
DATA ROAMING REGULATION: THE COMMERCIALLY REASONABLE STANDARD AND ITS INCREASING NEED FOR CLARITY

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The advent of mobile broadband services (such as fourth generation, or “4G” technology) altered how Americans consume information by allowing them to access data with dramatically enhanced speed and mobility.¹ Today, it is possible to download over forty high-definition movies in a single second using advanced broadband technology.² Music and film are effortlessly downloaded in every corner of the country on devices slightly larger than a deck of playing cards.³ Mobile service providers (AT&T, Sprint, T-Mobile, Verizon, etc.) require broadband access to attract and retain customers.⁴ However, pro-

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¹ See, e.g., *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, WT Docket No. 05-265, 26 FCC Rcd 5411, para. 1 (Apr. 7, 2011) (*aff’d sub nom.* Cellco P’ship v. FCC, 700 F.3d 534, 537 (D.C. Cir. 2012)) [hereinafter *2011 Data Roaming Order*]; see also *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, Declaratory Ruling, WT Docket No. 07-53, 22 FCC Rcd 5901, para. 11 (Mar. 22, 2007) (discussing Wireless Broadband Internet access and the use of spectrum to deliver high speed mobile Internet capabilities).

² See David Lee, ‘Fastest Ever’ Broadband Passes Speed Test, BBC NEWS (Jan. 22, 2014, 8:48 PM), <http://www.bbc.com/news/technology-25840502> (“Speeds of 1.4 terabits per second...enough to send 44 uncompressed HD films a second.”).

³ See, e.g., *Coverage Locator*, VERIZON WIRELESS, <http://vzwmap.verizonwireless.com/dotcom/coveragelocator/default.aspx?requestfrom=webagent> (last visited Feb. 14, 2015) (showing the domestic range of Verizon’s 4G LTE data coverage); see also *Coverage Check*, SPRINT, <http://coverage.sprint.com/IMPACT.jsp?> (last visited Feb. 14, 2015) (showing the domestic range of Sprint Spark™, Sprint 4G LTE, and Sprint 3G data coverage).

⁴ See, e.g., *In re* Petition for Expedited Declaratory Ruling Filed by T-Mobile USA, Inc. Regarding Data Roaming Obligations, *Reply Comments of Competitive Carrier Association*, WT Docket No. 05-265, 3 (Aug. 20, 2014) [hereinafter *Reply Comments of Competitive Carrier Association*]

viders are finding it increasingly difficult to secure data roaming agreements in areas where their own network does not reach.⁵ The competitive disadvantage to providers that fail to secure data roaming agreements for mobile broadband services will grow in the near future, as roaming revenue is expected to increase from \$57 billion in 2014 to \$90 billion in 2018.⁶

Healthy competition in the mobile industry is at risk because of the exorbitantly high rates providers must pay for data roaming agreements.⁷ The Federal Communications Commission (“Commission” or “FCC”) tried and failed to address the problem in the 2011 Second Report and Order in the *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services* (“Data Roaming Order”).⁸

The *Data Roaming Order* is ineffective because it merely requires providers to offer rates at a “commercially reasonable” standard.⁹ Because the criteria that define the commercially reasonable standard in the *Data Roaming Order* are too ambiguous to guarantee fair agreements, the largest mobile service

The ability to procure commercially reasonable roaming agreements is essential to facilitation of the provision of competitive wireless services, which consumers now expect will include nationwide coverage and seamless data services. Thus, without data roaming, non-nationwide carriers, particularly those that serve rural areas, will struggle to compete, especially in a consolidating market.

Id.

⁵ *2011 Data Roaming Order*, 26 FCC Rcd 5411, paras. 14-15. Cincinnati Bell attests that it has lost a significant number of customers to national carriers, despite providing superior service in the regional coverage area. According to Cincinnati Bell, customers defected because of Cincinnati Bell’s inability to reach a fair agreement for data roaming with providers outside the region. *See, e.g., id.* at para. 15.

⁶ *See* Nitin Bhas, *Press Release: Mobile Roaming to Represent 8% of Global Operator Billed Service Revenues by 2018*, JUNIPER RES. (Mar. 4, 2014), <http://www.juniperresearch.com/viewpressrelease.php?pr=432>.

⁷ *See generally 2011 Data Roaming Order*, 26 FCC Rcd 5411, para. 9 (stating the intent of the Commission to increase competition within the Mobile industry); *see also* Letter from Caressa D. Bennett, Rural Wireless Ass’n, Gen. Counsel, to The Honorable Fred Upton and The Honorable Greg Walden, U.S. H. Rep., *Comments of the Rural Wireless Ass’n, Inc. in response to White paper #2: Modernizing U.S. Spectrum Policy*, (Apr. 25, 2014) (Electronically filed via Email).

⁸ *2011 Data Roaming Order*, 26 FCC Rcd 5411, 5485 (statement of Commissioner Clyburn).

⁹ *See, e.g., In re* Petition for Expedited Declaratory Ruling of T-Mobile USA, Inc., *Comments of NTCA – The Rural Broadband Association*, WT Docket No. 05-265, 6 (July 10, 2014) [hereinafter *Comments of NTCA*]

The *Data Roaming Order* sought to address inequities in the data roaming marketplace by requiring facilities-based providers of commercial mobile data services to offer data roaming arrangements to other providers of such services on ‘commercially reasonable terms and conditions’. . . . Greater clarity as to the meaning of ‘commercially reasonable’ in the context of data roaming is needed.

Id.

providers continue to offer smaller mobile service providers data roaming agreements at inflated rates.¹⁰ In an effort to mitigate this dilemma, T-Mobile recently proposed applying benchmarks, based on prices of other industry services, to the FCC evaluation of the commercially reasonable standard.¹¹ The benchmarks attempt to define the non-binding limits of the commercially reasonable standard.¹² The FCC should utilize the T-Mobile benchmarks to clarify the commercially reasonable standard, because the current definition fails to promote the competitive goals set forth in the 2011 *Data Roaming Order*.¹³

Part I of this Comment introduces data roaming and provides a brief background of the industry dynamics that create obstacles to healthy competition among mobile service providers. Part II explains how roaming obligations evolve over time, and how the current regime has a negative effect on the mobile industry. Part II concludes by reviewing the issues resulting from the 2007 Order and why they still linger today. Part III argues that the FCC has established authority to meaningfully clarify the commercially reasonable standard. The D.C. Circuit Court affirmed this authority and outlined how to clarify rules without overstepping statutory authority.¹⁴ Part IV evaluates T-Mobile's recommended "benchmarks" meant to give carriers guidance as to what negotiated terms are "commercially reasonable." Part V gives a brief update of data roaming regulations in light of the FCC's Net Neutrality Order.¹⁵

I. DATA ROAMING IN CONTEXT

Commercial mobile radio service ("CMRS") is any mobile service provided for profit and available to the public.¹⁶ CMRS carriers, or "providers," like

¹⁰ See, e.g., *id.*; *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Petition For Expedited Declaratory Ruling Of T-Mobile USA, Inc., WT Docket No. 05-265, 6 (May 27, 2014) [hereinafter *T-Mobile Data Roaming Petition*].

¹¹ See generally *T-Mobile Data Roaming Petition*, WT Docket No. 05-265, 11.

¹² See generally *id.* (explaining four benchmarks for the Commission to consider when providing guidance on the commercially reasonable standard).

¹³ See, e.g., *Comments of NTCA*, WT Docket No. 05-265, 5-6 (stating NTCA's support of the suggested four industry benchmarks); see *T-Mobile Data Roaming Petition* WT Docket No. 05-265, 6 (explaining that despite the adoption of the 2011 *Data Roaming Order*, problems with discriminatory data roaming agreements still remain prevalent).

¹⁴ See generally *Cellco Partnership v. FCC*, 700 F.3d 534 (D.C. Cir. 2012).

¹⁵ See *In the Matter of Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, GN Docket No. 14-28 (Feb. 26, 2015) ("Net Neutrality Order").

¹⁶ See 47 C.F.R. § 20.3 (2013). "Commercial mobile radio service" is defined as:

A mobile service that is: (a)(1) provided for profit, *i.e.*, with the intent of receiving compensation or monetary gain; (2) An interconnected service; and (3) Available to

Sprint or Verizon, allow subscribers to access mobile services through the use of devices such as cell phones.¹⁷ Voice telephony service (phone calls), short message service (“SMS” or “text messaging”), and push-to-talk services are all examples of CMRS.¹⁸

Roaming service, or “roaming,” occurs when the subscriber of one CMRS carrier uses the facilities of a wholly unrelated CMRS carrier to initiate, receive, or continue a voice call or other commercial mobile service.¹⁹ When roaming, the subscriber’s own CMRS carrier is known as the “requesting provider,”²⁰ while the carrier whose facilities are being used by the requesting provider, is known as the “host provider.”²¹

Large carriers have little incentive to forge roaming agreements with small, regional carriers.²² Accordingly, smaller carriers often struggle to negotiate data roaming agreements with the two largest facilities-based carriers²³: AT&T

the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or (b) The functional equivalent of such a mobile service described in paragraph (a) of this section 47 C.F.R. § 20.3 (2013).

Id.; see also *id.* (defining “Commercial mobile data service” as “(1) Any mobile data service that is not interconnected with the public switched network and is: (i) Provided for profit; and (ii) available to the public or to such classes of eligible users as to be effectively available to the public”).

¹⁷ See, e.g., *Activate Your Verizon Wireless Device and Explore Plans in a Few Easy Steps*, VERIZON, <http://www.verizonwireless.com/b2c/nso/enterDeviceId.do?&zipRdr=y> (last visited Feb. 14, 2015) (illustrating the various devices that can be connected to the Verizon mobile and wireless services).

¹⁸ See *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 05-265, 22 FCC Rcd 15817, paras. 54-55 (Aug. 7, 2007) [hereinafter *2007 Data Roaming Order*].

¹⁹ See *id.* at para. 5, 6

There are two forms of roaming – manual and automatic. With manual roaming, the subscriber must establish a relationship with the host carrier on whose system he or she wants to roam in order to make a call. Typically, the roaming subscriber accomplishes this in the course of attempting to originate a call by giving a valid credit card number to the carrier providing the roaming service. By contrast, with automatic roaming, the roaming subscriber is able to originate or terminate a call without taking any special actions. Automatic roaming requires a pre-existing contractual agreement between the subscriber’s home system and the host system.

Id.

²⁰ *Roaming for Mobile Wireless Services*, FCC, <http://www.fcc.gov/encyclopedia/roaming-mobile-wireless-services> (last visited Feb. 14, 2015).

²¹ See *2007 Data Roaming Order*, 22 FCC Rcd 15817, para. 2.

²² See *id.* at para. 28 (“[I]t is getting more difficult for small and rural carriers to obtain access to nationwide carriers’ networks through automatic roaming agreements.”).

²³ *Reply Comments of Competitive Carrier Association*, WT Docket No. 05-265, at 2.

and Verizon.²⁴ Small and regional carriers depend on roaming agreements with large carriers to ensure consumers will have nationwide access outside their coverage area.²⁵ National carriers often already have infrastructure in areas where regional carriers build out their networks, so they often have little to gain by providing roaming service.²⁶

According to the FCC, consolidation of the mobile marketplace has made it increasingly challenging for regional carriers to obtain fair data roaming agreements.²⁷ Major carriers have the resources to acquire or construct the infrastructure needed to support nationwide service to consumers.²⁸ Because large carriers possess their own equipment across the country,²⁹ they lack the incentive to enter reciprocal agreements with regional carriers, who may have previously had the only comprehensive network in a given coverage area.³⁰ The continuous expansion of major carriers' networks has driven a significant number of smaller providers out of business.³¹ When large carriers can meet their roaming needs by only dealing with one another, smaller providers are priced out of the market because developing infrastructure is so costly.³²

²⁴ See *2011 Data Roaming Order*, 26 FCC Rcd. 5411, paras. 25-26 (Apr. 7, 2011) (stating the difficulties in reaching negotiation agreements with both Verizon and AT&T). Perhaps preempting the Commission's response to this dynamic, a suspicious number of data roaming agreements were reached in the months preceding the release of the *Data Roaming Order*. *Id.* at para. 27. The Commission acknowledged the disparity, noting that the spontaneous cooperation "may not accurately reflect the ability of requesting providers to obtain data roaming arrangements in the future." *Id.*

²⁵ *Id.* at para. 15.

²⁶ See *id.* at paras. 25-26 (stating that large carriers have refused to enter into negotiations with small carriers that will not expand the already existing carrier coverage of the large carrier).

²⁷ *Id.* at para. 27.

²⁸ See, e.g., *id.* (describing the Commission's opinion that AT&T and Verizon would likely not offer roaming arrangements with smaller carriers for the newest "Long Term Evolution networks").

²⁹ See *id.* ("We also note that AT&T and Verizon Wireless are only now deploying 'fourth generation' Long Term Evolution networks.").

³⁰ See *id.* (stating that the large carriers may halt any roaming negotiations for "advanced mobile data networks" due to the extent of coverage enjoyed by these carriers).

³¹ See *id.* at 5485 (statement of Commissioner Mignon L. Clyburn).

³² Ibkis, *Regional Wireless Carriers Love the New Data Roaming Mandate*, TAO OF IBKIS (Apr. 13, 2011), <http://taoofibkis.blogspot.com/2011/04/regional-wireless-carriers-love-new.html>.

II. EVOLUTION OF ROAMING REQUIREMENTS HAS RESULTED IN COMPLEX AND PROBLEMATIC CLASSIFICATIONS OF MOBILE SERVICES

One major impetus for establishing a data roaming rule is that it benefits consumers by fostering competition.³³ A significant barrier to entry for potential cell service providers, or CMRS carriers, is the ability to secure data roaming agreements for areas that will not be covered by the potential carrier's network.³⁴ Consumers expect nationwide service,³⁵ and if regional carriers are unable to provide this coverage through roaming agreements, it becomes very difficult to attract customers or maintain viability in the mobile marketplace.³⁶

After years of consideration, the Commission finally extended roaming obligations to mobile data services in the *Data Roaming Order*, published in 2011.³⁷ But the *Data Roaming Order* does not go far enough because it only obligates carriers to offer data roaming service on "commercially reasonable" terms.³⁸ This is problematic because the "commercially reasonable" standard is judged according to sixteen explicit criteria, in addition to the "the totality of the circumstances."³⁹ The factors range from subjective judgments like "the

³³ 2011 *Data Roaming Order*, 26 FCC Rcd. 5411, para. 31.

³⁴ See, e.g., *id.* at para. 19 (citing Bright House Network's contention that data roaming agreement requirements would be key to barrier removal).

³⁵ See, e.g., *id.* at para. 15 ("[C]onsumers expect to be able to have access to the full range of services available on their devices wherever they go."); see *Reply Comments of Competitive Carrier Association*, WT Docket No. 05-265, at 3 (on competitive wireless services: "consumers now expect will include nationwide coverage and seamless data services").

³⁶ See, e.g., *In re Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, Comments of Limitless Mobile, LLC.*, WT Docket No. 05-265, at 2 (filed July 10, 2014)

American consumers have come to expect that *all* retail wireless carriers offer voice and data rate plans with nationwide coverage. For a facilities-based carrier like Limitless, this expectation means that its own nationwide, retail service offering must consist of some combination of local coverage (provided on-network) and roaming partner coverage. Because Limitless is a local mobile wireless service provider with a modest licensed footprint in just one state, it relies upon AT&T and T-Mobile (which operate similar GSM-based networks) as absolutely crucial nationwide roaming partners. Limitless depends upon these two carriers to supplement its local coverage so that Limitless may offer truly nationwide retail plans that are even remotely competitive with the retail rates and plans offered by the nationwide carriers.

Id.

³⁷ 2011 *Data Roaming Order*, 26 FCC Rcd. 5411, para. 1.

³⁸ *Id.*

³⁹ See *id.* at paras. 85-86

In addition to others, the Commission will take into account the following enumerated factors: whether the host provider has responded to the request for negotiation, whether it has engaged in a persistent pattern of stonewalling behavior, and the

level of competitive harm in a given market and the benefits to consumers,” to objective measurements such as “the propagation characteristics of the spectrum licensed to the providers.”⁴⁰ However, the *Data Roaming Order* is vitally flawed because it fails to explain how the factors will be weighed relative to each other or even how they will be interpreted individually. What level of competitive harm is acceptable? How important is competitive harm in relation to spectrum propagation characteristics? Without any intelligible guidance, carriers cannot know if an agreement is in violation of the *Data Roaming Order*.⁴¹ In the three years since the *Data Roaming Order* was released, the commercially reasonable standard has had little to no impact on the anti-competitive concerns it was intended to address.⁴²

length of time since the initial request; 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; whether the parties have any roaming arrangements with each other, including roaming for interconnected services such as voice, and the terms of such arrangements; whether the providers involved have had previous data roaming arrangements with similar terms; the level of competitive harm in a given market and the benefits to consumers; the extent and nature of providers’ build-out; 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; whether the requesting provider is seeking data roaming for an area where it is already providing facilities-based service; the impact of the terms and conditions on the incentives for either provider to invest in facilities and coverage, services, and service quality; whether there are other options for securing a data roaming arrangement in the areas subject to negotiations and whether alternative data roaming partners are available; events or circumstances beyond either provider’s control that impact either the provision of data roaming or the need for data roaming in the proposed area(s) of coverage; the propagation characteristics of the spectrum licensed to the providers; whether a host provider’s decision not to offer a data roaming arrangement is reasonably based on the fact that the providers are not technologically compatible; whether a host provider’s decision not to enter into a roaming arrangement is reasonably based on the fact that roaming is not technically feasible for the service for which it is requested; whether a host provider’s decision not to enter into a roaming arrangement is reasonably based on the fact that changes to the host network necessary to accommodate the request are not economically reasonable; whether a host provider’s decision not to make a roaming arrangement effective was reasonably based on the fact that the requesting provider’s provision of mobile data service to its own subscribers has not been done with a generation of wireless technology comparable to the technology on which the requesting provider seeks to roam; other special or extenuating circumstances.

Id.

⁴⁰ See *id.* at para. 86.

⁴¹ See, e.g., *id.* (showing a lack of this information present in the listed factors).

⁴² See, e.g., *T-Mobile Data Roaming Petition*, WT Docket No. 05-265, at 1 (filed May 27, 2014) (providing an example of the ongoing need for guidance on the “commercially reasonable” standard); see also *In re* Petition for Expedited Declaratory Ruling Filed by T-Mobile USA, Inc. Regarding Data Roaming Obligations, *Reply Comments of Competitive Carrier Association*, WT Docket No. 05-265 at 1.

A. The 2007 Order Imposes First Automatic Roaming Requirement on Voice Telephony Service

The Commission adopted roaming requirements for the first time in 1981.⁴³ It followed with additional orders in 1996,⁴⁴ 2000⁴⁵ and 2007.⁴⁶ The 2007 Order is significant because it extended automatic⁴⁷ roaming requirements to phone calls, text messaging, and push-to-talk services.⁴⁸ This allowed consumers to use voice, text, and push-to-talk services on other providers' networks as if they were using their own carrier's network.⁴⁹

While developing the 2007 Order, the Commission contemplated extending the automatic roaming requirements to "non-interconnected data services" such as mobile broadband Internet access.⁵⁰ When the proposal was met with strong opposition from mobile carriers,⁵¹ the Commission concluded that it was premature to extend roaming requirements to non-interconnected data services.⁵² Although broadband services were exempt in the 2007 Order, the increased importance of data roaming spurred the Commission to release a Further Notice of Proposed Rulemaking ("FNPRM") seeking comment as to whether or when automatic roaming obligations should extend to non-

⁴³ See *In the Matter of An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, Report and Order, CC Docket No. 79-318, 86 FCC 2d 469, para. 75 (May 4, 1981) [hereinafter *Cellular Report & Order*].

⁴⁴ *In the Matter of Interconnection and Resale Obligations*, Second Report and Order, CC Docket No. 94-54, 11 FCC Rcd. 9465, para. 1 (June 27, 1996).

⁴⁵ *In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Third Report and Order and Memorandum Opinion and Order on Reconsideration, CC Docket No. 94-54, 1515 FCC Rcd 15975, para. 22 (Aug. 28, 2000).

⁴⁶ See *2007 Data Roaming Order*, WT Docket No. 05-265, 22 FCC Rcd 15817, para. 2 (Aug. 16, 2007).

⁴⁷ See *id.*

⁴⁸ See *id.* at para. 54. The 2007 Order officially applies to real-time, two-way switched voice and interconnected data services offered by CMRS carriers. The Commission applied this designation to voice calls; and although they extended the automatic roaming requirement to SMS and push-to-talk services, the Commission notes that nothing in the 2007 Order should be construed as addressing the regulatory classification of SMS, push-to-talk, or other data services. *Id.* at paras. 2, 54-55.

⁴⁹ See *id.* at para. 60.

⁵⁰ See *id.* at paras. 58, 60.

⁵¹ See *id.* at para. 58 ("Of those commenters who addressed data roaming services, the majority oppose extending automatic roaming to data services using enhanced digital networks.").

⁵² See *id.* at para. 60.

interconnected data services like mobile broadband.⁵³ The Commission considered roaming obligations for data services numerous times after releasing the FNPRM,⁵⁴ but it would still take nearly four years for any data roaming regulations to be adopted.⁵⁵

On April 7, 2011, the FCC released the Data Roaming Order, formally known as the Second Report and Order: In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services.⁵⁶ The primary objective of the Data Roaming Order is to promote expansion of nationwide mobile broadband service by requiring facilities-based providers of commercial mobile data services to offer commercially reasonable data roaming arrangements to other providers.⁵⁷

B. Obligations Imposed by the Commercially Reasonable Standard

In the *Data Roaming Order*, the Commission expands the scope of roaming obligations to include mobile data services.⁵⁸ After reviewing public comments the Commission concluded that requiring facilities-based providers to offer commercially reasonable agreements was in the public interest.⁵⁹ Specifically, the FCC found that imposing data roaming regulations benefits the public through increased investment, which promotes competition among providers and expands access to mobile broadband services for millions of Americans.⁶⁰

⁵³ See *id.* at para. 77.

⁵⁴ See *2011 Data Roaming Order*, 26 FCC Rcd 5411, para. 5 (citing *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, WT Docket No. 05-265, 25 FCC Rcd 4181, para. 18 (Apr. 21, 2010)).

⁵⁵ See *id.* at para. 1.

⁵⁶ See *id.* at paras. 1-3.

⁵⁷ See *id.* at para. 1.

⁵⁸ The 2007 Order only applied to “real-time, two-way switched voice or data services . . . that are interconnected with the public switched network,” but the simultaneously released Further Notice contemplated a more general automatic data roaming obligation that covers interconnected and non-interconnected data. See *2007 Data Roaming Order*, 22 FCC Rcd. 15817, para. 23. The 2010 Second Further Notice again requested comment on whether roaming obligations should extend to mobile broadband Internet access and other non-interconnected mobile data services. See *2011 Data Roaming Order*, 26 FCC Rcd 5411, para. 4.

⁵⁹ *2011 Data Roaming Order*, 26 FCC Rcd 5411, para. 13.

⁶⁰ See *id.* at paras. 29-31 (finding that adoption of the rule will benefit providers that serve “millions of American consumers who otherwise might not have full access to mobile broadband services,” as well as promote investment, deployment and competition among facilities-based providers).

However, the vague obligations imposed by the “commercially reasonable” standard have stymied progress toward those goals.⁶¹

The Commission will determine whether a provider’s conduct, negotiations, or terms are commercially reasonable on a case-by-case basis, taking into consideration the totality of the circumstances.⁶² More specifically, the FCC looks at sixteen factors⁶³ for each individual negotiation, including whether the carrier engages in persistent stonewalling behavior, whether the parties had similar agreements in the past, and whether terms offered are “so unreasonable as to be tantamount to a refusal to offer a data roaming arrangement.”⁶⁴ Beyond listing them, the *Data Roaming Order* neglects to clarify how any of the factors are evaluated. Aside from noting that carriers may negotiate individual terms and prices when they “reasonably reflect actual differences in particular cases,”⁶⁵ the Commission’s sole remaining guidance is that “conduct that unreasonably restrains trade, however, is not commercially reasonable.”⁶⁶ This exemplifies the issues providers face dealing with the ambiguity of the commercially reasonable standard. By stating “[an] unreasonable restraint of trade is not commercially reasonable,” followed directly thereafter with “a difference in circumstance may justify a difference in terms,” the Commission leaves unanswered whether a difference in terms not justified by a difference in circumstance qualifies as an unreasonable restraint of trade.⁶⁷

The *Data Roaming Order* lends more clarity to circumstances in which the host providers are exempt from offering commercially reasonable terms. There are four important limitations to the scope of the commercially reasonable standard: individualized negotiations are still allowed;⁶⁸ networks must be

⁶¹ See, e.g., *T-Mobile Data Roaming Petition*, WT Docket No. 05-265, at 10 (May 27, 2014)

Simply put, the roaming market is dysfunctional. . . . [P]roviding greater clarity as to the meaning of ‘commercially reasonable’ in the limited context of data roaming . . . will help arm providers with the tools they need to obtain the data roaming agreements necessary to enable them to compete.

Id.

⁶² *2011 Data Roaming Order*, 26 FCC Rcd 5411, para. 85.

⁶³ *Id.* at para. 86.

⁶⁴ *See id.*

⁶⁵ *See id.* at para. 85

⁶⁶ *See id.*

⁶⁷ *See id.* at paras. 45, 85.

⁶⁸ Providers’ obligation to offer data roaming arrangements with commercially reasonable terms and conditions provides an exception that allows host providers to reach individualized negotiations with a requesting provider. The Commission provides that commercially reasonable terms offered to a requesting provider may be tailored to individual circumstances, however any conduct that “unreasonably restricts trade” is prohibited. *See id.* at para. 45 (“First, providers may negotiate the terms of their roaming agreements on an individualized basis.”).

technologically compatible;⁶⁹ arrangement must be economically feasible for the host provider;⁷⁰ and the roaming carrier must provide comparable wireless technology.⁷¹

C. Issues Continue to Plague a Majority of Providers

Despite widespread consensus⁷² among mobile service providers, the abstract commercially reasonable standard has yet to be clarified by the FCC since the release of the *Data Roaming Order* in 2011.⁷³ The Commission's inaction has led T-Mobile to call for industry guidance due to further issues regarding competition and market consolidation.⁷⁴

Because of the unclear standards in the *Data Roaming Order*, competition in

⁶⁹ Requesting providers are not required to have an identical air interface as the host provider. Rather, the requesting provider's technology simply has to be able to communicate with the host provider's network. One way technological compatibility can be overcome is by providing customers with multi-band devices that function on several different networks. *See id.* at para. 46 (“[I]t is commercially reasonable for providers not to offer a data roaming arrangement to a requesting provider that is not technologically compatible.”).

⁷⁰ In certain circumstances, a requesting provider may be able to communicate with a host network, yet the host network is still unable to provide roaming for some services. In these circumstances, host providers are not required to offer commercially reasonable terms if the changes to the network necessary to accommodate such roaming are economically infeasible. *See id.* at para. 47 (stating that it is commercially reasonable for providers to refuse roaming agreements where necessary changes would be unreasonable economically).

⁷¹ This exception allows host providers to refrain from offering commercially reasonable terms to a requesting provider when the requesting provider is effectively reselling the host provider's roaming service in lieu of building their own networks. This situation could arise if a requesting provider supplied its customers with 4G-capable devices, but offered little or no 4G service on their own network. Here, a host provider with broad 4G coverage would not be obligated to offer commercially reasonable terms to the requesting provider. The Commission's reasoning is that requesting providers would have incentives to enter roaming agreements instead of upgrading their own networks. By conditioning the effectiveness of roaming agreements on the requesting provider's ability to service a comparable generation of wireless technology on their own network, the Commission ensures roaming obligations will not deter future investment in infrastructure. *Id.* at para. 48.

⁷² *See Reply Comments of Competitive Carriers Association*, WT Docket No. 05-265, at 14 (Aug. 20, 2014) (accessible via FCC Electronic Comment Filing System).

⁷³ *See, e.g., T-Mobile Data Roaming Petition*, WT Docket No. 05-265, at 10.

By providing greater clarity as to the meaning of ‘commercially reasonable’ in the limited context of data roaming, the Commission will help arm providers with the tools they need to obtain the data roaming agreements necessary to enable them to compete. . . . Clarification will help parties better understand their data roaming rights and obligations, help narrow the issues in dispute in roaming negotiations, and allow parties to arrive at commercially reasonable terms more consistently and more quickly.

Id.

⁷⁴ *See id.* at i.

the mobile marketplace suffered because small and mid-size carriers are still unable to enter commercially reasonable data roaming agreements with the largest carriers.⁷⁵ Unprecedented consolidation within the mobile service industry reduced competition and helped Verizon and AT&T further establish their dominance.⁷⁶ The two largest mobile service providers currently account for sixty-seven percent of all wireless revenue, as they look to continue to gain shares of the market.⁷⁷ The vast resources separating Verizon and AT&T from all other carriers minimize their incentive to offer fair or reasonable data roaming rates to smaller carriers.⁷⁸ By using the ambiguity of the commercially reasonable standard and their respective positions of market dominance, AT&T and Verizon are able to strong-arm smaller carriers into disadvantageous data roaming arrangements because smaller carriers often depend on data roaming to remain operational.⁷⁹

Aside from Verizon and AT&T, commenters unanimously expressed the view that the current wholesale roaming market is uncompetitive.⁸⁰ Some carriers have reported waiting as long as eight months for an initial response to a data roaming request.⁸¹ The Rural Broadband Association (“NTCA”) conduct-

⁷⁵ See John Blevins, *Death of the Revolution: The Legal War on Competitive Broadband Technologies*, 12 YALE J. L. & TECH. 85, 131 (2009)

As carriers get larger and fewer, roaming arrangements become increasingly important. At the same time, however, the data and in-market exceptions make it increasingly more difficult for smaller carriers to obtain roaming agreements. The two forces working together—size and law—have amplified entry costs, and therefore limited competitive threats to incumbents.

Id.

⁷⁶ See *Reply Comments of Competitive Carriers Association*, WT Docket No. 05-265, at 5-6; *In re* Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, *Comments of Rural Wireless Association, Inc.*, WT Docket No. 05-265, at 5 (July 10, 2014) (accessible via FCC Electronic Comment Filing System).

⁷⁷ See *T-Mobile Data Roaming Petition*, WT Docket No. 05-265, at 7.

⁷⁸ See *Reply Comments of Competitive Carriers Association*, WT Docket No. 05-265, at 5-6.

⁷⁹ See *id.* at 4-5.

⁸⁰ See *id.*

All commenters, aside from AT&T and Verizon, denounce the wholesale roaming market as uncompetitive. Several commenters describe the challenges they face in obtaining data roaming in regions where it is most needed, which suggests that AT&T and Verizon have used the ambiguity in the ‘commercially reasonable’ standard to impede negotiations and to preclude roaming arrangements. In other instances, AT&T and Verizon have used their dominant positions as providers of nationwide roaming capabilities to strong-arm small carriers into executing data roaming arrangements containing commercially *unreasonable* terms.

Id.

⁸¹ See *T-Mobile Data Roaming Petition*, WT Docket No. 05-265, at 6 (citing *In re* Matter of Petition for Expedited Declaratory Ruling Filed by T-Mobile USA, Inc. Regarding

ed a survey of 900 rural, independent phone companies and found that fifty-eight percent identify data roaming negotiations as a major area of concern; while sixty-nine percent of respondents consider their experience of negotiating data roaming arrangements with other carriers as “moderately to extremely difficult.”⁸² Other carriers are required to prepare largely speculative long-term data traffic projections for their customers’ use of data roaming services, with substantial financial penalties imposed for deviating too far from the projections.⁸³ Even T-Mobile, the fourth largest mobile service provider in the United States, could not negotiate commercially reasonable rates for wholesale data roaming.⁸⁴ In fact, the average wholesale data roaming rate paid by T-Mobile in 2013 was several times greater than rates major carriers would charge their own retail customers, notwithstanding the traditional notion that bulk purchases come at a discounted price per unit.⁸⁵

D. Issues Will Persist Until the FCC Implements Effective Regulations

AT&T and Verizon contend that further Commission intervention into data roaming is unnecessary because both carriers have entered into more than thirty data roaming agreements each since 2011.⁸⁶ Moreover, Verizon claims that

Data Roaming Obligations, *Comments of NTCA – The Rural Broadband Association*, WT Docket No. 05-265, at 3 (July 10, 2014) (accessible via FCC Electronic Comment Filing System)).

⁸² See *id.* at 6-7; NAT’L TELECOMM. COOP. ASS’N, NTCA 2012 WIRELESS SURVEY (Sept. 2012), *available at* <http://www.ntca.org/images/stories/Documents/Advocacy/SurveyReports/2012ntcawirelessurveyreport.pdf>.

⁸³ See *T-Mobile Data Roaming Petition*, WT Docket No. 05-265, at 6.

⁸⁴ See *generally id.* at 20; see also Daniel B. Kine, *T-Mobile Wins an FCC Battle with AT&T and Verizon*, THE MOTLEY FOOL (Dec. 23, 2014), <http://www.fool.com/investing/general/2014/12/23/t-mobile-wins-an-fcc-battle-with-at-and-verizon.aspx> (stating that T-Mobile was seeking enforcement clarification from the FCC to determine whether specific data roaming agreements were actually commercially reasonable, the FCC granted this Petition by T-Mobile on December 18, 2014).

⁸⁵ See *Reply Comments of Competitive Carrier Association*, WT Docket No. 05-265, at 9, Ex. 2 to Petition at para. 86 (citing Decl. of Dr. Joseph Farrell, D.Phil)

Finally, AT&T also disregards Dr. Farrell’s remarks accompanying the data that “the average domestic wholesale data roaming rate that T-Mobile paid in 2013 is 3.6 times the maximum retail rate that Verizon charges a user of 1,700 MB per month, six times the rate AT&T charges, over seven times the rate that T-Mobile charges, and over ten times Sprint’s maximum rate.

Id.

⁸⁶ See *In the Matter of Petition for Expedited Declaratory Ruling Filed by T-Mobile USA, Inc.*, Opposition of AT&T, WT Docket No. 05-265, at 10-11 (filed July 10, 2014) (accessible via FCC Electronic Filing System) [hereinafter *Opposition of AT&T*].

data roaming prices have dropped forty percent over the same stretch of time.⁸⁷ Although data roaming prices have decreased at a consistent rate in recent years,⁸⁸ Verizon's statistics could take into account special agreements reached with small carriers, in which Verizon retains greater than normal control over the small carrier's operations and the small carrier receives a discounted data roaming rate from Verizon.⁸⁹

Verizon and AT&T also mention that few, if any, complaints have been filed pursuant to the FCC's data roaming dispute resolution procedures since the release of the 2011 *Data Roaming Order*.⁹⁰ However, Competitive Carrier Association (CCA) explains that this is not a function of a healthy data roaming marketplace.⁹¹ Rather, the lack of complaints filed with the Commission can be attributed to two concerns: first, there is no precedent for evaluating "commercially reasonable" terms, therefore aggrieved carriers lack confidence in the success of dispute resolution, and second, the heavy reliance on data roaming partners dissuades small carriers from engaging in hostile conduct.⁹²

Despite protests from Verizon and AT&T, there is evidence that deregulation leads to market concentration and diminished competition.⁹³ In July 2014, Verizon announced their plan to begin throttling users with grandfathered-in

⁸⁷ See also *In re Matter of Petition for Expedited Declaratory Ruling Filed by T-Mobile USA, Inc. Regarding Data Roaming Obligations*, Comments of Verizon, WT Docket No. 05-265, at 8-9 (filed July 10, 2014) (accessible via FCC Electronic Filing System).

⁸⁸ *Reply Comments of Competitive Carrier Association*, WT Docket No. 05-265, at 7.

⁸⁹ See *id.*; see also Brian Fung, *Sprint's Enlisting Small Carriers in its War on Verizon and AT&T*, WASH. POST (Mar. 27, 2014), <http://www.washingtonpost.com/blogs/the-switch/wp/2014/03/27/sprints-enlisting-small-carriers-in-its-war-on-verizon-and-att/>.

⁹⁰ *Opposition of AT&T*, WT Docket No. 05-265, at 10.

⁹¹ *Reply Comments of Competitive Carrier Association*, WT Docket No. 05-265, at 5-6 ("Commenters agree with CCA's assessment that the imbalance between the two largest carriers has been exacerbated by increased consolidation in the industry.").

⁹² See *id.* at 10

Furthermore, the 'must-have' nature of roaming partners with broader coverage necessarily means that parties will be less likely to file complaints if they have no choice but to accept unfavorable terms. The lack of roaming complaints, thus, is not a useful measure of the effectiveness of the rules...[g]iven the extreme disparity in the negotiating positions of the two largest carriers, the exorbitant data roaming rates experienced by carriers commenting in this proceeding reflect the entrenched advantage that the two largest carriers hold.

Id.

⁹³ See Blevins, *supra* note 75, at 100 ("[T]he general concern is that the FCC's deregulation has led to increasing prices. Indeed, a recent report . . . has documented these price increases, concluding that prices are rising in areas that have been the most thoroughly deregulated (and thus theoretically most subject to competition)."); see, e.g., U.S. PUB. INST. RESEARCH GRP., *THE FAILURE OF CABLE DEREGULATION: A BLUEPRINT FOR CREATING A COMPETITIVE, PRO-CONSUMER CABLE TELEVISION MARKETPLACE 55* (2003), available at http://www.uspirg.org/sites/pirg/files/reports/Failure_Of_Cable_Deregulation_USPIRG.pdf (discussing the concentration of the cable industry as a result of deregulation).

unlimited data plans on October 1, 2014, and justified the policy with dubious technical concerns.⁹⁴ FCC Chairman Tom Wheeler contacted Verizon expressing his frustration, saying in part:

Reasonable network management concerns the technical management of your network; it is not a loophole designed to enhance your revenue streams. It is disturbing to me that Verizon Wireless would base its network management on distinctions among its customers' data plans, rather than on network architecture or technology I know of no past Commission statement that would treat as reasonable network management a decision to slow traffic to a user who has paid, after all, for unlimited service.⁹⁵

On October 1, 2014, the day the throttling policy was set to take effect, Verizon announced the company had changed its mind, and cancelled the initiative.⁹⁶ Questionable practices like Verizon's throttling policy underscore why FCC regulation of mobile data roaming is in the public interest.

The *Data Roaming Order*, including the commercially reasonable standard, works to benefit consumers by increasing competition among mobile carriers.⁹⁷ Yet many mobile carriers attest that competition has stagnated or decreased because the commercially reasonable standard does not require national carriers to provide the fair data roaming arrangements contemplated by the *Data Roaming Order*.⁹⁸ Unless the Commission takes action to clarify the commer-

⁹⁴ See Kellex, *Starting October 1, Verizon Will Include Unlimited 4G LTE Customers in "Network Optimization,"* DROID LIFE (July 24, 2014), <http://www.droid-life.com/2014/07/24/verizon-network-optimization-throttling-unlimited-lte/>.

⁹⁵ Jon Brodtkin, *FCC Chair Accuses Verizon of Throttling Unlimited Data to Boost Profits*, ARSTECHNICA (July 30, 2014), <http://arstechnica.com/business/2014/07/fcc-chair-accuses-verizon-of-throttling-unlimited-data-to-boost-profits/> (quoting FCC Chairman Tom Wheeler's letter to Verizon Wireless CEO Daniel Mead).

⁹⁶ See Kellex, *Verizon Cancels Plans for Network Optimization of Unlimited Data Users*, DROID LIFE (Oct. 1, 2014), <http://www.droid-life.com/2014/10/01/breaking-verizon-cancels-plans-for-network-optimization-of-unlimited-data-users/> (citing Verizon's statement)

We've greatly valued the ongoing dialogue over the past several months concerning network optimization and we've decided not to move forward with the planned implementation of network optimization for 4G LTE customers on unlimited plans. Exceptional network service will always be our priority and we remain committed to working closely with industry stakeholders to manage broadband issues so that American consumers get the world-class mobile service they expect and value.

Id.

⁹⁷ See *2011 Data Roaming Order*, WT Docket No. 05-265, 26 FCC Rcd 5411, at para. 1.

⁹⁸ See *T-Mobile Data Roaming Petition*, WT Docket No. 05-265, at ii (filed May 27, 2014) (accessible via FCC Electronic Comment Filing System) ("In adopting the *Data Roaming Order*, the Commission found that data roaming requirements would provide incentives for all carriers to invest in and deploy advanced networks, promoting competition among multiple providers."); see also *Reply Comments of Competitive Carrier Association*, WT Docket No. 05-265, at 11-12; *In re* Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services,

cially reasonable standard, mid-size carriers will not be able to secure favorable roaming agreements, which will diminish their commercial viability and contribute to decreased competition as a whole.⁹⁹ Not only does the Commission have the *opportunity* to benefit the public interest by clarifying the commercially reasonable standard, they also have the authority established by recent precedent.¹⁰⁰

III. CELLCO AFFIRMS THE FCC'S AUTHORITY TO CLARIFY COMMERCIALY REASONABLE STANDARD

The FCC cites Title III, Section 706 of the Telecommunications Act of 1996 and ancillary jurisdiction as authority to establish the commercially reasonable standard for data roaming negotiations.¹⁰¹ Unlike roaming regulations for voice services in the *2007 Order*, the *Data Roaming Order* cannot use Title II to impose common carrier obligations because of a separate FCC ruling in 2007: the *Wireless Declaratory Ruling* codified mobile broadband Internet access service (MBIAS) as a “private mobile service” under § 332 of the Communications Act.¹⁰² Section 332(c)(2) stipulates that providers of private mobile services “shall not . . . be treated as a common carrier for any purpose”¹⁰³ Thus, in the *Data Roaming Order* the Commission had to develop a commercially reasonable standard for roaming negotiations that did not breach this threshold.¹⁰⁴

Comments of NTCH, Inc., Flat Wireless, LLC and Buffalo-Lake Erie Wireless Systems Co., LLC WT Docket No. 05-265, at paras. 2-4 (filed July 10, 2014) (accessible via FCC Electronic Comment Filing System) (discussing a lack of competition for small carriers due to their dealing through Verizon and AT&T).

⁹⁹ See Blevins, *supra* note 75, at 103

In any event, the inability to secure favorable roaming agreements has limited, and will continue to limit, the competitive strength of smaller and mid-sized carriers. The growth of mid-sized carriers, in particular, is important given that they have the most potential to eventually grow into national competitors. As described above, however, these mid-sized carriers have been disappearing lately, and carriers' inability to get more favorable roaming agreements has played an important role in their disappearance.

Id.

¹⁰⁰ See *Cellco P'ship v. FCC*, 700 F.3d 534, 548 (D.C. Cir. 2012).

¹⁰¹ See *2011 Data Roaming Order*, 26 FCC Rcd 5411, at para. 64.

¹⁰² See *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, Declaratory Ruling, WT Docket No. 07-53, at para. 39 (Mar. 22, 2007) (accessible via FCC Electronic Filing System); see also 47 U.S.C. § 332(c)(2) (2012).

¹⁰³ § 332(c)(2).

¹⁰⁴ See *2011 Data Roaming Order*, 26 FCC Rcd. 5411, para. 68 (laying out the Commission's data roaming agreement “commercially reasonable” standard, noting “that the data roaming rules [they] adopt do not amount to treating mobile data service providers as ‘common carriers’ under the Act”).

The FCC's authority to impose the resulting standard would be challenged and affirmed soon after its release in *Cellco Partnership v. FCC*.

A. *Cellco* Outlines Why the FCC has Authority to Establish the Commercially Reasonable Standard

In response to the release of the *Data Roaming Order*, Cellco (the then-parent company of Verizon) challenged the FCC's authority to impose a commercially reasonable standard for data roaming agreements.¹⁰⁵ Cellco fought the Order on two grounds: the FCC does not have the statutory authority to implement a commercially reasonable standard, and the commercially reasonable standard unlawfully regulates mobile Internet providers as common carriers.¹⁰⁶ With regard to the first charge, the D.C. Circuit held that the FCC has three separate sources of statutory authority to implement the commercially reasonable standard.¹⁰⁷ But the substantive analysis of the FCC's authority occurs during the court's evaluation of the second challenge: whether the commercially reasonable standard impermissibly treats mobile data as common carriage under Title II.¹⁰⁸

Cellco brought a facial challenge to the D.C. Circuit Court, meaning the commercially reasonable standard has to be upheld unless "no set of circumstances exists" in which it can be lawfully applied.¹⁰⁹ In this context, the court found three reasons to uphold the commercially reasonable standard: (1) proper deference to the Commission to interpret their own rules; (2) the obligations imposed do not amount to ceding control, as opposed to the public access rule from *Midwest Video II*; and (3) the commercially reasonable standard explicitly allows individualized negotiations.¹¹⁰

¹⁰⁵ See *Cellco P'ship*, 700 F.3d at 537.

¹⁰⁶ *Id.* at 540.

¹⁰⁷ See *id.* at 541. Using their spectrum management authority under Title III, the Commission elected to promote access and deployment of mobile broadband service by requiring mobile data service providers to offer "commercially reasonable" terms when one provider requests to use a host provider's facilities for commercial mobile data services. See *generally id.* at 541-43.

¹⁰⁸ Even though wireless carriers ordinarily provide their customers with voice and data services under a single contract, they must comply with Title II's common carrier requirements only in furnishing voice service. Likewise, the Commission may invoke both its Title II and Title III authority to regulate mobile-voice services, but may not rely on Title II to regulate mobile data. *Id.* at 538.

¹⁰⁹ *Id.* at 549 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

¹¹⁰ *Id.* at 548.

1. *Proper Deference to FCC*

Common carriage is characterized by a requirement for providers to offer their services indiscriminately and on general terms.¹¹¹ However, there is no definitive method for ascertaining whether a given policy is so imposing as to qualify as a requirement “to offer services indiscriminately and on general terms.”¹¹²

In order to determine whether the commercially reasonable standard violates the prohibition against treating mobile broadband providers as common carriers, it is necessary to first define “common carrier.”¹¹³ Unfortunately, as the D.C. Circuit Court explains, “the [Communications] Act’s definition of ‘common carrier’ is unsatisfyingly circular,”¹¹⁴ because § 153 defines “common carrier” as “any person engaged as a common carrier for hire.”¹¹⁵ Courts have previously held the Commission’s interpretation of common carriage warrants *Chevron* deference.¹¹⁶ Yet the court may overturn the presumption that the Commission’s interpretation of common carriage is reasonable if the standard (as interpreted by the FCC) effectively relegates mobile broadband providers to common carrier status.¹¹⁷

Rules that are not fully consistent with common carriage do not necessarily relegate providers to common carrier status.¹¹⁸ A “grey area” exists in the gap between what is common carriage *per se* and what is *private carriage per se*.¹¹⁹

¹¹¹ See *Verizon v. FCC*, 740 F.3d 623, 651 (D.C. Cir. 2014).

¹¹² See 700 F.3d at 547 (referring to a “grey area” of common carriage and the “significant latitude” that the Commission has in determining common carriage).

¹¹³ *Id.* at 544.

¹¹⁴ *Id.* at 538.

¹¹⁵ 47 U.S.C. § 153(11) (2012).

¹¹⁶ See *United States Telecomm. Ass’n v. FCC*, 295 F.3d 1326, 1332 (D.C. Cir. 2002); see also *Recent Cases, Telecommunications Law – Internet Regulation – D.C. Circuit Holds That Federal Communications Commission Violated Communications Act In Adopting Open Internet Rules – Verizon v. FCC*, 127 HARV. L. REV. 2565, 2572 (2014)

Under *Chevron*, future D.C. Circuit review of new FCC interpretations of [common carriage] provisions must apply canons of statutory construction to assess the reasonableness of the interpretation, and to uphold any reasonable interpretation. Thus, a court should defer to a reasonable agency interpretation even if it is not “the reading the court would have reached if the question initially had arisen in a judicial proceeding,” and even if a court or the agency acknowledged statutory ambiguity and had previously interpreted the statute differently.

Id.

¹¹⁷ See *FCC v. Midwest Video Corp.*, 440 U.S. 689, 700-01 (1979).

¹¹⁸ *Cellco P’ship*, 700 F.3d at 547 (“[A]lthough a given regulation might be applied to common carriers, the obligations imposed are not common carriage *per se*.”).

¹¹⁹ *Id.* This grey area is largely due to the Commission neglecting to update its rules in response to new business practices and technological advancements. See Rob Frieden, Arti-

Due to the vague statutory definition of common carriage, the Commission's interpretation warrants deference if it lies anywhere within this grey area.¹²⁰

Because the FCC is granted deference, the only way the commercially reasonable standard can fall outside the Commission's authority is if it constitutes common carriage per se.¹²¹ And because Cellco submitted a facial challenge, the standard can not constitute common carriage per se unless there is no *possible application* of the standard that would not be common carriage per se.¹²²

2. Commercially Reasonable Standard Does Not Amount to Ceding Control

Common carriage per se is not well defined, but one relevant determination comes from the *Midwest Video* cases.¹²³ During the two challenges, the court determined that the "public access rule" is common carriage per se. The public access rule obligates cable television systems to make channels available for public and educational use.¹²⁴ The court determined this was common carriage per se because it removed the cable system owner's ability to enter individualized negotiations, effectively requiring that they offer terms on an indiscriminate basis.¹²⁵ In contrast, the commercially reasonable standard does "not amount to a duty to hold out facilities indifferently . . . for public use" because it expressly allows individualized negotiations.¹²⁶

cle, *The Rise Of Quasi-Common Carriers and Conduit Convergence*, 9 ISJLP 471, 494-95 (2014)

Congress has not responded to the technological and marketplace convergence that has occurred since the last major substantive amendment of the *Communications Act of 1934*, which took place in 1996. Congress has also not mandated mutual exclusivity in terms of regulatory oversight between a venture that offers telecommunications services and one that offers information services. Convergence all but guarantees that companies will offer a diverse array of services that combine telecommunications and information services, even as a single Internet conduit can transmit them all. Under these changed and volatile circumstances, the FCC might make a convincing argument that it needs to revise its demarcation between regulated and unregulated services.

Id.

¹²⁰ *Cellco P'ship*, 700 F.3d at 547.

¹²¹ *Id.*

¹²² *Id.* at 547-48.

¹²³ *Id.* at 547.

¹²⁴ *Id.* at 544-48; see Matthew Eller, Comment, *The FCC and Ancillary Power: What Can It Truly Regulate?*, 36 HASTINGS COMM. & ENT L.J. 311, 326 (2014).

¹²⁵ 700 F.3d at 547-48.

¹²⁶ *Id.* at 544.

3. Commercially Reasonable Standard Allows for Individualized Negotiations

According to the court, the *Data Roaming Order* makes several material distinctions that allow for “substantial room for individualized bargaining and discrimination in terms.”¹²⁷ A primary example identified in the decision is the “commercially reasonable” term itself, which by design provides greater freedom from agency intervention than the “just and reasonable” common carriage standard under Title II.¹²⁸ The Commission builds significant flexibility into the commercially reasonable standard by specifying a case-by-case determination that weighs sixteen explicit factors, as well as the totality of circumstances.¹²⁹

The D.C. Circuit Court ruled that, barring further clarification from the FCC, the commercially reasonable standard as formulated in the *Data Roaming Order* merely obligates host providers to offer requesting providers some version of a data roaming agreement.¹³⁰ The FCC may choose to interpret the commercially reasonable standard as imposing more stringent obligations on data roaming agreements,¹³¹ however, until the FCC establishes regulations that breach the common carriage threshold, the FCC retains the authority to enforce commercially reasonable data roaming negotiations.¹³²

B. The FCC Can Clarify Commercially Reasonable Standard in Accordance With *Cellco*

The Commission has the authority to clarify the commercially reasonable standard, and effect meaningful change in the data roaming marketplace.¹³³ According to the *Cellco* decision, the FCC has broad discretion to determine whether the commercially reasonable standard qualifies as common carriage, unless that interpretation is so unreasonable that the rules employed constitute common carriage per se.¹³⁴ However, the Commission has yet to expand the

¹²⁷ *Id.* at 548.

¹²⁸ *Id.*

¹²⁹ *Id.* (sixteen factors for evaluating under commercially reasonable standard); see *2011 Data Roaming Order*, WT Docket No. 05-265, 26 FCC Rcd. 5411, para. 86 (listing the sixteen factors used in a case-by-case determination).

¹³⁰ *Cellco P’ship*, 700 F.3d at 548.

¹³¹ *Id.* at 550.

¹³² *Id.* at 549.

¹³³ *Id.* at 541-42; Lawrence R. Freedman, *D.C. Circuit affirms FCC’s data roaming rule*, AIPLA NEWSTAND (Dec. 6, 2012), <http://www.lexology.com/library/detail.aspx?g=c8d9ab8c-254b-448a-9cd4-34781851a920>.

¹³⁴ *Cellco P’ship*, 700 F.3d at 547.

commercially reasonable standard to impose regulations any more stringent than the original ineffective formulation.¹³⁵

IV. T-MOBILE BENCHMARKS CAN IMPROVE COMMERCIALY REASONABLE STANDARD WITHOUT VIOLATING COMMON CARRIAGE LIMITS

On May 27, 2014, three years after the Commission released the *Data Roaming Order*, T-Mobile filed a petition seeking FCC clarification of obligations imposed by the commercially reasonable standard.¹³⁶ According to T-Mobile's Petition, the commercially reasonable standard should be based on predictable criteria so carriers know whether the terms of an agreement are commercially reasonable.¹³⁷ The Petition proposes using "price benchmarks" to help clarify the commercially reasonable standard.¹³⁸

A. T-Mobile's Benchmarks Can Show Contrasting Rates For Similar Services

T-Mobile does not suggest that price benchmarks provide mathematically precise, prescriptive regulation of data roaming rates.¹³⁹ Instead, price benchmarks serve as non-binding guideposts that give carriers a general idea of what rates and terms will be designated as commercially reasonable.¹⁴⁰

1. Retail Benchmark

T-Mobile believes that "a natural benchmark for wholesale mobile data prices is retail mobile data pricing."¹⁴¹ According to the petition, some providers artificially inflate the price of wholesale mobile data service in order to

¹³⁵ See generally Robert Margetta, *FCC, Congress Gear Up for Net Neutrality Next Steps*, ROLL CALL (Jan. 12, 2015, 2:05 PM), http://www.rollcall.com/news/fcc_congress_gear_up_for_net_neutrality_next_steps-239194-1.html (showing debate concerning "commercially reasonable standard" still continues in 2015).

¹³⁶ *T-Mobile Data Roaming Petition*, WT Docket No. 05-265, at i.

¹³⁷ *Id.* at 11.

¹³⁸ *Id.* at 12.

¹³⁹ *Id.* at 27.

¹⁴⁰ *Id.*

¹⁴¹ The proposed benchmarks are derived from the price of providing services similar to data roaming, but in a different competitive context. They contrast the cost requesting providers pay for data roaming to rates charged by host providers for: (1) retail data services; (2) data roaming for foreign carriers; (3) data roaming for Mobile Virtual Network Operators (MVNOs); and (4) data roaming for requesting providers of similar size. *Id.* at 12.

raise operating costs for the requesting provider.¹⁴² Large host providers, like AT&T, have the resources to unfairly influence data roaming agreements. Such agreements require requesting providers to buy wholesale mobile data service at a price “many orders of magnitude” greater than the rate the host provider charges their own customers for purchasing far less data on a retail basis.¹⁴³

T-Mobile argues that AT&T charges outrageous rates for wholesale mobile data services so that costs increase for its competitors, forcing them to either raise their prices or reduce their quality of service.¹⁴⁴ Such anti-competitive conduct should be prohibited under a “commercially reasonable” standard.¹⁴⁵ While it is conceivable some rare circumstances could justify charging comparable rates for wholesale and retail mobile data service, T-Mobile believes breaching this threshold can be indicative of anti-competitive behavior, making it a useful guidepost for evaluating a commercially reasonable standard.¹⁴⁶

2. Rates Charged to Foreign Carriers

Mobile data roaming agreements between domestic and foreign carriers that have no affiliation are useful tools of comparison because they reveal alternate competitive motives when compared to other data roaming negotiations.¹⁴⁷ T-Mobile claims that foreign carriers acquire reasonable data roaming rates because the numerous options for roaming partners helps to foster honest competition.¹⁴⁸ Also, because the two contracting providers operate in different countries and have entirely separate customer bases, there is no incentive to increase operating costs for the other provider by artificially inflating wholesale data roaming rates.¹⁴⁹ Removing the anti-competitive bias makes this a helpful guidepost because it is more likely to reveal the fair-market value of data roaming service.¹⁵⁰

¹⁴² *Id.*

¹⁴³ *Id.* at 6.

¹⁴⁴ *Id.* at 12-13.

¹⁴⁵ *Id.*

¹⁴⁶ *See id.* at 12, 19 (discussing T-Mobile’s position on the mobile data services pricing power exercised by AT&T).

¹⁴⁷ *See id.* at 13-14 (citing two reasons that non-affiliated domestic and foreign data roaming agreements may provide a more “attractive” benchmark).

¹⁴⁸ *Id.* at 13.

¹⁴⁹ *Id.* at 14.

¹⁵⁰ *Id.*

3. Rates Charged to MVNOs

MVNOs are mobile service providers that do not have any infrastructure of their own.¹⁵¹ Instead, MVNOs enter agreements with providers to allow the MVNOs' customers to use the host provider's facilities on a primary basis.¹⁵² MVNO subscribers are, in a sense, permanently roaming.¹⁵³ From a technical perspective, providing mobile data service for an MVNO should not be any more or less expensive than providing the same service for a small requesting provider.¹⁵⁴ MVNOs and requesting providers are both purchasing data roaming service at a wholesale rate; however, MVNOs often receive far lower rates because of coinciding business interests with the host provider.¹⁵⁵ According to T-Mobile, the requesting provider is forced to pay a premium for the same service because host providers artificially inflate prices in order to gain a competitive advantage.¹⁵⁶

4. Rates Charged by Other Carriers

Analyzing the data roaming rates charged by providers can be a useful way to identify a carrier with consistently inflated rates.¹⁵⁷ However the benchmark could be fundamentally flawed because it presumes the most common rates and terms are indicative of commercial reasonability.¹⁵⁸ Because carriers are often leveraged into disadvantageous roaming agreements with larger host providers, even a large sample of data roaming rates could be skewed.¹⁵⁹

B. Some Benchmarks Will Provide Meaningful Insight to Commercially Reasonable Terms for Data Roaming

Two of T-Mobile's benchmarks, the retail and MVNO benchmarks, are simple enough to provide real guidance to mobile broadband providers.¹⁶⁰ The retail benchmark is an effective barometer for commercially unreasonable conduct because wholesale data roaming service should not cost significantly

¹⁵¹ *Mobile Virtual Network Operator (MVNO)*, TELECOMSPACE, <http://www.telecomspace.com/latesttrends-mvno.html> (last visited Feb. 13, 2015).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *T-Mobile Data Roaming Petition* WT Docket No. 05-265, at 15.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 14.

more than the retail rate.¹⁶¹ MVNO rates may also prove to be a beneficial comparison because, from a technical standpoint, providing data roaming service for MVNOs is similar to providing the same service to smaller, requesting carriers.¹⁶²

However, T-Mobile's foreign carrier rate and "other domestic carriers" rate contain too many variables to liken to commercially reasonable data roaming rates.¹⁶³ Using the rates charged by other domestic carriers to determine what is commercially reasonable is a mistake because it equates "popular" or "common" with "reasonable," without justifying the correlation.¹⁶⁴ It seemingly incentivizes collusion among providers rather than competition because incumbents could use artificially high prices from past agreements to rationalize artificially high prices in the future.¹⁶⁵

T-Mobile's Petition received resounding support from other carriers.¹⁶⁶ With the notable exceptions of Verizon and AT&T, all commenters denounce the current wholesale data roaming market and support FCC clarification of the commercially reasonable standard.¹⁶⁷

To remain within the boundaries of *Cellco*, proposals for clarifying the commercially reasonable standard cannot impose regulations that qualify as common carriage per se, which requires a carrier to offer service indiscriminately and on general terms.¹⁶⁸ The T-Mobile proposal should be well outside the realm of per se common carriage because T-Mobile does not advocate using any benchmark to single-handedly determine what is or is not commercial-

¹⁶¹ See *id.* at 12, 15.

While other factors may justify some gap between a carrier's wholesale roaming rates and the retail rates charged to consumers, the existence of a large gap may be evidence that the host carrier is attempting to raise its rivals' costs by insisting on high wholesale data roaming rates, thereby inducing the requesting carrier to raise its retail prices or compromise its service quality

Id.

¹⁶² See *id.* at 15 ("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.").

¹⁶³ *Id.* at 14-15.

¹⁶⁴ *Id.* at 15 ("As with other proposed benchmarks, T-Mobile recognizes that this one should be used with caution, because if some of the comparison agreements were not themselves commercially reasonable, then similarity will not imply reasonableness.").

¹⁶⁵ See *id.* at 15-16 ("[A] facially unreasonable 'outlier' rate such as the rate charged by AT&T cannot be used to measure the commercial reasonableness of any other rate.").

¹⁶⁶ See *Reply Comments of Competitive Carrier Association*, WT Docket No. 05-265, at 6 (Aug. 20, 2014).

¹⁶⁷ See *T-Mobile Data Roaming Petition.*, WT Docket No. 05-265, at 5-6.

¹⁶⁸ *Cellco P'ship v. FCC*, 700 F.3d 534, 547 (D.C. Cir. 2012); *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994).

ly reasonable.¹⁶⁹ T-Mobile envisions retaining the considerable flexibility of the current regulatory regime by using benchmarks as additional factors to be considered when determining commercial reasonableness.¹⁷⁰

Mobile providers currently have no meaningful guidance for abiding by the commercially reasonable standard.¹⁷¹ If just a single benchmark is established as an “upper boundary” to the commercially reasonable standard, providers will have a better idea when it is appropriate to seek dispute resolution with the FCC. The Commission could face a legal challenge if they clarify the commercially reasonable standard, but *Cellco* stipulates that the FCC has the authority to do so.¹⁷²

V. MOBILE DATA ROAMING POST-NET NEUTRALITY ORDER

On February 26, 2015, the Commission voted to adopt the *Report and Order on Remand, Declaratory Ruling, and Order in the Matter of Protecting and Promoting the Open Internet*.¹⁷³ Fixed and mobile broadband service will be reclassified to impose certain Title II provisions on carriers.¹⁷⁴ The FCC will issue a letter of inquiry regarding how these new classifications should affect mobile data roaming obligations, but notes the current rules remain in effect until the Commission completes another full rulemaking procedure.¹⁷⁵

VI. CONCLUSION

The *Data Roaming Order* fails because the “commercially reasonable” standard is too vague to impose meaningful regulations.¹⁷⁶ The standard was developed to impose requirements wholly distinct from common carriage obligations under Title II of the Communications Act.¹⁷⁷ The number of factors

¹⁶⁹ See *T-Mobile Data Roaming Petition* WT Docket No. 05-265, at ii, 25-27 (discussing the flexibility of T-Mobile’s approach to using benchmarks).

¹⁷⁰ See *id.* at 26-27.

¹⁷¹ See, e.g., *Reply Comments of Competitive Carrier Association*, WT Docket No. 05-265, at 4 (“AT&T and Verizon have used the ambiguity in the ‘commercially reasonable’ standard . . .”).

¹⁷² 700 F.3d at 547.

¹⁷³ *In the Matter of Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, GN Docket No. 14-28 (Feb. 26, 2015).

¹⁷⁴ See *id.* at para. 51.

¹⁷⁵ See *id.* at para. 526.

¹⁷⁶ See *T-Mobile Data Roaming Petition*, WT Docket No. 05-265, at 2.

¹⁷⁷ See *2011 Data Roaming Order*, 26 FCC Rcd. 5411, paras. 57, 70. The Commission found three sources of authority to implement the commercially reasonable standard without using Title II: (1) Title III; (2) section 706 of the Telecommunications Act; and (3) ancillary jurisdiction. *Id.*

used to evaluate the commercially reasonable standard, coupled with the flexibility to weigh those factors on a case-by-case basis under the totality of the circumstances, was adequate for withstanding a Title II challenge.¹⁷⁸ However, its endless possible applications fail to yield meaningful guidance as to what is actually prohibited by the standard.¹⁷⁹

When the D.C. Circuit Court upheld the legality of the commercially reasonable standard in *Cellco v. FCC*, the court ruled that the Commission may interpret “commercially reasonable” as they see fit, so long as their interpretation falls short of per se common carriage under Title II.¹⁸⁰ The FCC chose to go beyond clarifying the commercially reasonable standard in the Net Neutrality Order by effectively reclassifying mobile broadband service as an interconnected service subject to the same common carriage roaming obligations as voice telephony services in the *2007 Order*. However, until the Commission establishes a new data roaming regime reflecting the reclassification of mobile broadband, the current framework will remain in effect and the issues harming the mobile industry will persist.

¹⁷⁸ *Cellco P’ship v. FCC*, 700 F.3d 534, 548 (D.C. Cir. 2012).

¹⁷⁹ *T-Mobile Data Roaming Petition*, WT Docket No. 05-265, at 2.

¹⁸⁰ *Cellco P’ship*, 700 F.3d at 547.