D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 3-C

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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ORDER ON MOTION BY BELL ATLANTIC FOR CLARIFICATION AND RECONSIDERATION; MOTION BY MCI FOR RECONSIDERATION

I. INTRODUCTION

On July 29, 1997, the Department of Telecommunications and Energy issued an Order in Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 3-B (1996) ("Phase 3-B Order") dealing with issues relating to performance standards and liquidated damages. On September 22, 1997, New England Telephone and Telegraph Company, d/b/a Bell Atlantic-Massachusetts ("Bell Atlantic") filed a Motion for Reconsideration and Clarification of the Department's Order relative to a number of issues. Attached to Bell Atlantic's Motion was an affidavit of Julie A. Canny, the company's executive director, operations support and implementation of legal requirements. Also on September 22, 1997, MCI Telecommunications Corporation ("MCI") filed a Motion for Reconsideration of the Department's findings relative to (1) burden of proof, (2) billing accuracy, and (3) level of aggregation.

AT&T Communications of New England, Inc. ("AT&T") filed a response to Bell Atlantic's Motion on October 6, 1997, and also on that date, Bell Atlantic filed a response to MCI's Motion. On October 8, 1997, Teleport Communications Group, Inc. ("TCG") filed a response to Bell Atlantic's Motion.

II. STANDARD OF REVIEW

A. Reconsideration

The Department's policy on reconsideration is well settled. Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that we take a fresh look at the record for the express purpose of substantially modifying a decision reached after review and deliberation. Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Essex County Gas Company, D.P.U. 87-59-A at 2 (1988); Western Massachusetts Electric Company, D.P.U. 85-270-C at 12-13 (1987); Hutchinson Water Company, D.P.U. 85-194-B at 1 (1986).

A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Western Massachusetts Electric Company, D.P.U. 84-25-A at 6-7 (1984); Boston Edison Company, D.P.U. 1720-B at 12 (1984); Hingham Water Company, D.P.U. 1590-A at 5-6 (1984); Boston Edison Company, D.P.U. 1350-A at 4 (1983); Trailways of New England, Inc., D.P.U. 20017, at 2 (1979); Cape Cod Gas Company, D.P.U. 19665-A at 3 (1979).[1] Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence. Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989), citing Western Union Telegraph Company,

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[1] The Department has denied reconsideration when the request rests on an issue or updated information presented for the first time in the motion for reconsideration. See generally Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987); Western Massachusetts Electric Company, D.P.U. 86-280-A at 16-18 (1987).

D.P.U. 84-119-B (1985).

B. Clarification

The Department will grant clarification of previously issued orders when an order is silent as to the disposition of a specific issue requiring determination in the order, or when the order contains language that is so ambiguous as to leave doubt as to its meaning. Boston Edison Company, D.P.U. 92-1A-B at 4 (1993); Whitinsville Water Company, D.P.U. 89-67-A at 1-2 (1989). Clarification does not involve reexamining the record for the purpose of substantively modifying a decision. Boston Edison Company, D.P.U. 90-335-A at 3 (1992), citing Fitchburg Gas & Electric Light Company, D.P.U. 19296/19297, at 2 (1976).

III. GROUNDS FOR CLARIFICATION AND RECONSIDERATION

A. Computation of Quarterly Payments

1. Introduction

In the Phase 3-B Order, we determined that quarterly performance periods should be used for purposes of computing payments to be made by Bell Atlantic. Phase 3-B Order at 31. This approach differed from that offered by Bell Atlantic, which was based on annual performance periods.

2. Positions of the Parties

Bell Atlantic states that, if the baseline annual level of performance is compared to quarterly performance, there could be significant differences from the annualized value from quarter to quarter (Bell Atlantic Motion at 3). It notes that this quarterly variation would not

necessarily show up as a divergence from parity among companies, but it could give an erroneous indication that there is a degradation in historical service, thereby resulting in the company's being penalized (id.). Bell Atlantic therefore seeks clarification that, although parity payments would be made based on quarterly comparison for any deviation in performance parity, the comparison with baseline, historic levels should be conducted only annually (id.).

AT&T argues that Bell Atlantic's motion is a vehicle for improperly seeking to present more detail regarding the argument which it previously made and which the Department rejected in the Phase 3-B Order (AT&T Response at 2). AT&T also notes that Ms. Canny's affidavit shows that the seasonal variation for 1996 is likely to favor Bell Atlantic just as often as it may favor the Competitive Local Exchange Carriers ("CLECs"), permitting Bell Atlantic to avoid payments even if its performance is worse than the corresponding quarter of 1996 (id. at 3). TCG argues that Bell Atlantic has not offered any new facts, nor has it shown that the Department's ruling was the result of mistake or inadvertence (TCG Response at 3-4).

3. Analysis and Findings

Through quarterly reporting, the Department sought a technique that would ensure that the competing carriers would receive more frequent payments for deviations from parity. Phase 3-B Order at 31. Bell Atlantic is correct, however, that the Order was silent on the issue of baseline historic levels for use in setting the "no-change-in-parity" levels. As the parties recognize, the baseline, historic levels that are used to set the "no-change-in-parity" levels are based on annual figures that are not disaggregated by quarter. Thus, parsing them into

quarterly reporting figures would be inappropriate. To be specific, payments will be applied (1) in the event that parity is not achieved in any one quarter and (2) if there was a violation of the "no-change-in-parity" rule over the course of a year.

B. Timing of Payments

1. Positions of the Parties

Bell Atlantic asks for reconsideration that liquidated damages payments be made within 30 days after the end of each quarterly reporting period (Bell Atlantic Motion at 7). Bell Atlantic states that it will require more than 30 days to collect and analyze the data and compute the payments (id. at 8). Bell Atlantic states that the process will initially take up to 75 days, but that the process will be reduced to 60 days over time (id.).

AT&T argues that there is nothing in Ms. Canny's affidavit that justifies the 75-day period for application of credits (AT&T Response at 7). AT&T notes that the parity measurement procedure established by the Department is a simple, straightforward one (id.). TCG argues that Bell Atlantic has not set forth sufficient evidence to demonstrate that the required review and posting of credit cannot be performed within 30 days (TCG Response at 7). TCG also maintains that should the Department find that Bell Atlantic cannot complete its requirements within 30 days, any amount payable to a CLEC should be deemed to bear interest at the late payment rate commencing no later than the expiration of the thirty day period (id. at 9).

2. Analysis and Findings

The record is not well-developed concerning the level of effort required for Bell Atlantic to collect and analyze the requisite data, to compute quarterly payments owed, and to process and forward those payments ("payment process"). The record consists largely of contradictory assertions (i.e., claims that "30 days is sufficient" versus counterclaims that "60 to 75 days is needed"). The meagerness of the record is perhaps understandable, for the task has not yet been performed and is certainly not yet routinized. While the Department hesitates to be prescriptive in business details best left to management, nonetheless, some direction is in order so that the parties may have clear rules to conduct their business.

Accordingly, the Department denies Bell Atlantic's motion and establishes the following approach subject to adjustment in January, 1998. For only the first quarter following this Order, Bell Atlantic will be accorded 60 days in which to complete the payment process. For succeeding calendar quarters, the Department, given the undeveloped state of the record on this point, is inclined to look to ordinary commercial practice (which recognizes that payment is due within 30 days) as the best guide for the payment process.

We invite the parties to file comments by January 6, 1998 on the following proposed resolution of this dispute. For the second and succeeding quarters, Bell Atlantic would have 30 days from the end of each quarter in which to complete the payment process before interest began accruing, and in no case longer than the last day of the second month following the end of the quarter in question (i.e., ordinarily, about 60 days, depending on the lengths of the months in question). Placing payment in the U.S. mail would constitute payment, although

other forms of payment may be reasonable. Payment would thus be due and owing on and from the thirtieth day following the quarter's end. Any balance unpaid on and from the thirty-first day until the sixtieth day would accrue interest at the then-prevailing Federal Reserve prime rate. The first 30 days would not be subject to interest. We do not regard interest as a penalty, but merely as a means to make whole the CLECs for the time-value of money that may be owed them after the thirtieth day post-quarter.

The parity measurement procedure earlier established by the Department does not appear complex. Phase 3-B Order at 30-31. We regard 30 days as likely to prove a reasonable period in which to complete the payment process -- once one quarters' experience has been gained. We believe this rule would strike a fair balance between the practical needs of Bell Atlantic to put a payment process in place and its obligation to make payments in a timely-fashion to the CLECs. The lack of empirical experience and the undeveloped state of the record prompt us to seek informed guidance from the parties. Comments should be brief and to the point.

C. Multiple Payments

1. Introduction

In the Phase 3-B Order, we adopted more performance measurements than had been proposed initially by Bell Atlantic and fewer measurements than had been proposed by the competing carriers. Phase 3-B Order at 33-37. Our goal was to have measurements that were discrete enough to be responsive to the competitive needs of the other carriers, while also

trying to avoid double counting of the same parity violation.

2. Positions of the Parties

Bell Atlantic seeks clarification that, when computing payments for a measurement with additive reporting, the payments would be based on the incremental reporting disparity (Bell Atlantic Motion at 4). It provides an example as the reason for this proposal: If there were a deviation from parity for the "percent of installations completed within three days", that failure would also be carried forward to the failure to meet the percent of installation completed within five days, causing two parity payments to be made for the same failure (id. at 5). Under the company's proposal, to continue with the same example, it would not make an additional payment if the deviation from parity remained constant at the five-day measurement (id.).

AT&T offers a different approach, one that eliminates the additive reporting. Using the above example, the measurement of "percent completed within five days" would measure only those installation appointments completed on days four and five, and thus would not be additive (AT&T Response at 4). The three- and five-day measurements would each stand on their own, and the appropriate parity calculation could be made for each (id.).

3. Analysis and Findings

Contrary to its motion, Bell Atlantic is attempting to reargue an issue that was argued and fully considered in the main case. The Order was not silent or ambiguous on this issue, nor did it make a mistake in setting the measures. In deciding on these measurements, the Department was fully aware that there is occasionally a potential for the additive result

mentioned by Bell Atlantic. However, it is by no means a foregone conclusion that the company's failure to meet the three-day measurement would also guarantee a failure to meet the five-day measurement. The company's example is but one of many possible scenarios and fails to recognize that Bell Atlantic is in a position to remediate the sub-parity performance documented in the three-day measurement by responding in the two days remaining before the five-day measurement is calculated. Indeed, our intent in including both was to help ensure that one measurement might be met, even if the other was not. While we recognize that it might sometimes require an extra effort on the part of Bell Atlantic to recover from sub-parity performance in the three-day time period in order to meet the five-day measurement, such an effort would be fully consistent with our overall objectives. The motion is therefore denied.

D. Mean Time to Repair

1. Positions of the Parties

Bell Atlantic asks the Department to reconsider its decision to impose payments for parity failures of both "mean time to repair" ("MTR") and "percentage of lines restored" (Bell Atlantic Motion at 5). It argues that the decision to require payments for both types of measurements results in the type of double-counting that the Department sought to avoid (id.).

AT&T argues that the two measurements are, in fact, different and that eliminating payments with regard to "mean time to repair" would improperly allow Bell Atlantic to avoid payments for failure to achieve parity with regard to troubles that did not involve lines that were completely out of service (AT&T Response at 4).

2. Analysis and Findings

Bell Atlantic is correct that there is the potential for double-counting between these two measures, but it is also true, as AT&T notes, that the two measures account for service quality in different ways, both of which are important to our competitive purposes. It is mathematically possible to meet one and fail the other. The Department's decision to impose disaggregated performance standards was made with full understanding of the indices, and with the intent not to double-count the same parity. Phase 3-B Order at 32. The Department concluded that a detailed level of aggregation is required to ensure parity within and across a wide variety of market segments. Id. at 33. Therefore, we find that the Department's decision was not the result of mistake or inadvertence, and accordingly Bell Atlantic's motion for reconsideration is hereby denied.

E. Special Services

1. Positions of the Parties

Bell Atlantic states that, in gathering information regarding the actual performance on measurements for Special Services, it "had become apparent" that the reports for some of the measurements ordered by the Department will have meaningless results (Bell Atlantic Motion at 6). Based on this information that was previously not part of the record in this case, the company requests reconsideration of these reporting requirements (id.). Specifically, it notes that the installation time routinely scheduled for Special Services is six days, with most installation in the 12- to 15-day range (id.). Thus, it argues, measurements for one and three

day installation appointments and for seven-day trouble reports are not meaningful (id.). Bell Atlantic's proposes, therefore, that these measurements be eliminated.

AT&T argues that Bell Atlantic has not given appropriate reasons for eliminating the measurements (AT&T Response at 5). The company asserts that even if most Special Service installations take from six to fifteen days, it is important that Bell Atlantic not be able to favor its end-user customers by giving quick installation times (id.). Likewise, AT&T argues that trouble reports within seven days of installation remains an important measurement; the fact that not all initial troubles are captured by the measurement does not mean that it should be abandoned (id.). TCG argues that Bell Atlantic's assertion is untested in the record, and does not provide a basis for revision of the Department's decision (TCG Response at 6). TCG also maintains that if Bell Atlantic is correct that no customer will receive installation within three days, there will be no disparity treatment, and Bell Atlantic will not be subject to any damages (id. at 7). However, TCG argues, the reporting requirement is the only way to determine what standard of service is being provided to different customers (id.).

2. Analysis and Findings

We agree with AT&T and TCG on the substance of this issue, finding that the information presented by Bell Atlantic does not constitute unknown or undisclosed facts that would have a significant impact on the decision already rendered, for which the Department must grant reconsideration. The indices imposed by the Department were chosen to ensure parity within and across a wider variety of market segments. Phase 3-B Order at 33. The

reporting requirements as they stand ensure the greater level of disaggregation that the Department intended to impose. Id. Accordingly, Bell Atlantic's motion is denied.

F. Minimum Sample Size

1. Introduction

In the Phase 3-B Order, we determined that damage payments will not be assessed if there are fewer than 10 in a sample size for a given measure in a given performance review period. Phase 3-B Order at 34.

2. Positions of the Parties

Bell Atlantic argues that the record in the case did not address the precise sample size that would result in a statistically valid sample size for determining parity for purposes of assessing payments (Bell Atlantic Motion at 6-7). In its affidavit, the company offers new information regarding this issue and asks for reconsideration that the minimum sample size be raised to 400, stating that this sample size is needed to conclude, in a statistically valid way, that a measurement is not being provided at parity (id. at 7).

AT&T urges that we reject Bell Atlantic's attempt to present what AT&T characterizes as hearsay evidence on this issue, noting that Bell Atlantic had ample opportunity to address this issue during the case (AT&T Response at 6). TCG argues that the Department considered and rejected Bell Atlantic's claim in the Phase 3-B Order at 33-34 (TCG Response at 5). TCG further states that Ms. Canny does not have the expertise or personal knowledge to support Bell Atlantic's assertion (id.).

3. Analysis and Findings

This issue was clearly raised by AT&T during the proceeding (AT&T Brief at 7), and Bell Atlantic clearly responded to AT&T's proposal at the time (Bell Atlantic Reply Brief at 26). Bell Atlantic is attempting here to reargue issues considered and decided in the main case. Phase 3-B Order at 33-34. As such, we find that the information presented by Bell Atlantic does not constitute unknown or undisclosed facts that would have a significant impact on the decision already rendered. Accordingly, Bell Atlantic's motion is denied.

G. Burden of Proof

1. Positions of the Parties

MCI argues that the Phase 3-B Order inappropriately shifted to the CLECs burdens of proof and persuasion that belong on Bell Atlantic (MCI Motion at 3). It states that Bell Atlantic should be required to demonstrate that the collection of data on a given service function is not needed to affirmatively provide parity of service to CLECs (id. at 4). It asserts that it and AT&T have made proposals that they deem to be necessary to demonstrate that Bell Atlantic is meeting its parity obligation (id.).

Bell Atlantic responds that MCI's claim is based on a mischaracterization of the Department's Order and the record in this proceeding, stating that the Department did not shift any burden to CLECs to establish that Bell Atlantic was meeting the parity standard (Bell Atlantic Response at 3). Bell Atlantic recounts that it presented substantial evidence during the proceeding and, in response to other parties, presented evidence as to why their proposed

measurements were inappropriate (id.). Bell Atlantic asserts that MCI's claim is solely a complaint that the Department did not accept its positions and provides no cause for reconsideration (id. at 4).

2. Analysis and Findings

We agree with Bell Atlantic that MCI has mischaracterized the Department's discussion and findings in the Phase 3-B Order. The Department carefully reviewed the submission made by Bell Atlantic with regard to performance measures to determine whether the measures proposed by Bell Atlantic would be adequate to measure and support its parity obligation. In a number of instances, whether suggested by the CLECs or upon its own analysis, the Department added a number of measures, finding that Bell Atlantic had not proposed a number or range of measures sufficient to measure parity. In other instances, the Department considered the points raised by MCI and AT&T, and, in light of the evidence presented by Bell Atlantic and upon its own analysis, found that MCI and AT&T's proposals for additional measures were not persuasive. These findings did not shift the burden of proof from Bell Atlantic. Bell Atlantic made its initial proposal, offered evidence in support of that proposal and in rebuttal of the CLECs proposals, and that evidence was considered by the Department along with the evidence offered by the CLECs. MCI is attempting here to reargue issues considered and decided in the case. Accordingly, MCI's Motion for Reconsideration on the issue of burden of proof is denied.

H. Billing Accuracy

1. Positions of the Parties

MCI asks the Department to reconsider our decision not to require Bell Atlantic to measure the relative billing accuracy of the various exchange companies (MCI Motion at 4). MCI cites information from New York in support of its argument that there is a need for billing accuracy measures (MCI Motion at 5). Bell Atlantic opposes this motion, stating that the information from New York does not provide a basis for reconsideration (Bell Atlantic Response at 5).

2. Analysis and Findings

Our ruling in the Phase 3-B Order was made because the evidence in the case demonstrated that the common method of collecting data made such a measurement unnecessary to demonstrate parity. Phase 3-B Order at 6. The information presented by MCI in its motion does not constitute unknown or undisclosed facts that would have a significant impact on the decision already rendered. MCI's motion is an attempt to reargue issues considered and decided in the main case, and it is therefore denied.

I. Level of Aggregation

1. Positions of the Parties

MCI states that our decision to allow Bell Atlantic to group its services into two baskets for purposes of measuring parity, POTS and Special Services, should be reconsidered (MCI Motion at 6). It argues that this proposal is contrary to the Telecommunications Act of 1996 ("the Act") because it would allow Bell Atlantic to inappropriately aggregate its services,

allowing it to hide a lack of parity with regard to particular services (id. at 6-7). MCI seeks to introduce post-hearing information from another jurisdiction in support of its contention that a different level of aggregation is technically feasible, non-burdensome, and meaningful (id. at 7).

Bell Atlantic responds in opposition to the MCI motion, stating that nothing in the Act or the Federal Communications Commission rules supports MCI's claim (Bell Atlantic Response at 8). It also states that the information from New York does not provide a basis for reconsideration (id. at 9).

2. Analysis and Findings

As above, the Department reviewed various aspects of the aggregation issue in the Phase 3-B Order, and MCI's motion is an attempt to reargue issues considered and decided in the main case. Phase 3-B Order at 13. MCI's claim that the current aggregation would allow Bell Atlantic to hide a lack of parity with regard to particular services was clearly addressed by the Department in the main case, and did not result from mistake or inadvertence. Id. As such, the Department finds that the information presented by MCI does not constitute unknown or undisclosed facts that would have a significant impact on the decision already rendered. MCI's motion is hereby denied.

IV. ORDER

After due consideration, it is

ORDERED: That the Motion for Clarification filed by New England Telephone and Telegraph d/b/a Bell Atlantic-Massachusetts relative to the computation of quarterly payments is

hereby GRANTED; and it is

FURTHER ORDERED: That the Motion for Reconsideration filed by New England Telephone and Telegraph d/b/a Bell Atlantic-Massachusetts relative to the timing of payments is hereby DENIED; and it is

FURTHER ORDERED: That the Motion for Clarification filed by New England Telephone and Telegraph d/b/a Bell Atlantic-Massachusetts on the issue of multiple payments is hereby DENIED; and it is

FURTHER ORDERED: That the Motion for Reconsideration filed by New England Telephone and Telegraph d/b/a Bell Atlantic-Massachusetts on the issue of the mean time to repair is hereby DENIED in part; and it is

FURTHER ORDERED: That the Motion for Reconsideration filed by New England Telephone and Telegraph d/b/a Bell Atlantic-Massachusetts on the issue of special services is hereby DENIED; and it is

FURTHER ORDERED: That the Motion for Reconsideration filed by New England Telephone and Telegraph d/b/a Bell Atlantic-Massachusetts relative to the minimum sample size is hereby DENIED; and it is

FURTHER ORDERED: That the Motion for Reconsideration filed by MCI Telecommunications Corporation relative to burden of proof is hereby DENIED; and it is

FURTHER ORDERED: That the Motion for Reconsideration filed by MCI Telecommunications Corporation on the issue of billing accuracy is hereby DENIED; and it is

FURTHER ORDERED: That the Motion for Reconsideration filed by MCI Telecommunications Corporation relative to the level of aggregation is hereby DENIED; and it is

FURTHER ORDERED: That New England Telephone and Telegraph d/b/a Bell Atlantic-Massachusetts make a compliance filing on the issues decided herein and in the Phase 3-B Order within 35 days of the date of this Order.

By Order of the Department,

Janet Gail Besser, Acting Chair

John D. Patrone, Commissioner

James Connelly, Commissioner