BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

OPPOSITION TO AT&T AND VERIZON APPLICATIONS FOR REVIEW

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COMPTEL, through undersigned counsel, hereby submits its opposition to the Applications for Review of the Wireless Bureau's December 18, 2014 Declaratory Ruling[1] filed by AT&T Services, Inc.[2] and Verizon[3] in the above-captioned proceeding. In response to a Petition filed by T-Mobile USA, Inc. that received overwhelming support from the wireless industry (with the notable exceptions of AT&T and Verizon),[4] the Wireless Bureau provided additional guidance on and clarified factors that may be considered in determining the "commercial reasonableness" of data roaming arrangements. Specifically, the Bureau found that the data roaming rule permitted "a complaining party to adduce evidence in any individual case as to whether proffered roaming rates are substantially in excess of retail rates, international

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1 *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services,* WT Docket No. 05-265, Declaratory Ruling, DA 14-1865 (rel. Dec. 18, 2014) (hereinafter "*Declaratory Ruling*").

2 Application For Review of AT&T.

3 Verizon Application For Review.

4 *Declaratory Ruling* at ¶7.

rates, and MVNO/resale rates, as well as a comparison of proffered roaming rates to domestic roaming rates as charged by other providers."[5] The Bureau also provided guidance on and clarified the application of the rebuttable presumption of commercial reasonableness that the Commission established for the terms and conditions of signed roaming agreements[6] and the application of the build out factor in determining the commercial reasonableness of proffered agreements.[7] Contrary to the assertions of AT&T and Verizon, the *Declaratory Ruling* did not effect a substantive change to the data roaming rule. Instead, the *Declaratory Ruling* is totally consistent with the rule and the Commission's Report and Order adopting the rule. The Applications for Review should be denied.

I. Introduction and Summary

AT&T and Verizon are by far the nation's two largest facilities-based providers of mobile wireless service. Because of the geographic breadth of their network coverage, smaller providers, most especially local and regional providers, often need to obtain roaming arrangements with them in order to offer their customers nationwide access to commercial mobile data services and competitive choice. Although the Commission has extolled the public interest benefits "of ensuring that all Americans have access to competitive broadband mobile data services,"[8] AT&T and Verizon have consistently resisted the Commission's efforts to

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5 *Id.* at ¶ 9.

6 *Id.* at ¶¶ 25-26.

7 *Id.* at 28-29.

8 *See e.g., In the Matter of 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, FCC 11-52 at ¶ 1 (rel. Apr. 7, 2011) (hereinafter "*Data Roaming Order*").

promote consumer access to nationwide mobile data coverage by requiring providers to offer data roaming arrangements on commercially reasonable terms and conditions.[9] True to form, AT&T and Verizon urged the Commission to deny T-Mobile's Petition for additional guidance and clarification on the factors the Commission would consider in evaluating commercial reasonableness[10] and are the only two parties that have sought Commission review of the Wireless Bureau's disposition of the Petition.

The Applications for Review fail to identify any sustainable reason for the Commission to vacate or otherwise undo the guidance and clarifications provided by the Wireless Bureau in the *Declaratory Ruling*. Contrary to AT&T's and Verizon's allegations, the *Declaratory Ruling* does not in any way amend or modify the data roaming rule adopted by the Commission, but instead simply offers additional insight into the application of the myriad of factors the Commission itself identified as being potentially relevant in resolving a dispute with respect to the commercial reasonableness of a proffered data roaming arrangement.

II. The Data Roaming Rule

Almost four years ago, the Commission adopted a rule[11] that requires facilities-based providers of commercial mobile data services to offer data roaming arrangements to other such providers on commercially reasonable terms and conditions.[12] In the Order adopting the rule, the Commission stated repeatedly that the requirement of commercial reasonableness would be

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9 *Id.* at ¶12 ("only AT&T and Verizon Wireless oppose the Commission adoption of a data roaming requirement").

10 *Declaratory Ruling* at ¶7.

11 47 C.F.R. § 20.12(e).

12 *Data Roaming Order* at ¶1.

applied to *all* roaming terms and conditions, including rates and prices.[13] The data roaming rule itself explicitly provides,[14] and the Commission repeatedly emphasized in the Order adopting the rule, that in the event of a dispute, commercial reasonableness would be determined on a case-by-case basis taking into consideration the totality of the circumstances presented in each case.[15]

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[13] *Id.* at ¶ 21 ("we adopt a general requirement of commercial reasonableness for all roaming terms and conditions, *including rates*"); ¶ 24 (the rule "includes the ability to offer individualized, commercially reasonable terms, *including rates*"); ¶68 ("providers will have flexibility with regard to roaming *charges*, subject to a general requirement of commercial reasonableness"); ¶ 79 (to resolve "claims regarding the commercial reasonableness of the proffered terms and conditions, *including prices*," the Commission may require parties to provide their best and final offers); *id.* ("if negotiations fail to produce a mutually acceptable set of terms and conditions, *including rates*, the Commission staff may require parties to submit on a confidential basis their final offers, *including price*"); ¶ 86 ("we clarify that, to guide us in determining the reasonableness of the negotiations, providers' conduct, and the terms and conditions of the proffered data roaming arrangements, *including the prices*, we may consider the following [17] factors, as well as others;" ¶ 87 ("We emphasize that these factors are not exclusive or exhaustive and that providers may argue that the Commission should consider other relevant factors in determining the commercial reasonableness of the negotiations, providers' conduct, and the terms and conditions of the proffered data roaming arrangements, *including the prices*.") (Emphasis added).

[14] 47 C.F.R. §20.12(e)(2) (the Commission will resolve data roaming disputes "on a case-by-case basis, taking into consideration the totality of the circumstances presented in each case").

[15] *See e.g.*, *Data Roaming Order* at ¶22 (in the event of a dispute, commercial reasonableness will be determined by the Commission on a case-by-case basis); *id.* at ¶23 (the data roaming rule includes the ability to offer individualized, commercially reasonable terms, including rates, and to evaluate a number of factors on a case-by-case basis, in determining commercial reasonableness); *id.* at ¶ 42 ("We will determine whether the terms and conditions of a proffered data roaming arrangement are commercially reasonable on a case-by-case basis, taking into consideration the totality of the circumstances.); *id.* at ¶53 ("a dispute over the reasonableness of any particular measure can be addressed under the dispute resolution procedures, on a case-by-case basis, based on the totality of the circumstances"); *id.* at ¶74 (disputes will be resolved based on the totality of the circumstances); *id.* at ¶ 85 ("We will assess whether a particular data roaming offering includes commercially reasonable terms and conditions, or whether a provider's conduct during negotiations, including its refusal to offer data roaming, is commercially reasonable, on a case-by-case basis, taking into consideration the totality of the circumstances").

In the Order, the Commission identified 16 specific factors that it may consider in determining the commercial reasonableness of the terms and conditions of proffered roaming arrangements as well as a general catch-all of "other special or extenuating circumstances."[16] The Commission also made clear "that these factors are not exclusive or exhaustive and that providers may argue that the Commission should consider other relevant factors in determining the commercial reasonableness" of the terms and conditions of proffered data roaming arrangements.[17] At least two of the enumerated factors relate to the terms and conditions of current and prior data roaming arrangements between the providers and at least four relate to build out issues.

III. The Guidance and Clarification Provided In The *Declaratory Ruling* Is Wholly Consistent With The Data Roaming Rule and Order

AT&T and Verizon allege that the Bureau exceeded the bounds of its delegated authority by modifying through the *Declaratory Ruling* the Commission's *Data Roaming Order*.[18] They are mistaken. In the *Data Roaming Order*, the Commission affirmatively invited parties to file petitions for declaratory ruling to resolve disputes arising under the data roaming rule.[19] The Commission also delegated authority to the Wireless Bureau to act on such petitions for declaratory ruling.[20] While AT&T and Verizon are correct that the Wireless Bureau does not

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16 *Id.* at ¶86.

17 *Id.* at ¶ 87.

18 AT&T Petition at 5-13; Verizon Petition at 3-9.

19 *See e.g.*, *Data Roaming Order* at ¶¶ 2, 8, 75, 81, 82. Section 1.2 of the Commission's Rules, 47 C.F.R. §51.2 provides that petitions for declaratory ruling may be filed to terminate a controversy or remove uncertainty.

20 *Id.* at ¶¶ 82, 97.

have authority to act on petitions that present new or novel questions of law or policy that cannot be resolved under outstanding Commission precedents or guidelines,[21] they are incorrect in asserting that the Wireless Bureau did so act in the *Declaratory Ruling.* Contrary to their assertions, the *Declaratory Ruling* did not change or modify the Commission's data roaming rule. Rather, it provided additional guidance and clarification on the factors the Commission identified in the *Data Roaming Order* that are to be used in determining the commercial reasonableness of a proffered roaming arrangement, a determination that must be made on a case-by-case basis, taking into account the totality of the circumstances.[22]

AT&T and Verizon are correct that the Administrative Procedure Act requires notice and comment rulemaking proceedings to change an agency rule.[23] Such a rulemaking is not required, however, when an agency does not change an existing rule, but issues an interpretation "to advise the public of the agency's construction of the statutes and rules that it administers."[24] Despite their claims and hyperbole, neither AT&T nor Verizon has demonstrated that the additional guidance and clarification provided in the *Declaratory Ruling* is in any way inconsistent with the data roaming rule or the *Data Roaming Order.*

A. Benchmark Rates

As noted above, the Commission left no doubt that rates and prices must be considered in determining the commercial reasonableness of any proffered data roaming arrangements. In the

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21 AT&T Petition at 4, 5-6, 12-13 and Verizon Petition at 8-9, citing Section 0.331(a)(2) of the Commission's rules, 47 C.F.R. section 0.332(a)(2).

22 *See* n. 15, *supra* and *Declaratory Ruling* at ¶¶ 3, 10, 14, 17, 19, 22, 28.

23 AT&T Petition at 4, Verizon Petition at 7-9

24 *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995).

Declaratory Ruling, the Bureau clarified that a potential roaming partner may present evidence that a proposed data roaming rate substantially exceeds retail, MVNO/resale or international rates and/or evidence with respect to how the proposed rate compares to data roaming rates charged by other providers. Significantly, the Bureau stated that the other rates would "not function as a ceiling or as a cap on prices" and that it did "not expect that these other rates will be probative factors in every case or that they will be relevant to the same degree."[25] Instead, the rates "are merely reference points to inform the Commission and negotiating parties,"[26] must be considered in conjunction with the other factors identified by the Commission and not in isolation, and the degree of their relevance "will depend on the facts and circumstances of the individual case, including other terms and conditions of the proposal."[27]

AT&T asserts erroneously that the "Commission has consistently held for years that wholesale roaming rates *should* be substantially in excess of retail rates, to ensure that requesting providers do not use roaming as a substitute for building out their networks,"[28] and criticizes the Bureau for not considering or citing to these alleged Commission holdings.[29] Not surprisingly, AT&T itself provides no citation to a Commission holding that wholesale roaming rates should substantially exceed retail rates. The closest it comes is a Commission reference to an argument made by a party in the Voice Roaming proceeding.[30] What the *Commission* actually said in the

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25 *Declaratory Ruling* at ¶¶ 17-18.

26 *Declaratory Ruling* at ¶16.

27 *Id.* at ¶19.

28 AT&T Petition at 6 (emphasis in the original); *see also* AT&T Petition at 14-15.

29 AT&T Petition at 7.

cited paragraph of the *Voice Roaming Reconsideration Order* is identical to what the Commission said in the *Data Roaming Order*: "We find that, as a practical matter, 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."[31] AT&T's characterization of the Commission's finding that the price of roaming is relatively high compared to the cost of providing facilities-based service as a holding that wholesale roaming rates should substantially exceed retail rates amounts to little more than wishful thinking untethered to reality.

Verizon's contention that the *Declaratory Ruling* substantively modified the *Data Roaming Order* by "reversing prior Commission decisions not to link roaming rates to a provider's wholesale and retail rates"[32] is similarly flawed. In support of this argument, Verizon cites to the *Voice Roaming Order*.[33] In the *Voice Roaming Order*, the Commission declined to "impose price cap or any other form of rate regulation" on the voice roaming fees carriers pay each other, opting instead for rates to be determined in the marketplace through negotiations.[34]

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30 AT&T Petition at 7, n. 19, citing *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services,* WT Docket No. 05-265, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, FCC 10-59, 25 FCC Rcd 4181 at ¶ 32, n. 90 (2010) "*Voice Roaming Reconsideration Order")*.

31 *Voice Roaming Reconsideration Order* at ¶32; *see also, Data Roaming Order* at ¶21.

32 Verizon Petition at 4 (emphasis in the original).

33 Id. at n. 5.

34 *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services,* WT Docket No. 05-265, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817 at ¶37 (2007).

The *Declaratory Ruling* did not alter this Commission decision by imposing price cap or any other form of rate regulation on data roaming rates. The benchmarks the Bureau established are merely factors that the parties to a dispute may urge the Commission to consider (or not consider) in determining the commercial reasonableness of proffered terms and conditions, including pricing. The Commission made clear in the *Data Roaming Order* that the 17 factors it identified were "not exclusive or exhaustive" and that "providers may argue that the Commission should consider other relevant factors in determining the commercial reasonableness of the negotiations, providers' conduct, and the terms and conditions of the proffered data roaming arrangements, including the prices."[35]

There is no merit to Verizon's assertion that the *Data Roaming Order* limited consideration of pricing to pricing in other data roaming agreements.[36] Although the list of factors identified by the Commission to be weighed in determining the commercial reasonableness of proffered terms and conditions include the terms and conditions of current and previous roaming agreements between the parties,[37] the Commission stated repeatedly throughout the *Data Roaming Order* that prices were a relevant consideration and in no way restricted the evidence of pricing that parties were permitted to adduce.[38] If Verizon's reasoning were accepted, parties that did not have current or previous data roaming arrangements with the host provider would not be permitted to adduce evidence of pricing at all, a result clearly at odds

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35 *Data Roaming Order* at ¶87; see also ¶ 86 where the Commission stated it would consider the listed factors as well as others.

36 Verizon Petition at 6.

37 *Data Roaming Order* at ¶ 86.

38 See n. 13, *supra*.

with the Commission's determination that pricing must be considered in evaluating the commercial reasonableness of proffered terms and conditions on a case-by-case basis.

Verizon's contention that the *Declaratory Ruling* "arbitrarily" failed to address the proper relevance of non-roaming rates in complaint proceedings[39] is surprising. According to Verizon, non-roaming rates do not exist in a vacuum and are integrally tied to other terms and conditions, including the revenues expected to be generated by an entire bundle of services. Had the Bureau specified the precise weight to be given to non-roaming rates in data roaming complaint proceedings, Verizon would no doubt have accused it of attempting to impose common carrier rate regulation on hosting data roaming providers and of improperly considering such rates in a vacuum. The *Declaratory Ruling* makes clear that non-roaming rates will not be considered in isolation, will not be probative in every case, will not be relevant to the same degree in every case and may be considered along with the numerous other factors that may bear on commercial reasonableness.[40] This flexibility allows a host provider to argue that such rates are not relevant in a particular case as well as "substantial room for individualized bargaining and discrimination in terms."[41]

The Commission must reject Verizon's argument that the Bureau's alleged failure to consider whether and to what extent "linking the price of data roaming arrangements to data pricing in retail, MVNO, and international roaming rates" would diminish investment incentives

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39 Verizon Petition at 13-16.

40 *Declaratory Ruling* at 9, 17.

41 *Declaratory Ruling* at 17, 19; *see also Cellco Partnership v. FCC*, 700 F. 3d 534, 547-548 (D.C. Cir. 2012) (the commercial reasonableness standard must leave "substantial room for individualized bargaining and discrimination in terms").

requires that the *Declaratory Ruling* be vacated.[42] As noted above, the Bureau did not "link" data roaming rates to data pricing in retail, MVNO and international roaming agreements. It merely confirmed that a requesting party was free to argue that such rates may be considered in determining commercial reasonableness under appropriate circumstances.[43] In rebuttal, hosting providers, such as Verizon, would be free to counter with an argument that the mere comparison of such rates to their proffered roaming rates would diminish their investment incentives. How any such issues or arguments will be resolved in a particular matter cannot be addressed in the abstract. In its opinion on Verizon's appeal of the *Data Roaming Order*,[44] the D.C. Circuit denied Verizon's facial challenge to the data roaming rule on the grounds that Verizon had failed to demonstrate that there are no circumstances in which the rule could be lawfully applied. Here, Verizon has brought a facial challenge to the *Declaratory Ruling* and it has similarly failed to demonstrate that there are no circumstances in which the clarification and guidance provided therein can be lawfully applied. Its Application for Review should be denied.

B. Build-Out Clarification

In the *Declaratory Order*, the Bureau stated that the Commission's consideration of the extent and nature of providers' build-out as one of the factors to be used in determining commercial reasonableness was not intended to allow a host provider to deny roaming, or to charge commercially unreasonable roaming rates in a particular area "simply because the otherwise build-out requesting provider has not built out in that area."[45] AT&T challenges this

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42 Verizon Petition at 11-13.

43 *Data Roaming Order* at ¶ 15.

44 *Cellco Partnership v. FCC*, 700 F. 3d 534 at 548.

45 *Declaratory Ruling* at ¶ 28.

statement as inconsistent with, and an unlawful modification of, the *Data Roaming Order*. It also decries the Bureau's suggestion that "in some cases build out may be unrealistic or the provider may face 'increased costs'" as being in direct conflict with the *Data Roaming Order.* [46]

Again, AT&T is wrong. Among the reasons the Commission put forth for adopting the data roaming rule was that data roaming arrangements can "provide additional incentives to enter a market by allowing network providers without a presence in an area a competitive level of local coverage during the early period of investment and build out."[47] The Bureau's clarification is totally consistent with the Commission's reasoning and findings in the *Data Roaming Order* as demonstrated by the following statements the Commission made in that order:

- "Providers with local or regional service areas need roaming arrangements to offer nationwide coverage and there may be areas where building another network may be economically infeasible or unrealistic."[48]

- "We have found that, in some areas of the country with very low population densities, it is simply uneconomic for several carriers to build out. Further, we note that it may be significantly more costly to build out where the carrier only has access to higher spectrum frequencies where propagation characteristics are less advantageous."[49]

- The commercially reasonable standard "will provide the requesting provider with sufficient incentive to invest in facilities, except where doing so would be economically infeasible or unrealistic regardless of the availability of roaming agreements."[50]

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46 AT&T Petition at 8-10.

47 *Data Roaming Order* at ¶18.

48 *Data Roaming Order* at ¶15.

49 *Id.* at n. 51.

50 *Id.* at ¶ 34.

- "In our previous decision applying the voice roaming obligation to 'in-market' roaming, the Commission concluded that there may be areas where building another network may be economically infeasible or unrealistic."[51]

AT&T's objection to the Bureau's "suggestion" that the Commission may consider the feasibility of build out and the impact on roaming rates on a case-by-case basis under the totality of the circumstances standard[52] is what is inconsistent with the *Data Roaming Order*, not the Bureau's clarification. The Commission itself is the body that determined that the feasibility of build out is a relevant consideration and that each case would be decided on its own merits based on the totality of the circumstances. Among the 17 factors the Commission listed as being relevant to resolving disputes about roaming arrangements were "significant economic factors, such as whether building another network in the geographic area may be economically infeasible or unrealistic, and the impact of any 'head-start' advantages." The Commission also stated that "the propagation characteristics of the spectrum licensed to providers" should be considered in resolving disputes over data roaming arrangements.[53]

AT&T seems terribly bothered by the notion that roaming disputes will be resolved on a case-by-case basis and that each complaint proceeding will be decided on its own merits.[54] AT&T's attempt to fault the *Declaratory Ruling* for introducing "vagueness" into the dispute resolution process by simply reiterating this standard is misdirected.[55] It is the Commission that

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51 *Id.* at n. 110.

52 AT&T Petition at 9.

53 *Data Roaming Order* at ¶86.

54 AT&T Petition at 14-18 and 18-21.

55 For example, AT&T criticizes the Bureau for suggesting that "it may selectively consider whether roaming should be favored in a particular circumstance to allow the requesting provider to offer 'a competitive level of local coverage during the early period of investment or

adopted the commercially reasonable standard for data roaming arrangements,[56] the Commission that specified that numerous factors should be taken into account in assessing commercial reasonableness in any particular dispute,[57] and the Commission that determined that that each case would be decided on its own facts and circumstances.[58] By its nature, the commercially reasonable standard is vague. If AT&T had an issue with that vagueness, it should have filed a petition for reconsideration of the *Data Roaming Order*. As it is, the Court of Appeals has noted with approval that the commercially reasonable standard leaves providers plenty of leeway to respond to market forces and engage in individualized bargaining and discrimination in terms and that determinations of commercial reasonableness would be made on a case-by-case basis.[59]

C. The Rebuttable Presumption Clarification

In the *Data Roaming Order*, the Commission established a rebuttable presumption that the terms of a signed roaming agreement are commercially reasonable and that a party challenging those terms would be required to rebut that presumption. Specifically, the Commission stated:

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buildout.'" AT&T Petition at 17-18. The Bureau said nothing about selective consideration. Instead, consistent with the *Data Roaming Order*, it stated that the level of a requesting provider's buildout is a factor to be considered in determining commercial reasonableness. Of course, the allegedly offensive *Declaratory Ruling* language that AT&T quotes at page 18 of its Petition is taken directly from the *Data Roaming Order* where the Commission described the availability of roaming arrangements as providing "additional incentives to enter a market by allowing network providers without a presence in an area a competitive level of local coverage during the early period of investment and build out." *Data Roaming Order* at ¶18.

56 47 C.F.R. § 20.12(e)(1).

57 *Data Roaming Order* at ¶¶86-87.

58 47 C.F.R. § 20.12(e)(2).

59 *Cellco Partnership v. FCC*, 700 F. 3d 534, 547-548 (D.C. Cir. 2012).

> [W]e provide that a requesting provider could file a complaint or petition for declaratory ruling regarding the commercial reasonableness of the agreed terms and conditions to the extent such claims are based on new information that the requesting provider reasonably did not know prior to signing the agreement. Because the standard of commercial reasonableness is one that we expect to accommodate a variety of terms and conditions in data roaming and to discourage frivolous claims regarding the reasonableness of the terms and conditions in a signed agreement, we will presume in such cases that the terms of a signed agreement meet the reasonableness standard and will require a party challenging the reasonableness of any term in the agreement to rebut that presumption.[60]

Consistent with the Commission's determination that the presumption would apply *only* where a requesting provider collaterally challenged the commercial reasonableness of terms in an executed agreement, the *Declaratory Ruling* stated that the Commission did not intend for the presumption to apply to the terms proffered for a subsequent agreement not yet executed.[61] The presumption of reasonableness, of course, is based upon both parties' agreement to the terms of a roaming arrangement as evidenced by their signatures. Although the Commission may consider the terms of any roaming agreements that the negotiating parties currently have or may once have had with one another in determining commercial reasonableness,[62] the terms of prior agreements should not be "presumed" reasonable in complaint or declaratory ruling proceedings for a new agreement.

AT&T contends that the Bureau has read the presumption too narrowly and that the Commission in fact intended the presumption of reasonableness to apply to the terms and conditions of all signed agreements in perpetuity. AT&T also alleges that the "prevailing rates in unchallenged agreements are presumed reasonable and form the starting point for assessing

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60 *Data Roaming Order* at ¶81.

61 *Declaratory Ruling* at ¶ 25.

62 *Data Roaming Order* at ¶86.

whether any given wholesale offer is reasonable."[63] In other words, AT&T submits that a requesting provider would be required to rebut a presumption of reasonableness attached to the terms and conditions of a prior agreement in a subsequent complaint proceeding to establish the terms and conditions of a new agreement. Such a reading would relegate requesting providers to prove a negative before putting on an affirmative case in a complaint proceeding for a new agreement and would encourage host providers to offer requesting providers only the terms and conditions of prior agreements, including agreements entered into before the adoption of the data roaming rule, regardless of changed circumstances. While "prevailing rates" may be AT&T's starting point for negotiating a new agreement, they are entitled to no presumption of reasonableness.

The Bureau's clarification does not eliminate the presumption of reasonableness established by the Commission in the *Data Roaming Order*, as alleged by AT&T. Instead it provides a common sense reading of the presumption as applying only when a requesting provider subsequently attempts to challenge the terms of an agreement it executed, rather than to the terms of a new agreement offered by a host provider. AT&T's arguments that the Bureau exceeded its authority in issuing the clarification must be rejected.

IV. The *Declaratory Ruling* Does Not Deny AT&T Fair Notice

There is no merit to AT&T's allegation that the *Declaratory Ruling* denies parties fair notice by undermining the predictability of the Commission's commercial reasonable standard.[64] As noted above, it is the Commission's rule that provides that commercial reasonableness will be

63 AT&T Petition at 10-12, 15.

64 AT&T Petition at 18-21.

resolved on a case-by-case basis taking into account the totality of the circumstances.[65] The *Declaratory* Ruling did not amend that rule or the case-by-case method of resolving data roaming disputes. AT&T's objection that such a case-by-case approach is unlawful under the APA and unconstitutional should have been raised in a challenge to the *Data Roaming Order* and must be rejected.

CONCLUSION

For the foregoing reasons, COMPTEL respectfully requests that the Commission deny the Applications for Review filed by AT&T and Verizon.

February 4, 2015

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65 47 C.F.R. § 20.12(e).