August 21, 1998

D.T.E. 98-74

Investigation by the Department into an arbitrated interconnection agreement between New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, and Covad Communications Company, pursuant to § 252(e) the Telecommunications Act of 1996.

APPEARANCES: Bruce Beausejour, Esq.
185 Franklin Street, Room 1403
Boston, MA 02210-1585
FOR: NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY d/b/a BELL ATLANTIC-MASSACHUSETTS
Petitioner

Thomas Koutsky, Esq.
6849 Old Dominion Drive, Suite 220
McLean, VA 22101
FOR: COVAD COMMUNICATIONS COMPANY
Petitioner

I. INTRODUCTION

On July 23, 1998, pursuant to § 252(e) of the Telecommunications Act of 1996 ("Act"), New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts ("Bell Atlantic") and Covad Communications Company ("Covad") filed their final arbitrated interconnection agreement ("Agreement") for approval by the Department of Telecommunications and Energy ("Department"). The Department docketed review of the Agreement as D.T.E. 98-74. Under § 252(e)(4) of the Act, the Department must approve or reject the Agreement within 30 days of the filing (i.e., by August 22, 1998), or it shall be deemed approved. The Agreement includes both negotiated and arbitrated provisions that set forth rates, terms and conditions under which Bell Atlantic and Covad will interconnect their respective networks, as well as the network elements, services, and other arrangements that Bell Atlantic will provide to Covad. The arbitrated rates, terms and conditions were determined by the Department in D.T.E. 98-21 (1998).

Pursuant to notice duly issued, the Department held a public hearing in this proceeding on August 12, 1998. No comments were received at the public hearing. In addition, the Department received no written comments in response to our request for comments on the Agreement.

II. DESCRIPTION OF AGREEMENT

According to Bell Atlantic's transmittal letter, dated July 23, 1998, the Agreement is similar to an agreement between Bell Atlantic and C-TEC Services, Inc. previously approved by the Department. See NYNEX/C-TEC Agreement, D.P.U. 96-108 (1997). The

Agreement, executed on July 1, 1998, is a comprehensive set of rates, terms and conditions governing the interconnection of Bell Atlantic's local exchange network with Covad's network, including, inter alia: (1) physical interconnection of Covad's network to Bell Atlantic's network; (2) reciprocal compensation; (3) meet-point billing; (4) tandem transit service; (5) access to E911 and 911 services; (6) Network Maintenance and Management; (7) access to and rates for certain unbundled network elements or combinations of elements; (8) access to and rates for resale of local services; (9) collocation; (10) number portability; (11) dialing parity; (12) access to rights of way, ducts, conduits, and pole attachments; (13) access to directory assistance, operator services, and directory listings; and (14) Performance Standards (BA/Covad Agreement at i-iii). The Agreement has an initial term ending March 15, 2001 (BA/Covad Agreement at 56).

The Agreement contains provisions based in whole or part on issues decided in D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 ("Consolidated Arbitrations") (BA/Covad Agreement at 62), including prices for unbundled links, reciprocal compensation, interconnection, and the resale discounts (id. at Exh. A, at 2-15). In addition, the Agreement contains "placeholders" for certain newly-identified issues that the Department is currently arbitrating in the Consolidated Arbitrations such as the provision and pricing of dark fiber as an unbundled network element (BA/Covad Agreement at 71; Exh.-A, at 1).

III. STANDARD OF REVIEW

A. Negotiated Agreements

Section 252(e)(1) of the Act requires parties to an interconnection agreement to submit the agreement to a state commission for approval, and further requires state commissions to 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.[1] 47 U.S.C. § 252(e)(2)(A).

B. Arbitrated Agreements

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 Federal Communications Commission ("FCC") pursuant to Section 251,[2] or the pricing standards set forth in Section 252(d) of the Act.

---

[1] 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.

[2] 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"). On July 18, 1997, the United States Court of Appeals for the Eighth Circuit, inter alia, 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 Board, et al. Petitioners, v. Federal Communications Commission; United States of America, Respondents, 120 F.3d 753 (8th Cir., July 18, 1997, as amended on

(continued…)

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).

IV. ANALYSIS AND FINDINGS

A. Negotiated Provisions

Consistent with the Department's review of prior negotiated interconnection agreements (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, convenience, and necessity.

The negotiated portions in the Agreement do not bind other carriers; other carriers are free to negotiate their own arrangements with Bell Atlantic. In addition, the negotiated portions in the Agreement meet the requirements of 47 U.S.C. § 252(i) by making interconnection to network elements, provided under the Agreement to Covad, available to other telecommunications carriers on the same terms and conditions, if so requested (see Agreement at 68).

---

[2](…continued)
rehearing on October 14, 1997) (1997) ("Eighth Circuit Decision"). 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 801.

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 Bell Atlantic and Covad.

Accordingly, the Department hereby approves the negotiated provisions of the Agreement. In approving these provisions, however, the Department makes no findings on the applicability of these terms and conditions to other interconnection agreements that may be submitted for Department review in the future.

B. Arbitrated Provisions

Before addressing the substantive issues, it is important that we discuss the impact on our analysis of the Eighth Circuit Decision, which, as of the date of this Order, is on appeal to United States Supreme Court.[3] As we stated in Brooks Fiber/NYNEX Interconnection Agreement, D.P.U. 97-70 (1997), "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 methods complied with the pricing standards of Section 252(d)." D.P.U. 97-70, at 7. Because only the jurisdiction of the FCC to establish pricing requirements was challenged, and not the underlying pricing methods, the Department found that it could continue to rely on those methods, which were used in the Consolidated Arbitrations in reviewing final arbitrated interconnection agreements. Our use of these pricing methods will

---

[3] AT&T Corp., et al. v. Iowa Utilities Board, et al., __ U.S. __, 118 S. Ct. 879 (1998).

continue unless we determine that the interim rates established through those methods are no longer appropriate for setting rates for interconnection unbundled network elements ("UNEs"), reciprocal compensation, and resale. See Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 2, at 4-8 (1996).

In D.T.E. 98-15, the Department currently is investigating whether the interim resale discounts should be made permanent or whether other discounts, based on a different method, are more appropriate. In addition, the Department has decided to expand the scope of D.T.E. 98-15 to include developing permanent rates for unbundled elements. However, until the Department changes the interim resale discounts and UNE rates, those rates remain in effect. Accordingly, the Department finds that our use of the interim resale discounts and UNE rates in the Consolidated Arbitrations, and included in the Agreement under review in this proceeding, are still valid, and are not affected by the Eighth Circuit Decision. Further, as with all other Bell Atlantic negotiated and arbitrated agreements in which interim rates are used, the interim rates contained in this Agreement are subject to change based on the results of D.T.E. 98-15 and other subsequent Department investigations, and Covad and Bell Atlantic shall be required to incorporate such results as amendments to their agreements. In addition, with regard to "placeholder" provisions in the Agreement for issues yet to be decided in the Consolidated Arbitrations, the Department directs Covad and Bell Atlantic to submit for Department approval relevant contract language after we issue our Order on those provisions.

With respect to the arbitrated terms of the Bell Atlantic/Covad Agreement, the Department has reviewed the contract language of the arbitrated provisions and compared that

language to the applicable Department-arbitrated decisions. We find those provisions consistent with our review of prior arbitrated agreements, e.g., ACC National Telecom Corp., D.P.U. 97-85 (1997), and that the parties have correctly incorporated the relevant portions of those arbitrated decisions into the Agreement. In addition, 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.[4] However, as noted above, in light of the Eighth Circuit 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.

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

---

[4] 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."

V. ORDER

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

ORDERED: That the final arbitrated interconnection agreement between New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts and Covad Communications Company, filed with the Department on July 23, 1998, be and hereby is approved; and it is

FURTHER ORDERED: That Bell Atlantic and Covad comply with all directives contained herein.

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