

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554**

In the Matter of )  
 )  
**Reexamination of Roaming Obligations** )  
**of Commercial Mobile Radio Service Providers** )  
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WC Docket No. 05-265

To: The Commission

**JOINT PETITION FOR COMMISSION INQUIRY  
PURSUANT TO SECTION 403 OF THE COMMUNICATIONS ACT**

AIRPEAK Communications, LLC, Airtel Wireless LLC, Cleveland Unlimited, Inc., Leap Wireless International, Inc., MetroPCS Communications, Inc., Punxsutawney Communications, Rural Telecommunications Group, Inc., and Southern Communications Services, Inc. d/b/a SouthernLinc Wireless, (collectively, the “Petitioners”) hereby respectfully petition the Commission to institute an inquiry pursuant to its authority under Section 403 of the Communications Act of 1934, as amended, and Section 1.1 of its Rules<sup>1</sup> for the purpose of gathering additional information related to the current state of roaming markets. Specifically, the Petitioners request that the Commission gather and inspect a representative sample of wireless carrier roaming agreements on a confidential basis. Such an inquiry would offer the Commission more of the information it has requested as part of its pending proceeding on CMRS roaming regarding “the current availability of automatic roaming services in various regions with

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<sup>1</sup> 47 U.S.C. § 403; 47 C.F.R. § 1.1 (2005).

specific data.”<sup>2</sup> This will assist the Commission in its efforts to gain a complete picture of the core facts relevant to the important issues presented in this proceeding.

## I. Introduction

The Commission is examining in this proceeding whether wireless carriers are discriminating unreasonably against other carriers in the provision of automatic roaming services.<sup>3</sup> Local, rural, and regional carriers have filed comments in this proceeding describing continued serious difficulties in obtaining fair roaming agreements. Consolidation in the wireless carrier market seems to have exacerbated the situation, with several non-national carriers having found it necessary to bring roaming pricing and discrimination problems to the Commission’s attention in the course of recent merger proceedings. The Commission initiated this proceeding to consider these concerns and to ascertain whether additional rules are required with respect to automatic roaming. However, as is described in more detail below, most CMRS carriers are not currently in a position to disclose voluntarily and publicly specific details of their current roaming agreements due to contractual restrictions or other concerns related to such disclosure. Therefore, the Petitioners are asking the Commission to initiate the requested inquiry because a review of a representative cross-section of the actual agreements entered into by wireless carriers will assist in determining whether (a) unjust or unreasonable discrimination is occurring; and, (b) there is a public interest need for the Commission to mandate requirements for the provision of automatic roaming at just and reasonable rates among carriers with compatible systems.

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<sup>2</sup> *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 15047 (2005) (“*Roaming NPRM*”) at ¶ 27 and ¶ 40.

<sup>3</sup> See 47 C.F.R. § 20.12(c) (2005).

## II. Background

The issue as to whether the Commission should adopt a rule to govern the provision of automatic roaming by CMRS carriers has been pending in one or more docketed rulemaking proceedings for more than a decade with little headway being made. In 1996, the Commission solicited comments from the wireless industry on whether the Commission should adopt a rule to govern CMRS providers' obligations to provide automatic roaming.<sup>4</sup> Four years later, the Commission terminated the proceeding because changes in the marketplace and technology had made the record stale,<sup>5</sup> but instituted a new proceeding to consider, *inter alia*, the same issue.<sup>6</sup>

In the resulting *2000 CMRS Roaming NPRM*, the Commission stated it would consider adopting an automatic roaming requirement if it was convinced that some carriers' practices were "unreasonably hindering the operation of the mobile telephony market to the detriment of consumers."<sup>7</sup> The Commission expressly sought comment on whether "providers have discriminated unreasonably with respect to the prices or other terms on which they make roaming agreements available to different carriers," and solicited concrete information regarding the nature and extent of the roaming arrangements that existed in the wireless marketplace.<sup>8</sup> However, these requests for specific roaming agreement data went largely unanswered.

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<sup>4</sup> See *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Third Notice of Proposed Rulemaking, 11 FCC Rcd 9464 at 9579 (1996).

<sup>5</sup> See *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Third Report and Order and Memorandum Opinion and Order on Reconsideration, 15 FCC Rcd 15975 (2000).

<sup>6</sup> See *Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services*, WT Docket No. 00-193, Notice of Proposed Rulemaking, 15 FCC Rcd 21628 (2000).

<sup>7</sup> *Id.* at ¶ 21635-36, ¶ 18.

<sup>8</sup> *Id.*

In 2005, the Commission closed the record in the roaming proceeding initiated in 2000 without action because, once again, the record had become “stale.”<sup>9</sup> The Commission then initiated the current proceeding, noting that roaming issues have been raised consistently in opposition to merger transactions and that the Commission is in need of up-to-date information concerning the roaming market. In a familiar refrain, the Commission explicitly sought specific information regarding “the current availability of automatic roaming services in various regions with specific data.”<sup>10</sup> The resulting record contains reports of discriminatory activity and excessive charges, but does not provide a comprehensive overview of the nature and extent of the roaming relationships that large national carriers have with one another, with smaller local, regional or rural carriers and with non-facilities based carriers, such as Mobile Virtual Network Operators (“MVNOs”).<sup>11</sup>

To some extent, the fact that carriers have failed to volunteer concrete information regarding their roaming rates and practices is understandable. Many roaming agreements contain confidentiality provisions that prohibit the disclosure of rate information in the absence of compulsory legal process. And, even in the absence of confidentiality restrictions, carriers that are charging different rates to different roaming partners naturally are reluctant to disclose this information for fear of fostering allegations of discrimination. Further, local, rural, and regional carriers may be concerned about possible retaliation in renewing existing agreements or receiving new roaming agreements if they voluntarily disclose their roaming agreements with the large nationwide carriers absent Commission intervention. Voluntary disclosures by interested

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<sup>9</sup> *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, Memorandum Opinion & Order and Notice of Proposed Rulemaking, 20 FCC Rcd 15047 (2005).

<sup>10</sup> *Id.* at para 27; *see also id.* at para 40 (seeking data on whether large nationwide carriers are preferring one another over other carriers in roaming agreements).

<sup>11</sup> *See* discussion of MVNOs *infra* at note 18.

parties is unlikely to provide the Commission with a comprehensive overview of current roaming arrangements.

The record addressing the need to adopt automatic roaming requirements now before the Commission presents two very different pictures of today's marketplace realities. There is stark disagreement between the large national carriers, on the one hand, and smaller local and regional carriers, on the other hand, as to whether roaming services are being made available on reasonable non-discriminatory terms. The best evidence to resolve this dispute is the agreements themselves. Fortunately, the Commission has the tools to obtain the specific information it needs. As is set forth in detail below, by means of a Section 403 proceeding the Commission can require production of information relating to roaming, including a representative sample of roaming agreements. The Commission can review the information and agreements to discern exactly what is going on in the market and to determine whether unjust and unreasonable rates are being charged. This will enable the Commission to properly assess whether an automatic roaming rule is needed to ensure the availability of automatic roaming services to all United States consumers and to protect and promote wireless competition.

### **III. A Section 403 Inquiry is Appropriate**

Section 403 of the Communications Act of 1934, as amended, authorizes the Commission to institute an inquiry as to any matter or thing concerning "any question" that may arise under the Act.<sup>12</sup> "Congress recognized that inherent in an effective scheme of regulation is the ability to conduct inquiries into matters bearing upon the activities ... licensees",<sup>13</sup> and thus gave the

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<sup>12</sup> 47 U.S.C. §403. Section 403 also provides the Commission with the same powers and authority to proceed with any inquiry as though it had been appealed to by complaint or petition. Accordingly, the Commission has the authority to enforce requests and thereby ensure that it gets the information requested.

<sup>13</sup> *Inquiry into Alleged Violation of Sections 317 and 508 of the Communications Act of 1934 as amended and the Rules Thereunder*, 42 RR 2d 199 at para. 4 (1978).

Commission broad authority under Section 403 to conduct such inquiries. Section 1.1 of the Commission's rules reflects this broad authority by providing that the Commission may "on its own motion or petition of any interested party hold such proceedings as it may deem necessary ... for the purpose of obtaining information necessary or helpful in the determination of its policies. . . [or] the formulation or amendment of its rules and regulations."<sup>14</sup> Section 1.1 also provides the Commission with the authority to "require the production of evidence."<sup>15</sup>

A Section 403 inquiry is appropriate in this situation. Information on the roaming arrangements that exist currently, and the exact terms of the operative agreements, will be helpful in examining the state of the roaming market. Indeed, the Commission already has requested such information in this proceeding. "Whether or not to begin an investigation under Section 403 is a matter within the Commission's discretion."<sup>16</sup> Exercise of that discretion is appropriate when the Commission needs to conduct "a market wide inquiry" of the practices of licensees, and the relevant information is not already a matter of record before the Commission.<sup>17</sup> Most important, the Commission has recognized explicitly in the past that the use of compulsory process under Section 403 of the Act is appropriate when the information pertaining to industry-wide practices volunteered by commenting parties in a rulemaking proceeding is inadequate to

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<sup>14</sup> 47 C.F.R. § 1.1 (2005). See *Stahlman v. F.C.C.* (D.C.Cir. 1942) (Section 403 inquiry for rulemaking purpose affirmed).

<sup>15</sup> 47 C.F.R. § 1.1 (2005).

<sup>16</sup> *Complaint and Request for Section 405 Investigation*, 16 FCC Rcd 7647, para. 3 (2001).

<sup>17</sup> See *Inquiry into Alleged Abuses of the Commission's Processes by Applicants for Broadcast Facilities*, 65 RR 2d 91 (1988) (initiating a single broad-based Section 403 inquiry into potential abuses of application processes by broadcast applicants rather than pursuing individual proceedings); see also *Inquiry into the Manner in which Cable Television Regular Subscriber Rates are Established*, 58 FCC 2d 915 (1970) (initiating an industry-wide Section 403 inquiry to gather factual information regarding cable rates); c.f. *Inquiry into the Employment Policies and Practices of Certain Designated Broadcast Licensees and Broadcast Headquarters located throughout the United States* 42 RR 2d 1219, n.3 (1978) (declining an industry-wide inquire "where the [operative] facts are already before the Commission").

establish a complete record. For example, in *Commercial Television Network Practices and the Ability of Station Licensees to Serve the Public Interest*, 62 FCC Rcd 548 (1977), the Commission noted in its *Notice of Inquiry* into commercial television network practices regarding program distribution

The staff's analysis of the comments and reply comments may be followed by the issuance of questionnaires or inquiries designated to provide a complete factual record. If at any point it appears that these procedures are inadequate, the special staff will be authorized to initiate compulsory process under Section 403 of the Act.

*Id.* at para. 29. Accordingly, given the inability or reluctance of carriers to volunteer all of the specific information and data requested by the Commission in this proceeding, the Commission should institute a Section 403 Inquiry.

#### **IV. A Selection 403 Inquiry Can Be Structured So As Not to Be Unduly Burdensome**

The Commission need not review every current roaming agreement. Rather, it can require carriers to provide a summary of the pertinent information and review a representative sample of relevant agreements. Petitioners suggest that the Commission secure this information by setting up a two-step process.

In the first step, every broadband wireless licensee would be obligated to file a list of the roaming agreements to which it is a party. The list would identify: (1) the date of the agreement; (2) the term of the agreement; (3) the parties to the agreement; (4) the territories covered by the agreement; and, (5) whether or not the rates and service territories set forth in the agreement are reciprocal and symmetrical. The Commission also should require carriers to identify both the most expensive and least expensive current roaming rate that is available in each agreement.

In the second step, the Commission would review the summary information, identify a representative sample of the agreements it desired to review, and compel the parties to those agreements to file them with the Commission. For example, for each of the major nationwide

carriers the Commission might secure a sampling of agreements with: (a) another nationwide carrier; (b) a regional carrier that provides facility-based competition in some markets; (c) a rural carrier; (d) an MVNO<sup>18</sup> or reseller; and, (e) an affiliate. These carriers also should be asked to provide schedules of their retail rates, particularly their high use bucket plans, in order to give the Commission a frame of reference to assess the reasonableness of the roaming rates being charged to roaming partners in different categories. In addition, for comparison purposes, representative agreements also should be requested that are among and between rural, local and/or regional carriers. To the extent that the Commission wanted a report on these agreements and the state of the marketplace, it could engage an independent third party to review the information and agreements and report on the results of that review in order to assist the Commission in its decisionmaking.

#### **V. Confidentiality of Roaming Agreements May Be Maintained**

Should the Commission conclude that it is appropriate to maintain the confidentiality of the information it will obtain, Petitioners have no objection to the Commission accepting such information pursuant to Section 0.459 of the Commission's Rules<sup>19</sup> and making the information and agreements available for inspection only subject to an appropriate protective order. It is well-settled that commercially-sensitive information forming the basis of rulemaking decisions

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<sup>18</sup> Petitioners' recognize that some carriers have argued that MVNO arrangements are distinguishable from pure roaming agreements and that different rates may be justified due to these differences in circumstances. Again, however, the best evidence of the facts and circumstances will be the agreements themselves. The Commission should review MVNO agreements along with the other agreements to determine whether the offered rates are consistent or inconsistent with the rates offered in pure roaming arrangements, and whether there are other aspects of the MVNO arrangement that explain and justify any inconsistencies.

<sup>19</sup> 47 C.F.R. § 0.459. Petitioners agree to confidential treatment of roaming agreements for the purposes of fostering their examination by the Commission, should the Commission find such protection to be appropriate under these circumstances, without prejudice to the view of some of the Petitioners that roaming agreements should, in the future, be required to be filed publicly in order to foster voluntary agreements and deter discrimination.

can be limited in circulation to interested parties and subject to non-disclosure and other appropriate restrictions by an appropriate protective order. For example, the Commission's transaction team routinely utilizes this approach in seeking public comment on large merger transactions that require the filing of sensitive information. Similarly, in the Commission's 2004 *Notice of Proposed Rulemaking* in WC Docket No. 04-259, the Commission stipulated that any party could seek a protective order for confidential or proprietary data contained in cost studies submitted to the Commission.<sup>20</sup> Similar treatment was accorded to information submitted by Verizon during a proceeding that addressed universal service.<sup>21</sup> Commercially sensitive information also was protected as confidential that was submitted by the Competitive Telecommunications Association (CompTel) and the Association for Local Telecommunications Services (ALTS) in the rulemaking that addressed the Section 251 unbundling obligations of incumbent local exchange carriers (ILECS).<sup>22</sup>

Based on these precedents, the Commission may proceed to garner the requested information while protecting the confidentiality of agreements that some parties may consider to be commercially sensitive.

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<sup>20</sup> See *National Exchange Carrier Association Petition to Amend Section 69.104 of the Commission's Rules*, Order Granting Petition for Rulemaking, Notice of Proposed Rulemaking, and Order Granting Interim Partial Waiver, 19 FCC Rcd 13591 at ¶ 21 (2004). ("To the extent that a party expects to include confidential or proprietary data in a cost study, it may seek a protective order.")

<sup>21</sup> See *Federal-State Joint Board on Universal Service, etc.*, Protective Order, 16 FCC Rcd 21771 (2001).

<sup>22</sup> See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order, 17 FCC Rcd 5852 (2002).

## CONCLUSION

As the industry continues to consolidate, it becomes increasingly urgent for the Commission to obtain complete facts about current roaming practices. We therefore urge the Commission to gather the specific information it has requested in this proceeding through the two step process outlined in this Petition. We are hopeful that the Commission will do so and, based upon the facts, adopt a reasonable automatic roaming rule that fosters a fair and competitive roaming environment for the local, rural and regional carriers that remain.

Respectfully Submitted.

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