

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Reexamination of Roaming Obligations of) WT Docket No. 05-265
Commercial Mobile Radio Service Providers)
and Other Providers of Mobile Data Services)

OPPOSITION OF THE BLOOSTON RURAL CARRIERS

The law firm of Blooston Mordkofsky Dickens Duffy & Prendergast, LLP (“Blooston”), on behalf of its rural wireless carrier clients (the “Blooston Rural Carriers”), respectfully submits its Opposition to Applications for Review filed by AT&T Services, Inc. (“AT&T”) on behalf of its operating subsidiaries and by Verizon Wireless and the regulated wholly-owned subsidiaries of Verizon Communications Inc. (“Verizon”), in the above-captioned proceeding.¹ These Applications for Review seek to overturn the Wireless Telecommunications Bureau’s (the “Bureau’s”) Declaratory Ruling issued on December 18, 2014.²

I. The Bureau’s Declaratory Ruling is Consistent with the *Data Roaming Order*

AT&T and Verizon each make procedural challenges to the *Declaratory Ruling* as being both outside the scope of the Bureau’s authority and inconsistent with the Commission’s mandates in the *Data Roaming Order*. However, these arguments must be rejected because they are based on a self-serving mischaracterization of the Declaratory Ruling. The Commission should therefore deny the Applications for Review.

¹ See AT&T Application for Review, WT Docket No. 05-265, dated January 16, 2015 (“*AT&T Application for Review*”), and Verizon Application for Review, WT Docket No. 05-265, filed January 20, 2015 (“*Verizon Application for Review*”).

² 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*”).

a. The Bureau Had Clear Authority to Issue Clarification in the Form of a Declaratory Order

In its Application for Review, AT&T argues that the Declaratory Ruling is procedurally defective because the Commission can change its data roaming rules “only through a new notice-and-comment rulemaking, not a declaratory order, and the Bureau certainly has no power to make such changes on delegated authority.”³ Verizon raises the very same argument when it says that the *Declaratory Ruling* is *ultra vires* and must be vacated.⁴ These arguments incorrectly label the Declaratory Ruling as a “rule change” and ignore the reality that the *Declaratory Ruling* is entirely within the scope of the existing rule. The adopted benchmarks provide the industry with guidance on how to evaluate data roaming agreements under the “commercial reasonableness” standard that the Commission previously established in Section 20.12(e) of the Rules. This is a meaningful clarification that should help carriers to negotiate individually tailored data roaming agreements on commercially reasonable terms and conditions. It most certainly is not a substantive change in the Commission’s Rules.

The Commission used clear and unambiguous language in its *Data Roaming Order*⁵ when it delegated authority for the Bureau to resolve complaints arising out of the data roaming rule. In order to address disputes, it provided that that parties could file either a complaint under Section 20.12(e) or a petition for declaratory ruling under Section 1.2 of the Rules, depending on the circumstances of the case.⁶ To now argue that the Bureau lacked authority to issue such a ruling ignores this plain language. If the Commission did not intend for the Bureau to have

³ *AT&T Application for Review* at p. 5.

⁴ *Verizon Application for Review* at p. 4.

⁵ Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, WT Docket No. 05-265, *Second Report and Order*, 26 FCC Rcd 5411 (2011) (“*Data Roaming Order*”) *aff’d sub nom. Celco Partnership v. FCC*, 799 F.3d 534 (DC Cir. 2012).

⁶ *Data Roaming Order* at para. 82.

authority to issue rulings based on the data roaming rule or interpretations/clarifications of the rule, it would not have used such sweeping language in granting this authority. If it intended there to be any limitations in the Bureau's issuance of declaratory guidance, it would have mentioned those limitations here.

Instead, the record in the Commission's Data Roaming proceeding (WT Docket No. 05-265) and related judicial rulings show that the FCC had ample authority to adopt a rule requiring mobile data providers to offer roaming agreements to other such providers on commercially reasonable terms and conditions. In this regard, the United States Court of Appeals for the District of Columbia Circuit in 2012 upheld Commission's *Data Roaming Order* in the face of challenges from Verizon and others that the Commission lacked statutory authority to adopt its data roaming rule, and that the rule unlawfully treats mobile internet providers as common carriers.⁷ The court therein found that Title III of the Communications Act "plainly empowers the Commission to promulgate the data roaming rule,"⁸ and it deferred to the Commission's determination that the rule imposes no common carrier obligations on providers of mobile data services.⁹ Delegating authority for the Wireless Bureau to "flesh out" the details of what is commercially reasonable in this context was and is entirely appropriate, and fits squarely within the Commission's delegation of authority for the Wireless Bureau to resolve "other disputes with respect to the data roaming rule" found at Paragraph 82 of the Data Roaming Order. Declaratory rulings are issued in the context of a non-complaint proceeding; and providing guidance on how to evaluate data roaming agreements under the commercial reasonableness standard will lessen

⁷ See *Cellco Partnership v. FCC*, 700 F.3d 534 (DC Cir. 2012).

⁸ *Id.* at 537.

⁹ *Id.*

ambiguity in the Commission's later individualized interpretations of that Order, and is appropriately taken up by the Bureau in a declaratory ruling.

Then FCC Chairman William E. Kennard phrased it best when he said:

“Delegated authority permits the Bureaus to clarify and implement the policies and rules adopted by the full Commission, thus greatly expediting the resolution of the countless disputes and inquiries that are presented to us. Pre-clearance by the full Commission of Bureau-level items would undermine the very efficiency that delegated authority is designed to promote, and would interfere with my statutory obligation "to promote the prompt and efficient disposition of all matters within the jurisdiction of the Commission.” (*citing* 47 U.S.C. § 155(a)).¹⁰

In this case, the Wireless Bureau issued its *Declaratory Ruling* to clarify and implement the commercial reasonableness standard that was adopted by the full Commission, lessening ambiguity in the standard and totality of circumstances approach for resolving disputes.¹¹ As such, it was appropriately addressed as a Bureau-level item rather than a matter requiring approval by the full Commission. To the extent that there is any uncertainty about the Bureau's delegated authority, and the Blooston Rural Carriers believe there is none, the full Commission can remove this uncertainty by simply ratifying the *Declaratory Ruling*.

b. The Bureau's Declaratory Ruling is Consistent with the Commission's Policy Mandates in the Data Roaming Order

Verizon further challenges the *Declaratory Ruling* as undermining the Commission's policy goals set forth in the *Data Roaming Order*. In this regard, Verizon suggests that the *Declaratory Ruling* somehow strips away the ability for carriers to negotiate individualized data roaming agreements, with differing terms and conditions.¹² Verizon also argues that the Bureau

¹⁰ *In the Matter of Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, 14 FCC Rcd 6033, 6051 (FCC 1999) (Separate Statement of Chairman William E. Kennard).

¹¹ *Declaratory Ruling* at para. 22.

¹² *Verizon Application for Review* at pps. 9-11.

failed to address potential adverse effects of its *Declaratory Ruling* on incentives to invest in broadband deployment.¹³ Both of these arguments miss the mark. The Commission was careful to preserve the ability for service providers to negotiate individualized terms and conditions, including prices, depending on the circumstances of each case.¹⁴ Likewise, in clarifying that host providers should not be permitted to deny roaming or to charge commercially unreasonable rates for roaming in areas where an otherwise built-out carrier lacks coverage, the Commission did not foreclose the ability for service providers to consider the extent and nature a requesting carrier’s individualized network buildout. As a result, and for other reasons discussed below, the Bureau’s *Declaratory Ruling* is entirely consistent with the policy mandates in the *Data Roaming Order* and the Applications for Review should be dismissed.

In its Application for Review, Verizon argues that the adoption of new rate factors would undermine the benefits of individualized data roaming negotiations.¹⁵ It even implies that the *Declaratory Ruling* crosses over the line into the territory of prescriptive rate regulation.¹⁶ In reality however, nothing could be further from the truth. The *Declaratory Ruling* contemplates use of data roaming rates in other contexts only as “comparative reference points,”¹⁷ and a determination whether proffered roaming rates are substantially in excess of retail rates, international rates, and MVNO/resale rates is consistent with a “totality of the circumstances” analysis established by the Commission.¹⁸ Indeed, without knowledge of or ability to consider these rates, evaluating the commercial reasonableness of any individual data roaming agreement

¹³ *Id* at pps. 11-13.

¹⁴ *See Declaratory Ruling* at para. 22 (“This approach, therefore, will continue to allow host providers substantial room for individualized bargaining.”).

¹⁵ *Verizon Application for Review* at pps. 9-11.

¹⁶ *Id.*

¹⁷ *See Declaratory Ruling* at para. 16.

¹⁸ *Data Roaming Order* at para.42.

(the terms and conditions of which necessarily include price terms) would be an exercise at pulling numbers out of a hat, rather than with a wider understanding and appreciation of trends in the rapidly evolving wireless industry. And evaluating whether data roaming rates are “substantially in excess” of these reference points in any given case, to the extent that these rates are even relevant, does not have the effect of setting any ceiling or cap on prices. To the extent that such rates are introduced into evidence in an individual dispute proceeding, serving carriers would be free to explain why particular rates are or are not relevant.¹⁹

In terms of preserving incentives for network buildout, the Commission has previously recognized that providers with local or regional service areas, like the Blooston Rural Carriers and many other participants in this proceeding, require roaming agreements so they are able to offer nationwide coverage.²⁰ It also found that the availability of data roaming on commercially reasonable terms and conditions will help ensure the viability of new wireless data network deployments and thus promote investment in and development of competitive facilities-based services.²¹ Rather than specifying how the availability of data roaming might promote or impede network buildout in rural areas, the Bureau rightfully concluded that “[t]he Commission will consider such build-out concerns on a case-by-case basis under the totality of the circumstances approach and it will apply this factor to both larger and smaller providers.”²² The potential adverse impact of data roaming on any given rural, regional or competitive carrier and their incentives to network buildout will necessarily vary. For the smallest carriers, the availability of

¹⁹ *Declaratory Ruling* at para. 15. (“Thus, in applying the terms of the Data Roaming Order to disputes involving price, parties would be free to argue that other price-related facts (including, as specifically noted below, prices charged in other contexts) are relevant factors that the Commission should consider in assessing the commercial reasonableness of the price at issue.”)

²⁰ *Data Roaming Order* at Para. 15 (Cite p. 5419)

²¹ *Id.* at Para 16 (Cite pp. 5419-20).

²² *Declaratory Ruling* at para. 29.

data roaming in the service provider's home market may be a necessity in order to allow them to offer a competitive service – and to extend services to unserved or underserved communities - at the earliest stages of network buildout. Thus, it would not have been appropriate for the Bureau to specify exactly how it would weigh this factor in any given case in the context of its *Declaratory Ruling*.

CONCLUSION

The Blooston Rural Carriers respectfully urge the Commission to uphold the Bureau's *Declaratory Ruling* in all respects. The ruling provides meaningful clarification of the *Data Roaming Order* and important relief to rural, regional and competitive carriers and will ensure that their customers have access to data roaming services when they are traveling outside of their home provider's existing service area.

Respectfully submitted,

THE BLOOSTON RURAL CARRIERS



By: _____

John A. Prendergast
D. Cary Mitchell
Blooston, Mordkofsky, Dickens,
Duffy & Prendergast, LLP
2120 L Street, NW, Suite 300
Washington, DC 20037
Phone: (202) 659-0830

Their Counsel

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