

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of)	
McLeodUSA Telecommunications Services,)	
Inc. dba PAETEC Business Services and)	
LDMI Telecommunications, Inc.,)	
)	
Complainants,)	
)	
v.)	Case No. 11-3407-TP-CSS
)	
AT&T Ohio,)	
)	
Respondent.)	

ENTRY ON REHEARING

The Commission finds:

- (1) On June 3, 2011, McLeodUSA Telecommunications Services, LLC dba PAETEC Business Services and LDMI Telecommunications, Inc. (collectively PAETEC) filed a complaint against AT&T Ohio (AT&T). In the complaint, PAETEC challenges the lawfulness of AT&T's charges for collocation. PAETEC alleged in its complaint that direct current (DC) power is a resource shared by AT&T and other collocators. Because AT&T bases its DC collocation power charges on amps of ordered cable capacity instead of amps of power used, PAETEC concludes that AT&T charges PAETEC for power that PAETEC does not consume. Moreover, because AT&T charges for costs that it does not incur, PAETEC believes that AT&T effectively subsidizes its own DC power costs by overcharging other collocators.
- (2) On October 12, 2011, the Commission issued an entry that granted AT&T's motion to dismiss the complaint.
- (3) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matter determined by the Commission within 30 days after the entry of the order upon the Commission's journal.

- (4) On November 10, 2011, pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code (O.A.C.), PAETEC filed an application for rehearing. In its application for rehearing, PAETEC contends that the Commission's entry is unreasonable and unlawful, and lists the following assignments of error:
- (a) The Commission erred in finding that it lacked authority to review PAETEC's complaint and unreasonably and unlawfully made findings of fact concerning the parties' interconnection agreements.
 - (b) The Commission failed to consider Section 252(i)¹ when making its determination that Section 252(a)(1)² allows AT&T to charge for physical collocation.
 - (c) The Commission erred by dismissing PAETEC's complaint over the requirements of Section 252(e)(2).
- (5) In its argument, PAETEC rejects the notion that its complaint is a challenge to an existing agreement based solely upon unfairness. Instead, PAETEC seeks enforcement of the nondiscriminatory provisions of federal law and the parties' interconnection agreement. In seeking enforcement, PAETEC disagrees with the Commission's finding that it does not have the authority to enforce the nondiscriminatory provisions of federal law and the parties' interconnection agreement. In support of its argument, PAETEC highlights authority issued by the Commission where the Commission stated that it has continuing regulatory oversight concerning interconnection agreements. PAETEC believes that the Commission is obligated to apply this authority to the terms of the parties'

¹ Section 252(i): 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.

² Section 252(a)(1), states in pertinent part: Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standard set forth in subsections (b) and (c) of section 251 of this title....

interconnection agreement. Specifically, PAETEC highlights nondiscrimination provisions in the interconnection agreements that dictate that collocation must be provided on a nondiscriminatory basis. In addition, PAETEC contends that the Commission can draw authority from Section 251(c) of the Telecommunications Act of 1996 (the Act)³ to enforce the nondiscrimination provisions for collocation. PAETEC adds that the interconnection agreements incorporate the provisions of Section 251(c).

- (6) PAETEC contends that the Commission failed to apply the proper standard of review to AT&T's motion to dismiss. By making findings of fact, PAETEC argues that the Commission applied the incorrect standard of review. To act lawfully, according to PAETEC, the Commission should have taken all of PAETEC's allegations as if true.

To PAETEC, it is important that the Commission accept as if true PAETEC's claim that it was not aware until recently that AT&T incurred collocation costs on a usage basis, not a capacity basis. The Commission also should have accepted as if true PAETEC's allegation that AT&T's method of charging for DC power resulted in a great disparity between the charges incurred by PAETEC for DC power and the costs incurred by AT&T for the same DC power.

PAETEC takes issue with the Commission's assertion that capacity-based pricing is reasonable. PAETEC's initial concern is that the Commission appears to rely on an evaluation that occurred years prior to the discrimination that PAETEC discovered. PAETEC also claims that there is no language in the Commission's opinion and order approving collocation rates that would lead to the conclusion that the Commission evaluated capacity-based pricing.⁴ Beyond "reasonable," PAETEC contends that Section 251(c)(6)⁵ of the Act requires

³ Hereinafter all references to Section 251 or 252 shall refer to the Act.

⁴ *In the Matter of the Review of Ameritech Ohio's Economic Costs for Interconnection, Unbundled Network Elements, and Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic*, Case No. 96-922-TP-UNC (Opinion and Order issued March 13, 2003).

⁵ Section 251(c)(6), entitled "Collocation," reads, in pertinent part as follows: "In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:...The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection...."

that terms and conditions of interconnection agreements must also be nondiscriminatory.

- (7) Citing as error that the Commission wrongfully concluded that PAETEC negotiated the collocation terms of its interconnection agreement, PAETEC emphasizes that it did not negotiate collocation terms. Instead, PAETEC emphasizes that it opted into the collocation provisions pursuant to Section 252(i). Because of the Federal Communications Commission's (FCC) pick and choose rules contained in Section 252(i), PAETEC underscores that it had no opportunity to negotiate the terms of collocation. Collocation terms were adopted without revision. Nevertheless, PAETEC points out that the collocation provisions specify that collocation will be provided in a manner that is consistent with Section 251(c)(6). To PAETEC, it is the discriminatory practices of AT&T that are at issue. Similarly, PAETEC emphasizes that the PAETEC 2003/2004 collocation power amendments were not negotiated. They were nonnegotiable form amendments offered by AT&T.
- (8) In short, PAETEC declares that the Commission erred in three ways. First, PAETEC believes that the Commission erred by finding that PAETEC negotiated collocation portions of its interconnection agreements with AT&T. Second, PAETEC accuses the Commission of ignoring that PAETEC has only recently discovered AT&T's collocation cost allocation method. PAETEC states that it could not have negotiated to eliminate nondiscrimination requirements of Section 251(c)(6), because it was not aware of AT&T's conduct. Finally, PAETEC concludes that the Commission erred by not accepting as true that AT&T has engaged in discriminatory conduct. The combination of these errors, according to PAETEC, led to the wrongful dismissal of the complaint.
- (9) In addition to failing to apply the proper standard of review, PAETEC contends that the Commission failed to consider how Section 252(i) impacts Section 252(a)(1). PAETEC seems to acknowledge that Section 252(a)(1) allows parties to override the discrimination prohibitions of Section 251(c)(6) through negotiation. PAETEC, however, emphasizes that it did not negotiate the terms of collocation. Instead, the terms of collocation were entered into through a take-it-or-leave-it form amendment available to all competitive local exchange carriers

(CLECs). With no record of negotiation, PAETEC argues that the Commission could not have concluded that PAETEC waived the protections of Section 251(c)(6). Similarly, PAETEC rejects the idea that it negotiated the amendments to the interconnection agreement. The amendments were presented in an all-or-nothing form. The alternative to choosing the amendment was to continue paying for collocation power based on the capacity of two leads. Owing to a lack of negotiation with respect to the interconnection agreement and the amendment to the interconnection agreement, PAETEC concludes that Section 252(a)(1) has no bearing in this proceeding.

Anticipating from AT&T the argument that Section 252(a)(1) applies if any part of an interconnection agreement is negotiated, PAETEC rejects such a position as being against the plain language of the statute. Moreover, PAETEC believes that nondiscriminatory treatment of carriers and the promotion of competition are the primary goals of 252(a)(1).

- (10) In its reading of Section 252(e)(1) and (2), PAETEC argues that the Commission cannot approve an interconnection agreement if any portion of the agreement discriminates against other carriers or is in violation of the public interest, convenience, and necessity. Section 252(e) reads as follows:

Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject—

- (A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that—

- (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement:
or
 - (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or
- (B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, or the standards set forth in subsection (d) of this section.

PAETEC believes that, under this provision, its allegations of discrimination and overcharging for collocation by AT&T warranted the Commission's investigation. PAETEC regards as unlawful and unreasonable the Commission's failure to abide by its obligations under Section 252(e).

- (11) On November 21, 2011, AT&T filed a memorandum contra. Taking issue with PAETEC's claim that the Commission misunderstood PAETEC's application for rehearing and its authority to review PAETEC's complaint, AT&T counters that it is PAETEC that misunderstands. AT&T clarifies that the Commission did not state that it lacked authority to review the issues raised in the complaint. More accurately, according to AT&T, the Commission stated that it could not, pursuant to contract and federal provisions, consider PAETEC's issues in the context of a complaint case. Moreover, AT&T emphasizes that PAETEC did not claim any breach of the interconnection agreement or the amendments. Both the agreement and the amendments require the type of provisioning and billing that PAETEC labels as discriminatory.

It appears to AT&T that PAETEC wants the Commission to ignore Section 252(a) and focus on Section 251(c)(6). However, AT&T supports the Commission's *in pari materia* reading of the two sections. AT&T adds that the Commission has addressed

collocation power issues in four separate cases, and the Commission has approved the current rate structure. Consequently, AT&T rejects PAETEC's claims of discrimination.

- (12) AT&T rejects PAETEC's claim that the Commission engaged in fact finding and did not apply the proper standard of review. Pointing to language in the Commission's entry, AT&T asserts that the Commission did consider all the facts and applied the proper standard of review. Accepting PAETEC's allegations of unjust and discriminatory charges to be true, the Commission stated that PAETEC is not entitled to relief through a complaint proceeding.
- (13) AT&T is not persuaded by PAETEC's argument that because it adopted an agreement pursuant to Section 252(i) it never negotiated anything and, therefore, cannot be bound under federal law to an allegedly discriminatory collocation provision. AT&T argues that PAETEC, by adopting an agreement pursuant to Section 252(i), in effect, negotiated and agreed to the terms of the agreement. Moreover, AT&T believes that PAETEC should be regarded as standing in the shoes of the underlying CLEC, taking the entire agreement along with any flaws. AT&T points out that, if allowed otherwise, PAETEC would obtain greater rights than the CLEC that was a party to the original negotiated agreement.

AT&T notes that the FCC has established an "all-or-nothing" rule concerning Section 252(i) adoptions. An agreement must be accepted in its entirety employing the same rates, terms, and conditions. Contrary to the FCC's rule, PAETEC proposes the prior "pick-and-choose" rule. According to AT&T, the pick-and-choose rule is no longer permitted in Section 252(i) adoptions.

- (14) AT&T challenges PAETEC's assertion that the Commission cannot approve an interconnection agreement that is discriminatory. AT&T regards the attack as a late attempt at rehearing the Commission's approval of the agreements. As an alternative, AT&T suggests that PAETEC could have negotiated an interconnection agreement or amendment offered by AT&T. AT&T rejects PAETEC's argument that the Commission would not have approved the agreements if it

were made aware of allegedly discriminatory charges. In response, AT&T emphasizes that the Commission did approve the agreements under the automatic approval process established by federal law. AT&T concludes that it is too late to undo the Commission's approval.

- (15) AT&T condemns PAETEC's complaint as an attempt at contract reformation, rejecting PAETEC's characterization that its complaint is an enforcement and contract interpretation case. Again, AT&T emphasizes that there is no allegation that AT&T is in breach of the agreement. AT&T supports the Commission's conclusion that a complaint is not the proper mechanism for considering AT&T's collocation charges. Doing so would violate basic principles of contract law and federal laws governing interconnection agreements.
- (16) Taking into consideration the application for rehearing and the memorandum contra, we conclude that PAETEC has raised no *new facts or arguments* that would give us good cause to grant rehearing. In our entry dismissing the complaint, we explained why it would not be prudent or lawful to address the issues raised by PAETEC in the context of a complaint proceeding. To modify the interconnection agreement in this complaint proceeding would not be consistent with the law and would not make good precedent or policy.
- (17) PAETEC contends that the Commission erred by not applying the correct standard of review. The correct standard of review, according to PAETEC is that the Commission must accept all allegations of fact as true. The Commission, however, applied the standard of review that PAETEC suggests. In Paragraph 34 of our entry, we made it clear that we accepted PAETEC's allegations as true when we stated that "[i]n consideration of the provisions of the Act, we find that AT&T's collocation charges, even if alleged to be unjust or discriminatory, do not entitle PAETEC to relief through a complaint." From this language, there can be no claim that the Commission ignored PAETEC's allegations or the standard of review. The Commission assumed the allegations of discrimination to be true.
- (18) PAETEC declares that the Commission erred by failing to consider Section 252(i) when applying Section 252(a)(1). We do

not read Section 252(i) as a basis for ignoring the implications of Sections 252(a)(1) and 251(c)(6). By claiming that it adopted an agreement pursuant to Section 252(i), PAETEC believes it has avoided the consequences of “negotiation” under Section 252(a)(1). We disagree. By adopting an agreement pursuant to Section 252(i), a CLEC is simply taking advantage of a prior CLEC’s negotiations. An adopting CLEC stands in the place of the CLEC that was a party to the agreement and must accept all terms of the agreement, both favorable and unfavorable. As pointed out by AT&T, to allow a CLEC to challenge a contract term would be contrary to the FCC’s “all-or-nothing” rule and would place the CLEC in a position superior to that of the CLEC that negotiated the agreement. We do not believe that it is the intent of Section 252(i) to give adopting parties an advantage over the original CLEC party by allowing the adopting CLEC the ability to pick and choose terms. We, therefore, deem that adoption pursuant to Section 252(i), in effect, incorporates the negotiation that took place in the underlying agreement. Based upon this principle, it was not necessary to make factual findings concerning whether negotiation actually took place.

- (19) PAETEC asserts Section 252(e) as a basis for invalidating AT&T’s collocation provision. Section 252(e) sets the standards for approval of an interconnection agreement. It bars approval of an agreement that discriminates against nonparty carriers and prohibits approval of agreements that do not promote the public interest, convenience, and necessity. It must be pointed out, however, that Section 252(e) governs approval of an agreement. The complaint concerns an agreement that has already been approved. We, therefore, find PAETEC’s assertion of Section 252(e) to be inapplicable because it is untimely. PAETEC appears to recognize that the Commission cannot apply Section 252(e) retroactively to undo an approved agreement by stating that the Commission would not have approved the agreement had it known about the collocation power arrangement. To undo an approved agreement pursuant to Section 252(e) would exceed the limitations of the statute.
- (20) Overall, we find that PAETEC’s application for rehearing has raised no new facts, issues, or arguments that give us good

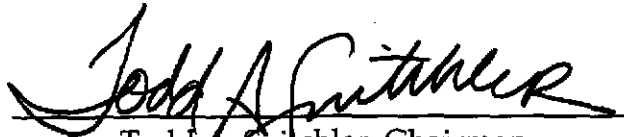
cause to grant rehearing. The application for rehearing should, therefore, be denied in its entirety.


It is, therefore,

ORDERED, That PAETEC's application for rehearing be denied in its entirety. It is, further,

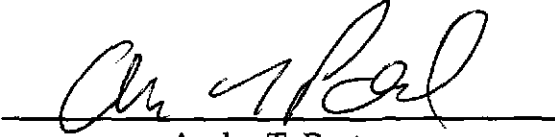
ORDERED, That copies of this entry on rehearing be served upon the parties, their counsel, and all interested persons of record.


THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Snitchler, Chairman


Paul A. Centolella


Steven D. Lesser


Andre T. Porter


Cheryl L. Roberto

LDJ/vrm

Entered in the Journal

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Betty McCauley
Secretary