

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)

Order entered: 3/16/99

ORDER RE:
PROCEDURAL SCHEDULE FOR FURTHER PROCEEDINGS ON THE UNE PLATFORM

A. Background

On October 8, 1998, the Public Service Board ("Board") concluded that federal law does not preempt state power to order local exchange companies ("LECs") to offer combined unbundled network elements ("UNEs") to competitive LECs ("CLECs") and other telecommunications providers who request them. Furthermore, the Board concluded that it has sufficient authority under current Vermont law to direct incumbent LECs to recombine UNEs for CLECs, if the Board concludes that such recombination is appropriate. The Board, however, also decided that it lacked a factual record in this docket upon which to base such a conclusion and, consequently, the Board directed the Hearing Officer to take evidence and submit a proposed decision on this question.

On January 25, 1999, in *AT&T Corp. v. Iowa Utilities Board*,¹ the Supreme Court resolved a number of challenges to rules promulgated by the Federal Communications Commission ("FCC" or "Commission") in implementing the Telecommunications Act of 1996 (the "1996 Act" or the "Act"). The Court upheld some aspects of the Eighth Circuit Court of Appeals' decision, and reversed others.² The Court held that:

1. *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999) ("*AT&T Corp.*").

2. *Iowa Utilities Board v. FCC*, 120 F3d 753 (1997).

- Section 201(b) of the Telecommunications Act, 47 U.S.C. § 201(b), gives the FCC jurisdiction to implement all of the Act's provisions, including in particular the Act's pricing provisions;³
- Rule 315(b), 47 C.F.R. § 51.315(b), which prevents incumbent LECs from disconnecting previously connected elements before leasing them to competitors, is a lawful and reasonable construction of § 251(c)(3) of the Act;⁴
- Rule 809, 47 C.F.R. § 51.809, the "pick and choose" rule, is a lawful and reasonable construction of § 252(i) of the Act;⁵ and
- Rule 319, 47 C.F.R. § 51.319, identifying which network elements the FCC would "unbundle," could not be upheld on the present record because the FCC did not adequately consider the statutory standards set out in § 251(d)(2).⁶

By memorandum dated January 27, 1999, I asked the parties to comment on the Supreme Court's rulings and to "offer their informed opinions as to how this component of the docket should proceed."⁷

B. Parties' Comments

New England Telephone and Telegraph Company d/b/a Bell Atlantic-Vermont ("BAVT") takes the position that the Board "has no ability under state law to determine BAVT's responsibilities with respect to matters falling within the scope of § 251(c)(3) of the Act."⁸ BAVT contends that the Board's October 10, 1998, decision "is now a nullity as a result of the Supreme Court decision."⁹ Further, BAVT argues that if the Board lacks jurisdiction then, pursuant to Vt. R. Civ. P. 12(h)(3) (which is incorporated by PSB Rule 2.103), "[the Board] must dismiss this portion of the proceeding."¹⁰

3. *AT&T Corp.*, 119 S. Ct. at 729-33.

4. *Id.* at 736-38.

5. *Id.* at 738

6. *Id.* at 734-36. The Supreme Court did not address the merits of the FCC's pricing rules. Nor did the Supreme Court address how its construction of the Act would affect other rules that the Eighth Circuit has upheld (*e.g.*, Rule 317, 47 C.F.R. § 51.317) or has invalidated (*e.g.*, Rule 315(c)-(f), 47 C.F.R. § 51.315(c)-(f)).

7. Hearing Officer Memorandum to Parties in 5713, 1/27/99. Among the questions that the parties were to address were whether the Court's decision precludes the need for further action by the Board with respect to UNE-Platform and, if not, then what are the issues that remain to be resolved, and are evidentiary hearings necessary?

8. BAVT Comments, 2/10/99 at 1-2. See also BAVT Reply Comments, 2/17/99.

9. *Id.* at 2, n. 1.

10. *Id.*

In addition to arguing that the Board has no jurisdiction over the manner in which LECs provide CLECs with UNEs, BAVT contends that "even if the Board is eventually given the authority to decide which elements must remain combined as a matter of implementing federal policy in specific cases, no regulation currently exists for the Board to interpret or enforce."¹¹ In other words, adds BAVT, "there currently exists no requirement regarding combinations of elements for the Board to implement."¹²

AT&T Communications of New England, Inc., ("AT&T") has a different perspective. According to AT&T, not only does the Board have the requisite authority, but it should exercise it and "issue an order expressly requiring Bell Atlantic-Vermont to provide UNE combinations, and delineating principles for establishing lawful prices for UNE combinations."¹³ AT&T maintains that the recent Supreme Court case makes it clear that (1) BAVT must provide the UNE-Platform and all other UNE combinations to CLECs upon request; (2) that BAVT may not disassemble UNE combinations before leasing them to CLECs; and (3) that BAVT may not assess any "glue charge"¹⁴ for the use of any UNE combinations that is not based on forward-looking costs.¹⁵ In support of its contentions, AT&T argues, in essence, that the Board has already addressed what amounts to a preemption argument by BAVT. That argument, says AT&T, was rejected by the Board in its October 8, 1998, Order.¹⁶

The Department of Public Service ("DPS" or "Department") takes substantially the same positions as AT&T. With respect to jurisdiction, the DPS argues that "the Board need look no further than its October 8, 1998, order in this docket."¹⁷ According to the DPS, for "precisely the same reasons that the Board found it was not preempted on UNE combinations, it should find that the Act does not preempt it from requiring incumbent LECs to provide UNEs in addition to those required by the Act or by the FCC."¹⁸

11. *Id.* at 3.

12. *Id.*

13. AT&T Comments, 2/9/99, at 1.

14. *I.e.*, a charge for providing assembled network elements.

15. *Id.* at 2.

16. *Id.*

17. DPS Reply Comments, 2/17/99, at 4.

18. *Id.*

As to BAVT's concerns over the alleged absence of appropriate standards to apply, the DPS does not see a problem, arguing that "the thrust of the Court's decision is to uphold 47 C.F.R. § 51.315(b), which forbids an incumbent from separating already-combined network elements before leasing them to a non-incumbent" ¹⁹ The DPS contends that, though, for the time being, the Court's decision leaves no FCC rule defining a set of UNEs, the Act empowers states to identify elements to be unbundled, in addition to those named by the FCC²⁰; besides, the Act itself enumerates UNEs in § 271(c)(2)(B).²¹ Furthermore, adds the Department, the Board, in its Phase I Order of May 29, 1996, has already established the set of elements that incumbent LECs are required to unbundle.²² According to the Department, the Court's decision to vacate Rule 319 poses no problem:

While the forthcoming FCC rules may require a set of elements that is either more or less expansive, the Act does not preempt the Board's requirement to unbundle these elements. If the forthcoming FCC rule establishes sets [sic] a higher floor – requiring incumbents to unbundle additional elements – then Bell must make the FCC's larger set of elements available. If instead the FCC's rule establishes a lower floor – reducing the set of elements that incumbents are required to unbundle – the Board's Phase I unbundling requirements will be above the Act's floor and will remain intact. Regardless of the outcome of the FCC proceeding, then, the Board will retain authority to require unbundling of the elements that in Phase I it tagged for unbundling. Consequently, the Board may and should enforce its unbundling requirement immediately.²³

C. Conclusion

The absence of an FCC-prescribed list of UNEs does not relieve incumbent LECs of their obligation under the Act to provide unbundled elements to competitors – indeed, BAVT already makes leased elements available by contract and through its statement of generally available terms

19. *Id.* at 2.

20. *Id.* at 5, citing § 261(b) of the Act, which preserves state regulations enacted prior to the Act, and § 261(c), which authorizes states to impose requirements on carriers for intrastate services, so long as the requirements are not in either case inconsistent with the Act.

21. *Id.* at 2. According to the "competitive checklist" in § 271(c)(2)(B) of the Act, regional Bell Operating Companies such as BAVT must provide access to local loop transmission from the central office to the customer's premises, local transport from the trunk side of a wireline local exchange carrier switch, local switching, and nondiscriminatory access to databases and associated signaling. *Id.*

22. *Id.* at 3. This list includes the local loop, end-office switching, inter-office transport, tandem switching, signaling, directory assistance, access to E-911, and operations support systems. Docket 5713, Order of 5/29/96 at 19-21.

23. *Id.* at 3-4.

("SGAT"). Also, the U.S. Supreme Court's decision in *AT&T Corp.* upholds the FCC's interpretation of § 251(c)(3) of the Act, which prevents incumbents from wastefully disassembling combined elements before providing them to CLECs. Once more, the absence of an FCC list of UNEs does not free LECs of this duty, although there may remain legitimate disagreement about which elements should be made available; but it is into this breach that state jurisdiction under both the Act and state law neatly steps.

BAVT's position is premised on a fundamental misconception of this Board's responsibilities. BAVT apparently reasons that because the FCC's Rule 319, identifying leased network elements, has been vacated, the Act's savings clauses and Vermont law somehow become irrelevant. However, AT&T is correct when it states that "Nothing in the Supreme Court's decision in any way diminishes the power of the Board to act in a manner consistent with the Act, as construed by the Federal Communications Commission."²⁴ The Department's comments on this point provide the theoretical underpinning for AT&T's declaration and bear full quotation here:

While [the decision] makes it clear that the FCC has rulemaking authority with respect to the local competition provisions of the Act, the Court's decision does not limit the scope of the Act's savings clauses and does not expand the scope of the Act's preemption provisions. Read together, the Act's broad savings clauses and narrow preemption provisions establish a floor beneath which State regulatory bodies may not go, but not a ceiling on State efforts to encourage competition. Applied to the issue of network elements that incumbent LECs must handle, the legislative regime devised by Congress prohibits States from restricting the set of unbundled elements required by the Act or by FCC rule, but States may supplement that set of unbundled elements in order to facilitate entry and competition.²⁵

Both AT&T and the DPS are correct in their assessment of the Board's October 10, 1998 Order. While it is true that, in that Order, the Board was dealing with the Eighth Circuit's decision, the Board's reasoning applies with equal force to the U.S. Supreme Court's decision in *AT&T Corp.* because both cases address the validity of FCC rules and the nature of FCC authority under the Act. The Board's conclusions about state jurisdiction are unchanged by *AT&T Corp.*²⁶

24. AT&T Reply Comments, 2/17/99, at 2.

25. DPS Reply Comments, 2/17/99 at 3. See also the savings provisions in § 251(d)(3) of the Act.

26. However, at least one question that the Board asked me to investigate has been mooted. In the October 8th Order, the Board did not conclude that requiring incumbent LECs to offer combined UNEs (the so-called UNE-Platform or UNE-P) was an appropriate policy (it lacked evidence to make that determination), but only that it had authority to so find, if the record warranted it. The U.S. Supreme Court's ruling on FCC Rule 315(b) appears to have decided this issue.

For all these reasons, I conclude that the Board has authority to continue this portion of the investigation and to require parties to address its next phase, namely, the factual basis for the development of a UNE-combination policy that appropriately balances the objectives of economic efficiency, fairness, improved service, and creative product development.

It need not be a contentious enterprise. In its Phase I Order of May 29, 1996, the Board named six categories of elements to be unbundled, and they bear a striking resemblance to those listed in § 271(c)(2)(B) of the Act.²⁷ Moreover, Bell Atlantic has informed the FCC that it intends to continue making available each of the network elements defined in the now-vacated FCC rule. And, of course, BAVT offers UNEs under its SGAT. Presumably, included in these sets of elements are those that AT&T (or another CLEC) would like to see provided in a UNE-Platform. In order to proceed most expeditiously, I direct AT&T and any other party wishing to do so to file within twenty-one (21) days a description of the elements that it wishes to purchase on a combined basis. Within twenty-one days following AT&T's filing, BAVT shall file the terms, conditions, and prices upon it will make the combined elements available. If, at that point, a dispute arises, a party may file for relief from the Board. With any such filing, the party should include a proposed procedural schedule for resolving the disagreement.

SO ORDERED.

27. Phase I Order at 20.

DATED at Montpelier, Vermont, this 16th day of March, 1999.

s/ Frederick W. Weston III
Frederick W. Weston, III
Hearing Officer

OFFICE OF THE CLERK

FILED: March 16, 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.