

DT 99-086

BELL ATLANTIC

**Special Contract with University of New Hampshire
Order Conditionally Approving the Special Contract**

O R D E R N O. 23,255

July 7, 1999

On June 4, 1999, New England Telephone and Telegraph Company d/b/a Bell Atlantic (BA-NH or the Company) filed with the New Hampshire Public Utilities Commission (Commission), pursuant to RSA 378:18, a petition for approval of Special Contract No. 99-6 (Special Contract) with the University of New Hampshire (UNH). The proposed special contract, executed on March 16, 1998, provides Asynchronous Transfer Mode(ATM)Cell Relay Services within the State of New Hampshire at a uniform statewide rate over high-speed access lines. Along with the special contract, Bell Atlantic filed a contract overview and cost study information in support of the filing.

Concurrently, Bell Atlantic filed a Motion for Protective Order, seeking to exempt portions of the Special Contract and supporting materials from public disclosure. The Commission will rule on that motion separately. However, pursuant to N.H. Admin. Rules Puc 204.06, the identified portions will be kept confidential until the Commission rules on the motion.

On June 28, 1999, Destek filed an objection to BA-NH's petition and requested to intervene as a full party in this proceeding. Destek asserts, *inter alia*, that BA-NH special contracts benefiting one organization are discriminatory and minimize or eliminate the ability of other companies to compete. According to Destek, the proposed special contract will negatively impact the development of telecommunications in New Hampshire. Destek also asserts that BA-NH failed to prove the existence of special circumstances and that competition has not yet materialized. Destek argues that BA-NH is therefore prohibited from entering into a special contract under RSA 378:18. Destek further notes that UNH is currently not a certified telecommunications carrier or a Competitive Local Exchange Carrier (CLEC).

According to BA-NH, the proposed ATM special contract will provide the opportunity for all K-12 schools, the University System of New Hampshire, libraries and other non-educational organizations throughout the State to obtain access to multi-site distance learning facilities as well as high-speed Internet access. The proposed special contract will provide the opportunity for students to access advanced placement courses and other educational resources that are not offered at facilities in their region. In addition, the proposed contract will provide increased professional development opportunities for teachers and

administrators.

According to Bell Atlantic, its cost study shows that the special contract's proposed rates exceed the incremental costs of the services being provided, pursuant to the requirements of RSA 378:18-b.

Staff's review of the proposed Special Contract raised questions as to whether BA-NH's filing is in the public interest under RSA 378:18 and whether the proposed rate meets the requirement of RSA 378:18-b. The BA-NH cost support data filed with the petition does not provide important detail about the method BA-NH used to allocate non-direct, joint and common costs to UNH. BA-NH has not provided supporting cost information related to copper, fiber, circuit digital or ATM investments. As a result, the sparseness of the Company's filing has made it difficult to determine in the 30 days required by the statute whether the statutory standards have been met.

The lack of detail in the cost study filing has hampered the Commission in its effort to determine whether the proposed rate exceeds the incremental cost of analogous elements. Because this proposed contract is the first time the Commission has reviewed an ATM service, we cannot draw on existing applications to determine how Bell Atlantic will construct the network, and Bell Atlantic did not provide complete information on this question in the filing.

Based on the filing, it is also difficult to determine

exactly which network elements will be used in the provision of this service. As a result, it is difficult to compare the proposed rate to the wholesale cost of analogous unbundled network elements which CLEC's would have to purchase from BA-NH in order to compete.

Nonetheless, because of the importance of the proposed service to the modernization of the state's educational system, Staff drew on information in the filing and in related dockets to develop estimates of the appropriate cost floors for RSA 378:18-b analysis. This estimate shows the proposed rate exceeds, by a narrow margin, the cost of providing ATM service under RSA 378:18-b, I and II.

RSA 378:18 provides a public utility the authority to make a contract for service at rates other than those fixed by its tariff, if special circumstances exist which render such departure from tariffed rates just and consistent with the public interest. If the petition is determined to be consistent with the public interest, the Commission shall by order allow such contract to take effect. RSA 378:18-b allows special contracts for telecommunications services to become effective 30 days after filing, without Commission order, provided the proposed rates exceed: I, the "incremental cost of the relevant service"; or II, "where the telephone utility's competitors must purchase access from the telephone utility to offer a competing service, the price of the lowest form of access that competitors could

purchase to compete for customers with comparable volumes of usage, plus the incremental cost of related overhead." The relevant statutes state:

378:18 Special Contracts for Service.

Nothing herein shall prevent a public utility from making a contract for service at rates other than those fixed by its schedules of general application, if special circumstances exist which render such departure from the general schedules just and consistent with the public interest and, except as provided in RSA 378:18-b, the commission shall by order allow such contract to take effect.

378:18-b Special Contracts; Telephone Utilities

Any special contracts for telephone utilities providing telephone services shall be filed with the commission and shall become effective 30 days after filing, provided the rates are set not less than:

I. The incremental cost of the relevant service; or

II. Where the telephone utilities competitors must purchase access from the telephone utility to offer a competing service, the price of the lowest cost form of access that competitors could purchase to compete for customers with comparable volumes of usage, plus the incremental cost of related overhead.

While the Company's cost studies were only barely adequate, when supplemented by other available material, to evaluate whether the cost floors of the statute have been met, and the question is a close one, at least one staff analysis shows the contract price exceeding the relevant cost floors. To account for the uncertainty in the estimates, the staff analysis attempted to use conservative assumptions about which parts of

the affected network will be essential facilities under RSA 378:18-b, II. The analysis also used conservative (that is to say, high) cost assumptions from the filing and material submitted in the SGAT docket.

Under ordinary circumstances, where the information provided is not sufficient to permit a determination of the relevant cost floors without resort to such uncertain estimates, the better practice in reviewing such a special contract filing would be to suspend the filing and open an investigation. However, special circumstances exist in this case to adopt a different approach. Denying the proposed special contract now and conducting an investigation could unnecessarily deny school children the benefits of ATM services during the upcoming school year. The question becomes, then, whether the proposed service offering can be provided on a basis that does not demand, where the information provided is not sufficient to permit a determination of the relevant cost floors without resort to such uncertain estimates, the exhaustive analysis required by RSA 378:18-b.

It is our understanding that the Company stated in the technical sessions in docket DT 99-020 that it was willing to offer the same services at the same price to all customers who purchase a minimum of 30 lines. There is thus no reason for this type of service to be provided on a special contract basis. The cost floor for a tariffed filing is not as specialized, and is

easier to establish, than the cost floor required by statute for a special contract approval. This is so because a tariffed filing is available on a non-discriminatory basis, does not require definitive action within 30 days, and typically does not raise the issues of cost-shifting and anti-competitive effect to the same degree as a special contract. Based on the supporting material submitted to date, a tariff offering the same services at the same prices and on the same terms and conditions would likely receive rapid approval.

In this case, however, special circumstances require that the customer in question in Special Contract No. 99-6 not be forced to wait until such a tariff is prepared, filed, reviewed and approved before it can sign up for this service and prepare to implement it. If the University were to have to wait until the Company now prepares and files a tariff, the window of opportunity to acquire these services would close for the coming school year. Students completing high school and college in the coming academic year would be denied the only opportunity they will have during their educations to take advanced and specialized courses. As other customers will shortly have access to the same technology at the same prices, and at least one Staff cost estimate shows the prices exceeding the appropriate cost floors for a special contract, providing UNH the opportunity to take advantage of the services under the terms of the Special Contract is not unduly discriminatory and meets the requirements

of the statutes.

For these reasons, we find that proposed Special Contract No. 99-6 should be allowed to go into effect, on the condition that the Company, within 90 days of the date of our Order approving the Special Contract, file a tariff to offer the same service statewide, on a non-discriminatory basis to any customer requesting a minimum of 30 lines, on the same terms and conditions, and at the same price as the price in this Special Contract.

Accordingly, we will not open an investigation, and thus interventions are not required. With respect to Destek's underlying objections to the special contract, we have addressed them in the discussion above.

Finally, it has come to our attention that certain information for which BA-NH has sought confidential treatment has become generally known during a recent technical session with a group of Internet service providers in DT 99-020. Therefore, we direct the Company to refile the contract disclosing the total number of circuits and the average mileage between customer locations and serving wire centers.

Based upon the foregoing, it is hereby

ORDERED, that Bell Atlantic's request for approval of Special Contract No. 99-6 with the University of New Hampshire is conditionally GRANTED, and it is

FURTHER ORDERED, that as a condition of the grant of such approval, Bell Atlantic file a tariff making ATM services available throughout the State upon the same terms and conditions and at the same prices as in Special Contract No. 99-6, within 90 days from the date of this Order, unless it can demonstrate why good cause exists to charge any other prices or offer such service on any other terms and conditions, and it is

FURTHER ORDERED, that Bell Atlantic refile Special Contract No. 99-6 disclosing the number of ATM circuits and the average number of miles to serve customer locations from a serving wire center.

By order of the Public Utilities Commission of New Hampshire this seventh day of July, 1999.

Douglas L. Patch
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Thomas B. Getz
Executive Director and Secretary