D.T.E. 98-57

Investigation by the Department on its own motion as to the propriety of the rates and charges set forth in the following tariffs: M.D.T.E. Nos. 14 and 17, filed with the Department on August 27, 1999, to become effective on September 27, 1999, by New England Telephone Telegraph Company d/b/a Bell Atlantic-Massachusetts.

APPEARANCES: Bruce P. Beausejour, Esq.

Keefe B. Clemons, Esq.

Bell Atlantic - Massachusetts

185 Franklin Street

Boston, MA 02110-1585

Petitioner

Thomas Reilly

Attorney General

By: Daniel Mitchell,

Assistant Attorney General

200 Portland Street, 4th Floor

Boston, MA 02114

Intervenor

Alan D. Mandl, Esq.

Ottenberg, Dunkless, Mandl & Mandl, LLP

260 Franklin Street

Boston, MA 02110

-and-

Hope H. Barbulescu

MCI WorldCom

Five International Drive

Rye Brook, NY 10573

FOR: MCI WORLDCOM, INC.

Intervenor

John Farley

Network Plus, Inc.

1 World Trade Center, Suite 8121

New York, NY 10048

Intervenor

Eric J. Krathwohl, Esq.

Rich, May, Bilodeau & Flaherty, P.C.

294 Washington Street

Boston, MA 02108

FOR: TELECOMMUNICATIONS RESELLERS ASSOCIATION

FOR: CTC COMMUNICATIONS CORP.

FOR: NETWORK PLUS, INC.

Intervenors

Jay E. Gruber, Esq.

Jeffrey F. Jones, Esq.

Kenneth W. Salinger, Esq.

Palmer & Dodge, LLP

One Beacon Street

Boston, MA 02108-3190

-and-

Melinda Milberg, Esq.

AT&T Communications, Inc.

32 Avenue of the Americas, Room 2700

New York, NY 10013

-and-

Patricia Jacobs, Ph.D.

State Manager for Government Affairs

AT&T Communications of New England, Inc.

99 Bedford Street

Boston, MA 02111

FOR: AT&T COMMUNICATIONS OF NEW ENGLAND, INC.

Intervenor

Cathy Thurston, Esq.

Sprint Communications Company, L.P.

1850 M Street, N.W., Suite 1110

Washington, DC 20036

Intervenor

Ellen W. Schmidt, Esq.

Counsel, Director of Regulatory Affairs

MediaOne Telecommunications of Massachusetts, Inc.

6 Campanelli Drive

Andover, MA 01810

Intervenor

Tony Petrilla, Esq.

Dana Frix, Esq.

Russell M. Blau

Swidler Berlin Shereff Friedman, LLP

3000 K Street, NW, Suite 300

Washington, DC 20007-5116

FOR: RCN-BECOCOM, L.L.C.

FOR: CHOICE ONE COMMUNICATIONS, INC.

Intervenors

John C. Ottenberg, Esq.

Ottenberg, Dunkless, Mandl & Mandl, LLP

260 Franklin Street

Boston, MA 02110

-and-

Jeffrey Blumenfeld, Esq.

Blumenfeld & Cohen

1615 M Street, N.W.

Suite 700

Washington, DC 20036

FOR: ACI CORP. D/B/A ACCELERATED CONNECTIONS, INC.

Intervenor

Christopher H. Kallaher, Esq.

Mintz Levin Cohn Ferris Glovsky and Popeo, PC

One Financial Center

Boston, MA 02111

FOR: GLOBAL NAPS, INC.

FOR: CORECOMM MASSACHUSETTS, INC.

Intervenors

William J. Rooney, Esq.

General Counsel

Global NAPs, Inc.

10 Merrymount Road

Quincy, MA 02169

Intervenor

Douglas Denny-Brown, Esq.

RNK Inc.

1044 Central Street

Stoughton, MA 02072

Intervenor

Susan Jin Davis, Esq.

Assistant General Counsel

Covad Communications Company

Hamilton Square

600 14th Street, NW, Suite 750

Washington, DC 20005

Intervenor

J. Joseph Lydon

Beacon Strategies

11 Beacon Street, Suite 1030

Boston, MA 02108

Limited Participant

Robert H. Watkinson, Executive Director

Statewide Emergency Telecommunications Board

PO Box 156

Reading, MA 01867

Limited Participant

ORDER

I. INTRODUCTION

On April 2, 1999, New England Telephone Telegraph Company d/b/a Bell Atlantic-Massachusetts ("Bell Atlantic") filed with the Department of Telecommunications and Energy ("Department") two tariffs to become effective on May 2, 1999. By Order dated April 13, 1999, the Department suspended the effective date of the tariffs. Thereafter, on May 27, 1999 and again on August 25, 1999, the Department suspended the procedural schedule. On August 20, 1999, the Department requested Bell Atlantic to (1) withdraw Tariff No. 17 and certain portions of Tariff No. 14, filed April 2, 1999, and (2) refile these Tariff provisions by August 27, 1999.

On August 24, 1999, Bell Atlantic notified the Department that the tariffs would be revised slightly when refiled. On August 26, 1999, MCI WorldCom, Inc. ("MCI"), ACI Corp. d/b/a Accelerated Connections ("ACI"), AT&T, and Global NAPs, Inc. ("Global NAPs") (collectively, "Intervenors") requested a stay of the procedural schedule and proposed revisions to the schedule to allow for more time to review the revised tariff filing.

On August 27, 1999, Bell Atlantic refiled with the Department the two revised tariffs for approval with an effective date of September 27, 1999. On that day, the Department also stayed the August 30, 1999 surrebuttal testimony deadline to consider the Intervenors' requests for a stay of the procedural schedule. In its response of September 1, 1999 ("Bell Atlantic Response") to the requests for a stay of the procedural schedule, Bell Atlantic requested that the Department permit the two refiled tariffs to go into effect immediately on an interim basis subject to refund. Furthermore, Bell Atlantic proposed a procedural schedule for the review of those tariffs whereby a Department decision on their propriety would be rendered by December 23, 1999 (id. at 3-4).

In accordance with the Hearing Officer's directive of September 2, 1999, MCI, ACI, AT&T, and Global NAPs filed comments on Bell Atlantic's proposal that the Department permit the tariffs to go into effect on an interim basis subject to refund, and to Bell Atlantic's proposed procedural schedule.

II. POSITIONS OF THE PARTIES

A. Bell Atlantic

Bell Atlantic contends that allowing M.D.T.E. Tariff Nos. 14 and 17 to go into effect immediately on an interim basis, subject to refund, would permit Bell Atlantic to provide the services and arrangements under tariffed terms to all CLECS while preserving the right of all parties to receive a final Department determination of the terms and/or rates. (Bell Atlantic Response at 3).

In addition, Bell Atlantic claims that its proposed procedural schedule is consistent with the Department's objective of concluding this investigation expeditiously as well as fairly to all parties

since it provides ample time for the CLECs to represent their positions (id. at 4). Bell Atlantic urges the Department to adopt the proposed procedural schedule and states that the CLECs have had an extensive opportunity to examine fully the overwhelming portions of Bell Atlantic's proposed Tariff Nos. 14 and 17 since the original filing on April 2, 1999 (id. at 4). Moreover, Bell Atlantic contends that the suggestion that substantial effort will be required to conclude this case is based on erroneous claims pertaining to the modifications and additions to the tariffs subsequent to the original filing (id. at 4). Bell Atlantic asserts that a complete version of the tariffs was filed on April 2, 1999, but that additions and modification were necessary in order to comply with FCC and Department rulings issued subsequent to the original filing (id. at 1-2).

B. Global NAPs

Global NAPs opposes allowing the refiled tariff to go into interim effect subject to refund (Global NAPs' Comments, at 1). In support of its position, Global NAPs first cites the complexity of the tariff which purports to set the rates, terms and conditions for a range of telecommunication services that competing carriers like Global NAPs will be providing their customers using the facilities of Bell Atlantic, the incumbent local exchange carrier (id. at 1). Global NAPs argues that, in many instances, the final resolution of the issues raised by Bell Atlantic's proposed tariff terms will determine how, or even whether, competing carriers will make services available to their customers (id. at 1).

Secondly, Global NAPs states that allowing the tariffs to go into interim effect would force CLECs like Global NAPs to spend time and resources accommodating the terms of the interim tariff with no certainty that further time and resources will not have to be spent to accommodate the terms of the tariff as finally set by the Department (id. at 1). By way of example, Global NAPs states that the tariff requires Global NAPs to replace its single point of interconnection with the Bell Atlantic system with what Bell Atlantic considers to be a "geographically representative" interconnection point in each central office where Global NAPs has customers (id. at 1). Global NAPs contends that the effect of this provision, even on an interim basis, is no better than allowing it to be implemented on a permanent basis since Global NAPs would be forced to build a host of additional points of termination irrespective of whether the Department later strikes this requirement from the tariff (id. at 1).

Thirdly, Global NAPs contends that allowing the tariff to take effect without further investigation results in a type of regulatory extortion as carriers who have spent time and money to comply with the interim tariff provisions mute their opposition to otherwise objectionable terms in order to avoid the time and expense of accommodating further changes to the tariff (id. at 2). Global NAPs argues that allowing the tariff to go into effect immediately gives Bell Atlantic the upper hand by establishing its position as the status quo (id. at 2). Global NAPs notes that this was the strategy pursued by Bell Atlantic in DTE 97-116 B (id. at 2).

With respect to Bell Atlantic's proposed procedural schedule, Global NAPs requests that Intervenors should be allowed to file discovery on any issue discussed in Bell Atlantic's rebuttal, not

just Enhanced Extended Links ("EEL") and Switch Subplatform (id. at 2). Global NAPs indicates that Intervenors had such right prior to the suspension of the procedural schedule and should not be placed in a worse position after the suspension (id. at 2).

In sum, Global NAPs opposes permitting the tariffs to go into interim effect subject to refund (id. at 1-2). In addition, Global NAPs objects to adoption of the procedural schedule proposed by Bell Atlantic (id. at 2).

C. MCI and ACI

MCI and ACI oppose permitting Bell Atlantic Tariff Nos. 14 and 17 to become effective on an interim basis in advance of the Department's investigation of the tariffs (MCI and ACI's Comments, at 1). First, MCI and ACI indicate that, although the Department has taken the proposed approach in the case of price cap annual compliance filings, the proposed tariffs are more controversial and subject to dispute than are formula-based price cap filings (id. at 1). MCI and ACI contend that the proposed tariffs consist of compliance filings, new cost studies, new service offerings and provisions which conflict with a recent arbitration decision of the Department (id. at 1). Specifically, MCI and ACI indicate that Bell Atlantic's proposal regarding the obligation of CLECs to establish multiple interconnection points was previously rejected by the Department in the August 25, 1999 MediaOne/Greater Media Telephone/Bell Atlantic arbitration decision in D.T.E. 99-42/99-43/99-52 (id. at footnote 1).

Next, MCI and ACI contend that the potential for conflicts and misunderstandings regarding the interplay between existing interconnection agreements and the proposed tariffs also militate against permitting the proposed tariffs to become effective prior to a comprehensive investigation (id. at 2). Lastly, MCI and ACI argue that the "subject to refund" qualification would not cure the substantial operational difficulties which would

arise out of the terms and conditions of the proposed tariffs if they were allowed to become effective as filed (id. at 2).

With regard to Bell Atlantic's proposed procedural schedule, MCI and ACI state that it is critical that Bell Atlantic complete its filing prior to the establishment of any discovery deadlines (id. at 2). MCI and ACI note that the proposed schedule would allow only two days to file discovery assuming a hearing officer decision on the proposed schedule was rendered the day following receipt of requested comments on Bell Atlantic's proposals (id. at 2). MCI and ACI also indicate that more than four days following Bell Atlantic's answers to discovery are needed to prepare surrebuttal (id. at 2). Moreover, MCI and ACI point to the possible hardship with the Reply Briefs being due the day before Thanksgiving as well as the potential inconvenience of a December 23, 1999 deadline for a Department decision (id. at 2-3).

In sum, MCI and ACI object to allowing the tariffs to go into interim effect subject to refund and request modifications to the procedural schedule proposed by Bell Atlantic (id. at 1-3).

- AT&T

AT&T contends that there is no advantage to allowing the tariffs to take interim effect, and, urges that the Department establish a schedule with a fixed suspension period which provides all parties an opportunity to be heard. Further, AT&T asserts that the Department should have an opportunity to evaluate all the issues presented by the tariff in accordance with applicable legal requirements and the interests of competition. (AT&T Comments, at 2). In support of its position, AT&T contends that, through the suspension orders of April 13 and May 27, 1999, and, the Memorandum and Revised Procedural Schedule dated August 25, 1999, the Department determined that suspension of the tariffs

pending further investigation was warranted (id. at 1). Thus, AT&T argues, Bell Atlantic's request that the tariff be given interim effect is inconsistent with the Department's prior determination that suspension pending investigation is warranted (id.).

Second, AT&T states that there is more reason now for the suspension period to continue given that, as of August 27, 1999, Bell Atlantic finally filed what purports to be a complete version of Tariff No. 17 (id. at 1). AT&T contends that Bell Atlantic's repeated modifications and additions to the tariff, many of which have been necessitated by Bell Atlantic's own premature filing of the tariff, not regulatory rulings, have made coherent review of the tariff by interested Intervenors difficult (id. at 1-2). AT&T claims that there is no justification for giving the tariff effect before the Department has held hearings, and heard the concerns and arguments of the Intervenor CLECS who will be directly affected by the tariff (id. at 2).

Besides procedural concerns, AT&T also contends that issues pertaining to Tariff No. 17's conformance to applicable law must be addressed before the tariff can become effective (id. at 2). Specifically, AT&T states that the substance of Tariff No. 17 is in large part dictated by the requirements of the Telecommunications Act of 1996 and applicable FCC and Department orders, including orders issued at or since the time of Bell Atlantic's original filing. At&T argues that provisions of Tariff No. 17 which are contrary to law must be altered or stricken before the tariff goes into effect rather than given interim effect subject to refund (id. at 2).

Furthermore, AT&T argues that allowing the tariff to take effect subject to refund invites unjustified administrative and billing nightmares. (Id. at 2). AT&T notes that Bell Atlantic does not identify the number of ways a CLEC would be required to monitor its and Bell Atlantic's operations so that the appropriate refund could be claimed in the event that the tariff is modified (id. at 2).

Turning to Bell Atlantic's proposed procedural schedule, AT&T proposes several modifications to accommodate the interests of all parties (id. at 3). First, AT&T asserts that discovery should not be limited to EEL and Switch Subplatform issues and any changes to Tariff No. 17 introduced in the August 27, 1999 filing (id. at 3). Next, At&T argues that Bell Atlantic's Rebuttal Testimony should be limited to responding to

Intervenor testimony on issues not previously addressed in Intervenor testimony (id. at 3). Last, AT&T requests that the proposed evidentiary hearing dates be modified due to unavailability of AT&T counsel and provides an alternative proposed procedural schedule for consideration (id. at 3).

In sum, AT&T opposes allowing the tariffs to do into interim effect subject to refund and notes deficiencies in the proposed procedural schedule (id. at 3-4).

III. ANALYSIS AND FINDINGS

Pursuant to G.L. c. 159 §§ 19 and 20, the Department is accorded broad discretion in allowing, suspending and investigating proposed tariffs. In the past, the Department has specifically allowed price cap compliance filings to take interim effect pending the Department's investigation. See NYNEX Third Annual Price Cap, D.P.U. 97-67 (1997) and NYNEX Fourth Annual Price Cap, D.P.U. 98-67 (1998).

The Department, however, does not typically allow tariffs to take interim effect prior to an investigation of the propriety of the terms and conditions contained in the tariff absent extenuating circumstances. In the NYNEX price cap tariff cases cited above, by allowing the tariffs to take interim effect, NYNEX customers were provided with immediate revenue reductions with possible additional reductions based upon the results of the full investigation by the Department. See NYNEX Fourth Annual Price Cap, D.P.U. 98-67, at 10 (1998). The situation at hand is clearly distinguishable from the circumstances found in the NYNEX price cap filings.

In the present case, not only are the proposed tariffs subject to more dispute than formula-based price cap filings, Bell Atlantic's request that its tariffs take interim effect, subject to refund, results in a situation that places CLECs at a disadvantage. In the NYNEX price cap filings, customers received refunds as a result of the interim effect of the tariffs. Here,

allowing the tariffs to take interim effect would allow Bell Atlantic to charge CLECs for services based upon rates and conditions that may later be determined inappropriate or anti-competitive.

Secondly, the mere fact that CLECs may be entitled to a future refund, in the event that the Department later modified the tariffs after a full Department investigation, fails to take into account the time and resources which may be expended by the CLECs in order to accommodate the terms and conditions of the interim tariffs. Nor does it recognize additional time and resources that may be required to accommodate the modified tariffs. In addition, the potential and likelihood for administrative and billing problems must also be considered in the event that the tariff is modified after Department investigation. It must be noted that Bell Atlantic has not provided any indication as to the prerequisites to claim a refund, or how the refund would be determined in the event that the tariffs are modified. Thus, the complexity of the tariffs and the potential for confusion if a refund is necessary dictates against permitting the tariffs to take interim effect.

Last, aside from its assertion that allowing the tariffs to take interim effect would allow Bell Atlantic to provide the services and arrangements under tariffed terms to all CLECs while preserving the right of all parties to receive a final Department determination of the terms and/or rates, Bell Atlantic has not made any showing that immediate interim effect of the tariff is warranted due to any extenuating circumstances. On the other hand, Bell Atlantic's filing and the Intervenors' comments raise a number of questions and concerns about the operation of the tariffs. Therefore, based upon the filing and arguments made by the Intervenors to date, the Commission finds that a full investigation as to the propriety of the tariffs is necessary prior to the tariffs taking effect.

IV. ORDER

After review and consideration, it is hereby

ORDERED: That Bell Atlantic's proposal that the Department permit Tariff Nos. 14 and 17 to take interim effect subject to refund is DENIED; and it is

FURTHER ORDERED: That Bell Atlantic shall comply with all other 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