

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

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

COMMENTS OF AT&T INC.

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COMMENTS OF AT&T INC.

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

INTRODUCTION AND SUMMARY

Wireless broadband data networks that have been pushed to their limits by explosively expanding demand in recent years are on the cusp of yet another quantum leap in traffic growth. As the Commission has noted, North American wireless networks that already carried 17 petabytes of data per month in 2009, the equivalent of 1,700 Libraries of Congress, will carry 740 *petabytes* – a fortyfold increase – by 2014.² Soaring wireless broadband demand and the efforts of the many competing providers to meet that demand with better, faster and more economical services are, of course, extremely positive signs. Indeed, in our increasingly mobile society, there is no more important bellwether of the success of the National Broadband Plan than the continuation of this virtuous cycle of ever-increasing mobile broadband quality that

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

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

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

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

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

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

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

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

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

⁵ *Notice*, ¶¶ 50 & 55.

⁶ Report and Order, *Implementation of Sections 3(n) and 332 of the Commc’ns Act; Regulatory Treatment of Mobile Servs.*, 9 FCC Rcd. 1411, ¶ 12 (1994) (“*1994 Regulatory Treatment Order*”).

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

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

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

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

⁸ *Id.* § 332(c)(2), (d)(3) (emphasis added).

⁹ 47 C.F.R. § 20.3.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁹ *Notice*, ¶¶ 50, 55.

²⁰ 47 U.S.C. § 332(c)(1).

²¹ *Id.* § 332(c)(2) & (d)(3).

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

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

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

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

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

²³ Notice, ¶¶ 64-71.

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

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

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

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

²⁵ *1994 Regulatory Treatment Order*, ¶ 11.

²⁶ 47 U.S.C. § 332(c)(1).

²⁷ *Id.*, § 332(c)(2) (emphasis added).

²⁸ *Id.*, § 332(d)(1).

²⁹ *Id.* § 332(d)(2).

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

³⁰ 47 C.F.R. § 20.3 (emphasis added).

³¹ *Id.*

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

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

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

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

³⁴ 47 U.S.C. § 332(d)(3).

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

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

³⁷ *Id.* (emphasis in original).

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

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

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

³⁸ *Id.* See also *Implementation of Sections 3(n) and 332(c) of the Communications Act; Regulatory Treatment of Mobile Services*, Notice of Proposed Rulemaking, 8 FCC Rcd. 7988, ¶ 15 (1993) (“it appears that Congress intended by use of the term ‘interconnected service’ to distinguish between those communications systems that are physically interconnected with the network and those systems that are not only interconnected but that also make interconnected service available”).

³⁹ *Id.*, ¶ 45 n.119.

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

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

⁴⁰ *2007 Roaming Order*, ¶ 60.

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

⁴² *1994 Regulatory Treatment Order*, ¶ 79.

⁴³ *Implementation of Sections 3(n) and 332(c) of the Communications Act; Regulatory Treatment of Mobile Services*, Notice of Proposed Rulemaking, 8 FCC Rcd. 7988, ¶¶ 29-30 (1993) (noting that, in the Conference Report, the Conference Committee included “a specific example of a service meeting the literal definition of a commercial mobile service that nevertheless might not be functionally equivalent”).

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

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

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

⁴⁴ 47 C.F.R. § 20.3.

⁴⁵ *Notice*, ¶ 62.

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

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

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

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

⁴⁶ 47 U.S.C. § 332(d)(1).

⁴⁷ *1994 Regulatory Classification Order* ¶ 65.

⁴⁸ *Id.*, ¶¶ 66-67.

⁴⁹ *Id.*, ¶ 65.

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

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

⁵⁰ Notice ¶¶ 64-71.

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

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

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

⁵² *Notice*, ¶ 65.

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

⁵⁴ *Notice*, ¶ 66.

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

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

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

⁵⁶ *Notice*, ¶ 67.

⁵⁷ *Id.*, ¶ 67

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

⁵⁹ *Notice*, ¶ 66.

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

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

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

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

⁶² *Notice*, ¶ 66.

⁶³ 47 U.S.C. § 316(a)(1).

⁶⁴ *Id.* at § 316(a), (b).

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

Finally, the *Notice* cites the Commission’s rulemaking authority under Section 303(r) to “[m]ake such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of the Act.”⁶⁶ But it is well settled that this is not an independent grant of regulatory authority. As the D.C. Circuit has held, “[t]he FCC cannot act in the ‘public interest’ [under section 303(r)] if the agency does not *otherwise* have the authority to promulgate the regulations at issue.”⁶⁷ In this regard, the “open platform” obligations that were imposed in the Upper 700 MHz C Block rulemaking were justified under Section 309.⁶⁸ By contrast, here, there is no other provision of Title III that grants the Commission authority to adopt data roaming obligation, so section 303(r) is irrelevant.

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

⁶⁶ 47 U.S.C. § 303(r).

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

⁶⁸ *Compare Notice*, ¶ 66.

⁶⁹ *Comcast*, 600 F.3d at 665; *see also id.* (“Were we to accept [Commission’s theory of its authority], we see no reason why the Commission would have to stop” with regulating the network management practices of internet service providers because there would be “few examples of regulation” under Title II, Title III, and Title IV that the Commission would be “unable to impose”).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

information service under the Act. As AT&T has previously explained,⁷⁶ the Commission concluded in the *Cable Modem Declaratory Ruling*⁷⁷ that the use of DNS, in conjunction with other applications often associated with broadband internet access, constitutes an information service under the Act, and the Supreme Court expressly sustained this reasoning when it affirmed the *Cable Modem Declaratory Ruling*.⁷⁸

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

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

⁷⁶ *Id.*, at 8-9.

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

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

⁷⁹ 47 U.S.C. § 153(44).

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

⁸¹ *See Wireless Broadband Internet Access Order*, ¶ 52.

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

There is no basis for a “legal compulsion” here. As the Commission has held repeatedly, a legal compulsion is inappropriate where the market is functioning on its own.⁸² The Commission has repeatedly rejected – and could not accept here – any claim that the wireless marketplace is characterized by the types of fundamental market failures that would be required to justify compulsory common carriage.⁸³ Moreover, the marketplace is already responding with private carriage contracts, and allowing providers to respond to rapidly changing market conditions with privately negotiated agreements is far preferable to heavy-handed Commission

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

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

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

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

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

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

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

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

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

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

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

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

⁸⁸ *Notice*, ¶ 70.

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

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

The issue here is not whether mobile broadband roaming will be widely available absent common carriage regulation. It will. Voice roaming was ubiquitous years before the Commission adopted common carrier regulation for voice,⁸⁹ so much so that by 2007 “most wireless [voice] customers [had come] to expect to roam automatically on other carriers’ networks.”⁹⁰ Mobile broadband 2.5G roaming has also become ubiquitous without common carrier obligations.⁹¹ Roaming is well under way for 3G. Next generation 3G technologies have only recently covered most of the population; HSPA covered only 20 percent of the U.S. population in 2006, and less than 60 percent in 2008.⁹² Now that it covers most of the U.S. population, 3G roaming is increasingly being developed and offered. International 3G roaming is already widely available,⁹³ and, as discussed below, providers are now hammering out appropriate terms and conditions for domestic 3G roaming.

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

⁸⁹ *Id.*

⁹⁰ *2007 Roaming Order*, ¶ 27.

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

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

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

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

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

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

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

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

⁹⁴ 2010 Roaming Order, ¶ 18; see also 2007 Roaming Order, ¶¶ 27-35.

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

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

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

⁹⁸ See, e.g., *id.*, ¶¶ 36-40.

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

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

⁹⁹ *Notice*, ¶ 54.

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

existing spectrum,¹⁰¹ and it will be years before additional sufficient spectrum will be available.¹⁰²

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

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

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

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

¹⁰³ Notice, ¶ 81.

¹⁰⁴ *2010 Roaming Order*, ¶ 21.

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

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

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

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

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

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

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

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

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

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

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

¹⁰⁹ *National Broadband Plan*, at 77.

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

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

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

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

¹¹¹ Rysavy Research, *Mobile Broadband Spectrum Demand*, at 14 (Dec. 2008), available at http://www.rysavy.com/Articles/2008_12_Rysavy_Spectrum_Demand_.pdf.

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

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

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

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

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

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

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

¹¹⁴ See *id.*

¹¹⁵ See *id.*

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

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

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

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

¹¹⁶ Notice, ¶ 75.

5 biggest E.U. countries combined (U.K., France, Germany, Italy, Spain).¹¹⁷ As explained by the Commission, “[d]uring 2008 and 2009, mobile wireless service providers continued to improve the coverage, capacity, and capabilities of their networks, focusing largely on the upgrade and expansion of mobile broadband networks to enable high-speed Internet access and other data services for their customers.”¹¹⁸ AT&T announced the completion of a software upgrade at 3G cell sites nationwide – deployment of High-Speed Packet Access (HSPA) 7.2 technology – that provides faster speeds on its 3G network; it has expanded its 3G mobile broadband network in 14 states and will upgrade of approximately 6,500 additional cell sites to 3G in 37 states in 2010.¹¹⁹ Verizon Wireless has also invested in network upgrades to enhance its 3G capacity and coverage in 2010 with the construction of new cell sites in 30 states.¹²⁰ T-Mobile has announced plans to upgrade its national high-speed 3G service to the High Speed Packet Access Plus (HSPA+) technology by the end of 2010, covering more than 100 metropolitan areas and 185 million people.¹²¹ And companies of all sizes and types are making substantial investments today in 3G networks, including companies like Leap, MetroPCS, Cellular South, Golden State Cellular, and

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

¹¹⁸ *Fourteenth CMRS Competition Report*, ¶ 105.

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

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

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

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

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

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

¹²³ See, e.g., *Fourteenth Competition Report*, ¶ 73 (“Cox Communications (Cox) invested more than \$500 million in spectrum in the AWS and 700 MHz bands and the development of infrastructure in 2006 and 2008. In 2008, Cox announced plans to deploy a 3G mobile wireless network in selected regions of the United States. In 2009, Huawei Technologies announced that it had signed a contract with Cox Communications to supply CDMA 1x and EV-DO network infrastructure and equipment for a Cox Communications mobile wireless network.”); Memorandum Opinion and Order and Declaratory Ruling, *SkyTerra Communications, Inc., Transferor and Harbinger Capital Partners Funds, Transferee Applications for Consent to Transfer of Control of SkyTerra Subsidiary, LLC*, DA 10-535, IB Docket No. 08-184, ¶¶ 55-56 (rel. Mar. 26, 2010) (describing Harbinger/Skyterra’s planned deployment) .

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹²⁸ See, e.g., 2010 Roaming Order, ¶ 21.

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

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

While the idea that roaming mandates would encourage deployment was doubtful in the voice context, there is no doubt that, in the context of *data* services, the entire premise of this argument – *i.e.*, the notion that the absence of mandated data roaming is deterring entry – is false. Wireless broadband providers of all sizes – including the major proponents of a data roaming obligation, such as Leap, MetroPCS, and U.S. Cellular¹³¹ – are all aggressively entering the 3G and 4G data marketplaces despite the absence of common carrier data roaming rules. Leap Wireless has been rapidly expanding its 3G footprint, and it is testing 4G.¹³² MetroPCS is leap-frogging 3G altogether and is jumping straight into 4G, which it expects to deploy this year.¹³³ Cellular South is likewise quickly expanding its 3G network.¹³⁴ Golden State Cellular

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

¹³¹ See *id.*, ¶ 75 n.220.

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

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

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

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

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

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

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

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

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

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

¹³⁸ Memorandum Opinion and Order and Declaratory Ruling, SkyTerra Communications, Inc., *Transferor and Harbinger Capital Partners Funds, Transferee Applications for Consent to Transfer of Control of SkyTerra Subsidiary, LLC*, DA 10-535, IB Docket No. 08-184, ¶¶ 55-56 (rel. Mar. 26, 2010).

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

¹⁴⁰ *Fourteenth CMRS Competition Report*, ¶ 117.

¹⁴¹ *Id.*

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

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

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

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

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

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

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

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

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

¹⁴⁵ *Notice*, ¶ 59.

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

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

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

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

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

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

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

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

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

1. There Should Be No Presumption That Any Mobile Wireless Broadband Roaming Request By A Technically Compatible Requesting Provider Is Reasonable. The Commission asks whether it should adopt a presumption, as it did in the voice context, that a mobile broadband roaming request is “reasonable” if it is made by a technically compatible provider.¹⁴⁸ It should not. Mobile broadband roaming presents far more complex and unpredictable issues than was the case for voice, and forcing broadband providers to negotiate against the backdrop of such a presumption would greatly exacerbate the harms of common carrier regulation.

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

¹⁴⁸ Notice, ¶ 82.

¹⁴⁹ See, e.g., *Hi-Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781, 787 (D.C. Cir. 2000) (affirming that the complainant in a proceeding conducted under section 208 of the Act bears the

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

The Commission cannot surmount that high hurdle. When the Commission shifted the burden for voice roaming in 2007, it did so in the context of a mature and predictable marketplace, for a single discrete service (voice), based on more than a decade of experience. By 2007, mobile voice technology was stable and well understood, demand was growing at a predictable rate, and there were no significant congestion or capacity issues. Thus, by the time the Commission determined that roaming requests would be presumed reasonable, the terms, conditions, pricing, and other issues that made up a reasonable roaming arrangement were well

burden of proof); *Am. Message Ctrs. v. FCC*, 50 F.3d 35, 41 (D.C. Cir. 1995) (stating, regarding a case brought under § 208, that “the rules place the burden of pleading and documenting a violation of the Act on [the complainant]. They do not require [the carrier] to prove it has not violated the Act.”); *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1235 n.34 (D.C. Cir. 1980) (noting that the complaint procedure of §§ 206-209 “shifts the burden of proof onto the aggrieved party”).

¹⁵⁰ 5 U.S.C. § 556(d).

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

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

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

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

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

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

¹⁵⁴ *Notice*, ¶ 60.

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

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

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

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

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

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

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

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

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

2. Host Providers Must Be Permitted The Flexibility To Manage Network Congestion, Implement Security Measures, And Prioritize Their Own Customers' Traffic. If the Commission mandates mobile broadband roaming, such rules must give host providers specific authority and discretion to manage all traffic on their network, including roaming traffic, in the manner that the host provider, in its sole discretion, determines best serves its customers. This discretion should explicitly include the ability to prioritize the host providers own traffic over that of roaming traffic and to implement security and other measures to protect its network.

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

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

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

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

¹⁵⁷ *Notice*, ¶ 80.

¹⁵⁸ *Id.*, ¶ 81.

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

The Commission should thus establish a “safe harbor” that host providers are permitted to prioritize traffic for their own customers in times of congestion or where there are otherwise competing needs for bandwidth.¹⁶⁰ Such prioritization could take several forms: (1) manual or dynamic packet prioritization at times and locations of congestion; (2) limiting roaming users to 2/2.5G networks at times and locations of congestion; (3) “speed” limits on roaming users; and (4) congestion-based pricing. Such prioritization and management prerogatives are commonly included today in international broadband roaming arrangements.

3. Wireless Broadband Roaming Mandates Should Apply Only To Networks That Use The Same Radio Technologies And Air Interfaces And That Have Substantial Networks Of Their Own. To preserve the proper incentives for investment, common carrier obligations

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

¹⁶⁰ This would include allowing host providers “to identify roaming users as a group and apply[ing] suitable network management protocols to such a group to address congestion issues.” *Notice*, ¶ 81.

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

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

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

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

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

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

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

¹⁶² 2010 Data Roaming Order, ¶ 31.

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

¹⁶⁴ *Id.*

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

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

4. Mobile Wireless Broadband Roaming Rules Should Clearly Prohibit The Use Of Roaming Arrangements As De Facto Resale Services. Any Commission rules in this context should also strongly protect against permitting “a backdoor way to create *de facto* mandatory resale obligations or virtual reseller networks.”¹⁶⁶ The Commission has consistently recognized, including in this *Notice* (¶ 76), that the availability of resale would strongly undermine investment incentives. As the Commission has previously explained, “[w]hile resale obligations are intended to offer carriers the opportunity to market a competitive retail service without facilities development, such a resale product would not serve our goals of promoting facilities-based competition, the development of spectrum resources, and the availability of ubiquitous coverage.”¹⁶⁷ Indeed, the Commission expressly recognized that mandatory resale imposed

¹⁶⁵ *Notice*, ¶ 84.

¹⁶⁶ *Notice*, ¶ 35; *see also* 2007 *Roaming Order*, ¶ 51.

¹⁶⁷ *Notice*, ¶ 35.

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

First, the Commission should expressly authorize host providers to deny mobile broadband data roaming to requesting providers that seek to sell service to individuals located outside of the requesting provider’s home mobile broadband service area. A provider that sells service to a person located outside of its service territory is clearly using roaming as *de facto* resale.¹⁷¹

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

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

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

¹⁷⁰ See, e.g., *2007 Roaming Order*, ¶ 51 (2007) (“We note that the Commission’s mandatory resale rule was sunset in 2002, and automatic roaming obligations can not be used as a backdoor way to create *de facto* mandatory resale obligations or virtual reseller networks.”).

¹⁷¹ *Id.* (“CMRS resale entails a reseller’s purchase of CMRS service provided by a facilities-based CMRS carrier in order to provide resold service within the same geographic market as the facilities-based CMRS provider.”).

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

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

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

¹⁷³ *Notice*, ¶ 76.

CONCLUSION

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

Respectfully Submitted,

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