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December 17, 2014

**Ex Parte**

**VIA ECFS**

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

**RE: Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, WT Docket No. 05-265**

Dear Ms. Dortch:

T-Mobile's Expedited Petition for Declaratory Ruling seeks relief that cannot be granted in a declaratory ruling. As set forth more fully in the attached white paper, the rate "benchmarks" T-Mobile seeks are substantive changes to the data roaming rules and are subject to the rulemaking requirements of the Administrative Procedure Act. T-Mobile's proposal to link roaming rates to retail, resale, or international roaming rates is a departure from the FCC's *Data Roaming Order*, which did not include any price benchmarks in the list of factors relevant to determining whether a roaming rate is commercially reasonable. The same is true for T-Mobile's requests to alter both the *Order's* presumption that the terms of a signed roaming agreement are commercially reasonable, and its decision as to the relevance of a requesting carrier's capacity for build-out. The petition also raises numerous complicated issues, such as how to weigh the varied factors that may affect the development of roaming or resale rates, that can be addressed only through rulemaking. The FCC must deny T-Mobile's petition and consider these issues, if at all, in a rulemaking proceeding that meets APA requirements.

Sincerely,

A handwritten signature in black ink that reads "Kathleen Grillo".

Attachment

## **T-MOBILE’S PETITION REQUESTS A CHANGE IN EXISTING LAW THAT CANNOT BE GRANTED THROUGH A DECLARATORY RULING**

T-Mobile requests that the Commission alter its 2011 *Data Roaming Order* by declaring that the commercial reasonableness of a carrier’s offered data roaming rate can be determined by reference to that carrier’s retail, resale, international roaming, and domestic roaming rates.<sup>1</sup> This request cannot be granted through a declaratory ruling, which is to define what existing law is – not to change the law. The Commission rejected the use of any prescriptive rate regulation (*e.g.*, benchmarks) for data roaming rates in the data roaming rulemaking proceeding,<sup>2</sup> yet that is exactly what T-Mobile would have the Commission adopt here through the declaratory ruling process. It is well established, however, that “a declaratory ruling may not be used to substantively change a rule.”<sup>3</sup> Rather, the proper vehicle for such changes is either a petition for reconsideration (which is now years out of time) or a petition for rulemaking.<sup>4</sup>

T-Mobile claims it is merely seeking to have the FCC interpret and clarify existing rules rather than change them,<sup>5</sup> but the proposed benchmarks are “substantive” changes that by law cannot be effectuated through interpretive guidance. These procedural infirmities alone compel denial of T-Mobile’s petition. T-Mobile may choose to seek Commission relief in its dispute with AT&T through a complaint or a declaratory ruling – the dispute resolution procedures

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<sup>1</sup> Petition for Expedited Declaratory Ruling of T-Mobile, USA, Inc., WT Docket No. 05-265, at 11 (May 27, 2014) (“Petition”).

<sup>2</sup> See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 26 FCC Rcd 5411, 5423 ¶ 21 (2011) (“*Data Roaming Order*”).

<sup>3</sup> *Amendment of the Definition of Auditory Assistance Device in Support of Simultaneous Language Interpretation*, 26 FCC Rcd 13600, 13603 ¶ 10 & n.22 (2011) (“*Auditory Assistance Device Order*”) (citing *United States Telecom Ass’n v. FCC*, 400 F.3d 29, 35 (D.C. Cir. 2005) (“*U.S. Telecom Ass’n*”).

<sup>4</sup> See *Competition in the Interstate Interexchange Marketplace, Petitions for Modification of Fresh Look Policy*, 8 FCC Rcd 5046, 5049-50 ¶ 20 (1993) (“*Fresh Look MO&O*”).

<sup>5</sup> See Reply Comments of T-Mobile USA, Inc., WT Docket No. 05-265, at 28 (Aug. 20, 2014) (“*T-Mobile Reply*”).

envisioned in the *Data Roaming Order*<sup>6</sup> – but given that it seeks generic, substantive changes to the rules, it must pursue a rulemaking.<sup>7</sup>

**A. The APA Dictates that an Agency Cannot Make Substantive Rule Changes Through a Declaratory Ruling’s Interpretive Guidance.**

It is well-settled that an agency cannot change existing rules simply through interpretive guidance, as T-Mobile’s petition would have the Commission do. The Supreme Court has made clear that if an agency effects “a substantive change” in an existing regulation, an Administrative Procedure Act (“APA”) rulemaking is required.<sup>8</sup> Likewise, the D.C. Circuit has held that new rules that work “substantive changes”<sup>9</sup> or “major substantive legal additions”<sup>10</sup> to prior regulations are subject to the APA’s rulemaking procedures.<sup>11</sup> As the court explained succinctly: “when an agency changes the rules of the game . . . more than a clarification has occurred.”<sup>12</sup> Thus, “fidelity to the rulemaking requirements of the APA” bars courts from permitting agencies to use the declaratory ruling process to “avoid those requirements by calling a substantive regulatory change an interpretative rule.”<sup>13</sup>

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<sup>6</sup> See *Data Roaming Order*, 26 FCC Rcd at 5449-50 ¶¶ 75-77 & n.231.

<sup>7</sup> See Comments of Verizon, WT Docket No. 05-265, at 2-4 (July 10, 2014) (“Verizon Comments”).

<sup>8</sup> *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 100-01 (1995) (internal quotation marks omitted); see 5 U.S.C. § 553.

<sup>9</sup> *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003) (“*Sprint*”).

<sup>10</sup> *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000).

<sup>11</sup> See also *Alaska Prof’l Hunters Ass’n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) (“When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule . . .”); *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (“If a second rule repudiates or is irreconcilable with [a prior rule], the second rule must be an amendment of the first . . .”) (quotation mark omitted).

<sup>12</sup> *Sprint*, 315 F.3d at 374; see also *SBC Inc. v. FCC*, 414 F.3d 486, 497-498 (3d Cir. 2005).

<sup>13</sup> *U.S. Telecom Ass’n*, 400 F.3d at 33-35; see *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000); *C.F. Communications Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997).

Applying these well-established tenets of Administrative Law, the Commission has long recognized that “a declaratory ruling may not be used to substantively change a rule” and avoid the APA’s rulemaking requirements.<sup>14</sup> To the contrary, a declaratory ruling is appropriate only for purposes of “terminating a controversy or removing uncertainty.”<sup>15</sup> Where a substantive rule change is desired, the proper recourse is to file either a timely petition for reconsideration of the order adopting the rule or a petition for rulemaking.<sup>16</sup>

**B. T-Mobile’s Petition Asks the Commission to Make Substantive Changes to the Data Roaming Rules.**

T-Mobile’s petition asks the FCC to make substantive changes to the data roaming rules in several ways, including by (1) 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) modifying how certain existing presumptions and factors will be applied.<sup>17</sup> Each of T-Mobile’s requests would require the Commission to reconsider and reverse decisions made in the *Data Roaming Order* – “substantive changes” that must be addressed, if at all, through a rulemaking, not interpretive guidance.

First, T-Mobile asks the Commission to rule that the commercial reasonableness of a carrier’s offered data roaming rate should be determined by reference to four pricing benchmarks – the carrier’s retail, resale, international roaming, and domestic roaming rates – in addition to the factors the Commission has already adopted.<sup>18</sup> In both the voice and data roaming

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<sup>14</sup> *Auditory Assistance Device Order*, 26 FCC Rcd at 13603 ¶ 10 & n.22 (citing *U.S. Telecom Ass’n*, 400 F.3d at 35); *Travelers Information Stations, et al.*, 25 FCC Rcd 18117, 18121 ¶ 12 & n.37 (2010) (“[A] declaratory ruling may not be used to substantively change a policy.”) (citing *U.S. Telecom Ass’n*, 400 F.3d at 35).

<sup>15</sup> 47 C.F.R. § 1.2 (incorporating the declaratory ruling provision of the APA, 5 U.S.C. § 554(e)).

<sup>16</sup> *See Fresh Look MO&O*, 8 FCC Rcd at 5049-50 ¶ 20.

<sup>17</sup> *See* Petition at 11-23.

<sup>18</sup> *See id.* at ii, 11-16.

proceedings, however, the Commission considered *and rejected* requests to use wholesale and/or retail rates as benchmarks for reasonable roaming rates.

In the voice context, the Commission rejected calls for such benchmark rates,<sup>19</sup> stating, “we are not persuaded that consumers would be harmed in the absence of a price cap or some other form of rate regulation.”<sup>20</sup> To the contrary, the Commission found that rate regulation could harm both consumers and investment:

[W]e agree with concerns raised in the record that rate regulation has the potential to distort carriers’ incentives and behavior with regard to pricing and investment in network buildout. Capping roaming rates by tying them to a benchmark based on larger carriers’ retail rates may diminish larger carriers’ incentives to lower retail prices paid by their customers, and perhaps even give them an incentive to raise retail rates.... By enabling smaller regional carriers to offer their customers national roaming coverage at more favorable rates without having to build a network, rate regulation would tend to diminish smaller carriers’ incentives to expand the geographic coverage of their networks. In addition, by reducing or eliminating any competitive advantage gained as a result of building out nationwide or large regional networks, rate regulation would impair larger carriers’ incentives to expand, maintain, and upgrade their existing networks.<sup>21</sup>

Likewise, the Commission rejected requests in the data roaming proceeding to adopt rules linking data roaming rates to rates for retail services,<sup>22</sup> and did not include any price benchmarks

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<sup>19</sup> See Comments of Leap Wireless International, Inc., WT Docket No. 05-265, at 17 (Nov. 28, 2005) (arguing that “[i]n areas where there are three or fewer facilities-based carriers from which the carrier seeking automatic roaming service could obtain such service, the Commission should prohibit a facilities-based carrier from demanding rates for automatic roaming that exceed that carrier’s average retail revenue per minute for that area”); Comments of NTCH, Inc., WT Docket No. 05-265, at 6 (Nov. 28, 2005) (arguing that the Commission should require national wireless providers to make roaming available at rates no more than the rates they charge Mobile Virtual Network Operators (“MVNOs”)).

<sup>20</sup> *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd 15817, 15832-33 ¶ 37 (2007) (“*Voice Roaming Order*”) (citation omitted).

<sup>21</sup> *Voice Roaming Order*, 22 FCC Rcd at 15832-33 ¶¶ 39-40.

<sup>22</sup> See Comments of Bright House Networks, WT Docket No. 05-265, at 13-14 (June 14, 2010) (arguing that the Commission should adopt the use of “retail yield” – defined as average revenue for a unit of a particular data service divided by average usage for the data service – as an evaluative criterion for

in the list of factors for determining whether a roaming rate offered is commercially reasonable.<sup>23</sup> The Commission was concerned that any rate regulation would erode incentives to invest in advanced data services. In addressing these concerns, it stated:

[H]ost providers will be paid for providing data roaming service, and 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*. This will give host providers appropriate discretion in the structure and level of such rates that they offer. As we found in the *Order on Reconsideration* “the relatively high price of roaming compared to providing facilities-based service will often be sufficient to counterbalance the incentive to ‘piggy-back’ on another carrier’s network.”<sup>24</sup>

Thus, requiring data roaming to be offered at prices comparable to retail services would be a departure from *Data Roaming Order*, and the Commission’s logic applies equally to roaming rates linked to resale or international or domestic roaming rates or any other form of rate regulation. Given that the Commission elected not to adopt requirements linking voice roaming rates to rates for retail or MVNO services in the common carrier voice roaming regime, it certainly could not adopt such requirements in a more “flexible” Title III regulatory regime. Indeed, any action by the Commission to place more prescriptive bounds on the rates a provider of mobile data services may charge for roaming would unquestionably be a substantive – and risky – change.

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determining if rates are reasonable); Comments of NTCH, Inc., WT Docket No. 05-265, at 5 (June 14, 2010) (arguing that the Commission should adopt a benchmark for reasonable data roaming rates set at the prevailing market rates for data services); Reply Comments of SouthernLINC Wireless, WT Docket No. 05-265, at 28 (July 12, 2010) (arguing that data roaming rates should be compared to the rates the host carrier charges its own retail subscribers for data services).

<sup>23</sup> See *Data Roaming Order*, 26 FCC Rcd at 5452-53 ¶¶ 85-87 (discussing the commercially reasonable standard and providing a list of factors to be considered in analyzing terms against this standard).

<sup>24</sup> *Id.* at 5423 ¶ 21 (emphasis added) (citation omitted).

Second, T-Mobile asks the Commission to effectively modify how certain existing presumptions and factors will be applied. Here again, T-Mobile is not seeking to “clarify” the data roaming rules, but substantively change them. T-Mobile effectively seeks to reverse the finding that, in any future complaint proceeding, the Commission will “presume” 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.”<sup>25</sup> Likewise, T-Mobile wants the Commission to overturn its view that the commercially reasonable standard should take a large provider’s capacity for build-out into account,<sup>26</sup> but this would upend the finding that its rules should not encourage providers to rely on data roaming in lieu of economically feasible build-out of their own networks.<sup>27</sup>

In short, T-Mobile here is not seeking an interpretive change that merely “supplies crisper and more detailed lines than the authority being interpreted,”<sup>28</sup> or simply provides “a clarification of an existing rule.”<sup>29</sup> And the Commission already considered and rejected requests to link

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<sup>25</sup> *Data Roaming Order*, 26 FCC Rcd at 5451 ¶ 81; *see id.* at ¶ 86 (“[T]o guide us in determining the reasonableness of ... the terms and conditions of the proffered ... we may consider ... whether the providers involved have had previous data roaming arrangements with similar terms ...”). *Cf.* Petition at 16-22 (suggesting that the Commission should “clarify” that the presumption that existing agreement terms are commercially reasonable does not apply to future agreements).

<sup>26</sup> *See* Petition at 22-23.

<sup>27</sup> *See Data Roaming Order*, 26 FCC Rcd at 5411 ¶ 1 (describing how the new rules will “promote the development of competitive facilities-based service offerings for the benefit of consumers”); *id.* at 5423 ¶ 22 (providing that “if providers bring disputes to the Commission, we will take into account factors including the impact on buildout incentives and the extent and nature of providers’ existing build-out in determining the commercial reasonableness of proffered terms”); *id.* at 5439 ¶ 49 (stating that the Commission “seeks to encourage facilities-based offerings of advanced mobile data services); *id.* at 5436 ¶ 51 (recognizing that the “relatively high cost 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”); *id.* at 5452 ¶ 86 (considering among the factors used to determine commercial reasonableness “significant economic factors, such as whether building another network in the geographic area may be economically infeasible or unrealistic”).

<sup>28</sup> *American Mining Cong.*, 995 F.2d at 1112.

<sup>29</sup> *Sprint Corp.*, 315 F.3d at 374.

roaming rates to the rates for other services, so there is no “controversy” or “uncertainty” for the Commission to resolve in a declaratory ruling. Rather, T-Mobile’s proposals would substantively change a preexisting rule, which can be valid only if accomplished in accordance with the rulemaking provisions of the APA.<sup>30</sup>

**C. Public Notice of T-Mobile’s Petition Does Not Avoid the Requirement to Act Through Rulemaking.**

Because T-Mobile is seeking substantive rule changes, its request cannot be granted in this declaratory ruling proceeding.<sup>31</sup> As the Commission has previously explained in denying a petition for declaratory ruling filed by Sprint that also sought substantive changes, “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.”<sup>32</sup> The facts here compel the same result, and are distinguishable from *City of Arlington* and *U.S. Telecom Ass’n*, which were found to involve harmless error.

The Wireless Telecommunications Bureau’s public notice of the T-Mobile petition does not obviate the need for a rulemaking to consider T-Mobile’s proposals. First, the notice here was issued by the Bureau and was never published in the Federal Register.<sup>33</sup> The Commission’s failure to do so here means that, as in the *Sprint* case, parties are not “on notice” as to whether

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<sup>30</sup> See *U.S. Telecom Ass’n v. FCC*, 400 F.3d at 38.

<sup>31</sup> T-Mobile cites language in the *Data Roaming Order* inviting petitions for declaratory ruling. That language, however, appears in the dispute resolution section of the order and simply invites petitions for declaratory ruling as an alternative to a complaint proceeding for resolving a two-party roaming dispute. See *Data Roaming Order*, 26 FCC Rcd at 5449-50 ¶¶ 75-77 & n.231. Nothing in the language T-Mobile cites constitutes an invitation to seek through a declaratory ruling new obligations or interpretations of the order that would apply globally to all providers, which is the province of rulemakings.

<sup>32</sup> *Fresh Look MO&O*, 8 FCC Rcd at 5049-50 ¶ 20. In that case, Sprint filed a petition for declaratory ruling seeking to expand the scope of the Commission’s “Fresh Look” policy. *Id.* at 5046 ¶ 3, 5047 ¶ 7.

<sup>33</sup> See *Public Notice*, “Wireless Telecommunications Bureau Seeks Comment On Petition For Expedited Declaratory Ruling Filed By T-Mobile USA, Inc. Regarding Data Roaming Obligations,” DA 14-798 (rel. Jun. 10, 2014) (“*T-Mobile Petition PN*”).

the Commission is even proposing any rule changes.<sup>34</sup> In contrast, in *City of Arlington* and *U.S. Telecom Ass’n*, the Commission began its processes by publishing a notice in the Federal Register.<sup>35</sup> Second, the notice here contained no description of the substance of the issues under consideration, whereas the notices in the *City of Arlington* and *U.S. Telecom Ass’n* cases “made the issue under consideration crystal clear.”<sup>36</sup> These deficiencies are fatal because new agency rules must be a logical outgrowth of the rules the agency proposes in its notice, and here there has been *no proposal* by the agency.<sup>37</sup> Rather, the Bureau’s public notice simply reported the filing of a petition for declaratory ruling seeking “guidance” on the “commercially reasonable” standard in the data roaming rule, giving no indication proposed rule changes were contemplated or under consideration, let alone what those proposed changes might be.<sup>38</sup> “Suffice it to say, there can be no ‘logical outgrowth’ of a proposal that the agency has not properly noticed.”<sup>39</sup>

Indeed, in its *Report on FCC Process Reform*, FCC staff explained that the text of a proposed rule should be included any notice “to ensure adequate notice of the potential final rule and to focus both drafters and commenters on the precise proposal under consideration.”<sup>40</sup> Furthermore, in those “rare cases” where FCC staff determines it not advisable or possible to include the precise rule text in a notice, staff should “acknowledge that specific rule text is not proposed and provide an explanation, and ask specific questions about the subjects and issues

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<sup>34</sup> See *Sprint*, 315 F.3d at 376.

<sup>35</sup> See *City of Arlington v. FCC*, 668 F.3d 229, 244 (5th Cir. 2012), *aff’d*, 133 S.Ct. 1863 (2013); *U.S. Telecom Ass’n v. FCC*, 400 F.3d at 38.

<sup>36</sup> *U.S. Telecom Ass’n v. FCC*, 400 F.3d at 38; see *City of Arlington*, 668 F.3d at 244.

<sup>37</sup> See *Sprint*, 315 F.3d at 376.

<sup>38</sup> See *T-Mobile Petition PN*.

<sup>39</sup> *Sprint*, 315 F.3d at 376.

<sup>40</sup> FCC STAFF WORKING GROUP, REPORT ON FCC PROCESS REFORM 41 (Feb. 14, 2012), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-14-199A2.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-14-199A2.pdf).

involved that are adequate to provide notice under Section 553 of the [APA].”<sup>41</sup> The Bureau’s abbreviated public notice here does neither, and for these and the reasons stated above is in no way a substitute for the proper notice required under the APA for substantive rule changes.

**D. T-Mobile’s Petition Raises Numerous Complicated Issues that Require Notice and Comment Rulemaking.**

The Commission also cannot adopt T-Mobile’s proposed benchmarks without initiating a rulemaking proceeding, because a rulemaking is the only proper vehicle for the Commission to address and resolve numerous follow-on issues that would result from modifying its 2011 *Order*.

For example, if carriers’ retail, MVNO and international roaming rates are now to be considered in a data roaming complaint proceeding, the Commission needs to determine how to balance compelled disclosure of those rates against the well-recognized, serious competitive concerns that occur when carriers reveal to each other the rates that are contained in confidential agreements. These concerns are at least as great as those presented by compelled disclosure of content agreements, and could only be required in extraordinary circumstances and subject to extraordinary protections. Under T-Mobile’s approach, the complaining carrier would almost certainly seek access to a competitor’s confidential non-roaming rate agreements – and the competitor would seek the same information from the complainant. The Commission has repeatedly acknowledged the risks that flow from carriers sharing confidential rate agreements or financial data. How to balance those risks against the objectives of the data roaming rules raises new and novel policy and legal issues that are not appropriate for declaratory ruling -- let alone leaving to Commission staff to assess and resolve in a complaint proceeding.

The Commission also should consider T-Mobile’s proposed benchmarks through rulemaking because only a rulemaking enables the Commission to consider how to evaluate

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<sup>41</sup> *Id.*

differences between roaming rates and the proposed benchmark rates, and how to apply the benchmarks in light of these differences. As T-Mobile’s own expert concedes, “[n]one of these benchmarks is or can be ideal.”<sup>42</sup> The prices for MVNO services, retail services, and international roaming are based upon markedly different factors. For example, they may depend on volume commitments, arrangements for exchanging traffic, locations of traffic concentrations and many other factors that are different from factors that affect roaming rates. Moreover, a retail rate in a geographic area may be targeted to compete with a rate being offered by a particularly aggressive competitor in that area. Some customers may have retail rates based on a promotion that was available only for a limited period of time in a limited geographic area. Those prices may be lower than the prices generally available or available in other areas, but T-Mobile’s proposal would make them the basis for comparing roaming rates available to other providers seeking roaming in that geographic area. In addition, MVNO relationships are viewed as supplemental to a carrier’s retail channel. Thus, MVNO rates are typically designed to attract customers that the underlying service provider is not attracting, while not undermining the service provider’s existing retail base.<sup>43</sup> Because of the myriad factors and context that go into retail, MVNO and international roaming rates, they could never be considered divorced from

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<sup>42</sup> Farrell Declaration (attached to Petition) at 3.

<sup>43</sup> See *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Sixteenth Report, 28 FCC Rcd 3700 at ¶ 29 (2013) (“MVNOs may target their service and product offerings at specific demographic, lifestyle, and market niches, including consumers who are low income, are relatively price sensitive, do not want to commit to multi-year subscription contracts, have low usage needs, or do not want to buy a bundle that contains unwanted data services.”); *id.* ¶ 30 (“A facilities-based provider that also resells services may be motivated by the desire to expand its geographic coverage outside of its network coverage area or to add service offerings that are not available on its own network by reselling the services of another provider.”); *id.* ¶ 31 (“MVNOs often increase the range of services offered by the host facilities-based provider by targeting certain market segments, including segments previously not served by the hosting facilities-based provider.”). See also Farrell Declaration at 30-31.

those factors. A declaratory ruling cannot deal with how these variations and factors should be evaluated and addressed. A rulemaking is the proper (and only proper) course.

### **CONCLUSION**

In short, the Commission cannot issue a declaratory ruling here without violating the APA. Should the Commission believe that revisions to its existing rules may be needed, the lawful course is to initiate a rulemaking.