
**SEPARATE STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY**

Re: Core Communications and Z-Tel Communications v. SBC Communications Inc., et al., File No. EB-01-MD-017, Memorandum Opinion and Order

I support the foregoing Order, both in terms of its jurisdictional analysis and its discussion of the merits. I write separately to explain the narrowness of the Commission's jurisdictional holding.

This Order holds that the Commission has concurrent jurisdiction with the state commissions to adjudicate interconnection disputes. I agree that the plain language of the Act compels this conclusion. But I also believe there are significant limitations on the circumstances in which complainants actually will be able to state a claim under section 208 for violations of section 251(c) and the Commission's implementing rules.

First, as the Order acknowledges, the section 252 process of commercial negotiation and arbitration provides the primary means of resolving disputes about what should be included in an interconnection agreement. A party's failure to adhere to the requirements of an interconnection agreement — its change-of-law provisions, for example — likely would foreclose any remedy under section 208. Thus, in this case, the failure of Core Communications and Z-Tel to follow the change-of-law provision in their interconnection agreement in California denied them a cause of action against SBC for failing to provide shared transport for intraLATA toll traffic in California. Order at ¶¶ 28-35.

In addition, if a party *does* invoke the state-commission arbitration process prescribed in section 252, and *loses*, it seems clear that the party's sole remedy is to file an appeal in federal district court under section 252(e)(6) — the party may *not* collaterally attack the state action before the FCC in a section 208 complaint. Permitting a second bite at the apple before the Commission would appear to violate not only the text and structure of section 252, but also black letter law on collateral estoppel. I recognize that the *Local Competition Order* suggested that a party aggrieved by a state arbitration determination may prevail in a section 208 action against a carrier that is in compliance with the state-approved agreement.¹ While the facts of this proceeding do not require the Commission to confront this issue, I believe the *Local Competition Order* was clearly wrong to the extent it suggested that section 208 confers jurisdiction for collateral attacks on state arbitration decisions. I hope that if the Commission is presented with such an effort to supplant the statutory scheme, we squarely hold that our jurisdiction under section 208 does not authorize such actions.

¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15564-65 ¶¶ 127-28 (1996).