Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition For Expedited Declaratory Ruling Filed By T-Mobile USA, Inc. Regarding Data Roaming Obligations	)	WT Docket No. 05-265
	)	

OPPOSITION OF AT&T

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Pursuant to the Public Notice released on June 10, 2014 in WT Docket No. 05-265 (DA 14-768), AT&T respectfully submits this opposition to the Petition For Expedited Declaratory Ruling Filed By T-Mobile USA, Inc. Regarding Data Roaming Obligations.

INTRODUCTION AND SUMMARY

T-Mobile's petition is a document at odds with itself. Its headline is a sweepingly broad claim that, despite the Commission's adoption of data roaming rules in 2011, the data roaming marketplace is "dysfunctional," leaving providers "stymied in their efforts to negotiate data roaming agreements on commercially reasonable terms."[1] But the petition shows the opposite: as T-Mobile recognizes, providers have negotiated dozens of commercial agreements under the new rules, yet T-Mobile has not cited a single instance where any provider anywhere in the country has found it necessary to file a complaint with the Commission alleging an inability to obtain commercially reasonable terms, much less demonstrated that the complaint process would be inadequate to address any such claim. Moreover, according to T-Mobile's own economist,

[1] T-Mobile USA, Inc., Petition for Expedited Declaratory Ruling of T-Mobile USA, Inc., *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, at i, 10 (filed May 27, 2014) ("Pet.").

"[w]holesale [roaming] rates have trended *downward strongly* in recent years."[2] Indeed, Professor Farrell shows that the average wholesale roaming rate T-Mobile pays has fallen *nearly 70 percent* since 2011 and continues to decline.[3] This is specifically true with respect to AT&T as well: the rate T-Mobile pays to AT&T has fallen equally dramatically since 2011. Just as the Commission envisioned, commercial negotiations are producing a variety of terms to meet differing needs, including the highly-touted LTE roaming hub T-Mobile's own trade association (CCA) has established with scores of rural carriers to "help Sprint and T-Mobile fill the holes in their network[s],"[4] which Sprint has already used to extend its roaming coverage by 34 million people in 23 states.

Thus, far from demonstrating an industry-wide problem that requires the rule "clarifications" T-Mobile proposes, the petition itself evinces a well-functioning market for wholesale data roaming services with which the Commission should be loathe to interfere. Moreover, T-Mobile's proposals would unlawfully *rewrite*, rather than clarify, those rules in ways that would limit marketplace flexibility, undermine incentives to invest in broadband networks, and constitute prohibited common carriage regulation. The Commission carefully crafted its data roaming rules to balance two important goals: ensuring that mobile wireless providers can obtain data roaming arrangements on reasonable terms, but also preserving incentives to invest in broadband networks. T-Mobile's proposals would systematically undo that careful balance. The result would be prescriptive rate "benchmarks" and other policies

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[2] *See* Declaration of Joseph Farrell, attached as Exhibit 2 to Pet., at ¶ 13 ("Farrell Decl.") (emphasis added).

[3] *See* Farrell Decl., Table 6.

[4] Marguerite Reardon, *Sprint to join rural operators in nationwide roaming hub*, CNET (Mar. 26, 2014), *available at* http://www.cnet.com/news/sprint-to-join-rural-operators-in-nationwide-roaming-hub/ ("CNET Sprint Roaming Hub article").

designed to allow T-Mobile to continue to rely on data roaming in lieu of investing in extending its broadband networks.

For example, T-Mobile's suggestion that the Commission should "clarify" that the terms of existing roaming agreements should not be presumed commercially reasonable would turn the Commission's data roaming standard on its head. The *Data Roaming Order* expressly provides that, in any future complaint proceeding, the Commission will "presume" that "the terms of a signed agreement meet the reasonableness standard and will require a party challenging the reasonableness of any term in the agreement to rebut that presumption."[5] That presumption should be especially strong with respect to agreements that were negotiated subject to the Commission's *Data Roaming Order* regime and never challenged – such as the agreement T-Mobile negotiated with AT&T just last year which, contrary to T-Mobile's suggestion, provides very favorable terms and rates.

T-Mobile's argument that the Commission's commercial reasonableness standard should not take a *large* provider's capacity for build-out into account is equally indefensible. The Commission repeatedly made clear that its rules should not be interpreted in ways that would encourage providers to use data roaming as a substitute for economically feasible build-out of their own networks, and for good reason.[6] As the Commission has long recognized, consumers are best-served by facilities-based competition, and the Commission's regulations should not discourage such competition. Thus, here again, T-Mobile is not seeking a "clarification" of the data roaming rules, but an unwarranted revision to them.

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[5] Second Report and Order, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, 26 FCC Rcd. 5411, ¶ 81 (2011) ("*Data Roaming Order*").

[6] *Data Roaming Order* ¶¶ 22, 51, 86 (Commission will "take into account" the extent and nature of a requesting provider's build-out in a given area when it assesses the commercial reasonableness of roaming rates and refusals to offer roaming).

It is particularly ironic that it is T-Mobile that is seeking such a revision. T-Mobile holds spectrum in almost all of the areas in which its customers roam on AT&T's network. There is no reason T-Mobile cannot build out that spectrum just as AT&T did. Indeed, in many cases, AT&T's networks in these rural areas use the same mid- and high-band spectrum that T-Mobile holds. Moreover, in the 600 MHz auction proceeding, T-Mobile successfully advocated for spectrum set-asides on the (apparently false) pretext that it planned to build out into rural areas. Now it's pitching a very different message, urging the Commission to ignore build-out concerns simply because a provider may face certain "cost challenges" in building out to rural areas.[7] In patently self-serving fashion, T-Mobile suggests that build-out concerns should inform data roaming policies only where the requesting provider has "a very limited or non-existent network and . . . is looking to design its business primarily to 'piggyback' on other providers' network investments." Simply put, a primary goal of the *Data Roaming Order* was to preserve incentives to deploy broadband networks, and the notion that the Commission did not intend to apply this aspect of its commercial reasonableness test to providers like T-Mobile that have more than a "very limited or non-existent network," not to mention substantial assets and corporate resources, is nonsensical.

T-Mobile's proposed rate benchmarks are also inappropriate. T-Mobile's own economist acknowledges that these benchmarks are "imperfect" and could be used only "cautiously and in conjunction with one another and with an analysis of competitive risks" – thus tacitly conceding that adopting them could not possibly provide "clarity" in commercial negotiations.[8] In any event, the *Data Roaming Order* is clear that resort to the particular benchmarks T-Mobile favors – notably, retail and resale rates – would *undermine* the rules by eliminating incentives for

[7] Pet. at 23.

[8] Farrell Decl. ¶ 8.

investment and encouraging the use of roaming as resale. Indeed, using retail or resale rates that reflect the blended costs of serving urban, suburban and rural customers as a benchmark would be particularly inappropriate for a requesting provider like T-Mobile that uses roaming services almost exclusively in rural areas, because such low rates would act as an especially powerful disincentive for T-Mobile to build out in such areas. Indeed, when the Commission applied common carrier obligations to wholesale voice roaming services, it considered and flatly *rejected* prescriptive rate regulation, including caps "based on some benchmark of retail rates."[9] The use of such benchmarks would be even more inappropriate in the context of the Commission's private carriage regime governing data roaming, which, according to the Commission, does "not amount to treating mobile data service providers as 'common carriers' under the Act" in significant part because "providers will have flexibility with regard to roaming charges."[10]

Despite the overwhelming evidence of a well-functioning commercial marketplace, T-Mobile claims that prescriptive rate regulation is necessary to cabin the exercise of "market power" by AT&T and other "must have" roaming partners, particularly in rural areas where T-Mobile is constrained by its GSM technology choice. The reality is quite different. Rural America is served by many smaller GSM carriers; AT&T has negotiated roaming agreements with dozens of them. Moreover, T-Mobile, like the rest of the industry, has shifted to LTE, and can choose among multiple LTE roaming partners, including roaming hub arrangements, in most areas. But even if it were the case that a single GSM carrier is T-Mobile's only "fallback" option

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[9] Report and Order and Further Notice of Proposed Rulemaking, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd. 15817, ¶¶ 36-40 (2007) ("*Voice Roaming Order*").

[10] *Data Roaming Order* ¶ 68.

in a given area, the Commission's rules already permit T-Mobile to file a complaint and make its case if it has difficulty securing what it contends are commercially reasonable terms.

Finally, T-Mobile's proposals are unlawful. The Communications Act prohibits the Commission from treating broadband wireless providers as common carriers.[11] The D.C. Circuit rejected a facial challenge to the data roaming rules solely because the Commission's "commercially reasonable" standard leaves "substantial room for individualized bargaining and discrimination in terms."[12] The court specifically cautioned the Commission that, "[i]n implementing the rule and resolving disputes that arise in the negotiation of roaming agreements, the Commission would thus do well to ensure that the discretion carved out in the rule's text remains carved out in fact."[13] T-Mobile's proposals, however, are designed to function as *de facto* price caps that would limit providers' flexibility in rate negotiations and push the Commission's regime far over the line into impermissible common carrier regulation. Indeed, the sorts of broad, industry-wide pronouncements that T-Mobile seeks are especially inappropriate in the context of the Commission's private carriage data roaming regime, which is designed to rely on a case-by-case assessment of commercial reasonableness that can be grounded in facts specific to a ripe dispute.

In short, T-Mobile's petition is designed to further its narrow business interests, not any legitimate industry-wide need for clarity. T-Mobile seeks extreme and untenable interpretations of the *Data Roaming Order*, in advance of any live controversy, that T-Mobile can brandish in

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[11] *Cellco Partnership* v. *FCC*, 700 F.3d 534, 546 (D.C. Cir. 2012).

[12] *Id.*, 700 F.3d at 548.

[13] *Id.*, 700 F.3d at 549; *see also Verizon* v. *FCC*, 740 F.3d 623, 652 (D.C. Cir. 2014) ("we cautioned that were the Commission to apply the 'commercially reasonable' standard in a restrictive manner, essentially elevating it to the traditional common carrier 'just and reasonable' standard, . . . the rule might impose obligations that amounted to common carriage *per se*, a claim that could be brought in an 'as applied' challenge").

negotiations in hopes of obtaining roaming rates well below the commercially reasonable rates that prevail in today's negotiated and unchallenged agreements. The Commission should dismiss the petition.

I. THE BALANCED APPROACH ADOPTED IN THE *DATA ROAMING ORDER* IS WORKING AND FURTHER COMMISSION ACTION IS UNNECESSARY.

Just three years ago, after developing an extensive record, the Commission adopted comprehensive rules requiring facilities-based providers of mobile data services to offer data roaming to other providers on commercially reasonable terms and conditions. Those rules were carefully crafted to balance a number of concerns, but, in particular, to give broad flexibility to parties to negotiate agreements tailored to individual circumstances and to preserve all providers' incentives to build out their networks. All of the evidence available in this proceeding confirms that the Commission's rules are working as intended, and T-Mobile has made no showing that there are fundamental problems in the wholesale data roaming marketplace that the existing rules cannot address.

Given that T-Mobile purportedly is asking the Commission to "clarify" the rules as they currently exist, it is important to start by reiterating the basic features of those rules and how the Commission intended them to be applied. The Commission declined to undertake "specific prescriptive regulation of rates," as "requested by some commenters," and instead adopted "a general requirement of commercial reasonableness for all roaming terms and conditions, including rates."[14] Indeed, the commercial reasonableness standard, of necessity, must allow for a broader range of outcomes than the "just and reasonable" ratemaking standard of common

[14] *Data Roaming Order* ¶ 21.

carriage regulation, which contemplates a range, or "zone," of acceptable rates.[15] The linchpin of the *Order*'s approach is thus an unusual degree of flexibility: the Commission listed seventeen factors that it "may" consider in determining whether a particular offer is commercially reasonable, but the Commission emphasized that these factors "are not exclusive or exhaustive and that providers may argue that the Commission should consider other relevant factors."[16]

Although the Commission required providers to offer data roaming, it recognized throughout the *Order* that such a requirement created "the possibility that requesting providers will substitute roaming for investment in coverage and accordingly under-invest in deploying new infrastructure."[17] The Commission thus sought to establish a balance that encouraged data roaming in a way that still preserved the investment incentives of both host providers and requesting providers. The rules strike this balance in several ways. First, host providers are given "appropriate discretion in the structure and level of such rates that they offer" within the "commercial reasonableness" standard.[18] Second, the Commission reiterated its finding from the 2010 *Order on Reconsideration* that "the relatively high price of roaming compared to providing facilities-based service will often be sufficient to counterbalance the incentive to 'piggy back' on

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[15] *FPC* v. *Conway Corp.*, 426 U.S. 271, 278 (1976) ("there is no single cost-recovering rate, but a zone of reasonableness: statutory reasonableness is an abstract quality represented by an area, rather than a pinpoint" (quotation omitted)); 47 U.S.C. § 201.

[16] *Data Roaming Order* ¶ 86.

[17] *Id.* ¶ 34; *see also id.* ¶ 21 n. 76 (recognizing also that "there are pro-competitive benefits that flow from providers differentiating themselves on the basis of coverage," and thus host providers may have a disincentive to invest in their networks if other providers can "free-ride" on their investment via roaming"); *see also id.* ¶¶ 16-22, 33-34.

[18] *Id.* ¶ 21.

another carrier's network."[19] The Commission had previously found that the fact that "roaming rates [are] *much higher* than retail rates" would preserve investment incentives, and the Commission cited that prior finding with approval in the *Data Roaming Order*.[20] Third, the Commission recognized that one of the most important factors for assessing whether a roaming rate is commercially reasonable (or whether refusal to offer roaming is reasonable) is whether the requesting carrier has the spectrum and resources to build out its own network in the area(s) where roaming is being requested, and that it would "take into account" such factors in assessing commercial reasonableness.[21]

The other central pillar of the *Data Roaming Order* is that it relies on a case-by-case approach to assessing commercial reasonableness. The Commission took care not to unduly limit the flexibility of parties in negotiation by making overly specific statements in advance about how the Commission might assess various rates and terms in future proceedings. Instead, the order provides that parties can file complaints *after* a dispute has arisen in negotiations, which the Commission commits to resolve "expeditiously."[22] The Commission emphasized that such disputes will be resolved "based on the totality of the circumstances," including but not limited to the seventeen factors that it enumerated.[23] The rules thus rely primarily on marketplace negotiations, with a complaint process as a backstop, which allows the Commission

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[19] *Id.; see also id.* ¶ 51 (emphasizing that roaming will be offered at a "relatively high price" and that this high price should itself be sufficient to "counterbalance the incentive" to "rely[] on another provider's network").

[20] Order on Reconsideration and Second Further Notice of Proposed Rulemaking, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, 25 FCC Rcd. 4181, ¶ 32 n.90 (2010) ("*Voice Roaming Order on Reconsideration*").

[21] *Data Roaming Order* ¶¶ 22, 51, 86.

[22] *Id.* ¶¶ 75, 77.

[23] *Id.* ¶¶ 74, 86.

to use the adversary process to resolve concrete disputes in a context where it can assess case-specific facts and where both parties can bring to the Commission's attention all of the circumstances and factors that they believe are relevant.

T-Mobile argues that this regulatory framework is not working, and that as a result, "the roaming market is dysfunctional."[24] It claims that requesting providers have difficulty negotiating roaming agreements, that many providers' roaming rates are too high, and that the difficulties "are getting worse."[25] The actual evidence, including the evidence T-Mobile cites, refutes these claims.

Indeed, T-Mobile's sweeping claims of industry-wide dysfunction simply do not square with marketplace realities. The Commission's existing framework specifically provides a mechanism for requesting providers to assert – and document with evidence – the very sort of allegations that T-Mobile raises here. Thus, if requesting providers were really facing the difficulties T-Mobile describes, then one would expect there to be a dearth of roaming arrangements and a swarm of complaints filed with the Commission. The opposite is true. AT&T has successfully negotiated more than 30 data roaming agreements since the release of the *Data Roaming Order* – including an agreement with T-Mobile just last year – and, to date, not one provider has even filed (much less successfully adjudicated) a formal complaint with the Commission showing that AT&T is not offering commercially reasonable rates. In fact, T-Mobile has not identified a single instance where any provider has filed a formal complaint against any other provider under the *Data Roaming Order*.

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[24] Pet. at 10.

[25] *Id.* at 5-9.

T-Mobile's claim that data roaming rates are excessive is also contradicted by the facts. T-Mobile's own data show that, as demand for mobile data services has continued to increase, prices for data roaming have plummeted.[26] For example, T-Mobile's economist asserts that the average price per MB that T-Mobile pays for data roaming has fallen dramatically in recent years, from about $1.19 per MB in 2011 (when the *Data Roaming Order* was adopted) to about $0.30 per MB in 2013, and T-Mobile estimates that those prices will continue to decline to about $0.18 for 2014.[27]

T-Mobile's assertions about AT&T's roaming rates are particularly disingenuous. The rate T-Mobile pays to AT&T today has fallen by more than 70 percent since 2011 and compares very favorably to the rates that T-Mobile claims that it pays to other providers. Far from denying T-Mobile commercially reasonable data roaming rates, just last year AT&T entered into a roaming arrangement with T-Mobile with 2013 data roaming rates that are more than two-thirds lower than the prior year's rates, and 2014 rates that are reduced by another 16 percent. The rate T-Mobile negotiated with AT&T is one of the lowest rates in any of AT&T's domestic roaming arrangements.[28]

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[26] *See* Farrell Decl. ¶ 13 ("Wholesale rates have trended downward strongly in recent years").

[27] Farrell Decl., Table 6. In fact, T-Mobile's roaming costs have fallen even more dramatically since 2009, from $2.90/MB to about $0.30/MB in 2013 – a drop of *nearly 90 percent*. *Id.*

[28] T-Mobile's assertion that AT&T's roaming rates have "forced" it to throttle speeds for its customers roaming on AT&T's network is also unsupported and, again, would not justify Commission intervention in all events. *See* Declaration of Dirk Mosa, attached as Exhibit 1 to Pet., at ¶¶ 10-11 ("Mosa Decl."). The roaming rates that T-Mobile pays AT&T have declined dramatically over the last three years, compare favorably to other presumptively commercially reasonable rates in the marketplace, and do not "force" T-Mobile to do anything. The fact that T-Mobile may have *chosen* to throttle speeds for its customers does not change the reality that T-Mobile could choose to serve its customers in these areas in a variety of ways – including, for example, by building out its own broadband networks or structuring its services or charges in different ways. Again, the Commission has concluded that roaming rates *should* significantly exceed retail rates in order to promote build-out, particularly by carriers such as T-Mobile that

In fact, T-Mobile appears to have succeeded in negotiating lower average wholesale roaming rates than has AT&T. AT&T pays an average roaming rate that is higher than the 30 cents T-Mobile reports that it paid to other providers in 2013 (and significantly higher than the 18 cents T-Mobile predicts that it will pay in 2014).[29]

Similarly, the contention that AT&T has an incentive to inflate T-Mobile's rates is incorrect for several reasons. T-Mobile's theory is that AT&T is using roaming rates in an attempt to raise T-Mobile's costs to make T-Mobile a less effective competitor. The theory is far-fetched, because T-Mobile's roaming costs are only a tiny fraction (less than half of one percent) of its total service revenues.[30] It is simply not plausible that T-Mobile's roaming arrangements are harming it competitively, and in fact, T-Mobile has been experiencing record growth during the past two years.[31] Moreover, even if AT&T's or another provider's data roaming rates were well above retail rates in the relevant areas, that would not constitute evidence that the Commission's framework is failing. To the contrary, as explained above, the Commission made clear that it *expected* roaming rates to be "much higher" than retail rates, to

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have the spectrum holdings and resources to do so but have made business decisions not to invest.

[29] Farrell Decl., Table 6.

[30] T-Mobile reports that its 2013 service revenues were $19,068,000,000. *See* 2013 Annual Report, T-Mobile, *available at* http://investor.t-mobile.com/Cache/1500059458.PDF?Y=&O=PDF&D=&fid=1500059458&T=&iid=4091145. T-Mobile's economist reports that its total roaming costs for 2013 were about $80,000,000. Farrell Decl., Table 6 (determined by multiplying T-Mobile's reported 2013 average price per MB paid for roaming times its reported 2013 roaming volumes).

[31] T-Mobile gained 2.4 million customers on net in the first quarter of 2014, and has experienced more than one million net additions in each of the last four quarters, making T-Mobile the fastest growing wireless carrier in the industry. *See* Press Release, "T-Mobile US Reports First Quarter 2014 Results and Best Ever Quarterly Performance in Branded Postpaid Net Customer Additions," *available at* http://newsroom.t-mobile.com/news/t-mobile-us-reports-first-quarter-2014-results-and-best-ever-quarterly-performance-in-branded-postpaid-net-customer-additions.htm (May 1, 2014).

ensure that requesting providers like T-Mobile continue to have an incentive to build out their broadband networks.[32]

Significantly, T-Mobile has not identified any concrete example of a situation in which a provider has been unable to obtain a data roaming agreement from AT&T on commercially reasonable terms. Instead, T-Mobile relies almost entirely on vague and unsubstantiated assertions made by *other* parties in prior proceedings. For example, T-Mobile makes much of the fact that certain parties in the AT&T-Leap merger proceeding asked the Commission to require AT&T to reduce roaming rates as a condition of the merger.[33] But that in itself is hardly remarkable; it has become routine practice for carriers to seek regulatory handouts in merger proceedings. More importantly, the Commission rejected these arguments, finding that "the Commission's general roaming policies and rules should ensure that entities can obtain roaming agreements on reasonable terms and conditions" and that if "Youghiogheny Communications, NTCH, or any member of CCA, encounters difficulties in obtaining reasonable roaming services or roaming rates under our rules and policies, it can file complaints with the Commission pursuant to our established roaming rules."[34]

T-Mobile also cites a 2012 survey in which carriers reported that negotiating roaming arrangements was somewhere between "moderately" and "extremely" difficult.[35] Whether negotiating roaming agreements was "easy" or "difficult" in 2012 would not constitute evidence, then or now, of a market failure. Data roaming arrangements, like many complex commercial

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[32] Notably, AT&T is a net purchaser of roaming overall and thus has no incentive to negotiate high roaming rates.

[33] Pet. at 8-9.

[34] Memorandum Opinion and Order, *Application of Cricket License Company, LLC,* et al., *Leap Wireless International, Inc, and AT&T Inc. for Consent to Transfer Control of Authorizations,* WT Docket No. 13-193, 29 FCC Rcd. 2735, at ¶ 107 (2014) ("*AT&T-Leap Order*").

[35] Pet. at 7.

arrangements, can be "moderately" to "extremely" difficult to negotiate. But in AT&T's experience, whether the negotiation process is easy or hard, the parties reach a commercially reasonable outcome, and T-Mobile has offered no evidence to the contrary.[36]

Ultimately, much of T-Mobile's "case" boils down to its assertion that certain providers, notably AT&T, are "must have" roaming partners that, by virtue of their superior "bargaining" position, have the ability to dictate rates and terms that are not commercially reasonable. T-Mobile is mistaken, for several reasons. Most notably, T-Mobile's argument appears to be based almost entirely on providers with legacy GSM networks.[37] But AT&T is not the only GSM provider available to T-Mobile. There are dozens of GSM carrier networks in the U.S., and AT&T has domestic roaming arrangements with approximately 45 of them.

In any event, it would be short-sighted to make fundamental changes to the Commission's data roaming policies based on experience with roaming on GSM networks, because the industry is quickly transitioning to LTE. T-Mobile can obtain data roaming on any LTE network, including the three national providers and various local and regional providers (*e.g.*, U.S. Cellular and C-Spire). Although T-Mobile claims that LTE providers still require their customers to use older technologies for voice services, T-Mobile does not dispute that it can separately obtain voice roaming on GSM networks at just and reasonable rates. But that is a short-term issue as well: the mobile industry is beginning to deploy Voice over LTE ("VoLTE"), and as carriers move to VoLTE, T-Mobile will no longer be restricted to roaming only on legacy GSM networks to the extent it requires voice roaming. Indeed, T-Mobile

[36] T-Mobile also relies on various other pleadings in which advocates for more roaming regulation made cursory assertions that they could not obtain commerically reasonable agreements. Pet. at 5-7. Absent any details about these undisclosed negotiations, the Commission cannot credit the one-sided assertions that any delays and difficulties were caused by the host provider rather than the requesting provider.

[37] *See, e.g.*, Pet. at 3-4 & Mosa Decl. ¶¶ 13-15.

trumpets itself as a leader in deploying VoLTE.[38] It would be imprudent to make the sort of broad, industry-wide rulings T-Mobile seeks based on GSM arrangements that are being superseded by LTE.

Finally, the actions of other carriers in the marketplace vividly illustrate that T-Mobile's asserted need for investment-killing regulatory intervention is spurious. For example, Sprint and dozens of rural providers are implementing innovative arrangements that provide incentives for further facilities-based investment in mobile networks. Sprint has launched its Data Access Hub program under which Sprint works with rural providers to build out their LTE networks and, in return, Sprint and these rural providers are permitted to roam on each other's LTE networks.[39] Industry analysts have indicated that "the hub will give Sprint[,] . . . as well as dozens of rural operators, access to a nationwide 4G LTE wireless footprint via a patchwork of networks."[40] For Sprint, which is "primarily confined to metro markets, it gives [it] access to true nationwide coverage, even in rural and suburban markets where [it] typically [does not] have coverage."[41] For rural operators, it "gives them easy access to 4G LTE roaming partners in big cities."[42] CCA President Steve Berry has explained that "this concept of the hub is . . . empowering to smaller players and bigger operators" because "[i]t gives them choices and incentives to invest in the

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[38] T-Mobile's chief technology officer recently said that T-Mobile was "the first to roll out Voice over LTE (VoLTE) and as of today, we've launched VoLTE in 15 markets and have more VoLTE devices than anyone else – now covering more than 107 million Americans. And, we expect to deliver nationwide VoLTE before the end of 2014." *See* T-Mobile, Press Release, "The Un-carrier Network: Designed Data-Strong," June 18, 2014, *available at* http://newsroom.t-mobile.com/issues-insights-blog/the-un-carrier-network-designed-data-strong.htm.

[39] NetAmerica Alliance, "SMART Delivers the Future to Rural America," http://www.netamericaalliance.com/smart.

[40] *See* CNET Sprint Roaming Hub article.

[41] *Id*.

[42] *Id*.

networks they already operate."[43] It will help Sprint "fill the holes in [its] network. . . . The rural guys are already in those markets. And in many instances they have a stronger network than either Verizon or AT&T."[44] Sprint recently announced that it now has LTE roaming agreements with thirteen providers in 23 states, covering more than 325,000 square miles and a population of more than 34 million people.[45] Thus, rather than asking the Commission for market-distorting regulatory "clarifications," T-Mobile would be better served by following Sprint's lead and pursuing readily available commercial solutions for its roaming needs.

II. T-MOBILE'S PROPOSED "CLARIFICATIONS" ARE REALLY AN ATTEMPT TO REWRITE THE *DATA ROAMING ORDER* AND UNDO THE CAREFUL BALANCE UNDERLYING THE DATA ROAMING REGIME.

T-Mobile has not only failed to demonstrate that there is any industry problem that requires Commission intervention; its proposed "solutions" actually would affirmatively conflict with the *Data Roaming Order*. Indeed, T-Mobile asks the Commission to "clarify" the order in ways that would improperly *rewrite*, rather than clarify, the foundations of the data roaming regime. In so doing, T-Mobile's petition would undo the careful balance that it is at the heart of the Commission's approach, eliminating the Commission's considered attempt to maintain incentives to invest in deploying broadband data networks. It is well-settled that "a declaratory

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[43] *Id*.

[44] *Id*.

[45] *See* Sprint, Press Release, "Rural Roaming Preferred Program Accelerates Deployment and Utilization of 4G LTE in Underserved Areas Across the U.S." June 16, 2014 (announcing LTE roaming agreements with twelve regional carriers), *available at* http://newsroom.sprint.com/news-releases/sprint-to-expand-4g-lte-roaming-through-12-new-agreements-with-carriers-covering-a-population-of-over-34-million.htm; *see also* Sarah Reedy, "Sprint Adds First 12 LTE Rural Roaming Partners," Light Reading (June 16, 2014), *available at* http://www.lightreading.com/mobile/4g-lte/sprint-adds-first-12-lte-rural-roaming-partners/d/d-id/709479.

ruling may not be used to substantively change a rule,"[46] and thus the Commission could not lawfully grant T-Mobile's petition, which in reality seeks fundamental modifications to the rules. As the Commission has made clear, the proper vehicle under the Administrative Procedure Act for such changes is either a petition for reconsideration (which is now years out of time) or a petition for rulemaking.[47]

A. The *Data Roaming Order* Is Clear That Rates In Existing, Unchallenged Contracts Are Presumptively Reasonable.

T-Mobile asks that the Commission "clarify" that the terms of existing roaming agreements are not presumptively commercially reasonable for purposes of negotiating future agreements.[48] Any such "clarification" would be improper, because T-Mobile's position would plainly negate the terms of the *Data Roaming Order*. The Commission clearly stated that "[t]o guide us in determining the reasonableness of . . . the terms and conditions of the proffered data roaming arrangements" in a data roaming dispute, the Commission will consider (among other things) "whether the providers involved have had previous data roaming arrangements with similar terms."[49] The Commission also held that it will "presume" that "the terms of a signed

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[46] Order and Notice of Proposed Rulemaking, *Amendment of Part 15 of the Commission's Rules to Amend the Definition of Auditory Assistance Device in Support of Simultaneous Language Interpretation*, ET Docket No. 10-26, 26 FCC Rcd. 13600, ¶ 10 & n.22 (2011) (citing *U.S. Telecom Ass'n* v. *FCC*, 400 F.3d 29, 35 (D.C. Cir. 2005) ("[F]idelity to the rulemaking requirements of the APA bars courts from permitting agencies to avoid those requirements by calling a substantive regulatory change an interpretative rule")); Order and Notice of Proposed Rulemaking, *Travelers Information Stations, et al.*, PS Docket No. 09-19, 25 FCC Rcd. 18117, ¶ 12 & n.37 (2010) ("a declaratory ruling may not be used to substantively change a policy") (citing *U.S. Telecom Ass'n* v. *FCC*, 400 F.3d 29, 35 (D.C. Cir. 2005)).

[47] Memorandum Opinion and Order, *Competition in the Interstate Interexchange Marketplace Petitions for Modification of Fresh Look Policy*, CC Docket No. 90-132, 8 FCC Rcd. 5046, ¶ 20 (1993).

[48] Pet. at 16-22.

[49] *Data Roaming Order*, ¶ 86 ("[T]o guide us in determining the reasonableness of . . . the terms and conditions of the proffered . . . we may consider . . . "whether the providers involved have

agreement meet the reasonableness standard and will require a party challenging the reasonableness of any term in the agreement to rebut that presumption."[50]

In other words, the *Data Roaming Order* is already clear that existing agreements are not only relevant but presumptively reasonable, and that it would be T-Mobile's burden in any future proceeding to show that the terms of existing agreements are unreasonable or irrelevant. Indeed, there would be no rational basis to exclude altogether the rates in recently signed agreements, which are the result of arm's-length negotiations between sophisticated parties – *i.e.*, what parties have found to be reasonable in actual commercial arrangements. To be sure, a party is free under the Commission's existing rules to try to demonstrate that market conditions have changed and that any specific agreement, particularly an older agreement, should carry less weight in resolving a current dispute. But the presumption of reasonableness does and should attach more strongly to agreements – such as AT&T's current 2013 roaming agreement with T-Mobile – that were negotiated after the issuance of the data roaming rules and that were never challenged.

T-Mobile's principal argument is that the Commission should deem all existing agreements to be suspect because AT&T and other providers may have exercised market power in the past to negotiate rates that exceed commercially reasonable levels.[51] Aside from the fact that this request impermissibly seeks a *change*, not a clarification of the *Data Roaming Order*, the Commission should reject that claim for at least two additional reasons. First, the Commission is in no position to evaluate T-Mobile's blanket claims of market power in this proceeding, and, as noted above, the rates T-Mobile pays to other carriers, including AT&T,

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had previous data roaming arrangements with similar terms . . . [and] whether the parties have any roaming arrangements with each other, including roaming for interconnected services such as voice, and the terms of such arrangements.").

[50] *Id.* ¶ 81.

[51] Pet. at 17-21.

have been declining dramatically. T-Mobile has not placed the terms or facts concerning any specific agreement before the Commission; its claims of market power are entirely in the abstract. Any assessment of market power in the data roaming marketplace, however, would require an analysis of numerous agreements across the industry, including an understanding of the factual context in which each individual agreement was negotiated, and none of that is in the record here. Accordingly, the Commission could not suddenly declare existing agreements not to be presumptively reasonable in future complaint proceedings on T-Mobile's sweeping and unsupported blanket premise that existing agreements do not reflect competitive conditions.

Equally important, the Commission's rules already adequately account for T-Mobile's concerns. If a provider is unable to obtain an agreement with commercially reasonable terms, the rules provide a remedy: it may file a complaint with the Commission. Accordingly, the Commission has properly determined that if an agreement has not been challenged, it is appropriate to begin with the presumption that such agreements are commercially reasonable (in the absence of any specific evidence to the contrary that T-Mobile might offer in a future complaint proceeding). The suggestion that AT&T's agreements are not commercially reasonable is particularly implausible: AT&T's data roaming agreements are typically reciprocal and AT&T is a net *purchaser* of roaming. Thus AT&T has no incentive to seek high data roaming rates, since even if AT&T is a not a net payor in a particular relationship, those rates will inform negotiations in other contexts where AT&T is a net payor.[52] In recently rejecting a petition for reconsideration of the *Data Roaming Order*, the Wireless Telecommunications

[52] Tellingly, in the relatively unusual circumstance where a T-Mobile affiliate is a substantial *seller* of roaming – which is the case in Iowa, where T-Mobile is the majority owner of Iowa Wireless – T-Mobile charges precisely the sorts of roaming rates it claims here are not commercially reasonable. *See* iWireless website ("iWireless T-Mobile Affiliate") at http://www.iwireless.com/support/about/default.aspx.

Bureau found that the Commission had already "considered" and accounted for the possibility of "disparate bargaining power" when it designed its rules, and it reiterated that the complaint process is fully adequate to address any specific situation in which a provider is not acting in a commercially reasonable manner.[53] It should do so again here.

None of T-Mobile's remaining arguments would support the ruling it seeks here. For example, T-Mobile claims that certain smaller providers that are net sellers of roaming do not want to give T-Mobile certain rates because a most favored nation ("MFN") clause would contractually obligate them to give the same lower rate to AT&T.[54] In fact, AT&T has such MFNs in only seven agreements (out of dozens), and each of these agreements is part of a larger, more complex agreement in which AT&T is either providing access to spectrum or otherwise funding build-out of broadband networks in the relevant area.[55] Here again, T-Mobile has provided no facts to support its claims, and its suggestion that the per-MB rates in these agreements are unreasonably high is incorrect. But even if that were not the case, T-Mobile's claim would not provide a basis for "clarifying" the *Data Roaming Order*. If one of these third-party providers were truly unwilling to offer T-Mobile a commercially reasonable rate to avoid

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[53] Order on Reconsideration, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, DA 14-865, Order on Reconsideration, ¶ 11 (released June 25, 2014).

[54] Pet. at 19-20. Notably, T-Mobile's theory assumes that AT&T, as a net purchaser, is *paying* commercially *unreasonable* rates to these third-party providers.

[55] In six of these agreements, AT&T is providing access to AWS, PCS, 850, and 700 MHz spectrum to support the build out of UMTS and LTE networks in the rural area covered by the roaming agreement. In the remaining agreement, AT&T committed to make minimum payments of tens of millions of dollars, in part to fund the building of a new network. Given the significant commitment that AT&T is making to the carriers in these deals, it is not commercially unreasonable for AT&T to seek assurances that these carriers will not charge AT&T higher rates than other wholesale roaming customers who have not made such commitments.

triggering an MFN clause in its agreement with AT&T, then T-Mobile could file a complaint with the Commission against that seller and submit evidence to support such claims.

B. The *Data Roaming Order* Is Clear That Commercial Reasonableness Depends In Part On The Requesting Provider's Capacity To Build Out Its Network.

T-Mobile asks the Commission to clarify that its inclusion of "the extent and nature of providers' build-out" in the factors that it considers in assessing commercial reasonableness,[56] was "not intended to allow a host carrier to deny roaming, or to charge commercially unreasonable rates for roaming, in a particular area where the otherwise built-out requesting provider has not built out."[57] Specifically, T-Mobile requests that the Commission "[d]eclare" that lack of build-out will not be considered when the requesting carrier is a large carrier, like T-Mobile, but merely for a "provider that has only a very limited or non-existent network, and that is looking to design its business primarily to 'piggyback' on other providers' network investments."[58]

Once again, T-Mobile is requesting a "clarification" that is squarely inconsistent with the clear terms of the *Data Roaming Order*. One of the Commission's central objectives in designing the data roaming rules was to avoid creating disincentives for both host carriers and requesting carriers to invest in and deploy advanced data networks. The resulting rules reflect an attempt to balance the requirement to offer data roaming with the need to preserve these investment incentives. A critical part of this balance is the Commission's explicit insistence that it will "take into account" the extent and nature of a requesting provider's build-out in a given

[56] *Data Roaming Order* ¶ 86.

[57] Pet. at 22.

[58] *Id.* at 23.

area when it assesses the commercial reasonableness of roaming rates and the terms of which a host provider will offer roaming.[59]

There is no basis either in logic or in the language of the *Data Roaming Order* for T-Mobile's proposed distinction between large and small carriers. To be sure, a small carrier that has a limited network and whose entire business plan is premised on using data roaming as a substitute for resale represents an egregious case, and the Commission's rules would clearly and correctly take such a requesting provider's investment plans into account in a complaint proceeding concerning such a data roaming agreement. But the logic and purposes of the Commission's rule apply equally strongly to a provider like T-Mobile. One of the Commission's paramount goals in this proceeding was to maximize deployment of mobile broadband networks for the benefit of consumers, and thus it made clear in the order that any attempt by requesting providers (large or small) to substitute roaming services for economically feasible build-out of their own network would be strongly disfavored. Accordingly, the notion that the Commission never intended to apply this policy to T-Mobile – which holds substantial amounts of unused spectrum and which is owned by Deutsche Telekom, one of the largest telecommunications companies in the world that clearly has the corporate resources to deploy broadband networks[60] – is simply not a plausible interpretation of the order.

T-Mobile's track record of avoiding investment in rural areas, coupled with its suggestion that the Commission ignore build-out concerns where carriers "face increased costs to build out

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[59] *Data Roaming Order* ¶¶ 22, 51, 86.

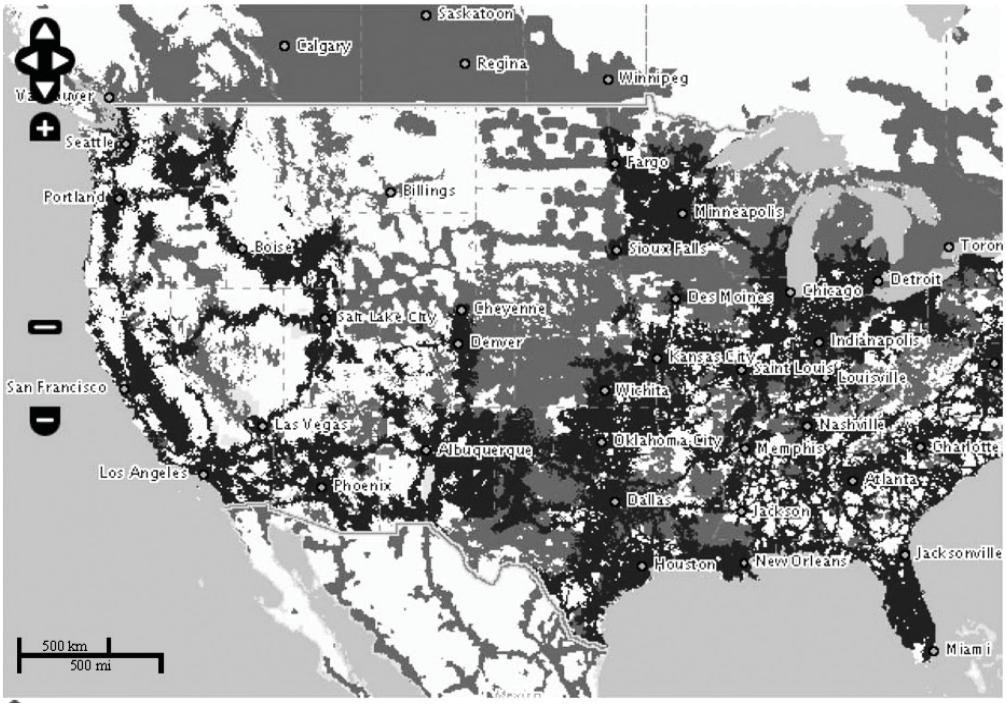
[60] *See* T-Mobile, Press Release, "T-Mobile US Reports First Quarter 2014 Results and Best Ever Quarterly Performance in Branded Postpaid Net Customer Additions," May 1, 2014, *available at* http://newsroom.t-mobile.com/news/t-mobile-us-reports-first-quarter-2014-results-and-best-ever-quarterly-performance-in-branded-postpaid-net-customer-additions.htm (May 1, 2014) ("For the full year of 2014, T-Mobile now expects Adjusted EBITDA to be in the range of $5.6 to $5.8 billion").

based on its licensed frequencies in that area,"[61] provide ample grounds for concern that T-Mobile is indeed trying to lay the groundwork for agreements that would allow it to rely on data roaming as resale and as a means to avoid investing in broadband networks. As shown by the coverage viewer on T-Mobile's website (reproduced in Figure 1, below), T-Mobile uses roaming extensively throughout the Mid-West, Mountain, and certain Eastern portions of the U.S.[62] But as shown in Figure 2, below, in those broad swaths of the country – mostly rural areas – T-Mobile holds PCS and AWS spectrum that it has declined to build out. In many of these rural areas, AT&T built out its network using the same higher frequency spectrum T-Mobile holds. There is no reason T-Mobile could not do the same.

[61] Pet. at 22.

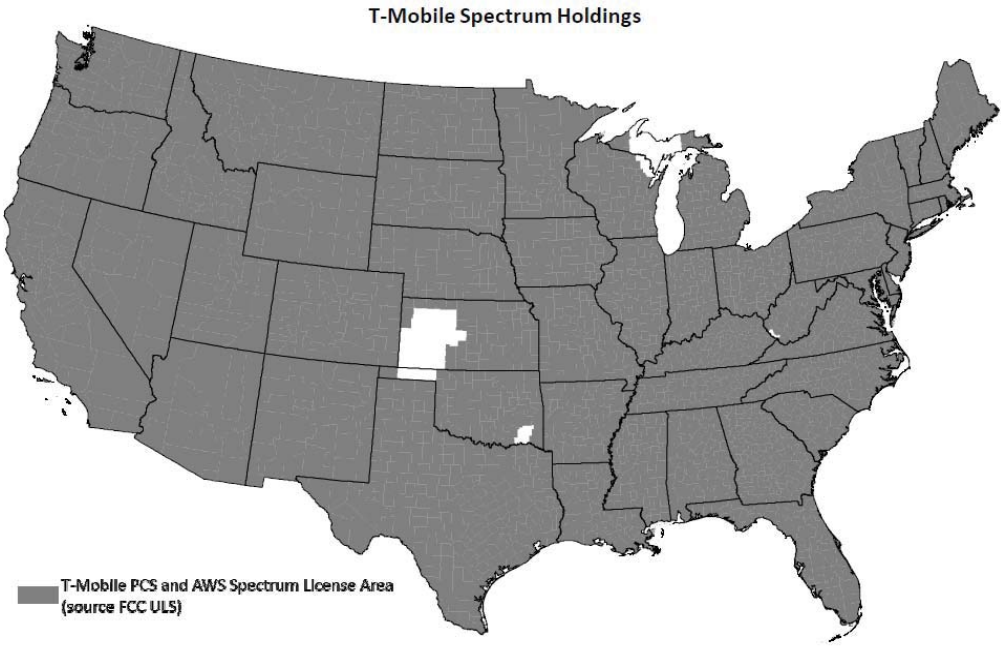
[62] *See* http://www.t-mobile.com/coverage/pcc.aspx/. (To see T-Mobile's roaming coverage, zoom-in one level so that the U.S. map fills the viewer window.)

Figure 1. TMO's 3G/4G/LTE Roaming (grey) vs. Facilities Coverage (black).



Source: T-Mobile Website, http://www.t-mobile.com/coverage/pcc.aspx/.

Figure 2. TMO's Spectrum Holdings.



Source: FCC Universal Licensing System (ULS).

Ironically, T-Mobile sought special set asides in the 600 MHz auction proceeding based, in part, on the argument that those set asides would enable it to build out in rural areas more cost effectively.[63] The Commission accepted T-Mobile's arguments and adopted rules that protect T-Mobile's ability to win spectrum in the auction, and indeed, Chairman Wheeler has made clear that he expects carriers like T-Mobile that win 600 MHz spectrum to invest in rural broadband networks.[64] T-Mobile's petition, however, would suggest it has other plans.

Indeed, so too do its actions in the marketplace. For example, in some rural areas where T-Mobile has unused spectrum but AT&T does not, AT&T has offered to lease the unused spectrum from T-Mobile and build out a network during the lease term, under terms that would allow both companies to use the network. T-Mobile has refused to participate in such arrangements.

Granting T-Mobile's petition would only further encourage these kinds of choices, resulting in less investment and less facilities-based competition. That would undermine a key goal of both the *Data Roaming Order* and the set asides adopted in the 600 MHz proceeding.

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[63] *See, e.g.*, Declaration of Mark McDiarmid (Vice President for Radio Network Engineering and Development at T-Mobile USA, Inc.), attached to Letter from Trey Hanbury (TMO) to Marlene H. Dortch (FCC), WT Docket No. 12-269, at ¶ 10 (April 11, 2014) ("carriers with greater access to low-band spectrum have the ability . . . to serve more consumers while spending less on network equipment in areas where extra capacity is not needed [*i.e.*, in rural areas]"); *id.* ¶¶ 24-28 ("Simply stated, when signals travel further, as low-band signals do, we can construct networks of larger cells and use fewer sites to cover the same area," and "we determined that, by transitioning to low-band spectrum, we could provide high quality coverage to . . . mostly rural consumers who do not currently receive coverage under our mid-band baseline").

[64] *See, e.g.*, Letter from Chairman Wheeler, FCC, to Hon. Bruce L. Braley, House of Representatives, dated April 17, 2014, at 1 (the need to ensure that all providers have access in the auction to low-frequency spectrum is "particularly important in rural areas where low-band spectrum is necessary if competitors are to fill in the blank white spaces on the coverage maps we see on TV commercials"); *see also id.* ("Simply put, because of the better propagation properties of low-band spectrum, wireless providers holding more low-band spectrum licenses provide more rural coverage").

C. The *Data Roaming Order* Is Clear That T-Mobile's Proposed Rate Benchmarks Would Be Improper.

T-Mobile's proposed rate benchmarks are also flatly inconsistent with the *Data Roaming Order*. Indeed, the Commission previously rejected the use of benchmarks (or any prescriptive rate regulation) both in the *Data Roaming Order* and even in the context of common carrier regulation of voice roaming.[65] The Commission expressly declined to "impose a price cap or any other form of rate regulation" on voice roaming rates because it was "not persuaded that consumers would be [otherwise] harmed."[66] The Commssion found that "the better course . . . is that the rates individual carriers pay for automatic roaming services be determined in the marketplace through negotiations between the carriers, subject to the statutory requirement that any rates charged be reasonable and non-discriminatory."[67] Indeed, the Commission held that it was "not persuaded that the existing level and structure of roaming rates negotiated between carriers harm consumers of mobile telephony services," and thus no rate regulation was warranted.[68] If rate caps or benchmarks were unwarranted in the context of voice roaming, they would be all the more out of place in the context of the Commission's putatively private carriage data roaming regime – especially given that T-Mobile proposes benchmarks that would rely on precisely the types of proxies that the Commission has said in the *Data Roaming Order* would be inappropriate.

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[65] *See Voice Roaming Order* ¶¶ 36-40.

[66] *Id.* ¶ 37.

[67] *Id.*

[68] *Id.* ¶ 38.

T-Mobile's lead benchmark is retail rates, which it describes as a "natural benchmark" for roaming rates.[69] The Commission could not have been clearer in the *Data Roaming Order* that data roaming rates that are close to retail rates would *undermine* the Commission's balanced regime, because it would encourage providers to use roaming as resale and as a substitute for broadband investment. As explained above, the Commission has indicated that it expects roaming rates to be "*much higher* than retail rates,"[70] which is necessary to "counterbalance the incentive" to "rely[] on another provider's network."[71]

Even T-Mobile's economist concedes that "[c]harging different prices to different customers [*e.g.*, different prices for roaming and retail mobile services] is normal and not inherently problematic in markets such as mobile communications. That is why I do not suggest that strong conclusions can be drawn based on this benchmark."[72] Instead, Professor Farrell explains that, in his view, retail rates are relevant only insofar as roaming rates "greatly exceed" retail rates.[73] In other words, T-Mobile's economist appears to be conceding that roaming rates can (and perhaps even should) be much higher than retail rates, and thus the proposed benchmark ultimately turns on the somewhat metaphysical question of when roaming rates "exceed" retail rates too "greatly." But neither T-Mobile nor Professor Farrell has offered any method for

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[69] Pet. at 12; Farrell Decl. ¶ 10 ("the Commission should consider whether a roaming rate offered to a retail competitor *greatly exceeds* a suitable measure of retail price" (emphasis added)).

[70] *Voice Roaming Order on Rconsideration*, ¶ 32, n.90.

[71] *Data Roaming Order* ¶ 51; *see also id.* ¶ 21 ("the relatively high price of roaming compared to providing facilities-based service will often be sufficient to counterbalance the incentive to 'piggy back' on another carrier's network"). *See also Voice Roaming Order* ¶¶ 36-40 (specifically rejecting cap "based on some benchmark of retail rates").

[72] Farrell Decl. ¶ 60; *see also* Pet. at 12 ("factors may justify some gap between a carrier's wholesale roaming rates and the retail rates charged to consumers").

[73] Farrell Decl. ¶ 10; *see also* Pet. at 12 ("existence of a large gap" between retail and roaming rate may be evidence of a lack of commercial reasonableness).

resolving such a question that is either consistent with the *Data Roaming Order* or designed to promote clarity.[74]

T-Mobile's proposal to use MVNO resale rates as a benchmark is equally arbitrary and contrary to the Commission's existing framework. As explained above, the Commission has repeatedly stressed that it will not use the commercial reasonableness standard to force providers to price data roaming at levels that would constitute *de facto* resale, because one of its main objectives is to prevent the data roaming rules from creating disincentives for investment. The rates charged to MVNOs, *by definition*, are rates that are designed to facilitate resale and thus would provide an inappropriate benchmark for data roaming rates. Moreover, resale rates are often contained in confidential contracts that cannot be shared, thus making any attempt to benchmark against resale rates impractical.[75] The Commission itself has explained that "[t]hese negotiated [wholesale] rates are generally not publicly available, so it is not possible to track wholesale pricing in the mobile wireless sector in a comprehensive manner."[76] In addition, resale rates, like retail rates, are often calculated on the basis of buckets of data at a fixed price, and MVNO contracts frequently also have other terms that function as a monthly recurring cost

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[74] Similarly, although roaming services are often sold on a per-MB basis (*e.g.*, 25 cents per MB), retail services are typically sold in buckets (*e.g.*, $100 for 10 GB), and thus the rate structures are not directly comparable. One could convert the bucket price to a per-MB rate, but that has difficulties as well: as T-Mobile's economist notes, a per-MB retail price cannot be computed by simply dividing the price of the bucket (*e.g.*, $100) by the number of MBs included in the bucket (*e.g.*, 10 million), because many retail consumers do not use all of data they are allowed in their plans. T-Mobile suggests that *its* average customer uses 1700 MB, and that the Commission should therefore use that figure to estimate the per-MB price of *all* provider's retail plans, but T-Mobile provides no evidence to support this particular figure as representative.

[75] *See* Farrell Decl. ¶ 83 ("T-Mobile has provided me with certain data on the rates that it has charged in the last five years to MVNOs for mobile data. I am informed that the data cannot be reported here because they are confidential.").

[76] Sixteenth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 28 FCC Rcd. 3700, at ¶ 272 (2013).

(*e.g.*, administrative costs and/or revenue commitments paid to the underlying carrier) – all of which again raises difficult issues of how to make the proper adjustments to make direct comparisons of per-MB charges. And, as T-Mobile's economist acknowledges, "[t]he MVNO benchmark must also be interpreted cautiously because MVNO customers may use the host carrier's network in substantially different ways compared to a roaming customer of a facilities-based competitor."[77]

Similarly, T-Mobile contends that the Commission should compare proposed data roaming rates to international roaming rates, but such a comparison would not improve clarity or even help T-Mobile. As T-Mobile's economist notes, "[o]f course, prices in foreign markets in part reflect conditions there, which may differ in a variety of ways from U.S. market conditions."[78] That is putting it mildly. Any attempt to use international roaming rates as a benchmark would require difficult adjustments to account for countless factors that are not present in comparing domestic roaming agreements, including which countries' rates would provide the most useful comparisons and how to account for the important differences between domestic and international roaming arrangements that can have a significant impact on the rates and other terms in those contracts (such as population density, terrain, foreign regulatory regimes, and the like).

In addition, international roaming arrangements are premised on a very different value proposition than domestic arrangements. In international roaming agreements, both carriers gain access to a country in which they do not own licenses or a network and additional "build out" is not typically a viable option. Thus, there is no policy reason for such rates to be high because international roaming does not create concerns about "piggybacking" or reducing incentives to

[77] Farrell Decl. ¶ 12.

[78] *Id.* ¶ 79.

invest. Similarly, international agreements are different in that they typically assume a more even balance of trade – *i.e.*, both parties roam significantly on the other – whereas many U.S. roaming agreements are influenced by the fact that the trade is very imbalanced and involve small carriers that are net sellers. There is no clear way to adjust for all of these factors, and thus the use of this benchmark would likely reduce rather than enhance clarity.

In all events, T-Mobile's own data show that U.S. domestic roaming rates are favorable relative to international roaming rates. T-Mobile's comparison of U.S. domestic roaming rates to international roaming rates shows that the average per MB rate it charged to foreign operators to allow their customers to roam in the U.S. was $0.34 for 2013, and is projected to average $0.20 for 2014.[79] T-Mobile's data show that its average domestic roaming rates – the rates it pays to AT&T and other domestic carriers – are lower: $0.30 for 2013 and $0.18 for 2014.[80]

Indeed, the fact that domestic roaming rates are less than European roaming rates is particularly remarkable, because the European Commission has capped those rates to ensure low-cost roaming for Europeans who use their devices throughout Europe. The per MB rate cap

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[79] *Id.*, Table 3.

[80] *Id.*, Table 6. T-Mobile's comparison of its own international roaming rates to domestic roaming rates illustrates one of these problems. T-Mobile claims that it has been able to negotiate very low fixed-fee international roaming arrangements that permit its customers to have all-you-can-eat data roaming when traveling abroad. But as T-Mobile's website makes clear the all-you-can-eat international data plans are for 2G data services, not the 3G and LTE data roaming services that T-Mobile has negotiated with U.S. carriers for domestic roaming. As Forbes described T-Mobile's international data roaming service: "[It is] [a]ccess to 2G data [that] is being offered for free in all of the T-Mobile included countries. What that really means is the ability to send and receive email without large attachments, and to transmit and receive pictures, but at a pitifully slow speed in many places." Marc Weber Tobias, "Why T-Mobile's New Global Roaming Plan Might Be An Industry Game-Changer," Forbes (Dec. 30, 2013), *available at* http://www.forbes.com/sites/marcwebertobias/2013/12/30/why-t-mobiles-new-global-roaming-plan-is-an-industry-game-changer/. Comparisons of these international 2G roaming arrangements are not very useful for assessing the commercial reasonableness of domestic 3G and LTE data roaming services.

mandated by the European Commission for 2013 was 0.45 Euros (roughly $0.60)[81] – which is about two times *higher* than the average rate that T-Mobile claims to have paid for domestic roaming in the U.S. for 2013.[82] Of course, European roaming rates are capped by regulators in a manner that would be an impermissible form of common carrier regulation under U.S. law, and thus do not provide an appropriate comparison for purposes of the private carriage "commercial reasonableness" standard here.

Finally, T-Mobile argues that its proposed benchmarks would make Commission "enforcement" more "predictable,"[83] but in fact, T-Mobile's own economist demonstrates that it would not be appropriate to apply these benchmarks in a way that would actually promote clarity. T-Mobile's economist expressly states that "none of these benchmarks is or can be ideal,"[84] and that he does "not offer a single theory of the appropriate price for data roaming, nor do I propose a single focus on one benchmark."[85] Instead, he stresses that, "[b]ecause no benchmark is perfect, the Commission should apply the proposed benchmarks cautiously and in conjunction with one another and with an analysis of competitive risks."[86] In other words, T-Mobile's economist all but concedes that any straightforward application of these benchmarks would not be economically sound, and the Commission could use those benchmarks only in conjunction with a broader and much more complex inquiry into marketplace conditions. But if that is the case, then T-Mobile's proposal has not advanced the cause of clarity at all; indeed,

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[81] European Commission, "Digital Agenda for Europe: Roaming Tariffs," http://ec.europa.eu/digital-agenda/en/roaming-tariffs.

[82] Farrell Decl., Table 6.

[83] Pet. at 11.

[84] Farrell Decl. ¶ 8.

[85] *Id.* ¶ 93.

[86] *Id.* ¶ 57.

neither T-Mobile nor its economist has really explained how T-Mobile thinks the Commission should use these benchmarks and certainly not how the Commission would conduct the additional "analysis of competitive risks." Accordingly, T-Mobile's proposal is arbitrary and capricious on its face and would only increase regulatory uncertainty if adopted.

III. T-MOBILE'S REQUESTED RULINGS WOULD CONSTITUTE UNLAWFUL COMMON CARRIAGE REGULATION.

Finally, the rulings T-Mobile seeks would transform the data roaming rules into unlawful common carrier regulation. It is well-settled that data roaming is not a common carrier activity. The Commission has specifically held that "wireless internet service both *is* an 'information service' and *is not* a 'commercial mobile service,'" and therefore, as the D.C. Circuit has held, "mobile-data providers are statutorily immune, perhaps twice over, from treatment as common carriers."[87] That is because Section 153(51) of the Act expressly prohibits common carrier regulation of information services,[88] and Section 332(c)(2) independently prohibits common carrier regulation of private mobile services.[89] Thus, the D.C. Circuit has found it "obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers."[90]

As the D.C. Circuit has explained, however, the Commission's data roaming rules already come close to prohibited common carrier regulation. Under the Communications Act's

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[87] *Cellco*, 700 F.3d at 538 (emphasis in original).

[88] 47 U.S.C. § 153(51) ("[a] telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services").

[89] *Id.* § 332(c)(2) ("[a] person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter"). *See also Verizon*, 740 F.3d at 650.

[90] *Verizon*, 740 F.3d at 650 (citing *Cellco*, 700 F.3d at 538); *see also Cellco*, 700 F.3d at 545 ("the Commission concedes that . . . it has no authority to treat mobile-data providers like Verizon as common carriers").

common carrier regime, a carrier must offer rates and terms that are "just and reasonable" and without undue discrimination,[91] subject to complaint under Section 208.[92] The data roaming rules bear many of these "marks of common carriage,"[93] including a requirement to offer rates and terms that are "commercially reasonable" subject to a complaint procedure very similar to the Section 208 procedures. As the court noted, the Commission's data roaming regime thus already lies in what the court called the "space between *per se* common carriage and *per se* private carriage."[94]

The D.C. Circuit rejected a *facial* challenge to the data roaming rules, because it found that those rules could be interpreted to "differ materially from the kind of requirements that necessarily amount to common carriage."[95] The key difference, the court found, was that the data roaming rules leave "substantial room for individualized bargaining and discrimination in terms."[96] Whereas a carrier must "offer service indiscriminately and on general terms,"[97] broadband providers may "adapt [data] roaming agreements to 'individualized circumstances without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms.'"[98] The court noted with approval that "the rule itself actually spells out

[91] 47 U.S.C. §§ 201, 202.

[92] *Id.* § 208.

[93] *Cellco*, 700 F.3d at 545.

[94] *Id.* at 547.

[95] *Id.* at 547.

[96] *Id.* at 548.

[97] *Id.* at 547.

[98] *Id.* at 548 (quoting *Data Roaming Order* ¶ 45).

sixteen different factors plus a catch-all" factor that the Commission must take into account in assessing whether a rate that a provider offers is commercially reasonable.[99]

The court made clear, however, that the issue is not what labels the Commission uses, but whether the way the Commission actually implements and applies the rules has the *effect* of "relegating" data roaming providers to common carrier status.[100] In that regard, the court noted that "we take Verizon's point that even if the rule *sounds* different from common carriage regulation, the more permissive language could, as applied, turn out to be no more than 'smoke and mirrors.'"[101] Accordingly, the court emphasized that, "[i]n implementing the rule and resolving disputes that arise in the negotiation of roaming agreements, the Commission would thus do well to ensure that the discretion carved out in the rule's text remains carved out in fact," or else providers could return to the court with a meritorious "as applied" challenge.[102]

T-Mobile's petition here is asking the Commission for rulings that would move the data roaming regime over the line into prohibited common carrier regulation. T-Mobile seeks a series of generalized interpretations of the rules, applicable to all providers and all data roaming agreements, which if adopted would have the effect of significantly restricting providers' discretion in the rates they could offer in marketplace negotiations. Such generalized interpretations, which T-Mobile openly contends would render many existing, negotiated contract terms unlawful, would eliminate most of the "room for individualized bargaining and

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[99] *Cellco*, 700 F.3d at 548.

[100] *Id.* at 545 (quoting *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 700-01 (1979)).

[101] *Id.* at 548 (emphasis in original).

[102] *Id.* at 549; *see also Verizon*, 740 F.3d at 652 ("we cautioned that were the Commission to apply the 'commercial reasonable' standard in a *restrictive* manner, essentially elevating it to the traditional common carrier 'just and reasonable' standard, . . . the rule might impose obligations that amounted to common carriage *per se*, a claim that could be brought in an 'as applied' challenge" (emphasis added)).

discrimination in terms" that has prevailed to date under the commercial reasonableness standard and that "salvaged the data roaming requirements in *Cellco*."[103]

Against this backdrop, T-Mobile's requested rulings designed to regulate the *rates* providers may assess for data roaming are especially troubling. If the benchmarks T-Mobile proposes are to be applied with any rigor, those benchmarks would function, in effect, as a *de facto* price cap. In other words, T-Mobile is asking the Commission to declare that the fact that a provider's proposed rates exceed one or more of these benchmarks would be taken as evidence in a complaint proceeding that the proposed rate is not commercially reasonable, which would have the purpose and effect of putting severe pressure on providers to offer rates in negotiations that are in line with these benchmarks.[104] The inevitable result would be that rates in the marketplace would coalesce around these benchmarks, much as if the Commission had formally mandated such rate levels through caps or similar devices. Thus, there can be no question that T-Mobile's proposals would eliminate most of the negotiating freedom that providers rely on today, because T-Mobile is proposing rate benchmarks that are radically lower than what many sophisticated parties have actually negotiated in the marketplace and that, under the current rules, would be presumptively commercially reasonable.

Such a ruling would transform the private carriage "commercial reasonableness" standard into a common carrier regime of rate regulation based on Commission-determined proxies for what the Commission believes to be a "reasonable" rate. Any purported difference between the "commercially reasonable" and "just and reasonable" standards would become mere "smoke and

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[103] *Cellco*, 700 F.3d at 548; *Verizon*, 740 F.3d at 656.

[104] *See, e.g.*, Pet. at 27 (benchmarks would act as "guideposts to inform whether the proposed terms of a roaming agreement are commercially reasonable").

mirrors."[105] Accordingly, T-Mobile's proposals would eliminate the marketplace discretion and flexibility that the D.C. Circuit found essential to the legality of the Commission's data roaming regime.

In addition, such a sweeping declaratory ruling concerning rates would be procedurally inappropriate in the context of these putatively private carriage data roaming rules. The Commission's data roaming regime is intended to be flexible and to permit a broad range of marketplace arrangements. Accordingly, the Commission designed the regime to be based on case-by-case determinations in adversary proceedings in which the parties to a controversy could present evidence specific to their dispute as well as any other evidence that they believe to be relevant and probative. This flexibility, and the case-by-case approach, is thus the foundation for this private carriage regime of regulation, and allows the Commission to tailor its rulings to the particulars of a given situation, without making overly broad pronouncements that might unduly restrict the discretion of other parties to enter into different arrangements arising out of other circumstances. The sort of declaratory ruling T-Mobile seeks here would eliminate most of the flexibility providers have with respect to data roaming rates and thereby short-circuit the Commission's entire approach to regulation in this area.

CONCLUSION

In sum, what T-Mobile really seeks is an abstract ruling in which the Commission gives T-Mobile assurances that the Commission will accept certain generic arguments that T-Mobile might make in a future complaint proceeding. T-Mobile would apparently like to have these advance rulings in hand when it sits down to negotiate future agreements, in the hope that such rulings will pressure other providers to agree to radically low rates (preferably below retail) that

[105] *Cellco*, 700 F.3d at 548.

would allow T-Mobile to rely more heavily on data roaming in lieu of investing in broadband networks.[106] Any such ruling would be arbitrary and fundamentally inconsistent with both the statute and the language and purposes of the Commission's *Data Roaming Order*. T-Mobile's petition is procedurally and substantively flawed and should be rejected.

[106] In its Petition, T-Mobile asserts that "expeditious Commission action is needed" because "certain of T-Mobile's most critical roaming agreements" will "sunset" at the end of 2014. Mosa Declaration ¶ 8. T-Mobile, however, does not explain what it means by "sunset." In AT&T's experience, including an agreement with a "critical roaming partner," roaming agreements often continue in full force and effect after their initial term expires, and remain in effect indefinitely unless affirmatively terminated by one of the parties on written notice (*e.g.*, 60-90 days). For example, when the term of AT&T's prior agreement with a "critical roaming partner" expired at the end of 2012, AT&T continued providing roaming services to the partner for several months without interruption while the parties negotiated a new, mutually acceptable roaming agreement. Thus, the Commission should be wary of any suggestions that T-Mobile faces an imminent threat to its ability to obtain wholesale data roaming services.

Respectfully Submitted,

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