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

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

MEMORANDUM OPINION AND ORDER

Adopted: April 10, 2003 **Released: April 17, 2003**

By the Commission: Commissioner Abernathy issuing a separate statement.

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we grant in part and deny in part the formal complaint filed by CoreComm Communications, Inc. ("Core") and Z-Tel Communications, Inc. ("Z-Tel") (collectively, "Complainants"), pursuant to section 208 of the Communications Act of 1934, as amended ("Act" or "Communications Act"),[1] against nine

[1] 47 U.S.C. § 208.

incumbent local exchange carriers ("ILECs") and their parent corporation, SBC Communications Inc. ("SBC") (collectively, "Defendants").[2]

2. Core and Z-Tel state in their complaint that they purchased access to the shared transport unbundled network element ("UNE") from Defendants, but that Defendants have refused to allow them to use that UNE to transport intraLATA toll traffic. Core and Z-Tel allege that Defendants' refusal violates sections 201(b), 202(a), 251(c)(1), and 251(c)(3) of the Act,[3] Commission rules 51.309(a), 51.309(b), and 51.313(b),[4] and paragraph 56 of the *SBC/Ameritech Merger Order Conditions*.[5]

3. As discussed below, we grant Core and Z-Tel's claim that Defendants Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc. (collectively, "Ameritech") violated paragraph 56 of the *SBC/Ameritech Merger Order Conditions,* and, in this regard, section 201(b) of the Act. We otherwise deny the complaint.

II. BACKGROUND

A. Statutory and Regulatory Background

4. Section 251(c)(3) of the Act obligates an ILEC "to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis … ."[6] The Commission determined that one of the UNEs to be provided pursuant to section 251(c)(3) is the shared transport UNE, defined as "transmission facilities shared by more than one carrier, including the incumbent LEC, … in the incumbent LEC network."[7]

5. Section 252 of the Act[8] establishes procedures for negotiating, arbitrating, and approving agreements between ILECs and requesting carriers for interconnection, services, and

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2 *See* Formal Complaint, File No. EB-01-MD-017 (filed Aug. 28, 2001) ("Complaint"). Core and Z-Tel filed the Complaint jointly pursuant to Commission rule 1.723(a). 47 C.F.R. § 1.723(a).

3 47 U.S.C. §§ 201(b), 202(a), 252(c)(1), (c)(3).

4 47 C.F. R. §§ 51.309(a), 51.309(b), 51.313(b).

5 *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14712 (1999) ("*SBC/Ameritech Merger Order*" or "*Merger Order*") at Appendix C ("*Conditions*").

6 47 U.S.C. § 251(c)(3).

7 47 C.F. R. § 51.319(d)(1)(iii).

8 47 U.S.C. § 252.

access to UNEs pursuant to section 251. Section 252(a)(1) provides that the parties may negotiate and enter into a binding agreement "without regard to the standards set forth in subsections (b) and (c) of section 251."[9] Section 252(b) provides that either party to section 251 negotiations may petition the state commission to arbitrate any open issues, and section 252(c) provides that the state commission's resolution of arbitrated issues shall "meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251… ."[10] Section 252(i)[11] obligates a local exchange carrier to make available "any interconnection, service, or network element" provided under an approved agreement to which it is a party to any other requesting carrier upon the same terms and conditions as those provided in the agreement. This provision allows a requesting carrier to "opt in" to existing agreements (or specific provisions of existing agreements) between other carriers.

6. Section 201(b) of the Act declares unlawful any unjust or unreasonable "charge, practice, classification, or regulation" by a carrier in connection with communication service.[12] Section 202(a) provides that it shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in connection with like communication service.[13]

7. In the *Merger Order*, the Commission approved the applications filed by SBC and Ameritech Corporation, pursuant to sections 214 and 310 of the Act,[14] for approval to transfer control of certain licenses and lines from Ameritech Corporation to SBC in connection with the companies' proposed merger. The Commission made its approval subject to certain conditions, stating "We conclude that approval … is in the public interest because such approval is subject to significant and enforceable conditions designed to mitigate the potential public interest harms of their merger … ."[15] One condition, contained in paragraph 56 of the *Merger Order Conditions*, requires Ameritech to "offer shared transport … within the Ameritech states under terms and conditions … that are substantially similar to (or more favorable than) the most favorable terms [SWBT] offers to telecommunications carriers in Texas as of August 27, 1999."[16]

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9 47 U.S.C. § 252(a)(1).

10 47 U.S.C. §§ 252(b), 252(c)(1).

11 47 U.S.C. § 252(i).

12 47 U.S.C. § 201(b).

13 47 U.S.C. § 202(a).

14 47 U.S.C. §§ 214, 310.

15 *Merger Order*, 14 FCC Rcd at 14716, ¶ 2.

16 *Merger Order Conditions,* 14 FCC Rcd at 15023-4, ¶ 56.

B. Factual Background

8. The Defendants are ILECs in one or more of 13 states ("13-state region").[17] Core is a competitive local exchange carrier ("CLEC") providing telecommunications services in four states in the 13-state region; Z-Tel is a CLEC providing telecommunications services in eleven states in the 13-state region.[18]

9. Core and Z-Tel purchased the shared transport UNE from Defendants Ameritech, Pacific, and SWBT by "opting in," pursuant to section 252(i) of the Act, to existing Ameritech, Pacific or SWBT interconnection agreements or Statements of Generally Accepted Terms ("Agreements").[19] Core and Z-Tel have not purchased the shared transport UNE from Defendants SNET or Nevada Bell, and do not allege that they are in negotiations to do so.[20]

10. Core and Z-Tel allege that the *Merger Order*, the Act, and Commission rules 51.309 and 51.313 require Defendants to allow them to use the shared transport UNE to transport intraLATA toll traffic.[21] Core and Z-Tel state that they will file a supplemental complaint for damages if successful in establishing liability,[22] and request "that the Commission

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[17] Revised Joint Statement of Stipulated Facts, File No. EB-01-MD-017 (filed Nov. 23, 2001) ("Revised Joint Statement") at 2, ¶¶ 3-4; Defendants' Answer, File No. EB-01-MD-017 (filed Oct. 10, 2001) ("Answer") at 1-2 n.1. The 13-state region is comprised of Arkansas, California, Connecticut, Illinois, Indiana, Kansas, Michigan, Missouri, Nevada, Ohio, Oklahoma, Texas, and Wisconsin. The Ameritech Defendants are ILECs in Illinois, Indiana, Michigan, Ohio, and Wisconsin. The Southern New England Telephone Company ("SNET"), Nevada Bell Telephone Company ("Nevada Bell"), and Pacific Bell Telephone Company ("Pacific") are ILECs in Connecticut, Nevada, and California, respectively. Southwestern Bell Telephone Company ("SWBT") is an ILEC in Arkansas, Kansas, Missouri, Oklahoma, and Texas. Answer at 1-2 n.1.

[18] Revised Joint Statement at 2-3, ¶ 6-7.

[19] Revised Joint Statement at 2-3, ¶¶ 6-7.

[20] Revised Joint Statement at 2, ¶ 4; Letter to Magalie R. Salas, Office of the Secretary, FCC, from Michael H. Hazzard, counsel to Core and Z-Tel, File No. EB-01-MD-017 (filed Sept. 20, 2001) (stating that "neither Core nor Z-Tel provide[s] service in … Connecticut or Nevada," and only "plan eventually to provide service in those jurisdictions") (emphasis added). *See* Revised Joint Statement at 2-3, ¶¶ 6-7; Answer at 1-2 n.1.

[21] Complaint at 14-24, ¶¶ 35-97 (citing 47 U.S.C. §§ 201(b), 202(a), 251(c); 47 C.F.R. §§ 51.309(a), 51.309(b), 51.313(b); *SBC/Ameritech Merger Order*, 14 FCC Rcd 14712). An intraLATA toll call is one that stays within LATA boundaries but that is "between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." 47 U.S.C. § 153(48) (defining "telephone toll service"). Complainants allege that Defendants' refusal to allow them to use the shared transport UNE for intraLATA toll calls has forced them to transport their intraLATA toll traffic to an interexchange carrier. Complaint at ii.

[22] Complaint at 24-25, ¶ 99 (citing 47 C.F.R. § 1.722(b)).

order [Defendants] to permit [Core and Z-Tel] to transport intraLATA toll traffic over the entirety of [Defendants'] shared transport network."[23]

11. In their Answer, Defendants assert that the Commission does not have jurisdiction over Core and Z-Tel's claims,[24] and that, in any event, neither the *Merger Order*, nor the Act, nor the Commission's rules obligates them to allow CLECs to use the shared transport UNE to transport intraLATA toll traffic.[25] In addition, Defendants deny the substance of Core and Z-Tel's claims as to each of the Defendants, although on different grounds depending on the company. First, Defendants deny the claims against SBC, SNET, and Nevada Bell on the ground that Complainants have not purchased shared transport from these Defendants.[26] Defendants deny the claims against SWBT on the ground that SWBT allows Complainants to use shared transport for intraLATA toll.[27] As to the remaining states, Defendants assert that the Ameritech and Pacific Agreements do not make available shared transport for intraLATA toll and that, therefore, Complainants fail to state a claim or have waived their claim.[28]

III. DISCUSSION

A. Jurisdiction

1. *Merger Order Conditions*

12. Defendants assert that the Commission lacks jurisdiction over Core and Z-Tel's claims alleging violations of the *Merger Order*.[29] We disagree. Sections 214(c) and 310(d) of the Act[30] expressly authorize the Commission to impose conditions such as the *Merger Order Conditions*, and section 416(c) of the Act[31] requires compliance with such conditions, thereby creating a cause of action under section 208 for violation of the conditions. Moreover, the Commission has a duty to enforce those conditions to protect the public interest, and has

[23] Complaint at 15, ¶ 41; 16, ¶ 48; 17, ¶ 55; 19, ¶ 63; 20, ¶ 71; 21, ¶ 77; 22, ¶ 83; 23, ¶ 89; 24, ¶ 96.

[24] Answer at 2-5.

[25] Answer, Ex. C (Defendants' Legal Analysis) at 15-55.

[26] Answer at 19, ¶ 21; Revised Joint Statement at 2, ¶ 4.

[27] Answer at 12-13, ¶ 13.

[28] Answer at 3-5.

[29] Answer at 2-5, Ex. C (Defendants' Legal Analysis) at 6-9.

[30] Section 214(c) authorizes the Commission, in resolving a section 214 application, to impose "such terms and conditions as in its judgment the public convenience and necessity may require." 47 U.S.C. § 214(c). Section 310(d) prohibits the transfer of licenses except "upon finding by the Commission that the public interest, convenience, and necessity will be served thereby." 47 U.S.C. § 310(d).

[31] 47 U.S.C. § 416(c).

discharged this duty by adjudicating section 208 complaints alleging violations of merger conditions imposed in orders approving license transfers, as well by initiating forfeiture proceedings on our own motion.[32] Nothing in the *Merger Order* or the Act suggests that the Commission cannot enforce paragraph 56 of the *Merger Order Conditions*. Quite to the contrary, we stated in the *Merger Order* that, "[a]ttaching conditions to a merger without an efficient and judicious enforcement program would impair the Commission's ability to protect the public interest."[33] Section 208 formal complaint proceedings are an integral part of that enforcement process: "Members of the public may pursue a claim [alleging failure to comply with the *Merger Order*] in accordance with either section 207 or 208 of the Act. … In this way, the enforcement plan rightly ensures that consumers will not be forced to bear the costs of SBC/Ameritech's mistakes."[34] Accordingly, we find that we have jurisdiction, pursuant to section 208, to resolve Core and Z-Tel's claims relating to the *Merger Order Conditions*.

2. Section 251 and the FCC's Rules

13. Defendants also assert that the Commission lacks jurisdiction over Core and Z-Tel's claims alleging violations of section 251(c) of the Act, and the Commission's rules implementing section 251(c).[35] According to Defendants, "[t]he 1996 Act makes unmistakably clear … that such disputes are to be determined in the first instance not through [section 208] complaint proceedings before this Commission, but rather through private negotiations, and, if necessary, state commission arbitrations, with Federal district court (not Commission) review of such arbitrations."[36] We find that, while the section 252 process is the primary means of resolving disputes about what should be included in an interconnection agreement, and that failure to invoke that process may in some cases deprive parties of a cause of action, the Commission has jurisdiction to adjudicate Core and Z-Tel's complaint.[37] The language,

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[32] *See, e.g.*, *Global NAPs, Inc. v. Verizon*, Memorandum Opinion and Order, 17 FCC Rcd 4031 (2002) (section 208 complaint); *In the Matter of SBC Communications, Inc., Apparent Liability for Forfeiture*, Forfeiture Order, 17 FCC Rcd 19923, *petition for reconsideration pending* (2002) ("*SBC Forfeiture Order*") (self-initiated forfeiture proceeding); *SBC Communications Inc.*, Order of Forfeiture, 16 FCC Rcd 5535 (EB 2001), *review denied*, Order on Review, 16 FCC Rcd 12306 (2001) (self-initiated forfeiture proceeding).

[33] *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14881, ¶ 406.

[34] *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14885, ¶ 415. *See In the Matter of SBC Communications, Inc., Apparent Liability for Forfeiture, Notice of Apparent Liability,* 17 FCC Rcd 1397 (2002) at ¶ 19 (rejecting SBC's argument that the Commission lacks authority to enforce the *Merger Order Conditions*).

[35] Answer, Ex. C (Defendants' Legal Analysis) at 6; Defendants' Response Brief, File No. EB-01-MD-017 (filed Feb. 12, 2002) ("Defendants' Response Br.") at 2-4.

[36] Answer, Ex. C (Defendants' Legal Analysis) at 6.

[37] Our conclusion here is consistent with our previous statements on this issue. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobil Radio Service Providers,* First Report and Order, 11 FCC Rcd 15499 (1996) (*subsequent history omitted*) ("*Local Competition First Report and Order*"), at 15564, ¶ 126 ("[s]ections 251 and (continued….)

structure, and purpose of the statute all support our conclusion. Our jurisdiction is, of course, concurrent with state jurisdiction to interpret and enforce interconnection agreements.[38]

14. The language of the Communications Act expressly grants the Commission jurisdiction to resolve complaints alleging any violation of the Act. Section 206 makes carriers liable for damages for "any act, matter, or thing in this Act prohibited or declared to be unlawful" and for "omit[ting] to do any act, matter, or thing in this Act required to be done."[39] Similarly, section 208 allows a complaint to be filed by "[a]ny person…complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof… ."[40] Thus, the Commission's complaint jurisdiction has generally been understood to be coextensive with the reach of the substantive provisions at issue. Here, Core and Z-Tel allege violations of the Act, bringing their complaint squarely within the scope of sections 206 and 208.

15. Defendants' jurisdiction arguments rest on the assumption that sections 251 and 252 of the Act implicitly override the broad language of sections 206 and 208. Section 601 of the Telecommunications Act provides, however, that "[t]his Act and the amendments made by this Act shall not be construed to impair, or supersede Federal, State, or local law unless *expressly* so provided."[41] Accordingly, in order for the 1996 Act to supersede the Commission's broad general complaint authority, it would have to do so explicitly. There is, however, no explicit language in sections 251 or 252, or elsewhere in the Act, depriving the Commission of jurisdiction to hear complaints involving the local competition provisions.

16. The structure of the Act also supports the view that the Commission's complaint

(Continued from previous page)
252 do not divest the Commission of its section 208 authority"). *See also TSR Wireless, LLC v. US West Communications, Inc.*, 15 FCC Rcd 11166 (2000) (rejecting defendants' arguments that the Commission lacked jurisdiction to resolve the formal complaints before it), *upheld on appeal on different reasoning*, *Qwest Corp. v. FCC,* 252 F.3d 462 (D.C. Cir. 2001).

38 *See, e.g.*, *BellSouth Telecomm., Inc. v. MCIMetro Access Transmission Services, Inc.*, 317 F.3d 1270 (11th Cir. 2003) (*en banc*); *Southwestern Bell Tel. Co. v. Pub. Util. Comm'n of Texas,* 208 F.3d 475, 479-80 (5th Cir. 2000); *Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Oklahoma, Inc.,* 235 F.3d 493, 496-97 (10th Cir. 2000).

39 47 U.S.C. § 206 (emphasis added).

40 47 U.S.C. § 208 (emphasis added). In 1997, the Eighth Circuit ruled that the Commission lacks authority to enforce sections 251 and 252 of the Act through section 208 complaints, but the Supreme Court reversed, finding that the issue was not ripe for judicial review. *Iowa Utilities Board v. FCC*, 120 F.3d 753, 803-804 (8th Circuit 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366 (1999). In the vacated decision, the Eighth Circuit asserted that "nothing in the Act even suggests that the FCC has the authority to enforce the terms of negotiated or arbitrated agreements or the general provisions of sections 251 and 252." *Iowa Utilities Board v. FCC*, 120 F.3d at 804. We believe, however, that the language of sections 206 through 208 directly grants such authority.

41 47 U.S.C. § 152 note (emphasis added).

authority extends to complaints alleging violations of sections 251 and 252 of the Act. In this regard, in *Iowa Utilities Board*,[42] the Supreme Court examined the structure of the Act in assessing the extent of the Commission's rulemaking authority, and the reasoning of the Court on that issue is equally valid here. The Court held that Congress's general grant of authority to the Commission in section 201(b) of the Act to prescribe rules and regulations "to carry out the provisions of this Act"[43] included a grant of authority to promulgate rules and regulations implementing sections 251 and 252. "Since Congress expressly directed that the 1996 Act, along with its local-competition provisions, be inserted into the Communications Act of 1934," the Court stated, "the Commission's rulemaking authority would seem to extend to implementation of the local-competition provisions."[44] Further, the Court found that it "cannot plausibl[y] [be] assert[ed]" that Congress, in passing the 1996 Act, was unaware of section 201(b), because section 251(i) specifically refers to section 201.[45]

17. It seems equally true that, since Congress inserted the local competition provisions into the existing statute, the complaint provisions of that statute extend to the local competition provisions. And, as with the section 201(b) rulemaking authority, it may not "plausibl[y] [be] assert[ed]" that in passing the 1996 Act, Congress was unaware of section 208. Indeed, Congress was fully aware of section 208, having amended that section in the 1996 Act.[46] Thus, the logic of the Supreme Court on the issue of rulemaking authority leads directly to the conclusion that the Commission's enforcement authority also extends to the local competition provisions of the 1996 Act.[47]

18. We also find that our interpretation furthers the purpose of the Act, to promote competition. In this case, the Complainants allege violations throughout SBC's 13-state region. If the statute were read to exclude complaint authority in this case, the parties would have to litigate the same issue in multiple states. Allowing for the filing of a single complaint under

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42 *Iowa Utilities Board v. FCC*, 525 U.S. 366 (1999).

43 47 U.S.C. § 201(b).

44 *Iowa Utilities Board*, 525 U.S. at 377–78 (citations omitted).

45 *Id.* at 378 n.5.

46 The 1996 Act changed the statutory deadlines for certain section 208 complaints. *See* 47 U.S.C. §208(b)(1). In addition, Congress considered (and then rejected) a proposal to allow the Commission to forbear from section 208. H.R. Rep. No. 104-458, 184 (1996), *reprinted in* 1996 U.S. Code Cong. & Admin. News 1584.

47 The Supreme Court decision in *Iowa Utilities Board* also discredits the Eighth Circuit's conclusion that FCC jurisdiction to adjudicate complaints involving sections 251 and 252 would "provide the FCC with jurisdiction over intrastate communications services in contravention of section 2(b)." *Iowa Utilities Board,* 120 F.3d at 804. The Supreme Court rejected a similar conclusion by the Eighth Circuit that section 2(b) restricted the Commission's local competition rulemaking authority, and the same reasoning should apply to enforcement. *See National Cable & Telecomm. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002) (rejecting arguments that the language and structure of the 1996 Act *implicitly* limit the scope of the general grant of authority to the Commission pursuant to section 224).

section 208 enhances enforcement, and competition, by resolving the issues economically, helping to achieve uniform results, and relieving the parties of the burdens of multistate litigation.

19. In short, we find that we have jurisdiction, pursuant to section 208, to resolve Core and Z-Tel's claims.[48] The fact that we have jurisdiction pursuant to section 208 to resolve a particular complaint does not, of course, necessarily mean that the complainant has a meritorious cause of action. Indeed, as explained below, we find that Z-Tel cannot prevail in this case in California because it failed properly to invoke governing statutory and contractual provisions to amend its existing interconnection agreement.

B. The Merits

1. The Ameritech States

20. Defendants admit that Core and Z-Tel purchased the shared transport UNE from Ameritech, that Core and Z-Tel requested permission to use the UNE to transport intraLATA toll call traffic, and that Ameritech denied those requests.[49] Given these facts, we find that Ameritech has violated the *Merger Order*.[50]

21. As we recently stated, "[t]he plain language of paragraph 56 required [Ameritech] to offer … shared transport for intraLATA toll to CLECs in the Ameritech region as of October

[48] In support of their jurisdictional argument, Defendants cite the Eighth Circuit's ruling in *Iowa Utilities Board*. *See* Answer, Ex. C (Defendants' Legal Analysis) at 7. The decision does not support Defendants' position, however, because the Supreme Court vacated it. *See Iowa Utilities Board*, 525 U.S. at 386. Moreover, as discussed above, the logic of the Supreme Court's opinion supports our conclusion that the Commission has jurisdiction over this dispute. Defendants also cite *Trinko v. Bell Atlantic Corp*., 305 F.3d 89 (2d Cir. 2002), *pet. for cert. granted in part on other grounds sub nom. Verizon Communications, Inc. v. Trinko*, -- S.Ct. --, 2003 WL891459 (Mar., 2003), for the proposition that the Second Circuit has "rejected the notion that a plaintiff can sue an ILEC alleging a violation of section 251 where an ILEC has entered into an interconnection agreement in accordance with section 252." Letter to Secretary, FCC, from SBC, File No. EB-01-MD-017 (filed July 24, 2002). In *Trinko,* a divided panel of the Second Circuit dismissed a suit in federal court alleging that breach of an interconnection agreement violated section 251 of the Act. We need not address *Trinko,* as this case expressly does not involve breach of an agreement, nor does it involve a suit in federal court. We also note that the court did not have before it a cause of action alleging violations of conditions imposed by the Commission pursuant to sections 214(c) and 303(r) of the Act.

[49] Answer at 15-16, ¶¶ 17-18; Revised Joint Statement at 5-6, ¶¶ 19-20, 7 ¶¶ 22-23.

[50] Core and Z-Tel allege that all of the Defendants violated Paragraph 56 of the *Merger Order Conditions*. Complaint at 24, ¶ 95. By its very terms, however, that condition applies only in the five states in which the Ameritech Defendants are ILECs. *Merger Order Conditions*, 14 FCC Rcd at 15023-4, ¶ 56 (requiring that Ameritech "offer shared transport … *within the Ameritech states*…") (emphasis added). We therefore find no violation of the *Merger Order* outside the Ameritech states.

8, 2000."[51] Thus, we reject Defendants' arguments here that the *Merger Order* does not require Ameritech to offer shared transport for intraLATA toll traffic. The *Merger Order* obligates Ameritech to "offer" use of the shared transport UNE for intraLATA toll to CLECs who request such use. To the extent that Ameritech's existing agreements with the Complainants did not make available shared transport for intraLATA toll, the *Merger Order* required Ameritech to agree to the necessary amendments to do so. When Core and Z-Tel asked for this functionality, however, Ameritech just said "no."[52] That refusal self-evidently constituted a failure to offer under paragraph 56.

22. Defendants nevertheless argue that the Complaint fails to state a claim, or that Complainants have waived their right to claim that Ameritech violated the *Merger Order*.[53] According to Defendants, "[u]nder the plain language and structure of the 1996 Act, once parties have concluded an interconnection agreement, the terms of that agreement – not the … Commission's … orders – govern their relations."[54]

23. We reject Defendants' argument, as unsupported by the statute and fundamentally inconsistent with the purpose of the paragraph 56 condition. As Defendants note,[55] under section 252(a)(1), parties are free to negotiate terms that do not meet the requirements of sections 251(b) and (c). The issue before us in this claim, however, is not whether Defendants complied with their obligations under section 251(c), but whether they violated the terms of the *Merger Order*. Paragraph 56 of the *Merger Order Conditions,* which SBC itself proposed,[56] imposes an obligation pursuant to sections 214(c) and 303(r) of the Act. Even if sections 251 and 252 did not obligate Defendants to amend their agreements with Core and Z-Tel to provide for shared transport for intraLATA toll traffic, the *Merger Order* did. Section 252(a)(1) says nothing about overriding requirements beyond those established in section 251, and Defendants have provided no support to lead us to read it that way.

24. Moreover, Defendants' suggested approach would run entirely counter to the basic purpose of the paragraph 56 condition. As Defendants recognize, prior to the *Merger Order*, Ameritech had refused to provide shared transport;[57] indeed, that refusal is what made the

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51 *SBC Forfeiture Order*, 17 FCC Rcd at 19925-6, ¶ 5. *See In the Matter of SBC Communications Inc., Apparent Liability for Forfeiture,* Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 1397 (2002) ("*SBC Notice of Apparent Liability*") at 1399-1406, ¶¶ 7-19.

52 *See, e.g.,* Answer at 16-17, ¶ 18 (admitting that Z-Tel requested negotiation of the shared transport issue in Illinois and Michigan, but that Defendants denied those requests.)

53 Answer at 3-5.

54 Answer, Ex. C (Defendants' Legal Analysis) at 3.

55 Answer, Ex. C (Defendants' Legal Analysis) at 12-13.

56 *Merger Order*, 14 FCC Rcd at 14716, ¶ 1.

57 Answer, Ex. C (Defendants' Legal Analysis) at 39, 44.

paragraph 56 condition necessary. Thus, presumably Ameritech interconnection agreements predating the *Merger Order,* including those with the Complainants in some states, did not provide for shared transport of any kind.[58] Yet if we accepted Defendants' arguments, then those carriers who had been denied shared transport previously would be unable to amend their agreements to take advantage of a merger condition specifically designed to remedy the situation.

25. Paragraph 56 requires Ameritech to offer shared transport for intraLATA toll traffic to carriers who request it. Here it did not do so. Rather than agreeing to make any necessary amendments to its interconnection agreements, Ameritech responded to requests by asserting that it was not required to provide shared transport for intraLATA toll. Accordingly, we find that Ameritech violated paragraph 56 of the *Merger Order Conditions,* and in so doing, engaged in an unjust and unreasonable practice under section 201(b) of the Act.[59]

2. SNET (Connecticut) and Nevada Bell (Nevada)

26. We deny Core and Z-Tel's claims against SNET and Nevada Bell because the record does not support Complainants' allegations against these Defendants. Complainants allege that they purchased the shared transport UNE from Defendants, and that Defendants have violated the Act and Commission rules by refusing to agree to allow Complainants to use that UNE for intraLATA toll calls.[60] The record does not show that SNET and Nevada Bell ever failed to comply with the Commission's UNE rules, however, because Core and Z-Tel have not purchased the shared transport UNE from either SNET or Nevada Bell.[61] Accordingly, we deny the Complaint against Defendants SNET and Nevada Bell because the claims against these Defendants are not supported by the record.

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[58] For example, Core entered into agreements in Illinois and Ohio, and Z-Tel in Ohio, prior to the effective date of paragraph 56 of the *Merger Order Conditions*. Letter dated December 7, 2001 from Christopher M. Heimann, counsel to SBC, to Magalie R. Salas, Office of the Secretary, FCC, File No. EB-01-MD-017 (filed Dec. 7, 2001) (enclosing the Agreements between SBC and Core or Z-Tel).

[59] We do not address Core and Z-Tel's claim that Ameritech violated section 251(c) and relevant implementing rules, because our finding that Ameritech violated the *SBC/Ameritech Merger Order* grants Core and Z-Tel all the relief to which they are entitled against Ameritech.

[60] Complaint at 7, ¶¶ 16-17.

[61] *See* Letter dated September 20, 2001 to Magalie R. Salas, Office of the Secretary, FCC, from Michael H. Hazzard, counsel to Core and Z-Tel, File No. EB-01-MD-017 (filed Sept. 20, 2001) at Attachment (stating that "neither Core nor Z-Tel provide[s] service in … Connecticut or Nevada," and only "plan *eventually* to provide service in those jurisdictions.") (emphasis added). *See also* Revised Joint Statement at 2-3, ¶¶ 6-7; Answer at 1-2 n.1. Moreover, the only count in the Complaint alleging failure to negotiate in good faith asserts that Defendants have failed in good faith to negotiate amendments to *existing* interconnection agreements. Complaint at 17, ¶ 52; 19, ¶ 68.

3. The SWBT States (Arkansas, Kansas, Missouri, Oklahoma, and Texas)

27. We also deny the complaint with respect to the SWBT states. The record shows no violation in Kansas or Oklahoma, because SWBT agreed to allow Z-Tel to use the shared transport UNE for intraLATA toll in Kansas and Oklahoma after Z-Tel opted into SWBT interconnection agreements for those states.[62] Similarly, the record does not establish that SWBT ever denied Core or Z-Tel use of the shared transport UNE for intraLATA toll in Texas, Arkansas or Missouri.[63]

4. Pacific Bell (California)

28. Core and Z-Tel assert that Pacific has violated sections 201(b), 202(a), 251(c)(1), and 251(c)(3) of the Act, and the Commission's unbundling rules, by refusing to provide shared transport for intraLATA toll traffic. We find that Complainants have failed to prove their case, and deny the claims against Pacific.[64]

29. Z-Tel currently has an interconnection agreement with Pacific, entered into through the section 252(i) opt-in process,[65] that includes provisions for the shared transport UNE. Core and Z-Tel do not appear to assert that Z-Tel's current agreement with Pacific is itself in

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[62] *See* Complaint, Tab D, Ex. 13 (Letter dated December 21, 2000 from SBC to Z-Tel) at 1 (referring to the fact that Z-Tel informed SBC on December 5, 2000 that Z-Tel had opted into SWBT interconnection agreements for the states of Kansas and Oklahoma, and agreeing that Z-Tel could use the shared transport UNE for intraLATA toll in those states).

[63] The record establishes that Z-Tel was allowed to use shared transport for intraLATA toll in Arkansas and Missouri by at least August 8, 2001, but contains no evidence that Z-Tel was denied such use prior to that date. S*ee* Complaint, Tab D, Ex. 1 (Letter dated August 8, 2001 from SBC to counsel to Z-Tel) at 3-4 (expressing surprise at Z-Tel's assertion that it was unable to obtain shared transport for intraLATA toll throughout the 13-state region since "Z-Tel can purchase this capability under its current interconnection agreement … in … Arkansas, [and] … Missouri …"). Similarly, the record establishes that Z-Tel was allowed to use shared transport for intraLATA toll calls in Texas by at least November 30, 2000, but contains no evidence that Z-Tel was denied such use prior to that date. *See* Complaint, Tab D, Ex. 10 (Letter from counsel Z-Tel to SWBT dated December 5, 2000) at 1 (discussing the fact that Z-Tel was using the shared transport for intraLATA toll in Texas on November 30, 2000). *See also* Revised Joint Statement at 4, ¶ 11; 6 ¶¶ 19-20 (Complainants stipulate that SWBT provides Z-Tel shared transport for intraLATA toll in Arkansas, Missouri, and Texas.).

[64] Core has no agreement with Pacific, nor does the record indicate that it has ever attempted to negotiate one. We therefore focus solely on Z-Tel, and Pacific's actions with respect to Z-Tel.

[65] We note that if Z-Tel was dissatisfied with the shared transport terms of the Agreement, it need not have opted into them. Under our "pick and choose" rule, 47 C.F. R. § 51.809, Z-Tel had the option of opting into only those portions of the Agreement with which it was satisfied. Z-Tel could then have sought negotiation, and arbitration if necessary, on the shared transport UNE. Z-Tel instead took the approach of opting into an agreement, and then requesting additional rights.

violation of the Act or Commission rules,[66] nor do they assert that Pacific has breached that agreement. Core and Z-Tel effectively admit, for purposes of this complaint, that Z-Tel's agreement with Pacific does not permit the use of shared transport for intraLATA toll traffic.[67] The premise of their complaint is that Pacific violated the Act and Commission rules by refusing to negotiate in good faith and agree to an amendment to permit the use of shared transport for intraLATA toll traffic. The record indicates that Z-Tel asked Pacific to agree to such an amendment by signing a "Memorandum of Understanding,"[68] and that Pacific refused that request.[69] Defendants assert that they are not required to agree to amend their agreement with Z-

[66] Given that Pacific appears to have complied with Z-Tel's opt-in request, we see no basis for any such assertion.

[67] Accordingly, for purposes of this case only, we presume that the agreement between Z-Tel and Pacific does not provide for shared transport for intraLATA toll traffic. The complaint is premised on Pacific's refusal to agree to the desired terms, not on any argument that the interconnection agreement requires Pacific to provide shared transport for intraLATA toll traffic but that Pacific has failed to comply with the agreement. The Complainants do not allege any breach of the agreement, and indeed explicitly disavow any such allegation.

In particular, Defendants allege in support of their Second Affirmative Defense that Complainants "have specifically disavowed any claim that Defendants have violated [the Pacific Agreement] …," Answer at 4, n.9, and that "Complainants voluntarily … adopted [an] existing interconnection agreement[] that do[es] not make available the intraLATA interexchange transmission capability they seek … . " Answer at 4-5. Core and Z-Tel's Reply to Defendants' affirmative defense does not deny Defendants' allegations, and asserts instead that Defendants have violated the Act and Commission rules even if they are in compliance with the Pacific Agreement. Reply at 8-9. Moreover, Complainants informed the Commission that two key legal issues in this proceeding are "whether Complainants have waived any claim that Defendants' conduct is inconsistent with the Act … because Complainants voluntarily … adopted [an] existing interconnection agreement[] that do[es] not make available the intraLATA interexchange transmission capability they seek …, " and "whether Complainants have failed to state a claim upon which relief can be granted given that Complainants … have disavowed any claim that Defendants have violated the terms of [the Pacific] agreement[]…". Revised Joint Statement, Statement of Key Legal Issues at 11-12, ¶¶ 6-7. Finally, Complainants do not allege that Pacific is in breach of the Pacific Agreement, did not file a copy of the agreement until ordered to do so by Commission staff, and have not cited any of the agreement's provisions as providing use of shared transport for intraLATA toll.

We note that SBC has made apparently contradictory statements about what its agreement with Z-Tel requires. In California, Z-Tel opted into the Pacific-AT&T agreement. In this record, Defendants deny that the interconnection agreement "require[s] Defendants to provide shared transport in the manner requested by Complainants." Answer at ¶ 16. In its section 271 application for California, however, SBC argues that under this same agreement, it does have a legal obligation to "offer shared transport for intraLATA toll in accordance with the order of the California PUC in the AT&T Arbitration." Reply Comments of SBC in Support of In-Region InterLATA Relief in California at 62, filed November 4, 2002 in WC Docket No. 02-306, and Shannon Affidavit at ¶ 94, Application by SBC Communications, Inc. et al., for Provision of In-Region, InterLATA Services in California, filed September 20, 2002, in WC Docket No. 02-306. We need not resolve the apparent inconsistency between these positions here, as it would not affect the outcome of this case. If we were to take SBC's most recent statements as true, we would still find in favor of Defendants, since Core and Z-Tel have specifically disavowed any claim of breach of the interconnection agreement.

[68] Revised Joint Statement at 5-6, ¶ 19.

[69] Revised Joint Statement at 6, ¶ 20.

Tel except insofar as Z-Tel has complied with any modification or change of law provision in that agreement.[70]

30. Our rules do "plainly require unbundling of shared transport for use with intraLATA toll traffic."[71] At the same time, however, the obligations created by section 251 and our rules are effectuated through the process established in section 252 – that is, by reaching agreement through negotiation, arbitration, or opt-in.[72] In this case, Z-Tel opted into a pre-existing Pacific interconnection agreement with another party, including its shared transport terms, and then sought to negotiate an amendment to that agreement. We agree with Defendants that Z-Tel is bound by the terms of its agreement, and that therefore any request to amend the interconnection agreement must comply with any modification or change of law provisions.

31. Z-Tel provides no evidence in this record that it complied with any modification or change of law provisions. Furthermore, Z-Tel does not assert that Pacific failed to comply with such provisions; as noted above, Complainants expressly disavow any claim that Pacific has breached the agreement. Under these circumstances, we cannot find that Core and Z-Tel have met their burden of demonstrating that Pacific's refusal to agree to an amendment violated either the substantive requirements of the Act and our rules, or the duty to negotiate in good faith. Accordingly, we deny the claims against Pacific.

32. Core and Z-Tel seek support for their claims in the *Local Competition First Report and Order's* statement that a party may file a section 208 complaint alleging violations of section 251 or Commission rules "even if the [defendant] carrier is in compliance with an agreement approved by the state commission."[73] It is true, as the *Local Competition First Report and Order* states, that there may be circumstances in which a carrier could file (and prevail on) a section 208 complaint, even where the defendant is in compliance with its interconnection agreement. For instance, a carrier could allege a violation of the duty to negotiate in good faith under section 251(c)(1), "even if the [defendant] carrier is in compliance with an agreement approved by the state commission."[74] By choosing to opt into an agreement that Complainants say does not provide shared transport for intraLATA toll traffic, however, Z-Tel effectively waived any right to insist upon different terms. In light of the specific processes established in

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[70] Answer, Ex. C (Defendants' Legal Analysis) at 4.

[71] *See SBC Forfeiture Order*, 17 FCC Rcd at 19932, ¶ 18. Defendants argue that the D.C. Circuit decision in *United States Telecom Assoc'n v. FCC*, 295 F.3d 1326 (D.C. Cir. 2002) prevents the Commission from enforcing this rule against them. Because we rule in favor of Defendants, however, we need not address this argument.

[72] *See, e.g.,* 47 U.S.C. § 251(c)(1) (duty to negotiate in good faith "the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection.")

[73] *Local Competition First Report and Order*, 11 FCC Rcd at 15565, ¶ 127.

[74] *Id.*

section 252 for effectuating the obligations set forth in section 251, Z-Tel cannot rely upon the general section 251 duties to circumvent the terms of its agreement.

33. We also find that Core and Z-Tel fail to establish a cause of action against Pacific pursuant to section 201(b) of the Act.[75] Core and Z-Tel assert no reason, independent of the obligations imposed by section 251(c) and Commission implementing rules, why Pacific's refusal to allow Z-Tel to use shared transport for intraLATA toll is an "unjust or unreasonable" practice within the meaning of section 201(b). Yet, as discussed, the requirements of section 251 and Commission implementing rules do not apply where, as here, the parties have entered into a section 252(a)(1) agreement on different terms.

34. Finally, Core and Z-Tel have not established a cause of action against Pacific pursuant to section 202(a) of the Act.[76] Core and Z-Tel's complaint alleges that "the intraLATA toll service that … *Complainants provide* to their local exchange customers and the intraLATA toll service *SBC provides* to its retail customers are like services… ."[77] Section 202(a) is not concerned with whether the services of two *separate* carriers are "like"; it is concerned with whether two services offered by the *same* carrier are like, and provides that, if the services are "like," the carrier may not unjustly or unreasonably discriminate in their provision.[78]

35. In sum, we deny Core and Z-Tel's claims against Pacific pursuant to sections 201(b), 202(a), and 251(c)(1) and (3) of the Act, as well as the Commission's rules implementing section 251(c).[79]

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[75] Section 201(b) of the Act states, "All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful … ." 47 U.S.C. § 201(b).

[76] Section 202(a) of the Act provides, "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communications service … ." 47 U.S.C. § 202(a).

[77] Complaint at 14, ¶ 37.

[78] *See, e.g.*, *Competitive Telecomm. Ass'n v. FCC*, 998 F.2d 1058, 1064 (D.C. Cir. 1993) ("Section 202(a) is designed to prevent a carrier from granting a discount to one (usually large) user that it would not grant were the same or a 'like' service purchased by another (usually small) customer.")

[79] Core and Z-Tel request "that the Commission order [Defendants] to permit [Core and Z-Tel] to transport intraLATA toll traffic over the entirety of [Defendants'] shared transport network." Complaint at 15 ¶ 41. The *SBC Forfeiture Order* imposes a fine upon SBC for violating Paragraph 56 of the *Merger Order Conditions* by refusing to allow ILECs to use the shared transport UNE for intraLATA toll calls. Moreover, as explained in the *SBC Forfeiture Order*, the Commission's implementing rules require that ILECs allow CLECs to use the shared transport UNE for *any* telecommunications service, including intraLATA toll service, unless the parties agree otherwise pursuant to section 252(a)(1). *See SBC Forfeiture Order*, 17 FCC Rcd at 19928-33, ¶¶ 1-17. Defendants are required by law fully to comply with the Act and our rules, and their failure to do so will result in appropriate enforcement action.

(continued….)

IV. ORDERING CLAUSE

36. Accordingly, IT IS ORDERED, pursuant to sections 201, 202, 208, and 251 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 201, 202, 208, and 251, sections 51.309 and 51.313 of the Commission's rules, 47 C.F.R. §§ 51.309 and 51.313, and Paragraph 56 of the *Merger Order Conditions*, that the instant formal complaint, IS GRANTED to the extent indicated herein, and is in all other respects DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

(Continued from previous page)

SEPARATE STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Core Communications and Z-Tel Communications v. SBC Communications Inc., et al., File No. EB-01-MD-017, Memorandum Opinion and Order

I support the foregoing Order, both in terms of its jurisdictional analysis and its discussion of the merits. I write separately to explain the narrowness of the Commission's jurisdictional holding.

This Order holds that the Commission has concurrent jurisdiction with the state commissions to adjudicate interconnection disputes. I agree that the plain language of the Act compels this conclusion. But I also believe there are significant limitations on the circumstances in which complainants actually will be able to state a claim under section 208 for violations of section 251(c) and the Commission's implementing rules.

First, as the Order acknowledges, the section 252 process of commercial negotiation and arbitration provides the primary means of resolving disputes about what should be included in an interconnection agreement. A party's failure to adhere to the requirements of an interconnection agreement — its change-of-law provisions, for example — likely would foreclose any remedy under section 208. Thus, in this case, the failure of Core Communications and Z-Tel to follow the change-of-law provision in their interconnection agreement in California denied them a cause of action against SBC for failing to provide shared transport for intraLATA toll traffic in California. Order at ¶¶ 28-35.

In addition, if a party *does* invoke the state-commission arbitration process prescribed in section 252, and *loses*, it seems clear that the party's sole remedy is to file an appeal in federal district court under section 252(e)(6) — the party may *not* collaterally attack the state action before the FCC in a section 208 complaint. Permitting a second bite at the apple before the Commission would appear to violate not only the text and structure of section 252, but also black letter law on collateral estoppel. I recognize that the *Local Competition Order* suggested that a party aggrieved by a state arbitration determination may prevail in a section 208 action against a carrier that is in compliance with the state-approved agreement.[80] While the facts of this proceeding do not require the Commission to confront this issue, I believe the *Local Competition Order* was clearly wrong to the extent it suggested that section 208 confers jurisdiction for collateral attacks on state arbitration decisions. I hope that if the Commission is presented with such an effort to supplant the statutory scheme, we squarely hold that our jurisdiction under section 208 does not authorize such actions.

[80] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15564-65 ¶¶ 127-28 (1996).