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July 6, 2004

Ex Parte

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

Re: *BellSouth Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access by Requiring BellSouth To Provide Wholesale or Retail Broadband Service,* WC Docket No. 03-251

Dear Ms. Dortch:

I write on behalf of BellSouth to inform the Commission of a recent federal court decision that strongly supports BellSouth's arguments in this proceeding.

In *Wisconsin Bell, Inc. v. AT&T Communications of Wisconsin, L.P*, No. 03-C-671-S (W.D. Wisc. July 1, 2004) (attached), the federal district court found that a state commission arbitration decision requiring an ILEC to provide data services to CLEC UNE customers was contrary to this Commission's regulations and thus inconsistent with federal law. The state commission decision at issue did not "expressly require [the ILEC] to unbundle the [high-frequency portion of the loop] or [the low-frequency portion of the loop]," but did require the ILEC to "'continue to provide all existing data services.'" Slip op. 20 (quoting interconnection agreement). The agreement also required the ILEC to pay AT&T for use of the high-frequency portion of the loop. *See id.*

The district court concluded that the state commission's decision was contrary to the *Triennial Review Order.*[1] The court explained that the obligation imposed by the state commission was "functionally identical to compelled unbundling of the [high-frequency portion of the loop] and [the low-frequency portion of the loop]" and thus was

[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *vacated in part and remanded, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

a "thinly veiled unbundling of the local loop portions which was expressly rejected by the FCC." *Id.* Because the result imposed by the state commission was equivalent to the proposal that this Commission rejected in paragraph 270 of the *Triennial Review Order*, it violated federal law. *See id.* at 20-22.

In this regard, the court expressly rejected the argument that "this [is] a circumstance where [the state commission] might have exercised its residual state authority to impose the additional unbundling." Slip. op. 21. The agreement provision was "*directly inconsistent with the FCC regulations implementing the Act and the reasoning underlying those requirements*." *Id.* (emphasis added). In particular, the federal court stated, this Commission had reasoned that the proper way to address any alleged "tying" of voice and data services was not to compel ILECs to offer functionalities to CLEC UNE customers (as the state commission had done), but by "allowing the market to fill the void through partnerships between competing LECs." *Id.* at 22. Given this conflict between the state decision and this Commission's conclusions in the *Triennial Review Order*, the ILEC was "entitled to a determination that the agreement provision compelling it or its subsidiary to provide DSL service when defendant AT&T provides voice service does not comply with the Act." *Id.* at 22.

Finally, it is important to note that, although, in this instance, the state commission required the ILEC to pay AT&T for use of the high-frequency portion of the loop, the conflict that the court identified with this Commission's "regulations implementing the Act and the reasoning underlying those requirements" would exist if that had not been the case. As the federal court explained, the Commission's reasoning on this point rested on the desire to encourage CLEC broadband deployment, either individually or through line-splitting. *See id.* at 21; *Triennial Review Order* ¶¶ 261, 270. The Commission's logic had nothing to do with the cost of the high-frequency portion of the loop; on the contrary, the Commission stressed that "most states" set the rate for access to that portion of the loop at "roughly zero." *Id.* ¶ 260 & n.774.

In sum, the federal court's decision tracks BellSouth's arguments in this proceeding and supports BellSouth's request for prompt preemption of state commission attempts to require ILECs to offer broadband services to CLEC UNE customers.

Respectfully submitted,

Sean A. Lev

cc: William Maher
Jeffrey Carlisle
Michelle Carey
Tom Navin
Ian Dillner

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

JUL - 1 2004

WISCONSIN BELL, INC. d/b/a/ SBC WISCONSIN

Plaintiff,

v.

MEMORANDUM AND ORDER
03-C-671-S

AT&T COMMUNICATIONS OF WISCONSIN, L.P. and TCG MILWAUKEE, INC.

and

BURNEATTA BRIDGE, AVE N. BIE, and ROBERT M. GARVIN, in their official capacities as Commissioners of the Public Service Commission of Wisconsin,

Defendants.

Plaintiff Wisconsin Bell Inc. commenced this action pursuant to the Telecommunications Act of 1996, 47 U.S.C. § 252(e)(6), to challenge certain determinations made by defendants Burneatta Bridge, Ave M. Bie and Robert M. Garvin in their official capacities as Commissioners of the Public Service Commission of Wisconsin ("PCSW") in approving an interconnection agreement between plaintiff and defendants AT&T Communications of Wisconsin Inc. and TCG Milwaukee (collectively "AT&T"). Defendant AT&T counter- and cross-claims challenging certain other determinations made by the PSCW in approving the agreement. Jurisdiction is based on 28 U.S.C. §§ 1331. The matter is presently before the Court on cross-motions for summary judgment. The parties have stipulated to the relevant facts and agree that the matter be resolved on summary judgment.

BACKGROUND

In January 2000 plaintiff and defendant AT&T began voluntary negotiations for an interconnection agreement pursuant to 47 U.S.C. § 252(a)(1). After they failed to agree on certain terms defendant AT&T filed a Petition for Arbitration with the PSCW on June 16, 2002 pursuant to § 252(b). On October 12, 2000 a panel of arbitrators appointed by defendant PSCW issued its decision, entitled "Arbitration Award," which purported to resolve the open issues and directed the parties to file interconnection agreements consistent with the Arbitration Award by November 10, 2000.

Unable to reach agreement on contract language conforming to the October 12, 2000 Arbitration Award, the parties jointly filed a report of disputed articles and schedules of the interconnection agreements on December 12, 2000 with the arbitration panel. On February 27, 2001 the panel issued an "Additional Arbitration Award" to resolve disagreements that had arisen between the parties as they tried to reach agreement on contract language conforming with the Arbitration Award. On April 3, 2001, after the parties reported to the panel that there were disputed provisions in addition to those addressed by the Additional Arbitration Award, the panel issued a "Second Additional Arbitration Award" to address those additional disputed provisions. The Second Additional Arbitration Award directed AT&T and SBC Wisconsin to file interconnection agreements conforming with the three awards.

AT&T and SBC Wisconsin filed an interconnection agreement. The panel invited the parties to submit written comments to the PSCW supporting either approval or rejection of the agreement. The panel advised the parties that it would then "submit the interconnection agreement, together with the filed comments, the arbitration award, and a summary memorandum to the [PSCW]." The PSCW would then "issue its decision approving or rejecting the interconnection agreement, in whole or in part, according to applicable law."

On June 19, 2001 defendant PSCW issued a notice of opportunity to submit comments on the agreement. In its comments plaintiff challenged all aspects of the agreement which are the subject of its present claims. Defendant AT&T did not challenge the provisions of the agreement which are the subject of Count I of its counterclaim. On March 15, 2002 defendant PSCW rejected the agreement, identifying specific deficiencies and instructed the parties to file a revised agreement that remedied the identified deficiencies.

On June 7, 2002 the parties submitted a revised agreement. On July 11, 2002 the agreement was approved by an administrator employed by defendant PSCW without further comment by the parties and without modification of the PSCW determinations. The parties have been operating under the agreement since July 11, 2002. The agreement has a two year term but provides that it will automatically remain in full force and effect thereafter unless written notice is given at least 270 days prior to the expiration of the two year term. On October 9, 2003 plaintiff gave defendant notice of its intent to terminate the agreement and negotiate new interconnection agreements and the parties agreed to do so. Pursuant to § 21.1.5 the agreement's terms will remain in force until a successor agreement is reached. Plaintiff filed this action on November 26, 2003.

MEMORANDUM

Initially, defendant PSCW urges the Court not to reach the merits of the case, asserting that plaintiff has waived its right to pursue the action or that the Court should exercise discretion not to entertain jurisdiction over plaintiff's request for declaratory relief. Plaintiff and defendant AT&T each seek summary judgment on the merits of their claims and counterclaims.

PSCW's Procedural Motions

There is no dispute that the Court has subject matter jurisdiction over plaintiff's claims because 47 U.S.C. § 252 creates an express, federal private right of action for the review of defendant PSCW's determinations involving interconnection agreements. Verizon Maryland, Inc. v. Public Service Comm'n of Maryland, 535 U.S. 635, 644 (2002). Nevertheless, defendant PSCW argues that the Court can and should decline to exercise jurisdiction to review the determinations because the declaratory relief plaintiff seeks is discretionary. Defendant PSCW's argument is flawed in two respects: plaintiff's remedy does not arise under 28 U.S.C. § 2201 and therefore does not trigger the discretionary jurisdiction of § 2201 and the standards for exercising discretionary jurisdiction would clearly suggest retaining the case in any event.

The discretionary nature of jurisdiction over a declaratory judgment action under § 2201 is based on "the statute's textual commitment to discretion." Wilton v. Seven Falls Co., 515 U.S. 277, 286 (1995). The Declaratory Judgment Act expressly provides that the Court "may declare the rights" of an interested party. 28 U.S.C. § 2201(a). Plaintiff does not depend on § 2201 for a remedy, however, because 47 U.S.C. § 252(e)(6) itself provides the remedy. No reference to § 2201 and its discretionary language is required to sustain jurisdiction over the action. The fact that plaintiff, in an apparent abundance of caution, refers in its complaint to § 2201 in addition to § 252(e)(6) and 28 U.S.C. § 1331 as bases for jurisdiction does not alter this conclusion.

Furthermore, a review of the factors which guide the exercise of discretion lead to the conclusion that the case would not be one where jurisdiction would be declined.

> (1) whether the judgment would settle the controversy;
> (2) whether the declaratory judgment action would serve a useful purpose in clarifying the legal relations at issue.
> (3) whether the declaratory remedy is being used for the purpose of "procedural fencing" or "to provide an arena for a race for *res judicata*";
> (4) whether the use of a declaratory action would increase the friction between our federal and state courts and improperly encroach on state jurisdiction, and
> (5) whether there is an alternative remedy that is better or more effective.

Nucor Corp. v. Aceros Y Maquilas de Occidente, S.A. de C.V., 28 F.3d 572, 579 (7th Cir. 1994). The clear answer to the first two inquiries is that the action will settle a controversy and serve a useful purpose in determining the parties legal rights under both the current agreement and the successor agreement in negotiation.

Defendant PSCW argues that plaintiff's delay in commencing this action makes it procedural fencing. There is no discernible procedural advantage to plaintiff from pursuing the case now rather than last year. Any rulings in its favor will benefit future performance of this contract or its successor. Its delay prevented it from benefitting sooner but has no apparent detriment to the other parties. Defendant PSCW also argues that in the intervening period between approval and this action other competitors may have relied on the rulings in accordance with 47 U.S.C. § 252(i). While this is probably true, a possible correction of a legal error in those agreements would be a benefit rather than a detriment to those third parties. There appears to be no sound rationale for perpetuating a potential error.

Considering the fourth factor, because the action is exclusively federal, no state federal friction is at issue. Finally, considering the fifth factor, defendant PSCW suggests that impending negotiation of a new agreement is an adequate alternative remedy. It is difficult to conceive how negotiations under the identical legal uncertainties which surrounded the negotiations of the agreement in suit could be a substitute for resolution of those legal uncertainties. Resolution of those issues before the approval process for the successor agreement can only make that process easier and more certain. Accordingly, had the Court discretion to decline jurisdiction it would not do so.

In an argument defendant PSCW pursued vigorously in its support brief but abandoned in reply, it argued that review be based on the standards for acceptance of a negotiated agreement, 47 U.S.C. § 252(e)(2)(A) (consistent with public interest, convenience and necessity) rather that the standard for an arbitrated agreement, § 252(e)(2)(B) (meets the requirements of § 251 and related regulations). The undisputed facts are that portions of the agreements were voluntarily negotiated and others were resolved through arbitration, a circumstance expressly contemplated by the statute. There is also no dispute that the agreement provisions at issue in the claims and counterclaims were in fact adopted in conformance with the arbitrator's determinations. Accordingly, the standard for rejection would appear to fall squarely within § 252(e)(2)(B) for the provisions in dispute. Defendant PSCW's suggestion that the agreement became entirely voluntary by the parties' delay in submission is belied by the approval order itself which provides: "For those portions of the Agreement arrived at through arbitration, the Commission considered and applied the standards for review set forth in 47 U.S.C. § 252(e)(2)(A)."

Accordingly, the Court denies defendant PSCW's motion for summary judgment and considers the merits of the contested, arbitrated agreement provisions in accordance with the standards of § 252(e)(2)(A).

UNE Combinations

Plaintiff challenges the provisions of the interconnection agreement requiring it to combine unbundled network elements ("UNE's") at defendant's request. Specifically, § 9.3.2.1 provides that plaintiff "shall allow [defendant] to order any Network Element or Combination that is ordinarily combined in [plaintiff's] network, in accordance with § 9.1." In its arbitration ruling, the PSC ruled that plaintiff could be required to provide "such combinations of UNE elements that it normally combines within its own network." Arbitration Award at 53. The arbitration panel asserted its state law authority in addition to concluding that federal law imposed the combination requirement. Id. Plaintiff argues that the requirement to combine elements at defendant's request is inconsistent with the Telecommunications Act of 1996 and applicable FCC rules as upheld and interpreted by the Supreme Court in Verizon Communications, Inc. v. FCC, 535 U.S. 467 (2002). Defendant contends that the Rules and Verizon support the provision, and in any event residual state authority would support the PSC's ruling.

The principal relevant legal authority is 47 CFR § 51.513(c) which provides:

> Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements in any manner, even if those elements are not ordinarily combined in the incumbent LEC's network, provided that such combination is:
>
> (1) technically feasible; and
>
> (2) would not impair the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC's network.

The Supreme Court upheld the Rule in Verizon, noting particularly that "Rule 315(c), to the extent that it raises a duty to combine what is 'ordinarily combined,' neatly complements the facially similar Rule 315(b), upheld in AT&T Corp. v. Iowa Utilities Bd., 525 U.S. at 395, forbidding incumbents to separate currently combined elements." 535 U.S. at 536. Such combinations satisfy the two conditions -- technical feasibility and non-impairment of access -- by definition. Verizon acknowledged that a requirement to combine customarily combined elements was unobjectionable and focused on the more difficult question of whether an incumbent provider could be compelled to combine elements not ordinarily combined, a burden not imposed by this agreement.

Although the Supreme Court recognized a further limitation on the duty of the incumbent that the entrant carrier be "unable to combine the elements," id. at 538, it did not literally require inability to combine:

> There is no dispute that the incumbent could make the combination more efficiently than the entrant; nor is it contested that the incumbent would provide the combination itself if a customer wanted it or the combination otherwise served a business purpose. It hardly seems unreasonable, then, to require the incumbent to make the combination, for which it will be entitled to a reasonable fee; otherwise, an entrant would not enjoy true "non-discriminatory access" notwithstanding the bare provision on an unbundled basis of the network elements it needs to provide a service.

Id. This reasoning, applied in Verizon to non-ordinary combinations, appears to apply with even greater force to ordinarily combined elements. Accordingly, the language of Rule 315(b), as interpreted by the Supreme Court, is consistent with imposing the duty to combine ordinarily combined elements.

Indiana Bell Telephone Co., Inc. v. McCarty, 362 F.3d 378 (7th

Cir. 2004) does not compel remand to the PSCW. The contract at issue in McCarty required the incumbent to combine both ordinarily combined elements and elements which were not ordinarily combined by the incumbent. The state agency having approved the contract prior to Verizon, the matter was remanded for further consideration. Not surprisingly, the Court remanded all aspects of the contract including the portion of the provision relating to ordinarily combined elements. 362 F.3d at 391, n. 14. Given the clarity of Verizon concerning the propriety of requiring the combination of ordinarily combined elements, remand is unnecessary.

Additionally, defendant PSCW expressly exercised its residual state authority in imposing the requirement, a circumstance not present in McCarty, and which independently supports defendant PSCW's approval of the provision. Specifically, in ruling on the issue in arbitration defendant PSCW's arbitration panel stated: "The Panel finds that combinations of UNEs are an important means of allowing CLECs to enter and compete in markets to which it has not yet brought it's own facilities." Arbitration Award at 52. 47 U.S.C. § 261(c) preserves state regulatory authority:

> Nothing in this part precludes a state from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the states requirements are not inconsistent with this part or the Commission regulations to implement this part.

This residual authority may be exercised by the PSCW on an individualized basis in the context of agreement approval. See McCarty, 362 F.3d at 393. Even if, under the rule interpretation of Verizon, AT&T might be literally able to make the combination itself, it would certainly not be inconsistent with the regulation for a state to independently require the incumbent to combine elements it routinely combines for itself in the interest of efficiency and the promotion of competition.

Defendants are entitled to summary judgment dismissing plaintiff's challenge to the combination requirement.

Provision of Superior Network Facilities

Plaintiff's second challenge is to agreement provisions which require it to provide network interfaces and other equipment which are not currently in use in its network. In support of its challenge plaintiff relies on Iowa Utilities Bd. v. F.C.C., 219 F.3d 744 (8th Cir. 2000) ("IUB III")[1], which held that the FCC was precluded from adopting rules requiring incumbents to provide superior quality elements to competitors.

> We again conclude the superior quality rules violate the plain language of the Act.... Subsection 251(c)(2)(C) requires the ILECs to provide interconnection "that is at least equal in quality to that provided by the local

[1] IUB III was issued by the Eighth Circuit after several cases were consolidated pursuant to the Hobbs Act. See McCarty, 362 F.3d 378, 389 n. 13.

> exchange carrier to itself...." Nothing in the statute requires the ILECs to provide superior quality interconnection to competitors. The phrase "at least equal in quality" establishes a minimum level for the quality of the interconnection; it does not require anything more.

Id. at 758.

In arbitrating and approving the interconnection agreements defendant PSCW approved a requirement for plaintiff to provide interfaces and other equipment superior to that present in plaintiff's network. Invoking both federal and state authority defendant PSCW held that new competitors "must be allowed to provide new and innovative services in order to compete in the marketplace. At times, this may require interfaces or capabilities not already provided in Ameritech's network. CLECs should have the ability to request such capabilities." Arbitration Award at 62.

The Seventh Circuit has expressly approved the use of residual state authority to impose superior quality requirements:

> As already explained, the roles--and the authority--of the state commissions and the FCC are distinct under the Act. Hence we do not agree with the premise that because the FCC may not implement a blanket regulation requiring superior quality, the IURC may not require acceptance testing when, after individualized review, it finds it to be in the public interest and a means of promoting competition in Indiana.

McCarty, 262 F.3d at 393. The Court went on to note that state imposition of superior quality requirements does not violate the prohibitions of the Act because the Act itself sets only a floor ("at least equal") allowing for state requirements which exceed the floor. Id. The circumstances here are indistinguishable. Defendant PSCW imposed individualized superior equipment requirements based on its conclusion that such requirements were necessary to promote competition in the local telecommunications market. McCarty holds that it has the authority to do so.

Plaintiff does not deny that McCarty controls the issue, arguing instead that the decision is legally incorrect and seeking to press its case for reconsideration on appeal. Accordingly, defendants are entitled to summary judgment dismissing plaintiff's challenge to the superior facilities requirements.

Shared Transport Requirement

At the time of arbitration, FCC rules required incumbent LECs to provide access to shared transmission facilities to carry local telecommunications. Over plaintiff's opposition, defendant PSCW ruled that the agreement could also require plaintiff to provide access to the shared transmission facilities for the purpose of transporting intraLATA or "local toll" calls. Plaintiff does not seek review of defendant PSCW's arbitration ruling on the basis of the arguments it made before the PSCW. Rather, it argues that FCC rules have changed by virtue of the FCC's August 21, 2003 order, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 F.C.C.R. 16978 ("Triennial

Review Order"), and since this court is required to apply current law rather than the law in existence at the time of arbitration, McCarty, 362 F.3d at 394, the court should determine that the agreement does not comply with federal law.

The Triennial Review Order at ¶ 534 provides:

> Incumbent LECs and competitive LECs demonstrate that the use of unbundled shared transport is tied exclusively to unbundled local switching. [FN1635] Verizon and SBC assert that because switching and shared transport are inextricably linked, if incumbent LECs are no longer obligated to unbundle switching, they should no longer be obligated to unbundle shared transport. [FN1636] We agree. Therefore, we find that requesting carriers are impaired without access to unbundled shared transport only to the extent that we find they are impaired without access to unbundled switching. [FN1637] Because unbundled shared transport is linked to the use of unbundled switching, and because the Commission delegates a role to state commissions in identifying impairment for unbundled circuit switching, [FN1638] states should incorporate into their analyses of switching the economic characteristics of shared transport and other backhaul. [FN1639] Thus, we find that requesting carriers are impaired without access to unbundled shared transport - transmission facilities shared by more than one carrier between end office switches, between end office switches and tandem switches, and between tandem switches [FN1640] in the incumbent LEC's network - to the extent that local circuit switching is unbundled.

Subsequently, the Circuit Court for the District of Columbia held unlawful the FCC's rules delegating authority to the state commissioners to determine whether local switching was to be unbundled. U. S. Telecom Ass'n v. FCC, 359 F.3d 554, 566 (D.C.

Cir. 2004) ("USTA II"). The court further rejected any nationwide determination of an impairment requiring the unbundling of mass market switches. Id. at 569. Under 47 C.F.R. § 51.319(d)(4)(ii) shared transport is unbundled only to the extent that local switching is unbundled. Accordingly, plaintiff argues that there is no present legal obligation to provide unbundled access to shared transport facilities and the agreement should be found not in compliance with federal law.

Defendants raise three arguments in response. First, that the decision in USTA II is subject to a temporary stay. See Id. at 595. Second, that plaintiff is independently required to provide unbundled access to intraLATA transport under its merger agreement. Third, that § 29.3 of the agreement applies and requires renegotiation of the affected provisions in the event of changes in controlling law.

There is no real question that the agreement does not meet the requirements of the Act and current FCC regulations in light of USTA II. Specifically, access to unbundled switching, and therefore unbundled shared transit is not required by the Act. USTA II is applicable on its face and there is no suggestion in the record that any stay remains to delay its effect. Plaintiff is entitled to summary judgment of this determination.

However, this determination does not permit plaintiff to avoid its contractual obligations concerning the effect of changed law on the agreement. Pursuant to § 29.3 of the agreement a legal change, such as the one which occurred here, does not render the provision unenforceable or void but triggers a process of renegotiation. The FCC has expressly endorsed adherence to such agreements in the event of legal changes.

> Thus, to the extent our decision in this Order changes carriers' obligations under section 251, we decline the request of several BOCs that we override the section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with renegotiation of contract provisions. [FN2085] Permitting voluntary negotiations for binding interconnection agreements is the very essence of section 251 and section 252. We do not believe that the lag involved in negotiating and implementing new contract language warrants the extraordinary step of the Commission interfering with the contract process..... We note, however, that the practical effect of this negotiation of new terms may be that parties are provided a transition period.

Triennial Review Order at ¶ 710. Nor is there any basis to absolve plaintiff from abiding by the terms of its Merger Agreement which requires the provision of intraLATA transport until USTA II becomes final and non-appealable. 14 F.C.C.R. 15023-24, Appendix C, ¶56.

McCarty is consistent with this approach. While it is clear that a federal court performing its review function is obligated to apply current law in assessing whether agreements are in compliance with the Act, there is nothing in McCarty indicating that the Court can or should disregard contractual provisions addressing the appropriate procedures to be followed in the event legal changes render the agreement non-compliant. In fact, McCarty recognizes the FCC preference for following such procedures. 362 F.3d at 394. Accordingly, based on the non-compliance of the present agreement plaintiff is entitled to pursue its right to renegotiate pursuant to its agreement and defendant PSCW's arbitration of any new agreement will be informed by this decision.

Local Loop Unbundling

Individual households typically receive telecommunications services via a local loop of copper wire which connects a household to the telephone company switch. A local loop is capable of simultaneously carrying low frequency transmissions such as voice service over the low frequency portion of the loop ("LFPL") and high frequency transmission such as internet DSL over the high frequency portion of the loop ("HFPL"). Under applicable federal law the incumbent LEC must provide unbundled access to local loops. Triennial Review Order at ¶ 249. The incumbent must also provide the competitive LEC with the ability to engage in line splitting arrangements so that one competitive LEC can provide voice service over the LFPL while a second CLEC provides xDSL service over the HFPL. Id. at ¶251.

However, the rules expressly do not require incumbent LEC's to unbundle either the LFPL or the HFPL of the loop to make them available separately to competitors. Id. at ¶¶ 255, 270. In reaching this conclusion the FCC reasoned as follows.

> 260. We find that allowing competitive LECs unbundled access to the whole loop and to line splitting but not requiring the HFPL to be separately unbundled creates better competitive incentives than the alternatives. This is largely due to the difficulties in pricing the HFPL as a separate element.... In contrast, allowing competitive LECs unbundled access to the whole loop and to line splitting but not requiring the HFPL to be separately unbundled puts competitive LECs using only the HFPL in a more fair competitive position with respect to other competitive LECs and to the incumbent LECs. Each carrier faces the same loop costs and, it if (sic) wishes, each can partner with another carrier to provide service over the HFPL alone or the low frequency portion of the loop alone as it wishes.
>
> 261. We expressly reject the Commission's earlier finding that "line sharing will level the competitive playing field ...." [FN775] In fact, rules requiring line sharing may skew competitive LECs' incentives toward providing a broadband-only service to mass market consumers, rather than a voice-only service or, perhaps more importantly, a bundled voice and xDSL service offering. In addition, readopting our line sharing rules on a permanent basis would likely discourage innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs' and the competitive LECs' offerings. We find that such results would run counter to the statute's express goal of encouraging competition and innovation in all telecommunications markets.

Id. The D.C. Circuit upheld the rules and affirmed the reasoning. USTA II, 359 F.3d at 584-85.

The agreement provision which is subject to dispute, schedule

9.2.2, ¶9.2.2.3.5, does not expressly require plaintiff to unbundle the HFPL or LFPL. Rather, it requires that if defendant AT&T acquires a voice service customer to whom plaintiff or its affiliate is currently providing data service "[plaintiff] agrees to continue to provide all existing data service in the HFS, for the term of the customer's contract, to any customer that chooses AT&T as their local service carrier for voice services and where the retail customer desires continuation of such services...." The provision further requires plaintiff or its affiliate to pay AT&T for the HFPL. Defendant PSCW approved this provision and ruled in defendant AT&T's favor in arbitration to prevent plaintiff from refusing to continue to provide data service to customers who opted for AT&T voice service as a means of discouraging customers from contracting with AT&T. Defendant PSCW reasoned that such behavior was anti-competitive and should be contractually precluded.

This provision is functionally identical to compelled unbundling of the HFPL and LFPL and therefore cannot be sustained as consistent with federal law. While the entire unbundled local loop is nominally leased to defendant, the compelled lease back of the HFPL by plaintiff from defendant leaves the parties in the exact same position as if the LFPL were unbundled and transferred separately. The provision is nothing more than a thinly veiled unbundling of the local loop portions which was expressly rejected by the FCC. Defendant's effort to characterize the arrangement as mere line splitting cannot withstand scrutiny. The essence of line splitting is that voluntary arrangements can be made between competitive LECs to provide both services:

> We conclude that unbundling the [LFPL] is not necessary to address the impairment faced by requesting carriers because we continue (through our line splitting rules) to permit narrow band service-only competitive LEC to take full advantage of and unbundled loops capability by partnering with a second competitive LEC that will offer xDSL service.

Id. at ¶270. A provision which compels an unwilling incumbent (or the incumbent's controlled subsidiary) to purchase the HFPL is not line splitting as contemplated by the FCC - it is disguised unbundling.

Neither is this a circumstance where defendant PSCW might have exercised its residual state authority to impose the additional unbundling. 47 U.S.C. § 261(c) preserves state regulatory authority only to the extent that "the State's requirements are not inconsistent with this part or the Commission regulations to implement this part." This agreement provision is directly inconsistent with the FCC regulations implementing the Act and the reasoning underlying those regulations. Furthermore, in reaching its determination against requiring unbundled local loop components the FCC expressly considered the fact that incumbents were known to tie high frequency services to voice services to deter competition. Triennial Review Order at ¶259. It concluded nevertheless that competition would be best served by allowing the market to fill the void through partnerships between competing LECs. Defendant PSCW's contrary policy decision cannot be imposed to override the FCC's application of federal law. See McCarty, 362 F.3d at 395 (where FCC denies unbundling on a national basis, state unbundling almost certainly will not comply with the Act).

Accordingly, plaintiff is entitled to a determination that the agreement provision compelling it or its subsidiary to provide DSL service when defendant AT&T provides voice service does not comply with the Act. Because this result is compelled primarily by the Triennial Review Order applying the Act after the adoption of the agreement, the provisions of § 9.3 of the agreement apply.

Cageless Physical Collocation

Plaintiff objects to provision 12.3 of the agreement which permits defendant AT&T to convert its current virtual collocation to cageless physical collocation under certain conditions. Plaintiff argues that § 12.3 imposes obligations on it to provide physical space which are greater than and inconsistent with the FCC rules governing collocation. Specifically, plaintiff argues that the agreement requires it to provide physical space for defendant's equipment under circumstances where federal regulations would not require it and could subvert federal first come first served requirements for physical space allocation. The Court finds that, properly interpreted, § 12.3 is consistent with the federal requirements.

To provide service competitive LECs require equipment in the incumbent's offices in order to connect to network loops. This can be accomplished either by assigning physical space within the office to the competitor where equipment can be installed and accessed by the competitor (physical collocation) or by having the incumbent install and maintain the equipment for the competitor (virtual collocation). Initially, physical collocation was required only when sufficient space was available to create a separate caged area for the competitor's equipment (caged physical collocation). However, the FCC subsequently required incumbents to permit cageless physical collocation, see 47 CFR § 51.323(k)(2), a change which provided greater flexibility and therefore made physical collocation feasible where caged collocation had not been. The Act itself favors physical over virtual collocation requiring the former unless the incumbent demonstrates "that physical collocation is not practical for technical reasons or because of space limitations." 47 U.S.C. § 251(c)(6).

Section 12.3 of the Agreement is an effort to implement the preference for cageless physical collocation. It provides in relevant part:

> Where AT&T is Virtually Collocated ... [it] may elect to (i) retain its Virtual Collocation...; or (ii) convert its Virtual Collocation to a Cageless Physical Collocation

> unless [plaintiff] elects to move the collocation to other available space ... [and pays the costs of the move]...; or (iii) unless it is not practical for technical reasons or because of space limitations, convert its Virtual Collocation to Physical Collocation at such Premises....

Plaintiff first suggests that this provision could require it to provide physical collocation in spaces that are inappropriate. The provision's limitation at part (iii) protects plaintiff from placements which are impractical "for technical reasons or because of space limitations," exactly reflecting the statutory limitations. Though the provision admits some ambiguity it cannot rationally be read to require under subpart (ii) that which is expressly denied under subpart (iii). Furthermore, such an interpretation is necessary to provide meaning to section 12.1 which preserves plaintiff's right to prove physical collocation entirely impractical. Subsection (ii) meanwhile preserves plaintiff's right to control its own facilities by permitting it to choose other feasible space even if could reasonably convert the space presently used for virtual collocation.

There is no merit to the suggestion that section 12.3 circumvents the first come first served rule of space allocation. Defendant AT&T could only have come into possession of its present virtual collocation space because there was no available physical space and it was first in line for the virtual space. It follows that it would also be first in line for conversion of its virtual collocation space in the event that it can appropriately be converted to cageless physical space. Finally, there is nothing in the agreement which would improperly impinge on defendant's right to reserve future space for its own expansion needs. Section 12.3, read in conjunction with § 12.1 maintains defendant's right to deny physical collocation "because of space limitations" which would necessarily encompass any federal right to reserve space for its own anticipated expansion. Plaintiff's motion for summary judgment on this claim is denied.

<u>Financial responsibility for Interconnection</u>

Defendant AT&T challenges the decision of the arbitration panel embodied in § 4.3.1 of the agreement which provides in part:

> Each party shall provision and maintain their own one(1)-way trunks to deliver calls originating on their own network and routed to the other Party's network.... AT&T will be responsible for costs of trunking and transport from its customers to SBC-AMERITECH end offices.

Defendant AT&T asserts that this provision, as explained by the panel in resolving arbitration issues 4, 6 and 9, improperly imposes upon it an obligation to establish and maintain facilities beyond its designated point of interconnection ("POI") with plaintiff's network. Plaintiff opposes the claim on procedural grounds arguing that defendant failed to preserve its claim before defendant PSCW. Plaintiff also argues that the provision is consistent with federal regulation.

Defendant AT&T is entitled to prevail on its claim. It is apparent that AT&T raised the present issue before the arbitration panel and that the panel considered and rejected its position during arbitration. In fact, the issue was expressly considered by the panel as issue 9:

> Should a party only bear financial responsibility for facilities necessary to deliver traffic originating on its network to a point of interconnection with the other party's network, or should the parties share equally in the investment for interconnection facilities?

The panel resolved this issue against defendant AT&T requiring it to pay a portion of the facilities costs from the POI to plaintiff's end office switches. This is sufficient to preserve the issue for purposes of the present action. Bell Atlantic-Delaware, Inc. v. McMahon, 80 F.Supp. 2d 218, 244 (D. Del. 2000). Plaintiff offers no support for the proposition that defendant AT&T was required to renew its argument before the PSCW itself nor does defendant PSCW suggest that the matter was waived.

On the merits, it is improper for the agreement to require defendant to pay for facilities within plaintiff's network. Pursuant 47 U.S.C. § 251(c)(2)(B) plaintiff was entitled to designate a technically feasible POI, which could be a single point. MCIMetro Access Transmission Services, Inc. v. Bellsouth

Telecommunications, Inc., 352 F.3d 872, 877 (4^{th} Cir. 2003). Once a POI is so designated each party must bear the cost of transporting calls which originate on its network to the POI and must pay appropriate reciprocal compensation from the POI to the carrier who terminates the call. 47 CFR § 51.703. Defendant AT&T does not dispute its obligation to pay reciprocal compensation to plaintiff from the POI for calls defendant originates and plaintiff terminates. Rather, defendant AT&T contends that it cannot be compelled to finance equipment which is part of plaintiff's network because such a requirement would impinge on its right to designate a feasible POI.

Defendant AT&T is correct. By requiring defendant to "be responsible for the costs of trunking and transport from its customers to Ameritech end offices" § 4.3.1 effectively and improperly converts plaintiff's end office switches into involuntary POI's for defendant's network. Plaintiff's designated POI is the financial demarcation point between the parties. Each party must bear the cost of carrying calls originating on its network to the POI and the cost of terminating calls on its network from the POI. Each party in entitled to reciprocal compensation for transport from the POI for calls it terminates. See In re WorldCom, Inc., 17 F.C.C.R. 27039 at ¶53 (2002). A party cannot be made to pay for the cost of transporting calls to the POI which another carrier originates even though transport costs are made more expensive by the POI choice. MCIMetro, 352 F.3d at 880-881. It follows that neither party is responsible for the cost of transport beyond the POI except for its obligation to pay reciprocal compensation. See 47 CFR §§ 51.305, 51.701(e), 51.703.

Provision 4.3.1 of the agreement improperly imposes costs on defendant AT&T for facilities beyond the POI. Such an arrangement is contrary to the basic scheme of the regulations and to the POI concept as defined by the regulations. Defendant is entitled to summary judgment determining that the provision is contrary to federal law.

Reciprocal Compensation Rate

Defendant AT&T's second challenge to defendant PSCW's determinations is that it was improperly permitted to charge the end office reciprocal compensation rate instead of the tandem interconnection rate. Plaintiff and defendant PCCW concede that defendant is correct and is entitled to receive the tandem rate. Summary judgment will therefore be granted accordingly.

ORDER

IT IS ORDERED that defendant PSCW's motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment is GRANTED insofar as it seeks a determination that the provisions of the agreement requiring shared transport for intraLATA calls and the obligation of schedule 9.2.2, ¶9.2.2.3.5 to provide ongoing data service are contrary to the requirements of 47 U.S.C. §§ 251 and 252, and that plaintiff's motion for summary judgment is in all other respects DENIED.

IT IS FURTHER ORDERED that defendant AT&T's motion for summary judgment on its cross-claims and counter-claims is GRANTED.

IT IS FURTHER ORDERED that the matter is remanded to defendant PSCW for modification of the agreement in accordance with the rulings on defendant AT&T's counterclaims and for further proceedings consistent with this Memorandum and Order which may be appropriate pursuant to § 29.3 of the agreement or ongoing negotiation and arbitration for a new agreement.

Entered this 30th day of June, 2004.

BY THE COURT:

John C Shabaz

JOHN C. SHABAZ
District Judge