D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-E

Consolidated Petitions of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Teleport Communications Group, Inc., Brooks Fiber Communications, AT&T Communications of New England, Inc., MCI Communications Company, and Sprint Communications Company, L.P., pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration of interconnection agreements between Bell Atlantic-Massachusetts and the aforementioned companies.

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I. INTRODUCTION

This Order concerns an arbitration proceeding held pursuant to the Telecommunications Act of 1996 ("the Act"). 47 U.S.C. § 252. The proceeding is a consolidated arbitration between New England Telephone and Telegraph Company, d/b/a Bell Atlantic ("Bell Atlantic", formerly "NYNEX") and its competitors, AT&T Communications of New England ("AT&T"), Brooks Fiber Communications of Massachusetts, Inc. ("Brooks Fiber"), MCI Telecommunications Corporation ("MCI"), Sprint Communications Company L.P. ("Sprint"), and Teleport Communications Group, Inc. ("TCG").

On December 4, 1996, the Department of Public Utilities (now, Department of Telecommunications and Energy, or "Department") issued an order in this proceeding ("Phase 4 Order") which set forth our rulings with regard to the method to be used by Bell Atlantic in carrying out total element, long-run, incremental cost ("TELRIC") studies to determine the prices to be charged by Bell Atlantic to competing local exchange carriers ("CLECs") for the use of unbundled network elements ("UNEs").[1] The Department followed the method set forth by the Federal Communications Commission ("FCC") in its First Report and Order dated August 8, 1996 ("Local Competition Order"). (A companion order, the "Phase 2 Order", set forth our rulings with regard to the wholesale discount to be applied to the purchase by CLECs of NYNEX retail services.) On February 5, 1997, in response to motions for clarification, recalculation, and

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[1] 47 U.S.C. § 153 defines network element as "a facility or equipment used in the provision of a telecommunications service." 47 U.S.C. § 251(c)(3) obligates incumbent local exchange carriers to provide access to network elements on an unbundled basis to any requesting telecommunications carrier, subject to certain conditions.

reconsideration, the Department issued a second order ("Phase 4-A Order") with regard to the TELRIC studies and directed Bell Atlantic to submit cost studies in compliance with that Order. Most aspects of that TELRIC compliance filing (and all parts of the compliance filing with regard to resold services) were approved by the Department on May 2, 1997 ("Phase 2-B, 4-B Order"), and the remaining aspects of the TELRIC compliance filing were approved on June 27, 1997 ("Phase 4-D Order"). As part of this consolidated arbitration proceeding, the Department is currently reviewing a number of other TELRIC studies submitted by Bell Atlantic, those related to collocation, dark fiber, non-recurring charges for resold services and UNEs, and operation support systems ("OSS") for resold services and UNEs.

On November 18, 1997, Bell Atlantic informed the Department by letter that it was withdrawing one rate element -- the customer interface panel ("CIP") -- from its collocation cost study. The CIP is a digital cross-connect panel that was to have been offered by Bell Atlantic to connect individual UNEs to each other as specified by a CLEC. In its letter, Bell Atlantic asserted that in light of recent decisions by the United States Court of Appeals for the Eighth Circuit ("the Eighth Circuit Decision")[2], the Company was not required to combine UNEs on behalf of competing carriers and that it therefore declined to do so. AT&T and Sprint, on November 21 and 25, 1997, respectively, responded to Bell Atlantic's letter arguing that, notwithstanding the Eighth Circuit Decision, Bell Atlantic should be required to offer combinations of UNEs in Massachusetts.

[2] Iowa Utilities Board, et al. Petitioners, v. Federal Communications Commission; United States of America, Respondents, 120 F.3d 753 (8th Cir., July 18, 1997, as amended on rehearing on October 14, 1997) (1997).

On December 16, 1997, the Department held an evidentiary hearing on facts concerning the logistical and technical aspects of how a CLEC would order and how Bell Atlantic would provide uncombined UNEs and how the CLEC would arrange for the combination of those uncombined UNEs (Tr. 20, at 34-35). Bell Atlantic presented Amy Stern, director of product development for Bell Atlantic wholesale services (Tr. 25, at 7-126). AT&T presented Robert V. Falcone, division manager, local services division (Tr. 25, at 127-158).

Initial briefs were filed by Bell Atlantic, AT&T, MCI, and Sprint on January 9, 1998. Reply briefs were filed by these parties on January 16, 1998.[3]

The parties raise two types of arguments. The first is whether the state has been preempted by the Eighth Circuit Decision from requiring Bell Atlantic to offer UNE combinations. The second is whether, in light of Bell Atlantic's agreement to offer UNE combinations in earlier stages of the interconnection negotiations, it is now contractually bound by that agreement, notwithstanding the Eighth Circuit Decision.

II. THE PREEMPTION QUESTION

A. Positions of the Parties

Bell Atlantic first notes that the Eighth Circuit found that the FCC's rule requiring incumbent local exchange companies ("ILEC") to recombine UNEs "cannot be squared with the terms of subsection 251(c)(3) [of the Act]," and that a rule which prohibits an ILEC, such as Bell Atlantic, from separating UNEs that it may currently combine "is contrary to" that same subsection. While Bell Atlantic recognizes that a state may impose interconnection requirements

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[3] Brooks Fiber and Teleport did not file briefs in this matter.

on an ILEC that are not specifically mentioned in the Act, it further notes that subsection 261(c) of the Act provides that such state requirements cannot be inconsistent with the Act or with the FCC's regulations to implement the Act. Because the Court has found that an FCC requirement to offer combined UNEs "cannot be squared with" and "is contrary to" the requirements of Section 251, Bell Atlantic asserts therefore that any attempt by the state to order such a requirement would likewise be inconsistent with the Act (Bell Atlantic Initial Brief at 11-12).

Bell Atlantic further argues that the CLECs cannot attack the Eighth Circuit Decision collaterally before the Department and thereby seek, in essence, to reimpose unlawful FCC rules. It argues that the appropriate forum for review of the Eighth Circuit's Decision and this issue is the Supreme Court. Bell Atlantic asserts that the doctrine of collateral estoppel or issue preclusion is plain and applicable in this situation. It notes that AT&T, MCI, Sprint, and Bell Atlantic were all parties to the Eighth Circuit proceeding, and that Court has issued a valid final judgment deciding the question of law surrounding the recombination of UNEs. That decision, argues Bell Atlantic, is binding on those parties, and they should be precluded from relitigating this issue in the hope of attaining an inconsistent decision in another forum (id. at 11-13). Bell Atlantic argues that the Eighth Circuit decision to strike down the FCC's rules is equally applicable to a state's attempt to impose the same requirements because the rules, in whatever jurisdiction, are contrary to the Act (Bell Atlantic Reply Brief at 1).

The CLECs in this case argue that the Department has the authority to require Bell Atlantic to offer combined UNEs pursuant to state law. Sprint, for example, argues that the Eighth Circuit Decision confirms the authority of the state to decide the issue of UNE combinations, noting that the Court recognized that "Congress intended to preserve the state's traditional authority to regulate local telephone markets . . . so long as the state rules are consistent with the requirements of section 251 and do not substantially prevent the implementation of the section 251 or the purposes of Part II" of the Act (Sprint Initial Brief at 6). Sprint further notes that the Eighth Circuit ruling was more narrow than that argued by Bell Atlantic. That ruling, argues Sprint, was a finding with regard to an FCC rule, and was not a ruling on whether any state-imposed requirement that furthers the pro-competitive policies of a state is consistent with the Act (Sprint Reply Brief at 2-4).

AT&T offers similar arguments. The Company notes that the Eighth Circuit's ruling regarding UNE combinations dealt only with a narrow question of federal law, whether the FCC had the authority under the act to require ILECs to provide UNE combinations. It argues that no question of state regulatory authority was at issue in the Eighth Circuit Decision. The Court did not have before it, and therefore did not rule on, any efforts by states acting pursuant to state law to impose obligations on ILECs beyond those provided by Section 251 of the Act. In fact, notes AT&T, the Court was explicit in acknowledging this fact, leaving "to another day any determination of whether a specific state access or interconnection regulation is inconsistent with the Section 251 or substantially prevents the implementation of Section 251 or Part II" (AT&T Initial Brief at 13-14, <u>citing</u> <u>Iowa Utilities Board</u>, 120 F.3d at 807, n.27).

AT&T asks us to recognize that Bell Atlantic is not arguing that the provision of UNE combinations is illegal; rather Bell Atlantic is arguing that it is beyond the authority of any state or federal regulator to require it to provide such combinations when it does not choose to do so.

This position, says AT&T, is unsupported by the Act or the Eighth Circuit's Decision (id. at 17). AT&T explains that if it is not inconsistent with the Act for Bell Atlantic voluntarily to provide a UNE combination, then it cannot be inconsistent with the Act for a state commission, acting under independent state law, to impose a requirement that it do so (id. at 18).

MCI also offers the view that the Eighth Circuit Decision was narrowly focused, finding that the FCC could not rely on subsection 251(c)(3) of the Act as a source of authority to promulgate rules requiring ILECs to combine UNEs. Nothing in the decision, argues MCI, prohibits a state commission, acting independently of the Act and pursuant to state authority, from requiring an ILEC to combine UNEs at the request of a CLEC (MCI Initial Brief at 10). As a general matter, says MCI, various sections of the Act expressly acknowledge independent state authority to regulate telecommunications services. Hence, the Department is not precluded from directing Bell Atlantic to combine UNEs at a CLEC's request (MCI Initial Brief at 11-12). This authority, argues MCI, is inherent in the Department's jurisdiction, as codified in G.L. c. 159 (id. at 14-16).

B. Analysis and Findings

There is no disagreement that the Eighth Circuit's Decision, unless overturned by the U.S. Supreme Court,[4] precludes the FCC from requiring an ILEC to offer UNE combinations to a CLEC. Likewise, there is no disagreement that an ILEC can voluntarily offer UNE combinations to a CLEC. The disagreement rather is whether the Act permits this Department, acting under the

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[4] On January 12, 1998, the U.S. Supreme Court agreed to review the Eighth Circuit Decision.

broad authority granted to it by the General Court, to order an ILEC to do something which the FCC, under the Act, cannot order.

We begin by quoting the relevant portion of the Eighth Circuit Decision in its entirety.

> Combination of Network Elements
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> We also believe that the FCC's rule requiring incumbent LECs, rather than the requesting carriers, to recombine network elements that are purchased by the requesting carriers on a unbundled basis, 47 C.F.R. § 51.315(c)-(f), cannot be squared with the terms of subsection 251(c)(3). The last sentence of subsection 251(c)(3) reads, "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." 47 U.S.C.A. § 251(c)(3) (emphasis added). This sentence unambiguously indicates that requesting carriers will combine the unbundled elements themselves. While the Act requires incumbent LECs to provide elements in a manner that enables the competing carriers to combine them, unlike the Commission, we do not believe that this language can be read to levy a duty on the incumbent LECs to do the actual combining of elements. The FCC and its supporting intervenors argue that because the incumbent LECs maintain control over their networks it is necessary to force them to combine the network elements, and they believe that the incumbent LECs would prefer to do the combining themselves to prevent the competing carriers from interfering with their networks. Despite the Commission's arguments, the plain meaning of the Act indicates that the requesting carriers will combine the unbundled elements themselves: the Act does not require the incumbent LECs to do all of the work. Moreover, the fact that the incumbent LECs object to this rule indicates to us that they would rather allow entrants access to their networks than have to rebundle the unbundled elements for them.
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> Section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis. Stated another way, § 251(c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services. To permit such an acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent telecommunications retail services for resale on the other. Accordingly, the Commission's rule, 47 C.F.R. § 51.315(b), which prohibits an incumbent LEC from separating network elements that it may currently combine, is contrary to § 251(c)(3) because the rule would permit the new entrant access to the incumbent LEC's

network elements on a bundled rather than an unbundled basis.

Consequently, we vacate rule 51.315(b)-(f) as well as the affiliated discussion sections.

Iowa Utilities Board, 120 F.3d at 813.

We also quote the section of the Act concerning reservation of state authority. Subsection 261(c), entitled "Additional State Requirements," provides that:

> Nothing in this part [i.e., Part II, comprising sections 251 to 261] precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the [FCC's] regulations to implement this part.

Subsection 261(c) negates any inference or argument that Congress sought to occupy the telecommunications field entirely and thereby to oust the states from any, even interstitial, regulation. See e.g., Campbell v. Hussey, 368 U.S. 297 (1961). But insofar as the Act does speak to a particular question, there must be no conflict between a state's actions and the Congressional enactment in order for state regulation to be permitted to supplement Federal requirements. Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963); Rice v. Santa Fe Elevator Co., 331 U.S. 218 (1947). Where, however, state action conflicts with a Congressional act governing interstate commerce, state action is invalid. Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965).

Thus, as a general matter, some measure of state authority is reserved by the Act; but we would need to address whether, given this well-known principle of federalism and the Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, restated in subsection 261(c), a determination by the Department to require the provision of UNE combinations would be inconsistent with subsection

251(c)(3) of the Act.

On the general question of state authority, it is quite clear that the Department has authority to rule on issues central to the furtherance of telecommunications competition in the state. The Department is granted broad supervisory authority over telecommunications companies in G.L. c. 159. No one claims that the Act preempts Chapter 159; nor have we the power so to find. Spence v. Boston Edison Co., 390 Mass. 604, 610 (1983); Dispatch Communications of New England, D.P.U./D.T.E. 95-59-B/95-80/95-112/96-13, at 12 n.11 (1998). The question is what scope the Act and Chapter 159 together afford this Commission for action on the UNE question. In particular, Sections 12 and 16 of G.L. c. 159 provide that the Department may inquire into and adjust the regulations and practices of telecommunications carriers in the state. That authority was used over a decade ago to introduce competition in the state. IntraLATA Competition, D.P.U. 1731 (1985). Since that time, Chapter 159 has undergirded other principles established by the Department. See e.g., New England Telephone, D.P.U. 93-125 (1994); New England Telephone, D.P.U. 94-50 (1995). If it is clear that the issue of UNE combinations is relevant to the public policy goals we have set forth in the past, it would be appropriate for us to consider that issue under the broad authority granted to us by the General Court, subject to the restriction that our rulings not be inconsistent with the Act.

In this case, the Eighth Circuit Decision guides our finding. We agree with the CLECs that the Court did not expressly address the issue of state authority over UNEs in its decision. The specific issue raised was whether the FCC had the authority to order ILECs to combine UNEs, and the Court found that the FCC did not have that authority. However, in reaching the conclusion that the FCC exceeded its authority, the Eighth Circuit based its reasoning on the requirements of the Act -- not just the identity of the agency issuing the rules -- and therefore, the Court's reasoning could be applied with equal force to any similar rule or decision issued by the Department. The Department notes that the Eighth Circuit Decision is being debated widely across the country, and that the question of its applicability to the states is central to this debate.[5]

In light of the Eighth Circuit Decision and ensuing debate, the Department finds that it would not be productive in achieving our larger goal of completing the arbitrations to challenge the Eighth Circuit conclusion by requiring Bell Atlantic to combine UNEs in the exact manner prescribed by the FCC and proscribed by the Court. Therefore, we are ordering the parties back to negotiations as discussed further below.

We must address another important concern with respect to UNEs before we proceed to the negotiation and contractual issues raised by the parties in this proceeding. Relying upon the evidence brought forth in this proceeding, AT&T has succinctly set forth a number of consequences of the manner in which Bell Atlantic proposes to require a CLEC to combine UNEs, i.e., through the use of collocation facilities in every central office in which the CLEC chooses to purchase this array of services. We quote from AT&T's
Initial Brief:

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5 To date, five states have addressed this issue, four of which have declined to find that the Act prohibits ILECs from providing UNE combinations. See Michigan Public Service Commission, Case No. U11551 (1998); Idaho Public Utilities Commission, Order No. 27236 (1997); Public Utility Commission of Texas, PUC Docket Nos. 16189, et al. (1997); Public Utilities Commission of Ohio, Case No. 96-922-TP-UNC (1997). Compare Public Service Commission of Maryland, Case No. 8731 Phase II(c).

First, the end result of all of Bell Atlantic's proposed network rearrangements is to recreate precisely the same service functionality that the customer had to begin with. No improvement in service quality or network efficiency is created by any of this network reengineering. See, e.g., Tr. Vol. 25, pp. 67-68. To the contrary, there will be a material degradation of service quality. Every additional interconnection is a potential point of failure. Tr. Vol. 25, pp. 66, 146. The multiple human and computer coordinations required to "hot cut" service to a CLEC customer will inevitably result in service interruptions. See, e.g., Tr. Vol. 25, pp. 82-83, 144-146.

Bell Atlantic's proposed network reengineering requirements will result in substantial additional (and totally unnecessary) costs, almost all of which will be imposed on the CLECs. There will be substantial costs incurred to establish physical collocation facilities at every Bell Atlantic central office by every CLEC that wishes to purchase UNEs. There will be multiple "SAC" [service access charge] charges and nonrecurring charges for the central office interconnections. Tr. Vol. 25, pp. 11, 14. There will be undetermined but undoubtedly significant costs to "overlay" copper feeder plant where a fiber feeder link is already in place (or, alternatively, even greater cost for "expensive" demultiplexing equipment). Tr. Vol. 22, pp. 46-47, see also
Tr. Vol. 25, pp. 103, 104.

Finally, Bell Atlantic's policy will ensure that no CLEC order for UNEs will ever be able to flow through Bell Atlantic's ordering and provisioning OSSs [operational support systems] in the way that Bell Atlantic's own customer orders will flow through. See, e.g., Tr. Vol. 21, pp. 95-98; Tr. Vol. 22, pp. 53; Tr. Vol 25, pp. 39-40, 89. This fact has both quality of service and cost consequences. Bell Atlantic's OSSs are designed to provide service ordering and provisioning on an electronic basis with a minimum of human intervention. The new policy will ensure that CLECs, unlike Bell Atlantic, never have the benefits of the electronic flow through systems. Thus, while Bell Atlantic can provide service to its own new customer for a one-time charge of $13.88 (Tr. Vol. 22, pp. 34, 63), it will impose literally hundreds of dollars in NRC [nonrecurring charges], OSS and collocation charges on a CLEC wishing to provide the same service to the same customers. See Tr. Vol. 21, pp. 102-106.

In conclusion, it cannot be overemphasized that all of the foregoing service quality and cost consequences are totally unnecessary. See, e.g., Tr. Vol. 21, pp. 96-98, Tr. Vol. 25, pp. 43-44. They result in no service improvement, no increase in functionality, no increase in network efficiency. They simply make it more expensive and more difficult for Bell Atlantic's competitors to serve their customers.

AT&T Initial Brief, at 9-10 (emphasis and footnote omitted).

Similar points were raised by MCI and Sprint, and these consequences are uncontroverted. Bell Atlantic has left them unaddressed and chosen instead to rely on purely legal arguments in support of the policy decision it urges upon us. Those legal arguments we have already addressed. We cannot, however, ignore the consequences, since they have important implications for the successful introduction of competition in Massachusetts, a major goal of the Department. Bell Atlantic's response to the Eighth Circuit Decision does not advance our or the Act's policy to create efficiency-enhancing conditions that would allow local exchange competition to develop and to deliver price and service benefits to customers. Consequently, Bell Atlantic's policy is not conducive to its own goal of receiving authority from the FCC, under Section 271 of the Act, to originate interLATA calls in Massachusetts.[6]

We believe, based on the record in this case, that Bell Atlantic's chosen method of provisioning UNEs solely through collocation may not be adequate to meet the Act's UNE provisioning requirements in Subsection 251(c)(3). We cannot approve an arbitrated agreement that contains provisions not consistent with the Act's Section 251 requirements. While it is true that the Eighth Circuit found that the FCC may not require ILECs to combine network elements, the Eighth Circuit also found that "a requesting carrier may achieve the capability to provide

[6] Under the Act, Bell Atlantic must notify this Department of its intent to seek Section 271 certification from the FCC when it requests the right to offer intra-region, interLATA, long-distance service. The Act gives this Department the obligation and the right to comment on that filing to the FCC. 47 U.S.C. § 271(d)(2)(B).

telecommunications services completely through access to the unbundled elements of an incumbent LEC's network,"[7] and that a requesting carrier is not required "to own or control some portion of a telecommunications network before being able to purchase unbundled elements."[8] Based on the record, it is clear that collocation requires a competing carrier to own a portion of a telecommunications network, so making collocation a precondition for obtaining UNEs appears to be at odds with the Eighth Circuit's findings.[9] Therefore, unless Bell Atlantic can demonstrate convincingly that its collocation requirement is consistent with the Act and the Eighth Circuit's findings, it must develop an additional, alternative or supplemental method for provisioning UNEs in such a way that they can be recombined by competing carriers without imposing a facilities-requirement on those carriers. Without this additional method, we believe that Bell Atlantic's insistence on collocation as the only answer to the UNE question very well may not meet the Act's Section 251 interconnection requirements as they relate to the provisioning of UNEs, and, consequently, that Bell Atlantic might not meet the requirements of the Section 271 interconnection "checklist." Opportunity remains, however, to avert so untoward an outcome.

In light of the Eighth Circuit Decision, Bell Atlantic might consider a different approach -- an approach alternative or supplemental to collocation. Recognizing the network efficiencies that

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7 Iowa Utilities Board, 120 F.3d at 814.

8 Id.

9 The FCC states that it is "still evaluating the implications of these rulings and whether they may compel a result that would require methods other than or in addition to collocation for combining network elements." FCC 97-418, Memorandum Opinion and Order, CC Docket No. 97-208, released December 24, 1997, ¶ 199 ("FCC South Carolina Order").

would result from combining UNEs in the manner proposed by the CLECs -- the method Bell Atlantic had planned to use for the months leading up to the ruling, using OSSs designed precisely for this purpose -- Bell Atlantic still may voluntarily agree to provide such combinations. Indeed, such voluntary recombination by an ILEC might well plant "the seeds of Section 271 success."[10] Alternatively, it might propose an approach suggested by FCC Commissioner Michael K. Powell in his separate statement in the FCC's decision to reject Bell South's petition for 271 authority in South Carolina, in which UNEs would be recombined voluntarily by ILECs for what Commissioner Powell labelled a modest "glue charge."[11] In this way, UNEs could be provided by Bell Atlantic in a way that contributes to efficiency, an important goal of economic regulation, and therefore to the further development of local exchange competition -- while avoiding a potentially fatal defect in Bell Atlantic's compliance with the Act's Section 251 interconnection requirements and the Section 271 checklist. Compliance with the Act's Section 251 interconnection and Section 271 "checklist" requirements is the linchpin for further progress toward and final achievement of open and more competitive markets for both local and long-distance service. Success in meeting those requirements is an important goal for this Department. Otherwise, local exchange competition in Massachusetts and Bell Atlantic's prospects for receiving interLATA

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10 FCC South Carolina Order, Separate Statement of Commissioner Michael K. Powell, p. 1.

11 Id. at 2. The Department recognizes that the level at which such a charge might properly be set could be a subject of debate and offer yet another opportunity to obstruct our goal of increased intraLATA and interLATA competition.

authority will both be harmed, to the ultimate detriment of Massachusetts consumers.[12]

In light of our conclusions above, the Department orders the parties to return to negotiations on the issue of UNE provisioning. The parties are to report to the Department on the status of those negotiations two weeks from the date of this Order. If the parties are unsuccessful in reaching agreements regarding UNE provisioning, the Department will proceed to arbitration on this issue.

III. THE NEGOTIATION AND CONTRACTUAL ISSUES

We now address the negotiation and contractual issues raised by the parties in this proceeding.

A. Positions of the Parties

AT&T and MCI argue that, in the months leading up to the Eighth Circuit Decision, Bell Atlantic had agreed, during the negotiations of interconnection agreements, to provide combinations of UNEs. They claim that Bell Atlantic is now reneging on those commitments, and they argue, as a matter of contract law and under the terms of the Act, that Bell Atlantic should have to stand by the earlier agreements. AT&T, for example, notes that because Bell Atlantic and AT&T had reached a negotiated agreement that Bell Atlantic was to provide UNE combinations,

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[12] To date, the record of the Bell Operating Companies ("BOCs") in satisfying the FCC's Section 271 requirement is disappointing as evidenced by failure any BOC to obtain FCC approval. The goal of this Department with respect to Bell Atlantic's Section 271 filing is to succeed in implementing the Act's interconnection and Section 271 requirements by doing it once and doing it right. Sound treatment of the UNE issue will advance us toward that goal. In the larger scheme, this goal is far more important than protracted skirmishing over the UNE issue. This strategic objective should not be jeopardized for mere tactical gain.

AT&T's petition for arbitration did not list this issue as "unresolved" and thus subject to arbitration. AT&T asserts that Bell Atlantic's attempt to reopen issues settled during the negotiation stage of the process and not identified as issues open for arbitration would render meaningless the Act's requirement that parties identify issues open for arbitration. It cites similar cases and orders by the Ohio and Texas public utilities commissions in support of its conclusions (AT&T Initial Brief at 27-29).

Likewise, MCI asserts that the course of conduct of Bell Atlantic and MCI during their negotiations established that agreement had been reached on the issue of UNE combinations. It argues that Bell Atlantic should not be permitted to create a disputed issue where none existed earlier. MCI argues that the Department should enforce the contractual obligation it asserts has been created during the negotiation process (MCI Initial Brief at 4-9).

In reply, Bell Atlantic asserts that its earlier agreement to provide UNE combinations was not voluntary but was imposed upon it by the FCC's interpretation of the Act, an interpretation since found to be in error by the Eighth Circuit. It argues, therefore, that it should not be bound by those agreements, and that, in any event, it has made clear during this proceeding that it was reserving its rights to revisit issues based on later judicial determinations (Bell Atlantic Reply Brief at 2, 11). It further points out that the negotiated agreements contain a provision stating, in essence, that the terms would be subject to renegotiation if regulatory changes occurred that made those terms obsolete (id. at 11). Bell Atlantic also argues that it has no contract with AT&T, Sprint, or MCI, and where there is no contract with a party, there is no merit to a contractual claim (id. at 2).

B. Analysis and Findings

Each of the interconnection agreements for the parties in this consolidated proceeding is at a different stage: the Brooks Fiber agreement is completed and signed, and has been approved by the Department (see D.T.E. 97-70 (1997)); the arbitration sessions and Department's orders for the AT&T agreement are completed, but the agreement has not been signed; the arbitration sessions and Department orders for the Sprint agreement are completed, and we understand that Sprint was awaiting the specific language of the AT&T agreement to serve as a model for its agreement; the MCI arbitration sessions have been completed by the arbitrator, but his awards remain subject to the Department's review of exceptions submitted by the parties; and the arbitration sessions and Department orders for the TCG agreement are completed, and the agreement is under Department review.

We recognize that, had the Eighth Circuit Decision been issued before the start of negotiations, Bell Atlantic might have refused, at that time, to offer UNE combinations to the CLECs, even though it would have been technically feasible to offer them. We can surmise that this issue would then have been added to the list of disputed items that would be subject to arbitration. On the other hand, Bell Atlantic might have volunteered to offer UNE combinations during such a negotiation, trading that provision in the variety of "gives" and "takes" that are inherent in any such negotiation. These and other possibilities, however, are speculative and do not help to inform our decision on this issue.

The Act creates an obligation on parties to an interconnection negotiation to indicate to the Department which issues are unresolved in that negotiation and are therefore subject to arbitration. 47 U.S.C. § 252(b)(2)(A). While the Department has attempted to be flexible in the early months of the arbitrations with regard to the deadlines provided by the Act, the Department has been guided by these deadlines in anticipation of achieving the Act's intention of producing interconnection agreements in a brief period of time so that the benefits of competition envisioned in the Act could reach the consumers of Massachusetts. Although several issues remain to be litigated in this consolidated arbitration proceeding, all of those issues were identified in the initial petitions or were natural extensions of those issues as the arbitration proceeding has evolved. Thus, for example, the CLECs and Bell Atlantic disagreed on whether Bell Atlantic should provide dark fiber as a UNE; Bell Atlantic was ordered to do so; and, as a natural extension of that decision, the pricing methodology for that UNE is now being litigated. In those instances in which issues were stated as unresolved in the petitions, and where the parties recognized that the arbitration was likely to take an extended period of time (e.g., pricing and performance standards), "placeholders" in the interconnection agreement were inserted.

We first address the AT&T interconnection agreement. We assume, for purposes of this analysis, that an agreement is completed, in that all disputed provisions have been arbitrated and an order issued by the Department. AT&T/NYNEX Arbitration, D.P.U. 96-80/81 (August 29, 1997). As Bell Atlantic has noted, a generic provision was included in the approved language of this agreement which states, "[I]n the event that as a result of any decision, order or determination of any judicial or regulatory authority with jurisdiction over the subject matter hereof, it is determined that [Bell Atlantic] shall not be required to furnish any service or item or provide any benefit required to be furnished or provided to AT&T hereunder, then AT&T and [Bell Atlantic] shall promptly commence and conduct negotiations in good faith with a view toward agreeing to mutually acceptable new terms..." (Bell Atlantic Reply Brief at 11-12). As we have found above, the Eighth Circuit Decision is a clear example of such a decision. We conclude, therefore, that AT&T has a right to expect Bell Atlantic to commence good faith negotiations in accordance with the agreement. We next address the Sprint interconnection agreement. As in the case of the AT&T agreement, the Department has completed its review of disputed items. Sprint/NYNEX Arbitration, D.P.U. 96-94 (January 15, 1997). Our understanding, based on correspondence from Sprint, is that it was awaiting the final version of the AT&T agreement as a model.[13] Accordingly, the conclusion we have reached with regard to the AT&T agreement is also applicable to Sprint. Sprint has a right to expect Bell Atlantic to commence good faith negotiations in accordance with the agreement.

We next address the MCI agreement. As we have noted above, the parties have filed exceptions to the arbitrator's awards with the Department. Nonetheless, the draft agreement has provisions which are similar to those of the AT&T agreement. Accordingly, the conclusion we have reached with regard to the AT&T agreement is also applicable to MCI. MCI has a right to expect Bell Atlantic to commence good faith negotiations in accordance with the agreement.

Brooks Fiber and TCG have not offered comments on this issue of UNE combinations. To the extent their agreements provide for renegotiation in the face of changes to statutory

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[13] "Sprint wants to ensure that it is offered comparable terms and conditions as those granted to other competitors, such as AT&T. Therefore, Sprint respectfully requests an extension of time, until two weeks after AT&T files its interconnection agreement, to file its interconnection agreement with the Department." Letter from Cathy Thurston, Attorney for Sprint, to Mary Cottrell, Secretary to the Department. January 14, 1998.

interpretations or regulatory changes, they, too, have the right to pursue renegotiations with Bell Atlantic.

IV. ORDER

After due consideration, it is

ORDERED: That Bell Atlantic, AT&T, Brooks Fiber, MCI, Sprint, and TCG return to negotiations on the issue of UNE combinations, and report to the Department on the status of those negotiations two weeks from the date of this Order; and it is

FURTHER ORDERED: That Bell Atlantic and its competitors, AT&T, Brooks Fiber, MCI, Sprint, and TCG, complete, and file for Department review, interconnection agreements consistent with the Act and the terms of this Order.

By Order of the Department,

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Janet Gail Besser, Chair

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John D. Patrone, Commissioner

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James Connelly, Commissioner

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W. Robert Keating, Commissioner

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Paul B. Vasington, Commissioner