

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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CLERK, DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY  DEPUTY

SPRINT COMMUNICATIONS COMPANY L.P.,
Plaintiff,

-vs-

Case No. A-06-CA-065-SS

THE PUBLIC UTILITY COMMISSION OF
TEXAS; PAUL HUDSON, Commissioner of the
Public Utility Commission of Texas; JULIE
PARSLEY, Commissioner of the Public Utility
Commission of Texas; BARRY SMITHERMAN,
Commissioner of the Public Utility Commission of
Texas; and BRAZOS TELEPHONE
COOPERATIVE, INC.,

Defendants.

ORDER

BE IT REMEMBERED on the 15th day of June 2006, the Court held a hearing in the above-styled cause, and the parties appeared through counsel. Before the Court were Brazos Telecommunications, Inc.'s ("Brazos") Motion to Dismiss [#20], Sprint Communications Company L.P.'s ("Sprint") Response [#23], Brazos's Reply [#29], the Public Utility Commission's ("PUC") Motion for Summary Judgment [#27], Sprint's Response [#33], Brazos's Motion for Summary Judgment [#31], Sprint's Response [#33], Sprint's Motion for Partial Summary Judgment [#21], the PUC's Response [#28], Brazos's Response [#30], and Sprint's reply [#33]. Having considered the motions, responses, and replies, the arguments of counsel at the hearing, the relevant law, and the case file as a whole, the Court now enters the following opinion and orders.

RP

Background

This case involves a dispute between two telecommunications companies, Sprint Communications Company L.P. (“Sprint”) and Brazos Telecommunications, Inc. (“Brazos”), and the Public Utility Commission of Texas (“the PUC”) over the interconnection and arbitration requirements of the Telecommunications Act of 1996 (“the Act”). In order to understand either party’s position with respect to the interconnection and arbitration provisions of the Act, it is necessary to begin with a discussion of the context in which those provisions and the rest of the Act arose.

Until the time of the Act’s passage, local telephone service was treated as a natural monopoly in the United States, with individual states granting franchises to local exchange carriers (“LECs”), which acted as the exclusive service providers in the regions they served. *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). The 1996 Act fundamentally altered the nature of the market by restructuring the law to encourage the development and growth of competitive local exchange carriers (“CLECs”), which now compete with the incumbent local exchange carriers (“ILECs”) in the provision of local telephone services. *Id.* The Act achieved its goal of increasing market competition by imposing a number of duties upon ILECs, the most significant of which is the ILEC’s duty to share its network with the CLECs. *Id.*; 47 U.S.C. § 251. Under the Act’s requirements, when a CLEC seeks to gain access to the ILEC’s network, it may negotiate an “interconnection agreement” directly with the ILEC, or if private negotiations fail, either party may seek arbitration by the state commission charged with regulating local telephone service, which in Texas is the PUC. § 252(a), (b). In either case, the interconnection agreement must ultimately be publicly filed with the state commission for final approval. § 252(e).

Sprint brings this action for a declaration of the rights and duties of the parties under §§ 251, 252, and 253 of the Telecommunications Act of 1996. A brief summary of the procedural events leading to this case is in order. On November 16, 2004, Sprint requested interconnection with Brazos, and Brazos responded that, as a rural telephone company, it was not obligated to negotiate interconnection with Sprint.¹ On April 25, 2005, Sprint filed a petition for compulsory arbitration under § 252(b)(1) with the PUC, and on May 13, 2005, Brazos filed a motion to dismiss Sprint's arbitration petition, claiming that Brazos was exempt from the interconnection obligations set forth in Sprint's petition because Brazos was a rural telephone company under § 251(f)(1)(A). On June 14, 2005, the PUC granted Brazos's motion to dismiss, finding that Sprint's request was governed by § 251(c), a provision from which Brazos is exempt as a rural telephone company. Sprint appealed this order, and claimed that it was only seeking interconnection under § 251(a) & (b), provisions from which Brazos is not exempt. Then, on August 23, 2005, the PUC referred the case to the Texas State Office of Administrative Hearings for a hearing to develop the evidentiary record. Finally, on December 2, 2005, the PUC denied Sprint's appeal of the PUC's order dismissing Sprint's petition to arbitrate an interconnection agreement between Sprint and Brazos, reasoning that Brazos was exempt from the type of interconnection agreement sought by Sprint unless and until Sprint successfully petitioned to lift Brazos's rural exemption. PUC Order Denying Sprint's Appeal at 3.

Sprint asserts the PUC violated 47 U.S.C. §§ 251(a), 251(b), 252, and 253(a) and engaged in arbitrary and capricious decisionmaking. Sprint further asserts that Brazos violated §§ 251(a) and 251(b). Sprint requests the following relief: (1) declare that § 251(a) imposes a duty on Brazos to

¹ The Act allows carriers to establish interconnection agreements voluntarily; but if they are unable to do so, either carrier may petition the state commission to arbitrate an interconnection agreement. 47 U.S.C. § 252.

interconnect for the mutual exchange of traffic; (2) declare that Brazos has a duty to provide Sprint with number portability and dialing parity and to establish reciprocal compensation under § 251(b); (3) declare that the PUC's final order violated §§ 251(a), 251(b), 252, and 253; (4) declare the PUC's findings arbitrary and capricious; (5) direct the PUC to arbitrate and approve an interconnection agreement; and (6) declare that Brazos violated its duties and award Sprint damages for Brazos's failure to interconnect.

Brazos has filed a motion to dismiss and a motion for summary judgment. The PUC has filed a motion for summary judgment, and Sprint has filed a motion for partial summary judgment.

Analysis

I. Brazos' Motion to Dismiss

Brazos moves to dismiss Sprint's complaint for lack of subject matter jurisdiction. Brazos claims that the PUC order at issue is not a final determination of an interconnection agreement over which this Court has jurisdiction. The PUC's order finds that Brazos is exempt from the type of interconnection Sprint seeks; therefore, Brazos contends Sprint must first file a petition to remove Brazos's rural exemption before any final, appealable determination of the PUC can issue. Brazos contends that if Sprint were to file a petition to remove Brazos's rural exemption, the PUC's decision to remove the exemption in whole or in part might moot some or all of the relief Sprint seeks, and, alternatively, if the PUC were to uphold Brazos's rural exemption, that decision would be appealable.

Section 252(e)(6) of the Act provides: "In any case in which a State commission makes a *determination* under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the

requirements of section 251 of this title and this section.”² 47 U.S.C. § 252(e)(6) (emphasis added). Brazos asserts this Court has no jurisdiction over this case because the PUC’s order is interlocutory and is not a “determination” as defined by § 252(e)(6). Brazos contends that under § 252(e)(6) federal district courts may only review state commission decisions approving or enforcing an interconnection agreement.

Sprint takes the position that the PUC made a final determination subject to this Court’s review under § 252(e)(6). In *Southwestern Bell Telephone Co. v. Public Utility Commission of Texas*, 208 F.3d 475 (5th Cir. 2000), the Fifth Circuit declined to “read section 252(e)(6) so narrowly as to limit its grant of federal district court jurisdiction to review decision of state commissions only to those decisions that either approve or reject interconnection agreements.” *Id.* at 480–81. “[F]ederal court jurisdiction extends to review of state commission rulings on complaints pertaining to interconnection agreements and . . . such jurisdiction is not restricted to mere approval or rejection of such agreements.” *Id.* at 481. *Accord AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (recognizing that “if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel.”). Further, a district court has sustained subject matter jurisdiction under § 252(e)(6) to review a state commission’s decision dismissing a portion of a petition for arbitration. *MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 112 F. Supp. 2d 1286, 1297–98 (N.D. Fla. 2000), *aff’d*, 298 F.3d 1269 (11th Cir. 2002) (remanding to the state commission for arbitration of the disputed liquidated damages provision as part of the proposed interconnection agreement).

² Section 251 discusses the general duties and obligations of telecommunications carriers, and it will be discussed below in greater detail. 47 U.S.C. § 251.

The PUC's counsel admitted in open court that the PUC believes this Court has jurisdiction over this case. *See also* PUC's Amended Answer at ¶ 1 (filed March 10, 2006). This Court agrees with Sprint's position that the PUC's Order Denying Sprint's Appeal, dated December 2, 2005, rendered a final determination on the issue of whether the rural exemption relieves Brazos from any obligation to negotiate and arbitrate an interconnection agreement with Sprint; therefore, the Court has subject matter jurisdiction to review the PUC's interpretation of the Act and Brazos' motion is denied.

II. Summary Judgment Motions

A. Standard of Review

In evaluating whether the PUC's interpretation of the Telecommunications Act and the FCC's regulations are correct, this Court applies a *de novo* standard of review. *Southwestern Bell Tel. Co. v. Pub. Util. Comm'n of Texas*, 208 F.3d 475, 482 (5th Cir. 2000). The PUC's resolution of all other issues is reviewed under the "arbitrary and capricious" standard. *Id.* The parties agree that summary judgment is appropriate in this case because there are no genuine issues of material fact and this case may be wholly decided as a matter of law. FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986).

B. The PUC's Motion for Summary Judgment

The PUC moves for summary judgment and asks this Court to affirm the PUC's dismissal of Sprint's request for compulsory arbitration and to deny Sprint all relief it seeks. The PUC contends that this case presents only one question: whether or not Brazos's rural exemption must be removed before Brazos can be compelled to participate in compulsory arbitration with Sprint?

All parties agree, for purposes of this appeal, that Brazos is a rural telephone company as

defined by 47 U.S.C. § 153(37) and a “local exchange carrier with fewer than 2 percent of the Nation’s subscriber lines” as defined by 47 U.S.C. § 251(f)(2).

The Act imposes varying obligations on telecommunications companies under the subsections of section 251, “[s]ection 251(a) imposes relatively limited obligations on all telecommunications carriers; section 251(b) imposes moderate duties on local exchange carriers; and section 251(c) imposes more stringent obligation on ILECs. Thus, section 251 of the Act create[s] a three-tiered hierarchy of escalating obligations based on the type of carrier involved.” *Total Telecomms. Servs., Inc. & Atlas Tel. Co., Inc. v. AT&T Corp.*, FCC 01-84, File No. E-97-003, Memorandum Op. & Order at ¶ 25.

Section 251(a)(1) imposes a universal duty on all “telecommunications carriers” to “interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.” 47 U.S.C. § 251(a)(1). “Interconnection” is “the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic.” 47 C.F.R. § 51.5 (2005). Section 251(b) imposes certain duties on “all local exchange carriers” which include: resale, number portability, dialing parity, access to rights-of-way, and reciprocal compensation. 47 U.S.C. § 251(b)(1)–(5). Section 251(c) imposes additional duties on “incumbent local exchange carriers” including a duty to negotiate, interconnection duties, unbundled access, resale, notice of changes, and collocation. 47 U.S.C. § 251(c)(1)–(6).

Section 252 sets forth the procedures by which ILECs may fulfill the duties imposed by § 251. An ILEC may reach an agreement with a CLEC to fulfill its § 251 duties either through voluntary negotiations or, should negotiations fail, through arbitration before the State commission. Section 252(a)(1) describes the voluntary negotiations procedure: “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.” 47 U.S.C. § 252(a)(1). Should voluntary negotiations not result in a complete interconnection agreement, “the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.” *Id.* at § 252(b)(1).

Here, Brazos is an ILEC, but also qualifies as a rural telephone company under the Act. Sprint is a local exchange carrier, but not an ILEC. As discussed above, Sprint asked Brazos to negotiate an interconnection agreement, and Brazos responded that, as a rural telephone company, it was not required to negotiate such an agreement. The PUC essentially agreed with Brazos and decided it could not consider Sprint’s petition for arbitration until Brazos’s rural exemption was terminated.

Sprint takes the position that the PUC was obligated to require Brazos to comply with its statutory duties under § 251(a) and (b), to which the rural exemption does not apply, instead of merely dismissing Sprint’s Petition for Arbitration. 47 U.S.C. § 252(b)(4)(C) (“The State commission shall resolve each issue set forth in the petition . . . by imposing appropriate conditions as required to implement [the requirements of § 251].”). However, as discussed in detail below, Sprint’s interpretation conflicts with the plain language of the Act. Because Brazos was exempt from the duty to negotiate any interconnection agreement with Sprint, the PUC had no authority to arbitrate any agreement between Sprint and Brazos.

Section 251(f)(1), which sets forth the rural exemption, 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, 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” 47 U.S.C. § 251(f)(1)(A).

Where the parties disagree here is on whether the rural exemption shields Brazos from the duty to negotiate an interconnection agreement with regard to duties arising under § 251(a) and (b). By its plain language, the “rural exemption” only applies to the duties set forth in § 251(c), the third tier of interconnection duties. However, the “duty to negotiate” the particular terms and conditions of agreements is specifically set forth in § 251(c)(1),³ and Brazos is exempt from this duty as a rural telephone company. Therefore, Brazos has no duty to negotiate any interconnection agreement with Sprint unless and until its rural exemption is lifted.

“An ILEC is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act when a CLEC requests negotiation pursuant to §§ 251 and 252.” *Coserv Ltd. Liab. Corp. v. Southwestern Bell Tel. Co.*, 350 F.3d 482, 487 (5th Cir. 2003). Here, 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’s rural exemption. The policy evinced in § 251(f) is that rural telephone companies should be shielded from burdensome interconnection requests until the PUC has screened such requests. This policy could be too easily thwarted if a CLEC, such as Sprint, could evade PUC screening by denominating its request for

³ “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.” 47 U.S.C. § 251(c)(1).

interconnection as one solely under § 251(a) and (b). In this situation, where Brazos has refused to negotiate with Sprint, there are no “open issues” for the PUC to arbitrate under § 252.

Here, Brazos had no duty to negotiate or to submit to arbitration of an agreement with Sprint under § 252. The Fifth Circuit has expressly stated that “[t]he party petitioning for arbitration may not use the compulsory arbitration provision to obtain arbitration of issues that were not the subject of negotiations.” *Coserv*, 350 F.3d at 487; *see also U.S. W. Commc’n, Inc. v. Minnesota Pub. Utils. Comm’n*, 55 F. Supp. 2d 968 (D. Minn. 1999) (holding that “open issues” are limited to those that were the subject of voluntary negotiations).

The Court further notes that § 251(a) and (b) say nothing at all about “agreements,” “negotiations,” or “arbitration.” 47 U.S.C. § 251(a) and (b). Although there are duties established by § 251(a) and (b), and such duties apply to Brazos, the Court cannot find any language in the Act indicating that these duties independently give rise to a duty to negotiate or to arbitrate.⁴ Therefore, the Court concludes that the PUC made the proper legal determination when it determined that it could not compel Brazos to arbitrate an interconnection agreement with Sprint with respect to Brazos’s duties under § 251(a) and (b) of the Act.

For the reasons set forth above, the Court grants the PUC’s and Brazos’s motions for summary judgment⁵ and denies Sprint’s motion for partial summary judgment. The Court further rejects Sprint’s claim that the PUC’s order violates 47 U.S.C. § 253. Because the Court has already

⁴ The only duty to negotiate arises under § 251(c), a duty from which Brazos is exempt as a rural telephone company.

⁵ Brazos’s Motion for Summary Judgment [#31] is very similar to the PUC’s motion and seeks the same result: denial of Sprint’s motion for partial summary judgment and affirmance of the PUC’s order. Therefore, the Court grants Brazos’s motion for the same reasons it grants the PUC’s motion.

upheld the PUC's decision, Sprint's claim that the PUC created a legal requirement prohibiting entry into Texas rural telecommunications markets falls flat.

Conclusion

In accordance with the foregoing:

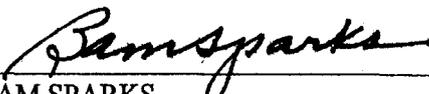
IT IS ORDERED that Brazos's Motion to Dismiss [#20] is DENIED;

IT IS FURTHER ORDERED that the PUC's Motion for Summary Judgment [#27] and Brazos's Motion for Summary Judgment [#31] are GRANTED, and the PUC's dismissal of Sprint's petition for compulsory arbitration is AFFIRMED;

IT IS FURTHER ORDERED that Sprint's Motion for Partial Summary Judgment [#21] is DENIED; and

IT IS FINALLY ORDERED that all other pending motions are DISMISSED AS MOOT.

SIGNED this the 14th day of August 2006.



SAM SPARKS
UNITED STATES DISTRICT JUDGE