

Supreme Court Affirms That Competing Telephone Companies Can Obtain Connections to Incumbents at Low, Cost-based Rates

By John C. Dodge, K.C. Halm, and Christopher W. Savage

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On Thursday, June 9, 2011, the Supreme Court held that incumbent local exchange carriers (ILECs) must provide interconnection facilities to competitors at cost-based (i.e., TELRIC) rates. Because TELRIC rates are normally significantly lower than the tariff rates most ILECs have been charging, this ruling should provide an immediate economic benefit to competitive local exchange carriers (CLECs), their interconnected VoIP provider partners, and wireless (CMRS) carriers which lease such interconnection facilities from ILECs at the higher tariffed rates.

Background

In 2010 the Sixth Circuit Court of Appeals (covering Kentucky, Michigan, Ohio and Tennessee) ruled that ILECs could charge relatively high tariff rates for so-called “Entrance Facilities”—communications links from the CLEC’s switch to an ILEC switch over which local traffic is exchanged. The Sixth Circuit reasoned that Entrance Facilities were not unbundled network elements (UNEs) under Section 251(c)(3), for which discounted pricing is required. It reached this conclusion based on a misreading of prior Federal Communications Commission (FCC) rulings concerning appropriate pricing for Entrance Facilities.

The Sixth Circuit’s ruling conflicted with decisions in other circuits (Seventh, Eighth, and Ninth), all of which ruled that ILECs must provide Entrance Facilities at TELRIC rates. These other circuits concluded that the FCC had ruled that when Entrance Facilities are used for interconnection, pursuant to Section 251(c)(2), TELRIC pricing still applies. Many ILECs, including AT&T, rallied behind the Sixth Circuit ruling, often refusing to offer cost-based rates for Entrance Facilities even outside the Sixth Circuit.

The Supreme Court decision

In reversing the Sixth Circuit, the Supreme Court deferred to the FCC’s interpretation of the Communications Act and FCC rules to determine how Entrance Facilities should be priced. The high court concluded that although the Communications Act did not unambiguously address the question of the pricing of Entrance Facilities used for interconnection, the FCC’s interpretation of the statute and its own rules was reasonable. Thus, the Court decided it would defer to the expert agency—the FCC—to interpret its own rules on pricing. Since the agency’s orders showed that it understood that Entrance Facilities are a means of interconnection under Section 251(c)(2) of the Communications Act, they qualify for so-called TELRIC pricing, which is often a fraction of tariffed rates.

Impact on competitors

This ruling presents an immediate opportunity for CLECs, and their interconnected VoIP provider partners, and CMRS providers to reduce current network interconnection costs. Specifically, these competitors can now implement new contract terms that reduce current rates for these facilities, consistent with the Court's decision. Depending on individual circumstances, carriers may have to take one or more informal or formal steps to effectuate the Supreme Court's decision, and to pay less for Entrance Facilities:

- Carriers with interconnection agreements need to examine those contracts' change-of-law provisions to amend Entrance Facility pricing as of June 9, 2011, at the latest;
- Carriers that have been disputing tariff charges may now qualify for refunds or credits, and need to consider the best way to approach ILECs for such refunds or credits;
- Carriers should brace themselves to use state utility complaint procedures if their ILEC balks about lowering Entrance Facilities rates prospectively or honoring past disputes.

On this last point, because many ILECs do not have currently approved TELRIC rates for Entrance Facilities, state commissions may be required to hold new cost proceedings to determine such TELRIC rates. We believe competitive carriers may be able to negotiate significantly lower Entrance Facility pricing prior to, or outside of, such formal proceedings, or at least agree to interim lower pricing or pricing true-ups while such state-level cases sort themselves out over the next several months.

DWT has vast experience in negotiating and arbitrating Entrance Facilities pricing issues with ILECs. Please contact us for assistance in the wake of the Supreme Court's decision.

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