D.T.E. 98-15 (Phase I)

Investigation by the Department on its own motion into the propriety of the Resale Tariff of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, filed with the Department on January 16, 1998, to become effective February 14, 1998.

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I. 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, for effect February 15, 1998. Bell Atlantic made the filing in order to comply with a previous order of the Department, (Local Competition, D.P.U. 94-185-C (1997)), and § 251(c)(4) of the Telecommunications Act of 1996 ("Act"). The proposed tariff included the interim resale discounts adopted in Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (Phase 2 Order) (December 2, 1996), and a set of proposed terms and conditions. At that time, Bell Atlantic also filed a petition to establish a permanent resale discount to replace the interim resale discount established in Consolidated Arbitrations. On February 2, 1998, the Department docketed its investigation of Bell Atlantic's proposed tariff and petition to establish permanent resale discounts as D.T.E. 98-15, and suspended the tariff until August 15, 1998.

II. PROCEDURAL HISTORY

On March 23, 1998, the Department held a public hearing and procedural conference, and granted intervenor status to AT&T Communications of New England, Inc. ("AT&T"), MCI Telecommunications Corporation ("MCI"), Sprint Communications Company L.P. ("Sprint"), CTC Communications Corp. ("CTC"), and the Telecommunications Resellers Association ("TRA"). On March 27, 1998, AT&T filed a motion to expand the scope of the proceeding ("AT&T Motion on Scope") to also establish permanent rates for unbundled network elements ("UNE"), and a motion to strike ("AT&T Motion to Strike") tariff sections regarding non-recurring charges and operations support system ("OSS") charges. Bell Atlantic responded to these motions on April 15, 1998. On April 16, 1998, AT&T filed a motion to stay the procedural schedule pending a Department ruling on the AT&T Motion on Scope. The hearing officer granted the motion to stay.

On May 29, 1998, the Department issued an Order on AT&T's Motion on Scope and Motion to Strike. In that Order, the Department restructured the present docket into three phases. In Phase I, the Department is investigating the terms and conditions of Bell Atlantic's proposed resale tariff. In Phase II, the Department is investigating

permanent resale discounts. In Phase III, the Department is investigating permanent rates for UNEs, reciprocal compensation, and interconnection. On July 8, 1998, at the Department's request, Bell Atlantic withdrew and refiled its tariff, with an effective date of August 7, 1998. On July 9, 1998, the Department suspended the tariff until September 18, 1998.

On August 19, 1998, the Department held an evidentiary hearing in Phase I of this docket. At the hearing, Bell Atlantic presented the testimony of Barbara Crawford, director of product development for telecommunications industry services marketing; and AT&T presented the testimony of Joan Hogarth, district manager of its law and government affairs division. Bell Atlantic and AT&T filed initial briefs on August 28, 1998. In lieu of an initial brief, TRA filed comments in the form of a letter on August 31, 1998. On September 3, 1998, Bell Atlantic filed a motion to strike TRA's letter, to which TRA responded on September 10, 1998. Bell Atlantic, AT&T, and TRA filed reply briefs on September 4, 1998.

III. BELL ATLANTIC'S RESALE TARIFF

Bell Atlantic's proposed tariff introduces general regulations that govern the relationship between the Company and a reseller, such as limits on the Company's liability when it discontinues services and reseller notification procedures. The tariff would also establish terms and conditions for the ordering of resold services, which would proceed as follows. After getting authorization from an end user, the reseller would have to give to Bell Atlantic the end user's name, location, configuration of service, and facility interface so that the Company could provide the requested service and bill the reseller for it. Bell Atlantic would accept orders, other requests, and complaints only from the reseller, not from the end user. The reseller would place orders for resold services, as well as requests for modifications and cancellations, through an operational interface, which Bell Atlantic would establish.[(1)]

Under the tariff provisions for the issuance, payment, and crediting of reseller bills, the reseller would be considered the 'customer of record' and thus would be responsible for payment to Bell Atlantic of all charges incurred, as well as for allocation of end-user charges for resold service. All bills rendered would be due 31 days after the bill date and would be subject to a late-payment penalty if the payment is received after the payment date. Bell Atlantic also proposed that, in certain instances, it would require a deposit before providing service to a reseller.[(2)]

The proposed tariff also introduced regulations that would govern billing disputes between a reseller and Bell Atlantic. If the billing dispute is resolved in favor of Bell Atlantic, any payments that were withheld by the reseller would be subject to the late-payment penalty. If resolved in favor of the reseller, Bell Atlantic would apply a credit for the correct disputed amount. In certain circumstances, the reseller would also receive a credit for the disputed amount or late payment penalty.

The proposed tariff also defines the terms "resale." "Resale" would mean the sale of telecommunications services by Bell Atlantic to another person for the purpose of reselling the service to a third party, rather than for the purpose of using the service itself. The purchase of services by an agent for use by its principal would not be considered "resale" within the meaning of the proposed tariff.

Bell Atlantic would offer for resale all services that it offers to end-users under its Massachusetts Tariff D.P.U. No. 10. Promotional programs of 90-day duration or less would be available for resale, but would not be subject to the resale discount. Also, directory assistance ("DA") would be available for resale. DA services associated with residential, Centrex, or private branch exchange services, however, would not be subject to the resale discount due to Massachusetts E-911 funding requirements. All other DA service offerings would be subject to the resale discount.

The proposed tariff would allow for resale of Lifeline and Linkup America services to eligible end users. Resellers would also be able to purchase blocking services that would restrict an end-user's access to certain services, such as calls placed to vendor-operated services or information services with a 900 service access code. Resellers would be subject to any restrictions contained in the Company's Tariff No. 10 that limit the availability of a service to a particular type of customer.

Bell Atlantic would also offer for resale those services that it offers to end users on a customer-specific basis under D.P.U. Mass. No. 12. The Company would calculate a wholesale discount equal to its avoided costs, based on the customer-specific service configuration. The Company would reserve the right to propose a different avoided-cost discount for service provided under special contract arrangements.

Finally, the proposed tariff provides that Bell Atlantic may include the name, address, and telephone number of the resellers' end users in its telephone directories and DA records; that resellers' telephone exchange service customers would be included in the relevant E911 database; and that resellers would be entitled to use the services provided by the Company's annoyance call bureau.[(3)]

IV. POSITIONS OF THE PARTIES

A. AT&T

AT&T maintains that the tariff is unreasonable because Bell Atlantic intends that its terms apply to all offerings of Bell Atlantic telecommunications service for resale (including those offered pursuant to interconnection agreements), rather than only to services purchased under the tariff (AT&T Brief at 2). AT&T argues that the tariff should state that its terms and conditions apply only to purchases made pursuant to the tariff and that purchases made pursuant to contractual arrangements with Bell Atlantic are governed by the terms of the applicable interconnection agreement (AT&T Brief at 3). AT&T contends that, without such clarifying language, the tariff could supersede the terms of its interconnection agreement with Bell Atlantic in future disputes -- a result not

intended by the interconnection agreement (AT&T Reply Brief at 2-3). AT&T admits that disagreement over the meaning of the interconnection agreement does not affect the reasonableness of the terms and conditions of Bell Atlantic's proposed tariff, but argues that the Department should not permit Bell Atlantic to file a tariff that applies to purchases made under contractual agreements (AT&T Brief at 5).

AT&T acknowledges that the permanent wholesale discount rate established in Phase II of this docket will apply to existing interconnection agreements, but argues that the discount then cannot be changed during the term of the agreement, even if the tariffed discount rate changes (AT&T Brief at 2-3).

B. TRA

As discussed below, the Department has stricken TRA's initial filing, and the positions taken in that filing will not be considered in this order. TRA did file a timely reply brief in which it argues that certain tariff provisions should be changed or clarified (TRA Reply Brief at 2). Specifically, TRA argues that the tariff should provide that a resellers' own use of service be at the wholesale discount (Section 1.3.1); that the tariff must ensure fair access to facilities, procedures, and standards regarding facility availability (Section 2.2.2.C); that the tariff should avoid unequal treatment of resale and retail customers (Section 5.2.1.C); that the tariff's liability provisions are one-sided and should be changed (Section 2.3.1); that the tariff's billing dispute provisions allow for anti-competitive action (Sections 2.2.2.B, 3.2.1. and 4.1.7); that the tariff should specifically bar Bell Atlantic's improper use of customer information; and that the Department should scrutinize the level and application of the tariff charges (TRA Reply Brief at 2-5).

C. Bell Atlantic

Bell Atlantic argues that its proposed resale tariff is "reasonable and contains complete and appropriate terms, conditions and charges governing the resale of BA-MA's retail telecommunications services" (Bell Atlantic Reply Brief at 3). Bell Atlantic argues that no party presented evidence challenging the reasonableness of any provision of the tariff (Bell Atlantic Brief at 1; Bell Atlantic Reply Brief at 3-4). Bell Atlantic maintains that AT&T's concerns relate to the interpretation of its interconnection agreement, but that such concerns should not prevent the Department from approving the tariff (Bell Atlantic Brief at 1). Bell Atlantic maintains that any disputes concerning the interconnection agreement should be resolved through dispute resolution, as provided in the agreement (Bell Atlantic Brief at 6). On the merits of AT&T's arguments, Bell Atlantic argues that the Department has "continuing jurisdiction over resale discount rates and other resale charges" and, as such, any Department order establishing wholesale discount rates would apply to all relevant carriers (Bell Atlantic Brief at 5).

V. ANALYSIS AND FINDINGS

A. Bell Atlantic's Motion to Strike

Bell Atlantic moved to strike TRA's August 31, 1998 letter, which TRA filed "in lieu of" its initial brief. The procedural schedule set by the Department in its May 29, 1998 order established Friday, August 28, 1998 as the date by which parties would have to file initial briefs. There is no dispute that TRA filed on August 31, 1998 a letter purporting to raise issues that should have been raised in an initial brief. Further, there is no dispute that TRA did not seek or obtain permission from the Department to make an initial filing, whether denominated a brief or a letter, after the deadline set by the May 29 order. Bell Atlantic argues that TRA's August 31 letter should be stricken pursuant to 220 C.M.R. 1.11(6), which provides, in pertinent part,

Briefs not filed or served on or before the dates fixed therefor shall not be accepted for filing. . . . Requests for an extension of time in which to file briefs shall conform to the requirements of 220 C.M.R. 1.02(5) and shall be filed before the time fixed for filing such briefs.

TRA argues that it should be excused from its failure to adhere to the May 29 order due to the breakdown of informal discussions with Bell Atlantic (TRA August 31, 1998 letter at 1; TRA Opposition to Motion to Strike at 2). TRA argues further that it should be excused because it informed Bell Atlantic and the hearing officer of its intent to address for the first time in its reply brief the issues it had raised through cross-examination (TRA Opposition to Motion to Strike at 2-3). Finally, TRA argues that it should be excused because Bell Atlantic "pretended that no issues were raised" by TRA on cross-examination (id.).

Section 1.02(5) of 220 C.M.R. provides a means by which a party may seek additional time to file papers with the Department. That section requires that such requests be made by motion and before the expiration of the period originally prescribed. The party seeking an extension must show good cause for the request. Cambridge Electric Light Company/Commonwealth Electric Company, D.P.U. 89-242/89-246/89-247, at 5 (1990); Fitchburg Gas and Electric Light Co., D.P.U. 85-235, at 2 (1985). When a party meets these requirements, the Department may accommodate a party's exigent circumstances. A party ignores these requirements, as TRA has done, at its peril. TRA did not request leave to file late and does not show good cause for so doing. The issues it raised in its August 31 letter could and should have been raised in a timely-filed initial brief, regardless of any discussions with counsel for Bell Atlantic.[(4)] It is the Department -- not Bell Atlantic -- that is conducting an investigation of Bell Atlantic's tariff, so whatever may have occurred in bilateral discussions of TRA and Bell Atlantic is irrelevant to Department procedural requirements.

TRA's suggestion that it should be excused because it had indicated that it might forego an initial brief altogether, and that its August 31 letter could therefore be considered an early reply brief, compounds its problems in two respects. First, TRA filed a reply brief on September 4; it cannot have two. Second, the tactic of raising for the first time

in a reply brief substantive arguments that are based on a previously filed tariff and evidence adduced at hearing should not be encouraged or condoned, much less seen as an excuse for the late-filing of another document. A party is free to waive its right to an initial brief and respond only to substantive issues raised by the initial briefs of other parties. The Department looks unfavorably, however, on a party's attempt to have the last word in matters that could and should be raised on initial brief. For these reasons, Bell Atlantic's motion to strike TRA's August 31, 1998 letter is granted, and the Department will not consider the matters raised in the letter in rendering this order.

In its reply brief, TRA did raise certain issues regarding the reasonableness of Bell Atlantic's resale tariff. This filing is procedurally defective as well; the arguments presented therein do not respond to the arguments presented in any party's initial brief. Rather than responding to issues raised in the other parties' initial briefs, the reply brief either repeats statements made in TRA's first filing, (which has been stricken), which statements therefore represent yet another attempt to file a delayed first brief, or it raises substantive issues for the first time. These arguments refer only to the language of the tariff itself and the testimony of Bell Atlantic's witness, Ms. Crawford, to support TRA's argument that certain sections of the tariff are unreasonable. These arguments could have and should have been raised in a timely-filed initial brief. As discussed above, the Department disfavors any party's attempt to have the last word by saving for a reply brief arguments that could be raised in an initial filing. Procedural regularity and fairness are the reasons for having the rules set out in 220 C.M.R. 1.00 et seq.[(5)] For this reason, the Department will not consider the other issues raised by TRA for the first time in its reply brief.

B. Bell Atlantic's Resale Tariff

Section 251(c)(4) of the Act imposes the obligation upon Bell Atlantic, as an incumbent local exchange carrier ("ILEC"), "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to" end users and "not to impose unreasonable or discriminatory conditions or limitations" on these resold services. In D.P.U. 94-185-C, in accordance with the Act and also to satisfy the Department's existing price floors requirements, the Department ordered Bell Atlantic to file a proposed resale tariff. The purpose of this tariff is to give resellers of local exchange service the option of either providing services to customers via the resale tariff or pursuant to a resale agreement, either negotiated or arbitrated, with Bell Atlantic. The tariff option reduces the transaction costs for new competitors and streamlines the entry process. Clarity and fairness are important characteristics of any tariff, and they are of especial importance here as conditions of market entry.

Pursuant to G.L. c. 159, § 20, the Department must determine whether Bell Atlantic's proposed terms and conditions in its resale tariff are "just and reasonable."[(6)] The right of a common carrier to make rules and regulations governing the offering of its services, subject to the approval of the Department and the requirement of

reasonableness, has been long recognized. Wilkinson v. New England Tel. & Tel. Co., 327 Mass. 132, 135 (1951) (emphasis added).

The terms and conditions in the resale tariff closely mirror "standard" resale terms and conditions contained in approximately 50 Department-approved interconnection and resale agreements between Bell Atlantic and competing local exchange carrier ("CLEC") resellers. The Department has received very few complaints from CLECs concerning these standard terms and conditions. Although the CLECs' silence to date cannot be assumed to imply universal support for the terms and conditions, the repeated use of those terms and conditions over the past two years in numerous approved agreements amounts to marketplace and regulatory validation. Moreover, the record in this case does not reflect a challenge to any of the specific terms and conditions.[(7)] Therefore, we find that based on the Department's careful review of the terms and conditions, the tariff is reasonable. We note, however that the local exchange resale market in Massachusetts is evolving and that changes in the marketplace or changes in regulatory law or policy could require the Department to re-evaluate the reasonableness of specific terms and conditions in Bell Atlantic's resale tariff.

Next, we address AT&T's argument concerning the applicability of the tariff to AT&T's existing arbitrated interconnection agreement. While we agree with Bell Atlantic that AT&T's concern is premature, we believe it is important for other carriers who are providing resale service to know how the resale tariff will affect existing resale agreements. The Act created a preference for competing carriers to negotiate the rates, terms, and conditions under which they would compete in the local exchange market. See Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), cert. granted, 118 S. Ct. 879 (January 26, 1998) ("The structure of the Act reveals the Congress's preference for voluntarily negotiated interconnection agreements between incumbent LECs and their competitors over arbitrated agreements. . . ."). Implicit in this Congressional preference for negotiated agreements is the understanding that state commissions not try to override what parties have freely negotiated, so long as such provisions do not run afoul of the standards in Section 252 of the Act concerning approval of negotiated agreements. Consistent with this understanding, a resale tariff may not supersede the negotiated terms and conditions of an existing resale agreement, unless the parties mutually agree through renegotiation that the ILEC/seller's tariff does so or may do so.

Arbitrated terms and conditions, however, should be treated differently, for the parties, by requesting arbitration, have explicitly sought a Department determination on contract provisions. Where parties have sought such a determination, the Department-arbitrated provisions in the tariff shall supersede corresponding provisions in the existing resale agreements between those parties. This finding applies to the Department's determination of permanent resale discounts, which apply equally to all resale agreements. Once the Department issues its order in Phase II of this docket, AT&T and other carriers will be required to include the new, permanent discounts in their agreements as a result of those discounts being established by the Department under the

Act's arbitration procedures. Similarly, any future Department-arbitrated changes to the resale discount will govern and supersede existing interconnection agreements.

As a result of this distinction between negotiated and arbitrated provisions of resale agreements, Bell Atlantic shall file, within two weeks of the date of this order, a revised tariff that contains a provision specifying that tariffed rates and terms, derived from Department arbitrations, supersede corresponding provisions in resale agreements.[(8)] In addition, Bell Atlantic shall file a list of such arbitration-derived provisions in the tariff.

VI. ORDER

Accordingly, after due notice, hearing, and consideration, it is

ORDERED: That the Resale Tariff of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, filed with the Department on July 8, 1998, to become effective August 7, 1998, be and hereby is APPROVED; and it is

FURTHER ORDERED: That Bell Atlantic's motion to strike TRA's August 31, 1998 letter is hereby GRANTED, and that the Department shall also disregard those portion's of TRA's reply brief that raise substantic issues for the first time on reply; and it is

FURTHER ORDERED: That Bell Atlantic shall file, within two weeks of the date of this order, a compliance tariff as specified in Part V.B., above.

By Order of the Department,

Janet Gail Besser, Chair

James Connelly, Commissioner

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

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).

1. [1] The operational interface allows Bell Atlantic to process a reseller's order. Through the interface, a reseller can, among other things, establish end-user accounts, assign telephone numbers, enter service orders into the Company's systems, negotiate and schedule installations for end users, reserve installation appointments, enter end user service and repair inquiries, and verify the network status of an associated telephone line.

2. [2] The deposit could not exceed the actual or estimated rates and charges for service for a two-month period. Bell Atlantic would return the deposit, with interest, after the reseller had established credit.

3. "E911" is enhanced 911 service, which allows all emergency calls to be routed to a Public Safety Answering Point to properly identify the caller's location.

4. The Department has rejected a party's attempt to avoid a procedural schedule by making a late filing in the form of a letter rather than a brief. Yankee Microwave, Inc., D.P.U. 87-201, at 2 (1989).

5. TRA or any individual reseller may avail itself of G.L. c. 159, § 16, if it finds that services provided under this tariff are "unjust, unreasonable, unsafe, improper or inadequate."

6. [6] As noted above, the Department is only investigating the terms and conditions of the resale tariff in this Phase. The resale tariff includes the interim discounts adopted in the Consolidated Arbitrations. Those interim discounts will remain in effect until declared permanent or replaced by other, permanent discounts based on the findings in Phase II of this proceeding.

7. The TRA did raise concerns about the terms and conditions, but the Department did not consider them. As noted in Section V.A., above, the Department granted Bell Atlantic's motion to strike the TRA's late-filed initial comments, and also will not consider arguments made by the TRA for the first time in its reply brief, which could have been presented in a timely-filed initial brief.

8. [8] The proposed resale tariff inaccurately referred to public telephone service, which has been de-tariffed and removed from Tariff No. 10. We direct Bell Atlantic to correct this mistake in its compliance filing.