

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

ACCEPTED/FILED

JUL 11 2014

Federal Communications Commission
Office of the Secretary

GN Docket No. 93-252

In the Matter of)

NTCH, Inc.)

Petition to Rescind Forbearance from)
Application of Section 211 of the)
Communications Act of 1934)

To: The Commission)

OPPOSITION OF VERIZON¹

The Commission should reject NTCH's second Petition to rescind the 1994 decision forbearing from the contract filing provisions of Section 211 of the Communications Act for CMRS carriers.² The Commission also should not open a new rulemaking to reconsider 20 years of settled law on these issues.

NTCH's latest Petition is virtually identical to its November 22, 2013 filing, which Verizon opposed on December 2, 2013. Neither the facts nor the law have changed in the last few months. At bottom, NTCH continues to ignore the Commission's longstanding roaming policies, including strong incentives for carriers to expand facilities-based networks and support for the other pro-competitive benefits that flow from forbearance from Section 211. Reversing course now would discourage parties from experimenting with alternative roaming arrangements tailored to their particular needs and would undermine competition by providing competing

¹ In addition to Verizon Wireless, the Verizon companies participating in this filing are the regulated, wholly-owned subsidiaries of Verizon Communications Inc. (collectively, "Verizon").

² NTCH, Inc., Petition to Rescind Forbearance and Initiate Rulemaking, *Application of Section 211 of the Communications Act of 1934*, GN Docket No. 93-252 (July 2, 2014) ("Petition").

No. of Copies rec'd 0+2
List ABCDE

carriers with information about one another's costs. Moreover, NTCH ignores the reality of the mobile market, which is robustly competitive and has produced enormous consumer benefits over the last 20 years.

As more fully explained in Verizon's previous Opposition (see Attachment A), the Commission should dismiss both NTCH petitions and deny NTCH's latest request to initiate a new rulemaking.

Respectfully submitted,

By: /s/ Christopher M. Miller

Michael E. Glover, *Of Counsel*

Christopher M. Miller
John T. Scott, III
Andre J. Lachance
Verizon
1320 North Courthouse Road
9th Floor
Arlington, VA 22201-2909
(703) 351-3071

July 11, 2014

ATTACHMENT A

STAMP AND RETURN

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Petition to Rescind Forbearance from Application of)
Section 211 of the Communications Act)

ACCEPTED/FILED

DEC - 2 2013

To: The Commission

Federal Communications Commission
Office of the Secretary

OPPOSITION OF VERIZON¹

The Commission should reject the Petition to rescind its 1994 decision forbearing from the contract filing provisions of Section 211 of the Communications Act ("Act") for CMRS carriers.² The Petition is procedurally defective and wrong as a policy matter. The Act does not provide for "de-forbearance" or decades-later petitions for reconsideration. To reinstate Section 211 requirements nearly 20 years after the fact Petitioner NTCH and the Commission at the very least would have to comply with Administrative Procedure Act ("APA") requirements to initiate a new rulemaking, and Petitioner makes virtually no attempt to support new rules. In addition, the Petition ignores the Commission's longstanding roaming policies themselves, including support for pricing differentials among roaming agreements and the pro-competitive benefits of forbearing from Section 211. And Petitioner's unsupported allegations cannot overcome the facts: the mobile market is robustly competitive and provides astonishing consumer benefits far beyond what the Commission could have anticipated in 1994.

¹ In addition to Verizon Wireless, the Verizon companies participating in this filing are the regulated, wholly-owned subsidiaries of Verizon Communications Inc. ("Verizon").

² NTCH, Inc., Petition to Rescind Forbearance, GN Docket No. 93-252 (filed Nov. 22, 2013) ("Petition"). Although a future public notice may set forth comment dates in response to the Petition, Verizon submits this filing to ensure compliance with Section 1.45(b) of the Commission's rules.

The Commission decided in 1994 to eliminate the requirement to file contracts as applied to wireless carriers.³ It concluded at the time that the better course was to allow wireless carriers to interconnect, exchange, and carry traffic under privately negotiated commercial contracts and that doing so would promote competition, innovation and growth of the wireless industry. The Commission was right. Wireless carriers since have negotiated thousands of individual contracts and exchanged billions of minutes of traffic as prices to consumers have declined steadily. The Commission twice reaffirmed that conclusion, first when adopting voice roaming rules and recently again in the course of adopting data roaming rules.⁴ Both times the Commission rejected a public filing requirement with respect to roaming agreements, finding that competition is better served by commercial arrangements.⁵ And again, its conclusions have proven correct. Wireless carriers have continued to enter into roaming agreements, and rates to consumers have continued to decline. As detailed below, voice revenue per minute has declined, from more than \$0.40 in 1993 to under \$0.05; and the effective price per megabyte (“MB”) dropped 50 percent, from \$0.06 per MB in 2011 to \$0.03 per MB in 2012.

³ *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1480 ¶ 181 (1994) (“*CMRS Second Report & Order*”).

⁴ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817, 15839-40 ¶ 62 (2007) (“*Voice Roaming Order*”); *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile-Data Services*, Second Report & Order, 26 FCC Rcd 5411, 5445-46 ¶ 68 (2011) (“*Data Roaming Order*”).

⁵ See *Voice Roaming Order*, 22 FCC Rcd at 15840 ¶ 62 (“where competition disciplines the rates, creating transparency in rates may have the effect of restricting competition and raising rates above competitive levels.”); and *Data Roaming Order*, 26 FCC Rcd at 5445 ¶ 68 (rejecting any “obligation on providers of mobile data services to publicly disclose the rates, terms, and conditions of their roaming agreements.”).

There simply is no legal or factual basis to reverse course now on Section 211 forbearance. The Commission's decision nearly 20 years ago – reaffirmed at least twice since then – has proven to be correct.

I. THE PETITION IS PROCEDURALLY INFIRM AND WRONG ON THE MERITS

A. The Commission Cannot Rescind or Reconsider the 1994 Forbearance Decision

The Petition acknowledges that “neither the statute nor the Commission’s rules establish a set mechanism for rescinding a forbearance once granted.”⁶ That is because none exists. The Commission’s forbearance authority does not provide the “de-forbearance” mechanism that NTCH conjures here.⁷ The Petition is thus procedurally defective and should be dismissed. Moreover, the Commission cannot revisit a forbearance decision adopted nearly 20 years ago.⁸ The deadline for filing a petition for reconsideration with the Commission (or sua sponte reconsideration) has long since passed.⁹ To reinstate Section 211 as applied to wireless carriers, at the very least the Commission would have to comply with APA requirements to regulate anew.¹⁰

⁶ Petition at 3.

⁷ NTCH cites to Section 10 forbearance authority whereas the Commission relied on Section 332(e)(1)(A) to forbear from Section 211. Petition at 3; *CMRS Second Report & Order*, 9 FCC Rcd at 1463-64 ¶¶ 124-25, 1480 ¶ 181. In any event, the provisions are materially the same.

⁸ *CMRS Second Report & Order*, 9 FCC Rcd at 1480 ¶ 181.

⁹ 47 U.S.C. § 405; 47 C.F.R. § 1.106(f).

¹⁰ In any event, at most, Section 211 could only apply to voice roaming, not data roaming, because data roaming is not a common carrier service. See *Data Roaming Order*, 26 FCC Rcd 5411.

As a party seeking regulatory relief from the Commission, NTCH has the burden of proving that new regulations are necessary based on a record that reflects today's marketplace conditions.¹¹ Once forbearance is granted, neither market participants nor the Commission need continually prove that forbearance is *still* warranted, despite NTCH's suggestion to the contrary. Instead, to overturn a grant of forbearance and to provide a basis to re-regulate consistent with the Commission's authority, a petitioner must prove that at least one of the forbearance criteria is no longer met. That is, a petitioner must show (or the Commission must demonstrate through a record established following APA requirements) that regulation with respect to voice rates is in fact again necessary to ensure rates are reasonable and not unreasonably discriminatory, to protect consumers, or otherwise in the public interest. This is the same showing that would be required in a rulemaking to establish regulations in the first instance.

In this case, Petitioner would have to identify a market failure and show — based on evidence that reflects the current state of competition — that a roaming contract filing requirement is necessary to discipline rates, protect consumers, or allow competition. Petitioner fails to meet this burden. Instead, Petitioner makes only general observations about wireless market changes and consolidation over the last several years.¹² And Petitioner makes light of Commission predictions two decades ago about how the domestic wireless marketplace may evolve.¹³ At no point does Petitioner actually address the dynamic state of the wireless marketplace today (see below) and the myriad choices that consumers enjoy.

¹¹ 5 U.S.C § 556(d) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”); *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 366 (D.C. Cir. 1989).

¹² Petition at 2-5.

¹³ *Id.* at 5-6.

Finally, even if Petitioners were correct that the Commission could consider the relief they seek in the forbearance context, the Petition fails to meet the procedural requirements for a forbearance petition, including that petitions must be “complete as filed” and include “[a]ll supporting data upon which the petition intends to rely, including a market analysis.”¹⁴ The Petition is six pages long with no attachments, lacks facts or data in support, and provides no market analysis. The Petition also fails to even acknowledge Section 20.15(b)(1), which expressly provides that CMRS carriers need not “[f]ile with the Commission copies of contracts entered into with other carriers.”¹⁵ To impose a new filing requirement, Petitioner would need to overturn this provision as well.

B. The Petition Ignores the Commission’s Roaming Orders and Fails to Make Any Showing that Could Justify Imposing Contract Filing Requirements

The Commission’s policies set forth in the three roaming orders it has adopted in the last six years do not support NTCH’s theory that roaming contracts need to be filed and made publicly available in order to protect consumers.¹⁶ For example, the Commission’s roaming policy differs from the Petition’s unsupported statement that “[t]here is no question that discriminatory terms and rates for roaming agreements are a detriment to consumers.”¹⁷ Rather, the Commission has established that “the rates individual carriers pay for automatic roaming services be determined in the marketplace through negotiations between carriers” and that “it is

¹⁴ 47 C.F.R. § 1.54(e)(3)(ii).

¹⁵ *Id.* § 20.15(b)(1).

¹⁶ See *Voice Roaming Order*, 22 FCC Rcd 15817; *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 25 FCC Rcd 4181 (2010) (“*Voice Roaming Reconsideration Order*”); *Data Roaming Order*, 26 FCC Rcd 5411.

¹⁷ Petition at 4.

likely that automatic roaming rates will reasonably vary.”¹⁸ Rates could vary based on different geographic markets due to difference in population and other factors affecting supply and demand.¹⁹ The Commission made clear that rates are appropriate if they are reasonable and not unreasonably discriminatory in the voice roaming context, and a party may seek review of contract provisions in a Section 208 complaint alleging violations of the Act.

The roaming regulatory framework is premised on a detailed dispute resolution process to assess whether roaming rates and terms are reasonable and not unreasonably discriminatory in the voice roaming context. The Commission identified multiple factors for that assessment.²⁰ As the Commission observed, this “case-by-case analysis” allows it to consider “the particular circumstances of each dispute as they are relevant to the Commission’s goals” regarding the reasonableness of proffered roaming rates and terms.²¹ With this complaint process tailored to the roaming context, there is no reason to adopt industry-wide contract filing requirements.

Indeed, as part of the roaming proceeding, the Commission considered and rejected a call to impose a filing requirement for roaming agreements.²² In light of its decision to make voice roaming a common carrier obligation, the Commission concluded that “the available remedies for redress are sufficient to address disputes that may arise.”²³ Consistent with its conclusions in 1994, the Commission observed that a filing requirement for roaming agreements could have

¹⁸ *Voice Roaming Order*, 22 FCC Rcd at 15832 ¶ 37, 15834 ¶ 44.

¹⁹ *See id.* at 15834 ¶ 44.

²⁰ *Voice Roaming Reconsideration Order*, 25 FCC Rcd at 4200-01 ¶ 39.

²¹ *Id.* at 4191 ¶ 20.

²² *Voice Roaming Order*, 22 FCC Rcd at 15839-40 ¶ 62.

²³ *Id.*

negative effects on the roaming market, such as by enabling CMRS carriers to ascertain competitors' prices and thereby encouraging carriers to maintain artificially high rates.²⁴

II. THE FACTS SUPPORT FORBEARANCE FROM SECTION 211 EVEN MORE SO TODAY THAN IN 1994

The Petition lacks *any* facts or data to rebut the 1994 decision's finding that forbearance from contract filing provisions will not cause consumer harm. In the 1994 decision, the Commission concluded that consumers would not be harmed by forbearance from contract filing provisions. Specifically, the Commission found that "[c]ompetitive market forces will ensure that inter-carrier contracts will not be used to harm consumers."²⁵ Yet the Petition provides *no* evidence of consumer harm that could support imposing a contract filing requirement.

Contrary to the Petition's unsupported assertions, the mobile wireless marketplace has become increasingly vibrant in the years since 1994, and consumers are benefitting from commercial mobile competition now more than ever before. A snapshot of the market shows that output is increasing, prices are decreasing, and massive, ongoing investment and innovation is fueling even more competition – all to the benefit of the U.S. wireless consumer.²⁶

- Data traffic continues to explode and voice minutes of use ("MOUs) are rising: reported data traffic for 2012 was 1.468 trillion MB, up from 866.9 billion MB in 2011, and MOUs for 2012 totaled 2.299 trillion, up from 2.295 trillion in 2011.²⁷

²⁴ *Id.*, citing *CMRS Second Report & Order*, 9 FCC Rcd at 1478-80 ¶¶ 175-79; see also *Data Roaming Order*, 26 FCC Rcd at 5444-46 ¶ 68.

²⁵ *CMRS Second Report & Order*, 9 FCC Rcd at 1480 ¶ 181. In the event of a dispute, the Commission observed, it would be possible to obtain contracts provisions in a Section 208 complaint proceeding.

²⁶ See generally Comments of Verizon Wireless, WT Docket No. 13-135 (filed June 17, 2013).

²⁷ See Robert F. Roche & Liz Dale, CTIA'S WIRELESS INDUSTRY INDICES at 2-3 (May 2013) ("CTIA 2013 WIRELESS INDUSTRY INDICES").

- Wireless service prices have declined precipitously. From December 2005 to December 2012, the wireless CPI fell 8.0%,²⁸ while the overall CPI for all items increased 16.7%.²⁹ And the trends since 1997 (the first year in which the government tracked wireless CPI) are even more dramatic: wireless CPI declined by more than 40%, while overall CPI increased by more than 43%.³⁰
- Similarly, Voice Revenue per Minute (“RPM”) fell 2.1% from December 2011 to June 2012 to \$0.046.³¹ Overall, Voice RPM has declined from more than \$0.40 in 1993³² to the current \$0.05 (as rounded to the nearest cent).
- For data services, the price declines were even more dramatic: the effective price per megabyte (“MB”) fell 50% from \$0.06 per MB in 2011 to \$0.03 per MB in 2012.³³ These price declines occurred while data usage soared nearly 70% over the same period from 866.9 billion MB in 2011 to 1.468 trillion MB in 2012.³⁴ Overall, the price per MB has fallen more than 93% in just five years, from \$0.46 in 2008 to \$0.03 in 2012.³⁵
- The fiercely competitive market is revealed in the billions of dollars U.S. wireless carriers invest in expanding coverage, increasing capacity, and deploying next-generation networks. Last year, wireless carriers made \$30.1 billion in incremental capital

²⁸ See *id.* at 217-20.

²⁹ See U.S. Dep’t of Labor, Bureau of Labor Statistics, Consumer Price Index: All Urban Consumers – (CPI-U), U.S. City Averages, All Items, <ftp://ftp.bls.gov/pub/special.requests/cpi/cpi.ai.txt> (“CPI – All Items”).

³⁰ See CTIA 2013 WIRELESS INDUSTRY INDICES at 214-20; CPI – ALL ITEMS

³¹ Compare *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, 3877, Table 13 (2013) (“*Sixteenth Report*”) with CTIA 2013 WIRELESS INDUSTRY INDICES at 93 (Table 35), 98 (Table 36), 149 (Table 53), 167 (Table 61).

³² See *Sixteenth Report*, 28 FCC Rcd at 3877, Table 13.

³³ See Visage, Infographic: The Staggeringly Huge Future of Mobility, <http://visagemobile.com/mobilityblog/2012/09/06/infographic-the-staggeringly-huge-future-of-mobility/> (“Visage Infographic”).

³⁴ CTIA 2013 WIRELESS INDUSTRY INDICES at 3.

³⁵ See Visage Infographic.

investment in the United States,³⁶ accounting for 25% of the world's wireless capital investment.³⁷ Since 1994, wireless carriers have made nearly \$350 billion in cumulative capital investment in the United States.³⁸

III. CONCLUSION

For these reasons, NTCH's Petition is without merit and should be denied.

Respectfully Submitted,

MICHAEL E. GLOVER
Of Counsel

/s/ Christopher M. Miller
CHRISTOPHER M. MILLER
ANDRE J. LACHANCE
VERIZON
1320 North Courthouse Road, 9th Floor
Arlington, VA 22201-2909
(703) 351-3071

December 2, 2013

Counsel for Verizon and Verizon Wireless

³⁶ See CTIA 2013 WIRELESS INDUSTRY INDICES at 105.

³⁷ Steve Largent, CEO, CTIA – The Wireless Association, “How to Actually Get Americans Online” (Jan. 31, 2012), *available at* <http://blog.ctia.org/2013/01/31/how-to-actually-get-americans-online/> (citing Bank of America Merrill Lynch).

³⁸ See CTIA, SEMI-ANNUAL WIRELESS INDUSTRY SURVEY RESULTS DECEMBER 1985 – DECEMBER 2012 5.

CERTIFICATE OF SERVICE

I, Jennifer Pelzman, hereby certify that the foregoing Opposition was served this 11th day of July, 2014, by depositing a true copy thereof with the United States Postal Service, first class postage pre-paid, addressed to:

Donald J. Evans
Fletcher Heald & Hildreath, PLC
1300 North 17th Street
11th Floor
Arlington, VA 22209

/s/ Jennifer E. Pelzman

Jennifer Pelzman