

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

**COMMENTS IN SUPPORT OF THE
BLANCA TELEPHONE COMPANY
PETITION FOR RECONSIDERATION**

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MetroPCS Communications, Inc. (“MetroPCS”),¹ National Telecommunications Cooperative Association (“NTCA”), NTELOS Holdings Corp. (“nTelos”), PRWireless, Inc. *d/b/a* Open Mobile (“PRWireless”), Revol Wireless (“Revol”), Rural Cellular Association (“RCA”), Rural Telecommunications Group, Inc. (“RTG”), and United States Cellular Corporation (“U.S. Cellular”) (collectively, the “Commenters”), by their undersigned counsel and pursuant to the November 21, 2011 *Public Notice*² issued by the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned proceeding, hereby respectfully submit these comments in support of the *Petition for Reconsideration* (“Petition”) by Blanca

¹ For purposes of these comments, the term “MetroPCS” refers to MetroPCS Communications, Inc. and all of its FCC license-holding subsidiaries.

² As published in the Federal Register on December 1, 2011. 76 Fed. Reg. 74,721 – 74, 722 (Dec. 1, 2011).

Telephone Company (“BTC”) of the Commission’s *Second Report and Order* in the above-captioned proceeding.³ For the reasons set forth in greater detail below, the Commenters support the BTC Petition to adopt a “shot clock” for roaming negotiations because without a specific, identifiable timeframe, a host carrier being asked to provide roaming services can delay, hinder and ultimately undermine any potential roaming arrangement. In support, the following is respectfully shown:

I. INTRODUCTION AND SUMMARY

The Commenters support BTC’s Petition, which requests that the Commission “reconsider and reverse its decision declining to ‘adopt a time limit for roaming negotiations to limit the opportunity for host carriers to delay in negotiating roaming agreements.’”⁴ Despite the Commission’s laudable efforts to foster roaming arrangements and further promote consumer access to nationwide mobile broadband service, the *Second Report and Order* does not impose a sufficiently concrete timetable to incent nationwide carriers to negotiate commercially reasonable agreements on a timely basis with small, rural and mid-tier carriers. Without a specific timetable, the largest carriers – who have openly opposed the Commission’s roaming rules -- will have the incentive and the ability to delay any roaming arrangement.⁵

This concern of the Commenters is neither academic nor hypothetical. Since the data roaming rules went into effect in May of this year, the negotiation of data roaming agreements

³ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Report and Order, FCC 11-52 (rel. Apr. 7, 2011), 76 Fed. Reg. 26199 (May 6, 2011) (“*Second Report and Order*” or “*Order*”).

⁴ Blanca Telephone Company, Petition for Reconsideration in WT Docket No. 05-265, 5 (filed June 6, 2011) (quoting the Commission’s *Order*, at ¶ 84) (“*BTC Petition*”).

⁵ Indeed, Verizon has appealed the *Second Report and Order*. See *Cellco Partnership d/b/a Verizon Wireless v. FCC*, Case No. 11-1135 (D.C. Cir. 2011).

has not meaningfully progressed. The Commenters have experienced continued foot-dragging, including unnecessary delays and stonewalling tactics, by large, nationwide carriers. The result is the unavailability of data roaming to more customers serviced by rural, small, and mid-tier carriers and reduced competition to the detriment of the public.

In order to remedy this problem, the Commission should expeditiously grant the Petition and impose strict deadlines for carriers to put forth their best and final offers in the course of data roaming negotiations. In doing so, the Commission would be emulating other successful regulatory schemes where the existence of a shot clock or negotiating timetable has fostered the prompt resolution of voluntarily negotiated commercial arrangements. With this change, the Commission will help ensure that proper incentives are provided for the large, nationwide carriers to “offer data roaming arrangements on commercially reasonable terms and conditions . . . and avoid actions that unduly delay or stonewall the course of negotiations.”⁶

II. COMMISSION ACTION IS WARRANTED

The *Second Report and Order* recognizes the critical and increasing role that data roaming plays in the wireless industry. The data roaming rules were adopted, *inter alia*, to promote the deployment of mobile data networks through widespread availability of data roaming capability.⁷ Specifically, the Commission adopted provisions requiring nationwide providers to offer data roaming arrangements on commercially reasonable terms and conditions, and admonished carriers of their “duty to respond promptly to [negotiation] request[s] and avoid actions that unduly delay or stonewall the course of negotiations.”⁸ While the Commenters

⁶ *Order* at ¶ 43.

⁷ *Id.* at ¶ 1.

⁸ *Id.* at 42.

appreciate the Commission's efforts thus far, the lack of progress following the adoption of the *Second Report and Order* clearly indicates that additional actions must be taken to ensure that this duty is fulfilled by the large, nationwide providers.

Data roaming is absolutely crucial for small, rural and mid-tier carriers who do not have nationwide footprints and are unlikely to be able to put such footprints together in the future due to a lack of available resources and access to additional spectrum. The ability to offer nationwide data service has become a necessity for wireless operators wanting to provide the smartphones and data services demanded by their customers. As a result, non-nationwide carriers have no choice but to rely on roaming agreements with the large, nationwide providers to meet their customers' needs. In addition, a sizable number of consumers select services based on the handsets available,⁹ and increasingly the handsets demanded by consumers are smartphones.¹⁰ Studies show that customers are increasingly demanding smartphones, wireless data usage is increasing exponentially,¹¹ and users expect to be able to use their wireless devices

⁹ A Google study found that approximately 24 percent of consumers made their wireless purchase decision solely on handsets, while 28 percent of consumers said both handset and carrier influenced their purchase decision. Rita Chang, *Proof that Handset Brands Help Sell Wireless Plans*, ADVERTISING AGE, Oct. 27, 2008, <http://adage.com/article/news/proof-handset-brands-sell-wireless-plans/132051/>. A Consumer Union report found that found that 27% of all respondents claimed to have a specific wireless handset in mind when they went shopping for a new wireless phone. *Best Cell Phone Service*, CONSUMER REPORTS, Jan. 2010, available at <http://www.consumerreports.org/cro/magazine-archive/2010/january/electronics-computers/cell-phone-service/overview/cell-phone-service-ov.htm>.

¹⁰ Don Kellogg, *In U.S. Market, New Smartphone Buyers Increasingly Embracing Android*, NIELSENWIRE, Sept. 26, 2011, http://blog.nielsen.com/nielsenwire/online_mobile/in-u-s-market-new-smartphone-buyers-increasingly-embracing-android/ (stating that “[w]hile 43 percent of all mobile subscribers in the US had a smartphone as of August, 56 percent of those who got a new device in the last 3 months chose a smartphone over a feature phone.”).

¹¹ See Amy Vernon, *Mobile Data Surpasses Voice Traffic For First Time*, HOTHARDWARE.COM, Apr. 2, 2010, <http://hothardware.com/News/Mobile-Data-Surpasses-Voice-Traffic-For-First-Time/>.

to receive data services while they are roaming. In light of this evolving market, it is no surprise that wireless service plans and new customer acquisitions are increasingly focused on smartphones and data plans allowing nationwide use. Service providers that are unable to provide competitive nationwide data usage plans are at a severe disadvantage in the wireless marketplace. Inevitably, it ends up being small, rural or mid-sized providers that are unable to obtain reasonable data roaming arrangements. Indeed, the inability of non-nationwide carriers to offer nationwide data services in conjunction with many smartphone offerings has become the latest competitive wedge being used by the largest carriers to further enhance their market power. Ultimately, the lack of data roaming may force further consolidation in an already highly concentrated industry.¹²

While the *Second Report and Order* admonished carriers to “avoid actions that unduly delay or stonewall the course of negotiations,”¹³ the Commission failed to put any regulatory teeth into such arguments by refraining from setting any timing benchmark or “shot clock” for data roaming negotiations. This effectively places the burden on the carrier requesting roaming (the “Requesting Carrier”) to demonstrate inordinate delay by the carrier from which roaming is sought (the “Host Carrier”). Yet, it will be difficult for a Requesting Carrier to prove such stonewalling in light of the unfortunate language in the *Second Report and Order* indicating that some roaming negotiations may be so complex or fact-intensive that a negotiating timetable could be inappropriate.¹⁴ The nationwide carriers are certain to use this language as a shield,

¹² Without data roaming, non-nationwide carriers would be forced into a “Hobson’s” choice – withdraw from the market or only offer voice services. Either would reduce competition and harm consumers.

¹³ *Order* at ¶ 42.

¹⁴ *Id.* at 84. This Commission concern is misguided given the current state of development of roaming arrangements, especially with the largest carriers. The voice roaming market has

particularly since the substantive requirement that carriers offer data roaming on “commercially reasonable” terms is to be judged by the Commission on a “case-by-case basis, taking into consideration the totality of the circumstances.”¹⁵ By creating this fact-intensive standard, the Commission has inadvertently given Host Carriers an easy excuse for delay. The Commission admonition against delay becomes hollow in these circumstances and any Host Carrier who opposes roaming requirements stands to benefit from being intransigent. As noted in detail below, the lack of progress in data roaming negotiations since the adoption of the *Order* confirms this concern.

The core problem is that there is a complete lack of equal bargaining power at the data roaming negotiating table and every incentive for the largest carriers to delay roaming negotiations in order to gain a competitive advantage. The two largest nationwide providers, having little or no incentive to cooperate with the smaller providers, take advantage of this bargaining imbalance to undermine the prospects of an agreement being reached.¹⁶ The resulting inability of small, rural and mid-tier wireless carriers to accommodate their customers’ requests for data services when they travel, severely inhibits their ability to compete even in markets where they have network operations. In this environment, the lack of specific measurable

evolved to the point where certain forms of voice roaming agreements are widely used throughout the industry. And now, these agreements have been adapted to 2G and 3G data roaming. This means that many of the technical issues raised in the early stages of the data roaming debate have been addressed as data agreements have started to emerge. 4G roaming agreements are less prevalent and present some additional issues at this time, but such arrangements would be built on already existing frameworks and should be able to be resolved in a relatively short time frame.

¹⁵ *Order* at ¶ 85.

¹⁶ For instance, in roaming negotiations with one of the Commenters, a large national carrier indicated that it wasn’t interested in the roaming revenue it would receive; it wanted the Requesting Carrier’s customers.

timeframes provides a fertile ground for the largest national carriers to delay any agreement. As noted by BTC, these are the precise harms that the Commission was seeking to minimize or avoid in its *Second Report and Order*.¹⁷

III. ROAMING NEGOTIATIONS HAVE LANGUISHED DESPITE THE ADOPTION OF THE SECOND REPORT AND ORDER

The Petition demonstrates that BTC has encountered recurring difficulties in its efforts to secure both voice and data roaming agreements due to the nationwide carriers' lack of cooperation in negotiating roaming agreements on a timely basis with reasonable terms, conditions, and rates.¹⁸ Unfortunately, this same lament is heard throughout the industry by small, rural and mid-sized wireless carriers seeking to obtain roaming agreements with the largest national carriers – AT&T and Verizon. Indeed, the Commenters have experienced inordinate delays during attempts to negotiate data roaming agreements. While the specific circumstances of particular individual negotiations are subject to non-disclosure agreements, some general parameters serve to highlight the problems:

- In one instance, data roaming negotiations have been ongoing for 2 years without resolution. Negotiations have languished between 6 and 28 months for others.
- In some instances, requestors have waited more than 8 months for an initial response, and between 2 and 12 months for a substantive rate proposal. And, more often than not, the wholesale data roaming rate that is offered after considerable delay is many orders of magnitude higher than the offering carrier's retail rates to its own data customers.
- In some instances, after waiting months for a response, the proposal offered is so one-sided that negotiations continue to be delayed even further. Typically, the intervening months are characterized by the obvious use of steering tools to reduce roaming traffic.

¹⁷ See *BTC Petition*, at 7.

¹⁸ *Id.* at 2.

- Rates proposed for more efficient services are higher than rates proposed for less efficient services.
- Requesting Carrier traffic would often be given a lesser priority (or suspended entirely) at any time by the Host Carrier.
- Requesting Carriers often must deal with an ever changing cast of negotiators for the Host Carrier, and each personnel change extends the negotiating timetable.
- Host Carriers often request detailed, long-term traffic projections and propose onerous consequences in the event that the traffic projections are not accurate.
- Host Carriers often inform the Requesting Carrier that, before testing can begin, the Requesting Carrier must enter a testing queue, composed of multiple Requesting Carriers, each with a specific service request of the Host Carrier, for an undisclosed or indeterminate period of time.
- Often, network freezes, lack of human resources and alternative internal priorities are common rationalizations for why Requesting Carriers are delayed in the testing queues. The Requesting Carriers often have no choice but to abide by the excuse given for the delay of the testing queue, and they have little to no means to contest the appropriateness of these unilaterally-imposed delays.
- Generally, efforts to escalate stalled negotiations within the organization of the Host Carrier in order to get to a person with decision making authority are unsuccessful.

Obviously, the admonitions regarding prompt negotiations contained in the *Second Report and Order* are not being taken seriously by the largest national carriers. There is no doubt that one reason for this attitude is that there is nothing in the data roaming rule itself that requires the roaming carrier to negotiate in good faith or to conclude negotiations according to any specific timetable. To the contrary, the rule permits carriers to “negotiate the terms of their roaming arrangements on an individualized basis....”¹⁹ This accords carriers seeking delay great leeway, particularly in light of the Commission’s rationale not to impose a shot clock because some negotiations may be complex and fact intensive. In effect, carriers being asked to grant

¹⁹ 47 C.F.R. § 21.12(e)(1).

data roaming rights can stonewall with impunity since those requesting roaming will be hard-pressed to demonstrate that any rule or policy is being violated.

Notably, recent findings of the Commission and the D.C. District Court in the AT&T/T-Mobile antitrust trial highlight the serious problems facing every small, rural or mid-tier carrier seeking a roaming agreement with a nationwide carrier. The Commission’s recent Staff Analysis and Findings on the AT&T/T-Mobile Transaction recognized that a “[r]oaming agreement between two providers can be difficult to negotiate when there is limited mutual interest”²⁰ which is uniformly the case when the two negotiating parties have vastly different wireless footprints. The Staff Report also cited evidence of opponents of the AT&T/T-Mobile transaction indicating that AT&T has been less than forthcoming in its negotiation of roaming arrangements.²¹ Similarly, faced with sworn allegations that “AT&T has engaged in a pattern and practice of denying roaming agreements to smaller carriers, as part of its efforts to monopolize local markets and to injure competition,” the D.C. District Court in the AT&T/T-Mobile antitrust case denied the motion of AT&T/T-Mobile to dismiss the roaming-based antitrust claims of C-Spire (formerly Cellular South) because of the potential competitive harm caused by reduced access to roaming inputs.²²

In light of these recurring competitive roaming concerns, which the Commenters can attest do not apply only to AT&T, the Commission must put teeth into its effort to discourage stonewalling by requiring Host Carriers to meet reasonable deadlines in the course of fulfilling

²⁰ FCC Staff Analysis and Findings on AT&T and T-Mobile Transaction, WT Docket No. 11-65, ¶ 67 (filed Nov. 29, 2011)(the “Staff Report”).

²¹ Staff Report at ¶ 100, n. 294.

²² See *Sprint Nextel Corporation v. AT&T et al.*, Case No. 1:2011-cv-01600, Memorandum Opinion, 37 – 38 (D.C. Cir. 2011) (filed Nov. 2, 2011).

their obligation to provide data roaming service on commercially reasonable terms and conditions.

IV. SHOT CLOCKS HAVE PROVEN TO BE EFFECTIVE IN ANALOGOUS CIRCUMSTANCES

The Commission refrains from adopting a time limit for roaming negotiations due to possibly complex or fact-intensive issues that might arise during discussions.²³ However, as indicated below, Congressional- and Commission-imposed shot clocks have proven to be an effective tool for fostering negotiations and agreements in circumstances where the parties have unequal bargaining power.

For example, prior to the amendment of the Communications Act (the “Act”) by the Telecommunications Act of 1996 (the “96 Act”), telecommunications carriers were having recurring difficulty negotiating interconnection agreements with incumbent local exchange carriers (“ILECs”) because of the ILEC’s unequal bargaining power. To remedy this situation, Congress amended the Act by adding Section 252, which established “Procedures for Negotiation, Arbitration, and Approval of Agreements.”²⁴ In effect, ILECs were accorded 135 days to negotiate in good faith and reach agreement, at which point they were subject to mandatory arbitration before state commissions in the absence of an agreement.²⁵ There can be no serious dispute that interconnection agreements, as a class, are much more complex and fact-intensive than data roaming agreements. And yet, Congress found it to be necessary and appropriate to adopt a hard deadline by which ILECs would be subject to litigation if an

²³ *Order* at ¶ 84.

²⁴ 47 C.F. R. § 252.

²⁵ Pursuant to Section 252, between the 135th and 160th day after which a request for negotiation has been made, a carrier may petition a state commission to arbitrate any open issues. 47 U.S.C. § 252(b)(1).

agreement was not reached. The Commenters know from personal experience that this deadline worked both to spur negotiations and to foster agreements. Indeed, interconnection agreements started to be entered into within months after the adoption of rules implementing Section 252 of the Act. In contrast, the release of the *Second Report and Order* has not had the desired result of promptly fostering data roaming agreements.

Section 252 of the Act is not the only example of a successful use of a negotiating timetable. Shot clocks have also been effectively utilized by the Commission in analogous circumstances. Tower sites, like data roaming agreements, are a critical input in the wireless marketplace. The inability of a carrier to secure access to a necessary site can severely disadvantage a wireless carrier from effectively participating in the wireless market.²⁶ Nonetheless, the Commission found that wireless service providers “often faced lengthy and unreasonable delays [from state agencies] in the consideration of their facility siting applications, and that the persistence of such delays [was] impeding the deployment of advanced and emergency services.”²⁷ The Commission concluded that the unreasonable delays obstructed the provision of wireless services and were subjecting wireless providers to unreasonably lengthy and costly processes.²⁸ Therefore, the FCC adopted rules that imposed a 90-day deadline to process applications for colocations, and 150 days for new tower applications.²⁹ If an agreement

²⁶ See *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165, Declaratory Ruling, FCC 09-99 (rel. Nov. 18, 2009) (“*Tower Siting Shot Clock Ruling*”).

²⁷ *Id.* at ¶ 32.

²⁸ *Id.* at ¶ 34.

²⁹ *Id.* at ¶ 32.

was not reached by these deadlines, then the issue would go to court.³⁰ Again, a myriad of separate circumstances and unique facts can pertain to a tower siting application, and yet the Commission found it necessary and appropriate to adopt a limited time constraint for tower siting issues to be resolved by state agencies. Notably, the complaints spotlighted by the Commission in the *Tower Siting Shot Clock Ruling* are similar to the cries the Commission is hearing now with respect to data roaming agreement delays.³¹

In yet another similar circumstance, excessive delays processing pole attachment requests led the Commission to adopt a specific timeline for both pole owners and attachers earlier this year.³² The Commission established a four-stage timeline for pole attachments, with a maximum timeframe of up to 148 days for completion of all stages. The first stage – the survey – (which is most applicable to the current situation) was allotted a 45-day period in which the utility was required to respond to a receipt of an attachment application.³³ The Commission concluded that “having a specific timeline offers certainty to attachers and allows them to make concrete business plans.”³⁴ Such certainty should also be made available in data roaming proceedings, however, the unnecessary delays and other stonewalling tactics that are underway in many current data roaming negotiations do not allow for such predictability.³⁵ The Commission

³⁰ *Id.*.

³¹ *See Id.* at ¶ 33.

³² *See In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, in WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, FCC No. 11-50 (rel. April 7, 2011) (“*Pole Attachment Order*”).

³³ *Id.* at ¶ 24.

³⁴ *Id.* at ¶ 21.

³⁵ Indeed, one can argue that the effect of not having one site on competition is considerably less than the effect of *no customers* of a carrier having the ability to use these services when they roam.

should follow its past precedent and take action to limit the opportunity for the largest carriers to stonewall or delay negotiations.

The Commenters join BTC in urging the Commission to impose a reasonable deadline for a Host Carrier to make its best and final offer in response to a request for a data roaming agreement. The Commenters submit that 60 days for the initial roaming request would make a suitable deadline for such an offer. The Commission then should act promptly to resolve any issues upon which the parties have not agreed by the end of that term.³⁶ With the imposition of such a deadline, along with an indication that fines and forfeitures could apply for failure to comply, carriers being asked to provide data roaming services will have the missing incentive to come to terms with wireless carriers requesting data roaming. A discernible deadline also will increase the prospect that the negotiating parties will have made their best and final offers before needing to complain before the FCC. As BTC correctly explains, with a shot clock, “the incentive to delay and stonewall” would be transformed “into an incentive to negotiate and reach agreement (rather than risk an adverse Commission decision).”³⁷

V. CONCLUSION

The Commenters respectfully urge the Commission to grant BTC’s Petition For Reconsideration and adopt a time limit for negotiations. Since the adoption of the *Second Report and Order*, small, rural and mid-sized carriers have continued to struggle to obtain adequate data roaming from the largest nationwide carriers in a reasonable time. Carriers on which the Commenters desire to roam have no incentive to engage in prompt negotiations, as they are aware that the small, rural and mid-sized carriers have little or no recourse since the admonitions

³⁶ See *BTC Petition*, at 8.

³⁷ *Id.*

for prompt action are not embodied in any enforceable rule. The imposition of a shot clock will provide the necessary incentive for large, nationwide carriers to properly engage in data roaming negotiations to enhance the prospect that all carriers may provide nationwide data coverage to their customers. Without such incentive, negotiations will continue to be unduly delayed, resulting in less overall coverage provided by small, rural and mid-sized carriers.

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CERTIFICATE OF SERVICE

I, Jessica DeSimone, do hereby certify that on this 16th day of December, 2011, I caused a copy of the foregoing **COMMENTS IN SUPPORT OF THE BLANCA TELEPHONE COMPANY PETITION FOR RECONSIDERATION** to be served on the following via First-Class Mail, postage pre-paid:

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