ANDREWS OFFICE PRODUCTS CAPITOL HEIGHTS, MD (K)

BELL ATLANTIC DIRECT CASE
CC DOCKET NO. 95-145

Issue I: **Is the difference between Bell Atlantic's rates for DS3 service and video dialtone access link service reasonable?**

Yes, the difference between Bell Atlantic's rates for DS3 service and video dialtone access link service is reasonable.

Video dialtone access links are unique services that differ in material respects from DS3 services, and are therefore priced differently. In particular, the access link provides only one-way transport for 6 Mbps digitally encoded video signals, and must terminate at the video distribution office. In contrast, DS3 service has no geographic restrictions on termination, provides two-way transport, and is "protected," a spare set of fibers is available for alternate routing should the primary pair fail.

These distinctions between access links and DS3 service also result in a real cost difference. The costs for DS3 service include costs for a variety of technologies and circuit designs used to provide service. This is necessary because of the variety of circumstances under which DS3 services are offered. In contrast, the costs for the video dialtone access link are based on the equipment specific to providing video dialtone service in a limited geographic region. Because of the cost differences that result from these facts, setting the price of the access link for video dialtone service at the same level as DS3 service would result in a price that exceeds the access link's fully loaded cost.

Issue I-Information Request (par. 42):

I(1) We require Bell Atlantic to provide a comparison between the costs of DS3 service and that of the video dialtone access link and describe material technical differences between the two services and the specific cost savings that result from use of a video dialtone access link rather than a DS3 service.

The requested cost comparison is provided in Attachment I(1).

As stated by Dr. Charles L. Jackson,[86] there are significant differences between the video dialtone access link and DS3 service that would make a comparison of the two misleading.

> The video dialtone access link provides a high-speed digital link capable of carrying 96 video channels (each digitized at 6 Mbps). It connects to other equipment using an electrical interface similar to that used for DS3 signals. I believe that the use of such a standard interface simplifies the design task, by allowing reuse of existing hardware and software designs, and simplifies electrical interconnection and testing at both the programmer-customer's location and at the Bell Atlantic facilities.
>
> Notwithstanding this electrical interface, there are several elements that make it improper to compare the access link service with traditional DS3 service. First and foremost, the access link service is a one-way service (appropriate for video distribution) rather than the two-way service provided by DS3 circuits (appropriate for telephone calls). Second, the VDT access link does not provide the redundancy and alternate route protection for the video transport service that is a part of DS3 service. This new video transport service operates using a single fiber. In contrast, DS3 service is normally provisioned using four fibers - primary transmit, backup transmit, primary receive, and backup receive. The backup fibers for DS3 service are normally routed over different routes than the primary fibers thereby increasing reliability by giving protection against compromise to the fiber system. Third, all 96 video channels follow the same routing from the programmer-customer's location to Bell Atlantic's video distribution office, unlike the case with DS3s which are individually routed. That is, a customer who purchases multiple DS3s can route each DS3 to a different destination. The DS3 service requires additional distribution electronics to accommodate such routing - electronics that are not required for the video access link service. These major

[86] *See* Jackson Reply Affidavit, at Exhibit B, ¶¶ 19, 20; provided here as Attachment A.

differences make any one-for-one comparison of the video dialtone access link with DS3 improper and misleading, and give rise to cost differences.

The costs provided in tariff filing documentation supporting the rates for DS3 service included entrance facilities comprised of asynchronous fiber optic terminals. Two terminals are included -- one in the serving wire center and one on the customer's premises. With DS3 service, a terminal picks up signals at a customer's premises using electronics which convert the signals from digital to optical. The optical signals are then transmitted to the serving wire center where additional fiber terminal electronics forward them as either optical or electrical. The fiber optic terminals are bi-directional (two-way) and can be used for transport anywhere within the public switched network, as well as for gateway functionality with interexchange providers. The terminals are also able to segment transmission streams into sub-channels, such as DS1s or DS0s. Costs include the two terminals, cable and conduit in between the terminals, and power and common equipment.

In contrast to DS3 fiber terminals, the video dialtone access link utilizes supertrunk transmitter electronics which are unidirectional (one-way only) and which cannot be used for transport throughout the network or gateway functions. The supertrunk transmitter was designed specifically for video-only applications and cannot be segmented or sub-channeled; it is designed to handle real-time encoded multiplexer output from a programmer-customer for the transport of video signals.

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Issue J: **Are Bell Atlantic's rates for interconnection reasonable?**

Yes, Bell Atlantic's rates for interconnection are reasonable. The collocation charges assessed to video dialtone programmer-customers who wish to interconnect at Bell Atlantic's video distribution office are the same as those charged for alternate providers who wish to interconnect at other Bell Atlantic central offices for connection to standard high capacity, DS3, services. This is appropriate, given that the network interface connection is in both cases a 45 Mbps connection, regardless of the transport facilities providing the transmission.

Bell Atlantic's currently effective rates for interconnection are Commission-prescribed, but are undergoing an additional investigation. Any further changes in those rates resulting from the further investigation would be reflected in a refund to the customer (be it an access customer or a video dialtone customer).

Issue J-Information Request (par. 43):

J(1) We require Bell Atlantic to provide cost information justifying the collocated interconnection charge for interconnection at the SWC and the monthly virtual collocation interconnection charge for interconnection at the VDO.

The video dialtone tariff at issue here simply refers programmer-customers to Bell Atlantic's interconnection charges, located in another section of the tariff, for those instances where a programmer-customer prefers to utilize facilities furnished by an alternative provider to carry their video transmissions from their location to Bell Atlantic's video distribution office.

Bell Atlantic's interconnection rates have been appropriately justified within the context of the virtual collocation tariff proceeding. The following outlines the progression and current status of that proceeding:

September 1, 1994: Bell Atlantic files virtual collocation tariff.

December 9, 1994: FCC issues Order partially suspending the rates in CC Docket No. 94-97 (DA 94-1421).

December 13, 1994: Bell Atlantic files Transmittal No. 724 containing rates reflecting Commission's partial prescription.

February 28, 1995: Commission issues "Order Designating Issues for Investigation in CC Docket No. 94-97, Phase I (DA 95-374)".

March 21, 1995: Bell Atlantic files its Direct Case.

May 11, 1995: Commission issues a "Report and Order" in CC Docket No. 94-97, Phase I (FCC 95-200), which prescribes rates based on its investigation of overheads. (No tariff changes were required for Bell Atlantic to be in compliance with the Order.)

September 19, 1995: Commission issues "Order Designating Issues for Investigation" in CC Docket No. 94-97, Phase II (DA 95-2001).

October 19, 1995: Bell Atlantic files its Direct Case.

The Bell Atlantic documents described above can be found in Attachment J(1).

K

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Issue K: Are Bell Atlantic's volume and term discounts for video dialtone service in Dover Township, New Jersey, unreasonably discriminatory?

No, Bell Atlantic's volume and term discounts for video dialtone service in Dover Township are not unreasonably discriminatory. Bell Atlantic's term and volume discount options are available to any programmer customer that wishes to purchase them. The fact that certain programmers might find those options more attractive than others does not constitute unreasonable price discrimination. As set forth in response to Information Request K(1), Bell Atlantic's discounts are economically and commercially reasonable.

Issue K-Information Request (par. 46):

K(1) We require that Bell Atlantic demonstrate that its volume and term discounts are not unduly discriminatory and do not unreasonably favor certain programmers.

As shown in response to Information Request F(1), term and volume discounts are utilized in many industries, including the CATV industry. Any customer can purchase any term or volume offered by Bell Atlantic without pre-qualification.

When Bell Atlantic offers term and volume discounts, it exercises sound business practices and economic judgment.[87] Bell Atlantic benefits from having the greatest number of channels leased and by having stable programmer-customers on the system to attract others to the service. Programmer-customers benefit from discounted pricing and stable terms. All involved are acting in an economically efficient manner. Moreover, the ability of programmers to resell the capacity they have purchased under term and volume discounts would permit small programmers to act as self-aggregators to obtain the benefits of the volume and term discount rates.[88]

As discussed in response to Information Request F(1), the Commission should not discourage use of such discounts for this competitive new service. As a new entrant in an established market, volume and term discounts are vital to allow video dialtone to become a truly

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[87] *See* Taylor Direct Case Affidavit.

[88] *See* Volume Discount Order, 97 FCC2d at 944.

competitive service.[89] Moreover, the discounts proposed by Bell Atlantic are modest in relation to other volume and term discounts previously accepted by the Commission.[90]

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89 *See* Taylor Reply Affidavit at ¶¶ 24-28.

90 See Response to Information Request F(1).

K(2) Bell Atlantic should explain why it has offered only a five year term discount and not terms of shorter duration that might be more attractive to a wider group of programmers.

Bell Atlantic, as the company offering video dialtone service, evaluated the market and determined that the proposed tariff structure was appropriate at this time. In particular, potential programmer-customers expressed interest in monthly and five year terms. Should bona fide demand for intermediate terms materialize, terms of shorter duration could be pursued in subsequent tariff filings.

L

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Issue L: **Are Bell Atlantic's liability provisions for early termination of service agreements reasonable?**

Yes, as discussed in greater detail below, Bell Atlantic's liability provisions for early termination of service agreements are reasonable. Except in the limited case where the programmer-customer is making termination payments and 100% of the video dialtone system capacity is filled, tariff termination liability provisions would do no more than make Bell Atlantic whole following a programmer-customer's breach. Bell Atlantic would not object to a tariff modification waiving termination liability in those limited circumstances. See response to Information Request L(6).

Issue L-Information Request (par. 49-51):

L(1) We require that Bell Atlantic provide a detailed showing of why a term imposing liability for 100% of the remaining contract amount is reasonable.

The proposed termination liability of 100% of the remaining contract payments is a commercially reasonable term, designed to encourage programmers to fulfill their service commitments and ensure that Bell Atlantic is not worse off if they do not. The standard measure of damages for breach of contract is the cost of putting the non-breaching party in the same position as that party would have been had the contract been fully performed. It is therefore appropriate to require a programmer who secured lower rates by making a long-term commitment to fulfill that commitment.

A comparison can again be made between the video dialtone network and the real estate industry. A standard real estate lease imposes severe penalties for early termination, and it is not uncommon for the terms of the lease to require full payment if the tenant who wishes to terminate the lease early cannot produce a replacement tenant who is equally able to meet the lease terms. The landlord has lost all economies of scale and regained all the liabilities associated with the unrented properties that initially prompted the offer of a term discount. In addition, the landlord may have also turned away other prospective tenants, in good faith, believing the property to be rented. Finally, the value of the property is diminished if a major tenant leaves. The landlord suffers financial loss and inconvenience upon the loss of a tenant who does not fulfill the terms of the lease. It is reasonable for a landlord to expect a tenant to fulfill the financial obligation of a lease contract, just as it is reasonable for Bell Atlantic to expect a programmer-customer to fulfill the obligations of a five year tariff purchase. The 100% liability provision accurately measures Bell Atlantic's opportunity costs for the cancelled customer.

L(2) Bell Atlantic should provide examples of tariffs or contracts, for other services, in which such 100% liability is a condition of the offering.

Bell Atlantic's FCC Tariff No. 1 contains several examples of 100% termination liability:

- The DS3, DS3C, and DS3G service Term Pricing Plan (TPP) has two termination liability options. Option I requires 100% of the total monthly charges for the unexpired portion of the minimum period plus 15% of the total monthly charges for the remaining portion of the term plan. Option II requires 100% of the total monthly charges for the minimum period plus an additional amount depending on the TPP period. DS3G has a three year minimum period.[91]
- The Exchange Access Frame Relay Service termination liability for the 3-year TPP imposes 100% of the monthly charges offset by 1/36th for each month in service. For the 5-year TPP, liability is for the difference between the 3-year TPP monthly rate for 36 months and the actual number of months the plan has been in effect multiplied by the monthly rate for the 5-year TPP.[92]
- The Full Fiber Distributed Data Interface (FFDI) service has three termination liability provisions based on the term of the agreement. For the 3-year term, 100% liability is imposed for the remainder of the term. For the 5-year term, the customer is liable for the difference between the monthly rates for 36 months at the 3-year term rates and the actual

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[91] Bell Atlantic Tariff FCC No. 1, § 6.8.22(c).

[92] *Id.*, §16.3.2(c).

number of months the plan has been in effect multiplied by the 5-year monthly rates. For the 10-year term, the customer is liable for the difference between the monthly rates for 60 months at the 5-year term rates and the actual number of months the plan has been in effect multiplied by the 10-year rates.[93]

Additionally, Bell Atlantic-New Jersey's state tariff for Centrex Extend Service contains a liability provision for system features equal to the applicable monthly rate(s) multiplied by the number of months remaining in the contract period.[94]

The tariff pages referenced are provided as Attachment L(2).

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93 *Id.*, § 16.4.5.

94 New Jersey Bell Telephone Company, Tariff B.P.U.- N.J.-No. 2, § 9.1.4(H)(8)(d).

L(3) Bell Atlantic should explain why, especially for a new and untested service like video dialtone, it is reasonable to limit termination without liability for inadequate service to situations where Bell Atlantic fails to deliver service to more than 5% of the programmer's subscribers for more than one hour per day for more than 30 days in any 90 day period, or there is a continual outage of more than 5 days affecting more than 5% of the programmer's subscribers, and the programmer gives Bell Atlantic written notice within 30 days of such failure.

Bell Atlantic's tariff protects programmer-customers against major outages which can disrupt the services they offer to end-user subscribers. In cases where more than 5% of the programmer-customer subscribers are affected by a problem in the video dialtone network, either continuously or intermittently, the programmer-customer is able to cancel service without incurring any penalty. Bell Atlantic believes that the 5% threshold represents a reasonable point at which the programmer-customer's business may be considered to have been significantly affected. Moreover, the service outage provision included in Section 2.3 of the tariff provided additional protection for programmer-customers.

In addition, Bell Atlantic believes that a lower threshold may allow customers who have secured large blocks of channels for an extended period to use a minor outage as an excuse to terminate. The loss of a major customer on the video dialtone network has a substantial negative impact, and Bell Atlantic reasonably desires to protect itself against this event. Of course, Bell Atlantic is committed to maintaining highly reliable video dialtone services.

L(4) Bell Atlantic should explain why early termination without liability in situations where programmers lose a specified percentage of subscribers due to Bell Atlantic's service problems, is unreasonable to implement.

While this provision may have some appeal at first glance, the details of implementing this policy make it impractical to adopt. It would be difficult, if not impossible, to determine whether a subscriber left because of a Bell Atlantic service problem or some other dissatisfaction with a programmer-customer's service offering or pricing. Any effort to make such determination would rely on the subjective impression of dissatisfied customers. Moreover, collecting data from these unhappy customers would further complicate the process. The likely result would be a dispute as to the true nature of a customer's decision to drop service. Regardless, Bell Atlantic is committed to maintaining the same high reliability for its video dialtone services as with its other services.

L(5) Bell Atlantic shall justify why a 90 day limit on finding a replacement programmer is reasonable and why mitigation is permitted only if the programmer, not Bell Atlantic or someone else, finds a replacement.

From a business standpoint, it is important to establish liability with a time certain. This assures that cost recovery occurs within the same basic time period during which costs are incurred. Moreover, the programmer-customer is not forced to terminate service at any time, and consequently can choose not to initiate this 90 day window until it has located a replacement programmer, or can choose to continue service until the end of its term period. Thus, the customer retains flexibility, so long as it does not default on its tariff obligation.

There is no mitigation when Bell Atlantic or another third party finds a new programmer, because such a customer could have purchased service anyway. Only when the departing customer-programmer brings in the new buyer can it truly be considered a replacement.

L(6) Bell Atlantic must explain why double recovery is not likely and why certain protections against double recovery, at least in situations where 100% of channel capacity has been filled, are not necessary.

As explained in Bell Atlantic's response to Information Request L(5), there is no possibility of double recovery if a programmer-customer terminates service when less than 100% of channel capacity has been purchased. In that situation, it can safely be presumed that any new programmer seeking capacity would have purchased channels in addition to those reserved by the defaulting programmer-customer. Therefore, if Bell Atlantic receives the 100% termination liability payment from the defaulting programmer-customer and later finds an additional programmer to purchase service, Bell Atlantic is simply in the position it would have been if the defaulting programmer had fulfilled his contractual obligations--the classic measure of damages for breach of contract. Bell Atlantic would have no objection to a tariff modification that clarifies that termination liability is waived to the extent that 100% of the system's capacity is being utilized.

M

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Issue M: **Is the difference in the interest rate for late payments Bell Atlantic charges video dialtone service customers and access service customers reasonable?**

As set forth below in response to Information Request M(1), Bell Atlantic's interest rate for late payment charges to video dialtone service customers is reasonable because it assures that Bell Atlantic recovers its cost of capital and promotes prompt payment of video dialtone bills by programmer-customers. Bell Atlantic should not be required to make low interest loans to delinquent customers.