January 10, 2000

D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-O

Consolidated Petitions of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Teleport Communications Group, Inc., Brooks Fiber Communications of Massachusetts, Inc., AT&T Communications of New England, Inc., MCI Telecommunications 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.

ORDER ON MOTIONS FOR RECONSIDERATION OF MCI WORLDCOM, INC. AND MOTION FOR RECONSIDERATION AND CLARIFICATION OF BELL ATLANTIC-MASSACHUSETTS

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ORDER ON MOTIONS FOR RECONSIDERATION OF MCI WORLDCOM, INC. AND MOTION FOR RECONSIDERATION AND CLARIFICATION OF BELL ATLANTIC-MASSACHUSETTS

I. INTRODUCTION

On October 14, 1999, the Department of Telecommunications and Energy ("Department") issued an order in this proceeding ("Phase 4-L Order") with regard to cost studies and rate methodologies filed by New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts ("Bell Atlantic") for non-recurring charges ("NRCs") for certain unbundled network elements ("UNEs") and operation support

systems ("OSS") that are provided to competitive local exchange carriers ("CLECs") pursuant to the Telecommunications Act of 1996 ("the Act"). Two motions for reconsideration of the Phase 4-L Order were filed by MCI WorldCom, Inc. ("MCI") on October 28, 1999, and November 4, 1999. A motion for reconsideration and clarification was submitted by Bell Atlantic on November 5, 1999. On November 3, 1999, AT&T Communications of New England, Inc. ("AT&T") submitted a memorandum in support of MCI's first motion for reconsideration. On November 18, 1999, Bell Atlantic and MCI filed comments in opposition to each other's motions for reconsideration. AT&T also joined that day in filing comments in opposition to Bell Atlantic's motion. A further reply in support of MCI's motion was filed by AT&T on November 24, 1999.

II. STANDARD OF REVIEW FOR RECONSIDERATION AND CLARIFICATION

The Department's Procedural Rule, 220 C.M.R. § 1.11(10), authorizes a party to file a motion for reconsideration within twenty days of service of a final Department Order. 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 substantively modifying a decision reached after review and deliberation. North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995); Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A at 2 (1987).

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. Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). 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. Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987); but see Western Massachusetts Electric Company, D.P.U. 86-280-A at 16-18 (1987). 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); Boston Edison Company, D.P.U. 1350-A at 5 (1983).

Clarification of previously issued orders may be granted 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. 18296/18297, at 2 (1976).

III. APPLICATION OF NRC STUDY RESULTS

We now address Bell Atlantic's motion for clarification and each party's request for reconsideration in light of the standard of review.

Bell Atlantic notes that, in the Phase 4-L Order, the Department indicated that it would address the specific application of the NRC study results in the next phase of this proceeding. Bell Atlantic asks the Department to clarify this procedural ruling. It offers the opinion that the application of NRCs is now being addressed in D.T.E. 98-57, where Bell Atlantic has proposed comprehensive terms for interconnection and access to UNEs, including terms relating to the application of NRCs. Bell Atlantic notes that the parties to this proceeding are participants in D.T.E. 98-67, where they can address the application of NRCs. It asserts that considering the same issues in different proceedings is not appropriate and will result in duplicative efforts and create confusion. It suggests, therefore, that the Department clarify that the application of NRCs will be dealt with in D.T.E. 98-57, where Tariff No. 17 is being considered, and not as a new stage of these Consolidated Arbitrations (Bell Atlantic Comments at 5).

AT&T and MCI oppose both Bell Atlantic's motion for clarification and the suggestion that the application of NRC study results be included in the D.T.E. 98-57 docket. On the first point, they note that the Phase 4-L Order needs no clarification, in that the Department clearly stated that the application of NRCs would be considered in the next phase of this proceeding, when Bell Atlantic submits its NRC study compliance filing. Phase 4-L Order at 26-27. The two parties also disagree with Bell Atlantic on the substance of its recommendation. They assert that the established schedule for D.T.E. 98-57 precludes a timely consideration of the application of NRCs (AT&T Comments at 6; MCI Reply Comments at 2-3). Moreover, notes AT&T, the instant investigation continues to offer the appropriate forum for resolution of UNE-related NRCs. The two dockets, says AT&T, have always been understood by all parties to be overlapping proceedings, and that the Department's relevant arbitration decisions will be ultimately incorporated into Tariff No. 17. Finally, AT&T notes that, in any event, Bell Atlantic has offered no testimony in D.T.E 98-57 to explain the application of its NRCs (AT&T Reply Comments at 5-7). In addition, MCI argues that the procedural rights of the parties under the Act would be violated if the Department began taking issues out of the arbitration proceedings and moving them, in midstream, into tariff investigations (MCI Reply Comments at 3).

There is no need for clarification. The Department's Order was clear. On June 17, 1998, in the Phase 4-L proceeding, Bell Atlantic submitted its description for the application of NRCs to UNEs (Exh. BA-OSS/NRC-12). This exhibit received little review and comment during the rest of the Phase 4-L proceeding, as the parties focused their efforts on the NRC cost study method. No party, however, suggested that review of this aspect of the Consolidated Arbitrations should be transferred to another docket. Accordingly, the Department stated that it would address the questions of application of the NRCs "in the next phase of this proceeding, when Bell Atlantic submits its NRC study compliance filing." Phase 4-L Order at 26-27. Accordingly, Bell Atlantic's motion for clarification does not meet the Department's standard for approval.

IV. CUDS AND CSR

Bell Atlantic's filing had included cost studies for Call Usage Detail Service ("CUDS") and Customer Service Record Retrieval Service ("CSR") in its presentation on OSS. In the Phase 4-L Order, the Department rejected Bell Atlantic's pricing proposals for OSS, but did not address CUDS and CSR specifically. In its motion for reconsideration, Bell Atlantic argues that CUDS and CSR were supported by entirely separate, forward-looking, unit cost studies, which did not suffer from the deficiencies the Department found in the OSS study. The company argues that, through mistake or inadvertence, the Department did not distinguish CUDS and CSR and did not address the cost analyses presented by Bell Atlantic for these services. It further goes on to distinguish CUDS and CSR as using special facilities other than the general OSS access systems, and it says that its proposed charges for these services were fully supported by TELRIC studies. Bell Atlantic also notes that none of the parties presented evidence demonstrating that these studies were flawed or failed to follow TELRIC principles. Accordingly, says Bell Atlantic, the Department should reconsider its order and approve the company's proposals for CUDS and CSR (Bell Atlantic Comments at 3-4).

MCI and AT&T urge the Department to reject Bell Atlantic's motion. MCI notes that CUDS and CSR were fully considered by the Department in the same manner as it considered OSS, and that the Department's treatment of these two services is consistent with Bell Atlantic's presentation of CUDS, CSR, and OSS as part of an integrated cost study. Further, notes MCI, the same concerns that the Department expressed as to other OSS cost studies apply equally to CUDS and CSR (MCI Reply Comments at 1-2).

AT&T raises the same points as MCI and emphasizes that there is no merit to Bell Atlantic's suggestion that the proposed CUDS and CSR OSS charges be viewed as separate and distinct from the rest of its OSS study. In fact, says AT&T, Bell Atlantic presented a single cost study that was supported by the interrelated testimonies of Messers. Kelly, Minion, and Orosz. It further notes that the summary of OSS-related charges submitted by Bell Atlantic did not distinguish the CUDS and CSR charges in any way from other OSS charges (AT&T Reply Comments at 2-4).

The record in this case indicates that the CUDS and CSR OSS cost studies were conducted in a manner different from the other OSS elements. This distinction was

summarized in Bell Atlantic's initial brief in the case, where it noted: "[a] single per-transaction charge is proposed for all types of transactions, except for CUDS and CSR retrieval. . . . As explained above, these two services have unique ongoing cost components, and their costs were thus determined separately" (Bell Atlantic Initial Brief at 48). Mr. Minion explained in his testimony that CSR charges were determined by dividing annual ongoing costs by a projection of the levelized number of requested records over a five-year period to derive a cost per retrieved record. CUDS costs were determined in a similar manner on a per record basis (Exh. BA-OSS-2, at 29-32; Exhs. BA-OSS- 2 and -3, at Attachment C). Mr. Minion reiterated that these services were handled in a distinct manner during his cross-examination (Tr. 27, at 34, 90).

In the Phase 4-L Order, we did not explicitly address the issue of the CUDS and CSR OSS cost studies, and this was the result of inadvertence. Our analysis should have included a section on these services because their costs were estimated in a manner somewhat different from other OSS elements. We do so now, and the motion for reconsideration is granted, although, the Department notes, with no effect on the final result.

Mr. Minion explained that the CSR service provides CLECs with the ability to request information electronically and to view the customer service record of an end user. The service record reflects the most recent, completed service order activity and identifies the services and equipment billed by Bell Atlantic to the customer. He noted that providing the CSR service requires additional computer memory to store the customer service records and additional processing capability to permit the sorting and handling of each request for a record. He developed a cost study that estimates the computer expense associated with retrieving customer records. To this, he applied a gross revenue loading factor and a cost of capital, and he divided the resulting cost by the estimated number of retrievals over a five year period. A similar approach was taken with regard to CUDS, a service which provides CLECs with a variety of detailed usage information by line or billed telephone number (Exh. BA-OSS-2, at 29-31).

Dr. Selwyn offered testimony that Mr. Minion's estimates of computer costs are dramatically overstated by today's standards and do not reflect the decrease in computational costs that are expected under "Moore's Law," a widely accepted principle in the digital electronics industry, which holds that the cost of digital technology decreases by 50 percent every 18 to 24 months. Mr. Minion's cost study is based on a cost per gigabyte of storage capacity of $3000; a 1997 cost per million instructions per second ("MIPS") of $20,000; and a processing cost of $13.13 per CPU minute (Exh. BA-OSS-3, at Attachment C). Dr. Selwyn argues that a forward-looking cost study would conservatively assume a cost of below $500 per gigabyte of storage capacity, of $10,000 per MIPS, and a CPU processing time well below a minute. He also notes that archival storage could be offered in a manner requiring no capital investment at all (Exh. AT&T-OSS/NRC-1, at 18-21).

Dr. Selwyn's direct testimony in this regard is persuasive, as is his surrebuttal to Mr. Minion's rebuttal (Exh. ATT-OSS/NRC-11, at 39-45; Exh. BA-OSS/NRC-8, at 19-26).

Were we to accept the method offered by Mr. Minion, we would have to conclude that Bell Atlantic had not met its burden of proving that the components of that cost estimate were accurate. However, for reasons set forth in the Phase 4-L Order, we cannot accept Mr. Minion's method. In that Order, we noted that the UNE and resale rates approved by the Department already compensate Bell Atlantic for forward-looking, computer-related costs. Hence, it could not be permitted to charge for these costs a second time through OSS charges. Phase 4-L Order at 47-49. The company states that the CUDS and CSR OSS charges, which are the subject of this motion for reconsideration, are distinct from those it had proposed for general OSS elements. In that CSR and CUDS OSS involve the extension of computer-related functionality to permit CLEC access to Bell Atlantic records for UNEs and resale, we see no such distinction. Accordingly, on this basis, as well, Bell Atlantic's proposed OSS charges for CUDS and CSR are denied.

V. UDLC TECHNOLOGY

MCI asks the Department to reconsider its findings that permitted Bell Atlantic to model the use of universal digital loop carrier ("UDLC") central office wiring technology in determining NRCs. MCI argues that the Department's finding was based on the mistaken belief that Bell Atlantic's assumption regarding the digital loop technology in the NRC study was the same as that used in the Department-approved TELRIC recurring cost study. In fact, states MCI, the recurring cost study was based on the use of integrated digital loop carrier ("IDLC") technology. It cites testimony from Bell Atlantic witnesses Michael Anglin and Joseph Gansert during the earlier phase of this proceeding in support of this contention (MCI Comments at 1-3). AT&T joins in support of this motion, citing testimony, as well, from two other Bell Atlantic witnesses (AT&T Comments at 3-4; AT&T Reply Comments at 1-5).

MCI followed its first motion for reconsideration with a second one in which it asserts that use of the IDLC technology with GR-303 functionalities is not only technically feasible, but is also being deployed by Bell Atlantic. MCI argues that this deployment eliminates the cost of manual cross connect activity for central office wiring. MCI cites a decision by the New York Public Service Commission in which Bell Atlantic acknowledges the current availability of the GR-303 technology, as opposed to its speculative availability when TELRIC recurring rates in that state were first established. Accordingly, citing extraordinary circumstances, MCI asks the Department to consider this newly available information and base NRC rates upon it (MCI Second Motion at 2-8). AT&T concurs with this recommendation (AT&T Comments at 4-5).

Bell Atlantic responds that the CLECs have not met the standard for reconsideration. It notes that its network design in the TELRIC recurring cost study was based on IDLC using a TR-008 protocol, not the GR-303 protocol proposed by MCI. It asserts that no party has presented evidence in the case that disputes the fact that Bell Atlantic's NRC study requires the exact same physical cross connections that are necessary when assuming an IDLC environment with TR-008 functionality (Bell Atlantic Reply Comments at 4-5).

Bell Atlantic further argues that, in effect, MCI is seeking a review of the underlying network assumptions used in the recurring cost model that the Department has already approved. This review is unwarranted, states Bell Atlantic, absent some compelling circumstance, and, it notes, MCI can petition for such a review in that case. However, until the recurring cost study is modified, the network assumptions in the recurring and NRC studies should be the same (id. at 5-6). In any event, says Bell Atlantic, the record is clear that IDLC using the GR-303 protocol would not prevent the need for manual cross connections at the main distribution frame in an environment of multiple carriers (id. at 6).

Our aim, as stated, is to maintain consistency between the assumptions used in the TELRIC recurring cost study and the NRC study. Phase 4-L Order at 19, 21. This must be our goal, notwithstanding intervening changes in technology or regulatory decisions reached by other states. If it were not, these Consolidated Arbitrations would be ripe for attempted cherry-picking by one or another party. Id. at 19.

In their comments on the motion to reconsider, the parties agree that the TELRIC recurring cost study was based on the use of IDLC technology, as opposed to the UDLC technology inadvertently assumed by the Department. To that extent, the motion for reconsideration is granted. The answer to the question of which protocol is paired with the IDLC technology in the TELRIC recurring cost study -- the TR-008 protocol or the GR-303 protocol - is not quite as clear on the face of our Order. In our review of the record of that portion of the case, we find no mention of a specifically named protocol. What is clear, however, is that, in the recurring cost study, Bell Atlantic presented a network design that does not rely on manual cross connects using the main distribution frame. Its assumption of a network based on fiber feeders was explicitly combined with an assumption that those loops would terminate at the DS1 level in the central office at a fiber distribution frame, which for fiber cable has a similar functionality to a main distributing frame, directly into the electronics that drive the fiber. The DS0 would not be disaggregated in the 24 individual loops, or DS0s, that constitute a DS1 circuit, which, in contrast, would terminate at a main distribution frame and require a manual cross connection (Tr. 7, at 58-63). This assumption was also contained in the TELRIC compliance filing submitted by Bell Atlantic on February 14, 1997, which only refers to digital loop electronics and makes no mention of main distribution frames (Workpapers Part A, at 1-45). Accordingly, such should be the assumption for the NRC study. We had assumed the opposite in the Phase 4-L Order, but our review of the entire record of the proceeding persuades us that we ruled in error by inadvertantly focusing on the parties' arguments about one or another protocol rather than on the underlying technology contained in the recurring cost study. Thus, the request for reconsideration asking that the NRC eliminate the use of the manual cross connection at the main distribution frame is granted.

VI. ORDER

Accordingly, after due consideration, it is

ORDERED: That Bell Atlantic's Motion for Reconsideration and Clarification is granted in part and denied in part; and it is

FURTHER ORDERED: That the Motions for Reconsideration of MCI WorldCom are granted; and it is

FURTHER ORDERED: That Bell Atlantic file with the Department within 30 days from the date of this Order a NRC compliance filing that incorporates the directives herein.

By Order of the Department,

_____

James Connelly, Commissioner

_____

W. Robert Keating, Commissioner

_____

Paul B. Vasington, Commissioner

_____

Eugene J. Sullivan, Jr., Commissioner