Before the
Federal Communications Commission
Washington, D.C. 20554

Broadview Networks, Inc.,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. EB-03-MD-021
	)	
Verizon Telephone Companies and Verizon New York, Inc.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Adopted: November 9, 2004 **Released: November 10, 2004**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we grant a Motion to Dismiss or, in the Alternative, Defer filed by Verizon New York Inc. ("Verizon").[1] The Motion requests that the Commission either dismiss the formal complaint filed by Broadview Networks, Inc. ("Broadview") against Verizon,[2] or defer further proceedings in connection with the Complaint, in light of a recent order issued by the Supreme Court of the State of New York directing the parties to proceed to commercial arbitration.[3] As discussed below, we grant the Motion to the extent that we defer proceedings relating to the Complaint, pending the outcome of the court-ordered arbitration. Additionally, for internal administrative purposes only, we convert the Complaint into an informal complaint.

II. BACKGROUND

A. The Parties and Their Dispute

2. Broadview is a competitive provider of local exchange, exchange access, interexchange, and information services in New York and other states.[4] Verizon is an incumbent local exchange carrier ("incumbent LEC"), as defined by section 251(h) of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 251(h).[5]

[1] Motion to Dismiss or, in the Alternative, Defer, File No. EB-03-MD-021 (filed Aug. 4, 2004) ("Motion").

[2] Formal Complaint of Broadview Networks, Inc., File No. EB-03-MD-021(filed Dec. 30, 2003) ("Complaint").

[3] Motion, Exhibit 1 (*Verizon New York Inc. v. Broadview Networks, Inc.*, Index No. 103080/2004, slip op. (N.Y. Sup. Ct. July 28, 2004) ("*New York Order*")).

[4] Joint Statement, File No. EB-03-MD-021 (filed Mar. 5, 2004) ("Joint Statement") at 2, ¶ 1.

[5] Joint Statement at 2, ¶ 2.

3. On December 18, 1998, Broadview and Verizon entered into their first interconnection agreement pursuant to sections 251 and 252 of the Act, 47 U.S.C. §§ 251-252.[6] They subsequently entered into three other interconnection agreements, the last of which became effective on July 20, 2003, and remains in force today.[7]

4. The Interconnection Agreement provides that the dispute resolution procedures set forth in the Agreement are the "exclusive remedy for all disputes between Verizon and [Broadview] arising out of th[e] Agreement or its breach."[8] Those procedures require that, if certain informal mechanisms fail to resolve a dispute, "the Parties shall initiate an arbitration in accordance with the AAA rules for commercial disputes."[9] The New York Public Service Commission required inclusion of the mandatory arbitration provisions in the Interconnection Agreement.[10]

5. Pursuant to section 251(c)(6) of the Act,[11] the Interconnection Agreement addresses Verizon's provision of "Collocation" to Broadview.[12] Specifically, the Interconnection Agreement states that "Collocation shall be provided pursuant to Verizon's applicable federal and state Tariffs as amended from time to time."[13] The Interconnection Agreement further states that Broadview "shall purchase Cross Connection to Verizon services or facilities as described in Verizon's applicable Tariffs."[14] The Interconnection Agreement also states that "[e]ach Party hereby *incorporates by reference* those provisions of its Tariffs that govern the provision of any of the services or facilities provided hereunder."[15] Between May 27, 1999 and February 24, 2000, Broadview submitted approximately 112 applications to Verizon ordering collocation pursuant to the Interconnection Agreement and Verizon's

[6] Joint Statement at 3, ¶ 8.

[7] Joint Statement at 3-4, ¶ 8. We hereafter refer to the parties' current agreement as the "Interconnection Agreement." The Interconnection Agreement stems from Broadview's opting into a pre-existing interconnection agreement between Verizon and AT&T pursuant to 47 U.S.C. § 252(i). Joint Statement at 3, ¶ 8. *See* Answer, Exhibit M (Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 by and between Verizon New York, Inc. and AT&T Communications of New York, Inc.) (VZ 00294-002207).

[8] Answer, Exhibit M (Interconnection Agreement) at Part 28.11.2(a) (VZ 002185).

[9] Answer, Exhibit M (Interconnection Agreement) at Part 28.11.5(a) (VZ 002187).

[10] Answer, Exhibit M (Opinion and Order Resolving Arbitration Issues, *Petition of AT&T Communications of New York, Inc. for Arbitration of an Interconnection Agreement with New York Telephone Company; Petition of New York Telephone Company for Arbitration of an Interconnection Agreement with AT&T Communications of New York, Inc.*, Case Nos. 96-C-0723, 96-C-0724, 1996 N.Y. PUC LEXIS 704, at *95-96 (N.Y. Pub. Serv. Comm'n Nov. 29, 1996) (VZ 003516-55) ("*NYPSC Order*").

[11] 47 U.S.C. § 251(c)(6) (requiring incumbent LECs "to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier . . .").

[12] Answer, Exhibit M (Interconnection Agreement) at Part 13.0 (VZ 002153-54). The Interconnection Agreement defines "Collocation" as "an arrangement in which the equipment of [Broadview] is installed and maintained at the premises of Verizon for the purpose of Interconnection with Verizon and access to the unbundled Network Element[s] of Verizon." Answer, Exhibit M (Interconnection Agreement) at Part 1.17 (VZ 002101).

[13] Answer, Exhibit M (Interconnection Agreement) at Part 13.1 (VZ 002153). The Interconnection Agreement defines "Tariff" as "any applicable federal or state tariff of a Party, as may be amended by the Party from time to time, under which a Party offers a particular service, facility, or arrangement." Answer, Exhibit M (Interconnection Agreement) at Part 1.79 (VZ 002108).

[14] Answer, Exhibit M (Interconnection Agreement) at Part 13.4 (VZ 002154).

[15] Answer, Exhibit M (Interconnection Agreement) Part 2.3 (VZ 002110) (emphasis added).

tariffs.[16]

6. In 2001, Broadview and Verizon became embroiled in a dispute concerning charges that Verizon levied for cable terminations and associated equipment – known as "terminations" or "cross-connects" – used to physically connect Broadview's collocated equipment with Verizon's equipment.[17] In short, Verizon asserted that (i) Broadview failed to pay Verizon for voice-grade terminations that Broadview ordered pursuant to the Interconnection Agreement and Verizon's New York state tariff;[18] and (ii) as result of certain November 13, 2000 amendments to Verizon's FCC Tariff No. 11, Broadview owes Verizon additional amounts for DS1 and DS3 terminations that Broadview ordered in 1999 and 2000.[19]

B. Verizon's Arbitration Demands

7. Following a series of unsuccessful settlement discussions between the parties in 2002 and 2003,[20] on October 9, 2003, pursuant to Part 28.11 of the parties' Interconnection Agreement, Verizon sent Broadview a Demand for Arbitration regarding Broadview's voice-grade terminations in New York, and filed documents with the American Arbitration Association ("AAA").[21] After the AAA inquired of Verizon whether both parties consented to AAA administration of the arbitration, Verizon sent a letter to the AAA requesting that the AAA return the paperwork and filing fee submitted with the Demand for Arbitration.[22] On October 21, 2003, Broadview transmitted a letter to Verizon pursuant to section 1.721 of the Commission's rules (47 C.F.R. § 1.721(a)(8)), indicating, *inter alia*, that if the parties were unable to resolve their dispute, Broadview would file a formal complaint with the Commission.[23] On November 3, 2003, Verizon sent Broadview a second Demand for Arbitration and filed the demand with the AAA.[24] The next day, Broadview sent a letter to the AAA opposing the second Demand for Arbitration.[25] The AAA subsequently advised the parties that it will accept an arbitration demand only if both parties submit to AAA administration of the arbitration.[26] On November 17, 2003, Broadview sent a letter to the AAA reiterating its view that the AAA is not the proper forum for resolution of the dispute.[27]

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[16] Joint Statement at 8, ¶ 27 (Chronology description of "Event" on May 27, 1999).

[17] Joint Statement at 3, ¶ 5. *See, e.g.*, Joint Statement at 10, ¶ 27 (Chronology citing Complaint, Exhibits 10, 17) . Terminations are available in different capacities, including 2-Wire and 4-Wire voice grade, DS1, and DS3. Joint Statement at 4, ¶ 9.

[18] Answer, Legal Analysis at 15-17. According to the Interconnection Agreement's "Detailed Schedule of Itemized Charges," the "rates for Intrastate Collocation are based upon the rates set forth in PSC NY No. 8 Tariff, as amended from time to time." Answer, Exhibit M (Interconnection Agreement), Exhibit A, Part VIII (VZ 002201).

[19] Answer, Legal Analysis at 17-18.

[20] Joint Statement at 10-12, ¶ 27 (Chronology citing settlement negotiations on April 12, 22, and 29, 2002; May 17, 24, and 31, 2002; June 10, 2003; September 10-October 8, 2003).

[21] Joint Statement at 12, ¶ 27 (Chronology citing Complaint, Exhibit 21). *See* Answer at 20; Motion at 2.

[22] Joint Statement at 12, ¶ 27 (Chronology citing Complaint, Exhibit 22). *See* Answer, Exhibit F (Declaration of Edward Keenan) at 6, ¶ 19.

[23] Joint Statement at 12, ¶ 27 (Chronology citing Complaint, Exhibit 23).

[24] Joint Statement at 12, ¶ 27 (Chronology citing Complaint, Exhibit 27). *See* Answer, Exhibit F (Declaration of Edward Keenan) at 6, ¶ 21.

[25] Joint Statement at 12, ¶ 27 (Chronology citing Complaint, Exhibit 29).

[26] Joint Statement at 12, ¶ 27 (Chronology citing Complaint, Exhibit 30).

[27] Joint Statement at 12, ¶ 27 (Chronology citing Complaint, Exhibit 31).

C. This Complaint Proceeding

8. Broadview filed its Complaint with the Commission on December 30, 2003. In the Complaint, Broadview asserts that Verizon accepted Broadview's collocation applications, provisioned the collocation arrangements and terminations, and submitted bills "for all associated charges," which Broadview paid on a timely basis.[28] Broadview maintains that Verizon subsequently sent further bills for those terminations more than two years after it provisioned the terminations.[29] The Complaint alleges that Verizon violated the Act by (i) improperly "backbilling" for the additional collocation charges; (ii) imposing charges that are not listed in Verizon's federal tariff (FCC Tariff No. 11); and (iii) imposing charges from a state tariff for services ordered under a federal tariff.[30] Verizon filed an answer to the Complaint,[31] asserting, *inter alia*, that the Interconnection Agreement's mandatory arbitration provision bars the Complaint.[32] Thereafter, Broadview filed a reply.[33]

D. The *New York Order*

9. After Broadview filed the Complaint, Verizon filed a Petition to Compel Arbitration with the Supreme Court of the State of New York.[34] In the Petition to Compel Arbitration, Verizon argued that the dispute between the parties arises under and is governed by the parties' Interconnection Agreement, which requires arbitration of all disputes arising from the Interconnection Agreement or its breach.[35] Broadview opposed the Petition to Compel Arbitration, arguing that the services at issue in the Complaint were not provided under the Interconnection Agreement, but rather were ordered under Verizon's federal or state tariff, and, accordingly, that the Commission should resolve the matter.[36] Broadview maintained that, because the tariffs "conclusively and exclusively enumerate the rights and liabilities of the contracting parties,"[37] the terms of the Interconnection Agreement cannot apply as a matter of law, and the arbitration provision is inapposite.[38]

10. The Supreme Court of the State of New York granted Verizon's Petition to Compel Arbitration on July 28, 2004, and directed the parties to proceed to arbitration within 20 days after service

[28] Complaint at 6, ¶ 14.

[29] Complaint at 7-13, ¶¶ 15-36.

[30] Complaint at 22-25, ¶¶ 59-79. Pursuant to 47 C.F.R. § 1.722(d), the Complaint requested that a determination of damages be made in a separate proceeding subsequent to the proceeding in which the determination of liability and prospective relief are made. Complaint at 26-27, ¶ 82.

[31] Verizon New York Inc.'s Answer to Broadview Networks, Inc.'s Formal Complaint, File No. EB-03-MD-021 (filed Jan. 29, 2004) ("Answer").

[32] *See, e.g.*, Answer at 27.

[33] Reply of Broadview Networks, Inc., File No. EB-03-MD-021 (filed Feb. 17, 2004) ("Reply").

[34] Supplement to Information Designation, File No. EB-03-MD-021 (filed Mar. 2, 2004) (*Verizon New York Inc. v. Broadview Networks, Inc.*, Index No. 103080/2004, Petition to Compel Arbitration (N.Y. Sup. Ct. Feb. 27, 2004) ("Petition to Compel Arbitration") (VZ 004328-VZ 004442)).

[35] Petition to Compel Arbitration at 1-3, 5-11.

[36] E-mail from Todd Daubert, counsel for Broadview, to Rhonda Lien, FCC, File No. EB-03-MD-021 (Mar. 16, 2004) (*Verizon New York Inc. v. Broadview Networks, Inc.*, Index No. 103080/2004, Respondent Broadview Network, Inc.'s Memorandum of Law in Opposition to Petitioner Verizon New York Inc.'s Petition to Compel Arbitration at 2, 8-10, (N.Y. Sup. Ct. Mar. 12, 2004) ("Opposition to Petition to Compel Arbitration")).

[37] Opposition to Petition to Compel Arbitration at 10 (quoting *Marcus v. AT&T Corp*., 138 F.3d 46, 58 (2d Cir. 1998)). *See* Reply at 7-13 & nn.41-42.

[38] Opposition to Petition to Compel Arbitration at 10.

of the order.[39] The *New York Order* found, *inter alia*, that there is a valid written agreement between the parties to arbitrate disputes,[40] and that the instant dispute "clearly falls within the broad scope of the arbitration agreement," because it is a dispute "arising out of the [Interconnection] Agreement or its breach."[41] The Court described Broadview's assertion that the dispute arises out of Verizon's tariffs, not the Interconnection Agreement, as being "without merit," explaining that the "terms of the tariff(s) are part of the Interconnection Agreement."[42] Moreover, the Court rejected Broadview's contention that enforcement of the arbitration provision would violate the filed tariff doctrine.[43] Finally, the Court dismissed Broadview's argument that the claim Verizon seeks to arbitrate is an "inarbitrable statutory claim,"[44] and noted that the Interconnection Agreement provides a mechanism for dealing with any inconsistent rulings that may result from a Commission decision to exercise jurisdiction over Broadview's Complaint.[45]

11. Verizon thereafter filed the Motion with the Commission, which Broadview opposes.[46] In a conference call on September 7, 2004, Commission staff informally granted the Motion and indicated that a formal order would follow. This Memorandum Opinion and Order formally grants the Motion and provides the reasons for our ruling.

III. DISCUSSION

A. The *New York Order* Is Reasonable and Warrants Deference.

12. We first examine whether the mandatory arbitration provision of the parties' Interconnection Agreement applies to this dispute. That question has two subparts: (i) whether the Interconnection Agreement, rather than Verizon's tariffs standing alone, governs the collocation orders at issue, and if so, (ii) whether the language of the Interconnection Agreement's mandatory arbitration provision encompasses this dispute. The *New York Order* answered both of those questions in the

[39] *New York Order* at 4, 12.

[40] *New York Order* at 4.

[41] *New York Order* at 5.

[42] *New York Order* at 7.

[43] *New York Order* at 8-10.

[44] *New York Order* at 11.

[45] *New York Order* at 11-12.

[46] Opposition of Broadview Networks, Inc. to Verizon's Motion to Dismiss, or, in the Alternative, Defer, File No. EB-03-MD-021 (filed Aug. 11, 2004) ("Opposition to Motion"). *See also* Defendant's Reply Brief to Opposition to Motion to Dismiss or, in the Alternative, Defer, File No. EB-03-MD-021 (filed Aug. 17, 2004) ("Reply in Support of Motion"). Subsequent to the filing of Verizon's Reply in Support of Motion (which Commission staff directed Verizon to file), Broadview filed three additional pleadings: (1) an August 19, 2004 letter highlighting the manner in which Verizon purportedly had "changed the basis for the relief it seeks" and the existence of "factual inaccuracies and omissions" in the Reply in Support of Motion (*see* Letter to Alex Starr, Chief, Market Disputes Resolution Division, from Brad E. Mutschelknaus, Edward A. Yorkgitis, Jr. and Todd D. Daubert, Counsel for Broadview, File No. EB-03-MD-021 (filed Aug. 19, 2004) ("August 19 Letter")); (2) a September 1, 2004 Motion to Strike the Reply in Support of Motion (*see* Broadview Networks, Inc. Motion to Strike Reply Brief or, in the Alternative, File a Response, File No. EB-03-MD-021 (filed Sept. 1, 2004) ("Motion to Strike")); and (3) a Response to the Reply in Support of Motion (*see* Response of Broadview Networks, Inc. to Reply Brief, File No. EB-04-MD-021 (filed Sept. 1, 2004) ("Response to Reply in Support of Motion")). Broadview did not seek leave to file the August 19 Letter or the Response to Reply in Support of Motion. *See* 47 C.F.R. § 1.727 (authorizing only one response to a motion, as of right). Nevertheless, in reaching the ruling discussed herein, we have considered the arguments made in those submissions, which largely are duplicative of the arguments contained in the Opposition to Motion to Dismiss.

affirmative.[47] For the following reasons, we reject Broadview's contention that we should ignore the determinations of the Supreme Court of New York.[48]

13. First, the *New York Order*'s conclusion that the Interconnection Agreement (including its mandatory arbitration provision), rather than Verizon's tariffs standing alone, governs this dispute is reasonable, given that (i) the Interconnection Agreement clearly incorporates the tariffs with respect to the collocation orders at issue here,[49] and (ii) at least one federal court of appeals has held that, when an interconnection agreement incorporates a tariff, the parties thereafter act through the agreement, not the tariff.[50] Moreover, the *New York Order*'s conclusion that the Interconnection Agreement's mandatory arbitration provision encompasses this dispute is reasonable, in light of (i) the breadth of the provision's language,[51] and (ii) the federal policies favoring arbitration and resolving any doubt in favor of arbitrability.[52]

14. Second, we do not believe that deferring to the conclusions of the New York Supreme Court results in any unfairness to Broadview, because it appears that Broadview had an ample opportunity to make its arguments before the New York court. Based on our review of the record, which includes pleadings filed by the parties in the New York court proceeding, we conclude that Broadview extensively litigated in the New York court proceeding the questions of whether the parties' Interconnection Agreement applies and whether the Agreement requires arbitration of this dispute. Indeed, the *New York Order* thoroughly examines not only the arguments that Broadview made in its court papers, but also arguments that Broadview made only in its papers here.[53] Thus, the Supreme Court of New York was clearly informed by Broadview's arguments when it issued the *New York Order*, and we see no reason to ignore that Court's conclusions.

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[47] *New York Order* at 6-7 ("Broadview contends that the parties' dispute . . . does not arise out of the Interconnection Agreement, but, rather, out of the tariff(s) . . . [T]hat contention is without merit."); 5 ("The dispute which Verizon seeks to have arbitrated clearly falls within the broad scope of the arbitration agreement contained in the Interconnection Agreement, because it is a dispute 'arising out of [the Interconnection] Agreement or its breach.'").

[48] *See, e.g.*, Opposition to Motion at 11; August 19 Letter at 2 n.1; Response to Reply in Support of Motion at 6, 16, 18, 28.

[49] *See* Part II(A) at ¶ 5. Indeed, Broadview itself states that the Interconnection Agreement "establishes the contractual terms under which Verizon provides collocation and related services to Broadview in New York." Complaint at 3, ¶ 8.

[50] *U.S. West Communications, Inc. v. Sprint Communications Co., L.P.*, 275 F.3d 1241, 1251 (10th Cir. 2002).

[51] *See* Part II(A) at ¶ 4.

[52] *See, e.g.*, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 n.8 (1995) ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.") (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24-25 (1983)); *Volt Info. Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior Univ.*, 489 U.S. 468, 475-76 (1989) ("[I]n applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the Act . . . due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration."); *Oldroyd v. Elmira Sav. Bank, FSB*, 134 F.3d 72, 76 (2d Cir. 1998) (courts construe arbitration clauses as broadly as possible, and resolve any doubts concerning the scope of arbitrable issues in favor of arbitration); *David L. Threlkeld & Co., Inc. v. Mettalgesellschaft Ltd.*, 923 F.2d 245, 250-51 (2d Cir. 1991) ("[W]e are mindful of the Supreme Court's directive with respect to broad arbitration clauses: '[I]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of purpose to exclude the claim from arbitration can prevail.'") (quoting *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986); *United Steel Workers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584-85 (1960)).

[53] *New York Order* at 11.

15. Finally, the questions whether the parties' Interconnection Agreement applies and requires arbitration of this dispute do not involve such preeminent federal concerns that we should disregard the *New York Order*'s holdings.[54] Instead, those questions raise garden variety matters of contract interpretation that state tribunals have ample ability and authority to resolve. Indeed, the Act expressly contemplates that state tribunals will play a central role in arbitrating, approving, and interpreting interconnection agreements.[55] Moreover, the Commission has emphasized the importance of abiding by the terms of interconnection agreements, including valid forum-selection clauses.[56]

16. In sum, we defer to the *New York Order*'s determination that the Interconnection Agreement's mandatory arbitration provision applies and requires arbitration of the parties' dispute. As explained below,[57] the arbitration should resolve approximately 90 percent of the parties' disputes. To the extent disputes remain unresolved, the Commission can address them after arbitration.

B. We Reject Broadview's Argument That, Even if the Mandatory Arbitration Provision Applies, We Should Not Honor It.

17. According to Broadview, even assuming, *arguendo*, that the Interconnection Agreement's mandatory arbitration provision applies to this dispute, the Commission should decline to enforce the provision and, instead, proceed to ruling on the merits of Broadview's claims here.[58] We disagree, for the following reasons.

18. Broadview and Verizon agree, correctly, that three appellate cases – *Duke Power*,[59] *Ivarans I*,[60] and *Ivarans II*[61] – establish principles that should guide the Commission in determining the enforceability of an arbitration clause contained in an interconnection agreement. Distilled to their essence, these cases stand for the following propositions: The parties' agreement to arbitrate disputes cannot divest a federal agency of jurisdiction to decide a case.[62] Nonetheless, a federal agency should

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[54] *Cf. Arapahoe County Pub. Airport Auth. v. Federal Aviation Admin.*, 242 F.3d 1213, 1220-21 (10th Cir. 2001) (holding that the strong policy of federal supremacy in the field of aviation prevailed over full faith and credit principles that would have required the Federal Aviation Administration to give preclusive effect to a state court ruling); *American Airlines, Inc. v. Department of Transp.*, 202 F.3d 788, 800 (5th Cir. 2000) (holding that, because aviation regulation is an area where federal concerns are preeminent, and the Department of Transportation ("DOT") is charged with representing those concerns, the DOT was not required to grant preclusive effect to the outcome of a state court proceeding).

[55] *See generally* 47 C.F.R. §§ 251, 252; *Verizon Communications v. FCC*, 535 U.S. 467, 487-89 (2002).

[56] *See Core Communications, Inc. v. Verizon Maryland Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 7962, 7973 n.81 (2003) ("*Core v. Verizon*") (observing that "nothing in this order indicates that the Commission would ignore a valid forum-selection clause in an interconnection agreement."). *Cf. In the Matter of Unbundled Access to Network Elements*, Order and Notice of Proposed Rulemaking, FCC 04-179, 2004 WL 1900394, ¶¶ 22-23 (Aug. 20, 2004) (preserving incumbent LECs' "contractual prerogatives to initiate change of law proceedings to the extent consistent with their governing interconnection agreements" to effectuate whatever final unbundling rules the Commission enacts).

[57] *See* Part III(B) at ¶ 25.

[58] Opposition to Motion at ii-v, 4-7, 12-14; August 19 Letter at 3-4; Response to Reply in Support of Motion at i-ii, 7-26.

[59] *Duke Power Co. v. Federal Energy Regulatory Comm'n*, 864 F.2d 823, 829 (D.C. Cir. 1989) ("*Duke Power*").

[60] *A/S Ivarans Rederi v. United States*, 895 F.2d 1441, 1445 (D.C. Cir. 1990) ("*Ivarans I*").

[61] *A/S Ivarans Rederi v. United States*, 938 F.2d 1365, 1368 (D.C. Cir. 1991) ("*Ivarans II*").

[62] *See Ivarans I*, 895 F.2d at 1445 ("Private regulated parties cannot agree to waive the subject matter jurisdiction of the agency charged with the statutory responsibility to insure that parties implement agreements as approved by and (continued....)

honor agreements to arbitrate absent a compelling reason not to do so.[63] Such compelling circumstances may exist when (1) the complaint concerns a dispute that lies at the core of an agency's enforcement mission;[64] (2) the dispute "inevitably touches commercial relationships" among many participants in the relevant industry;[65] (3) the dispute involves interpretation of facially clear contract language (as opposed to the interpretation of ambiguous contract language or the application of contract language to particular facts);[66] or (4) arbitration would be a waste of time.[67] Moreover, where, as here, the arbitration provision was included in the interconnection agreement at the specific direction of a state commission, acting pursuant to its authority under sections 251 and 252 of the Act, [68] we must honor the arbitration provision under all but the most compelling circumstances; otherwise, we would do violence to the statutory scheme, which provides specific mechanisms for the creation, approval, and judicial review of the provisions of interconnection agreements.

19. None of those factors warrants departure here from the general rule favoring enforcement of mandatory arbitration clauses. First, the gravamen of the Complaint is that Verizon improperly backbilled Broadview for termination charges.[69] Although the Commission may possess jurisdiction to

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filed with that agency."); *Duke Power*, 864 F.2d at 829 ("It is uncontested . . . that the Commission has continuing regulatory jurisdiction over rates charged under the agreements.").

[63] *Duke Power*, 864 F.2d at 831 (FERC does not have a "license to disregard mandatory arbitration clauses in routine contract disputes"). Buttressing our conclusion that disregarding an arbitration provision is the exception, not the rule, is the fact that, after *Duke Power*, FERC repeatedly has enforced arbitration provisions. *See, e.g.*, *PPL EnergyPlus, LLC*, 99 FERC 61257 (2002); *Indiana Michigan Power Co. and Ohio Power Co.*, 64 FERC 61184 (1993); *North Carolina Eastern Municipal Power Agency v. Carolina Power & Light Co.*, 46 FERC 61181 (1989).

[64] *Ivarans I*, 895 F.2d at 1446 (the Federal Maritime Commission retains the right to hear complaints that an agreement filed pursuant to the Shipping Acts has been improperly modified through arbitration); *Duke Power*, 864 F.2d at 829 ("[T]he Commission's acceptance for filing of an agreement that contains an arbitration clause does not legally disable the Commission from resolving disputes at the core of its enforcement mission."). Even when a dispute does concern important agency interests, however, the agency still lawfully may decide that the interest in enforcing a contractual obligation to arbitrate remains preeminent. *Duke Power*, 864 F.2d at 829 ("[I]f the Commission finds a violation of the filed rate doctrine, it is not required to submit the dispute to arbitration despite a mandatory arbitration clause in the agreements constituting the filed rate schedule, *although it may, in its discretion*, *do so*.") (emphasis added).

[65] *Ivarans II*, 938 F.2d at 1367.

[66] *Duke Power*, 864 F.2d at 830 (affirming agency's disregard of arbitration provision, partly because "the agreements were clear on their face and could be interpreted without resort to extrinsic evidence"); *Ivarans II*, 938 F.2d at 1367-68.

[67] *Ivarans II*, 938 F.2d at 1368.

[68] Answer, Exhibit M (*NYPSC Order*) (VZ 003544) (holding that the alternative dispute resolution process will "provide for the expeditious resolution of all disputes between the parties arising out of this agreement," and will constitute "the exclusive remedy for all disputes between the parties arising out of this agreement or its breach").

[69] *See, e.g.*, Reply at 2 ("The FCC should grant Broadview's backbilling claims . . . and requested relief, which would resolve the entire dispute between the parties and obviate the need to review any of the other Counts on the merits."); 5 ("Assuming *arguendo* that Verizon's charges for the VG, DS1 and DS3 terminations were valid, Verizon engaged in an unjust and unreasonable practice in violation of Section 201(b) of the Act by backbilling."); 15 ("Significantly, because the Commission can grant all of the relief Broadview has requested by addressing Counts II and V [principally alleging backbilling], the Commission does not need to address Section 204(a)(3) at all to resolve this dispute."); Opposition to Motion at iv ("Verizon knows that if the Commission applies this [backbilling] precedent to the current dispute Verizon will not be entitled to collect the overwhelming majority of the disputed charges from Broadview, and that the Commission will not have to reach any of the other issues in this proceeding, such as the applicability of Section 204(a)(3)."); August 19 Letter at 2 n.1 ("Verizon's unlawfully delayed backbilling for services ordered under tariff is at the heart of the dispute.").

resolve this backbilling claim,[70] such a claim does not lie at the "core" of the Commission's enforcement mission, but instead more closely resembles a "routine contract dispute."[71] Further, as noted above, the Commission has expressed a strong interest in encouraging compliance with interconnection agreements, including deference to valid forum-selection provisions contained in interconnection agreements.[72] This broader interest clearly outweighs any interest in adjudicating the merits of this particular dispute.

20. Moreover, resolving a backbilling claim such as Broadview's does not require the Commission's expertise. Assessing whether the timing of a carrier's bills is unlawful generally involves standards of commercial reasonableness and a "totality-of-the-circumstances" test.[73] Experienced commercial arbitrators selected by the parties pursuant to the arbitration procedures set forth in their Interconnection Agreement will be well-equipped to handle that task.

21. With respect to the second factor, because this dispute concerns an agreement between only the two named parties, a resolution will have no direct and immediate impact on third parties.[74] Broadview is correct that a Commission order on the merits in this case would, to some extent, "set a standard for the propriety of carriers' practices in many other interconnecting carrier relationships,"[75] but only because of the order's status as precedent, which is true of all Commission orders.

22. As to the third factor, this case does not involve a purely legal question of interpreting clear contract language. Rather, it involves an assessment of the reasonableness of Verizon's billing practices, based on both contract and tariff language and "resort to extrinsic evidence."[76] As noted above, this type of reasonableness assessment and evidentiary analysis is well-suited to the arbitration process that the parties agreed in their Interconnection Agreement to undertake.

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[70] Verizon argues, with some persuasive force, that Broadview ordered the services at issue pursuant to the parties' Interconnection Agreement and Verizon's New York state tariff regarding intrastate services, in which case the Commission might not have jurisdiction to resolve Broadview's backbilling claims. *See, e.g.*, Answer at 27; Answer, Legal Analysis at 23-27; Reply in Support of Motion at 14 n.39; Verizon New York Inc.'s Opposition to Broadview Networks, Inc.'s Motion to Strike Reply Brief or, in the Alternative, File a Response, File No. EB-03-MD-021 (filed Sept. 3, 2004) at 6-7 n.17.

[71] *Duke Power*, 864 F.2d at 831.

[72] *See* Part III(A) at n.56.

[73] *See, e.g.*, *The People's Network, Inc. v. American Telephone & Telegraph Co.*, Memorandum Opinion and Order, 12 FCC Rcd 21081, 21090 (1997) ("Our decision regarding the reasonableness of AT&T's backbilling practices in this particular case should not be construed as establishing a rule of general applicability. . . . We will consider such matters on a case-by-case basis to determine compliance with the just and reasonable requirements of Section 201(b)."); *Brooten v. AT&T Corp.*, Memorandum Opinion and Order, 12 FCC Rcd 13343 (Comm. Carr. Bur. 1997) (same); *American Network, Inc.: Petition for Declaratory Ruling Concerning Backbilling of Access Charges*, Memorandum Opinion and Order, 4 FCC Rcd 550, 551-52, ¶ 20 (Comm. Carr. Bur. 1989) (backbilling may under certain circumstances constitute an unjust and unreasonable practice in violation of section 201(b) of the Act, and the limitations period contained in section 415 of the Act does not authorize backbilling for any particular period). We note that, because Broadview may have ordered the services at issue through the Interconnection Agreement, rather than directly via a tariff, and because the relevant tariff may be Verizon's New York state tariff regarding intrastate services, the Commission's precedent concerning backbilling under section 201(b) of the Act may not even be directly applicable. *See, e.g.*, Answer at 27; Answer, Legal Analysis at 31-33; Reply in Support of Motion at 14 n.39 (arguing that New York State's six-year statute of limitations governs Broadview's backbilling claims).

[74] *Compare Ivarans II*, 938 F.2d at 1366 (describing how a resolution would affect numerous non-parties to the proceeding, because the dispute concerned a multiparty "pooling agreement").

[75] Opposition to Motion at 6.

[76] *Duke Power*, 864 F.2d at 830.

23. Concerning the fourth factor, we do not view arbitration as a waste of time. Pursuant to the *New York Order*, arbitration should be underway,[77] and the arbitration proceedings will resolve the bulk of Broadview's claims.[78] Moreover, although the initial pleading cycle here is complete, and the parties attended an initial status conference,[79] the parties have not yet submitted briefs on the merits addressing the numerous substantive issues the Commission staff identified in its briefing order.[80] Thus, holding this case in abeyance while the parties engage in arbitration will conserve the resources of the parties and the Commission. Finally, Broadview cannot credibly complain about the stage of the litigation before the Commission,[81] because that is a situation of Broadview's own making. Verizon first attempted to initiate arbitration almost three months before Broadview filed its Complaint.[82] Broadview resisted (and continues to resist) Verizon's efforts at every turn, which resistance the Supreme Court of New York now has held to have been baseless.

24. Although we need not decide the issue in light of our decision to defer, rather than dismiss, the Complaint, we do not agree with Broadview that section 208 of the Act (47 U.S.C. § 208) requires the Commission to resolve all complaints by issuing a substantive order on the merits.[83] Section 208 requires the Commission to "investigate the matters complained of in such manner and by such means as it shall deem proper."[84] An "investigation," however, does not entitle every complainant to a ruling on the merits of a complaint. The Commission, like courts, often has the right and the obligation to conclude an "investigation" of a complaint by issuing an order that does not reach the underlying merits of the complaint's claims when, for example, the Commission declines to exercise its jurisdiction to adjudicate a complaint or the complaint is otherwise defective.[85] Concluding a complaint investigation,

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[77] *New York Order* at 12.

[78] *See* Part III(B) at ¶ 25.

[79] *See* Letter from Lisa B. Griffin, Deputy Chief, Market Disputes Resolution Division, Enforcement Bureau, FCC, to Brad E. Mutschelknaus and Kathleen Grillo, File No. EB-03-MD-021 (Jan. 6, 2004); Letter from Alexander P. Starr, Chief, Market Disputes Resolution Division, Enforcement Bureau, FCC, to Brad E. Mutschelknaus and Catherine K. Ronis, File No. EB-03-MD-021 (Feb. 4, 2004).

[80] Letter from Lisa B. Griffin, Deputy Chief, Market Disputes Resolution Division, Enforcement Bureau, FCC, to Brad E. Mutschelknaus and Catherine K. Ronis, File No. EB-03-MD-021 (July 6, 2004) (setting forth 38 issues to be briefed, and allowing each party up to 125 pages to do so). Following the filing of the Motion, Commission staff made every effort to minimize wasted effort by the parties by extending the briefing schedule three times while the Commission considered the Motion. *See* Letter from Alexander P. Starr, Chief, Market Disputes Resolution Division, Enforcement Bureau, FCC, to Brad E. Mutschelknaus and Catherine K. Ronis, File No. EB-03-MD-021 (Sept. 7, 2004); Letter from Lisa B. Griffin, Deputy Chief, Market Disputes Resolution Division, Enforcement Bureau, FCC, to Brad E. Mutschelknaus and Catherine K. Ronis, File No. EB-03-MD-021 (Aug. 24, 2004); Letter from Lisa B. Griffin, Deputy Chief, Market Disputes Resolution Division, Enforcement Bureau, FCC, to Brad E. Mutschelknaus and Catherine K. Ronis, File No. EB-03-MD-021 (Aug. 9, 2004). *Cf.* Reply in Support of Motion at 12 ("The parties would still have to finish researching and drafting 75-page initial briefs, and then file 50-page reply briefs, at a minimum.").

[81] Opposition to Motion at 6.

[82] *See* Part II(B) at ¶ 7. Thus, the facts belie Broadview's contention that Verizon pursued arbitration only after Broadview filed the Complaint. Opposition to Motion at 2; Motion to Strike at 2-4.

[83] Opposition to Motion at 12-14; Motion to Strike at 7-9.

[84] 47 U.S.C. § 208(a). *See* 47 U.S.C. § 208(b).

[85] *See, e.g.*, *MCI Worldcom Network Servs., Inc. v. FCC*, 274 F.3d 542, 543 (D.C. Cir. 2001) (affirming the Commission's dismissal of complaint alleging breach of merger conditions, given Commission's holding that state public utility commission was proper forum); *Centennial Communications Corp. v. Tricom USA, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 10794, 10803-05, ¶¶ 21-26 (2002) (dismissing formal complaint due to considerations of international comity); *AT&T Corp. v. Bell Atlantic-Pennsylvania*, Memorandum Opinion and

(continued....)

were we to do so here, by honoring a mandatory arbitration clause would be no different.[86]

25. Finally, we make clear that we grant the Motion only to the extent that the Complaint is deferred, not dismissed. The claims in the Complaint involve billing for DS1/DS3 terminations and for voice-grade terminations, whereas the *New York Order* requires arbitration regarding only the voice-grade terminations.[87] We thus agree with Broadview that the claims in the Complaint are somewhat broader than those that will be arbitrated pursuant to the *New York Order*.[88] Therefore, outright dismissal of the Complaint would be inappropriate at this time.[89] Because the charges pertaining to voice-grade terminations comprise approximately 90 percent of Broadview's claims,[90] however, we believe that arbitration will involve the majority of issues in the Complaint. To the extent that other issues remain after the arbitration is concluded, the Commission can address them then.

26. For administrative purposes, we revise the status of the Complaint to an informal complaint pending the outcome of the parties' court-ordered arbitration. We do this for purposes of internal docket organization only, and we do not intend this action to affect the rights and obligations of either party. If the proceeding resumes, it will do so under its current designation, File No. EB-03-MD-021. Converting the informal complaint back to formal complaint File No. EB-03-MD-021 will occur only if we receive notice from a party that it wishes to do so within 60 days of the final, non-appealable conclusion of the arbitration ordered in the *New York Order*. In the meantime, every 90 days (starting from the date of this Order), the parties shall jointly file in the informal complaint docket a report on the status of the arbitration proceeding.

(...continued from previous page)
Order, 14 FCC Rcd 556, 565-66, ¶¶ 12-16 (1998) (dismissing claims arising from conduct occurring outside the two-year limitations period under 47 U.S.C. § 415); *Comsat Corp. v. IDB Mobile Communications, Inc.*, Order on Review, 15 FCC Rcd 14697, 14698, ¶ 2 (2000) (upholding Bureau decision dismissing complaint on res judicata grounds).

[86] Contrary to Broadview's assertion, *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), is distinguishable from this case. *See* Opposition to Motion to Dismiss at 13-14; Response to Reply in Support of Motion at 12-13. In *USTA II*, the United States Court of Appeals for the District of Columbia Circuit held that the Commission could not delegate to state utility commissions its statutory duty under section 251(d)(2) of the Act (47 U.S.C. § 251(d)(2)) to determine which telephone network elements incumbent LECs are required to unbundle and make available to other carriers. Section 251(d)(2) states, in relevant part, that "[i]n determining what network elements shall be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether . . . the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2)(A). In contrast, section 208 of the Act does not require the Commission to make a specific substantive determination. Rather, it instructs the Commission to "investigate" formal complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208. In this case, the Commission is investigating Broadview's Complaint by allowing contractually agreed-upon arbitration to proceed first, and then assessing what issues between the parties remain. Similarly, we find unpersuasive Broadview's citation to *Core v. Verizon*, 18 FCC Rcd at 7962. Unlike *Core v. Verizon*, this case presents specific circumstances (*i.e.*, an arbitration clause that Verizon sought to invoke prior to the filing of the Complaint, and a New York court order interpreting the clause as applicable) that make it appropriate for the Commission to decline presently to exercise its jurisdiction to adjudicate Broadview's complaint. *Core v. Verizon*, 18 FCC Rcd at 7973-74, ¶ 29.

[87] *See* Complaint at 22-26; *New York Order* at 2, 12.

[88] Opposition to Motion at i n.2.

[89] Verizon asserts that it served an "arbitration demand for DS1/DS3 cross-connects," and that it "has now consolidated [all of] the cross-connect disputes into a single arbitration." Reply in Support of Motion at 2 n.1. Verizon, however, has not provided any documentation to support this assertion of consolidation.

[90] *See* Complaint, Tab I (Affidavit of James Lennon) at 8, ¶¶ 35-36.

27. In sum, we find that good cause exists to grant the Motion, to the extent described herein, in order to allow the parties to follow the mandate of the *New York Order* and proceed to arbitration. We also convert the Complaint into an informal complaint for internal administrative purposes only.

IV. ORDERING CLAUSES

28. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, and sections 0.111, 0.311, and 1.727 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, and 1.727, Verizon's Motion to Dismiss or, in the Alternative, Defer, is GRANTED to the extent indicated herein.

29. IT IS FURTHER ORDERED that, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, and sections 1.3, 1.716-1.718, and 1.720-1.736 of the Commission's rules, 47 C.F.R. §§ 1.3, 1.716-1.718, and 1.720-36, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111 and 0.311, Broadview's formal complaint of December 30, 2003 SHALL BE CONVERTED into an informal complaint with a designated filing date of December 30, 2003, and that the formal complaint and answer filed in the above-captioned proceeding satisfy sections 1.716-1.717 of the Commission's rules, 47 C.F.R. §§ 1.716-1.717.

30. IT IS FURTHER ORDERED that, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, and sections 1.3, 1.716-1.718, and 1.720-1.736 of the Commission's rules, 47 C.F.R. §§ 1.3, 1.716-1.718, and 1.720-1.736, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111 and 0.311, the file number for the informal complaint is EB-04-MDIC-0105.

31. IT IS FURTHER ORDERED that, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, and sections 1.3, 1.716-1.718, and 1.720-1.736 of the Commission's rules, 47 C.F.R. §§ 1.3, 1.716-18, and 1.720-1.736, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111 and 0.311, the docket established in the above-captioned formal complaint proceeding shall be transferred in its entirety to the newly established informal complaint docket.

32. IT IS FURTHER ORDERED that, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, and sections 1.3, 1.716-1.718, and 1.720-1.736 of the Commission's rules, 47 C.F.R. §§ 1.3, 1.716-18, and 1.720-1.736, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111 and 0.311, every 90 days (starting from the date of this Order), the parties shall jointly file in the informal complaint docket a report on the status of the court-ordered arbitration proceeding, until the arbitration is concluded.

33. IT IS FURTHER ORDERED that, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, and sections 1.3, 1.716-1.718, and 1.720-1.736 of the Commission's rules, 47 C.F.R. §§ 1.3, 1.716-18, and 1.720-1.736, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111 and 0.311, the Commission will convert the informal complaint back to formal complaint File No. EB-03-MD-021 if, within 60 days of the final, non-appealable conclusion of the arbitration ordered in the *New York Order*, a party notifies the Commission that it desires such action.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau