

**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)

To: The Commission

**REPLY COMMENTS OF
RURAL WIRELESS ASSOCIATION, INC.**

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SUMMARY

The Rural Wireless Association, Inc. (“RWA”) supports those comments that have been filed in response to T-Mobile USA, Inc.’s petition for expedited declaratory ruling that seek FCC clarification of the criteria to be used to determine whether the terms and conditions of any given wholesale data roaming agreement meet the “commercially reasonable” standard outlined in the Data Roaming Order and codified in Section 20.12 of the Commission’s Rules. All commenters, with the exception of AT&T and Verizon, seek FCC clarification of what is considered “commercially reasonable.”

It is clear from the comments filed in this proceeding that the way in which AT&T and Verizon measure whether a wholesale data roaming rate is “commercially reasonable” is vastly different than the way the rest of the commenters in this proceeding measure commercial reasonableness. Since there is no yardstick to measure the commercial reasonableness of these rates, there are significant problems in the marketplace. These problems include the loss of competition through consolidation and carriers going out of business, the loss of services to rural consumers, and the very real threat of increased retail data rates for rural subscribers to offset carriers’ wholesale data roaming costs.

Verizon and AT&T have taken the position that it is commercially reasonable for them to charge wholesale data roaming rates that are so high as to be unaffordable to rural carriers and their customers. RWA argues the Commission should clarify that wholesale data roaming rates are *per se* commercially unreasonable if they exceed, by any degree, the retail data rate the must-have carrier or requesting carrier charges its retail customers. This clarification would provide the industry with the necessary guidelines to allow for the continued provision of vital nationwide data roaming services to rural Americans.

Verizon and AT&T argue the Commission lacks the authority to clarify what constitutes commercially reasonable terms and conditions. However, the Commission has the regulatory authority under Title III of the Communications Act, of 1934, as amended (the “Act”), which authority has been upheld the D.C. Circuit Court, to impose data roaming obligations on facilities-based providers of commercial mobile data services to other such providers on commercially reasonable terms and conditions, and this authority extends to its ability to clarify these obligations.

It is clear from the comments filed in this proceeding that roaming market players have divergent views on what constitutes commercially reasonable wholesale data roaming terms and conditions. The Commission must clarify the data roaming rule and establish benchmarks the industry can use to determine whether wholesale data roaming rates are commercially reasonable. RWA strongly urges the Commission to clarify that data roaming rates are *per se* commercially unreasonable if they exceed, by any degree, the retail data rate the host carrier or requesting carrier charges its retail customers.

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The Rural Wireless Association, Inc. (“RWA”), by its attorneys, respectfully submits these reply comments in support of those comments supporting the petition for expedited declaratory ruling filed by T-Mobile USA, Inc. (“T-Mobile”).¹ RWA strongly supports those commenters who urge the Commission to provide additional clarification and direction with regard to what constitutes “commercially reasonable” terms and conditions. It should be noted that every commenter, except AT&T and Verizon, agrees that this clarification is needed.²

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

² Comments of NTCH, Inc., Flat Wireless, LLC and Buffalo-Lake Erie Wireless Systems Co., LLC, WT Docket No. 05-265 at p. 2 (filed July 10, 2014) (“NTCH Comments”) (the data roaming rule “has ended up having no impact on the roaming marketplace because the ‘commercially reasonable’ standard is toothless, vague and very difficult to enforce”); Comments of NTELOS Holdings Corp. In Support of Petition for Expedited Declaratory Ruling of T-Mobile USA, Inc., WT Docket No. 05-265 (filed July 10, 2014) (“NTELOS Comments”) (strongly supporting adoption of a retail benchmark based on a measure of retail price for wholesale mobile data pricing); Comments of NTCA - The Rural Broadband Association, WT Docket No. 05-265 (filed July 20, 2014) (“NTCA Comments”) (agreeing that guidance is needed to provide clarity in negotiations and help parties evaluate the commercial reasonableness of offered data roaming agreement terms); Comments of PinPoint Wireless, Inc., WT Docket No. 05-265 (filed July 10, 2014) (“PinPoint Comments”) (urging the Commission to take steps to promote transparency and clarity in the roaming marketplace); Comments of Limitless Mobile, Inc., WT Docket No. 05-265 (filed July 10, 2014) (“Limitless Comments”) (lack of clarity and direction from the Commission regarding what constitutes commercially reasonable wholesale

Commercially unreasonable wholesale mobile data roaming rates impact all roaming carriers and consumers across the country. Despite Verizon’s position to the contrary,³ the Commission’s data roaming rules are not working and the roaming market is dysfunctional and must be addressed by the Commission.⁴ The Commission adopted the data roaming rule, which “require[s] providers of commercial mobile data roaming services to offer data roaming arrangements on commercially reasonable terms and conditions, subject to specified limitations....”⁵ The Commission adopted these rules in order to foster investment and innovation in the use of spectrum and the development and deployment of data network facilities

data roaming rates and the imbalance of bargaining power in the market, has hurt competition and drastically reduces consumer choice); Comments of Comptel, WT Docket No. 05-265 at n. 6 (filed July 10, 2014) (“Comptel Comments”) (clarification is needed for determining the commercial reasonableness of proffered terms and conditions, and the “commercially reasonable” standard is too vague to adequately protect the public interest); Comments of Cellular South, Inc. (d/b/a C Spire Wireless), WT Docket No. 05-265 (filed July 10, 2014) (“C Spire Comments”) (competitive mobile carriers face substantial difficulties providing seamless data services to customers due in large part to their inability to evaluate commercial reasonableness of proposed data roaming terms and conditions); Comments of The Blooston Rural Carriers, WT Docket No. 05-265 (filed July 10, 2014) (“Blooston Rural Carriers Comments”) (supports T-Mobile request for clarification, seeks 60-90 day shot clock and notes that rural carriers may face great difficulty in meeting their Mobility Fund public interest obligations if wholesale data roaming rates are not reduced); Comments of Competitive Carriers Association, at p. 2 WT Docket No. 05-265 (filed July 10, 2014) (“CCA Comments”) (“T-Mobile’s proposed benchmarks for assessing whether the data roaming rates are commercially reasonable would provide sorely-needed guidance to the industry...); Comments of Sprint Corporation, WT Docket No. 05-265 (filed July 10, 2014) (“Sprint Comments”) (the Commission must clear up industry confusion regarding implementation of the data roaming rules); Comments of Truphone, Inc. and Truphone Limited, WT Docket No. 05-265 (filed August 11, 2014) (supports T-Mobile’s request for clarification).

³ See Verizon Comments at p.3.

⁴ See *T-Mobile Petition* at p. 10.

⁵ *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 at ¶ 13 (rel. April 7, 2011) (“*Data Roaming Order*”); see also 20 C.F.R. § 20.12(e).

and services, competition for mobile broadband business by multiple providers, and the availability of advanced and innovative mobile services with seamless nationwide coverage.⁶

The FCC’s policy objectives have been thwarted by dominant carriers with superior bargaining power who have taken advantage of the confusion surrounding what constitutes “commercially reasonable” data roaming terms and conditions. As a result, competition and rural consumers are suffering. Commercially unreasonable data roaming rates are forcing rural carriers to consider leaving the market or discontinue services to subscribers, are delaying carriers’ deployment of new infrastructure and services to rural America, and will eventually result in higher retail rates for rural consumers. To address these public interest harms, the Commission must clarify what constitutes “commercially reasonable” mobile data roaming terms and conditions.

I. CLARIFYING THE TERM “COMMERCIALLY REASONABLE” AS PROPOSED BY RWA DOES NOT CONSTITUTE COMMON CARRIAGE REGULATION.

RWA disagrees with AT&T’s argument that the clarification requested in T-Mobile’s petition would transform the data roaming rules into common carriage regulation.⁷ Clarifying what constitutes “commercially reasonable” does not remove carriers’ flexibility to negotiate and develop individually tailored agreements. RWA’s requested clarification would describe the maximum wholesale data roaming rate that would be considered “commercially reasonable.” This clarification is clearly needed given the fact that AT&T’s and Verizon’s interpretations of

⁶ *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, WT Docket No. 05-265 (rel. April 21, 2010) (“*2010 Order on Reconsideration*”).

⁷ AT&T Opposition at p. 32.

what constitutes commercially reasonable rates, terms and conditions for wholesale data roaming services is so far afield from the rest of the commenters in this proceeding.

The D.C. Circuit Court upheld the Commission finding that the data roaming rule does not relegate mobile data providers to common carrier status. Despite AT&T's argument to the contrary, clarifying what constitutes "commercially reasonable" terms and conditions would not constitute common carrier regulation. Specifically, in response to a challenge by Verizon that the data roaming rule relegates mobile-data providers to common carriers, the court found that:

[i]f a carrier is forced to offer service indiscriminately and on general terms, then that carrier is being relegated to common carrier status. But perhaps more importantly, the Commission has significant latitude to determine the bounds of common carriage in particular cases. Moreover, there is an important distinction between the question whether a given regulatory regime is *consistent* with common carrier or private carrier status, and the *Midwest Video II* question whether that regime *necessarily confers* common carrier status. Accordingly, even if a regulatory regime is not so distinct from common carriage as to render it inconsistent with common carrier status, that hardly means it is so fundamentally common carriage as to render it inconsistent with private carrier status. In other words, common carriage is not all or nothing--there is a gray area in which although a given regulation might be applied to common carriers, the obligations imposed are not common carriage *per se*. It is in this realm--the space between *per se* common carriage and *per se* private carriage--that the Commission's determination that a regulation does or does not confer common carrier status warrants deference. Such is the case with the data roaming rule.⁸

The court found the Commission's data roaming rule falls within this "grey" area, and is not inconsistent with private carrier status because:

the data roaming rule leaves substantial room for individualized bargaining and discrimination in terms. The rule expressly permits providers to adapt roaming agreements to individualized circumstances without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms.

⁸ *Cellco Partnership v. FCC*, 700 F.3d 534, 547 (D.C. Cir. 2012) (internal citations omitted).

Given this... the data roaming rule does ‘not amount to a duty to hold out facilities *indifferently* for public use.’”⁹

While the clarification requested by both T-Mobile and RWA will provide additional guidance to carriers as to what constitutes commercially reasonable wholesale data roaming rates, neither clarification would require carriers to “hold themselves out to serve all comers indiscriminately on the same or standardized terms.” Carriers will continue to have the opportunity to negotiate individual wholesale data roaming agreements, with whatever commercially reasonable terms and conditions the parties deem appropriate given individual circumstances, within the guidelines of ensuring that the wholesale data roaming rates do not exceed, and may include any rate below, the retail data rate the must-have¹⁰ carrier or requesting carrier charges its retail customers.¹¹

RWA agrees with CCA that “the guidance requested in the Petition would still leave substantial room for individualized bargaining and arrangements, and preserve the discretion contained within the language of the rule...”¹² Adopting retail data rates as the benchmark for determining whether wholesale data roaming rates are commercially reasonable, as

⁹ *Cellco*, 700 F.3d at p. 548 (emphasis in original, internal citations omitted).

¹⁰ RWA considers a must-have carrier to be the only wireless carrier that is able to provide the requesting carrier with wireless data roaming services in a market that has significant “map value” to the requesting carrier. “Map value” is used in the wireless industry to describe a service area that adds significant value to a carrier’s network by satisfying the demand of the carrier’s customers. Examples of areas with map value include, but are not limited to, major Interstates; areas covering hundreds of square miles; markets that fill-in a carrier’s doughnut hole-shaped service territory; and rural markets that are immediately adjacent to a carrier’s service territory.

¹¹ This retail data rate could be based on the prevailing nationwide retail data rate, the local data rate, the data rate charged to foreign carriers whose customers roam on a must-have carrier’s network, or the data rate charged to MVNOs.

¹² CCA Comments at p. 9.

recommended by RWA in its Comments in this proceeding,¹³ also leaves substantial room for individual bargaining, negotiation and discretion between roaming partners. However, RWA disagrees with CCA's example for describing how carriers will continue to be able to use their discretion to negotiate individual wholesale data roaming agreements. Specifically, CCA states that "...rural areas are often more costly to serve and therefore carriers serving these areas should be capable of recouping these deployment costs through fair and economically reasonable roaming rates."¹⁴ RWA strongly encourages the Commission to adopt the retail data rate the must-have carrier charges its retail customers as the appropriate benchmark for determining whether the wholesale data roaming rate is *per se* commercially unreasonable, including data roaming services being provided in rural areas.¹⁵ It is safe to assume that the prevailing retail data rates offered to retail customers will properly account for host carriers' costs of providing data services in any market, including in rural areas, and as such, those retail data rates are an appropriate benchmark for determining the commercial reasonableness of the wholesale data roaming rates offered to roaming partners for those exact same data services.

II. TITLE III OF THE ACT PROVIDES THE COMMISSION THE AUTHORITY TO CLARIFY SECTION 20.12 OF THE RULES AND THE CLARIFICATION PROPOSED BY RWA WILL ALLOW INDIVIDUALIZED BARGAINING.

Verizon argues that the FCC does not have the authority under Title III of the Act to clarify what constitutes a commercially reasonable rate stating that because the FCC "elected not to adopt requirements linking voice roaming rates to rates for retail or MVNO services in the

¹³ Comments of the Rural Wireless Association, Inc., WT Docket No. 05-265 at p. 7 (filed July 10, 2014) ("RWA Comments").

¹⁴ CCA Comments at p. 9.

¹⁵ This retail data rate could be based on the prevailing nationwide retail data rate, the local data rate, the data rate charged to foreign carriers whose customers roam on a must-have carrier's network, or the data rate charged to MVNOs. *See* Comments of the Rural Wireless Association, Inc., WT Docket No. 05-265 at ¶ 15 (filed July 10, 2014) ("RWA Comments").

common carrier voice roaming regime, it certainly could not adopt such requirements in a more ‘flexible’ Title III regulatory regime.”¹⁶ The Commission elected not to adopt benchmarks in the voice roaming proceeding because it was not convinced consumers would be harmed by its failure to do so.¹⁷ It is clear from the comments in this proceeding that competition and consumers are being harmed by the Commission’s failure to establish criteria for determining whether wholesale data roaming rates are commercially reasonable. Furthermore, the fact that the Commission elected not to adopt benchmarks in the voice roaming proceeding does not mean the Commission cannot do so here. As discussed above, the Commission has established, and the D.C. Circuit Court has upheld, that the Commission has statutory authority under Title III of the Act to impose data roaming obligations on facilities-based providers of commercial mobile data services to other such providers on commercially reasonable terms and conditions, and this authority extends to its ability to clarify these obligations as requested by T-Mobile and RWA.¹⁸

Specifically, the Commission has found that Section 301 of the Act provides it with the authority to regulate “radio communications” and “transmission of energy by radio.”¹⁹ Section 303 of the Act provides the Commission with “the authority to establish operational obligations for licensees that further the goals and requirements of the Act if the obligations are in the ‘public convenience, interest, or necessity.’”²⁰ The Commission has determined that “reasonable

¹⁶ Verizon Comments at p. 7.

¹⁷ See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817 at ¶ 37 (2007) (“*Voice Roaming Order*”).

¹⁸ *Cellco*, 700 F.3d 534 (“Title III of the Communications Act of 1934 plainly empower the Commission to promulgate the data roaming rule.”).

¹⁹ *2010 Order on Reconsideration* at ¶ 66 citing 47 U.S.C. § 301.

²⁰ *2010 Order on Reconsideration* at ¶ 66 citing 47 U.S.C. § 303 (“stating that if the ‘public convenience, interest, or necessity requires’ the Commission shall ... prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of the Act”); *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1048 (7th Cir. 1992)

roaming obligations can serve the public interest by promoting competition, investment, and new entry while facilitating consumer access to ubiquitous service.”²¹ Furthermore, the Commission is obligated to advance the objectives outlined in Section 309(j)(3) of the Act, which include “the development and rapid deployment of new technologies, products and services for the benefit of the public... without administrative or judicial delays; [and] ... efficient and intensive use of the electromagnetic spectrum...”²² In addition, the FCC has found that imposing automatic data roaming obligations is supported by Section 303(g) of the Act, which requires the Commission to “[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest...”²³

Clarifying that wholesale data roaming rates that exceed retail data rates are *per se* commercially unreasonable falls within the FCC’s authority under Title III of the Act. This clarification will give all carriers significant direction with regard to their negotiations concerning data roaming services, while continuing to provide carriers with the flexibility to negotiate and develop “individually tailored arrangements.”

RWA proposed in its comments that the Commission find that wholesale data roaming rates that exceed retail rates are *per se* commercially unreasonable. Adopting this clarification for determining whether the terms and conditions of a proffered agreement are commercially reasonable is supported by the Commission’s authority under Title III of the Act, which authority has been upheld by the D.C. Circuit. The guidance requested by T-Mobile and RWA leaves substantial room for individualized bargaining and negotiations. Furthermore, as stated by the

(Communications Act invests Commission with ‘enormous discretion’ in promulgating licensee obligations that the agency determines will serve the public interest).

²¹ 2010 Order on Reconsideration at ¶ 67.

²² 47 U.S.C. § 309(j)(3).

²³ 47 U.S.C. § 303(g).

D.C. Circuit in *Cellco v. FCC, Midwest Video II* makes it clear that “not every limitation on an entity’s discretion concerning with whom and how it will deal is necessarily common carriage.”²⁴

III. IMPLEMENTATION OF THE DATA ROAMING RULES HAS FAILED TO MEET THE COMMISSION’S STATED POLICY OBJECTIVES; CLARIFICATION BY THE FCC OF WHAT CONSTITUTES “COMMERCIALLY REASONABLE” WILL CURE THIS DEFICIENCY.

In 2011, the Commission imposed data roaming obligations on mobile data roaming service providers in order to serve the public interest by promoting competition, investment, and new entry while facilitating consumer access to ubiquitous service. These policy objectives are the cornerstone of the Commission’s data roaming rules. While the Commission attempted to adopt rules that balance these objectives, this has not occurred in practice, as evidenced by the record in this proceeding. Clarification of the data roaming rules is needed to effectively carry out the Commission’s mobile data roaming policy objectives.

Faced with “take it or leave it” data roaming agreements with commercially unreasonable data roaming rates, terms and conditions, RWA members have been forced to accept such agreements, or refused to accept such terms, forcing them either to limit their customers’ ability to access certain larger carriers’ networks or continue to provide customers with essential nationwide data roaming services, but at a financial loss. If RWA members continue to provide their customers with nationwide plans under these scenarios, they will not be in business much longer.

²⁴ *Cellco*, 700 F.3d 534, 547 (citing *FCC v. Midwest Video Corp. (Midwest Video II)*, 440 U.S. 689, 99 S. Ct. 1435, 59 L. Ed. 2d 692 (1979)).

IV. AT&T ATTEMPTS TO JUSTIFY CHARGING COMMERCIALY UNREASONABLY HIGH WHOLESALE DATA ROAMING RATES ON MISSTATED FCC POLICY.

RWA strongly disagrees with AT&T's interpretation of the policy objectives the FCC adopted when it implemented the data roaming rule. As discussed above, the Commission's policy objective was to "serve the public interest by promoting competition, investment, and new entry while facilitating consumer access to ubiquitous service."²⁵ This policy objective includes the goal of ensuring that roaming carriers do not rely on data roaming services *in lieu of* investing in their own home networks.

AT&T attempts to justify its commercially unreasonable wholesale data roaming rates and twists the Commission's policy objectives by inferring that the Commission gave carriers permission to charge wholesale data roaming rates that are so high that these carriers have no choice but to build new networks outside of their current home networks rather than roam on another carrier's network. For example, AT&T states in its opposition that "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 another carrier's network.'"²⁶ The FCC intended this statement to refer to "in-home network roaming" where multiple parties have licensed spectrum in the same area.

AT&T also states that "[t]he Commission had previously found that the fact that 'roaming rates [are] *much higher* than retail rates' would preserve investment incentives, and the

²⁵ 2010 *Order on Reconsideration* at ¶ 67.

²⁶ AT&T Opposition, WT Docket No. 05-165 (filed July 10, 2014) at pp. 8-9 (*citing Data Roaming Order* at ¶ 51).

Commission cited that prior finding with approval in the *Data Roaming Order*.²⁷ AT&T misquotes this paragraph of the *2010 Order on Reconsideration*. The Commission did not make a finding that roaming rates that are much higher than retail rates would preserve investment incentives. Paragraph 32 of the *2010 Order on Reconsideration* states:

32. AT&T argues that, if the first carrier providing coverage in a given area were required to provide automatic home roaming service to its competitors' customers, there would be no reason for competitors to build out their own networks in that area [citation omitted]. We disagree. Carriers deploying next generation networks will still have incentives to build out to ensure that their subscribers receive all of the benefits of the carriers' own advanced networks.⁹⁰

⁹⁰ SpectrumCo Petition for Reconsideration at 12-13 and Reply at 4 (also noting that with roaming rates being much higher than retail rates, a smaller carrier cannot expect to compete when its subscribers are roaming all the time or even a large percentage of the time.) *See also*, MetroPCS Petition for Reconsideration at 12 noting it is simply not economically feasible or sound business practice for any carrier to pursue a strategy based on roaming at the expense of building its own network.

The Commission is citing to SpectrumCo's petition for reconsideration for support that carriers will continue to have incentives to build out their home networks even if they initially provide service through roaming agreements. Even if the Commission had made a "finding" that roaming rates much higher than retail were justified to preserve infrastructure investments, which it did not, the Commission was once again discussing investing in infrastructure in the roaming carrier's home network, not nationwide. AT&T is attempting to validate charging commercially unreasonable wholesale data roaming rates in an effort to force roaming carriers to expand their networks rather than roam on AT&T's network.

The Commission initially discussed the comparison of roaming costs and network deployment costs in the *2010 Order on Reconsideration* in the context of elimination of the home exclusion rule. Once the home exclusion rule was eliminated, carriers were required to

²⁷ AT&T Opposition at p. 9 citing *2010 Order on Reconsideration* at ¶ 32 n. 90.

provide roaming services under reasonable terms and conditions even in areas where a roaming carrier held spectrum. The Commission again made this comparison in the *Data Roaming Order* when it declined to adopt AT&T's proposal that a carrier be required to provide data roaming only to carriers that have built substantial networks of their own.²⁸ In both instances the Commission continued to require that roaming terms and conditions be reasonable.

At no time did the Commission endorse or promote the policy that nationwide carriers should charge commercially unreasonable wholesale data roaming rates in order to discourage carriers from roaming on a carrier's network. When the Commission adopted the *Data Roaming Order*, its intention was to ensure that carriers have access to vital data roaming services in order to ensure consumers have access to nationwide data services. The Commission balanced the need for access to data roaming services against ensuring that carriers did not rely on data roaming as the "primary" means of serving subscribers rather than deploying new infrastructure.²⁹

RWA members are not using roaming arrangements as a "primary" means of serving subscribers. AT&T's suggestion that charging commercially unreasonable data roaming rates that are so high that they are resulting in carriers leaving the market will somehow provide incentives for RWA carrier members to invest in infrastructure, and that this scenario is somehow validated by Commission policy, is misplaced. AT&T's Opposition implies that the Commission's rules condone, or even encourage, facilities-based carriers such as AT&T to charge unreasonably high data roaming rates in an effort to force small, rural carriers with non-nationwide footprints, and who clearly have neither the spectrum nor the financial wherewithal, to invest in infrastructure rather than seek data roaming services. AT&T states "the Commission

²⁸ *Data Roaming Order* at ¶50.

²⁹ *Data Roaming Order* at ¶ 21.

made clear that it *expected* roaming rates to be ‘much higher’ than retail rates, to ensure that requesting providers like T-Mobile continue to have an incentive to build out their broadband networks.”³⁰

Even if RWA’s member carriers built out 100% of their licensed footprints, those carriers would still be charged the dominant carrier’s commercially unreasonable wholesale data roaming rates that are applied to large and regional carriers across the country. RWA’s carrier members will never be in a position to construct nationwide networks and will always be reliant on roaming partners to provide their subscribers with nationwide data plans. Under AT&T’s interpretation of the FCC’s policy, RWA members who are small, rural carriers that seek data roaming agreements with AT&T are financially punished with commercially unreasonable data roaming rates that are likely to eventually push them out of the mobile data marketplace because they do not have the spectrum or the financial ability to build their own nationwide networks.

While some carriers have spectrum with near-nationwide footprints but have not yet deployed nationwide networks, RWA members, among others,³¹ simply do not have the spectrum needed, or the financial wherewithal, to deploy nationwide networks. RWA members, whose rural carrier members serve fewer than 100,000 customers, will never be in a position to build nationwide networks and will always rely on roaming partners to provide rural consumers with nationwide service plans.

While AT&T’s position is that excessively high wholesale data roaming rates will push carriers to deploy their own infrastructure, the opposite has happened. As outlined below,

³⁰ AT&T Opposition at pp. 12-13 (emphasis in original).

³¹ See NTELOS Comments at p. 5 (NTELOS has a limited spectrum footprint (due in part to nationwide spectrum constraints) and must rely on other carriers in order to provide nationwide coverage... [and] needs the ability to obtain data roaming agreements on commercially reasonable terms and conditions and offer the maximum coverage possible in order to just be competitive in the wireless marketplace.”).

wholesale data roaming rates currently being charged by must-have roaming partners have actually stifled the ability of rural carriers to deploy infrastructure and new services. In addition, at least one RWA member is being pushed out of business as a result of commercially unreasonable wholesale data roaming rates. These rates have also resulted in (1) market consolidation; (2) consumers being denied access to certain carrier networks; and (3) the real potential of higher retail rates being charged to rural consumers. Given the public interest harms that have resulted from the wholesale data roaming rates currently being charged by must-have carriers, it is clear there is no legitimate commercially reasonable basis for carriers to charge wholesale data roaming rates that exceed retail prices.³² Furthermore, the Commission has stated that “conduct that unreasonably restrains trade... is not commercially reasonable.”³³

V. TODAY’S WHOLESALE DATA ROAMING RATES HARM COMPETITION AND RURAL CONSUMERS.

As evidenced by the comments in this proceeding, competition and consumers have been harmed by AT&T’s and Verizon’s pricing policies.³⁴ RWA’s small rural carrier members rely on roaming partners to provide subscribers with nationwide service. Even if they built out 100% of their licensed territories, they would rely on roaming partners to provide nationwide service.

³² See also Comptel Comments at p. 3 (T-Mobile’s “proposed benchmarks are extremely generous especially since it is difficult to contemplate a legitimate commercially reasonable basis for a host provider’s wholesale roaming rates to exceed its retail pricing to any degree.”).

³³ *Data Roaming Order* at ¶ 85.

³⁴ Further evidence of these harms has been found by another federal communications regulatory body. The Canadian Radio-television and Telecommunications Commission (“CRTC”) recently conducted an investigation to “assess the impact of wholesale data roaming agreements on the competitiveness of the Canadian wireless industry and the choices available to Canadians.” The CRTC found national carriers had the ability to use wholesale roaming agreements as a strategic tool to ensure that new entrants do not become effective competitors. In addition, the Canadian Telecommunications Act was amended to establish caps on wholesale mobile wireless roaming rates based on retail rates. See Canadian Radio-television and Telecommunications Commission, Telecom Decision CRTC 2014-398, File Nos. 8620-C12-201317230 and 8620-C12-201312082 (Ottawa, July 31, 2014).

When a small carrier's subscribers roam, particularly if they roam a large percentage of the time, the carrier's costs of providing service increase significantly. Many times these costs exceed what the carrier can reasonably expect to recoup from its subscribers and remain competitive. If a carrier has a number of subscribers that roam a large percentage of the time, the carrier cannot afford to support those customers on its network.

RWA has at least one member carrier that is being pushed out of business due to commercially unreasonable wholesale data roaming rates, and has many others who are incurring significant costs as a result of wholesale data roaming rates and are considering their options. NTELOS Holdings Corp. ("NTELOS") points out that "[f]ormer carriers, such as MetroPCS, Allied Wireless, and Leap Wireless have all cited difficulty in obtaining reasonable roaming rates as significant reasons for exiting the market, despite the adoption of the *Data Roaming Order*."³⁵ Limitless Mobile, Inc. ("Limitless") and PinPoint Wireless, Inc. ("PinPoint") make clear that rural customers are being harmed by current wholesale data roaming rates. Consumers are being harmed because they are being denied nationwide coverage because rural carriers are restricting access to nationwide networks as a result of commercially unreasonable roaming rates, consumers are losing the benefits of competition by the exit of local competitors from the marketplace, and consumers are facing higher retail rates from rural carriers that are forced to pass their wholesale data roaming costs through to consumers.³⁶ Comptel also correctly points

³⁵ NTELOS Comments at p. 9 *citing* MetroPCS/T-Mobile Public Interest Statement, 18-19 (Lead File No. 0005446627 (filed Oct. 18, 2012)) (one reason MetroPCS decided to merge with T-Mobile was the fact that "reasonably-priced voice, and particularly data, roaming arrangements have been extremely difficult to obtain, despite the existence of [the FCC data roaming rules]"); *see also* Allied Wireless/AT&T Public Interest Statement, 22 (Lead File No. 0005632405) (filed Feb. 5, 2013) (NTELOS notes that "Allied also emphasized the disadvantage it faced by 'high and increasing roaming costs'").

³⁶ *See* Limitless Comments at p. 4 (Limitless restricted customer access to "the AT&T network for the sole reason that AT&T's data roaming rates are too high and by continuing roaming

out that carriers seeking wholesale roaming arrangements compete with the host provider for retail customers, thereby giving the host carrier the incentive to raise the competitor's costs by charging commercially unreasonable roaming rates.³⁷

As outlined by PinPoint, if wholesale data roaming rates are not lowered, rural carriers face the prospect of (1) continuing to offer nationwide roaming to subscribers at competitive retail rates at a loss; (2) passing wholesale data roaming costs on to rural consumers through higher retail rates, which will likely result in the carrier going out of business because the carrier's retail rates are not competitive;³⁸ or do what Limitless was forced to do and (3) restrict subscriber access to certain networks.³⁹ Any of these scenarios will likely result in the carrier going out of business.⁴⁰ The options faced by rural carriers support the argument that today's wholesale data roaming rates are commercially unreasonable and must be addressed by the Commission.

Absent FCC intervention, roaming rates will continue to be much higher than retail rates, and small rural carriers will be unable to compete. The Commission should clarify that wholesale data roaming rates are *per se* commercially unreasonable if they exceed retail data rates. Many of today's wholesale data roaming rates are commercially unreasonable because they force competitors out of the market; restrict rural consumers' access to nationwide data services; or force rural carriers to charge much higher retail prices, resulting in the pass-through of commercially unreasonable wholesale roaming costs to rural consumers.

access, Limitless could not maintain a commercially competitive retail wireless data offering to the general public”).

³⁷ Comptel Comments at p. 4.

³⁸ PinPoint Comments at p. 7 (filed July 10, 2014); *see also* NTELOS Comments at p. 16 *citing* T-Mobile Petition at p. 12 (“high wholesale roaming rates ‘are intended to, and have the effect of, keeping retail data rates unnecessarily high for the wireless customers of competitors’”).

³⁹ Limitless Comments at p. 4.

⁴⁰ *See* PinPoint Comments at p. 7 (filed July 10, 2014).

VI. RWA SUPPORTS ADOPTION OF A ROAMING NEGOTIATION SHOT CLOCK.

RWA supports adoption of a roaming negotiation shot-clock as proposed by NTCA⁴¹ and the Blooston Rural Carriers⁴² that would address the time frame within which carriers must respond to a request to begin roaming negotiations. NTCA correctly notes that while the *Data Roaming Order* admonished carriers to “avoid actions that unduly delay or stonewall the course of negotiations...” there are no “regulatory teeth” to the Commission’s rules.⁴³ Currently, RWA members wait months to even begin negotiating roaming agreements. These delays are exacerbated by network evolutions. Specifically, data roaming agreements covering 2G services are not applicable to areas where the host carrier is providing 3G or 4G LTE services. In order for a roaming carrier to access either of these higher evolution networks, it must negotiate new wholesale data roaming agreements. Negotiating new roaming agreements each time a host carrier’s network is upgraded causes significant delays and added expenses. For these reasons, RWA supports adoption of a shot clock for the conclusion of negotiations and execution of a mutually acceptable wholesale data roaming agreement.⁴⁴

VII. CONCLUSION.

Mobile broadband is at a critical state in its development, and the massive consolidation of this industry has resulted in a significant lack of competition in the mobile broadband ecosystem. Roaming services are needed to ensure competition and the provision of ubiquitous nationwide services to rural consumers. Currently, there is no yardstick to measure the commercial reasonableness of wholesale data roaming rates, which is causing significant

⁴¹ NTCA Comments at pp. 6-8.

⁴² Blooston Rural Carriers Comments at pp. 1-3.

⁴³ NTCA Comments at p. 6.

⁴⁴ Blooston Rural Carriers Comments at pp 1-3.

problems in the marketplace. Verizon and AT&T have taken the position that it is commercially reasonable for them to charge wholesale data roaming rates that are so high as to be unaffordable to rural carriers and their customers. The fact that AT&T's and Verizon's interpretations of what constitutes commercially reasonable rates, terms and conditions for data roaming services is so far afield from the rest of the commenters in this proceeding makes it clear that FCC clarification is needed. Clearly the Commission must establish some benchmarks the industry can use to determine whether wholesale data roaming rates are commercially reasonable. RWA strongly urges the Commission to clarify that wholesale data roaming rates are *per se* commercially unreasonable if they exceed, by any degree, the retail data rate the must-have carrier or requesting carrier charges its retail customers.

Respectfully submitted,

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