



STATE OF NEW JERSEY
Board of Public Utilities
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TELECOMMUNICATIONS

IN THE MATTER OF THE BOARD INVESTIGATION)
RECLASSIFICATION OF INCUMBENT LOCAL)
EXCHANGE CARRIER (ILEC) SERVICES AS)
COMPETITIVE)

ORDER REGARDING MOTION
TO CONSOLIDATE AND STRIKE

DOCKET NO. TX07110873

(SERVICE LIST ATTACHED)

BY COMMISSIONER FREDERICK F. BUTLER:

By Order dated November 28, 2007, in response to a request from Verizon New Jersey, Inc. ("Verizon"), the Board initiated this proceeding to fully investigate and consider the question of whether incumbent local exchange carrier (ILEC) provided mass market retail services should be declared competitive pursuant to criteria set out in N.J.S.A. 48:2.21-19 (b), namely, ease of market entry, presence of other competitors and availability of like or substitute services in the relevant geographic area.

MOTION TO CONSOLIDATE

By letter dated January 15, 2008, the Department of the Public Advocate, Division of Rate Counsel ("Rate Counsel") filed a motion to have the Board open a plenary proceeding and consolidate this investigation with a pending proceeding filed by AT&T Communications of New Jersey, LLP ("AT&T"), seeking intrastate access relief. I/M/O Petition of AT&T Communications of New Jersey, LLP Regarding Access Payments to Verizon New Jersey Inc. etc., BPU Docket No. TR03100767 ("AT&T Access Petition"). The AT&T Access Petition, filed in 2003, is still pending and has not been heard. In support of its request, Rate Counsel argues that the AT&T Access Petition should be consolidated with the ILEC case because in reviewing the appropriateness of reclassifying ILEC mass market retail services, the Board should address the adverse effect and anti-competitiveness of high intrastate access rates charged by Verizon and Embarq.

Further, Rate Counsel cites to a pending motion filed by AT&T to consolidate the AT&T Access Petition with a docket previously transmitted to the Office of Administrative Law ("OAL"). I/M/O Petition of AT&T Communications for Determination of Compliance by Bell Atlantic-NJ Inc. 's Selective Calling and Intra-municipal Calling Services with Imputation Requirements, BPU Dkt. No. TO97100808 ("SELEX"). The Board transmitted the SELEX case to the OAL for determination of whether access charges respecting SELEX and Intra Municipal Calling services impede competition. In arguing the merits of its request to consolidate, Rate Counsel contends that there is a link between high intrastate carrier access rates in New Jersey and what it sees as a lack of competition in the local exchange service market.

By letter dated January 23, 2008, United Telephone Company of New Jersey Inc., d/b/a Embarq ("Embarq") opposed Rate Counsel's motion, and argued that it is inappropriate to open a dormant proceeding and include Embarq in a filing by AT&T regarding access rates. Embarq stated that there is no nexus between the proceedings, and to link the two is unjustified. Embarq argued that Rate Counsel ignores the Board's reconsideration ruling on December 21, 2007, in this matter, finding that access rates should be addressed in a separate proceeding.

Lastly, Embarq contends that Rate Counsel failed to satisfy the standards for consolidation pursuant to N.J.A.C. 17:27.3(a). That section requires consideration of the following factors: the identity of the parties in each of the matters; the nature of all the questions of fact and law respectively involved; the extent that common questions of fact and law are involved, whether adjudication within the same action would result in the saving of time and expense, and avoid duplication and inconsistency; and whether such issues can be thoroughly, competently and fully tried and adjudicated together with and as a constituent part of all other issues in the two cases. To the extent that dissimilar questions of fact or law are present, consideration must be given to whether there is a danger of confusion, delay or undue prejudice to any party and the advisability generally of disposing of all aspects of the controversy in a single proceeding.

Finally, consideration must be given to other matters appropriate to a prompt and fair resolution of the issues, including whether a case still pending in an agency is contested or ripe to be declared contested. Embarq specifically noted that it is not a party to the AT&T Access Petition, other parties to the AT&T Access Petition did not move to intervene or participate on their own in this matter, and the stated scope of this matter does not include intrastate access rates.

Therefore, according to Embarq, the questions of law and fact are not the same, and because there is a lack of common questions in the cases, consolidation at this late date will only lead to delay, confusion and unnecessary duplication. Embarq also argued that Rate Counsel's motion is an attempt to delay the proceeding and is unsupported since no additional evidence has been provided to suggest a change in circumstances which would be expected to result in a change in the Board's prior decision in this regard finding the level of intrastate access charges as outside the scope of this reclassification proceeding.

On January 25, 2008, Verizon also responded in opposition to Rate Counsel's motion asserting that Rate Counsel has no standing to seek a plenary proceeding in a matter commenced by AT&T. Verizon characterized the filing as an "end run" to the Board's previous determination regarding the issue of access charges and cost of service. Verizon argued that the Board previously considered the issue of access charges and cost of service as outside the scope of this proceeding. Moreover, Verizon contended that Rate Counsel provides no detail into how consolidation will result in any saving of time or expense, or will prevent duplication and inconsistency, which are factors reviewed in considering a motion for consolidation. Verizon maintained that Rate Counsel's request, if granted, would only cause delay, and would not serve any purpose other than to unnecessarily complicate the Board's focused review of the reclassification of ILEC provided mass market retail services.

On January 30, 2008, Rate Counsel responded to Verizon and Embarq's opposition to the request to consolidate the proceedings contending that both positions lack merit. Rate Counsel contended that Verizon and Embarq do not want a full and complete record in this proceeding. Rate Counsel supports the claims of Sprint Communications Company, L.P. Sprint Spectrum, L.P. and Nextel of New York, Inc. (collectively "Sprint-Nextel") that above cost intrastate access rates affect whether the criteria set forth in N.J.S.A. 48:2-21.19(b) are met and whether intrastate access rates are subsidizing competitive services.

MOTION TO STRIKE

In addition to being at the heart of Rate Counsel's request to consolidate, the issue of access charges is central to the January 16, 2008 motion filed jointly by Verizon and Embarq¹ to strike the testimony of James A. Appleby submitted on behalf of Sprint-Nextel. Verizon contends that Mr. Appleby's testimony is inconsistent with the sole purpose of this proceeding which is to investigate whether ILEC provided retail mass market services are competitive, and argues that the Board's Reconsideration Order explains that issues related to cost of service and profits are beyond the scope of the ILEC proceeding. Verizon contends that Mr. Appleby's testimony focuses squarely on the issue of intrastate switched access rates. Verizon states that Mr. Appleby's reliance on N.J.S.A. 48:2-21.18(c) and 48:2-21.16-1a(3) as support for his position that the Board must investigate the level of access charges in order to determine whether a service can be reclassified is improper. Verizon further argues that these statutes require the Board to ensure that Verizon's non-competitive services do not subsidize competitive services. Verizon argues that should the Board decide to evaluate whether competitive services are being subsidized, the focus would be on whether competitive services, not intrastate access services, generate sufficient revenues to cover the costs of the competitive services.

Verizon also disputes Sprint Nextel's claim that Verizon's Plan for Alternative Regulation ("PAR 2") requires a showing of direct cost data that non-competitive services are not subsidizing competitive services. Verizon contends that what is required under PAR 2 is a showing that services that are being reclassified cover their costs. As Verizon intrastate access services are not competitive, Verizon maintains that they are irrelevant to the determination of whether retail mass market services should be reclassified. In addition, the Board's PAR 2 order does not require a cost of service analysis in reclassification proceedings.

Verizon also disputes Mr. Appleby's implication that intrastate access charges are excessive, and are barriers to a level competitive playing field. Verizon emphasizes that the criterion here is whether there exist barriers to entry, not barriers to a level competitive playing field. Verizon stressed that a carrier's ability to enter the market is not affected by intrastate access rates because access charges are not paid on the services at issue (e.g., residential basic exchange service, single line business service and directory assistance service) and are not imposed on basic local exchange calls or the other services at issue in this case. Access charges are paid by carriers other than Sprint Nextel, and are simply a cost of doing business for all carriers, according to Verizon.

On January 28, 2008, Sprint Nextel filed a brief in opposition to the Verizon motion to strike the testimony of Mr. Appleby. Sprint Nextel contended that if it is unable to offer Mr. Appleby's testimony into the record, there will not be a full investigation into the question of whether reclassification is appropriate. Sprint Nextel maintained that Verizon's own statements concede that Mr. Appleby's testimony is relevant when Verizon asserted that the Board's hearing process provides the parties with ample opportunity to submit their positions. Sprint Nextel argues that the appropriate course to follow would be for the parties who oppose Mr. Appleby's testimony to submit rebuttal testimony pursuant to the Board's procedures, and to cross examine the witness, and to submit briefs based on the record.

¹ The letter indicates that Verizon filed the motion with the full concurrence and approval of Embarq.

Sprint Nextel, in its brief argues that Verizon's motion to strike in actuality constitutes a motion for partial summary decision since it seeks a finding respecting the relationship between access charges and the criteria for reclassification. Verizon must therefore, meet the standards for summary decision set forth in N.J.A.C. 1:1-12.5(a), including that there is no material issue of fact in question and that it would prevail as a matter of law.

Sprint Nextel maintains that the level of access charges is relevant to this case by alleging that access charges are a barrier to entry, one of the three criteria for making a determination regarding the competitiveness of a service, and that this in and of itself is a fact sensitive issue. Sprint Nextel disputes Verizon's assertion that entrance into the basic exchange market is not affected by intrastate access charges, and contends that excessive intrastate switched access charges create a barrier to offering bundled service. Sprint Nextel urges the Board to wait for the evidence at hearing and briefs post hearing before rendering a finding on the issue of whether access charges are a barrier to competitive entry in the belief that Verizon's factual assertions are more appropriate for reply testimony and post hearing briefs.

Further, Sprint Nextel argues that there is no legal basis upon which to dismiss Mr. Appleby's testimony as it goes to the statutory criteria of ease of market entry and the ILEC's contention that there are no barriers to entry. Sprint Nextel contends that dismissal of Mr. Appleby's testimony would violate the New Jersey Administrative Procedure Act, due process and fundamental fairness.

In addition, Sprint Nextel asserts that the testimony must be admitted in order to ensure that the provisions of N.J.S.A. 48:2-21.18(c), barring the use of revenues earned or expenses incurred in conjunction with noncompetitive services do not subsidize competitive services, are upheld. Sprint Nextel argues that reclassification of basic exchange services as competitive, while subsidized by access charges, may result in a violation of the statutes precluding subsidization of competitive services by non competitive services.

Sprint Nextel also alleges that, Verizon misstates the facts when claiming that its PAR 2 does not requires cost data showing rate regulated services will not subsidize competitive services to be reclassified. Sprint Nextel, further cited the PAR 2 order, stating that "in order to demonstrate that rate regulated services will not subsidize competitive services, Verizon will provide annual reports to the Board's staff showing that in the aggregate, the total revenues for Verizon NJ's competitive services exceed the total direct cost of the services. In connection with any filing to make a service competitive, Verizon NJ will file with the Board direct cost data." (PAR-2 Safeguard V.B.1).

Sprint Nextel argues that, pursuant to the Reconsideration Order, the Board stated only that it will not take action herein to adjust access charges, but will address that "remedial issue" in a subsequent case. Sprint Nextel contends that since only one portion of the testimony deals with intrastate access charges, there is no justification for striking all of Mr. Appleby's testimony. The sum total of Mr. Appleby's testimony, as described by Sprint Nextel, is focused on excessive access rates posing a barrier to competition for incumbent provided mass market services, and thus reclassification must be denied.

By letter dated February 4, 2008, Verizon and Embarq replied to Sprint Nextel's opposition to the Motion to Strike the Testimony of James A. Appleby. According to the letter, Mr. Appleby's testimony addresses intrastate access issues which are outside the scope of the proceeding, and Sprint Nextel has not offered a single credible argument to contradict this fact. Therefore, Verizon argues, the Board should strike Mr. Appleby's irrelevant access testimony.

In support of their argument, the letter states that, in an attempt to concoct a more favorable legal standard, Sprint Nextel mischaracterizes the motion to strike as a partial summary judgment motion. Sprint's reliance on a summary judgment standard is misplaced. Contrary to Sprint Nextel's contentions, the motion does not seek to dispose of a claim (e.g., whether there are barriers to entry) as matter of law. To the contrary, the motion seeks to strike testimony solely devoted to the issue of the appropriate level of intrastate access charges -an issue that the Board has already determined to be outside the scope of the proceeding. Accordingly, Verizon argues Sprint Nextel's efforts to manufacture "disputed issues of fact" are of no consequence here.

The letter further states that Sprint Nextel's argument that the Board's "reference" to access charges is mere "dicta" is a blatant mischaracterization of the Board's Reconsideration Order. The Board's pronouncement on access charges is not an offhand remark tangential to the resolution of Rate Counsel's motion, as Sprint Nextel contends, but instead is a ruling essential to the resolution of Rate Counsel's motion-that access charge issues will not be considered here.

The letter goes on to say that while the New Jersey Telecommunications Act does state that competitive services should not be subsidized by non-competitive services, that provision is in a section of the Act unrelated to service reclassification. Thus, any ongoing requirement that competitive services not be subsidized by non-competitive services is similar to any other ongoing provision in the Act, and need not be examined during a service reclassification proceeding.

Finally, the letter disputes Sprint Nextel arguments that its testimony bears on whether there are barriers to entering the mass market. In actuality, Sprint Nextel's testimony argues for access rate reductions within this proceeding, in contravention of the Board's Reconsideration Order. Sprint Nextel concedes this fact, noting that Mr. Appleby recommends that the Board reduce access rates in the course of this proceeding. Moreover, the claim that access charges are a barrier to entry is plainly wrong according to Verizon. All carriers, including Petitioners and their affiliates, pay access charges which make these charges a cost of business for everyone, as opposed to a barrier to entry that affects some carriers but not others. Further, Verizon contends their effect on all carriers is clearly not to create a barrier to entry, as the large number and variety of competing providers makes evident.

DISCUSSION

The essence of the case at hand is whether Verizon and Embarq can establish that ILEC mass market retail services satisfy the criteria set forth by statute and thereby support their claims for reclassification. While it is not uncommon for parties to raise all issues of merit in an active docket, the Board, and I preliminarily, must carefully consider the prudence of allowing issues to be included which are not directly related to the case, solely because they have been raised and recognized as issues of general importance. The issue of access charges has been noted repeatedly in the papers filed in this matter, and, in order to avoid the inappropriate mixing of issues, the Board determined in its Reconsideration Order that intrastate access charges would be addressed in a separate proceeding exclusively dealing with access costs and revenues, and whether access rates are set at an appropriate level. There currently are pending two dockets which address the issue of access charges, and I anticipate that the focus of those docketed matters will cover the spectrum of issues related to access. The issue before this Board at this time, however, is whether mass market retail services are competitive, and the statutes speak specifically as to what is to be considered when determining such a question.

The stated purpose of the cases referred to in Rate Counsel's letter is to investigate the appropriate level of certain intrastate access rates which the Board has already found will not be addressed herein. Rate Counsel is saying they want the cases merged because the cases deal with the issues raised by Sprint. The parties to that case which are not the same parties as this matter, will have an opportunity to be heard on those issues. The facts in the two cases cited are different from this case, the questions addressed in the cases are unrelated (i.e., this matter addresses the three criteria for a declaration for competitive status, not reasonableness of intrastate access rates); the parties in the cases are not

identical (Embarq and Sprint Nextel are not parties to those access rate cases); and the questions of fact and law are not the same. Therefore I am persuaded that it is not advisable to try to review these very different issues within the same proceeding.

The criteria for declaring a service competitive are set forth in N.J.S.A. 48:2-21.19, and involve a review of the ease of market entry, presence of competitors and, and the availability of like or substitute services in the relevant geographic area. These are not the same standards for determining whether a rate is just and reasonable. The Board must not detract from its review of the specific purpose of the immediate case by attempting to address other issues of significance, at the risk of burdening this case to a point where it becomes unable to carry out its statutory mandates.

Accordingly, in reviewing the arguments supporting consolidation and those in opposition, I FIND the criteria for consolidation have not been met and accordingly, I HEREBY DENY the motion to consolidate the AT&T Access Petition and SELEX cases with this proceeding.

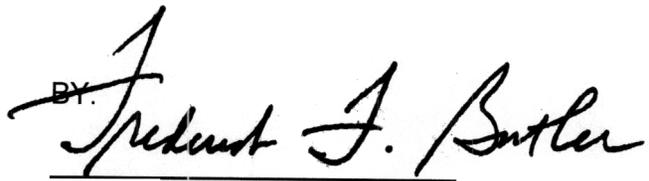
As discussed in the previous orders, and as evidenced in the discussions set forth above, the issue of the level of intrastate access rates, while important to the Board, is not within the scope of this proceeding. Accordingly, Verizon and Embarq jointly moved to have the testimony of Mr. Appleby sponsored by Sprint Nextel stricken. Sprint Nextel's response to the motion characterizing the request by Verizon as one for summary decision is not persuasive. The motion does not seek the type of relief described in N.J.A.C. 1:1-12.5, and Sprint Nextel's characterization of the motion to strike does not appear to accurately reflect the intent of the movants. While one can argue that there is a genuine issue of material fact regarding the proper level of intrastate access charges, the question of intrastate access rates and charges is not being tested in this case. The proper level of access rates is not an element for investigation in a determination of whether mass market retail services are competitive. The dispute is whether the issue is relevant to the question pending regarding reclassification of mass market retail services, and as stated above, the Board has previously spoken to this issue in its Reconsideration Order and no new evidence has been proffered which persuades me that the prior determination must be reexamined at this time.

In sum, there is no dispute that there is an open issue regarding the appropriate level of intrastate access rates. However, the forum for resolution of the access rate issue is not here, and has been answered by the full Board. It is not my interpretation of the facts that Verizon is seeking, as a matter of law, to have the issue of access charges resolved in its favor by requesting the striking of Mr. Appleby's testimony but to merely have it reviewed and addressed in the appropriate forum. Engaging in a review of the justness of the rates set for intrastate access is misplaced in this case, and therefore arguments supporting its inclusion herein are rejected.

N.J.S.A. 48:2.21-19(b) sets forth the three criteria that are the framework for this investigation, and each test must be met for a service to qualify for a competitive classification, including a finding by the Board that there are no barriers to entry. In addition, the separate but ongoing provision in the statutes that prohibits competitive services from being subsidized by non-competitive services, while not a pre-requisite to or required for a declaration of competitive status, has been identified as a potential issue. In fact, Verizon has submitted Rebuttal Testimony addressing the allegation of cross subsidization by Sprint Nextel and Rate Counsel. Thus, regarding the testimony submitted by Mr. Appleby on behalf of Sprint Nextel, those portions of the testimony which speak to the level of access rates are HEREBY STRIKEN from the record in this proceeding, but may be submitted in the Board's future proceeding on intrastate access rates. The remainder of Mr. Appleby's testimony relating to the question of whether access charges are a barrier to entry into the ILEC mass market retail service arena and whether there is an issue of cross subsidization, WILL BE ADMITTED into the record in this matter, and will be accorded the appropriate weight.

This provisional ruling is subject to ratification or other alteration by the Board as it deems appropriate during the proceedings in this matter.

DATED: 2 - 13 - 08

BY: 

FREDERICK F. BUTLER
COMMISSIONER

**IN THE MATTER OF THE BOARD INVESTIGATION REGARDING THE
RECLASSIFICATION OF INCUMBENT LOCAL EXCHANGE CARRIER
(ILEC) SERVICES AS COMPETITIVE**

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