STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PUBLIC UTILITIES COMMISSION

IN RE: CUSTOMER SPECIFIC PRICING CONTRACTS :
LARGE SYSTEM-SPECIFIC PRICING PLANS : DOCKET NO. 2676

REPORT AND ORDER

I. Introduction.

On January 7, 1999, Bell Atlantic-Rhode Island ("BA-RI") filed with the Rhode Island Public Utilities Commission ("Commission") amendments to various of its Customer Specific Pricing Contracts ("CSPC") and Large System-Specific Pricing Plan ("LSSP") arrangements (collectively, "Contracts"),[1] pursuant to which BA-RI provides Digital Centrex Service to various large business customers, including the City of Providence Department of Public Schools, the City of Woonsocket, the Town of North Kingstown Department of Public Schools, Brown University, Vector Healthsystems, and the State of Rhode Island.

The Division of Public Utilities and Carriers ("Division") wrote to the Commission on January 27, February 3 and February 15, 1999, with regard to Paragraph 9.3 contained in several of these Contracts, specifically objecting to this "anti-assignment" provision. The precise wording of each contract varies

[1] In accordance with the procedures established by the Commission in Docket No. 1903, BA-RI is authorized to enter into Customer Specific Pricing Contracts for customized service packages and Large System-Specific Pricing Plan arrangements for Centrex systems with large business customers under Tariff No. 15, Part A, Section 1, page 45 and pages 40-44, respectively, as approved by the Commission.

slightly. For example, Paragraph 9.3 of the Brown University Contract provides in relevant part:

> *Bell Atlantic may assign or transfer part or all of this application to any of its affiliates. Provided that customer provides Bell Atlantic with reasonable prior written notice, customer may assign or transfer the application to any company that is the successor to substantially all of its assets and shall pay Bell Atlantic any transfer fee required to be paid under applicable tariffs. All other attempted assignments shall be void without prior written consent.*

The Division objected that this language imposed unreasonable and discriminatory conditions on the resale of telecommunications services, and requested that the Commission strike this type of anti-assignment provision from all Contracts pending the Commission's generic determination as to the validity of such provisions under the Telecommunications Act of 1996 ("Act").

At an open meeting on February 18, 1999, the Commission approved the Contracts, but specifically excepted their anti-assignment provisions, and suspended the enforceability of such provisions pending their review in the docket. The Commission further ordered BA-RI to notify affected customers that the anti-assignment provisions contained in their Contracts had been suspended, pending the outcome of this proceeding. The parties were ordered to brief the Act's applicability to the anti-assignment and termination liability provisions of BA-RI's Contracts.

In a related matter, decided shortly after the initiation of this generic proceeding, the Commission found that BA-RI's prohibition on assignment of contracts by end-users, and imposition of "termination fees" in connection with

the assignment of its retail customer contracts to CTC Communications Corporation ("CTC"), a competitive local exchange carrier, violated the Act.[2] CTC filed a motion to intervene in this docket on February 18, 1999. However, on March 2, 1999, CTC withdrew its motion since it had reached a settlement with BA-RI. On April 16, 1999, BA-RI informed the Division that, as a result of the settlement with CTC, it would "consent to the assignment by retail business customers of contracts for telecommunications services entered into on or before February 24, 1999, unless the contract or related tariff contained language prohibiting assignment". BA-RI also notified all resellers of telecommunication services in Rhode Island that it would no longer consent to assignment of any retail contracts after February 24, 2001.

II. BA-RI's Brief.

In its brief filed with the Commission on May 27, 1999, BA-RI insists that the anti-assignment provisions in its Contracts are valid under the Act. Citing § 251(c)(4) of the Act, BA-RI acknowledges that the Act requires an incumbent local exchange carrier ("ILEC") such as BA-RI to offer its telecommunications services, including Centrex and other business services, to its competitors at wholesale rates, but argues that nothing in the Act requires BA-RI to consent to an assignment of its contracts with retail customers to another telecommunications provider.[3] BA-RI further argues that the Act's prohibition against unreasonable and discriminatory restrictions on resale

[2] See Order No. 15920 (issued July 21, 1999) in Docket No. 2829 (hereafter, "CTC-RI").

[3] BA-RI Brief at pp. 7-8.

applies only to limitations and conditions in the *wholesale* offerings applicable to resellers, and that nothing in the Federal Communication Commission's ("FCC") rules implementing the Act prohibits lawful conditions on *retail* service offerings, such as the imposition of charges for early termination.[4]

While conceding that early termination fees can serve to raise the cost of switching service from BA-RI to another telecommunications provider, BA-RI maintains that such charges are not anti-competitive, because the customer has weighed the cost of early termination in deciding whether to accept the contract in the first place. In support of the propriety of such charges, BA-RI cites a 1996 decision of the Pennsylvania Public Utility Commission in which that Commission rejected AT&T's claim that early termination charges in BA-Pennsylvania's retail tariff unlawfully locked customers into the ILEC, observing that "[t]he fact that a competitor's costs might increase in a competitive market does not, in our view, rise to the level of an anti-competitive advantage that must be rejected by the Commission."[5]

BA-RI contends that an anti-assignment provision in the context of CSPCs and LSSPs should not give rise to the anti-competitive concerns which the Act was designed to address, because even before the passage of the Act, the market for business services such as Centrex was, and continues to

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[4] Ibid. at p. 8 (emphasis added.)

[5] BA-RI Brief at pp. 9-10, citing AT&T Communications of Pennsylvania, Inc. v. Bell Atlantic - Pennsylvania, Inc., Docket R-00953394C004 (Opinion and Order dated June 20, 1996, entered July 7, 1996) [hereafter, "AT&T-Pennsylvania"], at p. 14.

remain, highly competitive in Rhode Island.[6] In this context, BA-RI argues, it should be free to impose the same anti-assignment liability provisions that its competitors use.[7]

BA-RI further argues that the anti-assignment clauses at issue are reasonable and non-discriminatory provisions designed, among other things, to compensate BA-RI for lost revenue in the event an end-user fails to complete the term of the contract. BA-RI points out that such contract clauses are widely used in various commercial settings, and that the Contracts at issue were negotiated and agreed to by sophisticated businesses, in a competitive business market. BA-RI argues that the special term and volume discounts negotiated for services provided under the Contracts take into consideration the additional benefits BA-RI could realize over the life of the Contracts, such as sales of additional services to the end-user; hence, these anti-assignment clauses reasonably allow BA-RI to preserve the full benefit of the bargain made with its customer. This customer-specific benefit is lost where a competitor takes an assignment of the Contract, BA-RI contends, even if BA-RI still receives the payments provided for in the Contract. Therefore, BA-RI concludes, it should be permitted to include negotiated termination fees in its Contracts to protect against such losses.[8]

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[6] See Order No. 12910 (issued March 13, 1989), In re: New England Telephone Company, Docket No. 1903, at p. 14.

[7] BA-RI Brief at pp. 10-11.

[8] Ibid. at pp. 11-12.

Finally, BA-RI cites language from a decision of Massachusetts Department of Telecommunications and Energy ("DTE"), authorizing Bell Atlantic to include anti-assignment clauses in its contracts on a prospective basis.[9]

III. The Division's Brief.

Responding to BA-RI in its Brief filed with the Commission on July 13, 1999, the Division contends that the anti-assignment clause improperly restricts the resale of telecommunications services in violation of the Act. The Division points out that the Commission declared in Docket No. 2829 that BA-RI's policy of prohibiting assignments could not be sustained under the Act. BA-RI should not be permitted to circumvent the Commission's decision or the federal statute by insertion of a contractual anti-assignment provision, even if the consent of the end-user to such provision is obtained.

The Division also refutes BA-RI's contention that the prohibition against unreasonable or discriminatory resale restrictions applies only to *wholesale* offerings applicable to resellers under § 251(c)(4), and that restrictions on retail service offerings are not prohibited by the Act. The Division observes that the Act contains no such restrictive language, and that the FCC could not have intended this result because it was, in fact, was concerned that ILECs would attempt to avoid the statutory resale obligation by shifting their customers to

[9] In re: CTC Communications Corporation, DTE 98-18, 1998 WL 694538 (July 8, 1998) [hereafter, "CTC-Massachusetts"], at p. 7.

the nonstandard offering.[10] Moreover, the ILEC's argument that special contracts known as Customer Service Arrangements are exempt from the resale requirements of the Act was rejected by the New Hampshire Public Utilities Commission and the United States District Court for the Eastern District of North Carolina.[11]

The Division also criticizes BA-RI's assertion that termination penalties are appropriate in the context of assignments, noting that every jurisdiction which has considered this argument has rejected it. Termination penalties are not designed to protect the ILEC from competition during the contract period; rather, termination provisions protect the revenue stream to which the ILEC is entitled under the contract. To the extent a competitor takes an assignment of an end-user contract, the assignment protects the revenue stream and actually places the ILEC in a better position, the Division contends, because the ILEC continues to receive the entire revenue stream under the assigned contract while no longer bearing the costs of servicing the account. All the ILEC loses, the Division argues, is the competitive advantage of continued customer contact over the life of the contract.[12] Termination penalties are not warranted in this context.

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[10] Division Brief at p. 6.

[11] Id., citing CTC Communications Corporation, Order Permitting Assignment of Certain Retail Contracts, N.H.P.U.C. (October 7, 1998) [hereafter, "CTC – New Hampshire"]; AT&T Communications v. Bell South, 7 F.Supp.2d 661, 671-672 (E.D.N.C. 1998) [hereafter, "Bell South"].

[12] Division Brief at p. 7.

Although acknowledging that no jurisdiction has yet ruled on whether a contractual anti-assignment clause violates the Act, the Division points out that in addition to the Commission's ruling in Docket No. 2829, both the New Hampshire Public Utilities Commission and the New York Public Service Commission have ruled that BA-RI's anti-assignment policy violates the Act.[13] The Division further dismisses BA-RI's reliance on the DTE's ruling in CTC-Massachusetts which did not directly address the issue of whether an anti-assignment provision would violate the Act.

In conclusion, the Division urges the Commission to strike the anti-assignment provisions in BA-RI's customer contracts pursuant to the Mobile-Sierra doctrine as articulated in Northeast Utilities Service Co. v. FERC, 55 F.3d 686, 691 (1st Circuit 1995).

COMMISSION FINDINGS

Having considered the legal arguments in this docket, the Commission finds the arguments advanced by the Division to be more persuasive and consistent with our prior holdings. Although on the surface the legal issues raised in this case appear to be technical and complex, the concept underlying the Commission's ruling is simple and straightforward.

The market for telecommunication services is gradually developing into a full-fledged competitive commercial market. As this Commission previously observed, the Act "was passed to introduce competition into the local telephone

[13] See CTC-New Hampshire, supra; Bell South, supra, Complaint and Request of CTC Communications, Order Granting Petition, N.Y.P.S.C. (September 14, 1998).

market."[14] The presumed goal of the Congress was to lift the heavy hand of government regulation from the telecommunications market. Thus, the Commission will intervene and interfere in the natural workings of the competitive marketplace only cautiously and with great circumspection.

BA-RI is correct in asserting that anti-assignment provisions permeate contracts drafted and enforced in commercial markets. The validity of anti-assignment clauses is so universally recognized that Rhode Island case law on the enforceability of anti-assignment clauses is scant. The common law in Rhode Island is that "a contact cannot be assigned when its terms forbid an assignment".[15] Furthermore, these contracts were negotiated between BA-RI and sophisticated, large business enterprises. Under normal circumstances, these anti-assignment clauses would be valid. However, these are not "normal circumstances", due to the passage of the Act.

It is an undisputed principle of the common law that an agreement between private parties cannot override an act of Congress.[16] Thus, the essential issue is how to apply the Act to the facts presented in this docket.

The language of the Act does not specifically allow or prohibit anti-assignment clauses in contracts involving telecommunications. Neither party presented any legislative history relevant to the instant docket. The parties have also failed to present any case law or decisions from other jurisdictions

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[14] CTC-Rhode Island, supra, at p. 22.

[15] Swarts v. Narragansett Electric Lighting Co., 26 R.I. 388, 389 (1904).

[16] McNear v. American & British Mfg. Co., 42 R.I. 302, 308 (1919).

that specifically find that the Act is violated by an anti-assignment clause in a telecommunications service contract. In these uncharted waters, the Commission's compass will be guided by its prior decision in Docket No. 2829, and the decisions of the FCC. The FCC has declared that "Congress prohibited unreasonable restrictions and conditions on resale" so as to prevent anti-competitive results.[17] As a consequence, the FCC concluded that it is reasonable "to presume resale restrictions and conditions to be unreasonable" under the Act.[18]

This Commission has held that the "burden to justify a resale restriction falls squarely on Bell Atlantic" -- the party seeking enforcement of the restriction.[19] Thus, the Commission declares unequivocally and simply: a restriction on the resale of a telecommunications service is presumed to be in violation of the Act and the party seeking enforcement of such a restriction has the burden of persuasion to prove that such a restriction is permissible under the Act.

BA-RI's argument that the Centrex market is highly competitive, so that there is no need for the Commission to interfere with the anti-assignment clause has considerable appeal. As a general rule, the more competitive the market, the less the need for regulatory oversight. The Commission desires to

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[17] In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order (August 8, 1996), at § 948 (hereafter, "First Report and Order").

[18] Id.

[19] See CTC-Rhode Island, supra, at p. 23.

create and enhance a competitive market for telecommunications, not to set a policy which will give a competitive advantage to one type of corporate entity over another.

Unfortunately, the Commission cannot ignore the effect of this anti-assignment clause. The language of the clause effectively prohibits all assignments. Moreover, it locks in the ILEC's customers; we note that in Docket No. 2829, BA-RI conceded that continuing customer contact created an opportunity for additional sales. In that docket, BA-RI argued that banning assignments preserved this opportunity. However, the Commission found that the opportunity essentially permitted BA-RI to maintain its market position and obtain a competitive advantage over new entrants. Thus, citing §§ 251(b) and 251(c)(4) of the Act, Docket No. 2829 struck down the total prohibition of assignments. Whether BA-RI's blanket prohibition of assignments is set by company policy or set forth in a contract clause, it still has the same effect and thus is prohibited.

BA-RI argued that the limitations and prohibitions set forth in § 251(c)(4) are applicable only to wholesale offerings of telecommunications services. Even if valid, this argument fails to address the provisions of § 251(b), which applies to both CLECs and ILECs, and mirrors the language of § 251(c)(4).[20]

[20] Indeed, in § 977 of its First Report and Order, the FCC pointed out that "Sections 251(b)(1) and 251(c)(4) contain the same statutory standards regarding resale restrictions. Therefore, we conclude that our rules concerning resale restrictions under section 251 (b)(1), such as the general presumption that all resale restrictions are unreasonable, should be the same as under section 251(c)(4)."

When interpreting an Act of Congress or any other statute, the Commission attempts to determine the legislative intent and interpret any ambiguous clauses in a manner consistent with that intent. In this case, the lack of specific language in the Act and the absence of any legislative history regarding assignments require the Commission to speculate on the intent of Congress. It is clear to the Commission that Congress intended to foster competition in the local telephone market. Thus, in the Commission's view, an anti-assignment contractual clause that completely prohibits the transfer of telecommunication services would be contrary to congressional intent.

BA-RI cites the decision of the Pennsylvania Public Utility Commission, AT&T-Pennsylvania, supra, in support of its position that early termination charges are permissible. However, this decision did not discuss these fees in the context of an anti-assignment policy or clause. More significantly, the case was decided in 1996; as one of dissenters noted, "the FCC is proceeding to develop its final rules on...Sections 251 and 252 of the Telecommunications Act of 1996."[21] The majority of the Pennsylvania Commission did not discuss and interpret the Act in any shape, manner or form. It is clear to this Commission, however, that any decision in this docket must be decided in the light of the Act.

Another decision cited by BA-RI to support its position is CTC-Massachusetts, supra. This decision contains language which suggests that the DTE would authorize the prospective application of contractual anti-

[21] AT&T-Pennsylvania, supra (D. Rolka, dissenting), at p. 2.

assignment clauses. While this Commission is not bound by the decisions of other state commissions, the analysis of other jurisdictions is frequently helpful in our deliberations. The DTE language cited by BA-RI appears to be mere *dicta*. The primary holding of that decision was that, in the absence of a contractual or tariffed non-assignment provision, BA-RI could not prohibit the assignment of its contracts to competitors. The case was decided only on the limited facts before the DTE, which did not reach the issue of whether an anti-assignment provision violates the Act. Thus, the decision in Massachusetts is not inconsistent with those of either New Hampshire or New York, or with our own precedent in Docket No. 2829.

Accordingly, it is

(16032) ORDERED:

1. The anti-assignment clauses contained in Bell Atlantic-Rhode Island's January 7, 1999 amendments to various Customer Specific Pricing Contracts and Large System Specific Pricing Plan contracts are declared invalid and unenforceable because they effectively constitute a total prohibition on assignment of these contracts to other telecommunication providers in violation of §§ 251(b) and 251(c)(4) of the Telecommunications Act of 1996.
2. Bell Atlantic-Rhode Island is directed to remove any extant anti-assignment clauses from its Customer Specific Pricing Contracts and Large System Specific Pricing Plan contracts, and to desist from incorporating such clauses in any future contracts, pending further

order of this Commission, because they violate §§ 251(b) and 251(c)(4) of the Telecommunications Act of 1996.

3. Bell Atlantic-Rhode Island shall act in accordance with all other findings and instructions contained within the Report and Order.

EFFECTIVE AT PROVIDENCE, RHODE ISLAND PURSUANT TO AN OPEN MEETING DECISION ON SEPTEMBER 28, 1999. WRITTEN ORDER ISSUED DECEMBER 15, 1999.

PUBLIC UTILITIES COMMISSION

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Kate F. Racine, Commissioner

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Brenda K. Gaynor, Commissioner