

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 5713

Investigation into New England Telephone and)
Telegraph Company's (NET's) tariff filing re:)
Open Network Architecture, including)
the unbundling of NET's network, expanded)
interconnection, and intelligent networks in re:)
Phase II, UNE-Platform)

Order entered: 6/4/99

ORDER RE: HEARING OFFICER'S PROCEDURAL ORDER

In this order we deny the request of New England Telephone and Telegraph Company, d/b/a Bell Atlantic-Vermont ("BAVT" or "Company") for interlocutory review of the Hearing Officer's procedural order of March 16, 1999 ("March 16th Order") in this docket. In addition, we conclude that the Hearing Officer's decision not to stay filing requirements in this docket was also appropriate.

A. Background

On April 2, 1999, Bell Atlantic filed a motion requesting full Public Service Board ("Board") review of the Hearing Officer's March 16th Order, which set a schedule for further proceedings on the question of combined unbundled network elements (the so-called "UNE-Platform"¹). The Department of Public Service ("Department" or "DPS") and AT&T submitted responses to BAVT's motion, both arguing that it should be denied.

The Hearing Officer, by Order of April 7, 1999, treated BAVT's motion as a request for permission to seek interlocutory review by the Board, and granted the request. The Company did not also request, and the Hearing Officer did not grant, a stay of the procedural requirements of the March 16th Order, namely the filing by BAVT of proposed terms, conditions, and prices upon which it will make combined UNEs available. On April 14th, Bell Atlantic requested that stay, which was

1. "UNE" denotes *unbundled network element*. The UNE-Platform, or "UNE-P," refers to the recombination of UNEs necessary to the provision of basic local exchange service. AT&T Communications of New England, Inc., ("AT&T") is asking that Bell Atlantic be required to offer UNE-P to competitive local exchange companies ("CLECs") such that CLECs have to neither recombine the elements themselves nor pay the incumbent to do so. See Order of 10/8/98 at 4-5 ("October 8th Order").

opposed by the DPS on April 28th. On May 3rd, both AT&T and the DPS filed comments in opposition to Bell Atlantic's request that the Board reverse the Hearing Officer's March 16th Order. Lastly, on May 13th, the Hearing Officer issued an order in which he concluded that it was unnecessary to grant a stay of the UNE-P filing, and he directed the Company to make that filing by May 28, 1999.

B. Positions of the Parties

BAVT has raised three arguments in opposition to the March 16th Order. First, it contends that the March 16th Order is not wholly procedural, but substantive, in nature. Second, BAVT argues that the March 16th Order wrongly concludes that the Board retains jurisdiction over the issue, in light of the U.S. Supreme Court's recent decision in *AT&T v. Iowa Utilities Bd.*, 119 S. Ct. 721 (1999). Finally, argues BAVT, even if the Board retains jurisdiction, further action at this time would be a waste of administrative resources, while parties await the Federal Communications Commission's ("FCC's") decision on unbundled network elements (Rule 319) currently being considered.²

The Department opposes Bell Atlantic's motion on several grounds. First, it points out that the Board rarely grants motions for interlocutory review of Hearing Officer orders, thus discouraging litigation tactics that unnecessarily delay final resolution of substantive issues. Next, the DPS argues that the Telecommunications Act of 1996 ("Act") does not preempt the Board's authority to order incumbent local exchange companies ("LECs") to provide UNE-P to CLECs upon request. The Act, says the Department, "established a floor beneath which State regulatory bodies may not go, but not a ceiling on State efforts to encourage competition."³ The DPS, after reviewing the doctrine of preemption, contends that the U.S. Supreme Court's recent decision in *AT&T v. Iowa Utilities Bd.* "does not alter the 1996 Act's 'floor but no ceiling' paradigm."⁴ Lastly, the Department contends that there is no need to await the outcome of the FCC's rulemaking on UNEs: the Board has already

2. BAVT Motion, 4/2/99, at 1-2; see *Further Notice of Proposed Rulemaking*, CC Docket Nos. 96-98 and 95-185 (FCC 99-70), released April 16, 1999.

3. DPS Comments, 5/3/99, at 6.

4. *Id.* at 9.

established a list of elements to be unbundled from among which those relevant to UNE-P can be identified.⁵

AT&T's arguments echo those of the Department.⁶ In addition, AT&T contends that the Hearing Officer's March 16th Order rests on the same legal reasoning adopted by the Board in its October 8th Order. In that Order, the Board concluded that, under the Eighth Circuit's Rehearing Order in a proceeding concerning the validity of rules issued by the FCC to implement provisions of the Act,⁷ the Board nevertheless retained jurisdiction to require incumbent LECs to unbundle and, if the facts warranted, to provide UNE-P.⁸

C. Discussion and Conclusions of Law

We look to the Vermont Rules of Appellate Procedure ("V.R.A.P.") for guidance as to the appropriateness of granting interlocutory review. After considering BAVT's request and the Hearing Officer's March 16th Order, we conclude that the issues do not merit interlocutory review under the standard set forth in V.R.A.P. 5.1(a) or under that in V.R.A.P. 5(b).

Under V.R.A.P. 5.1(a), a court may permit an appeal to be taken from any interlocutory order or ruling "if the judge finds that the order or ruling conclusively determines a disputed question, resolves an important issue completely separate from the merits of the action, and will be effectively unreviewable on appeal from a final judgment."⁹ Further:

The order permitting or denying appeal shall contain a statement of the grounds upon which appeal has been permitted or denied and shall also order whether or not the proceedings shall be stayed, and upon what conditions.

If the trial judge denies the motion for interlocutory appeal, or denies a stay pending the taking of such an appeal, the judge shall allow adequate opportunity for the moving party to contact a single justice of the Supreme Court for a stay, which contact may be by telephone from the courthouse or in some other matter ordered by the judge.¹⁰

The Reporter's Notes to the rule add that:

5. *Id.* at 11-13.

6. AT&T Comments, 5/3/99, 1-14.

7. *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997); *Iowa Utilities Bd. v. FCC*, No. 96-3321 et al., 1997 U.S. App. LEXIS 28652 (8th Cir. Oct. 14, 1997) ("Rehearing Order" or "Eighth Circuit Decision"). It was this decision that was the subject of the U.S. Supreme Court's review in *AT&T v. Iowa Utilities Bd.*

8. AT&T Comments, 5/3/99, at 2, 7-8.

9. V.R.A.P. 5.1(a).

10. *Id.*

It is contemplated that pending this expedited appeal or request for a stay no proceeding or enforcement would occur which would prejudice the application to the single justice. Upon proper motion, the justice could rule on both a request for stay of the proceedings under this rule and a stay of the order under V.R.A.P. 8(a).¹¹

We conclude that the standard for granting an appeal under V.R.A.P. 5.1(a) is not met in this case for the simple reason that the Hearing Officer's March 16th Order neither conclusively determines any disputed question nor resolves any important issues completely separate from the merits of the action; nor will his Orders be effectively unreviewable on appeal from a final judgment. The Order at issue here was designed to facilitate the development of an evidentiary record upon which the Board can decide what UNE provisioning policies are appropriate for Bell Atlantic in Vermont. In establishing a procedural schedule, the Hearing Officer is simply acting in accordance with our October 8th Order.¹²

We also note, as we have in the past,¹³ that collateral appeals are discretionary interlocutory appeals,¹⁴ and that even where all of the threshold criteria are satisfied, the movant is not entitled to interlocutory review.¹⁵ Overriding the criteria is the need to balance the potential loss of certain rights against the important aim of avoiding piecemeal review.¹⁶ While BAVT has asserted that important rights are at issue here, it has failed to establish that this is, in fact, the case. Its assertions remain unsupported in spite of its pleadings on the matter.¹⁷

The standard for interlocutory appeal set forth in V.R.A.P. 5(b)(1) is likewise not met in this case. This Rule states that a judge "shall permit an appeal to be taken from any interlocutory order

11. *Id.* (Reporter's Notes, 1996 Supp. at 117). The Reporter's Notes also make clear that it is only a "small class" of decisions that fall within the exception to the final judgment rule. *Id.* (Reporter's Notes, 1996 Supp. at 114-115) (quoting *State v. Lafayette*, 148 Vt. 288, 291 (1987) and citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)).

12. "The Board is not precluded by federal law from examining whether incumbent LECs should be required to offer combined UNEs to competitive providers; furthermore, under Vermont law the Board is authorized to do so. However, we also conclude that the factual basis for determining whether such a conclusion is consistent with the public interest is lacking. In order to develop a UNE-combination policy that appropriately balances the objectives of economic efficiency, fairness, improved service, and creative product development, a full factual record must be developed. We hereby direct the Hearing Officer to take evidence and submit a proposed decision on this question." October 8th Order at 14.

13. Docket 5856, Order of 11/15/96 at 6.

14. *In re J.G.*, 160 Vt. 250 (1993).

15. *In re C.K.*, 156 Vt. 194 (1991).

16. *Id.*

17. The provision of V.R.A.P. 5.1(a) calling for "adequate opportunity . . . to contact a single justice of the Supreme Court for a stay," is not applicable to requests to the *Board* for interlocutory review. It would, of course, be relevant to a request for interlocutory review by the Vermont Supreme Court.

or ruling if the judge finds that the order or ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the termination of the litigation."¹⁸

We find no controlling question of law to be present here. The controlling question of law in this matter was decided by the Board over six months ago in our October 8th Order.¹⁹ Despite activity at the FCC, the State of Vermont has an interest, and Vermont's Public Service Board has the authority, to order unbundling of network elements, as appropriate, as long as such an order does not conflict with the Act or FCC practices.

There is, likewise, no substantial ground as to a difference of opinion here. The Board has held that it is authorized both under the Act and under Vermont law to order BAVT to provide UNE-P if the Board concludes that to do so is in the best interest of Vermont.²⁰ The recent decision of the U.S. Supreme Court in *AT&T v. Iowa Utilities Bd.*, which deals primarily with FCC jurisdiction under the Act, does not change our earlier conclusion.²¹

Nor, finally, can we conclude that an immediate appeal "may materially advance the termination of the litigation." On the contrary, it is obvious that an immediate appeal would serve only to protract this litigation even further. Over three years ago, in the spring of 1996, the Board concluded in Phase I of this docket that there would be at least six categories of elements which BAVT would need to unbundle. In spite of BAVT's argument that the Hearing Officer has decided substantive issues here, that is not the case. Indeed, there has been no record upon which the Hearing Officer could base any substantive decision regarding actual network elements. The denial of this motion will allow that process to go forward, and will materially advance the termination of this litigation.

For the foregoing reasons, we deny Bell Atlantic's motion for interlocutory review of the Hearing Officer's March 16th Order. We direct the Company to comply with the procedural requirements set out by the Hearing Officer, in order to facilitate an expeditious resolution of the substantive issues raised by AT&T's original request.

18. V.R.A.P. 5(b)(1).

19. October 8th Order at 14; see footnote 12 and text, *supra*.

20. *Id.*

21. The Hearing Officer reached this same conclusion in his March 16th Order (at 5).

SO ORDERED.

Dated at Montpelier, Vermont, this 4th day of June, 1999.

s/ Richard H. Cowart)

) PUBLIC SERVICE

s/ Suzanne D. Rude)

) BOARD

s/ David C. Coen)

) OF VERMONT

OFFICE OF THE CLERK

FILED: June 4, 1999

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.