

D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (Phase 1-A)

Consolidated Petitions of New England Telephone and Telegraph Company d/b/a NYNEX, 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 NYNEX and the aforementioned companies.

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I. INTRODUCTION

This is an arbitration proceeding being held pursuant to the Telecommunications Act of 1996 ("the Act"). On November 8, 1996, the Department issued an Order in this proceeding which set forth our rulings with regard to various issues regarding the interconnection agreement between New England Telephone and Telegraph Company d/b/a NYNEX ("NYNEX") and Brooks Fiber Communications ("Brooks"). Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (Phase 1) (1996) ("Phase 1 Order"). NYNEX and Brooks were directed to incorporate these determinations into an interconnection agreement.

Regarding the schedule for liquidated damages, the Department determined that NYNEX's proposal to Brooks on this issue was discriminatory in that it varied considerably from that offered to another competing carrier, MFS Intelenet of Massachusetts, Inc. ("MFS"). The Department concluded: "NYNEX has two clear alternatives that would eliminate the discrimination we have found. It has the option of revising the MFS agreement to be in accord with that offered . . . Brooks, or it could amend the Brooks agreement to correspond with the MFS agreement." Phase 1 Order at 22. At a hearing on compliance issues on February 25, 1997, it became clear that this issue remained unresolved, and Brooks and NYNEX were asked to submit written statements outlining their difference of opinion on this matter for the Department's resolution. Both parties did so on March 4, 1997.

II. SCHEDULE FOR LIQUIDATED DAMAGES

A. Positions of the Parties

1. Brooks

Brooks notes that, instead of amending the Brooks agreement to correspond with the MFS agreement, NYNEX terminated negotiations with Brooks and delayed compliance with the

Phase 1 Order while it sought to renegotiate the MFS agreement. Brooks reports that in late January 1997, NYNEX offered Brooks a revised schedule for liquidated damages and informed Brooks that MFS had agreed to amend its agreement in accordance with the revised schedule.

According to Brooks, the revised NYNEX proposal offers a sliding scale of liquidated damages, based on the number of links installed by the competing carrier, according to the following schedule:

<u>Links installed</u>	<u>Liquidated Damage (per breach)</u>
250-499	\$2,500
500-749	\$7,500
750-999	\$45,000
1000 and over	\$75,000

Brooks argues that this proposal is discriminatory, stating that nondiscrimination means that NYNEX must treat all similarly situated carriers alike. It notes that MFS was previously entitled to liquidated damages of \$75,000 without any sliding scale. According to Brooks, MFS' current agreement to a sliding scale for liquidated damages for fewer than 1000 links is meaningless since MFS already has more than 1000 links in service. Brooks argues that it should be entitled to be treated in the same manner MFS was.

Brooks also notes that the revised agreement has not yet been filed with or approved by the Department in accordance with Section 252(e) of the Act. Given its discriminatory features, Brooks says it is unlikely to be approved by the Department. Finally, Brooks argues that NYNEX's attempt to impose discriminatory restrictions on the availability of liquidated damages to Brooks constitutes a violation of the Sherman Act in that it has only one purpose, to deny Brooks a competitive advantage NYNEX made available to MFS.

Accordingly, Brooks requests that it be provided with the same schedule of liquidated

damages NYNEX provided to MFS in its original agreement with MFS.

2. NYNEX

NYNEX reports that it reached an agreement with MFS to amend the schedule of liquidated damages as follows:

<u>Links installed</u>	<u>Liquidated Damage (per breach)</u>
250-499	\$5,000
500-749	\$25,000
750-999	\$45,000
1000 and over	\$75,000

NYNEX notes that the Phase 1 Order contemplated that the MFS agreement could be amended to include the liquidated damages provision in NYNEX's initial offer to Brooks. It asserts that the product of NYNEX's discussion with MFS was a revised liquidated damages provision which is more advantageous to Brooks than the original terms offered to Brooks by NYNEX, in addition to eliminating any discriminatory treatment to Brooks. In light of these changes, NYNEX asserts, Brooks' failure to accept its new proposal is unwarranted.

Accordingly, NYNEX would have the Department issue an order that finds NYNEX has remedied the discrimination found by the Department, by offering to Brooks what has been offered to MFS.

B. Analysis and Findings

We note that NYNEX has not offered Brooks a proposal which complies with the Phase 1 Order. It has not revised the MFS agreement to be in accord with that originally offered Brooks; nor has it offered Brooks the same terms found in the original agreement with MFS. Instead, it offers a third alternative, and it is to that we now turn.

We find NYNEX's new proposal to be inadequate. Originally, MFS had the advantage of a more generous liquidated damages schedule for fewer than 1000 links. It is not appropriate now to base a schedule for Brooks on MFS' acquiescence to a less advantageous schedule for fewer than 1000 links when that portion of the schedule does not apply to MFS. We agree with Brooks that to do so would be discriminatory in that similarly situated companies would not be treated alike. We found an analogous situation in another section of the Phase 1 Order, and we reached a similar conclusion there: "One can scarcely have expected the other carriers to negotiate hard on behalf of a service territory in which they have little commercial interest; and Brooks should not be bound by the terms of an agreement among parties that unfairly works to its detriment." Phase 1 Order at 17.

While NYNEX may believe that its new proposal is more advantageous to Brooks than its original offer and its previous agreement with MFS, Brooks has made it clear that it does not believe the new NYNEX offer is in fact more advantageous. Brooks has requested that it be provided with the same schedule of liquidated damages NYNEX provided to MFS in its original agreement with MFS, the option set forth in the Phase 1 Order. We believe this is a simple and equitable solution to this issue, and we order that this provision be incorporated into the interconnection agreement between NYNEX and Brooks.

III. ORDER

After due notice, hearing and consideration, it is

ORDERED: That the issues under consideration in Phase 1-A be determined as set forth above; and it is

FURTHER ORDERED: That the parties incorporate these determinations into a final agreement, setting forth both negotiated and arbitrated terms and conditions, to be filed with the Department pursuant to the Section 252(e)(1) of the Act; and it is

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

By Order of the Department,

John B. Howe, Chairman

Janet Gail Besser, Commissioner