700 MHz Block A Good Faith Purchasers Alliance Petition*, RM-11592 (June 11, 2010). See also Comments of Motorola, *Wireless Telecomm’s Bureau Seeks Comment on Petition for Rulemaking Regarding 700 MHz Band Mobile Equipment Design and Procurement Practices*, RM No. 11592, at 3, 6,8 (Mar. 31, 2010) (the Cellular South proposal would “limit the national and international roaming ability and legacy band support for new mobile broadband services”).

<sup>187</sup> See NTCH, at 5 (mediation); Bright House, at 14 (accelerated complaint).

<sup>188</sup> See, e.g., *USTA v. FCC*, 359 F.3d at 565 (D.C. Cir. 2004); see also AT&T Reply Comments, WC Dkt. No. 05-25 & RM-10593 (Feb. 24, 2010).

With regard to proposals that such procedures be automatically placed in the Commission's accelerated docket, the Commission has already rejected that approach,<sup>189</sup> and there is no basis for the Commission to depart from that ruling now. To the contrary, disputes about roaming limitations on next-generation broadband networks are likely to raise novel engineering and technical issues that make them even less likely to be resolved appropriately on an accelerated basis.

### CONCLUSION

For the forgoing reasons and the reasons set forth in AT&T's initial comments in this proceeding, the Commission should not impose common carrier regulation on mobile broadband roaming.

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July 12, 2010

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<sup>189</sup> 2007 Roaming Order, ¶ 31.