D.T.E. 97-116-B

Complaint of MCI WorldCom, Inc. (successor-in-interest to WorldCom Technologies and MFS Intelenet Service of Massachusetts, Inc.) against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996.

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INTERLOCUTORY ORDER ON BELL ATLANTIC MOTION FOR STAY

I. INTRODUCTION

On October 21, 1998, the Department of Telecommunications and Energy ("Department") issued an Order granting the petition of MCI WorldCom, Inc.[(1)] ("MCI") and directing Bell Atlantic-Massachusetts ("Bell Atlantic") to continue reciprocal compensation payments[(2)] for the termination of local exchange traffic to Internet service providers ("ISPs") in accordance with its interconnection agreements. WorldCom Technologies, Inc., D.T.E. 97-116, at 12 (1998) ("MCI WorldCom"). The Department applied its finding to all interconnection agreements between Bell Atlantic and Competitive Local Exchange Carriers ("CLECs"). Id. at 13.

The Department determined that a call to an ISP is functionally two separate services: (1) a local call to the ISP, and (2) an information service provided by the ISP when the ISP connects the caller to the Internet. Id. at 11. Because the Department decided that a call from a Bell Atlantic customer to an ISP that is terminated by a CLEC, such as MCI, is a "local call," for purposes of Bell Atlantic's interconnection agreements, CLECs

transporting and terminating calls to ISPs are eligible for reciprocal compensation. Id. at 12-13. In its Order, the Department recognized that proceedings pending before the Federal Communications Commission ("FCC") could require a modification to the findings contained therein. Id. at 5 n.11. Finally, concerns that ISPs in Massachusetts may be establishing themselves as CLECs solely to receive reciprocal compensation from Bell Atlantic prompted the Department to request information that would enable it to determine whether to open an investigation into the regulatory status of particular CLECs. Id. at 13.

II . Post-Order Procedural Background

On November 10, 1998, MCI filed a Motion for Reconsideration arguing that the Department's decision possibly to open an investigation into the regulatory status of certain CLECs was not consistent with the Act. MCI also requested an extension of the judicial appeal period. On November 6, 1998, Bell Atlantic also filed a Motion for Extension of the Judicial Appeal Period for all parties until 20 days after the FCC issues a ruling on reciprocal compensation for dial-up Internet-bound traffic. On November 10, 1998, the Department granted Bell Atlantic's motion.

On February 25, 1999, the Department issued an Order denying MCI's Motion for Reconsideration, finding that the Department's general supervisory and regulatory jurisdiction permits it to request information from telecommunications carriers and to use that information in determining whether to open an investigation.[(3)] MCI WorldCom, D.T.E. 97-116-A at 4 (February 25, 1999).

On February 26, 1999, the FCC issued a Declaratory Ruling and Notice of Proposed Rulemaking in which it decided, among other things, that ISP-bound traffic is interstate in nature. In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 and 99-68 (rel. Feb. 26, 1999) ("Declaratory Ruling"). Specifically, the FCC concluded that ISP-bound traffic does "not terminate at the ISP's local server . . . but continue[s] to the ultimate destination or destinations, specifically at a[n] Internet website that is often located in another state." Declaratory Ruling at ¶ 12. Having decided that the jurisdictional nature of ISP-bound traffic is determined by the nature of the end-to-end transmission between an end user and the Internet, Id. at ¶ 18, the FCC concludes that a substantial portion of ISP-bound traffic is interstate. Id. at ¶ 20. However, the FCC also found that the record was insufficient to make a determination on the appropriate compensation for this type of traffic, and, therefore, opened a rulemaking to address that issue. Id. at ¶ 21. Pending completion of that rulemaking, the FCC found that state commissions could continue to determine the appropriate reciprocal compensation for dial-up Internet traffic. Id. at ¶ 22. The FCC explicitly stated that, pending the outcome of its rulemaking, state commissions could either continue to enforce existing reciprocal compensation obligations between carriers under interconnection agreements or could modify those obligations based on its findings in the Declaratory Ruling. Id.

On March 2, 1999, Bell Atlantic filed a Motion for Modification of the Department's MCI WorldCom Order ("Motion for Modification") to relieve Bell Atlantic of its continuing obligation, pursuant to existing interconnection agreements, to pay reciprocal compensation for Internet-bound traffic. Bell Atlantic argues that because the FCC determined that ISP-bound traffic is non-local interstate traffic, the reciprocal compensation requirements of the Act and the FCC's rules do not govern inter-carrier compensation for this traffic (Motion for Modification at 2). Therefore, Bell Atlantic contends that it is no longer required to make such payments, and states that it will escrow reciprocal compensation payments for Internet traffic until the Department modifies MCI WorldCom (id.).[(4)] The Department originally established a deadline of March 19, 1999 for responses to the Motion for Modification, and March 26, 1999 for Bell Atlantic's reply.

On March 9, 1999, Department staff contacted Bell Atlantic to indicate the Department's concern that Bell Atlantic's announced unilateral action concerning escrow of reciprocal compensation appeared to violate the MCI WorldCom Order, and that Bell Atlantic was still required to make such payments absent a Department suspension of that obligation. On March 10, 1999, Bell Atlantic filed a Motion for Stay Pending Decision on Motion for Modification ("Motion for Stay"), for permission to escrow reciprocal compensation pending a Department ruling on its Motion for Modification.[(5)] The Department established a deadline for responses of March 12, 1999, and a deadline for Bell Atlantic's reply of March 15, 1999.[(6)] Comments were filed by MCI, Level 3 Communications, Inc. ("Level 3"),[(7)] RCN-BecoCom, LLC ("RCN"), Choice One Communications, Inc. ("Choice One") (joined by PaeTec Communications, Inc.), a coalition of Massachusetts CLECs and ISPs (the "Coalition"), Focal Communications Corporation ("Focal"), Global NAPs, Inc. ("GNAPS"),[(8)] New England Voice & Data, LLC ("NEVD"), Norfolk County Internet ("Norfolk"), Prism Operations, LLC ("Prism"), and RNK, Inc. ("RNK").[(9)] Bell Atlantic filed reply comments on March 15, 1999.[(10)]

In this Order, the Department only addresses Bell Atlantic's Motion for Stay. In a subsequent Order to be issued shortly, the Department will rule on Bell Atlantic's Motion for Modification.

III. POSITIONS OF THE PARTIES AND COMMENTERS

A. Bell Atlantic

Bell Atlantic argues that its Motion for Stay should be granted because (1) there is a substantial likelihood that Bell Atlantic will prevail on the merits of its Motion for Modification, (2) absent the stay, it will suffer irreparable harm, (3) CLECs will not be harmed by granting the stay, and (4) the public interest would be served with a grant of stay.

Bell Atlantic contends that the primary basis for the Department's decision in D.T.E. 97-116 (that dial-up Internet traffic is "local" under interconnection agreements) has been completely undermined by the FCC's "end-to-end" analysis in the Declaratory Ruling

(Bell Atlantic Reply Comments at 3, citing D.T.E. 97-116, at 11). Based on the FCC's analysis, Bell Atlantic argues that Internet-bound calls no longer qualify for reciprocal compensation under Bell Atlantic's interconnection agreements (id.).

In addition, Bell Atlantic argues that the FCC's decision to commence a rulemaking on inter-carrier compensation for Internet traffic is a totally separate inquiry from the question of contractual interpretation that the Department considered in MCI WorldCom -- the only matter now at issue in this case (Bell Atlantic Reply Comments at 3; Motion for Stay at 4 n.3). Bell Atlantic contends that the Department may proceed with an investigation of inter-carrier compensation for ISP-bound traffic pending the FCC's final rulemaking, but only after adequate notice and the opportunity for comment pursuant to G.L. c. 30A, § 11(1), (3) and 220 C.M.R. § 1.06(5), (6) (Bell Atlantic Reply Comments at 3-4; Motion for Stay at 4-5 n.3).

Bell Atlantic argues that the escrow mechanism is necessary to protect Bell Atlantic from irreparable harm. According to Bell Atlantic, if in ruling on the Motion for Modification, the Department decides that it is not required to make reciprocal compensation payments, Bell Atlantic may not be able to recover payments made to certain carriers (Motion for Stay at 1-2; Bell Atlantic Reply Comments at 10). Bell Atlantic states that it filed the Motion for Stay to ensure that there is no ambiguity regarding its ability to withhold payments while the Department considers the Motion for Modification (Bell Atlantic Reply Comments at 10 n.2).

Bell Atlantic asserts that no other party will be harmed. If the Department denies Bell Atlantic's Motion for Modification requiring Bell Atlantic to continue to pay reciprocal compensation to CLECs, these escrow payments will protect CLECs (Motion for Stay at 5-6). Bell Atlantic argues that public interest demands a grant of stay. According to Bell Atlantic, allowing CLECs to receive reciprocal compensation for ISP calls has undermined the development of facilities-based local competition (id. at 6).

B. CLECs[(11)]

The CLECs all strongly oppose Bell Atlantic's Motion for Stay. First, the CLECs contend that the Motion for Stay is procedurally improper. GNAPs argues that Bell Atlantic does not seek the normal function of a stay, which is to keep the status quo, but rather, that Bell Atlantic seeks to reverse the status quo by not paying reciprocal compensation for ISP-bound calls (GNAPs at 4). GNAPs states that it is extremely rare for courts to grant preliminary relief to a party, resulting in reversal of the status quo while the matter is still pending (GNAPs at 8).

Prism argues that Bell Atlantic errs in citing G.L. c. 30A, § 14(3) in seeking a grant of a stay because "neither the enabling statutes nor the Department's procedural rules provide for the grant of a stay five months after a final Department order" (Prism Comments at 1). Prism states that the statutory provision referred to by Bell Atlantic is applicable only where a party is seeking reconsideration or judicial review of an agency order within the specific time periods (id. at 2). MCI echoes those comments, stating that only the

Supreme Judicial Court, not the Department, may stay a Department order (MCI Comments at 2-3). MCI also states that 220 C.M.R. §§ 1.11 through 1.13 do not allow for a stay of a Department final order (id. at 3-4). In addition, Level 3 points out that in the context of a request for a stay pending judicial review, the Department has indicated in the past that, "such a request is rare, and we are not aware that the Department ever has granted such relief" (Level 3 Comments at 1, citing Boston Edison Company, D.P.U. 92-130-A at 5 (1993)).

The CLECs also contend that should the Department consider the merits of the Motion for Stay, Bell Atlantic utterly fails to satisfy any of the four factors necessary for a stay of the Department's MCI WorldCom Order (see e.g., Focal Communications Comments at 1; NEVD Comments at 1; Level 3 Comments at 1; Choice One Comments at 5; GNAPS Comments at 4-5; Prism Comments at 2; Coalition Comments at 3; RNK Comments at 1-2; Norfolk Comments at 1-2; MCI Comments at 1-2). First, they argue that Bell Atlantic does not have a reasonable likelihood of success on the merits because the Declaratory Ruling permits the Department to continue requiring reciprocal compensation even if the original basis for its decision has been undermined by the FCC's order (see, e.g., Level 3 Comments at 3). The CLECs argue that it is the interconnection agreements that control, pending the FCC's rulemaking (id.).

Second, the CLECs assert that Bell Atlantic will not be irreparably harmed by having to continue making reciprocal compensation payments. They state that "unnecessary expenditure of money" does not qualify as irreparable harm (see, e.g., Level 3 Comments at 3, citing Waterbury Hospitals v. Commission on Hospital and Health Care, 316 A.2d 787, 789 (Conn. C.P. 1974)).

Third, the CLECs argue that Bell Atlantic is wrong in stating that CLECs would not be harmed by the stay. Level 3, for example, argues that it is obvious that CLECs incur costs in transporting and terminating calls to ISPs that are originated by Bell Atlantic's customers, and those CLECs would be left without compensation if the Department were to grant a stay, and thus would have to use money that would be better utilized in expanding operations or providing additional facilities (Level 3 Comments at 4).

Fourth, the CLECs contend that the public interest demands a denial of the Motion for Stay. Level 3 asserts that Bell Atlantic's allegation that reciprocal compensation serves as disincentive to facility-based competition in Massachusetts is not substantiated (id. at 5).

In addition, RCN argues that Bell Atlantic wrongly presumes that the FCC's recent Declaratory Ruling overturns the Department's MCI WorldCom Order (RCN Comments at 1-2). According to RCN, preemption of state regulation by the federal government would require "(1) the impossibility to separate the interstate and intrastate components of the FCC regulation and (2) the state regulation negating the FCC's lawful authority over interstate communications" (id. at 3). RCN contends that Bell Atlantic has not shown how the well-established federal preemption test has been met (id. at 3). RCN further argues that even if Bell Atlantic has met the requirement for federal preemption,

that conclusion should not cause the Department to reverse its Order because nothing in the Declaratory Ruling modifies the status quo (id. at 4).

III. ANALYSIS AND FINDINGS

As we stated above, the Department addresses Bell Atlantic's Motion for Stay in this order. The Department agrees with the CLECs that Bell Atlantic's Motion for Stay is procedurally improper for obtaining the interim relief it seeks. Pursuant to G.L. c. 30A, §14(3), the Department may grant a stay pending judicial appeal of a Department Order under certain circumstances.[(12)] In this case, Bell Atlantic has not filed an appeal of MCI WorldCom nor has it indicated whether it will in fact do so. Instead, Bell Atlantic seeks a stay pending modification of the MCI WorldCom Order. However, "[n]either the enabling statutes nor the Department's procedural rules provide explicitly for a stay pending reconsideration of a Department order." CTC Communications Corp., D.T.E. 98-18-A at 4 (July 24, 1998). In D.T.E. 98-18-A, the Department, in effect, set aside operation of a "premature" final order to allow Bell Atlantic to present key evidence that it had withheld under the belief that the Department would be first issuing an order on the scope of the proceedings. Id. at 5, 8-10. While in D.T.E. 98-18-A, the Department did grant a stay pending reconsideration of its final order to correct a procedural error, the circumstances in this case present no such procedural infirmities. For these reasons, we find that Bell Atlantic's Motion for Stay is not the procedurally correct method for obtaining the interim relief it seeks, and, therefore, we deny the motion. However, for the reasons discussed below, we find that the substantive interim relief sought in the motion (i.e., the permission to escrow reciprocal compensation payments pending a ruling on the Motion for Modification) should be granted.

When the Department issued the MCI WorldCom Order, we made it very clear that we might need to modify our findings based upon pending FCC investigations. D.T.E. 97-116, at 5 n.11. Specifically, we stated: "We agree . . . that the FCC has jurisdiction over Internet traffic. Pursuant to that authority, the FCC may make a determination in proceedings pending before it that could require us to modify our findings in this Order." Id. Thus, carriers have been on notice of the possibility for modification -- perhaps swift modification -- of the terms governing reciprocal compensation for Internet-bound traffic.

Bell Atlantic has argued that, as a result of the FCC's Declaratory Ruling, it is no longer obligated to pay compensation for Internet-bound traffic. The CLECs have argued that nothing in the FCC's declaratory ruling disturbs the Department's original findings in D.T.E. 97-116, and, therefore, Bell Atlantic should continue to make reciprocal compensation payments as directed in that Order. Clearly, the parties are in dispute on these payments, and the FCC's declaratory ruling raises legitimate questions about the Department's finding that ISP-bound traffic is local in nature and thus eligible for reciprocal compensation payments. Declaratory Ruling at ¶ 27. Escrow of monies is a well-established method for handling disputed amounts under commercial agreements. See, e.g. Mass. R. Civ. Proc. Rule 67 (authorizing the deposit of disputed funds with a court). In addition, it is a method by which Bell Atlantic and certain CLECs have already agreed to use in the event of disputed payments under their interconnection agreements.

See, e.g., MFS Intelenet/NET Agreement at § 29.11; GNAPs/NET Agreement at § 29.11; XCOM/NET Agreement at § 29.11.1. Therefore, pursuant to our authority under § 252(e)(1) of the Act to enforce the terms of interconnection agreements, we find that Bell Atlantic may escrow reciprocal compensation payments, in the manner requested,[(13)] pending our ruling on its Motion for Modification. We note that interim relief is not a standard Department practice,[(14)] but the unique circumstances in this case (i.e., the Department specifically stated that we may modify our findings in response to an FCC determination, and some interconnection agreements provide for an escrow mechanism) warrant the granting of interim relief.

IV. PROCEDURAL SCHEDULE FOR CONSIDERATION OF MOTION FOR MODIFICATION

Parties to D.T.E. 97-116-B and all facilities-based carriers with interconnection agreements are invited to participate in oral arguments to be held at the Department's offices on March 31, 1999 at 10 a.m. Consideration of arguments made by non-parties to D.T.E. 97-116-B does not confer any rights (e.g., right to appeal a Department decision) on those carriers. In addition, the Department will permit non-attorneys to comment on the Motion for Modification. The Department notes that a Hearing Officer notice dated March 18, 1999 established the deadline for written responses to Bell Atlantic's Motion for Modification as March 23, 1999, and gave Bell Atlantic until 5:00 p.m., March 29, 1999 to file a reply.

V. ORDER

After due consideration, it is hereby

ORDERED: That the Motion for Stay, filed by New England Telephone and Telegraph Company d/b/a Bell Atlantic - Massachusetts on March 9, 1999, is DENIED; and it is FURTHER ORDERED: That New England Telephone and Telegraph Company d/b/a Bell Atlantic - Massachusetts shall escrow reciprocal compensation payments for Internet-bound traffic for CLECs that terminate twice as much traffic as they originate, pending a ruling on Bell Atlantic's Motion for Modification.

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

1. MCI WorldCom, Inc. is the successor-in-interest to WorldCom Technologies, Inc. which is the successor-in-interest to MFS Intelenet Service of Massachusetts, Inc. ("MFS"). MFS is the entity that filed the original complaint in this docket.

2. Section 251(b)(5) of the Telecommunications Act of 1996 (the "Act") requires all local exchange carriers to compensate each other for the transport and termination of local traffic that originates on one carrier's network and terminates on another carrier's network. 47 U.S.C. § 251(b)(5). The Federal Communications Commission has interpreted this provision as limiting reciprocal compensation payments to only the transport and termination of local traffic. See 47 C.F.R. § 51.701.

3. Prior to issuing MCI WorldCom, Inc., D.T.E. 97-116-A (Feb. 25, 1999), the Department's Telecommunications Division issued formal data requests to ten CLECs to determine whether their customer bases were predominately or solely ISPs, and whether any affiliate relationship exists between the CLECs and their ISP customers. Responses were received on or before January 20, 1999.

4. Bell Atlantic states that it will escrow amounts billed to any CLEC that terminates at least twice as much traffic as it sends to Bell Atlantic, but that if a CLEC demonstrates that the imbalance is associated with "local" traffic, Bell Atlantic will pay reciprocal compensation charges for those calls (Motion for Modification at 2 n.3).

5. Bell Atlantic notes that it filed the Motion for Stay to ensure that there is "no ambiguity regarding [Bell Atlantic's] ability to withhold payments while the Department considers the Motion for Modification" (Motion for Stay at 3 n. 2).

6. In addition to parties to D.T.E. 97-116, the Department allowed comments from all facilities-based CLECs with interconnection agreements with Bell Atlantic.

7. Level 3 is the successor-by-merger of XCOM Technologies, Inc., which is an intervenor.

8. On March 4, 1999, GNAPS filed a petition for intervention. The Department has yet to rule on that petition.

9. RCN, Choice One, the Coalition, Focal, GNAPS, NEVD, Norfolk, Prism, and RNK are not parties in D.T.E. 97-116.

10. With the Department's permission, MCI filed its response on March 15, 1999, and Bell Atlantic filed its reply to MCI's response on March 18, 1999.

11. For ease of reference, we group similar arguments of CLECs together.

12. Section 14(3) provides that "the commencement of an action [for judicial review] shall not operate as a stay of enforcement of the agency decision, but the agency may stay

enforcement, and the reviewing court may order a stay upon such terms as it considers proper." G.L. c. 30A, § 14(3).

13. We direct that the escrow account shall be interest bearing.

14. But see, Boston Edison Company, D.P.U. 92-130-2, at 10-13 Interlocutory Order on Request for Stay (Aug. 4, 1992) (granting a stay of a Department Order requiring Boston Edison Company to negotiate and execute a contract regarding RFP 3 while an underlying decision on whether RFP 3 should continue remained to be determined).