D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (Phase 4-D)

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 December 4, 1996, the Department issued an order in this proceeding ("Phase 4 Order") which set forth our rulings with regard to the method to be used by NYNEX in carrying out total element long-run incremental cost ("TELRIC") studies to determine the prices to be charged by NYNEX to competing local exchange carriers for the use of unbundled network elements. The methodology employed by the Department was the one set forth by the Federal Communications Commission in its First Report and Order in CC Docket No. 96-68, dated August 8, 1996. On February 5, 1997, in response to motions for clarification, recalculation, and reconsideration, the Department issued a second order ("Phase 4-A Order") with regard to the TELRIC studies and directed NYNEX to submit cost studies in compliance with that order. NYNEX submitted its compliance filing with the Department on February 14, 1997. On March 14, 1997, NYNEX filed revisions to its compliance filing, noting that it had identified an error in the calculation of the rates for tandem switching. The revisions would reduce the reciprocal compensation rate for tandem switching by about 57 percent.

On March 24, 1997, TCG filed a motion to strike NYNEX's revisions. On March 31, 1997, NYNEX responded to TCG's motion. On that day, too, the Arbitrator announced that, pursuant to the Department's rules, the hearing would be reopened to accept the new information (Tr. 13, at 201). A hearing was held on May 14, 1997, to hear evidence on the revised compliance filing. Michael J. Anglin, NYNEX's witness on the TELRIC studies in the

earlier portions of the proceeding, appeared again as a witness for NYNEX. No other witnesses were presented.

TCG filed a brief on this matter on May 22, 1997. NYNEX submitted a reply brief on May 30, 1997. TCG filed a reply letter on June 6, 1997. In the interim, on May 2, 1997, the Department issued an order approving the other elements of NYNEX's TELRIC compliance filing ("Phase 4-B Order").

II. PROCEDURAL ISSUE

TCG has characterized the May 14, 1997, session as "a hearing on whether there was good cause to open the record." This is an incorrect characterization. As noted above, on March 31, 1997, the Arbitrator ruled that the hearing would be reopened to consider the new information filed by NYNEX. This procedure is expressly permitted in the Department's regulations where it is stated: "The Department may, at any time prior to the rendering of a decision, reopen the hearing on its own motion." 220 CMR § 1.11(8).

Nonetheless, we take TCG's arguments on this matter as, in essence, a motion to reconsider the reopening of the hearing. At the heart of TCG's argument is its assertion that NYNEX was motivated by commercial interests, rather than by a bona fide interest in accurate costs, in submitting the revisions to the compliance filing. In addition, TCG asserts that there must be some finality to the Department's process. Finally, TCG states that the Department has previously rejected a finding of good cause when "inadvertence and avoidable miscommunication" are present and states that NYNEX's proposed changes can be similarly characterized. This is particularly the case, asserts TCG, where NYNEX provided the

Department with misleading information regarding the nature of its error, which TCG describes as an error of modeling assumptions versus input values.

On the first point, we need reach no conclusion as to whether NYNEX's filing is motivated by its commercial interests. We would be naive to believe that all parties to this proceeding are not motivated in great measure by this interest. While we agree with NYNEX that TCG has failed to demonstrate that NYNEX will be a net beneficiary of the proposed change (NYNEX Brief at 3), whether it is or is not is irrelevant to the question. On the second point, we agree that there should be some finality to the arbitration process, but as correctly stated by the Arbitrator, our goal is to produce rates that, as much as practicable, represent the costs of the unbundled network elements essential for interconnection agreements (Tr. 17, at 5-6). A few weeks of delay in establishing accurate rates—especially while other sections of the interconnection agreements remained in litigation—is not unreasonable given their clear importance to the parties. Finally, on the last point, we are cognizant of the extensive effort undertaken by all of the parties during the fall of 1996 to conclude the TELRIC phase of these arbitrations in the limited time period set forth by the Act. It is not unreasonable for mistakes of inadvertence and miscommunication to have been made by NYNEX during this accelerated and compressed proceeding, and, in this case, we will not use our finding in the Phase 4 Order to prohibit a proposed correction from being offered for review by the parties and the Department. We disagree with TCG that NYNEX provided the Department with misleading information regarding the nature of its error. NYNEX clearly stated the nature of the error, and we do not find persuasive TCG's distinctions among errors of mathematics, data transfer,

keying, or input assumption.

Accordingly, we find that it was appropriate to reopen the hearing for consideration of NYNEX's proposed revisions to the compliance filing. We now turn to the merits of the proposed change.

III. THE PROPOSED REVISION

A. Introduction

The revised tandem rates proposed by NYNEX are different from its original compliance filing because the company made a change in the percentage of tandem busy hour minutes to total tandem minutes. This figure is an input to convert annual costs per busy hour minute of use to a per-minute-of-use cost. The original busy hour ratio used by the company was 0.23, and the revised value was 0.10. This revised figure, like the original figure, was used in the TELRIC cost study methodology prescribed by the Department in the Phase 4 Order and Phase 4-A Order, and it resulted in a lower cost for tandem switching.

B. Positions of the Parties

1. NYNEX

NYNEX states that the 0.23 figure was actually based on overflow minutes, usage that spills over into the tandem switch when the trunking that directly connects two end offices has exhausted its capacity to handle calls. As explained by Mr. Anglin, in this situation, the tandem serves as a "relief route" to handle such calls. He stated that this figure was not representative of the ratio of busy hour to total minutes of general tandem usage because the overflow is only one small segment of all tandem traffic (Tr. 17, at 13-14). Instead of this overflow figure,

NYNEX proposes to use the ratio of busy hour to total usage that is experienced in end offices. NYNEX states that it uses this ratio because it does not have a way to measure actual tandem busy hour minutes, and it asserts that the end office ratio is reasonably close to the ratio that would be experienced in the tandem switch because all tandem traffic ultimately originates or terminates in an end office (Tr. 17, at 11). The source of this ratio is a company database called MITAS, and the figures derived were collected in the month of March 1996 (Tr. 17, at 8-10).

2. TCG

TCG argues that NYNEX has not met its burden of proof in three respects. First, it claims that NYNEX was not able to demonstrate that the original busy hour ratio was erroneous. Second, it asserts that NYNEX did not support its theory that the ratio of busy hour minutes to total minutes should be the same at both the end office and the tandem level of the network. Third, TCG states that NYNEX did not offer any evidence demonstrating that the new data it has obtained are any more reliable than the original data submitted in this proceeding.

C. Analysis and Findings

1. Accuracy of the Original Busy Hour Ratio

As noted above, Mr. Anglin offered an explanation as to why the original busy hour ratio was erroneous. He explained that it included only overflow traffic, thereby eliminating the preponderance of tandem switching traffic. We find this explanation persuasive. As NYNEX notes, while tandem offices handle overflow traffic, they also function as primary

routing points for NYNEX toll traffic, interexchange carrier traffic, cellular and wireless access, and CLEC traffic, as well as the routing point for a variety of different services (NYNEX Brief at 9). The overflow traffic ratio clearly is not representative of general tandem usage. Therefore, there is strong reason to believe that the 0.23 figure is inappropriate.

2. End Office and Tandem Comparison

TCG describes the primary function of the tandem switch as accommodating overflow traffic generated by interexchange carriers and NYNEX, and it argues that common sense would dictate that the busy hour ratio for the tandem would be higher than that of the end office (TCG Brief at 13). To reach this conclusion, TCG characterizes Mr. Anglin's testimony as stating that there are many instances where NYNEX routes traffic through a tandem rather than on an end office-end office basis (TCG Brief at 12). NYNEX states that this characterization is incorrect and has no evidentiary support (NYNEX Brief at 9).

We read Mr. Anglin's testimony differently from the way TCG does. We agree that Mr. Anglin was explaining that certain traffic is routed through a tandem rather than through a direct end office-end office trunk, but that in no way contradicts his assertion that the vast preponderance of tandem traffic ultimately originates or terminates in an end office.[1] In light of NYNEX's testimony that separate measurements are not maintained of the tandem busy hour ratio, we conclude that NYNEX's use of the end office busy hour ratio is a reasonable

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[1] There may be instances, as noted by Mr. Anglin, where a trouble situation at an end office can force calls to be placed through a tandem, but there is no evidence on this record to suggest (1) the level and frequency of such trouble conditions or (2) that such conditions are likely to occur more or less during the busy hour and therefore affect the busy hour ratio (Tr. 17, at 19).

surrogate for the tandem busy hour ratio.

3. Data Reliability

The data supporting the 0.10 figure are derived from the NYNEX MITAS system. The company used data from the month of March, 1996. NYNEX chose this period to provide comparable cost study results with the other TELRIC cost studies in this proceeding (Tr. 17, at 25). TCG has offered no arguments as to why such data are likely to be unreliable. We find that nothing on this record suggests that the data from the MITAS system are inaccurate, and we further find that it is reasonable for the variety of unbundled network element cost studies to be based on data from similar time periods.

4. Conclusion

Upon review of the evidence presented, we find that NYNEX's proposed revision to its TELRIC compliance filing is reasonable and in accord with the Department's rulings in the Phase 4 Order and the Phase 4-A Order. Accordingly, TCG's request is denied, and the proposed revisions to NYNEX's compliance filing relating to the tandem rate are approved.

IV. ORDER

After notice, hearing, and due consideration, it is

ORDERED: That the issues under consideration be determined as set forth above; and it is

FURTHER ORDERED: That the TELRIC compliance filing revisions filed by New England Telegraph and Telegraph Company d/b/a NYNEX on March 14, 1997, are hereby approved.

By Order of the Department,

John B. Howe, Chairman

Janet Gail Besser, Commissioner