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

COMMENTS OF CELLULAR SOUTH, INC.
ON PETITION FOR EXPEDITED DECLARATORY RULING
FILED BY T-MOBILE USA, INC.

Cellular South, Inc. (d/b/a C Spire Wireless) ("C Spire"), by its attorneys and pursuant to Section 1.2(b) of the Commission's Rules,[1] hereby respectfully submits these Comments on the petition for expedited declaratory ruling filed by T-Mobile USA, Inc. ("T-Mobile") in the above-referenced docket.[2] The requested ruling would provide guidance and clarification regarding the criteria used to determine whether the terms of a data roaming agreement meet the "commercially reasonable" standard prescribed in Section 20.12(e) of the Commission's Rules.[3]

I. INTRODUCTION.

Competitive mobile wireless carriers are facing substantial difficulties in their efforts to provide seamless data services to their customers. These difficulties largely stem from carriers'

[1] 47 C.F.R. § 1.2(b).

[2] T-Mobile, Petition for Expedited Declaratory Ruling Regarding 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").

[3] 47 C.F.R. § 20.12(e) (providing that wireless carriers are required to offer data roaming arrangements to other providers "on commercially reasonable terms and conditions"). *See Wireless Telecommunications Bureau Seeks Comment on Petition for Expedited Declaratory Ruling Filed by T-Mobile USA, Inc. Regarding Data Roaming Obligations*, Public Notice, DA 14-798 (June 10, 2014).

inability to evaluate the commercial reasonableness of proposed terms and conditions for data roaming agreements, and these difficulties will likely become even more acute until the Commission takes expeditious action to clarify the commercial reasonableness standard and to ensure the realization of its data roaming goals.

The Commission acted in 2011 to promote the widespread availability of data roaming capabilities, in order to advance its goal of ensuring that all Americans have access to competitive broadband mobile data services.[4] Now, three years later, it is clear that this goal is slipping beyond reach, in spite of the Commission's efforts in the *Data Roaming Order* to construct a workable data roaming standard.

Data roaming arrangements are critically important to wireless carriers because of the increasing consumer demand for mobile data services.[5] As C Spire has explained, "consumers who are relying on mobile data services in growing numbers also expect that these data services will work whether at home or outside their carrier's home market area."[6] All carriers—and especially competitive wireless carriers—must have access to data roaming on commercially reasonable terms to meet the basic consumer demand for seamless data services.

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[4] *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 (2011) ("*Data Roaming Order*"), *aff'd sub nom. Cellco Partnership v. FCC*, 700 F.3d 534 (D.C. Cir. 2012). On June 25, 2014, the Chief of the Wireless Telecommunications Bureau issued an Order on Reconsideration denying a petition for reconsideration of the *Data Roaming Order*, which was filed by Blanca Telephone Company four years ago, and which sought reconsideration of the Commission's decision not to adopt a uniform time limit or "shot clock" for all data roaming negotiations. *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, DA 14-865 (WTB June 25, 2014).

[5] *See* Petition at 3.

[6] Comments of Cellular South, Inc., WT Docket No. 05-265 (filed June 14, 2010) ("C Spire 2010 Comments"), at 13 (internal quotation marks omitted).

Reliable access to data roaming, however, is frustrated by a dysfunctional marketplace in which AT&T and Verizon Wireless (the "Big Two" national wireless carriers)—which are "must-have" roaming partners for many other wireless providers—are asserting their dominant market power and exploiting to their advantage the lack of clarity in the Commission's "commercially reasonable" data roaming standard.

The fact that market power and anti-competitive incentives are trumping the Commission's efforts to "promote consumer access to nationwide mobile broadband service"[7] is a compelling reason for Commission action. T-Mobile has presented a persuasive case for the steps the Commission should take, demonstrating that its proposals to clarify application of the "commercially reasonable" standard will serve to enhance the effectiveness of the data roaming rule.

II. DISCUSSION.

Market failures continue to frustrate the Commission's data roaming goals today—three years after the *Data Roaming Order* was adopted. C Spire supports T-Mobile's proposed clarifications of the "commercially reasonable" standard for data roaming agreements because the clarifications will provide greater opportunity for competitive wireless carriers to obtain data roaming agreements and provide the seamless data services wireless customers demand.

A. Competitive Wireless Carriers Are Thwarted in Their Efforts To Obtain Commercially Reasonable Data Roaming Agreements with the Big Two National Wireless Carriers.

As T-Mobile observes, cellular carriers will likely always need data roaming on commercially reasonable terms in order "to offer customers the widest possible coverage footprint."[8] The

[7] *Data Roaming Order*, 26 FCC Rcd at 5411 (para. 1).

[8] Petition at 3 (footnote omitted).

problem is that the lack of a competitive market in many areas is crippling carriers' efforts to obtain data roaming on commercially reasonable terms.

C Spire identified this problem four years ago, explaining that the seamless use of mobile services was eroding because, as the large national carriers continued to consolidate their holdings and gain more and more sizable market share, their need for roaming arrangements with other carriers, particularly competitive wireless carriers, was diminishing.[9]

C Spire argued that, if the Commission was not successful in promulgating an effective data roaming mandate, "this consolidation and the burgeoning market power of the large carriers" would enable them to continue to decline to enter into data roaming agreements with competitive wireless carriers, or to offer arrangements at unreasonable rates and with unreasonable terms and conditions.[10]

The Commission attempted in the *Data Roaming Order* to curb the effects of these alarming market failures by requiring carriers to negotiate and implement data roaming agreements with commercially reasonable terms and conditions, noting that the rule it adopted:

> includes the ability to offer individualized, commercially reasonable terms, including rates, and to evaluate a number of factors on a case-by-case basis in determining commercial reasonableness. We find that this approach strikes the best balance between concerns over the potential for congestion or other harms from roaming traffic and the significant benefits that data roaming arrangements can provide to consumers.[11]

Unfortunately, real-world industry experience during the three years since the *Data Roaming Order* was adopted demonstrates that this approach for ensuring commercially reasonable terms and

[9] C Spire 2010 Comments at 17.

[10] *Id*. at 18.

[11] *Data Roaming Order*, 26 FCC Rcd at 5424 (para. 23).

rates is not working. The marketplace problems that C Spire and other parties described four years ago continue to worsen.

As T-Mobile explains, competitive carriers continue to face exclusionary actions by AT&T and Verizon, including the denial of data roaming agreements on commercially reasonable terms and conditions. AT&T and Verizon account for approximately 67 percent of all wireless service revenues, they have substantial spectrum holdings,[12] and "[t]his market dominance is only expected to increase as the two largest carriers continue to purchase substantial spectrum assets through piecemeal transactions and enter into arrangements to acquire their competitors."[13]

The problem currently gripping the data roaming marketplace has been succinctly described by Youghiogheny Communications, which has explained that "[t]he structural dynamic of the roaming market leaves AT&T and Verizon, which have the most ubiquitous coverage, in a position to dictate roaming terms. They can and do charge whatever they want because there are no practical alternatives for most carriers in many areas."[14]

B. Clarifications of the "Commercially Reasonable" Standard Proposed by T-Mobile Will Better Ensure That the Data Roaming Rule Provides Consumer Benefits and Enhances Competition as the Commission Intended.

As T-Mobile explains, the Commission had the foresight in the *Data Roaming Order* to provide a framework for revisiting its decisions and taking additional action. The Commission

[12] Petition at 7 (citations omitted).

[13] *Id*. (footnote omitted).

[14] Letter from Donald J. Evans, Fletcher, Heald & Hildreth, P.L.C., Counsel to Youghiogheny Communications, LLC, to Marlene H. Dortch, FCC, WT Docket No. 13-193 (filed Feb. 3, 2014), at 2, *quoted in* Petition at 18.

announced its commitment to monitor developments in the commercial broadband data marketplace,[15] and it invited parties to file declaratory ruling petitions to resolve controversies concerning the data roaming rule.[16] Continuing and worsening marketplace failures make additional Commission action necessary, and C Spire strongly supports the actions proposed by T-Mobile.

Benchmarks.—C Spire endorses T-Mobile's view that the Commission should adopt prospective guidance "to provide necessary clarity in individualized negotiations and to help parties better evaluate the commercial reasonableness of offered terms and to reach agreements."[17] Given the fact that a prominent barrier faced by competitive wireless carriers seeking data roaming agreements is the excessive, anti-competitive rates being imposed by must-have roaming partners, the four rate benchmarks proposed by T-Mobile are urgently needed to provide this guidance.

▪ *Retail rates*.—C Spire agrees with T-Mobile that retail mobile data pricing should serve as a "natural benchmark" for wholesale mobile data rates.[18] The current problem is that the wholesale roaming rates of must-have roaming partners "are intended to, and have the effect of, keeping retail data rates unnecessarily high for the wireless customers of competitors."[19] To curb this anti-competitive pricing, the Commission should adopt a benchmark based on a public interest policy that it is not commercially reasonable for a roaming partner to impose wholesale roaming rates that are substantially higher than retail rates charged to consumers.

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[15] *Data Roaming Order*, 26 FCC Rcd at 5427 (para. 27); *see* Petition at 4.

[16] *Data Roaming Order*, 26 FCC Rcd at 5412 (para. 2); *see* Petition at 4.

[17] Petition at i.

[18] *Id*. at 12.

[19] *Id*. *See* Cellular South Reply Comments, WT Docket No. 05-265, filed Nov. 28, 2007, at 2 (noting that "[l]arge carriers can and do frustrate market actions by refusing to negotiate roaming agreements and by only offering roaming agreements at exorbitant rates").

■ *Rates charged to foreign carriers*.—Comparing rates for foreign carriers to wholesale roaming rates for other carriers would be probative because foreign carriers have the benefit of a relatively competitive market for wholesale roaming in the U.S. As T-Mobile explains, since foreign carriers generally do not compete for customers in the U.S., there is little incentive for the Big Two carriers to raise data roaming costs for these carriers.[20]

■ *Rates charged to Mobile Virtual Network Operators*.—C Spire agrees with T Mobile that examining whether a wholesale roaming rate substantially exceeds prices paid by Mobile Virtual Network Operator ("MVNO") customers for wholesale data services would be instructive, because providing data services to MVNOs is similar to providing data roaming services. As T Mobile explains, in both cases the network service provider "is allowing another operator's customers to use its network to retrieve and deliver data."[21]

■ *Rates charged by other carriers*.—C Spire agrees that the reasonableness of a roaming rate proposed in a negotiation should be measured against other competitively negotiated wholesale roaming rates. T-Mobile points out, for example, that AT&T's rate charged to T-Mobile for data roaming is "very high . . . when compared to the rates that other carriers charge T-Mobile for data roaming."[22] In C Spire's view, the benchmark proposed by T-Mobile would help to clarify whether such a pricing practice of a must-have roaming partner is commercially reasonable.

Clarifying the Build-Out Factor.—One of the non-exclusive factors the Commission adopted in the *Data Roaming Order* for purposes of applying the commercial reasonableness test

[20] Petition at 14.

[21] *Id*. at 15.

[22] *Id*.

is "the extent and nature of providers' build-out . . . ."[23] C Spire agrees with T-Mobile that the Commission should clarify that this factor does not permit host carriers to deny roaming, or impose commercially unreasonable terms, in cases in which a requesting carrier has substantially built out its facilities but does not cover a particular area.[24]

The factor adopted by the Commission is useful in preventing carriers with very limited networks (or with no networks) from utilizing data roaming agreements to "piggyback" on other carriers' networks. On the other hand, C Spire supports the argument that the factor should not penalize carriers that have built out their networks, but have refrained from building out facilities in discrete areas because of the considerations referenced by T-Mobile, including significant build-out costs, zoning limitations, the inability to recover investments, or other similar factors.[25]

Existing and Future Agreements.—The Commission, seeking to discourage frivolous claims challenging the commercial reasonableness of terms and conditions in a signed data roaming agreement, indicated in the *Data Roaming Order* that it "will presume in such cases that the terms of a signed agreement meet the reasonableness standard . . . ."[26] C Spire supports T-Mobile's proposal that the Commission should clarify that this presumption does not apply in the case of ***future*** data roaming agreements or proposed agreements.

Competitive wireless carriers, even after adoption of the *Data Roaming Order*, continue to face the prospect of having no alternative other than to sign data roaming agreements with must-have roaming partners that impose "the highest possible prices on terms highly unfavorable to"

[23] *Data Roaming Order*, 26 FCC Rcd at 5453 (para. 86).

[24] Petition at 22.

[25] *See id*.

[26] *Data Roaming Order*, 26 FCC Rcd at 5451 (para. 81).

the competitive wireless carrier involved.[27] It would be unreasonable and contrary to the Commission's data roaming policies for the presumption established in the *Data Roaming Order* to be construed as permitting the rates and terms incorporated in these existing agreements to "be used to judge the commercial reasonableness of future agreements."[28] C Spire agrees with T-Mobile that such an interpretation "could essentially gut the 'commercially reasonable' standard by effectively extending the past exercise of market power to future arrangements."[29]

The Commission's Authority.—C Spire's previous argument that "adoption of a data roaming mandate is well within the Commission's authority established in Title III of the [Communications] Act [of 1934]"[30] has been validated by the U.S. Court of Appeals for the D.C. Circuit,[31] and C Spire agrees with T-Mobile that the declaratory ruling sought by T-Mobile also is encompassed within the Commission's broad spectrum management authority under Title III.[32]

Moreover, C Spire supports T-Mobile's analysis that its proposed clarifications of the "commercially reasonable" standard do not constitute common carrier regulation because the clarifications would not interfere with the ability of mobile data service providers to negotiate the terms and prices of data roaming agreements on an individualized basis.[33] Finally, C Spire believes

[27] Petition at 18.

[28] *Id*. at 19.

[29] *Id*. at 20.

[30] C Spire 2010 Comments at 4 (footnote omitted).

[31] *Cellco Partnership v. FCC*, 700 F.3d at 537 (holding that "Title III of the Communications Act of 1934 plainly empowers the Commission to promulgate the data roaming rule"), *cited in* Petition at 23.

[32] Petition at 24.

[33] *Id*. at 25-27.

that T-Mobile is correct in arguing that the benchmarks it proposes "would not amount to 'prescriptive' regulation of data roaming rates."[34]

IV. CONCLUSION.

For the reasons discussed above, Cellular South, Inc. (d/b/a C Spire Wireless) respectfully requests the Commission to grant the petition for expedited declaratory ruling submitted by T-Mobile USA, Inc., and to adopt the clarifications to the "commercially reasonable" data roaming standard proposed by T-Mobile in its petition.

Respectfully submitted,

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[34] *Id*. at 27 (footnote omitted).