

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

In the Matter of	)	
	)	
NTCH, Inc.,	)	EB Docket No. 14-212
	)	File No. EB-13-MD-006
Complainant,	)	
	)	
v.	)	
	)	
Cellco Partnership dba Verizon Wireless,	)	
	)	
Defendant.	)	

**OPPOSITION OF VERIZON WIRELESS**

The Commission should deny NTCH’s Application for Review<sup>1</sup> of the Enforcement Bureau’s Discovery Ruling regarding access to roaming cost information from Verizon.<sup>2</sup> The Bureau correctly denied NTCH’s request for discovery of cost data.

First, the cost information NTCH seeks is irrelevant to the legal standard for resolving roaming disputes. The Commission has decided, and its voice and data roaming rules make clear, that the legal standard in a roaming dispute is whether a party has offered roaming rates within the range of reasonable rates negotiated with other providers. Verizon has produced information relevant to this legal standard – *i.e.*, the roaming rates paid to and by Verizon.

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<sup>1</sup> Application for Review, EB Docket No. 14-212, File No. EB-13-MD-006 (May 6, 2015) (“NTCH AFR”).

<sup>2</sup> Letter from Rosemary McEnery, Deputy Chief, Market Disputes Resolution Division to Donald J. Evans and Jonathan Markman, counsel to NTCH, and Andre J. Lachance and Tamara Preiss, counsel to Verizon Wireless, EB Docket No. 14-212; File No. EB-13-MD-006 (Apr. 2, 2015) (“Discovery Ruling”). A more detailed rationale for the Discovery Ruling was provided in a subsequent letter ruling. Letter from Rosemary McEnery, Deputy Chief, Market Disputes Resolution Division to Donald J. Evans and Jonathan Markman, counsel to NTCH, and Andre J. Lachance and Tamara Preiss, counsel to Verizon Wireless, EB Docket No. 14-212; File No. EB-13-MD-006 (Apr. 17, 2015) (“Discovery Explanation Ruling”).

Second, NTCH is not entitled to discovery of Verizon's costs based on its assertion that Verizon is unlawfully restraining trade. Verizon cannot be found to have unlawfully restrained trade based on a cost analysis because costs are irrelevant in roaming complaints before the Commission, and rates offered by providers to other carriers are not required to be cost-based. Third, as the Bureau noted, the Commission's complaint rules require NTCH to adequately explain why it needs access to Verizon's cost information to prove its case. NTCH twice failed to provide a sufficient explanation – first in its interrogatories before the Bureau and now in its Application for Review.<sup>3</sup>

### DISCUSSION

1. The Commission's *Voice and Data Roaming Orders* make clear that the FCC cannot determine the reasonableness of roaming rates based on a carrier's costs. Instead, the Bureau must base its decision on whether the roaming rates Verizon offered to NTCH are reasonable compared to rates Verizon receives from and pays to other providers. As a result, cost information is irrelevant to the Bureau's decision-making on the merits.

The Commission chose to rely on market forces rather than cost-based regulation to ensure that voice roaming rates are reasonable. In the *Voice Roaming Order*, the Commission held that roaming rates would "be freely determined through negotiations between the carriers based on competitive market forces."<sup>4</sup> The *Voice Roaming Order* expressly recognized that "competitive market forces" would necessarily result in a range of *different* rates and terms,

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<sup>3</sup> Commission precedent also establishes the NTCH AFR is procedurally defective because it is premature. *See Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, 16 FCC Rcd 5681, 5697-98 ¶ 38 (2001) (holding that "the Commission generally will not consider applications for review of interlocutory staff rulings in the context of a Section 208 complaint except in conjunction with ruling on the merits of the complaint."); Discovery Explanation Ruling at 3, n.14.

<sup>4</sup> *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817, 15824 ¶ 18 (2007) ("*Voice Roaming Order*").

reflecting the particular facts of each individual negotiation. The Commission said “it is likely that automatic roaming rates will reasonably vary.”<sup>5</sup> The Commission expressly rejected requests “to impose a price cap or any other form of rate regulation on the fees carriers pay each other when one carrier’s customer roams on another carrier’s network,”<sup>6</sup> and did not include cost information among the factors the Commission will consider in determining whether voice roaming rates are reasonable.<sup>7</sup>

Cost information is even less relevant to data roaming rates. In the *Data Roaming Order*, the Commission adopted a “commercially reasonable standard,” which allows “individualized service agreements and [does] not require providers to serve all comers indifferently on the same terms and conditions.”<sup>8</sup> As in the voice roaming proceeding, the Commission rejected requests to prescribe specific rates or standards, and did not include carriers’ costs in the list of factors for determining whether a roaming rate offered is commercially reasonable.<sup>9</sup>

The *Voice and Data Roaming Orders* collectively preclude the Bureau from basing its decision in a roaming dispute on cost information. Those orders provide that other roaming rates negotiated by the parties to a dispute – information that Verizon has provided to NTCH in the discovery process – are the appropriate gauge for determining whether the offered rates are reasonable. Indeed, one of the reasons the Commission rejected roaming rate regulation was to

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<sup>5</sup> *Id.* at 15834 ¶ 44.

<sup>6</sup> *Id.* at 15832 ¶ 37.

<sup>7</sup> *Reexamination of Roaming Obligations of CMRS Providers and Other Providers of Mobile Data Services*, Second Report and Order, 25 FCC Rcd 4181, 4200-01 ¶ 39 (*Voice Roaming Reconsideration Order*). *See also* Legal Analysis of Verizon Wireless, EB Docket No. 14-212, File No. EB-13-MD-006 (Aug. 4, 2014) at 2-12.

<sup>8</sup> *Data Roaming Order*, 26 FCC Rcd at 5445 ¶ 68.

<sup>9</sup> *Id.* at 5422-23 ¶¶ 21 (rejecting request for “prescriptive regulation of rates requested by some commenters”); and 5452-53 ¶¶ 85-87 (discussing the commercially reasonable standard and providing a list of factors to be considered in analyzing terms against this standard). *See also* Legal Analysis of Verizon Wireless, EB Docket No. 14-212, File No. EB-13-MD-006 (Aug. 4, 2014) at 14-20.

provide carriers flexibility to negotiate rates based on market conditions – flexibility that would not exist if rates were tied to carrier costs.<sup>10</sup>

The FCC should reject NTCH’s arguments to the contrary. NTCH argues that the *Voice Roaming Reconsideration Order* does not set forth a standard for determining whether voice roaming rates are reasonable, and therefore the Commission should rely on cost information.<sup>11</sup> That is wrong. The *Voice Roaming Reconsideration Order* sets forth a number of “factors the Commission may consider when resolving such roaming disputes that are brought before it – specifically in determining whether a request is reasonable and *whether the host carrier’s response to the request is reasonable and not unreasonably discriminatory.*”<sup>12</sup> Those factors do not include carrier cost information. Likewise, NTCH suggests that costs are relevant to data roaming rates because the *Data Roaming Order’s* list of relevant factors is not exhaustive.<sup>13</sup> But all of the data roaming factors (listed or not) still must speak to the question of what is commercially reasonable. The Commission’s prior decisions make clear that the Commission has expressly decided *not* to impose a cost-based regulatory regime on data roaming and that cost information is not relevant to the question of what is commercially reasonable. And the Commission has embraced other ways to demonstrate that rates are commercially reasonable – *e.g.*, the competitive circumstances of a particular negotiation and rates offered and paid in similar situations.<sup>14</sup>

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<sup>10</sup> See *id.* at 5422-23 ¶ 21.

<sup>11</sup> NTCH AFR at 3-4.

<sup>12</sup> *Voice Roaming Reconsideration Order*, 25 FCC Rcd at 4200-01 ¶ 39 (emphasis added).

<sup>13</sup> NTCH AFR at 4 (citing *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Declaratory Ruling, 29 FCC Rcd 15483 (2014)) (“*Declaratory Ruling*”).

<sup>14</sup> See, *e.g.*, *Orloff v. Vodafone AirTouch Licenses LLC d/b/a Verizon Wireless and New Par*, 17 FCC Rcd 8987 (2000), *aff’d sub. nom.*, *Orloff v. FCC*, 352 F3d 415 (D.C. Cir 2003), *cert. denied*, 542 U.S. 937 (2004); and *Review*

2. Cost information also is not necessary to determine whether Verizon's roaming rate offer to NTCH unlawfully restrains trade.<sup>15</sup> NTCH argues that cost information would permit it to determine Verizon's rationale for differences in rates with other providers, which according to NTCH, potentially speaks to whether Verizon unlawfully restrained trade in violation of the *Data Roaming Order*.<sup>16</sup> This argument is without merit because NTCH has no right to use this roaming dispute as a forum to raise freestanding allegations about purported restraint of trade. The portion of the *Data Roaming Order* NTCH cites merely points out that carriers remain prohibited from engaging in unlawful restraint of trade in violation of the antitrust laws. In any event, NTCH has offered no basis to support such a claim. Even if the roaming rates offered by Verizon to NTCH had no connection to Verizon's costs, NTCH could not demonstrate that Verizon is unlawfully retraining trade because roaming rates are not required to be cost-based in the first place. NTCH's assertion is at odds with the underpinnings of the *Voice and Data Roaming Orders*, which hold that there are many reasons for roaming rates to vary. In the *Voice Roaming Order* the Commission expressly predicted that negotiated roaming rates would "reasonably vary."<sup>17</sup> And in the *Data Roaming Order* the Commission embraced the fact that a commercial reasonable standard allows "individualized service agreements and [does] not require providers to serve all comers indifferently on the same terms and conditions."<sup>18</sup>

3. NTCH failed to explain why cost information is necessary for the Commission to resolve this complaint. The Commission's rules require the party requesting discovery to include

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*of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17389, ¶ 653 (2003).

<sup>15</sup> *Data Roaming Order*, 26 FCC Rcd at 5452 ¶85.

<sup>16</sup> NTCH AFR at 5.

<sup>17</sup> *Voice Roaming Order*, 22 FCC Rcd at 15834 ¶ 44.

<sup>18</sup> *Data Roaming Order*, 26 FCC Rcd at 5445 ¶ 68.

“an explanation of why the information sought in each interrogatory is both necessary to the resolution of the dispute and not available from any other source.”<sup>19</sup> NTCH has never adequately explained why cost information is necessary for the Commission to resolve this dispute. NTCH’s only explanation for its request for discovery of Verizon’s costs was a general statement 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.”<sup>20</sup> The Bureau correctly rejected this general theory as insufficient.<sup>21</sup>

NTCH’s explanation in its Application for Review of why cost information is necessary was procedurally barred and deficient. Commission rules prohibit raising new arguments in an application for review.<sup>22</sup> And even if the Commission were to consider the additional argument in NTCH’s Application for Review, that argument is still deficient. NTCH now argues that cost information is necessary because certain bundled rate information produced by Verizon does not let NTCH reverse engineer the rate to arrive at a reasonable estimate of the cost of providing service.<sup>23</sup> Again, this argument merely assumes (incorrectly) that cost information is necessary to resolve the dispute, and the argument still fails to explain why.

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<sup>19</sup> 47 C.F.R. § 1.729(b).

<sup>20</sup> NTCH AFR at 2.

<sup>21</sup> Discovery Explanation Ruling at 1-2.

<sup>22</sup> 47 C.F.R § 1.115(c).

<sup>23</sup> NTCH AFR at 3.



**CERTIFICATE OF SERVICE**

I hereby certify that on this 21<sup>st</sup> day of May, 2015, copies of the foregoing Opposition of Verizon Wireless were delivered via US mail and email to the following individual:

Donald J. Evans  
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/s/  
Sarah E. Trosch