Before the
Federal Communications Commission
Washington, D.C. 20554

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

OPPOSITION OF CELLULAR SOUTH, INC.

Benjamin M. Moncrief
Vice President, Government Relations
CELLULAR SOUTH, INC.
1018 Highland Colony Parkway
Suite 300
Ridgeland, Mississippi 39157

David L. Nace
John Cimko
LUKAS, NACE, GUTIERREZ & SACHS, LLP
8300 Greensboro Drive, Suite 1200
McLean, Virginia 22102
(703) 584-8695

Counsel for Cellular South, Inc.

February 4, 2015

TABLE OF CONTENTS

Before the
Federal Communications Commission
Washington, D.C. 20554

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

OPPOSITION OF CELLULAR SOUTH, INC.

Cellular South, Inc. (d/b/a C Spire Wireless) ("C Spire"), by its attorneys and pursuant to Section 1.115(d) of the Commission's Rules ("Rules"),[1] hereby respectfully submits this Opposition to applications for review of a Declaratory Ruling issued by the Wireless Telecommunications Bureau ("Bureau") in the above-captioned proceeding,[2] filed by AT&T[3] and Verizon.[4]

SUMMARY.

Contrary to arguments advanced by the Applicants, the Bureau's provision for the use of rate reference points as a guide in applying factors listed in the *Data Roaming Order*,[5] and in assisting in the determination of the commercial reasonableness of proffered rates in individual

[1] 47 C.F.R. § 1.115(d).

[2] Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, WT Docket No. 05-265, Declaratory Ruling, 29 FCC Rcd 15483 (WTB 2014) ("*Declaratory Ruling*" or "*Ruling*"). Oppositions to applications for review are due February 4. *Wireless Telecommunications Bureau Establishes Filing Deadline for Oppositions to Applications for Review and Replies in the Data Roaming Proceeding*, WT Docket No. 05-265, Public Notice, DA 15-122 (rel. Jan. 28, 2015).

[3] AT&T Services, Inc. ("AT&T"), Application for Review, WT Docket No. 05-265 (filed Jan. 16, 2015) ("AT&T Application").

[4] Verizon, Application for Review, WT Docket No. 05-265 (filed Jan. 20, 2015) ("Verizon Application"). AT&T and Verizon are collectively referred to as the "Applicants."

[5] *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"* or "*Order*"), *aff'd sub nom. Cellco Partnership v. FCC*, 700 F.3d 534 (D.C. Cir. 2012).

cases, does not conflict with the *Order* and, in fact, is consistent with the Commission's policy to ensure that the case-by-case determination of commercial reasonableness protects consumers by facilitating their access to nationwide broadband service. AT&T's claim that the use of rate reference points conflicts with a "lodestar" Commission policy relating to the preservation of investment incentives fails in part because it ignores the Commission's commitment to enabling consumers' access to nationwide broadband.

Similarly, the Bureau has acted consistently with the *Data Roaming Order* in clarifying that the Commission did not intend to allow a denial of roaming, or the imposition of rates that might not otherwise be commercially reasonable, in a particular service area simply because an otherwise built-out carrier has not built out in that area. The Bureau's clarification explicitly relies upon a Commission finding in the *Order* that one of the primary public interest benefits of roaming is that it can allow a provider without a presence in a given market to provide a competitive level of local coverage during the early period of investment and build-out.

AT&T fails to support its argument that a key Commission policy is to ensure that prevailing roaming rates in the marketplace are given weight as a guide in determining the commercial reasonableness of proffered rates, or that the Bureau's ruling concerning the presumption of reasonableness of existing rates conflicts with the *Data Roaming Order*. The Bureau's clarification that the Commission intended the presumption to apply only to existing signed agreements, and to the parties to those agreements, explicitly relies on the plain wording of the *Order*.

The Applicants also are misguided in arguing that the *Declaratory Ruling* evades Administrative Procedure Act ("APA") rulemaking requirements. A rulemaking is required only if an agency seeks to formulate, amend, or repeal a "legislative rule." The *Data Roaming Order* itself does not constitute a legislative rule, and the legislative rules it promulgated in Section 20.12(e)

of the Rules are not amended or repealed by the Bureau in the *Ruling*. Moreover, the *Ruling* neither has the effect of promulgating an additional rule in conflict with Section 20.12(e), nor changing any definitive interpretation of Section 20.12(e).

AT&T's other procedural attack—claiming that the Bureau exceeds its authority in the *Declaratory Ruling*—also fails. The Bureau had delegated authority to act on the petition for expedited declaratory ruling filed by T-Mobile USA, Inc. ("T Mobile"), and the petition did not present any new or novel question of law or policy that the Bureau would lack authority to address.

Rather than overriding guidance provided in the *Data Roaming Order* and effecting a "standardless" approach to the review of data roaming negotiations, as alleged by AT&T, the *Declaratory Ruling*, in providing for rate reference points, is consistent with the framework established by the Commission in the *Order* for the review of proffered rates, terms, and conditions, and brings greater clarity to the issue of how that framework may be applied in particular cases.

Verizon's concern that the Bureau's provision for rate reference points will undermine the Commission's intention to rely on individualized negotiations to produce data roaming agreements is misplaced in part because the *Declaratory Ruling* does not impose any prescriptive regulation of rates or non-discrimination obligations. Moreover, the rate reference points, in providing guidance for the determination of the commercial reasonableness of rates, terms, and conditions, will serve as one of numerous factors and considerations that may be taken into account on a case-by-case basis, taking into consideration the totality of the circumstances.

I. THE DECLARATORY RULING DOES NOT CONFLICT WITH, OR SUBSTANTIVELY CHANGE, THE DATA ROAMING ORDER.

The Applicants argue that the rulings made by the Bureau in the *Declaratory Ruling* conflict with, and materially change, the *Data Roaming Order* and therefore exceed the Bureau's authority. These arguments lack merit and should be rejected by the Commission.

A. Consideration of Other Rates.

AT&T contends that the Commission has ruled that wholesale roaming rates should be substantially in excess of retail rates, to ensure that requesting carriers do not use roaming as a substitute for building out their own networks, and that the *Declaratory Ruling* impermissibly modifies this policy.[6] Verizon argues that the *Data Roaming Order* rejected any use of rate benchmarks or linkage between roaming rates and a carrier's wholesale or retail rates, and that the *Ruling* substantively modifies this approach.[7]

These arguments are unavailing. For numerous reasons, the Bureau's clarification regarding using retail rates, international rates, and mobile virtual network operator ("MVNO")/resale rates as reference points in considering the commercial reasonableness of data roaming rates is not inconsistent with, and does not make any substantive changes to, the *Data Roaming Order*.

First, as a general matter, the Commission indicated in the *Data Roaming Order* that it would resolve disputes relating to the commercial reasonableness of proffered data roaming prices, and adopted various factors that may be taken into account in making this determination.[8] The *Declaratory Ruling* merely provides guidance and clarification regarding the data that may be taken into account in evaluating proffered rates. The clarification provided by the Bureau, which is intended "to provide additional guidance on how to evaluate data roaming agreements under the standard set forth in Section 20.12(e) of the Commission's rules[,]"[9] serves the purpose of "lessening ambiguity in the application of the commercial reasonableness standard and totality of the

[6] AT&T Application at 6.
[7] Verizon Application at 4-6.
[8] *Data Roaming Order*, 26 FCC Rcd at 5452 (para. 86).
[9] *Declaratory Ruling*, 29 FCC Rcd at 15483 (para. 1).

circumstances approach for resolving disputes."[10]

Second, AT&T is incorrect in suggesting that the *Data Roaming Order* installed the preservation of investment incentives as a lodestar that should be given comparatively more weight than other factors in the application of the commercial reasonableness standard.[11] AT&T's argument advances a narrow and unsupported view of the policies driving the *Order*.

The Commission made clear in the *Data Roaming Order* that it was establishing "a case-by-case determination of commercial reasonableness in the event of a dispute [that] preserves incentives to invest *and protects consumers by facilitating their access to nationwide service*."[12] Thus, contrary to AT&T's implication, the case-by-case determination is intended to include a focus on another lodestar, namely, whether proffered rates, terms, and conditions promote consumer access to nationwide service, and not to focus on the preservation of investment incentives while excluding considerations of consumer welfare. This focus on consumer welfare and access to nationwide broadband puts the guidance supplied in the *Declaratory Ruling* into a perspective much different than the one presented by AT&T.

Specifically, the Bureau's rate reference points will assist the Commission in evaluating

---

[10] *Id*. at 15487 (para. 10) (footnote omitted). In explaining its approach, the Bureau observes that "[a]ny other reading of the *Data Roaming Order* would deprive parties of a meaningful opportunity to challenge price terms under the commercially reasonable standard because they would be unable to provide evidence as to such comparative reference points." *Id*. at 15488 (para. 16).

[11] *See, e.g.*, AT&T Application at 3 (arguing that the commercial reasonableness test was grounded "in an appreciation of … the need to maintain incentives for broadband investment"), 19 (contending that the factors listed in the *Data Roaming Order* point to the lodestar of "maintain[ing] incentives for broadband investment").

[12] *Data Roaming Order*, 26 FCC Rcd at 5423 (para. 22) (emphasis added). The Commission also indicated that one of the factors to be taken into account as a guide in determining the commercial reasonableness of proffered rates is "the level of competitive harm in a given market and the benefits to consumers[,]" *id*. at 5453 (para. 86), and stated that the factors it adopted in the *Data Roaming Order* "relate to public interest benefits and costs of a data roaming arrangement offered in a particular case, including the impact on investment, competition, and consumer welfare …." *Id*. at 5452 (para. 86).

whether data roaming rates proffered by host carriers could have the effect of stifling competitive offerings and harming competition in the mobile broadband marketplace, thus impeding consumers' access to nationwide service. As the Commission explained in the *Data Roaming Order*:

> According to BendBroadband, its mobile broadband product is "not commercially viable for most consumers primarily because we cannot offer mobility outside of our service area, due to our *inability to secure reasonable rates* and terms for data roaming." A data roaming requirement will therefore help to ensure that, as consumers become increasingly reliant on wireless devices, continuity of spectrum-based services is preserved across networks and geographic regions.[13]

The Bureau's rate reference points advance the Commission's data roaming policies not only by "allow[ing] providers to better gauge the commercial reasonableness of data roaming terms, which in turn will facilitate the successful negotiation of future data roaming arrangements[,]"[14] but also by "promot[ing] consumer access to seamless mobile data coverage nationwide, … as well as foster[ing] competition among multiple service providers in the mobile wireless marketplace."[15]

It is true that, as AT&T notes,[16] the Commission acknowledged that its actions in the *Data Roaming Order* were intended to "give host providers *appropriate* discretion in the structure and level of [roaming] rates that they offer[,]"[17] but the Bureau explains that its approach "allows host providers substantial room for individualized bargaining and discrimination in terms without changing the underlying legal standard."[18] Moreover, the Commission's discussion of the discretion granted to host carriers in offering rates was in the context of its explanation of why it was not adopting "a more specific *prescriptive regulation* of rates requested by some commenters."[19] Thus,

---

[13] *Id*. at 5419 (para. 15) (footnote omitted) (emphasis added).
[14] *Declaratory Ruling*, 29 FCC Rcd at 15490 (para. 21).
[15] *Id*. at 15484 (para. 3) (citing *Data Roaming Order*, 26 FCC Rcd at 5418 (para. 13)).
[16] AT&T Application at 8 n.23.
[17] *Data Roaming Order*, 26 FCC Rcd at 5423 (para. 21) (emphasis added).
[18] *Declaratory Ruling*, 29 FCC Rcd at 15489 (para. 19) (footnote omitted).
[19] *Data Roaming Order*, 26 FCC Rcd at 5423 (para. 21) (emphasis added).

the Bureau's rate reference points, which stop well short of "prescriptive regulation," cannot be said to "materially change[ ]—and indeed undermine[ ]—the Commission policy."[20]

Third, while the Commission also indicated in the *Data Roaming Order* that it anticipated the continuation of "relatively high" data roaming rates,[21] the Bureau's clarification regarding use of rate reference points in determining commercial reasonableness does not prohibit or undercut the proffering of "relatively high" roaming rates in circumstances in which such rates are appropriate (as determined by the Commission on a case-by-case basis, based on the totality of circumstances involved in a given case).[22]

The Commission stated that the commercial reasonableness of prices in "each case will be decided based on the totality of the circumstances."[23] Under the *Declaratory Ruling*, circumstances in any given case could demonstrate that "relatively high" roaming rates are not necessary to preserve requesting carriers' investment incentives and avoid piggy-backing. In such a case, the rate reference points may serve as one of the guides in determining whether proffered rates are commercially reasonable. This utilization of the reference points would not create rate benchmarks or any linkage between roaming rates and a host carrier's wholesale or retail rates. In fact, the Bureau specifically indicates that the reference points "do not function as a ceiling or as a cap on prices."[24]

---

[20] AT&T Application at 8 (footnote omitted).

[21] *Data Roaming Order*, 26 FCC Rcd at 5423 (para. 21) (noting that such rates would counterbalance "piggy-backing" on host carriers' networks and would tend to prevent reduced investment in broadband facilities by carriers requesting data roaming agreements).

[22] In responding to AT&T's argument that it would be reasonable for host carriers to set higher rates for rural roaming, the Bureau states that "[t]he degree of relevance [of the Bureau's rate reference points] will depend on the facts and circumstances of the specific case. This approach, therefore, will continue to allow host providers substantial room for individualized bargaining." *Declaratory Ruling*, 29 FCC Rcd at 15490 (para. 22).

[23] *Data Roaming Order*, 26 FCC Rcd at 5452 (para. 86).

[24] *Declaratory Ruling*, 29 FCC Rcd at 15489 (para. 18).

Applying the rate reference points in this manner would be an important means of advancing the Commission's objective, as stated in the *Data Roaming Order*, that application of the commercial reasonableness standard would serve to protect consumers by facilitating their access to nationwide service. It is a current marketplace reality that "[m]ust-have roaming partners [*i.e.*, AT&T and Verizon] are able to raise their rivals' costs in a way that artificially inflates prices …."[25] As the Bureau explains in the *Declaratory Ruling*, clarifying the application of the commercial reasonableness standard will assist in addressing a current real-world experience in which smaller carriers are often offered unreasonable data roaming rates.[26] The Bureau indicates that the "need for such guidance is underscored by increasing consumer demand for data services which is driving significantly more intensive use of mobile networks, and by differences among mobile broadband service providers in terms of spectrum holdings and network coverage."[27]

And, ***fourth***, rather than being inconsistent with the *Data Roaming Order*, one function served by the Bureau's rate reference points will be to act as a guide in applying at least two of the factors listed in the *Order* that the Commission may use "in determining the reasonableness of the negotiations, providers' conduct, and the terms and conditions of the proffered data roaming arrangements, including the prices …."[28]

One factor involves "whether the terms and conditions offered by the host provider are so unreasonable as to be tantamount to a refusal to offer a data roaming arrangement …."[29] The rate reference points will aid in determining whether proffered rates are patently unreasonable. Rather

[25] Ex Parte Letter from Luisa L. Lancetti, Chief Counsel, Law and Policy, Federal Regulatory, T-Mobile, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265 (Oct. 14, 2014), at 2.
[26] *Declaratory Ruling*, 29 FCC Rcd at 15487 (paras. 11, 13 & n.37).
[27] *Id*. at 15487 (para. 13).
[28] *Data Roaming Order*, 26 FCC Rcd at 5452 (para. 86).
[29] *Id*. at 5453 (para. 86).

than resulting in "a completely standardless approach to case-by-case adjudication[,]"[30] the reference points will provide useful further guidance in applying the commercial reasonableness standards to proffered rates. This guidance will be particularly important to consumers because providing a probative and efficient mechanism for evaluating whether proffered rates are considerably out of bounds in terms of commercial reasonableness will help to expedite the resolution of disputes, promote reaching data roaming agreements, and facilitate the Commission's pro-competitive data roaming policies.

The second factor involves whether the host carrier "has engaged in a persistent pattern of stonewalling behavior …."[31] Again, the rate reference points will provide relevant guidance in applying this factor. If proffered rates substantially exceed reference point rates, the Commission could use this fact as an element in determining whether the host carrier is engaging in a serious effort to reach agreement with a requesting carrier, or instead is pursuing stonewalling practices.

For all the reasons discussed above, the Commission should find that the Applicants have failed to demonstrate that the Bureau's guidance in the *Declaratory Ruling* regarding the consideration of other rates is inconsistent with the *Data Roaming Order* or makes substantive changes to the *Order*.

B. Build-Out Factor.

AT&T argues that the *Declaratory Ruling*—in finding that the *Data Roaming Order* was not intended to allow a denial of roaming in a particular service area simply because an otherwise built-out carrier has not built out in that area—conflicts with the Commission's decision in the *Order* that its rules will not be applied in ways that encourage the use of roaming as resale.[32] The

[30] AT&T Application at 2. The issue of whether the *Declaratory Ruling* has created a "standardless" approach to the review of data roaming negotiations is discussed further in Sec. II.B., *infra*.
[31] *Data Roaming Order*, 26 FCC Rcd at 5452 (para. 86).
[32] AT&T Application at 9.

Commission should reject this argument, as well as AT&T's claim that the Bureau's ruling is inconsistent with, and unlawfully modifies, the *Order*.[33]

Rather than prescribing a policy in conflict with the *Data Roaming Order*, the Bureau is simply clarifying that the Commission, in indicating that "the extent and nature of providers' build-out"[34] is a factor in determining commercial reasonableness, did not intend to establish a *per se* rule that a host carrier may deny roaming, or charge rates that otherwise might be found to be commercially unreasonable, in a particular area simply because the otherwise built-out requesting carrier has not built out its network in that area.

The Bureau's clarification that the Commission did not establish a *per se* rule does not disturb the Commission's intent that, if a requesting carrier has not engaged in any build-out in a particular area for which it is seeking an agreement, this absence of build-out could be considered in evaluating the commercial reasonableness of proffered rates, terms, and conditions.[35] AT&T's argument, however, should not be accepted to the extent it suggests that the Bureau's clarification barring a *per se* rule is in conflict with, and unlawfully modifies, the Commission's policy against prohibiting the application of its rules in ways that encourage the use of roaming as resale.

AT&T's interpretation of the *Data Roaming Order* ignores the fact that the *Order* "made clear that one of the primary public interest benefits of roaming is that it can allow a provider *without a presence in any given market* to provide a competitive level of local coverage during the

[33] *Id*.
[34] *Data Roaming Order*, 26 FCC Rcd at 5453 (para. 86).
[35] *See Declaratory Ruling*, 29 FCC Rcd at 15492 (para. 28) (explaining that "[t]he level of a requesting provider's build-out is a factor in determining the commercial reasonableness of a host provider's proffered terms, and we believe the Commission intended to review the matter under the case-by-case, totality of the circumstances approach").

early period of investment and build-out."[36] Moreover, the Commission explicitly indicated in the *Order* that its data roaming policies embrace both the encouragement of investment made by requesting carriers (*e.g.*, by discouraging the use of roaming as resale), and the protection of consumers by facilitating their access to nationwide broadband.[37] The Bureau's interpretation of the build-out factor is consistent with the Commission's explicit objective of promoting a competitive level of coverage during early periods of investment and build-out.

C. Presumption of Reasonableness of Existing Agreements.

AT&T contends that the *Declaratory Ruling* conflicts with the *Data Roaming Order* because the Bureau provides that the reasonable rate presumption adopted by the Commission in the *Order* applies only to existing data roaming agreements and to the parties who signed the existing agreements.[38] AT&T argues that the *Order* does not support this limitation, because the limitation is at odds with the core meaning of a "commercially reasonable" standard.[39]

AT&T's claim that the *Declaratory Ruling* conflicts with the *Data Roaming Order* has no

---

[36] *Id*. (footnote omitted) (emphasis added) (citing *Data Roaming Order*, 26 FCC Rcd at 5421 (para. 18)). The Commission explained in the *Order* that "[w]e find that encouraging new entry and local or regional deployments serves the public interest, given that such network deployments, particularly when these deployments are coupled with roaming availability beyond the network service area, would provide consumers with greater competitive choices in mobile broadband." *Data Roaming Order*, 26 FCC Rcd at 5421 (para. 18).

[37] See the discussion of this issue in Sec. I.A., *supra*.

[38] AT&T Application at 11 (arguing that "[t]he Bureau reads this presumption out of the *Data Roaming Order* by making the scope of the presumption exceedingly narrow").

[39] AT&T Application at 11. AT&T asserts that the "touchstone" for this "core meaning" of the standard "must be what sophisticated parties have found to be reasonable in the marketplace in the agreements that they have actually negotiated and are using to provide service to customers." *Id*. at 11-12. This optimistic portrayal of the workings of the mobile broadband marketplace overlooks the fact that no level of sophistication on the part of small rural and regional carriers can overcome the enormous mismatch in bargaining strength between them and the two large, national must-have roaming partners. *See Declaratory Ruling*, 29 FCC Rcd at 15487 (para. 11 n.37) (citing commenters who explain that smaller carriers often are offered unreasonable data roaming rates, terms, and conditions). A core purpose of the *Data Roaming Order* is to provide a framework that helps to ameliorate the effects of this mismatch. The guidance provided by the *Declaratory Ruling* is not in conflict with this core purpose.

reasonable basis. The Bureau reasons logically that applying the presumption of reasonableness to subsequent negotiations (which would be the effect of AT&T's interpretation[40]) would conflict with the data roaming rule because such an approach "could have the effect of perpetuating terms negotiated in prior years. A rate negotiated a year ago might have been commercially reasonable at that time but may no longer reflect current marketplace conditions, which is why the Commission limited this presumption to existing agreements and not to future negotiations."[41]

Moreover, the Bureau's clarification is consistent with the plain wording of the Commission's provision in the *Data Roaming Order* regarding the presumption of reasonableness, and, therefore, the clarification does not conflict with the *Order*. Specifically, the *Order* provides that:

> Because the standard of commercial reasonableness is one that we expect to accommodate a variety of terms and conditions in data roaming, and to discourage frivolous claims regarding the reasonableness of the terms and conditions in a *signed agreement*, we will presume in such cases that the terms of a signed agreement meet the reasonableness standard and will *require a party challenging the reasonableness of any term in the agreement* to rebut that presumption.[42]

The Bureau reasonably concludes that the Commission's reference to "party" meant the party to the signed agreement, and that "the Commission did not intend for the presumption to apply to subsequent negotiation of another agreement (including extension or renewal of an existing agreement) that is not yet signed."[43] Rather than imposing an "exceedingly narrow"[44] scope on the presumption adopted by the Commission, the Bureau's clarification is the product of a reasonable interpretation of the terms of the *Order*.

---

[40] *See* AT&T Application at 11 (indicating that the Bureau's interpretation prevents carriers from assuming that "the prevailing terms of existing agreements are presumptively commercially reasonable").

[41] *Declaratory Ruling*, 29 FCC Rcd at 15492 (para. 26) (footnotes omitted).

[42] *Data Roaming Order*, 26 FCC Rcd at 5451 (para. 81) (emphasis added), *quoted in Declaratory Ruling*, 29 FCC Rcd at 15491 (para. 25).

[43] *Declaratory Ruling*, 29 FCC Rcd at 15491 (para. 25).

[44] AT&T Application at 11.

D. The Need for a Commission Rulemaking.

AT&T and Verizon fault the Bureau for allegedly evading the rulemaking requirements of the APA.[45] According to AT&T, "[i]t is well-settled that an agency must use the APA's notice-and-comment procedures in order to change or eliminate existing rules."[46] In Verizon's view, "[i]t is well-settled that an agency cannot change existing rules through interpretive guidance."[47] Both pronouncements suffer from imprecision.

A notice-and-comment rulemaking is required under Section 553 of the APA when the agency wants to formulate, amend, or repeal a "rule,"[48] which the APA defines as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy."[49] However, Section 553(b) exempts "interpretive rules" and "general statements of policy" from its notice-and-comment rulemaking requirements.[50] Therefore, the APA only requires a notice-and-comment rulemaking when an agency wants to formulate, amend, or repeal a "legislative rule," a term which refers to "a rule that may be promulgated only after compliance with the rulemaking requirements of § 553 of the APA."[51]

Verizon completely misses the mark when it complains that the *Declaratory Ruling* made "substantive changes" to the *Data Roaming Order,* which required a "Commission-level notice-and-comment rulemaking."[52] The *Order* obviously is not a rule, much less a legislative rule.[53] The

---

[45] *See* AT&T Application at 12-13; Verizon Application at 7-8.
[46] AT&T Application at 12.
[47] Verizon Application at 7.
[48] *See* 5 U.S.C. § 551(5).
[49] *Id.* § 551(4).
[50] *See id.* § 553(b)(3)(A). "Interpretive rules" and "policy statements" may be rules within the meaning of the APA, but "neither type of 'rule' has to be promulgated through notice and comment rulemaking." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000).
[51] *Central Texas Telephone Cooperative, Inc. v. FCC*, 402 F.3d 205, 210 (D.C. Cir. 2005).
[52] Verizon Application at 7.
[53] Under the APA, an "order" is "the whole or a part of a final disposition … of an agency in a

Order identified the three legislative rules, the amendment or repeal of which would necessitate an APA rulemaking.

The "rules" that the Commission promulgated in the notice-and-comment rulemaking were the amendments to Parts 0 and 20 of the Rules that were set forth in Appendix A to the *Data Roaming Order*.[54] Appendix A set forth amendments to Sections 0.111(a)(11) and 20.3 of the Rules, and a new 20.12(e).[55] Of the three legislative rules, Section 20.12(e) is at issue here.

Section 20.12(e) has two subsections. The first prescribes the duty of facilities-based commercial mobile data service providers to offer roaming arrangements on "commercially reasonable terms and conditions."[56] The second subsection affords parties alleging violations of Section 20.12(e)(1) the right to submit their disputes to the Commission as formal or informal complaints or as petitions for declaratory rulings,[57] and it provides that the Commission "will resolve such disputes on a case-by-case basis taking into consideration the totality of the circumstances presented in each case."[58]

The *Declaratory Ruling* made no change in the text of Section 20.12(e) as promulgated by the Commission in the *Data Roaming Order* and as published in the Federal Register. Therefore, the Bureau could have run afoul of the APA only if its *Ruling* effectively promulgated a second

---

matter <u>*other than rule making*</u> but including licensing." 5 U.S.C. § 551(6) (emphasis added). In APA terms, the *Data Roaming Order* was the final disposition by the Commission in a "rule making," or its "process for formulating, amending, or repealing a rule." *Id.* § 551(5).

[54] *See Data Roaming Order*, 26 FCC Rcd at 5455 (para. 95).

[55] *See id.* at 5457-58.

[56] 47 C.F.R. § 20.12(e)(1).

[57] *See id.* § 20.12(e)(2).

[58] *Id*.

rule which "repudiates or is irreconcilable with" either paragraph of § 20.12(e),[59] or if it significantly changed a prior "definitive interpretation" of either paragraph.[60]

As C Spire has explained in the previous sections, the *Declaratory Ruling* cannot be read to establish a new rule that repudiates or is irreconcilable with Section 20.12(e). And the Bureau did not substantially change a "definitive interpretation" of the rule, because the *Data Roaming Order* provided no such interpretation.

The word "definitive" means "serving to define, fix, or specify definitely."[61] In the *Data Roaming Order*, the Commission neither defined the term "commercially reasonable" for the purposes of the Section 20.12(e)(1) duty, nor specified definitively what would constitute "commercially reasonable" terms and conditions for data roaming agreements. Instead of specifying the "commercially reasonable" terms and conditions that providers of commercial mobile data service ***must offer*** for a data roaming arrangement, the Commission only found it "appropriate to specify the grounds on which … providers of commercial mobile data service can ***reasonably refuse to offer*** a data roaming arrangement."[62]

Furthermore, the Bureau did not attempt to definitively interpret the "commercially reasonable" provisions of Section 20.12(e)(1). Instead, it provided "guidance" with respect to the

---

[59] It is a "maxim of administrative law" that a second rule that "repudiates or is irreconcilable with a prior legislative rule" is an amendment of the first and "must itself be legislative." *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003). *See* AT&T Application at 12 n.34; Verizon Application at 7 n.20.

[60] "When an agency has given a regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment." *Alaska Professional Hunter's Ass'n, Inc. v. FAA, Inc.*, 177 F.3d 1030, 1034 (D.C. Cir. 1999). *See* Verizon Application at 7 n.20.

[61] *Random House Webster's Unabridged Dictionary* 523 (2d ed. 2001).

[62] *Data Roaming Order*, 26 FCC Rcd at 5431 (para. 40) (emphasis added). *See* 47 C.F.R. § 20.12(e)(1)(i)-(iv) (placing four "limitations" on the duty to offer commercially reasonable terms and conditions).

factors that may be deemed relevant under the "totality of circumstances" approach for resolving disputes between negotiating parties set forth in the *Data Roaming Order* and Section 20.12(e)(2).[63]

In the *Data Roaming Order*, the Commission emphasized that each data roaming dispute that is brought before it pursuant to Section 20.12(e)(2) "will be decided on the totality of the circumstances."[64] However, the Commission did not specify definitely the factors that it would consider under its totality of circumstances approach to determining commercial reasonableness. It stated only that it "*may* consider [seventeen] factors, *as well as others*" to "determine the reasonableness of the negotiations, provider's conduct, and the terms and conditions of the proffered data roaming arrangements, including the prices."[65]

The Commission's listing of *some* of the factors that it *may* consider to determine commercial reasonableness in subsequent Section 20.12(e)(2) adjudications cannot be considered a definitive, binding statement of the factors it *will* consider under Section 20.12(e)(2). Indeed, the *Data Roaming Order* is so indefinite as to invite or authorize the Bureau to provide guidance as to the factors that may be considered potentially relevant, or the presumptions that may be applied, in the case-by-case resolution of disputes under Section 21.12(e)(2). Thus, the statement of the factors in the *Order* that may be considered in determining commercial reasonableness cannot be considered a legislative rule that can be amended only in a notice-and-comment rulemaking.

E. Scope of Bureau Authority.

Citing Section 0.331(a)(2) of the Rules, AT&T makes the baseless claim that the *Declaratory Ruling* must be vacated "because the Bureau has no authority to modify the Commission's

[63] *Declaratory Ruling*, 29 FCC Rcd at 15493 (para. 31).
[64] *Data Roaming Order*, 26 FCC Rcd at 5452 (para. 86).
[65] *Id.* (emphasis added).

policies on delegated authority."[66] The Bureau may exercise "such authority as may be assigned, delegated or referred to it by the Commission."[67] The Commission indicated that "the Enforcement Bureau has delegated authority to resolve complaints arising out of the data roaming rule," and that the Bureau "has delegated authority to resolve other disputes with respect to [that] rule."[68]

The filing of a petition for declaratory ruling is the procedural alternative to the filing of a formal or informal complaint arising out of the data roaming rule.[69] Accordingly, the Bureau had the authority to act on T-Mobile's petition for a declaratory ruling in this case.[70] Moreover, the Bureau would be without such authority only if T-Mobile's petition presented a "new or novel question[ ] of law or policy which [could not] be resolved under outstanding Commission precedents and guidelines."[71] As C Spire has shown, T-Mobile's petition presented policy questions that the Bureau could resolve under the *Data Roaming Order* and Section 20.12(e) of the Rules.

II. THE DECLARATORY RULING DOES NOT MAKE THE COMMERCIAL REASONABLENESS STANDARD VAGUE OR UNPREDICTABLE.

The Applicants fail to support their assertions that the *Declaratory Ruling* is inconsistent with guidance supplied by the Commission in the *Data Roaming Order* regarding the determination of whether proffered rates, terms, and conditions are commercially reasonable, that the *Ruling* has the effect of eliminating the Commission's lodestars providing this guidance, or that the *Ruling* undermines the predictability of the Commission's standard.

A. The "Degree of Guidance" Provided in the Data Roaming Order.

AT&T's arguments relating to the purported "vagueness" and "unpredictability" created

[66] AT&T Application at 4.
[67] 47 C.F.R. § 0.131(l).
[68] *Data Roaming Order*, 26 FCC Rcd at 5451.
[69] *See id. See also* 47 C.F.R. § 20.12(e)(2).
[70] T-Mobile, Petition for Expedited Declaratory Ruling, WT Docket No. 05-265 (filed May 27, 2014).
[71] 47 C.F.R. § 0.331(a)(2).

by the *Declaratory Ruling* are largely based upon its assertions that the Commission provided a "degree of guidance" in the *Data Roaming Order* concerning the determination of the commercial reasonableness of rates in particular cases, and that the Bureau's ruling has undercut this guidance.[72] AT&T's claims do not withstand scrutiny.

The credibility of AT&T's claim that the *Declaratory Ruling* has thrown the commercial reasonableness standard into disarray is dependent upon AT&T's assertion that the Commission in the *Data Roaming Order* established a "degree of guidance"[73] for administering the standard by "set[ting] forth clear boundaries on the scope of what the commercial reasonableness standard would require a data provider to offer."[74] The "boundaries" that AT&T attempts to identify, however, cannot carry the freight that AT&T seeks to load onto them.

Wholesale Data Roaming Rates.—AT&T argues that the Commission expected wholesale data roaming rates "to remain well above retail rates to maintain incentives for broadband deployment …."[75] As C Spire has explained,[76] the Commission indicated in the *Data Roaming Order* that its data roaming policies were intended ***both*** to promote build-out incentives for requesting carriers ***and*** to protect consumers by facilitating their access to nationwide service. Thus, rather than signaling that "retail and other similar rates would not be the basis for a successful challenge to a wholesale roaming offer[,]"[77] the Commission was indicating in the *Order* that the commercial reasonableness test should police against proffered rates that are set so high as to constitute an

[72] *See* AT&T Application at 1, 13-15. Verizon makes similar arguments, claiming that the *Declaratory Ruling* "revers[es] prior Commission decisions ***not*** to link roaming rates to a provider's wholesale or retail rates." Verizon Application at 4 (emphasis in original).
[73] AT&T Application at 14.
[74] *Id*.
[75] *Id*. at 14-15.
[76] See Sec. I.A., *supra*.
[77] AT&T Application at 15.

impediment to consumers' access to broadband services.

Rates Negotiated by "Sophisticated Parties."—AT&T claims that another "degree of guidance" supplied by the Commission is that it based its commercial reasonableness standard "first and foremost on what sophisticated parties had generally found to be reasonable in the competitive broadband data marketplace …."[78] Again, however, as C Spire has explained,[79] AT&T's expansive view of the Commission's intentions in the *Data Roaming Order* regarding the application of existing agreements is mistaken. The Bureau demonstrates convincingly in the *Declaratory Ruling* that it would be illogical and contrary to the Commission's intent to apply the presumption of reasonableness to any rates other than those contained in signed agreements.

Build-Out by Requesting Carriers.—Another "degree of guidance" in the *Data Roaming Order*, according to AT&T, is that "the extent of the requesting provider's build-out would be an important factor in assessing the reasonableness of an offer …."[80] AT&T asserts that this guidance "reinforce[es] the Commission's policy of maintaining incentives for broadband deployment[,]"[81] and also maintains that the build-out factor reflects the Commission's policy "that its rules are not to be applied in ways that would encourage the use of roaming as resale."[82]

AT&T fails to demonstrate that the *Declaratory Ruling* has interpreted the build-out factor in a manner that conflicts with Commission's policies. Contrary to AT&T's assertion that "[t]he Bureau's ruling … eliminates any real guidance as to how the Commission will assess a requesting provider's ability to build out its network[,]"[83] the Bureau has interpreted the build-out factor in a

[78] *Id*.
[79] See Sec. I.C., *supra*.
[80] AT&T Application at 15.
[81] *Id*.
[82] *Id*. at 9.
[83] *Id*. at 17.

manner that is consistent with the *Data Roaming Order*, by explaining that the policies explicitly stated by the Commission in the *Order* preclude a *per se* rule governing requests for data roaming in a particular area in which an otherwise built-out requesting carrier has not built out its network.[84]

Moreover, contrary to AT&T's claims, the Bureau provides explicit guidance for applying the build-out factor, and this guidance is linked to specific Commission policies and findings. Thus, the Bureau indicates that the factor will take into account the fact that "there may be areas where expanding a provider's network may be economically infeasible or unrealistic[,]"[85] and that "some providers [in some areas of the country] may face significantly increased costs to build-out using higher spectrum frequencies."[86]

Finally, as C Spire has explained, AT&T does not go far enough in characterizing the "degree of guidance" the Commission has provided regarding the build-out factor, since the factor must be applied by taking into account both the Commission's policy encouraging investment in network facilities by requesting carriers and its policy protecting consumers by facilitating their access to nationwide service.[87]

B. The Purported "Standardless Approach" to Adjudications.

Once AT&T's erroneous claims regarding the degree of guidance supplied by the Commission in the *Data Roaming Order* are put to one side, it becomes clear that AT&T is also incorrect in claiming that the Bureau has created a "standardless" approach to the data roaming adjudicatory process,[88] and that the Bureau has made it impossible to predict how the Commission might

[84] *Declaratory Ruling*, 29 FCC Rcd at 15492 (at para. 28). See the discussion in Sec. I.B., *supra*.
[85] *Id*. (footnote omitted) (citing *Data Roaming Order*, 26 FCC Rcd at 5419 n.51).
[86] *Id*., 29 FCC Rcd at 15493 (para. 29) (footnote omitted) (citing, *inter alia*, *Data Roaming Order*, 26 FCC Rcd at 5419 n.51).
[87] See Sec. I.B., *supra*.
[88] *See*, *e.g*., AT&T Application at 2.

rule in complaint proceedings.

AT&T's claim that "[t]he Bureau's order erases each of [the] boundaries"[89] established by the "degree of guidance" supplied by the Commission in the *Data Roaming Order* rings hollow because, as C Spire has explained, AT&T's "boundaries" either do not exist or they must be interpreted and applied in the context of other policies and guidance provided by the Commission in the *Order*. The fact that the Bureau has not acted to "erase" any of the limiting boundaries conjured up by AT&T undercuts AT&T's assertion that "the Bureau has eliminated any reasonable or predictable limits on the commercial reasonableness standard."[90] In fact, the guidance the Bureau supplies in introducing the rate reference points fits neatly within the analytical framework established by the Commission in the *Data Roaming Order*, and lends a degree of clarity regarding how that framework may be applied.

The Commission gave the Bureau specific delegated authority to adopt declaratory rulings to resolve disputes "with respect to the data roaming rule adopted" by the Commission,[91] and it indicated that factors in addition to those listed in the *Data Roaming Order* may be taken into account in guiding determinations of "the reasonableness of … the terms and conditions of the proffered data roaming arrangements, including the prices …."[92] The Commission also "emphasize[d] that each case will be decided based on the totality of the circumstances."[93]

This framework established by the Commission does not give it unfettered discretion to reach any desired outcome in any given case, because decisions will be driven by the facts of the case and the arguments of the parties regarding how the factors delineated in the *Data Roaming*

[89] *Id*. at 15.
[90] *Id*.
[91] *Data Roaming Order*, 26 FCC Rcd at 5451 (para. 82).
[92] *Id*. at 5452 (para. 86).
[93] *Id*.

Order, as well as other factors, should be applied to the facts in resolving issues in dispute, including whether proffered rates are commercially reasonable. Moreover, as the Commission resolves disputes in data roaming negotiations, its application of its policies and the relevant factors will develop precedents to guide decisions in future cases.[94]

The guidance provided in the *Declaratory Ruling* regarding the rate reference points is in harmony with the Commission's framework. Consistent with the *Data Roaming Order*, and rather than acting as a ceiling or cap on prices,[95] the reference points are a source of "information [that] could have a bearing on commercial reasonableness and … the parties and Commission should determine the probative value of such information on a case-by-case basis."[96] The reference points function in the same manner as the factors listed in the *Order*—they can be applied to the facts of each case to guide a determination regarding commercial reasonableness.[97]

The *Data Roaming Order* provides carriers with notice that host carriers are required to provide data roaming; that the Commission may consider applying various listed factors, ***and other factors***,[98] in determining whether the host carrier "has met its duty"[99] in proffering commercially reasonable rates, terms, and conditions; and that these determinations will be made on a case-by-case basis taking into account the totality of circumstances.[100]

The *Declaratory Ruling* does nothing to undermine or otherwise alter this process adopted

---

[94] *See id*. 5453 (para. 87) (indicating that "in making this determination [of commercial reasonableness, the Commission] also will consider all relevant precedents and decisions by the Commission").
[95] *Declaratory Ruling*, 29 FCC Rcd at 15489 (para. 18).
[96] *Id*.
[97] As C Spire has explained, the rate reference points will also provide guidance regarding the application of specific factors adopted by the Commission in the *Data Roaming Order*. See Sec. I.A., *supra*.
[98] *Data Roaming Order*, 26 FCC Rcd at 5452 (para. 86).
[99] *Id*. at 5450 (para. 79).
[100] *Id*. at 5452 (para. 86).

by the Commission. In clarifying the factors that may be taken into account in determining the commercial reasonableness of rates, the *Ruling* provides guidance regarding how the Commission will approach making determinations of commercial reasonableness. Nor does the *Ruling* open the door to unfettered Commission discretion to reach any desired outcome in any given case.[101] As it will do for the factors listed in the *Data Roaming Order*, the Commission will consider evidence and arguments about the relevance of the rate reference points in a given case, will decide upon the relevance and application of the reference points, and will make a decision based on the facts of the case and the totality of circumstances presented in the case. Thus, the *Ruling* gives the Commission no more discretion than it already has.

AT&T's apparent theory is that the Commission signaled in the *Data Roaming Order* that various lodestars would outrank other factors in providing guideposts to enable "broadband providers to anticipate when a proffered agreement may be subject to enforcement."[102] But, as C Spire has shown, there is no basis for concluding that the Commission intended that these lodestars—*i.e.*, looking primarily to generally prevailing roaming rates, and maintaining incentives for broadband investment[103]—would be given preferential consideration in deciding disputes in negotiations for data roaming agreements.

To the contrary, the *Order* assigned no particular weight to any of the listed factors, and instead underscored the fact that "each case will be decided based on the totality of the circumstances."[104] The *Declaratory Ruling* does nothing more than abide by this approach and bring additional clarity to how the listed factors, and other factors, may be applied in particular cases.

---

[101] *See* AT&T Application at 13.
[102] *Id*. at 19.
[103] *Id*.
[104] *Data Roaming Order*, 26 FCC Rcd at 5452 (para. 86).

III. THE DECLARATORY RULING DOES NOT UNDERMINE RELIANCE ON INDIVIDUAL NEGOTIATIONS.

Verizon criticizes the Bureau's determination that "non-roaming rates offered to end users and resellers may factor into determining whether its ***roaming*** rate is commercially reasonable"[105] because, according to Verizon, it conflicts with the Commission's decisions in the *Data Roaming Order* "to rely on individualized rates" (enforced by an obligation to negotiate in good faith),[106] "to avoid any hint that the data roaming framework would result in non-discrimination obligations or rate regulation[,]"[107] and "not to engage in rate comparisons because doing so would undermine the benefits of individualized negotiations."[108]

As Verizon acknowledges in its Application for Review, the "rate comparisons" the Commission specifically avoided in the *Data Roaming Order* were ones that could result in the prescriptive regulation of rates and non-discrimination obligations. The *Declaratory Ruling* does not conflict with the *Order* because the guidance provided by the *Ruling* regarding the rate reference points does not prescribe rates or impose any non-discrimination obligations.

Moreover, the rate reference points will not disturb the individualized negotiations established in the *Order* because the rate reference points are intended to serve as one among numerous other factors and considerations that may be taken into account "on a case-by-case basis, taking into consideration the totality of the circumstances."[109]

IV. CONCLUSION.

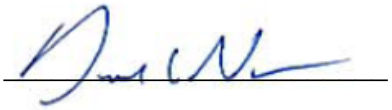
For the reasons discussed herein, Cellular South, Inc. (d/b/a C Spire Wireless) respectfully requests that the Commission deny the applications for review, submitted by AT&T Services, Inc.,

---

[105] Verizon Application at 10 (emphasis in original).
[106] *Id*. at 9.
[107] *Id*. at 10.
[108] *Id*.
[109] *Data Roaming Order*, 26 FCC Rcd at 5432 (para. 42) (footnote omitted).

and Verizon, of the Declaratory Ruling issued by the Wireless Telecommunications Bureau in the above-captioned proceeding.

Respectfully submitted,



David L. Nace
John Cimko

LUKAS, NACE, GUTIERREZ & SACHS, LLP
8300 Greensboro Drive, Suite 1200
McLean, Virginia 22102
(703) 584-8695

Counsel for Cellular South, Inc.

Benjamin M. Moncrief
Vice President, Government Relations
CELLULAR SOUTH, INC.
1018 Highland Colony Parkway
Suite 300
Ridgeland, Mississippi 39157

February 4, 2015

Certificate of Service

I hereby certify that on this 4th day of February, 2015, a copy of the foregoing "Opposition of Cellular South, Inc." submitted in WT Docket No. 05-265 was sent by U.S. Mail to each of the following parties:

Michael P. Goggin
AT&T Services, Inc.
1120 20th Street, NW
Washington, DC 20036

Amina Fazlullah
Benton Foundation
1250 Connecticut Ave., NW-Suite 200
Washington, DC 20036

Harold Mordkofsky
Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP
2120 L Street NW – Suite 300
Washington, DC 20037

Julia K Tanner
Broadpoint, LLC
1170 Devon Park Dr. Suite 104
Wayne, PA 19087

Todd O'Boyle
Common Cause
1133 19th Street, NW - 9th Floor
Washington, DC 20036

Mary C. Albert
COMPTEL
1200 G Street, NW – Suite 350
Washington, DC 20005

Steven K. Berry
Competitive Carriers Association
805 15th Street, NW – Suite 401
Washington, DC 20005

Jill Canfield
NTCA
4121 Wilson Blvd. – Suite 1000
Arlington, VA 22203

Donald J. Evans
Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th Street – 11th Floor
Arlington, VA 22209
Counsel for NTCH, Flat Wireless, and Buffalo-Lake Erie Wireless Systems

Brian J. O'Neil
NTELOS Holdings Corp.
1154 Shenandoah Village Dr.
Waynesboro, VA 22980

Michael Calabrese
Open Technology Institute at the New America Foundation
1899 L Street, NW – 4th Floor
Washington, DC 20036

Daryl A. Zakov
Bennet & Bennet, PLLC
6124 MacArthur Blvd.
Bethesda, MD 20816
Counsel for PinPoint Wireless, Inc. and Limitless Mobile, LLC

Catherine R. Sloan
Computer & Communications Industry Association
900 17th Street, NW – Suite 1100
Washington, DC 20006

Harold Feld
Public Knowledge
1818 N Street, NW – Suite 410
Washington, DC 20036

Daryl Zakov
Rural Wireless Association, Inc.
10 G Street, NE – Suite 710
Washington, DC 20002

Charles W. McKee
Sprint Corporation
900 7th Street, NW – Suite 700
Washington, DC 20001

Andrew W. Levin
T-Mobile USA, Inc.
601 Pennsylvania Ave., NW
Washington, DC 20004

John T. Scott, III
Verizon
1300 I Street, NW
Washington, DC 20005

W. Scott McCollough
Worldcall Interconnect, a/k/a Evolve Broadband
1290 S. Capital of Texas Hwy
Building 2-235
West Lake Hills, TX 78746

/s/

Donna L. Brown