

Synergies Law Group, PLLC

June 22, 2009



VIA OVERNIGHT DELIVERY

Debra A. Howland, Executive Director
New Hampshire Public Utility Commission
21 South Fruit Street, Suite 10
Concord, NH 03301-2429

**RE: Docket No. 09-048
Supplement To Record**

Dear Director Howland:

In the procedural schedule issued on June 16, 2009 by the arbitrator in the above-captioned docket, the arbitrator requested that the Parties provide additional information with respect to the threshold issue of whether IDT America, Corp. ("IDT") is seeking Section 251(c) interconnection which is not permitted without termination of Union's rural exemption. The issue was referred to the arbitrator pursuant to the Commission's June 15, 2009 letter. In response to that request and in order to ensure that the record of this proceeding is as complete as possible, Union Telephone Company ("Union"), by and through undersigned counsel, submits for the Commission's review the attached *CRC Communications of Maine, Inc. Decision* issued by the Maine Public Utilities Commission ("MPUC"), on May 5, 2008.¹ In the attached case, the MPUC confronted legal issues virtually identical to those before this Commission in the dispute at hand. The MPUC, adopting the reasoning of the Brazos Texas PUC case (that was upheld in District Court) as previously cited by Union in this current docket's record, unequivocally found that CRC Communications of Maine, Inc. ("CRC"), a competitive carrier, was not entitled to interconnection unless and until the rural carrier's exemption under Section 251(f)(1) was lifted.

In the *CRC Decision*, CRC demanded interconnection from a number of rural incumbent carriers operating in Maine. Unitel, Inc. ("Unitel"), one of those carriers, claimed exemption from "any duty to negotiate, provide services, network elements or interconnection to CRC" because Unitel was a rural carrier. Unitel also declined to provide interconnection because CRC did not hold the requisite authority to operate within Unitel's operating territory.² CRC also

¹ *CRC Communications of Maine, Inc. Petition for Consolidated Arbitration with Independent Telephone Companies Towards an Interconnection Agreement Pursuant to 47 U.S.C. 151, 252, Docket No. 2007-611 (May 5, 2008) ("CRC Decision")*.

² *Id.* at 2.

received similar responses denying interconnection from Oxford Telephone Company, Oxford West Telephone Company, TideWater Telecom, Inc., and Lincolnville Telephone Company.³

CRC responded by filing with the MPUC a petition seeking arbitration with the rural incumbent carriers. CRC's arguments were virtually identical to those made by IDT America, Corp. ("IDT") in this proceeding. In short, CRC's central arguments included that CRC was not seeking interconnection under Section 251(c) of the Communications Act, as amended (the "Act"), but rather only interconnection under Section 251(a) and (b) and that Section 252(b) required the Commission to arbitrate all disputes arising under the subsections of Section 251 of the Act.⁴

In finding that CRC had no right to demand interconnection and was not entitled to arbitration, the MPUC stated,

. . . The statutory source of an ILEC's obligation to negotiate an interconnection agreement with competitive carriers is §251(c)(1). However, rural ILECs are exempt from this provision of the TelAct pursuant to §251(f)(1). Our authority to compel and conduct arbitration over the terms of an interconnection agreement between ILECs and competitive carriers pursuant to §251(b)(2) presumes a duty on the part of an ILEC to engage in good faith negotiations regarding the terms of such an agreement in the first instance.

A rural ILEC is not exempt from the obligations set forth in §251(a) and §251(b). We are unable, however, to find in the text of the TelAct language conferring upon this Commission authority to directly enforce the requirements of §251(a) and §251(b). Instead the TelAct contemplates only that the requirements of §251(a) and §251(b) will be enforced by a state commission in the context of its authority to arbitrate "open issues" remaining after voluntary negotiations have yielded incomplete results. Again, however, rural ILECs are exempt from the duty to negotiate in good faith. Until and unless the rural exemption is lifted, there is, quite simply, nothing to arbitrate.⁵

Union submits that as with the previous authorities submitted by Union, the *CRC Decision* again demonstrates the well settled point that rural carriers such as Union are exempt from interconnection demands under Section 251 unless and until the rural carrier's exemption from such demands is lifted. Union therefore renews its request that the Commission grant Union's Motion to Dismiss filed on May 15, 2009 so that the Commission and the Parties to this proceeding can avoid further dissipation of their respective scarce resources creating an agreement which ultimately will not become binding.

³ *Id* at 4-5.

⁴ 47 U.S.C. §§251 & 252; *CRC Decision* at 8.

⁵ *CRC Decision* at 14.

Debra A. Howland, Executive Director

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Pursuant to Commission rules, this letter is being electronically filed at _____ . In addition, an original and seven (7) copies of this letter are also being filed via overnight mail. Please date stamp and return the enclosed extra copy of this filing. Please do not hesitate to contact the undersigned with any questions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Brian McDermott", with a long horizontal flourish extending to the right.

Brian McDermott
Edward S. Quill, Jr.

Counsel Union Telephone Company

Enclosure

cc: Service List

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2007-611

May 5, 2008

CRC COMMUNICATIONS OF MAINE, INC.
PETITION FOR CONSOLIDATED
ARBITRATION WITH INDEPENDENT
TELEPHONE COMPANIES TOWARDS AN
INTERCONNECTION AGREEMENT
PURSUANT TO 47 U.S.C. 151, 252.

ORDER

I. SUMMARY

In this Order we find that CRC Communications of Maine, Inc. (CRC) has made bona fide requests of Unitel, Inc., Oxford West Telephone Company, Oxford Telephone Company, TideWater Telecom, Inc., and Lincolnville Telephone Company (ITCs) for interconnection, services, or network elements and that each of the ITCs responded to such bona fide requests by asserting that it is exempt from the duty of an incumbent local exchange carrier to negotiate in good faith the terms and conditions of an agreement to provide such interconnection, services, or network elements. We also find that CRC has provided notice to the Commission of its request of the ITCs for interconnection, services, or network elements. We further find that before we may exercise our authority under the TelAct to compel negotiation and/or arbitration, we must first consider, as to each ITC, whether to lift the so-called "rural exemption." We therefore direct the Hearing Examiner to schedule a conference of counsel for the purpose of establishing a schedule to conduct proceedings pursuant to 47 U.S.C. §251(f)(1)(B).

II. FACTS

On July 5, 2007, CRC sent to each of the ITCs a letter reciting the following:

Please accept this letter as a formal request to resume discussions for an agreement with your company for interconnection and the exchange of telephone traffic. This letter is a bona fide request by CRC Communications of Maine to interconnection with [name of ITC] pursuant to section 251(a), (b) and (c) of the Telecommunications Act of 1996. The interconnection terms in which CRC Communications of Maine is primarily interested are provisions regarding mutual exchange of traffic, number porting, reciprocal compensation and dialing parity.

Section 252 specifically sets forth that between the 135th and 160th day after a party has received a request for negotiations under this Section, either party may request the state regulatory commission to initiate

arbitration proceedings to resolve any open issues. CRC of Maine will treat the date of this letter as the starting point for determining the arbitration window.

When we met at your office on September 6, 2006¹, CRC Communications of Maine (d.b.a., Pine Tree Networks) presented a draft agreement and appendices for your consideration. The following documents were included:

- INTERCONNECTION AGREEMENT – UNDER SECTIONS 251 AND 252 OF THE TELECOMMUNICATIONS ACT OF 1996
- APPENDIX NIM (Network Interconnection Methods)
- APPENDIX ITR (Interconnection Trunking Requirements)
- APPENDIX NUMBERING
- APPENDIX NUMBER PORTABILITY
- APPENDIX RECIPROCAL COMPENSATION

I believe these documents provide a reasonable point to begin our dialogue. However, if you have a draft agreement you would like to use I would be agreeable to using it as our starting point.

Please contact me at your earliest convenience to discuss this request and to establish a timeline whereby we can negotiate a mutually acceptable agreement.

/s/ Robert Souza, President

UniTel's response to CRC, dated August 9, 2007, states the following:

This is a response to your letter of July 5, 2007 requesting to negotiate an interconnection agreement pursuant to 47 USC 251(a), (b) and (c). You stated in your letter that you wished to "resume discussions". To be clear, we are treating your letter of July 5, 2007 as the sole request for interconnection. Any prior

¹ Reference to a September 6, 2006 meeting is made in CRC's July 5, 2007 letter to UniTel. CRC's July 5, 2007 letter to Tidewater Telecom / Lincolnville Telephone Company and to Oxford Telephone Company / Oxford West Telephone Company reference instead a September 18, 2006, mailing in which CRC forwarded a draft agreement and appendices for the consideration of these companies. In all other respect, CRC's July 5, 2007 letters to the ITCs are identical to one another.

communication was outside the scope of the rights and obligations of UniTel, Inc. and CRC Communications of Maine, Inc. (CRC) pursuant to the Telecommunications Act of 1996.

Please be advised that UniTel, Inc. hereby claims its exemption from any duty to negotiate, provide services, network elements or interconnection to CRC. Please see 47 USC 251 and 252, including but not limited to subsection 251(f) (1), for such authority. This exemption, known as the "rural exemption," applies to the entire request of CRC, regardless of the description of any part of CRC's interconnection request as being pursuant to sections 251(a),(b), or (c) and section 252.

As an additional matter, the scope of the July 5, 2007 request for interconnection appears to be outside the authority of CRC. On July 5, 2000 in Docket No 2000-141 the Maine Public Utilities Commission (PUC) granted authority to CRC to provide facilities-based local exchange service only in the five service areas within the exchanges of Verizon, then Bell Atlantic (Portland, Lewiston, Westbrook, Windham and Scarborough). The July 5, 2000 Order provides, "We will grant authority to CRC to provide facilities-based local exchange service only within those exchanges." Order, at paragraph II, page 3. The Order continues as follows, "If CRC wishes to expand its facilities-based local exchange area in the future; it shall seek such approval pursuant to 35-A M.R.S.A. sec. 2120, requesting the Commission to amend this Order." Order, at paragraph II, page 3.

Subsequently in multiple dockets, CRC sought to expand its authority to provide facilities-based competitive local exchange services in several other Verizon exchanges. Upon review of past and present dockets, it appears that no such authority to enter into the UniTel, Inc service area has been applied for or granted by the PUC as is required by 35-A MRSA 2102. Therefore, to the extent that CRC seeks facilities-based competitive local exchange services outside the scope of authority granted the July 5, 2000 Order, Unitel, Inc. believes that CRC should seek amendment of its authority.

At such time as CRC sends a notice of its request for interconnection with UniTel, Inc. to the PUC, UniTel, Inc. will shortly thereafter contact the Maine Public Utilities Commission ("PUC") with a request for procedural guidance on two issues: a) the scope of CRC's existing authority as described above, and b) implications of CRC's request for interconnection in the pending Docket No. 2006-739, wherein the PUC requested the parties to comment on the interpretation of 251(a), (b) and (c), and the PUC's role related thereto.

As CRC has made multiple requests for interconnection with ILECs located across the State of Maine, and since CRC has the burden to provide sufficient evidence to terminate each ILEC's rural exemption, it is clear that the PUC is going to experience a tremendous increase in docket load. Therefore, UniTel, Inc. would be willing to make a joint request with CRC and others to clarify the implicated procedural issues within Docket Nos. 2000-144 and 2006-739 that have been triggered by CRC's letter of July 5, 2007.

If CRC's understanding of its authority regarding the UniTel, Inc. service area is contrary to the comments in this letter please so advise in writing, but it appears that the CRC request for interconnection is premature and without authority, to the extent that CRC seeks facilities-based competitive local exchange telephone service.

I look forward to hearing from you as we address these complicated and time consuming issues.

/s/ Laurie Osgood, President

The response of Oxford West Telephone Company and Oxford Telephone Company to CRC's request, dated August 10, 2007, states the following:

Oxford West Telephone Company & Oxford Telephone Company received your letter dated July 5, 2007, regarding your request for interconnection under sections 251(a), (b) and (c) of the Telecommunications Act of 1996 ("TelAct") as well as a request for negotiations pursuant to Section 252 of the TelAct. We hereby respectfully decline to enter into such negotiations at this time.

As far as we are aware, Pine Tree Networks is not currently authorized to provide facilities based local exchange service in any of Oxford West Telephone Company or Oxford Telephone Company exchanges. Moreover, prior to obtaining such authority, significant issues would have to be addressed under Section 251(f) of the TelAct. Because Section 251(f) of the TelAct specifically indicates that we are not obligated to abide by the provisions of Section 251(c) unless and until the State Commission removes the rural exemption for a specific exchange, we are similarly not required to negotiate under Section 252 of the TelAct as that is only mandatory if proceeding with an Interconnection Agreements under Section 251(c) of the TelAct.

Because of your lack of standing to seek interconnection in a territory where you are not certified to provide facilities based local exchange service, and because we are still covered by the rural exemption in Section 251(f) of the TelAct, we have no obligations to enter into any negotiations with you at this point. Accordingly, we elect at this time not to enter into such negotiations.

/s/ Dawna K. Hannan
Director – External Affairs

The response of Tidewater Telecom, Inc. and Lincolnville Telephone Company to CRC's request, dated August 30, 2007, states the following:

Tidewater Telecom, Inc. and Lincolnville Telephone Company (the Companies) have received your letter dated July 5, 2007 relative to Pine Tree's request for interconnection pursuant to Section 251(a), (b), and (c) of the Telecommunications Act of 1996 and request for negotiations per Section 252 of the Act.

To the knowledge of the Companies, Pine Tree is not authorized to provide facilities based local exchange service in the Companies' service areas. In addition, if Pine Tree were to seek such authorization, significant issues would have to be addressed pursuant to Section 251(f) of the Act. Because Section 251(f) of the Act sets forth that the Companies are not obligated to follow the provisions of Section 251(c) unless the Maine Public Utilities Commission removes the rural exemption for each exchange in the Companies' service areas, and because the Companies are not obligated to negotiate pursuant to Section 252 of the Act unless pertaining to an Interconnection Agreement under Section 251(c) of the Act, the Companies are not required to negotiate pursuant to Section 252 of the Act.

The Companies are not obligated to enter into negotiations pursuant to your letter dated July 5, 2007, and choose not to do so at this time.

/s/ Shirley P. Manning
President/General Manager

III. JURISDICTIONAL ISSUE

A. Background

On November 29, 2007, CRC Communications of Maine, Inc. (CRC) filed a petition seeking arbitration by the Commission, pursuant to Section 252(b) of the federal Communications Act of 1934, as amended by the Telecommunications Act of 1996 (TelAct), of certain issues related to Sections 251 and 252 of the TelAct over which there is claimed to be a dispute between CRC and the following independent local exchange companies (ITCs): Unitel, Inc., Oxford West Telephone Company, Oxford Telephone Company; Tidewater Telecom, Inc., and Lincolnville Telephone Company. CRC asks that the following issues be decided through arbitration:

- 1) Whether the ITCs are required to negotiate with CRC in good faith towards an interconnection agreement for the items set forth in Sections 251(a) and (b) of the TelAct.
- 2) Whether CRC's request for an interconnection agreement with the ITCs implicates the "rural exemption" from interconnection arrangements, as provided in Section 251(f) (1) of the TelAct.

- 3) Whether CRC's request for an interconnection agreement with the ITCs implicates the "2%" carrier relief from interconnection arrangements, as provided in Section 251(f)(2) of the TelAct.
- 4) Whether the terms of the proposed interconnection agreement provided to the ITCs by CRC is in the public interest and consistent with the requirements of Sections 251 and 252 of the TelAct.

The dispute over these issues arises out of CRC's attempt to engage the ITCs in negotiations that would lead to formal agreements for the interconnection and exchange of telephone traffic. According to CRC, the exchange of correspondence, as reproduced above, demonstrates that the ITCs have rebuffed CRC's overtures and that the Commission must therefore exert its authority pursuant to Section 252(b) of the TelAct, and according to the procedures described by the Commission in an Order dated June 25, 1996 in Docket No. 91-114, to arbitrate the matter with respect to each of the purportedly recalcitrant ITCs.

On December 20, 2007, Unitel moved to dismiss the petition for consolidated arbitration. Among the grounds for dismissal asserted by Unitel is the contention that the PUC lacks jurisdiction to either compel Unitel to negotiate with CRC for an interconnection agreement or to arbitrate the terms of such an agreement. This threshold issue was also raised by the Telephone Association of Maine (TAM) in comments it filed on December 21, 2007. At the heart of this jurisdictional issue is the assertion that when the object is an interconnection agreement with a "rural telephone company," the compulsory arbitration provision of 47 U.S.C. §252(b) may be brought to bear only in instances in which a rural telephone company is empowered to invoke the so-called "rural exemption" pursuant to 47 U.S.C. §251(f)(1)² as an "affirmative defense" to the imposition (by arbitration) of an interconnection agreement or to the enforcement of a duty to negotiate.

Observing that Unitel's motion to dismiss fairly raises fundamental questions regarding the Commission's authority to compel, by arbitration or otherwise, the negotiation sought by CRC in its petition, and that such jurisdictional questions can and should be resolved as a matter of law at the outset of this proceeding on January 11, 2008, the Presiding Officer ordered the parties to file written comments addressing the following issues:

² CRC concedes that neither it nor the ITCs have raised, in their correspondences with one another, the prospect of a proceeding commenced by the Commission to suspend or modify a requirement or requirements of 47 U.S.C. §251(b) or (c) upon a petition for such relief brought by a local exchange carrier with fewer than 2% of the Nation's subscriber lines installed pursuant to 47 U.S.C. §251(f) (2). Nonetheless, CRC identifies this issue as the third of the issues which should be the subject of arbitration before the Commission. We find that the "2% carrier" issue has not been sufficiently raised as to warrant further consideration at this stage of this proceeding.

- 1) Does the Commission have the authority to compel, by mandatory arbitration or otherwise, Unitel, Oxford West Telephone Company, Oxford Telephone Company, Tidewater Telecom, Inc., and Lincolnville Telephone Company to negotiate the terms of an interconnection agreement with CRC and, if so, what is the statutory source of this authority and does such statute (or statutes) require that the Commission exert its authority to compel negotiation? For the limited purpose of analyzing the foregoing the Presiding Officer will assume that each of the listed ITCs is a "rural telephone company" within the definition of that term set forth in 47 U.S.C. §153(37).

- 2) Is the Commission's jurisdiction and authority to compel, by mandatory arbitration or otherwise, Unitel, Oxford West Telephone Company, Oxford Telephone Company; Tidewater Telecom, Inc., and Lincolnville Telephone Company to negotiate the terms of an interconnection agreement with CRC limited as a matter of state law (including, but not limited to 35-A M.R.S.A. §§7901 and 7903), and, if so, what is the extent of such limitation? In analyzing this question, comments addressing the legislative history of state statutes might be especially useful. Also helpful would be comments addressing whether and to what extent Commission precedent approving arbitration proceedings pursuant to Section 252 of the TelAct has addressed, either implicitly or explicitly, the question of whether state statutes limit the authority of the Commission to implement Section 252 of the TelAct.

- 3) Assuming that the Commission's authority to compel, by arbitration or otherwise, negotiation between CRC and the ITCs over the terms of an interconnection agreement, is not circumscribed by state law, does the TelAct itself limit such authority to only those circumstances in which the Commission must determine, pursuant to 47 U.S.C. §251(f)(1)(B), whether to terminate the so-called "rural exemption? If the Commission's authority is not so limited by the TelAct itself, are there public policy reasons which would support abstention by the Commission of its authority to compel negotiation in circumstances in which it is not called upon to determine, pursuant to 47 U.S.C. §251(f)(1)(B), whether to terminate the so-called "rural exemption ?

UniTel, the Telephone Association of Maine (TAM), and CRC filed written comments addressing these questions on January 30, 2008. Time Warner Cable Information Services (Maine) LLC (Time Warner) filed comments on January 31, 2008. In addition to these filings, we have reviewed and considered the arguments set forth in CRC's petition for arbitration, UniTel's December 21, 2007 response and motion to dismiss the petition, and TAM's December 21, 2007 comments in response to the CRC petition. We have also reviewed and considered the written comments of TAM, Time Warner, and Unitel bearing on the applicability of the rural exemption and filed in response to a February 9, 2007 Procedural Order issued in Docket No. 2006-739.³

³ In Docket No. 2007-739, Time Warner petitioned the Commission for an expansion of its authority to provide service. At the request of the Hearing Examiner, the parties in that matter filed briefs addressing the applicability of the rural exemption.

B. Positions of the Parties

1) CRC and Time Warner

CRC and Time Warner argue that CLECs have an unequivocal right under §251(a) to interconnect and exchange traffic with all telecommunications carrier, that §251(b) imposes additional duties on LECs that go beyond interconnection and the exchange of traffic, such as the obligation to provide resale, number portability dialing parity, access to rights-of-way, and reciprocal compensation arrangements for the transport and termination of telecommunications, and that §251(c) imposes still further obligations on the even narrower group of telecommunications companies, the ILECs, including the duty to provide interconnection "at any technically feasible point" at rates established through the TELRIC methodology, to provide to the resale of telecommunications services at a cost-based discount, and to make available for purchase unbundled network elements at TELRIC prices.

According to CRC and Time Warner, the duty of an ILEC to interconnect pursuant to §251(c)(2) does not come into play until and unless a CLEC makes a specific request for interconnection pursuant to that section. Further, CRC and Time Warner claim that only a specific request for interconnection pursuant to §251(c)(2), coupled with the submission of notice to the PUC, implicates the rural exemption. Thus, CRC and Time Warner read the rural exemption provision of the statute, §251(f)(1)(A), which states "[s]ubsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements," as though it read "[s]ubsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bone fide request for interconnection, services, or network elements *pursuant to §251(c)*, *however, subsection (c) of this section shall apply to a rural telephone company when the company has received a bone fide request for interconnection or services pursuant to §251 (a) or (b).*" In the view of CRC and Time Warner, an ILEC cannot evade its §251(a) duty to interconnect by refusing to negotiate and enter into an interconnection agreement.

CRC and Time Warner also assert that the compulsory arbitration procedures set forth in §252(b) requires state commissions to arbitrate disputes arising under all subsections of §251. This is evident, according to CRC and Time Warner, from the language of §252(a) (1) stating 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 or carriers without regard to the standards set forth in subsections (b) and (c) of section 251." In the view of CRC and Time Warner, the fact that particular subsections of section 251 are not referenced in

In our November 15, 2007 Order granting Time Warner's petition, we found that consideration of the rural exemption issue was, at that time premature, and we notified the parties that we would consider their written comments in any subsequent matter in which a request for interconnection triggered the rural exemption.

the first clause of the quoted language reflects Congress's intent not to limit the reach of the compulsory arbitration provisions of the statute to particular subsections such as §251(c).

CRC and Time Warner each assert that state law does not create any obstacle to the assertion by the Commission of jurisdiction over CRC's petition.

2) Unitel and TAM

Unitel and TAM argue that the duty of an ILEC to engage in good faith negotiations with a CLEC is found in §251(c)(1), but not in §251(a) or §251(b), and that, pursuant to the plain language of §251(c)(1), the duty pertains only to terms and conditions of agreements to fulfill those obligations as are set forth in either §251(b)(1)-(b)(5) and/or in §251(c). Thus, according to Unitel and TAM, no ILEC has a duty to engage in good faith negotiations unless the object of those negotiations is an interconnection agreement covering the terms of an arrangement for resale of telecommunications services, §251(b)(1), number portability, §251(b)(2), dialing parity, §251(b)(3), access to rights-of-way, §251(b)(4), reciprocal compensation for the transport and termination of traffic, §251(b)(5), interconnection for the transmission and routing of telephone exchange service and exchange access at any technically feasible point within the network of like quality as that provided by the ILEC to itself or its subsidiaries and at rates and on terms and conditions that are just, reasonable and nondiscriminatory, §251(c)(2), access to unbundled network elements, §251(c)(3), wholesale rates for any telecommunications service offered by the ILEC at retail to subscribers who are not telecommunications carriers, §251(c)(4), notice or changes in information necessary for the transmission and routing of services using the ILEC's facilities, §251(c)(5), or physical collocation of equipment necessary for interconnection or access to unbundled network elements, §251(c)(6).

Unitel and TAM each assert that state law does not create any obstacle to the assertion by the Commission of jurisdiction over CRC's petition.

C. Relevant Statutes and Decisional Authority

1. TelAct

Relevant portions of the operative sections of the TelAct are:

§251(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty –

- (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

- (2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

§251(b) Obligations of all local exchange carriers

Each local exchange telecommunications carrier has the following duties:

- (1) Resale
- (2) Number portability
- (3) Dialing parity....
- (4) Access to rights-of-way
- (5) Reciprocal compensation

§251(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

- (1) Duty to negotiate.

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.

- (2) Interconnection.

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network –

- (A) for the transmission and routing of telephone exchange service and exchange access;
 - (B) at any technically feasible point within the carrier's network;
 - (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
 - (D) on rates, terms, and conditions that are just, reasonable and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.
- (3) Unbundled access.....
 - (4) Resale...
 - (5) Notice of changes...
 - (6) Collocation...

§251(f)(1) Exemption for certain rural telephone companies

(A) Exemption.

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b) (7) and (c) (1) (D) thereof).

(B) State termination of exemption and implementation schedule.

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b) (7) and (c) (1) (D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

§252(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....

(2) Mediation.

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

§252(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 the 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 issue.

2. *Sprint Communications Company v. Public Utilities Commission of Texas and Brazos Telephone Cooperative*, No. A-06-CA-065-SS, 2006 U.S. Dist. LEXIS 96569 (W.D. Tex. Aug. 14, 2006).

The *Brazos* case arises out of a decision of the Public Utilities Commission of Texas dismissing a petition for arbitration brought by Sprint. Sprint, a CLEC, sought arbitration of an interconnection agreement it sought with Brazos. Sprint claimed that it was seeking interconnection under §251(a) and (b). The Texas commission found that Sprint's request for interconnection was governed by §251(c), and that Brazos was exempt from the requirements of that section because it is a rural carrier entitled to invoke the rural exemption pursuant to §251(f) (1).

The District Court upheld the decision of the Texas PUC, and based its decision on the text and structure of the TelAct. Specifically, the Court observed that the rural exemption only applies to the duties set forth in §251(c) because the language of the exemption, set forth in §251(f) (1) states: "[s]ubsection (c) of this section shall not apply to a rural telephone company..." The Court held that because the "duty to negotiate" terms of an interconnection agreement is found, and created, in §251(c) (1), that duty is among those which "shall not apply to a rural company" unless and until the rural exemption is lifted. Thus, "because Brazos is a rural telephone company exempt from §251(c) (1)'s duty to negotiate, Brazos is free to refuse to negotiate anything at all with Sprint unless and until the PUC lifts Brazos' rural exemption. The Court explained that "[t]he policy evinced in §251(f) is that rural telephone companies should be shielded from burdensome interconnection requests until the PUC has screened such requests," and that "[t]his policy could too easily be thwarted if a CLEC, such as Sprint, could evade PUC screening by denominating its request for interconnection as one solely under §251(a) or (b). The Court also noted that "§251(a) and (b) say nothing at all about 'agreements,' 'negotiations,' or 'arbitration,'" and while "there are duties established by §251(a) and (b), and such duties apply to Brazos," there is no "language in the Act indicating that these duties independently give rise to a duty to negotiate or to arbitrate."

3. *In the Matter of Telephone Number Portability*, CC Docket No. 95-116, RM-8535, Memorandum Opinion and Order, Adopted March 6, 1997, rel. March 11, 1997.

In its 1997 *Number Portability Order*, the FCC rejected the contention, made by rural LECs, that they are relieved from any obligation to provide number portability until such time as a state commission lifts the

rural exemption pursuant to §251(f)(1). The FCC rejected such a reading of §251(f)(1), stating that “Sections 251(b) and 251(c) are separate mandates,” and “the requirements of Section 251(b) apply to a rural LEC even if Section 251(f)(1) exempts such LECs from a concurrent Section 251(c) requirement.” *Order* at ¶ 119. The FCC noted, however, that “Section 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), including number portability.” *Order* at ¶ 117, n. 393. The FCC did not reconcile whatever might be the tension caused by the coexistence of a statutory requirement that rural LECs provide number portability, §251(b) (2), and the statutory relief provided to rural LECs by §251(f) (1) from the duty, set forth in §251(c) (1), to negotiate in good faith over the terms and conditions of agreements to fulfill the obligations to provide number portability.

4. *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, WC Docket No. 06-55, DA 07-709 (WCB rel. Mar. 1, 2007).

In its 2007 *Time Warner Order*, the Wireline Competition Bureau of the FCC issued a declaratory ruling that wholesale providers of telecommunications services are telecommunications carriers for the purposes of §251(a) and §251(b), and that they “are entitled to interconnect and exchange traffic with incumbent LECs pursuant to Section 251(a) and (b) of the Act for the purpose of providing wholesale telecommunications services.” *Order* at ¶ 8. The declaratory ruling was limited to the issue of whether the Nebraska and South Carolina correctly found that a provider of wholesale service is not a “telecommunications carrier” within the meaning of the TelAct. The Bureau was not called upon to address, and did not address, the question of whether a rural ILEC can be compelled, by arbitration or otherwise, to negotiate in good faith over the terms and conditions of agreements to provide such interconnection and exchange of traffic pursuant to §251(a) and §251(b).

D. Decision

We adopt the reasoning of the *Brazos* court. The statutory source of an ILEC's obligation to negotiate an interconnection agreement with competitive carriers is §251(c)(1). However, rural ILECs are exempt from this provision of the TelAct pursuant to §251(f)(1). Our authority to compel and conduct arbitration over the terms of an interconnection agreement between ILECs and competitive carriers pursuant to §252(b)(2) presumes a duty on the part of an ILEC to engage in good faith negotiations regarding the terms of such an agreement in the first instance.

A rural ILEC is not exempt from the obligations set forth in §251(a) and §251(b). We are unable, however, to find in the text of the TelAct language conferring upon this Commission authority to directly enforce the requirements of §251(a) and §251(b). Instead, the TelAct contemplates only that the requirements of §251(a) and §251(b) will be enforced by a state commission in the context of its authority to arbitrate "open issues" remaining after voluntary negotiations have yielded incomplete results. Again, however, rural ILECs are exempt from the duty to negotiate in good faith. Until and unless the rural exemption is lifted, there is, quite simply, nothing to arbitrate.

We are mindful that the TelAct, so read, creates a regulatory gap whereby a state commission is without authority to enforce directly the requirements of §251(a) and §251(b) as they relate to rural ILECs for whom the rural exemption has not been lifted. See *Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and CenturyTel or Washington, Inc., Pursuant to 37 U.S.C. Section 252*, Seventh Supplemental Order: Affirming Arbitrator's Report and Decision, Docket No. UT-023043, at 11 (Wash. Utilities & Transp. Comm'n Feb. 28, 2003). In its *Number Portability Order*, *supra*, upon which Time Warner relies, the FCC implicitly recognized the existence of this gap when it observed, on the one hand, that the rural exemption does not shield rural ILECs from their obligations under §251(a) and §251(b), but that on the other hand, rural ILECs are exempt from the duty to negotiate with competitive carriers over agreements to fulfill the requirements of §251(a) and §251(b). The FCC decisions cited by CRC and Time Warner, such as the *Time Warner Cable Request for Declaratory Ruling*, *supra*, do not resolve this tension – a tension created by the text and structure of the TelAct itself.

Notwithstanding the foregoing, and having found that §251(f)(1) presently exempts the rural ILECs from a duty to negotiate, we find that the correspondence between the parties is sufficient to demonstrate that, as of this date, CRC has made a bona fide request for interconnection, services, or network elements of the rural carriers, and that the rural carriers have, in turn, properly raised the rural exemption. The Hearing Examiner shall schedule evidentiary hearings and such additional proceedings as will enable us to determine whether the rural exemption should be terminated as to each rural ILEC within 120 days of this Order.

