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**EX PARTE VIA ELECTRONIC FILING**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Room TW-A325  
Washington, D.C. 20554

**Re: Roaming Obligations of Commercial Mobile Radio Service Providers,  
WT Docket 05-265**

Dear Ms. Dortch:

On November 20, 2014, Jeanine Poltronieri, Colleen Thompson and Michael Goggin, representing AT&T, met with David Horowitz, Stephanie Weiner and William Richardson of the Office of General Counsel to discuss the above captioned matter.

We expressed the view that the Commission's 2011 roaming order struck the proper balance between ensuring that data roaming is widely available and the need to maintain incentives for build-out. The weight of evidence in the docket proves that the data roaming market is working, including for LTE roaming agreements. Data roaming agreements are now commonly available from the four national carriers. AT&T has negotiated eight LTE-based data roaming agreements, including some with carriers who have not yet deployed LTE but who want the surety of an established agreement, and expects to complete additional LTE roaming agreements by year end. Data roaming rates are also falling, as is demonstrated by the rates T-Mobile itself has presented in the record. For example, the rate that T-Mobile is paying to AT&T is more than 70% less than it was three years ago.

We discussed the fact that AT&T is a net payor of roaming expense – it buys more data roaming than it sells both on a megabyte basis and on a dollar basis. Moreover, the average data roaming rate paid by AT&T was more than the average data roaming rate paid by T-Mobile. For 2014, the average rate paid by AT&T thru August (\$0.27/MB) is higher than T-Mobile's projected average rate for 2014 (\$0.18/MB). Moreover, the rates AT&T has offered to T-Mobile for LTE roaming compare favorably with T-Mobile's projected average 2014 rates. These facts indicate that AT&T has

offered data roaming to T-Mobile on commercially reasonable terms. Indeed, the fact that T-Mobile has not sought to challenge the commercial reasonableness of AT&T's offered rates and terms under the existing data roaming rule, but has instead chosen to seek changes to the rule in the guise of "clarifications" is a tacit admission of this fact.

AT&T also noted that the relief T-Mobile seeks would be unlikely to survive appellate review if granted. First, it would be procedurally improper to grant the relief that T-Mobile seeks by declaratory ruling. Such an order would contradict the FCC's data roaming order and change the substantive meaning of the rule. To adopt such changes through a declaratory ruling, rather than a rulemaking, would violate the Administrative Procedures Act. Second, to adopt T-Mobile's request that the commercial reasonableness of roaming rates be determined by measuring them against "benchmarks" drawn from rates applicable to other services, such as retail wireless services, would amount to common carrier rate regulation, which is prohibited by the Communications Act.

T-Mobile's petition for declaratory relief is procedurally improper in that it seeks to have the FCC contradict the data roaming order in three respects, each of which would affect the substantive meaning of the rule. First, T-Mobile seeks to have the FCC reverse its finding that a carrier's agreements with other carriers are entitled to a presumption of commercial reasonableness. The basis for this presumption can be found in rather elementary economic principles—in any market, the rates and terms upon which market participants freely agree to exchange a particular service make up the very definition of what is "commercially reasonable" with regard to that market. In its order, the Commission expressly ruled—in part to head off the sort of chicanery in which T-Mobile is engaged here—that a party seeking to challenge the commercial reasonableness of a signed agreement must overcome a presumption "that the terms of a signed agreement meet the reasonableness standard."<sup>1</sup> For the Commission to reverse this ruling as T-Mobile requests would not amount to a mere "clarification," but a clear contradiction, and one that would change the data roaming rule in its meaning and application.

Similarly, T-Mobile asks that the Commission reverse itself with regard to the manner in which "the extent and nature" of a provider's build out will be considered in assessing commercial reasonableness. In particular, T-Mobile asks that build out be considered only in the case of a small carrier; a "provider that has only a very limited or non-existent network" and "is looking to design its business primarily to 'piggyback' on other providers' network investments."<sup>2</sup> TMO asks that the Commission clarify that the "nature and intent" factor was "not intended to allow a host carrier to deny roaming, or to charge commercially unreasonable rates for roaming in a particular area where the otherwise built-out requesting carrier has not built-out."<sup>3</sup> The only reasonable

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<sup>1</sup> Second Report and Order, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, 26 FCC Rcd. 5411 (2011) ("Data Roaming Order") at ¶81.

<sup>2</sup> T-Mobile USA, Inc., Petition for Expedited Declaratory Ruling, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265 (filed May 27, 2014) ("Pet.") at 23.

<sup>3</sup> *Id.* at 22.

interpretation of this request is that TMO seeks a ruling that the build-out of a large carrier—one with more than a “very limited or non-existent network” not be considered at all in assessing commercial reasonableness.<sup>4</sup> This is flatly inconsistent with the clear terms of the data roaming order. Indeed, one of the Commission’s objectives in adopting the data roaming order was to preserve incentives to build out. While T-Mobile holds spectrum covering every square inch of the continental United States, it has built out in only the most populous portions, choosing to ‘piggyback’ on other carriers’ network investments over huge portions of the U.S. The inclusion of the “nature and extent” of a carrier’s build-out was intended in large part to ensure that the incentives of a carrier like TMO to deploy facilities-based services over its extensive spectrum holdings would not be diminished. Indeed, the Commission observed that “the relatively high price of roaming compared to providing facilities-based service will often be sufficient to counterbalance the incentive to scale back deployments in favor of relying on another provider’s network” and therefore “the Commission may consider the extent and nature of providers’ build-out as one of the relevant factors in determining whether the proposed terms and conditions of a particular data roaming arrangement are commercially reasonable.”<sup>5</sup> T-Mobile’s request would effect a reversal of this portion of the order, a clear change that cannot lawfully be effected by a declaratory ruling.

Third, T-Mobile requests that the Commission add price “benchmarks” to be used in assessing commercial reasonableness. In particular, T-Mobile would measure proposed roaming rates against some measure of retail wireless rates, and any roaming rate that “greatly exceeds” retail rates would be deemed commercially unreasonable.<sup>6</sup> In its past roaming orders, the Commission expressly rejected using retail mobile service rates as a “benchmark” for roaming rates.<sup>7</sup> Therefore, the relief TMO requests would again require that the Commission reject its past findings, and in a way that effected a change in the meaning and effect of the rule. This cannot be lawfully accomplished by a declaratory ruling.

The FCC’s data roaming rules provide a remedy for any carrier who complains that they are unable to obtain data roaming on “commercially reasonable” terms—the carrier may file a complaint with the Commission for adjudication. The fact that T-Mobile has not challenged AT&T’s offered terms as “commercially unreasonable” speaks volumes—it is a tacit admission that the terms T-Mobile has been offered *are* commercially reasonable. T-Mobile simply seeks to have the Commission change the

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<sup>4</sup> This is the only reasonable interpretation because otherwise, what TMO requests would be meaningless. What TMO literally requests is a declaration that a host carrier may not withhold roaming entirely or charge commercially unreasonable rates based solely on the state of the requester’s build out. Such actions are clearly proscribed by the data roaming order. Accordingly, the only reasonable interpretation of T-Mobile’s request is that while it is ok for the Commission to consider the build-out of a small carrier, the Commission should *not* consider the state of T-Mobile’s build-out when assessing the commercial reasonableness of rates offered to T-Mobile.

<sup>5</sup> Data Roaming Order at ¶51. See also, *id.* at ¶22, ¶86.

<sup>6</sup> Pet. at 11.

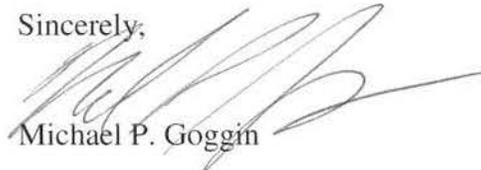
<sup>7</sup> Data Roaming Order at ¶ 21; Report and Order and Further Notice of Proposed Rulemaking, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd. 15817 (2007) (“Voice Roaming Order”) at ¶37.

rules to afford it a more favorable outcome than mere commercial reasonableness. To do so through a declaratory ruling, however, would be unlawful.

The centerpiece of T-Mobile's requested relief—price benchmarks—would be unlawful to impose, even through rulemaking. To adopt price benchmarks would transform the data roaming rules into unlawful common carrier regulation. The Communications Act prohibits the regulation of data roaming as a common carrier service as it is both an information service and a private mobile service.<sup>8</sup> To determine “commercial reasonableness” on the basis of whether an offer would “greatly exceed” a retail rate benchmark would be essentially to impose price caps, de facto common carrier rate regulation. This would eliminate the “substantial room for individualized bargaining and discrimination in terms” that narrowly saved the data roaming rules from reversal in the D.C. Circuit.

In accordance with Commission rules, this letter is being filed electronically with your office for inclusion in the public record.

Sincerely,



Michael P. Goggin

cc: [David.Horowitz@fcc.gov](mailto:David.Horowitz@fcc.gov)  
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<sup>8</sup> 47 U.S.C. at §§ 153(51), 332(c)(2).