

D.T.E. 97-101

Complaint of RCN Telecom Services of Massachusetts, Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic - Massachusetts for Failure to Make Voice Messaging Service Available for Resale

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FOR: RCN TELECOM SERVICES OF MASSACHUSETTS,  
INC.  
Petitioner

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## I. INTRODUCTION

On September 22, 1997, pursuant to G.L. c. 159, sec. 16, and Section 251(c)(4) of the Telecommunications Act of 1996 ("Act"), RCN Telecom Services of Massachusetts, Inc. ("RCN") filed a Complaint with the Department of Telecommunications and Energy ("Department") alleging that New England Telephone and Telegraph d/b/a Bell Atlantic-Massachusetts ("Bell Atlantic" or "Company") is unlawfully refusing to provide voice messaging services ("VMS") for resale. In its complaint, RCN requests that the Department compel Bell Atlantic to make VMS available to it at wholesale rates. On February 5, 1998, Bell Atlantic filed an Answer to the Complaint. The Department docketed the complaint as D.T.E. 97-101.

On January 8, 1998, the Department noticed the proceeding. The Department granted limited participant status to the Telecommunications Resellers Association ("TRA").<sup>1</sup> In addition to the initial pleadings, the record consists of the parties' responses to information requests, initial and reply briefs of RCN and Bell Atlantic, a supplemental brief of TRA, and a Bell Atlantic reply to TRA's supplemental brief. These documents form the basis for the facts and arguments upon which the Department rests its decision.<sup>2</sup>

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<sup>1</sup> CTC Communications Corporation also sought to be a limited participant but subsequently withdrew its request.

<sup>2</sup> The parties did not request an evidentiary hearing; in their briefs, they stated that no material facts were in dispute that would require development through evidentiary hearings. The Department stated its intent to proceed on the written record in a February 2, 1998 hearing officer ruling.

## II. FINDINGS OF FACT

### 1. Bell Atlantic's Voice Messaging Services

Bell Atlantic offers two voice messaging services to retail customers: call answering and voice mail (Bell Atlantic Initial Brief at 2-3, Att. A).<sup>3</sup> Call answering provides automated telephone answering for a customer whose line is busy or is not answered (id.). The caller records a message for the customer, who later retrieves it through Bell Atlantic's VMS (id.). Voice mail allows the customer to send voice messages to one or more callers, who can later retrieve those messages (id.). The voice mail application allows a caller to dial the VMS system directly and leave a message for, rather than speak to, the called party (id.). Currently, Bell Atlantic, a telecommunications carrier under the Act, does not make either form of VMS available for resale to RCN, or any other reseller (Complaint at Exh. B).

Bell Atlantic's VMS system is composed of tariffed services and specialized computer equipment and software (Bell Atlantic Response to IR DTE 1-1). The tariffed services are:

1. SMDI (station message detail indicator) data links, which transmit two-way signals between each equipped central office and the VMS computer. The computer uses these signals to route calls to the appropriate mailbox and return a message waiting signal, such as a stutter dial tone or a message-waiting indicator light, to the subscribed line customer;
2. Multi-line hunt groups, which are installed in each local office and provide local calling access to the VMS system;
3. DDS II circuits, which are connections from the network interface unit

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<sup>3</sup> RCN seeks to resell both VMS services.

(a hardware component) to the data traffic control card (a software component) located on the VMS operating system, and which control network volume to the VMS system; and

4. Superpath connections, which connect each central office with the network interface unit, and the network interface unit with the voice controller (a software component) of the VMS system.

(Id.).

The computer hardware and software include the network interface unit, the voice messaging platform,<sup>4</sup> the data traffic control card, and the voice control card (id.). Bell Atlantic's VMS Product Management unit purchases the tariffed services from the Company at tariffed rates and under standard tariff conditions (id.). A competitive supplier provides the computer hardware and software (id.). Voice messaging platforms are generally modular and can be expanded as the number of subscribers increases (id.).

B. The Price at which RCN could offer VMS

RCN can obtain the tariffed services from Bell Atlantic at tariffed rates, but cannot obtain use of the VMS platform from Bell Atlantic (RCN Reply Brief at Exh. A). Thus, the only way RCN could offer its customers a VMS product comparable to Bell Atlantic's service would be to develop its own VMS, including a VMS platform (id. at ¶ 3). RCN would incur the following costs to offer a comparable service: an estimated one-time investment of \$125,000 for voice mail hardware equipment that would accommodate 2,000 to 3,000 voice mail boxes; approximately \$480 for each SMDI link from a central office to RCN's location (\$960 per central office if redundancy were required); and installation charges for the SMDI

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<sup>4</sup> The VMS platform consists of the VMS operating system and disk storage.

lines of \$1,500 (or \$3,000 if redundancy were required) (RCN Response to IR DTE 1-2). Recurring costs for SMDI lines would be approximately \$345 per SMDI link per month, which would result in monthly SMDI costs of \$11,981.25 (id.).<sup>5</sup> Further, RCN states that Bell Atlantic offers forwarding/busy no-answer features at \$1.95 per voice mail box and 800 service at \$1.25 per voice mail box for a total of \$3.20 in recurring charges per month per voice mail box (id.).

According to RCN, if it sold residential and business voice mail boxes at an average price of \$6.00 and provided service to 25 central offices, it would have to sell over 4,000 voice mail boxes to break even, not including capital expenditures for non-tariffed hardware and software components (id.). Bell Atlantic estimates that a voice mail provider could expect to pay about \$30.00 per mailbox for hardware and software to support a voice messaging system similar to the Bell Atlantic system (Bell Atlantic Response to IR DTE 1-2). Bell Atlantic currently offers VMS to residential customers for between \$3.95 and \$5.95 per month, and to business customers for \$12.00 per month (RCN Response to IR DTE 1-2).

### 3. The Market for VMS

According to Bell Atlantic, it had in February 1998 approximately 379,000 VMS mailboxes in Massachusetts. This total is composed of approximately 300,000 mailboxes in the residential sector (14 percent of approximately 2.1 million lines); 24,000 mailboxes in the small business sector (4 percent of approximately 584,000 lines); and 51,000 mailboxes in the

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<sup>5</sup> In the Consolidated Arbitrations, D.P.U. 96-73/74, et seq., Phase 4 (1996), the Department approved Bell Atlantic interim unbundled network element rates for SMDI that total \$272.09 per link per month (Bell Atlantic Response to IR DTE 1-7.).

Centrex sector (16 percent of 325,000 lines) (Bell Atlantic Response to IR DTE 1-9). Bell Atlantic stated further that voice messaging services occupy approximately 12 percent of its available lines in Massachusetts (Bell Atlantic Response to IR DTE 1-8). RCN estimates that 8 percent of Bell Atlantic's residential customers use VMS, and that RCN could persuade approximately 25 percent of those customers to switch to RCN by offering a \$30 credit to obtain an answering machine (RCN Response to IR DTE 1-5; RCN Reply Brief at Exh. A).

Bell Atlantic stated that 97 percent of residential VMS subscribers purchase the "call answering" service portion of VMS (See Bell Atlantic Response to IR DTE 1-6). For business customers, RCN believes that the voice mail service is inferior to the call answering service and that no business customer would purchase VMS without the "message waiting" indicator (e.g., stutter dial tone or message-waiting indicator light) that is available with call answering (RCN Response to IR DTE 1-2). Approximately 20 percent of Bell Atlantic's 51,000 Centrex VMS subscribers have voice mail rather than call answering (Bell Atlantic Response to IR DTE 1-6).

Bell Atlantic has found that many of its Centrex customers purchase their own VMS-like systems, which are available from a number of equipment vendors, including Centigram, Octel, Comverse, and Unisys (Bell Atlantic Response to IR DTE 1-2). A number of competitive suppliers offer voice mail service; however, call answering that uses Bell Atlantic SMDI lines is available from only one provider other than Bell Atlantic (Bell Atlantic Reply Brief at attachment; Bell Atlantic Response to IR DTE 1-4).

### III. ANALYSIS AND FINDINGS

RCN makes two claims. First, it claims that VMS is a "telecommunications service" under the Act; and, thus, Bell Atlantic must make VMS available to resellers, including RCN, at wholesale rates (Complaint at 2-3). RCN also claims that Bell Atlantic's refusal to make VMS available for resale constitutes unjust and unreasonable discrimination, and that the Department should order Bell Atlantic to make VMS available pursuant to the Department's authority under G.L. c. 159, § 16 (id. at 6-7). The Department rejects both of these claims for the following reasons.

#### A. Whether VMS is a "Telecommunications Service" Under the Act

RCN's first claim is based on § 251(c)(4) of the Act<sup>6</sup>, which states that a telecommunications carrier has "[t]he duty . . . to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." "Telecommunications service" means "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). "Telecommunications" means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

RCN argues that VMS is a telecommunications service because: (1) it "involves a transmission between the message memory of Bell Atlantic's VMS system and the purchaser's

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<sup>6</sup> 47 U.S.C. § 251(c)(4) (1996).

premises;" (2) Bell Atlantic does not change the form or content of the message; and (3) Bell Atlantic offers VMS for a fee to retail customers (RCN Brief at 2-3).<sup>7</sup>

Bell Atlantic responds that VMS is not a "telecommunications service" but, rather, that it is an "information" or "enhanced" service, which Congress intended not to be subject to the Act's resale provisions (Bell Atlantic Brief at 6). Under the Act, the term "information service" means:

the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.<sup>8</sup>

Bell Atlantic argues that to adopt RCN's interpretation of § 153(46) of the Act would render § 153(20) superfluous, as there would be no distinction between the regulatory treatment of "telecommunications" and "information" services, a distinction that Congress intended the Act to make (Bell Atlantic Brief at 6-7; Reply Brief at 4).

The Department has not addressed the issue of VMS's status under the Act.<sup>9</sup> Both

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<sup>7</sup> TRA makes the same argument (TRA Brief at 5).

<sup>8</sup> 47 U.S.C. § 153(20).

<sup>9</sup> The issue was arbitrated in D.P.U. 96-83, Petition for Arbitration of MCI Telecommunications Corporation, in which the Arbitrator concluded that "[t]he resale obligation of a local exchange carrier under the Act extends only to telecommunications services. Voice mail services are not telecommunications services as defined in the Act." The Department has not adopted the Arbitrator's award in that case, and it is, therefore, not binding on the Department in this case.



parties cite decisions of other state regulatory agencies in support of their positions.<sup>10</sup> For its part, the Federal Communications Commission ("FCC") has not addressed whether VMS must be resold pursuant to § 251(c)(4) of the Act, (although TRA has petitioned the FCC for an order requiring ILECs to make VMS available for resale on those grounds). The FCC has held that, for purposes of the release of proprietary information, it considers VMS (both voice

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<sup>10</sup> See, e.g., MCI Telecommunications Corporation: Petition for Arbitration, 1997 Ill. PUC LEXIS at 40 (February 5, 1997) (in which the Illinois Commerce Commission found that "Voice Mail does not fall within the Act's definition of a telecommunications service. Voice Mail is predominantly a service that involves the recording of information that has been sent through the use of a telecommunications service. Thus, it does not have to be made available for resale at this time."); In the Matter of the Petition for Arbitration of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and US West Communications, Inc., 1997 Wash. LEXIS 49, at 26 (July 11, 1997) (in which the Washington Commission found that "Voice mail is an enhanced service, and not a telecommunications service. Although voice mail is often bundled with telecommunications services, it is not involved in the transmission of information. Insofar as voice mail is not part of the transmission of information by the public switched network, it is not a "telecommunications service" as defined in federal law."); see also In the Matter of the Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with US West Communications, Inc., Docket No. P-422 et al., at 27 (December 2, 1996) (in which the Minnesota Public Utilities Commission concluded that "[l]abeling [enhanced] services as information services does not take them out of the statutory category which must be offered for resale"); Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service (Rulemaking 95-04-043), Decision 97-08-076, at 12 (August 15, 1997) (in which the California Public Utilities Commission ordered ILECs to make VMS available for resale pursuant to its retained state jurisdiction over enhanced services, but did not answer the question of whether an "enhanced," "auxiliary," or "information" service could be a "telecommunications" service under the Act); Petition of MCI Telecommunications and MCImetro Access Transmission Services of Virginia, Inc., Case No. PUC 960113, at 4 (May 8, 1997) (in which the Virginia State Corporation Commission concluded, without analysis, that "Voice mail is an enhanced service rather than a telecommunications service. Hence, the Act does not mandate that BA-VA offer it for resale").

mail and call answering) to be "information services," and that "information services" and "telecommunications services" are "separate, non-overlapping categories, so that information services do not constitute 'telecommunications' within the 1996 Act." In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket Nos 96-115 and 96-149 at pars. 45, 46, and 72 (February 26, 1998).

The Department regards the Act's definition of "telecommunications" as the key to determining whether VMS is a "telecommunications service" or an "information service." The Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43)(emphasis added). The term "telecommunications" equals "the transmission . . . of information." The question thus becomes whether VMS is best described as "the transmission of information."

We find that it is not, for the following reasons. Bell Atlantic's VMS consists of a number of components. These components include the network interface unit, voice messaging platform, and data traffic and voice control cards, which are the hardware and software that provide the capability to generate, store, process, and retrieve information in the form of voice messages. Bell Atlantic obtains these components from outside vendors and

does not make their use available to resellers. The VMS system also includes components that allow for the "transmission of information," in the form of voice messages, between users of the system and the hardware and software components mentioned above. These transmission elements include SMDI data links, multi-line hunt groups, DDS II circuits, and Superpath connections.

The transmission elements within the Bell Atlantic VMS system provide for "the transmission of information" and, therefore, are "telecommunications services," which must be made available for resale. Bell Atlantic does, in fact, make these transmission elements of VMS available to resellers as tariffed services, on the same terms and at the same rates that Bell Atlantic itself purchases those services from Bell Atlantic's regulated services division. To the extent that VMS contains elements that provide the "transmission of information" and, therefore, should be considered "telecommunications services," Bell Atlantic makes those elements available for resale, thereby complying with § 251(c)(4) of the Act.

The components of the system that Bell Atlantic does not make available for resale, (the network interface unit, voice messaging platform, and data traffic and voice control cards), are not transmission components. They are components that record information and allow it to be retrieved and otherwise manipulated by users of the system. While users gain access to these components via transmission components, the hardware and software that RCN would like Bell Atlantic to resell do not themselves function in the "transmission of information," which is the essential characteristic of a "telecommunications service." In this respect, we agree with the Illinois and Washington commissions (see n.10, above), which

characterized VMS as a recording device that may be bundled with certain telecommunications services. Because the components Bell Atlantic does not make available for resale are used for "generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications," they are "information services" and need not be resold pursuant to § 251(c)(4) of the Act.

The Act defines "telecommunications" only as the "transmission . . . of information." Congress defined other services (such as those offering the capability for generating, storing, processing, and retrieving information) separately as "information services." Information services, such as the storage and retrieval of voice messages, may use transmission to fulfill their purpose. If the use of transmission rendered the information service itself a "telecommunications service," then the separate definition of "information services" would be surplusage.

The Department therefore finds that the elements of Bell Atlantic's VMS offerings that should be considered "telecommunications services" are, in fact, offered for resale in compliance with § 251(c)(4). VMS itself, however, is an "information service" that the Act does not compel Bell Atlantic to offer for resale to RCN.

B. Whether Bell Atlantic's Refusal to Make VMS Available for Resale Constitutes Unjust and Unreasonable Discrimination under State Law

RCN argues that, even if Bell Atlantic's VMS offerings are not telecommunications services under the Act, the Department should nonetheless order Bell Atlantic, pursuant to the Department's authority under G.L. c. 159, §§ 12 and 16, to make VMS available for resale (RCN Brief at 6-10; RCN Reply Brief at 2-4). RCN argues that it has "no practical alternative

to Bell Atlantic's VMS . . . for service to resale customers" and that its "inability to offer a comparable service offering hinders RCN's ability to compete particularly in the market for small and mid-sized businesses" (RCN Brief at 3-4). Bell Atlantic responds that using G.L. c. 159, §§ 12 and 16 to regulate VMS would expand the scope of the Department's authority beyond that intended by the Legislature, and is not warranted in connection with a service that is available from competitive suppliers (Bell Atlantic Brief at 8-9; Reply Brief at 5-7).

The Department agrees with Bell Atlantic that a particular service must come under the Department's jurisdiction pursuant to G.L. c. 159, § 12 before the Department can regulate that service pursuant to G.L. c. 159, § 16. Section 12 sets forth the Department's express grant of authority:

The Department shall, insofar as may be necessary for the purpose of carrying out the provisions of law relative thereto, have general supervision and regulation of, and jurisdiction and control over, the following services, when furnished or rendered for public use within the commonwealth and in the exercise thereof, the department shall take cognizance of all applicable transportation plans and programs adopted by the public works commission pursuant to section five A of chapter sixteen, and all persons, firms, corporations, associations and joint stock associations or companies furnishing or rendering any such services, in sections ten to forty-four, inclusive, collectively called common carriers and severally called a common carrier:

. . .

(d) The transmission of intelligence within the commonwealth by electricity, by means of telephone lines or telegraph lines or any other method or system of communication, including the operation of all conveniences, appliances, instrumentalities, or equipment appertaining thereto, or utilized in connection therewith.

G.L. c. 159, § 12 (emphasis added).

Section 12 thus gives the Department jurisdiction over "common carriers" engaged in

"the transmission of intelligence." For purposes of our analysis, the key word in Section 12 is "transmission." VMS is not "the transmission of intelligence." Rather, as Bell Atlantic correctly points out, it is "a repository of information that is accessed through telecommunications services." Bell Atlantic Reply Memorandum of Law at 5. Section 12 gives the Department the authority to regulate the common carrier telecommunications services through which customers gain access to the repository, but not the repository itself.<sup>11</sup>

Moreover, the Department has not required that VMS be tariffed in Massachusetts pursuant to the requirements in c. 159, § 19, which pertains to all common carrier telecommunications services within the Department's jurisdiction. If we determined here that VMS falls under our jurisdiction to mandate that it be provided for resale, then we would also have to require Bell Atlantic to offer the services under an approved tariff. Regardless of whether it is more efficient for competitors to resell Bell Atlantic's VMS than it is to provide

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<sup>11</sup> We also note that the fact that Bell Atlantic is a common carrier of telecommunications service does not compel the conclusion that it is a common carrier for purposes of the provision of VMS. A company's status as a common carrier "does not depend upon its chartered powers or the name under which it does business but depends upon the nature and character of the business actually conducted and the methods and means employed." First National Stores Inc. v. H.P. Welch Co., 316 Mass. 147, 149 (1944). This principle applies to telephone companies as well as to transportation companies. Mentzner v. New England Tel. & Tel. Co., 276 Mass. 478, 488 (1931); New England Tel. & Tel. Co. v. Dept. of Pub. Utils., 262 Mass. 137, 146 (1928). The decisive question is not, therefore, whether Bell Atlantic is a common carrier for any purpose, but whether VMS falls within the § 12(d) definition of services for which the Department must consider Bell Atlantic to be a common carrier subject to the Department's jurisdiction. Common carrier status is a legal conclusion that follows from the nature of the particular service provided, not an innate characteristic of a particular company that allows or compels the Department to regulate all of its offerings.

the services through other means, such a ruling would broaden our jurisdiction over services that have not been, and are not now, regulated by the Department as common carrier services under c. 159, § 12(d).

Rather than address the threshold question of the Department's jurisdiction under § 12, RCN focuses on § 16, with its reference to the Department's authority to address "unjust, unreasonable, unsafe, improper or inadequate" practices of a common carrier. However, because RCN has not met its initial burden of showing that the regulation of VMS is within the Department's jurisdiction pursuant to § 12, we need not review the issue of whether Bell Atlantic's refusal to make it available for resale is an "unjust, unreasonable, unsafe, improper or inadequate" practice under § 16.<sup>12</sup>

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<sup>12</sup> That the Department does not have jurisdiction pursuant to § 12 does not necessarily mean that RCN is without a remedy at law or equity. RCN could pursue, in State or Federal court, a claim that Bell Atlantic's VMS is an "essential facility" or that Bell Atlantic's refusal to make VMS available for resale is a violation of G.L. c. 93, § 5. See, e.g., Wojcieszek v. New England Tel. & Tel. Co., 977 F. Supp. 527 (D. Mass. 1997); Foster v. Shubert Holding Co., 316 Mass. 470 (1944).

IV. ORDER

Accordingly, after due notice and consideration, it is

ORDERED: That the request of RCN that Bell Atlantic be ordered to make VMS available to RCN for resale is hereby DENIED.

By Order of the Department,

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Janet Gail Besser, Chair

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W. Robert Keating, Commissioner

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Paul B. Vasington, Commissioner

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Eugene J. Sullivan, Jr., Commissioner



Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).