The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

April 8, 1998

D.P.U./D.T.E. 96-118

Petition of Cape Organization for the Rights of the Disabled, Northeast Independent Living Program, Stavros Center for Independent Living, Western Massachusetts Association for the Deaf and Hearing Impaired, and over twenty (20) customers of MCI Telecommunications Corporation as Telecommunications Relay Service provider, regarding alleged substandard services that are being provided, pursuant to G.L. c. 159, §§ 12(d), 16 and 24.

APPEARANCES: Cape Organization for the Rights of the Disabled
114 Enterprise Road
Hyannis, MA 02601
Complainant

Stavros Center for Independent Living
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Amherst, MA 01002
Complainant

Northeast Independent Living Program
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Lawrence, MA 01843
Complainant

Western Massachusetts Association for the Deaf and Hearing Impaired
P.O. Box 4713
Springfield, MA 01101
Complainant

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-and-

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FOR: SETTLEMENT INTERVENTION STAFF
Intervenor

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FOR: MCI TELECOMMUNICATIONS CORPORATION
Respondent

Barbara Anne Sousa, Esq.
Bell Atlantic
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FOR: NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY D/B/A BELL ATLANTIC
Respondent

ORDER ON MOTION FOR ENTRY OF ORDER ACCORDING TO THE TERMS AS STIPULATED BY THE PARTIES AND SET FORTH HEREIN

I. INTRODUCTION

On December 16, 1996, Cape Organization for the Rights of the Disabled, Northeast Independent Living Program, Stavros Center for Independent Living, Western Massachusetts Association for the Deaf and Hearing Impaired ("the four consumer groups"), and over twenty (20) customers of MCI Telecommunications Corporation ("MCI") filed a complaint with the Department of Public Utilities (now the Department of Telecommunications and Energy) ("Department"), requesting an investigation regarding the quality of service of the Telecommunications Relay Service ("TRS"). TRS is a system which uses third party operators to connect deaf, hard of hearing, and speech impaired persons with persons of normal hearing and speech by way of the telephone network. MCI provides TRS in Massachusetts as a contractor for New England Telephone and Telegraph Company d/b/a Bell Atlantic - Massachusetts ("Bell Atlantic").[1]

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[1] G.L. c. 166, § 15E requires, inter alia, that carriers that provide local exchange service to one thousand or more subscribers ("local exchange carriers") provide a dual party TDD/TTY telephone message relay service from a center located within the Commonwealth. The statute also requires local exchange carriers to issue an RFP, subject to the review and approval of the Department, to provide dual party TDD/TTY service. The statute defines TDD/TTY as a telecommunications device for the deaf consisting of terminals that permit two-way, typed telephone conversations with or between deaf people.

On October 6, 1995, the Department approved a Request for Proposal submitted by Bell Atlantic (then NYNEX) for TRS in Massachusetts. See Dual Party Relay Service, D.P.U. 95-54 (1995). On November 27, 1995, MCI was awarded the contract to provide TRS for Bell Atlantic in Massachusetts. Bell Atlantic began offering TRS service using MCI as its contractor in June 1996.

On February 14, 1997, MCI filed an Answer to the Complaint ("Answer"). In its Answer, MCI disputed all the major allegations as either not accurate or not supported by any data. In addition, MCI contended that the Complaint against it must be dismissed on a number of legal grounds. After the Department conducted a preliminary review of the complaint, the Department suggested Alternative Dispute Resolution to the parties, with the assistance of the Massachusetts Office of Dispute Resolution, as a preferred method of addressing the complainants' concerns. However, on May 14, 1997, MCI informed the Department that it could not agree to mediation.

On June 4, 1997, the Attorney General of the Commonwealth ("Attorney General") filed a notice of intervention pursuant to G.L. c. 12, § 11E. On June 20, 1997, the Hearing Officer granted Bell Atlantic's petition to intervene.

The Department conducted a procedural conference on June 13, 1997. On June 25, 1997, MCI filed with the Department a motion to limit the scope of the Department's inquiry and to exclude the award of monetary damages. After briefing by the parties, on August 11, 1997 the Hearing Officer issued a ruling on the Scope of the Proceeding, which stated that the Department found that the appropriate scope of inquiry in the proceeding is whether MCI has complied with the terms, conditions, and specifications of Bell Atlantic's Request For Proposal ("RFP"), which was approved by the Department. On September 16, 1997, the Department held a public hearing in Buzzards Bay. The Department also accepted written comments from the public on their experience with the MCI TRS.

On November 13, 1997, the Hearing Officer issued a ruling joining intervenor Bell Atlantic as a Respondent in this matter, and on November 26, 1997, Bell Atlantic filed an answer to the Complaint.

On December 11, 1997, the Department held a second procedural conference, at which the schedule for Testimony, Evidentiary Hearings, and Briefing was set.[2] Initial Testimony was filed by the Attorney General and Bell Atlantic on January 23, 1998, and Rebuttal Testimony was filed by MCI and the Attorney General on February 23, 1998. MCI and Bell Atlantic filed Surrebuttal Testimony on March 6, 1998.

On March 8, 1998, the Department appointed Andrew O. Kaplan and Valerie Anderson as Settlement Intervention Staff ("SIS"). On March 24, 1998, the Attorney General, MCI, Bell Atlantic, and SIS filed a Motion for Entry of Order According to the Terms As Stipulated by the Parties and Set Forth Herein, and a Proposed Settlement Agreement ("Settlement"). On March 26, 1998, the Department issued a notice of opportunity to comment on the Settlement. No comments were received.

II. TERMS OF THE PROPOSED SETTLEMENT

The Settlement was executed by the Attorney General on behalf of the four consumer groups and all the individual complainants, MCI, Bell Atlantic, and SIS ("the Parties"). The

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[2] At the December 11, 1997 Procedural Conference, the representatives of the four consumer groups agreed to be represented by the Attorney General. The Department sent a letter to the more than 230 signatories to the Complaint, explaining that the Department will presume that those signatories will be represented by the four consumer groups, unless the signatories notify the Department that they do not wish to be so represented. The Department received no such notification.

Settlement purports to settle all aspects of the Complaint. Further, the Settlement states that MCI and Bell Atlantic will modify the terms of their contract consistent with the Settlement.

The proposed Settlement includes the following provisions.

The Parties will develop a Test Plan that will contain the methods Bell Atlantic will use to measure MCI's performance and to determine whether MCI has violated the Settlement (Settlement at 1). Under the Settlement, MCI and Bell Atlantic will bear their own costs for developing the Test Plan (id.). In addition, Bell Atlantic will conduct the Test Plan at no cost to MCI and in a manner that will not disrupt MCI's provision of TRS (id.). Further, on a regular basis to be determined, Bell Atlantic will certify to the Attorney General that the testing meets the requirements defined in the Test Plan (id.). Initial testing will begin no later than May 1, 1998 (id. at 2).

The Test Plan will include:

a. Choice of test monitors who are impartial and possess experience in testing;

b. The text of the script used to test Communications Assistants'("CAs") typing speed which may consist of two 65-word paragraphs. Test monitors will conduct 200 random test calls each month, based upon the above script, with each call lasting approximately five minutes;

c. Technical requirements for testing answering machine protocols. MCI will not be required to upgrade its equipment currently in use, although MCI is not precluded from upgrades in response to test results or to improve its performance;

d. Methods and techniques for timing test calls. Raw test scores from the tests will be regarded as proprietary by Bell Atlantic, except that a designated individual from MCI, Bell Atlantic, and the Attorney General, may have access upon request to Bell Atlantic;

e. There is to be a standard period for commencement, frequency, and duration of initial and subsequent testing.

(id. at 1-2).

The Settlement contains a liquidated damages provision which is tied to MCI's performance as measured by the Test Plan. If MCI meets typing accuracy and speed requirements, and three of five requirements relating to: (1) percentages of calls answered within ten seconds; (2) percentages of calls answered within 30 seconds; (3) identification of CA to callers; (4) CA asking if user is familiar with the relay system; (5) and adherence to answering machine protocol, MCI will pay no liquidated damages (id. at 3-4). If, however, MCI fails to meet typing accuracy or speed requirements by five percent or less, Bell Atlantic will withhold from its payments to MCI $6,250 for the testing month (id. at 3). If MCI's performance falls outside that five percent range, Bell Atlantic will withhold $12,500 for the testing month (id.). Similarly, if MCI fails to meet three of the five other categories, Bell Atlantic will withhold $25,000 for that testing month (id. at 3-4). At no time will MCI's total liability be more than $25,000 for any test month, or more than $300,000 for the remainder of its contract to provide TRS (id. at 3).

The Parties agree that damages under the Settlement are difficult to assess, and therefore agree to liquidated damages as the exclusive remedy of the parties with respect to MCI's TRS performance under the Settlement (id. at 4). Further, each party agrees to release each other from all claims for the provision of TRS raised in the Complaint (id. at 6).

Before withholding any liquidated damage amount for nonperformance under the Test Plan, Bell Atlantic must provide MCI and the Attorney General's Office with written notice within ten days of receiving MCI's monthly invoice, and MCI shall have ten days to explain why the liquidated damages do not apply (id. at 4-5). The Settlement indicates that the Attorney General will decide whether MCI must pay the liquidated damages (id. at 5).

Promptly following the execution of the Settlement, Bell Atlantic shall begin to solicit new bids for the provision of TRS, subject to approval of the Department, and MCI will not be restricted from bidding for the new contract (id.). MCI's contract to provide TRS will end when either a new contractor assumes operation, or May 1, 1999, whichever comes earlier (id.). A provision for the transition also exists, during which MCI would have no liability for liquidated damages under the Settlement (id.). MCI may transfer the overflow of TRS calls to other TRS relay centers if it is unable to hire suitable CAs due to the transition to another TRS provider, and may be tested on the performance of these other relay centers (id. at 5-6).

MCI agrees to improve its service by, among other things: installing new software to reduce garbling; giving more information to callers; maintaining adequate circuits to handle long distance calls; testing more thoroughly the professionalism of its CAs; training CAs to refrain from interjecting personal comments; and instructing CAs to use reasonable efforts to leave and retrieve messages on and from answering machines (id. at 7-8). MCI also agrees to provide comprehensive initial training for CAs, to require supervisors and CAs to participate in "refresher training" after each year of service, and to allow the Attorney General an opportunity to review MCI's training program (id. at 9). MCI further agrees to be ultimately responsible for all training materials and costs (id.). Finally, MCI agrees to notify the public of the process for filing complaints regarding its provision of TRS (id.).

Bell Atlantic agrees that any monies withheld from MCI would be separately identified by Bell Atlantic and would be used for the sole purpose of purchasing equipment distributed under the TDD equipment and Specialized Customer-Premises Equipment ("SCPE") distribution service, as defined by G.L. c. 166, § 15E(a) and (b), which is limited to subscribers qualified for

a reduced fee or free equipment (id. at 9). The Settlement prohibits Bell Atlantic from using the monies to cover overhead, administration, or any other costs of the TDD equipment and SCPE distribution service (id.). The Settlement also prohibits Bell Atlantic from using withheld funds to reduce or minimize any of its financial obligations required by Massachusetts law or regulation (id.).

III. STANDARD OF REVIEW

In assessing the reasonableness of an offer of settlement, the Department must review the entire record to ensure that the settlement is consistent with Department precedent and the public interest. Massachusetts Electric Company, D.P.U. 96-25 (1997); Western Massachusetts Electric Company, D.P.U. 96-8-CC (1996); Commonwealth Gas Company, D.P.U. 94-128 (1994); Barnstable Water Company, D.P.U. 91-189 (1992).

IV. ANALYSIS AND FINDINGS

The Department recognizes the importance of high-quality relay service to the deaf, hard of hearing, and speech impaired communities in the Commonwealth. The liquidated damages provisions in the Settlement should be an effective deterrent to MCI from allowing its service quality to deteriorate.[3] The Department has previously endorsed financial incentives to ensure service quality is maintained. See NYNEX, D.P.U. 94-50 (1994). The

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[3] According to the Settlement, the Test Plan and associated liquidated damages will be tools to monitor MCI's performance under the current contract with Bell Atlantic. Once a new contract is signed, there is the possibility that there will be a transition to a new TRS provider. In the current proceeding, there was significant information presented which demonstrated that the quality of service suffered during the transition from Bell Atlantic to MCI. The Department emphasizes the need for all those involved in any transition to minimize disruption of TRS service.

Department finds that implementing a Test Plan with the involvement of all parties is a reasonable way to monitor quality of service. The Department orders the parties to file the Test Plan with the Department once it has been finalized. In addition, the parties shall make test results available for review upon request of Department staff.

In reviewing the Settlement, the Department notes that while Section 5(b) provides that the Attorney General will determine whether MCI is responsible for payment of liquidated damages under the Settlement, by statute, the Department has exclusive jurisdiction over service quality issues involving telecommunications companies. G.L. c. 159, § 16. In addition, the legislature has given the Department the authority to regulate TRS services in Massachusetts. G.L. c. 166, § 15E. Even though the Attorney General may certify compliance with the terms of the Settlement, Section 5(b) does not affect the Department's oversight role as the Department retains ultimate jurisdiction over the quality of TRS service. Furthermore, our approval of the Settlement sets no precedent for future determinations regarding liquidated damages, nor does it set precedent for our review of quality of service issues. The TRS user community's right to seek relief from the Department regarding service quality issues, whether through our Consumer Division, or through complaints submitted pursuant to G.L. c. 159, §§ 16 and 24, is not changed by our approval of the Settlement. However, the Department acknowledges that the provisions of the Settlement relating to liquidated damages are the product of Parties' negotiations and as such are contractual in nature; in this instance we will not disturb their agreement on this point.

Based on the Department's review of the record in this proceeding,[4] including testimony at the public hearing and written comments submitted by the user community, the Department finds that the Settlement submitted by the parties produces a fair result and a balanced resolution of the matters before the Department. In addition, the Settlement is consistent with the terms of Bell Atlantic's RFP which was previously approved by the Department. See D.P.U. 95-54. Accordingly, the Department finds that the Settlement is consistent with Department precedent and the public interest. Therefore, the Department approves the Settlement.[5]

Our acceptance of the Settlement does not constitute a determination as to the merits of any allegations, arguments or contentions made in this proceeding, nor does it set a precedent for future proceedings before the Department, whether ultimately settled or adjudicated.

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[4] The Department hereby marks for identification as Exhibit 1, and admits into evidence: the Dual-Party Relay System RFP, as approved by the Department on October 6, 1995, in D.P.U. 95-54.

[5] Based on the disposition of these proceedings and our approval of this Settlement, any outstanding motions in D.P.U./D.T.E. 96-118 are rendered moot.

V. ORDER

After due notice, hearing, and consideration, it is

ORDERED: That the Motion for Entry of Order According to the Terms As Stipulated by the Parties and Set Forth Herein, be and hereby is granted; and it is

FURTHER ORDERED: That the Test Plan referenced in the Settlement be filed with the Department once it is finalized.

By Order of the Department,

Janet Gail Besser, Chair

John D. Patrone, Commissioner

James Connelly, Commissioner

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

A true copy
Attest:

MARY L. COTTRELL
Secretary

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).