D.T.E. 99-271

Investigation by the Department of Telecommunications and Energy upon its own motion pursuant to Section 271 of the Telecommunications Act of 1996 into the Compliance Filing of New England Telephone and Telegraph d/b/a Bell Atlantic-Massachusetts as part of its application to the Federal Communications Commission for entry into the in-region interLATA (long distance) telephone market.

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INTERLOCUTORY ORDER ON JOINT PETITIONERS' APPEAL OF

HEARING OFFICERS' DECISIONS DATED AUGUST 19, 1999

I. INTRODUCTION

On May 24, 1999, New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts ("Bell Atlantic") filed with the Department of Telecommunications and Energy ("Department") a copy of a preliminary application ("271 Filing") Bell Atlantic intends to submit to the Federal Communications Commission ("FCC") for its consideration. If this application is approved by the FCC, Bell Atlantic may commence offering long distance telephone service in Massachusetts.

Under § 271 of the Telecommunications Act of 1996 ("Act"), Bell Atlantic must demonstrate to the FCC its compliance with a 14-point checklist of market-opening requirements, which includes an analysis of Bell Atlantic's operations support systems ("OSS"). 47 U.S.C. § 271(c)(2)(B). The Act requires the FCC to consult with the Department to verify Bell Atlantic's compliance with the competitive checklist,[(1)] and in previous FCC 271 Orders, the FCC emphasized the importance of state commission proceedings to develop a comprehensive factual record on a Bell Operating Company's ("BOC") compliance with the checklist and the status of local competition prior to the BOC's filing with the FCC.[(2)]

The Department docketed Bell Atlantic's 271 Filing as D.T.E. 99-271 and on June 29, 1999, the Department issued a Notice of Filing and Public Hearings ("Notice") on the 271 Filing. The Department held five hearings throughout the state from July 19 through August 5, 1999, and on July 22, 1999, the Department held its first procedural conference.

On August 19, 1999, the hearing officers issued a decision ("Decision"). That Decision granted in part and denied in part AT&T's Motion to Suspend Further Proceedings Regarding the Section 271 Checklist Items. That Decision also denied the Joint Petition for Appeal ("Joint Petition") of MCI WorldCom, Inc., RCN-BecoCom, LLC, the Telecommunications Resellers Association ("TRA"), Sprint Communications Company, RNK, Inc., and TelEnergy (collectively, "Joint Petitioners") and established an initial procedural schedule. On September 1, 1999, the Joint Petitioners filed an appeal

("Appeal") of (1) the denial of their request that the Department order Bell Atlantic to provide the same market-opening commitments as were made in the New York Roadmap[(3)] ("Point 1"), (2) the denial of AT&T's request to address the establishment of a collaborative process, which is the subject of D.T.E. 99-20, in D.T.E. 99-271 ("Point 2"), and (3) the procedural schedule ("Point Three") (Appeal at 1).

On September 8, 1999, Bell Atlantic and AT&T each filed responses ("Response") to Point Three of the Appeal. On September 10, 1999, Breakthrough Massachusetts filed a letter with the Department on behalf of its members[(4)] in support of the Appeal. On September 13, 1999, Bell Atlantic and AT&T each filed responses ("Second Response") to Points One and Two of the Appeal. During the procedural conference conducted on September 9, 1999, several participants spoke either in favor of or in opposition to all three points of the Appeal (Tr. at 18-96).

II. SUMMARY OF THE APPEAL

According to the Joint Petitioners, the hearing officers denied Point One of the Appeal for the following reasons: the Department lacks the resources for the complex negotiations required to create a Roadmap; the Department will not commit in advance to any findings on the 271 Filing; and the uncertainties created by litigation at the federal level that drove the Roadmap process have largely been resolved (id. at 2, citation omitted). The Joint Petitioners argue that the hearing officers are wrong on all three counts. First, the Joint Petitioners contend that adopting the commitments Bell Atlantic made in New York will actually reduce the Department's burden (id.). Rather than engaging in complex negotiations, the Joint Petitioners urge the Department to require Bell Atlantic to offer Massachusetts no less than what it offered New York before Bell Atlantic requests the Department's support for its 271 Filing (id. at 2-3).

The Joint Petitioners contend that requiring Bell Atlantic to submit a New York-style Roadmap does not serve as a quid pro quo for any Department finding on the 271 Filing (id. at 3). According to the Joint Petitioners, they are requesting that Bell Atlantic provide, as a baseline in Massachusetts, no less than the commitments Bell Atlantic provided New York (id.). Lastly, while the Joint Petitioners agree that many issues have been resolved subsequent to Bell Atlantic's filing of its New York Roadmap, this resolution does not obviate the need for Bell Atlantic to make similar commitments in Massachusetts (id.).

The Joint Petitioners argue that the hearing officers erred on Point Two of the Appeal by rejecting AT&T's renewed request that the Department establish a collaborative process to resolve provisioning issues (Appeal at 4). According to the Joint Petitioners, the Decision rejected this part of AT&T's motion without explanation (id.). The Joint Petitioners contend that due to the differences between Bell Atlantic's network in Massachusetts and New York, the Department cannot rely upon the provisioning standards set in New York to create competition in advanced services in Massachusetts (id. at 5-6). The Joint Petitioners ask that the Department reconsider the hearing officers' decision to "not even order the beginning of a collaborative" (id. at 6).

The Joint Petitioners oppose Point Three of the Appeal, the procedural schedule, because, they argue, the dates set in the procedural schedule would preclude meaningful participation by parties except Bell Atlantic (id.). According to the Joint Petitioners, the Decision on the schedule requests only Bell Atlantic's comment as to the checklist items requiring completion of the OSS test and, therefore, overlooks CLECs' experiences using Bell Atlantic's OSS (id.). The Joint Petitioners contend that CLECs will be hindered in the discovery process, according to the Joint Petitioners, because they must submit their questions in advance for the Department's review, and the Department will then determine the questions to ask Bell Atlantic (id. at 7). The Joint Petitioners argue that this screening of discovery is inefficient and creates additional work for a resource-strapped Department (id.). Based upon their experience ordering UNEs and resale, and attempting to interconnect, the Joint Petitioners argue that CLECs should be permitted to conduct their own discovery and cross-examination of Bell Atlantic (id.). Finally, the Joint Petitioners contend that the current procedural schedule does not allow sufficient time to permit adequate consideration of the complicated issues contained in the 14 checklist items (id.).

III. POSITIONS OF THE PARTICIPANTS

A. Roadmap

1. AT&T

While AT&T does not support negotiations with Bell Atlantic to obtain specific market-opening commitments as a quid pro quo for a favorable ruling on Bell Atlantic's 271 Filing, AT&T does support requiring Bell Atlantic to commit, at a minimum, to a New York-style Roadmap as a condition of the Department's consideration of the 271 Filing (AT&T Second Response at 2-3). According to AT&T, the Department should require Bell Atlantic to comply with existing Department Orders, especially with respect to UNE combinations including the UNE-platform, and to honor commitments made to the Department and the FCC before the Department devotes its resources to complex fact finding (id. at 3-10).

2. Bell Atlantic

Bell Atlantic argues that the hearing officers were correct to deny Point One of the Appeal. According to Bell Atlantic, its 271 Filing must be judged on its own merits and not against commitments that may have been negotiated in another state at another time (Bell Atlantic Second Response at 2). Bell Atlantic contends that the Department must make its own judgment about Bell Atlantic's compliance with the checklist and Bell Atlantic must be permitted to present its case in Massachusetts, independent from what may have been negotiated in another state (id.). Finally, Bell Atlantic argues that the Joint Petitioners' demand for a New York-style Roadmap is unnecessary because the commitments Bell Atlantic made in New York have "largely been implemented" by Bell Atlantic in Massachusetts (id. 3).

B. Collaborative

1. AT&T

AT&T argues that a collaborative process is the only practical way to establish procedures for CLECs to request interconnection services and UNEs from Bell Atlantic (AT&T Second Response at 11). While the carriers and the Department may build upon the collaborative work completed in New York, AT&T argues that the existence of differences in Bell Atlantic's systems in the two states will require collaborative sessions in Massachusetts (id.). Lastly, AT&T argues that a Massachusetts collaborative should proceed in tandem with the ongoing region-wide collaborative[(5)] to ensure that Bell Atlantic's uniform interfaces are tested in Massachusetts (id. at 12).

2. Bell Atlantic

Bell Atlantic argues that the hearing officers did not rule on AT&T's request to establish a collaborative proceeding but correctly noted that a decision on that request would be issued in D.T.E. 99-20 (Bell Atlantic Second Response at 3). According to Bell Atlantic, the Joint Petitioners have no cause for complaint with Point Two of the Decision because AT&T's petition to establish a collaborative will be addressed in the case in which it was filed (id. at 4). Bell Atlantic contends that the Joint Petitioners do not establish that the hearing officers' decision on Point Two was in error; rather, they simply reargue a claim made in D.T.E. 99-20 about the need to create a collaborative to resolve an integrated digital loop carrier dispute (id.). Bell Atlantic argues that this contention lacks merit and does not justify the implementation of a collaborative process (id. at 4-7).

C. Procedural Schedule

1. AT&T

AT&T argues that the hearing officers' decision to restrict the use of pre-technical session written discovery and technical session oral discovery by participants will impede the development of an accurate factual record (AT&T Response at 2). AT&T asserts that the CLECs' real world experience is key to producing a record that reveals whether Bell Atlantic is, in fact, capable of satisfying the checklist requirements, and that the Department should not place artificial restrictions on CLEC discovery (id. at 3-4). In addition, AT&T argues that the Department's limited resources are best used for a critical review of Bell Atlantic's discovery responses, as opposed to reviewing the participants' discovery requests (id. at 4). According to AT&T, Department filtering of discovery may have the unintended consequence of screening out discovery designed by the participants' technical experts to elicit important information up front, thus forcing an extended process later for the development of such information (id. at 5).

AT&T argues that Bell Atlantic must demonstrate that it has earned the privilege of offering interLATA toll service in Massachusetts and, therefore, bears the burden of producing all relevant information on the issue (id. at 6). According to AT&T, if Bell

Atlantic believes that a particular discovery request is "irrelevant or overly burdensome," it may object and seek relief from the Department (id. at n.6). Finally, AT&T cautions against unduly limiting cross-examination at the technical sessions in an effort to meet some arbitrary 271 deadline (id. at 7). AT&T contends that participants must be provided the opportunity to resolve, through oral examination, ambiguities created by omissions in the record (id.).

2. Bell Atlantic

Bell Atlantic argues that the Joint Petitioners cannot assert any "right" to discovery and cross-examination because the Department's inquiry in this proceeding is not a traditional adjudication (Bell Atlantic Response at 2, citing Notice at 2). Bell Atlantic contends that the hearing officers' procedural decisions are reasonable and appropriate for the scope of this proceeding and that CLECs will be permitted a full opportunity to provide meaningful input under the procedures contained in the Decision (id. at 2-3). According to Bell Atlantic, limiting the amount of discovery and questioning to those issues the Department wishes to pursue will save time and resources for all participants (id. at 3). Lastly, Bell Atlantic notes that the Department has used successfully "this type of flexibility" in other industry-wide, non-adjudicatory proceedings involving the gas and electric industries[(6)] (id.).

IV. ANALYSIS AND FINDINGS

The Department has considered what analysis it will accord to challenges or appeals[(7)] of hearing officer decisions issued in this inquiry. We take this opportunity to advise the participants that the Commission, in examining any challenge to or appeal of the hearing officers' decisions, will examine a number of factors, including: the substance of the appeal, whether the decision rests upon a reasonable foundation, whether the decision is consistent with the hearing officer's delegation of authority, whether the decision will aid the Department in its inquiry under the Act, and whether the appeal was presented in writing and in a timely fashion, with copies sent to the Department and to all participants. The hearing officers have substantial discretion in managing such matters, and the Commission will not readily overrule them in the sound exercise of their delegated discretion.

We have had the opportunity to review the Decision, the Appeal, the responses to the Appeal, and the transcript of the procedural conference. We conclude, for the reasons detailed below, that the Decision rests upon reasonable foundations, is consistent with the delegation of authority we have vested in the hearing officers, and will aid the Department in its inquiry into Bell Atlantic's 271 filing. We note that the Joint Petitioner's Appeal was filed thirteen days after the Decision was issued. Future appeals to hearing officer decisions in D.T.E. 99-271 must be filed within ten calendar days of issuance of the decision.

A. Roadmap

The Department supports the hearing officers' statement that they will not make any judgments about the sufficiency of the 271 Filing until the Department's review has "run its course" (Decision at 8). Furthermore, we agree with Bell Atlantic that its 271 Filing must be judged on its own merits against the requirements contained in § 271 of the Act and not against commitments made in another state (see Bell Atlantic Response at 2). The Joint Petitioners contend that their request, that the Department direct Bell Atlantic to provide the same commitments in Massachusetts as it did in its New York Roadmap, does not suggest any quid pro quo with respect to Department findings on the 271 Filing. We disagree. If the Department requires Bell Atlantic to file a New York-style Roadmap in Massachusetts at this stage of the proceeding, the implication might be that Bell Atlantic's 271 Filing is deficient. We are not prepared to make such a determination before developing and reviewing the record in D.T.E. 99-271.

We presume that Bell Atlantic submitted its 271 Filing to the Department last May because Bell Atlantic believes it complies with the 14-point checklist in Massachusetts. We presume further that Bell Atlantic believes it complies with its § 271 obligations in Massachusetts, absent implementation in our state of all of the commitments it made in its New York Roadmap. This decision, about the sufficiency of its 271 Filing, is Bell Atlantic's alone to make and is done solely at its peril.

The Department will determine whether Bell Atlantic's filing meets the requirements of

§ 271 based upon our review and analysis of Bell Atlantic's filing along with the record that is developed in this proceeding. Bell Atlantic's 271 Filing last May asserts that "Massachusetts' local telecommunications market is unquestionably and irreversibly open to competition" (Affidavit of Paula Brown, at ¶ 5). The Department must and will test Bell Atlantic's claim against a thorough factual record. Bell Atlantic's commitments, implemented or not, made in another state may be useful to know but do not control this proceeding.

B. Collaborative

The Department disagrees with the Joint Petitioners' assertion that the hearing officers rejected AT&T's request to establish a collaborative process "without explanation." In the Decision, the hearing officers clearly stated that AT&T's petition to create a collaborative will be addressed in a forthcoming order to be issued by the Department in another proceeding, D.T.E. 99-20 (Decision at 6). The hearing officers were correct to decline to address the merits of another proceeding in a hearing officer ruling in this proceeding. The Commission traditionally has not delegated to hearing officers the discretion to rule on substantive matters in Department adjudications. Likewise, in D.T.E. 99-271, we have not delegated to the hearing officers the authority to rule in the instant docket on the merits of other Department proceedings.

The Department agrees with the hearing officers' decision not to rule on AT&T's request to establish a collaborative in this 271 proceeding. The Department will soon issue its order in D.T.E. 99-20 addressing the request for a collaborative process.

C. Procedural Schedule

The Joint Petitioners and AT&T oppose the hearing officers' decision to submit to the Department for its review proposed questions seeking information related to the 271 Filing. The Joint Petitioners and AT&T argue that this screening hinders the CLECs, is inefficient, and will impede the development of an accurate factual record. We note that the FCC has directed state commissions to develop a comprehensive factual record of BOCs' compliance with the checklist and the status of local competition. We conclude that the process set forth in the Decision is designed to fulfill that responsibility in an efficient manner.

The Department's procedures, of reviewing proposed questions and declining to adopt those not likely to result in information relevant to verifying Bell Atlantic's compliance with the checklist or the status of local competition, will create a reliable record for the FCC and will focus Bell Atlantic on points relevant to the inquiry. Similarly, the hearing officers' decision reserving the right of the Department to limit participants' questioning at the technical sessions is designed to produce a record upon which both the FCC and Department of Justice can depend. Having said that, we recognize the CLECs' "real world" experience in ordering UNEs and interconnecting to Bell Atlantic systems. For that reason, relevant questions will be allowed with CLECs being provided with a reasonable opportunity for follow-up at the technical sessions.

In the Decision, the hearing officers stated that the procedural schedule in this docket is subject to change from time to time as this inquiry advances (Decision at 10). The Joint Petitioners argue that the proposed schedule in the Decision does not permit adequate time for consideration of the checklist items. The responsibility that § 271 places upon the states is unusual and perhaps unprecedented. Flexibility of procedure and schedule are warranted if the Department is to meet the twin demands of thoroughness and timeliness established by the Act. The Department recognizes that the issues that are the subject of this proceeding are complex; flexibility in the procedural schedule will be necessary to address the checklist items in a thorough manner. The Department finds that the hearing officers' initial proposed schedule is reasonable and permits an appropriate measure of flexibility to develop a comprehensive record.

V. ORDER

Accordingly, after due consideration, it is hereby

ORDERED: That the Joint Petition for Appeal of MCI WorldCom, Inc., RCN-BecoCom, LLC, the Telecommunications Resellers Association, Sprint Communications Company, RNK, Inc., and TelEnergy filed with the Department on September 1, 1999, be and is hereby DENIED.

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

1. 47 U.S.C. § 271(d)(2)(B).

2. See e.g., In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket 97-137, ¶ 30 (rel. August 19, 1997).

3. A collaborative effort between the New York Public Service Commission, Bell Atlantic-New York, and CLECs resulted in a "Roadmap" filing by Bell Atlantic-New York of business rules and system requirements sufficient to enable CLECs to develop their own systems to interface electronically with Bell Atlantic's OSS for unbundled network elements ("UNEs").

4. Breakthrough Massachusetts states in its letter that it is a coalition of the following telecommunications providers and an industry association: Covad Communications, CTC Communications, Intermedia Communications, MCI WorldCom, Sprint, TRA, USN Communications, and WinStar Communications.

5. The goal of this region-wide collaborative is to implement OSS interfaces that are uniform throughout Bell Atlantic's region. The region-wide collaborative flows from a settlement agreement resolving MCI WorldCom, Inc. and AT&T Corp. v. Bell Atlantic Corp., FCC File No. EAD-99-0003, at ¶ 2.1 (August 20, 1999).

6. According to Bell Atlantic, discovery and questioning were conducted only by the Department in both D.T.E. 98-32-B and D.P.U. 96-100 (Bell Atlantic Response at 3).

7. Despite the non-adjudicatory nature of the instant matter, we may occasionally use the term "appeal" for lack of a better one. No adjudicatory implication is intended by this use, and none may be inferred.