The Commonwealth of Massachusetts

DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

D.T.C./D.T.E. 04-33-D September 14, 2007

Petition of Verizon New England, Inc. d/b/a Verizon Massachusetts for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order

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ORDER ON MOTION FOR PARTIAL RECONSIDERATION BY VERIZON NEW ENGLAND, INC. D/B/A VERIZON MASSACHUSETTS

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ORDER ON MOTION FOR PARTIAL RECONSIDERATION BY VERIZON NEW ENGLAND, INC. D/B/A VERIZON MASSACHUSETTS

I. INTRODUCTION

On July 14, 2005, December 16, 2005, and May 5, 2006, respectively, the Department of Telecommunications and Cable, formerly the Department of Telecommunications and Energy,[1] ("Department") issued its Arbitration Order, Reconsideration Order, and Compliance Order in D.T.E. 04-33 (collectively, "Arbitration Orders"). Pursuant to the Arbitration Orders, Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon"), Conversent Communications of Massachusetts, Inc., DSLnet Communications, LLC, RCN-BecoCom LLC, RCN Telecom Services of Massachusetts, Inc, and the Competitive Carrier Group[2] jointly filed on May 26, 2006 an Amendment ("Joint Amendment") for the Department's review and approval.

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[1] Pursuant to legislation filed by the Governor of the Commonwealth of Massachusetts, Deval L. Patrick, to overhaul the structure of utility regulation in Massachusetts, the Department ceased to exist as of April 11, 2007. See An Act Reorganizing the Governor's Cabinet and Certain Executive Agencies of the Executive Department, House Bill 2034 ("Reorganization Plan"). The Reorganization Plan was approved by the Legislature. See Chapter 19 of the Acts and Resolves of 2007. In the Department of Telecommunications and Energy's place, two distinct agencies were created: (1) the Department of Telecommunications and Cable, which handles telecommunications and cable issues; and, (2) the Department of Public Utilities, which handles gas, electric, siting, pipeline, water and transportation issues. As a result of the Reorganization Plan, all telecommunications and cable proceedings that were initiated prior to and still ongoing as of April 11, 2007, such as the current proceeding, are identified with "D.T.C./D.T.E."

[2] The Competitive Carrier Group includes: A.R.C. Networks Inc. d/b/a InfoHighway Communications; DIECA Communications Inc. d/b/a Covad Communications Company; and XO Communications Services, Inc. (formerly XO Massachusetts, Inc. and Allegiance Telecom of Massachusetts, Inc.).

Additionally, on June 8, 2006, Verizon filed revisions to M.D.T.E. Tariff No. 17 ("Tariff No. 17") in compliance with the Department's Arbitration Orders. On June 21, 2006, RCN-BecoCom LLC and RCN Telecom Services of Massachusetts, Inc., jointly ("RCN"), CTC Communications Corporation, DIECA Communications, Inc. d/b/a Covad Communications, and Conversent Communications of Massachusetts, Inc. ("Conversent") filed comments on Verizon's proposed tariff revisions. Verizon, Conversent and XO Communications Services, Inc. submitted reply comments on June 26, 2006.

On July 7, 2006, the Department issued its Letter Order in which the Department approved the Joint Amendment and made findings on Verizon's proposed revisions to Tariff No. 17. On July 27, 2006, Verizon filed a Motion for Partial Reconsideration of one aspect of the Letter Order. RCN filed its opposition to Verizon's Motion on August 17, 2006. On October 4, 2006, RCN submitted supplemental authority to support its opposition to Verizon's Motion.

II. STANDARD OF REVIEW

The Department's Procedural Rule, 220 C.M.R. § 1.11(10), authorizes a party to file a motion for reconsideration within twenty days of service of a final Department order. The Department's policy on reconsideration is well settled. Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995); Boston Edison

Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A at 2 (1987).

A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). The Department has denied reconsideration when the request rests on an issue or updated information presented for the first time in the motion for reconsideration. Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987); but see Western Massachusetts Electric Company, D.P.U. 86-280-A at 16-18 (1987). Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence. Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989); Boston Edison Company, D.P.U. 1350-A at 5 (1983).

Clarification of previously issued orders may be granted when an order is silent as to the disposition of a specific issue requiring determination in the order, or when the order contains language that is sufficiently ambiguous to leave doubt as to its meaning. Boston Edison Company, D.P.U. 92-1A-B at 4 (1993); Whitinsville Water Company, D.P.U. 89-67-A at 1-2 (1989). Clarification does not involve reexamining the record for the purpose of substantively modifying a decision. Boston Edison Company, D.P.U. 90-335-A

at 3 (1992), citing Fitchburg Gas & Electric Light Company, D.P.U. 18296/18297, at 2 (1976).

III. ACCESS TO ENTRANCE FACILITIES

A. Background

In the Triennial Review Order[3] and the Triennial Review Remand Order[4] the Federal Communications Commission ("FCC") removed the obligation of incumbent local exchange carriers ("ILECs") to provision entrance facilities[5] as an unbundled network element ("UNE") at TELRIC-based rates pursuant to § 251(c)(3) of the Telecommunications Act of 1996 ("Act"). Section 251(c)(3) of the Act requires ILECs to provide requesting

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[3] In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket 96-98; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147; Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 01-36, at ¶ 366 (rel. Aug. 21, 2003) ("Triennial Review Order"), vacated in part and remanded in part by United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004).

[4] In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313; Review of the Section 251 Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Order on Remand, FCC 04-290, at ¶ 140 (rel. Feb. 4, 2005) ("Triennial Review Remand Order").

[5] An entrance facility is a transmission facility that connects competitive local exchange carrier ("CLEC") networks with ILEC networks. Triennial Review Remand Order at ¶ 136. Entrance facilities can also be used to provide a final link in a dedicated transmission path between a CLEC customer and a CLEC switch. See Southwestern Bell Telephone, L.P., d/b/a SBC Missouri v. Missouri Public Service Commission, et al., No. 4:05-CV-1264 CAS, 2006 W.L. 3103677, at *13 (E.D. Missouri) (Sept. 14, 2006).

telecommunications carriers with unbundled access to network elements at TELRIC rates. 47 U.S.C. § 251(c)(3).

Notwithstanding the de-listing of entrance facilities as a UNE, in its comments on Verizon's proposed tariff revisions, RCN argued that the FCC explicitly preserved the right of CLECs to use ILEC dedicated transport (which includes dedicated interoffice transport and entrance facilities) for interconnection purposes under § 251(c)(2) of the Act (RCN Compliance Tariff Comments at 2). Section 251(c)(2) of the Act requires access to "the facilities and equipment" used by competing carriers for "interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access." 47 U.S.C. § 251(c)(2). RCN therefore urged the Department to require Verizon to clarify in the tariff that entrance facilities remained available for interconnection purposes under § 251(c)(2) of the Act (id.).

In reply to RCN, Verizon noted that the Department rejected the CLECs' argument that the parties' interconnection agreements concerning interconnection facilities required amendment and, thus, argued that it was also unnecessary to amend the tariff with respect to interconnection facilities (Verizon Reply at 2). Nevertheless, Verizon proposed to modify the tariff to state that discontinuance of the entrance facility UNE "does not alter" the parties' rights and responsibilities as to interconnection under § 251(c)(2) of the Act (id. at 3).

In the Letter Order, the Department rejected RCN's proposal to clarify in Tariff No. 17 that entrance facilities formerly available as UNEs under § 251(c)(3) of the Act remain available for interconnection purposes under § 251(c)(2) of the Act. Letter Order at 7.

Instead, the Department approved, without change, Verizon's modified proposal. Id.. Specifically, the Department stated that:

> In response to RCN's concerns that the tariff should specify that entrance facilities, including dedicated transport, remain available for interconnection purposes so that CLECs may interconnect with Verizon's network for the transmission and routing of telephone exchange service and exchange access service pursuant to § 251(c)(2), Verizon offered a further modification to its tariff which states that discontinuance of unbundled entrance facilities does not alter carriers' preexisting rights and responsibilities concerning interconnection facilities (see Verizon Reply Comments at 3). We find that this further modification is consistent with the Department's earlier determinations in this proceeding with respect to interconnection facilities and does not limit CLECs' access to tariffed interconnection facilities at TELRIC rates, and terms and conditions unchanged by the Triennial Review Order and the Triennial Review Remand Order.

Id. The Department went on to state that:

> Although we do not adopt RCN's preferred language, we note, for purposes of avoiding future disputes between Verizon and CLECs, that our adoption of Verizon's revised language, as well as our findings in the Arbitration Orders, reflects our determination that, although entrance facilities, including dedicated transport, are no longer available as UNEs, they remain available to CLECs at TELRIC rates for interconnection under § 251(c)(2).

Id. It is this last passage in the Department's analysis on which Verizon seeks reconsideration.

B. Positions of the Parties

1. Verizon

Verizon presents two arguments in support of its reconsideration request. First, Verizon contends that the passage at issue is factually incorrect because nothing in either Verizon's revised tariff language or in the Arbitration Orders reflect the determination that entrance facilities remain available to CLECs under § 251(c)(2) or at TELRIC rates (Verizon

Motion at 3). As to its revised tariff language,[6] Verizon states that the tariff language makes no statement as to the availability or unavailability of interconnection facilities, nor does it purport to state that "entrance facilities" qualify as "interconnection facilities" (id.). Rather, Verizon maintains, the tariff language only states that whatever rights and responsibilities the parties may have with regard to interconnection facilities do not change as a result of the elimination of unbundled access to entrance facilities (id. at 3-4). With regard to the Arbitration Orders, Verizon states that the only finding on this issue is that the issue of interconnection pursuant to § 251(c)(2) via entrance facilities should not be litigated in this proceeding (id. at 4). Therefore, Verizon argues, the Department's finding in the Letter Order rests on mistaken facts and should be vacated (id.).

Verizon's second argument in support of its reconsideration request is that the passage at issue is inconsistent with the Arbitration Order. Specifically, Verizon argues that in the Arbitration Order, the Department held that proposed changes regarding interconnection rights fall outside the scope of this proceeding (Verizon Motion at 4-5, citing Arbitration Order at 53, 224 and Compliance Order at 4-5). But, Verizon asserts, the finding in the Letter Order regarding entrance facilities concerns the parties' rights and responsibilities with respect to interconnection and, therefore, according to Verizon, contradicts the Arbitration Order

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[6] The tariff language proposed by Verizon, and approved by the Department, states that:

> The discontinuation of such unbundled entrance facilities does not alter either [Verizon's or the CLEC's] pre-existing rights and responsibilities concerning interconnection facilities under section 251(c)(2) of the Act.

(see Verizon Reply Comments in Support of its Compliance Tariff at 3).

(Verizon Motion at 4-5). Verizon further contends that, because no party sought reconsideration of the Department's decision not to address interconnection rights in this proceeding, the issue is not open to debate (Verizon Motion at 5-6).[7] Verizon characterizes RCN's attempt to insert favorable language in the tariff as a collateral attack on the Department's findings in the Arbitration Order as well as an effort to prejudice Verizon's rights (id. at 6).

Lastly, Verizon claims that, in responding to RCN's arguments with respect to the compliance tariff filing, it reasonably relied upon the Department's ruling that it would not litigate interconnection rights and responsibilities and therefore refrained from briefing the merits to demonstrate that entrance facilities are not available under § 251(c)(2) (id.). Verizon maintains that, before the Department addressed the issue in connection with the tariff compliance filing, it was incumbent upon the Department to provide the parties with notice and an opportunity to brief and present argument on the issue of interconnection facilities (id. at 6-7). Verizon states that if the Department now feels the issue should be addressed, it must give notice and the opportunity to a present comments or record evidence (id. at 7).

In such comments or evidence, Verizon asserts it would establish, among other things, that RCN's claims are wrong and based upon misrepresentations and erroneous interpretations of FCC rulings (Verizon Motion at 7). Specifically, Verizon contends that § 251(c)(2) of the Act does not impose on an ILEC the obligation to provide unbundled facilities for the purpose

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[7] Verizon notes that AT&T initially sought reconsideration of this issue but later withdrew this aspect of its reconsideration motion (see Verizon Motion at 5-6).

of interconnection but, rather, only requires an ILEC to enable CLECs to connect their own facilities to any technically feasible point on the ILEC's network for the mutual exchange of traffic (id. at 7-8). Additionally, Verizon states that in comments and evidence it would show that RCN's theory that § 251(c)(2) enables a CLEC to lease de-listed entrance facilities at TELRIC rates would render the FCC's rulings on those facilities meaningless (id. at 8).

2. RCN

RCN states that, contrary to Verizon's claims, the finding in the Letter Order regarding entrance facilities is not factually incorrect or mistaken (RCN Opposition at 1). RCN asserts that Verizon fails to recognize that it is the Letter Order itself that clarifies the Department's interpretation of law and CLEC § 251(c)(2) entitlements under Verizon's tariff (id. at 1-2). RCN states that the Letter Order was clear that it was addressing tariffed interconnection facilities at TELRIC rates (id. at 2).

More specifically, RCN states that the finding in the Arbitration Order that it was unnecessary for parties to amend their agreements with respect to interconnection facilities specifically addressed whether existing interconnection agreements needed to be amended to reflect the scope of Verizon's obligation to provision interconnection facilities (RCN Opposition at 2). RCN argues that, in the Letter Order, however, the Department was not addressing Verizon's obligation under its existing interconnection agreements but, rather, was addressing Verizon's obligation under its tariff when it clarified that, although entrance facilities were no longer available as UNEs, Verizon remains obligated to offer entrance facilities under its tariff at TELRIC rates for § 251(c)(2) interconnection purposes (id. at 2-3).

Moreover, RCN states that, for the reasons provided in its June 21, 2006 comments on the tariff revisions, which it incorporates into its Opposition to Verizon's Motion, the clarification of Verizon's obligation, pursuant to § 251(c)(2), under Verizon's tariff was necessary and proper and, RCN maintains, does not alter the terms upon which Verizon provides interconnection facilities under its existing interconnection agreements (RCN Opposition at 3-4). RCN therefore argues that the Letter Order does not contradict nor is it inconsistent with the prior Arbitration Orders (id. at 4).

Next, RCN dismisses Verizon's contention that the Department was obligated to provide Verizon with notice and the opportunity to submit comments or record evidence on the issue before it issued its ruling on the parties' interconnection rights and duties (RCN Opposition at 4). RCN states that Verizon had sufficient notice of RCN's position and opportunity to address the issue in written comments and, given that the issue is purely a legal one, RCN discounts as nonsensical Verizon's claim that it should be provided an opportunity to submit record evidence (id. at 4-5).

Finally, RCN maintains that Verizon's interpretation of § 251(c)(2) misrepresents the FCC's orders and is directly at odds with the FCC's unqualified statement that "all telecommunications carriers . . . will have the ability to access transport facilities . . . to interconnect for the transmission and routing of exchange service and exchange access, pursuant to section 251(c)(2)" (RCN Opposition at 5, citing Triennial Review Order at ¶ 368). Furthermore, RCN argues that Verizon's position renders meaningless the FCC's discussion in the Triennial Review Order and the Triennial Review Remand Order about entrance facilities

which CLECs could no longer obtain as UNEs pursuant to § 251(c)(3) to backhaul traffic versus the entrance facilities ILECs must provision pursuant to § 251(c)(2) for interconnection purposes (id. at 6) (citations omitted). RCN explains that there would be no reason for any clarification if the FCC's position were that CLECs did not have access to entrance facilities and dedicated transport for interconnection purposes pursuant to § 251(c)(2) (id.).

RCN asserts that Verizon's position amounts to a misplaced and untimely complaint with the FCC for its interpretation of § 251(c)(2) (RCN Opposition at 6). RCN states that the Department is bound by law to adhere to the FCC's interpretation of § 251(c)(2) (id.). RCN therefore requests that the Department deny Verizon's reconsideration request.

C. Analysis and Finding

As discussed fully below, the Department denies Verizon's Motion for Partial Reconsideration. Verizon alleges factual mistake as well as a lack of consistency with our Arbitration Orders as grounds for reconsideration of the Letter Order. However, the gravamen of Verizon's objection to the Letter Order is that, in addition to determining that parties' pre-existing rights and responsibilities with regard to interconnection facilities were unchanged by the Triennial Review Order and the Triennial Review Remand Order (with which Verizon agrees), the Department went on to clarify in the Letter Order, "for purposes of avoiding future disputes," what those pre-existing rights and responsibilities entail (with which Verizon does not agree). As Verizon's objection incorporates both substantive and procedural aspects, we will address both. We begin by looking to the relevant sections of the TRO and TRRO, as these orders have been the Department's pole star throughout this proceeding.

In the Triennial Review Order, the FCC eliminated access to entrance facilities as a UNE but stated that:

> [T]o the extent that carriers need facilities in order to 'interconnect[ ] with the [ILEC's] network,' section 251(c)(2) of the Act expressly provides for this and we do not alter the Commission's interpretation of this obligation.

Triennial Review Order at ¶ 366. Then, in the Triennial Review Remand Order, the FCC further stated that:

> [O]ur finding of non-impairment as to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.

Triennial Review Remand Order at ¶ 140. A plain reading of these FCC's findings shows that our conclusion in the Letter Order on this issue simply reiterates the FCC's conclusions in the Triennial Review Order and Triennial Review Remand Order.

While Verizon takes issue with our conclusion on entrance facilities, and accordingly, with the FCC's interpretation of its § 251(c)(2) obligations, we note that the United States District Court for the Eastern District of Missouri recently addressed the issue of access to entrance facilities under § 251(c)(2). See Southwestern Bell Telephone, L.P., d/b/a SBC Missouri v. Missouri Public Service Commission, et al., No. 4:05-CV-1264 CAS, 2006 W.L. 3103677 (E.D. Missouri) (Sept. 14, 2006). There, the District Court concluded that the ILEC was required under the Act and FCC regulations to provide access to entrance facilities necessary for interconnection, and that TELRIC is the appropriate rate for these facilities. Id. at *13-*15.

Notwithstanding the FCC's conclusions in the Triennial Review Order and the Triennial Review Remand Order, Verizon argues that our findings in the Letter Order were factually mistaken and inconsistent with our holdings in the Arbitration Order, and, thus, should be vacated. We disagree. Verizon's revised tariff language, which we adopted without modification, clearly does not state that entrance facilities remain available for interconnection at TELRIC under § 251(c)(2) of the Act. Nor does the Letter Order purport to claim that it does. But, because Verizon's revised language preserves the parties pre-existing rights concerning interconnection under § 251(c)(2) of the Act, and because those pre-existing rights include a CLEC's right under § 251(c)(2) to access "the facilities and equipment" used by competing carriers for "interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access" at TELRIC, our "adoption" in the Letter Order of Verizon's revised language reflects the determination that entrance facilities remain available for interconnection at TELRIC under § 251(c)(2) of the Act. As the FCC clearly stated, the FCC did not alter its interpretation of this obligation. Triennial Review Order at ¶ 366.

Likewise, no factual mistake exists in our statement that our findings in the Arbitration Order reflects the determination that entrance facilities, including dedicated transport, remain available for interconnection under § 251(c)(2). In the Arbitration Order, we stated that:

> In the Triennial Review Order, at ¶ 366, and the Triennial Review Remand Order, at ¶ 140, the FCC stated that its findings of non-impairment for entrance facilities did not alter the FCC's prior determinations concerning interconnection facilities. The FCC made no findings, clarifications, or statements in the Triennial Review Order or the Triennial Review Remand

> Order that changed the parties' pre-existing rights and responsibilities concerning interconnection facilities.

Arbitration Order at 223. Once again, with regard to the parties' pre-existing rights, the FCC stated that despite its finding of non-impairment for entrance facilities, these interconnection facilities remain available for interconnection under § 251(c)(2) at cost-based rates. Triennial Review Remand Order at ¶ 140. Nor is the Letter Order inconsistent with our finding in the Arbitration Order that it was unnecessary to litigate any change in language or to amend the interconnection agreements with respect to interconnection rights because no change regarding interconnection rights resulted from the Triennial Review Order and the Triennial Review Remand Order. Arbitration Order at 223. Our directive to Verizon to file revisions to Tariff No. 17 to reflect the Department's findings on the amendment did not limit the Department from expanding upon an issue with respect to tariff language and does not prejudice Verizon's rights under the interconnection agreement.

Finally, although Verizon also raises procedural arguments in its objection to the Letter Order, we also do not find these to be a sufficient basis for reconsideration. Specifically, Verizon's procedural arguments rest on a "lack of notice" theory, with Verizon asserting that the Department's failure to conduct further proceedings before reversing its position on interconnection facilities and deciding that entrance facilities used for interconnection purposes remain available at TELRIC deprived Verizon of its procedural rights (see Verizon Motion at 6-7). For the following reasons, we do not agree.

First, we agree with RCN that the access to entrance facilities pursuant to § 251(c)(2) is purely a legal issue, and, as such, does not require presentation of record evidence (see

RCN Opposition at 4-5). Second, Verizon provided detailed written arguments outlining its position to the Department in its filings. Third, in the Letter Order, the Department did not reverse its prior rulings pertaining to interconnection rights, as explained above, and, thus, reconsideration on this basis is not warranted. Lastly, the Department included its clarification in the Letter Order that entrance facilities used for interconnection remain available at TELRIC "for purposes of avoiding future disputes." Letter Order at 7. It is clear from Verizon's response that a future dispute on this issue was inevitable, therefore, we conclude that it was in the best interests of both administrative efficiency and regulatory certainty for the Department to have included this clarification in the Letter Order.

IV. ORDER

Accordingly, after due consideration, it is

ORDERED: That Verizon New England, Inc. d/b/a Verizon Massachusetts' Motion for Partial Reconsideration is denied; and it is

FURTHER ORDERED: That the parties shall comply with all other directives contained herein.

By Order of the Department,

/s/
Sharon E. Gillett, Commissioner

Pursuant to § 252(e)(6) of the Telecommunications Act of 1996, appeal of this final Order may be taken to the federal district court or the Federal Communications Commission. Timing of the filing of such appeal is governed by the applicable rules of the appellate body to which the appeal is made or in the absence of such, within 20 days of the date of this Order.