STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 5713

Investigation into NET's tariff filing)
re: Open Network Architecture, including)
the unbundling of NET's network, expanded)
interconnection, and intelligent networks)

Order entered: 9/4/96

ORDER RE: MOTION FOR RECONSIDERATION

On June 18, 1996, New England Telephone & Telegraph Company ("NYNEX" or "Company") filed a motion requesting that the Board reconsider two findings in our Order of May 29, 1996, in Phase One of this docket ("Phase I Order"). Specifically, the Company asked that we reconsider our decisions with respect to, one, "bill and keep" compensation arrangements and, two, the self-provisioning element of the imputation rule. NYNEX Motion at 1-2. MCI Telecommunications Corporation ("MCI"), Atlantic Cellular Company, L.P. and Hyperion Telecommunications of Vermont, Inc. (jointly "Alternative Technology Providers" or "ATP"), and AT&T Communications of New England, Inc. ("AT&T") all filed responses opposing the motion. The Department of Public Service ("DPS") filed a letter stating that it neither supports nor opposes the motion. DPS Letter, 7/8/96, at 1.

For the reasons that follow, we deny NYNEX's motion to reconsider.

A. Compensation Mechanisms for Interconnection

In our Order of May 29th, we concluded that rates for interconnection need not be capped at the total service long-run incremental cost ("TSLRIC") for interconnection, but could include, if appropriate, a "mark-up" for some portion of an incumbent's just and reasonable joint and common costs. Phase I Order at 27-52, 79. We also concluded that any of a variety of compensation arrangements among incumbent local exchange companies ("LECs") and competitors, depending upon specific circumstances and negotiating objectives, would generally be found acceptable. *Id*. at 49-52, 79. However, we also stated that, "[i]n instances where parties to a negotiation cannot agree on an acceptable compensation arrangement, we intend to order bill and keep."[1] *Id*. at 79.

1. NYNEX's Motion

NYNEX asks that we amend our Order to remove this intention to impose bill and keep in those circumstances where agreement among negotiating parties is not achieved. NYNEX offers several reasons in support of its position.

First, NYNEX asserts that the federal Telecommunications Act of 1996 ("Act") proscribes the Board's action, arguing that the Act:

> specifically provided for the negotiation of mutual recovery of call terminating costs, and specifically did not impose a bill and keep standard. The Board's Order, in contrast, effectively mandates bill and keep and negates the Section 252 negotiation process by prejudging the bill and keep issue.

NYNEX Motion at 2.

Next, the Company contends that bill and keep is "poor economic policy" and gives four reasons for this:

> (i) Bill and keep distorts interconnecting carriers' "incentives to minimize the total costs of service, causing them to disregard the costs imposed on others and to focus only on minimizing their own costs";
> (ii) Bill and keep assumes that all carriers have identical costs;
> (iii) The Board's decision "ignores the existence of directional call imbalances that are generated by the false incentives 'zero cost' termination creates; and
> (iv) Bill and keep prevents incumbents from recovering their total costs of terminating local traffic when providing interconnection to a competitor.

Id. at 6-7.

Third, NYNEX asserts that there is no basis in the record or in fact to support the Board's decision. Specifically, NYNEX argues that bill and keep is not "necessary to the effective development of local competition," that administrative savings do not warrant it, and that the Board's general powers of regulatory oversight, rather than imposition of bill and keep, will act to prevent incumbents from exerting market power. *Id*. at 15-17.

For all these reasons, NYNEX urges the Board to establish symmetric reciprocal compensation rates, pending quantification of costs. *Id*. at 17.

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1. "Bill and keep," or mutual traffic exchange, denotes that arrangement whereby competitive local exchange providers terminate each other's local exchange traffic at no charge. Phase I Order at 51.

2. Positions of the Parties

MCI opposes NYNEX's motion, stating that, because NYNEX's request "is not based on any mistakes of law or fact in the Board's Order," it should be denied. MCI Response at 1. MCI specifically addressed two of the Company's arguments, summarized as follows:

- Bill and keep is consistent with the public interest and the Act. Under § 252(d)(2)(i) of the Act, the Board has the authority to adopt mutual traffic exchange. If Congress intended that bill and keep were to be limited *only* to voluntary agreements, the explicit reference to voluntary agreements in this section would be unnecessary, since such agreements can be entered into "without regard to the standards set forth in subsections b and c of Section 251."
- MCI, Frontier, and the ATP all presented evidence on mutual traffic exchange, and NYNEX presented evidence opposing it. The detailed record in Phase One provides ample support for the Board's decision on this point.

Id. at 2-4.

AT&T recommends that the Board deny NYNEX's motion on the ground that it "fails to bring any new insight or evidence on the issues addressed and should, therefore, be dismissed." AT&T Response at 1. Also, in arguing the Board's decision to adopt bill and keep "is consistent with both the spirit and letter of the Act," AT&T also responds to several specific points raised by NYNEX:

- Section 252(d)(2) of the Act is intended to protect against incumbent bargaining power, not guarantee any particular compensation arrangement for incumbents.
- Nothing in Sections 251 and 252(d)(2) prohibits mandated bill and keep arrangements.
- The Board's decision is supported by the record in this docket. Furthermore, NYNEX's argument that bill and keep distorts competitors' incentives to minimize costs is incorrect.
- By the terms of the Board's Order on bill and keep, reconsideration is unnecessary, since its designation as a default arrangement is interim only and, upon a demonstration of substantial harm (as opposed to an allegation merely), the Board will consider imposition of alternative arrangements.

Id. at 2-5.

The Alternative Technology Providers also oppose NYNEX's motion. Like MCI and AT&T, they argue that the Board's decision on bill and keep is lawful under the Act, represents sound policy and economics, and is supported by the record in this docket. ATP Response at 2-7.

3. Discussion

The Telecommunications Act of 1996 states that LECs "have the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications."

Act § 251(b)(5). LECs also have "the duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in [Sections 251(b) and (c)]." Act § 251(c). Finally, the Act requires state public utility commissions to review (and approve or reject) negotiated agreements and, in instances where complete agreement is not achieved, to "arbitrate any open issues" and resolve them. Act §§ 252(b)(1), (b)(4), and (e)(1).

NYNEX argues that, under Section 252(d) of the Act, the Board is precluded from imposing bill and keep. This section states that a state commission cannot find:

> the terms and conditions for reciprocal compensation to be just and reasonable unless [they] provide for the mutual and reciprocal recovery by each carrier of its costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier . . . .

Act § 252(d)(2)(A)(i). As the ATP point out, NYNEX interprets this subsection to mean that actual payment to the incumbent LEC for interconnection must occur, unless the incumbent waives payment and accepts an alternative arrangement, such as bill and keep. ATP Response at 3. However, the subsection of the Act that immediately follows belies NYNEX's interpretation:

> This paragraph shall not be construed . . . to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill and keep arrangements) . . . .

Act § 252(d)(2)(B)(i). Taken together, these subsections grant state commissions wide latitude in determining the appropriate charges and compensation mechanisms for the transport and termination of local traffic. As such, our decision is entirely consistent with the Act.[2]

On the evidence to date, we conclude that bill and keep promotes economic efficiency; it will also facilitate the emergence of competition in the local exchange for the benefit of Vermont consumers and the state's economy. In the Phase I Order, we stated that a demonstration of substantial harm would justify a reevaluation of this policy. In its motion to reconsider, NYNEX has raised several theoretical points that could, in specific factual circumstances, be shown to result in substantial harm; but, at this point, the Company has not made that demonstration. Of course, NYNEX remains free to file a petition that makes such a demonstration. Lastly, we must point out that our decision on bill and keep is intended to deal with one issue that may arise in arbitration proceedings *during the pendency of this docket*. Compensation mechanisms will be

2. NYNEX argues that the Act's use of the word "waive" in § 252(d)(2)(B)(i) reserves only to the parties to a negotiation the right to waive reciprocal compensation in favor of bill and keep. NYNEX Motion at 4-5. We do not agree.

revisited in light of the technical and cost study data that are considered in Phase II. *See* Procedural Order, 3/1/95 at 2 (fn. 2), 4.

B. Imputation

In the Phase I Order, we adopted the imputation rule proposed by the Hearing Officer, and adopted also a rebuttable presumption "that no meaningful differences between the costs of self-provisioning and wholesale provisioning exist." Phase I Order at 80.

1. NYNEX's Motion

NYNEX asks that we eliminate the rebuttable presumption on provisioning, arguing that it "is premature on this record" and that "it creates an evidentiary hurdle . . . for NYNEX to surmount . . . that does not exist for any other cost element." NYNEX Motion at 18-19. NYNEX argues that the Board, in adopting the rebuttable presumption prior to the completion of the cost studies, has prejudged the issue. *Id*. at 19-20.

2. Positions of the Parties

AT&T opposes NYNEX's motion, arguing that the presumption "is supported by the record and responds to strong and clear concerns of the Hearing Officer." AT&T Response at 5. MCI also opposes the motion, stating that "it is entirely reasonable and necessary for NYNEX to be required to demonstrate the costs that it incurs before imposing those costs on CLECs. Otherwise NYNEX would have unfettered discretion to load additional 'wholesale provisioning' charges into the rates it charges CLECs for wholesale services and network elements." MCI Response at 5. The ATP did not address the question.

3. Discussion

We decline to eliminate this rebuttable presumption at this time. It is fully supported by the record in this docket. Phase I Order at 34-35, 48-49, 80. We adopted it to assure a fair and orderly transition to local exchange competition, and to guard against anti-competitive behavior by incumbents.[3] In this light, it is entirely appropriate that the participants that are in possession

3. In its motion, NYNEX states that "There is no evidence of anti-competitive behavior on NYNEX's part in this or any other docket. . . . The Company strenuously objects to any such characterization of its conduct as implying that NYNEX engages in anti-competitive behavior." NYNEX Motion at 20, fn. 7. Our decision is not a finding with respect to NYNEX's behavior (which as the Phase I Order makes clear has been energetic and

(continued...)

of the relevant data (*i.e.*, incumbent LECs) be required to demonstrate the existence of particular costs before charging others for use of bottleneck monopoly inputs. We expect that the cost studies will shed further light on this issue.

C. Conclusion

For the foregoing reasons, we deny NYNEX's motion on both points.

SO ORDERED.

DATED at Montpelier, Vermont, this 4th day of September, 1996.

s/Richard H. Cowart	PUBLIC SERVICE
s/Suzanne D. Rude	BOARD
s/David C. Coen	OF VERMONT

OFFICE OF THE CLERK

FILED: 9/4/96

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board of any technical errors, in order that any necessary corrections may be made.

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and Order.

3. (...continued)
forthright). Instead, the presumption serves to set one of the "rules of the game" by inhibiting behavior that could be inimical to efficient markets.