

***Data Roaming Obligations of
Commercial Mobile Radio Service
Providers***

WT DOCKET NO. 05-265

METROPCS COMMUNICATIONS, INC.
*2250 Lakeside Boulevard
Richardson, Texas 75082*

DATA ROAMING IS CRITICAL TO BROADBAND DEPLOYMENT AND WIRELESS COMPETITION

- Data roaming rights are critical to foster the deployment of 3G and 4G wireless broadband and Internet access services and fulfill the goals of the National Broadband Plan. In order to encourage investment, the data roaming proceeding should be put on a fast track by the Commission to spur deployment of broadband services
 - Rural carriers will not be able to deploy advanced data services successfully if the largest carriers are allowed to deny data roaming on reasonable terms and compete unfairly with them
 - Wireless represents the best chance for additional facilities-based competition with existing broadband Internet access providers
- **Time is of the essence** – The widespread roll-out and adoption of 4G services by carriers other than the large national carriers will be impaired if data roaming is not guaranteed
 - A failure to invest now will have long-term consequences on broadband deployment
- Nearly all wireless carriers, with the exception of the two dominant largest national carriers (AT&T and Verizon Wireless) support an automatic data roaming right
 - The Commission record contains substantial evidence that, in the absence of an obligation, the largest two carriers have been denying, and will continue to deny, reasonable, cost-based, non-discriminatory data roaming
 - The record shows that, even when offered, the rates preclude any data roaming

DATA ROAMING IS CRITICAL TO BROADBAND DEPLOYMENT AND WIRELESS COMPETITION (cont'd)

- ❑ Consumers are harmed when voice and data services are subject to different roaming obligations
 - Customers should not have to understand the arcane differences between data, 3G/4G data, SMS and voice – roaming should just work
 - In many instances, data services are complementary to or can be effective substitutes for voice communications – so data roaming rights are essential to protect the voice roaming rights previously granted
- ❑ Technical implementation issues can and will be resolved voluntarily as long as the legal entitlement to data roaming where technically feasible is clearly established
- ❑ Data roaming can help moderate the effects of the spectrum shortage by ensuring that all carriers do not need to have spectrum in each market in order to offer broadband services
 - Meaningful data roaming rights will lead to more efficient use of existing spectrum by incenting existing carriers to deploy 4G

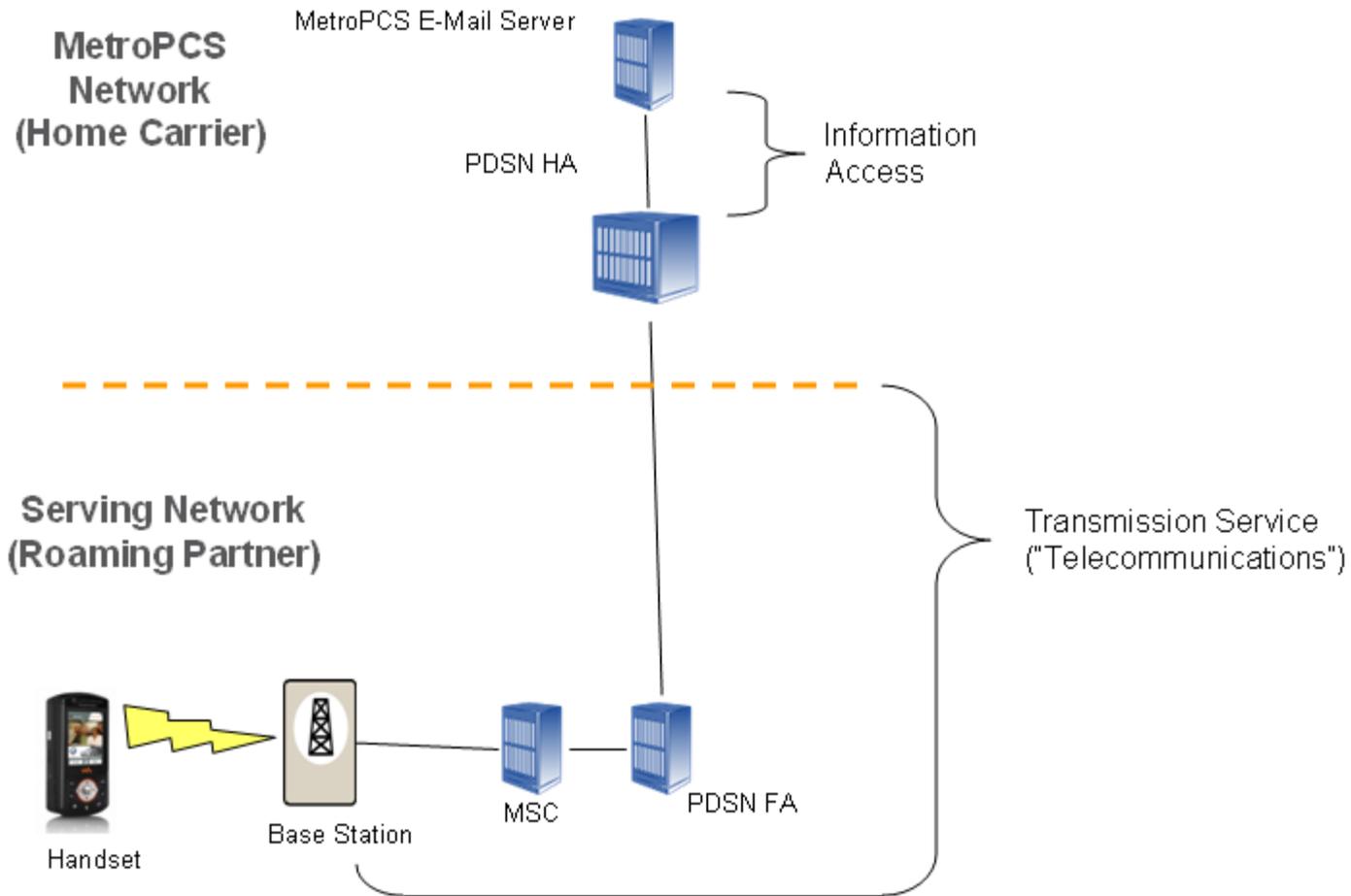
THE COMMISSION HAS CLEAR JURISDICTION TO ENACT DATA ROAMING REGULATIONS

- ❑ The Commission has ample jurisdiction to mandate data roaming under Titles I, II and/or III of the Communications Act
- ❑ Data roaming clearly is a transmission service subject to Title II
 - The Commission has jurisdiction under Title II because the functions provided by the roaming partner in connection with data roaming are “the functional equivalent of CMRS”
- ❑ Whether automatic broadband data roaming is a “private mobile service” or CMRS is a red herring
 - Automatic broadband data roaming is not a “private mobile service” exempt from common carrier regulation by 47 U.S.C. § 332(c)(2) because Section 332(c) of the Communications Act does not apply to wholesale services
 - Even if the Commission treats data roaming as a private mobile service, the necessary data roaming regulations can be mandated under 332(a) without regulating private mobile carriers as common carriers
 - Even if the end-to-end service afforded end users is classified as PMS, such a classification does not mandate that the portions of the service which are separately provided by the roaming partner are also PMS

THE COMMISSION SHOULD ADOPT DATA ROAMING REGULATIONS UNDER TITLE II

- ❑ The separate, severable, non-integrated transmission service provided by a third-party data roaming partner is properly viewed as a pure transmission service that qualifies under long-standing Commission precedent as “telecommunications” and as a “telecommunications service”
 - MetroPCS and AT&T agree that data roaming is a wholesale carrier-to-carrier service
 - As a wholesale service, customer data is transmitted without change in the form or content of the information from the customer, through the roaming partner, to the home carrier
- ❑ The transmission service provided by the data roaming partner also satisfies the Commission’s two prong test for common carrier treatment, as set forth in *NARUC I*
 - Roaming partners offer roaming service to a sufficiently large carrier population to be deemed to be offering service to the public indiscriminately
 - The public interest demands that data roaming be classified as a common carrier service
- ❑ Given the mutually-exclusive categories of telecommunications services and information services, the Commission must categorize data roaming as a telecommunications service
- ❑ This conclusion is consistent with prior Commission and Supreme Court precedent, and distinct from the proposed *Third Way* approach regarding net neutrality
 - The *Third Way* attempts to sever an inseverable end-user information service into information services and telecommunications services and regulate the telecommunications portion
 - Data roaming is a distinct transmission service

TECHNICAL ILLUSTRATION OF DATA ROAMING



THE COMMISSION CAN REGULATE DATA ROAMING AS A COMMON CARRIER SERVICE BECAUSE THE FUNCTIONS PERFORMED BY THE SERVING CARRIER ARE FUNCTIONALLY EQUIVALENT TO CMRS

- The functions performed by the serving carrier to provide data roaming are functionality equivalent to CMRS
 - The Commission has correctly found that voice roaming is CMRS
 - The Commission does not need to reach whether the end-to-end data service is the functional equivalent – just that the functions performed by the roaming partner are
 - The transmission telecommunications service provided by the data roaming partner is functionally equivalent to the transmission telecommunications service provided for voice roaming. The roaming partner in both instances is merely transporting information generated by the user between or among points of the user's choosing without change in form or content
 - The technical functions performed by the roaming partner in data roaming also are the functional equivalent of those provided for voice roaming
 - Local breakout over data roaming is identical to voice roaming
 - The home carrier, not the roaming partner, determines what services are provided to the end-user
 - The roaming partner never provides service to the customer – only to the home carrier

THE COMMISSION CAN REGULATE DATA ROAMING AS A COMMON CARRIER SERVICE BECAUSE THE FUNCTIONS PERFORMED BY THE SERVING CARRIER ARE FUNCTIONALLY EQUIVALENT TO CMRS (cont'd)

- Voice and data service generally are provided over the same radio spectrum
- The costs of providing these services are intertwined – the services in many instances use the same base stations, same tower sites, and the same backhaul facilities, among others
 - DNS does not convert data roaming into an information service and does not change the functional equivalency of data and voice roaming
 - Properly viewed, the conversions performed with DNS fall within the exception to information services for call routing and the management of telecommunications services
 - Even if DNS is considered part and parcel of an information service when provided to an end-user, DNS provided on a wholesale basis to a carrier is not, as this is used to control and manage telecommunications
- The Commission should not draw distinctions between telecommunications and information services based on the form, content or ultimate destination of information that is being transported over the radio network since the intercarrier aspects remain largely unchanged
- Failing to provide data roaming rights will threaten voice roaming rights as wireless voice services are converted to VOIP

THE COMMISSION CAN REGULATE DATA ROAMING AS A COMMON CARRIER SERVICE BECAUSE THE FUNCTIONS PERFORMED BY THE SERVING CARRIER ARE FUNCTIONALLY EQUIVALENT TO CMRS (cont'd)

- ❑ To find that the functions performed by the serving carrier are the functional equivalent of CMRS does not change the classification of the end-to-end service as an information service
 - When a carrier provides a telecommunications facility to an ISP which the ISP combines with the ISP's information service, the facility remains a telecommunications service while the end-to-end service is an information service

- ❑ If the Commission decides to reach the issue whether the end-to-end data roaming service is the functional equivalent of voice roaming, it has ample authority to do so
 - In the *Fourteenth Report* on mobile competition found consumers increasingly view data services as a substitute for voice services
 - The Commission, however, does not need to reach this conclusion if it finds the transmission service provided by the roaming partner is the functional equivalent of the transmission service performed in voice roaming

SECTION 332 WAS NOT INTENDED TO APPLY TO WHOLESALE CARRIER-TO-CARRIER SERVICES, AND THUS THE PMS/CMRS DICHOTOMY WOULD NOT APPLY HERE

- ❑ Prior Commission decisions indicate that Section 332 was not intended to apply to wholesale carrier-to-carrier services such as data roaming
- ❑ Section 332 was intended to draw a distinction between the regulatory treatment to be accorded to two distinct categories of retail mobile services: (1) those offered for profit to sufficient categories of users to be deemed offered indiscriminately to the public; and, (2) those offered to a sufficiently restricted class of users to be deemed “private” rather than “public” offerings. These two distinct classes of retail offerings simply have no relevance to the wholesale intercarrier services carriers provide when they handle data roaming
- ❑ The Commission recently interpreted provisions of Section 332 as applying only to retail charges to end users of CMRS, rather than to termination charges to other carriers associated with CMRS
- ❑ AT&T has cited no authority for the proposition that the wholesale/retail classification does not matter

EVEN IF THE COMMISSION CLASSIFIES DATA ROAMING AS A PRIVATE MOBILE SERVICE, IT CAN AND SHOULD ADOPT DATA ROAMING AS A SPECTRUM MANAGEMENT REGULATION UNDER 332(a)

- ❑ AT&T incorrectly claims that the Commission can only regulate data roaming pursuant to Sections 201 or 202; the Commission has applied diverse regulations to private mobile services under Section 332(a)
- ❑ Section 332(a) of the Communications Act states:
 - “In taking actions to manage the spectrum to be made available for use by private mobile services, the Commission shall consider, consistent with section 151 of this title, whether such actions will:” “promote the safety of life and property;” “encourage competition and provide service to the largest feasible number of users”; or “increase interservice sharing opportunities between private mobile services and other services.”
 - A data roaming rule requiring carriers to provide data roaming service upon reasonable request certainly would “encourage competition and provide service to the largest feasible number of users,” increase broadband deployment and access across the country and promote public safety (particularly if roaming rights are extended across the 700 MHz band)

THE COMMISSION CAN ADOPT MEANINGFUL AUTOMATIC DATA ROAMING REGULATIONS WITHOUT REGULATING PRIVATE MOBILE SERVICE AS A COMMON CARRIER SERVICE

- ❑ AT&T claims that insofar as a person provides a service that is a private mobile service under Section 332, that person “shall not . . . be treated as a common carrier for any purpose under the Act”
- ❑ The Commission may properly interpret the requirement that a private mobile service carrier not be “treated as a common carrier” as simply barring the Commission from subjecting such service to the full panoply of Title II regulation
- ❑ A data roaming regulation that requires carriers to offer data roaming on a wholesale basis to other carriers on just, reasonable and non-discriminatory terms is not a “quintessential common carrier obligation”
 - The regulation would not require data roaming to be offered to all comers, but rather only to technologically-compatible carriers who have entered into data roaming agreements on a wholesale basis
 - The rule need not require the roaming partner to offer services to the public at large or to require carriers to offer manual data roaming to any interested individual
 - A hallmark of a private mobile service obligation is the ability to decide “whether and on what terms” to provide service. Common carriage status connotes that the carrier loses practically all discretion. The data roaming obligation contemplates the host carrier maintaining the ability to individually negotiate the terms of any roaming agreement, and the fashion in which the roaming service will be provided, subject to basic non-discrimination rights

THE COMMISSION CAN ADOPT MEANINGFUL AUTOMATIC DATA ROAMING REGULATIONS WITHOUT REGULATING PRIVATE MOBILE SERVICE AS A COMMON CARRIER SERVICE (cont'd)

- There are many instances where the Commission has found multiple authority for actions under the rules (e.g. mobile interconnection under 201, 251, and 332)
- The FCC would only be regulating private mobile service as a common carrier if it applied the full range of common carrier obligations by:
 - Requiring the service to be offered (or be required to be offered) to the public indiscriminately for hire; and
 - Requiring the carrier to be responsible for the service on an end-to-end basis (see *Southern Pacific Communications Co. v. AT&T*, 556 F. Supp. 825 (D.C. Cir. 1982); and
 - Requiring that the rates must be just and reasonable and non-discriminatory
 - *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 F.C.C.2d 261, ¶ 101 (1976) (“offering a communications service for hire to the public” in a public, not private, and non-discriminatory manner is “the ‘sine qua non’ of common carrier status”)
- Here, AT&T effectively concedes that any regulation of data roaming would not meet the first prong of the test since the services would not be required to be offered to the public indiscriminately
- AT&T admits that the service is a wholesale service offered to carriers, not to the public

THE COMMISSION CAN ADOPT MEANINGFUL AUTOMATIC DATA ROAMING REGULATIONS WITHOUT REGULATING PRIVATE MOBILE SERVICE AS A COMMON CARRIER SERVICE (cont'd)

- ❑ The second prong also is not met since the home carrier, not the serving carrier, is responsible for the end-to-end user service
- ❑ Requiring rates be just and reasonable and non-discriminatory alone is insufficient to be common carrier regulation
 - The Commission previously held that subjecting broadcasters to the non-discrimination mandate of the fairness doctrine did not constitute common carrier regulation, even though it required a broadcaster (which was prohibited from being regulated as a common carrier) to carry all viewpoints, if it carried any [\[1\]](#)
 - The fairness doctrine ruling held that if you offer to one, you had to offer to all. That is what the proposed data roaming rule would accomplish
 - If the fairness doctrine was not considered a “quintessential common carrier obligation,” the Commission should hold the same for the proposed data roaming rule
 - Both AT&T and Verizon claim that they offer data roaming to other carriers (and each clearly offers data roaming to its own customers). In doing so, each carrier has “opened the door” to data roaming in the same manner that broadcasters “opened the door” to contrasting viewpoints under the fairness doctrine
- ❑ The Commission could also apply this non-common carrier regulation under Title II, using the *NARUC I* analysis described above

[1] *FCC v. Midwest Video Corp., et al*, 44 U.S. 689, fn.14 (1979) (quoting *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1251 (1949)).