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VIA ECFS

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

Re: Reply Brief of NTCH, Inc.
EB Docket No. 14-212
File No. EB-13-MD-006

Dear Ms. Dortch:

Attached please find the Public version of the Reply of NTCH, Inc. ("NTCH") to the Opposition of Cellco Partnership, d/b/a Verizon Wireless, LLC ("Verizon"). This document has been redacted pursuant to the Protective Order in the above-captioned proceeding. 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)

NTCH, Inc. for and on behalf)
of its Operating Subsidiaries,)

Complainant,)

v.)

Cellco Partnership dba Verizon Wireless)
and its Operating Subsidiaries,)

Defendant.)

EB Docket No. 14-212
File No. EB-13-MD-006

REPLY BRIEF OF NTCH, INC.

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October 23, 2015

SUMMARY

This Reply of NTCH to Verizon's Response Brief demonstrates the error in each of Verizon's defenses to the Complaint. The defenses are addressed in turn. (a) The fact that Verizon charges rates similar or higher than the rates it has offered NTCH does not make those rates reasonable. As demonstrated by NTCH, Verizon's domination of the CDMA roaming market leaves other carriers, including the very largest ones, with little or no negotiating power against Verizon. This allows Verizon to charge everyone exorbitant roaming rates, which it, of course, does. (b) The fact that the Commission has attempted to rely on market forces to discipline roaming rates in the past does not prevent it from intervening now that a serious failure of competition renders traditional market forces ineffective. (c) The factors enumerated in the Data Roaming Order and the T-Mobile Declaratory Ruling support a finding that Verizon's data rates are commercially unreasonable. (d) NTCH will not be disincented from building its own facilities since, even at much lower roaming rates, it is still more cost effective for NTCH to build its own facilities in its home markets to serve customers. Disincentives to build do not of course apply to the vast majority of the American market where NTCH does not have spectrum rights and therefore must rely on Verizon for CDMA roaming. Verizon's failure to offer reasonable rates itself disincentivizes NTCH to initiate service until this matter is straightened out. (e) Verizon may not use its market power in the roaming market to impede competition in local markets by imposing unreasonably high roaming rates. (f) Unreasonable rate discrimination is barred under the Act, particularly in situations where the customer (here, Verizon's potential roaming partner) has no effective alternative.

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INTRODUCTION

The roaming rates which have been offered to NTCH are between [REDACTED] higher than the rates offered by Verizon to its own retail customers and to at least one MVNO. The Wireless Bureau has correctly recognized that the rates offered to these categories of customers bear upon the reasonableness of the roaming rates offered to other carriers.¹ While Verizon quibbles with the way NTCH did the rate comparison between bundled retail and MVNO rates and unbundled roaming rates, it is indisputable that there is a huge differential somewhere near the order calculated by NTCH. Because it costs the same (or actually considerably less) to deliver a voice minute to a retail customer or MVNO as to a roaming partner, it is difficult on its face to grasp how the huge difference in rates could possibly be justifiable. If Verizon is making a reasonable return on its retail offerings – and its public pronouncements indicate that it is doing quite well indeed – how could a return [REDACTED] greater than that be reasonable? On the face of the rate data, Verizon has a tough row to hoe.

Verizon attempts to justify the excessive roaming rates on six basic theories:

1. The rates it is offering NTCH are somewhat consistent with the rates it charges everybody else, so the rates must be reasonable.
2. Since the FCC has eschewed prescriptive rate regulation of the wireless industry, it cannot intervene to prevent price gouging even when it is made aware of it.
3. Verizon's data roaming rates do not fall afoul of the criteria enumerated in the *Data Roaming Order*,² without regard to the *T-Mobile Declaratory Ruling*.

¹ *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 *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 26 FCC Red 5411 (2011)

4. Lower roaming rates will disincent NTCH to build out its own facilities, even though NTCH has indicated that it can provide service in its home areas at less cost than the roaming rates it seeks from Verizon.
5. Verizon's roaming rates must take into account the possibility that lower rates could result in loss of customers in markets where there is head to head competition, a rationale that is both contrary to the anti-trust laws and contrary to the Commission's longstanding policy of ensuring ubiquitous service.
6. The Commission's polices permit rate discrimination, no matter how unreasonable.

NTCH will address these rationales, none of which hold water, below. NTCH does not propose to address here the improperly adduced evidence offered by Verizon in the form of a belated proffer of an evidentiary Declaration by a Dr. Hal Singer. NTCH has moved in a companion pleading to strike that grossly untimely material from the record.

1. Reasonableness of Rates Cannot be Judged by Comparison With Other Unreasonably High Rates

Verizon's primary line of defense is that its roaming rates must be reasonable because that is what it is charging everybody else, and that is what everybody else is charging them. This doesn't work on numerous grounds.

- a. Verizon is [REDACTED], as is clear from the chart provided at Exhibit A of Verizon's August 17, 2015 response to interrogatories. And it [REDACTED]. [REDACTED]. [REDACTED]. Data rates run from [REDACTED]. So rates charged to other carriers cannot serve as any kind of uniform benchmark for assessing reasonableness.

b. What is consistent about Verizon's roaming rates are that they are, across the board, [REDACTED]. Verizon's theory is that as long as it grossly overcharges everybody, that makes its charges reasonable. To state that proposition is to refute it. 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 NTCH. But that is not the world we live in. As NTCH demonstrated in its Complaint, and as the Commission has repeatedly declared, the current CMRS market is not competitive,³ and Verizon in particular has no incentive to enter into fair and reasonable rates.⁴ 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 in much of the United States, while other CDMA carriers do. A critical finding for the Commission to make here is that the roaming market is in no sense free and open.

This plain fact distorts the negotiating dynamic radically. Given the large number of carriers who have complained to the Commission, in various forums, 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

³ *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).

⁴ "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*").

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.

- c. In a truly free and open market, one would indeed expect rates to naturally fall to reasonable levels related to the supplier's costs. In fact, as we will see below, Verizon has strong incentives to keep roaming rates artificially high to give it leverage in other markets where it actually faces competition. But the best evidence that this submarket is not free and open is that Verizon is getting away with charging rates that are at least [REDACTED] its costs (as roughly measured by what it charges retail customers [REDACTED]). By any economic theory, these are "monopoly rents" because otherwise alternative suppliers would rush in to claim a portion of those enormous margins. No other carrier has done so, because no other carrier can. This market failure is what gives Verizon the dominating power to charge excessively high rates and causes other carriers to accept them. Far from justifying continuation of these excessive rates, these circumstances cry out for regulatory intervention to discipline them.
- d. The fact that Verizon itself happily pays many carriers roaming rates which are as exorbitant as its own is puzzling but perhaps explicable. If Verizon is truly [REDACTED]

██████████, why would it not be complaining alongside NTCH that roaming fees are too high? There are a couple of explanations. First, roaming fees usually, though not always, tend to be reciprocal. If Verizon tried to get the rates charged to it by others down, it would have to lower its own rates too. So the high rates Verizon charges come back the other way. But perhaps more compelling is the admission by Verizon that it sets its roaming rates high so as to give it a competitive edge in its local markets vis a vis other carriers. Again, this will be discussed in greater detail below, but it appears that Verizon is willing to pay out more in roaming rates than it takes in because that practice gives it a huge advantage in attracting and holding retail customers, where the real money is to be made.

2. The Commission Has Not Abdicated its Obligation to Ensure Just and Reasonable Rates

Verizon argues that the Commission is foreclosed from limiting roaming rates based on costs because it elected in the *Data Roaming*⁵ proceeding not to regulate roaming rates on that basis and it has otherwise eschewed rate regulation in favor of market forces. There is no doubt that the Commission has generally avoided intervention in wireless roaming rates, preferring and hoping that market forces would ensure reasonable rates. But those decisions were always predicated on the existence of a competitive market that could substitute for regulatory oversight. And 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.

⁵ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 26 FCC Red 5411 (2011) (*Data Roaming Order*).

Data Roaming Order at p. 5449, ¶ 74 et seq.; *Automatic Roaming Order*⁶ 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).

We must emphasize that NTCH is not invoking either of the bogeymen dredged up by Verizon: rate prescription or price cap regulation. Neither of those heavy-handed approaches to the excessive rate problem is requested or necessary here. 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. That time has now come because consumers are every day being denied access to roaming service because Verizon's rates are too high for the home carrier to pay. Declaring a rate unlawfully high, as the Commission must do here, does not constitute rate prescription or price cap regulation. It simply will find the rates unjust and unreasonable. Verizon is then free to set its rate at a level that comports with the just and reasonable standard adopted here. 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. Additional action is now called for.

3. The Criteria in the *Data Roaming Order* and the *T-Mobile Declaratory Ruling* Strongly Support a Finding of Unreasonableness

⁶ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd 15817 at ¶¶ 18-35 (2007) ("*Automatic Roaming Order*").

REDACTED PURSUANT TO PROTECTIVE ORDER FOR PUBLIC INSPECTION

Verizon addresses the criteria for assessing commercial reasonableness set forth in the *Data Roaming Order* by picking out a few criteria that seem to support its position and ignoring the rest. Treating the rate benchmarks discussed in the *T-Mobile Declaratory Ruling* as a sort of addendum to the criteria set forth as examples in the *Data Roaming Order*, the unreasonableness of Verizon's rates are compellingly established by the following factors:

(a) Verizon's rates exceed its retail [REDACTED] rates by [REDACTED]

(b) The terms and conditions offered by Verizon are so unreasonable as to be tantamount to a refusal to offer a data roaming arrangement. In today's marketplace, it is not practically feasible for carriers to pass through roaming charges incurred by customers when they roam, as was done in the early years of cellular service. When roaming charges are excessive, a customer's home carrier cannot afford to pay those charges because they would easily exceed the amount the customer is paying the home carrier. Charging an excessively high roaming rate is therefore the practical equivalent of offering no roaming at all. The home carrier must therefore block its customers' access to high-priced roaming carriers, leaving the customer with the choice of no service at all, or spotty and unreliable service from an alternative CDMA carrier.

(c) The competitive harm to NTCH caused by unreasonable roaming rates has been crippling. Not only must it compete against MVNOS [REDACTED], but its own customers are hampered in their ability to have ubiquitous service because they have no access to the Verizon network to roam on. This has caused NTCH to cease service in some markets and to delay launch of service in others until reasonable roaming rates become available. So critical is reasonable roaming to a small carrier that this has been the

difference, along with federal Lifeline subsidies, between a lean but profitable competitive, low cost operation and one that cannot succeed commercially.

(d) There are no other viable alternatives to Verizon as a roaming partner. As explained in NTCH's Initial Brief, Sprint is the only other nationwide CDMA carrier, and its network is neither as broad nor as deep as Verizon's. In many areas, there is no alternative at all to Verizon as a CDMA roaming partner. All of these factors demonstrate that Verizon's rates are commercially unreasonable. In response, Verizon points to the possibility of disincentivizing NTCH from building out its own facilities. That point is addressed below.

4. Lower Roaming Rates Will Not Disincent NTCH to Build Out Its Own Facilities

Verizon repeats this hoary rationale for charging high rates even though it has been refuted by the facts. Low roaming rates would not disincent NTCH to build out its own facilities -- they would actually incentivize NTCH to build out by making a commercially sustainable operation feasible. It is, on the contrary, unreasonably high rates that are keeping NTCH from expanding its facilities-based networks because it cannot compete without access to reasonable rates. NTCH has represented without qualification that it can readily build out and provide service to consumers for less than what it would have to pay Verizon even at the reduced roaming rates sought by NTCH here, so those rates in this case do not have the dampening effect on facilities construction that the Commission has expressed concerns about. The need for reasonable roaming rates is not in the limited number of areas where NTCH has spectrum licenses or leases, but rather in the remaining 95% or so of the United States where NCTH does not have spectrum rights and therefore must rely on roaming.

5. Verizon's Roaming Rates Unlawfully Leverage its Monopoly Power in the Roaming Market to Secure Advantages in the Competitive Retail Market

REDACTED PURSUANT TO PROTECTIVE ORDER FOR PUBLIC INSPECTION

Verizon's legal analysis espouses a new theory not previously raised by Verizon in its Answer or otherwise.⁷ The "opportunity cost" theory holds that the reason Verizon must set its roaming rates high is to deter current and potential customers in the highly competitive retail market from switching to NTCH. NTCH, and other similarly situated carriers, would be more attractive to customers if they could deliver ubiquitous roaming outside the home market. Indeed, as NTCH has acknowledged, without such ubiquitous roaming access, NTCH cannot offer a competitive product. Simply stated, Verizon's ability to manipulate the roaming market by charging excessive rates allows it to gain a very significant advantage in the market where it does face competition: the local retail market. Verizon now makes no bones about its use of its roaming pricing policy as a tool to attract and retain retail customers. The problem with this pricing strategy is that it violates both the Commission's policy on ubiquitous roaming and the anti-trust laws.

The Commission has consistently demanded as one of the most fundamental tenets of its cellular radio policy that roaming be ubiquitously available. This has been a foundation of the regulatory regime for mobile wireless communications since at least 1982.⁸ It was always possible for one carrier to get an edge over another by having greater facilities-based coverage, but the Commission saw that it was essential to the whole nationwide service paradigm that customers be able to roam on other carriers' networks when they were outside their home markets. That bedrock principle has never changed. Verizon's "opportunity cost" theory of roaming pricing directly violates that principle. It holds that roaming rates can and should be set high enough so that a

⁷ As noted at the beginning of this Reply, NCTH has separately moved to strike Verizon's introduction of an entire new body of evidence at this post-evidentiary stage of this proceeding. NTCH is therefore addressing here only the legal arguments raised in Verizon's "legal analysis" while ignoring its reliance on the new facts and opinions submitted by Dr. Singer.

⁸ *An Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, CC Docket No. 79-318, Report and Order, 86 FCC 2d 469 at ¶ 75 (1981).

customer is actually deterred from roaming by the high rate charged to home carrier of the roaming subscriber. Setting rates so high that a roaming partner cannot possibly pay them has the same effect as denying roaming directly, something the Commission expressly forbids. Now we know that Verizon has been cleverly and intentionally violating the “ubiquitous roaming” rule by setting roaming rates high.

Even worse, 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, i.e., 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 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 NTCH (and other carriers as well) in the markets NTCH operates in. NTCH 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. Verizon admits that it sets its roaming rates at a level which will discourage customers from leaving Verizon and going to NTCH 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.

6. The Commission Has Never Indicated that Unreasonable Rate Discrimination is Lawful

Verizon erects a straw man at p. 17 of its Legal Analysis that NTCH is arguing that Section 202(a) of the Act "mandates uniform roaming rates for roaming." NTCH is doing no such thing. Rather, Section 202(a) prohibits only "unreasonable discrimination" and that is the prohibition which NTCH seeks to enforce here. Verizon relies on the authority of *Orloff v. Vodafone AirTouch Licenses LLC*, 17 FCC Red. 8987 (2002), *aff'd sub nom. Orloff v. FCC*, 352 F.3d 415 D.C. Cir. 2003) to justify its policy of roaming rate discrimination, a reliance that is wholly misplaced. In *Orloff*, the carrier involved was charged with offering point of sale concessions to customers in order 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.

REDACTED PURSUANT TO PROTECTIVE ORDER FOR PUBLIC INSPECTION

In the CDMA roaming market, unlike the retail 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, NTCH 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.

The bottom line is that Verizon has not made the slightest effort to justify or explain why it offers different carriers widely varying rates for the exact same roaming services. As NTCH has pointed out, the discriminating carrier bears the burden of demonstrating the reasonable basis for its price discrimination once it has been established that different rates are being charged to different customers.⁹ In the absence of any such showing from Verizon, the Commission cannot possibly find the discriminations reasonable.

CONCLUSION

The facts establish that Verizon is charging roaming rates [REDACTED] higher than it charges its own customers. Not only is this being done with blatant anti-competitive intent, but Verizon has proffered no lawful basis on which it could impose such grossly excessive charges and has offered no basis whatsoever for the discrimination in rates between NTCH [REDACTED] [REDACTED]. The Commission should therefore grant NTCH's complaint,

⁹See, e.g. *MCI Telecom. Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990) ("the carrier offering [the discriminatory prices] has the burden of justifying the price disparity as reasonable"); *In the Matter of William G. Bowles v. United Telephone Company of Missouri*, 12 FCC Rcd 9840, 9852 (1997) ("Once the like services and discrimination are established, the burden shifts to the defendant carrier to show that the discrimination is not unreasonable.").

REDACTED PURSUANT TO PROTECTIVE ORDER FOR PUBLIC INSPECTION

require Verizon to immediately offer NTCH the roaming rates it has requested, and require the rates charged by Verizon to be made publicly available.

Respectfully requested,
NTCH, Inc.



By: _____
Donald J. Evans
Jonathan Markman

Its Attorneys

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703-812-0400

October 23, 2015

CERTIFICATE OF SERVICE

I, Jonathan R. Markman, do certify that I sent the foregoing REPLY BRIEF OF NTCH, INC., on this 23rd 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
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Federal Communications Commission



By: _____
Jonathan R. Markman