

**STATE OF NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION
INTER-DEPARTMENT MEMORANDUM**

Date: May 20, 2009

TO: Commissioners
FROM: F. Anne Ross, Hearing Examiner
RE: DT 09-048 Petition of IDT America, Corp.
For Arbitration with Union Telephone Co.



HEARING EXAMINER'S REPORT

At your request, I presided over the May 7, 2009 prehearing conference in the above referenced case.

On March 12, 2009, IDT America Corp. (IDT) petitioned pursuant to the Communications Act of 1934, as amended, including but not limited to 47 U.S.C. §§ 252(b), 251(a) and 251(b) for the Commission to arbitrate certain rates, terms and conditions in an agreement governing interconnection pursuant to 47 U.S.C. § 251(a) (obligations as between telecommunications carriers, and 47 U.S.C. § 251(b) (obligations as between local exchange carriers (LECs)) with Union Telephone Company (Union). According to IDT's petition, Union has refused, despite repeated requests beginning with a letter on October 8, 2008, to respond to IDT's request for negotiation of an interconnection agreement (ICA).

On April 7, 2009, Union responded to the IDT petition claiming that "it is well established that interconnection negotiations will not be initiated....before a company has received proper authority from the state public utility commission....to begin operations in the territory of the incumbent." Union further claimed it had notified IDT of this deficiency by letter of February 13, 2009. Union acknowledged that IDT has subsequently requested and received authorization to provide local exchange service in Union's service territory, but claims that authorization is currently clouded by Union's challenge to the Commission's authorization. Finally, Union claimed that none of the requirements or timeframes under 47 U.S.C. § 252(b) apply because IDT is not requesting interconnection under 47 U.S.C. § 251(c).

On May 1, 2009 Union filed a motion to dismiss or in the alternative to stay this proceeding. Union's motion raised a number of issues. Union claimed IDT's October 8, 2008 demand for negotiation was invalid because IDT did not provide telecommunications services in Union's service territory and had not received authorization to do so from the Commission. Union also claimed that IDT's subsequent demand letter dated April 24, 2009, should be the starting point for purposes of setting timeframes to negotiate an interconnection agreement with Union. Union questioned whether IDT intends to operate as a common carrier. Further, Union requested a stay of this proceeding while the Commission considers Union's request for rehearing on IDT's

CLEC certification and while the New Hampshire Supreme Court considers an appeal by Union challenging MetroCast Cablevision NH's authorization in Union's service territory.

On May 4, 2009 IDT filed a response to the Union motion to dismiss and motion to stay arguing that a carrier is not required to be certified in Union's service territory prior to beginning negotiation of an ICA. IDT claims that Union's tactics are solely designed to delay the negotiation process and that Union's challenges to IDT's CLEC certification in its territory are unfounded.

On May 4, 2009, MetroCast Cablevision NH filed a motion to intervene in the proceeding.

The prehearing conference was conducted as provided in the Order of Notice, but was limited to: 1) petitions to intervene and objections thereto; and 2) arguments in support and in opposition to Union's motion to dismiss or stay the proceeding. Following the hearing I asked the parties to meet and negotiate a procedural schedule for the docket in the event the Commission denies Union's pending motion. I also invited the parties to file additional legal authority for their respective positions. Union and IDT each filed additional authority and arguments by letter on May 12, 2009.

Appearances

Carl Billek, Esq. and Thomas Jordan, Esq. for IDT America Corp.
Brian McDermott, Esq. and Darren Winslow for Union Telephone Company
Robert J. Munnelly, Esq. for MetroCast Cablevision NH (MetroCast)
Stephen Eckberg for Office of Consumer Advocate (OCA)
Robert Hunt, Esq. for Commission Staff (Staff)

Intervention Requests

MetroCast will be using IDT's telecommunications services to provide service to its end users and is directly affected by the outcome of this docket. There were no objections to MetroCast's intervention. OCA did not request participation, but indicated that it would be monitoring this docket concerning issues relating to competitive offerings in the Union service territory.

Motion to Dismiss or in the Alternative to Stay

The federal law governing this case involves two sections of the 1996 Telecommunications Act, 47 U.S.C. §§ 251 and 252. IDT has asserted its right to have the Commission arbitrate its ICA with Union pursuant to section 251 (a) and (b) and section 252(b).

Section 251(a) requires all telecommunications carriers to interconnect either directly or indirectly with other telecommunications carriers. Section 251(b) requires all local exchange carriers to: provide for resale of services, port numbers, provide dialing parity, give access to rights of way for poles, ducts and conduits, and establish reciprocal compensation arrangements.

Section 252(a) allows for voluntary agreements “for interconnection, services, or network elements pursuant to section 251 of this title...” Section 252(b) provides timeframes for requesting arbitration of ICAs and outlines the duties of State commissions as well as the time allowed for arbitrating such disputes. *See*, 252(b)(4).

I do not find any limitation under section 252 to arbitrating only disputes under section 251(c). In section 252(d) there are pricing standards exclusively for section 251(c) and there are also pricing standards exclusively for section 251(b)(5), however references in 252(a) and (c) are to the whole section 251. Further, there is no reference to 251 or any of its subsections in 252(b). Based upon a plain reading of the statute, Union and IDT’s dispute over an ICA based on sections 251(a) and (b) is subject to this Commission’s arbitration pursuant to section 252(b).

Section 251(c)(1) provides, in addition to the duties contained in subsection 251(b), the duty to negotiate in good faith. As a result, while Union is not required to negotiate in good faith with IDT under section 251(c)(1), it nonetheless has a duty to provide the services required by sections 251(a) and (b).

Although Union has provided a North Dakota Public Service Commission case, *Level 3 Communications, LLC Interconnection arbitration Application*, Case No. PU-2065-02-465 (May 30, 2003), in which the North Dakota Commission found that Level 3 was really requesting interconnection pursuant to section 251(c)(2)(a) even though it claimed to be requesting interconnection under section 251(a). Union has not yet argued that IDT’s request for interconnection in this docket is really a request for interconnection pursuant to section 251(c)(2)(A). As a result, these arguments have not been raised or responded to and should not be considered at this time.

Union argues that RSA 374:22 prohibits IDT from negotiating an ICA with Union until it receives franchise approval. RSA 374:22 prohibits an entity from commencing, or engaging in, business as a public utility without first obtaining Commission approval. Engaging in business as a public utility is not further defined in RSA 374:22, the general franchise statute. Nonetheless, RSA 374:22-g, dealing specifically with entry into existing telephone utility service territories, sheds light on what activities the Commission must approve in connection with a telephone franchise. It gives the Commission authority to “authorize the providing of telecommunications services...” Franchise authority under 374:22-g is tied to the provision of telecommunications services. Negotiation of an ICA is a prerequisite to offering telecommunications services. Attempting to reach agreement on the terms of future services with an incumbent local exchange carrier (ILEC) does not constitute providing or offering such services to the public. Hence attempting to negotiate an ICA does not require prior Commission approval under RSA 374:22-g.

Union’s motion to dismiss or stay this arbitration proceeding is based upon its claims that IDT is not an authorized telecommunications provider in the Union service territory. This claim is not supported by statutory language, nor by any case law provided by the parties. The duty to interconnect under section 251(a) is between telecommunications carriers. The definition of a telecommunications carrier under section 153(44) does not require state authorization. The fact

that some carriers may require state authorization prior to negotiating an ICA, as Union argues, does not change the federal or New Hampshire state requirements on this point.

Union's argument that the October 8, 2008 IDT letter requesting interconnection negotiations was invalid because IDT was not an authorized provider in the Union service territory fails because the duty to provide services under sections 251(a) and (b) does not turn on state certification of the requesting carrier.

Finally, Union questions whether IDT is a common carrier based upon IDT's unique relationship with MetroCast. Since this legal question is related to facts not yet developed, the issue is not ripe for decision.

Technical Session

As reported by the appointed Arbitrator, Victor D. Del Vecchio, Esq., by letter of May 8, 2009, the parties met in a technical session following the prehearing conference and developed a proposed schedule for arbitrating and ICA between IDT and Union. The proposed schedule reaches a final Commission hearing on July 17, 2009, and requests a Commission decision by August 7, 2009.

Recommendations

I recommend that MetroCast be granted intervention without condition.

I recommend the Commission approve the proposed procedural schedule.

I recommend that the Commission find that Union and IDT's dispute over an ICA is subject to Commission arbitration pursuant to section 252(b).

I recommend the Commission not address potential arguments that IDT's request for interconnection is really a request for interconnection pursuant to section 251(c)(2)(A) until these arguments are raised and a record is developed.

I recommend the Commission defer ruling on IDT's status as a common carrier until additional facts are presented on this issue.

I recommend that the Commission deny Union's motion to dismiss or stay the proceeding and find that Commission authorization of a carrier's provision of telecommunications services is not a prerequisite to that carrier's commencing arbitration of an ICA under 47 U.S.C. § 252(b).

By _____
F. Anne Ross, Hearing Examiner