

Telecommunications Alert: State Regulatory Commissions Affirm Interconnection Rights for Cable-Owned CLECs Providing VoIP Services

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Recent decisions by public service commissions in New Hampshire and Vermont, and by a Michigan administrative law judge, affirm that competitive local exchange carriers (CLECs) furnishing voice over Internet protocol (VoIP) providers access to the public switched telephone network are “telecommunications carriers” entitled to interconnection rights with incumbent local exchange carriers (ILECs).

Section 251 of the Communications Act establishes a duty for all telecommunications carriers to interconnect with other telecommunications carriers. In several states, rural ILECs have gone before state regulatory commissions to challenge the right of cable-owned CLECs carrying a substantial volume of VoIP traffic to operate in the ILEC’s service area or to obtain interconnection with ILEC networks. In each of the decisions briefly reviewed below, the state commission held in favor of allowing the cable CLEC to compete with and obtain interconnection from the ILEC.

Vermont

In a petition for arbitration of an interconnection agreement between Comcast Phone of Vermont (a CLEC) and the Vermont Telephone Company (“VTel”) (a rural ILEC), VTel argued that Comcast Phone was not a telecommunications carrier entitled to interconnection because it allegedly does not offer its services on a common carrier basis (Comcast Phone currently provides wholesale local interconnection services in Vermont only to its Comcast Digital Voice VoIP affiliate) and that the VoIP services Comcast offers through the CLEC are not telecommunications services.¹

Relying in part on the FCC’s decision last year in *Bright House Networks v. Verizon*,² the Vermont Public Service Board (VPSB) held that the fact that Comcast Phone offered its wholesale interconnection service to all eligible customers made it a common carrier, despite the fact that none but the Comcast affiliate had accepted the offer.³ The VPSB also held that, having found the Comcast CLEC to be a telecommunications carrier, the question of whether Comcast’s VoIP service affiliate was providing “telecommunications services” was irrelevant,⁴ and the Comcast CLEC was entitled to interconnection rights under the Communications Act.

Michigan

In a similar proceeding in Michigan involving arbitration of an interconnection agreement between another cable-owned CLEC, Comcast Phone of Michigan, and a rural ILEC, TDS Telecom, an administrative law judge last month applied the rationale of the FCC’s 2007 *Time Warner* decision⁵ to hold that “any CLECs offering to provide interconnected VoIP service providers with wholesale transmission of information across their respective networks are entitled to interconnect and exchange traffic with ILECs.”⁶ The decision must still be reviewed by the Michigan Public Service Commission before it becomes final.

New Hampshire

Before the New Hampshire Public Utilities Commission (PUC), rural ILEC subsidiaries of TDS Telecom argued that grant of a certificate to Comcast Phone of New Hampshire to operate as a CLEC in their territory should be denied because Comcast Phone’s application was intended primarily to facilitate the provisioning of VoIP services, and the regulated ILECs could not compete fairly with unregulated VoIP products. Applying New Hampshire statutory standards for reviewing CLEC applications, the state PUC recently held that the regulatory status of VoIP services was beyond the scope of the CLEC’s application before it. The PUC did not find the fact that affiliated Comcast entities would be offering both regulated and unregulated services to be unfair to TDS Telecom, which itself offers regulated services bundled with unregulated services such as video and high-speed data services.⁷

Issue Continues to Be Litigated in Other States

Despite direction by the FCC in the 2007 *Time Warner* and 2008 *Bright House* orders, ILECs continue to challenge the right of cable CLECs to compete and obtain interconnection rights when providing wholesale local interconnection services to affiliated VoIP service providers. For example, in Washington, the state independent telephone association is currently asking that state’s public service commission to rule that Comcast Phone is not entitled to interconnection, and the Washington commission expects to issue a ruling by February 27.⁸ The recent decisions in Vermont, Michigan and New Hampshire, discussed above, show that, at least to date, when confronted with the question state commissions will affirm the interconnection rights of CLECs providing wholesale services to VoIP providers.

Please contact your Mintz Levin telecommunications attorney, or any attorney listed in the left column of this Alert, for more information or to obtain a copy of any of the decisions described above.

Endnotes

¹ VTel also filed a petition with the FCC in April 2008 seeking “a policy clarification” regarding: “(1) whether only telecommunications carriers are entitled to interconnection with local exchange carriers pursuant to sections 251 and 252; (2) whether a VoIP provider is entitled to interconnection pursuant to sections 251 and 252 when, in separate proceedings, that provider has taken a position that it is not a telecommunications carrier; and (3) whether Comcast Phone of Vermont, LLC, as a VoIP provider, is a telecommunications carrier and therefore entitled to interconnection pursuant to sections 251 and 252.2.” See *Pleading Cycle Established for Comments on Vermont Telephone Company’s Petition for Declaratory Ruling Regarding Interconnection Rights*, WC Docket No. 08-56, Public Notice, 23 FCC Rcd. 6625 (2008). The FCC has not yet acted on that petition.

² *Bright House Networks, LLC v. Verizon California, Inc.*, File No. EB-08-MD-002, Memorandum Opinion and Order, 23 FCC Rcd. 10704, ¶¶ 37-41 (2008), *aff’d sub nom. Verizon Cal., Inc. v. FCC*, No. 08-1234 (D.C. Cir. Feb. 10, 2009).

³ As a condition of its finding, the VPSB required Comcast to “fully reveal all prices, terms and conditions related to the wholesale interconnection services” provided to its affiliate. *Petitions of Vermont Telephone Company, Inc. (“VTel”), and Comcast Phone of Vermont, LLC, d/b/a Comcast Digital Phone (“Comcast”), for Arbitration of an Interconnection Agreement Between VTel and Comcast, Pursuant to Section 252 of the Telecommunications Act of 1996, and Applicable State Laws*, Docket No. 7469, Order, at 18 (Vt. Pub. Serv. Bd., Feb. 2, 2009).

⁴ *Id.* at 19.

⁵ *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket 06-55, Memorandum Opinion and Order, 22 FCC Rcd. 3513 (2007).

⁶ *Petition of Communications Corporation of Michigan, d/b/a TDS Telecom, for Sections 251/252 Arbitration of Interconnection rates, Terms, and Conditions with Comcast Phone of Michigan, d/b/a Comcast Digital Phone*, Case No. U-15725, at 21 (Mich. Pub. Serv. Comm’n, Jan. 28, 2009).

⁷ *Comcast Phone of New Hampshire Application for Authority to Serve Customers in the TDS Service Territories*, Docket No. DT 08-013, Order No. 24,938, Order Granting Authority, at 18-19 (N.H. Pub. Util. Comm’n, Feb. 6, 2009).

⁸ TR State News, Feb. 17, 2009, at 2.

Please contact your Mintz Levin telecommunications attorney, or any attorney listed below, for more information as we continue to follow these developments.

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