

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

In the Matter of)	
)	
Petition For Expedited Declaratory Ruling Filed)	WT Docket No. 05-265
By T-Mobile USA, Inc. Regarding Data)	
Roaming Obligations)	

REPLY COMMENTS OF AT&T

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INTRODUCTION

T-Mobile’s petition¹ to “clarify” the *Data Roaming Order* is a self-serving attempt to convince the Commission to intervene in a well-functioning marketplace to force wholesale data roaming rates to levels that would allow T-Mobile to substitute roaming for broadband investment. The comments supporting T-Mobile’s petition serve only to illustrate the extreme nature of T-Mobile’s requests, and, indeed, to set the three fatal flaws in T-Mobile’s petition in even starker relief: (1) there is no evidence that any market failure exists that would merit Commission action; (2) T-Mobile’s proposals would conflict with and undermine the broadband investment and other purposes of the *Data Roaming Order*; and (3) those proposals would transform the data roaming rules into prohibited common carrier regulation.

First, the commenters repeat T-Mobile’s headline assertion that the data roaming marketplace is “dysfunctional,” but the comments are remarkably devoid of any *facts* that would actually support such a characterization. Like T-Mobile, the commenters have no answer to the facts that roaming rates have been declining dramatically since the issuance of the *Data Roaming Order*. The commenters also miss the mark in fixating on AT&T as a “must-have” roaming

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

partner; the reality is that the transition to LTE is substantially *increasing* all providers' potential roaming options. This is illustrated most dramatically by Sprint's recent set of LTE roaming agreements with smaller providers around the country, developed in conjunction with CCA, yet not even mentioned in CCA's comments here.

Second, the comments make even clearer that T-Mobile's proposals would undermine rather than "clarify" the *Data Roaming Order*. T-Mobile's supporters zealously advocate retail rates as a guidepost for "commercially reasonable" roaming rates. Indeed, many of these commenters argue for explicit forms of rate regulation that would operate as rigid, Commission-enforced price caps. As AT&T previously explained, the *Data Roaming Order* reflects a careful balance between requiring providers to offer data roaming while maintaining incentives to invest in build-out of wireless networks. The Commission clearly stated that it expected data roaming rates to remain well above retail rates, as the mechanism to ensure that incentives to invest in broadband deployment are preserved. Whether characterized as a guidepost, benchmark or rigid price cap, the commenters' retail rate proposal would run roughshod over the Commission's approach, radically changing the commercial reasonableness standard and effectively rendering virtually all mobile broadband investment inherently and permanently uneconomic. It is well-settled that the Commission cannot use a declaratory ruling to "clarify" its rules in ways that would substantively change them.

Third, the comments remove any doubt that T-Mobile's petition seeks the imposition of prohibited common carrier regulation. Although most of the commenters follow T-Mobile's lead in attempting to characterize the rate regulation they seek as consistent with private carriage, some commenters (notably Public Knowledge) drop the pretense altogether and argue that the Commission should instead find a way to evade Section 332's prohibition on common carriage.

The D.C. Circuit, however, has found it “obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers,”² and none of T-Mobile’s supporters comes to grips with the fact that the regulation they seek would eliminate the “room for individualized bargaining and discrimination in terms” that “salvaged the data roaming requirements in *Cellco*.”³ Finally, as explained below, T-Mobile’s petition is not a proper vehicle for considering the request of Public Knowledge and others that the Commission effectively reclassify data roaming services as common carrier commercial mobile radio services (“CMRS”).

I. THE COMMISSION’S RULES ARE WORKING AND NO PARTY HAS SHOWN THAT FURTHER COMMISSION ACTION IS NECESSARY.

Many of T-Mobile’s supporters repeat the same superficial allegations: (1) the roaming market is “dysfunctional”; (2) commercially negotiated roaming rates are not commercially reasonable; and (3) “consolidation” since the adoption of the *Data Roaming Order* has reduced the number of potential roaming partners. As the facts in T-Mobile’s own Petition show, however, none of these allegations are consistent with the reality of today’s roaming marketplace.

First, the commenters’ claim that the marketplace is “dysfunctional” is based entirely on unsupported assertions,⁴ and these parties ignore the most important and defining facts about today’s marketplace. For example, no party grapples with T-Mobile’s evidence that

² *Verizon v. Federal Communications Commission*, 740 F.3d 623, 650 (D.C. Cir. 2014) (citing *Cellco Partnership v. Federal Communications Commission*, 700 F.3d 534, 538 (D.C. Cir. 2012)).

³ *Cellco*, 700 F.3d at 548; *Verizon*, 740 F.3d at 656.

⁴ *See, e.g.*, Comments of NTCA—The Rural Broadband Association, at 3 (July 10, 2014) (asserting without citation that “[t]here is empirical and anecdotal evidence showing that the wholesale roaming rates offered by the largest mobile wireless operators are predatory and anticompetitive in nature”).

“[w]holesale [roaming] rates have trended *downward strongly* in recent years,”⁵ and that the average wholesale roaming rate T-Mobile pays has fallen almost 70 percent since 2011 and is expected to fall again this year.⁶ None of these commenters provides any concrete example of an instance in which a party was unable to reach an agreement, nor does any party provide any *facts* (as opposed to adjectives like “outrageous”) that would support the claim that rates or terms in any of its agreements actually retard competition.⁷ Contrary to the claims of widespread “dysfunction,” no commenter disputes the fact that there have been no adjudicated complaints under the new rules.⁸ Simply put, the commenters have not identified any market failure that would require the Commission to change or further clarify the rules, standards, or complaint processes that are already in place.

The specific criticisms of AT&T are equally baseless. Pinpoint claims that “it relies upon [Viaero and] AT&T . . . as absolutely crucial nationwide roaming partners,”⁹ but AT&T has no

⁵ See Declaration of Joseph Farrell, attached as Exhibit 2 to Pet., at ¶ 13 (“Farrell Decl.”) (emphasis added).

⁶ See Farrell Decl., Table 6; see also Comments of Verizon, at 8-9 (July 10, 2014) (“Since April 2011 . . . Verizon has either negotiated new agreements or negotiated rate changes in existing agreements with 48 of its 59 active roaming partners. In each of these cases, when Verizon’s data roaming charges have changed, they have declined. Indeed, over that time period Verizon’s average data roaming charges (measured in revenue per roaming MB used) have declined by more than 40 percent.”).

⁷ Typical of the unsupported hyperbole in these comments is RWA’s suggestion that, if the Commission does not force providers to charge roaming rates that are no higher than retail rates, rural carriers “will cease to exist” – even though those providers have survived for years on roaming rates that T-Mobile’s petition shows were generally substantially higher than today’s rates. See Comments of Rural Wireless Association, Inc. (“RWA”), at 6, 8 (July 10, 2014).

⁸ NTCH claims that it initiated a formal complaint against Verizon last year, Comments of NTCH, Inc. et al., at 2 (July 10, 2014), but it provides no facts about the nature of the dispute nor does it provide any reason to conclude that the availability of the Commission’s complaint process was in any way inadequate or ineffective in resolving the dispute. In any event, even assuming a few complaints had been filed, their number is minimal compared to the number of roaming agreements reached through commercial negotiation.

⁹ Comments of PinPoint Wireless, Inc., at 2 (July 10, 2014).

data roaming agreement with PinPoint because, to AT&T's knowledge, Pinpoint has never asked AT&T for one. Similarly, Limitless's comments here ignore the long history of its predecessor's relationship with AT&T, in which the predecessor company was in gross violation of both the terms of its data roaming contract with AT&T and the Commission's roaming policies for a period of years. Under the "totality of the circumstances," AT&T's current arrangement with Limitless is not only commercially reasonable, but generous.

Second, NTELOS and others argue that commercially negotiated roaming rates in the range of 10-25 cents per MB are not commercially reasonable, but this claim too is untenable.¹⁰ As AT&T previously explained, AT&T is a net purchaser of roaming and, on average, pays a rate that is actually *higher* than 30 cents per MB to the domestic roaming partners from which it obtains data roaming services.¹¹ Once again, the commenters' focus on AT&T is misguided. These parties are in reality complaining about rate levels that are the norm throughout the industry, and contrary to these parties' suggestions, the rates AT&T charges other providers compare favorably to the rates that prevail generally in the marketplace.¹² The Commission's "commercial reasonableness" standard is designed to give providers the flexibility to negotiate roaming arrangements that fit their needs, and the rate levels that prevail today are the product of scores of negotiations that have taken place between sophisticated parties within the framework of the Commission's current rules (and which are embodied in unchallenged agreements). It is

¹⁰ Comments of NTELOS Holdings Corp. In Support of Petition For Expedited Declaratory Ruling of T-Mobile USA, Inc., at 12-13 (July 10, 2014) (claiming it was offered rates ranging from 10 to 25 cents per MB "during negotiations with certain potential roaming partners").

¹¹ *See* Opposition of AT&T, at 19 (July 10, 2014) (explaining that AT&T has no marketplace incentive to seek high roaming rates because most of its agreements are bilateral and AT&T is a net purchaser of roaming).

¹² *See, e.g.*, AT&T Opposition at 11 (noting that, in its current agreement with T-Mobile, AT&T gives T-Mobile a rate that compares very favorably to the rates that T-Mobile claims that it pays to other providers).

simply not credible to suggest (as T-Mobile and its supporters do) that the roaming rates that providers have negotiated throughout the industry are *all* commercially unreasonable by an order of magnitude. None of these parties has provided any evidence that today's roaming rates retard effective competition or that the Commission's existing standards and complaint procedures would be inadequate to address a genuine issue if it arose.

Third, providers have many options today for roaming, and with the industry's transition to LTE, the number of choices is *increasing*, not decreasing. For example, PinPoint acknowledges that it has "dozens of roaming partners"¹³ among the many small, medium, and nationwide "GSM/LTE carriers" that exist in the United States. As AT&T previously explained, there are numerous domestic GSM carrier networks and AT&T has roaming arrangements with approximately 45 of them.¹⁴ But the industry is rapidly transitioning to LTE, which means that *all* providers will gain access to an even broader range of potential roaming partners, including all four nationwide networks and many additional smaller and medium-sized networks. Accordingly, although the commenters claim that "consolidation" has made the roaming marketplace "worse,"¹⁵ the truth is that data providers have many *more* potential roaming partners today than they did in 2011, and the number of choices will only increase as the transition to LTE continues.¹⁶

¹³ PinPoint Comments at 8.

¹⁴ AT&T Opposition at 14.

¹⁵ *See, e.g.*, Comments of Cellular South, Inc. On Petition For Expedited Declaratory Ruling Filed by T-Mobile USA, Inc., at 5 (July 10, 2014); Comments of Competitive Carriers Association ("CCA"), at 4-5 (July 10, 2014); NTELOS Comments at 8; RWA Comments at 5.

¹⁶ Notably, the Commission specifically considered allegations that AT&T's acquisition of Leap would reduce options for roaming and rejected those claims in light of AT&T's roaming-related commitments. *See* Memorandum Opinion and Order, *Application of Cricket License Company, LLC, et al., Leap Wireless International, Inc, and AT&T Inc. for Consent to Transfer Control of Authorizations*, WT Docket No. 13-193, 29 FCC Rcd. 2735, ¶¶ 103-108 (2014) ("AT&T-Leap

NTELOS confirms this reality when it acknowledges (in a footnote) that it has in fact “entered into a strategic network alliance with Sprint pursuant to which, among other things, NTELOS and Sprint provide data roaming to each other.”¹⁷ Although NTELOS declares that it will not “consider” the implications of this agreement in its pleading,¹⁸ the Commission cannot ignore the fact that the Sprint arrangement, and others like it, dramatically refute these commenters’ central argument that there are no competitive alternatives in today’s marketplace. Indeed, NTELOS (and other Sprint partners like CCA) are hiding the ball. Sprint forthrightly notes that it “recently . . . reached 4G LTE agreements with 12 rural and regional network carriers related to Sprint’s Rural Roaming Preferred Program,” which “provides rural operators with low cost access to Sprint’s nationwide 4G LTE network and an opportunity to pursue an expanded range of mobile devices, while providing Sprint with a stronger LTE footprint outside of the larger markets in which it has focused a majority of its initial LTE build.”¹⁹ These commenters cannot credibly argue that roaming options are disappearing when the transition to LTE, and arrangements like Sprint’s, are in fact substantially expanding all providers’ roaming alternatives.

Order”). In all other respects, the Commission found that its “general roaming policies and rules should ensure that entities can obtain roaming agreements on reasonable terms and conditions.” *Id.* ¶ 107.

¹⁷ NTELOS Comments at 12 n.35.

¹⁸ *See id.* (declaring that “such arrangement is not referenced or otherwise considered herein” merely because the agreement also involves network build-out requirements and exclusive provision of wholesale services).

¹⁹ Comments of Sprint Corporation, at 7 (July 10, 2014); *see also id.* (“[i]n addition, the RRPP complements the Small Market Alliance for Rural Transformation (“SMART”) initiative by Sprint and the NetAmerica Alliance, which provides participating rural communications service providers the capabilities to help reduce roaming costs and accelerate the deployment and utilization of 4G LTE across rural America”).

Finally, in attempting to articulate how roaming rates harm consumers, Public Knowledge can muster only the extraordinarily convoluted argument that AT&T's roaming rates have somehow "force[d]" T-Mobile to market a "Music Freedom" promotion in which streaming music from the seven largest music services will not count against a T-Mobile customer's monthly allotment of LTE data (which, in turn, is said to be a net neutrality violation).²⁰ The argument is misguided on many levels, but suffice it to say that T-Mobile's music promotion has nothing to do with AT&T's roaming rates. The Music Freedom promotion gives customers an exception to T-Mobile's basic service LTE data caps, which would apply mostly in-network.²¹ Moreover, as AT&T previously explained,²² the amount that T-Mobile pays in data roaming fees is so small compared to its overall revenues that there is no plausible argument that roaming rates at today's levels "force[d]" T-Mobile to implement its music promotion (or are in any other way impeding competition).²³

II. THE COMMENTS CONFIRM THAT T-MOBILE'S SPECIFIC PROPOSALS WOULD BE UNLAWFUL.

As AT&T previously demonstrated, T-Mobile's specific proposed "clarifications" would actually conflict with (and indeed, rewrite) the *Data Roaming Order* in ways that would undo the

²⁰ Comments of Public Knowledge, et al., at 7-11 (July 10, 2014).

²¹ See T-Mobile Simple Choice Plans, available at <http://www.t-mobile.com/cell-phone-plans/individual.html> (last visited August 18, 2014).

²² AT&T Opposition at 12.

²³ Although the net neutrality issues are beyond the scope of this proceeding, Public Knowledge alleges that T-Mobile's Music Freedom plan gives its customers a marginal incentive to listen to their favorite music instead of a Public Knowledge podcast. Public Knowledge Comments at 10. With all due respect to Public Knowledge, it strains credulity to suggest that any purported lack of listenership to its podcasts is the result of anything other than the content of the podcasts themselves, let alone that the terms of T-Mobile's music plan are leading its customers to make a conscious choice between listening to music vs. Public Knowledge podcasts in the sort of numbers that would constitute a clear and present public interest harm meriting immediate Commission intervention.

Commission’s carefully crafted balance between encouraging data roaming arrangements and preserving incentives to invest in broadband deployment and thus providing more facilities-based alternatives to the public. Although T-Mobile’s supporters generally support all of T-Mobile’s proposed rulings,²⁴ the commenters focus almost all of their attention on T-Mobile’s proposed rate benchmarks, particularly the notion that Commission should suddenly declare any roaming rate that exceeds retail rates to be commercially unreasonable. Any such ruling – and the commenters’ additional requests for a “model” agreement, a shot clock, and public filing of commercially negotiated roaming contracts – would be unlawful.

Rate Benchmarks. The comments make dramatically clear that the principal purpose of T-Mobile’s Petition is to impose profoundly unlawful rate “benchmarks” that would function as price caps that radically reduce roaming rates and eliminate investment incentives. As AT&T previously explained, T-Mobile in its own Petition was careful to acknowledge that neither the Commission’s rules nor sound economic principles would permit its proposed rate benchmarks to be applied in a rigid, bright-line manner.²⁵ Many of T-Mobile’s supporters, however, will brook no such caveats, and explicitly insist that retail rates should act as a hard cap on roaming rates. For example, RWA argues that “the Commission should find that a data roaming rate is *per se* commercially unreasonable if it exceeds, by any degree, the retail data rate the must-have carrier or requesting carrier charges its retail customers.”²⁶ NTELOS urges the Commission to

²⁴ See, e.g., Cellular South Comments at 6-9; CCA Comments at 6-7; Comments of COMPTTEL, at 3-4 (July 10, 2014); NTCA Comments at 5-6; NTCH Comments at 5; NTELOS Comments at 14-19; RWA Comments at 4-5; Sprint Comments at 3-7.

²⁵ See AT&T Opposition at 26-32.

²⁶ RWA Comments at 7-8 (“disagree[ing]” with T-Mobile’s caveats and arguing “[i]t is not enough for the Commission to merely *consider* the difference between the data roaming rates charged by must-have carriers and the rates such carriers charge foreign carriers or MNVO customers. The Commission should clarify that *any* difference in these rates is *per se* commercially unreasonable”); see also COMPTTEL Comments at 3 (“it is difficult to contemplate

establish a bright-line “benchmark below retail prices” because of the “ease with which it could be applied,” and indeed it urges a “flexible,” moving cap “so that when prices of retail rates decline, roaming rates would decline as well.”²⁷ Limitless argues that T-Mobile’s proposed benchmarks are a “good start,” but that the Commission should “draw definitive lines-in-the-sand” with *de facto* price caps. Indeed, Limitless and PinPoint argue that the Commission should deem any roaming rate commercially unreasonable if it exceeds *either* the retail rate, the wholesale MVNO rate, *or* the roaming rate charged to foreign providers.²⁸

All of these proposals would conflict with the Commission’s current data roaming rules, in three important respects. First, the Commission explicitly rejected any such interpretation of the commercial reasonableness standard in the *Data Roaming Order*. The Commission had previously concluded in the *Voice Roaming Order* that mandatory roaming would not deter facilities investment because roaming rates would be “*much higher* than retail rates,”²⁹ and it cited that prior finding with approval in reaching the same conclusion in the *Data Roaming Order*.³⁰ Indeed, the Commission emphasized that roaming would be offered at a “relatively

a legitimate commercially reasonable basis for a host provider’s wholesale roaming rates to exceed its retail pricing to any degree”).

²⁷ NTELOS Comments at 15.

²⁸ Comments of Limitless Mobile, LLC, at 5-6 (July 10, 2014); PinPoint Comments at 5; *see also* RWA Comments at 7 n.15.

²⁹ Order on Reconsideration and Second Further Notice of Proposed Rulemaking, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 25 FCC Rcd. 4181, ¶ 32, n.90 (2010) (“*Voice Roaming Order on Reconsideration*”).

³⁰ Second Report and Order, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 26 FCC Rcd. 5411, ¶ 21 (2011) (“*Data Roaming Order*”).

high price” and that this high price was necessary to “counterbalance the incentive” to “rely[] on another provider’s network.”³¹

Second, T-Mobile’s retail benchmark, and the commenters’ even more extreme proposals to establish retail rates as a hard *cap* on roaming rates, would completely eliminate any provider’s incentive to build out its broadband wireless networks. If the Commission’s rules ensured that these providers could obtain roaming at rates at or near the retail price, the Commission will have effectively converted all data roaming into a service designed primarily to facilitate resale, contrary to the Commission’s expressly stated purposes in the *Data Roaming Order*. As AT&T previously explained, the Commission intended its rules to strike a careful balance between requiring providers to offer data roaming while at the same time preserving all providers’ incentives to invest in expanding their broadband networks.³² By forcing providers to provide access to their networks at or near retail rates, the Commission would destroy that balance and affirmatively create powerful *disincentives* for any provider to invest in broadband build-out, because the guaranteed availability of roaming at such low rates would render any business case for investment in those areas no longer rational or cost-effective. That is why the Commission was counting on roaming rates to be “*much higher* than retail rates”³³ – not just “higher.”

³¹ *Data Roaming Order* ¶ 51; *see also id.* ¶ 21 (“the relatively high price of roaming compared to providing facilities-based service will often be sufficient to counterbalance the incentive to ‘piggy back’ on another carrier’s network”). *See also* Report and Order and Further Notice of Proposed Rulemaking, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd. 15817, ¶¶ 36-40 (2007) (specifically rejecting cap “based on some benchmark of retail rates”) (“*Voice Roaming Order*”).

³² AT&T Opposition at 7-10.

³³ *Voice Roaming Order on Reconsideration*, ¶ 32 n.90.

Third, these proposed “clarifications” would in fact radically change the commercial reasonableness standard. The Commission declined to undertake “specific prescriptive regulation of rates,” as “requested by some commenters,” and instead adopted “a general requirement of commercial reasonableness for all roaming terms and conditions, including rates.”³⁴ The commercial reasonableness standard relies to a significant degree on what sophisticated parties have actually negotiated in the marketplace. Under the Commission’s rules, existing marketplace agreements that were never challenged are presumed to be commercially reasonable. T-Mobile and its supporters are asking the Commission to “clarify” the commercial reasonableness standard in a way that would imply that the roaming rates in dozens if not hundreds of existing, unchallenged agreements throughout the industry are in fact commercially unreasonable by an order of magnitude. That cannot possibly be a faithful interpretation of the *Data Roaming Order*.

Additional Requests. A number of parties seize on T-Mobile’s Petition as an excuse to press for completely different changes to the rules that T-Mobile has not requested. The Commission should reject those requests as well. For example, RWA asks the Commission to endorse a specific “model roaming agreement” as a means of establishing a “commercially reasonable standard for all wireless carriers to follow.”³⁵ The whole point of the Commission’s commercial reasonableness standard, however, is to encourage “individualized bargaining” and flexibility in rates and terms.³⁶ The Commission would inevitably undermine that flexibility if it put its weight behind a single, “model,” one-size-fits-all agreement. Given the dynamic nature of the wireless marketplace, the pace of technology change, and the greatly varying needs of

³⁴ *Data Roaming Order* ¶ 21.

³⁵ RWA Comments at 9 & Exhibit 1.

³⁶ *Cellco Partnership*, 700 F.3d at 548.

different providers, it would be particularly unwise for the Commission to try to anticipate the sort of “model” agreement that would meet these disparate concerns. Indeed, Commission endorsement of a single roaming template for use by the entire industry would drive not just a single wireless provider to hold out its data roaming services indiscriminately to all purchasers (a hallmark of common carriage); rather it would push *all wireless providers* to offer data roaming on the same basic terms and conditions. Such a result would be tantamount to prohibited common carrier regulation of data roaming services in direct contravention of the Act and the D.C. Circuit’s *Cellco* decision.

But even if it were appropriate for the Commission to adopt a “model” agreement, RWA’s proposed agreement is not really a roaming agreement at all, but rather a faux roaming agreement designed to mandate resale on a broad scale. As RWA notes, its model agreement “at its heart, calls for the inter-carrier data roaming rates to be *at or below* the prevailing retail data rate.”³⁷ Moreover, the agreement on its face permits a party to place *half* of its traffic on the roaming partner’s network: Section 5 of the agreement requires each party merely to “endeavor” to provide “the majority of its customers’ mobile data services on its own network.”³⁸ Contrary to the Commission’s data roaming policies, the agreement also expressly makes the roaming provider’s capacity for build-out irrelevant to whether it is entitled to roam on the other’s network (beyond any build-out requirements associated with its license).³⁹ As AT&T has previously explained, each one of these provisions would be contrary to the Commission’s

³⁷ RWA Comments at 9 (emphasis in original).

³⁸ *Id.* at Exhibit 1, Model Roaming Agreement § 5.

³⁹ *Id.* (“Further, neither party may require or precondition any network build out or any other network or launch requirement that exceeds in any way any build-out requirement established by the FCC”).

existing data roaming policies.⁴⁰ The Commission could not lawfully require any party to accept these provisions under its current rules, and thus it would make no sense to endorse RWA's proposed contract as a "model."

Several commenters ask the Commission to adopt a "shot clock" that would require providers to conclude their negotiations in a set period of time (such as 60 days).⁴¹ The Commission recently rejected a petition for reconsideration of the *Data Roaming Order* that made the same request,⁴² and there would certainly be no basis for imposing such a requirement now in a declaratory ruling. Similarly, several commenters ask the Commission to require all providers to submit their roaming agreements to the Commission and make them publicly available.⁴³ NTCH recently filed a petition to "rescind forbearance" that seeks the same change in the rules, and AT&T just filed an opposition to that petition that explains why any such change would be both unwarranted and unlawful.⁴⁴

III. THE COMMENTS CONFIRM THAT T-MOBILE'S PETITION SEEKS THE UNLAWFUL IMPOSITION OF COMMON CARRIER REGULATION.

Finally, as AT&T previously explained, T-Mobile's proposals would transform the Commission's data roaming rules into prohibited common carrier regulation, and the comments

⁴⁰ AT&T Opposition at 21-25.

⁴¹ *E.g.*, Comments of the Blooston Rural Carriers, at 2-3 (July 10, 2014).

⁴² Order on Reconsideration, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, DA 14-865, ¶ 11 (rel. June 25, 2014) (reiterating that the complaint process is fully adequate to address any specific situation in which a provider is not acting in a commercially reasonable manner).

⁴³ *See, e.g.*, Limitless Comments at 8-9; NTCA Comments at 6-8; NTCH Comments at 2-3; PinPoint Comments at 8-9; RWA Comments at 9-10.

⁴⁴ Opposition of AT&T, *Petition Filed By NTCH, Inc. To Rescind Forbearance And Initiate Rulemaking To Make Inter-Provider Roaming Rates Available*, RM-11723 & WT Docket No. 05-265 (filed Aug. 18, 2014).

dramatically confirm that common carrier regulation is precisely what T-Mobile and its supporters want.⁴⁵ Many commenters attempt to maintain the charade that what they are proposing would pass muster as private carriage; others, like Public Knowledge, forthrightly argue that the Commission should reclassify wireless broadband services to facilitate common carrier regulation. But their proposals, however they attempt to characterize them, would violate the statute.

Most of the commenters follow T-Mobile's lead in asking for common carriage regulation in fact while continuing to call it private carriage.⁴⁶ As the D.C. Circuit made clear, however, what matters is not the label but how the Commission actually applies the rules, because "even if the rule *sounds* different from common carriage regulation, the more permissive language could, as applied, turn out to be no more than 'smoke and mirrors.'"⁴⁷ The extent to which T-Mobile's proposals cross the line into common carrier regulation is most obvious in the commenters' endorsement of T-Mobile's rate benchmarks, which as AT&T previously explained, would function in practice as *de facto* price caps whose manifest purpose is to eliminate almost all of the "room for individualized bargaining and discrimination in terms" that "salvaged the data roaming requirements in *Cellco*."⁴⁸ The comments make clear that T-Mobile's supporters perceive the proposed rate benchmarks as common-carrier-style rate

⁴⁵ See, e.g., COMPTTEL Comments at 2 n.6 ("COMPTTEL wholeheartedly agrees with T-Mobile's assertion of the need for clarification, but also submits that as an overarching matter, the 'commercially reasonable' standard is too vague to adequately protect the public interest").

⁴⁶ See, e.g., Cellular South Comments at 9-10; CCA Comments at 9-10; NTCH Comments at 5-6; see also Public Knowledge Comments at 15 (arguing that the Commission has broad discretion to define what is and is not common carriage).

⁴⁷ *Cellco*, 700 F.3d at 548 (emphasis in original); see also *id.* at 545 (Commission prohibited from applying the rules in a way that has the effect of "relegating" data roaming providers to common carrier status (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 700-01 (1979))).

⁴⁸ *Cellco*, 700 F.3d at 548; *Verizon*, 740 F.3d at 656.

regulation that will force providers to implement large reductions in their roaming rates, and indeed, as noted above, many of those commenters expressly advocate retail or other rates as a hard, Commission-enforced price cap. A number of commenters give the game away even further by defending a retail-rate benchmark or cap as a means of regulating roaming rates on the basis of cost.⁴⁹ Cost-based schemes of rate regulation are the hallmark of the “just and reasonable” rate standard under Title II. By contrast, the Commission was careful in the *Data Roaming Order* not to define the commercial reasonableness standard as dependent in any way on measures of cost. In short, such “restrictive” rate regulation is precisely what the Communications Act prohibits in this context.⁵⁰

Other commenters, including Public Knowledge, argue that the Commission should simply find some way to regulate data roaming as a common carrier service.⁵¹ Public Knowledge’s principal suggestion is that the Commission could now effectively reclassify data roaming as a commercial mobile radio service (“CMRS”) under Section 332, either by holding that it is offered “in connection with” CMRS within the meaning of Section 332(a) or that it is

⁴⁹ See, e.g., NTELOS Comments at 13 n.41 (“[t]he time-tested measuring rod for assessing the reasonableness of telecom rates is cost” (quoting *Ex Parte Presentation* filed by Youghioghney Communications, LLC, in WT Docket No, 13-193, at 3 (filed Feb. 3, 2014)); see also *id.* at 15; RWA Comments at 8; see also Pet. at Exhibit 1, Mosa Decl. ¶ 21.

⁵⁰ *Verizon*, 740 F.3d at 652 (“we cautioned that were the Commission to apply the ‘commercially reasonable’ standard in a *restrictive* manner, essentially elevating it to the traditional common carrier ‘just and reasonable’ standard, . . . the rule might impose obligations that amounted to common carriage *per se*, a claim that could be brought in an ‘as applied’ challenge” (emphasis added)).

⁵¹ See Public Knowledge Comments at 11-15; see also NTCH Comments at 6 (“perhaps now is also the time for the Commission to revisit its regulatory classification of data roaming services”). Public Knowledge acknowledges that the fundamental classification of wireless broadband service as an information service is “not before the Commission in this proceeding.” Public Knowledge Comments at 4.

the “functional equivalent” of CMRS within the meaning of Section 332(d)(3).⁵² It would be wholly improper to consider any such reclassification here. T-Mobile has not asked for such a ruling. More fundamentally, any such ruling would clearly require an entirely new rulemaking, because the Commission’s current data roaming rules expressly authorize a degree of “individualized bargaining and discrimination in terms”⁵³ that Sections 201 and 202 would prohibit in a common carrier regime (absent extensive forbearance that would for all intents and purposes negate the finding of common carriage). Accordingly, the proper vehicle for such a reclassification would be a petition for rulemaking.⁵⁴

Public Knowledge also argues that the Commission could adopt T-Mobile’s benchmarks even if they do constitute common carriage, on the theory that the Commission could now hold that Section 332(c)(2) does not actually prohibit common carrier regulation for private mobile services.⁵⁵ The statute, however, is unambiguous: it provides that “insofar as” a person provides a “service that is a private mobile service,” that person “*shall not . . . be treated as a common carrier for any purpose under this Act.*”⁵⁶ Given the unambiguous language of the statute, coupled with the D.C. Circuit’s twice-repeated conclusion that it is “obvious that the

⁵² Public Knowledge Comments at 14-15.

⁵³ *Cellco*, 700 F.3d at 545.

⁵⁴ In all events, these issues were litigated extensively in the data roaming rulemaking proceeding and Public Knowledge does not offer any substantive arguments in its pleading here as to why the Commission could now adopt any of these arguments for treating data roaming as CMRS. *See* Public Knowledge Comments at 14-15 (arguing merely that the Commission could now address arguments made previously during the rulemaking proceeding). AT&T has explained in detail why each of these arguments is meritless. *See, e.g.*, Letter from Michael Goggin (AT&T) to Marlene Dortch (FCC), WT Docket No. 05-265, at 2-10 (Jan. 17, 2011); Letter from Michael Goggin (AT&T) to Marlene Dortch (FCC), WT Docket No. 05-265, at 5-6 (Sept. 22, 2010).

⁵⁵ Public Knowledge at 12-14.

⁵⁶ 47 U.S.C. § 332(c)(2) (emphasis added).

Commission would violate the Communications Act were it to regulate [wireless] broadband providers as common carriers,”⁵⁷ the Commission is not now free to adopt an alternative interpretation of Section 332(c)(2).⁵⁸

CONCLUSION

For the reasons stated herein and in AT&T’s opening comments, the Petition should be denied and dismissed.

Respectfully Submitted,

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⁵⁷ *Verizon*, 740 F.3d at 650 (citing *Cellco*, 700 F.3d at 538).

⁵⁸ *Cf.* Public Knowledge at 13-14 (acknowledging that the D.C. Circuit conclusion would be binding to the extent that the statute is unambiguous).