

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on November 24, 1998

COMMISSIONERS PRESENT:

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

CASE 96-C-0723 - Petition of AT&T Communications of New York,
Inc. for Arbitration of an Interconnection
Agreement with New York Telephone Company.

ORDER APPROVING AT&T BEST AND FINAL OFFER

(Issued and Effective January 5, 1999)

BY THE COMMISSION:

SUMMARY

AT&T Communications of New York, Inc. (AT&T) and Bell Atlantic-New York (BA-NY) submitted to the Commission a dispute arising out of their interconnection agreement. The issue is the means by which BA-NY's Pre-filing Statement commitment to combine unbundled network elements should be incorporated into the AT&T/BA-NY Interconnection Agreement. The parties agreed to submit "best and final offers" to the Commission. Based on our review, we approve AT&T's offer and direct the parties to amend the Interconnection Agreement accordingly.

BACKGROUND

On June 13, 1997, BA-NY and AT&T entered into a detailed Interconnection Agreement (the Agreement) pursuant to Section 252 of the Telecommunications Act of 1996 (the Act). Under the Agreement, BA-NY undertook to offer certain unbundled network elements and combinations. The Agreement also included a "change of law" clause (Section 7.3). In October 1997, the

United State Court of Appeals for the Eighth Circuit vacated an FCC rule that required incumbent local exchange carriers to combine unbundled network elements.^{1/} As a result of that ruling and pursuant to the change of law clause, BA-NY notified AT&T that it would discontinue the provision of network element combinations under the Agreement. On December 2, 1997, AT&T asked the Commission to open a general proceeding relating to BA-NY's refusal to provide UNE combinations. In April 1998, the Commission denied the motion and referred network element combination issues arising under interconnection agreements to the dispute resolution procedures provided for by those agreements.^{2/}

In April 1998, BA-NY issued its Pre-filing Statement (PFS) in connection with Case 97-C-0271 relating to long distance entry by BA-NY. The Pre-filing Statement sets forth commitments that BA-NY is prepared to make to the FCC in connection with an application to enter the long distance market under Section 271 of the Act. Certain of those commitments relate to the provision of network element combinations.

On June 1, 1998, AT&T and several other CLECs filed a motion with the Commission requesting a Declaratory Ruling that BA-NY must offer competitive local exchange carriers seeking to provide service under interconnection agreements immediate access to network element combinations pursuant to their interconnection agreements. In its response to that petition, BA-NY committed to make combinations available both under tariff and through interconnection agreements. Staff urged petitioners to attempt to negotiate the terms of an amendment with BA-NY; the instant dispute is a result of that effort. Although the parties could

^{1/} Iowa Utilities Board v. FCC, 120 F.3d 753, 813 (8th Cir. 1997), cert. granted, 66 U.S.L.W. 3490, 1998 U.S. Lexis 664, 139 L. Ed. 2d 867 (1998).

^{2/} Cases 96-C-0723, et. al. - Notice Concerning Petitions for Arbitration and Enforcement of Interconnection Agreements, (issued April 22, 1998).

not resolve the matter, they did agree to submit best and final offers to the Commission for resolution.

PARTIES' POSITIONS

Both the BA-NY and AT&T proposals are designed to incorporate into the Agreement, by amendment, BA-NY's commitments to provide combinations of unbundled network elements as set forth in the Pre-filing Statement. Moreover, both best and final offers incorporate the Pre-filing Statement by referencing some portion of the 916 (network elements) tariff. The key difference between the proposals is that BA-NY's proposal would use the tariff to set the rates and define the network elements that would comprise any combination made available pursuant to the amendment, whereas AT&T's proposal would use the Agreement to set the rates and define the network elements that would comprise the combinations. In essence, AT&T contends that the use of tariffed network element descriptions/definitions and rates are not explicitly called for by the Pre-filing Statement, and therefore, to incorporate them here is to go beyond the scope of BA-NY's Pre-filing Statement commitment and abrogate contract commitments. BA-NY, on the other hand, argues that approval of the tariff - either in its original form or as modified - will ensure that the tariff terms faithfully implement the Pre-filing Statement.

AT&T frames the question as which offer best reflects the commitments made in the Pre-filing Statement and which proposal is best drafted to work in the context of an interconnection agreement.^{1/} AT&T claims that the only provisions of the tariff that can be referenced are those that fall directly out of the Pre-filing Statement and that do not

^{1/} AT&T prefaces its arguments by contending that BA-NY's Pre-filing Statement commitments are not voluntary but are mandatory under the Act. It also claims that the instant dispute process is a Section 252 proceeding that must comport with the provisions of the Act. The Commission need not resolve these claims.

upset the "ancillary contractual rights" in the Interconnection Agreement. Any other result, it claims, would alter or contract the substantive commitments made in the Pre-filing Statement or detract from AT&T's ancillary rights under its interconnection agreement.

Because the Pre-filing Statement addresses network element combinations, and not the underlying network elements, AT&T states that any tariff terms that reference individual network elements go beyond the Pre-filing Statement and should not be included in any amendment. Thus, AT&T's proposal relies upon the terms of the Interconnection Agreement unless the Pre-filing Statement explicitly modifies those arrangements. AT&T's proposal specifies that the rates, terms and conditions for the provision of combinations shall be as specified in the Agreement, except for the description of the availability (e.g., duration and geographic area) and applicable "glue" charges.^{1/} Under AT&T's proposed amendment, "the individual unbundled network elements that comprise any such combinations shall be as defined in this Agreement". The use of network element definitions contained in the Agreement are important, AT&T contends, because in negotiating the Agreement AT&T and BA-NY defined some elements differently from how they were defined in the tariff.^{2/}

BA-NY's proposed amendment would offer combinations pursuant to specified sections of its 916 tariff. BA-NY's proposal would incorporate specific tariff sections, as well as "those sections of the 916 tariff which relate to the provision of combinations by BA-NY" It also incorporates terms of the Agreement that would apply in the event the tariff and the Agreement conflict. However, under BA-NY's proposal, tariff

^{1/} The description of the availability of combinations is governed by the tariff (AT&T proposed amendment ¶1).

^{2/} The parties point to one such element - the definition of "dedicated transport". This network element was the subject of an arbitration by Professor Eric Green. That arbitration upheld AT&T's interpretation.

terms that address rates and charges, availability, duration, or definitions/descriptions of unbundled network elements always override the Agreement. Thus, BA-NY's proposal relies broadly on the tariff terms.

BA-NY states that the Pre-filing was intended to be implemented by tariff (BA-NY Reply at 5). It argues that the definition of each constituent element is critical to defining an element combination, and therefore, to determining the scope of the combination obligation. BA-NY asserts that the Pre-filing Statement is a generic document and that its proposal to use the tariff provides a supporting structure of terms and conditions that provides all CLECs the ability to obtain combinations on the same terms and conditions. It also points out that approval of the tariff will ensure that the terms are in fact consistent with the Pre-filing Statement. As to rate terms, BA-NY notes that the Pre-filing Statement specifically sets forth the rate standard to be applied to the offered combinations. For the unbundled network element (UNE) platform, the Pre-filing Statement specifies the applicable "glue" charges and states that those charges are in addition to the sum of the UNE prices and other non-recurring and recurring charges established by the Commission". (PFS at 9 and 8). For sub-platform (or lesser) combinations, BA-NY asserts, the Pre-filing standard is Public Service Commission-approved unbundled element prices, together with any Commission-approved additional charges. (PFS at 10). Thus, BA-NY claims that the rates that the Pre-filing Statement specifies are the rates set forth in the tariff.

AT&T states that a key objective in incorporating the right to combinations into its Agreement is to ensure that its contractual performance standards and remedies would be retained and made applicable to combination orders. AT&T claims that BA-NY's offer does not assure this outcome. AT&T speculates that any limitation of liability provision and any remedy provisions that BA-NY puts into the tariff as part of its "backsliding commitments" would override the Agreement. BA-NY points out, however, that the performance standards and remedies are

specifically made applicable by BA-NY's proposed amendment and those terms would prevail in the event of a conflict between the Agreement and the tariff.

AT&T raises a number of other issues concerning various terms and conditions that would be incorporated into the Agreement under BA-NY's proposal. AT&T claims that these tariff provisions would require AT&T to forfeit rights it won in its interconnection agreement whenever it uses network elements in combination.

DISCUSSION

A key objective shared by the parties is to incorporate BA-NY's Pre-filing Statement combination commitments into the Interconnection Agreement so that AT&T can order combinations pursuant to its Agreement and thereby receive the benefit of the performance standards and remedies specified in the Agreement. Both proposals accomplish this objective.

The analysis then becomes which proposal best implements the Pre-filing commitment to offer combinations. In other words, which proposal implements the combination commitments in a manner that is consistent with the letter and spirit of the Pre-filing Statement and modifies the Interconnection Agreement only to the extent necessary to implement the Pre-filing.

An important aspect of the Pre-filing Statement was BA-NY's commitment to offer CLECs network elements on a recombined basis. The Pre-filing Statement commits BA-NY to provide the complete unbundled element platform to enable CLECs to offer residential and business POTS and ISDN service. The UNE platform, however, is restricted to certain geographic areas, and is to be provided for specified duration periods and at specified monthly "glue" charges, in addition to the sum of the UNE prices and other non-recurring and recurring charges established by the Commission. The Pre-filing Statement also commits BA-NY to provide lesser combinations in all geographic areas and all

classes of service at Public Service Commission-approved unbundled element prices.^{1/}

The Eighth Circuit Iowa Utilities Board decision arguably nullified the portions of the Agreement relating to the platform and lesser combinations, but did not override remaining portions of the Agreement. The Pre-filing Statement was designed to re-establish BA-NY's commitment to recombine network elements, with certain specified limitations and conditions.

A central feature of the new regulatory environment under the Telecommunications Act, is that, in general, interconnection agreements govern the terms and conditions for the provision of wholesale services. These agreements are tailored to the particular needs of the competitive carrier and involve numerous trade-offs. Consistent with this approach, the terms of the Interconnection Agreement should be disturbed only to the extent necessary to reflect the change in law provision and the Pre-filing Statement.

The tariff revisions that were specifically called for by the Pre-filing Statement are the codification of BA-NY's commitment to provide: (i) the UNE platform, subject to product (POTS and ISDN) and geographic area restrictions, duration periods, and glue fees; and (ii) the right of competitive carriers to obtain lesser combinations, including the expanded extended link (EEL).^{2/} Importantly, nothing in the Iowa Utilities Board decision, which triggers the change of law provision, or the Pre-filing Statement specifically envisions

^{1/} Lesser combinations are combinations of network elements that do not involve combining BA-NY's link with its port (i.e., switch).

^{2/} The tariff revisions were called for by Case 95-C-0657 et al., Order Approving Tariff and Directing Revisions (issued June 12, 1998 (June 12 Order)). The tariff offering makes the company's network element obligations and commitments generally available. However, in the June 12 Order, the Commission noted that tariff terms do not generally supersede inconsistent provisions of an approved interconnection agreement.

changes to existing unbundled network element definitions established by agreement. While it is true that the scope of BA-NY's obligation to provide combinations is defined by a combination's component parts, a fair reading of the Pre-filing Statement is that it did not intend to modify existing network element definitions, price terms (other than the glue charges) or ancillary terms other than the core terms mentioned above (i.e., description of combinations and glue charge).

BA-NY states that the definition of each element is critical to determining the scope of its combination obligation because the element definitions determine the prices that BA-NY will charge for combinations. Moreover, BA-NY claims that its combination commitment was intended to be implemented by tariff. (BA-NY Reply at 5). This argument is not persuasive. The Pre-filing Statement addresses the critical issue of price by providing for a glue charge, in addition to the sum of the UNE prices and other charges established by the Commission. This section of the Pre-filing does not mandate that Commission tariff rates and element definitions override Commission approved rates and element definitions in interconnection agreements. Similarly, while the Pre-filing Statement specifies that lesser combinations will be provided at "Public Service Commission-approved unbundled element prices" (PFS at 10), it does not mandate tariff prices for lesser combinations or displace prices in interconnection agreements.

BA-NY's claim that the Pre-filing Statement envisions a generic solution executed through tariff terms and conditions is not supported by the language of the Pre-filing. Its contention that approval of the tariff will ensure consistency with the Pre-filing Statement likewise misses the mark. Many of the terms that BA-NY would incorporate into the Agreement were not revised as a result of the Pre-filing Statement. By broadly incorporating tariff terms related to the provisioning of combinations, BA-NY's proposal would potentially alter a number of terms in the Interconnection Agreement (e.g., element definitions, prices and other terms) that go beyond the core

restrictions and conditions specified in the
Pre-filing Statement.

In sum, the Pre-filing Statement fills the void in the Agreement created by the Eighth Circuit decision by re-committing BA-NY to recombine network elements for CLECs. BA-NY's best and final offer would import into the Agreement tariff terms that go beyond the restrictions and terms set forth in the Pre-filing. BA-NY's proposal also introduces an additional layer of contract interpretation complexity by incorporating tariff terms that overlap with contract terms. AT&T's proposal, on the other hand, incorporates tariff terms that implement BA-NY's commitment with the Pre-filing restrictions and terms. Thus, the Commission adopts AT&T's best and final offer.

The Commission orders:

1. AT&T Communications of New York, Inc.'s best and final offer to incorporate BA-NY's Pre-filing Statement commitment to offer network element combinations into the AT&T/BA-NY interconnection agreement is approved.
2. This proceeding is continued.

By the Commission,

(SIGNED)

DEBRA RENNER
Acting Secretary