

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

In the Matter of)	
)	
Petition for Expedited Declaratory Ruling)	WT Docket No. 05-265
Filed by T-Mobile USA, Inc. Regarding Data)	
Roaming Obligations)	

COMMENTS OF COMPETITIVE CARRIERS ASSOCIATION

Competitive Carriers Association (“CCA”) hereby submits its comments in support of the petition of T-Mobile USA, Inc. (“T-Mobile”) for expedited declaratory ruling, which is intended to provide further guidance to the wireless industry on the criteria used in determining whether the terms of a data roaming agreement or proposal satisfy the “commercially reasonable” standard set forth in the Commission’s rules.¹

I. INTRODUCTION AND SUMMARY

CCA represents the interests of more than 100 competitive wireless carriers, including rural and regional carriers as well as national providers. CCA’s members are keenly interested in ensuring that all carriers—including rural, mid-sized and regional carriers—have access to data roaming on reasonable terms and conditions. Data roaming is essential to promoting competition and providing consumers with the ubiquitous mobile broadband services that they demand and increasingly rely upon. In recognition of this important need, the Commission adopted data roaming requirements, including an obligation to offer data roaming arrangements to other providers on “commercially reasonable terms and conditions,” subject to limitations that afford

¹ T-Mobile USA, Inc., Petition for Expedited Declaratory Ruling, Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, WT Docket No. 05-265 (filed May 27, 2014) (“Petition”). *See* 47 C.F.R. § 20.12.

flexibility to offering carriers.² However, despite these requirements, competitive carriers continue to face significant difficulties in reaching data roaming agreements with the largest national carriers. Today, the need for effective data roaming obligations is greater than ever amidst the exploding demand for mobile data services and the further consolidation of wireless carriers and spectrum resources by the two largest providers.

T-Mobile's proposed benchmarks for assessing whether data roaming rates are commercially reasonable would provide sorely-needed guidance to the industry and advance the purposes of the data roaming requirements, while maintaining flexibility in carriers' negotiations. T-Mobile's Petition is the proper procedural vehicle for providing additional guidance under current market circumstances. Issuing such guidance would not change the Commission's rules and is well within the Commission's statutory authority, which has been upheld by the D.C. Circuit. CCA respectfully requests that the Commission evaluate the current state of the data roaming marketplace and expeditiously grant T-Mobile's proposal to clarify the "commercial reasonableness" standard set forth in the Commission's data roaming rule.

II. THERE IS A CONTINUING NEED FOR THE COMMISSION TO ADDRESS DATA ROAMING AVAILABILITY

In the *Data Roaming Order*, the Commission adopted data roaming requirements based on overwhelming evidence that the public interest would be served by promoting consumer access to seamless mobile data coverage nationwide and fostering competition among mobile service providers.³ The sharp increase in mobile data consumption, resulting from greater reliance by consumers on mobile devices (particularly smartphones), and shifting consumer

² 47 C.F.R. § 20.12(e)(1).

³ *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 ¶ 13 (2011) ("*Data Roaming Order*").

expectations regarding the ubiquitous availability of Internet connectivity, led the Commission to conclude that the availability of roaming capabilities is critical to ensuring the viability of mobile broadband data service competition.⁴ Since the Commission adopted the *Data Roaming Order*, demand for mobile data services has continued to skyrocket due to the exponential growth in the adoption smartphones, and the surging demand by consumers for tablets, which were still relatively nascent technologies when the *Data Roaming Order* was adopted.⁵ The Commission has recognized industry projections that by 2019 almost all handsets in North America will be smartphones, and that total smartphone traffic over mobile networks will increase 10 times between 2013 and 2019.⁶ The Commission also has acknowledged repeatedly in various recent proceedings that this rising consumer demand for high-speed data is accompanied by the expectation that mobile broadband will be available ubiquitously.⁷ The importance of data roaming is only increasing.

⁴ *Id.* at ¶ 15 (“As data services increasingly become the focus of the mobile wireless services, consumers increasingly expect their providers to offer competitive broadband data services, and the availability of data roaming arrangements can be critical to providers remaining competitive in the mobile services marketplace.”).

⁵ *See, e.g., Amendment of the Commission’s Rules with Regard to Commercial Operations in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Band*, Report and Order, 29 FCC Rcd 4610 ¶ 3 (2014) (“*AWS-3 Order*”) (citing the rapid adoption of smartphones and tablets, noting that as of June 2013, 34 percent of American adults owned a tablet, while only 18 percent owned one in September 2010); *Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, Report and Order, 27 FCC Rcd 16102 ¶ 3 (2012) (citing the 50 percent annual growth rate in 2011 in smartphone adoption, and the rapid adoption of tablets, which were first introduced in January 2010 and grew to almost 70 million users by the end of 2012).

⁶ *AWS-3 Order* at ¶ 3 (citing Ericsson Mobility, Ericsson Mobility Report on the Pulse of the Networked Society at 7, 11 (Nov. 2013), available at <http://www.ericsson.com/res/docs/2013/ericsson-mobility-report-november-2013.pdf> (last visited July 8, 2014)).

⁷ *See, e.g., Policies Regarding Mobile Spectrum Holdings, WT Docket No. 12-269*, Report and Order, FCC 14-63 ¶ 2 (rel. June 2, 2014) (“*Mobile Spectrum Holdings Order*”).

At the same time, the concerns and the dynamics in the wireless marketplace that drove the need for a data roaming mandate in the first instance still exist, and indeed have been magnified by the increasing imbalance among roaming providers in the marketplace. At the time it adopted the *Data Roaming Order*, the Commission recognized that consolidation in the mobile wireless industry had reduced the number of potential roaming partners for smaller, regional and rural providers, and therefore, reduced the incentives of the largest two providers to enter into roaming arrangements.⁸ Thus, the Commission rejected arguments by AT&T and Verizon Wireless that a data roaming rule was unnecessary, finding that “providers have encountered significant difficulties obtaining data roaming arrangements on advanced ‘3G’ data networks, particularly from the major nationwide providers,” and citing the challenges facing smaller, rural wireless carriers in particular.⁹

Unfortunately, since the adoption of the data roaming rule, competitive conditions in the CMRS marketplace have deteriorated further, compounding the challenges of small, mid-sized and even smaller national carriers in obtaining data roaming agreements with the largest two carriers. Consolidation into the AT&T-Verizon Wireless duopoly in the last three years has intensified the threat that these two largest carriers will continue to withhold data roaming on commercially reasonable terms. The Commission noted this dynamic when the *Data Roaming Order* was adopted, and it has only gotten worse.¹⁰ In the intervening years, AT&T and Verizon Wireless have each increased their spectrum holdings dramatically through secondary market transactions, and AT&T has acquired smaller carriers, reducing the number of competitors in the

⁸ *Data Roaming Order* at ¶ 27.

⁹ *Id.* at ¶ 24.

¹⁰ *See, e.g., Mobile Spectrum Holdings Order* at ¶ 25 (noting that AT&T and Verizon Wireless together accounted for 68 percent of the nation’s subscribers as of year-end 2013, as compared to 51 percent in 2004).

wireless market.¹¹ Significantly, AT&T and Verizon each have pending transactions that potentially decrease competition further, continuing the trend of consolidation among the largest two carriers that threatens to further diminish roaming opportunities.¹²

CCA agrees with T-Mobile's assessment that "disparate bargaining power remains a characteristic of the data roaming marketplace."¹³ T-Mobile in its Petition references well-documented instances of carriers that have been similarly unable to obtain roaming agreements on reasonable terms, even after the implementation of the data roaming requirements.¹⁴ For example, during negotiations with certain potential roaming partners a CCA member was offered data roaming rates as much as 33 times the retail rates generally charged by national carriers to their retail customers for data access. The time is ripe for the Commission to revisit the efficacy of the data roaming requirements and the sufficiency of the factors it established to evaluate compliance with the standards in the rule.

III. THE COMMISSION SHOULD GRANT THE INSTANT PETITION

A. The Additional Clarifications to the "Commercial Reasonableness" Standard Sought by T-Mobile are Well Supported and in the Public Interest

In the Petition, T-Mobile seeks a declaratory ruling that would provide guidance for assessing whether data roaming rates are commercially reasonable in accordance with the

¹¹ See, e.g., *AT&T Inc. and Qualcomm Inc.*, 26 FCC Rcd 17589 (2011); *Cellco P'ship d/b/a Verizon Wireless and SpectrumCo LLC*, 27 FCC Rcd 10698 (2012); *AT&T Mobility Spectrum LLC*, 27 FCC Rcd 16459 (2012); see also *Cricket License Co., LLC, Leap Wireless Int'l, Inc., and AT&T Inc.*, 29 FCC Rcd 2735 (2014); *AT&T Inc. and Atlantic Tele-Network, Inc.*, 28 FCC Rcd 13670 (2013).

¹² See, e.g., *Cellco P'ship d/b/a Verizon Wireless, Cincinnati Bell Wireless, LLC, Grain Spectrum III, LLC*, Public Notice, DA 14-688 (rel. May 21, 2014); *Cellco P'ship d/b/a Verizon Wireless, Coral Wireless, LLC*, Public Notice, DA 14-690 (rel. May 21, 2014); *AT&T Inc., NTCH, Inc.*, Public Notice, DA 14-375 (rel. Mar. 20, 2014); *AT&T Inc., Paul Bunyan Rural Telephone Coop.*, Public Notice, DA 14-376 (rel. Mar. 20, 2014).

¹³ Petition at 17.

¹⁴ See *id.* at 6-7.

standard set forth in Section 20.12(e)(1) of the Commission’s rules. Specifically, T-Mobile proposes four benchmarks: (i) whether a wholesale roaming rate offered to a retail competitor substantially exceeds the relevant retail rate; (ii) whether a wholesale roaming rate substantially exceeds roaming rates charged to foreign carriers when their customers roam in the U.S.; (iii) whether a wholesale roaming rate substantially exceeds the price for wholesale data service that a seller charges to mobile virtual network operator customers; and (iv) how the proposed wholesale roaming rate compares to other competitively negotiated wholesale roaming rates (with the caveat that the imbalance in bargaining power between the parties to a legacy agreement should not be assumed to be commercially reasonable in future negotiations).¹⁵ The proposed benchmarks are intended to be used as guiding principles that must be applied flexibly depending on the circumstances at issue, and it is understood that no benchmark can fit every circumstance.¹⁶ CCA supports T-Mobile’s proposal to incorporate these benchmarks as part of the Commission’s existing approach to determine whether proffered roaming terms are commercially reasonable.

Such additional guidance is needed because of AT&T and Verizon Wireless’s market power in the sale of wholesale roaming services,¹⁷ each of whose dominance continues to grow. Monopoly power in the market for roaming can increase costs and prices to competitors, which in turn may be passed on to retail customers as a special charge for roaming or as part of the overall price of service.¹⁸ While there are a small number of local markets where a rural or regional service provider has achieved significant market share, the Commission acknowledges

¹⁵ *Id.* at 11.

¹⁶ *Id.* at ii.

¹⁷ *See* Petition, Exhibit 2, Declaration of Joseph Farrell, D.Phil., ¶¶ 40, 46.

¹⁸ *See id.* at ¶ 41.

that these carriers still require roaming agreements with nationwide facilities-based providers to be competitive and offer mobile wireless services that extend beyond the geographic reach of their networks.¹⁹ There is no question that the existing dynamic in the marketplace for wholesale roaming is detrimental to competition and consumers.

Providing the clarity needed to inject balance into data roaming negotiations would ensure that the purposes of the rules are effectuated. Further, adopting T-Mobile's proposed clarifications would establish more predictable criteria that would expedite roaming negotiations by narrowing the issues and enabling parties to arrive at commercially reasonable terms in a more efficient manner. Thus, grant of T-Mobile's Petition is in the public interest.

B. A Petition for Declaratory Ruling is the Appropriate Procedural Vehicle for the Relief Sought in the Petition

In the *Data Roaming Order*, the Commission adopted a number of factors for consideration in determining whether the standard of commercial reasonableness has been met.²⁰ In particular, certain factors address "whether the providers involved have had previous data roaming arrangements with similar terms," and "whether a host provider's decision not to enter into a roaming arrangement is reasonably based on the fact that changes to the host network necessary to accommodate the request are not economically reasonable."²¹ The benchmarks that T-Mobile proposes would refine the analysis suggested by these factors. Looking at other wholesale, retail and roaming rates and terms are apt comparisons for assessing the commercial reasonableness of a particular roaming rate and other economic terms being offered.

¹⁹ *Mobile Spectrum Holdings Order* at ¶ 25.

²⁰ *Data Roaming Order* at ¶ 86.

²¹ *Id.*

Notably, the Petition does not seek to change the data roaming rule. The Petition simply seeks to supplement the Commission’s previous guidance on determining whether the applicable reasonableness standard has been satisfied, and to clarify further the sorts of evidence germane to evaluating pricing terms. The Commission emphasized in the *Data Roaming Order* that the list of factors cited therein was non-exclusive guidance and was not meant to be exhaustive. Indeed, the Commission left open the possibility that providers may in the future propose “other relevant factors in determining the commercial reasonableness of the negotiations, providers’ conduct, and the terms and conditions of the proffered data roaming arrangements, including the prices.”²² The record now suggests that the Commission must intervene to address further the detrimental effects that the disparate bargaining power between the largest national carriers, on the one hand, and all other wireless carriers seeking roaming on the other.

As such, a petition for declaratory ruling is the appropriate procedural vehicle for the relief that T-Mobile has requested. The Commission invited petitions for declaratory ruling to address further controversies or uncertainty relating to data roaming and indicated that it intends to address such petitions expeditiously.²³ Taking favorable action on T-Mobile’s Petition would be consistent the Commission’s commitment in the *Data Roaming Order* to monitor the developments in the data roaming marketplace and take additional action as necessary to help ensure that the goals of the data roaming rules are achieved.²⁴ The clarifications sought in the Petition will provide additional and much-needed guidance in the administration and enforcement of the “commercial reasonableness” standard.

²² *Id.* at ¶ 87.

²³ *Id.* at ¶ 75 n.231; *see also id.* at ¶ 77.

²⁴ *See id.* at ¶¶ 27, 56.

C. The Commission Has Ample Authority to Adopt T-Mobile’s Proposed Clarifications

Title III of the Communications Act of 1934, as amended, confers on the Commission the authority to manage spectrum and to impose conditions on licensees where necessary. The Commission relied on this authority in adopting requirements that wireless carriers enter into data roaming arrangements on commercially reasonable terms and conditions, reasoning that such requirements served the public interest by promoting connectivity for, and nationwide access to, mobile broadband services.²⁵ Significantly, the D.C. Circuit upheld the Commission’s rule and affirmed the scope of the Commission’s Title III authority.²⁶ The same broad Title III authority invoked by the Commission to adopt data roaming rules in the first instance, and upheld by the D.C. Circuit, supports the action requested here.

The guidance requested in the Petition would still leave substantial room for individualized bargaining and arrangements, and preserve the discretion contained within the language of the rule. In upholding the Commission’s data roaming rules, the D.C. Circuit concluded that the rule did not constitute prohibited common carrier regulation based on the Commission’s establishment of different factors that it must take into account in determining whether a proffered roaming agreement is commercially reasonable, and the broad flexibility that providers were allowed in individual negotiations.²⁷ For example, rural areas are often more costly to serve and therefore carriers serving these areas should be capable of recouping these deployment costs through fair and economically reasonable roaming rates. The guidance that T-Mobile requests would maintain this same level of discretion among the parties and would not

²⁵ *Id.* at ¶ 61.

²⁶ *Cellco P’ship v. FCC*, 700 F.3d 534, 543 (D.C. Cir. 2012).

²⁷ *Id.* at 548.

impose a presumption of reasonableness. Rather, these data points would still be considered on a case-by-case basis, in the context of the totality of the circumstances. In sum, the Commission would be well within its Title III authority, and grant of the Petition would be fully consistent with the D.C. Circuit's ruling.

IV. CONCLUSION

For the foregoing reasons, CCA urges the Commission to expeditiously grant T-Mobile's Petition and provide the requested guidance to ensure that data roaming terms meet the "commercially reasonable" standard established in the Commission's data roaming rules.

Respectfully submitted,

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