

## Analysis of FCC Ruling Affirming Interconnection Rights of Competitive Carriers in Rural Areas and Availability of State Commissions for Arbitration and Mediation of Disputes

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Competitive voice service providers will be better positioned to extend the reach of their service to rural areas following release of a May 26, 2011 declaratory ruling by the Federal Communications Commission (FCC or Commission). The ruling reaffirms the scope of telecommunications carriers' statutory interconnection rights under Section 251 of the Communications Act (the Act), and authorizes a procedure for resolving disputes over the implementation of such rights. Specifically, the ruling:

- Confirms that rural incumbent local exchange carriers (ILECs) are subject to the statutory obligation to interconnect with other carriers under Section 251(a), as well as the specific duties local carriers owe each other under Section 251(b) (such as number porting and reciprocal compensation). These obligations apply even when the rural carriers are exempt, pursuant to Section 251(f), from the more extensive duties imposed on larger incumbent local carriers under Section 251(c) (such as unbundling, collocation, etc.).
- Affirms that rural ILECs must negotiate the terms of an agreement to implement Section 251(a)-(b) duties with requesting carriers.
- Clarifies that disputes over the implementation of Section 251(a) and (b) rights and obligations in interconnection agreements are subject to mediation and/or arbitration before the relevant state public service commissions (PSCs).
- Re-affirms that interconnection rights and obligations under Section 251 extend to providers of wholesale telecommunications services—such as competitive LECs providing connectivity to VoIP providers.

### Background

The FCC issued this ruling in the wake of an order of the Maine PUC, which held that certain rural ILECs were not required to negotiate Section 251(a) and (b) interconnection arrangements with requesting carriers. The Maine PSC's decision rested on its conclusion that the rural ILECs' exemption from Section 251(c) duties (pursuant to Section 251(f)(1)) effectively eliminated their obligation to comply with Sections 251(a) and (b) as well.

The statute sets forth a series of duties regarding interconnection and traffic exchange, with different duties applying to different classes of carriers. Section 251(a) requires all *telecommunications carriers* to interconnect directly, or indirectly, with the facilities and

equipment of other telecommunications carriers. Section 251(b) imposes duties on all *local exchange carriers* to perform certain functions to facilitate voice service competition, interconnection and traffic exchange (e.g. number porting, access to directories, and reciprocal compensation). Section 251(c) imposes additional obligations on all *incumbent local exchange carriers*, including direct interconnection, unbundling, and collocation. Section 251(c)(1) also specifically requires ILECs to negotiate the terms of interconnection with requesting carriers.

Section 251(f)(1)(A), however, exempts certain rural ILECs from the obligations of Section 251(c).

The rural ILECs' argument was this: because their duty to negotiate arises from Section 251(c)(1), and because they are exempt from Section 251(c) by virtue of the rural exemption under Section 251(f)(1), they have no express duty to negotiate with competitors, and state commissions have no authority to mediate or arbitrate interconnection disputes under Section 252. The Maine Commission accepted that argument, and Time Warner Cable (which provides VoIP services) brought a petition to the FCC, seeking a declaratory ruling that the rural LECs' exemption from 251(c) did not extend to Sections 251(a) or (b).

## The Ruling

### 1. Rural Exemption Does Not Excuse Rural ILECs from All Interconnection Obligations

In rejecting the rural ILECs' argument, the FCC affirmed that the "rural" exemption in Section 251(f) only applies to the obligations of Section 251(c), but does not excuse rural ILECs from their obligations under 251(a) and (b).

### 2. Duty to Negotiate in Good Faith 251(a) and (b) Obligations

Further, the FCC affirmed that all LECs have the duty to negotiate in good faith terms of agreements implementing the duties of 251(a) and (b). Although the statute does not expressly require good faith negotiations of 251(a) and (b) obligations, the FCC found the obligation implicit in the statute, and consistent with the broader intent of Section 251 to promote competition in voice services. Thus, all LECs now have the duty to negotiate in good faith the terms of agreements implementing 251(a) and (b) obligations.

### 3. Disputes Over 251(a) and (b) Obligations Subject to Mediation and Arbitration

The FCC also ruled that disputes concerning the implementation of 251(a) and (b) obligations can be resolved in mediation and arbitration proceedings before state PSCs. This conclusion similarly relies upon the agency's decision to construe the statute broadly. Notably, the FCC determined that arbitration and mediation rights only arise when 251(a) issues (that is, basic interconnection rights) are raised in conjunction with 251(b) issues (number portability, intercarrier compensation, etc.). The FCC noted that its decision does not change prior rulings finding that state PSCs do not have the authority to resolve disputes that only involve 251(a) issues in isolation.

#### *4. Interconnection Rights Extend to Wholesale Providers of Telecommunications Services*

Finally, the FCC reaffirmed the Wireline Competition Bureau's 2007 conclusion that telecommunications carriers providing wholesale services are entitled to the same interconnection rights under Sections 251(a) and (b) as telecommunications carriers providing retail services. Thus, carriers who provide telecommunications services to other service providers, including to interconnected VoIP providers, are entitled to interconnect and exchange traffic with all LECs pursuant to Sections 251(a) and (b).

#### **Implications: Process for establishing compensation and traffic exchange terms may lead to more agreements (and disputes) in near term**

This ruling will support the efforts of many competitive providers to extend the reach of their service offerings to smaller rural communities throughout the nation. Because rural ILECs can no longer refuse to interconnect under 251(a) and (b), competitive providers should now be able to more readily obtain interconnection with rural ILECs, with the applicable terms memorialized in a binding agreement reviewed and approved by the relevant state PSC.

Also, this ruling reinforces the reasoning of two federal district court decisions finding that incumbent LECs have a statutory obligation to provide tandem transit service to competitors. Federal courts in Connecticut and Nebraska have ruled that the statutory obligation of all telecommunications carriers to interconnect indirectly pursuant to Section 251(a) provides a basis to conclude that incumbent LECs must support such indirect interconnection arrangements through the provision of tandem transit services pursuant to Section 251(c). By reaffirming the application of 251(a) obligations to all carriers, including those operating in rural areas, the FCC ruling provides further support for the federal courts' decision to mandate the provision of transit services that permit indirect interconnection.

Davis Wright Tremaine represents clients in many Section 251 arbitrations and mediation, and other interconnection matters. Please contact a Davis Wright Tremaine professional for further information on this ruling and related issues.

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