

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of
NTCH, INC.,
Complainant
v.
CELLCO PARTNERSHIP d/b/a
VERIZON WIRELESS,
Defendant
EB Docket No. 14-212
File No. EB-13-MD-006

ORDER

Adopted: June 30, 2016

Released: June 30, 2016

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this proceeding, NTCH, Inc. (NTCH) filed a formal complaint alleging that Verizon violated the Commission’s voice and data roaming rules by offering roaming rates—which Verizon charges when NTCH wireless customers travel outside NTCH’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 NTCH’s complaint.

II. BACKGROUND

2. Complainant NTCH is a wireless service provider that holds a number of spectrum licenses.1 Using Code Division Multiple Access (CDMA) technology, NTCH provides wireless voice and data service to [redacted]2 NTCH also provides [redacted]3 Defendant Cellco Partnership d/b/a Verizon Wireless (Verizon) is a nationwide facilities-based provider of CDMA wireless voice and data service.4

A. Legal Framework

3. No single wireless carrier has licensed spectrum and network facilities covering the entire

1 Amended Complaint, File No. EB-13-MD-006 (filed July 2, 2014) (Complaint) at 1, 24; Joint Statement of NTCH and Verizon, File No. EB-13-MD-006 (filed Sept. 30, 2014) (Jt. Statement), at 2, para. 5; Legal Analysis of Verizon Wireless, File No. EB-13-MD-006 (filed Aug. 4, 2014) (Verizon Legal Analysis), Att. A.

2 Complaint at 1, 4-5, paras. 1, 12; Jt. Statement at 2, para. 4.

3 Id. NTCH additionally holds spectrum in other markets. Verizon Legal Analysis, Att. A.

4 Complaint at 1, 4-6, paras. 3, 12-13; id. at Ex. B; Verizon Wireless, Better Matters, http://www.verizonwireless.com/landingpages/better-matters/ (last visited Apr. 21, 2016); Response Brief for Verizon, File No. EB-13-MD-006 (filed Oct. 9, 2015) (Verizon Opposition Brief) at 3.

United States. Consequently, 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.⁵ The Commission has determined that the availability of wireless roaming arrangements is critical to promoting seamless consumer access to mobile services nationwide, innovation and investment, and facilities-based competition among multiple service providers. The Commission has also determined that data roaming, specifically, "encourage[s] service providers to invest in and upgrade their networks and to deploy advanced mobile services ubiquitously, including in rural areas."⁶ Further, the Commission has noted that consolidation in the mobile wireless marketplace may have reduced the incentives of the largest providers to enter into data roaming agreements with other providers because of their reduced need for reciprocal roaming.⁷

4. In a series of orders, the Commission addressed wireless carriers' obligation to provide roaming to carriers requesting roaming agreements. 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."⁸ The Commission declined to set voice roaming rates and rejected price caps or other forms of rate regulation.⁹ Instead, the Commission relied on "negotiations between the carriers based on competitive market forces" to establish the rates.¹⁰ In 2010, the Commission provided further guidance, including a list of factors that may be considered in resolving a voice roaming dispute.¹¹ The Commission acknowledged that its chosen approach might result in a "relatively high price of [voice] roaming compared to providing facilities-based service"¹² and anticipated that rates resulting from individualized negotiation would "reasonably vary."¹³ 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."¹⁴ 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,

⁵ See Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, DA 15-1487 (Dec. 23, 2015) at 78-79, para. 123.

⁶ *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, 5443, para. 64 (2011) (*Data Roaming Order*).

⁷ *Id.* at 5426-27, para. 27.

⁸ *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, para. 1 (2007) (*2007 Voice Order*).

⁹ See *id.* at 15832-33, paras. 37-40.

¹⁰ *Id.* at 15824, para. 18.

¹¹ See *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, 4200-01, para. 39 (2010) (*2010 Voice Order*). We refer to the *2007 Voice Order* and *2010 Voice Order*, collectively, as the "*Voice Roaming Orders*."

¹² *2010 Voice Order*, 25 FCC Rcd at 4197-98, para. 32.

¹³ *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.

¹⁴ *2007 Voice Order*, 22 FCC Rcd at 15833, para 40.

subject to the statutory requirement that any rates charged be reasonable and non-discriminatory.”¹⁵

5. To facilitate productive negotiations concerning voice roaming, the Commission established a presumption of reasonableness for a voice roaming request that is technologically compatible, among other considerations.¹⁶ When a presumptively reasonable request is made, the would-be voice roaming host “has a duty to respond to the request and avoid actions that unduly delay or stonewall the negotiations regarding that request.”¹⁷ If a would-be host carrier refuses to respond or engages in a persistent pattern of stonewalling behavior, the Commission indicated that this evidence would likely support a finding that the would-be host provider had violated its voice roaming obligations.¹⁸

6. In 2011, the Commission addressed data roaming, which enables customers to maintain wireless Internet connectivity when outside their carriers’ service areas.¹⁹ 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.²⁰ Similar to the *Voice Roaming Orders*, the *Data Roaming Order* established a framework for individual negotiations of reasonable rates and terms based on market forces,²¹ while balancing the strategic incentives of competitors and the consumer benefits from widespread roaming.²² In 2014, the Wireless Telecommunications Bureau (WTB) issued a *Declaratory Ruling* that provided further guidance to parties on the “commercial reasonableness” of proffered data roaming rates, including the potential relevance of retail rates, international rates, and resale rates.²³ WTB stated, *inter alia*, that “the probative value of these other rates as reference points will depend on the facts and circumstances of any particular case.”²⁴

7. In the *Voice Roaming Orders*, the Commission found that Section 208 of the Act, which

¹⁵ *Id.* at 15832, para. 37.

¹⁶ *Id.* at 15831, para. 33. *See also* 2010 *Voice Order*, 25 FCC Rcd at 4190, para. 18 (eliminating the home roaming exclusion).

¹⁷ *Id.*

¹⁸ *Id.* *See also* 2007 *Voice Order*, 22 FCC Rcd at 15831, para. 34 (stating that the presumption of reasonableness was intended to provide guidance in the context of a Section 208 complaint proceeding regarding roaming).

¹⁹ *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*).

²⁰ *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 recent *Open Internet Order*, the Commission reclassified mobile broadband internet access services (MBIAS) as commercial mobile radio services (CMRS). In doing so, it forbore from applying the automatic roaming rule in Section 20.12(d) to MBIAS providers, “conditioned on such providers continuing to be subject to the obligations, process, and remedies under the data roaming rule codified in 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*).

²¹ *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”).

²² *See id.* at 5418, 5422-23, paras. 13, 20-21.

²³ *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*).

²⁴ *Id.*

provides that complaints against common carriers may be filed with the Commission for adjudication, applied to the provisioning of voice roaming as a common carrier service. Under the Commission's rules, the Enforcement Bureau (Bureau) resolves complaints filed under Section 208.²⁵ In the *Data Roaming Order*, the Commission set forth procedures for resolving disputes regarding the Commission's data roaming rule.²⁶ The Commission held that parties may file a formal or informal complaint under Section 20.12(e)(2) of the Commission's rules, and delegated authority to the Bureau to adjudicate data roaming complaints.²⁷ In both the *Voice Roaming Orders* and the *Data Roaming Order*, the Commission explained that it would consider complaints in light of the "totality of the circumstances of the case."²⁸

B. History of NTCH's Complaint

8. NTCH and Verizon executed a voice roaming agreement in 2006 which is still in effect.²⁹

[REDACTED]³⁰ In late 2011, NTCH requested a new roaming agreement with Verizon that would [REDACTED]³¹ Verizon responded to NTCH's proposal.³² Although the parties continued negotiations—and participated in mediation at the Commission—they were unable to reach an agreement.³³ NTCH 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*.³⁴

²⁵ 47 C.F.R. § 0.111(a)(1).

²⁶ *Data Roaming Order*, 26 FCC Rcd at 5445-46, para. 68.

²⁷ 47 C.F.R. § 0.111(a)(11); *Data Roaming Order*, 26 FCC Rcd at 5451, para. 82 ("We further clarify that the Enforcement Bureau has delegated authority to resolve complaints arising out of the data roaming rule.") & n.238 ("We add appropriate clarifying language to this effect to the rule governing the functions of the Enforcement Bureau.") (citing modifications to 47 C.F.R. § 0.111(a)(11)).

²⁸ See *2007 Voice Order*, 22 FCC Rcd at 15829-30, para. 30; *Data Roaming Order*, 26 FCC Rcd at 5452-53, para. 86.

²⁹ Complaint, Ex. A.3 at 00001-00050; Jt. Statement at 1, para. 1; Verizon Opposition Brief at 3. [REDACTED]

³⁰ Jt. Statement at 2, para. 4; Initial Brief of NTCH, Inc., File No. EB-13-MD-006 (filed Sept. 18, 2015) (NTCH Initial Brief) at 12. See <https://www.fcc.gov/general/mobile-broadband-deployment-coverage-areas-provider> (last visited Apr. 26, 2016).

³¹ Complaint, Ex. A.3 at 00053-00073; Jt. Statement at 1, 3, paras. 2-3, 6.

³² Complaint, Ex. A.3 at 00069, 00072-00073, 00079, 00086-00087, 00098-00099; Jt. Statement at 1, para. 2.

³³ Complaint, Ex. A.3 at 00053-00099, 00111-00116; Verizon Wireless Answer, File No. EB-13-MD-006 (filed Aug. 4, 2014) (Answer), Tab G (Declaration of Joseph A. Trent) at 1-3, paras. 4-15; Answer, Tab F at Exs. 1, 2, 4-9; Jt. Statement at 1-5.

³⁴ In responding to NTCH's claims, Verizon filed a declaration of its proposed expert, Dr. Hal Singer. See Verizon Opposition Brief, Ex. A (Declaration of Dr. Hal J. Singer). NTCH moved to strike the declaration, and Verizon opposed the motion. See Motion to Strike Singer Declaration, File No. EB-13-MD-006 (filed Oct. 23, 2015) (Motion to Strike); Verizon's Opposition to Motion to Strike, File No. EB-13-MD-006 (filed Oct. 28, 2015). Because this Order does not rely on any evidence or argument derived from the Singer Declaration, we deny the Motion to Strike as moot.

9. 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.³⁵ NTCH proposed:

[Redacted]

Verizon counter-proposed the following:

[Redacted]

10. NTCH 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.⁴⁰ NTCH explained that this interrogatory was relevant

³⁵ [Redacted]

³⁶ The parties differ as to the proper data unit of measure. [Redacted]
Because NTCH does not dispute Verizon’s claim that “[c]arriers typically negotiate roaming rates on a per-[megabyte] basis,” Verizon Opposition Brief at 18, our analysis will be in terms of megabytes.

³⁷ Best and Final Offer of NTCH, Inc., File No. EB-12-MD-006 (filed Sept. 9, 2015) (NTCH Best and Final Offer) at 1-2. [Redacted]

³⁸ [Redacted] 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).

³⁹ Best and Final Offer of Verizon Wireless, File No. EB-12-MD-006 (Sept. 8, 2015) (Verizon Best and Final Offer) at 1; Jt. Statement at 2, para. 3. [Redacted]

⁴⁰ See Interrogatories of NTCH, Inc., File No. EB-13-MD-006 (July 2, 2014) (NTCH Interrogatories) at 2; Letter from Rosemary McEnery, Deputy Chief, Market Disputes Resolution Division to Donald J. Evans and Jonathan Markman, counsel to NTCH, and Andre J. Lachance and Tamara Preiss, counsel to Verizon Wireless, File No. EB-13-MD-006 (Apr. 2, 2015); Verizon’s Response to NTCH’s Interrogatories, File No. EB-13-MD-006 (Apr. 27, 2015) (Verizon Interrogatory Responses) at 1. See also Letter from Rosemary McEnery, Deputy Chief, Market Disputes Resolution Division to Donald J. Evans and Jonathan Markman, counsel to NTCH, and Andre J. Lachance and Tamara Preiss, counsel to Verizon Wireless, File No. EB-13-MD-006 (Apr. 17, 2015); Supplemental Discovery of NTCH, Inc., File No. EB-13-MD-006 (June 30, 2015); Letter from Rosemary McEnery, Deputy Chief, Market

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.”⁴¹ In response to NTCH’s interrogatory, Verizon produced a chart identifying approximately [REDACTED] roaming agreements, including voice and/or data rates for each.⁴²

III. DISCUSSION

11. NTCH’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.⁴³ Additionally, NTCH contends that Verizon’s roaming rates are unlawfully high when compared to Verizon’s cost of providing roaming, retail rates, or MVNO rates.

A. Voice Roaming

12. NTCH argues that Verizon’s voice roaming offer violates the *Voice Roaming Orders*. We disagree. The *Voice Roaming Orders* require that voice roaming rates be reasonable and non-discriminatory, but allow for individualized negotiations that can lead to reasonable differences in rates. In the orders, the Commission indicated that agreements with other providers were among the factors the Commission may consider in resolving a roaming dispute.⁴⁴ Verizon’s voice roaming agreements, as well as NTCH’s agreements, show that Verizon’s proffered voice roaming rate in this case—[REDACTED]—is well within the range of comparable contractual rates. The record demonstrates that there are more than [REDACTED] under which Verizon charges its roaming partners [REDACTED] or more for voice.⁴⁵ The record further reflects that the weighted average of rates Verizon charges its roaming partners across [REDACTED]—exactly the rate Verizon is offering NTCH.⁴⁶ This is also the weighted average rate that Verizon pays to other carriers for roaming.⁴⁷

13. In contrast, NTCH’s proposal of [REDACTED] is below the voice roaming rate in [REDACTED].⁴⁸ Indeed, NTCH’s

Disputes Resolution Division to Donald J. Evans and Jonathan Markman, counsel to NTCH, and Andre J. Lachance and Tamara Preiss, counsel to Verizon Wireless, File No. EB-13-MD-006 (July 24, 2015).

⁴¹ NTCH Interrogatories at 2.

⁴² Verizon Interrogatory Responses at Ex. A.

⁴³ Complaint at ii; *id.* at 9-18, 21-24, paras. 21-36, 39-44. *See also* NTCH Initial Brief at 14-30; Reply Brief of NTCH, Inc., File No. EB-13-MD-006 (filed Oct. 23, 2015) (NTCH Reply Brief) *at passim*. NTCH analyzes Verizon’s data roaming rates according to both the commercially reasonable standard and also the “just and reasonable” and “not unreasonably discriminatory” requirements of Title II. NTCH Initial Brief at 9-10. Since the Commission has determined to analyze data roaming rates for commercial reasonableness, we do not consider NTCH’s Title II analysis of data roaming. *See* note 20, *supra*.

⁴⁴ *See 2010 Voice Order* at 4201, para. 39 (2010).

⁴⁵ *See* Verizon Interrogatory Responses at Ex. A; Statement of Facts of Verizon Wireless, File No. EB-13-MD-006 (filed Aug. 4, 2014) (Verizon Statement of Facts) at 12-13.

⁴⁶ *See* Declaration of Joseph A. Trent at 3, para. 17; Verizon Statement of Facts at 12.

⁴⁷ *See* Verizon Interrogatory Responses at Ex. A; Declaration of Joseph A. Trent at 3-4, paras. 17-20; Verizon Opposition Brief at 2.

⁴⁸ *See* Verizon Interrogatory Responses at Ex. A; Declaration of Joseph A. Trent at 4, para. 18; Verizon Opposition Brief at 8-9.

proposal is only a third of the prevailing rate that Verizon offers to other carriers. Moreover, [REDACTED]

14. NTCH contends that Verizon's voice roaming rate is unreasonably discriminatory because Verizon has failed to "demonstrat[e] the reasonable basis for its price discrimination" across roaming agreements.⁵⁰ But 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.⁵¹ Indeed, the Commission has held that it would "distort competitive market conditions" if the Commission were to mandate equality of rates.⁵² Consistent with the regime established by the Commission, Verizon has negotiated with [REDACTED] third-party carriers to reach a "range of roaming rates in [] arm's-length contracts."⁵³ Although NTCH can provide reciprocal roaming in [REDACTED], it argues that it is entitled to obtain the *lowest* roaming rates from a national roaming partner having superior network coverage.⁵⁴ Nothing in the Commission's orders compels such a result. Moreover, any claim of discriminatory harm to NTCH is belied by the fact that a number of carriers pay Verizon higher rates for voice roaming than the rate Verizon offered NTCH.⁵⁵ Accordingly, we do not see a reason based upon the current record to find that Verizon's offer to NTCH on voice roaming is in violation of the *Voice Roaming Orders*.⁵⁶

B. Data Roaming

15. NTCH argues that Verizon's offered data roaming rates are commercially unreasonable and a restraint on trade in violation of the *Data Roaming Order*. We disagree. In the *Data Roaming Order*, the Commission indicated that agreements with other providers were among the factors the

⁴⁹ Response to Interrogatories of NTCH, File No. EB-13-MD-006 (Apr. 27, 2015) at 1.

⁵⁰ NTCH Reply Brief at 12. As an adjunct to its discrimination claim, NTCH asks the Commission to require Verizon to make its roaming rates publicly available. Complaint at 25-26, paras. 53-54. The Commission has already addressed and decided the issue of public rate disclosure in a rulemaking order. *See 2007 Voice Order*, 22 FCC Rcd at 15839-40, para. 62 ("We decline to impose an affirmative obligation on CMRS carriers to post their roaming rates."). NTCH's request may be resolved in its pending Petition to Rescind Forbearance and Initiate Rulemaking. *See* Petition to Rescind Forbearance and Initiate Rulemaking, Docket No. 93-252 (filed July 2, 2014) (Petition to Rescind Forbearance).

⁵¹ *See 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.").

⁵² *See 2007 Voice Order*, 22 FCC Rcd at 15834, para. 44.

⁵³ Declaration of Joseph A. Trent at 3-4, paras. 16-20. *See* Verizon Interrogatory Responses at Ex. A; Verizon Opposition Brief at 9; *Orloff v. FCC*, 352 F.3d 415, 421 (D.C. Cir. 2003) (observing that "the Commission was 'entitled to value the free market, the benefits of which are well-established'" (internal citation omitted)).

⁵⁴ *See* Complaint at 25-26, paras. 53-54 (requesting that the Commission prohibit Verizon from "charging NTCH any more for roaming or imposing more onerous conditions than it imposes on other carriers").

⁵⁵ Verizon Interrogatory Responses at Ex. A.

⁵⁶ *See 2010 Voice Order*, 25 FCC Rcd at 4201, para. 39 (considering "whether the carriers involved have had previous roaming arrangements with similar terms"). Because Verizon charges rates to its roaming partners that vary, NTCH argues that the rates "cannot serve as any kind of uniform benchmark for assessing reasonableness." NTCH Reply Brief at 2. But this argument contradicts the *Voice Roaming Orders*, which identify third-party agreements as potentially relevant and contemplate individually negotiated agreements having differing rates.

Commission may consider in resolving a data roaming dispute.⁵⁷ Here, Verizon's offered data rates are well within the range of rates in Verizon's other roaming agreements. Verizon's offer to NTCH is at or below the average rate that other Verizon roamers pay—and that Verizon itself pays as a roamer—across Verizon's existing agreements [REDACTED].⁵⁸ Indeed, the rates Verizon offered NTCH are at least 50% lower than the weighted average rate Verizon charges other roaming carriers [REDACTED].⁵⁹ NTCH's rate demand, by contrast, is dramatically lower than any contract rate between Verizon and any other CDMA wireless carrier.⁶⁰ NTCH's rate demand for data is only 6% of the weighted average rate Verizon charges to other carriers [REDACTED], and only 3% of the weighted average rate Verizon charges others [REDACTED].⁶¹ Although NTCH argues that such rate comparisons provide a "false measure" of reasonableness because Verizon's rates are overpriced,⁶² it offers no evidence demonstrating that Verizon's rates are unreasonable under current market conditions.⁶³ NTCH does not focus on Verizon's proffered roaming rate for LTE data and, indeed, the record includes [REDACTED] [REDACTED].⁶⁴ Thus, NTCH has not demonstrated that Verizon's proposed LTE rates are commercially unreasonable.

16. Other factors confirm that Verizon's offer is reasonable under the totality of the circumstances here. First, [REDACTED] there are smaller carriers that also provide CDMA coverage.⁶⁵ Second, as NTCH admits, Verizon has

⁵⁷ *Data Roaming Order*, 26 FCC Rcd at 5452-53, para. 86.

⁵⁸ See Verizon Interrogatory Responses at Ex. A; Declaration of Joseph A. Trent at 3-4, paras. 16-20; Verizon Opposition Brief at 2, 8-9.

⁵⁹ By weighted average, Verizon roaming partners pay [REDACTED]. Declaration of Joseph A. Trent at 3, para. 17; Verizon Statement of Facts at 12.

⁶⁰ See Verizon Interrogatory Responses at Ex. A; Verizon Opposition Brief at 7-9.

⁶¹ See Declaration of Joseph A. Trent at 3, para. 17.

⁶² NTCH Initial Brief at 7.

⁶³ Apparently referring to roaming rates [REDACTED] NTCH claims that when Verizon "actually needs a roaming agreement with other carriers, that commercial reality tempers its normal high rates." NTCH Initial Brief at 7 [REDACTED]

[REDACTED] See Verizon Interrogatory Responses at Ex. B; Declaration of Joseph A. Trent at 3, para. 16; Verizon Opposition Brief at nn. 10, 13. In any event, the commercially reasonable standard contemplates variation in rates.

⁶⁴ See Declaration of Joseph A. Trent at 4, para. 21; Verizon Interrogatory Responses at Ex. A. [REDACTED]

Further, NTCH never argues that commercial reasonableness requires that the same rate be charged regardless of the wireless network technology used. [REDACTED]

⁶⁵ Jt. Statement at 2, para. 4. See Complaint at 5, para. 12 ("Sprint offers CDMA service on a national basis."); <https://www.fcc.gov/general/mobile-broadband-deployment-coverage-areas-provider> (last visited Apr. 26, 2016).

dealt with it responsively at all times throughout the negotiation.⁶⁶ Third, although NTCH asserts that “[l]ow roaming rates would” incentivize it to build out its own facilities,⁶⁷ the Commission has found 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.”⁶⁸

17. Nor does NTCH support its claim that Verizon’s proffered roaming rates amount to an unlawful restraint of trade. According to NTCH, 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 NTCH’s ability to compete with large wireless resellers and other providers.⁶⁹ In the *Data Roaming Order*, the 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.”⁷⁰ But nowhere does NTCH plausibly establish a claim of competitive harm. NTCH 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

18. As discussed above, Verizon’s offered voice and data roaming rates fall well within the range of rates that Verizon offers others and itself pays today. Nevertheless, NTCH has argued that Verizon’s offered rates violate the Commission’s rules because of how they compare to Verizon’s costs, retail rates, and MVNO rates. We address each of NTCH’s arguments in turn.

1. Costs

19. NTCH asserts that roaming rates must be cost-based in order to comply with the Commission’s rules.⁷³ Specifically, NTCH argues that our analysis of voice roaming rates should follow the Commission’s Title II wireline precedent, which “consistently used the cost of providing a given service, plus a reasonable rate of return, as the guiding benchmark.”⁷⁴ Similarly, in its Complaint, NTCH asks the Commission to rule that data roaming is a common carrier service subject to Title II.⁷⁵ NTCH insists that data roaming rates must be tied to costs and suggests that Verizon’s roaming rates should be—

For technical reasons, it is important for CDMA-based carriers to roam on other CDMA-based carriers. See <http://www.androidauthority.com/how-it-works-roaming-95498> (last visited May 31, 2016).

⁶⁶ Jt. Statement at 1, para. 2; NTCH Initial Brief at 23.

⁶⁷ NTCH Reply Brief at 8; NTCH Initial Brief at 24.

⁶⁸ 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).

⁶⁹ NTCH Initial Brief at 10-14.

⁷⁰ *Data Roaming Order*, 26 FCC Rcd at 5433, para. 45.

⁷¹ See note 65, *supra*.

⁷² NTCH Initial Brief at 10.

⁷³ See, e.g., Complaint at 10, 15, paras. 23, 30; NTCH Initial Brief at 5.

⁷⁴ See NTCH Initial Brief at 5.

⁷⁵ See Complaint at 18-21, paras. 38-42.

at most—no higher than the rate Verizon charges to its resellers.⁷⁶

20. NTCH is correct that cost-based rate regulation traditionally has been a core feature of the Commission’s Title II authority.⁷⁷ The Commission, however, 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 costs⁷⁸—and the Commission has determined not to do so in either the voice or data roaming context. In the *Voice Roaming Orders*, the Commission 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.⁷⁹ Those orders rely instead on individual negotiations to determine market-driven rates.⁸⁰ 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.⁸¹ Again, the Commission explicitly declined to impose “prescriptive regulation of rates,” opting instead to rely on “individually negotiated data roaming arrangements.”⁸²

21. NTCH’s Complaint, in essence, seeks new rules for both voice and data roaming that would impose—for the first time—cost-based rates.⁸³ The Complaint, however, must be decided based on the orders and rules duly issued by the Commission. In the instant proceeding, NTCH has not shown that we are required to consider Verizon’s costs and we reject NTCH’s arguments to the contrary.

⁷⁶ See Complaint at 15, 23, paras. 30, 42-43. See also NTCH Initial Brief at 16 (asserting that roaming rates should be “significantly less” than retail rates for comparable services).

⁷⁷ See *MCI v. FCC*, 675 F.2d 408, 410 (D.C. Cir. 1982) (“A basic principle used to ensure that rates are ‘just and reasonable’ is that rates are determined on the basis of cost.”); see also *ALLTEL Corp. v. FCC*, 838 F.2d 551, 557 (D.C. Cir. 1988) (same).

⁷⁸ 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 (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”).

⁷⁹ See *2007 Voice Order*, 22 FCC Rcd at 15832-33, para. 37. Notably, the list of 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.

⁸⁰ *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 4200-4201, paras 39-40. NTCH argues that the underlying assumptions have changed, dictating a change to Commission rules; such a request is not appropriate in a complaint proceeding.

⁸¹ *Cellco P’ship v. FCC*, 700 F.3d 534, 548 (D.C. Cir. 2012) (emphasis added). See note 20, *supra*.

⁸² 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).

⁸³ See, e.g., Complaint at 25, para. 48 (seeking a “Commission Order classifying mobile data services as . . . subject to the common carrier rules of Title II); *id.* at 15, para. 30 (asserting that Verizon’s “voice and SMS roaming rates may not justly and reasonably exceed its demonstrated costs, plus a reasonable return”); NTCH Reply Brief at 6 (claiming that assessment of reasonableness “must be founded on costs of service”); *id.* at 9 (stating that “cost is, and must be, the primary measure of reasonable rates”).

2. Retail Rates

22. NTCH argues that Verizon's retail rates are relevant to our determinations under the *Voice Roaming Orders* and *Data Roaming Order* in this case.⁸⁴ While retail rates may be relevant in certain circumstances,⁸⁵ reliable retail rates are unavailable for comparison here because NTCH employed a flawed methodology to derive retail rates for comparison to Verizon's offered roaming rates. For its starting point, NTCH elicited from Verizon "the lowest retail rate[s] Verizon provides for" voice and data services.⁸⁶ From among the numerous voice and data plans Verizon identified, NTCH selected a single plan that NTCH claimed represented "one of the *relatively low price points*."⁸⁷ A comparison, however, to one single plan is not representative of a would-be host provider's retail rates—particularly a plan selected to have lower-than-average rates. As such, NTCH's chosen plan does not offer a reliable reference point for our determinations of reasonableness.

23. NTCH further reduced the reliability of this data by making questionable assumptions in its subsequent calculations. In estimating service usage, for example, NTCH assumed that a retail customer is on the phone for every minute of a 90-day quarter and uses approximately 12,000 megabytes of data per quarter. These numbers contrast starkly with the record evidence, including NTCH's previous statement that a typical smartphone prepaid customers incurs about 85 hours of voice usage and 5,700 megabytes of data per quarter.⁸⁸ NTCH's overstatement of voice and data usage under the Verizon retail plan substantially lowers the calculations for per-MOU for voice and per-megabyte for data.⁸⁹ NTCH further reduced its voice and data rate calculations by assuming a large number of SMS text messages [REDACTED]—even though NTCH's and Verizon's best-and-final offers both propose [REDACTED].⁹⁰ In light of these shortcomings in NTCH's calculations, NTCH'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*.

3. MVNO Rates

24. NTCH asserts that Verizon's MVNO rates should serve as a benchmark as to the reasonableness of Verizon's roaming rate offers.⁹¹ But NTCH has failed to identify comparable rates. As with NTCH's retail calculations, NTCH relied on Verizon's lowest MVNO rates for its calculations, and NTCH then compared the roaming offer to an MVNO agreement that was not of comparable scale.⁹² Indeed, NTCH's expected usage of Verizon's network [REDACTED]

⁸⁴ NTCH claims that Verizon's roaming rates should be "significantly *less* than the rate provided to retail customers for the same bundle of services." NTCH Initial Brief at 16 (emphasis original).

⁸⁵ See *T-Mobile Declaratory Ruling*, 29 FCC Rcd at 15489, para. 17.

⁸⁶ Verizon Interrogatory Responses at 2.

⁸⁷ NTCH Initial Brief at 15 (emphasis added).

⁸⁸ Complaint at 14, para. 28.

⁸⁹ *Id.* NTCH's retail data rate assumption also is based on a flawed calculation that ignores some amount consumers pay for data, further driving down the calculated rate. Compare NTCH Initial Brief at 15-16 with Verizon Interrogatory Responses at 4-5.

⁹⁰ NTCH Best and Final Offer at 1; Verizon Best and Final Offer at 1. See also Complaint at 14, para 28.

⁹¹ NTCH Reply Brief at 1.

⁹² Verizon Interrogatory Responses at 1-2; NTCH Initial Brief at 17-18.

⁹³ [REDACTED]

