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BRIEF FOR RESPONDENTS

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

NO. 16-1277

NTCH, INC.,

PETITIONER,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

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

BRENT SNYDER
DEPUTY ASSISTANT ATTORNEY GENERAL

ROBERT B. NICHOLSON
JONATHAN H. LASKEN
ATTORNEYS

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

DAVID M. GOSSETT
DEPUTY GENERAL COUNSEL

RICHARD K. WELCH
DEPUTY ASSOCIATE GENERAL COUNSEL

MATTHEW J. DUNNE
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

All parties, intervenors, and amici appearing in this Court are listed in Petitioner's Brief.

2. Rulings under review.

The ruling under review is *NTCH, Inc. v. Cellco Partnership d/b/a Verizon Wireless*, 31 FCC Rcd 7165 (Enforcement Bureau 2016) ("*Order*") (JA__).

3. Related cases.

The rulings under review have not previously been before any court. As NTCH explains (Br. ii), it previously petitioned for review of an FCC order regarding the transfer of certain licenses to Verizon, which raised broadly similar issues regarding Verizon's roaming rates. *See NTCH, Inc. v. FCC*, 841 F.3d 497 (D.C. Cir. 2016), *pet. for reh'g en banc pending*. This Court denied that petition. *Id.*

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GLOSSARY

2007 Voice Roaming Order	*Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd 15817 (2007)
2010 Voice Roaming Order	*Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 25 FCC Rcd 4181 (2010)
The Act	The Communications Act of 1934, 48 Stat. 1064, as amended, codified at 47 U.S.C. § 151 *et seq.*
CDMA	Code Division Multiple Access—a wireless technology used by Verizon, Sprint, NTCH, and several other carriers
Data Roaming	Roaming to transmit data, such as to access the Internet
Data Roaming Order	*Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 26 FCC Rcd 5411 (2011)
MVNO	Mobile Virtual Network Operator, see note 5 below
Roaming	This occurs when the subscriber of one mobile service uses the network of another mobile service with which it does not have a direct business relationship
Voice Roaming	Roaming to carry out a voice phone call

JURISDICTION

This Court has jurisdiction over petitions for review of "final orders of the Federal Communications Commission." 28 U.S.C. § 2342(1). As explained below, because NTCH petitions for review of a staff-level order, not a Commission-level order, this Court lacks jurisdiction. This Court also lacks jurisdiction over NTCH's challenge to the Commission's forbearance in *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601, 5743 ¶ 331 (2015), because NTCH has filed a petition for reconsideration of that decision with the Commission, which makes the decision "nonfinal, and hence unreviewable, with respect to" NTCH. *TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 133 (D.C. Cir. 1989).

QUESTIONS PRESENTED

For the second time in less than two years,[1] NTCH seeks to collaterally attack Commission rules put in place in 2007 and 2010 governing disputes about "roaming" rates—that is, rates charged by a host carrier (such as Verizon) to allow the customer of a "roaming" carrier (such as NTCH) to use the host carrier's network when that customer travels outside the range of its own carrier's network. *See Cellco P'ship v. FCC*, 700 F.3d 534, 537 (D.C. Cir. 2012). In the proceeding below, NTCH complained that the roaming

[1] *See NTCH, Inc. v. FCC*, 841 F.3d 497 (D.C. Cir. 2016), *pet. for reh'g en banc pending.*

rates offered by Verizon in contract negotiations were unjust, unreasonable, unreasonably discriminatory, and commercially unreasonable. In the *Order* on review, the FCC's subordinate Enforcement Bureau, acting on delegated authority and applying rules and guidelines set out by the Commission in three previous orders, compared the proffered rates to those offered by Verizon to other carriers and found that the rates were not unlawful. *See NTCH, Inc. v. Cellco Partnership d/b/a Verizon Wireless*, 31 FCC Rcd 7165 (Enforcement Bureau 2016) ("*Order*") (JA__). NTCH did not seek review from the full Commission, and instead directly petitioned this Court for review. The case presents the following questions:

1. Does the Court lack jurisdiction to review the staff-level order challenged by NTCH?

2. NTCH has filed a petition for administrative reconsideration with the FCC asking the Commission to reverse its decision in the *Open Internet Order* to forbear from applying the voice roaming rules to data roaming. That petition is still pending. Is NTCH's challenge to that forbearance determination in this litigation incurably premature?

3. Did the Bureau reasonably decline to judge rates based on Verizon's costs, where the Commission refused to set rules based on cost in

its 2007 *Voice Roaming Order*, and instead allowed market negotiations to serve as a benchmark?

4. Did the Bureau reasonably find that the proffered data roaming rates were commercially reasonable?

5. Did the Bureau reasonably find that the proffered voice roaming rates were just, reasonable, and not unreasonably discriminatory?

STATUTES AND REGULATIONS

Relevant statutes and regulations appear in an addendum to this brief.

COUNTERSTATEMENT

A. *2007* and *2010 Voice Roaming Orders*

This case concerns "roaming rates" charged by one wireless carrier to another. *Order* ¶ 2 (JA__). No single wireless carrier has licensed spectrum and network facilities covering the entire United States. *Order* ¶ 1 (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.* ¶ 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.* ¶¶ 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.* ¶ 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.* ¶ 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.* ¶ 38. Given a lack of record evidence of harm to consumers, the agency found it need not "address the argument that the state of competition in the intermediate product market is such as to warrant rate regulation." *Id.*

The FCC also cited potential perverse incentives 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.* ¶ 39. Moreover, "regulation to reduce roaming rates has the potential to deter investment in network deployment" from both large and small carriers. *Id.* ¶ 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. *2007 Voice Roaming Order* ¶ 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.* ¶ 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, including a list of factors that it may consider in resolving a voice roaming dispute, including "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 and Other Providers of Mobile Data Services*, 25 FCC Rcd 4181, 4201 ¶ 39 (2010) ("*2010 Voice Roaming Order*").

The Commission made clear that carriers may bring complaints pursuant to section 208 of the Communications Act of 1934, as amended

("the Act"), *see 2007 Voice Roaming Order* ¶ 30, 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). The Enforcement Bureau is authorized to resolve complaints under section 208, except that it must refer to the full Commission orders concluding an investigation under section 208(b) of the Act. *See* 47 C.F.R. §§ 0.111(a)(1) & 0.311(a)(5). *See* note 7 below (setting out section 208).

B. 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.[2] In 2011, the Commission addressed data roaming—that is, roaming for wireless Internet connectivity. *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 26 FCC Rcd 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.* ¶ 62 (citing authority to "[p]rescribe the nature of the service to be rendered" by

[2] Below, we use CMRS roaming and voice roaming interchangeably.

licensees, 47 U.S.C. § 303, and to impose conditions on wireless licenses to "promote the public interest, convenience, and necessity," *id.* § 311).[3]

The Commission required wireless data service providers to offer data roaming arrangements on "commercially reasonable terms and conditions." *Id.* ¶ 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 rates. *Id.* ¶ 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* ¶ 32).

The agency emphasized that although carriers must engage in negotiations and may not "unreasonably restrain[] trade," *id.* ¶¶ 42, 45, they

[3] The FCC has two primary sources of authority over the actions and rates charged by wireless carriers. Title II of the Communications Act of 1934, as amended, 47 U.S.C. §§ 201-76, 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.* §§ 301-99, 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).

"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.* ¶ 45; *see also* ¶ 23 (Carriers can negotiate "individualized, commercially reasonable terms, including rates."); *id.* ¶ 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 decide complaints "on a case-by-case basis," considering "the totality of the circumstances." *Id.* ¶ 85. 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.* ¶ 86.

The agency delegated authority to the Enforcement Bureau to resolve complaints arising out of the data roaming rule. *Id.* ¶ 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. *Data Roaming Order* ¶ 74 & 76.

This Court rejected a direct challenge to the data roaming rule. *Cellco*, 700 F.3d at 534. In a previous suit by NTCH, the Court also stated that "[t]he terms of the rule are facially reasonable and the underlying rationale for the rule makes sense." *NTCH, Inc.*, 841 F.3d at 507.

C. Reclassification of Internet Access Service as Common Carriage

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 Rcd 5601, 5743 ¶ 331 (2015), *aff'd, United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) ("*Open Internet Order*") (*pets. for reh'g and reh'g en banc pending*). The agency found further that retail mobile broadband is a "commercial mobile service" under section 332(d)(1) of the Act, and for that reason too is subject to common carriage regulation. *Id.* ¶ 338.

The Commission recognized that classifying retail mobile internet access as a telecommunications service and a commercial mobile service would remove data roaming from the existing Title III-based data roaming

rules and subject it instead to the Title II-based CMRS roaming rules. *Id.* ¶ 525.

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* ¶ 526. The agency decided instead to retain the data roaming rules "at this time," both in order to "to proceed incrementally" and because of "the absence of significant comment" in the record regarding what data roaming requirements should apply. *Id.* ¶ 526 (providing that "[t]he data roaming rule, rather than the automatic roaming rule or Title II, will govern" the obligations of mobile providers to offer data roaming). The agency "commit[ted], however, to commence in the near term a separate proceeding to revisit the data roaming obligations of [mobile broadband] providers," in order to create "a complete and focused record" necessary for "an informed decision." *Id.*

D. NTCH's Complaint

NTCH is a wireless carrier that provides retail service [redacted], *Order* ¶ 2 (JA__)—that targets "low income/bad credit customers" (Br. 44). Verizon is a nationwide wireless carrier. *Order* ¶ 2 (JA__). These carriers use compatible "CDMA" (Code Division Multiple Access) technology. *Id.* NTCH and Verizon negotiated a voice roaming agreement in 2006. *Id.* ¶ 8 (JA__). In late 2011, NTCH requested a new roaming agreement with substantially lower voice roaming rates and, for the first time, data roaming. *Id.* Verizon responded to the proposal, and the parties negotiated, including mediation before FCC staff, but were unable to reach an agreement. *Id.*

On November 22, 2013—after the data and voice roaming orders were released, but before the *Open Internet Order* reclassified mobile broadband as a Title II service—NTCH filed a complaint against Verizon with the Commission. *Complaint* (JA__). The complaint alleged that Verizon had violated the Commission's voice and data roaming rules by offering roaming rates that are unjust and unreasonable, unreasonably discriminatory, and commercially unreasonable. The complaint did not reference 47 U.S.C. § 208(b)(1), which requires that the "Commission shall" issue an order "within 5 months" concluding an investigation into the lawfulness of a charge

or practice of a common carrier. On July 2, 2014, NTCH filed an amended complaint, again without any assertion that the complaint proceeding was governed by the time limit in section 208(b)(1).

In response to interrogatories, Verizon produced a chart identifying the rates for approximately [redacted] voice and data roaming agreements. *Order* ¶ 10 (JA__). After the close of the pleading cycle, the parties exchanged best-and-final offers for a roaming agreement, but were still far apart on terms. *Order* ¶ 9 (JA__).

E. Order on Review

On June 30, 2016, the FCC's Enforcement Bureau issued the staff-level *Order*, denying NTCH's complaint. *Order* ¶ 1 (JA__).

1. Voice Roaming

The Bureau first found that Verizon's proffered voice roaming rate was not unjust or unreasonable under the Commission's rules. *Id.* ¶¶ 12-14 (JA__-__). It emphasized that the *2010 Voice Roaming Order* indicated that the agency would consider agreements with other providers when deciding these complaints. *Id.* ¶ 12 (citing *2010 Voice Roaming Order* ¶ 39). Here, the record showed that Verizon's proffered voice roaming rate was equal to or lower than some [redacted] agreements out of [redacted] with other carriers, and equal to the weighted average of voice roaming rates in the record. *Id.* That rate was thus

"well within the range of comparable contractual rates." *Id.* It was also equal to the weighted average rate that Verizon itself paid to other carriers for roaming. *Id.* By contrast, NTCH's proffered rate was below the voice roaming rates [redacted] and another carrier, and was "only a third of the prevailing rate that Verizon offers to other carriers." *Id.* ¶ 13 (JA__). Thus, 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* ¶ 37, and its direction that rates be considered in light of agreements with other carriers, the Bureau found that NTCH had not shown that Verizon's proffered voice roaming rates were unjust and unreasonable. *Order* ¶ 12 (JA__).

It likewise found that those rates were not unreasonably discriminatory. *Id.* ¶ 14 (JA__). NTCH had argued that Verizon failed to demonstrate a reasonable basis for price discrimination, and that NTCH was therefore "entitled to obtain the *lowest* roaming rates from a national roaming partner having superior network coverage," even though NTCH could provide reciprocal coverage in only one or two markets. *Id.* The Bureau found that "[n]othing in the Commission's orders compels such a result," and indeed the

approach set out there "anticipates individualized bargaining and variation in roaming rates." *Id.* The Bureau thus found that the proffered rates were not unreasonably discriminatory against NTCH.

2. Data Roaming

The Bureau also found that Verizon's proffered data roaming rates were commercially reasonable and so did not violate the Commission's data roaming rules. *Id.* ¶ 15 (JA__). Here too, the Bureau applied and followed the Commission's guidelines by looking to agreements with other providers and found that Verizon's proffered data rates were "well within the range of rates in Verizon's other roaming agreements." *Id.* Specifically, the offer was "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],[4] and indeed was at least 50% lower than the weighted average rate Verizon charges other roaming carriers [redacted]. *Id.* The rate that NTCH sought, by contrast, was "dramatically lower" than any contract rate offered by Verizon to any other carrier. *Id.* (NTCH's demanded data rate was 6% of the weighted average rate charged to other carriers for one technology, and 3% for another). NTCH

[4] [redacted]

argued that such comparisons provided a "false measure" of reasonableness because Verizon's rates were overpriced, but the Bureau found NTCH "offers no evidence demonstrating that Verizon's rates are unreasonable under current market conditions." *Id.* ¶ 15 (JA__).

NTCH also argued that Verizon can charge monopoly rates that stifle NTCH's ability to compete, amounting to an "unlawful restraint of trade." *Id.* ¶ 17 (JA__); *see Data Roaming Order* ¶ 45 (rates that unreasonably restrain trade are not commercially reasonable). The Bureau also denied this claim, finding that NTCH did not "establish a claim of competitive harm." *Id.* Contrary to NTCH's claim that given Verizon's extensive network, there are "no realistic alternative[s]," the Bureau found NTCH had not "identified a specific market in which Verizon is its only available roaming partner." *Order* ¶ 17 & n.65 (JA__). For example Sprint also offers service compatible with NTCH on a national basis, while other smaller carriers also provide compatible coverage. *Id*. Nor had NTCH "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.*

3. Consideration of other factors

The Bureau also addressed NTCH's arguments that the FCC should consider other factors in evaluating Verizon's proffered rates. NTCH argued

that voice roaming rates should follow the Commission's precedent for regulation of wireline rates, which NTCH claimed "consistently used the cost of providing a given service, plus a reasonable rate of return, as the guiding benchmark." *Order* ¶ 19 (JA__). NTCH 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.*

The Bureau explained that NTCH "in essence, seeks new rules for both voice and data roaming that would impose—for the first time—cost-based rates." *Id.* ¶ 21 (JA__). However, the Bureau emphasized that it was obligated to decide the complaint "based on the orders and rules duly issued by the Commission." *Id.* It explained that the "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." *Id.* ¶ 20 (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 Bureau cited the Commission's concern that such price setting would "impede investment in, and limit build-out of, wireless networks" by both large and small carriers. *Id.* n.80 (JA__). And though NTCH argued that the assumptions underlying the Commission's

rules had "changed, dictating a change to Commission rules," the Bureau explained that "such a request [was] not appropriate in a complaint proceeding." *Id.*

NTCH also argued that comparison to Verizon's retail rates for service showed that the proffered roaming rates were too high, but the Bureau found NTCH's proposed comparison "flawed," "not…reliable," and based on "questionable assumptions." *Id.* ¶¶ 22-23 (JA__). First, NTCH used only a single retail rate for comparison—one of the lowest examples from a set of Verizon's lowest retail rates. *Id.* ¶ 22 (JA__). The Bureau found that such a cherry-picked example "does not offer a reliable reference point." *Id.* Second, in extrapolating the cost per minute for voice and per megabyte for data, NTCH assumed that a retail customer would use far more service than was typical, thus greatly lowering the average cost per minute and per megabyte. *Id.* ¶ 23 (JA__).[5] These "shortcomings" made NTCH's retail rate comparison "not sufficiently reliable" to use in evaluating Verizon's offers.

[5] NTCH assumed a customer would be on the phone every minute of the day, over 2,000 hours per quarter, while the record, including NTCH's evidence, showed that retail customers use an average of 85 hours per quarter. NTCH also assumed a customer would use 12,000 megabytes of data per quarter, compared to a record average of 5,700 megabytes. *Order* ¶ 23 (JA__).

Finally, NTCH urged comparisons to Verizon's agreements for carriage with certain carriers known as Mobile Virtual Network Operators (MVNOs) as a benchmark for reasonable rates.[6] *Id.* ¶ 24 (JA__). These too the Bureau found were not comparable, both because NTCH again cherry-picked the lowest rates, and especially because the scale of the particular MVNO agreement cited by NTCH [redacted] *Id.* The MVNO agreement offered Verizon a [redacted] *Id.* & n.94. Thus, here too NTCH had not shown the proffered rates were unjust, unreasonable, or commercially unreasonably by comparison. *Id.*

SUMMARY OF ARGUMENT

NTCH disagrees with the Commission's voice and data roaming rules. But that disagreement provides no basis to disturb the Enforcement Bureau's order denying NTCH's complaint against Verizon. The Bureau properly

[6] MVNOs "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).

applied and followed the FCC's rules in effect, as it was bound to do. The Court should reject NTCH's petition for review.

I. A. As a threshold matter, this Court lacks jurisdiction over this staff-level order. First, filing an application for review before the full Commission is a "condition precedent" to petition for judicial review of a Bureau order. 47 U.S.C. § 155(c)(7). NTCH has not done so. Second, the Hobbs Act gives this Court jurisdiction over "final orders by the Federal Communications Commission," not orders issued on delegated authority by its subordinate bureaus. 28 U.S.C. § 2342(1). For both reasons, it is hornbook law that a party may not seek review of a bureau-level order.

B. Nor does section 208(b)(3) excuse NTCH's failure to exhaust. That section states that a tariff investigation "concluding an investigation under paragraph (1)" is final and appealable. 47 U.S.C. § 208(b)(3). Paragraph (1) in turn refers only to an investigation by "the Commission," not by subordinate staff. Indeed, the Commission is forbidden from delegating 208(b) investigations to staff. *Id.* § 155(c)(7). Section 208(b)(3) thus does not make staff-level orders appealable; it simply makes clear that a Commission level order under that section may be appealed immediately. Legislative history and the rest of the Act confirm that the limitation of section 208 to the "Commission" was deliberate.

II. Even if this Court had jurisdiction to hear this petition, the Bureau's actions were reasonable, both in finding that the data roaming rates were commercially reasonable, as explained in Part II, and in finding that the voice roaming rates were just and reasonable, as explained in Part III.

A. This Court lacks jurisdiction to hear NTCH's attack on the Commission's decision in the *Open Internet Order* to forbear from applying the voice roaming rules to data roaming disputes, once the agency classified internet access service as a Title II service. NTCH makes an impermissible collateral attack in this petition on the *Open Internet Order*. Moreover, NTCH has filed a still-pending petition for reconsideration of that *Order* with the FCC raising the same arguments it raises here. Any petition for judicial review is therefore incurably premature.

B. The Bureau applied the *Data Roaming Order's* "commercially reasonable" standard reasonably. The deal that Verizon offered to NTCH for data roaming was comparable to or better than the average deal it offered to the rest of the market, and NTCH offered no evidence that those rates were unreasonable under current market conditions.

III. A. The Bureau likewise reasonably applied the Commission's rules for deciding voice roaming disputes. Here too, Verizon offered rates comparable to or better than the average rates offered to others in the record.

B. NTCH argues that the Bureau should have instead used Verizon's costs as a benchmark for reasonableness. But the Commission has explicitly declined to set rates based on costs, preferring instead that rates be set through market negotiations. *2007 Voice Roaming Order* ¶ 37. The Bureau was not free to adopt a different standard in this proceeding. The Commission's decision was reasonable in any case. Although rates in wireline markets have often been evaluated in part on cost, the Act does not require that approach, and the Commission has chosen to evaluate "just and reasonable" rates in the wireless market, including in the roaming market, with a broader view of the public interest. It has stressed, for example, that relatively high roaming rates may incentivize both large and small carriers to invest in network architecture. Although NTCH argues that there is insufficient competition in the market for roaming services compatible with NTCH's technology, the Bureau found NTCH failed to show Verizon was the only provider in any specific market, pointing to both Sprint and other smaller carriers. In any case, the Commission stated in 2007 that because it did not see evidence of harm to consumers—and NTCH has not attempted to show harm to consumers here—it declined to evaluate the state of competition in "intermediate markets."

Finally, the Bureau reasonably found the offered voice roaming rates, comparable to those offered to other carriers, were not unreasonably discriminatory against NTCH.

STANDARD OF REVIEW

NTCH argues that the Commission has unlawfully forborne from sections 201 and 202 of the Act, as applied to data roaming, and that the Bureau erred in finding that the proffered voice roaming rates were just and reasonable and not unjustly discriminatory under those same sections. Those challenges are subject to review under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). Under that standard, this Court will "defer to the Commission's interpretation of the Communications Act so long as the Congress has not unambiguously forbidden it and it is otherwise permissible." *California Metro Mobile Commc'ns, Inc. v. FCC*, 365 F.3d 38, 43 (D.C. Cir. 2004).

NTCH's challenges to the Bureau's application of the FCC's voice and data roaming rules are subject to arbitrary and capricious review under 5 U.S.C. § 706(2)(A). *Eagle Broad. Grp., Ltd. v. FCC*, 563 F.3d 543, 551 (D.C. Cir. 2009). Under that standard, this Court will "not prefer [its] judgment to that of the Commission and require[s] only that it 'examine the relevant data and articulate a satisfactory explanation for its action' including a 'rational

connection between the facts found and the choice made.'" *Cal. Metro Mobile*, 365 F.3d at 43 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *see also Cellco*, 700 F.3d at 550.

To the extent NTCH challenges factual findings of the agency, such as the Bureau's findings regarding the intermediate market for roaming services, 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. Federal Maritime Comm'n*, 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 BUREAU-LEVEL ORDER IS NOT FINAL COMMISSION ACTION, AND SO CANNOT BE APPEALED.

NTCH has not properly invoked this Court's jurisdiction. The Court should therefore dismiss this petition for review.

A. The Communications Act and the Hobbs Act require exhaustion through administrative appeal.

The *Order* was issued by the FCC's subordinate Enforcement Bureau, not the full Commission. Courts of appeals lack jurisdiction over petitions for review of orders from the FCC's subordinate bureaus for two reasons. First, section 155(c) of the Act—which allows the Commission to delegate functions to its subordinate bureaus and permits applications for review to the full Commission of those decisions, 47 U.S.C. § 155(c)(1) & (3)—states: "The filing of an application for review under this subsection shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to [such] a delegation…." *Id.* § 155(c)(7). Courts have confirmed that this provision "precludes the court from exercising jurisdiction over" petitions for review of a decision taken pursuant to delegated authority. *Richman Bros. Records v. FCC*, 124 F.3d 1302, 1303 (D.C. Cir. 1997); *see also, e.g.*, *Verizon Tel. Cos. v. FCC*, 453 F.3d 487, 500 (D.C. Cir. 2006) (no jurisdiction to review staff decision) (*Verizon II*); *Georgia Power Co. v. Teleport Commc'ns Atlanta, Inc.*, 346 F.3d 1047, 1050 (11th Cir. 2003) (no futility exception to § 155(c)(7) exhaustion requirement); *Int'l Telecard Ass'n v. FCC*, 166 F.3d 387, 388 (D.C. Cir. 1999) (holding § 155(c)(1) bars jurisdiction where Commission has not acted on application

for review); *Mobilfone Serv., Inc. v. FCC*, 79 F. App'x 445, 446 (D.C. Cir. 2003) (unpublished).

Second, section 402(a) of the Act permits litigants to seek judicial review of "any order of the Commission," 47 U.S.C. § 402(a), and section 2342(1) of the Hobbs Act likewise vests this Court with jurisdiction to review "final orders of the Federal Communications Commission," 28 U.S.C. § 2342(1). Both provisions contemplate review only of Commission orders, not orders of subordinate bureaus. Thus, when Verizon sought review of both a final Commission-level decision on liability, and a subsequent staff-level decision on remedy, this Court held it had jurisdiction over the Commission-level decision, but not the Bureau-level decision. *Verizon II*, 453 F.3d at 500 (citing 47 U.S.C. § 402(a) & 28 U.S.C. § 2342(1)); *see also Mobilefone*, 79 F. App'x at 446 (citing 28 U.S.C. § 2342(1)).

This statutory structure embodies the well-recognized principle of exhaustion. By "avoid[ing the] premature interruption of the administrative process," the exhaustion requirement serves to "let the agency develop the necessary factual background," "to exercise [its] discretion," and "to apply [its] expertise." *McKart v. United States*, 395 U.S. 185, 193–94 (1969). And while courts may in limited circumstances excuse a "prudential exhaustion" requirement that is judicially created, no such exception exists for a

"jurisdictional exhaustion" requirement, where "Congress requires resort to the administrative process as a predicate to judicial review." *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004).

The filing of an application for review before the full Commission is an unambiguous "condition precedent to judicial review" of a staff-level order, 47 U.S.C. § 155(c)(7), and thus a jurisdictional exhaustion requirement. *Georgia Power Co.*, 346 F.3d at 1050. Because NTCH did not satisfy this requirement, and because the Hobbs Act provides jurisdiction only over final orders of the "Commission," this petition must be dismissed.

B. Section 208(b) is not an exception to the exhaustion requirement.

NTCH does not acknowledge this well-established law, but does state in passing that its petition falls under "the special procedure in Section 208(b)(3) of the Act," which NTCH claims "treats a ruling on a formal complaint as the FCC's final appealable decision on the matter." Br. 11. This novel reading of section 208, for which NTCH cites no case law, is incorrect for two reasons. Section 208(b)(3) is not an exception to the exhaustion requirement, and section 208(b) is inapplicable to either some or all of the proceeding below.

1. Section 208(b) does not excuse the exhaustion requirement.

Section 208(a) allows persons to bring complaints against common carriers, and section 208(b) states that "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." 47 U.S.C. § 208(b)(1) (emphasis added).[7] It then adds that "Any order

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[7] Section 208 states:

(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….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….

(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. § 208.

concluding an investigation under paragraph (1)…shall be a final order and may be appealed under section 402(a) of this title." *Id.* § 208(b)(3).

Section 208(b)(3) thus simply makes clear than an order issued pursuant to paragraph (1)—that is, an order by "the Commission"—is immediately appealable. Because it is explicitly limited by cross-reference to Commission orders, section 208(b)(3) does not make bureau-level orders immediately appealable. Indeed, it does not reference bureau orders at all.

Nor does the text of section 208(b)(3) overcome the explicit statutory obstacles to an appeal of a bureau order, discussed above. It does not state that an application for review is no longer a "condition precedent" to appeal. *See* 47 U.S.C. § 155(c)(7). Had Congress meant to override that clear statutory requirement, it presumably would have done so explicitly, as it has in many other provisions governing the Commission.[8] Likewise, section 208(b)(3) by its text does not provide courts of appeals with additional jurisdiction, which again is limited to appeals of final orders by the

[8] *Compare, e.g*, 47 U.S.C. § 555 ("Notwithstanding any other provision of law," an action challenging certain sections of title 47 to be heard by three-district-judge-panel); *id.* § 1455(a)(1) ("Notwithstanding section 704 of [the 1996 Act] or any other provision of law," state and local governments may not deny certain wireless tower zoning permits); *id.* § 765f ("Notwithstanding any other provision of law," the Commission may not assign orbital locations by competitive bidding).

"Commission," not by subordinate bureaus. *See* 47 U.S.C. 402(a) & 28 U.S.C. § 2342(1).[9]

Section 208(b)(3)'s use of the word "any" in the phrase "[a]ny order concluding an investigation under paragraph (1)," *id.* § 208(b)(3), should not be read to sweep in bureau-level orders. By its terms, "any order" refers only to "an investigation under paragraph (1)," which in turn refers only to an investigation by "the Commission." Thus, "any order" refers only to any order by the Commission. *See Nixon v. Missouri Mun. League*, 541 U.S. 125, 132 (2004) ("'[A]ny' can and does mean different things depending upon the setting."); *N.Y. v. EPA*, 443 F.3d 880, 885 (D.C. Cir. 2006) (Though often expansive, "the meaning of 'any' can differ depending upon the statutory setting."). To be sure, final orders by the Commission are appealable anyway under section 402(a), but this does not mean section 208(b)(3) is surplusage. For example, this Court relied on section 208(b)(3) to hold that a tariff investigation order by the full Commission finding liability was final, even

[9] *Compare* 47 U.S.C. § 227(g)(2) (district courts "shall have exclusive jurisdiction over" actions brought by states to enforce section 227); *id.* § 406 ("The district courts of the United States shall have jurisdiction upon the relation of any person alleging" violation of the Act which prevents service to relator).

though the Commission had not yet reached the issue of damages. *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1104 (D.C. Cir. 2001) ("*Verizon I*").[10]

Nor should section 208(c)(1)'s focus on orders by the "Commission" be read more loosely to refer to both the full Commission and its subordinate bureaus. In the same law that added section 208(b), Congress forbade the Commission from delegating investigations under section 208(b) to the staff. *See* 47 U.S.C. § 155(c) (FCC may delegate any function, with specific exceptions including "any action referred to in section[]… 208(b)"). Moreover, Congress has elsewhere distinguished deliberately between the Commission and its staff. The Act states, for example, that an order made "pursuant to [a] delegation" has the same force "as orders…*of the Commission*," 47 U.S.C. § 155(c)(3), which makes sense only if "the Commission" in section 155(c)(3) refers to the full Commission.

The legislative history of section 208(b) shows a similar awareness of the distinction between staff and "the Commission," and a deliberate limitation of the scope of section 208(b) to the full Commission alone.

[10] Legislative history also shows that Congress was concerned that a Commission-level tariff investigation order "may be subject to reconsideration under section 405," and that "in practice, the courts often await the resolution of a reconsideration before permitting that judicial process to go forward." 134 Cong. Rec. S15287-01, 1988 WL 179054 (Oct. 7, 1988). Section 208(b)(3) serves to militate against such delay.

Senator Inouye, the sponsor of the bill, explained that tariff investigation orders "are often issued by the Common Carrier Bureau on delegated authority," thus requiring "an application for review to the full Commission," and delaying judicial review. 134 Cong. Rec. S15287-01, 1988 WL 179054; *see also id.* (again distinguishing between when "the Bureau issues an order" and when "the Commission rules" on an application for review). And again, in this same bill, Congress forbade the Commission from delegating section 208(b) proceedings to resolve that issue. *See id.* & 47 U.S.C. § 155(c)(1). Congress was thus fully aware of the difference between a "bureau" and "the Commission," and section 208(b) should be read only as referring to an investigation by "the Commission."

In sum, the text, structure, and legislative history of section 208(b)(3) all make clear that it refers only to Commission-level orders. It does not make bureau-level orders appealable.

2. Section 208(b) is inapplicable to some or all of this proceeding.

Moreover, it is far from clear that section 208(b) even applies to this proceeding, or indeed to any investigations regarding roaming rates. Certainly, section 208 is inapplicable to at least the data roaming portion of the complaint. Data roaming, at the time of the *Data Roaming Order* and this complaint, had not been classified as a common carrier service. *Data*

Roaming Order ¶¶ 57-60. But section 208 applies only to complaints about actions "by any common carrier subject to [the Act], in contravention of the provisions thereof." 47 U.S.C. § 208(a). And in the *Open Internet Order*, the Commission held that "the data roaming rule, rather than the automatic roaming rule or Title II, will govern" data roaming disputes. *Open Internet Order* ¶ 526. Thus, data roaming complaints must still be made through the complaint process of the data roaming rule rather than Title II's section 208 complaint process, and section 208 simply does not apply.

Although complaints about rates for voice roaming—which was defined as a common carrier service at the time of the complaint—clearly are subject to section 208(a), it is unclear that they fall within the subset of complaints that are subject to section 208(b). Section 208(a) applies broadly to "anything done or omitted to be done by any common carrier" "in contravention of the" Act, 47 U.S.C. § 208(a), while section 208(b) applies only to "any investigation under this section of the lawfulness of a charge, classification, regulation, or practice," *id.* § 208(b). Based on this statutory distinction, this Court has held that "[t]he class of investigations contemplated by § 208(b), and subject both to that subsection's time limitations and finality rules, is narrower than the class of investigations contemplated by § 208(a)." *Verizon I*, 269 F.3d at 1105. Based on this

distinction and the regulatory and legislative history leading up to section 208(b), the Commission has held that "Section 208(b) applies only to formal complaints which involve 'investigation[s] into the lawfulness of a charge, classification, regulation or practice' contained in tariffs filed with the Commission," or those about a service "that would have been tarrifed but for our forbearance decision." *Implementation of the Telecommunications Act of 1996*, 12 FCC Rcd 22497, 22514 ¶ 37 (1997).

The Commission has never opined on whether voice roaming disputes fall within the confines of section 208(b). Voice roaming is not a tariffed service, and it is unclear whether it falls within the exception for services that would have been tariffed but for the Commission's forbearance. In the proceeding below, neither Verizon nor the Commission understood this dispute to fall under section 208(b), and NTCH did not mention the possibility until its brief at the end of the administrative proceeding, 22 months after filing its complaint, and with no analysis or explanation. *See*

NTCH 9/18/2015 Brief at 30 (JA__).[11] Had NTCH consulted with Commission staff about the issue, the agency could have addressed the issue squarely, for example by bifurcating the proceeding to separately address voice and data roaming if necessary.

Instead, NTCH raised the issue of whether roaming compalints are governed by section 208(b) at the end of the administrative proceeding before the Bureau and in this litigation. It has never raised the issue before the Commission, and so cannot raise it here. *See NTCH*, 841 F.3d at 508 ("Section 405(a) of the Act states that the FCC must be 'afforded [an] opportunity to pass" on all arguments made to a court.'" (quoting 47 U.S.C. § 405(a))). NTCH does not argue that the matter was improperly taken up by the Bureau on delegated authority. In any case, the correct avenue to seek redress for such a claim would be to first seek review by the full Commission, and then, if necessary, relief from this Court through mandamus or a petition for review. NTCH never sought such relief or argued that this matter must be

[11] Contrary to its assertion that it filed a complaint "under the provisions of Section 208(b)(3)" (Br. 6), NTCH did not, so far as we are aware, reference 208(b) in its complaint or amended complaint. In its prayer for relief, for example, NTCH asked for expeditious action "as provided in Para. 77 of the *Data Roaming Order*." Amended Compl. ¶ 45. Again, the *Data Roaming Order* had made clear that section 208 did not apply to data roaming disputes. *Data Roaming Rule* ¶ 76.

adjudicated by the Commission, and nothing authorizes this Court to remedy any error by reaching the merits of the underlying rate dispute.

II. THE BUREAU REASONABLY FOUND THAT THE PROFFERED DATA ROAMING RATES WERE COMMERCIALLY REASONABLE.

Even if this Court had jurisdiction to review the substance of the *Order*, the Bureau exercised its authority reasonably, both as to voice roaming, discussed in Part III below, and as to data roaming, discussed here. The Bureau applied the Commission's rules for data roaming in a clear and straightforward manner, and found the record did not support NTCH's claims. To the extent that NTCH argues different rules should apply, it must look to the full Commission for such a change.

A. NTCH is barred from arguing here that the commercially reasonable standard for data roaming is unlawful.

NTCH argues (Br. 17-22) that the Commission erred in the *Open Internet Order* when it stated it would forbear from applying the voice roaming rules to data roaming disputes, and stated it would instead retain its data roaming rules "at this time," while it committed to opening a full rulemaking on the issue in the future. *Open Internet Order* ¶ 526.

NTCH seems, in this proceeding, to challenge the forbearance as set out in the *Open Internet Order*. *See* Br. 19 (describing "problems with [the

agency's approach" in the *Open Internet Order*). Manifold threshold obstacles prevent this Court's review of that forbearance here. First, to challenge that order in this Court, NTCH must petition for review of that order. *See* 47 U.S.C. § 402(a). It has not done so, and instead attempts to raise an untimely collateral attack here. *See* 28 U.S.C. § 2344 (petition for review must be brought within 60 days of entry of the order challenged). Second, the full Commission has not been "afforded [an] opportunity to pass" on these arguments, and so this Court may not consider them. 47 U.S.C. § 405(a); *see NTCH*, 841 F.3d at 508.

Finally, NTCH has already petitioned the Commission for reconsideration of the *Open Internet Order*, 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)). A petition for judicial review filed under such circumstances is "incurably premature" and must be dismissed. *Bellsouth Corp. v.* FCC, 17 F.3d 1487, 1490 (D.C. Cir. 1994). NTCH complains that the Commission has not yet acted on its petition for reconsideration, due in part, according to NTCH, to the ongoing transition between political administrations. *Id.* If

NTCH believes this delay is unreasonable, it may seek mandamus, but any delay does not make a pending matter final and reviewable. *See generally, e.g.*, *Nat'l Tel. Co-op. Ass'n v. FCC*, 563 F.3d 536, 542 (D.C. Cir. 2009).

Even if this Court could reach the matter, NTCH's argument is unsound.[12] NTCH argues that section 332 "forbids forbearance" from sections 201, 202, and 208, which, NTCH asserts, the agency has done regarding data roaming by retaining the data roaming rules rather than using the voice roaming rules. Br. 20. It is true that section 332 allows the agency to forbear from applying much of Title II to commercial mobile service providers, but excepts sections 201, 202, and 208 from that forbearance authority. 47 U.S.C. § 332(c)(1)(A). But in the *Open Internet Order*, 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, *Open Internet Order* ¶ 523, a separate grant which does not withhold authority to forbear from sections 201, 202, and 208 (or any other section). 47 U.S.C. § 160(a). Moreover, section 10 was enacted later than section 332, and

[12] NTCH does not appear to argue that the Bureau should have applied the voice roaming rules to the data roaming dispute below, even absent action by the Commission. Such an argument would be meritless. The Bureau may not decide matters "that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines," and so is powerless to change the rules put in place by the Commission. 47 C.F.R. § 0.311(a)(3).

grants forbearance authority "[n]otwithstanding section 332(c)(1)(A)." *Id.* It is thus at a minimum unclear that section 332 should 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.[13]

The agency has committed to a proceeding to address what standards should apply in data roaming. *Open Internet Order* ¶ 526. "[A]n agency need not solve every problem before it in the same proceeding." *Mobil Oil Expl. & Producing Se. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 231 (1991) ("This applies even where the initial solution to one problem has adverse consequences for another area that the agency was addressing."); *Grunewald v. Jarvis*, 776 F.3d 893, 906 (D.C. Cir. 2015). In the interim, it was reasonable to retain the status quo, based on the agency's evaluation that those rules could maintain just, reasonable, non-discriminatory rates as required by the Act. *See Open Internet Order* ¶ 526.

[13] It is also noteworthy that section 10 allows forbearance only where a regulation or law "is not necessary to ensure" that rates "are just and reasonable and are not unjustly or unreasonably discriminatory." 47 U.S.C. § 160(a)(1). Thus, by finding those conditions met, *Open Internet Order* ¶ 526, the Commission found that the data roaming rules could ensure that rates remain just, reasonable, and not unduly discriminatory, as sections 201 and 202 require.

B. The Bureau reasonably applied the Commission's rules for data roaming.

NTCH does not appear to argue that Verizon's proffered rates were actually commercially unreasonable. *See, e.g.*, Br. 1-2 (questions presented). In any case, the Bureau reasonably exercised its discretion. The proffered rates were at or below the average rate that other Verizon roamers pay—and that Verizon itself pays as a roamer—across Verizon's existing agreements for each of the two relevant types of technology. *Order* ¶ 15 (JA__). And it was at least 50% lower than the weighted average rate Verizon charges other roaming carriers [redacted] *Id.* By contrast, NTCH sought a data rate 94-97% lower than the weighted average rates charged [redacted] *Id.*

NTCH "offer[ed] no evidence demonstrating that Verizon's rates are unreasonable under current market conditions." *Id.* ¶ 16 (JA__). And even on appeal, it offers no reason to find that the Bureau abused its discretion in finding that an offer equal to or lower than the rate agreed to by other carriers in arms-length transactions is "commercially reasonable."

III. THE BUREAU REASONABLY FOUND THAT THE PROFFERED VOICE ROAMING RATES WERE LAWFUL.

A. The Bureau properly applied the Commission's rules.

The Bureau 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* ¶ 12 (JA__). Specifically, the proffered rate was equal to or lower than approximately [redacted], equal to the weighted average of voice roaming rates paid to Verizon in the record, and equal to the average rate that Verizon itself paid to other carriers for voice roaming. *Id.* Although this new voice roaming rate would reduce NTCH's then-current rate by [redacted], NTCH instead sought a rate two-thirds lower [redacted] the prevailing rate Verizon offered to others. *Id.* ¶ 13 (JA__). Based on this record, the Bureau reasonably found that Verizon had not offered unjust or unreasonable rates. *Id.* ¶12 (JA__).

This was a reasonable application of the Commission's rules. The Commission stated 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* ¶ 37. It further stated that it would consider rate complaints in light of agreements with other carriers. *2010 Voice Roaming*

Order ¶ 39. Here, the Bureau did exactly that—based on the record of other agreements, it found that the proffered rate was well within (or on the low end of) comparable rates. It followed that NTCH had not shown that the market rates were unjust or unreasonable. *Order* ¶ 12 (JA__).

B. NTCH's challenges to the voice roaming are unpersuasive.

NTCH raises two challenges to the Bureau's determination that the voice rates were lawful. Neither has merit.

1. NTCH's argument for different rules is barred and unpersuasive.

NTCH argues that—rather than applying the Commission's existing rules—the Bureau, and the Commission, should have instead used the "cost of service" as a "touchstone for judging the reasonableness of a rate." Br. 26.[14]

But 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 rates be determined by market negotiations. *Order* ¶ 20 (JA__) (citing *2007 Voice Roaming Order* ¶ 37). And the cost of providing service was not among the several factors that

[14] Notably, NTCH does not argue that the Bureau misapplied the Commission's rules. For example, it does not argue that the Commission actually did not intend the Bureau to look at comparable rates. Nor does it argue that the rates it was offered were outside the range of comparable rates.

the Commission said would be considered for roaming disputes. *Id.* n.79 (JA__) (citing *2010 Voice Roaming Order* ¶ 37).

As the Bureau explained, NTCH "in essence, seeks new rules for both voice and data roaming that would impose—for the first time—cost based rates." *Order* ¶ 21 (JA__). This attack illustrates why orders from staff are not appealable—agency staff must apply Commission precedent and may not decide matters "that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines." 47 C.F.R. § 0.311(a)(3). As the Bureau explained, it was required to "decide[] based on the orders and rules duly issued by the Commission," *Order* ¶ 21, and was powerless in this proceeding to judge rates based on a provider's costs, as NTCH advocated.

NTCH 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. 26-27. But that is not required by the Act. *See 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.") (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 "'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).[15]

In the *2007 Voice Roaming Order*, the agency declined to use costs as a benchmark for rates, and found that promoting market negotiations rather than rate regulation would incentivize both large and small carriers to invest in networks, ultimately benefitting consumers. *2007 Voice Roaming Order* ¶ 40; *see 2010 Voice Roaming Order* ¶ 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, NTCH's allegation that the Commission departed from

[15] *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).

precedent without explanation (Br. 26-27) fails both because the agency did not depart from precedent, and because it explained why it was not basing rates on cost here. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (when changing positions, an agency "must show that there are good reasons for the new policy," not that "the reasons for the new policy are better than the reasons for the old one").

NTCH argues in response that "the roaming market for CDMA carriers"—*i.e.*, those that use the same technology as Verizon, Sprint, and NTCH—has "become dangerously non-competitive in the years since 2007" when the Commission issued the *2007 Voice Roaming Order*. Br. 23. Therefore, NTCH argues, the market-based approach, even if "sustainable in the 2007 period," should be abandoned. *Id.*[16]

In the 2007 *Voice Roaming Order*, the Commission analyzed similar arguments about the competitive market structure through the lens of consumers, rather than their effect on intermediates like NTCH, finding 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

[16] Notably, in this proceeding, Verizon proferred voice roaming rates [redacted] *Order* ¶ 12 (JA__).

regulation." *2007 Voice Roaming Order* ¶ 38. NTCH still has not attempted to show a concrete effect on consumers, but it is free to present its arguments to the full Commission in a petition for new rulemaking. In the proceeding below, the Bureau explained it was powerless to make new rules based on purported changes to the underlying market. *Order* ¶ 21 (JA__). In any case, the Bureau found that NTCH had not "identified a specific market in which Verizon is its only available roaming partner." *Id.* ¶ 17 (JA__). NTCH asserts that this finding was erroneous because NTCH had purportedly shown that Verizon has superior coverage to Sprint, and that "it was either Verizon or nothing for most of NTCH's customers." Br. 24. But this ignores the other "smaller carriers that also provide [compatible] coverage." *Order* ¶ 16; *see* nn.65 & 71 (JA__) (citing coverage data for some 94 carriers on FCC's website). NTCH did not attempt to show that other, smaller carriers were unavailable in areas where Sprint's network may have fallen short.[17]

[17] The agency also reasonably found NTCH's methodology "flawed" when NTCH used Verizon's retail rates in an attempt to show the proffered roaming rates were unreasonable. *Order* ¶ 22 (JA__). NTCH cherry-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 and used several times the normal data usage. *Id.* NTCH argues now that the retail rates nevertheless shed light on Verizon's costs. Br. 37. Even if that is true, which is uncertain, it again presumes incorrectly that the Commission must judge rates based on cost.

2. The Bureau reasonably found that the proffered voice roaming rates were not unreasonably discriminatory

NTCH also argues that the proffered voice roaming rates were unreasonably discriminatory. Br. 38. That argument is belied by the record. Again, Verizon proffered voice roaming rates that were equal to the weighted average of rates paid by other carriers, and lower than the rates paid by many. *Order* ¶ 12 (JA__). The Bureau was therefore reasonable in finding that the rates offered to NTCH were not unreasonably discriminatory. *Id.* ¶ 14 (JA__). NTCH points out that some other carriers, including "MVNOs," got 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* ¶ 43. Instead, it specifically anticipated "that automatic roaming rates will reasonably vary" because of "differences in population and other factors affecting the supply and demand for roaming service." *Id.* ¶ 44.

NTCH points to case law regarding tariffed wireline services, in which carriers are required to justify differences in price. Br. 39, 41 (citing, *e.g.*, *MCI Telecomms. Corp. v. FCC*, 917 F.2d 30 (D.C. Cir. 1990)). 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 Bureau noted that Verizon had offered the lower rates to a "national roaming partner [with] superior network coverage." *Order* ¶ 14 (JA__). This was a reasonable implementation of the Commission's rule, which anticipated some variation in rates due to such factors.[18]

CONCLUSION

The petition for review should be dismissed for lack of jurisdiction or, in the alternative, denied.

[18] NTCH alleges that Verizon's "own expert conceded" that Verizon set prices to disadvantage competitors. Br. 45. 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__, __).

Respectfully submitted,

BRENT SNYDER
DEPUTY ASSISTANT ATTORNEY GENERAL

ROBERT B. NICHOLSON
JONATHAN H. LASKEN
ATTORNEYS

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

DAVID M. GOSSETT
DEPUTY GENERAL COUNSEL

RICHARD K. WELCH
DEPUTY ASSOCIATE GENERAL COUNSEL

/s/ Matthew J. Dunne

MATTHEW J. DUNNE
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

January 23, 2017

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

NTCH, INC., PETITIONER, v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	NO. 16-1277

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Respondents in the captioned case contains 10,688 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times Roman font.

/s/ Matthew J. Dunne
Matthew J. Dunne
Counsel
Federal Communications Commission

STATUTORY ADDENDUM

Page

28 U.S.C. § 2342

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 158. ORDERS OF FEDERAL AGENCIES; REVIEW

§ 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;

* * * * * *

47 U.S.C. § 155

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER I. GENERAL PROVISIONS

§ 155. Commission

* * * * * *

(c) Delegation of functions; exceptions to initial orders; force, effect and enforcement of orders; administrative and judicial review; qualifications and compensation of delegates; assignment of cases; separation of review and investigative or prosecuting functions; secretary; seal

(1) When necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may, by published rule or by order, delegate any of its functions (except functions granted to the Commission by this paragraph and by paragraphs (4), (5), and (6) of this subsection and except any action referred to in sections 204(a)(2), 208(b), and 405(b) of this title) to a panel of commissioners, an individual commissioner, an employee board, or an individual employee, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter; except that in delegating review functions to employees in cases of adjudication (as defined in section 551 of Title 5), the delegation in any such case may be made only to an employee board consisting of two or more employees referred to in paragraph (8) of this subsection. Any such

rule or order may be adopted, amended, or rescinded only by a vote of a majority of the members of the Commission then holding office. Except for cases involving the authorization of service in the instructional television fixed service, or as otherwise provided in this chapter, nothing in this paragraph shall authorize the Commission to provide for the conduct, by any person or persons other than persons referred to in paragraph (2) or (3) of section 556(b) of Title 5, of any hearing to which such section applies.

(2) As used in this subsection the term "order, decision, report, or action" does not include an initial, tentative, or recommended decision to which exceptions may be filed as provided in section 409(b) of this title.

(3) Any order, decision, report, or action made or taken pursuant to any such delegation, unless reviewed as provided in paragraph (4) of this subsection, shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission.

(4) Any person aggrieved by any such order, decision, report or action may file an application for review by the Commission within such time and in such manner as the Commission shall prescribe, and every such application shall be passed upon by the Commission. The Commission, on its own initiative, may review in whole or in part, at such time and in such manner as it shall determine, any order, decision, report, or action made or taken pursuant to any delegation under paragraph (1) of this subsection.

(5) In passing upon applications for review, the Commission may grant, in whole or in part, or deny such applications without specifying any reasons therefor. No such application for review shall rely on questions of fact or law upon which the panel of commissioners, individual commissioner, employee board, or individual employee has been afforded no opportunity to pass.

(6) If the Commission grants the application for review, it may affirm, modify, or set aside the order, decision, report, or action, or it may order a rehearing upon such order, decision, report, or action in accordance with section 405 of this title.

(7) The filing of an application for review under this subsection shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to a delegation under paragraph (1) of this subsection. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title, shall be computed from the date upon which public notice is given of orders disposing of all applications for review filed in any case.

(8) The employees to whom the Commission may delegate review functions in any case of adjudication (as defined in section 551 of Title 5) shall be qualified, by reason of their training, experience, and competence, to perform such review functions, and shall perform no duties inconsistent with such review functions. Such employees shall be in a grade classification or salary level commensurate with their important duties, and in no event less than the grade classification or salary level of the employee or employees whose actions are to be reviewed. In

the performance of such review functions such employees shall be assigned to cases in rotation so far as practicable and shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency.

(9) The secretary and seal of the Commission shall be the secretary and seal of each panel of the Commission, each individual commissioner, and each employee board or individual employee exercising functions delegated pursuant to paragraph (1) of this subsection.

* * * * * *

47 U.S.C. § 160

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER I. GENERAL PROVISIONS

§ 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.

* * * * * *

47 U.S.C. § 201

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART I. COMMON CARRIER REGULATION

§ 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. § 202

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART I. COMMON CARRIER REGULATION

§ 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. § 208

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART I. COMMON CARRIER REGULATION

§ 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 C.F.R. § 0.311

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERL COMMUNICATIONS COMMISSION
SUBCHAPTER A. GENERAL
PART O. COMMISSION ORGANIZATION
SUBPART B. DELEGATIONS OF AUTHORITY
ENFORCEMENT BUREAU

§ 0.311 Authority delegated.

The Chief, Enforcement Bureau, is delegated authority to perform all functions of the Bureau, described in § 0.111, provided that:

(a) The following matters shall be referred to the Commission en banc for disposition:

(1) Notices of proposed rulemaking and of inquiry and final orders in such proceedings.

(2) Applications for review of actions taken pursuant to delegated authority.

(3) Matters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines.

(4) Forfeiture notices and forfeiture orders if the amount is more than $100,000 in the case of common carriers or more than $25,000 in the case of all other persons or entities.

(5) Orders concluding an investigation under section 208(b) of the Communications Act and orders addressing petitions for reconsideration of such orders.

(6) Release of information pursuant to section 220(f) of the Communications Act, except for release of such information to a state public utility commission or in response to a Freedom of Information Act Request.

* * * * * *

47 C.F.R. § 20.12

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 20. COMMERCIAL MOBILE SERVICES

§ 20.12 Resale and roaming.

* * * * * *

(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.

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

NTCH, INC., Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	**No. 16-1277**

CERTIFICATE OF SERVICE

I, Matthew J. Dunne, hereby certify that on January 23, 2017, I electronically filed the foregoing "Public Copy—Sealed Material Deleted" Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Donald J. Evans
Ashley Ludlow
Jonathan Markman
FLETCHER, HEALD & HILDRETH, PLC
1300 North 17th Street
11th Floor
Arlington, VA 22209
evans@fhhlaw.com
ludlow@fhhlaw.com
markman@fhhlaw.com
Counsel for: NTCH, Inc.

Jonathan H. Lasken
Robert B. Nicholson
U.S. DEP'T OF JUSTICE
Rm 3228
950 Pennsylvania Avenue, NW
Washington, DC 20530
jonathan.lasken@usdoj.gov
robert.nicholson@usdoj.gov
Counsel for: USA

David Haga
Christopher M. Miller
VERIZON
1320 North Courthouse Road
Arlington, VA 22201
david.haga@verizon.com
christopher.miller@verizon.com
Counsel for: Cellco P'ship

/s/ Matthew J. Dunne

Matthew J. Dunne

Counsel

Federal Communications Commission
Washington, D.C. 20554