UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PAETEC COMMUNICATIONS, INC., Plaintiff,	:	
	:	CIVIL ACTION NO.
v.	:	3:03cv1783 (SRU)
	:	
STATE OF CONNECTICUT, DEPARTMENT OF PUBLIC UTILITY CONTROL, ET AL., Defendants.	:	

DECISION AND ORDER

PAETEC Communications, Inc. ("PAETEC"), a telecommunications carrier, has sued the Connecticut Department of Public Utility Control and several of its commissioners (collectively "the DPUC"), claiming principally that the DPUC acted arbitrarily and capriciously when it interpreted PAETEC's interconnection agreement with the Southern New England Telephone Company ("SNET") as not requiring SNET to pay PAETEC reciprocal compensation for the transport and termination of virtual foreign exchange ("virtual FX") traffic. I conclude that the DPUC's interpretation of PAETEC and SNET's interconnection agreement was neither arbitrary nor capricious.

I. Background

A. Reciprocal Compensation

As part of its attempt to allow competitive local exchange carriers ("CLECs") to enter the market for provision of telephone exchange service, a market historically dominated by one state-regulated incumbent local exchange carrier ("ILEC"), the Telecommunications Act of 1996 ("the 1996 Act") imposes on all local exchange carriers "[t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C.

§ 251(b)(5).

Prior to 2001, the Federal Communications Commission ("FCC") had interpreted section 251(b)(5) to apply only to "local" telecommunications traffic, with the delineation of that term being left to state public utility commissions. *See First Report and Order*,[1] 11 F.C.C.R. 15499, 16013 ¶ 1034 (1996). In the FCC's 2001 decision on the question of intercarrier compensation for Internet Service Provider traffic, the FCC concluded that its previous interpretation was incorrect and that, in fact, all telecommunications traffic was subject to section 251(b)(5) compensation with the exception of exchange access, information access, and exchange services for such access. *ISP Remand Order*,[2] 16 F.C.C.R. 9151 ¶ 32-34 (Apr. 27, 2001). Accordingly, the relevant question for the purpose of determining whether section 251(b)(5) covered a particular type of traffic shifted from the question whether the traffic at issue was "local," and was therefore covered, to the question whether the traffic at issue fell into one of the enumerated exception categories, and was therefore exempted.

Under either interpretation of the scope of section 251(b)(5), one type of traffic that has consistently eluded easy categorization is virtual FX traffic. That traffic is the subject of this dispute.

B. Virtual FX

The Public Switched Telephone Network ("PSTN") consists of thousands of switches

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[1] The full name of this decision is *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order.

[2] The full name is *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order.

scattered around the country, each switch connected to a discrete number of customers in a geographical area as well as to other nearby switches. When one customer places a call to another, the switch does one of two things. If the two customers are both connected to the same switch, the switch simply connects the two. If the called customer is on a different switch, the switch routes the call to the remote switch where it is completed.

Calls are routed across the PSTN by means of the North American Numbering Plan ("NANP"). Each terminating point on the PSTN is assigned a ten-digit number, in the format NXX-NXX-XXXX, where N is any digit from 2 to 9, and X is any digit from 0 to 9. The first three digits are the Numbering Plan Area ("NPA"), more commonly called an "area code," which typically designates a specific geographic area.[3] For a given geographic NPA, the second three digits in an NANP number designate the switch or central office to which the customer is connected. This second set of digits is referred to as both the "central office prefix" and "NXX". Finally, for a given NPA and central office prefix – collectively known as an NPA/NXX – the last four digits designate a particular customer's phone line.

Accordingly, at least for geographic NPAs, when a customer dials a ten-digit telephone number, the customer is entering three pieces of routing information. The NPA directs the call to a general geographic area, the NXX directs the call to a particular switch within that geographic area, and the final four digits direct the call to a specific customer on that switch.

State regulations typically do not allow local telecommunications providers to bill each customer directly for the cost of completing that customer's calls. Instead, local carriers must

[3] Not all NPAs are geographic. The most common non-geographic NPAs are the so-called Easily Recognizable Codes, such as 800, 888, and 900.

offer each customer a basic level of service for which the customer pays a flat, non-distance-based fee. This service is commonly known as "local service." The scope of "local service" is a matter of state regulation and, consequently, varies from state to state. Typically, however, a customer will be permitted to make calls to numbers within his own NPA/NXX area, as well as several adjacent NPA/NXX areas – a Local Calling Area ("LCA") – without incurring a distance-based fee. In other words, calls within an LCA are "local" calls, and any other calls are "toll" calls.

As explained above, a customer's NPA/NXX is typically determined by which switch services that customer. Particular switches serve customers in a given geographical area. As a result, because "local" calls are determined by NPA/NXX, a customer can typically make non-toll calls only to other customers who are geographically nearby. Businesses that are physically located in one area, however, often wish to have a local presence in another area, including an NPA/NXX from that area so customers can call the business toll-free. The most direct way to obtain this type of service is to run a private line from the business customer's premises in the one area to the switch in the second area. Thus, although the business would be physically present in one area – or "exchange" – its phone would be directly connected to the switch in another area – a "foreign exchange" – resulting in the assignment of an NPA/NXX from that foreign exchange. Technology now makes it possible to provide "foreign exchange" service without actually running a private line to the foreign exchange. Instead, a provider can simply assign numbers with the foreign exchange NPA/NXX to customers on other exchanges and then program the foreign exchange switch to route calls made to those numbers to the appropriate remote switch. This technology is dubbed "virtual FX."

C. History of PAETEC and SNET

In 1997, SNET, Connecticut's ILEC, entered into an interconnection agreement ("the MFS Agreement") with a CLEC, Worldcom Technologies Inc. f/d/b/a MFS Intelenet of Connecticut. The agreement was approved by the DPUC. With respect to reciprocal compensation, the agreement contained the following provisions:

Definitions - Section 3

> "Local Traffic" are calls within a designated and tariffed "local service area" that offers a subscriber dial access to a prescribed set of contiguous central offices to be determined by each respective provider without the imposition of any additional charge associated with distance.
>
> "Mutual Compensation for Local" is the compensation agreed upon by the Parties for those "Local Service Area" calls that originate on one network and terminate on the other network.

Reciprocal Compensation - Section 4.1.5

> The parties agree that . . . [f]or Local calls, Section 4.1.5.2 "Mutual Compensation for Local" will apply.

Mutual Compensation for Local - Section 4.1.5.2

> "Local Serving Area" is the local service area (also referred to as the local calling area) in which SNET offers subscribers a tariffed dial access service to a prescribed set of contiguous central office prefixes (NXX) without imposition of additional charges associated with distance; i.e. the area in which SNET customers may make calls without the payment of toll charges, and also constitutes what WorldCom determines is a local call from their particular switch as tariffed. This definition will apply for Mutual Compensation of Local regardless of how either Party may hereinafter decide to rate and bill such calls to its end users.

In 1999, when PAETEC wished to enter the Connecticut LEC market, it opted-in to the MFS Agreement with SNET, as permitted by 47 U.S.C. § 252(i), rather than negotiating its own agreement.

In 2002, the DPUC issued a decision ("the FX Decision") holding that FX traffic was not "local" traffic and therefore section 251(b)(5) did not require local exchange carriers to come up with reciprocal compensation arrangements for such traffic.[4] After the DPUC issued the FX Decision, PAETEC filed a motion seeking clarification of the effect of that decision on the MFS Agreement. PAETEC argued that the FX Decision effectively redefined "local service" and therefore could have no effect on the definition of local service used in the MFS Agreement, a definition that PAETEC argued covered virtual FX traffic.

The DPUC agreed that the FX Decision could not override preexisting contractual arrangements, such as the MFS Agreement, but held that the MFS Agreement's section on reciprocal compensation did not cover virtual FX traffic. PAETEC appeals that ruling ("Ruling on Motion No. 5"). SNET has intervened on behalf of the DPUC. All three parties – PAETEC, the DPUC, and SNET – have moved for summary judgment.

II. Discussion

A. Standard of Review

When reviewing a state public utility commission's interpretation of a telecommunications interconnection agreement, a federal court reviews the commission's findings of fact under an "arbitrary and capricious" standard, and it reviews the commission's application of federal law *de novo*. *SNET v. DPUC*, 285 F. Supp. 2d 252 (D. Conn. 2003). Under the arbitrary and capricious standard a court considers (1) whether the decision was based

[4] In a separate proceeding, this court concluded that the FX Decision was inconsistent with federal law. *See SNET v. MCI Worldcom*, 353 F. Supp. 2d 287, 297-98 (D. Conn. 2005). That has no bearing on this case. PAETEC does not argue that section 251(b)(5) mandates reciprocal compensation for virtual FX traffic. Consequently, the only issue presently before the court is the DPUC's interpretation of the MFS Agreement.

on a consideration of the relevant factors, and (2) whether there is a rational connection between the facts found and the choice made. *Id.* at 258. The court may not, however, "supply a reasoned basis for the agency's action that the agency itself has not given." *Id.*

B. The DPUC's Interpretation of the MFS Agreement

The DPUC interpreted the MFS Agreement as not subjecting virtual FX traffic to reciprocal compensation based principally on the facts that (a) the MFS Agreement did not explicitly mention virtual FX traffic[5] and (b) PAETEC had amended its subsequent agreements with SNET to specifically make virtual FX traffic subject to reciprocal compensation.

> Review of the [SNET]/PAETEC interconnection agreements . . . provided similar results, (i.e., no provisions specifically addressing the carriage of traffic over FX facilities for purposes of mutual compensation were made). . . . PAETEC stated that the reason for Agreement2 and the Amendment was to obtain the same type of reciprocal compensation for virtual FX traffic as it received from other incumbent local exchange carriers. In the opinion of the Department, this statement negates the PAETEC argument that Agreement1[, the MFS Agreement,] provided for mutual compensation for virtual FX traffic.

Ruling on Motion No. 5 at 3.[6]

PAETEC contends that, despite not using the term "virtual FX" explicitly, the plain language of the MFS Agreement requires reciprocal compensation for virtual FX traffic. Accordingly, PAETEC argues, the DPUC's contrary conclusion and its resort to external

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[5] PAETEC argues that the term "virtual FX" traffic was not in use at the time the MFS Agreement was drafted. The agreement, however, makes no reference to such traffic, either by the name "virtual FX" or by any other designation.

[6] At several places in its briefs, PAETEC argues that the DPUC did not interpret the MFS Agreement at all. As this quote makes clear, the DPUC certainly reviewed the agreement, and, though I agree with PAETEC that the DPUC's opinion is extremely sparse, its interpretation of the MFS Agreement and its rationale are both discernible from that opinion.

evidence in support of that conclusion were arbitrary and capricious.

I do not agree with PAETEC that the MFS Agreement unambiguously subjects virtual FX calls to reciprocal compensation. Under the MFS Agreement, reciprocal compensation, or "mutual compensation," is required for local calls, defined as "calls within a designated and tariffed 'local service area' that offers a subscriber dial access to a prescribed set of contiguous central offices." PAETEC argues, in essence, that it is clear and unambiguous that the term "local service area" refers not to a geographic area but to a set of central office prefixes, regardless of where the customers assigned numbers with those prefixes actually reside, and therefore calls "within" that area are any calls made between customers assigned numbers with those prefixes.

PAETEC's reading is far from the clear and unambiguous import of the words of the MFS Agreement. The term "local service area" could just as easily be read to refer to the geographic area within which residents are offered a specific toll-free service, and calls "within" that area could be read to refer to calls made between customers residing in that area. That reading is bolstered by the fact that the words "area," "within," and "contiguous" all have, in common usage, geographic connotations. In fact, were PAETEC's reading correct, one would expect Local Service Area to be defined simply as "a prescribed set of central office prefixes to which SNET offers subscribers a tariffed access service," instead of as "*the local service area . . . in which* SNET offers subscribers a tariffed access service to a prescribed set of contiguous central office prefixes." MFS Agreement § 4.1.5.2 (emphasis supplied).

Given that the plain language of the MFS Agreement does not unambiguously subject virtual FX traffic to reciprocal compensation, it was reasonable for the DPUC to rely on extrinsic

evidence of the parties' intent in support of its conclusion that the MFS Agreement did not contemplate reciprocal compensation for virtual FX traffic. Moreover, even without that extrinsic evidence, it was reasonable for the DPUC to read the MFS Agreement's "silen[ce] relative to the payment of mutual compensation for virtual FX traffic" as indicating that the parties did not intend virtual FX traffic to be covered by the definition of "Local Traffic." Consequently, I conclude that the DPUC's interpretation was neither arbitrary nor capricious.

C. PAETEC's Other Arguments

PAETEC makes a host of other arguments that are all without merit and can be disposed of summarily.

PAETEC argues the DPUC's decision misapplied Connecticut contract law. It did not. The MFS Agreement was ambiguous, and Connecticut law permits resort to extrinsic evidence of the parties' intent in such a case. *See TIE Communications, Inc. v. Kopp*, 218 Conn. 281, 288-89 (1991). PAETEC argues that the DPUC's decision impaired PAETEC's contractual rights in violation of Article I, Section 10 of the United States Constitution. It did not. The DPUC simply interpreted an existing contract; it did not impose new, or impair old, obligations. PAETEC argues that the DPUC's interpretation of the MFS Agreement is inconsistent with other courts' and agencies' interpretations of similar agreements. Even if true, that point is irrelevant. The DPUC was required to interpret the MFS Agreement according to Connecticut contract law, not the law of other states. Finally, PAETEC argues that the DPUC's interpretation of the MFS Agreement resulted in disparate treatment of PAETEC compared with other CLECs. There is no evidence in the record to support such an assertion.

III. Conclusion

PAETEC's motion for summary judgment (doc. # 23) is DENIED. The DPUC's motion for summary judgment (doc. # 44) and SNET's motion for summary judgment (doc. # 38) are GRANTED. The clerk shall close the file.

It is so ordered.

Dated at Bridgeport, Connecticut, this 28th day of March 2005.

/s/ Stefan R. Underhill
Stefan R. Underhill
United States District Judge