

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

Reexamination of Roaming Obligations of)
Commercial Mobile Radio Service Providers)
and Other Providers of Mobile Data Services)

) WT Docket No. 05-265
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REPLY COMMENTS OF T-MOBILE USA, INC.

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T-Mobile USA, Inc. (“T-Mobile”) hereby submits these reply comments in the above-captioned proceeding. T-Mobile is the fourth largest wireless carrier in the United States and serves approximately 33 million customers. For the reasons set forth in its initial comments and below, T-Mobile urges the Commission to adopt rules governing automatic data roaming as soon as possible to maintain and promote competition in the mobile broadband marketplace.

INTRODUCTION AND SUMMARY

With the notable exception of the two dominant CMRS providers, the Commission’s proposed extension of its automatic roaming obligations to data services has near-unanimous support from the parties commenting in this proceeding. Consumers today use their mobile devices for more than simply calling one another, making the Commission’s extension of its roaming obligations to include data as well as voice services especially important. Other commenters underscore T-Mobile’s concern that increased consolidation in the wireless industry makes a data roaming rule necessary to promote competition and consumer choice. In addition, a data roaming rule facilitates the goals of the National Broadband Plan to promote ubiquitous broadband connectivity.

The Commission has ample legal authority to extend its roaming obligations to data services. The record demonstrates that the Commission could rely on its authority under Titles I, II and III of the Communications Act to adopt a data roaming rule. AT&T and Verizon argue that the Commission has no authority to adopt a data roaming rule because it cannot impose common carrier obligations on private mobile radio services (“PMRS”). As the record demonstrates, however, data roaming is either an information service or a common carrier telecommunications service, not PMRS, and the FCC has authority to impose roaming obligations under either characterization.

Despite the arguments of AT&T and Verizon, a data roaming rule would not impede carriers from managing their networks or reduce incentives of carriers to invest in new facilities. AT&T and Verizon’s arguments against mandatory data roaming are unfounded and simply reiterations of the arguments they made against voice roaming. In addition, the Commission should reject AT&T and Verizon’s proposals for the Commission to narrow the scope of data roaming requirements from what it adopted for voice roaming.

Finally, the Commission should reject Verizon’s argument that the imposition of a data roaming rule on licensees would constitute a regulatory taking in violation of the U.S. Constitution. There is no evidence in the record to suggest that the expansion of the Commission’s roaming rules to include data services would amount to a taking, especially where licensees already comply with the Commission’s roaming rules for voice and related services.

I. THERE IS NEAR UNANIMOUS SUPPORT FOR DATA ROAMING

Based on the near-unanimous agreement in the record, the Commission should move forward with the extension of automatic roaming obligations to non-interconnected data services. With the notable exception of the two dominant CMRS providers, the Commission’s proposed

data roaming rule has overwhelming support from commenting parties.^{1/} Even parties that initially opposed the extension of the Commission’s roaming requirement to non-interconnected data services now support the Commission’s proposed data roaming rule. Sprint Nextel reassessed its prior opposition because of “changes in the wireless marketplace, including the

^{1/} See Comments of Blooston Rural Carriers at 1 (filed June 14, 2010) (“Blooston Rural Carriers urge the Commission to adopt a rule for data roaming that largely mirrors the circuit switched data and voice roaming rule adopted in the *2007 Report and Order*, subject only to restrictions in cases of technical infeasibility.”); Comments of Bright House Networks at 9 (filed June 14, 2010) (“[T]he FCC should undertake to implement an automatic data rule.”); Comments of Cellular South, Inc. at 2 (filed June 14, 2010) (“Cellular South has been a longstanding supporter of a data roaming mandate.”); Comments of Cincinnati Bell Wireless, , at 4 (filed June 14, 2010) (“Cincinnati Bell urges the Commission to extend automatic roaming obligations to all data services and to apply the obligation to all facilities-based providers, whether or not they also provide CMRS.”); Comments of Clearwire Corporation at 1 (filed June 14, 2010) (“Clearwire [] believes that the time is ripe for the Commission to create certainty with regard to carriers’ rights to non-discriminatory access to data roaming.”); Comments of Free Press at 2 (filed June 14, 2010) (“[T]he Commission should extend automatic roaming obligations to data services.”); Comments of Leap Wireless International, Inc. at 29 (filed June 14, 2010) (“Leap urges the Commission to implement wireless data roaming obligations under which a request is presumptively reasonable so long as there is technological compatibility.”); Comments of Media Access Project at 9 (filed June 14, 2010) (“[T]he Commission should adopt automatic roaming obligations for non-interconnected data services, similar to the obligations it previously adopted in this proceeding for voice roaming.”); Comments of MetroPCS Communications, Inc. at 55 (filed June 14, 2010) (“MetroPCS respectfully requests that the Commission adopt a requirement that all providers of wireless broadband services are obligated to provide wireless data roaming services to any requesting carrier using compatible technology when such roaming is technically feasible and economically reasonable.”); Comments of NTCH, Inc. at 1 (filed June 14, 2010) (“Automatic data roaming must be mandated.”); Comments of NTELOS Inc. at 8 (filed June 14, 2010) (“NTELOS urges the Commission to adopt automatic roaming measures for data as it has for voice, ensuring that all wireless carriers - including smaller carriers, regional carriers and new entrants - will be able to negotiate reasonable terms for roaming.”); Comments of The Organization for the Promotion and Advancement of Small Telecommunications Companies and the National Telecommunications Cooperative Association (“OPASTCO”) at 2 (filed June 14, 2010) (“The Commission should extend its automatic roaming obligations to mobile data services.”); Comments of Rural Cellular Association at 1 (filed June 14, 2010) (“RCA commends the Commission for undertaking a rigorous evaluation of the need for a data roaming mandate and urges the Commission to adopt such a mandate.”); Comments of Rural Telecommunications Group at 13 (filed June 14, 2010) (“RTG respectfully requests that the Commission extend automatic roaming obligations to data services in a manner that mirrors those roaming obligations currently applicable to voice services.”); Comments of SkyTerra Subsidiary LLC at 1 (filed June 14, 2010) (“SkyTerra strongly supports extending automatic roaming obligations to all data services.”); Comments of SouthernLINC Wireless at 41 (filed June 14, 2010) (“[T]he Commission should act immediately to extend the scope of its automatic roaming rule to include non-interconnected mobile wireless services.”); Comments of Sprint Nextel Corporation at 1 (filed June 14, 2010); Comments of United States Cellular Corporation at 1 (filed June 14, 2010) (“USC strongly supports a right to roam that incorporates non-interconnected services and features, including information services.”).

loss of alternative providers of roaming services and the overall increase in importance of data services to consumers. . . .”^{2/} T-Mobile itself initially asserted that a data roaming requirement was premature, but now believes that changing market conditions make it a crucial element in the continued growth of mobile broadband competition.

The Commission’s proposed data roaming rule is warranted in light of the well-documented shift of wireless traffic from voice to data, a trend further evidenced by the comments in this proceeding. NTELOS describes its “firsthand [experience with] the transformation in the wireless market brought about by broadband data services” and the “explosive growth in the popularity of smartphone handsets, wireless broadband data cards and other devices [that] has brought about a massive increase in demand for wireless data capacity” such that “81% of NTELOS customers pay monthly for either text or data services.”^{3/} Revenue from data services continues to climb and now amounts to roughly 21 percent of total monthly average revenue per user.^{4/} The Commission is correct to propose extending its roaming obligation to data services to reflect this new reality. As Sprint Nextel observes, “[c]onsumer appetite for wireless data will only increase as other mobile devices with advanced data capabilities become available and proliferate.”^{5/}

A data roaming rule is also necessary because market consolidation in the wireless industry has reduced the number of choices for data roaming partners and has exacerbated the

^{2/} Comments of Sprint Nextel Corporation at 1.

^{3/} Comments of NTELOS Inc. at 4-5.

^{4/} Comments of Free Press at 9 (citing *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Fourteenth Report, WT Docket No. 09-66, FCC 10-81, at 11 (rel. May 20, 2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-81A1.pdf (“*Wireless Competition Report*”).

^{5/} Comments of Sprint Nextel Corporation at 8.

market position of the two largest providers – AT&T and Verizon.^{6/} Sprint Nextel correctly observes that “[i]ndustry consolidation has eliminated certain key roaming partners that provided competitive alternatives.”^{7/} Likewise, as Cellular South notes, “[i]n the absence of a roaming mandate, this consolidation and the burgeoning market power of the large carriers would enable them to continue to decline to enter into data roaming agreements with the smaller carriers, or to offer arrangements at unreasonable rates and with unreasonable terms and conditions.”^{8/} Other commenters also identify consolidation as a reason that the Commission should act swiftly in adopting an automatic data roaming rule.^{9/}

T-Mobile explained in its comments that consumers do not distinguish between voice and data in their expectations of roaming capabilities.^{10/} Other commenters agree.^{11/} As Sprint Nextel notes, “data services have become an indispensable part of the overall bundle of mobile services consumers demand.”^{12/} SouthernLINC Wireless likewise asserts that “wireless consumers expect the same seamless connectivity with respect to all mobile data services.”^{13/}

^{6/} Comments of T-Mobile at 7 (citing the *Wireless Competition Report* at 6).

^{7/} Comments of Sprint Nextel Corporation at 2.

^{8/} Comments of Cellular South, Inc. at 18.

^{9/} Comments of MetroPCS Communications, Inc. at 45 (“Unfortunately, the disappearance of a number of former small, rural and mid-tier roaming partners as a result of the recent market consolidation has made it much more difficult for small, rural and mid-tier carriers to negotiate reciprocal wireless data roaming agreements.”); Comments of Rural Cellular Association at 14 (industry consolidation has led to reluctance on the part of AT&T and Verizon to enter into data roaming arrangements with rural and small regional carriers “since such arrangements would enhance the competitiveness of these carriers.”).

^{10/} Comments of T-Mobile USA, Inc. at 6.

^{11/} *See, e.g.*, Comments of Blooston Rural Carriers at 3 (“Consumers increasingly regard broadband data services as a seamless feature on modern wireless handsets, and few consumers know or care about the difference between interconnected data (like SMS) and non-interconnected data (such as email).”); Comments of Bright House Networks at 5 (“consumers [] expect to access the Internet [] on a ubiquitous basis, in the same way that they can access voice services on a ubiquitous basis today.”).

^{12/} Comments of Sprint Nextel Corporation at 2.

And, Free Press states that “[c]onsumers have widely embraced mobile wireless data services and expect those services to go anywhere their handsets can.”^{14/}

The Commission’s proposed data roaming rule would promote competition, enabling smaller and regional carriers to enter the market and enhance consumer choice.^{15/} As Cincinnati Bell Wireless LLC explains, “absent an assurance of the availability of automatic roaming, it has become very difficult – if not impossible – for a small or regional wireless provider to develop a business plan that justifies investing in additional spectrum and the build-out of the associated network.”^{16/}

In addition, an automatic data roaming rule will facilitate the goals of the Commission’s National Broadband Plan to promote ubiquitous broadband connectivity, including in rural areas.^{17/} A data roaming rule is “fundamental to achieving the Federal government’s goals of seamless and widespread availability of broadband services, and expanding the availability of broadband in rural America, consistent with the Commission’s goals in developing its National Broadband Plan.”^{18/} As Leap Wireless correctly notes, automatic data roaming is an important

^{13/} Comments of SouthernLINC Wireless at 5 (citing *Wireless Competition Report* at ¶ 8, “consumers are increasingly substituting among voice, messaging and data services, and, in particular, are willing to substitute from voice to messaging or data services for an increasing portion of their communications needs.”).

^{14/} Comments of Free Press at 11.

^{15/} Comments of T-Mobile at 8.

^{16/} Comments of Cincinnati Bell Wireless LLC at 6.

^{17/} Comments of Sprint Nextel Corporation at 9 (“An automatic data roaming obligation [] would serve to advance the Commission’s underlying policy goal of expanding mobile broadband network deployment and competition.”); *see also* Comments of NTELOS Inc. at 7 (“Like other smaller and regional carriers, an absolutely critical question for NTELOS as it formulates a strategy on whether to deploy 4G technology is whether roaming services will be available on reasonable terms and conditions.”); Comments of MetroPCS Communications, Inc. at 54.

^{18/} Comments of Blooston Rural Carriers at 4.

component in the Commission’s desire to “foster wireless broadband as a platform of innovation and growth.”^{19/}

Finally, an overwhelming majority of commenters agree with T-Mobile that Commission action is necessary to address today’s excessive wholesale data roaming rates. As Media Access Project asserts, “increased market power of especially the two largest carriers, and the various tools that these giants can use to wield that market power, allow the largest incumbent providers to extract higher prices from their subscribers and thereby harm consumers.”^{20/} AT&T and Verizon often impose “onerous rate structures or other terms and conditions” on roaming arrangements,^{21/} and comments indicate that smaller carriers often have no choice but to capitulate to excessive roaming rates.^{22/}

II. THE COMMISSION HAS AMPLE AUTHORITY TO ADOPT AN AUTOMATIC DATA ROAMING RULE

The Commission has the authority to adopt automatic data roaming requirements under Titles I, II and III of the Communications Act. The Commission’s ancillary authority under Title I is a sufficient basis for adopting a data roaming mandate and there are numerous statutory provisions to which a roaming requirement would be ancillary.^{23/} SouthernLINC, for instance,

^{19/} Comments of Leap Wireless International, Inc. at 5.

^{20/} Comments of Media Access Project at 6 (citing Comments of Cricket Communications, Inc. WT Docket No. 09-66, at 2 (filed Sept. 30 2009) (“[T]he Commission has exposed consumers to harm from the nation’s largest carriers that have amassed a dominant position in many geographic areas of the country and have abused the market position to extract anticompetitive prices for wholesale services such as roaming.”).

^{21/} Comments of NTCH, Inc. at 3.

^{22/} Comments of Free Press at 12 (noting that before Alaska-based rural cooperative MTA Wireless could secure a data roaming arrangement with host carrier Digitel, “Digitel required MTA to end its voice roaming agreement with another carrier and pay Digitel voice roaming costs twice as high as those contained in their earlier agreement”).

^{23/} *See generally* Comments of Cellular South, Inc. at 11 (A data roaming mandate “would be consistent with and would advance numerous relevant responsibilities set forth in Title III of the Act,” and it would advance the policy goals of numerous other statutory provisions, including Section 706 of

comprehensively discusses the Commission’s Title I authority to adopt a data roaming mandate as reasonably ancillary to several express delegations of statutory authority under various provisions of Title III, Sections 201, 202, and 255 of the Act.^{24/}

In some circumstances, moreover, wireless providers purchase only transmission services from host carriers to provide mobile data services to roaming customers, and the home carriers otherwise perform the functions necessary to connect those customers to the Internet. MetroPCS, for example, provides a detailed description of the network architecture used in its roaming interactions and explains that the information access component of a roaming customer’s data session is performed by the home carrier and that the host carrier merely transmits that data back MetroPCS’s packet data switching node.^{25/} United States Cellular Corporation and Leap Wireless describe their roaming arrangements in a similar way.^{26/} As

the Act, which directs the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capacities to all Americans.”); Comments of Leap Wireless International, Inc.; Comments of OPASTCO and the National Telecommunications Cooperative Association; Comments of Rural Telecommunications Group; Comments of SouthernLINC Wireless; and Comments of United States Cellular Corporation.

^{24/} Comments of SouthernLINC Wireless at 23-30.

^{25/} Comments of MetroPCS Communications, Inc. at 18; (“[N]on-integrated transmission service provided by a third-party wireless Roaming Partner is properly viewed as purely a transmission service that qualifies under long-standing Commission precedent as ‘telecommunications’ and as a ‘telecommunications service.’”); *See also* Comments of Leap Wireless International, Inc. at 20 (“[D]ata roaming entails a functional and practical distinction between the pure transmission of data and any more complex information services because the central feature of data roaming is the wholesale provision of data transmission to other carriers.”); Comments of NTCH Inc. at 3 (“In NTCH’s view, data roaming, just like voice roaming, is a common carrier service.”); Comments of Rural Telecommunications Group at 4-5 (“[T]his ‘transmission’ quality [] makes data roaming fall squarely under the authority of Title II.”); Comments of SouthernLINC Wireless at 18 (“[R]oaming is a wholesale carrier-to-carrier transmission service.”).

^{26/} Comments of United States Cellular Corporation at 8 (“Data roaming between carriers is arguably a telecommunications service properly subject to Title II regulation in that the service that roaming carrier receives from the ‘host’ carrier is ‘transport’ by the host carrier of ‘communications’ over its network to the ‘requesting’ carrier’s customer.”); Comments of Leap Wireless International, Inc. at 20 (“[D]ata roaming entails a functional and practical distinction between the pure transmission of data and any more complex information services because the central feature of data roaming is the wholesale provision of data transmission to other carriers.”).

MetroPCS explains, under this architecture the host carrier provides a Title II wholesale common carrier service that is not functionally integrated with the information service offered by the home carrier to its own customers.^{27/}

In opposition to an automatic data roaming requirement, AT&T and Verizon argue that data roaming is not a commercial mobile radio service because it is not interconnected with the public switched network and that it must therefore be a “private mobile radio service,” which, they allege, is exempt from the “common carrier” obligation of data roaming.^{28/} While a convenient means of invoking a prohibition on common carrier regulation, this argument ignores the record evidence in this proceeding that data roaming is either an information service provided via telecommunications^{29/} or a common carrier telecommunications service.^{30/} AT&T’s and Verizon’s contention that data roaming is a private mobile service is contradicted by their own claims that data roaming is an information service.^{31/} An “information service” is provided via telecommunications.^{32/} Thus, to the extent they are providing PMRS when they offer data roaming, it is as the telecommunications element of data roaming and not data roaming itself.

^{27/} Comments of MetroPCS Communications, Inc. at 18. MetroPCS correctly notes that because host carriers provide a Title II wholesale common carrier service, it is not necessary for the Commission to “reclassify” this service as telecommunications. *Id.* at 35.

^{28/} Comments of AT&T at 13; Comments of Verizon Wireless at 20. *See* 47 U.S.C. § 332(c)(2) (“A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this Act.”).

^{29/} *See e.g.* Comments of Bright House Networks at 10 (citing the *Order on Reconsideration and Second FNPRM* ¶ 89). Comments of AT&T at 5; Comments of Verizon Wireless at 24.

^{30/} *See e.g.* Comments of MetroPCS at 7 (“the transmission service provided by the Roaming Partner is a common carrier “telecommunication service” as defined by the Act”); Comments of NTCH Inc. at 3 (“[D]ata roaming, just like voice roaming, is a common carrier service.”).

^{31/} Comments of AT&T at 5 (“data roaming services plainly involve the provision of information services to the user”); Comments of Verizon Wireless at 24 (“data roaming is properly classified as an ‘information service,’ as that term is defined in the Act”).

^{32/} *See* 47 U.S.C. § 153(20) (defining “information service” as the offering of capabilities “via telecommunications” (emphasis added)).

AT&T and Verizon improperly conflate the component telecommunications with the information service being offered.

AT&T's and Verizon's argument also founders on the faulty assumption that all wireless offerings must be either CMRS or PMRS and that data roaming must therefore be PMRS. As MetroPCS demonstrates, however, the transport-type data roaming it and other carriers purchase is a carrier-to-carrier telecommunications service, even if it is not CMRS and even if neither the host carrier nor the home carrier interconnects data traffic to the PSTN.^{33/} The latter element is the hallmark of CMRS, but it is not a requirement for all common carrier offerings; thus, the mere absence of interconnection does not render a service "PMRS." And, even if AT&T and Verizon Wireless are correct that in some instances the host carrier provides the Internet connection to the roaming customer and not just pure transmission, the Commission has ancillary authority to regulate all data roaming services to ensure consistent treatment and prevent frustration of its statutory responsibility to ensure data roaming is available at just, reasonable, and non-discriminatory rates, terms, and conditions.^{34/}

^{33/} Comments of MetroPCS at 33-34.

^{34/} See, e.g., *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, CC Docket No. 96-115, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927, ¶¶ 56-57 (2007) ("[T]he extension of the CPNI privacy requirements to providers of interconnected VoIP service is reasonably ancillary to the effective performance of the Commission's duty to protect the CPNI of all telecommunications customers under Title II."); *Telephone Number Requirements for IP-Enabled Services Providers; Local Number Portability Porting Interval and Validation Requirements*, WC Docket No. 07-243, *et al.*, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531, ¶ 25 (2007) (extending numbering requirements to IP-enabled services in part "because we 'believe it is important that [the Commission] adopt uniform national rules regarding number portability implementation and deployment to ensure efficient and consistent use of number portability methods and numbering resources on a nationwide basis'") (footnote omitted). Verizon has it exactly backwards when it says that the Commission should ensure uniform treatment of data roaming by not regulating it at all, even if it concludes (as it could, based on the record in this proceeding) that at least some data roaming constitutes a telecommunications service. Comments of Verizon Wireless at 27.

For much the same reason, Section 153(44) of the Act, which limits the imposition of common carrier regulation to carriers only when they are engaged in providing telecommunications services, is not an impediment to the adoption of an automatic data requirement.^{35/} To the extent data roaming is a common carrier offering, requiring adherence to Sections 201 and 202 is not the imposition of common carrier requirement with respect to the offering of non-telecommunications service. And, if data roaming is an information service, FCC regulation of data roaming pursuant to ancillary jurisdiction, *e.g.*, to prevent the frustration of voice roaming and common carrier interconnection obligations,^{36/} is not itself the imposition of a common carrier requirement.

Finally, the Commission's prior classification of voice roaming as a common carrier service does not preclude its exercise of Title III authority to impose a data roaming requirement, regardless of whether data roaming is deemed to be an information service.^{37/} While the Commission's authority to impose obligations on wireless licensees under Title III of the Act is not unlimited, "[a]pplication of [Title III] is not affected by whether the service using the spectrum is a telecommunications service or information service."^{38/} Indeed, the Commission has imposed common carrier-like regulations, such as resale, on non-Title II services when such obligations are found to be in the public interest.^{39/}

^{35/} Comments of AT&T at 28; Comments of Verizon Wireless at 32.

^{36/} Comments of T-Mobile at 18.

^{37/} *Cf.* Comments of Verizon Wireless at 33.

^{38/} *Second Further Notice* at ¶ 66.

^{39/} *Id.* at n.198.

III. THE COMMISSION SHOULD REJECT AT&T’S AND VERIZON’S UNFOUNDED CLAIMS REGARDING THE BENEFITS AND COSTS OF DATA ROAMING

Verizon and AT&T argue that FCC regulation of data roaming would produce greater harms than regulation of voice roaming.^{40/} As with their prior efforts to defeat voice roaming, their arguments are unfounded and in many cases simply reiterations of the same arguments they have made before. The Commission has rejected these arguments in the voice roaming context, and it should reject them again.

First, AT&T and Verizon assert that an automatic data roaming obligation is not required because the market is functioning properly.^{41/} The market may be functioning for AT&T and Verizon, but it is not functioning for many other carriers and their customers – particularly carriers that are unable to negotiate roaming agreements on reasonable terms and conditions with Verizon and AT&T.^{42/} AT&T’s argument ignores the fundamental point that a data roaming rule would make roaming less expensive and more accessible – ultimately benefitting consumers. The Commission already twice rejected AT&T’s assertion that competition in the retail market obviated the need for an automatic roaming rule,^{43/} finding instead that facilitating reasonable

^{40/} See, e.g., Comments of AT&T, Inc. at 37.

^{41/} Comments of AT&T Inc. at 29 (“The Commission has repeatedly rejected – and could not accept here – any claim that the wireless marketplace is characterized by the types of fundamental market failures that would be required to justify compulsory common carriage.”); Comments of Verizon Wireless at 10 (“It is well established that where there is no demonstrable market failure and/or consumer harm, there is no justification for regulation.”).

^{42/} See, e.g., Comments of Cellular South, Inc. at 18 (noting that in the absence of a roaming mandate, large carriers will continue to decline to enter into roaming agreements with smaller carriers, or “offer arrangements at unreasonable rates and with unreasonable terms and conditions.”); Comments of Rural Cellular Association at 14 (noting that other providers have had difficulty securing roaming agreements at reasonable rates and conditions).

^{43/} *Second Further Notice* ¶ 34.

roaming requests promotes the public interest by ensuring that customer expectations can be met.^{44/}

Second, Verizon argues that because of the emergence of LTE, it is unnecessary to impose a roaming obligation,^{45/} but the fact that there will be more carriers using a similar technological platform in the future does not negate the need for a data roaming rule. Today, carriers with the same technological platform as Verizon are often unable to negotiate roaming on reasonable terms and conditions with Verizon. While there may be other carriers using LTE in the future, Verizon will continue to be a dominant provider and the ability to enter into reasonable data roaming agreements with it will continue to be important to smaller providers who will require coverage in areas where only Verizon has constructed facilities. Moreover, even though many carriers plan to deploy LTE, the full deployment of that technology is years away and dependent on deployment of additional spectrum. The need to ensure providers' ability to enter into data roaming agreements exists today.

Third, AT&T's allegations about harms to its own operations from a data roaming mandate are exaggerated. For instance, AT&T argues that a data roaming requirement would diminish a carrier's ability to manage, and would overload, its network.^{46/} As noted below, however, wireless carriers have the flexibility to manage their networks today and the Commission has not proposed any regulations that would infringe on that flexibility.^{47/}

Fourth, as it did in the voice roaming proceeding, AT&T once again argues that the imposition of a data roaming obligation would reduce providers' incentives to construct their

^{44/} *Id.*

^{45/} Comments of Verizon Wireless at 16.

^{46/} Comments of AT&T Inc. at 33 ("Common carrier roaming obligations would make it even more difficult to manage congestion issues from the added roaming traffic").

^{47/} *See infra* Section IV.

own facilities. The FCC most recently rejected this flawed logic in the *Order on Reconsideration* in addressing the home roaming exclusion. There, the Commission found that while the home roaming exclusion was intended to promote facilities-based competition, it had the opposite effect by hindering the development of competition and creating disincentives to construct.^{48/} The Commission also found that there are many reasons why a carrier would require roaming rights that are unrelated to its ability to construct its own facilities. For example, for AWS-1 licensees, spectrum may not be available due to unfinished relocation obligations.^{49/}

Providers are required to construct their facilities pursuant to Commission regulation; they must satisfy those obligations regardless of the ability of their customers to roam on others' systems. Further, contrary to AT&T's assertion,^{50/} the ability to offer data roaming to its consumers will not impede T-Mobile's roll-out of HSPA+ technology. Because of the additional costs of roaming, it is far preferable for a provider to be able to offer service over its own facilities than to have to purchase the use of another provider's network for its customers. Moreover, AT&T and Verizon's opposition to data roaming on these grounds contradicts their own acknowledgements that carriers are building data networks today.^{51/} Where carriers can build wireless data networks, they are. A data roaming requirement will not change those incentives.

AT&T also contends that imposing data roaming requirements will particularly deter the build-out of data networks in rural areas, where costs are already higher, thereby reducing rural

^{48/} *Second Further Notice* ¶ 21.

^{49/} *Second Further Notice* ¶ 22.

^{50/} Comments of AT&T, Inc. at 44.

^{51/} Comments of AT&T, Inc. at 49; Comments of Verizon Wireless at 4.

facilities-based competition.^{52/} This argument ignores the fact that some rural markets simply cannot support multiple facilities-based carriers, and in the absence of a data roaming rule, many rural customers would have no access to service. AT&T's claim is belied by the comments of rural carriers themselves, who need data roaming rights to ensure that their customers can have seamless coverage across the country.^{53/}

Finally, AT&T argues that consumers can rely on existing data networks such as WiFi to achieve seamless coverage.^{54/} Asserting that a consumer has multiple avenues for Internet access is no answer to the consumer who relies on her mobile wireless devices for Internet access but cannot access the Internet because of a lack of roaming capability for that device. WiFi is not a substitute for wide-area mobile broadband coverage provided by wireless carriers. Consumers should not be required to "make do" with whatever Internet access is available when there is a compatible carrier in the market simply because the compatible carrier does not want to negotiate an automatic data roaming agreement on reasonable terms and conditions.

IV. THE FCC SHOULD NOT NARROW THE SCOPE OF DATA ROAMING REQUIREMENTS FROM WHAT IT ADOPTED FOR VOICE ROAMING

AT&T and Verizon propose that if the Commission adopts data roaming requirements, those requirements should be narrower than the voice roaming requirements adopted in 2007 and clarified in the *Order on Reconsideration*. These proposals would undermine a data roaming requirement, and the Commission should reject them.

^{52/} Comments of AT&T, Inc. at 47.

^{53/} See, e.g., Comments of Rural Cellular Association at 7 ("Data roaming is the fundamental building block for bringing ubiquitous broadband to rural America"); Comments of SouthernLINC Wireless at 10 (Data roaming is necessary to "provide seamless connectivity for mobile data services for all US consumers, particularly those who live or work in rural and underserved areas").

^{54/} Comments of AT&T, Inc. at 53.

AT&T asserts that the Commission should not, as it does in the voice context, assume that data roaming requests are reasonable, saying that “mobile broadband roaming presents far more complex and unpredictable issues that was the case for voice...”^{55/} T-Mobile agrees with AT&T that mobile data services are not as developed as mobile voice services. However, it was not just the maturity of the voice market that led the FCC to conclude that roaming requests should be considered reasonable. Instead, it was the importance that consumers attached to voice roaming, the pro-competitive effects associated with requiring voice and the negative effects of carriers denying roaming requirements on reasonable terms and conditions that prompted the Commission to act.^{56/} Given the Commission’s recognition of the increasing importance of mobile data,^{57/} it need not wait until the mobile data service is more mature to bring those benefits and avoid those harms to data roaming. AT&T should not be permitted to abuse its market position under the guise of a maturing marketplace or alleged technical complexities.

Similarly, the Commission should not dilute a provider’s data roaming obligation by, as AT&T suggests, giving host providers “specific authority and discretion to manage all traffic on their network, including roaming traffic, in the manner that the host provider, in its sole discretion, determines best serves its customers.”^{58/} T-Mobile certainly agrees that wireless providers must continue to have broad discretion to manage their networks. Wireless providers have always had the discretion to, for example, determine when additional cell sites should be

^{55/} Comments of AT&T, Inc. at 56.

^{56/} *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817, ¶ 13 (2007) (“*2007 Roaming Order*”) (noting the “broad scope of some of the competitive concerns” as a reason for Commission action on roaming); *Second Further Notice* ¶ 60 (noting that the goals that informed the Commission’s determinations regarding the scope of roaming obligations for voice, including fostering competition, consumer benefit and seamless connectivity, also guide its considerations for data roaming).

^{57/} *Wireless Competition Report* at 5 (stating that the wireless industry is “driven in particular by mobile wireless broadband and data usage”).

^{58/} Comments of AT&T, Inc. at 61.

added to manage customer traffic and to determine the appropriate signal strength level at which calls should be switched to another cell site. A carrier's failure to make those decisions in the public interest has competitive consequences – such as service quality reduction and a loss of customers.

AT&T apparently believes that wireless providers' current flexibility is insufficient and asks for added ability to discriminate against data roaming traffic. The Commission has not adopted specific regulations to enable providers to manage voice roaming traffic and it should not adopt specific regulations to permit carriers to manage data roaming traffic. Such regulations would only provide AT&T the ability to justify discriminatory practices.

AT&T also argues that the requirement to provide wireless data roaming should only extend to providers that use the same radio technologies and air interfaces and that have “substantial networks” of their own.^{59/} Such a limitation is unnecessary and contrary to the FCC's previous roaming decisions. The Commission has consistently limited roaming obligations to technically compatible networks. Therefore, the handset of a home carrier's customer must be able to operate on a host carrier's system and a host carrier must be able to deliver traffic, as necessary to the home carrier. AT&T would undermine that obligation for data roaming by requiring that both the home carrier and host carrier use the same infrastructure technologies. Such a limitation is unnecessary and contrary to the public interest. Consumers should get the roaming benefit of, for example, multi-band and multi-mode handsets even if their home carrier's infrastructure facilities do not share the same technologies as a host carrier's.

The “substantial” networks requirement is also unnecessary. Carriers will not construct infrastructure using last-generation or otherwise inferior equipment just so that they can get

^{59/} Comments of AT&T, Inc. at 63.

roaming rights on other networks. Doing so is contrary to a carrier's best interest and will ultimately lead to its customers finding alternative service in the carrier's home market. AT&T itself effectively acknowledges that its concern in this regard is wholly speculative, since it elsewhere recognizes that carriers are deploying 4G and other advanced technologies.^{60/} Similarly, carriers should not be required to have made "substantial" investments in the same technologies in order to request roaming from a host carrier. The Commission imposed no such requirements for host carriers to be able to request voice roaming and AT&T does not provide any justification for its application to data roaming. Moreover, the Commission has recognized that small and regional carriers require the ability to offer nationwide service – through roaming – in order to be competitive.^{61/} A requirement that a carrier demonstrate that it has a "substantial" network, particularly in comparison with AT&T, would lead to endless disputes over what is meant by substantial – delaying to the point of denying reasonable roaming requests.

Finally, AT&T would limit data roaming to "those situations where the requesting provider's spectrum usage rights are encumbered such that it cannot use them...and only for the geographic areas where and for the time period during which the spectrum is actually encumbered." While T-Mobile agrees that a data roaming requirement should not become *de facto* resale, this standard is needlessly restrictive and will prompt numerous disputes over whether spectrum is encumbered. Requiring requesting providers to provide the underlying service for which roaming is requested, using their own facilities and spectrum – combined with

^{60/} Comments of AT&T, Inc. at 42 ("Wireless providers of all types and sizes are investing billions of dollars in next-generation 3G and 4G networks.").

^{61/} *Order on Reconsideration and Second FNPRM* at ¶ 46 (recognizing that roaming is important in the interests of rural carriers to "plan their service roll out in their license areas").

the build out requirements imposed on licensees – are sufficient to prevent abuse of the data roaming rule in a home market.

V. THE IMPOSITION OF AN AUTOMATIC DATA ROAMING REQUIREMENT DOES NOT CONSTITUTE A “TAKING” UNDER THE U.S. CONSTITUTION

Verizon Wireless argues that the imposition of an automatic data roaming rule on licensees would “effect a regulatory taking under *Penn Central Transportation Co. v. City of New York*” because it would interfere with licensees’ investment-backed expectations in spectrum.^{62/} Under *Penn Central*, courts balance three factors to determine whether government action that does not authorize a physical occupation of property, but merely regulates its use, constitutes a regulatory taking: (1) the extent to which the regulation interferes with the owner’s reasonable investment-backed expectations, (2) the economic impact on the property owner, and (3) the character of the government action.^{63/} Automatic data roaming does not rise to the level of a regulatory taking.

The Commission and courts have, on several occasions, rejected arguments that Commission rules constitute regulatory takings under the U.S. Constitution.^{64/} For instance, the Commission has found in cases where “there is no evidence in the record that the expansion of our rules will interfere with reasonable investment-backed expectations,” and where no evidence in the record suggests that the economic impact of interest holders will be significant, a rule that

^{62/} Comments of Verizon Wireless at 46 (citing *Penn. Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978)).

^{63/} *Penn Central*, 438 U.S. at 124.

^{64/} See, e.g., *Sinclair Broadcasting Group, Inc. v. Federal Communications Commission*, 284 F. 3d 138 (D.C. Cir. 2002) (rejecting the argument that the Commission’s local ownership rule which did not grandfather existing local marketing agreements constitutes a regulatory taking).

“promotes the substantial governmental interest in choice and competition” does not constitute a regulatory taking.^{65/}

Here too, the Commission should reject the suggestion that a data roaming mandate would constitute a regulatory taking. There is no evidence in the record to suggest that the expansion of the Commission’s roaming rules to include non-interconnected data services would interfere with the reasonable investment-backed expectations of spectrum licensees, especially where licensees already comply with the Commission’s roaming rules for voice and related services. Nor is there any evidence in the record suggests that the economic impact of a data roaming rule on licensees would be significant, despite Verizon’s unsupported assertion that increased data traffic from an automatic data roaming rule would overwhelm its networks. As one commenter observed, industry data on overall roaming revenue suggests that “data roaming will not add a significant burden to any one carrier’s network.”^{66/} OPASTCO and NTCA note that the claim of the dominant carriers that mandatory data roaming will strain the capacity of wireless broadband networks “is nothing more than a thinly veiled attempt [] to protect their existing competitive advantage.”^{67/} To the contrary, roaming actually improves the economics of the host carrier by adding traffic to a largely fixed-cost business, especially in rural areas where

^{65/} *Implementation of Section 207 of the Telecommunications Act of 1996 Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services*, 13 FCC Rcd 23874, ¶¶ 24-26 (1998) (finding that a rule allowing renters to install over-the-air reception devices on rental property does not constitute a regulatory taking under *Penn Central* because the rule does not interfere with investment-based expectations in that property owners will still be able to collect rent from tenants, the economic impact on property owners is not significant and finally, the rule promotes the substantial governmental interests of choice and competition in the video programming marketplace).

^{66/} Comments of Cincinnati Bell Wireless LLC, at 12-13 (citing CTIA’s Wireless Industry Indices, Semi-Annual Data Survey Results, Year-End 2009 Results, Table 82, pages 193-94).

^{67/} Comments of OPASTCO at 7.

most roaming occurs. Carriers such as Verizon Wireless and AT&T earn substantial revenues from both voice and data roaming today, further undermining allegations of economic harm.

Finally, the Commission should find here, as it has found before, that the character of the government action does not constitute a regulatory taking where the rule would promote the substantial governmental interest in “increasing competition and encouraging the deployment of advanced communication technology.”^{68/} In this case, a data roaming mandate would increase competition in the marketplace and encourage the deployment of mobile broadband.

CONCLUSION

For foregoing reasons, the Commission should promptly extend its automatic roaming rules to non-interconnected data services.

Respectfully submitted,

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^{68/} *Continental Airlines Petition for Declaratory Ruling Regarding the Over-the-Air Reception Devices (OTARD) Rules*, 21 FCC Rcd 13201 at ¶ 53 (2006) (applying the Commission’s over-the-air reception device (ORAD) rules to allow Continental Airlines to maintain a wireless network in Logan Airport does not constitute a regulatory taking because “the OTARD rules in this situation will promote the important government interest of increasing competition and encouraging the deployment of advanced communication technology.”).