Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-43

In the Matter of

NEW JERSEY BELL TELEPHONE COMPANY
Tariff F.C.C. No. 38 Transmittal No. 474

Proposed Revisions To Establish Rates and Regulations for Local Packet Switching Service

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: December 20, 1989; Released: January 17, 1990

By the Commission:

I. INTRODUCTION

1. On August 7, 1989, GTE Telenet Communications Corporation (Telenet) and Tymnet, Inc. (Tymnet) jointly filed a petition for reconsideration of an Order released by this Commission in the above-captioned proceeding.[1] The Order terminated an investigation of the New Jersey Bell Telephone Company's (New Jersey Bell) rates for its Local Packet Switching Service (LPSS). The Bell Atlantic Companies (Bell Atlantic), on behalf of New Jersey Bell, filed an opposition to Telenet and Tymnet's petition on September 6, 1989.[2] Telenet and Tymnet filed a reply to Bell Atlantic's opposition on September 15, 1989.

II. BACKGROUND

2. In 1985, New Jersey Bell filed Transmittal 474 to market packet switching services. New Jersey Bell filed the tariff revisions pursuant to a Commission Order providing that certain common carriers could offer protocol conversion services without the need to form separate subsidiaries. [3] Telenet and Tymnet, who both offer protocol conversion and packet switching services to the public, filed petitions to reject or suspend the tariff revisions which asserted that the New Jersey Bell rates were too low. Subsequently, the Common Carrier Bureau initiated an investigation to examine issues relating to the cost support provided with the revisions, and required New Jersey Bell to file quarterly reports identifying the costs and revenues associated with its LPSS service.[4] In April 1986, Bell Atlantic, on behalf of New Jersey Bell, filed Transmittal 52, which increased the rates for LPSS.[5] Telenet and Tymnet again filed petitions against the proposed rates, arguing that the rates were still too low. The Common Carrier Bureau accepted the rate revisions subject to the outcome of the investigation in this docket.[6] Finally, Bell Atlantic filed Transmittal 239 in April 1988 on behalf of New Jersey Bell. The effect of this transmittal was to revise the rates and data submitted originally with New Jersey Bell's Transmittal 474. No parties opposed Transmittal 239 and it became effective on July 16, 1988.

3. In our *Final Order*, we concluded that the tariff revisions in Transmittals 52 and 239 filed subsequent to Transmittal 474 changed the circumstances which prompted this investigation such that any further attempt to resolve the issues raised by those transmittals was unnecessary. The issue under investigation was whether Bell Atlantic's rates in Transmittals 474 and 52 were too low. Because Transmittal 239, which was not opposed by either Telenet or Tymnet, resulted in New Jersey Bell LPSS rates above those originally filed under Transmittal 474, this Commission concluded that it was no longer necessary to devote Commission resources to this investigation. The Commission concluded that even if the rates under investigation had been unreasonably low during the period that the rates were in effect, the only possible remedy would have been a rate increase. Accordingly, the Commission terminated the investigation.[7]

III. SUMMARY OF PLEADINGS

4. Telenet and Tymnet aver that the *Final Order* is incorrect in asserting that Transmittal 239 increased the rates for LPSS. Petitioners also claim that the Order is illogical in concluding that because they did not protest Transmittal 239, they did not believe that the rates contained therein were not predatory. Telenet and Tymnet Petition at 4. Petitioners concede that Transmittal 239 increased LPSS rate elements, but assert that usage-based rates for LPSS actually declined. *Id.* at 5. Telenet and Tymnet explain that they did not protest Transmittal 239 because they did not view the transmittal as affecting the issues in this investigation. *Id.* at 5-7. Furthermore, petitioners argue that the *Final Order* is defective because this Commission failed to account for the low demand in Transmittal 239 (as opposed to the demand forecasted in Transmittal 474), and failed to account for the fact that the proposed revenues in Transmittal 239 fall short of the forecasted revenues in Transmittal 474. *Id.* at 7-9. Finally, Telenet and Tymnet conclude that there is still an available remedy in this investigation -- the Commission may still require Bell Atlantic to raise its LPSS rates.

5. Bell Atlantic replies that in arguing that Transmittal 239 actually decreased rates, petitioners are incorrectly comparing the rates in Transmittal 239 with the LPSS rates effective at the time that transmittal was filed. Bell Atlantic Opposition at 2-3. Bell Atlantic argues that this Commission compared the Transmittal 239 LPSS rates with the rates under investigation, which were the rates in Transmittal 474. *Id.* In addition, Bell Atlantic asserts that this Commission was correct in concluding that Telenet and Tymnet's failure to protest Transmittal 239 could be interpreted as acquiescence to the rates proposed therein. *Id.* at 4-5. Bell Atlantic says that this point is irrelevant, however, because this Commission has the discretion to terminate an investigation without any obligation to consider petitioners' actions. Moreover, Bell Atlantic notes, we are obligated to terminate this investigation under the recent legislation imposing certain deadlines on Commission proceedings.[8] *Id.* at 5. Furthermore, Bell Atlantic argues that this Commission should not hold Bell Atlantic to its original forecasts for LPSS because the service had never been offered by any other carrier and, hence, there

was no basis for an accurate forecast. *Id.* at 6. Finally, Bell Atlantic supports our conclusion in the *Final Order* that the investigation at issue could be terminated because there is no possibility of relief. *Id.* at 7.

6. In their reply to Bell Atlantic's opposition, petitioners raise two arguments concerning Bell Atlantic's assertion that this Commission was comparing the rates in Transmittal 239 with the rates in Transmittal 474. First, Telenet and Tymnet argue that such comparison would be irrelevant because the rates in Transmittal 474 were superseded by the rates in Transmittal 52.[9] Telenet and Tymnet Reply at 4-7. Second, petitioners argue that if this Commission was indeed comparing the LPSS rates in Transmittal 239 with those rates in Transmittal 474, we would not have inferred from petitioners' failure to protest Transmittal 239 that the petitioners did not believe the new rates to be predatory. *Id.* Telenet and Tymnet further assert that this Commission does not have the discretion to terminate an investigation without judicial review. *Id.* at 7-8. Moreover, they argue, this Commission is not obligated to terminate the investigation under the Authorization Act; rather, we are only obligated to decide whether to grant the petition for reconsideration. *Id.* at 9-10. Finally, petitioners aver that Bell Atlantic is incorrect in arguing that no relief is available in this investigation. *Id.* at 11-13.

IV. DISCUSSION

7. We find it unnecessary to decide the merits of petitioners' claims with respect to the mootness rationale that the *Final Order* used to explain the decision to terminate this investigation. As discussed below, we conclude, albeit on different grounds, that this investigation should be terminated, and accordingly deny Telenet's and Tymnet's petition.

8. The *Designation Order* said that New Jersey Bell's LPSS rates would be investigated because of uncertainty regarding New Jersey Bell's cost support, particularly its demand and revenue forecasts. The *Designation Order* required the carrier to file reports on its LPSS revenues to ensure that LPSS rates recovered their costs. We find that the record in this proceeding, including New Jersey Bell's LPSS reports, demonstrates that anticompetitive or otherwise improper pricing is unlikely to occur, and that no useful purpose would be served by continuing this investigation.

9. We find that this Commission's determinations in two recent decisions involving the packet switching services of Southern Bell Telephone and Telegraph Company (Southern Bell) are applicable in assessing the utility of continuing to investigate New Jersey Bell's LPSS rates. The first Order, in which the Commission granted Southern Bell a waiver of the cost support requirements of Section 61.38 of our Rules, 47 C.F.R. § 61.38, states that:

> Section 61.38 of our Rules normally requires that carriers proposing to offer a new service submit a study projecting costs for a representative 12-month period as well as estimates of the effect of the proposed tariff revisions on the carrier's traffic and revenues . . . . Because we find that existing market conditions make it unlikely that BellSouth could engage in anti-competitive or otherwise improper pricing, we conclude that it is reasonable to waive the requirement that BellSouth submit detailed cost and demand projections for [its public packet switching service] at this time.[10]

Based upon the foregoing analysis, we subsequently terminated our investigation of the rates for Southern Bell's public packet switching service. We determined, based upon cost and revenue reports filed by that carrier, that the Southern Bell packet switching offerings had a very limited impact on the market, and that our authority under Section 204 and 208 of the Communications Act, 47 U.S.C. §§ 204, 208, would be sufficient to deter potential threats to competition or ratepayers in the future.[11]

10. The record in this proceeding reveals conditions that are very similar to the conditions that led this Commission to waive cost support requirements and to terminate the investigation in connection with Southern Bell's packet switching service. New Jersey Bell's quarterly reports demonstrate that its packet switching service has, in fact, had limited impact on the market.[12] We recognize, as we did in connection with the Southern Bell investigation, that market conditions are seldom static. We believe, however, that the complaint procedures under Section 208 of the Communications Act, 47 U.S.C. § 208, provide a viable check, under present circumstances, against anticompetitive or otherwise improper behavior. In addition, we may initiate investigations of local exchange carrier packet switching services in the future, should circumstances warrant such action. In light of these conclusions, our administrative resources are best employed, consistent with the Communications Act, by affirming our decision in the *Final Order* to terminate this investigation.

V. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED that the petition for reconsideration filed by GTE Telenet Communications Corporation and Tymnet, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] New Jersey Bell Telephone Company, Transmittal No. 474, Proposed Revisions To Establish Rates and Regulations for Local Packet Switching Service, CC Docket No. 86-43, Memorandum Opinion and Order, 4 FCC Rcd 5360 (1989) (*Final Order*).

[2] Bell Atlantic filed a motion for extension of time to file its opposition on August 15, 1989, and the Bureau granted it on August 21, 1989. *See* New Jersey Bell Telephone Company, Transmittal No. 474, CC Docket No. 86-43, DA 89-994, released Aug. 21, 1989 (Com.Car.Bur.).

[3] *See* Petitions for Waiver of Section 64.702 of the Commission's Rules and Regulations, 100 FCC 2d 1057 (1985) (*Protocol Waiver Order*).

[4] New Jersey Bell Telephone Company, Revisions to Tariff F.C.C. No. 38 To Establish Rates and Regulations for Local Packet Switching Service, CC Docket No. 86-43, Mimeo No. 2381, released Feb. 4, 1986 (*Designation Order*).

[5] *See* Bell Atlantic Tariff F.C.C. No. 1, Transmittal No. 52, filed Apr. 7, 1986.

[6] New Jersey Bell Telephone Company and Bell Atlantic Telephone Companies, Revisions to Tariff F.C.C. No. 1 To Establish Rates and Regulations for Local Packet Switching Service, Transmittal Nos. 52 and 53, Mimeo No. 5305, released June 23, 1986 (Com.Car.Bur.).

[7] *Final Order*, 4 FCC Rcd at 5361.

[8] *See* Federal Communications Commission Authorization Act of 1988, Pub. L. No. 100-594, § 8, 102 Stat. 3021, 3032 (1988) (Authorization Act).

[9] *See* para. 2, n.5, *supra*.

[10] BellSouth Corporation on Behalf of Southern Bell Telephone and Telegraph Company, Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations To Authorize Protocol Conversion Offerings, FCC 88-333, 3 FCC Rcd 6961, 6962 (1988) (*BellSouth Order)*.

[11] Southern Bell Telephone and Telegraph Company, Revisions to Tariff F.C.C. No. 1 To Introduce Rates for X.25 and X.75 Protocol Packet Switching Network Channel Interfaces, Transmittal Nos. 1310 and 1320, FCC 89-314, released Dec. 8, 1989.

[12] New Jersey Bell's quarterly total company regulated revenues from packet switching services have ranged from $26,587 during the second quarter 1987 to $74,662 during the third quarter 1988.