COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department on its own motion as to the propriety of the rates and charges set forth in the following tariffs: M.D.T.E. No. 14, filed with the Department on January 16, 1998 to become effective February 14, 1998, by New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts.	D.T.E. 98-15

REPLY BRIEF OF AT&T COMMUNICATIONS OF NEW ENGLAND, INC., REGARDING PHASE I (RESALE TARIFF) ISSUES

On August 28, 1998, New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts ("Bell Atlantic") filed its initial brief in Phase I for this docket ("BA Initial Brief"). AT&T Communications of New England., Inc. ("AT&T") submits this Reply Brief to respond to Bell Atlantic's mischaracterization of concerns raised by AT&T regarding the language of the resulting resale at issue here.

A. Contrary To Bell Atlantic's Mischaracterization, AT&T's Concern Is With The Resale Tariff At Issue In This Case, Not With The Bell Atlantic-AT&T Interconnection Agreement.

Bell Atlantic argues in its brief that AT&T is seeking "a ruling regarding only a potential future dispute that may arise under the interconnection agreement." BA Initial Brief, at 4. Bell Atlantic argues that AT&T is seeking resolution of the issue of "whether changes in the discounts or other charges in the Resale Tariff that the Department

approves in the future affect the parties interconnection agreement." *Id.*, at 5. Bell Atlantic argues that the Department should refrain from addressing such hypothetical concerns. Bell Atlantic's mischaracterization of AT&T's concerns is an attempt to divert the Department's attention away from a very real problem in Bell Atlantic's resale tariff.

It is AT&T's position that Subsection 2.1.1.A. under Section 2.1 (Application of Tariff) is unreasonable in that it purports to apply to all offerings of Bell Atlantic's telecommunications services for resale, rather than only offerings purchased under the tariff. A simple change in the language of this provision would alleviate AT&T's concerns. Indeed, changing the language of Section 1.1.1.A. to the following would be sufficient to address AT&T's concerns:

> Regulations, rates and charges in this tariff apply to the purchase under this tariff of Telephone Company telecommunications services for resale.

AT&T agrees that a dispute over the meaning of the interconnection agreement should be left for another day, and that such a dispute over the meaning of the contract should not be affected by the language approved in this later filed resale tariff. Limiting the application of this tariff's provisions to purchases made under the tariff will accomplish that result. As noted in AT&T's initial brief, such a limitation is not inconsistent with a mutual intent, clearly expressed in a contract, to be bound by some or all of the terms of the tariff.

Indeed, the failure to limit the tariff's application to purchases made under it could prejudge later disputes. For example, the tariff, as proposed, purports to apply its terms and conditions to any telecommunications services offered for resale. Its terms and conditions may be inconsistent with the AT&T/Bell Atlantic interconnection agreement, and AT&T and Bell Atlantic may have a dispute over whether the contract between them

contemplated that the provisions of the tariff would take precedent over the existing provisions in the interconnection agreement. That dispute should be resolved at the appropriate time and in the appropriate way, but the Department should not prejudge the dispute or dictate the outcome of that dispute by approving a tariff here that purports to apply to all telecommunications services. If the Department approves (as it should) a tariff that clearly states that it applies only to the purchase of telecommunications services for resale under the tariff, then the issue to be resolved in the contract dispute (if there ever is one) will be only whether or not the contract intended these tariff provisions to apply. Bell Atlantic will not be able to argue that, regardless of the parties intent under the contract, the tariff takes precedence because its language so indicates.[1]

It is ironic that Bell Atlantic claims that AT&T is seeking to have the Department "prejudge" a future contract dispute (*see,* BA Initial Brief at 6), when it is Bell Atlantic **B** by the inclusion of overbroad language in its tariff **B** that is seeking to "prejudge" the result of future contract disputes. Indeed, Bell Atlantic does not seek to prejudge future results only with overbroad tariff language; it seeks to do so in its briefs as well. In its initial brief, Bell Atlantic **B** appropriately citing to the record **B** notes the parties' agreement as to the immediate effect on the interconnection agreement of the discount rates adopted in citation (because there is none) **B** makes the further assertion that "the parties agree that the rates set by the Department in the *Consolidated Arbitrations* for

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[1] When asked what AT&T's concern with the tariff language is, Ms. Hogarth stated:

> Well, the fact that this tariff has been filed to apply to all resellers, and knowing that AT&T has an interconnection agreement [which is] sufficient for AT&T to purchase its resale services, I wanted to make sure that this general tariff was not intended to apply to AT&T as it purchases resale services under the interconnection agreement.

Tr., p. 82. One might add that it would still be open to Bell Atlantic to argue in a contract dispute case that the contract provides that the tariff will apply. AT&T seeks here only the a change in the tariff language regarding the tariff's application.

services associated with resale (such as Call Usage Detail Service and Service Establishment and Maintenance charges) will be inserted in both the interconnection agreement and the Resale Tariff." *Id*., pp. 4-5. Nowhere in the record of this case has AT&T made such a statement, and the issue of whether the Bell Atlantic/AT&T contract contemplates that result is not before the Department. Moreover, if the parties have a dispute regarding this issue, the Department should not prejudge the issue by approving language in the present tariff that purports to apply this tariff's charges to services associated with resale that are procured under the Bell Atlantic/AT&T interconnection agreement.

B. Bell Atlantic's Arguments Regarding The Legal Effect Of Rates Approved Or Ordered By The Department In Certain Situations, If Different From Rates Under A Contract, Have No Relevance To This Case.

In its brief, Bell Atlantic cites to the testimony of AT&T's witness, Joan Hogarth, in response to a question (objected to by AT&T counsel on the ground that it calls for a legal opinion), which essentially inquires into the authority the Department to order a change of a rate term in a contract between AT&T and Bell Atlantic. According to Bell Atlantic, the inability of Ms. Hogarth to offer a legal opinion on the stand as to the Department's authority to make such an order, and its enforceability, demonstrates that it is "unreasonable for AT&T to ask the Department to reach a decision about future events when its own witness wasn't sure what the correct decision should be." Such an argument reflects a complete misunderstanding of the request for relief that AT&T seeks.

AT&T does not seek the Department's resolution of a future dispute over which rate will apply in the future.[2] AT&T seeks only the reasonable result that the tariff

[2] Indeed, this is a complex issue that should not be addressed in the abstract in this case. Clearly, the Telecommunications Act of 1996 contemplated (indeed, expressly provided for) a system of bilateral contracts rather than a system based on generally available tariffs, as had been

language, which **B** as proposed **B** applies to all telecommunications services offered for resale, indicate that the terms of the tariff apply to purchases under the tariff.

Conclusion

For the foregoing reasons and for those cited in AT&T's initial brief, the Department should order Bell Atlantic to refile its proposed tariff with a limitation on the overbroad language relating to its application.

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DATED: September 4, 1998

the case in a more regulated environment. Contracts by their very nature provide rights to the parties to them that are not generally available. The Department will almost certainly be required in the future to reconcile the tensions between a system based on contracts and a system based on generally available tariffs. It need not, however, undertake that task here.

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INITIAL BRIEF OF AT&T COMMUNICATIONS OF NEW ENGLAND, INC., REGARDING PHASE I (RESALE TARIFF) ISSUES

Introduction

On January 16, 1998, New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts ("Bell Atlantic") filed with the Department of Telecommunications and Energy ("Department") a wholesale tariff for the resale of its retail services. Pursuant to the Department's directive in D.P.U. 94-185-C (1997), the tariff included discounts developed and approved in the *Consolidated Arbitrations,* D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94, and, in addition, a set of terms and conditions. At the same time, Bell Atlantic filed a petition to establish a permanent resale discount based on an avoided cost study that reflected avoided costs different from those found by the Department to be avoided in the *Consolidated Arbitrations*. On March 27, 1998, AT&T filed a motion to, *inter alia,* expand the scope of the proceeding to establish permanent unbundled network element ("UNE") rates. On May 29, 1998, the Department issued an order granting

AT&T's motion and establishing a schedule for the resolution of the various issues in the case. In general, the Department divided the case into three phases: investigation of the proposed resale tariff (Phase I), investigation to determine permanent resale discounts (Phase II), and investigation to determine permanent UNE rates (Phase III). Discovery and hearings regarding Phase I have now been completed. This is AT&T's initial brief in Phase I.

Background

AT&T's interest in Phase I of the proceeding is very limited. AT&T takes no position on the reasonableness of the terms and conditions that Bell Atlantic proposes to apply to purchases made pursuant to its resale tariff, so long as Bell Atlantic does not also propose to apply those terms and conditions to AT&T's purchase of wholesale service for resale pursuant to the AT&T/Bell Atlantic interconnection agreement. Based on discovery and the testimony of Bell Atlantic witness, Barbara Crawford, it is apparent that Bell Atlantic does not intend to apply the *non-rate* terms and conditions of its resale tariff to AT&T's purchases under the AT&T/Bell Atlantic interconnection agreement. August 19, 1998 Transcript 1 ("Tr."), pp. 23-24. *See also, id*, p. 13.

During the course of this proceeding, it became apparent that **B** with regard to the rate terms of the tariff **B** Bell Atlantic has a different understanding as to the application of this tariff than does AT&T. Both parties acknowledge that the numbers for the wholesale discounts that are determined in Phase II of this proceeding will replace the interim discounts both in this tariff and in the AT&T/Bell Atlantic interconnection agreement. However, it is AT&T's position that,

once the interim discounts in its interconnection agreement are replaced with the permanent numbers to be decided in Phase II, those numbers cannot thereafter be changed in the interconnection agreement for the term of the agreement. Bell Atlantic, on the other hand, believes that the discount rates in its resale tariff **B** whatever they are **B** will apply to AT&T purchases made under the interconnection agreement, and that, therefore, if the tariff discount rates change in the future, the new tariff discount rate would apply to AT&T purchases under the interconnection agreement.

Argument

I. THE DEPARTMENT SHOULD REQUIRE BELL ATLANTIC TO CHANGE SUBSECTION 2.1.1.A. OF ITS TARIFF TO COMPORT WITH BELL ATLANTIC'S INTENTIONS WITH REGARD TO NON-RATE TERMS AND CONDITIONS.

Subsection 2.1.1.A. under Section 2.1 (Application of Tariff) states "Regulations, rates and charges in this tariff apply to the offering of Telephone Company telecommunications services for resale." Bell Atlantic's proposed tariff, therefore, on its face purports to apply to any purchase of Bell Atlantic's telecommunications services for resale. Given that Bell Atlantic agrees that at least the non-rate terms and conditions of the tariff do not apply AT&T's purchases under its interconnection agreement, Subsection 2.1.1.A as currently stated does not even comport with Bell Atlantic's understanding of its own tariff. As a result, this tariff provision should be changed to reflect the undisputed points (a) that the "regulations" in the tariff apply only to purchases made pursuant to the tariff and (b) that purchases made pursuant to contractual arrangements with Bell Atlantic are governed by those arrangements.

Bell Atlantic may argue that such a provision would create a problem because some of its interconnection agreements refer to the terms and conditions in the resale tariff. This is not a problem. Inclusion in the tariff of the foregoing (*i.e.*, points (a) and (b)), produces exactly the intended result for contracts that incorporate the tariff's provisions: that purchases made under the contract will be subject to the terms and conditions in the tariff.

II. THE DEPARTMENT SHOULD REQUIRE BELL ATLANTIC TO CHANGE SUBSECTION 2.1.1.A. OF ITS TARIFF TO COMPORT WITH THE DEPARTMENT'S INTENTIONS WITH REGARD TO RATES AND CHARGES.

As noted above, subsection 2.1.1.A. under Section 2.1 (Application of Tariff) states "Regulations, rates and charges in this tariff apply to the offering of Telephone Company telecommunications services for resale." Bell Atlantic's proposed tariff, therefore, on its face purports to apply its rates and charges to any purchase of Bell Atlantic's telecommunications services for resale. As explained below, the Department's own orders do not authorize Bell Atlantic to file a tariff that can unilaterally impose new rates for the purchase of wholesale service under pre-existing interconnection agreements. As a result, this tariff provision should be changed to reflect the Department's prior rulings.

In the Department's May 29, 1998, order in this docket, the Department expressed its intentions regarding the use to which the resale discounts developed in this proceeding will be put. The Department made

clear that the discounts determined in this proceeding will be substituted for the interim discounts in the pre-existing interconnection agreements and will be substituted for the interim discount in the wholesale tariff. *See, id.*, p. 3, n. 2. The Department did not state that the wholesale tariff rate provisions shall apply to purchases made under pre-existing interconnection agreements. The language of subsection 2.1.1.A. as filed, however, purports to do exactly that, in that it purports to apply to any purchase of wholesale service.

This is not a contract interpretation issue as Bell Atlantic would have the Department believe. AT&T and Bell Atlantic may have a disagreement over the meaning of its interconnection agreement, but that does not affect the reasonableness of the terms and conditions in Bell Atlantic's proposed tariff. Here, Bell Atlantic has proposed a tariff that purports to apply to any offering of wholesale service. Even if Bell Atlantic were correct regarding its interpretation of the AT&T/Bell Atlantic agreement (that the agreement should reflect any future changes in the tariffed discount rate), an interpretation that AT&T adamently opposes, the Department still should not permit Bell Atlantic to file a tariff that purports to apply to purchases made under contractual arrangements.

Conclusion

For the foregoing reasons, the Department should order Bell Atlantic to refile its proposed tariff with language consistent with its own and the Department's intentions.

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DATED: August 28, 1998