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Federal Communications Commission
Office of Secretary

April 18, 1997

William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington D.C. 20554

Re: Ex parte contact in CC Docket No. 96-61

Dear Mr. Caton:

I am writing to supplement the record in the above-captioned docket with respect to pending petitions for reconsideration of the Commission's Detariffing Order.[1]

As we have repeatedly explained in this proceeding, customers are at a substantial disadvantage when they are compelled to purchase telecommunications services pursuant to carrier tariffs rather than by contract. This point was dramatically illustrated in a recent proceeding before the New York Public Service Commission ("PSC") concerning interconnection arrangements between AT&T and New York Telephone, and we thought that the Commission would find a development there to be illuminating.

In the PSC proceeding, AT&T strenuously resisted New York Telephone's efforts to require AT&T to obtain local services from New York Telephone (for resale by AT&T to end users) pursuant to tariff. AT&T pointed out that New York Telephone could change the terms of any applicable tariff without AT&T's consent and, further, that AT&T would have no remedies for breach of the tariff by New York Telephone other than for gross negligence or willful misconduct.[2]

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1 *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket 96-61, Second Report and Order, FCC 96-424 (released Oct. 31, 1996), 61 Fed. Reg. 59340 (Nov. 22, 1996).

2 *See* Opinion and Order Resolving Arbitration Issues, Opinion No. 96-31 at pp. 4-7 (NY PSC November 28, 1996). A copy is enclosed.

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In other words, AT&T was disturbed because the rights and remedies that ordinarily apply to commercial relationships would not apply in a tariff setting. These are *precisely* the concerns voiced by customers in this proceeding, and it is noteworthy that the nation's largest carrier pursued them with vigor when it found itself in the role of purchaser.

The PSC ultimately ruled that the terms governing interconnection *would* be tariffed, citing the need to preserve its own "flexibility to make modifications" in local interconnection arrangements through control of the tariff process.[3] That ruling merits three observations:

- The competitive climate in the market for local exchange services market is very different from the competitive climate in the interstate interexchange market place. This Commission need not (and does not) intervene by prescribing service terms for nondominant carriers.

- Because this Commission does not routinely review nondominant carrier tariffs except when complaints are filed, the opportunities for abuse of the filed rate doctrine are far greater at the interstate level than under a regime like New York's, where the tariffs filed by the state's largest carriers are reviewed and frequently changed at the PSC's direction.

- The PSC's ruling has given New York Telephone a new weapon in its fight against competitors and competition. That company now can (and does) fight competitive entry by filing terms favorable to itself in its resale tariff, and then insisting in interconnection negotiations and arbitrations that the tariff is not negotiable and will govern all interconnection agreements.

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3 *Id.* at 7.

The proceedings before the PSC demonstrate that carriers – who are well aware of the relevant law and facts – complain loudly (and, we believe, correctly) about the fundamental unfairness of the filed tariff doctrine when it works to their disadvantage. End users face such unfairness every day.

Sincerely,

Ellen G. Block

Henry D. Levine
Ellen G. Block

Counsel for the Ad Hoc Telecommunications Users Committee, the California Bankers Clearing House Association, the New York Clearing House Association, ABB Business Services, Inc. and The Prudential Insurance Company of America

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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

OPINION NO. 96-31

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

CASE 96-C-0724 - Petition of New York Telephone Company for Arbitration of an Interconnection Agreement with AT&T Communications of New York, Inc.

OPINION AND ORDER RESOLVING ARBITRATION ISSUES

Issued and Effective: November 29, 1996

filings. After the Eighth Circuit issued the stay, Judge Harrison then requested the parties to file an analysis of its effect on their positions or proposals in this arbitration, and both parties responded in filings dated October 23. In a letter to the parties dated October 24, the judge denied New York Telephone's request to submit supplemental rate proposals.

The issues stipulated by the parties for arbitration were then analyzed on the basis of the record developed and comments submitted, and presented to us for a final determination. The issues are divided among four categories, as discussed below: resale, elements and combinations, collocation, and miscellaneous.

RESALE

Applicability of the 915 Tariff

1. Requirements of the Act

New York Telephone's 915 tariff, effective on a temporary basis on October 8, 1996, provides in extensive detail the terms and conditions for resale of its retail services. This tariff was filed pursuant to an order issued June 25, 1996.[1] AT&T has submitted to arbitration a list of issues involving terms and conditions for resale, a few of which are not addressed in the 915 tariff, but most of which would alter the terms provided in the tariff. AT&T requests adoption of its position on these issues.

AT&T proposes a stand-alone contract with the arbitrated terms and conditions for resale incorporated as contract terms. According to AT&T, if the tariff is reflected in the agreement, the tariff should be amended to prohibit changes to it without AT&T's consent, and to include a waiver by New York

[1] Cases 94-C-0095 et al., Regulatory Framework for the Transition to Competition in the Local Exchange Market, Order Declaring Resale Prohibitions Void and Establishing Tariff Terms (issued June 25, 1996).

Telephone of the right to initiate changes that would materially and adversely affect the rights of interconnection agreement signatories.

In response, New York Telephone argues that the 915 tariff should be incorporated in the agreement by reference, and that the agreement should be deemed to be modified by any future changes the Commission permits to be made in the tariff. Nothing in the Act, according to New York Telephone, overturns our decision in the June 25 Order that the terms and conditions of resale should be offered pursuant to tariff.

AT&T acknowledges that the 915 tariff does not violate the Act; in fashioning an interconnection agreement between it and New York Telephone under the Act, however, AT&T asserts that it is not bound by the terms of the 915 tariff and is entitled to have other proposed terms arbitrated. AT&T points out that incumbent local exchange carriers (incumbent LECs) under the Act have a duty to negotiate interconnection agreements in good faith[1], and that any filed statement of "generally available terms" under §252(f) of the Act does not "relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251."[2] AT&T also suggests that, because the Act requires a state commission in an arbitration to "resolve each issue" presented by the parties,[3] we are required to consider alternatives presented to the provisions in New York Telephone's 915 tariff.

In response to these arguments, New York Telephone concedes that individually negotiated and arbitrated agreements are contemplated by the Act, but argues that AT&T's reference to the Act's provisions concerning its duty to negotiate is beside

[1] 47 U.S.C. §251(c)(1).

[2] 47 U.S.C. §252(f)(5).

[3] 47 U.S.C. §252(b)(4)(C).

the point, now that it is in an arbitration with AT&T. New York Telephone argues that we may allow it to apply the terms of its 915 tariff to its interconnection agreement with AT&T. The requirements of the Act were considered, New York Telephone adds, in the development of the tariff.

New York Telephone asserts, moreover, that the terms of the 915 tariff should apply generally to all carriers entering into interconnection agreements. Pointing out that the Act provides that all local exchange carriers (LECs) and incumbent LECs are generally required "not to impose unreasonable or discriminatory conditions or limitations on" resale,[1] New York Telephone argues that offering service for resale on a generic basis through the 915 tariff accomplishes that objective.

In response to that argument, AT&T asserts that reference to the various provisions requiring non-discriminatory conditions for resale is beside the point, because the Act also provides that New York Telephone must make available to all other carriers any of the terms or agreements for resale included in its agreement with AT&T.

Its interconnection agreement should not be made conditional or reliant on the 915 tariff in any way, AT&T continues, for reasons relating to the difference between its rights under contract law and its rights as a subscriber under the terms of a tariff. For one thing, AT&T argues, changes could be made to the tariff pursuant to the Commission's normal tariff revision process, under which it has a right to comment but no more, whereas the terms and conditions in a contract could not be changed without its consent. For another, AT&T asserts, there is no liability of New York Telephone to AT&T for breach of a tariff term, except for gross negligence or willful misconduct,[2] while it has a right to enforce contract terms. Finally, AT&T avers

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1 47 U.S.C. §§251(b)(1) and 251(c)(4)(B).

2 Public Service Law §93.

that its right to appeal our decision on resale terms and conditions in an AT&T interconnection agreement, as being inconsistent with Act §§251 or 252, will be limited to our determination in this arbitration, and will not be available to contest a future change in the 915 tariff.

New York Telephone is correct that the duty of incumbent LECs to negotiate does not compel the conclusion that the 915 tariff terms cannot be considered. Similarly, AT&T is correct that the non-discrimination requirements of the Act do not compel the conclusion that those terms must be used. The issue relates to the conditions under which the terms and conditions for resale effective under the agreement should be permitted to change in the future. Any terms or conditions for resale in AT&T's interconnection agreement that were reached through agreement with New York Telephone, once approved, could not be changed without the mutual consent of the parties. In prescribing an arbitrated result, however, nothing in the Act prohibits us from instituting a tariff process, or adopting the previously instituted 915 tariff process, as a term to be included in the agreement.

Such a result is appropriate because it preserves our flexibility to make modifications--consistent with the Act and with the public interest--that may appear desirable or necessary as experience with resale is gained. Setting one set of terms in stone for AT&T would appear to be a less desirable approach and, while the Act permits such an approach, it does not require it.[1]

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[1] Notably, two interconnection agreements we have approved have incorporated the terms and conditions of the 915 tariff, and provided that the agreements must be changed to reflect future changes in the tariff. Case 96-C-0655, New York Telephone Company and United Telemanagement Services, Inc., Order Approving Interconnection Agreement (issued October 3, 1996); Case 96-C-0656, New York Telephone Company and Frontier Communications International, Inc., Order Approving Interconnection Agreement (issued October 3, 1996).