

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

In the Matter of)	
)	
Petition Filed By NTCH, Inc. To Rescind)	RM-11723
Forbearance And Initiate Rulemaking To Make)	
Inter-Provider Roaming Rates Available)	WT Docket No. 05-265
)	

OPPOSITION OF AT&T

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OPPOSITION OF AT&T

Pursuant to the Public Notice released on July 14, 2014 in RM-11723 and WT Docket No. 05-265 (DA 14-997), AT&T respectfully submits this opposition to the Petition Filed By NTCH, Inc. To Rescind Forbearance And Initiate Rulemaking To Make Inter-Provider Roaming Rates Available.¹

INTRODUCTION AND SUMMARY

NTCH is confused. It wants the Commission to require providers of voice and data roaming services to publicly disclose their rates contained in privately negotiated commercial contracts. Yet the petition to “rescind forbearance” that it has filed is not an appropriate vehicle for obtaining that relief. As an initial matter, no statute or Commission rule authorizes the Commission to rescind an earlier forbearance ruling. But even if the Commission could rescind an earlier forbearance ruling, reversing the ruling that NTCH challenges – a 1994 ruling in which the Commission decided to forbear from applying certain contract filing requirements to CMRS carriers – would not provide NTCH the relief it seeks because the requirement it is attempting to “bring back” is merely a filing requirement, not a public disclosure requirement. In addition,

¹ NTCH, Inc., Petition To Rescind Forbearance From Application of Section 211 of the Communications Act of 1934, RM-11723 & WT Docket No. 93-252 (filed July 2, 2014) (“Pet.”).

Section 211's filing requirement could not apply to data roaming in any event, because Section 211 applies only to common carrier services, and data roaming is not a common carrier service. Accordingly, NTCH's filing is procedurally invalid.

NTCH is really requesting that the Commission impose entirely new rules on voice and data roaming carriers. Its filing, however, does not meet the most basic requirements for initiating a new rulemaking. Indeed, NTCH's burden to justify new rules is particularly high here because the Commission expressly declined to impose public rate disclosure requirements in its 2007 and 2011 roaming orders – a circumstance that NTCH acknowledges only in a footnote on the last page of its pleading.

In all events, NTCH has provided no substantive basis for the Commission to revisit its reasons for rejecting public rate disclosure requirements in the 2007 and 2011 roaming orders. The Commission properly determined that this highly proprietary information should remain confidential. A public disclosure requirement would have a severely chilling effect on future roaming negotiations, because publication of rates creates substantial disincentives for providers to offer discounts or other innovative arrangements. That is why the Commission has repeatedly held that a public rate filing requirement “may have the effect of restricting competition,”² and NTCH fails to identify any marketplace failure, customer harm or other basis for revisiting these prior Commission determinations. And with respect to data roaming, NTCH ignores the fact that imposing a *de facto* tariffing regime on data roaming rates would move the data roaming regime over the line into prohibited common carriage regulation, in violation of the D.C. Circuit's decision in *Cellco Partnership v. FCC*, 700 F.3d 534 (D.C. Cir. 2012).

² Report and Order and Further Notice of Proposed Rulemaking, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd. 15817, ¶ 62 (2007) (“Voice Roaming Order”).

I. NTCH’S PETITION IS PROCEDURALLY IMPROPER BECAUSE THE RULES THAT IT SEEKS MAY BE IMPOSED ONLY IN A NEW RULEMAKING, AND IT HAS NOT MADE THE SHOWINGS THAT ARE LEGALLY REQUIRED TO INITIATE A RULEMAKING.

Although styled as a petition to rescind forbearance – a form of relief that NTCH concedes is not authorized by any statute or Commission rule – NTCH is in fact seeking several new rules that could only be imposed after a full rulemaking proceeding. The petition, however, does not remotely meet the threshold standards under the APA for beginning a new rulemaking proceeding.

NTCH misapprehends the legal framework at issue here – both procedurally and substantively – in asking the Commission to revisit its prior forbearance ruling.³ The focus of NTCH’s petition is a request that the Commission rescind the 1994 ruling in which it decided to forbear from applying the contract filing provisions of Section 211⁴ of the Communications Act to CMRS carriers.⁵ Yet, as NTCH concedes, “neither the statute nor the Commission’s rules establish a set mechanism for rescinding a forbearance once granted.”⁶ Section 332(c)(1)(A), the provision under which the Commission acted in 1994, does not contemplate petitions to “rescind” an earlier forbearance ruling. The plain terms of Section 332(c)(1)(A) only confer affirmative authority on the Commission to exempt CMRS from certain statutory requirements, and it enumerates the substantive standards for exercising that authority.

³ Pet. at 1.

⁴ 47 U.S.C. § 211. Section 211(a) provides: “Every carrier subject to this chapter shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this chapter, in relation to any traffic affected by the provisions of this chapter to which it may be a party.”

⁵ See Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, 9 FCC Rcd. 1411, ¶ 181 (1994) (“1994 Order”).

⁶ Pet. at 4.

NTCH contends that forbearance “must be withdrawn” because the criteria specified in Section 332(c)(1)(A) are no longer satisfied,⁷ but this misconstrues the operation of that statute and ignores that the relief it seeks would require a new rulemaking. Section 332(c)(1)(A) does not actually use the term “forbearance”; instead, it authorizes the Commission to “specify by regulation” that particular provisions of the Communications Act are “inapplicable” to CMRS carriers if the Commission determines that the enumerated criteria are satisfied. Here, the Commission determined in the *1994 Order* that the criteria for forbearance from Section 211 were satisfied and, as required by Section 332(c)(1)(A), “specified in a regulation” (47 C.F.R. § 20.15(b)(1)) that this statute is inapplicable to CMRS carriers. NTCH suggests that Rule 20.15(b)(1) should be amended as a “[c]onforming” measure,⁸ but this fails to recognize that the rule *must* be formally repealed in order for the Commission to “rescind” its prior action under Section 332(c)(1)(A). Thus, the proper statutory mechanism – and the only proper statutory mechanism – for the relief NTCH requests is a petition for rulemaking that seeks repeal or amendment of Rule 20.15(b)(1) and re-imposition of the Section 211 filing requirement.⁹ In such a proceeding, NTCH would bear the burden of showing that regulatory intervention is necessary.¹⁰

⁷ *Id.* at 1, 4.

⁸ *Id.* at 8.

⁹ 47 C.F.R. § 1.401(a) (a petition for rulemaking can seek “repeal of a rule or regulation”).

¹⁰ 5 U.S.C. § 556(d) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”). The Commission has never attempted to reverse a determination under Section 332(c)(1)(A). See Austin Schlick, General Counsel, FCC, *A Third-Way Legal Framework for Addressing the Comcast Dilemma*, at 9 (May 6, 2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297945A1.pdf (noting that “the FCC has never reversed a forbearance determination made under section 10, nor one made for wireless under the similar criteria of section 332(c)(1),” and that in order to do so, “the Commission would first have to compile substantial record evidence that the circumstances it

Apart from the operation of Section 332(c)(1)(A), the relief that NTCH requests necessarily requires a new rulemaking for several additional reasons. *First*, NTCH is seeking the publication of carriers' rates for both voice roaming and data roaming.¹¹ But providers of data roaming have never been subject to Section 211's requirements in the first place. Section 211 applies only to common carrier services, and data roaming is not a common carrier service.¹² Accordingly, "rescinding" the Commission's 1994 determination and accompanying regulation would only apply to voice roaming and would not revive or bring back any filing requirement that could apply to data roaming. With respect to data roaming, then, NTCH is necessarily seeking to impose a wholly new filing regime. This would necessarily require a rulemaking under the APA.

Second, even with respect to voice roaming, bringing back Section 211's requirements would not provide NTCH the rule that it seeks. NTCH characterizes Section 211 as a "rate publication requirement" and seeks public disclosure of carriers' roaming rates.¹³ But Section 211 merely requires common carriers to *file* certain carrier-to-carrier contracts, and does not require the Commission to make these contracts public.¹⁴ Accordingly, bringing back the

previously identified as supporting forbearance had changed, and then survive judicial review under the Administrative Procedure Act's arbitrary-and-capricious standard").

¹¹ Pet. at 9; *see also id.* at 5 & n.1. In the Commission's current docket on data roaming, NTCH recently filed comments urging the Commission to "require[] contracts between carriers to be filed or otherwise made publicly available" and referring to the Petition at issue here. *See* Comments of NTCH, Inc., Flat Wireless, LLC and Buffalo-Lake Erie Wireless Systems Co., LLC on Petition for Expedited Declaratory Ruling Of T-Mobile USA, Inc. Regarding Data Roaming Obligations, at 2-3, WT Docket No. 05-265 (July 10, 2014).

¹² *See Cellco Partnership v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012) ("mobile-data providers are statutorily immune, perhaps twice over, from treatment as common carriers").

¹³ Pet. at 10.

¹⁴ In that regard, the language of Section 211 stands in sharp contrast to Section 203, which expressly requires carriers to file tariffs and keep them "open for public inspection." 47 U.S.C. § 203(a).

Section 211 requirements for voice roaming agreements would not make those agreements publicly available. In order to make the agreements publicly available, the Commission would have to adopt completely new requirements which – again – would necessitate a new rulemaking. In such a proceeding, the Commission would have the substantial burden of creating a record that could support findings that the disclosure of roaming rates is in the public interest and that roaming contracts should not be subject to confidentiality provisions. NTCH’s bare-bones petition does not provide a basis for the Commission to impose such novel requirements.

Third, NTCH proposes in the alternative that the Commission require roaming carriers to “make their rates publicly available on their websites.”¹⁵ This likewise would be a novel requirement that would fundamentally alter the current regime and would necessitate a new rulemaking.

For all of these reasons, the entire basis of NTCH’s request is misguided. Section 332(c)(1)(A)’s criteria are irrelevant to NTCH’s request for new regulation. Thus, if the Commission were inclined to expend the time and resources to address NTCH’s claims – which for the reasons discussed below, it should not – it would find itself in the same position as in any other circumstance in which there is no regulation governing a particular activity and be obligated to start from scratch with a new regulatory proceeding under the APA. NTCH’s petition, however, does not satisfy the criteria for (and thus cannot be treated as) a petition for rulemaking.¹⁶ Indeed, NTCH’s burden to justify a new rulemaking is especially steep here,

¹⁵ Pet. at 8.

¹⁶ The Commission’s rules for promulgating new regulations require the submission of a petition that “set[s] forth the *text or substance of the proposed rule*, . . . together with all facts, views, arguments and data deemed to support the action requested.” 47 C.F.R. § 1.401(c) (emphasis added). NTCH has not set forth the text and substance of the new publication and non-

because the Commission has previously rejected publication requirements for both voice and data roaming rates¹⁷ – a fact that NTCH only mentions at the very end of its petition.¹⁸ Given these prior rejections of public disclosure requirements for roaming rates and the high burden that the Commission faces in justifying a change of position,¹⁹ NTCH must present specific data and arguments showing that the Commission’s prior reasons for rejecting disclosure are no longer valid. NTCH’s petition, which barely acknowledges the Commission’s prior rulings and analysis, does not remotely meet this high standard.

II. NTCH’S PETITION FAILS TO ESTABLISH ANY LEGITIMATE BASIS FOR THE SWEEPING NEW RULES THAT IT SEEKS.

Even if the Commission were inclined to consider NTCH’s petition as a request to initiate a new rulemaking proceeding, NTCH has provided no substantive basis for the Commission to revisit its conclusions in the 2007 and 2011 roaming orders that public disclosure of roaming rates would be contrary to the public interest.

The Commission expressly recognized in 2007 that voice roaming contracts are “confidential” commercial agreements and it “decline[d] to impose an affirmative obligation on CMRS carriers to post their roaming rates” for several reasons.²⁰ The Commission found that a public filing requirement would be affirmatively harmful. As the Commission explained, in a context such as this, “where competition disciplines the rates,” a public rate filing requirement

confidentiality rules that it seeks for voice and data roaming agreements, nor has it provided any data or analysis to support such rules.

¹⁷ See *Voice Roaming Order* ¶ 62; see also Second Report and Order, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 26 FCC Rcd. 5411, ¶ 68 (2011) (“*Data Roaming Order*”).

¹⁸ Pet. at 9 n.4.

¹⁹ See, e.g., *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); see also *Nat’l Fed’n of Fed. Employees v. FLRA*, 412 F.3d 119, 124-25 (D.C. Cir. 2005).

²⁰ *Voice Roaming Order* ¶ 62.

“may have the effect of restricting competition.”²¹ Public disclosure of rates discourages providers from bargaining with roaming partners to offer discounts or other innovative arrangements, because publication creates pressure to give all roaming partners the same or similar rates. The Commission also explained that “disclosure of roaming agreements would enable CMRS carriers to ascertain competitors’ prices which could encourage carriers to maintain artificially high rates.”²² These conclusions were consistent with a long line of Commission and antitrust precedent recognizing that tariffing and similar rate publication requirements “hinder[] competitive responsiveness.”²³

The Commission also explained that such disclosure was unnecessary. The Commission had already concluded that there was “insufficient evidence to justify” rate regulation and that the “better course” was for “the rates individual carriers pay for automatic roaming services [to] be determined in the marketplace through negotiations between carriers.”²⁴ Given that rates would be individually negotiated, the Commission fully expected that “it is likely that automatic roaming rates will reasonably vary.”²⁵ Without prophylactic rate regulation, there was no regulatory need for a public disclosure requirement; the Commission concluded instead that the

²¹ *Id.*

²² *Id.*

²³ *MCI WorldCom Inc. v. FCC*, 209 F.3d 760, 764 (D.C. Cir. 2000) (affirming Commission finding that carriers could use interexchange service tariffs “as a shield to avoid individual contract negotiations with large and small users, thereby reducing competition among carriers”); *see also Voice Roaming Order* ¶ 62 n.155 (citing *1994 Order* ¶¶ 175-79 (declining to impose tariffs on CMRS carriers, in part, because it would allow carriers to maintain artificially high rates) and Department of Justice/Federal Trade Commission Merger Guidelines § 2.1 (the amount of information available to companies could be relevant to the companies’ abilities to engage in anticompetitive behavior)).

²⁴ *Voice Roaming Order* ¶¶ 37-38.

²⁵ *Id.* ¶ 44.

availability of the complaint procedure was “sufficient to address disputes that may arise.”²⁶ Thus, the Commission specifically held that public disclosure would provide no consumer-oriented benefit that would outweigh the significant “administrative costs” and “burden[s]” that a filing requirement would place on carriers.²⁷

More recently, the Commission specifically rejected a public disclosure requirement for data roaming agreements in the *Data Roaming Order*.²⁸ Indeed, the reasons for declining to impose a publication requirement for voice roaming apply even more strongly to data roaming. Unlike voice roaming, data roaming is not a common carrier service. The Commission’s “commercial reasonableness” standard that governs data roaming agreements permits a significantly *wider* degree of flexibility and variation in rates than even Section 201 and 202 would permit for the voice roaming common carrier regime.²⁹ Given that the central thrust of the data roaming regime is to encourage highly individualized negotiations, there is no regulatory rationale for a rate publication requirement, and the Commission has since repeatedly held that the availability of the complaint process is fully adequate to address any specific issue that may arise.³⁰ Moreover, since mobile data services are provided in an environment “where

²⁶ *Id.* ¶ 62 (“[i]n light of our adoption of an automatic roaming rule as discussed below, we find that the available remedies for redress are sufficient to address disputes that may arise”).

²⁷ *Id.* (“we need not burden CMRS carriers by requiring them to file roaming agreements”).

²⁸ *Data Roaming Order* ¶ 68 (“the rule we adopt does not impose any form of common carrier rate regulation or obligation on providers of mobile data services to publicly disclose the rates, terms, and conditions of their roaming agreements”).

²⁹ *See, e.g., Cellco*, 700 F.3d at 548.

³⁰ *See, e.g., 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, ¶ 11 (rel. June 25, 2014); 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, ¶ 107 (2014) (“*AT&T-Leap Order*”) (affirming that if a provider “encounters difficulties in

competition disciplines the rates,” a rate publication requirement would have the same effect of “restricting competition” as in the voice roaming context.³¹

NTCH’s petition would reverse twenty years of consistent Commission policy with respect to wireless services, but it has provided no basis for revisiting any of these Commission judgments. To the contrary, NTCH’s public disclosure requirement would result in precisely the public interest harms the Commission previously identified. As the Commission acknowledged, these contracts are, by their nature, “confidential.”³² Wholesale roaming arrangements between providers are highly proprietary, and in most cases one or both parties want the option of a nondisclosure agreement. Forcing wireless providers to publicly file their roaming agreements would, in effect, establish a *de facto* tariffing regime. Given that all providers could easily “ascertain competitors’ prices,”³³ a rate publication requirement would create a substantial disincentive for any provider to offer discounts or engage in other individualized bargaining. NTCH is apparently counting on this feature of rate publication requirements to eliminate most if not all disparities in roaming rates, as it claims that a rate filing requirement would have a “sobering effect” on the ability of providers to “discriminate” and would “simplify and regularize negotiations between the carriers.”³⁴ But NTCH never grapples with the Commission’s longstanding (and widely shared) conclusion that, on balance, mandatory rate publication requirements *restrict* competition and discourage beneficial bargaining.³⁵ Thus,

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”).

³¹ *Voice Roaming Order* ¶ 62.

³² *Id.*

³³ *Id.*

³⁴ *See, e.g.,* Pet. at 7-8.

³⁵ *Voice Roaming Order* ¶ 62 & n.155.

contrary to NTCH's suggestion, a rate publication requirement would have a substantial chilling effect on the individualized negotiations the Commission's roaming polices are designed to encourage.³⁶

A rate publication requirement for *data* roaming agreements would be unlawful for the additional reason that it would transform the data roaming regime into common carrier regulation. The Communications Act expressly prohibits the Commission from regulating data roaming services as common carriage, and the D.C. Circuit upheld the Commission's data roaming regime solely because the rules' standards and procedures allow enough flexibility in the negotiation of rates and terms that the rules could not be said to constitute common carriage *per se*.³⁷ In the *Data Roaming Order*, the Commission cited the absence of a public disclosure requirement as one of the key distinctions between its data roaming rules and common carriage.³⁸ The avowed purpose of NTCH's rate publication requirement, however, is to stamp out most if not all of this variability and flexibility in data roaming arrangements, which would eliminate the "room for individualized bargaining and discrimination in terms" that "salvaged the data roaming requirements in *Cellco*."³⁹ Given that the D.C. Circuit has found that the

³⁶ Notably, any new rate publication rule could apply only to contracts entered into after the effective date of the new rule, and not to existing contracts. The Commission's authority to abrogate existing contracts is limited, and the Commission could not make the sort of public interest findings that would be necessary here to frustrate the expectations of contracting parties that entered into existing nondisclosure agreements. *See National Cable & Telecom. Association v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009) (the APA requires that "legislative rules . . . be given future effect only") (internal quotation marks omitted); 5 U.S.C. § 551(4) (a "rule" means "the whole or a part of an agency statement of general or particular applicability *and future effect* designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . .") (emphasis added).

³⁷ *See Cellco*, 700 F.3d at 547 (noting that the Commission's data roaming regime lies in the "space between *per se* common carriage and *per se* private carriage").

³⁸ *Data Roaming Order* ¶ 68.

³⁹ *Cellco*, 700 F.3d at 548; *Verizon v. FCC*, 740 F.3d 623, 656 (D.C. Cir. 2014).

Commission’s data roaming rules already come close to common carriage, the addition of a public disclosure requirement would move the data roaming regime well over the line into prohibited common carriage regulation.

NTCH does not identify any marketplace failure, customer harm or other basis for revisiting the current rules, and the concerns it does cite would not support a rule change. NTCH’s principal argument is founded on a speculative premise: NTCH is certain that unlawful discrimination is rampant throughout the industry, but it claims no one can file a complaint against such discrimination because carriers “have no way of knowing if they are being discriminated against” because the contracts are not public.⁴⁰ The argument is meritless: the Commission clearly can adjudicate a Section 202 nondiscrimination claim (or, in the case of data roaming, a commercial reasonableness claim) without requiring every wireless provider to publicly file all of their roaming agreements. The Commission has a wealth of time-tested procedures, including most obviously protective orders, that would allow a fair consideration of any carrier’s discrimination claim without subjecting all providers to the costs, burdens, and competitive harms of a continuous public disclosure requirement. Furthermore, as AT&T has recently demonstrated, NTCH’s repeated (and unsupported) assertions that existing roaming rates are “too high” and “discriminatory”⁴¹ founder on the reality that prices for data roaming have plummeted in recent years, roaming providers such as AT&T have negotiated countless roaming agreements with other carriers, and few if any Section 208 complaints concerning roaming rates or negotiations have been filed.⁴²

⁴⁰ Pet. at 7.

⁴¹ See, e.g., *id.* at 2, 4, 5, 6, 9-10.

⁴² See Opposition of AT&T, *Petition for Expedited Declaratory Ruling Filed By T-Mobile USA, Inc. Regarding Data Roaming Obligations*, WT Docket No. 05-265, at 10-16 (July 10, 2014). NTCH’s remaining arguments are equally invalid. For example, it claims that the current rules

These difficulties, as well as the potential pitfalls of rate transparency discussed above, would not be avoided by NTCH's alternative suggestion that carriers be required post their rates on their websites, rather than file them with the Commission.⁴³ This is simply another form of public disclosure, and NTCH fails to provide a legitimate basis for the Commission to depart from its prior roaming orders that rejected such a requirement.⁴⁴

“undermine[] the statutory scheme in which rates were intended to be publicly available” and allow carriers “to circumvent with impunity the obligations of Section 203,” but the Commission detariffed wireless services twenty years ago and Section 203 does not even apply to data roaming. *See* Pet. at 2-3.

⁴³ Pet. at 8.

⁴⁴ NTCH's suggestion that the public disclosure approach that the Commission adopted for Section 252 interconnection agreements is a useful analogy is frivolous. Pet. at 9. Interconnection agreements represent the polar opposite of roaming agreements: Sections 251 and 252 extensively regulate almost every rate and term of interconnection agreements, and state commissions must approve them before they go into effect. 47 U.S.C. §§ 251-52. Public disclosure is a critical feature of that regulatory regime, because such agreements are subject to uniquely broad nondiscrimination and most-favored-nation statutory provisions that do not apply to other agreements. *See, e.g.*, 47 U.S.C. §§ 251(c)(2)(C) & 252(i).

CONCLUSION

For the foregoing reasons, the Commission should reject NTCH's Petition.

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