

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE JOINT APPLICATION)
OF BELL ATLANTIC-DELAWARE, INC. AND)
CAPITAL TELECOMMUNICATIONS, INC.)
FOR APPROVAL OF AN INTERCONNECTION) PSC DOCKET NO. 97-429
AGREEMENT PURSUANT TO SECTION 252(e))
OF THE TELECOMMUNICATIONS ACT OF 1996)
(FILED NOVEMBER 25,1997))

FINDINGS, OPINION, AND ORDER NO. 4713

A. INTRODUCTION

1. Bell Atlantic-Delaware, Inc. (ABA-Del@) and Capital Telecommunications, Inc. ("Capital"), have jointly asked the Commission to approve a reseller=s agreement under the provisions of 47 U.S.C. Section 252(e), as added by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. BA-Del is the incumbent local exchange carrier and Capital represents that it plans to provide telecommunications services, including local exchange service, within Delaware. Consistent with its Aresale@ purpose, the proffered agreement sets forth the terms, conditions, and prices for Capital to purchase BA-Del=s retail services for purposes of resale to end-users. It also includes prices, terms, and conditions for Capital to access BA-Del's Operations Support Systems (AOSS@) for ordering, provisioning, maintaining, and billing the services purchased. All of the terms of the agreement were negotiated and the two parties ask for approval under the review standards applicable to such consensual contracts. See 47 U.S.C. Section 252(e)(2)(A). After consideration of the proffered resale agreement and the comments received, the Commission approves the agreement, subject to two conditions. The Commission does so in furtherance of this State=s policy which encourages the growth of competitive telecommunications markets and the availability of customer choice for telecommunications services. 26 Del. C. Section 702(3), (4).

B. BACKGROUND

2. On November 25, 1997, BA-Del and Capital filed their resale agreement with this Commission. The contract, dated September 17, 1997, has an initial term extending to August 26, 1998, and will continue thereafter until terminated, upon notice, by either party. It contains a price list for access to BA-Del's OSS and adopts a wholesale discount rate for Capital to purchase BA-Del's retail services of either 16% or 20% depending on which carrier provides the operator services. Agreement, Attach. 1 to Exh. II. However, the schedule of prices indicates that all the listed rates shall apply until they are replaced by new rates as may be approved or allowed to go into effect by the Commission. At such time, the parties will then amend the schedule to reflect the new approved rates. Agreement, Attach. 1 to Exh. II n. 1.

3. Pursuant to Guideline 30 of the Commission's AGuidelines for Negotiations, Mediation, Arbitration, and Approval of Agreements Between Local Exchange Telecommunications Carriers,@ notice of the filing of the resale agreement and the application for its approval were given both by newspaper publication and by actual notice to the participants in PSC Regulation Docket No. 45 and all certificated local exchange carriers.

4. Only Staff filed comments in response to the notice. In that submission, Staff asserted that it had found the agreement to be in the public interest and recommended its approval. Staff asked that such approval be conditioned on the parties filing any future changes in the agreement for approval and Capital acquiring a Certificate of Public Convenience and Necessity ("CPCN").

5. At its meeting on February 3, 1998, the Commission considered whether to approve or reject the Agreement tendered by BA-Del and Capital. After deliberation, the Commission approves the Agreement, subject to two single conditions.

C. FINDINGS AND DISCUSSION

6. By 26 Del. C. Section 703(4), this Commission has been granted the authority to implement the provisions of the federal Telecommunications Act of 1996, including the authority to approve agreements submitted under 47 U.S.C. Section 252(e)(1).

7. Pursuant to the provisions of 47 U.S.C. Section

252(e)(2)(A), the Commission may reject an agreement adopted by negotiation only if it finds that the agreement discriminates against a non-party telecommunications carrier or that implementation of the agreement would not be consistent with the public interest. Subject to the conditions set forth below, the Commission, in this proceeding, cannot find that the tendered agreement discriminates against another telecommunications carrier. Moreover, the Commission determines that approval of the agreement, and its implementation, is, and would be, in the public interest and consistent with the General Assembly's command that this Commission foster competition in the telecommunications markets. See 26 Del. C. Section 702(3), (4). Third, the Commission believes that the certification process, coupled with the ongoing supervision of certificated local exchange service providers, will ensure compliance with local service obligations, including service quality standards.

8. The resale agreement contains a provision which calls for alteration of the agreement if any legislative, regulatory, or other governmental action affects the material terms of the Agreement or a party's ability to perform. Agreement at Section 26.3. Moreover, the itemized schedule of charges includes a footnote provision which indicates that the listed discounts and rates will be replaced by new rates later approved by the Commission. Agreement, Attach. 1 to Exh. II n. 1. In addition, in other provisions, the agreement allows BA-Del to change the agreed upon wholesale discounts and other prices where such change is required, approved, or permitted by applicable law. Agreement, Exh. II Sections 1.3, 2.2.

9. Initially, the Commission notes that the obligation to change the rates in light of later new rates represents a contractual pledge of the parties, not a Commission directive. Here, the Commission reviews the rates as it would any other term or condition resolved by negotiation. If the prices set forth in the agreement are to be later replaced it is because the parties are free to construct a contract in such a manner.

10. Second, the Commission believes, and finds, that any later changes, modifications, or amendments to the resale agreement, including those triggered under any of the above-described provisions, should, and must, be filed with the Commission and be subject to the opportunity for Commission approval. Because the Commission must maintain

a copy of all interconnection and resale agreements for inspection, and because the terms of such agreements must be available to any other carrier, any such changes to this agreement must be filed with the Commission. Moreover, the Commission finds that the review process set forth by 47 U.S.C. Section 252(e)(1) reaches to all material changes or modifications (as determined by the Commission), whether such alterations are commanded by the present agreement or arise from later agreements between the carriers.

11. Consequently, to maintain the Commission's oversight and to ensure that the agreement's terms are available, the Commission will require BA-Del and Capital to file with the Commission any alterations or revisions made to their agreement. For alterations, amendments, or revisions, brought about by later agreement of the parties or pursuant to the terms of the present agreement, the parties shall file a copy of the altered contract with the Commission. Material changes (as determined by the Commission) shall be subject to Commission approval under the provisions of 47 U.S.C. Section 252(e).

12. The second criteria for review of an agreement adopted by negotiation asks if implementation of the agreement will be in the public interest. The Commission answers that question in the affirmative. Once Capital obtains its CPCN, it can, with this now-approved resale agreement, enter the local exchange market and thus offer Delaware consumers more choices for telecommunications services. The Commission urges Capital to begin the process of obtaining a CPCN.

13. In summary, for the above reasons, the Commission approves, subject to two conditions expressed below, the resale agreement between BA-Del and Capital. The conditions are that: (1) the parties file for review and approval any changes, modifications, or amendments made to this agreement hereafter; and (2) that Capital not take under the agreement for purposes of providing intrastate services until it has received a CPCN to provide telecommunications services.

14. The Commission emphasizes that its approval of this resale agreement shall not be construed as any Commission finding or endorsement that any of the terms, conditions, and prices in the agreement will allow BA-Del to apply for authority to offer interLATA services under 47 U.S.C. Section 271. Because the negotiated portions are not

subject to review under any substantive standard, the Commission's approval of those portions cannot be deemed an assessment of "checklist" compliance. So too, the Commission makes no finding whether Capital is, or will be, a provider meeting the criteria set forth in 47 U.S.C. Section 271(c)(1)(A).

D. ORDERING PARAGRAPHS

Now, therefore, this 3rd day of February, 1998, IT IS ORDERED:

1. That, subject to the conditions set forth in this Order, the resale agreement presented by Bell Atlantic-Delaware, Inc. and Capital Telecommunications, Inc. on November 25, 1997, is approved under the provisions of 47 U.S.C. Section 252(e)(2)(A).

2. That, pursuant to the provisions of 47 U.S.C. Section 252(h), the resale agreement between Bell Atlantic-Delaware, Inc. and Capital Telecommunications, Inc., dated September 17, 1997, shall be made available for public inspection and copying.

3. That, pursuant to the provisions of 47 U.S.C. Section 252(i), Bell Atlantic-Delaware, Inc. shall make available any interconnection, service, or network element provided under the above agreement to any other requesting telecommunications carrier upon the same terms and conditions as provided in the agreement.

4. That Bell Atlantic-Delaware, Inc. and Capital Telecommunications, Inc. shall promptly notify the Commission of the nature and terms of any changes to be made to the agreement either by further agreement of the parties, by operation of the terms of the present agreement, or by changes in any referenced tariffs.

5. That Bell Atlantic-Delaware, Inc. and Capital Telecommunications, Inc. shall not undertake any sale or purchase under the resale agreement in order to provide intrastate telecommunications services until Capital Telecommunications, Inc. has obtained a Certificate of Public Convenience and Necessity to provide the appropriate telecommunications services within this State.

6. That the Commission reserves the jurisdiction and

authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

/s/ Robert J. McMahon
Chairman

Vice Chairman

/s/ Arnetta McRae
Commissioner

/s/ John R. McClelland
Commissioner

Commissioner

ATTEST:

/s/ Linda A. Mills
Secretary