

**PUBLIC VERSION
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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

**AT&T MOBILITY LLC
1055 Lenox Park Blvd. NE
Atlanta, GA 30319
404-236-7895**

Complainant

v.

**IOWA WIRELESS SERVICES, LLC
4135 NW Urbandale Drive
Urbandale, Iowa 50322**

Defendant.

Proceeding 15-259

File No. EB-15-MD-007

**OPPOSITION TO MOTION FOR LEAVE; MOTION TO STRIKE UNAUTHORIZED
REPLY, OR, IN THE ALTERNATIVE, MOTION FOR ACCEPTANCE OF SURREPLY**

I. INTRODUCTION

On October 23, 2015, AT&T Mobility LLC (“AT&T”) filed a Motion for Interim Relief. On November 20, 2015, iWireless filed an Opposition to the AT&T Motion for Interim Relief (the “Opposition”). On November 30, 2015, AT&T filed a Motion of AT&T for Leave to File a Reply in Support of its Motion for Interim Relief (“Motion for Leave”) along with AT&T’s Reply in Support of its Motion for Interim Relief (the “Reply”).

Iowa Wireless Services, LLC (“iWireless”) hereby opposes AT&T’s Motion for leave on the grounds that reply pleadings are expressly prohibited under Section 1.727(f) of the rules of the Federal Communications Commission’s (the “Commission” or the “FCC”), and AT&T has

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failed to meet its burden of justifying a waiver of the rules. Accordingly, iWireless requests that AT&T's unauthorized Reply be stricken from the record.

In the alternative, iWireless respectfully requests that it be allowed to file a surreply to AT&T's Reply (attached as Exhibit C) because under normal practice the respondent to a Motion is entitled to the final pleading in the cycle and the AT&T Reply contains new information to which iWireless has not been given a fair opportunity to respond.

**II. UNDER FCC RULES AND PRECEDENT, AT&T'S MOTION FOR LEAVE
SHOULD BE DENIED AND ITS UNAUTHORIZED REPLY SHOULD BE
STRICKEN FROM THE RECORD**

**A. The Commission's Rules Do Not Permit Replies To Oppositions In Formal
Complain Proceedings**

Under the Commission's rules governing formal complaints, a defendant has five business days to respond to a motion filed by the Complainant. This completes the pleading cycle and the moving party is not permitted to file a reply. Section 1.727(f) of the Commission's rules unambiguously states that "[n]o reply may be filed to an opposition to a motion"¹ and this rule has been relied upon routinely by the Commission to deny reply submissions.²

Here, AT&T's argues that "good cause" exists for AT&T to file a Reply because the iWireless Opposition "introduces new arguments" and "raises legal and factual issues that AT&T should be permitted to address."³ AT&T's reasoning cannot be accepted as "good cause." In adopting this two-pleading cycle, the Commission explicitly declined – contrary to the urging of

¹ 47 C.F.R. § 1.727(f).

² See note 6, *infra*.

³ AT&T Mot. For Leave to File a Reply in Supp. of its Mot. for Interim Relief, 1-2 (filed Nov. 30, 2015) ("AT&T Motion for Leave").

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several parties – to permit replies to oppositions in the event the opposition distorts facts or “where matters are raised for the first time in the opposition.”⁴

Moreover, in this instance, AT&T should not be heard to complain that iWireless included arguments in its Opposition to which AT&T has not been allowed to respond. As iWireless has noted before, AT&T jumped the gun by filing its Motion for Interim Relief before iWireless proffered the rate on which it was willing to provide service on an interim basis. Had AT&T exercised reasonable restraint, it would have known the rate at issue and could have filed a complete motion in the first instance. The Commission certainly should not reward AT&T by granting it leave to file an authorized reply when the situation it faces is one of its own making and could easily have been avoided.

In sum, the Commission has made it clear that replies are not permitted to be filed in response to oppositions and AT&T has failed to meet its burden of justifying a waiver of Section 1.727(f). The Motion for Leave should be DENIED.

B. Precedent Supports Striking AT&T’s Unauthorized Pleadings From The Record

The Commission generally does not permit unauthorized pleadings to remain in the record, regardless of the type of proceeding. For instance, the Commission’s rules “do not contemplate the filing of pleadings beyond the comment and reply comment periods” set forth in rulemaking proceedings, and therefore, such untimely pleadings are “unauthorized” and generally “not considered” by the Commission.⁵ Similarly, in instances where parties have

⁴ *In the Matter of Implementation of the Telecommunications Act of 1996 Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, CC Docket No. 96-238, Report and Order, 12 FCC Rcd 22497, 22590, ¶¶ 223-24 (1997) (emphasis added).

⁵ *In the Matter of Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Scotland Neck and Pinetops, North Carolina)*, Report and Order, 7 FCC Rcd 5113, 5113, ¶ 1, n.1 (AB 1992); see also *In the Matter of Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Blackville, Branchville, Edisto Beach, Estill, Georgetown, Kiawah Island, Moncks Corner and Walterboro, South Carolina, and Richmond Hill, Georgia)*, First Report and Order, 7 FCC Rcd 3900, 3900, ¶1 n.8 (PR 1992); *In the Matter of Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Rapid City, South Dakota)*, Report and Order, 5 FCC Rcd

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submitted replies to oppositions, the Commission, relying upon Section 1.727(f), has recognized the filing as an “unauthorized pleading” as well and has stricken it from the record.⁶

Here, AT&T submitted an unauthorized pleading into the record. The rule is clear: replies are not permitted in response to an opposition. With blatant disregard for the rules (yet again), AT&T submitted its Reply under the guise of a Motion for Leave – it asked the Commission for permission to file a Reply, and without waiting for an answer, filed the pleading along with its request. The pleading was filed without authorization and therefore should be struck from the record, pursuant to Commission precedent.

C. The Staff Should Change the Law of the Case that AT&T Has Established

The pleading practice of attaching an unauthorized substantive pleading to a motion for leave to file is disruptive of orderly process. As iWireless previously has explained, it is difficult, if not impossible, for decisionmakers to disregard unauthorized material that has been submitted even if it is deemed stricken.⁷ This same concern arises when a party attaches an unauthorized substantive pleading to a motion for leave to file. In effect, this pleading practice allows a party to submit an unauthorized pleading with virtual impunity. While AT&T has claimed that this practice is allowed in other legal proceedings, the Staff has the authority to determine that it will not be encouraged here.

1033, 1033, ¶1 n.1 (AB 1990) (finding that pleadings filed after the notice and comment period were “unauthorized pleadings” which would not be accepted by the Commission).

⁶ See e.g., *EarthLink, Inc., Complainant, v. SBC Communications, Inc., SBC Advanced Solutions, Inc., Defendants*, File No. EB-04-MD-006, Order, 19 FCC Rcd 17804, ¶1 n. 1 (2004) (concluding that a reply to an opposition is “an unauthorized pleading, which we hereby strike”); *In the Matter of Petition for Waiver filed by Rural Telephone Service Company Concerning the Definition of “Study Area” Contained in Part 36 Appendix-Glossary of the Commission’s Rules*, AAD 96-38, Memorandum Opinion and Order, 12 FCC Rcd 785, 794-95, ¶ 11 (CCB 1997) (recognizing that Rule 1.727 provides, “that no reply may be filed in response to an opposition to a motion” and denying the party’s request to submit a reply to an opposition, and finding “[f]or that reason . . . [the] pleading replying to [the] oppositions . . . [is] excluded from the record.”).

⁷ See iWireless Mot. to Compel AT&T Compliance with Confidentiality Orders and for Related Relief, 11 (filed No. 6, 2015).

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Unfortunately, AT&T's adoption of this practice, coupled with the Staff's earlier disinclination to immediately disapprove it,⁸ has caused the practice to become the law of the case. iWireless would be prejudiced if it were to unilaterally refrain from tendering a copy of a pleading it is seeking leave to file when AT&T has made clear its intention to exercise no such restraint. Consequently, iWireless is submitting herewith its Surreply to the AT&T Reply along with a request for leave to file. Nonetheless, iWireless continues to believe that orderly procedure will be promoted if the Staff issues a ruling indicating that a party seeking leave to file an authorized pleading must be granted leave to file before tendering the pleading.

III. IN THE ALTERNATIVE, IF AT&T'S REPLY IS ACCEPTED, IWIRELESS SHOULD BE GRANTED LEAVE TO RESPOND

If the Commission grants AT&T leave to reply, iWireless deserves to be given an opportunity to respond on the record. Consequently, in that instance, iWireless requests that the Commission grant iWireless leave to file the Surreply in response to AT&T's Reply, attached hereto as Exhibit C.

Rule 1.3 of the Commission's Rules provides that "[a]ny provision of the [Commission's] rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown." 47 C.F.R. § 1.3. Here, there is "good cause" for accepting iWireless's Surreply because the normal order of pleading procedure allows the target of a motion to respond to arguments raised in the Motion.⁹ The AT&T Reply is replete with arguments that were not included in the original Motion. For example:

⁸ See Email from Lisa Saks to Carl Northrop, James Bendernagel et al. dated December 1, 2015 re: AT&T Motion for Leave to File a Reply in Support of its Motion for Interim Relief.

⁹ See e.g., 47 C.F.R. §§ 1.721, 1.724, 1.726 (Permitting defendants to file answers to complaints, and only permitting complainants to file replies in the event that affirmative defenses are raised); 47 C.F.R. § 1.727(e), (f) (permitting oppositions to motions to be filed and prohibiting replies to oppositions).

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- [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED]
[REDACTED] [END
CONFIDENTIAL]
- [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED]
[REDACTED] [END
CONFIDENTIAL]

- AT&T for the first time discusses the various factors set forth in *Data Roaming Order*.
- AT&T includes in its Reply references to Declarations from the Formal Complaint that contain confidential information that is in the process of being removed from the record. iWireless has not had an opportunity to address this AT&T tactic.

In sum, good cause is shown for iWireless to be given an opportunity to respond to the AT&T Reply if it is to be given any consideration by the Staff.

IV. CONCLUSION

FCC rules and precedent clearly direct the Commission to strike AT&T's unauthorized pleading from the record and deny AT&T's Motion for Leave to file a Reply. However, if the Commission permits AT&T's Reply to remain in the record, iWireless respectfully requests that the Commission accept iWireless's response to AT&T's Reply. iWireless has provided a proposed order for adoption that accepts this request, attached hereto as Exhibit B. A copy of

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iWireless's Surreply to AT&T's Reply is attached as Exhibit C.

Respectfully Submitted,

By: /s/ Carl Northrop

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December 7, 2015

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EXHIBIT A

**Proposed Order Granting iWireless's Opposition to AT&T's Motion for
Leave and Motion to Strike AT&T Mobility LLC's Reply**

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

AT&T MOBILITY LLC
1055 Lenox Park Blvd. NE
Atlanta, GA 30319
404-236-7895

Complainant

v.

IOWA WIRELESS SERVICES, LLC
4135 NW Urbandale Drive
Urbandale, Iowa 50322

Defendant.

Proceeding 15-259

File No. EB-15-MD-007

[PROPOSED] ORDER

Adopted: _____, 2015

Released: _____, 2015

By the _____, Market Disputes Resolution Division, Enforcement Bureau:

1. On November 30, 2015, AT&T Mobility LLC (“AT&T”) filed a Motion for Leave to File a Reply in Support of its Motion for Interim Relief (“Motion for Leave”), along with its Reply (“AT&T Reply”).
2. On December 7, 2015, Iowa Wireless Services, LLC (“iWireless”) filed a Opposition to AT&T’s Motion for Leave and Motion to Strike AT&T Mobility LLC’s Reply in Support of its Motion for Interim Relief, requesting that the Commission deny AT&T’s Motion to Leave and strike its Reply from the record.
3. iWireless’s Motion is hereby **GRANTED**. Accordingly, we hereby deny AT&T’s Motion for Leave and order that AT&T’s Reply be stricken from the record in this proceeding. The stricken pleading will be purged from the record and not be given any consideration by the Commission and the iWireless Motion for Acceptance of Surreply is dismissed as moot.
4. We also order the Parties, on a going forward basis, not to attached unauthorized substantive pleadings to a motion for leave to file, but rather to await action on any such motion before tendering the substantive pleading for which leave is sought.

FEDERAL COMMUNICATIONS COMMISSION

Market Disputes Resolution Division, Enforcement Bureau

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EXHIBIT B

Proposed Order Granting iWireless's Motion for Acceptance of Surreply

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

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Complainant

v.

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Defendant.

Proceeding 15-259

File No. EB-15-MD-007

[PROPOSED] ORDER

Adopted: _____, 2015

Released: _____, 2015

By the _____, Market Disputes Resolution Division, Enforcement Bureau:

1. On November 30, 2015, AT&T Mobility LLC (“AT&T”) filed a Motion for Leave to File a Reply in Support of its Motion for Interim Relief (“Motion for Leave”), along with its Reply (“AT&T Reply”).
2. On December 7, 2015, Iowa Wireless Services, LLC (“iWireless”) filed a Opposition to AT&T’s Motion for Leave and Motion to Strike AT&T Mobility LLC’s Reply in Support of its Motion for Interim Relief, or, in the Alternative, Motion for Acceptance of Surreply.
3. AT&T’s Motion for Leave is **GRANTED**; the iWireless Opposition to the Motion for Leave and Motion to Strike is hereby **DENIED**.
4. The iWireless Motion for Acceptance of Surreply is hereby **GRANTED**.
5. We also order the parties, on a going forward basis, not to attached unauthorized substantive pleadings to a motion for leave to file, but rather to await action on any such motion before tendering the substantive pleading for which leave is sought.

FEDERAL COMMUNICATIONS COMMISSION

Market Disputes Resolution Division, Enforcement Bureau

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**EXHIBIT C
iWireless Surreply to AT&T's Reply**

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**Before the
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Washington, D.C. 20554**

In the Matter of

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Urbandale, Iowa 50322**

Defendant.

Proceeding 15-259

File No. EB-15-MD-007

**IOWA WIRELESS SERVICES, LLC SURREPLY TO AT&T MOBILITY LLC'S REPLY
IN SUPPORT OF AT&T'S MOTION FOR INTERIM RELIEF**

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Dated: December 7, 2015

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**IOWA WIRELESS SERVICES, LLC SURREPLY TO AT&T MOBILITY LLC'S REPLY
IN SUPPORT OF AT&T'S MOTION FOR INTERIM RELIEF**

Iowa Wireless Services, LLC ("iWireless"), by its attorneys, hereby files this surreply in response to the AT&T Mobility LLC ("AT&T") Reply in Support of its Motion For Interim Relief ("AT&T Reply"). The AT&T Reply responds to the iWireless Opposition filed on November 20, 2015 ("Opposition"), which opposed the AT&T Motion for Interim Relief dated October 20, 2015 ("Motion"). The following is respectfully shown:

I. INTRODUCTION AND SUMMARY

The Enforcement Bureau (the "Bureau") of the Federal Communications Commission (the "Commission" or "FCC") is faced with a straightforward decision: Will the Bureau utilize the explicit procedures set forth by the Commission for allowing data roaming service to be

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provided on an interim basis pending resolution of a formal complaint? The decision is easy. iWireless has proffered an interim rate that is [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]
[REDACTED] [END CONFIDENTIAL] AT&T has not contested the indisputable claim that it can afford to pay the interim rate, and iWireless has made clear that it will continue to provide uninterrupted service as long as sums due to iWireless are paid on a timely basis. The Bureau has the authority at the conclusion of the complaint proceeding to order a possible true-up if justified based upon the full record. In sum, an explicit mechanism was established by the Commission to deal with this precise situation, and the Bureau must follow it.

The AT&T Reply provides no basis for either the Bureau or the Commission to abandon the established process and to prejudge the outcome of the Complaint by engaging in *ad hoc* ratemaking as a prologue to a contested proceeding. In effect, AT&T is asking the agency to set a rate, in a situation where there is no current agreement, and no evidentiary record, at a level of AT&T's choosing, in direct violation of both the *Data Roaming Order*¹⁰ and the *Declaratory Ruling*.¹¹

As is set forth in detail below, the AT&T Reply is based upon serious misstatements of fact and law, and is unsupported by relevant authority. The Bureau should dismiss the AT&T Motion as moot and let the parties proceed to present their respective cases as to commercially reasonable data roaming rates based on the totality of the circumstances.

¹⁰ See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Radio Service Data (WT Docket No. 05-265), *Second Report and Order*, 26 FCC Rcd 5451 at para. 87 (2011) (the "*Data Roaming Order*").

¹¹ See Reexamination of Roaming Obligations of Commercial Mobile Radio Service and Other Providers of Mobile Data Services (WT Docket No. 05-265), *Declaratory Ruling*, DA 14-1865 (rel. Dec. 18, 2014) (the "*Declaratory Ruling*").

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II. THE AT&T REPLY IS BASED UPON FALSE PREMISES AND LACKS BOTH FACTUAL AND LEGAL SUPPORT

The AT&T Reply is riddled with misstatements of fact and law and seeks unprecedented relief which cannot be justified based upon the operative facts and the governing law. For example:

- AT&T alleges that, in setting the interim rate, iWireless ignores other rates that are being charged in the market. Actually, as noted herein,¹² the iWireless rate has been set well below the parameters established by other rates in the market.
- [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED]
[REDACTED] [END CONFIDENTIAL] iWireless has a strategic relationship with T-Mobile, which holds a non-controlling 55% interest in iWireless and AT&T has conceded in the past, as it must, that strategic relationships and arm's length agreements are not comparable.
- AT&T falsely asserts that iWireless is claiming the unfettered right to “unilaterally impos[e] whatever rates it desires during the pendency of the Complaint proceeding.”¹³ In truth, iWireless is saying that when the proffered rate of the host carrier is less than rates that the roaming carrier is charging, the explicit interim procedure specified by the Commission must apply.
- AT&T asks the Commission “to direct iWireless to continue to provide service at the current contract rates during the pendency of the Complaint” proceeding.”¹⁴ As is

¹² See discussion *infra* at p. 10,14.

¹³ AT&T Mobility LLC Reply in Support of its Motion For Interim Relief, p. 3 (filed Nov. 30, 2015) (“AT&T Reply”).

¹⁴ *Id.* at p. 4.

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discussed in greater detail below, this request for relief subverts the procedure specified in the *Declaratory Ruling* when, as is the case here, a prior agreement is expiring.

- Incredibly, AT&T has the temerity to ask the Commission to direct iWireless to make a Best and Final Offer that is “in no event higher than the rates in the [prior] agreement adopted by the parties.”¹⁵ No authority is cited for this preemptive rate-setting action that would depart radically from the carefully crafted procedures that the Commission has put in place to handle roaming disputes.
- Similarly, AT&T has confirmed that it is asking the Commission to preemptively rule that any interim charges in excess of the current rates “will be subject to true up” rather than following the protocol established by the Commission where such rates *may* be subject to *possible* true up at the conclusion of the proceeding.
- AT&T seeks an order permitting it to pay certain amounts due to iWireless into an escrow account rather than paying them to iWireless.¹⁶ AT&T again cites no authority in support of this extraordinary remedy. Nor has it made any showing that, in the unlikely event of a true-up, credits against future payments due will not suffice to make AT&T whole. [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED]
[REDACTED] [END CONFIDENTIAL]
- References are made throughout the AT&T Reply to the declarations of Gram Meadors and Jonathan Orszag, which accompanied the AT&T Complaint.¹⁷ As the Bureau knows, iWireless objected to the fact that AT&T included confidential material in its Complaint

¹⁵ AT&T Reply, p. 4.

¹⁶ *Id.*

¹⁷ See AT&T Reply at p. 5, 6, 9, 12.

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and the accompanying declarations.¹⁸ As a result, AT&T has agreed to file either an amended or revised complaint with the expectation that the objectionable material will be removed and the iWireless Motion to Compel will be withdrawn.¹⁹ Under these circumstances, in ruling on the AT&T Motion for Interim Relief, the Bureau cannot and should not rely upon the Meadors and Orszag declarations that are repeatedly cited by AT&T.

- AT&T misleadingly claims that [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [END CONFIDENTIAL]
- AT&T incorrectly asserts that [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED]
[REDACTED] [END CONFIDENTIAL]

However, the Commission has made clear that the determination of commercial reasonableness is based upon the totality of circumstances, and many of the relevant factors cited by the Commission involve economic considerations.

¹⁸ iWireless Motion to Compel Compliance with Confidentiality Orders and for Related Relief (filed Nov. 6, 2015) (“Motion to Compel”).

¹⁹ See Joint Status Report and Motion for Ruling, filed December 4, 2015.

²⁰ [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

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- AT&T disputes the claim that AT&T has engaged in a relentless campaign against iWireless subjecting iWireless to extraordinary costs and expenses that were not factored into the prior rate. Yet, [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL] And, leaving aside the issue of whether the AT&T effort was or was not relentless, it did cause (and is continuing to cause) iWireless to incur extraordinary charges that were not a factor when the rate in the prior agreement was established.

- AT&T seeks to dismiss the economic testimony cited by iWireless of former FCC Chief economist Thomas Hazlett on the ground that the testimony argues against the imposition of rate caps which has nothing to do with the interim rate conflict here. But, AT&T is arguing that the rates in the prior AT&T/iWireless agreement should be imposed as a cap on the rate that iWireless can charge on an interim basis, and Mr. Hazlett's argument is certainly relevant to that claim.

In sum, the AT&T Reply does not manage to cure the shortcomings identified by iWireless with respect to the original AT&T Motion. The Motion should be dismissed as moot and AT&T should be advised by the Commission to pay any amounts due and payable under the rate proffered by iWireless on a timely basis if it wishes to maintain service.²² Notably, an order of

²¹ [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

²² [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL]

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this nature which resolves the interim arrangement in accordance with the protocol established by the full Commission in the *Data Roaming Order* is relatively easy to write and can be issued by the Bureau on delegated authority well before [BEGIN CONFIDENTIAL] [REDACTED] [REDACTED] [END CONFIDENTIAL] In fact, the iWireless Opposition, filed on November 20, 2015, included a draft order as Exhibit 1 that can be issued on delegated authority immediately.

III. THE BUREAU DOES NOT HAVE THE AUTHORITY TO ENGAGE IN THE RATEMAKING REQUESTED BY AT&T

The AT&T Reply asks the Bureau to set a data roaming rate on the *requesting provider's proscribed terms* for a period when (1) there is no current roaming relationship between the parties; (2) the host carrier (iWireless) has proffered an interim rate to the requesting carrier (AT&T) in accordance with the *Data Roaming Order and Declaratory Ruling* and has agreed to provide uninterrupted service at that rate; and (3) a formal complaint proceeding is pending to determine a commercially reasonable rate. There are explicit procedures in place to govern this exact scenario. The Bureau would be contradicting and violating both the *Data Roaming Order* and the *Declaratory Ruling* if it grants the unprecedented relief AT&T is requesting. The Bureau should make its determination on commercial reasonableness based on a complete record established in accordance with the Commission's long established complaint procedures. An earlier decision would be premature and would reflect a troubling prejudgment of the merits of this dispute.

The Bureau's authority with respect to an interim rate for data roaming where there is no current agreement is set forth specifically in the *Data Roaming Order*. The Commission's explicit protocol for this exact situation in the *Data Roaming Order* negates any need or authority for the Bureau to adopt the novel, *ad hoc* procedure requested by AT&T. The Bureau

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has the ability (but does not have the obligation) to compel iWireless to provide interim service to AT&T at the rates proffered by iWireless. This delegation of authority is specific, and directly applicable to this situation. Indeed, the *Declaratory Ruling* acknowledged and reaffirms this protocol. Accordingly, it would violate the *Data Roaming Order* -- and the explicit limit on the Bureau's authority in Section 0.311(a)(3) of the rules -- to heed AT&T's call for an interim rate, or a best and final offer rate, set at rates capped by AT&T or the Bureau.

AT&T seeks comfort in the fact that the language in paragraph 80 of the *Data Roaming Order* is permissive, arguing that is it "does not *obligate* the Commission to accept whatever rate a host carrier proffers." Paragraph 80 states:

[w]ith respect to disputes filed before reaching an agreement regarding the commercial reasonableness of a would-be host provider's proffered terms and conditions . . . the Commission staff may, if requested and in appropriate circumstances, order the host provider to provide data roaming on its proffered terms, during the pendency of the dispute, subject to possible true-up once the roaming agreement is in place.²³

The meaning of this paragraph is plain. The Bureau is not obligated to require iWireless to provide interim data roaming to AT&T. The Commission staff can do so upon request and in appropriate circumstances. If this election is made, the procedures to be followed are clear. The Commission staff has been delegated the authority to order interim service on the terms proffered by iWireless and may only order true up in the event the proffered such rate is found to be commercially unreasonable, which cannot properly happen until the formal complaint proceeding has run its course.

It is absurd to suggest that the use of the word "may" in paragraph 80 grants the Bureau unfettered discretion to do what the Commission itself repeatedly has refused to do: *i.e.*, to set

²³ *Id.* at para. 80 (emphasis added).

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benchmark roaming rates on either an interim or permanent basis based primarily upon the terms in a prior agreement. It also does not empower the Commission staff to impose a rate based upon purported general trends in the marketplace when the talisman of the legal standard set forth in the *Data Roaming Order* is individualized decisionmaking.

The Commission previously rejected invitations to set benchmark rates for roaming service.²⁴ The Opposition noted, and it bears repeating here, that because data roaming is not subject to Sections 201 and 202 of the Act, the talisman which empowered the Commission to adopt the data roaming rule is “individualized decisionmaking.”²⁵

Giving providers flexibility to negotiate the terms of their roaming arrangements on an individualized basis ensures that the data roaming rule best serves our public interest goals discussed herein, and the boundaries of the rule are narrowly tailored to execute our spectrum management duties under the Act.²⁶

The DC Circuit decision which upheld the *Data Roaming Order* on appeal hinged upon this very point:

[T]he data roaming rule leaves substantial room for individualized bargaining and discrimination in terms. The rule expressly permits providers to adapt roaming agreements to “individualized circumstances without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms.” *Data Roaming Order*, 26 F.C.C.R. at 5433 ¶ 45. Given this ..., the data roaming rule does “not amount to a duty to hold out facilities *indifferently* for public use.”²⁷

Granting AT&T’s ratemaking request would fly in the face of these prior Commission and Court rulings. **[BEGIN CONFIDENTIAL]** [REDACTED]

²⁴ *Declaratory Ruling* at para. 30; *Data Roaming Order* at para. 68.

²⁵ Opposition at 15.

²⁶ *Data Roaming Order* at para. 45.

²⁷ *Cellco Partnership v. FCC*, 700 F.3d 534, 548 (D.C. Cir. 2012) (citing *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 n.16 (1979)).

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[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [END CONFIDENTIAL]

If the Commission staff follows the path laid out by AT&T, it will violate the FCC's determination that the provision of data roaming is not a common carrier service.

AT&T argues that iWireless' proffer is tantamount to a refusal to deal.²⁹ That is preposterous. [BEGIN CONFIDENTIAL]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] [END CONFIDENTIAL] iWireless has offered to provide continuous service on an interim basis following the precise process specified by the Commission and has assured both AT&T and the Commission that service will not be terminated as long as sums due to iWireless [BEGIN CONFIDENTIAL]

[REDACTED] [END CONFIDENTIAL] are paid. It is undisputed that (a) AT&T can afford to pay the interim rate meaning that there need be no disruption of service; [BEGIN CONFIDENTIAL]

[REDACTED]
[REDACTED] [END

²⁸ Opposition at 16.

²⁹ AT&T Reply at 14. These same arguments apply with respect to AT&T's insinuation that the Bureau should proceed with fines, forfeitures and other remedies to reduce incentives to delay data roaming negotiations. As noted above, despite having an existing agreement, iWireless responded promptly and in good faith during negotiations with AT&T at all times.

³⁰ See Opposition at 3-4.

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CONFIDENTIAL] AT&T also fails to provide any legal support -- because there is none -- for its assertions that (1) the Commission staff should order iWireless to provide AT&T service at a prior contract rate in a situation where no current contractual agreement exists between the parties, and (2) that an iWireless best and final offer should be no higher than the rates used in a prior agreement between the parties.³¹ As noted in the Opposition, the rate in a previous agreement, pursuant to the *Declaratory Ruling*, has no presumption of reasonableness with respect to iWireless/AT&T future negotiations or agreements.³² AT&T has failed to cite any Commission support for its self-serving assertion that, while the rates in a prior agreement have no presumption of reasonableness, they form a cap on future rates. Moreover, AT&T's request that iWireless' best and final offer be used on an interim basis ignores the fact that critical components of any best and final offer include both (1) the rate and (2) the term of the agreement. In the event any such best and final offer is referenced on an interim basis by the Bureau, it must include both components in any such order.

**IV. THE BUREAU MUST AVOID PREJUDGING THE RATE ISSUES WITH
PREEMPTIVE RULINGS**

As noted in the Opposition,³³ rather than having the interim rate proffered by iWireless be subject to possible true-up based upon a complete record when a going forward agreement is in place, AT&T is seeking a preemptive ruling that there will indeed be a true-up. The Commission staff must reject this request. The iWireless Opposition set forth over a dozen factors **[BEGIN CONFIDENTIAL]** [REDACTED] **[END**

³¹ **[BEGIN CONFIDENTIAL]** [REDACTED] **[END**

CONFIDENTIAL] reasonable rates.

³² Opposition at 19.

³³ *Id.* at 20.

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[REDACTED] [END CONFIDENTIAL] These are precisely the types of claims that need to be resolved in an adjudicatory proceeding rather than upon a single parties' untested assertions.

Nevertheless, iWireless is compelled to respond to a number of arguments related to commercial reasonableness made in the AT&T Reply. First, AT&T makes numerous generalized claims that data roaming rates have fallen significantly since 2008, and makes repeated references to its average rates.³⁸ These claims in particular need to be examined in the crucible of the formal complaint process – along with other relevant evidence – and cannot be accepted at face value. For example, at present neither iWireless nor the Commission are privy to the underlying agreements upon which these claims are based and thus no determination can be made whether the carriers and markets are similarly situated or not.

Equally important, iWireless notes that roaming agreements and roaming rates are not generally public. One important issue in the upcoming proceeding will be how the Commission should go about ascertaining relevant trends in the market. At this point, the rate evidence upon which AT&T principally relies is primarily limited to its own rates. But, AT&T's rates standing alone do not provide a sufficient base to determine what rates should be deemed "commercially reasonable" in rural Iowa markets that are undergoing many significant macro-economic changes.

Second, iWireless earlier noted that AT&T, by its own admission, is a net payor of roaming charges to other carriers.³⁹ Under these circumstances, AT&T has a powerful incentive to use its considerable market power to drive down the average roaming rates it pays. In the AT&T Reply, AT&T questions the iWireless claim that AT&T has sufficient market power to

³⁸ *Id.* at 5.

³⁹ Opposition at 14.

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[REDACTED]

[REDACTED] [END
CONFIDENTIAL] And, it is likely that discovery in the course of the formal complaint proceeding will show that other providers are also offering data roaming service at similar rates – in accordance with the individualized decisionmaking described by the Commission in the *Data Roaming Order*.

Fifth, AT&T completely misconstrues the iWireless position when it argues that iWireless is seeking to use the interim rate process to “extract higher rents on a short term basis” during the pendency of the Complaint proceeding. [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL] The simple economic point that

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Dated: December 7, 2015

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2015, I caused the foregoing submission to be served on Complainant and provided to the Commission as indicated below.

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