

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544**

In the Matter of

CRC Communications of Maine and Time
Warner Cable Petition for Preemption

WC Docket No. 10-143

COMMENTS OF VERIZON

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INTRODUCTION AND SUMMARY

Rural incumbent local exchange carriers (ILECs) have obligations under the Telecommunications Act of 1996 (“1996 Act”), but the Maine Public Utilities Commission (“Maine Commission”) has concluded that it cannot arbitrate disputes arising from those obligations unless it first terminates the rural ILECs’ temporary exemption from section 251(c). In the National Broadband Plan,² the Commission criticized the *Maine PUC Order*³ that Time Warner Cable and CRC Communications of Maine now seek to undo⁴, because it impedes competition. The Maine Commission got it wrong, and this Commission should declare that state commissions can arbitrate disputes with rural ILECs stemming from section 251(b) of the 1996 Act.

¹ The Verizon companies participating in this filing (“Verizon”) are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

² FCC, *Connecting America: The National Broadband Plan*, <http://download.broadband.gov/plan/national-broadband-plan.pdf> (2010) (“National Broadband Plan”).

³ Order, *CRC Communications of Maine, Inc. Petition for Consolidated Arbitration with Independent Telephone Companies*, Dkt. No. 2007-611 (Me. Pub. Utils. Comm’n May 5, 2008) (“*Maine PUC Order*”).

⁴ Petition for Preemption, *Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended*, WC 10-143 (June 15, 2010) (“Petition”).

The Commission has already recognized, in the *Time Warner Declaratory Ruling*⁵ and the National Broadband Plan, that state commission rulings that hinder the implementation of rural ILECs' duties delineated in section 251(b) conflict with the 1996 Act and sound public policy. Those duties pertain to resale, number portability, dialing parity, access to rights-of-way, and reciprocal compensation (the "251(b) duties"). As the Commission did when it granted Time Warner Cable's prior petition, the Commission should reject the Maine rural ILECs' effort to evade those obligations, which unquestionably apply to rural ILECs. The 251(b) duties are a critical component of the development of facilities-based local telephone competition.

Contrary to the Maine Commission's conclusion, the availability of the arbitration process does not turn on whether a rural ILEC retains its temporary exemption from section 251(c), which applies only until a rural ILEC receives a request for interconnection, services, or network elements and a state commission determines that the request is not unduly burdensome.⁶ That temporary exemption, found in section 251(f)(1)(A), does not exempt rural ILECs from the arbitration process with respect to the 251(b) duties; it does not even mention the arbitration process described in section 252, nor does it say anything about the 251(b) duties. Without a doubt, those obligations apply to rural ILECs, and requesting carriers can invoke the arbitration process to enforce them.

The majority of courts and state commissions that have confronted this question agree that a request to a rural ILEC to enter an agreement implementing one or more of the 251(b) duties initiates the negotiation and arbitration process. That conclusion follows from the text of

⁵ *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2007) ("*Time Warner Declaratory Ruling*").

⁶ See 47 U.S.C. § 251(f)(1)(A).

section 252, which requires only a request “pursuant to section 251” to initiate negotiations. A carrier may then – during the period from the 135th to the 160th day after the date on which the rural ILEC received the request for negotiation -- petition for arbitration, and state commissions have authority to adjudicate the disputes between the requesting carrier and a rural ILEC regarding the 251(b) duties. The Commission should declare that the Maine Commission misinterpreted federal law in concluding that it lacked authority to arbitrate the dispute between CRC and the rural ILECs.

DISCUSSION

I. THE COMMISSION SHOULD DECLARE, AS IT DID IN THE *TIME WARNER DECLARATORY RULING*, THAT STATE EFFORTS TO IMPEDE COMPETITION FROM VoIP PROVIDERS ARE CONTRARY TO THE 1996 ACT

1. In 2007, the Commission rejected arguments made by rural ILECs and the Nebraska and South Carolina Public Service Commissions and concluded that carriers providing wholesale services to VoIP providers are entitled to enter into interconnection agreements with rural ILECs to implement the 251(b) duties.⁷ The Commission emphasized the importance of ensuring that the carriers that sell wholesale services to VoIP providers can enter into interconnection agreements with rural ILECs and exchange IP-PSTN traffic, explaining that “ensuring the protections of section 251 interconnection is a critical component for the growth of facilities-based local competition.”⁸ Moreover, ensuring that wholesale carriers that offer “PSTN connectivity” service to VoIP providers are able to implement the 251(b) duties with rural ILECs “will spur the deployment of broadband infrastructure” by creating an incentive for

⁷ See *Time Warner Declaratory Ruling* ¶¶ 5-6.

⁸ *Id.* ¶ 13.

providers to deploy broadband services and end-user customers to purchase those services.⁹ The Commission also concluded that the deployment of advanced VoIP services “holds particular promise for consumers in rural areas.”¹⁰

The National Broadband Plan also recognized the need for carriers that offer wholesale service to VoIP providers to be able to obtain the services through which rural ILECs implement the 251(b) duties. The National Broadband Plan criticized decisions by one federal court and several state commissions — including the *Maine PUC Order* at issue here — that held that “the Act does not require certain rural carriers to negotiate interconnection agreements with other carriers” to implement rural ILECs’ 251(b) duties.¹¹ Without those agreements, “a broadband provider, which may partner with a telecommunications carrier to offer a voice-video-Internet bundle, is unable to capture voice revenues that may be necessary to make broadband entry economically viable.”¹² The Plan accordingly recommended that the Commission act “to prevent the spread of this anticompetitive interpretation of the Act and eliminate a barrier to broadband deployment.”¹³

2. In the *Maine PUC Order*, as in the state commission orders that led to the *Time Warner Declaratory Ruling*, the Maine Commission found a way to frustrate Time Warner Cable’s ability to offer VoIP services in rural ILEC territories in Maine. Rather than flatly denying that CRC has a right to invoke the 251(b) duties in order to exchange Time Warner Cable’s traffic with rural ILECs, the Maine Commission significantly limited the *procedures*

⁹ *Id.* ¶ 13 & n.37.

¹⁰ *Id.* ¶ 13 & n.38.

¹¹ National Broadband Plan at 49.

¹² *Id.*

¹³ *Id.*

available to CRC — and other similarly situated carriers — to enforce the rural ILECs’ obligations. The Maine Commission did not dispute that rural ILECs are obligated to comply with the 251(b) duties. Instead, it concluded that CRC could not use the arbitration process to create interconnection agreements with the rural ILECs implementing those obligations.¹⁴

The Maine Commission’s decision effectively insulates those rural ILECs from the obligation to comply with section 251(b), impeding Time Warner Cable and other providers from introducing VoIP competition into the rural ILECs’ service territories. The decision leaves CRC only one way to enforce the 251(b) duties against recalcitrant rural ILECs — namely, by suing the rural ILECs for declaratory or injunctive relief in federal district court, or before the Commission.¹⁵ In contrast, in a section 252 arbitration, a state commission can go beyond that relief and can both “impos[e] appropriate conditions as required to implement” the 251(b) duties and set “a schedule for the implementation of the terms and conditions” imposed through the arbitration.¹⁶ If not undone, the Maine Commission’s order will stymie providers from introducing competition into local telephone markets, directly contravening the policy goals set forth in the 1996 Act, the National Broadband Plan, and the *Time Warner Declaratory Ruling*.

II. THE COMMISSION SHOULD DECLARE THAT THE RURAL EXEMPTION DOES NOT PRECLUDE STATE COMMISSIONS FROM ARBITRATING DISPUTES OVER SECTION 251(b) OBLIGATIONS

The Maine Commission concluded that, so long as a rural ILEC retains its temporary exemption from section 251(c), the commission lacks authority under section 252 to arbitrate disputes that arise over the rural ILEC’s compliance with its 251(b) duties.¹⁷ But section

¹⁴ See *Maine PUC Order* at 14.

¹⁵ See 47 U.S.C. §§ 206-208.

¹⁶ *Id.* § 252(b)(4)(C), (c)(3).

¹⁷ See *Maine PUC Order* at 14.

251(f)(1)(A), which spells out both the rural exemption and the conditions for its termination, does not mention either section 251(b) or section 252. The Maine Commission was wrong to conclude that the rural exemption, while in force, bars requesting carriers from enforcing rural ILECs' 251(b) duties by arbitrating interconnection agreements. The Commission should issue a declaratory ruling holding that the Maine Commission incorrectly interpreted the Act, , and that a request to a rural ILEC to implement the 251(b) duties is sufficient to initiate the negotiation and arbitration process.

1. In the 1996 Act, Congress temporarily exempted certain “rural telephone companies” from the duties, including the duty to negotiate in good faith, that section 251(c) imposes on ILECs.¹⁸ By its plain terms, the rural exemption does not extend to the other duties in section 251 imposed on all telecommunications carriers,¹⁹ or on all local exchange carriers.²⁰ The Commission itself has recognized that the rural exemption “offers an exemption only from the requirements of section 251(c).”²¹ The 1996 Act includes no possibility of exemption from the duty to interconnect,²² and, as the Commission recognized, “the *only* statutory avenue for relief from the section 251(b) requirements” is for a rural ILEC “to request suspension or

¹⁸ 47 U.S.C. § 251(f)(1); *see id.* § 153(37).

¹⁹ *See id.* § 251(a).

²⁰ *See id.* § 251(b).

²¹ *Telephone Number Portability*, First Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 7236, ¶ 117 (1997) (“*Telephone Number Portability Order*”); *see also Vermont Tel. Co. v. Comcast Phone of Vermont, LLC*, No. 09-cv-198, slip op. at 11 (D. Vt. Feb. 5, 2010) (noting that the rural exemption “does not affect the substantive duties imposed on communications carriers and LECs by [sections 251(a) and (b)]”).

²² 47 U.S.C. § 251(a); *see National Broadband Plan* at 66 n.93 (“All telecommunications carriers have a basic duty to interconnect under Section 251(a). A rural carrier’s rural exemption under Section 251(f) does not impact this obligation.”) (citations omitted).

modification” of those requirements “under the procedure established by section 251(f)(2).”²³

None of the rural ILECs at issue in this proceeding have sought relief from the Maine Commission under that procedure, so there is no argument that those carriers can escape their substantive obligations under sections 251(a) and (b), including the duties to interconnect directly or indirectly with other telecommunications carriers, and to provide number portability and dialing party.

2. Similarly, the rural exemption does not free rural ILECs from compliance with section 252, which establishes procedures for creating interconnection agreements that implement the 251(b) duties. No one has suggested — in this proceeding or otherwise — that rural ILECs are exempt from any other provision of section 252, such as the obligation to submit interconnection agreements to state commissions for approval,²⁴ or the obligation to allow other carriers to opt-in to approved interconnection agreements.²⁵

Nor are rural ILECs exempt from the voluntary negotiation and compulsory arbitration process set forth in sections 252(a) and (b). Section 252(a)(1) states that, “[u]pon 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.”²⁶ A request that a rural ILEC enter an interconnection agreement to implement the 251(b) duties is a “request for interconnection[] [and] services . . .

²³ *Telephone Number Portability Order* ¶ 117 (emphasis added). A rural ILEC with “fewer than 2 percent of the Nation’s subscriber lines” may petition a state commission for “suspension or modification” of the requirements of section 251(b) if, *inter alia*, such requirements are “unduly economically burdensome” or “technically infeasible.” 47 U.S.C. § 251(f)(2).

²⁴ 47 U.S.C. § 252(e).

²⁵ *Id.* § 252(i).

²⁶ *Id.* § 252(a)(1) (emphasis added).

pursuant to section 251.”²⁷ If those negotiations do not result in an interconnection agreement, the requesting carrier or the rural ILEC may “petition a State commission to arbitrate any open issues,” within 135 to 160 days after receiving the request.²⁸ Nothing in section 252(a) limits this process to requests made in accordance with the good-faith negotiation duty in section 251(c)(1).

Indeed, the Commission has emphasized that “the obligations created by section 251,” including those in section 251(b), “are effectuated *through the process established in section 252* — that is, by reaching agreement through negotiation, arbitration, or opt-in.”²⁹ That conclusion is unsurprising, as the 251(b) duties are clearly not self-executing, but instead must be implemented through agreements.

Although the rural exemption poses no bar to a state commission’s authority to arbitrate disputes about a rural ILEC’s compliance with the 251(b) duties, a state commission does not have authority to arbitrate disputes about section 251(a). Section 252 does not authorize state commissions to arbitrate the rates, terms, and conditions on which a carrier complies with its duty to “interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers,”³⁰ nor does it contemplate entry into interconnection agreements to effectuate this duty.³¹ Instead, each telecommunications carrier is “permitted” to satisfy its

²⁷ *Id.*

²⁸ *Id.* § 252(b)(1).

²⁹ *Core Communications, Inc. v. SBC Communications, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 7568, ¶ 30 (2003) (emphasis added).

³⁰ 47 U.S.C. § 251(a)(1).

³¹ *See Core Communications, Inc. v. SBC Communications, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 8447, ¶ 18 (2004) (“Neither the general interconnection obligation of section 251(a) nor the interconnection obligation arising under section 332 is implemented through the negotiation and arbitration scheme of section 252.”); *Qwest Corp.*, Notice of

obligation to interconnect directly or indirectly with other carriers “based upon [its] most efficient technical and economic choice[],” including by choosing “indirect connection.”³²

Therefore, as a practical as well as a legal matter, there is nothing for a state commission to arbitrate with respect to section 251(a) because a state commission cannot insist that a carrier satisfy its duty in a particular manner. Indeed, even here, it appears that the Maine rural ILECs have satisfied their section 251(a) obligations with respect to CRC, which does not appear to dispute that its network is connected indirectly to the rural ILECs’ networks.³³

3. As Time Warner Cable and CRC note, a clear majority of the courts and state commissions that have considered the threshold issue of whether the arbitration process described in section 252 applies to rural ILECs have held that the arbitration process does apply, and that state commissions have authority to arbitrate disputes arising out of a request to a rural ILEC to implement the 251(b) duties.³⁴ One district court, in an unpublished opinion,³⁵ reached

Apparent Liability for Forfeiture, 19 FCC Rcd 5169, ¶ 23 (2004) (defining the term “interconnection agreement” for purposes of section 252, as limited that term to those “agreement[s] relating to the duties outlined in sections 251(b) and (c)”); *see also, e.g., Qwest Corp. v. Public Utils. Comm’n of Colo.*, 479 F.3d 1184, 1197 (10th Cir. 2007) (“[T]he ‘interconnection agreements’ that result from arbitration necessarily include only the issues mandated by § 251(b) and (c).”).

³² *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 997 (1996) (“*Local Competition Order*”) (subsequent history omitted); *see also Total Telecommunications Servs., Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 5726, ¶ 27 (2001) (holding that “[s]ection 251(a) only requires AT&T to provide direct or indirect physical links between itself and [other telecommunications carriers]”), *petition for review denied in relevant part, AT&T Corp. v. FCC*, 317 F.3d 227 (D.C. Cir. 2003).

³³ *See* Petition at 19.

³⁴ *See* Petition at 24-25 & n.73 (citing decisions); *see also Vermont Tel. Co.*, slip op. at 11 (rejecting as “circular” the argument that rural ILECs are bound by the substantive requirements of 251(b) but are not bound by the “mandatory arbitration process that would lead to an eventual agreement”).

the opposite result, but the National Broadband Plan found that decision to be “based on a misinterpretation of the Act’s rural exemption and interconnection requirements.”³⁶ The Maine Commission nonetheless “adopt[ed] the reasoning” of that decision.³⁷

That district court reasoned that the “duty to negotiate” an interconnection agreement is only set forth in section 251(c)(1), from which rural ILECs are exempt.³⁸ The court went on to conclude that Brazos, the rural ILEC in that case, had “no duty to negotiate any interconnection agreement with Sprint unless and until its rural exemption is lifted.”³⁹ Because the rural ILEC had no duty to negotiate, the court further held that there could be no “open issues” arising out of negotiations for the state commission to arbitrate.⁴⁰ The court then held that the state commission “could not compel Brazos to arbitrate an interconnection agreement with Sprint with respect to Brazos’s” 251(b) duties.⁴¹

Although the *Brazos* court correctly affirmed the Texas commission’s conclusion that it lacked authority to arbitrate an agreement with respect to Brazos’ *section 251(a)* duty, its conclusion that it lacked authority to arbitrate an agreement with respect to Brazos’ *section 251(b) duties* is wrong. The *Brazos* court erred by beginning with section 251(c)(1) instead of section 252(a)(1), which defines the “request” that initiates the arbitration process. As a result, the court did not confront the fact that a request to implement the obligations in section 251(b)

³⁵ See *Sprint Communications Co. v. Public Utils. Comm’n of Texas*, No. A-06-CA-065-SS, 2006 WL 4872346 (W.D. Tex. Aug. 14, 2006) (“*Brazos*”).

³⁶ National Broadband Plan at 49.

³⁷ *Maine PUC Order* at 14.

³⁸ *Brazos*, 2006 WL 4872346, at *4.

³⁹ *Id.*

⁴⁰ *Id.* at *5 (internal quotation marks omitted).

⁴¹ *Id.*

constitutes a “request for interconnection[] [and] services . . . pursuant to section 251,” which triggers the arbitration process (upon a carrier submitting a petition to the relevant state commission). The *Brazos* court also relied on the Fifth Circuit’s decision in *Coserv LLC v. Southwestern Bell Tel. Co.*⁴² for the proposition that a rural ILEC’s refusal to negotiate about its 251(b) duties precludes a state commission from arbitrating any issues pertaining to those duties.⁴³ But *Coserv* actually addressed the very different question of whether an ILEC’s willingness to negotiate about matters entirely unrelated to both section 251(b) and (c) gives state commissions authority to arbitrate disputes over those issues.⁴⁴ *Coserv* says nothing about whether the rural exemption must be terminated for a state commission to have authority to enforce a rural ILEC’s 251(b) duties through the arbitration process. And, in any event, *Coserv* wrongly decided the question of whether states could arbitrate issues unrelated to the section 251(b) duties or section 251(c), and at least three other circuits have rejected its reasoning.⁴⁵

The Maine Commission also relied on a footnote in a 1997 Commission order noting that “[s]ection 251(f)(1) does exempt rural carriers from the duty to negotiate in good faith over the terms and conditions of agreements to fulfill the duties of section 251(b).”⁴⁶ But the Commission did not address the further question whether a refusal to respond to a request to implement section 251(b) prevents the requesting carrier from invoking the arbitration process. Moreover, the Commission’s reference to “good faith” negotiations is best read to confirm that

⁴² 350 F.3d 482 (5th Cir. 2003).

⁴³ See *Brazos*, 2006 WL 4872346, at *5.

⁴⁴ See 350 F.3d at 487-88.

⁴⁵ See *Qwest Corp. v. Arizona Corp. Comm’n*, 567 F.3d 1109, 1117 (9th Cir. 2009); *Qwest Corp.*, 479 F.3d at 1197; *MCI Telecommunications Corp. v. BellSouth Telecommunications Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002).

⁴⁶ *Maine PUC Order* at 12-13 (quoting *Telephone Number Portability Order* ¶ 117 n.393 (internal quotation marks omitted)).

the rural ILEC is simply exempt from compliance with the various rules the Commission adopted in the *Local Competition Order* that identify practices that do, or may, constitute a failure to negotiate in good faith for purposes of section 251(c)(1).⁴⁷

4. The best reading of the 1996 Act is that it grants state commissions the authority to arbitrate any open issues following a “request” by an interconnecting carrier to a rural ILEC to implement the 251(b) duties, even if that rural ILEC remains subject to the rural exemption. At a minimum, however, the statute is ambiguous, as the 1996 Act does not unambiguously *prohibit* state commissions from engaging in those arbitrations. And even the Maine Commission recognized that its interpretation of the statute — that state commissions have authority to arbitrate only those disputes arising out of requests made under section 251(c)(1) — “creates a regulatory gap whereby a state commission is without authority to enforce directly the requirements of . . . § 251(b) as they relate to rural ILECs for whom the rural exemption has not been lifted.”⁴⁸

The Commission’s interpretation of section 252 would therefore be entitled to *Chevron* deference.⁴⁹ Interpreting the Act to grant state commissions this authority, without the need first to terminate the rural exemption, is eminently reasonable. It furthers Congress’s and the Commission’s policy goals of promoting competition in local telephone markets and broadband deployment. It provides requesting carriers with an attractive alternative to litigation before federal district courts or this Commission under section 208, as section 252 arbitrations include

⁴⁷ See *Local Competition Order* ¶¶ 148-156.

⁴⁸ *Maine PUC Order* at 14.

⁴⁹ See, e.g., *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999).

both a specific deadline calling for prompt resolution of disputes about the 251(b) duties⁵⁰ and an adjudicator authorized to establish the specific terms of an agreement implementing those duties.⁵¹

* * *

Time Warner Cable and CRC have styled their filing as a “Petition for Preemption” under section 253, but it is in substance a request for a declaratory ruling.⁵² Section 253 allows for preemption if “a State or local government has permitted or imposed any statute, regulation, or legal requirement” that prohibits an entity from offering telecommunications service.⁵³ The Maine Commission’s decision, however, was that it *lacked authority* under the federal Communications Act to arbitrate the disputes between CRC and the rural ILECs.⁵⁴ The Commission can — and should — *reject* that erroneous interpretation of federal law, but it cannot “preempt” the Maine Commission’s decision, which was grounded in federal, not state or local, law.

⁵⁰ See 47 U.S.C. § 252(b)(4)(C) (deadline of 9 months from date of request that initiates arbitration process).

⁵¹ See *id.* § 252(b)(4)(C), (c)(3).

⁵² See 47 C.F.R. § 1.2 (Commission may “issue a declaratory ruling terminating a controversy or removing uncertainty”).

⁵³ 47 U.S.C. § 253.

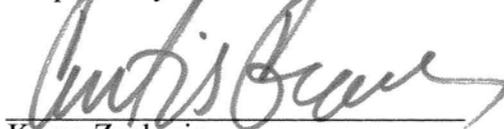
⁵⁴ See *Maine PUC Order* at 14 (“We are unable, however, to find in the text of the [1996 Act] language conferring upon this Commission authority to directly enforce the requirements of §251(a) and §251(b).”).

CONCLUSION

The Commission should declare that the Maine Commission erroneously interpreted the Act, because the rural exemption does not prevent a state commission from conducting an arbitration following a carrier's request to a rural ILEC to implement the 251(b) duties.

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