

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA  
717 14<sup>TH</sup> STREET, N.W., WASHINGTON, D.C. 20005

\_\_\_\_\_  
)  
In the Matter of: )  
)  
)  
IDB Worldcom Services, Inc. and )  
Worldcom ICC, Inc. )  
Complainant )  
)  
v. )  
)  
Bell Atlantic-Washington, D.C., Inc. )  
Respondent )  
)  
\_\_\_\_\_

Formal Case No. 956-A-01

Order No. 11590

Date: January 27, 2000

**ORDER**

By this Order, the Public Service Commission of the District of Columbia (“Commission”) disposes of several pending motions, allows the complainant an opportunity to amend the complaint to include any relevant information or argument that was previously unavailable, and directs the respondent to file a specific answer to the complaint.

**I. BACKGROUND**

On July 31, 1985, Bell Atlantic-Washington, D.C., Inc.’s (“BA-DC”) predecessor, the Chesapeake and Potomac Telephone Company, entered into a licensing agreement with the International Communications Company (“ICC”) under which ICC gained access to what is now BA-DC’s underground conduit.<sup>1</sup> Under the terms of that agreement, ICC agreed to pay for each linear foot of conduit that it occupies.<sup>2</sup> However, ICC and BA-DC disagreed on the exact amount of the conduit access rates that ICC was required to pay. That dispute was resolved on May 1, 1993, when ICC and BA-DC entered into a settlement agreement.<sup>3</sup>

<sup>1</sup> Formal Complaint IDB Worldcom Services, Inc. and Worldcom ICC, Inc., filed October 9, 1997 at 4 (“Complaint”)

<sup>2</sup> *Id* at 4.

<sup>3</sup> *Id* at 5.

The dispute over conduit rates resurfaced several years later when Congress amended the Communications Act of 1934 by passing the Telecommunications Act of 1996 (“federal Act”).<sup>4</sup> Among other things, the federal Act required local exchange carriers like BA-DC to afford any telecommunications carrier nondiscriminatory access to any pole, conduit, or right-of-way owned or controlled by it.<sup>5</sup> That access must be provided under the rates, terms and conditions of section 224.<sup>6</sup>

The federal Act also required local exchange carriers like BA-DC to permit other telecommunications carriers to interconnect with its telecommunications network.<sup>7</sup> Pursuant to the federal Act, MFS Intelenet of Washington, D.C. (“MFS”), an affiliate of ICC, opened interconnection negotiations with BA-DC.<sup>8</sup> As a separate matter, MFS raised concerns over the conduit rates paid by its affiliate ICC.<sup>9</sup> Ultimately, ICC’s conduit rates became a part of the overall interconnection negotiations between BA-DC and MFS.<sup>10</sup> Negotiations between BA-DC and MFS concluded with the signing of an interconnection agreement on July 16, 1999.<sup>11</sup> However, the parties soon disagreed over whether the agreement established a rate for conduit access.

MFS took the position that the interconnection agreement did not prescribe specific conduit access rates, but rather required BA-DC to negotiate rates that are just and reasonable as required by both District and federal law. Therefore, in August of 1996, MFS approached BA-DC in an attempt to negotiate new conduit access rates.<sup>12</sup> In the interim, IDB Worldcom and Worldcom ICC (collectively “Worldcom”) acquired all of the assets of MFS and ICC, respectively.<sup>13</sup> When efforts to negotiate conduit rates proved unsuccessful, IDB Worldcom and ICC Worldcom (collectively

---

<sup>4</sup> 47 U.S.C. § 151 *et. seq.*

<sup>5</sup> See 47 U.S.C. §§ 224 and 251.

<sup>6</sup> Prior to passage of the federal Act, section 224 was applicable only to cable television systems.

<sup>7</sup> 47 U.S.C. § 251.

<sup>8</sup> Complaint at 6-7.

<sup>9</sup> *Id* at 7.

<sup>10</sup> *Id* at 7.

<sup>11</sup> The Commission approved the agreement on October 15, 1996 in Formal Case 956 A.

<sup>12</sup> Complaint at 6-9.

<sup>13</sup> *Id* at 2.

“Worldcom”), in its capacity as successor by acquisition to the rights of MFS, filed a complaint with the Commission claiming that BA-DC has “continued to enjoy the benefits of excessive monopoly rents despite the requirements of the Federal 1996 Act and the D.C. 1996 [Telecommunications] Act -- and despite its own agreement -- to discontinue that practice.”<sup>14</sup> The complaint was accompanied by a request for expedited review and a statement, pursuant to 15 DCMR § 104.1 (g) (1998), indicating that the complaint should be designated as a rate case for assessment purposes.<sup>15</sup>

At BA-DC’s request, the Commission allowed the company until October 30, 1997, to file a response to Worldcom’s complaint.<sup>16</sup> On October 16, 1997, BA-DC filed a “Motion to Dismiss Complaint and Response to Motion for Expedited Review.”<sup>17</sup> On November 7, 1997, Worldcom filed a Consented-To Motion for Enlargement of Time until November 14, 1997 to respond to BA-DC’s Motion and Response. On November 12, 1997, Worldcom filed its opposition to BA-DC’s Motion and Response, which included a request that the Commission enter a default judgment in favor of Worldcom or, in the alternative, order BA-DC to answer Worldcom’s complaint.<sup>18</sup> On December 2, 1997, BA-DC filed a motion for leave to file a reply accompanied by the reply itself. By Order dated April 2, 1998, the Commission granted Worldcom’s Consented-To Motion for Enlargement of Time and accepted into the record Worldcom’s November 12, 1997 Opposition to BA-DC’s October 30, 1997 Motion to Dismiss. By that same Order, the Commission also granted BA-DC’s request to file a reply memorandum, but accepted the reply only to the extent that it addresses Worldcom’s request for a default judgment.<sup>19</sup>

---

<sup>14</sup> *Id* at 10.

<sup>15</sup> 15 DCMR § 104.1 (g) requires that each initial petition, application, or formal complaint contain a “[s]tatement indicating whether the proceeding sought should be considered a ‘rate case’ or an ‘other investigation’ for purposes of D.C. Code § 43-612 (1981 Ed.) and the factual and legal basis for the assertion.”

<sup>16</sup> Formal Case No. 956 A, Order No. 11079 (October 24, 1997).

<sup>17</sup> Motion to Dismiss Complaint and Response to Motion for Expedited Review, filed October 30, 1997 (“BA-DC Motion”)

<sup>18</sup> Opposition to Motion to Dismiss filed by Worldcom on November 12, 1997 (“Opposition”).

<sup>19</sup> The Commission noted that replies are normally accepted in judicial proceedings only when they are directed to new and material issues and when further briefing would be helpful to the court. Consequently, the Commission accepted BA-DC’s Reply Memorandum only insofar as it addressed Worldcom’s request for a default judgment which, in the Commission’s view, was the only new matter raised by Worldcom in its Opposition.

**II. PRELIMINARY MATTERS**

The Commission has before it several pending motions: 1) Worldcom's October 9, 1997 motion for expedited review; 2) BA-DC's October 16, 1997 motion to dismiss; and 3) Worldcom's November 12, 1997 motion for a default judgment or, in the alternative, motion to compel BA-DC to answer the complaint.

**A. WORLDCOM'S MOTION FOR EXPEDITED REVIEW**

Worldcom asserts that BA-DC's failure to negotiate a reasonable conduit rate:

[H]as posed and continues to pose a substantial barrier to local telephone competition. As such it undermines the fundamental public policies of both the Federal 1996 Act and the D.C. 1996 Act. Protracted adjudication of the narrow issues in this case would only allow Bell Atlantic to continue to benefit from its delays at the substantial expense of competition and the District of Columbia.<sup>20</sup>

In response, BA-DC states:

[T]here is no reason to treat [the complaint] on an expedited basis. Worldcom's last correspondence on this issue occurred more than a year before the Complaint was filed; Worldcom itself plainly has felt no urgency in dealing with this matter. Moreover, conduit rates identical to those in the Worldcom contracts are contained in BA-DC's proposed Statement of Generally Available Terms ("SGAT"), yet Worldcom was not concerned enough to even mention these rates in the extensive testimony it offered during the SGAT hearings in Formal Case No. 962.<sup>21</sup>

Although we understand Worldcom's interest in resolving this dispute as quickly as possible, there is nothing in the record of this case to suggest that investigating this complaint through our normal review process will somehow prejudice its case or cause irreparable harm to either the company or the competitive market. Therefore, Worldcom's request for an expedited review is denied.

---

<sup>20</sup> Request for Expedited Review filed by Worldcom on October 9, 1997 at 2 ("Request for Expedited Review").

<sup>21</sup> BA-DC Motion to Dismiss at 2-3.

**B. BA-DC'S MOTION TO DISMISS****1. VENUE**

BA-DC asserts that Worldcom's complaint should be dismissed because Worldcom filed it in the wrong forum. According to BA-DC, if Worldcom disputes the existing conduit arrangements, then it should have invoked paragraph 16.0 of the interconnection agreement entitled "ACCESS TO RIGHTS-OF-WAY."<sup>22</sup> That paragraph states as follows:

Each Party shall provide the other Party access to its poles, ducts, rights-of-way and conduits it owns or controls in conformance with 47 U.S.C. § 224, as set forth in Exhibit A, where facilities are available, on terms, conditions and prices comparable to those offered to any other entity pursuant to each Party's applicable Tariffs . . . In addition, the Parties agree to review any existing rights-of-way arrangements between them in order to bring such arrangements into conformance with the requirements of 47 U.S.C. § 224 within ninety (90) days of the date hereof. If the Parties are unable to agree on the necessary changes to the existing arrangements or the appropriateness of applying them on a retroactive basis, the Parties may initiate an appropriate action in any federal or state court of competent jurisdiction, or before the FCC or an agreed-upon panel of arbitrator(s).

Inasmuch as paragraph 16 of the agreement does not permit the Parties to initiate actions before the Commission, BA-DC urges the Commission to dismiss Worldcom's complaint as procedurally defective.<sup>23</sup>

However, the Commission's jurisdiction to review conduit rates is conferred by statute, not private contracts between telecommunications carriers. Specifically, D.C. CODE ANN. § 43-1452 (i)(6) (1998 Repl.) requires BA-DC to permit competitive telecommunications carriers to access its conduits and goes on to state:

[T]he PSC shall determine the criteria for ensuring that such access shall be equal in type and quality to the access which the BOC affords itself or to any other person, and that such access is made available by the BOC on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.

---

<sup>22</sup> BA-DC Motion to Dismiss at 14-15.

<sup>23</sup> *Id.*

The provision set forth above makes clear that the Commission has authority to review conduit rates. Additionally, section 252 (e) of the federal Act expressly requires that any interconnection agreement made pursuant to the Act be submitted to the State Commission so that the State Commission can either approve or reject the agreement. The power to accept or reject the agreement necessarily carries with it the authority to enforce the provisions of the agreement that the State commission has approved. *Iowa Utilities Bd. v. F.C.C.*, 120 F.3d 753, 804 (8<sup>th</sup> Cir. 1997), *aff'd in part, rev'd in part*, 525 U.S. 366 (1999). Moreover, it is well settled that private parties cannot agree to waive the subject matter jurisdiction of the agency charged with the statutory responsibility to insure that parties implement agreements as approved by and filed with that agency. *A/S Ivarans Rederi v. U.S.* 895 F.2d 1441, 1445 (D.C. Cir. 1990). Therefore, BA-DC's motion to dismiss Worldcom's complaint on this ground must be denied.

## 2. FAILURE TO STATE A CLAIM UNDER DISTRICT OR FEDERAL LAW

BA-DC also asserts that Worldcom's complaint should be dismissed because it fails to state a claim under either District or federal law. Specifically, BA-DC takes issue with Worldcom's position that current conduit rates violate D.C. Code § 43-1451 (i)(6) and § 43-501 (a) which prohibits as unlawful charges by a public utility that are not just, reasonable and nondiscriminatory. With regard to Section 501 (a), BA-DC notes that this provision was in effect at the time MFS agreed to pay the conduit rates that Worldcom now claims are unlawful. BA-DC maintains that the fact that MFS knowingly agreed to pay that rate, despite the existence of Section 501 (a), is dispositive evidence that the rate is neither unreasonable nor discriminatory. As to Section 43-1452 (i)(6), BA-DC asserts that, at best, this provision simply empowers the Commission to open a generic proceeding to prospectively determine the criteria to govern access to poles, ducts, conduit and rights-of-way and the circumstances under which such criteria should apply. In BA-DC's view, "such a prospective proceeding would not apply to undo the specific agreements that MFS has voluntarily reached with BA-DC -- it could apply only to new arrangements to be negotiated when the term of those agreements has run."<sup>24</sup>

BA-DC asserts that Worldcom's complaint fares no better under federal law. According to BA-DC, Worldcom's claim that BA-DC violated the federal Act is premised on the assumption that Section 224's rate setting provisions take precedence over the terms of an interconnection agreement between carriers. However, BA-DC notes that, by its own terms, the rate setting provisions of Section 224 only apply when a telecommunications carrier is not a party to a pole attachment agreement. In view of the fact that there is an existing pole attachment agreement, BA-DC maintains that Section 224 is inapplicable and, therefore, cannot be a basis for a complaint under federal law.<sup>25</sup>

---

<sup>24</sup> BA-DC Motion to Dismiss at 10-13.

<sup>25</sup> *Id.* at 9-10.

In considering a motion to dismiss, the Commission will review the complaint in the light most favorable to Worldcom, assuming for the purpose of the motion that the allegations in the complaint are true. *See, Cauman v. George Washington Univ.*, 630 A.2d 1104, 1105 (D.C. 1993) [Check case on Westlaw]. Worldcom's complaint asserts that the rates are not just and reasonable.<sup>26</sup> Assuming for the purpose of this motion that Worldcom's allegation is true, the allegation alone is sufficient to withstand a motion to dismiss.<sup>27</sup> Therefore, we deny BA-DC's motion to dismiss for failure to state a claim under D.C. Code § 501 (a).

We agree with BA-DC that D.C. Code § 43-1452 (i)(6) empowers the Commission to open a generic proceeding to prospectively determine the criteria to govern access to poles, ducts, conduit and rights-of-way and the circumstances under which such criteria should apply. However, the language on which BA-DC relies is only part of the provision. Section 43-1452 (i)(6) also obligates BA-DC to afford reasonable and nondiscriminatory access to its conduits.<sup>28</sup> That obligation remains even if the Commission has not yet adopted criteria to ensure that such access is just and reasonable. Therefore, Worldcom's complaint that BA-DC has failed to offer just, reasonable and nondiscriminatory access is sufficient to state a claim under § 43-1452 (i)(6). Inasmuch as the complaint states a claim under D.C. law, BA-DC's motion to dismiss can be denied without reaching the question of whether the complaint also states a claim under federal law.

### 3. PROHIBITION AGAINST UNILATERAL MODIFICATION OF THE AGREEMENT

BA-DC asserts that conduit rates are established in the agreement and that the agreement itself bars the parties from seeking unilateral modifications. In BA-DC's view, Worldcom is attempting to unilaterally modify an existing conduit rate contrary to the parties' agreement. BA-DC urges the Commission to enforce the terms of the contract by dismissing the complaint.<sup>29</sup>

---

<sup>26</sup> Complaint at p. Paragraph 31.

<sup>27</sup> In our opinion, the fact that MFS signed an agreement specifying conduit rates does not create an irrebuttable presumption that it did so because it believed the rates were just and reasonable. It is equally plausible that MFS believed that its interests could be best advanced by obtaining immediate access to BA-DC's conduit rather than delaying access in the hope of negotiating a reasonable rate.

<sup>28</sup> Specifically, § 1452 (i)(6) states that the "BOC [Bell Operating Company] shall afford to any competitive telecommunications service provider offering, or seeking to offer, a telecommunications service reasonable and nondiscriminatory access to . . . conduits."

<sup>29</sup> BA-DC motion at 2.

However, Worldcom maintains that the agreement did not fix a particular conduit rate but, instead, requires the parties to negotiate just and reasonable rates following the execution of the agreement.<sup>30</sup> As stated above, for the purpose of ruling on a motion to dismiss, we will assume that the allegations in the complaint are true. In this case, if Worldcom's interpretation of the agreement is correct, then it is seeking enforcement of the agreement's terms rather than a unilateral modification of an established conduit rate. For that reason, we must deny BA-DC's motion to dismiss.

### C. WORLDCOM'S MOTION FOR DEFAULT JUDGMENT

Worldcom notes that, pursuant to Rule 105.1 of the Commission's Rules of Procedure, BA-DC was required to answer the complaint within 10 days of service. Worldcom goes on to note that, pursuant to Rule 105.6, BA-DC's answer should have admitted or denied each material allegation in the complaint, set forth any new matter constituting a defense, and set forth any defects in the complaint which require amendment or modification. According to Worldcom, despite the fact that Worldcom agreed to a 10 day extension of time for BA-DC to file its answer, BA-DC did not file an answer as required by Commission Rules. Instead, Worldcom asserts that BA-DC filed a frivolous motion to dismiss and has announced that "it has no intention of filing an answer until the Commission denies its motion to dismiss." Worldcom requests that the Commission either enter a default judgment against BA-DC or direct BA-DC to file an answer.<sup>31</sup>

The entry of a default judgment is an extreme sanction, and it should be imposed only upon a showing of severe circumstances. Severe circumstances arise from the nonmovant's deliberate or willful non-compliance with court rules and orders, resulting prejudice to the movant's ability to successfully pursue the litigation, and the conclusion that alternative, less severe sanctions will not suffice, notwithstanding the societal preference for a decision on the merits. Willfulness includes a conscious or intentional failure to act. Decisions on the merits are preferred whenever possible, and where there is any doubt, it should be resolved in favor of trial. *Murphy v. A.A. Beiro Const. Co.*, 679 A.2d 1039, 1044-5 ( D.C. 1996).

In this case, BA-DC's filing of a motion to dismiss in lieu of an answer does not demonstrate willful non-compliance with Commission rules. We note that, in its motion to dismiss, BA-DC states:

While cast as a Motion to Dismiss, the instant pleading also may be construed and considered as a general answer to the Complaint which "fully advise[s] the Complainant and Commission of the nature of the defense" to the Complaint, as required under 15 D.C.M.R. § 105.5. Should the Commission deny this Motion -- which it should not --

---

<sup>30</sup> Worldcom Opposition at 11.

<sup>31</sup> Worldcom Opposition at 18-19.

BA-DC respectfully submits that a conference with the Commission would be appropriate to determine further procedures, including the time for the filing of a detailed, paragraph by paragraph answer to the Complaint. This would comport with general judicial practice, which, as a matter of judicial economy, first allows decision on motions prior to the filing of a detailed answer.<sup>32</sup>

Because the Commission does not have detailed procedures governing motions, we think it appropriate to be guided in this regard by the rules used in the local courts. Pursuant to D.C. Sup. Ct. R. Civ. Pro. 12 (a)(4)(A), the respondent's time for filing an answer is automatically extended upon the filing of a motion. BA-DC followed this practice. Moreover, although not required by local court rules, BA-DC crafted its motion to dismiss as a general answer to Worldcom's complaint, which included information regarding the nature of its defense. Under the circumstances, we find that BA-DC acted reasonably and conclude that a default judgment against BA-DC is unwarranted.

### III. DECISION

The Commission recognizes that the relevant issues in this case may have been impacted by subsequent orders of the FCC, voluntary negotiations by the parties, or a number of other factors. Therefore, the Commission will allow Worldcom 30 days to amend its complaint to include any relevant information or argument that was previously unavailable. If Worldcom chooses to rest on the complaint as filed, it shall file a statement to that effect with the Commission. BA-DC shall have 20 days after the filing of Worldcom's amended complaint or statement to file an answer.

As always, the Commission encourages the parties to resolve all disputes through negotiation rather than through litigation. Therefore, it is imperative that the parties engage in settlement discussions throughout the course of this proceeding. To that end, once BA-DC files an answer, we direct the parties to participate in at least one settlement conference to be held no later than March 31, 2000.

#### THEREFORE, IT IS HEREBY ORDERED THAT:

1. BA-DC motion to dismiss is DENIED;
2. Worldcom's motion for default judgment is DENIED;
3. Worldcom shall submit the amended complaint or statement required by this Order by February 28, 2000;
4. BA-DC shall file an answer within 20 days of the date that Worldcom files its amended complaint or answer;

---

<sup>32</sup> BA-DC Motion to Dismiss at 1.

5. The parties shall have until March 31, 2000 to complete the settlement process required by this Order; and
6. Within 5 days after the settlement process has concluded, the parties shall file with the Commission either the settlement agreement or a statement explaining what, if anything, was accomplished through the settlement process.

**A TRUE COPY:**

**BY DIRECTION OF THE COMMISSION**

A handwritten signature in black ink that reads "Jesse P. Clay, Jr." in a cursive style.

**CHIEF CLERK:**

**JESSE P. CLAY, JR.  
COMMISSION SECRETARY**