BEFORE THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS

In the Matter of a General Investigation into Interconnection, Porting, Evolving Technology, and the Impacts on Consumer Choices in Kansas.	))))	Docket No. 20-GIMT-387-GIT

COMMENTS OF INCOMPAS

I. INTRODUCTION

INCOMPAS is the preeminent national industry association for providers of Internet and competitive communications networks, including both wireline and wireless providers in the broadband marketplace. We represent fixed broadband companies, including small local fiber and fixed wireless providers, that provide residential broadband Internet access service ("BIAS"), as well as other mass-market services, such as video programming distribution and voice services in urban, suburban, and rural areas. We also represent companies that are providing business broadband services to schools, libraries, hospitals and clinics, and businesses of all sizes, including regional fiber providers; transit and backbone providers that carry broadband and Internet traffic; online video distributors ("OVDs") which offer video programming over BIAS to consumers, in addition to other online content, such as social media, streaming, cloud services, and voice services. Many of INCOMPAS members are providing and/or relying upon broadband capability, speed and quality. IdeaTek is a member of INCOMPAS.

In the Kansas State Corporation Commission's ("KCC" or "Commission") *Order Opening General Investigation Into Interconnection, Porting, Evolving Technology, And The Impact On Consumer Choices In Kansas* filed on March 12, 2020, the Commission asked a series of questions regarding the issues of interconnection, porting, VoIP technology, and its

impacts on consumers. INCOMPAS provides guidance and clarity to the Commission on these issues from a federal standpoint, and to help the Commission answer the following questions posed in its Order:

- (b) What obligations exist for ILECs or electing carriers to port customers to a VoIP provider? Does an Incumbent LEC or electing carrier have an obligation to ensure it has facilities in place to port numbers to competitive providers?

- (d) When do the obligations imposed under 47 U.S.C. § 251(b)(2) and (c)(2) require direct interconnection with an ILEC or electing carrier? When is an ILEC or electing carrier required to allow indirect interconnection with a VoIP provider?

- (e) Does the technology used by a competitive provider impact an ILEC's or electing carrier's obligations to port customers, complete calls, and/or interconnect under §§ 251 and 252? Does an ILEC's or electing carrier's obligations change when VoIP technology is used? What role, if any, does the technology used by a competitive provider have on its interconnection, porting and call completion obligations?

As we discuss below, federal precedent demonstrates that incumbent local exchange carriers ("ILECs") have an obligation under the Communications Act of 1934, as amended, to indirectly interconnect with competitive carriers.

II. FEDERAL REGULATORY AND JUDICIAL PRECEDENT SHOW THAT COMPETITIVE CARRIERS CAN CHOOSE TO INTERCONNECT INDIRECTLY WITH AND PORT NUMBERS FROM INCUMBENT LOCAL EXCHANGE CARRIERS, WHICH ARE REQUIRED TO ADHERE TO THIS CHOICE REGARDLESS OF THE TECHNOLOGY BEING USED.

Federal regulatory precedent and case law show that the technology used by a provider does not impact an ILEC's obligation to port customers, complete calls, or interconnect. Instead, competitive providers can choose whether to interconnect directly or indirectly, and ILECs must port requests from an interconnected VoIP provider without unnecessary barriers regardless of the technology used by the competitive provider.

(a) ***The technology used by a competitive provider does not impact an ILEC's obligations to port customers, complete calls, or interconnect under federal law.***

On March 1, 2007, the Federal Communications Commission ("FCC" or "Commission") released a *Memorandum Opinion and Order* in response to Time Warner Cable's request for a declaratory ruling that competitive local exchange carriers ("CLECs") may obtain interconnection under section 251 of the Communications Act of 1934 ("the Act") to provide wholesale telecommunications service to VoIP providers.[1] In Time Warner's petition for a declaratory ruling, Time Warner asked the Commission to declare that wholesale telecommunications carriers are entitled to interconnect and exchange traffic with ILECs when providing services to other service providers. This included VoIP service providers pursuant to sections 251(a) and (b) of the Act after the South Carolina and Nebraska State Commissions determined that rural local exchange carriers ("RLECs") were not obligated to enter into interconnection agreements with competitive service providers to the extent that such competitors operated as wholesale providers.

In its Order, the FCC clarified that because the Act does not differentiate between retail and wholesale services when defining "telecommunications carrier" or "telecommunications service," that "telecommunications carriers are entitled to interconnect and exchange traffic with ILECs pursuant to section 251(a) and (b) for the purpose of providing wholesale telecommunications services."[2] It further explained that "a contrary decision would impede the

[1] Time Warning Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers, *Memorandum Opinion and Order*, WC Docket No. 06-55 (rel. Mar. 1, 2007).

[2] *Id.* at ¶ 8.

important development of wholesale telecommunications and facilities-based VoIP competition, as well as broadband deployment policies developed and implemented by the Commission over the last decade, by limiting the ability of wholesale carriers to offer service."[3] The Commission found that "telecommunications service" can be either a wholesale or retail service for purposes of sections 251(a) and (b), and that wholesale telecommunications service providers have the same rights as any telecommunications carrier under those provisions.[4]

The Commission further concluded that the statutory classification of the end-user service, and the classification of VoIP specifically, is not dispositive of the wholesale carrier's rights under section 251.[5] In affirming the rights of wholesale carriers to interconnect and exchange traffic with VoIP providers, the Commission explained that this decision "will spur the development of broadband infrastructure" and that "such wholesale competition and its facilitation of the introduction of new technology holds particular promise for consumers in rural areas."[6] The Order further concluded that interconnection rights under section 251(a) and (b) of a wholesale telecommunications carrier do not depend on the regulatory classification of the retail service offers to the end user.[7] In particular, the Commission rejected the argument that the regulatory status of VoIP is the underlying issue in this matter and clarified that the statutory classification of a third-party provider's VoIP service as an information service or a

[3] *Id.*

[4] *Id.* at ¶ 9.

[5] *Id.*

[6] *Id.* at ¶ 13.

[7] *Id.* at ¶ 5.

telecommunications service is irrelevant to the issue of whether a wholesale provider of telecommunications may seek interconnection under the Act.[8]

As such, this FCC Order helps demonstrate that the technology used by a competitive provider does not impact an ILEC's obligations to interconnect. In particular, the fact that a competitive provider provides VoIP services to its end users is not dispositive of its interconnection rights under section 251. Rather, the KCC should look at which policies will best spur the development of telecommunications and broadband infrastructure and help consumers, particularly in rural areas where consumers may not have any other competitive options.

(b) ***Non-incumbent telecommunications providers can choose whether to interconnect directly or indirectly with the local exchange carrier.***

On August 8, 1996, the FCC released its *First Report and Order* regarding the implementation of the local competition provisions in the Telecommunications Act of 1996 that specifically addresses the rights of non-incumbent telecommunications providers regarding interconnection under section 251(a).[9] In this extensive Order that was published to further explain the then-recently passed Telecommunications Act, the FCC published a section solely dedicated to explaining the duties imposed on telecommunications carriers under section 251(a).[10] In the FCC's Order, the Commission concluded that "if a company provides both telecommunications and information services, it must be classified as a telecommunications carrier for purposes of section 251."[11] The FCC then further explained the obligations of

[8] *Id.*

[9] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, CC Docket No. 96-98 ("*1996 Local Competition Order*").

[10] *Id.* at 465.

[11] *1996 Local Competition Order*, at ¶ 995.

telecommunications carriers regarding interconnecting directly or indirectly with other telecommunications carriers' facilities and stated the following:

> "Regarding the issue of interconnecting 'directly or indirectly' with the facilities of other telecommunications carriers, we conclude that telecommunications carriers should be permitted to provide interconnection pursuant to section 251(a) ***either directly or indirectly***, ***based upon their most efficient technical and economic choices***. The interconnection obligations under section 251(a) differ from the obligations under section 251(c). Unlike section 251(c), which applies to ILECs, ***section 251(a) interconnection applies to all telecommunications carriers including those with no market power.*** Given the lack of market power by telecommunication carriers required to provide interconnection via section 251(a), and the clear language of the statute, we find that indirect connection (*e.g.*, two non-incumbent LECs interconnecting with an incumbent LEC's network) satisfies a telecommunications carrier's duty to interconnect pursuant to section 251(a)."[12]

The Commission went further to clarify this point by stating:

> "Section 251 is clear in imposing different obligations on carriers depending upon their classification (*i.e.*, incumbent LEC, LEC, or telecommunications carrier). For example, section 251(c) specifically imposes obligations upon incumbent LECs to interconnect, upon request, at all technically feasible points. ***This direct interconnection, however, is not required under section 251(a) of all telecommunications carriers.***"[13]

Therefore, according to the FCC, it is the telecommunications carrier that lacks market power that can choose whether to interconnect directly or indirectly, rather than the ILEC. As such, the competitive carrier may request an indirect interconnection and the ILEC must fulfill such a request regardless of whether the incumbent prefers to instead interconnect directly.

Furthermore, helpful case law shows that the competitive carrier has the right to request an indirect interconnection and that the ILEC must fulfill this duty to interconnect. *WWC License, LLC v. Boyle*[14] dealt with a competitive wireless carrier's decision not to directly

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[12] *Id.* at ¶ 997 (emphasis added).

[13] *Id.* (emphasis added).

[14] 459 F.3d 880 (8th Cir. 2006).

interconnect with the ILEC in its local exchange area. In this case, the Court rejected the idea that a direct connection requirement is a condition on local dialing parity. As it explained:

> "The statutory provision that imposes the duty to interconnect networks expressly permits direct or indirect connections. Nothing in the Act suggests that Congress intended a carrier's duties to be altered based on the carrier's election to connect indirectly rather than directly. We believe that if Congress intended there to be consequences attendant to choosing an indirect rather than a direct connection, Congress could have made that fact clear. Accordingly, any distinction we might draw based on the existence of a direct connection would be textually unsupported."[15]

Moreover, in *Atlas Telephone Co. v. Oklahoma Corp. Com'n*,[16] the Court decided a case regarding a dispute that arose from negotiations for interconnection agreements between the rural telephone companies ("RTCs") and Commercial Mobile Radio Services ("CMRS") providers, which are wireless telecommunications carriers. The Court here explained that section 251 establishes a three-tier system of obligations imposed on separate telecommunications entities, namely telecommunications carriers (251(a)), the more limited class of local exchange carriers (251(b)), and the even narrower class of incumbent local exchange carriers ("ILECs") (251(c)). In this case, the RTCs argued that section 251(c)(2) requires that the exchange of local traffic occur at specific, technically feasible points within an RTC's network, and that this duty is also binding on interconnecting carriers due to the reciprocal compensation arrangements required in section 251(b)(5).[17] However, the Court did not find support for this argument in either the text of the statute or the FCC's treatment of the statutory provisions. Instead, the Court found that section 251(c)(2) "imposes a duty on the *ILECs* to provide physical interconnection with

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[15] *Id.* at 892-893.

[16] 400 F.3d 1256 (10th Cir. 2005).

[17] *Id.* at 1265.

requesting carriers at technically feasible points within the RTC's networks."[18] The Court further explained that "this duty *only* extends to ILECs and is *only* triggered on request" and therefore only applies to the more limited class of ILECs rather than also to the requesting carrier.[19] As the Court pointed out, the statute identifies only ILECs as the entities to bear additional burdens under section 251(c). Moreover, the Court found that the RTCs' interpretation of the provision "would operate to thwart the pro-competitive principles underlying the Act."[20]

The Court concluded its decision by stating: "The RTCs interpret 47 U.S.C. § 251(c) as imposing a requirement of direct connection on a competing carrier. We disagree. . . [T]he affirmative duty established in § 251(c) runs solely to the ILEC, and is only triggered on request for direct connection. The physical interconnection contemplated by § 251(c) in no way undermines telecommunications carriers' obligation under section 251(a) to interconnect 'directly or *indirectly*.'"[21] As such, the Court held that "the RTCs' obligation to establish reciprocal compensation arrangements with the CMRS provider in the instant case is not impacted by the presence or absence of a direct connection."[22] Although this Court decision dealt with the indirect interconnection between an RTC and a CMRS provider, its analysis of interconnection can extend to a competitive VoIP provider interconnecting with a local exchange carrier.

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[18] *Id.*

[19] *Id.*

[20] *Id.* at 1266.

[21] *Id.* at 1268.

[22] *Id.*

(c) ***Incumbent local exchange carriers are obligated to port requested numbers to an interconnected VoIP provider without unnecessary barriers.***

On November 8, 2007, the FCC released a *Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking* regarding telephone number requirements for IP-enabled service providers, which clarified VoIP providers' rights and obligations regarding local number portability ("LNP").[23] One of the FCC's goals in publishing this Order was to "help ensure that consumers and competition benefit from LNP as intended by the Act and Commission precedent."[24] First, the FCC extended LNP obligations and numbering administration support obligations to encompass interconnected VoIP services.[25] Second, the FCC clarified that "no entities obligated to provide LNP may obstruct or delay the porting process by demanding from the porting-in entity information in excess of the minimum information needed to validate the customer's request."[26] Instead, the LNP validation should only be based on four fields for simple ports: (1) a 10-digit telephone number; (2) customer account number; (3) 5-digit zip code; and (4) pass code (if applicable).[27]

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[23] Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, *Telephone Number Requirements for IP-Enabled Services Providers, Local Number Portability Porting Interbal and Validation Requirements, IP-Enabled Services, Telephone Number Portability, CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues, Final Regulatory Flexibility Analysis, Number Resource Optimization*, WC Docket Nos. 07-243, 07-244, 04-36, CC Docket Nos. 95-116, 99-200 (rel. Nov. 8, 2007).

[24] *Id.* at ¶ 16.

[25] *Id.*

[26] *Id.*

[27] *Id.*

The FCC's Order focused on the importance and benefits of porting for VoIP providers' customers, including enabling and promoting additional competition, and found that the customers of interconnected VoIP services should receive the benefits of LNP. The FCC found:

> "[B]y requiring interconnected VoIP providers and their numbering partners to ensure that users of interconnected VoIP services have the ability to port their telephone numbers when changing service providers to or from an interconnected VoIP provider, we benefit not only customers but the interconnected VoIP providers themselves. Specifically, the ability of end users to retain their NANP telephone numbers when changing service providers gives customers flexibility in the quality, price, and variety of services they can choose to purchase."[28]

Moreover, allowing for customers to respond to price and service changes without changing their telephone numbers enhances competition, which is a fundamental goal of section 251 of the Act.[29]

The Order further clarified that "both an interconnected VoIP provider and its numbering partner must facilitate a customer's porting request to or from an interconnected VoIP provider."[30] By "facilitate," the Commission meant that the interconnected VoIP provider has an "affirmative legal obligation to take all steps necessary to initiate or allow a port-in or port-out itself or through its numbering partner on behalf of the interconnected VoIP customer (*i.e.*, the "user"), subject to a valid port request, without unreasonable delay or unreasonable procedures that have the effect of delaying or denying porting of the number."[31] The FCC went further to state that "carriers have an obligation under our rules to port-out NANP telephone numbers,

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[28] *Id.* at ¶ 17.

[29] *Id.*

[30] *Id.* at ¶ 32.

[31] *Id.*

upon valid request, for a user that is porting that number for use with an interconnected VoIP service."[32] In addition, the FCC found that "interconnected VoIP providers and their numbering partners may not enter into agreements that would prohibit or unreasonably delay an interconnected VoIP service end user from porting between interconnected VoIP providers, or to or from a wireline carrier or a covered CMRS provider."[33] The FCC focused on the importance of promoting competition and consumer choice and found that because LNP promotes competition and consumer choice, any agreement by interconnected VoIP providers or their numbering partners that prohibits or unreasonably delays porting could undermine the benefits of LNP to consumers. As such, the FCC had a clear goal to ensure competition and ease for the consumer regarding interconnection and number portability, which the KCC should use as guidance when reviewing ILECS' actions.

Moreover, porting obligations also imply that a carrier must have sufficient default interconnection methods available to deliver its customer's traffic to the PSTN at all times, and that the obligation is the responsibility of the originator. VoIP carriers can send their traffic to the terminating side via numerous methods and do not need direct interconnection to fulfill their obligation of call completion. The obligation to port numbers to and from VoIP providers implies that LECs must be prepared to complete calls to all ported numbers, and specifically "to *receive* calls that originate on the public switched telephone network and

[32] *Id.* at ¶ 35.

[33] *Id.* at ¶ 33.

to *terminate* calls to the public switched telephone network."[34] The FCC spoke to this directly in its *Numbering Policies Order*:

> "The interconnected VoIP provider need not demonstrate that the point where it delivers traffic to or accepts traffic from the PSTN is in any particular geographic location so long as it demonstrates that it is ready to provide interconnected VoIP service, which is by definition service that '[p]ermits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.'"[35]

In addition, in the context of rural call completion, the FCC has held that the originating provider has great responsibility in ensuring traffic completion. In fact, the FCC has made clear that "it is an unjust and unreasonable practice in violation of section 201 of the Act for a carrier that knows or should know that it is providing degraded service to certain areas to fail to correct the problem or to fail to ensure that intermediate providers, least-cost routers, or other entities acting for or employed by the carrier are performing adequately."[36]

III. EVEN IF THE STATUTORY LANGUAGE IS AMBIGUOUS, FCC AND JUDICIAL PRECEDENT SHOW THAT THE STATUTE SHOULD BE INTERPRETED TO ENABLE AND PROMOTE COMPETITION.

The regulatory and judicial precedent detailed above show that section 251 is clear in requiring an ILEC to adhere to a competitive carrier's request to indirectly interconnect as well as port its customers' numbers. However, even if the KCC finds the statutory language is not as

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[34] *Numbering Policies for Modern Communications*, WC Docket No. 13-97 (rel. June 22, 2015), at ¶ 37 (emphasis added) (quoting 47 U.S.C. § 153(25) and 47 C.F.R. § 9.3).

[35] *Id.*

[36] *Developing A Unified Intercarrier Compensation Regime, Establishing Just And Reasonable Rates for Local Exchange Carriers*, Declaratory Ruling, CC Docket No. 01-92, WC Docket No. 07-135 (rel. Feb. 6, 2012), at ¶ 12. Notably, this standard was cited in support of a recent Illinois class actions suit alleging malfeasance in completing calls to rural consumers. *Craigville Telephone Co. et al. v. T-Mobile USA, Inc. et al.*, Case No. 1:19-cv-07190, N.D. Ill (filed Nov. 1, 2019), at ¶ 92-93.

clear on its face or through previous interpretations, the Act should be interpreted to enable and promote competition among carriers and the resulting benefits for consumers. The purpose of the Telecommunications Act of 1996 was to dismantle monopolies and enable and promote competition. As such, it is crucial to read and interpret the provisions of this statute through this lens. In *WWC License, LLC,* the Court explained this sentiment when it stated:

> "[A]ll else being equal, if a provision of the Act is vague we are inclined to interpret the provision in a manner that promotes competition. It is undisputed that Congress passed the Act with the intention of eliminating monopolies and fostering competition. We do not suggest that this general intent should be used to impose duties on incumbents beyond those created by Congress. We do, however, believe that this general intent should guide our consideration of competing interpretations of the Act. Such guidance suggests that we should be wary of interpretations that simultaneously expand costs for competitors (such as a requirement for direct connections) and limit burdens on incumbents . . . If a cost is imposed on a competitor, it becomes a barrier to entry and rewards the company who previously benefitted from monopoly protection. Because Congress passed the Act with a clear intent to foster competition, we are more inclined to interpret a vague provision in a manner that reduces barriers to entry."[37]

Furthermore, in the FCC's *1996 Local Competition Order*, the Commission stated the three principal goals established by the telephony provisions of the Act: (1) opening the local exchange and exchange access markets to competitive entry; (2) promoting increased competition in telecommunications markets that are already open to competition; and (3) reforming the system of universal service so that universal service is preserved and advanced as the local exchange and exchange access markets move from monopoly to competition.[38] The FCC foresaw the dynamic nature of telecommunications technology and markets, and in regards to sections 251 and 252 it specifically cautioned that "it will be necessary over time to review

[37] *WWC License, LLC.*, 459 F.3d at 890.

[38] *1996 Local Competition Order*, at ¶ 3.

proactively and adjust these rules to ensure both that the statute's mandate of competition is effectuated and enforced[.]"[39]

The current KCC proceeding is this moment that the FCC warned about, and the KCC has the opportunity to interpret the provisions of the Act consistent with the FCC and the courts, and in a way that promotes and ensures that competition is effected and enforced. Such an interpretation and clarification would ensure that competitive carriers have the ability to indirectly interconnect with and port customer numbers from an ILEC. Doing so would allow for competitive carriers to act in the best interest of their customers rather than at the will of incumbent carriers. The KCC should reject attempts by incumbent carriers to impose unnecessary costs on competitive carriers to the detriment of competition and consumers. Instead, the KCC should order incumbent carriers to indirectly interconnect with requesting competitive carriers.

Respectfully submitted,

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[39] *Id.* at ¶ 6.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the above and foregoing was sent via electronic mail this 15th day of June, 2020, addressed to:

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