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

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

DECLARATORY RULING

Adopted: December 18, 2014 **Released: December 18, 2014**

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Declaratory Ruling, we grant, as set out below, a T-Mobile USA, Inc. ("T-Mobile") petition for an expedited declaratory ruling ("Petition"),[1] in order to provide additional guidance on how to evaluate data roaming agreements under the standard set forth in Section 20.12(e) of the Commission's rules. This rule obligates facilities-based providers to offer data roaming arrangements to other such providers on "commercially reasonable terms and conditions."[2] Specifically, the Petition requests guidance that, in evaluating data roaming disputes, the Commission will consider as potentially relevant whether proffered data roaming rates are substantially in excess of retail rates, international rates, and mobile virtual network operator (MVNO)/resale rates, as well as how proffered data roaming rates compare to domestic data roaming rates charged by other providers. Additionally, the Petition argues that: (i) the presumption in the *Data Roaming Order*[3] that the terms of an existing roaming agreement are commercially reasonable should be interpreted to apply only with respect to challenges to the terms of that agreement, and not to future agreements; and (ii) the inclusion of the extent and nature of providers' build-out as a relevant factor should not be interpreted to allow a host provider to deny roaming or charge commercially unreasonable rates for roaming in a particular area where the otherwise built-out requesting provider has not built out in that area.[4]

II. BACKGROUND

2. Roaming arrangements between wireless service providers enable customers of one provider to receive services from another provider's network when they are in areas that their provider's network does not cover. The Commission has previously determined that the availability of both voice

[1] *See* Petition for Expedited Declaratory Ruling of T-Mobile USA, Inc., WT Docket No. 05-265 (filed May 27, 2014) ("T-Mobile Petition").

[2] 47 C.F.R. § 20.12(e)(1).

[3] *See* Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, WT Docket No. 05-265, *Second Report and Order*, 26 FCC Rcd 5411, 5451 ¶ 81 (2011) (*"Data Roaming Order"*), *aff'd sub nom. Cellco Partnership v. FCC,* 700 F.3d 534 (D.C. Cir. 2012).

[4] *See* T-Mobile Petition at 16-23.

and data roaming arrangements is critical to promoting seamless consumer access to mobile services nationwide, to promoting innovation and investment, and to promoting facilities-based competition among multiple service providers.[5] The Commission found that data roaming is "particularly important for consumers in rural areas – where mobile data services may be solely available from small rural providers."[6] Further, the Commission noted, additional consolidation in the mobile wireless marketplace may have reduced the incentives of the largest providers to enter into agreements with other providers because of their reduced need for reciprocal roaming.[7]

3. In the *Data Roaming Order,* the Commission adopted a rule that requires 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.[8] Under the data roaming rule, the Commission determines the commercial reasonableness of data roaming terms and conditions and resolves disputes thereunder on a case-by-case basis, taking into consideration the totality of circumstances of the individual negotiations.[9] The requirement that providers offer data roaming arrangements on commercially reasonable terms and conditions allows service providers the flexibility to negotiate different terms and conditions, including prices, with different parties based on the circumstances in each case.[10] The Commission concluded that the data roaming rule would promote consumer access to seamless mobile data coverage nationwide, appropriately balance the incentives for new entrants and incumbent providers to invest in and deploy advanced networks across the country, as well as foster competition among multiple service providers in the mobile wireless marketplace.[11]

4. In 2012, the D.C. Circuit upheld the Commission's data roaming rule and concluded that the rule did not impose *per se* common carrier requirements. While it observed that the rule "plainly bears some marks of common carriage," the court declined to conclude that such marks "so predominate as to 'relegate[]' mobile-internet providers 'to common-carrier status.'"[12] In the court's view, a key distinction is whether a provider "make[s] individualized decisions in particular cases whether and on what terms to serve."[13] The court noted that the rule "spells out sixteen different factors plus a catch-all 'other special or extenuating circumstances' factor that the Commission must take into account."[14] Given

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[5] *See Data Roaming Order,* 26 FCC Rcd at 5411-12 ¶ 1; Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, WT Docket No. 05-265, *Order on Reconsideration and Second Further Notice of Proposed Rulemaking*, 25 FCC Rcd 4181, 4182 ¶ 2 (2010) ("*Voice Roaming Order on Reconsideration*").

[6] *Data Roaming Order,* 28 FCC Rcd at 5418-19 ¶ 15; *id.* at 5425-26 ¶ 26 ("We note again the importance of roaming to consumers in rural areas, where mobile data services may be solely available from small rural providers, and therefore the past difficulties of rural providers in obtaining data roaming presents a serious concern.") and at 5442-43 ¶ 64 ("Data roaming will encourage service providers to invest in and upgrade their networks and to deploy advanced mobile services ubiquitously, including in rural areas.").

[7] *See id.* at 5426-27 ¶ 27.

[8] *Id*. at 5411-12 ¶¶ 1-2.

[9] *See id.* at 5452-53 ¶¶ 85-86; *see also* 47 C.F.R. § 20.12(e).

[10] *See Data Roaming Order*, 26 FCC Rcd at 5452 ¶ 85. This means that service providers can adapt roaming arrangements to individualized circumstances without having to serve all comers indiscriminately on the same or standardized terms. *See id.* at 5433 ¶ 45.

[11] *Id.* at 5418 ¶ 13.

[12] *Cellco Partnership v. FCC*, 700 F.3d 534, 545, 548 (D.C. Cir. 2012).

[13] *Id.* at 546. The court also noted that there is a "gray area in which although a given regulation might be applied to common carriers, the obligations imposed are not common carriage *per se.*" In this realm, "the Commission's determination that a regulation does or does not confer common carrier status warrants deference." *Id.* at 547.

[14] *Id.* at 548.

that the Commission's "commercially reasonable" standard "leaves substantial room for individualized bargaining and discrimination in terms" and allows for "considerable flexibility for providers to respond to the competitive forces at play in the mobile-data market," the D.C. Circuit upheld the data roaming rule against Verizon's claim that it constituted impermissible common carriage regulation.[15] The court cautioned the Commission against applying the rule in such a manner as to effectively relegate mobile-data providers to common carrier status, stating that the Commission "would thus do well to ensure that the discretion carved out in the rule's text remains carved out in fact."[16]

5. T-Mobile filed its Petition on May 27, 2014. The Petition asks the Commission to provide guidance for determining whether the terms of any given data roaming agreement meet the "commercially reasonable" standard adopted in the *Data Roaming Order*.[17] T-Mobile asserts that the data roaming marketplace is not working and that providers face difficulties negotiating data roaming agreements due in part to uncertainties in the commercially reasonable standard. It argues that "must have" roaming partners have exploited ambiguity in the rules to deny roaming requests, and that difficulties in negotiations have led to substantial delays in the process.[18] Specifically, T-Mobile proposes four "benchmarks" that it asserts would be relevant for assessing the commercial reasonableness of data roaming rates: (i) retail rates; (ii) international roaming rates; (iii) MVNO/resale rates; and (iv) roaming rates charged by other providers.[19] T-Mobile asserts that the Commission should consider whether a proffered data roaming rate "substantially exceeds" the first three of these benchmarks, and also "how [that rate] compares" to the fourth benchmark, as part of the totality of the circumstances approach in deciding whether a proffered data roaming rate is commercially reasonable.[20] T-Mobile also asserts that the Commission should consider the relevance of such other rates in conjunction with one another, and with an analysis of competitive risks.[21]

6. In addition, T-Mobile requests clarification that: (i) the presumption in the *Data Roaming Order* that the terms of an existing roaming agreement are commercially reasonable applies only with respect to challenges to the terms of that agreement, and not to future agreements or proposed agreements; and (ii) inclusion of the extent and nature of providers' build-out as a factor was not intended to allow a host provider to deny roaming or charge commercially unreasonable rates for roaming in a particular area where the otherwise built-out requesting provider has not built out.[22]

7. On June 10, 2014, the Wireless Telecommunications Bureau ("WTB") sought comment on the T-Mobile Petition.[23] Nineteen parties filed comments and/or reply comments. The majority of commenters support the Petition and argue that further guidance on the commercial reasonableness standard could help relieve some of the difficulties faced by smaller service providers in roaming agreement negotiations, which smaller providers argue have often been protracted, excessively expensive,

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[15] *Id.* at 537, 548.

[16] *Id.* at 549.

[17] T-Mobile Petition at i, 1-2; Exhibits 1-2.

[18] *Id.* at 2, 6.

[19] *Id.* at ii, 11-16, Exhibit 2, Farrell Declaration at ¶¶ 10-13.

[20] *Id.* at ii, 11-16, Exhibit 2, Farrell Declaration at ¶¶ 8-13; T-Mobile Reply Comments at 10-15.

[21] T-Mobile Petition, Exhibit 2, Farrell Declaration at ¶ 8; T-Mobile Reply Comments, Exhibit 2, Farrell Declaration at ¶¶ 46, 48.

[22] T-Mobile Petition at ii-iii, 16-23.

[23] *See* Wireless Telecommunications Bureau Seeks Comment on Petition For Expedited Declaratory Ruling Filed by T-Mobile USA, Inc. Regarding Data Roaming Obligations, WT Docket No. 05-265, *Public Notice*, 28 FCC Rcd 6035 (WTB 2014).

and one-sided.[24] By contrast, AT&T and Verizon oppose T-Mobile's Petition and argue that the data roaming marketplace is functioning well as evidenced by the steady and significant decline in data roaming rates, and that the Commission's data roaming rule, along with the Commission's mediation and complaint procedures, is sufficient to resolve any roaming disputes.[25] Further, they contend that T-Mobile's proposal would radically change the commercial reasonableness standard by linking roaming rates to other rates, which would function as a de facto price cap and reduce negotiating freedom.[26] They also argue that T-Mobile's principal proposal would "convert the existing data roaming rules into an intrusive rate regulation regime"[27] and "unlawful common carrier regulation."[28] In contrast to other smaller providers, Cellular One opposes the Petition, arguing that it would decrease roaming rates indiscriminately for all providers, including smaller providers receiving roaming revenues who are least equipped to negotiate for rates that depart from any benchmarks.[29]

III. DISCUSSION

8. Based on the record before us, we grant T-Mobile's request to the extent we provide guidance on the *Data Roaming Order*'s standard for evaluating the commercial reasonableness of proffered data roaming terms and conditions under Section 20.12(e) of the Commission's rules. We also grant T-Mobile's additional requests by providing the guidance set forth below with respect to the order's presumption regarding existing agreements and its consideration of the build-out factor. In both respects, we provide guidance on what the Commission intended to achieve in the *Data Roaming Order*, in a manner that should lessen any ambiguity over the meaning of that order.

A. Request for Guidance on Consideration of Other Rates

9. In our view, the data roaming rule was intended to permit consideration of the totality of the facts and therefore to permit a complaining party to adduce evidence in any individual case as to whether proffered roaming rates are substantially in excess of retail rates, international rates, and MVNO/resale rates, as well as a comparison of proffered roaming rates to domestic roaming rates as charged by other providers. As noted below, the probative value of these other rates as reference points will depend on the facts and circumstances of any particular case, including all of the factors set forth in the *Data Roaming Order*, and these other rates should be considered in conjunction with one another rather than in isolation.

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[24] *See, e.g.,* T-Mobile Reply Comments at i-ii, 1-4; Rural Wireless Association (RWA) Comments at 6-7; NTCA Comments at 2-4; PinPoint Comments at 2-3; NTCH, Flat Wireless and Buffalo-Lake Erie Wireless Systems ("Blue Wireless") Comments at 2, 4; Letter from Donald J. Evans, Counsel, Blue Wireless, to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Dec. 4, 2014 at 2; Competitive Carriers Association (CCA) Reply Comments at 2, 5-6; Sprint Reply Comments at 1; C Spire Wireless Comments at 3-5; Letter from Beverly Jones Heydinger, Chair, Minnesota Public Utilities Commission, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, filed Dec. 5, 2014 at 1-2; Letter from Steven V. King, Executive Director and Secretary, Washington Utilities and Transportation Commission, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, filed Oct. 24, 2014 at 3; Letter from Thomas L. Welch, Chairman, *et al.*, Maine Public Utilities Commission, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, filed Oct. 14, 2014 at 2; Letter from Elin Swanson Katz, Consumer Counsel, Connecticut Office of Consumer Counsel, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, filed Sept. 23, 2014 at 1-2.

[25] *See* Verizon Comments at 8-9; AT&T Opposition at 10-14; *see also* Letter from David L. Lawson, Attorney, AT&T, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, filed Dec. 10, 2014 (AT&T Dec. 10 *Ex Parte*).

[26] *See* AT&T Opposition at 34-36; AT&T Reply Comments at 12; Verizon Comments at 10, Verizon Reply Comments at 3-4.

[27] Verizon Comments at 16.

[28] AT&T Opposition at 32-36; *see also* AT&T Dec. 10 *Ex Parte* at 8-9.

[29] *See* Cellular One Reply Comments at 1-2.

10. We agree with the majority of commenters that additional guidance will benefit negotiating parties as to the application of the commercial reasonableness standard in the data roaming rule, as well as to the totality of the circumstances approach for resolving disputes between negotiating parties.[30] Providers are currently negotiating new data roaming agreements, many of which are replacing agreements that predate the new rule.[31] Our interpretation of the scope of the *Data Roaming Order* and the rule may help alleviate any concerns resulting from disputes between negotiating parties by lessening ambiguity in the application of the commercial reasonableness standard and totality of the circumstances approach for resolving disputes.[32]

11. T-Mobile asserts that real-world experience since the adoption of the data roaming rule over three years ago shows that providers continue to be stymied in their efforts to negotiate data roaming agreements on commercially reasonable terms and further, that these problems are due in large part to ambiguities in the commercially reasonable standard.[33] T-Mobile contends that because it cannot negotiate roaming at commercially reasonable rates, it "has been forced to throttle and cap" roaming by its subscribers,[34] and that "this is precisely the type of impact on consumers that the 'commercially reasonable' standard should be interpreted to prevent."[35] Specifically, T-Mobile argues that clarification will help parties better understand their data roaming rights and obligations, narrow issues in dispute, and allow parties to negotiate terms more consistently and quickly.[36] Likewise, smaller providers assert that negotiations are extremely difficult and often they are offered unreasonable data roaming rates, terms, and conditions.[37]

12. In light of these concerns about current negotiations, CCA argues that the guidance T-Mobile requests would establish more predictable criteria and would expedite roaming negotiations by narrowing the issues concerning the scope of the Commission's requirements and enabling parties to arrive at commercially reasonable terms in a more efficient manner.[38] Sprint asserts that without further guidance on the commercial reasonableness standard, it is unclear what it would take to file a viable complaint for the Commission's review and consideration.[39]

13. In our view, it would serve the purposes of the data roaming rule for us to provide this guidance. The need for such guidance is underscored by increasing consumer demand for data services which is driving significantly more intensive use of mobile networks,[40] and by differences among mobile

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[30] *See* 47 C.F.R. § 20.12(e)(1), (2).

[31] *See* Letter from Andrew W. Levin, T-Mobile, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, filed Nov. 13, 2014, at 1-2.

[32] *See, e.g.,* Sprint Comments at 2-3; T-Mobile Petition at 6, n. 25.

[33] *See* T-Mobile Petition at i.

[34] *Id.* at 13; Exhibit 1, Mosa Declaration at ¶ 10.

[35] *Id.* at 13.

[36] *See id.* at 10; *see also* T-Mobile Reply Comments at 1-2.

[37] *See, e.g.,* CCA Comments at 5; NTELOS Comments at 7-14; Limitless Comments at 3-4; Letter from Daryl A. Zakov, Assistant General Counsel, RWA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, filed Dec. 5, 2014 at 3 (RWA Dec. 5 *Ex Parte*); NTCA Comments at 2-3; Blooston Comments at 3; NTCH, Flat Wireless and Blue Wireless Comments at 2.

[38] *See* CCA Comments at 7; *see also* Letter from Rebecca Murphy Thompson, General Counsel, CCA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, filed Nov. 21, 2014 at 1-2 (CCA *Ex Parte*).

[39] Sprint Reply Comments at 20-21.

[40] *See* Policies Regarding Mobile Spectrum Holdings; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, WT Docket No. 12-269, Docket No. 12-268, *Report and Order*, 29 FCC Rcd 6133, 6146, ¶ 23 (2014) ("*Mobile Spectrum Holdings Report and Order*").

broadband service providers in terms of spectrum holdings and network coverage.[41] The availability of roaming capabilities is and will continue to be a critical component enabling consumers to have a competitive choice of facilities-based providers offering nationwide access to mobile data services.[42] We believe that issuing guidance can facilitate the achievement of these objectives and is thus an appropriate exercise of the Commission's broad discretion in conducting its proceedings so as to "best conduce to the proper dispatch of business and to the ends of justice."[43]

14. We also believe, contrary to the positions of AT&T and Verizon Wireless, that this guidance is consistent with the *Data Roaming Order,* where the Commission made clear that, in resolving disputes under its commercially reasonable standard, "each case will be decided based on the totality of the circumstances."[44] The Commission concluded that as a "guide" it "may consider" seventeen specified factors, including "other special or extenuating circumstances," as well as other factors.[45] It then emphasized – again – that "these factors are not exclusive or exhaustive" and that "providers may argue that the Commission should consider other relevant factors" in determining commercial reasonableness of proffered terms and conditions, "including the prices."[46]

15. This language clearly reflects a broad view of what could be relevant in determining commercial reasonableness, and a determination not to circumscribe the Commission's consideration of potentially relevant factors. The Commission adopted this broad view with respect to its consideration of all terms and conditions of proffered roaming arrangements – "including the prices."[47] Thus, in applying the terms of the *Data Roaming Order* to disputes involving price, parties would be free to argue that other price-related facts (including, as specifically noted below, prices charged in other contexts) are relevant factors that the Commission should consider in assessing the commercial reasonableness of the price at issue.

16. Further, we see nothing in the Commission's expansive approach as intending to foreclose, as a *per se* rule, such potentially relevant evidence designed to inform the inquiry into whether a rate is commercially reasonable. Indeed, two of the seventeen listed factors -- "whether the parties have any roaming arrangements with each other…and the terms of such arrangements" and "whether the providers involved have had previous data roaming arrangements with similar terms" -- expressly contemplate that the terms of other data roaming agreements (which, as noted above, include prices) could be relevant in the analysis.[48] Any other reading of the *Data Roaming Order* would deprive parties of a meaningful opportunity to challenge price terms under the commercially reasonable standard because they would be unable to provide evidence as to such comparative reference points.

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[41] As of July 2014, the top two nationwide providers, Verizon Wireless and AT&T, covered approximately 96% and 91% of the population respectively, and approximately 57% and 30% of the land area with 4G LTE. The two smaller nationwide providers, Sprint and T-Mobile, covered approximately 73% and 70% of the population respectively, and approximately 17% and 8% of the land area with 4G LTE. The largest of the local or regional service providers, US Cellular, covered only 7% of the population and 6% of the land area with LTE, and 10% of the population and 13% of the land area with 3G. Estimates based on census block analysis of provider coverage maps, using ©2013-2014 Mosaik Solutions, LLC, July 2014 CoverageRight. Population and area data are from the 2010 Census, and include the United States (50 states plus the District of Columbia) and Puerto Rico.

[42] *See Data Roaming Order,* 26 FCC Rcd at 5419-20 ¶ 16.

[43] *FCC v. Schreiber,* 381 U.S. 279, 289 (1965), quoting 47 U.S.C. § 154(j).

[44] *Data Roaming Order,* 26 FCC Rcd at 5452-53 ¶ 86.

[45] *Id.*

[46] *Id.* at 5453 ¶ 87.

[47] *Id.* at 5452-53 ¶ 86; *see also id.* at 5453 ¶ 87 (analysis applies to all "terms and conditions of the proffered data roaming arrangements, including the prices").

[48] *Id.* at 5452-53 ¶ 86.

17. Verizon and AT&T assert that it is not appropriate to base data roaming rates on retail, MVNO, or international roaming rates because these other rates are based on markedly different factors.[49] In this guidance, we provide only, as requested by T-Mobile, that substantial differences from these other rates are potentially relevant reference points in determining commercial reasonableness. We do not expect that these other rates will be probative factors in every case or that they will be relevant to the same degree. Further, just as the Commission would consider a provider's arguments as to why certain other rates would be relevant as reference points, it also would consider a party's arguments as to why they would not be relevant, based on the facts and circumstances of a particular case.[50]

18. Verizon and AT&T also argue that the Commission has already considered and rejected requests to use wholesale and/or retail rates as a benchmark and that T-Mobile's request is therefore inconsistent with the *Data Roaming Order*.[51] Verizon also asserts that the Commission was asked to include other rates as a listed factor when it adopted the data roaming rule but did not do so.[52] Contrary to Verizon's and AT&T's assertions, the guidance we provide in this ruling is consistent with the *Data Roaming Order* because the rates T-Mobile identifies as "benchmarks" are merely reference points to help inform the Commission and negotiating parties. These reference points do not function as a ceiling or as a cap on prices. As explained above, the consideration of differences from other rates as reference points is consistent with the approach set forth in the *Data Roaming Order*, which recognizes that a broad range of information could have a bearing on commercial reasonableness and that the parties and Commission should determine the probative value of such information on a case-by-case basis. In addition, nothing in the *Data Roaming Order* indicates that the Commission intended to exclude other rates from consideration, and some of the listed factors, as discussed above, specifically contemplate consideration of terms and conditions in other agreements (which would include other rates).[53]

19. For these reasons, the guidance we provide is also consistent with the D.C. Circuit's decision in *Cellco Partnership v. FCC.* We disagree with AT&T and Verizon that the use of these reference points as proposed by T-Mobile would turn the data roaming rule into a common carrier requirement by curtailing or eliminating the ability to offer discrimination in terms.[54] In granting the T-Mobile Petition, we are providing guidance that these other rates can be considered, along with other data from the listed factors, under the totality of the circumstances approach. The degree of relevance of other rates will depend on the facts and circumstances of the individual case, including other terms and conditions of the proposal. In accordance with the court's decision, this approach allows host providers substantial room for individualized bargaining and discrimination in terms without changing the underlying legal standard.[55]

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[49] Verizon Comments at 11-14; AT&T Opposition at 28-32; Letter from Kathleen Grillo, Senior Vice President, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, filed Dec. 17, 2014 at 11 (Verizon *Ex Parte*).

[50] To the extent other rates are confidential or proprietary, there are well-established procedures for protecting that information from disclosure in Commission proceedings. *See* 47 C.F.R. § 20.12(e)(2), citing 47 C.F.R. § 1.731 (confidentiality of information exchanged by parties in formal complaint proceedings); *see generally FCC v. Schreiber*, 381 U.S. 279 (1965); Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, GC Docket No. 96-55, *Report and Order*, 13 FCC Rcd 24816 (1998); *see also, e.g.*, Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC for Consent to Assign Licenses, WT Docket No. 12-2, *Second Protective Order*, 27 FCC Rcd 289 (WTB 2012). We expect parties to use similar means to protect the confidentiality of information during negotiations.

[51] *See* Verizon Comments at 10-11; AT&T Opposition at 26-29; Verizon *Ex Parte* at 5-6.

[52] *See* Verizon Comments at 6-7; *see also Data Roaming Order,* 26 FCC Rcd at 5422-23, 5448 ¶¶ 21, 73.

[53] *See supra* ¶ 15.

[54] *See* AT&T Reply Comments at 15; Verizon Reply Comments at 3-4; AT&T Dec. 10 *Ex Parte* at 8-9.

[55] *Cellco Partnership*, 700 F.3d at 548.

20. Other objections to T-Mobile's request for guidance are not persuasive in our view. For example, AT&T claims that the marketplace is quickly transitioning to LTE and as a result, any further guidance based on the experience with roaming on GSM or CDMA networks is short-sighted.[56] The full migration to LTE, however, is not immediate, and providers will continue to need "fallback" roaming for 2G and 3G services.[57] Further, as T-Mobile notes, many customers are slow to migrate to more modern handsets that are LTE compatible, and providers continue to experience challenges in the development of multi-mode handsets that access LTE networks.[58] AT&T also asserts that the relief requested by T-Mobile will imply that roaming rates in "dozens if not hundreds" of existing agreements are commercially unreasonable by an order of magnitude.[59] We disagree. Under the Commission's standard, consideration of whether there is a substantial difference between proffered roaming rates and retail, international, and MVNO/resale rates, as well as a comparison of proffered rates and rates in other domestic roaming agreements, must be undertaken within the totality of circumstances of a particular case. This includes a host of other factors -- those identified in the *Data Roaming Order* "as well as others."[60] In addition, the four reference points should be considered in conjunction with each other and not in isolation.

21. Verizon also objects to T-Mobile's request for guidance on grounds that the current dispute resolution process is working and that T-Mobile and other providers should use these remedies to address concerns with data roaming rates.[61] The guidance we provide today is not an indication that the complaint process is not working. Rather, we grant T-Mobile's requested relief to address commenters' concerns over the difficulties that providers are experiencing in negotiating data roaming agreements. This guidance will allow providers to better gauge the commercial reasonableness of data roaming terms, which in turn will facilitate the successful negotiation of future data roaming arrangements.

22. Further, Cellular One argues that benchmarking data roaming rates to retail, MVNO, or international rates would put significant downward pressure on all roaming rates indiscriminately and would disadvantage smaller service providers in their negotiations with larger service providers.[62] AT&T also asserts that "it is reasonable to see higher rates for rural roaming than for urban roaming" due to the unique economic challenges faced by service providers in rural markets.[63] As discussed above, we are here providing guidance that, under the terms of the *Data Roaming Order*, these other rates can be considered in any given case. The degree of relevance will depend on the facts and circumstances of the specific case.[64] This approach, therefore, will continue to allow host providers substantial room for individualized bargaining.

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[56] AT&T Opposition at 14-16.

[57] *See* T-Mobile Petition, Exhibit 1, Mosa Declaration at ¶ 22; T-Mobile Reply Comments at 21-22; *see also* Sprint Reply Comments at 6 (explaining how LTE handsets will continue to revert to 2G/3G for voice and data service where the LTE signal is unavailable even after deployment of VoLTE).

[58] T-Mobile Reply Comments at 21-22.

[59] AT&T Reply Comments at 12.

[60] *Data Roaming Order,* 26 FCC Rcd at 5452-53 ¶ 86.

[61] Verizon Comments at 2-3; Verizon Reply Comments at 5-7.

[62] *See* Cellular One Reply Comments at 1.

[63] Letter from Joan Marsh, AT&T, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, filed Nov. 2, 2014 at 1-2 (AT&T *Ex Parte*).

[64] *See* Letter from Andrew W. Levin, T-Mobile, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, filed Nov. 21, 2014 at 6 (T-Mobile Nov. 21 *Ex Parte*) (asserting that nothing in the T-Mobile requested guidance would prohibit rural providers from negotiating roaming rates that reflect the particular circumstances of their service areas).

23. Commenters in this proceeding also make various arguments about whether the data roaming marketplace is functioning properly and whether AT&T and Verizon have the incentive and ability to raise data roaming costs.[65] As noted above, we are granting the Petition to the extent set out herein because T-Mobile and the majority of commenters raise concerns about how to apply the commercial reasonableness standard, and we believe that providing guidance as to our views of the scope of the *Data Roaming Order* will help to facilitate the successful negotiation of data roaming arrangements on a more expeditious and less costly basis. We do not need to address arguments about whether service providers have the incentive and the ability to raise their rivals' costs, or whether these arguments have already been addressed in the *Data Roaming Order,* and we decline to do so in this declaratory ruling.

B. Additional Requests For Guidance

24. T-Mobile also seeks guidance that: (i) the presumption in the *Data Roaming Order* that the terms of an existing roaming agreement are commercially reasonable applies only with respect to challenges to the terms of that agreement, and not to the reasonableness of future agreements or proposed agreements; and (ii) inclusion of the extent and nature of providers' build-out as a relevant factor was not intended to allow a host provider to deny roaming in a particular area where the otherwise built-out requesting provider has not built out.[66] Commenters disagree as to the intent and purpose of these provisions,[67] and we believe that guidance as to our views of the application of the *Data Roaming Order* will help resolve any future disputes among roaming partners and facilitate data roaming arrangements.

25. *Presumption of Reasonableness of Existing Agreements.* The Commission stated in the *Data Roaming Order* that "[b]ecause the standard of commercial reasonableness is one that we expect to accommodate a variety of terms and conditions in data roaming, and to discourage frivolous claims regarding the reasonableness of the terms and conditions in a signed agreement, we will presume in such cases that the terms of a signed agreement meet the reasonableness standard and will require a party challenging the reasonableness of any term in the agreement to rebut that presumption."[68] In our view, the Commission intended for this presumption to apply only when a party challenges the terms and conditions of a signed agreement. The Commission's discussion of the presumption was in the context of a statement that "the terms of the agreement generally will govern the data roaming rights and obligations of the parties," pursuant to "relevant contract law."[69] Such contract rights and obligations extend only with respect to the terms of the existing agreement, and the parties that signed it. Thus, while applying the presumption to any collateral attack on those terms by either of those parties seeking to obtain different terms to the same agreement under the data roaming rule, the Commission did not intend for the presumption to apply to subsequent negotiation of another agreement (including extension or renewal of an existing agreement) that is not yet signed.[70]

26. Further, we note that applying the presumption to subsequent negotiations would not be consistent with the overall purpose of the data roaming rule because, as T-Mobile and commenters note, it

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[65] *See supra* ¶¶ 7, 10; T-Mobile Reply Comments at 18-20; RWA Dec. 5 *Ex Parte* at 2-3; CCA *Ex Parte* at 2-3; AT&T Opposition at 10-16; Verizon Comments at 7-9.

[66] *See* T-Mobile Petition at 16-23.

[67] *See, e.g.,* T-Mobile Petition at 19-23; Sprint Comments at 5-6; RWA Comments at 4-5; *but see* AT&T Opposition at 18-23; Verizon Comments at 14-16.

[68] *Data Roaming Order,* 26 FCC Rcd at 5451 ¶ 81.

[69] *Id.*

[70] AT&T argues that the presumption of reasonableness attaches to any agreements "negotiated after the issuance of the data roaming rules and that were never challenged." AT&T Opposition at 18; AT&T *Ex Parte* at 2. To the extent that the terms in such an agreement are the subject of negotiation of a subsequent agreement, they would not be presumed to be reasonable.

could have the effect of perpetuating terms negotiated in prior years.[71] A rate negotiated a year ago might have been commercially reasonable at that time but may no longer reflect current marketplace conditions, which is why the Commission limited this presumption to existing agreements and not to future negotiations.[72] As discussed above, however, the seventeen listed factors in the *Data Roaming Order* include "whether the parties have any roaming arrangements with each other…and the terms of such arrangements."[73] As a result, the terms of prior agreements between the parties may be relevant for determining the commercial reasonableness of terms in a subsequent negotiation, depending on the circumstances of the individual case (*e.g.,* the length of time since the prior negotiation and the existence of subsequent changes in marketplace conditions, technologies, and consumer demand).[74]

27. To the extent a requesting provider requires data roaming services but believes a would-be host provider's proffered terms and conditions are commercially unreasonable, we remind such providers that the Commission staff may, in appropriate circumstances, order a would-be host provider to provide data roaming services on its proffered terms during pendency of a dispute.[75] Such services would be subject to possible true-up once a roaming agreement is in place.[76]

28. *Build-out Factor*. To guide the Commission and the parties in determining the commercial reasonableness of proposed data roaming terms and conditions, "including the prices,"[77] the *Data Roaming Order* set forth a non-exclusive list of factors, including the extent and nature of providers' build-out. In our view, the Commission's inclusion of this factor was not intended to allow a host provider to deny roaming, or to charge commercially unreasonable roaming rates, in a particular area simply because the otherwise built-out requesting provider has not built out in that area.[78] Any other interpretation of the Commission's order would be inconsistent with the order itself, which made clear that one of the primary public interest benefits of roaming is that it can allow a provider without a presence in any given market to provide a competitive level of local coverage during the early period of investment and build-out.[79] The Commission also recognized that providers with local or regional service areas need roaming arrangements to offer nationwide coverage, and that there may be areas where expanding a provider's network may be economically infeasible or unrealistic.[80] The level of a requesting provider's build-out is a factor in determining the commercial reasonableness of a host provider's proffered terms, and we believe the Commission intended to review the matter under the case-by-case, totality of the circumstances approach.[81]

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[71] *See, e.g.,* T-Mobile Petition at 21; Sprint Comments at 5-6; C Spire Comments at 8-9.

[72] Of course, an agreement signed prior to the effective date of the new rule would not have been negotiated pursuant to "the standard of commercial reasonableness" upon which the *Data Roaming Order* relied in establishing its presumption. Thus, it would not appear to be consistent with the Commission's intent to attach any such presumption to its terms in evaluating later proposed terms and conditions.

[73] *Data Roaming Order*, 26 FCC Rcd at 5452-53 ¶ 86.

[74] *See also id.* (explaining how the Commission will consider as one of the listed factors "whether the providers involved have had previous data roaming arrangements with similar terms").

[75] *See id.* at 5450-51 ¶ 80.

[76] *See id.*

[77] *See supra* ¶¶ 13-14.

[78] T-Mobile Petition at 22.

[79] *See Data Roaming Order*, 26 FCC Rcd at 5421 ¶ 18; *see also id*. at 5435-36 ¶ 51 (declining AT&T's request for a "substantial network" requirement and noting the role of roaming in build-out).

[80] *See id.* at 5419 n.51.

[81] *See id.* at 5452-53 ¶¶ 85-86.

29. AT&T argues that T-Mobile is asking the Commission to ignore build-out concerns when providers face increased costs to build-out because of their licensed frequencies in that area and that T-Mobile has a track record of avoiding investment in rural areas.[82] The Commission, however, has found that, in some areas of the country, it is uneconomical for several providers to build-out and that some providers may face significantly increased costs to build-out using higher spectrum frequencies.[83] The Commission will consider such build-out concerns on a case-by-case basis under the totality of the circumstances approach and will apply this factor to both larger and smaller providers.[84]

30. Finally, some commenters ask the Commission to take additional steps, such as imposition of a cap or ceiling on data roaming rates,[85] endorsement of a model data roaming agreement,[86] filing of agreements with the Commission,[87] and imposition of a "shot clock" that would apply to negotiations.[88] These requests are beyond the scope of the relief sought by T-Mobile, and we do not address them in this declaratory ruling.[89]

IV. CONCLUSION

31. For the reasons set forth above, we grant the Petition and issue this Declaratory Ruling to provide guidance on the application of the commercial reasonableness standard, as well as the totality of the circumstances approach for resolving disputes between negotiating parties, set forth in the *Data Roaming Order* and Section 20.12(e). In the *Data Roaming Order*, the Commission concluded that the data roaming rule would promote consumer access to seamless mobile data coverage nationwide, appropriately balance the incentives for new entrants and incumbent providers to invest in and deploy advanced networks across the country, as well as foster competition among multiple service providers in the mobile wireless marketplace. In our view, the additional guidance we provide under the standard set forth in Section 20.12(e) will facilitate the ability of parties to negotiate successful data roaming agreements, which in turn will promote the provision of high quality advanced broadband services by multiple service providers in urban, suburban and rural areas to the benefit of American consumers.

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[82] AT&T Opposition at 22-23.

[83] *See Data Roaming Order,* 26 FCC Rcd at 5419 n.51; *see also Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6146 ¶ 60.

[84] The Commission took a similar approach in the voice roaming context when it modified its rules with respect to automatic roaming by eliminating the home roaming exclusion that had excluded from the automatic roaming obligation any request for roaming in a location where the requesting party held spectrum suitable for the provision of CMRS service. *Voice Roaming Order on Reconsideration*, 25 FCC Rcd at 4190, 4197 ¶¶ 18, 31.

[85] *See, e.g.*, RWA Comments at 7-8 (arguing that the Commission should find that a data roaming rate is *per se* commercially unreasonable if it exceeds the retail data rate the requesting provider charges its retail customers); Pinpoint Comments at 3-5, 10 (arguing that the Commission should find that a data roaming rate is *de facto* commercially unreasonable if it exceeds retail or MVNO rates or rates charged to foreign providers).

[86] *See, e.g.*, RWA Comments at 9 (arguing that the Commission should endorse the RWA Model Roaming Agreement).

[87] *See, e.g.*, RWA Comments at 9-10; NTCH, Flat Wireless and Blue Wireless Comments at 2-3; Pinpoint Comments at 8-9.

[88] *See, e.g.,* NTCA Comments at 6-8; Blooston Comments at 1-3.

[89] Under our delegated authority pursuant to 47 C.F.R. § 1.429(l), we also have already denied a petition for reconsideration of the Commission's determination in the *Data Roaming Order* to reject such a shot clock on the basis that the data roaming rule allows "individual providers to seek expedited intervention by the Commission when a provider is unduly delaying the course of a data roaming negotiation" irrespective of any specific time frame for negotiations. *See* Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, *Order on Reconsideration,* 29 FCC Rcd 7515, 7520 ¶ 12 (WTB 2014).

V. ORDERING CLAUSES

32. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 4(i), 4(j), 5(c), and 303(r) of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 155(c), and 303(r); section 5 of the Administrative Procedure Act, 5 U.S.C. § 554(e); sections 0.131, 0.331(a)(2), and 1.2 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331, and 1.2; and paragraph 82 of the *Data Roaming Order,*[90] T-Mobile's petition is HEREBY GRANTED, to the extent set forth in this Declaratory Ruling.[91]

FEDERAL COMMUNICATIONS COMMISSION

Roger C. Sherman
Chief
Wireless Telecommunications Bureau

[90] *Data Roaming Order,* 26 FCC Rcd at 5451 ¶ 82 ("delegated authority to resolve . . . disputes with respect to the data roaming rule").

[91] *See also Charles County Broadcasting Co.,* 25 R.R. 903, 906-07 (1963) (confirming Review Board's authority with respect to "consideration or interpretation of existing Commission policy," and "consider[ation of] the extension of present policies to include new factual situations without making new, or changing old, policy"). *See generally* R. Pierce, Administrative Law Treatise § 2.7 (2010), quoting 107 Cong. Rec. 5847, 5849 (1961) (remarks of President Kennedy) (need for "reduction of existing delays in our regulatory agencies" through subdelegation, leading to enactment of 47 U.S.C. § 155(c)).