

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE ARBITRATION OF:

SPRINT COMMUNICATIONS COMPANY L.P.,

Petitioning Party,

vs.

ACE COMMUNICATIONS GROUP, CLEAR LAKE INDEPENDENT TELEPHONE COMPANY, FARMERS MUTUAL COOPERATIVE TELEPHONE CO. OF SHELBY, FARMERS TELEPHONE COMPANY, FARMERS MUTUAL TELEPHONE COMPANY, GRAND RIVER MUTUAL TELEPHONE CORPORATION, HEART OF IOWA COMMUNICATIONS COOPERATIVE, HEARTLAND TELECOMMUNICATIONS COMPANY OF IOWA d/b/a HICKORYTECH, HUXLEY COMMUNICATIONS, IOWA TELECOMMUNICATIONS SERVICES, INC., d/b/a IOWA TELECOM f/k/a GTE MIDWEST, KALONA COOPERATIVE TELEPHONE, LA PORTE CITY TELEPHONE COMPANY, LEHIGH VALLEY COOPERATIVE TELEPHONE ASSOCIATION, LOST NATION-ELWOOD TELEPHONE COMPANY, MINBURN TELECOMMUNICATIONS, INC., ROCKWELL COOPERATIVE TELEPHONE ASSOCIATION, SHARON TELEPHONE, SHELL ROCK TELEPHONE COMPANY d/b/a BEVCOMM c/o BLUE EARTH VALLEY TELEPHONE COMPANY, SOUTH CENTRAL COMMUNICATIONS, INC., SOUTH SLOPE COOPERATIVE TELEPHONE COMPANY, SWISHER TELEPHONE COMPANY, VAN BUREN TELEPHONE COMPANY, INC., VENTURA TELEPHONE COMPANY, INC., VILLISCA FARMERS TELEPHONE COMPANY, WEBSTER CALHOUN COOPERATIVE TELEPHONE ASSOCIATION, WELLMAN COOPERATIVE TELEPHONE ASSOCIATION, and WEST LIBERTY TELEPHONE COMPANY d/b/a LIBERTY COMMUNICATIONS,

Responding Parties.

DOCKET NO. ARB-05-2

ORDER ON REHEARING

(Issued November 28, 2005)

INTRODUCTION

On March 31, 2005, Sprint Communications Company L.P. (Sprint) filed with the Utilities Board (Board) a petition for arbitration pursuant to 47 U.S.C. § 252, seeking an interconnection agreement with 27 rural local exchange carriers (RLECs)¹ in Iowa. The RLECs filed two motions to dismiss on April 15, 2005, arguing that Sprint was not entitled to invoke the arbitration provisions of the federal law. On May 26, 2005, the Board issued an order granting the motions and dismissing Sprint's petition. The Board found that, based on the record at that time, Sprint would not be making its services available on a common carrier basis in the exchanges at issue. As a result, Sprint was not entitled to invoke the arbitration and negotiation process under the federal act. "Order Granting Motions to Dismiss" at pages 11-17.

On June 23, 2005, Sprint filed a complaint in the United States District Court for the Southern District of Iowa,² asking the court to overturn the Board's decision. In the course of those proceedings, it became apparent that Sprint intended to

¹ Ace Communications Group, Clear Lake Independent Telephone Company, Farmers Mutual Cooperative Telephone Co. of Shelby, Farmers Telephone Company, Farmers Mutual Telephone Company, Grand River Mutual Telephone Corporation, Heart of Iowa Communications Cooperative, Heartland Telecommunications Company of Iowa d/b/a HickoryTech, Huxley Communications, Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom, Kalona Cooperative Telephone, La Porte City Telephone Company, Lehigh Valley Cooperative Telephone Association, Lost Nation-Elwood Telephone Company, Minburn Telecommunications, Inc., Rockwell Cooperative Telephone Association, Sharon Telephone, Shell Rock Telephone Company d/b/a BEVCOMM c/o Blue Earth Valley Telephone Company, South Central Communications, Inc., South Slope Cooperative Communications Company, Swisher Telephone Company, Van Buren Telephone Company, Inc., Ventura Telephone Company, Inc., Villisca Farmers Telephone Company, Webster Calhoun Cooperative Telephone Association, Wellman Cooperative Telephone Association, and West Liberty Telephone Company d/b/a Liberty Communications.

² Sprint Comm. Co. LP v. IUB, Case No. 4:05-CV-00354 (S.D. Iowa 2005).

introduce evidence in the court proceedings that Sprint had not presented to the Board. In the same general time frame, public utility commissions in other states were considering similar evidence and concluding that in similar circumstances Sprint would be a telecommunications service provider.³ Accordingly, Sprint and the Board stipulated to a remand of the court proceedings to allow the Board to review the previously-unseen evidence and arguments and reconsider its May 26, 2005, order. On August 18, 2005, the Court approved a 60-day remand for that purpose.

On October 17, 2005, the Court granted a joint motion of the parties to extend the remand to November 21, 2005.

The major issue at this time is whether Sprint's proposed activities in the RLEC exchanges will support a finding that Sprint will be a "common carrier" in those exchanges. If so, then Sprint will be a "telecommunications service provider" (as defined in 47 USC § 153) and is therefore entitled to invoke the arbitration process under the federal act. If the Board finds that Sprint meets the test, then the arbitration proceedings will be resumed at the stage where they were terminated, with approximately 79 days left.

Determining whether a carrier is a "common carrier," as opposed to a private carrier or contract carrier, requires application of a two-pronged test that can be summarized as follows:

³ See, e.g., Cambridge Telephone Co., et al., Docket Nos. 05-0529, et al., "Final Order" (Illinois Commerce Commission, July 13, 2005) (Rehearing denied August 23, 2005); Petition of Sprint Comm. Co. L.P. for Arbitration, "Order Resolving Arbitration Issues," Cases 05-C-0170 and 05-C-0183 (New York Public Service Commission, May 24, 2005).

1. Does the carrier hold itself out to serve all potential users indifferently?
2. Does the carrier allow customers to transmit intelligence of their own design and choosing?

NARUC v. FCC, 525 F.2d 630 (D.C. Cir. 1976). The first prong was further clarified in United States Telecom Ass'n v. FCC, 295 F.3d 1326, 1329 (D.C. Cir. 2002), by noting that a carrier that offers its service only to a defined class of customers can still be considered a common carrier if it holds itself out to serve all within that class indiscriminately. The focus of this proceeding is on the first factor; there is no dispute in this record that Sprint does not regulate or alter the content of the messages it transmits.

Regarding the first factor, Sprint's position is that "as long as Sprint offers its services indiscriminately to entities that are capable of providing their own last mile facilities; [sic] it may enter into separate agreements with users and maintain its status as a common carrier." (Sprint Prehearing Brief at p. 15.) In other words, Sprint argues that as long as it is willing to provide interconnection services to any cable television company (or anyone else with last-mile facilities), it is a common carrier, even if it negotiates individual, confidential contracts with each such entity.

Sprint also argues that it is a telecommunications service provider because it will indirectly offer service "to that subset of the general public consisting of customers of MCC [MCC Telephony Services of Iowa, Inc.] and other similarly situated competitive service providers that utilize Sprint's service... ." (Sprint Prehearing Brief at p. 8.) In other words, Sprint argues that it can establish its own

status based on the fact that MCC will serve the public indiscriminately and Sprint will be serving MCC. The RLECs argue that this proves too much, since the same argument would make every supplier that MCC deals with into a telecommunications service provider.

The RLECs point out that they have expressed their willingness to negotiate with MCC, or with Sprint as agent for MCC, but Sprint has refused to negotiate in any capacity other than in its own name. The RLECs appear to be suspicious of this approach and insist they have a right to an interconnection agreement with the competitive local exchange carrier (CLEC) that will actually be offering retail service to the public, this is, with MCC.

Board member Stamp previously was an attorney with the law firm which is representing Sprint in this matter. However, during his time with the firm as it pertains to this matter, Board member Stamp did not do any work for Sprint, was not involved in counseling or advising Sprint, and was not privy to any confidential information involving Sprint. After reviewing the relevant professional codes, General Counsel has advised Board member Stamp that he may participate in the decision-making in this docket.

SUMMARY OF THE POSITIONS OF THE PARTIES

A. Sprint's evidence

To provide voice service, Sprint provides the switching, the public switched telephone network (PSTN) interconnectivity including all intercarrier compensation,

numbering resources and porting, toll service, operator and directory assistance, 911 circuits, and numerous back-office functions. (Transcript of hearing of October 18, 2005, at p. 22, hereinafter referred to as "Tr. 22.") In this case, it is MCC that provides the last-mile functions to the customer premise, sales, billing, customer service, and installation. (Id.) Sprint uses this business model to provide competitive telephone service to over 500,000 customers in 13 states. (Tr. 23.) Carriers such as MCI use this same business model in six other states. (Id.)

Neither Sprint nor MCC is the agent of the other party. (Id.) Each company has independent obligations under its contract to provide specific parts of the network. The business model capitalizes on the resources and capabilities of both companies to allow market entry sooner than if either company were to attempt to do it alone. (Tr. 24.)

Although this business model is not the only way to provide competitive facilities-based telephone service, it is a legitimate business model that qualifies for interconnection under the Act, according to Sprint. The Act gives competitive LECs three options for providing service: 1) self-provisioning, 2) resale, or 3) leasing unbundled network elements from an ILEC. New entrants may also employ a combined approach where one carrier provides some of the facilities necessary to provide service and other carriers provide other parts of the network. The Act also requires all LECs, including CLECs, to resell their services to other competitors. In

the case at hand, Sprint is one CLEC reselling its services to a second CLEC – MCC.
(Tr. 27.)

In over 30 markets across the country, Sprint acts as a retail service provider by purchasing switching and interconnection from another CLEC and purchasing loops from the ILEC to provide service. (Tr. 31.) Sprint says this is comparable to the proposed Sprint/MCC arrangement in Iowa, with MCC (as the retail service provider) purchasing switching and interconnection from Sprint. (Id.)

In other markets, Sprint has purchased unbundled network elements from another CLEC which has purchased them from the ILEC. (Id.) Again, Sprint says this is comparable to the Sprint/MCC arrangement, except in those markets Sprint is the retail service provider where in Iowa MCC will be the retail service provider.

Sprint has entered into arrangements with other cable companies in 18 states including MCC, Wide Open West, Time Warner Cable, Wave Broadband, and Blue Ridge Communications. (Tr. 38.) Sprint will offer its interconnection services to all entities similarly situated to MCC with last-mile facilities to the cable companies. Through these arrangements Sprint provides services to all within the class similar to MCC to allow those services effectively to be offered to the public. However, the network configurations will not be identical for each entity that intends to use Sprint's services, because different carriers will have different requirements. (Tr. 39.)

On October 17, 2005, the day before the hearing in this matter, Sprint filed with the Board a proposed tariff for a wholesale service offering.⁴ (Tr. 13.) The proposed tariff is offered only to competitive service providers that are similarly situated to cable companies. (Tr. 57-58.) The proposed tariff reflects only a portion of the services reflected in the contract between Sprint and MCC. (Tr. 59-60.) The contracts Sprint has entered into with cable companies to date reflect "a lot of material differences in the business relationship that Sprint has with the cable companies or any other similarly situated company... ." (Tr. 61-62.) As a result, the pricing is different in each of these contracts. (Tr. 64.)

B. Sprint's argument.

Pursuant to § 251(a) of the Act, a party must be a "telecommunications carrier" to be entitled to interconnection. Sprint's proposed services fit the definition of "telecommunications carrier" and "telecommunications services" within the definitions of sections 153(44) and 153(47). State commissions in Illinois and New York have affirmed Sprint on this point and the Ohio Commission has affirmed MCI on this point. Since Sprint's switches will terminate MCC traffic to the public switched telephone

⁴ The RLECs objected to consideration of the proposed tariff as a part of this docket, based on the lack of time available to review the proposed tariff. (Tr. 14.) The Board noted the objection and reserved the option of scheduling additional hearing time for cross-examination concerning the proposed tariff, if necessary. (Tr. 15.) The Board then issued an order giving the RLECs until October 24, 2005, to file in this docket a response to Sprint's proposed tariff, addressing the possible effect of the tariff on the issue currently before the Board: whether Sprint's proposed activities would make it a "telecommunications carrier" for purposes of 47 U.S.C. §§ 251 and 252. No response was filed.

network (PSTN), this clearly falls within the definition of “telephone exchange service” in § 153(47).

The RLECs contend that entering into an interconnection agreement with Sprint would somehow interfere with their § 251(b) rights with respect to MCC. Sprint asserts that this is a red-herring argument that should be disregarded. The presence of an interconnection agreement with Sprint would in no way preclude the RLECs from seeking a separate agreement with MCC. (Tr. 50.)

The RLECs also contend that even if they are required to interconnect, Sprint would not be entitled to local number portability or dialing parity pursuant to § 251(b). On this claim, Sprint argues, the RLECs are wrong on two counts. First, Sprint meets the statutory definitions of both “telephone exchange service” and “exchange access” making Sprint a “local exchange carrier” pursuant to § 153(26) and is explicitly eligible for rights under § 251(b). Second, even if Sprint were not a “local exchange carrier” within the meaning of the Act, a plain reading of § 251(a) makes it clear that the obligation to interconnect directly or indirectly extends to all telecommunications carriers – not just local exchange carriers. The Tenth Circuit Court of Appeals in *Atlas Telephone* upheld this principle.⁵ (Sprint Initial Brief pp. 15-16.)

C. RLEC evidence

In October 2004, each of the RLECs received a letter from Sprint requesting interconnection pursuant to §§ 251 and 252 of the Act. (Tr. 179.) The letter from

⁵ *Atlas Telephone Co., et al. v. Oklahoma Corp. Comm'n, et al.*, 400 F.3d 1256 (10th Cir. 2005).

Sprint did not mention Sprint's intent to use the interconnection agreement to provide services to other local exchange carriers or to MCC. (Id.) After some communication, the RLECs determined that Sprint was not requesting interconnection as a CLEC, but was seeking an agreement to enable it to provide certain business services to MCC. Iowa Telecom, and perhaps other RLECs, offered to execute an interconnection agreement either with MCC as a CLEC or with Sprint as MCC's agent. (Tr. 179.) This offer was rejected. (Id.) There have been no requests from MCC for interconnection. (Id.)

The RLECs believe MCC is a local exchange carrier, while Sprint is merely one of many suppliers of resources needed by MCC to provide local exchange service. (Tr. 180.) This is confirmed in Sprint's prehearing brief where it states "MCC will outsource much of the network functionality, operations and back-office systems to Sprint... Service will be provided in MCC's name and MCC will be responsible for its local network, marketing and sales, end-user billing, customer service and installation." (Sprint Prehearing Brief p. 3.)

Many ILECs and CLECs procure operator services, directory assistance, and directory publishing services from other vendors rather than producing these capabilities themselves. (Tr. 182.) None of these vendors are considered local exchange carriers, even though the services they provide may be "vital and necessary components of a total service package." (Id.) Sprint is trying to convince

the Board to significantly expand its definition of carrier activities to encompass vendor and contractor services.

D. RLEC argument.

Affording Sprint the legal status for negotiation and arbitration pursuant to §§ 251 and 252 would produce competitive distortions that would affect the rights of both ILECs and CLECs. Further, even if the Board were to find that Sprint is entitled to interconnection pursuant to § 251(a), Sprint would not satisfy the requirements of § 251(b). This is because Sprint is not providing “telephone exchange service” or “exchange access” pursuant to § 153. Thus, without meeting the requirements of 251(b), Sprint would not be entitled to local number portability or dialing parity. (RLEC Initial Brief pp. 13-19.)

BOARD ANALYSIS

At this stage of this proceeding, the Board must answer one question: Is Sprint proposing to operate as a common carrier in the service territories of the 27 RLECs? If the answer is yes, then Sprint will be a telecommunications service provider and is entitled to invoke the negotiation and arbitration provisions of 47 USC § 252 and seek interconnection pursuant to § 251. The Board will then re-commence the arbitration docket as soon as general jurisdiction of the matter is restored to the

agency. This is the conclusion that the Illinois, New York, and Ohio commissions have reached.⁶

If the answer is no, then Sprint does not have the right to negotiation and arbitration pursuant to § 252.⁷ The Board will not change its May 26, 2005, order, and the matter will either return to court or MCC will send a bona fide request for negotiations to the RLECs.

In order to invoke the negotiation and arbitration procedures of § 252 and, therefore, the interconnection obligations in § 251(a), Sprint must show that it is a "telecommunications carrier" pursuant to § 153(44) of the Act. The relevant part of § 153(44) defines "telecommunications carrier" as "any provider of telecommunications services... ." Section 153(46), in turn, defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such class of users as to be effectively available directly to the public, regardless of the facilities used."

⁶ Sprint Communications Company L.P., Petition For Consolidated Arbitration with Certain Illinois Incumbent Local Exchange Carriers, "Proposed Arbitration Decision," Docket No. 05-0402 (Ill. Commerce Comm'n, October 26, 2005); Petition Of Sprint Communications Company L.P. For Arbitration To Establish An Inter-carrier Agreement With Independent Companies, "Order Resolving Arbitration Issues," Case No. 05-C-0170 (NYPSC May 18, 2005); Application And Petition In Accordance With Section II.A.2.b Of The Local Service Guidelines Filed By The Champion Telephone Co., et al., Case No. 04-1494-TP-UNC, "Order On Rehearing" (Ohio PUC January 26, 2005).

⁷ This is the decision the Nebraska commission recently reached in similar circumstances, Sprint Communications Co. LP, Petition For Arbitration Between Sprint And Southeast Nebraska Telephone Co., Application No. C-3429 (Neb. PSC September 13, 2005).

This statutory language has been the subject of interpretation by the FCC and the courts,⁸ which have held that in order to be a "telecommunications carrier," an entity must be a "common carrier." The leading case is Virgin Islands Telephone v. FCC, 198 F.3d 921 (D.C. Cir. 1999), in which the court affirmed an FCC determination that an AT&T affiliate was not a "telecommunications carrier" under the act because it would not function as a "common carrier."

Common carrier status is determined by a two-pronged test: First, whether the carrier holds itself out to serve all potential users indiscriminately and, second, whether the carrier allows each customer to transmit information of the customer's own design and choosing. United States Telecom Ass'n v. FCC, 295 F.3d 1326, 1329 (D.C. Cir. 2002), citing National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 642 (D.C. Cir. 1976). The key determinant is whether an entity is holding itself out to serve indiscriminately. Virgin Islands Tel., 198 F.3d at 927, citing NARUC I, 525 F.2d at 642. "But a carrier will not be a common carrier where its practice is to make individualized decisions in particular cases, whether and on what terms to deal. It is not necessary that a carrier be required to serve all indiscriminately; it is enough that its practice is, in fact, to do so." NARUC I, 525 F.2d at 641, footnotes omitted.

⁸ Because as state commission assumes federal authority when it acts pursuant to §252 of the Act, the Board is required to employ these standards when arbitrating an interconnection agreement. Bell Atlantic-Delaware, Inc. v. Global NAPS South, Inc., 77 F.Supp.2d 492, 500 (D. DE 1999).

Applying these standards to the record before it, the Board finds that Sprint has carried its burden of showing that it is proposing to operate as a common carrier in the RLEC service territories. It is clear that Sprint is willing to provide wholesale services to any last-mile retail service provider that wants Sprint's services in Iowa.

Thus, the Board finds that Sprint is a common carrier and therefore a telecommunications carrier under the Act. While Sprint does not offer its services directly to the public, it does indiscriminately offer its services to a class of users so as to be effectively available to the public, that class consisting of entities capable of offering their own last-mile facilities. Thus, Sprint meets the first prong of the NARUC I test, as clarified by USTA. (Sprint also meets the second prong of the NARUC I test by not altering the content of the communications it will carry; there was no dispute concerning this part of the test.)

The RLECs point out that each contract Sprint has with a last-mile provider has a different price and all of those prices are considered by Sprint to be confidential. The RLECs argue, in essence, that Sprint cannot be holding itself out to serve the public indiscriminately under these conditions. The Board disagrees for three reasons.

First, it should be no surprise that each contract has different provisions, including different prices. The fact is that the business of selling these wholesale services has not evolved into a standardized offering. Sprint is offering numerous different wholesale services and different last-mile providers will purchase different

pieces to create their own distinct bundles. When each contract is for a different set of services, it should be no surprise that each contract has different pricing.

Second, it is unsurprising that the parties to these contracts consider the specific terms and conditions, including the pricing, to be confidential. One of the points of the Act was to create and foster competition in the local exchange marketplace. Competitors typically do not want their competition to know their costs and consider cost information to be a trade secret. It is reasonable to expect that as competition increases, the willingness of the competitors to reveal their cost data will decrease.

Third, because each contract involves a unique set of circumstances and a unique bundle of services, cost comparisons between the contracts would not be particularly meaningful. To know that a bundle of services sold to one last-mile provider costs one price, and a bundle sold to another last-mile provider costs another price would tell a potential buyer with different needs little or nothing about the cost of the bundle Sprint could provide to that buyer. Again, this market has not developed to produce standardized, cookie-cutter offerings.⁹

Finally, there appears to be an underlying concern in the RLEC position that Sprint and MCC are insisting upon this particular business model in order to achieve some as-yet-unspecified advantage. For example, the RLECs argued that if they are

⁹ In this context, it is important to note that the Board is not relying on Sprint's day-before-hearing tariff filing in support of this ruling. While Sprint may have identified one small part of the overall bundle of services that can be standardized and filed as part of a tariff, it is not a complete bundle of services and is irrelevant to this analysis.

required to enter into an interconnection agreement with Sprint, rather than MCC, the RLECs might be denied some rights under § 251. During the course of this proceeding, Sprint was able to respond to each of the concerns raised by the RLECs, but the RLECs may still be concerned. (See, e.g., Tr. 49, 50, 165.) The Board will not reject Sprint's preferred business model on the basis of unspecified concerns, but the Board emphasizes that if any anti-competitive problems develop as a result of this approach, the RLECs may file an appropriate complaint with the Board.

Having reconsidered its May 26, 2005, order on the basis of the additional evidence presented to the Board, the Board concludes that Sprint's proposed business plan with MCC in the RLEC exchanges is sufficiently affected with the public interest to establish that Sprint will be operating as a common carrier. This means, in turn, that Sprint will be a telecommunications carrier in these exchanges and is therefore entitled to invoke the arbitration provisions of 47 U.S.C. § 252. As a result, the Board will reinstate the pending arbitration proceedings at the point at which they were terminated, just as soon as general jurisdiction of this matter has been restored to the Board by Court order, by dismissal of the Court action, or by other appropriate means. Picking up the schedule where it left off, the parties and the Board will have only 79 days to complete this arbitration (in the absence of a joint waiver or other agreement by the parties to extend the arbitration deadline). This is an unusually tight time frame, made even more so by the fact that the parties have

not negotiated to any significant degree. The parties should expect that the procedural schedule, once set, will be firm.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The Board hereby reconsiders and rescinds its May 26, 2005, "Order Granting Motions To Dismiss" in this docket, for the reasons given in the body of this order.
2. General Counsel is directed to file a copy of this order in the United States District Court proceeding relating to the Board's May 26, 2005, order.
3. Upon the return of jurisdiction over this matter from the Court, this docket will be resumed as of the point at which it was interrupted.

UTILITIES BOARD

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Curtis W. Stamp

Dated at Des Moines, Iowa, this 28th day of November, 2005.