

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Reexamination of Roaming Obligations of
Commercial Mobile Radio Service Providers and
Other Providers of Mobile Data Services

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WT Docket No. 05-265

To: The Commission

VERIZON APPLICATION FOR REVIEW

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VERIZON¹ APPLICATION FOR REVIEW

SUMMARY

The Wireless Telecommunications Bureau’s *Declaratory Ruling*² unlawfully changed the Commission’s 2011 *Data Roaming Order*.³ That Commission *Order* adopted a process for adjudicating data roaming complaints that was built on the obligation of both parties to negotiate in good faith. It specified seventeen factors to be considered in determining the commercial reasonableness of offered rates and terms, but rejected requests to include non-roaming agreement rates as another factor. The Commission expressly determined that this approach would achieve the right balance between ensuring that carriers enter into data roaming arrangements and protecting their incentives to build out their networks, particularly in rural areas.

¹ In addition to Verizon Wireless, the Verizon companies participating in this filing are the regulated wholly-owned subsidiaries of Verizon Communications Inc.

² *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Declaratory Ruling, DA 14-1865 (WTB Dec. 18, 2014) (“*Declaratory Ruling*”).

³ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 26 FCC Rcd 5411 (2011).

The Bureau upended the Commission's *Data Roaming Order* and undercut that balance. It injected a carrier's retail and resale rates as new factors – even though the Commission previously declined to do so. Determinations of whether a carrier's offered roaming rate is commercially reasonable can now take into account the carrier's rates for retail and MVNO services, and compare those rates to the offered roaming rate – precisely the approach the Commission did not adopt. These changes were unlawful because modifications to the *Data Roaming Order* must be made through rulemaking – and must be made by the full Commission, not by the Bureau. They also undermine the Commission's policy decision to ensure that its roaming rules do not cause carriers to rely on roaming rather than to expand their coverage and invest in building out facilities. Specifically:

1. The Bureau violated the Administrative Procedure Act. The APA precludes an agency from changing existing law through a declaratory ruling, and requires instead notice and comment rulemaking. The Bureau made substantive changes to several aspects of the *Data Roaming Order* without the requisite rulemaking.

2. The changes to the *Data Roaming Order* must also be made by the full Commission – not by the Bureau. The Bureau has no authority to modify a Commission order or reconsider the policy basis for it. Whether to add new factors the Commission had previously rejected was undoubtedly an issue that the full Commission must resolve.

3. In addition to the legal flaws that require vacating the Bureau's ruling, the Commission should set it aside because it will undermine the Commission's policy objectives. Introducing carriers' MVNO and retail rates into complaint proceedings will lead to the very comparative rate analysis that the Commission rejected as incompatible with the commercially

reasonable standard it adopted. And it will discourage new facilities-based competition, particularly in rural areas.

4. Finally, the Commission should vacate the Bureau's ruling because it arbitrarily failed to address issues critical to a reasoned decision and created new controversies. For example, the Bureau failed to confront the fact that sharing wholesale rate information with the companies with whom the resellers directly compete will undermine rather than promote competition, and in the absence of regulatory compulsion would raise significant issues under the antitrust laws. Nor did the Bureau establish any mechanism to ameliorate the competitive harm, such as making the information available only for in camera review by Commission staff, rather than by sharing the information with direct competitors. Likewise, the Commission previously has recognized that individual terms cannot be plucked out of agreements unaccompanied by the other terms and conditions that were part of the overall bargain, or to simply transfer terms from one context to another. By failing to address the relevance of wholesale rates consistent with these and other limitations, the Bureau merely created new controversies rather than resolved one.

For each of these reasons, the *Declaratory Ruling* is in conflict with statute, regulation, case precedent and established Commission policy,⁴ and the Commission should vacate it.

I. THE BUREAU'S RULING BYPASSED THE RULEMAKING THAT WAS REQUIRED TO CHANGE THE DATA ROAMING ORDER.

The *Declaratory Ruling* substantively changes the data roaming rules, which cannot lawfully be accomplished in a declaratory ruling. Instead, the Administrative Procedure Act requires the Commission to proceed through a rulemaking. In addition, the Bureau lacks the

⁴ See 47 C.F.R. § 1.115(b)(2).

legal authority to take the actions it did in the *Declaratory Ruling*. The *Declaratory Ruling* is therefore *ultra vires* and must be vacated.

A. The *Declaratory Ruling* Unlawfully Changed the *Data Roaming Order* by Reversing Prior Commission Decisions Not to Link Roaming Rates to a Provider’s Wholesale and Retail Rates.

The *Declaratory Ruling* substantively modified the *Data Roaming Order* by reversing prior Commission decisions not to link roaming rates to a provider’s wholesale and retail rates. By deciding that the commercial reasonableness of a provider’s offered data roaming rate can be determined by considering among other factors that provider’s rates for other, non-roaming services, the *Declaratory Ruling* adopts pricing factors that the Commission declined to adopt both there and in its previous *Voice Roaming Order*.⁵

The Bureau’s argument that its “guidance” is consistent with the *Data Roaming Order* is incorrect.⁶ The Bureau relies on general statements it culled from the *Data Roaming Order* – namely, that the seventeen factors to consider in data roaming disputes are “not exclusive or exhaustive,” that “each case will be decided based on the totality of the circumstances,” and that “providers may argue that the Commission should consider other relevant factors” in determining commercial reasonableness of proffered terms and conditions, including the prices.⁷ But these general statements cannot be read as a delegation of authority to the Bureau to revisit the Commission’s decisions not to link voice and data roaming rates to wholesale and retail rates.

⁵ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd 15817 (2007) (“*Voice Roaming Order*”).

⁶ *Declaratory Ruling* at ¶¶ 14-15.

⁷ *Id.* ¶ 14 (quoting *Data Roaming Order*, 26 FCC Rcd at 5453 ¶ 87).

First, as Verizon explained in comments to the petition, the Commission rejected calls for rates tied to retail or resale rates in the voice context.⁸ Instead, it concluded that rate regulation could harm both consumers and investment:

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.... [R]ate 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.⁹

In the *Data Roaming Order*, the Commission found that the voice roaming factors were relevant for data roaming as well and concluded that they should be taken into account. At no point did it suggest (let alone state) that its rationale for rejecting the use of non-roaming rates did not extend to data roaming.¹⁰

Second, as in the voice roaming proceeding, several parties in the data roaming proceeding asked that the Commission link data roaming rates to rates for retail services.¹¹ But

⁸ 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 MVNOs).

⁹ *Voice Roaming Order*, 22 FCC Rcd. at 15832-33 ¶¶ 39-40.

¹⁰ See *Data Roaming Order*, 26 FCC Rcd. at 5452-53 ¶ 86.

¹¹ 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 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

the Commission did not include any price benchmarks in the list of factors for determining whether a roaming rate offered is commercially reasonable.¹² The Commission instead adopted the commercial reasonableness standard “rather than a more prescriptive regulation of rates requested by some commenters.”¹³ The Commission found that this approach – free from benchmarking rates – “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.’”¹⁴

The Bureau’s reliance on language in the *Data Roaming Order* suggesting that the factors enable consideration of “pricing” is also incorrect.¹⁵ The factors adopted by the Commission only reference the terms and conditions, including pricing, in relevant roaming agreements, and do not encompass retail or resale rates. Thus while the Commission authorized the Enforcement Bureau to consider the price terms in the parties’ other roaming agreements, it did not authorize it to consider the price terms in non-roaming agreements. Moreover, as discussed above, the language in the *Data Roaming Order* stating that other factors raised by complainants may be considered cannot be the basis for the Bureau to adopt factors that were previously considered but rejected by the Commission.

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).

¹² 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).

¹³ *Id.* at 5423 ¶ 21.

¹⁴ *Id.* (citation omitted).

¹⁵ *Declaratory Ruling* at ¶ 15.

B. Substantive Changes May Not Be Accomplished Through Declaratory Rulings.

As “substantive changes” to the *Data Roaming Order*, the changes wrought by the *Declaratory Ruling* cannot lawfully be accomplished in a declaratory ruling, but require a Commission-level notice-and-comment rulemaking proceeding.¹⁶ It is well-settled that an agency cannot change existing rules simply through interpretative guidance. To effect “a substantive change” in an existing regulation, the law requires the agency to proceed through a rulemaking under APA and not through declaratory ruling.¹⁷ New rules that work “substantive changes”¹⁸ or “major substantive legal additions”¹⁹ to prior regulations are subject to the APA’s rulemaking procedures.²⁰ As the D.C. Circuit explained: “when an agency changes the rules of the game ... more than a clarification has occurred.”²¹ Thus, “fidelity to the rulemaking requirements of the APA” prohibits agencies from using the declaratory ruling process to “avoid those requirements by calling a substantive regulatory change an interpretative rule.”²²

The Commission has repeatedly recognized that it must proceed through rulemaking to alter prior decisions, because “a declaratory ruling may not be used to substantively change a

¹⁶ See *U.S. Telecom Ass’n v. FCC*, 400 F.3d at 38.

¹⁷ *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 100-01 (1995) (internal quotation marks omitted); see 5 U.S.C. § 553.

¹⁸ *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003) (“*Sprint*”).

¹⁹ *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000).

²⁰ 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).

²¹ *Sprint*, 315 F.3d at 374; see also *SBC Inc. v. FCC*, 414 F.3d 486, 497-98 (3d Cir. 2005).

²² *United States Telecom Ass’n v. FCC*, 400 F.3d 29, 34-35 (D.C. Cir. 2005) (“*U.S. Telecom Ass’n*”); 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).

rule.”²³ As it explained in denying a petition for declaratory ruling filed by Sprint, “Sprint should have pursued the relief it seeks in a petition for reconsideration of the Report and Order or a petition for rulemaking.”²⁴

The fact that the Bureau put T-Mobile’s petition out for public comment did not obviate the need for the Commission to proceed through a rulemaking in this case. First, the notice was issued by the Bureau and was never published in the Federal Register, and thus the requisite legal notice was not made.²⁵ Second, the Bureau’s public notice contained no description of the substance of the issues to be considered. Parties were thus not lawfully “on notice” that the Commission was considering proposing, much less implementing, significant and substantive changes to the data roaming rules.²⁶ Because the Bureau issued the public notice, there was *no proposal* by the Commission at all, and the issues that the Commission planned to address were not “crystal clear.”²⁷ Under these facts, the Bureau’s process was legally insufficient and cannot be sustained.

C. The Bureau Lacked Authority to Issue the Declaratory Ruling.

In addition, the Bureau lacks the legal authority to issue the *Declaratory Ruling*. The Bureau does “not have the authority to act upon any complaints, petitions or requests . . . [that]

²³ *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).

²⁴ *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.

²⁵ 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*”).

²⁶ See *Sprint*, 315 F.3d at 376.

²⁷ *U.S. Telecom Ass’n v. FCC*, 400 F.3d at 38; see *City of Arlington v. FCC*, 668 F.3d 229, 244 (5th Cir. 2012), *aff’d*, 133 S.Ct. 1863 (2013).

present new or novel questions of law or policy which cannot be resolved under outstanding Commission precedent or guidelines.”²⁸ In other words, “a delegated authority decision cannot conflict or otherwise reverse the decision of the full Commission.”²⁹ As discussed above, however, this is precisely what the Bureau did – it substantively modified the Commission’s *Order*.

Moreover, there was no reason for the Bureau to act presumptively. In the three and a half years since the Commission adopted the *Data Roaming Order*, there has not been a single reported adjudication involving data roaming – let alone a decision finding a carrier’s offered roaming rate was unreasonable. The Bureau presented no data showing that urgent action was necessary, or why (if it believed T-Mobile’s petition had merit) the petition could not have been addressed through a Commission rulemaking. The lack of any factual predicate for the Bureau’s action underscores why its decision was *ultra vires*.

II. THE *DECLARATORY RULING* UNDERMINES THE COMMISSION’S POLICY GOALS.

A. Reliance on Individual Negotiations

The Commission specifically chose to rely on individualized negotiations – backed up by an enforceable obligation to negotiate in good faith – because it found this approach was most likely to ensure that carriers reach commercially reasonable roaming agreements. The Commission eschewed the “prescriptive regulation of rates requested by some commenters”³⁰ and instead gave “host providers appropriate discretion in the structure and level of such rates

²⁸ 47 C.F.R. § 0.331(a)(2), 0.331(d).

²⁹ *Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo, PC*, 17 FCC Rcd 16100, 16102 (WTB 2002) (citing 47 C.F.R. §§ 0.331(a)(2), 1.115(b)(2)(ii); *Advanced Communications Corp.*, 11 FCC Rcd 3399, 3407 n.31 (1995)).

³⁰ *Data Roaming Order*, 26 FCC Rcd at 5423 ¶ 21.

that they offer.”³¹ The Commission sought to avoid any hint that the data roaming framework would result in non-discrimination obligations or rate regulation.³² In fact it suggested that the only terms and conditions that would violate the commercially reasonable requirement were those that “unreasonably restrain[] trade.”³³ The D.C. Circuit agreed, finding that “[a]lthough the rule obligates Verizon to come to the table and offer a roaming agreement where technically feasible, the ‘commercially reasonable’ standard largely leaves the terms of that agreement up for negotiation.”³⁴

The Bureau’s ruling that a carrier’s non-roaming rates offered to end users and resellers may factor into determining whether its roaming rate is commercially reasonable conflicts with the Commission’s decision not to engage in rate comparisons because doing so would undermine the benefits of individualized negotiations. Armed with the Bureau’s ruling, carriers bringing complaints will seek to compare the data roaming rates they are offered with non-roaming rates, drawing the Commission into determining what rate differentials exist, by how much, and how those facts affect the determination of commercial reasonableness. But the Commission designed the complaint process precisely to avoid this focus on rates that it feared would stifle innovative approaches to data roaming arrangements.

The Bureau denies that adopting the new rate factors will have any significant effect on parties’ negotiating incentives. The Bureau asserts instead that retail and MVNO rates will be considered “under the totality of the circumstances,”³⁵ will not “be probative in every case,” and

³¹ *Id.*

³² *See id.* at 5444-46 ¶ 68.

³³ *Id.* at 5433 ¶ 44, 5452 ¶ 85.

³⁴ *Cellco*, 700 F.3d at 548.

³⁵ *Declaratory Ruling* ¶¶ 14-20.

will not “be relevant to the same degree,” but their relevance will vary depending on the “facts and circumstances of the individual case.”³⁶ If this is the case, then the Bureau’s action accomplishes little more than inviting additional dispute and litigation. Indeed, the Bureau itself acknowledges that “just as the Commission would consider a provider’s arguments as to why certain other rates would be relevant as reference points, it also would consider a party’s arguments as to why they would not be relevant, based on the facts and circumstances of a particular case.”³⁷ Regulatory processes that promote disputes and litigation necessarily, however, also create disincentives for parties to engage in productive give-and-take and should be avoided.³⁸

B. Promoting Pro-Competitive Network Investment and Buildout.

In adopting the *Data Roaming Order*, the Commission was particularly concerned with the effect a mandatory data roaming requirement would have on carrier decisions to invest in broadband network deployment.³⁹ The Commission therefore balanced encouraging carriers to negotiate data roaming arrangements with ensuring that data roaming would be priced at levels to preserve investment incentives. Specifically, the Commission preserved investment incentives by deciding not to adopt more specific rate regulation, and relied upon “the relatively high price of roaming compared to providing facilities-based service” to “counterbalance the incentive to ‘piggy-back’ on another carrier’s network.”⁴⁰

³⁶ *Id.*, ¶¶ 17, 19.

³⁷ *Id.*, ¶ 17.

³⁸ *See generally Pick-and-Choose Order*, 19 FCC Rcd 13528-29 ¶ 68.

³⁹ *Data Roaming Order*, 26 FCC Rcd at 5422-5424 ¶¶ 21-23.

⁴⁰ *Id.* at 5422-23 ¶ 21.

In opposing T-Mobile’s petition, Verizon argued that granting the petition would upset the balance struck by the Commission and diminish incentives to invest in broadband deployment.⁴¹ The Cellular One Carriers argued that “impairing the ability of the carriers that serve [remote] areas to negotiate fair rates, which consider the higher costs of building and operating in such areas, can only serve to negatively impact their ability to continue to do so.”⁴² Likewise, AT&T argued that adopting T-Mobile’s proposals would “undermine the rules by eliminating incentives for investment and encouraging the use of roaming as resale.”⁴³ It argued that T-Mobile in particular had not built out in many rural areas and that the petition was an effort by T-Mobile to rely on roaming rather than investing in broadband networks.⁴⁴

The *Declaratory Ruling* only discussed network build-out in the context of granting T-Mobile’s request to “clarify” the factor taking into account the extent and nature of providers’ build-out, by ruling that this factor was not intended to allow host providers to deny roaming or charge unreasonable rates.⁴⁵ There the Bureau dismissed AT&T’s concerns about how that factor was intended to apply, finding that in some areas it is uneconomical for multiple providers to build-out, and that some providers face higher costs to build-out higher spectrum frequencies.⁴⁶ The Bureau failed, however, to address the adverse effects that linking the price of data roaming arrangements to data pricing in retail, MNVO and international roaming rates

⁴¹ Comments of Verizon, WT Docket No. 05-265, at 10 (July 10, 2014) (“Verizon Comments”).

⁴² Reply Comments of Broadpoint, LLC, Central Louisiana Cellular, LLC, and Texas 10, LLC (collectively, “the Cellular One Carriers”), WT Docket No. 05-265, at 3 (August 20, 2014) (“Cellular One Reply Comments”).

⁴³ Opposition of AT&T, WT Docket No. 05-265, at 4-5 (July 10, 2014). AT&T argued further that T-Mobile has failed to build out much of its spectrum and uses roaming extensively throughout the Mid-West, Mountain, and certain Eastern portions of the U.S. *Id.* at 22-25.

⁴⁴ *Id.* at 21-25.

⁴⁵ *Declaratory Ruling*, ¶¶ 28-30.

⁴⁶ *Id.*, ¶ 29.

would have on investment in new facilities, despite information in the record pointing to those same harms. The Bureau’s failure to consider whether and what extent its ruling would diminish investment incentives requires that the *Declaratory Ruling* be vacated.

III. THE DECLARATORY RULING ARBITRARILY FAILS TO ADDRESS THE PROPER RELEVANCE OF NON-ROAMING RATES IN COMPLAINT PROCEEDINGS.

The *Declaratory Ruling* arbitrarily failed to address the implications of requiring companies to share non-roaming rate information with companies with whom they directly compete. As a result, the Bureau did not resolve controversies but created additional ones.

The Commission has repeatedly acknowledged that preventing competitors from ascertaining one another’s pricing and service strategies discourages anti-competitive conduct such as price coordination.⁴⁷ For example, the Commission held that requiring non-dominant carriers to file tariffs impeded and removed incentives for competitive price discounting and presented an “opportunity for collusive pricing by competing carriers because carriers can ascertain their competitors’ existing rates and keep track of any changes”⁴⁸ The Commission concluded that mandatory detariffing would discourage such tacit price coordination “by eliminating carriers’ ability to ascertain their competitors’ interstate rates and service offerings”⁴⁹

Consistent with these Commission decisions, carriers should not be required to disclose these agreements in data roaming complaint proceedings. Instead, complainants should be limited to having access to redacted, anonymized data such as rates and the relevant terms and

⁴⁷ *Policies and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of 254(g) of the Communications Act of 1934, as amended*, 11 FCC Rcd 7141, 7183 (1996).

⁴⁸ *Id.* at 7160 (citing *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Sixth Report and Order, 99 FCC 2d 1020, 1030 (1985)).

⁴⁹ 11 FCC Rcd at 7183-84.

conditions of service. Providing information on a redacted, anonymized basis represents a balance between “the interests in disclosure and the interests in preserving the confidentiality of competitively sensitive materials.”⁵⁰

The *Declaratory Ruling* also arbitrarily failed to explain what it meant in stating that retail and MVNO rates will be considered only “under the totality of the circumstances,”⁵¹ which will generate additional uncertainty and controversy. The Commission has long recognized that a particular rate in an agreement does not exist in a vacuum, but is integrally tied to the other terms and conditions of that agreement. For that reason, the relevance of a particular rate must take into account the nature of the service and the contractual trade-offs that underlie and justify that rate. For example, the Commission recognized ten years ago in revising its rules for inter-carrier interconnection negotiations that individual price terms or other terms cannot be taken out of agreements, unaccompanied by the other terms and conditions that were part of the overall negotiated agreement. In its initial implementation of section 252(i) of the Communications Act,⁵² the Commission had allowed requesting carriers to “pick and choose” isolated provisions from another carrier’s agreement without having to accept all of the terms and conditions of the agreement.⁵³ The Commission ultimately replaced the “pick and choose” rule with an all-or-nothing alternative, finding that the pick and choose rule had “impeded productive give-and-take

⁵⁰ *Confidential Information Policy*, 13 FCC Rcd. at 24823-24; *Bell Telephone Operating Cos. Request for Confidential Treatment*, 10 FCC Rcd. 11541, 11542 (1995) (“[R]elease of commercial and financial information of only a summary nature does not present the concerns about competitive harm that normally lead us to withhold ... information from public disclosure.”).

⁵¹ *Declaratory Ruling*, ¶ 14.

⁵² 47 U.S.C. § 252(i) (requiring incumbent local exchange carriers to “make available any interconnection, service, or network element provided” under an agreement with one of its competitors “to any other requesting telecommunications carrier upon the same terms and conditions. . . .”).

⁵³ See generally *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 13494 (2004) (“*Pick-and-Choose Order*”).

negotiations”⁵⁴ and interconnection negotiations had produced “largely standardized agreements with little creative bargaining to meet the needs of both” parties.⁵⁵

As Verizon and other parties made clear in their comments, rates for these disparate services do not lend themselves to “apples-to-apples” comparisons. When carriers price services to a customer, whether a retail customer, reseller or roaming partner, the pricing is based on the revenues expected to be generated by the entire bundle of services. The service bundle sold typically includes separate rate elements for access, data (and possibly different prices depending on the different data networks – 1x, EVDO, LTE – used), voice, SMS, and toll. The prices for each rate element will vary depending on the customer preferences and expected usage patterns. One customer may have a relatively low data rate, but higher access, voice, or SMS prices. For another customer, the data rate may be relatively higher, but other elements could be priced lower. Moreover, the data price may change as different volume tiers are reached. In such agreements, determining the effective price necessarily includes determining the volume of data used and the price that applies to each volume tier.⁵⁶

In addition, the pricing for different categories of customers can be significantly different. For example, roaming partners do not typically pay access charges. Rather, the revenue from a roaming agreement is derived from voice, toll, data and other applicable charges. Retail and resale customers, however, are typically assessed a per-subscriber access charge. Because some revenue is derived from the access charge, the prices for the other elements in a retail or resale

⁵⁴ *Id.* at 13504.

⁵⁵ *Id.* at 13501-02.

⁵⁶ Verizon Comments at 13-14. *See also* Cellular One Reply Comments at 2-3 (“Wholesale rates are not set based on the same factors as retail, MVNO, and foreign carrier rates, and at times are very different for valid economic reasons, in the absence of which small businesses operating in rural areas could not maintain solid business plans.”).

service bundle might be lower than in a roaming bundle. Resale pricing often includes significant volume commitments and/or requirements to grow the volume annually. While some roaming agreements may include volume commitments, they typically do not include requirements to continue to grow the volume.⁵⁷

The *Declaratory Ruling* failed to consider that the prices, terms and other conditions in an intercarrier agreement – whether a retail, resale or roaming agreement – are all interdependent, and cannot be severed from one another without undercutting the negotiation process. Nor did it establish any mechanism to blunt the competitive harms that such disclosure would cause, such as requiring such information be available only for Commission staff’s *in camera* review. In failing to address the harms of a pick and choose approach by, for example, making clear that any party relying on MVNO or retail rates as evidence of commercial unreasonableness must also account for other terms and conditions in the agreement, the Bureau created new controversies rather than resolving existing ones.

⁵⁷ Verizon Comments at 14.

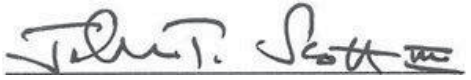
IV. CONCLUSION

For the reasons set forth herein, the Commission should vacate the *Declaratory Ruling*.

Respectfully submitted,

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Dated: January 20, 2015

Certificate of Service

I hereby certify that on this 20th day of January copies of the foregoing “Verizon Application for Review” in WT Docket 05-265 were sent by US Mail to the following parties:

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