

DT 99-096

VERIZON NEW HAMPSHIRE/RNK, INC.

Interconnection Agreement

Order on Request for Advisory Opinion

O R D E R N O. 23,680

April 16, 2001

I. INTRODUCTION AND PROCEDURAL BACKGROUND

On July 26, 1999, the New Hampshire Public Utilities Commission (Commission) entered Order No. 23,264, exercising its authority under section 252(e) of the federal Telecommunications Act (TAct), 47 U.S.C. § 252(e), to approve an interconnection agreement between RNK, Inc. d/b/a RNK Telecom (RNK) and New England Telephone and Telegraph Company (Bell Atlantic), the predecessor entity of incumbent local exchange carrier (ILEC) Verizon New Hampshire (Verizon). See *New England Telephone and Telegraph Company dba Bell Atlantic*, 84 NH PUC 390 (1999). RNK is a competitive local exchange carrier (CLEC) with authority to conduct business in New Hampshire.

The interconnection agreement approved in 1999 was consummated pursuant to the so-called "opt-in" provision of the TAct, 47 U.S.C. § 252(i), which requires that an ILEC "make available any interconnection, service, or network element provided under an agreement approved under this

section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." RNK opted into the terms of an agreement between Verizon and Brooks Fiber Communications, Inc., d/b/a New England Fiber Communications (Brooks), which itself had been approved by the Commission in 1997. By its terms, the Verizon-Brooks agreement expired on July 17, 2000. However, Order No. 23,264 described the Verizon-RNK agreement as including an "initial term" that "expires on May 24, 2002," subject to automatic extension in certain circumstances. 84 NH PUC at 390.

Now pending is a request filed by RNK on January 12, 2001 for an advisory ruling as to the continued viability of the RNK-Verizon interconnection agreement in light of the termination of the underlying Verizon-Brooks contract. Verizon submitted a letter on January 24, 2001 to state its position.¹ Neither party has requested a hearing.

II. POSITIONS OF THE PARTIES

A. RNK, Inc. d/b/a RNK Telecom

¹ The Commission is also in receipt of a letter filed on February 7, 2001 by Conversent Communications of New Hampshire, LLC (Conversent), another CLEC that opted into the terms of the Verizon-Brooks Agreement. Conversent, whose position is supportive of that of RNK, has not sought intervenor status and, thus, is not a party to the instant proceeding.

RNK contends that, in light of the above-quoted language in Order No. 23,264, the Commission should declare that the Verizon-RNK interconnection agreement remains in effect through May 24, 2002 notwithstanding the expiration of the underlying Verizon-Brooks contract. RNK points out that no party sought further review of the Commission's 1999 determination, either under applicable provisions of the TAct or otherwise. Therefore, according to RNK, the 1999 Order is final and binding on the parties - including the provision of the Order specifying that the interconnection agreement expires in May 2002.

B. Verizon New Hampshire

Verizon asks the Commission to rule that the interconnection agreement with RNK expired when the Brooks contract did, notwithstanding the suggestion to the contrary in Order No. 23,264. According to Verizon, this was the clear intent of the parties to the Verizon-RNK agreement, an intention that was confirmed by the conduct RNK subsequent to being notified by Verizon in mid-2000 that Verizon was treating the contract as about to expire.

According to Verizon, the language at issue from Order No. 23,264 is "merely descriptive" and does not accurately reflect the agreement actually approved by the

Commission. Further, Verizon contends that a ruling in favor of RNK here would amount to the Commission modifying the agreement in violation of section 252(e)(1) of the TAct, which, according to Verizon, limits the Commission to approving or rejecting the Agreement as opposed to modifying it.

III. ANALYSIS

Well-established principles of contract law leave us unable to provide the relief requested by RNK. A careful review of the agreement we approved in 1999 between Verizon and RNK makes clear that this contract expired by its terms when the Verizon-Brooks contract was terminated.

The agreement between Verizon and Brooks provided for an "effective date" of July 10, 1997.² Section 21.1 of the Verizon-Brooks contract provided that

[t]he initial term of this Agreement shall be three (3) years . . . which shall commence on the Effective Date. Absent the receipt by one Party of written notice from the other Party at least sixty (60) days prior to the expiration of the Term to the effect that such Party does not intend to extend the Term of this Agreement, this Agreement shall automatically renew and remain in full force and effect on or after

² The Verizon-Brooks agreement actually bears a date of July 17, 1997 and it appears that Verizon and Brooks treated July 17, and not July 10, as the effective date. The discrepancy is not relevant here.

the expiration of the Term until terminated by either Party as set forth before.

Section 21.1.1 further provided that

[i]f pursuant to section 21.1 the Agreement continues in full force and effect after the expiration of the Term, either Party may terminate the Agreement ninety (90) days after delivering written notice to the other Party of the intention to terminate this Agreement. Neither party shall have any liability to the other Party for termination of this Agreement pursuant to this Section 21.1 other than to pay to the other Party any amounts owed under this Agreement.

As noted by Verizon, pursuant to Section 21.1 the Verizon-Brooks Agreement terminated at the conclusion of its initial term in July of 2000.

The Verizon-RNK Agreement bears a date of May 25, 1999 and included the entire Verizon-Brooks contract as Appendix 1, incorporating it by reference and referring to it as the "Separate Agreement." According to Section 1.3 of the Verizon-RNK Agreement,

[r]eferences in Appendix 1 hereto to the "Effective Date", the date of effectiveness thereof and like provisions shall be for purposes of this Agreement be deemed to refer to the date first written above [May 25, 1999]. Unless terminated earlier in accordance with the terms of Appendix 1 hereto, this Agreement shall continue in effect until the Separate Agreement expires or is otherwise terminated.

In the absence of ambiguity, the meaning of a

contract must be derived from the plain meaning of the words used in the document. *Robbins v. Salem Radiology*, ___ N.H. ___, ___, 764 A.2d 885, 886 (2000). There is no ambiguity present here. Pursuant to the first sentence of section 1.3 quoted above, May 25, 1999 was substituted throughout the underlying agreement wherever it appears, making it the effective date of the Verizon/RNK Agreement. This did not affect the termination date of the Verizon/RNK Agreement because, based on the plain meaning of the second sentence quoted above from section 1.3, the new agreement continued in effect for only as long as the Verizon/Brooks contract did. In other words, when RNK opted into the Verizon/Brooks Agreement, the agreement actually signed by Verizon and RNK changed the effective date of the underlying agreement without changing its termination date.

Any suggestion to the contrary in Order No. 23,264 is of no consequence. As a practical matter, we agree with Verizon that Order No. 23,264 approved the Verizon/RNK Agreement as it was actually entered into by the parties, and the erroneous reference to a 2002 expiration date was merely introductory and descriptive. Even if this language had substantive effect, the Commission is free to "alter, amend, suspend, annul, set aside or otherwise modify any order made

by it," RSA 365:28, as long as any such action meets the requirements of due process and is legally correct, *Meserve v. State*, 119 N.H. 149, 152 (1979). The doctrine of *res judicata* does not apply to prevent an administrative agency from correcting a mistake of law. *Id.* at 154-55. The interpretation of an unambiguous contract is considered a legal question. *Lake v. Sullivan*, ___ N.H. ___, ___, 766 A.2d 708, 711 (2001).

Our authority under section 252 is limited to approval or rejection of interconnection agreements, "with written findings as to any deficiencies." 47 U.S.C. § 252(e)(1). We may only reject a negotiated (as opposed to arbitrated) interconnection agreement if it discriminates against a telecommunications carrier not a party to the agreement or if the "implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity." *Id.* at (e)(2).

Thus, our task under section 252 is arguably somewhat different than that of a court adjudicating a claim arising under the state law of contracts. In this instance, however, we need not decide whether there is any distinction to be made between the application of black-letter contract principles to this dispute and the resolution of the matter

under the TAct. This is because the relevant federal authorities point us to the same result as that which applies under contract law. Specifically, under the balance struck by Congress in promoting the development of CLECs while still providing some protection to ILECs, section 252(i) requires a CLEC opting into a pre-existing interconnection agreement to accept the expiration date of the underlying agreement. See *Global NAPS South, Inc.*, 1999 WL 587307 at ¶ 8, n. 27 (FCC, August 5, 1999) and *Bell Atlantic Delaware, Inc. v. Global NAPS South, Inc.*, 77 F.Supp.2d 492, 504 (D.Del. 1999).

In summary, both as a general matter under the TAct and based on the plain meaning of the specific terms of the interconnection agreement between Verizon and RNK, the contract expired on July 17, 2000. We are therefore unable to grant the RNK petition.

Based upon the foregoing, it is hereby

ORDERED, that the request of RNK Inc. d/b/a RNK Telecom for a determination that its interconnection agreement with Verizon New Hampshire remains in effect is DENIED.

By order of the Public Utilities Commission of New Hampshire this sixteenth day of April, 2001.

Douglas L. Patch
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Kimberly Nolin Smith
Assistant Secretary