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Department of Telecommunications
Commonwealth of Massachusetts

Investigation by the Department on its own)
Motion as to the Propriety of the Rates and) D.T.E. 98-57
Charges Set Forth in M.D.T.E. Nos. 14 and 15) (Phase III)

)

COMMENTS OF MASSACHUSETTS CLEC
ALLIANCE ON PROPOSED
TARIFF CHANGES FOR ADSL

In accordance with the order of the Department issued May 8, 2000, the Massachusetts CLEC Alliance ("CLEC Alliance") submits its comments in opposition to the tariff changes proposed by Bell Atlantic - Massachusetts ("Bell Atlantic") on May 5, 2000. As explained below, the CLEC Alliance asks that the Department: (1) suspend Bell Atlantic's proposed tariff changes under G.L. c. 159 §§ 19, 20, (2) order Bell Atlantic to reduce its proposed DSL rates by 70 percent across-the-board, and (3) require Bell Atlantic to modify the non-price terms and conditions governing the provision of DSL service, as described in more detail below.

Background

The tariff changes now proposed by Bell Atlantic for xDSL capable loops and line sharing are the result of the Department's March 24, 2000 decision requiring Bell Atlantic to include the terms and conditions for xDSL capable loops in its Tariff No. 17. Bell Atlantic had opposed including such terms and conditions in its tariff on the ground that DSL is an emerging technology with many technical issues yet to be resolved. March 24 Order, slip op. at 166. The Department acknowledged the existence of such technical issues but did not believe that they precluded Bell Atlantic from publishing the essential terms and conditions for DSL service in its tariffs. According to the Department, "CLECs require greater certainty on the pricing of xDSL-capable loops and not, necessarily, the immediate resolution of all technical issues." Id. The Department dismissed the notion that the publication of a tariff posed an undue burden for Bell Atlantic, on the ground that much of the information needed for issuance of tariff provisions was already being developed in New York. Indeed, the Department noted specifically that "Bell Atlantic agrees that its DSL tariff on file in New York would be very similar to the tariff provisions they develop for Massachusetts, the primary difference being rates due to different underlying costs." Id. n. 94.

In its tariff filing, Bell Atlantic proposes a wide array of terms and conditions, and rates and charges, applicable to the provision of xDSL service. First, Bell Atlantic proposes provisioning intervals for DSL loops of six business days for one to five links (and even longer intervals where links are ordered in greater quantities), and 15 business days to provision a digital designed link. Part A, Section 3.2.3.A. (3 and 5-6). These intervals are in addition to the three business days allowed for manual loop qualification and engineering queries. Id. (7-8). Second, the proposed tariff provides for manual loop qualification in the event that Bell Atlantic's mechanized data base shows that a particular loop does not qualify.

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Part B, Section 5.4.2.A (2 and 3). Third, Bell Atlantic proposes to charge for cooperative testing of xDSL loops. Part B, Section 5.4.7.B. Fourth, Bell Atlantic extends its existing non-recurring charges ("NRCs") and loop rates to DSL service. Part M, Section 1.3, 2.5. Fifth, Bell Atlantic proposes a number of recurring and non-recurring charges for loop conditioning, cooperative testing and wideband test access. Part M, Section 2.5.3. In support of its proposed DSL rates and charges, Bell Atlantic submitted a document entitled "ADSL Conditioning," which purports to provide cost support for the recurring and non-recurring charges that are unique to providing DSL loops.

ARGUMENT

The Department has frequently acknowledged that it is "accorded broad discretion in allowing, suspending and investigating proposed changes to tariffs." In *New England Telephone & Telegraph Co.*, D.T.E. 98-57, 1999 WL 1132958 (September 24, 1999). However, the Department "does not typically allow tariffs to take interim effect prior to an investigation of the propriety of the terms and conditions contained in the tariff absent extenuating circumstances." *Id.* The Department has been particularly reluctant to allow disputed tariffs for unbundled network elements ("UNEs") to go into effect on an interim basis -- even subject to refund -- in recognition of the potential anti-competitive effects on competitive local exchange companies ("CLECs") that cannot be mitigated by refunds. Thus, in the above-cited decision, the Department stated that:

"not only are the proposed tariffs subject to more dispute than formula-based price cap filings, Bell Atlantic's request that its tariffs take interim effect subject to refund, results in a situation that places CLECs at a disadvantage. In the NYNEX price cap filings, customers received refunds as a result of the interim effect of the tariffs. Here, allowing the tariffs to take interim effect would allow Bell Atlantic to charge CLECs for services based upon rates and conditions that may later be determined inappropriate or anti-competitive.

"the mere fact that CLECs may be entitled to a future refund, in the event that the Department later modified the tariffs after a full Department investigation, fails to take into account the time and resources which may be expended by the CLECs in order to accommodate the terms and conditions of the interim tariffs."

Id. at *5.

In this case, the Department should exercise its authority to suspend Bell Atlantic's proposed tariff changes for DSL service. As demonstrated below, the proposed tariff terms and conditions proposed by Bell Atlantic have not been shown to be just and reasonable. In particular the recurring and non-recurring charges proposed by Bell Atlantic for loop conditioning, cooperative testing and wideband testing have not been shown to be justified on the basis of costs. To the contrary, as discussed below, these charges are virtually identical to those recently rejected and ordered reduced by 70 percent by the New York Public Service Commission ("NYPSC"). Bell Atlantic's proposed DSL rates should therefore either be suspended or significantly reduced -- by 70 percent across-the-board -- and allowed to go into effect subject to refund. In addition, several of the non-cost tariff provisions should be rejected as anti-competitive.

A. The Department Should Suspend Bell Atlantic's Proposed DSL Rates and Charges, Require Bell Atlantic to Reduce those Proposed Charges Across the Board, and Allow the Reduced Rates to Go Into Effect Subject to Refund.

Bell Atlantic's proposed recurring and non-recurring charges for loop conditioning, loop qualification, cooperative testing and wideband testing are not supported and should be reduced considerably -- i.e., by 70 percent. The cost support submitted by Bell Atlantic for these charges is skimpy at best, consisting of two pages of exhibits and eleven pages of workpapers that present a wide variety of cost elements

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without explanation and with no attempt to justify the applicability or levels of those cost elements under the FCC's Total Element Long Run Incremental Cost ("TELRIC") guidelines. Thus, for example, the sole basis for the loop conditioning rates are completely unsupported and unsourced costs for service order, wiring, provisioning and field installation activities from workpaper page 2, that are in turn applied to buried and aerial cable. To derive the purported cost of adding the electronics, Bell Atlantic merely multiplies the material cost of ISDN equipment by a number of unsupported factors under two separate, unspecified "scenarios." See Workpaper Page 3. The calculation of the costs for mechanized loop qualification and wideband testing is similarly unsourced and unsupported. See Workpaper Pages 5-10. The failure by Bell Atlantic to provide even a prima facie justification for its proposed DSL rates by itself justifies suspension of those rates and the provision of further cost justification by the company.

Bell Atlantic's failure to provide more than token support for its proposed DSL rates is inexplicable. Consistent with Bell Atlantic's previous assertion that its DSL tariff would be similar to that previously proposed in New York, Bell Atlantic's proposed DSL rates are virtually identical to DSL rates previously proposed in New York, which rates are subject to an ongoing investigation initiated by the NYPSC. There, the NYPSC held a hearing into Bell Atlantic's proposed line sharing rates, generating a record consisting of 12 exhibits (including Bell Atlantic's cost model) and 300 pages of transcript and written testimony. Based on its conclusion that Bell Atlantic's proposed DSL rates were excessive, and its cost model seriously flawed, the NYPSC ordered those rates reduced by 70 percent, subject to the outcome of a larger cost proceeding now scheduled for hearings in October of this year. See Opinion No. 99-12, Opinion and Order Concerning DSL Charges (December 17, 1999) at 2-3, 45-46 ("NY DSL Order"). Since then, Bell Atlantic has submitted another round of voluminous testimony on DSL and loop conditioning rates. Both rounds of testimony before the NYPSC dwarf the cost support offered in support of Bell Atlantic's proposed recurring and non-recurring DSL charges before this Department.

Given the relative dearth of cost support for Bell Atlantic's proposed DSL rates, the NY DSL Order reducing Bell Atlantic's proposed DSL rates -- by 70 percent across the board -- constitutes compelling evidence that Bell Atlantic's proposed DSL rates for Massachusetts are similarly inflated. As shown in Table 1 below, the DSL recurring and non-recurring charges Bell Atlantic now proposes for Massachusetts are essentially the same as those initially proposed in the New York -- and many multiples in excess of those ultimately accepted by the NYPSC.

TABLE 1

Bell Atlantic Proposed and NYPSC Approved Rates for DSL Loops

-- versus --

Bell Atlantic - Mass. Proposed Loop Conditioning Rates for Line Sharing
BA-NY

Proposed DSL Loop

Conditioning Rate

NYPSC Revised Per Opinion No. 99-12

BA - MA Proposed Line Sharing Loop Conditioning Rate

Manual Loop Qualification

\$40.37

\$12.11

\$113.67

Engineering Query

\$113.95

\$34.19

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\$147.91

Engineering Work Order Charge (per order)

\$81.00

\$24.30

\$671.23

ISDN Loop Electronics Charge

\$971.25

\$291.38

\$894.15

Load Coil Removal (18kft –21kft)

\$1062.36

\$318.71

\$910.35

Load Coil Removal (21kft – 27kft)

\$1410.00

\$423.00

\$1210.04

Remove Single Bridged Tap

\$344.87

\$103.46

\$250.60

Remove Multiple Bridged Taps (per link)

\$833.25

\$249.91

\$609.92

In some instances, Bell Atlantic has proposed charges that are even higher than those it initially proposed in New York. While there may be cost differences between the two jurisdictions, they are not likely to be 70 percent, and in any case, Bell Atlantic has made no effort to quantify any such differences, if they do exist.

No less significant is the laundry-list of fundamental shortcomings identified by the NYPSC based on its analysis of the Bell Atlantic cost model submitted in support of DSL rates that are almost identical to those Bell Atlantic now proposes for Massachusetts. First, according to the NYPSC, Bell Atlantic failed to justify the work functions underlying its proposed estimates, instead relying "almost exclusively on the judgments of a small number of engineers." Id. Second, the NYPSC found that Bell Atlantic had failed to take "account of the cost savings that might be available in a forward-looking network." Id. at 40. Third, the NYPSC criticized the Bell Atlantic cost model for double-counting of costs between recurring and non-recurring charges. Id. Finally, the NYPSC found that Bell Atlantic had failed adequately to consider allocation of costs among the first CLEC to request a loop and subsequent CLEC requesters. Id. The NYPSC concluded that these flaws, taken together, resulted in DSL rates that could constitute a significant barrier to entry by CLECs seeking to provide DSL service, thereby justifying an across-the-board reduction in the proposed rates. Id. at 41.

Given the similarity of the DSL rates proposed by Bell Atlantic for Massachusetts to those proposed in New York, there is every reason to believe that the DSL rates at issue here are based on vastly overstated costs. While Bell Atlantic may or may not contend that it faces higher costs in Massachusetts, it is simply not possible that the costs of providing DSL loops in Massachusetts could be several hundred percent higher than Bell Atlantic's costs in New York. Nor has Bell Atlantic made any attempt to demonstrate that its cost support does not suffer from the same deficiencies as those identified in the NYPSC DSL Order. Thus, for example, Bell

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Atlantic does not even attempt to establish that its proposed cost support incorporates the efficiencies that would be available in a forward-looking network. Nor does it attempt to disprove the existence of the double-counting of costs identified in the NYPSC DSL Order. Finally, as with the loop conditioning rates proposed in New York, Bell Atlantic does not even attempt to consider the allocation of loop conditioning costs among subsequent requesters along the same distribution routes.

Bell Atlantic's proposed charges for cooperative testing and wideband test access are similarly suspect. Significantly, Bell Atlantic proposed no such charges in New York and does not explain why such charges should be applicable to DSL offerings in Massachusetts. Indeed, in hearings before the NYPSC held on April 17, 2000, Bell Atlantic withdrew its earlier assertions -- contained in filed testimony and answers to data requests -- that the wideband test access charge would apply to xDSL service. Bell Atlantic stated flatly that the wideband testing charge would apply only in the context of line sharing. Furthermore, in the line sharing phase of the ongoing cost proceeding before the NYPSC, the evidence raised significant question whether the approach chosen by Bell Atlantic for providing Wideband Test Access constituted a least cost, most efficient deployment under TELRIC. Indeed, the evidence showed further that such testing was adopted not in the interests of CLECs, but rather to benefit Bell Atlantic's own retail DSL offerings.

Because suspension of the rates and charges proposed by Bell Atlantic for DSL service may result in a delay in providing such service, the Department should order Bell Atlantic to reduce its proposed rates by 70 percent before allowing those rates to go into effect subject to true-up or refund.

B. The Department Should Suspend as Anticompetitive a Number of the Non-Price Tariff Provisions Proposed by Bell Atlantic.

The terms and conditions proposed by Bell Atlantic for the provision of DSL service, if adopted, would threaten to erect a barrier to entry, significantly restricting the ability of CLECs to compete on a level playing field with Bell Atlantic. First, the provisioning intervals proposed by Bell Atlantic for DSL loops -- 6 business days for one to five links and 12 business days for six to nine links, with extra 3 business day intervals for manual loop qualification and engineering queries -- are far longer than is reasonable, given the work necessary before allowing the CLEC access to the loop. Moreover, Bell Atlantic does not justify the imposition of proportionately longer intervals where a CLEC requests access to more loops. Bell Atlantic should be required to apply the SMARTS clock, as it does in provisioning other UNEs. Compare Part A, section 3.2.3.B. Further, Bell Atlantic proposes 15 days to provision digital design links ("DDL"). Given that Bell Atlantic makes specific provisions only for ADSL and HDSL services, CLECs wishing to provide any other types of xDSL services, such as SDSL, may be forced to order DDL at some two and a half times the interval for the DSL links favored by Bell Atlantic. Such limitation of competitive alternatives is manifestly anticompetitive.

Second, Bell Atlantic should be responsible for providing mechanized loop qualification. Its proposed tariff language in Part B Section 5.A.2 & 3 regarding manual loop qualification and engineering query should be stricken. Similarly, there should be no NRC applicable to cooperative testing, as Bell Atlantic should be required to deliver loops with continuity without charge.

Finally, the Department should examine a number of other tariff provisions proposed by Bell Atlantic that constitute potential barriers to competitive entry. These provisions are as follows:

Part A, Section 3.3.4.B allows the CLEC to cancel a service order only if Bell Atlantic exceeds the standard or negotiated interval by more than 30 days, thus removing any commercial penalty should Bell Atlantic fail to comply with its own

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service minima.

Part B, Section 19.1.1.A(1) defines the high frequency part of the loop as the frequency range above the voiceband on a copper facility "that is being used" to carry voiceband transmissions. The FCC's Line Sharing Order at ¶ 18 provides that "requesting carriers are entitled at their option to exclusive use of the entire unbundled loop facility." Id. Furthermore, not all xDSL services are compatible with line sharing, e.g., SDSL.

Section 19.1.2.B(1) and C(4) state that Bell Atlantic will not condition or deploy xDSL technology where it is "likely to degrade" or "interfere." These standards are far too permissive, vague, and subject to conflicting interpretations. They should be replaced with "significantly degrade" and "significantly interfere," both of which should be defined in the tariff. See also Section 5.4.3.B (referring to "interference" or "impairment"). The FCC's Line Sharing Order, speaks of "significant degradation, which is an action that noticeably impairs a service from a user's perspective." Id. (executive summary); see also ¶¶ 85-86, 202 (addressing "significantly degrade" standard and declining to adopt objective standard for "significant degradation" due to absence of record support).

Section 19.1.5.D. (3) allowing for the removal of the splitter, should be amended by adding the words "The TC shall promptly advise the CLEC in writing of any such removal." Similarly, Section 19.1.5.E regarding damages resulting from repair and maintenance should be amended by adding the words "if the trouble arises from the TC equipment."

Part E, section 1.1.2.G(6), which provides that if Bell Atlantic "augments its work force based on [CLEC] forecasts, the CLECs will be held accountable for the accuracy of their forecasts" is vague, open ended, and potentially punitive and therefore should be deleted or modified to require a reasonable percentage range of accuracy for forecasts provided by CLECs to Bell Atlantic. Workforce augmentation should also be defined in the tariff.

Part E, section 3.5.2(B) regarding CLEC liability in the event it cancels an application for collocation space should be amended by adding the words "set forth in this tariff" following the words "Telephone Company" in the second line. Such language is necessary to limit CLEC liability only to costs and liabilities incurred by Bell Atlantic in fulfilling its obligations under the tariff.

In part E, section 3.5.12.A, there should be a reasonableness limitation in this language, by inserting the words "reasonably and solely" after the word "charges" and before the word "incurred" in the fourth line.

CONCLUSION

For the forgoing reasons, the Massachusetts CLEC Alliance respectfully requests that Bell Atlantic's proposed tariff revisions be suspended. In addition, Bell Atlantic's proposed DSL rates and charges should be reduced by 70 percent and allowed to go into effect subject to true-up following resolution of any investigation into such proposed rates and charges.

Respectfully submitted

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