

Communications Daily

Tatel Floats Remand Possibility

Judges Question FCC Basis for Denying GLC Rural CLEC Exemption in AT&T Dispute

TOP NEWS | 4 Apr 2016 | Ref: 1604010024

Federal judges questioned an FCC rationale for subjecting Great Lakes Comnet to CLEC rate regulation when the agency sided with AT&T in an intercarrier compensation dispute (Great Lakes Comnet v. FCC, No. 15-1064). Judges David Tatel and Sri Srinivasan of the U.S. Court of Appeals for the D.C. Circuit pressed FCC and AT&T attorneys at oral argument Friday to explain the basis and scope of the commission's determination that GLC was ineligible for a "rural CLEC" exemption from the rate regulation. Both judges suggested there was a discrepancy in the FCC's reasoning and Tatel at one point asked if the court should remand the case to the agency for further consideration, though he didn't clarify his intentions.

GLC challenged a March 2015 FCC decision that found GLC overbilled AT&T's long-distance arm for interstate access services by filing a tariff that violated a CLEC "benchmark" rule requiring its access charges to be no higher than a competing ILECs. GLC said in its brief it provided tandem switching and transport services and wasn't a "competitive local exchange carrier" under the regulatory definition, but even if it were, it was exempted from the rate regulation as a rural CLEC, among other reasons (see 1508190065). In its brief, the FCC said it reasonably concluded GLC was a CLEC and was ineligible for the rural exemption because it "admits that its service falls within large urban areas" (see 1510060033). GLC recently filed for Chapter 11 bankruptcy protection and says AT&T owes it \$24 million in unpaid access charges (see 1602040034), and GLC attorney Michael Oliva said Friday other long-distance companies owe a similar amount.

The three-judge D.C. Circuit panel focused on whether GLC is a rural CLEC exempt from the rate regulation. Oliva said it could not be excluded from being considered a rural CLEC just because its customers make calls to, and receive calls from, people in urban areas. For example, he said, if Sheriff Andy Taylor in the fictional town of Mayberry on the Andy Griffith Show receives a call from state police in Raleigh, North Carolina, that doesn't mean the rural exemption doesn't apply to the telco serving Mayberry and Mt. Pilot. All three judges probed the nuances of the definitional arguments, but when Judge Robert Wilkins asked about the rural status of "intermediary carriers" such as GLC, Oliva said the FCC's legal interpretation would mean that no intermediary carrier would qualify for the rural exemption. He said the commission could try to adopt such an exclusion through a new rulemaking, but he said that policy is not in the FCC order.

Srinivasan quickly asked the FCC attorney Thaila Sundaresan about the rural CLEC issue when it was her time to speak, and specifically about Oliva's assertion regarding intermediary carriers. Sundaresan acknowledged that no intermediary carrier could qualify as a rural CLEC, prompting Srinivasan to probe her for the FCC's written explanation. When Sundaresan pointed to language in the order that allowed parties "to deduce" intermediary carriers didn't qualify, Tatel interjected

that the order "doesn't say that." Sundaresan said, "Not explicitly." Tatel replied, "It doesn't say it at all." Srinivasan also said that the order didn't actually say that intermediary carriers couldn't qualify for the rural exemption, and that the suggestive language was "buried in a footnote."

Tatel said the court has to review the order before it, and the FCC's explanation in the order was that the decision turned on the location of GLC's facilities and whether it didn't serve any urban end users. He asked if the case should be sent back to the FCC for further consideration.

Sundaresan suggested it should not be and noted the FCC order's language explaining the rule. But Srinivasan said the order "didn't go on" to make clear the "upshot": that no intermediary carrier can qualify for the rural exemption. The order and legal brief complicated things further by talking about the location of GLC's facilities as a factor, he said. Questioned by Tatel, Sundaresan said the FCC had not decided a "statute of limitations" question regarding company exposure.

AT&T attorney Michael Hunseder delved into further detailed arguments supporting the FCC's finding that his client was being overcharged by GLC. But Tatel questioned where judges could find the analysis; Hunseder cited certain provisions. Tatel again cited FCC explanations that GLC's nonrural status flowed from the location of some facilities, in Chicago, and the location of end users in urban areas. That sounds like a decision on "this particular CLEC," not intermediary carriers in general, he said.

Srinivasan said that intermediary carriers would look to the FCC order for guidance on an important rate question, and in the order it "seems to matter" where facilities are located. But now it "turns out" intermediary carriers are totally barred from using the rural exemption, he said. As a simple analytical matter, he suggested, the FCC could have made clear the "threshold" issue of intermediary carrier ineligibility for the rural exemption before looking at carrier particulars.

As an aside, Tatel questioned Oliva at one point about 800-number payment issues that could affect Tatel's cellphone use. Tatel said he was asking the questions because of the difficulty of understanding telecom complexities. Tatel, who has reviewed many FCC orders, is on the panel reviewing its 2015 net neutrality decisions. At the net neutrality oral argument in December (see 1512040058), Tatel several times referenced his personal cellphone, which he said was not a smartphone, in pressing attorneys to help him better understand certain interconnection issues.

written by David Kaut

Copyright© 2016 by Warren Communications News, Inc. Reproduction or retransmission in any form, without written permission, is a violation of Federal Statute (17 USC101 et seq.).