

**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

APPLICATION FOR REVIEW OF AT&T

David L. Lawson
James P. Young
Christopher T. Shenk
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Michael P. Goggin
Gary L. Phillips
Lori Fink
AT&T Services, Inc.
1120 20th Street, N.W.
Washington, D.C. 20036
(202) 457-3048

Counsel for AT&T

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Pursuant to 47 C.F.R. § 1.115, AT&T Services, Inc. (“AT&T”), on behalf of its operating subsidiaries, respectfully submits this Application for Review of the Wireless Bureau’s Declaratory Ruling issued on December 18, 2014, in the above-captioned proceeding.¹

INTRODUCTION AND SUMMARY

In its 2011 *Data Roaming Order*, the Commission adopted a “commercial reasonableness” standard for adjudicating data roaming disputes that, while flexible, provided predictable guidance to the industry. That guidance was founded on two substantive lodestars. First, the Commission made clear that commercial reasonableness would be determined to a significant degree by the rates and terms that prevail in the existing, negotiated roaming agreements that scores of sophisticated parties rely on today to compete in the marketplace, which would be presumed reasonable. Second, the Commission made clear that its data roaming rules must be applied to promote broadband investment and facilities-based competition, and that it therefore expected roaming rates to substantially exceed retail service rates to maintain appropriate incentives for build-out.

¹ Declaratory Ruling, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265 (rel. Dec. 18, 2014) (“*Declaratory Ruling*”).

Responding to a nakedly self-interested plea from T-Mobile for additional leverage in its commercial negotiations with AT&T, the Wireless Bureau issued a declaratory ruling that purports to “clarify” the Commission’s rules, provide “additional guidance” and “lessen[] ambiguity,”² but has in fact thrown the Commission’s entire data roaming regime into confusion. The *Declaratory Ruling* adopts three rulings that are plainly inconsistent with the foundational principles of the *Data Roaming Order*, and the Bureau provides no guidance how the Commission will apply any of these rulings in individual cases. The result is a completely standardless approach to case-by-case adjudication that eliminates any ability to predict how the Commission might rule in any given complaint proceeding.

The Bureau invites requesting providers to “adduce evidence” in enforcement disputes as to whether proffered roaming rates are “substantially in excess” of “retail rates, international rates, MVNO/resale rates, as well as a comparison of proffered roaming rates to domestic roaming rates as charged by other providers.”³ The Bureau repeatedly emphasizes, however, that “[w]e do not expect that these other rates will be probative factors in every case or that they will be relevant to the same degree.”⁴ So how do regulated parties know whether the Commission will follow the *Data Roaming Order* and look to generally prevailing roaming rates or whether it may find these other rates in some way “probative”? The Bureau cannot say: consideration of other rates “must be undertaken within the totality of the circumstances of a particular case,” which requires consideration of a “host of other factors” including the seventeen listed factors in the *Data Roaming Order* “as well as others.”⁵

² *Id.* ¶ 10.

³ *Id.* ¶ 9.

⁴ *Id.* ¶ 17.

⁵ *Id.* ¶ 20.

The same confusion reigns with respect to the Bureau's other two rulings. The Bureau has all but eliminated the *Data Roaming Order*'s presumption that rates and terms in existing, unchallenged agreements "meet the [commercial] reasonableness standard."⁶ Negotiating parties now have no bearings in assessing what the Commission may determine to be a reasonable proffered rate: "the terms of prior agreements may be relevant for determining the commercial reasonableness of terms in a subsequent negotiation, depending on the circumstances of the individual case."⁷ Similarly, the Bureau suggests, contrary to the *Data Roaming Order*, that the Commission may (or may not) consider the requesting provider's potential for build-out in determining the reasonableness of offered terms. But how do regulated parties know whether the Commission will favor incentives for build-out or situational encouragement of roaming? Again, it all depends, but on what, again, the Bureau cannot say.⁸

This is not reasoned decisionmaking and, indeed, under the Bureau's order there is now in effect no standard at all. The commercial reasonableness "standard," as articulated by the Bureau, is that the Commission may consider *any* factor on a completely case-by-case basis. Gone is the clarity of the lodestars of the Commission's commercial reasonableness test, which was grounded in an appreciation of wholesale roaming marketplace outcomes and the need to maintain incentives for broadband investment. In its place the Bureau erects a hopelessly vague and endlessly manipulable standard that allows the Commission, in the role of an external arbiter, to impose arbitrary and unpredictable outcomes in any given case.

⁶ 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, ¶ 81 (2011) ("*Data Roaming Order*"); *Declaratory Ruling* ¶ 25.

⁷ *Declaratory Ruling* ¶ 26.

⁸ *Id.* ¶ 28.

The Bureau's *Declaratory Ruling* is unlawful on two independent bases. *First*, the *Declaratory Ruling* is inconsistent with the *Data Roaming Order*. The *Declaratory Ruling* must be vacated on this ground alone, because the Bureau has no authority to modify the Commission's policies on delegated authority.⁹ Indeed, even if the full Commission wanted to modify its policies in this fashion, it would have to conduct a new notice-and-comment rulemaking proceeding; it could not simply issue a declaratory ruling substantively changing its rules in the guise of a "clarification."¹⁰

Second, and equally important, the Bureau's formulation of the commercial reasonableness standard is so hopelessly vague and open-ended that is unlawful under the Administrative Procedure Act ("APA") and unconstitutional under the Due Process Clause. A regulation is unlawfully vague if it either "fails to give fair warning of the proscribed conduct" or constitutes "an unrestricted delegation of power that enables enforcement officials to act arbitrarily and with unchecked discretion."¹¹ The Bureau's ruling fails on both grounds. Indeed, the Bureau's standard could not be more open-ended: rather than provide meaningful guidance, the Bureau repeatedly tells negotiating parties that they will simply have to wait and see how the Commission will react to their concerns in any specific complaint proceeding.

Fair notice is fundamental principle of both administrative law and due process, but regulated parties no longer have any idea what the Commission's commercial reasonableness standard may require them to offer in any individual case, or which proffered rates and terms

⁹ See 47 C.F.R. § 0.331(a)(2).

¹⁰ *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995); *C.F. Communications Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997).

¹¹ *Keefe v. Library of Cong.*, 777 F.2d 1573, 1581 (D.C. Cir. 1985).

might subject them to enforcement actions.¹² For many of the same reasons, the Bureau's order eliminates any check on the Commission's discretion in complaint and enforcement proceedings. The Bureau's new standard is so vague and case-specific that the Commission could reach wildly contradictory outcomes in similar cases and still claim fidelity to the commercial reasonableness standard. As the Supreme Court has made clear, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them."¹³ The Bureau's ruling eliminates any such explicit standards, and therefore unlawfully invites arbitrary enforcement. The Commission should vacate the *Declaratory Ruling*.

I. THE BUREAU'S ORDER IS INCONSISTENT WITH THE *DATA ROAMING ORDER*.

The Commission can change its data roaming rules only through a new notice-and-comment rulemaking, not through a declaratory order, and the Bureau certainly has no power to make such changes on delegated authority. In the *Data Roaming Order*, the Commission indicated that the Enforcement Bureau would have "delegated authority to resolve complaints arising out of the data roaming rule," and that the Wireless Bureau would have a residual delegated authority to resolve "other disputes with respect to the data roaming rule."¹⁴ This delegation of authority to the Wireless Bureau, however, remains subject to the general limitations on delegated authority in the Commission's rules, which expressly deny the Bureau any authority to "act on any complaints, petitions or requests . . . [which] present new or novel

¹² See, e.g., *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) ("If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation").

¹³ *Grayned v. Rockford*, 408 U.S. 104, 108 (1972).

¹⁴ *Data Roaming Order* ¶ 82.

questions of law or policy which cannot be resolved under outstanding Commission precedents and guidelines.”¹⁵ The Bureau cannot make new policy; it can only apply the *Data Roaming Order* as written.

The Bureau’s *Declaratory Order* oversteps those boundaries. Each of the Bureau’s three rulings – with respect to “reference point” rates, the presumption of reasonableness, and the treatment of build-out – is flatly inconsistent the *Data Roaming Order*. Because the Bureau has no authority to change the Commission’s rules on delegated authority, the Commission should vacate the *Declaratory Ruling*. Moreover, even if the Bureau had the requisite delegated authority, rule changes could lawfully be implemented only through a notice and comment rulemaking proceeding.

Retail Rates. The Bureau’s principal ruling is that the Commission’s commercial reasonableness standard contemplates that complaining parties may “adduce evidence” in an enforcement dispute as to whether the proffered roaming rates are “substantially in excess” of “retail rates, international rates, MVNO/resale rates, as well as a comparison of proffered roaming rates to domestic roaming rates as charged by other providers.”¹⁶ This ruling is inconsistent with the *Data Roaming Order* and impermissibly modifies the Commission’s policy.

The Commission has consistently held for years that wholesale roaming rates *should* be substantially in excess of retail rates, to ensure that requesting providers do not use roaming as a substitute for building out their networks. Throughout the *Data Roaming Order*, the Commission expressed concern that mandating providers to offer data roaming created “the possibility that requesting providers will substitute roaming for investment in coverage and

¹⁵ 47 C.F.R. § 0.331(a)(2). The Bureau recognizes these limitations on its authority to interpret the *Data Roaming Order*, because it specifically cited this rule in the ordering clauses of the *Declaratory Ruling*. See *Declaratory Ruling* ¶ 32 (ordering clauses, citing Rule 0.331(a)(2)).

¹⁶ *Declaratory Ruling* ¶ 9; see *id.* ¶ 20 (referring to these rates as “the four reference points”).

accordingly under-invest in deploying new infrastructure.”¹⁷ The Commission required providers to offer roaming agreements only on the understanding that “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.”¹⁸ The Commission’s approach built on its previous finding that a voice roaming mandate would not discourage investment because “roaming rates [are] *much higher* than retail rates” – a finding that the Commission noted with approval in the *Data Roaming Order*.¹⁹

The Bureau never considers or even cites to these Commission holdings. Instead, in direct contravention of them, the Bureau now finds that retail (and other similar) rates could act as some sort of “reference point” for determining the commercial reasonableness of a proffered rate, although this is left to the complete discretion of the Commission on a case-by-case basis. It is impossible to square this purported “clarification” with the Commission’s express holding that it was relying on the “relatively high price” of roaming rates – *i.e.*, high relative to retail rates – to maintain incentives for broadband build-out. Rate comparisons that were previously deemed irrelevant now may or may not be irrelevant, and differentials that were previously deemed appropriate now may be fodder for a complaint. Or maybe not. The Bureau has thus effectively altered a central pillar of the Commission’s policy.

¹⁷ *Id.* ¶ 34; *see also id.* ¶ 21 n. 76 (recognizing also that “there are pro-competitive benefits that flow from providers differentiating themselves on the basis of coverage,” and thus host providers may have a disincentive to invest in their networks if other providers can “free-ride” on their investment via roaming”); *see also id.* ¶¶ 16-22, 33-34.

¹⁸ *Id.* ¶ 21 (quoting Order on Reconsideration and Second Further Notice of Proposed Rulemaking, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, 25 FCC Rcd. 4181, ¶ 32 (2010) (“*Voice Roaming Order on Reconsideration*”)); *see also id.* ¶ 51 (emphasizing that roaming will be offered at a “relatively high price” and that this high price should itself be sufficient to “counterbalance the incentive” to “rely[] on another provider’s network”).

¹⁹ *Voice Roaming Order on Reconsideration* ¶ 32 n.90 (emphasis added).

The Bureau's only attempt to anchor its clarification in the text of the *Data Roaming Order* is off the mark. It notes that the Commission, in its list of seventeen factors, included whether the parties have any roaming agreements with each other and what the terms of those agreements are.²⁰ The Bureau takes this factor as evidence that the Commission intended complaining parties to be able to offer evidence of other prices as “comparative reference points.”²¹ But the fact that the Commission encouraged a comparison of proffered rates to other *wholesale data roaming agreements* is very different from a comparison to the rates charged for services other than wholesale domestic roaming, such as retail mobile wireless service or wholesale MVNO services. The Commission pointedly did *not* include in its list of seventeen factors any suggestion that data roaming rates should be set by reference to retail rates, resale rates, international roaming rates or other domestic retail roaming rates.²² The Bureau's interpretation, by effectively adding retail and other similar rates to the seventeen-factor standard, and thereby suggesting that the Commission might key a determination of “commercially reasonable” roaming rates in some way to retail rates, materially changes – and indeed undermines – the Commission's policy.²³

Build-Out Factor. The Commission made clear in the *Data Roaming Order* that the extent and nature of the requesting provider's build-out would be a relevant factor in determining

²⁰ *Declaratory Ruling* ¶ 16.

²¹ *Id.*

²² *Data Roaming Order* ¶¶ 85-87.

²³ *Id.* ¶ 21 (rejecting rate benchmarks from outside the wholesale roaming context and “giv[ing] host providers appropriate discretion in the structure and level of . . . rates that they offer”); Report and Order and Further Notice of Proposed Rulemaking, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, 22 FCC Rcd. 15817, ¶ 37 (2007) (same for voice roaming).

whether a proffered agreement is commercially reasonable.²⁴ The Bureau now “clarifies” that the Commission’s “inclusion of this factor was not intended to allow a host provider to deny roaming, or to charge commercially unreasonable roaming rates, in a particular area simply because the otherwise built-out provider has not built out in that area.”²⁵ Although the Bureau’s statement is somewhat of a tautology – the Commission obviously did not intend to permit commercially unreasonable rates in any circumstance – the Bureau’s explanation is once again inconsistent with, and unlawfully modifies, the *Data Roaming Order*.

The Bureau’s order treats the notion that roaming allows a provider to offer coverage before it builds out as a “primary” benefit of roaming, and suggests that in some cases build out may be unrealistic or the provider may face “increased costs.”²⁶ The Bureau therefore suggests that the Commission may consider the *feasibility* of build out and the impact on roaming rates on a case-by-case basis under the totality of the circumstances approach.²⁷ The Bureau’s interpretation directly conflicts with the Commission’s consistent explanations throughout the *Data Roaming Order* that its rules are not be applied in ways that would encourage the use of roaming as resale.

Equally important, the Bureau is notably silent on *how* the Commission would consider the feasibility of build-out in any given area or what type of evidence it would require in any such inquiry. A company’s capital planning decisions are based on a wide variety of factors and reflect judgments about how best to deploy resources in the larger context of the company’s full range of business opportunities, and the Commission could not reasonably hope to assess the

²⁴ *Data Roaming Order* ¶¶ 22, 51, 86.

²⁵ *Declaratory Ruling* ¶ 28.

²⁶ *Id.* ¶¶ 28-29.

²⁷ *Id.*

feasibility of build-out within specific areas of a requesting provider's spectrum holdings without injecting itself into the internal capital planning processes of these companies and second-guessing their business decisions. Such an inquiry would be not only deeply inconsistent with a private carriage commercial reasonableness standard, which of necessity must give wide latitude to providers in negotiations, but also unfair to the parties, since two parties negotiating a data roaming agreement could not be expected to know or share the details of their capital planning processes.

Presumptions of Reasonableness. The Commission clearly stated that “[t]o 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 the seventeen factors) “whether the providers involved have had previous data roaming arrangements with similar terms.”²⁸ The Commission also 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.”²⁹ In other words, the *Data Roaming Order* establishes that existing agreements are presumptively reasonable, and that it is a requesting provider's burden in any complaint proceeding to show that the terms of existing agreements are unreasonable (or for some reason irrelevant). These principles reflect the fundamental concept of a private carriage, *commercial* reasonableness standard, in which any inquiry into whether a proffered rate is reasonable would start with what competitors in the

²⁸ *Data Roaming Order* ¶ 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 . . . [and] whether the parties have any roaming arrangements with each other, including roaming for interconnected services such as voice, and the terms of such arrangements.”).

²⁹ *Id.* ¶ 81.

marketplace have found to be reasonable in their existing contracts and which recognizes that providers should be given broad leeway in their negotiations.³⁰

The Bureau reads this presumption out of the *Data Roaming Order* by making the scope of the presumption exceedingly narrow. According to the Bureau, the presumption applies only “with respect to the terms of the existing agreement, and the parties that signed it.”³¹ In other words, the presumption applies only when a party that has signed an agreement later files a complaint alleging that the *existing* agreement is unreasonable. Under this ruling, even if two parties already have an existing data roaming agreement that neither party has challenged, the parties cannot assume that the terms of their own existing agreement are reasonable as they relate to rates and terms proffered in a subsequent negotiation between those two parties.

Nothing in the *Data Roaming Order* supports this limitation on the presumption of reasonableness. Indeed, the Bureau’s limitations on the scope of the presumption make no sense. If the presumption attaches when one of the parties to an agreement is attempting to challenge the terms of its own completed agreement, the presumption logically should attach all the more strongly to agreements that neither party has ever challenged. But under the Bureau’s interpretation, broadband providers may not assume that the prevailing terms of existing agreements are presumptively commercially reasonable, even though a party to one such agreement would face a presumption of reasonableness were it to challenge that agreement in a complaint case. Such an interpretation is not only illogical, but it is at odds with the core meaning of the “commercially reasonable” standard, the touchstone for which must be what

³⁰ See, e.g., *Cellco Partnership v. FCC*, 700 F.3d 534, 547-48 (D.C. Cir. 2012) (private carriage commercial reasonableness standard must leave “substantial room for individualized bargaining and discrimination in terms”).

³¹ *Declaratory Ruling* ¶ 25.

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.

The Bureau purports to explain its decision by claiming that attaching a presumption to existing agreements risks “perpetuating terms negotiated in prior years.”³² But the Commission did not establish an irrebutable presumption, and parties who believe that an existing agreement is no longer (or never was) commercially reasonable may present evidence to rebut the presumption attached to that agreement. Of course, at the end of the day, the Bureau’s *policy* objections to the presumption are irrelevant because it is not the Bureau’s prerogative to dispense with a presumption established by the Commission. T-Mobile could have raised its concerns in a petition for reconsideration, and the Commission is free to initiate a rulemaking on its own. Those are the appropriate processes for considering the arguments mustered by the Bureau, not a declaratory ruling on delegated authority. In short, the Bureau had no power to issue any of these three rulings, each of which seek to materially change the Commission’s commercial reasonableness standard.

Notice and Comment Rulemaking Requirement. It is well-settled that an agency must use the APA’s notice-and-comment procedures in order to change or eliminate existing rules.³³ 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.”³⁴ The D.C. Circuit has also warned that an agency “may not bypass [the APA’s

³² *Declaratory Ruling* ¶ 26.

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

³⁴ *Shalala*, 514 U.S. at 100 (internal quotation omitted); *see also United States Telecom Ass’n v. FCC*, 400 F.3d 29, 35 (D.C. Cir. 2005) (“fidelity to the rulemaking requirements of the APA bars courts from permitting agencies to avoid those requirements by calling a substantive regulatory change an interpretive rule”); *Central Texas Telephone Co-op, Inc. v. FCC*, 402 F.3d 205, 211

notice-and-comment procedures] by rewriting its rules under the rubric of ‘interpretation.’”³⁵ Accordingly, even if the full Commission wanted to change the commercial reasonableness standard in the fashion contemplated in the *Declaratory Ruling*, it could not do so through the mechanism of a declaratory ruling; it would have to initiate a new notice-and-comment rulemaking proceeding. Under those circumstances, the Wireless Bureau certainly cannot adopt such changes on *delegated* authority.³⁶

II. THE BUREAU’S ORDER RENDERS THE COMMISSION’S COMMERCIAL REASONABLENESS STANDARD UNLAWFULLY VAGUE UNDER THE APA AND THE DUE PROCESS CLAUSE.

Although the *Declaratory Ruling* claims to “lessen ambiguity” and to provide “additional guidance,”³⁷ the Bureau has in fact made the Commission’s commercial reasonableness standard so hopelessly vague and unpredictable that its ruling is unlawful for this reason as well. Indeed, after the Bureau’s ruling, there is no real standard at all: the “standard,” as articulated by the Bureau, is that the Commission will consider any conceivably relevant factor on a completely *ad hoc* case-by-case basis. The Bureau’s formulations are so open-ended that regulated parties attempting to negotiate roaming agreements now have no idea how the Commission might rule in any specific complaint or enforcement proceeding, and the Bureau has effectively claimed unfettered discretion to reach any outcome in any given enforcement case.

Both the APA and the Due Process Clause require the Commission to articulate an intelligible standard that gives parties adequate notice of what its rule prohibits and that places reasonable limits on the Commission’s discretion in enforcement cases. Indeed, courts have

(D.C. Cir. 2005) (when order “repudiates [and] is irreconcilable with” the regulation, it may be enacted, if at all, only through the APA’s notice and comment procedures (quotations omitted)).

³⁵ *C.F. Communications Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997).

³⁶ 47 C.F.R. § 0.331(a)-(b), (d).

³⁷ *Declaratory Ruling* ¶¶ 8, 10.

consistently held that a rule is unlawfully vague if it either “[fails to] give fair warning of the proscribed conduct” or constitutes “an unrestricted delegation of power that enables enforcement officials to act arbitrarily and with unchecked discretion.”³⁸ The Bureau’s *Declaratory Ruling* fails on both grounds.

A. The Declaratory Ruling Renders The Commercial Reasonableness Standard Hopelessly Vague And Unpredictable.

The *Data Roaming Order* provided a degree of guidance as to what the Commission would find to be a commercially reasonable offer in the context of individual disputes. To be sure, the commercial reasonableness standard, as articulated in the *Data Roaming Order*, was flexible, in that it identified a non-exhaustive list of seventeen factors that the Commission would consider potentially relevant in any given enforcement proceeding.³⁹ The Commission had to give the *proffering* provider such increased flexibility, however, because as the D.C. Circuit confirmed on appeal, the Communications Act mandates that broadband data providers be given significantly broader discretion in negotiations than they would have in a common carrier regime governed by the just and reasonable standard.⁴⁰

But the *Data Roaming Order* did not establish a completely open-ended inquiry. To the contrary, the *Data Roaming Order* set forth clear boundaries on the scope of what the commercial reasonableness standard would require a data provider to offer. For example, the Commission made clear that it expected wholesale data roaming rates to remain well above retail

³⁸ *Keefe*, 777 F.2d at 1581; *Washington Mobilization Committee v. Cullinane*, 566 F.2d 107, 117 (D.C. Cir. 1977).

³⁹ See *Data Roaming Order* ¶ 86.

⁴⁰ *Cellco*, 700 F.3d at 547-48 (upholding *Data Roaming Order* solely because the commercial reasonableness standard as articulated “differ[s] materially from the kind of requirements that necessarily amount to common carriage,” and specifically that the rules leave “substantial room for individualized bargaining and discrimination in terms”).

rates to maintain incentives for broadband deployment – which provided guidance to parties negotiating agreements that retail and other similar rates would not be the basis for a successful challenge to a wholesale roaming offer. Similarly, the Commission made clear that its commercial reasonableness standard was based first and foremost on what sophisticated parties had generally found to be reasonable in the competitive broadband data marketplace – again providing guidance to parties that the generally prevailing rates in unchallenged agreements are presumed reasonable and form the starting point for assessing whether any given wholesale offer is reasonable. And, the Commission expressly noted that the extent of the requesting provider’s build-out would be an important factor in assessing the reasonableness of an offer – reinforcing the Commission’s policy of maintaining incentives for broadband deployment and signaling to parties that they could incorporate this into their negotiations.

The Bureau’s order erases each of these boundaries – and in so doing, the Bureau has eliminated any reasonable or predictable limits on the commercial reasonableness standard.

Most prominently, the Bureau’s ruling departs from the *Data Roaming Order* by inviting requesting providers to bring complaints and “adduce evidence . . . as to whether proffered roaming rates are substantially in excess of retail rates, international rates, and MVNO/resale rates, as well as a comparison of proffered roaming rates to domestic roaming rates as charged by other providers.”⁴¹ But the Bureau repeatedly suggests that the “probative” value of these “four reference points” may vary wildly from case to case: “the probative value of these other rates as reference points will depend on the facts and circumstances of any particular case.”⁴² Indeed, under the Bureau’s standard, the Commission may adhere to the *Data Roaming Order*’s policy of looking principally to other wholesale roaming agreements in some cases, while it may

⁴¹ *Declaratory Ruling* ¶ 9.

⁴² *Id.*

suddenly find one or more of these “four reference points” to be “probative” in others: “[w]e do not expect that the these other rates will be probative factors in every case or that they will be relevant to the same degree.”⁴³ But how will regulated parties know whether the Commission will think these reference point rates are “probative” in any given case? The Bureau cannot say: the Commission will consider “arguments as to why certain other rates would be relevant as reference points” and “arguments as to why they would not be relevant, based on the facts and circumstances of a particular case.”⁴⁴

Rather than provide any meaningful guidance, the Bureau repeatedly tells parties attempting to negotiate agreements that they will simply have to wait and see how the Commission will react in any specific complaint proceeding. What if a proffered rate is consistent with the generally prevailing rates in the industry, even though those rates are well above any of the four reference point rates? The Bureau offers only that “consideration of whether there is a substantial difference between proffered roaming rates and [the four reference point rates], as well as a comparison of proffered rates and rates in other domestic roaming agreements, must be undertaken within the totality of the circumstances of a particular case,” which requires consideration of a “host of other factors” including the seventeen listed factors in the *Data Roaming Order* “as well as others.”⁴⁵ Would the Bureau’s new standard put “significant downward pressure on all roaming rates,” potentially disadvantaging “smaller service providers in their negotiations with larger service providers” (*Declaratory Ruling* ¶ 22)?

⁴³ *Id.* ¶ 17.

⁴⁴ *Id.* ¶ 17; *see also id.* ¶ 18 (“a broad range of information 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”); *id.* ¶ 19 (“[t]he degree of relevance of other rates will depend on the facts and circumstances of the individual case, including other terms and conditions of the proposal”).

⁴⁵ *Id.* ¶ 20.

The Bureau will say only that it is “providing guidance that . . . these other rates can be considered in any given case,” but “the degree of relevance will depend on the facts and circumstances of the specific case.”⁴⁶ Indeed, the Bureau repeatedly suggests that the fact the Commission has ruled one way in one case does not mean that it cannot reach the opposite result in favor of another provider in the next case, because each case is to be judged entirely on its own unique facts and circumstances.

The same vagueness applies to the presumption of reasonableness. The Bureau has abandoned the *Data Roaming Order*’s guidance that negotiating parties could work from a starting presumption that the rates in existing, unchallenged agreements are commercially reasonable. Having eliminated that guidepost, however, the Bureau has left negotiating parties with no bearings whatsoever in assessing what the Commission may determine to be a reasonable proffered rate. Negotiating parties can no longer presume that any commercially negotiated rate is commercially reasonable; indeed, the two parties cannot even presume that the rates they themselves negotiated in their existing agreement would be held reasonable if offered again. Instead, the parties know only that “the terms of prior agreements . . . may be relevant for determining the commercial reasonableness of terms in a subsequent negotiation, depending on the circumstances of the individual case.”⁴⁷

The Bureau’s ruling also eliminates any real guidance as to how the Commission will assess a requesting provider’s ability to build out its network. Although the *Data Roaming Order* provides that the requesting provider’s ability to build out its network in the areas covered by the roaming agreement would be considered a relevant factor in determining whether an offer is reasonable, the Bureau now suggests that it may selectively consider whether roaming should

⁴⁶ *Id.* ¶ 22.

⁴⁷ *Id.* ¶ 26.

be favored in a particular circumstance to allow the requesting provider to offer “a competitive level of local coverage during the early period of investment or build-out.”⁴⁸ But whether the Commission will favor one factor or the other will again be decided on a completely *ad hoc* basis: “the level of a requesting provider’s build-out is a factor in determining the reasonableness of 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.”⁴⁹

B. The Bureau’s Interpretation Denies Regulated Parties Fair Notice And Would Give The Commission Unfettered Discretion In Enforcement Cases.

The Bureau’s articulation of the commercial reasonableness standard is unlawfully vague because (1) regulated parties now have no fair notice as to what the standard prohibits and (2) the Commission would have unfettered discretion to reach any desired outcome in any given case.

Fair Notice. “Fair notice of the standards against which one is to be judged is a fundamental norm of administrative law.”⁵⁰ Indeed, “[w]hen an agency utterly fails to provide a standard for its decision, it runs afoul of more than one provision of the Administrative Procedure Act.”⁵¹ But such vagueness is also an unconstitutional denial of due process, because regulations “must be sufficiently specific to give regulated parties adequate notice of the conduct they require or prohibit.”⁵² An agency “has the responsibility to state with ascertainable certainty what is meant by the standards [it] has promulgated.”⁵³

⁴⁸ *Id.* ¶ 28.

⁴⁹ *Id.* ¶ 28.

⁵⁰ *Marrie v. SEC*, 374 F.3d 1196, 1206 (D.C. Cir. 2004).

⁵¹ *Checkosky v. SEC*, 139 F.3d 221, 226 (D.C. Cir. 1998).

⁵² *Freeman United Coal Mining Co. v. Fed. Mine Safety & Health Rev. Comm.*, 108 F.3d 358, 362 (D.C. Cir. 1997); *Gen. Elec.*, 53 F.3d at 1328-29.

⁵³ *Gates & Fox Co. v. Occupational Safety & Health Review Comm.*, 790 F.2d 154, 156 (D.C. Cir. 1986) (quoting *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976)).

Although the Bureau's order was purportedly for the purpose of "guidance" and increased clarity, the order in fact radically undermines the predictability of the Commission's standard. Although the *Data Roaming Order* sets forth a standard that looks to seventeen factors, those seventeen factors all point to the same lodestars – *i.e.*, that the Commission would look primarily to generally prevailing domestic roaming rates and terms in marketplace agreements and seek to maintain incentives for broadband investment. The Bureau's ruling undermines that predictability and has made it impossible for broadband providers to anticipate when a proffered agreement may subject them to enforcement. Under the *Declaratory Ruling*, the Commission may sometimes tilt toward prevailing roaming rates and broadband investment, but it may sometimes tilt in the complete opposite direction, toward retail rates and situational encouragement of roaming. But whether the Commission will tilt one way or the other is unknowable: the *Declaratory Ruling* provides no guidance or controlling principles as to how the Commission may assess these or other factors.

The *Declaratory Ruling*'s articulation of the standard is therefore unlawful. As the D.C. Circuit has explained, regulations must be sufficiently clear that, "by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform."⁵⁴ Under the Bureau's ruling, however, broadband data providers can no longer simply read the Commission's rules and orders and ascertain how the rules will be applied in any given enforcement proceeding.⁵⁵ Reviewing courts would not uphold any judgment

⁵⁴ See, e.g., *Gen. Elec.*, 53 F.3d at 1329.

⁵⁵ *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (regulation is impermissibly vague when parties have no notice of "what fact[s] must be proved" in an enforcement proceeding).

against a party under such a vague standard,⁵⁶ and the Commission should therefore vacate the Bureau's order.

Indeed, contrary to the ostensible purpose of the ruling, the vagueness of the Bureau's order will almost certainly impede the progress of negotiations and invite increased litigation. Requesting providers will inevitably interpret the vagueness of the order as creating the possibility – for the first time, and contrary to the *Data Roaming Order* – that the Commission might actually order a host provider to offer rates at levels near retail and far below what generally prevails today in the wholesale marketplace. The order therefore encourages requesting providers to hold out for unreasonably low wholesale roaming rates, and to bring complaints against host providers of all types (large and small), to test whether the Commission will apply this “declaratory order” in a manner that is at odds with the *Data Roaming Order*.

Arbitrary Enforcement. Regulations must provide clear guidelines not only to ensure that regulated parties know what is prohibited, but also to prevent arbitrary enforcement by the agency. “We insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly, . . . and if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.”⁵⁷

The *Declaratory Ruling* is unlawful on this ground as well. The Bureau's new articulation is so vague and case-specific that the Commission could reach any outcome in any case and still claim fidelity to the commercial reasonableness standard. Indeed, under the Bureau's formulation, there is essentially no standard at all but a completely open-ended case-by-case inquiry. For example, the Commission could find retail rates “probative” in one case by

⁵⁶ See, e.g., *Gen. Elec.*, 53 F.3d at 1329.

⁵⁷ *Grayned*, 408 U.S. at 108; see also *Gen. Elec.*, 53 F.3d at 1329; *Keefe*, 777 F.2d at 1581.

pointing to certain arbitrarily picked “facts” and “circumstances” asserted to be important to that particular case, but then find retail rates not to be “probative” in the next case due to certain other arbitrarily picked “facts” and “circumstances” there.

As the Supreme Court has explained, “precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.”⁵⁸ Because the Bureau’s “standard” is endlessly elastic and incorporates no intelligible principle guiding enforcement, there would never be any basis for claiming that the Commission had violated the standard – because the “standard,” as articulated by the Bureau, is that each case is to be treated as completely unique. Laws that “lack[] ... terms susceptible of objective measurement” necessarily lend themselves to “arbitrary and discriminatory enforcement” and are therefore both unlawful under the APA and unconstitutional.⁵⁹

⁵⁸ *Fox Television Stations*, 132 S. Ct. at 2317.

⁵⁹ *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1035 (D.C. Cir. 1980) (quotations omitted); *Grayned*, 408 U.S. at 108 (“if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them”).

CONCLUSION

For the foregoing reasons, the Commission should grant the Application for Review and vacate the *Declaratory Ruling*.

Respectfully Submitted,

/s/ Michael P. Goggin

Michael P. Goggin

Gary L. Phillips

Lori Fink

AT&T Services, Inc.

1120 20th Street, N.W.

Washington, D.C. 20036

(202) 457-3048

David L. Lawson
James P. Young
Christopher T. Shenk
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for AT&T

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