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Carla M. Butler
Lead Paralegal

December 19, 2006

Frances Nichols Anglin
Oregon Public Utility Commission
550 Capitol St., NE
Suite 215
Salem, OR 97301

Re: ARB 747

Dear Ms. Nichols Anglin:

Enclosed for filing please find an original and five (5) copies of Qwest Corporation's Response to Petition of Beaver Creek Cooperative Telephone Company for Extension of Date to Comply with Order No. 06-637, along with a certificate of service.

If you have any questions, please do not hesitate to give me a call.

Sincerely,

Carla

Carla M. Butler

CMB:
Enclosure
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PUBLIC UTILITY COMMISSION OF OREGON

ARB 747

In the Matter of BEAVER CREEK COOPERATIVE TELEPHONE COMPANY Petition for Arbitration of the Terms, Conditions and Prices for Interconnection and Related Arrangements with QWEST CORPORATION	**QWEST CORPORATION'S RESPONSE TO PETITION OF BEAVER CREEK COOPERATIVE TELEPHONE COMPANY FOR EXTENSION OF DATE TO COMPLY WITH ORDER NO. 06-637**

Pursuant to OAR 860-013-0050, Qwest Corporation ("Qwest") hereby responds to the Petition of Beaver Creek Cooperative Telephone Company ("BCT") for an extension of the date to comply with Order No. 06-637, entered on November 20, 2006, which requires the parties to file with the Commission for approval an interconnection agreement ("ICA") that is consistent with Order No. 06-637.[1] BCT seeks an extension of the Order No. 06-637 requirement that the parties file an ICA consistent with the order within 30 days (or by December 20, 2006) of the order on grounds that it has "exercised its right under 47 C.F.R section 51.809 to make an opt-in election," and thus that "the process that is called for in OAR 860-016-0025 should be allowed to continue" in docket ARB 780 (which docketed BCT's request to "opt in" to an interconnection agreement between Qwest and Ymax Communications Corp. ("Ymax")). For the reasons set forth below, as well as in Qwest's December 18, 2006 objections in docket ARB 780 to BCT's Notice of Adoption, Adopting the Terms of the Interconnection Agreement

[1] It is somewhat unclear when Qwest's response to BCT's "petition" is due. BCT states in its December 4, 2006 filing that it files a "petition" pursuant to OAR 860-014-0093. That rule allows a party to file a petition for an extension of an effective date or of time to comply with a rule or an order of the Commission. Pursuant to OAR 860-103-0050(1)(a), an answer to a petition shall be filed within 20 days of service, which would be December 24, 2006 (on a holiday weekend), and thus December 26, 2006. However, pursuant to OAR 860-013-0050(3)(d), a response to a motion shall be filed within 15 days of service, which would be December 19, 2006. Given that a "motion" is defined as a request to the Commission or Administrative Law Judge for a ruling or other action which affects the rights of a party to the *proceeding* (OAR 860-013-0031), and there is already a "proceeding" here, one

between Ymax and Qwest which was previously approved in docket ARB 756, Qwest opposes BCT's petition. As such, Qwest respectfully requests that the Commission deny BCT's petition and that the Commission review, and if appropriate, approve, the ICA that Qwest intends to file on December 20, 2006 as required by Order No. 06-637. Finally, in the event the Commission is inclined to grant a brief extension here for the process in ARB 780 to be completed, Qwest respectfully requests that (1) the Commission and its Staff begin to review the ICA that Qwest intends to file on December 20, 2006 to ensure the ICA is consistent with Order No. 06-637, and that (2) if the Commission and its Staff agree the ICA is consistent with the order, the Commission approve the ICA.

INTRODUCTION

Qwest opposes BCT's petition for an extension of the date to comply with the ICA-filing requirement in Order No. 06-637 for several reasons. First, BCT's attempt in docket ARB 780 to adopt or "opt in" to the Ymax interconnection agreement ("ICA") with Qwest, after it has gone through with fully litigating an ICA in this arbitration (docket ARB 747), simply because BCT is dissatisfied with the results of this arbitration, is unlawful under federal law. In addition, for the reasons set forth below, BCT's attempt to adopt the Qwest/Ymax ICA in docket ARB 780 is also against this Commission's own policy and precedent, as well as against public policy. Finally, BCT's request to adopt or opt in to the Ymax ICA in docket ARB 780 is objectionable pursuant to OAR 860-016-0025, especially because of the greater costs for interconnection with BCT, and because, unlike Ymax, BCT is not a new entrant in the Oregon telecommunications market.

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could argue that BCT's filing may be a "motion" to which a response is due within 15 days. Under abundance of caution, Qwest files this response within 15 days of the BCT filing.

PERTINENT PROCEDURAL BACKGROUND

On May 3, 2006, BCT elected to bring a petition for arbitration of an ICA with Qwest before this Commission to replace its current ICA with Qwest. That petition was docketed as ARB 747 (the present docket). The parties then went through extensive pleadings, discovery, rounds of testimony, and post-hearing briefs.[2] On October 20, 2006, the Commission issued its Arbitrator's Decision. Thereafter, on November 2, 2006, BCT filed comments to the Arbitrator's Decision, and took exception to various rulings in the Arbitrator's Decision.

Two weeks later, on November 14, 2006, BCT wrote to the Commission, purporting to state that further proceedings in this arbitration docket were "unnecessary" because BCT had "made a determination to exercise its rights under 47 C.F.R. § 51.809 to opt in" to the ICA between Qwest and Ymax filed in docket ARB 756 and approved by the Commission in Order No. 06-523. The Arbitrator here then issued a memorandum that same day stating, among other things, that BCT had not made an OAR 860-016-0025 filing, and that under OAR 860-016-0025(4), Qwest may file objections within 21 days of such notice. The Arbitrator also noted that the Commission order in this docket was due November 20, 2006, and thus asked the parties to promptly advise whether they mutually agreed to a waiver of the November 20, 2006 deadline. BCT did advise that it would agree to waive the deadline, but Qwest did not. Thus, a few days later, on November 20, 2006, the Commission issued Order No. 06-637, adopting the Arbitrator's Decision in its entirety. The Commission's order also required the parties to file an ICA consistent with Order No. 06-637 within 30 days of the order (or by December 20, 2006).

[2] The parties agreed to waive the evidentiary hearing and submit the matter on prefiled testimony and post-hearing briefs.

Meanwhile, on November 27, 2006, after the Commission's order in this arbitration, but before the parties were to submit a compliant ICA, and clearly because it is dissatisfied with the results of this arbitration docket, BCT completed its filing of an opt-in request pursuant to OAR 860-016-0025. The Commission docketed BCT's opt-in request as docket ARB 780 and set a December 18, 2006 deadline for objections to the request. Qwest timely filed its objections to BCT's adoption or opt-in request as directed by the Commission on December 18, 2006.

Finally, on December 4, 2006, BCT filed its petition in this docket for an extension of the December 20, 2006 date for the filing of a compliant ICA, as ordered in Order No. 06-637. This filing is Qwest's response, and opposition, to the BCT request for an extension on similar grounds as its objections to BCT's opt-in request under OAR 860-016-0025 in docket ARB 780.

ARGUMENT

I. THE COMMISSION SHOULD DENY BCT'S REQUEST FOR AN EXTENSION

For the reasons set forth below, Qwest opposes BCT's request for an extension of the date to comply with the ICA-filing requirement in Order No. 06-637 while the process in the opt-in docket, ARB 780, is completed. First, BCT's attempt to adopt or "opt in" to the Qwest/Ymax ICA is unlawful, under both federal law and Commission policy and precedent. Thus, there is no good cause for an extension of the ICA-filing requirement in Order No. 06-637 in this docket. Second, BCT's attempt to opt in to the Qwest/Ymax ICA, after it has already elected to and gone through this arbitration proceeding, is against public policy. Thus, there is again no good cause for an extension of the date to comply with Order No. 06-637 here. Finally, the Commission should not wait until the process in ARB 780 is completed because BCT would not be eligible to adopt or opt in to the Qwest/Ymax ICA in any event. This is so because the costs of providing interconnection and related services to BCT are greater than the costs of providing it to Ymax. See OAR 860-016-0025(5)(a); 47 C.F.R. § 51.809(b)(1).

A. **<u>BCT's attempt to "opt in" is unlawful under federal law</u>**

First, BCT's attempt in docket ARB 780 to "opt in" to the Qwest/Ymax ICA is unlawful under federal law. Therefore, the Commission should deny BCT's request for an extension of the date to comply with Order No .06-637 in this docket.

Specifically, although Qwest is not aware of the Ninth Circuit addressing this issue, the First Circuit has held that a CLEC is not free to avoid terms of a final arbitration order by seeking to opt into terms of a previous interconnection agreement that an ILEC had with another CLEC. Specifically, in *Global NAPs, Inc. v. Verizon New England, Inc*., 396 F.3d 16 (1st Cir. 2005), the First Circuit affirmed a District of Massachusetts decision (2004 WL 1059792 (D. Mass., May 12, 2004) that affirmed a Massachusetts Department of Telecommunications and Energy ("DTE") decision in favor of the ILEC, and against the CLEC, in which the CLEC had attempted to opt in to another ICA, pursuant to 47 U.S.C. § 252(i), after having elected to go through an interconnection arbitration, simply because it was not satisfied with the results of the arbitration. (For the Commission's convenience, Qwest attaches the two cases as Exhibit 1 (Massachusetts district court decision) and Exhibit 2 (First Circuit decision).)

For example, in the district court decision, the court ruled as follows:

> [The] DTE clearly held that Global's [the CLEC] choice was curtailed not by the expiration of time, but by its decision to arbitrate: As Verizon points out, the Sprint Agreement was available to [Global] for adoption before [Global] filed its petition for arbitration and, at any point prior to the issuance of our final Arbitration Order, [Global] could have chosen to adopt the Sprint Agreement. *But once our final Arbitration Order was issued, the adoption process under* § 252(i) *was not a lawful option in order to comply with the arbitrated decision*. [Citation to record omitted, emphasis added.] That is a reasonable and correct interpretation of the statute. *See Southern New England Telephone Co. v. Conn. Dept. of Public Utility Co.,* 285 F.Supp.2d 252, 254 (D.Conn.2003) ("An entering CLEC can *either* opt into an existing interconnection agreement between the [incumbent] LEC and another CLEC, *or* it can negotiate [and arbitrate] its own interconnection agreement" (emphasis added).) *Global NAPs, Inc. v. Verizon New England, Inc*., 2004 WL 1059792, *2.

The district court also rejected the CLEC's argument that the DTE erred in ruling that a CLEC's choice of one process forecloses another one. Specifically, it stated:

> Global's interpretation of the terms and the intended effect of Section 252(i) is far too broad. Section 252(i) does not guarantee that all CLECs will obtain comparable terms in their interconnection agreements; that purported goal is inconsistent with the goal of the Act, which is to promote competition among the carriers. Section 252(i) merely provides CLECs with the opportunity to opt into an existing agreement - an opportunity that Global did not take. 2004 WL 1059792, *2.

Further still, the district court rejected the CLEC's argument that a CLEC, unlike an ILEC, is not obligated to accept an arbitrated agreement, stating:

> The FCC clearly states that the arbitration order is binding on *both* parties. Furthermore, under Section 252(b)(5), Global's refusal to cooperate with the arbitrator's order constitutes a failure to negotiate in good faith. *See* 47 U.S.C. § 252(b)(5) ("The refusal of any other party to the negotiation ... to cooperate with the State commission in carrying out its function as an arbitrator ... shall be considered a failure to negotiate in good faith."). Therefore, enforcement of the arbitration order is an entirely appropriate penalty and serves as a disincentive for a CLEC to force an ILEC to arbitrate an agreement while reserving the right to withdraw if it does not like the outcome. 2004 WL 1059792, *3. (Emphasis in original.)

Finally, the district court agreed with the DTE that permitting a CLEC to ignore an arbitration award would waste the DTE's resources and impose an unnecessary burden on the ILEC. The court ruled that insofar as the CLEC contended the arbitration order is discriminatory, it has a remedy in a suit concerning the merits of the order. 2004 WL 1059792, *3.

The First Circuit agreed and affirmed. The Court framed the precise issue as follows:

> The precise legal question under review is narrow, though one of first impression in the circuit courts of appeals: does a competing carrier have an unconditional right, under § 252(i) of the TCA [Telecom Act], to avoid the terms of a final arbitration order from a state telecommunications commission, adjudicating a dispute between the CLEC and ILEC, by seeking to opt into the terms of a previous interconnection agreement that the ILEC has with another CLEC? *This is an issue of federal statutory interpretation of the TCA*. [Footnote omitted.] We agree with the DTE and the district court that the TCA grants no such right. *Global NAPs, Inc. v. Verizon New England*, 396 F.3d at 24 (1st Cir. 2005). (Emphasis added.)

The First Circuit specifically held that "[i]n attempting to void the terms of a valid arbitration order, it is clear that Global NAPs is refusing to cooperate with the DTE, in violation of its duty to negotiate in good faith" as set forth in section 252(b)(5). 396 F.3d at 25.

The Court also ruled that it is the *FCC*, and *not* a state commission, that is the agency with the power granted by Congress to administer the Act, through the formulation of policy, rulemaking, and regulation. Thus, the Court did not afford deference to the DTE's interpretation of the statute under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). 396 F.3d at 23, fn. 7.

The Court then ruled that section 251(i) must be read in light of the structure and intent of the statute, and that the CLEC's interpretation that the arbitration order was not binding on it was inconsistent with the basic arbitral power vested in the state commission. That is, "Section 252(b), entitled 'Agreements arrived at through compulsory arbitration,' allows for either party to an interconnection agreement to petition a state commission for arbitration of open issues, and grants powers to the state commission to carry out the arbitration." 396 F.3d at 24. The Court also ruled that the CLEC's reading of section 252(i) was inconsistent with state commissions' power to make their arbitral decisions *binding on both parties,* as well as the section 252(b)(5) duty of both parties to cooperate with the arbitration (and with the Commission as arbitrator), and the general duty of good faith negotiation under section 252(a). In other words, the Commission ruled that "there is no basis for [the CLEC's] reading § 252(i) as somehow turning the parallel obligations that run throughout § 252(b) into merely one-way obligations." 396 F.3d at 24.

The First Circuit also ruled that in addition to its reading of the statutory sections, there is another source of law to consider, namely, the FCC regulations interpreting the statutory sections at issue. Specifically, the Commission ruled:

> The FCC regulation 47 C.F.R. § 51.809 itself rejects Global NAPs' premise that § 252(i) grants an unconditional right to CLECs to adopt the terms of any interconnection agreement the ILEC has with another CLEC. The obligation of ILECs to make those agreements available to other CLECs is itself subject to conditions: comparable-cost, technical-feasibility, and the reasonable-time restrictions are three such conditions contemplated by the regulation. 396 F.3d at 26.

The Court also rejected the argument that the FCC's *Local Competition* First Report and Order allowed CLECs to use section 252(i) to avoid obligations under binding arbitration orders:

> Significantly, the Local Competition Order does not state that competitors have a right to use § 251(i) to avoid their obligations under a binding arbitration order. Properly read the Order refers to the admitted binding effect in FCC arbitrations, but says nothing about state arbitrations. Further, the FCC regulation's explicit statement of the binding effect on both parties supports the DTE's position. *See* 47 C.F.R. § 51.807(h). 396 F.3d at 26.

Finally, the Court rejected the CLEC's attempts for public policy reasons. Said the Court:

> Global NAPs makes a final, policy-based argument that reading § 252(i) to prevent it from opting into the Sprint agreement post-arbitration is both anti-competitive and discriminatory, and thus at odds with the purpose of the TCA. If what Global NAPs alleges were true, namely that the terms of the underlying arbitration order are either contrary to law or unduly burdensome on Global NAPs (or both), the statute provides Global NAPs with a remedy-direct review of the terms of the arbitration order in district court. 47 U.S.C. § 252(e)(6). This is the remedy Congress provided.

Accordingly, there is no question that this is an issue of federal law interpretation.[3]

Although there is no Ninth Circuit decision (and indeed, absent a conflict with the Ninth

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[3] Various other federal courts and commissions have addressed this issue and have ruled consistently with the district court in Massachusetts and First Circuit. See e.g., *Application for Pacific Bell Tel. Co*., 05-05-027, 2006 WL 1547814, Arbitrator's Ruling on Motions (Cal. P.U.C. June 2, 2006) (rejecting a CLEC's attempt to include extra terms in an arbitrated ICA and stating that this request "effectively seeks to arbitrate certain matters here but, where MCIm lost, to adopt terms from another agreement which MCIm likes better. This is unreasonable, and should not be permitted.") (citing the *Global NAPs* First Circuit decision); *In Re DSCI Corp*., Case 04-C-0647, 2005 WL 517307, Order Denying Petition for Rehearing (N.Y.P.S.C. Mar. 3, 2005) (stating that 252(i) is an *alternative* to 252(b), and not allowing a CLEC to opt-in to a more favorable agreement after the *USTA II* decision was published); *Southern New England Tel. Co. v. Connecticut*, 285 F. Supp. 2d 252, 254 (D. Conn. 2003) (a "CLEC can either opt into an existing [ICA] between the LEC and another CLEC, *or* it can negotiate its own [ICA].") (emphasis added). See also 1 Thomas H. Oemke, *Commercial Arbitration*, § 24:15 (2006) ("A competing carrier has no unconditional right under TCA § 252(i) to avoid the terms of a final arbitration order from a state telecommunications commission (adjudicating a dispute between the CLEC and ILEC) by seeking to opt into the terms of a previous interconnection agreement that the ILEC has with another CLEC.") (citing the First Circuit *Global NAPs* decision); FCC *ISP Remand Order*, FCC No. 01-131 at ¶ 82 (rel. Apr. 27, 2001) ("[A]s of the date this Order is published in the Federal Register, carriers may no longer invoke section 252(i) to opt into an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic."); *BellSouth*

Circuit), the Commission should follow the First Circuit's decision on this issue. As such, the Commission should deny BCT's request for an extension to comply with Order No. 06-637 because the basis for the request (the opt in docket in ARB 780) is unlawful under federal law and constitutes bad faith negotiation, precluded by 47 U.S.C. § 252(b)(5).

B. BCT'S attempt to "opt in" is against Commission precedent

In addition, the Commission should deny BCT's request for an extension of the date to comply with Order No. 06-637 because BCT's attempts in docket ARB 780 to opt in to the Qwest/Ymax ICA is against Commission policy and precedent. Indeed, this Commission recently rejected a similar situation in which a CLEC, dissatisfied with an arbitration order and the final compliant ICA, attempted to walk away from the arbitration decision and ICA by trying again in a new docket.

Specifically, in docket ARB 537, the Commission issued its Arbitrator's Decision and its Commission order adopting the Arbitrator's Decision in an arbitration proceeding brought by Western Radio Services Co. ("Western Radio"). See e.g., Order No. 04-600 (issued October 18, 2004), adopting Arbitrator's Decision of September 20, 2004. As is required, the Commission directed the parties to submit an ICA consistent with the terms of its order. Western Radio, however, refused to sign it, and instead filed a complaint with the federal court under 47 U.S.C. § 252(e)(6). Thus, Qwest timely filed the ICA without Western Radio's signature and asked the Commission to approve the ICA, if appropriate, because it was compliant with the Commission's previous order. After the federal court denied Western Radio's complaint for lack of jurisdiction, Qwest again requested the Commission to approve the ICA on July 28, 2005.

Telecomms. v. Southeast Telephone, Inc., 462 F.3d 650, 653-54, 659-60 (6th Cir. 2006) (discussing four limitations on a CLEC's ability to opt-in under section 252(i) and discussing with approval the *Global NAPs* First Circuit decision).

Thereafter, on October 10, 2005, the Commission approved the ICA, without Western Radio's signature. Order No. 05-1075. With respect to Western Radio's refusal to sign the ICA, the Commission ruled:

> The parties subject to the section 252(b) process are plainly required to go through the steps set forth and are *not free to walk away from the arbitrated interconnection agreement if they are dissatisfied with the outcome* of the arbitration process before the state commission. Indeed, if they were, it would *render the concept of compulsory arbitration meaningless. …...*
>
> An arbitrated interconnection agreement, with the disputed terms decided by the Arbitrator and adopted by the commission, has the *same legal power to bind the parties as if the agreement had been freely entered into by both parties* prior to the Commission. *One party cannot simply refuse to execute and honor the outcome of the arbitration proceeding*. Order No. 05-1075, at p. 3. (Emphasis added.)

Thus, the Commission approved the ICA, which it found to be consistent with its previous order (Order No. 04-600). It did so despite that the CLEC, Western Radio, had refused to sign it.

However, four days later, on October 14, 2005, Western Radio filed another petition for arbitration, which was docketed as ARB 706. On November 8, 2005, Qwest filed its response, including a motion to dismiss on several grounds, which included the ground that the petition was inappropriate in light of the Commission's previous order in docket ARB 537 (Order No. 05-1075). The Commission agreed with Qwest, and dismissed the new arbitration in ARB 706. Order No. 06-001 (issued January 3, 2006).

Specifically, in Order No. 06-001, the Commission quoted from Order No. 05-1075 regarding Western Radio's refusal to sign the ICA after the Commission's Arbitrator's Decision and order in the ARB 537 proceeding. Further, the Commission ruled in Order No. 06-001:

> The Approved Agreement went into effect on October 10, 2005, and remains in effect for a period of three years. [Footnote omitted.] Just as it is *inappropriate to allow Western to ignore the results of an arbitration proceeding* by refusing to enter into an agreement consistent with the Commission's arbitration decision, it is likewise *inappropriate for Western to attempt to commence arbitration of a new interconnection agreement* only days after the Commission-arbitrated and approved interconnection agreement became effective. As Qwest points out, entertaining Western's Petition would essentially *render*

the Commission's arbitration decisions meaningless. Both parties are expected to abide by the terms and conditions of the Approved Agreement until it expires or they voluntarily negotiate a new agreement. Order No. 06-001, p. 3. (Emphasis added.)

Although docket ARB 706 involved a new interconnection arbitration petition (instead of an opt-in request under section 252(i) and OAR 860-016-0025), and although there was already a Commission-approved ICA in ARB 537 (instead of only an Arbitrator's Decision and Commission order adopting the Arbitrator's Decision, as here), it is clear that the Commission's decisions in Order Nos. 05-1075 and 06-001 apply as precedent here.[4] Because the Commission should reject BCT's attempts, in bad faith, to "start all over again," after making the Commission and Qwest go through a full contested arbitration proceeding, there is no basis for the extension that BCT seeks in this docket. For the same reasons as set forth above regarding the federal courts' intolerance for such tactics, BCT's attempts to opt in to the Ymax ICA, after going through the arbitration in this arbitration (simply because it is dissatisfied with the Arbitrator's Decision and Order No. 06-637), is against Commission precedent and policy on these issues.[5]

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[4] Qwest notes that its research of this issue uncovered an old arbitration decision by the Commission almost 10 years ago in 1997, in the early days of interconnection arbitrations. In Order No. 97-229 in docket ARB 11, the Commission granted CLEC Sprint Communications Company's motion for reconsideration in part by allowing it, in a separate proceeding, the right to opt in to a then-pending ICA between the ILEC (GTE) and AT&T (in docket ARB 5). However, this decision, at a time when there was uncertainty about many issues regarding sections 251 and 252 of the Act (including the wholesale discount, the so-called "pick-and-choose" rule (since abrogated by the FCC) and section 252(i) "elections"), has clearly been overruled by subsequent Commission Order Nos. 05-1075 and 06-001, not to mention the federal courts' decisions that Qwest discusses above. Moreover, the Commission in ARB 11 did not permit Sprint to opt in to the GTE/AT&T agreement in that docket. Rather, the Commission merely ruled that Sprint had a right, under section 252(i), to elect the final GTE/AT&T ICA in a *separate proceeding*, finding that Sprint's request *was beyond the scope of that arbitration*, and thus that Sprint would have to *withdraw* its request for arbitration (since the Commission would not simultaneously entertain mutually exclusive competing proceedings (an arbitration and an opt-in)). There is no evidence, however, that Sprint ever formally withdrew the petition in ARB 11 (according to the Commission's E-dockets website link). Further, Qwest has not uncovered any evidence that Sprint ever actually opted in to the subsequent GTE/AT&T ICA (which was not approved for 19 months, until January 20, 1999), or that, if Sprint did so, GTE ever objected to Sprint's attempts to do so. Given that both the federal courts and this Commission have since clarified the parties' good faith duties under section 252, including the restriction of a party from attempting to opt in to a new ICA under section 252(i) after it has previously gone through an arbitration proceeding, it is clear that Order No. 97-229 does not apply to the situation here.

[5] Qwest also notes that a Florida Commission decision, about the same time period as docket ARB 11, and also involving Sprint, was very critical of Sprint's tactics. Indeed, that commission ruled, in an arbitration between

Thus, this Commission should deny BCT's attempts to game the section 252 process by engaging in a game of "heads I win, tails you lose," and thus should deny the requested extension.

C. <u>The request to opt in to the Ymax ICA is objectionable due to greater costs</u>

Further still, the Commission should deny BCT's request for an extension of the date to comply with Order No. 06-637 because BCT's attempt in docket ARB 780 to opt in to the Qwest/Ymax ICA is objectionable pursuant to OAR 860-016-0025(5)(a). This is so because the costs of providing interconnection and related services to the requesting carrier (BCT) are greater than the costs of providing it to the carrier that originally negotiated the agreement (Ymax), especially because of BCT's history of interconnection and because it is not, like Ymax, new to Oregon. See also 47 C.F.R. § 51.809(b)(1).

There is no question the costs of providing interconnection and related services to BCT are greater than the costs of providing it to Ymax. This is especially so because Ymax is a new entrant in Oregon, and thus Qwest does not have a history in which to determine the costs with Ymax in the future, and therefore, the parties agree to a presumption of equal volumes of traffic. See e.g., § 7.3.4.1.1 of the Qwest/Ymax ICA (docket ARB 756), in which the parties agree to bill and keep reciprocal compensation for local/EAS traffic since Oregon "is a new state" for Ymax.

Sprint and GTE Florida, that Sprint had ample opportunity prior to the commission's final decision to withdraw its petition for arbitration and request the AT&T/GTE agreement, but it chose not to do so. Said the Commission:

> Rather, the arbitration continued. The issues were framed, litigation ensued and we made our determination on the evidence in the record. This, we believe, is the procedure contemplated by the Act. *We do not believe Congress intended to permit parties to take parallel tracks in arbitration proceedings*: one track to pursue the *best deal possible* in an arbitration, and the other track to *keep all options open* so that either party can abandon an arbitration order simply because it does not like what it gets.

Order No. PSC-97-0550-FOF-TP, *In Re: Petition by Sprint Communications Company Limited Partnership d/b/a Sprint for Arbitration with GTE Florida Incorporated Concerning Interconnection Rates, Terms, and Conditions, Pursuant to the Federal Telecommunications Act of 1996*, Fla. PSC, Docket No. 961173-TP (May 13, 1997), at *6. (Emphasis added.)

The evidence in this proceeding, however, as well as past history with BCT (some of which the Commission discussed in the Arbitrator's Decision and Order No. 06-637), makes it abundantly clear that the costs of interconnection with BCT are greater than the costs of interconnection with Ymax. For example, as Qwest showed in its testimony, due to BCT's trunking practices, the interconnection with BCT is more costly in that, even if the traffic were approximately balanced in both cases, Qwest would need to either (1) implement unique call detail collection and data processing to parse the BCT CLEC-originated traffic from the BCT ILEC-originated traffic,[6] *or* (2) file a formal complaint to compel BCT to send its traffic over the trunks in order to make item (1) unnecessary,[7] *or* (3) continue to forego the revenue associated with termination and transit of the BCT-originated traffic.[8] None of these costs is faced by Qwest in association with its Ymax interconnection.

Accordingly, Qwest respectfully submits that OAR 860-016-0025(5)(a) and 47 C.F.R. § 51.809(b)(1) provide the Commission yet another, independent reason (apart from the unlawful nature of BCT's request under federal law and Commission policy and precedent), why it should reject BCT's request to "opt in" to the Qwest/Ymax ICA. Therefore, there is no good cause for the Commission to grant BCT's petition for extension of the date to comply with Order 06-637.

D. <u>The opt-in request in ARB 780 should be rejected on public policy grounds</u>

Finally, the Commission should deny BCT's request for an extension to comply with Order No. 06-637 in this docket based on public policy grounds. Qwest will not reargue the

[6] See e.g., Qwest/3, Freeberg/12, lines 20-22; Qwest/1, Freeberg/6, lines 7-14; Qwest/1, Freeberg/20, lines 17-23; Qwest/1, Freeberg/21, lines 25-26; Qwest/3, Freeberg/5, lines 9-13; Qwest/3, Freeberg/11, lines 6, 16-20.

[7] See e.g., Exs. Qwest/1, Freeberg/10, lines 7-14; Qwest/1, Freeberg/20, lines 5-17; Qwest/1, Freeberg/21, lines 1-3 and 10-13; Qwest/1, Freeberg/21, lines 10-13; Qwest/1, Freeberg/23, lines 7-14; Qwest/3, Freeberg/5, lines 4-9; Qwest/3, Freeberg/7, lines 11-13; Qwest/3, Freeberg/11, lines 20-21; Qwest/3, Freeberg/13, lines 12-15.

public policy grounds that this Commission, as well as the First Circuit and the district court in Massachusetts, discussed in their various decisions. Suffice it to say that the Commission should not countenance such "heads I win, tails you lose" gamesmanship. As the Commission knows, both the ILEC and the CLEC in a section 252 arbitration, indeed in the section 252 process generally, have duties of good faith and fair dealing. Like Global NAPs in Massachusetts and Western Radio here in Oregon, BCT's attempts to undo all that the Commission did, simply because BCT does not like the Commission's decisions in this arbitration docket (which is evident by the BCT comments on November 2, 2006 in this docket), is in bad faith and should be soundly rejected. If BCT were able to get away with this tactic, the Commission can be well assured that CLECs in the future will do the same thing, thereby making the section 252 arbitration process a one-way street stacked against the ILEC, and wasting the Commission's time and resources. Qwest need not say any more because the issue is so clear cut, in this case and in any other similar case. It would be a gross abuse of the section 252 process, and of Congress' intent in the Telecom Act, and of the Commission's resources, to allow BCT (or any other similarly situated CLEC) to opt into an ICA at this point. Thus, at a very minimum, the Commission should reject BCT's opt-in request in ARB 780 on public policy grounds. As such, there is no good cause to grant BCT the request for an extension it seeks here.

II. IF THE COMMISSION GRANTS AN EXTENSION, IT SHOULD ALSO PROCEED WITH A REVIEW, AND APPROVAL, OF THE COMPLIANT ICA

Finally, in the event the Commission is inclined to grant a brief extension of the date to comply with Order No. 06-637, Qwest respectfully submits that the Commission should also continue to proceed with its review of the compliant ICA and, if appropriate, to approve the ICA.

[8] See e.g., Exs. Qwest/1, Freeberg/15, line 3 to Qwest/1, Freeberg/18, line 13; footnote 10; Qwest/1, Freeberg/30, lines 8-11; Qwest/3, Freeberg/10, lines 10-13; Qwest/3, Freeberg/13, lines 11-12; and Qwest/3, Freeberg/18, lines 12-17.

As Qwest mentions, Qwest intends to file a compliant ICA with the Commission on December 20, 2006, as directed by Order No 06-637. As Qwest further showed in section I.B., above, there is Commission precedent for the Commission to approve an ICA that is consistent with the Commission's arbitration order *even where the CLEC refuses to sign the agreement*. See e.g., Order No. 05-1075 (docket ARB 537), pp. 3-4; Order No. 06-001 (docket ARB 706), pp. 2-3.

It is Qwest's view that the parties are required to file an ICA compliant with Order No. 06-637 within 30 days, or by December 20, 2006. Although Qwest acknowledges that BCT has filed a request or petition for an extension of that filing requirement, the Commission has not granted the petition, and thus Qwest intends to comply on the 30th day, December 20, 2006. Moreover, Qwest has previously provided BCT with a copy of an ICA that Qwest believes is compliant with the order on or about November 30, 2006. BCT, however, has not signed it, and instead filed its petition for an extension. It is clear, therefore, that BCT refuses to sign the ICA that Qwest provided, at least not until the Commission has ruled on BCT's extension (assuming the Commission denies the petition).

Further still, even if the Commission grants a brief extension of the date to comply with Order No. 06-637, it is Qwest's view that it (Qwest) can still submit or file an ICA that it believes is compliant or consistent with Order No. 06-637 for the Commission and its Staff to review, while the extension is pending or the process in docket ARB 780 is being completed, and that if appropriate, the Commission can approve the agreement. This would have the effect of not causing a delay in the Commission's review and approval process in this arbitration docket while the "opt-in" review process in docket ARB 780 is pending. As stated, the Commission can approve an ICA, if appropriate, even without BCT's signature, as it did with Western Radio in

docket ARB 537.[9] Of course, if BCT believes that any aspect of the ICA is not consistent with Order No. 06-637, it would have the opportunity to object with its reasons for its belief.

Finally, there is no harm to BCT if the Commission were to approve the ICA without its signature. That is so because if BCT were to conclude that the Commission's approval of the ICA was not appropriate, or that the ICA itself was not consistent with governing law, it would have a remedy. That is, BCT would have the right to file a petition for judicial review with the federal court under section 252(e)(6) of the Act.

CONCLUSION

Accordingly, for the reasons set forth above, Qwest respectfully requests the Commission deny BCT's petition for an extension of the date to comply with Order No. 06-637 in this docket.

DATED: December 19, 2006

Respectfully submitted,

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[9] In addition, section 252(e)(4) of the Act provides that if the Commission does not approve within 30 days an ICA that is filed after an arbitration, the ICA is deemed approved.

Briefs and Other Related Documents
Global Naps, Inc. v. Verizon New England, Inc.D.Mass.,2004.Only the Westlaw citation is currently available.

United States District Court,D. Massachusetts.
GLOBAL NAPS, INC.
v.
VERIZON NEW ENGLAND INC. d/b/a **Verizon** Massachusetts, et al.
No. Civ.A.03-10437-RWZ, 02-12489-RWZ.

May 12, 2004.

Jeffrey C. Melick, John O. Postl, Global NAPs, Inc., Samuel Zarzour, Global Naps Legal Dept., William Rooney, Norwood, MA, Christopher Savage, Cole, Raywid & Braveman, LLP, Washington, DC, for Plaintiff.
Bruce P. Beausejour, Keefe B. Clemons, Daniel J. Hammond, Thomas A. Barnico, Boston, MA, for Defendants.

Memorandum of Decision

ZOBEL, J.
***1** Until the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 101, *et seq.,* was passed, local telephone service was provided by one company throughout a given region. The Act promotes competition by encouraging and facilitating the entry of new telecommunications carriers into local service markets. It requires incumbent local exchange carriers ("ILECs") to share their networks with competing local exchange carriers ("CLECs") upon request, and to negotiate interconnection agreements in good faith. An entering CLEC can choose to opt into an existing agreement between an ILEC and a CLEC, or it can negotiate its own agreement with the ILEC. 47 U.S.C. § 252(i), § 251(a)(1). Where negotiation is unsuccessful, either party may request that a state commission arbitrate the disputed terms. 47 U.S.C. § 252(a)(2) and (b). The negotiated or arbitrated agreement must then be submitted to the state commission for approval. 47 U.S.C. § 252(e)(1). The state commission may reject the agreement only if it fails to satisfy 47 U .S.C. § § 251 and 252(d). 47 U.S.C. § 252(e)(2).

Global NAPS, Inc. ("Global"), a CLEC, entered into negotiations with Verizon New England, Inc. ("Verizon") concerning the terms of an interconnection agreement. On July 30, 2002, Global petitioned the Massachusetts Department of Telecommunications and Energy ("DTE") for arbitration of the disputed terms. On December 12, 2002, DTE ordered the parties to incorporate its findings into a final interconnection agreement to be filed with DTE within 21 days, or by January 2, 2003. Both parties, thereafter, moved to extend the time to finalize the language of the agreement.

On December 30, 2002, Global filed suit in this Court against Verizon, DTE, and various commissioners, seeking a declaration that DTE's December 12, 2002, arbitration order is unlawful and enjoining defendants from enforcing it (Civil Action No. 02-12489-RWZ). A few weeks later, Global informed DTE that it would adopt the terms of another interconnection agreement between Verizon and Sprint Communications L.P. ("Sprint Agreement"), which existed before Global entered into the arbitration, instead of finalizing the arbitrated agreement. The next day, Verizon filed a Motion for Approval of Final Arbitration Agreement or, in the Alternative, for Clarification, in the DTE proceeding. Global opposed.

On February 19, 2003, DTE rejected Global's proposal absent Verizon's consent. DTE determined that 47 U.S.C. § 252(i) does not allow a CLEC to avoid an arbitrated agreement by opting into a more favorable agreement for the following reasons: (1) DTE's arbitrated decisions are final and binding on both parties, and (2) public policy dictates the arbitrated agreement be upheld to provide incentive for the CLECs to negotiate in good faith and to conserve administrative resources. With specific reference to this case, it determined that the incorporation of Section 252(i) into the arbitrated agreement does not allow Global to opt into another agreement at any time. DTE approved Verizon's agreement, which incorporated the terms of the arbitration, and directed the parties to sign the approved arbitration agreement within seven days.

***2** Global then filed the present suit on March 6, 2003, against Verizon, DTE and various commissioners, contesting DTE's February 19, 2003, order. More specifically, Global seeks to set aside the order and opt into the Sprint Agreement. This action was consolidated with Civil Action No. 02-12489-

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RWZ. All parties have moved for summary judgment. Global contends that DTE erred by insisting on the finality of its arbitration award and in its interpretation of the Act. Both Verizon and DTE argue that the February 19, 2003 order is entirely consistent with the Act. The parties agree that jurisdiction is proper under 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331.

Global asserts that under 47 U.S.C. § 252(i), it has a right to adopt the Sprint Agreement at any time. That section provides:

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

On its face, Section 252(i) says nothing about temporal limits or the inability of a CLEC to adopt a pre-existing agreement instead of an arbitrated one. However, 47 C.F.R. § 51.809(c) provides that individual interconnection arrangements shall remain available to CLECs "for a reasonable period of time after the approved agreement is available for public inspection...." Global protests that DTE did not rely on the passage of a reasonable period of time, and it is not clear that the time had, in fact, run. The argument mixes apples and oranges. DTE clearly held that Global's choice was curtailed not by the expiration of time, but by its decision to arbitrate:As Verizon points out, the Sprint Agreement was available to [Global] for adoption before [Global] filed its petition for arbitration and, at any point prior to the issuance of our final Arbitration Order, [Global] could have chosen to adopt the Sprint Agreement. But once our final Arbitration Order was issued, the adoption process under § 252(i) was not a lawful option in order to comply with the arbitrated decision.

(Global's Appendix Tab 1 at 13-14). That is a reasonable and correct interpretation of the statute. *See Southern New England Telephone Co. v. Conn. Dept. of Public Utility Co.,* 285 F.Supp.2d 252, 254 (D.Conn.2003) ("An entering CLEC can *either* opt into an existing interconnection agreement between the [incumbent] LEC and another CLEC, *or* it can negotiate [and arbitrate] its own interconnection agreement.") (emphasis added).

Global further attacks DTE's strict insistence that a CLEC's choice of one process forecloses another one. It contends that "[b]oth by its terms and its intended effect, Section 252(i) assures that regardless of the outcome of any particular negotiation or arbitration, all CLECs remain on equal footing." (Global Mem. at 15). Therefore, Global concludes that under § 252(i), "if an arbitration results in unfavorable terms for the arbitrating CLEC, it can adopt its competitor's terms." (Global Reply at 9). Global's interpretation of the terms and the intended effect of Section 252(i) is far too broad. Section 252(i) does not guarantee that all CLECs will obtain comparable terms in their interconnection agreements; that purported goal is inconsistent with the goal of the Act, which is to promote competition among the carriers. Section 252(i) merely provides CLECs with the opportunity to opt into an existing agreement - an opportunity that Global did not take.

***3** Global next asserts that Section 252(i) allows a CLEC to amend its interconnection agreement to include the more favorable terms of another agreement. However, it fails to note that it is not a party to the other agreement and cannot, therefore, force an amendment thereto. Instead, Global is attempting to avoid the agreement it arbitrated by opting into another one - an altogether different proposition, which is not discussed in the language of Section 252(i).[FN1]

FN1. Because Global is not a party to the arbitrated agreement, there is no need to address DTE's statement concerning Global's inability to void an existing contract in favor of a better contract.

Global also states that a CLEC, unlike an ILEC, is not obligated to accept the arbitrated agreement. In this it is supported by the asymmetrical nature of the Act which imposes obligations on the ILECs only. However, both Global and Verizon cite to the Federal Communications Commission's ("FCC") Local Competition Order, which states that:

We reject SBC's suggestion that an arbitrated agreement is not binding on the parties. Absent mutual agreement to different terms, the decision reached through arbitration is binding.... We also believe that, although competing providers do not have an affirmative duty to enter into agreements under Section 252, a requesting carrier might face penalties if, by refusing to enter into an arbitrated agreement, that carrier is deemed to have failed to negotiate in good faith. Such penalties should serve as a disincentive for requesting carriers to force an incumbent LEC to expand [sic] resources in arbitration if the requesting carrier does not intend to

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abide by the arbitrated decision.

(Global's Appendix Tab 4 at ¶ 1293). The FCC clearly states that the arbitration order is binding on *both* parties. Furthermore, under Section 252(b)(5), Global's refusal to cooperate with the arbitrator's order constitutes a failure to negotiate in good faith. *See* 47 U.S.C. § 252(b)(5) ("The refusal of any other party to the negotiation ... to cooperate with the State commission in carrying out its function as an arbitrator ... shall be considered a failure to negotiate in good faith."). Therefore, enforcement of the arbitration order is an entirely appropriate penalty and serves as a disincentive for a CLEC to force an ILEC to arbitrate an agreement while reserving the right to withdraw if it does not like the outcome.

Finally, DTE correctly ruled that permitting Global to ignore its arbitration decision would waste DTE's limited resources and impose an unnecessary burden on Verizon. Global asserts that resources would be saved by allowing it to adopt the Sprint Agreement now instead of having to appeal the arbitration order. However, DTE has already expended resources with the arbitration. Global's statement that "[r]esources are not wasted in arbitration even though some of the contract terms established through arbitration may never be used" is completely untenable. (Global Reply at 9). Global's final argument that "there is no realistic basis for any concern that CLECs will waste DTE and Verizon resources with unnecessary arbitrations" is belied by this very suit. (Global Mem. at 20). Insofar as Global is contending that the arbitration order is discriminatory, it has a remedy in the suit concerning the merits of the order.

***4** Accordingly, Global's Motion for Summary Judgment is DENIED and the motions by Verizon and DTE are ALLOWED.

D.Mass.,2004.
Global Naps, Inc. v. Verizon New England, Inc.
Not Reported in F.Supp.2d, 2004 WL 1059792 (D.Mass.)

Briefs and Other Related Documents (Back to top)

- 2005 WL 3617076 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Support of Motion for Reconsideration or, in the Alternative, for Clarification of Terms of Additional Security (Nov. 16, 2005) Original Image of this Document with Appendix (PDF)
- 2005 WL 3617075 (Trial Motion, Memorandum and Affidavit) Global Naps Inc.'s Reply Concerning Additional Security (Nov. 9, 2005) Original Image of this Document with Appendix (PDF)
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- 2005 WL 3617066 (Trial Motion, Memorandum and Affidavit) Plaintiff Global NAPs Inc.'s Reply in Support of its Motion for Partial Summary Judgment (Jun. 10, 2005) Original Image of this Document (PDF)

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• 2005 WL 3617065 (Trial Motion, Memorandum and Affidavit) Plaintiff Global NAPs Inc.'s Memorandum in Support of its Motion for Partial Summary Judgment (May 20, 2005) Original Image of this Document (PDF)
• 2005 WL 3617064 (Trial Motion, Memorandum and Affidavit) Memorandum of Reasons in Support of Motion for Consolidation of Cases (Feb. 14, 2005) Original Image of this Document with Appendix (PDF)
• 2003 WL 24219382 (Trial Motion, Memorandum and Affidavit) Global NAPs, Inc's Reply Brief to Defendants' Oppositions to its Motion for Summary Judgment, and Memorandum in Opposition to Defendants' Motions for Summary Judgment (Jul. 1, 2003) Original Image of this Document (PDF)
• 2003 WL 24219380 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Support of Verizon Massachusetts' Motion for Summary Judgment and in Opposition to Global Naps, Inc.'s Motion for Summary Judgment (Jun. 23, 2003) Original Image of this Document (PDF)
• 2003 WL 24219381 (Trial Motion, Memorandum and Affidavit) Memorandum of Law of Department of Telecommunications and Energy in Support of its Motion for Summary Judgment and in Opposition to Global NAPs, Inc.'s Motion for Summary Judgment (Jun. 23, 2003) Original Image of this Document (PDF)
• 2003 WL 23521352 (Trial Pleading) Answer of Verizon Massachusetts (Apr. 02, 2003)
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Briefs and Other Related Documents

Global Naps, Inc. v. Verizon New England, Inc.C.A.1 (Mass.),2005.

United States Court of Appeals,First Circuit.
GLOBAL NAPS, INC., Plaintiff, Appellant,
v.
VERIZON NEW ENGLAND, INC.; Massachusetts Department of Telecommunications and Energy; Paul B. Vasington, in his capacity as Commissioner; James Connelly, in his capacity as Commissioner; W. Robert Keating, in his capacity as Commissioner; Diedre K. Manning, in her capacity as Commissioner; and Eugene J. Sullivan, in his capacity as Commissioner, Defendants, Appellees.
No. 04-1711.

Heard Dec. 10, 2004.
Decided Jan. 19, 2005.

Background: Competitive local exchange carrier (CLEC) brought action challenging enforceability of arbitration order determining terms of interconnection agreement with incumbent local exchange carrier (ILEC). The United States District Court for the District of Massachusetts, Rya W. Zobel, J., upheld arbitration order, and CLEC appealed.

Holding: The Court of Appeals, Lynch, Circuit Judge, held that CLEC was not free to avoid terms of final arbitration order by seeking to opt into terms of previous interconnection agreement that ILEC had with another CLEC.

Affirmed.

West Headnotes

[1] Telecommunications 372 635

372 Telecommunications
372I In General
372k633 Judicial Review or Intervention in General
372k635 k. Jurisdiction. Most Cited Cases
(Formerly 372k11.1)

Federal courts have subject matter jurisdiction to review state agency determinations under Telecommunications Act of 1996 (TCA) for compliance with federal law. 28 U.S.C.A. § 1331; Communications Act of 1934, § 252(e)(6), as amended, 47 U.S.C.A. § 252(e)(6).

[2] Federal Courts 170B 599

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)2 Finality of Determination
170Bk598 Determination of Controversy as Affecting Finality
170Bk599 k. Multiple Claims or Parties. Most Cited Cases

Disposition of one case in consolidated action is final and appealable judgment unless cases were consolidated “for all purposes.” 28 U.S.C.A. § 1291.

[3] Telecommunications 372 904

372 Telecommunications
372III Telephones
372III(F) Telephone Service
372k899 Judicial Review or Intervention
372k904 k. Decisions Reviewable. Most Cited Cases
(Formerly 372k263)

Claims in consolidated action to (1) review merits of arbitration order setting terms for interconnection agreement between local exchange carriers (LECs) and (2) determine one LEC's entitlement to opt out of order retained their separate identities during litigation, and thus order resolving only second issue was final and appealable, despite consolidation order statement that case were being consolidated “for all future proceedings.” 28 U.S.C.A. § 1291.

[4] Telecommunications 372 906

372 Telecommunications
372III Telephones
372III(F) Telephone Service
372k899 Judicial Review or Intervention
372k906 k. Parties in General; Standing. Most Cited Cases
(Formerly 372k267)

Competitive local exchange carrier (CLEC) had standing to appeal order refusing to allow it to opt out of arbitration order setting terms of interconnection agreement with incumbent local exchange carrier (ILEC); terms of alternative agreement which CLEC

sought to join were materially different from terms of arbitrated agreement, and possibility that state commission would interpret agreements consistently was insufficient to deprive CLEC of standing.

[5] Telecommunications 372 870

372 Telecommunications
372III Telephones
372III(F) Telephone Service
372k854 Competition, Agreements and Connections Between Companies
372k870 k. Proceedings; Arbitration. Most Cited Cases
(Formerly 372k267)

Competitive local exchange carrier (CLEC) was not free to avoid final arbitration order from state telecommunications commission, setting terms of interconnection agreement with incumbent local exchange carrier (ILEC), by seeking to opt into terms of previous interconnection agreement that ILEC had with another CLEC; arbitration order was binding on both parties. Communications Act of 1934, § 252(b, i), as amended, 47 U.S.C.A. § 252(b, i); 47 C.F.R. § 51.807(h).

[6] Statutes 361 219(9.1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(9) Particular State Statutes
361k219(9.1) k. In General. Most Cited Cases

State agency interpretations of Telecommunications Act of 1996 (TCA) are subject to de novo review. Communications Act of 1934, § 252(e)(6), as amended, 47 U.S.C.A. § 252(e)(6).

***17** William J. Rooney, Jr., with whom Jeffrey Melick was on brief, for appellant.
Scott H. Angstreich, with whom Bruce P. Beausejour, Keefe B. Clemons, Sean A. Lev, Mary Ann McGrail, and Kellogg, Huber, Hansen, Todd, & Evans were on brief, for appellee Verizon New England, Inc.
Thomas A. Barnico, Assistant Attorney General, with whom Thomas F. Reilly, Attorney General, was on brief, for appellee Massachusetts Department of Telecommunications and Energy.

Before LYNCH, LIPEZ, and HOWARD, Circuit Judges.
***18** LYNCH, Circuit Judge.
This appeal represents one part of a larger dispute between Global NAPs, a competitive local exchange carrier (CLEC), and Verizon New England, Inc., an incumbent local exchange carrier (ILEC), in their attempt to reach an interconnection agreement under the Telecommunications Act of 1996(TCA), Pub.L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.). The TCA sets up detailed procedures for the creation of interconnection agreements in order to serve the TCA's goal of fostering competition in local telephone markets. Those procedures allow competing carriers to gain access to the incumbent carrier's telecommunications network and facilities and govern the terms and fees of that access.

Global NAPs appeals from the district court's judgment affirming a February 19, 2003 order of the Massachusetts Department of Telecommunications and Energy (DTE), the state commission given the power to arbitrate disputes over interconnection agreements under the TCA. 47 U.S.C. § 252(b). The February 19, 2003 administrative order followed an earlier December 12, 2002 DTE order deciding the arbitration between Verizon and Global NAPs. That arbitration had been initiated by Global NAPs after a period of negotiation with Verizon failed to produce an agreement on all issues.

The challenged February 19 order allowed a remedial motion by Verizon to force Global NAPs to sign an interconnection agreement consistent with the terms of the DTE's earlier December 12 arbitration order. Verizon brought this motion because Global NAPs had balked at the December 12 arbitration order, said it was not bound by the result of the arbitration, and that it was instead exercising what it thought was its unconditional right under § 252(i) of the Act to adopt the terms of an interconnection agreement Verizon had with Sprint, which preexisted Global NAPs' arbitration request.

The merits of the underlying December arbitration order from the DTE are not before us. The merits issue before us is whether in its February order the DTE acted in violation of § 252(i) of the TCA in precluding Global NAPs from nullifying and avoiding the effect of the arbitration-which binds Global NAPs and Verizon to an agreement-by instead opting into the terms of an older agreement Verizon had signed with Sprint. If Global NAPs were free to so opt in, that would moot the challenge to the

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underlying December arbitration order. We find that the DTE's February 19 order was not in violation of the TCA and affirm the district court.

I.

Before the passage of the TCA, local telephone service was provided mainly by state-regulated monopolies, such as Verizon. These monopolies, the ILECs, owned all networks and facilities (including telephone lines, poles, trunks, etc.) attendant to the provision of local telephone service. *See AT & T Corp. v. Iowa Utils. Bd.,* 525 U.S. 366, 371, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). A purpose of the TCA was to end the local telephone monopolies and create a national telecommunications policy that strongly favored competition in local telephone markets. *See P.R. Tel. Co. v. Telecomm. Regulatory Bd. of P.R.,* 189 F.3d 1, 7 (1st Cir.1999).

Section 251 of the TCA imposes obligations on both competing carriers and incumbent carriers. Section 251(a)(1) imposes a duty on all carriers "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a)(1). ***19** The TCA imposes on an incumbent carrier more stringent duties, including "the duty to permit other carriers to interconnect with its facilities, to provide other carriers with access to elements of its local network on an 'unbundled' basis, to sell to other carriers at wholesale prices the services that it provides to its customers, and to negotiate interconnection agreements in good faith." *P.R. Tel. Co.,* 189 F.3d at 8; *see* 47 U.S.C. § 251(c).

Section 252 provides the procedures for the creation of interconnection agreements.[FN1] Interconnection agreements govern the terms and conditions by which CLECs may gain access to the ILECs' local telephone network and facilities, thus allowing the CLECs to provide competing local telephone service. Incumbents and competitors may negotiate freely an interconnection agreement, and both parties have a duty to negotiate in good faith. 47 U.S.C. § 251(c)(1). If the parties reach an agreement through negotiation, that agreement need not satisfy the substantive requirements of § § 251(b) and (c). *Id.* § 252(a)(1). If after a period of negotiation the parties are not able to come to an agreement on some issues, either party may petition a state commission to decide those open issues in arbitration. *Id.* § 252(b)(1). The commission then has the authority to decide the open issues between the parties, and to impose conditions on the parties for the implementation of the terms of arbitration into an agreement. *Id.* § 252(b)(4)(C). In deciding those issues, the commission must "ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the [Federal Communications Commission] pursuant to section 251." *Id.* § 252(c)(1). Further, either party's refusal to negotiate or to cooperate with the state commission acting as arbitrator constitutes a breach of its duty to negotiate in good faith. *Id.* § 252(b)(5).

FN1. In addition to pursuing an interconnection agreement, a competitor may also seek access to the incumbent's network by purchasing local telephone services at wholesale rates for resale to end users or by leasing elements of the incumbent's network on an "unbundled basis." 47 U.S.C. § 251(c); *U.S. West Communication, Inc. v. Sprint Communications Co.,* 275 F.3d 1241, 1244 (10th Cir.2002).

In addition, the TCA requires ILECs to allow any requesting CLEC to adopt the terms and conditions of any interconnection agreement it has with any other CLEC, provided that agreement has been approved by the requisite state telecommunications commission. *Id.* § 252(i).

Once a negotiated or arbitrated agreement is completed, it must be submitted to the state commission for approval. *Id.* § 252(e)(1). The commission may reject any negotiated agreement if it discriminates against a third party carrier or if its implementation is "not consistent with the public interest, convenience, and necessity." *Id.* § 252(e)(2)(A). The commission may reject an arbitrated agreement if it fails to meet the substantive requirements of § 251, including the FCC's implementing regulations, or the pricing standards set forth in § 252(d). *Id.* § 252(e)(2)(B). That commission decision is subject to federal judicial review:

In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

Id. § 252(e)(6).

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Verizon and Global NAPs began the negotiation process for a new interconnection ***20** agreement in early 2002, because their previous agreement was approaching expiration. On July 30, 2002, Global NAPs filed a petition with the DTE to arbitrate several issues on which the parties could not agree. The DTE issued an order on December 12, 2002, resolving all open issues and ordering the parties to incorporate the arbitrated terms into an agreement and file that agreement with the DTE within 21 days, or by January 2, 2003. The DTE allowed the parties' joint motion for extension of time to file the agreement until January 17, 2003.

On December 30, 2002, Global NAPs brought an action in federal district court challenging the merits of the DTE's arbitration determination.[FN2] The merits of that December 12, 2002 DTE order are not before us.

> FN2. The most important contested issue in that arbitration between the parties relates to the reciprocal compensation requirements between ILECs and CLECs for toll-free calls placed by the ILEC's customers to a CLEC's internet service provider (ISP) customers. This issue has prompted much litigation, including issues concerning the validity of FCC rulings on the issue. *See, e.g., WorldCom, Inc. v. FCC,* 288 F.3d 429 (D.C.Cir.2002).

On January 9, 2003, Global NAPs informed Verizon that, rather than entering into the agreement embodying the DTE's arbitration decision, it would seek to adopt the terms of a preexisting December 19, 2001 agreement Verizon had with Sprint ("Sprint agreement"). Global NAPs contended that it has an unconditional right to do so pursuant to 8 U.S.C. § 252(i). Global NAPs said its adoption of the preexisting Sprint agreement was consistent with the arbitration order, under which Global NAPs retained its § 252(i) rights.

On January 16, 2003, Global NAPs informed the DTE of its intention to opt into the Sprint agreement, in place of the arbitrated agreement. In response, on January 17, 2003, Verizon filed a motion with the DTE to approve the arbitration order, seeking, in essence, to force Global NAPs to execute an agreement consistent with the arbitration order, or alternatively, should the DTE allow Global NAPs to opt into the Sprint agreement, to order that the "agreement be modified to reflect the [DTE]'s legal and policy determinations set forth in the Arbitration Order."

On February 19, 2003, the DTE granted the initial portion of Verizon's motion and ordered the parties to sign and file an agreement consistent with the initial arbitration order. That February 19, 2003 order is the subject of this appeal. All parties agree that this order left Global NAPs free to challenge the substance of the December 12, 2002 arbitration order.

In the February 19 order, the DTE rejected Global NAPs' claim that it retained the unconditional right to opt into the Sprint Agreement even after the DTE issued its arbitration order. The DTE first held that a final arbitration order pursuant to § 252(b) is binding on both parties,[FN3] noting that it had always required that arbitration be binding on both parties. ***21** It held that its rule that arbitrations be binding on both parties was consistent with FCC regulation. *See* 47 C.F.R. § 51.807(h). Further, the DTE noted that the FCC's Local Competition Order, which embodies the FCC's initial post-enactment interpretation of the statute, stated that the states may consider the FCC's rules when implementing their own standards for arbitration. *See* Local Competition Order, 11 F.C.C.R. 15499, 16127, 1996 WL 452885 (1996).

> FN3. The DTE also rejected Global NAPs' claim that when the FCC stated, in the Local Competition Order ¶ 1293, that "competing providers do not have an affirmative duty to enter into agreements under section 252," the FCC meant that CLECs were not bound by the results of an state arbitration under § 252(b). Local Competition Order, 11 F.C.C.R. 15499, 16131, 1996 WL 452885 (1996). Rather, the DTE held that a fuller reading of the TCA and FCC rules shows that this paragraph stood for the narrower proposition that competing carriers, unlike incumbents, cannot be forced to enter into an interconnection agreement, but rather can purchase services directly through the incumbent's tariff. The DTE held that it does not mean that CLECs can avoid the terms of a valid arbitration order.

Further, the DTE held that since the arbitration order directed the parties to file an agreement containing the arbitrated terms, and provided no alternatives, Global NAPs' attempt to opt into the Sprint agreement was in violation of that earlier order. The

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DTE held that "[t]he § 252(i) adoption process permits a CLEC, during the negotiation process, to opt into another carrier's contract, not to do so after a decision has been reached through arbitration."

It also noted that Global NAPs' interpretation of the TCA was contrary to public policy, as it would allow carriers to "game the system" by always attempting to arbitrate, and if unhappy with the results, merely to opt into an existing agreement.[FN4] The DTE ordered the parties to file an agreement consistent with the initial arbitration order within seven days. The parties signed and entered an agreement consistent with the court's ruling, under Global NAPs' protest. The DTE did not, contrary to Global NAPs' assertion, hold that a party to an arbitrated agreement can never exercise rights under § 252(i). It also did not, contrary to Verizon's assertion, hold that a party subject to a valid arbitration order could never, under § 252(i), take advantage of terms in a previously available agreement.

FN4. The DTE reasoned that competing carriers would have no incentive to negotiate and would always seek arbitration, because the ability to opt into an existing agreement post-arbitration would mean that such competitors could only benefit and never be made worse off by arbitration. That would waste the DTE's limited resources and be unduly burdensome to incumbents.

On March 6, 2003, Global NAPs filed a second action in district court, this time challenging the DTE's February 19 order.

On March 11, 2003, all parties to the second litigation (Global NAPs, Verizon, and the DTE) filed a joint motion to consolidate Global NAPs' two actions. In that motion, the parties proposed that the district court rule on Global NAPs' challenge of the DTE's February 19 order-whether Global NAPs is permitted to opt into the Sprint Agreement-prior to ruling on its challenge to the DTE's underlying arbitration order-the merits of the arbitration agreement. The district court granted the motion and accepted the parties' briefing schedule, under which the parties filed cross motions for summary judgment in the first action on the issue whether § 252(i) would permit Global NAPs to opt into the Sprint agreement despite the existence of the DTE's arbitration order to the contrary. The district court granted Verizon's and the DTE's motions for summary judgment, and denied Global NAPs' motion. Global NAPs timely appealed.

II.

Appellate Jurisdiction

[1] The parties agree the federal courts have subject matter jurisdiction to review state agency determinations under the TCA for compliance with federal law, pursuant to 28 U.S.C. § 1331. ***22***Verizon Md., Inc. v. Public Serv. Comm'n of Md.,* 535 U.S. 635, 642, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002). *See also,* 47 U.S.C. § 252(e)(6).

Verizon initially argues that this court lacks appellate jurisdiction to hear Global NAPs' appeal due to (1) the lack of a final judgment under 28 U.S.C. § 1291 and (2) lack of standing in Global NAPs. The DTE does not join Verizon in arguing lack of appellate jurisdiction or lack of standing, but briefs the case on the merits.

[2][3] Verizon argues that the district court's ruling was not a final judgment because Global NAPs' two actions were consolidated, thus rendering them one case, and the grant of summary judgment disposed of only one of the two consolidated cases. This argument is without merit. The disposition of one case in a consolidated action is a final and appealable judgment unless the cases were consolidated "for all purposes." *See Bay State HMO Management, Inc. v. Tingley Sys., Inc.,* 181 F.3d 174, 178 n. 3 (1st Cir.1999). In moving to consolidate these cases, the parties expressly requested that the district court review the February 12, 2003 DTE order before proceeding with its review of the December 12, 2002 order, and the district court agreed to do so.[FN5] Review of the merits of the December 12, 2002 arbitration order was, in essence, stayed pending the court's determination of the challenge to the second DTE order; the parties proposed completely separate briefing schedules for the review of the two consolidated cases. Verizon's claim that the cases were consolidated "for all purposes" is wrong and Verizon's last minute assertion is inconsistent with how it presented its case in the trial court.

FN5. Further, we note that Verizon did not move to challenge jurisdiction upon the filing of Global NAPs' appeal, waiting instead until the filing of its brief to do so.

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These circumstances bring the case squarely within the bounds of *In re Massachusetts Helicopter Airlines, Inc.,* 469 F.2d 439 (1st Cir.1972). There, this court determined that the claims in a consolidated action remained separate, and therefore a Rule 54(b) determination was not required for appellate jurisdiction to be proper, because "[e]xcept for the consolidation of the[ ] cases for the convenience of pre-trial and trial procedure, the cases maintained their separate identities throughout the litigation. Separate judgments were entered in each of the five cases." *Id.* at 441. We found this to be consistent with the theory behind consolidation, which was a procedural mechanism meant to serve the purposes of judicial economy and convenience of the parties, as here, but not to alter the substantial rights the parties had in the separate actions.[FN6] *Id.*

FN6. Verizon's attempt to characterize the district court's order as a grant of partial summary judgment is in error. There is nothing in the district court's memorandum or judgment that suggests it was a grant of partial summary judgment.

Verizon relies on a notation in the district court docket from the clerk of court that the second complaint, i.e. the present case, was consolidated "for all future proceedings," and that this removes it from the *Massachusetts Helicopter* rule. *See Bay State HMO Management, Inc., v. Tingley Sys., Inc.,* 181 F.3d 174, 178 n. 3. The reality of the situation is that the consolidation was for purposes of convenience and efficiency.

Verizon also urges us to overrule *Massachusetts Helicopter* in favor of the Ninth Circuit rule in *Huene v. United States,* 743 F.2d 703, 705 (9th Cir.1984), also followed in *Trinity Broad. Corp. v. Eller,* 827 F.2d 673, 675 (10th Cir.1987) and ***23***Spraytex, Inc. v. DJS&T, Homax Corp.,* 96 F.3d 1377, 1382 (Fed.Cir.1996). The advantage, it says, of the Ninth Circuit rule is that it provides a bright line-no ruling in a consolidated case may be appealed until there is an ultimate final judgment on all matters. That is true. The disadvantage of the rule is that it may cause injustice on particular facts, and the rule acts as a disincentive which may prevent consolidation for purely pragmatic reasons of convenience and efficiency.

In any event, our adherence to the *Massachusetts Helicopter* rule was reaffirmed more recently in *Bay State HMO Management,* 181 F.3d at 178 n. 3. As a panel, we are not free to overrule circuit precedent. The district court's grant of summary judgment is a final order within the meaning of 28 U.S.C. § 1291.

[4] Verizon's challenge to Global NAPs' standing to pursue an appeal is also without merit. Verizon's claim of lack of standing seems to be predicated on the notion that, if Global NAPs is allowed to opt into the Sprint agreement, the DTE will construe the Sprint agreement in a manner consistent with the terms of the arbitration order, and thus Global NAPs will be no better off.

Global NAPs disagrees, and recites injury to itself. Further, Verizon's position is contrary to its position below in several respects. Among them is that Verizon requested from the DTE that, should the DTE allow Global NAPs to adopt the Sprint agreement, then the agreement be modified to adopt legal and policy determinations made in the arbitration order. If the Sprint agreement were not materially different from the challenged agreement, such modification would not be necessary. Indeed, Global NAPs would not be trying to join the Sprint agreement. Further, the possibility that the DTE *might* construe the Sprint agreement consistently with the December 12 arbitration order, and that doing so would be upheld against a likely challenge, is insufficient to render Global NAPs without standing in this case. We reject the lack of standing argument.

III.

Interpretation of the TCA § 252(i)

[5] The precise legal question under review is narrow, though one of first impression in the circuit courts of appeals: does a competing carrier have an unconditional right, under § 252(i) of the TCA, to avoid the terms of a final arbitration order from a state telecommunications commission, adjudicating a dispute between the CLEC and ILEC, by seeking to opt into the terms of a previous interconnection agreement that the ILEC has with another CLEC? This is an issue of federal statutory interpretation of the TCA.[FN7] We agree with the DTE and the district court that the TCA grants no such right.

FN7. Since the FCC, and not the individual state commissions, is the agency with the power granted by Congress to administer the

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TCA, through the formulation of policy, rulemaking, and regulation, we do not afford deference to the DTE's interpretation of the statute under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

Standard of Review

[6] This circuit has not previously articulated precisely the standard of judicial review of state agency determinations under the TCA. Issues of law, as here, are subject to de novo review, *P.R. Tel. Co. v. Telecomm. Regulatory Bd. of P.R.,* 189 F.3d 1, 7 (1st Cir.1999), and we apply that standard to state agency determinations under the TCA.[FN8]

FN8. Each of the Circuits that has addressed the standard of review under the TCA has held that where the state agency determination rests principally on an interpretation of the TCA, de novo review is applied. *See, e.g., Ind. Bell Tel. Co. v. McCarty,* 362 F.3d 378, 383 (7th Cir.2004); *MCIMetro Access Transmission Servs. v. Bellsouth Telecomms., Inc.,* 352 F.3d 872, 876 (4th Cir.2003); *Coserv. Ltd. Liab. Corp. v. Southwestern Bell Tel. Co.,* 350 F.3d 482, 486 (5th Cir.2003); *U.S. West Communications, Inc. v. Sprint Communications Co.,* 275 F.3d 1241, 1248 (10th Cir.2002); *AT & T Communications of S. States, Inc. v. BellSouth Telecomm., Inc.,* 268 F.3d 1294, 1296 (11th Cir.2001); *AT&T Communications of N.J. v. Verizon N.J., Inc.,* 270 F.3d 162, 169 (3d Cir.2001); *U.S. West Communications., Inc. v. MFS Intelenet, Inc.* 193 F.3d 1112, 1117 (9th Cir.1999). Further, other Circuits have held that where no error of law exists, the state agency's other determinations are reviewed under the arbitrary and capricious standard. *See, e.g., MCI Telecomms. Corp. v. Ohio Bell Tel. Co.,* 376 F.3d 539, 548 (6th Cir.2004); *U.S. West Communications, Inc.,* 275 F.3d at 1248; *Southwestern Bell Tel. Co. v. Waller Creek Communications, Inc.,* 221 F.3d 812, 816 (5th Cir.2000); *MFS Intelenet,* 193 F.3d at 1117.

***24** In interpreting a statute, we begin with the text. *BedRoc Ltd. v. United States,* 541 U.S. 176, 124 S.Ct. 1587, 1593, 158 L.Ed.2d 338 (2004). Section 252(i) states:

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

47 U.S.C. § 252(i). In urging the court to hold that § 252(i) gives it an unconditional right to avoid the terms of an arbitration order and opt into a previously available agreement, Global NAPs points out that the text of § 252(i) does not state expressly when and under what circumstances the incumbent must make interconnection agreements available to other competitors. From this silence, Global NAPs argues it is free to opt in at any time it chooses. But § 252(i) does not expressly state what Global NAPs reads it to mean either. At best, § 252(i) is ambiguous on the subject, if that section is read alone. The absence of an express statement in § 252(i) does not end the matter; the section must be read in light of the structure and intent of the statute. Global NAPs' broad reading of § 252(i) is incorrect, because that reading brings § 252(i), under the circumstances of this case, into direct conflict with, and in important aspects negates, several other sections of the TCA.

Global NAPs' reading is inconsistent with the basic arbitral power vested in the state commission. Section 252(b), entitled "Agreements arrived at through compulsory arbitration," allows for either party to an interconnection agreement to petition a state commission for arbitration of open issues, and grants powers to the state commission to carry out the arbitration. *Id.* § 252(b).

Global NAPs' reading is also inconsistent with the power of state commissions to make their arbitral decisions *binding on both parties.* Section 252(b)(4)(C) requires the state commission to "resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement." *Id.* § 252(b)(4)(C). In turn, subsection (c), among other things, states that "a State commission shall ... provide a schedule for implementation of the terms and conditions by the parties to the agreement." *Id.* § 252(c). By allowing the commission acting as arbitrator to place conditions on *both* parties for the implementation of interconnection agreements, it is clear that § 252(b)(4)(C) intends for arbitration orders to be binding on both parties.

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***25** Global NAPs responds that arbitration orders are not binding because generally under the TCA, the obligations on CLECs are not equal to or reciprocal with those on ILECs and so arbitration decisions are equally asymmetrical in their results. Global NAPs also makes a broader argument that the FCC's regulations, and the TCA generally, create asymmetrical rights and obligations on competitors and incumbents, and those greatly tip the scale in favor of competitors. It argues that under § 252 incumbents are required to enter into interconnection agreements, but competitors are not. Thus Global NAPs argues that, to the extent there is ambiguity as to the scope of § 252(i), it should be construed broadly in favor of competitors and against the incumbent, consistent with the asymmetry created by the statute and regulations as a whole.

This argument, however, ignores the important fact that § 252(b) is *not* one of the areas of the TCA that creates asymmetrical obligations on the parties. Section 252(b)(1) allows either party to the negotiation to petition for arbitration. Section 252(b)(4) allows the state commission to impose conditions on both parties in order to carry out the arbitration. And § 252(b)(5) creates a duty for both parties to cooperate with the arbitration at the risk of breaching the duty both parties have, under § 252(a), to negotiate in good faith. There is no basis for Global NAPs' reading § 252(i) as somehow turning the parallel obligations that run throughout § 252(b) into merely one-way obligations.

Further, Global NAPs' reading is in conflict with the statutory duties of good faith and cooperation with the commission as arbitrator. The TCA, at § 252(b)(5), states:

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

Id. § 252(b)(5). In attempting to void the terms of a valid arbitration order, it is clear that Global NAPs is refusing to cooperate with the DTE, in violation of its duty to negotiate in good faith.[FN9]

FN9. The record is clear that the DTE did not consider its order to be a penalty. Rather, the DTE held that § 252(i) could not be read to allow Global NAPs to void the terms of the binding arbitration order by opting into an agreement available to them throughout the entire period of negotiation and arbitration.

Global NAPs responds by asking the court to read an implicit limitation on the good faith requirement of § 252(b)(5)-that CLECs are not bound by the terms of § 252(b)(5) if they attempt to opt into a previously available contract. Global NAPs says that this is the effect of § 252(i). But § 252(i) says nothing of the sort. Rather, it is written in terms of an obligation on the part of ILECs to make agreements available to potential CLECs, not as an unconditional right on the part of CLECs to modify their clear obligations under earlier subsections of § 252. We read the sections consistently, and conclude that § 252(i) is not an implicit limit on the binding effect of the arbitration provisions of § 252(b)(5). In this context, there is nothing ambiguous about the terms of § 252(b)(4)(C) and (b)(5).

Global NAPs' argument is also inconsistent with the judicial review provisions in the TCA, for determinations made by a state commission:

In any case in which a State commission makes a determination under this ***26** section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. § 252(e)(6). If “any party aggrieved by a determination” feels the arbitral determination is contrary to the TCA, its remedy is through judicial review, not self-help.

In addition to our reading of the statutory sections, there is another source of law to consider: FCC regulations interpreting the statutory sections at issue, albeit on different points. The FCC's interpretation is relevant in two senses. First, under § 252(c)(1), the DTE itself must “ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251.” *Id.* § 252(c)(1). Second, to the extent there is ambiguity in the statute, present here in § 252(i) but not in § 252(b)(4)(C) and (b)(5), deference is due to the FCC's reasonable interpretation. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).[FN10]

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FN10. The FCC is explicitly granted rulemaking authority under the TCA, 47 U.S.C. § 201(b), and the Supreme Court has held that this includes rulemaking power for § § 251 and 252, without being limited to interstate and foreign matters. *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999).

The FCC has not interpreted the statute on the precise question before us. That is not surprising, since the issue is one of the power of a state commission. The TCA is an interwoven whole and the FCC's interpretation of related strands of the weaving is relevant, at least by analogy.

Both sides cite to the FCC's regulation interpreting § 252(i), found at 47 C.F.R. § 51.809, in support of their interpretation of the statute. The regulation, 47 C.F.R. § 51.809(b), provides two express limitations to a CLEC's opt in rights under § 252(i): an incumbent need not make available the terms of an interconnection agreement to a particular competitor 1) if it shows that the costs of providing a service will be greater to the requesting competitor than it was to the original negotiating party, or 2) if it shows that the provision of that service is technically infeasible. 47 C.F.R. § 51.809(b). In addition, there is a third limitation: 47 C.F.R. § 51.809(c) states that incumbents must make terms of interconnection agreements available to other competitors only "for a reasonable time" after their approval by the state commission.

The FCC regulation 47 C.F.R. § 51.809 itself rejects Global NAPs' premise that § 252(i) grants an unconditional right to CLECs to adopt the terms of any interconnection agreement the ILEC has with another CLEC. The obligation of ILECs to make those agreements available to other CLECs is itself subject to conditions: comparable-cost, technical-feasibility, and the reasonable-time restrictions are three such conditions contemplated by the regulation. [FN11]

FN11. The reasoning provided for our reading of the statute above, consistent with the entirety of § 252, adequately dispels Global NAPs' argument that the limitations on § 252(i) promulgated by the FCC in § 51.809 are the *only* permissible limitations that could apply to that subsection.

The reasonable-time requirement under 47 C.F.R. § 51.809(c) is particularly relevant. Here, after all, the DTE has said it might have reached a different outcome if, during the pendency of an arbitration, Global NAPs had sought to withdraw its ***27** request for arbitration in favor of exercising whatever opt in rights it had. The DTE held only that once it had concluded its arbitration and issued its order, Global NAPs was not free to enter into an opt in agreement in lieu of accepting arbitrated terms and incorporating them into its agreement. The DTE's position is entirely consistent with the FCC regulation's reasonable-time requirement.

We also consider the parties' arguments based on the FCC's Local Competition Order, which embodies the FCC's initial interpretative rulemaking implementing the TCA after its passage in 1996, as support for its interpretation of the statute. *See* 11 F.C.C.R. 15499 (1996). Global NAPs attempts to argue that while FCC arbitrations are binding on both parties, 47 C.F.R. § 51.807(h), the Local Competition Order demonstrates that arbitrations before state agencies under § 252(b) are only binding on incumbents. It makes a sort of negative pregnant argument from the FCC's Local Competition Order ¶ 1293, which states:

Absent mutual agreement to different terms, the decision reached through arbitration is binding. We conclude that it would be inconsistent with the 1996 Act to ... permit incumbent LECs to not be bound by an arbitrated determination. We also believe that, although competing carriers do not have an affirmative duty to enter into agreements under section 252, a requesting carrier might face penalties if, by refusing to enter into an arbitrated agreement, that carrier is deemed to have failed to negotiate in good faith.

11 F.C.C.R. at 16131, 1996 WL 452885. Global NAPs contends that this renders the arbitration provision a one-way ratchet: incumbents are bound by the arbitration decision, but competitors are not. We disagree. The Order does not say that competitors are not required to accept the terms of an arbitration order. Rather it says that competitors are not required "to enter into agreements under section 252," and this is clearly correct. The law mandates that an incumbent must enter into an interconnection agreement under the requisite conditions, and the competitor need not enter into an agreement even if the incumbent so desires. It says nothing about the obligations of a competitor that is subject to the terms of a binding arbitration order.

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Significantly, the Local Competition Order does not state that competitors have a right to use § 251(i) to avoid their obligations under a binding arbitration order. Properly read the Order refers to the admitted binding effect in FCC arbitrations, but says nothing about state arbitrations. Further, the FCC regulation's explicit statement of the binding effect on both parties supports the DTE's position. *See* 47 C.F.R. § 51.807(h).

Global NAPs then makes another argument based on lack of symmetry as to most favored nation clauses. Global NAPs cites to Local Competition Order ¶ 1316, as well as the Tenth Circuit's decision in *U.S. West Communications, Inc. v. Sprint Communications Co.,* 275 F.3d 1241 (10th Cir.2002), to support its interpretation of § 252(i). Neither is helpful to Global NAPs' position. Paragraph 1316 of the Local Competition Order states:

We further conclude that section 252(i) entitles all parties with interconnection agreements to "most favored nation" status regardless of whether they include "most favored nation" clauses in their agreements. Congress's command under section 252(i) ... means that any requesting carrier may avail itself of more advantageous terms and conditions *subsequently* negotiated by any other carrier for the same individual interconnection,***28** service, or element once the subsequent agreement is filed with, and approved by, the state commission.

11 F.C.C.R. at 16139-40, 1996 WL 452885 (emphasis added). Paragraph 1316's "most favored nation" language deals with an issue not presented here: the ability of a party to an existing interconnection agreement to adopt the terms of another carrier's agreement that is *subsequently* approved by a state commission. The DTE's decision said nothing about Global NAPs' § 252(i) rights to adopt terms in subsequently approved agreements, nor does our decision here do so.

Global NAPs' reliance on *U.S. West* suffers from a similar problem. The question that court faced was whether the state commission acting as arbitrator properly interpreted § 252(i) to allow a competitor to amend its interconnection agreement to take advantage of an incumbent's tariffs, as opposed merely to an element in another competitors' approved interconnection agreement, that are more favorable than the prices in its agreement. *U.S. West,* 275 F.3d at 1249. The case did not say that a CLEC subject to a binding arbitration order can use § 252(i) to avoid the terms of that order and adopt completely the terms of a previously available agreement.

Global NAPs makes a final, policy-based argument that reading § 252(i) to prevent it from opting into the Sprint agreement post-arbitration is both anti-competitive and discriminatory, and thus at odds with the purpose of the TCA. If what Global NAPs alleges were true, namely that the terms of the underlying arbitration order are either contrary to law or unduly burdensome on Global NAPs (or both), the statute provides Global NAPs with a remedy-direct review of the terms of the arbitration order in district court. 47 U.S.C. § 252(e)(6). This is the remedy Congress provided.

Accordingly, we ***affirm.*** Costs are awarded to Verizon.

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396 F.3d 16, 34 Communications Reg. (P&F) 1390

Briefs and Other Related Documents (Back to top)

- 2004 WL 3590860 (Appellate Brief) Brief of Defendants-Appellees, Commissioners of the Massachusetts Department of Telecommunications and Energy (Oct. 20, 2004) Original Image of this Document with Appendix (PDF)
- 2004 WL 3590859 (Appellate Brief) Brief of the Appellant, Global NAPs, Inc. (Aug. 30, 2004) Original Image of this Document with Appendix (PDF)
- 04-1711 (Docket) (Jun. 4, 2004)

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CERTIFICATE OF SERVICE

ARB 747

I hereby certify that on the 19th day of December 2006, I served the foregoing **QWEST CORPORATION'S RESPONSE TO PETITION OF BEAVER CREEK COOPERATIVE TELEPHONE COMPANY FOR EXTENSION OF DATE TO COMPLY WITH ORDER NO. 06-637** in the above entitled docket on the following person via U.S. Mail, by mailing a correct copy to him in a sealed envelope, with postage prepaid, addressed to him at his regular office address shown below, and deposited in the U.S. post office at Portland, Oregon.

Richard Finnigan
Attorney at Law
2112 Black Lake Blvd. SW
Olympia, WA 98512

DATED this 19th day of December, 2006.

QWEST CORPORATION

By: ______________________________
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