

STATE OF NEW HAMPSHIRE

BEFORE THE PUBLIC UTILITIES COMMISSION

DT-09-048

MOTION TO DISMISS

Pursuant to Section 203 of the New Hampshire Code of Administrative Rules, Union Telephone Company (“Union”) files this Motion in response to the Hearing Examiner Report filed in this docket and respectfully requests that the Commission dismiss the above captioned proceeding. In the Hearing Examiner Report in this docket (dated May 20, 2009) (“Hearing Report”), Examiner F. Anne Ross recommends that the “Commission not address potential arguments that IDT’s request for interconnection is really a request for interconnection pursuant to section 251(c)(2)(A) until these arguments are raised and a record is developed.”¹

Through this proceeding, IDT America Corp. (“IDT”) seeks to require Union to enter into binding arbitration in order to obtain an interconnection agreement for local exchange traffic. It is well established that such interconnection can only be demanded through Section 251(c) of the Communications Act (as amended),² and not through Section 251(a). IDT therefore has no right to demand and Union has no obligation to provide the type of interconnection that IDT is demanding.

IDT’s interconnection demands are, in reality, Section 251(c) demands, the plain reading of that correspondence and the Hearing Report notwithstanding, Union is not required to

¹ Hearing Report at 9.

² 47 USC (“The Act”)

provide such interconnection. Union is a rural carrier and it is undisputed that Section 251(f) of the Act applies to it. Section 251(f) specifically exempts rural carriers from Section 251(c) interconnection obligations until carriers have received a *bona fide* request for interconnection and the state commission had determined that the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of the Act. In short, Union is not required to provide interconnection of the type that IDT is seeking unless the Commission were to lift Union's rural exemption upon IDT's request. To date, IDT has not even made such a request for the Commission to consider.

I. Sections 251(a) and (b) Do Not Provide an Independent Basis to Demand Interconnection for Local Exchange Service – Such Authority Can Only Be Sought Under Section 251(c).

To date, IDT's sole interconnection demand has been made pursuant to Section 251(a) and 251(b). That conclusion is supported not only by the plain language of IDT's requests,³ but by the Hearing Report as well. While Section 251(a) may contain a broadbased requirement that carriers interconnect, the requirements of Section 251(a) do not obligate carriers to interconnect for the purposes of exchange access service.⁴ Indeed, this issue has already been considered by other state commissions which have determined that to reach such a result would undermine the entire Federal statutory regime relating to interconnection.

When Level 3 sought to seek interconnection for the provision of local services in North Dakota from a rural carrier under Section 251(a) for example, the Commission rejected Level 3's right to do so, stating:

³ IDT's demand letter specifically reference Section 251(a) and (b) and makes no mention of Section 251(c).

⁴ IDT's Petition for Arbitration dated March 9, 2009 ("Petition for Arbitration") specifically states that the proposed agreement will be "for purposes of connection and exchange of Local Traffic."

If Level 3 is truly offering a local exchange service, then it cannot simply declare that it is filing an exclusive 251(a) interconnection agreement. The clear language of the act prevents that occurrence. When interconnecting with an ILEC, such as SRT, the transmission and routing of telephone exchange service and exchange access is clearly stated under 251(c)(2)(A). While Level 3 may want to apply under solely 251(a), there is no basis upon which to allow that to happen. We do not view the act as a buffet menu from which carriers are allowed to choose which parts of it they wish to file under, to the exclusion of those sections they would rather ignore. Such an interpretation would seriously undermine the protections afforded rural carriers by Congress in section 251(f).⁵

The situation in North Dakota is directly analogous to the current proceeding.

The State of Texas likewise considered this issue when Sprint attempted to interconnect with rural Brazos Telecommunications, Inc (“BTI”) by means of Sections 251 (a) and (b). In that case, the Commission stated:

The Commission disagrees with Sprint’s contention that it can receive interconnection through FTA [Federal Telecommunications Act] Section 251(a) to offer and provide telephone exchange service. FTA Section 251(c)(2) provides, in part, that an ILEC is obligated to provide interconnection for the transmission and routing of “telephone exchange service” and exchange access. FTA Section 251(a), however, does not require ILECs or other telecommunications carriers to interconnect for the express purpose of exchanging traffic relating to telephone exchange service. FTA Section 251(a) encompasses a broad duty to interconnect for all carriers. The duty of an ILEC to provide interconnection for purposes of exchanging “telephone exchange service” is solely and expressly a FTA Section 251(c) obligation. Therefore, according to FTA Section 251(f)(1)(A), BTI is exempt from this FTA Section 251(c) obligation until (1) it receives a bona fide request for interconnection and (2) the Commission determines that such request is not unduly economically burdensome, is technically feasible, and is consistent with FTA Section 254. Accordingly, the Commission finds that Sprint is requesting interconnection under FTA Section 251(c)(2), and therefore, Sprint is required to petition to lift BTI’s rural exemption under FTA Section 251(f)(1)(A) before proceeding to negotiate and arbitrate an interconnection agreement.⁶

⁵ North Dakota Public Service Commission Order, Case No. PU-2065-02-465 (May 30, 2003) and ¶10. The entire Order is attached as Exhibit A.

⁶ Public Utility Commission of Texas, Order Denying Sprint’s Appeal of Order No. 1, PUC Docket No. 31038 (December 2, 2005)(*emphasis added*). Order attached as Exhibit B

These precedents make clear that IDT simply does not have the right to demand arbitration for the purposes of forcing interconnection for local exchange traffic under Section 251(a). Therefore the Commission must dismiss this proceeding.

II. IDT's Arguments Related to Interconnection Obligations Are Invalid Because the Rights IDT Asserts Apply Only to Section 251(c) Interconnection.

Although IDT has sought to interconnect under only Sections 251(a) and (b), IDT has invalidly asserted that rights available only under Section 251(c) should apply. IDT also mentions numerous times that, Union has failed to abide by its duty to negotiate in good faith. In fact, IDT's entire May 12th Supplement to the Record center around the duty to negotiate in good faith and requirements related to that duty codified at 47 C.F.R. §51.301. That regulation simply does not apply to this proceeding because the regulation applies only to Section 251(c) proceedings and not to Section 251(a).

In fact, Union has no duty to negotiate under Section 251(a). The duty to negotiate in good faith is set forth under Section 251(c). That Section states:

(c) Additional obligations of incumbent local exchange carriers
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.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--

- (A) for the transmission and routing of telephone exchange service and exchange access;
- (B) at any technically feasible point within the carrier's network;
- (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
- (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.⁷

In the Hearing Report, Examiner Ross acknowledges that Section 251(c)(1) does not apply to Union and that Union does not have a duty to negotiate in good faith. In short, to date, IDT has demanded interconnection only pursuant to Section 251(a). IDT has no ability to assert rights under Section 251(c) unless and until it demands interconnection under Section 251(c).

III. Interconnection Under Section 251(c) Is Not Available to IDT Because As a Rural Carrier, Union Is Exempt from Section 251(c) Obligations.

Even if, despite the conclusions made in the Hearing Report and the plain language of IDT's requests, the Commission was to construe IDT's demands as falling under Section 251(c), such interconnection rights are not available to IDT because Union is a rural carrier and therefore exempt from Section 251(c) obligations.

Specifically, Section 251(f)(1) clearly states that Section 251(c) does not apply to rural carriers "until (i) such company has received a *bona fide* request for interconnection, services, or network elements, and (ii) the State commission determines...that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title..."⁸ To date, such a *bona fide* request has neither been made nor ruled on. Instead, IDT is attempting to do an end run around Section 251(f) by demanding interconnection only under

⁷ 47 U.S.C. Section 251(c).

⁸ 47 U.S.C. Section 251(f).

Section (a) and then pretending that such interconnection ought to afford Section 251(c) rights. Such a construction is neither available nor permissible under the Act.

For IDT to obtain Section 251(c) interconnection rights, IDT's recourse is first to make a *bona fide* request to have Union's rural exemption terminated under Section 251(f)(1). In that type of proceeding, the Commission would examine the totality of circumstances to determine whether making a rural interconnect is overly burdensome. Such an analysis is necessary in order to ensure that rural carriers can continue to serve their existing customers. For example, in this proceeding, IDT has asked Union to provide number portability, a service which would require Union to have to make new equipment purchases. IDT should not be permitted to force Union or other rural carriers to make such capital investments without any Commission examination as to the economic burden such investment would have on the rural carrier.

VI. Conclusion

As the foregoing makes clear, IDT has sought only interconnection under Sections 251(a) and (b). That Section simply does not afford IDT the right to interconnection for the purposes of exchanging local traffic. Union is only obligated to provide such interconnection pursuant to a Section 251(c) interconnection demand. Yet even if IDT had requested Section 251(c) interconnection (which it hasn't), Section 251(c) rights are not available to IDT because Union is a rural carrier and therefore exempt from Section 251(c) due to Section 251(f). For IDT to obtain Section 251(c) rights, therefore, IDT must first file to extinguish Union's rural exemption. Since to date, that has not occurred, IDT has no right to demand Section 251(c) interconnection and the Commission must therefore dismiss this proceeding.

Respectively submitted,



Brian McDermott
Edward S. Quill, Jr.

Counsel for
Union Telephone Company

Dated: May 27, 2009