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October 19, 2015

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**VIA ECFS**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: Consolidated Filing Flat Wireless, LLC  
EB Docket No. 15-147  
File No. EB-15-MD-005

Dear Ms. Dortch:

Attached please find the following: the Consolidated Answer to Affirmative Defenses and Reply to Answer, the Response to Interrogatories, the Reply to Opposition to Interrogatories, and the Motion to Strike, all of Flat Wireless. Some of the documents contain confidential information which is being redacted pursuant to the Protective Order in the above-captioned proceeding. This copy has been redacted for public inspection. Unredacted copies of the filing have been submitted under seal to the Commission. Please contact this office with any questions or concerns.

Respectfully Submitted,

By: \_\_\_\_\_

Donald J. Evans  
Jonathan R. Markman  
*Its Attorneys*

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554

_____	)	
In the Matter of	)	
	)	
Flat Wireless, LLC,	)	EB Docket No. 15-147
	)	File No. EB-15-MD-005
Complainant,	)	
	)	
v.	)	
	)	
Cellco Partnership dba Verizon Wireless	)	
and its Operating Subsidiaries,	)	
	)	
Defendant.	)	
_____	)	

**Flat Wireless, LLC's  
Consolidated Answer to Affirmative Defenses and Reply to Answer**

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October 19, 2015

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## REDACTED PURSUANT TO PROTECTIVE ORDER

Flat Wireless, LLC (“Flat”), by its attorneys, hereby submits its Answer to Verizon Wireless's (“Verizon”) Affirmative Defenses and replies to the factual and legal material submitted by Verizon in connection with its answer.

### SUMMARY

Verizon's Answer boils down to a few simple positions, all of which are erroneous.

1. Verizon asserts that the reasonableness of Verizon's offer to Flat can be measured by the roaming rates it has with other carriers. The fact that Verizon has been grossly overcharging lots of other carriers is no justification for overcharging Flat, too.

2. Verizon asserts that the cost of producing a telecom service is not a basis for assessing the reasonableness of the rate charged for that service. This flies directly in the face of 75 years of common carrier regulation by the Commission and should be rejected out of hand.

3. Verizon asserts that the Commission is foreclosed from granting rate relief here because it previously declined to impose industry-wide roaming rate standards. This ignores the Commission's repeated admonition to parties complaining about Verizon's rates in broader contexts that they should file a formal complaint if they think the rates are too high. Flat has accepted that invitation.

4. Verizon asserts that the mandating of roaming rates at levels proposed by Flat that are consistent with Verizon's putative costs would disincent Flat to build out and operate its own network. In fact, the refusal of Verizon to offer reasonable roaming rates has had the opposite effect: the absence of reasonable roaming makes it impossible for Flat to offer adequate service to customers who expect and require the availability of universal roaming. This cripples the ability of Flat to build and offer service competitive to Verizon in the areas where Flat has licenses. Flat does not partially seek to roam on Verizon in those areas and would accept higher

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recurring rates in its home market if that would alleviate Verizon's concerns. As demonstrated below, even at the rates proposed by flat here, it would be more profitable for Flat to build out and operate its own facilities rather than roaming on Verizon's network.

5. Verizon asserts that reasonably priced roaming partners are available to Flat. In fact, as the responses to the T-Mobile petition in Docket 05-265 makes clear, all carriers except Verizon and AT&T have been unable to negotiate reasonable roaming rates with those two carriers. Moreover, carriers such as Spirit are not nearly as universally available to Flat as CDMA roaming partners as Verizon, and are therefore not adequate substitutes.

6. Verizon presents a chart which purports to support the reasonableness of its proffered rates by comparison with unexplained average rates offered to some, but not all, other carriers. A more useful chart is the one provided below which compares Flat's proposed rates to Verizon's costs as deduced from various public metrics.

7. Verizon's new theory to justify its exorbitant roaming rates proves its anticompetitive policy is an unfair trade practice.

8. Flat does not address the untimely information and evidence belatedly submitted by Verizon as an attachment to its "Legal Analysis," in contravention of the Commission's rules.

### **I. Cost/Rate Information**

Verizon presented a chart which purports to show the "weighted average" of rates paid by, or to, Verizon. Verizon nowhere explains how this weighted average was derived other than to describe it as "the average rates for all roaming traffic under these agreements."<sup>1</sup> How or why the weighting was done is unclear, and without the underlying rates to refer to, no one can tell what they mean. In fact, Verizon's own admission that "arithmetic averaging" would have been a worse representation of average prices demonstrates precisely how manipulation of hidden source data to serve the interest of the presenter can easily create deceptive or even false representations of the truth. There could, for example, be high rates charged to a few small carriers and low rates charged to others who have higher volume and a better negotiating position, or vice versa. This is why the actual rates for each roaming partner are needed to conduct a fair evaluation. This is especially important, given that Verizon relies heavily on the rates charged to others as a basis for the reasonableness of the rates it has offered to Flat. That basis cannot be founded on the false predicate of "averaged" rates weighted in some way to Verizon's benefit. To the extent that Verizon has provided additional information in discovery bearing on the rates it charges to others, some of the omissions in the chart have been ameliorated, but not entirely resolved. Knowing the identity of Verizon's roaming partners and the rates charged to each would aid in honing in on where and why rate discrimination is occurring.

In a world where there is an open market, with multiple choices of roaming partners, with equal negotiating power and comparable service areas, the rates charged by Verizon to others would bear somewhat on the reasonableness of the rates offered to Flat. But that is not the world we live in. As Flat demonstrated in its Complaint, and as the Commission has repeatedly

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<sup>1</sup> Verizon Statement of Facts at p. 11, footnote 39.

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declared, the current CMRS market is not competitive<sup>2</sup>, and Verizon in particular has no incentive to enter into fair and reasonable rates.<sup>3</sup> It has little incentive to enter into roaming agreements with other carriers on reasonable terms because its own broad coverage leaves relatively few areas uncovered. It doesn't need roaming, while other CDMA carriers do.

This plain fact distorts the negotiating dynamic radically. Given the large number of carriers who have complained in various forums to the Commission that they are being overcharged for roaming by the two majors (Verizon and AT&T), the Commission cannot assume that the fact of those rates being accepted by other carriers somehow establishes their reasonableness. In fact, T-Mobile's petition expressly, and at great length, explained how legacy agreements have been entered into under duress or monopoly conditions where the other party had little or no choice but to accept the terms proffered. (See pp. 16 - 22 of T-Mobile's May 27, 2014 Petition for Declaratory Ruling in Docket 05-265). In essence, the two major carriers are in a position to, and do, impose unreasonable rates on numerous smaller carriers. A multitude of wrongs do not make a right, and the fact that Verizon has certain rate agreements with numerous carriers does not render those rates reasonable. A non-competitive market cannot be the primary basis for assessing reasonableness; rather, it must be founded on costs of service, as will be explained below.

Of course, Verizon's averaging approach completely glosses over the issue of discrimination in the rates it offers. There is a wide range of rates offered by Verizon, some of

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<sup>2</sup> *Sixteenth Report, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Wireless Services*, 28 FCC Rcd 3700 pp. 3757-3764 at ¶¶ 59-72 (2013).

<sup>3</sup> "The transfer of AWS-1 spectrum to Verizon Wireless would place it in the hands of a nationwide provider that has little incentive to provide the roaming capability necessary for competitors with less than national footprints." *In the Matter of Applications of Cellco Partnership d/b/a Verizon Wireless and a few o LLC and Cox TMI, LLC for Consent to Assign AWS-1 Licenses*, Memorandum Opinion and Order and Declaratory Ruling, 27 FCC Rcd 10698, 10730 at ¶ 84, rel. August 23, 2012. ("*SpectrumCo Order*").



## II. Cost Has Always Been the Touchstone for Reasonable Rates

Verizon's blithe assertion that rates need not be based on costs to be reasonable is puzzling. As one of the last remaining progeny of Ma Bell, Verizon should be more aware than anyone that, for decades, the Commission required AT&T to submit detailed cost information with every tariff filing to demonstrate that its rates were reasonable. Rates which exceeded costs plus a specified rate of return would be rejected as unreasonable.<sup>4</sup> We have come a long way from the days of tariff filings and tariff protests, but the underlying principle set forth in the Act still governs. *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 Capital Network System, Inc.*, 10 FCC Rcd 13732, 13734 (1995) (noting that some the reasonableness of rates for one carrier was not determinative for another carrier because others “may have different costs”); *In the Matter of Investigation of Special Access Tariffs*, 4 FCC Rcd.

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<sup>4</sup> *See, e.g., In the Matter of MCI Telecommunications Corporation*, 5 FCC Rcd 216, 226 at ¶ 75 (1990) (“We find that the defendants have violated the Communications Act by earning in excess of a valid rate of return...making their rates unjust and unreasonable under Section 201 of the Communications Act.”); *In the Matter of Investigation of Access*, 1984 FCC LEXIS 2764 at ¶ 111 (“The proposed and current higher rates, which would exceed this rate of return, are therefore unreasonable and unlawful.”).

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4797, 4800 at ¶ 32 (1988) (noting that, under Section 201 of the Act, “Costs 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); *In the Matter of The Western Union Telegraph Company*, 95 F.C.C. 2d 924, 931 at ¶ 40 (1982) (noting that “the Commission has expressly held that costs will be the primary criteria for determining whether a carrier’s charges are just and reasonable”) (citing to *In the Matter of American Telephone and Telegraph Company*, 74 F.C.C.2d 1); *In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services*, 84 F.C.C. 2d 445, 451 at ¶ 19 (1981) (“...the assurance that rates charged by the regulated firm are not excessive but instead are ‘just and reasonable,’ reflecting the average unit cost”).

The catalogue of FCC cases espousing this principle could consume an entire pleading, but suffice it to say that the principle is embedded in the evaluation of reasonable rates as deeply as any principle in communications law. In recent years, the Commission has relied on competitive market forces to ensure that rates are reasonable, figuring that competition would serve to prevent rates from rising above reasonable levels. But where a market failure occurs, as is certainly the case with the roaming market, the Commission must dust off Section 201 and get back to basics.

Because cost is, and must be, the primary measure of reasonable rates, we must look to Verizon's cost of providing roaming service. In the absence of actual cost data from Verizon, Flat proffered a basis for estimating Verizon's costs based on Flat’s own experience with the usage patterns of unlimited pre-pay and advance subscribers. Using those benchmarks, Flat was

able to derive the rate that Verizon is likely charging [REDACTED]. Flat's estimate of about \$2.00 per GB was somewhat [REDACTED]. Flat also used other metrics (retail minus, cost plus, MVNO retail minus, and European roaming equivalents<sup>5</sup>) as proxies for actual cost data. It assumed in all instances that Verizon is not charging less than a rate which would both recover its costs and provide an acceptable return on investment to Verizon. Those metrics all place Verizon's cost structure in the range of \$2.50–\$4.00 per GB of data and less than 1 cent a minute for voice. It is in that context that we must evaluate whether the proffered rate of [REDACTED] of data could be considered anywhere in the ballpark of reasonableness. It is no wonder that Verizon has refused to provide any cost data whatsoever, since such data might well show that its costs are even lower than these estimates.

### **III. The Commission is Not Foreclosed from Providing the Requested Relief**

Verizon argues that the Commission is foreclosed from limiting roaming rates based on costs because it elected in the *Data Roaming*<sup>6</sup> proceeding not to regulate roaming rates on that basis. Verizon is wrong on several counts. First, an administrative agency is always free to adopt rules by adjudication rather than by rulemaking, especially where the rule adjudicatively adopted is given prospective effect only and does not penalize a party for past behavior. *See, e.g. Bechtel v. FCC*, 957 F.2d 873, 881 (noting that the FCC may choose between rulemaking and adjudication) (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293 (1974) (“The choice between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.”) The full Commission may choose to

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<sup>5</sup> See Posner Declaration attached to Flat Complaint.

<sup>6</sup> *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 26 FCC Rcd 5411 (2011) (*Data Roaming Order*).

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apply a cost-based reasonableness test in the context of a specific complaint which proves that actual market conditions, rather than hypothetical ones, require such regulation.

But more importantly, the Commission does not need to actually change course here. In every instance in which the Commission has declined to impose across-the-board limits on roaming rates, it has always noted that aggrieved parties have the option of filing a complaint in the event that the rates being charged are in fact in violation of the Act. This is true both of Title II based rates and data roaming rates which are subject to a somewhat different complaint standard. *Data Roaming Order* at p. 5449, ¶ 74 et seq.; *Automatic Roaming Order*<sup>7</sup> at p. 15822, ¶ 13; *SpectrumCo Order* at p. 10756, ¶ 154. This can only mean that the Commission has expressly anticipated the possibility of revisiting the imposition of rate limits in the complaint context. This squares with the Commission's observation in the *Automatic Roaming Order* (quoted by Verizon in its Response) that "[a]bsent a finding that the existing level and structure of roaming rates harm consumers, regulation of rates for automatic roaming service is not warranted." *Automatic Roaming Order* at p. 15832, ¶ 38 (emphasis added). The Commission has consistently evidenced a willingness to undertake roaming rate review via the complaint process upon a proper showing that rates are problematic to consumers. This is that showing. Finally, the Commission has emphasized that it will closely monitor the commercial mobile broadband data service and "stand[s] ready to take additional action if necessary to help ensure that [its] goals in this proceeding are achieved." *Data Roaming Order* at p. 5438, ¶ 56. Clearly additional action is now called for.

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<sup>7</sup> *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd 15817 at ¶¶ 18-35 (2007) ("Automatic Roaming Order").

**IV. Retail and MVNO Rates Do Not Represent Proposed “Caps” on Verizon’s Roaming Rates but Touchstones for Reasonableness**

Verizon repeatedly suggests that Flat is seeking to use its retail rates and its wholesale rates as “caps” on what it can charge its roaming partners. It misapprehends both the process involved here and the teaching of the *T-Mobile Declaratory Ruling*. Flat has consistently argued that the Commission should examine Verizon’s costs to determine what a just rate would be. In the absence of cost data, examination of retail and wholesale rates is a useful surrogate for cost information. The logic here is quite simple. If we assume that Verizon is not charging below-cost rates to its retail customers or [REDACTED], then we can know with some certainty that Verizon’s costs *must* be below the levels it is charging those entities. Verizon does its best to obfuscate its per service charges to consumers and [REDACTED] by bundling voice, text, toll and data into packages where the individual components are not broken out, but we can nevertheless make reasonable judgments about how much voice, text, data and toll service can be bought from Verizon for a given price, a price which logically must be higher than Verizon’s costs.

Flat will show in its Initial Brief how the rates offered to Flat exceed the rates it charges retail and wholesale customers by as much as [REDACTED]. The retail and wholesale rates do not serve as caps – rather, they serve as very compelling proof that the rates offered to Flat for the identical services are obscenely out of contact with any reasonable cost basis. Verizon’s margin on these rates must be on the order of at least [REDACTED]. Such margins could only exist in a market where there are no available or comparable alternatives, and the fact that so many of Verizon’s roaming partners pay these rates shows not that the rates are reasonable but that they have nowhere else to go.

**V. Flat Will Not be Disincented to Build Out Its Markets**

Verizon argues that the imposition of cost-based roaming rates at the levels proposed by Flat would disincent Flat to build out its own markets. The exact opposite is true. It is the *absence* of reasonable roaming rates which has crippled Flat's ability to compete in the marketplace, especially with companies like [REDACTED]. [REDACTED]. These preferential rates have permitted [REDACTED] to grow into a significant national presence without any spectrum-based facilities of its own, despite the Commission's strong policy of encouraging facilities-based competition. The lack of viable roaming options has thus worked to the detriment of consumers by preventing Flat, with its low cost, high quality, flat rate, facilities-based service from expanding its market coverage. Without viable national roaming, Flat cannot offer an attractive service package to customers. This obviously has the effect of restraining trade and harming consumers, because it reduces the number of competitors that Verizon has to contend with in these markets. Conduct which unreasonably restrains trade, the Commission has emphasized, is presumptively *not* commercially reasonable. *Data Roaming Order* at p. 5437, ¶ 45. *See* Section IX below.

Of course, there can be no “disincentive” to build out a competing network in areas where Flat has no authority to build out a network, so Verizon has no excuse for charging exorbitant roaming rates in the vast majority of the United States where Flat does not hold licenses. Within its own markets, Flat would be willing to accept a higher roaming rate to ensure that it is not “piggy-backing” on Verizon’s in-market network. Flat is confident that it can build out and serve the remainder of its markets for less than Verizon’s roaming rates, but it must have a viable local product to achieve that goal.<sup>8</sup>

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<sup>8</sup> *See* Beierschmidt Declaration.

## VI. Availability of Other Roaming Partners

Verizon indicates that there is at least one other carrier and one MVNO in Flat's markets, as proof that consumers are not being harmed by the lack of reasonable roaming rates. We observe in this regard that both T-Mobile and Sprint have publicly expressed the view that they too have been unable to achieve reasonable data roaming agreements with the majors, which necessarily results in higher prices to their customers. As a CDMA carrier, Flat has itself had little experience with AT&T as a roaming partner, but those who have clearly contradict the rosy picture painted by Verizon. Cricket, whom Verizon cited as an alternative facilities-based carrier in South Carolina, was bought by AT&T last year. While Cricket had been a reliable and reasonable roaming partner before its acquisition, the record of the AT&T/Leap docket shows that Cricket jacked up its roaming rates astronomically in anticipation of the AT&T acquisition.<sup>9</sup> Moreover, it is being phased out as a CDMA provider, and is therefore no longer a potential long term roaming partner for any CDMA carrier. It is worth noting that prior to its acquisition by AT&T, Cricket had been a loud and consistent critic of Verizon as a source of reasonable roaming rates. If Flat had the same roaming rates as Verizon effectively offers [REDACTED], there would be another vigorous competitive carrier serving the low-end advance-pay market.

Verizon insists that Sprint is a viable alternative nationwide roaming partner. If this were actually the case, Flat would not have gone through the agonizing process of trying to obtain reasonable roaming rates from Verizon. Without wanting to derogate Sprint's network, there is no question that the network is not nearly as extensive as Verizon's, as Verizon's own marketing maps emphasize. (See Exhibits B and C to Complaint). The maps do not even fully convey the inadequacy of the Sprint network for Flat's subscribers when they leave their home area and are

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<sup>9</sup> Ex Parte Comment of Buffalo-Lake Erie Wireless Systems Co., LLC filed in Docket 13-193 on January 6, 2014

required to roam. There are frequent dropped calls and many service holes that have not been filled. Sprint has publicly announced a plan to significantly expand and upgrade its network, and if and when that upgrade occurs, Flat would welcome them as a roaming partner, and they would provide desperately needed competition to Verizon. But in the meantime, there is no practical substitute for Verizon as a CDMA roaming partner in large portions of the United States.

Verizon is a unique and essential roaming partner for most CDMA carriers, and it is that status that gives it effective monopoly power to dictate roaming terms. This fact renders the "free and fair negotiation" model preferred by the Commission unworkable. Market forces cannot operate when one firm holds all the cards.

#### **VII. Rates Need Not All Be Uniform to be Unreasonably Discriminatory**

Verizon states at p. 17 of its Legal Analysis that Flat is arguing that Section 202(a) “mandates uniform roaming rates for roaming.” Flat is doing no such thing. Rather, Section 202(a) prohibits only “unreasonable discrimination” and that is the prohibition which Flat seeks to enforce here. Verizon relies on the authority of *Orloff v. Vodafone AirTouch Licenses LLC*, 17 FCC Rcd. 8987 (2002), *aff’d sub nom. Orloff v. FCC*, 352 F.3d 415 D.C. Cir. 2003) to justify its pattern of consistent roaming rate discrimination, a reliance that is wholly misplaced. In *Orloff*, the carrier involved was charged with offering point of sale concessions to customers to close sales, concessions which were not available to all customers. The Commission and the reviewing Court ruled that such concessions were reasonable in the context of a competitive retail market where a customer could easily turn to another carrier if she could not get a free phone or a short term price break. However, the Commission explicitly declared that in less competitive markets its decision might have been quite different and in those circumstances it would not hesitate to find unreasonable discrimination. *Orloff* at Para. 23.

No one here has even remotely suggested that Verizon has had to cut its rates to some carriers in order to secure their business as roaming partners or to counter competitive threats of some sort. In the CDMA roaming market, unlike the roaming market, there are no or virtually comparable alternatives that a potential roaming partner can turn to for roaming service. Verizon holds all the cards in this negotiation. Even so, Flat has recognized that there might be circumstances such as transitional short term roaming situations where a special roaming rate might be appropriate, and it has not challenged such special circumstances because there the discrimination is arguably a reasonable one. That is not the case here. Far from supporting Verizon's position, *Orloff* emphasizes the obligation to offer non-discriminatory rates where market forces are not present to check anti-competitive behavior.

### **VIII. MVNO Rates are Relevant**

Verizon disputes the similarity of, and indeed even the relevance of data about, MVNO arrangements [REDACTED] to roaming arrangements. Flat does not seek nor desire the imposition of mandatory resale obligations. The purpose of referencing the rates charged by Verizon to [REDACTED] is to establish a basis for the cost structure which should apply to roaming partners. The functional service provided, access to its network for another carrier's subscribers, is identical, a point which Verizon notably does not deny. The only differences it points to between an MVNO and a roaming partner are differences in the billing arrangements and the "predictability" of demand. (Verizon Response at p. 14). Those insignificant differences could easily be handled in deriving a reasonable roaming rate formula that starts from the basic service rate structure that [REDACTED] enjoys.<sup>10</sup>

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<sup>10</sup> As noted below, Verizon's belated and untimely attempt to rely on Dr. Singer's Declaration to supply a new perspective on how MVNO's differ from roaming partners cannot be accepted.

**IX. Verizon's Opportunity Cost Theory Confirms its Unlawful Use of Market Power**

In its Legal Analysis submitted on October 9, 2015, Verizon introduced a new theory into its justification for its roaming rates not previously seen before. As set forth more fully in Flat's concurrently filed Motion to Strike, Verizon has attempted to introduce through the back door a broad range of new facts into the record long after its opportunity to adduce those facts expired. The "Legal Analysis" submitted by Verizon was supposed to be just that – an analysis of the legal implications of the facts that had been adduced by both parties in their respective Complaint and Answer. Instead, Verizon took it upon itself to fill significant holes in its factual showing with a 39 page Declaration of a paid economist. It also belatedly supplements its opposition to interrogatories on a post hoc basis to incorporate the new "facts" offered by Dr. Singer. Assuming the Commission will not accommodate or allow this gross breach of the hearing procedures and timetable which it established for this case, Flat will here respond only to the actual legal analysis submitted by Verizon on October 9 and not the host of new facts it attempts to rely on.

First, Verizon now espouses a new theory as to why it is reasonable for it to charge exorbitant, non-cost-based rates to its roaming partners. This new "opportunity cost" theory holds that one must somehow calculate the loss of customers and revenue to Verizon which would be occasioned by its offer of roaming rates comparable to retail or wholesale rates. If this is its theory, Verizon nowhere articulates what that cost would be.

But second, and more importantly, Verizon's reliance on this theory very dramatically and conclusively establishes that its roaming pricing policies constitute an unfair trade practice. The antitrust laws have consistently recognized that it is unlawful for a firm with monopoly power to exercise that power to gain competitive advantages in another area of competition. *See,*

*ie, United States v. Griffith*, 334 U.S. 100 (1948). There the Supreme Court considered the case of a group of movie theater owners who got concessions from the film distributors based on the fact that they were the only theater in many markets. But the concessions applied even in the markets where they had competition, to the serious detriment of their competitors. The Court held that “the use of monopoly power, however lawfully acquired, to foreclose competition, to gain competitive advantage, or to destroy a competitor, is unlawful.” *Griffith* at 107. This time-honored tenet of antitrust law provides quite simply that one who holds monopoly power, even if it acquired that power lawfully, cannot use that power to destroy or disadvantage competitors in markets where it does not hold a monopoly. Yet that is *precisely* what Verizon now confesses that it is doing here.

In a nutshell, everyone agrees that there is competition between Verizon and Flat (and other carriers as well) in the markets Flat operates in. Flat has shown that in order to offer a competitive service to potential customers in its home market where it competes with Verizon, it must be able to offer those customers the ability to roam when they are outside the home market. This ability to roam ubiquitously is, of course, the most basic element of the nationwide cellular structure that the Commission established in 1982. As Flat has indicated, if roaming is not available to its customers at reasonable rates, it cannot offer them that service and it loses, or never gets, customers that need to roam. Flat intends to quantify the degree to which Verizon’s failure to offer reasonable roaming rates has crippled it competitively and financially in the damages phase of this case. But the important thing for the case right now is that Verizon admits that it sets its roaming rates at a level which will discourage customers from leaving Verizon and going to Flat or any other CDMA competitor. In antitrust terms, it is using the uncompetitive market where it holds monopoly market power (the CDMA roaming market) to foreclose

competition, gain a competitive advantage and destroy competition in the local market where there is competition. It is refreshing to see a monopolist so candidly acknowledge that uses its market power to destroy and disadvantage competition. This admission should make it very easy for the Commission to find that Verizon's roaming rate policy constitutes an unfair trade practice which the Commission has indicated it will not tolerate. *Data Roaming Order* at Para. 45.

**X. Answer to Verizon's "Affirmative Defenses"**

Flat hereby responds to Verizon's five "affirmative defenses." Flat does not believe that most of these arguments constitute affirmative defenses under the Commission's Rules. However, Flat will address them here.

**First Affirmative Defense.** Verizon's First Affirmative Defense is not in fact an affirmative defense; it is a legal argument as to the sufficiency of Flat's Complaint. However, insofar as it qualifies as an affirmative defense, Flat denies that its Complaint fails to satisfy the requirements of Section 1.721 of the Rules, and asserts that its alleged facts justify a claim that Verizon's offered rates are unjust and unreasonable, unreasonably discriminatory, and commercially unreasonable.

**Second Affirmative Defense.** Verizon's Second Affirmative Defense is not in fact an affirmative defense; it is again an argument as to the sufficiency of Flat's Complaint. However, insofar as it qualifies as an affirmative defense, Flat denies that its Complaint fails to state a cause of action. Flat's Complaint has clearly laid out a set of facts and legal arguments which justify a finding by the Commission that Verizon has violated the Act and the Rules in its negotiations over roaming rates.

**Third Affirmative Defense.** Flat denies that its request that Verizon make its roaming rates public is not appropriately the subject of this complaint. As Flat argues above, the

REDACTED PURSUANT TO PROTECTIVE ORDER

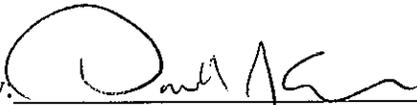
Commission has the authority to make these rates available, certainly to Flat, but also to the public at large. Flat acknowledges that a Petition to Rescind Forbearance is pending before the Commission, but the Commission has chosen not to even seek public comment on the well-founded (and virtually indisputable) contention that the wireless market has changed radically since 1994 when forbearance was first granted. None of the assumptions that informed that action still apply. Since the Commission has not acted to remedy that situation for the entire industry, it is required here to address Flat's allegation that the failure to make rates public violates the Act.

**Fourth Affirmative Defense.** Verizon's Fourth Affirmative Defense is not in fact an affirmative defense; it is a legal argument as to the correct interpretation of particular language in a Commission Order. However, insofar as it qualifies as an affirmative defense, Flat denies that its request for interim relief is precluded by the Commission Rules and Orders. Flat does acknowledge that it would accept Verizon's proffered rates on an interim basis subject to true up if the Commission so interprets the interim rate provision to apply to the host provider's proffered rates.

**Fifth Affirmative Defense.** Verizon's Fifth Affirmative Defense is not in fact an affirmative defense; it is an effort to reserve the right to make alternative affirmative defenses in the future. Flat reserves the right to respond to any other affirmative defenses offered by Verizon, should it do so in the future.

Respectfully submitted,

Flat Wireless, LLC.

By: 

Donald J. Evans  
Jonathan R. Markman

*Its Attorneys*

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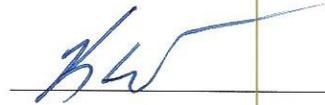
October 19, 2015

## Declaration of Kevin Beierschmitt

Kevin Beierschmitt, president and chief executive officer of Flat Wireless, LLC, hereby declares under penalty of perjury as follows:

Flat would not be disincented to expand its own network in the areas where it holds spectrum licenses by the availability of reasonable roaming rates. At the rates which Flat seeks to pay Verizon for roaming, it would still be less costly for Flat to expand its own facilities to those areas and provide service there itself. Flat has been impeded in its ability to expand its facilities-based networks by the severe competitive disadvantage of not being able to offer its customers reliable roaming outside of its home territory. Once that impediment is removed by Commission action, Flat can construct additional facilities that would make home roaming rarely necessary.

In the meantime, if Verizon is concerned about disincentivizing Flat from expansion, Flat would accept somewhat higher roaming rates in its home markets to eliminate that as an issue.



10/19/2015

Kevin Beierschmitt

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554

<hr/>	)	
In the Matter of	)	
	)	
Flat Wireless, LLC, for and on behalf of its Operating Subsidiaries,	)	File No. EB-15-MD-005
	)	
Complainant,	)	EB Docket No. 15-147
	)	
v.	)	
	)	
Cellco Partnership dba Verizon Wireless and its Operating Subsidiaries,	)	
	)	
Defendant.	)	
<hr/>	)	

**Reply to Verizon Wireless Opposition to Interrogatories**

Flat Wireless hereby responds to Verizon’s Opposition to Interrogatories (“Opposition”) and repeats its requests. As Verizon noted in its Opposition, Flat and Verizon agreed to produce the same information provided by Verizon in *NTCH v. Cellco Partnership*, EB Docket No. 14-212, File No. EB-13-MD-006, retaining all objections raised in the NTCH proceeding. Flat therefore attaches and restates all responses made by NTCH in the NTCH proceeding in response to Verizon’s preserved objections.

Verizon has also objected to Flat’s requests insofar as they exceed this agreement.<sup>1</sup> Verizon seems to misunderstand the terms of the agreement, since the agreement expressly contemplated that either party could pose different questions than those posed in the NTCH case,

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<sup>1</sup> Verizon Opposition at p. 1.

and the responding party would have the right to lodge any proper objection.<sup>2</sup> Where the interrogatories do overlap, the parties have spared the Commission the effort of reaching the same conclusions based on the same objections. Flat hereby responds to Verizon's specific objections.

Responses to Verizon's General Objections:

**1. *Verizon's Theory of the Case does not Determine the Scope of its Discovery Obligations.*** Verizon seems to believe that simply asserting something is irrelevant makes it so. This is clearly not the correct interpretation of Section 1.729 of the Rules, which allow a party the right to "any non-privileged matter which is relevant to the material facts in dispute." Note that the question is not whether something is "relevant to the Commission's resolution of the dispute" (Verizon Opposition at 1), or, as Verizon seems to be asserting, whether something is "relevant to our theory of the case." It is whether the matter is relevant *to the material facts in dispute.*" (emphasis added). Further, any attempt by Verizon to limit its production to information which it has already agreed to provide is flawed.

There is no question that there is dispute as to the "material facts" of Verizon's relationship with other carriers vis a vis roaming agreements, as to its relationship with MVNOs, as to its costs of providing roaming, etc. That a fact is not relevant to *Verizon's* theory of the case does not mean that it is not relevant to *Flat's* theory, or potentially to the way the Commission ultimately interprets the Rules and the Act. Without the requested information, Flat must make its case that Verizon's offered roaming rates are unjust, unreasonable, and

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<sup>2</sup> See paragraph 3 of attachment to July 7, 2015 letter to Rosemary McEnery outlining the agreement between the parties: "To the extent Flat or Verizon propound interrogatories that are materially different from those propounded in Docket No. 14-212, either party may oppose the request at the time designated by the MDRD or set forth in the rules, and each party will maintain the ordinary rights to respond and appeal the resolution of such an objection as are permitted by the rules."

discriminatory by indirection. While the Commission may certainly find that Verizon's rates are unjust, unreasonable and unreasonably discriminatory based on the material Flat has gathered and submitted, the most direct route to such a finding is through the cost data which only Verizon can provide.

**2. Cost Information Is Relevant and Must be Provided.** Flat recognizes that the MDRD has ruled that cost information is irrelevant. However, for the reasons set forth in NTCH's application for review of the Division's ruling on relevance, including some 70 years of case law supporting the direct relevance of cost information, the Division may wish to re-think this particular ruling. Flat therefore continues to request cost information on the basis of those reasons.

**3. Document Production is Necessary.** Verizon maintains that there is no reason for it to provide documents related to Flat's interrogatories because it has provided documents and information "sufficient for resolution of the dispute". As described above, this is wholly incorrect. Verizon has in fact provided almost no facts or documents, declaring nearly all of Flat's requests irrelevant. As discussed above, Verizon's views of the relevance of the data is, itself, irrelevant. Verizon must provide complete information relating to Flat's interrogatories and the documents substantiating them.

#### Responses to Verizon's Specific Objections

**1. Further Domestic Rate and International Roaming Rate Information is Relevant and Must Be Provided.** Verizon has objected to further domestic roaming rate information on the grounds that the information it has provided is sufficient. As discussed above, Verizon's view of the sufficiency of information is not the determining factor of whether

something is discoverable, it is whether the facts are relevant to the dispute. The information requested clearly is.

Verizon continues to object to the disclosure of its international roaming rate information despite the clear holding in the *T-Mobile Order*<sup>3</sup> that such information is relevant to the analysis of the justness and reasonableness of roaming rates. Verizon argues that, because Flat has not *explicitly* discussed international roaming rates in its Complaint, it has not demonstrated their relevance in this proceeding. However, Flat did not explicitly discuss international roaming rates in its Complaint because it believes that international roaming rates are simply a subset of the category of “roaming rates,” which are discussed extensively. The specific request for international roaming rates is made only because, in the NTCH Proceeding, Verizon successfully argued to the Staff that international rates had not been requested when only “roaming rates” were mentioned in the interrogatory. We understood that the Staff in Docket 14-212 was not intending to over-ride the Wireless Bureau’s clear determination that international roaming rates are relevant factors to be considered in relation to domestic roaming rates, but rather that NTCH had not clearly requested international roaming rates in its initial interrogatory request (which preceded the *T-Mobile Order*). Flat here timely made explicit its request for inarguably relevant international roaming rates. Because international roaming rates are not known to the public, Flat cannot make an argument about how they do – or do not – reflect upon the reasonableness of Verizon’s domestic roaming rates until it sees and assesses the rates. Flat maintains that, in accordance with the *T-Mobile Order*, international rates must be analyzed alongside other roaming rates when determining the justness and reasonableness and discriminatory nature of proffered rates.

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<sup>3</sup> *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket 05-265, Released December 18, 2014.

**2. Offered and Grandfathered Rates Must Be Included in the Analysis of Verizon's Rates.** As NTCH argued in its proceeding, offered rates are critical to the analysis of the justness and reasonableness and discriminatory nature of the rates offered by Verizon to Flat. If looking only at the rates currently in effect, Flat and the Staff are unable to get a complete picture of the roaming landscape and market; it cannot see all the rates which Verizon *attempted* to charge but which were not accepted by the other party because they were too high. Similarly, a complete analysis of Verizon's offerings is impossible if only current rate packages are included; many of Verizon's customers continue to operate on grandfathered plans, including some with unlimited data. Only considering Verizon's current offerings, rather than all the plans it currently operates, will not give an accurate view of Verizon's cost and billing structure.

**3. Verizon's Rationale for Different Rates is The Essence of the Analysis of Discriminatory Charges.** There is no question that Verizon charges different roaming rates to different carriers. In order to determine whether these rate differentials are reasonable, Flat and the Commission must know whether there is any legitimate basis for the differences. Only Verizon can provide that critical information.

**4. Average Cost Information is Crucial to Analyzing The Justness and Reasonableness of Verizon's Proposed Roaming Rates.** As discussed above in the general objections response, Flat maintains that the core of the just and reasonable rate analysis is whether those rates are in line with the costs of providing the service. Therefore, in the absence of detailed cost data, which Verizon has refused to provide, some form of average cost data is essential to Flat's and the Commission's analysis of Verizon's rates.

**5. Lowest Retail and Wholesale Rate Information is Necessary.** As discussed above, and as the Staff held in the *T-Mobile Order*, wholesale and retail rate information is

relevant in the review of proposed roaming rates. Flat has attempted to reduce the burden on Verizon and on the Staff by requesting only the lowest of Verizon's rates, since those would be the ones most useful in this analysis. Should Verizon instead prefer to provide additional data, it is free to do so, but there is no question that this information must be included in a thorough analysis of the rates at issue.

**6. Average Monthly Volume Data is a Substitute for Cost Information.** Because Verizon has refused to provide cost and margin information, Flat is forced to work backwards in order to make its arguments to the Staff regarding the disparity between the roaming rates Verizon is charging and the cost of providing the service to Flat. Flat would, of course, prefer to skip this calculation using Verizon's cost and margin information directly, but in lieu of that data, the average monthly volume data is essential to Flat's arguments in this case and must be provided.

**7. Information on Identities of Individuals.** Flat has requested this information because it will use it to analyze the veracity of the information provided.

**8. Repeated Request for Interrogatories.** Flat hereby repeats all its interrogatories, as set forth in its initial filing.

Respectfully Submitted,



By: \_\_\_\_\_

Donald J. Evans  
Jonathan R. Markman  
Counsel for Flat Wireless, LLC

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1300 North 17th Street, Suite 1100  
Arlington, VA 22209

October 19, 2015

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554

In the Matter of	)	
	)	
NTCH, Inc. for and on behalf	)	
of its Operating Subsidiaries,	)	File No. EB-13-MD-006
	)	
Complainant,	)	
	)	
v.	)	
	)	
Cellco Partnership dba Verizon Wireless	)	
and its Operating Subsidiaries,	)	
	)	
Defendant.	)	
	)	

**Reply to Verizon Wireless Opposition to Interrogatories**

NTCH hereby responds to Verizon’s Opposition to its interrogatories and repeats its requests. Verizon has failed to provide any information relating to this proceeding other than to admit that it has a relationship with StraightTalk Wireless, an MVNO (see Verizon Answer, Para. 25) and to assert, via a chart of undefined “weighted averages,” that the rates offered to NTCH are comparable to the rates it charges other providers (see Verizon Statement of Facts at 12).

***1. Verizon’s Theory of the Case does not Determine the Scope of its Discovery Obligations.*** Section 1.729 of the Rules allows a party the right to discover “any non-privileged matter which is relevant to the material facts in dispute.” There is no question that there is a dispute as to the “material facts” of Verizon’s relationship with other carriers vis a vis roaming agreements, as to its relationship with MVNOs, as to its costs of providing roaming, etc. The

requested information is necessary to discover whether Verizon's offered roaming rates are unjust and/or discriminatory based on the cost of producing such service, the rates at which such services are offered to end users and MVNOs, and also based on the rates offered to other similarly situated carriers. No one can possibly assess the reasonableness of the rates or the discriminatoriness of the rates without the actual information requested. That means this information is relevant "to material facts in dispute" and must be disclosed by Verizon, regardless of its beliefs as to their relevance.

2. *Verizon's "Weighted Averages" Do Not Provide Any Relevant Information.* In its Statement of Facts at page 12, Verizon provides a sanitized chart of "weighted averages" of roaming rates it charges to other carriers. It claims in a footnote that these "averages" are "a better representation of average price paid per unit of roaming traffic." But it makes no effort to explain how these averages were calculated. Nor does it explain what they are "better" than, or what "better" even means in this context. They are certainly not "better" than providing the requested basic information of all agreements which NTCH requested in its interrogatories. Verizon may not refuse to provide raw data and instead do its own (completely unexplained) calculations, excissions, and omissions, and expect NTCH and the Commission to trust that its results are accurate and correctly describe its other roaming arrangements.

For example, Verizon Wireless chose to delete from its weighting process information regarding parties with whom it has "LTE in Rural America" roaming agreements, explaining cursorily that there are special factors which justify a different roaming rate for those roaming partners. That may well be the case, but only scrutiny of the arrangements will permit NTCH and the Commission to assess whether the stated grounds for rate discrimination actually hold water, and will also bear upon the method by which a reasonable rate could be calculated for

other carriers. But it offers no clear explanation of why these were hidden. The Respondent cannot simply avoid providing information about relevant arrangements because those arrangements do not support its theory of the case. Indeed, the fact that Verizon Wireless has chosen to hide this data makes the discovery of it even more compelling.

Tellingly, Verizon repeatedly notes, in its Answer and attached documents, that its rates should be deemed reasonable because it charges other companies the same or lower rates. While this claim is false -- it is likely that many other carriers are *also* being overcharged for roaming, and that does not make the overcharging reasonable -- NTCH is entitled to discover the actual rates charged to see what they are, determine if they are in fact reasonable, and measure whether there is any basis for discrimination. Verizon Wireless cannot simultaneously point to the importance of its concluded negotiations for roaming and then refuse to provide data as to the results of those negotiations. If the market is able to arrive at fair and reasonable roaming rates, then Verizon should provide evidence of that market, not simply a set of numbers produced by an incomplete, arbitrary (and secret) set of "weighted averages".

Further, while Verizon claims that it has provided the names and information of all persons with knowledge of this proceeding, its information seems only to include persons who have been involved in the negotiation with NTCH. It has not provided *any* information about who performed the calculations which arrived at these "weighted averages," how these were arrived at, and who has the underlying data from which the calculations were done. Other than assertions in the Trent Declaration, which simply restate the information in Verizon's proffered charts, there is no information given about who would be able to answer questions related to specifics of other roaming agreements or the rates and terms in those agreements. In other words, Verizon has simply asserted that the rates it has offered NTCH are comparable to its other

agreements, but has provided no real evidence of that assertion. This undermines the purpose of a fact-finding hearing.

The data provided by Verizon is wholly inadequate to allow NTCH or the Commission to determine if the rates offered to it by Verizon are unlawfully unjust and discriminatory. NTCH therefore repeats its request for “the roaming rates for the provision of voice, toll, SMS, and data services” between Verizon and any carrier with which it has a roaming agreement. (See Interrogatory 1). In addition, Verizon Wireless claims that offered rates which have not resulted in a roaming agreement are irrelevant. To the contrary, if a party declined to enter into an agreement with Verizon Wireless because the offered rates were too high, that would be extremely probative of the negative effect of excessive rates on the roaming market and would corroborate the predatory effect of Verizon Wireless's roaming pricing policies. Therefore, NTCH repeats its requests as to negotiations for roaming agreements which did not ultimately result in a final agreement.

3. *Cost and MVNO Information Is Relevant and Must be Provided.* Despite Verizon's claims in its Legal Analysis that Cost and MVNO information is not relevant to this proceeding, they are at the core of NTCH's view of proceeding and its arguments to the Commission. As NTCH explains more fully in its attached Reply to Verizon's Answer, cost has historically been *the single most* important basis for justifying the reasonableness of common carrier rates as far back as the '30's.<sup>1</sup> Cost data is essential if we are to get to the truth of whether

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<sup>1</sup> See, e.g., *In the Matter of Rates for Interstate Inmate Calling Services (ICS II)*, 28 FCC Rcd 15927, 15928 (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 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 Capital*

Verizon Wireless's rates are reasonable. MVNO information is similarly relevant because MVNO service is functionally very similar to roaming service. To the extent there are small differences which may bear upon the differences in the costs of the two services, Verizon Wireless can explain how and why those differences matter. The Commission cannot completely analyze or decide this proceeding without this data.

Verizon Wireless must provide "the average cost...of delivering to, from or for a wireless customer (a) a minute of voice service, (b) an SMS message, (c) a minute of toll service, or (d) a GB of data. If the cost of delivering any of these services to, from or for an NTCH customer differs from the average, explain and quantify the difference" (see Interrogatory 4) and its "lowest retail and wholesale (including MVNO) rates" (see Interrogatory 5). Verizon is free to submit this information confidentially, as both sides have to this point, but it may not simply refuse to do so

**4. Document Production is Necessary Given Verizon's Refusal to Provide Data and to Test and Corroborate the Information Supplied.** Verizon maintains that there is no reason for it to provide documents related to NTCH's interrogatories because it has provided documents and information "sufficient for resolution of the dispute." As described above, this is wholly incorrect. Verizon has in fact provided almost no facts or documents, declaring nearly all of NTCH's requests irrelevant. The documents requested by NTCH are carefully tailored to

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*Network System, Inc.*, 10 FCC Rcd 13732, 13734 (1995) (noting that some the reasonableness of rates for one carrier was not determinative for another carrier because others "may have different costs"); *In the Matter of Investigation of Special Access Tariffs*, 4 FCC Rcd. 4797, 4800 (1988) (noting that, under Section 201 of the Act, "Costs 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 (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); *In the Matter of The Western Union Telegraph Company*, 95 F.C.C. 2d 924, 931 (1982) (noting that "the Commission has expressly held that costs will be the primary criteria for determining whether a carrier's charges are just and reasonable") (citing to *In the Matter of American Telephone and Telegraph Company*, 74 F.C.C.2d 1); *In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services*, 84 F.C.C. 2d 445, 451 (1981) ("...the assurance that rates charged by the regulated firm are not excessive but instead are 'just and reasonable,' reflecting the average unit cost").

establish the facts regarding the rates currently offered by Verizon Wireless to others and the costs of providing the services for which such rates are being charged. Especially given Verizon Wireless's admitted manipulation of the data to derive self-serving averages, it is critical to the fact-finder to have available the actual rate data. As discussed above, the cost of providing a given service has consistently and correctly been the single most important factor in justifying the reasonableness. It is essential that NTCH and the Commission have access to data establishing Verizon Wireless's cost structure so that the accuracy of its interrogatory responses regarding costs can be tested and verified or challenged, as appropriate. The purpose of a hearing is to establish the truth of the matters in issue, and Verizon Wireless should not be permitted to shield its assertions from independent verification by stonewalling. Verizon Wireless must provide complete information relating to NTCH's interrogatories *and* the documents requested to substantiate the answers.

5. *The Request does Not Exceed Ten Interrogatories.* Contrary to the assertion of Verizon, NTCH has not exceeded the ten interrogatory limit. Interrogatory 3 does not count as two interrogatories under the Rules; Section 1.729 states that "subparts of any interrogatory will be counted as separate interrogatories for purposes of compliance with" the ten interrogatory limit, but the two sentences of Interrogatory 3 are not subparts. Rather, the second sentence is simply a clarification of the request as described in the first. The "subpart" provision of the rule does not lead to the illogical result where the grammatical choice to break a single request into two sentences results in one request becoming two interrogatories. In addition, Verizon incomprehensibly asserts that NTCH's request for documents somehow counts as an interrogatory. This assertion is so nonsensical as to require no response. NTCH has not exceeded the ten interrogatory limit.

6. *Repeated Request for Interrogatories.* NTCH hereby repeats all its interrogatories, as set forth in its initial filing.

Respectfully Submitted,

By:  \_\_\_\_\_

Donald J. Evans  
Jonathan R. Markman  
Counsel for NTCH, Inc.

FLETCHER, HEALD & HILDRETH, P.L.C.  
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Arlington, VA 22209  
703-812-0400

August 22, 2014

## **Roaming Agreements**

**REDACTED**

REDACTED PURSUANT TO PROTECTIVE ORDER

**FLAT WIRELESS**

Call Sign	Licensee	Market	Market Name	Band	Block	MHz	Partitioned	2013		Facilities-Based Services
								Pops	MHz Pops	
<b>PCS Licenses</b>										
<b>West Texas</b>										
<a href="#">WQRK792</a>	Flat Wireless, LLC	<b>MTA007</b>	<b>Dallas, TX</b>	<b>PCS</b>	<b>A</b>	<b>10</b>		<b>437,387</b>	<b>4,373,870</b>	<b>REDACTED</b>
		<i>BTA040</i>	<i>Big Spring, TX</i>							
		<i>BTA296</i>	<i>Midland, TX</i>							
		<i>BTA327</i>	<i>Odessa, TX</i>							
<a href="#">WQJS666</a>	Flat Wireless, LLC	BTA057	Brownwood, TX	PCS	C	10		62,291	622,910	
<a href="#">WQKE627</a>	Flat Wireless, LLC	BTA068	Carlsbad, NM	PCS	C	10		55,471	554,710	
<a href="#">WQKE628</a>	Flat Wireless, LLC	BTA191	Hobbs, NM	PCS	C	10		68,062	680,620	
<a href="#">KNLH756</a>	Flat Wireless, LLC	BTA087	Clovis, NM	PCS	D	10		82,425	824,250	
<a href="#">KNLG748</a>	Flat Wireless, LLC	BTA264	Lubbock, TX	PCS	D	10		455,666	4,556,660	
<a href="#">KNLH754</a>	Flat Wireless, LLC	BTA013	Amarillo, TX	PCS	E	10		440,864	4,408,640	
<a href="#">WQBG689</a>	Flat Wireless, LLC	BTA400	San Angelo, TX	PCS	F	10	Yes	114,954	1,149,540	
<b>El Centro, CA / Yuma, AZ</b>										
<a href="#">WPOJ764</a>	Flat West Wireless, LLC	BTA124	El Centro-Calexico, CA	PCS	C	15		176,584	2,648,760	
<a href="#">KNLH706</a>	Flat West Wireless, LLC	BTA486	Yuma, AZ	PCS	D	10		201,201	2,012,010	
<b>PCS Total</b>								<b>2,094,905</b>	<b>21,831,970</b>	

Call Sign	Licensee	Market	Market Name	Band	Block	MHz	Partitioned	2013		Facilities-Based Services
								Pops	MHz Pops	
<b>AWS Licenses</b>										
<b>West Texas</b>										
<a href="#">WQGD619</a>	Flat Wireless, LLC	BEA128	Abilene TX	AWS	C	10		227,832	2,278,320	
<a href="#">WQGD620</a>	Flat Wireless, LLC	BEA135	Odessa-Midland TX	AWS	C	10		458,605	4,586,050	
<a href="#">WQGD621</a>	Flat Wireless, LLC	BEA136	Hobbs NM-TX	AWS	C	10		216,461	2,164,610	
<a href="#">WQGD622</a>	Flat Wireless, LLC	BEA137	Lubbock TX	AWS	C	10		416,007	4,160,070	
<a href="#">WQGD623</a>	Flat Wireless, LLC	BEA138	Amarillo TX-NM	AWS	C	10	Yes	397,833	3,978,330	
		<i>CMA188</i>	<i>Amarillo, TX</i>							
		<i>CMA652</i>	<i>Texas 1 - Dallam</i>							
		<i>CMA653</i>	<i>Texas 2 - Hansford</i>							
<a href="#">WQSH836</a>	Flat Wireless, LLC	BEA135	Odessa-Midland TX	AWS	D	10	Yes	151,468	1,514,680	
<a href="#">WQSH836</a>	Flat Wireless, LLC	BEA138	Amarillo TX-NM	AWS	D	10		397,833	3,978,330	
<a href="#">WQSS449</a>	Flat Wireless, LLC	BEA138	Amarillo TX-NM	AWS	D	10		123,080	1,230,800	
<a href="#">WQLG580</a>	Flat Wireless, LLC	<b>REA005</b>	<b>Central</b>	<b>AWS</b>	<b>E</b>	<b>10</b>	<b>Yes</b>	<b>1,226,215</b>	<b>12,262,150</b>	
		<i>BEA129</i>	<i>San Angelo TX</i>				<i>Yes</i>	<i>163,530</i>	<i>1,635,300</i>	
		<i>BEA135</i>	<i>Odessa-Midland TX</i>				<i>Yes</i>	<i>307,137</i>	<i>3,071,370</i>	
		<i>BEA136</i>	<i>Hobbs NM-TX</i>					<i>216,461</i>	<i>2,164,610</i>	
		<i>BEA137</i>	<i>Lubbock TX</i>					<i>416,007</i>	<i>4,160,070</i>	
		<i>BEA138</i>	<i>Amarillo TX-NM</i>				<i>Yes</i>	<i>123,080</i>	<i>1,230,800</i>	
<b>AWS Total</b>								<b>2,003,348</b>	<b>36,153,340</b>	

<b>TOTAL</b>								<b>2,443,424</b>	<b>57,985,310</b>	
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DECLARATION UNDER PENALTY OF PERJURY

I, Kevin Beierschmitt, President and CEO of Flat Wireless, LLC, hereby declare under penalty of perjury that I caused the preparation of the attached Response to Interrogatories from Cellco Partnership, and that the facts set forth therein are true and correct to the best of my knowledge and belief.

  
\_\_\_\_\_ 10/16/2015  
Kevin Beierschmitt                      Date

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554

In the Matter of	)	
	)	
Flat Wireless, LLC,	)	EB Docket No. 15-147
	)	File No. EB-15-MD-005
Complainant,	)	
	)	
v.	)	
	)	
Cellco Partnership dba Verizon Wireless	)	
and its Operating Subsidiaries,	)	
	)	
Defendant.	)	

**Motion to Strike Singer Declaration  
And  
Modified Version of Verizon’s Opposition to Interrogatories**

Flat Wireless, LLC (“Flat”) hereby moves the Commission to strike the untimely and inappropriate attempt by Verizon to introduce new material into the record via a “Declaration” submitted by Dr. Hal Singer, a paid economist retained by Verizon, which was appended to and made a part of Verizon’s “Legal Analysis.” As will be set forth below, the Singer Declaration is not legal analysis but rather constitutes entirely new evidence which was required to be filed in Verizon’s Answer no later than September 15, 1015. That date itself was significantly extended from the normal date in order to accommodate Verizon’s concern with possible strike-related diversions of resources. The parties later agreed that Verizon could submit the “legal analysis” portion of its Answer on October 9.

1. Verizon's Answer in this case was due no later than September 15. The Commission's rule (47 C.F.R. Section 1.724) as expressly applied to this case by the MDRD's initial Order of July 15, 2015, requires the Defendant's Answer to advise the Commission "fully and completely of the nature of any defense" (1.724(b)). Most significantly for our purposes here, the rule requires the defendant to attach to the Answer "copies of all affidavits, documents, data compilations and tangible things in the defendant's possession, custody or control, upon which the defendant relies or intends to rely to support the facts alleged and legal arguments made in the answer." (1.724(g)). Thus, all affidavits or declarations on which Verizon intended to rely had to be filed by September 15.

2. Dr. Singer's "Declaration" is by definition in the category of factual material which the rules require to be submitted at the Answer stage. Not only is it self-described as a "Declaration," but it represents the presumably expert opinion of Dr. Singer. Expert opinions are deemed factual matters for purposes of the rules of evidence. See Federal Rule of Evidence 702. This is why such evidence is subject to challenge, preliminary qualification, rebuttal and cross examination in an ordinary hearing context, just like any other evidence. An expert's proffered opinion is in no sense "legal analysis." Of course, Dr. Singer does not even purport to offer legal analysis; he is an economist, not a lawyer. His statement includes a treatment of economic theories, not legal principles. His declaration has no place in a document which was expressly limited to "legal analysis." Verizon is attempting to surreptitiously and unfairly abuse the Commission's and Flat's willingness to accommodate Verizon's schedule by agreeing to defer the legal analysis portion of Verizon's answer by more than three weeks. Instead, Verizon used the three weeks to generate entirely new evidence in direct contravention of both the rules and the procedures set by the Commission for this case.

4. While Dr. Singer's Declaration as an expert "opinion" itself constitutes new evidence in its entirety, he also relies on his "understanding" of other "facts" regarding the state of competition in the retail market, the availability of other roaming sources, the development of CDMA-based carriers, Verizon expenditures on LTE development, Verizon's ARPA, and other facts which are found nowhere else in the record. Verizon has simply used Dr. Singer's declaration as a back door path to introduce material which it was required to file much earlier in the process but did not.

5. The Joint Motion filed by the parties requesting an extension of the filing date for Verizon's legal analysis specifically indicated that the extension was being requested "to facilitate the ability of both parties to brief the legal issues in this case given the addition of a request for damages to Flat's Complaint." Nothing in the motion or in the Commission's grant of that extra time to "brief the legal issues" opened the door for Verizon to engage in wholesale introduction of new and untimely facts into the record. It goes without saying that it would also be impossible for Flat to generate a responsive expert opinion in the brief 10 day period which the agreed schedule afforded Flat to respond to Verizon's legal analysis. Again, Verizon is simply abusing the limited leeway which Flat and the Commission afforded it.

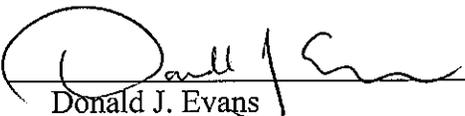
6. Finally, the factual nature of the Singer Declaration is underscored by Verizon's wholly unauthorized attempt to submit a revised version of its opposition to Flat's interrogatories. The Commission did not allow such an untimely revision and Flat did not agree to one. In its Opposition to Interrogatory 5 at p. 6 of its revised Opposition, Verizon explicitly states that is relying on the "facts and information" contained in, among other things, its "Declarations" and "Legal Analysis" as providing all information necessary to respond to Flat's interrogatory. Obviously, Verizon itself recognized that the Singer Declaration and the "Legal

Analysis” contain facts and information upon which Verizon intends to rely – facts and information that should have been submitted over a month ago.

For the reasons set forth above, the Singer Declaration should be stricken in its entirety from the record and Verizon’s revised version of its Opposition to Interrogatories should be rejected.

Respectfully submitted,

Flat Wireless, LLC

By:   
Donald J. Evans  
Jonathan R. Markman  
Its Attorneys

FLETCHER, HEALD & HILDRETH, PLC  
1300 North 17th Street, Suite 1100  
Arlington, VA 22209  
703-812-0400

October 19, 2015

## CERTIFICATE OF SERVICE

I, Jonathan Markman, do certify that I sent the foregoing documents: Consolidated Answer to Affirmative Defenses and Reply to Answer, Motion to Strike, and Reply to Verizon Wireless Opposition to Interrogatories, all of Flat Wireless, LLC, on this 19th day of October, 2015, addressed to the following (by agreement of the parties) via email:

Christopher M. Miller  
Andre J. Lachance  
Tamara Preiss  
Verizon Wireless

Rosemary McEnery  
Deputy Chief, Market Disputes Resolution Division  
Enforcement Bureau  
Federal Communications Commission

Lisa Boethley  
Market Disputes Resolution Division  
Enforcement Bureau  
Federal Communications Commission



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