Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rainbow Programming Holdings, Inc.,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. E-97-15
	)	
Bell Atlantic-New Jersey, Inc., and	)	
Bell Atlantic Network Services, Inc.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Adopted: July 5, 2000 **Released: July 6, 2000**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we grant the formal complaint filed by Rainbow Programming Holdings, Inc. ("Rainbow") against Bell Atlantic-New Jersey, Inc. and Bell Atlantic Network Services, Inc. (collectively referred to as "Bell Atlantic") pursuant to section 208 of the Communications Act of 1934, as amended ("the Act").[1] Rainbow seeks the return of deposit money it paid to reserve channels on Bell Atlantic's video dialtone system in Dover Township, New Jersey.

2. For the reasons set forth below, we conclude that Bell Atlantic violated section 201(b) of the Act by engaging in unjust and unreasonable practices that wrongfully denied Rainbow the ability to provide video programming to end-users on Bell Atlantic's video dialtone system in Dover Township.[2] We further conclude that these unjust and unreasonable practices by Bell Atlantic damaged Rainbow within the meaning of section 206 of the Act in the amount of the

[1] 47 U.S.C. § 208. *See* Formal Complaint of Rainbow Programming Holdings, Inc., File No. E-97-15 (filed March 28, 1997) ("Complaint").

[2] 47 U.S.C. § 201(b). Section 201(b) of the Act, in relevant part, provides that "all charges, practices, classifications, and regulations for and in connection with such communication service [interstate or foreign communication by wire or radio], shall be just and reasonable. . . ." *Id.*

deposit Rainbow paid to Bell Atlantic.[3] We therefore require Bell Atlantic to return the $345,600 channel reservation deposit to Rainbow with appropriate interest.

II. BACKGROUND

3. Bell Atlantic-New Jersey, Inc. is a New Jersey corporation and wholly-owned subsidiary of Bell Atlantic Corporation, whose principal business is the provision of telecommunications services.[4] Bell Atlantic Network Services, Inc. is a Delaware corporation that provides marketing, planning, procurement, financial, legal, accounting, technical support and other management services for various Bell Atlantic Corporation subsidiaries, including Bell Atlantic-New Jersey.[5] At the time of the filing of the formal complaint in this matter, Rainbow was a New York corporation and managing partner of several partnerships that provided national and regional video programming to cable and other types of multichannel video delivery systems.[6]

4. On August 14, 1992, the Commission authorized incumbent local exchange carriers to participate in the video marketplace by provisioning video dialtone service to video programmers.[7] Video dialtone, as conceived by the Commission, was designed to foster competition in the video programming delivery market by making available to video programmers a basic platform, provided by the local telephone company, for the distribution of programming to end-users. In order to guarantee space on each system for multiple programmers, the Commission required video dialtone providers to operate as common carriers.[8]

5. Soon after the release of the *Second Report and Order*,[9] Bell Atlantic filed an application with the Commission to operate a video dialtone system in Dover Township, New Jersey. The Commission granted Bell Atlantic's application on July 18, 1994.[10]

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3 47 U.S.C. § 206.

4 Complaint ¶ 2; Answer, File No. E-97-15 (filed May 27, 1997) ("Answer"), at 18.

5 Complaint ¶ 3; Answer, at 18.

6 Complaint ¶ 1.

7 *Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781 (1992) ("*Second Report and Order*").

8 The Commission defined the "basic platform" as a common carriage transmission service with the means by which an end-user could access any or all video programming. *Application of New Jersey Bell Telephone Company*, Order and Authorization, 9 FCC Rcd 3677, 3677-78 (1994) ("*New Jersey Bell Order*"). *See* Brief of Rainbow Programming Holdings, Inc., File No. E-97-15 (filed January 14, 1998) ("Rainbow Brief"), at 5 (*citing Second Report and Order*, 7 FCC Rcd at 5787, 5797).

9 *See* note 7, *supra*.

10 *See New Jersey Bell Order*, 9 FCC Rcd at 3677 ¶ 1.

6. Following the *Second Report and Order*, Bell Atlantic entered into an agreement with Futurevision of America Corporation ("Futurevision"), a video programmer competing with Rainbow, that would allow Futurevision to provide video programming over the Dover Township system, once activated.[11] In connection with this agreement, Bell Atlantic agreed to pay half of the development costs for interface software for the Dover Township system. This software was to be developed by, and the payment made to, Broadband Applications Development Corporation ("Broadband"), an affiliate of Futurevision. In exchange, Bell Atlantic received the right to use the software to perform tests on its system and the right to license the software to other video programmers.[12]

7. In January 1995, Bell Atlantic filed Tariff Transmittal No. 741, which proposed to extend its FCC Tariff No. 10 ("Tariff") to govern the terms of the video dialtone service in Dover Township.[13] Section 2.10(A) of the Tariff required prospective programmers to submit a pre-paid deposit based on the number of channels they sought to reserve on the system. Section 2.10(A) further provided that, once the programmer ordered service and began providing programming to its end-users, Bell Atlantic would credit all charges against the balance of the deposit until the deposit amount reached zero.

8. When the enrollment period began on March 13, 1995, Futurevision immediately submitted a deposit to reserve 36 channels on the Dover Township system.[14] Shortly thereafter, Rainbow gave Bell Atlantic $345,600 to reserve 192 channels.[15] On April 10, 1995, Bell Atlantic allocated 192 channels to Rainbow and 96 channels to Futurevision.[16] Bell Atlantic and Rainbow then entered into an agreement,[17] as required by the Tariff,[18] in which Rainbow agreed to take the 192 channels for a minimum period of three months after the system began operations.

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[11] Brief of Bell Atlantic-New Jersey, File No. E-97-15 (filed January 14, 1998) ("Bell Atlantic Brief"), at 3.

[12] Bell Atlantic Brief at 26. *See* Defendants' Responses and Objections to Plaintiff's First Set of Interrogatories, File No. E-97-15 (filed July 28, 1997) ("Bell Atlantic Response to Interrogatories"), at 9 (attached as Exhibit A to Bell Atlantic Brief).

[13] Bell Atlantic Brief at 3; *Bell Atlantic Telephone Companies*, Tariff No. 10, Transmittal No. 741 (filed Jan. 27, 1995) (attached as Exhibit 2 to Complaint); *Bell Atlantic Telephone Companies*, Tariff No. 10, Transmittal No. 756 (filed March 10, 1995) (attached as Exhibit 7 to Complaint).

[14] Bell Atlantic Brief at 6. Futurevision had already entered into an agreement with Bell Atlantic to reserve 60 channels on the Dover Township system. Bell Atlantic and Futurevision agreed that Futurevision should submit an additional deposit to cover those initial 60 channels in addition to its deposit for the 36 channels. Futurevision submitted this additional deposit on August 3, 1995. *See* Bell Atlantic Response to Interrogatories, at 13.

[15] *See* Bell Atlantic Brief at 6; Rainbow Brief at 8. *See also* Affidavit of Andrea Greenberg at 1, ¶ 3 (attached as Exhibit 11 to Complaint).

[16] *See* Letter from Hardy F. Moebius, Executive Director, Video Dialtone Sales and Marketing, Bell Atlantic Network Services, Inc., to Andrea Greenberg, Senior Vice President, Business and Regulatory Affairs, Rainbow Programming Holdings, Inc., dated April 12, 1995 (attached as Exhibit 4 to Complaint); Bell Atlantic Response to Interrogatories at 14.

[17] "Application for Video Dialtone Service" dated May 17, 1995 (attached as Exhibit 6 to Complaint).

9. Before the video dialtone system became operational, Bell Atlantic told all potential programmers they would need to have interface software to access the system.[19] The Futurevision affiliate Broadband, pursuant to the agreement between Futurevision and Bell Atlantic, developed the Enhanced Provisioning Interactive Communication (EPIC) interface software that permitted programmers to access the video dialtone system.[20] Bell Atlantic informed all potential programmers that, in order to access the system, the potential programmers could: (i) develop their own interface software using the generic specifications Bell Atlantic supplied; (ii) license the EPIC software from Futurevision; or (iii) license the EPIC software from Bell Atlantic itself.[21]

10. As discussed in more detail below, Bell Atlantic specifically represented to Rainbow that it would make available to Rainbow the EPIC software. However, Bell Atlantic neither provided Rainbow with any licensing proposal for the EPIC software in response to Rainbow's request nor allowed Rainbow to use the EPIC software without a license. As a result, Rainbow asserts that it was unable to provide video programming to end-users in Dover Township on the date the system began operations.

11. The Dover Township system began operations on January 29, 1996 with the EPIC software as the only software capable of interfacing with the system. Moreover, Futurevision was the only programmer providing video programming to end-users.[22]

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[18] *See* Tariff § 3.2(A) ("The service for which Video Dialtone Service is provided is either month-to-month or sixty (60) months, depending upon the rate schedule chosen by the Programmer-Customer. Programmer-Customers must purchase Video Dialtone Service for a minimum of three months.")

[19] *See* Bell Atlantic Brief at 25; Bell Atlantic Reply Brief at 10; December 20, 1995 Declaration of John C. Phillips at 3, ¶ 8-9 (attached as an exhibit to Answer) ("Phillips Dec. 20 Decl."). John C. Phillips served as the manager of Video Dialtone Marketing and Sales for Bell Atlantic Network Services, Inc. and was responsible for representing Bell Atlantic's video dialtone products to programmers, including Rainbow. Phillips Dec. 20 Decl. at 1, ¶ 1.

[20] Bell Atlantic Response to Interrogatories, at 5.

[21] *Id. See also* Bell Atlantic Brief at 6, 7-8, 26; Bell Atlantic Reply Brief at 9-10.

[22] Rainbow Brief at 10; Bell Atlantic Brief at 10. On February 8, 1996, the Telecommunications Act of 1996 ("the 1996 Act") became law. (*See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996)). Section 302(b)(3) of the 1996 Act required the termination of the video dialtone regulations and policies previously adopted by the Commission, but stated that it should "not be construed to require the termination of any video-dialtone system that the Commission has approved before the date of enactment of this Act." Pursuant to section 302(b)(3), the Commission eliminated the video dialtone rules and policies on March 11, 1996, but did not require existing video dialtone providers to cease operations. *See Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, Report and Order and Notice of Proposed Rulemaking, 11 FCC Rcd 14639, 14668 ¶¶ 75-76 (1996); *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, First Order on Reconsideration, 11 FCC Rcd 19081, 19085 ¶ 9 (1996) ("*First Order on Reconsideration*"). Rather, on July 23, 1996, in the *First Order on Reconsideration*, the Commission required video dialtone providers to select by November 1996 one of four programming delivery options to supplant that provider's existing video dialtone system. *See First Order on Reconsideration*, 11 FCC Rcd at 19085 ¶¶ 7-9.

12. By letters dated September 25 and October 22, 1996, Rainbow informed Bell Atlantic that it was terminating its agreement to order service.[23] In the letters, Rainbow demanded that Bell Atlantic return its entire channel reservation deposit with interest because, among other things, Bell Atlantic had refused to negotiate with Rainbow for or provide access to the "necessary componentry and functionality" needed to interface with the Dover Township system.[24] In response, by letters dated October 4 and December 16, 1996, Bell Atlantic refused Rainbow's demand, claiming that it had made the necessary specifications available to Rainbow, and that Rainbow could have developed its own interface software.[25] Rainbow then filed the instant formal complaint.

III. DISCUSSION

13. Rainbow alleges that Bell Atlantic failed to furnish the requested video dialtone service in a nondiscriminatory manner, in violation of sections 201(a) and 202(a) of the Act.[26] Rainbow also asserts that Bell Atlantic's refusal to return Rainbow's deposit was an unjust and unreasonable practice, in violation of section 201(b) of the Act.[27] In addition, Rainbow contends: (i) that Bell Atlantic failed to substantially perform or reasonably discharge its duty under the tariff, in violation of section 203(a) of the Act; (ii) that the tariff was ambiguous and should be construed to require the return of the deposit to Rainbow under section 61.2 of the Commission's rules; and (iii) that the tariff was void and should have been rescinded.[28] Finally, Rainbow alleges that Bell Atlantic's failure to provide access to the video dialtone platform by denying it the necessary EPIC interface software was an unjust and unreasonable practice in violation of section

[23] *See* Letters from Andrea Greenberg, Senior Vice President, Business and Regulatory Affairs, Rainbow Programming Holdings, Inc., to Hardy F. Moebius, Executive Director, Video Dialtone Sales and Marketing, Bell Atlantic Network Services, Inc., dated September 25, 1996 and October 22, 1996 (attached as Exhibit 13 to Complaint) ("Greenberg Letters").

[24] *See* Greenberg Letters.

[25] *See* Letters from Hardy F. Moebius, Executive Director, Video Dialtone Sales and Marketing, Bell Atlantic Network Services, Inc., to Andrea Greenberg, Senior Vice President, Business and Regulatory Affairs, Rainbow Programming Holdings, Inc. dated October 4, 1996 and December 16, 1996, attached as Exhibit 14 to Complaint.

[26] Complaint ¶¶ 53, 67. Section 201(a) of the Act, in relevant part, requires every common carrier offering an interstate communications service to furnish such service "upon reasonable request." 47 U.S.C. § 201(a). Section 202(a) of the Act, in relevant part, precludes "unjust or unreasonable discrimination" in the charges, practices, or services of a regulated common carrier and prohibits a carrier from exercising any "undue or unreasonable prejudice or disadvantage" against any person or class of persons. 47 U.S.C. § 202(a).

[27] Complaint ¶ 80.

[28] Complaint ¶¶ 82, 90, 91-96, 103. Section 61.2(a) of the Commission's rules provides that, "in order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations." 47 C.F.R. § 61.2(a). Section 203(a) of the Act, in relevant part, requires carriers to file tariffs showing all charges for service and "the classification, practices, and regulations affecting such charges." 47 U.S.C. § 203(a).

201(b) of the Act.[29] Rainbow seeks the return of its $345,600 channel reservation deposit plus accumulated interest.

A. Bell Atlantic's Conduct Was Unjust and Unreasonable in Violation of Section 201(b) of the Act.

14. We find that Bell Atlantic violated section 201(b) of the Act by engaging in unjust and unreasonable practices that denied Rainbow access to the video dialtone platform. As explained in more detail below, we so find because: (i) Bell Atlantic made various representations to Rainbow that it would make available to Rainbow the EPIC software; (ii) Bell Atlantic subsequently failed to make the EPIC software available; and (iii) Rainbow refrained from developing its own interface software after reasonably and detrimentally relying on Bell Atlantic's representations.[30]

15. First, we determine that Bell Atlantic's refusal to provide the EPIC software to Rainbow constitutes a practice "in connection with . . . communication service" within the meaning of section 201(b) of the Act.[31] In the *First Report and Order* permitting incumbent local exchange carriers to offer video dialtone, the Commission concluded that the video dialtone platform should include "limited computer processing applications directly related to the facilitation of the connection between the subscriber and the service provider" and that such applications would be adjunct to basic services provided.[32] Moreover, the Commission, in the *New Jersey Bell Order*, found that interface software was "necessary to facilitate video programmer interconnection to [Bell Atlantic's] basic platform."[33] Bell Atlantic admits that Rainbow could not have provided delivery of its programming without some interface software.[34] On the Dover Township system, video programmers could not provide programming without accessing the Video Administration Module ("VAM") component of the system. The VAM provisioned and maintained information about the system for the programmer, allowed programmers to schedule and modify end-user video service, and performed billing functions.[35] Therefore, a video programmer that could not interface with the VAM could not access the video dialtone system and could not provide programming. We therefore conclude that Bell Atlantic's actions in providing (or failing to provide) the interface software was a "practice" conducted "in connection with" the video dialtone service within the meaning of section 201(b) of the Act.

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29 Complaint ¶ 74.

30 Complaint ¶¶ 53.

31 47 U.S.C. § 201(b).

32 *Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, CC Docket No. 87-266, Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry, 7 FCC Rcd 300, 316, at ¶ 30 (1991).

33 *Application of New Jersey Bell*, 9 FCC Rcd at 3689 ¶ 67.

34 *See* Bell Atlantic Reply Brief at 10.

35 Bell Atlantic Response to Interrogatories at 4; Rainbow Brief at 25-26.

16. We next conclude that Bell Atlantic failed to make available to Rainbow the EPIC interface software after it made representations that it would do so and after Rainbow reasonably relied upon these representations in deciding not to develop its own interface software. Prior to the activation of the Dover Township system, Bell Atlantic made several representations concerning the availability of the EPIC software. In May 1994, the New Jersey Cable Television Association ("NJCTA") petitioned the Commission to deny Bell Atlantic's video dialtone application. Among other points, the NJCTA alleged that the software development agreement between Futurevision and Bell Atlantic possibly violated the Commission's telephone company-cable television cross-ownership rules.[36] On May 20, 1994, Bell Atlantic responded to NJCTA's concerns by informing the Commission, as well as all potential programmers, that programmers would be able to license from Bell Atlantic the EPIC software.[37] Bell Atlantic does not deny that it made this representation.

17. The next year, on April 26, 1995, one month after Rainbow had given Bell Atlantic its $345,600 channel reservation deposit, Rainbow representatives met with Bell Atlantic representatives to discuss a number of issues related to the provision of the video dialtone service in Dover Township. The parties discussed the appropriate activation date for the Dover Township system, marketing arrangements, channel assignments for the different video programmers, and the necessary interface software. Rainbow asserts that during these discussions, Bell Atlantic assured Rainbow that Bell Atlantic "had available and would be willing to lease Rainbow" the EPIC software.[38] Bell Atlantic does not deny making this statement to the Rainbow representatives.

18. Bell Atlantic continued throughout 1995 to represent to Rainbow that it could and would license the EPIC software. According to Rainbow, during the week of October 23, 1995, Bell Atlantic told Rainbow that the EPIC interface software was the only software available that would allow programmers to access the system.[39] In addition, Bell Atlantic's own representative stated in an affidavit that he told Rainbow that, if Rainbow wanted to use the EPIC software, Rainbow could negotiate a license for the software with Bell Atlantic.[40] Shortly thereafter, on

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[36] *New Jersey Bell Order*, 9 FCC Rcd at 3689 ¶ 65.

[37] *Id.* ¶ 66. Bell Atlantic also notified programmers that they could license the EPIC software from Futurevision or develop their own software. *Id.*

[38] *See* Rainbow Answers and Objections to Interrogatories, File No. E-97-15 (filed July 28, 1997) ("Rainbow Response to Interrogatories"), at 11 (attached as Exhibit 8 to Rainbow Brief).

[39] *See* Rainbow Response to Interrogatories at 13; Affidavit of Frank P. DeJoy at 5, ¶ 19 ("DeJoy Aff.") (attached as Exhibit 10 to Complaint). Frank DeJoy served as Senior Vice President of Video Services at Rainbow and had "overall responsibility for the provision of the video programming service in Dover Township." DeJoy Aff. at 1, ¶ 1. DeJoy also claimed that Bell Atlantic told him Rainbow would need to use the specific proprietary EPIC software to access the system. DeJoy Aff. at 5, ¶ 19. However, this claim is contradicted by Bell Atlantic's John Phillips, who "did not tell him [DeJoy] that Rainbow would be unable to offer its video programming service unless it acquired specific proprietary interface software." Phillips Dec. 20 Decl. at 3, ¶ 8.

[40] Phillips Dec. 20 Decl. at 4-5, ¶ 13.

November 13, 1995, Rainbow attempted to negotiate with both Bell Atlantic and Futurevision for a license to use the EPIC software.[41] During these discussions, Futurevision told Rainbow that it would not allow Rainbow to use the EPIC software until Rainbow licensed Futurevision to carry Rainbow's video programming. At the same time, Bell Atlantic told Rainbow it would lease to Rainbow the EPIC software at rates, terms and conditions to be negotiated in the future.[42] Rainbow then requested that Bell Atlantic submit a licensing proposal, which Bell Atlantic failed to do.[43] Once again, Bell Atlantic does not deny that it made these representations.

19. Finally, as late as December 1995, Bell Atlantic represented that it would license the EPIC software to Rainbow. As part of a Common Carrier Bureau tariff investigation, Rainbow filed comments complaining that, because the EPIC software was the only software that allowed access to the Dover Township system, and because only Bell Atlantic and Futurevision could license the EPIC software, Rainbow might not be able to gain access to the system.[44] Rainbow asked the Commission to require Bell Atlantic to offer access to the EPIC software. In response, on December 20, 1995, Bell Atlantic informed the Commission in a written filing that it had offered to license the EPIC software to Rainbow.[45] Bell Atlantic conceded in the filing that Rainbow had requested a proposal to license the EPIC software from Bell Atlantic in November 1995, but claimed that it had not yet completed the "internal work" needed to submit such a proposal.[46] Despite these representations, Bell Atlantic never provided Rainbow with any EPIC software licensing proposal.[47]

20. We also find that Rainbow reasonably relied upon these statements in deciding not to pursue development of its own interface software until it was too late to pursue such an alternative route. As detailed above, over a period of more than a year and a half prior to the January 1996 launch of service on the Dover Township system, Bell Atlantic repeatedly represented to Rainbow and the Commission that it would make the EPIC software available for licensing. In reliance on these representations, Rainbow refrained from developing its own interface software and instead requested a license to use the EPIC software from Bell Atlantic.[48] Under these circumstances, Rainbow's reliance on Bell Atlantic's representations and decision not to develop its own interface software were entirely reasonable.

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41 Phillips Dec. 20 Decl. at 4, ¶ 12. *See* Rainbow Response to Interrogatories at 13.

42 *Id.*

43 Phillips Dec. 20 Decl. at 4-5, ¶¶ 13.

44 *Bell Atlantic Telephone Companies Revisions to Tariff FCC No. 10*, CC Docket No. 95-145, Opposition of Rainbow Programming Holdings, Inc. to Bell Atlantic Direct Case (filed Nov. 30, 1995) at 15.

45 *Bell Atlantic Telephone Companies Revisions to Tariff FCC No. 10*, CC Docket No. 95-145, Comments of Bell Atlantic (filed January 11, 1996), at 25.

46 *Id.*

47 Bell Atlantic Brief at 27; Rainbow Brief at 27.

48 *See* Phillips Dec. 20 Decl. at 4-5, ¶¶ 12-13. *See also* Rainbow Response to Interrogatories at 13.

21. Bell Atlantic concedes that Rainbow needed to have some software capable of interfacing with the system, but claims that Rainbow could have developed its own interface software from the available generic technical specifications.[49] Additionally, Bell Atlantic contends that Rainbow knew it would have to develop its own interface software because Bell Atlantic allegedly informed all programmers that they, and not Bell Atlantic, were responsible for the interface software.[50]

22. As explained above, however, Bell Atlantic made specific representations both to Rainbow and the Commission that it would license the EPIC software to Rainbow. By the time Rainbow realized that Bell Atlantic would not live up to its promises, it was too late (and too expensive) for Rainbow to develop its own interface software before the Dover Township system began operations. According to Bell Atlantic, Futurevision took more than two years and spent approximately $300,000 to develop the EPIC software.[51] In early 1996, Rainbow estimated that it could develop its own software with "2½ to 3½ man-years effort" at a cost of $350,000 to $400,000.[52] Bell Atlantic told Rainbow as recently as December 20, 1995 that it would provide the EPIC software for Rainbow's use. Even if Bell Atlantic had informed Rainbow the very next day that the EPIC software was no longer available, Rainbow could not reasonably have developed its own interface software by the time Bell Atlantic activated service at the end of January 1996. We are thus not persuaded that Rainbow could have developed its own interface software in a timely manner and at a reasonable cost.

23. Bell Atlantic next insists that Rainbow could have licensed the EPIC software from Futurevision. Rainbow did attempt to negotiate an agreement with Futurevision, but Futurevision refused to license the EPIC software unless Rainbow agreed to let Futurevision carry Rainbow's video programming.[53] In essence, Futurevision leveraged its right to license the EPIC software to try to force Rainbow to give up the exclusive rights to its own video programming. Under these circumstances, particularly considering Futurevision's close relationship with Bell Atlantic, we do not consider this to be a reasonable alternative for Rainbow. In any event, Bell Atlantic's representations significantly affected Rainbow's ability to exercise this option since Rainbow had no reason to pursue such negotiations with Rainbow until it became clear that Bell Atlantic was refusing to provide the EPIC software.

24. Bell Atlantic asserts two additional arguments, each of which is undermined by its representations to Rainbow. Bell Atlantic first asserts that Futurevision prohibited it from licensing the EPIC software to Rainbow because Bell Atlantic could not provide the required

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49 Bell Atlantic Brief at 25; Bell Atlantic Reply Brief at 10.

50 Bell Atlantic Brief at 6, 7-8, 26; Bell Atlantic Reply Brief at 9-10

51 Bell Atlantic's Response to Interrogatories, at 5. Rainbow Brief at 27.

52 Rainbow Response to Interrogatory 6 at 13.

53 DeJoy Aff. at 5, ¶ 23.

technical support and was unwilling to pay Futurevision's proposed technical support fee.[54] Second, Bell Atlantic argues that it had no obligation to provide the EPIC software because the Tariff only obligated it to provide "delivery of . . .video signals between the Programmer-Customer and its End-User Subscribers."[55] We find these arguments are without merit. Beginning in May 1994 and continuing through December 1995, Bell Atlantic held itself out to Rainbow and the Commission as able and willing to license the EPIC software. Rainbow reasonably relied upon these representations. As a result, Bell Atlantic could not lawfully refuse to supply the license on the grounds that it would be too expensive or was not legally required.

25. In light of these facts, we conclude that Bell Atlantic's refusal to make the EPIC software available to Rainbow was an unjust and unreasonable practice under section 201(b) of the Act.[56]

B. Rainbow is Entitled to Damages.

26. Rainbow requests damages in the amount of its $345,600 channel reservation deposit plus interest. We find this relief, including prejudgment interest, is appropriate and reasonable under sections 206 and 209 of the Act.[57] From October 4, 1996 (the date on which Bell Atlantic first refused to return Rainbow's channel reservation deposit), until the present day, Bell Atlantic has wrongfully retained the channel reservation deposit and has deprived Rainbow of the beneficial use of these funds. We conclude that an award of interest in this proceeding will make Rainbow whole and avoid any unjust enrichment to Bell Atlantic stemming from behavior we find to be in violation of section 201(b) of the Act. The parties shall compute the interest using the IRS rate for tax refunds based on the total amount of $345,600 and covering the time period beginning October 4, 1996 and concluding on the date Bell Atlantic provides full payment to Rainbow.[58]

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54 *See* May 27, 1997 Declaration of John C. Phillips, attached as Exhibit B to Answer, at 2 ("Phillips May 27 Decl."); *see also* Bell Atlantic Response to Interrogatories at 5.

55 *See* Bell Atlantic Brief at 18; Tariff § 2.2.1.

56 Because we conclude that Bell Atlantic violated section 201(b) of the Act by denying Rainbow the necessary EPIC interface software and failing to provide access to the Dover Township system, we need not and do not address the other claims in the complaint.

57 47 U.S.C. §§ 206, 209. Bell Atlantic does not address the applicability of pre-judgement interest in this case other than to deny the allegation in Rainbow's complaint. *See* Answer, at 28. The Commission's authority to award prejudgment interest in a section 208 complaint proceeding is well established under the Act. *MCI Telecommunications Corp. v. Pacific Bell Telephone Co. et al.*, Memorandum Opinion and Order, 8 FCC Rcd 1517, 1529-30 (1993); *US Sprint Communications Limited Partnership v. Pacific Northwest Bell Telephone Company et al.*, Memorandum Opinion and Order, 8 FCC Rcd 1288, 1298 (1993). In deciding whether to award prejudgment interest, the Commission is guided by the law applied by federal courts, which provides that a prejudgment interest award is "a matter left to the sound discretion of the court" and is therefore guided by considerations of fairness. *Id.*

58 The IRS rate of interest for refunds and additional tax payments is the appropriate interest rate for this type of a proceeding, because the rate is easily obtainable and revised on a regular basis. *See Sprint v. PNBTC*, 1288 FCC Rcd at 1298 ¶ 51, n.109 (*citing Teleprompter of Fairmont v. C&P of West Virginia*, 79 FCC 2d 232 (1980)).

IV. CONCLUSION

27. For the foregoing reasons, we grant Rainbow's complaint and conclude that Bell Atlantic violated section 201(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 201(b). As damages for this violation, Bell Atlantic must pay Rainbow $345,600, including interest computed as set forth above.

V. ORDERING CLAUSES

28. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201(b), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201(b), and 208, and authority delegated pursuant to sections 0.111 and 0.333 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.333, that the formal complaint filed in this matter by Rainbow Programming Holdings is hereby GRANTED in part as indicated herein.

29. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 206, 208 and 209 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 206, 208 and 209, and authority delegated pursuant to sections 0.111 and 0.333 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.333, that Defendants Bell Atlantic-New Jersey, Inc., and Bell Atlantic Network Services, Inc. shall pay Complainant Rainbow Programming Holdings, Inc. three hundred forty-five thousand, six hundred dollars ($345,600) not later than thirty (30) days from the release date of this Memorandum Opinion and Order, along with prejudgment and post-judgment interest. The parties shall compute the interest payment using the 1996 IRS rate for tax refunds. The interest payment shall be calculated beginning on October 4, 1996 and ending on the date that Bell Atlantic makes full payment to Rainbow of the damages owed.

30. IT IS FURTHER ORDER that Rainbow's Motion to Compel, filed August 26, 1997, is DENIED as moot.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau