

BRIEF FOR RESPONDENTS

Oral Argument Not Yet Scheduled

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18-1271, 18-1273

FLAT WIRELESS, LLC, *ET AL.*,

PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION
AND
THE UNITED STATES OF AMERICA,

RESPONDENTS

ON PETITIONS FOR REVIEW OF AN ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION

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STATEMENT OF PARTIES, RULINGS AND RELATED CASES

1. Parties

All parties appearing in this Court are listed in petitioners' brief.

2. Ruling Under Review

In the Matter of Flat Wireless, LLC v. Cellco Partnership d/b/a Verizon Wireless, 33 FCC Rcd 7972 (2018) (JA --).

3. Related Cases

The order on review has not previously been before this Court or any other court.

We are aware of one related case, which currently is pending before this Court: NTCH is one of the petitioners in *Mozilla Corp. v. FCC*, Nos. 18-1051 *et al.* (D.C., Cir. argued Feb. 1, 2019), which involves challenges to the FCC's *Restoring Internet Freedom Order*. NTCH is challenging the FCC's regulation of data roaming rates in that case, as it does here.

We are aware of four other related cases that this Court previously has denied or dismissed:

- This Court previously dismissed a petition for review filed by petitioner NTCH, Inc., which raised essentially the same issues as the petitions here, for lack of jurisdiction because NTCH was seeking review of an FCC staff ruling rather than an order by the full Commission. *NTCH, Inc. v. FCC*, 877 F.3d 408 (D.C. Cir. 2017).
- This Court also previously denied a petition for writ of mandamus filed by petitioner NTCH, Inc. alleging delay in acting on an

application for agency review of a discovery dispute related to the complaint denied by that staff ruling. *In re NTCH, Inc.*, No. 18-1016 (D.C. Cir. March 14, 2018).

- Petitioner NTCH, Inc. also raised broadly similar issues regarding Verizon's roaming rates in another earlier case in which this Court denied NTCH's petition for review. *NTCH, Inc. v. FCC*, 841 F.3d 497 (D.C. Cir. 2016).
- Petitioner Flat Wireless, LLC sought mandamus against the Commission, alleging delay in acting on the complaint at issue in this litigation. The Court dismissed the mandamus petition as moot after the Commission issued the order challenged here. *In re Flat Wireless, LLC*, No. 18-1123 (D.C. Cir. Nov. 1, 2018).

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GLOSSARY

CDMA	code division multiple access – digital cellular network standard that utilizes spread-spectrum technology
EVDO	evolution data optimized – a telecommunications standard for the wireless transmission of data through radio signals, typically for broadband Internet access
MVNO	mobile virtual network operator – a wireless communications services provider that does not own the wireless network infrastructure over which it provides services to its customers
RTT	round trip time – length of time it takes for a signal to be sent plus the length of time it takes for an acknowledgement of that signal to be received

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BRIEF FOR RESPONDENTS

INTRODUCTION

For the third time in roughly three years,¹ NTCH, this time along with Flat Wireless,² seeks collaterally to attack Commission rules put in place in 2007 and

¹ *NTCH, Inc. v. FCC*, 877 F.3d 408 (D.C. Cir. 2017); *NTCH, Inc. v. FCC*, 841 F.3d 497 (D.C. Cir. 2016).

² NTCH and Flat Wireless, represented by the same counsel, have filed a “Joint Initial Brief of Petitioners.”

2011 governing “roaming” rates – that is, rates charged by a host carrier (such as Verizon Wireless) to allow the customer of a “roaming” carrier (such as NTCH or Flat Wireless) to use the host carrier’s network when that customer travels outside the range of its own carrier’s network. *See Cellco Partnership v. FCC*, 700 F.3d 534, 537 (D.C. Cir. 2012). In the adjudicatory proceeding below, Flat Wireless complained that the roaming rates offered by Verizon in contract negotiations were unjust, unreasonable, unreasonably discriminatory, and commercially unreasonable. The FCC denied that complaint in the *Order* on review. Applying its voice and data roaming rules, the Commission compared Verizon’s proffered roaming rates to those offered by Verizon to other carriers and found that the rates were not unlawful. *In the Matter of Flat Wireless, LLC v. Cellco Partnership d/b/a Verizon Wireless*, 33 FCC Rcd 7972 (2018) (JA --). The decision below was correct in all respects, and Flat Wireless’s challenges to it should be denied. NTCH’s petition for review, by contrast, should be dismissed because NTCH is not a “party aggrieved” for purposes of Hobbs Act review, 28 U.S.C. § 2344.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issues presented are:

1. Whether the FCC reasonably found that the proffered voice roaming rates were just, reasonable, and not unreasonably discriminatory.

2. Whether the FCC reasonably found that the proffered data roaming rates were commercially reasonable and thus lawful.
3. Whether the FCC reasonably found that Verizon's roaming rates did not constitute an unreasonable restraint of trade.
4. Whether NTCH's petition for review in No. 18-1273 should be dismissed because NTCH is not a "party aggrieved" for purposes of Hobbs Act review, 28 U.S.C. § 2344.

JURISDICTION

This Court has jurisdiction in No. 18-1271 pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). The FCC order on review was released on August 3, 2018. The petitions for review were filed on September 28, 2018, within 60 days of that date, as required by 28 U.S.C. § 2344 and 47 C.F.R. § 1.4(b)(2). As explained below (see pp. 40-44), the Court lacks jurisdiction in No. 18-1273 because the petitioner in that case, NTCH, Inc., is not a "party aggrieved" for purposes of Hobbs Act review, 28 U.S.C. § 2344.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set out in the Statutory Addendum to this brief.

COUNTERSTATEMENT OF THE CASE

A. Statutory and Regulatory Framework

1. 2007 and 2010 Voice Roaming Orders

This case concerns “roaming rates” charged by one wireless carrier to another. *Order* ¶1 (JA --). No single wireless carrier has licensed spectrum and network facilities covering the entire United States. *Id.* ¶3 (JA --). Thus, when any carrier’s wireless voice or data customers travel beyond that carrier’s geographic coverage area, those customers must “roam” on another carrier’s network to maintain access to wireless service – that is, use that other carrier’s wireless facilities. *Id.* The FCC has long worked to facilitate roaming in order to provide American consumers, “to the greatest extent possible, ‘a nationwide high-capacity mobile communications service.’” *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd 15817, 15820 ¶7 (2007) (“2007 Voice Roaming Order”) (quoting 1981 order setting out the first roaming requirement).

In 2007, the Commission strengthened its roaming requirements, mandating that wireless carriers provide “automatic” roaming for voice calls – that is, allow customers of other carriers to switch automatically onto their networks when necessary. *Id.* at 15826 ¶23. The Commission further held that automatic roaming is a common carrier service “subject to the protections outlined in Sections 201 and

202 of the Communications Act.” *Id.* The record in 2007 showed that while customers increasingly expected nationwide service, smaller carriers were met with an “increased unwillingness by the nationwide carriers to enter into roaming agreements.” *Id.* at 15828 ¶¶27-28. The agency therefore found it to be “in the public interest to facilitate reasonable roaming requests by carriers on behalf of wireless customers.” *Id.* at 15828 ¶28. And “[i]f the request is reasonable, then the would-be host carrier cannot refuse to negotiate an automatic roaming agreement with the requesting carrier.” *Id.*

Although the FCC required carriers to negotiate, it “decline[d] to impose a price cap or any other form of rate regulation on the fees carriers pay each other” for roaming. *Id.* at 15832 ¶37. Instead, the agency believed “that the better course ... is that the rates individual carriers pay for automatic roaming services be determined in the marketplace through negotiations between the carriers, subject to the statutory requirement that any rates charged be reasonable and non-discriminatory.” *Id.* The agency kept its focus on consumers, finding that “any harm to consumers in the absence of affirmative [rate] regulation ... is speculative” and that, with the duties it was imposing, “consumers are protected from being harmed by the level and structure of roaming rates negotiated between carriers.” *Id.* at 15832 ¶38. Given a lack of record evidence of harm to consumers, the agency found that it need not “address the argument that the state of competition in the intermediate

product market [*i.e.* products or services one provider sells to another] is such as to warrant rate regulation.” *Id.*

The FCC also cited potential disincentives from rate regulation. “Capping roaming rates by tying them to a benchmark based on larger carriers’ retail rates” could discourage carriers from lowering those retail rates. *Id.* at 15832 ¶39.

Moreover, “regulation to reduce roaming rates has the potential to deter investment in network deployment” from both large and small carriers. *Id.* at 15833 ¶40. If small carriers can offer nationwide coverage at favorable rates without building their own network, they would have a reduced incentive to expand their networks. And larger carriers would have a reduced incentive to build and maintain their networks if they can no longer compete based on superior coverage and prices. *Id.*

The FCC also refused a request to require large carriers to offer small carriers the same rates offered to their “most favored” roaming partners. *Id.* at 15834 ¶43. The agency anticipated that because “the value of roaming services may vary across different geographic markets due to differences in population and other factors affecting the supply and demand for roaming services, it is likely that ... roaming rates will reasonably vary.” *Id.* at 15834 ¶44; *see id.* (“[M]obile services in the United States are differentiated based on price, as well as non-price attributes, including geographic coverage. Competition ... differentiated in these ways benefits consumers.”).

In 2010, the Commission issued an order providing further guidance, listing factors that it may consider in resolving a voice roaming dispute. These include “the impact of granting the request on the incentives for either carrier to invest in facilities,” “whether the carriers involved have had previous roaming arrangements with similar terms,” and “whether alternative roaming partners are available.”

Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, 25 FCC Red 4181, 4201 ¶39 (2010) (“2010 Voice Roaming Order”).

The Commission made clear that carriers may bring administrative complaints pursuant to section 208 of the Communications Act, 47 U.S.C. § 208, which allows any person to complain of “anything done or omitted to be done by any common carrier” “in contravention” of the Act, 47 U.S.C. § 208(a). *See 2007 Voice Roaming Order*, 22 FCC Rcd at 15829 ¶30. The Commission’s Enforcement Bureau was authorized to resolve complaints in the first instance under Section 208. *See* 47 C.F.R. §§ 0.111(a)(1) & 0.311(a)(5). The rules also specify a process for Commission review of such staff-level decisions. 47 C.F.R. § 1.115. *See also NTCH, Inc. v. FCC*, 877 F.3d 408 (D.C. Cir. 2017).

2. 2011 Data Roaming Order

The 2007 and 2010 orders addressed the roaming obligations of commercial mobile radio service (“CMRS”) providers, that is, roaming for traditional mobile voice calls. Increasingly, however, consumers were using their mobile devices to

access the Internet in addition to making traditional voice calls. Accordingly, in 2011, the Commission addressed data roaming – that is, roaming for wireless Internet connectivity. *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 26 FCC Red 5411 (2011) (“*Data Roaming Order*”). Because Internet access service was not then classified as a common carriage service, the Commission relied not on its authority under Title II of the Act, as it did with voice roaming, but rather on its authority under Title III of the Act to regulate wireless service. *Id.* at 5440 ¶62 (citing authority to “[p]rescribe the nature of the service to be rendered” by licensees, 47 U.S.C. § 303(b), and to impose conditions on wireless licenses to “promote the public interest, convenience, and necessity,” 47 U.S.C. § 312.³

The Commission required wireless data service providers to offer data roaming arrangements on “commercially reasonable terms and conditions.” 26 FCC Rcd at 5416 ¶13; 47 C.F.R. § 20.12(e)(1). As with voice roaming, it explicitly declined to impose rate caps or to set a benchmark based on retail

³ The FCC has two primary sources of authority over the actions and rates charged by wireless carriers. Title II of the Communications Act, 47 U.S.C. §§ 201, *et seq.*, covers “every common carrier engaged in interstate or foreign communication by wire or radio.” *See id.* § 201(a). The FCC is tasked with ensuring that rates and practices of common carriers are “just and reasonable” and not “unreasonabl[y] discriminat[ory]” *Id.* §§ 201 & 202. Title III of the Act, *id.* §§ 301, *et seq.*, authorizes the agency to license and regulate radio communications, including “commercial mobile service” such as voice and data communications by mobile phones, *see id.* § 332(d).

rates. 26 FCC Rcd at 5422 ¶21 (adopting standard of commercial reasonableness “rather than a more specific prescriptive regulation of rates [as] requested by some commenters”). The agency found “pro-competitive benefits” in “providers differentiating themselves on the basis of coverage,” and predicted that “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.” *Id.* (quoting *2010 Voice Roaming Order*, 25 FCC Rcd at 4197 ¶32).

The agency emphasized that although carriers must engage in negotiations and may not “unreasonably restrain[] trade,” 26 FCC Rcd at 5431, 5433 ¶¶42, 45, they “may negotiate the terms of their roaming arrangements on an individualized basis” and so may negotiate conditions “tailored to individualized circumstances without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms,” *id.* at 5433 ¶45; *see also id.* at 5424 ¶23 (Carriers can negotiate “individualized, commercially reasonable terms, including rates.”); *id.* at 5452 ¶85 (“[P]roviders can negotiate different terms and conditions, including prices, with different parties, where differences in terms and conditions reasonably reflect actual differences in particular cases.”).

The FCC stated it would adjudicate complaints under the rules “on a case-by-case basis,” considering “the totality of the circumstances.” *Id.* As in the

2010 Voice Roaming Order, the agency listed a number of factors it would consider, including “whether the providers involved have had previous data roaming arrangements with similar terms,” whether the host carrier refused to negotiate, the impact of the terms on the incentives of either party to build out, and “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.” *Id.* at 5452 ¶86.

The agency delegated authority to the Enforcement Bureau to resolve complaints arising out of the data roaming rule in the first instance. *Id.* at 5451 ¶82; 47 C.F.R. § 0.111(a)(11). It stated that its complaint procedures for data roaming were “similar” to those for voice roaming, but made clear that data roaming, unlike voice roaming, was not governed by section 208 of the Act. 26 FCC Rcd at 5448-49 ¶¶74 & 76.

This Court rejected a direct challenge to the data roaming rule. *Cellco Partnership*, 700 F.3d 534. The Court made clear that it understood the Commission’s interpretation was that the rule “did not on its face impose a common carrier obligation” on providers of data roaming service. *Id.* at 549. In a subsequent suit by NTCH, the Court also stated that “[t]he terms of the [data roaming] rule are facially reasonable and the underlying rationale for the rule makes sense.” *NTCH, Inc.*, 841 F.3d at 507.

3. Reclassification Of Internet Access Service

In 2015, the FCC issued the *Open Internet Order*, in which it classified retail broadband Internet access service, both landline and mobile, as a “telecommunications service” subject to common carriage regulation under Title II of the Act. *See Protecting and Promoting the Open Internet*, 30 FCC Red 5601, 5743 ¶¶331 (2015), *aff’d*, *United States Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *cert. denied*, 139 S. Ct. 453 (2018). The agency found further that retail mobile broadband is a “commercial mobile service” under section 332(d)(1) of the Act, 47 U.S.C. § 332(d)(1), and for that reason too is subject to common carriage regulation. 30 FCC Rcd at 5747 ¶338.

The Commission recognized that classifying retail mobile Internet access service as a telecommunications service and a commercial mobile service would imply that data roaming be regulated not under the existing Title III-based data roaming rules but instead under the Title II-based CMRS roaming rules. *Id.* at 5857 ¶525.

The agency decided instead to retain the data roaming rules “at this time,” in order “to proceed incrementally.” *Id.* at ¶526. The Act directs the Commission to forbear from “any regulation or any provision” of the Act if the agency determines that (1) the requirement is not necessary to ensure rates are

just, reasonable, and not discriminatory, (2) it is not necessary for the protection of consumers, and (3) forbearance is in the public interest. *See* 47 U.S.C. § 160. The agency found these conditions met for purposes of granting certain conditional forbearance to mobile Internet access providers from both the voice roaming regulations and the underlying Title II obligations codified by those regulations. *Open Internet Order*, 30 FCC Rcd at 5858 ¶526. The agency “commit[ted], however, to commence in the near term a separate proceeding to revisit the data roaming obligations of [mobile broadband] providers.” *Id.*

In 2017, before the agency completed that proceeding – but after the time period covered by petitioners’ complaints here⁴ – the Commission again modified its regulatory approach to broadband Internet access, restoring that service to its prior classification as a Title III “information service.” *Restoring Internet Freedom*, 33 FCC Rcd 311 (2018), *pets. for review filed, Mozilla Corp. v. FCC*, Nos. 18-1051, *et al.* (argued Feb. 1, 2019). The *Restoring Internet Freedom* order made clear that one effect of that reclassification was to continue the regulatory approach to data roaming that was set forth in the *Data Roaming Order*, and upheld by this Court in *Cellco Partnership*, 700 F.3d at 534. *Id.* at 734 ¶399.⁵

⁴ *See* Br. 20 & n.6.

⁵ NTCH is one of the petitioners in the *Mozilla* case, and is challenging the FCC’s regulation of data roaming rates in that litigation. *See* Joint Br. for Pets. Mozilla Corp., *et al.* at 66.

B. Flat Wireless's Administrative Complaint

Flat Wireless is a wireless carrier that provides retail service in parts of Texas and the Southwest United States. *Order* ¶2 (JA --). It claims “to target low income/bad credit customers.” Br. 46. Verizon is a nationwide wireless carrier. *Id.* Flat Wireless and Verizon negotiated a voice roaming agreement in 2011. *Id.* ¶6 (JA --). In early 2015, Flat Wireless requested a new roaming agreement with substantially lower voice roaming rates and, for the first time, data roaming. *Id.* Verizon responded to the request. Flat Wireless terminated negotiations after two months and, in June 2015, filed the administrative complaint at issue in this case. *See Complaint* (JA --). The complaint alleged that the roaming rates Verizon offered violated the Commission’s *Voice Roaming Orders* and the *Data Roaming Order*, as well as related Commission rules, by offering roaming rates that are unjust and unreasonable, unreasonably discriminatory, and commercially unreasonable.⁶ *See id.* at ii (JA --).

⁶ Petitioners also cite and refer to a similar complaint, and related documents, filed in a separate proceeding in 2013 by petitioner NTCH, Inc. (also against Verizon). *See, e.g.*, Br. at i, 4, 5, 9, 22, 26, 27, 35, 38, 40, 43. That complaint was denied by the agency’s Enforcement Bureau in 2016. *See NTCH v. Cellco Partnership d/b/a/ Verizon Wireless*, 31 FCC Rcd 7165 (EB 2016). NTCH did not seek Commission review of that bureau order, but instead sought review in this Court. The Court dismissed NTCH’s petition for review on the ground that NTCH was required to appeal to the full Commission before going to court. *NTCH*, 877 F.3d 408. NTCH’s failure timely to seek Commission review renders the dismissal of its 2013 complaint final. Thus, NTCH’s complaint is not before the Court here.

C. Order On Review

On August 3, 2018 the Commission issued an order denying Flat Wireless's complaint. *Flat Wireless, LLC v. Cellco Partnership d/b/a Verizon Wireless*, 33 FCC Rcd 7972 (JA --).

1. Voice Roaming

The Commission first found that Verizon's proffered voice roaming rate was not unjust or unreasonable under the Commission's rules. *Order* ¶¶10-12 (JA --). It emphasized that the *2010 Voice Roaming Order* indicated that the agency would consider agreements with other providers when deciding these complaints. *Id.* ¶10 (JA --) (citing *2010 Voice Roaming Order*, 25 FCC Rcd at 4201 ¶39). Here, the record contained a list of more than 40 agreements with other providers under which Verizon charged the same or more than the rate it had offered Flat Wireless.⁷ Moreover, Verizon's proposed rate was [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] below the rate Flat Wireless was currently paying and [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] than the voice roaming rate that Verizon itself pays to roam on the networks of dozens

NTCH seeks to revive its complaint through a footnote in the *Order* that discusses a discovery motion in its complaint proceeding. *See, e.g.*, Br. i, 10, 13. We explain below (at 40-44) why this tactic fails to afford NTCH a second chance to challenge the dismissal of its 2013 complaint.

⁷ *See* Verizon BAFO, Exh. A (JA --).

of its partners.” *Order* ¶10 (JA --).⁸ In contrast, the Commission found, “Flat’s proposal is [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of the prevailing rate that Verizon offers to other carriers, and [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] the weighted average rate that Verizon pays other carriers for roaming.” *Id.*⁹

Verizon’s proffered rate was thus “well within the range of comparable contractual rates.” *Id.* Given the agency’s legal framework that allows roaming rates to “be determined in the marketplace through negotiations between the carriers, subject to the statutory requirement that any rates charged be reasonable and non-discriminatory,” *2007 Voice Roaming Order*, 22 FCC Rcd at 15832 ¶37, and its direction that rates be considered in light of agreements with other carriers, the Commission found that Flat Wireless had failed to show that Verizon’s proffered voice roaming rates were unjust and unreasonable. *Order* ¶10 (JA --).

The Commission likewise found that those rates were not unreasonably discriminatory. *Id.* ¶11 (JA --). Flat Wireless had argued that Verizon

⁸ See Verizon BAFO at 1; Flat Compl. at 7, ¶18 (JA --,--)

⁹ See Verizon BAFO, Exh. A; Verizon Interrog. Resp. Exh. A; Verizon Answer Tab C, 3-6; Tab G, 2-3 (JA --,--,--,--)

failed to justify differences in roaming rates and that Flat Wireless was therefore “entitled to obtain the *lowest* roaming rates from a national roaming partner having superior network coverage,” even though Flat Wireless could provide reciprocal coverage in only one or two markets. *Id.* The Commission found that nothing in the Commission’s orders “mandate[s] equality of rates” as Flat Wireless’s claim suggests. *Id.* “Nothing in the Commission’s orders compels Verizon, which is a national roaming partner having superior network coverage, to offer its *lowest* rates to Flat, a carrier that can provide reciprocal roaming in comparatively few markets.” *Id.* The Commission found that “Verizon has dozens of voice roaming agreements under which [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] offered to Flat.” *Id.*¹⁰ Based on this record, the Commission found that Verizon’s proffered voice roaming rates were not unreasonably discriminatory against Flat Wireless. *Id.*

2. *Data Roaming*

The Commission also found that Verizon’s proffered data roaming rates were commercially reasonable and so did not violate the Commission’s data roaming rules. *Id.* ¶¶12-14 (JA --). Here too, the Commission applied and followed its

¹⁰ Verizon BAFO Exh. A; Verizon Interrog. Resp., Exh A; Verizon Answer, Tab C, 3-6 (JA --,--,--)

established guidelines by looking to agreements with other providers and found that Verizon's proffered data rates were "commercially reasonable in view of existing agreements with other providers." *Id.* ¶12 (JA --). Specifically, the offer was "below [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL] and [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL] *Id.*¹²

In addition, the Commission found the rate that Flat Wireless sought, by contrast, was dramatically lower than any contract rate offered by Verizon to any other carrier. *Id.* Flat Wireless's demanded data rate was [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL]. *Id.*

¹¹ 1xRTT and EVDO are two types of advanced wireless technology, *see id.* ¶7 n.29 (JA --); the specifics of these technologies are irrelevant for present purposes.

¹² Verizon BAFO Exh. A; Verizon Interrog. Resp., Exh A; Verizon Answer, Tab C, 3-6; Tab G, 2-3 (JA --,--,--,--)

Flat Wireless also argued that Verizon can charge monopoly rates that stifle Flat Wireless's ability to compete, amounting to an "unlawful restraint of trade." *Id.* ¶14 (JA --); see *Data Roaming Order*, 26 FCC Rcd at 5433 ¶45 (rates that unreasonably restrain trade are not commercially reasonable). The Commission also denied this claim, finding that Flat Wireless did not "establish a claim of competitive harm." *Id.* Contrary to Flat Wireless's claim that given Verizon's extensive network, there are "no realistic alternative[s]," the Commission found that Flat Wireless had "failed to support its claim that Verizon has leveraged monopoly power in the roaming market to eliminate competition in local markets," adding that Flat Wireless had not "identified a specific market in which Verizon is its only available roaming partner." *Order* ¶14 (JA --). For example, Sprint also offers service compatible with Flat Wireless on a national basis, while other smaller carriers also provide compatible coverage. *Id.* ¶13 & n.60 (JA --). Nor had Flat Wireless "adduced any evidence that Verizon has discriminated on price 'in order to gain or solidify' its alleged market dominance or 'with the intent of undercutting' its competitors." *Id.* ¶14 (JA --).

3. Consideration Of Other Factors

The Commission also addressed Flat Wireless's arguments that the FCC should consider other factors in evaluating Verizon's proffered rates. Flat Wireless argued that voice roaming rates should follow the Commission's precedent for

regulation of wireline rates, which Flat Wireless claimed “consistently used the cost of providing a given service, plus a reasonable rate of return, as the guiding benchmark.” Flat Init. Br. at 4 (JA --). Flat Wireless further argued that – contrary to the legal framework set out in the *Data Roaming Order* – data roaming should be a common carrier service with rates tied to costs. *Id.* at 20 (JA --).

The Commission explained that Flat Wireless “asks us to impose cost-based rates, but the Commission has expressly declined to do so.” *Order* ¶16 (JA --); *see id.* n.74 (JA --) (citing precedent). The Commission emphasized that it “is not required to establish cost-based rates even under Title II or to provide that the reasonableness of rates will be determined by reference to a carrier’s costs.” *Id.* ¶16 (JA --). Indeed, “the Commission expressly declined to impose price caps or any other form of rate regulation, [including] setting rates by reference to a provider’s costs,” relying instead on “individual negotiations to determine market-driven rates.” *Id.* The Commission cited its concern that such price setting would “impede investment in, and limit build-out of, wireless networks” by both large and small carriers. *Id.* n.77 (JA --). And though Flat Wireless argued that the assumptions underlying the Commission’s rules had “changed, dictating a change

to Commission rules,” the agency explained that “such a request [was] not appropriate in a complaint proceeding.” *Id.*¹³

Flat Wireless also argued that comparison to Verizon’s retail rates for service showed that the proffered roaming rates were too high, but the Commission found Flat Wireless’s proposed comparison “flawed,” “not ... reliable,” and “unpersuasive.” *Order* ¶17 & n.84 (JA --). First, Flat Wireless used only a single retail rate for comparison – one of the lowest examples from a set of Verizon’s lowest retail rates. *Id.* ¶17 (JA --). The Commission found that such a “cherry-picked” example did not offer a reliable reference point. *Id.*

Second, in extrapolating the cost per minute for voice and per megabyte for data, Flat Wireless overestimated the former and underestimated the latter, assuming that a retail customer would use far more voice service and far less data than was reflected in the record.¹⁴ These “shortcomings” made Flat Wireless’s

¹³ Because the Commission rejected the request that it impose cost-based rates, it also denied as moot an application for review of a decision by the Enforcement Bureau denying certain discovery relating to Verizon’s costs. *See Order* n.80 (JA --). Although that discovery request and application for review were originally filed in the NTCH complaint proceeding, Flat Wireless and Verizon had agreed that the same discovery and discovery request could be applied to their proceeding to the extent that Flat Wireless had raised similar cost arguments in this proceeding. NTCH seeks to use this footnote in the *Order* to revive the entirety of its complaint against Verizon. We address below (*see* p.42) why this effort fails.

¹⁴ Flat Wireless assumed a customer would be on the phone every minute of the day, over 2,000 hours per quarter, while the record, including Flat Wireless’s

retail rate comparison “not sufficiently reliable” to use in evaluating Verizon’s offers. *Order* ¶16 (JA --).

Finally, Flat Wireless urged comparisons to Verizon’s agreements for carriage with certain carriers known as Mobile Virtual Network Operators (MVNOs) as a benchmark for reasonable rates.¹⁵ *Id.* ¶18 (JA --). These too, the Commission found, were not comparable, both because Flat Wireless again cherry-picked the lowest rates, and especially because it relied on an [BEGIN CONFIDENTIAL]

[REDACTED] [END

CONFIDENTIAL] *Id.* Flat Wireless offered no evidence that [BEGIN CONFIDENTIAL]

[REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL]

evidence, showed that retail customers use an average of [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] per quarter. Flat Wireless also assumed a customer would use 12,000 megabytes of data per quarter, compared to record evidence that a typical customer uses [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] per quarter. *Order* ¶17 (JA --).

¹⁵MVNOs “do not own any network facilities, but instead . . . purchase mobile wireless services wholesale from facilities-based providers and resell these services to consumers”; they often “target specific market segments such as low-income consumers or consumers with low-usage needs.” *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 31 FCC Rcd 10534, 10540 ¶9 (2016). MVNOs include companies such as Boost Mobile, Consumer Cellular and Cricket Wireless.

Id. & n.94 (JA --). Thus, here too Flat Wireless had not shown the proffered rates were unjust, unreasonable, or commercially unreasonable by comparison. *Id.* ¶18 (JA --).¹⁶

SUMMARY OF ARGUMENT

Flat Wireless disagrees with the Commission's voice and data roaming rules. But Flat Wireless's unhappiness with those rules provides no basis to disturb the Commission's *Order* denying its complaint against Verizon. Those rules have been in effect for years and, in the case of the data roaming rules, have been approved by this Court. In adjudicating Flat Wireless's complaint, the Commission properly applied those existing rules. The Court should deny Flat Wireless's petition for review in No. 18-1271.

Flat Wireless does not seriously challenge the Commission's application of either the voice or data roaming rules in response to its complaint. There is no serious dispute in the record that Verizon's proffered rates were consistent with the

¹⁶ Flat Wireless asserts that its "Complaint entitles it to damages for unreasonable and discriminatory rates previously charged by Verizon" (Br. 18), and that "Flat's complaint seeks damages from Verizon resulting from the unreasonable and discriminatory rates charged by Verizon." (Br. Standing Addendum - Beierschmitt Decl.). However, nowhere in its complaint to the FCC did Flat Wireless mention, much less seek, damages relating to its claims regarding Verizon's roaming rates, and the *Order* understandably did not address that question. *See, e.g.*, Compl. at 22 ("Prayer for Relief") (JA --). In any event, damages are not available in a proceeding adjudicating a data roaming complaint. *See Data Roaming Order*, 28 FCC Rcd at 5448 ¶¶74-76; 47 C.F.R. § 20.12(e)(2).

standards established in the Commission's rules (that the voice rates be just, reasonable, and non-discriminatory, and that the data rates be commercially reasonable). The Commission had made clear in adopting the rules that it would allow roaming rates to be determined in the marketplace by negotiations between carriers subject to the statutory requirement for reasonableness and non-discrimination. And it had made clear that it would consider any complaints in light of agreements with other carriers. The record clearly established here that for both voice and data rates, the rates Verizon had offered to Flat Wireless were well within the range of comparable rates offered to other carriers.

Flat Wireless's real complaint is that the Commission should have based its regulation of roaming rates on the carriers' or providers' costs. But there is no basis for that argument. The Commission rejected such an approach in the *Voice Roaming Orders* and the *Data Roaming Order*. On voice roaming, this Court has specifically held that there is no requirement that the FCC establish purely cost-based rates for Title II common carriers. *See National Ass'n of Reg. Util. Comm'rs v. FCC*, 737 F.2d 1095, 1137 (D.C. Cir. 1984). And for data roaming, this Court rejected challenges to the Commission's adoption of the rules at issue here, in which the "commercially reasonable" standard is not based on providers' costs. *Cellco Partnership*, 700 F.3d at 548-49.

The Commission also reasonably dismissed Flat Wireless's contention that Verizon's roaming rates amounted to a restraint of trade. Flat Wireless's argument is largely a recasting of its mistaken contention that lawful rates must be based on costs. The Commission also found nothing in the record to support Flat Wireless's assertion that Verizon had misused a "monopoly position" and engaged in "anti-competitive strategy." The Commission noted, among other things, that Flat Wireless had failed to identify any specific market in which Verizon was its only available roaming partner or to plausibly show any competitive harm as a result of Verizon's roaming rates.

Finally, the Court should dismiss NTCH's petition for review in No. 18-1273. The Court lacks jurisdiction to hear that case because NTCH was not a party to the Flat Wireless proceeding below and thus is not a "party aggrieved" for purposes of Hobbs Act review, 28 U.S.C. § 2344. NTCH's attempt to resurrect a similar complaint that it filed against Verizon in 2013 should be rejected by the Court. That complaint was denied by the FCC's Enforcement Bureau in 2016, and this Court dismissed NTCH's attempt to seek judicial review of that ruling in 2017, thereby ending NTCH's case. Nothing about the Flat Wireless *Order* before the Court here revived that separate proceeding.

STANDARD OF REVIEW

The court reviews questions concerning its jurisdiction *de novo*. *NTCH, Inc. v. FCC*, 877 F.3d 408, 412 (D.C. Cir. 2017). Assuming the Court has jurisdiction, Flat Wireless bears a heavy burden to establish that the *Order* on review is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). “Under this ‘highly deferential’ standard of review, the court presumes the validity of agency action ... and must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment.” *Cellco Partnership v. FCC*, 357 F.3d 88, 93-94 (D.C. Cir. 2004); *see also NTCH, Inc. v. FCC*, 841 F.3d 497, 502 (D.C. Cir. 2016). The court “may not ‘substitute its judgment for that of the agency,’ but must instead evaluate whether the agency’s decision considered relevant factors and whether it reflects a clear error of judgment.” *Id.* (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Judicial review of the Commission’s interpretation of provisions of the Communications Act at issue in this case is subject to the two-step framework set forth in *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, if “the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843. The reviewing court

“will defer to the Commission’s interpretation of the ... Act so long as the Congress has not unambiguously forbidden it and it is otherwise permissible.” *NTCH, Inc. v. FCC*, 877 F.3d at 412 (quoting *California Metro Mobile Commc’ns, Inc. v. FCC*, 365 F.3d 38, 43 (D.C. Cir. 2004)).

This case also involves the FCC’s interpretations of its own orders and regulations. Such agency determinations are also “owed deference because of the agency’s superior knowledge of its own regulations.” *AT&T, Inc. v. FCC*, 886 F.3d 1236, 1246 (D.C. Cir. 2018); *cf. Kisor v. Wilkie*, No. 18-15 (S. Ct.) (cert granted to determine whether to overrule *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)) (set for oral argument March 27, 2019).

To the extent that petitioners challenge the agency’s factual findings, those findings must be supported by “substantial evidence.” 5 U.S.C. § 706(2)(E); *see* 47 U.S.C. § 402(g). This means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Schoenbohm v. FCC*, 204 F.3d 243, 246 (D.C. Cir. 2000), quoting *Consolo v. FMC*, 383 U.S. 607, 620 (1966).

“Because this standard is ‘something less than the weight of the evidence, ... the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.’” *Id.*

ARGUMENT

I. THE COMMISSION REASONABLY FOUND THAT VERIZON'S PROFFERED VOICE ROAMING RATES WERE LAWFUL.

A. The Commission Properly Applied Its Rules.

The Commission reasonably found that Verizon's proffered voice rates were not unjust or unreasonable because they were "well within the range of comparable contractual rates." *Order* ¶10 (JA --). The record contained a list of more than 40 agreements with other providers under which Verizon charged the same or more than the rate it had offered Flat Wireless. *See* Verizon BAFO, Exh. A (JA --). Moreover, Verizon's proposed rate was [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] below the rate Flat Wireless was currently paying and [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] than the voice roaming rate that Verizon itself pays to roam on the networks of dozens of its partners." *Order* ¶10 (JA --). In contrast, the Commission found, "Flat's proposal is [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of the prevailing rate that Verizon offers to other carriers, and [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] the weighted average rate that Verizon pays other carriers for roaming. *Id.* Based on this record, the Commission reasonably found that Verizon had not offered unjust or unreasonable rates. *Id.* ¶12 (JA --).

This was a reasonable application of the Commission's controlling rules. The Commission had previously determined that it would allow roaming rates to "be determined in the marketplace through negotiations between the carriers, subject to the statutory requirement that any rates charged be reasonable and non-discriminatory." *2007 Voice Roaming Order*, 22 FCC Rcd at 15832 ¶37. It further stated that it would consider rate complaints in light of agreements with other carriers. *2010 Voice Roaming Order*, 25 FCC Rcd at 15832 ¶39. Here, the Commission did exactly that – it found, based on the record of other agreements, that the proffered rate was well within (or on the low end of) comparable rates. It followed that Flat Wireless had failed to show that the market rates were unjust or unreasonable. *Order* ¶10 (JA --).

B. Flat Wireless's Challenges To The Voice Roaming Rates Are Unpersuasive.

Flat Wireless raises two challenges to the Commission's determination that Verizon's voice rates were lawful. Neither has merit.

1. Flat Wireless's Argument For Different Rules Is Unpersuasive.

Flat Wireless argues that instead of applying the Commission's existing rules, the Commission should have used the "cost of service" as the "touchstone

for judging the reasonableness of a rate.” Br. 29.¹⁷ The Court should reject this collateral attack on the FCC’s roaming rules.

The Commission has “expressly declined to impose price caps or any other form of rate regulation, which would include setting rates by reference to a provider’s costs,” preferring instead that voice roaming rates be determined by “individual negotiations to determine market-driven rates.” *Order* ¶16 (JA --) citing *2007 Voice Roaming Order*, 22 FCC Rcd at 15832 ¶37. And the cost of providing service was not among the several factors that the Commission said would be considered for roaming disputes. *Order* n.76 (JA --) citing *2010 Voice Roaming Order*, 25 FCC Rcd at 4200 ¶39.

Flat Wireless notes that, in the wireline context, the Commission has often looked to a provider’s costs to judge whether rates are just and reasonable. Br. 29-30. But that is not required. *See National Ass’n of Reg. Util. Comm’rs v. FCC*, 737 F.2d 1095, 1137 (D.C. Cir. 1984) (holding that there is no mandate that the FCC establish purely cost-based rates); *FERC v. Pennzoil Producing Co.*, 439 U.S. 508, 517 (1979) (In implementing requirement for “just and reasonable” gas rates, FERC “is not required to adhere ‘rigidly to a cost-based determination of rates.’”)

¹⁷ Notably, Flat Wireless does not argue that the Commission misapplied its rules. For example, it does not argue that the rules did not contemplate that the Commission would look at comparable rates. Nor does it argue that the rates it was offered were outside the range of comparable rates.

(quoting *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 308 (1974); *Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003) (the “‘generality’ of the terms unjust and unreasonable in Title II of the Communications Act “‘opens a rather large area for the free play of agency discretion’”) (quoting *Bell Atlantic Tel. Co. v. FCC*, 79 F.3d 1195, 1202 (D.C. Cir. 1996)). As the agency has explained, “determinations whether rates fall within [a ‘zone of reasonableness’] are not dictated by reference to carriers’ costs and earnings but may take account of non-cost considerations such as whether rates further the public interest by tending to increase the supply of the item being produced and sold.” *Petition of the Connecticut Dep’t Pub. Util. Control to Retain Regulatory Control of the Rates of Wholesale Cellular Serv. Providers in the State of Connecticut*, 10 FCC Rcd 7025, 7029 ¶ 7 (1995).¹⁸ See *Order n.75* (JA --).

In keeping with these principles, the Commission in the *2007 Voice Roaming Order* declined to use costs as a benchmark for rates. It found instead that promoting market negotiations rather than rate regulation would serve the public interest by enhancing incentives for both large and small carriers to invest in networks, ultimately benefitting consumers. *2007 Voice Roaming Order*, 22 FCC

¹⁸ See generally, e.g., *Request to Update Default Comp. Rate for Dial-Around Calls from Payphones*, 19 FCC Rcd 15636, 15639 (2004) (in payphone regulations, agency “chose a market-based, rather than a cost-based, default compensation amount” for “dial-around” compensation between carriers).

Rcd at 15833 ¶40; see *2010 Voice Roaming Order*, 25 FCC Rcd at 4197 ¶32 (“[T]he 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.”). Thus, Flat Wireless’s allegation that the Commission departed from precedent without explanation (Br. 30) fails because the agency did not depart from precedent. In any event, the Commission explained in this *Order* and in consistent prior orders why it was not basing roaming rates on costs. *Order* ¶16 (JA --).¹⁹

Flat Wireless argues in response that “the roaming market for CDMA carriers” – *i.e.*, those that use the same technology as Verizon, Sprint, and Flat Wireless – has “become dangerously non-competitive since 2007” when the Commission issued the *2007 Voice Roaming Order*. Br. 26. Therefore, it argues, the market-based approach, even if “sustainable in the 2007 period,” should be abandoned. Br. 25.²⁰

¹⁹ Even if Flat Wireless had made a persuasive case that the Commission should modify or abandon its existing rules, which it did not, it was proper for the agency to conclude that modifying complex rules of industry-wide applicability should take place in a rulemaking proceeding, not in the context of adjudicating an individual complaint. See *Order* n.77 (JA --).

²⁰ It is noteworthy that in this proceeding, Verizon proffered voice roaming rates that were [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] than those Flat Wireless had accepted when the market was purportedly more competitive in 2011. *Order* ¶10 (JA --).

In the 2007 *Voice Roaming Order*, the Commission analyzed similar arguments about the competitive market structure through the lens of consumers, rather than of intermediates like Flat Wireless. It found that “any harm to consumers in the absence of affirmative [rate] regulation ... is speculative,” and that it thus need not “address the argument that the state of competition in the intermediate product market is such as to warrant rate regulation.” *2007 Voice Roaming Order*, 22 FCC Rcd at 15832 ¶38. Flat Wireless still has not attempted to show a concrete effect on consumers, but it is free to present its arguments to the Commission in a petition for new rulemaking. In any case, the Commission found that Flat Wireless had not “identified a specific market in which Verizon is its only available roaming partner.” *Order* ¶14 (JA --).

Flat Wireless asserts that this finding was erroneous because it had purportedly shown that Verizon has superior coverage to Sprint, and that “it was either Verizon or nothing for most of petitioners’ customers.” Br. 26-27. But this ignores the fact that other smaller carriers also provide compatible coverage. *Order* ¶13 (JA --); *see* n.60 (JA --). Flat Wireless did not attempt to show that such carriers were unavailable in areas where Sprint’s network allegedly may have fallen short.²¹

²¹ The agency also reasonably found Flat Wireless’s methodology “flawed” when Flat Wireless used Verizon’s retail rates in an attempt to show that the proffered

2. *The Commission Reasonably Found That Verizon's Proffered Voice Roaming Rates Were Not Unreasonably Discriminatory.*

Flat Wireless also argues that the proffered voice roaming rates were unreasonably discriminatory. Br. 41. That argument is belied by the record. Again, Verizon proffered voice roaming rates that were equal to or lower than rates paid by other carriers. *Order* ¶10 (JA --). The Commission therefore properly found that the rates offered to Flat Wireless were not unreasonably discriminatory. *Id.* ¶11 (JA --).

Flat Wireless points out that some other carriers, including Mobile Virtual Network Operators (MVNOs), received even lower rates, and argues that Verizon was required to justify any discrepancy as reasonable. Br. 41. But in 2007 the Commission specifically refused to require large carriers to offer small carriers the same rates offered to their “most favored” roaming partners. *2007 Voice Roaming Order*, 22 FCC Rcd at 15834 ¶43. Instead, it specifically anticipated “that automatic roaming rates will reasonably vary” because of “differences in population

roaming rates were unreasonable. *Order* ¶17 & n.84 (JA --). Flat Wireless picked the lowest retail rate available, and then extrapolated per-minute rates based on a hypothetical user who spoke on the phone every minute of the day but used significantly less data than normal usage. *Id.* Flat Wireless argues now that the retail rates nevertheless shed light on Verizon's costs. Br. 39. Even if that is true, which is uncertain, it again presumes incorrectly that the Commission must judge rates based on cost.

and other factors affecting the supply and demand for roaming service.” *Id.* at 15834 ¶44.

Flat Wireless points to case law regarding tariffed wireline services, in which carriers were required to justify differences in price. Br. 41 (citing *MCI Telecomms. Corp. v. FCC*, 917 F.2d 30 (D.C. Cir. 1990)). But as this Court has explained, such cases “deal with dominant carriers whose charges were regulated through § 203’s tariff-filing requirement. Allowing those carriers to grant discriminatory concessions would have undermined the regulatory scheme then in effect.” *Orloff*, 352 F.3d at 421. That is “distinguishable” from the wireless market, where Congress and the FCC have endorsed an untariffed, market-based approach. *Id.* (distinguishing, *e.g.*, *MCI*, 917 F.2d 30). In that setting, the FCC is “entitled to value the free market, the benefits of which are well-established,” and to permit some variations in rates which the agency finds will benefit the public interest. *Orloff*, 352 F.3d at 421 (quoting *MCI WorldCom v. FCC*, 209 F.3d 760, 766 (D.C. Cir. 2000)). Here, the Commission noted that Flat could provide reciprocal roaming in comparatively few markets, and that “Verizon has dozens of voice roaming agreements under which it charges more than the [rate] if has offered to Flat.” *Order* ¶11 ((JA --)). This was a reasonable implementation of the Commission’s rule, which anticipated some variation in rates due to such factors.

II. THE COMMISSION REASONABLY FOUND THAT VERIZON'S PROFFERED DATA ROAMING RATES WERE COMMERCIALY REASONABLE AND THUS LAWFUL.

A. Flat Wireless Is Barred From Arguing Here That The Commercially Reasonable Standard For Data Roaming Is Unlawful.

As discussed above, the Commission analyzes the reasonableness of data roaming rates under Title III and a “commercially reasonable” standard. *See* pp. 7-10 above. Flat Wireless argues (Br. 20-24) that the Commission should instead apply a Title II just, reasonable, and non-discriminatory standard to data roaming; in particular, Flat Wireless argues (Br. 22) that the Commission erred in the *Open Internet Order* when, after reclassifying mobile broadband to be a Title II service, the Commission determined to forbear from applying the Title II voice roaming rules to data roaming disputes “at [that] time.” *Open Internet Order*, 30 FCC Rcd at 5858 ¶526.

Petitioners cannot collaterally attack the forbearance analysis in the *Open Internet Order* here. Flat Wireless did not petition for review of that order, which this Court in any event upheld in its entirety. *See* 47 U.S.C. § 402(a); *United States Telecom Ass’n*, 825 F.3d 674. And even were NTCH a proper party to litigate here, NTCH petitioned the Commission for reconsideration of the *Open Internet Order* on this very issue, and its petition is still pending. Br. 20-21. A “pending petition for administrative reconsideration” “renders the underlying agency action nonfinal,

and hence unreviewable, with respect to the petitioning party.” *TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 133 (D.C. Cir. 1989) (citing *United Transp. Union v. ICC*, 871 F.2d 1114 (D.C. Cir. 1989)).²²

Even if this Court were to reach the matter, it should reject Flat Wireless’s argument as unsound. Flat argues that Section 332 of the Act, 47 U.S.C. § 332, “forbids forbearance” from sections 47 U.S.C. §§ 201 & 202, which, Flat Wireless asserts, the agency has done regarding data roaming by retaining the data roaming rules rather than using the voice roaming rules. Br. 23. It is true that Section 332 allows the Commission to forbear from applying much of Title II to commercial mobile service providers but excepts Sections 201 and 202 from that forbearance authority. 47 U.S.C. § 332(c)(1)(A). In the *Open Internet Order*, however, the Commission did not rely on its Section 332 forbearance authority to retain its data roaming rules. Instead, it relied on its Section 10 forbearance authority, 47 U.S.C. § 160(a), a separate grant which does not withhold authority to forbear from Sections 201 and 202 (or any other section). *See Open Internet Order*, 30 FCC Rcd at 5857 ¶523. Moreover, Section 10 was enacted later than Section 332, and grants

²²As noted above, the Commission modified its regulatory approach to broadband Internet access in 2017, eliminating the forbearance issue prospectively. *See* pp. 11-12 above. Flat Wireless’s complaint, however, covers a period when the forbearance issue with respect to the regulatory treatment of data roaming rates was effective. Flat Wireless is not entitled to damages (see n.16 above) on its complaint. Since it has not proven its complaint, the Court need not reach whether Flat Wireless is entitled to more than prospective relief.

forbearance authority “[n]otwithstanding section 332(c)(1)(A).” 47 U.S.C. § 160(a). Hence, Section 332 should not be read to restrict the FCC from forbearing from the application of any part of Title II, including Sections 201 and 202, if the agency finds that the forbearance criteria of Section 10 are met.

B. The Commission Reasonably Applied The Data Roaming Rules.

Flat Wireless does not appear to argue that Verizon’s proffered data roaming rates were actually commercially unreasonable. *See, e.g.*, Br. 1-2 (Statement of the Issues). And rightfully so. The proffered rates were [BEGIN CONFIDENTIAL]

[REDACTED]

[REDACTED] [END CONFIDEN-

TIAL] for each of the two relevant types of technology. *Order* ¶12 (JA 13). And the proffered rate for one of the technologies was [BEGIN CONFIDENTIAL]

[REDACTED]

[END CONFIDENTIAL] *Id.* By contrast, Flat Wireless sought a data rate

[BEGIN CONFIDENTIAL] [REDACTED] [END

CONFIDENTIAL] Verizon charges to others for one of the relevant technologies

and [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] for the

other. *Id.*

Flat Wireless offered no evidence demonstrating that Verizon’s rates are unreasonable under current market conditions. Based on the record before it, the

Commission reasonably concluded that “Verizon’s offered data rates are commercially reasonable in view of existing agreements with other providers.” *Order* ¶12 (JA --). And even on review, Flat Wireless offers no reason to find that the Commission abused its discretion in finding that an offer equal to or lower than the rate agreed to by many other carriers in arms-length transactions is “commercially reasonable.”

III. THE COMMISSION REASONABLY FOUND NO BASIS FOR FLAT WIRELESS’S RESTRAINT OF TRADE ARGUMENT.

Flat Wireless also contends that Verizon’s “rate structure restrains trade.” Br. at 46. This argument is little more than a recasting of its other claims, properly rejected by the Commission, that Verizon’s roaming rates are unlawful. Flat Wireless argues that Verizon’s “monopoly position allows it to set roaming prices that restrain competition in markets where the potential for actual competition exists.” Br. at 46. The Commission acknowledged that, in the *Data Roaming Order*, the Commission held that while providers like Verizon were “not required to hold themselves out to serve all comers indiscriminately on the same or standardized terms, ‘[c]onduct that unreasonably restrains trade ... is not commercially reasonable.’” *Order* ¶14 (JA --), quoting *Data Roaming Order*, 26 FCC Rcd at 5433 ¶45. But the Commission found no record support for Flat Wireless’s claim that Verizon “exercises monopoly power [or] that Flat Wireless has maximized its competitive effort in its own territory.” *Order* ¶14 (JA --).

Specifically, the Commission pointed out: (1) Flat Wireless has “neither demonstrated that Verizon exercises market power nor that Flat has maximized its competitive effort in its own home territory”; (2) Flat Wireless had “failed to support its claim that Verizon engages in ‘predatory pricing by proxy’”; (3) Flat Wireless did not “plausibly establish a claim of competitive harm”; and (4) Flat Wireless had “neither identified a specific market in which Verizon is its only available roaming partner, nor has it adduced any evidence that Verizon has discriminated on price ‘in order to gain or solidify’ its alleged market dominance or ‘with the intent of undercutting’ its competitors.” *Id.*

Other than generalized allegations about Verizon’s “monopoly position” and “anticompetitive strategy,” Br. 46, 48, Flat Wireless points to nothing in the record that contradicts the Commission’s conclusions summarized above.²³ Flat Wireless alleges that Verizon’s “own expert conceded” that Verizon set prices to disadvantage competitors. Br. 48. But Verizon’s expert was an economist, not a Verizon executive, and did not opine on Verizon’s pricing strategies at all. *See Singer Decl.* ¶¶ 9-11 (JA --). Moreover, Flat Wireless overlooks that Dr. Singer’s declaration

²³ Flat Wireless’s citation of a declaration attached to its complaint allegedly “demonstrat[ing] without contradiction that in large areas where [its] customers roam, Verizon is the only available or effective CDMA service provider,” Br. 51, simply does not show that – it contains only undocumented assertions of Kevin Beierschmitt, the CEO and President of Flat Wireless. *See Decl.* (JA --). The Commission found no basis in the record for such claims. *See Order* ¶13 & n. 60 (JA --).

was submitted “to provide an economic opinion on how to evaluate competing offers of roaming rates in this dispute.” *Id.* ¶1 (JA --). He concluded that “Verizon’s offer [to Flat Wireless], which is more closely grounded in market comparables, is more consistent with an economic understanding of what constitutes a commercially reasonable roaming rate.” *Id.* ¶39 (JA --).

IV. NTCH’S PETITION FOR REVIEW IN NO. 18-1273 SHOULD BE DISMISSED BECAUSE THE COURT LACKS JURISDICTION.

Petitioner in No. 18-1273, NTCH, Inc., contends that the order on review in this case resolved not only Flat Wireless’s application for Commission review of Flat Wireless’s administrative complaint, but also resolved the administrative complaint that NTCH filed against Verizon in 2013. *See* Pet. for Review in No. 18-1273 at 1 (“The proceeding before the FCC was a formal complaint brought by NTCH against Cellco Partnership d/b/a Verizon Wireless”). That is simply incorrect. NTCH’s complaint was resolved by the Commission’s Enforcement Bureau, acting pursuant to delegated authority, in 2016,²⁴ and NTCH may not challenge that determination here.

As discussed above, NTCH improperly sought review in this Court of the 2016 Bureau order, rather than seeking review by the full Commission. Accordingly, the Court dismissed NTCH’s petition for review for lack of jurisdiction.

²⁴ *NTCH v. Cellco Partnership d/b/a/ Verizon Wireless*, 31 FCC Rcd 7165 (EB 2016).

NTCH, 877 F.3d at 409. *NTCH* did not separately seek review by the full Commission of the 2016 staff ruling, either before or after *NTCH*'s 2017 court challenge.²⁵

Seeking to avoid this procedural roadblock, *NTCH* contends in its petition for review that the Commission actually took “final Commission action on *NTCH*'s [2013] complaint” in the Flat Wireless order under review. Pet. for Rev. at 2. Not so. The only issue before the Commission in the order from which *NTCH* has sought review was the Flat Wireless complaint. That *Order* is entitled *Flat Wireless, LLC v. Cellco Partnership d/b/a Verizon Wireless*, and does not purport to address *NTCH*'s separate complaint against Verizon. *NTCH* was not a party to Flat Wireless's complaint and did not participate in the proceeding below. Accordingly, it is not a “party aggrieved” pursuant to 28 U.S.C. § 2344, and the Court lacks jurisdiction of its petition for review.

The Communications Act provides that “[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the [Commission] . . . shall be brought as provided by and in the manner prescribed in” the Hobbs Act. 47 U.S.C. § 402(a). The Hobbs Act vests exclusive jurisdiction in the courts of appeals to “determine

²⁵ By the time the Court in 2017 dismissed *NTCH*'s petition for review, time had long since expired for *NTCH* to file an application for FCC review of the Enforcement Bureau ruling. See 47 C.F.R. § 1.115(d) (establishing 30-day period to file an application for review). *NTCH* never sought leave from the Commission to file an application for review out of time.

the validity of [] all final orders of the [Commission].” 28 U.S.C. § 2342. “Any party aggrieved by the final order may . . . file a petition to review the order.”

Id. § 2344. This Court has held that the phrase “party aggrieved” requires a petitioner to be a party to the proceedings before the agency. *Simmons v. ICC*, 716 F.2d 40, 42 (D.C. Cir. 1983); *Gage v. U.S. Atomic Energy Comm’n*, 479 F.2d 1214, 1218 (D.C. Cir. 1973) (explaining that the court “does not have jurisdiction” over claims raised by petitioners who were not parties to the agency proceedings).

In an apparent attempt to address this jurisdictional problem, NTCH relies entirely on footnote 80 of the *Order* (JA__). But the Commission did not purport to revive NTCH’s fully resolved administrative complaint proceeding in footnote 80. Rather, the Commission noted that while NTCH’s administrative complaint proceeding was pending before the Enforcement Bureau, NTCH filed an application for review of an Enforcement Bureau discovery ruling related to that complaint; the Bureau had refused to compel Verizon to provide NTCH with certain material. *See id.* As the Commission notes, Flat Wireless also unsuccessfully sought the same material from Verizon, and Flat and Verizon agreed to have the same discovery appeal be applicable to their own dispute. *See id.* In rejecting Flat Wireless’s substantive challenges to the Bureau’s resolution of its administrative complaint, the Commission held that this discovery was unnecessary. *See id.* at ¶16 &

n.80. Thus, the Commission denied the application for review challenging the discovery order. *Id.*

Notably, nothing about the Commission's determination suggests that the Commission ever even considered addressing NTCH's substantive complaint, because that complaint had been fully resolved. Indeed, this Court suggested as much in denying NTCH's petition for a writ of mandamus, No. 18-1016, in which NTCH argued that the Commission had "unreasonably delayed in acting on [NTCH's] pending application for review of a discovery decision." *In re NTCH, Inc.*, No. 18-1016, at 1 (March 14, 2018). As the Court explained, NTCH "[had] not demonstrated that the Commission has a clear duty to act on that application *since the proceeding was terminated in June 2016.*" *Id.* (emphasis added). And the Court further rejected NTCH's implicit effort to use this discovery dispute to relitigate its substantive complaint. "To the extent petitioner seeks to compel the Commission to resolve its 2013 complaint, mandamus may be invoked only if the statutorily prescribed remedy is clearly inadequate. In this action, petitioner could have filed an application for review of the Enforcement Bureau's June 30, 2016 order by the Commission, and then sought judicial review of the Commission's order in this court." *Id.* (citations omitted).

Moreover, because the Commission determined that the discovery was not relevant to the Flat Wireless-Verizon dispute, the pending NTCH application for

review was appropriately dismissed as moot. *Id.* Even if footnote 80 were read to resolve on the merits NTCH's application for review of the Bureau's discovery ruling, NTCH would lack standing to challenge that ruling. NTCH cannot show an injury fairly traceable to the denial of its discovery request related to its 2013 complaint, given that the Bureau's substantive decision in that complaint proceeding has become final and is no longer itself subject to review.

But if the Court were to reach NTCH's petition for review, it should deny it for the same reasons as Flat Wireless's petition for review in No. 18-1271.

CONCLUSION

Flat Wireless's petition for review in No. 18-1271 should be denied.

NTCH's petition for review in No. 18-1273 should be dismissed; in the alternative it should be denied.

Respectfully submitted,

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March 8, 2019

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CERTIFICATE OF FILING AND SERVICE

I, C. Grey Pash, Jr., hereby certify that on March 8, 2019, I filed the foregoing Brief for Respondents with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system. The participants in the case who are registered CM/ECF users will be served electronically by the CM/ECF system.

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28 U.S.C.A. § 2342**Jurisdiction of court of appeals**

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

- (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

* * *

28 U.S.C.A. § 2344**Review of orders; time; notice; contents of petition; service**

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of--

- (1) the nature of the proceedings as to which review is sought;
- (2) the facts on which venue is based;
- (3) the grounds on which relief is sought; and
- (4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

47 U.S.C.A. § 160**Competition in provision of telecommunications service**

(a) Regulatory flexibility

Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that--

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) Competitive effect to be weighed

In making the determination under subsection (a)(3) of this section, the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

(c) Petition for forbearance

Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) of this section within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a) of this section. The Commission may grant or deny

a petition in whole or in part and shall explain its decision in writing.

(d) Limitation

Except as provided in section 251(f) of this title, the Commission may not forbear from applying the requirements of section 251(c) or 271 of this title under subsection (a) of this section until it determines that those requirements have been fully implemented.

(e) State enforcement after commission forbearance

A State commission may not continue to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying under subsection (a) of this section.

47 U.S.C.A. § 201

Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without

charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

47 U.S.C.A. § 202

Discriminations and preferences

(a) Charges, services, etc.

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services included

Charges or services, whenever referred to in this chapter, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Penalty

Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of \$6,000 for each such offense and \$300 for each and every day of the continuance of such offense.

47 U.S.C.A. § 208

Complaints to Commission; investigations; duration of investigation; appeal of order concluding investigation

(a) Any person, any body politic, or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to

be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(b)(1) Except as provided in paragraph (2), the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed.

(2) The Commission shall, with respect to any such investigation initiated prior to November 3, 1988, issue an order concluding the investigation not later than 12 months after November 3, 1988.

(3) Any order concluding an investigation under paragraph (1) or (2) shall be a final order and may be appealed under section 402(a) of this title.

47 U.S.C.A. § 303

Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall--

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

* * *

47 U.S.C.A. § 316

Modification by Commission of station licenses or construction permits; burden of proof

(a)(1) Any station license or construction permit may be modified by the Commission

either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this chapter or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall be given reasonable opportunity, of at least thirty days, to protest such proposed order of modification; except that, where safety of life or property is involved, the Commission may by order provide, for a shorter period of notice.

(2) Any other licensee or permittee who believes its license or permit would be modified by the proposed action may also protest the proposed action before its effective date.

(3) A protest filed pursuant to this subsection shall be subject to the requirements of section 309 of this title for petitions to deny.

(b) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission; except that, with respect to any issue that addresses the question of whether the proposed action would modify the license or permit of a person described in subsection (a)(2) of this section, such burdens shall be as determined by the Commission.

47 U.S.C.A. § 332

Mobile services

(a) Factors which Commission must consider

In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 151 of this title, whether such actions will--

(1) promote the safety of life and property;

(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands;

(3) encourage competition and provide services to the largest feasible number of users;
or

(4) increase interservice sharing opportunities between private mobile services and other services.

(b) Advisory coordinating committees

(1) The Commission, in coordinating the assignment of frequencies to stations in the private mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government.

(2) The authority of the Commission established in this subsection shall not be subject to or affected by the provisions of part III of Title 5 or section 1342 of Title 31.

(3) Any person who provides assistance to the Commission under this subsection shall not be considered, by reason of having provided such assistance, a Federal employee.

(4) Any advisory coordinating committee which furnishes assistance to the Commission under this subsection shall not be subject to the provisions of the Federal Advisory Committee Act.

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208 of this title, and may specify any other provision only if the Commission determines that--

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers;
and

(iii) specifying such provision is consistent with the public interest.

(B) Upon reasonable request of any person providing commercial mobile service, the

Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.

(C) As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after August 10, 1993, complete a rulemaking required to implement this paragraph with respect to the licensing of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to August 10, 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile

service and the Commission shall grant such petition if such State demonstrates that--

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition. The Commission shall review such petition in accordance with the procedures established in such subparagraph, shall complete all action (including any reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

(4) Regulatory treatment of communications satellite corporation

Nothing in this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communications Satellite Act of 1962 [47 U.S.C.A. § 741 et seq.] of the corporation authorized by title III of such Act [47 U.S.C.A. § 731 et seq.].

(5) Space segment capacity

Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

(6) Foreign ownership

The Commission, upon a petition for waiver filed within 6 months after August 10, 1993, may waive the application of section 310(b) of this title to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993, but only upon the following conditions:

(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b) of this title.

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof-

-

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph--

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

(8) Mobile services access

A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. The requirements for unblocking shall not apply to mobile satellite services unless the Commission finds it to be in the public interest to apply such requirements to

such services.

(d) Definitions

For purposes of this section--

(1) the term “commercial mobile service” means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

(2) the term “interconnected service” means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B) of this section; and

(2) the term “private mobile service” means any mobile service (as defined in section 153 of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

47 U.S.C.A. § 402

Judicial review of Commission’s orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

* * *

47 C.F.R. § 0.111

Functions of the Bureau

(a) Serve as the primary Commission entity responsible for enforcement of the Communications Act and other communications statutes, the Commission’s rules,

Commission orders and Commission authorizations, other than matters that are addressed in the context of a pending application for a license or other authorization or in the context of administration, including post-grant administration, of a licensing or other authorization or registration program.

- (1) Resolve complaints, including complaints filed under section 208 of the Communications Act, regarding acts or omissions of common carriers (wireline, wireless and international).

Note To Paragraph (a)(1): The Consumer and Governmental Affairs Bureau has primary responsibility for addressing individual informal complaints from consumers against common carriers (wireline, wireless and international) and against other wireless licensees, and informal consumer complaints involving access to telecommunications services and equipment for persons with disabilities. The International Bureau has primary responsibility for complaints regarding international settlements rules and policies.

- (2) Resolve complaints regarding acts or omissions of non-common carriers subject to the Commission's jurisdiction under Title II of the Communications Act and related provisions, including complaints against aggregators under section 226 of the Communications Act and against entities subject to the requirements of section 227 of the Communications Act.

Note to paragraph (a)(2): The Consumer and Governmental Affairs Bureau has primary responsibility for addressing individual informal complaints from consumers against non-common carriers subject to the Commission's jurisdiction under Title II of the Communications Act and related provisions.

- (3) Resolve formal complaints regarding accessibility to communications services and equipment for persons with disabilities, including complaints filed pursuant to sections 225 and 255 of the Communications Act.

- (4) Resolve complaints regarding radiofrequency interference and complaints regarding radiofrequency equipment and devices, including complaints of violations of sections 302 and 333 of the Communications Act.

Note to paragraph (a)(4): The Office of Engineering and Technology has shared responsibility for radiofrequency equipment and device complaints.

- (5) Resolve complaints regarding compliance with the Commission's Emergency Alert System rules.

- (6) Resolve complaints regarding the lighting and marking of radio transmitting towers under section 303(q) of the Communications Act.

Note to paragraph (a)(6): The Wireless Telecommunications Bureau has responsibility for administration of the tower registration program.

(7) Resolve complaints regarding compliance with statutory and regulatory provisions regarding indecent communications subject to the Commission's jurisdiction.

(8) Resolve complaints regarding the broadcast and cable television children's television programming commercial limits contained in section 102 of the Children's Television Act.

Note to paragraph (a)(8): The Media Bureau has responsibility for enforcement of these limits in the broadcast television renewal context.

(9) Resolve complaints regarding unauthorized construction and operation of communications facilities, including complaints of violations of section 301 of the Communications Act.

(10) Resolve complaints regarding false distress signals under section 325(a) of the Communications Act.

(11) Resolves other complaints against Title III licensees and permittees, including complaints under § 20.12(e) of this chapter.

* * *

47 C.F.R. § 1.115

Application for review of action taken pursuant to delegated authority

(a) Any person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission. Any person filing an application for review who has not previously participated in the proceeding shall include with his application a statement describing with particularity the manner in which he is aggrieved by the action taken and showing good reason why it was not possible for him to participate in the earlier stages of the proceeding. Any application for review which fails to make an adequate showing in this respect will be dismissed.

(b)(1) The application for review shall concisely and plainly state the questions presented for review with reference, where appropriate, to the findings of fact or conclusions of law.

(2) The application for review shall specify with particularity, from among the

following, the factor(s) which warrant Commission consideration of the questions presented:

(i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.

(ii) The action involves a question of law or policy which has not previously been resolved by the Commission.

(iii) The action involves application of a precedent or policy which should be overturned or revised.

(iv) An erroneous finding as to an important or material question of fact.

(v) Prejudicial procedural error.

(3) The application for review shall state with particularity the respects in which the action taken by the designated authority should be changed.

(4) The application for review shall state the form of relief sought and, subject to this requirement, may contain alternative requests.

(c) No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.

Note: Subject to the requirements of § 1.106, new questions of fact or law may be presented to the designated authority in a petition for reconsideration.

(d) Except as provided in paragraph (e) of this section and in § 0.461(j) of this chapter, the application for review and any supplemental thereto shall be filed within 30 days of public notice of such action, as that date is defined in § 1.4(b). Opposition to the application shall be filed within 15 days after the application for review is filed. Except as provided in paragraph (e)(3) of this section, replies to oppositions shall be filed within 10 days after the opposition is filed and shall be limited to matters raised in the opposition.

(e)(1) Applications for review of interlocutory rulings made by the Chief Administrative Law Judge (see § 0.351) shall be deferred until the time when exceptions are filed unless the Chief Judge certifies the matter to the Commission for review. A matter shall be certified to the Commission only if the Chief Judge determines that it presents a new or novel question of law or policy and that the ruling is such that error would be likely to require remand should the appeal be deferred and raised as an exception. The request to certify the matter to the Commission shall be filed within 5 days after the ruling is made. The application for review shall be filed within 5 days after the order certifying the matter

to the Commission is released or such ruling is made. Oppositions shall be filed within 5 days after the application is filed. Replies to oppositions shall be filed only if they are requested by the Commission. Replies (if allowed) shall be filed within 5 days after they are requested. A ruling certifying or not certifying a matter to the Commission is final: *Provided, however*, That the Commission may, on its own motion, dismiss the application for review on the ground that objections to the ruling should be deferred and raised as an exception.

(2) The failure to file an application for review of an interlocutory ruling made by the Chief Administrative Law Judge or the denial of such application by the Commission, shall not preclude any party entitled to file exceptions to the initial decision from requesting review of the ruling at the time when exceptions are filed. Such requests will be considered in the same manner as exceptions are considered.

(3) Applications for review of a hearing designation order issued under delegated authority shall be deferred until exceptions to the initial decision in the case are filed, unless the presiding Administrative Law Judge certifies such an application for review to the Commission. A matter shall be certified to the Commission only if the presiding Administrative Law Judge determines that the matter involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate consideration of the question would materially expedite the ultimate resolution of the litigation. A ruling refusing to certify a matter to the Commission is not appealable. In addition, the Commission may dismiss, without stating reasons, an application for review that has been certified, and direct that the objections to the hearing designation order be deferred and raised when exceptions in the initial decision in the case are filed. A request to certify a matter to the Commission shall be filed with the presiding Administrative Law Judge within 5 days after the designation order is released. Any application for review authorized by the Administrative Law Judge shall be filed within 5 days after the order certifying the matter to the Commission is released or such a ruling is made. Oppositions shall be filed within 5 days after the application for review is filed. Replies to oppositions shall be filed only if they are requested by the Commission. Replies (if allowed) shall be filed within 5 days after they are requested.

(4) Applications for review of final staff decisions issued on delegated authority in formal complaint proceedings on the Enforcement Bureau's Accelerated Docket (see, e.g., § 1.730) shall be filed within 15 days of public notice of the decision, as that date is defined in § 1.4(b). These applications for review oppositions and replies in Accelerated Docket proceedings shall be served on parties to the proceeding by hand or facsimile transmission.

(f) Applications for review, oppositions, and replies shall conform to the requirements of §§ 1.49, 1.51, and 1.52, and shall be submitted to the Secretary, Federal Communications Commission, Washington, DC 20554. Except as provided below, applications for review and oppositions thereto shall not exceed 25 double-space typewritten pages. Applications

for review of interlocutory actions in hearing proceedings (including designation orders) and oppositions thereto shall not exceed 5 double-spaced typewritten pages. When permitted (see paragraph (e)(3) of this section), reply pleadings shall not exceed 5 double-spaced typewritten pages. The application for review shall be served upon the parties to the proceeding. Oppositions to the application for review shall be served on the person seeking review and on parties to the proceeding. When permitted (see paragraph (e)(3) of this section), replies to the opposition(s) to the application for review shall be served on the person(s) opposing the application for review and on parties to the proceeding.

(g) The Commission may grant the application for review in whole or in part, or it may deny the application with or without specifying reasons therefor. A petition requesting reconsideration of a ruling which denies an application for review will be entertained only if one or more of the following circumstances is present:

(1) The petition relies on facts which related to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or

(2) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

(h)(1) If the Commission grants the application for review in whole or in part, it may, in its decision:

(i) Simultaneously reverse or modify the order from which review is sought;

(ii) Remand the matter to the designated authority for reconsideration in accordance with its instructions, and, if an evidentiary hearing has been held, the remand may be to the person(s) who conducted the hearing; or

(iii) Order such other proceedings, including briefs and oral argument, as may be necessary or appropriate.

(2) In the event the Commission orders further proceedings, it may stay the effect of the order from which review is sought. (See § 1.102.) Following the completion of such further proceedings the Commission may affirm, reverse or modify the order from which review is sought, or it may set aside the order and remand the matter to the designated authority for reconsideration in accordance with its instructions. If an evidentiary hearing has been held, the Commission may remand the matter to the person(s) who conducted the hearing for rehearing on such issues and in accordance with such instructions as may be appropriate.

Note: For purposes of this section, the word “order” refers to that portion of its action wherein the Commission announces its judgment. This should be distinguished from the “memorandum opinion” or other material which often accompany and explain the order.

(i) An order of the Commission which reverses or modifies the action taken pursuant to delegated authority is subject to the same provisions with respect to reconsideration as an original order of the Commission. In no event, however, shall a ruling which denies an application for review be considered a modification of the action taken pursuant to delegated authority.

(j) No evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission believes should have been taken in the original proceeding shall be taken on any rehearing ordered pursuant to the provisions of this section.

(k) The filing of an application for review shall be a condition precedent to judicial review of any action taken pursuant to delegated authority.

47 C.F.R. § 20.12

§ 20.12 Resale and roaming

(a)(1) Scope of manual roaming and resale. Paragraph (c) of this section is applicable to providers of Broadband Personal Communications Services (part 24, subpart E of this chapter), Cellular Radio Telephone Service (part 22, subpart H of this chapter), and specialized Mobile Radio Services in the 800 MHz and 900 MHz bands (included in part 90, subpart S of this chapter) if such providers offer real-time, two-way switched voice or data service that is interconnected with the public switched network and utilizes an in-network switching facility that enables the provider to re-use frequencies and accomplish seamless hand-offs of subscriber calls. The scope of paragraph (b) of this section, concerning the resale rule, is further limited so as to exclude from the requirements of that paragraph those Broadband Personal Communications Services C, D, E, and F block licensees that do not own and control and are not owned and controlled by firms also holding cellular A or B block licenses.

(2) Scope of automatic roaming. Paragraph (d) of this section is applicable to CMRS carriers if such carriers offer real-time, two-way switched voice or data service that is interconnected with the public switched network and utilizes an in-network switching facility that enables the carrier to re-use frequencies and accomplish seamless hand-offs of subscriber calls. Paragraph (d) of this section is also applicable to the provision

of push-to-talk and text-messaging service by CMRS carriers.

(3) Scope of offering roaming arrangements for commercial mobile data services. Paragraph (e) of this section is applicable to all facilities-based providers of commercial mobile data services.

(b) Resale. The resale rule is applicable as follows:

(1) Each carrier subject to paragraph (b) of this section shall not restrict the resale of its services, unless the carrier demonstrates that the restriction is reasonable.

(2) The resale requirement shall not apply to customer premises equipment, whether or not it is bundled with services subject to the resale requirement in this paragraph.

(3) This paragraph shall cease to be effective five years after the last group of initial licenses for broadband PCS spectrum in the 1850–1910 and the 1930–1990 MHz bands is awarded; i.e., at the close of November 24, 2002.

(c) Manual roaming. Each carrier subject to paragraph (a)(1) of this section must provide mobile radio service upon request to all subscribers in good standing to the services of any carrier subject to paragraph (a)(1) of this section, including roamers, while such subscribers are located within any portion of the licensee's licensed service area where facilities have been constructed and service to subscribers has commenced, if such subscribers are using mobile equipment that is technically compatible with the licensee's base stations.

(d) Automatic roaming. Upon a reasonable request, it shall be the duty of each host carrier subject to paragraph (a)(2) of this section to provide automatic roaming to any technologically compatible, facilities-based CMRS carrier on reasonable and not unreasonably discriminatory terms and conditions, pursuant to Sections 201 and 202 of the Communications Act, 47 U.S.C. 201 and 202. The Commission shall presume that a request by a technologically compatible CMRS carrier for automatic roaming is reasonable pursuant to Sections 201 and 202 of the Communications Act, 47 U.S.C. 201 and 202. This presumption may be rebutted on a case by case basis. The Commission will resolve automatic roaming disputes on a case-by-case basis, taking into consideration the totality of the circumstances presented in each case.

(e) Offering roaming arrangements for commercial mobile data services.

(1) A facilities-based provider of commercial mobile data services is required to offer roaming arrangements to other such providers on commercially reasonable terms and conditions, subject to the following limitations:

(i) Providers may negotiate the terms of their roaming arrangements on an

individualized basis;

(ii) It is reasonable for a provider not to offer a data roaming arrangement to a requesting provider that is not technologically compatible;

(iii) It is reasonable for a provider not to offer a data roaming arrangement where it is not technically feasible to provide roaming for the particular data service for which roaming is requested and any changes to the host provider's network necessary to accommodate roaming for such data service are not economically reasonable;

(iv) It is reasonable for a provider to condition the effectiveness of a roaming arrangement on the requesting provider's provision of mobile data service to its own subscribers using a generation of wireless technology comparable to the technology on which the requesting provider seeks to roam.

(2) A party alleging a violation of this section may file a formal or informal complaint pursuant to the procedures in §§ 1.716 through 1.718, 1.720, 1.721, and 1.723 through 1.735 of this chapter, which sections are incorporated herein. For purposes of § 20.12(e), references to a "carrier" or "common carrier" in the formal and informal complaint procedures incorporated herein will mean a provider of commercial mobile data services. The Commission will resolve such disputes on a case-by-case basis, taking into consideration the totality of the circumstances presented in each case. The remedy of damages shall not be available in connection with any complaint alleging a violation of this section. Whether the appropriate procedural vehicle for a dispute is a complaint under this paragraph or a petition for declaratory ruling under § 1.2 of this chapter may vary depending on the circumstances of each case.