

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554**

In the Matter of	)	
	)	
NTCH, Inc.,	)	
	)	
Complainant	)	
	)	File No. EB-13-MD-006
v.	)	
	)	
Cellco Partnership d/b/a Verizon Wireless	)	
	)	
Defendant	)	

**APPLICATION FOR REVIEW**

NTCH, Inc. (NTCH), by its attorneys, hereby submits this application for review of an interlocutory decision of the Market Disputes Resolution Division of the Enforcement Bureau in the above-captioned case. Review of the Division’s order severely limiting the scope of discovery to exclude cost information regarding the rates in question prevents the Commission and the Complainant from having access to the single most critical element in assessing the justness and reasonableness of a rate.

**QUESTIONS PRESENTED**

- a. Is information regarding a CMRS carrier’s cost of delivering a service relevant to determining the justness and reasonableness of the rate offered by the carrier?
- b. When roaming rate levels are alleged to constitute a restraint of trade, is the basis and intent of such rates a relevant inquiry in determining the lawfulness of such rates?
- c. Does a different standard apply to data roaming rates as opposed to voice roaming rates?

## FACTORS WARRANTING REVIEW

1. The MDRD's limitation of discovery is in conflict with some 75 years of Commission precedent.
2. The Commission has never ruled on the specific criteria for assessing justness and reasonableness of CMRS rates.
3. The need to discipline currently out of control roaming rates by requiring them to bear some reasonable relation to costs is urgent and Commission direction to the Bureau is therefore necessary to ensure that the proper standard is applied to such rates.

## ARGUMENT

### I. Need for Interlocutory Relief

Section 1.115 of the Commission's rules permits applications for review of decisions made on delegated authority, with certain limited exceptions. Discovery rulings are not an exception. It will preserve administrative resources for the full Commission to resolve the issue raised here now because otherwise the complaint will proceed to a conclusion at the Staff level guided by the same erroneous principle which governed the erroneous interrogatory ruling. In the end, the Commission will rule correctly that the information not provided was relevant and the parties will have to come back and start over.

The need to expedite the process comes from two sources. First, Section 208(b) of the Communications Act requires Title II complaints to be resolved in not more than five months.<sup>1</sup> The instant complaint which is founded in part on Title II was filed in November 2013 and amended in July 2014, so the Commission is already in serious violation of the statutory deadline. Second, the Commission itself ordained that complaints regarding data roaming charges should be handled "expeditiously." *Reexamination of Roaming Obligations of CMRS Providers and Other Providers of Mobile Data Services*, 25 FCC Rcd 5411, Para. 77, 2011. (*Data Roaming Order*). It has taken more than a year and half to get to a discovery order in the

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<sup>1</sup> 47 U.S.C. § 208(b)(1).

case, so the case has proceeded the opposite of expeditiously. Neither the Act nor the Commission's own order requiring swift disposition of these complaints is being obeyed.

The particular issue that has arisen in the course of discovery is a simple one. NTCH sought cost information from Cellco Partnership d/b/a Verizon Wireless ("Verizon") Verizon in order to determine whether its roaming charges are just and reasonable. NTCH had hoped to use the benchmarks of MVNO rates, retail rates and international roaming rates as a means of establishing a metric for the justness and reasonableness of the roaming rates offered by Verizon, but the material provided to date by Verizon, which consists of numerous bundled packages of services, does not readily permit reverse engineering of the rate to arrive at a reasonable estimate of the cost. The MDRD denied NTCH's request for actual cost information from Verizon, as well as information regarding the typical usage patterns that must have formed the basis for Verizon's rates. NTCH had explained in its discovery request that "the calculus of what constitutes a reasonable rate can be approached from the standpoint of the costs to the carrier of providing the service or the rates being offered by the carrier to others purchasing comparable services. The interrogatories therefore seek information on Verizon's costs (which are known only to Verizon) and the rates (and assumptions underlying the rates) that are being offered to others." Given that the Commission has consistently, over the entire duration of its existence, used carrier costs as the single most important criterion for determining the justness and reasonableness of a rate, a point which NTCH had emphasized at length in its Complaint and its Reply to Answer, NTCH did not think that an extended elaboration on that point was necessary.

The sole substantive basis for the MDRD's rejection of the request for cost information was clearly erroneous. Ignoring entirely the literally hundreds of Title II cases in the Commission's annals holding that costs are the single most important measure of just and reasonable rates,<sup>2</sup> the MDRD instead pointed to the *Reexamination of Roaming Obligations of*

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<sup>2</sup> See, e.g., *In the Matter of Rates for Interstate Inmate Calling Services (ICS II)*, 28 FCC Rcd 15927, 15928 at ¶ 3 (2013) (noting that "To be just and reasonable [under Section 201], rates must be related to the cost of providing service."); *In the Matter of Rates for Interstate Inmate Calling Services (ICS I)*, 2013 FCC Lexis 4028 at ¶ 45 (2013) (noting that "the just and reasonable rates required by Sections 201 and 202...must ordinarily be cost-based"); *In the Matter of Petition of ACS of Anchorage*, 22 FCC Rcd. 16304, 16330 n. 155 (2007) (noting that "If ACS's rates are challenged, it may be necessary for the Commission to consider its costs and earnings in assessing the reasonableness of its rates."); *In the Matter of Application by Verizon New England*, 17 FCC Rcd 7625, 7632 at ¶ 13 ("determination of the just and reasonable rates for network elements shall be based on the cost of providing the network elements, shall be nondiscriminatory, and may include a reasonable profit."); *In the Matter of Investigation of Special Access Tariffs*, 4 FCC Rcd. 4797, 4800 at ¶ 32 (1988) (noting that, under Section 201 of the Act, "Costs

*CMRS Providers and Other Providers of Mobile Data Services*, 25 FCC Rcd 4181 (2010) (*Automatic Roaming Order*). That order deals exclusively with the circumstances of when a carrier must offer automatic roaming to another carrier. It does not address at all the justness or reasonableness of the rates offered. It is therefore no surprise that the Commission did not identify carrier costs as one of the items that would be considered, as they are wholly inapplicable in that context. But the provision of automatic roaming has nothing to do with the relevance of costs in the context of establishing just and reasonable rates. There is no reason why a CMRS carrier's costs should be treated differently from any other carrier's costs, and the Division certainly cited none.

The Commission did indicate in 2007 that the “better course” is that the “rates individual carriers pay for automatic roaming services be determined in the marketplace through negotiations between the carriers, subject to the statutory requirement that any rates charged be reasonable and non-discriminatory.”<sup>3</sup> Thus, while the Commission has very clearly enunciated its preference for negotiation over ex ante rate regulation, it has never renounced the fundamental obligation that rates be just and reasonable as required by Section 201 of the Act. The MDRD rejected the request for cost information for the provision of data on the grounds that the *Data Roaming Order* did not list costs as a factor in evaluating the reasonableness of data rates. In this regard we must note that the Wireless Bureau has recently emphasized that the factors cited in the data roaming order were not intended to be exhaustive, and the Bureau effectively added additional items to the list of matters to be considered.<sup>4</sup> The absence of costs in the 2011 Order is therefore no bar to considering another factor in determining the commercial reasonableness of a rate. And given the more than half a century of using costs as the primary benchmark for reasonable rates, it would be strange indeed *not* to use costs as a factor in determining “commercially reasonable” rates.

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are traditionally and naturally a benchmark for evaluating the reasonableness of rates”); *In the Matter of MTS and WATS*, 97 F.C.C. 2d 682, 687 at ¶ 10 (1995) (“Preeminent among these principles is the conclusion that actual costs of providing service underlie the statutory requirement that rates be just, reasonable, and nondiscriminatory.”) (internal quotations omitted).

<sup>3</sup> *Reexamination of Roaming Obligations of CMRS Providers and Other Providers of Mobile Data Services*, 22 FCC Rcd 15817, 15833 (2007) (Emph. added).

<sup>4</sup> *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, DA 14-1865, rel. Dec. 18, 2014 (*T-Mobile Declaratory Ruling*).

The relevance of costs as a metric in the data roaming context is even more strongly justified by the Commission’s recent reclassification of data roaming as a Title II CMR service.<sup>5</sup> The Commission no longer needs to tiptoe around the obligation to ensure that data rates are just and reasonable. It can and must demand just and reasonable rates of its Title II carriers. NTCH recognizes that the *Net Neutrality Order* facially preserved the “commercially reasonable” standard for regulating data roaming rates (*Id.* at Para. 526), but the Commission overlooked the fact that under Section 332(c) of the Act it cannot forebear from imposing the requirements of Section 201 on CMRS providers. NTCH is filing a petition for reconsideration seeking correction of the Commission’s apparent error. In the meantime, it is irrational to ignore the single most important element in establishing the justness and reasonableness of a rate, cost, whether under Title II standards or any other standard.

## II. Rates in Restraint of Trade are Unlawful

NTCH laid out in its petition facts that proving that Verizon’s rate structure, in combination with rates offered to other providers, has a severe anti-competitive effect on competing carriers who must rely on Verizon’s network for roaming. (Amended Complaint at Paras. 33, 42-44). The Commission explicitly indicated in the *Data Roaming Order* that “conduct that unreasonably restrains trade, however, is not commercially reasonable.” (*Id.* at Para. 85). NTCH sought to discover the basis for the rates offered by Verizon in part to determine whether they are intended to restrain trade, since they clearly have that effect. It was therefore perfectly reasonable and relevant for NTCH to request information going to that issue in order for it – and the Commission – to evaluate the commercial reasonableness of the rates from a “restraint of trade” perspective. Yet the MDRD denied without discussion interrogatories<sup>6</sup> that would permit NTCH to determine the rationale, if any, for rate differences between carriers or between carriers and MVNOs that have an anti-competitive effect.

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<sup>5</sup> *Report and Order on Remand, Declaratory Ruling, and Order*, FCC 15-24, rel. March 12, 2015 (“*Net Neutrality Order*”).

<sup>6</sup> NTCH Interrogatories 3, 4, 7 and 8.

III. Conclusion

NTCH therefore requests that the Commission immediately reverse the action of the MDRD and order Verizon to provide the information requested in NTCH Interrogatories 2, 3,4,6,7 and 8 on an expedited basis.

Respectfully submitted,

NTCH, Inc.

By: \_\_\_\_\_/s/ \_\_\_\_\_

Donald J. Evans  
Jonathan R. Markman  
Fletcher, Heald & Hildreth, PLC  
1300 North 17th Street, Suite 1100  
Arlington, VA 22209  
703-812-0400  
*Attorneys for NTCH, Inc.*

## CERTIFICATE OF SERVICE

I, Jonathan R. Markman, do certify that I sent the foregoing Application for Review to be delivered, on this 6th day of May, 2015, via email (unless otherwise noted) to:

John T. Scott III (john.scott@verizon.com)  
Christopher M. Miller (chris.m.miller@verizon.com)  
Andre J. Lachance (andy.lachance@verizon.com)  
Tamara Preiss (tamara.preiss@verizon.com)  
Verizon Wireless

Rosemary McEnery  
Deputy Chief, Market Disputes Resolution Division  
Enforcement Bureau  
Federal Communications Commission  
rosemary.mcenery@fcc.gov

Lisa Boehley  
Market Disputes Resolution Division  
Enforcement Bureau  
Federal Communications Commission  
lisa.boehley@fcc.gov

Chairman Tom Wheeler  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554  
(via hand delivery)

Commissioner Mignon Clyburn  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554  
(via hand delivery)

Commissioner Jessica Rosenworcel  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554  
(via hand delivery)

Commissioner Ajit Pai  
Federal Communications Commission  
445 12th Street, SW

Washington, DC 20554  
(via hand delivery)

Commissioner Michael O’Rielly  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554  
(via hand delivery)

A handwritten signature in blue ink, appearing to read "Jonathan R. Markman".

By: \_\_\_\_\_  
Jonathan R. Markman