

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 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 T-MOBILE USA, INC.  
TO APPLICATIONS FOR REVIEW**

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## INTRODUCTION AND SUMMARY

The Applications for Review filed by AT&T and Verizon are nothing more than untimely renewed attempts to overturn the Commission's *Data Roaming Order* previously affirmed by the D.C. Circuit. Indeed, AT&T and Verizon challenge features of the Commission's data roaming regime that were specifically endorsed by the D.C. Circuit in upholding the *Order*. Their challenge to the Wireless Telecommunications Bureau's grant of T-Mobile's Petition for Declaratory Ruling simply questions – again – the underpinnings of the *Data Roaming Order*. The Applications, therefore, must be denied.

In its Petition, T-Mobile asked the Commission to clarify the guidance it provided in the *Data Roaming Order* regarding the commercial reasonableness standard and described marketplace conditions requiring this additional guidance. Almost all other carriers were in broad agreement that clarification was needed to enable wireless carriers to negotiate commercially reasonable data roaming rates, terms, and conditions critical to competition. They described a roaming marketplace where “must have” carriers such as AT&T and Verizon can unilaterally establish anti-competitive and unreasonable rates and terms, to the detriment of their competitors and consumers. AT&T and Verizon, on the other hand, predictably argued against the clarifications and requested that the Commission maintain the *status quo*. The Bureau correctly agreed with T-Mobile and the industry at large that additional clarification was appropriate and necessary. The *Declaratory Ruling*, in turn, provided additional guidance regarding the factors that may be relevant in determining commercial reasonableness, and clarified the impact of a requesting carrier's build-out on negotiations and the relevance of past agreements in determining the commercial reasonableness of future agreements.

AT&T and Verizon do not even address – let alone contest – the underlying premise of T-Mobile’s request: that the roaming marketplace is broken and that additional guidance was needed. Instead, they complain that the Bureau’s action violated the APA. However, the Bureau merely provided guidance to support what the Commission had already done in the *Data Roaming Order* – something that it is clearly permitted to do under the APA. As a result, AT&T’s and Verizon’s filings are nothing more than untimely objections to the *Data Roaming Order* itself, and not to the *Declaratory Ruling*, which imposes no new obligations on them whatsoever.

AT&T’s Application is also largely based on a wishful, but incorrect, interpretation of the *Data Roaming Order* – that the Commission has somehow granted AT&T the right to maintain in perpetuity the anti-competitively high data roaming rates that it was able to force its roaming partners to accept prior to the adoption of the *Data Roaming Order*, no matter what changes may occur in the marketplace in later years. AT&T argues that any rate that it might offer for data roaming in any future negotiation must be *per se* reasonable if that rate is at or below its 2011 rates. AT&T’s argument has no basis in the *Data Roaming Order* and represents a threat to the continued development of a competitive data roaming market; for these reasons, it was properly rejected by the Bureau in the *Declaratory Ruling*, which clarified that applying the presumption of reasonableness of existing agreements to subsequent negotiations would not be consistent with the overall purpose of the data roaming rule because it could have the effect of perpetuating terms which may no longer reflect current marketplace conditions.

AT&T and Verizon also ask the Commission to knit together from prior Commission orders a blanket prohibition against consideration of relevant market factors such as data roaming rates offered by other carriers; pricing of the same data units to other customers; and the

effect of inflated data roaming rates on retail prices paid by consumers. Contrary to their claims, the Commission has never enacted any such prohibition, and the Bureau in the *Declaratory Ruling* agreed that such factors are probative with regard to assessing commercial reasonableness, based on the totality of the circumstances.

AT&T and Verizon also strangely suggest that the Commission has an over-arching policy that roaming is to be discouraged through the imposition of inflated roaming rates that they believe are needed to encourage build-out. But AT&T and Verizon ignore the fact that their regulatory obligation to provide data roaming on commercially reasonable terms is unaffected by requesting carriers' build-out status. And a requesting carrier's build-out status is only one factor among many for judging the commercial reasonableness of a proffered roaming arrangement.

Finally, AT&T and Verizon argue that the *Declaratory Ruling* creates new obligations that are somehow vague or ambiguous for purposes of negotiating commercially reasonable agreements. However, it was precisely the employment of a case-by-case, totality-of-the-circumstances approach that the D.C. Circuit found critical when it affirmed the Commission's actions, and the *Declaratory Ruling* is consistent with that approach.

In sum, AT&T and Verizon are not simply challenging the *Declaratory Ruling*; they are again challenging the regulatory regime adopted by the Commission in the *Data Roaming Order* and upheld by the D.C. Circuit. The D.C. Circuit has already resolved this challenge. The Applications should therefore be rejected.

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**OPPOSITION OF T-MOBILE USA, INC. TO APPLICATIONS FOR REVIEW**

T-Mobile USA, Inc. (“T-Mobile”)<sup>1/</sup> submits this Opposition to the Applications for Review filed by AT&T Services, Inc. (“AT&T”)<sup>2/</sup> and Verizon<sup>3/</sup> of the *Declaratory Ruling* adopted by the Wireless Telecommunications Bureau (“Bureau”)<sup>4/</sup> providing guidance on, and clarification of, the FCC’s data roaming rules.<sup>5/</sup>

**I. THE DECLARATORY RULING IS ENTIRELY CONSISTENT WITH THE DATA ROAMING ORDER AND DID NOT REQUIRE A NEW RULEMAKING.**

AT&T and Verizon both argue that the *Declaratory Ruling* violates the Administrative Procedure Act (“APA”) because the Bureau’s action required a full notice-and-comment

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<sup>1/</sup> T-Mobile USA, Inc. is a wholly-owned subsidiary of T-Mobile US, Inc., a publicly traded company.

<sup>2/</sup> See Application for Review of AT&T, WT Docket No. 05-265 (filed Jan. 16, 2015) (“AT&T AFR”).

<sup>3/</sup> See Verizon Application for Review, WT Docket No. 05-265 (filed Jan. 20, 2015) (“Verizon AFR,” and together with the AT&T AFR, the “Applications”).

<sup>4/</sup> See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Declaratory Ruling, DA 14-1865, WT Docket No. 05-265 (rel. Dec. 18, 2014) (“*Declaratory Ruling*”); see also *Wireless Telecommunications Bureau Establishes Filing Deadline for Oppositions to Applications for Review and Replies in Data Roaming Proceeding*, Public Notice, DA 15-122, WT Docket No. 05-265 (rel. Jan. 28, 2015) (consolidating filing deadlines).

<sup>5/</sup> See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, 26 FCC Rcd. 5411 (2011) (“*Data Roaming Order*”), *aff’d sub nom. Cellco P’ship v. FCC*, 700 F.3d 534 (D.C. Cir. 2012).

rulemaking proceeding.<sup>6/</sup> They also allege that the Bureau did not have the power to issue the *Declaratory Ruling* on delegated authority.<sup>7/</sup>

The *Declaratory Ruling* did not make any substantive changes to the data roaming rules. As a result, no rulemaking was required and a Bureau-level decision was entirely appropriate.<sup>8/</sup> It is well-established law that a rulemaking is required only when an agency promulgates, modifies, or revokes a substantive rule; general rulemaking requirements do not apply to “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”<sup>9/</sup>

Although not separately defined by the APA, a “general statement of policy” has been defined by the Department of Justice as a statement “issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.”<sup>10/</sup> In other words, a “general statement of policy” is an announcement to the public of a policy that

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<sup>6/</sup> AT&T AFR at 12-13; Verizon AFR at 7-9.

<sup>7/</sup> AT&T AFR at 5-6; Verizon AFR at 8-9.

<sup>8/</sup> For the Applications to be granted, Verizon and AT&T would be required to demonstrate that the *Declaratory Ruling* conflicts with statute, regulation, case precedent, or established Commission policy, or involves a question of law or policy that has not previously been resolved by the Commission, which it does not. See 47 C.F.R. § 1.1115(b)(2)(i)-(ii); see also Verizon AFR at 3. Neither AT&T nor Verizon seeks review under any of the Commission’s other factors – *i.e.*, by expressly alleging that the *Data Roaming Order* should be overturned, that there was an erroneous finding of fact, or that there was prejudicial error. See 47 C.F.R. § 1.1115(b)(2)(iii)-(v). Moreover, contrary to the FCC’s rules, AT&T does not “specify with particularity, from among the [options listed in Section 1.1115(b)(2)(i)-(v)], the factor(s) which warrant Commission consideration of the questions presented.” 47 C.F.R. § 1.1115(b)(2). AT&T instead merely references Section 1.1115 generally in seeking review of the *Declaratory Ruling*.

<sup>9/</sup> 5 U.S.C. § 553(b)(A); see also *Pac. Gas and Elec. Co. v. Fed. Power Comm’n*, 506 F.2d 33, 37 (D.C. Cir. 1974).

<sup>10/</sup> U.S. DEPARTMENT OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947). The D.C. Circuit “has afforded this definition considerable weight because of the very active role that the Attorney General played in the formulation an enactment of the APA.” *Davis Walker Corp. v. Blumenthal*, 460 F. Supp. 283, 294 (D.D.C. 1978) (quoting *Pac. Gas and Elec. Co.*, 506 F.2d at 38, n.17) (internal quotations omitted).

the agency intends to follow in future adjudications<sup>11/</sup> and which leaves the agency “free to exercise its discretion to follow or not to follow that general policy in an individual case.”<sup>12/</sup> A substantive rule, on the other hand, establishes a binding norm that grants rights or imposes obligations and leaves no room for agency discretion.<sup>13/</sup> As demonstrated below, the Bureau’s action has none of the hallmarks of a substantive rule change.

**A. The Declaratory Ruling Adopts No New Rules.**

The *Declaratory Ruling* adopts no new rules and is fully consistent with the discretionary features of the *Data Roaming Order* endorsed by the D.C. Circuit in upholding the data roaming rules.<sup>14/</sup> Further, the 17 factors for assessing commercial reasonableness noted in the *Data Roaming Order* are not part of the FCC’s rules.<sup>15/</sup> So, any Bureau action that affects those non-rule factors cannot be rule changes. Moreover, as AT&T admits, the *Data Roaming Order*

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<sup>11/</sup> *Pac. Gas and Elec. Co.*, 506 F.2d at 38.

<sup>12/</sup> *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983), *cert. denied*, 466 U.S. 927 (1984).

<sup>13/</sup> *See, e.g., Ctr. for Auto Safety & Pub. Citizen, Inc. v. Nat’l Highway Traffic Safety Admin.*, 452 F.3d 798, 806-807 (D.C. Cir. 2006) (stating that an inquiry into whether an agency issued a binding norm or a statement of policy “considers the effects of an agency’s action, inquiring whether the agency has (1) impose[d] any rights and obligations, or (2) genuinely [left] the agency and its decisionmakers free to exercise discretion” (internal quotations omitted)). In addition to considering whether an agency action is binding or, alternatively, leaves the agency free to exercise discretion, courts are also guided by the agency’s own characterization of the action and whether the action was published in the Federal Register or Code of Federal Regulations. *See, e.g., Ctr. for Auto Safety & Pub. Citizen, Inc.*, 452 F.3d at 807 (“The second line of analysis looks to the agency’s expressed intentions. This entails a consideration of three factors: (1) the [a]gency’s own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency.” (internal quotations omitted)).

<sup>14/</sup> *See, e.g., Ryder Truck Lines, Inc.*, 716 F.2d at 1377 (“As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm.”); *Am. Trucking Assoc. v. Interstate Commerce Comm’n*, 659 F.2d 452, 463 (5th Cir. 1981) (quoting *American Bus Ass’n v. United States*, 627 F.2d 525, 529 (D.C.Cir.1980) (stating that a policy statement is not a binding norm if (1) it acts only prospectively, and (2) it genuinely leaves the agency and its decision-makers free to exercise discretion)).

<sup>15/</sup> *See Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986) (“The real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations.”).

describes the list of factors as non-exclusive.<sup>16/</sup> Thus, the list of factors is no more or less “non-exclusive” today than it was when the Commission adopted the *Data Roaming Order*.

Instead of changing the rules, as AT&T and Verizon allege, the *Declaratory Ruling* does the opposite – it preserves the regime of allowing for individualized negotiations that are analyzed for commercial reasonableness on a case-by-case basis, and based on the totality of circumstances. Verizon argues that the Bureau’s decision to add four market-based economic benchmarks as factors for consideration under the commercial reasonableness standard interferes with the individualized negotiations required by the D.C. Circuit.<sup>17/</sup> But, like the 17 non-exclusive factors on which the D.C. Circuit’s approval of the *Data Roaming Order* was based, the benchmarks are not prescriptive. They are factors that the FCC may consider, in its discretion, under its existing authority to assess the commercial reasonableness of proffered rates, terms, and conditions and to adjudicate roaming disputes.<sup>18/</sup>

Nor did the Bureau adopt new rules or engage in rate regulation by stating that market-based economic benchmarks may be relevant to data roaming negotiations and disputes. In this regard, Verizon mischaracterizes the Commission’s history of considering economic benchmarks, and particularly its consideration of retail rates.<sup>19/</sup> The Commission has never barred the consideration of relevant economic factors, including retail rates, in assessing the

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<sup>16/</sup> AT&T AFR at 14.

<sup>17/</sup> Verizon AFR at 9-11.

<sup>18/</sup> The Bureau and the Commission have both made clear that all of benchmarks may not be relevant in all circumstances. See, e.g., *Declaratory Ruling* ¶ 17 (“We do not expect that these other rates will be probative factors in every case or that they will be relevant to the same degree.”); *Declaratory Ruling* ¶ 22 (“[W]e are here providing guidance that, under the terms of the *Data Roaming Order*, these other rates can be considered in any given case. The degree of relevance will depend on the facts and circumstances of the specific case.”); *Data Roaming Order* ¶ 86 (“We find it is therefore appropriate to take [the non-exclusive factors] into account, as listed below, and to the extent relevant in the data roaming context. We emphasize that each case will be decided based on the totality of the circumstances.”).

<sup>19/</sup> See Verizon AFR at 4-6.

commercial reasonableness of a roaming agreement. Rather, in the 2007 *Voice Roaming Order* upon which Verizon relies, the Commission rejected requests to use retail rates as a basis for effectively *capping* roaming rates.<sup>20/</sup> But its decision not to use retail voice rates as a metric for price caps was not a pronouncement that retail rates could never be considered as a relevant factor for purposes of analyzing commercial reasonableness. In fact, Verizon recognizes as much, citing to passages in the *Voice Roaming Order* that specifically refer to “[c]apping roaming rates by tying them to a benchmark based on larger carriers’ retail rates.”<sup>21/</sup> Because it does not use retail rates (or any other factor) to cap roaming rates, the *Declaratory Ruling* does not “revisit” any past Commission decision by determining that market-based economic benchmarks, along with a host of other factors, may be relevant when assessing commercial reasonableness.<sup>22/</sup>

**B. The *Declaratory Ruling* Is Consistent with the Existing Process for Evaluating Data Roaming Agreements.**

AT&T is wrong when it asserts that all of the guidance in the *Data Roaming Order*, including the list of 17 non-exclusive factors set forth as indicators of commercial reasonableness, boils down to two “lodestar” goals, which it identifies as (i) the supremacy of “prevailing rates” in determining commercial reasonableness, and (ii) the encouragement of build-out through high roaming rates.<sup>23/</sup> Verizon is similarly wrong when it argues that the Commission was “particularly concerned” with keeping roaming rates high in order to

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<sup>20/</sup> See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 15817, ¶¶ 36-40 (2007) (“*Voice Roaming Order*”).

<sup>21/</sup> Verizon AFR at 5 (quoting *Voice Roaming Order* ¶ 39).

<sup>22/</sup> Verizon AFR at 4.

<sup>23/</sup> See AT&T AFR at 1.

discourage roaming in favor of build-out.<sup>24/</sup> AT&T's imagined "lodestars" were never the rule to begin with, and AT&T and Verizon improperly criticize the *Declaratory Ruling* for departing from Commission policies that do not exist – and that would permit them to continue their anticompetitive practices.

**1. The *Declaratory Ruling* Correctly Considers the Relevance of Prevailing Rates in Data Roaming Agreements.**

AT&T argues that one of the "lodestars" of commercial reasonableness is "generally prevailing rates" – existing rates between carriers – which AT&T argues should be presumed reasonable for all time.<sup>25/</sup> It asserts that the *Declaratory Ruling* impermissibly departs from this lodestar by clarifying that the presumption in the *Data Roaming Order* applied only to existing agreements, not future agreements negotiated under different circumstances. Under AT&T's interpretation of the *Data Roaming Order*, which it has consistently relied on in its data roaming negotiations, any rate that AT&T offers for data roaming is *per se* reasonable if that rate is no higher than AT&T's rates in 2011, when the *Data Roaming Order* was issued. This is a nonsensical interpretation of the *Data Roaming Order*, and as the Bureau recognizes, a misstatement of the Commission's policies.

Existing agreements between carriers is *one* of 17 non-exclusive factors that the Commission listed in the *Data Roaming Order* for assessing commercial reasonableness. The Commission did not characterize that factor as a "lodestar" to be considered to the exclusion of other factors. And under AT&T's tortured interpretation, regardless of changed circumstances, it will forever be able to rely on its unreasonable, inflated historical roaming rates as justification for imposing unreasonable rates in future roaming agreements. But, as the *Declaratory Ruling*

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<sup>24/</sup> See Verizon AFR at 11.

<sup>25/</sup> AT&T AFR at 1, 10-12.

points out, it was to prevent this very harm that the Commission limited its presumption to existing agreements in the first place.<sup>26/</sup> Even if there had been some ambiguity in the *Data Roaming Order* as to how the Commission would weigh previously agreed-to rates when examining the commercial reasonableness of later negotiations, the *Declaratory Ruling* provided precisely the right vehicle for removing that uncertainty going forward.<sup>27/</sup>

AT&T also ignores the plain language of both the *Declaratory Ruling* and the *Data Roaming Order*. It argues that “generally prevailing rates” reflect a fundamental concept of private carriage – *i.e.*, that commercial reasonableness is “based first and foremost on what sophisticated parties had generally found to be reasonable in the competitive broadband data marketplace.”<sup>28/</sup> As the Bureau recognizes, however, it is a basic premise of contract law that contract rights and obligations extend only to the terms of the existing agreement and to the parties that signed it.<sup>29/</sup> Therefore, in negotiating roaming arrangements with a party, AT&T cannot simply rely on rates negotiated with that party in the past under different circumstances as

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<sup>26/</sup> See *Declaratory Ruling* ¶ 25; *Data Roaming Order* ¶ 81.

<sup>27/</sup> The Commission expressly contemplated the filing of petitions for declaratory ruling to resolve disputes arising out of the data roaming rule and delegated authority to the Bureau to resolve them. See *Data Roaming Order* ¶¶ 75, 82. Neither Verizon nor AT&T challenged the Commission’s delegation of authority to the Bureau, which it has now exercised. The Bureau previously affirmed its authority, again without objection by AT&T and Verizon. See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Order on Reconsideration, 29 FCC Rcd. 7515, ¶ 4 n.15 (2014) (citing *Data Roaming Order* ¶ 82). Having not complained about the Commission’s delegation of authority when the rules were adopted, AT&T and Verizon cannot object now when the Bureau properly acts pursuant to Commission directive. Contrary to Verizon’s argument, the Bureau was not required to wait until roaming disputes require adjudication to issue a declaratory ruling. See Verizon AFR at 9. As T-Mobile argued previously in the record, the fact that there have been no adjudications of roaming disputes is evidence for, rather than against, more guidance. See Reply Comments of T-Mobile USA, Inc., WT Docket No. 05-265, at 4-5 (filed Aug. 20, 2014) (“T-Mobile Reply Comments”). Moreover, the Petition sought prospective industry-wide guidance, not an evaluation of particular existing agreements. See T-Mobile Reply Comments at 29-30; see also Petition for Expedited Declaratory Ruling of T-Mobile USA, Inc., WT Docket No. 05-265 (filed May 27, 2014) (“T-Mobile Petition”).

<sup>28/</sup> AT&T AFR at 10-11, 15.

<sup>29/</sup> *Declaratory Ruling* ¶ 25.

an indication of commercial reasonableness going forward, and without regard to other considerations. The facts and circumstances that lead to a roaming agreement between two parties necessarily change over time.<sup>30/</sup>

Similarly, AT&T cannot rely exclusively, in negotiating roaming with one party, on the rates it has reached with other parties. To do so ignores each party's unique circumstances – exactly the characteristic that the D.C. Circuit found critical in affirming the *Data Roaming Order*. Moreover, AT&T's position ignores the very reason why the Bureau issued the *Declaratory Ruling* in the first place: to provide much needed clarity so that carriers would no longer be subject to AT&T's and Verizon's anti-competitive interpretation of the *Data Roaming Order*. The record in this proceeding is replete with carriers' descriptions of the abusive tactics that Verizon and AT&T have used in data roaming negotiations.<sup>31/</sup> AT&T's suggestion that the rates that resulted from those practices should be the "lodestar" by which all future data roaming rates should be judged completely ignores the record and the law.

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<sup>30/</sup> For example, as explained in T-Mobile's Petition, the cost to produce a megabyte of data has continued to decline with the adoption of more efficient 4G/LTE technologies. As a result, commercially reasonable rates should also decline due to the lower costs associated with the new technologies and terms and conditions of prior agreements should not be locked in forever. See T-Mobile Petition at 21; see also Declaration of Dirk Mosa ¶ 21, attached to T-Mobile Petition.

<sup>31/</sup> See, e.g., Comments of Competitive Carriers Association ("CCA"), WT Docket No. 05-265, at 5 (filed July 10, 2014) (stating that a CCA member was offered a data roaming rate as much as 33 times the retail rates generally charged by national carriers to their retail customers for data access); Comments of Limitless Mobile, LLC ("Limitless"), WT Docket No. 05-265, at 3-4 (filed July 10, 2014) (describing how Limitless was forced to severely restrict its customers' access to the AT&T network "for the sole reason that AT&T's data roaming rates are too high and by continuing roaming access, Limitless could not maintain a commercially competitive retail wireless data offering to the general public"); Comments of NTELOS Holdings Corp. ("NTELOS"), WT Docket No. 05-265, at 12-13 (filed July 10, 2014) (stating that a roaming rate NTELOS was offered was approximately 10 to 25 times higher than what is being charged to retail customers); Letter from W. Scott McCollough, McCollough Henry PC, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, at 2 (filed Nov. 24, 2014) (stating that AT&T's proposed terms in a roaming agreement with Worldcall Interconnect, Inc. "include a much higher base roaming price and a penalty rate for 'excessive' roaming that is orders of magnitude greater than the prevailing retail rate"); see also *Worldcall Interconnect, Inc. v. AT&T Mobility LLC*, File No. EB-14-MD-011, EB Docket No. 14-221; *NTCH, Inc. v. Cellco Partnership d/b/a Verizon Wireless*, EB-13-MD-006, EB Docket No. 14-212.

## 2. The *Declaratory Ruling* Does Not Alter the Relevance of the Build-Out Factor.

Verizon and AT&T also complain that the *Declaratory Ruling* conflicts with a supposed Commission policy that shields unreasonable roaming rates from scrutiny because high rates encourage network build-out.<sup>32/</sup> At no time, including in the *Data Roaming Order*, has the Commission promulgated such a rule or policy. In fact, the Commission has consistently underscored the paramount importance of competitive access to roaming, and it has refused to permit carriers to deny roaming or charge unreasonably high roaming rates merely because an otherwise built-out carrier has not yet built in a particular area.

In the *Data Roaming Order*, the Commission made clear that the widespread availability of data roaming “is and will continue to be a critical component to enable consumers to have a competitive choice of facilities-based providers offering nationwide access to commercial mobile data services.”<sup>33/</sup> It also established that roaming can *incentivize*, rather than dis-incentivize, network build-out by providing an additional rationale for carriers to enter a market and ensuring that carriers can provide a competitive level of coverage.<sup>34/</sup>

Similarly, by rejecting AT&T’s request for a “substantial network” requirement whereby would-be host providers could decline to enter into commercially reasonable roaming arrangements where the requesting provider lacked substantial network deployments, the Commission found that such a requirement could hinder build-out in rural areas “by unduly

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<sup>32/</sup> See AT&T AFR at 6-10; Verizon AFR at 11-13.

<sup>33/</sup> *Data Roaming Order* ¶ 15.

<sup>34/</sup> See *id.* ¶ 17 (stating that that access to commercially reasonable data roaming terms actually increases incentives for network development by “ensuring that providers wanting to invest in their networks can offer subscribers a competitive level of mobile network coverage”); *id.* ¶ 18 (stating that “[t]he availability of roaming arrangements can also provide additional incentives to enter a market by allowing network providers without a presence in an area a competitive level of local coverage during the early period of investment and buildout”).

limiting the role of roaming in network build out.”<sup>35/</sup> The *Declaratory Ruling* is entirely consistent with these conclusions by recognizing that “one of the primary public interest benefits of roaming is that it can allow a provider in any given market to provide a competitive level of local coverage during the early period of investment and build-out.”<sup>36/</sup>

It defies logic that if the Commission wishes to encourage competitive roaming, it would allow carriers to establish unreasonable roaming rates that effectively prohibit roaming by carriers that have otherwise built out. By allowing such carriers to roam even where they hold spectrum (so-called “home roaming”), the Commission recognized the importance of roaming for carriers that may not necessarily be expected to build in a particular area.<sup>37/</sup> Allowing carriers to charge unreasonable roaming rates as a means of discouraging roaming frustrates the Commission’s policies. Unreasonable roaming rates also divert capital that could otherwise be used for build-out to pay a competitor for roaming. Verizon’s concerns about the “adverse effects” on build-out of including economic benchmarks in the assessment of commercial reasonableness<sup>38/</sup> are misplaced and should be rejected.

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<sup>35/</sup> See *id.* ¶ 51.

<sup>36/</sup> *Declaratory Ruling* ¶ 28 (citing *Data Roaming Order* ¶¶ 18, 51).

<sup>37/</sup> See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 25 FCC Rcd. 4181, ¶ 23 (2010) (“*Voice Roaming Order on Reconsideration*”) (stating that “building another network may be economically infeasible or unrealistic in some geographic portions of licensed service areas,” that “in some areas of the country with very low population densities, it is simply uneconomic for several carriers to build out,” and that “it may be significantly more costly to build out when the carrier only has access to higher spectrum frequencies where propagation characteristics are less advantageous”); see also *Declaratory Ruling* ¶ 28; *Data Roaming Order* ¶¶ 15, 34, n.110.

<sup>38/</sup> Verizon AFR at 12-13.

## II. THE *DECLARATORY RULING* ADDS CLARITY TO FUTURE NEGOTIATIONS AND ENFORCEMENT.

AT&T and Verizon challenge the *Declaratory Ruling* under two diametrically opposed theories. On the one hand, they argue that the ruling is too prescriptive and amounts to direct rate regulation. On the other hand, they argue that the ruling is so ambiguous and without standards as to be unenforceable.<sup>39/</sup> Neither argument is valid.

First, as discussed above, listing factors that may be considered when assessing commercial reasonableness on a case-by-case basis still preserves individualized negotiations and does not impose new rules or rate regulation. Second, the *Declaratory Ruling* adds clarity to the *Data Roaming Order*; it does not make it *less* clear, as AT&T and Verizon contend. The *Declaratory Ruling*, for instance, clarifies the factors that the Bureau may view as relevant when determining commercial reasonableness, the impact of a requesting carrier's build-out on negotiations, and the relevance of past agreements in determining the commercial reasonableness of future agreements.<sup>40/</sup> By providing this clarity, the *Declaratory Ruling* will aid parties in data roaming negotiations and subsequent enforcement proceedings should those negotiations fail.

AT&T's and Verizon's arguments that the *Declaratory Ruling* is vague contravene what the D.C. Circuit held was an essential feature of the *Data Roaming Order*: its reliance on individualized, case-by-case adjudication based on the totality of circumstances. In upholding the *Data Roaming Order*, the D.C. Circuit supported the Commission's assessment of commercial reasonableness on a case-by-case basis, taking into account the totality of the circumstances and using a non-exclusive list of potentially relevant factors, because it afforded providers "considerable flexibility" to respond to the competitive forces at play in the mobile

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<sup>39/</sup> See AT&T AFR at 4-5, 6-8, 13-21; Verizon AFR 1-3, 4-6, 7-8, 9-11. ]

<sup>40/</sup> See *Declaratory Ruling* ¶¶ 8-9, 17, 24-27, 28-29.

data marketplace.<sup>41/</sup> It determined that, because the data roaming rule “expressly permits providers to adapt roaming agreements to ‘individualized circumstances without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms,’”<sup>42/</sup> the rule did not constitute prohibited common carrier regulation. AT&T’s and Verizon’s argument that the *Declaratory Ruling* does not impose sufficiently concrete decisional criteria is therefore at odds with the D.C. Circuit’s order.

AT&T’s particular reference to the vagueness doctrine, which applies to rules and regulations, is also misplaced.<sup>43/</sup> The *Declaratory Ruling* does not adopt any new rules; it merely clarifies an existing rule.<sup>44/</sup> The *Data Roaming Order* previously established that commercial reasonableness will be evaluated based on “numerous individualized factors”<sup>45/</sup> and the Court of Appeals affirmed – and relied on – that flexibility in upholding the *Data Roaming Order*. That level of discretion remains unchanged under the *Declaratory Ruling*. AT&T and Verizon are therefore seeking review of the *Data Roaming Order* itself, as upheld by the Court of Appeals, not the *Declaratory Ruling*. They should not be permitted to re-litigate the case here, and their Applications should be rejected.

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<sup>41/</sup> *Cellco P’ship*, 700 F.3d at 548.

<sup>42/</sup> *Id.* at 547-48 (quoting *Data Roaming Order* ¶ 45).

<sup>43/</sup> *See, e.g.*, AT&T AFR at 19 (citing *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012)).

<sup>44/</sup> *See Ryder Truck Lines, Inc.*, 716 F.2d at 1377 (explaining that as long as an agency “remains free to consider the individual facts in the various cases that arise,” then the agency action in question has not established a rule, but a general policy statement, which are not subject to the APA’s notice-and-comment rulemaking requirements).

<sup>45/</sup> *Data Roaming Order* ¶ 68.

### III. THE *DECLARATORY RULING* NEED NOT ANTICIPATE OR ADDRESS EVERY FUTURE ISSUE.

Finally, Verizon argues that the *Declaratory Ruling* should be vacated because it arbitrarily fails to “address issues critical to a reasoned decision and created new controversies.”<sup>46/</sup> These claims are also meritless. A declaratory ruling is not flawed merely because it leaves unanswered questions. An administrative agency is entitled to select and prioritize issues for action, without responding to every question or issue put before it. Section 4(j) of the Communications Act specifically provides that “the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.”<sup>47/</sup> The D.C. Circuit Court has similarly “upheld in the strongest terms the discretion of regulatory agencies to control the disposition of their caseload.”<sup>48/</sup> Pursuant to this discretion, the Commission often chooses whether it wishes to address a particular question or to defer action to a later date.<sup>49/</sup>

There are countless examples of Commission proceedings in which issues arise later that are not initially contemplated. In the rulemaking context, for instance, the Commission routinely

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<sup>46/</sup> Verizon AFR at 3.

<sup>47/</sup> 47 U.S.C. § 154(j).

<sup>48/</sup> *Nader v. FCC*, 520 F.2d 182, 195-196 (D.C. Cir. 1975) (“Consolidation, scope of the inquiry, and similar questions are housekeeping details addressed to the discretion of the agency.”) (citing *City of San Antonio v. CAB*, 374 F.2d 326 (D.C. Cir. 1967)).

<sup>49/</sup> See, e.g., *Modernizing the FCC Form 477 Data Program*, Report and Order, 28 FCC Rcd. 9887, ¶ 13 n.29 (2013) (“We do not address the collection of price data or service quality and customer satisfaction data at this time, and those issues remain open for consideration.”); *TCI Cablevision of Oakland County, Inc.; Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e), and 253*, Memorandum Opinion and Order, 12 FCC Rcd. 21396, ¶ 101 (1997) (“[W]e exercise our discretion not to address any of the challenges to the validity under section 253 of the Troy Telecommunications Ordinance in this proceeding.”). Cf. *Voicestream Wireless Corporation or Omnipoint Corporation, Transferors, and Voicestream Wireless Holding Company, Cook Inlet/VS GSM II PCS, LLC, or Cook Inlet/VS GSM III PCS, LLC, Transferees, et al.*, Memorandum Opinion and Order, 15 FCC Rcd. 3341, ¶ 37 n.104 (2000) (“[W]hile we have discretion to consider this issue separately, we have chosen to address QUALCOMM’s argument in this proceeding to minimize the uncertainty for the parties that could have resulted from proceeding otherwise.”).

issues Further Notices of Proposed Rulemaking to build upon its record.<sup>50/</sup> It can also release Public Notices requesting additional input.<sup>51/</sup> As an active participant in Commission proceedings, Verizon is certainly aware of the options that the Commission has available to act on unanswered questions. The fact that a decision leaves some issues open does not affect the validity of the decision.

#### IV. CONCLUSION

The Bureau correctly agreed with T-Mobile and the industry at large when it determined that guidance and clarification was necessary to help inform the negotiation of data roaming agreements and the enforcement of the Commission's data roaming rules. AT&T and Verizon now seek to overturn not just the *Declaratory Ruling*, but the underpinnings of the *Data Roaming Order*. The *Declaratory Ruling*, however, establishes no new obligations on regulated parties, and instead only provides needed guidance and reinforces the case-by-case approach upheld by the D.C. Circuit. The Commission should deny the Applications.

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<sup>50/</sup> See, e.g., *Amendment of the Commission's Rules with Regard to Commercial Operations in the 3550-3650 MHz Band*, Further Notice of Proposed Rulemaking, 29 FCC Rcd. 4273 (2014); *Facilitating the Deployment of Text-to-911 and Other Next Generation 911 Applications; Framework for Next Generation 911 Deployment*, Further Notice of Proposed Rulemaking, 27 FCC Rcd. 15659 (2012).

<sup>51/</sup> See, e.g., *Commission Seeks Comment on Licensing Models and Technical Requirements in the 3550-3650 MHz Band*, Public Notice, 28 FCC Rcd. 15300 (2013).

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Kara D. Romagnino, hereby certify that on this 4th day of February 2015, a copy of the foregoing “Opposition of T-Mobile USA, Inc. to Applications for Review” was sent via U.S. mail to the following:

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