

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

REPLY OF AT&T IN SUPPORT OF APPLICATION FOR REVIEW

Pursuant to 47 C.F.R. § 1.115 and the Public Notice dated January 28, 2015, AT&T respectfully submits this Reply in Support of its Application for Review of the Wireless Telecommunications Bureau’s *Declaratory Ruling* in the above-captioned proceeding.¹

ARGUMENT

In its Application, AT&T showed that the *Declaratory Ruling* unlawfully changed the commercially reasonable standard by (1) all but eliminating any presumption that rates and terms in negotiated agreements are reasonable, (2) elevating new considerations in the reasonableness inquiry that the Commission had specifically rejected, such as retail rates, and (3) diluting any consideration of incentives for build-out that the Commission had found necessary to encourage investment. In the wake of these rulings, there is essentially no standard at all. The Commission may now pick and choose among an endless variety of contradictory and mutually exclusive factors and decide which ones it deems to be more “probative” in any individual case. As AT&T demonstrated, this completely standardless approach to case-by-case adjudication is unlawfully vague, permits arbitrary enforcement, and leaves broadband providers with no means of predicting how the Commission might rule in any given complaint proceeding.

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

T-Mobile and its allies have no answer to any of these points. First, try as they might, they cannot reconcile the Bureau’s new substantive formulations with the *Data Roaming Order*. The Commission recognized repeatedly in the *Data Roaming Order* that a data roaming requirement created “the possibility that requesting providers will substitute roaming for investment in coverage and accordingly under-invest in deploying new infrastructure.”² To combat this possibility, the Commission reiterated its 2010 finding that “the relatively high price of roaming compared to providing facilities-based service will often be sufficient to counterbalance the incentive to ‘piggy back’ on another carrier’s network.”³ The Commission also made clear that, in resolving disputes, it would “take into account” whether the requesting carrier has the spectrum and resources to build out its own network in the areas where roaming is being requested, and it would “presume” that “the terms of a signed agreement meet the reasonableness standard and will require a party challenging the reasonableness of any term in the agreement to rebut that presumption.”⁴ The opponents’ position here – which invites providers to file complaints pointing to retail rates and ignoring the requesting provider’s potential for build-out – would undermine the Commission’s express and repeated holdings that it was relying on the “relatively high price” of wholesale rates and an explicit examination of

² Second Report and Order, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, ¶ 34 (2011) (“*Data Roaming Order*”); see also *id.* ¶ 21 n.76 (host providers may have a disincentive to invest in their networks if other providers can “free-ride” on their investment via roaming); see also *id.* ¶¶ 16-22, 33-34.

³ *Id.* ¶ 21 (quoting Order on Reconsideration and Second Further Notice of Proposed Rulemaking, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 25 FCC Rcd. 4181, ¶ 32 (2010)); see also *id.* ¶ 51 (roaming will be offered at a “relatively high price” and that this high price should itself be sufficient to “counterbalance the incentive” to “rely[] on another provider’s network”).

⁴ *Id.* ¶ 81; see also *id.* ¶ 86 (“[t]o guide us in determining the reasonableness of . . . the terms and conditions of the proffered data roaming arrangements” Commission will consider “whether the providers involved have had previous data roaming arrangements with similar terms”).

possible build-out to maintain incentives for broadband investment. The D.C. Circuit has made clear that an agency “may not bypass [the APA’s notice-and-comment procedures] by rewriting its rules under the rubric of ‘interpretation.’”⁵

Unable to defend the substance of the *Declaratory Order*, T-Mobile resorts to mischaracterizing AT&T’s arguments. Most notably, T-Mobile claims that AT&T’s “interpretation of the *Data Roaming Order*, which it has consistently relied on in its data roaming negotiations,” is purportedly that “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.” That claim is both incorrect and disingenuous. T-Mobile’s own economist showed that the rates T-Mobile pays to AT&T have fallen by more than 70 percent since 2011 and compare very favorably to the rates that T-Mobile claims that it pays to other providers.⁶ The *Data Roaming Order* makes clear that the commercial reasonableness standard must look first to the range of rates that sophisticated data providers are paying in *today’s* marketplace in unchallenged agreements, and under that standard T-Mobile would have no conceivable argument that AT&T’s rates are not commercially reasonable – which is undoubtedly why T-Mobile is trying to smuggle through a rule change without going through a rulemaking.

Second, none of the opponents can explain how the Bureau’s new standard will apply in any individual case. For example, T-Mobile emphasizes that the new rate benchmarks are only

⁵ *C.F. Commc’ns Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997). T-Mobile implicitly recognizes that the Bureau has no authority to modify the data roaming rules, and thus T-Mobile attempts to show that the *Declaratory Ruling* is a “policy” and not a “rule.” Opposition of T-Mobile at 2-3 (Feb. 4, 2015) (“T-Mobile Opp.”). The cases T-Mobile cites are inapposite because the Bureau was attempting to “clarify” what the Commission’s existing rule requires, not to adopt a new, free-standing “policy.” See, e.g., *Ryder Truck Lines v. United States*, 716 F.2d 1369, 1376-78 (11th Cir. 1983) (considering whether ICC acted properly in proceeding by rulemaking or general statement of policy).

⁶ Opposition of AT&T, WT Docket No. 05-265, at 10-11 (July 10, 2014).

“factors that the FCC may consider, in its discretion,” and “that all of benchmarks may not be relevant in all circumstances.”⁷ How does anyone know when they may be “probative” or “relevant”? All anyone can say is that the Commission will look at the “facts” and the “totality of circumstances” in each individual case.⁸ T-Mobile even suggests that the *Declaratory Ruling* is not binding from case to case; rather, T-Mobile argues that the ruling is a policy statement “which leaves the agency ‘free to exercise its discretion to follow or not to follow that general policy in an individual case.’”⁹

T-Mobile and its allies seek to defend the *Declaratory Ruling*’s standardless approach on the ground that the *Data Roaming Order* itself adopted a completely standardless approach. In T-Mobile’s view, the Commission’s “list of [seventeen] factors is no more or less ‘nonexclusive’ today than it was when the Commission adopted the *Data Roaming Order*.”¹⁰ But the mere fact that the Commission’s list is “non-exclusive” does not mean that the Bureau can add items that are plainly inconsistent with the thrust of that order. The Commission’s seventeen listed factors consistently support certain intelligible principles that underlie the rules – most notably, that the Commission would look primarily to generally prevailing rates and terms in marketplace roaming agreements and seek to maintain incentives for broadband investment. The *Declaratory Ruling*’s endlessly manipulable standard, by contrast, undermines those policies and both “[fails to] give fair warning of the proscribed conduct” and constitutes “an unrestricted delegation of

⁷ T-Mobile Opp. at 4.

⁸ See, e.g., Opposition of Cellular South at 23 (Feb. 4, 2015) (“Cellular South Opp.”); T-Mobile Opp. at 12; Sprint Opposition at 22-23 (Feb. 4, 2015) (“Sprint Opp.”); Comptel Opposition at 7 (Feb. 4, 2015); Opposition of Competitive Carriers Association at 7 (Feb. 4, 2015).

⁹ T-Mobile Opp. at 3; see *id.* at 2-3.

¹⁰ T-Mobile Opp. at 3-4; see also Cellular South Opp. at 23.

power that enables enforcement officials to act arbitrarily and with unchecked discretion.”¹¹ Reviewing courts would not uphold a judgment against a party that is the product of such a vague and unpredictable standard.¹²

In short, T-Mobile’s own data in its petition showed that providers have entered into dozens of data roaming agreements since 2011 without resorting to litigation, that “[w]holesale [roaming] rates have trended *downward strongly* in recent years,”¹³ and that the average wholesale roaming rate T-Mobile pays has fallen nearly 70 percent since 2011 and continues to decline.¹⁴ Although opponents here repeat the same irresponsible rhetoric about “abusive tactics” and “premium” rates,¹⁵ the Bureau notably did not credit any of those claims. To the contrary, the Bureau specifically noted that it was not making any finding that the “complaint process is not working,” that the “data roaming marketplace is [not] functioning properly,” or that data roaming providers have “the incentive or the ability to raise their rivals’ costs.”¹⁶ The Bureau had no factual or legal basis to issue the *Declaratory Ruling*, and T-Mobile and its allies have provided no grounds on which the Commission could affirm it.

CONCLUSION

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

¹¹ *Keefe v. Library of Cong.*, 777 F.2d 1573, 1581 (D.C. Cir. 1985); *Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107, 117 (D.C. Cir. 1977).

¹² *See, e.g., Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995).

¹³ *See* Declaration of Joseph Farrell, attached as Exhibit 2 to Petition for Expedited Declaratory Ruling of T-Mobile, WT Docket No. 05-265, at ¶ 13 (May 19, 2014) (“Farrell Decl.”) (emphasis added).

¹⁴ *See* Farrell Decl., Table 6.

¹⁵ T-Mobile Opp. at 8; Sprint Opp. at 23.

¹⁶ *Declaratory Ruling* ¶¶ 21, 23.

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

Respectfully Submitted,

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

Counsel for AT&T

Dated: February 19, 2015

Certificate of Service

I hereby certify that on February 19, 2015, I caused copies of the foregoing document filed in WT Docket 05-265 to be sent by U.S. Mail to the following parties:

John T. Scott, III
Verizon
1300 I Street, N.W.
Ste 400-West
Washington, DC 20005

Amina Fazlullah
Benton Foundation
1250 Connecticut Ave., NW – Suite 200
Washington, DC 20036

John A. Prendergast
Blooston, Mordkofsky, Dickens, Duffy &
Prendergast, LLP
2120 L Street, NW – Suite 300
Washington, DC 20037

Julia K Tanner
Broadpoint, LLC
1170 Devon Park Drive, Suite 104
Wayne, PA 19087

Benjamin M. Moncrief
Cellular South, Inc.
1018 Highland Colony Parkway
Suite 300
Ridgeland, MS 39157

Todd O'Boyle
Common Cause
1133 19th Street, NW – 9th Floor
Washington, DC 20036

Mary C. Albert
COMPTEL
1200 G Street, NW – Suite 350
Washington, DC 20005

Catherine R. Sloan
Computer & Communications Industry
Association
900 17th Street, NW – Suite 1100
Washington, DC 20006

Steven K. Berry
Competitive Carriers Association
805 15th Street, NW – Suite 401
Washington, DC 20005

Jill Canfield
NTCA
4121 Wilson Blvd. – Suite 1000
Arlington, VA 22203

Donald J. Evans
Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th Street – 11th Floor
Arlington, VA 22209
*Counsel for NTCH, Flat Wireless, and
Buffalo-Lake Erie Wireless Systems*

Brian J. O'Neil
NTELOS Holdings Corp.
1154 Shenandoah Village Dr.
Waynesboro, VA 22980

Michael Calabrese
Open Technology Institute at the
New America Foundation
1899 L Street, NW – 4th Floor
Washington, DC 20036

Daryl A. Zakov
Bennet & Bennet, PLLC
6124 MacArthur Blvd.
Bethesda, MD 20816
*Counsel for PinPoint Wireless, Inc. and
Limitless Mobile, LLC*

Harold Feld
Public Knowledge
1818 N St., NW – Suite 410
Washington, DC 20036

Daryl Zakov
Rural Wireless Association, Inc.
10 G Street, NE – Suite 710
Washington, DC 20002

Charles W. McKee
Sprint Corporation
900 7th Street, NW – Suite 700
Washington, DC 20001

Andrew W. Levin
T-Mobile USA, Inc.
601 Pennsylvania Ave., NW
Washington, DC 20004

W. Scott McCollough
Worldcall Interconnect, a/k/a Evolve
Broadband
1290 S. Capital of Texas Hwy
Bldg 2-235
West Lake Hills, TX 78746

/s/ Rishi P. Chhatwal

Rishi P. Chhatwal
Associate
Sidley Austin LLP