D.P.U./D.T.E. 94-185-C

Investigation by the Department on its own motion into IntraLATA and Local Exchange Competition in Massachusetts.

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ORDER ON MOTION FOR RECONSIDERATION AND CLARIFICATION OF BELL ATLANTIC

I. INTRODUCTION

On May 30, 1997, the Department of Telecommunications & Energy ("Department") issued an Order on New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts' ("Bell Atlantic" or "Company") compliance filing with the price floor directives of its investigation of local exchange competition. Local Competition, D.P.U. 94-185-B (1997) ("Order").[1] The Department found that the level of detail provided in Bell Atlantic's compliance filing was insufficient (id. at 5). It also found that the Company did not comply with the Department's directives concerning the establishment of price floors for monopoly services that contain usage components. Bell Atlantic was, therefore, directed to refile a complete list of services within 14 days of the date of the Order, identifying for each service, the current tariffed

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[1] On August 29, 1996, the Department issued a final Order in its investigation of local exchange competition issues, and found, inter alia, that total service long-run incremental cost ("TSLRIC") is appropriate as a basis for determining the price of Bell Atlantic's monopoly/essential services, for computing price floors for monopoly services, and for measuring subsidies. Local Competition, D.P.U. 94-185, at 15 (1996).

On December 3, 1996, in compliance with D.P.U. 94-185, Bell Atlantic filed a proposed list of services for which price floors would be calculated. On December 20, 1996, also in compliance with the Order, Bell Atlantic filed a description of the method it proposes to use to complete its TSLRIC study.

On March 31, 1997, the Department issued an Order on motions for clarification and reconsideration by MCI Telecommunications Corporation and AT&T Communications of New England, Inc. upholding its finding that Long-Run Incremental Cost should be used as the basis for determining price floors of competitive services and that Marginal Cost Study VI is an incremental cost study. Local Competition, D.P.U. 94-185-A (1997).

rate or sum of tariffed rates, and the source of Bell Atlantic's calculation for the price floor (id. at 6). Bell Atlantic was also directed to file a completed TSLRIC cost study within 60 days of the date of the Order (id. at 13). The Department stated that the new TSLRIC study should include forward-looking cost factors, and should clearly identify assumptions made, such as the least-cost, forward-looking technology used (id.). On June 23, 1997, Bell Atlantic filed a motion for clarification and reconsideration, pursuant to 220 C.M.R. § 1.11(10).

Bell Atlantic moves that the Department clarify whether the Order allows the Company to satisfy its price floor obligation by filing a wholesale tariff for all of its retails services, and thus eliminating the need for the Company to (1) provide a revised, more complete list of retail services and (2) produce a TSLRIC study based on that revised list of retail services (Bell Atlantic Motion at 2-6). On July 2 and 10, 1997, MCI Telecommunications Corporation ("MCI") and AT&T Communications of New England, Inc. ("AT&T"), respectively, filed responses in opposition to the motion. No other parties commented on the motion.

II. POSITIONS OF THE PARTIES

A. Bell Atlantic

Bell Atlantic states that the Department in D.P.U. 94-185 found that the wholesale version of the Company's retail services may be used for calculating price floors of monopoly services (Bell Atlantic Motion at 3). Where a wholesale rate does not exist, Bell Atlantic states that the Department required the price floor for monopoly services to be the TSLRIC of that service (id.). Accordingly, Bell Atlantic argues that, since it is making its retail telecommunications services available for resale in compliance with section 251(c)(4) of the Act and the Department's Order in

the Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (Phase 4 Order) (1996), there is no need for the Company to conduct TSLRIC study for its retail services (id. at 3-4).

Bell Atlantic states that a construction of the Department's Order to the effect that the Company file a wholesale tariff for its retail services and conduct a TSLRIC study would be ambiguous and probably internally inconsistent. The Order thus requires clarification (id. at 3). Bell Atlantic maintains that the Department's approval of the wholesale tariff will establish that Bell Atlantic has met the Department's price floor test for its retail services as described in D.P.U. 94-185-B. Bell Atlantic argues that the requirement to file a TSLRIC study is unnecessary because such a requirement could be based only on the assumption that a cost study is needed for Bell Atlantic to demonstrate compliance with the price-floor standard for services for which a wholesale rate does not exist (id. at 4).

According to the Company, the only services for which the TSLRIC price floor test might be appropriate are certain wholesale services (id. at 5). However, Bell Atlantic argues that the reasons that caused the Department to adopt the price floor requirement do not apply to wholesale services because the Company has no incentive to price the services it provides at wholesale to competitors below cost; moreover, Bell Atlantic contends that other wholesale services, such as unbundled network elements, have been priced at the Company's total element long-run incremental cost ("TELRIC") in the Consolidated Arbitrations, and thus meet the price floor test (id. at 5-6).

Accordingly, Bell Atlantic seeks clarification from the Department whether approval of a

wholesale tariff for all of the Company's retail services would meet the price-floor test for these services and that, therefore, there is no need for the Company to identify retail services and develop TSLRIC studies for those services (id. at 5).

In conjunction with its request for clarification, the Company seeks reconsideration of the ordering clauses in the D.P.U. 94-185-B that require the Company to provide a revised, complete list of retail services and to produce a TSLRIC study based on that list of services (id. at n.2). Assuming the Department clarifies its Order that the Company can satisfy its price floors obligation by filing a wholesale tariff for all of its retail services, Bell Atlantic argues that the ordering clauses relating to the list of services and TSLRIC study are incompatible with the findings and directives in the Order relating to the wholesale tariff (id.). According to Bell Atlantic, the Department was either mistaken about the need for this superfluous requirement in that the Department may have thought that the Company's wholesale tariff would not cover all of the Company's retail services, or alternatively, the Department inadvertently overlooked the fact that Bell Atlantic's wholesale tariff would cover all retail services (id.).

Finally, if the Department continues to require Bell Atlantic to file a TSLRIC study for all its retail services, the Company requests that the Department clarify its directives concerning the level of detail for Bell Atlantic's list of services (id. at 6). The Company argues that the Department's explanation in D.P.U. 94-185-B regarding the level of detail needed to define a service, especially for usage components, appears to require the Rate Element Approach, which, according to Bell Atlantic, the Department had previously rejected (id. at 6-7, citing D.P.U. 94-185, at 29). According to Bell Atlantic, the Department's assertion, that it is inappropriate to use

an average usage factor in calculating a price floor, contradicts the Department's other requirements that the proper price floor for rate elements that can be purchased only collectively include all charges for rate elements incurred as a result of using that particular service (id. at 7). The Company claims that the prices of certain usage based services, such as toll, include different charges based on first and additional minutes, and peak and off-peak periods and, therefore, it is impossible for customers to purchase additional minutes of usage without buying the initial minute (id.). Thus, Bell Atlantic contends that it must calculate price floors for such services based on average usage (id.).

B. AT&T

AT&T argues that Bell Atlantic's motion for clarification and reconsideration is improper in that Bell Atlantic is seeking to be relieved of its price floor and TSLRIC study obligations required by the Department (AT&T Motion at 5). Moreover, AT&T argues that whether the availability of retail services at wholesale accomplishes the same function as price floors is an issue that cannot be resolved without the development of a factual record and briefing (id. at 6). AT&T contends that Bell Atlantic had numerous opportunities after D.P.U. 94-185 was issued to raise the issue, but did not and, therefore, it should not be allowed to raise the issue at this late date (id. at 7).

Furthermore, AT&T argues that the availability of Bell Atlantic's retail services for resale at a wholesale discount does not diminish the need for price floors and TSLRIC studies (id.). AT&T contends that Bell Atlantic will always meet the price floor standards with regard to pure resellers, no matter what rates it charges for its retail services, because the wholesale rate would

be based on the Company's retail rates (id. at 10). However, in doing so, AT&T claims that Bell Atlantic could violate the price floor standard the Department established in D.P.U. 94-50 (id.). AT&T cites that, for example, Bell Atlantic's proposed third annual price cap compliance filing, in which the Company proposes to lower its toll rates to five cents a minute, could violate the price floor standard (id.). According to AT&T, Bell Atlantic's proposed toll rate does not comply with the Department's price floor standard that toll rates exceed the relevant access rates that the Company charges its facilities-based carriers by the marginal cost of related overhead or 1.1 cents (id.). AT&T, therefore, claims that the availability of wholesale tariffs will not accomplish the purposes for which the price floor was designed because there would be no price floor to protect facilities-based intraLATA toll providers from anticompetitive price squeezes imposed by Bell Atlantic (id. at 7-8).

Furthermore, AT&T requests that the Department deny Bell Atlantic's request that the Department clarify the Company's obligations regarding the filing of a complete list of services because there is nothing unclear about the Department's statement (id. at 11).

C. MCI

MCI claims that the Company's Motion is an attempt to avoid compliance with the Department's TSLRIC study and price floor directives (id.). According to MCI, Bell Atlantic has not met the Department's standard for clarification because there is nothing ambiguous about the two Department directives (id.). Similar to AT&T, MCI claims that, while resellers may find some comfort from the filing of wholesale rates for Bell Atlantic's retail services, wholesale rates do not provide protection against price squeezes that facilities-based competitors of Bell Atlantic

will experience if Bell Atlantic's retail services are priced below TSLRIC (id.). Moreover, MCI argues that, since Bell Atlantic has not filed wholesale rates pursuant to the Department's Order, its request is premature and unwarranted (id. at 2-3).

III. STANDARD OF REVIEW

A. Reconsideration

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).

B. Clarification

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 so ambiguous as 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).

IV. GROUNDS FOR CLARIFICATION AND RECONSIDERATION

In its Motion, Bell Atlantic asks the Department to clarify whether it can satisfy the Department's price floor requirement, adopted in D.P.U. 94-50, by filing a wholesale tariff for all of its retail services, making those services available for resale by competitive local exchange carriers at the avoided cost discount approved by the Department in the Consolidated Arbitrations. According to Bell Atlantic, this would obviate the need for the Company to comply with the Department's directive in D.P.U. 94-185-B to produce a TSLRIC study for its retail services, and, therefore, the Department should clarify that directive.

Contrary to the arguments of AT&T and MCI, the Department's Order in D.P.U. 94-50

implicitly recognized that Bell Atlantic could satisfy the Department's price floor requirement if it made all of its retail services available at wholesale. In that Order, the Department found that "[f]or services where NYNEX controls an essential input for a competitor's offering of a competing service, in order to prevent anti-competitive pricing, the proper price floor for NYNEX's own rate element shall consist of the relevant wholesale rate that at least one competitor pays to NYNEX in order to offer the service, and NYNEX's marginal cost of related overhead. For all other services . . . the proper price floor shall be the marginal cost ...." D.P.U. 94-50, at 205-206 (emphasis added).[2] For AT&T and MCI to argue otherwise, is itself to argue for reconsideration of our findings in D.P.U. 94-50.

However, the Department's directives in D.P.U. 94-185-B were inadvertently ambiguous and inconsistent: while we found that the Company could satisfy the price floor requirement by filing a wholesale tariff for its retail services (and indeed ordered the Company to file such a tariff to comply with its obligation under the Section 251(c)(4) of the Telecommunications Act of 1996), the Department also ordered the Company to develop a TSLRIC study. The Department's directive was ambiguous in that we did not state that the TSLRIC study would only be required for those services which would not have wholesale rates. As Bell Atlantic has correctly noted, all of the Company's retail services will be included in its wholesale tariff.[3] Therefore, Bell Atlantic is

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[2] Later, in D.P.U. 94-185, the Department found that Bell Atlantic shall calculate the price floors for monopoly services using a TSLRIC study. D.P.U. 94-185, at 15; D.P.U. 94-185-A, at 9 (1996).

[3] Under the Telecommunications Act of 1996, Bell Atlantic is not required to make available for resale wholesale services. Unbundled elements, the interim prices for which were developed in the Consolidated Arbitrations, are wholesale services, in that they are

(continued...)

not required to develop a TSLRIC study for any of its retail services since all of those services will be included in the wholesale tariff. The Company's filing of a wholesale tariff, based on the avoided costs discount determined in the Consolidated Arbitrations, will serve as the basis for price floors for Bell Atlantic's retail services, in compliance with the price floor requirements in D.P.U. 94-50. The Company is hereby directed to file a wholesale tariff, which includes a comprehensive set of terms and conditions, within 30 days of the date of this Order.[4]

Given our above clarification of the Order, Bell Atlantic's Motion for Reconsideration on the issue of the ordering clauses is moot. The ordering clauses were contingent on Bell Atlantic satisfying its price floor requirement in part or in full using the cost study. Therefore, since the Company will be using the wholesale tariff to satisfy its requirement for all of its retail services, Bell Atlantic is not required to conduct a TSLRIC study for any of its retail services. However, Bell Atlantic is still required to comply with the Department's directives in this docket concerning competitive services. See D.P.U. 94-185, at 16-17; D.P.U. 94-185-A at 6-9 (collectively, finding that Bell Atlantic shall calculate price floors for "sufficiently competitive" services using a Long-run Incremental Cost ("LRIC") methodology, and that Bell Atlantic's Marginal Cost Study VI ("MCS VI") is a LRIC study).

With respect to AT&T and MCI's arguments concerning a possible price squeeze for

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[3](...continued)
inputs provided to a competitor to allow that competitor to offer a competing service to end user customers. To the extent that the Department may have mischaracterized unbundled elements as retail services in D.P.U. 94-185-B, we clarify our statements here. See D.P.U. 94-185-B, at 13-14.

[4] Bell Atlantic shall consult with the Department's Telecommunications Division on the proper format of the tariff prior to making its filing.

facilities-based competitors, the Department notes that our Order in D.P.U. 94-50 did not require price floors for Bell Atlantic's wholesale services. At the time, the primary services Bell Atlantic offered at wholesale were switched access services, and it was not known then that Bell Atlantic would be required to make all of its retail services available at wholesale. Today, with Bell Atlantic offering all of its retail services on a wholesale basis, the implications of the type of possible anti-competitive pricing alleged by AT&T and MCI are greater. Therefore, it may be necessary to open an investigation to develop price floors for Bell Atlantic's wholesale services. To better inform the Department on whether such an investigation is warranted, we would like parties to submit argument with supporting affidiavits on the following question: With Bell Atlantic satisfying the Department's retail services price floor requirement through the filing of a wholesale tariff (that makes all of the company's retail services available for resale at a discount), is there a need for the Department to require price floors for Bell Atlantic's wholesale services in order to preclude the possibility of anti-competitive pricing? Parties should support their arguments with affidavits from recognized economic experts. The deadline for initial submissions is 5:00 p.m., December 30, 1997. Reply submissions are due by 5:00 p.m., on January 9, 1997.

Based on the submissions, the Department will then determine whether to open a wholesale price floors docket. The Department anticipates initiating a comprehensive cost study investigation of universal service subsidies within the next month, and if we determine that there is a need to develop price floors for Bell Atlantic's wholesale services, we would anticipate conducting that work within the universal service cost study docket.

V. ORDER

Accordingly, after due consideration, it is hereby

ORDERED: That the Motion for Clarification and Reconsideration of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, filed with the Department on June 23, 1997, be and hereby is GRANTED insofar as the request for clarification in concerned and determined to be moot as a result of this Order, insofar as the request for reconsideration is concerned, and it is

FURTHER ORDERED: That New England Telephone and Telegraph d/b/a Bell Atlantic-Massachusetts file price floors, with supporting documentation from its MCS VI cost study, for all of its retail services classified as sufficiently competitive, within 30 days of the date of this Order;

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

By Order of the Department,

_____
Janet Gail Besser, Acting Chair

_____
John D. Patrone, Commissioner

_____
James Connelly, 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).