

1 the proceeds from operating or selling the cellular systems. In a 1991 staff ruling, the FCC
2 found that the MCRSA violated the FCC's rules. See 56 Fed. Reg. 28559 (June 21,
3 1991)(summary). The appeal process within the FCC concluded on June 3, 1997 when the full
4 FCC released a decision upholding the staff ruling. The decision stated that the "it is clear that
5 the MCRSAs violate the absolute ban on partial settlements among non wireline applicants set
6 forth in section 22.33(b)(2), the expressed purpose of which was to bar abusive application
7 practices that squander the Commission's time and administrative resources." (FCC Decision at
8 8165-8168 in Exh. 2 to Pl.'s Neely Aff.) The FCC concluded that agreements that allowed
9 lottery losers to participate in the economic benefits of the lottery winner's cellular system
10 violated the ban on partial settlements. Id at 8167. Although the Plaintiff in this matter asked the
11 FCC to permit reformation of the MCRSA, the FCC refused, stating that any such arrangement
12 violated the FCC's rule banning partial settlements. Id at 8167. Furthermore, the FCC awarded
13 licenses to two of the MCRSAs participants (including the Plaintiff) only after it found that they
14 had rescinded the MCRSA. Id at 8158,8168. The FCC denied petitions for reconsideration of its
15 decision, Algreg Cellular Engineering, 14 FCCC Rcd 18524. The United States Court of
16 Appeals for the District of Columbia Circuit affirmed the FCC Decision, Alee Cellular v.
17 Communications v. FCC, 2000 U.S. App. LEXIS 7111 (D.C Cir. 2000), and no party appealed to
18 the U.S. Supreme Court.

21 ANALYSIS

22 Article X of the MCRSA contains two different provisions concerning the submission of
23 certain disputes to arbitration, Section 10.1 and Section 10.2. In their Motion to Compel
24 Arbitration, the Moving Defendants failed to specify under which provision they were seeking to
25 compel arbitration. In the Moving Defendants' Reply, the Moving Defendants suggest that they

1 are moving to compel arbitration pursuant to Section 10.2. (Moving Defs.'s Reply at 3 ("the
2 Defendants have moved to compel arbitration on the issues of interpretation and implementation
3 of the Agreement. See MRSA § 10.2").) Because the Court finds that the distinction between
4 Section 10.1 and Section 10.2 is significant and instructive as to whether arbitration can be
5 compelled, the Court will address arbitration under both provisions.

6
7 **Article X Section 10.1**

8 In Article X, Section 10.1 of the MCRSA, the parties to the MCRSA agreed that:

9 Should the FCC issue a determination, by Final
10 Order, that this Agreement does not comply with
11 its rules and policies, the Active Participants
12 shall submit to arbitration in accordance with
13 Section 10.3 hereof for the purpose of revision
14 of this Agreement in any manner necessary to meet
15 the FCC's requirements.

16 (MCRSA at Article X, Section 10 in Opp. at Exh. 1.) (emphasis added). Section 10.1
17 unambiguously requires the parties to submit to arbitration for the specific purpose of reforming
18 the MCRSA in order to make it comply with the FCC's requirements. In this case the FCC
19 concluded that MCRSAs "violate the absolute ban on partial settlements among non wireline
20 applicants set forth in section 22.33(b)(2)." Because MCRSAs violate the express purpose of the
21 ban, the FCC refused the Plaintiff's request to reform their MCRSA in an effort to comply with
22 the FCC rules. Since the only purpose of the arbitration mandated by Section 10.1 is "revision of
23 [the MCRSA] in any manner necessary to meet the FCC's requirements" and the FCC concluded
24 that MCRSAs violate the express purpose of the absolute ban on partial settlements and refused
25 to permit revision of the MCRSA, the Court concludes that it cannot compel an arbitration under
Section 10.1. The purpose of such an arbitration -to revise the MCRSA to conform with the
FCC's rules -would be futile, *i.e.*, a legal impossibility.

1 **Article X Section 10.2**

2 In their Reply, the Moving Defendants suggest they are seeking to compel arbitration
3 pursuant to Section 10.2 of Article X. In Article X Section 10.2, the parties to the MCRSA
4 agreed:

5 [T]o attempt in mutual good faith to resolve any
6 issues which may arise with respect to the inter-
7 pretation or implementation of this Agreement. If
8 they are unable to do [*sic*] any active participant
may request that the issues in dispute be submitted
arbitration in accordance with Section 10.3.

9 (MCRSA at Article X, Section 10.2 in Opp. at Exh. 1 (emphasis added).) The Court finds that
10 Section 10.2 does not require arbitration but rather allows a party to the MCRSA to "request"
11 arbitration for issues relating to the "interpretation or implementation" of the MCRSA. Its
12 permissive language stands in stark contrast to the mandatory language in Section 10.3 ("the
13 Active Participants shall submit to arbitration in accordance with Section 10.3 hereof for the
14 purpose of revision of this Agreement"). The Court, therefore, cannot compel arbitration where
15 the parties did not agree to mandatory arbitration.
16

17 Furthermore, as set out below, even if there was a basis in the MCRSA for the mandatory
18 arbitration of certain disputes under Article X, the Court finds that it cannot compel arbitration
19 under Article X for at least two other reasons. The MCRSA unambiguously indicates that the
20 parties were to be relieved of their obligations if the MCRSA was found to be wholly contrary to
21 the FCC rules and the MCRSA is unenforceable as an illegal contract.
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1 **The Intent of the Parties Was To Cease Their Obligations Under the MCRSA If the**
2 **FCC Found that the MCRSA Was Contrary to its Rules**

3 That the FCC might declare the entire MCRSA illegal was foreseen by the parties to the
4 MCRSA and their understanding is clearly reflected in Article VII, Section 7.2(a) and Article X,
5 Sections 10.1 and 10.4:

6 7.2 This Agreement shall terminate without further
7 liability between or among the Participants upon
8 the happening of any of the following events:

- 9 (a) The FCC finds by Final Order that the
10 Agreement is contrary to the Communications
11 Act of 1934, as amended, or the FCC's Rules
12 or policies, and the Participants are unable to
13 amend the Agreement in accordance with
14 Article X hereof to cure the factual basis for
15 such a finding.

16 The contingency planned for in Section 7.2 (a) is precisely what eventually happened: the
17 FCC found that the MCRSA was contrary to its rules and policies and the participants were not
18 permitted to amend the MCRSA to cure its defect. The MCRSA, therefore, by its own provision,
19 terminated "without further liability between or among the Participants."

20 Additionally, Section 10.1, the mandatory arbitration provision for correction of defects
21 to conform the MCRSA to the FCC's requirements. states: "The Participants expressly
22 understand and intend that the provisions of this Agreement fully comply with all applicable
23 FCC rules and policies." Once the FCC stated that an MCRSA was contrary to its rules
24 (specifically, the express purpose of the absolute ban on partial settlements), Section 10.1 further
25 indicates that the intent of the parties was that the Agreement should terminate.

 Finally in Section 10.4, the Parties agreed: "The FCC. . . shall have jurisdiction over this
Agreement. Any action, obligation, or duty of any Participant is conditioned on the receipt of

1 favorable regulatory approval wherever required[.]” Because Section 10.4 conditioned “[a]ny
2 action, obligation, or duty of any Participant” on FCC approval and the FCC declared that the
3 MCRSA was contrary to its rules (and could not be revised), the intent of the Participants
4 appears to be that they would be relieved of any obligation to one another under the MCRSA if it
5 was rejected in its entirety. The Court is unpersuaded by the Moving Defendants' argument in
6 their Reply that there is any ambiguity in the MCRSAs provisions. Accordingly, the Court
7 cannot compel the Plaintiff to arbitrate pursuant to an obligation arising under Article X.
8

9 **The MCRSA May Be Unenforceable Because it is an Illegal Contract**

10 As stated above, the FCC found that the purpose of the MCRSA was contrary to its rules,
11 rules that flatly banned such arrangements. “It is a long-standing principle of District of
12 Columbia law that when parties have entered into an illegal contract, such contract is
13 unenforceable and, typically, we leave the parties where we find them.” See McMahan v.
14 Anderson, Hibey & Blair, 728 A.2d 656 (D.C. 1999); (Hartman v. Lubar, 77 U.S. App. D.C.
15 95,96, 133 F.2d 44, 45 (1942) (“an illegal contract, made in violation of a statutory prohibition
16 designed for police or regulatory purposes, is void and confers no right upon the wrongdoer”),
17 cert. denied, 319 U.S. 767,87 (1943). See also Richard A. Lord, Williston on Contracts § 12:4,
18 at 23-24 (4th ed. 1995) (it is an “elementary principle . . . that one who has participated in a
19 violation of the law will not be allowed to assert in court any right based upon the illegal
20 transaction”); Restatement of the Law of Contracts § 598 (1932) (general rule in contract law for
21 the effect of illegality on a contractual arrangement is that the arrangement is unenforceable by
22 either party). Accordingly, the Moving Defendants cannot seek to have the Court enforce any
23 provision of the MCRSA, nor, for that matter, can they have a Court enforce a decision made by
24 arbitrators pursuant to the provisions of the MCRSA.
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