Congress of the United States
House of Representatives
Washington, D.C. 20515

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February 4, 2011

The Honorable Julius Genachowski
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20515

Dear Chairman Genachowski:

We are concerned that you may be moving forward with a proposal to impose data roaming obligations on mobile broadband service providers without having adequately answered our previous inquiry into your authority to do so. Please take no additional action on this matter until you have provided us with a more full written analysis and we have had an opportunity to evaluate the efficacy of your response.

We asked in our November 23, 2010, letter that you "[p]lease identify what *provisions* in the Communications Act give the Commission the statutory authority to regulate data roaming and provide a basis on which the Commission can move forward with an Order" (emphasis added). In your December 13 response to us, however, you failed to adequately explain the authority upon which the Commission could impose data roaming obligations. Instead, you did little more than broadly assert authority under various *titles* of the Act and summarize arguments made by parties in the pending proceeding.

As we noted, section 153(44) of the Communications Act provides that "[a] telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services." Mandatory roaming, as the Commission has acknowledged, is a common carrier obligation. Conversely, the Commission determined in 2007 that mobile broadband services are information services, not telecommunications services. Please explain, with specificity, how a common carrier obligation can be imposed upon the provision of a non-telecommunications service.

In addition, Section 332(c)(2) of the Communications Act provides that "[a] person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier *for any purpose under this Act*" (emphasis added). Please explain how the Commission has the authority to circumvent this provision with respect to mobile broadband services, which is private mobile service.

We ask for a prompt response to this letter. Please outline your views, not the views of others, and include as part of your analysis references to specific provisions of the Communications Act. If you have any questions, don't hesitate to contact the Republican staff of the Committee on Energy and Commerce at (202) 225-2927.

Sincerely,

Mary Bono Mack

Marsha Blackburn

Steve Scalise

Phil Gingrey

Ed Whitfield

Joe Barton

Ralph M. Hall

Tim Murphy

cc: The Honorable Henry A. Waxman, Ranking Member

The Honorable Anna Eshoo, Jr., Ranking Member
Subcommittee on Communications

Committee on Energy and Commerce
Republican Office
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515
Phone: (202) 225-2927
Fax: (202) 225-1919

To:	Ms. Terri Glaze, Director of Legislative Affairs, Federal Communications Commission for Chairman Julius Genachowski, Federal Communications Commission
From:	Rep. Fred Upton, Chairman, Committee on Energy and Commerce
Fax:	(202) 418-2806
Date:	February 4, 2011
Phone:	
Pages:	4 (including cover)
Notes:	

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

March 17, 2011

The Honorable Fred Upton
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Upton:

Thank you for your recent letter inquiring whether the Commission intends to impose common-carrier roaming obligations on facilities-based providers of commercial mobile data services. For nearly 30 years, the Commission has, on a bipartisan basis, required roaming in one form or another to "continue to foster the development of seamless automatic roaming services for all [ ] subscribers in the nation."[1] I believe data roaming arrangements are best negotiated between mobile providers in light of commercial considerations. Accordingly, I do not support a common-carriage mandate for data roaming.

In response to your initial letter dated November 23, 2010, I described in some detail the arguments that had been made before the Commission concerning the extension of automatic voice roaming to the data services context. At that time, we were still reviewing the record, both with respect to the appropriate substance of the rule and the legal support underlying the inclusion of data services as part of a provider's roaming obligations. Because we had yet to determine what course to pursue, it was not possible to offer a specific analysis of the scope of the Commission's legal authority.

After an extensive review of the record, the FCC staff has concluded – and I agree – that a data roaming rule is necessary to ensure vibrant competition in the mobile marketplace, to unleash billions of dollars of investment that is currently sidelined, to create thousands of new jobs and to meet the consumer demand for seamless nationwide coverage, be it for voice or data. The record contains abundant evidence from both national and rural businesses that a data roaming rule is necessary to achieve these important goals because some providers have been unwilling to negotiate either 3G or 4G data roaming agreements or have created long delays or taken other steps to impede healthy competition and roaming for consumers. Moreover, as the mobile world moves to LTE, the Commission's basic bipartisan voice roaming rules will be in jeopardy, as they will no longer ensure automatic voice roaming.

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Based on these factors, today I am circulating to my colleagues a draft order for consideration that requires a facilities-based provider of commercial mobile data services to offer roaming arrangements to other such providers on commercially reasonable terms and conditions, subject to various limitations designed to account for and protect the legitimate interests of the companies that would be providing roaming. This requirement fulfills the Commission's duty under Section 303(b) of the Communications Act to prescribe, "as public convenience, interest, or necessity requires, … the nature of the service to be rendered" by providers of mobile services and other authorized users of spectrum. At the same time, the draft avoids the legal authority concern raised in your letter of treating mobile data service providers as "common carriers" under the Communications Act. To the contrary, the draft order under consideration eschews a common carriage approach and leaves mobile service providers free to negotiate and determine, on a customer-by-customer basis, the commercially reasonable terms of data roaming agreements. This is not common carriage. *See National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (1976) (stating that "to be a common carrier one must hold oneself out indiscriminately to the clientele one is suited to serve" and "a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal").

I appreciate your interest in this matter. Please let me know if I can be of any further assistance.

Sincerely,

Julius Genachowski

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

March 17, 2011

The Honorable Joe Barton
U.S. House of Representatives
2109 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Barton:

Thank you for your recent letter inquiring whether the Commission intends to impose common-carrier roaming obligations on facilities-based providers of commercial mobile data services. For nearly 30 years, the Commission has, on a bipartisan basis, required roaming in one form or another to "continue to foster the development of seamless automatic roaming services for all [ ] subscribers in the nation."[1] I believe data roaming arrangements are best negotiated between mobile providers in light of commercial considerations. Accordingly, I do not support a common-carriage mandate for data roaming.

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Sincerely,

Julius Genachowski

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

March 17, 2011

The Honorable Marsha Blackburn
U.S. House of Representatives
217 Cannon House Office Building
Washington, D.C. 20515

Dear Congresswoman Blackburn:

Thank you for your recent letter inquiring whether the Commission intends to impose common-carrier roaming obligations on facilities-based providers of commercial mobile data services. For nearly 30 years, the Commission has, on a bipartisan basis, required roaming in one form or another to "continue to foster the development of seamless automatic roaming services for all [ ] subscribers in the nation."[1] I believe data roaming arrangements are best negotiated between mobile providers in light of commercial considerations. Accordingly, I do not support a common-carriage mandate for data roaming.

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Sincerely,

Julius Genachowski

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

March 17, 2011

The Honorable Mary Bono Mack
U.S. House of Representatives
104 Cannon House Office Building
Washington, D.C. 20515

Dear Congresswoman Bono Mack:

Thank you for your recent letter inquiring whether the Commission intends to impose common-carrier roaming obligations on facilities-based providers of commercial mobile data services. For nearly 30 years, the Commission has, on a bipartisan basis, required roaming in one form or another to "continue to foster the development of seamless automatic roaming services for all [ ] subscribers in the nation."[1] I believe data roaming arrangements are best negotiated between mobile providers in light of commercial considerations. Accordingly, I do not support a common-carriage mandate for data roaming.

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Sincerely,

Julius Genachowski

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

March 17, 2011

The Honorable Phil Gingrey
U.S. House of Representatives
442 Cannon House Office Building
Washington, D.C. 20515

Dear Congressman Gingrey:

Thank you for your recent letter inquiring whether the Commission intends to impose common-carrier roaming obligations on facilities-based providers of commercial mobile data services. For nearly 30 years, the Commission has, on a bipartisan basis, required roaming in one form or another to "continue to foster the development of seamless automatic roaming services for all [ ] subscribers in the nation."[1] I believe data roaming arrangements are best negotiated between mobile providers in light of commercial considerations. Accordingly, I do not support a common-carriage mandate for data roaming.

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Sincerely,

Julius Genachowski

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

March 17, 2011

The Honorable Ralph M. Hall
U.S. House of Representatives
2405 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Hall:

Thank you for your recent letter inquiring whether the Commission intends to impose common-carrier roaming obligations on facilities-based providers of commercial mobile data services. For nearly 30 years, the Commission has, on a bipartisan basis, required roaming in one form or another to "continue to foster the development of seamless automatic roaming services for all [ ] subscribers in the nation."[1] I believe data roaming arrangements are best negotiated between mobile providers in light of commercial considerations. Accordingly, I do not support a common-carriage mandate for data roaming.

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Sincerely,

Julius Genachowski

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

March 17, 2011

The Honorable Tim Murphy
U.S. House of Representatives
322 Cannon House Office Building
Washington, D.C. 20515

Dear Congressman Murphy:

Thank you for your recent letter inquiring whether the Commission intends to impose common-carrier roaming obligations on facilities-based providers of commercial mobile data services. For nearly 30 years, the Commission has, on a bipartisan basis, required roaming in one form or another to "continue to foster the development of seamless automatic roaming services for all [ ] subscribers in the nation."[1] I believe data roaming arrangements are best negotiated between mobile providers in light of commercial considerations. Accordingly, I do not support a common-carriage mandate for data roaming.

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Julius Genachowski

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

March 17, 2011

The Honorable Steve Scalise
U.S. House of Representatives
429 Cannon House Office Building
Washington, D.C. 20515

Dear Congressman Scalise:

Thank you for your recent letter inquiring whether the Commission intends to impose common-carrier roaming obligations on facilities-based providers of commercial mobile data services. For nearly 30 years, the Commission has, on a bipartisan basis, required roaming in one form or another to "continue to foster the development of seamless automatic roaming services for all [ ] subscribers in the nation."[1] I believe data roaming arrangements are best negotiated between mobile providers in light of commercial considerations. Accordingly, I do not support a common-carriage mandate for data roaming.

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

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THE CHAIRMAN

March 17, 2011

The Honorable John M. Shimkus
U.S. House of Representatives
2452 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Shimkus:

Thank you for your recent letter inquiring whether the Commission intends to impose common-carrier roaming obligations on facilities-based providers of commercial mobile data services. For nearly 30 years, the Commission has, on a bipartisan basis, required roaming in one form or another to "continue to foster the development of seamless automatic roaming services for all [ ] subscribers in the nation."[1] I believe data roaming arrangements are best negotiated between mobile providers in light of commercial considerations. Accordingly, I do not support a common-carriage mandate for data roaming.

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After an extensive review of the record, the FCC staff has concluded – and I agree – that a data roaming rule is necessary to ensure vibrant competition in the mobile marketplace, to unleash billions of dollars of investment that is currently sidelined, to create thousands of new jobs and to meet the consumer demand for seamless nationwide coverage, be it for voice or data. The record contains abundant evidence from both national and rural businesses that a data roaming rule is necessary to achieve these important goals because some providers have been unwilling to negotiate either 3G or 4G data roaming agreements or have created long delays or taken other steps to impede healthy competition and roaming for consumers. Moreover, as the mobile world moves to LTE, the Commission's basic bipartisan voice roaming rules will be in jeopardy, as they will no longer ensure automatic voice roaming.

Based on these factors, today I am circulating to my colleagues a draft order for consideration that requires a facilities-based provider of commercial mobile data services to offer roaming arrangements to other such providers on commercially reasonable terms and conditions,

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[1] Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-265, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 15817, 15831 ¶ 35 (2007).

subject to various limitations designed to account for and protect the legitimate interests of the companies that would be providing roaming. This requirement fulfills the Commission's duty under Section 303(b) of the Communications Act to prescribe, "as public convenience, interest, or necessity requires, … the nature of the service to be rendered" by providers of mobile services and other authorized users of spectrum. At the same time, the draft avoids the legal authority concern raised in your letter of treating mobile data service providers as "common carriers" under the Communications Act. To the contrary, the draft order under consideration eschews a common carriage approach and leaves mobile service providers free to negotiate and determine, on a customer-by-customer basis, the commercially reasonable terms of data roaming agreements. This is not common carriage. *See National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (1976) (stating that "to be a common carrier one must hold oneself out indiscriminately to the clientele one is suited to serve" and "a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal").

I appreciate your interest in this matter. Please let me know if I can be of any further assistance.

Sincerely,

Julius Genachowski

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

March 17, 2011

The Honorable Cliff Stearns
Chairman
Subcommittee on Oversight and Investigations
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Stearns:

Thank you for your recent letter inquiring whether the Commission intends to impose common-carrier roaming obligations on facilities-based providers of commercial mobile data services. For nearly 30 years, the Commission has, on a bipartisan basis, required roaming in one form or another to "continue to foster the development of seamless automatic roaming services for all [ ] subscribers in the nation."[1] I believe data roaming arrangements are best negotiated between mobile providers in light of commercial considerations. Accordingly, I do not support a common-carriage mandate for data roaming.

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

March 17, 2011

The Honorable Lee Terry
Vice Chairman
Subcommittee on Communications and Technology
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Vice Chairman Terry:

Thank you for your recent letter inquiring whether the Commission intends to impose common-carrier roaming obligations on facilities-based providers of commercial mobile data services. For nearly 30 years, the Commission has, on a bipartisan basis, required roaming in one form or another to "continue to foster the development of seamless automatic roaming services for all [ ] subscribers in the nation."[1] I believe data roaming arrangements are best negotiated between mobile providers in light of commercial considerations. Accordingly, I do not support a common-carriage mandate for data roaming.

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Sincerely,

Julius Genachowski

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

March 17, 2011

The Honorable Ed Whitfield
U.S. House of Representatives
2368 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Whitfield:

Thank you for your recent letter inquiring whether the Commission intends to impose common-carrier roaming obligations on facilities-based providers of commercial mobile data services. For nearly 30 years, the Commission has, on a bipartisan basis, required roaming in one form or another to "continue to foster the development of seamless automatic roaming services for all [ ] subscribers in the nation."[1] I believe data roaming arrangements are best negotiated between mobile providers in light of commercial considerations. Accordingly, I do not support a common-carriage mandate for data roaming.

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