D.T.E. 98-85

Petition of MCI Telecommunications Corporation to require New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts to implement intraLATA presubscription in Massachusetts no later than February 8, 1999.

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ORDER ON BELL ATLANTIC APPEAL OF HEARING OFFICER RULING

I. INTRODUCTION

On November 3, 1998, the Hearing Officer granted a Motion for Preliminary Relief of AT&T Communications of New England, Inc. ("AT&T"), which required New England Telephone and Telegraph Company d/b/a Bell Atlantic - Massachusetts ("Bell Atlantic") to "commence immediately all steps necessary to be prepared to implement intraLATA presubscription by February 8, 1999," in the event the Department of Telecommunications and Energy ("Department") determines in the final order in this docket that Bell Atlantic must implement intraLATA presubscription ("ILP") by that date ("Hearing Officer Ruling" or "Ruling" at 7-8, 11). On November 5, 1998, Bell Atlantic filed a Motion to Stay the Hearing Officer Ruling until the Department rules on Bell Atlantic's appeal of the ruling ("Appeal"), which Bell Atlantic submitted on November 6, 1998.[1] On November 11 and 13, 1998, respectively, AT&T and MCI filed Oppositions to the Appeal. In addition, at a hearing on November 13, 1998, the Attorney General of the Commonwealth ("Attorney General") stated his opposition to the Appeal.

II. HEARING OFFICER RULING

In her Ruling, the Hearing Officer found that "Bell Atlantic has known for more than a year that it may be required to implement ILP starting February 8, 1999." Hearing Officer

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[1] AT&T, MCI WorldCom, Inc. ("MCI"), and Competitive Telecommunications Association and Telecommunications Resellers Association jointly, filed Oppositions to the Motion to Stay.

Ruling at 6, citing NYNEX ILP, D.P.U./D.T.E. 96-106, at 5-6 (1997). In addition, the Hearing Officer noted that the Department had reminded Bell Atlantic of the possibility that the Department could exercise its discretion under the Telecommunications Act of 1996 (the "Act") to order implementation of ILP by February 8, 1999, even if interLATA authority had not been granted. Ruling at 6-7, citing, August 28, 1998 Letter Order of Bell Atlantic's ILP Compliance Filing, IntralATA Presubscription Compliance Filing, D.T.E. 96-106A (1998). The Hearing Officer stated that "[s]ince Bell Atlantic raises technical implementation problems as a reason for not implementing ILP by February 8, 1999, then Bell Atlantic must be prepared to accept the consequences of a finding by the Department that such technical implementation can be sooner, should the Department find at the conclusion of its investigation that Bell Atlantic has the capability to do so and the public interest so requires." Id. at 7-8.

III. POSITIONS OF THE PARTIES[2]

A. Bell Atlantic

Bell Atlantic contends that the Hearing Officer Ruling "contravenes prior Department decisions approving ILP implementation coincident with BA-MA's entry into the in-region interLATA market, but also contradicts the clear and unequivocal language of BA-MA's ILP tariff and customer notification materials approved by the Department" (Appeal at 1).

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[2] Bell Atlantic filed a Motion to Stay with its Appeal. Because the Motion to Stay sought to stay the Hearing Officer Ruling until the Department ruled on Bell Atlantic's Appeal -- a ruling we make in this Order -- the Motion to Stay is rendered moot. Accordingly, we do not recite the arguments made concerning the Motion to Stay. We note that those arguments are very similar to the arguments made in Bell Atlantic's Appeal and deny the Motion to Stay.

Bell Atlantic argues that the Hearing Officer Ruling is prejudicial to and violative of Bell Atlantic's due process rights because it has "pre-determined" the ultimate issue in the case (i.e., the timing of ILP implementation) before litigation of the matter is complete (id. at 1-2, citing G.L. c. 30A, § 11(1), (3) and 220 C.M.R. 1.06(5), (6)). In addition, Bell Atlantic claims that the Ruling was beyond the Hearing Officer's delegated authority (id. at 2, citing 220 C.M.R. § 1.06(a)). Bell Atlantic also contends that the Ruling violates the "reasoned consistency" doctrine because the Ruling reversed a pattern of prior Department decisions without a full adjudication and without a "statement of reasons" (id. at 3-4, citing Monsanto Company v. Department of Public Utilities, 402 Mass. 564, 524 N.E. 2d 96, 100 (1988), and Boston Gas Company v. Department of Public Utilities, 324 N.E. 2d 372, 379 (1975)).

The Ruling, according to Bell Atlantic, would also require Bell Atlantic to begin the customer notification process immediately, which could lead to serious customer confusion and impair Bell Atlantic's relationship with its customers if the Department later ordered ILP implementation at a different date (id. at 5-6). Bell Atlantic notes that it would have to modify the language of the bill inserts in a way that "would seriously undermine the competitive balance that the Department sought to achieve by permitting ILP once carriers are allowed to offer both intraLATA and interLATA services on a presubscribed basis" (id. at 6). Finally, Bell Atlantic asserts that the ruling would prevent Bell Atlantic from completing systems requirements on an integrated basis (id. at 5).

B. AT&T

AT&T claims that not only does the Hearing Officer Ruling not violate Bell Atlantic's

due process rights by determining the final outcome in the case but a reversal of the Ruling in fact "*would* prejudge the final outcome" (AT&T Opposition at 2; emphasis in original). AT&T argues, as it did in its Motion for Preliminary Relief, that unless Bell Atlantic is required to begin preparations for implementing ILP by February 8, 1999, then if the Department ultimately decides for public policy reasons to require ILP implementation no later than that date, Bell Atlantic would not be able to comply with that order because the necessary technical, operational and customer notification activities would not have been completed (id.). AT&T also contends that "[t]he minor problem relating to the supposed need to stuff the bills of a few customers can be easily remedied" by delaying notice to customers in the first billing cycle and, upon a final determination, notifying those customers through a special mailing (id. at 2-3).

In addition, AT&T disputes Bell Atlantic's "reasoned consistency" claim, arguing that the Department in D.P.U. 96-106 never considered the issue of whether Bell Atlantic should implement ILP by February 8, 1999, since the record in that docket clearly showed that Bell Atlantic had every expectation of being in the interLATA market well before then (id. at 3-5). AT&T also disputes Bell Atlantic's claim that the Department's Order D.P.U./D.T.E. 96-106 sought to achieve a competitive balance by coordinating ILP implementation with Bell Atlantic's entry into the interLATA market (id. at 6). Finally, AT&T argues that fairness and the public interest require that the Department uphold the Hearing Officer Ruling so that Bell Atlantic is not able to further delay intraLATA choice to Massachusetts customers (id. at 7-8).

C. MCI

MCI argues that the Hearing Officer Ruling does not determine the outcome of the investigation but only requires Bell Atlantic to be ready to implement ILP on February 8, 1999, should the Department determine that such a result is necessary (MCI Opposition at 2-3). If Bell Atlantic were not required to begin preparations, MCI claims that the Department would be unable to provide it and other parties the ultimate relief they seek in this case, thereby depriving them of their due process rights (id. at 3). In addition, MCI asserts that the Hearing Officer Ruling is "entirely consistent" with the Department's prior ILP decisions that sought to require ILP implementation on "the first legally permissible date" (id. at 4).

MCI also disputes Bell Atlantic's claim of "surprise." According to MCI, Bell Atlantic has known since the Department's May 28, 1997 Order in D.P.U. 96-106, and certainly since August 5, 1998, when MCI filed its Petition in this case, that the Department could order ILP implementation beginning February 8, 1999 (id. at 4-5). Finally, MCI states that upholding the Hearing Officer Ruling would not irreparably harm Bell Atlantic, but reversing the ruling would harm other parties in the case since Bell Atlantic could delay ILP implementation beyond February 8, 1999 simply by raising implementation problems (id. at 5-6).

D. Attorney General

In opposing the Appeal, the Attorney General argues that based on the evidence presented at the November 12 and 13 hearings, the Department can address Bell Atlantic's operational, technical and customer notification concerns and still require Bell Atlantic to make the preparations necessary for a possible February 8, 1999 ILP implementation date (Tr. 2 at

301-302).

IV. ANALYSIS AND FINDINGS

For the reasons discussed below, we uphold the Hearing Officer's Ruling with some modifications.

Bell Atlantic has known since the passage of the Act in February, 1996, that the Department could require ILP implementation beginning on February 8, 1999. Certainly, the filing of MCI's Petition in August of this year and the Department's unambiguous language in the August 28 Letter Order[3] should have signalled Bell Atlantic that it could no longer reasonably rely on the implementation date contained in its ILP tariffs as the most likely date. The increasingly urgent need to complete ILP implementation activities was reasonably evident. Therefore, we uphold the Hearing Officer's Ruling subject to the modifications discussed below. Her Ruling was necessary in order to preserve the Department's ability to approve the relief requested in MCI's Petition.

Bell Atlantic, however, demonstrated convincingly at the November 12 and 13, 1998, evidentiary hearings that it has not adequately completed planning for ILP implementation by

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[3] "Although the compliance filing states that intraLATA presubscription will be implemented upon Bell Atlantic being granted authority to originate interLATA services in Massachusetts, we note that the Telecommunications Act of 1996 gives the Department the discretion to order implementation of intraLATA presubscription starting February 8, 1999, if interLATA authority has not already been granted. We further note that the Department has opened a docket to investigate this issue, in response to a petition filed by MCI Telecommunications Corp. (D.T.E. 98-85). Approval of Bell Atlantic's compliance filing does not limit the Department's ability to direct Bell Atlantic to implement intraLATA presubscription any time after February 8, 1999." August 28, 1998 Letter Order, IntraLATA Presubscription Compliance Filing, D.T.E. 96-106-A (1998).

February 8, 1999 despite the Department's clear signal on August 28, 1998. As a result, to be ready to implement ILP on February 8, 1999, Bell Atlantic would have to take certain steps that very likely would adversely affect customers and competing carriers. For example, Bell Atlantic would have to reschedule its ILP information systems work for completion by February, 1999. That rescheduling would delay completion of several important projects "of critical importance to Bell Atlantic's customers and other carriers" at least until April, 1999.[4] In addition, given the timing of bill inserts, Bell Atlantic might not have sufficient time to train all of its customer service representatives to respond to ILP questions, if implementation begins on February 8, 1999 (Tr. 2 at 238). Bell Atlantic also testified that requiring it to meet the February 8, 1999, deadline could lead to customer confusion related to the bill inserts (id. at 235).

These effects might have been avoided had Bell Atlantic attended to its preparatory obligations under the Act. However, missed opportunities to complete this work cannot be recaptured without incurring other costs. The Department wants to ensure a smooth, efficient implementation of ILP. The record demonstrates that most, if not all, of the customer and carrier disruptions can be avoided, and a smooth implementation ensured, if Bell Atlantic is given until April 20, 1999, to complete the preparations.[5] Accordingly, we modify the

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[4] See DTE-RR-6 and DTE-RR-7 at 1-2. Bell Atlantic estimates that completing the ILP system will take approximately 1200 hours, that the scheduling of projects for April, 1999, has not been finalized and that "the number of requested projects already exceeds the Company's capacity." Id.

[5] See Tr. 2 at 203-205 and DTE-RR-6.

Hearing Officer's Ruling and require Bell Atlantic to commence immediately all steps necessary to be prepared to implement ILP on April 20, 1999, should the Department determine in the final order that such an implementation date is in the public interest.[6] Given this determination, we encourage the parties to continue settlement discussions on an ILP implementation date, in an effort to avoid further litigation in this docket. The parties are required to report to the Hearing Officer on the progress of settlement within 10 days of this Order.

V. ORDER

After due notice, hearing and consideration, it is

ORDERED: That the Hearing Officer Ruling, dated November 3, 1998, is hereby upheld in part and modified in part, consistent with the above findings; and it is

FURTHER ORDERED: That the Petition for Appeal and Motion for Stay of New England Telephone and Telegraph Company d/b/a Bell Atlantic - Massachusetts are hereby denied; and it is

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[6] The Department intends to issue a final order by mid-December.

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

By Order of the Department,

Janet Gail Besser, Chair

James Connelly, Commissioner

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).