

# **EXHIBIT 1**

JOHN DOE

My Service	
Wireless Number:	123-456-7890
Rate Plan:	\$9.99 FAMTALK NATION 1400 ROLL UNL M2M UNL N&W
Rate Plan Charge:*	\$9.99
Term of Service:	24 months
Anytime/Daytime Minutes:	1400
Night/Weekend Minutes:	Unlimited
Mobile to Mobile Minutes:	Unlimited in US
Activation Fee:	\$26.00

\*Additional charges apply. See page 2 for details.

My Plan Details	
<b>ROLLOVER MINUTES</b>	Included
<ul style="list-style-type: none"> <li>Unused, accumulated Anytime Minutes that carry over from month to month.</li> <li>Start accumulating after your first full billing period; expire after 12 rolling bill periods.</li> <li>Oldest Rollover Minutes are used first. Not transferable or redeemable for cash or credit.</li> <li>If you change rate plans, any accumulated Rollover Minutes in excess of the new plan's number of monthly anytime minutes will expire upon such change.</li> </ul>	
<b>MOBILE TO MOBILE MINUTES</b>	Included
<ul style="list-style-type: none"> <li>Calls made to and from other AT&amp;T customers in your mobile to mobile calling area do not count against Anytime Minutes. Minutes do not rollover (exceptions may apply)</li> <li>Mobile to Mobile minutes only apply in the US</li> </ul>	
<b>NIGHTS AND WEEKEND MINUTES</b>	Included
<ul style="list-style-type: none"> <li>For use in your calling plan area only</li> <li>Mon. - Fri. 9pm to 6am</li> <li>Sat. and Sun. 24 hours a day through 6am Mon.</li> <li>Minutes do not count against Anytime Minutes</li> </ul>	
<b>OTHER FEATURES</b>	Included
<ul style="list-style-type: none"> <li>To review additional features on your plan please visit <a href="http://att.com/wireless">att.com/wireless</a> for details</li> </ul>	

### Using My Phone

**Phone Model:** Samsung SGH-a777

To learn more about using your phone, go to: [att.com/DeviceSupport](http://att.com/DeviceSupport).

### Using My Voicemail

**Set Up Mailbox/Check Messages**

PRESS and HOLD **1** to dial your voicemail and follow the prompts.

**Check Messages From Another Phone**

- Dial your 10-digit wireless phone number.
- When the greeting begins, PRESS **\***
- Enter your password and follow the prompts.

**Forgot Your Password?**

Dial 611 and follow the prompts to reset.

To learn more about voicemail features and security, go to: [att.com/WirelessVoicemail](http://att.com/WirelessVoicemail).

### \* Services

Check usage or balance via a FREE text message.

DIAL: **\* MIN # Send (\*646#)**

DIAL: **\* BAL # Send (\*225#)**

Check data usage via a FREE text message.

DIAL: **\* DATA # Send (\*3282#)**

Check phone upgrade discount availability.

DIAL: **\* NEW # Send (\*639#)**

FREE instant access to our automated bill pay system.

DIAL: **\* PAY Send (\*729)**

See [att.com/StarServices](http://att.com/StarServices) for limits regarding \*MIN#/\*DATA#.

TXT-2-PAY: A monthly text message reminder of your bill — and you can pay just by replying.

### Contact Us

**Web:** [att.com/wireless](http://att.com/wireless)

**Wireless Phone:** 611

**Landline:**

**Store Phone:**

**Store Manager:**

Generated on: 09/21/2010

Manage your account online! View your current balance, detail billing records, pay your bill and access this document by registering for online account management at: [att.com/Mywireless](http://att.com/Mywireless).

## Understanding My First Bill

Your first bill may be higher than expected! The bill may include:

- Activation fee.
- One month's service billed in advance.
- Prorated charges and fees for the month when you signed up.

The sample bill is not part of your contract.

Start Of Billing Cycle: 24th of the month

Wireless Summary For:		123-456-7890	
JOHN DOE			
Monthly Service Charges		First Month's Bill	Ongoing Monthly Bill
<b>Rate Plan</b>			
\$9.99 FAMTALK NATION 1400 ROLL UNL M2M UNL N&W	(Prorated)	1.00	
\$9.99 FAMTALK NATION 1400 ROLL UNL M2M UNL N&W		9.99	9.99
<b>Other Services</b>			
Total Monthly Service Charge		\$10.99	\$9.99
Usage, Additional Minutes, Roaming, Directory Assistance (411) and Long Distance Charges		BASED ON ACTUAL USAGE	
<b>Credits, Adjustments &amp; Other Charges*</b>			
Activation Fee		26.00	
Regulatory Cost Recovery Charge		1.20	1.20
Federal Universal Service Fund		1.44	.39
State Universal Service Fund		.52	.14
Other AT&T Surcharges		2.97	1.35
Total Credits, Adjustments & Other Charges		\$32.13	\$3.08
<b>Government Fees &amp; Taxes</b>			
State and Local Tax			
911 Fee			
Total Government Fees & Taxes**			
<b>Total Charges:</b>		<b>(ESTIMATED) \$43.12</b>	<b>\$13.07</b>

\*AT&T imposes a Regulatory Cost Recovery Charge of up to a \$1.25 to help defray costs incurred in complying with State and Federal telecom regulation; State and Federal Universal Service charges and surcharges for government assessments on AT&T. These are not taxes or government required charges. \*\* The estimates above are based on the highest tax/fee/surcharge rates assessed in your state; actual charges may vary. For actual state percentages, visit [att.com/AdditionalCharges](http://att.com/AdditionalCharges). To prevent unauthorized charges, notify AT&T immediately if your phone is lost or stolen. Your rate plan brochure/contract controls if inconsistent with this document. ©2010 AT&T Intellectual Property. All rights reserved. AT&T, AT&T logo and all other marks contained herein are trademarks of AT&T Intellectual Property and/or AT&T affiliated companies.

## Standard Charges

Additional Minutes:	40¢/min.
411:	\$1.99/call + Airtime
Text/IM:	20¢ (25¢/50¢ Intl.)/message*
Picture/Video:	30¢/message*
Data:	\$2/MB

\*Charged for messages sent and received.

### International Roaming

International voice and data rates apply for usage outside the U.S. When eligible, international roaming may be automatically activated on your line of service. To opt out or for rates/details, see: [att.com/global](http://att.com/global).

## Our Policies

### 30-Day Equipment Return Policy

- AT&T Stores: returns/exchanges must be like new, with all original packaging, accessories, manuals and proof of purchase. All devices are subject to a \$35 restocking fee except where prohibited. See [att.com/ReturnPolicy](http://att.com/ReturnPolicy) for details.
- Authorized Retailer and Other Locations: See the specific location's return policy.

### 30-Day Service Cancellation Policy

- Payment required for services used.
- Activation fee will be refunded if termination occurs within 3 days of activation.
- See our complete policy at: [att.com/ReturnPolicy](http://att.com/ReturnPolicy).

### Manufacturer's Warranty

Manufacturers offer a One-year warranty on NEW equipment and a 90-day warranty on refurbished equipment. For repairs or replacement of your wireless phone with original proof of purchase, call 1-800-801-1101 or visit [att.com/dsc](http://att.com/dsc) to find the Device Support Center nearest you.

## Wireless Service Agreement

Wireless Number: 123-456-7890

Account Number: 123456789000

### Your agreement with AT&T consists of:

1. The Wireless Customer Agreement #FMSTCT09100172E **and its arbitration clause**, and
2. The rates and other details about the rate plan in the Customer Service Summary or at [att.com/wireless](http://att.com/wireless).

### Early Termination Fee (ETF)

If I terminate this Agreement before expiration of my Service Commitment, I will pay AT&T an Early Termination Fee of \$150 minus \$4 for each full month of my Service Commitment that I complete for each wireless telephone number associated with the service.

### Guaranty

If I am signing on behalf of an entity, I represent that I am authorized to sign on its behalf, and I agree to be jointly responsible with the entity for payment of any sums that become due under, and to be bound by, this Agreement. I agree you can collect directly from me without first proceeding against the entity.

### Service/Coverage Limitations

Service is not available at all times in all places. There are gaps in coverage within the service areas shown on maps.

### iPhone and Certain Other Devices

Eligible voice and data plans are required for iPhone and certain other devices. The data plans do not cover international data charges. I agree that AT&T may add required plans to my account and bill me the appropriate monthly fee if I use an iPhone or other device that has plan requirements.

### Optional Roadside Assistance is Available from AT&T

Enroll for \$2.99/month and get the first 30 days free. After the free period the charge is \$2.99/month per line. You may cancel at any time by contacting AT&T.

### 30-Day Cancellation Policy

I may terminate this Agreement within 30 days after activating service without paying an Early Termination Fee. I will pay all fees and charges incurred through the termination date, but AT&T will refund any activation fee if I terminate within three days of activation. Also, I may have to return any handsets and accessories purchased with this Agreement and pay any applicable restocking fees. If I terminate after the 30th day but before the Agreement's Service Commitment has expired, I will pay AT&T an Early Termination Fee for each wireless telephone number associated with the service.

### Mobile Content

I understand that wireless devices can be used to purchase goods, content, and services (including subscription plans) like ring tones, graphics, games, and news alerts from AT&T or other companies. I understand that I am responsible for all authorized charges associated with such purchases from any device assigned to my account, that these charges will appear on my bill (including charges on behalf of other companies), and that such purchases can be restricted by using parental controls available from an AT&T salesperson, at [att.com/wireless](http://att.com/wireless), or by calling AT&T.

### Optional Wireless Phone Insurance Is Available

If not already enrolled, ask about optional Wireless Phone Insurance. If eligible, you have 30 days from the date of activation or upgrade to add it. Provided by Asurion Protection Services, underwritten by CNA. See brochure for complete terms and conditions. Key terms include:

- Premium: \$4.99/month
- Non-refundable Deductible: from \$50-\$125/per claim.
- Limits: Two claims per 12 months; maximum replacement value of \$1500/per claim.
- Replacements may be refurbished or different model.
- Cancel at any time for a prorated refund of the monthly charge.
- iPhone is not eligible for insurance through AT&T but is available through Asurion at [mymobileprotect.com](http://mymobileprotect.com).

**I have reviewed and agree to the rates, terms, and conditions for the wireless products and services described in the Wireless Customer Agreement (including limitation of liability and arbitration provisions) and the Customer Service Summary. If buying an iPhone, I agree that use of the iPhone acts as an acceptance of the Apple and third party terms and conditions included with the iPhone.**

## My Service Details

Agreement Start Date: 09/21/10

Deposit Amount: \$0

Dealer/Sales Code: ABC12

IMEI: 123456789000000

SIM: 12345678900000000000

## Signing My Agreement

You will sign this agreement electronically.

1. If you do not sign using a signature capture device, dial \*862 from your phone or 1-866-895-1092.
2. Listen and follow the prompts.
3. Upon completion, your phone will be activated.

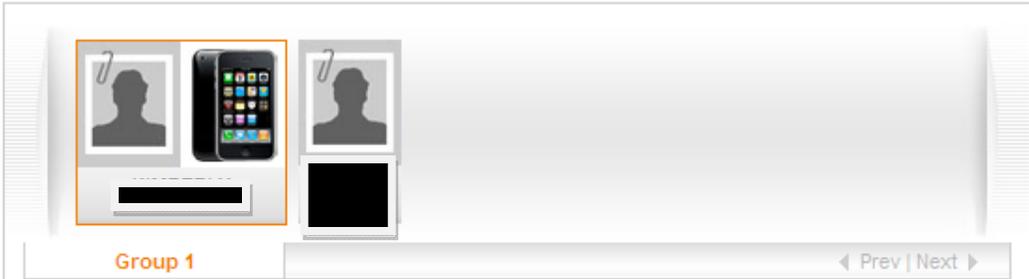
If electronic signature is not available, please sign below:

Signature \_\_\_\_\_

# **EXHIBIT 2**

# Voice & Data Usage Support

- Wireless
  - Phone/Device
    - Device Security
  - Bill & Payments
  - Usage
  - Rate Plan
  - Features
    - AT&T 3G MicroCell
  - Account
  - Shopping
  - International



**Answer Center**

Ask a Question:

Specific to Voice & Data Usage Support

- Browse Categories**
- Voice & Data Usage
  - Data plan options

- Popular Questions**
- ▶ How can I view the number of text messages sent/received in my current billing cycle?
  - ▶ How can I find out how many minutes are left on My Account?
  - ▶ How can I see numbers I have called this billing cycle?
  - ▶ How do I check my data usage?
  - ▶ Why is my data usage not showing up in My Account?
  - ▶ How current is the usage information on My Account?
  - ▶ What are rollover minutes and how many do I have left?
  - ▶ What is Overage?
  - ▶ How can I estimate my data usage?

**\*Services**

**Check Out \*Services**

With \*Services you can use your phone to check you minutes used, your balance, or to make a payment.

[▶ Learn more](#)

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[My Voice & Data Usage](#) ▶

[How To Videos](#) ▶

[Contact Us](#) ▶

**Data Usage Calculator**

Estimate the approximate usage of your wireless device with the AT&T Data Usage Calculator.



[▶ Learn more](#)

**Mobile To Mobile**

Our mobile to mobile look-up tool lets you see who you can call without using your monthly wireless minutes.

**Wireless Number**

[▶ Check more than one number](#)



EXPLORE

SHOP

SUPPORT

myWireless Account

Log in | Sign up now

[Phone/Device](#) | [Bill & Payments](#) | [Usage](#) | [Rate Plan](#) | [Features](#) | [Account](#) | [Shopping](#) | [International](#) | [Communities](#)

## Answer Center

How can I find out how many minutes I've used for the current billing cycle?



**Question:**

How can I find out how many minutes I've used for the current billing cycle?  
How can I view my minutes used in my current billing cycle?  
What are my available included minutes?

**Answer:**

**Note:** If you want to check your GoPhone account balance, see [How can I check my GoPhone balance or other Prepaid Account balance online?](#)

**To check your voice usage from your wireless device:**

1. Dial **\*MIN# (\*646#)** for English. Dial **\*USO# (\*876#)** for Spanish.
2. Press the **Send** key.
3. A text message detailing your voice usage will be sent to your device.

**To check your voice usage online:**

1. Log in to your [myWireless Account](#).
2. The Account Overview screen will display the number of minutes used under **My Usage Summary** (for Individual plans) or **Group Usage Summary** (for FamilyTalk plans).
3. Select **View Voice Details** to see an itemized account of your voice usage for the current billing period.

**Note:** Minutes used represents an estimate of usage. Usage reports may take up to five days to post. Additional delays of up to 60 days are possible for reports that include minutes used while roaming on another carrier's network. See the Important information section on the Usage & Recent Activity page for details.

Other topics of interest:

- [What are Rollover Minutes and how many do I have left on my account?](#)
- [How are Rollover Minutes expired or forfeited?](#)
- [What are \\*Services and how do I use \\*Services?](#)
- [How do I check my data usage?](#)

*Content reflects instructions for devices and services from AT&T. Some differences may exist for devices not purchased from AT&T.*

## Answer Center

What are \*Services and how do I use \*Services?



### Question:

What are \*Services and how do I use \*Services?

How can I check my balance using my phone?

How can I check my minutes using my phone?

How can I make a payment using my phone?

About \*Services

### Answer:

\*Services is a self-service feature that allows you easy access from your wireless device to check your minutes used, balance, last payment received, or to make a payment. Just follow the instructions below and your information will be delivered instantly via text message to your handset. \*Services is available 24 hours a day, 7 days a week. Unfortunately, this service is not available for prepaid accounts. \*Services is free but requires a valid Text Messaging feature to function.

Task	Steps
Check your balance and last payment received	<ol style="list-style-type: none"><li>1. Dial <b>*BAL# (*225#)</b> from your wireless phone. Spanish speaking customers dial <b>*SAL# (*725#)</b>.</li><li>2. Press the <b>Send</b> key.</li><li>3. Within seconds, your balance is delivered via text message to your phone screen. You'll also see your next bill's due date as well as your last payment posted.</li></ol>
Check your remaining minute balance	<ol style="list-style-type: none"><li>1. Dial <b>*MIN# (*646#)</b> from your wireless phone. Spanish speaking customers dial <b>*USO# (*876#)</b>.</li><li>2. Press the <b>Send</b> key.</li><li>3. Within seconds, the minutes remaining are delivered via text message to your phone screen. These minutes will be broken down by type.</li></ol>
Check your remaining data usage	<ol style="list-style-type: none"><li>1. Dial <b>*DATA# (*3282#)</b> on your phone.</li><li>2. Press the <b>Send</b> key.</li><li>3. Within seconds, a breakdown of your remaining data usage will be delivered via text message to your phone screen. The remaining data usage will be broken down by type.</li></ol>
Make a payment	<ol style="list-style-type: none"><li>1. Dial <b>*PAY (*729)</b> from your wireless phone. Spanish speaking customers, dial <b>*PAGAR (*72427)</b></li><li>2. Press the <b>Send</b> key.</li><li>3. You'll get immediate access to our automated voice system. Follow the prompts to pay your current bill with a checking account, debit card, or credit card.</li></ol>
Check equipment upgrade eligibility	<ol style="list-style-type: none"><li>1. Dial <b>*NEW# (*639#)</b> from your wireless phone.</li><li>2. Press the <b>Send</b> key.</li><li>3. You will then be provided with an upgrade eligibility message and the reason associated with the eligibility message.</li></ol>

**\*Services Disclaimers**

Customers must have a device capable of sending and receiving text messages. \*Services is not available to certain former customers of acquired companies.

**\*MIN#:** There may be delays processing network call records. "Minutes Remaining" may not reflect airtime used within the last two to five days and does not include recent roaming minutes due to delayed processing. Roaming airtime and roaming long distance minutes remaining are based on call records received from other carriers and processed by AT&T. A delay of two to ten days at minimum is usual. A delay of up to 60 days or longer is possible. Results for FamilyTalk customers may not involve all minutes for the entire FamilyTalk group. Rollover balance may overstate minutes available if you recently changed rate plans. Prepaid customers will not have access to \*Services.

**\*PAY:** If paying via bank account, you have authorized your bank to deduct from your bank account this one-time payment of your wireless services bill from AT&T. If paying via credit card or debit card, you have authorized your credit card or debit card to be charged this one-time payment of your wireless services bill from AT&T. You understand the following: This is only a one-time payment; should you dispute any portion of your bill, you must notify AT&T prior to processing your payment via \*PAY; if you choose to pay using your bank account or debit card and should your bank reject the onetime checking account or debit payment, AT&T may charge a return fee; if paying by credit card, and your payment is rejected, you will still be held responsible for the full amount of your wireless services bill from AT&T as well as any late charges that may accrue.

**Note:** For more information about managing content/location, controlling spending, increasing safety, and limiting time for your Wireless, Internet, TV, and U-verse services, refer to: [AT&T Smart Controls](#).

*Content reflects instructions for devices and services from AT&T. Some differences may exist for devices not purchased from AT&T.*

**Feedback**

Was this answer easy to find?    Yes     No 

Did this answer help you?    Yes     No 

**Submit**

[< Previous Page](#)

# **EXHIBIT 3**

- Choosing a Phone
- Laptop Data Cards
- Refurbished Cell Phones
- Choosing a Plan
- Choosing Features & Services**
- Shopping FAQs

## \*Services

Use your phone to check minutes remaining, your balance, your upgrade eligibility, or to make a payment. It's easy! Just follow the instructions below and your information will be delivered instantly to your handset's display. \*Services are available 24 hours a day, 7 days a week — it's free.



### Check your balance

1. Dial \*BAL# (\*225#) on your phone.
2. Press the Send key.
3. Within seconds, your balance is delivered via text message to your phone screen. You'll also see your next bill's due date as well as your last payment posted.



### Check your minutes

1. Dial \*MIN# (\*646#) on your phone.
2. Press the Send key.
3. Within seconds, the minutes remaining are delivered via text message to your phone screen. These minutes will be broken down by type.



### Check your remaining data usage

1. Dial \*DATA# (\*3282#) on your phone.
2. Press the Send key.
3. Within seconds, a breakdown of your remaining data usage will be delivered via text message to your phone screen. The remaining data usage will be broken down by type.



#### Check your upgrade eligibility

1. Dial \*NEW# (\*639#) on your phone.
2. Press the Send key.
3. Within seconds, your upgrade eligibility is delivered by text message to your phone screen.



#### Make a payment

1. Dial \*PAY (\*729) on your phone.
2. Press the Send key.
3. You'll get immediate access to our automated voice system. Follow the prompts to pay your current bill with a checking account, debit card, or credit card.

#### \*Services Disclaimers

Customers must have a device capable of sending and receiving text messages. \*Services is not available to certain former customers of acquired companies.

\*MIN#/\*DATA#: There may be delays processing network call records. "Minutes Remaining" or "Data Remaining" may not reflect airtime/data used within the last two to five days and does not include recent roaming minutes due to delayed processing. Roaming airtime and roaming long distance minutes remaining are based on call records received from other carriers and processed by AT&T. A delay of two to ten days at minimum is usual. A delay of up to 60 days or longer is possible. Results for FamilyTalk customers may not involve all minutes for the entire FamilyTalk group. Rollover® balance may overstate minutes available if you recently changed rate plans. Prepaid customers will not have access to \*Services.

\*PAY: If paying via bank account, you have authorized your bank to deduct from your bank account this one-time payment of your AT&T bill. If paying via credit card or debit card, you have authorized your credit card or debit card to be charged this one-time payment of your AT&T bill. You understand the following: This is only a one-time payment; should you dispute any portion of your statement, you must notify AT&T prior to processing your payment via \*PAY; if you choose to pay using your bank account or debit card and should your bank reject the onetime checking account or debit payment, AT&T may charge a return fee; if paying by credit card, and your payment is rejected, you will still be held responsible for the full amount of your AT&T bill as well as any late charges that may accrue.

# **EXHIBIT 4**

Phone

# AT&T Services

**Check Bill Balance** \*225#

**Directory Assistance** 411

**Pay My Bill** \*729

**View My Minutes** \*646#

**Voice Connect** \*08

**AT&T MyAccount**

# **EXHIBIT 5**

## Account Overview

### BILL & PAYMENTS

Last Payment Received \$59.14

**Current Account Balance** \$59.33

AutoPay to be Applied 01/23/2011

[View Bill Summary](#)

[View Full Bill](#)

[Make a Payment](#)

[Bill & Payments Support](#)

### MY SERVICES

Welcome back, [Redacted] | Valued customer since 06/22/2001



#### Samsung i897

Nation 450 Rollover & 5000 Night/Weekend & Unlimited Mobile-To-Mobile Minutes

#### Quick Links

- [Check Upgrade Options](#)
- [Change Rate Plan](#)
- [Add a Line](#)
- [Wireless Support](#)
- [Manage Features](#)

[Check Order Status](#)

- [View My A-List History](#)
- [Manage AT&T Smart Limits for Wireless™](#)

### My Messages Inbox (13)



#### 01/04/11, 12:00 PM, AT&T

Did you know you can create a private Wi-Fi hotspot at home?

#### 12/16/10, 04:00 PM, AT&T

myAT&T - Now More Online. Watch the videos and see what you can do.

#### 12/15/10, 06:00 PM, AT&T

Check out the \$20,000 Grand Prize Winning Video from the AT&T Simplify Your Life Contest!

#### 11/05/10, 05:00 PM, AT&T

Stay connected with an att.net email account. Signing up is easy as 1, 2, 3... and there's no charge!

#### 11/01/10, 12:00 PM, AT&T

Moving Soon? Don't forget your AT&T services

### MY USAGE SUMMARY

[View Voice Details](#)

[Analyze Past Usage](#)

As of January 07, 2011, you have 27 days left in your billing cycle.

<b>Anytime Minutes</b>	<a href="#">?</a>		0 of 450 used
<b>Night &amp; Weekend</b>	<a href="#">?</a>		0 of 5000 used
<b>Rollover Minutes</b>	<a href="#">?</a>		0 of 1788 used
<b>DataPro 2 GB</b>	<a href="#">?</a>		0 of 2048 used

#### Unlimited Usage

Mobile to Mobile [?](#) **0 Min**      Messaging [?](#) **0 Msgs**

**Next Bill Cycle: February 03, 2011**

[Wireless Usage Support](#)

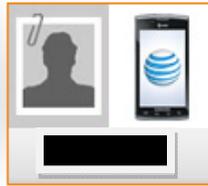
# Voice & Data Usage

## Wireless

[Wireless Summary](#)

[Minutes Used](#)

[Data Used](#)



### Is It Time?

Add another line to your account and get a FREE phone.

[▶ Learn more](#)



## My Wireless Usage

[What's this?](#)

**Nation 450 Rollover & 5000 Night/Weekend & Unlimited Mobile-To-Mobile Minutes**

[▶ Analyze Past Usage](#)

As of **January 07, 2011** you have 27 days left in your billing cycle.

<b>Anytime minutes</b>		<b>0</b> of 450 used
<b>Night &amp; Weekend Minutes</b>		<b>0</b> of 5000 used
<b>Rollover Minutes</b>		<b>0</b> of 1788 used
<b>DataPro 2 GB</b>		<b>0</b> of 2048 used

## Unlimited Usage

Mobile to Mobile **0 Min**      Messaging **0 Msgs**

**Next billing cycle starts February 03, 2011**

[▶ Usage Support](#)

[Important Information](#)

## MINUTE USAGE

USER LINE	Anytime minutes	Night & Weekend Minutes	Mobile to Mobile Minutes
	<b>0</b> of 450	<b>0</b> of 5,000	<b>0</b> of Unlimited

[View Details](#)

## DATA USAGE

USER LINE	Data GPRS MB WAP/BBRY/ISP 2GB DOM \$10.00/1GB ADDL - SMT2GB <sup>?</sup>	Messaging IMB UNLTD DOM - MSG3 <sup>?</sup>
	0 MB of 2048 MB	0 of Unlimited
<a href="#">View Details</a>		

**Important:** There are delays in reporting and processing call or data records. It may take up to two to five days for usage on the AT&T wireless network to show up in any Voice & Data Usage category. Additional delays may occur due to technical difficulties. Further delays may apply to roaming usage, which is based on call records received from other carriers. A delay of a minimum of two to ten days for roaming usage is usual and up to 60 days or longer is possible. During the time your invoice is being processed, you may not be able to view your usage or you may experience additional delays in reporting of usage. Minutes used in excess of those available will either be deducted from available Rollover or from another category of usage for which that call is eligible. Minutes "Used" may reflect airtime for unanswered voice mails, administrative calls, and other calls for which you are not billed. Data usage information (including text messages, picture messages & Internet usage) may also be delayed based on the same reasons mentioned above. This usage information is only an estimate and, regardless of what is shown, your next invoice will be determined by the information contained in our billing system, not this usage information. Hawaii Text/Data Users: The time stamp for your unbilled data usage may be off by up to 4 hours.

### NEED MORE MINUTES?

Change your rate plan today to avoid costly overages.

[▶ Change Your Rate Plan](#)

### ADD WIRELESS FEATURES

Messaging bundles, data packages, Smart Limits and more.

[▶ Add features](#)

# Change Rate Plan

**Wireless**

- [Add a Line](#)
- [Phone](#)
- [Upgrade](#)
- [Rate Plan](#)
- [Change Rate Plan](#)
- [Features](#)
- [A-List](#)
- [Location Based Services](#)

Account Owner: [Redacted] [View Account Profile](#)  
 Account Number: [Redacted]

Change is inevitable. If you've out-texted, out-talked or simply outgrown your old plan, have a look at the other rate plans we offer.

Note: All the wireless numbers in the current FamilyTalk group will need to be changed to the new FamilyTalk plan.

Step 1 | Step 2 | Step 3

Current Rate Plan: [Redacted]

PLAN NAME	MONTHLY COST	SHARED MINUTES		
		ANYTIME MINUTES	NIGHT/WKND MINUTES	MOBILE TO MOBILE
FamilyTalk Nation 700 Rollover & Unlimited Night/Weekend & Unlimited Mobile-To-Mobile Minutes	\$60.00	700	Unlimited	Unlimited

**Rate Plans Available**

PLAN NAME	MONTHLY COST	SHARED MINUTES			SELECT
		ANYTIME MINUTES	NIGHT/WKND MINUTES	MOBILE TO MOBILE	
<b>Family Nation Plans</b>					
<b>Nation 550 FamilyTalk w/Rollover® Minutes</b> <a href="#">Select Plan</a>					
First Line	\$50.00	550	Unlimited	Unlimited	
each add'l line	\$9.99				
<b>Nation 1400 FamilyTalk w/Rollover® Minutes +</b> <a href="#">Select Plan</a>					
First Line	\$80.00	1400	Unlimited	Unlimited	
each add'l line	\$9.99				
<b>Nation with Canada FamilyTalk 700</b> <a href="#">Select Plan</a>					
First Line	\$80.00	700	1000	Unlimited	
each add'l line	\$9.99				
<b>Nation with Canada FamilyTalk 1400 +</b> <a href="#">Select Plan</a>					
First Line	\$100.00	1400	1000	Unlimited	

**Rate Plan Support**

- [▶ Customer Communities](#)
- [▶ Mobile to Mobile Calling](#)
- [▶ FamilyTalk Support](#)
- [▶ Rate Plan Support](#)

[Features Support](#) ▶

[Manage Your Account](#) ▶

**Wireless Coverage Viewer**

Enter your ZIP Code to see the wireless coverage in your area.

**ZIP Code**  
 [View Map](#)

[▶ View National Map](#)

**Mobile To Mobile**

Our mobile to mobile look-up tool lets you see who you can call without using your monthly wireless minutes.

**Wireless Number**  
   [Look Up](#)

[▶ Check more than one number](#)

## Billing Reports

### Wireless

[Make A Payment](#)

[Bill Summary](#)

[Payment Options](#)

[AutoPay](#)

[TXT-2-PAY](#)

[Bill History](#)

[Payment History](#)

[Paperless Billing](#)

[Billing Reports](#)

Account Owner: [REDACTED]

[View Account Profile](#)

Account Number: [REDACTED]

To analyze your usage and billing, use the drop down menus below to create a report.

[Create A Report](#)

[What's this?](#)

User

Report

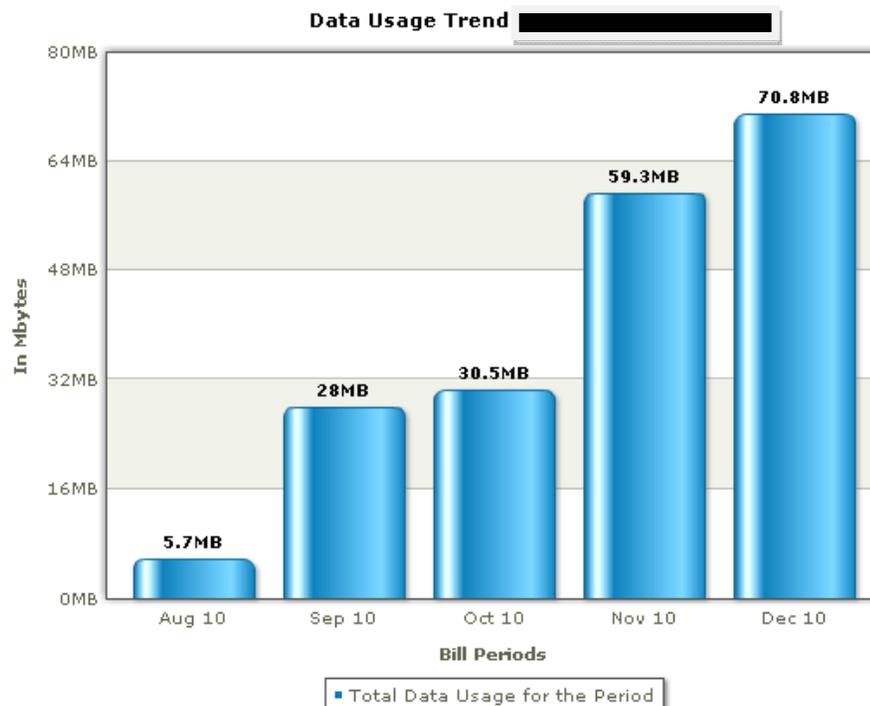
- Data Usage Trend
- Minutes by Call Type
- Breakdown of Charges
- Breakdown of Rollover
- Cost by Call Type
- Charges by Wireless Number
- Total Dollar Amount Over Time
- Total Usage Charges
- Voice Usage Charges
- Data Usage Charges
- Data Usage Trend

Bill period start date

Bill period end date

[Submit](#)

[Report View](#)



Right click on the graph and select **Print Graph** to print a copy for your records.

[Bill & Payment Support](#)

[Manage Your Account](#)

[Avoiding Overages](#)

[What is Rollover?](#)

[Add Smart Limits](#)

[Add Unlimited Text](#)

[Add Early Nights & Weekends](#)

### Answer Center

Find answers to your questions.

[Go](#)

[Browse Answer Center](#)

### Data Usage Calculator

Estimate the approximate usage of your wireless device with the AT&T Data Usage Calculator.



[Learn more](#)

### Online Deals!

Shop the best deals in your area for Phone, TV, Internet, and Wireless.



[Learn more](#)

# **EXHIBIT 6**



# **EXHIBIT 7**



## Data Calculator

Use the sliders below to estimate your daily or monthly usage.  
**Wi-Fi usage does not count against the data included in your plan!**

Select Your Device  
Smartphone

**Emails sent/received (no attachments)**  
0 emails a day

**Web pages Viewed**  
0 pages a day

**Emails with photo attachments**  
0 emails a day

**Apps/Games/Songs downloaded**  
0 apps a day

**Emails sent/received with attachments**  
0 emails a day

**Social media posts with photos uploaded**  
0 posts a day

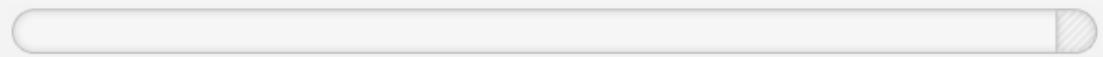
**Hours of Streaming music**  
0 Hours a day

**Minutes of streaming video**  
0 minutes a day

### Your Estimated Monthly Usage

RESET CALCULATOR

0.00 GB



DataPlus  
200 MB

DataPro  
2 GB

Tip! Select the 200 MB or 2 GB button to get an idea of what kind of usage you can get out of a smartphone data plan.

Wi-Fi usage does not count against the data included in your plan; smartphone, laptop and netbook data plans include free access to AT&T's Wi-Fi Hotspots. Other restrictions apply. Learn more at [www.att.com/wifiaccess](http://www.att.com/wifiaccess).

## Data Legend smartphone

The examples below provide a general guideline for the amount of data used per service:



1 email (text only)  
**20 KB**



1 web page  
**180 KB**



1 App/Game/Song  
**4 MB**



1 email with photo attachment  
**350 KB**



1 minute of streaming music  
**500 KB**



Social media download/upload  
w/photo  
**500 KB**



1 email with Word, Excel or  
Powerpoint attachment  
**300 KB**



1 minute of streaming video  
(YouTube™ standard quality)  
**2 MB**

Note: Data usage varies per phone/device. The above examples are based on averages using a smartphone and are estimates only. The actual amount of data used for the described activity can vary significantly.

1 MB = 1,024 KB; 1 GB = 1,024 MB

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## International Roaming Data Calculator

Use the sliders below to estimate your daily or monthly usage.

Select Your Device  
Smartphone

**Emails sent/received (no attachments)**  
Slider: 0 to 100  
0 emails a day

**Emails with photo attachments**  
Slider: 0 to 100  
0 emails a day

**Emails sent/received with attachments**  
Slider: 0 to 100  
0 emails a day

**Hours of Streaming music**  
Slider: 0 to 100  
0 Hours a day

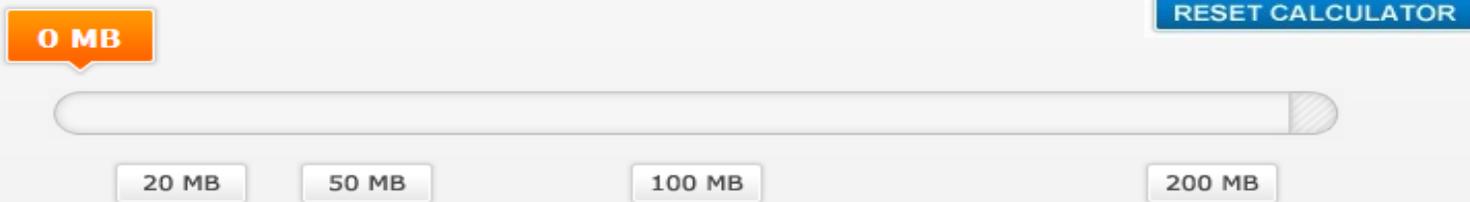
**Web pages Viewed**  
Slider: 0 to 100  
0 pages a day

**Apps/Games/Songs downloaded**  
Slider: 0 to 100  
0 apps a day

**Social media posts with photos uploaded**  
Slider: 0 to 100  
0 posts a day

**Minutes of streaming video**  
Slider: 0 to 100  
0 minutes a day

### Your Estimated Monthly International Usage



The estimated usage shown above is for **one month** of international roaming usage. **Estimate accordingly if your trip abroad will be for shorter or longer duration.** The Data Global Add-ons (20MB, 50MB, 100MB and 200MB) apply in more than 90 countries - check [att.com/dataconnectglobal](http://att.com/dataconnectglobal) for the list of applicable countries. Outside those countries, the pay-per-use rate of \$.0195/KB (\$19.97/MB) applies. For countries, rates & terms, and additional details, see [att.com/global](http://att.com/global).

To gain the full benefit of the Megabyte data allowance included, the Data Global Add-ons should be effective for an entire billing cycle. Both the monthly charge and the megabyte allowance included in the Data Global Add-ons prorate based on the days active in your billing cycle.

## Data Legend smartphone

The examples below provide a general guideline for the amount of data used per service:

 1 email (text only)  
**20 KB**

 1 email with photo attachment  
**350 KB**

 1 email with Word, Excel or  
Powerpoint attachment  
**300 KB**

 1 web page  
**180 KB**

 1 minute of streaming music  
**500 KB**

 1 minute of streaming video  
(YouTube™ standard quality)  
**2 MB**

 1 App/Game/Song  
**4 MB**

 Social media download/upload  
w/photo  
**500 KB**

Note: Data usage varies per phone/device. The above examples are based on averages using a smartphone and are estimates only. The actual amount of data used for the described activity can vary significantly.

1 MB = 1,024 KB; 1 GB = 1,024 MB

# **EXHIBIT 8**

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

In the Matter of )  
 )  
Petition of Public Knowledge et. al for ) WT Docket No. 08-7  
Declaratory Ruling Stating Text Messaging and )  
Short Codes are Title II Services or are Title I )  
Services Subject to Section 202 )  
Nondiscrimination Rules )

**COMMENTS OF AT&T, INC. ON PETITION OF PUBLIC KNOWLEDGE ET AL.**

Robert Sutherland  
Jack S. Zinman  
Michael P. Goggin  
Gary L. Phillips  
Paul K. Mancini

AT&T INC.  
1120 20<sup>th</sup> Street, N.W.  
Washington, D.C. 20036  
202-457-2055

March 14, 2008

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

In the Matter of	)	
	)	
Petition of Public Knowledge et. al for	)	WT Docket No. 08-7
Declaratory Ruling Stating Text Messaging and	)	
Short Codes are Title II Services or are Title I	)	
Services Subject to Section 202	)	
Nondiscrimination Rules	)	

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

AT&T Inc. (“AT&T”) hereby submits these comments in opposition to the Petition for Declaratory Ruling of Public Knowledge, *et al.* filed on December 11, 2007 in WT Docket No. 08-7 (“Petition”).

**INTRODUCTION AND SUMMARY**

The Petition seeks a Commission “declaration” that wireless text messaging services should henceforth be subjected to the most intrusive forms of Title II regulation even though they unquestionably offer computer-based storage and retrieval and net protocol conversion capabilities, have always been provided as information services, and are offered by multiple providers in an intensely competitive marketplace characterized by soaring demand, falling prices, and rapidly evolving service offerings. This request is patently unlawful, entirely unsupported, directly contrary to the Communication Act’s core intent to allow information services to develop free from the impediments of common carrier regulation and, if adopted, would affirmatively harm wireless consumers. The Petition should be denied.

The Petition’s central contention that wireless text messaging services (also known as “short message service” or “SMS”) are already subject to Title II regulation is plainly wrong and, indeed, foreclosed by the Commission’s own prior decisions. The only Title III wireless service that is subject to Title II regulation as a “telecommunications service” is “commercial mobile service” as that term is defined in the Act and the Commission’s “commercial mobile radio service” regulations, and AT&T’s text messaging services are not commercial mobile services for two independent reasons.

First, as the Commission recognized in the *Wireless Broadband Order*, an information service “cannot also be a ‘commercial mobile radio service’ under section 332 of the Communications Act.”<sup>1</sup> No other conclusion was possible, because section 3 of the Act mandates that a carrier can “be treated as a common carrier *only* to the extent that is engaged in providing telecommunications service,”<sup>2</sup> and reading the commercial mobile radio service definition to include information services would thus create “an internal contradiction in the statutory framework” and lead to “absurd” and “irrational” results.<sup>3</sup>

That holding is dispositive here. The Act defines information services as “the offering of a capability for generating, acquiring, storing, processing, retrieving, utilizing, or making available information via telecommunications.”<sup>4</sup> Wireless text messaging services are quintessential computer-based storage and retrieval services that have been recognized as information services for decades in an unbroken line of Commission and court decisions. Like e-mail services, wireless text messaging services offer customers a store and forward capability

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<sup>1</sup> Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd. 5901, ¶ 56 (2007) (“*Wireless Broadband Order*”).

<sup>2</sup> 47 U.S.C. § 153(44).

<sup>3</sup> *Wireless Broadband Order* ¶¶ 48, 56.

<sup>4</sup> 47 U.S.C. § 153(20).

that allows one person to send a message to another person “without any need for the other person to be available to receive it at that time”<sup>5</sup> – a wireless text message is often stored for hours or even days before the intended recipient retrieves it at his or her convenience. As detailed below, wireless text messaging services also offer other well-established information service hallmarks, including the capability to retrieve information from computer databases and end-to-end “net” protocol conversion capabilities that enable text message communication between wireless handsets and land-based computers that use the Internet Protocol.

The Petition’s primary focus on wireless text messaging service providers’ “short code” activation practices in support of third party text messaging advertising campaigns only reinforces this conclusion. Text messages are typically addressed to a recipient’s 10-digit telephone number or an email address. “Common short codes” (or “CSCs”) are simply 5 or 6 digit numbers that may be used as a shorthand address for text messages. Advertisers and other third parties can obtain CSCs from the Common Short Code Administration. When activated in a provider’s network CSCs enable a database translation that routes a text message sent to the short code to the CSC holder’s designated address, typically a server on an IP network. The Petition offers no explanation how the availability of short code routing could impact the information service classification of a wireless text messaging service or somehow allow a Title II “telecommunications service” classification of the provider’s short code practices themselves, and no such explanation is possible in any event.

It would be quite frivolous to claim that the mere provision of short code routing could transform an end user service that provides storage, retrieval and processing capabilities into a telecommunications service. Wireless text messaging providers offer a single, integrated service

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<sup>5</sup> Federal-State Joint Board on Universal Service, 13 FCC Rcd. 11501, ¶ 78 & n.161 (1998) (“*Stevens Report*”).

to their subscribers that inextricably combines the transmission of data with computer-based storage, retrieval and processing capabilities, and, as the Commission and the courts have repeatedly held, an integrated service that offers *any* such capabilities is an information service regardless what other features it may provide.<sup>6</sup> If, on the other hand, the Petition means to suggest that the Commission could assign a Title II service classification to wireless text providers' short code activation dealings with the third parties that obtain CSCs, it is equally off beam. Those third party contractual arrangements involve no transmission and hence no provision even of "telecommunications," much less the provision of "telecommunications services" on a common carrier basis, and thus are necessarily outside Title II altogether.

Second, AT&T's wireless text messaging service also does not fit within the definition of "commercial mobile service," because it is not an "interconnected service" within the meaning of that definition. As the Commission has explained, the definition "focuses on the service provided to end users"<sup>7</sup> and applies only to services that "give subscribers the capability to communicate to or receive communications from *all other users* on the public switched network."<sup>8</sup> Regardless whether messages are routed directly to a 10-digit number or indirectly through a short code translation, AT&T's wireless text messaging services do not give subscribers the capability to communicate to or receive communications from all other users on the public switched network. In particular, text messaging subscribers cannot use AT&T's service to receive communications from (or send texts to) the many tens of millions of wireline users of the PSTN.

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<sup>6</sup> See, e.g., *Wireless Broadband Order* ¶ 31.

<sup>7</sup> *Wireless Broadband Order* ¶ 43.

<sup>8</sup> 47 C.F.R. § 20.3 (interconnected service definition) (emphasis added).

Nor is there any conceivable basis for the Commission to adopt the Petition's radical fallback argument that even if text messaging services fall outside the limited subset of Title III services that Congress intended to be subject to common carrier regulation, those services should nonetheless be subjected to Title II burdens through an exercise of "ancillary" Title I jurisdiction. In any context, the exercise of Title I jurisdiction to impose regulation requires a record-based finding that the regulation would promote a statutory purpose, and, as the Commission has long held, where "there is sufficient competition to allow market forces to respond" to unreasonable practices, "no statutory purpose would be served."<sup>9</sup> Those that ask the Commission to impose common carrier regulation on information services face a particularly heavy burden, because such regulation would necessarily "work at cross purposes with Congress's intent to maintain a regime in which information service providers can develop without the impediments of common carrier regulation."<sup>10</sup>

The Petition does not even attempt to show the type of clear market failure in the provision of text messaging services or the activation of CSCs that would be required even to warrant serious consideration of the common carrier burdens it proposes, and for good reason. Competition in the provision of wireless services in the United States is, by any measure, more than sufficient to allow market forces to respond to any provider's attempt to impose unreasonable terms or engage in unreasonable practices – indeed, it is universally recognized as among the most intensely competitive communications marketplaces in the world.<sup>11</sup> Prices have,

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<sup>9</sup> Report and Order, *Detariffing of Billing and Collection Services*, 104 FCC 2d 1150, ¶ 37 (1986); see also Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384, ¶ 126 (1980) ("Second Computer Inquiry").

<sup>10</sup> *Wireless Broadband Order* ¶ 54.

<sup>11</sup> See, e.g., *Orloff v. Vodafone Airtouch*, Memorandum Opinion and Order, 17 FCC Rcd. 8987, ¶ 24 (2002) ("the Commission has regulated CMRS through competitive market forces, declining to impose specific cost-based regulations on CMRS providers").

for years, been rapidly declining even as output has been rapidly rising, and wireless innovation and investment are unparalleled. The vast majority of wireless customers has a choice of 3, 4, 5 or even more providers, and customers can and do vote with their feet. This is no less true of wireless text messaging services than of wireless voice services. All wireless carriers offer these data services, demand is growing exponentially, prices are falling and service offerings are constantly evolving and improving as providers compete to attract and retain customers. CSC campaigns directed at text messaging subscribers are also growing by leaps and bounds, and AT&T and other text messaging providers have worked tirelessly with advertisers, industry groups and others to develop market-oriented guidelines and practices that ensure that consumers receive the benefits – and are spared the burdens, including unwanted messages and charges, service degradation and pornographic content – that can be associated with these campaigns.

Against this irrefutable backdrop of intense competition and tangible proof that the marketplace is working quite well to promote and protect consumer interests, the Petition does not present *any* evidence of a systemic market failure that could remotely justify regulation. Indeed, with respect to the provision of text messaging services to consumers, the Petition does not purport to identify a *single* instance of claimed anticompetitive or otherwise improper conduct by any provider. Not one.

And the two isolated anecdotal examples of “unthinkable” refusals by providers other than AT&T to activate CSC codes that the Petition trumpets as “discriminatory” decisions that demonstrate the need for wholesale regulation of advertiser/provider dealings only confirm that continued reliance on market forces is appropriate. Even if substantiated as improper, two such incidents could hardly demonstrate the kind of systemic market failure that could warrant regulating an entire industry (even ignoring the serious First Amendment issues that would be

raised by any attempt to force wireless providers indiscriminately to promote others' advertising campaigns, without regard to any harm to the providers or their subscribers). In any event, as Verizon Wireless has already publicly explained, its initial decision not to activate a NARAL CSC was a mistake that was quickly corrected. And, the only other example, a refusal by wireless carriers to promote the activities of an entity that sought to use short codes to set up international toll calls that would bypass both domestic and international charges, raises unique issues that cannot possibly be deemed to suggest any general market failure that could warrant the very great and certain costs of imposing common carrier regulation.

The Commission has repeatedly recognized that Title II "regulation impose[s] significant costs on carriers and their customers."<sup>12</sup> Such regulation "impedes [carriers] from quickly introducing new services in response to customer demands and opportunities created by technological developments," "reduces" the ability of carriers "to respond quickly to [their] competitors' advanced services offerings and tailor [their] own offerings to meet customers' individualized needs," and "diminishes" carriers' "ability to reduce prices and improve service in response to competitive pressures."<sup>13</sup> Title II regulation also encourages wasteful rent-seeking from those that seek to hijack the regulatory process for private gain.<sup>14</sup>

As detailed below, the imposition of common carrier regulation on any aspect of wireless text messaging services – thereby supplanting the well-functioning and rapidly evolving industry practices that have developed in response to market forces with inflexible "nondiscrimination"

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<sup>12</sup> Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefore, 85 FCC 2d 1, ¶ 14 (1980) ("*Competitive Carrier Order*"), *rev'd on other grounds*, *MCI v. FCC*, 765 F.2d 1186, 1195-96 (D.C. Cir. 1985); *AT&T v. FCC*, 978 F.2d 727, 736 (D.C. Cir. 1992); *see also* Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, 11 FCC Rcd. 3271, ¶ 27 (1995) ("*AT&T Non-Dominance Order*").

<sup>13</sup> Review of Regulator Requirements for Incumbent LEC Broadband Telecoms. Servs., 17 FCC Rcd. 27000, ¶ 26 (2002) ("*ASI Forbearance Order*"); *see also AT&T Non-Dominance Order* ¶ 27.

<sup>14</sup> *AT&T Non-Dominance Order* ¶ 27.

and other regulatory requirements – would guarantee all of these public interest harms in spades. Moreover, if wireless text messaging providers, answerable to their subscribers and market forces, were to be told that they can no longer take the steps they deem necessary to protect their subscribers and their networks from the constantly changing “dark side” of certain CSC campaigns, that burden – and the blame for failing adequately to address it – would necessarily fall on the Commission.

The common carrier obligations Public Knowledge seeks to foist on the highly competitive wireless text messaging industry were “written to apply specifically to cases involving a monopoly service provider using its bottleneck facilities to provide services to a public that is without significant power to negotiate the rates, terms, and conditions of those services.”<sup>15</sup> No such concerns are remotely present here, and Public Knowledge thus has it exactly backwards – the only thing that is truly “unthinkable” is to grant the Petition and consign competitive information services to the intensely regulatory regimes of a past era on the basis of nothing more than empty speculation.

#### **I. SMS AND SHORT CODES ARE NOT “COMMERCIAL MOBILE SERVICES” SUBJECT TO TITLE II COMMON CARRIER REGULATION.**

Public Knowledge’s central contention is that the Commission should declare wireless text messaging service (and associated short code practices) to be a “commercial mobile service” within the meaning of Section 332 of the Act, because the statute provides that a provider of such services “shall . . . be treated as a common carrier for purposes of this chapter.” *See* Petition at 7-13; 47 U.S.C. § 332(c)(1)(A). The Commission has made clear however, that a service is *not* a “commercial mobile service” if it is either (1) an information service or (2) not an “interconnected service” within the meaning of Section 332 and the Commission’s regulations.

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<sup>15</sup> Notice of Proposed Rulemaking, *IP-Enabled Services*, 19 FCC Rcd. 4863, ¶ 74 (2004).

SMS falls comfortably within both exceptions. Moreover, although Public Knowledge does not explain how the Commission should analyze short codes themselves, there is no theory under which any such offerings could be deemed to be common carrier services.

1. SMS is an information service, and therefore it is not a common carrier “commercial mobile service” under Section 332. In the *Wireless Broadband Order*, the Commission held that Congress intended the statutory definitions of “commercial mobile service” and “information service” to be mutually exclusive.<sup>16</sup> As the Commission explained, it would be irrational, and would lead to absurd results, if Section 332 were read to reimpose common carrier regulation on wireless information services, when Congress clearly intended “to allow information services to develop free from common carrier regulations.”<sup>17</sup> Therefore, the real question – which Public Knowledge never even asks<sup>18</sup> – is whether SMS is an “information service” under the Act.

The answer is clearly yes. The Act defines “information service” as “the offering of a capability for generating, acquiring, storing, transforming, retrieving, utilizing, or making available information via telecommunications.”<sup>19</sup> SMS clearly falls within this definition, both because it offers the capability for “storing” and “retrieving” information, and because it provides “processing” and “transforming” of information through protocol conversions.

Indeed, SMS is a classic “store-and-forward” service that allows a user to store and retrieve information. SMS is a wireless carrier offering that permits the transmission of short

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<sup>16</sup> See *Wireless Broadband Order* ¶ 52.

<sup>17</sup> *Id.* ¶ 54.

<sup>18</sup> Public Knowledge never analyzes whether SMS meets the statutory definition, but instead focuses on the obvious and irrelevant point that SMS does not fit within the Commission’s definition of a broadband Internet access service. Indeed, Public Knowledge spends almost all of its discussion arguing (incorrectly) that SMS is “interconnected with the public switched network” within the meaning of Section 332(c), but it never acknowledges that the Commission has expressly held that “*even if* [a] service were an ‘interconnected service’ for purposes of Section 332,” it still cannot be a common carrier service if it meets the statutory definition of an information service.

<sup>19</sup> 47 U.S.C. § 153(20).

data messages, usually through a mobile handset.<sup>20</sup> When a SMS message is sent to or from a wireless user, the message is routed through a server (called an SMS Center) in AT&T's data network. If the recipient of the message does not have his equipment active and ready to receive the message, the message is stored in the SMS Center for delivery later – sometimes days later. Moreover, once the message is delivered, the user can store the message indefinitely in his handset, where the user can edit the message, forward it to someone else, or reply by text.

Accordingly, for these purposes SMS is indistinguishable from email, which the Commission has expressly held to be an information service. As the Commission explained in the *Stevens Report*, “electronic mail utilizes data storage as a key feature of the service offering.”<sup>21</sup> Like SMS, the “sender uses a software interface to generate an electronic mail message,” and the message is “convey[ed] to a ‘mail server’ computer . . . which stores the message until the recipient chooses to access it.”<sup>22</sup> The fact that the message is stored “in digital form offers the subscriber extensive capabilities for manipulation of the underlying data.”<sup>23</sup> While a user “may not exploit this feature of the service offering, . . . it is central to the service offering that electronic mail is store-and-forward, and hence asynchronous; one can send a message to another person, via electronic mail, without any need for the other person to be

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<sup>20</sup> SMS messages travel over the signaling (or control) channel of the wireless system rather than over a voice channel. SMS was initially envisioned to be used for network maintenance messaging (such as notification of a voice mail message), and therefore the use of the signaling channel was adopted by the GSM standards bodies. This difference means that SMS messaging is strictly limited in the amount of data that can be sent (typically approximately 160 characters of text), as opposed to a voice or data message that is delivered over a communications channel.

<sup>21</sup> *Stevens Report* ¶ 78.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

available to receive it at that time.”<sup>24</sup> SMS has exactly these same characteristics: these “store-and-forward” features of the service are “central” to the offering.<sup>25</sup>

SMS is an information service for the additional reason that it offers the capability for protocol conversions. From the very beginning of its *Computer Inquiry* framework, the Commission has held that “services that result in a protocol conversion are enhanced services, while services that result in no net protocol conversion to the end user are basic services.”<sup>26</sup> The Commission has subsequently made clear that services involving net protocol conversion are also “information services” under the Act, because such conversion involves the “transforming” of information.<sup>27</sup> SMS services offer protocol conversion capabilities, and indeed, many SMS messages undergo a net protocol conversion. For example, when an SMS message is sent to a computer, the message is converted from a SMS protocol message from a mobile device to an email SMTP message in IP format – a net protocol conversion. Similarly, when SMS messages are sent from AT&T customers to Verizon Wireless customers, for example, there are protocol

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<sup>24</sup> *Id.* ¶ 78 & n.161. Basic services contain no storage features at all, outside of delays caused by congestion. *Second Computer Inquiry* ¶ 95 (“In the provision of a basic transmission service, memory or storage within the network is used only to facilitate the transmission of the information from the origination to its destination, and the carrier's basic transmission network is not used as an information storage system. Thus, in a basic service, once information is given to the communication facility, its progress towards the destination is subject to only those delays caused by congestion within the network or transmission priorities given by the originator”). *See also* 47 C.F.R. § 64.702(a) (“Enhanced services are not regulated under title II of the Act”).

<sup>25</sup> *See, e.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd. 3019, ¶ 139 & n.77 (2002) (“Examples of services that the Commission has treated as enhanced include . . . store-and-forward services”).

<sup>26</sup> *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd. 7457, 7459, ¶ 4 (2004).

<sup>27</sup> *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, 11 FCC Rcd. 21905, ¶ 102 (1996) (“the differently-worded definitions of ‘information services’ and ‘enhanced services’ . . . should be interpreted to extend to the same functions”); *id.* ¶¶ 104-105 (protocol processing services that were considered “enhanced” services prior to 1996 treated as “information services” under the 1996 Act); *see also Stevens Report* ¶ 88.

conversions in that scenario as well, due to differences in the SMS protocols used in each network.<sup>28</sup>

2. Text messaging is not a CMRS service for the additional reason that it is not “interconnected” to the public switched network within the meaning of Section 332. Section 332 defines a “commercial mobile service” as “any mobile service . . . that is provided for profit and makes *interconnected service* available (A) to the public or (B) such classes of eligible users as to be effectively available to a substantial portion of the public.”<sup>29</sup> The Act defines an “interconnected service” as a “service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) . . . .”<sup>30</sup> Under the Commission’s rules, “interconnected service” is defined as “a service that is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network.”<sup>31</sup>

As the Commission recognized in the *Wireless Broadband Ruling*, therefore, the critical question is whether the service gives the end user the capability “to communicate to or receive communications from *all other users* on the public switched network.”<sup>32</sup> SMS clearly does not. SMS gives a subscriber the capability to interact, via SMS, only with other SMS-enabled devices. SMS does not permit communications with *everyone* on the public switched network

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<sup>28</sup> SMS also allows subscribers to “retrieve” data by accessing electronic databases, such as automatic alerts, sports scores, weather updates, and other similar information. It is well settled that such “customer interaction with stored information” triggers an information service classification. *Northwestern Bell Tel. Co. Petition for Declaratory Ruling*, 2 FCC Rcd. 5986, ¶ 20 (1987) (“*Talking Yellow Pages*”).

<sup>29</sup> 47 U.S.C. § 332(d)(1).

<sup>30</sup> 47 U.S.C. § 332(d)(2).

<sup>31</sup> 47 C.F.R. § 20.3.

<sup>32</sup> *Wireless Broadband Order* ¶ 45 (“by using the phrase ‘interconnected service,’ Congress intended that mobile services should be classified as commercial services if they make interconnected service broadly available through their use of the public switched network”).

(i.e., a customer could not use SMS to reach any landline phone or any wireless phone that is not SMS-enabled).

Public Knowledge's reliance on the Commission's recent *Roaming Order* is misplaced.<sup>33</sup> In that order, the Commission was not considering the question whether SMS fell within the statutory definition of "commercial mobile service." Rather, the Commission was considering the limited question of whether extending the automatic roaming requirement to SMS in some instances would be in the public interest. It noted that SMS is "typically" bundled with *other* features that are "interconnected with the public switched network," such as "real-time, two-way switched mobile voice or data." SMS itself, the Commission acknowledged, was provisioned differently from carrier to carrier, as an "interconnected feature[] or service[] in some instances, but non-interconnected in others, depending on the technology and network configuration chosen by the carriers."<sup>34</sup> But SMS is not interconnected in a way that would permit a user to communicate with "all other users" on the public switched network – and therefore, regardless of what the Commission may have said in the *Roaming Order*, SMS is not a "commercial mobile service" within the meaning of Section 332. Indeed, the Commission was quite explicit in the *Roaming Order* that "nothing in this order should be construed as addressing regulatory classifications of push-to-talk, SMS, or other data features/services."<sup>35</sup>

3. Finally, although Public Knowledge never analyzes the regulatory classification of short codes *per se*, there is no theory under which an offering of short code routing or activation could be considered a common carrier service.

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<sup>33</sup> See Petition at 8-9 (citing *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd. 15817, ¶ 55 (2007) ("*Roaming Order*").

<sup>34</sup> *Roaming Order* ¶¶ 54-55.

<sup>35</sup> *Id.* ¶ 54 & n.134.

Short codes are numeric codes that substitute for a text address. Public Knowledge’s Petition focuses especially on “common short codes,” which are five- or six-digit codes that have been set aside for use with any wireless carrier’s network. These common short codes are assigned by Common Short Code Administration (“CSCA”) for a fee. Advertisers and other third parties purchase access to these codes, which they typically use in advertising campaigns.

With respect to the service that a wireless provider is offering to its subscribers, short code routing is simply a feature that is inextricably bundled with the SMS offering. The code is loaded into the wireless carrier’s network through translation changes – to the customer, it is just an abbreviated text address feature that has no utility except as part of the SMS service. As explained above, however, SMS is unquestionably an information service because of its store-and-forward and protocol conversion capabilities. Therefore, it does not matter how the Commission might classify the short code aspect of that SMS service if it were analyzed in isolation from the other features of the service – the entire SMS service remains an information service either way. For example, the Commission has held that facilities-based cable broadband services are information services, because those services “offer” the information “capabilities” of “email, newsgroups, the ability to create a webpage . . . and the DNS (domain name service).”<sup>36</sup> The Commission acknowledged that end-users did not always use these information capabilities, but the Commission found nonetheless that the telecommunications components were “not separable from the data-processing capabilities of the service” and were “part and parcel of cable

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<sup>36</sup> Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, 17 FCC Rcd. 4798, ¶ 39 (2002) (“*Cable Modem Declaratory Ruling*”); Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd. 14853, ¶ 104 (2005) (“*Wireline Broadband Order*”); Memorandum Opinion and Order, *United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, 21 FCC Rcd. 13281, ¶ 14 (2006); *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 999 (2005).

modem service and integral to its other capabilities.”<sup>37</sup> So too here: because SMS with short code routing capabilities is a single service from the standpoint of the subscriber, the entire SMS service, including short codes, is an information service.

From the standpoint of the offering of activation of such codes to third party advertisers, short codes are not a communications “service” at all, much less a common carrier service. Short codes are simply computer translations within the network that facilitate the routing of content; they do not involve any *transmissions*. Therefore, a contractual arrangement with a third party to activate the third party’s short codes in a text messaging provider’s network cannot be a “telecommunications service,” because the Act defines “telecommunications service” as the offering of “telecommunications” to the public for a fee, and it defines “telecommunications” as the “transmission” of information. Similarly, an offering to a third party to activate its short codes is not a “mobile service” under Section 332(d)(1); since that offering involves no transmission, it does not involve any “radio communications service carried on between mobile stations.” *See* 47 U.S.C. § 153(27). For all of these reasons, the Commission has no Title II authority to regulate short codes at all, as they relate to third party purchasers.<sup>38</sup>

## **II. THE COMMISSION CANNOT EXERCISE ANCILLARY TITLE I JURISDICTION TO IMPOSE TITLE II REGULATION ON TEXT MESSAGING SERVICES.**

The Commission also should reject Petitioner’s extreme fall back proposal that the Commission should “apply the nondiscrimination provisions of Title II of the Communications Act under its Title I ancillary jurisdiction.” Petition at 16. The Commission has long recognized

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<sup>37</sup> *Cable Modem Declaratory Ruling* ¶ 39. *See also Wireline Broadband Order* ¶ 15 (“[b]ecause wireline broadband Internet access service inextricably combines the offering of powerful computer capabilities with telecommunications, we conclude that it falls within the class of services identified in the Act as ‘information services’”).

<sup>38</sup> *See, e.g., Audio Communications, Inc. Petition for a Declaratory Ruling that the 900 Service Guidelines of US Sprint Communications Co. Violate Sections 201(a) and 202(a) of the Communications Act*, 8 FCC Rcd. 8697, ¶¶ 18-22 (1993) (offering of billing and collection services to a 900 number holder not a common carriage service).

that the exercise of ancillary jurisdiction may not be used where markets are working, and the Commission should be especially reluctant to impose Title II restrictions on information services. The Commission’s data, analyses, and precedent confirm that wireless service markets generally, and SMS-related markets specifically, are working extremely well. There is intense competition for the provision of SMS-related services, with numerous competing providers, increasing supply, falling prices, and continuous innovation. Indeed, Petitioners have not provided a single example of a purported market failure for text messaging – no blocking of messages or customer complaints.

Nor do Petitioners dispute that provisioning of short codes is robust and thriving, that wireless providers continue to develop and enhance those services, and that the wireless industry has, without onerous mandatory regulations, developed and adopted guidelines (which have been widely praised by regulators) to protect customers from abuses of such services. Rather, Public Knowledge’s entire request for sweeping regulation of SMS-related services rests on *two* out of literally tens of thousands of short code transactions. On closer inspection, however, both incidents only confirm that competition is working.

In these circumstances – where markets are thriving and there is no evidence of failure – the Commission has repeatedly recognized that foisting Title II provisions on providers would only hamper investment and innovation, and ultimately would harm consumers.<sup>39</sup> Further, as explained below, such regulations would significantly undermine and reduce wireless providers’ incentives to continue developing and implementing policies and guidelines to protect their

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<sup>39</sup> See, e.g., *AT&T Non-Dominance Order* ¶ 27 (Title II regulation can “inhibit[] [a carrier] from quickly introducing new services and from quickly responding to new offerings by its rivals” and “imposes compliance costs on [regulated carriers] and administrative costs on the Commission”); *Wireline Broadband Order* ¶ 44 (rejecting proposals to impose Title II regulation on certain broadband services finding that such “regulation can have a significant impact on the ability of wireline platform providers to develop and deploy innovative broadband capabilities that respond to market demands” and that “[i]t is precisely this negative impact on broadband infrastructure that led the Commission to eliminate other . . . [such] regulation”).

customers from unwanted SMS charges and content. Finally, Public Knowledge’s proposal to restrict wireless providers’ ability to screen CSC campaigns raises serious issues under the First Amendment.

1. The Commission has repeatedly acknowledged that “the exercise of ancillary jurisdiction requires a record finding that such regulation would be directed at protecting or promoting a statutory purpose,” but that where “there is sufficient competition to allow market forces to respond to excessive rates or unreasonable . . . practices[,] . . . no statutory purpose would be served.”<sup>40</sup> Moreover, those seeking to have the Commission graft common carrier regulation on information services face a particularly heavy burden, because such regulation would necessarily “work at cross purposes with Congress’s intent to maintain a regime in which information service providers can develop without the impediments of common carrier regulation.”<sup>41</sup>

Petitioners do not (and cannot) seriously dispute that wireless services are intensely competitive: supply is increasing, quality is increasing, and prices are falling.<sup>42</sup> At the end of 2006, more “than 95 percent of the U.S. population live[d] in areas with at least three mobile telephone operators competing to offer service, and more than half of the population live[d] in areas with at least five competing operators.”<sup>43</sup> Wireless carriers in the U.S. now offer service with lower revenue per minute of use than any of the other top ten countries (in terms of Gross

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<sup>40</sup> Report and Order, *Detariffing of Billing and Collection Services*, 102 FCC 2d 1150, ¶ 37 (1986) (internal quotations omitted). See also *Second Computer Inquiry* ¶ 126 (“Even though an activity falls within our subject matter jurisdiction, our ability to subject it to regulation is not without constraints. The principal limitation upon, and guide for, the exercise of these additional powers which Congress has imparted to this agency is that Commission regulation must be directed at protecting or promoting a statutory purpose. In some instances, that means not regulating at all, especially if a problem does not exist”).

<sup>41</sup> *Wireless Broadband Order* ¶ 54.

<sup>42</sup> Twelfth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 07-71, ¶ 2 (Feb. 4, 2008) (“*Twelfth Wireless Competition Report*”).

<sup>43</sup> *Id.*

Domestic Product (“GDP”)), and U.S. consumers on average use more minutes than subscribers in any other nation.<sup>44</sup> Further, the U.S. wireless industry is now less concentrated than any of the other top ten GDP countries, with the top two providers accounting for only a little more than half of the wireless subscribers in the market.<sup>45</sup> Indeed, the Commission recognized long ago that “market forces [for wireless services] are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service set by carriers who lack market power.”<sup>46</sup>

Not surprisingly wireless providers are competing fiercely in the provision of SMS-related services. As with wireless services in general, SMS-related services are characterized by rapidly increasing supply and falling prices.<sup>47</sup> CTIA’s most recent statistics show that in just the month of June 2007 28.8 billion text messages were sent in the United States (which is 240.8 billion messages on an annualized basis).<sup>48</sup> That is more than a four-fold increase over June 2005.<sup>49</sup> The Commission’s recent report on competition in the wireless industry shows that the average price for text messaging has been “declin[ing].”<sup>50</sup>

Further, the deregulatory environment has led to rapid development and widespread use of short code translations. The wireless industry, free from the constraints of onerous regulations has responded to FCC, FTC, and customer encouragement for self-regulation. For example, the

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<sup>44</sup> See *Ex Parte* of CTIA – The Wireless Association, WT Docket No. 07-71, at 2 (Jan. 8, 2008) (citing Glen Campbell, *et al.*, “Global Wireless Matrix 2Q07,” Merrill Lynch, Oct. 4, 2007, at Table 1).

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

<sup>46</sup> Second Report and Order, *Implementation of Section 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, 9 FCC Red. 1411, ¶ 173 (1994).

<sup>47</sup> *Twelfth Wireless Competition Report* ¶ 2.

<sup>48</sup> See CTIA, *Wireless Quick Facts*, <http://www.ctia.org/advocacy/research/index.cfm/AID/10323> (last visited March 14, 2008).

<sup>49</sup> *Id.*

<sup>50</sup> *Twelfth Wireless Competition Report* ¶ 202 (citing Simon Flannery, *et al.*, *Wireless Data: Just Getting Started*, Morgan Stanley, Equity Research, Sep. 11, 2007, at 11).

wireless industry has adopted and implemented the consumer protection policies published by the Mobile Marketing Association and CTIA. These policies, among other things, provide for “opt-in” procedures for subscriber acceptance of text messaging charges for messages sent by short code users, and require “double opt-in” procedures if the message provider seeks to charge rates above standard text messaging rates. These policies also seek to protect customers and their children from unwanted content, by allowing wireless carriers to screen against provisioning common short codes to those seeking to distribute pornography, violent materials, or illegal products and services. In addition, these guidelines address customer concerns about receiving too many SMS messages (for which they often pay a per-message fee) and to protect against network congestion, with policies that limit the number of such messages that can be sent to by an advertiser to a customer. To protect against the distribution of copyrighted materials, and fraudulent or illegal messages to their SMS customers, these policies also prevent such messages from being distributed to wireless customers. AT&T also ensures that the terms of service of mobile content providers are fully disclosed, which includes requiring short code providers to fully disclose the price terms of the services they offer. These self-regulatory policies have been praised by federal regulators.<sup>51</sup>

2. With such robust and working competitive markets, there is no justification whatsoever to graft onerous new Title II nondiscrimination requirements on SMS-related services. Indeed, Petitioners provide *no* basis for regulating text messaging at all. Out of the billions of text messages sent to millions of customers each year, Petitioners have not documented a single instance of a blocked text message or alleged discriminatory practices

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<sup>51</sup> See, e.g., *Implementing the Children’s Online Protection Act*, FTC Report to Congress, at 26-27 (Feb. 2007) (“The Mobile Marketing Association . . . issued its most recent set of ‘Consumer Best Practices Guidelines for Cross Carrier Mobile Content Programs’ in November 2006 . . . This guidance document sends a clear message to the mobile industry that it must be mindful of COPPA’s requirements when developing new products and services, especially in light of children’s wholehearted embrace of these new technologies.”).

directed at any consumer. Accordingly, the bulk of Petitioners' Title I request – which seeks the full-scale regulation of all text messaging – is patently frivolous.

Even the request for regulation of advertiser/provider short code interactions is based on *two* flimsy incidents, out of the many thousands of discrete common short code transactions each year. Closer inspection of even those two transactions, however, confirms that competitive markets are working and that there is no need for any intervention, much less the imposition of Title II regulations. For example, Petitioners point to an instance in which Verizon initially rejected a political advocacy group's request for a common short code number. Verizon changed its mind, however, and granted the application just two days later – which simply confirms there is no market failure.

Petitioners also point to an instance in which Verizon and Alltel allegedly refused to provision a common short code to a competitor that wanted to use the code to set up international toll and VoIP services. This situation, however, obviously raises unique and special concerns. Congress has expressly authorized wireless carriers to deny competitors access to their network for the purpose of providing competing toll services even when such carriers are providing common carrier “commercial” mobile services,” and it would be odd in the extreme to require wireless carriers to provide competitors with access to short codes.<sup>52</sup> In short, it would be an extraordinary overreaction to these two incidents to impose the sort of sweeping new regulation of SMS services that Petitioners seek here.

3. In these circumstances, where markets are flourishing without regulation and where there are no established market failures, the Commission has repeatedly recognized that Title II

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<sup>52</sup> 47 U.S.C. § 332(c)(8). *See also FCC v. Midwest Video Corp.*, 440 U.S. 689, 700-09 (1979) (invalidating Commission attempt to impose regulation under Title I that was prohibited elsewhere in the Act).

“regulation [would] impose significant costs on carriers and their customers,”<sup>53</sup> by “imped[ing]” carriers’ ability to “quickly introduce[e] new services in response to customer demands and opportunities created by technological developments,” “reduc[ing]” carriers’ ability “to respond quickly to competitors’ advanced services offerings and tailor[ing] [their] own offerings to meet customers’ individualized needs,” and “diminish[ing]” their “ability to reduce prices and improve service in response to competitive pressures.”<sup>54</sup>

Moreover, the Title II “nondiscrimination” provisions Petitioners seek would essentially supplant the industry’s voluntary guidelines and chill any further incentives to develop procedures to protect customers from unwanted SMS messages and charges. Indeed, if SMS and short codes are suddenly to be treated like common carrier services, wireless providers will likely choose to cut back or eliminate their screening of the provisioning of common short codes to protect their customers from pornographic materials, mass SMS mailings (resulting in high SMS fees), fraud and other abuses out of fear that they will be accused of engaging in unreasonable discrimination. This is true even if wireless carriers believe that measures are clearly reasonable, because they will want to avoid frivolous lawsuits that Title II regulation encourages by those that seek to hijack the regulatory process for private gain.<sup>55</sup> Moreover, the Commission would effectively be stepping into the shoes of the industry’s policy-setting committees, replacing the industry’s widely praised guidelines with heavy-handed Title II regulation, and turning every business dispute over short codes into a discrimination case that

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<sup>53</sup> *Competitive Carrier Order* ¶ 14; *AT&T v. FCC*, 978 F.2d at 736; see also *AT&T Non-Dominance Order* ¶ 27.

<sup>54</sup> *ASI Forbearance Order*, 17 FCC Rcd. 27000, ¶ 26 (2002); see also *AT&T Non-Dominance Order* ¶ 27 (Title II regulation can “inhibit[] [a carrier] from quickly introducing new services and from quickly responding to new offerings by its rivals” and “imposes compliance costs on [regulated carriers] and administrative costs on the Commission”).

<sup>55</sup> *AT&T Non-Dominance Order* ¶ 27 (“In addition, to the extent AT&T were to initiate such strategies [to offer new services or lower prices], AT&T’s competitors could use the regulatory process to delay, and consequently, ultimately thwart AT & T’s strategies”).

must be litigated at the Commission. Petitioners have not even remotely made the case for such extensive new Commission regulation.

4. Finally, Petitioners' proposal raises serious First Amendment concerns. In provisioning short codes, wireless providers – like newspapers and cable operators – exercise editorial discretion by deciding which campaigns are appropriate and which should be screened because they may, for example, be unsuitable for minors who are using their wireless systems, fraudulent or otherwise abusive. Under the First Amendment,<sup>56</sup> the government may not dictate “the exercise of editorial control and judgment” – whether fair or unfair.” *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). That protection extends to the right of non-common carrier network operators to decide which advertisements and other content that they will carry to their customers and which they will not. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 637 (1994).

Using its Title I ancillary authority to impose Title II nondiscrimination provisions on wireless carriers' provision of short codes would put the Commission in the business of policing decisions of wireless providers as to whether to allow pornographers or similarly disfavored content providers to promote their content through CSC campaigns over the providers' networks, and second-guessing whether the providers are engaged in unlawful “discrimination” based on those editorial decisions. Such regulation strikes at the heart of the First Amendment because it would subject these editorial judgments by private entities to governmental interference by the Commission. And the Act must be interpreted in a manner to reconcile the editorial First Amendment rights of wireless carriers. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 588 (1988) (interpreting the National Labor

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<sup>56</sup> The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .” U.S. Const. amend I.

Relations Act that it would not extend to regulate the distribution of hand bills, thereby avoiding a potential conflict with the First Amendment).

### CONCLUSION

For the forgoing reasons, the Commission should reject the requests of Public Knowledge, *et al.* to define short code administration and SMS as Title II services subject to common carrier regulation and to impose nondiscrimination requirements on these services.

Respectfully submitted,

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202-457-2055

March 14, 2008

# **EXHIBIT 9**

**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

**COMMENTS OF AT&T INC.**

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June 14, 2010

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**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

**COMMENTS OF AT&T INC.**

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 comments.

**INTRODUCTION AND SUMMARY**

Wireless broadband data networks that have been pushed to their limits by explosively expanding demand in recent years are on the cusp of yet another quantum leap in traffic growth. As the Commission has noted, North American wireless networks that already carried 17 petabytes of data per month in 2009, the equivalent of 1,700 Libraries of Congress, will carry 740 *petabytes* – a fortyfold increase – by 2014.<sup>2</sup> Soaring wireless broadband demand and the efforts of the many competing providers to meet that demand with better, faster and more economical services are, of course, extremely positive signs. Indeed, in our increasingly mobile society, there is no more important bellwether of the success of the National Broadband Plan than the continuation of this virtuous cycle of ever-increasing mobile broadband quality that

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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. April 21, 2010).

<sup>2</sup> *Connecting America: The National Broadband Plan*, Federal Communications Commission, at 76-77, (“*National Broadband Plan*”), available at <http://www.broadband.gov/plan>.

spurs more and entirely new types of mobile broadband usage – by both humans and machines – that, in turn, spurs more investment and innovation to support the new and increased uses. But the dark cloud of the spectrum crisis greatly limits the industry’s flexibility to meet the coming challenges. Despite massive gains in efficiency over the last decade and enormous investments both to expand core network capacity and to “off-load” traffic through wi-fi, femtocell and other innovative arrangements, mobile broadband providers are increasingly approaching the limits of their ability to squeeze more capacity out of limited spectrum.<sup>3</sup> Mobile broadband providers face unprecedented challenges in the coming years to navigate an extremely complex radio resource management environment, and meeting those challenges will require maximum flexibility to respond to constantly changing capacity, congestion and service quality issues.

Under these circumstances, subjecting mobile broadband providers to entirely unnecessary common carrier data roaming obligations would only exacerbate these congestion issues, unduly limiting providers’ ability to tailor data roaming arrangements that are appropriately flexible and sensitive to the spectrum-constrained radio environment, and harming consumers as a result. Thus, if Congress had empowered the Commission to determine whether the public interest is better served by the *status quo* of commercially negotiated data roaming terms or instead with a new regulatory overhang of government second-guessing, the policy choice would be a simple one. Only market-based solutions will promote tailored industry arrangements that deliver reciprocal benefits, including preserving the ability of those providing roaming to meet the paramount needs of their own customers and enjoy the fruits of their

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<sup>3</sup> See Prepared Remarks of Chairman Julius Genachowski, America’s Mobile Broadband Future, *International CTIA Wireless I.T. & Entertainment, San Diego, California*, at 4 (delivered Oct. 7, 2009) (“the biggest threat to the future of mobile America is the looming spectrum crisis,” and “[e]ven with innovative spectrum policies and innovative new technologies, experts believe we are way too likely to be caught short”).

quality-improving investments and innovation. But this is *not* an area in which Congress empowered the Commission to make that policy choice. To the contrary, Congress expressly *prohibited* the Commission from displacing market-based arrangements with regulations that require data roaming under terms that the Commission believes reasonable.

The Commission has recognized that automatic roaming requirements are quintessential common carrier obligations.<sup>4</sup> The *Notice* proposes that the Commission extend these common carrier obligations to mobile broadband data services “that are provided without interconnection to the public switched telephone network” and that thus are “non-CMRS services.”<sup>5</sup> Under the plain terms of the Act, however, common carrier obligations may be imposed *only* on services that offer customers interconnection with all users of the public switched network and otherwise meet the Act’s definition of commercial mobile radio service (“CMRS”).

In Section 332(c), “Congress has replaced traditional regulation of mobile services with an approach that brings all mobile service providers under a comprehensive, consistent regulatory framework.”<sup>6</sup> That framework divides mobile wireless services into two categories: (1) “commercial mobile services” (CMRS), such as mobile voice services, which are defined by their offering of “interconnection with the public switched network” to the public, and which are

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<sup>4</sup> Report and Order and Further Notice of Proposed Rulemaking, *Reexamination Of Roaming Obligations Of Commercial Mobile Radio Service Providers*, 22 FCC Rcd. 15817, ¶ 22 (2007) (“*2007 Roaming Order*”) (“automatic roaming is a common carrier service, subject to the protections outlined in Sections 201 and 202 of the Communications Act”).

<sup>5</sup> *Notice*, ¶¶ 50 & 55.

<sup>6</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*”).

subjected to certain common carrier obligations,<sup>7</sup> and (2) non-CMRS “private mobile” services which “shall not . . . be treated as a common carrier [service] for any purpose under this Act.”<sup>8</sup> Since mobile data roaming services quite plainly do not “give[] subscribers the capability to communicate to or receive communication from all other users on the public switched network”<sup>9</sup> (and those services also are not “available to the public,” but instead only to other wireless providers on a private carriage basis), Section 332(c) is the complete answer to this entire *Notice*. The statutory dichotomy of “commercial” and “private” mobile services provides the controlling legal framework, and it forecloses the data roaming regulation proposed in the *Notice*. There is no “third” way here.<sup>10</sup>

The *Notice* overlooks Section 332 altogether. Instead, it recites a litany of Title I, II, and III provisions and asks whether they might support common carriage obligations. The short answer is that none of the listed provisions is relevant. No matter how broadly one might construe them as grants of general authority to impose regulation of the type contemplated here, none of them could displace the specific statutory prohibition on such regulation that Congress provided in Section 332(c) with respect to private mobile services like data roaming.

But even without Section 332(c), the Commission could not rely on any of the provisions the *Notice* lists. Those Title III provisions – statements of general purpose (§ 301), provisions that govern initial license and auction conditions or the modification of those conditions with

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<sup>7</sup> See 47 U.S.C. § 332(c)(1) (“A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this Act”), (d)(1), (d)(2).

<sup>8</sup> *Id.* § 332(c)(2), (d)(3) (emphasis added).

<sup>9</sup> 47 C.F.R. § 20.3.

<sup>10</sup> See, e.g., *Cellnet Commc’ns, Inc. v. FCC*, 149 F.3d 429, 433 (6th Cir. 1998) (“CMRS includes all mobile services operated for profit that solicit for subscribers and are interconnected with the public switched network, which is the traditional land-line telephone service. . . . PMRS includes all wireless services that do not meet the definition for CMRS.”).

respect to individual licenses (§§ 307, 309, 316), provisions that authorize the Commission to limit the uses of or to study and provide for “new,” “experimental” or “more efficient and intensive” uses of spectrum (§§ 303(b), 303(g)), and the general grant of “housekeeping” authority to make rules to implement other expressly delegated powers (§ 303(r)) – are facially inapplicable. In any event, common carrier obligations are *Title II* obligations that could not be re-created under Title III absent a clear statement authorizing such regulation which is glaringly absent from all of the suggested Title III provisions.<sup>11</sup> Moreover, as the Commission recognized in an order that it relies on in the *Notice* (§¶ 66), whatever authority is contained in these Title III provisions extends only to obligations that “will further the goals of the Communications Act *without contradicting any basic parameters of the agency’s authority.*”<sup>12</sup>

Nor does Title II offer any support. Title II common carrier regulation applies only to telecommunications services. As explained below, data roaming services plainly involve the provision of information services to the user – *i.e.*, the roaming provider – because the host provider provides functionality above and beyond mere transmission of information of the user’s choosing. For example, data roaming includes information processing features such as DNS lookups that the Commission, affirmed by the Supreme Court, has already determined warrant information service classification.<sup>13</sup> In all events, Congress, in Section 332(c), categorically prohibited the Commission from subjecting non-CMRS private mobile services like data

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<sup>11</sup> See, e.g., *FCC v. Midwest Video Corp.*, 440 U.S. 689, 700 (1979).

<sup>12</sup> Second report and Order, *In re Service Rules for 700 MHz Bands*, 22 FCC Rcd. 15289, ¶ 207 (2007) (emphasis added); see also 47 U.S.C. § 303(r) (Commission action must be “not inconsistent with law”).

<sup>13</sup> Declaratory Ruling and Notice of Proposed Rulemaking, *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798, ¶¶ 37-38 (2002), *aff’d by Nat’l Cable Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 998-1000 (2005).

roaming to common carrier regulation, *regardless of whether such services are classified as a telecommunications or information service.*

Nor, finally, can the Commission fall back upon its “ancillary” Title I authority. The *Comcast* decision reaffirmed the long-held principle that any assertion of ancillary jurisdiction must further the agency’s “statutorily mandated responsibilities” as laid out elsewhere in the Act.<sup>14</sup> The *Notice* suggests that common carrier regulation of data roaming could be tied to one or more of the statutory responsibilities laid out in the Title III provisions it lists, but, as explained above and in more detail below, none of those provisions could remotely bear that weight. In any event, the Commission may not exercise ancillary authority in a manner that is “antithetical to a basic regulatory parameter” established for its statutory responsibilities,<sup>15</sup> and here, too, Section 332(c) stands as an insurmountable obstacle.

But even if Congress had left it to the Commission to decide whether to impose common carrier obligations on mobile data roaming, the very balancing test that the Commission applied to mandate voice roaming would compel the opposite conclusion here. As an initial matter, the choice here is not *whether* there will be data roaming – data roaming is already widely available and will continue to develop.<sup>16</sup> Rather the issue is whether the Commission will now saddle these commercial arrangements with common carrier regulation and all of the attendant costs and

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<sup>14</sup> *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010).

<sup>15</sup> Report and Order, *Interconnected VOIP Disability Access Order*, 22 FCC Rcd. 11275, ¶ 22 n.91 (2007) (citing *FCC v. Midwest Video Corp.*, 440 U.S. 689, 700 (1979)); *see also NARUC v. FCC*, 533 F.2d 601, 607 (D.C. Cir. 1976) (“at the outset” of assessing a Commission claim of ancillary jurisdiction, court must examine “whether any statutory commandments are directly contravened” by the asserted jurisdiction) (citing *United States v. Sw. Cable Co.*, 392 U.S. 157, 169 n.29 (1968)).

<sup>16</sup> *Notice*, ¶ 82 (“Data roaming arrangements are already established in the United States that provide roaming on 2.5G data networks.”); *id.*, ¶ 84 (“a number of 3G roaming arrangements have been made between domestic and foreign carriers to support international roaming at home and abroad”).

restraints.<sup>17</sup> In the voice orders, the Commission explained that it was “balanc[ing] a number of competing interests,” which included “promoting competition (including facilities-based competition), encouraging new entry, protecting consumers, and fostering innovation and investment.”<sup>18</sup> Given the vastly different characteristics of data services and networks, the Commission could not rationally conclude that the balance tips in favor of regulating data even if that conclusion was justified for voice (as it was not).

Most notably, the spectrum crisis that the wireless industry faces today is a *data*-driven crisis. Wireless providers are in a constant battle to meet soaring data demand and to maintain quality of service for their own customers. The Commission and all independent observers believe that data traffic will continue to grow exponentially and unpredictably. That growth, in turn, will put ever-increasing strain on wireless networks, requiring dynamic reactions to congestion problems that can vary from place to place and minute to minute. In that environment, imposing common carrier data roaming obligations that force providers to accept the data traffic of requesting providers, even in circumstances where they are struggling to accommodate the bandwidth requirements of their own customers, simply makes no sense. It would exacerbate the congestion problem, reduce service quality, and discourage the very investment that could at least mitigate wireless congestion – all while discouraging providers from building out their own networks by making their own investments. Moreover, wireless broadband providers would lose the flexibility they need to fashion workable arrangements if all of these technical and radio resource decisions can be second-guessed as “unreasonable” in a Commission complaint proceeding.

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<sup>17</sup> See, e.g., *1994 Regulatory Treatment Order*, ¶ 16; Report And Order And Notice Of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd. 14853, ¶¶ 54-72 (2005).

<sup>18</sup> *2010 Roaming Order*, ¶ 18; see also *2007 Roaming Order*, ¶¶ 19, 27-35.

Regulation would also harm wireless broadband competition, particularly in rural areas where additional broadband entry would be most beneficial. In particular, a rigid common carrier regime that forced providers immediately and indiscriminately to share hard-won investments in broadband technology in rural areas with all comers would unquestionably discourage additional build-out in those areas by others. With a free pass to roam on other providers' networks in rural areas that are more costly to serve, urban-focused providers would have less incentive to make full use of their rural spectrum holdings to build next-generation networks.

In addition to the greatly increased harms of common carrier regulation of data, the arguments that the Commission advanced in support of supposed benefits of voice regulation simply do not fit the data context. "Seamlessness," for example, is a yes or no proposition in the voice context – a provider either has contractual roaming rights that allow it to offer broad geographic coverage or it does not. The data world is quite different with many flavors of seamlessness. As the *Notice* recognizes, 2.5G roaming is nearly ubiquitous today, and consumers have additional data connectivity options other than roaming, such as wi-fi. The question here is thus not whether competing providers will be able to offer "seamless" coverage – they will – but whether particular levels of seamlessness will be mandated by government fiat, without regard to the harms that intervention would cause.

Likewise, the "head start" entry barrier concerns that animated voice roaming regulation are inapt in the data context where all providers are still in the "build-out" phase, and rapidly evolving technologies provide opportunities for later entrants to "leap frog" first movers and acquire their own head starts. This is confirmed in the marketplace today where new entrants are entering with 4G technologies and some established providers are leaping from 2G to 4G. The

incontrovertible marketplace facts establish that wireless providers are *not* waiting for Commission rules on common carrier data roaming, but that providers of all sizes – including all of the major proponents of data roaming rules – are investing to deploy 3G and 4G networks and offer next-generation services in the absence of data roaming obligations.

With law and policy so clearly aligned against common carrier regulation of data roaming arrangements, the Commission should reject all such proposals. But in response to those that insist that the Commission simply must regulate, these comments also demonstrate that wholesale extension of the voice regulations to data would be exceptionally irresponsible and that any rational regulatory framework for data would contain a number of clear limits and safe harbors designed to at least reduce the inevitable public interest harms.

There is no legitimate basis, for example, for the Commission to port from its voice rules the “presumption” that *any* roaming request is “reasonable.” When voice roaming regulation was promulgated in 2007, the industry already had more than a decade of experience with roaming rates and terms in the relatively straightforward voice context. But the industry is just beginning to learn appropriate terms in the very different 3G environment (and *technical* standards for 4G roaming have not even been completed). And what proved “reasonable” for voice, which supported discrete services with relatively predictable demand, may prove profoundly unreasonable in the data context. Mobile broadband data supports myriad devices (*e.g.*, handsets, data cards, netbooks, tablet computers, GPS units and machines of every type) and services (*e.g.*, internet access, email, e-books, turn-by-turn directions, music streaming, video streaming, video conferencing, telemedicine, energy grid control, and security). Requesting and host providers may, over time and with experience, develop a common understanding of “reasonable” roaming terms in the face of the congestion and other issues that

are unique to the 3G/4G data context, but there is plainly no basis today simply to *presume* that whatever any provider may request in this new context is reasonable.

Any rational data roaming regulation would also include clear safe harbors that expressly authorize a host provider to employ, at its discretion, the full range of tools available to it to ensure that its own customers' service quality is not degraded by roaming data traffic. At a minimum, this would include authority to prioritize the host provider's own customers' traffic, to impose "speed" or bandwidth limits on roamers, to limit roamers to 2.5G connections where necessary to address 3G congestion, and to employ congestion-based pricing. Any conceivable concept of "reasonableness" – and, indeed, fundamental fairness – must allow providers to first protect their own customers without risk of *ad hoc* government second-guessing.

As described further below, still further limitations would be essential. For example, any Commission regulations in this area should also: (1) apply only across providers with the same air interfaces and radio technologies that have made significant facilities investments, and (2) not permit *de facto* resale (*e.g.*, reliance upon "roaming" rights to sell mobile services to customers' outside of the areas where the requesting provider has a compatible mobile broadband network). The best – and only lawful – course, however, is simply to eschew common carrier regulation altogether.

#### **I. THE COMMISSION HAS NO LEGAL AUTHORITY TO EXTEND ITS AUTOMATIC ROAMING REQUIREMENTS TO MOBILE DATA SERVICES.**

The Commission's analysis should begin and end with the question of its legal authority. The *Notice* proposes that the Commission "extend" its existing common carrier roaming obligations to mobile broadband Internet access and other mobile data services "that are provided without interconnection to the public switched telephone network" and that thus are

“non-CMRS services.”<sup>19</sup> However, Congress has made it explicit that the Commission has no legal authority to extend common carrier obligations to these services. Under the terms of the Act, common carrier obligations may be imposed ONLY on services that offer users interconnection with the public switched network and otherwise meet the Act’s definition of commercial mobile radio service (“CMRS”).<sup>20</sup> By contrast, Congress expressly provided that other mobile services are “private mobile service” and are exempt from common carrier obligations, even when the services are offered by a CMRS provider and whether or not the services are classified as “telecommunications” or “information” services.<sup>21</sup> Under Section 332, the Commission therefore has no authority to displace market-based roaming arrangements with regulations that require data roaming under terms that the Commission believes reasonable.

The Commission has repeatedly recognized that it likely lacks authority to impose automatic roaming obligations on non-interconnected mobile data services for this reason.<sup>22</sup> Yet the *Notice* simply overlooks the fundamental limit that Section 332 imposes on the Commission’s authority. Instead, the *Notice* suggests theories under which data roaming might be deemed a “telecommunications service” that is subject to Sections 201 and 202 or could be

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<sup>19</sup> *Notice*, ¶¶ 50, 55.

<sup>20</sup> 47 U.S.C. § 332(c)(1).

<sup>21</sup> *Id.* § 332(c)(2) & (d)(3).

<sup>22</sup> *2007 Roaming Order*, ¶ 60 (“We find that automatic roaming, as a common carrier obligation, does not extend to services that are classified as information services *or to other wireless services that are not CMRS*”) (emphasis added); *see also id.*, ¶¶ 80-81; *see also Notice*, Statement of Commissioner Robert M. McDowell (noting the “question” whether there is “a legally sustainable path to mandate automatic data roaming”); *Notice*, Statement of Commissioner Meredith Attwell Baker (noting that the Commission “should proceed with great caution before extending any automatic roaming obligations to data services” because “[i]mportant questions need to be resolved with respect to what authority the Commission might have, if any, to act in this area”).

required under Title III even if data roaming is classified as an information service.<sup>23</sup> As detailed below in part II.B, these theories would be invalid even if they were otherwise legally permissible. But the fundamental point is that they are not. Regardless of whether data roaming services are properly classified as information or telecommunications services, they manifestly are non-interconnected, non-CMRS services, and Section 332 unambiguously prohibits the imposition of common carrier roaming obligations on these services.

**A. Under Section 332(c), Roaming Obligations Cannot Be Extended To Mobile Data Roaming Services Because They Are Not Interconnected With The Public Switched Network And Also Are Not Offered To The Public.**

Automatic roaming requirements are quintessential common carrier obligations.<sup>24</sup> They are based on Sections 201 and 202 of the Act. They require carriers to provide roaming services to other carriers upon a reasonable request and under terms and conditions that are just, reasonable, and not unreasonably discriminatory. The rules set forth presumptions of when a request for roaming service is or is not reasonable, and they provide that complaints may be filed with the Commission if a requesting provider contends that roaming services have not been offered on terms that are just and reasonable and not unreasonably discriminatory. This is common carrier regulation.

In the Commission's prior orders, it has been careful to impose these requirements only on wireless services that satisfy the Act's definition of CMRS (*i.e.*, that offer interconnection with the public switched network). That is because under the plain terms of Section 332 and the

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<sup>23</sup> Notice, ¶¶ 64-71.

<sup>24</sup> 2007 Roaming Order, ¶ 23 (“automatic roaming is a common carrier service, subject to the protections outlined in Sections 201 and 202 of the Communications Act”); *see also id.*, ¶ 26 (when a carrier “offers automatic roaming, [that offer] triggers its common carrier obligations with respect to the provisioning of that service under the Communications Act,” including the obligation to serve all potential customers upon “reasonable request” on “reasonable and non-discriminatory terms and conditions” under Sections 201 and 202).

Commission's many prior orders, the Commission is prohibited from imposing these common carrier requirements on mobile data services that do not offer interconnection with the public switched networks and that therefore are not CMRS services.

In Section 332(c), "Congress replaced traditional regulation of mobile services with an approach that brings all mobile service providers under a comprehensive, consistent regulatory framework."<sup>25</sup> That framework divides mobile wireless services into two regulatory categories: First, there are "commercial mobile services" ("CMRS"), which are subject to certain common carrier obligations.<sup>26</sup> Second, there are non-CMRS ("private mobile") services which "*shall not be treated as a common carrier [service] for any purpose under the Act.*"<sup>27</sup> Under the plain terms of the Act, therefore, services that are not CMRS services cannot be subject to common carrier regulation, even if they are telecommunications services within the meaning of the Act's definition of that term.

The principal factor that distinguishes CMRS from non-CMRS services is the offering of interconnection with the public switched network. Section 332 defines a "commercial mobile service" as "any mobile service . . . that is provided for profit and makes *interconnected service* available (A) to the public or (B) such classes of eligible users as to be effectively available to a substantial portion of the public."<sup>28</sup> The Act defines an "interconnected service" as a "service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission)."<sup>29</sup>

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<sup>25</sup> 1994 *Regulatory Treatment Order*, ¶ 11.

<sup>26</sup> 47 U.S.C. § 332(c)(1).

<sup>27</sup> *Id.*, § 332(c)(2) (emphasis added).

<sup>28</sup> *Id.*, § 332(d)(1).

<sup>29</sup> *Id.* § 332(d)(2).

The Commission’s regulations give effect to the plain meaning of these terms. “Interconnected service” is “a service that is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from *all other users* on the public switched network.”<sup>30</sup> The “public switched network,” in turn, is “[a]ny common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, or mobile service providers, that uses the North American Numbering Plan in connection with the provision of switched services.”<sup>31</sup> The Commission has emphasized that “use of the North American Numbering Plan by carriers providing or obtaining access to the public switched network is a key element in defining the [public switched] network because participation in the North American Numbering Plan provides the participant with ubiquitous access to all other participants in the Plan.”<sup>32</sup> As the Commission has explained, Congress’s purpose in defining CMRS as an “interconnected service” was to “ensure that a mobile service that gives its customers the capability to communicate to or receive communication from other users of the public switched network should be treated as a common carriage offering.”<sup>33</sup>

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<sup>30</sup> 47 C.F.R. § 20.3 (emphasis added).

<sup>31</sup> *Id.*

<sup>32</sup> 1994 *Regulatory Treatment Order* ¶¶ 59-60. The Commission also held that a “common carrier switching capability” is another “important element” of the definition, because such switching capability is “implied” by the term “public switched network.” *Id.*, ¶ 60.

<sup>33</sup> *Id.*, ¶ 54; *see also id.*, ¶ 55 (“it is reasonable to conclude that an interconnected service is any mobile service that is interconnected with the public switched network, or service for which a request for interconnection is pending, that allows subscribers to send or receive messages to or from *anywhere on the public switched network*” (emphasis added)); *id.*, ¶ 56 (“we define ‘interconnected’ to mean “a direct or indirect connection through automatic or manual means (either by wire, microwave, or other technologies) to permit the transmission of messages or signals between points in the public switched network and a commercial mobile radio service provider”).

Conversely, the Act defines “private mobile services” (which cannot be subject to common carrier requirements under any provision of the Act) as “any mobile service that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.”<sup>34</sup> Wireless services that do not make available interconnection with the public switched network are necessarily non-CMRS “private mobile services” under this definition.<sup>35</sup>

Consistent with the clear terms of the statute, the Commission has previously held that wireless broadband Internet access service is not an “interconnected service” and is not CMRS under Section 332(c). In so holding, the Commission reasoned that this service “does not give subscribers the capability to communicate with *all other users* on the public switched network.”<sup>36</sup> The Commission placed particular importance on the fact that wireless broadband Internet access service does not use the North American Numbering Plan to access the Internet, which, it noted, “limits subscribers’ ability to communicate to or receive messages from *all other users* in the public switched network.”<sup>37</sup> The Commission also expressly held that the existence of VoIP applications or services that *use* the Internet does not make wireless broadband Internet access service itself an interconnected service. Rather, it specifically found that users of a

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<sup>34</sup> 47 U.S.C. § 332(d)(3).

<sup>35</sup> See, e.g., *Cellnet Commc’ns, Inc. v. FCC*, 149 F.3d 429, 433 (6th Cir. 1998) (“CMRS includes all mobile services operated for profit that solicit for subscribers and are interconnected with the public switched network, which is the traditional land-line telephone service. . . . PRMS includes all wireless services that do not meet the definition for CMRS”); *Conn. Dept. of Public Util. Control, et al. v. FCC*, 78 F.3d 842 (2d Cir. 1996) (same).

<sup>36</sup> Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, 22 FCC Rcd. 5901, ¶ 45 (2007) (“*Wireless Broadband Internet Access Order*”) (emphasis in original) (quoting 47 C.F.R. § 20.3); see also *id.* (emphasizing that Internet access service “in and of itself does not provide th[e] capability to communicate with all users of the public switched network”).

<sup>37</sup> *Id.* (emphasis in original).

mobile wireless broadband Internet access service “need to rely on another service or application, such as certain [VoIP] services . . . to make calls to, and receive calls from, ‘all other users on the public switched network,’” and therefore wireless Internet access “itself is not an ‘interconnected service’ as the Commission has defined that term.”<sup>38</sup> Indeed, the Commission expressly clarified that, notwithstanding evolving technology, a mobile service cannot be a CMRS service unless that service itself offers interconnection with the “traditional local exchange or interexchange network.”<sup>39</sup>

Data roaming is even further removed from the public switched network than wireless broadband Internet access service. Data roaming is merely a wholesale, provider-to-provider service that facilitates the offering of another non-interconnected service, wireless broadband Internet access. Data roaming is a service that directs Internet traffic back to the home provider’s non-interconnected data network, where the home provider then completes a connection allowing its customers to communicate with servers and other computers that are not themselves part of the public switched network. A data roaming service has none of the markers of an “interconnected” service. It does not use the North American Numbering Plan. Nor does it provide any functionality that would enable either the roaming provider or its customers to communicate with “all other users” on the public switched network.

As the Commission also previously recognized, because data roaming is not an “interconnected service,” it is a non-CMRS “private mobile service,” and providers cannot be

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<sup>38</sup> *Id.* See also *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, ¶ 15 (1993) (“it appears that Congress intended by use of the term ‘interconnected service’ to distinguish between those communications systems that are physically interconnected with the network and those systems that are not only interconnected but that also make interconnected service available”).

<sup>39</sup> *Id.*, ¶ 45 n.119.

subject to a common carrier obligation of providing data roaming service. In the Commission’s *2007 Roaming Order*, it required the provision of automatic roaming upon reasonable request for interconnected voice services. At the same time, the Commission stated: “We find that automatic roaming, as a common carrier obligation, does not extend to services that are classified as information services *or to other wireless services that are not CMRS.*”<sup>40</sup>

Nor could there be any serious claim that mobile data services are the “functional equivalent” of CMRS services. The Commission has stressed that a service cannot be the “functional equivalent” of CMRS unless the service is, at a minimum, an economic substitute for CMRS – such that changes in price “would prompt customers to change from one service to the other.”<sup>41</sup> Under this standard, the Commission has made clear 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>42</sup> In fact, the Commission has previously noted that both the statutory language and the legislative history support the view that the purpose of the “functional equivalence” test was to *narrow* the definition of CMRS – *i.e.*, “a service that fell within the *literal* definition of a ‘commercial mobile service’ could nonetheless be classified as private if we determined that it was not *functionally* equivalent.”<sup>43</sup>

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<sup>40</sup> *2007 Roaming Order*, ¶ 60.

<sup>41</sup> *Id.*, ¶ 80; *see also, e.g., Application of Brookfield Development, Inc. and Colorado Callcom*, 19 FCC Rcd. 14385, ¶ 13 (2004) (“without further market-specific information or empirical data to ascertain the target market and to evaluate consumer demand, among other factors, we cannot reasonably conclude that Callcom’s operations at the time in question were a ‘close substitute’ to, and therefore, a functional equivalent of, CMRS”).

<sup>42</sup> *1994 Regulatory Treatment Order*, ¶ 79.

<sup>43</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”).

Data roaming plainly is not “functionally equivalent” to any CMRS service, because it does not provide any of the same *functions* as CMRS services. Data roaming is not remotely similar to traditional dialed telephone services that allow communications with all telephone users on the public switched network.<sup>44</sup> Indeed, it is inconceivable that any consumer would, at any price, view a non-interconnected data roaming arrangement – which provides an Internet connection between two mobile data providers – as a substitute for an interconnected CMRS service that allows ubiquitous access to and the ability to communicate with the NANP telephone numbers of all other users of the PSTN. Accordingly, non-interconnected data roaming services are “private mobile services” and cannot be subject to the common carrier requirement that they be made available under reasonable request.

Contrary to the suggestion in the *Notice*, the Commission may not make any distinction between firms that provide both CMRS services and non-CMRS data services and firms that provide only non-CMRS data services.<sup>45</sup> Under the terms of Section 332, private mobile services are exempt from common carrier requirements, irrespective of whether a firm also separately provides CMRS. Section 332(c) provides that “insofar as” a person provides a “service that is a private mobile service,” the person “shall not . . . be treated as a common carrier for any purpose under this Act.” Thus, all non-interconnected data services are exempt from requirements that they be provided under terms that the Commission believes reasonable, irrespective of whether the provider also provides CMRS services that are subject to common carrier regulation.

Further, there is a separate and independent reason why data roaming is not a CMRS and is a private mobile service. To be a CMRS service, a mobile service must not only offer

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<sup>44</sup> 47 C.F.R. § 20.3.

<sup>45</sup> *Notice*, ¶ 62.

interconnection with the public switched network, but also must be “available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public.”<sup>46</sup> As the Commission explained in the *1994 Regulatory Classification Order*, an offering “to the public” under Section 332(d)(1) is an offer that is made to the public “without restriction on who may receive it.”<sup>47</sup> The Commission further explained that a mobile service would not qualify as a CMRS service if it was “offered only to a significantly restricted class of eligible users.”<sup>48</sup> Wireless data roaming does not satisfy these requirements. AT&T today offers data roaming only on a private carriage basis and only to other wireless data providers. AT&T does not have a standing roaming offer to all similarly situated providers, but rather negotiates specific contracts on an individualized, case-by-case basis. Data roaming, therefore, is not “available to the public,” because providers do not offer it “without restriction on who may receive it.”<sup>49</sup>

In short, data roaming is a “private mobile service” because data roaming lacks two of the essential characteristics of CMRS. It does not offer interconnection with the PSTN and also is not offered to the public. For these reasons, it cannot be subject to the Commission’s proposed automatic roaming requirements or any other common carrier requirements under any provision of the Communications Act.

**B. The Commission Has No Authority To Order Mandatory Data Roaming Under Any Other Provisions Of The Act.**

Against this background, it is puzzling that the *Notice* has not cited Section 332(c), but has instead cited to a long list of other general provisions of Titles I, II, and III and asked for

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<sup>46</sup> 47 U.S.C. § 332(d)(1).

<sup>47</sup> *1994 Regulatory Classification Order* ¶ 65.

<sup>48</sup> *Id.*, ¶¶ 66-67.

<sup>49</sup> *Id.*, ¶ 65.

comment on whether one or more of these other provisions could be read so broadly as to provide a legal basis for extending automatic roaming requirements to non-interconnected mobile data services.<sup>50</sup> However, none of these provision could possibly override Section 332(c)(2)'s express ban on treating providers of these services as common carriers “for any purpose under this Act.” Thus, even if these other statutory provisions actually gave the Commission general authority that could be exercised to order mandatory roaming – which they do not – the specific prohibition in Section 332(c)(2) bans any such common carriage regulation and cannot be trumped by vague and general other provisions of the Act.<sup>51</sup>

For the same reason, any result-driven undertaking by the Commission to reclassify data roaming, and, indeed broadband Internet access, as a telecommunications service would be futile because the clear directive of Congress in section 332(c) that private mobile services may not be subject to common carrier regulation is not dependent on whether the service at issue is an information service or a telecommunications service. Regardless of its status, those services may not be subjected to common carrier regulations, such as mandatory automatic roaming requirements. While Section 332(c) is thus an absolute bar to the Commission's proposal to mandate automatic data roaming, the Commission would lack authority to adopt this proposal even in the absence of section 332(c). Indeed, none of the purported statutory bases the Commission cites would empower the Commission to regulate data roaming as a common carrier service.

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<sup>50</sup> Notice ¶¶ 64-71.

<sup>51</sup> See, e.g., *Bloate v. U.S.*, 130 S.Ct. 1345, 1354 (2010) (“There is no question that . . . [g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment,” quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)).

**Title III.** The *Notice* focuses on a hodgepodge of different provisions of Title III under the theory that *when* the provisions of Title III are *applicable*, the classification of a licensee’s service as an information service is not always relevant.<sup>52</sup> However, wholly apart from Section 332(c)(2), none of the cited provisions of Title III could conceivably be read as granting the Commission authority to impose automatic data roaming or other common carrier obligations on providers of wireless services. Common carrier obligations are imposed by Title II, and the Commission is not free to transplant the provisions of Title II into Title III unless there is *clear legislative authorization* in the terms of Title III. None of the cited provisions confer such authority. Indeed, under *Comcast Corp. v. FCC*,<sup>53</sup> and numerous prior Supreme Court and other precedents cited in that case, the statutory provisions listed in the *Notice* are legally insufficient to justify any form of data roaming regulation, common carrier or otherwise.

First, many of the Commission’s citations are to the statements of policy or other generalized directives that do not grant the Commission authority to impose specific obligations on radio licensees. For example, the Commission cites Section 301, which grants it authority to regulate “radio communications” and “transmission of energy by radio.”<sup>54</sup> But as the courts have repeatedly held, such general grants of subject matter authority are not delegations of authority to adopt any specific regulations.<sup>55</sup>

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<sup>52</sup> *Notice*, ¶ 65.

<sup>53</sup> *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

<sup>54</sup> *Notice*, ¶ 66.

<sup>55</sup> *See Comcast*, 600 F.3d at 18. The Commission also asserts that data roaming obligations may further certain “statutory goals” of the Communications Act, such as those set forth in section 1 of the Act, 47 U.S.C. § 151, and section 1302(a), 47 U.S.C. § 1302. *See Notice*, ¶ 67. As the D.C. Circuit held recently, however, the Commission has acknowledged that section 1 is a statement of policy that itself “delegate[s] no regulatory authority,” and the same is plainly true of section 1302. *Comcast*, 600 F.3d at 652; *see also id.* at 654 (“[p]olicy statements . . . are not delegations of regulatory authority”).

In a similar vein, the *Notice* discusses Section 303(g), which authorizes the Commission to “study new uses for radio, provide for experimental uses of radio spectrum, and encourage the larger and more effective use of radio in the public interest.”<sup>56</sup> But the Commission is not here proposing to conduct a study, much less a study of new uses for radio, nor is it providing for the experimental use of radio spectrum. And the Commission’s rationale – that data roaming may “encourage more efficient use of spectrum in rural areas” and thus advance the “direction” of Section 303(g)<sup>57</sup> – is makeweight because a statement that the Commission is to “encourage” efficient use of radio spectrum is, at most, a general policy goal, and a “statement of policy” confers no “regulatory authority.”<sup>58</sup>

Second, the *Notice* points to several provisions of Title III that “provide the Commission authority to establish license conditions in the public interest.”<sup>59</sup> In particular, the *Notice* refers to the Commission’s general authority to grant licenses under sections 301 and 307(a) of the Act,<sup>60</sup> as well as its authority to issue licenses through competitive auctions under section 309(j).<sup>61</sup> The *Notice* notes that these provisions allow the Commission to establish requirements

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<sup>56</sup> *Notice*, ¶ 67.

<sup>57</sup> *Id.*, ¶ 67

<sup>58</sup> *Comcast*, 600 F.3d at 658-59. In all events, as explained below, a broadband data roaming requirement would actually create disincentives for efficient spectrum use, especially in rural areas, by discouraging facilities-based deployment and upgrades.

<sup>59</sup> *Notice*, ¶ 66.

<sup>60</sup> See 47 U.S.C. § 301 (providing that uses of the radio spectrum must take place “under licenses granted by Federal authority”); 47 U.S.C. § 307(a) (“The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefore a station license provided for by this chapter”).

<sup>61</sup> Specifically, the Commission cites its authority to specify eligibility criteria for the licenses that are auctioned and its responsibility to promote certain objectives when designing auction methods, including “the development and rapid deployment of new technologies” and “efficient and intensive use of the electromagnetic spectrum.” See 47 U.S.C. §§ 309(j)(3)(A) & (D).

that licensees must meet and to prescribe the service to be rendered by each class of licensees.<sup>62</sup> These provisions are irrelevant. They apply only to conditions that are imposed before new licenses are granted. They are inapplicable here because the Commission is not designing an auction or otherwise granting new licenses. In addition, these provisions are far too general to be construed to authorize the imposition of common carrier obligations under Title III on even new radio licensees.

Third, the *Notice* cites to the Commission's Section 316 authority to modify licenses.<sup>63</sup> But this section is also irrelevant. As an initial matter, this is a rulemaking, not a license modification proceeding, and Section 316 imposes specific procedural protections to the licensee – individual written notice, an opportunity to protest, and hearings in some cases – that apply to license modifications and which the Commission plainly is not providing here.<sup>64</sup> As courts have held, section 316 “is concerned with the conduct and other facts peculiar to an individual licensee” and does not apply to rulemakings that may impact all existing licensees.<sup>65</sup> In addition, the provisions of Section 316 are far too vague and general to authorize the imposition of common carrier obligations.

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<sup>62</sup> *Notice*, ¶ 66.

<sup>63</sup> 47 U.S.C. § 316(a)(1).

<sup>64</sup> *Id.* at § 316(a), (b).

<sup>65</sup> *WBEN, Inc. v. United States*, 396 F.2d 601, 618-19 (2d Cir. 1968) (internal quotation marks omitted). The Commission misreads *WBEN* in asserting that it holds that the Commission “may modify conditions of a license class under Section 316 through a rulemaking process.” *Notice*, ¶ 66 n.195. The Second Circuit recognized the Commission's authority to use rulemaking to implement requirements that affect all existing licenses, but it did so by recognizing that Section 316 license modifications and rulemakings are two separate processes – the former designed to address the “situation of individual parties” and the latter designed to address “a new policy . . . based upon the general characteristics of an industry” – not by holding that the Commission can exercise its section 316 authority “through” a rulemaking process. *See WBEN*, 396 F.2d at 618; *see also id.* (citing cases upholding rules “modifying all existing licenses *despite* a statute [such as section 316] requiring an evidentiary hearing for modification of a particular license”) (emphasis added).

Finally, the *Notice* cites the Commission’s rulemaking authority under Section 303(r) to “[m]ake such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of the Act.”<sup>66</sup> But it is well settled that this is not an independent grant of regulatory authority. As the D.C. Circuit has held, “[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.”<sup>67</sup> In this regard, the “open platform” obligations that were imposed in the Upper 700 MHz C Block rulemaking were justified under Section 309.<sup>68</sup> By contrast, here, there is no other provision of Title III that grants the Commission authority to adopt data roaming obligation, so section 303(r) is irrelevant.

For all of these reasons, if the Commission were to conclude that this laundry list of Title III provisions authorized imposition of common carrier obligations, the Commission would make the same mistake it made in *Comcast*. Indeed, if these general provisions governing licensing procedures were as expansive as suggested in the *Notice*, it “would virtually free the Commission from its congressional tether” – the same flaw that prompted the D.C. Circuit to reject the Commission’s position in *Comcast*.<sup>69</sup> The Supreme Court and other federal courts have similarly recognized that the authority of administrative agencies cannot be “unbounded” or

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<sup>66</sup> 47 U.S.C. § 303(r).

<sup>67</sup> *Motion Picture Ass’n of Am., Inc. v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002) (emphasis added); *see also id.* (“The FCC must act pursuant to *delegated authority* before any ‘public interest’ inquiry is made under § 303(r)” (emphasis in original)).

<sup>68</sup> *Compare Notice*, ¶ 66.

<sup>69</sup> *Comcast*, 600 F.3d at 665; *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”).

“unrestrained,”<sup>70</sup> yet that is precisely the consequence of the *Notice*’s Title III theory. If Title III’s licensing and auction provisions, including sections 301, 307, 309, and 316, provide the Commission with general authority to adopt any regulations for wireless providers that the agency deems to be in “the public interest,” then that authority is completely unbounded. Just as the D.C. Circuit found in *Comcast*, there would be no reason for the Commission to “stop” with the automatic roaming obligation that it proposes here: the Commission would be free to adopt virtually any regulation that it imposes under other titles of the Act, including common carrier regulations under Title II. This would be a fundamental alteration of the Communications Act that would not survive judicial review – particularly since the Commission would be suddenly finding new meaning in phrases in a host of provisions that it has never before interpreted or relied on in this manner.<sup>71</sup>

In all events, even if any of these provisions were relevant, the Commission has recognized – in an order that the Commission relies on in the *Notice* (at ¶ 66) – that whatever authority is contained in those provisions empowers the Commission only to establish license conditions and operational obligations that “will further the goals of the Communications Act

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<sup>70</sup> *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000) (rejecting FDA’s assertion of regulatory authority over tobacco because the “breadth of the authority” it asserted made it less plausible that Congress intended to delegate such broad discretion); *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1823 (2009) (Kennedy, J., concurring in part and concurring in the judgment) (“the amorphous character of the administrative agency in the constitutional system” requires that agency authority cannot be unbounded); *Am. Library Ass’n v. FCC*, 406 F.3d 689, 691, 704, 708 (D.C. Cir. 2005) (rejecting Commission assertion of “sweeping authority” to regulate that it had “never before asserted”).

<sup>71</sup> *See Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (“Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes”) (quoting *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 468 (2001)).

*without contradicting any basic parameters of the agency's authority.*"<sup>72</sup> But under Section 332(c), imposition of an automatic data roaming requirement would do precisely that.<sup>73</sup>

**Title II.** In recognition that it is proposing new common carrier obligations, the Commission also asks if data roaming service may be declared a "telecommunications service" that is subject to Title II of the Act. *Notice* ¶ 68. It notes that one commenter has suggested that data roaming it is "just a transmission service," and it transmits data "without change" to the roaming provider's network. *Id.* Wholly apart from Section 332(c), which, as discussed above, is dispositive, the Commission has no authority to apply common carrier regulation under Title II to data roaming, for several reasons.

First, data roaming is an information service and cannot be regulated under Title II. The Act defines an information service as the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."<sup>74</sup> The provision of data roaming easily falls within this statutory

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<sup>72</sup> Second report and Order, *In re Service Rules for 700 MHz Bands*, 22 FCC Rcd. 15289, ¶ 207 (2007) (emphasis added); *see also* 47 U.S.C. § 303(r) (Commission action must be "not inconsistent with law" and "necessary to carry out the provisions" of the Act); 47 U.S.C. § 307(a) (Commission's authority to grant licenses is "subject to the limitations" of the Act).

<sup>73</sup> In the *Wireless Broadband Internet Access Order* (¶¶ 37-56), the Commission held that wireless broadband services are *not* CMRS services.

<sup>74</sup> 47 U.S.C. § 153(20). A "telecommunications service" subject to Title II common-carrier regulation is defined, in relevant part, as "the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used," and "telecommunications" in turn is defined as "the transmission . . . of information of the user's choosing, *without change in the form or content of the information as sent and received.*" 47 U.S.C. §§ 153(46), (43) (emphasis added). The distinction is significant because it is well-established that the Communications Act "regulates telecommunications carriers, but not information-service providers, as common carriers." *Nat. Cable Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 975 (2005); *see also Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 534 (D.C. Cir. 2007) (under the Communications Act, "providers of telecommunications services are regulated as common carriers, but providers of information services are not") (citing cases).

definition.<sup>75</sup> Wireless broadband roaming involves the provision of “information services” to the customer – here the roaming provider – because the host provider provides functions above and beyond mere transmission of information of the end-user’s choosing.

When AT&T provides broadband data roaming, AT&T sets up a “tunnel” over a private network between the AT&T network equipment (the Serving GPRS Support Node or “SGSN”) and the home provider’s interface to the Internet (the Gateway GPRS Support Node (“GGSN”). To create this tunnel and direct traffic through it, AT&T must alter the data it receives from the roaming providers device and also store information.

For example, when the roaming device seeks to initiate a data session it transmits an Access Point Name (“APN”), which is an alphanumeric name for the various groupings of data services defined by the home network provider, *e.g.*, “Internet” or “mywap.” AT&T needs to translate that APN into an IP address associated with the GGSN that the home provider has assigned for such services so that AT&T can set up a tunnel and route traffic to and from that GGSN. AT&T therefore performs a DNS lookup that translates the alphanumeric APN into an IP address. AT&T also pre-appends the data packets it receives from the handset with data that allows the traffic to be properly routed through the tunnel. In addition, AT&T creates and stores (for up to 24 hours) a “profile” for the roaming devices (which is done when AT&T initially registers the roaming device with its network), which contains, for example, the types of services the customer’s is permitted to obtain when roaming.

These changes to the data sent by the roaming customer and the use of stored information are all inseverable parts of the data roaming service and plainly meet the definition of an

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<sup>75</sup> See, *e.g.* Reply Comments of AT&T Inc., *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, at 5-10 (Nov. 28, 2007) (“AT&T Automatic Roaming Reply Comments”).

information service under the Act. As AT&T has previously explained,<sup>76</sup> the Commission concluded in the *Cable Modem Declaratory Ruling*<sup>77</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 sustained this reasoning when it affirmed the *Cable Modem Declaratory Ruling*.<sup>78</sup>

Because data roaming is an information service, not a telecommunications service, the Commission has no authority to regulate it as a common carriage offering. Any such regulation would run afoul of section 153(44) of the Act,<sup>79</sup> which provides that “[a] telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services.”<sup>80</sup> The Commission has separately come to the same conclusion under Section 332: it has held that Section 332 establishes information services and CMRS as mutually exclusive categories, and that it would be irrational, and would lead to absurd results, if Section 332 were interpreted to permit the re-imposition of common carrier regulation on wireless information services, when Congress clearly intended “to allow information services to develop free from common carrier regulations.”<sup>81</sup>

Third, *even if* data roaming were simply a transmission service that did not qualify as an information service, and *even if* Section 332(c)(2) did not already expressly prohibit the

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<sup>76</sup> *Id.*, at 8-9.

<sup>77</sup> Declaratory ruling and Notice of Proposed Rulemaking, *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798, ¶¶ 37-38 (2002).

<sup>78</sup> *See Nat’l Cable Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 998-1000 (2005).

<sup>79</sup> 47 U.S.C. § 153(44).

<sup>80</sup> *Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (“one can be a common carrier with regard to some activities but not others”) (quoting *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976)).

<sup>81</sup> *See Wireless Broadband Internet Access Order*, ¶ 52.

Commission from ordering providers to offer such services on a common carrier basis, the Commission still would not have authority to order mandatory roaming. In the absence of Section 332's specific prohibition, the Commission would have authority to order *mandatory* – *i.e.*, common carrier – data roaming only if it could show that there was a basis for a “legal compulsion” to offer the service on a common carrier basis under the test laid out in *NARUC v. FCC*, 525 F.2d 630, 641-43 (D.C. Cir. 1976).

There is no basis for a “legal compulsion” here. As the Commission has held repeatedly, a legal compulsion is inappropriate where the market is functioning on its own.<sup>82</sup> 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.<sup>83</sup> Moreover, the marketplace is already responding with private carriage contracts, and allowing providers to respond to rapidly changing market conditions with privately negotiated agreements is far preferable to heavy-handed Commission

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<sup>82</sup> See, e.g., *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 925 (D.C. Cir. 1999) (upholding the Commission's determination that regulatory compulsion is appropriate only where the carrier “has sufficient market power to warrant regulatory treatment as a common carrier”); *Norlight Private Carriage Order*, 2 FCC Rcd. 132, ¶ 19 (1987) (“NorLight's insignificant market power and the class of users it proposes to serve fall within the private carrier test set out in *NARUC I*”); *Transponder Sales Order*, 90 FCC 2d 1238 ¶¶ 31-34 (1982) (documenting the benefits of private carriage); *Detariffing Order*, 11 FCC Rcd. 20730, ¶ 52 (1996) (where services are provided in workably competitive environment, a regime without tariffs or other legacy Title II restrictions is the “most pro-competitive, deregulatory system” and will “promote competitive market conditions”).

<sup>83</sup> See, e.g., Thirteenth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 24 FCC Rcd. 6185, ¶ 1 (2009) (“U.S. consumers continue to reap significant benefits – including low prices, new technologies, improved service quality, and choice among providers – from competition in the CMRS marketplace, both terrestrial and satellite CMRS.”); Twelfth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 23 FCC Rcd. 2241, ¶ 1 (2008) (“U.S. consumers continue to reap significant benefits – including low prices, new technologies, improved service quality, and choice among providers – from competition in the Commercial Mobile Radio Services marketplace”).

regulation. Accordingly, there would be no lawful basis to order wireless broadband providers to offer these services as common carriage.

**Title I.** Finally, the *Notice* asks if the Commission may impose data roaming obligations under “ancillary” Title I jurisdiction. It may not. As the *Notice* correctly states, ancillary jurisdiction is permissible only where it is the case both (1) that the services at issue fall within the Commission’s general grant of authority under Title I and (2) the regulation is “reasonably ancillary to the effective performance of the Commission’s statutorily mandated responsibilities.”<sup>84</sup> Here, the second requirement plainly is not met. A data roaming obligation is not related to any specific power of the Commission, and is further flatly barred by Section 332(c)(2)’s prohibition on the imposition of common carrier obligations on non-interconnected services under any provision of the Act.

As the D.C. Circuit reaffirmed in its recent decision in *Comcast*, any assertion of ancillary jurisdiction must further the agency’s statutory responsibilities as laid out elsewhere in the Act.<sup>85</sup> The courts have repeatedly held that, because ancillary jurisdiction is “incidental to, and contingent on, specifically delegated powers under the Act . . . each and every assertion of jurisdiction over [the ancillary activity] must be independently justified as reasonably ancillary to” a specific Commission power.<sup>86</sup> In addition, the Commission has recognized that it may not

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<sup>84</sup> See *Notice* ¶ 70 & n.212 (“it may exercise ancillary authority over a matter only when it falls within the agency’s general statutory grant of jurisdiction under Title I and the regulation is reasonably ancillary to the effective performance of the Commission’s statutorily mandated responsibilities” (citing cases)).

<sup>85</sup> *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

<sup>86</sup> *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 533 F.2d 601, 612 (D.C. Cir. 1976).

exercise ancillary authority in a manner that is “antithetical to a basic regulatory parameter” established for its statutory responsibilities.<sup>87</sup>

Here, the *Notice* does not cite any “statutorily mandated responsibilities” to which mandatory data roaming might be ancillary. Instead, it refers only to the vague (and dubious) notion that data roaming may promote facilities-based service and seamless connectivity and cites the same generic licensing provisions in Title III that are discussed above.<sup>88</sup> But for the same reasons explained above, these provisions of Title III could not support the imposition of common carrier obligations on radio licensees, wholly apart from Sections 332(c) and 153(44), both of which serve as a absolute bar to such regulation.

That conclusion is further confirmed by *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979), where the Supreme Court squarely held that where the Communications Act *expressly* carves out a set of services from common carrier regulation, the Commission cannot use its ancillary authority to impose a common carrier obligation. In *Midwest Video*, Section 3(h) of the Act provided that “a person engaged in . . . broadcasting shall not . . . be deemed a common carrier,” and therefore the Court struck down a Commission order imposing common-carrier-type access obligations on cable providers. *Id.* at 700-01 (access obligations violated statute because “[e]ffectively, the Commission has relegated cable systems, *pro tanto*, to common-carrier status”). The same would be true if the Commission required data roaming: In light of Section 332 (as well as Section 153(44)), an obligation to provide data roaming would

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<sup>87</sup> Report and Order, *Interconnected VOIP Disability Access Order*, 22 FCC Rcd. 11275, ¶ 22 n.91 (2007) (citing *FCC v. Midwest Video Corp.*, 440 U.S. 689, 700 (1979)); *see also* *NARUC v. FCC*, 533 F.2d 601, 607 (D.C. Cir. 1976) (“at the outset” of assessing a Commission claim of ancillary jurisdiction, court must examine “whether any statutory commandments are directly contravened” by the asserted jurisdiction) (citing *United States v. Sw. Cable Co.*, 392 U.S. 157, 169 n.29 (1968)).

<sup>88</sup> *Notice*, ¶ 70.

“effectively . . . relegate” wireless broadband providers – who are non-CMRS information service providers – to “common-carrier status” in violation of the Act.

## **II. COMMON CARRIER REGULATION OF WIRELESS DATA ROAMING ARRANGEMENTS WOULD HARM CONSUMERS, REDUCE COMPETITION, AND DISCOURAGE INVESTMENT AND INNOVATION.**

The issue here is not whether mobile broadband roaming will be widely available absent common carriage regulation. It will. Voice roaming was ubiquitous years before the Commission adopted common carrier regulation for voice,<sup>89</sup> so much so that by 2007 “most wireless [voice] customers [had come] to expect to roam automatically on other carriers’ networks.”<sup>90</sup> Mobile broadband 2.5G roaming has also become ubiquitous without common carrier obligations.<sup>91</sup> Roaming is well under way for 3G. Next generation 3G technologies have only recently covered most of the population; HSPA covered only 20 percent of the U.S. population in 2006, and less than 60 percent in 2008.<sup>92</sup> Now that it covers most of the U.S. population, 3G roaming is increasingly being developed and offered. International 3G roaming is already widely available,<sup>93</sup> and, as discussed below, providers are now hammering out appropriate terms and conditions for domestic 3G roaming.

Legal issues aside, the only real issue, therefore, is whether, given this track record, and the significant harms that could be caused by mandating automatic data roaming, which are

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<sup>89</sup> *Id.*

<sup>90</sup> *2007 Roaming Order*, ¶ 27.

<sup>91</sup> *Notice*, ¶ 82 (“Data roaming arrangements are already established in the United States that provide roaming on 2.5G data networks.”).

<sup>92</sup> Fourteenth Report, *Implementation Of Section 6002(B) Of The Omnibus Budget Reconciliation Act Of 1993*, WT Docket No. 09-66, ¶ 123 (rel. May 10, 2010) (“*Fourteenth CMRS Competition Report*”).

<sup>93</sup> *Notice*, ¶ 84 (“a number of 3G roaming arrangements have been made between domestic and foreign carriers to support international roaming at home and abroad”).

discussed below, there is any sound policy basis for such a requirement. There is not. When the Commission examined roaming for voice, it believed that on balance the harms from common carrier regulation would be outweighed by the benefits. Whether the Commission's belief in that rationale was reasonable remains doubtful, but clearly no such conclusion could be reached for data. As shown below, the potential harms from common carrier obligations for mobile broadband data are far greater than those the Commission presumed for voice, and the benefits are far less or nonexistent. In particular, unlike voice, mobile broadband providers are facing acute spectrum shortages and explosive and unpredictable demand, which threaten service quality. Common carrier roaming obligations would make it even more difficult to manage congestion issues from the added roaming traffic, which would harm consumers and create disincentives for investment. Further, common carrier roaming obligations would encourage providers to rely on roaming in rural areas where it is more expensive to build out networks, thus leaving their own spectrum to lay fallow and undermining core goals of the national broadband plan to encourage facilities-based mobile broadband competition in rural areas and to use spectrum efficiently.

Nonetheless, if the Commission does attempt to impose common carrier obligations on these services, it should take a number of steps to minimize the harms from such regulation, and certainly should not simply import the obligations it adopted for voice. Rather, as explained below, it is critical that the Commission narrowly tailor any new common carrier regulation for mobile broadband data to account for the unique and far more complex challenges with which such providers must contend.

**A. Data Roaming Requirements Would Cause Significant Harm And Offer Little, If Any, Benefit.**

The Commission has consistently recognized that, even in circumstances in which common carrier regulation is necessary, it imposes significant social costs. In the context of mobile *voice* roaming in 2007, the Commission believed that the benefits of common carrier regulation outweighed the costs.<sup>94</sup> No such conclusion is possible here.

When the Commission mandated automatic voice roaming in 2007, mobile voice facilities had long been deployed nationwide. “Approximately 99.8 percent of the total U.S. population . . . [had] one or more different operators . . . offering mobile telephone service in the census blocks in which they live,” and each of the national providers covered at least 77 percent of the population.<sup>95</sup> Roaming arrangements had become widespread through the normal operation of market forces.<sup>96</sup> The terms of roaming arrangements were well-established, and wireless voice customers had come to expect seamless national voice service from their providers.<sup>97</sup> The disincentives for investment while real were, the Commission believed (erroneously in AT&T’s view), outweighed by the benefits, because the industry’s focus had already turned to broadband technologies, and the prospect of additional *voice* traffic from common carrier obligations posed little risk to those investments.<sup>98</sup>

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<sup>94</sup> 2010 Roaming Order, ¶ 18; see also 2007 Roaming Order, ¶¶ 27-35.

<sup>95</sup> Thirteenth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, WT Docket No. 08-27, DA 09-54, ¶¶ 2, 18 (rel. Jan. 16, 2009) (“*Thirteenth CMRS Competition Report*”).

<sup>96</sup> See, e.g., 2007 Roaming Order, ¶ 27 (“automatic roaming is currently widespread”); *Thirteenth CMRS Competition Report*, ¶ 18 (“many regional and smaller providers are able to offer pricing plans with nationwide coverage through roaming agreements with other providers.”).

<sup>97</sup> See, e.g., 2007 Roaming Order, ¶ 27 (“today, most wireless customers expect to roam automatically on other carriers’ networks when they are out of their home service area”).

<sup>98</sup> See, e.g., *id.*, ¶¶ 36-40.

In the context of wireless *data* services, the balance clearly tips radically in the opposite direction. The *Notice* acknowledges that “[a]lthough the mobile broadband market is similar to the voice market in key respects, it appears to be different in others, and it is important that we understand whether any of those differences would justify a different regulatory approach to achieve our underlying policy goals that we are taking today with regard to interconnected voice.”<sup>99</sup> In fact, there are critical differences between mobile data and voice services that militate strongly against ordering common carrier data roaming.

Most importantly, the harms and costs from common carrier data roaming obligations would be vastly greater than for voice. The wireless industry today faces a “spectrum crisis” that is being driven by explosive demand for wireless *data* services. The mobile broadband data marketplace today is a rapidly evolving ecosystem; innovation in networks, devices, and applications is proceeding at an incredibly fast pace, and data usage is growing exponentially.<sup>100</sup> As a result, network operators are reaching the theoretical limits of what they can do with

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<sup>99</sup> *Notice*, ¶ 54.

<sup>100</sup> See, e.g., *Fourteenth CMRS Competition Report*, ¶¶ 135-152, 181-183 (describing exponential growth in data and the rapid innovation in networks, devices and applications); FCC National Broadband Plan, September Commission Meeting, at slide 70 (Sept. 29, 2009), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-293742A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293742A1.pdf) (“Smartphones and Mobile PCs are driving traffic growth”; “mobile broadband handsets (speeds of 3.5G and higher) and portables will account for 83% of all mobile data traffic by 2013”; smartphones use 30x the data of a standard phone; mobile PCs use 450x the data of a standard phone); *id.*, at slide 68 (showing forecasts by Forrester Research, Gartner, Yankee Group, and Rysavy, all showing exponential growth for mobile broadband data).

existing spectrum,<sup>101</sup> and it will be years before additional sufficient spectrum will be available.<sup>102</sup>

The Commission asks whether it can lessen these harms by decreeing “that a host provider’s provision of data roaming is subject to reasonable network operations needs.”<sup>103</sup> That would not be sufficient. Even the best “operational” measures could only partially address the additional congestion caused by common carrier treatment of mobile broadband services. In fact, however, the prospect of after-the-fact litigation over every data roaming decision would only make things worse. Such an open-ended “reasonableness” standard will lead to constant second-guessing of complex decisions that must be made in real time, and the prospect of after-the-fact second guessing of those decisions by the Commission under some nebulous “reasonableness” standard would only further harm providers’ ability to effectively address complex issues.

On the other side of the scale, common carrier data regulation of mobile data would not provide the benefits that the Commission believed existed for automatic voice roaming. For example, the Commission believed that automatic voice roaming was important to facilitate entry and offset the head-start advantages of other providers.<sup>104</sup> But basic marketplace realities refute any suggestion that data roaming regulation is necessary to allow providers to gain a foothold. Numerous providers are investing heavily to deploy broadband wireless networks

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<sup>101</sup> See, e.g., *National Broadband Plan*, at 85 (“While technology will continue to improve, spectral efficiency of current OFDM-based solutions is approaching the theoretical limit set by information theory.”).

<sup>102</sup> See, e.g., FCC National Broadband Plan, September Commission Meeting, at slide 73 (Sept. 29, 2009), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-293742A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293742A1.pdf) (showing an historical 6 to 11 year time lag from the first step in identifying spectrum to the time it is deployed).

<sup>103</sup> Notice, ¶ 81.

<sup>104</sup> *2010 Roaming Order*, ¶ 21.

without common carrier requirements, including cable companies, fixed wireless companies, satellite companies, and traditional CMRS providers. Some smaller providers are even leap-frogging over 3G and skipping straight to 4G networks.<sup>105</sup> Nor are common carrier obligations needed to ensure seamless data connectivity, as the Commission thought was the case for voice. Mobile broadband data roaming is already ubiquitously available at 2.5G speeds and will develop for new technology, and most broadband devices today incorporate wi-fi capabilities, which consumers can use outside their home provider's service area.<sup>106</sup>

### **1. Common Carrier Regulation of Mobile Broadband Data Would Produce Far Greater Harms Than For Voice.**

Common carrier treatment of mobile broadband data services would cause substantially greater harm to consumers, investment and innovation, and competition than was the case for mobile voice.

*Harm To Consumers.* In contrast to the situation when the Commission mandated voice roaming, mobile broadband data providers today are facing a spectrum crisis. Rapid innovation in networks, devices, and applications has led to exponential growth in demand for network capacity that is projected to continue for the foreseeable future.<sup>107</sup> Yet at the same time, amidst

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<sup>105</sup> MetroPCS, for example, is skipping 3G technology and upgrading its 2G network directly to 4G. *Fourteenth CMRS Competition Report*, ¶ 114.

<sup>106</sup> See, e.g., *National Broadband Plan*, at 77 (“Most smartphones available today feature Wi-Fi, and users increasingly take advantage of this capability inside homes or businesses where high-speed broadband connectivity is available. According to a November 2008 report from AdMob, 42% of all iPhone traffic was transported over Wi-Fi networks rather than carriers’ own networks. Other carriers report similar trends in how their customers use Wi-Fi to complement cellular service.”).

<sup>107</sup> See, e.g., FCC National Broadband Plan, September Commission Meeting, at slide 68 (Sept. 29, 2009), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-293742A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293742A1.pdf) (showing forecasts by Forrester Research, Gartner, Yankee Group, and Rysavy, all showing historical and predicted future exponential growth for mobile broadband data).

this explosive growth in demand, providers are running out of spectrum and nearing the theoretical limit of efficient use of existing spectrum.<sup>108</sup>

The Commission itself has recognized the implications of this looming spectrum crisis: “The growth of wireless broadband will be constrained if the government does not make spectrum available to enable network expansion and technology upgrades. In the absence of sufficient spectrum, network providers must turn to costly alternatives, such as cell splitting, often with diminishing returns. If the U.S. does not address this situation promptly, scarcity of mobile broadband could mean higher prices, poor service quality, an inability for the U.S. to compete internationally, depressed demand and, ultimately, a drag on innovation.”<sup>109</sup> Similarly, the Deputy Chief of the Wireless Bureau has emphasized that, with these shortages and congestion, “networks will cost more to build and operate, quality will suffer, and, ultimately, prices will be higher.”<sup>110</sup>

Unfortunately, this is not a future problem. This spectrum shortage and the corresponding congestion is *already* threatening service quality. As one analyst put it: “[t]here simply is not enough network capacity to address the emerging demand, and we are already

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<sup>108</sup> See, e.g., Julius Genachowski, Chairman, Fed. Commc’ns Comm’n, Prepared Remarks to the New America Foundation: A 21st Century Plan for U.S. Competitiveness, Innovation and Job Creation (Feb. 24, 2010), *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-296490A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296490A1.pdf) (“the fact is America is facing a looming spectrum crunch.”); *National Broadband Plan*, at 64 (mobile broadband technology for efficient use of spectrum “is approaching the theoretical limit set by information theory”); Rysavy Research, *Mobile Broadband Capacity Constraints* (Commissioned by RIM), February 24, 2010, at 8 (predicting that mobile broadband demand exceeding supply in 2013).

<sup>109</sup> *National Broadband Plan*, at 77.

<sup>110</sup> Howard Buskirk, *More Efficient Use, More Spectrum Both Needed to Address Spectrum Shortfall*, *Communications Daily* (Mar. 5, 2010) (quoting John Leibovitz, deputy chief of the FCC Wireless Bureau).

witnessing the effects of network congestion, with many users complaining of slow network operation on some networks.”<sup>111</sup>

In this environment, it would be sheer folly for the Commission to require wireless operators to offer automatic data roaming service on a common carrier basis. It simply makes no sense to impose on wireless broadband providers, struggling to meet the bandwidth requirements of their own customers in the midst of a severe spectrum shortage, to open their networks to other providers on a common carrier basis – all the more so when those other providers could have built out their own networks, but, for whatever reason, chose not to. That much should be self-evident, but it is not just that automatic roaming requires providers to accommodate additional traffic when there may already be congestion in their network; it is also that such traffic compromises the ability of providers to engage in efficient traffic management and network engineering.

Mobile broadband providers today have some control over bandwidth demand through the pricing, service plans, and devices they promote. AT&T, for example, recently introduced new lower priced mobile broadband data plans that break free from the “one-size-fits-all” data model.<sup>112</sup> Broadband providers also make predictions about when and where bandwidth demand is likely to occur and the types of services the provider will need to support because the provider knows what devices, pricing plans, and service options its customers choose, as well historical data on its own customers’ usage patterns. But host providers have no control over the data

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<sup>111</sup> Rysavy Research, *Mobile Broadband Spectrum Demand*, at 14 (Dec. 2008), available at [http://www.rysavy.com/Articles/2008\\_12\\_Rysavy\\_Spectrum\\_Demand\\_.pdf](http://www.rysavy.com/Articles/2008_12_Rysavy_Spectrum_Demand_.pdf).

<sup>112</sup> See Press Release, AT&T, AT&T Announces New Lower-Priced Wireless Data Plans to Make Mobile Internet More Affordable to More People (June 2, 2010) <http://www.att.com/gen/press-room?pid=17991&cdvn=news&newsarticleid=30854&mapcode=financial|Wireless>. This new pricing structure allows the 98% of AT&T customers that do not typically exceed 2GB of data use to obtain lower prices. *Id.*

plans, services and other options available to roamers that may affect their demand for data, nor do they have access to the types of pricing plans and service options roamers purchase or their historical usage patterns. Consequently, host providers, for the most part, have severely diminished ability to manage or predict data usage by roamers, and this uncertainty adds to the cost of managing networks and creates significant potential for degraded service quality.

Moreover, common carrier roaming could produce fundamentally unfair results for customers of the host provider, effectively institutionalizing *reverse discrimination*. Some host providers will seek to manage congestion, in part, by implementing pricing plans that reward efficient bandwidth consumption or, they may implement other provisions to address individual customer behavior that degrades network performance for other customers. But other providers may choose not to implement such measures – or they may not need to, particularly if they decide to piggyback on the host provider’s network instead of building out their own in areas of severe congestion. In all events, the host provider would be in no position to enforce any such measures vis-à-vis the roaming provider’s customer because it would lack basic account information about that customers. Thus, while a host provider’s own customers may be subject to financial or other consequences for additional bandwidth usage, customers of other providers may be able to use the same network without such consequences – a perverse result if ever there was one. And the likely effect is that roaming customers would consume far more bandwidth than home customers – exacerbating congestion problems and the attendant service quality issues.

It is no answer to say that these harms can be avoided merely by allowing “reasonable” denials of roaming arrangements. Wireless broadband providers have no way to predict what the Commission will ultimately deem to be a “reasonable” denial or limitation on a roaming request.

Unlike the case with voice in 2007, there are no objective metrics of “standard” wireless engineering practices that the Commission could employ to distinguish “reasonable” from “unreasonable” mobile broadband data roaming denials.<sup>113</sup> The technologies, network architectures, traffic loads and science are evolving much too rapidly.<sup>114</sup> As the devices, applications, and services become more diverse, the resources and practices necessary to support them to provide consumers with acceptable performance also become more diverse, adding further complexity to these issues. As a result, judgments made quickly with imperfect information could be subjected to necessarily arbitrary second guessing by regulators as to whether particular measures were “reasonable.”<sup>115</sup> Given the severe consequences of guessing incorrectly about regulators’ ultimate view of any particular action, providers would inevitably end up harming their own customers.

Beyond that, the probability that the Commission would make the wrong choices in its after-the-fact determinations would be high. Even if a Commission decision was right with regard to a particular network at a particular time, that decision would provide little guidance to other networks employing different technologies and facing different performance, congestion and demand issues. Indeed, given how rapidly technologies and applications are changing, most Commissions decisions would be obsolete by the time they were rendered – meaning that a system of case-by-case adjudication would never give providers any clarity or predictability. Commission errors, however, would prove much more durable and could cause irreversible

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<sup>113</sup> See, e.g., Jeffrey H. Reed and Nishith D. Tripathi, *The Application of Network Neutrality Regulations to Wireless Systems: A Mission Infeasible*, at 7-8, Exhibit 2 to Comments of AT&T, Inc., *Preserving the Open Internet, Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010).

<sup>114</sup> See *id.*

<sup>115</sup> See *id.*

damage to the evolution of wireless broadband networks and services and optimal performance delivery to consumers and businesses.

In short, AT&T and other broadband data providers are working aggressively to keep up with demand and to maintain service quality in this uncertain and rapidly evolving environment by, among other things, expanding the capacity of their networks by increasing backhaul capacity, increasing the number of cell sites, expanding wi-fi networks and deploying femto-cell technologies that offload traffic from wireless data networks, and investing in improved network management capabilities. But even with all of this investment, most independent observers predict that demand will continue to explode and will soon strain the available supply. Common carrier regulation of mobile broadband would only increase that congestion, further endangering service quality. It could also impede a provider's ability to quickly transition to next-generation technologies. The better approach here is to allow the marketplace to determine how and under what conditions mobile broadband data roaming arrangements should occur.

*Harm To Investment Incentives.* The Commission also seeks comment on “the impact that extending roaming requirements to wireless data services would have on the incentives of providers to invest in advanced data networks.”<sup>116</sup> The answer is simple: common carrier regulation of mobile broadband will significantly reduce incentives to invest in and expand advanced networks, especially in rural areas.

To begin with, in the absence of common carriage requirements for mobile broadband, the pace of investment and innovation is extremely strong. Wireless providers of all types and sizes are investing billions of dollars in next-generation 3G and 4G networks. In 2009, U.S. wireless providers invested more than \$20.4 billion in their networks versus \$17.9 billion for the

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<sup>116</sup> Notice, ¶ 75.

5 biggest E.U. countries combined (U.K., France, Germany, Italy, Spain).<sup>117</sup> As explained by the Commission, “[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>118</sup> AT&T announced the completion of a software upgrade at 3G cell sites nationwide – deployment of High-Speed Packet Access (HSPA) 7.2 technology – that provides faster speeds on its 3G network; it has expanded its 3G mobile broadband network in 14 states and will upgrade of approximately 6,500 additional cell sites to 3G in 37 states in 2010.<sup>119</sup> Verizon Wireless has also invested in network upgrades to enhance its 3G capacity and coverage in 2010 with the construction of new cell sites in 30 states.<sup>120</sup> T-Mobile has announced plans to upgrade its national high-speed 3G service to the High Speed Packet Access Plus (HSPA+) technology by the end of 2010, covering more than 100 metropolitan areas and 185 million people.<sup>121</sup> And companies of all sizes and types are making substantial investments today in 3G networks, including companies like Leap, MetroPCS, Cellular South, Golden State Cellular, and

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<sup>117</sup> CTIA Notice of Ex Parte, *Annual Report and Analysis of Competitive Market Conditions With Respect To Mobile Wireless Including Commercial Mobile Services*, WT Docket No. 09-66, at 1 (May 12, 2010).

<sup>118</sup> *Fourteenth CMRS Competition Report*, ¶ 105.

<sup>119</sup> Press Release, AT&T Upgrades 3G Technology at Cell Sites Across Nation (Jan. 5, 2010), <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=30358&mapcode=corporate|financial>.

<sup>120</sup> See, e.g., Press Release, Verizon Wireless, Colorado Customers Receive More 3G Coverage With New Verizon Wireless Cell Sites (Apr. 5, 2010), *available at* <http://news.vzw.com/news/2010/04/pr2010-04-05b.htm>.

<sup>121</sup> Press Release, T-Mobile, T-Mobile to Rollout the Nation’s Fastest 3G Wireless Network with HSPA+ to More than 100 Metropolitan Areas in 2010 (Mar. 23, 2010), [http://www.tmobile.com/company/PressReleases\\_Article.aspx?assetName=Prs\\_Prs\\_20100324&title=%20T-Mobile%20to%20Rollout%20the%20Nation's%20Fastest%203G%20Wireless%20Network%20with%20HSPA+%20to%20More%20than%20100%20Metropolitan%20Areas%20in%202010](http://www.tmobile.com/company/PressReleases_Article.aspx?assetName=Prs_Prs_20100324&title=%20T-Mobile%20to%20Rollout%20the%20Nation's%20Fastest%203G%20Wireless%20Network%20with%20HSPA+%20to%20More%20than%20100%20Metropolitan%20Areas%20in%202010).

Bluegrass Cellular.<sup>122</sup> Many others are also either entering or positioned to enter, such as Cox and Harbinger/Skyterra.<sup>123</sup>

Common carriage treatment of mobile broadband data would almost certainly reduce the scale and pace of these investments. The Commission has never disputed that roaming requirements create disincentives for investment;<sup>124</sup> the question is the magnitude of those disincentives and how they balance against potential benefits. Given the looming spectrum crisis and the rapid, unpredictable level of growth of data services, the investment disincentives from common carrier treatment of mobile broadband services would be far greater than for voice, because providers will be reluctant and less able to make new investments when they will have

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<sup>122</sup> See *Fourteenth CMRS Competition Report*, ¶ 72 (“Leap, which holds many PCS licenses and AWS licenses (acquired at the 2006 auction) in markets throughout much of the country has expanded its coverage from approximately 53.9 million people in October 2008 to 80.5 million in October 2009, an increase of 26.6 million. . . . MetroPCS, which holds PCS and AWS spectrum in many markets throughout the United States, has expanded its facilities-based coverage from October 2008, when it covered approximately 56.0 million people, to 84.6 million people in October 2009, an increase of 28.6 million.”). See, e.g., Press Release, Cellular South, Cellular South Expands Advanced 3G Mobile Broadband Network To Lumberton and Lamar County (Feb. 5, 2010), <https://www.cellularsouth.com/news/2010/20100205.html>. See also pp. 48-52, *infra* (describing entry and expansion by others).

<sup>123</sup> See, e.g., *Fourteenth Competition Report*, ¶ 73 (“Cox Communications (Cox) invested more than \$500 million in spectrum in the AWS and 700 MHz bands and the development of infrastructure in 2006 and 2008. In 2008, Cox announced plans to deploy a 3G mobile wireless network in selected regions of the United States. In 2009, Huawei Technologies announced that it had signed a contract with Cox Communications to supply CDMA 1x and EV-DO network infrastructure and equipment for a Cox Communications mobile wireless network.”); Memorandum Opinion and Order and Declaratory Ruling, *SkyTerra Communications, Inc., 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, ¶¶ 55-56 (rel. Mar. 26, 2010) (describing Harbinger/Skyterra’s planned deployment) .

<sup>124</sup> See, e.g., *Notice*, ¶ 76 (acknowledging that roaming requirements create free-riding effects); *2007 Roaming Order*, ¶ 49 (“if a carrier is allowed to ‘piggy back’ on the network coverage of a competing carrier in the same market, then both carriers lose the incentive to build-out into high cost areas in order to achieve superior network coverage” and “[c]onsequently, consumers may be disadvantaged by a lack of product differentiation, lower network quality, reliability and coverage”).

no control over the terms and conditions under which they will carry the substantial and unpredictable data traffic of others in addition to their own.

As discussed above, as providers upgrade their networks to 3G and 4G capabilities, they must already account for the explosive growth in demand that they are experiencing for their own customers (and the fact that the mere existence of faster networks will spur the development of new devices and applications that in turn will drive demand to even higher levels). The exponential increases in demand and the uncertainty about how rapid innovation in the marketplace will proceed significantly increases the risks and the costs of such investment, as providers try to increase capacity and improve technology to manage their own customers' growth in data traffic.

It is indisputable that common carrier treatment of mobile broadband services would add significantly to these costs. It would severely limit providers' ability to manage the impact of the additional network congestion caused by the additional roaming traffic, and the fact that roamers' data traffic is also growing exponentially and will be affected in unpredictable ways by rapidly changing technology will add significantly to the risk and costs of facilities-based deployments. Any wireless broadband provider wishing to extend its 3G or 4G network into a new geographic area would have to plan for additional capacity to handle the uncertain but likely large demand from roamers, and it would have to implement technologies and administrative capacities needed to support widespread data roaming on those networks. Further, common carrier roaming requirements may impede providers' ability to quickly transition from older technologies that roamers may be using to newer, more efficient ones. These significant additional costs could only slow the pace of those investments and the expansion of 3G and 4G capabilities, and in some cases would likely discourage it altogether. For example, a provider

that initially intended to upgrade to 4G in four cities may choose instead to upgrade in only three cities, given the additional costs of managing more congestion and the additional uncertainty and corresponding risks associated with unknown traffic volumes from common carrier roaming obligations.

There is, moreover, something fundamentally unfair about forcing added congestion onto networks. Wireless broadband providers compete today on the scope of their geographic coverage, and providers make expensive and risky investments to extend their next-generation networks into ever expanding service areas. Common carrier requirements for data roaming would undermine that competition,<sup>125</sup> and in the context of a spectrum-constrained world, it would be fundamentally unfair to mandate that, as soon as a provider builds a new, higher-speed network in an area, the provider must immediately make the limited capacity available on that network available to all of its competitors under common carrier arrangements – creating additional uncontrollable congestion problems and forcing the host provider’s customers to suffer service quality issues and other problems.

In sum, the baseline from which the Commission is operating is the existing environment for investment, in which wireless providers of all sizes are aggressively investing billions of dollars to upgrade their networks to 3G and 4G capabilities. The “claims” of proponents of common carrier treatment of mobile broadband data roaming that a new regime of sharing would *increase* the overall amount of investment over today’s already enormous levels is simply not credible.<sup>126</sup> Courts have consistently recognized that forced sharing comes at a very significant

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<sup>125</sup> *2010 Roaming Order*, ¶ 31 (“We agree that there are pro-competitive benefits that flow from carriers differentiating themselves on the basis of coverage in their licensed service areas, including rural and remote areas”).

<sup>126</sup> *Cf. Notice*, ¶ 75 (noting that “proponents of a data roaming obligation” claim that “the amount of network investment would be increased”). Notably, each one of the proponents cited (*see id.*,

cost in terms of lost incentives for beneficial investments.<sup>127</sup> In contrast to voice roaming, the sheer magnitude of the data traffic involved relative to the scarce spectrum resources available means that a common carrier requirement would substantially increase the cost of any expansion of next-generation networks, and that can have only one effect – it will slow the pace and restrict the reach of future broadband deployments. At a time when it is critically important to do everything possible to encourage investment in wireless networks and job creation in this industry, the Commission should avoid any new regulatory mandates that would slow the pace of those investments.

*Harm to Competition.* Common carrier regulation of data roaming would clearly harm competition, especially in rural areas. Because common carriage requirements will raise the costs and increase the risks of any new investment in next generation networks, wireless broadband providers will be especially likely to rely on roaming in areas where the costs and risks of investment are already the greatest – which means that the pace of deployment of next-generation networks is especially likely to be reduced in rural areas. Greater reliance on roaming would lessen competition, because there would be fewer facilities-based competitors offering 3G or 4G services and because forced roaming would likely lower the service quality of the providers that do deploy such networks. Equally important, many smaller providers hold substantial spectrum in rural areas, and thus common carrier roaming would encourage inefficient use of spectrum – effectively inviting such providers to buy capacity on other networks rather than upgrading their own networks to make full use of their spectrum. In short,

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¶ 75 n.220) is aggressively investing in next-generation networks today and in some cases is leap-frogging 3G altogether to build a 4G network.

<sup>127</sup> See *USTA v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002) (“mandatory unbundling comes at a cost, including disincentives to research and development”); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 428-29 (1999) (Breyer, J., concurring in part and dissenting in part).

the incentives produced by common carrier obligations are diametrically opposed to the core mandates of Section 706 of the Act and the Commission's National Broadband Plan to encourage the deployment of facilities-based mobile broadband entry.

## **2. The Benefits From Common Carrier Regulation of Mobile Broadband Data Roaming Would Be Minimal.**

In the past, the Commission has identified two possible benefits of common carrier treatment of mobile voice services. First, in some contexts it believed that common carriage would promote facilities-based investment by giving new entrants a “leg up” to overcome the “head start” of established providers.<sup>128</sup> Second, the Commission believed that common carriage might promote entry by ensuring that all providers could provide seamless national geographic coverage.<sup>129</sup> Of course, these possible benefits would flow from the availability of roaming services. Given the fact that roaming services were available from and to virtually every provider in the wireless marketplace prior to the rule, it remains doubtful that a rule displacing market forces with a mandate was needed to achieve these possible benefits. In any event, these predicted benefits either do not exist or are minimal in the context of mobile broadband roaming.

*There Is No Need To Give New Mobile Broadband Data Entrants A “Leg Up” To Encourage Facilities-Based Investment.* When proponents of regulation of data roaming argue that new common carrier mandates will promote facilities-based investment, they mean that a wireless broadband provider offering data services cannot compete effectively if it cannot offer seamless nationwide coverage for those data services, and therefore without a common carrier requirement, such providers will not enter the broadband data marketplace at all. Thus, as the Commission notes, the claim that common carrier treatment of mobile broadband data services

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<sup>128</sup> See, e.g., 2010 Roaming Order, ¶ 21.

<sup>129</sup> See, e.g., 2007 Roaming Order, ¶¶ 27-29; 2010 Roaming Order, ¶ 2.

will lead to increased facilities-based investment is based entirely on the notion that such rules will induce entry that would not otherwise occur, with the result that (on balance) there will be more facilities-based investment than would otherwise occur.<sup>130</sup>

While the idea that roaming mandates would encourage deployment was doubtful in the voice context, there is no doubt that, in the context of *data* services, the entire premise of this argument – *i.e.*, the notion that the absence of mandated data roaming is deterring entry – is false. Wireless broadband providers of all sizes – including the major proponents of a data roaming obligation, such as Leap, MetroPCS, and U.S. Cellular<sup>131</sup> – are all aggressively entering the 3G and 4G data marketplaces despite the absence of common carrier data roaming rules. Leap Wireless has been rapidly expanding its 3G footprint, and it is testing 4G.<sup>132</sup> MetroPCS is leap-frogging 3G altogether and is jumping straight into 4G, which it expects to deploy this year.<sup>133</sup> Cellular South is likewise quickly expanding its 3G network.<sup>134</sup> Golden State Cellular

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<sup>130</sup> See *Notice*, ¶ 75 (“proponents of a data roaming obligation argue that, because the availability of roaming will facilitate entry, the amount of network investment will be increased”).

<sup>131</sup> See *id.*, ¶ 75 n.220.

<sup>132</sup> See, e.g., Press Release, Leap, Leap Brings Unlimited Wireless Services to Philadelphia (Mar. 9, 2010), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle&ID=1263917&highlight> (expanding to Philadelphia); Press Release, Leap, Leap Brings Cricket Unlimited Wireless Services to Washington, D.C. (June 23, 2009), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle&ID=1301347&highlight> (expanding to the greater Washington, D.C. and Baltimore areas); Press Release, Leap Brings Cricket Unlimited Wireless Services to Lake Charles, La. (Nov. 17, 2009), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle&ID=1356547&highlight> (expanding to Lake Charles, Louisiana); 10-Q, Filed: May 10, 2010 for Period: March 31, 2010, at 65 (Leap is conducting a technical trial of 4G).

<sup>133</sup> See, e.g., Press Release, MetroPCS, MetroPCS Reports First Quarter 2010 Results, at 1-2 (May 6, 2010), available at <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NDQ4NDh8Q2hpbGRJRD0tMXxUeXBIPtM=&t=1> (MetroPCS reiterated it is “on track for our initial 4G LTE launch in selected metropolitan areas in the second half of this year” and that its “4G LTE network will enable us to offer and increasing array of new services and applications to Smartphones and other devices.”).

recently completed a significant upgrade of its 2G network to 3G.<sup>135</sup> And, Bluegrass Cellular has recently upgraded large portions of its network from 2G to 3G.<sup>136</sup> Obviously, the absence of common carrier data roaming is not deterring these companies from entering the broadband data marketplace and offering higher-speed next-generation services.<sup>137</sup>

The Harbinger/Skyterra project is another example. As the Commission recently explained: “Harbinger plans to construct a[] . . . 4G mobile broadband network that primarily uses SkyTerra’s ATC authority and SkyTerra’s new next generation satellites. . . . Harbinger’s broadband network will provide voice and data mobile wireless services nationwide, including to rural areas that lack service from existing terrestrial wireless providers. . . . Harbinger’s network will cover 100 percent of the U.S. population via the satellite component and ultimately over 90 percent of the population via its terrestrial component. . . . Excluding satellite coverage, Harbinger has committed to a build-out schedule of its 4G terrestrial network that will provide coverage in the United States to at least 100 million people by December 31, 2012, at least 145 million people by December 31, 2013, and at least 260 million people by December 31,

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<sup>134</sup> Press Release, Cellular South, Cellular South Expands Advanced 3G Mobile Broadband Network Throughout Mississippi (Dec. 28, 2009), *available at* <https://www.cellularsouth.com/news/2009/20091228.html> (“The company’s commitment to providing its customers with the most advanced and reliable 3G coverage available has included the activation of more than 500 new cell sites across its footprint and nearly 450 completely new sites with 3G capacity. This year Cellular South has continued with its promise and launched more than 158 new 3G sites enhancing its network and improving its overall wireless coverage.”).

<sup>135</sup> News Release, Golden State Cellular, 3G (Mar. 9, 2010), *available at* <http://www.goldenstatecellular.com/golden-state-cellular-news/htc-hero/> (“Golden State Cellular announces the addition of 3G Mobile Broadband to a significant portion of their network.”).

<sup>136</sup> *See* News Releases, Bluegrass Cellular, *available at* <http://70.32.115.24/about/news> (various news releases on expansions and upgrades).

<sup>137</sup> What is driving this investment is *competition*. *See, e.g., Fourteenth CMRS Competition Report*, ¶ 105 (“Network investment remains a centerpiece of providers’ efforts to improve their customers’ mobile wireless service experience.”).

2015.”<sup>138</sup> Harbinger obviously is not waiting for common carrier treatment of mobile broadband services.

Clearwire is another prominent example. It is a brand new entrant in mobile broadband data services that now provides service in nearly two dozen cities across the United States (including Hawaii) and it is continuing to expand rapidly.<sup>139</sup> Clearwire’s service is “expect[ed] to reach 120 million POPs by the end of 2010,” and “it is available under both Sprint Nextel’s 4G brand as well as Clearwire’s CLEAR brand.”<sup>140</sup> “In addition, since July 2009, Comcast has been reselling Clearwire’s WiMAX service under the brand name Comcast High-Speed 2go in five cities - Atlanta, Chicago, Philadelphia, Portland, and Seattle” and it “is sold bundled with one of Comcast’s other Internet access, phone, or multichannel video products.”<sup>141</sup>

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<sup>138</sup> Memorandum Opinion and Order and Declaratory Ruling, SkyTerra Communications, Inc., *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, ¶¶ 55-56 (rel. Mar. 26, 2010).

<sup>139</sup> News Release, Clearwire, *Clearwire Ramps Up CLEAR(R) 4G Service in Baltimore* (June 1, 2010), available at <http://newsroom.clearwire.com/phoenix.zhtml?c=214419&p=irol-newsArticle&ID=1432550&highlight> (“Clearwire service is currently available in cities across the United States, including: Atlanta and Milledgeville, GA; Baltimore, MD; Boise, ID; Chicago, IL; Las Vegas, NV; Kansas City, KS, Philadelphia, Harrisburg, Reading, Lancaster and York, PA; Charlotte, Raleigh, and Greensboro, NC; Honolulu and Maui, HI; Seattle and Bellingham, WA; Portland, OR; and Dallas/Ft. Worth, Houston, San Antonio, Austin, Abilene, Amarillo, Corpus Christi, Killeen/Temple, Lubbock, Midland/Odessa, Waco and Wichita Falls, TX; and central Washington, D.C. In the summer of 2010, CLEAR service will extend to Jacksonville and Daytona, FL; Nashville, TN; St. Louis, MO; Salt Lake City, UT; Merced, Modesto, Stockton, and Visalia, CA; Wilmington, DE; Grand Rapids, MI; Eugene, OR; Richmond, VA; and Yakima and Tri-Cities, WA.”). See also Kevin Fitchard, *Clearwire’s Wolff embraces 4G as a whole but touts spectrum position*, Connected Planet, Apr. 2, 2009, available at [http://blog.connectedplanetonline.com/bloglive\\_ctia/2009/04/02/clearwires-wolff-embraces-4g-as-a-whole-but-touts-spectrum-position](http://blog.connectedplanetonline.com/bloglive_ctia/2009/04/02/clearwires-wolff-embraces-4g-as-a-whole-but-touts-spectrum-position) (Clearwire co-chairman Ben Wolff asserting that “Clearwire[] [has] superior spectrum holdings compared to other operators, giving it implicit an advantage in any large-scale mobile broadband rollout.”).

<sup>140</sup> *Fourteenth CMRS Competition Report*, ¶ 117.

<sup>141</sup> *Id.*

Cox Communications, a cable company, is another obvious example. “When it comes to wireless and mobility, Cox Communications Inc. isn’t messing around this time. It’s putting its money where its mouth is, going ‘all-in,’ and jumping in with both feet all at the same time as it builds out elements of its own 3G network, installs the steps necessary to make the climb to Long-Term Evolution (LTE) technology, and takes control of the services that will ride on top of it all.”<sup>142</sup>

In many ways, the entire notion of a “head start” does not really exist for mobile broadband services, where technology is continuously and rapidly evolving and all providers are, for all intents and purposes, new entrants. Everyone is still at the starting blocks for 4G deployment, and every existing and potential facilities-based provider has an opportunity to get in on the ground floor today, regardless of what types of networks they currently offer (as illustrated by MetroPCS’s plan to jump straight to 4G).

Courts have repeatedly reversed the Commission for imposing regulation designed to give new competitors a “leg up” against established competitors in contexts in which the evidence clearly showed that entry was occurring undeterred.<sup>143</sup> Whatever the merit of the view

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<sup>142</sup> Jeff Baumgartner, *Cox Wireless: Soup to Nuts*, Light Reading, Oct. 28, 2008, available at [http://www.lightreading.com/document.asp?doc\\_id=166865&site=lr\\_cable](http://www.lightreading.com/document.asp?doc_id=166865&site=lr_cable); see also Kelly Riddell, *Cox Bets on Mobile Phones to Lure AT&T, Verizon Users (Correct)*, Bloomberg Businessweek, Mar. 12, 2010, available at <http://preview.bloomberg.com/news/2010-05-12/cox-communications-ceo-bets-on-mobile-service-to-lure-at-t-verizon-users.html> (“Cox will start its consumer mobile service in three markets – Orange County, California; Omaha, Nebraska; and Hampton Roads, Virginia – in the next two to three months, President Pat Esser said in an interview. Cox Business’s wireless plans will also be rolled out first in those markets. . . . Cox plans to upgrade its network to long-term evolution 4G technology, with trials already going on in Phoenix and San Diego, Esser said. The company has signed on several handset providers, he said, without disclosing names.”)

<sup>143</sup> *USTA v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002) (unlawful for Commission to “inflict on the economy the sort of costs” associated with mandated unbundling with “naked disregard of the competitive context,” including widespread entry by competitors); *Comcast Corp. v. FCC*, 579 F.3d 1, 7 (D.C. Cir. 2009) (Commission “fails to consider the impact of DBS companies’

that voice providers would not enter the marketplace without a guaranteed ability to offer voice roaming nationwide, common carrier treatment of mobile broadband data services is obviously not deterring entry in the broadband data marketplace, and it would be patently arbitrary for the Commission to accept the self-serving and unsupported claims of those who seek to take advantage of mandatory data roaming requirements over the uncontrovertible evidence that providers are aggressively building out 3G and 4G networks without such requirements.<sup>144</sup> Indeed, far from inducing entry and investment, common carrier treatment of data roaming would facilitate a scaled-back investment strategy, in which providers transfer the risks associated with exploding data traffic and more expansive deployments to other providers and rely on roaming to free-ride on the investments of others.

*Seamless Coverage.* The Commission seeks comment on “the importance of data roaming.”<sup>145</sup> One of the major reasons why providers of all types are proceeding with aggressive build-out plans despite the absence of a common carrier requirement is that consumers today have a broader variety of options for obtaining data connectivity outside their home areas than was ever the case for voice services, including not only roaming but also wi-fi access. The question in the data context is not whether customers have seamless access to data services today, but what is the appropriate *level* of seamlessness given the tradeoffs at stake. Common carrier regulation might ensure that customers can obtain a higher level of service (*i.e.*, data

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growing market share (from 18% to 33%) over the six years immediately preceding issuance of the Rule, as well as the growth of fiber optic companies.”).

<sup>144</sup> *Cf. USTA*, 290 F.3d at 429 (vacating “line sharing” for data services sought by the very competitors that “appear to be leading the incumbent LECs in their deployment of advanced services,” because “inflict[ing] on the economy the sort of costs” that come from forced sharing is irrational “where it had no reason to think doing so would bring on a significant enhancement of competition”).

<sup>145</sup> *Notice*, ¶ 59.

access at higher speeds), but common carriage imposes many costs. Moreover, it would be an odd competition policy to mandate, in effect, that consumers are guaranteed the same level of service, regardless of which provider they have chosen. In short, there is simply no marketplace *need* for common carrier treatment of data roaming.

As an initial matter, consumers today already effectively enjoy seamless nationwide roaming for data connectivity. As the Commission concedes, roaming on 2G networks is already widely available,<sup>146</sup> and U.S. providers have already entered into several international roaming arrangements for 3G data services. What is more, AT&T is currently in the process of developing a domestic 3G roaming policy that it intends to make available. After 4G service has been deployed, it is likely that the marketplace will develop roaming alternatives for 4G services as well.

In contrast, in the voice context, the Commission was dealing with an all-or-nothing proposition; the concern was that, in the absence of automatic roaming, there would be areas in which new entrants would not be able to offer voice service at all. In the data context, however, roaming is effectively ubiquitous today, and the only question is whether to mandate additional *layers* of “seamlessness” – *i.e.*, whether consumers should be entitled to roam on data networks *at any particular speed*. Accordingly, the premise of the Commission’s decision in the context of voice roaming does not exist for 3G and 4G services, and the costs of common carriage would be far too great merely to attempt to guarantee higher levels of service (especially when the marketplace evidence today shows that the ability to roam at the highest speed offered by whatever provider happens to have deployed the most advanced technology in each area is not competitively necessary).

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<sup>146</sup> See, e.g., *id.*, ¶ 82 (“Data roaming arrangements are already established in the United States that provide roaming on 2.5G data networks.”).

Equally important – and again, in contrast to voice roaming – mobile broadband data customers have other ways to obtain data connectivity outside of their home areas apart from roaming. Most 3G handsets today (and likely all 4G handsets) have wi-fi capabilities. There are tens of thousands of wi-fi hotspots available today throughout the country.<sup>147</sup> In most cases, anyone with a wi-fi compatible device can sign up to use those wi-fi hotspots, often for free, and obtain connectivity at speeds and service quality that are often equal to or even greater than 3G and 4G services. Indeed, wireless broadband consumers today are quite comfortable using wi-fi capabilities even *within* their home areas, because providers actively encourage consumers to use wi-fi hotspots to offload excess traffic and to control congestion. The enormous popularity of devices like the wi-fi-only iPad and the iPod Touch, which rely *entirely* on wi-fi connectivity, dramatically underscores that that wi-fi is a broadly accepted alternative and that common carrier treatment of mobile broadband data is not necessary to facilitate a competitive entry into the data marketplace.

**B. 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 to require data roaming and the compelling public policy reasons that counsel against any such requirement at this time, the Commission nonetheless is determined to push forward with such a requirement, the Commission cannot simply extend voice roaming rules to the data context. Data roaming presents fundamentally different issues and any regulatory requirements adopted for data roaming must reflect those differences. Most importantly, any such requirements must leave host providers with a

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<sup>147</sup> For example, Starbucks and McDonalds will be offering *free* wi-fi access at their many thousands of locations nationwide. See Ashley M. Heher, Starbucks: Free Wi-Fi at 6,700 US Sites, ABC News, June 14, 2010, available at <http://abcnews.go.com/Technology/wireStory?id=10911923>.

substantial degree of discretion to manage congestion on their networks and ensure, first and foremost, that their own customers receive the highest quality service possible. To that end, the Commission should not adopt a presumption that any request for roaming from a technically compatible provider is reasonable, and it should adopt other rules to allow providers to prioritize the traffic of their own customers. Because subjective standards that purport to address that interest will only raise as many questions as they answer, bright-line rules and safe harbors, rather than nebulous after-the-fact “reasonableness” standards, would also be imperative. In addition, as explained below, any roaming obligations should expressly (1) apply only between networks that use the same radio technologies and air interfaces and that have substantial networks of their own, in order to preserve the proper incentives for facilities investment, and (2) prevent providers from using roaming as *de facto* resale.

***1. There Should Be No Presumption That Any Mobile Wireless Broadband Roaming Request By A Technically Compatible Requesting Provider Is Reasonable.*** The Commission asks whether it should 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>148</sup> It should not. Mobile broadband roaming presents far more complex and unpredictable issues than was the case for voice, and forcing broadband providers to negotiate against the backdrop of such a presumption would greatly exacerbate the harms of common carrier regulation.

The adoption of any such presumption would face a high legal hurdle. The D.C. Circuit and Supreme Court have held repeatedly that the complainant bears the burden in Section 208 Complaint proceedings.<sup>149</sup> The Administrative Procedure Act likewise provides that “[e]xcept as

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<sup>148</sup> Notice, ¶ 82.

<sup>149</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

otherwise provided by statute, the proponent of a rule or order has the burden of proof.”<sup>150</sup> And, the Commission has always and consistently held that “it is well settled that complainants in Section 208 formal complaint proceedings bear the burden of proof.”<sup>151</sup> Any attempt by the Commission to reverse this long-established principle in the context of data roaming would thus be subjected to exacting scrutiny on review.<sup>152</sup>

The Commission cannot surmount that high hurdle. 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. By 2007, mobile voice technology was stable and well understood, demand was growing at a predictable rate, and there were no significant congestion or capacity issues. Thus, by the time the Commission determined that roaming requests would be presumed reasonable, the terms, conditions, pricing, and other issues that made up a reasonable roaming arrangement were well

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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 “the 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”).

<sup>150</sup> 5 U.S.C. § 556(d).

<sup>151</sup> *See, e.g., Beehive Tel., Inc.*, 12 FCC Rcd. 17930, ¶ 23 (1995), *aff’d on other grounds*, 179 F.3d 941 (D.C. Cir. 1999); *see also Ascom Commc’ns, Inc. v. Sprint Commc’ns Co.*, 15 FCC Rcd. 3223, 3230 n.41 (2000); *AT&T v. Bell Atlantic*, 14 FCC Rcd. 556, 570 (1998); *Directel, Inc. v. AT&T*, 11 FCC Rcd. 7554, 7560 (1996).

<sup>152</sup> *See, e.g., Ramaprakash v. FAA*, 346 F.3d 1121, 1124 (D.C. Cir. 2003) (agency must “provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored”) (internal quotation marks omitted).

understood, and, indeed, such arrangements were already wide-spread throughout the United States.<sup>153</sup>

Data roaming has none of these characteristics. The mobile broadband marketplace is far from mature. As the Commission admits, it is still “at a critical early stage.”<sup>154</sup> Indeed, the mobile broadband data marketplace is in far greater flux than the voice marketplace was in 1996, when the Commission expressly declined to impose any automatic roaming obligations, finding the technological, economic and public interest impact to be “inconclusive.”<sup>155</sup> In contrast to voice, the mobile broadband marketplace is characterized by exploding demand, congestion concerns, spectrum shortages, and complex network management issues that threaten quality of service and continued innovation, and broadband providers need to maintain the freedom to manage these issues, especially as the spectrum crisis worsens. Both the Commission and the industry have limited experience in managing these issues for data roaming; the industry is only now beginning to examine how best to implement 3G roaming and there is no experience whatsoever with 4G roaming.

Second, unlike the case with voice, mobile broadband is not a single, discrete service based on a relatively uniform device technology. Broadband “data” service is actually many different services with vastly different network demands, including (among others) Internet browsing, email, video streaming, music streaming, video conferencing, gaming, interactive statistics and real time video for sporting events, movie previews, online banking, ebook

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<sup>153</sup> *2007 Roaming Order*, ¶ 27 (“The record demonstrates that automatic roaming is currently widespread. . . . Today, most wireless customers expect to roam automatically on other carriers’ networks when they are out of their home service area.”).

<sup>154</sup> *Notice*, ¶ 60.

<sup>155</sup> Second Report and Order and Third Notice of Proposed Rulemaking, *Interconnected Resale Obligations Pertaining to Commercial Mobile Radio Services*, 11 FCC Rcd. 9462, ¶¶ 16-18 (1996) (“*1996 Report and Order*”).

services, and turn-by-turn directions services. Broadband data services are offered in conjunction with a vast array of devices with wide-ranging technologies, from traditional handsets, to data cards for computers, to machine-to-machine devices (*e.g.*, GPS devices, e-readers, e-healthcare devices, energy grid devices, security alarms, fleet management). And network technologies continue to rapidly evolve with different providers choosing and experimenting with myriad and constantly evolving technologies, including CMRS-based technologies, Wi-Max-based mobile technology, and satellite technology using MSS services. There is no one-size-fits-all presumption in this context – the reasonableness of a data roaming request will vary greatly depending on the technologies, frequency bands, devices, and services involved.

Given the enormous differences between voice and data roaming, it would be wholly arbitrary to for the Commission to reverse the standard statutory presumptions by deeming any request for broadband roaming presumptively reasonable. The simple fact is that not all data roaming requests will be reasonable. Whether any particular roaming request is “reasonable” will hinge on a myriad of factors. One consideration, for example, would be whether the host provider has sufficient capacity to handle the roaming traffic without causing congestion that harms service quality for its customers. Less obvious, but just as important, is the fact that some devices and applications rely on significantly more signaling than other devices and applications, and these difference can have severe impacts on the amount of capacity needed to support such devices.<sup>156</sup> And given the need to manage congestion, the host provider may need to preserve

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<sup>156</sup> See Jeffrey H. Reed & Nishith D. Tripathi, *Wireless Net Neutrality Regulation: A Response to Afflerbach and DeHaven*, at 15, Exhibit 1 to Reply Comments of AT&T Inc., *Preserving the Open Internet, Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52 (filed Apr. 26, 2010) (“Some devices also may be designed to be aggressive and bombard the network with extremely frequent location area updates upon initial location area update failure.

the right to prioritize its own traffic, and any roaming request that did not permit such prioritization would be presumptively unreasonable.

Whether a roaming request is reasonable also depends on the robustness, coverage and capabilities of the *requesting* provider's network, and whether the host provider has an interest in roaming on the requesting provider's network. Where there is an interest in reciprocal roaming, the value of such roaming will necessarily be reflected in the terms, conditions and pricing of a roaming arrangement, but value of the reciprocal roaming arrangement will vary greatly depending on the extent to which the requesting provider can support the mobile broadband data requirements of the host provider's customers. Moreover, whether a request is reasonable would also depend on whether the requester could show that obtaining broadband roaming would facilitate its own continued deployment of mobile broadband facilities, rather than incenting it to avoid such investments, particularly in underserved marketplaces where the requester holds spectrum.

The proper approach here is to preserve the negotiating parties' freedom to find different solutions to varying problems, rather than straightjacket negotiations with "presumptions" that will skew providers toward accepting harmful requests in order to avoid Commission litigation. Such rigid presumptions will blunt incentives for investment and innovation for devices and applications, deter investment by would-be host and requesting providers, and undermine

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Excessive signaling associated with location area updates degrades the performance of the network and affects network accessibility for other devices. Such aggressive location area updates may seemingly improve the performance of this one device, but their impact on the network is analogous to a denial-of-service attack. Live-air field tests by the network operator are the only way to discover these types of problems. No standards body or independent third-party test lab could predict the need for testing in areas such as this; only the wireless operator who has in-depth knowledge and experience with the network can do so.”).

competition by decreasing incentives for providers to differentiate themselves by building out networks over larger geographic areas.

***2. Host Providers Must Be Permitted The Flexibility To Manage Network Congestion, Implement Security Measures, And Prioritize Their Own Customers' Traffic.*** If the Commission mandates mobile broadband roaming, such rules must give 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. This discretion should explicitly include the ability to prioritize the host providers own traffic over that of roaming traffic and to implement security and other measures to protect its network.

AT&T and European providers have already experienced significant congestion issues that have resulted in providers reducing the access or speeds that are made available to roamers. Most international data roaming agreements allow the host provider to throttle back the availability or capacity of service to roamers to address congestion. European providers today frequently rely on these provisions and move international roamers from 3G to 2G networks. AT&T itself has been forced to take similar actions in very limited circumstances – specifically, during the last holiday season, due to extraordinary demand, AT&T exercised its right to place international 3G roamers on its 2G network in New York City. If the Commission orders common carriage treatment of data roaming for domestic data traffic, it is inevitable that providers will experience even greater added congestion and need to protect their own customers' service quality.

Indeed, the Commission recognizes that mobile broadband roaming raises significant issues “regarding network capacity, integrity, [and] security” and affects “the ability of providers

to offer full access to their own customers.”<sup>157</sup> There is no one-size-fits-all solution to these issues. AT&T is investing enormous resources to develop and implement best practices to address these issues, a task that is extremely complex. Mobile wireless broadband roaming obligations should not be allowed to impede host providers’ ability to experiment with and implement network management techniques that maximize the value of the network for their customers. Accordingly, the Commission should clarify that any broadband data roaming requirements it adopts will not in any way limit a host providers’ ability to manage traffic on its network to address congestion, security and other significant operational issues in the manner chosen by the network operator, regardless of its impact on roaming customers.

The Commission asks whether it is sufficient to clarify “that a host provider’s provision of data roaming is subject to reasonable network operations needs.”<sup>158</sup> It is not. As discussed above, such a “reasonable” 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 solving congestion and security issues. Further, what is “reasonable” will be in constant flux as technology, services and applications continue to evolve. Network experts Professor Reed and Dr. Tripathi recently provided an illustrative example: a wireless caller who uses a video application on a mobile basis and therefore consumes bandwidth from three different cell sites. This single customer might be consuming enough bandwidth to support 32 separate voice calls at each of the base stations. Without prioritization of voice, this one caller could block up to 96 voice calls; even with prioritization, that caller could block a variety of other non-prioritized data users. As Professor Reed and Dr. Tripathi ask: “What is ‘reasonable’ in this situation? Is it ‘reasonable management’ to maintain the video link since it was

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<sup>157</sup> *Notice*, ¶ 80.

<sup>158</sup> *Id.*, ¶ 81.

established before the [other] call requests? Is it ‘reasonable management’ to deny service to 32 or more users for the sake of one user?” They explain: “The point is that radio resource management in traffic prioritization is a complex issue, one that must be driven by unreliable propagation and limited bandwidth. The best design does the best job possible to satisfy aggregate customer satisfaction in the particular circumstances, which will differ from network to network, at different locations within networks, and with time.”<sup>159</sup> The issues raised by Professor Reed and Dr. Tripathi, of course, were in the context of a network operator handling traffic for its own customers. These issues become increasingly complex when roaming is introduced.

The Commission should thus establish a “safe harbor” that host providers are permitted to prioritize traffic for their own customers in times of congestion or where there are otherwise competing needs for bandwidth.<sup>160</sup> Such prioritization could take several forms: (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) “speed” limits on roaming users; and (4) congestion-based pricing. Such prioritization and management prerogatives are commonly included today in international broadband roaming arrangements.

***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 Own.*** To preserve the proper incentives for investment, common carrier obligations

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<sup>159</sup> See, e.g., Jeffrey H. Reed and Nishith D. Tripathi, *The Application of Network Neutrality Regulations to Wireless Systems: A Mission Infeasible*, at 33-34, Exhibit 2 to Comments of AT&T, Inc., *Preserving the Open Internet, Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010).

<sup>160</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.

should apply only among providers using the same air interfaces, spectrum bands and radio technologies, and where the requesting provider has already deployed a substantial network.<sup>161</sup> Without such requirements, providers will have heightened incentives to scale back their own deployments and free-ride on the superior investments of others.

Any common carrier roaming obligation will create incentives to build the smallest networks possible, in the lowest cost areas (typically urban areas), and to use roaming arrangements that rely on the networks and investments of others to fill out their service areas. Without an “equal network” rule, these negative incentives would be even worse: providers would have an incentive to build a 2G network, provide their customers with 3G capable handsets, and rely on roaming arrangements to provide national 3G coverage. For example, absent an equal network rule, a provider could build out a less expensive GSM/EDGE network in Los Angeles and provide customers with HSPA handsets that are backwards compatible with its GSM/EDGE network, and then rely on roaming arrangements to supply its customers with HSPA services in both its home area and throughout the country. These perverse incentives would especially deter facilities-based build-out in rural areas.

An equal network rule would also promote competition. Common carrier data roaming undermines competitive incentives of all providers to differentiate themselves with investments in faster technologies and greater coverage. Wireless competition today is largely a competition to innovate and to differentiate oneself from one’s competitors, and firms compete by innovating in every facet of their offerings – network infrastructure, handsets, applications, pricing plans, and billing systems. The transition to 3G and soon to 4G will only increase the opportunities for

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<sup>161</sup> AT&T suggests that the Commission adopt a substantial buildout requirement to be eligible for roaming along the lines of the buildout requirements adopted by the Commission in the 700 MHz proceedings.

competitive differentiation and innovation. As the Commission itself points out, “there are pro-competitive benefits that flow from carriers differentiating themselves on the basis of coverage in their licensed service areas, including rural and remote areas.”<sup>162</sup> But if providers cannot obtain any competitive benefit from distinguishing themselves with upgrades to 3G and 4G technologies, common carrier roaming will undermine competition.

These adverse effects can be mitigated by limiting common carrier roaming obligations to providers that have already made substantial investments in the same technologies. Such a rule would allow like-to-like roaming while maintaining beneficial incentives to invest in upgrades in their air interfaces, radio technologies, and geographic coverage. Smaller providers appear to support such restrictions. For example, Leap Wireless has previously explained that it would be appropriate to limit data roaming to instances where “a requesting carrier provides the requested service to its customers on its own home network before the roaming obligation applies.”<sup>163</sup> Leap has further argued that this step would help to address the problem of “free-riding on the innovation of others” and that such a requirement would help “leave ample room for product differentiation.”<sup>164</sup>

Further, common carrier rules for mobile broadband data roaming only if the requester has deployed mobile broadband in its service area using the same frequencies and air interface technology would ensure that data roaming could be reciprocal, allowing users of both networks to have broader, more seamless broadband services. Without reciprocal access, a roaming

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<sup>162</sup> 2010 Data Roaming Order, ¶ 31.

<sup>163</sup> Comments Of Leap Wireless International, Inc., *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, at 7 (Oct. 29, 2007).

<sup>164</sup> *Id.*

mandate becomes a one-way street, advantaging some competitors literally at the expense of others and, as noted, quickly starts to look more like impermissible resale than roaming.

Finally, as noted, the Commission clearly should not apply any new common carrier data roaming rules to 4G services.<sup>165</sup> Given that neither providers nor the Commission have real-world experience with 4G services, it is impossible to predict at this time the extent to which 4G roaming will cause congestion or other problems that will undermine service quality. Further, forcing each provider to consider the impact of roaming – in terms of both control of congestion and technical implementation – would add a layer of complexity and expense that could only slow down the deployment of 4G services. In addition, unlike 2G and 3G networks, LTE 4G networks will carry both voice and data traffic over the same data network and any action that increases congestion would thus harm voice services in addition to data services.

***4. Mobile Wireless Broadband Roaming Rules Should Clearly Prohibit The Use Of Roaming Arrangements As De Facto Resale Services.*** Any Commission rules in this context should also strongly protect against permitting “a backdoor way to create *de facto* mandatory resale obligations or virtual reseller networks.”<sup>166</sup> The Commission has consistently recognized, including in this *Notice* (¶ 76), that the availability of resale would strongly undermine investment incentives. As the Commission has previously explained, “[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.”<sup>167</sup> Indeed, the Commission expressly recognized that mandatory resale imposed

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<sup>165</sup> *Notice*, ¶ 84.

<sup>166</sup> *Notice*, ¶ 35; *see also* 2007 *Roaming Order*, ¶ 51.

<sup>167</sup> *Notice*, ¶ 35.

significant administrative costs, and that the ability to free-ride on other networks effectively undermined investment incentives.<sup>168</sup> As explained by the Sixth Circuit, “the FCC reasoned [that] the costs of the resale rule would come to outweigh its benefits.”<sup>169</sup> Accordingly, the Commission permitted the resale rule to sunset in 2002, and has declined to adopt rules that would effectively re-impose such rules.<sup>170</sup> Any new rules governing data roaming must therefore prohibit practices that would effectively permit resale.

First, the Commission should expressly authorize host providers to 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. A provider that sells service to a person located outside of its service territory is clearly using roaming as *de facto* resale.<sup>171</sup>

Second, the Commission should expressly authorize host providers to 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. A provider that uses roaming where it does or could provide its own service is clearly engaged in *de facto* resale. Accordingly, any common carrier roaming requirements should be limited to only those situations where the requesting provider’s spectrum usage rights are encumbered such that it cannot use them to provide mobile broadband service and only for the geographic areas where

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<sup>168</sup> First Report and Order, *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, 11 FCC Rcd. 18455, ¶¶ 14, 25 (1996).

<sup>169</sup> *Cellnet Commc’ns v. Telecomms. Resellers Ass’n*, 149 F.3d 429, 434 (6th Cir. 1998).

<sup>170</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>171</sup> *Id.* (“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.”).

and for the time period during which the spectrum is actually encumbered. In this regard, the Commission should clarify that in the event of any dispute between a requesting provider and a host provider regarding the requesting provider's right to automatic roaming in its home market, the host provider has the right to seek Commission adjudication by filing a Section 208 complaint.<sup>172</sup>

Third, the Commission should adopt its proposal to allow providers to prohibit “a carrier that obtains automatic roaming from another carrier” from “advertis[ing] that it offers its subscribers roaming on a particular carrier's network absent a voluntary agreement by the host carrier.”<sup>173</sup> Advertising that customers can use a particular host network out-of-region as a means of differentiating the requesting provider's service also encourages the use of roaming as *de facto* resale and should not be permitted. AT&T, for instance, makes significant capital and marketing investments to maximize the quality and brand image of its network to differentiate itself from its many competitors, and roaming providers should not be permitted to trade on AT&T's brand or encourage customers to sign up with its service in order to obtain AT&T service out-of-region.

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<sup>172</sup> In addition, where a requesting provider is permitted to obtain home roaming, it should be “obligate[d] . . . to allow the host provider to use the requesting provider's spectrum in the market in which the host provider makes data roaming available to the requesting provider.” *Notice*, ¶ 83. If a provider is requesting roaming in an area where it has spectrum, that indicates that the provider, for whatever reason, is unwilling to deploy service using that spectrum, and rather than allowing such spectrum to remain fallow, the host provider should be allowed to put it to use. Such a rule would result in far more efficient use of spectrum, and allow the host provider to offset at least some of the congestion and other harms caused by the requesting provider's roaming.

<sup>173</sup> *Notice*, ¶ 76.

**CONCLUSION**

For the forgoing reasons, the Commission should not impose common carrier regulation on mobile broadband roaming.

Respectfully Submitted,

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