

D.T.E. 98-18

Petition of CTC Communications Corp. for Emergency Relief with Respect to the Alleged
Actions and Omissions of New England Telephone and Telegraph Company d/b/a Bell
Atlantic - Massachusetts

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I. INTRODUCTION

On February 5, 1998, CTC Communications Corp. ("CTC") filed with the Department of Telecommunications and Energy ("Department") a complaint against Bell Atlantic - Massachusetts ("Bell Atlantic" or "the Company") claiming that Bell Atlantic has been wrongfully refusing to process resale orders submitted by CTC for the assignment of accounts of existing Bell Atlantic customers, unless the customer pays a termination fee to Bell Atlantic. CTC claims that Bell Atlantic's refusal to process the orders violates the Telecommunications Act of 1996 and applicable state law, and is a breach of the resale agreement between CTC and Bell Atlantic. CTC seeks interim injunctive relief and various forms of permanent relief, including an order directing Bell Atlantic to process CTC orders without charging a termination fee. The complaint was docketed as D.T.E. 98-18.¹

The case was duly noticed. Twelve parties moved to intervene. On March 26, the Department conducted a public hearing and a procedural conference. At the procedural conference, the Department sought a statement of stipulated facts from CTC and Bell Atlantic, and sought answers to briefing questions from CTC, Bell Atlantic, and the Attorney General, who was allowed to intervene as a matter of right. Ruling on the other petitions to intervene was deferred pending the resolution of issues unique to the dispute between CTC and Bell Atlantic. CTC and Bell Atlantic provided a stipulation of facts on April 15, 1998. CTC and Bell Atlantic provided responses to the briefing questions on April 17, 1998. CTC, Bell Atlantic, and the Attorney General filed replies to the initial responses on April 23, 1998.

¹ CTC reiterated its request for relief in a Motion for Specific and Expeditious Emergency Relief filed on March 2, 1998.

In this order, the Department grants CTC's motion for expeditious relief to the extent that it seeks processing of orders that would give effect to lawful assignment of contracts of Bell Atlantic customers to CTC. The remaining requests for relief contained in the motion are denied as moot.

II. STATEMENT OF FACTS

CTC is a competitive local exchange carrier that provides local exchange service in Massachusetts (Stipulation of Facts at ¶5). CTC was an authorized sales agent for Bell Atlantic from 1984 to December, 1997 (*id.* at ¶3). In November, 1997, CTC and BA entered into agreements that allow CTC to act as a reseller of Bell Atlantic services in Massachusetts, New Hampshire, Maine, Rhode Island, and Vermont (*id.* at ¶6, page 2). CTC provides resold intrastate telecommunications service in Massachusetts pursuant to CTC's Tariff No. 1 on file with the Department (*id.* at ¶6, page 3).

Disputes arising from the termination of the Sales Agency Agreement and CTC's subsequent foray into the resale business are being adjudicated in U.S. District Court for the District of Maine (No. 97-CV-395 PH) (*id.* at ¶4). The case was transferred to Maine from the Southern District of New York on March 11, 1998 (*id.* at Ex. 3). Before the case was transferred, the District Court entered an order granting Bell Atlantic's motion for a temporary restraining order enforcing the non-compete clause in the Sales Agency Agreement (*id.* at Ex. 2). In that order, the District Court enjoined CTC from soliciting customers for whom CTC was responsible when acting as Bell Atlantic's sales agent in order to sell or promote Bell Atlantic's IntraLATA transmission services in conjunction with CTC's own customer service, customer and technical support, sales contracting, billing, and other such non-transmission

services (id. at 12). The District Court also enjoined CTC from using Bell Atlantic's trademark and trade name, and from using confidential information disclosed to CTC in CTC's capacity as Bell Atlantic's sales agent (id. at 14, 15-18).

Before late January, 1998, Bell Atlantic permitted customers to assign certain contracts to resellers at full retail rates without penalty to the end user (id. at ¶8). Under such an arrangement, a customer would execute a contract and a letter of authorization with CTC and, at CTC's request, Bell Atlantic would convert its records to reflect that CTC, not the end user, was the customer of record (CTC Response to Briefing Questions at 2). The other terms of the contract between Bell Atlantic and the end user would remain the same, including the term length, volume commitments, termination provisions, and retail prices, which CTC would pay to Bell Atlantic on behalf of the end user (id.). The terms and conditions of the agreement between CTC and the customer allow for assumption by CTC of the customer's rights and obligations under the contract between the customer and Bell Atlantic (CTC Brief at Exh. A). Neither the terms of the typical end user contract with Bell Atlantic nor the terms of the Bell Atlantic tariffs incorporated in those contracts prohibit the assignment to a third party of the rights and obligations under the contract (Stipulation of Facts at Exhs. 5 and 6).

In late January, 1998, Bell Atlantic stopped processing orders that use the above arrangement. Since that time, if a reseller wishes to resell the services covered by an existing Bell Atlantic end user contract, Bell Atlantic processes such an order upon receiving the reseller's acknowledgment that it accepts the terms and conditions set forth in the original contract, with the rates and charges in the new Bell Atlantic/reseller contract being the same as those contained in the original contract, less any applicable wholesale discount (Stipulation of

Facts at ¶7). At that point, Bell Atlantic terminates its existing service arrangement with the end user and submits a bill for the customer's final charges, including any termination charge specified in the original contract (id.).

III. POSITIONS OF THE PARTIES

A. CTC Communications, Inc

CTC argues that the contracts between Bell Atlantic and its business customers contain no limitation on the otherwise broad right under Massachusetts law to assign contracts and, thus, Bell Atlantic cannot refuse to process orders that effect the assignment of the contract from the customer to CTC (CTC Brief at 10-12). CTC argues further that because assignment does not terminate the contract, Bell Atlantic has no right to impose a termination fee on the customer making the assignment (id.). If anything, CTC argues, Bell Atlantic benefits from the proposed assignments since CTC's fulfillment of its contractual obligation to the customers allows Bell Atlantic to avoid certain costs while continuing to collect the retail price under the contract (CTC Brief at 12). CTC states that it is "entirely willing" to accept the terms and conditions of the retail contracts, including payment to Bell Atlantic of the full retail price, so that Bell Atlantic has no basis for refusing to process orders from customers seeking to enter into such assignment relationships with CTC (CTC Brief at 4; CTC Reply Brief at 2).

CTC argues that Bell Atlantic's refusal to process orders calling for assignment of customer rights and obligations to it is having a severely detrimental impact on the local resale market and will make it difficult, if not impossible, for CTC and other CLECs to compete for certain segments of the business market (CTC Brief at 4-5). CTC argues further that Bell Atlantic's refusal to process its orders seriously impedes customers' ability to choose their

suppliers (CTC Brief at 5).

B. Bell Atlantic

Bell Atlantic denies that it has any obligation under the Telecommunications Act of 1996 (“Act”) to permit assignment to a reseller of a contract under which the Company provides retail telecommunications to specific end user customers (Bell Atlantic Answer at 1). Bell Atlantic also denies that enforcing provisions of its contracts and tariffs, including termination liabilities payable if a customer terminates its service with the Company prior to the term specified in the contract or tariff, is unreasonable or constitutes a penalty (*id.*) The Bell Atlantic policy that CTC complains about seeks only to enforce rights contained in contracts and tariffs with specific customers so that the Company receives the benefit of the bargain made with those customers (*id.* at 2).

Bell Atlantic admits that before late January 1998 it did permit its Massachusetts customers to assign certain contracts to resellers at retail rates without penalty to the end user (Stipulation of Facts at 3). Throughout the fall of 1997, however, Bell Atlantic advised CTC that it (Bell Atlantic) was under no legal obligation to provide for the assignment of existing customer contracts to resellers, and that it was under no obligation to give written documentation to CTC regarding this policy (Answer of Bell Atlantic-Massachusetts at 5). In late January, 1998, Bell Atlantic began processing such orders upon receiving the reseller’s acknowledgment that it accepted the terms and conditions set forth in the original contract, with the rates and charges in the new Bell Atlantic reseller contract being the same as those contained in the original contract but less any applicable wholesale discount (Stipulation of Facts at 3). The Company then terminates its existing service arrangement with the end user and submits a bill for the customer’s final charges, including any termination charge specified in the original contract (*id.*). Bell

Atlantic admits that it does not currently accept orders placed by CTC which are based upon attempted assignment of Bell Atlantic contracts with end user customers, but denies that it is preventing CTC the ability to resell any telecommunications service (Answer of Bell Atlantic-Massachusetts at 2). The Company denies that any provision in the December 1, 1997 Interim Resale Agreement between itself and CTC obligates it to permit the assignment of a customer contract to a reseller (*id.* at 5), and that “CTC in any event should not confuse temporary practices with ‘policy’ on this issue” (Bell Atlantic 2/5/98 Letter to Young & Associates).

IV. ANALYSIS AND FINDINGS

A. Bell Atlantic's Refusal to Process CTC's Orders for Resale

CTC has proposed an arrangement whereby it assumes the contractual rights and obligations of Bell Atlantic customers who take service pursuant to agreements that give the customer a discount from tariffed rates for certain telecommunications services. According to the terms and conditions of its standard agreement, CTC receives from the Bell Atlantic customer express permission for this assignment of rights and obligations from the customer to CTC. Through these agreements, certain Bell Atlantic customers have manifested their intent to assign to CTC their rights under Bell Atlantic contracts.² Under Massachusetts law, such assignments are valid except in circumstances not present here. American Employers' Insurance Co. v. Medford, 38 Mass. App. Ct. 18, 22 (1995). For example, the Bell Atlantic contracts involve no relationship of personal confidence, nor is there evidence that the relationship of Bell Atlantic to the end user requires the services of particular persons. Garber's Auto Rental, Inc. v. Genoa

² The precise number of customers who have made a valid assignment of their contractual rights is discussed below in Section IV.B.

Packing Co., 2 Mass. App. Ct. 298, 302 (1974); Restatement (Second) of Contracts, §317, Assignment of a Right (1979).

Bell Atlantic does not claim that its contracts with end users cannot be assigned because they fall into one of the exceptions to the general rule that all rights are assignable. Rather, Bell Atlantic claims that end users cannot assign their retail contracts to CTC because there are no provisions in Bell Atlantic's contracts or tariffs that provide for assignment of their services to an entity that is not an end user customer, and that there is no tariff provision or rule that requires the Company to agree to such an assignment (Bell Atlantic Brief at 4). Under Massachusetts law, however, all rights are assignable -- an express provision allowing assignment is not required. MacLaughlin v. New England Telephone and Telegraph Co., 345 Mass. 555, 188 N.E.2d 552 (1963); Bethlehem Fabricators, Inc. v. H.D. Watts Co., 285 Mass. 556, 190 N.E. 828 (1934); American Employers Insurance Co. v. Medford, 38 Mass. App. Ct. 18, 22, (1995).³

³ In American Employers' Insurance Co., a teacher assigned to an insurer his statutory right to be indemnified by the City of Medford in a negligence action brought against him by a student. The City argued that the right to indemnity was personal and not assignable, an argument that the Appeals Court of Massachusetts rejected:

The City contends that the absence of express language in the collective bargaining agreement allowing a teacher to assign the right to indemnity prohibited the assignment Mahoney [the teacher] purported to make to Employers. That argument turns familiar contract law upside down. It is axiomatic that a contractual right can be assigned unless assignment is expressly forbidden by the terms of the contract or, in a case such as this, by the statute. Other exceptions to the general rule would be cases as to which the substitution would materially change the duty or risk of the obligor, in this case the municipality. [citations omitted]

Id.

In this case, no provision of the Bell Atlantic contracts or the tariffs incorporated therein by reference forbids assignment of the contracts. There is also no evidence that the assignment would materially change the duty or risk of Bell Atlantic, which will continue to receive the full contract price for the duration of the retail contracts it signed with the end users. The assignments may, in fact, put Bell Atlantic in a better financial position than they enjoy under the contracts themselves, given that Bell Atlantic will continue to receive full retail rates while avoiding retail costs associated with that customer.⁴ See Restatement (Second) Contracts §317 (1979).

Bell Atlantic also argues that it should collect a termination fee if it processes the CTC orders that call for assignment of end user contracts. The Bell Atlantic contracts provide that "[i]f a Customer terminates or cancels a Variable Term Payment Plan option or Service Discount Plan option before the expiration date, the Customer will be subject to a termination liability charge as outlined in the relevant tariff" (Stipulation of Facts at Exh. 6). The relevant tariff provision states that "[i]f a customer terminates service or cancels an OPP before the expiration of a commitment period the customer is subject to a termination liability charge" (Stipulation of Facts at Exh. 5, § 2.3.4(C)). In this case, however, the Bell Atlantic customers are not terminating or canceling their agreements with Bell Atlantic; they are assigning them to CTC. Bell Atlantic cites no authority for the proposition that an assignment of rights results in termination of a contract, and such an argument runs counter to the Massachusetts law discussed above, which allows for relatively unfettered assignment of contractual rights. As such, Bell Atlantic cannot collect a

⁴ The Department has determined that Bell Atlantic avoids, on average, 29.47 percent of its total costs when it no longer provides service on a retail basis. New England Telephone and Telegraph, 96-73/74 et al. (Phase 2-B) (Phase 4-B) (May 2, 1997).

termination charge for a valid assignment from an end user to CTC where, as here, the assignment does not terminate the contract.

Based on the foregoing, the Department finds that Bell Atlantic cannot refuse to process any order from CTC that gives effect to a valid assignment of contractual rights from a Bell Atlantic end user to CTC in which the essential terms of the original Bell Atlantic contract, including the price for and duration of the service, remain intact. Bell Atlantic may, on a going-forward basis, change the terms of its contract and propose to change its tariff provisions to expressly include a non-assignment clause. Then, customers who choose to enter into a contract with Bell Atlantic will do so with the full understanding that the contract may not be transferred to others.

B. The Effect of the Federal Court Injunction

The parties appended to their Stipulation of Facts a copy of an order from the United States District Court for the Southern District of New York in which the District Court granted Bell Atlantic's motion for a temporary restraining order enforcing the non-competition provision of its Agency Agreement with CTC (Stipulation of Facts at Exh. 2).⁵ In that order, the District Court, among other things, temporarily restrained CTC from "soliciting the customers for whom CTC was responsible when acting as Bell Atlantic's sales agent under the Agency Agreement" (Id. at 13). According to the responses to the Department's briefing questions, as many as 47 out of the 68 orders that CTC alleges Bell Atlantic unlawfully refuses to process are subject to the District Court's temporary restraining order.

⁵ By an order dated March 11, 1998, the Southern District of New York transferred the case to the Southern District of Maine (Stipulation of Facts at Exh. 3).

CTC cannot recapture from this Department what it lost before a Federal Court of competent jurisdiction. The Department therefore finds that any agreement entered into by CTC in contravention of the District Court's temporary restraining order is not a valid assignment for purposes of its findings in the preceding section of this order. Any disputes regarding the scope of the District Court's temporary restraining order should be presented to that court for resolution.

C. CTC's Other Requests for Relief

In its Motion for Specific and Expeditious Emergency Relief, CTC sought several forms of relief in addition to an order directing Bell Atlantic to accept assignment of existing Bell Atlantic contracts. Having ordered Bell Atlantic to process the valid assignments presented by CTC, the Department finds that the remaining requests for relief are moot, as they could accomplish no more than the relief already granted by the Department under applicable Massachusetts law.⁶

V. ORDER

Accordingly, after due notice and consideration, it is hereby

ORDERED: That CTC's Motion for Specific and Expeditious Emergency Relief is GRANTED to the extent it seeks an order directing Bell Atlantic to process orders from CTC that give effect to a valid assignment of contractual rights from a Bell Atlantic end user to CTC in

⁶ At the public hearing and procedural conference, several commenters raised the issue whether CTC should be allowed to receive a wholesale discount rather than paying the full retail rate to Bell Atlantic, without triggering the termination fee provisions of the Bell Atlantic tariffs. While CTC's request for specific and expeditious relief does not compel us to reach this question, it is an important one and will be considered at such time that it is fairly before us.

which the essential terms of the original Bell Atlantic contract, including the price for and duration of the service, remain intact; and it is

FURTHER ORDERED: That Bell Atlantic cannot attempt to collect a termination fee for the processing of such orders; and it is

FURTHER ORDERED: That CTC's remaining claims for relief are dismissed as moot.

By Order of the Department,

Janet Gail Besser, Chair

James Connelly, Commissioner

W. Robert Keating, Commissioner

Paul Vasington, Commissioner