

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held in the City of  
Albany on September 16, 1998

COMMISSIONERS PRESENT:

Maureen O. Helmer, Chairman  
John B. Daly  
Thomas J. Dunleavy  
James D. Bennett

CASE 98-C-0799 - Petition of MCI Telecommunications

Corporation for a Declaratory Ruling Regarding  
Availability of New York Telephone Toll Services  
to Competitive Local Exchange Company Customers.

DECLARATORY RULING  
REGARDING BELL ATLANTIC-NEW YORK'S  
INTRALATA TOLL OFFERINGS

(Issued and Effective December 7, 1998)

INTRODUCTION

By this ruling, we declare that Bell Atlantic-New York (BA-NY)'s intraLATA toll tariff does not permit BA-NY to restrict the availability of intraLATA toll service within BA-NY's service territory to customers who obtain their local exchange service from BA-NY. Rather, stand-alone, unbundled intraLATA toll services must be offered on a non-discriminatory basis to all customers without regard to the identity of a customer's local exchange carrier.

BACKGROUND

MCI Petition

On May 18, 1998, MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. (collectively, MCI) filed a petition for declaratory ruling, wherein MCI requests that the Commission declare BA-NY's policy of not providing intraLATA toll service to the local service customers of MCI (and

other competitive local exchange companies or CLECs) to be unlawful, anti-competitive and unreasonably discriminatory. In late 1997, in response to inquiries it had made, MCI was informed that it is BA-NY's policy not to provide intraLATA toll service to any customer who is not also a BA-NY local exchange service customer. MCI objects to this policy on several grounds.

MCI believes that BA-NY's refusal to provide intraLATA toll service to MCI's (or any other CLEC's) local customers is unlawfully discriminatory, and BA-NY must offer its tariffed services to any and all customers as a matter of law. MCI also argues that BA-NY's policy does not comply with the Commission's Common Carrier obligations under Rule 605.2<sup>1/</sup> and that BA-NY's policy gives an unreasonable preference to its own local customers in violation of § 91(3) of the New York Public Service Law (PSL).<sup>2/</sup>

MCI further argues that BA-NY's policy is an anti-competitive tying arrangement. MCI alleges that "by refusing to offer intraLATA toll service to MCI local customers, BA-NY is attempting to leverage its intraLATA toll market dominance to provide it with a means of preserving its monopoly stranglehold on the local market."<sup>3/</sup> Therefore, MCI alleges, actual or potential MCI customers may leave or not choose MCI local service in the first instance if they cannot receive BA-NY's intraLATA toll service.

---

<sup>1/</sup> The section of the Commission's rules cited by MCI states, in part, that "telephone corporations operating as common carriers must provide publicly offered conduit services on demand to any similarly situated user on substantially similar terms . . . .", 16 NYCRR Part 605.2.

<sup>2/</sup> PSL § 91(3) states in pertinent part, "no . . . telephone corporation shall make or give any undue or unreasonable preference or advantage to any person, corporation or locality, or subject any particular person, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

<sup>3/</sup> MCI Petition, 3-4.

Finally, MCI cites a Commission decision in the Competition II proceeding,<sup>1/</sup> which requires CLECs to provide their customers with intraLATA equal access and presubscription, as evidence of the Commission's intention to allow end users to be able to choose a toll provider that is not their local provider.

BA-NY Memorandum in Opposition

BA-NY's memorandum in opposition to MCI's petition primarily addresses the anti-competitive aspects. It also argues that a Commission order compelling it to offer intraLATA toll service to other carriers' customers would be unreasonable and inconsistent with the Commission's policies concerning local exchange competition.

BA-NY argues that it must be allowed the freedom to make business decisions concerning its product offerings, and choosing to limit its toll plans to its own local exchange customers is not anti-competitive, since MCI local customers have ample toll alternatives available. These include MCI's own facilities, the purchase and provision of toll services through unbundled network elements or through BA-NY's own tariffed toll resale offerings. Customers can also purchase toll services from other carriers participating in intraLATA presubscription.<sup>2/</sup>

In addition, BA-NY claims that its attempts to attract and retain customers by offering attractive toll services and pricing cannot be considered anti-competitive, since no improper means, such as predatory pricing, are used to win or retain customers. BA-NY cites several Commission initiatives, such as

---

<sup>1/</sup> Case 94-C-0095, Order Instituting Framework for Directory Listings, Carrier Interconnection and Inter-carrier Competition, (issued September 27, 1995), p. 7.

<sup>2/</sup> Customers have "equal access" to any carrier wishing to provide toll service, and may presubscribe to the toll carrier of their choice, so that all directly dialed calls are automatically carried and billed by that specific carrier.

the intraLATA presubscription and toll pricing cases, which prevent anticompetitive pricing of BA-NY's services and open up the market to other carriers. The company asserts that policies that allow competitors to offer innovative pricing schemes of their own creation have in fact established a competitive market in which BA-NY has "lost substantial volumes of toll usage to competitors in both the business and residential markets," in part because competitors are able to package local service with their own long distance services.<sup>1/</sup>

BA-NY asserts that there is no anticompetitive "tying" of local service to its intraLATA toll service, because its market power in the local exchange market is greater than its market power in the intraLATA toll market.

BA-NY also asserts that the Commission rejected an anti-competitive argument similar to MCI's when it allowed BA-NY to offer a discounted version of Call Answer.<sup>2/</sup> In that proceeding, the Commission found merit to BA-NY's argument that it is not "a dominant provider" in the messaging market and held that BA-NY could, therefore, offer the service only to its own intraLATA toll customers. BA-NY further argues that the Telecommunications Act of 1996 does not require an incumbent to offer its retail toll services to the customers of other local carriers. Rather, the Act focuses on interconnection, unbundled elements, and resale as the means to encourage local exchange competition.

Although it offers no specifics, BA-NY alleges that MCI's proposal would impose additional administrative, billing and collection costs and burdens associated with billing and collection from CLEC local exchange customers with no guarantee of cost recovery.<sup>3/</sup>

---

<sup>1/</sup> Memorandum in Opposition, p. 5.

<sup>2/</sup> Case 95-C-0810, Order Allowing Tariff to Become Effective, (issued March 20, 1996).

<sup>3/</sup> Memorandum in Opposition, pp. 1, 7.

Finally, BA-NY asserts that MCI is attempting to take itself out of the intraLATA toll market. It alleges that the Commission's policy articulated in the Competition II proceeding, of encouraging LECs to provide the "full range" of services, would be contravened if MCI or any other CLEC were freed of the need to offer toll service.

Further Pleadings

MCI's reply to the BA-NY memorandum asserts that the BA-NY submission fails to address the "real" issues MCI raised in its petition -- that BA-NY's failure to offer intraLATA toll service to the local customers of competitors is unlawfully discriminatory and anti-competitive and violates its common carrier obligations. MCI does not dispute BA-NY's argument that the Telecommunications Act does not explicitly address the result sought by MCI. It characterizes BA-NY's suggestion that MCI no longer wants to provide intraLATA toll services as a "possibly deliberate" misstatement and reaffirms its intention to continue to offer intra (and inter) LATA toll service to "any and all customers who want it."<sup>1/</sup>

MCI agrees with BA-NY that toll alternatives are available, but claims that fact is immaterial. MCI asserts that it is the non-availability of BA-NY's toll services to MCI local customers, while such services are available to other BA-NY local, non-MCI customers that is at issue here. MCI reiterates its arguments that BA-NY fails to comply with the PSL, the Commission's Common Carrier rules, and the Commission's directive for equal access and presubscription in Competition II. MCI does not address BA-NY's arguments as to increased cost burdens or inconsistency with the Commission's Call Answering tariff ruling.

MCI does attack BA-NY's argument that its toll policy is not anti-competitive because it does not involve an "anti-competitive use of market power," claiming that by offering toll services only to its own customers, BA-NY is "using its

---

<sup>1/</sup> MCI reply, p. 2.

substantial market power in the intraLATA toll market to retain any and all customers that it can in the local market."<sup>1/</sup> MCI believes that BA-NY is "tying" toll service to retention of local service, thereby "attempting to leverage its intraLATA toll market power to provide it with a means of preserving its monopoly in the local exchange market."<sup>2/</sup>

In a short letter reply, BA-NY addresses MCI's arguments based on Common Carrier rules and PSL § 91(3) by stating that a distinction between different classes of customers is reasonable in light of competitive, cost and other considerations set forth in BA-NY's original responsive memorandum.

#### DISCUSSION

BA-NY has not pointed to any language in its tariff that restricts the provision of intraLATA toll service to BA-NY's local exchange customers. A policy to offer intraLATA toll only as an option bundled with local exchange service must be made explicit in BA-NY's tariff. BA-NY is free to propose revisions to its tariff to expressly limit the availability of intraLATA toll service, but such tariff revisions would need to satisfy the following policy considerations.

#### Policy Considerations

First, a greater degree of unbundling is consistent with the offering of more choices to consumers in the market and thus helps further the development of competition. This goal was expressed as one of the Commission's foundation principles: "Segregable services and functions requested by users should be provided to the extent technically and economically practicable."<sup>3/</sup> However, as competition in the toll and local

---

<sup>1/</sup> Id., p. 5.

<sup>2/</sup> Id., p. 6.

<sup>3/</sup> Case 94-C-0095, Opinion and Order Adopting Regulatory Framework, May 22, 1996, Case 94-C-0095, at 16, and orders (continued...)

markets increases, we expect market forces increasingly to drive decisions on the markets that BA-NY will serve. In that environment, so long as adequate choices remain for customers, we would afford greater deference to reasonable business decisions about where and how BA-NY can offer intraLATA toll service, including on a bundled or stand-alone basis.

Second, BA-NY's market strength is a significant factor weighing in favor of offering intraLATA toll service on a stand-alone basis. The market for intraLATA toll service is open to competition, with participation by a variety of companies including MCI.<sup>1/</sup> Customers, therefore, have a choice of intraLATA toll services. However, although BA-NY argues it has lost "substantial volumes of toll usage" to both business and residential competitors, the fact remains that BA-NY has substantial market dominance in the intraLATA toll market. Because BA-NY remains the dominant provider in the intraLATA market, BA-NY's policy could have the effect of hindering the development of competition in the local exchange market, a market in which BA-NY is currently dominant.

### Legal Analysis

Given our conclusion that BA-NY's tariff must be read to offer intraLATA toll on a stand-alone basis, it is appropriate to apply our Common Carrier Rules and PSL § 91(3) to that stand-

---

(...continued)  
cited therein.

<sup>1/</sup> One would assume that the reason for MCI's request must be that MCI cannot match BA-NY's price or features for the intraLATA toll service. However, the reason for such a price differential, if one exists, is not immediately obvious. To the extent MCI is serving the customer on a facilities basis or via unbundled network elements, it would not be subject to BA-NY's carrier access fees for calls terminating in the same LATA. MCI should be able to compete in terms of price and enjoy a substantial profit margin. Other CLECs which operate only as resellers are likely to be disadvantaged by BA-NY's policy to a far greater extent than MCI.

alone service. Both the PSL and our rules require service to be offered on a non-discriminatory basis. Under BA-NY's current policy, intraLATA service is offered selectively, so that similarly situated customers are treated differently. In this case, BA-NY has not provided a reasonable basis for its refusal to provide intraLATA toll to customers of MCI or other CLECs.

BA-NY asserts, without offering definitive proof, that it would incur significant additional costs in billing and maintaining customer records for customers that are not currently its local exchange customers. Its position is not persuasive in view of the fact that BA-NY provides toll on a stand-alone basis to customers of many independent telephone companies. Moreover, we are not persuaded that an acceptable billing arrangement could not be reached with MCI. Such billing arrangements are commonplace in the telecommunications market, and carriers entering the intraLATA market, in which BA-NY claims to have lost substantial volumes, face precisely that scenario.

MCI also claims that the Commission's decision to require CLECs to offer intraLATA equal access and presubscription somehow requires BA-NY to provide its toll service to CLEC customers. This argument is not persuasive. MCI is correct that the decision signals a clear intention to allow end users to choose a toll provider, but no finding was made in that case that requires all toll providers to make their services available to local customers of all other carriers.

BA-NY's argument that it should not provide the service because it is not required to by the Telecommunications Act of 1996 is incorrect. The Telecommunications Act does not govern the provision of intrastate retail services under state law.

BA-NY argues that the Commission's decision in the Call Answering tariff filing case governs the result here. In that decision, however, the Commission found that BA-NY was "not a

dominant provider," a finding that does not apply to BA-NY's provision of intraLATA toll service.<sup>1/</sup>

CONCLUSION

Given that BA-NY's intraLATA toll tariff does not specifically limit the service to BA-NY's own local exchange customers and that BA-NY makes its intraLATA toll service available on a stand-alone basis to customers in independent company territories, the company's policy of limiting the service is not supported by the tariff. Any limitations on the company's intraLATA offerings that BA-NY may wish to propose must be specified in the tariff, and a reasonable basis must underlie any such limitations. During the transition to local competition, practices that tend to diminish customers' choices or hinder market entry by competitors will be carefully scrutinized. Such practices will only be permitted when found to be supported by a rational and legitimate basis.

Accordingly, we find and declare that (1) BA-NY's policy of limiting intraLATA toll service to its own local exchange customers is not supported by BA-NY's tariff; (2) BA-NY must offer intraLATA toll service on a stand-alone basis to all customers located in the geographic areas specified in the tariff without regard to the identity of the customer's local exchange carrier; (3) BA-NY is free at any time to propose revisions to its tariff to expressly limit the availability of intra-LATA toll service. Such tariff revisions will be approved by the Commission only upon evidence of sufficient justification by BA-NY, taking into account, among other factors, the level of competition in the relevant markets at the time.

By the Commission,

(SIGNED)

JOHN C. CRARY

---

<sup>1/</sup> In light of the decision we reach here, we need not, and do not, reach MCI's allegation that BA-NY has engaged in anticompetitive "tying."

Secretary