BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

REBUTTAL TESTIMONY OF JOESEPH P. GILLAN

ON BEHALF OF

AT&T COMMUNICATIONS OF THE SOUTHERN STATES, INC.

AND TCG SOUTH FLORIDA, INC.

DOCKET NO. 000731-TP

JANUARY 3, 2001

Q. What is your name?

A. My name is Joseph Gillan. I previously filed direct testimony in this arbitration on behalf of AT&T Communications of the Southern States, Inc. and TCG South Florida, Inc. ("AT&T").

Q. What is the purpose of your rebuttal testimony?

A. The purpose of my rebuttal testimony is to respond to BellSouth's testimony on two issues:

Issue 4: What does "currently combines" mean as that phrase is used in 57 C.F.R. §51.315(b)?

Issue 5: Should BellSouth be permitted to charge AT&T a "glue charge" when BellSouth combines network elements?

Although sponsored by AT&T, my testimony emphasizes the importance of correctly resolving these issues on competition more generally. It is not

unusual for entrants to rely on AT&T's arbitration to resolve critical issues; therefore, the Commission's decision here will affect not only AT&T, but will have a significant impact on other entrants as well.

Q. Have you reviewed BellSouth's testimony (Ruscilli, pages 4-12) on this issue?

A. Yes. BellSouth's testimony is a blend of legal argument and economic rationalization. The goal of its legal argument is to assert that the Commission has the legal authority to make local entry even more difficult and expensive, while its remaining testimony tries to justify why it makes sense to do so. In the rebuttal that follows, I explain that even if BellSouth's legal reasoning were correct – an issue with which I disagree, but that I fundamentally leave to the brief – there is no rational justification for making local competition harder, and therefore more costly, than it already is.

In support of its basic position that the Commission should make entry more difficult by sanctioning BellSouth's refusal to offer any combination of network elements that it currently combines for itself, BellSouth advances three basic theories:

* Forcing entrants to combine elements in inefficient ways will somehow produce efficient results;
* Combining elements for entrants will discourage BellSouth from introducing innovative new technologies; and

* Requiring BellSouth to combine elements is "...inconsistent with the Act's basic purpose, which is to introduce competition into the local market."

As I explain below, however, none of these "justifications" can be squared with standard economic theory. At issue here is a simple choice. Should BellSouth provision network element combinations in the most efficient manner (i.e., combining those elements for entrants that it routinely combines today), or should it be allowed to require additional and unnecessary work – for both itself and the entrant – to get to the same result? Economics always favors the "less is more" alternative, because costs and effort that are unnecessary ultimately result in higher prices and wasted resources. The same conclusion holds true here. There is one clearly favorable outcome – i.e., that elements be combined in the most efficient manner – that can be achieved only if the Commission rejects BellSouth's proposal.

Q, Before addressing each of BellSouth's arguments in more detail, do you have a preliminary comment?

A. Yes. These hearings (as currently scheduled) will roughly commemorate the fifth anniversary of the Telecommunications Act of 1996. This anniversary provides a useful point from which to consider exactly where local competition is today, and where it may be heading absent strong action by this Commission (both in this arbitration and other proceedings). The

Telecommunications Act (as well as Florida's own Chapter 364) was intended to foster a competitive local market. Unfortunately, the initial optimism that greeted passage of the Act has dissipated in the reality of the past five years.

Q. Do you have any statistics that document the "dissipating enthusiasm" for local competition?

A. Yes. One useful measure of the waning enthusiasm for local entry is the stock price of competitive entrants. Exhibit JPG-2 (attached) shows that the stock values of CLECs and IXCs – i.e., CLECs with a preexisting base of long distance customers -- have fallen dramatically over the past year. While ILEC stocks are also down during the period (roughly 19%), their collapse is nowhere near as dramatic as that experienced by the competitive sector. CLEC stocks have declined nearly 80% from their 52-week highs, while IXC stocks are down nearly 70%. Overall, capital markets have effectively shut their doors to CLEC fund-raising efforts.

Q. Why do you believe that local competition has progressed so slowly?

A. A variety of factors have contributed to the poor health of local competition. To begin, competitive local exchange service is more complicated than many first believed. The incumbent's inherited network is vast, representing the cumulative product of more than 100 years of investment. It is an understatement to observe that this network will not be duplicated any time

soon. As a result, widespread competition is dependent upon access to this network, and is likely to remain dependent upon access to existing network facilities for some time. While litigation has delayed the process, the fact remains that establishing cost-based prices, implementing nondiscriminatory OSS, and embracing policies that encourage efficiency will be necessary if local competition is to succeed.

Q. How does this observation relate to the issues in this proceeding?

A. The past five years has generally demonstrated that hand-crafting competitive local exchange services – which is fundamentally what entrants must do to serve customers using their own facilities and network elements obtained individually – is most viable only for larger, sophisticated business customers. Expanding local competition to the typical consumer – i.e., residential customers and small businesses – requires access to network element combinations that greatly simplify the competitive process.

The core "combinations" issue before the Commission in this arbitration is simple, yet far-reaching. Mass-market competition depends upon *efficient* provisioning systems structured to minimize cost and accommodate volume. This same basic conclusion applies with equal force to *new* combinations as it does to *existing* arrangements. Consumers are unlikely to accept entrants that can serve an existing line, but cannot provision additional lines or serve the customer at a new location. Consumers will not benefit from policies that

make local competition more complex, more cumbersome and more expensive. If the Commission wants competition for average consumers, then it must be committed to policies that make entry more simple and cost-effective.

Q. Do you intend to respond to BellSouth's legal argument?

A. No, not in any detail. Addressing the legal basis to BellSouth's position is more appropriate to post-hearing briefs than testimony. Without attempting to render a legal opinion, however, I do believe a number of points should be considered.

To begin, it would seem that the central legal issue concerns the limits of the Commission's discretion – that is, may the Commission evaluate BellSouth's obligation on its merits, or must the Commission sanction BellSouth's proposal, without regard for the consequences to Florida consumers. As I explained in my direct testimony, I believe that the Commission has the authority to judge the issue on the merits.

For its part, BellSouth places great emphasis on a decision from the Eighth Circuit (which the FCC and a number of other parties have requested the Supreme Court review) that had the effect of leaving vacated an FCC rule that would have removed any uncertainty that BellSouth was obligated to combine elements that it routinely combined. The Eighth Circuit's decision,

however, does not preclude this Commission from deciding the issue on its merits. For instance, the United States Courts of Appeals for the Fifth and Ninth Circuits have determined that it is consistent with the Telecommunications Act of 1996 and the decision of the U.S. Supreme Court for state commissions to require ILECs to combine network elements. *US West Communications v. MFS Intelenet,* 193 F.3d 1112 (9th Cir. 1999); *Southwestern Bell Telephone Co. v. Waller Creek Communications, Inc., et. al.*, 221 F.3d 812 (5th Cir. 2000). These decisions are attached as Exhibit JPG-3 and JPG-4, respectively. These decisions have the practical effect that the ILEC must provide combinations to CLECs where the ILEC ordinarily combines such network elements to provide service.

Moreover, BellSouth never tries to reconcile its position with other FCC rules that prohibit restricting network elements. For instance, FCC Rule 309(a) specifically provides:

> An incumbent LEC shall not impose limitations, restrictions or requirements on requests for, or the use of unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunication carrier intends.

There is no apparent dispute that BellSouth cannot restrict the use of stand-alone loops (or switching or transport) to serve only customers who currently receive service from BellSouth. For instance, when an entrant orders a DS-1 loop to a customer premise, there is no requirement that the customer already be served over such a facility. BellSouth should not be allowed to restrict the use of combinations of elements. A combination of elements is just that – a combination of elements. There is no basis for BellSouth to impose restrictions on the use of such elements merely because they are provisioned in combined form.

In any event, I will generally rely on AT&T's brief to explain why the Commission has the legal discretion (if not legal obligation) to require BellSouth to combine for entrants those elements that is "currently combines" today. The larger purpose of my testimony is to explain why the Commission should reach this conclusion for the benefit of Florida consumers.

Q. Moving to the merits of BellSouth's position, what policy rationale does BellSouth use to justify its refusal to combine elements for entrants that it currently combines for itself (or, in the alternative, charge a glue charge)?

A. BellSouth offers three "policy reasons" for its position. The first of these justifications is that requiring BellSouth to combine elements would (Ruscilli, page 7), according to BellSouth:

> ... not benefit consumers as a general matter, and would unnecessarily reduce the overall degree of competition in the market.

Q. Does this conclusion make economic sense?

A. No. Even BellSouth agrees that consumers benefit when entrants "use the most efficient method" for providing service (Ruscilli, page 7). This conclusion – that consumer benefit is tied to efficiency – lies at the heart of economics. The *reason* that entrants want BellSouth to combine elements is precisely because that is the *most efficient* way to obtain ordinary combinations. BellSouth routinely combines elements in the network today. It is reasonable to expect that its central offices are designed so that facilities used for routine cross-connection are easily (if not electronically) accessible, with procedures employed to avoid unnecessary reconfiguration and investment.

Remarkably, rather that simply combining elements for entrants at those points in the network (such as existing cross-connect frames) that BellSouth has established for precisely this purpose, BellSouth is proposing to create new environments where entrants would do the same work. Under

BellSouth's proposal, entrants would combine elements in collocation space, or use assembly "rooms" or "points" specially constructed for this purpose (Ruscilli, page 9). These additional steps – creating the assembly room/point, and then extending requested elements via new facilities and additional cross-connections – does nothing but create increased cost and points of potential failure.

The central criterion of "efficiency" is the elimination of unnecessary costs, yet in the *name* of efficiency BellSouth proposes the opposite result. Importantly, BellSouth's proposal would result in *more* work and *increased* costs for both itself and new entrants. Even BellSouth would do "more combining" by cross-connecting the requested elements to the facilities necessary to extend the elements to the CLEC, not to mention the cost -- in time, money and space – to create the associated "assembly areas." Expending resources for sole purpose of achieving a less reliable and more costly environment is a wasteful exercise that can find no support in economics, common sense or sound policy.

Q. Should the Commission expect *less* competition (as BellSouth claims) if BellSouth is required to combine elements it routinely combines today?

A. No. Before addressing this point on the merits, however, consider the following paradox: Would it really make sense for BellSouth – the incumbent monopolist – to advocate positions that *increase* competition,

while AT&T – the entrant – promotes policies that would produce *less*? Of course not.

The more simple and cost effective it is to obtain network elements, the more customers entrants can reasonably serve. This proposition cannot be denied. BellSouth's complaint is not that entrants won't compete more extensively, its real complaint is that BellSouth does not want to "share" its network with competitors.

Q. BellSouth quotes Supreme Court Justice Breyer's observation that "...is in the unshared, not in the shared, portions of the enterprise that meaningful competition would likely emerge" (Ruscilli, page 7) to support its position. Is BellSouth's use of Justice Breyer's opinion here relevant?

A. No. Justice Breyer was addressing the threshold question as to *what* elements should be made available, while the issue here concerns *how* they should be offered. The FCC has already addressed the issue raised by Justice Breyer by concluding that entrants would be impaired -- and that competition would therefore be less -- without access to the network elements in question.

What BellSouth seeks here is to subvert the FCC's impairment decision by imposing provisioning practices that would increase the entrants' cost to use the network elements to which it is legally entitled. There is nothing in

Justice Breyer's analysis that offers support for the proposition that inefficient provisioning systems will promote competition. If an entrant is impaired without access to an element, then the law requires that it be available in a manner that is nondiscriminatory.

Q. BellSouth also claims that combining elements for entrants would discourage facilities-investment by BellSouth (Ruscilli, page 8). Is this view reasonable?

A. No. First, BellSouth's objection appears directed more at the TELRIC pricing standard than the requirement to combine elements (Ruscilli, page 8):

> ...requiring BellSouth to combine UNEs at cost-based prices, particularly at Total Element Long Run Incremental Cost (TELRIC)-based prices, reduces BellSouth's incentive to invest in new capabilities. TELRIC-based prices do not cover the actual cost of elements ...

As to the economic properties of the TELRIC pricing standard, BellSouth is simply wrong when it claims that TELRIC rates do not cover actual cost. The TELRIC standard explicitly requires that prices accurately reflect the *forward-looking* cost of network elements for the precise reason that it is an element's forward-looking cost that will guide investment decisions. Just as BellSouth's earlier argument was structured to undermine the FCC's

impairment analysis, BellSouth's testimony here is nothing more than an attempt to negate the TELRIC pricing standard.

Moreover, BellSouth's again misapplies Justice Breyer's opinion for the proposition that BellSouth would not:

> ... undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement.

It is important to appreciate, however, that there is no "complex technological innovation" at issue here. BellSouth is refusing to combine basic building blocks – i.e., loops to ports, or digital facilities (with multiplexing) to standard interoffice transport – that are generic, not proprietary. It because these building blocks are *routinely* combined that makes possible the efficiencies of the present system. There is nothing unique about these standardized combinations that would give rise to some "complex technological innovation." This is network engineering, not improvisation.

Q. Finally, BellSouth argues that requiring it to combine network elements is inconsistent with the Act's basic purpose (Ruscilli, page 9). Do you agree?

A. No, not at all. BellSouth's final objection is based on its view that the Act is intended to "introduce competition" not "subsidize competitors" (Ruscilli, page 9). On this much, we agree. However, there is nothing to suggest that requiring BellSouth to combine elements for rivals that they routinely combine for themselves would result in less competition or subsidized competitors.

Consider the practical reality here. A customer moves into a new home and AT&T requests the combination (loop and port) needed to serve them. Under the approach recommended by AT&T, BellSouth would be required to combine these elements as they routinely do today. Once combined, then even BellSouth would agree that the combination would be available to other competitors – including BellSouth – so that the customer could easily change local carriers in the future. Simple system, low cost, greater competition.

In contrast, under BellSouth's proposal, these same elements (loop and port) would be extended to a *different* location in the central office (such as AT&T's collocation space or an "assembly room/point") where they would then be cross-connected. The result: higher costs and additional points of failure. Moreover, under BellSouth's approach, if the customer sought to change carriers, then the entire exercise of manually reconfiguring the requested combination to a different "assembly frame" would need to be repeated – at least until the customer moved to BellSouth.

Finally, it is useful to remember that BellSouth cannot ultimately prevent entrants from gaining access to the combinations they seek, BellSouth can only (if allowed) impose costs that are unnecessary. For instance, an entrant seeking to add a second line can order the line as a retail service (or resold service), and then migrate that combination to UNEs the next day. Similarly, an entrant needing an EEL to serve a distant customer can order the facility as a special access circuit and migrate then it to UNEs as well. It makes no sense to create a system that doubles the work for every party involved – ILEC, CLEC and, undoubtedly, the customer itself. Every unnecessary step injects additional opportunity for failure, and a cost that is a dead-weight loss to the economy.

Q. Should BellSouth be permitted to impose a "glue charge"?

A. No. Even BellSouth acknowledges that the term "glue charge" is synonymous with "market rate"(Ruscilli, page 10). Of course, if a functioning "market" existed, there would be no need for UNEs. The requested facilities are deemed to be "unbundled network elements" precisely because entrants would be impaired – and, therefore, competition would be harmed – if they were not available at cost-based rates.

Furthermore, the entrant is already compensating BellSouth for the elements it purchases – BellSouth's "glue charge" is no different than a demand for above-cost rates. Glue charges must ultimately be recovered in the prices

charged to end-users. BellSouth's proposal is nothing more than a request to inflate its rivals' *costs* so that it may inflate its rivals' *prices*, thereby assuring that its own monopoly prices are protected from competition. The Commission should reject its proposal.

Q. Does this conclude your rebuttal testimony?

A. Yes.

Docket No. 000731-TP
Exhibit JPG-2

Stock Values as of December 12, 2000

Ticker	Company	52 wkHigh	Price	Growth
ABIZ	Adelphia	$70.44	$5.28	-93%
ALGX	Allegiance	$110.06	$20.56	-81%
CWON	Choice One	$71.38	$10.25	-86%
CONV	Convergent	$18.75	$1.44	-92%
COMM	CoreComm	$52.75	$3.91	-93%
COVD	Covad	$66.63	$2.50	-96%
CPTL	CTC Comm.	$56.13	$6.63	-88%
DSLN	DSLNet, Inc.	$32.56	$1.31	-96%
ESPI	e.spire	$16.81	$1.00	-94%
ELIX	Electric Lightwave	$27.00	$5.28	-80%
FCOM	Focal Comm.	$85.00	$9.50	-89%
ICIX	Intermedia	$77.38	$12.19	-84%
ITCD	ITC DeltaCom	$43.50	$6.44	-85%
MCLD	McLeodUSA	$35.94	$16.38	-54%
MPWR	Mpower	$52.00	$3.97	-92%
NTKK	Net2000	$40.00	$3.06	-92%
NASC	Network Access	$40.00	$2.19	-95%
NPLS	NetworkPlus	$62.63	$2.94	-95%
NPNT	NorthPoint	$34.75	$0.75	-98%
PACW	Pac-West	$41.75	$3.75	-91%
RTHM	Rhythms	$50.00	$1.25	-98%
TGNT	Teligent	$100.00	$3.50	-97%
TWTC	Time Warner	$93.00	$66.50	-28%
CLEC	US LEC	$48.00	$5.31	-89%
WCII	WinStar	$66.50	$16.44	-75%
XOXO	XO	$66.25	$20.75	-69%
ZTEL	Z-TEL	$50.00	$6.50	-87%
CLEC Weighted Average		**$55.84**	**$12.82**	**-77%**
BLS	BellSouth	$53.50	$43.06	-20%
Q	Qwest	$66.81	$42.50	-36%
SBC	SBC	$59.00	$52.25	-11%
VZ	Verizon	$67.25	$55.38	-18%
ILEC Weighted Average		**$62.83**	**$50.86**	**-19%**
T	AT&T	$61.00	$21.56	-65%
GX	Global Crossing	$61.81	$17.94	-71%
FON	Sprint	$73.06	$24.94	-66%
WCOM	WorldCom	$59.75	$17.63	-70%
IXC Weighted Average		**$55.26**	**$18.10**	**-67%**

193 F.3d 1112
99 Cal. Daily Op. Serv. 8279, 1999 Daily Journal D.A.R. 10,571, 17 Communications Reg. (P&F) 1081
(Cite as: 193 F.3d 1112)

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United States Court of Appeals,
Ninth Circuit.

US WEST COMMUNICATIONS, Plaintiff-Appellant,
v.
MFS INTELENET, INC.; Sharon L. Nelson, Chairman; Richard Hemstad, Commissioner; William P. Gillis, Commissioner, in their official capacities as Commissioners of the Washington Utilities and Transportation Commission; and Washington Utilities and Transportation Commission, (WUTC), Defendants-Appellees.
US West Communications, Plaintiff-Appellant,
v.
TCG Seattle, a limited partnership; Anne Levinson, Chairperson; Richard Hemstad, Commissioner; William P. Gillis, Commissioner, in their official capacities as Commissioners of the Washington Utilities and Transportation Commission; and Washington Utilities and Transportation Commission, Defendants-Appellees.

Nos. 98-35146, 98-35203.

Argued and Submitted Nov. 2, 1998.
Decided Oct. 8, 1999.

Incumbant local exchange carrier brought suits challenging decisions of Washington Utilities and Transportation Commission approving interconnection agreements, and asserting taking claims. The United States District Court for the Western District of Washington, William L. Dwyer, J., 1998 WL 350588, upheld agreements and dismissed taking claims as unripe. Carrier appealed. The Court of Appeals, James R. Browning, Circuit Judge, held that: (1) challenges to interim pricing provisions were not ripe; (2) number portability cost recovery provisions did not violate Telecommunications Act; (3) requirement to combine unbundled elements did not violate Act; (4) deregulated and unregulated services were properly included in resale provisions; (5) telephone calls from end-user to end-user's Internet Service Provider (ISP) were properly included in reciprocal compensation provisions; (6) competitor's switch was properly characterized as tandem switch; (7) interconnection provisions were proper; (8) provisions permitting competitor to combine local and toll traffic on two-way trunks were proper; (9) security arrangement was proper; (10) requiring parties to negotiate future agreement for pole attachment and conduit usage was appropriate; and (11) takings claim was not ripe.

Affirmed.

West Headnotes

[1] **Telecommunications ⇐263**
372k263

Court of Appeals reviews de novo whether interconnection agreements comply with Telecommunications Act and implementing regulations. Telecommunications Act of 1996, 47 U.S.C.A. § 252(e)(6).

[2] **Telecommunications ⇐263**
372k263

In action challenging decision of Washington Utilities and Transportation Commission approving interconnection agreements, district court should have reviewed question of whether agreements complied with Telecommunications Act and implementing regulations de novo, rather than apply arbitrary and capricious standard. Telecommunications Act of 1996, 47 U.S.C.A. § 252(e)(6).

[3] **Telecommunications ⇐263**
372k263

In action challenging decision of Washington Utilities and Transportation Commission approving interconnection agreements, doctrine of primary jurisdiction did not apply to require substantial deference to Commission's price determination and cost methodology; case was not a judicial action independent of agency proceedings.

[4] **Administrative Law and Procedure ⇐704**
15Ak704

Federal courts must refrain from premature

adjudication of agency action to avoid entangling themselves in abstract disagreements over administrative policies, and also to protect agencies from judicial interference until administrative decision has been formalized and its effects felt in concrete way by the challenging parties.

[5] **Telecommunications ⇐263**
372k263

Challenges to interim pricing provisions of interconnection agreements approved by Washington Utilities and Transportation Commission were not ripe; interim rates were set by arbitration and generic price proceeding to determine permanent rates was still underway, and delaying review of interim rates would not impose undue hardship on parties.

[6] **Telecommunications ⇐267**
372k267

Federal Communications Commission (FCC) ruling that mechanism assigning costs based on each exchange carrier's active local numbers was "competitively neutral," but a mechanism requiring new entrants to bear all costs of number portability was not, could not be collaterally attacked in actions challenging decisions of Washington Utilities and Transportation Commission approving interconnection agreements. Telecommunications Act of 1996, 47 U.S.C.A. § 251(e)(2); Communications Act of 1934, § 3(30), 47 U.S.C.A. § 153(30).

[7] **Telecommunications ⇐267**
372k267

Provision of interconnection agreement requiring incumbent local exchange carrier to share with competing carrier all access charges paid by interexchange carriers to incumbent carrier, including charges for local transport, local switching, interconnection, and common carrier line charge, did not violate Telecommunications Act. Telecommunications Act of 1996, 47 U.S.C.A. § 251(e)(2).

[8] **Telecommunications ⇐267**
372k267

Provision in interconnection agreement requiring incumbent local exchange carrier to combine unbundled network elements at competing carrier's request before leasing did not violate Telecommunications Act. Telecommunications Act of 1996, 47 U.S.C.A. § 251(c)(3).

[9] **Telecommunications ⇐267**
372k267

Inclusion of deregulated and unregulated services in resale provisions of interconnection agreements did not violate Telecommunications Act. Telecommunications Act of 1996, 47 U.S.C.A. § 251(c)(4)(A).

[10] **Telecommunications ⇐267**
372k267

Federal Communications Commission (FCC) ruling, which required incumbent local exchange carrier and competing carrier to be bound by interconnection agreement which included telephone calls from end-user to end-user's Internet Service Provider (ISP) in its reciprocal compensation provisions was not subject to collateral attack in actions challenging decisions of Washington Utilities and Transportation Commission approving agreement. Telecommunications Act of 1996, 47 U.S.C.A. § 251(b)(5).

[11] **Telecommunications ⇐267**
372k267

Washington Utilities and Transportation Commission did not act arbitrarily or capriciously, in arbitration regarding interconnection agreement, in classifying competing local exchange carrier's switch as a tandem switch. Telecommunications Act of 1996, 47 U.S.C.A. § 251.

[12] **Telecommunications ⇐267**
372k267

Whether Washington Utilities and Transportation Commission, in arbitration regarding interconnection agreement, properly classified competing local exchange carrier's switch as a tandem switch was not a determination of compliance with requirements of Telecommunications Act and its implementing regulations, and therefore was reviewed under arbitrary and capricious standard. Telecommunications Act of 1996, 47 U.S.C.A. § 251.

[13] **Telecommunications ⇐267**
372k267

Provisions of interconnection agreements permitting

competing carriers to interconnect at incumbent local exchange carrier's tandem switch or local and end office switches did not violate Telecommunications Act, absent proof that interconnections were not feasible. Telecommunications Act of 1996, 47 U.S.C.A. § 251(c)(2).

[14] **Telecommunications ⇐267**
372k267

Federal Communications Commission (FCC) regulations stating that interconnection at tandem switch was technically feasible were not subject to collateral attack in suits challenging decisions of Washington Utilities and Transportation Commission approving interconnection agreements. 28 U.S.C.A. § 2342(1); 47 C.F.R. § 51.305(a)(2)(iii).

[15] **Telecommunications ⇐267**
372k267

Federal Communications Commission (FCC) regulations requiring incumbent local exchange carrier to provide two-way trunking where competing carrier had insufficient traffic to justify use of separate one-way trunks and two-way trunking was technically feasible were not subject to collateral attack in suits challenging decisions of Washington Utilities and Transportation Commission approving interconnection agreements. 28 U.S.C.A. § 2342(1); 47 C.F.R. § 51.305(f).

[16] **Telecommunications ⇐267**
372k267

Decision of Washington Utilities and Transportation Commission, in approving interconnection agreement, to permit incumbent local exchange carrier to require screening and bonding in reasonable amounts for collating carrier's personnel at incumbent's facilities, rather than follow incumbent's suggestion of escorts, was not arbitrary and capricious. Telecommunications Act of 1996, 47 U.S.C.A. § 251(c)(6); 47 C.F.R. § 51.323(i).

[17] **Telecommunications ⇐267**
372k267

Provision in interconnect agreement requiring incumbent local exchange carrier and competitor to negotiate future agreement for pole attachment and conduit usage was "appropriate condition" to implement incumbent's statutory duty to afford access to poles, ducts, conduits and rights-of-way, where parties could not agree to provision regarding that duty. Telecommunications Act of 1996, 47 U.S.C.A. §§ 251(b)(4), 252(b)(4)(C), (c)(1).

[18] **Contracts ⇐25**
95k25

Generally, agreement to agree in the future is not enforceable.

[19] **Eminent Domain ⇐277**
148k277

Because rates included in interconnection agreements approved by Washington Utilities and Transportation Commission were interim rates and incumbent local exchange carrier could receive retroactive compensation for the interim period, agency had not taken final action on allegedly confiscatory rates and carrier's takings claim was not ripe. U.S.C.A. Const.Amend. 5.

[20] **Eminent Domain ⇐277**
148k277

Because Washington law provided local exchange carrier with a remedy for allegedly confiscatory rates in interconnection agreements, carrier had to pursue that remedy before seeking relief under Fifth Amendment for unlawful taking. U.S.C.A. Const.Amend. 5.

***1115** Sherilyn Peterson and Kirstin S. Dodge, Perkins Coie, Bellevue, Washington, Norton Cutler, U.S. West Law Department, Denver, Colorado, for the plaintiff-appellant.

Daniel M. Waggoner, Seattle, Washington, Shannon E. Smith, Assistant Attorney General, Olympia Washington, for the defendants-appellees.

Joel VanOver and Douglas G. Bonner, Swidler & Berlin, Washington, D.C., for the defendant-appellee.

Paul M. Gordon, Gordon & Goddard, Oakland, California, for the defendant- appellee.

Susan L. Pacholski, United States Department of Justice, Washington, D.C., for the amicus.

Appeals from the United States District Court for the Western District of Washington. William L. Dwyer, District Judge, Presiding, D.C. No. CV-97- 00222-WLD, D.C. No. CV-97-00354-WLD.

Before: BROWNING and HAWKINS, Circuit Judges, and SHADUR, [FN1] District Judge.

FN1. The Honorable Milton I. Shadur, Senior United States District Judge, Northern District of Illinois, sitting by designation.

*1116 JAMES R. BROWNING, Circuit Judge:

The Telecommunications Act of 1996(Act) is designed to foster competition in local and long distance telephone markets. The local competition provisions of the Act require incumbent local exchange carriers (defined in 47 U.S.C. § 251(h)(1)) to allow other local exchange carriers access to the incumbent carrier's networks or services to enable them to compete in providing local telephone services: (1) incumbent carriers must interconnect their networks with new entrants "at any technically feasible point," and the interconnection must be "at least equal in quality" to the interconnection the incumbent carrier provides for itself, 47 U.S.C. § 251(c)(2); (2) incumbents must provide nondiscriminatory, unbundled access to network elements [FN2] in a manner that allows new entrants to combine the elements to provide telecommunications services, see 47 U.S.C. § 251(c)(3); and (3) incumbents must offer for resale, at wholesale rates, any telecommunications service an incumbent offers at retail, and permit new entrants to resell those services to end-users. See 47 U.S.C. § 251(c)(4). The Act prohibits incumbent carriers from imposing unreasonable or discriminatory conditions or limitations on the resale of the services. See id.

FN2. A "network element" is a facility or equipment used in the provision of telecommunications service. See 47 U.S.C. § 153(29).

Incumbent carriers must negotiate in good faith agreements (commonly referred to as interconnection agreements) with competing carriers setting forth particular terms and conditions upon which incumbent carriers will satisfy their duties under the Act. See 47 U.S.C. § 251(c)(1). If the parties are unable to reach agreement through good faith negotiations, a party to the negotiation may request that the state utilities commission arbitrate unresolved issues. See 47 U.S.C. § 252(b)(1). A state commission may impose terms by arbitration only if the terms meet the substantive requirements of section 251, including regulations implementing that section, and the pricing standards of section 252. See 47 U.S.C. § 252(c). After the state commission approves an interconnection agreement, a party to the agreement may bring an action in district court "to determine whether the agreement or statement meets the requirements" of the Act. 47 U.S.C. § 252(e)(6).

The Federal Communications Commission (FCC) issued rules implementing the local competition provisions of the Act. See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15499 (Aug. 8, 1996) (Local Competition Order). Suits challenging the rules were consolidated in the Eighth Circuit. The Eighth Circuit vacated the pricing rules on the ground that the Act authorized state utility commissions, not the FCC, to set rates. See Iowa Utilities Bd. v. FCC, 120 F.3d 753, 793-800 (8th Cir.1997). The court expressly declined to review the pricing rules on the merits. See id. at 800. The court also vacated non-pricing rules that required incumbent carriers to combine unbundled network elements for competing carriers, and prohibited incumbent carriers from separating already combined network elements before leasing them to competing carriers.

In relevant part, the Supreme Court reversed the Eighth Circuit's ruling that the FCC did not have jurisdiction to promulgate pricing rules, holding the FCC had jurisdiction to "prescribe such rules and regulations as may be necessary in the public's interest to carry out the provisions of the Act," including the "jurisdiction to design a pricing methodology." See AT & T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 119 S.Ct. 721, 729, 733, 142 L.Ed.2d 835 (1999). The Supreme Court also reinstated the rule prohibiting incumbent carriers from separating already combined network elements. See id. 119 S.Ct. at 737-38.

*1117 Procedural Background

MFS Intelenet, Inc. (MFS) and TCG Seattle (TCG), competing local exchange carriers, asked U.S. West Communications (U.S. West), the incumbent local exchange carrier, to negotiate an interconnection agreement. The parties were unable to resolve all

issues by negotiation, and MFS and TCG requested arbitration by the Washington Utilities and Transportation Commission (Commission). The Commission appointed an arbitrator in each case, and arbitration hearings were held. Arbitrators' reports and decisions were filed and comments and objections received. The Commission concluded the agreements met the requirements of sections 251 and 252 of the Act, and approved them. US West challenged the Commission's decisions and asserted takings claims in district court. The district court held that the agreements complied with the Act and dismissed the taking claims as unripe. US West appealed.

Standard of Review

[1][2][3] We review the district court's grant of summary judgment de novo. See San Diego Gas & Elec. Co. v. Canadian Hunter Mktg., 132 F.3d 1303, 1306 (9th Cir.1997). The Act confers jurisdiction upon district courts to review interconnection agreements for compliance with the Act:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. § 252(e)(6) (emphasis added). We apply the same standard the district court should apply, considering de novo [FN3] whether the agreements are in compliance with the Act and the implementing regulations, see Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1495 (9th Cir.1997) (a state agency's interpretation of a federal statute is considered de novo), and considering all other issues under an arbitrary and capricious standard. See, e.g., U.S. West Communications, Inc. v. Hix, 986 F.Supp. 13, 19 (D.Colo.1997) (holding that courts should apply the de novo standard to all issues involving a "determination of the [state commission's] procedural or substantive compliance 'with the requirements of the [Telecommunications Act] and its implementing regulations,' " and an arbitrary and capricious standard to all other issues). We agree with the district court that the agreements complied with the Act and the FCC regulations, and that other decisions of the Commission challenged by U.S. West were not arbitrary and capricious. Although the district court applied the wrong standard in its review of some of the issues, [FN4] the errors were harmless. [FN5]

FN3. US West argues that we should not defer to the Commission on any of its rulings because section 252(e)(6) provides for a private right of action instead of an appeal to the district court. All district court proceedings are initiated by filing an "action" in district court. See Fed.R.Civ.P. 1, 2 & 3. Congress' use of this term in section 252(e)(6) does not affect the proper standard of review.

FN4. The district court erred in applying the arbitrary and capricious standard to the following issues relating to the agreements' compliance with the Act: (1) charges for number portability, infra at 1120; (2) inclusion of deregulated or unregulated services, infra at 1121; (3) inclusion of ISP-Bound Traffic, infra at 1122; (4) interconnection at certain points, infra at 1124; and (5) combination of toll and local traffic, infra at 1124.

FN5. The district court erred in holding that the doctrine of primary jurisdiction required substantial deference to the Commission's price determination and cost methodology. The doctrine of primary jurisdiction is not applicable. This is not a judicial action independent of agency proceedings. See Cost Management Serv., Inc. v. Washington Natural Gas Co., 99 F.3d 937, 949 (9th Cir.1996). However, the error was harmless.

Discussion

1. Ripeness of Challenge to Interim Rates

US West challenges several of the pricing provisions as inconsistent with pricing ***1118** standards fixed by the Act. Because the challenged provisions are interim only and may be adjusted by later pricing proceedings, we conclude that these prices are therefore not ripe for review.

[4] Federal courts must refrain from premature adjudication of agency action to avoid "entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an

administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Abbott Lab. v. Gardner, 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). Principles of federalism lend this doctrine additional force when a federal court is reviewing a state agency decision at an interim stage in an evolving process. See 13A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3532.1 n. 16 & accompanying text (2d ed. 1984 & Supp.1998).

The D.C. Circuit, which decides most petitions for review of federal agency actions, explained:

> The primary focus of the ripeness doctrine as applied to judicial review of agency action has been a prudential attempt to time review in a way that balances the petitioner's interest in prompt consideration of allegedly unlawful agency action against the agency's interest in crystallizing its policy before that policy is subjected to judicial review and the court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting.

Mississippi Valley Gas Co. v. Federal Energy Regulatory Comm'n (MVGC), 68 F.3d 503, 508 (D.C.Cir.1995) (quoting Eagle-Picher Indus. v. EPA, 759 F.2d 905, 915 (D.C.Cir.1985)) (internal quotation marks omitted).

"In considering whether a case is ripe for review, a court must evaluate '[1] the fitness of the issues for judicial decision and [2] the hardship to the parties of withholding court consideration.' " Winter v. California Med. Review, Inc., 900 F.2d 1322, 1325 (9th Cir.1990) (quoting Abbott, 387 U.S. at 149, 87 S.Ct. 1507). "A claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." Standard Alaska Prod. Co. v. Schaible, 874 F.2d 624, 627 (9th Cir.1989). "To meet the hardship requirement, a litigant must show that withholding review would result in direct and immediate hardship and would entail more than possible financial loss." Winter, 900 F.2d at 1325 (internal quotation marks omitted).

a. Fitness of Issues for Judicial Decision

[5] We conclude that U.S. West's challenge to the interim rates is not yet fit for judicial decision. First, we cannot determine whether these rates are final since the Commission may not have reached a final decision on the rates that will be charged during the period between the effective date of the agreements and the establishment of permanent rates. The Commission adopted a two-stage process for fixing interconnection rates: interim rates were to be set by arbitration; permanent rates were to be determined in a generic price proceeding. The generic proceeding is still underway. US West challenges the interim rates, but says its concerns would be resolved if TCG and MFS were ordered to compensate U.S. West for any differences between the interim rates and the permanent prices, referred to as an "administrative true-up." US West apparently requested a true-up in arbitration proceedings. The arbitrators' orders cryptically provide that the rates in the agreements "will remain in effect pending the outcome of the Commission's generic pricing proceeding." The Commission's orders approving the arbitrated agreements are similarly ambiguous: "The prices contained in the Agreement are interim prices, subject to replacement by prices adopted in the Commission's generic cost and price proceeding...." When asked at oral argument to clarify whether a true-up might ***1119** be available, the Commission was noncommital. Therefore, we must conclude that there is still a possibility the Commission will award a true-up at the conclusion of the generic price proceeding.

Accordingly, we avoid unnecessary adjudication by declining to review the interim prices now. [FN6] If a true-up is ordered, this appeal might become moot, as U.S. West has indicated it would be satisfied with such an order. Even if the appeal does not become moot, either because the true-up is denied or because MFS or TCG appeals the award of a true-up, this court will benefit from the Commission's and the district court's legal analysis of whether a true-up is authorized by the Act and from their assessment of whether it should be imposed in these particular cases. Indeed, TCG indicated at oral argument that it may challenge the legitimacy of the generic price proceeding itself. It may assist us to have all of these legal questions presented at once, after they have been fully considered below and after the factual record has been fully developed in the generic price proceeding. See MVGC, 68 F.3d at 508 (concluding that the court "will benefit from deferring review until the agency's policies have crystallized and the question[s] arise[ ] in some more concrete and final form") (internal quotation marks omitted).

FN6. Compare MVGC, 68 F.3d at 509 (finding petition for review unripe in part

because of "the possibility that MVGC will obtain relief from the effect of the [challenged] FERC orders in the pending hearings"), and Placid Oil Co. v. FERC, 666 F.2d 976, 981 (5th Cir.1982) (finding petition for review unripe in part because the agency "may have been receptive" to the petitioner's argument in a subsequent proceeding), with United Distribution Cos. v. FERC, 88 F.3d 1105, 1183 (D.C.Cir.1996) (finding petition for review ripe in part because agency had demonstrated that it did not intend to reconsider the relevant ruling or amplify its justifications for the ruling in further proceedings); Mid- Tex Elec. Coop., Inc. v. FERC, 773 F.2d 327, 337-38 (D.C.Cir.1985) (finding petition for review ripe in part because the agency informed the court that the challenged order was the agency's definitive ruling on the relevant issue: "Here the Commission states that its rule binds it to accept rates calculated with CWIP in the rate base; its discretion has been exercised and no longer exists.").

b. Hardship to the Parties

Delaying review of the interim rates will not impose an undue hardship on any of the parties. US West indicated at oral argument that it would not object to deferred review, as long as it may renew its appeal at the conclusion of the generic proceeding if the Commission denies a true-up. Clearly, U.S. West may do so. Cf. MVGC, 68 F.3d at 509 (explaining that at the conclusion of ratemaking, the court will have "jurisdiction to review the entire proceeding").

TCG objects to continued uncertainty regarding the rates it must pay to U.S. West, which affect the rates it charges its customers. TCG notes that it entered the local phone market and conducted business based on the approved agreements and the interim rates they fixed, and the generic proceeding may not conclude before the agreements expire. TCG has known, however, that the rates were subject to judicial review and might be revised in the generic proceeding, at least prospectively. Delay alone ordinarily is not a sufficient hardship to preclude a finding of unripeness. See Pennzoil Co. v. FERC, 645 F.2d 394, 399-400 (5th Cir.1981) (holding that mere delay is an inadequate showing of hardship, absent showing that delay will result in irreparable losses, intrusion into daily business decision-making, or the imposition of a Hobson's choice of whether to comply with a possibly invalid regulation or to violate it in order to challenge it).

Moreover, it is unclear whether declining to review the rates now will significantly delay a final resolution. At oral argument, the parties informed us that the generic proceeding was almost completed. Once it is completed, and following review in the district court, an accelerated schedule for briefing and argument can be set.

***1120** Finally, TCG and MFS do not suffer undue hardship since they might be more prejudiced by immediate review of the interim rates than by a possible true-up. It appears that the permanent prices ultimately adopted in the generic price proceeding are likely to be lower than U.S. West's proposed prices. However, if this court in a later appeal of the generic proceeding were to determine that a TCG or MFS proposal adopted in the arbitrated agreements did not comply with the Act, one practical alternative might be to order the Commission to adopt the U.S. West proposal in its place. Therefore, TCG and MFS may actually benefit from our decision to delay review until the conclusion of the generic proceeding.

We conclude that the possible hardship caused by deferring review is outweighed by the factors favoring deferral.

2. Charges for Interim Number Portability

US West argues the district court erred in affirming the interim number portability provisions in the agreements because the assignment of costs based on the number of each exchange carrier's active local numbers violates the Act. The district court upheld the Commission's approval of the provisions because the FCC had approved the methodology. We affirm.

[6] The Act requires U.S. West to provide number portability, defined as the "ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another." 47 U.S.C. § 153(30). The Act provides that "the costs of establishing ... number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the [FCC]." 47 U.S.C.

§ 251(e)(2) (emphasis added). The FCC has ruled that a mechanism assigning costs based on each exchange carrier's active local numbers is "competitively neutral," see In re Telephone Number Portability, 11 F.C.C.R. 8352, § 135 (July 2, 1996) (Number Portability Order), but a mechanism requiring new entrants to bear all the costs of number portability is not. See id. at § 138. The FCC order is not subject to collateral attack in this proceeding. The Hobbs Act grants exclusive jurisdiction to courts of appeals to determine the validity of all final orders of the FCC. See 28 U.S.C. § 2342; 47 U.S.C. § 402(a); see also FCC v. ITT World Communications, 466 U.S. 463, 468-69, 104 S.Ct. 1936, 80 L.Ed.2d 480 (1984); Wilson v. A.H. Belo Corp., 87 F.3d 393, 397-400 (9th Cir.1996). An aggrieved party may invoke this jurisdiction only by filing a petition for review of the FCC's final order in a court of appeals naming the United States as a party. See 28 U.S.C. §§ 2342, 2344.

[7] US West also argues that mandatory sharing of switched access charges required by the MFS Agreement violates the Act. The district court upheld the Commission's approval of a provision requiring U.S. West to share these charges because the Act and the FCC's Number Portability Order permit such sharing.

Switched access charges are fees paid by interexchange (long distance) carriers to local exchange carriers for transporting long distance telephone calls over the local exchange carrier's networks to complete the calls. The MFS Agreement requires U.S. West to share with MFS all access charges paid by interexchange carriers to U.S. West, including charges for local transport, local switching, interconnection, and a common carrier line charge. US West argues it should be required to share only the common carrier line charge because MFS provides only final call termination.

The Act states the cost of establishing the number portability system must be borne by all carriers on a "competitively neutral basis." 47 U.S.C. § 251(e)(2). The FCC's Number Portability Order stated the "overarching principle is that the carriers are to share in the access revenues received for a ported call." ***1121** Number Portability Order at § 140. The Number Portability Order does not require that U.S. West recover all its costs relating to number portability, but only that all carriers share the costs.

The district court correctly held that the number portability cost recovery provisions do not violate the Act.

3. Requirement to Combine Unbundled Elements

[8] The district court's holding sustaining the provision in the MFS Agreement requiring U.S. West to combine unbundled network elements at MFS's request before leasing must be affirmed under the rationale of AT & T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 119 S.Ct. 721, 736-38, 142 L.Ed.2d 835 (1999), sustaining a provision prohibiting an incumbent from separating already-combined elements before leasing. [FN7]

> FN7. The MFS provision states: "USWC agrees to perform and MFS agrees to pay for the functions necessary to combine requested elements in any technically feasible manner either with other elements from [US West's] network, or with elements possessed by MFS."

The Act states that an incumbent carrier must provide

> nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable, and nondiscriminatory.... An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

47 U.S.C. § 251(c)(3) (emphasis added).

In sustaining a provision that prohibited the incumbent from separating already-combined elements before leasing, the Supreme Court held that the phrase, "on an unbundled basis," does not necessarily mean "physically separated"; an equally reasonable interpretation is that it means separately priced. AT & T, 119 S.Ct. at 737. The Court also held that the statutory language requiring incumbent carriers to "provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service" indicates that network elements may be leased in discrete parts, but "does not say, or even remotely imply, that elements must be provided only in this fashion and never in combined form." Id. It follows, the Court held, that

the FCC regulation prohibiting an incumbent carrier from separating already-combined network elements, see 47 C.F.R. § 51.315(b), was not inconsistent with the Act.

It also necessarily follows from AT & T that requiring U.S. West to combine unbundled network elements is not inconsistent with the Act: the MFS combination provision does not conflict with the Act because the Act does not say or imply that network elements may only be leased in discrete parts.

US West nevertheless argues that the Eighth Circuit's invalidation of the FCC regulation that required incumbent carriers to combine unbundled elements for competing carriers, see 47 C.F.R. § 51.315(c)-(f), requires this court to conclude that the MFS combination provision violates the Act. The Supreme Court opinion, however, undermined the Eighth Circuit's rationale for invalidating this regulation. Although the Supreme Court did not directly review the Eighth Circuit's invalidation of § 51.315(c)-(f), its interpretation of 47 U.S.C. § 251(c)(3) demonstrates that the Eighth Circuit erred when it concluded that the regulation was inconsistent with the Act. We must follow the Supreme Court's reading of the Act despite the Eighth Circuit's prior invalidation of the nearly identical FCC regulation.

4. Inclusion of Deregulated/Unregulated Services

US West argues the district court erred in failing to exempt deregulated and unregulated ***1122** services from the resale provisions of the MFS Agreement.

[9] The FCC instructed the parties to examine the incumbent carrier's retail tariffs to determine which services the incumbent carrier must provide for resale. See Local Competition Order at § 872 ("State commissions, [incumbent carriers] and resellers can determine the [telecommunications] services that an [incumbent carrier] must provide at wholesale rates by examining that [local exchange carrier's] retail tariffs.") (emphasis added). The Local Competition Order, however, only tells the parties they may examine the incumbent's retail tariffs to determine which services an incumbent carrier must provide for resale, and does not say a state commission may impose the duty to sell for resale only telecommunications services covered by the incumbent's retail tariffs. See id.

The plain language of the Act imposes on incumbent carriers the duty "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4)(A) (emphasis added). The plain language does not exempt unregulated and deregulated services from the statutory definition of telecommunication services [FN8] or the duty to sell those services for resale. "If the intent of Congress is clear from the face of the statutory language, we must give effect to the unambiguously expressed Congressional intent." Saipan Stevedore Co., Inc. v. Director, Office of Workers' Compensation Programs, 133 F.3d 717, 722 (9th Cir.1998) (citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

> FN8. A "telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46).

We affirm the district court's decision that deregulated and unregulated telecommunication services are subject to the resale provisions.

5. Inclusion of ISP-Bound Traffic

[10] US West argues the district court erred in permitting the inclusion of "ISP-Bound Traffic" (a telephone call from an end-user to the end-user's Internet Service Provider [FN9]) in the reciprocal compensation provisions of the MFS Agreement. The FCC has held parties are bound by interconnection agreements that include ISP-Bound Traffic in their reciprocal compensation provisions and are approved by a state commission. See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Inter-Carrier Compensation for ISP-Bound Traffic, 14 F.C.C.R. 3689 (Feb. 26, 1999) (ISP Ruling). Because the Commission has approved the MFS Agreement which provided reciprocal compensation for ISP-Bound Traffic, we affirm.

> FN9. An Internet service provider (ISP) "is an entity that provides its customers the

> ability to obtain on-line information through the Internet. ISPs purchase analog and digital lines from local exchange carriers to connect to their dial-in subscribers. Under one typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area. The ISP, in turn, combines computer processing, information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services." In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Inter-Carrier Compensation for ISP- Bound Traffic, 14 F.C.C.R. 3689 at § 4 (Feb. 26, 1999).

The Act imposes a duty upon all incumbent carriers to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). The FCC concluded that the reciprocal compensation provisions applied only to "local telecommunications traffic." Local Competition Order at § 1412. The FCC issued a declaratory ruling that "ISP-Bound Traffic is jurisdictionally mixed and appears to be largely interstate." ISP Ruling at § 1. At first glance, the FCC's conclusion that ISP-***1123** Bound Traffic is interstate supports the exclusion of ISP- Bound Traffic from the reciprocal compensation provisions. Arguably, if ISP- Bound Traffic is interstate, it cannot also be "local telecommunications traffic." Local Competition Order at § 1412 (emphasis added). However, the FCC held the existing interconnection agreements providing for reciprocal compensation of ISP-Bound Traffic were binding on the parties. [FN10] The FCC said:

> FN10. In the ISP Ruling, the FCC gave notice of a proposed rulemaking regarding inter-carrier compensation for ISP-Bound Traffic. The obligation to pay such compensation in existing interconnection agreements could be altered by future rules promulgated by the FCC.

> [Our jurisdictional] conclusion, however, does not in itself determine whether reciprocal compensation is due in any particular instance.... [P]arties may have agreed to reciprocal compensation for ISP-bound Traffic, or a state commission, in the exercise of its authority to arbitrate interconnection disputes under section 252 of the Act, may have imposed reciprocal compensation obligations for this traffic. In the absence, to date, of a federal rule regarding the appropriate inter-carrier compensation for this traffic, we therefore conclude that parties should be bound by their existing interconnection agreements, as interpreted by state commissions.

ISP Ruling at § 1 (emphasis added). [FN11]

> FN11. The FCC stated that the ISP Ruling "might cause some state commissions to reexamine their conclusion that reciprocal compensation is due." ISP Ruling at § 27. Even if the Commission did reconsider its conclusion that reciprocal compensation is due under the MFS Agreement, the parties could not attack the reciprocal compensation provisions in this forum. See Wilson v. A.H. Belo Corp., 87 F.3d 393, 400 (9th Cir.1996). In fact, the Commission did reconsider its conclusion and held reciprocal compensation is due for ISP-Bound Traffic. See WorldCom v. GTE Northwest Inc., 1999 WL 983858 (Wash.U.T.C. May 12, 1999).

US West may not collaterally attack the FCC's decision that parties are bound by existing interconnection agreements. [FN12] As noted, the Hobbs Act grants exclusive jurisdiction to courts of appeals to determine the validity of all final orders of the FCC. [FN13] See 28 U.S.C. § 2342; 47 U.S.C. § 402(a); see also ITT World Communications, 466 U.S. at 468-69, 104 S.Ct. 1936. It is irrelevant that U.S. West filed this action with the district court prior to the issuance of the ISP Ruling. "Once the [ISP Ruling] became final, it divested [this court] of jurisdiction to consider the issues decided in the [ISP Ruling]." Wilson, 87 F.3d at 400.

> FN12. US West argues that the FCC "abdicated its responsibility" by finding that even though ISP-Bound Traffic is jurisdictionally interstate, parties under existing interconnection agreements approved by state commissions must pay inter-carrier compensation for ISP-Bound Traffic (if such traffic is included in the reciprocal compensation provisions).

However, this argument should be made in a direct attack of the ISP Ruling. In fact, U.S. West and other telecommunications carriers have filed such actions in the D.C. Circuit seeking direct review of the ISP Ruling. See U.S. West v. FCC, No. 99-1095 (filed March 8, 1999); Bell Atlantic v. FCC, No. 99-1094 (D.C.Cir. filed March 8, 1999); MCI Worldcom v. FCC, No. 99-1097 (D.C.Cir. filed March 8, 1999).

FN13. US West argues that the Hobbs Act does not apply because section 252(e)(6) of the Act grants jurisdiction to federal district courts to determine whether the interconnection agreements comply with the Act and the FCC regulations. Section 252(e)(6) does not, however, grant jurisdiction to federal district courts to review the validity of FCC regulations.

We affirm the district court's decision to include ISP-Bound Traffic in MFS Agreement's reciprocal compensation provisions because the ISP Ruling requires U.S. West and MFS to be bound by the MFS Agreement which includes ISP- Bound Traffic in its reciprocal compensation provisions. [FN14]

FN14. Based on different reasoning, the Seventh Circuit also held the ISP Ruling did not prohibit a state commission from including ISP-Bound Traffic in the reciprocal compensation provisions of an interconnection agreement. See Illinois Bell Tel. Co. v. Worldcom Techs., 179 F.3d 566 (7th Cir.1999). The Seventh Circuit held the ISP-Ruling permits state commissions to decide whether ISP Bound-Traffic should be included in the interconnection agreement's reciprocal compensation provisions "at least until the time a [federal] rule is promulgated." Id. at 574.

***1124** 6. Treatment of MFS Switch as a Tandem Switch

[11][12] US West argues that the district court erred in characterizing the MFS switch as a tandem switch. Both MFS and U.S. West presented evidence in the arbitration hearing regarding the geographic area the MFS switch serves and the functions it performs. The Commission's classification of MFS's switch as a tandem switch was not arbitrary or capricious. [FN15] The Commission properly considered whether MFS's switch performs similar functions and serves a geographic area comparable to U.S. West's tandem switch. See Local Competition Order at § 1090. The Commission found that MFS's switch "is comparable in geographical scope" to U.S. West's tandem switch, and "performs the function of aggregating traffic from widespread remote locations" as a tandem switch does.

FN15. We review the Commission's decision under the arbitrary and capricious standard. Whether MFS's switch is a tandem switch is not a determination of compliance with the requirements of the Act and its implementing regulations.

US West challenges the rates the Commission required it to pay MFS for using its tandem switch, claiming they are not "reasonable approximations" of the additional costs MFS will incur for terminating U.S. West's calls as required by 47 U.S.C. § 252(d)(2). The rates adopted by the Commission were the rates U.S. West proposed for terminating MFS's calls. Though U.S. West and MFS will not incur precisely the same costs for terminating the other carrier's calls, the district court held the rates were "reasonable approximations" of the additional costs incurred by MFS, and therefore complied with the Act. We affirm.

7. Interconnection at Certain Points

[13] US West argues the district court erred in upholding provisions in the MFS Agreement permitting a single point of interconnection (at the tandem switch) per local access and transport area, and in upholding provisions in the TCG Agreement permitting TCG to interconnect at U.S. West access tandem switches and at local and end office switches.

The Act requires an incumbent carrier

> to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--(A) for the transmission and routing of telephone exchange service and exchange access; (B) at any technically feasible point within the

carrier's network.
47 U.S.C. § 251(c)(2) (emphasis added).

[14] The plain language requires local exchange carriers to permit interconnection at any technically feasible point within the carrier's network. An incumbent carrier denying a request for interconnection at a particular point must prove interconnection at that point is not technically feasible. See 47 C.F.R. § 51.305(e). US West provided no evidence that interconnection at its tandem or local or end office switches was not technically feasible. In any event, these regulations state that interconnection at a tandem switch is technically feasible, see 47 C.F.R. § 51.305(a)(2)(iii), and these regulations are not subject to collateral attack in this proceeding. See 28 U.S.C. § 2342(1); ITT World Communications, 466 U.S. at 468-69, 104 S.Ct. 1936.

8. Combination of Toll and Local Traffic

[15] US West argues the district court erred in upholding the provisions in the TCG Agreement permitting TCG to combine local and toll traffic on two-way trunks. The FCC regulations require an incumbent carrier to provide two-way trunking where the competing carrier has insufficient traffic to justify use of separate one-way trunks and two-way trunking is technically feasible. See Local Competition Order at § 219; see also ***112**547 C.F.R. § 51.305(f) ("If technically feasible, an incumbent [carrier] shall provide two-way trunking upon request."). The regulation is not subject to collateral attack in this proceeding. See 28 U.S.C. § 2342(1); ITT World Communications, 466 U.S. at 468-69, 104 S.Ct. 1936.

9. Providing Adequate Security at Collocation Sites

Because of the sensitive nature of the technology at incumbent carriers' facilities, the FCC permits incumbent carriers to "require reasonable security arrangements" to separate a collocating carrier's space from the incumbent carrier's facilities. 47 C.F.R. § 51.323(i). US West proposed providing escorts, at TCG's expense, while TCG employees were in U.S. West's facilities. The Commission concluded less costly arrangements would be adequate, and adopted TCG's proposal to permit U.S. West to require screening and bonding in reasonable amounts for TCG personnel in U.S. West facilities.

[16] We affirm the district court's holding that the bonding and screening provision provided a "reasonable" security arrangement as required by the Act and its implementing regulations. See 47 U.S.C. § 251(c)(6); 47 C.F.R. § 51.323(i). This is the same security standard U.S. West imposes on its own workforce. The Commission's decision that this arrangement was preferable to U.S. West's suggestion of escorts was not arbitrary and capricious.

10. Requiring U.S. West to Enter Into Future Agreement on Access to Poles, Conduits, Ducts, Rights of Way

[17] We uphold a provision in the TCG Agreement [FN16] requiring TCG and U.S. West to negotiate a future agreement for pole attachment and conduit usage as an "appropriate condition" to implement the statutory duty of U.S. West to afford access to poles, ducts, conduits and rights-of-way. See 47 U.S.C. §§ 251(b)(4); 252(b)(4)(C); 252(c)(1). US West argues that the Commission may impose the duty, but may not require U.S. West to enter into a future agreement to provide such access.

> FN16. The TCG Agreement states: "Parties agree to negotiate and execute a separate agreement for pole attachment and conduit usage within 30 days of either Party requesting the other to negotiate such an agreement."

State commissions impose "appropriate conditions as required" only to "ensure that such resolutions and conditions meet the requirements of section 251." 47 U.S.C. §§ 252(b)(4)(C), 252(c)(1). Section 251 lists many duties of incumbent carriers, including the "duty to afford access to the poles, ducts, conduits, and rights-of-way of the [incumbent] carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224." 47 U.S.C. § 251(b)(4).

[18] Because U.S. West and TCG could not agree to a provision regarding U.S. West's duty to afford TCG access to poles and conduits, requiring the parties to enter into a future agreement was appropriate to ensure U.S. West fulfills its duty to provide access. [FN17]

> FN17. Generally, an agreement to agree in the future is not enforceable. See Kapetan

v. Kelso, 4 Wash.App. 312, 481 P.2d 24, 25 (1971) (quoting Sandeman v. Sayres, 50 Wash.2d 539, 314 P.2d 428, 429 (1957)) ("An agreement for an agreement, or in other words, an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be complete is unenforcible [sic]."); 1 Farnsworth on Contracts § 3.26 at 345 (1998) (generally an agreement to negotiate is not enforceable); 1 Williston on Contracts, § 4.26 at 585 (1990) (generally an agreement to agree is not enforceable). This general rule does not apply where a state commission, pursuant to a federal statute, arbitrates and makes a binding decision on terms which are included in an interconnection agreement. See 47 U.S.C. 252(b)(1). A "meeting of the minds" is not necessary to bind parties to the terms of an interconnection agreement which results from arbitration and a binding decision of a governmental agency.

***1126** Takings Claims

US West argues that the Commission's imposition of arbitration terms constituted a taking of U.S. West's property without just compensation, because the rates included in the agreements do not provide for full cost recovery. The district court concluded this Fifth Amendment claim was not ripe and dismissed it. We affirm.

[19][20] In Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), the Supreme Court held that a regulatory taking claim against a state is not ripe until (1) the state agency imposing the allegedly confiscatory regulation has taken final action against the plaintiff's property and (2) the plaintiff has pursued all available remedies under state law. See id. at 186-97, 105 S.Ct. 3108. Because the rates included in the agreements approved by the Commission are interim rates and U.S. West may receive retroactive compensation for the interim period, the agency has not taken final action on the allegedly confiscatory rates and the takings claim is not ripe. Moreover, because Washington law provides a remedy for takings, see Washington State Const. art. I, § 16; see also, Manufactured Housing Communities v. Washington, 90 Wash.App. 257, 951 P.2d 1142 (1998), U.S. West must pursue that remedy before bringing an action under the Fifth Amendment in federal court.

US West argues that the Act effects a physical taking of its property, rather than a regulatory taking, but does not explain how this difference affects the ripeness of its claim. A court often must await final agency action before it can determine if a taking has occurred, because it must assess whether the regulation has deprived the property owner of all economically viable use of the property. In physical taking cases, whether a taking has occurred usually is not disputed. Even if the taking is established, however, a taking claim is not ripe until the state has taken final action on the plaintiff's request for just compensation. No court could determine whether U.S. West will receive just compensation until the pricing issues have been finally resolved. Even after the Commission approves permanent prices, U.S. West must pursue its state remedies before a federal court can determine whether the state has provided just compensation. [FN18]

FN18. US West argues it is not necessary to present its claims in state court before seeking relief in federal court, citing US West Communications, Inc. v. TCG Oregon, D.N. 97-858-JE (D.Or.1998), reprinted in part in 98-35203 Blue Br. at App. 33-38 (relying on Dodd v. Hood River County, 59 F.3d 852 (9th Cir.1995)). Dodd held that Williamson did not require plaintiffs to pursue Fifth Amendment takings claims in state court before seeking relief in federal court. See id. at 859. Williamson, we explained, only requires plaintiffs to pursue state remedies before bringing a Fifth Amendment claim. See id. As noted above, Washington law does provide an independent remedy for takings, and U.S. West must pursue that remedy before seeking relief under the Fifth Amendment.

We affirm the district court's dismissal of U.S. West's takings claims because they are not ripe for review.

221 F.3d 812
(Cite as: 221 F.3d 812)

United States Court of Appeals,
Fifth Circuit.

SOUTHWESTERN BELL TELEPHONE COMPANY, Plaintiff-Appellant,
v.
WALLER CREEK COMMUNICATIONS, INC.; Public Utility Commission of Texas; Pat Wood, III; Judy Walsh; Brett A. Perlman, Defendants-Appellees.

No. 99-50752.

Aug. 21, 2000.

Incumbent local exchange carrier (ILEC) brought action challenging decision of Texas Public Utilities Commission (PUC) that approved arbitrated interconnection agreement between ILEC and competing local exchange carrier (CLEC). The United States District Court for the Western District of Texas, Lucius D. Bunton, III, J., affirmed PUC decision, and ILEC appealed. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that: (1) district court order was final, appealable order; (2) PUC could, under "most favored nation" provision of the Telecommunications Act, permit CLEC to select certain provisions of existing interconnection agreement between ILEC and another CLEC for its own agreement, without having to accept the entire existing agreement; (3) CLEC could arbitrate "dark fiber" issue; (4) CLEC could opt into "combining elements" provision of existing agreement; and (5) CLEC could arbitrate issues related to Integrated Services Digital Network (ISDN) technology and collocation of switches.

Affirmed.

West Headnotes

[1] **Telecommunications ⇐263**
372k263

District court order affirming decision of Texas Public Utilities Commission (PUC) on two of five counts in action brought by incumbent local exchange carrier (ILEC) that challenged PUC's approval of arbitrated interconnection agreement between ILEC and competing local exchange carrier (CLEC) was final appealable order, where, based on the parties' consent, district court ordered that all parties would be bound by ultimate disposition of pending appeals in other, related cases as to issues raised in other counts of complaint.

[2] **Telecommunications ⇐263**
372k263

Court of Appeals would review de novo interpretation of the Telecommunications Act and Federal Communications Commission (FCC) regulations by state public utilities commission (PUC), but would review PUC's resolution of all other issues under the arbitrary and capricious standard. Communications Act of 1934, § 1 et seq., 47 U.S.C.A. § 151 et seq.

[3] **Telecommunications ⇐267**
372k267

Texas Public Utilities Commission (PUC) could, under "most favored nation" provision of the Telecommunications Act, permit new competing local exchange carrier (CLEC) to select certain provisions of existing interconnection agreement between incumbent local exchange carrier (ILEC) and another CLEC for new CLEC's own agreement with ILEC, without having to accept the entire existing agreement, where CLEC's ability to negotiate or arbitrate new provisions was limited to issues not contemplated by existing agreement. Telecommunications Act of 1996, 47 U.S.C.A. § 252(i); 47 C.F.R. § 51.809.

[4] **Telecommunications ⇐267**
372k267

When a competing local exchange carrier (CLEC) invokes the "most favored nation" provision of the Telecommunications Act, in order to import provisions of an existing interconnection agreement between an incumbent local exchange carrier (ILEC) and another CLEC into its own agreement with the ILEC, the ILEC can require the new CLEC to accept all terms that the ILEC can prove are legitimately related to the desired term. Telecommunications Act of 1996, 47 U.S.C.A. § 252(i); 47 C.F.R. § 51.809.

[5] **Telecommunications ⇐267**
372k267

New competing local exchange carrier (CLEC) that

sought, under Telecommunications Act's "most favored nation" provision, to import certain aspects of existing interconnection agreement between incumbent local exchange carrier (ILEC) and another CLEC into new CLEC's own agreement with ILEC was not required to accept existing agreement's provision for "dark fiber" element, but could arbitrate that issue, since new CLEC sought to use dark fiber for service that was not contemplated by existing agreement. Telecommunications Act of 1996, 47 U.S.C.A. § 252(i); 47 C.F.R. § 51.809.

[6] **Telecommunications ⇐267**
372k267

New competing local exchange carrier (CLEC) could, under Telecommunications Act's "most favored nation" provision, opt into provision of existing interconnection agreement between incumbent local exchange carrier (ILEC) and another CLEC by which ILEC agreed to combine certain network elements for other CLEC, despite claim that ILEC only agreed to that term because it was required to do so by Federal Communications Commission (FCC) rule that had since been vacated, as Telecommunications Act did not forbid such combinations, and vacatur of rule, even if correct, showed only that such arrangements were not required by law. Telecommunications Act of 1996, 47 U.S.C.A. § 252(i); 47 C.F.R. §§ 51.315(c-f), 51.809.

[7] **Telecommunications ⇐267**
372k267

State public utilities commission (PUC) could permit competing local exchange carrier (CLEC) seeking interconnection agreement with incumbent local exchange carrier (ILEC) to arbitrate provisions related to Integrated Services Digital Network (ISDN) technology, although CLEC was adopting other provisions of ILEC's prior agreement with another CLEC under Telecommunications Act's "most favored nation" provision, absent evidence of particular unfairness to ILEC or claim that ISDN issue was legitimately related to other provisions of existing agreement. Telecommunications Act of 1996, 47 U.S.C.A. § 252(i); 47 C.F.R. § 51.809.

[8] **Telecommunications ⇐267**
372k267

State public utilities commission (PUC) could permit competing local exchange carrier (CLEC) seeking interconnection agreement with incumbent local exchange carrier (ILEC) to arbitrate provisions related to virtual collocation of certain switches that ILEC had leased from third party, although CLEC was adopting other provisions of ILEC's prior agreement with another CLEC under Telecommunications Act's "most favored nation" provision, as ILEC had duty to provide collocation on just, reasonable, and nondiscriminatory terms, and there was no evidence of particular unfairness to ILEC or claim that collocation issue was legitimately related to other provisions of existing agreement. Telecommunications Act of 1996, 47 U.S.C.A. § 252(c)(6), (i); 47 C.F.R. § 51.809.

***813** Robert J. Hearon, Jr., Michael Lee Diehl (argued), Graves, Dougherty, Hearon & Moody, Austin, TX, for Plaintiff-Appellant.

***814** Russell M. Blau (argued), Robert V. Zener, Swidler, Berlin, Shereff, Friedman, Washington, DC, for Waller Creek Communications, Inc.

Elizabeth R.B. Sterling (argued), Natural Resources Div., Austin, TX, for Public Utility Com'n of Texas, Wood, Walsh, Curran and Perlman.

Appeal from the United States District Court for the Western District of Texas.

Before REAVLEY, DAVIS and BARKSDALE, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Southwestern Bell Telephone ("SWBT") appeals from the district court's order affirming the Texas Public Utilities Commission's ("PUC") approval of an arbitrated interconnection agreement between SWBT and Waller Creek Communications, Inc. ("Waller"). SWBT contends that the PUC erred in allowing Waller to adopt selected provisions from a prior SWBT agreement with AT&T without further negotiation, while at the same time allowing Waller to arbitrate additional provisions. We find no error in the PUC's arbitration procedures based upon its interpretation of the Telecommunications Act and the FCC's regulations. Nor do we find any error in the substantive decisions of the PUC. We therefore affirm.

I

The Telecommunications Act of 1996 [FN1] was adopted to promote competition by encouraging and facilitating the entry of new telecommunications carriers into local service markets. See AT&T Corp. v. Iowa Utilities Board ("Iowa Utilities II"), 525 U.S. 366, 371-72, 119 S.Ct. 721, 726-27, 142 L.Ed.2d 835 (1999); Reno v. ACLU, 521 U.S. 844, 857-58, 117 S.Ct. 2329, 2337-38, 138 L.Ed.2d 874 (1997). It requires incumbent local exchange carriers ("ILECs") to interconnect with competitors (competing local exchange carriers, or "CLECs") upon request, and to negotiate interconnection agreements in good faith. See 47 U.S.C. §§ 251(a)(1) and (c). If the parties are unable to reach an interconnection agreement through negotiation, either party may request that a state commission (here, the Texas PUC) arbitrate the areas of dispute identified by the parties. See 47 U.S.C. § 252(a)(2), (b). Interconnection agreements, whether reached by negotiation or arbitration, must be presented to the PUC for approval. See 47 U.S.C. § 252(e)(1). When an agreement has been arbitrated, the PUC can reject it only for failure to satisfy the requirements of 47 U.S.C. §§ 251 and 252(d). See 47 U.S.C. § 252(e)(2)(B).

FN1. Pub.L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. § 151 et seq.

Pursuant to the Telecommunications Act, Waller (a CLEC) requested negotiation of an interconnection agreement with SWBT (an ILEC). When negotiations failed to produce an agreement, Waller asked the PUC to arbitrate.

As a basis for its own agreement with SWBT, Waller sought to adopt most of the provisions of an existing interconnection agreement between SWBT and AT&T. In addition, Waller sought to arbitrate some additional provisions regarding services, uses of technology, and business plans not addressed by the AT&T/SWBT agreement. The PUC agreed with Waller that the so-called "most favored nation" ("MFN") clause of the Telecommunications Act, 47 U.S.C. § 252(i), permitted this procedure.

Section 252(i) provides that: "A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."

The FCC regulation interpreting the MFN clause has been termed the "pick and choose" rule, and it provides in relevant part that:

> ***815** An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement....

47 C.F.R. § 51.809(a) (1998).

SWBT argues that the MFN clause may not be invoked to adopt certain provisions of an earlier agreement if the CLEC also seeks to create additional provisions not covered in the earlier agreement. According to SWBT, a CLEC must either adopt all of its desired terms from an existing agreement or negotiate (and, if necessary, arbitrate) every provision of its agreement from scratch.

Although the PUC allowed Waller to arbitrate issues not arbitrated between SWBT and AT&T, it did not allow re-arbitration of terms decided in the prior arbitration. The PUC-approved agreement between Waller and SWBT included some amendments and additions to the AT&T agreement, but most of the AT&T terms were adopted without change. The district court affirmed the PUC's order and dismissed SWBT's complaint with prejudice, finding no error in the PUC's interpretation of the most favored nation provision. It also found that the PUC's actions were supported by substantial evidence and were not arbitrary or capricious. SWBT now appeals.

II

[1] We first address Waller's contention that we lack jurisdiction over this appeal. Waller contends that the district court's order was not final because it dismissed only Counts III and IV of SWBT's five-count complaint. [FN2]

FN2. The complaint alleged that: (1) the Commission erred by treating traffic destined for the Internet as local (Count I); (2) features contained in the AT&T agreement that Waller adopted and retained were unlawful (Count II); (3) the

Commission had applied the MFN provision, 47 U.S.C. § 252(i), improperly (Count III); (4) the modifications Waller was allowed to make to the AT&T agreement were improper (Count IV); and (5) the procedures adopted by the Commission to govern arbitrations,and applied in the Waller arbitration, were erroneous and unlawful (Count V).

Because the legal issues presented in Counts I, II, and V were the same as those presented by SWBT in two separate related cases pending in other courts, [FN3] the parties filed a joint motion to limit issues for briefing and trial to issues raised in Counts III and IV. [FN4] The district court granted the joint motion and ordered that no briefing or argument occur on Counts I, II, and V. [FN5] The agreed order further provided that the outcome of Counts I, II, and V be controlled by the other two pending appeals, and that the parties would be bound thereby. On July 2, 1999, the district court entered the order which is the subject of this appeal, affirming the decision of the PUC and dismissing SWBT's Counts III and IV with prejudice.

FN3. Waller was not a party in either of those appeals. Counts II and V were raised by SWBT in its appeal to this Court in the AT&T proceeding. See Southwestern Bell v. AT&T Communications, No. 98-51005, 99-50060, and 99-50073. Count I raised the same issue presented to this Court in the Time Warner proceeding. See Southwestern Bell Telephone Co. v. Public Utility Comm'n of Texas, 208 F.3d 475 (5th Cir.2000).

FN4. The Agreed Joint Motion to Limit Issues for Briefing and Trial and for Continuance, filed November 13, 1998, provides, in relevant part: "[A]ll parties agree to be bound by the ultimate disposition, including disposition on appeal, of these other decisions, to the extent these other decisions adjudicate the issues raised in Counts I, II, and V of Southwestern Bell's Complaint."

FN5. The Agreed Order, filed November 13, 1998, provides that, as to these counts, "all parties shall be bound by the ultimate disposition, including disposition on appeal, of the decisions in the cases listed below, to the extent these other decisions adjudicate issues raised in Counts I, II and V of Southwestern Bell's Complaint."

***816** Waller argues that the July 2, 1999 order did not constitute a final order as to Counts I, II, and V. Thus, it contends that we lack jurisdiction over this appeal because the district court has not entered an order pursuant to Federal Rule of Civil Procedure 54(b).

We agree with SWBT that we have appellate jurisdiction in this case. Based on the parties' consent, the district court ordered that all parties would be bound by the ultimate disposition of the pending appeals in the other cases as to the issues in Counts I, II, and V. [FN6] The district court's July 1999 order affirmed the PUC's decision, dismissed counts III and IV with prejudice, and entered judgment. Further, it expressly stated that "[a]ll other claims have been disposed pursuant to this Court's Agreed Order, filed November 13, 1998." Nothing remains for the district court to decide in this case, because it has disposed of all counts of SWBT's complaint. If either party disputes the application to this case of any new law created in the other appeals, [FN7] their recourse--under the intervening law clause of their arbitrated agreement--is to the PUC, not to the district court. Thus, we conclude that the district court's order was final and appealable, and we therefore have jurisdiction over this appeal.

FN6. See Agreed Order, filed November 13, 1998.

FN7. The related counts in the AT&T proceeding (corresponding to Counts II and V) were dismissed by SWBT as reflected in this Court's Order of October 21, 1999. The related count in the Time Warner proceeding (corresponding to Count I) has been decided on appeal by this Court. See Southwestern Bell, 208 F.3d 475.

III

A.

[2] We next turn to the merits of SWBT's appeal. In doing so, we review the PUC's interpretation of the Telecommunications Act and the FCC's regulations de novo. Southwestern Bell Telephone Co. v. Public Utility Comm'n of Texas, 208 F.3d 475, 482 (5th Cir.2000); US West Communications v. MFS Intelenet, Inc., 193 F.3d 1112, 1117 (9th Cir.1999); GTE South, Inc. v. Morrison, 199 F.3d 733, 742 (4th Cir.1999). We review the PUC's resolution of all other issues under the "arbitrary and capricious" standard. Id.

B.

[3] The dispute in this case centers around the scope of the "most favored nation" ("MFN") clause of the Telecommunications Act, 47 U.S.C. § 252(i), and the FCC's "pick and choose" rule interpreting that clause. [FN8] The FCC's "pick and choose" rule "allow[s] requesting carriers to 'pick and choose' among individual provisions of other interconnection agreements that have previously been negotiated between an incumbent LEC and other requesting carriers without being required to accept the terms and conditions of the agreements in their entirety." Iowa Utilities Board v. FCC ("Iowa Utilities I"), 120 F.3d 753, 800 (8th Cir.1997) (rev'd in part by 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999)).

FN8. 47 C.F.R. § 51.809 (1998).

The question we face today is whether, under the MFN clause, a CLEC may "pick and choose" certain provisions of an existing agreement without being required to accept the entire agreement, while at the same time seeking to negotiate and/or arbitrate new provisions not contemplated in the existing agreement.

The PUC found that, "[r]egarding new requests based upon new business ideas and arguments, ... a requesting carrier/CLEC may, consistent with [Federal Telecommunications Act] § 252(i), MFN into an existing agreement, then arbitrate new issues and incorporate the results into a new interconnection agreement." [FN9] If new carriers were allowed to opt into a previously- arbitrated agreement while also seeking new terms as to new business ***817** plans, technologies, or services, it would "allow[ ] local competition in Texas to move forward as new ideas are formulated in the competitive marketplace, thereby, building upon the groundwork laid by this Commission, SWBT, and various competitors that have arbitrated their disputes before this Commission." [FN10]

FN9. PUC's Order Approving Interconnection Agreement ("PUC Order"), filed April 28, 1998, at 4.

FN10. Id.

SWBT criticizes the PUC's interpretation of the MFN provision and the FCC's "pick and choose" rule as creating a "super-MFN" or "MFN-plus" approach, and contends that it creates a hybrid procedure not authorized or contemplated by the Telecommunications Act. SWBT argues that the Telecommunications Act creates two mutually exclusive procedures applicable to this case: (1) use of the MFN clause, § 252(i), to create an agreement composed only of terms adopted unchanged from existing agreements; or (2) negotiation and, if necessary, arbitration--under 47 U.S.C. § 252(a)-(c)--of every term of the desired new agreement. Thus, argues SWBT, the MFN clause only allows a CLEC to opt into provisions from another existing SWBT agreement if the CLEC seeks no additions or changes to that agreement. If a CLEC wishes to include in its agreement any new term not found in a prior agreement, it may not invoke the MFN clause for any provision.

Waller contends that the MFN clause was designed to facilitate the completion of new interconnection agreements, without the need for time- consuming and costly re-litigation and re-arbitration of numerous and complex issues already decided by regulatory commissions. [FN11] It urges that-- contrary to Congressional intent--SWBT's interpretation of the MFN provision would discourage innovations and new technologies by requiring CLECs with such plans to start from scratch and negotiate every minute detail of their desired agreement.

FN11. Waller notes that the AT&T arbitration took two years to resolve all disputed issues between the parties, and that there were "thousands of discrete issues" before the PUC. Quoting PUC Order, at 3-4.

Further, Waller argues that the PUC's approach was balanced and fair to both parties. The PUC did not give Waller an unrestricted right to arbitrate new terms; rather, the PUC allowed it to arbitrate only as to new issues not contemplated by the AT&T agreement, recognizing that "not all entrants have the same business plan and may need additional terms and conditions not addressed in an existing agreement." [FN12] [FN13] Waller was not allowed to re- litigate issues already litigated and decided in the AT&T arbitration. [FN14]

FN12. PUC Order, at 4.

FN13. For example, Waller sought "dark fiber" for the purpose of offering Ethernet service for retail customers. Ethernet service was already provided by SWBT to its customers, but was not a service provided for in the AT&T agreement. Thus, the AT&T agreement made dark fiber available only at a higher level of usage ("OC-12") not consistent with Ethernet service, did not include dark fiber access and information rights on a parity with SWBT, and did not include efficient use standards for the use of fiber by the ILEC and its competitors. Thus, the PUC allowed the Waller agreement with SWBT to permit usage of dark fiber below the OC-12 level. See PUC Order at 5. Although this amendment favored Waller, the PUC also amended the AT&T provision in favor of SWBT by shortening the length of "take-back" notice that SWBT must provide to Waller from one year to forty five days. Id. Also, the PUC required that access to dark fiber be reciprocal, such that Waller must make its dark fiber resources available to SWBT on similar terms.

FN14. For example, the PUC refused to allow modification to the reciprocal compensation bill-and-keep period because that issue had already been addressed in the AT&T agreement and arbitration. See PUC Order, at 5- 6.

The Supreme Court's decision in Iowa Utilities II is instructive on this issue. In that case, the issue was whether the MFN clause permitted a CLEC to " 'pick and choose' among individual provisions of other interconnection agreements that have previously been negotiated between an incumbent LEC and other requesting carriers without being required to accept the terms and conditions of the agreements in ***818** their entirety." Iowa Utilities I, 120 F.3d at 800; see also Iowa Utilities II, 525 U.S. at 395-96, 119 S.Ct. at 738.

The Eighth Circuit vacated the "pick and choose" rule, reasoning that it would deter voluntary negotiations favored by the Telecommunications Act by making ILECs reluctant to make concessions on one term in exchange for benefits on another term, knowing that a later CLEC could receive the same concession without having to grant the same benefit. Iowa Utilities I, 120 F.3d at 801.

The Supreme Court reversed and reinstated the "pick and choose" rule, holding that a CLEC who wants to incorporate one term from an existing agreement is not required to accept the entire agreement. Iowa Utilities II, 525 U.S. at 395-96, 119 S.Ct. at 738. Instead, it found that an ILEC can only require a CLEC to accept those terms in an existing agreement that it can prove are "legitimately related" to the desired term. Id. at 396, 119 S.Ct. at 738.

In Iowa Utilities I, as in this case, the ILECs argued that the FCC's "pick and choose" rule was unduly burdensome and would "thwart negotiations" by allowing later entrants "to select the favorable terms of a prior approved agreement without being bound by the corresponding tradeoffs that were made in exchange for the favorable provisions sought by the new entrant." 120 F.3d at 800. The Supreme Court dismissed concerns that the "pick and choose" rule would hinder the negotiation of interconnection agreements, as "a matter eminently within the expertise of the [FCC] and eminently beyond our ken." [FN15] Iowa Utilities II, 525 U.S. at 395- 96, 119 S.Ct. at 738. [FN16]

FN15. Similarly, the district court noted in this case, "Already, inherent in § 252(i)'s language, incumbent carriers like Southwestern Bell must certainly negotiate or arbitrate interconnection agreements with an eye towards what future carriers may do with those provisions. In this case, the PUC specifically found that Waller Creek's unique business ventures required a

modification of the AT&T terms. It was not error to arbitrate these terms into the Waller Creek Agreement. Does this create a 'ratcheting effect'? Perhaps so. But, this is Congress's policy decision to lay the burden upon incumbent carriers. Congress turns the wheel." District Court Order, filed July 2, 1999, at 15-16.

FN16. The Supreme Court also found that the FCC rule tracked the statutory language almost exactly and was therefore a reasonable and the "most readily apparent" interpretation. Id. at 396, 119 S.Ct. at 738.

We also find nothing in the language of the MFN provision that prohibits a CLEC from accepting some provisions of an existing agreement and then negotiating and arbitrating the terms of other provisions it wishes to include in its own agreement in order to implement its own unique business plan, technologies, or services. We agree with the district court that the MFN provision is not a separate and exclusive method of creating an interconnection agreement; rather, it is a tool to facilitate the creation of negotiated or arbitrated agreements. [FN17]

FN17. District Court Order, at 14.

[4] There is nothing inherently unfair in allowing such a procedure. Under the FCC's rules, when a CLEC invokes the MFN provision, an ILEC can require it to "accept all terms that [the ILEC] can prove are 'legitimately related' to the desired term." Iowa Utilities II, 525 U.S. at 396, 119 S.Ct. at 738. Consistent with this principle, the PUC in this case refused to allow Waller to re-arbitrate issues already decided in prior arbitration; rather, it limited arbitration to new issues. On those new issues, a hearing was provided and both parties had opportunity to present evidence and arguments.

The PUC's application of the MFN provision furthers the purpose of the Telecommunications Act to encourage competition and "encourage the rapid deployment of new telecommunications technologies." See 110 Stat. 56 (1996). It does this by efficiently resolving disputes over interconnection agreements and permitting new competitors to enter the marketplace. ***819** The entrance of new players into the marketplace encourages new innovations and technologies to improve services for consumers. In contrast, SWBT's proposed interpretation of the MFN provision would drastically slow the resolution of new interconnection agreements by requiring potential competitors to start negotiations from scratch if they sought to provide any services not found in prior agreements. This position finds no support from Iowa Utilities II and is contrary to the purpose of the Telecommunications Act. We therefore conclude that the PUC committed no error in its application of the MFN provision and the FCC's "pick and choose" rule.

C.

Although SWBT's primary argument on appeal is that the PUC followed an improper "hybrid" procedure in arbitrating the agreement between SWBT and Waller, SWBT also challenges four specific aspects of the agreement approved by the PUC as being unfair, each of which we address below: (1) dark fiber; (2) combining elements; (3) ISDN connection; and (4) switch collocation.

We review the PUC's determinations on these issues under an arbitrary and capricious standard. See Southwestern Bell Telephone Co., 208 F.3d at 482; US West Communications, 193 F.3d at 1117.

1. Dark Fiber

[5] "Dark fiber" refers to fiber-optic cable that has been installed but is not currently in use, as it has not been equipped with electronic devices allowing it to send transmission signals. The AT&T agreement permitted AT&T to access SWBT's dark fiber only for transmission of data at speeds [FN18] of OC-12 and above. The PUC's order in this case allowed Waller to gain access to SWBT's dark fiber for transmission of data at speeds as low as OC-3.

FN18. The term "speeds" refers not to the velocity at which data travels but rather the amount of data that is packaged together to travel simultaneously on the same strand.

SWBT complains that Waller should have been required to adopt the "dark fiber" network element upon the "same terms and conditions" contained in the AT&T agreement. [FN19] Under Iowa Utilities II, 525 U.S. at 396, 119 S.Ct. at 738, an ILEC can

require a CLEC to accept all terms of an existing agreement that the ILEC can prove are "legitimately related" to the terms the CLEC wants to adopt. SWBT contends that the dark fiber provisions in the AT&T agreement are on their face legitimately related to Waller obtaining dark fiber from SWBT.

FN19. Although SWBT raises the dark fiber issue as an example of the unfairness resulting from the "hybrid" procedure used by the PUC, it does not ask this court to invalidate this particular aspect of the approved agreement.

Waller contends that dark fiber is not a single network element, which must be adopted on the same terms and conditions as that of the prior approved agreement, if it is provided for different functions. According to Waller, it did not opt into the dark fiber provisions of the AT&T agreement because it wanted to offer Ethernet service to customers--something not contemplated by the AT&T agreement. [FN20] Because speeds of OC-12 are not consistent with Ethernet service, Waller sought to obtain dark fiber usage at a lower speed. The PUC treated as separate issues dark fiber provided for use at speeds of OC- 12 and dark fiber provided to allow Ethernet service. [FN21]

FN20. SWBT apparently was already providing Ethernet service to its own customers.

FN21. PUC Order, at 4-5.

Waller argues that this "functional" approach to defining "network elements" for purposes of the MFN provision means that a CLEC need not opt into provisions of an existing agreement with no functional relevance to the services the CLEC seeks to provide. This approach, it contends, is in accord with the holding of Iowa Utilities II because provisions with no functional ***820** relevance to the CLEC's services would not be "legitimately related to the desired term."

Waller argues further that, although the PUC allowed Waller to access SWBT dark fiber at speeds of OC-3, it modified the AT&T agreement's dark fiber terms in other ways that favored SWBT rather than Waller. For example, while the AT&T agreement required SWBT to give twelve months notice for the return of dark fiber, the PUC reduced the required "take-back" notice to forty-five days for dark fiber used at levels below OC-12. [FN22] This was done to address concerns that the fiber would be underutilized. [FN23] Also, the PUC required that access to dark fiber be reciprocal, such that Waller must make its dark fiber available to SWBT on similar terms. [FN24]

FN22. PUC Order, at 5.

FN23. Id.

FN24. Id.

We find nothing arbitrary and capricious in the PUC's decision to allow arbitration regarding dark fiber for Ethernet service. Although Waller opted into many terms of the AT&T agreement, it was not required to adopt that agreement in toto. Waller sought arbitration on dark fiber to accommodate its plan to offer Ethernet service--a service not contemplated by the AT&T agreement. In arbitrating the dark fiber terms, the PUC balanced the interests of both parties--as reflected in its provisions regarding take back notice and reciprocity.

2. CombiningElements

[6] Telephone networks are composed of a large number of elements, including switches, signaling systems, wires, fiber optic cables, wiring panels, buildings, and emergency power supplies. In its agreement with AT&T, SWBT agreed to combine elements for AT&T in order to allow AT&T to provide certain services. SWBT argues that it agreed to this term only because an FCC rule required it to do so, and that rule has now been vacated by the Eighth Circuit Court of Appeals. See 47 C.F.R. § 51.315(c)-(f); Iowa Utilities I, 120 F.3d at 801. [FN25] Thus, it contends that the Telecommunications Act does not require it to assemble combinations of elements for a CLEC. SWBT complains that the PUC's decision to allow Waller to use the MFN clause to opt into the combining elements provisions of the AT&T agreement was in error because: (1) the provisions

are now "illegal" and "unlawful;" and (2) Waller was ineligible to use the MFN clause because it chose to arbitrate other issues not contained in the AT&T agreement. Instead, SWBT contends that the PUC should have allowed it to reopen the combining elements issue in arbitration, since Waller was allowed to arbitrate other issues.

FN25. This aspect of the Eighth Circuit's decision was not appealed to the Supreme Court.

The PUC, in response to this argument, argues that the Ninth Circuit--contrary to the Eighth Circuit--upheld 47 C.F.R. § 51.315(c)-(f), finding that a state commission can require an ILEC to combine elements for competitors even if it did not combine such elements for itself. US West Communications, 193 F.3d at 1121. The Ninth Circuit based its decision on the Supreme Court's upholding of an FCC rule requiring an ILEC to combine those network elements for a requesting CLEC that the ILEC already combined for its own use. Id. (citing Iowa Utilities II, 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835).

We find nothing arbitrary and capricious about the PUC's decision to allow Waller to opt into the combining elements provision of the AT&T agreement. The MFN clause of the Telecommunications Act permits Waller to adopt any element of an existing agreement, even if it does not adopt the entire agreement. See Iowa Utilities II, 525 U.S. at 395-96, 119 S.Ct. at 738 (upholding FCC's "pick and choose" rule). The PUC therefore committed no error in refusing to allow SWBT to reopen the issue in arbitration. Waller accepted ***821** the provision without modification under the MFN clause. That clause would be stripped of any meaning if an ILEC could require a CLEC to re-litigate the provision by asserting that the ILEC erred in accepting that provision in an earlier agreement.

Further, there is nothing "illegal" about the provision requiring SWBT to combine network elements for Waller or any other CLEC. Nothing in the Telecommunications Act forbids such combinations. Even if the Eighth Circuit's decision on this issue is correct--which we do not decide today--it does not hold that such arrangements are prohibited; rather, it only holds that they are not required by law.

3. ISDN Connection

[7] Integrated Services Digital Network ("ISDN") technology creates a new method of interconnecting to a network. According to Waller, ISDN technology makes possible new types of technical network configurations and service offerings. SWBT complains that the PUC's "hybrid" procedure allowed Waller to arbitrate provisions related to ISDN, although the AT&T agreement contained no parallel provisions. However, SWBT does not specify any particular unfairness created by allowing Waller to incorporate such provisions into its agreement, nor does it point out any "legitimately related" provisions in the AT&T agreement. Thus, we find nothing arbitrary and capricious in the PUC's determinations.

4. Switch Collocation

[8] At some point during negotiations, Waller requested "virtual collocation," a form of network access, for certain switches that SWBT had leased from Siemens to provide ISDN service. SWBT had decided to discontinue use of the switches and had begun "de-installing" and returning them to Siemens. Waller agreed to buy them from Siemens and requested access from SWBT, but SWBT continued to remove the switches and notified Waller that Waller would have to pay for reinstallation if it wanted access. The PUC ordered that the switches be reinstalled for collocation without imposing undue costs on Waller.

SWBT had a duty under 47 U.S.C. § 251(c)(6) to provide collocation on "just, reasonable, and nondiscriminatory" terms. The district court agreed with the PUC that SWBT's actions were anti-competitive because they would have imposed wasteful costs on Waller. [FN26] It noted that in a similar situation the Supreme Court upheld an FCC rule aimed at "preventing incumbent [local exchange carriers] from 'disconnect[ing] previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants.' " [FN27] The district court found that virtual collocation provisions allowing SWBT to impose wasteful anti-competitive costs on Waller would not be just, reasonable, and nondiscriminatory. [FN28]

FN26. District Court Order, filed July 2, 1999, at 18-19, 23.

FN27. District Court Order, at 22 (quoting Iowa Utilities II, 525 U.S. at 395, 119 S.Ct. at 737).

FN28. District Court Order, at 22.

SWBT complains that Waller was allowed to arbitrate collocation provisions, although no such provisions were contained in the AT&T agreement. Waller contends that the switch collocation issue was never addressed in the AT&T arbitration; therefore, the PUC was consistent in only allowing arbitration of issues not already decided.

Once again, SWBT makes no attempt to explain the particular unfairness created by allowing Waller to incorporate such provisions into its agreement, nor does it point out any "legitimately related" provisions in the AT&T agreement. For this reason, we find nothing arbitrary or capricious in the PUC's determinations, including the finding that SWBT sought to ***822** impose unnecessary costs on Waller. Because 47 U.S.C. § 251(c)(6) imposes on SWBT a duty to provide collocation on just, reasonable, and nondiscriminatory terms, the decision to order collocation without imposing unnecessary costs on Waller is in accordance with the Telecommunications Act.

IV

For the reasons stated above, we AFFIRM the judgment of the district court.