D.T.E. 98-116

Petition of Global NAPs, Inc. against New England Telephone and Telegraph d/b/a Bell Atlantic-Massachusetts regarding dark fiber

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I. INTRODUCTION

On November 13, 1998, Global NAPs, Inc. ("GNAPS") filed with the Department of Telecommunications and Energy ("Department") a Motion for Complaint Regarding New England Telephone and Telegraph d/b/a Bell Atlantic-Massachusetts' ("Bell Atlantic") Provisioning of Dark Fiber.[(1)] In this motion, GNAPS requests that the Department order Bell Atlantic to lease to competitive local exchange carriers ("CLECs"), such as GNAPS, dark fiber that crosses local access and transport area ("LATA") boundaries.[(2)] On December 18, 1998, GNAPS amended its earlier filing to include in its complaint Bell Atlantic's refusal to lease dark fiber to GNAPS unless it collocates with Bell Atlantic. The Department docketed GNAPS' complaint as D.T.E. 98-116. Bell Atlantic filed its Answer to GNAPS' Amended Complaint on January 19, 1999.

Pursuant to notice duly issued, a public hearing was held on January 22, 1999, at which time the hearing officer granted the following petitions for intervention: AT&T Communications of New England, Inc. ("AT&T") and MCI WorldCom, Inc. The public hearing was followed immediately by a procedural conference during which it was agreed that GNAPS and Bell Atlantic would file a joint stipulation of facts ("Stipulation") by February 8, 1999. It was further agreed that Bell Atlantic would file a brief on the appropriateness of its provision of dark fiber across LATA boundaries by February 17, 1999, and the other parties would have until February 24, 1999 to respond. Both GNAPS and AT&T filed briefs in response to Bell Atlantic's brief. Since the issue of whether Bell Atlantic may require collocation as a condition of leasing dark fiber, among other unbundled network elements ("UNEs"), was to be addressed in a separate proceeding,[(3)] the hearing officer directed the parties to comment solely on the interLATA boundary issue in these briefs (Tr. at 8). On March 23, 1999, Bell Atlantic filed with the Department a Motion for Leave to File Reply ("Motion for Leave") together with a reply brief and two exhibits ("Reply Brief").

On November 5, 1999, the FCC released its UNE Remand Order, finding, among other things, that incumbent local exchange carriers ("ILECs") must provide access to

unbundled loops and that such loops include dark fiber. See UNE Remand Order at ¶ 165. In the order, the FCC notes that dark fiber is fiber that has not been activated through connection to the electronics that "light" it and render it "capable of carrying communications services." Id. at ¶ 174.

II. JOINT STIPULATION OF FACTS

In an earlier Department proceeding,[4] the Department found, among other things, that dark fiber is a network element that Bell Atlantic is required to provide under § 251(c)(3) of the Telecommunications Act of 1996 ("Act") (Stipulation at 2). In October of 1998, GNAPS and Bell Atlantic executed an amendment to their interconnection agreement related to the provision of dark fiber (id.). The First Amendment to the Interconnection Agreement between GNAPs and Bell Atlantic ("First Amendment") states that Bell Atlantic "agrees to provide Unbundled Dark Fiber to GNAPS as a Network Element pursuant to the same terms and conditions under which [Bell Atlantic] makes Unbundled Dark Fiber generally available to all [CLECs] in Massachusetts" (see Exh. B of Stipulation at 1, ¶ 1).[5] Pursuant to the First Amendment, GNAPS placed an order with Bell Atlantic on or about October 5, 1998, for the provision of dark fiber from GNAPS' switch location in Quincy, Massachusetts, to its Springfield, Massachusetts, facility (id.). Quincy is located in the Eastern Massachusetts LATA, whereas Springfield is in the Western Massachusetts LATA (id.).

Bell Atlantic declined to provide dark fiber as requested by GNAPS across a LATA boundary because of its concern that such a provision could be construed as a violation of

§ 271 of the Act (id. at 2-3). Bell Atlantic states that it has fiber facilities that cross LATA boundaries used for the provision of services and for purposes of "backhauling" jurisdictionally intraLATA traffic (id. at 3). Lastly, GNAPS states that it is currently obtaining telecommunications services from another carrier enabling it to connect its location in Quincy with its facility in Springfield, but at a capacity and a cost not comparable to that which it would receive from Bell Atlantic (id.).

III. STANDARD OF REVIEW

Pursuant to § 251(c)(3) of the Act, incumbent local exchange carriers ("ILECs") have a duty to provide a CLEC with UNEs in accordance with the terms and conditions of their interconnection agreement and the requirements of §§ 251 and 252. 47 U.S.C. § 251(c)(3). Although not explicitly mentioned in the Act, federal district courts have interpreted

§ 252 of the Act as not only giving state commissions the authority to approve or reject interconnection agreements but giving such commissions the jurisdiction to interpret and enforce those interconnection agreements. 47 U.S.C. § 252.[6] Finally, the Department's

broad supervisory power over the provision of telecommunications services and rates in Massachusetts gives us the authority to hear and decide GNAPS' complaint. G.L. c. 159,

§§ 12(d), 16, 19 and 20.

IV. POSITIONS OF THE PARTIES

In addition to the arguments summarized below, the parties argued about whether the Department should wait until the release of the FCC's UNE Remand Order before acting on GNAPS' complaint. As noted above, the FCC has issued its UNE Remand Order, clarifying that dark fiber is part of a loop that ILECs must make available to requesting carriers. Moreover, because we find, below, that absent FCC approval for Bell Atlantic to offer interLATA services in Massachusetts, § 271 of the Act bars Bell Atlantic from offering in-region, dark fiber across LATA boundaries, we find it unnecessary to address Bell Atlantic's "impairment" argument.

A. GNAPS

According to GNAPS, Bell Atlantic's concern about a possible § 271 violation is unfounded. GNAPS asserts that dark fiber is a "passive facility that does not include any transmission or similar gear by which telecommunications services could be offered; a firm that obtains dark fiber must supply the transmission gear (lasers, multiplexers, etc.) for itself" (GNAPS Brief at 10). GNAPS argues that if Bell Atlantic's supply of dark fiber across LATA boundaries violates § 271, Bell Atlantic is already in violation because it provides itself with interLATA dark fiber, stored up against future needs for permitted interLATA services, such as centralized directory assistance bureaus (id. at 11). Finally, according to GNAPS, a reason to make dark fiber available as a UNE, even that dark fiber which crosses LATA boundaries, is to allow competitors to take advantage of Bell Atlantic's embedded network and economies of scale (id.).

B. Bell Atlantic

Bell Atlantic asserts that when it leases dark fiber as a UNE to a carrier, Bell Atlantic retains ownership of that fiber within its existing network. Given Bell Atlantic's continued ownership of the dark fiber, Bell Atlantic is concerned that the FCC would conclude that it is violating § 271 by providing telecommunications services across LATA boundaries (Bell Atlantic Brief at 3). According to Bell Atlantic, the Department's ruling that dark fiber be provided as a UNE does not require Bell Atlantic to provide it across LATA boundaries (id.).

According to the motion for leave, Bell Atlantic argues that subsequent to filing its initial brief, counsel for Bell Atlantic continued to research the LATA boundary issue (Motion for Leave at 2). In the course of this research, Bell Atlantic asserts that it identified two FCC decisions suggesting that the FCC could view such provisioning as a violation of the Act. (id.). Bell Atlantic argues further that its reply brief contains authority not previously shared with the Department by any party and that this information will assist the

Department (id.). Lastly, Bell Atlantic contends that no party will be prejudiced by the inclusion of this additional relevant authority in the record of this proceeding (id.).

In its reply brief, Bell Atlantic argues that while the FCC has never directly addressed the issue of whether the provision of dark fiber across LATA boundaries is an "interLATA service" for purposes of the Act, FCC decisions issued in other contexts "cast doubt" on how the FCC would answer this question (Bell Atlantic Reply Brief at 1). Bell Atlantic contends that in the FCC's In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended[7] ("Safeguards Order"), the FCC concludes that

under traditional common carrier law, the ordinary leasing of network facilities is a communications service. See e.g., In the Matter of Applications for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Service, 8 FCC Rcd 2589, 2593 (1993)[8] (finding that even "the provision and maintenance of fiber optic transmission capacity between customer premises where the electronics and other equipment necessary to power . . . the fiber are provided by the customer" . . . is a communications service, because, among other things, the provider of dark fiber still owns, maintains, and repairs the fiber and merely leases it to the customer for a term of months or years).

(Bell Atlantic Reply Brief at 3, quoting Safeguards Order at 37-38 n.110). Bell Atlantic argues that the FCC's reference to its 1993 decision, in which it found dark fiber to be a communications service, calls into question whether the FCC also would include a lease of dark fiber within the definition of "interLATA service" (id. at 4). Lastly, Bell Atlantic argues that the Modification of Final Judgment[9] ("MFJ") specifically recognized that an ILEC could retain ownership of certain interLATA facilities for its own purposes; thus, Bell Atlantic asserts that it does not violate the Act by maintaining and using dark fiber across LATA boundaries for its own purposes or for purposes of backhauling jurisdictionally intraLATA call traffic (id.).

C. AT&T

AT&T states that it is clear that leasing dark fiber does not constitute the provision of "telecommunications" as that term is defined in the Act (AT&T Brief at 3). Because Bell Atlantic is not transmitting information when it leases dark fiber to CLECs, according to AT&T, there can be no § 271 violation when it provides this UNE across LATA boundaries (id.).

V. ANALYSIS AND FINDINGS

The Department must decide whether Bell Atlantic is required by contract or Department order to provide dark fiber to CLECs across LATA boundaries and whether

§ 271(a) of the Act precludes Bell Atlantic from so doing. For the reasons stated below, we are persuaded that, absent § 271 approval, the FCC would find Bell Atlantic's provision of dark fiber across LATA boundaries to be a violation of Bell Atlantic's current restrictions under the same section of the Act.

Section 271 of the Act prohibits a Bell Operating Company ("BOC") from providing in-region interLATA services unless it receives FCC approval or such services are "incidental," as defined in subsection (g). 47 U.S.C. §271. The Act defines "interLATA service" as "telecommunications between a point located in a local access and transport area and a point located outside of such area."(10) "Telecommunications" is defined in the Act as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."(11)

We agree with GNAPS that a dormant, fiber optic strand does not, in itself, transmit information and that to do so, necessary electronic equipment must be attached at either end of this strand. Indeed, as mentioned above, in its UNE Remand Order, the FCC stated that until the appropriate electronics have been connected to dark fiber, this fiber is incapable of "carrying communications services." See UNE Remand Order at ¶ 174. Although we agree with GNAPS on this point, our analysis cannot end there.

To date, the issue of whether a BOC would violate its § 271 obligations by providing interLATA dark fiber before receiving FCC approval to offer in-region interLATA services has not been directly addressed by the FCC. Absent an FCC ruling on point, the Department can neither disregard FCC dark fiber precedent nor construe the FCC's silence on the interLATA issue as approval to ignore one of the most significant provisions of the Act, that BOCs may not offer interLATA services unless and until they obtain § 271 relief from the FCC. See 47 U.S.C. § 271(b)(1). In addition, the Department finds that the provision of interLATA dark fiber does not fall within the definition of "incidental interLATA services," as provided for in § 271(g). Section 271(g) defines incidental interLATA services as the provision of audio or video programming, alarm monitoring services, interactive video services to or for schools, commercial mobile services, a service permitting a customer to retrieve stored information between LATAs, and signaling information. 47 U.S.C. § 271(g).

Bell Atlantic is correct that in a ruling after passage of the Act, the FCC found that "[t]he leasing of capacity on an in-region interLATA network is plainly an in-region interLATA service . . ." and, as mentioned above, that "[t]his conclusion also follows from the fact that, under traditional common carrier law, the ordinary leasing of network facilities is a communications service." Safeguards Order at ¶ 54. While it is true that the subject of this FCC order was the relationship between the BOCs and their affiliates, neither the Act nor the MFJ makes a distinction between affiliates and competitors in providing wholesale services, such as dark fiber. Therefore, we cannot discount the relevance of this FCC decision to our proceeding.

As mentioned above, to support its conclusion that leasing capacity on an in-region interLATA network is an in-region interLATA service, the FCC quotes an earlier dark fiber ruling in which it found that even

"the provision . . . of fiber optic transmission capacity between customer premises where the electronics and other equipment necessary to power . . . the fiber are provided by the customer" . . . is a communications service, because

. . . the provider of the dark fiber still owns . . .the fiber and merely leases it to the customer for a term of months or years.

Safeguards Order at ¶ 54 n.110, quoting Dark Fiber Order at 2593.

While the Dark Fiber Order was decided prior to passage of the Act, we find it significant that the FCC chose to include this earlier analysis in the post-Act Safeguards Order. The decision in the Dark Fiber Order was made in a different context,[(12)] but the FCC's analysis remains current. For example, although the Act amended the Communication Act of 1934 by supplanting the definition of "communications service" with that of "telecommunications service," and, in its Dark Fiber Order, the FCC found that dark fiber is a "communications service," the FCC continues to use this earlier term in describing dark fiber in its post-Act orders. See e.g., UNE Remand Order at ¶ 174 (finding that absent electronics to light it, dark fiber is not capable of "carrying communications services").

The Department may not direct Bell Atlantic to provide in-region interLATA dark fiber before receiving § 271 approval because to do so would thwart a key purpose of the Act, namely, to ensure that structural conditions for competition in the local market must be established before a BOC, such as Bell Atlantic, may offer in-region interLATA services. Until the FCC determines that these structural conditions for competition are in place, the Department is powerless to grant the relief GNAPS has sought.[(13)] Based on the above analysis, we find that Bell Atlantic may not provide dark fiber to requesting CLECs[(14)] across LATA boundaries until it receives § 271 approval from the FCC. Lastly, we agree with Bell Atlantic that it is expressly permitted, under the terms set forth in the MFJ, to retain ownership of certain interLATA facilities for its own purposes as represented in pleadings, and that its maintenance and usage of interLATA dark fiber does not violate its obligations under § 271 of the Act (see Bell Atlantic Reply Brief at 4-5).

VI. ORDER

Accordingly, after due notice and consideration, it is

ORDERED: That New England Telephone and Telegraph d/b/a Bell Atlantic-Massachusetts' Motion for Leave is hereby GRANTED; and it is

FURTHER ORDERED: That Global NAPs, Inc.'s Motion for Complaint Regarding New England Telephone and Telegraph d/b/a Bell Atlantic-Massachusetts' Provisioning of Dark Fiber is DENIED; and it is

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

By Order of the Department,

James Connelly, Chairman

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner

Deirdre K. Manning, Commissioner

Pursuant to § 252(e) of the Telecommunications Act of 1996, appeal of this final Order may be taken to the federal District Court or the Federal Communications Commission. See Puerto Rico Telephone Company v. Telecommunications Regulatory Board of Puerto Rico, 189 F.3d 1 (1st Cir. 1999). Timing of the filing of such appeal is governed by the applicable rules of the appellate body to which the appeal is made, or in the absence of such, within 20 days of the date of this Order.

1. The Federal Communications Commission ("FCC") defines dark fiber as "[u]nused fiber through which no light is transmitted, or installed fiber optic cable not carrying a signal. It is 'dark' because it is sold without light communications transmission. The [carrier] leasing the fiber is expected to put its own electronics and signals on the fiber and make it 'light.'" Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, at ¶162 n.292 (rel. Nov. 5, 1999)("UNE Remand Order") (quoting Newton's Telecom Dictionary 197-98 (14th ed. 1998)).

2. See 47 U.S.C. 153(25) for the definition of LATA.

3. In that other proceeding, the Department found that Bell Atlantic's proposal to provision previously uncombined UNEs solely through collocation is inconsistent with federal law and Department precedent. Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-K, at 26 (May 21, 1999).

4. Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 3, at 42 (December 4, 1996) ("Phase 3 Order").

5. The provision of dark fiber by Bell Atlantic to GNAPS is conditioned upon the continued validity of the Phase 3 Order. See First Amendment at ¶ 2.

6. Two federal district courts found that § 252(e) gives state commissions the jurisdiction to interpret and enforce interconnection agreements. See Michigan Bell Tel. Co. v. MFS Intelet of Michigan, Inc., 16 F. Supp.2d 817, 824 (W.D. Mich. 1998); Southwestern Bell Telephone Company v. Connect Communications, Corp., 72 F. Supp.2d 1043, 1049 (E.D. Ark. 1999).

7. 12 FCC Rcd 8653 (1997) (Second Order on Reconsideration).

8. "Dark Fiber Order."

9. United States v. Western Elec. Co., 569 F. Supp. 1057, 1097-1101 (D.D.C. 1983) (plan of reorganization), aff'd sub nom. California v. United States, 464 U.S. 1013 (1983).

10. 47 U.S.C. §153(21).

11. 47 U.S.C. §153(43).

12. In this order, the FCC determined that it did have jurisdiction over the provision of dark fiber service because such service fell within the definition of "wire communication" and was provided on a common carrier basis. Dark Fiber Order at

17-24.

13. If Bell Atlantic were to receive § 271 approval from the FCC, it would then be required to lease intrastate, interLATA dark fiber to requesting carriers.

14. The Department's finding that dark fiber was a UNE was not carrier specific; therefore, Bell Atlantic was directed to make this UNE available to all requesting carriers. Similarly, our finding that § 271 of the Act bars Bell Atlantic from leasing dark fiber applies to all requesting CLECs, and not just to GNAPS and the intervenors in this proceeding.