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
	)	
Petition for Expedited Declaratory Ruling of T-Mobile, USA, Inc.	)	DA 14-798

REPLY COMMENTS OF VERIZON

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I. INTRODUCTION AND SUMMARY

T-Mobile seeks to use a data roaming rate dispute with AT&T as a vehicle for asking the Commission to adopt prescriptive new rules for reviewing data roaming rates.[1] T-Mobile's request should be rejected on several grounds. First, T-Mobile's request asks the Commission to make material and substantial changes to the data roaming rules, changes that cannot be made in a declaratory ruling. Rather, such changes would require a new rulemaking. Second, T-Mobile's request would eliminate discretion to arrive at rates through negotiation and turn the data roaming requirement into an unlawful common carrier regulation. Third, neither T-Mobile nor any other party has demonstrated why the existing dispute resolution process to apply the factors the Commission established for evaluating commercial reasonableness – most notably including the range of rates in other agreements that were agreed to through commercial negotiations – is not adequate.

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[1] Petition for Expedited Declaratory Ruling of T-Mobile, USA, Inc., WT Docket No. 05-265, filed May 27, 2014 ("Petition").

II. GRANTING T-MOBILE'S REQEUST IN THIS PROCEEDING WOULD BE UNLAWFUL.

A. T-Mobile's Request Requires a Rulemaking.

T-Mobile's petition asks the Commission to make material and substantial changes to the data roaming rules in several ways, including (1) by reversing course and adopting entirely new, and previously rejected benchmarks for evaluating the commercial reasonableness of data roaming rates that are tied to rates for other services; and (2) by eliminating the presumption that data roaming agreements arrived at through commercial negotiations are commercially reasonable.[2] Verizon demonstrated that each of T-Mobile's requests would require the Commission to *reconsider and reverse* decisions made in the *Data Roaming Order*.[3] Neither T-Mobile nor any commenters supporting T-Mobile's request attempts to grapple with this threshold issue and explain how the Commission can grant the requested relief without changing the conclusions reached in the *Data Roaming Order* and the rules adopted therein.

It is well-settled that an agency cannot change existing rules through interpretative guidance. The Supreme Court has said that if an agency adopts "a new position *inconsistent with*" an existing regulation, or effects "*a substantive change in* the regulation," a new rulemaking is required.[4] "Fidelity to the rulemaking requirements of the [Administrative Procedure Act] bars courts from permitting agencies to avoid those requirements by calling a

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[2] Petition at 11-22.

[3] Verizon Comments at 4-7, 14-16. *See also, e.g., 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 (2011) ("*Data Roaming Order*") at 5452-53 ¶¶ 85-87 (declining to include retail or MVNO rates among factors relevant to commercial reasonableness); at 5434-35 ¶ 48 (distinguishing roaming from resale); at 5451 ¶ 81 (establishing a presumption that rates in signed agreements are commercially reasonable).

[4] *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995) (emphases added) (quotation marks omitted).

substantive regulatory change an interpretative rule."[5] T-Mobile's request for "clarification" is inconsistent with the rule and findings set forth in the *Data Roaming Order*. As such, its request cannot be granted in a declaratory ruling. If T-Mobile wants to pursue such changes, it must file a petition for rulemaking.[6]

B. T-Mobile's Request Would Constitute Unlawful Common Carrier Regulation.

The Commission adopted the data roaming requirements pursuant to its authority under Title III of the Communications Act. It grounded its rules on its finding that providers would have more "flexibility" with respect to rates than the common carrier requirement adopted for voice roaming.[7] In upholding the data roaming rules, the D.C. Circuit determined that, although the data roaming requirement adopted by the Commission resembled common carriage in some respects, the rule fell within a "gray area" in "the space between *per se* common carriage and *per*

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[5] *United States Telecom Ass'n v. FCC*, 400 F.3d 29, 35 (D.C. Cir. 2005). *See also C.F. Communications Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997) (the FCC "may not bypass [the APA's notice-and-comment] procedure by rewriting its rules under the rubric of 'interpretation'").

[6] *See Competition in the Interstate Interexchange Marketplace, Petitions for Modification of Fresh Look Policy,* Memorandum Opinion and Order, 8 FCC Rcd 5046, 5049-50 (1993) (denying Sprint's petition for declaratory ruling seeking to expand the scope of the Commission's "Fresh Look" policy because "Sprint should have pursued the relief it seeks in a petition for reconsideration of the Report and Order or a petition for rulemaking, not a petition for declaratory ruling." *See also Federation of American Health Systems,* Memorandum Opinion and Order, 12 FCC Rcd 2668, 2672-73 (1997); *Public Service Commission of Maryland, et al.*, 4 FCC Rcd 4000, 4003-04 (1989), *aff'd sub. nom Public Service Commission of Maryland v. FCC,* 909 F.2d 1510 (D.C. Cir. 1990).

[7] *See Data Roaming Order*, 26 FCC Rcd at 5444-45 ¶ 68 ("We also find that the data roaming rules we adopt do not amount to treating mobile data service providers as 'common carriers' under the Act. . . . Under the agreements to which negotiations may lead, providers will have flexibility with regard to roaming charges, subject to a general requirement of commercial reasonableness.").

se private carriage."[8] The distinguishing characteristic for the Court was that "[t]he data roaming rule leaves substantial room for individualized bargaining and discrimination in terms. . . . And the 'commercially reasonable' standard, at least as defined by the Commission, ensures providers more freedom from agency intervention than the 'just and reasonable' standard applicable to common carriers."[9] The Court warned, however, that "'commercially reasonable,' as applied by the Commission, may in practice turn out to be no different from 'just and reasonable.' . . . In implementing the rule and resolving disputes that arise in the negotiation of roaming agreements, the Commission would thus do well to ensure that the discretion carved out in the rule's text remains carved out in fact."[10]

T-Mobile and other commenters argue that changing the rules to require rates for data roaming to track rates for other wholesale or retail services would not convert the data roaming rule into common carriage because carriers would still have discretion to negotiate individualized roaming deals.[11] But whatever discretion is left would be severely limited. By tethering all data roaming rates to benchmark rates, T-Mobile's request would severely curtail, if not eliminate entirely, the "substantial room" in the current rule for "discrimination in terms."

Some commenters propose that the Commission go even further. RWA asks the Commission to rule that a "data roaming rate is *per se* unreasonable if it exceeds, by any degree,

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[8] *Cellco Partnership v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012) ("*Cellco*").

[9] *Id.* at 548.

[10] *Id.* at 549.

[11] Petition at 25-27; Competitive Carriers Association ("CCA") Comments at 9; Comments of Public Knowledge, Open Technology Institute at New America Foundation, Benton Foundation, and Common Cause ("Public Interest Comments') at 15; Cellular South Comments at 9.

the retail data rate the must-have carrier or requesting carrier charges its retail customers."[12] Similarly, Pinpoint Wireless and Limitless Mobile seek a ruling that a data roaming rate is commercially unreasonable if it exceeds either the retail rates offered to the offering provider's customers, the roaming rates charged to foreign providers, or the price for wholesale data services charged to MVNO customers.[13] These commenters do not even attempt to argue that these proposals to impose prescriptive rate regulation on common terms with other services would not constitute common carriage, nor could they.

III. T-MOBILE AND OTHER COMMENTERS CAN RESOLVE ANY DISPUTES THROUGH EXISTING PROCESSES.

A. Allegations that Host Providers Offered Unreasonable Rates Can Be Resolved through Existing Dispute Resolution Processes.

T-Mobile alleges that AT&T has failed to make data roaming available at commercially reasonable rates.[14] AT&T disputes this claim.[15] If T-Mobile has a legitimate dispute against AT&T, it can and should seek to resolve that dispute through one of the dispute resolution processes the Commission established – not through a generic, industry-wide proceeding.[16] T-Mobile cannot legitimately complain about the adequacy of the Commission's dispute resolution processes unless T-Mobile avails itself of those processes.

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[12] Rural Wireless Association ("RWA") Comments at 7.

[13] Pinpont Wireless Comments at 5; Limitless Mobile Comments at 5-6.

[14] *See* Petition, Exhibit 1, Declaration of Dirk Mosa ("Mosa Declaration") at 2-5 (explaining why T-Mobile needs to roam on AT&T's network, alleging that AT&T's rates are not commercially reasonable, and that AT&T has engaged in anticompetitive tactics).

[15] Opposition of AT&T at 11.

[16] Verizon Comments at 2-3.

The majority of commenters supporting the Petition do not allege any particular instances where a provider has failed to offer commercially reasonable data roaming rates. At most, these commenters rely on statements by others to justify the need for Commission action.[17] Some commenters allege that providers have made offers they consider to be commercially unreasonable.[18] Like T-Mobile's claim regarding AT&T, if these parties believe that a would-be host provider failed to offer commercially reasonable data roaming rates, terms or conditions, they should avail themselves of existing Commission processes to resolve those issues.

In the *Voice Roaming Order*, the Commission characterized roaming disputes as "fact-specific" and stated that such disputes "would be best resolved through an adjudicatory process."[19] In the *Data Roaming Order*, the Commission pledged to "assess whether a particular data roaming offering includes commercially reasonable terms and conditions . . . on a case-by-case basis, taking into consideration the totality of the circumstances."[20] Existing Commission processes are the proper forum to resolve such disputes because they are, as the Commission recognized, fact-specific. The Commission cannot rely on unsupported and generalized allegations to determine whether roaming agreements are commercially reasonable. It must test those allegations in an appropriate fact-finding process such as a complaint proceeding, where complainants are required to back-up their claims with sworn affidavits and the like.

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[17] *See* COMPTEL Comments; NTCA Comments; Public Interest Comments; RWAComments; Blooston Rural Carrier Comments; Cellular South Comments; Sprint Comments.

[18] *See* Comments of NTCH, Inc., Flat Wireless, LLC and Buffalo-Lake Erie Wireless Systems Co., LLC ("Blue Wireless") ("Joint Carrier Comments") at 2; NTELOS Comments at 12; CCA Comments at 5; Limitless Mobile Comments at 6-7; Pinpoint Wireless Comments at 3.

[19] *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817, 15830 ¶ 30 (2007) ("*Voice Roaming Order*").

[20] *Data Roaming Order,* 26 FCC Rcd at 5452 ¶ 85.

The Commission must also gather facts beyond the rate itself to determine if a rate offer is commercially reasonable. For example, the reasonableness of a rate offer allegedly made by a provider cannot be judged without knowing: (1) when the rate offer was made (i.e., recently or years ago, and at what stage of the negotiation process); (2) the rate proposed by the requesting provider; (3) whether the requesting provider was negotiating in good faith or demanding a rate well below other data roaming rates and refusing to negotiate; (4) the range of data roaming rates agreed to in other commercially negotiated agreements; and (5) the nature of the requesting provider's spectrum holdings, and resources, and the effect of the offered rate on build-out incentives.[21] These and other relevant facts can be established only through Commission dispute resolution processes.

B. Roaming Agreement Confidentiality Does Not Hinder Dispute Resolution.

RWA argues that "[b]ecause rural carriers are typically subject to non-disclosure agreements, they cannot bring an action before the Commission challenging the rates, terms and conditions of the Agreements."[22] This is not correct. Verizon is not aware of any confidentiality agreement that prohibits the rates, terms and conditions of that agreement from being revealed to the Commission in the context of an adjudicatory proceeding.

RWA and others also argue that the Commission should make roaming rates public or available for Commission inspection so that roaming rates can be readily compared.[23] The Commission previously rejected requests to make roaming rates public for good reason and cannot change course here. The Commission decided in 1994 to eliminate the requirement to file

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[21] *See, e.g., id.* at 5452-53 ¶¶ 85-86.

[22] RWA Comments at 7, 9-10.

[23] Joint Carrier Comments at 2-3; Pinpoint Wireless Comments at 8-9; Limitless Mobile Comments at 8-9; RWA Comments at 9-10.

contracts as applied to wireless carriers.[24] In the *Automatic Roaming Order*, the Commission considered and rejected arguments that it should impose a filing requirement for voice roaming agreements.[25] It found that a requirement to make roaming rates public was not necessary and stated "[i]n a market where competition disciplines the rates, creating transparency in rates may have the effect of restricting competition and raising rates above competitive levels."[26] The *Data Roaming Order* likewise emphasized that it was not "impos[ing] any … obligation on providers of mobile data services to publicly disclose the rates, terms, and conditions of their roaming agreements" for the same reasons – and to avoid treating mobile data service providers as common carriers.[27] Moreover, publication is not necessary as a practical matter because roaming rates can be made available subject to appropriate confidentiality orders and reviewed by the Commission and parties in the context of a dispute resolution proceeding.

In any event, this proceeding is not the appropriate forum for addressing this issue. On July 2, 2014, NTCH re-filed a petition it originally filed last fall asking the Commission to reverse its forbearance from Section 211 with regard to roaming agreements and to initiate a rulemaking proceeding.[28] NTCH apparently now recognizes that the Commission may not reverse a forbearance decision except through a rulemaking proceeding. It cannot do so through

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[24] *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1480 ¶ 181 (1994) ("*CMRS Second Report and Order*").

[25] *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817, 15839-40 ¶ 62 (2007) ("*Automatic Roaming Order*").

[26] *Id.* (citing *CMRS Second Report and Order,* 9 FCC Rcd at 1478-80 ¶¶ 175-79).

[27] *Data Roaming* Order, 26 FCC Rcd at 5444-46 ¶ 68.

[28] NTCH, Inc., Petition to Rescind Forbearance and Initiate Rulemaking, GN Docket No. 93-252 (filed Jul. 2, 2014).

a declaratory ruling. The Commission recently issued a Public Notice seeking comment on the Petition,[29] and Verizon has filed an Opposition.[30] These requests therefore will be considered in the context of that proceeding.

IV. DATA PRICES OFFERED TO MVNOS ARE NOT AN APPROPRIATE BENCHMARK FOR DATA ROAMING RATES.

Even if the Commission were inclined to reverse course on data roaming – which it should not do, and cannot do absent a new rulemaking – none of the rate benchmarks proposed by T-Mobile are appropriate for reasons Verizon explained in the first round of comments. Nonetheless, T-Mobile and some commenters continue to argue that the rates offered by providers to MVNOs in particular should be used as a benchmark because MVNO arrangements are allegedly similar to data roaming.[31] Again, the Commission has previously considered and – correctly – rejected this argument.[32] The Commission got it right: MVNO services and data roaming are not similar. The rates for each respond to different market factors. Roaming rates vary depending on the need to expand the carrier's footprint into a new area, the availability of other roaming providers, the size of the roaming partner's customer base, the extent to which the roaming partner has implemented advanced digital technologies and other features, and the scope of geographic network coverage. MVNO rates, on the other hand, tend to vary based on the size

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[29] *Wireless Telecommunications Bureau Seeks Comment on Petition Filed by NTCH, Inc. to Rescind Forbearance and Initiate Rulemaking to Make Inter-Provider Roaming Rates Available*, Public Notice, RM-11723, WT Docket No. 05-265 (July 14, 2014).

[30] *See* Opposition of Verizon, *Petition to Rescind Forbearance from Application of Section 211 of the Communications Act*, RM-11723, WT Docket No. 05-265 (filed August 18, 2014).

[31] Petition at 15. *See also* NTELOS Comments at 17; Cellular South Comments at 7.

[32] *Data Roaming Order*, 26 FCC Rcd at 5423 ¶ 21 ("we adopt a general requirement of commercial reasonableness for all roaming terms and conditions, including rates, rather than a more prescriptive regulation of rates requested by some commenters.").

or potential size of the MVNO customer base, and the perceived ability of the MNVO to reach a market segment that the provider is not otherwise reaching.[33]

There are also significant functional differences between roaming and MVNO services. T-Mobile's economist recognized these differences, stating "[t]he MVNO benchmark must also be interpreted cautiously because MVNO customers may use the host provider's network in substantially different ways compared to a roaming customer of a facilities-based competitor."[34] For example, roaming enables the customers of one provider to obtain service from another provider when leaving the area covered by the home provider network. MVNO providers do not have their own networks and rely on resale service to provide service to customers everywhere. Roaming is provided and billed on an individual call basis, whereas resale service is provided and billed in bulk. Roaming service also offers far less predictability with respect to demand.

Because of these differences, MVNO prices are not an appropriate benchmark for data roaming rates.

V. THERE IS NO REASON TO RECONSIDER THE RECENT DECISION NOT TO IMPOSE A SHOT-CLOCK ON DATA ROAMING NEGOTIATIONS.

Some commenters asked the Commission to consider imposing a shot-clock on data roaming negotiations – an issue rejected by the Wireless Telecommunications Bureau ("Bureau") less than two weeks before comments in this proceeding were filed.[35] There, in an order denying Blanca Telephone Company's Petition for Reconsideration seeking a "shot-clock"

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[33] Reply Comments of Verizon Wireless, WT Docket No. 05-265, at 18 (filed Jan. 26, 2006).

[34] Petition at Exhibit 2, Declaration of Joseph Farrell, D. Phil. In Support of Petition for Expedited Declaratory Ruling of T-Mobile USA, Inc. ("Farrell Declaration") at 5. *See also* NTELOS Comments at 17 (agreeing with T-Mobile that "there are differences between MVNO agreements and roaming agreements.").

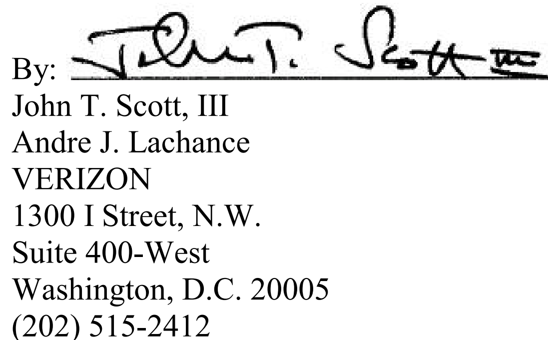
[35] NTCA Comments at 6-8; Blooston Rural Carriers Comments at 1-3;

for data roaming negotiations, the Bureau stated that Blanca and other commenters "fail to demonstrate that the processes established by the Commission in the *Data Roaming Order* rules are inadequate to address problems of unreasonable delay."[36] Given that the Bureau just decided a shot-clock is not warranted, there is no basis for the Commission to revisit the issue in this proceeding.

VI. CONCLUSION

For the reasons stated above, the Commission should deny T-Mobile's petition to modify the *Data Roaming Order*.

Respectfully submitted,

By: 

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[36] *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Order on Reconsideration, WT Docket No. 05-265, DA14-865 (Wireless Telecommunications Bureau, June 25, 2014) at ¶ 11.