

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
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)	
Reexamination of Roaming Obligations of)	WT Docket No. 05-265
Commercial Mobile Radio Service Providers and)	
Other Providers of Mobile Data Services)	
)	

**COMMENTS OF NTELOS HOLDINGS CORP. IN SUPPORT OF PETITION FOR
EXPEDITED DECLARATORY RULING OF T-MOBILE USA, INC.**

Michael Lazarus
Jessica DeSimone
TELECOMMUNICATIONS LAW
PROFESSIONALS PLLC
875 15th Street, NW, Suite 750
Washington, DC 20005
Telephone: (202) 789-3120
Facsimile: (202) 789-3112

Brian J. O'Neil
NTELOS Holdings Corp.
Executive Vice President, General Counsel
and Secretary
1154 Shenandoah Village Drive
Waynesboro, VA 22980
Telephone: (540) 946-2058

Its Attorneys

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NTELOS Holdings Corp. (“NTELOS”),¹ by its attorneys, hereby respectfully submits these comments in support of the *Petition for Expedited Declaratory Ruling* filed by T-Mobile USA, Inc. in the above-captioned proceeding (the “Petition”).² NTELOS joins T-Mobile in urging the Commission to issue clarifying guidance to assist all wireless carriers in determining whether the terms of any given data roaming agreement or proposal are “commercially reasonable,” as intended by the 2011 *Data Roaming Order*.³ In support, the following is respectfully shown:

¹ For purposes of these Comments, the term “NTELOS” refers to NTELOS Holdings Corp. and all of its FCC-licensed subsidiaries.

² *Petition for Expedited Declaratory Ruling of T-Mobile USA, Inc.* in WT Docket No. 05-265 (filed May 27, 2014) (“*T-Mobile Petition*”). See also *Wireless Telecommunications Bureau Seeks Comment on Petition for Expedited Declaratory Ruling Filed by T-Mobile USA, Inc. Regarding Data Roaming Obligations*, WT Docket No. 05-265, Public Notice, DA 14-798 (rel. June 10, 2014).

³ See generally *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, 26 FCC Rcd. 5411 (2011) (“*Data Roaming Order*”), *aff’d sub nom. Cellco P’ship v. FCC*, 700 F.3d 534 (D.C. Cir. 2012).

I. INTRODUCTION AND SUMMARY

NTELOS is a regional provider of high-speed voice and data services to businesses and approximately 468,000 retail subscribers in most areas of Virginia and West Virginia, and select areas of Maryland, Ohio, Kentucky, North Carolina and Pennsylvania. NTELOS' licensed territories have a total population of approximately 9.0 million residents, of which its wireless network covers approximately 6.0 million residents. NTELOS competes in its service areas against the nationwide wireless carriers, and it actively innovates and offers competitive services to its customers.

NTELOS applauds the Commission for seeking comment on T-Mobile's Petition concerning the state of the data roaming market. Access to commercially reasonable data roaming rates is critical to a wireless carrier's – especially a small, mid-tier or regional carrier's – ability to provide competitive services to its customers. In the *Data Roaming Order*, the Commission adopted rules in the hopes that roaming regulations would help level the uneven bargaining power present in roaming negotiations. However, the Commission also recognized that such a lofty goal may not be easily accomplished by these regulations, and therefore reserved the right to take additional action to ensure that such goals were, in fact, achieved.

In these Comments, NTELOS joins T-Mobile in asserting that additional action by the Commission is necessary to fix the broken market for data roaming at commercially reasonable rates that still exists despite the adoption of the *Data Roaming Order*. Namely, wireless carriers are still facing significant challenges with securing commercially reasonable roaming agreements. The continued problems are due, in part, to the continued consolidation of the wireless industry, which has increased the dominance of AT&T and Verizon in several aspects of the wireless market, including wholesale inputs such as roaming. The fact is, many carriers remain unable to obtain data roaming rates on commercially reasonable terms and conditions.

Therefore, NTELOS agrees with T-Mobile that explicit Commission guidance and clarity on the meaning of “commercially reasonable” is needed at this time, and NTELOS supports T-Mobile’s request to establish benchmarks and adopt certain clarifications concerning this standard. Specifically, NTELOS strongly supports the proposed retail benchmark based on a measure of retail price for wholesale mobile data pricing. NTELOS also supports the proposed benchmark to consider rates that facilities-based carriers charge Mobile Virtual Network Operators (MVNOs) for data. With respect to T-Mobile’s proposed benchmark based on rates negotiated with foreign carriers, as well as the benchmark based on other competitively negotiated wholesale rates, NTELOS also agrees that such rates may play an important role in helping to clarify the commercially reasonable standard.

In addition, NTELOS agrees with T-Mobile that certain clarifications relating to roaming are necessary. NTELOS strongly encourages the Commission to clarify that the *Data Roaming Order* presumption that a signed roaming agreement meets the commercially reasonable standard does not apply with respect to future or proposed roaming agreements. NTELOS highlights the fact that roaming negotiations are still taking place on uneven playing fields, and therefore even if an agreement is reached, it cannot be presumed that the agreed roaming rates are reasonable since oftentimes carriers may agree to commercially unreasonable roaming rates in order to ensure proper coverage.

II. THE ABILITY TO PROCURE COMMERCIALY REASONABLE ROAMING AGREEMENTS IS CRITICAL TO WIRELESS CARRIERS' ABILITY TO PROVIDE COMPETITIVE SERVICES TO CONSUMERS

A. Data Roaming Is Critical To Nationwide Coverage

Every wireless carrier, big or small, relies on roaming partners to help create a national footprint.⁴ Indeed, there is not a single mobile wireless provider that has built out its entire licensed service area.⁵ While roaming is important for all wireless carriers, small, mid-tier and regional carriers find this element critical to their ability to provide competitive wireless services to consumers. Simply put, without access to nationwide data roaming, competitive carriers cannot provide competitive services.

The Commission has recognized the critical role that roaming plays for competitive carriers in the wireless ecosystem. In its most recent report on competition in the wireless marketplace, the Commission explicitly recognized that “roaming remains particularly important for small and regional providers with limited network population coverage to remain competitive by meeting their customers’ needs for nationwide service.”⁶ In addition, the Commission has also noted that access to roaming is “particularly important for consumers in rural areas – where mobile data services may solely be available from small rural providers.”⁷

NTELOS agrees that roaming agreements are exceedingly important to providing its customers with a competitive wireless product. NTELOS’ customers have come to expect

⁴ *T-Mobile Petition*, 2.

⁵ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Sixteenth Report, 28 FCC Rcd. 3700, ¶ 208 (2013) (“*Sixteenth Competition Report*”).

⁶ *Id.*

⁷ *Data Roaming Order*, ¶ 30.

unfettered nationwide wireless service – for a reasonable price. As a regional carrier, NTELOS relies heavily on roaming agreements to provide uninterrupted service to its customers.

NTELOS has a limited spectrum footprint (due in part to nationwide spectrum constraints) and must rely on other carriers in order to provide nationwide coverage; a feature that is table stakes for a competitive wireless provider. NTELOS, like T-Mobile, finds it “unrealistic to expect that [NTELOS] will ever be able to provide 100 percent coverage of the entire United States on its own network alone.”⁸ Therefore, NTELOS, like all wireless carriers, needs the ability to obtain data roaming agreements on commercially reasonable terms and conditions and offer the maximum coverage possible in order to just be competitive in the wireless marketplace.⁹

B. The *Data Roaming Order*

In recognition of the important role that data roaming plays for all wireless carriers – and the need for reasonable practices surrounding these arrangements – the Commission opened a proceeding to investigate data roaming practices and examine whether there was a need to adopt regulations on roaming agreements. The overwhelming majority of commenters favored adoption,¹⁰ arguing that “given increasing consolidation and other constraints, roaming arrangements for commercial mobile data services at present are often difficult to obtain, and when available, are offered on unreasonable terms and conditions.”¹¹ NTELOS recognized the unequal bargaining power that was present at the data roaming negotiation table, and highlighted

⁸ *T-Mobile Petition*, 3.

⁹ See *T-Mobile Petition*, 3, Mosa Decl. ¶ 5, Farrell Decl. ¶¶ 30-32.

¹⁰ In fact, the only commenters opposing adoption of a data roaming rule were Verizon and AT&T.

¹¹ *Data Roaming Order*, ¶ 11.

the need for “a process at the FCC to resolve roaming questions.”¹² NTELOS further emphasized the role that data roaming played in its business, defining the input as a “critical component needed by virtually every carrier in the industry to be able to compete and expand.”¹³ NTELOS expressed serious concern at the growing level of market concentration in the wireless industry, noting that “[w]here NTELOS was formerly able to negotiate reciprocal roaming agreements with a web of smaller carriers, most of those carriers have disappeared [due to] consolidation of wireless carriers.”¹⁴

The Commission found that it would serve the public interest to adopt a data roaming rule that “require[s] providers of commercial mobile data services to offer data roaming agreements on commercially reasonable terms and conditions.”¹⁵ The Commission recognized that “the availability of data roaming arrangements can be critical to providers remaining competitive in the mobile services marketplace... [as] consumers expect to be able to have access to the full range of services available on their devices wherever they go.”¹⁶ The Commission also expressed concern regarding the unequal bargaining power present in roaming negotiations.¹⁷

¹² Comments of NTELOS Inc., 7 (filed June 14, 2010) (“*NTELOS Data Roaming Comments*”). NTELOS emphasized that due to consolidation in the industry, “NTELOS needs other carriers for roaming but the national carriers no longer need NTELOS – as Verizon has on several occasions reminded NTELOS.” *Id.* at 7.

¹³ Reply Comments of NTELOS Inc., 7 (filed July 12, 2010) (“*NTELOS Data Roaming Reply Comments*”).

¹⁴ *NTELOS Data Roaming Comments*, 7-8.

¹⁵ *Data Roaming Order*, ¶ 13.

¹⁶ *Id.* ¶ 15.

¹⁷ “Consolidation in the mobile wireless industry has reduced the number of potential roaming partners for some of the smaller, regional and rural providers. In addition, this consolidation may have simultaneously reduced the incentives of the largest two providers to enter into such arrangements by reducing their need for reciprocal roaming.” *Data Roaming Order*, ¶ 27.

In adopting the regulations in the *Data Roaming Order*, the Commission wanted to avoid the industry reaching a point where AT&T or Verizon “might halt the negotiations of roaming on their advanced mobile data networks altogether in the future in the absence of Commission oversight.”¹⁸ In addition to seeking to address the broken state of the data roaming market in 2011, the Commission also anticipated that actions may need to be taken in the future if the intended goals of the *Data Roaming Order* were not being fulfilled. First, it noted “the serious risk [that AT&T and Verizon would] not be willing to offer roaming arrangements that cover [4G LTE] networks anytime in the near future, except in very limited circumstances.”¹⁹ Second, the Commission emphasized that it would continue to monitor the development of the marketplace and would “take additional action if necessary to help ensure that our goals in this proceeding are achieved.”²⁰ Here, NTELOS joins T-Mobile in asserting that the time has come for the Commission to take additional necessary action to fix a data roaming market that still fails to function in a meaningful way for competitive carriers, and as a consequence, consumers.

C. Despite Adoption Of The *Data Roaming Order*, Wireless Carriers Face Significant Challenges With Securing Commercially Reasonable Roaming Agreements

The concerns NTELOS expressed regarding data roaming and the future of the wireless industry were submitted to the Commission almost exactly four years ago. Unfortunately, despite the adoption of the *Data Roaming Order* in 2011, the circumstances surrounding data roaming have become even worse. The most recent wireless competition report concluded that “the ability [of providers] to negotiate data roaming agreements on non-discriminatory terms and

¹⁸ *Id.* ¶ 28.

¹⁹ *Id.* ¶ 27.

²⁰ *Id.*

at reasonable rates remains a concern.”²¹ This is due in large part to the continued consolidation of the wireless industry.

Consolidation has led to AT&T and Verizon’s domination of the wireless industry. Viewed together, they have the broadest coverage, the greatest spectrum holdings and most subscribers and revenues in comparison to the rest of the industry. This is in part due to their abundance of resources and ability to out-bid smaller carriers at auctions, but also due to the seemingly-nonstop transactions allowing them to acquire competitors throughout the wireless industry. This domination also transfers into the roaming sector, as Verizon and AT&T’s dominance allows them the ability to act in an anti-competitive way with respect to the critical input of roaming. As rural provider Youghioghney Communications, LLC (“Youghioghney”) explained, “in order to have competition [in the roaming market], the first requirement is that there must be competitors, and the current race toward consolidation violates that basic precept.”²² The roaming partner pool is declining at an increasingly alarming rate due to potential partners being swept up by Verizon and AT&T. As these options decrease, so does competition, leaving Verizon and AT&T as almost-required roaming partners through the country. In this powerful position, Verizon and AT&T are now able to dictate roaming rates because they are often the only potential roaming providers in a given area. From this follows the disappearance of reasonable roaming rates. Verizon and AT&T do not offer reasonable roaming rates because they do not have to.

These two largest carriers have enhanced their industry dominance by acquiring numerous competitors through transactions. Many of these “competitors” were small, mid-tier

²¹ *Sixteenth Competition Report*, ¶ 210.

²² *Ex Parte Presentation* filed by Youghioghney Communications, LLC in WT Docket No. 13-193, 1 (filed Feb. 6, 2014) (“*Youghioghney Feb. 6 Ex Parte*”).

and regional carriers that cannot obtain the resources to effectively compete with the larger carriers. As recognized by Youghioghney, “[t]he loss of roaming service cripples independent carriers and ultimately drives them into the arms of the majors who have their control of the roaming market to exploit this chokehold.”²³ Former carriers, such as MetroPCS, Allied Wireless, and Leap Wireless have all cited difficulty in obtaining reasonable roaming rates as significant reasons for exiting the market, despite the adoption of the *Data Roaming Order*. MetroPCS explained that “reasonably-priced voice, and particularly data, roaming arrangements have been extremely difficult to obtain, despite the existence of [the FCC data roaming rules]” as a reason for its decision to merge with a nationwide carrier.²⁴ Allied also emphasized the disadvantage it faced by “high and increasing roaming costs.”²⁵ Most recently, Leap Wireless decided to merge into AT&T in part “because the combined company will offer a significantly greater on-net footprint than Leap could possibly hope to obtain.”²⁶

Each of these transactions eliminated a potential “reasonable roaming partner”²⁷ from the marketplace, making it even more difficult for competitive carriers to procure commercially reasonable roaming agreements. As AT&T and Verizon continue to surpass other carriers in terms of spectrum holdings, subscribers and revenues, they continue to lose any incentive they

²³ *Id.* at 5.

²⁴ MetroPCS/T-Mobile Public Interest Statement, 18-19 (Lead File No. 0005446627) (Filed Oct. 18, 2012).

²⁵ Allied Wireless/AT&T Public Interest Statement, 22 (Lead File No. 0005632405) (Filed Feb. 5, 2013).

²⁶ Leap/AT&T Public Interest Statement, 18-19 (Lead File No. 0005860676) (Filed Aug. 1, 2013).

²⁷ Reasonable roaming partners are generally industry participants that “have a reciprocal need to enter into roaming relationships with other competitive carriers in order to fill gaps in their own network” – such as the ones NTELOS formerly worked with as noted above. *See Ex Parte Presentation* filed by Competitive Carriers Association in WT Docket No. 13-193, 3 (filed Jan. 3, 2014) (“*CCA Jan. 3 Ex Parte*”).

might have had enter into a commercially reasonable roaming agreement. Indeed, with each transaction that is approved, the greater the negotiating power of AT&T and Verizon grows, and the smaller the bargaining power of a competitive carrier becomes.

This elimination of competitors has affected the ability of many small, mid-tier and regional carriers to obtain commercially reasonable roaming rates. Certainly, there is no lack of evidence in the record to support this assertion. As the Petition recognized, a recent survey conducted among members of NTCA – The Rural Broadband Association found that the majority of respondents “categorized their experience in negotiating data roaming and in-market roaming agreements with other carriers as moderately to extremely difficult.”²⁸ In addition, Youghioghenny recognized that AT&T and Verizon, with the broadest nationwide coverage, can dictate unreasonable roaming terms for the industry: “[t]hey can and do charge whatever they want because there are no practical alternative for most carriers in many areas.” Furthermore, Youghioghenny has explained that the complaint process offered by the FCC as recourse is not an option as “there is no compelling legal constraint on AT&T’s ability to charge high rates, and then dare smaller carriers to file a complaint.”²⁹

In addition, the Competitive Carriers Association (“CCA”), an association of which NTELOS is a member, has repeatedly informed the Commission of the problems that its members are having in procuring reasonable roaming agreements. CCA has stated on several occasions since the adoption of the *Data Roaming Order* that its members “have been unable to obtain reasonable data roaming rates, particularly for 4G LTE roaming, from the two largest

²⁸ NTCA, *NTCA 2013 Wireless Survey Report*, at 3 (Jan. 2014), available at <http://www.ntca.org/images/stories/Documents/Advocacy/SurveyReports/2013ntcawirelessurvey.pdf>.

²⁹ *Ex Parte Presentation* filed by Youghioghenny Communications, LLC, in WT Docket No, 13-193, 3 (filed Feb. 3, 2014) (“*Youghioghenny Feb. 3 Ex Parte*”).

carriers, AT&T and Verizon.”³⁰ It has recognized that AT&T and Verizon’s “size and dominant power” have allowed them to “effectively hamstring the ability of competitive carriers to compete by refusing to offer data roaming on reasonable terms and conditions.”³¹ And on more than one occasion, CCA has pointed out that the Commission’s prediction in the *Data Roaming Order* had come true – the serious risk that AT&T (or Verizon) would not enter into 4G roaming agreements, is now a reality.³² These actions and other offers to providers of similar services reflect the overall anti-competitive nature of AT&T and Verizon actions with respect to data roaming.

These problems will not fix themselves. Small, mid-tier and regional carriers are still facing significant obstacles in their ability to secure commercially reasonable roaming rates during negotiations set on level playing fields. The *Data Roaming Order* provided a good starting point in establishing the “commercially reasonable” standard, including certain factors and limitations to the rule and a vow to evaluate this standard in the roaming context on a case-by-case basis.³³ However, despite the Commission’s intentions to promote “widespread availability of data roaming capability” by requiring parties to agree to “commercially reasonable terms and conditions,” additional guidance is now needed.³⁴

³⁰ See *Ex Parte Presentation* filed by Competitive Carriers Association in WT Docket No. 13-193, 3 (filed Dec. 12, 2013) (“*CCA Dec. 12 Ex Parte*”).

³¹ See *id.*

³² See, e.g., *id.* 5 (“AT&T currently has no 4G LTE roaming agreements with any other U.S. carrier.”); *CCA Jan. 3 Ex Parte*, 1-2 (“we are not aware of AT&T entering into any 4G LTE roaming arrangements with other U.S. carriers.”).

³³ *Data Roaming Order*, ¶¶ 42-43.

³⁴ *Id.* ¶ 1.

III. COMMISSION GUIDANCE AND CLARITY ON THE “COMMERCIALLY REASONABLE” STANDARD IS NEEDED

As noted above, the *Data Roaming Order* appeared to anticipate that roaming-related issues would continue, despite adoption of the data roaming rules, and the Commission noted its intent to address any petitions for declaratory rulings expeditiously. NTELOS urges the Commission take expeditious action on T-Mobile’s Petition and issue additional guidance and clarity on the “commercially reasonable” standard.

NTELOS has first-hand experience in the world of “commercially reasonable” data negotiations, and has found that numerous offers and negotiations have not resulted in “commercially reasonable” rates. Such commercially unreasonable offers come into sharp focus when compared to retail plans currently offered by nationwide carriers, as well as the underlying cost to provide data service.

For instance, during negotiations with certain potential roaming partners,³⁵ NTELOS was offered data roaming rates ranging from \$0.10 – 0.25 per MB of data, or approximately \$100 - \$250 per GB, a stunningly high price when compared to current rates actually charged by carriers to their retail customers. AT&T is currently charging its retail customers as low as \$7.50/GB for high-data users under a shared data plan.³⁶ AT&T’s shared plan also values smaller amounts of data, such as 10 GB at \$10.00 per GB.³⁷ Verizon similarly offers its retail customers a shared data plan for 10 GB at \$160, or \$16.00/GB (which includes unlimited voice,

³⁵ NTELOS has entered into a strategic network alliance with Sprint pursuant to which, among other things, NTELOS and Sprint provide data roaming services to each other. Because said agreement covers other significant rights and obligations of the parties, including, without limitation, network build out requirements and the exclusive provision of selected wholesale services, such arrangement is not referenced or otherwise considered herein.

³⁶ See AT&T, Mobile Share Value Plans, <http://www.att.com/shop/wireless/data-plans.html#fbid=X9PrR1QMRqJ> (last visited July 9, 2014).

³⁷ See *id.*

so this plan effectively values the voice component at \$ 0.00).³⁸ T-Mobile also points to data demonstrating that both AT&T and Verizon's offers may average out at \$15/GB for retail customers.³⁹ Comparing Verizon and AT&T's retail rates to certain roaming rates offered to NTELOS, the proposed roaming rate is approximately *10 to 25 times higher than what is being charged to retail customers*.⁴⁰

To put this pricing in perspective, Youghioghenny has found, and the T-Mobile Petition highlights, that "data costs no more than \$2.20 - 2.40 per GB to deliver to a wireless subscriber." That estimate is about *50 to 125 times less than what was offered to NTELOS*.⁴¹ NTELOS believes that this practice of offering inflated roaming rates to competitive carriers is quite common. Such an inflated price should certainly not be considered "commercially reasonable" under the Commission's intended definition of the term.

While NTELOS' example provides such a large differential between the offered rate and the retail rate charged by the carrier to its customers that it would be difficult to *not* recognize the unreasonableness of the offer, it is sometimes difficult to evaluate roaming offers, and, therefore, not all carriers may be able to easily distinguish whether offered rates and conditions are

³⁸ See Verizon, The More Everything Plan, <http://www.verizonwireless.com/wcms/consumer/shop/shop-data-plans/more-everything.html> (last visited July 9, 2014).

³⁹ *T-Mobile Petition*, Farrell Decl., ¶ 66, Table 1.

⁴⁰ As noted by T-Mobile, the fact that AT&T offered Leap a "steeply discounted" roaming rate that was negotiated as part of a "break up fee" in the event that the AT&T and Leap deal would be terminated also demonstrates that "the roaming rates currently offered by AT&T are artificially high." *T-Mobile Petition*, 9.

⁴¹ Youghioghenny has noted that "[t]he time-tested measuring rod for assessing the reasonableness of telecom rates is cost, for if a rate in a presumptively competitive market is consistently above costs by a factor of 10, 20 or even 50 fold, there has certainly been a market failure which requires redress." *Youghioghenny Feb. 6 Ex Parte*, 3.

commercially reasonable or not.⁴² This is due in large part to the fact that most roaming agreements and negotiations are confidential, signed under non-disclosure agreements with little to no public data available on current rates or agreements.⁴³ While this practice is understandable due to the nature of the information contained in these agreements, participating parties should be provided some level of clarity or predictability on what is considered commercially reasonable. Therefore, in lieu of a carrier's ability to measure offered rates against (non-existing) public market roaming information, the Commission must offer guidance and additional clarity on the meaning of "commercially reasonable" in the context of data roaming to assist these parties. Industry participants will benefit from additional guidance that focuses on what the term "commercially reasonable" means and what defines the parameters of this standard. Doing so will not only encourage fair practices on the data roaming playing field, but will also assist the Commission in resolving disputes, as well as help avoid potential time-consuming complaints in the future.

IV. NTELOS SUPPORTS T-MOBILE'S REQUEST TO ESTABLISH BENCHMARKS AND CLARIFICATIONS REGARDING THE COMMERCIALLY REASONABLE STANDARD

NTELOS agrees with T-Mobile that establishing certain benchmarks and providing certain clarifications on the commercially reasonable standard can assist the industry in future roaming negotiations. This guidance should encourage a baseline understanding of the

⁴² As CCA has noted, "competitive carrier[s] cannot discern whether the terms and conditions offered by AT&T and Verizon are in line with those offered to other carriers." Competitive Carriers Association, "A Framework for Sustainable Competition in the Digital Age: Fostering connectivity, innovation and consumer choice," WT Docket No. 13-135, 15 (filed Dec. 4, 2013) ("CCA Competition Whitepaper").

⁴³ As Youghioghney has noted, "[t]he hidden rate structure obviously fosters discrimination in rates and also makes it more difficult to determine whether the rates being offered are reasonable." *Youghioghney Feb. 3 Ex Parte*, 2.

commercially reasonable standard and should establish “predictable criteria” surrounding roaming rates and negotiations.⁴⁴ Most importantly, any guidance should be designed to mitigate the effects of the unequal bargaining power that is often present in data roaming negotiations.

Based on its own experience with data roaming negotiations, NTELOS strongly supports T-Mobile’s proposed retail benchmark based on a “suitable measure of retail price” for wholesale mobile data pricing.⁴⁵ Comparing roaming rates to retail rates is a reasonable practice because retail prices are generally set to at least recover costs of providing a service. As T-Mobile’s Senior Vice President, Dirk Mosa states, “the actual cost to provide a megabyte of data to roaming partners mirrors the cost to provide a megabyte for one’s own customers.”⁴⁶ And, as detailed above, NTELOS can attest to roaming rates demanded by potential partners that are “on average, many times higher than the price charged for the same unit of data in even the most expensive retail data plans.”⁴⁷ Therefore, rather than have the potential roaming partner assume that such a rate is commercially reasonable, and the potential home partner disagree, roaming negotiations would benefit from a firm understanding that these proposals would not be considered “commercially reasonable.”

Establishing a benchmark below retail prices would also likely be welcome by competitive carriers due to the ease with which it could be applied. Publicly available retail data, along with a carrier’s own internal data, would easily assist the carrier in evaluating offered rates. Furthermore, the benchmark would be flexible so that when prices of retail rates decline,

⁴⁴ See *T-Mobile Petition*, 11.

⁴⁵ *Id.* at 12.

⁴⁶ See, e.g., *id.* Mosa Decl., ¶ 21.

⁴⁷ *Id.* at 12. See also discussion *supra* Section III.

roaming rates would decline as well.⁴⁸ This benchmark could also substantially decrease the instances of Commission intervention (and amount of FCC time and resources expended) to evaluate these situations on a “case-by-case basis” because the information would be readily available to carriers, better equipping providers to make a determination about whether the offered roaming are commercially reasonable “more consistently and more quickly.”⁴⁹

NTELOS also shares T-Mobile’s concern that in some cases, high wholesale roaming rates “are intended to, and have the effect of, keeping retail data rates unnecessarily high for the wireless customers of competitors.”⁵⁰ As a result T-Mobile explained that it has “been forced to throttle and cap its customers’ ability to roam on [the partner’s] network due to unreasonably high data roaming rates.”⁵¹ NTELOS has also limited its customers’ ability to roam on certain networks. Youghioghenny recognized this problem as well, noting that “[t]he rates charged for roaming are so high that no carrier can profitably afford to let its customers roam on a high cost roaming partner because the roaming charges would quickly exceed the rates paid by the customer to the home carrier.”⁵²

Indeed, if NTELOS had to enter into such an unreasonable roaming arrangement in an attempt to offer competitive services to its customers, it may quickly find itself actually losing

⁴⁸ See, e.g., *T-Mobile Petition*, Mosa Decl., ¶ 21 (noting that “costs to produce a megabyte continue to decline, with 4G/LTE being more efficient than its predecessor technologies... consequently, commercially reasonable rates should also decline over time due to the lower costs associated with the new technologies.”).

⁴⁹ *Id.* at 10. Of course, NTELOS recognizes that there may be situations where such information is not readily available, or other variables exist. Such an understanding further emphasizes the need to establish other benchmarks and/or clarifications to assist in the assessment of offered roaming rates.

⁵⁰ *T-Mobile Petition*, 12.

⁵¹ *Id.* at 13.

⁵² *Youghioghenny Feb. 6 Ex Parte*, 4.

money on any customers that used their devices on such roaming partner's network. For example, at a data roaming cost to NTELOS of approximately \$1 for each song that a customer downloads or streams, it is clear that it would not take many songs before the cost to NTELOS would exceed the entire monthly revenue that it receives from that customer. Video streaming would be even worse by orders of magnitude. This is an undesirable outcome and cannot be what the Commission intended.

Similarly, NTELOS also supports T-Mobile's proposed benchmark to "consider the rates that facilities-based carriers charge Mobile Virtual Network Operators [MVNOs] for data."⁵³ While NTELOS agrees that there are differences between MVNO agreements and roaming agreements, the end result is generally the same: a negotiated agreement that permits an operator's customers to use another operator's network.⁵⁴ Indeed, these rates should be within the same price-point, as the T-Mobile declaration explains, and NTELOS agrees, "there is no reason why the wholesale rates for minutes and megabytes charged to other carriers (*i.e.* roaming) should be so much higher than the wholesale rates for minutes and megabytes charged to MVNOs."⁵⁵ As the Petition reports, T-Mobile's MVNO rates "have been falling over time and that actual average price per MB was below 3 cents by 2013."⁵⁶ Similar to the proposed retail benchmark, this too, should be applied as a baseline – allowing the negotiating parties to have a general sense of a "reasonable" standard when they enter into negotiations. For instance, offering MVNOs significantly cheaper rates (than offered wholesale roaming rates) for similar traffic, such as roaming, should be viewed as presumptively unreasonable by the Commission.

⁵³ *T-Mobile Petition*, 14.

⁵⁴ *See id.* at 15, Farrell Decl., ¶ 82.

⁵⁵ *Id.* at 15, citing Mosa Decl., ¶ 27.

⁵⁶ *Id.* Farrell Decl., ¶ 83.

NTELOS also supports T-Mobile's other two proposed benchmarks. With respect to T-Mobile's benchmark based on "rates that T-Mobile has negotiated with non-affiliated foreign carriers,"⁵⁷ NTELOS recognizes the important role that these rates may play in helping to determine the commercially reasonable standard, and believes that this benchmark should be adopted along with the other benchmarks proposed by T-Mobile. With respect to the benchmark based on the comparison of wholesale roaming rates to other competitively negotiated wholesale roaming rates, NTELOS agrees that this benchmark should be used with caution, as some of the previously negotiated rates may not be commercially reasonable themselves. But, NTELOS also sees value in including this proposed benchmark in the Commission's guidance, because those agreements that are, in fact, commercially reasonable (i.e., a roaming agreement reached between carriers with equal bargaining power) would be extremely helpful comparison going forward.

Finally, in a similar vein, NTELOS strongly encourages the Commission to clarify that the *Data Roaming Order* presumption that a signed roaming agreement meets the commercially reasonable standard "does not apply with respect to *future* agreements or proposed agreements."⁵⁸ Indeed, as described herein, roaming negotiations are currently taking place on an uneven playing field. The unequal market power of the participants results in unequal bargaining power. As a consequence, "the simple fact that an agreement has been reached does not mean that the terms of the agreement can be presumed to be reasonable."⁵⁹ Small, mid-tier and regional carriers have long-recognized the problems surrounding roaming negotiations, but

⁵⁷ *Id.* at 13-14.

⁵⁸ *Id.* at 16-17.

⁵⁹ *Id.* at 17.

at the same time, have all needed roaming agreements to effectively compete in the wireless marketplace. In many instances, carriers have had no other choice but to enter into agreements where they are being charged commercially unreasonable prices to offer a service their customers demand. Such agreements, reached under such unequal circumstances, should not be used to evaluate future agreements. Doing so would only continue to encourage unreasonable roaming rates. Accordingly, NTELOS urges the Commission to adopt the requested clarification.

V. CONCLUSION

Based on the foregoing reasons, NTELOS respectfully requests that the Commission grant T-Mobile's *Petition for Expedited Declaratory Ruling* and provide much-needed guidance and clarity on the "commercially reasonable" standard in the context of data roaming agreements.

Respectfully submitted,

NTELOS Holdings Corp.

By: 

Michael Lazarus
Jessica DeSimone
TELECOMMUNICATIONS LAW
PROFESSIONALS PLLC
875 15th Street, NW, Suite 750
Washington, DC 20005
Telephone: (202) 789-3120
Facsimile: (202) 789-3112

Brian J. O'Neil
NTELOS Holdings Corp.
Executive Vice President, General Counsel
and Secretary
1154 Shenandoah Village Drive
Waynesboro, VA 22980
Telephone: (540) 946-2058

Its Attorneys

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