

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

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

To: Wireless Telecommunications Bureau

**COMMENTS OF NTCH, INC., FLAT WIRELESS, LLC AND BUFFALO-LAKE ERIE  
WIRELESS SYSTEMS CO., LLC ON PETITION FOR EXPEDITED DECLARATORY  
RULING OF T-MOBILE USA, INC. REGARDING DATA ROAMING OBLIGATIONS**

1. NTCH, Inc. (“NTCH”), Flat Wireless, LLC (“Flat”) and Buffalo-Lake Erie Wireless Systems Co., LLC (“Blue Wireless”), by its undersigned attorneys, submit these comments in support of the petition for expedited declaratory ruling filed by T-Mobile USA, Inc. (“T-Mobile”).<sup>1</sup> NTCH, Flat and Blue Wireless agree that the Commission needs to act expeditiously to remedy the ineffective rule to offer data roaming arrangements to other providers on “commercially reasonable terms and conditions.”<sup>2</sup>

2. The Commission intended, in part, for its data roaming rule to address the unwillingness of the largest wireless carriers to enter into fair data roaming arrangements with other facilities-based providers. Unfortunately, the rule has been a complete failure. The T-Mobile Petition is bursting with evidence, drawn from the experiences of a wide gamut of

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<sup>1</sup> T-Mobile USA, Inc., Petition for Expedited Declaratory Ruling Regarding Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, WT Docket No. 05-265 (filed May 27, 2014) (“Petition”).

<sup>2</sup> 47 C.F.R. § 20.12(e); *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, ¶¶ 40-41 (2011) (“*Data Roaming Order*”), *aff’d sub nom. Cellco P’ship v. FCC*, 700 F.3d 534 (D.C. Cir. 2012).

providers (basically everyone except the two largest carriers, AT&T and Verizon Wireless), of the “commercially reasonable” standard’s failures. After many months of consideration of the data roaming rule within the Commission and a hard-fought battle at the Court of Appeals to sustain the rule, the rule has ended up having no impact on the roaming marketplace because the "commercially reasonable" standard is toothless, vague and very difficult to enforce.

3. NTCH’s, Flat’s and Blue Wireless’ experiences, some of which are already documented in the Petition, are no different. NTCH’s attempts, over the course of several years, to secure a commercially reasonable data roaming arrangement with Verizon Wireless were unsuccessful to the point that a formal complaint had to be initiated with the Commission late last year. Similarly, Blue Wireless encountered absurdly high data roaming rate proposals from Cricket while the latter was in the process of being acquired by AT&T. At that time, in apparent anticipation of being acquired by AT&T in the near future, Cricket propounded data roaming rates that were in line with AT&T's data roaming rate structure. Cricket's complete about-face on roaming charges was especially outrageous because, prior to its deal to be acquired by AT&T, it had been an outspoken critic of the roaming rates offered by the majors and had consistently denounced them as being too high. Flat has experienced similarly outrageous data roaming rates in its dealings with the majors.

4. A major difficulty here is that all roaming negotiations are conducted under a cloud of secrecy imposed by the largest carriers. Accordingly, no one but the national carriers can know for sure what they are offering other carriers. While rate discrimination is permitted under the Commission's current data roaming regulatory scheme, the fact that certain rates are being offered to other similarly situated carriers would, and should factor into the assessment of whether a particular rate is "commercially reasonable." NTCH and other carriers have urged the

Commission to resume enforcement of the provision of the Communications Act (Section 211) that requires contracts between carriers to be filed or otherwise made publicly available.

Transparency of rates would aid immeasurably in moving the industry toward more reasonable rates since both the Commission and the carrier community would actually know what rates are being charged. In this connection, NTCH has filed a formal petition to rescind forbearance of Section 211 and or require the public posting of roaming rates. There is no reason why this action could not be taken within the current framework of the data roaming rules. Indeed, in the context of evaluating the instant request for declaratory ruling, the Commission is hamstrung by the fact that it -- the regulatory agency charged with ensuring reasonable rates -- does not have the slightest idea what the rates are.

5. There appear to be two common themes among the failed data roaming experiences with AT&T and Verizon Wireless. First, none of the unsuccessful attempts to obtain a commercially reasonable data roaming arrangement appeared to be due to technology-related limitations. In the *Data Roaming Order*, the Commission offered (and codified) specific guidance on what would be considered reasonable circumstances for a provider not to offer data roaming arrangements to a requesting provider: technological incompatibility, not technically feasible without unreasonable network changes, or non-comparable generations of technology.<sup>3</sup> These limitations are, for the most part, straightforward and objective. Before requesting providers even approach another provider for data roaming, they know to constrain their requests within these “commercially reasonable” parameters. Absent these limitations, providers should

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<sup>3</sup> 47 C.F.R. §§ 20.12(e)(1)(ii) – (iv). The only applicable limitation would be under 47 C.F.R. § 20.12(e)(1)(i): “Providers may negotiate the terms of their roaming arrangements on an individualized basis.”

have no legitimate justification for not proceeding expeditiously into a commercially reasonable data roaming arrangement.

6. Unfortunately, the second common theme is that AT&T and Verizon Wireless have little incentive to even attempt to propose data roaming rates within any universe that most people would consider to be commercially reasonable. The difficulty, in a nutshell, is that as the two major carriers have achieved near ubiquity of footprint nationwide, they have lost any incentive whatsoever to negotiate fair or reasonable roaming rates. The Commission's current regulatory approach for roaming is founded on the industry model that prevailed in the last century when the cellular market was characterized by numerous independent players operating in limited regions. Under that model, it was in every carrier's interest to negotiate reasonable reciprocal roaming rates with other carriers because each carrier would need its own customers to be able to roam when they are not on a home network. Those days are long past.

7. Now the two majors offer roaming only because it is an FCC requirement; while they do need roaming in some rural areas, they generally have some coverage of their own in all large and mid-size markets. They are therefore economically incentivized to offer roaming on rates and conditions that are higher than most competing carriers can feasibly agree to pay. The majors meet the letter of the FCC roaming regulation by offering a roaming rate, but not one which any other carrier can realistically afford to pay. And in the current marketplace, it is a practical impossibility for a carrier to attempt to pass through domestic roaming charges to its customers. Put another way, data roaming rates offered by AT&T and Verizon Wireless are deliberately set high to preclude a roaming arrangement or to simply impede negotiations. But because the Commission has not provided any objective guidance for evaluating whether a data roaming rate would not be deemed "commercially reasonable," AT&T and Verizon Wireless simply continue with their unreasonable pricing antics.

8. These themes illustrate the disparity in the data roaming rule's "commercially reasonable" standard. A requesting provider has to make a roaming request within certain

parameters or otherwise the host provider can flat out reject it under a presumption of reasonableness. On the flipside, there are no objective criteria governing the host provider's response to a valid request for data roaming.<sup>4</sup> This disparity, and its effect, is exacerbated when a requesting provider is dealing with market-power giants like AT&T and Verizon Wireless. This is why the Commission must issue additional guidance in the form of objective benchmarks. The Commission's "we'll look at the totality of the circumstances *if you want to file a complaint or petition*" approach to evaluating the commercially reasonable standard has not, thus far, yielded any incentive for good-faith bargaining. Hopefully, the Commission will take the opportunity presented by the T-Mobile Petition to change this.

9. Indeed, the proposals presented in the Petition do not even require the Commission to deviate from its current case-by-case "totality of circumstances" approach. The benchmarks proposed by T-Mobile are simply market circumstances that are nearly certain to be present in any case to be evaluated. There will always be retail rates, reseller rates, roaming arrangements with foreign carriers, and other roaming agreements. All are appropriate, predictable criteria for the Commission to adopt in evaluating the commercial reasonableness of a host provider's data roaming offers. Application of these benchmarks also speaks towards one of the factors the Commission has already enumerated in the *Data Roaming Order*: whether the terms and conditions offered by the host provider are so unreasonable as to be tantamount to a refusal to offer a data roaming arrangement.<sup>5</sup>

10. Applying these criteria in an evaluation would not preclude a host provider's ability to negotiate individually tailored data roaming agreements and, therefore, would not cross

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<sup>4</sup> The *Data Roaming Order* discusses factors the Commission *may* consider, but provides no practical guidance on how those factors would be evaluated. *Data Roaming Order* ¶¶ 85-87.

<sup>5</sup> *Id.*

over into common carrier regulation territory. Notwithstanding the foregoing, perhaps now is also the time for the Commission to revisit its regulatory classification of data roaming services. As previous commenters in this docket have pointed out, data roaming services amount to nothing more than a transmission service subject to Title II regulation as a telecommunications service.<sup>6</sup> The Commission noted arguments in the *Data Roaming Order* at Para. 70 that the provision of data roaming must be deemed a common carrier service because "during data roaming the host carrier is providing pure data transmission to another carrier." The provision of pure data transmission services between carriers does not qualify as an "information service" under the Act but is, rather, nothing more than a classic telecom service: "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. Section 153 (43). The Commission in 2011 elected not to decide whether data roaming services provisioned in this manner are or are not telecommunications services.<sup>7</sup> This view of data roaming therefore remains an open issue which, in the context of this Petition, is now ripe for decision. Even though the Commission has the requisite authority to adopt the Petition's proposed criteria under the current Title III regime, applying Title II considerations would provide even more certainty for the data roaming market.

11. In any case, it is clear that the current application of "commercially reasonable" data roaming standards does not work. The lack of a strong, enforceable, clearly defined data roaming obligation is becoming even more critical as the mobile communications industry rapidly becomes more and more data-based rather than voice-based. Reasonable roaming rates

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<sup>6</sup> *Data Roaming Order* ¶ 70.

<sup>7</sup> *Id.*

