Sixth Circuit Rules That States May Fashion ILEC Interconnection Obligations under Section 251(a)

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In an interconnection decision that may have implications beyond its facts, an appellate court ruled that State public utility commissions ("State Commissions") may rely on Section 251(a) in resolving interconnection disputes involving incumbent local exchange carriers ("ILECs"). On March 28, 2013, the U.S. Court of Appeals for the Sixth Circuit ruled that ILECS have interconnection obligations under Section 251(a) of the Communications Act of 1934, as amended (the "Act"), which State Commissions can enforce if the issue is sufficiently raised in Section 252 interconnection arbitrations. Affirming a judgment of the U.S. District Court for the Southern District of Ohio and an arbitration decision of the Public Utilities Commission of Ohio ("PUCO"), the Court found that an ILEC's interconnection obligations are not limited by those expressly set forth in Section 251(c), as AT&T had argued. Rather, the Court held that a State Commission can impose obligations on an ILEC under Section 251(a), including an obligation to establish a point of interconnection ("POI") on the network of a requesting interconnecting competitive local exchange carrier ("CLEC"). The decision is significant in that it is the first decision of which we are aware by a federal appellate court expressly finding that a State Commission can impose obligations on an ILEC under Section 251(a) that differ from the ILEC-specific obligations of Section 251(c)(2). The Court's decision also speaks to the authority a State Commission has to resolve issues in a Section 252 arbitration when the petition for arbitration is silent as to the statutory section on which the State Commission bases its decision.

Background to the Sixth Circuit Court of Appeals Proceedings

The case arose out of a request by Intrado Communications, Inc. ("Intrado") for interconnection with AT&T in order to provide competitive emergency communications services to Public Safety Answering Points ("PSAPs"), specifically services allowing the PSAPs to receive 911 emergency telephone calls made by residents, businesses, and other entities. When the two carriers failed to reach a negotiated agreement on all points, Intrado sought arbitration before PUCO under Section 252 of the Act. One of the issues Intrado raised was on whose network POIs should be established in geographic areas where Intrado was the designated 911 service provider. In its Petition, Intrado raised this issue, not under Section 251(a), but only by invoking Section 251(c) of the Act (which the Court found describes "additional" interconnection obligations of ILECs, but not their exclusive obligations). PUCO held that, when AT&T brought end user 911 calls to Intrado for completion to a PSAP served by Intrado, AT&T must establish a POI on Intrado's network. Ultimately, PUCO based its decision on Section 251(a), rather than Section 251(c)(2).

PUCO had Authority to Decide the Interconnection Dispute under

Section 251(a)

The Court first decided the threshold issue of whether PUCO properly relied on Section 251(a) in resolving the POI location issue when Intrado did not invoke Section 251(a) in its petition. Indeed, in its Petition, Intrado specifically cited Section 251(c) in support of its position on the POI location issue. The Court noted that Section 252(b)(4)(A) limited PUCO to arbitrating "the open issues set forth in the petition or the response." The Court ruled, however, that PUCO had the authority consider Section 251(a) because, in the course of the arbitration, "AT&T understood and contested Intrado's request to establish a point of interconnection on its own network." For this reason, the Court decided, the issue was "sufficiently" before PUCO regardless of "whether [it was] ultimately resolved under Section 251(a) or Section 251(c)(2)." In short, the Court ruled that in order for an issue to be considered by a State Commission in a Section 252 arbitration, the statutory section under which it is decided need not be the one under which the issue is decided by the State Commission provided that the parties understood and contest what was at stake substantively.

PUCO Properly Ordered AT&T to Establish a POI on Intrado's Network

Having established the authority of PUCO to address Intrado's request for a POI on its own network, the Court proceeded to consider AT&T's challenge against PUCO's application of Section 251(a) to AT&T as an ILEC. AT&T argued that only Section 251(c)(2) articulates the interconnection obligations that apply to an ILEC and that, as a result, the only POI that can be ordered in an arbitration involving an ILEC and a CLEC is *on the ILEC's network*. Specifically, AT&T pointed to Section 251(c)(2)(B), which obligates an ILEC to provide, upon request, "interconnection with the [incumbent] local exchange carrier's network . . . at any technically feasible point *within the carrier's network*" (emphasis added). In other words, AT&T argued that any Section 251(a) obligations it might have could not extend beyond the more specific ILEC obligations contained in Section 251(c)(2).

The Court plainly disagreed with AT&T that the POI must be located on AT&T's network for two principal reasons. One, it concurred with the FCC's straightforward statement in its 1996 decision implementing the local competition provisions of the Telecommunications Act of 1996 that Section 251(a) "applies to all telecommunications carriers." Two, the Court reasoned that "it makes little sense to read the Act in a way that imposes fewer obligations on the incumbent carriers than on less-established non-dominant carriers," which is how it characterized the relief AT&T sought. The Court observed that a State Commission could require one CLEC to establish a POI located on another interconnecting CLEC's network. The Court found that "there is no limiting language in the statute" requiring CLECs to always establish interconnection on the incumbent carrier's network. In so doing, the Court recognized the ability of State Commissions to fashion particular interconnection provisions under Section 251(a) in the absence of a prohibition against doing so when faced with making an arbitration determination.

Possible Ramifications of the Court's Decision

This decision represents a setback for AT&T and other ILECs that sought to limit their interconnection obligations to those explicitly set forth in Section 251(c) or to use Section 251(b)(4)(A) as a sword to preclude State Commissions from considering alternate legal or regulatory bases for action in arbitration proceedings that were not expressly raised in a petition or a response. It will be of interest to observe whether AT&T seeks further review of this matter, having now lost at the PUCO, the federal District Court, and before the U.S. Court of Appeals.

At the same time, it bears monitoring whether CLECs are able to make offensive use of this decision. Notably, the Court did not cite as a limitation of its decision the nature of the competitive services that Intrado sought to provide, *i.e.*, emergency communications. As such, therefore, the decision could be of relevance in a wide variety of interconnections configurations.

FULL DISCLOSURE: Kelley Drye & Warren LLP represented Intrado in this appeal before the U.S. Court of Appeals for Sixth Circuit.