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March 29, 2004

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**Re: Notice of Oral *Ex Parte* Presentation by the PACE Coalition in WC
Docket No. 03-157**

Dear Ms. Dortch:

On March 26, 2004, Richard Ramlall of CloseCall America and Genevieve Morelli and the undersigned of Kelley Drye & Warren, on behalf of the PACE Coalition, met with Brent Olson, Ian Dillner, Mike Engel, and Dennis Johnson of the Wireline Competition Bureau to discuss BellSouth's petition for declaratory ruling in the above-referenced proceeding.

The presentation focused on the comments filed by the PACE Coalition on January 20, 2004. Specifically, we indicated that the relief requested by BellSouth is not proper under the Triennial Review Order,¹ as none of the state decisions complained of by BellSouth ordered unbundling of additional network elements. In addition, we stressed that a specific petition pursuant to section 253 of the Act, not BellSouth's generic request, is the necessary procedural vehicle for the relief requested by BellSouth. We also voiced support for the Department of Justice's position that BellSouth's request for declaratory ruling should be held in

¹ See *Review of the section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978 (2002), reversed and remanded, *United States Telecom Ass'n v. FCC*, D.C. Cir. No. 00-1012 (and consolidated cases) (decided Mar. 2, 2004).

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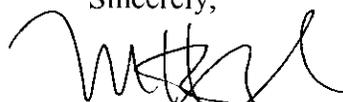
abeyance or dismissed without prejudice pending Commission resolution of other broadband matters.

We furthermore discussed the Fifth Circuit's decision in *Coserv v. Southwestern Bell Telephone Co.*, 350 F.3d 482 (5th Cir. 2002), which holds "that where the parties have voluntarily included in negotiations issues other than those duties required of an ILEC by § 251(b) and (c), those issues are subject to compulsory arbitration under § 252(b)(1)."² Under *Coserv*, preemption may not be possible when the parties have negotiated and arbitrated terms related to the provision of DSL service and the provision of plain old telephone service.

Finally, we discussed a variety of policy issues consistent with the PACE Coalition's January 20, 2004 comments. We underscored that grant of BellSouth's petition primarily would have the effect of limiting the addressable market of carriers that utilize the unbundled network element platform. Mr. Ramlall also made the point that grant of BellSouth's petition would discourage CloseCall America from expanding into the BellSouth territory.

In accordance with the Commission's rules, this letter is being filed electronically for inclusion in the public record in the above-referenced proceeding. If you have any questions regarding this matter, please contact me at (202) 887-1240.

Sincerely,



Michael B. Hazzard
Counsel to the PACE Coalition

Attachment

cc: Brent Olson
Ian Dillner
Mike Engel
Dennis Johnson

² A copy of this decision is attached hereto.

Briefs and Other Related Documents

United States Court of Appeals,
Fifth Circuit.
**COSERV LIMITED LIABILITY CORPORATION; Multitechnology Services LP, Plaintiffs-
Appellants,**
v.
**SOUTHWESTERN BELL TELEPHONE COMPANY; Public Utility Commission of Texas;
Rebecca Klein; Paul Hudson; Julie Parsley, Defendants-Appellees.**
No. 02-51065.
Nov. 21, 2003.

Competitive local exchange carrier (CLEC) requested interconnection agreement governing incumbent local exchange carrier's (ILEC's) duties under the Telecommunications Act and, when voluntary negotiations failed to result in an agreement, filed petition for arbitration with the Texas Public Utility Commission (PUC). After the PUC's entry of an arbitration award, CLEC brought action in federal district court, challenging the PUC's finding that it lacked jurisdiction to arbitrate issues relating to "compensated access." The United States District Court for the Western District of Texas, Sam Sparks, J., granted summary judgment in favor of ILEC, and CLEC appealed. Addressing an issue of apparent first impression in the Fifth Circuit, the Court of Appeals, E. Grady Jolly, Circuit Judge, held that: (1) state commissions arbitrating disputes between ILECs and CLECs may arbitrate any issue that was the subject of the parties' voluntary negotiations, and are not limited to those duties set forth in sections of the Act governing duties of local exchange carriers (LECs) and ILECs, and (2) in the instant case, the PUC properly denied jurisdiction over the compensated access issue, because compensated access was not a mutually agreed upon subject of voluntary negotiation between ILEC and CLEC.

Affirmed.

West Headnotes

[1] KeyCite Notes 

- ↳ 170B Federal Courts
 - ↳ 170BVIII Courts of Appeals
 - ↳ 170BVIII(K) Scope, Standards, and Extent
 - ↳ 170BVIII(K)1 In General
 - ↳ 170Bk776 k. Trial De Novo. Most Cited Cases

Court of Appeals reviews a grant of summary judgment *de novo*, applying the same standard as the district court.

[2] KeyCite Notes 

- ↳ 372 Telecommunications
 - ↳ 372II Telegraphs and Telephones
 - ↳ 372II(E) Telephone Service
 - ↳ 372k263 k. Judicial Review and Remedies; Injunction. Most Cited Cases

District court reviews the compliance of an interconnection agreement with federal law and related matters of statutory interpretation *de novo*.

[3] KeyCite Notes 

- ↳ 361 Statutes

- ☞361VI Construction and Operation
 - ☞361VI(A) General Rules of Construction
 - ☞361k187 Meaning of Language
 - ☞361k188 k. In General. Most Cited Cases

In matters of statutory interpretation, court begins with the plain language and structure of the statute.

[4] KeyCite Notes 

- ☞33 Arbitration
 - ☞33I Nature and Form of Proceeding
 - ☞33k4.1 k. Compulsory Arbitration. Most Cited Cases

Compulsory arbitration under the Telecommunications Act begins with a request by a competitive local exchange carrier (CLEC) to negotiate with an incumbent local exchange carrier (ILEC) regarding its obligations under the Act. Communications Act of 1934, §§ 251, 252, as amended, 47 U.S.C.A. §§ 251, 252.

[5] KeyCite Notes 

- ☞372 Telecommunications
 - ☞372II Telegraphs and Telephones
 - ☞372II(E) Telephone Service
 - ☞372k267 k. Competition, Agreements and Connections Between Companies. Most Cited Cases

Incumbent local exchange carrier (ILEC) is required by the Telecommunications Act to negotiate about those duties listed in sections of the Act setting forth duties of local exchange carriers (LECs) and ILECs. Communications Act of 1934, § 251(b, c), as amended, 47 U.S.C.A. § 251(b, c).

[6] KeyCite Notes 

- ☞372 Telecommunications
 - ☞372II Telegraphs and Telephones
 - ☞372II(E) Telephone Service
 - ☞372k267 k. Competition, Agreements and Connections Between Companies. Most Cited Cases

During negotiations between competitive local exchange carrier (CLEC) and incumbent local exchange carrier (ILEC) regarding ILEC's obligations under the Telecommunications Act, the parties are free to make any agreement they want without regard to the requirements of the sections of the Act setting forth the duties of local exchange carriers (LECs) and ILECs; to that extent, the parties are free to include interconnection issues that are not listed in the statute in their negotiations. Communications Act of 1934, § 251(b, c), as amended, 47 U.S.C.A. § 251(b, c).

[7] KeyCite Notes 

- ☞33 Arbitration
 - ☞33I Nature and Form of Proceeding
 - ☞33k4.1 k. Compulsory Arbitration. Most Cited Cases

If voluntary negotiations between competitive local exchange carrier (CLEC) and incumbent local exchange carrier (ILEC) regarding ILEC's obligations under the Telecommunications Act result in

only a partial agreement, or in no agreement at all, either party can petition for compulsory arbitration of any open issue. Communications Act of 1934, §§ 251, 252, as amended, 47 U.S.C.A. §§ 251, 252.



[8] KeyCite Notes

33 Arbitration

33I Nature and Form of Proceeding

33k4.1 k. Compulsory Arbitration. Most Cited Cases

Where competitive local exchange carrier (CLEC) and incumbent local exchange carrier (ILEC) have voluntarily included in negotiations issues other than those duties required of an ILEC by the Telecommunications Act, those issues are subject to compulsory arbitration; the jurisdiction of the state public utility commission (PUC), to arbitrate "any open issues," is not limited by the terms of the Act provisions setting forth the ILEC's duties but, instead, is limited by the actions of the parties in conducting voluntary negotiations. Communications Act of 1934, §§ 251(b, c), 252(b)(1), as amended, 47 U.S.C.A. §§ 251(b, c), 252(b)(1).



[9] KeyCite Notes

33 Arbitration

33I Nature and Form of Proceeding

33k4.1 k. Compulsory Arbitration. Most Cited Cases

Party petitioning for arbitration pursuant to the Telecommunications Act may not use the Act's compulsory arbitration provision to obtain arbitration of issues that were not the subject of negotiations. Communications Act of 1934, § 252(b)(1), as amended, 47 U.S.C.A. § 252(b)(1).



[10] KeyCite Notes

372 Telecommunications

372II Telegraphs and Telephones

372II(E) Telephone Service

372k267 k. Competition, Agreements and Connections Between Companies. Most Cited Cases

Incumbent local exchange carrier (ILEC) is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Telecommunications Act when a competitive local exchange carrier (CLEC) requests negotiation. Communications Act of 1934, §§ 251, 252, as amended, 47 U.S.C.A. §§ 251, 252.



[11] KeyCite Notes

33 Arbitration

33V Arbitrators and Proceedings

33k29 Nature and Extent of Authority

33k29.1 k. In General; Agreement or Submission as Determinative. Most Cited Cases

Where compensated access was not a mutually agreed upon subject of voluntary negotiation between incumbent local exchange carrier (ILEC) and competitive local exchange carrier (CLEC), that fact was a sufficient basis for the state public utility commission's (PUC's) denial of jurisdiction over the issue, as arbitrator, pursuant to the Telecommunications Act. Communications Act of 1934, § 252(b)(1), as amended, 47 U.S.C.A. § 252(b)(1).

***484** Lawrence R. Freedman (argued), Richard L. Davis, Fleischman & Walsh, Washington, DC, Jesus Sifuentes, Sifuentes, Drummond & Smith, Austin, TX, for Plaintiffs-Appellants. David John Schenck (argued), Robert Edwin Davis, Floyd Richard Hartley, Hughes & Luce, Dallas, TX, Thomas J. Horn, SBC Communications, Austin, TX, for Southwestern Bell Tel. Co. Elizabeth R. B. Sterling, Asst. Atty. Gen. (argued), Austin, TX, for Public Utility Com'n of Texas, Yzaguirre, Klein, Hudson and Parsley.
Appeal from the United States District Court for the Western District of Texas.

Before JOLLY, HIGGINBOTHAM and STEWART, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

In this case of first impression in this Circuit we interpret the compulsory arbitration provision of the Telecommunications Act of 1996 ("Telecom Act" or "Act") set forth at 47 U.S.C. § 252(b)(1). We hold that only issues voluntarily negotiated by the parties pursuant to § 252(a) are subject to the compulsory arbitration provision. In so holding, we affirm on alternative grounds the district court's grant of summary judgment.

I

Southwestern Bell Telephone Company ("SWBT") and **Coserv** Limited Liability Corporation ("**Coserv**") are local exchange carriers subject to the Telecom Act. SWBT is an incumbent local exchange ***485** carrier (ILEC) that provides telecommunications services and operates telecommunications equipment throughout Texas. **Coserv** is a competitive local exchange carrier (CLEC) that provides telecommunications services and operates telecommunications facilities located at approximately fifty-eight apartment complexes in Texas. At each of the apartment complexes, **Coserv's** facilities include telecommunications equipment in a central telephone equipment room as well as equipment and wires running to multiple buildings and individual apartments. In order to allow tenants to select telephone service from other telecommunications providers, **Coserv** allows other providers to bring a network connection to a single point in the central telephone equipment room. **Coserv** typically charges these other providers a one-time connection fee and a monthly service fee for the connection and use of its facilities. **Coserv** terms this practice "compensated access".

The obligations of SWBT, **Coserv**, and all other local exchange carriers, both incumbents as well as competitors, are listed in Section 251(b) of the Act. These obligations relate to: resale of telecommunications services; number portability; dialing parity; access to right-of-ways; and reciprocal compensation. [FN1] In addition, § 251(c) places six specific duties on ILECs, which relate to: the duty to negotiate; interconnection; unbundled access; resale; notice of changes; and collocation. [FN2] An ILEC's § 251(c)(1) duty to negotiate is limited in scope to "the particular terms and conditions of agreements to fulfill the duties described in [§ 251(b) and (c)]." [FN3]

FN1. 47 U.S.C. § 251(b).

FN2. 47 U.S.C. § 251(c).

FN3. 47 U.S.C. § 251(c)(1). The section reads in its entirety:

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

In § 252, the Act specifies the procedures for an ILEC to fulfill its duty to negotiate. Upon receiving a request for an agreement pursuant to the duties listed in § 251, an agreement can be reached through voluntary negotiations or through compulsory arbitration. [FN4] Under the provision for voluntary negotiations, the parties are free to reach any agreement, *without* regard to the duties set forth in § 251. [FN5] However, any voluntary agreement must be submitted to the state commission for approval. [FN6] The compulsory arbitration clause provides that:

FN4. 47 U.S.C. § 252(a) & (b).

FN5. 47 U.S.C. § 252(a)(1), "Voluntary negotiations," reads in part:

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title.

FN6. 47 U.S.C. § 252(a)(1).

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate *any open issues*. [FN7]

FN7. 47 U.S.C. § 252(b) (emphasis added).

***486** The meaning of the phrase, "any open issues" is the subject of this appeal. Once a petition for arbitration has been accepted by the state commission, the state commission "shall resolve each issue set forth in the petition ... by imposing appropriate conditions as required to implement subsection (c) of this section." [FN8] In resolving any open issues, the state commission shall ensure that the requirements of § 251 are met. [FN9]

FN8. 47 U.S.C. § 252(b)(4)(C).

FN9. 47 U.S.C. § 252(c)(1).

II

Coserv requested an interconnection agreement governing SWBT's duties under § 251. The parties proceeded with voluntary negotiations pursuant to § 252. **Coserv** sought to add to the negotiations its proposed rates, terms, and conditions for compensated access. SWBT refused to negotiate issues relating to compensated access. Voluntary negotiations over SWBT's § 251 duties continued but did

not result in an interconnection agreement.

Coserv filed a petition for arbitration with the Public Utility Commission ("PUC"), pursuant to § 252. **Coserv** identified several issues that it claimed remained open between the parties, including issues relating to compensated access. SWBT argued that the PUC lacked jurisdiction to arbitrate issues relating to compensated access and the PUC ultimately agreed. The PUC read § 252's "any open issues" clause narrowly, concluding that:

§ 251(c) limits the scope of interconnection agreements arbitrated pursuant to FTA § 252 to those duties described in "paragraphs (1) through (5) of subsection (b) and this subsection." ... By the clear terms of § 251(c), the parties' good faith duties to negotiate in accordance with § 252 are restricted to those duties described in (1)-(5) of (b), which apply to all LECs, and (c), which applies to ILECs exclusively.

The PUC entered an arbitration award setting forth an interconnection agreement governing SWBT's duties to **Coserv** under § 251 and refusing to consider the compensated access issues based on lack of jurisdiction. **Coserv** brought an action in federal district court challenging the PUC's jurisdictional finding. The district court agreed with the PUC and granted summary judgment accordingly. **Coserv** appeals the judgment of the district court.

III

[1]  [2]  We review the grant of summary judgment *de novo*, applying the same standard as the district court. [FN10] A district court reviews the compliance of an interconnection agreement with federal law and related matters of statutory interpretation *de novo*. [FN11]

FN10. *Wyatt v. Hunt Plywood Co.*, 297 F.3d 405, 408 (5th Cir.2002).

FN11. *Southwestern Bell Telephone Co. v. Public Utility Commission of Texas*, 208 F.3d 475, 482 (5th Cir.2000); *U.S. West Communications v. MFS Intelenet*, 193 F.3d 1112, 1117 (9th Cir.1999).

[3]  We begin, as we always do in matters of statutory interpretation, with the plain language and structure of the statute. [FN12] Section 251 provides that an ILEC has:

FN12. *See Society of Lloyd's v. Turner*, 303 F.3d 325, 330 (5th Cir.2002).

[t]he duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of ***487** subsection (b) of this section and this subsection. [FN13]

FN13. 47 U.S.C. § 251(c)(1).

Section 252 provides in relevant part:

- (a) Agreements arrived at through negotiation
- (1) Voluntary negotiations

Upon receiving a request for interconnection, services or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title....

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate *any open issues*. [FN14]

FN14. 47 U.S.C. §§ 252(a)(1); (b)(1) (emphasis added).

[4]  [5]  [6]  [7]  Thus, compulsory arbitration under § 252 begins with a request by a CLEC to negotiate with an ILEC regarding its obligations under § 251. An ILEC is *required* by the Act to negotiate about those duties listed in § 251(b) and (c). During negotiations, however, the parties are free to make any agreement they want without regard to the requirements of § 251(b) and (c). To that extent, the parties are free to include interconnection issues that are not listed in § 251(b) and (c) in their negotiations. If the voluntary negotiations result in only a partial agreement, or in no agreement at all, either party can petition for compulsory arbitration of any open issue.

[8]  [9]  There is nothing in § 252(b)(1) limiting open issues only to those listed in § 251(b) and (c). By including an open-ended voluntary negotiations provision in § 252(a)(1), Congress clearly contemplated that the sophisticated telecommunications carriers subject to the Act might choose to include other issues in their voluntary negotiations, and to link issues of reciprocal interconnection together under the § 252 framework. In combining these voluntary negotiations with a compulsory arbitration provision in § 252(b)(1), Congress knew that these non- § 251 issues might be subject to compulsory arbitration if negotiations fail. That is, Congress contemplated that voluntary negotiations might include issues other than those listed in § 251(b) and (c) and still provided that *any issue* left open after unsuccessful negotiation would be subject to arbitration by the PUC.

We hold, therefore, that where the parties have voluntarily included in negotiations issues other than those duties required of an ILEC by § 251(b) and (c), those issues are subject to compulsory arbitration under § 252(b)(1). The jurisdiction of the PUC as arbitrator is not limited by the terms of § 251(b) and (c); instead, it is limited by the actions of the parties in conducting voluntary negotiations. It may arbitrate only issues that were the subject of the voluntary negotiations. The party petitioning for arbitration may not use the compulsory arbitration provision to obtain arbitration of issues that were not the subject of negotiations. This interpretation comports with the views of the other courts that have reviewed this provision in ***488** similar contexts. [FN15] It also comports with the structure of the Act and our recognition of the flexibility accorded state PUCs by the Act. [FN16]

FN15. See *U.S. West Communications, Inc. v. Minnesota Public Utilities Commission*, 55 F.Supp.2d 968 (D.Minn.1999) (holding that "open issues" are limited to those that were the subject of voluntary

negotiations). See also *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 298 F.3d 1269 (11th Cir.2002) (rejecting a district court's conclusion that the compulsory arbitration provision was so broad as to include any issue raised by the petitioning party).

FN16. See *Southwestern Bell Telephone Co. v. Waller Creek Communications*, 221 F.3d 812, 816 (5th Cir.2000) (courts review a state PUC's Telecom Act interpretations *de novo*, but resolution of *all other issues* under the arbitrary and capricious standard); 47 U.S.C. §§ 251(d)(3), 251(e)(3), and 261(c).

[10]  In reaching this conclusion, we do not eliminate the limits § 251 places on an ILEC's duty to negotiate nor do we create any new obligations under the Telecom Act. An ILEC is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act when a CLEC requests negotiation pursuant to §§ 251 and 252. Indeed, in this case SWBT refused to negotiate the compensated access issues--such that these issues potentially become subject to the appropriate state remedies.

[11]  While the PUC erred in its interpretation of the compulsory arbitration provision, its ultimate refusal to arbitrate the compensated access issue was correct, because compensated access was not a mutually agreed upon subject of voluntary negotiation between SWBT and **Coserv**. As we find this a sufficient basis for the PUC's denial of jurisdiction, we do not reach the alternative grounds offered by the PUC or other issues raised by the parties in this case. For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

Briefs and Other Related Documents (Back to Top)

- COSERV LIMITED LIABILITY CORPORATION**; Multitechnology Services L.P., Plaintiffs-Appellants, v. SOUTHWESTERN BELL TELEPHONE COMPANY; Public Utility Commission of Texas; Max Yzaguirre; Rebecca Klein; Brett A. Perlman, Defendants-Appellees., 2002 WL 32387896 (Appellate Brief) (C.A.5 December 17, 2002), Brief for Appellants
- COSERV LIMITED LIABILITY CORPORATION**; Multitechnology Services L.P., Plaintiffs-Appellants, v. SOUTHWESTERN BELL TELEPHONE COMPANY; Public Utility Commission of Texas; Max Yzaguirre; Rebecca Klein; Brett A Perlman, Defendants-Appellees., 2003 WL 23325243 (Appellate Brief) (C.A.5 January 30, 2003), Brief for Appellee Southwestern Bell Telephone Company
- COSERV LIMITED LIABILITY CORPORATION**; Multitechnology Services, L.P., Plaintiffs-Appellants, v. SOUTHWESTERN BELL TELEPHONE COMPANY; Public Utility Commission of Texas; Rebecca Klein, Brett A. Perlman, Julie Parsley, Defendants-Appellees., 2003 WL 23325244 (Appellate Brief) (C.A.5 January 30, 2003), Brief of Appellees Public Utility Commission of Texas, Rebecca Klein, Brett A. Perlman, and Julie Pa
C.A.5 (Tex.),2003.

Coserv Ltd. Liability Corp. v. Southwestern Bell Telephone Co.
350 F.3d 482
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