D.P.U. 97-70

Investigation by the Department into an arbitrated interconnection agreement between New England Telephone and Telegraph Company d/b/a NYNEX and Brooks Fiber Communications, Inc., pursuant to § 252(e) the Telecommunications Act of 1996.

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I. INTRODUCTION

On June 24, 1997, pursuant to § 252(e) of the Telecommunications Act of 1996 ("Act"), New England Telephone and Telegraph Company d/b/a NYNEX ("NYNEX") filed an arbitrated interconnection agreement ("Agreement") between NYNEX and Brooks Fiber Communications, Inc. ("Brooks Fiber") for approval by the Department of Public Utilities ("Department"). Under § 252(e)(4) of the Act, the Department must approve or reject the Agreement with 30 days of the filing (i.e., by July 24, 1996), or its shall be deemed approved.

The Agreement includes both negotiated and arbitrated portions that set forth terms under which NYNEX and Brooks Fiber will interconnect their respective networks, as well as the network elements, services, and other arrangements that NYNEX will provide to Brooks Fiber. The arbitrated terms were determined by the Department in the Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94.[1] The Department ordered NYNEX and Brooks Fiber to incorporate these determinations, along with negotiated provisions, in a final arbitrated interconnection agreement, to be submitted to the Department for approval. The Department docketed its review of the Agreement as D.P.U. 97-70.

Pursuant to notice duly issued, the Department held a public hearing in this proceeding on July 17, 1997. Oral comments were presented by NYNEX and Brooks Fiber in favor of the Agreement, and by MFS Intelenet of Massachusetts, Inc. ("MFS") in opposition to the

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[1] On July 18, 1996, Brooks Fiber made its request for arbitration with NYNEX. The Department docketed that petition as D.P.U. 96-75. On August 23, 1996, the Department consolidated D.P.U. 96-75 with four other petitions for arbitration, thus establishing the Consolidated Arbitrations docket. See Notice of Consolidation of Arbitration Petitions; Request for Comments at 1-2 (August 23, 1996).

Agreement. In addition, MFS submitted written initial comments on July 11, 1997, and NYNEX submitted written reply comments on July 16, 1997.

II. DESCRIPTION OF AGREEMENT

The Agreement, executed on May 23, 1997, is a comprehensive set of terms and conditions governing the interconnection of NYNEX's local exchange network with Brooks Fiber'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; (9) directory listings and directory assistance; and (10) performance standards and liquidated damages. The Agreement is for interconnection in the 413 LATA (Agreement at § 4.2). The Agreement has an initial term of three years (id. at § 21.1).

The principal sections of the Agreement that contain arbitrated provisions are (1) Section 27.0 and Schedule 27.0 concerning performance criteria and liquidated damages; (2) Section 12.0 (Collocation) which allows Brooks Fiber to install a Remote Switching Module in collocation space; and (3) the Pricing Schedule which contains arbitrated prices for unbundled links and the resale discounts. See Agreement at §§ 12.0, 27.0, Schedule 27.0, Pricing Schedule; see also Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (Phase 1, at 13-22) (1996); Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (Phase 2) (1996) ("Phase 2 Order"); Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (Phase 3, at 16-27, 30-36) (1996); Consolidated Arbitrations,

D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (Phase 4) (1996) ("Phase 4 Order"); Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (Phase 1-A) (1997); Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (Phase 2-A) (1997); Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (Phase 3-A) (1997); Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (Phase 4-A) (1997); Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (Phase 2-B) (Phase 4-B) (1997); Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (Phase 2-B) (Phase 4-B) (1997); Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (Phase 4-C) (1997); Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (Phase 4-D) (1997); NYNEX March 14, 1997 Compliance Filing (regarding rates for unbundled elements and resale discounts).

III. POSITIONS OF THE PARTIES

A. MFS

MFS argues that the Agreement is deficient under Section 252(d)(1) of the Act in regard to the recurring rates it adopts for two- and four-wire conditioned links and four-wire analog links (collectively "links") (MFS Comments at 1).[2] MFS claims that the cost basis of the rates for the links is in doubt because (1) the Department did not litigate the rates during the consolidated arbitration proceeding nor did the Department consider them in the Phase 4 order

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[2] MFS states that its interests are implicated by the Agreement since the MFS negotiated interconnection agreement with NYNEX contains a provision incorporating any link rates contained in an approved arbitrated agreement. See MFS/NYNEX Negotiated Agreement at § 9.9.4.

in that proceeding, and (2) the rates are inconsistent with the rate structures of links in other states (id. at 1-2). MFS recommends that the Department reject the link rates, or declare them interim, and hold a generic proceeding to establish the cost basis of these links (id. at 2).

B. NYNEX

NYNEX argues that MFS' claims are without merit and should be rejected by the Department (NYNEX Comments at 1). NYNEX maintains that links were included in the cost study filed with the Department in Phase 4 of the Consolidated Arbitrations, and that other parties to the arbitration examined at length all aspects of NYNEX's methodology and the inputs used for estimating the costs for the network element (id. at 2-3). NYNEX also argues that MFS has been selective in the states it cites as having lower link rates (id. at 4). NYNEX states that MFS fails to mention that the New York Public Service Commission approved final analog and digital link rates for New York Telephone that are somewhat higher than the rates approved in Massachusetts (id.). NYNEX also states that MFS provides no basis for the Department to undertake another investigation into link rates, since Consolidated Arbitrations was based on the Federal Communications Commission's ("FCC") Total Element Long-Run Incremental Cost ("TELRIC") methodology (id. at 6).

IV. STANDARD OF REVIEW

Section 252(e)(1) of the Act requires that parties to an interconnection agreement submit the agreement to a state commission for approval and that the state commission approve or reject the agreement, with written findings as to any deficiencies. The state commission may only reject negotiated portions of an agreement if it finds 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.[3] 47 U.S.C. § 252(e)(2)(A).

The state commission may only reject arbitrated portions of an agreement if it finds that the agreement does not meet the requirements of Section 251 of the Act, including the regulations prescribed by the FCC pursuant to Section 251, or the pricing standards set forth in Section 252(d) of the Act.[4] 47 U.S.C. § 252(e)(2)(B). The state commission also may establish other non-price requirements in its review of an agreement, including service quality standards. 47 U.S.C. § 252(e)(3).

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[3] In NYNEX/MFS Agreement, D.P.U. 96-72, at 15-16 (1996), the Department rejected arguments that negotiated terms should be subject to the requirements of 47 U.S.C. § 251 relating to arbitrated terms. MFS/NYNEX Interconnection Agreement, D.P.U. 96-72, at 15-16 (1996).

[4] The FCC issued regulations pursuant to Section 251 of the Act in its First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, adopted August 1, 1996 (released August 8, 1996) ("First Report and Order"). In response to numerous appeals of that order, on October 15, 1996, the Eighth Circuit Court of Appeals stayed temporarily, pending final review, the operation and effect of the FCC's pricing rules and "pick and choose" rule found in the First Report and Order. Iowa Utilities Bd. v. FCC, 109 F.3d 418 (8th Cir.), motion to vacate stay denied, 117 S. Ct. 429 (1996). On July 18, 1997, the Eighth Circuit issued a final decision in which, inter alia, it vacated the FCC's pricing rules for interconnection, unbundled elements, reciprocal compensation, and resale because it determined that the FCC exceeded its jurisdiction in promulgating those rules. Iowa Utilities Bd. v. FCC, No. 96-3321 (Order Vacating Portions of FCC Rules filed July 18, 1997). In addition, the Eighth Circuit vacated the "pick and choose" rule on the ground that it is "an unreasonable construction of the Act". Id. at 117.

V. ANALYSIS AND FINDINGS

A. Negotiated Provisions

Consistent with our review of prior negotiated interconnection (see e.g., MFS/NYNEX Interconnection Agreement, D.P.U. 96-72 (1996)) and in accordance with the above standard of review, we find that the negotiated provisions of the Agreement do not discriminate against a telecommunications carrier not a party to the Agreement and implementation of the Agreement is consistent with the public interest.

The negotiated portions in the Agreement do not bind other carriers; other carriers are free to negotiate their own arrangements with NYNEX. In addition, the negotiated portions in the Agreement meet the requirements of 47 U.S.C. § 252(i) by making interconnection or network elements, provided under the Agreement to Brooks Fiber, available to other telecommunications carriers on the same terms and conditions, if so requested.

Moreover, the implementation of the negotiated portions in the Agreement is consistent with the public interest, convenience and necessity. These provisions, which account for the majority of the Agreement, were the product of good faith negotiations between NYNEX and Brooks Fiber, and will promote facilities-based local exchange competition in Western Massachusetts, which over time should lead to lower prices, more innovation, and an enhanced level of service for consumers in that part of the Commonwealth.

Accordingly, we approve the negotiated provisions of the Agreement. In approving these provisions, the Department makes no findings on the applicability of these terms and conditions to other interconnection agreements which may be submitted for Department review.

B. Arbitrated Provisions

Before addressing the substantive issues, it is important that we discuss the impact on our analysis of the just-released Eighth Circuit decision. First, we note that the Eighth Circuit struck down the FCC's pricing rules, including its TELRIC methodology for unbundled elements and avoided cost methodology for the resale discount, on jurisdictional grounds only and made no findings with respect to whether those methodologies complied with the pricing standards of Section 252(d). Therefore, the Department may continue to rely on the results of those methodologies, which were utilized in the Consolidated Arbitrations, in reviewing final arbitrated interconnection agreements until such time as the Department determines that those methodologies are no longer appropriate for setting rates for interconnection, unbundled elements, reciprocal compensation, and resale. Indeed, the Department has recognized almost from the outset of this proceeding that the rates that were established using the FCC's pricing rules could very likely be interim, depending on the outcome of the Eighth Circuit review. See Phase 2 Order at 4-8 (Department, noting that all parties agreed that pricing phases of arbitrations should go forward "as though the FCC regulations had not been stayed, in order to ensure a timely completion of this arbitration," found that rates should be considered interim and, to promote some degree of certainty, not be subject to reconciliation; Department made no finding on appropriateness of FCC methodologies vs. other methodologies and recognized need to open generic pricing docket). Accordingly, the Department considers the rates established in the Consolidated Arbitrations, and which are included in the Agreement under review in this proceeding as well as all other NYNEX negotiated and arbitrated agreements, to be interim,

subject to change based on the results of a subsequent Department investigation.

With respect to the arbitrated terms of the NYNEX/Brooks Fiber Agreement, the Department determines that the arbitrated portions of the Agreement meet the requirements of Section 251 of the Act, including the regulations prescribed by the FCC in the First Report and Order. The Department also finds that the arbitrated pricing arrangements in the Agreement meet the pricing standards set forth in Section 252(d) of the Act.[5] However, as noted above, in light of the Eighth Circuit's recent decision vacating the FCC's pricing rules, there is no need for the Department to consider whether the arbitrated rates conform to the requirements of those rules.

With respect to MFS' arguments, the Department fully litigated the rates for two- and four-wire conditioned links, and for four-wire analog links in Phase 4 of the Consolidated Arbitrations. After careful review of the network costing models that were proposed, the Department determined that the NYNEX model provided the best representation of a reconstructed local network, and determined to use the NYNEX TELRIC model for

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[5] Section 252(d) states, inter alia, that charges for interconnection and network elements shall be "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and nondiscriminatory, and may include a reasonable profit"; that charges for transport and termination of traffic shall "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier" … and shall be based on "a reasonable approximation of the additional costs of terminating such calls"; and that the wholesale rates shall be determined "on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier."

establishing the costs of unbundled network elements, specifically including links. See Phase 4 Order at 12-26; see also, NYNEX Comments, Attachment A. In addition, the Department fully litigated the cost inputs to the model, including the cost of capital, depreciation rates, and the calculation of forward-looking joint and common costs. Phase 4 Order at 37-61.

Regarding MFS' claim that digital links are far more expensive in Massachusetts compared to other parts of the country, we note that telecommunications prices are not averaged across states. Particular states use particular cost studies, so there will always be a disparity in prices among states. Furthermore, comparison to rates in other states is not included in the standard of review for arbitrated agreements put forth by the Act, and therefore such an argument is not a basis for rejecting the arbitrated link prices in the Agreement.

Finally, having reviewed the contract language of the arbitrated provisions and compared that language to the applicable Department arbitrated decisions, we find that the parties have correctly incorporated those arbitrated decisions into the Agreement.

Accordingly, for the reasons stated, the Department also approves the arbitrated portions of the Agreement.

VI. ORDER

Accordingly, after due notice, hearing, and consideration, it is

ORDERED: That the arbitrated interconnection agreement, between New England Telephone and Telegraph Company d/b/a NYNEX and Brooks Fiber Communications, Inc., filed with the Department on June 24, 1997, be and hereby is approved.

By Order of the Department,

John B. Howe, Chairman

Janet Gail Besser, Commissioner