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UTILITIES COMMISSION

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF PAGEDATA'S) Case No. GNR-T-04-05
PETITION FOR ARBITRATION OF)
INTERCONNECTION RATES, TERMS AND)
CONDITIONS AND RELATED) RESPONSE AND
ARRANGEMENTS WITH QWEST) MOTION TO DISMISS
CORPORATION PURSUANT TO SECTION) PETITIONS FOR
252(B) OF THE FEDERAL) ARBITRATION
TELECOMMUNICATIONS ACT.)

IN THE MATTER OF WAVESENT'S) Case No. GNR-T-04-06
PETITION FOR ARBITRATION OF)
INTERCONNECTION RATES, TERMS AND)
CONDITIONS AND RELATED)
ARRANGEMENTS WITH QWEST)
CORPORATION PURSUANT TO SECTION)
252(B) OF THE FEDERAL)
TELECOMMUNICATIONS ACT.)

Qwest Corporation ("Qwest") hereby (1) responds to the Petitions for Arbitration filed by Joseph McNeal d/b/a PageData and WaveSent, LLC (the "Pagers") and, (2) moves the Commission to dismiss the Petitions, for the reasons set forth below.

ORIGINAL

I. INTRODUCTION AND BACKGROUND

Petitions for Arbitration. On March 23, 2004, PageData filed a Petition for Arbitration of interconnection agreement terms and conditions with Qwest pursuant to Section 252(b) of the 1996 Act, and WaveSent filed a nearly identical Petition two days later.¹ The Pagers filed their Petitions for Arbitration even though they had only requested negotiations a few days earlier, and despite the fact that no negotiations whatsoever had yet taken place. In their Petitions, the Pagers also requested the Commission's "arbitration" of requests to adopt contract language from other agreements.

Order No. 29463. On April 2, 2004, the Commission consolidated the cases and issued a procedural order.² The Commission (1) ordered the Pagers to provide a citation to any case which purports to allow the Commission to entertain arbitration petitions filed prior to the 135th day after a request for negotiations, and (2) ordered Qwest to file its response to the petitions, separately addressing the Pagers' unresolved arbitration issues and those terms the Pagers desired to adopt under Section 252(i) of the Act.³

Amendment to Petition. The Pagers did not provide a citation of law to support their attempts to invoke the Commission's jurisdiction prior to the 135th day as required by Order No. 29463. Instead, on April 12, 2004, the Pagers filed a joint document entitled "Amendment to Petition" in which they requested that the Commission first

¹ Petition of Joseph B. McNeal, d/b/a PageData filed a Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Qwest Corporation Pursuant to Section 252(b), filed March 23, 2004; Petition of WaveSent, LLC for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Qwest Corporation Pursuant to Section 252(b), filed March 25, 2004. Mr. McNeal acts as "Attorney Pro Se" for both Pagers.

² Order 29463, issued April 2, 2004.

³ *Id.* at 4.

decide a dispute under their existing interconnection agreements with Qwest before proceeding to consider the Arbitration Petitions.⁴ The Amendment stated:

4. WaveSent and PageData seek to amend the Petition to request that the Commission first make a ruling on the current interconnection agreement and whether WaveSent and PageData's position is correct or whether Qwest's position is correct, and then if necessary proceed with the 252(i) and 252(b) requests. . . .

5. WaveSent and PageData seek arbitration under Sections 252(i) and 252(b) if the Commission determines that WaveSent and PageData's interpretation of Section 2.4 of the interconnection agreements is in error and accepts Qwest's interpretation of Section 2.4.⁵

In the Amendment, unlike the Petition, the Pagers appear to ask the Commission to resolve a dispute under their current agreement, rather than to decide unresolved interconnection issues for a new agreement. The Amendment seeks resolution of a dispute whether the Pagers may, under their current agreements, use paging interconnection facilities and services to terminate Internet/enhanced services traffic, including:

- whether the Pagers are entitled to route traffic for termination to Internet Service Providers (ISPs) over paging facilities;
- whether Qwest must provide free facilities for transporting such ISP-bound traffic
- whether ISP-bound traffic is subject to reciprocal compensation.⁶

Thus the Commission is asked to decide:

. . . whether Qwest's interpretation of the current interconnection agreements is correct, which necessitates WaveSent and PageData's taking advantage of the Commission's Order No. 29140 allowing for the adoption of the terms and conditions from the Verizon agreement under 252(i). WaveSent and PageData seek the Commission to adopt the proposed interconnection agreement (provided as Exhibit F) that incorporates the 252(i) adoptions, without changes. WaveSent and PageData would seek an instant and retroactive adoption of the Verizon ISP-Bound traffic amendment per attachment A of the amendment; as well as including the

⁴ WaveSent and PageData's Amendment to Petition, filed April 12, 2004.

⁵ Amendment, ¶¶ 4-5.

⁶ *Id.*, ¶¶ 6-15.

Commission ruling on incorporating the flat rate 6000 MOU of local paging traffic into Sections 2.2.1 and 3 of the amendment; dispute resolution clause, and ASR ordering process terms and conditions under 252(i), the Commission ruling on whether continuous paging is local paging, and possible 252(b) negotiations.⁷

The Pagers' confusing amalgam of requests for dispute resolution, arbitration under the Act, and "pick-and-choose" issues, leaves the parties and the Commission in an unusual and confusing situation. If, and only if, the Commission rules against the Pagers on the dispute under the current agreements, then the Pagers apparently would return to the arbitration or 252(i) process – however, not with the proposed agreement, contract language, and list of issues set forth in the Petitions. The Pagers provided new, different proposed agreements and contract language in the Amendment, and appear to have abandoned the original advocacy set out in the Petitions – at least to the extent they attached to the Amendment a new proposed agreement and other language from various interconnection agreements to be adopted with "instant and retroactive" effectiveness⁸.

Order No. 29477. On April 16, 2004, the Commission issued its Order acknowledging the Pagers' Amendment and extending the time for Qwest's "consolidated response to the two petitions and the recent Amendment."⁹

Motion for Expeditious Substantive Relief. An April 19, 2004, PageData filed a "Motion for Expeditious Substantive Relief" in the consolidated dockets. PageData requested the Commission to order Qwest to provision certain facilities.

Qwest's Response to Motion for Expeditious Substantive Relief. On May 3, 2004, Qwest filed its response to PageData's Motion for Expeditious Substantive

⁷ Amendment, pp. 13-14.

⁸ Amendment, ¶¶ 11, 17.

⁹ Order 29477, issued April 2, 2004, p. 2.

Relief.¹⁰ Qwest set forth a history of the dispute and attached relevant correspondence and other documents to its response. Qwest hereby incorporates that response and its attachments by reference.

Negotiations of the Parties. On May 7, 2004, the parties held their first negotiating session. Since then the parties have held several productive sessions, and have made significant progress toward a new interconnection agreement that would resolve the issues raised in the Petitions and the Amendment. Qwest is hopeful that as negotiations proceed, in the manner Congress intended under the Act, the issues between the parties can be resolved or at least substantially narrowed, before the Commission is called upon to decide them.¹¹

Qwest Provision of Facilities. After negotiations began on May 7, and the parties began actually working through the issues, Qwest provided most of the facilities that PageData sought in its Motion for Expeditious Substantive Relief. Qwest believes PageData's motion is now moot.

RESPONSE TO ARBITRATION PETITIONS AND AMENDMENT

The Commission ordered Qwest to respond separately to the negotiation/arbitration issues raised by the Petitions, and the pick-and-choose issues stated in the Petitions.

As Qwest explains below in its Motion to Dismiss, the Pagers are required to negotiate any changes to the existing interconnection agreement, whether they seek entirely new agreements or modification of their existing agreements. Their attempts to pick-and-choose portions of agreements are ineffective because they are currently bound

¹⁰ Qwest Corporation's Response to PageData's Motion for Expeditious Substantive Relief, filed May 3, 2004.

¹¹ Wayne Hart of the Commission's Staff has assisted the parties in these negotiations. Qwest is grateful for Mr. Hart's participation, and believes this has been an important factor in moving the parties toward resolution of the issues.

by agreements to which they previously chose to opt in. Accordingly, the Commission should not entertain the Petitions, but should let the negotiation process go forward.

Qwest notes also that until the parties sat down at the negotiating table well after the Pagers had filed their Petitions for Arbitration, the areas of dispute were not at all clear. This was demonstrated by (1) the Pagers' change of advocacy and strategy in the Amendment to Petition, (2) the Pagers' inclusion of new descriptions of issues and proposed language in the Amendment. Qwest refers the Commission to correspondence attached to Qwest's recent response to PageData's Motion for Expeditious Substantive Relief. A review of that correspondence shows nearly all of the issues raised in the Petitions were raised for the first time in the Petitions themselves. Moreover, many of the issues raised in the Petitions appear to Qwest to have now been resolved in negotiations, or to have become irrelevant to the current negotiation template on which the parties are now focused. For these reasons, and because the Pagers' attempt to invoke the Commission's jurisdiction was premature, Qwest is simply not able at this time to identify issues from the original Petitions that remain both unresolved and pertinent to the current negotiations draft agreement – much less formulate a response on those issues.

SEPARATE RESPONSE REGARDING 252(i) ISSUES

Order No. 29463 provided that Qwest should respond separately to the Pagers' requests for adoption of terms and conditions under 47 U.S.C. § 252(i). The situation here is even more confused. Qwest refers the Commission to correspondence between the parties, attached to Qwest's Response to Motion for Expeditious Substantive Relief, which shows that, even before they filed the Petitions, the Pagers were unclear or uncertain as to what interconnection agreement – or terms and conditions from multiple approved interconnection agreements – they sought to adopt.

The Petitions and Amendment have only further added to this muddle. For example, in their Amendment, the Pagers seem to have jettisoned their adoption attempts

described in the Petitions, proposing instead the adoption of an entirely new agreement, Exhibit F to the Amendment.

In none of these articulations of what they seek to pick and choose do the Pagers seek the adoption of another carrier's interconnection agreement that has been previously approved by the Commission. Exhibit F to the Amendment appears to be an amalgam of terms and conditions the Pagers deem favorable; they are from a number of other interconnection agreements.

Likewise, the Pagers seem to be of the mistaken view that they can adopt terms that they modify to their own needs as they see fit, or that they can adopt a provision as a starting point and seek further modification of it through the negotiation/ arbitration process. They state:

[t]hen the disputes listed in the Matrices of Unresolved Issues (Exhibits B of the original Petitions) would remain under 252(i) and need to be arbitrated by the Commission with the exception of items numbered 1, 3, 4, 13, 20, 21, 22, and 23 from WaveSent's Matrix and items numbered 1, 2, 4, 5, 14, 22, 23, and 24 from PageData's Matrix. These items would remain under 252(b) negotiations, if necessary.¹²

This "pick and change" methodology is simply different than what the law contemplates. A party adopting an agreement is bound by the terms of that agreement – it cannot pick a phrase here, another there, and then seek modification of the whole to provide an advantageous interconnection agreement.

Qwest also notes that the Pagers claim they would adopt provisions that, on their adoption, are instant and retroactive.¹³ There is no legal authority for a retroactive adoption. By its nature, 252(i) operates prospectively.

Accordingly, Qwest is uncertain as to the extent the Pagers are legitimately attempting to invoke Section 252(i), and is not able to formulate a separate response on

¹² Amendment ¶ 12.

¹³ Amendment, ¶¶ 11, 17.

these issues. As with Qwest's response above regarding the 252(b) arbitration issues, Qwest believes that the issues are currently irrelevant because of the intervening progress of negotiations.

Below, in Qwest's motion to dismiss, Qwest argues that the pick-and-choose provisions of Section 252(i) are not applicable to the present situation because the Pagers may not modify their existing agreements by adopting inconsistent terms and conditions.

MOTION TO DISMISS

Qwest Corporation moves to the Commission to dismiss the Petitions for Arbitration filed by Joseph McNeal d/b/a/ PageData and WaveSent, LLC.

Qwest's Motion to Dismiss the Petitions for Arbitration is based on the following:

- 1. The Pagers Must Follow Contractual Procedures to Modify their Existing Agreements or to Negotiate New Interconnection Agreements.** The Pagers' current Agreements provide specific time periods and procedures for modification or renegotiation which the Pagers have ignored. Because Pagers have not followed their contracts, the Commission should dismiss their Petitions.
- 2. Petitions for Arbitration May Not be Filed Before the 135th Day after a Request for Negotiations.** Because the Pagers have not complied with the Act's strict time requirements, the Commission should dismiss the Petitions for Arbitration.
- 3. Response to Pagers' Allegations of Bad Faith.** There is no law to support elimination of the statutory time requirements based on a claim of bad faith; nevertheless, the Pagers' claims of bad faith are not well taken, and Qwest responds thereto.

ARGUMENT

- 1. The Pagers Must Follow Contractual Procedures to Modify their Existing Agreements or to Negotiate New Interconnection Agreements**

Whether Pagers seek to negotiate new interconnection agreements, or to amend their existing interconnection agreements to incorporate provisions from other carriers' agreements with Qwest, they must follow the procedures in their existing contracts.

Both Pagers adopted the Type 1 and Type 2 Paging Interconnection Agreement between Qwest and Arch Paging - “the Arch Agreement”¹⁴ – and both Pagers are currently bound by the terms and conditions of those adopted Agreements.¹⁵ Pagers’ current Agreements provide specific time periods and procedures for modification or renegotiation which the Pagers have ignored. Section 11.4.2 of the Agreements provides:

11.4.2 Voluntary Termination. The Agreement may be terminated upon 160 days’ advance written notice at any time after August 11, 2001. The Parties agree that any such notification of termination shall be deemed a formal request under Sections 251 and 252 of the Act for negotiation of an interconnection agreement. During the termination notice period, the Parties shall negotiate in good faith to reach a revised agreement. If no such agreement is reached, the Agreement will terminate on the 161st day after notice, unless either party has requested arbitration pursuant to Section 252(b)(1) of the Act, in which case the Agreement will continue in force and effect until a successor agreement has been approved by the Commission.

These time periods coincide with those established under Section 252 of the Act.

The contractual terms of the Pagers’ existing Agreements have expired, and the contracts have gone into “evergreen” status. Accordingly, under the language of Section 11.4.2 above, either party is now entitled to send a termination notice and thus request negotiation of a new interconnection agreement. Until a party provides the notice

¹⁴ Type 1 and Type 2 Paging Interconnection Agreement between U S WEST Communications, Inc., and Arch Paging, Inc./ Mobile Communications Corporation of America, filed with the IPUC on July 13, 2000 (hereinafter as “Arch Agreement”). See *In the Matter of the Joint Application of Qwest Corporation FKA U S WEST Communications, Inc. Arch Paging, Inc. and Mobile Communications Corporation of America for Approval of a Type 1 and Type 2 Interconnection Agreement Pursuant to 47 U.S.C. § 252(e)*, Case No. USW-T-00-20. The Commission approved the Arch Agreement on September 1, 2000. *Id.*, Order No. 28499.

¹⁵ The Commission approved PageData’s and WaveSent’s adoptions of the Arch Agreement on February 25, 2003. 2003. See *In the Matter of the Joint Application of Qwest Corporation and Joseph B. McNeal dba PageData for Approval of a Paging Connection Agreement Pursuant to 47 U.S.C. § 252(i)*, Case No. QWE-T-03-6, Order No. 29198; *In the Matter of the Joint Application of Qwest Corporation and WaveSent, LLC for Approval of a Paging Connection Agreement Pursuant to 47 U.S.C. § 252(i)*, Case No. QWE-T-03-_, Order No. 29198.

contemplated in Section 11.4.2, however, the contract remains in effect. The notice starts a 160-day clock, at the end of which the Agreement terminates. Prior to that time, however, both parties remain bound by the existing interconnection Agreement. Qwest is willing to treat the Pagers' requests for negotiations as the termination notices required by Section 11.4.2 of the Agreement, but until the 160-day clock expires, the parties remain bound by the Agreements as written.

The Pagers are bound by the existing contract provisions, whether they seek to negotiate new agreements, amendments to the existing agreements, or whether they purport to incorporate new provisions into the existing agreements pursuant to Section 252(i).¹⁶ In fact, they are not entitled under Section 252(i) to adopt provisions that would modify their existing agreements. The FCC established these principles clearly in its May 4, 2004 reconsideration decision in *Core Communications v. SBC Communications, Inc.*,¹⁷ a copy of which is attached to this Response/Motion to Dismiss. In that case, complainant Z-Tel Communications had opted into interconnection agreements with Pacific Bell Telephone Company. The agreements did not provide shared transport for intraLATA toll calls. Z-Tel, like the Pagers here, sought to modify its existing interconnection agreement by amending the language to provide shared transport – a duty which all agreed was required by the FCC's rules.

¹⁶ See, e.g., *In re Petition of Supra Telecommunications for Generic Proceedings to Arbitrate Terms and Conditions of Interconnection with BellSouth*, Florida Public Service Commission, 1990 Fla. PUC LEXIS 632, Order Granting Motion to Dismiss, March 31, 1998:

As for Supra's request for an arbitration proceeding between Supra and BellSouth, we find nothing in the Act authorizing a state commission to conduct an arbitration on matters covered by an agreement that has been approved pursuant to Section 252(e). The Act does not authorize a state commission to alter terms within an approved negotiated agreement or to nullify an approved negotiated agreement.

¹⁷ *CoreComm Communications, Inc., and Z-Tel Communications, Inc., SBC Communications Inc., Southwestern Bell Telephone Company, Pacific Bell Telephone Company, Nevada Bell Telephone Company, The Southern New England Telephone Company, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc.*, FCC 04-106, Order on Reconsideration, released May 4, 2004.

The FCC ruled that Z-Tel could not allege that Pacific Bell had violated the Act, or that the agreement itself violated the Act, because parties negotiating for interconnection under Section 252 are free to choose terms and conditions that are different from terms required by the Act or the FCC's rules.¹⁸ Likewise, Z-Tel could not require Pacific Bell to amend the agreements, nor could Z-Tel attempt to modify the contractual language by invoking Section 252(i). The FCC stated:

[T]he Commission has never held that a requesting carrier may successfully charge an ILEC with violating its section 251(c) obligations when the requesting carrier has, pursuant to section 252(i), opted into an interconnection agreement that excludes the very section 251(c) obligations at issue.¹⁹

The FCC further explained:

Indeed, to so hold under these specific circumstances would undermine the point of these interconnection agreements, which Congress established as the mechanism to implement the duties arising section 251(c). In the present case, Z-Tel opted into a pre-existing Pacific interconnection agreement without first negotiating or arbitrating an amendment to the agreement regarding shared transport. Z-Tel is bound by the Pacific Agreement, and may not now require Pacific to amend its terms. *See Liability Order*, 18 FCC Rcd at 7581-82, ¶ 30 (stressing that any request by Z-Tel to change the Pacific Agreement's terms would have to comply with the agreement's modification or change of law provisions).²⁰

Like Z-Tel, the Pagers voluntarily opted into the Arch Agreements. Just as Z-Tel could not require Pacific to amend the agreements after opting in, the Pagers may not now require Qwest to modify the existing agreements.

Because Pagers are still bound by the existing contracts, the Commission should dismiss their Petitions.

¹⁸ 47 U.S.C § 252(a) and 47 U.S.C § 252(e)

¹⁹ *Id.*, ¶ 10.

²⁰ *Id.* n. 24.

2. Because Pagers Have Not Followed the Strict Time Periods Set Out in the Act, The Commission Should Dismiss the Petitions for Arbitration

Section 252(b)(1) of the Act states:

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

This section of the Act clearly and unambiguously requires a telecommunications carrier to wait 135 days after the date of a request for negotiation to file a petition for arbitration with a state commission.²¹ According to the Pagers' own pleadings, PageData requested negotiations on March 16, 2004;²² WaveSent's request for negotiations was made on March 18, 2004.²³ Accordingly, the windows for arbitration under Section 252 of the Act open on July 29, 2004 for PageData and July 31, 2004 for WaveSent.

Other state commissions have found the 135-day period for opening the arbitration window is mandatory or jurisdictional; i.e., a party cannot seek arbitration before the window opens. For example, the West Virginia Public Service Commission stated:

The Commission concludes that Sprint's petition for arbitration should be dismissed on the grounds that it was not timely filed under the provisions of TA96. Section 252(b) of that statute deals with interconnection agreements arrived at through compulsory arbitration and provides, in relevant part:

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request

²¹ 47 U.S.C. § 252(b)(1).

²² PageData Petition ¶ 7, see also Exhibit A, PageData's Petition.

²³ WaveSent Petition ¶ 7

for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issue.

47 U.S.C. § 252(b)(1). The Commission believes that this provision can only be read to require petitions to be filed within the 135-160 day period following the request for interconnection negotiations, despite the fact that the phrase “may petition” is used. A proper reading of the language in this section is that requesting carriers may file a petition for Commission arbitration of an interconnection agreement--they are not required to do so. However, if they wish to request such arbitration, they must file their petition requesting same during the 25-day period specified in 47 U.S.C. § 252(b)(1). This point is made clear by the legislative history of 47 U.S.C. § 252(b)(1). Congress wrote that: “Requests to the State to intervene must be made during the 25 day period that begins 135 days after the local exchange carrier received the negotiation request.” H. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 124, reprinted in 1996 U.S. CODE CONG. & AD. NEWS 135.²⁴

3. Response to Pagers’ Allegations of Bad Faith

The Pagers attempt to circumvent the strict requirements of Section 252(b)(1) by arguing that PageData is not required to comply with the time requirements because Qwest has negotiated in bad faith.²⁵ There is no authority for such a position; in fact, it is more likely that Congress imposed the 135-day negotiation requirement, and the requirement that both carriers negotiate in good faith, to avoid exactly the situation the Commission faces here: a carrier who seeks to use the Act’s processes to its own ends and until recently, without coming to the negotiating table

Qwest does not believe that the parties can – through their behavior or otherwise – modify the jurisdictional time periods set forth in Section 252(b)(1) of

²⁴ *In re Sprint LP Petition for Arbitration with Bell Atlantic*, CASE NO. 98-1493-T-PC, West Virginia Public Service Commission, 1999 *W. Va. PUC LEXIS 6444*, January 29, 1999.

²⁵ See P. 4, ¶ 11 of PageData’s Petition for Arbitration dated March 23, 2004.

the Act. However, Qwest will briefly address Pagers' baseless claims that Qwest has negotiated in bad faith.

As the Commission is well aware, the law concerning paging interconnection is disastrously unclear and self-contradictory. Likewise, the Commission is familiar with the Pagers in this case. They are among the most – if not the most - litigious in the industry. As of the day this motion is written, PageData is pursuing its claims against Qwest before this Commission, at the Idaho Supreme Court and in Federal District Court in at least six actions.

As demonstrated in the documents attached to Qwest's Response to PageData's Motion for Expedient Substantive Relief, Qwest notes that until after the Petitions for Arbitration had been filed there had been no negotiations at all between the parties. Qwest has been encouraged by recent negotiations and is hopeful that they will continue to be productive. Before that, however, Qwest faced claims of "instantaneously effective retroactive amendments" which the Pagers claim they can do without Qwest's agreement, take-it-or-leave-it demands; threats of further RICO lawsuits, accusations that Qwest's management are criminals, demands, and so forth. The Pagers also have a duty to engage in negotiations in good faith.

Because the Petitions for Arbitration were both filed before the 135th day of the time period established by Section 252(b)(1), the Commission should decline to exercise jurisdiction over the Petitions. Accordingly, the Commission should dismiss the Petitions as a matter of law.

CONCLUSION

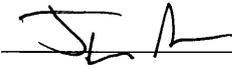
Based on the foregoing, Qwest respectfully requests that the Commission dismiss the Petitions for Arbitration and allow the parties to process with the negotiation process envisioned by Congress in the Telecommunications Act of 1996. The parties are currently making progress in negotiations. Once the parties reach the negotiation period contemplated by the existing interconnection agreements and Section 252 of the Act, any of the parties may seek the Commission's arbitration of unresolved issues. Until then, Qwest is hopeful that negotiations will continue to be fruitful, and is grateful for the Commission's assistance in that regard.

DATED this 18th day of June, 2004.

Respectfully Submitted,

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and

for  _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of June, 2004, I served the foregoing upon all parties of record in this proceeding as indicated below.

Jean Jewell Idaho Public Utilities Commission 472 W. Washington Street Boise, ID 83702-5983 (208) 334-0300	<input type="checkbox"/> Certified Mail <input type="checkbox"/> First Class Mail <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile
Joseph McNeal, d/b/a PageData P.O. Box 15509 Boise, ID 83715 (208) 375-9844	<input type="checkbox"/> Certified Mail <input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile



William J. Batt

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
CoreComm Communications, Inc., and)	
Z-Tel Communications, Inc.,)	
)	
Complainants,)	
)	File No. EB-01-MD-017
v.)	
)	
SBC Communications Inc.,)	
Southwestern Bell Telephone Company,)	
Pacific Bell Telephone Company,)	
Nevada Bell Telephone Company,)	
The Southern New England Telephone)	
Company,)	
Illinois Bell Telephone Company,)	
Indiana Bell Telephone Company,)	
Michigan Bell Telephone Company,)	
The Ohio Bell Telephone Company, and)	
Wisconsin Bell, Inc.,)	
)	
Defendants.)	

ORDER ON RECONSIDERATION

Adopted: April 28, 2004

Released: May 4, 2004

By the Commission:

I. INTRODUCTION

1. In this Order, we deny the Petition for Reconsideration¹ filed by Z-Tel Communications, Inc. ("Z-Tel") pursuant to section 405 of the Communications Act of 1934, as amended ("Act").² Z-Tel seeks reconsideration of the Commission's *Liability Order*³ insofar as

¹ Petition for Reconsideration, File No. EB-01-MD-017 (filed May 19, 2003) ("Petition").

² 47 U.S.C. § 405.

it denies Z-Tel's claim, made in a section 208 formal complaint, that defendant Pacific Bell Telephone Company ("Pacific") violated sections 201(b), 251(c)(1) and (c)(3) of the Act, and Commission rules 51.309 and 51.313.⁴ For the following reasons, we conclude that Z-Tel's Petition lacks merit.

II. BACKGROUND

2. Z-Tel is a competitive local exchange carrier ("CLEC"), and Pacific is an incumbent local exchange carrier ("ILEC").⁵ Pursuant to section 252(i) of the Act,⁶ Z-Tel opted into an existing section 252 interconnection agreement between Pacific and another CLEC (the "Pacific Agreement"). The Pacific Agreement granted Z-Tel access to the shared transport unbundled network element ("UNE"), but Pacific refused to allow Z-Tel to use the shared transport UNE to transport Z-Tel's customers' intraLATA toll calls. Z-Tel sought to amend the Pacific Agreement by asking Pacific to execute a "Memorandum of Understanding" that would have allowed Z-Tel to use the shared transport UNE for intraLATA toll. Pacific refused Z-Tel's request.⁷

3. In its Complaint filed in this proceeding, Z-Tel alleged that Pacific's refusal to allow Z-Tel to use the shared transport UNE for intraLATA toll, and its refusal to execute the Memorandum of Understanding, violated, *inter alia*, sections 201(b), 251(c)(1), and 251(c)(3) of

(Continued from previous page)

³ *CoreComm Communications, Inc. and Z-Tel Communications, Inc. v. SBC Communications Inc. et al.*, Memorandum Opinion and Order, 18 FCC Rcd 7568 (2003), *petition for review pending release of the instant order, sub nom. SBC Communications Inc. v. FCC*, No. 03-1147 (D.C. Cir. 2003) ("*Liability Order*").

⁴ 47 U.S.C. §§ 201(b), 251(c)(1) and (c)(3); 47 C.F.R. §§ 51.309(a), 51.309(b), 51.313(b). Z-Tel does not seek reconsideration of the Commission's denial of its section 202(a) claims. The Commission granted Z-Tel's claim that defendants Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, and Wisconsin Bell Telephone, Inc. (collectively, "Ameritech") violated paragraph 56 of the *SBC/Ameritech Merger Order Conditions. Liability Order*, 18 FCC Rcd at 7576-78, ¶¶ 20-25 (citing *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14712, 15023-24 (1999), (subsequent history omitted) ("*SBC/Ameritech Merger Order Conditions*"). Specifically, the *Liability Order* noted that Z-Tel purchased the shared transport UNE from Ameritech, that Z-Tel requested permission to use the UNE for intraLATA toll, and that Ameritech refused Z-Tel's request. Ameritech's refusal violated the *SBC/Ameritech Merger Order Conditions*, because those conditions require Ameritech to "offer" shared transport for intraLATA toll. *Liability Order* at 18 FCC Rcd at 7576-77, ¶¶ 20-21. The Commission has issued a forfeiture order against Ameritech for violation of the *Merger Order Conditions*. See *SBC Communications, Inc., Apparent Liability for Forfeiture*, Forfeiture Order, 17 FCC Rcd 19923 (2002), *appeal pending*.

⁵ *Liability Order*, 18 FCC Rcd at 7571, ¶ 8.

⁶ 47 U.S.C. § 252(i).

⁷ *Liability Order*, 18 FCC Rcd at 7579-81, ¶ 29.

the Act and Commission rules 51.309 and 51.313.⁸ The Complaint did not include a copy of the Pacific Agreement. Nor did the Complaint discuss or direct the Commission's attention to any of the language found in the Pacific Agreement.⁹

4. Pacific asserted in its Answer that it was not obligated by the Pacific Agreement to provide Z-Tel shared transport for intraLATA toll or to execute the Memorandum of Understanding.¹⁰ Pacific also stated that, "in conference calls with Commission staff ... counsel for [Z-Tel] specifically disavowed any claim that [Pacific] had violated their interconnection agreement[.]... ."¹¹ Pacific asserted as an affirmative defense that Z-Tel failed to state a claim and had waived any claim because Z-Tel "specifically disavowed any claim that [Pacific] ha[s] violated [the Pacific Agreement]" and had voluntarily entered into an agreement "that do[es] not make available the intraLATA interexchange transmission [Z-Tel] seek[s]."¹² Pacific also stated, "The reason [Z-Tel] attempt[s] to base [its] claims on the Act and the Commission's rules and orders rather than the governing agreements...is simple: [Z-Tel] ha[s] opted into agreements that do not make available the intraLATA interexchange transmission capability [Z-Tel] seek[s]...."¹³

5. Z-Tel's Reply to the Answer did not dispute Pacific's allegations about the requirements of the Pacific Agreement or about Z-Tel's "disavowal" of any claim of breach. Z-Tel subsequently informed the Commission that two "key legal issues" to be decided by the Commission were "whether [Z-Tel] ha[s] waived any claim that [Pacific's] conduct is inconsistent with the Act, and the Commission's rules and orders, ...because [Z-Tel] ... voluntarily ... adopted existing, approved interconnection agreements that do not make available the intraLATA interexchange transmission capability [Z-Tel] seek[s]..." and "whether [Z-Tel]...failed to state a claim upon which relief can be granted given that [Z-Tel] ... ha[s] disavowed any claim that [Pacific] ha[s] violated the terms of [the Pacific Agreement]... ."¹⁴

6. In the *Liability Order*, after granting Z-Tel's complaint against Ameritech for violating the *SBC/Ameritech Merger Order Conditions*, the Commission denied Z-Tel's claims against Pacific. The Commission found that Z-Tel had effectively admitted that the Pacific Agreement does not require Pacific to provide use of the shared transport UNE for intraLATA

⁸ *Liability Order*, 18 FCC Rcd at 7569, ¶ 2.

⁹ *Liability Order*, 18 FCC Rcd at 7580, ¶ 29 n.67.

¹⁰ *Liability Order*, 18 FCC Rcd at 7572, ¶ 11, 7579-81, ¶ 29.

¹¹ Defendants' Answer, File No. EB-01-MD-017 (filed Oct. 10, 2001) ("Answer"), Ex. B (Defendants' Legal Analysis) at 11.

¹² *Liability Order*, 18 FCC Rcd at 7580, ¶ 29 n.67; Answer at 4-5.

¹³ Answer Ex. B (Defendants' Legal Analysis) at 14.

¹⁴ *Liability Order*, 18 FCC Rcd at 7580, ¶ 29 n.67; Revised Joint Statement, File No. EB-01-MD-017 (filed Nov. 23, 2001) at Statement of Key Legal Issues, 11-12, ¶¶ 6-7.

toll.¹⁵ The Commission reasoned that, although Commission rules “plainly require unbundling of shared transport for use with intraLATA toll traffic,”¹⁶ the obligations created by section 251 and Commission implementing rules are effectuated through the section 252 processes of negotiation, arbitration, or opt-in.¹⁷ Therefore, because Z-Tel had voluntarily opted into an agreement that did not provide use of the shared transport UNE for intraLATA toll, Z-Tel had waived its claims pursuant to section 251(c)(3) and Commission rules.¹⁸

7. The Commission also denied Z-Tel’s claim that Pacific’s refusal to adopt Z-Tel’s “Memorandum of Understanding” violated section 251(c)(1). The Commission reasoned that Z-Tel could not voluntarily opt into the Pacific Agreement, and then invoke section 251(c)(1) to require Pacific to amend the agreement, unless the Pacific Agreement obligated Pacific so to do. Yet Z-Tel had not asserted that Pacific’s refusal to adopt the Memorandum of Understanding violated the Pacific Agreement’s amendment or change of law provisions, and, indeed, had disavowed any claim that Pacific had breached the Pacific Agreement. Accordingly, the Commission found that Z-Tel had not met its burden of proving that Pacific was obligated to adopt Z-Tel’s Memorandum of Understanding.¹⁹

8. Finally, the Commission denied Z-Tel’s section 201(b) claims because Z-Tel had advanced no reason, other than Pacific’s alleged violation of its obligations under section 251(c), why Pacific’s conduct was “unjust and unreasonable” within the meaning of section 201(b). Therefore, because Z-Tel’s section 251(c) claims failed, its section 201(b) claims also failed.²⁰

III. DISCUSSION

A. The *Liability Order* is Consistent with Commission Precedent.

9. Z-Tel argues that, in denying Z-Tel’s claims against Pacific, the Commission “abandon[ed]” prior Commission precedent establishing that the terms of any interconnection agreement between a CLEC and an ILEC are irrelevant to the issue of whether the CLEC may prevail on a claim that the ILEC has violated section 251.²¹ Z-Tel argues further that the Commission’s failure to follow this alleged precedent violated principles of administrative law.

¹⁵ *Liability Order*, 18 FCC Rcd at 7579-81 ¶ 29.

¹⁶ *Liability Order*, 18 FCC Rcd at 7581, ¶ 30 (citing *SBC Communications, Inc., Apparent Liability for Forfeiture*, Forfeiture Order, 17 FCC Rcd 19923, 19932, ¶ 18 (2002)).

¹⁷ *Liability Order*, 18 FCC Rcd at 7581, ¶ 30.

¹⁸ *Liability Order*, 18 FCC Rcd at 7579-81, ¶¶ 29-30.

¹⁹ *Liability Order*, 18 FCC Rcd at 7581-82, ¶¶ 30-32.

²⁰ *Liability Order*, 18 FCC Rcd at 7582, ¶ 33.

²¹ Petition at 3. *Accord* Petition at 6-12.

According to Z-Tel, where the Commission departs from its prior precedent, it is required to provide “a reasoned explanation” for its change of mind,²² and also to give the parties notice of the change and an opportunity to provide evidence bearing on the new standard.²³

10. We find, however, that the *Liability Order* is fully consistent with Commission precedent. Specifically, the Commission has never held that a requesting carrier may successfully charge an ILEC with violating its section 251(c) obligations when the requesting carrier has, pursuant to section 252(i), opted into an interconnection agreement that excludes the very section 251(c) obligations at issue.²⁴ As discussed below, the *Liability Order* is not inconsistent with any of the Commission precedent cited by Z-Tel in its Petition, provides a reasoned explanation for the Commission’s finding,²⁵ and thus fully complies with the requirements of administrative law.

i. The *Liability Order* is Consistent with Commission Rulemakings.

11. Z-Tel argues that the Commission’s denial of Z-Tel’s claim against Pacific is inconsistent with the Commission’s statement, in the *Local Competition Report and Order*,²⁶ that a party may file a section 208 complaint alleging violations of section 251 or Commission implementing rules “even if the [defendant carrier] is in compliance with an agreement approved by the state commission.”²⁷ Z-Tel misconstrues the Commission’s statement. The cited language cannot reasonably be read to suggest that section 251 is violated when a carrier voluntarily enters into an agreement, as Z-Tel did, that does not afford the full range of rights

²² Petition at 13.

²³ Petition at 3, 12-14.

²⁴ Indeed, to so hold under these specific circumstances would undermine the point of these interconnection agreements, which Congress established as the mechanism to implement the duties arising section 251(c). In the present case, Z-Tel opted into a pre-existing Pacific interconnection agreement without first negotiating or arbitrating an amendment to the agreement regarding shared transport. Z-Tel is bound by the Pacific Agreement, and may not now require Pacific to amend its terms. See *Liability Order*, 18 FCC Rcd at 7581-82, ¶ 30 (stressing that any request by Z-Tel to change the Pacific Agreement’s terms would have to comply with the agreement’s modification or change of law provisions). We note that Z-Tel had ample notice that it was taking a risk in failing to allege that the Pacific Agreement provided shared transport for intraLATA toll, because Pacific repeatedly argued that Z-Tel’s claims were precluded by the terms of the Pacific Agreement. For example, Pacific alleged that Z-Tel had waived its claims because Z-Tel had “specifically disavowed any claim that [Pacific] ha[s] violated [the Pacific Agreement].” *Liability Order*, 18 FCC Rcd at 7580, ¶ 29 n.67. Nevertheless, far from contesting Pacific’s allegations, Z-Tel affirmatively adopted them. See discussion at ¶ 5, *supra* (discussing Z-Tel’s “key legal issues”). Moreover, as discussed below, Z-Tel would not have prevailed even if it had asserted that Pacific breached the Pacific Agreement, because there was no such breach.

²⁵ *Liability Order*, 18 FCC Rcd at 7581-82, ¶¶ 30-32.

²⁶ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996) (subsequent history omitted) (“*Local Competition Report and Order*”).

²⁷ Petition at 6 (citing *Local Competition Report and Order*, 11 FCC Rcd at 15565, ¶ 127).

available under section 251, and later demands to change its terms. Such a construction would be fundamentally inconsistent with the statutory scheme, which permits carriers to enter into binding agreements “without regard to the standards set forth in subsections (b) and (c) of section 251.”²⁸ The Commission’s discussion in the *Local Competition Report and Order* simply does not address the situation where, as here, the complainant voluntarily opted into an interconnection agreement pursuant to section 252(i). As we explained in the *Liability Order*, Z-Tel may not rely upon the general section 251 duties to circumvent the more specific terms of an agreement that it has voluntarily chosen to adopt.

ii. The *Liability Order* is Consistent with Commission Adjudications.

12. Z-Tel also argues that the *Liability Order* is inconsistent with several Commission orders resolving section 208 formal complaints. Again, Z-Tel is incorrect. The cases upon which Z-Tel relies have no bearing on the instant matter.

13. First, Z-Tel cites *Net2000 Communications*,²⁹ in which the complainant CLEC alleged that the defendant ILECs had violated sections 201(b) and 251(c)(3) of the Act, as well as Commission rules requiring that, upon request, ILECs convert tariffed special access circuits into enhanced extended loops.³⁰ *Net2000* does not stand for the proposition that an ILEC may be found to have violated section 251(c) even though the parties’ interconnection agreement excludes the very section 251(c) obligations at issue. The Commission found it unnecessary to inquire into the terms of the special access tariff or the parties’ interconnection agreement because the Commission denied complainant’s claims on other grounds. Specifically, the Commission found that the complainant’s factual allegations were unsubstantiated.³¹

14. Z-Tel argues that the fact that *Net2000*’s claims were not dismissed on jurisdictional grounds makes the case inconsistent with the *Liability Order*: “If the Commission lacked the appropriate authority to address section 251 claims..., and if a violation of section 251 could not amount to a section 201(b) violation..., then the Commission presumably would have dismissed *Net2000*’s claims on jurisdictional grounds – which is exactly what the Commission did with regard to Z-Tel’s claims against Pacific.”³² With this argument, Z-Tel fundamentally misconstrues the *Liability Order*.

²⁸ 47 U.S.C. § 252(a)(1).

²⁹ *Net2000 Communications, Inc. v. Verizon-Washington, D.C., Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 1150 (2002).

³⁰ See 47 C.F.R. §§51.305 - .321.

³¹ The Commission found that the circuits at issue did not meet the criteria for conversion prescribed by Commission rules. *Net2000 Communications, Inc.*, 17 FCC Rcd at 1157, ¶ 23, 1160, ¶ 33.

³² Petition at 9.

15. First, the *Liability Order* does not stand for the proposition that the Commission “lack[s] the appropriate authority to address section 251 claims.” In the *Liability Order*, the Commission *did* address Z-Tel’s section 251 claims. The Commission asserted jurisdiction over Z-Tel’s section 251(c) claims against Pacific, and then denied those claims on the merits.³³ The Commission did not, as Z-Tel seems to believe, deny Z-Tel’s claims on jurisdictional grounds. Neither does the *Liability Order* stand for the proposition that “a violation of Section 251 could not amount to a Section 201(b) violation.” No such statement can be found in the *Liability Order*. The Commission denied Z-Tel’s section 201(b) claims because Z-Tel advanced no reason why Pacific’s conduct was “unjust and unreasonable” other than that Pacific had allegedly violated section 251(c), which the Commission found it had not. Because its section 251(c) claims failed, Z-Tel’s section 201(b) claims also failed. Nothing in this reasoning, however, supports Z-Tel’s cited assertion. Thus, the conflict that Z-Tel finds between the *Liability Order* and *Net2000* comes entirely from misconstruing the Commission’s decision in the *Liability Order*.

16. Z-Tel also cites *TSR Wireless*,³⁴ in which the Commission found that the defendant LECs had violated Commission rule 51.703(b)³⁵ by charging the complainants, commercial mobile radio service (“CMRS”) providers, for facilities used to deliver LEC-originated traffic. Z-Tel argues that *TSR Wireless* establishes that the terms of the Pacific Agreement were irrelevant to an analysis of Z-Tel’s claims against Pacific.³⁶ As with *Net2000*, Z-Tel again focuses on the jurisdictional issue that it has misunderstood. Z-Tel argues that in *TSR Wireless*, “the Commission again unequivocally stated that carriers could plead violations of its local competition implementing rules as part of a section 208 complaint arising under section 251.”³⁷ Nothing in the Commission’s statement of jurisdiction in *TSR Wireless* conflicts with the *Liability Order*.

17. Nothing in the substantive portion of the *TSR Wireless* decision conflicts with the *Liability Order*, either. We recognize that, in *TSR Wireless*, the Commission found the defendants bound by rule 51.703(b) even though the obligation created by that rule had not been incorporated into an interconnection agreement. The *TSR Wireless* defendants were bound by rule 51.703(b) for reasons not applicable to Pacific’s obligations at issue here. First, the Commission’s authority to issue rule 51.703(b), as applied to CMRS providers, arises under

³³ See *Liability Order*, 18 FCC Rcd at 7572-73, ¶¶ 12-13.

³⁴ *TSR Wireless, LLC v. U.S. West Communications, Inc.*, 15 FCC Rcd 11166 (2000), petition for review denied sub nom. *Qwest Corporation v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

³⁵ 47 U.S.C. § 51.703(b) (“A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC’s network.”)

³⁶ Petition at 9-10.

³⁷ Petition at 9.

section 332 of the Act.³⁸ Accordingly, rule 51.703(b) may apply, in circumstances such as those present in *TSR Wireless*, regardless of the existence or terms of a section 252 interconnection agreement. Further, in adopting rule 51.703(b), the Commission stated that “[a]s of the effective date of [the *Local Competition Report and Order*], a LEC must cease charging a CMRS provider ... for terminating LEC-originated traffic”³⁹ Thus, as the Commission stressed in *TSR Wireless*, rule 51.703(b) “clearly calls for LECs *immediately* to cease charging CMRS providers for terminating LEC-originated traffic; the [rule] does not require a section 252 agreement before imposing such an obligation on the LEC.”⁴⁰ The Commission has imposed no such immediate obligation with respect to shared transport. Indeed, the Commission stressed in *TSR Wireless* that, “to the extent that other Commission rules promulgated under the *Local Competition [Report and] Order* were not made ‘effective immediately,’ we would expect that requesting carriers would utilize the interconnection agreement process of sections 251 and 252 to obtain services under section 251.”⁴¹ Thus, *TSR Wireless* is not relevant to Z-Tel’s claims against Pacific, and does not stand for the proposition that a CLEC may successfully charge an ILEC with violating section 251(c) even though the parties’ interconnection agreement excludes the very section 251(c) obligations at issue.

18. Z-Tel also relies upon the Commission’s statement in *Cellexis*⁴² that “Defendants’ statutory interconnection obligations, whatever they may be, exist independently of the [interconnection] Agreement’s terms.”⁴³ Z-Tel reads the Commission’s statement out of context. The *Cellexis* case involved entirely different facts and statutory provisions than the instant matter. The complainant in that proceeding was a reseller of CMRS services who alleged that the defendant CMRS providers had violated sections 201(b), 202(a), 251(a), and 332(c)(1)(B) of the Act by refusing to continue to interconnect their cellular networks with complainants after the parties’ interconnection agreement had expired. The interconnection obligations at issue in *Cellexis* arose under sections 251(a) and 332 of the Act, not under section 251(c), as in this case. Neither the general interconnection obligation of section 251(a) nor the interconnection obligation arising under section 332 is implemented through the negotiation and

³⁸ 47 U.S.C. § 332. See *Iowa Utilities Brd. v. FCC*, 120 F.3d 753, 800 n.21 (8th Cir. 1997) (subsequent history omitted); *Qwest Corp. v. FCC*, 252 F.3d 462, 465-67 (D.C. Cir. 2001) (confirming that section 332(c)(1)(B) gives the Commission authority to require that LECs interconnect with CMRS providers).

³⁹ *TSR Wireless*, 15 FCC Rcd at 11167, ¶ 3.

⁴⁰ *TSR Wireless*, 15 FCC Rcd at 11183, ¶ 29 (emphasis added).

⁴¹ *TSR Wireless*, 15 FCC Rcd at 11182, ¶ 29 n.97. Similarly, the *Liability Order* emphasized that “the obligations created by section 251 and our rules are effectuated through the process established in section 252 – that is, by reaching agreement through negotiation, arbitration, or opt-in.” *Liability Order*, 18 FCC Rcd at 7581, ¶ 30.

⁴² *Cellexis Int’l, Inc. v. Bell Atlantic NYNEX Mobile Systems, Inc., et al.*, Memorandum Opinion and Order, 16 FCC Rcd 22887 (2001) (“*Cellexis*”).

⁴³ Petition at 10 (citing *Cellexis*, 16 FCC Rcd at 22891, ¶ 9, but omitting the word “Defendants”).

arbitration scheme of section 252.⁴⁴ Thus, the significance of the terms of any agreement in *Cellexis* has no bearing on the significance of the terms of the agreement in this case, and nothing in the *Liability Order* is inconsistent with *Cellexis*.

19. Finally, Z-Tel argues that, “In the context of pole attachment agreements entered into pursuant to section 224 of the Act, the Commission routinely has concluded that the existence of such agreements does not constitute a waiver of a carrier’s ability to file a formal complaint under the Commission’s pole attachment rules.”⁴⁵ Z-Tel’s analogy is unavailing. Section 252(a)(1) provides that an incumbent LEC “may negotiate and enter into a binding agreement ... without regard to the standards set forth in subsections (b) and (c) of section 251.”⁴⁶ In contrast, nothing in section 224 provides that parties may negotiate without regard to the requirements of the Act. Finally, the Commission’s pole attachment rules specifically contemplate that the Commission will rule on the reasonableness of the rates, terms, and conditions contained in pole attachment agreements before the Commission.⁴⁷

B. The Commission Correctly Concluded that Z-Tel Waived Its Section 251(c) Claims.

20. Z-Tel argues that the *Liability Order* incorrectly concludes that “carriers, such as Z-Tel, ‘implicitly’ waive their rights under section 251 of the Act and the Commission’s rules by merely signing an interconnection agreement – regardless of the language of the interconnection agreement.”⁴⁸ The *Liability Order* draws no such conclusion. Rather, the Commission in the *Liability Order* found that Z-Tel waived its claims because Z-Tel effectively admitted that the Pacific Agreement did not obligate Pacific either to provide shared transport for intraLATA toll

⁴⁴ Section 251(c) obligates incumbent LECs “to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection [*i.e.*, subsection (c)].” 47 U.S.C. § 251(c)(1). It does not require such negotiation with respect to section 251(a). Similarly, section 252(a)(1), 47 U.S.C. § 252(a)(1), permits ILECs to negotiate agreements “without regard to the standards set forth in subsections (b) and (c) of section 251,” but does not mention subsection 251(a). Section 332(c)(1)(B) requires interconnection when the Commission finds such action necessary or desirable in the public interest. *See* 47 U.S.C. § 332(c)(1)(B) (providing that, upon reasonable request of a CMRS provider, the Commission shall order interconnection pursuant to section 201.) There is, again, no mention of the section 251/252 negotiation process.

⁴⁵ Petition at 10.

⁴⁶ 47 U.S.C. § 252(a)(1).

⁴⁷ *See* Commission rule 1.1410 (“If the Commission determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and...[s]ubstitute in the pole attachment agreement the just and reasonable rate, term, or condition established by the Commission.”) 47 C.F.R. § 1.1410. *See also* *Southern Co. Servs. Inc. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002) (concluding that the Commission has authority to review the reasonableness of the terms of a pole attachment agreement). *Accord* *Pub. Service Co. of Colorado v. FCC*, 328 F.3d 675, 677-678 (D.C. Cir. 2003).

⁴⁸ Petition at 3.

or to execute a Memorandum of Understanding to do so.⁴⁹

21. Z-Tel argues that it made no admissions regarding the terms of the Pacific Agreement, but “only denied any need (under the Act, the Commission’s rules, or the [Pacific Agreement]) to plead a section 208 complaint under the interconnection agreement itself.”⁵⁰ Z-Tel ignores the record in this proceeding. For example, as stated above, Z-Tel informed the Commission that the Pacific Agreement “do[es] not make available the [use of the shared transport UNE] capability [Z-Tel] seeks,” and that Z-Tel “disavowed any claim that [Pacific] ha[s] violated the terms of [the Pacific Agreement].”⁵¹ Thus, we stand by our earlier conclusion that Z-Tel admitted that the agreement Z-Tel chose to adopt did not require Pacific to provide shared transport for intraLATA toll traffic, and that Z-Tel accordingly waived its right to demand such terms. Z-Tel opted into the Pacific Agreement without first negotiating or arbitrating an amendment to its terms regarding shared transport, and may not complain now.

C. The Pacific Agreement Excludes Shared Transport for IntraLATA Toll Unless Z-Tel Requests Such Use in Accordance with the Terms of the Agreement, and Z-Tel Has Not Done So.

22. Z-Tel argues that the Commission should have reviewed the Pacific Agreement to determine whether it in fact obligated Pacific to provide shared transport for intraLATA toll or to execute the Memorandum of Understanding.⁵² As discussed above, Z-Tel’s statements and omissions in this proceeding meant that the Commission was under no such obligation. In any event, however, any such review would have been unavailing. The Pacific Agreement provides use of the shared transport UNE for intraLATA toll calls only if Z-Tel complies with the Pacific Agreement’s “Bona Fide Request” process or requests “Customized Routing, Option C.” Z-Tel has not demonstrated that it did either.

⁴⁹ Z-Tel argues that the Commission in *Cellexis* “confirmed that a carrier does not waive its statutory right merely by signing an interconnection agreement.” Petition at 10 (citing *Cellexis*, 16 FCC Rcd at 22891, ¶ 9). What the Commission said, however, was that the interconnection agreement at issue in that case, which had expired, “does not alter whatever right to interconnection Cellexis may have under the Act.” *Cellexis*, 16 FCC Rcd at 22891, ¶ 9. The Commission’s statement is not inconsistent with the *Liability Order* because, as discussed, the duty of CMRS providers to interconnect can be imposed pursuant to section 332 independently of an interconnection agreement.

⁵⁰ Petition at 16.

⁵¹ Z-Tel argues that its “disavowal” of any claim that Pacific breached the Pacific Agreement, *see Liability Order*, 18 FCC Rcd at 7580, ¶ 29 n.67, merely meant that Z-Tel denied that it was obligated so to allege. Petition at 16. We disagree. As Z-Tel notes, “disavow” means, among other things, “to disclaim knowledge of. . . .” Petition at 16 (citing *Webster’s II New College Dictionary* 323 (2001)). If Pacific were in breach of the Pacific Agreement’s terms governing shared transport, Z-Tel would have had “knowledge of” that breach. Hence, when Z-Tel “disavowed” any claim that Pacific had breached the Pacific Agreement, it effectively admitted that there was no breach. In any event, the Commission’s conclusion, that Z-Tel effectively admitted that the Pacific Agreement had not been breached, was not based solely upon Z-Tel’s “disavowal,” but upon the totality of Z-Tel’s statements and omissions during the proceeding. *See Liability Order*, 18 FCC Rcd at 7580, ¶ 29 n.67.

⁵² Petition at 4-5, 17-20.

23. The Pacific Agreement provides at Attachment 6, section 2:

General: Unbundled Network Elements and Combinations: Access to [UNEs] shall be specified herein and not presumed. The Network Elements offered under this Agreement shall be clearly specified in this Agreement or the attachments hereto. In no event will it be presumed that access to a [UNE] is offered unless so specified. Pacific will make available any other form of access requested by [Z-Tel] that is required by the Act and the regulations thereunder. Requests for Network Elements not specified in this Attachment shall be processed according to the process described in Section 22 (Bona Fide Request) ... of this Agreement.⁵³

Thus, section 2 provides initially that Z-Tel may not have access to shared transport unless the Pacific Agreement expressly so states. Yet section 2 further provides that Z-Tel *may* obtain such access if it complies with the “Bona Fide Request” provisions of the Agreement: Pacific “will make available any other form of access” if that access is “required by... [Commission] regulations.” In short, Pacific was obligated to provide access to shared transport only to the extent provided in the Pacific Agreement *unless* Z-Tel complied with the “Bona Fide Request” process. The only section of the Pacific Agreement *expressly* granting access to the shared transport UNE provides that the UNE may be used for intraLATA toll only if Z-Tel exercises “Option C.”⁵⁴ “Option C” is found in an earlier section of the Pacific Agreement. That section is headed “Option C: Customized Routing-Complex for [Z-Tel] Using Routes Designated by [Z-Tel].” This section provides that, if Z-Tel exercises “Option C”, Pacific “shall route [Z-Tel’s] intraLATA traffic over Pacific’s Shared Transport facilities... .”⁵⁵

24. Z-Tel argues that the Pacific Agreement “expressly provides that Z-Tel may...request use of the shared transport UNE for intraLATA toll service,” and that “Z-Tel made such a request through its Memorandum of Understanding.”⁵⁶ Consistent with our analysis above, however, the language upon which Z-Tel relies provides shared transport for intraLATA toll only if Z-Tel requests “Option C”, or makes a request that complies with the “Bona Fide Request” process.⁵⁷ Yet Z-Tel has not shown that its Memorandum of Understanding complied

⁵³ Letter dated December 7, 2001 from Christopher M. Heimann, counsel to Pacific, to Magalie R. Salas, Secretary, FCC, File No. EB-01-MD-017 (“Heimann Letter”) Ex. 1 (Pacific Agreement) at Attachment 6, § 2.1.

⁵⁴ Heimann Letter Ex. 1 (Pacific Agreement) at Attachment 6, § 7.4.1 (providing that the shared transport UNE may be used for intraLATA toll “if requested by [Z-Tel] in connection with LSNE option ‘C’ under Section 6.5.3 above.”)

⁵⁵ Heimann Letter Ex. 1 (Pacific Agreement) at Attachment 6, § 6.5.3.

⁵⁶ Petition at 5. *Accord* Petition at 17-20.

⁵⁷ With regard to Option C, Z-Tel relies upon two sections of the Pacific Agreement providing shared transport for intraLATA toll only if Z-Tel exercises Option C. *See* Petition at 19 (citing Pacific Agreement, Attachment 6, § 6.5.3, which, as discussed above at paragraphs 25-26, provides shared transport for intraLATA toll only if Z-Tel exercises Option C). *See also* Petition at 19, n.45 (citing Pacific Agreement, Attachment 6, § 7.4.1, which provides, “Pacific shall route [Z-Tel’s] intraLATA traffic over Pacific’s Shared Transport facilities if requested by (continued....)”)

with the Bona Fide Request process, or that it constituted a request to exercise Option C.⁵⁸ Thus, as the *Liability Order* correctly concluded,⁵⁹ Pacific did not violate section 251(c)(1) by failing to negotiate in good faith.

25. Z-Tel's additional arguments regarding construction of the Pacific Agreement also fail. Z-Tel asserts that the agreement "permits either party to file a complaint at the FCC...".⁶⁰ Yet the Pacific Agreement does not state that any such complaint will succeed. Z-Tel argues that the Pacific Agreement "is expressly designed to encompass the UNEs required by the Act..."⁶¹ The language cited by Z-Tel, however, does not state that Pacific is offering all UNE access available under the Act and Commission rules. The section is entitled "Introduction," and merely explains that the purpose of Attachment 6 is to enumerate the specific UNEs provided. Indeed, Z-Tel omits the final sentence of this section: "The specific terms and conditions that apply to the [UNEs] and Combinations are described below."⁶² Thus, the terms pertaining to UNEs are "described below" – in the sections of the Pacific Agreement that follow.⁶³

(Continued from previous page)

[Z-Tel] in connection with LSNE option C under section 6.5.3 above." (emphasis added). Finally, with regard to the Bona Fide Request process, Z-Tel quotes a single sentence from Attachment 6, section 2. Petition at 18, n.42. As discussed above, however, when read in its entirety, this section requires compliance with the Bona Fide Request process.

⁵⁸ Z-Tel did not place the Memorandum of Understanding in the record, and it does not allege that the Memorandum was a "Bona Fide Request" or the exercise of Option C. On the contrary, Z-Tel admits that the Memorandum was an "amend[ment]" to the Pacific Agreement. See Formal Complaint, File No. EB-01-MD-017 (filed Aug. 28, 2001) ("Complaint") at 8, ¶ 18. Further, Z-Tel used the Memorandum of Understanding as a proposed amendment to a number of interconnection agreements, not just the Pacific Agreement. *Id.* Thus, the Memorandum of Understanding was not tailored specifically to comply with the requirements of the Pacific Agreement. See also Complaint Ex. 7 (Letter dated Jan. 19, 2001 from Michael Hazzard, counsel to Z-Tel, to Adam McKinney, counsel to Pacific) (describing the Memorandum of Understanding as "based on the MOU drafted by SBC and executed by Z-Tel in Texas..."); Petition at 5 (same). Z-Tel argues that Pacific was obligated to "suggest that Z-Tel modify or otherwise reformulate its request." Petition at 5. Z-Tel made no such claim in the liability phase of this proceeding, and therefore may make no such claim now. In any event, Z-Tel has advanced no reason why section 251(c)(1) imposes an obligation upon Pacific to explain to Z-Tel why Z-Tel's Memorandum did not comply with the Pacific Agreement.

⁵⁹ *Liability Order*, 18 FCC Rcd at 7579-82, ¶¶ 29-32.

⁶⁰ Petition at 17-18 (citing Pacific Agreement at Attachment 3, §2.1).

⁶¹ Petition at 18 (citing Pacific Agreement at Attachment 6, ¶ 1.1)

⁶² Heimann Letter Ex. 1 (Pacific Agreement) at Attachment 6, § 1.1.

⁶³ Because we affirm our denial of Z-Tel's section 251(c) claims, we also affirm our denial of Z-Tel's section 201(b) claims. Z-Tel's Petition provides no reason, independent of its claim that Pacific violated section 251(c), why Pacific violated section 201(b). See *Liability Order*, 18 FCC Rcd at 7582, ¶ 33.

IV. ORDERING CLAUSE

26. Accordingly, IT IS ORDERED, pursuant to sections 201, 208, 251, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 201, 208, 251, and 405, and sections 51.309 and 51.313 of the Commission's rules, 47 C.F.R. §§ 51.309 and 51.313, that the instant petition for reconsideration IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary