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December 18, 2014

Via ECFS

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

**Re: Roaming Obligations of Commercial Mobile Radio Service Providers, WT
Docket No. 05-265**

Dear Ms. Dortch:

The Commission's 2011 *Data Roaming Order*¹ struck the proper balance between ensuring that data roaming is widely available, maintaining incentives for build-out and robust facilities-based competition, and complying with the Communications Act's absolute prohibition on common carrier regulation of data roaming services.² As AT&T has previously demonstrated (and as T-Mobile's own Petition confirmed), the data roaming market is working, including for LTE roaming agreements. Contrary to T-Mobile's recent suggestions, AT&T and T-Mobile are currently negotiating a LTE roaming agreement in good faith, and the Commission's data roaming rules provide a remedy for T-Mobile or any other carrier who complains that it is not able to obtain data roaming on "commercially reasonable" terms. The focus of this submission,

¹ 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*").

² See Letter from Joan Marsh, AT&T, to Marlene H. Dortch, Secretary, FCC, *Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265 (Nov. 14, 2014); Letter from Joan Marsh, AT&T, to Marlene H. Dortch, Secretary, FCC, *Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265 (Nov. 11, 2014).

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however, is to demonstrate the legal risks associated with the relief that T-Mobile requests in its *Petition*.³

T-Mobile's requested relief is both procedurally improper and substantively unlawful. As a procedural matter, although T-Mobile's request for a declaratory ruling purports to seek "[c]larification" of the *Data Roaming Order*,⁴ it is really asking the Commission to reverse course on several aspects of the *Order*, and adopt entirely new rules, which would require a rulemaking pursuant to the Administrative Procedure Act (APA). For the same reasons, it would be procedurally improper to grant such relief on delegated authority. Substantively, T-Mobile improperly seeks to subject data roaming to common carrier regulation, which is prohibited by the Communications Act. For each of these two independent reasons, an order granting the relief that T-Mobile seeks would not survive judicial review.

I. T-Mobile's Requested Relief Is Procedurally Improper.

A declaratory ruling, the relief that T-Mobile seeks, is a limited procedural device that allows the Commission to "terminat[e] a controversy or remov[e] uncertainty."⁵ It is well-settled, however, that "a declaratory ruling may not be used to substantively change a rule."⁶

T-Mobile is seeking to rewrite the *Data Roaming Order* in at least three fundamental respects. *First*, T-Mobile's proposed rate benchmarks are flatly inconsistent with the

³ T-Mobile USA, Inc., *Petition for Expedited Declaratory Ruling of T-Mobile USA, Inc., Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265 (filed May 27, 2014) ("*Petition*").

⁴ *Petition* at 5.

⁵ 47 C.F.R. § 1.2; 5 U.S.C. § 554(e) (authorizing declaratory orders as a form of "adjudication[]").

⁶ Order and Notice of Proposed Rulemaking, *Amendment of Part 15 of the Commission's Rules to Amend the Definition of Auditory Assistance Device in Support of Simultaneous Language Interpretation*, ET Docket No. 10-26, 26 FCC Rcd. 13600, ¶ 10 & n.22 (2011) (citing *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 35 (D.C. Cir. 2005) ("[F]idelity to the rulemaking requirements of the APA bars courts from permitting agencies to avoid those requirements by calling a substantive regulatory change an interpretative rule")); Order and Notice of Proposed Rulemaking, *Travelers Information Stations, et al.*, PS Docket No. 09-19, 25 FCC Rcd. 18117, ¶ 12 & n.37 (2010) ("a declaratory ruling may not be used to substantively change a policy") (citing *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 35 (D.C. Cir. 2005)).

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Commission's rejection of rate benchmarks (or any prescriptive rate regulation) in the *Data Roaming Order*. In the data roaming proceeding, several parties asked the Commission to adopt rules that benchmarked data roaming rates to retail rates.⁷ The Commission expressly declined to do so, explaining that it was "adopt[ing] a general requirement of commercial reasonableness for all roaming terms and conditions, including rates, *rather than a more specific prescriptive regulation of rates requested by some commenters.*"⁸ Indeed, the Commission did not include in the extensive list of factors for determining whether a roaming rate is commercially reasonable any suggestion that data roaming rates should be set by reference to retail rates, resale rates, international roaming rates or any of the other rate metrics T-Mobile and its supporters have proposed.⁹

To the contrary, the Commission could not have been clearer in the *Data Roaming Order* that data roaming rates that are close to retail rates would *undermine* the Commission's policy objectives because it would encourage providers to use roaming as resale and as a substitute for broadband investment. As the Commission explained, it expected roaming rates to be higher than retail rates in order to "counterbalance the incentive" to "rely[] on another provider's network."¹⁰ Given the Commission's express consideration and rejection of rate benchmarks in the *Data Roaming Order*, T-Mobile's request that it now adopt such benchmarks would plainly negate the terms of the *Data Roaming Order*, not merely clarify them.

Second, T-Mobile's request that the Commission "clarify" that the terms of existing roaming agreements are not presumptively commercially reasonable for purposes of negotiating future agreements would likewise negate the terms of the *Data Roaming Order*.¹¹ The

⁷ See Comments of Verizon, at 6 & n.13 (July 10, 2014).

⁸ *Data Roaming Order* ¶ 21 (emphasis added); see also *id.* (noting that the Commission wanted to "give host providers appropriate discretion in the structure and level of . . . rates that they offer"). The Commission also previously rejected the use of rate benchmarks in the context of common carrier regulation of voice roaming, finding that "the better course . . . is that the rates individual carriers pay for automatic roaming services be determined in the marketplace through negotiations between the carriers." Report and Order and Further Notice of Proposed Rulemaking, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd. 15817, ¶ 37 (2007) ("*Voice Roaming Order*").

⁹ *Data Roaming Order* ¶¶ 85-87.

¹⁰ *Id.* ¶ 51; see also *id.* ¶ 21 ("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") (internal quotation marks omitted).

¹¹ See *Petition* at 16-22.

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Commission clearly stated that “to guide us in determining the reasonableness of . . . the terms and conditions of the proffered data roaming arrangements” in a data roaming dispute, the Commission will consider (among other factors) “whether the providers involved have had previous data roaming arrangements with similar terms.”¹² It further held that it 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.”¹³ Because the Commission expressly found in the *Order* that arm’s-length roaming agreements that have not been challenged should be presumed commercially reasonable, T-Mobile is seeking a substantive modification of the *Order*, not a mere “clarification” of it.

Third, T-Mobile’s request that the Commission clarify that commercial reasonableness does not depend in part on the extent of the requesting carrier’s build-out also would contradict the express terms of the *Data Roaming Order*. T-Mobile asks the Commission to clarify that its inclusion of “the extent and nature of providers’ build-out” in the factors that it considers in assessing commercial reasonableness,¹⁴ 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 provider has not built out.”¹⁵ The *Order*, however, makes no distinction between large and small carriers. Instead, it unequivocally provides that the extent and nature of *any* requesting providers’ build-out is relevant to the commercial reasonableness inquiry. This is a vital component of the *Order*. One of the Commission’s central objectives in designing the data roaming rules was to avoid creating disincentives for both host carriers and requesting carriers to invest in and deploy advanced data networks. The resulting rules are an attempt to balance the requirement to offer data roaming with the need to preserve these investment incentives. A critical part of this balance is the Commission’s explicit insistence that it will “take into account” the extent and nature of a requesting provider’s build-out in a given area when it assesses the commercial reasonableness of roaming rates and the terms on which a host provider will offer roaming.¹⁶ T-Mobile is thus seeking a material change in the clear terms of the *Order*, not a “clarification.”

¹² *Data Roaming Order* ¶ 86.

¹³ *Id.* ¶ 81.

¹⁴ *Id.* ¶ 86.

¹⁵ *Petition at 22; see also id.* at 23 (“the Commission should clarify that this factor is primarily designed to detect a requesting provider that has only a very limited or non-existent network, and that is looking to design its business primarily to ‘piggyback’ on other providers’ network investments”).

¹⁶ *Data Roaming Order* ¶¶ 22, 51, 86.

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In sum, T-Mobile is asking the Commission to reject its past findings and revise the standard and rules for assessing the commercial reasonableness of data roaming agreements to forbid considerations of two factors the Commission previously ruled are exceptionally important (existence of previous data roaming arrangements with similar terms, and the extent of requesting carrier's build-out) and add price-benchmarking that it previously rejected. It is well-settled that an agency must use the APA's notice-and-comment procedures in order to change or eliminate existing rules.¹⁷ The Supreme Court has made clear that APA rulemaking is required when an agency "adopt[s] a new position inconsistent with" existing regulations or effects "a substantive change in the regulations."¹⁸ And the D.C. Circuit has warned that an agency "may not bypass [the APA's notice-and-comment procedures] by rewriting its rules under the rubric of 'interpretation'".¹⁹ Here, T-Mobile's requested changes require a rulemaking because it is seeking new rules that are inconsistent with the existing ones. Under the foregoing authorities, the Commission would commit reversible error if it were to change course on central aspects of its data roaming rules in a declaratory order.

For the same reasons, it would be improper to grant T-Mobile's petition on delegated authority. Under the Commission's rules, the Wireless Bureau "shall not have authority to act on any complaints, petitions or requests . . . when such complaints, petitions or requests present new or novel questions of law or policy which cannot be resolved under outstanding Commission precedents and guidelines."²⁰ T-Mobile is asking the Commission to make material changes to its data roaming policies and rules – to such a degree that the APA would require even the full Commission to conduct a new rulemaking – and thus the Bureau has no power to entertain such requests for a "new or novel" policy on delegated authority.

II. T-Mobile's Requested Relief Would Constitute Unlawful Common Carrier Regulation.

¹⁷ 5 U.S.C. § 553 (the APA's notice-and-comment rulemaking procedures apply to "the issuance, amendment, or repeal of a rule").

¹⁸ *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995) (internal quotation omitted).

¹⁹ *C.F. Communications Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997).

²⁰ 47 C.F.R. § 0.331(b); *see also id.* § 0.331(d) (Bureau "shall not have the authority to act upon notices of proposed rulemaking and inquiry, final orders in rulemaking proceedings and inquiry proceedings, and reports arising from any of the foregoing except such orders involving *ministerial conforming amendments* to rule parts, or orders conforming any of the applicable rules to formally adopted international conventions or agreements *where novel questions of fact, law, or policy are not involved*" (emphasis added)).

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The rulings T-Mobile seeks would transform the data roaming rules into unlawful common carrier regulation. It is well-established that data roaming is not a common carrier activity. The Commission specifically has held that “wireless internet service both *is* an ‘information service’ and *is not* a ‘commercial mobile service,’” and therefore, as the D.C. Circuit has held, “mobile-data providers are statutorily immune, perhaps twice over, from treatment as common carriers.”²¹ That is because Section 153(51) of the Act expressly prohibits common carrier regulation of information services,²² and Section 332(c)(2) independently prohibits common carrier regulation of private mobile services.²³ Thus, the D.C. Circuit has found it “obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers.”²⁴

In *Cellco Partnership*, the D.C. Circuit rejected a facial challenge to the lawfulness of the 2011 data roaming rules solely because the Commission’s “commercially reasonable” standard leaves “substantial room for individualized bargaining and discrimination in terms.”²⁵ It made clear, however, that parties were “free to return to the court with an ‘as applied’ challenge.”²⁶ In this regard, the court noted that the Commission’s data roaming rules already come close to prohibited common carrier regulation.²⁷ It also made clear that the relevant inquiry is not what the rules say “on [their] face,” but whether the Commission’s implementation and application of

²¹ *Cellco Partnership v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012) (emphasis in original).

²² 47 U.S.C. § 153(51) (“[a] telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services”).

²³ *Id.* § 332(c)(2) (“[a] person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter”). See also *Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014).

²⁴ *Verizon*, 740 F.3d at 650 (citing *Cellco*, 700 F.3d at 538); see also *Cellco*, 700 F.3d at 545 (“the Commission concedes that . . . it has no authority to treat mobile-data providers like Verizon as common carriers”).

²⁵ *Cellco*, 700 F.3d at 548.

²⁶ *Id.* at 549.

²⁷ *Id.* at 545 (the data roaming rules “plainly bear[] some marks of common carriage” regulation); *id.* at 547 (the data roaming rules fall into a “gray area” that occupies “the space between *per se* common carriage and *per se* private carriage”).

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the rules have the *effect* of relegating data roaming providers to common carrier status.²⁸ And it expressly cautioned the Commission that it would “do well to ensure that the discretion carved out in the rule’s text remains carved out in fact.”²⁹ The relief requested by T-Mobile is precisely what the D.C. Circuit warned the Commission against: adopting rules that would move the data roaming regime over the line into prohibited common carrier regulation.

T-Mobile’s proposed rate benchmarks would be tantamount to prohibited common carrier regulation. Although T-Mobile labels these proposed rate levels as “benchmarks,” they would function as *de facto* price caps because T-Mobile is proposing that the Commission rely on them in complaint proceedings to determine whether particular data roaming agreements are “commercially reasonable.” If the Commission declares that it will use particular rates as “benchmarks” in evaluating “commercial reasonableness,” providers would be pressured to offer rates in negotiations that are consistent with those levels, which would eliminate most of the “discretion” and “room for individualized bargaining and discrimination in terms” that the D.C. Circuit identified as the key hallmarks of private carriage. In addition, rates in the marketplace would inevitably conform to the benchmarks, meaning that the benchmarks would effectively function as price caps.

Under such a regime, the “commercially reasonable” standard would “in practice turn out to be no different from [the] ‘just and reasonable’” standard that applies to common carriers.³⁰ Because providers would be constrained by the Commission-determined proxies for what constitutes a “reasonable” rate, providers would lose the “considerable flexibility” that they have under the current rules to “respond to the competitive forces at play in the mobile-data market,” and the room that these rules leave for “individualized negotiation.”³¹ In short, T-Mobile’s proposals would eliminate the marketplace discretion and flexibility that the D.C. Circuit found

²⁸ *Id.* at 549; *see also id.* at 548 (“[W]e take Verizon’s point that even if the rule *sounds* different from common carriage regulation, the more permissive language could, as applied, turn out to be no more than ‘smoke and mirrors.’”) (emphasis in original).

²⁹ *Id.* at 549; *see also Verizon*, 740 F.3d at 652 (“we cautioned that were the Commission to apply the ‘commercially reasonable’ standard in a *restrictive* manner, essentially elevating it to the traditional common carrier ‘just and reasonable’ standard, . . . the rule might impose obligations that amounted to common carriage *per se*, a claim that could be brought in an ‘as applied’ challenge”) (emphasis added).

³⁰ *Cellco*, 700 F.3d at 548.

³¹ *Id.*

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distinguished the data roaming requirements from common carrier regulation and, thereby, “salvaged” those rules in *Cellco*.”³²

For the foregoing reasons, as amplified by the evidence that AT&T has submitted in this proceeding, T-Mobile’s requested relief is unlawful.

Sincerely,

/s/ David L. Lawson
David L. Lawson
Counsel for AT&T

³² *Verizon*, 740 F.3d at 656.