

PUC DOCKET NO. 29415

F. CARY FITCH D/B/A FITCH § PUBLIC UTILITY COMMISSION
AFFORDABLE TELECOM §
PETITION FOR ARBITRATION § OF TEXAS
AGAINST SBC TEXAS UNDER §
§ 252 OF THE COMMUNICATIONS §
ACT §

ORDER APPROVING ARBITRATION AWARD WITH MODIFICATION

This Order addresses the Arbitration Award issued on July 15, 2005 the Arbitrators assigned to this proceeding. As discussed in this Order, the Commission adopts the Arbitration Award with the exception of issue numbers 3 and 8 on the parties' joint decision-point list (DPL).

I. Jurisdiction

The Federal Telecommunications Act of 1996 (FTA)¹ authorizes state commissions to arbitrate open issues between an incumbent local exchange carrier (ILEC) and a requesting telecommunications carrier.² The FTA also grants state commissions authority to approve or reject interconnection agreements adopted by negotiation or arbitration.³ The FTA's authorization to approve or reject these interconnection agreements carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved.⁴ The Public Utility Commission of Texas is a state commission responsible for approving interconnection agreements pursuant to the FTA.

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified in scattered section of 15 and 47 U.S.C.) (FTA).

² 47 U.S.C. § 252(b).

³ *Id.* § 252(e).

⁴ *BellSouth Telecommunications, Inc. v. MCI Metro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1274-76 (11th Cir. 2003); *Southwestern Bell Tel. Co. v. Public Util. Comm'n.*, 208 F.3d 475, 479-80 (5th Cir. 2000); *see also Michigan Bell Tel. Co. v. MCI Metro Access Transmission Servs., Inc.*, 323 F.3d 348, 356 (6th Cir. 2003).

II. Procedural History

On March 1, 2004, Fitch Affordable Telecom (Affordable Telecom) filed a request for arbitration pursuant to P.U.C. PROC. R. 21.95 and FTA § 252. On March 12, 2004, Affordable Telecom filed an amended petition in response to Order No. 1.⁵ The Arbitrators considered the issues in two phases. Phase I dealt with threshold issues, while Phase II addressed the main case.

Phase I

In Phase I, the parties filed direct testimony on May 5, 2004 and rebuttal testimony on May 11, 2004. On May 14, 2004, the Arbitrators held a hearing to consider the following threshold issues: (1) whether the service(s) for which Affordable Telecom seeks interconnection is telecommunications service and/or information service; and (2) if Affordable Telecom provides information service, whether that service is incidental to Affordable Telecom's commercial mobile radio service (CMRS). The parties filed their post-hearing briefs on May 26, 2004. After reviewing the evidence presented by the parties, the Arbitrators issued a decision on the Phase I threshold issues, finding that: (1) the resold paging and "Superpaging" services offered by Affordable Telecom are telecommunications services; (2) Affordable Telecom's dial-up Internet access service (DIAS) is an information service; and (3) Affordable Telecom's DIAS is not incidental to CMRS.⁶

Phase II

In Phase II, the parties filed direct testimony on October 26, 2004 and rebuttal testimony on November 23, 2004. On March 1, 2005, the parties filed stipulations regarding resolved issues.⁷ The parties withdrew DPL Issue No. 14⁸ and agreed to contract language resolving DPL Issue No. 16.⁹ The Arbitrators conducted a hearing on

⁵ Order No. 1 Notice of Insufficiency (Mar. 8, 2004).

⁶ Order No. 5 at 1 (June 3, 2004).

⁷ Stipulations Regarding Resolved Issues (Mar. 1, 2005).

⁸ *Id.* at 4. The parties agreed that the interconnection agreement would not provide for unbundled network elements under FTA Section 251(c)(3).

⁹ *Id.* at 5.

the merits on March 2, 2005. The parties filed their initial post-hearing briefs on April 8, 2005. The parties filed their reply briefs on April 22, 2005. On June 17, 2005, the Arbitrators issued the Proposal for Award. The parties filed exceptions to the Proposal for Award on June 29, 2005. On July 15, 2005, the Arbitrators addressed the parties' exceptions and issued the Arbitration Award. In particular, the Arbitrators reversed their initial position on DPL Issue Nos. 3 and 8. This issue is discussed in more detail below. Parties filed Motions for Reconsideration on August 22, 2005 and November 1, 2005. The parties filed a conforming interconnection agreement on September 30, 2005, and the Arbitrators filed comments on the conforming agreement on October 12, 2005.

III. Discussion

In their Proposal for Award regarding DPL Issues 3 and 8, the Arbitrators adopted SBC Texas's proposed language, which required that FTA § 251(b)(5) traffic eligible for reciprocal compensation had to be "exchanged directly between the parties." However, in its revised Award, the Arbitrators reversed their position and found that Affordable Telecom was entitled to reciprocal compensation on all intraMTA traffic, including intraMTA traffic that is dialed 1+ and handled by an interexchange carrier (IXC). Accordingly, the Arbitrators removed the requirement that intraMTA calls subject to reciprocal compensation had to be "exchanged directly between the parties."

The issue before the Commission in DPL issues 3 and 8 is whether Affordable Telecom is entitled to reciprocal compensation on intraMTA¹⁰ traffic that is dialed 1+ and handled by a third-party IXC. IntraMTA traffic exchanged directly between a local exchange carrier (LEC) and a CMRS provider through their point of interconnection is subject to the Federal Communications Commission (FCC) reciprocal compensation regime.¹¹ It is the introduction of a third-party IXC that switches and transports calls between the LEC and the CMRS provider's network facilities that is in dispute in this arbitration. In order to complete 1+ calls between carriers, IXCs are subject to

¹⁰ "MTA" stands for "major trading area."

¹¹ 47 C.F.R. 51.701.

originating and terminating access charges (exchange access), instead of the FCC's reciprocal compensation regime.¹²

The Commission acknowledges that FCC Rule 47 C.F.R. 51.701(c) and (e) prescribes the application of reciprocal compensation for the transport and termination of FTA § 251(B)(5) telecommunications traffic as being MTA and "between" the LEC and the CMRS provider. Despite the intent of the FCC rules, it appears that the Arbitrators were persuaded by Affordable Telecom's argument that the *Atlas II*¹³ case requires SBC to pay reciprocal compensation on IXC-handled intraMTA calls.

The fact situation in *Atlas II* is distinguishable from that in this arbitration. The *Atlas II* case involved two points of interconnection, one between two ILECs, and another point of interconnection between an ILEC and a CMRS provider. Unlike this arbitration, the interconnection agreement in dispute in *Atlas II* was between a subtending rural ILEC and the CMRS provider, and not between the directly interconnected ILEC and CMRS provider. *Atlas II* held, in pertinent part, that LECs have a duty to establish interconnection agreements with wireless carriers for traffic within in an MTA, and that wireless carriers were not required to establish a physical connection within a local exchange carrier's network for the exchange of local traffic.¹⁴ *Atlas II* did not, however, expressly discuss 1+ dialed traffic handled by an IXC. Thus, the Commission finds that the *Atlas II* case is not relevant to this proceeding as it did not hold that intraMTA 1+ calls handled by an IXC should be subject to reciprocal compensation.

Accordingly, the Commission finds that the Arbitrators' original position was correct, and adopts the following contract language regarding reciprocal compensation for § 251(B)(5) calls:

1.27 "Section 251(b)(5) Calls" for the purposes of termination compensation, are Authorized Services pages originating on SBC Texas'

¹² *In the Matters of TSR Wireless, LLC, et. al. v. U.S. West Communications, Inc. et. al.*, 15 F.C.C.R. 11166 (rel. June 21, 2000).

¹³ *Atlas Telephone Co. v. Corporation Comm'n of Oklahoma*, 400 F.3d 1256 (10th Cir. 2005) (*Atlas II*).

¹⁴ *Id.* at 2.

network, terminating on Affordable Telecom's network, and that are exchanged directly between the Parties and, at the beginning of the call, originate and terminate within the same MTA.

IV. Commission Findings

1. The FTA's authorization to approve or reject interconnection agreements carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved.
2. The Commission is a state commission responsible for approving interconnection agreements pursuant to the FTA.
3. The Commission has reviewed the Award, and the pleadings filed by SBC Texas and Fitch Affordable Telecom.
4. The Commission finds that the Award and its modification is consistent with 47 U.S.C. §§ 251 and 252.
5. The Commission finds the Award and its modification are consistent with Chapter 21 of the Commission's rules.

V. Ordering Paragraphs

1. The Award is approved, as modified by this Order. In the event there are inconsistencies between this Order and the Award, the Commission's decisions set forth in this order shall control.
2. All other issues disposed of by the Award but not discussed here are approved without change.

SIGNED AT AUSTIN, TEXAS on the 18th day of December 2005.

PUBLIC UTILITY COMMISSION OF TEXAS



PAUL HUDSON, CHAIRMAN



JULIE PARSLEY, COMMISSIONER



BARRY T. SMITHERMAN, COMMISSIONER

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