BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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

Reply Comments of NTCH, Inc.

NTCH, Inc. (NTCH), by its attorneys, hereby replies to the Oppositions filed by AT&T and Verizon to its petition to rescind forbearance. Only AT&T and Verizon opposed the petition, presumably because they not only insist on the current cloak of secrecy that masks roaming rates but also because they benefit the most by keeping other carriers and the Commission completely ignorant of their roaming charges. Their Oppositions boil down to three points: (i) once forbearance is granted by the Commission, it cannot be rescinded at all (Verizon), or only with great difficulty (AT&T), (ii) there is no factual basis for finding that non-enforcement of Section 211 of the Act is still justified, and (iii) data roaming is off the table since it is not a common carrier service covered by Section 211. All of these assertions are indisputably wrong.

I. The Necessary Predicate for Rescinding Forbearance

The Communications Act quite properly requires as a general rule that contracts between carriers be filed with Commission. 47 U.S.C. Section 211. This filing obligation, which historically has rendered all such filings available not only to the Commission but to other interested parties to review, is essential if the Commission is to enforce the bedrock common carrier mandate that rates be not only just and reasonable but non-discriminatory. How can the Commission possibly determine whether rates are reasonable and non-discriminatory if it has no idea what they are? And how can carriers know whether they are being discriminated against if they don't know what other carriers are being charged? Because mandates of the Act like

Section 211 establish the most basic elements of telecom regulation, forbearance treatment is necessarily rare.

Section 332(c) of the Communications Act permits the Commission to forbear from enforcing provisions of Title II of the Act against commercial mobile service providers only if the Commission determines that three distinct conditions exist: (i) enforcement is not necessary to ensure that charges and practices in connection with the service are just and reasonable and not unjustly or unreasonably discriminatory, (ii) enforcement is not necessary to protect consumers, and (iii) non-enforcement is in the public interest. All three conditions must be present for the Commission to adopt a regulation forbearing from enforcement. In Verizon's view, if at any point in time the three conditions exist, and the Commission adopts a rule accordingly, the Commission may not then rescind the rule at a later point without going through a standard rulemaking proceeding to consider the merits – good or bad – of amending the rule to reinstate enforcement of the statute regardless of whether any or all of the three conditions ceases to exist. The statutory command is thus effectively erased from the United States Code permanently by the original forbearance action. A moment's reflection will confirm that this cannot possibly be true.

The presence of all three conditions for forbearance is both sufficient and necessary for forbearance to continue. When any one of them ceases to apply, the Commission not only may, but must, resume enforcement of the statutory provision from which enforcement was previously forborne. Assume, for example, that the Commission determined that enforcement of Section 202 of the Act was necessary to ensure that rates charged are not unreasonably discriminatory. Could Congress have possibly intended that Section 202 would continue to go unenforced to the public detriment because, at some earlier point in time, conditions then obtaining permitted non-enforcement? Not only does that lead to an absurd result, but it is also inconsistent with the injunction that forbearance can be applied "only if" the three stated conditions exist.

Once a determination is made that forbearance is no longer warranted – as is certainly the case here – the Commission must then conform the regulation which authorized forbearance to the statute as written. Rules are frequently conformed to new statutory directives or judicial mandates. The conforming rule change is a ministerial act because the Commission has no discretion but to resume enforcement. For present purposes, this formulation of the forbearance

rescission process simplifies the Commission's task considerably because it need only find that any one of the three forbearance conditions is absent, and that finding alone is sufficient to require repeal of the first clause of Section 20.15(b)(1). That action has the effect of reinstating the obligation of CMRS carriers to file contracts pursuant to Section 211.

AT&T correctly notes that Section 211 only requires the filing of intercarrier contracts, not that they be made public. However, the Commission has traditionally made such filings available for public review for obvious reasons. ("…[T]he terms of such agreements or any other contracts…would be available for public scrutiny subject to the filing requirements of Section 211 of the Communications Act of 1934.")[1] ("An alternative would be a requirement that voluntarily-negotiated interconnection contracts be filed publicly. Such public filing, either at the Commission (pursuant to Section 211) or at state commissions…") *In the Matter of Interconnection Between Local Exchange Carriers*, 11 FCC Rcd 5020 at para. 91 (1996) The entire rationale for the "filed rate" doctrine is that rates be publicly available. Indeed, this was the historical basis for rate regulation under the Interstate Commerce Commission which was the model for the FCC. It doesn't do carriers any good for the FCC to know what rates are being charged to other carriers but not to make that publicly known. Nor could the Commission itself know whether rates charged were unjust and unreasonable without knowing the circumstances of the carriers involved. In other words, to require the filing of rates without making them public would reduce Section 211 to a meaningless exercise rather than an effective tool for both the Commission and the public to ensure just, reasonable and non-discriminatory rates.

II. The Conditions Which May Have Justified Forbearance Twenty Years Ago No Longer Exist

AT&T observes that requiring the filing and publication by CMRS carriers of roaming rates would reverse 20 years of consistent policy. This is true, and it is high time. A reversal of policy is necessary because the cellular marketplace is has changed radically and indisputably in the last 20 years. In its Petition, NTCH outlined the evolution of the cellular industry from one driven by a multiplicity of large regional carriers (including the Bells) and a host of smaller independent carriers, to the present duopoly where two carriers bestride the market like behemoths. AT&T does not even pretend to argue that the industry has not become severely

[1] *In the Matter of Allocation Method for Unrouted Ship-to-Overseas INMARSAT Telex Traffic*, 9 FCC Rcd 3653 at para. 10 (1994).

consolidated, particularly in the roaming submarket. The two largest national carriers with CDMA and GSM networks, respectively, are the only ones that have broad enough coverage to meet the roaming needs of the increasingly few remaining carriers' customers. This effectively gives them monopoly power in their respective network protocols.

Not only has the Commission repeatedly found as a fact that the cellular market is no longer competitive, [2] but it also specifically found in connection with the SpectrumCo transaction, that Verizon has no incentive to enter into roaming agreements with smaller competitors.[3] What is the point of the Commission undertaking annual reviews of the competitiveness of the CMRS market if its findings have no effect on the policies that follow from those findings? The fundamental change in the marketplace is precisely what demands a change in the regulatory regime for roaming. AT&T itself quoted the Commission's finding in the 2007 Voice Roaming Order that roaming rate publication is unnecessary – and possibly even harmful – "where competition disciplines the rates." AT&T Opp. at 7-8. That latter proviso is critical here: competition is <u>not</u> disciplining rates because the erstwhile multitude of actors in the market has disappeared. NTCH invites the Commission to incorporate into the record of this proceeding the extensive comments filed by numerous carriers in connection with T-Mobile's petition to set guidelines for data roaming rates. [4] The industry unanimously – except for AT&T and Verizon – expressed the view that data roaming rates are excessively high and intervention by the Commission is necessary to rein in these undisciplined rates. AT&T wants to retain a 20th Century regulatory paradigm based on a highly competitive market in the face of the reality of the duopolistic 21st Century market that now exists.

---

[2] *Sixteenth Report, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Wireless Services*, 28 FCC Rcd 3700 at ¶ ¶ 59-72 (2013) (note Chart 1, which shows that the industry has been "Highly Concentrated", and becoming more concentrated, since 2004); *Fifteenth Report, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Wireless Services*, 26 FCC Rcd 9664 ¶ ¶ 40-54 (2011).

[3] 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." *In the Matter of Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCO LLC and Cox TMI, LLC for Consent to Assign AWS-1 Licenses, Memorandum Opinion and Order and Declaratory Ruling*, FCC 12-95, rel. August 23, 2012 at ¶ 84.. ("SpectrumCo Order").

[4] Petition for Expedited Declaratory Ruling Filed By T-Mobile USA, Inc. Regarding Data Roaming Obligations, WT Docket No. 05-265.

The only evidence that AT&T and Verizon offer to contradict the Commission's own findings is that roaming rates have "plummeted" in recent years. This is not at all a point that should be conceded, especially given the complaints raised in the T-Mobile docket and in NTCH's pending Complaint against Verizon regarding the unreasonableness of roaming rates. As NTCH's instant petition suggests, the only way that the Commission can know whether rates are plummeting or whether they are in fact being maintained at artificially high levels by duopoly power is to actually look at the rates. It is outrageous that the Commission is unable to make the most basic findings about the industry rate structure because its rules deny it access to the very information needed to adjudge the facts.

In this connection, AT&T asserts that roaming rates are "highly proprietary." Nothing could be further from the truth. Roaming is defined as a common carrier offering where services must be held out to the public on reasonable and non-discriminatory terms. The normal statutory mechanism for ensuring that the public (or in this case the connecting carriers who seek roaming arrangements) is to ensure that rates are either filed or publicly available. A common carrier rate cannot by its very nature be "proprietary" or the prohibition on unreasonable discrimination would be meaningless. AT&T posits that public filing of rates would inhibit "innovative" rates, but there is no reason why AT&T can't be as innovative as it wants as long as the rates are not discriminatory. Why can't such innovative rates be made generally available? What AT&T is really worried about is not its freedom to offer low, innovative rates – rather, it wants to be able to impose excessive or discriminatory rates without anyone, including the Commission, knowing what is going on. That is what the current situation fosters.

III. Transparency of Data Roaming Rates

NTCH acknowledged in its petition, and AT&T agrees, that data roaming has not been categorized by the FCC as a common carrier service. This indeed takes it out of the Title II regulatory regime but leaves it subject to Title III. Again, we recognize that the Commission decided not to impose data roaming publication requirements in 2011, but the situation with data roaming has also changed in the last few years. For one thing, the Commission could not have known in 2011 that AT&T and Verizon would demand data roaming rates that exceed costs by as much as 2200%, according to submissions made to the Commission in connection with

AT&T's acquisition of Leap Communications, Inc. [5] These are rates that could only exist in a market where two firms are so dominant that even large national carriers like T-Mobile, MetroPCS, Sprint, and Cricket itself have complained bitterly that they cannot get reasonable rates. SpectrumCo threw in the towel because it could not get reasonable roaming rates. A number of large regional carriers have similarly surrendered since 2011, in part because of the difficulty of obtaining reasonable roaming rates.

In short, the Commission could not have known that the data roaming market would become so fundamentally skewed so quickly that the "commercially reasonable rates" anticipated by the Data Roaming Order have become impossible to obtain. This circumstance is even more critical to the survival of in independent cellular industry as cellular technology moves toward a model that is driven almost entirely by data, even for voice services. The Commission should bite the regulatory bullet now and acknowledge that action is required immediately to remediate the marketplace failure that has occurred in the data roaming regime.

IV. Rulemaking Actions Needed

To be sure, even with a finding that the conditions necessary to sustain forbearance no longer exist, the Commission would have to conduct rulemaking proceedings, as requested by NTCH, to implement two of the reforms it proposes. First, the Commission would have to require the filing or publication of data roaming rates by rule. The record gathered in the T-Mobile Petition Docket amply supports the need to pursue that action. Second, NTCH proposed as a more efficient method of making roaming rates public that instead of requiring the filing of such rates with the Commission, the Commission should require carriers to simply post them on their websites. That would serve the purpose of Section 211 without imposing any burdens on the Commission. That approach would impose the least burdens on the carriers themselves, and as we indicated in our original Petition, that is the approach that the Commission took in 1996 when it de-regulated non-dominant interstate carriers from tariff filing requirements. To the extent these reforms require the rulemaking process, NTCH urges the Commissions to initiate that process quickly to correct the serious imbalance which now exists in the industry.

Respectfully submitted,

[5] See Ex parte submission by Youghiogheny Communications, LLC filed in WT Docket 13-193, Feb. 6, 2014

NTCH, Inc.

By:_____/s/_____
Donald J. Evans
Its Attorney

FLETCHER, HEALD & HILDRETH, P.L.C.
1300 North 17th Street, 11th Floor
Arlington, Virginia 22209
Phone: (703) 812-0400

September 15, 2014