

D.P.U. 96-108

Review by the Department of the propriety of the rates and charges set forth in the negotiated interconnection agreement between New England Telephone and Telegraph Company d/b/a NYNEX and C-TEC Services, Inc. pursuant to the Telecommunications Act of 1996 and G.L. c. 159.

APPEARANCES: Bruce Beausejour, Esq.
Barbara Anne Sousa, Esq.
185 Franklin Street, Room 1403
Boston, MA 02210-1585
FOR: NEW ENGLAND TELEPHONE AND
TELEGRAPH COMPANY d/b/a NYNEX
Petitioner

Eric J. Branfman, Esq.
Swidler & Berlin, Chartered
3000 K Street, N.W., Suite 300
Washington, DC 20007-5116
FOR: C-TEC SERVICES, INC.
Petitioner

I. INTRODUCTION

On February 8, 1996, Congress enacted the Telecommunications Act of 1996 ("Act"), amending the Communications Act of 1934, 47 U.S.C. §§ 151 et seq. The Act established a regulatory framework for the expansion of competition in the local telecommunications industry. The Act also established broad requirements for interconnection with incumbent local telephone companies and the procedures for the negotiation, arbitration and approval of the interconnection agreements. 47 U.S.C. §§ 252 et seq. The Act designates the respective state regulatory commissions as the primary forum for review of negotiated and arbitrated interconnection agreements. 47 U.S.C. § 252(e). A state commission must act to approve or reject a negotiated agreement within 90 days after submission by the parties¹ and no state court has jurisdiction to review such action of a state commission.² 47 U.S.C. § 252(e)(4).

II. PROCEDURAL BACKGROUND

On November 8, 1996, New England Telephone and Telegraph Company d/b/a NYNEX ("NYNEX") filed a negotiated interconnection agreement ("Agreement") between NYNEX and C-TEC Services, Inc. ("C-TEC") for approval by the Department of Public Utilities ("Department").³ The Agreement sets forth terms under which NYNEX and C-TEC will interconnect their respective networks, as well as the network elements, services, and other

¹ If a state commission fails to act to carry out its responsibility under this section, the FCC shall issue an order preempting the state commission jurisdiction and act for the state commission. 47 U.S.C. § 252(e)(5).

² The proceeding by the FCC, and any judicial review of the FCC's action, shall be the exclusive remedies for a state commission's failure to act. 47 U.S.C. § 252(e)(6). Any party aggrieved by a state commission determination may bring an action in an appropriate federal district court. Id.

³ C-TEC's affiliates include Residential Communications Network of Massachusetts ("RCN"), Commonwealth Long Distance, Inc. ("CLD") and Commonwealth Communications, Inc. (Agreement at Att. B). The rates, terms and conditions included in the Agreement will also be available to these affiliates, two of which—RCN and CLD—have filed local exchange tariffs with the Department.

arrangements that NYNEX will provide to C-TEC. The Department docketed this matter as D.P.U. 96-108. The Department published notice of the proceeding and solicited comments from interested parties on the Agreement. No comments were filed.

III. DESCRIPTION OF AGREEMENT

The Agreement, dated October 15, 1996, is a comprehensive set of terms and conditions governing the interconnection of NYNEX's local exchange network with C-TEC's network, including (1) network architecture; (2) the transmission and routing of exchange service and exchange access traffic; (3) access to NYNEX's unbundled network elements;

(4) resale of NYNEX's retail exchange services; (5) collocation; (6) number portability;

(7) dialing parity; (8) access to rights-of-way; and (9) directory listings and directory assistance. The Agreement is for interconnection in the 617/508 LATA (Agreement at § 4.2). The Agreement has an initial term of three years (id. at § 21.1).

Pursuant to 47 U.S.C. § 251(c)(2), the Agreement provides for transmission and routing of local traffic and intraLATA toll traffic between the respective carriers' local exchange customers (id. at §§ 5.0 et seq.). The parties will compensate each other at the rate of \$.008 per minute for transport and termination of local traffic originating on NYNEX's or C-TEC's network for termination on the other party's network (id. at § 5.7, Pricing Schedule at 8). This rate will be adjusted bi-annually beginning January 1, 1997, based on the following formula:

$$(\text{C-TEC-originated peak minutes} + \text{NYNEX-originated peak minutes}) *$$

$$\text{Peak Rate}/(\text{Total C-TEC} + \text{NYNEX minutes})$$

$$+$$

$$(\text{C-TEC originated off-peak minutes} + \text{NYNEX-originated off-peak minutes}) *$$

$$\text{Off-peak Rate}/(\text{Total C-TEC} + \text{NYNEX minutes})$$

where: Peak Rate = \$.009 per minute of use

Off-Peak Rate = \$0.0065 per minute of use

(Agreement, Pricing Schedule at 8, 11).

Pursuant to 47 U.S.C. § 251(c)(2), the Agreement requires the joint provision of trunks that will connect C-TEC to NYNEX's tandem switches to allow interexchange carriers to originate and terminate traffic to/from C-TEC customers (id. at §§ 6.2 et seq.). The parties will use a meet-point billing arrangement for the jointly-provided switched exchange access services (id. at §§ 6.3 et seq.). The Agreement also addresses the transport and termination of other types of traffic, including information services traffic, Busy Line Verification/Busy Line Verification Interrupt ("BLV/BLVI") traffic, Tandem Transient service, Dedicated Transit service and a 911/E911 arrangement (id. at §§ 7.0 et seq., 19.2 et seq.).

Pursuant to 47 U.S.C. § 251(c)(3), C-TEC can purchase the following unbundled elements from NYNEX: (1) links (unbundled from local switching and local transport); (2) ports; (3) private lines; (4) special access; and (5) switched local transport from the trunk side of its switches (id. at §§ 9.1 et seq., 9.3, 9.4). The Agreement provides that the monthly rates for unbundled links will be \$16.50 until the Department determines interim and final link rates (id. at §§ 9.9 et seq.). The Agreement contains a true-up provision that requires the companies to compensate each other for the difference between the current rate for links and the interim and final link rates (id.). The monthly rates for residence and business voice grade ports will be \$8.00 (Agreement, Pricing Schedule at 9).

Under the Agreement, NYNEX also is required to provide, at any technically feasible point, access to other unbundled network elements, at the request of C-TEC (Agreement at § 9.6.1). Such requests will be governed by the procedures and timetables for "Network Element Bona Fide Requests" (Agreement, Exh. A). The Agreement provides that if the Department does not set interim or final link rates by December 31, 1996, NYNEX will file a tariff with the Department no later than February 1, 1997 designed to lead to the establishment

of final link rates (Agreement at § 9.9.14). The Agreement also contains a stipulation that C-TEC "acknowledges that the Network Element Bona Fide Request Process established pursuant to [the] Agreement satisfies the requirements of the Act to provide unbundled network elements" (id. at § 9.10.4).

Pursuant to 47 U.S.C. §§ 251(c)(4) and 251(b)(1), C-TEC will be able to purchase for resale at wholesale rates NYNEX's local exchange services (id. at § 10.1). Until the Department approves permanent resale rates, residential and business access lines are being offered to C-TEC at discounts to be negotiated based upon receipt of a Bona Fide Request (Agreement, Pricing Schedule at 9-10). The parties may also negotiate term and volume discounts (Agreement at § 10.3). The Agreement requires that C-TEC also make available to NYNEX its retail services for resale (id. at § 10.2).

Under the Agreement, NYNEX is also required to provide physical collocation for C-TEC's transport facilities and equipment as necessary for interconnection or for access to unbundled network elements, pursuant to 47 U.S.C. § 251(c)(6) (id. at § 12.1). The Agreement also requires the parties to provide number portability to each other, in accordance with rules and regulations prescribed by the FCC and/or the Department (id. at § 13.1.1). Until permanent number portability is implemented in the industry, the parties will provide interim number portability through remote call forwarding and other measures (id. at § 13.2 et seq.). NYNEX is also required to provide C-TEC with local dialing parity, as required by 47 U.S.C. § 251(b)(3) (id. at § 15.0). The Agreement also addresses such issues as access to rights-of-way, directory listings and directory assistance (id. at §§ 16.0, 19.0 et seq.).

The Agreement contains performance standards that NYNEX must meet with regard to the installation of links, the provision of interim number portability, and out-of-service repairs, the breach of which may result in the payment of liquidated damages to C-TEC (id. at §§ 27.0

et seq.).⁴ Section 28.0 of the Agreement requires the parties to renegotiate any portion of the Agreement which is rejected by the FCC or the Department.

NYNEX indicated in its initial filing that the Agreement is designed to meet the requirements of 47 U.S.C. §§ 251 and 271, and builds upon existing interconnection agreements in place in Massachusetts with other competing local exchange companies (Transmittal Letter at 1). Lastly, in accordance with 47 U.S.C. § 252(i), the Agreement states that any arrangements provided under the Agreement to C-TEC are available to other telecommunications carriers on the same terms and conditions, if so requested (Agreement at § 29.14).

IV. STANDARD OF REVIEW

Pursuant to 47 U.S.C. § 251(a), telecommunications carriers have a general duty of interconnection. Pursuant to 47 U.S.C. § 251(b), local exchange carriers are obligated to provide dialing parity, access to rights of way, reciprocity, and number portability to other local exchange carriers. In addition, local exchange carriers have a duty to negotiate in good faith, interconnect with other local exchange carrier networks, and provide nondiscriminatory access to network elements on an unbundled basis. 47 U.S.C. § 251(c). Upon receiving a request for interconnection pursuant to Section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement without regard to the standards set forth in subsections (b) and (c) of Section 251. 47 U.S.C. § 252(a)(1).

Any interconnection agreement adopted by negotiation must be submitted for approval by the appropriate state commission. 47 U.S.C. § 252(e). The state commission must approve or reject the agreement with written findings as to any deficiencies. 47 U.S.C. § 252(e)(1). The state commission may only reject a negotiated agreement, or any portion thereof, if it finds

⁴ Payments for liquidated damages shall only apply after a minimum of 250 links are installed for C-TEC in Massachusetts (Agreement at § 27.3).

that (1) the agreement discriminates against a telecommunications carrier not a party to the agreement, or (2) the implementation of such agreement is not consistent with the public interest, convenience, and necessity.⁵ 47 U.S.C. § 252(e)(2)(A). The state commission is not prohibited from establishing other non-price requirements in its review of an agreement, including service quality standards. 47 U.S.C. § 252(e)(3).

V. ANALYSIS AND FINDINGS

After review, the Department has determined that the Agreement is not discriminatory to other telecommunications carriers. The Agreement does not bind other carriers and other carriers are free to negotiate their own arrangements with NYNEX. In addition, the Agreement meets the requirements of 47 U.S.C. § 252(i) by making any interconnection or network elements, provided under the Agreement to C-TEC, available to other telecommunications carriers on the same terms and conditions, if so requested.

Moreover, implementation of the Agreement, exclusive of Section 9.10.4 (see discussion below), is consistent with the public interest, convenience and necessity. The negotiated rates in the Agreement are the product of good faith negotiations between two competing local exchange carriers. Presumably, parties, who best know their own business

⁵ In NYNEX/MFS Agreement, D.P.U. 96-72, at 15-16 (1996), the Department rejected arguments that negotiated agreements should be subject to the requirements of 47 U.S.C. § 251 relating to arbitrated agreements. Therefore, the Department may find that a negotiated agreement is consistent with the public interest without determining that the rates included therein are consistent with the pricing standards for arbitrated agreements at 47 U.S.C. §§ 251 and 252(d), or the FCC's interconnection and pricing rules. D.P.U. 96-72, at 15-16. In contrast, the Act requires state commissions to "ensure" that arbitrated agreements meet the requirements of Section 251, including FCC regulations, and the pricing standards of Section 252(d). Id. at 16; 47 U.S.C. § 252(c).

The Department further notes that the FCC's pricing rules have been stayed pending a decision on the merits by the Court of Appeals for the Eight Circuit. Iowa Utilities Board v. FCC, No. 96-332 (Oct. 15, 1996), Federal Communications Commission v. Iowa Utilities Board, No. A-299, ___ S.Ct. ___, 1996 WL 652984 (Nov. 12, 1996) (denial of FCC's Application to Vacate Stay).

interests and are negotiating in good faith, will arrive at an agreement that each deems to be acceptable in order to compete effectively in the local exchange market. If C-TEC or NYNEX believed that the rates, terms and conditions under negotiation would not allow them to compete effectively in the local exchange market, they would have sought arbitration from the Department under 47 U.S.C. § 252(b).

The Agreement will facilitate and expedite the participation of C-TEC affiliates in the local exchange market in Massachusetts to meet the needs of the company's new and existing customers. The negotiation process has enabled C-TEC and its affiliates to avail themselves of terms and conditions more favorable than those obtained by other interconnecting parties, either through negotiation or arbitration, without interruption of ongoing operations.

Finally, the Department addresses Section 9.10.4 of the Agreement. As noted above, Section 9.10.4 states that C-TEC acknowledges that the Network Element Bona Fide Request Process established in the Agreement satisfies NYNEX's obligation to provide unbundled network elements pursuant to 47 U.S.C. § 251(c)(3). Although the Department does not believe that approval of this provision in any way predetermines the issue of NYNEX's satisfaction of its obligations under 47 U.S.C. §§ 251, such approval may give the impression of a finding by the Department on this issue. Because NYNEX has not yet made a request to provide in-region interLATA long-distance service, it would be premature to raise this issue. Pursuant to 47 U.S.C. § 252(e)(2)(A), the Department may reject any portion of a negotiated agreement that is inconsistent with the public interest, convenience, and necessity. Moreover, the Department rejected similar language contained in a negotiated agreement between NYNEX and MFS Intelenet of Massachusetts, Inc. NYNEX/MFS Agreement, D.P.U. 96-72, at 18 (1996).⁶ Therefore, the Department rejects Section 9.10.4 of the Agreement.

⁶ Although the Department did not expressly reject Section 9.10.4 of the Agreement in D.P.U. 96-72, the Department does not believe that approval of that provision in any way predetermined the issue of NYNEX's satisfaction of its obligations under 47

Accordingly, the Department finds that the Agreement does not discriminate against any other telecommunications carrier, and implementation of the Agreement, exclusive of Section 9.10.4, is consistent with the public interest, convenience and necessity. In approving the Agreement, the Department makes no findings on the applicability of its terms and conditions to other negotiated agreements which may be submitted for Department review.

VI. ORDER

Accordingly, after due notice and consideration, it is

ORDERED: That the terms and conditions of the negotiated interconnection agreement, with the exception of Section 9.10.4, between New England Telephone and Telegraph Company d/b/a NYNEX and C-TEC Services, Inc. be and hereby are approved.

By Order of the Department,

U.S.C. §§ 251 and 271. The Department did reject Section 3.0, which was similarly worded, for the same reasons that the Department is now rejecting Section 9.10.4. D.P.U. 96-72, at 18.

John B. Howe, Chairman

Janet Gail Besser, Commissioner
