

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF
SPRINT CORPORATION

Sprint Corporation (“Sprint”) respectfully submits the following comments in support of T-Mobile USA, Inc.’s (“T-Mobile”) Petition for Expedited Declaratory Ruling (“Petition”),¹ which requests that the Federal Communications Commission (“Commission”) issue prospective guidance and predictable enforcement criteria for determining whether the terms of a given data roaming agreement or proposal meet the “commercially reasonable” standard adopted in the Commission’s *Data Roaming Order* and as set forth in Section 20.12(e) of the Commission’s rules.²

¹ See Petition for Expedited Declaratory Ruling of T-Mobile USA, Inc., WT Docket No. 05-265 (filed May 27, 2014) (“*Petition*”); see also *Wireless Telecommunications Bureau Seeks Comment on Petition for Expedited Declaratory Ruling Filed by T-Mobile USA, Inc. Regarding Data Roaming Obligations*, Public Notice, WT Docket No. 05-265, DA 14-798 (rel. June 10, 2014).

² See 47 C.F.R. §20.12(e)(2). The data roaming rule, which requires facilities-based providers of commercial mobile data services to offer commercially reasonable data roaming arrangements, provides that commercial reasonableness is determined on a case-by-case basis, taking the totality of the circumstances into consideration. *Id.* The *Data Roaming Order* provides initial guidance around the rule’s implementation, including a list of seventeen factors that may be considered in evaluating commercial reasonableness. See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and other Providers of Mobile Data Services*, Second Report and Order, 26 FCC Rcd. 5411 ¶ 86 (2011) (“*Data Roaming Order*”), *aff’d sub nom. Cellco P’ship v. FCC*, 700 F.3d 534 (D.C. Cir. 2012).

Three years of practical, real-world experience implementing the data roaming rule make clear that industry confusion over its application exists.³ The Commission guidance T-Mobile seeks is necessary to remove this lingering regulatory uncertainty across the marketplace.⁴ Specifically, the proposed benchmarks will provide additional points of reference for evaluating whether roaming terms meet the commercially reasonable standard. In addition, clarifying the ambiguity around the application of the “existing agreement presumption” and the build-out factor will remove these issues as potential obstacles to negotiating and reaching commercially reasonable data roaming agreements. Furthermore, given that these proposals seek to clarify, rather than expand or modify, the court-affirmed data roaming rule, this guidance would remain well within the Commission’s proper exercise of its jurisdictional authority. Accordingly, granting T-Mobile’s request for guidance will help expedite data roaming agreement negotiations, help inform the Commission’s data roaming dispute resolution process, and ultimately enable the data roaming rule to operate in the way the Commission originally intended.

I. T-Mobile’s Proposed Benchmarks Will Provide Useful Guidance in Determining the Commercial Reasonableness of a Wholesale Data Roaming Offering.

Sprint supports T-Mobile’s request for the Commission to include in prospective data roaming guidance four benchmarks that may be used to assess the commercial reasonableness of a wholesale data roaming rate.⁵ The proposed benchmarks include: (1) whether the wholesale

³ See *Petition* at 5-9.

⁴ The Commission has noted that petitions for declaratory ruling may be used “for the purpose of ‘terminating a controversy or removing uncertainty.’” *Data Roaming Order* at n. 231.

⁵ *Petition* at 11.

data roaming rate substantially exceeds the retail rate; (2) whether the wholesale data roaming rate substantially exceeds roaming rates charged to foreign carriers when their customers roam in the United States (and vice versa); (3) whether the wholesale data roaming rate substantially exceeds the price for wholesale service charged to Mobile Virtual Network Operators (“MVNOs”); and (4) how it compares to other competitively negotiated wholesale data roaming rates.⁶ Sprint concurs that the benchmarks applied individually or together, and in conjunction with other relevant factors, “would operate as useful guideposts to inform whether the proposed terms of a roaming agreement are commercially reasonable.”⁷

Sprint submits that the Commission’s flexible approach for determining commercial reasonableness as outlined in the *Data Roaming Order* would easily accommodate the inclusion of benchmark guidance.⁸ The Commission’s case-specific, “totality of the circumstances” review of commercial reasonableness is a fact-intensive analysis.⁹ The more relevant facts and information made available to inform that analysis, the increased likelihood that a truly commercially reasonable outcome will be reached. Indeed, the Commission anticipated that additional factors beyond the original seventeen it identified may be germane to its “totality of the circumstances” analysis.¹⁰ Specifically, the Commission noted that the seventeen factors “are not exclusive or exhaustive” and “providers may argue that the Commission should consider

⁶ *Id.*

⁷ *Id.* at 27.

⁸ *See Data Roaming Order* at ¶¶ 85-7.

⁹ *See id.*

¹⁰ *Id.* at ¶ 87.

other relevant factors in determining commercial reasonableness of . . . the terms and conditions of the proffered data roaming arrangements, including the prices.”¹¹ Information derived from the proper application of the benchmarks would constitute “other relevant factors.”

Furthermore, Sprint concurs that T-Mobile’s proposed benchmarks will serve as useful points of comparison to help assess whether proffered wholesale data roaming rates and related terms fall within the realm of commercial reasonableness. While there may be valid reasons to justify a rate difference, a proposed rate significantly higher than a particular benchmark, for example, may flag an issue warranting further examination.¹² In addition, the benchmarks, in conjunction with one another and with other applicable factors, would provide important context and insight into market conditions.

To help ensure that an application of the proposed benchmarks generates meaningful, relevant information, however, care must be taken to ensure that an “apples to apples” comparison is made. Arriving at an even comparison can be complex in a dynamic market offering an array of innovative pricing structures, such as unlimited plans, bundled voice, text and data service plans, and shared plans. It may be necessary, for example, to translate an unlimited, bundled retail offer into a per-MB retail mobile data rate prior to comparing it a proposed per-MB wholesale data roaming rate, as Dr. Farrell calculated in his analysis.¹³ Once

¹¹ *Id.*

¹² *See* Declaration of Joseph Farrell, D.Phil., In Support of Petition for Declaratory Ruling of T-Mobile USA, Inc. Petition (*Farrell Declaration*), Ex. 2 at 20.

¹³ *Id.* at 21-24 (providing Dr. Farrell’s methodology for deriving the maximum retail cost per MB for a customer who uses 1700 MB per month from unlimited and bundled plans).

the appropriate computations are made to ensure an equivalent comparison, application of the benchmarks would yield valuable information for the Commission's consideration.

II. The Commission Should Clarify that Terms of Existing Agreements are Not Presumptively Commercially Reasonable for Future Agreements.

The *Data Roaming Order* established the presumption that the terms of a signed wholesale data roaming agreement meet the commercial reasonableness standard, unless the party challenging the terms rebuts that presumption.¹⁴ Sprint endorses T-Mobile's request for the Commission to clarify that this presumption applies only to the terms of the signed agreement at issue, not to the terms of any future agreements.¹⁵

Existing, signed agreements reflect the dynamics of the wireless marketplace at the time of signature. As T-Mobile notes, if an agreement was signed at a time when a marked disparity in bargaining power existed between the parties or prior to the Commission's adoption of the automatic data roaming requirement, the agreement terms may have been commercially unreasonable from the start.¹⁶ Moreover, even assuming that the terms and conditions of an existing data roaming agreement were commercially reasonable when signed, changes in market conditions may render those same terms and conditions commercially unreasonable over time. For example, rapid advances in mobile wireless technology and network design that increase efficiencies may drive down costs and thus reduce market roaming rates far below rates frozen in signed agreements. Accordingly, it is imperative that the Commission clarify the proper scope of

¹⁴ *Data Roaming Order* at ¶ 81.

¹⁵ *Petition* at 16-17.

¹⁶ *Id.* at 17.

this presumption to ensure that providers are not locked into wholesale data roaming rates and terms that either never were, or may no longer be, commercially reasonable.

III. The Commission Should Clarify that the Build-out Factor Should Not be Used to Deny Data Roaming.

One of the seventeen factors the Commission identified as relevant to evaluating commercial reasonableness was “the extent and nature of providers’ buildout.” T-Mobile asks the Commission to clarify that this “factor was not intended to permit a host provider to deny roaming or to charge commercially unreasonable rates for roaming, in a particular area where the otherwise built-out requesting provider has not built out.”¹⁷ Rather, T-Mobile requests the Commission to clarify that it included this factor to uncover those providers with little or no network looking to “piggyback’ off of other providers’ network investments.”¹⁸

Sprint fully supports T-Mobile’s clarification request. The Commission’s inclusion of this one factor alone does not give a host provider license to deny roaming in areas where an otherwise built-out requesting provider has not built out. After carefully considering the impact of data roaming access on build-out incentives, the Commission purposefully designed the data roaming rule not only to promote network deployment, but also to preclude exploitation of the rule as a back door to a *de facto* resale arrangement.¹⁹

¹⁷ *Id.* at 22.

¹⁸ *Id.* at 23.

¹⁹ *See Data Roaming Order* at ¶ 50 (concluding that “providers will not have heightened incentives under the rule adopted here to scale back their own deployments and ‘free-ride’ on the superior investments of others.”).

Indeed, as the Commission predicted, the availability of data roaming has helped stimulate investment and network deployment “by ensuring that providers wanting to invest in their networks can offer their subscribers a competitive level of mobile network coverage” at least among competitive service providers.²⁰ As a prime example, Sprint recently announced that it reached 4G LTE agreements with 12 rural and regional network carriers related to Sprint’s Rural Roaming Preferred Program (“RRPP”).²¹ The RRPP provides rural operators with low cost access to Sprint’s nationwide 4G LTE network and an opportunity to pursue an expanded range of mobile devices, while providing Sprint with a stronger LTE footprint outside of the larger markets in which it has focused a majority of its initial LTE build.²² In addition, the RRPP complements the Small Market Alliance for Rural Transformation (“SMART”) initiative by Sprint and the NetAmerica Alliance, which provides participating rural communications service providers the capabilities to help reduce roaming costs and accelerate the deployment and utilization of 4G LTE across rural America.²³

²⁰ *Id.* at ¶17.

²¹ *Sprint to Expand 4G LTE Roaming Through 12 New Agreements with Carriers Covering a Population of Over 34 Million*, News Release, Sprint (June 16, 2014) available at <http://newsroom.sprint.com/news-releases/sprint-to-expand-4g-lte-roaming-through-12-new-agreements-with-carriers-covering-a-population-of-over-34-million.htm?previousArticle=11455&nextArticle=11452&gotoArt=%2Fnews-releases%2Fsprint-to-expand-4g-lte-roaming-through-12-new-agreements-with-carriers-covering-a-population-of-over-34-million.htm>.

²² *Id.* See also *Sprint, Competitive Carriers Association and NetAmerica Alliance Join Forces to Accelerate Deployment and Utilization of 4G LTE across the United States*, News Release, Sprint (Mar. 27, 2014) available at <http://newsroom.sprint.com/news-releases/sprint-competitive-carriers-association-and-netamerica-alliance-join-forces-to-accelerate-deployment-and-utilization-of-4g-lte-across-the-united-states.htm>.

²³ *Id.*

Notwithstanding innovative arrangements to expand and upgrade coverage, no single mobile service provider has deployed a wireless network that covers all people in all places across the country. As the Commission has repeatedly acknowledged, it is simply uneconomic for every mobile service provider to provide network coverage across every corner of the nation, even in areas where it is licensed. In the context of automatic voice roaming, the Commission actually reversed itself and eliminated the home roaming exclusion, in part, because “it [did] not adequately account for the fact that building another network may be economically infeasible or unrealistic in some geographic portions of licensed service areas.”²⁴ The Commission carried this notion forth in the context of data roaming. Recognizing that “there may be areas where building another network may be economically infeasible or unrealistic,” the Commission adopted the data roaming requirement to help ensure that “continuity of spectrum-based services is preserved across networks and geographic regions” for consumers.²⁵

The Commission must expressly clarify its intention behind this factor to ensure that the data roaming rule accommodates unavoidable gaps in network coverage. Preventing host providers from invoking the build-out factor as a means to short-circuit the data roaming rule

²⁴ *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 at ¶ 23 (2010) (*Order on Reconsideration*). The Commission recognized that “in some areas of the country with very low population densities, it is simply uneconomic for several carriers to build out” and “it may be significantly more costly to build out when the carrier only has access to higher spectrum frequencies where propagation characteristics are less advantageous.” *Id.* The Commission concluded that, “the up-front categorical home roaming exclusion adopted by the 2007 Report and Order would in many circumstances discourage, rather than encourage, the facilities-based competition it sought to promote.” *Id.* at ¶ 18.

²⁵ *Data Roaming Order* at ¶ 15.

will help safeguard the Commission's core policy goals to advance competition, promote mobile broadband network deployment, and provide consumers access to seamless, nationwide service.

IV. The Commission Has the Authority to Provide Additional Guidance.

Sprint agrees with T-Mobile that the Commission holds the requisite authority to provide additional guidance around the data roaming obligation. The Commission's authority to adopt the data roaming rule already rests on solid statutory authority. A three-judge panel of the U.S. Court of Appeals for the D.C. Circuit unanimously upheld the data roaming rule finding that Title III of the Communications Act of 1934, as amended, provided the Commission ample authority to promulgate it.²⁶ Specifically, the court ruled that the data roaming mandate falls within the authority conferred by sections 303(b) and (r) of the Communications Act, which authorize the agency to "prescribe the nature of the service to be rendered" by licensees.²⁷ In addition, the D.C. Circuit concluded that the data roaming rule does not impose prohibited common carrier regulation on mobile Internet providers because it leaves substantial room for individualized negotiation.²⁸

T-Mobile's requested clarifications of the authorized rule will serve to improve the rule's implementation and effectiveness, not extend or change the rule in any way. Specifically, the proposed benchmarks would merely generate additional data to help inform the data roaming rule's established commercial reasonableness analysis. Moreover, the two requested

²⁶ *Cellco P'ship v. FCC*, 700 F.3d 534, 537 (D.C. Cir. 2012) (finding that "Title III of the Communications Act of 1934 plainly empowers the Commission to promulgate the data roaming rule.").

²⁷ *Id.* at 542-3.

²⁸ *Id.* at 548.

clarifications regarding existing agreement terms and the build-out factor seek guidance on the Commission's intentions around the rule's implementation as outlined in the *Data Roaming Order*. Given that all three proposals are well rooted in the data roaming rule, the proposed guidance should remain safely within the bounds of the Commission's jurisdictional authority.

V. Conclusion

For the foregoing reasons, Sprint respectfully requests that the Commission grant T-Mobile's Petition for Expedited Declaratory Ruling and provide industry express guidance on the commercial reasonableness standard to ensure that the data roaming rule continues to serve the public interest.

Respectfully submitted,

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