



STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
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TELECOMMUNICATIONS

)
IN THE MATTER OF THE BOARD INVESTIGATION)
REGARDING THE RECLASSIFICATION OF INCUMBENT) ORDER ON MOTION
LOCAL EXCHANGE CARRIER (ILEC) SERVICES AS) TO COMPEL
COMPETITIVE) 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. ("VNJ"), the Board determined that it is appropriate at this time to conduct a full investigation of and hearing on the question of whether incumbent local exchange carrier (ILEC) provided mass market retail services should be declared competitive pursuant to N.J.S.A. 48:2-21.19 (b), after review and consideration of the necessary criteria.

By letter dated January 9, 2008, Sprint Communications, L.P., Sprint Spectrum, L.P., and Nextel of New York, Inc. (collectively "Sprint Nextel") filed a Motion to Compel United Telephone Company of New Jersey, Inc. *d/b/a* Embarq ("Embarq") to provide the data, information, and documents requested by Sprint Nextel in the First and Second Set of Interrogatories and Requests for Production of Documents which were propounded to Embarq on December 14, 2007 and December 21, 2007. According to the Motion, Embarq's discovery responses uniformly objected to every Interrogatory regarding bundled services and revenue streams.

Embarq's purported basis for objecting was that such information is not relevant, unlikely to lead to the discovery of relevant information, outside the scope of the proceeding, and often, that a special study would be required. According to Sprint Nextel, these objections are without merit since Embarq's own testimony references such topics, and the requested information relates to the statutory provisions applicable to Embarq's service reclassification request. According to Sprint Nextel, Embarq's objections are plainly a tactic to avoid meaningful scrutiny of its application, and consequently, Sprint Nextel asks the Board to compel full responses to its interrogatories.

The Motion goes on to state that Sprint Nextel requested that Embarq provide information regarding its bundled service offerings. Sprint-Embarq 3 – 7, 9, 10, and 24 specifically seek information regarding bundling of services.

In support of its Motion, Sprint Nextel argues, among other things that:

- 1) Embarq's Direct Testimony relies on the very information Sprint Nextel seeks in the interrogatories regarding wireless services and bundled services in New Jersey;
- 2) In considering the three criteria set forth in *N.J.S.A. 48:2-21.19*, Embarq's Direct Testimony claims a direct link between bundled services and whether the market for Embarq's retail mass market services is competitive, and therefore discovery on such topics is appropriate;
- 3) Embarq's objections to Sprint discovery requests inquiring into various sources of revenue are unfounded; and
- 4) Embarq must provide information related to whether its regulated services provide a subsidy to those services to be reclassified as competitive.

EMBARQ'S RESPONSE

On January 18, 2008, Embarq filed its response to the motion stating that Sprint Nextel's Motion must be denied because it seeks information and facts which the Board has previously determined are squarely outside the scope of this proceeding, and so are not relevant or likely to lead to admissible evidence. In Embarq's view, the Board has decided that access charges, costs of service, profits, quality of customer service, and rate base/rate of return are all issues outside the scope of this proceeding. Embarq's letter suggests that Sprint Nextel's attempts to secure this precise information, both directly and indirectly, are supported only by arguments that are either factually incorrect or otherwise mischaracterize both the information sought and the statutory requirements. Embarq urges the Board to reject Sprint Nextel's motion. In support of its opposition, Embarq states, among other things, the following:¹

- 1) The Board's Reconsideration Order further clarifies, in no uncertain terms, that neither intrastate access charges nor issues related to costs of service, profits, quality of customer service, and rate base/rate of return shall be addressed in this proceeding. Each of the 17 questions labeled by Sprint Nextel as addressing "bundled services" or "revenue streams" actually seeks detailed information that overtly or implicitly is geared to elicit voluminous information regarding switched access rates and related revenues, other revenues and costs related to the intrastate access relief sought by Sprint Nextel, and other matters that are squarely outside the scope of discovery all together. Sprint Nextel's motion must be denied as contrary to the express and identified scope of this proceeding.
- 2) Despite the fact that Sprint Nextel expressly states that the information it seeks "relates to the statutory provisions applicable to Embarq's service reclassification request," the discovery does not focus on Embarq's testimony. Sprint Nextel freely acknowledges that the majority of its data requests were filed prior to the filing of Embarq's expert testimony. Indeed, with one limited exception, Sprint's discovery is not directed to any particular page of Embarq's Direct Testimony. Rather, Sprint's questions undertake a

¹ In addition to these arguments, Embarq suggests that it has indeed responded to Sprint-Embarq 5 and 9.

deep dive solely into intrastate access rates and revenues as if intrastate access is one of the three criteria.

- 3) Sprint –Embarq 1, 2, 4, 8, 11, 12, 21 and 22-24 elicit “subsidy information” which is not relevant. Sprint Nextel argues that Embarq is required by its “current Plan for An Alternative Form of Regulation-2” to provide information about cost subsidies. As the Board is well aware, however, Embarq has never sought any form of alternative regulation, and so arguments based on obligations imposed pursuant to such plans are simply not relevant to Embarq.
- 4) Embarq notes that CLECs, such as Sprint Nextel, were not required to provide cost-of-service studies in the Board’s prior service reclassification proceeding. Sprint Nextel has provided no legal basis for treating ILECs, such as Embarq, any differently than CLECs. The reclassification statute does not distinguish on this point, and the Board has previously applied the same standards to both classes of services providers. Sprint Nextel has provided no legitimate reason for deviating from the Board’s well-reasoned prior decisions.

SPRINT NEXTEL’S REPLY

On January 23, 2008, Sprint Nextel filed its reply urging the Board to instruct Embarq to promptly produce the requested discovery. In support of its position, Sprint Nextel argues that it is well settled that the standard for production of discovery is lower than the standard for introduction of evidence at a hearing or trial. The discovery process is intended to allow the parties to obtain evidence to develop their arguments and undermine those of their opponents. Discovery requests need only be reasonably calculated to lead to the discovery of admissible evidence. Applying this standard to the instant dispute, according to Sprint Nextel, it is clear that information relevant to a determination regarding the existence of barriers to market entry is discoverable.

Sprint Nextel further argues that Embarq’s refusal to produce discovery is apparently based on a misguided interpretation of the Board’s December 21, 2007, Order on Reconsideration. As Sprint Nextel sees it, Embarq asserts that the Order on Reconsideration should be interpreted as prohibiting any mention of access charges in this proceeding, and relies on this interpretation as the foundation for its objections to Sprint Nextel’s discovery requests. The Order on Reconsideration is not, however, so very broad, as nothing in the Order on Reconsideration indicates that the Board will not consider whether access charges function as a barrier to entry or whether the reclassification sought in the instant proceeding must necessarily be delayed to avoid violating New Jersey law. According to Sprint Nextel, neither issue was precluded by the Board’s Order on Reconsideration.

DISCUSSION

Upon review of the discovery requests at issue in this motion, and each response thereto, HEREBY GRANT the following request:

Sprint-Embarq 10:

This requests a list of all service plans that provide a discount on non local services when purchased along with a local service. Although Embarq has adequately responded to several related questions regarding bundled services, this request has not been answered, and the information should be readily available to Embarq and is relevant in this matter because it has claimed that bundled services act as substitutes. Therefore, this request fits within the traditional

and appropriate scheme of discovery such that response to the request is appropriate and proper.

As has been noted in any number of discovery orders, discovery before an agency such as the Board is guided by the Uniform Administrative Procedure Rules, specifically N.J.A.C. 1:1-10.1 et seq. The purpose of discovery, as set out by N.J.A.C. 1:1-10.1, is to provide litigants access to "facts which tend to support or undermine their position or that of their adversary." Likewise, discovery is appropriate "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence," N.J.A.C. 1:1-10.1(b), and the test for the judge in reviewing a discovery motion requires the judge to "weigh the specific need for the information, the extent to which the information is within the control of the party and matters of expense, privilege, trade secret and oppressiveness," N.J.A.C. 1:1-10.1(c).

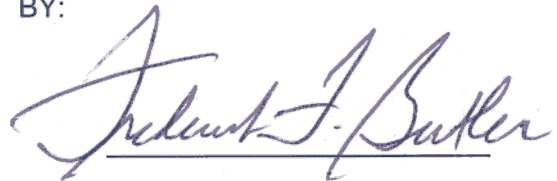
HEREBY FIND that the above discovery request is reasonably calculated to lead to the discovery of admissible evidence such that response should be provided, and therefore the motion as to this question is HEREBY GRANTED. Embarq shall provide responses to Sprint Nextel no later than February 4, 2008.

Beyond this, however, the remaining requests enumerated in the motion fall outside this range of required answers. First, there are questions that have been adequately answered, and are complete and correct. They include, Sprint-Embarq -5, -7, -9, -14, -15, -16, -18 and 20. Second, there are document requests that include documents that are available to the public through standard methods, and/or would be overly burdensome to produce. They include Sprint-Embarq - 19, - 23, and -24. Finally, there are requests that ask for material outside the scope of this hearing or which would be overly burdensome to produce, and include Sprint-Embarq -1, -2, -3, -4, -6, -8, -11, -12, -21, -22 and -25. These demands are therefore beyond the scope of discovery required in this proceeding and are HEREBY DENIED.

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

DATED: 1-29-08

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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