

United States Senate

WASHINGTON, DC 20510

April 6, 2011

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

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Dear Chairman Genachowski:

It has come to our attention that the Commission plans on issuing an order on Data Roaming during the April 7th meeting. We are writing today to express our deep concern regarding the Commission's current direction and urge you to refrain from proceeding on this controversial item.

The wireless industry has seen phenomenal growth since its first commercial phone call in 1983. Today, there are over 303 million wireless subscribers in the United States. The wireless industry employs over 250,000 people across the country with a payroll of over \$13.2 billion per year. In addition, U.S. carriers spend nearly \$25 billion a year in capital investment which is nearly a 500% increase since 1995. All of this has been done in the absence of the heavy handed government regulation currently under consideration. Unfortunately, the Commission's data roaming proposal would reverse this successful hands-off approach, and would subject the wireless industry to rate regulation of information services.

The Commission's agenda describes the Report and Order as "adopt[ing] a rule requiring facilities-based providers of commercial mobile data services to offer data roaming arrangements to other such providers on commercially reasonable terms and conditions, subject to certain limitations." Such a requirement would impose a "duty to serve," which is a core common carrier obligation to which telecommunications carriers are subject under Section 201 of the Communications Act. While such a common carriage requirement may be appropriate for mobile voice services, which the Commission has classified as "telecommunications services," such a requirement is certainly not appropriate for mobile data services, which the Commission itself classified in 2007 as "information services."

Given that the Commission itself has acknowledged that the agency cannot impose a common carrier obligation on a provider of an information service, we are eager to understand how the Commission could apparently reverse its own decision. And even if the terms and conditions of data roaming arrangements would not have to be "just and reasonable" under the Commission's Order, you seem to be ignoring the fact that merely requiring the provider of a private mobile service to "offer" data roaming subjects such a provider to a classic common carriage obligation. In fact, Section 332(c)(2) of the Act states that, "a private mobile service shall not . . . be treated as a common carrier for any purpose under this Act."

In addition, we are concerned about the Commission's assertion of statutory authority to impose data roaming obligations. The current direction in this proceeding and the Open Internet

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Proceeding suggest that, instead of following direct and explicit authority given to you by Congress, you may be stretching the meaning of certain Communications Act provisions to justify your pre-determined regulatory action.

The Commission's proposed Data Roaming Order threatens to undermine investment, job growth, and innovation in the mobile broadband sector. In March 2008, the Commission completed the 700 MHz auction. This auction brought in over \$19.5 billion into the Treasury. According to the Commission's own estimates, this was more money than a combined 68 auctions that took place over the past 15 years. The winning bidders have paid-in-full for use of the spectrum in order to bring new, robust services to consumers. These services are now being deployed, and as a result, consumers now have access to next-generation wireless products and services that will transform the industry and the way we use our mobile devices as well as continue to keep America at the top of technological innovation.

Carriers have spent vast amounts of capital to get access to spectrum and deploy their services with certainty regarding what they are allowed to do with the spectrum. Yet the Commission now seeks to change the rules of the road in a material way, imposing obligations that, if they had applied at the time of auction, would have dramatically reduced the value of the licenses. If the Commission's new data roaming rules go into effect, auction participants will no longer be able to bid on spectrum with regulatory certainty that the terms of the licenses will not be materially and adversely changed at some point down the road. This will devalue spectrum and reduce proceeds for the Treasury.

We need to create and foster an environment that encourages further technological advancement and investment in wireless networks, continued deployment, increased innovation of wireless services and devices, and, most importantly, job creation. We fail to understand how the Commission's proposed data roaming rules advances any of these goals. We respectfully ask the Commission to reconsider moving forward on this item and avoid the uncertainty and turmoil that will no doubt ensue.

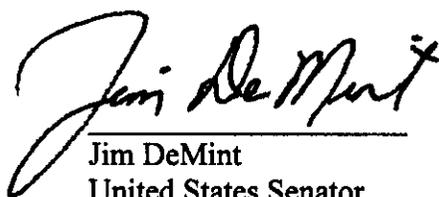
Sincerely,



Pat Toomey
United States Senator



John Ensign
United States Senator



Jim DeMint
United States Senator