

**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 COMPETITIVE CARRIERS ASSOCIATION

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OPPOSITION OF COMPETITIVE CARRIERS ASSOCIATION

Competitive Carriers Association (“CCA”) hereby opposes the Applications for Review of AT&T¹ and Verizon² filed in the above-captioned proceeding. CCA represents the interests of more than 100 competitive wireless carriers, many of which are small carriers who serve otherwise underserved portions of rural America. CCA also represents almost 200 associate members who include vendors and suppliers that provide products and services throughout the mobile communications supply chain. CCA filed comments and *ex partes* in support of T-Mobile’s Petition for Expedited Declaratory Ruling, and is a proper party to this proceeding.³

I. INTRODUCTION & SUMMARY

The Wireless Telecommunications Bureau properly granted T-Mobile’s request for an expedited declaratory ruling and issued much-needed additional guidance on how to evaluate data roaming agreements under the Commission’s “commercial reasonableness” standard set

¹ Application for Review of AT&T, WT Docket No. 05-265 (filed Jan. 16, 2015) (“AT&T Application”).

² Verizon Application for Review, WT Docket No. 05-265 (filed Jan. 20, 2015) (“Verizon Application”).

³ *See, e.g.* Comments of Competitive Carriers Association, WT Docket No. 05-265 (filed July 10, 2014); Reply of Competitive Carriers Association, WT Docket No. 05-265 (filed Aug. 20, 2014); *Ex Parte* Letter from Rebecca Murphy Thompson, General Counsel, CCA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265 (filed Nov. 21, 2014).

forth in Section 20.12(e) of the Commission’s rules.⁴ This guidance was welcomed by virtually every party submitting comments on T-Mobile’s petition save two notable exceptions—AT&T and Verizon, which predictably now have filed applications for full Commission review of the Bureau’s decision.

The Bureau’s issuance of additional guidance acknowledged the Commission’s ongoing need to facilitate the negotiation of data roaming agreements, given the concerns expressed in the record regarding the difficulties that providers have continued to experience in negotiating roaming agreements in the period since the data roaming rule was adopted. T-Mobile filed its petition because “must have” roaming partners (*i.e.*, AT&T and Verizon) “have exploited ambiguity in the rules to deny roaming requests.”⁵ To lessen this ambiguity, the Bureau intervened “to provide guidance on what the Commission intended to achieve in the *Data Roaming Order*.”⁶ The Bureau recognized that: (1) the “commercial reasonableness” standard has not yet been applied or adjudicated in a particular case; and (2) the need for such guidance is critical given the increasing consumer demand for data services, which is driving significantly more intensive use of mobile networks, and differences among mobile broadband services providers in terms of spectrum holdings and coverage.⁷ The Bureau’s hope was that its

⁴ See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Declaratory Ruling, DA 14-1865 (WTB Dec. 18, 2014) (“*Roaming Declaratory Ruling*”).

⁵ *Id.* ¶ 5. See *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. Cellco P’ship v. FCC*, 700 F.3d 534 (D.C. Cir. 2012).

⁶ *Roaming Declaratory Ruling* ¶ 8.

⁷ *Id.* ¶ 13. The timing also is appropriate as the FCC evaluates two currently pending complaints. See *NTCH, Inc. v. Cellco Partnership dba Verizon Wireless*, EB-13-MD-006 (filed Nov. 22, 2013); *Worldcall Interconnect v. AT&T*, ET-14-MD-011 (filed Sept. 8, 2014).

“interpretation of the scope of the *Data Roaming Order* and the rule may help alleviate any concerns resulting from disputes between negotiating parties by lessening ambiguity in the application of the commercial reasonableness standard and totality of the circumstances approach for resolving disputes.”⁸

Notably, AT&T and Verizon cannot deny the market power they wield in the roaming marketplace that led to the imposition of data roaming rules in the first place, and that now has caused the Bureau to issue further guidance. Instead, these carriers mount largely procedural objections to the Bureau’s clarifications, attempting to re-cast them as substantive rulemaking beyond the Bureau’s delegated authority and inconsistent with or beyond the scope of the Commission’s pronouncements in the *Data Roaming Order*.

None of these claims has merit. The Bureau’s guidance is squarely authorized by and encompassed within the *Data Roaming Order*. The Commission can make short work of these objections by affirming the Bureau’s action on the merits, and continuing to press these providers to be reasonable in their provision of roaming services, because problems remain in the data roaming marketplace. The AT&T and Verizon applications for review should be denied.

II. THE DECLARATORY RULING IS FULLY CONSISTENT WITH THE DATA ROAMING ORDER AND WAS PROPERLY ISSUED BY THE BUREAU

AT&T and Verizon make a suite of procedural arguments challenging the Bureau’s authority to issue the *Roaming Declaratory Ruling* that are all premised on the fundamental characterization of the Bureau’s action as a substantive rule change that is wholly inconsistent with the Commission’s reasoning in the *Data Roaming Order*.⁹ Of course, if the opposite is true—that is, if the *Declaratory Ruling*’s guidance is indeed authorized by or consistent with the

⁸ *Roaming Declaratory Ruling* ¶ 10.

⁹ AT&T Application at 4-13; Verizon Application at 3-9.

Data Roaming Order—and the Commission here so affirms, then these arguments simply fall away.¹⁰

Preliminarily, it bears mention that the *Data Roaming Order* did not simply grant the Bureau specific authority to “resolve any disputes arising out of the data roaming rule”¹¹ – it *expressly invited* carriers to file petitions for declaratory ruling such as T-Mobile’s *with the Bureau* in the event that additional guidance or interpretive resolution of issues proved necessary.¹² Furthermore, when the Commission listed the seventeen factors it would take into account in applying the commercial reasonableness standard, it recognized that these are representative factors that “may” be considered, and noted that there might be “others.”¹³ Indeed, the Commission chose to “emphasize that these factors are not exclusive or exhaustive,” and that “other relevant factors” could be proffered by parties to a roaming dispute and considered by the Commission in the context of a totality of the circumstances analysis.¹⁴

¹⁰ See, e.g., *In the Matter of Communique Telecommunications, Inc. d/b/a Logical Application for Review of the Declaratory Ruling and Order Issued by the Common Carrier Bureau; InterContinental Telephone Corp. Petition for Declaratory Ruling on National Exchange Carrier Association, Inc. Tariff F.C.C. No. 5 Governing Universal Service Fund and Lifeline Assistance Charges*, 14 FCC Rcd 13655, ¶ 41 (1999) (determining that the Commission “would in any event have rejected [applicant’s] argument that the Bureau’s decision exceeded its delegated authority” because the applicant “failed to show that any of the matters before the Bureau was sufficiently novel as to exceed the Bureau’s authority” and “[i]n any event, any improper delegation would have been rendered harmless because the Commission itself fully considered these matters in the instant order”).

¹¹ *Data Roaming Order* ¶ 97.

¹² *Id.* ¶¶ 75, 82.

¹³ *Id.* ¶ 86.

¹⁴ *Id.* ¶ 87.

Although Verizon accuses the Bureau of “culling” general statements from the *Data Roaming Order* to justify rogue action,¹⁵ it is plain that the Commission expected and invited the prospect of additional interpretive guidance by its staff, including by explicitly encouraging parties to seek “procedural guidance” as to whether a declaratory ruling is an appropriate vehicle.¹⁶ And the Commission’s emphasis that it was not cabining the types of evidence or other factors that could be considered, in addition to the seventeen factors already identified, is an indication that it expected that there could be a need for further guidance. Framed against this backdrop, an examination of the Bureau’s actual clarifications shows that the *Roaming Declaratory Ruling* is fully consistent with the *Data Roaming Order*, and did not change the data roaming rule, either in substance or effect.¹⁷

A. The *Roaming Declaratory Ruling* Offers Guidance on Adducing Evidence of Rates that is Thoroughly Consistent with the *Data Roaming Order*

AT&T’s and Verizon’s filings focus on the Bureau’s fundamental finding that the Commission’s consideration of the totality of the circumstances in a data roaming adjudication would allow parties to adduce evidence of whether proffered roaming rates are considerably in excess of retail rates, international rates, and/or MVNO/resale rates. Yet the Bureau correctly found that the text of the *Data Roaming Order* leaves little doubt that the Commission adopted a “broad view of what could be relevant in determining commercial reasonableness,” and

¹⁵ Verizon Application at 4.

¹⁶ *Data Roaming Order* ¶ 82.

¹⁷ Because the *Roaming Declaratory Ruling* effected no substantive change to the data roaming rule or the *Data Roaming Order*, there is no procedural deficiency in the Bureau’s decision to issue a declaratory ruling in response to T-Mobile’s petition, and no need for the Bureau to comply with requirements that would otherwise attend a formal rulemaking under the Administrative Procedure Act. The Verizon and AT&T arguments in this regard, *see, e.g.*, Verizon Application at 7-9, AT&T Application at 12-13, are simply inapposite.

determined “not to circumscribe the Commission’s consideration of potentially relevant factors.”¹⁸ Now the Bureau’s mere suggestion that these rates may be considered in evaluating an agreement’s commercial reasonableness evokes indignant charges by the two dominant providers of impermissible prescriptive ratemaking, violations of the Administrative Procedure Act and even unconstitutional agency action. These howls of pain are unwarranted.

The Bureau’s guidance in the *Roaming Declaratory Ruling* simply offers clarification that evidence of certain rates can be adduced and considered by the Commission in appropriate cases when applying the commercial reasonableness standard as set forth in the *Data Roaming Order*. This guidance is consistent with the *Data Roaming Order* because these rates, where probative, would be identified merely as reference points to help inform the reasonableness of a proffered roaming rate in a particular circumstance. In rejecting overtly prescriptive rate regulation approaches in the voice and data roaming orders, the Commission never disavowed its—or the Bureau’s—authority to consider the relevance of international, retail or MVNO rates in particular cases under the “commercial reasonableness” standard.¹⁹ Indeed, it is revisionist history and a mischaracterization to suggest that the Commission ever flatly “reject[ed] the use of non-roaming rates” in adjudicating data roaming disputes.²⁰ The Commission in the voice context made a determination not to impose price caps or any other formal rate regulation framework on roaming agreements.²¹ In 2010, on reconsideration, the Commission adopted a presumption that requests for automatic voice roaming are reasonable, and adopted a non-

¹⁸ *Roaming Declaratory Ruling* ¶ 15.

¹⁹ *Id.* ¶ 16.

²⁰ Verizon Application at 5.

²¹ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817, 15832 ¶ 37 (2007)

exclusive, non-exhaustive list of factors it would take into account in determining reasonableness based upon a totality of the circumstances.²² In the *Data Roaming Order*, the Commission took a similar tack in articulating the “commercial reasonableness” standard for data roaming agreements, and established a similar non-exclusive list of factors it may consider in particular cases. As the Bureau found, at no time in the evolution of the agency’s thinking did the Commission ever demonstrate an intent “to foreclose, as a *per se* rule, such potentially relevant evidence designed to inform the inquiry into whether a rate is commercially reasonable.”²³ Contrary to AT&T’s shrill protestations, the *Data Roaming Order* did not “previously deem” any rate comparison to be “irrelevant,” or bless any particular rate differential as “appropriate.”²⁴ Instead, the Commission has always been clear that it will adjudicate the probative value of evidence proffered by the parties considering the totality of the circumstances on a case-by-case basis.²⁵ The *Roaming Declaratory Ruling* merely reaffirms that approach.²⁶

²² See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 25 FCC Rcd 4181, 4200 ¶ 39 (2010) (“2010 Reconsideration Order”).

²³ *Roaming Declaratory Ruling* ¶ 16.

²⁴ AT&T Application at 7.

²⁵ *Roaming Declaratory Ruling* ¶¶ 17-18

²⁶ *Id.* Verizon spends several pages essentially chastising the Bureau for its alleged failures to specify the situations in which non-roaming rates would be “relevant,” as well as the procedures it and/or the Enforcement Bureau will use to protect the disclosure of competitively sensitive information in future complaint proceedings. See Verizon Application at 13-16. As to the first point, with the Commission having decided to apply its data roaming rule in individual cases based on the totality of the circumstances, it would (ironically) have been a *real* inconsistency with the Commission’s approach for the Bureau to prejudge Verizon’s arguments as to whether rates for disparate services “lend themselves to ‘apples-to-apples’ comparisons.” *Id.* at 15. Verizon is free to make such arguments in future complaint proceedings. As to the disclosure of roaming agreements or other sensitive data, the Wireless and Enforcement Bureaus were delegated express authority by the Commission to resolve data roaming disputes, see *Data Roaming Order* ¶¶ 75, 92, and there are a variety of measures that can be taken attendant to the

Verizon also is wrong that the Commission’s possible consideration of other roaming, retail or resale rates as reference points undercuts individualized negotiations.²⁷ The guidance issued by the Bureau maintains sufficient flexibility for parties to negotiate individual roaming agreements that reflect particular business circumstances. The *Roaming Declaratory Ruling* is very clear that any rate reference points adduced in a complaint proceeding would not be intended to function “as a ceiling or as a cap on prices.”²⁸ And it expressly notes that the degree of relevance of other rate evidence “will depend on the facts and circumstances of the individual case, including the terms and conditions of the proposal.”²⁹ In the meantime, host providers retain “substantial room for individualized bargaining and discrimination in terms,” while the legal standard remains unchanged.³⁰

Bureaus’ discretion to ensure the confidentiality of any data or evidence introduced that may lead to competitive harm. Indeed, Verizon acknowledged *in this proceeding* that “roaming rates can be made available subject to appropriate confidentiality orders and reviewed by the Commission and parties in the context of a dispute resolution proceeding.” Reply Comments of Verizon, WT Docket No. 05-265 at 8 (filed Aug. 20, 2014); *see also Ex Parte* Letter from Tamara Preiss, Vice President, Federal Regulatory Affairs, Verizon to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265 at 2 (filed Nov. 17, 2014) (noting that “a complaint proceeding enables a party to discover and produce evidence of roaming rates in its own and other parties’ agreements . . .”).

²⁷ Verizon Application at 9.

²⁸ *Roaming Declaratory Ruling* ¶ 18.

²⁹ *Id.* It thus is a fundamental mischaracterization of the *Roaming Declaratory Ruling* to suggest that the Bureau or the Commission has anywhere decided to “link,” “tie[],” bond, meld, etc. voice and data roaming rates to wholesale and retail rates in the manner that Verizon suggests. Verizon Application at 4-5. As this faulty premise is the first assumption in Verizon’s entire line of argument on this issue, its Application as to the Bureau’s guidance on the consideration of other rates fails on this fact alone.

³⁰ *Roaming Declaratory Ruling* ¶ 19. In this respect, the Bureau’s ruling also is consistent with the D.C. Circuit’s finding that application of the commercial reasonableness requirement must not give rise to a *de facto* imposition of common carrier requirements on data roaming providers that impermissibly curtail or eliminate the ability to offer discrimination in terms. *See Cellco P’ship*, 700 F.3d at 548. As set forth, the Bureau’s clarifications do nothing of the sort.

In sum, the Bureau’s suggestion that retail, MVNO or international roaming rates could be relevant in a data roaming complaint proceeding, and its clarification that the adducing of such evidence for consideration would be permitted in particular cases, does not change the legal standard adopted in the *Data Roaming Order*, does not conflict with the non-exclusive factors enumerated in *Data Roaming Order*, and does not operate as a substantive rule change, as AT&T and Verizon claim.

B. The Bureau’s Other Points of Guidance as to the Presumption of Reasonableness of Existing Agreements and the Build-out Factor are Reasonable and Straightforward Explanations of the Commission’s Intent in the *Data Roaming Order*

In the *Data Roaming Order*, the Commission adopted a presumption that “the terms of a signed data roaming agreement meet the reasonableness standard” and therefore stated that it “will require a party challenging the reasonableness of any term in the agreement to rebut that presumption.”³¹ In response to pernicious attempts by the largest carriers to suggest that this presumption of reasonableness would last in perpetuity and attach to any “agreements negotiated after the issuance of the data roaming rules and that were never challenged,”³² T-Mobile sought and received clarification from the Bureau that the Commission “intended for this presumption to apply only when a party challenges the terms and conditions of a signed agreement,” and “did not intend for the presumption to apply to subsequent negotiation of another agreement (including extension or renewal of an existing agreement) that is not signed.”³³

³¹ *Data Roaming Order* ¶ 81.

³² *Id.* n.70 (quoting AT&T Opposition to T-Mobile Petition at 18).

³³ *Id.* ¶ 25.

AT&T now asserts that “[n]othing in the *Data Roaming Order* supports this limitation on the presumption of reasonableness,”³⁴ yet, in disagreeing with the Bureau’s “narrow” construction of the scope of the presumption, AT&T concedes that the Bureau is engaging in an interpretive act (rather than attempting to create substantive rules). And although AT&T concludes that this interpretation is inconsistent with the “commercially reasonable” standard,³⁵ AT&T never persuasively explains why. Indeed, the Bureau grounded its interpretation in the text of the *Data Roaming Order*. The Bureau explained that the Commission’s “discussion of the presumption was in the context of a statement that ‘the terms of the agreement generally will govern the data roaming rights and obligations of the parties,’ pursuant to ‘relevant contract law.’”³⁶ The Bureau logically concluded from this discussion that “[s]uch contract rights and obligations extend only with respect to the terms of the existing agreement, and the parties that signed it.”³⁷ This construction is supported by the record; many commenters noted that AT&T’s proposed broad reading of the presumption would contravene the purpose of the data roaming rule by having “the effect of perpetuating terms negotiated in prior years.”³⁸ The Bureau’s explication of how the presumption of reasonableness of existing agreements will work is sound, logical and consistent with the *Data Roaming Order*.³⁹

³⁴ AT&T Application at 11.

³⁵ *Id.*

³⁶ *Roaming Declaratory Ruling* ¶ 25 (quoting *Data Roaming Order* ¶ 81).

³⁷ *Id.*

³⁸ *Id.* ¶ 26 (citations omitted).

³⁹ AT&T states that “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.” AT&T Application at 12. Of course, the same is essentially true for AT&T under the Bureau’s clarification of the presumption. The Bureau noted that the seventeen listed factors in the *Data Roaming Order* include “‘whether the parties have any roaming arrangements with each other . . . and the terms of such arrangements.’”

AT&T and Verizon also take issue with the Bureau’s clarification that “the nature and extent of a provider’s buildout” was not included as a factor in the *Data Roaming Order* as a pretext to allow these carriers to deny roaming or charge unreasonable rates “simply because the otherwise built-out requesting provider has not built out in that area.”⁴⁰ But this clarification by the Bureau similarly flows directly from the full Commission’s prior reasoning.

Specifically, AT&T notes that “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 in some cases build out might be unrealistic or the provider may face ‘increased’ costs.”⁴¹ This summary, while accurate, is then described by AT&T as “directly conflict[ing] with the Commission’s consistent explanations throughout the *Data Roaming Order* that its rules are not applied in ways that would encourage the use of roaming as resale.”⁴² The argument is completely without merit.

First, the propositions that AT&T attributes to the “Bureau’s Order” in fact were lifted directly from the Commission’s *Data Roaming Order* with appropriate citation by the Bureau. The full Commission observed that in many instances “[t]he availability of roaming arrangements can also provide incentives to enter a market by allowing network providers without a presence in an area a competitive level of coverage during the early period of investment and buildout.”⁴³ The Commission also recalled its earlier finding that:

Roaming Declaratory Ruling ¶ 26 (quoting *Data Roaming Order* ¶ 86). Thus, AT&T would be free to argue that the terms of prior agreements between the parties are relevant for purposes of determining “commercial reasonableness.” *See id.*

⁴⁰ *Roaming Declaratory Ruling* ¶ 28.

⁴¹ AT&T Application at 9.

⁴² *Id.*

⁴³ *Data Roaming Order* ¶18 (citing *Fourteenth Competition Report*).

a lack of roaming can constitute a significant hurdle to new competition and can delay or deter entry into a market because a provider seeking to provide service in a new geographic area, without the ability to supplement its networks with roaming and whose initial facilities would necessarily be limited, would be required to compete with incumbents that had been developing and expanding their networks for many years.⁴⁴

The Bureau went on to reiterate the Commission’s previous finding that providers “with local or regional service areas need roaming arrangements to offer nationwide coverage, and that there may be areas where expanding a provider’s network may be economically infeasible or unrealistic.”⁴⁵ Indeed, even the largest nationwide providers need roaming agreements for particularly remote parts of the country, as no one carrier has built out a network covering the entire geography of the United States.⁴⁶

Verizon and AT&T have essentially resurrected in this proceeding the same flawed arguments as to investment incentives that the Commission and the D.C. Circuit rejected when Verizon and AT&T made them in challenging the *Data Roaming Order*.⁴⁷ By alleging inconsistency between the Commission’s and the Bureau’s actions, they try to revisit on review of the *Roaming Declaratory Ruling* the careful policy balance of costs and benefits that the Commission achieved in the *Data Roaming Order*. But the D.C. Circuit provided a response that is equally applicable here:

Verizon oversimplifies the Commission’s reasoning and omits key language in the [*Data Roaming Order*], creating a contradiction where none exists. As one of several arguments against AT&T’s and Verizon’s assertions that the rule would remove incentives for investment, the Order states that ‘providers [would be] unlikely to rely on roaming arrangements in place of network deployments *as the*

⁴⁴ *Id.* ¶ 18 (citing 2010 Roaming Reconsideration Order).

⁴⁵ *Roaming Declaratory Ruling* ¶15 (citing *Data Roaming Order* ¶ 15, n.51).

⁴⁶ *See id.* ¶ 12.

⁴⁷ *See, e.g.*, Verizon Application at 12 (summarizing Verizon and AT&T arguments in the record as to why the Bureau’s action would diminish incentives to invest in broadband deployment and encourage the use of roaming as resale).

primary source of their service provision.’ [Data Roaming Order, ¶ 21] (emphasis added). This hardly amounts to an assertion that providers will decline to rely on the roaming rule at all; rather, the Order merely asserts that roaming will not displace network development as a ‘primary’ means of serving subscribers. Indeed, the Commission carefully explained that roaming would assist new entrants into various markets and that those new entrants could then amass a customer base sufficient to enable them to develop their own infrastructure. *See id.* at [¶¶ 18-22]. Verizon’s myopic focus on part of a longer sentence plucked from a more extensive analysis obscures what the Order makes clear: that the Commission performed a thoughtful and nuanced balance of the costs and benefits of the data roaming rule.⁴⁸

The Bureau’s clarification that a lack of build-out, standing alone, would not justify a refusal by Verizon or AT&T to deal, or the imposition of a commercially unreasonable roaming rate, plainly flows directly from the *Data Roaming Order*’s reasoning and findings, as affirmed on appeal. Moreover, the Bureau’s clarification is consistent with the Commission’s elimination of the “home roaming exclusion” in 2010, which essentially permitted AT&T and Verizon to deny automatic roaming in markets where the requesting carrier held a spectrum license or spectrum lease.⁴⁹ The Bureau was right to clarify that AT&T and Verizon will not be afforded the flexibility to re-litigate that result in roaming complaint proceedings.

III. THE BUREAU HAS BROUGHT FURTHER CLARITY TO DATA ROAMING NEGOTIATIONS

AT&T alleges that the Bureau’s additional guidance anomalously has clouded rather than illuminated the data roaming landscape. According to AT&T, the Bureau has re-invented a standard that now is “endlessly elastic and incorporates no intelligible guiding requirement.”⁵⁰ This characterization of the Bureau’s modest clarifications is absurd in its hyperbole. AT&T’s real issue apparently lies with the flexibility that is inherent in the “commercial reasonableness”

⁴⁸ *Cellco P’ship v. FCC*, 700 F.3d 534, 551 (D.C. Cir. 2012).

⁴⁹ *2010 Roaming Reconsideration Order*, 25 FCC Rcd at 4190, ¶ 18.

⁵⁰ AT&T Application at 21.

standard itself, and a frustration that the Commission intends to proceed to develop rulings in accordance with a case-by-case approach.⁵¹ Of course, both the standard itself and the Commission’s approach of case-by-case enforcement have been upheld in federal court.⁵² To the extent that AT&T now wants to craft new challenges to the “commercially reasonable” standard based on claims of vagueness, lack of notice or due process, the time for seeking agency or appellate review of the *Data Roaming Order* on these grounds has long since passed.

The “commercial reasonableness” standard, both before and after guidance⁵³ issued by the Bureau, continues to afford “considerable flexibility for providers to respond to the competitive forces at play in the mobile-data market.”⁵⁴ The Bureau has not changed any of the factors in the *Data Roaming Order* affirmed by the D.C. Circuit. It: (i) issued interpretive guidance clarifying that evidence of other types of roaming and retail rates could be admitted for consideration in a particular case in accordance with the full Commission’s “emphas[is] that [its enumerated] factors are not exclusive or exhaustive and that providers may argue that the Commission should consider other relevant factors in determining the commercial reasonableness of the negotiations”;⁵⁵ (ii) clarified how the Commission’s announced presumption of the reasonableness of existing agreements would be applied; and (iii) clarified that the Commission’s citation of buildout as a possible factor was not intended to allow a host provider on a *per se* basis to deny roaming or charge commercially unreasonable rates. These interpretations or clarifications do not render the “commercially reasonable” standard

⁵¹ See, e.g., AT&T Application at 16 (lamenting that parties “will simply have to wait and see how the Commission will react in any specific proceeding”).

⁵² See *Cellco P’ship v. FCC*, *supra*.

⁵³ See AT&T Application at 18-21.

⁵⁴ *Id.* at 548.

⁵⁵ *Data Roaming Order* ¶ 87.

“hopelessly vague and unpredictable.”⁵⁶ AT&T’s assertion that under the Bureau’s ruling, “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” is a non-sequitur. The Bureau did not change the factors previously articulated by the Commission; rather, it added *more* precision and clarity with respect to the areas it addressed. AT&T’s Application is littered with many hornbook propositions of administrative law, but there is no credible application of those propositions to the Bureau’s otherwise sound rationale and pronouncements.

IV. THE DECLARATORY RULING APPROPRIATELY ADDRESSES THE DIFFICULTIES CARRIERS HAVE EXPERIENCED IN NEGOTIATING DATA ROAMING ARRANGEMENTS WITH THE LARGEST CARRIERS

The Bureau acted on T-Mobile’s request based on a record replete with evidence of the difficulties that parties have faced in obtaining data roaming on commercially reasonable terms from the nation’s largest carriers. The Bureau’s approach was nuanced and careful, and does not result in any type of rate regulation. The guidance issued is aimed at facilitating the negotiation of data roaming arrangements, and does just that. The Bureau explicitly refrained from making a finding regarding whether the data roaming marketplace is functioning properly or whether service providers have the incentive and ability to raise their rivals’ costs.⁵⁷ Thus, the Bureau did not prejudge any individual negotiation of roaming rates. The public interest warrants validation by the full Commission of the Bureau’s *Roaming Declaratory Ruling*.

⁵⁶ AT&T Application at 14.

⁵⁷ *Roaming Declaratory Ruling* ¶ 23.

V. CONCLUSION

For the foregoing reasons, CCA opposes the applications for review of AT&T and Verizon and respectfully requests that such applications be denied.

Respectfully submitted,

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