

**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 T-MOBILE USA, INC.

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SUMMARY

The benchmarks and clarifications proposed by T-Mobile in its Petition are needed immediately to provide prospective guidance and predictable enforcement criteria for the “commercially reasonable” standard by which carriers are expected to negotiate data roaming agreements. Without further Commission action, some carriers will continue to charge unreasonable roaming rates to the detriment of wireless consumers.

The record is clear that all wireless carriers must be able to obtain data roaming on commercially reasonable terms in order to compete and confirms that these needs are not being met. Carriers face numerous challenges in their negotiations with “must-have” roaming partners, particularly AT&T and Verizon, and such difficulties are only worsening as the nation’s two largest providers continue to consolidate and expand their spectrum holdings and market share.

By way of stark illustration, T-Mobile itself has been forced into commercially unreasonable agreements with AT&T, including a data roaming rate that is currently *150 percent higher* than the average domestic rate that T-Mobile pays for data roaming across all other domestic data roaming partners. (To put AT&T’s pricing power in further context, its current data roaming rate with T-Mobile is *one thousand percent higher* than the data roaming rate negotiated between Leap Wireless and MetroPCS prior to AT&T’s acquisition of Leap and T-Mobile’s acquisition of MetroPCS.) AT&T has obtained this pricing power in part due to acquisitions that have left it as the only GSM roaming partner available to T-Mobile in many areas of the country.

Importantly, commenters recognize that adoption of the proposals does not require a rulemaking proceeding and will *not* require the Commission to deviate from its current case-by-case analysis in examining data roaming agreements; nor will it require it to engage in rate

regulation. Further, providers will also still have wide room for variation in negotiating roaming agreements.

Not surprisingly, the only two parties filing in opposition to T-Mobile's Petition are the very data roaming partners about which all other carriers are concerned: AT&T and Verizon. However, neither AT&T nor Verizon meaningfully address the raising rivals' costs harms discussed by Dr. Farrell in the Petition. The fact that some data roaming arrangements have been signed or that wholesale data roaming rates have generally declined market-wide does not diminish the need for benchmarks and the relief requested by T-Mobile. As Dr. Farrell explains, it is not unusual or uncommon for buyers with no other choice to engage in transactions with monopolists – and even a monopolist has incentives to reduce prices when costs are falling significantly. In addition, the lack of formal complaints shows only that competing carriers are reluctant to do battle with “must-have” roaming partners absent further guidance to help resolve such disputes.

The requested prospective guidance will help all parties better understand their data roaming rights and obligations, and facilitate the negotiation of commercially reasonable data roaming agreements, to the benefit of consumers. The Commission should expeditiously grant T-Mobile's Petition.

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REPLY COMMENTS OF T-MOBILE USA, INC.

T-Mobile USA, Inc. (“T-Mobile”) submits these reply comments in support of its Petition for Expedited Declaratory Ruling seeking additional guidance regarding the FCC’s data roaming rule.^{1/}

I. ALL COMMENTERS – OTHER THAN AT&T AND VERIZON – AGREE THAT T-MOBILE’S REQUESTED RELIEF IS NECESSARY.

A. Supporting Commenters Describe a Futile Process to Obtain Access to Data Roaming On Commercially Reasonable Terms.

1. Expedited Action is Needed.

Marketplace experience in the three years since the Commission adopted the *Data Roaming Order*^{2/} amply demonstrates that the Commission should act expeditiously to provide prospective guidance regarding the “commercially reasonable” standard in its data roaming rules.^{3/} As commenters explain, the ability of carriers to obtain commercially reasonable

^{1/} See Petition for Expedited Declaratory Ruling of T-Mobile USA, Inc., WT Docket No. 05-265 (filed May 27, 2014) (“T-Mobile Data Roaming Petition” or “Petition”).

^{2/} *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).

^{3/} See Comments of the Blooston Rural Carriers, WT Docket No. 05-265, at 1-2 (filed July 10, 2014) (“Blooston Comments”); Comments of Cellular South, Inc., WT Docket No. 05-265, at 3-5 (filed July 10, 2014) (“C Spire Comments”); Comments of Competitive Carriers Association, WT Docket No. 05-265, at 4-5 (filed July 10, 2014) (“CCA Comments”); Comments of COMPTTEL, WT Docket No. 05-

roaming agreements is diminishing as AT&T and Verizon continue to expand their spectrum holdings and market share through consolidation, decreasing their need for roaming arrangements with other carriers.^{4/} As a result, T-Mobile and other carriers have fewer potential roaming partners and increasingly unequal bargaining power when negotiating “must have” data roaming agreements. With little incentive to enter into commercially reasonable arrangements, AT&T and Verizon “can and do charge whatever they want because there are no practical alternatives for most carriers in many areas.”^{5/}

Although commenters agree that *all* wireless carriers need the ability to obtain data roaming agreements on commercially reasonable terms and conditions,^{6/} the record in this proceeding reflects numerous challenges faced by carriers other than AT&T and Verizon in obtaining data roaming in precisely those regions of the country where roaming is most needed – *i.e.*, where network build-out is difficult and customer choice is limited.^{7/} For instance, commenters report being offered data roaming rates that were 10, 25, and even as much as 33

265, at 2, 4 (filed July 10, 2014) (“COMPTEL Comments”); Comments of Limitless Mobile, LLC, WT Docket No. 05-265, at 3-4, 6-8 (filed July 10, 2014) (“Limitless Comments”); Comments of NTCA—The Rural Broadband Association, WT Docket No. 05-265, at 1-6 (filed July 10, 2014) (“NTCA Comments”); Comments of NTCH, Inc., Flat Wireless, LLC, and Buffalo-Lake Erie Wireless Systems Co., LLC, WT Docket No. 05-265, at 1-7 (filed July 10, 2014) (“NTCH Comments”); Comments of NTELOS Holdings Corp., WT Docket No. 05-265, at 7-11 (filed July 10, 2014) (“NTELOS Comments”); Comments of Pinpoint Wireless, Inc., WT Docket No. 05-265, at 2-3 (filed July 10, 2014) (“PinPoint Comments”); Comments of Public Knowledge, Open Technology Institute at New America Foundation, Benton Foundation, and Common Cause, WT Docket No. 05-265, at 5-7 (filed July 10, 2014) (“Public Interest Comments”); Comments of Sprint Corporation, WT Docket No. 05-265, at 2 (filed July 10, 2014) (“Sprint Comments”); *see also* T-Mobile Data Roaming Petition at 5-10.

^{4/} *See, e.g.*, CCA Comments at 4-5; C Spire Comments at 4-5; NTCA Comments at 2; NTELOS Comments at 7-10; RWA Comments at 5-7.

^{5/} C Spire Comments at 5 (quoting Letter from Donald J. Evans, Counsel to Youghioghny Communications, LLC, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 13-193 (filed Feb. 3, 2014)).

^{6/} *See, e.g.*, COMPTEL Comments at 2; NTELOS Comments at 4-5; Sprint Comments at 8.

^{7/} *See, e.g.*, CCA Comments at 5; Limitless Comments at 3-4, 6-8; NTCA Comments at 1-4; NTCH Comments at 2; NTELOS Comments at 9-14; PinPoint Comments at 6-8; RWA Comments at 8.

times higher than the retail rates generally charged by national carriers to their own retail customers.^{8/} Limitless Mobile describes how it was recently forced to severely restrict its customers' access to the AT&T network "for the sole reason that AT&T's data roaming rates are too high and by continuing roaming access, Limitless could not maintain a commercially competitive retail wireless data offering to the general public."^{9/} And, as the Rural Wireless Association ("RWA") notes, competing carriers "cannot sustain the provision of data roaming services if [they] must provide that service at a loss."^{10/}

The increasing dysfunction of the roaming marketplace based on the elimination of potential roaming choices has prompted the Commission to condition approval of transactions upon the extension and preservation of the acquired carrier's roaming agreements.^{11/} For example, the Commission noted the "difficulties providers have had obtaining broadband data roaming arrangements" when Verizon sought to acquire AWS-1 spectrum from wireless carriers

^{8/} See CCA Comments at 5 (stating that a CCA member was offered a data roaming rate as much as 33 times the retail rates generally charged by national carriers to their retail customers for data access); NTELOS Comments at 12-13 (stating that a roaming rate NTELOS was recently offered was approximately 10 to 25 times higher than what is being charged to retail customers).

^{9/} Limitless Comments at 3-4.

^{10/} RWA Comments at 8.

^{11/} See, e.g., *Applications of Cricket License Company, LLC, et al., Leap Wireless International, Inc., and AT&T Inc. for Consent to Transfer Control of Authorizations, et al.*, Memorandum Opinion and Order, 29 FCC Rcd. 2735, ¶¶ 178-180 (2014) (finding that "questions remain whether AT&T will continue to honor roaming agreements of providers with Leap" and requiring AT&T "to honor existing CDMA voice and data roaming services over Leap's network, so long as that network continues to operate" as a condition of approval); *Applications of AT&T Inc. and Centennial Communications Corp. for Consent to Transfer Control of Licenses et al.*, Memorandum Opinion and Order, 24 FCC Rcd. 13915, ¶¶ 122-129 (2009) (addressing commenters' concerns regarding the transaction – including that the transaction would lead to anticompetitive behavior and give AT&T power to "dictate terms and prices to its remaining roaming partners" – by imposing the commitment made by AT&T "to honor Centennial's existing agreements with other carriers to obtain roaming services on Centennial's network pursuant to the rates, terms and conditions contained in Centennial's roaming agreements on the date the AT&T-Centennial merger closes ("Merger Closing Date") for the full term of those agreements, notwithstanding any change of control or termination for convenience provisions in those agreements" as a condition of consent to the transaction).

and cable companies and the “potential harm to future competition” raised by such transactions,^{12/} finding that that the “transfer of AWS-1 spectrum to Verizon Wireless would place it in the hands of a nationwide provider that has little incentive to provide the roaming capability necessary for competitors with less than national footprints. . . .”^{13/}

The Commission has recognized the importance of competition for driving investment, innovation, deployment, and consumer choice in the wireless broadband market.^{14/} It has also found that carriers’ ability to roam is an important component of their ability to compete.^{15/} Therefore, just as it takes other appropriate measures to preserve competition, it must take action here to ensure that its roaming obligations are effective and functioning properly.

2. The Absence of Formal Complaints is Irrelevant.

Contrary to what AT&T and Verizon argue,^{16/} the lack of formal complaints before the Commission is not evidence of a well-functioning marketplace. Competing carriers are reluctant to go to battle with “must-have” roaming partners with the attendant expense and delay before the Commission issues much-needed guidance to help in the resolution and adjudication of such

^{12/} See *Applications of Cellco Partnership d/b/a/ Verizon Wireless and SpectrumCo LLC and Cox TMO, LLC for Consent to Assign AWS-1 Spectrum; Applications of Verizon Wireless and Leap for Consent To Exchange Lower 700 MHz, AWS-1, and PCS Licenses; Applications of T-Mobile License LLC and Cellco Partnership d/b/a/ Verizon Wireless for Consent to Assign Licenses*, Memorandum Opinion and Order and Declaratory Ruling, 27 FCC Rcd. 10698, ¶ 84 (2012).

^{13/} *Id.* ¶ 84. In an effort to address these concerns, the FCC imposed several conditions on the transaction, including requiring Verizon to offer other providers commercially reasonable data roaming arrangements on any of its spectrum in the areas where it acquired AWS-1 spectrum.

^{14/} See, e.g., *Policies Regarding Mobile Spectrum Holdings; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd. 6133, ¶ 1 (2014).

^{15/} See, e.g., *Data Roaming Order* ¶ 15 (“As data services increasingly become the focus of the mobile wireless services, consumers increasingly expect their providers to offer competitive broadband data services, and the availability of data roaming arrangements can be critical to providers remaining competitive in the mobile services marketplace.”).

^{16/} Opposition of AT&T, WT Docket No. 05-265, at 9 (filed July 10, 2014) (“AT&T Opposition”); Comments of Verizon, WT Docket No. 05-265, at 9 (filed July 10, 2014) (“Verizon Comments”).

disputes.^{17/} The type of prospective guidance requested in the Petition will help parties better understand their data roaming rights and obligations, which will in turn facilitate the negotiation of commercially reasonable terms and conditions more consistently and quickly.^{18/} Further, as Dr. Farrell states in his Reply Declaration, assuming *arguendo* that the lack of complaints means that there is *not* a problem and that carriers are *not* trying to charge excessive rates, then providing reasonable guidance about what *would* be a problem should do no harm.^{19/}

3. The Need for Benchmarks is Not Diminished By the Fact That Roaming Agreements Have Been Signed, or That Average Rates Have Declined.

AT&T and Verizon argue that, because roaming agreements have been signed in recent years, the marketplace is functioning.^{20/} But it is not unusual or uncommon for buyers with no other choice to engage in transactions with monopolists.^{21/} As T-Mobile explained, even in areas built out by multiple carriers, there will be discrete areas that are served by only one carrier, making roaming a necessity now and in the future.^{22/} Other commenters echo this concern. NTCA—The Rural Broadband Association (“NTCA”), for instance, notes that every carrier must

^{17/} See Reply Declaration of Joseph Farrell, D.Phil., In Support of Petition for Declaratory Ruling of T-Mobile USA, Inc. (“Farrell Reply Decl.”), ¶¶ 15, 45, attached as Exhibit 2; *see also, e.g.*, RWA Comments at 6-7 (noting that many small and rural carriers have had no choice but to enter into commercially unreasonable data roaming agreements as a result of the lack of bargaining power and some “must-have” carriers’ “take-it or leave-it negotiating tactics,” but that they are effectively prevented from pursuing Commission action because of confidentiality agreements and the overwhelming negotiating power those larger carriers wield).

^{18/} See T-Mobile Data Roaming Petition at 10.

^{19/} Farrell Reply Decl. ¶ 45.

^{20/} *See, e.g.*, AT&T Opposition at 10; Verizon Comments at 1.

^{21/} *See* Farrell Reply Decl. ¶¶ 14, 44.

^{22/} *See* T-Mobile Data Roaming Petition at 2-3.

rely on data roaming to offer its customers reliable, competitive coverage.^{23/} RWA agrees that certain carriers have become “must-have” roaming providers, and C Spire adds that wireless carriers typically have no alternative to signing unreasonable agreements with these must-have roaming partners.^{24/}

Dr. Farrell explains that AT&T’s and Verizon’s contentions regarding the probative value of recent, signed agreements are flawed for two reasons.^{25/} The fact that agreements were reached says nothing, as noted above, about possible delays or costs incurred in negotiating those agreements. More importantly, the existence of signed roaming agreements says nothing about whether the terms are reasonable. Providers will likely agree to unreasonable terms and conditions proposed by “must-have” carriers if the alternative is denial of the roaming request.^{26/}

For example, one of the ways that AT&T unfairly increases roaming rates to T-Mobile is through its administration of “location area codes,” or LACs, which are used to define the area covered by a roaming agreement.^{27/} As Mr. Mosa explains in his Reply Declaration, AT&T has changed its LAC management strategy over the past few years as it has acquired other carriers, to include more sites per LAC.^{28/} Under AT&T’s expanded LAC design, T-Mobile is forced to pay for roaming coverage it does not want or need, driving up its roaming costs. Worse, customers roaming in the area will have a degraded experience due to T-Mobile’s need to limit

^{23/} See NTCA Comments at 2-6; *see also* CCA Comments at 5-7 (reporting that while there are a small number of local markets where rural or regional service providers have achieved significant market share, these carriers still require roaming to be competitive).

^{24/} See RWA Comments at 5-6; C Spire Comments at 5-10.

^{25/} See Farrell Reply Decl. ¶¶ 43-44.

^{26/} See *id.* ¶ 44.

^{27/} Reply Declaration of Dirk Mosa (“Mosa Reply Decl.”), ¶ 5, attached as Exhibit 1.

^{28/} *Id.* ¶ 5.

data services because of AT&T's unreasonable roaming charges.^{29/} T-Mobile's only other alternative is for its customers to simply have no data roaming service in the affected area.^{30/}

Further, although data roaming rates overall are trending downward, this fact does not imply that any particular rate is commercially reasonable. AT&T's rates are still in the 90th percentile of roaming rates overall and are nowhere near the benchmarks proposed in the Petition.^{31/} In fact, AT&T's data roaming rates are 150 percent higher than the average rate T-Mobile pays for data roaming across all other domestic partners.^{32/}

This is true despite the fact that the rates that T-Mobile pays to its other roaming partners are artificially inflated through anticompetitive most favored nation ("MFN") restrictions that AT&T has demanded as part of broader transactions.^{33/} Under AT&T's MFNs, not only are other carriers' rates artificially inflated, but AT&T then relies on those inflated rates as a benchmark for the rates it offers to T-Mobile.^{34/} AT&T admits to having MFNs of this type in its agreements with seven different carriers, but dismisses them as only part of a "larger, more complex agreement" that includes other, non-roaming-related terms.^{35/} It is T-Mobile's

^{29/} *Id.* ¶ 6.

^{30/} *Id.* ¶ 6. In addition to raising roaming costs, AT&T's LAC administration practices distort other carriers' decisions regarding whether to build-out or rely on roaming. Requiring a carrier to take roaming services in areas within some parts of a LAC where it has its own network may deter the carrier from further expanding its network in the parts of the LAC where it does not yet provide service.

^{31/} T-Mobile Data Roaming Petition at 15.

^{32/} Mosa Reply Decl. ¶ 3.

^{33/} *Id.* ¶¶ 7-8.

^{34/} *Id.* ¶ 8.

^{35/} AT&T Opposition at 20.

understanding, however, that other carriers may be willing to accept these above-market roaming rates to take advantage of the agreement's other, non-roaming related terms.^{36/}

The behavior of other carriers prior to their acquisition by AT&T demonstrates the unreasonableness of AT&T's roaming rates. AT&T's current data roaming rate is *one thousand percent higher* than the data roaming rate negotiated between Leap Wireless and MetroPCS prior to AT&T's acquisition of Leap and T-Mobile's acquisition of MetroPCS.^{37/} In T-Mobile's view, the key difference between the rate that Leap offered prior to its acquisition and AT&T's current rate is AT&T's market power.

As Dr. Farrell also explains, the fact that average wholesale roaming rates have been declining does not by itself imply that the level of rates at any point in time is reasonable.^{38/} For one thing, each new generation of technology – from 2G to 3G and most recently to 4G LTE – is more efficient and less costly on a per-megabit basis than the previous generation.^{39/} Faster network speeds, improved smartphones, and more varied mobile content and applications have increased consumer demand for data.^{40/} Further, mobile providers have revised their pricing structures to encourage greater usage, both on their own networks and while roaming, through the use of fixed-fee roaming agreements.^{41/} Thus, the decline in wholesale roaming rates says

^{36/} Mosa Reply Decl. ¶ 8.

^{37/} *Id.* ¶ 3.

^{38/} Farrell Reply Decl. ¶¶ 31-33.

^{39/} *Id.* ¶ 32; *see also* Declaration of Dirk Mosa ("Mosa Decl."), ¶ 21, *attached to* T-Mobile Data Roaming Petition.

^{40/} Farrell Reply Decl. ¶ 32; *see also* T-Mobile Data Roaming Petition at 3.

^{41/} *See* Farrell Reply Decl. ¶ 32; *see also* Declaration of Joseph Farrell, D.Phil., In Support of Petition for Expedited Declaratory Ruling of T-Mobile USA, Inc. ("Farrell Decl."), ¶ 30, *attached to* T-Mobile Data Roaming Petition (noting that T-Mobile has been able to negotiate several roaming agreements recently that, for a fixed fee, provide either a large bucket of megabits or unlimited data

nothing about whether providers of data roaming have been engaging in raising rivals' costs strategies or whether those rates should be deemed "commercially reasonable."^{42/} Indeed, as Dr. Farrell states, "[e]ven a monopolist has incentives to reduce prices when costs are falling significantly."^{43/}

B. Supporting Commenters Describe the Many Public Interest Benefits That Will Result From Reasonable, Reliable Access to Data Roaming.

Supporting commenters underscore the growing importance of data roaming as data usage increases exponentially and more consumers turn to smartphones for their everyday communications needs.^{44/} As the Public Interest Commenters point out, by artificially increasing the cost of data roaming, AT&T and Verizon hurt consumers too. Action by the Commission to "curb unnecessarily high data roaming rates" will thus "directly benefit all consumers. . ."^{45/} and promote *more* roaming under *more reasonable* terms, consistent with the public interest.

Access to data roaming will also facilitate the expansion of advanced wireless services in currently un-served or under-served areas.^{46/} As COMPTTEL notes, the availability of data roaming arrangements is critical to a provider's ability to remain competitive and to offer consumers a choice of providers.^{47/} And, as Sprint recognizes, "the availability of data roaming

roaming); Mosa Decl. ¶ 31 (discussing unlimited use reciprocal contracts that T-Mobile recently negotiated).

^{42/} Farrell Reply Decl. ¶ 33.

^{43/} *Id.*

^{44/} See, e.g., CCA Comments at 3; Limitless Comments at 7; NTCH Comments at 6-7; PinPoint Comments at 7; Public Interest Comments at 5-6; see also T-Mobile Data Roaming Petition at 24.

^{45/} Public Interest Comments at 6.

^{46/} See, e.g., Blooston Comments at 2; CCA Comments at 6-7; COMPTTEL Comments at 2-4; RWA Comments at 8; Sprint Comments at 7; see also T-Mobile Data Roaming Petition at 24-25.

^{47/} COMPTTEL Comments at 3-4; see also Blooston Comments at 2 (noting that delays in data roaming negotiations have "hampered small and rural carriers' ability to launch competitive mobile data

has helped stimulate investment and network deployment” in rural areas.^{48/} Access to data roaming on reasonable terms will therefore provide increased customer choice in areas of the country where few carrier options are available today.

C. Supporting Commenters Endorse the Proposed Benchmarks as Appropriate And Necessary.

In its filing, T-Mobile proposed four benchmarks for prospectively assessing commercial reasonableness in the data roaming context.^{49/} Again, with the exception of AT&T and Verizon, commenters overwhelmingly endorse the proposed benchmarks.^{50/}

First, T-Mobile proposed that the Commission adopt a benchmark that considers whether a wholesale roaming rate offered to a retail competitor greatly exceeds a “suitable measure” of retail price.^{51/} As T-Mobile previously stated, the Commission should be particularly wary of wholesale roaming rates that are intended to, and have the effect of, keeping retail data rates unnecessarily high for wireless customers of competitors.^{52/} COMPTTEL agrees, noting that a provider requesting wholesale roaming arrangements competes with the host provider for customers at the retail level, giving the host provider the incentive to raise its rivals’ costs, which

services”); RWA Comments at 8 (stating that “rural carriers will not survive if the FCC does not clarify . . . what are considered ‘commercially reasonable’ rates, terms and conditions”).

^{48/} Sprint Comments at 7 (quoting *Data Roaming Order* ¶ 17). Sprint cites as a “prime example” its recently announced 4G LTE agreements with 12 rural and regional network carriers and its Smart Market Alliance for Rural Transformation (“SMART”) initiative. Sprint Comments at 7. However, “[n]otwithstanding innovative arrangements to expand and upgrade coverage, no single mobile service provider has deployed a wireless network that covers all people in all places across the country.” *Id.* at 8.

^{49/} See T-Mobile Data Roaming Petition at 11-16.

^{50/} See Blooston Comments at 1-2; CCA Comments at 5-7; C Spire Comments at 6-7; COMPTTEL Comments at 2; Limitless Comments at 4-5; NTCA Comments at 5-6; NTCH Comments at 5; NTELOS Comments at 14-18; PinPoint Comments at 4-5; Public Interest Comments at 4-5; RWA Comments at 4-5; Sprint Comments at 2-5.

^{51/} T-Mobile Data Roaming Petition at 12-13.

^{52/} *Id.* at 12.

in turn suppresses competition and limits consumer choice.^{53/} There is also general agreement that it is reasonable for the Commission to adopt a benchmark based on retail mobile data pricing, particularly because – as NTELOS states – “retail prices are generally set to at least recover costs of providing a service” and because the benchmark is flexible enough to allow for roaming rates to decline when retail rates do.^{54/} While there may be valid reasons to justify a rate difference between retail and roaming rates, Sprint correctly notes that a proposed rate significantly higher than a particular benchmark “may flag an issue warranting further examination.”^{55/}

Verizon claims that it is not appropriate to base data roaming pricing on retail pricing because prices for retail data roaming offerings are based on different factors.^{56/} Dr. Farrell recognized that retail pricing of mobile data services “is somewhat complex and nonlinear, so some analysis is required in order to translate retail offers into per-MB retail prices for mobile data.”^{57/} And as Sprint notes, “[o]nce the appropriate computations are made to ensure an equivalent comparison, application of the benchmarks would yield valuable information for the Commission’s consideration.”^{58/} Even using conservative estimates, Dr. Farrell found that the wholesale roaming rates demanded by certain of T-Mobile’s roaming partners for a unit of data

^{53/} See COMPTTEL Comments at 4.

^{54/} See NTELOS Comments at 14-17; *see also* C Spire Comments at 6-7.

^{55/} Sprint Comments at 4.

^{56/} Verizon Comments at 12.

^{57/} Farrell Decl. ¶ 61.

^{58/} Sprint Comments at 4-5; *see also* Farrell Decl. ¶ 61 (stating that the proposed benchmarks should be used cautiously to calculate a high-end measure of retail pricing of data services so as to minimize false positives).

roaming are, on average, many times higher than the price charged for the same unit of data in even the most expensive retail data plans.^{59/}

Second, T-Mobile proposed that the Commission adopt a guideline that measures whether a wholesale roaming rate substantially exceeds roaming rates charged to foreign carriers when their customers roam in the U.S.^{60/} Comparing rates for foreign carriers to wholesale roaming rates would be probative because, as C Spire states, “foreign carriers have the benefit of a relatively competitive market for wholesale roaming in the U.S.”^{61/}

Verizon and AT&T argue that international roaming agreements are driven by different market and competitive considerations.^{62/} T-Mobile’s request recognized that prices in foreign markets reflect conditions that may differ from U.S. market conditions.^{63/} Because, however, foreign carriers do not offer retail service in the U.S., the “raising rivals cost” incentive is absent and the resulting agreements provide a useful benchmark for assessing the reasonableness of offers to domestic carriers.^{64/} Thus, it is precisely because the relationship with foreign carriers is different that it offers a useful benchmark. Moreover, T-Mobile also noted that rates charged

^{59/} T-Mobile Data Roaming Petition at 12 (citing Farrell Decl. ¶¶ 64-73).

^{60/} *Id.* at 13-14.

^{61/} C Spire Comments at 7; *see also* NTELOS Comments at 18.

^{62/} Verizon Comments at 11-12; AT&T Opposition at 29-30.

^{63/} Farrell Decl. ¶ 79 (stating that “prices in foreign markets in part reflect conditions there, which may differ in a variety of ways from US market conditions”).

^{64/} *Id.* ¶ 11. Notably, these same international carriers *may* find it economically rational to raise rivals’ costs in roaming negotiations in their home countries, where they compete for retail customers with their roaming partners, as AT&T does in the U.S. The Canadian Radio-television and Telecommunications Commission (“CRTC”), for example, initiated a proceeding in December 2013 to examine whether certain Canadian mobile wireless carriers were charging or proposing to charge other Canadian mobile wireless carriers significantly higher rates for roaming services when compared to U.S.-based carriers. *See* CRTC, *Wholesale Mobile Wireless Roaming in Canada – Unjust Discrimination/Undue Preference*, Telecom Decision CRTC 2014-398, at 2-3 (July 31, 2014), available at <http://www.crtc.gc.ca/eng/archive/2014/2014-398.htm> (“CRTC 2014-398”).

for wholesale data roaming by foreign carriers are consistently lower than those charged inside the United States by certain of T-Mobile's roaming partners, including AT&T.^{65/} Further, foreign carriers negotiating reciprocal roaming agreements with T-Mobile frequently address traffic imbalances by offering U.S. carriers unlimited roaming on reciprocal terms for a fixed fee, with the pro-consumer result that marginal costs for roaming approach zero.^{66/} All of these factors make using rates charged to foreign carriers an appropriate guideline.

Third, T-Mobile proposed that the Commission consider whether a wholesale roaming rate substantially exceeds the price for wholesale data service that a seller charges to Mobile Virtual Network Operator ("MVNO") customers.^{67/} AT&T and Verizon argue that this benchmark would create disincentives for build-out and investment.^{68/} As the Commission has recognized, however, the availability of data roaming on commercially reasonable terms may actually *increase* incentives for network investment by "ensuring that providers wanting to invest in their networks can offer subscribers a competitive level of mobile network coverage."^{69/}

Verizon also argues that MVNO and roaming pricing are based on different factors – in particular, MVNO rates may be designed to attract customers that differ from the customer base of the underlying service provider.^{70/} T-Mobile and Dr. Farrell previously recognized that there

^{65/} See T-Mobile Data Roaming Petition at 14.

^{66/} See Farrell Decl. ¶ 77.

^{67/} T-Mobile Data Roaming Petition at 14-15.

^{68/} See AT&T Opposition at 28-29; Verizon Comments at 10. Verizon cites to a declaration by Dr. Gregory Rosston filed in 2006 in a proceeding addressing voice roaming. See Verizon Comments at 10. However, as Dr. Farrell explains, Dr. Rosston was discussing a proposal made eight years ago that would have capped wholesale voice roaming rates, a proposal which bears no resemblance to the guidance sought here. Farrell Reply Decl. ¶ 42.

^{69/} See *Data Roaming Order* ¶ 17; Farrell Reply Decl. ¶ 41.

^{70/} Verizon Comments at 11.

are differences between MVNO agreements and roaming agreements.^{71/} But examining rates that facilities-based carriers charge MVNOs remains instructive since – as NTELOS states – “there is no reason why the wholesale rates for minutes and megabytes charged to other carriers (*i.e.* roaming) should be so much higher than the wholesale rates for minutes and megabytes charged to MVNOs.”^{72/}

Finally, T-Mobile noted that it would be informative for the Commission to consider how the proposed wholesale roaming rate compares to other competitively negotiated wholesale roaming rates.^{73/} Again, use of this benchmark would help clarify whether pricing practices of “must-have” roaming partners are commercially reasonable.^{74/} Commenters agree, however, that this benchmark should be used with caution since, as discussed here, previously negotiated comparison agreements may not be commercially reasonable because of an imbalance of bargaining power.^{75/}

Importantly, and as NTCH notes, adoption of the benchmarks will not require the Commission to deviate from its current case-by-case, totality of the circumstances approach in examining roaming agreements.^{76/} As Sprint states, making more relevant facts and information

^{71/} See T-Mobile Data Roaming Petition at 14-15. As Dr. Farrell states, the “raising rivals’ cost” motive for charging high wholesale rates is tempered in the MVNO setting if the MVNO service is a qualitatively different retail product from that sold by the facilities-based carrier. See Farrell Decl. ¶ 12.

^{72/} NTELOS Comments at 17 (quoting T-Mobile Data Roaming Petition at 15); see also C Spire Comments at 7.

^{73/} T-Mobile Data Roaming Petition at 15-16.

^{74/} See C Spire Comments at 7; NTELOS Comments at 18.

^{75/} See, *e.g.*, CCA Comments at 6; NTELOS Comments at 18.

^{76/} NTCH Comments at 5.

available for the FCC to conduct its analysis increases the likelihood “that a truly commercially reasonable outcome will be reached.”^{77/}

D. Commenters Also Endorse the Remaining Clarifications Sought By T-Mobile.

Commenters, with the exception of AT&T and Verizon, similarly express support for the remaining clarifications proposed in the Petition. Specifically, commenters agree that the Commission should make clear that the presumption that the terms of an existing roaming agreement are commercially reasonable applies only with respect to challenges to the terms of *that agreement*, and not to the reasonableness of *future* roaming agreements.^{78/} Where there is unequal bargaining power between the parties, an existing agreement may have been commercially unreasonable from the start.^{79/} Moreover, even assuming that the existing agreement was commercially reasonable when signed, changes in the marketplace can easily render it commercially unreasonable today.^{80/}

In addition, commenters agree that the FCC should clarify that its inclusion of “the extent and nature of providers’ buildout” in the *Data Roaming Order* as a factor for consideration was not intended to allow a host carrier to deny roaming in a particular area where an otherwise built-out requesting provider needs to roam.^{81/} As C Spire recognizes, this factor was adopted to

^{77/} Sprint Comments at 3.

^{78/} See, e.g., C Spire Comments at 8-9; Limitless Comments at 5; NTCA Comments at 6; NTELOS Comments at 18-19; PinPoint Comments at 5; RWA Comments at 7; Sprint Comments at 5-6; see also T-Mobile Data Roaming Petition at 16-22; *Data Roaming Order* ¶ 81.

^{79/} See, e.g., NTCA Comments at 6; NTELOS Comments at 18-19; Sprint Comments at 5-6; see also T-Mobile Data Roaming Petition at 17-18.

^{80/} See, e.g., Sprint Comments at 5; T-Mobile Data Roaming Petition at 17-19.

^{81/} See, e.g., C Spire Comments at 7-8; Limitless Comments at 5; PinPoint Comments at 4; RWA Comments at 7; Sprint Comments at 6-9; see also T-Mobile Data Roaming Petition at 22-23; *Data Roaming Order* ¶ 86.

prevent carriers with limited or no networks from utilizing data roaming agreements to piggyback on other carriers' networks; it should not be used to penalize carriers that have built out their networks but have not yet reached a particular area because of costs, zoning limitations, the inability to recover investments, or other similar factors.^{82/} As Sprint puts it, preventing host providers from invoking this factor "as a means to short-circuit the data roaming rule will help safeguard the Commission's core policy goals to advance competition, promote mobile broadband network deployment, and provide consumers access to seamless, nationwide service."^{83/}

AT&T and Verizon assert incorrectly that T-Mobile is attempting to evade its build-out obligations by seeking the guidance requested in the Petition.^{84/} This suggestion wrongly assumes carriers seeking roaming face a binary choice between roaming or building network.^{85/} In fact, the alternative to paying AT&T's and Verizon's unreasonable roaming charges may be for the requesting carrier to not provide service in high-cost areas at all – either through roaming or network build-out – or, alternatively, to offer service through roaming on a restricted basis only.^{86/} Neither outcome benefits consumers in these areas.

AT&T and Verizon also ignore the fact that their regulatory obligation to provide data roaming on commercially reasonable terms is unaffected by the requesting carriers' build-out

^{82/} See C Spire Comments at 8; see also T-Mobile Data Roaming Petition at 22. As Dr. Farrell explains, there are a variety of reasons a mobile provider may decide not to build out, including that it may be uneconomic to build out and, in rural and less densely populated areas, a mobile provider may never recover its investment if it attempts to deploy network infrastructure. Farrell Reply Decl. ¶ 40.

^{83/} Sprint Comments at 8-9.

^{84/} See Verizon Comments at 5, 10; AT&T Opposition at 4-5, 22-23.

^{85/} Farrell Reply Decl. ¶ 38.

^{86/} *Id.* Moreover, as noted above, AT&T's own roaming practices may distort build-out decisions. See, *supra*, Section I(A)(3).

status. In the *Data Roaming Order*, the FCC considered and rejected the argument that a carrier’s decision not to build out in a particular area constitutes grounds for denying that carrier data roaming. Specifically, the FCC clarified that “a host provider may not decline to enter into a roaming agreement with a requesting provider on the grounds that the requesting provider is not actually providing service at the time of the request for negotiations.”^{87/} Further, the Commission declined to adopt a “substantial network” requirement, finding that the inability to negotiate a roaming arrangement before making a substantial build-out “could deter new entrants and small, rural, and mid-sized providers from investing in broadband at the exact time such investment is sorely needed.”^{88/}

The Commission’s decision that access to data roaming remains a paramount public interest goal remains correct.^{89/} Commercially reasonable data roaming agreements are essential to ensuring that hard-to-serve areas are accessible to multiple carriers, and to the provision of competitive services.^{90/} The guidance T-Mobile seeks will help achieve this goal.

^{87/} *Data Roaming Order* ¶ 48.

^{88/} *Id.* ¶ 51.

^{89/} See T-Mobile Data Roaming Petition at 22; Farrell Decl. ¶ 34. The Commission has similarly noted that there may be areas of the country where building another network may be economically infeasible or unrealistic. See, e.g., *Data Roaming Order* ¶ 15, n.51; ¶ 34, n.110.

^{90/} See, e.g., *Data Roaming Order* ¶ 15 (“We agree that the availability of roaming capabilities is and will continue to be a critical component to enable consumers to have a competitive choice of facilities-based providers offering nationwide access to commercial mobile data services.”).

II. AT&T’S AND VERIZON’S ARGUMENTS DO NOT ADDRESS THE HARMS IDENTIFIED IN THE PETITION.

A. AT&T And Verizon Dodge Dr. Farrell’s Raising Rivals’ Costs Analysis.

1. AT&T and Verizon Fail to Address the Problem of Raising Rivals’ Costs Strategies.

AT&T and Verizon also fail to meaningfully address Dr. Farrell’s raising rivals’ costs analysis, which is well-accepted by antitrust economists and the Commission, and which explains precisely why these carriers have an incentive to set roaming charges for competitors at a rate higher than what they would demand in a stand-alone market transaction.^{91/} As Dr. Farrell explains, a seller of roaming services with market power may find it profitable to raise a competing carrier’s costs by insisting on high wholesale data roaming rates, thereby inducing the second carrier to raise its retail prices^{92/} or compromise its service quality – *e.g.*, by limiting roaming for its subscribers.^{93/} AT&T itself appears to acknowledge this Hobson’s choice when it argues that, instead of restricting customers’ roaming on AT&T’s network, T-Mobile could simply “structure [its] charges in different ways.”^{94/}

As the Public Interest Commenters also recognize, the high price of data roaming effectively prohibits T-Mobile from offering consumer-friendly, unrestricted mobile broadband access at an affordable cost where T-Mobile requires roaming arrangements.^{95/} Given

^{91/} See Farrell Reply Decl. ¶¶ 17-18.

^{92/} See *id.* ¶ 19; see also Submission by Truphone, Inc. and Truphone Limited, WT Docket No. 05-265, at 5 (filed Aug. 11, 2014) (“Truphone Comments”) (describing how a dominant carrier’s high roaming rates can prevent a competitor from offering a competitively priced service).

^{93/} See Farrell Reply Decl. ¶ 27; Farrell Decl. ¶¶ 4, 45.

^{94/} See AT&T Opposition at 11, n.28.

^{95/} Public Interest Comments at 5.

T-Mobile’s history of offering low-price voice and data plans, “it seems reasonable to assume that requiring AT&T and Verizon to negotiate commercially reasonable data roaming agreements will result in T-Mobile offering lower prices and uncapped and unthrottled plans – forcing AT&T and Verizon to lower their own data rates.”^{96/}

The benchmarks proposed in T-Mobile’s Petition are designed to identify if and when carriers are undertaking the anticompetitive strategy of raising rivals’ costs. AT&T and Verizon have failed to rebut Dr. Farrell’s finding that dominant carriers with market power over data roaming have both the incentive and the ability to raise rivals’ costs through imposition of commercially unreasonable data roaming rates and terms.

2. AT&T’s “Net Purchaser” Argument is Flawed.

AT&T argues that – as a net purchaser of roaming – it has no incentive to increase roaming charges.^{97/} But this argument is flawed. Reference to AT&T’s aggregated roaming needs obscures its dominant position in roaming negotiations with virtually every other individual carrier, including T-Mobile. In fact, the Commission’s staff has previously found evidence to suggest that AT&T’s “net purchaser” arguments “are subject to question,” in part because AT&T has been working to reduce its roaming payments to other providers in recent years.^{98/} In addition, as Dr. Farrell points out in his Reply Declaration, a firm with market power in an input market may seek to raise its rivals’ costs along with its own costs if, as a result, downstream prices will rise, thus causing an increase in downstream profits.^{99/} In other words,

^{96/} *Id.* at 6-7.

^{97/} *See* AT&T Opposition at 19; *see also* AT&T Opposition at 13, n.32.

^{98/} *See Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, Staff Analysis and Findings, 26 FCC Rcd. 16188, 16240, ¶ 103 (2011).

^{99/} *See* Farrell Reply Decl. ¶ 36.

the “net purchaser” argument ignores the possible spill-over effects of high roaming rates on AT&T’s retail revenues.^{100/} Thus, even assuming it is true that AT&T is a net payor of roaming, that fact alone does not indicate whether it will have an incentive to raise wholesale roaming rates.^{101/}

Rather than rebut these arguments, AT&T argues, in effect, that the “Golden Rule” applies to its roaming agreements. AT&T argues that it “has no incentive to seek high data roaming rates, since even if AT&T is not a net payor in a particular relationship, those rates will inform negotiations in other contexts where AT&T is a net payor.”^{102/} This assumes that the data roaming market is well-functioning and transparent, which it is not.

To the contrary, data roaming rates with any particular carrier are purposefully kept secret by strong non-disclosure agreements and confidential negotiations. AT&T should, therefore, be expected to seek out a roaming rate that is in its best interest in each individual negotiation.^{103/} Moreover, if AT&T strategically charged higher rates to a particular competitor in a reciprocal roaming transaction, or offered lower rates to a different carrier, there would still be no connection to the overall rates that it would pay for data roaming from other carriers. It is not clear, then, why AT&T would offer a lower rate in any particular roaming negotiation simply because it is a net payor.^{104/}

^{100/} See *id.* The raising rivals’ costs literature makes clear that – in considering whether a firm with market power has the incentive to raise rivals’ costs – one should consider the effect of such an increase on the firm’s total profits. See *id.* ¶ 12.

^{101/} *Id.* ¶ 36.

^{102/} AT&T Opposition at 19.

^{103/} Farrell Reply Decl. ¶¶ 12, 35.

^{104/} *Id.* ¶ 35.

B. Network Migration From GSM to LTE Does Not And Will Not Eliminate The Need For Relief.

There can be no question that AT&T and Verizon have market power over data roaming. Commenters recognize that AT&T's and Verizon's status as "must-have" roaming partner carriers puts them in the position to dictate roaming terms.^{105/} As NTELOS states, AT&T is an "almost-required roaming partner" because it is often the only potential roaming provider in a given area.^{106/} In fact, AT&T is the *only* roaming partner available to T-Mobile in 17 states and in parts of many other states,^{107/} and T-Mobile only uses AT&T as a roaming partner today *where T-Mobile has no other choice.*

Unfortunately, the adoption of LTE technology will not alleviate AT&T's and Verizon's pricing power for roaming services.^{108/} The migration to LTE will not be immediate; the transition will be a multi-year process, and carriers will still need to support 2G and 3G customers for the foreseeable future. The LTE transition does nothing for the hundreds of thousands of wireless customers who currently own 2G and 3G data devices. As Mr. Mosa explained in his Declaration, many customers are slow to adopt the most modern handsets; thus carriers will continue to need a roaming partner that provides compatible last-generation

^{105/} See, e.g., C Spire Comments at 5 (stating that AT&T and Verizon, which have the most ubiquitous coverage, hold substantial spectrum holdings, and account for a majority of wireless service revenues, are in a position to use their market power to dictate roaming terms); CCA Comments at 6-7 (noting that AT&T's market power, which continues to grow, can lead to increased costs and prices to competitors, which are ultimately passed on to consumers); Limitless Comments at 3 (stating that it was "pressured" into entering into a data roaming deal with AT&T because AT&T offers wireless data coverage in nearby markets that are not covered by other carriers); RWA Comments at 5 (stating that AT&T is a must-have roaming partner for GSM carriers).

^{106/} NTELOS Comments at 8.

^{107/} See also Truphone Comments at 5 ("The fact which gives rise to the problem complained of by T-Mobile is the absence of competition in the wholesale market for the provision of national roaming services in areas where frequently, but not exclusively, AT&T is the only network operator.").

^{108/} See Mosa Decl. ¶ 23.

technology.^{109/} In addition, technological incompatibilities will persist even once LTE networks are deployed.^{110/} Each of the national carriers has announced an LTE roll-out on different spectrum bands and pursuant to inconsistent band classes that will present challenges to the development of a multi-mode handset that can consistently access LTE roaming.^{111/} As a result, a carrier may continue to have no choice of a roaming provider even in areas where there are two or more built-out, but incompatible LTE networks. Further, if a carrier attempts to support another LTE band class across the millions of consumer handsets it sells in order to support roaming, the carrier will be technologically locked into roaming solely on that provider.

C. AT&T's Argument Regarding the Impact of Its High Data Roaming Rates on T-Mobile's Cost Structure is Unpersuasive.

AT&T argues that its data roaming rates cannot possibly cause competitive harm to T-Mobile “because T-Mobile’s roaming costs are only a tiny fraction (less than half of one percent) of its total service revenues.”^{112/} But the percentage of revenue that T-Mobile currently pays to AT&T for roaming is, in fact, powerful evidence that AT&T’s data roaming rates are unreasonable. As Dr. Farrell explains, when a firm with market power raises a rival’s costs, the rival may raise prices, reduce output, or both.^{113/} Because AT&T’s rates are unreasonably high, T-Mobile must limit its customers’ ability to roam on AT&T’s network. The fact that

^{109/} *Id.* ¶ 22.

^{110/} *Id.* ¶¶ 22-23.

^{111/} Verizon’s initial LTE deployment is in the upper 700 MHz band using the 3GPP band class 13. AT&T’s initial LTE deployment is in the lower 700 MHz band using the 3GPP band class 17. Sprint’s initial LTE deployment is in the PCS H Block using 3GPP band class 25. T-Mobile’s initial LTE deployment is in the AWS band using 3GPP band class 4. While Verizon and AT&T are also deploying LTE service using the AWS band in some markets, their deployments are to solve capacity challenges and may be of limited use for roaming.

^{112/} AT&T Opposition at 12.

^{113/} Farrell Reply Decl. ¶ 27.

T-Mobile's roaming costs represent only a small percentage of total revenues reflects that fact that it has responded to the high rates by limiting its customers' roaming on AT&T's networks.^{114/}

If AT&T were not motivated by anticompetitive animus, it presumably would charge T-Mobile a reasonable roaming rate designed to drive higher traffic volumes to its network where it has the capacity to do so, thereby increasing its roaming revenues. In fact, T-Mobile has, in the past, made data roaming offers to AT&T that would allow T-Mobile to expand roaming on AT&T's network, thereby resulting in greater volume, revenues, and profits for AT&T.^{115/} These offers – the “readily available commercial solutions for roaming needs” that AT&T urges T-Mobile to pursue^{116/} – have been rejected. As Mr. Mosa stated in his Declaration, these anticompetitive tactics “seem designed to weaken T-Mobile rather than maximize the incremental revenue T-Mobile could offer to AT&T by expanding its roaming on AT&T's network.”^{117/}

III. T-MOBILE'S PETITION IS CONSISTENT WITH THE *DATA ROAMING ORDER* AND IS PROCEDURALLY APPROPRIATE.

A. The Petition Is Consistent With The *Data Roaming Order*.

AT&T and Verizon suggest that the proposals in the Petition should be rejected because they are either inconsistent with the FCC's *Data Roaming Order* or have already been considered by the FCC.^{118/} T-Mobile disagrees.

^{114/} *Id.* ¶ 28.

^{115/} *See* Mosa Decl. ¶ 17.

^{116/} AT&T Opposition at 15-16.

^{117/} Mosa Decl. ¶ 17.

^{118/} *See* AT&T Opposition at 16-25; Verizon Comments at 6, 10.

First, the Petition is fully consistent with the *Data Roaming Order*. It merely seeks the type of additional guidance that the *Data Roaming Order* itself anticipated might be necessary. The *Data Roaming Order* expressly invited carriers to file petitions for declaratory ruling like this one.^{119/} Without additional FCC guidance, “must-have” roaming partners will continue to be able to insist on unreasonable terms, thereby undermining the purpose of the data roaming rules.^{120/}

Second, the FCC, as several parties recognize, has emphasized that its list of factors is “not exclusive or exhaustive.”^{121/} CCA, for example, correctly observes that the *Data Roaming Order* left the door open for providers to propose other relevant factors.^{122/} Even AT&T acknowledges that the Commission may consider other factors not included in its list.^{123/} The fact that not all proposed benchmarks were adopted in the *Data Roaming Order* proceeding does not preclude the Commission, three years later, from appropriately relying on T-Mobile’s proposed benchmarks in fashioning additional industry-wide guidance on this critical matter.

Third, as detailed above, marketplace experience since adoption of the *Data Roaming Order* demonstrates that guidance is expeditiously needed. Without the benefit of the guidance that T-Mobile seeks, some carriers – AT&T in particular – will show no urgency in negotiating reasonable roaming agreements. For example, T-Mobile’s current roaming agreement with AT&T expires on December 31, 2014. It has taken T-Mobile a minimum of nine months, but as long as 18 months, to re-negotiate a roaming agreement with AT&T. AT&T is able to subject

^{119/} See *Data Roaming Order* ¶ 75.

^{120/} See T-Mobile Data Roaming Petition at 2.

^{121/} See *Data Roaming Order* ¶ 87 (emphasis added); T-Mobile Data Roaming Petition at 4, n.14.

^{122/} See CCA Comments at 7-8.

^{123/} See AT&T Opposition at 8.

T-Mobile and other carriers to this protracted process precisely because it knows that they have no other choice.^{124/}

The record confirms that, as noted above,^{125/} carriers have increasingly reported difficulties negotiating reasonable data roaming agreements.^{126/} CCA explains that this problem has been exacerbated by skyrocketing demand for data services, and increased market consolidation by the two largest carriers that has reduced the number of potential roaming partners.^{127/} Other commenters also observe that market changes have reduced competition in the roaming market, warranting renewed FCC evaluation of the data roaming rules.^{128/} As AT&T concedes, the Commission has committed to monitoring the market and to taking additional action as necessary.^{129/} The FCC should therefore act now to ensure that its data roaming rules promote competition and serve the public interest.

^{124/} Mosa Reply Decl. ¶¶ 4, 9.

^{125/} *See, supra*, Section I(A)(1).

^{126/} *See* T-Mobile Data Roaming Petition at 6-7.

^{127/} *See* CCA Comments at 2-5.

^{128/} *See, e.g.*, RWA Comments at 5-6 (noting that unprecedented consolidation in the wireless industry has significantly reduced competition in the mobile data roaming market, limiting the number of roaming partners (primarily down to AT&T and Verizon as “must-have” roaming partners) and resulting in unreasonable roaming rates, terms, and conditions); NTELOS Comments at 4-11 (suggesting that the time has come to take action, as the data roaming market has become even more dysfunctional since 2010 as a result of Verizon’s and AT&T’s continued consolidation of the wireless market, which has allowed them to dictate unreasonable rates, or even worse – refuse to enter into 4G data roaming arrangements altogether).

^{129/} *See* AT&T Opposition at 18 (“[A] party is free under the Commission’s existing rules to try to demonstrate that market conditions have changed . . .”); *see also* *Data Roaming Order* ¶ 56; CCA Comments at 7-8 (stating that granting the Petition would be consistent with the FCC’s commitment to monitor the market and take additional action as necessary).

B. The Proposed Benchmarks Do Not Constitute Rate Regulation.

AT&T and Verizon assert that the proposals in the Petition constitute impermissible common carrier rate regulation.^{130/} To the contrary, T-Mobile’s Petition merely seeks guidance and clarity on what constitutes “commercially reasonable” in the data roaming context.^{131/} The proposed benchmarks are not mathematical algorithms that produce a prescribed rate (or other term of service), and providers will still have “wide room for variation” in negotiating roaming agreements.^{132/} As Dr. Farrell reiterates, it is reasonable for the Commission to evaluate the proposed benchmarks in conjunction with each other, including in comparison to competitively negotiated rates.^{133/} Providers will continue to negotiate freely, and the discretion in the data roaming rules for individualized bargaining will remain “carved out in fact,” as instructed by the D.C. Circuit.^{134/}

The record shows broad agreement on this point. CCA points out that, not only would adoption of T-Mobile’s proposals still allow individualized bargaining and case-by-case review by the FCC of the relevant factors, they would not impose any presumption of reasonableness.^{135/} C Spire likewise explains that T-Mobile’s proposals do not amount to rate regulation or constitute common carrier regulation because they do not interfere with the ability of service providers to negotiate the terms and prices of agreements on an individualized basis.^{136/} NTCH

^{130/} AT&T Opposition at 6, 32-34.

^{131/} See T-Mobile Data Roaming Petition at 26.

^{132/} See *id.* at 26-27.

^{133/} See Farrell Reply Decl. ¶¶ 46, 48.

^{134/} See T-Mobile Data Roaming Petition at 26.

^{135/} See CCA Comments at 9-10.

^{136/} See C Spire Comments at 5-10.

agrees that application of the proposed criteria would not preclude providers from negotiating individually-tailored roaming agreements.^{137/}

In fact, one aspect of Dr. Farrell’s analysis that AT&T paints as a “flaw” proves the point: the Petition seeks directional guidance, not a definite, prescriptive rate.^{138/} At the same time as it decries Dr. Farrell’s proposal as prohibited rate regulation, AT&T seems to criticize Dr. Farrell’s proposal because it does not clearly prescribe a rate.^{139/} AT&T is correct that Dr. Farrell does not attempt to supply a rate formula. As Dr. Farrell explains, he “did not recommend that the Commission rely on a single benchmark exclusively or that it treat a particular benchmark as constituting a ceiling on what is a commercially reasonable rate.”^{140/} Rather, he provides reasonable guideposts that will continue to allow for individualized negotiations. The flexibility of these benchmarks and their proposed application clearly demonstrate that the benchmarks do not constitute common carrier regulation.

C. The Petition Does Not Seek Substantive Changes Necessitating a Formal Notice-and-Comment Rulemaking.

AT&T and Verizon assert that a Petition for Declaratory Ruling cannot be used to provide the requested guidance,^{141/} and that, instead, the proper vehicle under the Administrative Procedure Act (“APA”) is a Petition for Rulemaking.^{142/}

^{137/} See NTCH Comments at 5-7.

^{138/} We note that other commenters have called for more prescriptive regulation of data roaming. See, e.g., Blooston Comments at 1-3; Limitless Comments at 5-6, 8-9; NTCA Comments at 6-8; PinPoint Comments at 3-6, 8-9; RWA Comments at 7-9.

^{139/} AT&T Opposition at 31.

^{140/} Farrell Reply Decl. ¶ 16; see also *id.* ¶ 48.

^{141/} See AT&T Opposition at 16-17.

^{142/} See *id.*

It is well-established that any action that “works substantive changes,” makes “major substantive legal additions,” or “effectively amends” an existing rule requires notice-and-comment rulemaking procedures under the APA.^{143/} The Petition, however, does not seek any substantive change or additions to the data roaming rules. Nor does it seek to re-visit any of the decisions made in the *Data Roaming Order*. The Petition seeks only to remove uncertainty and clarify the guidance already provided in the *Data Roaming Order*, which does not necessitate a Petition for Rulemaking. To the contrary, as a decision cited by AT&T notes, rules that “suppl[y] crisper and more detailed lines than the authority being interpreted” or simply provide “a clarification of an existing rule” do not require notice-and-comment rulemaking procedures.^{144/}

Other commenters agree that a Petition for Declaratory Ruling is the proper vehicle for T-Mobile’s proposals. CCA explains that the Petition does not seek to change the data roaming rule, but merely supplements and adds clarity to previous FCC guidance in light of current market circumstances.^{145/} Sprint similarly agrees that T-Mobile’s proposals seek to clarify, rather than expand or modify, the court-affirmed data roaming rule.^{146/} And as Sprint notes, the proposed benchmarks can be easily integrated into the FCC’s fact-specific analysis, will provide additional points of reference and comparison, and will provide insight into market conditions.^{147/}

^{143/} See *U.S. Telecom Ass’n v. FCC*, 400 F.3d 29, 28 (D.C. Cir. 2005).

^{144/} See *id.* at 28 (finding that such clarifications are “interpretative rules” that are not subject to APA notice-and-comment requirements); AT&T Opposition at 17, n.46.

^{145/} See CCA Comments at 7-8.

^{146/} See Sprint Comments at 9-10.

^{147/} See *id.* at 2-5.

D. The Petition is Not a Complaint Against a Single Provider and the Requested Guidance Will Have Industry-Wide Impact.

T-Mobile's Petition is not a party-to-party complaint against AT&T.^{148/} As the comments show, the Petition identifies an industry-wide need for guidance best addressed through a Petition for Declaratory Ruling. According to a recent NTCA survey, more than half of NTCA members have categorized the experience of negotiating roaming agreements as moderately to extremely difficult.^{149/} Comments by others also demonstrate that access to equitable roaming agreements is a challenge faced by *all* carriers.^{150/} These are precisely the circumstances under which a Declaratory Ruling is appropriate. Prompt resolution of T-Mobile's Petition is essential to provide the entire wireless industry with necessary guidance for ongoing and future negotiations and predictable criteria for individualized arbitration or complaint proceedings should negotiations break down.

Moreover, to confirm, the Commission explicitly invited the submission of Petitions for Declaratory Ruling in the *Data Roaming Order*.^{151/} Verizon argues that, while the *Data Roaming Order* invited Petitions for Declaratory Ruling, it did so only as an alternative to complaint proceedings for resolving two-party roaming disputes.^{152/} But by adopting rules that offer alternative procedural vehicles, the Commission recognized that complaint procedures

^{148/} See Verizon Comments at 1 (stating that "T-Mobile seeks to use a data roaming rate dispute with one carrier as a vehicle for requesting that the Commission make sweeping changes to its 2011 *Data Roaming Order*").

^{149/} See NTCA Comments at 2-6.

^{150/} See, e.g., Blooston Comments at 3-4 (emphasizing the challenges its carriers face in fulfilling their public interest obligations in the wake of undue delay in negotiations and unreasonable data roaming rates); COMPTTEL Comments at 1-4 (noting that smaller providers continue to experience difficulties in negotiating reasonable data roaming arrangements with Verizon and AT&T).

^{151/} See T-Mobile Data Roaming Petition at 4; *Data Roaming Order* ¶ 75.

^{152/} See Verizon Comments at 4.

would not always be appropriate. T-Mobile's Petition is the appropriate vehicle for raising these industry-wide concerns.

IV. CONCLUSION

The record in this proceeding is clear that wireless carriers are unable to obtain data roaming on commercially reasonable terms. Clarification by the FCC of what constitutes "commercially reasonable" terms and conditions for data roaming is required to realize the public interest benefits associated with data roaming. T-Mobile respectfully requests that the Commission expeditiously issue a declaratory ruling that provides modest prospective guidance and predictable enforcement criteria for determining whether the terms of any given data roaming agreement or proposal meet the "commercially reasonable" standard.

Respectfully submitted,

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August 20, 2014

EXHIBIT 1
Reply Declaration of Dirk Mosa

REPLY DECLARATION OF DIRK MOSA

I, Dirk Mosa, do hereby declare and state as follows:

1. My name is Dirk Mosa. I am the Senior Vice President, Corporate Development and Roaming at T-Mobile USA, Inc. (“T-Mobile”). My background and experience is fully described in the May 22, 2014 “Declaration of Dirk Mosa” that is attached as Exhibit 1 to the “Petition for Expedited Declaratory Ruling of T-Mobile USA, Inc.” filed with the FCC on May 27, 2014, in WT Docket No. 05-265 (the “Petition”). What follows is a supplemental declaration addressing points raised by AT&T in its Comments filed on July 10, 2014 in this proceeding.

2. AT&T claims that there is no need for further regulatory guidance regarding data roaming because the marketplace is functioning. I disagree. In my nine years of experience negotiating roaming agreements for T-Mobile USA, including with AT&T, it has become clear that the data roaming marketplace is not functioning well.

3. T-Mobile has been forced into commercially unreasonable agreements with AT&T. In fact, T-Mobile has data roaming agreements with many other domestic carriers, and AT&T’s rate is currently *150 percent higher* than the average rate that T-Mobile pays for data roaming across all other domestic partners. Based on our acquisition of MetroPCS, we also know that AT&T’s current data roaming rate with T-Mobile is *one thousand percent higher* than the data roaming rate negotiated between Leap Wireless and MetroPCS prior to AT&T’s acquisition of Leap. However, that agreement was not surprisingly terminated by AT&T immediately after the Leap acquisition closed.

4. T-Mobile has no other option than to pay the exorbitant rates that AT&T demands because of the importance of roaming to any carrier’s business model – including T-Mobile’s – and the lack of other roaming partner options. AT&T is currently the only GSM roaming partner available to T-Mobile in 17 entire states and portions of many other states. The lack of alternatives has been exacerbated by AT&T’s acquisition of other roaming partners.

5. One of the ways AT&T drives up our roaming cost is by making us roam throughout geographically larger areas than we need. To explain, parties to roaming agreements typically mutually agree to open or restrict roaming in discrete geographic areas based on a group of cell sites organized into what are called location area codes (“LACs”). LACs can be of any size, from one cell site to multiple cell sites. Having LACs with a relatively small number of sites allows each party to closely match roaming areas to their needs for roaming services. Over the last few years in particular, as it has acquired other carriers, AT&T has begun to insist on including more sites per LAC.

6. AT&T’s design of LACs with large numbers of sites has negative consequences for T-Mobile and our customers, especially where T-Mobile only needs roaming in a small portion of a LAC. Under AT&T’s expanded LAC design, we are forced to pay for roaming coverage we don’t want or need and our customers roaming in the area will have a degraded experience due to our need to limit data services as the result of AT&T’s unreasonable roaming charges. Unfortunately, the only other alternative presented by AT&T is that our customers will simply not have data roaming service in the affected area.

7. Another way AT&T drives up roaming costs is through the anti-competitive use of “most favored nation” (“MFN”) clauses it has negotiated in roaming agreements with other carriers. Both AT&T and its roaming partners under MFN cite the MFN rate as the best available to other carriers, even though under T-Mobile’s analysis, the rates are unreasonably high. As we have been told, some of these roaming partners would extend better roaming rates to T-Mobile if they were not restricted by AT&T’s MFN.

8. AT&T says that these MFNs are “part of a larger, more complex agreement in which AT&T is either providing access to spectrum or otherwise funding build-out of broadband networks in the relevant area.” What AT&T fails to acknowledge, in my opinion, is that these high MFN data roaming rates cross-subsidize the other “arrangements” that AT&T describes. I suspect that under these business arrangements, AT&T either has an agreement with the operator to purchase their respective network and spectrum at some time in the future (something like a “call-option”), or AT&T leases spectrum to the operator with an option to purchase the network sometime in the future. As a result, operators will agree to above-market roaming rates to enter into the larger transaction to facilitate the larger deal. These operators then rely on these MFN rates as the best available when negotiating with other carriers such as T-Mobile. These MFN clauses, therefore, subject T-Mobile and other roaming carriers to roaming costs on both AT&T’s network and the network of its MFN roaming partners that are artificially inflated and completely inconsistent with commercially reasonable, independently negotiated rates.

9. Lastly, without the benefit of the guidance that T-Mobile seeks, some carriers – AT&T in particular – will continue to show no urgency in negotiating roaming agreements. For example, T-Mobile’s current roaming agreement with AT&T expires on December 31, 2014. I personally have been involved in T-Mobile’s past roaming negotiations with AT&T, and it has taken a minimum of nine months, but as long as 18 months to re-negotiate a roaming agreement with AT&T. Without direction from the Commission, I am very concerned that the present pace of negotiations may unnecessarily take this long or longer, which has the practical effect of having T-Mobile continue to pay unreasonable data roaming rates into 2015.

I have read the foregoing Reply of T-Mobile USA, Inc. With respect to statements made in the Petition, other than those of which notice can be taken, the facts contained therein and in this Declaration are true and correct to the best of my personal knowledge, information, and belief.

A handwritten signature in black ink, appearing to read "Dirk Mosa", written over a horizontal line.

Dirk Mosa

Date: August 20, 2014

EXHIBIT 2
Reply Declaration of
Joseph Farrell, D.Phil.
In Support of Petition for Expedited
Declaratory Ruling of T-Mobile USA, Inc.

REPLY DECLARATION OF JOSEPH FARRELL, D.PHIL.
IN SUPPORT OF PETITION FOR DECLARATORY RULING OF T-MOBILE USA, INC.
(WT Docket No. 05-265)

August 20, 2014

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I. Introduction

- (1) I have been asked by counsel for T-Mobile to respond to certain arguments made by AT&T and Verizon in the above-captioned proceeding and to highlight certain issues that they fail to address. Before turning toward this discussion, however, I summarize what I said in my initial declaration.

I.A. Summary of initial declaration

- (2) Consumers have come to expect nationwide voice and data coverage in their mobile plans, and carriers must provide such coverage if they are to remain competitive. But no carrier has a truly nationwide ubiquitous network. This is in part due to the fact that (as the Commission recognized in the *Data Roaming Order*) in certain parts of the country it may be economically infeasible for more than one carrier to build out its network. Accordingly, all mobile providers have to rely on roaming. Moreover, with the widespread adoption of smart phones, data roaming services have become increasingly important for retail competition among wireless carriers.
- (3) While competition in offering wholesale data roaming exists in most urban areas, the high cost of building out networks means that there exist “pockets of monopoly” in certain areas (either because there is only one carrier that has built out its network or because there is only one carrier that employs a technology compatible with the carrier seeking roaming). These pockets of monopoly give some carriers (large and small) a degree of market power in wholesale data roaming markets.
- (4) Where the seller of wholesale roaming services also competes with the roaming purchaser in retail markets, the roaming provider may have additional incentives to raise its rival’s costs even higher than it would charge if it were not competing. High wholesale rates will normally induce the purchasing carrier either to raise its retail rates or limit its customers’ use of roaming (or both). These effects will harm consumers even though the downstream retail market may remain reasonably competitive.
- (5) Recognizing this possibility, the Commission, in the *Data Roaming Order*, stated that, in evaluating whether a rate is commercially unreasonable, it would consider “the level of competitive harm in a given market and the benefits to consumers.”¹ It further stated that it also

¹ *Reexamination of Roaming Obligations Of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Second Report and Order, 26 FCC Rcd 5411, 5452-53, ¶ 86 (2011) (“*Data Roaming Order*”).

would consider “whether the terms and conditions offered by the host provider are so unreasonable as to be tantamount to a refusal to offer a data roaming arrangement.”²

- (6) In my initial declaration, I proposed that the Commission, in evaluating whether a proposed data roaming rate (or agreement) is commercially reasonable, should be especially concerned about high rates charged to a significant retail competitor that lacks adequate alternative roaming providers. To address this concern, I proposed that the Commission provide prospective guidance and predictable enforcement criteria to aid in identifying rates likely to have been influenced by such localized monopoly power and raising rivals costs strategies. I also noted that the effects of local market power may be blended into a single nationwide roaming rate that covers both areas of monopoly and areas where competing data roaming providers are present.
- (7) I also discussed several benchmarks that the Commission should consider in drafting prospective guidance for the industry and also in evaluating whether a proposed wholesale data roaming rate is “high” in a sense relevant to determining whether it is commercially unreasonable. In discussing these benchmarks, I acknowledged that none of these benchmarks is, or can be, ideal, but that they will provide guidance when analyzed in the context of overall competitive conditions relevant to a particular individualized negotiation.

I.B. Summary of this reply

- (8) As discussed in more detail below, neither AT&T nor Verizon directly address the issue of whether a provider of wholesale data roaming services may have an incentive to raise rivals’ costs or whether the Commission should consider this possibility in evaluating the commercial reasonableness of wholesale data roaming rates. Yet the possibility that a firm with market power might find it attractive to raise rivals’ costs is well-accepted by antitrust economists and by the Commission. And, as I explained in my initial declaration, the fact that certain mobile providers have market power over wholesale data roaming services in particular areas, and that they compete with other mobile data providers in the downstream retail market for mobile data services, suggests that those providers may have the ability and incentive to engage in raising rivals’ costs strategies, either unilaterally or jointly.
- (9) Because of this, I recommended that the Commission, in considering whether proposed wholesale data roaming rates are commercially reasonable, should consider multiple factors, including relevant competitive conditions (*e.g.*, whether the provider of the wholesale roaming may have market power and whether it may have an incentive to use that market power to raise rivals’ costs).

² *Id.*

- (10) I also explain why, for a number of reasons, AT&T's argument that roaming costs represent only a small fraction of T-Mobile's revenues and therefore do not reflect anticompetitive effects is flawed.
- (11) AT&T's and Verizon's argument that the downward trend in wholesale roaming rates is evidence that those rates are commercially reasonable is likewise flawed. As a matter of economic logic, a downward trend in prices does not disprove the presence of market power or prove that prices are commercially reasonable. More specifically, the downward trend in rates may reflect the introduction of improved, lower-cost technology, exogenous increases in consumer demand, and changes in mobile data pricing that are intended to take advantage of the elasticity of consumer demand. Given these developments, which should lower the marginal cost of providing mobile data service, even a monopoly provider of data roaming would lower wholesale roaming rates. Thus, the downward trend in roaming rates does not imply that the lower rates are commercially reasonable.
- (12) AT&T's argument that, because it is a net payer of roaming, it has an incentive to seek low roaming rates is wrong for two reasons. First, AT&T is not constrained to seek the same roaming rate for all its roaming agreements and thus could readily seek a low rate where it was a net payer and a high rate where it was a net payee. Second, even if it were so constrained, AT&T's argument focuses only on the effect of the roaming rate on AT&T's net roaming revenues. The raising rivals' cost literature makes clear, however, that, in considering whether a firm with market power has the incentive to raise a rival's costs, one should consider the effect of such an increase on the firm's total profits.
- (13) AT&T argues that adopting the benchmarks I proposed "would *undermine* the rules by eliminating incentives for investment and encouraging the use of roaming as resale." This argument appears to assume that every carrier seeking roaming is on the margin between using roaming and building a network. But that is not the case; carriers seeking roaming have other options besides building out in a particular area where a roaming provider has demanded unreasonably high rates. They instead could decide to not provide service at all in that area, or to cap or throttle customers' roaming usage. In practice, many carriers make those alternative choices. In addition, as the Commission pointed out in its *Data Roaming Order*, the availability of wholesale data roaming may actually increase incentives for network investment by ensuring that providers can offer a competitive level of network coverage.
- (14) AT&T and Verizon argue that the fact that dozens of roaming agreements have been negotiated under the new data roaming rules means that there is no need for the Commission to offer guidance on what is "commercially reasonable." This argument, which the Commission previously rejected, is flawed for at least two reasons. First, the fact that agreement was finally reached says nothing about possible delays or costs incurred in negotiating that agreement.

Second, and more importantly, the existence of signed roaming agreements says nothing about whether the terms are reasonable. If a provider of wholesale roaming with market power were demanding excessive rates (even above the monopoly price), we would expect the purchaser to agree if the alternative were even worse, such as that it could not offer nationwide data coverage. Similarly, the absence of complaints filed with the Commission does not mean that roaming providers are not demanding excessive roaming rates. Filing a complaint is an expensive and frequently time-consuming process.

- (15) Moreover, the lack of complaints may reflect a lack of confidence in how the Commission would respond to a complaint, which in turn may be due to the need for guidance under the Commission's *Data Roaming* rules, including benchmarks and analysis of the sort that I identified.
- (16) AT&T and Verizon also present various criticisms of the specific benchmarks I proposed, but they mischaracterize how I proposed that those benchmarks be employed. I made clear that that none of these benchmarks is, or can be, ideal standing alone, and that there are measurement issues associated with the benchmarks. I recommended that the Commission apply the benchmarks cautiously and in conjunction with one another and together with an analysis of competitive risks. I did not recommend that the Commission rely on a single benchmark exclusively or that it treat a particular benchmark as constituting a ceiling on what is a commercially reasonable rate.

II. AT&T and Verizon fail to address the problem of raising rivals' costs strategies.

(17) In their comments, neither AT&T nor Verizon directly address the issue of whether a provider of wholesale data roaming services may have an incentive to raise rivals costs or whether this is a relevant factor that the Commission should consider in evaluating the commercial reasonableness of wholesale data roaming rates. As I discuss below, the Commission traditionally has been, and should continue to be, concerned about raising rivals' costs strategies that undermine competition and harm consumers.

(18) The possibility that a firm with market power might seek to raise its rivals' costs is well accepted by antitrust economists. As Salop and Scheffman explain:

It is better to compete against high-cost firms than low-cost ones. Thus, raising rivals' costs can be profitable even if the rival does not exit from the market. Nor is it necessary to sacrifice profits in the short run for "speculative and indeterminate" profits in the long run. A higher-cost rival quickly reduces output, allowing the predator to immediately raise price or market share.³

(19) Where a firm with market power over an essential input also competes in downstream retail markets, it may have an incentive to raise the price of the input to its downstream retail competitors so as to cause them to raise their prices or restrict their output. As Salop and Scheffman explain:

Under appropriate conditions, a dominant firm finds backward integration to be a cost-effective way to raise downstream prices. If the upstream merger partner has some market power, input price increases to downstream rivals (perhaps to a level above the monopoly price) will raise their costs, allowing the dominant firm to increase price or output. Upstream profits are sacrificed but down-stream profits rise disproportionately.⁴

³ Steven Salop & David Scheffman, "Raising Rivals' Costs," *American Economic Review: Papers and Proceedings*, 73, No. 2 (1983) (Salop & Scheffman (1983)): 267; *see also* Steven Salop & David Scheffman, "Cost-Raising Strategies," *Journal of Industrial Economics* 36, No. 1 (1987): 19-34 ("Such [raising rivals' costs] strategies may be profitable whether or not the rivals exit, since higher cost rivals have an incentive to cut back output and raise prices immediately, which may make it possible for the predator to reap gains even in the short run."); Thomas Krattenmaker & Steven Salop, "Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price," *Yale Law Journal* 96, No. 2 (1986).

⁴ Salop & Scheffman (1983) at 268.

- (20) Finally, unlike predatory pricing, “classical, single firm market power . . . in the relevant [downstream] *output* market is *not* essential for the success of cost-raising strategies, since even perfect competitors can benefit if rivals have higher costs.”⁵
- (21) Although the Commission has not always used the phrase “raising rivals’ costs,” it has long been concerned with the possibility that a firm with market power over an essential input, would raise the price of that input so as to exclude or disadvantage downstream competitors. This was particularly true when the Commission was introducing competition into previously regulated monopoly markets or allowing incumbent LECs into competitive markets. For example, in implementing the *Telecommunications Act of 1996*, the Commission recognized that incumbent local exchange carriers (ILECs) “have little incentive to facilitate the ability of new entrants . . . to compete against them.”⁶ In particular, the Commission pointed out that ILECs have the “incentive and ability to engage in many kinds of discrimination, including delaying the provision of “interconnection or access to unbundled network elements or degrading the quality of access.”⁷ Similarly, in implementing Section 272 of the *Telecommunications Act of 1996*, the Commission recognized that a carrier may be able to “raise prices by increasing its rivals' costs or by restricting its rivals' output through the carrier's control of an essential input, such as access to bottleneck facilities, that its rivals need to offer their services.”⁸ And it explained that “raising rivals' costs [strategies]. . . could also delay the introduction of new technologies or degrade the quality of service that a BOC affiliate's interLATA competitors would otherwise provide.”⁹
- (22) Where the Commission has suspected that a regulated telephone company may have the incentive and ability to engage in raising rivals’ costs strategies, it has imposed various types of “competitive safeguards” intended to prevent the firm having market power over an input from raising rivals’ costs or foreclosing them from the market. These competitive safeguards have included, in particular, accounting requirements, nondiscrimination requirements, performance reporting requirements, and rate regulation of the essential inputs.
- (23) The Commission’s concern with possible raising rivals’ costs strategy has not been limited to common carrier regulation, however. The Commission has identified possible raising rivals’ costs

⁵ Steven Salop & David Scheffman, “Cost-Raising Strategies, *Journal of Industrial Economics* 36, No. 1 (1987): 19-20 (emphasis added).

⁶ *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 at ¶ 307 (1996).

⁷ *Id.*

⁸ *In re Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, Notice of Proposed Rulemaking, 11 FCC Rcd 18877 at ¶131 (1996).

⁹ *Id.* at n. 241.

concerns when evaluating mergers, including cable and media mergers,¹⁰ and in assessing forbearance petitions.¹¹

- (24) Although the Commission has never applied to the mobile wireless industry the kind of stringent regulation it applied to incumbent telephone companies (and I did not recommend that it do so here), that does not mean that it should not be concerned about identifying and addressing anticompetitive behavior, including raising rivals' costs strategies, if and when they arise. As I explained in my initial declaration, the facts that certain mobile providers have market power over wholesale data roaming services in particular areas, and that they compete with other mobile data providers in the downstream retail market for mobile data services, suggests that those providers may have the incentive to engage in raising rivals' costs strategies.
- (25) Only AT&T attempts to address the possibility that wholesale roaming rates could be used to raise rivals' costs, and its attempt fails to grapple with the essence of the raising rivals' costs concern. AT&T claims that T-Mobile's raising rivals' cost theory is "far-fetched," because "T-Mobile's roaming costs are only a tiny fraction (less than half of one percent) of its total service revenues." It adds that "[i]t is simply not plausible that T-Mobile's roaming arrangements are harming it competitively, and in fact, T-Mobile has been experiencing record growth during the past two years."¹²
- (26) AT&T's argument is unpersuasive for several reasons. First, AT&T offers no reason to believe that total costs or total revenues are a useful calibration for roaming costs, unless AT&T is suggesting that the Commission should limit concerns about raising rivals' costs to cases where the affected firm is likely to exit—and, as the quotes above remind us, that would be an unwarranted and dramatic limitation.
- (27) Second, as the raising rivals' cost literature makes clear, when a firm with market power raises a rival's costs, the rival may raise prices or reduce output or both. Here, T-Mobile's understandable market response to high roaming rates is to reduce output—specifically by not offering roaming or

¹⁰ See, e.g., *In re NewsCorp. and DirecTV Group, Transferors, and Liberty Media Corp., Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd 3265 at ¶ 66 (2008) (“[W]here a firm that has market power in an input market acquires a firm in the downstream output market, the acquisition may increase the incentive and ability of the integrated firm to raise rivals' costs either by raising the price at which it sells the input to downstream competitors or by withholding supply of the input from competitors.”); *In re Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corporation, Assignors, to Time Warner Cable Inc.*, Memorandum Opinion and Order, 21 FCC Rcd 8203 ¶ 71 (2006) (“[V]ertical transactions also can have anticompetitive effects. In particular, a vertically integrated firm that competes both in an upstream input market and a downstream output market may have the incentive and ability to (1) foreclose rivals from inputs or customers or (2) raise the costs to rivals generally.”).

¹¹ *In re Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd 8622 ¶ 120 (2010) (denying requested forbearance relief on the ground, *inter alia*, that “[t]he record here does not demonstrate that Qwest no longer possesses exclusionary market power.”).

¹² AT&T Comments at p. 12 (footnote omitted).

by limiting or throttling its customers' roaming on networks with high roaming costs. Not surprisingly, these natural responses reduce the quality of T-Mobile's service (which is equivalent to a price increase) and thus harms those customers who roam on high-cost networks. And T-Mobile's actual or natural response, not another presumably less profitable response, is what determines the effect of high roaming rates on consumers and competition.¹³

- (28) Third, the fact that T-Mobile's roaming costs represent only a small percentage of its total revenues reflects the fact that it has responded to the high rates by not offering service or throttling. Had it not, its roaming costs likely would have been significantly higher. As I stated in my initial declaration, at some point a roaming price high enough to induce the requesting carrier to severely limit its customers' usage can become tantamount to a refusal to provide roaming.
- (29) Fourth, as I indicated in my initial declaration, it is not necessary that the provider of wholesale data roaming explicitly charge a high roaming price in the local area where it has market power for it to raise rivals' costs. Rather, for example, the provider of wholesale data roaming could charge a single uniform price for wholesale roaming across both local monopoly areas and areas with more competition. The local monopoly power would then be expressed as a higher uniform wholesale price relative to what the carrier would charge if all areas where it provided roaming were subject to competition. It is my understanding that such a blend is in fact the pricing structure contained in the agreement between AT&T and T-Mobile.
- (30) Finally, AT&T's suggestion that T-Mobile's recent growth is inconsistent with AT&T's raising roaming rates as part of a raising rivals' cost strategy appears based on a false premise. This argument assumes the wrong "but for" world. The relevant comparison is not between T-Mobile's current growth rate and a zero growth rate. It very well could be that T-Mobile's growth rate would have been higher if wholesale data roaming rates were closer to competitive levels.

¹³ Cf. AT&T Comments at note 28.

III. Responses to particular issues and arguments raised by the parties

III.A. The downward trend in roaming rates does not prove that rates are commercially reasonable

- (31) AT&T asserts that the wholesale roaming “rate [that] T-mobile pays AT&T today has fallen more than 70 percent since 2011,” and suggests that this is evidence that the rates are reasonable.¹⁴ Similarly, Verizon, pointing to data showing that the average domestic roaming rates paid by T-Mobile have been declining since 2008, suggests that “market forces . . . are working to ensure steady and significant decline in data roaming rates.”¹⁵ That average wholesale roaming rates have been declining over time does not necessarily imply that the rates in any particular agreement, or at any point in time, are reasonable.
- (32) There are a number of reasons why average wholesale rates have declined over time. In particular, in recent years, mobile providers have transitioned from 2G to 3G and more recently to 4G LTE networks, and each new generation of technology has been more efficient and less costly (on a per-megabit basis) than the previous generation. Similarly, as I discussed in my initial report, there has been a dramatic increase in consumer data usage, surely due in part to faster network speeds, improved smart phones, and more varied mobile content and applications, all of which have tended to increase consumer demand. In addition, mobile providers, apparently recognizing the elastic nature of consumer demand, have changed their pricing structures to encourage greater usage (both on the providers’ own networks and while roaming).¹⁶ Given the fixed costs and economies of scale associated with wireless data networks, the increased usage also means that the average per-megabit cost should have declined.¹⁷
- (33) Given these factors, which also would explain the downward trend in wholesale roaming rates, the question becomes whether this downward trend tells us anything about the commercial reasonableness of any particular wholesale rate. And the answer is clearly no. Even a monopolist has incentives to reduce prices when costs are falling significantly. If there were a single

¹⁴ AT&T Comments at 11.

¹⁵ Verizon Comments at 8.

¹⁶ As I noted in my initial declaration, mobile data providers’ recognition of the elastic nature of consumer demand is beginning to be reflected in certain roaming agreements, where both the roaming provider and the purchaser of roaming recognize that it may be in their joint interest to reduce wholesale roaming rates. Thus, for example, T-Mobile has been able to negotiate several roaming agreements recently that, for a fixed fee, provide either a large bucket of MBs or unlimited data roaming. Farrell Declaration at 30.

¹⁷ See generally Mosa Declaration at para. 21.

monopoly provider of wholesale roaming, which set roaming rates at monopoly levels and which did not compete in retail mobile data markets, we would expect to see the same downward trend, given the changes in technology and significant increases in demand and in carriers' willingness to offer unlimited or much less limited roaming if they can obtain roaming at lower rates. Similarly, if the monopoly provider of roaming were also competing in the downstream retail market and setting roaming rates above the monopoly level in order to raise rivals' costs, we should again expect to see roaming rates decline given such changes. Thus, a decline over time in wholesale roaming rates does not tell us whether providers of roaming have been engaging in raising rivals' costs strategies or whether those rates should be deemed commercially reasonable.

III.B. That AT&T is a net purchaser of roaming does not imply that it will seek to lower roaming rates overall

- (34) AT&T argues that because it is a net purchaser of roaming, it “has no incentive to seek high data roaming rates.”¹⁸ It adds that, “even if AT&T is not a net payor in a particular relationship, those rates will inform negotiations in other contexts where ATT is a net payor.”¹⁹ This argument is unpersuasive for two separate reasons.
- (35) First, it is not clear why AT&T would seek a lower rate in a roaming agreement where it is a net payee, just because overall it is a net payer. As I understand it, roaming agreements are individually negotiated and generally subject to strict confidentiality provisions. This suggests that AT&T, in each negotiation, would seek to negotiate an individual roaming rate that is in its best interests given the particular circumstances of the negotiation. Given the strict confidentiality provisions in these agreements, I see no reason why AT&T should feel compelled to seek the same roaming rate in all roaming negotiations. And AT&T has presented no evidence that it does.
- (36) Second, this argument assumes that, when negotiating roaming agreements, AT&T is only concerned about its net roaming revenue (or cost). But that ignores the possible spill-over effects of roaming rates on AT&T's retail revenues. As the raising rivals' cost literature makes clear, a firm with market power in an input market may seek to raise its rivals' costs and its own if, as a result, downstream prices will rise, thus causing an increase in the firm's downstream profits. Thus, assuming AT&T seeks to maximize its profits, it will seek higher roaming rates (even if it is a net payer of roaming) if by doing so its total profits (including both those from roaming and from retail sales) will rise. Thus, the fact that AT&T is a net payer of roaming does not tell us whether it will have an incentive to raise wholesale roaming rates.

¹⁸ AT&T Comments at 19 and n. 32.

¹⁹ AT&T Comments at 19.

III.C. Employing benchmarks to evaluate the reasonableness of roaming rates would not eliminate build-out incentives

- (37) AT&T argues that “resort to the particular benchmarks T-Mobile favors . . . would *undermine* the rules by eliminating incentives for investment and encouraging the use of roaming as resale.”²⁰ AT&T further argues that “using retail or resale rates that reflect the blended cost of serving urban, suburban and rural customers as a benchmark would be particularly inappropriate for a requesting provider like T-Mobile that uses roaming services almost exclusively in rural areas, because such low rates would act as an especially powerful disincentive for T-Mobile to build out in such areas.”²¹
- (38) Although the logic of this argument is not completely clear, AT&T appears to be suggesting that any reduction in wholesale data roaming rates would reduce or eliminate T-Mobile’s and other providers’ incentives to build out. This seems to assume that every carrier seeking roaming is on the margin between using roaming and building a network. But in a particular area where the roaming provider demands unreasonably high wholesale rates, a carrier has other options besides building out. The response may instead be to not provide roaming service to its customers in that area, or to cap or throttle such roaming. And indeed, we see evidence that carriers frequently are choosing to cap and throttle (or deny service altogether) in these areas.²²
- (39) Moreover, the logical consequence of AT&T’s claim is that there should be no roaming regulation, or possibly even no roaming at all. But the Commission has already concluded that that is not the best policy for consumers.
- (40) For a variety of reasons, including some that reflect economic efficiency, a mobile provider may decide not to build out. For example, a mobile provider may lack spectrum in particular areas where its customers travel. Even if a provider has spectrum, it may be simply uneconomic to build out. In rural and less densely populated areas, a mobile provider may never recover its investment if it attempts to deploy network infrastructure, and because of this we find no network deployment or deployment by only a single carrier in much of the United States. As I pointed out

²⁰ AT&T Comments at 4-5.

²¹ *Id.* at 5.

²² For example, Sprint reserves the right, without notice, to deny, terminate, modify, disconnect or suspend service if off-network usage in a month exceeds 100 or 300 megabytes or (based on plan terms) a majority of kilobytes.” (https://shop2.sprint.com/en/legal/os_general_terms_conditions_popup.shtml) (accessed August 12, 2014) AT&T’s terms and conditions state that a subscriber’s “offnet data usage allowance is equal to the lesser of 24 megabytes or 20% of the kilobytes included with your plan.” (<http://www.att.com/shop/en/legal/terms.html?toskey=wirelessCustomerAgreement>) (accessed August 12, 2014) US Cellular reduces data speed for all its data plans when “roaming usage exceeds 200 MB.” (<http://www.uscellular.com/data/data-management/index.html>) (accessed August 12, 2014) Metro PCS’s terms and conditions concerning roaming state that, “if your usage each month is not predominantly in our service area, we may terminate your Service or restrict your ability to receive Service outside the areas served by our network.” (<https://www.metropcs.com/terms-conditions/terms-conditions-service.html>) (accessed August 12, 2014).

in my initial declaration, according to the *Sixteenth Wireless Competition Report*, as of October 2012, over 48% of total U.S. square miles had either no wireless broadband coverage or only one wireless broadband provider.²³

- (41) Finally, as the Commission pointed out in the *Data Roaming Order*, the availability of data roaming may actually increase incentives for network investment by “ensuring that providers wanting to invest in their networks can offer subscribers a competitive level of mobile network coverage.”²⁴
- (42) Verizon, citing a declaration by Dr. Gregory L. Rosston filed in 2006 in a proceeding addressing voice roaming, argues that “linking roaming rates to MVNO rates would similarly reduce incentives to lower MVNO rates and reduce incentives to innovate.”²⁵ Verizon’s citation to Dr. Rosston’s declaration is inapt for at least three reasons. First, Dr. Rosston was criticizing a proposal that would have capped wholesale voice roaming rates at the lowest retail rate for voice that a carrier offered. I did not propose, however, that any one benchmark should be used as a cap. Second, Dr. Rosston appeared to assume that, as long as the downstream retail market were competitive, consumers could not be harmed by a carrier’s demanding high wholesale roaming rates. Although the logic of Dr. Rosston’s argument is not completely clear, he appears to ignore the fact that carriers with market power might have an incentive to raise rivals’ costs and that this could result in higher downstream retail rates. Such a price rise would harm consumers. Finally, Dr. Rosston’s stress on the possibility that linking roaming rates to retail rates would raise retail rates presumes that there is a stronger incentive to insist on high roaming rates than to compete effectively in the retail market.

III.D. That roaming agreements have been reached does not mean that the terms are reasonable.

- (43) AT&T and Verizon argue that the fact that dozens of data roaming agreements have been negotiated under the new rules means that there is no need for the Commission to offer guidance on what constitutes “commercially reasonable” terms and conditions.²⁶ AT&T and Verizon made this same argument in the *Data Roaming* proceeding, where they opposed the adoption of any data roaming rules. The Commission rejected that argument then, finding that “providers have

²³ This was probably an underestimate at that time, because the Mosaic data treat a census block as completely served if there is coverage anywhere within the census block. *See Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Sixteenth Report (2012) (*Sixteenth Mobile Competition Report*), at Table 9.

²⁴ *Data Roaming Order*, 26 FCC Rcd at ¶ 17.

²⁵ Verizon Comments at 10.

²⁶ AT&T Comments at 1 & 10; Verizon Comments at 1.

encountered significant difficulties obtaining data roaming arrangements on advanced “3G” data networks, particularly from the major nationwide providers.”²⁷

- (44) For several reasons, it should likewise reject that argument here. First, the fact that agreement was finally reached says nothing about possible delays or costs incurred in negotiating that agreement. Second, and more importantly, the existence of signed roaming agreement says nothing about whether the terms are reasonable. We see purchasers entering into agreements with monopolists every day. And to the extent that a provider of wholesale roaming with market power was demanding rates above the monopoly price, we would expect the purchaser to agree if the alternative was that it could not offer nationwide data coverage and thus could not compete.
- (45) Nor does the absence of complaints filed with the Commission mean that individualized negotiations are resulting in rates that are always commercially reasonable. Filing a complaint is an expensive and frequently time-consuming process. Moreover, the lack of complaints may reflect a lack of confidence in how the Commission would respond to a complaint. To the extent that the Commission provides guidance on what constitutes commercially reasonable roaming rates and how it would evaluate roaming disputes, this could reduce the current uncertainty and help carriers decide whether to file a complaint. Moreover, to the extent that the lack of complaints means that there is no problem and that no carriers are trying to charge excessive roaming rates, then reasonable guidance about what *would* be a problem should do no harm.

III.E. Criticisms of particular proposed benchmarks

- (46) AT&T and Verizon present various criticisms of the benchmarks I proposed, but they appear to misconstrue or mischaracterize how I believe these benchmarks should be employed in evaluating the commercial reasonableness of a proposed roaming rate. In my initial declaration, I pointed out and explained why none of these benchmarks is, or can be, ideal standing alone. Nevertheless, given the risks that roaming providers with market power might charge excessive roaming rates that harmed both competition and consumers, I advised that the Commission should apply the benchmarks cautiously and in conjunction with one another and with an analysis of competitive risks. I did not recommend that the Commission rely on a single benchmark exclusively or that it treat a particular benchmark as constituting a ceiling on what is a commercially reasonable rate.

²⁷ *Data Roaming Order*, 26 FCC Rcd at ¶ 24 (footnote).

IV. Conclusion

- (47) Neither AT&T nor Verizon, the only two parties opposing T-Mobile's petition or questioning my earlier analysis, dispute the fact that there are pockets of monopoly in the provision of wholesale data roaming or that roaming providers that possess market power over wholesale roaming may have the incentive and ability to raise rivals' costs. Nor do they challenge the fact that certain wholesale roaming rates are sufficiently high as to induce retail mobile data providers to cap or throttle their customers' roaming usage.
- (48) It is for these reasons that I recommended that the Commission provide prospective guidance and predictable enforcement criteria for evaluating the commercial reasonableness of wholesale data roaming terms and conditions. I further recommended that, in such evaluations, the Commission should consider relevant competitive conditions, including whether the provider of the wholesale roaming may have market power and whether it may have an incentive to use that market power to raise rivals' costs. In conjunction with such an examination of competitive conditions, I also recommended that the Commission compare proposed terms to a variety of benchmarks. I did not recommend that the Commission rely on a single benchmark or use that benchmark as a ceiling on what constitutes commercially reasonable terms and conditions. Nor did I recommend rate regulation. Rather, I suggested that the Commission should apply those benchmarks cautiously and in conjunction with one another and with an analysis of competitive conditions. Nothing in AT&T's or Verizon's comments has persuaded me to change my views.

August 20, 2014

/s/ Joseph Farrell

Joseph Farrell