

roaming arrangements.<sup>148</sup> We caution, however, that host providers may not engage in stonewalling behavior or refuse to negotiate because of concerns over the impact of roaming traffic on network congestion.

53. We decline to further detail the specific measures that may be adopted to safeguard subscriber quality of service, as proposed by AT&T.<sup>149</sup> As discussed herein, the commercial mobile data services marketplace encompasses an array of generations of wireless technology and many different services -- many of which may require different technical considerations in resolving network congestion. Providers should have significant flexibility to negotiate safeguards subject to commercial reasonableness, and a dispute over the reasonableness of any particular measure can be addressed under the dispute resolution procedures, on a case-by-case basis based on the totality of circumstances. We do not agree with AT&T that our approach will lead to “constant second-guessing” by the Commission.<sup>150</sup>

54. We also decline to specify, as suggested by Clearwire, that data roaming be limited to “best efforts access” to the host provider’s network.<sup>151</sup> We do not see the benefit in prohibiting parties from negotiating other access terms in their roaming arrangement.<sup>152</sup>

55. Host providers of commercial mobile data roaming services also are authorized to negotiate commercially reasonable measures to ensure that data roaming does not compromise the security and integrity of their networks.<sup>153</sup> We are aware of the risks network operators face from harmful devices on their networks and note that the Commission has previously considered the need for providers to protect their networks when it adopted open platform provisions for the 700 MHz Band C Block.<sup>154</sup> It

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(stating that network management practices should not conceal anticompetitive conduct). Cf. RCA Comments to *Further Notice* at 5 (supporting suspension or denial of service to roamer that causes congestion).

<sup>148</sup> See Clearwire Reply Comments at 15; AT&T Comments at 61-63. See also T-Mobile Nov. 2, 2010 *Ex Parte* (“T-Mobile’s existing roaming agreements include a provision giving the host carrier the ability to suspend roaming service if roaming becomes impracticable for reasons such as system overload, system outage, or other operational or technical issues”). Cf. AT&T Comments at 39-40 (noting that because host providers have no control over the data plans, services and other options available to roamers that may affect their demand for data, they 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”).

<sup>149</sup> See AT&T Comments at 61. AT&T comments that such safeguards should include prioritization of subscriber traffic, and 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.” *Id.* at 63.

<sup>150</sup> AT&T Comments at 36; see also AT&T Reply Comments at 37 (“wireless broadband providers simply have no way to predict what the Commission will, in after-the-fact adjudication, deem to be a ‘reasonable’ denial or limitation on roaming.”).

<sup>151</sup> See Clearwire Reply Comments at 15-16.

<sup>152</sup> Because it is outside of the scope of this proceeding, we also decline to adopt SouthernLINC’s suggestion that the Commission amend its existing priority access service rules to require carriers choosing to provide the service to do so on a non-discriminatory basis to all customers on the network, including roamers. See SouthernLINC Reply Comments at 31 n.85 (citing 47 C.F.R. § 64.402 and Part 64, Appendix B).

<sup>153</sup> See AT&T Comments at 61.

<sup>154</sup> See Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150, Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. (continued....)

would also be appropriate for providers of commercial mobile data roaming service to take reasonable measures to ensure that network performance will not be significantly degraded.

56. We emphasize again that we intend to closely monitor further development of the commercial mobile broadband data marketplace and stand ready to take additional action if necessary to help ensure that our goals in this proceeding are achieved.

### C. Legal Authority

57. Background. In the *Second Further Notice*, we sought additional comment on the extent of the Commission's authority to impose roaming duties on non-interconnected data services. We sought comment on various different bases, including under our Title III authority relating to wireless services, our Title II common carrier authority, and our ancillary authority under Title I of the Communications Act.<sup>155</sup> Commenters in support of our adoption of data roaming requirements contend that the Commission has broad statutory authority to impose such requirements.

58. Several proponents of data roaming assert that the Commission's legal authority under Title III to regulate radio spectrum provides the Commission with a sufficient legal basis to require any entity utilizing radio spectrum to make available data roaming to other wireless service providers.<sup>156</sup> RCA argues that Title III provides the Commission with enormous discretion to regulate service providers that utilize radio spectrum.<sup>157</sup> SouthernLINC and Cellular South contend that the scope of this authority is not affected by whether the service using the spectrum is classified as a telecommunications or information service under the Act; rather, the Commission may use its Title III authority to adopt data roaming rules regardless of whether the service involved is a voice or data service, whether it is a telecommunications service or an information service, whether it is being offered on a common carriage basis, or whether it is interconnected with the public switched telephone network.<sup>158</sup>

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01-309, Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, WT Docket 03-264, Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules, WT Docket No. 06-169, Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06-229, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, WT Docket No. 96-86, Declaratory Ruling on Reporting Requirement Under Commission's Part 1 Anti-Collusion Rule, WT Docket No. 07-166, *Second Report and Order*, 22 FCC Rcd 15289, 15371 ¶ 223 (2007) (*700 MHz Second Report and Order*).

<sup>155</sup> *Second Further Notice* at ¶¶ 64-71.

<sup>156</sup> Cellular South Comments at 4-7; Leap Comments at 9-10; US Cellular Comments at 9-10; SouthernLINC Comments at 12-18; T-Mobile Comments at 16-18; US Cellular Comments at 9-10. Proponents argue that Section 301 empowers the Commission to regulate mobile data service including the imposition of roaming obligations that encompass data as well as voice as a means of efficiently managing the use of the nation's radio spectrum resources. See Bright House Comments at 11; RCA Comments at 4; T-Mobile Comments at 16-18. T-Mobile and SouthernLINC state that the Commission has authority under Section 303(b) to impose obligations on licensees including the nature of services provided by each class of licensee. See T-Mobile Comments at 17; SouthernLINC Comments at 13-14; Clearwire Reply Comments at 7.

<sup>157</sup> RCA Comments at ii, 2-6. See also Letter from Daniel L. Brenner, Counsel to Bright House Networks, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, filed Nov. 22, 2010, at 1 (Bright House Nov. 22, 2010 *Ex Parte*).

<sup>158</sup> Cellular South Comments 5-7; SouthernLINC Comments at 11-12. See also RCA Comments at ii, 2-6. As further evidence of the Commission's authority to regulate all wireless services, US Cellular, Cellular South and (continued....)

59. MetroPCS argues that the Commission has authority under Title II of the Act, asserting that the service provided to the home carrier by the roaming partner is merely a transmission service that qualifies under existing legal precedents as a telecommunications service under the Communications Act and is subject to the Commission's Title II authority.<sup>159</sup> MetroPCS asserts that the transmission service provided by a third-party wireless roaming carrier (the roaming partner) to facilitate data roaming is only telecommunications, and a roaming partner merely passes the end-user's transmitted data to the home carrier without any material change in the form or content making the transmission telecommunications.<sup>160</sup> Leap argues that the Commission should invoke Title I because a data roaming requirement is reasonably ancillary to the Commission's authority under Title III to manage radio spectrum and establish license conditions.<sup>161</sup> Leap also argues that wireless data roaming obligations are reasonably ancillary to the Commission's regulation of wireless voice roaming obligations because as voice and data increasingly converge, implementing wireless data roaming obligations is ancillary to achieving the public interest goals of its wireless voice roaming regulations.<sup>162</sup>

60. In contrast, AT&T and Verizon Wireless argue that the Commission lacks the legal authority to require data roaming under any provision of the Communications Act.<sup>163</sup> They assert that the Commission has no legal authority to impose a common carriage data roaming obligation because data roaming is a private mobile service as defined in 47 U.S.C. § 332.<sup>164</sup> Verizon Wireless asserts that Section 153(44) of the Communications Act prohibits the Commission from imposing a data roaming obligation on any service that is not a "telecommunications service under any Title in the Act."<sup>165</sup>

61. Discussion. We find that we have the authority to require facilities-based providers of commercial mobile data services to offer data roaming arrangements to other such providers on  
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RCA argue that Section 303(r) grants the Commission the general power to prescribe rules, restrictions, and conditions that are necessary to carry out the provision of the Act. *See* US Cellular Comments at 9-10; Cellular South Comments at 7; RCA Comments at 5-7. *See also* T-Mobile Comments at 17. Further, many Proponents assert that the Commission also may grant, revoke, or modify licenses, and may prescribe new conditions for licenses under Sections 307, 309, 312, and 316. *See* Leap Comments at 12-15. *See also* RCA Comments at 5-6; US Cellular Comments at 10; SouthernLINC Comments at 14; Clearwire Reply Comments at 7-9; Cellular South Reply Comments at 23-31; Bright House Comments at 12-13.

<sup>159</sup> MetroPCS Comments at 8-32.

<sup>160</sup> *Id.* at 6.

<sup>161</sup> Leap Comments at 25-27.

<sup>162</sup> *Id.* at 25-27.

<sup>163</sup> AT&T argues that Section 332(a) prohibits the Commission from imposing any roaming obligation on mobile data services that do not offer interconnection with the public switched networks and that are not CMRS services. *See* AT&T Comments at 12-19; AT&T Reply Comments at 12-23. AT&T also argues that the Commission lacks the legal authority under Titles I, II and III. *See* AT&T Comments at 19-32; AT&T Reply Comments at 12-22. Verizon Wireless asserts that Section 332(c)(2) and 153(44) as well as Titles I, II and III prohibit Commission action. *See* Verizon Wireless Comments at 19-36; Verizon Wireless Reply Comments at 23-43

<sup>164</sup> AT&T Comments at 10-19; AT&T Reply Comments at 1-12; Verizon Wireless Comments at 24-27; Verizon Wireless Reply Comments at 23-37; Letter from Michael Goggin, AT&T, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, filed Sept. 22, 2010 (AT&T Sept. 22, 2010 *Ex Parte*).

<sup>165</sup> Verizon Wireless Comments 23-27, 32-35; Verizon Wireless Reply Comments at 27-36; Letter from John T. Scott, Deputy General Counsel of Verizon Wireless, to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Nov. 8, 2010, at 10-13 (Verizon Wireless Nov. 8, 2010 *Ex Parte*).

commercially reasonable terms and conditions. As discussed above, we find that the rule we adopt today serves the public interest by promoting connectivity for, and nationwide access to, mobile broadband. By promoting consumer access to advanced wireless services, the data roaming rule will enhance the unique social and economic benefits that a mobile service provides. The data roaming rule will also serve the public interest by promoting competition and investment in and deployment of mobile broadband services. Broadband deployment is a key priority for the Commission, and the deployment of mobile data networks will be essential to achieve the goal of making broadband connectivity available everywhere in the United States. As noted earlier, mobile broadband networks, particularly “fourth-generation” networks, are still at an early stage of deployment. Both nationwide and non-nationwide providers have obtained licenses, including AWS and 700 MHz spectrum licenses, which will be used to provide innovative wireless data services to consumers. We find that the availability of data roaming will help ensure the viability of new data network deployments and promote the development of competitive service offerings for the benefit of consumers.

62. Our authority under Title III allows us to adopt requirements to serve these public interest objectives. Spectrum is a public resource, and Title III of the Act provides the Commission with broad authority to manage spectrum, including allocating and assigning radio spectrum for spectrum based services and modifying spectrum usage conditions in the public interest.<sup>166</sup> The Commission is charged with maintaining control “over all the channels of radio transmission” in the United States.<sup>167</sup> Section 301 states that “[i]t is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.”<sup>168</sup> The issuance of a Commission license does not convey any ownership or property interests in the spectrum and does not provide the licensee with any rights that can override the Commission’s proper exercise of its regulatory power over the spectrum.<sup>169</sup> Section 316 authorizes the Commission to adopt

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<sup>166</sup> Application of the Title III provisions is not affected by whether the service using the spectrum is a telecommunications service or information service under the Act. See *Wireless Broadband Internet Access Classification Order*, 22 FCC Rcd at 5915 ¶ 36 (finding that wireless broadband Internet access, although an information service, continues to be subject to obligations promulgated pursuant to Title III). The Commission also relied on authority under Section 303(r) to impose “open platform” obligations on Upper 700 MHz C Block licensees, without regard to whether such licensees were providing telecommunications services or information services. *700 MHz Second Report and Order*, 22 FCC Rcd at 15365 ¶ 207. See also *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, *Report and Order*, 11 FCC Rcd 18455, 18459-60 ¶ 7, 188471-72 ¶ 31 (relying on Title III authority to impose resale obligations on non-Title II services); *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, *Memorandum Opinion and Order on Reconsideration*, FCC 99-250, ¶ 27 (1999) (expressly rejecting “[a]rguments that the scope of the resale rule is overbroad because it extends to non-Title II services,” reaffirming that Title III provided a basis for imposing the rule).

<sup>167</sup> 47 U.S.C. § 301.

<sup>168</sup> *Id.*

<sup>169</sup> 47 U.S.C. §§ 301, 304, 309. Section 301 states that the Act provides for “use, under federally-issued licenses of limited duration, of channels of radio transmission,” “but not the ownership thereof,” and that “no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.” Section 304 states that “[n]o station license shall be granted by the Commission until the applicant therefore shall have waived any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.” Section 309(h) requires that each FCC license contain, *inter alia*, a condition that the “station license shall not vest in the licensee any right to operate (continued....)

new conditions on existing licenses if it determines that such action “will promote the public interest, convenience, and necessity.”<sup>170</sup> Further, the Commission may utilize its rulemaking powers to modify licenses when a new policy is based upon the general characteristics of an industry.<sup>171</sup> Section 303 provides the Commission with authority to establish operational obligations for licensees that further the goals and requirements of the Act if the obligations are in the “public convenience, interest, or necessity” and not inconsistent with other provisions of law.<sup>172</sup> Section 303 also authorizes the Commission, subject to what the “public interest, convenience, or necessity requires,” to “[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class.”<sup>173</sup>

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the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.”

<sup>170</sup> 47 U.S.C. § 316.

<sup>171</sup> See, e.g., *Celtronix Telemetry v. FCC*, 272 F.3d 585, 589 (D.C. Cir. 2001) (stating that the Commission “always retained the power to alter the term of existing licenses by rulemaking” and finding that the Commission may exercise this authority even if the licenses were awarded at auction); *WBEN, Inc. v. U.S.*, 396 F.2d 601, 618 (2d Cir. 1968) (stating that the Commission may modify licenses by rule making “when . . . a new policy is based upon the general characteristics of an industry, rational decision is not furthered by requiring the agency to lose itself in an excursion into detail that too often obscures fundamental issues rather than clarifies them”); *California Citizens Band Ass’n v. U.S.*, 375 F.2d 43, 50-52 (9th Cir. 1967); cf. *U.S. v. Storer*, 351 U.S. 763 (1956) (holding that Section 309(b) requirement that full hearing be conducted before license application is denied did not prevent the FCC from changing eligibility requirements by rulemaking, thereby obviating need for full hearing for applicants who failed new eligibility criteria); *Community Television v. FCC*, 216 F.3d 1133, 1140-41 (D.C. Cir. 2000) (holding that the “FCC may modify entire classes of licenses” through the rulemaking process and rejecting the argument that the nature of Commission action – giving broadcasters new digital channels that would eventually replace their analog channels – was too extreme to constitute a license modification, since the FCC “ha[d] not wrought a fundamental change to the terms of those permits and licenses”); *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1319-20 (D.C. Cir. 1995) (holding that the FCC has authority to act by rulemaking to establish rules of general applicability that modify technical requirements of all licenses in a given class); *American Airlines v. CAB*, 359 F.2d 624 (D.C. Cir. 1966) (upholding CAB regulation that modified through rule making all existing aviation certificates despite statutory requirement of a full adjudicatory hearing for modifications of specific certificates, and rejecting the contention that *Storer* doctrine is inapplicable to rulemaking proceedings in which outstanding licenses are affected).

<sup>172</sup> See 47 U.S.C. § 303(r) (stating that if the “public convenience, interest, or necessity requires” the Commission shall “. . . prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act”); *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1048 (7th Cir. 1992) (stating that the Communications Act invests Commission with “enormous discretion” in promulgating licensee obligations that the agency determines will serve the public interest). See also Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150, Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01-309, Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, WT Docket 03-264, Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules, WT Docket No. 06-169, Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06-229, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, WT Docket No. 96-86, Declaratory Ruling on Reporting Requirement under Commission’s Part 1 Anti-Collusion Rule, WT Docket No. 07-166, *Second Report and Order*, 22 FCC Rcd 15289, 15365 ¶ 207 (2007) (*700 MHz Second Report and Order*).

<sup>173</sup> 47 U.S.C. § 303(b).

63. We find that these provisions establish our authority to adopt rules facilitating roaming with respect to commercial mobile data services. Specifically, we find that it is within our authority to manage spectrum and to impose conditions on licensees where necessary to promote the public interest, convenience, and necessity to adopt data roaming rules.<sup>174</sup> As discussed above, we find that the data roaming rule we adopt today serves the public interest by facilitating consumer access to ubiquitous mobile broadband service.<sup>175</sup> As more and more consumers use mobile devices to access a wide array of both personal and business services, they have become more reliant on their devices. These consumers expect to be able to have access to the full range of services available on their devices wherever they go. By promoting connectivity for, and ubiquitous access to, mobile broadband, the rule we adopt today supports consumer expectations and helps ensure that consumers are able to fully utilize and benefit from the availability of wireless broadband data services.<sup>176</sup>

64. As discussed earlier, the data roaming rule we adopt today also supports our goal of encouraging investment and innovation and the efficient use of spectrum. We agree with commenters that adopting a data roaming rule will encourage service providers to invest in and upgrade their networks to be able to compete with other providers and control their costs.<sup>177</sup> By encouraging build-out and deployment of advanced data services, the rule we adopt today helps ensure that spectrum is being put to its best and most efficient use.<sup>178</sup> Data roaming also furthers the goals under Section 706(a) and (b) of the Telecommunications Act of 1996, including encouraging new deployment of advanced services to all Americans by promoting competition and by removing barriers to infrastructure investment, including the barriers to new entrants.<sup>179</sup> The Commission estimated that more than 10 million Americans live in rural

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<sup>174</sup> 47 U.S.C. §§ 301, 303, 304, 309, 316. See also *Interconnection and Resale Order*, 11 FCC Rcd at 9470-71 ¶ 13 (noting that the Commission has “authority to impose a roaming requirement in the public interest pursuant to our license conditioning authority under Sections 303(r) and 309 of the Act”).

<sup>175</sup> See *supra* III.A.

<sup>176</sup> Under Title I, the Commission may exercise ancillary authority over a matter 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. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172–73 (1968); accord *United States v. Midwest Video Corp.*, 406 U.S. 649, 662 (1972). See also *American Library Ass’n. v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005); *Comcast Corp. v. FCC*, 600 F. 3d 642 (D.C. Cir. 2010). Because encouraging data roaming serves the public interest by promoting connectivity for, and ubiquitous access to, mobile broadband as well as facilitating consumer access to wireless broadband data coverage nationwide, the obligations set forth above are reasonably ancillary to the Title III provisions to manage spectrum, allocate, assign, and to establish spectrum usage conditions in the public interest as set forth above.

<sup>177</sup> See *e.g.*, Leap Reply Comments at 4.

<sup>178</sup> 47 U.S.C. § 303(g).

<sup>179</sup> See *supra*, III.A. Section 1302(a) directs the Commission to take actions that encourage the deployment of “advanced telecommunications capability.” It directs the Commission to encourage the deployment of such capability by “utilizing, in a manner consistent with the public interest, convenience, and necessity,” various tools including “measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” 47 U.S.C. § 1302(a). Section 1302(b) directs the Commission to undertake annual inquiries concerning the availability of advanced telecommunications capability to all Americans and requires that, if the Commission finds that such capability is not being deployed in a reasonable and timely fashion, it “shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.” 47 U.S.C. § 1302(b). See also *Preserving the Open Internet*, GN Docket. No. 09-191, *Broadband Industry Practices*, WC Docket. No. 07-52, *Report and Order*, FCC 10-201, ¶¶ 117-123 (rel. Dec. 23, 2010) (*Open Internet Order*).

census blocks with two or fewer mobile service providers.<sup>180</sup> Data roaming will encourage service providers to invest in and upgrade their networks and to deploy advanced mobile services ubiquitously, including in rural areas.

65. We disagree with AT&T and Verizon Wireless's argument that the Commission lacks authority to impose data roaming rules because data roaming is a private mobile radio service, as defined in section 332 of the Act and thus any common carrier regulation of data roaming is prohibited under the terms of the statute. Section 332(c)(2) provides that "a person engaged in the provision of a service that is a private mobile service shall not ... be treated as a common carrier for any purpose ..."<sup>181</sup> AT&T and Verizon Wireless argue that Section 332(c)(2) prohibits the Commission from imposing any roaming obligation for provisioning of commercial mobile data services that do not interconnect with the public switched networks because non-interconnected commercial mobile data services are not CMRS but private mobile radio service (PMRS).<sup>182</sup> AT&T argues that roaming obligations clearly amount to common carrier obligations and that, under the Supreme Court's decision in *Midwest Video II*, such regulations are prohibited. In *Midwest Video II*, the Supreme Court found that obligations requiring cable television systems to allocate channels for educational, government, public, and leased access users had "relegated cable systems, *pro tanto*, to common-carrier status."<sup>183</sup> The Court noted that the rules required operators to make these channels available on a first-come non-discriminatory basis, prohibited cable operators from influencing the content of access programming, and also put limits on charges for access.<sup>184</sup> The Court found that this "common carrier status" violated the Act's prohibition against deeming broadcasters to be common carriers, because at the time, cable regulations rested on the FCC's authority to regulate broadcasting.<sup>185</sup> AT&T argues that requiring carriers to offer data roaming "on reasonable request, on reasonable terms and rates, and free from unreasonable discrimination"<sup>186</sup> would similarly treat such providers as common carriers in violation of the prohibition against common carrier treatment in the definition of "private mobile service."<sup>187</sup>

66. Contrary to the arguments of AT&T and Verizon Wireless, to adopt a data roaming rule as discussed herein, we do not need to determine that a mobile service should be classified as CMRS.<sup>188</sup> Section 332 does not bar the Commission from establishing spectrum usage conditions based upon our Title III authority. As discussed above, Title III generally provides the Commission with authority to regulate "radio communications" and "transmission of energy by radio."<sup>189</sup> Among other provisions,

<sup>180</sup> *Fourteenth Competition Report*, FCC 10-81 at 188-89 ¶ 353 & Table 38.

<sup>181</sup> 47 U.S.C. § 332(c)(2).

<sup>182</sup> See AT&T Comments at 12-19; AT&T Reply Comments at 12-22; Verizon Wireless Comments at 19-36; Verizon Wireless Reply Comments at 24-27, 37-43.

<sup>183</sup> *FCC v. Midwest Video Corp.*, 440 U.S. 689, 700-01 (1979) (*Midwest Video II*).

<sup>184</sup> *Id.* at 702.

<sup>185</sup> *Id.* at 703-09.

<sup>186</sup> AT&T Sept. 22, 2010 *Ex Parte* at 3.

<sup>187</sup> *Id.*

<sup>188</sup> T-Mobile Oct. 22, 2010 *Ex Parte* at 11; MetroPCS Oct. 15, 2010 *Ex Parte* attachment at 4; SouthernLINC Oct. 6, 2010 *Ex Parte* at 2.

<sup>189</sup> See Title III - Provisions Relating to Radio, 47 U.S.C. §§ 301 et seq. See also IP-Enabled Services NPRM, 19 FCC Rcd 4863, 4918 (2004).

Title III gives the Commission the authority to classify radio stations.<sup>190</sup> It also establishes the basic licensing scheme for radio stations, allowing the Commission to grant, revoke, or modify licenses.<sup>191</sup> The Commission has imposed operating conditions on licensees regardless of the type of service they provide.<sup>192</sup>

67. In this Order, we impose an obligation with limitations on facilities-based providers of commercial mobile data services to offer data roaming arrangements to other facilities-based providers of commercial mobile data services on an individualized case-by-case basis, subject to a standard of commercial reasonableness as well as certain specified limitations set forth herein.<sup>193</sup> Imposing such a requirement is consistent with our authority to impose certain operating conditions on any spectrum authorization holders, including private mobile radio licensees, if it serves the public interest. The data roaming rule will complement the current roaming rules applicable to interconnected services, improve efficiency of spectrum use, encourage competition and increase sharing opportunities between private mobile services and other services.<sup>194</sup> In particular, we find that the rule we adopt today is consistent with the requirements of sections 332(a)(2)-(4) of the Act. Sections 332(a)(2)-(4) provide that, in managing the spectrum made available for use by private mobile services, the Commission shall consider whether its actions will: improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands; encourage competition and provide services to the largest feasible number of users; or increase interservice sharing opportunities between private mobile services and other services.<sup>195</sup> We find that, by promoting competition, investment, and new entry while facilitating consumer access to ubiquitous mobile broadband service, the rule we adopt today will serve these objectives.

68. We also find that the data roaming rules we adopt do not amount to treating mobile data service providers as “common carriers” under the Act.<sup>196</sup> As AT&T and Verizon Wireless recognize, a

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<sup>190</sup> 47 U.S.C. §§ 302, 303.

<sup>191</sup> 47 U.S.C. §§ 307-309, 312, 316.

<sup>192</sup> See, 700 MHz Second Report and Order, 22 FCC Rcd at 15365 ¶ 207 (imposing “open platform” obligations on Upper 700 MHz C Block licensees based on Title III authority); Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, *Report and Order*, 11 FCC Rcd 18455, 18459 ¶ 7, 188471-72 ¶ 31 (relying on Title III authority to impose resale obligations on non-Title II services); Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, *Memorandum Opinion and Order on Reconsideration*, FCC 99-250, ¶ 27 (1999) (expressly rejecting “[a]rguments that the scope of the resale rule is overbroad because it extends to non-Title II services,” reaffirming that Title III provided a basis for imposing the rule).

<sup>193</sup> See *supra* III.B and *infra* III.D for detailed discussions of the scope and the application of the data roaming rule and other factors that may be relevant in determining commercial reasonableness.

<sup>194</sup> See Section 332(a).

<sup>195</sup> 47 U.S.C. § 332(a)(2)-(4).

<sup>196</sup> We note that courts review the Commission’s application of the test for common carrier status deferentially. See *U.S. Telecom. Ass’n v. FCC*, 295 F.3d 1326, 1332 (D.C. Cir. 2002) (“[W]here an agency has adopted a judicial test as its own, we . . . review its application of that test only to determine whether it is unreasonable or arbitrary and capricious.”).

“*sine qua non*” of common carrier treatment is “the undertaking to carry for all people indifferently.”<sup>197</sup> The extent of the obligation we impose today is to offer, in certain circumstances, individually negotiated data roaming arrangements with commercially reasonable terms and conditions. The rule we adopt will allow individualized service agreements and will not require providers to serve all comers indifferently on the same terms and conditions.<sup>198</sup> Providers can negotiate different terms and conditions on an individualized basis, including prices, with different parties. The commercial reasonableness of terms offered to a particular provider may depend on numerous individualized factors, including the level of competitive harm in a given market and the benefits to consumers; the extent and nature of the requesting provider’s build-out; whether the requesting provider is seeking roaming for an area where it is already providing facilities-based service; and the impact of granting the request on the incentives for either provider to invest in facilities and coverage, services, and service quality.<sup>199</sup> In addition, providers may reasonably choose not to offer a roaming arrangement to a requesting provider that is not technologically compatible or refuse to enter into a roaming arrangement where it is not technically feasible to provide roaming for the service for which it is requested.<sup>200</sup> A provider is not required to make changes to its network that are economically unreasonable, and it is reasonable for a provider to condition the effectiveness of a roaming arrangement on the requesting provider’s provision of mobile data service to its own subscribers using a generation of wireless technology comparable to the technology on which the requesting provider seeks to roam.<sup>201</sup> Providers of commercial mobile data services also are free to negotiate commercially reasonable measures to safeguard quality of service against network congestion that may result from roaming traffic or to prevent harm to their networks.<sup>202</sup> In addition, the rule we adopt does not impose any form of common carriage rate regulation or obligation on providers of mobile data services to publicly disclose the rates, terms, and conditions of their roaming agreements. Under the agreements to which negotiations may lead, providers will have flexibility with regard to roaming charges, subject to a general requirement of commercial reasonableness.<sup>203</sup> Further, actual provisioning

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<sup>197</sup> Letter from John T. Scott, Deputy General Counsel of Verizon Wireless, to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Mar. 30, 2011, at 3 (Verizon Wireless Mar. 3, 2011 *Ex Parte*) (quoting *NARUC v. FCC*, 533 F.2d 601, 608–09 (D.C. Cir. 1976) (*NARUC II*) (internal quotation marks omitted)).

<sup>198</sup> See *infra* III. D; see also *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (“[T]he indiscriminate offering of service on generally applicable terms . . . is the traditional mark of common carrier service.”). Verizon notes that in *Iowa Telecommunications Services v. Iowa Utilities Bd.*, 563 F.3d 743, 745–46 (8th Cir. 2009), the Eighth Circuit concluded that Sprint qualified as a telecommunications carrier, and thus a common carrier, “notwithstanding individually negotiated contracts.” Verizon Wireless Mar. 3, 2011 *Ex Parte* at 6. But in that case, Sprint, unlike the carriers here, “self-certified that it is a common carrier” and “ma[de] public its intent to act as a common carrier” for the services at issue. 563 F.3d at 749. Verizon also relies on *Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003). In *Orloff*, the D.C. Circuit reviewed an FCC policy of generally relying on market forces to ensure ultimate compliance by CMRS providers with the statutory prohibition on “unjust or reasonable discrimination in charges” of common carriers. 47 U.S.C. § 202(a); see *id.* at 419–21. In contrast, we here *reject*—rather than determine how to enforce—a common carriage requirement of “just and reasonable” rates, terms, and conditions.

<sup>199</sup> *Id.*

<sup>200</sup> See *supra* III. B.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

of data roaming under those arrangements and any practices in connection with such arrangements will be subject to individually negotiated contractual provisions,<sup>204</sup> unlike a common carrier obligation under Sections 201 and 202 of the Act which covers all charges and practices in connection with such services. In view of these boundaries, we find that the rule we adopt today to execute our spectrum management duties under the Act does not subject a spectrum-based commercial mobile data service provider to Title II nor does it treat these providers as common carriers with respect to their regulatory status and obligations.<sup>205</sup>

69. *Imposition of the Data Roaming Rule under Title III does not amount to Regulatory Taking.* Verizon Wireless argues that imposing data roaming obligations amounts to a physical and regulatory taking.<sup>206</sup> Verizon Wireless claims that data roaming is a physical taking of wireless carriers' property rights in their network infrastructure by authorizing third parties to occupy the physical space available on carrier networks at will.<sup>207</sup> Verizon Wireless also claims that data roaming would constitute a regulatory taking because it would interfere with licensees' reasonable expectations not to have common carrier regulations imposed on information services. We disagree. Under Section 304 of the Communications Act, the issuance of an FCC license does not provide the licensee with any rights that can override the Commission's proper exercise of its regulatory power over the spectrum: "[n]o station license shall be granted by the Commission until the applicant therefore shall have waived any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise."<sup>208</sup> Further, under the data roaming rule, the host provider will be compensated for service it provides consistent with the commercially reasonable terms it negotiates in the roaming agreement. There can be no taking if that compensation is "just."<sup>209</sup> It does not appear to be possible that compensation could be "unjust" if it is commercially reasonable. Commercially reasonable terms may also include measures that allow the host

(Continued from previous page)

<sup>203</sup> This is one fundamental distinction between the rules adopted here and those at issue in *Midwest Video II*, on which AT&T and Verizon rely. See *Midwest Video II*, 440 U.S. at 694, 701-02 (1979); see also *id.* at 702 (noting that the Commission "conceded before this Court that the rules 'can be viewed as a limited form of common carriage-type obligation'" (quoting Government brief)).

<sup>204</sup> See *infra* III. D.

<sup>205</sup> We also note that, although we do not treat non-interconnected commercial mobile data providers as common carriers here, Section 332 does not provide an absolute prohibition on imposing common carrier regulation on a provider of private mobile radio service to the extent that the provider offers a telecommunications service. See *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, *First Report and Order*, 11 FCC Rcd 15499, 15989 ¶ 993 (1996) (finding that "to the extent a PMRS provider uses capacity to provide domestic or international telecommunications for a fee directly to the public, it will fall within the definition of 'telecommunications carrier' under the Act and will be subject to the duties listed in section 251(a)").

<sup>206</sup> Verizon Wireless Comments at 43-48.

<sup>207</sup> Verizon Wireless Comments at vi, 43-48.

<sup>208</sup> 47 U.S.C. § 304.

<sup>209</sup> U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation"); see e.g., *Bauman v. Ross*, 167 U.S. 548, 574 (1897) ("The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more.").

provider to safeguard the quality of service and allow measures to prevent harm to the host provider's network.

70. *Commission's Title II Authority.* Several commenters argue that data roaming is a telecommunications service under Title II.<sup>210</sup> MetroPCS, for example, asserts that the transmission service provided by a third-party wireless roaming carrier (the Roaming Partner) to facilitate data roaming is only telecommunications and that the transmission provided by the Roaming Partner is functionally equivalent to the telecommunications services provided for voice roaming.<sup>211</sup> MetroPCS asserts that "the separate, severable, non-integrated transmission service provided by a third-party wireless Roaming Partner is properly viewed as purely a transmission service that qualifies under long-standing Commission precedent as 'telecommunications' and as a 'telecommunications service.'"<sup>212</sup> Leap argues that the Commission can act pursuant to its Title II authority, stating that "the Commission could define data roaming as a telecommunications service because during data roaming, the host carrier is providing pure data transmission to another carrier."<sup>213</sup> We find that we need not decide whether data roaming services provisioned in this manner are or are not telecommunications services. In any case, we impose the data roaming rule described herein based on our authority under Title III.

#### D. Dispute Resolution

71. *Background.* In the *Second Further Notice*, we sought comment on the appropriate process for dispute resolution and whether we should provide the same process for data roaming requests as for voice roaming requests.<sup>214</sup> We also sought comment on whether we should adopt measures to require or encourage the resolution of data roaming disputes through alternative dispute resolution procedures such as arbitration.<sup>215</sup> In addition, we asked whether there are any legal considerations, limitations, or concerns the Commission should consider with respect to alternative dispute resolution procedures and whether such procedures should be applicable more generally to roaming disputes if they are appropriate for data roaming disputes.<sup>216</sup>

72. Some commenters urge the Commission to adopt mandatory mediation or arbitration procedures for resolving data roaming disputes. NTCH asserts that the Commission should require mandatory mediation of data roaming disputes prior to the initiation of a complaint.<sup>217</sup> Cox states that the Commission should "backstop" the negotiation of roaming agreements by providing a forum for "reasonably fast resolution through mediating or, if necessary, arbitrating agreements."<sup>218</sup> RCA asserts

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<sup>210</sup> See, e.g., Clearwire Comments at 10-11; Cellular South Comments at 7-9; Leap Comments at 15-25; MetroPCS Comments at 8-33; RTG Comments at 4-5.

<sup>211</sup> MetroPCS Comments at 8-33.

<sup>212</sup> MetroPCS Comment at 18. See also Letter from Carl W. Northrop, Counsel to MetroPCS, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, filed Nov. 22, 2010.

<sup>213</sup> Leap Reply Comments at 16.

<sup>214</sup> *Second Further Notice*, 25 FCC Rcd 4181, 4223-24 ¶ 91.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> NTCH Comments at 5.

<sup>218</sup> Cox Reply Comments at 6-7.

that the Commission should adopt a “stalemate resolution process” that requires arbitration or mediation if a receiving carrier stonewalls or ignores roaming requests.<sup>219</sup> Other commenters argue that the Commission should adopt measures to expedite the resolution of all roaming disputes and place all such disputes into the accelerated docket process.<sup>220</sup> AT&T disagrees that the Commission should require mediation or arbitration, or that all roaming disputes should be placed on the Commission’s accelerated docket.<sup>221</sup> AT&T states that the Commission in the 2007 *Report and Order* rejected proposals to handle all voice roaming complaints via its accelerated docket, and there is no reason to depart from that ruling now.<sup>222</sup> In addition, AT&T argues that disputes regarding data roaming will raise novel engineering and technical issues that make them even less likely to be resolved appropriately on an accelerated basis.<sup>223</sup>

73. Some commenters also urge the Commission to adopt criteria or factors to use in resolving data roaming disputes. Bright House Networks urges us to use the factors we set forth for consideration in voice roaming disputes in the 2010 *Order on Reconsideration*,<sup>224</sup> as well as additional criteria related to the reasonableness of a provider’s proposed rates.<sup>225</sup> T-Mobile also urges us to use the factors from the 2010 *Order on Reconsideration* but argues that we should add some new factors and delete others.<sup>226</sup>

74. **Discussion.** To the extent that a complaint proceeding is an appropriate procedural vehicle to resolve a particular dispute arising out of the negotiation of a data roaming arrangement, we find that it is in the public interest to establish a complaint process similar to the complaint process

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<sup>219</sup> RCA Comments at 17.

<sup>220</sup> See e.g., T-Mobile Comments at 20-21 (urging the Commission to adopt expedited procedures for roaming disputes, including an accelerated docket process for roaming disputes; a mandatory 21-day supervised settlement period; expedited discovery of parties’ roaming agreements with third parties, subject to nondisclosure and confidentiality requirements; express authority for Commission staff to interpret and decide roaming complaints; and specific time periods governing roaming complaint decisions and appeals); SouthernLINC Reply Comments at 28-29; Letter from Shirley S. Fujimoto and David D. Rines, Counsel, SouthernLINC to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, Oct. 21, 2010 at 12-13 (SouthernLINC Oct. 21, 2010 *Ex Parte*); Bright House Comments at 14; BendBroadband Reply Comments at 5.

<sup>221</sup> AT&T Reply Comments at 53-54.

<sup>222</sup> *Id.* at 54.

<sup>223</sup> *Id.*

<sup>224</sup> See *Order on Reconsideration*, 25 FCC Rcd 4181, 4200-4201 ¶ 39 (setting out factors that the Commission may consider when resolving disputes that are brought before it).

<sup>225</sup> Bright House Networks argues that the Commission should develop additional factors, such as examination of a provider’s retail yield, for disputes that focus primarily on rates. See Bright House Comments at 13-14; see also Bright House Nov. 22, 2010 *Ex Parte* at 1 (proposing that the Commission use retail yield as a possible test for the reasonableness of charges); BendBroadband Reply Comments at 5 (agreeing with Bright House Networks that the Commission should develop criteria it will use in resolving roaming disputes and that it should be willing to review providers’ proposed rates); SouthernLINC Reply Comments at 27-28 (the Commission should use the factors it identified in the voice roaming context but also should “evaluate the reasonableness of the rates being offered by the host carrier, particularly to the extent that the offered rates are tantamount to a denial of data roaming”); U.S. Cellular Reply Comments at 5 (host carriers should provide data roaming on reasonable terms and conditions); RCA Comments at 16 (the Commission should require that data roaming terms and conditions are just and reasonable).

<sup>226</sup> See T-Mobile Comments at 20; Letter from Howard J. Symons, Counsel, T-Mobile-USA to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, Oct. 14, 2010, Attachment at 7-8 (T-Mobile Oct. 14, 2010 *Ex Parte*).

available under the current roaming obligations.<sup>227</sup> Specifically, to ensure consistent Commission processes for resolving all voice and data roaming disputes where a complaint is the appropriate procedural vehicle, we will use the procedural complaint processes established in the Commission's Part 1, Subpart E rules for data roaming to the extent discussed herein.<sup>228</sup> Disputes will be resolved based on the totality of the circumstances. The remedy of damages will not be available for data roaming complaints.

75. Parties may file a formal or informal complaint under the Commission's Part I, Subpart E rules<sup>229</sup> or file a petition for declaratory ruling under Section 1.2 of the Commission's rules<sup>230</sup> to resolve any disputes arising out of the data roaming rule adopted herein.<sup>231</sup> These procedural mechanisms are currently available for resolving voice roaming disputes, and we find that it is in the public interest to ensure a consistent Commission process for resolving both voice and data roaming complaints. Moreover, some roaming disputes will involve both data and voice and are likely to have factual issues common to both types of roaming. The approach we are taking allows, but does not require, a party to bring a single proceeding to address such a dispute, rather than having to bifurcate the matter and initiate two separate proceedings under two different sets of procedures. This, in turn, will be more efficient for the parties involved, as well as for the Commission, and should result in faster resolution of such disputes.

76. With respect to remedies, we exclude provisions applicable to damages in this context. We note that the remedy of damages after hearing on a complaint is specifically provided for in Section 209 of the Communications Act and applicable to claims arising out of Section 208 complaints.<sup>232</sup> This means that if a complaint alleges violations with respect to both voice and data roaming, damages potentially are available as a remedy for only the portion of the complaint that deals with roaming obligations arising out of Sections 201, 202, and 208 of the Act.<sup>233</sup>

77. When roaming-related complaints or petitions for declaratory ruling are filed, we intend to address them expeditiously. Further, we note that the Accelerated Docket procedures, including pre-complaint mediation, will be available to data roaming complaints.<sup>234</sup> Several commenters requested use

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<sup>227</sup> See 47 C.F.R. § 20.12; see also SouthernLINC Oct. 21, 2010 *Ex Parte* at 12-13 (asserting that the Commission has authority to apply the Section 208 complaint procedures to complaints involving data roaming).

<sup>228</sup> Specifically, we are extending, as applicable, the procedural rules in the Commission's Part I, Subpart E rules, 47 C.F.R. §§ 1.716-1.718, 1.720, 1.721, and 1.723-1.735, to disputes arising out of the data roaming rules.

<sup>229</sup> See 47 C.F.R. §§ 1.716-1.718, 1.720, 1.721, and 1.723-1.735.

<sup>230</sup> 47 C.F.R. § 1.2.

<sup>231</sup> As discussed below, extending the procedural complaint processes established in the Commission's Part 1, Subpart E rules to complaints regarding data roaming will require approval by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. We note that the Commission's rules already provide for the use of petitions for declaratory ruling for the purpose of "terminating a controversy or removing uncertainty" and the potential use of this vehicle to address data roaming controversies therefore does not require PRA approval.

<sup>232</sup> See 47 U.S.C. § 209.

<sup>233</sup> Section 1.722 of the Commission's rules, which addresses the recovery of damages in a complaint proceeding, is not applicable to data roaming complaints. See 47 C.F.R. § 1.722.

<sup>234</sup> See 47 C.F.R. § 1.730.

of the Commission's Accelerated Docket procedures to resolve all roaming complaints.<sup>235</sup> Although all roaming complaints will not automatically be placed on the Accelerated Docket, an affected provider can seek consideration of its complaint under the Commission's Accelerated Docket rules and procedures where appropriate.

78. We note that the duty to offer data roaming arrangements on commercially reasonable terms and conditions will allow greater flexibility and variation in terms and conditions, as parties will negotiate their rights and obligations under the agreements. We expect providers to include any material practices regarding provisioning of roaming in the agreement (*e.g.*, any practice to manage roaming traffic in times of congestion) because many disputes arising out of provisioning of roaming will be subject to the roaming contract provisions and generally applicable laws. To provide parties with additional certainty regarding rights and obligations and to facilitate timely resolution of disputes, we provide the following clarifications and guidance.

79. During ongoing negotiations, parties can seek Commission dispute resolution – including a determination whether the host provider has met its duty. We will consider claims regarding the commercial reasonableness of the negotiations, providers' conduct, and the terms and conditions of the proffered data roaming arrangement. With respect to claims regarding the commercial reasonableness of the proffered terms and conditions, including prices, the Commission staff may, in resolving such claims, require both parties to provide to the Commission their best and final offers (final offers) that were presented during the negotiation. For example, if negotiations fail to produce a mutually acceptable set of terms and conditions, including rates, the Commission staff may require parties to submit on a confidential basis their final offers, including price, in the form of a proposed data roaming contract.<sup>236</sup> These submissions would enable Commission staff, if it so chose, to resolve a particular roaming dispute in which a violation of our rules is found by ordering the parties to enter into a data roaming agreement pursuant to the terms of the complainant's commercially reasonable final offer or to otherwise rely on the submitted offers in determining an appropriate remedy. In cases where no violation of our rules is found, the complainant would be free, but not obligated, to enter into a roaming agreement on the proffered terms of the would-be host. The Commission staff also could order the parties to resume negotiations. The Commission staff's determination of the appropriate steps in resolving a particular dispute would depend in part of an assessment of the actions of both the host provider and the requesting provider.

80. With respect to disputes filed before reaching an agreement regarding the commercial reasonableness of a would-be host provider's proffered terms and conditions, we find that it is in the public interest to provide a possible avenue for the requesting provider to obtain data roaming service on an interim basis during the pendency of the dispute. Accordingly, in a case where a requesting provider disputes the commercial reasonableness of a roaming arrangement offered by a would-be host and none of the limitations is applicable,<sup>237</sup> the Commission staff may, if requested and in appropriate

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<sup>235</sup> See T-Mobile Comments at 20; SouthernLINC Reply Comments at 28; SouthernLINC Oct. 21, 2010 *Ex Parte* at 12-13; see also Bright House Comments at 14 (urging the Commission to adopt an accelerated process for roaming disputes); BendBroadband Reply Comments at 5 (supporting an expedited resolution process for roaming complaints).

<sup>236</sup> Of course, at any time following the submission of the final offers and prior to the Commission's staff's decision, either party may accept the other party's final offer, at which point the offer will become a binding contract between the parties.

<sup>237</sup> As discussed above, the duty to offer data roaming arrangements is subject to certain specified limitations, such that a host provider may not have an obligation to offer data roaming arrangements to a requesting provider. See *supra* III.B.

circumstances, order the host provider to provide data roaming on its proffered terms, during the pendency of the dispute, subject to possible true-up once the roaming agreement is in place. Similarly, if the Commission staff chooses to require submission of final offers as discussed above, in appropriate circumstances the Commission staff could order the host provider to provide data roaming in accordance with its final offer, subject to possible true-up. The ability to obtain data roaming service on an interim basis during the pendency of the dispute would enable the requesting provider's subscribers to obtain data roaming coverage without undue delay while the Commission staff considers the dispute. Alternatively, the parties may agree prior to the filing of the dispute to an interim roaming arrangement that will govern during the pendency of the dispute. Further, in the event a would-be host provider violates its duty by actions that unduly delay or stonewall the course of negotiations, we stand ready to move expeditiously with fines, forfeitures, and other appropriate remedies, which should reduce any incentives to delay data roaming negotiations.

81. After the parties have entered into a data roaming agreement, the terms of the agreement generally will govern the data roaming rights and obligations of the parties, and disputes relating to performance, validity, or interpretation of the agreement will be subject to review in court under the relevant contract law, with certain exceptions. For instance, parties may bring before the Commission a claim that a host provider's conduct during negotiations violated the federal duty to offer a data roaming arrangement with commercially reasonable terms and conditions. In addition, the requesting provider may show that a host provider engaged in undue delay, or negotiated without any intent to perform. Further, we provide that a requesting provider could file a complaint or petition for declaratory ruling regarding the commercial reasonableness of the agreed terms and conditions to the extent such claims are based on new information that the requesting provider reasonably did not know prior to signing the agreement. Because the standard of commercial reasonableness is one that we expect to accommodate a variety of terms and conditions in data roaming, and to discourage frivolous claims regarding the reasonableness of the terms and conditions in a signed agreement, we will presume in such cases that the terms of a signed agreement meet the reasonableness standard and will require a party challenging the reasonableness of any term in the agreement to rebut that presumption.

82. We further clarify that the Enforcement Bureau has delegated authority to resolve complaints arising out of the data roaming rule.<sup>238</sup> We note that the Wireless Telecommunications Bureau has delegated authority to resolve other disputes with respect to the data roaming rule adopted herein. We also note that whether or not the appropriate procedural vehicle is a complaint under Section 20.12(e) or a petition for declaratory ruling under Section 1.2 may vary depending on the circumstances of each case. If a dispute arises regarding data roaming, parties are encouraged to contact Commission staff for procedural guidance and for negotiations using the Commission's informal dispute resolution processes.

83. Some commenters propose other measures for resolving data roaming disputes or roaming disputes in general, such as mandatory mediation or arbitration.<sup>239</sup> Although we are not adopting any such mandatory processes, we note that providers are free to negotiate and mutually agree to other processes, such as third party mediation or arbitration, as a means to resolve the roaming dispute.

84. A few commenters propose that we adopt a time limit for roaming negotiations to limit

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<sup>238</sup> We add appropriate clarifying language to this effect to the rule governing the functions of the Enforcement Bureau. See Appendix A (modification to 47 C.F.R. § 0.111(a)(11)).

<sup>239</sup> See NTCH Comments at 5; Cox Reply Comments at 6-7; RCA Comments at 17.

the opportunity for host carriers to delay in negotiating roaming agreements.<sup>240</sup> We decline to adopt a specific time limit because some data roaming negotiations may be more complex or fact-intensive than others and are likely to require more time. A single time limit for all negotiations would not be appropriate in such cases. As part of the requirement to offer a data roaming arrangement, we expect parties to proceed with such negotiations in a timely manner and to avoid stonewalling behavior or undue delays. If a provider involved in a data roaming negotiation believes that another provider is delaying the negotiation unduly, it may ask the Commission to set a time limit for that particular negotiation. We will consider such requests on a case-by-case basis.

85. *Determination of Commercial Reasonableness.* We will assess whether a particular data roaming offering includes commercially reasonable terms and conditions or whether a provider's conduct during negotiations, including its refusal to offer data roaming, is commercially reasonable, on a case-by-case basis, taking into consideration the totality of the circumstances.<sup>241</sup> As discussed above, providers can negotiate different terms and conditions, including prices, with different parties, where differences in terms and conditions reasonably reflect actual differences in particular cases. Further, providers of commercial mobile data services can negotiate commercially reasonable measures to safeguard quality of service against network congestion that may result from data roaming traffic or to prevent harm to their networks.<sup>242</sup> Conduct that unreasonably restrains trade, however, is not commercially reasonable.

86. In the interconnected services context, we listed factors we will take into account in resolving roaming disputes that are brought before us.<sup>243</sup> Some parties have asked us to use these factors, or others, in resolving disputes that arise with respect to data roaming.<sup>244</sup> These factors relate to public interest benefits and costs of a data roaming arrangement offered in a particular case, including the impact on investment, competition, and consumer welfare and whether a particular data roaming offering is commercially reasonable. We find it is therefore appropriate to take them into account, as listed below, and to the extent relevant in the data roaming context. We emphasize that each case will be decided based on the totality of the circumstances. With that in mind, we clarify that, to guide us in determining the reasonableness of the negotiations, providers' conduct, and the terms and conditions of the proffered data roaming arrangements, including the prices, we may consider the following factors, as well as others:

- whether the host provider has responded to the request for negotiation, whether it has engaged in a persistent pattern of stonewalling behavior, and the length of time since the initial request;

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<sup>240</sup> See, e.g., Cox Reply Comments at 6-8; RCA Comments at 17; SouthernLINC Reply Comments at 25 -26; U.S. Cellular Reply Comments at 5.

<sup>241</sup> See *Order on Reconsideration*, 25 FCC Rcd 4181, 4200 ¶ 39.

<sup>242</sup> See *supra* III.B. The record indicates that providers already commonly include in their negotiated roaming agreements terms that give a host provider the ability to suspend roaming service if roaming becomes impractical for reasons such as overload, outage, or other operational or technical issues. See Letter from Kathleen O'Brien Ham, T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, filed Dec. 20, 2010, at 4.

<sup>243</sup> See *id.*

<sup>244</sup> See, e.g., T-Mobile Comments at 20; T-Mobile Oct. 14, 2010 *Ex Parte*, Attachment at 7-8 (stating that the Commission should use the factors it developed in the voice roaming context but should add some factors and delete others); SouthernLINC Reply Comments at 27-28 (the Commission should use the factors it identified in the voice roaming context but also should "evaluate the reasonableness of the rates being offered by the host carrier, particularly to the extent that the offered rates are tantamount to a denial of data roaming").

- whether the terms and conditions offered by the host provider are so unreasonable as to be tantamount to a refusal to offer a data roaming arrangement;
- whether the parties have any roaming arrangements with each other, including roaming for interconnected services such as voice, and the terms of such arrangements;
- whether the providers involved have had previous data roaming arrangements with similar terms;
- the level of competitive harm in a given market and the benefits to consumers;
- the extent and nature of providers' build-out;
- significant economic factors, such as whether building another network in the geographic area may be economically infeasible or unrealistic, and the impact of any "head-start" advantages;
- whether the requesting provider is seeking data roaming for an area where it is already providing facilities-based service;
- the impact of the terms and conditions on the incentives for either provider to invest in facilities and coverage, services, and service quality;
- whether there are other options for securing a data roaming arrangement in the areas subject to negotiations and whether alternative data roaming partners are available;
- events or circumstances beyond either provider's control that impact either the provision of data roaming or the need for data roaming in the proposed area(s) of coverage;
- the propagation characteristics of the spectrum licensed to the providers;
- whether a host provider's decision not to offer a data roaming arrangement is reasonably based on the fact that the providers are not technologically compatible;
- whether a host provider's decision not to enter into a roaming arrangement is reasonably based on the fact that roaming is not technically feasible for the service for which it is requested;
- whether a host provider's decision not to enter into a roaming arrangement is reasonably based on the fact that changes to the host network necessary to accommodate the request are not economically reasonable;
- whether a host provider's decision not to make a roaming arrangement effective was reasonably based on the fact that the requesting provider's provision of mobile data service to its own subscribers has not been done with a generation of wireless technology comparable to the technology on which the requesting provider seeks to roam;
- other special or extenuating circumstances.

87. We emphasize that these factors are not exclusive or exhaustive and that providers may argue that the Commission should consider other relevant factors in determining the commercial reasonableness of the negotiations, providers' conduct, and the terms and conditions of the proffered data roaming arrangements, including the prices. In addition, in making this determination we also will consider all relevant precedents and decisions by the Commission.

**E. Other Issues**

88. *Advertising.* In the *Second Further Notice*, we sought comment on whether we should “clarify that a carrier that obtains automatic roaming from another carrier does not have a right to advertise that it offers its subscribers roaming on a particular host carrier’s network absent a voluntary agreement of the host carrier” and whether such measure would help to “prevent free riding on the value of the host carrier’s brand name recognition and service quality reputation.”<sup>245</sup> We now clarify that we do not intend the rule we adopt today to be construed as permitting a provider that obtains roaming from another provider to use the trade name of a host provider when it advertises extended coverage due to roaming, unless the parties to the roaming agreement agree otherwise. Although Cellular South argues any such restrictions are not necessary or appropriate,<sup>246</sup> we agree with AT&T that providers can make significant capital and marketing investments with respect to differentiating the quality and brand image of their networks from competitors.<sup>247</sup> Also, we are concerned that construing the rule we adopt as allowing a roaming provider to engage in unauthorized use of a competitor’s brand name recognition and/or service quality reputation as a means of differentiating the roaming provider’s own service may indeed encourage the use of roaming as *de facto* resale.<sup>248</sup> The Commission has previously stated with regard to automatic roaming for voice and data services for CMRS providers that “automatic roaming obligations can not be used as a backdoor way to create *de facto* mandatory resale obligations or virtual reseller networks.”<sup>249</sup> As requested,<sup>250</sup> we also further clarify that we do not intend the data roaming rule we establish in this order to disturb any provider’s existing right, under applicable law, to advertise the geographic reach of their services, as extended by roaming agreements, and to use data roaming to expand their advertised service area, where under applicable law there is no unauthorized use of a competitor’s brand name and/or image associated with such advertising.

89. *Spectrum Sharing.* In the *Second Further Notice*, we sought comment on what other actions might be appropriate to address spectrum capacity needs that may arise out of data roaming or to help ensure that spectrum is utilized to the fullest extent possible, including, for example, whether facilitating spectrum sharing arrangements between a host provider and a requesting provider would be helpful or appropriate.<sup>251</sup> After review of the record, we find there is an insufficient basis to make a determination on spectrum sharing in the context of data roaming services at this time.<sup>252</sup> The one comment addressing the issue does so briefly in a footnote and provides no detail on how such a requirement would be implemented.<sup>253</sup> Given the very limited record on this option, we find that requiring spectrum sharing arrangements as a condition for commercial mobile data services roaming arrangements is not warranted at this time.

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<sup>245</sup> *Second Further Notice*, 25 FCC Rcd at 4219 ¶ 76.

<sup>246</sup> Cellular South Comments at 16.

<sup>247</sup> AT&T Comments at 68.

<sup>248</sup> See AT&T Comments at 68.

<sup>249</sup> *Report and Order*, 22 FCC Rcd at 15836 ¶ 51 (footnote omitted).

<sup>250</sup> See Cox Reply Comments at 9; Free Press Comments at 5.

<sup>251</sup> *Second Further Notice*, 25 FCC Rcd at 4221 ¶ 83.

<sup>252</sup> *Id.*

<sup>253</sup> See AT&T Comments at 68 n.172.

#### IV. PROCEDURAL MATTERS

##### A. Final Regulatory Flexibility Analysis

90. As required by the Regulatory Flexibility Act of 1980 (“RFA”),<sup>254</sup> the Commission has prepared a Final Regulatory Flexibility Analysis (“FRFA”) relating to the Second Report and Order. The FRFA is set forth in Appendix C.

##### B. Paperwork Reduction Analysis

91. This document contains modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the modified information collection requirements contained in this proceeding. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

92. In this present document, we have assessed the effects of using the procedural complaint processes established in the Commission’s Part 1, Subpart E rules, including applicable filing and discovery procedures, to govern the process for data roaming complaints, and find that this will ensure that voice and data roaming complaints are resolved under a consistent Commission process, which will reduce the regulatory burden of understanding and using these processes, and will allow a party to bring a single proceeding to address a roaming dispute that involves both voice and data services. This will, in turn, be more efficient for providers and result in faster resolution of such disputes.

##### C. Congressional Review Act

93. The Commission will send a copy of this Second Report and Order to Congress and the Government Accountability Office, pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

#### V. ORDERING CLAUSES

94. Accordingly, IT IS ORDERED, pursuant to the authority contained in Sections 1, 4(i), 4(j), 301, 303, 304, 309, 316, and 332 of the Communications Act of 1934, as amended, and Section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 301, 303, 304, 309, 316, 332, and 1302, that this SECOND REPORT AND ORDER in WT Docket No. 05-265 IS HEREBY ADOPTED.

95. IT IS FURTHER ORDERED that Parts 0 and 20 of the Commission’s rules, 47 C.F.R. Parts 0 and 20, are AMENDED as set forth in Appendix A, and such rule amendments shall be effective 30 days after the date of publication of the text thereof in the Federal Register, except for § 20.12(e)(2), which contains an information collection that is subject to OMB approval.

96. IT IS FURTHER ORDERED that § 20.12(e)(2) and the information collection contained in this Second Report and Order WILL BECOME EFFECTIVE following approval by the Office of Management and Budget. The Commission will publish a document at a later date establishing the effective date.

97. IT IS FURTHER ORDERED that, pursuant to Section 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c), the Enforcement Bureau and the Wireless Telecommunications

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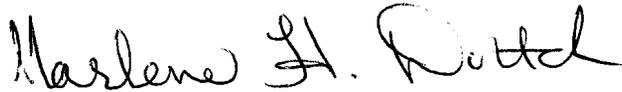
<sup>254</sup> *See* 5 U.S.C. § 604.

Bureau ARE GRANTED DELEGATED AUTHORITY to resolve any disputes arising out of the data roaming rule, as set forth in this SECOND REPORT AND ORDER and the rules in Appendix A.

98. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this SECOND REPORT AND ORDER, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

99. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this SECOND REPORT AND ORDER in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch

Secretary

**APPENDIX A****Final Rules****PART 0 – Commission Organization****PART 0 – COMMISSION ORGANIZATION****Subpart A – Organization**

- 1. The authority citation for Part 0 continues to read as follows:

AUTHORITY: Secs. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

- 2. Section 0.111(a) is amended by revising subparagraph (11) to read as follows:

**§ 0.111 Functions of the Bureau.**

(a) \* \* \* \* \*

(11) Resolves other complaints against Title III licensees and permittees, including complaints under § 20.12(e) of this chapter.

\* \* \* \* \*

**PART 20 – Commercial Mobile Radio Services****PART 20 – COMMERCIAL MOBILE RADIO SERVICES**

- 1. The authority citation for Part 20 is revised to read as follows:

AUTHORITY: 47 U.S.C. 154, 160, 201, 251-254, 301, 303, 316, and 332 unless otherwise noted. Section 20.12 also issued under 47 U.S.C. 1302.

- 2. Part 20 is amended by revising its title to read as follows:

**PART 20 – COMMERCIAL MOBILE SERVICES**

\* \* \* \* \*

- 3. Section 20.3 is amended by adding the definition “Commercial Mobile Data Service” after “Automatic Roaming” to read as follows”

\* \* \* \* \*

*Commercial Mobile Data Service.* Any mobile data service that is not interconnected with the public switched network and is: (1) provided for profit; and (2) available to the public or to such classes of eligible users as to be effectively available to the public. Commercial mobile data service includes

services provided by Mobile Satellite Services and Ancillary Terrestrial Component providers to the extent the services provided meet this definition.

\* \* \* \* \*

▪ 4. Part 20.12 is amended by adding the following new paragraph (a)(3) after paragraph (a)(2) to read as follows:

\* \* \* \* \*

**(3) *Scope of Offering Roaming Arrangements for Commercial Mobile Data Services.*** Paragraph (e) of this section is applicable to all facilities-based providers of commercial mobile data services.

5. Part 20.12 is amended by adding new paragraph (e) to read as follows:

**§ 20.12 Resale and roaming.**

\* \* \* \* \*

(e) *Offering Roaming Arrangements for Commercial Mobile Data Services.*

(1) A facilities-based provider of commercial mobile data services is required to offer roaming arrangements to other such providers on commercially reasonable terms and conditions, subject to the following limitations: (1) providers may negotiate the terms of their roaming arrangements on an individualized basis; (2) it is reasonable for a provider not to offer a data roaming arrangement to a requesting provider that is not technologically compatible; (3) it is reasonable for a provider not to offer a data roaming arrangement where it is not technically feasible to provide roaming for the particular data service for which roaming is requested and any changes to the host provider's network necessary to accommodate roaming for such data service are not economically reasonable; and (4) it is reasonable for a provider to condition the effectiveness of a roaming arrangement on the requesting provider's provision of mobile data service to its own subscribers using a generation of wireless technology comparable to the technology on which the requesting provider seeks to roam.

(2) A party alleging a violation of this section may file a formal or informal complaint pursuant to the procedures in §§ 1.716-1.718, 1.720, 1.721, and 1.723-1.735 of this chapter, which sections are incorporated herein. For purposes of section 20.12(e), references to a "carrier" or "common carrier" in the formal and informal complaint procedures incorporated herein will mean a provider of commercial mobile data services. The Commission will resolve such disputes on a case-by-case basis, taking into consideration the totality of the circumstances presented in each case. The remedy of damages shall not be available in connection with any complaint alleging a violation of this section. Whether the appropriate procedural vehicle for a dispute is a complaint under this paragraph or a petition for declaratory ruling under § 1.2 of this chapter may vary depending on the circumstances of each case.

**APPENDIX B****List of Commenters and Reply Commenters****Commenters**

ACS Wireless, Inc. (ACSW)  
AT&T Inc. (AT&T)  
Blooston Rural Carriers (Blooston)  
Bright House Networks (Bright House)  
Cellular South, Inc. (Cellular South)  
Cincinnati Bell Wireless LLC (Cincinnati Bell)  
Clearwire Corporation (Clearwire)  
Free Press (Free Press)  
Leap Wireless International, Inc. & Cricket Communications, Inc. (Leap)  
Media Access Project  
MetroPCS Communications, Inc. (MetroPCS)  
NTCH, Inc. (NTCH)  
NTELOS Inc. (NTELOS)  
The Organization for the Advancement of Small Telecommunications Companies (OPASTCO) & the National Telecommunications Cooperative Association (NTCA)  
Rural Cellular Association (RCA)  
Rural Telecommunications Group, Inc. (RTG)  
SkyTerra Subsidiary LLC (SkyTerra)  
Southern Communications Services, Inc. d/b/a SouthernLINC Wireless (SouthernLINC)  
Sprint Nextel Corporation (Sprint)  
T-Mobile USA, Inc. (T-Mobile)  
United States Cellular Corporation (U.S. Cellular)  
Verizon Wireless

**Reply Commenters**

AT&T  
Bend Cable Communications, LLC d/b/a BendBroadband (BendBroadband)  
Blooston  
Clearwire  
Cellular South  
Cox Communications (Cox)  
Free Press  
Leap  
MetroPCS  
National Cable & Telecommunications Association (NCTA)  
NTELOS  
RCA  
RTG  
SouthernLINC  
T-Mobile  
U.S. Cellular  
Verizon Wireless



## APPENDIX C

## Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Order on Reconsideration and Second Further Notice of Proposed Rulemaking in WT Docket No. 05-265.<sup>2</sup> The Commission sought written public comment on the proposals in the Second Further Notice, including comment on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.<sup>3</sup>

**A. Need for, and Objectives of, the Proposed Rules**

2. In the *Second Further Notice* that we adopted in conjunction with the *Order on Reconsideration* in 2010, we sought to refresh and further develop the record by requesting additional comment on whether to extend roaming obligations to mobile data services, including mobile broadband Internet access, that are provided without interconnection to the public switched telephone network.<sup>4</sup> The objective of the rules adopted is to require providers of commercial mobile data services to offer data roaming arrangements on commercially reasonable terms and conditions, pursuant to our authority under the Communications Act. In addition, we also clarify that providers of commercial mobile data roaming services are permitted to negotiate commercially reasonable measures to safeguard quality of service against network congestion that may result from roaming traffic or to prevent harm to their networks.

3. This rule will apply to all facilities-based providers of commercial mobile data services regardless of whether these entities are also providers of commercial mobile radio service (CMRS).<sup>5</sup> For purposes of data roaming, we define a “commercial mobile data service” as any mobile data service that is not interconnected with the public switched network but is (1) provided for profit; and (2) available to the public or to such classes of eligible users as to be effectively available to the public.

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, WT Docket No. 05-265, *Order on Reconsideration and Second Further Notice of Proposed Rulemaking*, 25 FCC Rcd 4181 (2010).

<sup>3</sup> See 5 U.S.C. § 604.

<sup>4</sup> The Commission had received several proposals concerning data roaming in response to the *Further Notice*, including a request by SpectrumCo that the Commission reconsider its decision to limit the automatic roaming obligation only to services that use the public switched network. See *Second Further Notice*, 25 FCC Rcd at 4212-13 ¶ 63. The Commission noted that issues in SpectrumCo’s petition for reconsideration were being addressed in the *Second Further Notice*. *Id.* at 4185 ¶ 9.

<sup>5</sup> For purposes of this proceeding, “commercial mobile data service” is defined as any mobile data service that is not interconnected with the public switched network but is (1) provided for profit; and (2) available to the public or to such classes of eligible users as to be effectively available to the public. 47 C.F.R. § 20.12. The current roaming obligation in Section 20.12 applies to CMRS carriers’ provision of mobile voice and data services that are interconnected with the public switched network, as well as their provision of text messaging and push-to-talk services. The data roaming rule adopted herein will cover mobile services that fall outside the scope of the current automatic roaming obligation if provided for profit; and available to the public or to such classes of eligible users as to be effectively available to the public.

4. Below, we describe the duty of providers of commercial mobile data services to offer data roaming arrangements on commercially reasonable terms and conditions subject to certain limitations. When a request for data roaming negotiations is made, as a part of the duty of providers to offer data roaming arrangements on commercially reasonable terms and conditions, a would-be host provider has a duty to respond promptly to the request and avoid actions that unduly delay or stonewall the course of negotiations regarding that request. We will determine whether the terms and conditions of a proffered data roaming arrangement are commercially reasonable on a case-by-case basis, taking into consideration the totality of the circumstances. The duty to offer data roaming arrangements on commercially reasonable terms and conditions is subject to certain limitations. In particular: (1) providers may negotiate the terms of their roaming arrangements on an individualized basis; (2) it is reasonable for a provider not to offer a data roaming arrangement to a requesting provider that is not technologically compatible; (3) it is reasonable for a provider not to offer a data roaming arrangement where it is not technically feasible to provide roaming for the particular data service for which roaming is requested and any changes to the host provider's network necessary to accommodate roaming for such data service are not economically reasonable; and (4) it is reasonable for a provider to condition the effectiveness of a data roaming arrangement on the requesting provider's provision of mobile data service to its own subscribers using a generation of wireless technology comparable to the technology on which the requesting provider seeks to roam.<sup>6</sup>

**B. Legal Basis**

5. The authority for the actions taken in this Second Report and Order is contained in Sections 1, 4(i), 4(j), 301, 303, 304, 309, 316, and 332 of the Communications Act of 1934, as amended, and Section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 301, 303, 304, 309, 316, 332, and 1302.

**C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply**

6. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>7</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>8</sup> A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>9</sup>

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<sup>6</sup> In other words, a provider offering service only through, for example, a 1xRTT or GPRS/EDGE network, would not be able to rely on the data roaming obligation for this service to obtain roaming on a later generation EV-DO or UMTS/HSPA network until it starts offering the later generation service.

<sup>7</sup> 5 U.S.C. § 601(6).

<sup>8</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

<sup>9</sup> 15 U.S.C. § 632.