

D.P.U. 96-94

Petition of Sprint Communications Company, L.P. pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration of interconnection agreements between Sprint and New England Telephone and Telegraph Company d/b/a NYNEX.

APPEARANCES: Cathy Thurston, Esq.
1850 M Street, N.W., Suite 1110
Washington, D.C. 20036
FOR: SPRINT COMMUNICATIONS COMPANY L.P.
Petitioner

Bruce P. Beausejour, Esq.
185 Franklin Street, Room 1403
Boston, MA 02107
FOR: NEW ENGLAND TELEPHONE &
TELEGRAPH COMPANY D/B/A NYNEX
Respondent

I. INTRODUCTION AND PROCEDURAL HISTORY

This is a proceeding being held pursuant to the federal Telecommunications Act of 1996 ("the Act") and regulations issued thereunder by the Federal Communications Commission ("FCC") in its First Report and Order dated August 8, 1996. 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) (hereinafter "Local Competition Order"). The Act and the FCC regulations are designed to facilitate the introduction of competition in the provision of telecommunications services throughout the United States. The Act recognized that many of the physical facilities and operating systems needed to provide local exchange service in a given geographic area are owned and controlled by the incumbent local exchange carrier ("ILEC") and that it would be difficult and inefficient for potential competitors to duplicate these facilities and systems. Accordingly, under procedures set forth in the Act, each ILEC is required to engage in good faith negotiations with each telecommunications carrier who wishes to compete against it. The purpose of the negotiations is to establish the terms and conditions of service for the resale of ILEC services, the provisioning of certain telecommunications services, and other matters (together, an "interconnection agreement") that would enable the potential competitor to enter the marketplace under conditions that would promote robust competition.

The Act and the FCC regulations further provide for binding arbitration in the event that negotiations cannot be concluded within a specified time, upon petition to the state public utility commission by either party to the negotiation. 47 U.S.C. § 252. This proceeding is the

result of such petitions.

On September 19, 1996, Sprint Communications Company L.P. ("Sprint") filed a petition requesting arbitration pursuant to the regulations, which was docketed as D.P.U. 96-94. This was one of several petitions which were filed by competing local carriers and New England Telephone and Telegraph Company, d/b/a NYNEX ("NYNEX"). Upon agreement by the parties, Paul F. Levy was designated by the Department of Public Utilities ("Department") as the arbitrator for each of these proceedings. At a procedural conference held on September 18, 1996, it was determined that there was sufficient overlap in the issues presented in the various petitions, and they were consolidated for hearing. The Department issued orders covering the various aspects of the consolidated arbitrations on November 8, December 3, and December 4, 1996. See Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (Phases 1- 4) (1996) (hereinafter "Phase 1 Order", "Phase 2 Order", "Phase 3 Order", and "Phase 4 Order").

Sprint and NYNEX agreed that there were additional issues beyond those covered in the consolidated proceeding that should be dealt with in a bilateral proceeding between the two companies.¹ By letter dated December 13, 1996, Sprint submitted a list of those issues to the Department, and a procedural schedule to address those issues was established. Initial statements were filed by the companies on December 20, 1996, and reply statements were filed

¹ The Department also conducted a separate arbitration to resolve a host of operational and technical issues between MCI and NYNEX. Paul M. Hartman served as the arbitrator. The Department issued an Order in that arbitration on December 26, 1996. See NYNEX/MCI Arbitration, D.P.U. 96-83 (1996).

on January 3, 1997. A hearing date was set to allow further exploration of these issues by the arbitrator, but he found it unnecessary, in light of the written statements, to conduct such a hearing.

In this order, we reach findings as to the issues raised by Sprint. Those issues are as follows:

- 1) Should NYNEX be required to include Sprint-specific information in the information pages of its directories at parity with what is provided to NYNEX?
- 2) Should NYNEX be required to provide additional yellow page listings to Sprint customers at parity with what is provided to NYNEX?
- 3) Should NYNEX be required to provide access to in- and out-collect processes for intraregion alternatively billed messages via the appropriate Bellcore client company?
- 4) Should NYNEX make available to Sprint any price, term and/or condition at the same time it is offered to any carrier on a most favored nation basis and notify Sprint of the existence of such better prices and/or terms?
- 5) Should NYNEX be required to offer volume discounts that are cost-based?
- 6) Should NYNEX be required to offer services for resale at a wholesale discount until Sprint can interface electronically with NYNEX?
- 7) Should NYNEX be required to provide quotes for operator services rates, including local call completion (0+ , 0-, billed to Calling Card, collect and third party, billable time and charges, etc.)?

Two other issues were raised by Sprint, concerning whether NYNEX should be required to indemnify Sprint for any fraud due to compromise of NYNEX's network that NYNEX could have reasonably prevented and for any fines imposed on Sprint due to NYNEX's actions, negligence and/or misconduct. In their reply submissions NYNEX and Sprint agreed to accept the Department's findings in the D.P.U. 96-83 Order as they relate to

these issues. See NYNEX/MCI Arbitration, D.P.U. 96-83 (1996). Accordingly, these issues need not be covered by this Order.²

II. ISSUES

A. Information Pages and Yellow Pages

1. Positions of the Parties

Sprint argues that NYNEX should be required to include Sprint-specific information in the information pages of its directories at parity with what is provided to NYNEX. Absent this requirement, says Sprint, the customers of competing carriers would be denied the benefits of readily accessible information regarding their local service providers, while NYNEX customers would continue to enjoy this benefit. Such a result, argues Sprint, would be anticompetitive and unfair.

NYNEX states that it has offered Sprint one-eighth of a page in the front of directories to inform Sprint customers as to how to contact Sprint. This is the same offer that has been made to the other competing carriers. NYNEX states that Sprint's request is not only an improper subject for arbitration under the Act but is also an unreasonable requirement that is not necessary for full and fair competition in Massachusetts.

On a second issue, Sprint argues that NYNEX should be required to provide parity as it relates to the provisioning of additional yellow page listings to Sprint's customers. Sprint says

² We note that Sprint has conditioned its acceptance of this finding, as that Order relates to indemnification for fines imposed on Sprint due to NYNEX's actions, negligence and/or misconduct, on a certain interpretation of the arbitrator's decision in D.P.U. 96-83 (Sprint Reply Statement at 3). In this Order, we offer no interpretation of that decision. It stands for itself.

this issue is properly before the Department because it was a subject of discussion during the negotiations leading to this arbitration. Sprint also asserts that it should be permitted to bill its customers for additional yellow page listings, as opposed to requiring such billing through NYNEX's branded billing function.

As in the previous issue, NYNEX argues that this issue is not arbitrable and that Sprint should negotiate the additional yellow pages listings it seeks directly with the yellow page company, NYNEX Information Resources Company ("NIRC").

2. Analysis and Findings

In the Phase 3 Order, we addressed a related issue with regard to directories: whether competing carriers have a right to have their brand placed on directories produced by NIRC.

There we found:

Turning to the issue of directories, we find nothing in the Act to support the competing carriers' assertion that they have a right to have their brand placed on directories produced by NIRC. NIRC is not a telecommunications carrier nor a local exchange carrier and therefore is not subject to the rebranding provisions of the Act or the Local Competition Order. The publication of telephone directories is a competitive business, and NYNEX's ownership of network telecommunications facilities is not a barrier to entry for any firm wishing to enter the directory business. We trust that publishers of directories would find commercial value in displaying the names of all local exchange carriers on their directories, but we do not here order them to do so.

Phase 3 Order at 15-16.

Here, too, we agree with NYNEX that Sprint's directory requests are not arbitrable issues under the Act. Section 251 of the Act does not mention directory requests; neither does the Local Competition Order. As NYNEX notes, the only mention of printed directories in the

Act relates to a requirement that the white pages contain directory listings for customers of the other carriers. 47 U.S.C. § 271(c)(2)(B)(viii). The fact that additional issues may have been discussed during the give-and-take of negotiations preceding this arbitration does not mean that they are arbitrable. Such a standard would mean that any party could simply bring up an issue during negotiations and then petition the Department for review of it.

Thus, we find Sprint's request beyond the jurisdiction of this arbitration. We believe it is in the commercial interest of NIRC -- and, for that matter, other directory providers -- to include Sprint-specific information in the information pages of its directories at parity with what is provided to NYNEX and to provide additional yellow page listings to Sprint customers at parity with what is provided to NYNEX, but that is a matter for the directory publishers to determine.

B. Alternatively-Billed Messages

1. Positions of the Parties

Alternatively-billed messages are operator-assisted calls that are billed to a number other than the originating number, e.g., collect, third-party, and calling card billed calls. Sprint has requested that, if a call originates from a Sprint line, then Sprint should be entitled to the end-user revenue and, therefore, the calls should be delivered to Sprint for Sprint rating and billing. Sprint argues that NYNEX's claimed right to this revenue is flawed because (1) it is NYNEX's lack of operator services rebranding or rerouting capability that is the only reason for these calls being handled by a NYNEX operator, and (2) ILECs in other areas of the country are already providing Sprint with such unrated messages. Sprint argues that

NYNEX's proposed practice will cause confusion with customers.

NYNEX argues that no single solution to this issue is appropriate. It notes that it has been participating with a group of local exchange carriers to establish an in-region clearinghouse and a process for billing and collection of these calls. NYNEX explains that the proper method for billing and the decision of which entity receives all or a portion of the revenue for the calls should depend on the specific relationship created by the type of call involved. The focus, says NYNEX, should be on whether the call is resold by Sprint. NYNEX presents four situations to illustrate this point: (1) an intraLATA call from any carrier's customer charged to a NYNEX customer over a NYNEX resold line; (2) an intraLATA call from a NYNEX customer telephone charged to a Sprint resale end-user; (3) a call billed to a third carrier, made on a NYNEX line resold by Sprint; and (4) a local call in another region billed to a Sprint resold line in the NYNEX region. For each of these examples, NYNEX offers its assessment of which company should collect the revenue, and it is only in example (2) that NYNEX concurs that Sprint should receive the revenues.

In its reply statement, Sprint asserts that NYNEX's presentation of the four scenarios goes against standard industry practices and customer choice and is not in the public interest.

2. Analysis and Findings

NYNEX's position is that the right to retain and/or obtain revenues from alternatively-billed messages should be based upon which carrier provides the network services and bears the risk of non-payment. Sprint's position is that the company chosen by the originating customer is determinative of who should bill the call. We find NYNEX's

presentation to be more persuasive.

The examples offered in scenarios (1) and (2) are illustrative. Here, a caller makes a collect call to a customer served by another carrier. Under the NYNEX formulation, the company serving the paying customer would bill that customer for the call and retain the revenues, while in the Sprint formulation, the company serving the originating caller would derive the revenue from the call by billing the receiving customer. We fail to see why, in this instance, the call should be billed by the company serving the originating caller. We do not see the element of confusion in the NYNEX proposal, as argued by Sprint. The receiving caller, i.e., the one who is paying for the collect call, should be billed by his/her regular carrier. Indeed, it would be more confusing for the receiving caller to get a bill from the originating caller's carrier. As NYNEX notes, the problem with the Sprint position is illustrated by the fact that if the call in question were actually originated by the receiving customer and not made as a collect call, that customer's carrier would bill the customer its retail rate.

With this and the other examples, Sprint contends that NYNEX is inserting itself into the process to retain end-user revenue because of its position as the underlying provider of operator services. It also contends that NYNEX is taking unfair advantage of its ability to participate in the centralized message distribution system with other Bell operating companies to exchange call records and charges associated with out-of-region calls. We have considered Sprint's argument and have concluded that it provides no basis for denying NYNEX the ability to collect revenues associated with alternatively-billed messages. While the situation with regard to operator services will, no doubt, change over time, the principle set forth by

NYNEX -- that the right to retain and/or obtain revenues from alternatively-billed messages should be based upon which carrier provides the network services and bears the risk of non-payment -- is persuasive in the situations set forth on this record.

Accordingly we accept NYNEX's proposal. We also direct the parties to include a provision in the interconnection agreement permitting modification of this billing process should the billing process developed through the in-region clearinghouse vary from that proposed by NYNEX in this proceeding.

C. Most Favored Nation

1. Positions of the Parties

Sprint argues that any price, term and/or condition offered to any carrier by NYNEX should be made available to Sprint, with limited exceptions, on a most favored nation ("MFN") basis, with timely notice to Sprint of any better price and/or term. MFN status, Sprint suggests, should apply to unbundled elements, resold services, rates and conditions, as well as other business arrangements, including service, products, terms, conditions, billing arrangements, record exchanges, fraud control and reconciliation, indemnification, and affirmative notice of new business arrangements, tariffs or contracts. Sprint cites sections 251(c)(2) and 252(i) of the Act in support of its argument. It also cites sections of the Local Competition Order, and while recognizing that a stay of the FCC's MFN rule has been granted, argues that the issuance of the stay does not preclude the Department from adopting the FCC's MFN rule based on its assessment of the merits of the rule. Sprint argues that the Department should recognize MFN rights because non-discriminatory treatment in the MFN

context is essential to the creation of a truly competitive local telephone service market, where no single carrier will gain an advantage due to its size or superior negotiating power.

NYNEX argues that Sprint's position is without merit. On the question of notice, NYNEX argues that it is already required under § 252(a) of the Act to file interconnection agreements with Department. This process, says, NYNEX, is sufficient to inform Sprint of any such agreements, and there is no need to repeat its requirements in the interconnection agreement.

NYNEX also argues that Sprint's request, which it terms a "pick and choose" rule, would allow a requesting carrier to obtain a service or element at a negotiated rate or under specific terms and conditions found in another contract, without regard to whether there was some broader quid pro quo in the negotiated agreement. NYNEX says that it would be impossible to ascertain whether the subsequent entrant is treated comparably to the original entrant without considering the totality of the consideration provided by the original entrant to obtain the service or element in question. Terms and conditions in one agreement might be severable, says NYNEX, while in another they may be part of a package deal. Allowance of MFN status, states NYNEX, would violate Congress' intent that interconnection services or network service be made available upon the same terms and conditions as provided in the prior agreement.

2. Analysis and Findings

The Act is clear that an ILEC cannot discriminate in the provision of services to competing carriers. The Act requires that, in considering whether to approve a proposed

interconnection agreement, the Department must determine whether the agreement, or a portion thereof, discriminates against a telecommunications carrier not a party to the agreement. 47 U.S.C. § 252(e)(2)(A)(i). We take this to mean that, where different terms and conditions of service are offered to carriers, there must be a clear basis for such differences. We addressed this issue in another context earlier in this proceeding:

Discrimination, where justified by cost differences, physical differences, or other measurable criteria, is not necessarily improper or unjust. Where differential terms and conditions have no basis, however, we must find undue discrimination and offer a remedy.

Phase 1 Order at 17.

In essence, Sprint has argued that MFN is the method for ensuring that discrimination does not occur, in that it would require NYNEX to offer any individual contract term later agreed to with a specific carrier to apply to all previously negotiated contracts. NYNEX correctly states the flaw in this argument: Where a specific contract term is the result of an overall negotiation, with gives and takes on both sides, it would be unjust to require that term in isolation to be made available to other carriers. This would violate the Act's provision that interconnection services or network elements be made available "upon the same terms and conditions" to the two carriers. 47 U.S.C. § 252(i).

Accordingly, Sprint's request is denied. It will have notice of the terms of interconnection agreements and the opportunity to argue that specific contract terms are discriminatory when such agreements are filed with the Department.

D. Volume Discounts

1. Positions of the Parties

Sprint says that volume discounts to carriers should only reflect cost savings to ensure that Sprint will not be disadvantaged vis-a-vis larger carriers simply on the basis of size. Non-cost-based volume discounts, argue Sprint, should not be allowed because they discriminate by applying subjective factors that can be used to favor one carrier or one type of carrier over another without any underlying cost rationale.

NYNEX argues that nothing in the Act precludes NYNEX from offering volume discounts below its wholesale rates as part of a negotiated resale interconnection agreement. Moreover, says NYNEX, such additional discounts may reflect either cost-based or non-cost-based considerations. For example, argues NYNEX, when a customer commits to a specified term and volume purchase, a service provider often provides a rate less than that offered to customers who do not make a similar commitment. NYNEX argues further that, under the Act, Sprint would have an opportunity to view and contest any such arrangements, since they will be filed with the Department, which must determine whether they discriminate against a carrier which is not a party to the agreement.

2. Analysis and Findings

Our findings with regard to both the wholesale discount for resold services and the rates for unbundled network elements were based on the premise that competing carriers could acquire those services for whatever duration they chose, even for very short periods. See, e.g., Phase 4 Order at 45. If NYNEX and a carrier determine that there is some advantage to both companies, for example, in specifying terms and volumes of services purchased, such that NYNEX wishes to offer a discount from those rates, it should be free to do so. Such a

discount might be based on the costs of those services, or it might be based on other considerations of value to the parties. Of course, as we have discussed above, any such terms must be filed in agreements before the Department and would be subject to argument by other carriers that they discriminate or are not consistent with the public interest, convenience, and necessity. 47 U.S.C. § 252(e)(2)(A). To facilitate the review of any such filings, NYNEX should indicate the specific provisions of the agreement that have led to the further discount. Further, it must make the same discount available to any other carrier which satisfies those same conditions.³ In light of these requirements, Sprint's request is denied.

E. Electronic Interfaces

1. Positions of the Parties

As part of its provision of resale, NYNEX is requiring all resellers to interface electronically with NYNEX to handle pre-service order inquiries, process customer service ordering and repair, and handle all other day-to-day operational issues. Sprint views this requirement as an unreasonable restriction on resale, a potential barrier to entry into the local exchange market, and a violation of the Act's non-discrimination requirement. NYNEX says its requirement is non-discriminatory because it applies equally to all firms seeking to purchase resold services. It says the requirement is not an unreasonable condition to resale in that the company would not be able to provide services to resellers at parity with its own retail customers if it is required manually to handle service orders.

³ However, the mere availability of similar terms to other carriers might not avoid our rejection of an interconnection agreement under the provisions of the Act. See, e.g., Phase 1 Order at 19-20.

2. Analysis and Findings

We do not find NYNEX's requirement for electronic interface to be either discriminatory or unreasonable. It is not discriminatory in that it will be applied to all resellers. It is not unreasonable in that it is essential to handle properly and expeditiously the thousands of service orders that will be delivered to NYNEX every week from a variety of competing carriers and from its own customer service agents. Further, as NYNEX suggests, it is the basis underlying the wholesale rates established in our Phase 2 Order and our requirement of parity and the service performance standards and financial penalties established in our Phase 3 Order. Thus, we find that NYNEX's proposal will increase quality and decrease errors and is consistent with the goals of the Act and our orders in the consolidated arbitrations. Sprint's request is therefore denied.

F. Operator Rate Quotes

1. Positions of the Parties

Sprint would like NYNEX operators to provide quotes of Sprint's rates to Sprint's customers when those operators are requested to do so. It argues that, without rate quote capabilities, Sprint is disadvantaged in the marketplace since Sprint customers will be unable to obtain the same level of service as NYNEX customers. In fact, says Sprint, its customers are likely to receive NYNEX operator service rates when requesting time and charge estimates.

NYNEX has agreed to provide these services when technically feasible, but it estimates that it will not have the technical ability to offer them until the first quarter of 1998. It submits an affidavit from Vincent Woodbury, director of market development in the operator service

regional unit, in support of this estimate.

2. Analysis and Findings

We agree with Sprint that NYNEX's current inability to provide rate quote service to Sprint customers is an inconvenience and does represent a different level of service from that provided to NYNEX customers, but we find NYNEX's technical explanation persuasive. We do not view its proposed delay of this service as having a significant impact on local exchange competition, and we therefore direct NYNEX to provide this service by the first quarter of 1998. We also direct NYNEX to train its operators to refer non-NYNEX customers to the appropriate customer service number of the competing carrier when such requests are made, rather than quoting NYNEX rates, once it has the ability to identify the reseller serving those customers, where that ability precedes its ability to offer the competing carrier's rate quotes.⁴

III. ORDER

After notice and consideration, it is

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

FURTHER ORDERED: That the parties reduce to contract language all negotiated issues and all issues determined in this Order; and it is

FURTHER ORDERED: That, pursuant to the Section 252(e)(1) of the Act, the parties submit a final interconnection agreement, setting forth both negotiated and arbitrated terms and

⁴ We assume the ability to identify the customer's carrier will take place when NYNEX has installed advanced intelligent network ("AIN") facilities. See Phase 3 Order at 8-15. If this assumption is incorrect, NYNEX should so inform the Department.

conditions, with the Department by February 28, 1997; and it is

FURTHER ORDERED: That the parties comply with all other directives contained herein.

By Order of the Department,

John B. Howe, Chairman

Janet Gail Besser, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).