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

In the Matter of	)	
	)	
FLAT WIRELESS, LLC,	)	Proceeding Number 15-147
Complainant	)	Bureau ID Number EB-15-MD-005
	)	
v.	)	
	)	
CELLCO PARTNERSHIP d/b/a	)	
VERIZON WIRELESS,	)	
Defendant		

ORDER

Adopted: August 2, 2018 **Released: August 3, 2018**

By the Commission:

I. INTRODUCTION

1. In this proceeding, Flat Wireless, LLC (Flat) filed a formal complaint alleging that Verizon violated the Commission's voice and data roaming rules by offering roaming rates—which Verizon charges when Flat wireless customers travel outside Flat's coverage area and roam onto Verizon's network—that are unjust and unreasonable, unreasonably discriminatory, and commercially unreasonable. For the reasons discussed below, we deny Flat's complaint.

II. BACKGROUND

2. Complainant Flat is a mobile wireless service provider that holds a number of spectrum licenses.[1] Using a Code Division Multiple Access (CDMA) based network, Flat provides facilities-based wireless voice and data service to retail customers in parts of western Texas and the southwestern United States.[2] Defendant Cellco Partnership d/b/a Verizon Wireless (Verizon) has a nationwide, CDMA-based network and provides mobile wireless voice and data service.[3]

A. Legal Framework

3. No single wireless carrier has licensed spectrum and network facilities covering the entire United States. Consequently, when any carrier's wireless voice or data customers travel beyond that

[1] *See* Complaint, Proceeding Number 15-147, Bureau ID Number EB-15-MD-005 (filed June 12, 2015) at 21, para. 44; Response to Interrogatories of Flat Wireless, Proceeding Number 15-147, Bureau ID Number EB-15-MD-005 (Oct. 19, 2015) (Flat Interrogatory Responses) at 2; Initial Brief of Flat Wireless, Inc., Proceeding Number 15-147, Bureau ID Number EB-15-MD-005 (filed Sept. 30, 2016) (Flat Initial Br.) at 1.

[2] Complaint at 6, para. 14; Complaint, Ex. A.2 at 1; Flat Interrogatory Responses at 2; Flat Initial Br. at 1, 12, 25.

[3] Verizon Wireless, Better Matters, http://www.verizonwireless.com/landingpages/better-matters/ (last visited Apr. 21, 2016).

carrier's geographic coverage area, those customers must "roam" on another carrier's network to maintain access to wireless services.[4]

4. The Commission has issued a series of orders addressing wireless carriers' obligation to provide voice and data roaming services, along with the steps an aggrieved party seeking a roaming agreement may pursue.[5] In 2007, the Commission determined that voice roaming is a common carrier service that must be provided "on a just, reasonable, and non-discriminatory basis pursuant to Sections 201 and 202 of the Communications Act."[6] The Commission declined to set voice roaming rates and rejected price caps or other forms of rate regulation.[7] Instead, the Commission relied on "negotiations between the carriers based on competitive market forces" to establish the rates.[8] In 2010, the Commission provided further guidance, including a list of factors that may be considered in resolving a voice roaming dispute.[9] The Commission acknowledged that its chosen approach might result in a "relatively high price of [voice] roaming compared to providing facilities-based service"[10] and anticipated that rates resulting from individualized negotiation would "reasonably vary."[11] The Commission reasoned that "regulation to reduce [voice] roaming rates has the potential to deter investment in network deployment by impairing buildout incentives facing both small and large carriers."[12] The Commission concluded that "the better course . . . is that the rates individual carriers pay for [voice] 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."[13]

5. In 2011, the Commission addressed data roaming, which enables customers to maintain wireless Internet connectivity when outside their carriers' service areas.[14] Pursuant to its authority under Title III of the Communications Act, the Commission required carriers to offer data roaming on commercially reasonable terms where technologically feasible.[15] Similar to the *Voice Roaming Orders*,

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[4] *See* Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, DA 16-1061 (Sept. 23, 2016) (Competition Report) at 74, para. 102.

[5] *See In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Serv. Providers & Other Providers of Mobile Data Servs.*, Second Report and Order, 26 FCC Rcd 5411 (2011) (*Data Roaming Order*); *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Serv. Providers & Other Providers of Mobile Data Servs.*, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 25 FCC Rcd 4181 (2010) (*2010 Voice Order*); *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Serv. Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817 (2007) (*2007 Voice Order*). We refer to the *2007 Voice Order* and *2010 Voice Order*, collectively, as the "*Voice Roaming Orders*."

[6] *2007 Voice Order*, 22 FCC Rcd at 15817, para. 1.

[7] *See id*. at 15832-33, paras. 37-40.

[8] *Id*. at 15824, para. 18.

[9] *See 2010 Voice Order*, 25 FCC Rcd at4200-01, para. 39

[10] *2010 Voice Order*, 25 FCC Rcd at 4197-98, para. 32.

[11] *2007 Voice Order*, 22 FCC Rcd at 15834, para. 44 ("Because the need for automatic roaming services may not always be the same, and 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 automatic roaming rates will reasonably vary."). *See also 2010 Voice Order*, 25 FCC Rcd at 4181, para. 32.

[12] *2007 Voice Order*, 22 FCC Rcd at 15833, para 40.

[13] *Id*. at 15832, para. 37.

[14] *See Data Roaming Order*, 26 FCC Rcd at 5411. The D.C. Circuit upheld the *Data Roaming Order* in 2012. *See Cellco P'ship v. FCC*, 700 F.3d 534, 548 (D.C. Cir. 2012) (*Cellco v. FCC*).

[15] *See Data Roaming Order*, 26 FCC Rcd at 5411, para. 1. The Commission in the *Data Roaming Order* did not exercise Title II authority. In the *Open Internet Order*, the Commission reclassifying mobile broadband internet

the *Data Roaming Order* established a framework for individual negotiations of reasonable rates and terms based on market forces,[16] while balancing the strategic incentives of competitors and the consumer benefits from widespread roaming.[17] In addition, in 2016 the Enforcement Bureau denied a Complaint by NTCH alleging that Verizon's proposed voice roaming rates were unjust and unreasonable and unreasonably discriminatory, and also that Verizon's proposed data roaming rates were commercially unreasonable.[18]

B. History of Flat's Complaint

6. Flat and Verizon executed a voice roaming agreement in 2011 that remains in effect.[19] Flat and Verizon do not have a data roaming agreement.[20] Flat also [redacted].[21] In 2015, Flat requested a new roaming agreement with Verizon that would include both voice and data roaming rates.[22] Verizon responded to Flat within 10 days and provided a written proposal within three weeks of Flat's original request.[23] Within two months, Flat terminated negotiations and informed Verizon of its intent to file a formal complaint.[24] Flat subsequently filed the instant Complaint, alleging, *inter alia*, that the rates Verizon offered for both voice and data were in violation of the *Voice Roaming Orders* and *Data Roaming Order*.[25]

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access services (MBIAS) as commercial mobile radio services (CMRS) explicitly forbore from applying the automatic roaming rule in Section 20.12(d) to MBIAS providers, who remain subject to Section 20.12(e). *See Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5857-58, para. 526 (2015), *aff'd*, *United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, No. 15-1063, 2016 WL 3251234 (D.C. Cir. June 14, 2016) (*Open Internet Order*). The Commission defined Broadband Internet Access as a Title I service in the Restoring Internet Freedom Order. *See* 83 FR 7852 (Feb. 22, 2018) (*Restoring Internet Freedom Order*).

[16] *See id*. at 5423, para. 23; *id*. at 5444-46, para 68 ("The extent of the obligation we impose today is to offer, in certain circumstances, individually negotiated data roaming arrangements with commercially reasonable terms and conditions."). *See also Cellco v. FCC*, 700 F.3d at 548 (noting that the *Data Roaming Order* "leaves substantial room for individualized bargaining and discrimination in terms").

[17] *See id*. at 5418, 5422-23, paras. 13, 20-21.

[18] *NTCH, Inc. v. Cellco Partnership d/b/a Verizon Wireless*, 31 FCC Rcd 7165 (EB 2016) ("*NTCH Order*"), *aff'd*, *NTCH v. Fed. Comms Comm'n*, 877 F.3d 408 (D.C. Cir. 2017). Among other holdings, the Enforcement Bureau rejected NTCH's contention that Verizon's roaming rates are unlawfully high when compared to Verizon's cost of providing roaming, its retail rates, and its MVNO (i.e., resale) rates. *See NTCH Order* at 7173-76, paras. 18-24.

[19] Complaint at 7, para. 18; Complaint, Ex. A.2, A.3; Verizon Wireless Answer, Proceeding Number 15-147, Bureau ID Number EB-15-MD-005 (filed Sept. 15, 2015) (Answer), Tab C at 1; *id.*, Tab G (Declaration of Michael J. Pocher) at 1; Flat Initial Br. at 2, 25. Under the current agreement, Flat pays [redacted]. Complaint at 7, para. 18; *id.*, Ex. A.3 at 72; Joint Statement of Flat and Verizon, Proceeding Number 15-147, Bureau ID Number EB-15-MD-005 (filed Oct. 30, 2015) (Jt. Statement) at 1, para. 1; Flat Initial Br. at 2.

[20] Answer at 6-7, para. 18; Jt. Statement at 1, para. 1.

[21] Complaint at 5-6, paras 13-14; Flat Wireless, LLC's Consolidated Answer to Affirmative Defenses and Reply to Answer, Proceeding Number 15-147, Bureau ID Number EB-15-MD-005 (filed Oct. 19, 2015) (Reply) at 10-11; Flat Interrogatory Responses at 1; Flat Initial Br. at 12.

[22] *See* Answer at 7, para. 19; *id.*, Tab C at 1; *id.*, Tab D at Ex. 1; Jt. Statement at 1, para. 2.

[23] *See* Complaint, Ex. A.1 at 1-2; Answer, Tab C at 2; *id.*, Tab D at Ex. 1.

[24] *See* Complaint, Ex. A.1; *id.* at Ex. A.2; Answer, Tab C at 3; *id.*, Tab D at Ex. 3.

[25] *See* Complaint.

7. After the close of the pleading cycle, and at the request of Commission staff, the parties exchanged best-and-final offers for a roaming agreement.[26] Flat proposed:

[redacted][28]

Verizon counter-proposed the following:

[redacted]

8. Flat sought discovery of Verizon's roaming agreements with third parties, asking Verizon to identify the prescribed roaming "rates paid to Verizon and by Verizon in each of its existing roaming agreements" for voice and data services.[31] Flat explained that interrogatories such as this were relevant because the "calculus of what constitutes a reasonable rate can be approached from the standpoint of . . . the rates being offered by the carrier to others purchasing comparable services."[32] In response to Flat's interrogatory, Verizon produced a collection of charts identifying over 50 roaming agreements, including voice and/or data rates for each.[33]

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[26] *See* Best and Final Offer of Flat Wireless, LLC, Proceeding Number 15-147, Bureau ID Number EB-15-MD-005 (filed Sept. 16, 2016) (Flat's Best-and-Final Offer); Verizon's Best and Final Offer, Proceeding Number 15-147, Bureau ID Number EB-15-MD-005 (filed Sept. 16, 2016) (Verizon's Best-and-Final Offer). The parties' best-and-final offers reflect agreement that [redacted]. *See id.*

[27] The parties differ as to the proper data unit of measure, with Flat typically referring to gigabytes (GB) and Verizon typically referring to megabytes (MB). One gigabyte is equal to approximately 1,000 megabytes. *See* definitions of gigabyte and megabyte in Newton's Telecom Dictionary (28th Ed. 2014 Harry Newton); https://www.conversion-metric.org/filesize/megabytes-to-gigabytes (last visited Oct. 25, 2016). For the convenience of using a common convention, our analysis will proceed in terms of megabytes.

[28] Flat's Best-and-Final Offer at 1.

[29] Verizon's Best-and-Final Offer at 1. 1xRTT and EVDO are wireless network technologies, and EVDO enables data transmission over wireless networks at a faster rate than 1xRTT. J.A. Esquerra-Soto et al., *Performance Analysis of 3G+ Cellular Technologies with Mobile Clients*, 10 Journal of Applied Research and Technology 227 (Apr. 2012).

[30] Verizon's Best-and-Final Offer at 1. LTE is a wireless network technology that enables an increased data rate over EVDO. R. Sapakal and S. Kadam, *5G Mobile Technology*, 2 International Journal of Advanced Research in Computer Engineering & Technology (IJARCET) 568 (Feb. 2013). Flat provides LTE on its own network. *See, e.g.,* Complaint at 13, para. 28; *id*. at 19, para. 41.

[31] *See* Verizon's Response to Flat's Interrogatories, Proceeding Number 15-147, Bureau ID Number EB-15-MD-005 (Sept. 15, 2015) (Verizon Interrogatory Responses) at 2; Discovery Agreement attached to Notice of Formal Complaint, Proceeding Number 15-147, Bureau ID Number EB-15-MD-005 (Jul. 15, 2015).

[32] *See id.*; Amended Interrogatories of Flat Wireless, LLC, Proceeding Number 15-147, Bureau ID Number EB-15-MD-005 (Sept. 1, 2015) (Flat Amended Interrogatories) at 2.

[33] *See* Verizon Interrogatory Responses at Ex. A. *See also* Verizon's Best-and-Final Offer at Ex. A; Answer, Tab C at 3; *id.*, Tab G at 2-3.

III. DISCUSSION

9. Flat's Complaint alleges that Verizon's proposed new voice roaming rate is unjust and unreasonable and unreasonably discriminatory, and that Verizon's proposed data roaming rates are commercially unreasonable.[34] Additionally, Flat contends that Verizon's roaming rates are unlawfully high when compared to Verizon's cost of providing roaming and Verizon's retail and MVNO rates.[35] The allegations are identical to those made by NTCH in its roaming complaint against Verizon—often repeated verbatim[36]—and the facts are substantially similar.[37] We consider each of Flat's arguments in turn.

A. Voice Roaming

10. Flat argues that Verizon's voice roaming offer is unjust and unreasonable in violation of Section 201(b) and the *Voice Roaming Orders*. We disagree. The *Voice Roaming Orders* require that voice roaming rates be just, reasonable, and non-discriminatory, but allow for individualized negotiations that can lead to reasonable differences in rates.[38] In the orders, the Commission indicated that agreements with other providers were among the factors the Commission may consider in resolving a roaming dispute.[39] Verizon's voice roaming agreements show that Verizon's proffered voice roaming rate in this case is not unjust or unreasonable, being well within the range of comparable contractual rates.[40] In fact, the record contains a list of more than 40 agreements under which [redacted].[41] Moreover, Verizon's proposed roaming rate would reduce Flat's current voice roaming rate [redacted],[42] and is [redacted] the rate that Verizon itself pays to roam on the networks of dozens of its partners.[43] In stark contrast, Flat's proposal is [redacted] the prevailing

[34] Complaint. *See also* Flat Initial Br. at *passim*; Reply Brief of Flat Wireless, Proceeding Number 15-147, Bureau ID Number EB-15-MD-005 (Oct. 24, 2016) (Flat Reply Br.) at *passim*.

[35] *See* Complaint at *passim*; Flat Initial Br. at *passim*; Flat Reply Br. at *passim*.

[36] *Compare* Flat Initial Br. *with* Initial Brief of NTCH, Inc., Proceeding Number 14-212, Bureau ID Number EB-13-MD-006 (filed Sept. 18, 2015).

[37] *See id*. Note also that the same counsel represents both Flat and NTCH, *see* Complaint; Amended Complaint, Proceeding Number 14-212, Bureau ID Number EB-13-MD-006 (filed July 2, 2014), and both companies do business as ClearTalk. *See, e.g.*, https://www.cleartalkwireless.com/terms-and-conditions/; https://www.ntia.doc.gov/legacy/broadbandgrants/applications/summaries/1298.pdf; http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=83913581 (all last visited Dec. 5, 2016).

[38] *See* para. 4, *supra*.

[39] *See 2010 Voice Order*, 25 FCC Rcd at 4201, para. 39.

[40] *See NTCH Order*, 31 FCC Rcd at 7170-71, paras. 12-13; Verizon's Best-and-Final Offer at Ex. A; Verizon Interrogatory Responses at Ex. A; Answer, Tab C at 3-6; *id.*, Tab G at 2-3.

[41] *See* Verizon's Best-and-Final Offer at Ex. A; Verizon Interrogatory Responses at Ex. A; Answer, Tab C at 3-6; *id.*, Tab G at 2-3.

[42] *Compare* Verizon's Best-and-Final Offer at 1 *with* Complaint at 7, para. 18; *id.*, Ex. A.3 at 72; Jt. Statement at 1, para. 1; Flat Initial Br. at 2. The Commission has confirmed that "whether the carriers involved have had previous roaming arrangements with similar terms" is also among the factors for determining reasonableness in voice roaming. *See 2010 Voice Order*, 25 FCC Rcd at 4201, para. 39.

[43] *See* Verizon's Best-and-Final Offer at Ex. A; Verizon Interrogatory Responses at Ex. A; Answer, Tab C at 3-6; *id.*, Tab G at 2-3.

rate that Verizon offers to other carriers, and [redacted] the weighted average rate that Verizon pays to other carriers for roaming.[44]

11. We also reject Flat's contention that Verizon's voice roaming rate is unreasonably discriminatory.[45] Flat claims that Verizon has failed to justify differences in roaming rates across its agreements.[46] We agree, however, with the Enforcement Bureau's finding in the *NTCH Order* that "differences in wireless roaming rates must be viewed through the lens of the *Voice Roaming Orders*' approach, which anticipates individualized bargaining and variation in roaming rates."[47] As we have held, it would "distort competitive market conditions" if the Commission were to mandate equality of rates.[48] Consistent with the regime established by the Commission, Verizon has negotiated with a significant number of third-party carriers to reach a range of voice roaming rates.[49] Nothing in the Commission's orders compels Verizon, which is a national roaming partner having superior network coverage, to offer its *lowest* roaming rates to Flat, a carrier that can provide reciprocal roaming in comparatively few markets. Further, Verizon has dozens of voice roaming agreements under which [redacted] offered to Flat.[50] Accordingly, we do not see a reason based upon the current record to find that Verizon's offer to Flat on voice roaming is in violation of the *Voice Roaming Orders*.

B. Data Roaming

12. Flat argues, like NTCH did previously, that Verizon's proffered data roaming rates are commercially unreasonable and a restraint on trade in violation of the *Data Roaming Order*.[51] We disagree. In the *Data Roaming Order*, the Commission indicated that agreements with other providers were among the factors the Commission may consider in resolving a data roaming dispute.[52] Here, Verizon's offered data rates are commercially reasonable in view of existing agreements with other providers.[53] Verizon's offer to Flat is below [redacted] and below [redacted].[54] Indeed, the rates Verizon offered Flat are [redacted][55] [redacted]

[44] *See* Verizon's Best-and-Final Offer at Ex. A; Verizon Interrogatory Responses at Ex. A; Answer, Tab C at 3-6; *id.*, Tab G at 2-3.

[45] *See NTCH Order*, 31 FCC Rcd at 7171, para. 14.

[46] *See id.*; Flat Initial Br. at 22-23.

[47] *See NTCH Order*, 31 FCC Rcd at 7171, para. 14 (italicization added).

[48] *See 2007 Voice Order,* 22 FCC Rcd at 15834, para. 44.

[49] *See* Answer, Tab G at 2-3.

[50] *See id.*; Verizon's Best-and-Final Offer at Ex. A; Verizon Interrogatory Responses at Ex. A; Answer, Tab C at 3-6.

[51] *See* Flat Initial Br. at 23-33.

[52] *Data Roaming Order*, 26 FCC Rcd at 5452-53, para. 86.

[53] *See NTCH Order*, 31 FCC Rcd at 7171-73, paras. 15-17.

[54] *See* Verizon's Best-and-Final Offer at Ex. A; Verizon Interrogatory Responses at Ex. A; Answer, Tab C at 3-6; *id.*, Tab G at 2-3. [redacted].

[55] *See* Verizon's Best-and-Final Offer at Ex. A; Verizon Interrogatory Responses at Ex. A; Answer, Tab C at 3-6; *id.*, Tab G at 2-3.

[redacted][56] Notably, Flat's data roaming rate demand is lower than [redacted].[57] Flat's rate demand for data is [redacted].[58]

13. In addition—as the Enforcement Bureau held in the *NTCH* case—Verizon's offer is reasonable under the totality of the circumstances here.[59] Although Flat would prefer to roam on Verizon's network, [redacted].[60] Further, as Flat admits, Verizon has dealt with it responsively at all times throughout the negotiation.[61] Finally, although Flat claims that it has "delayed further commercial build-out of its facilities" until it receives the low rates it considers reasonable,[62] Flat has failed to enter into the record any evidence of any such buildout plans.[63]

14. Flat also analyzes Verizon's data roaming rates according to the "just and reasonable" and "not unreasonably discriminatory" standards of Title II.[64] We have previously expressly declined to apply these Title II standards to data roaming and see no reason to revisit that decision here.[65] Flat also fails to support its claim that Verizon's proffered roaming rates amount to an unlawful restraint of trade. According to Flat, because Verizon has the most comprehensive CDMA network and there are "no realistic alternative[s]" to Verizon, Verizon's rate offer reflects its monopoly power and stifles Flat's ability to compete with large wireless resellers and other providers.[66] In the *Data Roaming Order*, the

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[56] *See id*. This analysis excludes [redacted]. *See id*. *See also* Answer, Tab C at 6; *id*., Tab G at 2-3.

[57] *See* Verizon's Best-and-Final Offer at Ex. A; Verizon Interrogatory Responses at Ex. A; Answer, Tab C at 3-6; *id*., Tab G at 2-3.

[58] *See id*.

[59] *See NTCH Order*, 31 FCC Rcd at 7172-73, para. 16.

[60] *See* Complaint at 5-6, paras 13-14; Reply at 10-11; Flat Initial Br. at 12. Flat argues that Verizon is the "only one viable national roaming" partner. *See, e.g.*, Initial Br. at 11-12. But Flat [redacted] *See* Complaint at 5, para. 13. *See also* Competition Report at 5. Further, the parties can pursue roaming arrangements with smaller CDMA carriers to broaden their coverage, as is evident [redacted]. *See* Flat Interrogatory Responses at 1; https://www.fcc.gov/general/mobile-broadband-deployment-coverage-areas-provider (last visited Apr. 26, 2016); Competition Report at 6-7, para 8; Verizon's Best-and-Final Offer at Ex. A; Verizon Interrogatory Responses at Ex. A; Answer, Tab C at 3-6; *id*., Tab G at 2-3. For example, Verizon asserts—and Flat does not dispute—that Flat can pursue participation in the Competitive Carriers Association's Data Services Hub to expand its roaming service area. *See* Legal Analysis of Verizon, Proceeding Number 15-147, Bureau ID Number EB-15-MD-005 (filed Oct. 9, 2015) at 15, *See also* Marguerite Reardon, *Sprint to join rural operators in nationwide roaming hub*, CNET (Mar. 26, 2014), *available at* https://www.cnet.com/news/sprint-to-join-rural-operators-in-nationwide-roaming-hub/ (last visited Feb. 21, 2017).

[61] Jt. Statement at 1, para. 2.

[62] *See* Flat Initial Br. at 25.

[63] Also relevant to Flat's argument here is the Commission's finding that "the relatively high price of roaming compared to providing facilities-based service" could "counterbalance the incentive to 'piggy back' on another carrier's network." *See Data Roaming Order*, 26 FCC Rcd at 5423, para. 21. *See also 2007 Voice Order*, 22 FCC Rcd at 15832-33, para. 40 (endorsing market-based pricing to incentivize smaller carriers to expand their coverage).

[64] *See, e.g.*, Flat Initial Br. at 9, 34-35.

[65] *See Restoring Internet Freedom Order; Open Internet Order,* 30 FCC Rcd at 5857-58, para. 526. We note, however, that Flat and other carriers have filed a petition for reconsideration of this decision (which remains pending). *See Petition for Reconsideration of NTCH, Inc. et al.*, GN Docket 14-28, May 13, 2015.

[66] *See* Flat Initial Br. at 11-14.

Commission observed that, while providers 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."[67] But Flat has failed to support its claim that Verizon has leveraged monopoly power in the roaming market to eliminate competition in local markets.[68] Indeed, Flat has neither demonstrated that Verizon exercises market power nor that Flat has maximized its competitive effort in its own home territory.[69] Similarly, Flat has failed to support its claim that Verizon engages in "predatory pricing by proxy," relying inadequately on the naked fact that Verizon charges [redacted].[70] Further, nowhere does Flat plausibly establish a claim of competitive harm. Flat has neither identified a specific market in which Verizon is its only available roaming partner,[71] 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.[72]

C. Comparisons to Verizon's Costs, Retail Rates, or MVNO Rates

15. As discussed above, Verizon's offered voice and data roaming rates fall within the range of rates that Verizon offers others and itself pays today. Nevertheless, Flat argues that Verizon's offered rates violate the Commission's rules because they exceed Verizon's costs, retail rates, and MVNO rates. In making this argument, Flat relies upon the Wireless Telecommunications Bureau's (WTB) December 2014 declaratory ruling that retail, international, and MVNO/wholesale rates could be relevant to the reasonableness of data roaming rates, depending on "the facts and circumstances of any particular case."[73]

16. Flat first asks us to impose cost-based rate regulation, but the Commission has expressly declined to do so.[74] Indeed, the Commission 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.[75] In the *Voice Roaming Orders*, the Commission expressly declined to impose price caps or any other form of

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[67] *Data Roaming Order*, 26 FCC Rcd at 5433, para. 45.

[68] *See* Flat Reply Br. at 3-4.

[69] *See* Flat Initial Br. at 25-26.

[70] *See* Flat Initial Br. at 32-33.

[71] *See id.* at 32. Further, while Flat points to particular coverage issues it faces in Texas, evidence cited by Flat shows that Verizon also has a substantial coverage gap in that state. Complaint at 5-6, para. 14; *id*., Ex. B-C.

[72] *See* Flat Initial Br. at 10.

[73] *See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 29 FCC Rcd 15483, 15486, para. 9 (WTB 2014) (*T-Mobile Declaratory Ruling*). We note that two applications for review of this ruling are pending. *See In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Serv. Providers & Other Providers of Mobile Data Servs.*, WT Docket No. 05-265, Application for Review of AT&T, (Jan. 16, 2015); *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Serv. Providers & Other Providers of Mobile Data Servs.*, WT Docket No. 05-265, Verizon Application for Review (Jan. 20, 2015).

[74] *See Flat Initial Br.* at 8-10, 15, paras. 19, 22-23, 30; *Cellco P'ship v. FCC*, 700 F.3d at 548; *2007 Voice Order*, 22 FCC Rcd at 15832-33, para. 37; *Data Roaming Order*, 26 FCC Rcd at 5422-23, 5444-46, paras. 21, 68.

[75] *See Competitive Telecomms. Ass'n v. FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996); *In the Matter of 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, para. 7 (1995) (denying state request for authority to regulate CMRS wholesale rates and providing that the measure of reasonableness under Section 201 is "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").

rate regulation, which would include setting rates by reference to a provider's costs.[76] Those orders rely instead on individual negotiations to determine market-driven rates.[77] Further, the Commission's data roaming regime applies a commercially reasonable standard, ensuring providers even "*more freedom* from agency intervention than the 'just and reasonable' standard" that applies in the voice roaming context.[78] Again, the Commission explicitly declined to impose "prescriptive regulation of rates," opting instead to rely on "individually negotiated data roaming arrangements."[79] We decline again to do so here for the reasons set out in those orders.[80]

17. Flat's argument concerning retail rates is similarly unpersuasive. Flat analyzed only a single Verizon retail plan—a plan that Flat cherry-picked as the lowest-cost from among many available Verizon plans.[81] Flat then assumed that a retail customer is on the phone for every minute of a 90-day quarter (equal to 2160 hours) and uses approximately 12,000 megabytes of data per quarter.[82] These numbers contrast starkly with the record evidence, including Flat's previous statement that a typical smartphone prepaid customers incurs about [redacted] per quarter.[83] Flat's unreliable estimate of voice and data usage under the single Verizon retail plan apparently under- and overestimates the calculated rates per-MOU for voice and per-megabyte for data.[84] Further, Flat reduced its voice and data rate calculations by assuming a large number of SMS text messages and imputing a price for each[85]—[redacted].[86] In light of these shortcomings in Flat's analytical approach, Flat's retail rate comparison is not sufficiently reliable to be used in considering whether Verizon's offers in this case violate the *Voice Roaming Orders* and the *Data Roaming Order*.

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[76] *See 2007 Voice Order*, 22 FCC Rcd at 15832-33, para. 37. Notably, the list of non-exclusive factors the Commission identified for resolving voice roaming disputes does not include the roaming provider's costs. *See 2010 Voice Order*, 25 FCC Rcd at 4200-01, para. 39.

[77] *2007 Voice Order* at 15824, para. 18. *See also id*. at 15831-32, paras. 36-38. The Commission thereby preserved for host carriers "flexibility, subject to a standard of reasonableness, to establish the structure and the level of roaming rates." *2010 Voice Order*, 25 FCC Rcd at 4197-98, para. 32. The Commission reasoned that regulating rates would impede investment in, and limit build-out of, wireless networks. *See id*.; *2010 Voice Order*, 25 FCC Rcd at 4200-01, paras. 39-40. Flat argues that the underlying assumptions have changed, dictating a change to Commission rules; such a request is not appropriate in a complaint proceeding.

[78] *Cellco P'ship v. FCC*, 700 F.3d 534, 548 (D.C. Cir. 2012) (emphasis added). *See* note 18, *supra*.

[79] *See Data Roaming Order*, 26 FCC Rcd at 5422-23, para 21; *id*. at 5444-46, para. 68. *See also T-Mobile Declaratory Ruling*, 29 FCC Rcd at 15489, para. 19 (allowing "host providers substantial room for individualized bargaining," including on price).

[80] For this reason, we deny as moot an application for review of a decision by the Enforcement Bureau's Market Disputes Resolution Division denying certain cost-related discovery. *See* Application for Review of NTCH, Inc., Proceeding Number 14-212, Bureau ID Number EB-13-MD-006, May 6, 2015. That application for review was filed in the *NTCH* case but became relevant to discovery in this case by the parties' agreement. *See* Supplement to Joint Statement of Flat and Verizon, Proceeding Number 15-147, Bureau ID Number EB-15-MD-005 (filed Feb. 5, 2016) at 1, paras. 1-2; Jt. Statement at 1, para. 3.

[81] *See* Verizon Interrogatory Responses at 2; Flat Initial Br. at 16.

[82] *See* Flat Initial Br. at 16-17.

[83] *See* Complaint at 13, para. 28.

[84] Flat's retail data rate assumption also is based on a flawed calculation that ignores part of the amount consumers pay for data, further altering the calculated rate. *Compare* Flat Initial Br. at 16-17 *with* Verizon Interrogatory Responses at 2-7.

[85] *See* Flat Initial Br. at 16-17.

[86] Flat's Best and Final Offer at 1; Verizon's Best and Final Offer at 1. *See also* Complaint at 14, para. 28.

18. Finally, Flat argues that Verizon's MVNO rates should serve as a benchmark for the reasonableness of Verizon's roaming rate offers, but Flat failed to identify comparable rates.[87] Flat relied on [redacted] as it had done for its retail-rate analysis, and Flat then compared Verizon's roaming offer to [redacted].[88] Indeed, Flat has offered no evidence that [redacted][89] Because Flat has not put forward reasonably determined rates from a comparable MVNO, it has failed to show that the roaming rates Verizon has offered are unjust, unreasonable, or commercially unreasonable by comparison to MVNO rates.[90]

IV. ORDERING CLAUSE

19. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 4(j), 201, 202, 208, 301, 303, 304, 309, 316, and 332 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201, 202, 208, 301, 303, 304, 309, 316, and 332 and sections 1.720-1.735 and 20.12 of the of the Commission's rules, 47 C.F.R. §§ 1.720-1.735 and 20.12, the *2010 Voice Order*, 25 FCC Rcd 4181 (2010), the *2007 Voice Order*, 22 FCC Rcd 15817 (2007), and the *Data Roaming Order*, 26 FCC Rcd 5411 (2011), Flat's Complaint is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[87] *See NTCH Order*, 31 FCC Rcd at 7175-76, para. 24; Flat Initial Br. at 18-20.

[88] *See* Verizon Interrogatory Responses at 1-2; Flat Initial Br. at 18.

[89] *See* Verizon Interrogatory Responses at 1-2. Flat would have us disregard this distinction, claiming that it has no effect on costs. Flat Initial Br. at 18. But, as we have said, we need not evaluate costs in our determination of reasonableness. *See* note 79, *supra*. By contrast, [redacted] a legitimate and significant commercial consideration.

[90] Verizon proposes several other distinguishing characteristics of its MVNO relationship, including [redacted] Verizon Interrogatory Responses at 1-2. The distinguishing effects of these factors are less clear-cut; consequently, we do not rely upon them.