

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

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

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

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NTELOS Holdings Corp. (“NTELOS”),¹ by its attorneys, hereby respectfully submits these reply comments in support of the *Petition for Expedited Declaratory Ruling* filed by T-Mobile USA, Inc. (“T-Mobile”) in the above-captioned proceeding (the “Petition” or “T-Mobile’s Petition”).² NTELOS agrees with the near-universal consensus in this proceeding that obtaining data roaming on commercially reasonable terms and conditions is an industry-wide concern and certain benchmarks and clarifications are needed to remove uncertainty surrounding

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

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

the commercially reasonable standard adopted in the 2010 *Data Roaming Order*.³ In support, the following is respectfully shown:

I. INTRODUCTION AND SUMMARY

A review of the comments submitted in response to the T-Mobile Petition highlights a concerning observation about today's wholesale roaming market: there is a near-universal consensus that this market is severely broken. The majority of commenters underscored their inability to secure commercially reasonable data roaming rates and terms and conditions and urged the Commission to consider T-Mobile's proposed benchmarks and clarifications. Many of these commenters also recognized AT&T and Verizon's anti-competitive practices as the reason for the state of today's market. These comments noted that while AT&T and Verizon continue to exert their control over the market through their significant spectrum holdings, they have little incentive to enter into commercially reasonable roaming arrangements with competitive carriers that have little to offer them in return. Therefore, it should come as no surprise that the two providers that are responsible for the uneven playing field, Verizon and AT&T, represent the sole opposition to the Petition.

In these comments, NTELOS rebuts AT&T and Verizon's self-interested view of the roaming landscape. While AT&T and Verizon argue that the Petition is attempting to rewrite or modify the data roaming rules, NTELOS urges the Commission to recognize the illusory nature of this argument: benchmarks, such as the ones that are proposed by the Petition, are objective reference points to help clarify what is commercially reasonable during case-by-case evaluations – not rewrite the Commission's data roaming rules. Other concerns contrived by AT&T and

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

Verizon, such as the ability of benchmarks to undermine carrier incentives for buildout are also misleading, and additional attempts to distract the Commission from the real issue: fixing the broken wholesale data roaming market.

II. CONTRARY TO AT&T AND VERIZON’S SELF-INTERESTED VIEW OF THE ROAMING ENVIRONMENT, THE RECORD CLEARLY DEMONSTRATES THAT THE MAJORITY OF WIRELESS CARRIERS FACE DIFFICULTY OBTAINING DATA ROAMING ON COMMERCIALY REASONABLE TERMS, CONDITIONS AND RATES

The record submitted in response to T-Mobile’s Petition indicates near-universal concern about the current data roaming landscape, suggesting that the issues raised in the Petition are industry-wide problems,⁴ and not just T-Mobile attempting to advance its narrow business

⁴ See e.g., Comments of Cellular South, Inc., 2 (carriers are unable “to evaluate the commercial reasonableness of proposed terms and conditions for data roaming agreements.”); Comments of Competitive Carriers Association, 5 (“a CCA member was offered data roaming rates as much as 33 times the retail rates generally charged by national carriers to their retail customers.”); Comments of COMPTEL, 4 (“[t]he continuing inability of smaller carries to obtain reasonable data roaming rates from the largest providers . . . undercuts the value of the data roaming rules and provides grounds for further clarification.”); Comments of Limitless Mobile, LLC, 6 (Limitless “has been forced to chose between paying for [‘must-have’] roaming coverage at rates which it considers commercially unreasonable and blocking the ability of its own subscribers to access that AT&T roaming coverage and thus reduce the coverage area available through its wireless retail offerings.”); Comments of NTCA-The Rural Broadband Association, 3 (“the wholesale roaming rates offered by the largest mobile wireless operators are predatory and anticompetitive in nature and have no relation to what the largest operators’ own retail customers are paying.”); Comments of NTCH, Inc., Flat Wireless, LLC and Buffalo-Lake Erie Wireless Systems Co., LLC (highlighting NTCH’s formal 2013 complaint against Verizon; Blue Wireless’ and Flat’s “outrageous data roaming rates” proposed by the majors); Comments of NTELOS Holdings Corp, 8 (“Small, mid-tier and regional carriers are still facing significant obstacles in their ability to secure commercially reasonable roaming rates during negotiations set on level playing fields.”) Comments of PinPoint Wireless Inc., 8 (“PinPoint has reason to believe that inter-carrier data roaming rates in the domestic mobile industry are five-times or perhaps even ten-times the prevailing retail rates for comparable data services.”); Comments of Public Knowledge et. al, 5 (AT&T and Verizon have the ability to impose “artificially high data roaming costs on rivals (or deny data roaming altogether)”); Comments of Rural Wireless Association, 6 (“[t]here is clearly no competition in the provision of data roaming services and the Twin Bells have the negotiating power to impose whatever rates, terms and conditions they see fit.”); Comments of Sprint Corporation, 2 (highlighting the need for guidance and clarification “to remove this lingering

(continued...)

interests, as the two sole opposing parties, AT&T and Verizon, claim.⁵ Commenters point their inability to secure commercially reasonable data roaming agreements to the increasingly consolidating wireless industry and the resulting lack of AT&T and Verizon's need for reciprocal mobile data roaming arrangements with competitive carriers.⁶ Furthermore, in instances where data roaming agreements are reached with one of the big two, the record shows that the agreement is not likely to be on commercially reasonable terms, signed "under duress" due to the lack of competition in the roaming partner pool.⁷

The record demonstrates that AT&T and Verizon enjoy a dominant position in the wholesale data roaming sector. As a result, they are able to charge almost any rate and impose almost any terms and conditions they want. This dominant position is the result of the stronghold they have on the wireless market in terms of spectrum, subscribers, revenues and nearly every other relevant metric. At the same time, competitive carriers are in need of

(...continued)

regulatory uncertainty across the marketplace.”). The preceding listed sources were all submitted in the initial round of comments in this proceeding on July 10, 2014.

⁵ Opposition of AT&T, 6, 10 (filed July 10, 2014) (“AT&T Opposition”) (“In short, T-Mobile’s petition is designed to further its narrow business interest, not any legitimate industry-wide need for clarity” and “T-Mobile’s sweeping claims of industry-wide dysfunction simply do not square with marketplace realities”); Comments of Verizon, 2 (filed July 10, 2014) (“Verizon Opposition”) (“The impetus for the Petition is T-Mobile’s desire to obtain lower data roaming rates from AT&T.”).

⁶ AT&T continues to claim that it is a “net purchaser” of roaming, and therefore, has “no incentive to seek high roaming rates.” AT&T Opposition, 19. The *Data Roaming Order* and several other commenters provide a different opinion of negotiating with AT&T (and Verizon). See e.g., *Data Roaming Order*, ¶ 27 (“consolidation may have simultaneously reduced the incentives of the largest two providers to enter into such arrangements by reducing their need for reciprocal roaming.”); RWA Comments, 6 (“large carriers have very little need for . . . reciprocal mobile data roaming...”); NTELOS Comments, 8 (Verizon and AT&T do not offer reasonable roaming rates because they do not have to.”). In addition, if AT&T has no incentive to seek higher roaming rates, it would have no incentive to oppose this Petition.

⁷ See e.g., RWA Comments, 4; Limitless Comments, 5; PinPoint Comments, 6.

commercially reasonable roaming rates and conditions in order to provide competitive services to consumers. It should come as no surprise that AT&T and Verizon are the only parties to oppose the adoption of certain clarifications and guidance on the commercially reasonable standard in the data roaming marketplace.⁸ Despite the attempts made by these dominant providers to provide valid reasoning for their assertions, the likely motive behind their opposition is to protect their dominant position in the wireless marketplace.

The two dominant carriers make several claims in an effort to convince the Commission that the wholesale roaming market is well-functioning. For instance, AT&T and Verizon argue that formal complaints have not been filed or determined by the Commission, and had there actually been problems in the industry, there would be a number of reported decisions.⁹ However, these assertions are misleading. NTCH initiated a complaint process with the Commission at the end of 2013 due to its unsuccessful “attempts, over the course of several years, to secure a commercially reasonable data roaming arrangement with Verizon Wireless.”¹⁰ This proceeding, to NTELOS’s knowledge, is still unresolved. Second, there are a number of obstacles that may contribute towards the lack of official data roaming complaints on file with the Commission. Inefficiency, cost, administrative burden and lack of insight into other marketplace roaming rules, are all significant reasons for failing to file an official complaint.

⁸ AT&T and Verizon were also the only parties to oppose the adoption of data roaming rules prior to the release of the *Data Roaming Order*. Four years later, AT&T and Verizon are yet again the sole opposing voices to data roaming rules and T-Mobile’s requested relief. *See e.g., Data Roaming Order*, 12 (recognizing that “only AT&T and Verizon Wireless oppose the Commission’s adoption of a data roaming requirement.”) *See also*, AT&T Opposition; Verizon Opposition.

⁹ AT&T Opposition, 10; Verizon Opposition, 9.

¹⁰ NTCH et al. Comments, 2.

Clarifying the commercial reasonableness standard would allow carriers to make informed decisions about whether to pursue formal complaints.

In addition, AT&T's assertions of a “well-functioning commercial marketplace” for support of a well-functioning wholesale roaming market should similarly be rejected.¹¹ Regardless of how the Commission views the retail wireless market (which has not seen ‘effective competition’ in a number of years),¹² the status of the retail market cannot and should not be viewed as evidence of the status of the roaming market. The two markets have varying levels of competition, resources and regulations. Based on the comments submitted during the initial round of this proceeding, it is apparent that the wholesale market is broken.¹³

III. AT&T AND VERIZON’S DISTORTED ASSERTIONS CONCERNING THE PETITION’S RECOMMENDATIONS ARE TRANSPARENT ATTEMPTS TO MAINTAIN THEIR DOMINANT POSITIONS IN THE WIRELESS INDUSTRY

As discussed above, the filings initially submitted in support of T-Mobile’s Petition, including NTELOS’s comments, largely attribute the current broken state of the wholesale roaming market to the anti-competitive actions by the two dominant carriers, AT&T and Verizon. In order to rectify and further prevent these actions from occurring, these commenters generally agree that T-Mobile’s proposed benchmarks and clarifications are the proper route for the Commission to take.

¹¹ AT&T Opposition, 5.

¹² *See 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, ¶ 2 (2013)* (recognizing that in ten competition reports, including the three most recent reports, the Commission has been unable to conclude that the CMRS marketplace is effectively competitive).

¹³ *See supra* note 4.

Not surprisingly, AT&T and Verizon represent the lone opposition. In separate filings, they each mischaracterize the intent of T-Mobile's Petition and further provide embellished "support" in an attempt to invalidate T-Mobile's claims for the purpose of attempting to maintain their dominant positions in the wireless industry.

A. The *Data Roaming Order* Explicitly States That A Petition for Declaratory Ruling is A Proper Mechanism to Seek Additional Guidance On The Data Roaming Rules

Verizon argues that T-Mobile failed "to avail itself of the processes established to resolve disputes" by filing a Petition for Declaratory Ruling.¹⁴ Verizon lists mediation and formal and informal complaints as the established dispute resolution processes in the *Data Roaming Order*. However, it fails to appropriately recognize a third listed potential resolution tool: a Petition for Declaratory Ruling.¹⁵ While Verizon claims that declaratory rulings should be sought only as an alternative to the complaint process for resolving a two-party dispute, the *Data Roaming Order* made no reference to such petitions being only for two-party disputes. Verizon's efforts here only illustrates their true motive: to prevent or delay any meaningful progress from taking place on the issue of what constitutes commercially reasonable data roaming rates.

The *Data Roaming Order* provides that parties may "file a petition for declaratory ruling under Section 1.2 of the Commission's rules to resolve any disputes arising out of the data roaming rule adopted [in the Order]."¹⁶ The *Data Roaming Order* also anticipates that such a Petition may be used "to address data roaming controversies."¹⁷ And Verizon, in arguing

¹⁴ Verizon Opposition, 3.

¹⁵ *Id.* at 4.

¹⁶ *Data Roaming Order*, ¶ 75.

¹⁷ *Id.* at n. 231.

another point, even agrees that declaratory orders are only appropriate “to terminate a controversy or **remove uncertainty.**”¹⁸ As COMPTTEL points out, “T-Mobile has taken the Commission up on its invitation.”¹⁹ Here, the T-Mobile Petition addresses “data roaming controversies” and “disputes arising out of the data roaming rule.” The dispute is an industry-wide problem that generally occurs during the majority of data roaming negotiations with potential home partners, AT&T and Verizon. The controversy stems from the uncertainty surrounding the meaning of “commercially reasonable” and must be clarified by the Commission to resolve the corresponding issues in the data roaming marketplace. The Commission used that language in the *Data Roaming Order* because it anticipated controversies arising. Therefore, a Petition for Declaratory Ruling, such as the one filed by T-Mobile is an appropriate vehicle to accomplish this goal.

B. Establishing benchmarks will not “rewrite” or “modify” the Commission’s rules, but will remove uncertainty, and clarify the commercial reasonableness standard.

AT&T and Verizon both state that T-Mobile is attempting to rewrite or modify the Commission’s data roaming rules in an unlawful manner. AT&T claims that 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.”²⁰ Verizon argues that T-Mobile seeks to modify the Commission’s rules.”²¹ This “rewrite/modify” argument is illusory. Here, T-Mobile explicitly asks the Commission to “remove uncertainty” surrounding the data roaming rules in the first line

¹⁸ Verizon Opposition, 4 (emphasis added)

¹⁹ COMPTTEL Comments, 1.

²⁰ AT&T Opposition, 16.

²¹ Verizon Opposition, 14.

of the Petition – it does not offer proposed language to modify the current rules, nor does it offer actual proposed rules for the Commission to adopt.²² Rather, T-Mobile seeks to remove the obvious uncertainty by using established benchmarks and providing certain clarifications.

Benchmarks, such as the ones proposed by the T-Mobile Petition, are objective reference points intended to help clarify what is to be considered “commercially reasonable” during case-by-case evaluations. Both AT&T and Verizon conveniently fail to recognize that proposing benchmarks as additional factors in determining commercial reasonableness of a rate, term or condition is directly in line with the Commission’s language in the *Data Roaming Order*.²³ While the *Data Roaming Order* offered several factors to assist carriers in determining commercial reasonableness, the Commission also recognized that additional factors would likely be necessary. Indeed, the Commission “emphasize[s] that [the listed] factors are not exclusive or exhaustive and that providers may argue that the Commission should consider other relevant factors in determining the commercial reasonableness of the negotiations, providers’ conduct, and the terms and conditions of the proffered data roaming arrangements, including the prices.”²⁴

Here, T-Mobile is seeking to offer such “other” relevant factors that may assist both the Commission and roaming partners in determining the commercial reasonableness of an offered roaming rate, term or condition. T-Mobile is not seeking to rewrite the data roaming rules, nor is it seeking to modify the language and meaning of these rules. Rather, T-Mobile is recommending that the Commission clarify and offer its guidance on an issue that is currently

²² T-Mobile Petition, 1 (stating “T-Mobile USA, Inc. (‘T-Mobile’) submits this petition for expedited declaratory ruling to remove uncertainty regarding the FCC’s data roaming rule.”).

²³ *Data Roaming Order*, ¶ 87.

²⁴ *Id.*

plaguing the industry, and an issue that was anticipated by the Commission when it adopted its data roaming rules.

C. Benchmarks guided by retail or other wholesale rates are appropriate measures for the “commercially reasonable” standard

i. The Proposed Retail Benchmark

AT&T and Verizon strongly oppose the use of retail rates as a benchmark for determining the commercial reasonableness of offered wholesale roaming rates.²⁵ Both parties argue that such a benchmark would violate the *Data Roaming Order* and diminish incentives for buildout.²⁶ However to reach such conclusions, both Verizon and AT&T distort the language of the Commission in the *Data Roaming Order* upon which they rely so heavily. For instance, the Commission recognizes that “the relatively high price of roaming” when compared to providing facilities-based service, *may* act as a way to “counterbalance the incentive” to buildout, but it certainly *does not* state that if roaming prices were closer to retail prices, all incentives for a competitive carrier to buildout would be lost.

In fact, the *Data Roaming Order* recognizes a major contributor to encouraging buildout and investment, which both AT&T and Verizon fail to acknowledge: actual access to data roaming. Indeed, the Commission found that the availability of data roaming “*encourag[es] investment and network deployments* and *ensure[s] that providers wanting to invest in their networks* or to enter into a new market can offer subscribers a competitive level of mobile

²⁵ See generally AT&T Opposition; Verizon Opposition.

²⁶ AT&T states that 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 rules by eliminating incentives for investment and encouraging the use of roaming as resale.” AT&T Opposition, 4; Verizon argues that “[r]equiring data roaming to be offered at prices comparable to retail services would be inconsistent with the *Data Roaming Order* and would exacerbate concerns about investment incentives.” Verizon Opposition, 7.

network coverage and service.”²⁷ And, in order to ensure that competitive carriers obtain the access they need, without overly burdening the carrier or presenting other barriers, the rates offered for such roaming services must be commercially reasonable. Allowing carriers to set wholesale roaming rates high above retail rates is effectively a way to prevent competitive carriers from offering competitive services to the public. No matter how the dominant carriers want to describe it, setting rates at these levels is anti-competitive and against the public interest.

It should come as no surprise that AT&T and Verizon have offered their distorted arguments to try and thwart competitive carriers’ efforts to encourage fair roaming practices. The two dominant providers’ strong opposition against this particular benchmark is likely due in large part to the fact that if and when AT&T and Verizon’s wholesale roaming rates (offered and/or actual) are compared to their retail rates, the lack of commercial reasonableness of such roaming rates would be obvious and their unfair practices in this regard would be exposed to competitive carriers, the Commission and the public.

ii. The Proposed MVNO And Other Services Benchmarks

AT&T and Verizon also jump at the chance to oppose MVNO and other wholesale rate benchmarks by arguing that these benchmarks will not be comparable due to the varying factors among roaming and other services. For example, AT&T argues that MVNO rates are “designed to facilitate resale” and “resale rates are often contained in confidential contracts that cannot be shared, thus making any attempt to benchmark against resale rates impractical.”²⁸ Verizon argues that “roaming rates and rates for other services [i.e., MVNO and international roaming]

²⁷ *Data Roaming Order*, ¶ 20 (emphasis added).

²⁸ AT&T Opposition, 28.

are derived from different factors and are thus not comparable.”²⁹ Verizon continues to argue that prices for these various service offerings “reflect the different factors” surrounding the service.³⁰ Verizon also makes a similar argument concerning the comparison of pricing for customers in different service categories.³¹

While Verizon specifies some differences it considers when setting roaming rates versus MVNO rates; such factors ignore the fact that the actual service being provided – resale of data capacity from their network to a third party – is virtually the same. Verizon continues to state that prices for roaming, wholesale and retail services are based on a mix of varying considerations, a point that further demonstrates that Verizon is in control of the setting of these rates and under the current system can charge whatever it wants to each type of provider for what is effectively the same service. The price for this service should not be differentiated according to how Verizon weights certain factors that it attributes differently to third-party sellers. Rather, the prices for the actual service should be essentially consistent regardless of the type of provider, particularly since Verizon’s costs associated with the provision of such service is likely the same for each provider it sells to.

Moreover, in both of the arguments presented by AT&T and Verizon, they ignore that they each have control over these “variable factors” that would allegedly prevent comparisons. For instance, it is AT&T that is responsible for characterizing resale contracts as confidential, or establishing non-disclosure provisions, in efforts to prevent future comparisons. And, it is

²⁹ Verizon Opposition, 11.

³⁰ *Id.* at 12.

³¹ *Id.* at 13 (arguing that “variations in pricing and pricing that varies with usage patterns exist for MVNO and roaming customers as well. These differences make comparing prices difficult, if not impossible....”).

ultimately Verizon and AT&T that are setting the rates for these other services and internally deciding which factors will be relevant in certain markets and services, based on what benefits each the most. Competitive carriers have no control over these AT&T- and Verizon-imposed barriers, yet may be affected greatly by these actions. It is yet another way that the big two ensure their dominance in the industry. These decisions and rates should be transparent to the Commission, allowing it to then decide which factors are relevant to a commercial reasonableness determination. But allowing AT&T and Verizon to wrap themselves in a cloak of mystery of their own making is certainly not in the public interest.

IV. THE COMMISSION SHOULD REQUIRE ROAMING AGREEMENTS TO BE SUBMITTED TO THE FCC FOR CONFIDENTIAL REVIEW

AT&T asserts that the claims of market power made in the Petition are “in the abstract” and would require “analysis of numerous agreements across the industry, including an understanding of the factual context in which each individual agreement was negotiated.”³² At the moment, T-Mobile and other carriers are almost certainly unable to voluntarily produce such support due to non-disclosure agreements that these types of roaming agreements are generally developed under, and that roaming partners such as AT&T and Verizon require.

Therefore, one way the Commission can determine whether or not the data roaming marketplace is broken (in addition to reviewing the record before it) is to actually review the roaming agreements at issue. If the Commission does not want to heed the concerns brought forth in a near-unanimous fashion by the industry, it should review additional evidence itself. NTELOS submits that the Commission should request all roaming agreements to be submitted on a confidential basis to the Commission. Doing so would provide the Commission with

³² AT&T Opposition, 19.

“numerous agreements across the country,” some of which may contain commercially sensitive data that may be reviewed under the Commission’s already-established confidentiality procedures. This information would assist the Commission in gaining an overall “understanding of the factual context in which each individual agreement was negotiated” during its case-by-case evaluation of these data roaming agreements. The more data that is collected, the more perspective the Commission will have for assessing individual agreements and be able to determine what the actual state of the data roaming market is. NTELOS believes that the Commission will find it to be broken.

V. CONCLUSION

In light of the near-universal support of established benchmarks and clarifications, NTELOS respectfully requests that the Commission grant T-Mobile's *Petition for Expedited Declaratory Ruling* and provide much-needed guidance and clarification to the industry, as a whole, on the commercially reasonable standard.

Respectfully submitted,

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