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An "Open Issue": The Fifth Circuit’s Misleading Interpretation of an Arbitrator’s Jurisdiction Under the Telecommunications Act of 1996

Coserv Limited Liability Corporation v. Southwestern Bell Telephone Company

I. INTRODUCTION

In Coserv v. Southwestern Bell Telephone Co., the Fifth Circuit addressed the meaning of “open issues” as related to an arbitrator’s jurisdiction to decide issues not agreed upon in voluntary negotiations under provisions of the Telecommunications Act of 1996 (Telecom Act) that ensure competition in local telephone service markets. Through statutory interpretation, the Fifth Circuit gave arbitrators almost limitless jurisdiction. In doing so, the Fifth Circuit cited to the Eleventh Circuit to support its view, but failed to acknowledge the opposite holding by the Eleventh Circuit on the same issue.

II. FACTS AND HOLDING

Telecommunications carriers Coserv Limited Liability Corporation (Coserv), a competitive local exchange carrier (CLEC), subject to the provisions of the Telecommunications Act of 1996 (Telecom Act), and Southwestern Bell Telephone Company (Southwestern Bell), an incumbent local exchange carrier

1. 350 F.3d 482 (5th Cir. 2003).
2. Telecommunications is the “transmission, between or among points, specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43) (2000). Telecommunications carriers provide such telecommunication service. Id. § 153(44).
3. Coserv provided telecommunications service and operated telecommunication facilities located at approximately fifty-eight apartment complexes in Texas. Coserv, 350 F.3d at 485. In each apartment complex, Coserv maintains telecommunications equipment in a central telephone equipment room. Id. Tenants in these apartment complexes may choose another a telecommunications provider. Id. Coserv engages in "compensated access" where the other providers may bring a network connection to a single point in its central equipment room. Id. Coserv charges these other providers a one-time connection fee and a monthly service fee for the connection and use of its facilities. Id.
4. Local exchange carriers are engaged in providing telephone exchange service or exchange access. 47 U.S.C. § 153(26). Local exchange carriers are divided into groups: competitive local exchange carriers and incumbent local exchange carriers. Richard W. Wiley et al., Communications Law 2003: Changes and Challenges, 769 PRACTISING L. INST. 509, 587 (2003). New entrants to a local telephone service market already dominated by another local exchange carrier are commonly referred to as "competitive local exchange carriers" or “CLECs.” Id.
6. Southwestern Bell provides telecommunication services and operates telecommunications equipment throughout Texas. Coserv, 350 F.3d at 485.
(ILEC) subject to the Telecom Act, entered into voluntary negotiations concerning Coserv’s request for an interconnection agreement governing Southwestern Bell’s statutory duties under section 251 of the Telecom Act. In addition to the section 251 duties, Coserv sought to negotiate its proposed rates, terms, and conditions for allowing Southwestern Bell to connect and use the facilities at apartment complexes where Coserv operated telecommunications facilities. After Southwestern Bell refused to negotiate the additional rates, terms, and conditions for connection at the apartment complexes and the parties failed to reach agreement, Coserv filed a petition with the Texas Public Utilities Commission (PUC) for arbitration.

The Texas PUC refused to consider the issue of rates, terms, and conditions for connection at apartment complexes due to lack of jurisdiction, on the grounds that arbitration was required only with respect to section 251 duties. Coserv then challenged the Texas PUC’s decision by bringing an action in the U.S. District Court for the Western District of Texas. The district court agreed with the Texas PUC, and Coserv appealed to the Fifth Circuit Court of Appeals.

The Fifth Circuit Court of Appeals held that non-section 251 issues can become subject to the compulsory arbitration provision of the Telecom Act only if such issues are voluntarily negotiated by telecommunications providers.

7. The dominant monopolistic local exchange carrier is referred to as an “incumbent local exchange carrier” or an “ILEC.” Wiley, supra note 4, at 587. Regional “Bell operating companies,” such as Southwestern Bell are a common example of ILECs targeted by the Telecom Act’s provisions to break up the monopoly of ILECs. See Reza Dibadj, Competitive Debacle In Local Telephony: Is the 1996 Telecommunications Act to Blame?, 81 WASH. U. L.Q. 1 (2003).

8. ILECs are required to negotiate with CLECs regarding the particular terms and conditions of interconnection agreements between the two companies. 47 U.S.C. § 251(c)(1). In section 252, the Act specifies the procedures an ILEC must meet to fulfill its duty. 47 U.S.C. § 252 (2000).


10. In addition to the duty to interconnect, the Act also imposed specific duties for local exchange carriers including: ban on prohibiting resale of telephone service, requirement that customers who switch carriers be allowed to keep their telephone numbers, prohibition on discriminatory access requirements, a duty to share access to rights of way for cable or wire, and a duty to enter “reciprocal compensation arrangements for the transport and termination of telecommunications.” 47 U.S.C. § 251(b)(1-5). Congress also imposed additional duties on ILECs including a duty to negotiate, to interconnect with potential competitors, to provide “nondiscriminatory access to network elements on an unbundled basis,” to offer wholesale rates for resale and not to prohibit resale, to provide notice of changes in transmission and routing, and to provide “for physical collocation of equipment necessary for interconnection or access to unbundled network elements.” Id. § 251(c). Congress further realized that such provisions would require extensive cooperation among telecommunications providers, and so required an ILEC to enter negotiations with a CLEC whenever interconnection was requested. Id. § 251(c)(1).

11. Coserv, 350 F.3d 482, 484-85 (5th Cir. 2003).

12. Id. at 486.

13. Id.

14. Id.

15. Id.

16. Id.

17. Id. at 484.
III. LEGAL BACKGROUND

In 1974, the Department of Justice brought an antitrust suit against AT&T that would ultimately re-shape the telecommunications industry. At that time AT&T, through its subsidiary corporations, directly owned or controlled eighty percent of the local and long-distance market. Seven years of pre-trial litigation and an eleven month trial resulted in a Modification of Final Judgment settlement that required AT&T to divest its local telephone companies into seven independent holding companies, known as Regional Bell Operating Companies (RBOC). Each of the seven RBOCs enjoyed a local monopoly power protected by the settlement. Even though the settlement resulted in competition in the long-distance market, monopolies continued to dominate the local telecommunications market. As a result, a person or business could choose from a variety of long-distance providers, such as Sprint, AT&T, or MCI, but might only have one option for local telephone service.

In 1996, Congress acted to stimulate local competition in telecommunication markets largely dominated by the well-established monopolistic telephone companies with regional offices (RBOCs). By passing the Telecommunications Act of 1996 (Telecom Act), Congress sought to quickly establish competition in local telecommunication markets by making it easier for competitors of well-established local telephone companies to enter the local market. To help make it easier for competitors, the Telecom Act requires the well-established monopolistic local telephone companies, commonly referred to as ILECs, to share elements of their networks with competitors, commonly referred to as CLECs, by an interconnection of competing networks. This involves the leasing of unbundled network elements, or reselling of the ILEC’s retail services. The statutory duties required of an ILEC are specifically detailed in section 251(c).

20. In the Telecom Act, Congress grouped the RBOCs with other incumbent telecommunications carriers referring to them as ILECs. Id. at 262.
21. Id.
22. AT&T, 552 F. Supp. at 224.
23. Romer, supra note 19, at 258 (using an example from Denver, Colorado).
24. See Steven Semeraro, The Antitrust-Telecom Connection, 40 SAN DIEGO L. REV. 555, 556, 562 (2003). Prior to the Telecom Act, monopolies were allowed in local telecommunication markets based on a rationale that “having more than one local service provider would lead to unwarranted duplication in the physical connecting wires through which local calls are transmitted.” Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atlantic Corp., 294 F.3d 307, 312 (2d Cir. 2002).
26. Interconnection between ILECs and CLECs is the “keystone to bringing competition” since without it “competition cannot possibly flourish.” Romer, supra note 19, at 258 (citing H.R. Conf. Rep. No. 104-458, at 118 (1996)). Without interconnection, a customer who subscribed to a CLEC could not call a person who subscribed to the ILEC or any other company. Id.
27. These duties include a duty to negotiate, to interconnect with potential competitors, to provide “nondiscriminatory access to network elements on an unbundled basis,” to offer wholesale rates for resale and not to prohibit resale, to provide notice of changes in transmission and routing, and a duty to provide “for physical collocation of equipment necessary for interconnection or access to unbundled network elements.” 47 U.S.C. § 251(c) (2000).
a local market, including both CLECs and ILECs, is bound by general affirmative duties detailed in section 251(b). 28

Congress recognized that the new section 251 duties would require a high level of cooperation among ILECs and CLECs. 29 With regard to the most important duty of interconnection, Congress knew that ILECs lacked any incentive to offer interconnection with a competitor. To counteract this, Congress specifically required ILECs to enter into good faith negotiations with a CLEC upon a request for interconnection. 30 Under the Telecom Act, ILECs are clearly required to negotiate about section 251 duties in compliance with the procedures for negotiation that are set forth in section 252. In addition to the section 251 duties, the parties may also choose to negotiate issues not listed in section 251. If the negotiations result in a partial agreement or no agreement at all, either the ILEC or CLEC can seek compulsory arbitration from state regulators concerning any “open issues.” 31

Neither the statute nor the legislative history define “open issues.” However, the phrase was recently addressed by federal courts in the District of Minnesota and the Northern District of Florida. In U.S. West Communications, Inc. v. Minnesota Public Utilities Commission, 32 the District Court of Minnesota held that “open issues” are limited to those that were the subject of voluntary negotiations as opposed to issues brought up during the arbitration proceedings for the first time. 33

The Northern District of Florida questioned whether “open issues” includes those duties that were the subject of negotiations, but were not based on section 251. In MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., 34 MCI, a CLEC, and BellSouth, an ILEC, entered into negotiations concerning an interconnection agreement that would govern MCI’s use of BellSouth’s network. 35 However, in the negotiations, BellSouth refused MCI’s request to include a compensation mechanism for breaches of the interconnection agreement. 36

Acting as arbitrator, the Florida Public Service Commission (PSC) refused to hear anything regarding MCI’s requested compensation mechanism because it concluded that it lacked authority to do so under the Telecom Act. 37 The Florida PSC determined that the Telecom Act authorized arbitration only on “the items enumerated to be arbitrated in sections 251 and 252 of the Act, and matters necessary to implement those items” and that a compensation mechanism was not such a matter. 38 The district court in MCI rejected the Florida PSC’s “narrow reading”

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28. These binding duties include a ban on prohibiting resale of telephone service, a requirement that customers who switch carriers be allowed to keep their telephone numbers, a prohibition on discriminatory access requirements, a duty to share access to rights of way for cable or wire, and a duty to enter “reciprocal compensation arrangements for the transport and termination of telecommunications.” Id. § 251(b).
29. See, e.g., Romer, supra note 19, at 262-64.
31. Id. § 252(b)(1). The state regulator is required to resolve any “open issues” within nine months of the initial request. Id. § 252(b)(4)(C).
33. Id. at 985.
34. 112 F. Supp. 2d. 1286 (D. Fla. 2000), aff’d, 298 F.3d 1269 (11th Cir. 2002).
35. Id. at 1289.
36. Id. at 1297.
37. Id.
38. Id.
of the Telecom Act's arbitration provisions. Through statutory interpretation, the district court found that the "open issues" term "makes clear that the right to arbitrate is as broad as the freedom to agree; any issue on which a party unsuccessfully seeks agreement may be submitted to arbitration." The district court explained:

MCI and BellSouth obviously would have been free to enter a voluntary agreement that included a compensation mechanism for breaches of the agreement. Nothing in the Telecommunications Act would have foreclosed any such voluntary agreement. Neither the Florida Commission nor BellSouth contend otherwise. BellSouth chose, however, not to agree voluntarily to any such provision. That was BellSouth's right. When BellSouth determined not to agree, this became an "open issue" that MCI was entitled to submit to arbitration. When the Florida Commission chose to act as the arbitrator in this matter, its obligation was to resolve "each issue set forth in the petition and the response, if any." 47 U.S.C. § 252(b)(4)(C). MCI's request for a compensation provision was such an issue. This was, therefore, an issue the Florida Commission was obligated to resolve.

On appeal, the Eleventh Circuit agreed with the district court's ultimate resolution in MCI, but on different grounds. The Eleventh Circuit found the compensation mechanism MCI requested actually fell within the Florida PSC's authority under the statutory language of 47 U.S.C. § 252(b)(4)(C), to resolve issues that impose "conditions . . . required to implement the agreement." The Eleventh Circuit stated that compensation mechanisms such as MCI's clearly fall within those types of conditions. With regards to the district court's interpretation, the Eleventh Circuit found that it was "too broad."

If the [Florida PSC] must arbitrate any issue raised by a moving party, then there is effectively no limit on what subjects the incumbent must negotiate. This is contrary to the scheme and text of that statute, which lists only a limited number of issues on which incumbents are mandated to negotiate.

39. Id.
40. Id.
41. Id.
42. MCI Telecomms., Corp. v. Bellsouth Telecommns., Inc., 298 F.3d 1269, 1274 (11th Cir. 2002).
43. Id. (internal quotes omitted).
44. Id.
45. Id.
46. Id. (emphasis added).
Thus, the Eleventh Circuit determined that the Florida PSC’s only obligation is to decide issues that the parties are obligated to negotiate in sections 251(b) and (c).\textsuperscript{47}

**IV. INSTANT DECISION**

In *Coserv v. Southwestern Bell Telephone*, the Fifth Circuit Court of Appeals had to decide the meaning of “open issues” as related to an arbitrator’s jurisdiction to arbitrate issues not agreed upon in negotiation.\textsuperscript{48} The Texas Public Utilities Commission (PUC), the chosen arbitrator in *Coserv*, limited the subject of compulsory arbitration to only certain section 251 duties.\textsuperscript{49} Because of this limitation, the Texas PUC refused to consider the “open issue” of compensated access.\textsuperscript{50} Since compensated access is not a section 251 duty, the Texas PUC found it did not have jurisdiction to hear the argument.\textsuperscript{51}

The court disagreed with the Texas PUC’s narrow reading of the “any open issue clause” from section 252.\textsuperscript{52} Instead, the court held that non-section 251 issues can become subject to the compulsory arbitration provision of the Telecom Act.\textsuperscript{53} The court focused its opinion on the structure of the Telecom Act itself.\textsuperscript{54} For instance, the court observed that nothing in section 252(b)(1) limits parties from trying to make an agreement regarding a duty not listed in section 251(b) and (c).\textsuperscript{55} The court further found the “open-ended voluntary negotiations provision in section 252(a)(1)” showed that “Congress clearly contemplated that sophisticated telecommunications carriers subject to the [Telecom] Act might choose to [voluntarily negotiate non-section 251 issues]” which could easily become subject to arbitration.\textsuperscript{56} By combining voluntary negotiations with section 252(b)(1)’s fall back compulsory arbitration, the court stated that Congress knew that non-section 251 issues could be subject to compulsory arbitration if negotiations failed.\textsuperscript{57}

However, the court did not give arbitrators unlimited jurisdiction.\textsuperscript{58} While the court held jurisdiction is not limited by the terms of section 251, the court clearly stated that jurisdiction is limited by the actions of parties involved in the voluntary negotiations.\textsuperscript{59} Thus, the court concluded that issues could only be arbitrated if they were the subject of voluntary negotiations.\textsuperscript{60} The court reasoned that this limitation would prevent a petitioning party from using the compulsory arbitration

\textsuperscript{47.} Id. \textit{See also In re Sprint-Florida, Inc., No. 030296-TP, PSC-03-1014-PCO-TP, 2003 WL 22149256, at *12 (Fla. Sept. 9, 2003) (applying the Eleventh Circuit’s standards as set forth in \textit{MCI} in an arbitration of unresolved issues from a negotiation between AT&T Communications of the Southern States and Sprint-Florida, Inc. for an interconnection agreement pursuant to the Telecom Act).}

\textsuperscript{48.} *Coserv*, 350 F.3d 482, 486 (5th Cir. 2003).

\textsuperscript{49.} Id.

\textsuperscript{50.} Id.

\textsuperscript{51.} Id. at 487.

\textsuperscript{52.} Id. at 487.

\textsuperscript{53.} Id.

\textsuperscript{54.} Id. at 488.

\textsuperscript{55.} Id. at 487.

\textsuperscript{56.} Id.

\textsuperscript{57.} Id.

\textsuperscript{58.} \textit{See id.}

\textsuperscript{59.} Id.

\textsuperscript{60.} Id.
provision to arbitrate issues that were not the subject of the initial voluntary negotiations. 61

The court pointed out that its interpretation and holding that the jurisdiction of the Texas PUC as arbitrator is only limited by the actions of the parties in conducting voluntary negotiations "comport[ed] with the views of other courts that have reviewed this provision in similar contexts." 62 The court mentioned two "supporting" court decisions in a brief footnote. 63 In the footnote, the court cited to U.S. West Communications, Inc. v. Minnesota Public Utilities Commission, 64 where a federal district court in Minnesota held that "open issues" are limited to those that were the subject of voluntary negotiations. 65 Most notably, the court also cited to the Eleventh Circuit's decision in MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., 66 to support its holding. 67 In the footnote, the court relied on the Eleventh Circuit's "[rejection of] a district court's conclusion that the compulsory arbitration provision was so broad as to include any issue raised by the petitioning party." 68

V. COMMENT

In Coserv, the Fifth Circuit's use of the Eleventh Circuit's decision in MCI to support its holding—that non-section 251 issues can become subject to compulsory arbitration—is misleading. In fact, the Fifth Circuit's holding in Coserv is opposite to the Eleventh Circuit's holding in MCI.

The Eleventh Circuit in MCI held that an arbitrator does not have jurisdiction to hear non-section 251 issues. However, the Fifth Circuit in Coserv held than an arbitrator does have jurisdiction to hear non-section 251 issues as long as the non-251 issues were brought up during a prior voluntary negotiation between the ILEC and the CLEC. Yet the Fifth Circuit failed to acknowledge the split. Instead, it seems the Fifth Circuit took one sentence from the Eleventh Circuit's opinion in MCI in an attempt to support its own view of an arbitrator's jurisdiction.

By comparing the opinions of Coserv and MCI, it is reasonable to believe that the Fifth Circuit was misleading by taking one sentence from the MCI opinion out of context. The MCI opinion refers to the Eleventh Circuit's "[rejection] of [the] district court's conclusion that the compulsory arbitration provision was so broad as to include any issue raised by the petitioning party." 69 The Fifth Circuit apparently relies on this to support its holding that non-section 251 issues can only be arbitrated if they were the subject of the previous voluntary negotiation between the CLEC and the ILEC. But when the Eleventh Circuit in MCI wrote, "[I]f the [arbiter] must arbitrate any issue raised by a moving party, then there is effectively no limit on what subjects the [ILEC] must negotiate," 70 it was supporting its

61. Id.
62. Id. at 487-88 (emphasis added).
63. Id. at 488 n.15.
65. Id. at 985.
66. MCI, 298 F.3d 1269 (11th Cir. 2002).
67. Coserv, 350 F.3d 482, 488 n.15 (5th Cir. 2003).
68. Id. at 488.
69. Id. at 488 n.15.
70. MCI, 298 F.3d at 1274.
holding that non-section 251 issues cannot be subject to arbitration at all, regardless of whether or not they were the subject of the voluntary negotiation between the CLEC and the ILEC. Thus, "any issue" is used to mean issues outside section 251, not issues left unaddressed in voluntary negotiations. This is clear because the next sentence relied upon by MCI states: "This [referring to an arbitrator's obligation to arbitrate "any issue"] is contrary to the scheme and text of that statute, which lists only a small number of issues on which [ILECs] are mandated to negotiate." 71

Furthermore, the district court in MCI held that non-section 251 issues not agreed upon in voluntary negotiations may be submitted for compulsory arbitration. 72 The district court's holding is the same as the Eleventh Circuit's holding. Yet, the Fifth Circuit clearly rejected the district court's holding.

While both statutory interpretations have merit, the Eleventh Circuit's interpretation stands out for practical purposes. As was argued to the Eleventh Circuit, if a state commission, who is acting as arbitrator, was required to arbitrate every disagreement that the ILEC and CLEC could not resolve in their voluntary negotiations, they would be embroiled "in the resolution of countless, endless squabbles not essential or even relevant to the interconnection requirements of the Telecom Act, and preclude the timely, efficient arbitration of those issues the Telecom Act does require." 73 And the Eleventh Circuit's approach, exemplified by MCI, still provides for the enforcement and compensation provisions to fall within an arbitrator's jurisdiction under section 252(b)(4)(c), which requires the arbitrator to determine issues required to implement the agreement between an ILEC and a CLEC. 74 Thus, the Eleventh Circuit's approach allows for the most workable and efficient process for an ILEC and CLEC to reach agreement, which complies with the overall purpose of the Telecom Act.

VI. CONCLUSION

In Coserv, the Fifth Circuit relied on its own statutory interpretation of the Telecom Act to support its conclusion that non-section 251 issues can become subject to the compulsory arbitration provision of the Telecom Act as long as such issues are voluntarily negotiated by telecommunication providers. In doing so, the Fifth Circuit brushed aside the Eleventh Circuit's contrary opinion and created a split between the Fifth and Eleventh Circuit.

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71. Id.
72. Id. at 1291.
74. See MCI, 298 F.3d at 1274.