Davis Wright Tremaine LLP

FCC Adopts Data Roaming Rules to Expand Mobile Broadband Access

By Richard A. Gibbs and Paul B. Hudson

April 07, 2011

A divided Federal Communications Commission (FCC) today adopted rules that require facilities-based providers of commercial mobile data services to offer "data roaming" arrangements to other providers using the same technology, under "commercially reasonable terms and conditions."

FCC rules already require wireless carriers to establish automatic roaming arrangements for voice services, so that wireless customers can send and receive phone calls even when outside their home carrier's coverage area. The goal of the new rules is to ensure that mobile data customers can use data services, such as mobile Internet access, in the same way.

The new rules do not set specific prices, terms, or conditions for such data roaming arrangements. However, if carriers cannot come to an agreement, the FCC will use an "arbitration" process to establish one.

The vote on the new rules was 3-2, along party lines.

The FCC's formal rulemaking decision has not yet been released, so some of the details are unclear at this time. Based on the press release, however, under the new rules, wireless carriers may first try to negotiate a data roaming agreement, including technology-specific requirements and reasonable traffic management terms to prevent the roaming traffic from causing congestion on, or harm to, the host network. According to Commissioner Robert McDowell's dissent, the rules will allow carriers to refuse to provide data roaming in at least some limited circumstances that will presumably be specified in the Order.

If negotiations are unsuccessful, the carrier seeking roaming arrangements may petition the FCC to resolve the dispute. The FCC will consider each situation on a case-by-case basis looking at the totality of the circumstances. The FCC may require parties to submit their best and final offers and then may fashion a remedy based on those offers.

The FCC's three Democrats stated that the rules would promote competition and consumer access to wireless broadband. The two dissenting Republicans argued that mobile data services fall within a specific statutory category, "private mobile services," which may not be subjected to common carrier regulation.

The FCC had previously ruled that mobile data services constitute "information services" (another statutory category), and the dissenters assert that this earlier classification brings mobile data services within the "private mobile services" rubric. Countering this claim, the FCC's formal ruling will explain that, because the new rules allow carriers to develop individualized agreements on "commercially reasonable" terms, and do not require those terms to be either "just and reasonable" or "nondiscriminatory," the new rules do not amount to imposing common carrier obligations, so it does not matter whether they are "private mobile services" or not. Opponents of the rules will almost certainly raise these arguments on appeal.

We are advising clients in this area and would be pleased to discuss at your convenience.

This advisory is a publication of Davis Wright Tremaine LLP. Our purpose in publishing this advisory is to inform our clients and friends of recent legal developments. It is not intended, nor should it be used, as a substitute for specific legal advice as legal counsel may only be given in response to inquiries regarding particular situations.