DT 99-096

VERIZON NEW HAMPSHIRE/RNK, INC.

Interconnection Agreement

Order Denying Motion for Rehearing

O R D E R N O. 23,719

June 7, 2001

I. INTRODUCTION

Competitive local exchange carrier RNK Inc. d/b/a RNK Telecom (RNK) has filed a motion for rehearing pursuant to RSA 541:3, asking the New Hampshire Public Utilities Commission (Commission) to revisit Order No. 23,680 (April 16, 2001). The subject of Order No. 23,680 is an interconnection agreement entered into in 1999 between RNK and New England Telephone and Telegraph Company (Bell Atlantic), the prior name of incumbent local exchange carrier Verizon New Hampshire (Verizon). Having previously approved this agreement pursuant to the relevant provision of the federal Telecommunications Act (TAct), 47 U.S.C. § 252(e), *see New England Telephone and Telegraph Co. d/b/a Bell Atlantic*, 84 NH PUC 390 (1999), the Commission determined in Order No. 23,680 that the agreement expired in July 2000 rather than the May 2002 date asserted by RNK. For the reasons that follow, we now deny RNK's request for rehearing.

RNK's timely rehearing motion was filed on May 16, 2001. Verizon filed a memorandum in opposition to the motion on May 23, 2001.

As noted in Order No. 23,680, the interconnection agreement at issue here was entered into pursuant to the so-called "opt-in" provision of the TAct, which requires that an ILEC such as Verizon "make available any interconnection, service, or network element provided under an agreement approved under [47 U.S.C. § 252] 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 a previously approved agreement between Verizon and Brooks Fiber Communications, Inc., d/b/a New England Fiber Communications (Brooks), which expired by its terms on July 17, 2000. The Commission held in Order No. 23,680 that the Verizon-RNK Agreement expired on the same date, notwithstanding a reference in the Commission's initial approval of the agreement to a 2002 expiration date. In so ruling, the Commission relied on what we described as the plain meaning of the relevant contractual terms as well as certain federal precedents under section 252(i).

II. POSITIONS OF THE PARTIES

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

As noted in Order No. 23,680, two separate documents comprise the interconnection agreement between Verizon and RNK: the agreement itself, to which RNK refers in its rehearing motion as the "Cover Agreement," and the text of the opted-into Verizon-Brooks Agreement, referred to in the Cover Agreement as the "Separate Agreement" and incorporated into the cover agreement by reference.

In aid of its rehearing request, RNK points out that (1) the Cover Agreement provides for an "Effective Date" of May 25, 1999, (2) section 1.3 of the Cover Agreement avers that, for purposes of the RNK-Verizon Agreement, references in the Separate Agreement to the "Effective Date" shall "be deemed to refer" to May 25, 1999, (3) the Separate Agreement provides for a three-year term that "shall commence on the Effective Date," and (4) if the parties had "intended the Separate Agreement to be coterminous with the Cover Agreement, they would not have used the same capitalized terminology for what Verizon contends is truly only the commencement date" and in fact would have referred to May 25, 1999 as the Commencement Date rather than the Effective Date or otherwise clarified this in the contract.

Section 1.3 of the cover agreement further provides that, "[u]nless terminated earlier in accordance with the terms of [the Separate Agreement], this Agreement shall continue in effect until the Separate Agreement expires or is otherwise terminated." In Order No. 23,680, we determined that, based on the plain meaning of this sentence, the Verizon-RNK Agreement "continued in effect for only as long as the Verizon/Brooks contract did." Order No. 23,680, slip op. at 6. Here, RNK contends that this language from Section 1.3 has no bearing on the instant dispute. And, according to RNK, even if this language were relevant, it simply means that the Cover Agreement, which RNK describes as simply "administrative" – "will cease to be in effect when the substantive Separate Agreement ends." RNK Motion for Rehearing at 10.

According to RNK, the Separate Agreement and the Cover Agreement together became the Verizon/RNK Interconnection Agreement – the Cover Agreement by operation of 47 U.S.C. § 252(e)[1] and the Separate Agreement pursuant to the opt-in provision contained in 47 U.S.C. § 252(i). RNK

[1] This is the general provision of the TAct providing for approval by the relevant state public utility commission of [a]ny interconnection agreement adopted by negotiation or arbitration." 47 U.S.C. § 252(e).

further contends that, pursuant to these statutory provisions, the intent is that the two combined agreements would "wrap up together, on the date established by the negotiated Cover Agreement," which "does not, however, somehow necessitate cotermination of the RNK Agreement with the pre-existing agreement between [Brooks] and Bell Atlantic." RNK Motion for Rehearing at 10. By contrast, in RNK's view, the reading urged by Verizon and adopted by the Commission would render the reference in section 1.3 to the Effective Date "meaningless and useless." *Id*.

In further support of its position, RNK contends that, in the months preceding the Commission's 1999 approval of the Verizon-RNK Agreement, Commission orders approving section 252(i) agreements did not typically refer to the expiration date of such agreements. Thus, RNK reasons, the explicit reference to such a date in the order approving the Verizon-RNK Agreement suggests that both RNK and Verizon reasonably believed that the 1999 Order was correct. According to RNK, prior to the date of the 1999 Order there were only three Commission interconnection agreement adoption orders that even mentioned expiration dates. Discussing these Orders, as well as similar Orders that have followed our 1999 decision as to RNK and Verizon, RNK contends that neither

Verizon nor the Commission "saw, then or now, any particular relation between an underlying agreement's expiration date with any cotermination of an adopted agreement." *Id*. at 14. Indeed, RNK takes the position that Verizon is estopped from making an argument to the contrary now.

Next, RNK confronts the two federal authorities cited in Order No. 23,680 – Global NAPS South, Inc., 1999 WL 587307 (FCC, August 5, 1999) and Bell Atlantic Delaware, Inc. v. Global NAPS South, Inc., 77 F.Supp.2d 492 (D.Del. 1999). As to the former, RNK agrees that the Federal Communications Commission (FCC) observed that a carrier opting into a pre-existing agreement pursuant to section 252(i) ordinarily takes the underlying agreement's termination date – but, according to RNK, this does not mean the FCC has determined that such a carrier is required to do so. As to the decision of the U.S. District Court in Delaware, RNK's position is that the determination does not bind the Commission and, in suggesting that it would be unfair for purposes of section 252(i) to extend the terms of an underlying agreement beyond those agreed to by the original parties, the Court was simply in error.

Finally, RNK invokes *Sprint Communications Co. LP*, 84 NH PUC 214 (1999), decided approximately four months before

approval of the Verizon-RNK Agreement. In the *Sprint* Order, we noted that "[t]he FCC has decided that the right to adopt an interconnection agreement should be limited to a reasonable period of time to allow for changes that occur over time such as prices and network configuration choices." *Id*. at 215. Accordingly, we stated that the "reasonable time issue" would be "addressed in a future Commission Docket and could change the allowable time for adoption of a previously approved agreement in the future." *Id*. According to RNK, this reflected what was, and is, an accurate understanding by the Commission that the TAct does not require what RNK characterizes as "automatic cotermination" under section 252(i).

B. Verizon New Hampshire

Verizon's position is that section 1.3 of the Cover Agreement makes clear that the Verizon-RNK Agreement terminates on the same date as the underlying agreement between Verizon and Brooks. According to Verizon, RNK's contrary reading of the Cover Agreement is "tortured." Verizon New Hampshire's Opposition to RNK's Motion for Rehearing at 1. In Verizon's view, the first sentence of section 1.3 states when the Verizon-RNK Agreement begins and the second sentence defines when it ends. According to Verizon, RNK's argument to the contrary amounts to an effort

to conjure a second agreement between the two companies to which the second sentence of section 1.3 applies.

Verizon further takes the position that the Commission should disregard RNK's references to other interconnection agreements because they are irrelevant, because RNK's characterizations of them are false and misleading, and because RNK failed to advance a valid explanation for why it did not make such an argument in its original motion for an advisory ruling by the Commission.

Finally, Verizon accuses RNK of improperly seeking to "have it both ways" by sometimes arguing that the Verizon-RNK Agreement was a simple adoption of an underlying agreement pursuant to section 252(i) and sometimes taking the position that the Verizon-RNK Agreement was a fully negotiated agreement pursuant to 47 U.S.C. § 252(a)(1) in which the parties were free to agree upon any terms, including termination provisions. According to Verizon, if RNK simply adopted the Verizon-Brooks Agreement then the two agreements include the same termination date. On the other hand, Verizon asserts, if the Verizon-RNK Agreement was a fully negotiated agreement then the dispute is purely a matter of interpreting the language of the contract, a task the Commission performed correctly.

III. ANALYSIS

Pursuant to RSA 541:3, we may grant a request for rehearing if "good reason for rehearing is stated in the motion." Upon review of the RNK rehearing request and Verizon's opposition to it, we remain convinced that our original analysis of the plain language of the Verizon-RNK Agreement was sound. Thus we properly decided that the Agreement by its terms expired in July 2000. Since this was the central basis of our determination in Order No. 23,680, no good reason for rehearing is stated in the instant motion and we have no reason to revisit the decision here.

Under New Hampshire law, the task of construing a written contract involves "all of its provisions, its subject matter, the situation of the parties at the time and the object intended to be effected." *Griswold v. Heat Corporation*, 108 N.H. 119, 123 (1967). The purpose of such an inquiry is to arrive "at the sense of the words [the contracting parties] used." *Id*. Assuming that RNK's references to other interconnection agreements and Commission approvals of them goes to the "situation of the parties at the time," events that post-date the Verizon-RNK Agreement are irrelevant. Further, the salient contract language is so clear that the most one can infer from any contemporaneous

'situation of the parties' is that they chose to ignore or deviate from other interconnection agreements with differing temporal provisions.

Moreover, most of RNK's argument about other agreements goes not to construing the contract language itself but to the alleged reasonableness of its supposed reliance on the reference in the 1999 Order to a 2002 expiration date. Pursuant to RSA 365:26, a Commission order is only effective "until the same shall be altered, amended, superceded, annulled, set aside or otherwise modified by the commission or the court." Significantly, RNK does not suggest that RSA 365:26 is inapplicable when the Commission exercises the authority reserved to it under a federal statute such as the TAct. In these circumstances, there can be no reliance interest in a Commission Order and, should such an Order seem potentially incorrect or ambiguous to a party subject to it, that party must live with any failure to seek clarification.

Nor is rehearing warranted by RNK's view of the FCC decision or U.S. District Court opinion cited in Order No. 23,680. Notably, RNK does not argue that these or any other federal tribunals have interpreted the TAct in a manner that precludes us from construing the plain meaning of an interconnection agreement in the manner reflected in Order No. 23,680. Therefore, we need not consider RNK's arguments about

the applicability or durability of the cited federal authorities.

Finally, the 1999 *Sprint* decision relied upon by RNK is inapposite. Nothing in that decision suggests that we should deviate here from the plain language of the interconnection agreement at issue.

Based upon the foregoing, it is hereby

ORDERED, that the motion of RNK Inc. d/b/a RNK Telecom (RNK) for rehearing of Order No. 23,680 is DENIED.

By order of the Public Utilities Commission of New Hampshire this seventh day of June, 2001.

Douglas L. Patch Chairman	Susan S. Geiger Commissioner	Nancy Brockway Commissioner

Attested by:

Thomas B. Getz
Executive Director and Secretary