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

In the Matter of)	
)	
CoreComm Communications, Inc., and)	
Z-Tel Communications, Inc.,)	
)	
Complainants,)	
)	File No. EB-01-MD-017
v.)	
)	
SBC Communications Inc.,)	
Southwestern Bell Telephone Company,)	
Pacific Bell Telephone Company,)	
Nevada Bell Telephone Company,)	
The Southern New England Telephone)	
Company,)	
Illinois Bell Telephone Company,)	
Indiana Bell Telephone Company,)	
Michigan Bell Telephone Company,)	
The Ohio Bell Telephone Company, and)	
Wisconsin Bell, Inc.,)	
)	
Defendants.)	

ORDER ON RECONSIDERATION

Adopted: April 28, 2004

Released: May 4, 2004

By the Commission:

I. INTRODUCTION

1. In this Order, we deny the Petition for Reconsideration¹ filed by Z-Tel Communications, Inc. ("Z-Tel") pursuant to section 405 of the Communications Act of 1934, as amended ("Act").² Z-Tel seeks reconsideration of the Commission's *Liability Order*³ insofar as

¹ Petition for Reconsideration, File No. EB-01-MD-017 (filed May 19, 2003) ("Petition").

² 47 U.S.C. § 405.

it denies Z-Tel's claim, made in a section 208 formal complaint, that defendant Pacific Bell Telephone Company ("Pacific") violated sections 201(b), 251(c)(1) and (c)(3) of the Act, and Commission rules 51.309 and 51.313.⁴ For the following reasons, we conclude that Z-Tel's Petition lacks merit.

II. BACKGROUND

2. Z-Tel is a competitive local exchange carrier ("CLEC"), and Pacific is an incumbent local exchange carrier ("ILEC").⁵ Pursuant to section 252(i) of the Act,⁶ Z-Tel opted into an existing section 252 interconnection agreement between Pacific and another CLEC (the "Pacific Agreement"). The Pacific Agreement granted Z-Tel access to the shared transport unbundled network element ("UNE"), but Pacific refused to allow Z-Tel to use the shared transport UNE to transport Z-Tel's customers' intraLATA toll calls. Z-Tel sought to amend the Pacific Agreement by asking Pacific to execute a "Memorandum of Understanding" that would have allowed Z-Tel to use the shared transport UNE for intraLATA toll. Pacific refused Z-Tel's request.⁷

3. In its Complaint filed in this proceeding, Z-Tel alleged that Pacific's refusal to allow Z-Tel to use the shared transport UNE for intraLATA toll, and its refusal to execute the Memorandum of Understanding, violated, *inter alia*, sections 201(b), 251(c)(1), and 251(c)(3) of

(Continued from previous page)

³ *CoreComm Communications, Inc. and Z-Tel Communications, Inc. v. SBC Communications Inc. et al.*, Memorandum Opinion and Order, 18 FCC Rcd 7568 (2003), *petition for review pending release of the instant order, sub nom. SBC Communications Inc. v. FCC*, No. 03-1147 (D.C. Cir. 2003) ("Liability Order").

⁴ 47 U.S.C. §§ 201(b), 251(c)(1) and (c)(3); 47 C.F.R. §§ 51.309(a), 51.309(b), 51.313(b). Z-Tel does not seek reconsideration of the Commission's denial of its section 202(a) claims. The Commission granted Z-Tel's claim that defendants Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, and Wisconsin Bell Telephone, Inc. (collectively, "Ameritech") violated paragraph 56 of the *SBC/Ameritech Merger Order Conditions. Liability Order*, 18 FCC Rcd at 7576-78, ¶¶ 20-25 (citing *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14712, 15023-24 (1999), (subsequent history omitted) ("*SBC/Ameritech Merger Order Conditions*"). Specifically, the *Liability Order* noted that Z-Tel purchased the shared transport UNE from Ameritech, that Z-Tel requested permission to use the UNE for intraLATA toll, and that Ameritech refused Z-Tel's request. Ameritech's refusal violated the *SBC/Ameritech Merger Order Conditions*, because those conditions require Ameritech to "offer" shared transport for intraLATA toll. *Liability Order* at 18 FCC Rcd at 7576-77, ¶¶ 20-21. The Commission has issued a forfeiture order against Ameritech for violation of the *Merger Order Conditions*. See *SBC Communications, Inc., Apparent Liability for Forfeiture*, Forfeiture Order, 17 FCC Rcd 19923 (2002), *appeal pending*.

⁵ *Liability Order*, 18 FCC Rcd at 7571, ¶ 8.

⁶ 47 U.S.C. § 252(i).

⁷ *Liability Order*, 18 FCC Rcd at 7579-81, ¶ 29.

the Act and Commission rules 51.309 and 51.313.⁸ The Complaint did not include a copy of the Pacific Agreement. Nor did the Complaint discuss or direct the Commission's attention to any of the language found in the Pacific Agreement.⁹

4. Pacific asserted in its Answer that it was not obligated by the Pacific Agreement to provide Z-Tel shared transport for intraLATA toll or to execute the Memorandum of Understanding.¹⁰ Pacific also stated that, "in conference calls with Commission staff ... counsel for [Z-Tel] specifically disavowed any claim that [Pacific] had violated their interconnection agreement[.]..."¹¹ Pacific asserted as an affirmative defense that Z-Tel failed to state a claim and had waived any claim because Z-Tel "specifically disavowed any claim that [Pacific] ha[s] violated [the Pacific Agreement]" and had voluntarily entered into an agreement "that do[es] not make available the intraLATA interexchange transmission [Z-Tel] seek[s]."¹² Pacific also stated, "The reason [Z-Tel] attempt[s] to base [its] claims on the Act and the Commission's rules and orders rather than the governing agreements...is simple: [Z-Tel] ha[s] opted into agreements that do not make available the intraLATA interexchange transmission capability [Z-Tel] seek[s]...."¹³

5. Z-Tel's Reply to the Answer did not dispute Pacific's allegations about the requirements of the Pacific Agreement or about Z-Tel's "disavowal" of any claim of breach. Z-Tel subsequently informed the Commission that two "key legal issues" to be decided by the Commission were "whether [Z-Tel] ha[s] waived any claim that [Pacific's] conduct is inconsistent with the Act, and the Commission's rules and orders, ...because [Z-Tel] ... voluntarily ... adopted existing, approved interconnection agreements that do not make available the intraLATA interexchange transmission capability [Z-Tel] seek[s]..." and "whether [Z-Tel]...failed to state a claim upon which relief can be granted given that [Z-Tel] ... ha[s] disavowed any claim that [Pacific] ha[s] violated the terms of [the Pacific Agreement]..."¹⁴

6. In the *Liability Order*, after granting Z-Tel's complaint against Ameritech for violating the *SBC/Ameritech Merger Order Conditions*, the Commission denied Z-Tel's claims against Pacific. The Commission found that Z-Tel had effectively admitted that the Pacific Agreement does not require Pacific to provide use of the shared transport UNE for intraLATA

⁸ *Liability Order*, 18 FCC Rcd at 7569, ¶ 2.

⁹ *Liability Order*, 18 FCC Rcd at 7580, ¶ 29 n.67.

¹⁰ *Liability Order*, 18 FCC Rcd at 7572, ¶ 11, 7579-81, ¶ 29.

¹¹ Defendants' Answer, File No. EB-01-MD-017 (filed Oct. 10, 2001) ("Answer"), Ex. B (Defendants' Legal Analysis) at 11.

¹² *Liability Order*, 18 FCC Rcd at 7580, ¶ 29 n.67; Answer at 4-5.

¹³ Answer Ex. B (Defendants' Legal Analysis) at 14.

¹⁴ *Liability Order*, 18 FCC Rcd at 7580, ¶ 29 n.67; Revised Joint Statement, File No. EB-01-MD-017 (filed Nov. 23, 2001) at Statement of Key Legal Issues, 11-12, ¶¶ 6-7.

toll.¹⁵ The Commission reasoned that, although Commission rules “plainly require unbundling of shared transport for use with intraLATA toll traffic,”¹⁶ the obligations created by section 251 and Commission implementing rules are effectuated through the section 252 processes of negotiation, arbitration, or opt-in.¹⁷ Therefore, because Z-Tel had voluntarily opted into an agreement that did not provide use of the shared transport UNE for intraLATA toll, Z-Tel had waived its claims pursuant to section 251(c)(3) and Commission rules.¹⁸

7. The Commission also denied Z-Tel’s claim that Pacific’s refusal to adopt Z-Tel’s “Memorandum of Understanding” violated section 251(c)(1). The Commission reasoned that Z-Tel could not voluntarily opt into the Pacific Agreement, and then invoke section 251(c)(1) to require Pacific to amend the agreement, unless the Pacific Agreement obligated Pacific so to do. Yet Z-Tel had not asserted that Pacific’s refusal to adopt the Memorandum of Understanding violated the Pacific Agreement’s amendment or change of law provisions, and, indeed, had disavowed any claim that Pacific had breached the Pacific Agreement. Accordingly, the Commission found that Z-Tel had not met its burden of proving that Pacific was obligated to adopt Z-Tel’s Memorandum of Understanding.¹⁹

8. Finally, the Commission denied Z-Tel’s section 201(b) claims because Z-Tel had advanced no reason, other than Pacific’s alleged violation of its obligations under section 251(c), why Pacific’s conduct was “unjust and unreasonable” within the meaning of section 201(b). Therefore, because Z-Tel’s section 251(c) claims failed, its section 201(b) claims also failed.²⁰

III. DISCUSSION

A. The *Liability Order* is Consistent with Commission Precedent.

9. Z-Tel argues that, in denying Z-Tel’s claims against Pacific, the Commission “abandon[ed]” prior Commission precedent establishing that the terms of any interconnection agreement between a CLEC and an ILEC are irrelevant to the issue of whether the CLEC may prevail on a claim that the ILEC has violated section 251.²¹ Z-Tel argues further that the Commission’s failure to follow this alleged precedent violated principles of administrative law.

¹⁵ *Liability Order*, 18 FCC Rcd at 7579-81 ¶ 29.

¹⁶ *Liability Order*, 18 FCC Rcd at 7581, ¶ 30 (citing *SBC Communications, Inc., Apparent Liability for Forfeiture*, Forfeiture Order, 17 FCC Rcd 19923, 19932, ¶ 18 (2002)).

¹⁷ *Liability Order*, 18 FCC Rcd at 7581, ¶ 30.

¹⁸ *Liability Order*, 18 FCC Rcd at 7579-81, ¶¶ 29-30.

¹⁹ *Liability Order*, 18 FCC Rcd at 7581-82, ¶¶ 30-32.

²⁰ *Liability Order*, 18 FCC Rcd at 7582, ¶ 33.

²¹ Petition at 3. *Accord* Petition at 6-12.

According to Z-Tel, where the Commission departs from its prior precedent, it is required to provide "a reasoned explanation" for its change of mind,²² and also to give the parties notice of the change and an opportunity to provide evidence bearing on the new standard.²³

10. We find, however, that the *Liability Order* is fully consistent with Commission precedent. Specifically, the Commission has never held that a requesting carrier may successfully charge an ILEC with violating its section 251(c) obligations when the requesting carrier has, pursuant to section 252(i), opted into an interconnection agreement that excludes the very section 251(c) obligations at issue.²⁴ As discussed below, the *Liability Order* is not inconsistent with any of the Commission precedent cited by Z-Tel in its Petition, provides a reasoned explanation for the Commission's finding,²⁵ and thus fully complies with the requirements of administrative law.

i. The *Liability Order* is Consistent with Commission Rulemakings.

11. Z-Tel argues that the Commission's denial of Z-Tel's claim against Pacific is inconsistent with the Commission's statement, in the *Local Competition Report and Order*,²⁶ that a party may file a section 208 complaint alleging violations of section 251 or Commission implementing rules "even if the [defendant carrier] is in compliance with an agreement approved by the state commission."²⁷ Z-Tel misconstrues the Commission's statement. The cited language cannot reasonably be read to suggest that section 251 is violated when a carrier voluntarily enters into an agreement, as Z-Tel did, that does not afford the full range of rights

²² Petition at 13.

²³ Petition at 3, 12-14.

²⁴ Indeed, to so hold under these specific circumstances would undermine the point of these interconnection agreements, which Congress established as the mechanism to implement the duties arising section 251(c). In the present case, Z-Tel opted into a pre-existing Pacific interconnection agreement without first negotiating or arbitrating an amendment to the agreement regarding shared transport. Z-Tel is bound by the Pacific Agreement, and may not now require Pacific to amend its terms. See *Liability Order*, 18 FCC Rcd at 7581-82, ¶ 30 (stressing that any request by Z-Tel to change the Pacific Agreement's terms would have to comply with the agreement's modification or change of law provisions). We note that Z-Tel had ample notice that it was taking a risk in failing to allege that the Pacific Agreement provided shared transport for intraLATA toll, because Pacific repeatedly argued that Z-Tel's claims were precluded by the terms of the Pacific Agreement. For example, Pacific alleged that Z-Tel had waived its claims because Z-Tel had "specifically disavowed any claim that [Pacific] ha[s] violated [the Pacific Agreement]." *Liability Order*, 18 FCC Rcd at 7580, ¶ 29 n.67. Nevertheless, far from contesting Pacific's allegations, Z-Tel affirmatively adopted them. See discussion at ¶ 5, *supra* (discussing Z-Tel's "key legal issues"). Moreover, as discussed below, Z-Tel would not have prevailed even if it had asserted that Pacific breached the Pacific Agreement, because there was no such breach.

²⁵ *Liability Order*, 18 FCC Rcd at 7581-82, ¶¶ 30-32.

²⁶ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996) (subsequent history omitted) ("*Local Competition Report and Order*").

²⁷ Petition at 6 (citing *Local Competition Report and Order*, 11 FCC Rcd at 15565, ¶ 127).

available under section 251, and later demands to change its terms. Such a construction would be fundamentally inconsistent with the statutory scheme, which permits carriers to enter into binding agreements "without regard to the standards set forth in subsections (b) and (c) of section 251."²⁸ The Commission's discussion in the *Local Competition Report and Order* simply does not address the situation where, as here, the complainant voluntarily opted into an interconnection agreement pursuant to section 252(i). As we explained in the *Liability Order*, Z-Tel may not rely upon the general section 251 duties to circumvent the more specific terms of an agreement that it has voluntarily chosen to adopt.

ii. The *Liability Order* is Consistent with Commission Adjudications.

12. Z-Tel also argues that the *Liability Order* is inconsistent with several Commission orders resolving section 208 formal complaints. Again, Z-Tel is incorrect. The cases upon which Z-Tel relies have no bearing on the instant matter.

13. First, Z-Tel cites *Net2000 Communications*,²⁹ in which the complainant CLEC alleged that the defendant ILECs had violated sections 201(b) and 251(c)(3) of the Act, as well as Commission rules requiring that, upon request, ILECs convert tariffed special access circuits into enhanced extended loops.³⁰ *Net2000* does not stand for the proposition that an ILEC may be found to have violated section 251(c) even though the parties' interconnection agreement excludes the very section 251(c) obligations at issue. The Commission found it unnecessary to inquire into the terms of the special access tariff or the parties' interconnection agreement because the Commission denied complainant's claims on other grounds. Specifically, the Commission found that the complainant's factual allegations were unsubstantiated.³¹

14. Z-Tel argues that the fact that *Net2000*'s claims were not dismissed on jurisdictional grounds makes the case inconsistent with the *Liability Order*: "If the Commission lacked the appropriate authority to address section 251 claims..., and if a violation of section 251 could not amount to a section 201(b) violation..., then the Commission presumably would have dismissed *Net2000*'s claims on jurisdictional grounds – which is exactly what the Commission did with regard to Z-Tel's claims against Pacific."³² With this argument, Z-Tel fundamentally misconstrues the *Liability Order*.

²⁸ 47 U.S.C. § 252(a)(1).

²⁹ *Net2000 Communications, Inc. v. Verizon-Washington, D.C., Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 1150 (2002).

³⁰ See 47 C.F.R. §§51.305 - .321.

³¹ The Commission found that the circuits at issue did not meet the criteria for conversion prescribed by Commission rules. *Net2000 Communications, Inc.*, 17 FCC Rcd at 1157, ¶ 23, 1160, ¶ 33.

³² Petition at 9.

15. First, the *Liability Order* does not stand for the proposition that the Commission “lack[s] the appropriate authority to address section 251 claims.” In the *Liability Order*, the Commission *did* address Z-Tel’s section 251 claims. The Commission asserted jurisdiction over Z-Tel’s section 251(c) claims against Pacific, and then denied those claims on the merits.³³ The Commission did not, as Z-Tel seems to believe, deny Z-Tel’s claims on jurisdictional grounds. Neither does the *Liability Order* stand for the proposition that “a violation of Section 251 could not amount to a Section 201(b) violation.” No such statement can be found in the *Liability Order*. The Commission denied Z-Tel’s section 201(b) claims because Z-Tel advanced no reason why Pacific’s conduct was “unjust and unreasonable” other than that Pacific had allegedly violated section 251(c), which the Commission found it had not. Because its section 251(c) claims failed, Z-Tel’s section 201(b) claims also failed. Nothing in this reasoning, however, supports Z-Tel’s cited assertion. Thus, the conflict that Z-Tel finds between the *Liability Order* and *Net2000* comes entirely from misconstruing the Commission’s decision in the *Liability Order*.

16. Z-Tel also cites *TSR Wireless*,³⁴ in which the Commission found that the defendant LECs had violated Commission rule 51.703(b)³⁵ by charging the complainants, commercial mobile radio service (“CMRS”) providers, for facilities used to deliver LEC-originated traffic. Z-Tel argues that *TSR Wireless* establishes that the terms of the Pacific Agreement were irrelevant to an analysis of Z-Tel’s claims against Pacific.³⁶ As with *Net2000*, Z-Tel again focuses on the jurisdictional issue that it has misunderstood. Z-Tel argues that in *TSR Wireless*, “the Commission again unequivocally stated that carriers could plead violations of its local competition implementing rules as part of a section 208 complaint arising under section 251.”³⁷ Nothing in the Commission’s statement of jurisdiction in *TSR Wireless* conflicts with the *Liability Order*.

17. Nothing in the substantive portion of the *TSR Wireless* decision conflicts with the *Liability Order*, either. We recognize that, in *TSR Wireless*, the Commission found the defendants bound by rule 51.703(b) even though the obligation created by that rule had not been incorporated into an interconnection agreement. The *TSR Wireless* defendants were bound by rule 51.703(b) for reasons not applicable to Pacific’s obligations at issue here. First, the Commission’s authority to issue rule 51.703(b), as applied to CMRS providers, arises under

³³ See *Liability Order*, 18 FCC Rcd at 7572-73, ¶¶ 12-13.

³⁴ *TSR Wireless, LLC v. U.S. West Communications, Inc.*, 15 FCC Rcd 11166 (2000), petition for review denied sub nom. *Qwest Corporation v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

³⁵ 47 U.S.C. § 51.703(b) (“A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC’s network.”)

³⁶ Petition at 9-10.

³⁷ Petition at 9.

section 332 of the Act.³⁸ Accordingly, rule 51.703(b) may apply, in circumstances such as those present in *TSR Wireless*, regardless of the existence or terms of a section 252 interconnection agreement. Further, in adopting rule 51.703(b), the Commission stated that “[a]s of the effective date of [the *Local Competition Report and Order*], a LEC must cease charging a CMRS provider ... for terminating LEC-originated traffic”³⁹ Thus, as the Commission stressed in *TSR Wireless*, rule 51.703(b) “clearly calls for LECs *immediately* to cease charging CMRS providers for terminating LEC-originated traffic; the [rule] does not require a section 252 agreement before imposing such an obligation on the LEC.”⁴⁰ The Commission has imposed no such immediate obligation with respect to shared transport. Indeed, the Commission stressed in *TSR Wireless* that, “to the extent that other Commission rules promulgated under the *Local Competition [Report and] Order* were not made ‘effective immediately,’ we would expect that requesting carriers would utilize the interconnection agreement process of sections 251 and 252 to obtain services under section 251.”⁴¹ Thus, *TSR Wireless* is not relevant to Z-Tel’s claims against Pacific, and does not stand for the proposition that a CLEC may successfully charge an ILEC with violating section 251(c) even though the parties’ interconnection agreement excludes the very section 251(c) obligations at issue.

18. Z-Tel also relies upon the Commission’s statement in *Cellexis*⁴² that “Defendants’ statutory interconnection obligations, whatever they may be, exist independently of the [interconnection] Agreement’s terms.”⁴³ Z-Tel reads the Commission’s statement out of context. The *Cellexis* case involved entirely different facts and statutory provisions than the instant matter. The complainant in that proceeding was a reseller of CMRS services who alleged that the defendant CMRS providers had violated sections 201(b), 202(a), 251(a), and 332(c)(1)(B) of the Act by refusing to continue to interconnect their cellular networks with complainants after the parties’ interconnection agreement had expired. The interconnection obligations at issue in *Cellexis* arose under sections 251(a) and 332 of the Act, not under section 251(c), as in this case. Neither the general interconnection obligation of section 251(a) nor the interconnection obligation arising under section 332 is implemented through the negotiation and

³⁸ 47 U.S.C. § 332. See *Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 800 n.21 (8th Cir. 1997) (subsequent history omitted); *Qwest Corp. v. FCC*, 252 F.3d 462, 465-67 (D.C. Cir. 2001) (confirming that section 332(c)(1)(B) gives the Commission authority to require that LECs interconnect with CMRS providers).

³⁹ *TSR Wireless*, 15 FCC Rcd at 11167, ¶ 3.

⁴⁰ *TSR Wireless*, 15 FCC Rcd at 11183, ¶ 29 (emphasis added).

⁴¹ *TSR Wireless*, 15 FCC Rcd at 11182, ¶ 29 n.97. Similarly, the *Liability Order* emphasized that “the obligations created by section 251 and our rules are effectuated through the process established in section 252 – that is, by reaching agreement through negotiation, arbitration, or opt-in.” *Liability Order*, 18 FCC Rcd at 7581, ¶ 30.

⁴² *Cellexis Int’l, Inc. v. Bell Atlantic NYNEX Mobile Systems, Inc., et al.*, Memorandum Opinion and Order, 16 FCC Rcd 22887 (2001) (“*Cellexis*”).

⁴³ Petition at 10 (citing *Cellexis*, 16 FCC Rcd at 22891, ¶ 9, but omitting the word “Defendants”).

arbitration scheme of section 252.⁴⁴ Thus, the significance of the terms of any agreement in *Cellelix* has no bearing on the significance of the terms of the agreement in this case, and nothing in the *Liability Order* is inconsistent with *Cellelix*.

19. Finally, Z-Tel argues that, "In the context of pole attachment agreements entered into pursuant to section 224 of the Act, the Commission routinely has concluded that the existence of such agreements does not constitute a waiver of a carrier's ability to file a formal complaint under the Commission's pole attachment rules."⁴⁵ Z-Tel's analogy is unavailing. Section 252(a)(1) provides that an incumbent LEC "may negotiate and enter into a binding agreement ... without regard to the standards set forth in subsections (b) and (c) of section 251."⁴⁶ In contrast, nothing in section 224 provides that parties may negotiate without regard to the requirements of the Act. Finally, the Commission's pole attachment rules specifically contemplate that the Commission will rule on the reasonableness of the rates, terms, and conditions contained in pole attachment agreements before the Commission.⁴⁷

B. The Commission Correctly Concluded that Z-Tel Waived Its Section 251(c) Claims.

20. Z-Tel argues that the *Liability Order* incorrectly concludes that "carriers, such as Z-Tel, 'implicitly' waive their rights under section 251 of the Act and the Commission's rules by merely signing an interconnection agreement – regardless of the language of the interconnection agreement."⁴⁸ The *Liability Order* draws no such conclusion. Rather, the Commission in the *Liability Order* found that Z-Tel waived its claims because Z-Tel effectively admitted that the Pacific Agreement did not obligate Pacific either to provide shared transport for intraLATA toll

⁴⁴ Section 251(c) obligates incumbent LECs "to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection [*i.e.*, subsection (c)]." 47 U.S.C. § 251(c)(1). It does not require such negotiation with respect to section 251(a). Similarly, section 252(a)(1), 47 U.S.C. § 252(a)(1), permits ILECs to negotiate agreements "without regard to the standards set forth in subsections (b) and (c) of section 251," but does not mention subsection 251(a). Section 332(c)(1)(B) requires interconnection when the Commission finds such action necessary or desirable in the public interest. See 47 U.S.C. § 332(c)(1)(B) (providing that, upon reasonable request of a CMRS provider, the Commission shall order interconnection pursuant to section 201.) There is, again, no mention of the section 251/252 negotiation process.

⁴⁵ Petition at 10.

⁴⁶ 47 U.S.C. § 252(a)(1).

⁴⁷ See Commission rule 1.1410 ("If the Commission determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and...[s]ubstitute in the pole attachment agreement the just and reasonable rate, term, or condition established by the Commission.") 47 C.F.R. § 1.1410. See also *Southern Co. Servs. Inc. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002) (concluding that the Commission has authority to review the reasonableness of the terms of a pole attachment agreement). Accord *Pub. Service Co. of Colorado v. FCC*, 328 F.3d 675, 677-678 (D.C. Cir. 2003).

⁴⁸ Petition at 3.

or to execute a Memorandum of Understanding to do so.⁴⁹

21. Z-Tel argues that it made no admissions regarding the terms of the Pacific Agreement, but “only denied any need (under the Act, the Commission’s rules, or the [Pacific Agreement]) to plead a section 208 complaint under the interconnection agreement itself.”⁵⁰ Z-Tel ignores the record in this proceeding. For example, as stated above, Z-Tel informed the Commission that the Pacific Agreement “do[es] not make available the [use of the shared transport UNE] capability [Z-Tel] seeks,” and that Z-Tel “disavowed any claim that [Pacific] ha[s] violated the terms of [the Pacific Agreement].”⁵¹ Thus, we stand by our earlier conclusion that Z-Tel admitted that the agreement Z-Tel chose to adopt did not require Pacific to provide shared transport for intraLATA toll traffic, and that Z-Tel accordingly waived its right to demand such terms. Z-Tel opted into the Pacific Agreement without first negotiating or arbitrating an amendment to its terms regarding shared transport, and may not complain now.

C. The Pacific Agreement Excludes Shared Transport for IntraLATA Toll Unless Z-Tel Requests Such Use in Accordance with the Terms of the Agreement, and Z-Tel Has Not Done So.

22. Z-Tel argues that the Commission should have reviewed the Pacific Agreement to determine whether it in fact obligated Pacific to provide shared transport for intraLATA toll or to execute the Memorandum of Understanding.⁵² As discussed above, Z-Tel’s statements and omissions in this proceeding meant that the Commission was under no such obligation. In any event, however, any such review would have been unavailing. The Pacific Agreement provides use of the shared transport UNE for intraLATA toll calls only if Z-Tel complies with the Pacific Agreement’s “Bona Fide Request” process or requests “Customized Routing, Option C.” Z-Tel has not demonstrated that it did either.

⁴⁹ Z-Tel argues that the Commission in *Cellexis* “confirmed that a carrier does not waive its statutory right merely by signing an interconnection agreement.” Petition at 10 (citing *Cellexis*, 16 FCC Rcd at 22891, ¶ 9). What the Commission said, however, was that the interconnection agreement at issue in that case, which had expired, “does not alter whatever right to interconnection Cellexis may have under the Act.” *Cellexis*, 16 FCC Rcd at 22891, ¶ 9. The Commission’s statement is not inconsistent with the *Liability Order* because, as discussed, the duty of CMRS providers to interconnect can be imposed pursuant to section 332 independently of an interconnection agreement.

⁵⁰ Petition at 16.

⁵¹ Z-Tel argues that its “disavowal” of any claim that Pacific breached the Pacific Agreement, see *Liability Order*, 18 FCC Rcd at 7580, ¶ 29 n.67, merely meant that Z-Tel denied that it was obligated so to allege. Petition at 16. We disagree. As Z-Tel notes, “disavow” means, among other things, “to disclaim knowledge of...” Petition at 16 (citing *Webster’s II New College Dictionary* 323 (2001)). If Pacific were in breach of the Pacific Agreement’s terms governing shared transport, Z-Tel would have had “knowledge of” that breach. Hence, when Z-Tel “disavowed” any claim that Pacific had breached the Pacific Agreement, it effectively admitted that there was no breach. In any event, the Commission’s conclusion, that Z-Tel effectively admitted that the Pacific Agreement had not been breached, was not based solely upon Z-Tel’s “disavowal,” but upon the totality of Z-Tel’s statements and omissions during the proceeding. See *Liability Order*, 18 FCC Rcd at 7580, ¶ 29 n.67.

⁵² Petition at 4-5, 17-20.

23. The Pacific Agreement provides at Attachment 6, section 2:

General: Unbundled Network Elements and Combinations: Access to [UNEs] shall be specified herein and not presumed. The Network Elements offered under this Agreement shall be clearly specified in this Agreement or the attachments hereto. In no event will it be presumed that access to a [UNE] is offered unless so specified. Pacific will make available any other form of access requested by [Z-Tel] that is required by the Act and the regulations thereunder. Requests for Network Elements not specified in this Attachment shall be processed according to the process described in Section 22 (Bona Fide Request) ... of this Agreement.⁵³

Thus, section 2 provides initially that Z-Tel may not have access to shared transport unless the Pacific Agreement expressly so states. Yet section 2 further provides that Z-Tel *may* obtain such access if it complies with the "Bona Fide Request" provisions of the Agreement: Pacific "will make available any other form of access" if that access is "required by... [Commission] regulations." In short, Pacific was obligated to provide access to shared transport only to the extent provided in the Pacific Agreement *unless* Z-Tel complied with the "Bona Fide Request" process. The only section of the Pacific Agreement *expressly* granting access to the shared transport UNE provides that the UNE may be used for intraLATA toll only if Z-Tel exercises "Option C."⁵⁴ "Option C" is found in an earlier section of the Pacific Agreement. That section is headed "Option C: Customized Routing-Complex for [Z-Tel] Using Routes Designated by [Z-Tel]." This section provides that, if Z-Tel exercises "Option C", Pacific "shall route [Z-Tel's] intraLATA traffic over Pacific's Shared Transport facilities..."⁵⁵

24. Z-Tel argues that the Pacific Agreement "expressly provides that Z-Tel may...request use of the shared transport UNE for intraLATA toll service," and that "Z-Tel made such a request through its Memorandum of Understanding."⁵⁶ Consistent with our analysis above, however, the language upon which Z-Tel relies provides shared transport for intraLATA toll only if Z-Tel requests "Option C", or makes a request that complies with the "Bona Fide Request" process.⁵⁷ Yet Z-Tel has not shown that its Memorandum of Understanding complied

⁵³ Letter dated December 7, 2001 from Christopher M. Heimann, counsel to Pacific, to Magalie R. Salas, Secretary, FCC, File No. EB-01-MD-017 ("Heimann Letter") Ex. 1 (Pacific Agreement) at Attachment 6, § 2.1.

⁵⁴ Heimann Letter Ex. 1 (Pacific Agreement) at Attachment 6, § 7.4.1 (providing that the shared transport UNE may be used for intraLATA toll "if requested by [Z-Tel] in connection with LSNE option 'C' under Section 6.5.3 above.")

⁵⁵ Heimann Letter Ex. 1 (Pacific Agreement) at Attachment 6, § 6.5.3.

⁵⁶ Petition at 5. *Accord* Petition at 17-20.

⁵⁷ With regard to Option C, Z-Tel relies upon two sections of the Pacific Agreement providing shared transport for intraLATA toll only if Z-Tel exercises Option C. See Petition at 19 (citing Pacific Agreement, Attachment 6, § 6.5.3, which, as discussed above at paragraphs 25-26, provides shared transport for intraLATA toll only if Z-Tel exercises Option C). See also Petition at 19, n.45 (citing Pacific Agreement, Attachment 6, § 7.4.1, which provides, "Pacific shall route [Z-Tel]'s intraLATA traffic over Pacific's Shared Transport facilities if requested by (continued....)

with the Bona Fide Request process, or that it constituted a request to exercise Option C.⁵⁸ Thus, as the *Liability Order* correctly concluded,⁵⁹ Pacific did not violate section 251(c)(1) by failing to negotiate in good faith.

25. Z-Tel's additional arguments regarding construction of the Pacific Agreement also fail. Z-Tel asserts that the agreement "permits either party to file a complaint at the FCC...".⁶⁰ Yet the Pacific Agreement does not state that any such complaint will succeed. Z-Tel argues that the Pacific Agreement "is expressly designed to encompass the UNEs required by the Act...."⁶¹ The language cited by Z-Tel, however, does not state that Pacific is offering all UNE access available under the Act and Commission rules. The section is entitled "Introduction," and merely explains that the purpose of Attachment 6 is to enumerate the specific UNEs provided. Indeed, Z-Tel omits the final sentence of this section: "The specific terms and conditions that apply to the [UNEs] and Combinations are described below."⁶² Thus, the terms pertaining to UNEs are "described below" -- in the sections of the Pacific Agreement that follow.⁶³

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[Z-Tel] in connection with LSNE option C under section 6.5.3 above.") (emphasis added). Finally, with regard to the Bona Fide Request process, Z-Tel quotes a single sentence from Attachment 6, section 2. Petition at 18, n.42. As discussed above, however, when read in its entirety, this section requires compliance with the Bona Fide Request process.

⁵⁸ Z-Tel did not place the Memorandum of Understanding in the record, and it does not allege that the Memorandum was a "Bona Fide Request" or the exercise of Option C. On the contrary, Z-Tel admits that the Memorandum was an "amend[ment]" to the Pacific Agreement. See Formal Complaint, File No. EB-01-MD-017 (filed Aug. 28, 2001) ("Complaint") at 8, ¶ 18. Further, Z-Tel used the Memorandum of Understanding as a proposed amendment to a number of interconnection agreements, not just the Pacific Agreement. *Id.* Thus, the Memorandum of Understanding was not tailored specifically to comply with the requirements of the Pacific Agreement. See also Complaint Ex. 7 (Letter dated Jan. 19, 2001 from Michael Hazzard, counsel to Z-Tel, to Adam McKinney, counsel to Pacific) (describing the Memorandum of Understanding as "based on the MOU drafted by SBC and executed by Z-Tel in Texas..."); Petition at 5 (same). Z-Tel argues that Pacific was obligated to "suggest that Z-Tel modify or otherwise reformulate its request." Petition at 5. Z-Tel made no such claim in the liability phase of this proceeding, and therefore may make no such claim now. In any event, Z-Tel has advanced no reason why section 251(c)(1) imposes an obligation upon Pacific to explain to Z-Tel why Z-Tel's Memorandum did not comply with the Pacific Agreement.

⁵⁹ *Liability Order*, 18 FCC Rcd at 7579-82, ¶¶ 29-32.

⁶⁰ Petition at 17-18 (citing Pacific Agreement at Attachment 3, §2.1).

⁶¹ Petition at 18 (citing Pacific Agreement at Attachment 6, ¶ 1.1)

⁶² Heimann Letter Ex. 1 (Pacific Agreement) at Attachment 6, § 1.1.

⁶³ Because we affirm our denial of Z-Tel's section 251(c) claims, we also affirm our denial of Z-Tel's section 201(b) claims. Z-Tel's Petition provides no reason, independent of its claim that Pacific violated section 251(c), why Pacific violated section 201(b). See *Liability Order*, 18 FCC Rcd at 7582, ¶ 33.

IV. ORDERING CLAUSE

26. Accordingly, IT IS ORDERED, pursuant to sections 201, 208, 251, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 201, 208, 251, and 405, and sections 51.309 and 51.313 of the Commission's rules, 47 C.F.R. §§ 51.309 and 51.313, that the instant petition for reconsideration IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary