

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In re Application of)	
)	
GTE CORPORATION,)	
Transferor,)	
)	
and)	
)	CC Docket No. 98-184
BELL ATLANTIC CORPORATION,)	
Transferee)	
)	
For Consent to Transfer Control of Domestic)	
and International Sections 214 and 310)	
Authorizations and Application to Transfer)	
Control of a Submarine Cable Landing License)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: June 16, 2000

Released: June 16, 2000

By the Commission: Commissioners Ness and Tristani issuing separate statements; Commissioners Furchtgott-Roth and Powell concurring in part, dissenting in part, and issuing separate statements.

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I. INTRODUCTION

1. In this Memorandum Opinion and Order, we consider the joint applications of Bell Atlantic Corporation (Bell Atlantic) and GTE Corporation (GTE) (collectively, Applicants)¹ pursuant to sections 214(a) and 310(d) of the Communications Act of 1934, as amended (Communications Act or Act),² for approval to transfer control of licenses and lines from GTE to Bell Atlantic in connection with their proposed merger.³ In order to persuade us to grant their applications, Bell Atlantic and GTE must demonstrate that their proposed transaction will serve the public interest, convenience, and necessity.⁴ As described in more detail below, Bell Atlantic and GTE supplemented their original applications with an additional filing that included proposed merger conditions to which both parties voluntarily committed.⁵ In addition, the Applicants submitted a proposal to transfer the Internet and related assets of GTE Internetworking, Inc., now known as Genuity, Inc. (Genuity), to an independently owned public corporation so that consummation of the merger would not instantly result in a violation of section 271⁶ of the Telecommunications Act of 1996.⁷

2. We first conclude that the Applicants' proposal to spinoff GTE's Internet backbone and related assets into a separate public corporation is sufficient to demonstrate that completion of the merger would not result in a violation of section 271. Under the transaction we approve herein and that the Applicants must complete prior to merger closing, the Applicants will retain shares that represent

¹ Throughout this Order, we refer to Bell Atlantic and GTE as "the Applicants" or "Bell Atlantic and GTE." We refer to the post-merger combined Bell Atlantic/GTE as "the merged entity," "the merged firm," or "the merged company."

² 47 U.S.C. §§ 214(a), 310(d). Our review is also conducted pursuant to the Cable Landing License Act, 47 U.S.C. §§ 34-39 (*Cable Landing License Act*).

³ See Application of GTE Corporation and Bell Atlantic Corporation for Transfer of Control (filed Oct. 2, 1998) (Bell Atlantic/GTE Oct. 2, 1998 Application); Supplemental Filing of Bell Atlantic and GTE (filed Jan. 27, 2000) (Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing).

⁴ See 47 U.S.C. §§ 214(a), 310(d). See also *Application of Ameritech Corporation and SBC Communications Inc. for Transfer of Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, 14736-38, paras. 1, 46-48 (1999) (*SBC/Ameritech Order*); *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18026-27, 18030-32 at paras. 1, 8-10 (1998) (*WorldCom/MCI Order*); *Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order, 12 FCC Rcd 19985, 19987, 20000-04 at paras. 2, 29-32 (1997) (*Bell Atlantic/NYNEX Order*).

⁵ See Proposed Conditions for Bell Atlantic/GTE Merger (filed Jan. 27, 2000) (Bell Atlantic/GTE Jan. 27, 2000 Proposed Conditions).

⁶ Section 271 prohibits Bell Operating Companies (BOCs) such as Bell Atlantic from providing interLATA services within their territories until such time as they have demonstrated compliance with section 271. 47 U.S.C. § 271. Section 271 was added to the Communications Act by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), *codified at* 47 U.S.C. §§ 151 *et seq.* All citations to the 1996 Act will be in accordance with its codification in Title 47 of the United States Code.

⁷ See Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing.

less than 10 percent of the spun-off entity and that contain a conditional conversion right. Applying a three-part test, we conclude that the merged firm will not own an equity interest or the equivalent thereof of more than 10 percent of Genuity. We further find that the merged firm will not control Genuity, nor will it be providing interLATA services through its post-spin-off relationship with Genuity.

3. In addition, we find in this Order that, absent conditions, the merger of Bell Atlantic and GTE will harm consumers of telecommunications services by (a) denying them the benefits of future probable competition between the merging firms; (b) undermining the ability of regulators and competitors to implement the pro-competitive, deregulatory framework for local telecommunications that was adopted by Congress in the 1996 Act; and (c) increasing the merged entity's incentives and ability to discriminate against entrants into the local markets of the merging firms. Moreover, we also find that the asserted public interest benefits of the proposed merger will not outweigh these public interest harms.

4. The Applicants, however, have proposed conditions that will alter the public interest balance. These conditions are designed to mitigate the potential public interest harms of the Applicants' transaction, enhance competition in the local exchange and exchange access markets in which Bell Atlantic or GTE is the incumbent local exchange carrier (incumbent LEC), and strengthen the merged firm's incentives to expand competition outside of its territories. We believe that the voluntary merger conditions proposed by the Applicants and adopted in this Order will not only substantially mitigate the potential public interest harms of the merger, but also provide public interest benefits that extend beyond those resulting from the proposed transaction. Accordingly, we conclude that approval of the applications to transfer control of Commission licenses and lines from GTE to Bell Atlantic serves the public interest, convenience, and necessity and, therefore, satisfies sections 214 and 310(d) of the Communications Act given these significant and enforceable conditions.

II. EXECUTIVE SUMMARY

5. The applications before us concern the proposed merger of one of four remaining Regional Bell Operating Companies (RBOCs) and an incumbent LEC of a size comparable to that of an RBOC.⁸ We conclude that, with the conditions adopted in this Order, the Applicants have demonstrated that the proposed transfer of licenses and lines from GTE to Bell Atlantic will serve the public interest. We also make the following determinations in support of this conclusion:

?? *Compliance with Section 271.* Because GTE will transfer its Internet backbone and related assets to a separate public corporation (Genuity) prior to merger closing, the proposed transaction will not result in a violation of section 271 of the Act. The merged firm will retain shares of Genuity stock that will comprise less than 10 percent of Genuity's voting, dividend and distribution rights. These Class B shares will contain a contingent right that enables the merged firm to convert the shares into additional shares of up to 80 percent of Genuity only if it obtains section 271 authority with respect to 95 percent of Bell Atlantic's in-region access lines within five years of the merger's closing. We conclude that

⁸ Because of its size, the Commission has consistently referred to GTE as a "first-tier" incumbent LEC and thus included it in the small group of carriers, along with the RBOCs, that have substantial market power. *See SBC/SNET Order*, 13 FCC Rcd at 21302, para. 21 (*citing Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6818-20 (1990)).

this conditional conversion right is not an equity interest or its equivalent within the meaning of the Act, for the following reasons:

- 1) The exercise of the conversion right is genuinely in question. The merged firm will be able to exercise its conversion right only if it obtains section 271 authority with respect to 95 percent of Bell Atlantic's in-region access lines within five years. It also must be in a position to operate Genuity's business consistent with section 271 in all Bell Atlantic in-region states prior to actual conversion. If the merged entity seeks to sell its conversion right prior to satisfying this 95-percent threshold, it must first offer to sell those shares to Genuity in exchange for a debt instrument in an amount equal to its initial investment plus a rate of return based on the Standard & Poor's 500 Index or the fair market value of the shares, whichever is less. If Genuity declines, the merged firm will transfer the shares to a liquidating trustee for disposition, and the merged firm would receive limited sales proceeds that would not exceed the value of its initial investment plus a rate of return based on the Standard & Poor's 500 Index.
- 2) The interest furthers the purposes of section 271 by increasing the merged firm's incentive to achieve section 271 compliance quickly throughout the Bell Atlantic region. This is reinforced by the requirement that the merged firm forgo ratably any appreciation that is attributable to the period of time prior to section 271 authorization in any state.
- 3) The interest will not increase the likelihood that the merged firm will discriminate against Genuity's rivals because any discriminatory behavior would be readily detectable, either by an independent auditor or through the section 271 approval process, and may result in appropriate enforcement action.

?? *Potential Public Interest Harms.* The proposed merger of this RBOC and major incumbent LEC threatens to harm consumers of telecommunications services in three ways.

- 1) The merger will remove GTE as one of the most significant potential participants in the local telecommunications mass markets within Bell Atlantic's region, thus substantially reducing the prospect of competition in those markets, which Congress has determined will serve the public interest.
- 2) The merger will reduce the Commission's ability to implement the market-opening requirements of the 1996 Act through comparative practice oversight (benchmarking) methods. Contrary to the deregulatory, competitive purpose of the 1996 Act, this will increase the duration of the entrenched firms' market power and raise the costs of regulating them and make it more difficult for the Commission to achieve the Act's deregulatory objective.
- 3) The merger will increase the incentive and ability of the merged entity to discriminate against its rivals, particularly with respect to the provision of advanced telecommunications services, a result that is likely to frustrate the Commission's ability to foster advanced services as it is directed to do by the 1996 Act.

?? *Potential Public Interest Benefits.* The asserted benefits of the proposed merger do

not outweigh the significant harms detailed above.

- 1) The Applicants have not met their burden of demonstrating that the proposed merger will produce a public interest benefit by promoting competition in the provision of Internet backbone services because (a) the ultimate recombination of GTE's Internet data business with Bell Atlantic's local customers is entirely speculative and (b) the Applicants have not demonstrated that such combination will result in a benefit to the Internet and data services market.
- 2) The Applicants have failed to demonstrate that the merger is necessary to obtain the benefits to local competition of its out-of-region expansion plan, in which the merged firm will enter twenty-one out-of-region local markets as a competitive LEC.
- 3) The Applicants have not demonstrated with any specificity that their merger is likely to produce public interest benefits in the long distance market.
- 4) The proposed merger produces some public interest benefits to the market for wireless communications. The recently completed merger of Bell Atlantic and Vodafone created a carrier with a substantial wireless footprint, and the addition of GTE's wireless markets to this footprint will afford consumers in these markets the option of selecting Bell Atlantic/Vodafone services.
- 5) A small portion of the Applicants' claimed cost-saving efficiencies, including consolidation efficiencies, implementation of best practices, faster and broader roll-out of new services, and benefits to employees and communities, are merger-specific, likely, and verifiable.

?? *Conditions.* On January 27, 2000, the Applicants supplemented their initial application by submitting a set of voluntary commitments as conditions of approval of their proposed transfer of licenses and lines. Following a period of public comment regarding their proposed conditions, the Applicants revised their commitments on April 14, 2000, April 28, 2000, and May 19, 2000. Assuming the merged firm's satisfactory compliance with their proposals, implementation of the conditions adopted herein will further the following goals:

- 1) promote advanced services deployment;
- 2) enhance the openness of in-region local telecommunications markets;
- 3) foster out-of-region local competition;
- 4) improve residential phone service; and
- 5) enforce the Merger Order.

These commitments are sufficient to alter the public interest balance such that the application to transfer licenses and lines is, overall, in the public interest and should be approved.

?? *Wireless.* Bell Atlantic and GTE are required by the U.S. Department of Justice (DOJ) and as a condition of this Order to divest one of the cellular telephone licenses in ninety-six

Metropolitan Statistical Areas and Rural Service Areas where the two companies have wireless licenses that overlap geographically.

?? *International.* The public interest will be served by transferring control of GTE's international section 214 authorizations and submarine cable landing licenses (other than those being transferred to Genuity) to Bell Atlantic, subject to the condition that the merged firm's subsidiaries be classified as dominant international carriers in their provision of service on the U.S.-Gibraltar, U.S.-Dominican Republic, and U.S.-Venezuela routes.

III. BACKGROUND

A. The Applicants

6. *GTE Corporation.* GTE is the nation's largest independent incumbent LEC, providing local exchange and exchange access services in twenty-eight states, with service to more than 26 million access lines.⁹ In 1999, GTE's operating revenues exceeded \$25 billion.¹⁰ Not one of the original RBOCs created during the dismantling of the Bell System, GTE was created from the combination of smaller telephone companies.¹¹ After its initial formation in 1918, GTE evolved and grew as a result of a series of acquisitions of telephone companies, including Peninsular Telephone, Hawaiian Telephone, and Northern Ohio Telephone. In 1990, GTE merged with Contel Corporation, and in 1999, GTE acquired a 40 percent ownership interest in the Puerto Rico Telephone Company.¹²

7. In addition to providing local exchange and exchange access services, GTE provides wireless, Internet access, and directory publishing services. Not subject to the interLATA restrictions governing BOCs, GTE entered the long distance market in 1997 through a long-term agreement with LDDS WorldCom.¹³ GTE also has significant investments in communications and information services business in Canada, the Dominican Republic, Venezuela, Argentina, Micronesia, and China.¹⁴

8. In 1997, GTE acquired BBN, a company involved in Internet activities, and purchased fiber-optic capacity from Qwest to develop internetworking capabilities. BBN, which evolved into GTE Internetworking and is now known as Genuity, operates a national Internet backbone network and provides a host of Internet-related services including dedicated and dial-up Internet access and Web

⁹ Letter from Pat Koch, Bell Atlantic, to Julie Patterson, Federal Communications Commission, filed May 22, 2000 (Bell Atlantic/GTE May 22, 2000 *Ex Parte* Letter).

¹⁰ *Id.*

¹¹ Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing, Exhibit B, Attach. 3, Joint Declaration of Marion C. Jordan and Jerry Holland at para. 10 (Bell Atlantic/GTE Joint Jordan/Holland Decl.).

¹² GTE 1999 Annual Report at 2.

¹³ Bell Atlantic/GTE Joint Jordan/Holland Decl. at para. 10.

¹⁴ Bell Atlantic Oct. 2, 1998 Application at 3. GTE is also engaged in ventures unrelated to the communications industry, including financing, insurance, leasing, and other related activities. *Id.*

hosting and security services.¹⁵

9. GTE holds numerous Commission licenses and operates lines used in interstate and international communications, including domestic and international lines authorized under section 214, and various Title III licenses necessary to operate cellular, paging, PCS, experimental radio, business radio, mobile radio, and microwave services, as well as earth station authorizations.¹⁶

10. *Bell Atlantic.* Bell Atlantic, one of the original seven regional Bell Operating Companies formed as part of the divestiture of AT&T's local operations, is the primary incumbent LEC in thirteen states in the mid-Atlantic and northeastern United States, in addition to the District of Columbia.¹⁷ Through its operating companies, Bell Atlantic services more than 43 million local exchange access lines and had 1999 operating revenues in excess of \$33 billion.¹⁸ In 1997, Bell Atlantic acquired NYNEX Corporation, which had been the incumbent provider of local exchange and exchange access services in the states of the northeastern United States, extending its in-region incumbent LEC activities substantially.¹⁹

11. In addition to local exchange and exchange access services, Bell Atlantic's operating companies provide a wide range of other services, including cellular, personal communications services (PCS), paging, Internet access, and directory publishing services.²⁰ Bell Atlantic's wireless operations include service provided throughout the United States as well as investments in Latin America, Europe, and the Pacific Rim.²¹ In 1999, Bell Atlantic's wireless companies provided service to more than 27 million subscribers.²² Bell Atlantic also has many overseas investments, including direct or indirect financial interests in communications and information services businesses in New Zealand, Mexico, Italy, Indonesia, Thailand, Gibraltar, the Philippines, the United Kingdom, Greece, Slovakia, and the Czech Republic.²³

12. On March 30, 2000, the Wireless Telecommunications and International Bureaus, acting upon delegated authority, granted approval of Bell Atlantic and Vodafone AirTouch, PLC (Vodafone), a U.K. corporation, to transfer control of their U.S. wireless licenses and authorizations to

¹⁵ Bell Atlantic/GTE Oct. 2, 1998 Application, Exhibit A, Declaration of John T. Curran at para. 1 (Bell Atlantic/GTE Curran Decl.).

¹⁶ *Id.*

¹⁷ Bell Atlantic's region includes Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland, West Virginia, Virginia, parts of Connecticut, and the District of Columbia. *See* Bell Atlantic/GTE Oct. 2, 1998 Application, Exhibit A, Tab 1.

¹⁸ *See* Bell Atlantic 1999 Annual Report at 6.

¹⁹ *See generally* Bell Atlantic/NYNEX Order, 12 RCC Rcd 19985.

²⁰ Bell Atlantic 1999 Annual Report at 6.

²¹ *Id.*

²² *Id.*

²³ Bell Atlantic/GTE Oct. 2, 1998 Application at 4. Bell Atlantic is also engaged in financing, systems integration services, customer premises equipment distribution, and telecommunications consulting. *Id.*

Cellco Partnership (Cellco).²⁴ In doing so, the Bureaus concluded that the transaction would not present competitive concerns, but rather, would likely result in a number of public interest benefits. Cellco is the vehicle through which Bell Atlantic and Vodafone formed a domestic, nationwide wireless business that combines their cellular, PCS, paging, and other wireless properties in the United States.²⁵

B. The Merger Transaction

13. *Proposed Transaction.* On July 28, 1998, Bell Atlantic and GTE announced their Agreement and Plan of Merger (Merger Agreement), under which a wholly-owned subsidiary of Bell Atlantic would merge with GTE, and GTE would be the surviving corporation and would itself become a wholly-owned subsidiary of Bell Atlantic.²⁶ GTE would therefore survive as a wholly-owned subsidiary of Bell Atlantic, and the GTE subsidiaries holding section 214 authorizations, submarine cable landing licenses, or radio licenses would survive as wholly-owned subsidiaries of GTE.²⁷ Following the merger, approximately 57 percent of the shares of Bell Atlantic would be held by the current shareholders, and approximately 43 percent of the shares of Bell Atlantic would be held by the shareholders of GTE. The board of directors of the merged firm would be comprised of an equal number of members from Bell Atlantic's board and GTE's board.²⁸

14. Together, Bell Atlantic and GTE would serve more than 69 million local access lines, representing more than one third of the nation's total access lines.²⁹ As determined from the December 1999 statistics of both companies, the merged entity would have annual revenues in excess of \$58 billion.³⁰ Accordingly, as measured by revenues, a combined Bell Atlantic and GTE would be the second largest telecommunications company in the country behind only AT&T. Based on the extensive breadth of the companies' operations, the proposed merger between Bell Atlantic and GTE requires the review of several government agencies, including the DOJ, state public utility commissions, and this Commission.

C. The Merger Review Process

1. Department of Justice Review

15. The DOJ reviewed the proposed transaction as part of the pre-merger review process

²⁴ See *Vodafone AirTouch, Plc and Bell Atlantic Corporation*, File Nos. 0000032969 et al., Memorandum Opinion and Order, DA 00-721 (WTB/IB rel. Mar. 30, 2000) (*Vodafone/Bell Atlantic Order*); *FCC Bureaus Approve Bell Atlantic/Vodafone and VoiceStream/Aerial License Transfers and Assignments—Two New National Wireless Competitors to be Created*, Press Release (rel. Mar. 30, 2000).

²⁵ *Id.*

²⁶ Bell Atlantic/GTE Oct. 2, 1998 Application at 2.

²⁷ *Id.* at 3.

²⁸ *Id.*

²⁹ See *Trends in Telephone Service*, Federal Communications Commission (March 2000) at 20-3, Table 20.21; see *supra* paras. 6, 10.

³⁰ Bell Atlantic 1999 Annual Report at 6; GTE 1999 Annual Report at 2.

under the Hart-Scott-Rodino Antitrust Improvements Act of 1976.³¹ On May 7, 1999, the DOJ filed a civil antitrust complaint alleging that the proposed transaction would violate section 7 of the Clayton Act by lessening competition in the markets for wireless mobile telephone services in ten major trading areas (MTAs), constituting sixty-five metropolitan statistical areas (MSAs) and rural statistical areas (RSAs) in nine states.³² A proposed final judgment was also filed, requiring either Bell Atlantic or GTE to divest its wireless telephone business in the markets where the two companies' businesses overlap.³³ After Bell Atlantic entered into a partnership with Vodafone to form a national wireless business, the DOJ amended the complaint and proposed final judgment to address the additional cellular overlap areas resulting from Bell Atlantic's affiliation with Vodafone.³⁴ The DOJ concluded that the combined effect of the Bell Atlantic/GTE and Bell Atlantic/Vodafone transactions would be to lessen competition in the markets for wireless services in thirteen MTAs and ninety-six MSAs and RSAs in fifteen states.³⁵ On April 20, 2000, the parties submitted to the court a proposed final judgment that requires Bell Atlantic, GTE, or Vodafone to divest wireless assets in ninety-six cellular overlap markets.³⁶

2. State Review

16. The proposed merger of Bell Atlantic and GTE also has required the review of or notification to a number of state governing bodies. Twenty-seven states conducted proceedings examining the proposed transaction, each approving it and many imposing conditions.³⁷ Twenty-three additional states declined jurisdiction over the transaction.³⁸ On March 2, 2000, the California Public Utilities Commission granted the Applicants the final necessary state approval for the proposed merger.³⁹

3. Commission Review

17. Bell Atlantic and GTE filed their initial applications for transfer of control on October 2, 1998, requesting Commission approval of the transfer of control to Bell Atlantic of licenses and lines owned or controlled by GTE or its affiliates or subsidiaries.⁴⁰ More than fifty parties have filed timely

³¹ See *United States of America v. Bell Atlantic Corp.*, 99CV-01119, Motion for Entry of Final Judgment (Apr. 20, 2000).

³² *United States of America v. Bell Atlantic Corp.*, 99CV-01119, Motion for Leave to File Supplemental Complaint (Dec. 6, 1999).

³³ *Id.*

³⁴ *Id.*

³⁵ *United States of America v. Bell Atlantic Corp.*, 99CV-01119, Motion for Entry of Final Judgment (Apr. 20, 2000).

³⁶ *Id.*

³⁷ "Bell Atlantic-GTE Clear Last State Merger Hurdle with Cal.," Washington Telecom Newswire (Mar. 2, 2000).

³⁸ *Id.*

³⁹ See *id.*

⁴⁰ *GTE Corporation and Bell Atlantic Corporation Seek FCC Consent for a Proposed Transfer of Control and Commission Seeks Comment on Proposed Protective Order filed by GTE and Bell Atlantic*, CC Docket No. 98-184, Public Notice, DA 98-2035 (rel. Oct. 8, 1998) (Oct. 8, 1998 Public Notice).

comments or petitions to deny the application.⁴¹ In addition, the Commission held a series of three public forums at which a number of parties expressed their views on the proposed merger, including the Applicants, states, economists, and consumer groups, community organizations, and industry participants.⁴²

18. On February 24, 1999, in response to concerns raised by Commission staff, Bell Atlantic and GTE filed a *Report on Long Distance Issues in Connection with their Merger and Request for Limited Interim Relief*. With respect to long distance voice services, Applicants requested that the Commission grant a reasonable transition period to permit GTE to transfer to other interexchange carriers its existing customers within Bell Atlantic's region.⁴³ Applicants also requested that the Commission grant interim relief to enable the merged firm to continue providing interLATA data services through GTE's Internet backbone provider, GTE Internetworking, while the merged company pursued section 271 authority for Bell Atlantic's in-region states.⁴⁴ The Applicants subsequently asked that the Commission hold its Request for Interim Relief in abeyance pending later filings addressing the long distance issues.⁴⁵ On April 14, 1999, Applicants requested that the Commission suspend processing of their merger application pending a further submission following Bell Atlantic's filing with the Commission of its application for section 271 relief in New York.⁴⁶

19. Bell Atlantic and GTE renewed and supplemented their initial application by submitting a January 27, 2000 Supplemental Filing, which included their Internet backbone spin-off proposal and a set of proposed merger conditions to which they voluntarily committed.⁴⁷ Bell Atlantic and GTE subsequently clarified the Internet backbone proposal and their proposed merger conditions through subsequent filings made on April 3, 2000,⁴⁸ April 14, 2000,⁴⁹ April 28, 2000,⁵⁰ May 19, 2000,⁵¹ June 7,

⁴¹ The parties that filed formal pleadings in this proceeding are listed in Appendix A.

⁴² See "Commission to Hold En Bancs Regarding Telecom Mergers," Public Notice, DA 98-2045 (Oct. 9, 1998); "Commission to Hold En Bancs Regarding Telecom Mergers," Public Notice, DA 98-2415 (rel. Dec. 2, 1998) (Dec. 2, 1998 Public Notice); "Chief Economist Names Participants on Economic Round Table Regarding Telecom Mergers," Public Notice, DA 99-119 (rel. Jan. 25, 1999) (Jan. 25, 1999 Public Notice).

⁴³ See Letter from Jennifer L. Hoh, Legal Department, Bell Atlantic, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 98-184 (Feb. 24, 1999) (Bell Atlantic/GTE Feb. 24, 1999 *Ex Parte* Letter).

⁴⁴ *Id.*

⁴⁵ See Letter from Steven G. Bradbury, Counsel, GTE, and Michael E. Glover, Counsel, Bell Atlantic, to Thomas Krattenmaker, Federal Communications Commission, CC Docket 98-184 (filed Apr. 8, 1999) (Bell Atlantic/GTE Apr. 8, 1999 *Ex Parte* Letter).

⁴⁶ See Letter from Steven G. Bradbury, Counsel for GTE, and Edward D. Young, III, Counsel for Bell Atlantic, to Katherine Brown, Federal Communications Commission, CC Docket No. 98-184 (filed Apr. 14, 1999) (Bell Atlantic/GTE Apr. 14, 1999 *Ex Parte* Letter).

⁴⁷ See Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing; Bell Atlantic/GTE Jan. 27, 2000 Proposed Conditions. See also *Commission Seeks Comments on Supplemental Filing Submitted by Bell Atlantic Corporation and GTE Corporation*, CC Docket No. 98-184, Public Notice (rel. Jan. 31, 2000) (Jan. 31, 2000 Public Notice). The parties filing comments and reply comments are listed in Appendix A.

⁴⁸ See Letter from Steven G. Bradbury, Counsel to GTE, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 98-184 (filed Apr. 3, 2000) (Bell Atlantic/GTE Apr. 3, 2000 *Ex Parte* Letter).

2000,⁵² and June 14, 2000.⁵³ On April 28, 2000, the Commission sought further comment on the altered spin-off proposal and modified merger conditions.⁵⁴

IV. PUBLIC INTEREST FRAMEWORK

20. Before approving the transfer of control of licenses and lines in connection with the proposed merger, the Commission must determine, pursuant to sections 214(a) and 310(d) of the Communications Act, that the proposed transfers serve the public interest.⁵⁵ In accordance with the Act's public interest standard, we must weigh any potential public interest harms of the proposed transaction against the potential public interest benefits to ensure that, on balance, the merger services the public interest, convenience, and necessity.⁵⁶ In doing so, we examine, *inter alia*, possible competitive effects of the proposed transfers and measure the effect of the merger on both the broader aims of the Communications Act and federal communications policy.⁵⁷

21. Section 214(a) of the Communications Act generally requires carriers to obtain from the Commission a certificate of public convenience and necessity before constructing, acquiring, operating or engaging in transmission over lines of communication, or before discontinuing, reducing or impairing

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⁴⁹ See Letter from Michael E. Glover, Associate General Counsel, Bell Atlantic, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 98-184 (filed Apr. 14, 2000) (Bell Atlantic/GTE Apr. 14, 2000 *Ex Parte* Letter).

⁵⁰ Letter from William P. Barr, Executive Vice President and General Counsel, GTE, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 98-184 (filed Apr. 28, 2000) (Bell Atlantic/GTE Apr. 28, 2000 *Ex Parte* Letter).

⁵¹ Letter from Pat Koch, Bell Atlantic, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 98-184 (filed May 19, 2000) (Bell Atlantic/GTE May 19, 2000 *Ex Parte* Letter).

⁵² Letter from Michael E. Glover, Associate General Counsel, Bell Atlantic, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 98-184 (filed June 7, 2000) (Bell Atlantic/GTE Glover June 7, 2000 *Ex Parte* Letter); Letter from Suzanne Yelen, Counsel for GTE, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 98-184 (filed June 7, 2000) (Bell Atlantic/GTE Yelen June 7, 2000 *Ex Parte* Letter).

⁵³ Letter from Michael E. Glover, Associate General Counsel, Bell Atlantic, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 98-184 (filed June 14, 2000) (Bell Atlantic/GTE Glover June 14, 2000 *Ex Parte* Letter).

⁵⁴ *Commission Seeks Comment on Additional Filings Submitted by Bell Atlantic Corporation and GTE Corporation*, Public Notice, CC Docket No. 98-184, DA 00-959 (rel. Apr. 28, 2000) (Apr. 28, 2000 Public Notice).

⁵⁵ 47 U.S.C. §§ 214(a), 303(r), 310(d). See *WorldCom/MCI Order*, 13 FCC Rcd at 18030, para. 8; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20000, para. 29.

⁵⁶ See *WorldCom/MCI Order*, 13 FCC Rcd at 18031-32, para. 10.

⁵⁷ See *Qwest Communications International Inc. and US WEST, Inc., Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 99-272, FCC 00-91, para. 9 (rel. Mar. 10, 2000) (*Qwest/US WEST Order*).

service to a community.⁵⁸ In this case, section 214(a) requires the Commission to find that the "present or future public convenience and necessity require or will require" Bell Atlantic to operate the acquired telecommunications lines and that "neither the present nor future public convenience and necessity will be adversely affected" by the discontinuance of service from GTE.⁵⁹ Section 310(d) provides that no construction permit or station license may be transferred, assigned, or disposed of in any manner except upon a finding by the Commission that the "public interest, convenience, and necessity will be served thereby."⁶⁰ Accordingly, the Commission must determine that the proposed transfer of licenses from GTE to Bell Atlantic "serves the public interest, convenience, and necessity" before it can approve the transaction.⁶¹

22. The public interest standard under sections 214(a) and 310(d) involves a balancing process that weighs the potential public interest harms of the proposed transaction against its potential public interest benefits.⁶² The Applicants bear the burden of proving by a preponderance of the evidence that, on balance, the proposed transaction serves the public interest.⁶³ In applying this public interest test, the Commission considers four questions: (1) whether the transaction would result in a violation of the Communications Act; (2) whether the transaction would result in a violation of the Commission's rules; (3) whether the transaction would substantially frustrate the Commission's ability to implement or enforce the Communications Act; and (4) whether the merger promises to yield affirmative public interest benefits that could not be achieved without the merger.⁶⁴

23. Our analysis of public interest benefits and harms under parts three and four of the public interest test includes, but is not limited to, an analysis of the potential competitive effects of the

⁵⁸ 47 U.S.C. § 214(a).

⁵⁹ 47 U.S.C. § 214(a). *See Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996; Petition for Forbearance of the Independent Telephone and Telecommunications Alliance*, CC Docket No. 97-11; AAD File No. 98-43, Report and Order in CC Docket No. 97-11 and Second Memorandum Opinion and Order in AAD File No. 98-43, FCC 99-104 (rel. June 30, 1999) (continuing to require Commission approval for transfers of control, even though blanket section 214 entry certification and streamlined section 214 exit certification have been granted for domestic carriers).

⁶⁰ 47 U.S.C. § 310(d).

⁶¹ *Id.*

⁶² *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20063, para. 157.

⁶³ *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Telecommunications, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 98-178, Memorandum Opinion and Order, 14 FCC Rcd at 3160, 3169-70, para. 15 (1999) (*AT&T/TCI Order*). *See also WorldCom/MCI Order*, 13 FCC Rcd at 18031, para. 10 n.33 (citing 47 U.S.C. § 309(e) (burdens of proceeding and proof rest with the applicant)); *American Telephone and Telegraph Co. and MCI Communications Corporation Petitions for the Waiver of the International Settlements Policy*, File No. USP-89-(N)-086, Memorandum Opinion and Order, 5 FCC Rcd 4618, 4621, para. 19 (1990) (applicant seeking a waiver of an existing rate bears the burden of proof to establish that the public interest would be better served by the grant rather than the denial of the waiver request); *LeFlore Broadcasting Co., Inc.*, Docket No. 20026, Initial Decision, 66 FCC 2d 734, 736-37, paras. 2-3 (1975) (on the ultimate issue of whether the applicants have the requisite qualifications and whether a grant of the application would serve the public interest, as on all issues, the burden of proof is on the licensees).

⁶⁴ *See SBC/Ameritech Order*, 14 FCC Rcd at 14737, para. 48.

transaction, as informed by traditional antitrust principles.⁶⁵ Although an antitrust analysis focuses solely on whether the effect of a proposed merger “may be substantially to lessen competition,”⁶⁶ the Communications Act requires the Commission to apply a different standard. The Commission must make an independent public interest determination that includes an evaluation of the merger’s likely effect on future competition.⁶⁷ Because Congress has determined that additional competition in telecommunications markets will better serve the public interest, in order to conclude that a merger is in the public interest, the Commission must “be convinced that it will enhance competition, not merely lessen it.”⁶⁸

24. Where necessary, the Commission can attach conditions to a transfer of lines and licenses to ensure that the public interest is served by the transaction.⁶⁹ Section 214(c) of the Act authorizes the Commission to attach to the certificate “such terms and conditions as in its judgment the public convenience and necessity may require.”⁷⁰ Similarly, section 303(r) of the Communications Act authorizes the Commission to prescribe restrictions or conditions, not inconsistent with law, that may be necessary to carry out the provisions of the Act.⁷¹ Indeed, unlike the role of antitrust enforcement

⁶⁵ Although the Commission’s analysis of competitive effects is informed by antitrust principles and judicial standards of evidence, it is not governed by them, which permits the Commission to arrive at a different assessment of likely competitive benefits or harms than antitrust agencies adduce based on antitrust law. *See FCC v. RCA Communications*, 346 U.S. 86, 96-97 (1953) (“To restrict the Commission’s action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles by specialization, by insight gained through experience, and by more flexible procedure.”). *See also SBC/Ameritech Order*, 14 FCC Rcd at 14738, para. 49, n.121; *WorldCom/MCI Order*, 13 FCC Rcd at 18034, para. 13 (citing *RCA Communications*, 346 U.S. at 94; *United States v. FCC*, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (*en banc*) (The Commission’s “determination about the proper role of competitive forces in an industry must therefore be based, not exclusively on the letter of the antitrust laws, but also on the ‘special considerations’ of the particular industry.”); *Teleprompter-Group W*, 87 FCC 2d 531 (1981), *aff’d on recon.*, 89 FCC 2d 417 (1982) (Commission independently reviewed the competitive effects of a proposed merger); *Equipment Distributors’ Coalition, Inc. v. FCC*, 824 F.2d 1197, 1201 (D.C. Cir. 1987); *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agencies “to analyze proposed mergers under the same standards that the Department of Justice . . . must apply.”).

⁶⁶ *See* 15 U.S.C. § 18.

⁶⁷ *See SBC/Ameritech Order*, 14 FCC Rcd at 14738, para. 49; *WorldCom/MCI Order*, 13 FCC Rcd at 18032-33, para. 12; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19987, para. 2.

⁶⁸ *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19987, para. 2.

⁶⁹ *See* 47 C.F.R. § 1.110. *See also WorldCom/MCI Order*, 13 FCC Rcd at 18031-32, para. 10; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20001-2, para. 30.

⁷⁰ 47 U.S.C. § 214(c). *See WorldCom/MCI Order*, 13 FCC Rcd at 18032, para. 10 n.35 (citing *MCI Communications Corp.*, File No. I-S-P-93-013, Declaratory Ruling and Order, 9 FCC Rcd 3960, 3968, para. 39 (1994); *Sprint Corp.*, File No. I-S-P-95-002, Declaratory Ruling and Order, 11 FCC Rcd 1850, 1867-72, paras. 100-33 (1996); *GTE Corp.*, File No. W-P-C-2486, Memorandum Opinion and Order, 72 FCC 2d 111, 135, para. 76 (1979)); *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20002, para. 30 n.59 (citing *Atlantic Tele-Network, Inc. v. FCC*, 59 F.3d 1384, 1389-90 (D.C. Cir. 1995); *GTE Service Corp. v. FCC*, 782 F.2d 263, 268 (D.C. Cir. 1986); *Western Union Tel. Co. v. FCC*, 541 F.2d 346, 355 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977)).

⁷¹ 47 U.S.C. § 303(r). *See, e.g., WorldCom/MCI Order*, 13 FCC Rcd at 18032, para. 10 n.36 (citing *FCC v. Nat’l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (*Nat’l Citizens*) (broadcast-newspaper cross-ownership rules properly adopted pursuant to section 303(r)); *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (section 303(r) (continued....))

agencies, the Commission's public interest authority enables it to rely upon its extensive regulatory and enforcement experience to impose and enforce conditions to ensure that the merger will yield overall public interest benefits.⁷²

25. Finally, as noted in the *SBC/Ameritech* and *AT&T-TCI Orders*, many transfer applications on their face demonstrate that the merger would yield affirmative public interest benefit and would neither violate the Communications Act or Commission rules nor frustrate the policies and enforcement of the Communications Act.⁷³ Such cases do not require extensive review by the Commission and interested parties. Because that is not the case with respect to this proposed transaction, we analyze the potential public interest harms and benefits of this proposed merger, absent conditions, in the following sections.

V. COMPLIANCE WITH SECTION 271

26. As an initial matter, we first consider whether the Applicants' proposed transaction would result in a violation of the Communications Act. Section 271 of the Act prohibits a Bell operating company or its affiliate from entering the in-region, interLATA market unless and until the BOC demonstrates that its local market is open to competition by satisfying a checklist of market-opening and other requirements set forth in the statute.⁷⁴ Bell Atlantic is comprised of several Bell operating companies,⁷⁵ and, to date, has obtained section 271 authorization only in New York.⁷⁶ GTE is not comprised of any BOCs and thus, prior to the contemplated license transfer application, was not subject to section 271's restrictions. At the time of the Application, GTE in fact provided interLATA services nationwide through various subsidiaries.

27. In anticipation of its merger with Bell Atlantic, GTE agreed to exit various interLATA businesses, including resold voice long distance service, in the section 271-restricted Bell Atlantic states

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powers permit Commission to order cable company not to carry broadcast signal beyond station's primary market); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989) (syndicated exclusivity rules adopted pursuant to section 303(r) powers).

⁷² See *WorldCom/MCI Order*, 13 FCC Rcd at 18034-35, para. 14. In addition to its public interest authority under the Communications Act, the Commission shares concurrent antitrust jurisdiction with DOJ under the Clayton Act to review mergers between common carriers. 15 U.S.C. §§ 18, 21(a). In this case, because our public interest authority under the Communications Act is sufficient to address both the competitive issues raised by the proposed merger and its likely effect on the public interest, we decline to exercise our Clayton Act authority for the proposed transaction. See *SBC/Ameritech Order*, 14 FCC Rcd at 14740, para. 53; *WorldCom/MCI Order*, 13 FCC Rcd at 18032, para. 12; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20005, para. 33. See also *United States v. FCC*, 652 F.2d 72, 88 (D.C. Cir. 1980) (en banc).

⁷³ See *AT&T/TCI Order*, 14 FCC Rcd at 3170, para. 16.

⁷⁴ See 47 U.S.C. § 271(a). See also 47 U.S.C. § 271(c) (setting forth the requirements for a BOC to seek authority to provide in-region, interLATA services).

⁷⁵ See 47 U.S.C. § 153(4) (defining "Bell operating company").

⁷⁶ See *Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, 15 FCC Rcd 3953 (1999).

before closing the merger.⁷⁷ GTE Communications Corporation, for example, terminated its direct dialing, dial around, 800 toll free, operator, private line and frame relay data services, and agreed to deactivate all calling cards of customers in the affected states and cease origination of calling card calls in that region.⁷⁸ In addition, GTE transferred to unaffiliated carriers the dedicated capacity services provided by GTE Data Services Incorporated, GTE Telecommunication Services, Inc. and GTE Network Services, and interLATA transmission services provided by GTE.net that originated in Bell Atlantic states other than New York. GTE also agreed to divest the retail private line resale business of GTE Telecom Inc. (GTE Telecom) prior to merger close.⁷⁹ With respect to GTE Telecom's private line wholesale services, GTE is seeking Commission approval to transfer corporate control of GTE Telecom to Genuity.

28. Genuity (formerly GTE Internetworking), a wholly-owned subsidiary of GTE, is a facilities-based Internet infrastructure supplier offering a comprehensive set of managed Internet access, web hosting and value-added e-business services, such as virtual private networks for secure data transmission and security services.⁸⁰ It operates a global network consisting of domestic broadband fiber optic cable, points of presence where Internet access is provided to end users and secure data centers. With its extensive network and customer base, Genuity is commonly regarded as a Tier I Internet backbone provider.

A. Applicants' Spin-off Proposal

29. Under the Applicants' spin-off proposal,⁸¹ GTE will transfer substantially all⁸² of

⁷⁷ See Letter from Alan F. Ciamporcerio, Vice President Regulatory Affairs, GTE, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-184 (filed Apr. 17, 2000) (describing the interLATA services provided by various GTE subsidiaries that the companies will cease providing before merger close), attached hereto as Appendix E.

⁷⁸ In February 2000, GTE notified its residential voice long distance customers in Bell Atlantic's section 271-restricted states that they could select another long distance provider, and, in late March, started transferring the customers. See Bell Atlantic/GTE Feb. 22, 2000 Reply at 3 n.2. See also *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Sprint Communications Company, L.P., Petition for Waiver*, CC Docket No. 94-129, Order, DA 00-620 (rel. Mar. 17, 2000); *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, GTE Service Corp., Petition for Waiver*, CC Docket No. 94-129, Order, DA 00-1113 (rel. May 19, 2000).

⁷⁹ See Letter from Alan F. Ciamporcerio, Vice President Regulatory Affairs, GTE, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-184 (filed Apr. 28, 2000), attached hereto as Appendix F.

⁸⁰ See Letter from Steven G. Bradbury, Kirkland & Ellis, Counsel for GTE, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-184 (filed Mar. 9, 2000) (Bell Atlantic/GTE Mar. 9, 2000 *Ex Parte* Letter) at 2; Letter from Patricia E. Koch, Assistant Vice President Federal Regulatory, Bell Atlantic, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-184 (filed June 9, 2000) (Form S-1 Registration Statement, Amendment No. 3), at 1-2 (describing services provided by Genuity).

⁸¹ See Appendix B (Conditions for Establishment of Genuity as a Separate Corporation; hereinafter Genuity Conditions). The Applicants submitted their spin-off proposal on January 27, 2000 and modified various aspects in *ex parte* submissions to the Commission on April 3, 2000, April 28, 2000, June 7, 2000, and June 14, 2000. See Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing; Bell Atlantic/GTE Apr. 3, 2000 *Ex Parte* Letter; Bell Atlantic/GTE Apr. 28, 2000 *Ex Parte* Letter; Bell Atlantic/GTE June 7, 2000 Glover *Ex Parte* Letter; Bell Atlantic/GTE June 14, 2000 *Ex Parte* Letter.

Genuity's nationwide data business to a separate public corporation. Before merging with Bell Atlantic, GTE will exchange its stockholdings in Genuity for shares of a new class of common stock, Class B common stock. Through an initial public offering (IPO) conducted prior to closing the merger with Bell Atlantic, public shareholders will purchase shares of Genuity Class A common stock initially carrying 90.5 percent of the voting rights and the right to receive 90.5 percent of any dividends or other distributions.⁸³ The merged Bell Atlantic/GTE's Class B shares will carry 9.5 percent of the voting rights and the right to receive 9.5 percent of any dividends or other distributions, along with a conversion right and certain investor safeguards.⁸⁴ Subject to satisfying certain conditions, the Class B shares will be convertible into newly-issued shares representing 80 percent of the shares of Genuity outstanding immediately after the IPO.

30. *Conditions to Sale or Exercise of Conversion Rights.* The potential for the holder of the Class B shares to convert those shares into a greater economic interest is subject to a number of restrictions described below.

?? *50-Percent Threshold.* Unless and until the merged Bell Atlantic/GTE eliminates section 271 restrictions as to at least 50 percent of total Bell Atlantic in-region lines, the Class B holder will only have the right to convert the shares into Class A stock representing a 10-percent interest in Genuity.⁸⁵ If the merged firm fails to meet this 50-percent threshold within five years from the closing of the merger, the Class B shares will never be convertible into more than a 10-percent interest, and the public shareholders' ownership of at least 90 percent of the company will not be diluted. Thus, if the merged entity were to sell all or a portion of the Class B shares before meeting the 50-percent threshold, the shares would be convertible into only 10 percent, or the proportionate lesser amount, of Genuity's then-outstanding shares. Similarly, if Bell Atlantic/GTE were to attempt to convert the Class B shares before satisfying the 50-percent threshold, the shares would be convertible only into Class A common stock representing 10 percent of the then-outstanding shares of Genuity.

?? *95-Percent Threshold for Bell Atlantic/GTE Conversion.* If the merged firm satisfies the 50-percent threshold, the ability of Bell Atlantic/GTE itself to convert remains subject to a further restriction. The merged firm can exercise the right to convert the Class B shares into shares representing approximately 80 percent of the shares of Genuity outstanding immediately after the

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⁸² The assets transferred to Genuity would include all of GTE's Internet backbone and related data business, including the nationwide Global Network Infrastructure (GNI), the BBN Planet backbone and related backbone operations, GTE Internetworking's Internet connectivity services for business customers and national modem and frame relay networks, its Web hosting and Internet security services, and various other interLATA data transport services and operations. GTE's dial-up ISP service (GTE.net) and the research and development operations of BBN Technologies would remain in the merged Bell Atlantic/GTE and not be transferred to Genuity. Bell Atlantic/GTE Feb. 22, 2000 Reply at 3 n.2. The Applicants maintain that BBN Technologies performs research, development and consulting services, primarily for government and commercial customers, and that it was not a part of GTE Internetworking's reported financial results from 1999. Bell Atlantic/GTE Mar. 9, 2000 *Ex Parte* Letter at 2-3.

⁸³ Bell Atlantic/GTE June 7, 2000 Glover *Ex Parte* Ex. A at 1.

⁸⁴ *Id.*

⁸⁵ *Id.* "Bell Atlantic in-region lines" refers to the sum of the number of total billable access lines reported in 1999 ARMIS Report 43-04 for the Bell Atlantic operating company in each of Bell Atlantic's in-region states. *Id.* at n.1.

IPO⁸⁶ only if it eliminates section 271 restrictions as to at least 95 percent of Bell Atlantic in-region lines within five years from merger closing, and eliminates any section 271 restrictions with respect to all remaining lines.⁸⁷ If, therefore, Bell Atlantic/GTE satisfies this 95-percent threshold, it can exercise the Class B conversion right for the purpose of immediately bringing Genuity's business into compliance with section 271. As set forth in an agreement between the merged firm and Genuity, however, the merged firm may require Genuity to reconfigure its operations to conform to section 271 in the states for which the merged firm has not obtained section 271 authorization only if those states in the aggregate represent no more than 3 percent of Genuity's revenues and if Bell Atlantic/GTE reimburses Genuity for the costs of coming into compliance with section 271.⁸⁸ Under the proposal, at least 90 days before the merged firm intends to convert and require Genuity to reconfigure its operations, it will notify the Commission and submit to the Chief of the Common Carrier Bureau a plan for how it would reconfigure Genuity's operations in the relevant states.⁸⁹

If the merged Bell Atlantic/GTE entity itself converts the Class B shares, they will convert into the appropriate number of Class C shares, which are identical to Class A shares except that they carry enhanced voting rights (five votes per share). If the merged firm transfers the Class B shares to another entity, that party may only convert them into Class A shares with ordinary voting rights (one vote per share).

Even if the merged firm eliminates these section 271 restrictions and is able to convert, it may not retain the portion of any appreciation that is attributable to Bell Atlantic in-region states during the period before it obtained section 271 authorization for those states.⁹⁰ Instead, that portion of the appreciation will be transferred to Genuity's public shareholders.⁹¹ The relevant portion of appreciation will be calculated based on the number of Bell Atlantic in-region access lines compared to the number of the merged firm's access lines nationwide.⁹²

⁸⁶ The post-conversion interest would be lower than 80 percent if Genuity were to issue additional Class A shares prior to any conversion. *Id.*, Ex. A at 4.

⁸⁷ *See id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 2.

⁹¹ The merged firm will elect to pay the relevant portion of any in-region appreciation by making a payment to Genuity for distribution to the Class A shareholders or by adjusting the conversion ratio to reduce by a corresponding amount the number of shares that the merged firm receives upon conversion. *Id.*

⁹² This would involve first determining Bell Atlantic/GTE's total appreciation, or the gain in value of the Class B shares from the IPO price on an as-converted basis, which would be calculated by a nationally-recognized investment banking firm (which has no prior association with the merged firm) based on the appreciation of the Class A stock adjusted, if necessary, to exclude any change in value attributable to the anticipated payment to Class A shareholders. Next, the appreciation attributable to a 10-percent interest would be subtracted from that total appreciation. Then, for each anniversary of the IPO, the percentage of Bell Atlantic in-region lines still subject to section 271 restrictions will be divided by the total number of Bell Atlantic in-region lines, and then multiplied by 25 percent to account for the portion of Genuity's domestic business operating in Bell Atlantic's region. These annual fractions will be averaged and multiplied by the total appreciation, less 10 percent, with the result adjusted for taxes (as if the merged firm had sold the Genuity stock initially). *Id.*, Ex. A at 3. Although AT&T and the Competition (continued....)

?? *Options between 50 and 95 percent.* If the merged firm meets the 50-percent threshold but not the 95-percent threshold, it can dispose of all or a portion of its Class B shares,⁹³ but the merged firm can only retain sale proceeds that do not exceed the value of its original investment (or ratable portion thereof) plus a return based on the Standard & Poor's 500 Index.⁹⁴ Nonetheless, if Bell Atlantic/GTE intends to dispose of all or a portion of its shares, it must first offer to sell the shares to Genuity for an amount that is the lesser of the value of its original investment (or ratable portion thereof) plus a return based on the Standard & Poor's 500 Index or the fair market value of such shares at the time of their disposition.⁹⁵ Genuity may pay the purchase price through a marketable

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Policy Institute suggest that basing the 25-percent multiplier on the percentage of in-region access lines is flawed, and that a better approach would be to use a multiplier equal to the ratio of Genuity's revenues derived from the Bell Atlantic region as compared with Genuity's national revenues, we note that the 25-percent figure closely approximates the actual percentage of Genuity's 1999 revenues attributable to the Bell Atlantic states other than New York. See Letter from Peter D. Keisler, Sidley & Austin, Counsel for AT&T, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-184 at 1-3 (filed June 9, 2000) (AT&T June 9, 2000 *Ex Parte* Letter); Letter from Ronald J. Binz, President, Competition Policy Institute, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-184 at 2 (filed June 12, 2000). But see Letter from Steven G. Bradbury, Kirkland & Ellis, Counsel for GTE, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-184 (filed Apr. 12, 2000) (containing confidential revenue materials). Accordingly, we find that the 25-percent multiplier is a reasonable approximation of the portion of Genuity's business that would be attributable to the Bell Atlantic section 271-restricted states.

⁹³ The merged firm may also exercise its conversion rights as part of a transaction by which it immediately disposes of all or a portion of its interest in Genuity so that its post-conversion interest in Genuity does not exceed 10 percent, subject to the limitations described below, which include offering the remainder first to Genuity and retaining limited sales proceeds. Bell Atlantic/GTE June 7, 2000 Glover *Ex Parte* Letter Ex. A at 3.

⁹⁴ Specifically, if the merged firm sells the Class B shares before it has met the 95-percent threshold, it will not have the right to retain sale proceeds that exceed (i) sale proceeds attributable to a 10-percent interest in Genuity, plus (ii) an amount equal to what the merged firm would have had if it had invested in the Standard & Poor's 500 Index its initial investment in Genuity above a 10-percent interest (based on the IPO price). Similarly, if it sells all its stock except an amount convertible into a 10-percent interest, it can retain only the amount described in clause (ii) above. In either case, Bell Atlantic/GTE would pay the remainder of its sales proceeds to the U.S. Treasury. *Id.*, Ex. A at 4. Although the Applicants' submissions refer to after-tax sales proceeds, we agree with AT&T that using after-tax proceeds would result in a windfall to the merged firm. See AT&T June 9, 2000 *Ex Parte* Letter at 5. Because the Applicants reserved the right to retain S&P 500-based appreciation in the pre-tax value of their initial investment in Genuity above a 10-percent interest, and thus do not account for tax effects from the disposition of Genuity at the front end of the calculation, we believe it is reasonable to adjust the cap at the back end "to reflect the fact that GTE would have had to pay taxes when it 'sold' Genuity and would have had less money to invest." Bell Atlantic/GTE June 7, 2000 Glover *Ex Parte* Letter Ex. A at 5. See also Letter from Michael E. Glover, Associate General Counsel, Bell Atlantic, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-184 (filed June 14, 2000) (clarifying that the amount the merged firm could retain is calculated without regard to tax consequences but that the payment to the U.S. Treasury would be calculated on a tax-adjusted basis to reflect the fact that the portion of sales proceeds above the cap may be subject to taxes). Therefore, as reflected in Appendix B, we clarify that the Applicants are not entitled to retain pre-tax sales proceeds that exceed the specified amount. We further clarify, however, that to the extent that the Applicants must remit sales proceeds in excess of the cap, that remission will be adjusted to reflect taxes due on any such excess amount.

⁹⁵ The Applicants clarified that their proposal would not prevent Genuity from purchasing the merged firm's shares (either directly from Bell Atlantic/GTE or from the disposition trustee) at a lesser mutually-agreeable price in the event that the value of the shares were less than the specified amount. See Letter from Michael E. Glover, Associate General Counsel, Bell Atlantic, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-184 (filed June 8, 2000), at 1. As reflected in Appendix B, we clarify the proposal even further to explicitly provide that Genuity has the right to purchase the shares directly from the merged firm upon its initial offer (prior to involvement of a disposition trustee) at the fair market value, if lower than the specified amount.

debt instrument that will bear interest at a commercially reasonable rate.⁹⁶ If Genuity declines to purchase Bell Atlantic/GTE's shares, the merged firm would be able to transfer the shares to a disposition trustee for sale to third parties, subject to the limitation on the firm's receipt of sales proceeds.⁹⁷

?? *Extension of Conversion Period.* If, at the end of five years, Bell Atlantic/GTE has eliminated section 271 restrictions as to at least 90 percent of total Bell Atlantic in-region lines (or 95 percent but for one state), Bell Atlantic/GTE may file a petition with the Commission requesting an additional year in which to eliminate the remaining section 271 restrictions. The Commission shall have the discretion whether to approve such a petition.⁹⁸ Moreover, if at the end of the five-year conversion period, litigation is pending over whether Bell Atlantic/GTE has eliminated section 271 restrictions as to certain lines, and if a court subsequently determines that the company has eliminated such restrictions, then the merged entity shall be deemed to have eliminated those restrictions within the conversion period.⁹⁹

31. *Officers and Directors.* Under the proposed structure for the Genuity board of directors, Genuity ultimately will have a thirteen-member board, twelve of whom are periodically elected by the Class A shareholders. Bell Atlantic/GTE, as the holder of the Class B shares, will designate the other member. In order to establish an independent board, GTE will appoint six directors before the IPO: one will be the CEO of Genuity, one will be designated by GTE (as the Class B designee), and the other four will be independent directors who have no prior relationship with Bell Atlantic or GTE.¹⁰⁰ Within 90 days after the IPO, the four independent directors will select seven additional directors who have no prior relationship with Bell Atlantic or GTE. This will bring the total board membership to 13 directors, a majority of whom will have been selected after the IPO.

32. As soon as possible, but no later than nine months after the IPO, all directors other than

⁹⁶ Bell Atlantic/GTE June 7, 2000 Glover *Ex Parte* Letter at 1. Genuity will have 90 days after the date it receives an offer to agree to purchase the merged firm's shares. If Genuity intends to purchase the shares, the merged firm will grant any consents necessary under its investor safeguards, and Genuity will have 180 days after the date it received the offer to make any applicable financial or other arrangements. Although the Applicants do not make representations concerning the interest rate or term of the debt instrument, we clarify in Appendix B that the applicable interest rate and term must be commercially reasonable, or comparable to rates and terms under similar instruments held by companies with debt ratings comparable to Genuity. If necessary, the conversion period will be extended to allow for the sale to Genuity or another party.

⁹⁷ *Id.*, Ex. A at 2-3. To the extent Class B shares are purchased by a person who is not subject to section 271 restrictions, the purchaser would be free to convert the Class B shares into Class A shares immediately.

⁹⁸ As reflected in Appendix B, we clarify that if the merged entity has achieved approvals representing 90 percent of Bell Atlantic in-region access lines (or 95 percent but-for one state), the Commission has discretion whether to grant the merged firm an additional year in which to obtain the remaining section 271 approvals. Although the Applicants' proposal also enables the Commission to toll or extend the conversion period to account for intervening events that delay elimination of section 271 restrictions, we foresee no circumstances under which the Commission would extend the conversion period in such a manner.

⁹⁹ Bell Atlantic/GTE June 7, 2000 Glover *Ex Parte* Letter Ex. A at 5.

¹⁰⁰ *Id.*

the Class B designee will stand for election by the Class A shareholders.¹⁰¹ From that point, every year four of the twelve publicly elected directors will stand for reelection.¹⁰² The Class B director stands for election annually. The Class B director will abstain from any vote until the board consists of at least ten members, and will at no time serve as chairman of the board.

33. The officers and directors of Genuity will owe fiduciary duties to the public shareholders. Incentive compensation for Genuity's managers will be tied to the performance of Genuity and the value of its publicly traded stock, not to the financial performance or stock value of the merged Bell Atlantic/GTE.¹⁰³

34. *Investor Safeguards.* The Class B shares also contain certain investor safeguards designed to protect the merged firm's interest as a minority investor and potential future majority shareholder.¹⁰⁴ The merged company will have these rights only until it converts its Class B shares or no longer has the possibility of converting into more than a 10-percent interest.¹⁰⁵ These safeguards include the right to approve certain fundamental business changes such as a change in control of Genuity or the sale of a significant portion of its assets. Some safeguards require a vote of the Class B shares,¹⁰⁶ while others require Genuity to obtain consent from the merged company.¹⁰⁷ In addition, no single holder or group of Class A shareholders may vote more than 20 percent of the Class A stock.¹⁰⁸ Moreover,

¹⁰¹ Bell Atlantic/GTE Apr. 28, 2000 *Ex Parte* Letter Ex. A at 1.

¹⁰² *Id.*, Ex. B at 1.

¹⁰³ Bell Atlantic/GTE June 7, 2000 Glover *Ex Parte* Letter Ex. A at 5.

¹⁰⁴ *Id.*

¹⁰⁵ See Appendix B (Genuity Conditions) at Att. 1 (Investor Safeguards). We note that the merged firm's right to receive shares of up to 80 percent if it owns shares of at least 70 percent extends for one year following conversion.

¹⁰⁶ A vote of the Class B shareholders is required for: (a) merger, consolidation, sale of all or substantially all assets or similar transactions; (b) bankruptcy or liquidation; (c) authorization of additional stock; (d) amendments to charter or certain by-law provisions that affect the rights of the Class B shareholders; (e) a material change in the nature or scope of Genuity's business; and (f) any action that would make it unlawful for the merged firm to exercise its conversion right. Bell Atlantic/GTE Apr. 28, 2000 *Ex Parte* Letter Ex. C at 1. See Appendix B (Genuity Conditions) at Att. 1 (Investor Safeguards).

¹⁰⁷ Bell Atlantic/GTE's consent is required for: (a) agreements or arrangements that (i) bind or purport to bind the merged firm or any of its affiliates or (ii) contain provisions that trigger a default, or provide for a material payment as a result of the merged firm's exercise of its conversion right; (b) declarations of extraordinary dividends or other extraordinary distributions; (c) issuance of shares, securities convertible into shares or share equivalents, with exceptions that include shares issued in connection with acquisitions so long as the aggregate number of shares does not exceed 30 percent of the shares outstanding immediately after the IPO, shares issued to fund operating needs of up to 5 percent, and shares issued or granted to employees in amounts specified in the registration statement; (d) an acquisition or series of related acquisitions that equal more than 20 percent of the fair market value of Genuity's assets or an acquisition or joint venture that is in excess of \$100 million and is not closely related to Genuity's business; (e) a disposition or series of dispositions that are in excess of 20 percent of the fair market value of Genuity's assets; and (f) incurrence of debt in excess of \$11 billion over a five-year period, with Genuity not incurring more than 35 percent of such debt in any year. Bell Atlantic/GTE Apr. 28, 2000 *Ex Parte* Letter Ex. C at 1. See Appendix B (Genuity Conditions) at Att. 1 (Investor Safeguards).

¹⁰⁸ Bell Atlantic/GTE Apr. 28, 2000 *Ex Parte* Letter Ex. C at 1.

insofar as Genuity's business plan does not contemplate the acquisition of a traditional voice long distance service provider, pursuant to these investor safeguard rights, Bell Atlantic/GTE will withhold its consent from Genuity's acquisition of such a carrier absent Commission approval.¹⁰⁹

35. *Financing.* A major source of Genuity's capital would consist of the proceeds from the sale of Class A stock in the IPO. Additional funding required by Genuity's business operations would be raised from the public markets, possibly by issuing additional Class A shares, by issuing debt to the public, or by arm's-length commercial loans, which could include loans from Bell Atlantic/GTE.¹¹⁰ Under the proposal, however, if Bell Atlantic/GTE loans money to Genuity, it could provide no more than 25 percent of Genuity's aggregate debt financing.¹¹¹

36. *Commercial Contracts.* All commercial interactions between the merged Bell Atlantic/GTE (and any affiliates) and Genuity will be pursuant to commercially reasonable contracts. For example, the companies will enter into contracts for the merged company to provide transitional administrative support services. Each contract will have a term of one year or less, and will be terminable at any time by Genuity without penalty.¹¹² In view of the transitional nature of the contracts, the contracts will not be renewed by the parties. Although the contracts enable the merged firm to provide some human resources administrative support, the merged firm will not have any role in hiring or firing Genuity employees.¹¹³ In addition, Genuity will not rely upon any network monitoring from the merged firm after October 31, 2000.¹¹⁴

37. Because a significant portion of Genuity's business is outside the Bell Atlantic region or in New York, where Bell Atlantic has obtained section 271 approval, the companies will enter into a marketing agreement for the period before conversion of the Class B shares. Pursuant to the Purchase, Resale and Marketing Agreement, Bell Atlantic/GTE will market Genuity's services (or the two companies will market their services jointly) as and where permitted by law.¹¹⁵ In New York, for example, where Bell Atlantic has received section 271 approval, the merged firm and Genuity will jointly market Genuity's Internet connectivity services. The Agreement, however, provides that Bell Atlantic/GTE will not provide or joint market any interLATA service of Genuity in any state where Bell Atlantic does not have interLATA authority.¹¹⁶ The Agreement is also non-exclusive, so that either company may purchase from or sell to others.

¹⁰⁹ Bell Atlantic/GTE June 7, 2000 Glover *Ex Parte* Letter Ex. A at 6.

¹¹⁰ *Id.*, Ex. A at 5.

¹¹¹ *Id.* This 25-percent limitation would not affect Genuity's ability to purchase Bell Atlantic/GTE's Genuity shares using a debt instrument in the event that the merged firm fails to obtain section 271 approvals representing 95 percent of its access lines and seeks to dispose of its shares.

¹¹² *Id.*, Ex. A at 6.

¹¹³ *Id.*, Ex. A at 6-7.

¹¹⁴ *Id.*, Ex. A at 7.

¹¹⁵ *Id.*, Ex. A at 6.

¹¹⁶ *Id.*

38. *Independent Auditor.* Under their proposal, the Applicants further commit to hire an independent auditor, acceptable to the Chief of the Common Carrier Bureau, to monitor ongoing compliance with the terms of the spinoff proposal.¹¹⁷

B. Discussion

39. Section 271 of the Act states that “[n]either a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services” except as set forth in that section.¹¹⁸ The term “affiliate” is not defined in section 271, but is defined generally in section 3(1) of the Act:

The term “affiliate” means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term “own” means to own an equity interest (or the equivalent thereof) of more than 10 percent.¹¹⁹

40. In considering whether the proposed merger of Bell Atlantic and GTE would result in a violation of the Communications Act, we must first determine whether Genuity (following its proposed spin-off from GTE) would be owned or controlled by the merged entity within the meaning of section 3(1) because such ownership or control would render Genuity an “affiliate” of the merged entity.

1. Ownership

41. For the reasons set forth below, we conclude that Bell Atlantic/GTE will not own Genuity within the meaning of section 3(1) of the Act. We find that, prior to exercise of its conditional conversion right to acquire additional shares, Bell Atlantic/GTE will not directly or indirectly own an equity interest or its equivalent in Genuity of greater than 10 percent. First, we establish that an equity interest under section 3(1) can include conditional conversion rights. Second, we apply a three-part test to determine whether the conversion right at issue should be deemed an equity interest or its equivalent. Under the facts of the instant proceeding, we conclude that it should not.

a. Statutory Meaning and History of “Equity Interest” and its “Equivalent”

42. In defining the term “affiliate,” section 3(1) specifies that “[f]or purposes of this paragraph, the term ‘own’ means to own an equity interest (or the equivalent thereof) of more than 10 percent.”¹²⁰ The terms “equity interest” and the “equivalent thereof” are not defined in section 3(1) or

¹¹⁷ *Id.*, Ex. A at 7. As discussed in Section VIII, the merged firm’s compliance with the spin-off proposal and the ongoing relationship between the companies following the spin-off will be included within the scope of the independent audit required by the merger conditions.

¹¹⁸ Through section 271, Congress made the BOCs’ authority to provide in-region, interLATA services contingent upon the BOC opening its local markets to competition by, for example, “providing access and interconnection” to local competitors. 47 U.S.C. § 271.

¹¹⁹ 47 U.S.C. § 153(1).

¹²⁰ 47 U.S.C. § 153(1).

elsewhere in the Act. The issue in this case is whether Bell Atlantic/GTE's retention of Class B shares, comprising 9.5 percent of Genuity's outstanding shares and carrying a potential right to convert into newly-issued shares representing up to 80 percent of Genuity upon satisfaction of certain conditions, represents "an equity interest (or the equivalent thereof) of more than 10 percent."¹²¹ We therefore must determine whether the merged entity's conditional conversion right should be considered an equity interest or its equivalent that is presently attributable to Bell Atlantic/GTE or whether this right does not become an equity interest or its equivalent until exercised. To answer this question, our first step is to determine whether the terms "equity interest (or the equivalent thereof)" include conditional interests.

43. Both the Applicants and AT&T have asserted facially plausible, yet opposing, meanings for the terms "equity interest" and its "equivalent." The Applicants interpret these terms narrowly and argue that a conversion right, or an option to acquire an equity interest in the future, is not an "equity interest" prior to conversion if it confers none of the three legal rights that, they contend, traditionally attend equity ownership: to vote, to participate in corporate earnings, and to participate in dissolution proceeds.¹²² This interpretation, they maintain, is supported by the statute's use of the present tense ("owns," "is owned," and "is under common ownership"), which they claim evidences that Congress intended to capture only current possession of equity interests, not interests that give rise to an equity interest in the future.¹²³ In further support of their interpretation, the Applicants cite the treatment of options in other contexts, including bankruptcy and accounting principles,¹²⁴ in court cases construing the notion of equity ownership and the rights conferred through options,¹²⁵ and Fletcher's Cyclopedia, which states that "[a]n option to purchase stock does not vest in the prospective purchaser an equitable title

¹²¹ All parties agree that Bell Atlantic/GTE's outright ownership of shares representing 9.5 percent of Genuity plainly constitutes an "equity interest" in Genuity. Parties disagree, however, on whether the potential right to convert those Class B shares upon satisfaction of certain conditions would itself fall within the meaning of "equity interest (or the equivalent thereof)," thereby potentially bringing Bell Atlantic/GTE's equity holdings above the 10-percent statutory restriction.

¹²² Bell Atlantic/GTE May 9, 2000 Reply at 13; Bell Atlantic/GTE Feb. 22, 2000 Reply at 4, Ex. A at para. 15 (Declaration of Ronald J. Gilson). *See also* Fletcher's Cyclopedia § 5081 (defining "proprietary interests in a corporation" as generally including "(1) a right to exercise some control over the corporation's management, (2) a right, upon dissolution, to share in any residual proceeds from liquidation of the assets, and most important (3) a right to share in the corporation's residual earnings.").

¹²³ Bell Atlantic/GTE May 9, 2000 Reply at 13 (*citing Sutton v. United Air Lines*, 119 S. Ct. 2139, 2146 (1999) (holding that a statute defining "disability" in the "present indicative verb form" requires that a person "be presently – not potentially or hypothetically – substantially limited" in a major life activity)).

¹²⁴ *See, e.g.,* Bell Atlantic/GTE May 9, 2000 Reply at 21 (*citing In re Motels of America, Inc.*, 146 B.R. 542, 544 (Bankr. D. Del. 1992) (under bankruptcy law, a holder of a share of stock stripped of voting rights and not freely transferable is not considered an "owne[r]" of "equity"). The Applicants also claim support from the Hart-Scott-Rodino reporting requirements, under which the mere acquisition of an option, warrant or similar convertible interest, in contrast to its later conversion or exercise, does not trigger merger review. Bell Atlantic/GTE May 9, 2000 Reply at 15 (*citing* 16 C.F.R. § 802.31).

¹²⁵ *See* Bell Atlantic/GTE May 9, 2000 Reply at 14 (*citing Ball v. Overton Square, Inc.*, 731 S.W.2d 536, 540 (Tenn. Ct. App. 1987) ("[A]n option to purchase stock does not vest in the prospective purchaser an equitable title to, or any interest or right, in the stock."); *Association of Flight Attendants v. USAir, Inc.*, 24 F.3d 1432, 1435 (D.C. Cir. 1994) ("USAir has no present equity interest in Shuttle, but it has an option to purchase a controlling interest in the company effective October 10, 1996."); *Powers v. British Vita, P.L.C.*, 969 F. Supp. 4, 5 (S.D. N.Y. 1997) ("Many cases hold that an option contract does not qualify as an equity interest.")).

to, or any interest or right in the stock.”¹²⁶

44. Conversely, AT&T and other commenters interpret these terms broadly, contending that the term “equity interest” plainly encompasses a conversion right embedded in an underlying equity security, as well as other convertible interests such as standalone options. Specifically, AT&T claims that options are treated as equity under securities law,¹²⁷ bankruptcy law,¹²⁸ corporate law¹²⁹ and financial accounting practices.¹³⁰ In particular, AT&T cites the American Law Institute’s Principles of Corporate Governance, which defines an “equity interest” as an “an equity security in a corporation,”¹³¹ which in turn is defined to include any instrument “convertible [into] a share in a corporation.”¹³²

45. The parties also disagree on the scope and meaning of term “equivalent” under section 3(1). The Applicants maintain that the “equivalent” of an equity interest refers to “those arrangements that confer the same (or very similar) participation rights as equity interests.”¹³³ AT&T, on the other hand, interprets the term more flexibly to mean something equal in value or worth. Consequently, AT&T regards as decisional the value that the market would place on Bell Atlantic/GTE’s Class B shares, which it asserts would amount to nearly 80 percent of Genuity.¹³⁴ We find that both of these

¹²⁶ Fletcher’s Cyclopedia § 5575. According to Fletcher’s, “[t]he essence of an option is the right of the optionee to buy or not to buy at the optionee’s election. The fact that the optionee is not bound to buy is the distinguishing feature of the contract.” *Id.*

¹²⁷ AT&T May 5, 2000 Opposition at 18 (*citing* 15 U.S.C. § 78c; 17 C.F.R. § 240.16a-4); *id.*, Ex. A at para. 12 (Third Declaration of John C. Coffee); AT&T Mar. 10, 2000 *Ex Parte* Letter at 3-5 (*citing* federal securities cases); *id.*, Ex. A at paras. 15-17 (Declaration of John C. Coffee).

¹²⁸ AT&T May 5, 2000 Opposition at 18 n.16 (*citing* 11 U.S.C. § 101(16); *Allen v. Levy*, 226 B.R. 857, 865 (Bankr. N.D. Ill. 1998) (“The Bankruptcy Code defines ‘equity security’ as a ‘share in a corporation’ and includes the right to purchase shares within the definition”); *In re The Charter Company*, 44 B.R. 256 (Bankr. M.D. Fla. 1984)(holding that shares of convertible preferred stock are “equity securities” under the bankruptcy laws)). *But see* Bell Atlantic/GTE May 9, 2000 Reply at 20 (stating that “bankruptcy law treats *some* potential future interests – such as options – like equity for the purpose of prioritizing the holder’s economic interest in the estate.”).

¹²⁹ AT&T May 5, 2000 Opposition at 19 (*citing* *Entel v. Guilden*, 223 F. Supp. 129, 132 (S.D.N.Y. 1963) (“[W]arrants are used . . . as a separate form of equity in corporations.”)).

¹³⁰ AT&T claims that options are regarded as common stock equivalents under financial accounting standards. AT&T May 5, 2000 Opposition at 9 (*citing* Financial Accounting Standards Board, Accounting Standard, Accounting Principles Board, Opinion No. 15)). *But see* Bell Atlantic/GTE May 9, 2000 Reply at 22-23 (contending that the FASB opinion cited by AT&T has been superseded by FASB Statement No. 128, under which options are not regarded as common stock equivalents if contingent upon some future event).

¹³¹ American Law Institute, Principles of Corporate Governance § 1.19 (1994).

¹³² American Law Institute, Principles of Corporate Governance § 1.20 (1994).

¹³³ Bell Atlantic/GTE May 9, 2000 Reply at 28-29 (explaining that equity “equivalents” would include devices that conferred the three participation rights through contract or other instruments that carry the distribution and liquidation rights of equity ownership absent voting, such as partnership interests, debt interests that confer the right to participate in earnings, and nonvoting preferred stock). *See also* Bell Atlantic/GTE Supplemental Filing at 35 n.21; Bell Atlantic/GTE Apr. 3, 2000 *Ex Parte* Letter Ex. E at para. 18 (Second Supp. Decl. of Ronald J. Gilson).

¹³⁴ Letter from Peter D. Keisler, Sidley & Austin, Counsel for AT&T, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-184 (filed Mar. 10, 2000), at 3 (“Two things are ‘equivalent,’ of course, if they are equal in value.”).

positions are plausibly supported by common uses of the term. The first of Black's Law Dictionary's two definitions of the term "equivalent," meaning "[e]qual in value, force, amount, effect, or significance,"¹³⁵ could be read to support AT&T's assertion that the primary indicia of ownership is the amount of Genuity's value attributed by the market to the Class B shares. By incorporating functional concepts, however, the second definition, "[c]orresponding in effect or function; nearly equal; virtually identical"¹³⁶ seemingly supports a more narrow interpretation related to the indicia of ownership asserted by the Applicants (*i.e.*, voting rights, earnings rights and liquidation rights). Other definitions of "equivalent" similarly reference both value and effect.¹³⁷

46. In light of the varying authorities cited by the Applicants and the merger opponents, we reject the parties' contrary assertions that the meaning of the term "equity interest" or its "equivalent" in the context of a conditional conversion right is clear and unambiguous. Our examination of corporate law and the other authorities cited produces no plain meaning of the terms when applied to a conditional conversion right. Although AT&T cites ALI principles, we believe that the ALI definition proves too much in the case of a conditional conversion right. If, for example, a party held a convertible instrument for which the conversion right was expressly conditioned upon something that was nearly certain not to occur, we believe that a bright line principle treating that interest as equity may result in unintended consequences. For this reason, we believe that we must look to other sources to determine a reasonable meaning of "equity interest (or the equivalent thereof)" in the context of a conditional conversion right. Moreover, we believe that if Congress intended that the Commission strictly apply the securities law understanding of an equity interest, reflected in the ALI principles cited by AT&T, it could have indicated as much in the language of the statute. Indeed, in another provision of the Act, Congress did just that and expressly defined "control" as having the same meaning as that term is defined in Securities and Exchange Commission regulations.¹³⁸

47. The issue of whether a conditional conversion right constitutes an "equity interest (or the equivalent thereof)" under section 3(1) presents a novel question for the Commission.¹³⁹ Although the

¹³⁵ Black's Law Dictionary (7th ed. 1999).

¹³⁶ *Id.*

¹³⁷ Webster's multiple definitions of the term "equivalent" include "equal in value" as well as "corresponding or virtually identical esp. in effect or function." Webster's Third New International Dictionary, (1993). Similarly, the Oxford English Dictionary defines "equivalent" as "[e]qual in value," "[t]hat is virtually the same thing; identical in effect; tantamount," and "[h]aving the same relative position or function; corresponding." The Oxford English Dictionary (Vol. III 1969).

¹³⁸ 47 U.S.C. § 274(i)(4) (defining the term "control" as having "the meaning that it has in 17 C.F.R. 240.12b-2, the regulations promulgated by the Securities and Exchange Commission pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) or any successor provision to such section.").

¹³⁹ The Commission has never clearly delineated the status of a conditional conversion right under section 3(1). In 1997, the Cable Services Bureau was confronted with the question of whether a multichannel video programming distributor was affiliated with Bell Atlantic or NYNEX, each of whom held shares of convertible preferred stock and jointly held a warrant to purchase additional shares. *Time Warner Cable*, CUID Nos. NY0335 *et al.*, Memorandum Opinion and Order, 12 FCC Rcd. 23363 (CSB 1997). At that time, unlike the permanent rules that adopted a different affiliate definition, the Commission's interim rules regarding the LEC effective competition test of section 623 of the Act applied section 3(1)'s definition of affiliate. 47 U.S.C. § 543(l)(1)(D). See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, CS Docket No. 96-85, Order and Notice of Proposed Rulemaking, 11 FCC Rcd 5937, 5944 (1996). Without attempting to resolve the definitional issues arising under section 3(1), the (continued....)

Commission has considered the treatment of options and conversion rights in other contexts, we find that these do not control our analysis of “equity interest” or its “equivalent” under section 3(1). As the Applicants point out, the Commission traditionally has not attributed options, warrants and other convertible securities as current ownership interests under the CMRS spectrum cap rules,¹⁴⁰ the LEC/LMDS cross-ownership rules,¹⁴¹ the application of section 310’s foreign ownership restrictions,¹⁴² and the broadcast¹⁴³ and cable¹⁴⁴ attribution rules. We nonetheless agree with AT&T’s observation that the “equity plus debt” rule recently adopted as part of the broadcast and cable attribution rules implies that such interests, if of a certain size, may be considered.¹⁴⁵ As AT&T further observes, the Commission’s rules for designated entities in spectrum auctions treat options “as if the rights thereunder already have been fully exercised.”¹⁴⁶ We find, therefore, that the Commission’s treatment of convertible instruments differs depending on the structure and purposes of the specific statute at issue. Insofar as none of precedents cited seek to interpret section 3(1) or the specific terms “equity interest” and its “equivalent,” we do not find that any particular precedent is controlling for our purposes. In addition, we note that the equity plus debt rule in the broadcast and cable attribution context seeks to identify not only entities with ownership and control, but also entities with “influence” over a licensee. Further, we note that, unlike the broadcast and cable attribution context, here we are not concerned with promoting localism or a diversity of viewpoints. We conclude therefore that none of these precedents controls our analysis.

48. Thus, employing the traditional tools of statutory construction,¹⁴⁷ we conclude that the

(Continued from previous page)

Bureau concluded that the interests held by Bell Atlantic and NYNEX did not give rise to an affiliate relationship. Although the Applicants here attempt to rely upon that case as controlling precedent for their spin-off proposal, we find that *Time Warner* is limited to its unique facts and not useful for resolving the question presently before us. The Bureau expressly did not resolve the scope of “equity interest” or its “equivalent” under section 3(1), and, in fact, the Bureau’s conclusion rested principally upon the intent of the parties, through a binding agreement, to dispose of their entire interest in the entity in question, something that the Applicants have not expressed an intent to do.

¹⁴⁰ Bell Atlantic/GTE Apr. 3, 2000 *Ex Parte* Letter at 8 (citing 47 C.F.R. § 20.6(d)(5)).

¹⁴¹ *Id.* (citing 47 C.F.R. § 101.1003(e)(5)).

¹⁴² *Id.* (citing *BBC License Subsidiary*, File Nos. BALCT-941031KF *et al.*, Memorandum Opinion and Order, 10 FCC Rcd 10968, 10972, para. 20 n.12 (1995); *GWJ PCS, Inc.*, File Nos. 00200CWL96, Memorandum Opinion and Order, 12 FCC Rcd 6441, 6445-46, para. 10 (1997)).

¹⁴³ *Id.* (citing 47 C.F.R. § 73.3555, Note 2(b) & (f)).

¹⁴⁴ *Id.* (citing 47 C.F.R. § 76.501, Note 2(e)).

¹⁴⁵ AT&T May 5, 2000 Opposition at 20. *See also infra* Section V.B.1 (discussing “equity plus debt” attribution rules for broadcasting and cable).”

¹⁴⁶ 24 C.F.R. § 24.709(b)(7). *See also Washington’s Christian Television Outreach, Inc.*, File Nos. BPCT-5042, Memorandum Opinion and Order, 94 F.C.C.2d 1360 (1983) (establishing a rebuttable presumption in the context of comparative broadcast hearings, where Commission staff sought to establish a fixed factual base for comparative purposes that viewed the applicant’s structure in its most unfavorable light, the Commission would take cognizance of options that are adverse to the applicant’s interests “in the absence of evidence that the options will not be exercised.”).

¹⁴⁷ *See Natural Resources Defense Council, Inc. v. Browner*, 57 F.3d 1122, 1125 (D.C. Cir. 1995) (quoting *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)).

undefined terms “equity interest” or its “equivalent,” as discussed above, are susceptible to varying interpretations. Neither the text of statute nor the context in which the terms “equity interest (or the equivalent thereof)” are used provide any specific guidance on the characterization of a conditional conversion right.

49. Insofar as the terms are ambiguous, we turn next to the legislative history for guidance. Congress did not specifically address the question of the status of a conditional interest as an “equity interest” or its “equivalent,” and we find that the legislative history is ultimately inconclusive. The Applicants contend that Congress intended the term “affiliate” to have the meaning set forth in the MFJ. There is some suggestion that, in adding section 3(1) as part of the 1996 Act, Congress may have derived the definition of “affiliate” from the MFJ and specifically intended it to have the same meaning as under the MFJ. Section IV(A) of the MFJ contained a definition of an “affiliate” that closely parallels section 3(1)’s language, with the only substantive change reflecting a reduction in the percentage of equity ownership from 50 percent in the MFJ to ten percent in section 3(1).¹⁴⁸ Committee Reports from bills that preceded the 1996 Act suggest that the definition of “affiliate” in those earlier bills was drawn from the MFJ and was intended to have the same meaning:

Section 106 of the bill contains the definitions to the terms used in title I of the Act. The definition of “affiliate” [and other terms relating to the BOC restrictions] are drawn from definitions in the MFJ. The Committee intends that these terms have the same meaning as under the MFJ.¹⁴⁹

50. While this history is instructive,¹⁵⁰ in the end we find the Applicants’ argument that the MFJ controls in interpreting “equity interest” and “equivalent thereof” unpersuasive and that the wholesale adoption of factors employed under the MFJ would be reading too much into the legislative history. The 1996 Act expressly overhauled the MFJ in favor of a pro-competitive and deregulatory regime designed to open all telecommunications markets to competition,¹⁵¹ and we decline to import into the Act an understanding of the term “affiliate” derived solely from the MFJ.

b. Statutory Purpose and Structure

51. Accordingly, having examined the statutory text, context and legislative history, we

¹⁴⁸ See *United States v. American Telephone and Telegraph Co.*, 552 F. Supp. 131, 228 (D. D.C. 1982) (*Modification of Final Judgment*), at Section IV(A) (stating that “[f]or the purposes of this paragraph, the terms ‘ownership’ and ‘owned’ mean a direct or indirect equity interest (or the equivalent thereof) of more than fifty (50) percent of an entity.”).

¹⁴⁹ H.R. Rep. No. 559(I), 103d Cong., 2d Sess. 130 (1994). See also H.R. Rep. 103-559 (II), 103d Cong., 2d Sess. 227 (1994) (same).

¹⁵⁰ In this regard, we note that the MFJ court drew a distinction between the acquisition of a conditional option and the acquisition of an “equity interest.” The Court wrote in *Tel-Optik* that NYNEX “[was] not proposing, at this juncture, acquisition of an *equity interest* in Tel-Optik,” but rather that NYNEX had paid for the right to acquire all of Tel-Optik’s stock “if certain conditions are met.” See *United States v. Western Electric Co.*, No. Civ. A. 82-0192, 1986 WL 11238, at *1 (D.D.C. Aug. 7, 1986) (*Tel-Optik*) (emphasis added and footnote omitted).

¹⁵¹ See 47 U.S.C. § 152 note.

decline suggestions by both the Applicants and merger opponents that we adopt a bright-line characterization of conditional interests. Rather, based on the context and relevant legislative history, we can reasonably conclude that the terms “equity interest (or the equivalent thereof)” neither encompass nor exclude all forms of conditional interests. We find that some conditional interests may appropriately be deemed an equity interest or its equivalent, thereby potentially giving rise to an affiliate relationship, while others may not. AT&T’s overly broad interpretation, however, could prohibit relationships that involve the potential right to acquire an equity interest, no matter how unlikely the occurrence of the contingency. Similarly, the Applicants’ overly narrow interpretation could fail to include some investments that, by their nature, enable the holder to obtain material benefits from conduct that the holder is restricted from engaging in itself, or that give rise to the very incentives that the particular statute at issue is designed to prevent. We note that our recognition that some conditional interests may constitute equity interests comports with the general notion that certain future interests may be attributable under the “equity plus debt” exception to the broadcast and cable attribution rules.¹⁵²

52. For these reasons, we reject either of the bright line tests that the parties have advocated for purposes of section 3(1). Having examined the conflicting corporate law authorities on the record, we are convinced that they do not resolve the question before us. Rather, we conclude that our analysis of whether this contingent interest constitutes an equity interest or its equivalent under section 3(1) should be guided not by any rote application of corporate or securities law jurisprudence, but by the statutory purposes and the structure of the 1996 Act. Indeed, the divergence of authority regarding characterization of conditional interests under other fields of law persuades us that Congress could *not* have intended that we determine the status of conversionary interests, under section 3(1) of the Communications Act, by reference to any single external body of law, given the considerable debate and conflicting views on this question.

53. Therefore, we resolve this issue from the perspective of communications jurisprudence and the statutory purposes underlying the provisions at issue. In making these determinations, we will evaluate, on a case-by-case basis, whether exclusion of the particular conditional interest from the status of an equity interest or equivalent would undermine Congress’ intentions. Where failure to treat a specific conditional interest as an “equity interest (or the equivalent thereof)” -- and thus as an “affiliate” -- would thwart the underlying statutory provision in which the term “affiliate” is used, we would find that such a conditional interest constitutes an “equity interest or equivalent.” We conclude, therefore, that a close evaluation of statutory purposes is an important part of any test for determining the characterization of a conditional interest.

54. Before we examine the purposes of the particular statutory provision, we first must find that the conditional interest at issue is a *bona fide* “conditional” interest. In other words, we must be satisfied that the actual exercise of the option or other conditional interest is sufficiently uncertain that it should not be considered a present equity interest or equivalent. Under this prong of our test, we will examine whether the occurrence of one or more contingencies to the exercise of the option is genuinely in question. If the exercise were virtually certain, then we would deem the interest a present equity interest or equivalent, rather than a *bona fide* conditional interest.

¹⁵² Because these attribution rules are not derived from section 3(1)’s affiliate definition and are designed in part to identify persons with “influence” over the core operations of a licensee, we decline to adopt the bright line 33-percent threshold adopted therein. See *infra* Section V.B.1 (discussion of debt-equity rule).

55. A third factor is also critical. Recognizing that the term “affiliate” in section 3(1) is generally invoked in the statute to impose regulatory restrictions that prevent various types of anticompetitive conduct among related entities,¹⁵³ we believe an appropriate factor in evaluating the scope of the term is whether the acquisition would increase the likelihood that the acquiring company would discriminate in favor of the company in which it will acquire the conditional interest. Indeed, through the BOC-specific Act provisions, just as during the MFJ years, BOCs are constrained from discriminating, and using their bottleneck control in the local and exchange access markets, to obtain an unfair advantage in the long distance market. Thus, we believe that ensuring that the acquisition of a conditional interest not result in a BOC’s using its monopoly position to favor related entities (to its own economic advantage) while discriminating against competitors is plainly relevant and material to our consideration here.

56. In sum, in evaluating whether or not a specific conditional interest constitutes an equity interest or equivalent thereof under section 3(1), we will consider the following three factors: (1) whether the conditional interest is subject to a genuine contingency; (2) whether the interest furthers (or instead undermines) the particular statutory provision at issue; and (3) whether the interest would increase the likelihood that the acquiring company would discriminate in a manner that favors or benefits the entity in which it will acquire the conditional interest.

57. The test we have set forth expressly recognizes that some relationships will result in conditional interests that create an affiliate relationship, while other such interests may not. In this regard, our case-specific evaluation bears some similarity to that applied under the MFJ. In examining the status of a BOC’s acquisition of a conditional interest, Judge Greene recognized that not all conditional interests would create relationships that would thwart the BOC line-of-business restrictions with which he was concerned.¹⁵⁴ By establishing a framework for BOC acquisitions of conditional interests, Judge Greene implicitly recognized that some conditional interests would lead to an “affiliated enterprise” relationship, while others would not.¹⁵⁵ While we consider a different set of factors than those evaluated by Judge Greene, our goals and analyses have aspects in common. Both the MFJ regime and the 1996 Act evidence concerns about BOC use of bottleneck control in the local and exchange access markets to obtain an unfair advantage in the long distance market. Under both the

¹⁵³ See, e.g., 47 U.S.C. § 224 (imputation of costs of pole attachment rate); 47 U.S.C. § 251 (interconnection at least equal in quality to that provided by the LEC to itself or to any affiliate); 47 U.S.C. § 260 (complaints alleging discrimination in telemessaging services); 47 U.S.C. § 275 (provision of alarm monitoring services by a BOC).

¹⁵⁴ In *Tel-Optik*, for example, the MFJ Court considered whether NYNEX’s purchase of a conditional right to acquire 100 percent of the stock of an undersea cable company would constitute entry into a restricted line of business. *Tel-Optik*, 1986 WL 11238 at *1. See also *United States v. Western Electric Co.*, 894 F.2d 430, 435 n.9 (D.C. Cir. 1990) (“even the appellees concede that not all conditional-interest transactions make the target firm into an ‘affiliated enterprise’ under Section II(D).”).

¹⁵⁵ Under the established MFJ procedures, prior to acquiring a conditional interest in a prohibited entity, the BOC would need to secure approval from the Department of Justice by showing: “(1) that the investment is relatively minor; (2) that occurrence of the contingency is genuinely in question; and (3) that the Regional Holding Company clearly lacks the ability, the incentive, or both, to disadvantage the target company’s competitors.” *Western Electric Co.*, 894 F.2d at 435. Following its approval, the Department of Justice would then file the BOC’s request and its approval with the court. As Judge Greene emphasized, however, the actual acquisition of an equity interest in the prohibited entity would require approval of the court under the waiver process outlined in section VIII(C) of the decree.

MFJ test and our own, we require that any interests be truly conditional, with genuine contingencies; and we give serious consideration to an acquiring carrier's ability or incentive to discriminate so as to advantage the target company or disadvantage that company's competitors. In the context of construing the 1996 Act and its numerous statutory requirements, however, we must do more, and accordingly we find pivotal to our analysis consideration of whether the interest furthers the purposes of the Act, including the particular statutory provision where the term "affiliate" is used.

58. In analyzing these factors, we recognize, as AT&T points out, that the ambiguous terms "equity interest" and its "equivalent" are found in a general definitional section of the Act, and that the defined term, "affiliate," is used throughout the Act.¹⁵⁶ We therefore believe it is appropriate, in assessing the scope of an ambiguous definition, to examine the instances in which the term is used, and we have made that a requirement of our test. Thus, we believe that the framework we establish today could accommodate for any differences required by the particular statutory provision at issue, to the extent any such differences exist.¹⁵⁷ As noted, however, several of the references to an "affiliate" are in the specific provisions of the Act that pertain to the BOCs, and for that reason the MFJ precedent can be instructive.

2. Analysis of the Applicants' Spin-off Proposal

59. In applying the factors to the Applicants' spin-off proposal, we find on this record that the merged firm's Class B conversion rights are not an "equity interest (or the equivalent thereof)" under section 3(1) of the Act because (i) their conversion rights are genuinely in question, (ii) their interest furthers the statutory purposes by increasing the merged entity's incentive to achieve section 271 compliance throughout the Bell Atlantic territory, and (iii) the interest will not increase the likelihood that the merged firm would discriminate against Genuity's rivals.

(i) Genuine Contingency

60. Because the likelihood of the contingency's occurrence is inherently related to the nature of the instrument as a bona fide conditional interest, we examine first whether the occurrence of the contingency is genuinely in question. With respect to the Applicants' proposed spin-off, we find that Bell Atlantic/GTE's ability to convert its shares into greater than 10 percent of Genuity's outstanding shares is genuinely in question.

61. As an initial matter, we reject the suggestion that Bell Atlantic/GTE's conversion right is not conditional. First, the terms of the proposed conversion right are conditioned in such a way that the Class B shares may never be convertible into greater than ten percent of Genuity's outstanding shares. If Bell Atlantic/GTE fails to achieve section 271 approval representing 50 percent of Bell Atlantic's total access lines within five years, the Class B shares will be convertible only into ten percent of Genuity's outstanding shares. This 50-percent threshold requirement, as the Applicants point out, entails a risk

¹⁵⁶ AT&T Mar. 22, 2000 *Ex Parte* Letter at 3, 11. *See, e.g., supra* n.153 (identifying statutory provisions using the term "affiliate"). We note that sections 273 and 274 of the Act contain section-specific definitions of the term "affiliate." 47 U.S.C. §§ 273, 274. In addition, Title VI of the Act contains a different definition of "affiliate" that pertains to cable communications. 47 U.S.C. § 522(2).

¹⁵⁷ We further note that nothing on the record suggests that our analysis of the proposed spin-off would be inconsistent with our treatment of similar interests in the other contexts in which the term "affiliate" is used.

that the GTE and Bell Atlantic would never be in a position to recoup the value of the initial assets that they contributed by obtaining an equity interest greater than ten percent. Second, the Applicants' proposal contains a significant access line limitation that renders its ability to convert the Class B shares uncertain. If Bell Atlantic/GTE fails to achieve section 271 approval representing 95 percent of Bell Atlantic's access lines in five years, it may receive at most a marketable note, the face value of which is subject to express limitations. Should Genuity decide not to purchase the interests so tendered, a liquidating trustee will sell that interest subject also to limitations on the amount that may be realized by the merged entity. Thus, under the current proposal, Bell Atlantic/GTE will be able to exercise the full conversion rights to obtain more than 10 percent of the equity shares of Genuity only after the merged entity has satisfied the 95-percent threshold.

62. We conclude that the 95-percent access line threshold that the merged firm must achieve in order to exercise the full conversion right represents a genuine contingency.¹⁵⁸ We therefore reject AT&T's argument, premised on an earlier version of the proposal, that the conversion right lacks the element of speculation that characterizes a conditional interest.¹⁵⁹ With respect to the current proposal, nothing in the record suggests that obtaining section 271 approvals representing 95 percent of Bell Atlantic's access lines within five years will be an easy task.¹⁶⁰ In this regard, we observe that in the four years following the Act, only one such application has been approved,¹⁶¹ while several others have been rejected.¹⁶² While we agree with AT&T that section 271 approval in any given state is primarily

¹⁵⁸ Because the Commission examines the underlying economic reality and not simply the labels that Applicants attach to various interests, contrary to AT&T's suggestions, we would not likely find that a contingency premised upon the Cubs winning the World Series would present a legitimate conditional interest. AT&T May 5, 2000 Opposition, Ex. A at 4 (Third Declaration of John C. Coffee, Jr.). See *Fox Television Stations, Inc.*, File No. BRCT-940201KZ, Second Memorandum Opinion and Order, 11 FCC Rcd 5714, 5719, at para. 14 (1995) (*Fox II*) (emphasizing that the Commission examines the economic realities and substance of the transactions under review and not simply the labels that the parties attach to their corporate incidents).

¹⁵⁹ AT&T argued under an earlier version of the proposal that the conversion of the Class B shares would be certain to occur. See AT&T May 5, 2000 Comments, Ex. A at 3 (Third Declaration of John C. Coffee, Jr.).

¹⁶⁰ In the *Ameritech Michigan Order*, the Commission emphasized the complexity of the task before the BOC as follows:

Complying with the competitive checklist, ensuring that entry is consistent with the public interest, and meeting the other requirements of section 271 are realistic, necessary goals. That is not to say, however, that they are easy to meet or achievable overnight. Given the complexities of the task of opening these local markets to true, sustainable competition, it is not surprising that companies that are earnestly and in good faith cooperating in opening their local markets to competition have not yet completed the task.

Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, Memorandum Opinion and Order, 12 FCC Rcd 20543, 20556 at para. 23 (1997) (*Ameritech Michigan Order*).

¹⁶¹ See *Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, 15 FCC Rcd 3953 (1999) (granting Bell Atlantic's application for section 271 authority in New York).

¹⁶² See *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, 13 FCC Rcd 20599 (1998) (*BellSouth Second Louisiana Order*) (denying application); *Application by* (continued....)

within Bell Atlantic's control, we do not find that this fact requires us to disregard the contingent nature of the 95-percent threshold. While the tools for satisfying section 271 approval rest with Bell Atlantic, a great variety of factors can impact the ultimate timing of section 271 approval. In particular, even though Bell Atlantic has obtained approval in one state, our review focuses heavily on the performance of a BOC's operations support systems, and Bell Atlantic does not use the same systems in all of its states. In addition, technical issues, such as problems with its systems or other network modifications that are necessary to comply with the BOC's obligations under the Act, might impede the progress made towards compliance. Further, regulatory entities or persons in addition to this Commission are involved in the section 271 process, most significantly various state regulatory entities and the Attorney General (to whose evaluation the Commission must afford "substantial weight"). Therefore, while a BOC does, in the final analysis, hold the key to its own section 271 success, a number of external or technical factors continue to pose challenges to good faith efforts to satisfy the statutory standards that govern section 271 approval by this agency. We believe that, in judging the nature of the contingency, the fact that this Commission must approve section 271 applications covering 95 percent of Bell Atlantic's access lines prior to it having any right to convert makes this right genuinely contingent as to Bell Atlantic.

63. We do not find that the absence of a payment by the merged firm to convert its right eviscerates the contingent nature of the instrument so as to render the instrument a present equity interest or its equivalent.¹⁶³ Although the pre-paid nature of the Applicants' conversion right is not typically present in option arrangements, we do not believe, where a conversion right is otherwise contingent, that paying for that right up front will automatically render it a present interest.¹⁶⁴ The up-front payment does not change the fact that the conversion right may never be exercised. The 95-percent access line threshold in the Applicants' proposal provides sufficient assurance that the full conversion right may never be exercised, regardless of any payment required for actual conversion.

64. We also find unavailing arguments by merger opponents that because the conversion right could be sold for value after the merged entity met the 50-percent threshold, it should therefore be characterized as equity. That argument is not persuasive in light of the terms of the current proposal.¹⁶⁵

(Continued from previous page)

BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Louisiana, CC Docket No. 97-231, Memorandum Opinion and Order, 13 FCC Rcd. 6245 (1998) (denying application); *Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208, Memorandum Opinion and Order, 13 FCC Rcd 539 (1997) (denying application); *Ameritech Michigan Order*, 12 FCC Rcd 20543 (denying application); *Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma*, CC Docket No. 97-121, Memorandum Opinion and Order, 12 FCC Rcd 8685 (1997) (denying application).

¹⁶³ See AT&T May 5, 2000 Opposition at 10; Competition Policy Institute May 5, 2000 Comments at 5; NEXTLINK Feb. 16, 2000 Comments at 8, 9 (observing that the merged firm will not have to pay anything to convert the Class B shares).

¹⁶⁴ In *Richard R. Zaragoza*, for example, the Mass Media Bureau found that an up-front payment "does not change the fact that the option may not be exercised." *Richard R. Zaragoza*, File Nos. BRH-970207YA, BTCH-961029GI, Letter, 14 FCC Rcd 1732, 1737, para. 20 (MMB 1998) (rejecting arguments that a pre-paid option with only a nominal payment required for exercise should be treated as "perfected").

¹⁶⁵ AT&T May 5, 2000 Opposition at 23-24; Competition Policy Institute May 5, 2000 Comments at 6 (arguing that, under an earlier version of the proposal, the conversion right would vest once Bell Atlantic/GTE satisfies the 50-percent access line threshold).

Specifically, under the proposal that we consider herein, we find that, if the conversion right were exercised between 50 and 95 percent, it would most properly be characterized as debt, not equity. The Commission, in other contexts, has established criteria to distinguish bona fide debt from equity that examine (1) whether there is a written unconditional promise to repay the money on demand and to pay a fixed rate of interest; (2) whether there is subordination to or preference over any indebtedness of the company; (3) the company's debt/equity ratio; (4) whether the alleged debt is convertible to stock; and (5) the relationship between holdings of stock in the corporation and holdings of the interest in question.¹⁶⁶ The Applicants' proposal provides for a note that appears to satisfy the first, second, fourth and fifth prongs. The note must be payable upon demand and at a fixed rate of interest once issued,¹⁶⁷ would not be convertible to equity and would be unsubordinated to other indebtedness of Genuity. In addition, there is no indication that the debt instrument would confer any of the benefits normally reflected in corporate ownership.¹⁶⁸ While satisfaction of the criteria, and in particular the third factor, can be assessed conclusively only at such time as Genuity may choose to purchase the shares from the merged entity, we anticipate that Genuity would likely finance any note, or arrange to pay it off on an accelerated basis, by raising capital through such measures as a secondary offering. Under that circumstance, we would expect that the company's debt-equity ratio would be well within a range adequate to find that the note were debt. Consequently, if we were to apply these factors to the Applicants' potential debt instrument, we would likely find that the debt instrument would properly be considered bona fide debt. We expect the Applicants to inform the Commission if this contingency arises and to provide the Commission with any agreements between the Applicants and Genuity or the liquidating trustee.

65. We also disagree with opponents of the merger that the value the public places on the IPO shares should control our assessment of the likelihood of the contingency. Prior to any potential conversion, which may never occur, the merged entity is not entitled to 80 percent of the economic incidents of Genuity's operation, such as flowing through operating losses for tax purposes or obtaining dividends or other distributions beyond 10 percent.¹⁶⁹ Although AT&T and other merger opponents claim that, under an earlier version of the proposal, the post-IPO public shareholders will value their interest as approximately 20 percent of Genuity,¹⁷⁰ we find that the likelihood of the contingency depends upon Bell Atlantic's showing of compliance with the requirements of section 271 of the Act, matters within the Commission's expertise. Our assessment of the strength of a contingency predicated

¹⁶⁶ See *Fox II*, 11 FCC Rcd at 5720, para. 16; *NextWave Personal Communications*, File Nos. 00341CWL96 *et al.*, Memorandum Opinion and Order, 12 FCC Rcd. 2030, 2049, para. 43 (1997) (*NextWave*).

¹⁶⁷ See *supra* n.96.

¹⁶⁸ *NextWave*, 12 FCC Rcd at 2057-58, para. 59.

¹⁶⁹ The proposal therefore differs from the instruments at issue in *Fox I*, where the holders of the preferred stock, representing 76 percent of voting rights, were entitled only to a fixed return on capital investment, whereas all other profits and losses of the company, as well as the right to nearly all of the assets upon sale or dissolution, flowed to the holder of the common stock, which represented 24 percent of the voting rights. *Fox Television Stations, Inc.*, File No. BRCT-940201KZ, Memorandum Opinion and Order, 10 FCC Rcd 8452, 8457-58, para. 13 (1995) (*Fox I*).

¹⁷⁰ See ALTS May 5, 2000 Comments at 9; AT&T May 5, 2000 Opposition at 15-16, Ex. B (Declaration of Dr. Richard N. Clarke); AT&T Mar. 22, 2000 *Ex Parte* Letter at 1; Competition Policy Institute May 5, 2000 Comments at 4-5; ITAA May 5, 2000 Comments at 7 (arguing that financial markets would value the merged firm's interest in Genuity at approximately 80 percent).

on section 271 compliance, therefore, may differ from the perception of market participants who value securities using forward-looking valuation methodologies, even if those approaches seek to weigh the likelihood that certain contingencies will take place. In addition, countering the emphasis that AT&T places on the market's perception of the value of the company is the actual accounting treatment of these assets – the Applicants have assured us that they will not be considered equity until converted.¹⁷¹ Thus, where the market may view the occurrence as not contingent, established accounting practices support that these assets should not be treated as equity prior to actual conversion.

(ii) The Purposes of Section 271

66. We find that Bell Atlantic/GTE's retention of a conditional interest in Genuity is consistent with and furthers the purposes underlying section 271, the particular statutory provision at issue in this case. In examining the effects of the conditional interest in light of the purposes of section 271, we believe it is relevant to consider whether the conditional interest is so significant that it would economically or otherwise disincentivize or divert resources from the carrier's obligations under the Act. Thus, in examining the status of a conditional interest under the 1996 Act, we are not concerned solely with the size of the investment but rather with the effect of the investment on the purposes of the particular statute at issue. As explained below, we find that the spin-off proposal will increase the merged firm's incentives to complete the section 271 process quickly so as not to lose the right to reacquire ownership and control of Genuity.

67. The Commission has often expressed section 271's dual underlying objectives. First, section 271 seeks to bring additional competition to the long distance market by offering the BOCs the potential opportunity to participate in that market.¹⁷² Second, by conditioning BOC entry into the in-region, interLATA market on the BOC opening its local markets to competition, section 271 seeks to facilitate entry by new entrants into the BOC's local exchange market.¹⁷³ Together, these dual objectives

¹⁷¹ See Letter from Patricia E. Koch, Assistant Vice President Federal Regulatory, Bell Atlantic, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-184 (filed May 18, 2000) (Bell Atlantic/GTE May 18, 2000 *Ex Parte* Letter) (Declaration of Mark E. Gaumond); Letter from Steven G. Bradbury, Kirkland & Ellis, Counsel for GTE, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-184 (filed Apr. 14, 2000) (Declaration of Frederic V. Salerno) (explaining the merged firm's planned accounting treatment of Genuity). The parties initially disagreed over the treatment of contingent interests as a matter of accounting practices, with AT&T arguing that such interests would be treated as equity. The Applicants countered, however, with an affidavit from an accounting firm, that this transaction would not be treated as equity for accounting purposes. Bell Atlantic/GTE May 18, 2000 *Ex Parte* Letter (Declaration of Mark E. Gaumond). In response, AT&T argued in effect that such accounting treatment should be irrelevant to our consideration under section 3(1). Letter from Peter D. Keisler, Sidley & Austin, Counsel for AT&T, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-184 (filed May 30, 2000). See also Letter from Patricia E. Koch, Assistant Vice President Federal Regulatory, Bell Atlantic, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-184 (filed June 1, 2000); Letter from Patricia E. Koch, Assistant Vice President Federal Regulatory, Bell Atlantic, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-184 (filed June 14, 2000) (illustrating the accounting treatment of Bell Atlantic/GTE's interest in Genuity). We therefore rely on the Applicants' assertions that the conditional interest will not be treated as equity for accounting purposes, and find that such treatment is consistent with our findings in this Order.

¹⁷² See, e.g., *AT&T Corp. v. Ameritech*, File No. E-98-41, Memorandum Opinion and Order, 13 FCC Rcd 21438, at para. 36 (1998) (*Qwest Teaming Order*); *Ameritech Michigan Order*, 12 FCC Rcd at 20551-52, para. 15.

¹⁷³ See, e.g., *Qwest Teaming Order*, 13 FCC Rcd 21438, at para. 36; *Ameritech Michigan Order*, 12 FCC Rcd at 20553, para. 17.

further the overall purpose of the 1996 Act in facilitating competition in all telecommunications markets by fundamentally altering the incentives for market entry and by eliminating remaining monopoly bottlenecks.¹⁷⁴ Congress therefore used the promise of long distance entry as an incentive to prompt the BOCs to cooperate in facilitating competition in their local markets.¹⁷⁵

68. We find that, rather than disincentivize the merged firm from opening its local markets, the spin-off proposal will provide Bell Atlantic with a substantial and compelling incentive to obtain section 271 authority quickly in order to reintegrate the operations of Genuity. Specifically, the spin-off proposal places Bell Atlantic under a time restriction requiring it to obtain section 271 authority representing 95 percent of its access lines within five years in order for the merged firm to acquire the right to convert the assets into a controlling interest.¹⁷⁶ Moreover, as discussed below, because the spin-off proposal requires the merged firm to ratably disgorge appreciation attributable to the period before it obtains section 271 approvals in the relevant states, Bell Atlantic/GTE has a substantial incentive to obtain section 271 authorizations as expeditiously as possible.¹⁷⁷ In addition, the risk that the merged firm will fail to obtain section 271 authority representing 50 percent of Bell Atlantic's access lines, and thereby lose its ability to recoup the value of the assets spun off to Genuity beyond a 10-percent interest, will provide a potent incentive for the merged firm to obtain section 271 authority quickly. In particular, because the spin-off involves all of the assets of Genuity, some of which are located outside of Bell Atlantic's region and could potentially be owned and operated by the merged firm lawfully, the shareholders of the combined firm bear the risk of losing the value of these out-of-region assets. This heavy shareholder burden should inspire Bell Atlantic/GTE's management to expend considerable resources in pursuit of demonstrating the openness of its local markets. Thus, the Applicants' proposal is designed to enhance Bell Atlantic's desire to satisfy the market-opening criteria established by Congress and thereby ensure that consumers will enjoy the long term benefits of competition among telecommunications providers.

69. We also reject arguments by merger opponents that the spin-off proposal enables Bell Atlantic/GTE to gain impermissibly the appreciation of a prohibited entity or realize substantial material benefits prior to attaining section 271 authorization. Rather, we find that, by requiring the merged firm to ratably disgorge appreciation attributable to the period before it obtains section 271 approval in the relevant states, the proposal gives the merged firm an added incentive to obtain section 271 authorizations as quickly as possible. In particular, AT&T and others criticized an earlier version of the

¹⁷⁴ The purpose of the 1996 Act is to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996). See also *Ameritech Michigan Order*, 12 FCC Rcd at 20549-56, paras. 10-23 (describing the purposes of section 271).

¹⁷⁵ See *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20602, para. 3; *Ameritech Michigan Order*, 12 FCC Rcd at 20551, para. 14.

¹⁷⁶ We note that under the Applicants' proposal, the Commission has discretion to grant an extra year in the event that the merged firm obtains 90 percent (or 95 percent but-for one state) of the requisite section 271 approvals.

¹⁷⁷ The requirement that Bell Atlantic/GTE ratably disgorge appreciation that is attributable to the period in time before section 271 authorization also undercuts AT&T's argument that the merged firm will obtain material benefits uniquely associated with the long distance market prior to the time that it is authorized to provide those services. See AT&T May 5, 2000 Opposition at 5. See also *Qwest Teaming Order*, 13 FCC Rcd 21438, at para. 37.

Applicants' proposal that would have allowed the merged entity, if and when it obtained the requisite approval under section 271, to convert its interests into shares of Genuity that would fully capture any prior appreciation in the value of Genuity shares, including appreciation attributable to Genuity's interLATA activities in states in which the merged entity did not at the time have section 271 approval.¹⁷⁸

These opponents argued that the potential retroactively to capture appreciation attributable to what were at the time prohibited services was evidence of "ownership" and diminished the incentive to comply with section 271 prior to the five-year deadline. The Applicants revised the proposal to address this concern by excluding from the benefits captured by Genuity upon conversion the amount of appreciation roughly proportional to revenues from areas in which section 271 approval had not yet been obtained. Thus, rather than having an incentive to delay section 271 approval, the merged entity will have an incentive to obtain approval as quickly as possible so that it may fully participate in any appreciation in the value of its potential interest.

(iii) Likelihood of Discrimination

70. We recognize that, through its ownership of the Class B shares, the merged firm has an incentive to enhance the value of Genuity's stock. Although Bell Atlantic/GTE's retention of a conditional interest will increase its incentive to engage in discriminatory behavior,¹⁷⁹ any such behavior on the merged entity's part would be readily detectable. We find that the significant risk of detection of any discriminatory conduct on Bell Atlantic/GTE's part should serve to restrain the company from acting on any incentive to discriminate in favor of Genuity.

71. Although we have no doubt that incumbent local exchange carriers would be able to use their bottleneck local exchange facilities to discriminate in the provision of Internet and data services, for the reasons set forth below, we find that any attempt by the merged entity to discriminate in such a manner would be readily detectable. At the same time, however, we note the weakness of the argument by opponents of the merger that the Applicants would be able to discriminate in favor of Genuity. AT&T, for example, provides only a limited discussion in support of its contention that the merged entity can plainly "discriminate."¹⁸⁰ Although AT&T notes Bell Atlantic's "continued control of bottleneck local exchange facilities," the Applicants respond, without contradiction, that Genuity does not currently "rely to any significant degree on Bell Atlantic's core LEC facilities" – Applicants' euphemism for bottleneck facilities – "to provide Internet and data services."¹⁸¹ Second, AT&T argues that the merged firm could discriminate in favor of ISPs that resell Bell Atlantic's DSL service by

¹⁷⁸ See AT&T May 5, 2000 Opposition at 4-5 (contending that section 271 prohibits a BOC from obtaining greater-than-10 percent equity returns from the long distance market from the period before the effective date of the grant); ITAA May 5, 2000 Comments at 1-2, 6-7 (alleging that Bell Atlantic/GTE would impermissibly obtain the benefit of Genuity's appreciation). See also Letter from Jonathan Jacob Nadler, Squire Sanders & Dempsey L.L.P., Counsel for Information Technology Association of America, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-184 (filed June 1, 2000) (ITAA June 1, 2000 *Ex Parte* Letter), Att. at 3.

¹⁷⁹ We note that because section 3(1) allows for a BOC to hold a 10-percent equity interest in a prohibited entity, some effect on a BOC's incentives is implicitly allowed under the statute.

¹⁸⁰ AT&T Feb. 15, 2000 Opposition at 29.

¹⁸¹ Bell Atlantic/GTE Feb. 22, 2000 Reply at 28.

providing superior quality of transport service to their internet backbone provider.¹⁸² However, the Applicants respond, again without contradiction, that “traffic from Bell Atlantic’s DSLAMs is not directly connected to any Internet backbone provider,” but instead is aggregated and delivered to the ISP premises, where the ISP controls the link to the Internet backbone provider.¹⁸³ In any event, however, we conclude for the reasons stated below that the merged entity will be unlikely to discriminate because of the likelihood that any such discrimination would be detected and appropriate enforcement action would be taken.

72. Specifically, to the extent that Genuity purchases access services, tariffed or otherwise, from the merged entity, we require the merged entity to report, on a disaggregated, company-specific basis,¹⁸⁴ certain measurements, all but one of which it currently provides as part of the Commission’s ARMIS requirements.¹⁸⁵ With respect to its provision of high-speed special access and regular special access services, we require Bell Atlantic/GTE, or any applicable affiliate,¹⁸⁶ to report: the percent of commitments met; the average interval (in days); the average delay days due to lack of facilities;¹⁸⁷ the average interval to repair service (in hours) and the trouble report rate.¹⁸⁸ These measurements should be reported on a monthly basis and made available to the independent auditor.¹⁸⁹ Thus, if, as ITAA suggests, the merged entity were to attempt to discriminate by favoring Genuity in the provision of high capacity special access circuits,¹⁹⁰ we find that this would be detectable by the independent auditor and this Commission.

73. Moreover, if, as ITAA also suggests, the merged entity were to attempt to discriminate in favor of Genuity by providing it “preferential access” to conditioned copper loops used to provide

¹⁸² AT&T Feb. 15, 2000 Opposition at 30. Specifically, AT&T alleges that the merged entity could provide better “throughput” to Genuity, meaning that it would transmit packets more quickly for Genuity than for its competitors.

¹⁸³ Bell Atlantic/GTE Feb. 22, 2000 Reply Tab B at 2 (Affidavit of Raymond F. Albers).

¹⁸⁴ The merged entity, therefore, will report on its provision of these services to all companies, including Internet service providers, Internet backbone providers and interexchange carriers.

¹⁸⁵ See 47 C.F.R. § 43.21(g); ARMIS 43-05 Service Quality Report, Table 1 (establishing reporting requirements for special access provided to interexchange carriers).

¹⁸⁶ For example, these reporting requirements attach to the separate advanced services affiliate if it begins to provision these special access circuits to Genuity.

¹⁸⁷ We note that average delay days due to lack of facilities is not currently reported through ARMIS. This measurement tracks average calendar days from due date to completion date on company missed orders due to lack of facilities.

¹⁸⁸ See *infra* Appendix D (Conditions) at para. 53. As provided in the Conditions, Bell Atlantic/GTE shall, in consultation with the Chief of the Common Carrier Bureau, modify these measurements and develop any applicable performance measurement business rules to the extent necessary. Any developed business rules, once approved by the Chief of the Common Carrier Bureau, will be made publicly available.

¹⁸⁹ See *infra* Appendix D (Conditions) at para. 56(f).

¹⁹⁰ See ITAA June 1, 2000 *Ex Parte* Letter Att. at 3 (alleging that the merged firm could discriminate in favor of Genuity in the provision of high-capacity point-to-point local circuits).

advanced services,¹⁹¹ we find that this behavior would be readily detectable as well. Specifically, to the extent that Genuity purchases loops from the merged entity as unbundled network elements pursuant to section 251, we find that any discrimination in the provisioning of such loops would become apparent in the section 271 approval process. In this respect, we note that Bell Atlantic/GTE must obtain section 271 approval with respect to 50 percent of its access lines to avoid a major loss. In addition, it cannot convert its interest in Genuity until it receives approval with respect to 95 percent of its access lines, and will lose part of any appreciation of Genuity on account of any delay in obtaining section 271 approval. In order to obtain section 271 approval, of course, Bell Atlantic/GTE must show that it provides nondiscriminatory access to its bottleneck facilities.¹⁹² In these circumstances, any attempt to use its bottleneck facilities to discriminate would jeopardize the merged firm's ability to reacquire ownership and control of Genuity¹⁹³ or, at the least, subject it to losses due to delay in obtaining section 271 approvals.

74. We find that the requirements that we adopt today with respect to providing disaggregated data on the merged entity's provision of special access circuits and the showing of nondiscriminatory access to unbundled loops required for the merged firm to demonstrate section 271 checklist compliance, will make any attempted discrimination in favor of Genuity in the provision of these services highly detectable. To the extent that parties allege that the merged firm could use its control over bottleneck assets to the detriment of Genuity's competitors in other ways,¹⁹⁴ such behavior may be readily apparent to the independent auditor, and, in any event, parties are always free to file section 208 formal complaints alleging a violation of the nondiscrimination provisions of the Act.¹⁹⁵ Thus, we conclude that the detectability of anticompetitive behavior, combined with the merged firm's incentive to obtain section 271 authority, will provide a potent deterrent to restrain the merged firm from acting on any incentive to impede competition through the use of Bell Atlantic's bottleneck facilities. Accordingly, we find that the ease in detecting discrimination on the merged firm's part in favor of Genuity serves to decrease the likelihood that such discrimination will in fact occur.

75. We note that this conclusion is similar to Judge Greene's findings in *Tel-Optik*. In that case, Judge Greene recognized the possibility that an acquisition of a conditional interest could provide a BOC with "substantial incentive and ability unfairly to impede competition by use of its monopoly

¹⁹¹ See *id.* (alleging that the merged firm could provide preferential access to copper loops used in the provision of xDSL service).

¹⁹² For subsequent section 271 applications, we expect that Bell Atlantic/GTE will submit disaggregated data showing its performance in processing orders and provisioning unbundled loops to Genuity as compared with its performance with respect to other carriers.

¹⁹³ We note that competitors have vigorously pursued allegations of discriminatory conduct in prior section 271 applications, and we have no reason to suspect that such vigor will diminish in the future.

¹⁹⁴ See ITAA June 1, 2000 *Ex Parte* Letter Att. at 3 (asserting that the merged firm could "steer" its large business customers to Genuity, and otherwise provide service "on favorable terms" to customers of its dial-up Internet access service that select Genuity as their Global Service Provider or to its unaffiliated ISP customers that hand-off traffic to Genuity).

¹⁹⁵ 47 U.S.C. § 208.

position in the market it is thus entering.”¹⁹⁶ He concluded, however, that if the BOC would attempt to use its monopoly position to disadvantage competitors, “that attempt would almost certainly be made known to the Court during any subsequent waiver proceedings.” Similarly, in the instant case, the knowledge that discrimination would be detected either by the independent auditor or in subsequent section 271 proceedings, and possibly deprive the BOC of its ability to exercise the conversion right, reduces the likelihood that the merged entity will engage in such behavior.

3. Control

76. As set forth below, we conclude that Bell Atlantic/GTE will not control Genuity.¹⁹⁷ We find that, under the Applicants’ proposal, Bell Atlantic/GTE will not exercise *de jure* or *de facto* control of Genuity prior to the potential conversion of its Class B shares. As an initial matter, we find no evidence that, prior to any potential conversion, Bell Atlantic/GTE will have *de jure* control, or voting control, of Genuity.¹⁹⁸ We recognize that *de facto* control, or actual control of a company, presents a closer question. As discussed below, having examined the composition of the board and management, the minority shareholder protections, Genuity’s financing arrangements, the contractual relationship between the entities following the spin-off, and other factors, we find that the merged firm will not have the power to dominate Genuity’s corporate affairs and, therefore, is not in actual control of Genuity. We note, however, that we base our conclusion on representations made by the Applicants regarding the relationship between the merged firm and Genuity after the spin-off. Should the actual relationship between Bell Atlantic/GTE and Genuity deviate from or extend beyond those representations, the Commission would be compelled to reevaluate its assessment of whether the merged firm controls Genuity. In the event that the Commission finds that, in light of the changed circumstances, the merged firm does, indeed, control Genuity, we will take appropriate enforcement action which may include issuing a standstill order.¹⁹⁹

77. The determination as to whether an entity is in *de facto*, or actual, control of another entity “transcends formulas, for it involves an issue of fact which must be resolved by the special circumstances presented.”²⁰⁰ Because the inquiry is inherently factual and not subject to a precise

¹⁹⁶ Judge Greene recognized that, even if the BOC would have an ability to discriminate, this ability “will not render the conditional interest infirm if the incentive to act anticompetitively is absent.” *Tel-Optik*, 1986 WL 11238 at *3. Despite the “obvious economic incentive” of the BOC in that case to enhance the value of the target company’s stock and the success of its operations, the line-of-business waiver process deterred the BOC from engaging in anticompetitive conduct. *Id.*

¹⁹⁷ 47 U.S.C. § 153(1).

¹⁹⁸ In this case, the merged entity has voting rights of only 9.5 percent, which we find insufficient to evidence *de jure* control. See, e.g., *Lockheed Martin Corp.*, Memorandum, Order and Authorization, FCC 99-237, at para. 30 (rel. Sept. 15, 1999); *Fox I*, 10 FCC Rcd at 8513, para. 151 (noting that *de jure* control is typically evidenced by ownership of more than 50 percent of an entity’s voting interests).

¹⁹⁹ See, e.g., *AT&T Corp. v. Ameritech Corp.*, File No. E-98-41, Memorandum Opinion and Order, 13 FCC Rcd 14508 (1998).

²⁰⁰ *Stereo Broadcasters, Inc.*, 55 FCC2d 819, 821 (1975). See also *Applications of Roy M. Speer and Silver Management Company*, File Nos. BTCCT-950913KG *et al.*, Memorandum Opinion and Order, 11 FCC Rcd 14147, 14157, para. 24 (1996) (*Roy M. Speer*) (stating that the determination of locus of control and influence necessarily depends upon the facts surrounding each case and the parties or persons involved).

formula, we must look at all relevant factors and the totality of the circumstances.²⁰¹ In ascertaining where actual control resides, “we are governed chiefly by the demonstration of [the shareholder’s] power to dominate the management of corporate affairs.”²⁰² Although the percentage of voting stock held by a minority shareholder is relevant, the Commission also has considered as important factors the right to elect members of the company’s board of directors, to determine the manner of operation, to make strategic decisions, and to control personnel and financing decisions.²⁰³ The Commission has recognized that spin-off situations may warrant greater flexibility in applying these factors.²⁰⁴

78. Having reviewed these and other factors, both individually and cumulatively, below, we are persuaded that Bell Atlantic/GTE would not exercise *de facto* control of Genuity. Prior to any potential conversion of the Class B shares, the public shareholders will have 90 percent of the voting rights, will elect twelve of the thirteen directors, and will have a potential right to acquire Bell Atlantic/GTE’s shares if the contingency is not satisfied. Nothing on the record undermines the public shareholders’ ability to manage and operate Genuity through this substantial voting control and board participation. Consequently, as described below, the merged firm will not be in a position to dominate the management of Genuity, or control its business decisions, personnel practices or finances. Although we do not dispute that the merged firm may have limited influence over Genuity, we find that this limited influence will not exceed the degree permitted by section 3(1).

79. *Voting Control.* While control over an entity confers affiliate status under section 3(1),

²⁰¹ See *Lockheed Martin Corp.*, at para. 30 (“Under Commission precedent, a *de facto* control determination involves the balancing of facts and is based on the ‘totality of the circumstances.’”).

²⁰² *Univision Holdings, Inc.*, File Nos. BTCCT-920508KG-KL *et al.*, Memorandum Opinion and Order, 7 FCC Rcd 6672, at para. 15 (1992) (quoting *Benjamin L. Dubb*, 16 F.C.C. 274, 289 (1951)). See also *Fox I*, 10 FCC Rcd at 8414-15, paras. 154, 156.

²⁰³ See, e.g., *id.*; *Airgate Wireless, L.L.C.*, File No. 0000002035, Memorandum Opinion and Order, 14 FCC Rcd 11827, 11840, para. 26 (1999); *Fox I*, 10 FCC Rcd at 8515, para. 156; *Metromedia Inc.*, Memorandum Opinion and Order, 98 F.C.C.2d 300 (1984) (indicating that the touchstone of control is the ability to determine a company’s policies and conduct its affairs). In broadcast cases, for example, the Commission traditionally has relied upon six factors, established in *Intermountain Microwave*, to ascertain the locus of control: (1) who determines and carries out the policy decisions; (2) who is in charge of the payment of financing obligations, including operating expenses; (3) who controls daily operations; (4) who is in charge of employment, supervision, and dismissal of personnel; (5) does the licensee have unfettered use of all facilities and equipment; and (6) who receives the monies and profits from the operation of the facilities. See *Intermountain Microwave*, Order, 24 Rad. Reg. (P&F) 983, 984 (1963); *Airgate*, 14 FCC Rcd at 11840, para. 26.

²⁰⁴ For example, in *WWOR-TC, Inc.*, the Commission reviewed two prior spin-off situations and concluded that:

these cases can be said to stand for two propositions. First, when a company is spun off, Commission requirements can still be met upon a review of all relevant facts, despite “carryover” employees, common directors and even on-going business relationships. Second, petitioners that wish to challenge such spin-offs as inconsistent with our requirements must allege specific facts to establish a substantial and material question as to whether the required degree of segregation would not be established or that the parties would not reasonably be expected to conduct themselves as represented.

WWOR-TC, Inc., BTCTT-901127KE, Memorandum Opinion and Order, 6 FCC Rcd 193, 201, para. 16 (1990).

the structure of the statute implies that a limited degree of influence, short of control, is permissible. This conclusion follows implicitly from section 3(1)'s recognition that a BOC may hold up to ten percent of the stock in a prohibited entity.²⁰⁵ Our concern in section 3(1), therefore, must be whether the entity holds *de facto* control, or exercises influence beyond the implicit *de minimis* level permitted by the statute. Thus, the mere fact that Bell Atlantic/GTE will be a 9.5-percent voting shareholder of Genuity, a widely held, publicly traded company, is not dispositive of the locus of control. In fact, we note that under the proposal other entities may exercise voting control twice that of Bell Atlantic/GTE.²⁰⁶

80. *Investor Safeguards.* We find that the minority investor protections afforded to the Class B shareholder or Bell Atlantic/GTE, as the case may be, are narrowly tailored and do not rise to a level that would consistently inject the merged firm into Genuity's business and policy decisions.²⁰⁷ Commission precedent recognizes that non-controlling shareholders have an incentive to act to protect their investment and may influence the operation of a company.²⁰⁸ Accordingly, the Commission has permitted minority shareholders "to wield significant influence, including the ability to affect the outcome of votes or the day-to-day operations of a company, so long as that influence does not rise to a consistent level of dominance at which the minority shareholder is determining how the company runs and what business choices it makes."²⁰⁹ Minority investor protections, for example, are commonly used to induce investment and ensure that the basic interests of minority stockholders are protected.²¹⁰ Accordingly, the Commission has stated that "the right to vote on matters involving extraordinary corporate actions does not ordinarily undermine the nonattributable character of otherwise non-cognizable interests, so long as that right is narrowly circumscribed."²¹¹

²⁰⁵ See *WWOR-TV*, 6 FCC Rcd at 199, para. 13 (indicating that a limited degree of influence of domestic broadcast stations is implicit in section 310(b), which permits foreigners to hold up to 25 percent of the stock of the parent of a licensee and to hold up to 25 percent of the seats on its board).

²⁰⁶ Although Bell Atlantic/GTE's maximum voting percentage is limited to 9.5 percent, which will be diluted if Genuity issues additional shares, other entities may vote up to 20 percent of Genuity's shares at any time. Given the merged firm's limited right to vote and the other circumstances of the spin-off proposal, we reject arguments that the 20-percent voting restriction evidences control. See Competition Policy Institute May 5, 2000 Comments at 8-9; CompTel Feb. 15, 2000 Comments at 4-5.

²⁰⁷ See Competition Policy Institute May 5, 2000 Comments at 8; CompTel Feb. 15, 2000 Comments at 5-6; NEXTLINK Feb. 16, 2000 Comments at 10-11 (contending that the investor safeguards, which were subsequently narrowed, restricted the public shareholders' discretion in making business decisions).

²⁰⁸ See, e.g., *Lockheed Martin Corp.*, at para. 31; *NextWave*, 12 FCC Rcd at 2042-43, para. 30 (explaining that minority or non-voting shareholders may be given a decision-making role in major corporate decisions that fundamentally affect their interests as shareholders, such as issuance of stock, expenditures that significantly affect market capitalization, incurrence of significant debt, sale of major corporate assets, and fundamental changes in corporate structure, without being deemed to be in *de facto* control).

²⁰⁹ See *Lockheed Martin Corp.*, at para. 31.

²¹⁰ See *id.*, at para. 39.

²¹¹ See *BBC License Subsidiary L.P. and SF Green Bay License Subsidiary, Inc.*, File Nos. BALCT-941014LH, BALTT-941014LI, Memorandum Opinion and Order, 10 FCC Rcd 7926, 7933, para. 41 (1995) (*BBC License Order*). See also *Applications of Quincy D. Jones and Qwest Broadcasting L.L.C.*, File No. BTCCT-941214KG, Memorandum Opinion and Order, 11 FCC Rcd. 2481, 2487, para. 29 (1995) (clarifying that, whether the right arises "in the form of an investor voting right derived from its equity interest or in the form of a licensee obligation derived from its debtor (continued....)

81. We find that the minority investor protections accorded to the Class B shareholders or Bell Atlantic/GTE are narrowly tailored to protect the company's initial equity investment and its potential right to convert the Class B shares upon satisfaction of the conditions.²¹² By leaving room for Genuity's management to, for example, enter into acquisitions of up to 20 percent of Genuity's fair market value without Bell Atlantic/GTE's consent, the safeguards do not enmesh the merged firm in all major decisions regarding how the company runs its operations or what business choices it makes. Moreover, through its veto rights, the merged firm cannot compel Genuity's officers and directors to pursue any particular course of action. Instead, the merged firm can only block, by withholding its consent, certain actions contemplated by Genuity's management.

82. *Officers and Directors.* We find that the selection and composition of Genuity's officers and directors do not evidence control of Genuity by the merged firm. In particular, we note that the board structure is designed to minimize concern that GTE's initial selection of board members will result in Bell Atlantic/GTE controlling Genuity or its board. As with other spin-off situations, the initial board of Genuity has been selected by GTE, its former parent. In this case, however, potential concern over board independence stemming from GTE's initial selection is tempered by the fact that shortly after the IPO a majority of the directors will be individuals who were not selected by GTE and who have no prior affiliation with either Bell Atlantic or GTE.²¹³ Specifically, within 90 days of the IPO, the four initial independent directors selected by GTE will select seven other independent directors. As a further safeguard against any potential lack of independence, rather than being locked in for specific multi-year terms, twelve directors (the four selected by GTE plus the additional independent directors selected by those four, as well as the Genuity CEO) will stand for election by the public shareholders within 9 months of the IPO. The potential for board turnover substantially mitigates potential concern over the independence of the initial board members.

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status," the right to participate in extraordinary corporate actions is ordinarily non-attributable so long as narrowly circumscribed); *Roy M. Speer*, 11 FCC Rcd at 14158, para. 25 (finding that rights accorded to a nonvoting stockholder to approve certain fundamental matters were "permissible investor protections that neither substantially restrict [the voting entity's] discretion nor rise to the level of attributable influence.").

²¹² In *Roy M. Speer*, for example, unanimous approval of both the entity with voting control and the non-voting stockholder were required for certain fundamental matters that included: (1) any transaction not in the ordinary course of business; (2) the acquisition or disposition of any assets or business with a value of 10 percent or more of the company's market value; (3) the incurrence of any indebtedness with a value of 10 percent or more of the company's market value; (4) any material amendments to the certificate of incorporation or bylaws; (5) engaging in any line of business other than media, communications and entertainment; (6) the settlement of any litigation, arbitration or other proceeding other than in the ordinary course of business; and (7) any transaction between the company and the entity with voting control, other than those of a certain size or on an arm's length basis. *Roy M. Speer*, 11 FCC Rcd at 14155, para. 18. See also *Lockheed Martin Corp.*, at n.90 (describing restrictions on Comsat's ability to engage in certain business activities without the consent of Lockheed Martin), at n.92 (describing standard minority protections approved by the Commission).

²¹³ See *WWOR-TV*, 6 FCC Rcd at 202 n. 19 (expressing no concern with a foreign-controlled entity's role in nominating the proposed board because, as a practical matter, the company was spun off as a means to eliminate the alien ownership problem); *id.* at 201-02, para. 18 (finding that control of the board would be in the hands of those who had not been officers, directors or employees of the foreign-controlled entity, and that after the proposed tender offer, six of the eight directors would have no connection to that entity). See also *Iacopi v. FCC*, 451 F.2d 1142, 1148 (9th Cir. 1971) (noting that after the spin-off of Viacom from CBS to comply with Commission rules, of the nine Viacom directors, six had not previously been directors, officers or employees of CBS while three others were former employees).

83. Although we note that the Class B shareholder has the right to designate one board member (who will refrain from voting until the board comprises at least 10 members), we do not find that such designation grants the Class B shareholder control over Genuity or its board.²¹⁴ There will be a clear majority of board members with no interest in Bell Atlantic/GTE, and no past association with either company. All of the directors, including the Class B designee, should have every incentive, as well as a clear fiduciary duty, to serve only the best interests of Genuity, regardless of whether this is also in the best interests of the merged firm.²¹⁵ We note that the proposal gives the directors the power and opportunity to carry out their fiduciary duties. Thus, we find nothing on the record to doubt that the directors will act in strict accordance with their clear fiduciary responsibility.²¹⁶ This expectation similarly applies to those officers and managers of Genuity who were previously employed by one of the merging parties.²¹⁷

84. We have carefully examined the impact of any prior relationship with the merging parties upon the ability of Genuity's officers and directors to control major business and policy decisions of the company.²¹⁸ Because Genuity is being spun off from GTE, a number of initial decisions affecting Genuity were made by GTE prior to the spin-off. We find, however, that these decisions do not lock in Genuity's officers and directors to specified courses of action, but rather are of a transitional nature and allow for the officers and directors to make independent business decisions on a going-forward basis. We note that several members of Genuity's management worked for Genuity's precursor, BBN, prior to its acquisition in 1997 by GTE, and thus have experience with independently managing and growing an Internet backbone company.

85. Given the contingent nature of the conversion right, we also find that, to the extent the existence of the Class B conversion right carries any degree of control in the eyes of Genuity's officers and directors,²¹⁹ any such control premium will be negligible.²²⁰ Genuity's management undoubtedly will

²¹⁴ See, e.g., *GWIPCS, Inc.*, 12 FCC Rcd at 6455, para. 34 (finding entity did not have *de facto* control despite its ability to elect two of 13 members of the board of directors); *WWOR-TV, Inc.*, BTCCT-901127KE, Memorandum Opinion and Order, 6 FCC Rcd. 6569, 6582, para. 14 (1991) (finding, for purposes of section 310(b)(4)'s 25-percent foreign ownership restriction, that even assuming that the two directors who were senior officials at the foreign-controlled organization were representatives of the foreign entity, no violation would exist because they represented only 25 percent of the Board).

²¹⁵ See *Columbia Pictures Industries, Inc.*, 30 FCC2d at 16; *WWOR-TV*, 6 FCC Rcd at 201-02, para. 18.

²¹⁶ See *Lockheed Martin Corp.*, at para. 37 (declining to speculate that directors would breach their fiduciary obligations "in the absence of sufficient particularized facts to overcome the presumption that all of the directors will fulfill their fiduciary obligations within an active and independent board of directors").

²¹⁷ See *WWOR-TV*, 6 FCC Rcd at 200, para. 14 (noting that in the CBS/Viacom spin-off, "[m]ost of Viacom's officers and employees would perform the same roles they had performed for CBS").

²¹⁸ See *Airgate*, 14 FCC Rcd at 11841, para. 27 (rejecting certain arrangements between a spunoff company and its former parent, including that the spunoff company was prohibited from deploying or investing in other technologies, and that the former parent company enjoyed a right to review bids submitted by other equipment vendors prior to submitting its own bid).

²¹⁹ See ALTS May 5, 2000 Comments at 4; AT&T May 5, 2000 Opposition at 6, 27; AT&T Mar. 22, 2000 *Ex Parte* Letter at 4, 19; Competition Policy Institute May 5, 2000 Comments at 7; Telecommunications Resellers Assoc. Feb 15, 2000 Comments at 12-13.

be cognizant of the conditional conversion right that carries with it a possibility that Bell Atlantic/GTE will obtain control of the company at some point in the future. Nonetheless, the merged firm will not have an absolute legal right to reacquire Genuity. Genuity's officers and directors therefore cannot be certain that the merged firm will satisfy the access line thresholds. Moreover, in the event that Bell Atlantic/GTE fails to meet the 95-percent threshold, the public shareholders will have the right to purchase its shares in return for a debt instrument. Thus, although the officers and directors will be aware of the possibility that Bell Atlantic/GTE will reacquire the company, they also will recognize that the Class A shareholders may ultimately retain full ownership of the company. This countervailing consideration weighs against ascribing an influential degree of control to the mere existence of Bell Atlantic/GTE's conditional conversion right.²²¹

86. *Finances.* We find that Bell Atlantic/GTE will not have control of Genuity's finances. At the time of the spin-off, the proceeds of the IPO will represent the primary source of financing for Genuity, and the spun-off entity will not be obligated to Bell Atlantic/GTE on any loan. Genuity retains the right to seek additional funding through arm's-length loans from the merged firm, but is not obligated to do so. If it does obtain loans from Bell Atlantic/GTE, these cannot amount to more than 25 percent of the total outstanding debt of Genuity. Because Genuity is under no obligation to obtain funding from the merged firm, and Bell Atlantic/GTE's ability to loan money to Genuity is restricted in any event, we conclude that any potential financing arrangements with the merged firm will not vest control of Genuity's finances in Bell Atlantic/GTE. Indeed, as a public corporation, Genuity has the ability to issue additional shares to finance some of its operational needs. In addition to examining the source of the funds, we also assess whether the locus of Genuity's financing decisions remains with Genuity, and find that it does. Although under the investor safeguards the merged firm's consent is required for Genuity to issue debt in excess of \$11 billion, we are persuaded that the size of this restriction leaves sufficient room for Genuity to control major decisions regarding financing. Thus, we find that the potential right to obtain arm's-length loans from the merged entity and the limited role of the merged firm in approving debt beyond \$11 billion do not vest control of Genuity's finances in Bell Atlantic/GTE.

87. *Commercial Contracts.* We find that the contractual relationship between Bell Atlantic/GTE and Genuity following the spin-off will not result in transferring day-to-day operational control of Genuity to Bell Atlantic/GTE. By their nature, the administrative support services contracts are transitional, limited to not more than one year, and expressly terminable by Genuity without penalty at any time.²²² We note also that the services provided by the former parent do not appear to involve the merged firm in Genuity's core operations. Many of the support services that are included in the contracts appear to be functions that are commonly outsourced, such as billing, payroll services, benefits

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²²⁰ See *NextWave*, 12 FCC Rcd at 2038-39, para. 21 (finding that "the fact that some of NextWave's management have been associated with Qualcomm does not support a finding of affiliation.").

²²¹ See *Lockheed Martin Corp.*, at para. 40 (finding that the existence of second stage of merger agreements was not sufficiently influential to constitute an element of actual control).

²²² See *WWOR-TV*, 6 FCC Rcd at 203-04, paras. 20-21 (allowing transitional arm's-length administrative arrangements in a spin-off situation, including a program supplier contract, a trademark license agreement, leases of office space, and a limited interim services agreement, to avoid the highly-disruptive immediate severance of such relationships); *Airgate*, 14 FCC Rcd at 11842, para. 29 (finding no evidence that a former parent controlled a spunoff entity because it offered to provide accounting, financial management, tax, payroll, shareholder and public relations, legal, human resources, procurement, real estate management, and other administrative services to the spunoff entity).

administration and processing, cash processing, realty and leasing management, environmental and safety services and information technology services.²²³ The merged firm will not, for example, have any role in hiring or firing Genuity employees, in training employees, in strategic planning and business development, in legal counsel and regulatory affairs support, and in advertising and other corporate communications.²²⁴ We therefore find it reasonable in this case that the merged entity may continue to provide narrowly-defined support services for a limited transitional period following the spin-off. Given the transitional nature of these narrowly-defined support services, which will not entail Genuity's core operations, we also conclude that Bell Atlantic/GTE will not be "providing" in-region, interLATA services in violation of section 271 through these contractual relationships.²²⁵

88. We further find that the joint marketing agreement between the merged firm and Genuity does not confer control over Genuity. Although the Purchase, Resale and Marketing Agreement has a five-year term and obligates Genuity to provide most favored customer pricing to Bell Atlantic/GTE, the Agreement is not exclusive and does not apply to those states in which the combined entity is prohibited from providing in-region, interLATA services. Genuity therefore has the right to market, distribute and sell its services nationwide, either directly or indirectly through other dealers or distributors, and according to the prices and volume or other purchase discount arrangements that it desires to make available to its other customers. In addition, we find that the agreement specifies that the prices for certain Genuity services will be renegotiated annually, or even quarterly. Moreover, because the contract specifies that the merged firm will not provide or jointly market in any state for which it has not obtained section 271 authority any Genuity service that is, or includes as a bundled component, an interLATA service, we also conclude that Bell Atlantic/GTE will not be "providing" in-region, interLATA services in violation of section 271 through the joint marketing agreement between the companies following the spinoff.²²⁶

89. *EDP Distinctions.* AT&T further suggests that various attribution rules under our *Cable Attribution Order* and *Broadcast Attribution Order* are pertinent to the control analysis and support a finding that Genuity would be an affiliate of the merged entities.²²⁷ We disagree. Both the broadcast equity-debt plus (EDP) attribution rule and the cable equity plus debt rule provide, in specific circumstances, for attribution of certain financial investments (including options and warrants) when the

²²³ Bell Atlantic/GTE June 7, 2000 Glover *Ex Parte* Letter Att. 1.

²²⁴ In view of the limited scope of the transitional and other contracts between the companies, we reject Covad's assertion that, under an earlier version of the contracts, there is little left for Genuity, "a shell of a corporation," to do. See Covad May 5, 2000 Comments at 7. See also Cable & Wireless Feb. 22, 2000 Reply at 4-5.

²²⁵ See Covad May 5, 2000 Comments at 11.

²²⁶ See *Qwest Teaming Order*, 13 FCC Rcd at 21438. In this regard, the contractual relationship between the merged firm and Genuity created through the joint marketing and transitional support services contracts is manifestly different from Ameritech's and US WEST's arrangements with Qwest that were found to violate section 271 in the *Qwest Teaming Order*. See *Qwest Teaming Order*, 13 FCC Rcd at 21438.

²²⁷ AT&T Mar. 22, 2000 *Ex Parte* at 2-3 (citing *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, CS Docket No. 98-82, Report and Order, FCC 99-288 (rel. Oct. 20, 1999) (*Cable Attribution Order*); and *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, MM Docket No. 94-150, Report and Order, 14 FCC Rcd. 12559, 12582, para. 47 (1999) (*Broadcast Attribution Order*)).

investor holds an interest in excess of 33 percent of the total asset value of the entity.²²⁸ These rules focus directly on those financial relationships in which there is significant incentive and ability for the otherwise nonattributable interest holder to exert influence over the core operations of the licensee. As we explained in the *Broadcast Attribution Order*, “[t]he approach of focusing on specific triggering relationships would extend the Commission’s current recognition that the category or nature of the interest holder is important to whether an interest should be attributed.”²²⁹ A similar equity-debt rule arises under our *Cable Attribution Order*. We stated in that Order that, in adopting the ED rule, “[w]e affirm our conclusion in the *Broadcast Attribution Order* that there is the potential for certain substantial investors or creditors to exert significant influence over key decisions, which may undermine the diversity of voices we seek to promote.”²³⁰ Therefore, reflecting our view that relationships that offer potential for significant influence or control should be counted in applying the broadcast and cable ownership rules, which promote diversity and competition, we adopted a targeted prophylactic, structural rule under which we would make certain interests attributable using a bright line test.

90. That same range of concerns is absent here, where we are primarily focused upon the competitive considerations underlying section 271, a provision that entails case-specific inquiry. Accordingly, we decline to adopt in this proceeding any bright line test for assessing whether an entity is an affiliate within the meaning of section 3(1). Instead, in this instance, we employ a case-specific evaluation tailored to the circumstances now before us, which implicate section 271. Thus, unlike the cable and broadcasting contexts, the specific policy concerns present here persuade us that a case-specific evaluation will best effectuate the applicable statutory purposes.

91. Finally, a third application of the equity-debt rule arises under section 623 of the Act, for which we have developed the LEC effective competition test. Under that test, effective competition exists (sufficient to free rates of a cable operator from regulation) where a LEC or its “affiliate” provides video programming services comparable to those of an unaffiliated cable operator. In determining affiliation for these purposes, the Commission has used the ED rule: “We believe that an ED investment, given its size, by a LEC gives an MVPD significant access to the resources of a LEC such that it can be presumed that there is effective LEC competition [with the cable operator].”²³¹ The question here, however, was not whether or not the LEC would have “control” over the related entity. Instead, our focus was different – whether the related entity would have sufficient support from the LEC and access to its resources, so that it could effectively compete with the unaffiliated cable operator. That is a concern very specific to section 623 of the Act. As a result, the policy concerns driving that bright line test are inapplicable here.

²²⁸ See 47 C.F.R. § 73.3555 Note 2(j); 47 C.F.R. § 76.503 Note 2(i).

²²⁹ *Broadcast Attribution Order* at para. 47. Attribution is triggered under the broadcasting debt-equity-plus rule only when the requisite financial interest is coupled with one of two triggering relationships (major program supplier or same market media entity).

²³⁰ *Cable Attribution Order* at para. 83.

²³¹ *Cable Attribution Order* at para. 129.

4. Other Issues

a. Transfer of GTE Telecom Wholesale Services to Genuity

92. As part of our finding that the proposed spin-off of GTE's Internet backbone and related assets will not result in a violation of section 271, we also approve the transfer of control to Genuity of certain domestic and international section 214 authorizations and cable landing licenses currently held by various GTE operating subsidiaries, including GTE Telecom.²³² Pursuant to domestic and international section 214 authorizations, GTE Telecom provides domestic interexchange and international wholesale services.²³³ Although GTE Telecom will divest its private line, point-to-point service to commercial and financial customers before closing the merger,²³⁴ the Applicants maintain that the transfer of GTE Telecom's wholesale services is necessary to preserve the integrity of Genuity's business.²³⁵ Because supplying private line services on a wholesale basis to other carriers is integrally related to Genuity's business, we find that the transfer of the authorizations associated with this business is in the public interest.

93. With respect to the international transfer, we modify the international section 214 authorizations that will be transferred to Genuity, and held by its international carrier subsidiary GTE Telecom, to reclassify GTE Telecom as a nondominant international carrier on the U.S.-Dominican Republic and U.S.-Venezuela routes. After the spin-off to Genuity, GTE Telecom will no longer have an "affiliation," within the meaning of section 63.09 of the rules, with any carrier that has market power on the foreign end of a U.S. international route.²³⁶ Accordingly, pursuant to section 63.10(a)(1) of the

²³² These authorizations include: (1) File No. ITC-214-19990708-00391 (global facilities-based and resale authorization held by GTE Telecom Incorporated); (2) File No. SCL-98-003/SCL-98-003A (submarine cable landing license for AMERICAS-II Cable to be held by GTE Telecom Incorporated after a pro forma assignment from GTE Communications Corp.); (3) File No. SCL-LIC-19990303-00004 (submarine cable landing license for TAT-14 Cable from GTE Intelligent Network Services); (4) File No. SCL-LIC-19981117-00025 (submarine cable landing license for Japan-U.S. Cable from GTE Intelligent Network Services); and (5) ITC-98-342/ ITC-98-342A (international section 214 authorization, associated with the AMERICAS-II Cable landing license, to be held by GTE Telecom Incorporated after a pro forma assignment from GTE Communications Corp.). Pursuant to the Cable Landing License Act, the Department of State, after coordinating with the National Telecommunications and Information Administration and the Department of Defense, approved the transfer of control to Genuity of the AMERICAS-II, TAT-14 and Japan-U.S. cable landing licenses held by GTE operating subsidiaries. See Letter from Geoffrey Chapman, United States Coordinator, Acting International Communications and Information Policy, United States Department of State, to Donald Abelson, Chief, International Bureau, Federal Communications Commission (filed May 23, 2000).

²³³ See GTE Corporation, Transferor, Genuity, Inc., Transferee, Application for Transfer of Control (filed Apr. 28, 2000) (Domestic Section 214 Application), at 1.

²³⁴ See Letter from Alan F. Ciamporcero, Vice President Regulatory Affairs, GTE, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-184 (filed Apr. 28, 2000), attached hereto as Appendix F.

²³⁵ Domestic Section 214 Application at 5.

²³⁶ See GTE Corporation, Transferor, Genuity, Inc., Transferee, Application for Transfer of Control of ITC-98-342/ ITC-98-342A (filed Apr. 28, 2000); GTE Corporation, Transferor, Genuity, Inc., Transferee, Application for Transfer of Control of ITC-214-19990708-00391 (filed Apr. 28, 2000). Section 63.09(e) of the rules provides, in relevant part, that: [t]wo entities are *affiliated* with each other if one of them, or an entity that controls one of them, directly or indirectly owns more than 25 percent of the capital stock of, or controls, the other one." 47 C.F.R. § 63.09(e). Currently, all of GTE's international carrier subsidiaries, including GTE Telecom, are affiliated with foreign carriers that we have found to possess market power in the Dominican Republic and Venezuela. For this reason, we have classified these (continued....)

rules, we find no basis in this record to regulate GTE Telecom as a dominant international carrier to the Dominican Republic and Venezuela.²³⁷

b. Waiver of Affiliate Transactions Rules

94. We also decline to grant the Applicants' request for a waiver of the affiliate transactions rules.²³⁸ Specifically, the Applicants seek permission to effectively treat Genuity as an affiliate for accounting purposes so that the merged firm's provision of services to Genuity through a "separate services affiliate" would not alter the manner in which the separate services affiliate provides service to other members of Bell Atlantic/GTE's corporate family.²³⁹ By ensuring arm's length transactions between a dominant incumbent LEC and its nonregulated affiliate, the affiliate transactions rules deter potential cost misallocations and protect ratepayers of regulated services from bearing the costs of competitive ventures.²⁴⁰

95. We deny the Applicants' waiver request for three reasons. First, the Applicants fail to demonstrate special circumstances that warrant a waiver.²⁴¹ Although they claim that the waiver would

(Continued from previous page)

_____ subsidiaries as dominant international carriers, as appropriate under section 63.10(a)(3) of the rules, for the provision of service between the United States and each of these countries. After the spin-off and upon consummation of the merger of GTE with Bell Atlantic, all of the *Bell Atlantic-controlled* international carriers will continue to be classified as dominant international carriers on the U.S.-Dominican Republic and U.S.-Venezuela routes, as appropriate under section 6.310(a)(3) of the rules. For a detailed discussion of our international dominant carrier rules as they relate to the merged entity, *see infra* Section X.

²³⁷ Section 63.10(a)(1) of the rules provides that: "[a] U.S. carrier that has no affiliation with, and that itself is not, a foreign carrier in a particular country to which it provides service (i.e., a destination country) shall presumptively be considered non-dominant for the provision of international communications services on that route."

²³⁸ Petition of GTE Service Corporation and GTE Consolidated Services, Inc. for Waiver of 47 C.F.R. § 32.27(c) (filed Apr. 25, 2000) (*GTE Waiver Request*).

²³⁹ GTE requests permission to continue providing services to Genuity while at the same time receiving favorable accounting treatment under our rules. *See GTE Waiver Request* at 2. To accomplish this, GTE Service Corporation and GTE Consolidated Services, Inc. must continue to receive classification as a "separate services affiliate," which is an affiliate that provides services solely to members of the corporate family. Under the accounting safeguards, incumbent LECs receive favorable accounting treatment in limited circumstances involving a "separate services affiliate." *See Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket 96-150, Report and Order, 11 FCC Rcd 17539 (1996) (*Accounting Safeguards Order*). Specifically, this treatment allows incumbent LECs to value the cost of services provided by a separate services affiliate at fully distributed cost without estimating the fair market value of the services. To qualify for this favorable accounting treatment, however, the separate services affiliate must provide services solely to members of the corporate family. *See id.* Transactions with unaffiliated third parties raise the risk that ratepayers of regulated services will subsidize an incumbent LEC's competitive operations.

²⁴⁰ The affiliate transactions rules prescribe the manner in which incumbent LECs record the costs of transactions between regulated and nonregulated affiliates on their books of account, and thereby help ensure that such transactions occur at arm's length. *See* 47 C.F.R. § 32.27. *See Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket 96-150, Second Order on Reconsideration, FCC 00-9 (rel. Jan. 18, 2000).

²⁴¹ *See* 47 C.F.R. §§ 1.3, 32.18; *see also* *Aliant Communications Co. Petition for Waiver of Section 32.27 of the Commission's Rules*, Order on Reconsideration, 14 FCC Rcd 6231 (1999); *Puerto Rico Telephone Co. Petition for Waiver of Section 32.27 of the Commission's Rules*, Memorandum Opinion and Order, DA 99-2233 (rel. Nov. 5, 1999).

only apply for a limited period of time, we note that, under the request, the separate services affiliate would provide certain services for up to a year. Similarly, the Applicants do not persuasively demonstrate that a waiver is necessary to ensure Genuity meets its operational schedule. We note that the services at issue (*e.g.*, human resources, accounting, real estate, and billing and collection) are readily available on the open market so that denying the Applicants' request does not prevent Genuity from obtaining these services in time for it to begin operations. Second, granting a waiver could result in ratepayers of regulated services directly or indirectly funding a portion of Genuity's start-up costs.²⁴² Finally, granting the request could have some bearing on our overall evaluation of Genuity's ownership and control. Our affiliate transactions rules apply only to incumbent LECs and their affiliates, and not to unaffiliated entities like Genuity. For these reasons, we conclude that waiving the affiliate transactions rules would be inconsistent with our findings in this order. We note, however, that Bell Atlantic/GTE may continue to provide such services, as long as it does so in accordance with all applicable requirements.²⁴³

VI. ANALYSIS OF POTENTIAL PUBLIC INTEREST HARMS

A. Overview

96. In the 1996 Act, Congress determined that the public interest is served when telecommunications markets are both more competitive and less regulated. In this Order, we conclude that if considered without the supplemental conditions proposed by the Applicants, the proposed merger threatens our ability to fulfill our statutory mandate in three respects. First, the merger of Bell Atlantic and GTE decreases the potential for competition in local telecommunications markets among large incumbent LECs. Second, the proposed merger frustrates the ability of the Commission and state regulators to implement the market-opening provisions of the 1996 Act through the use of comparative practices analyses, or "benchmarking," which can assist regulators in defining incumbent LEC obligations and implementing market-opening policies under section 251, section 271, and state law in a less regulatory manner. Third, the proposed merger would increase the incentives and ability of the merged entity to discriminate against rivals in local, advanced services, and long distance markets. Specifically, we conclude that the increase in the number of local calling areas controlled by Bell Atlantic as a result of the merger will increase its incentive and ability to discriminate against carriers competing in retail markets that depend upon access to Bell Atlantic's inputs in order to provide services. Accordingly, as described below, absent the supplemental conditions proposed by the Applicants, we would conclude that the proposed merger does not serve the public interest, convenience, or necessity because it would inevitably slow progress in opening local telecommunications markets to consumer-benefiting competition, thereby requiring us to engage in more regulation, which is contrary to Congressional policy.

²⁴² See AT&T May 5, 2000 Opposition at 7 & n.4.

²⁴³ For example, GTE Service Corp. could continue to provide such services to Genuity, but it would lose its status as a separate services affiliate.

B. Loss of Competition Between Bell Atlantic and GTE in the Local Market

1. Background

97. We begin our review of the proposed merger by examining the transaction's likely effects on interactions between the merging firms. Until 1996, carriers seeking to compete with incumbent LECs in most geographic markets for local exchange and exchange access services had been prevented or deterred from doing so due to legal, regulatory, economic, and operational barriers. As in the *SBC/Ameritech Order*, we recognize that local telecommunications markets are evolving into markets characterized by competitive conditions and, therefore, employ an analysis that accounts for the transitional nature of those markets.²⁴⁴

98. As explained in the *WorldCom/MCI Order*, our framework for analyzing transitional markets reflects the values of, but does not attempt to replicate, the "actual potential competition" doctrine established in antitrust case law.²⁴⁵ Under the actual potential competition doctrine, a merger between an existing market participant and a firm that is not currently a market participant, but that would have entered the market but for the merger, violates antitrust laws if the market is concentrated and entry by the nonparticipant would have resulted in deconcentration of the market or other pro-competitive effects.²⁴⁶ The transitional markets framework set forth in the *Bell Atlantic/NYNEX Order* identifies as "most significant market participants" not only firms that already dominate transitional markets, but also those that are most likely to enter in the near future, in an effective manner, and on a large scale once a more competitive environment has been established.²⁴⁷ The Commission seeks to determine whether either or both of the merging parties are among a small number of these most significant market participants,²⁴⁸ in which case its absorption by the merger could harm the public interest in violation of the Communications Act unless offset by countervailing positive effects.

99. In this portion of the Order, we conduct an analysis of the probable competitive effects

²⁴⁴ *SBC/Ameritech Order*, 14 FCC Rcd at 14744, para. 63. As we have noted previously, such a transitional market analysis is relevant to the examination of a merger under the Communications Act because of our statutory obligation to promote the development, and not merely prevent the lessening, of competition in telecommunications markets. *Id.*

²⁴⁵ See *SBC/Ameritech Order*, 14 FCC Rcd at 14744, para. 64; *WorldCom/MCI Order*, 13 FCC Rcd at 18038, para. 20.

²⁴⁶ See *id.* (citing *United States v. Marine Bancorporation*, 418 U.S. 602 (1974); ABA Section of Antitrust Law, *Antitrust Law Developments* (4th ed. 1997) at 346-50 (*Antitrust Law Developments*)).

²⁴⁷ See *SBC/Ameritech Order*, 14 FCC Rcd at 14744, para. 64. In addition, the transitional markets framework is well-tailored to the Commission's unique role as an expert agency and statutory obligation to promote competition and to open local markets.

²⁴⁸ As we stated in the *AT&T/TCG Order*, when analyzing a merger in a market that is rapidly changing, the best way to assess the likely effect of the merger is to isolate the merger's effects from all other factors affecting the development of the relevant market over time. This is achieved by framing the analysis in a way that holds constant the effects of all changes in the market conditions other than those directly caused by the merger. To do this, we also identify as market participants those firms that have been effectively precluded from the market—that is, those firms that are most likely to enter (or are just beginning to enter) the market but have until recently been prevented or deterred from participating in the market by the barriers that the 1996 Act seeks to eradicate. We then identify the most significant participants based on an assessment of capabilities and incentives to compete effectively in the relevant market. *AT&T/TCG Order*, 13 FCC Rcd at 15245-46, para. 17.

of the merger of Bell Atlantic and GTE on the provision of local exchange and exchange access services.²⁴⁹ We utilize the "transitional markets" analytical framework set forth in the *Bell Atlantic/NYNEX Order* to determine whether the proposed merger would result in a potential harm to the public interest by diminishing the potential for competition in local exchange and exchange access markets in Bell Atlantic's or GTE's regions.

2. Discussion

a. Overview

100. We conclude that the proposed merger is likely to result in a public interest harm by eliminating GTE as among the most significant potential participants in the mass market for local exchange and exchange access services in Bell Atlantic's operating areas. Specifically, with respect to the mass market for local services, we find that GTE is a most significant market participant in Bell Atlantic service areas adjacent to and surrounding its GTE's service areas and in which it has a cellular presence. We base this finding in part on our analysis of the plans of GTE to expand out-of-region and, in particular, into Bell Atlantic's territories within Pennsylvania and Virginia. We find that this elimination of GTE as a competitor in the mass market for these services will result in a significant public interest harm. We also conclude that Bell Atlantic, despite having the capabilities to be a most significant market participant in GTE's service area, lacks the incentives to enter the mass market in GTE's territory. In the larger business market for local exchange and exchange access services, we conclude that both Bell Atlantic and GTE are only two of a larger number of most significant actual and potential competitors in each other's service areas. The merger would thus be less likely to have adverse competitive effects leading to public interest harms in these markets.²⁵⁰

3. Relevant Markets

101. We begin our analysis of the proposed merger by defining the relevant product and geographic markets.²⁵¹ We then consider whether the merger frustrates the Communications Act's goal of encouraging greater competition in those markets.

102. *Product Markets.* We analyze the competitive effects of the proposed merger on the provision of local exchange and exchange access services.²⁵² Defining relevant product markets involves

²⁴⁹ See *SBC/Ameritech Order*, 14 FCC Rcd at 14745, para. 65; *WorldCom/MCI Order*, 13 FCC Rcd at 18036-37, para. 18; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20008-10, paras. 37-38.

²⁵⁰ Additionally, we note that our analysis of these competitive issues is necessarily truncated in this portion of the order. Because information concerning the Applicants' business plans is subject to a Protective Order, much of the evidence on which we rely is explained in Appendix C, to which access must be restricted.

²⁵¹ See *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016, para. 53; see also *SBC/Ameritech Order*, 14 FCC Rcd at 14746, para 67; *WorldCom/MCI Order*, 13 FCC Rcd at 18119, para. 164.

²⁵² In Sections IX and X, we address the proposed merger's impact upon the wireless and international markets. Additionally, although Bell Atlantic recently entered the long distance market in New York, it does not provide interexchange services in other states. Furthermore, as a result of a recent divestiture, GTE no longer serves long distance customers in either the larger business or mass markets within Bell Atlantic's region, with the exception of New York. Accordingly, we conclude that the proposed merger will not result in a loss of competition in the domestic market for long distance services. See *supra* Section V. As discussed below, however, we do find that a merged Bell (continued....)

identifying and aggregating consumers with similar demand patterns. For purposes of analyzing the competitive effects of this merger on local exchange and exchange access services we identify two distinct relevant product markets: (1) residential consumers and small business (mass market) and (2) medium-sized and large business customers (larger business market).²⁵³

103. *Geographic Markets.* We conclude that the relevant geographic market in which to measure the effects of this merger on local exchange and exchange access services consists of the geographic markets for those services in which one or both of the merging parties provide service.²⁵⁴ It is in these markets that the merging parties actually operate and where the potential is greatest for both parties to operate in the future. In focusing our analysis upon these markets, we recognize that the proposed merger can produce anticompetitive effects only in markets in which both firms actually or potentially operate.²⁵⁵ Furthermore, as was the case in the *WorldCom/MCI Order*, we conclude that, for purposes of this transaction, we need not conduct a separate assessment of each local area in which Bell Atlantic and/or GTE have facilities to determine whether there are potential anticompetitive effects.²⁵⁶

a. Market Participants

104. When analyzing the probable effects of this merger on the relevant product and geographic markets, we begin by identifying significant market participants. We first note that Bell Atlantic and GTE remain dominant within their traditional service areas and therefore are included in the list of most significant market participants within their respective traditional markets. Next we consider whether, but for the merger, either of the merging parties would be a significant potential competing provider of local exchange and exchange access services in the other's markets. In doing so, we examine each of Bell Atlantic's and GTE's capabilities and incentives to provide local exchange and exchange access services outside the region in which it is an incumbent LEC, with particular emphasis on analyzing existing plans and any past attempts to do so. We then examine other firms that may be considered most significant market participants in the relevant markets to determine the competitive

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Atlantic/GTE will have an increase ability and incentive to discriminate in the provision of exchange access service. See *infra* Section VI.D.

²⁵³ We distinguish mass market consumers from larger business customers because the services offered to one group may not be adequate or feasible substitutes for services offered to the other group, and because firms need different assets and capabilities to target these two markets successfully. See generally *SBC/Ameritech Order*, 14 FCC Rcd 14746, para. 68 & n.146; *WorldCom/MCI*, 13 FCC Rcd at 18119, para. 164; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016, para. 53. As recognized in previous merger orders, mass market customers have a different decision-making process than do larger business customers. For example, residential and small businesses are served primarily through mass marketing techniques including regional advertising and telemarketing, while larger businesses tend to be served under individual contracts and marketed through direct sales contacts. See *SBC/Ameritech Order*, 14 FCC Rcd at 14746, para. 68.

²⁵⁴ See *SBC/Ameritech Order*, 14 FCC Rcd at 14746, para. 69; *WorldCom/MCI Order*, 13 FCC Rcd at 18120, para. 167. See also *AT&T/TCG Order*, 13 FCC Rcd at 15248, para. 21; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20017, para. 54.

²⁵⁵ *WorldCom/MCI Order*, 13 FCC Rcd at 18120, para. 167.

²⁵⁶ See *id.* at 18120, para. 168.

impact of the loss of one of the Applicants as an independent entity.²⁵⁷

105. We consider all available evidence indicating that precluded competitors possess the capability to and would likely have entered the relevant markets.²⁵⁸ For instance, parties' plans or attempts to enter the relevant markets represent probative evidence of each firm's own perception that it possesses the capabilities and incentives necessary to be a significant market participant. We similarly examine unsuccessful plans to enter a relevant market in the past. While recognizing that a failed attempt could suggest that a firm is not a significant market participant, we would also consider all relevant circumstances, including changed market conditions, that might facilitate successful subsequent entry and the strategic business consequences to a firm of failing to enter into a relevant market.²⁵⁹

(i) Mass Market

106. With respect to the mass market for local exchange and exchange access services, we conclude that Bell Atlantic and GTE each has the capabilities to be considered a significant market participant in the other's operating areas. In addition, as major incumbent LECs, both Bell Atlantic and GTE are equipped with advantages when expanding out-of-region that other potential local service market entrants lack. GTE has had the incentive and intention to enter portions of Bell Atlantic's region, and we therefore find that it is a most significant participant in the mass market for local exchange and exchange access services in Bell Atlantic's region. Because we find that Bell Atlantic lacks the incentives to enter GTE's region, however, we conclude that it is not among the most significant potential participants in the mass market within GTE's service area.

107. *Capabilities and Incentives.* We conclude that both Bell Atlantic and GTE have the operational capabilities necessary to enter out-of-region markets. In general, as major incumbent LECs, both have the requisite access to the necessary facilities, "know how," and operational infrastructure such as customer care, billing, and related systems that are essential to the provision of

²⁵⁷ The Commission previously has set forth the various capabilities it considers in identifying the most significant potential competitors in local exchange and exchange access markets. Those capabilities include whether the firm possesses the following: (1) the operational ability to provide local telephone service (*i.e.*, know how and operational infrastructure, including sales, marketing, customer service, billing, and network management); (2) the ability to quickly acquire a critical mass of customers; (3) brand name recognition, a reputation for providing high quality and reliable service, an existing customer base, or the financial resources to get these assets; and (4) some significant unique advantages, such as a cellular presence in the relevant market. *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20019, paras. 58-64; *see also SBC/Ameritech Order*, 14 FCC Rcd at 14748, para. 73; *WorldCom/MCI Order*, 13 FCC Rcd at 18047-48, 18051-56, 18122, paras. 36, 42-51, 171.

²⁵⁸ *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20021-22, para. 64. We also noted in the *Bell Atlantic/NYNEX Order* that if a firm's internal documents demonstrate serious consideration of entry, they may create an inference of a capability to effect the market without a detailed examination of the competitor's capabilities and incentives.

²⁵⁹ Firms providing one service may choose to expand their offering to provide a whole range of products or expand to other geographic regions. For instance, as noted *supra*, in recent merger applications before the Commission, some merging parties have asserted that consumers are expressing demand for "one-stop shopping." *See WorldCom/MCI Order*, 13 FCC Rcd at 18037, para. 19; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20015, para. 52. According to the Applicants, this demand stimulated in part their merger plans. We also examine the activities of competitors providing similar services; if a competitor branches into new relevant markets, we may determine that a firm could or would respond to such a competitive challenge by serving these other relevant markets as well.

local exchange services to a broad base of residential and business customers.²⁶⁰ These systems are required whether entry occurs through resale, use of UNEs, or some other form of facilities-based entry. Similarly, Bell Atlantic and GTE also possess special expertise that they could bring to the interconnection negotiation and arbitration process when entering out-of-region markets because of their intimate knowledge of local telephone operations and experience negotiating interconnection agreements with new entrants.²⁶¹

108. Moreover, as was the case in the merger of SBC and Ameritech, Bell Atlantic and GTE have the additional advantage in Pennsylvania and Virginia of adjacent territories, a cellular presence, or both.²⁶² In Virginia, for instance, each of the areas served by GTE's incumbent LEC is abutted by Bell Atlantic's territory.²⁶³ Additionally, GTE's substantial wireless presence in Virginia is largely within Bell Atlantic's wireline territory.²⁶⁴ Each company has an array of switches and switching locations that have capacity or can be readily upgraded to provide switching to contiguous territories, and, in fact, GTE's own local entry strategy indicates its intent to leverage upgraded wireless switches to provide wireline service to "near-franchise" areas.²⁶⁵ Thus, in their contiguous service areas in Pennsylvania and Virginia, Bell Atlantic or GTE could lease or build transport from their existing switches to a newly entered market more readily than other potential local service providers because of their proximity to the newly entered market, as well as their understanding of the requirements of providing local exchange services.²⁶⁶ In addition, both Bell Atlantic and GTE have brand recognition in contiguous regions because of extensive advertising in media markets that cross these regions, as well as nationally recognized brand names resulting from extensive advertising campaigns.²⁶⁷ Finally, the wireless assets that Bell Atlantic and GTE possess in Pennsylvania and Virginia also provide unique advantages for out-of-region entry, for a wireless presence can provide a ready customer base for expanding into wireline

²⁶⁰ See *Bell Atlantic/NYNEX Order*, 12 FCC Rcd 20020, 20040-41, paras. 62, 106-08; see also AT&T Mar. 1, 2000 Opposition at 7-8.

²⁶¹ *Bell Atlantic/NYNEX Order*, 12 FCC Rcd 20040, para. 107; see also AT&T Mar. 1, 2000 Opposition at 7-8; National ALEC Assoc. Mar. 1, 2000 Comments at 5.

²⁶² See *Bluestar*, et al. Mar. 1, 2000 Comments at 2; National ALEC Assoc. Mar. 1, 2000 Comments at 6; *CompTel* Mar. 1, 2000 Comments at 4-5; *MCI WorldCom* Nov. 23, 1998 Comments at 22. See also *SBC/Ameritech Order*, 14 FCC Rcd at 14753-54, paras. 85-86 (adjacency and cellular presence or both evidence that merging parties are significant market participants in each other's operating areas).

²⁶³ See Appendix C (Summary of Confidential Information).

²⁶⁴ See *id.*

²⁶⁵ See *id.* In this regard, we find GTE's argument that it intended to utilize only one upgraded wireless switch for the provision of wireline services to be contradicted by its own internal documents. See *id.*

²⁶⁶ As contiguous incumbent LECs in Pennsylvania and Virginia, Bell Atlantic and GTE also have the ability to use remote digital loop carriers to serve out-of-region end users. Such technology has a range of about 125 miles, which would permit it to be used in conjunction with the contiguous provider's switch in its nearby in-region territory. See AT&T Nov. 23, 1998 Opposition at 24.

²⁶⁷ As discussed below, GTE launched a national advertising campaign, and the company's traditional advertising strategy has emphasized "national, strategic branding." See *Sprint* Nov. 23, 1998 Petition at 19-20.

local telephony.²⁶⁸ As discussed below, this is indicated by GTE's own entry plans.²⁶⁹

109. *GTE's Out-of-Region Plans.* In addition to having the capability to do so, we conclude that GTE also possesses the incentives to be a most significant participant in the mass market for local exchange and exchange access services in Bell Atlantic's region, particularly in Pennsylvania and Virginia. By 1998, when it announced the proposed merger with Bell Atlantic, GTE had entered and was providing service as a competitive LEC in the small business market for local exchange and exchange access services in several states spread across the territories of each Bell Operating Company (BOC) with the exception of Bell Atlantic.²⁷⁰ In those markets, GTE offered local services through resale, as well as through utilization of proximate wireless switches in certain places.²⁷¹ As with many other competitive LECs that initially enter a market through resale of the incumbent LEC's services, GTE's business plans indicate that it intended to convert its resale activities into facilities-based services as its customer base expanded.²⁷²

110. We find that, absent the merger, it is highly likely that GTE would have continued entering local markets, including Bell Atlantic-controlled markets, and would have continued converting its resale operations into facilities-based service. The fact that prior to the merger announcement GTE had not begun offering local wireline services in Bell Atlantic's region does not establish that it lacked the capabilities and incentives to do so.²⁷³ Rather, GTE's internal documents indicate that it planned to continue expanding its local presence by offering services through resale and by leveraging its existing facilities and wireless and long distance customer bases to offer bundled service packages.²⁷⁴

111. Both Bell Atlantic and GTE are incumbent LECs in substantial geographic areas within Virginia and Pennsylvania. Internal GTE documents indicate that GTE had long-standing plans to enter Bell Atlantic's local markets in each of these states.²⁷⁵ For instance, GTE's competitive LEC had completed interconnection negotiations with Bell Atlantic and submitted interconnection agreements to the Pennsylvania and Virginia state utility commissions for approval.²⁷⁶ Significantly, GTE withdrew its request for approval of its interconnection agreement with Bell Atlantic in Virginia the day before it filed

²⁶⁸ See Appendix C (Summary of Confidential Information). See also *SBC/Ameritech Order*, 14 FCC Rcd at 14754, para. 85.

²⁶⁹ See Appendix C (Summary of Confidential Information).

²⁷⁰ *Id.*

²⁷¹ See *id.*

²⁷² See *id.*

²⁷³ See *SBC/Ameritech Order*, 14 FCC Rcd 14750, para. 78.

²⁷⁴ See Appendix C (Summary of Confidential Information).

²⁷⁵ See *id.*

²⁷⁶ See Appendix C (Summary of Confidential Information). We reject Applicants' argument that because GTE opted into an existing Bell Atlantic interconnection agreement in Virginia pursuant to section 252(i) of the Act, its plans were not concrete. See Bell Atlantic/GTE Dec. 23, 1998 Joint Reply. Adoption of a previously approved interconnection agreement in no way renders the subsequent agreement less meaningful. See Sprint Nov. 23, 1998 Petition at 19.

its application for approval of the merger with this Commission,²⁷⁷ further indicating that GTE would have expanded into Bell Atlantic's Virginia market but for its merger with Bell Atlantic.

112. In addition to its significant presence in Virginia as an incumbent LEC, GTE has a substantial wireless presence in Virginia, with several wireless switches from which it could offer facilities-based local exchange and exchange access services in Bell Atlantic's region. Despite its wireless presence in Pennsylvania being more limited, GTE's wireline presence throughout the state would permit it to implement its competitive LEC's plans to enter adjacent "near-franchise" areas. Although it appears that GTE's plans to enter Bell Atlantic's region suffered several delays during 1998, documents created after the proposed merger was announced indicate that GTE had not abandoned its plans to enter the local markets in either of these states. To the contrary, GTE continued to have definite plans and articulated strategies for entering Bell Atlantic's local markets in 1999.²⁷⁸ Accordingly, we conclude that GTE is a significant market participant in the mass market for local exchange and exchange access service in Bell Atlantic's local markets in Pennsylvania and Virginia.

113. In addition, GTE had long-term plans to expand into many additional states within Bell Atlantic's region. Indeed, at the time of the announcement of the merger, in addition to Pennsylvania and Virginia, GTE's competitive LEC had filed applications for certification as a competitive LEC in Connecticut, Maryland, New Hampshire, New York, Rhode Island, and the District of Columbia.²⁷⁹ Indeed, the Applicants' Supplemental Filing in this proceeding refers to the investment by GTE's competitive LEC of "hundreds of millions [of dollars] in [operational] support systems and other assets needed to compete outside its traditional local telephone service areas."²⁸⁰

114. We are unpersuaded by GTE's contentions that its competitive LEC was pursuing an extremely limited out-of-region presence prior to the merger. Although GTE argues that its competitive LEC's initial launch in California demonstrated stark differences between its business plan and its actual commercial results, causing it to prepare to enter only one out-of-region city in 1999,²⁸¹ GTE's internal documents indicate that it in fact planned to enter several additional markets as a competitive LEC in 1999, including Bell Atlantic's incumbent LEC markets of Pennsylvania and Virginia.²⁸² Similarly, GTE's argument that its competitive LEC's entry plans focused nearly exclusively on reselling its incumbent LEC's services to customers within its own region²⁸³ is belied by the evidence indicating that GTE, in fact, intended to offer local services to small businesses in several states in which its incumbent

²⁷⁷ See *id.*

²⁷⁸ Appendix C (Summary of Confidential Information).

²⁷⁹ See Appendix C (Summary of Confidential Information); See also Sprint Nov. 23, 1998 Petition at 13-16.

²⁸⁰ Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing, Attach. B, Tab 2, para. 3.

²⁸¹ See Bell Atlantic/GTE Dec. 23, 1998 Joint Reply, Attach. B at 6.

²⁸² Appendix C (Summary of Confidential Information).

²⁸³ Bell Atlantic/GTE Dec. 23, 1998 Joint Reply, Attach. B. at 5 ("Consumers were not targeted out-of-franchise because acquisition costs were too high.")

LEC has no presence.²⁸⁴

115. Despite GTE's claims that its competitive LEC was considering canceling many of its out-of-region entry plans because of problems experienced with its competitive LEC's entry into the local market in California, it has presented no evidence to that effect. Rather, documents dated after the announcement of GTE's merger with Bell Atlantic indicate that GTE had extensive competitive local market entry activities planned for 1999.²⁸⁵ Moreover, whatever the merits of GTE's reasons for allegedly scaling back its competitive LEC's activities, none of them is described in contemporaneous documents as a reason for halting its plans for more extended entry. Indeed, there is no indication that GTE would not have continued developing its resale strategy, as well as its plans to begin offering facilities-based service, absent the announcement of the merger with Bell Atlantic. We therefore conclude that GTE's extensive entry plans were ultimately cancelled because it preferred to merge with Bell Atlantic rather than compete on its own in the mass market for local exchange and exchange access services.²⁸⁶

116. We similarly disagree with GTE that its entry into the mass market for local services would have a limited impact on that market because its entry was resale-based.²⁸⁷ Relying on resale operations is a typical initial entry strategy employed by competitive LECs. As we recognized in the *SBC/Ameritech Order*, a competitor's entry by resale can be a necessary first step to facilities-based competition, not a *per se* disavowal of it.²⁸⁸ Nor do we find credible GTE's assertion that it lacks brand name recognition outside of its region. GTE operates in twenty-eight states, offers long distance, wireless, local, and Internet services, and has a decidedly national corporate focus.²⁸⁹ Moreover, we disagree with Applicants' contention that GTE has limited name recognition in Pennsylvania and Virginia.²⁹⁰ Although GTE's brand recognition in Pennsylvania and Virginia on a statewide basis may not approach that of the three largest interexchange carriers that also provide local services, it is likely to be extremely high in the Bell Atlantic areas adjacent to GTE's incumbent LEC operating areas simply because of advertising spillover. In any case, GTE's brand recognition nonetheless is greater than that of other competitive entrants due to its substantial presence in those states as an incumbent LEC and wireless provider. Additionally, GTE retained the services of a national advertising agency to begin implementing a national campaign to assist it with becoming a nationwide integrated provider of local, long distance, wireless, and data products.²⁹¹

117. We also find that, despite having the capability to enter the out-of-region mass market

²⁸⁴ See Appendix C (Summary of Confidential Information).

²⁸⁵ *Id.*

²⁸⁶ See *id.*

²⁸⁷ Bell Atlantic/GTE Dec. 23, 1998 Joint Reply, Attach. B at 5.

²⁸⁸ See *SBC/Ameritech Order*, 14 FCC Rcd at 14751, para. 81.

²⁸⁹ See Appendix C (Summary of Confidential Information).

²⁹⁰ Bell Atlantic/GTE Dec. 23, 1998 Joint Reply at 34.

²⁹¹ See Sprint Nov. 23, 1998 Petition at 19-20.

within GTE's service areas, Bell Atlantic lacked the incentive to enter that market. The record does not indicate that Bell Atlantic had any specific or concrete plans to enter the mass market for local exchange and exchange access services in GTE's service areas.²⁹² Moreover, we note that because it contains largely rural and less populated areas and contains few concentrated geographic areas, GTE's local markets are not as attractive for entry as are those of Bell Atlantic. Accordingly, we do not find that Bell Atlantic is a most significant market participant in GTE's territory.

118. With respect to other significant market participants, we reaffirm our finding in prior decisions that the three largest interexchange carriers, AT&T, MCI WorldCom, and Sprint are among the most significant participants in the mass market for local exchange and exchange access services.²⁹³ We find that each of these firms each has the capabilities, incentives, and stated intentions to serve the mass market for local exchange services. Because each of these three firms has a substantial base of residential customers of their long distance services and established brand names resulting from their marketing of these services, they are among the best positioned to provide local services to residential customers. Furthermore, their stated intentions to begin serving the mass market for local services underscores their position as being among the most significant competitors.²⁹⁴ Nevertheless, in certain regions, such as adjacent territories or cellular markets, where incumbent LECs have brand name and/or customer base advantages similar to those enjoyed by the interexchange carriers with their customers, incumbent LECs have the additional advantage of their experience in providing local services to mass market customers as incumbent LECs.

119. Finally, as in previous merger orders, we conclude that other firms currently serving or planning to serve the mass market for local exchange and exchange access services out-of-region are not yet included in the list of most significant market participants.²⁹⁵ Competitive LECs have begun serving residential markets but do not yet have the existing customer base and brand name that enable AT&T, MCI WorldCom, and Sprint, as well as certain incumbent LECs, to become most significant competitors.

(ii) Larger Business Market

120. We find that the larger business local exchange market has a number of market participants with similar incentives and capabilities as an incumbent LEC expanding out-of-region. As the Commission found in earlier orders, incumbent LECs still dominate the market for local exchange and exchange access services sold to larger business customers in their regions and are therefore most significant market participants.²⁹⁶ We recognize, however, that in contrast to the relative lack of competition incumbent LECs face in the market for local services sold to mass market customers, incumbent LECs face increasing competition from numerous new facilities-based carriers in serving the

²⁹² See Appendix C (Summary of Confidential Information).

²⁹³ See *SBC/Ameritech Order*, 14 FCC Rcd at 14754, para. 87; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20029, para. 82.

²⁹⁴ *SBC/Ameritech Order*, 14 FCC Rcd at 14754, para. 87.

²⁹⁵ See *SBC/Ameritech Order*, 14 FCC Rcd at 14755, para. 88.

²⁹⁶ See *WorldCom/MCI Order*, 13 FCC Rcd at 18123, para. 172; *AT&T/TCG Order*, 13 FCC Rcd at 15250, para. 26.

larger business market.²⁹⁷

121. Because the record demonstrates that Bell Atlantic undertook significant efforts to win large business customers in GTE's region in Virginia, we conclude that Bell Atlantic is one of the more significant market participant in the larger business market for local exchange and exchange access services in GTE's service area.²⁹⁸ Similarly, GTE is likely to have pursued a number of its large business customers in out-of-region states in Bell Atlantic's territory, as documented by GTE's plans to offer local exchange services.²⁹⁹ Unlike in the mass market for local exchange and exchange access services, however, a large number of other firms may have similar capabilities and incentives expanding out-of-region to serve larger business customers.³⁰⁰ As we have noted previously, the larger business market for local exchange and exchange access services differs from the mass market.³⁰¹ Larger business customers in general tend to be more sophisticated and knowledgeable purchasers of telecommunications services than mass market customers.³⁰² Finally, broad-based brand name recognition and mass advertising are less important in attracting larger business customers,³⁰³ and, as a result, many more firms are entering the larger business market successfully than are entering the mass market for local exchange services.

b. Public Interest Analysis

122. Applying our analysis to the proposed transaction, we conclude that eliminating GTE as an actual or potential participant in the mass market for local exchange and exchange access services in Bell Atlantic's region, particularly in Pennsylvania and Virginia, results in a significant public interest harm by frustrating the Communications Act's objective of fostering greater competition in the markets for those services. More specifically, we find that the merger of Bell Atlantic and GTE is likely to cause a significant public interest harm by reducing the level of competition in the mass market for local exchange and exchange access services. One of the major purposes of the Act is to lower the entry barriers that gave incumbent LECs monopoly control over the local services offered to customers in

²⁹⁷ See *SBC/Ameritech Order*, 14 FCC Rcd at 14755, para. 89; *WorldCom/MCI Order*, 13 FCC Rcd at 18123, para. 172.

²⁹⁸ See Appendix C (Summary of Confidential Information).

²⁹⁹ See *id.*

³⁰⁰ The list of market participants with the capabilities and incentives to provide local exchange services to larger business customers includes the largest interexchange carriers.

³⁰¹ See *SBC/Ameritech Order*, 14 FCC Rcd at 14755-56, paras. 89-91; See also *WorldCom/MCI Order*, 13 FCC Rcd 18119, para. 164; *AT&T/TCG Order*, 13 FCC Rcd 15257, para. 38. AT&T/TCG, with its combination of AT&T's capital resources and existing base of business long distance customers along with TCG's local exchange facilities and existing base of business local exchange customers, is a significant competitor in the local market for larger business customers. Similarly, with its combination of MCI's business customer base and local facilities along with WorldCom's competitive LEC assets (including Brooks Fiber and MFS), MCI WorldCom is also a significant competitor in the larger business local exchange market.

³⁰² A significant difference between the mass market for local services and the larger business market for local services is that larger business customer purchases are not limited to a single local metropolitan geographic area; rather, they purchase simultaneously in numerous local markets.

³⁰³ See *AT&T/TCG Order*, 13 FCC Rcd at 15257, para. 39; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016, para. 53.

their regions. The Act's goal is to introduce competition in these markets to the ultimate benefit of customers, both as entrants attempt to win consumers' business with lower prices and improved services and as incumbents are forced in turn to respond to the entrants or lose customers. The potential for achieving these goals is jeopardized if the incumbent and one of the most significant competitors in its region choose to merge instead of compete. This is true even where the competitor has not entered the market during the transitional period when entry barriers are being eliminated, for the merger will eliminate future entry and any corresponding competitive restraint it would place on the incumbent.

123. As discussed above, we base our conclusion on the following. First, until the merger was negotiated, GTE was implementing plans to enter the mass market for local services in both Pennsylvania and Virginia. Second, we conclude that GTE was among the most significant potential competitors to Bell Atlantic in Pennsylvania and Virginia. We base this finding on our determination that, as an incumbent LEC, GTE has the operational experience to be able to offer local exchange services on a large scale in out-of-region markets. In addition, GTE has a number of advantages for entering Bell Atlantic's territory in Pennsylvania and Virginia, including its substantial wireless customer base, brand reputation, and adjacency to those regions. Additional most significant potential market participants in the mass market for local services in Pennsylvania and Virginia are limited to the major interexchange carriers that are able to capitalize on their brand name and existing customer base.³⁰⁴ We thus conclude that the merger will eliminate GTE as one of a very limited number of most significant market participants in the mass market for local services in Pennsylvania and Virginia and, therefore, will result in a public interest harm.³⁰⁵

124. Additionally, we further conclude that the proposed merger will likely result in the elimination of GTE as a significant market participant in other states within Bell Atlantic's region. As discussed above, the record indicates that GTE's competitive LEC had long-term plans to expand its operations into many states in which Bell Atlantic is the incumbent LEC. In view of the advantage of GTE's operational experience as both an incumbent LEC and a competitive LEC, we find that GTE had the capabilities and incentives to further expand into the mass market for local services in Bell Atlantic's region.

125. Accordingly, we conclude that the merger of Bell Atlantic and GTE results in the loss of a most significant potential competitor in the provision of mass market local exchange services in portions of Bell Atlantic's region, resulting in a potential public interest harm. The harm is significant because GTE is among a very few firms that are able to enter a market dominated by an entrenched monopolist that are equipped with genuine abilities to challenge that monopolist. Without accompanying conditions, we therefore would be forced to conclude that the proposed merger does not serve the public interest.

³⁰⁴ See *SBC/Ameritech Order*, 14 FCC Rcd at 14758, para. 95; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20024, para. 70.

³⁰⁵ In doing so, we recognize that the Department of Justice did not find any basis for a case of actual potential competition with regard to the proposed merger of Bell Atlantic and GTE. We note, however, that as discussed above, the public interest standard that governs the Commission's review is broader than the antitrust analysis undertaken by the Department. In particular, as described herein, we find that the merger may contravene the intent of the 1996 Act by delaying the future development of competition or lessening its eventual impact.

126. With respect to the provision of local exchange access services to larger business customers, we conclude that, absent the merger, GTE is likely to have followed a number of its large business customers in a number of out-of-region states in Bell Atlantic's territory, as documented by GTE's plans to offer local exchange services. Additionally, Bell Atlantic had demonstrated plans to win large business customers in GTE's service areas and would likely have continued its plans absent the merger.³⁰⁶ At the same time, however, we also conclude that there are a number of significant competitors equally competitive with Bell Atlantic and GTE in these larger business markets.³⁰⁷ Therefore, although Bell Atlantic and GTE are significant market participants, they are not among a limited number of most significant market participants. Accordingly, we do not find that the merger will substantially frustrate the goals of the Act and by reducing competition in the provision of local exchange and exchange access services to larger business customers.³⁰⁸

C. Comparative Practices Analysis

127. In this section, we analyze the effect of the proposed merger on the ability of regulators and competitors to use comparative analyses of the practices of similarly situated independent incumbent LECs to implement the Communications Act in an effective, yet minimally intrusive manner. As the Commission explained in the *SBC/Ameritech Order*, comparative practices analyses, also referred to as "benchmarking," provide valuable information regarding the incumbents' networks, operating practices and capabilities to regulators and competitors seeking, in particular, to promote and enforce the market-opening measures required by the 1996 Act and the rapid deployment of advanced services.³⁰⁹ Without the use of this tool, regulators would be forced, contrary to the goals of the 1996 Act and similar state laws, to engage in less efficient, more intrusive regulatory intervention in order to promote competition and secure quality service at reasonable rates for customers.³¹⁰ We find that the proposed merger of Bell Atlantic and GTE would pose a significant harm to the public interest by severely handicapping the ability of regulators and competitors to use comparative practices analysis as a critical, and minimally intrusive, tool for achieving the objectives of the 1996 Act.

128. The Commission's public interest test considers, among other things, "whether the merger. . . would otherwise frustrate our implementation or enforcement of the Communications Act and federal communications policy."³¹¹ In previous incumbent LEC mergers, the Commission has recognized that the declining number of independently-owned major incumbent LEC's limits the

³⁰⁶ See Appendix C (Summary of Confidential Information).

³⁰⁷ See *SBC/Ameritech Order*, 14 FCC Rcd at 14760, para. 100; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20022, para. 65.

³⁰⁸ See *WorldCom/MCI Order*, 13 FCC Rcd at 18074, para. 86; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20022, para. 65. We note, further, that this conclusion undermines the Applicants' argument that a potential public interest benefit would result post-merger from Applicants following their larger business customers out-of-region. Cite. A number of firms, including Bell Atlantic and GTE, are already providing or could provide local exchange and exchange access services to these customers.

³⁰⁹ *SBC/Ameritech Order*, 14 FCC Rcd at 14760-61, para. 101.

³¹⁰ *Id.* at 14761, para. 101.

³¹¹ *Id.* at 14761, para. 102; *AT&T/TCI Order*, 14 FCC Rcd at 3169, para. 14.

effectiveness of benchmarking for regulators in carrying out the competitive goals of the Communications Act in a less regulatory fashion.³¹² In the *SBC/Ameritech Order*, the Commission concluded that by further reducing the number of major incumbent LEC's, the merger increased the risk that the remaining firms will collude, either explicitly or tacitly, to conceal information and hinder the benchmarking efforts of regulators and competitors.³¹³ Consequently, the Commission expressly noted that the SBC/Ameritech merger posed "a significant harm to the public interest."³¹⁴ The Commission stated that the SBC/Ameritech "merger would result in dangerously few RBOC and major incumbent LEC benchmarks,"³¹⁵ and posed "grave harms" to the regulatory processes and the operation of the 1996 Act's interconnection requirements.³¹⁶

129. Following the concerns expressed in prior merger orders, we must consider the effect that a further reduction in the number of large incumbent LEC's would have on the ability of regulators and competitors to use comparative practices analyses as a deregulatory means to advance the pro-competitive goals of the Communications Act.³¹⁷ We find, as the Commission concluded in the *SBC/Ameritech Order*, that the major incumbent LECs (RBOCs and GTE), because they face similar statutory obligations and market conditions, remain uniquely valuable benchmarks for assessing each other's performance.³¹⁸ Thus, a reduction in the few remaining major incumbent LECs would restrict the flow of information to regulators and competitors that otherwise could be used to promote innovative and deregulatory market-opening solutions or to identify and curtail unreasonable and discriminatory behavior that frustrates Congress' goal of encouraging vibrant competition.³¹⁹

130. As discussed in greater detail below, we find that the proposed merger's elimination of GTE and Bell Atlantic as separate independent major incumbent LECs,³²⁰ will adversely impact the ability of this Commission, state regulators and competitors to use comparative practices analyses to develop beneficial, pro-competitive deregulatory approaches to open telecommunications markets to competition and to promote rapid deployment of advanced services. More specifically, the loss of GTE and Bell Atlantic as separate independent sources of comparative practices analysis, and the increased

³¹² *SBC/Ameritech Order*, 14 FCC Rcd at 14761, para. 102; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19994, para. 16; *SBC/SNET Order*, 13 FCC Rcd at 21292, para. 21.

³¹³ *SBC/Ameritech Order*, 14 FCC Rcd at 14762, para. 104. In the *Bell Atlantic/NYNEX Order*, the Commission stated that further reduction of the number of RBOCs is problematic because "the potential for coordinated behavior increases and the impact of individual company actions on our aggregate measures of the industry's performance grows." *Bell Atlantic/NYNEX Order* 12 FCC Rcd at 20062-63, para. 156.

³¹⁴ *SBC/Ameritech Order*, 14 FCC Rcd at 14761, para. 101.

³¹⁵ *Id.* at 14792, para. 179.

³¹⁶ *Id.* at 14795, para. 185.

³¹⁷ See *SBC/Ameritech Order*, 14 FCC Rcd at 14761, para. 103; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 1994, para. 16; *SBC/SNET Order*, 13 FCC Rcd at 21292, para. 21; *SBC/PacTel Order*, 12 FCC Rcd at 2624, para. 32.

³¹⁸ *SBC/Ameritech Order*, 14 FCC Rcd at 14761-62, para. 103.

³¹⁹ *Id.* at 14762, para. 103.

³²⁰ Bell Atlantic and GTE state that their merger "is a true merger of equals and not an outright acquisition." Bell Atlantic/GTE Jan. 2000 Supplemental Filing at 25.

incentive for the merged entity to reduce autonomy at the local operating company level, would severely restrict the diversity of practices that regulators and competitors could observe and, where pro-competitive and less regulatory, endorse. By further reducing the number of major incumbent LECs, the merger also increases the risk that the remaining firms will collude, either explicitly or implicitly, to conceal information and thereby hinder regulators' and competitors' ability to benchmark.³²¹ We therefore conclude that the proposed merger of Bell Atlantic and GTE would impede the ability of regulators and competitors to effectively benchmark, precipitating more intrusive, more costly and less effective regulatory schemes, contrary to the deregulatory aims of the 1996 Act and the interests of regulated firms, consumers and taxpayers.

131. Our analysis of the effect on comparative practices analysis of the Bell Atlantic/GTE merger is comprised of: (1) the need for comparative practices analyses to offset the informational disadvantage of regulators and competitors; (2) the impact of a reduction in the number of comparable firms on benchmarking's effectiveness; (3) the adverse impact of the proposed Bell Atlantic/GTE merger on the effectiveness of benchmarking; and (4) the current inadequacy of other alternatives to large incumbent LEC benchmarks.

1. Need for Comparative Practices Analyses

132. Comparative practices analyses of the practices and performances of similarly situated incumbent LECs, yield a plethora of valuable information for regulators and competitors. The 1996 Act requires regulators to oversee the opening of local telecommunications markets to competition and to promote rapid deployment of advanced services under circumstances in which regulators possess far less accurate and less complete information than incumbent LECs about the capabilities and constraints of existing networks.³²² Without such information, regulators and competitors may not be able to make well informed decisions regarding the feasibility and costs of certain interconnection or access arrangements, particularly when disputes arise over the introduction of new technologies or services.³²³ The incumbent LEC's superior knowledge also give it a tangible advantage over competitors in negotiating prices, terms, and conditions for interconnection or network access.³²⁴

133. In the *SBC/Ameritech Order*, we established the need for and importance of comparative practices analyses.³²⁵ Absent the ability to benchmark among major independent incumbent LECs, this Commission and state regulators would very likely have to engage in highly intrusive and time consuming regulatory practices, such as investigating the challenged conduct directly and at substantial cost to make an assessment regarding its feasibility or reasonableness.³²⁶ The

³²¹ See also *SBC/Ameritech Order*, 14 FCC Rcd at 14762, para. 104.

³²² *Id.* at 14762-63, para. 106.

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.* at 14762-67, paras. 106-17

³²⁶ As Sprint points out, without benchmarking, the Commission would have to employ far more intrusive measures, including document and *in personae* subpoenas, more after-the-fact complaint adjudication, or on-the record hearings. Sprint Nov. 23, 1998 Petition at 52-53.

increased need for such direct regulation would not only be more costly, but would clash with the deregulatory goals of the 1996 Act.³²⁷ Furthermore, these more intrusive, time consuming, and costly regulatory alternatives are unlikely to be as effective as comparative practices analysis in implementing the pro-competitive mandates of the 1996 Act, given the rapid evolution of technology, the incumbent LECs' informational advantage and their incentive to conceal such information.

2. Effect of Reduction in Number of Benchmarks

134. In order to devise a variety of policies and practices for regulators and competitors to observe and analyze, comparative practices analysis requires a large number of comparable independent sources of observation. For this reason, mergers between benchmark firms significantly weaken the effectiveness of this pro-competitive, deregulatory tool. Removing a benchmark firm through a merger reduces the independence of the sources of observation at three levels: (a) the holding company level, as policies of each of the merging firms conflicts with the other's; (b) the local operating company level, as the merged company's incentive to impose uniform practices throughout its expanded region increases; and (c) the industry level, as the incentives and capabilities of the few remaining major incumbent LECs to coordinate their behavior increase. In addition, the loss of an independent incumbent LEC will have a greater impact on reducing benchmarking's effectiveness the larger the region of the combined entity and the smaller the number of similarly-situated firms remaining following the merger.

a. Effect at Holding Company Level

135. A merger of two large incumbent LECs obviously eliminates an independent source of observation at the holding company level. The combined entity is unlikely to continue with two sets of policies and practices where the dual policies conflict with one another. Instead, it is likely to eliminate any divergent approaches in favor of a standard policy (which may represent a choice between the two firms' positions, or a compromise). Consequently, as the Commission explained in the *Bell Atlantic/NYNEX Order*, the result of the merger may be a reduction in the level of experimentation and variety of approaches observable to regulators and competitors.³²⁸

136. When only a few similarly-situated benchmark firms remain, the harms to benchmarking increase more than proportionately with each successive loss of a firm as an independent source of observation.³²⁹ As the number of independent sources of observation declines, there is less likelihood that one of these firms will emerge to undertake a strategic or management decision that departs from the other incumbents, and that may establish a best practice in the industry. Moreover, the observed best practice is likely to become worse simply because there are fewer observations.³³⁰ Finally, as the

³²⁷ See *id.* at 53-54.

³²⁸ *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20060-62, paras. 152-54.

³²⁹ See *id.* at 20062-63, para. 156.

³³⁰ The Applicants contend that in many instances, a merger will have no effect on a best-practices benchmark. Bell Atlantic/GTE Dec. 23, 1998 Joint Reply App. F, Declaration of Kenneth J. Arrow at para. 37 (Bell Atlantic/GTE Arrow Decl.). While the Applicants' contention has merit in theory, the argument breaks down when applying it to the present merger. The Bell Atlantic/GTE merger will reduce the number of major incumbent benchmarks from five to four, thus significantly reducing the sample size of observations available for benchmarking. The reduction in (continued....)

number of independent sources of observation decreases, deviations from average practices can be identified less confidently as unreasonable and punishable.

137. Having a significant number of independent points of observation is especially crucial for regulators and competitors in decisions regarding new services and innovative technologies. Such decisions are likely to entail forecasting the expected benefits, costs, timing, and problems associated with the provision, maintenance, and interconnection of such new services and new technologies. Although it is impossible to make such predictions with certainty, the existence of numerous major incumbent LECs increases the information available to regulators in evaluating whether or when to require the offering and interconnection of the new service or technology, and in setting interconnection standards, terms, conditions, and rates. Conversely, having few major incumbent LECs to serve as independent points of observation can undermine the credibility of such determinations.

b. Effect at Operating Company Level

138. A merger of two holding companies is likely to reduce the relative autonomy of their local operating companies and hence the overall level of experimentation and diversity for decisions that were made at the operating company level. This is because a holding company's size increases, the cost it incurs when one of its operating companies' practices is used as a benchmark against the rest of the company also increases. For example, if each of the merging firms previously had five local operating companies, then each of these holding companies would have been concerned only with the cost of adopting a benchmark practice for its four other operating companies. Following the merger, however, the holding company would have to consider the cost of adopting this benchmark practice for a total of nine other operating companies. Accordingly, as a holding company acquires more operating companies and its service region expands, it has an increased incentive to ensure that all of its operating companies' policies are uniform and consistent with each other and with those of the holding company.

139. Where a merger creates an incumbent LEC of sufficient size to dominate the setting of industry averages and standard practices, which are based on data from operating companies, the merged firm acquires an incentive to impose uniform practices in order to influence or set the *de facto* average benchmark. An incumbent LEC with few operating companies, for example, may allow its local operating companies to set the non-recurring charge (NRC) associated with cutting over a loop, because the data from its operating companies will have negligible impact on the industry average. If, however, as a result of a merger, the holding company controlled a large percentage of the nation's local loops, then it would have a strong incentive to establish a uniform NRC in order to influence the industry average.³³¹ The result would be a loss of independent sources of observation for regulators and competitors seeking to use comparative practices analyses, rather than intrusive and expensive regulation, to promote competition and rapid deployment of advanced services.

(Continued from previous page) _____

benchmarks also increases the ability for firms to either tacitly or explicitly engage in suboptimal behavior that would reduce the effectiveness of best practices benchmarking, and result in a less beneficial "best practice." See, e.g., Nov. 23, 1998 Petition at 47-49; Letter from Michael Jones, Willkie Farr & Gallagher, Counsel to Sprint, to Magalie Roman Salas, Secretary, FCC (filed Apr. 12, 1999) (Sprint Apr. 12, 1999 *Ex Parte* Letter), Farrell & Mitchell Attachment at 20.

³³¹ See *SBC/Ameritech Order*, 14 FCC Rcd at 14768, para. 120 & n.236.

c. Effect at Industry Level

140. A reduction in the number of independently owned major incumbent LECs as a result of a merger increases the likelihood of coordination, either tacit or explicit, among the remaining firms in the industry for the purposes of reducing the effectiveness of comparative practices analyses. As general antitrust principles indicate, collusion is more likely to occur where only a few participants comprise a market and entry is relatively difficult.³³² This is due in part to the fact that, with fewer firms, less potentially divergent interests must be accommodated by the coordinated behavior. On the other hand, with a large number of competitors and low barriers to entry, coordinated behavior is less likely.³³³

141. In the context of comparative practices analysis, we expect that having fewer benchmark firms would result in the remaining firms being better able to coordinate their behavior. In this situation, the coordination of behavior could be designed not to raise price, but, rather, to conceal information concerning operating practices (particularly concerning interconnection), and strategic behavior (particularly dealing with nascent competitors) from regulators, and thereby impede the development of a competitive, less regulatory market. Unlike coordinated pricing activity, where each participant has a unilateral incentive to cheat on the agreement in order to raise its profits, no such incentive to cheat exists with respect to an agreement, tacit or explicit, to behave in a uniform way to conceal market-opening information from a regulator.

142. By reducing the number of benchmark firms, and thereby simplifying coordination of operational and strategic behavior, a merger between major incumbent LECs facilitates the ability of the remaining firms to conceal information to thwart the effectiveness of benchmarking.³³⁴ The remaining firms will find it easier to coordinate the withholding of certain types of information and the elimination of divergent operational practices that regulators and competitors could use in comparative practices analyses. For example, tacit coordination among fewer major incumbent LECs may make it easier for the remaining firms to agree not to provide a certain type of interconnection or access arrangement in

³³² See F. M. Scherer and D. Ross, *Industrial Market Structure and Economic Performance* 277-315 (3rd Ed., 1990); A. Jacquemin and M. Slade, "Cartels, Collusion, and Horizontal Merger," published in R. Schmalensee and R.D. Willig, *Handbook of Industrial Organization*, Vol. 1 (1989).

³³³ Applying these principles, the Commission has recognized that the markets for local exchange and exchange access services, traditional monopolies collectively dominated by major regional holding companies, are conducive to coordinated interaction. See *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20047, para. 122 (concluding "that the risk of coordinated interaction is particularly high in the markets in which Bell Atlantic and NYNEX compete.").

³³⁴ Because each successive reduction in the number of benchmarks will reduce the utility of comparative practices analyses, there will be some point at which further reduction in benchmark firms renders such comparisons ineffective. In the *Horizontal Merger Guidelines*, the Department of Justice and the Federal Trade Commission set a threshold of market concentration according to an 1800 HHI, approximately the equivalent of six equally-sized firms. "Where the post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise." In such a market, a merger that reduces the number of competing firms from six to five is therefore likely to be challenged as raising serious concern regarding unilateral and coordinated effects. A merger that reduces the number of competing firms from five to four raises even greater concerns. Analogously, using a market which consists not of competing firms but of benchmark firms, reducing the number of benchmark firms from five to four, is likely to raise grave concern with respect to coordinated efforts to defeat benchmarking, which are more likely to succeed here than in competitive markets where each firm faces potential gain from unilateral deviation. *Horizontal Merger Guidelines*, Department of Justice and Federal Trade Commission (1997); *SBC/Ameritech Order*, 14 FCC Rcd at 14769-70, n.240.

order to prevent regulators and competitors from concluding that such arrangement is technically and practically feasible because another major incumbent is providing it. In this way, further consolidation among the major incumbent LECs could severely curtail regulators' abilities to constrain any tacit or explicit coordination by these incumbents to impede comparative practices analyses, especially as regulators seek to open the incumbents' markets to competition.

3. Adverse Effects of Bell Atlantic/GTE Merger

143. We conclude that the merger of Bell Atlantic and GTE will have an adverse impact on the ability of regulators and competitors to employ comparative practices analyses, which ultimately would force regulators to substitute more intrusive, more costly, and less effective methods of regulation to the detriment of the public interest. We now examine the merger's likely impact upon the diversity of approaches among major incumbent LECs to comply with the Communications Act and adopt market-opening measures (a) at the holding company level, (b) at the local operating company level, and (c) at the industry level.

a. Loss of GTE as Independent Holding Company

144. We find that, with only five major incumbent LECs remaining today (the RBOCs and GTE), the elimination of an independent source of observation impairs the ability of regulators and competitors to use comparative practices analyses to facilitate implementation of the Communications Act. Moreover, by reducing the number of major incumbent LECs, the merger makes it less likely that deviations from the average benchmark will be identified confidently as unreasonable and punishable.

145. We reject the Applicants' arguments that GTE's service areas are highly dispersed and largely rural, thus differentiating GTE from Bell Atlantic for benchmarking purposes.³³⁵ As an initial matter, we note that GTE has been selling many of its rural exchanges to other independent local telephone companies.³³⁶ Thus, on a going forward basis, it appears that GTE's service area is becoming increasingly less rural in nature. Similarly, we reject the Applicants' contentions that "GTE's value as a benchmark for RBOCs is limited,"³³⁷ and that the 1996 Act has created a far greater number of benchmarks than the seven RBOCs created by the MFJ.³³⁸ As we stated above and in license transfer proceedings associated with other RBOC mergers, the major incumbent LECs (RBOCs and GTE),

³³⁵ Bell Atlantic/GTE Mar. 16, 2000 Joint Reply at 8. *But see* AT&T Mar. 1, 2000 Comments at 12 (refuting Applicants' claim that GTE is not similarly situated with the RBOCs, and that GTE's service area is predominantly rural by stating "[s]uch claims are unbelievable on their face. Indeed, it is apparent that even Applicants themselves do not believe this, for later in their filing they announce that this is a 'true merger of equals.'").

³³⁶ *See, e.g., Comments Invited on GTE Southwest Incorporated's Application to Discontinue Local Exchange and Exchange Access Service for Certain Exchanges in New Mexico*, Public Notice, NSD File No. W-P-D-457 (rel. Mar. 24, 2000).

³³⁷ Bell Atlantic/GTE Mar. 16, 2000 Joint Reply at 9; Bell Atlantic/GTE Dec. 23, 1998 Joint Reply at 40. *But see* CoreComm Mar. 1, 2000 Comments at 13 (citing Commission orders stating that the Commission has consistently relied upon GTE in establishing benchmark rates, terms and conditions).

³³⁸ Bell Atlantic/GTE Dec. 23, 1998 Joint Reply at 39. *See also* Bell Atlantic/GTE Arrow Decl. at para. 6 (stating that the 1996 Act and the widespread deployment of facilities and services by competitive LECs, have reduced the importance of the traditional types of benchmarks relied on by the Commission and other regulatory bodies).

because they face similar statutory obligations and market conditions, remain uniquely valuable benchmarks for assessing each other's performance.³³⁹ Instead, we find that the dispersed nature of GTE's service area makes it much more valuable as a benchmark, because it operates under a wide range of geographic, regulatory, and economic conditions. Moreover, GTE owns about 11% of customer loops in the United States, far more than any smaller independent LEC or competitive LEC, and comparable to the other major incumbent LECs.³⁴⁰

146. We also reject the Applicants' argument that the merger represents "but a small loss in the effectiveness of one regulatory tool."³⁴¹ This proposed merger cannot be evaluated in a vacuum. Rather, it must be examined in the context of recent developments in the telecommunications marketplace. Specifically, less than a year ago, the Commission concluded that the SBC/Ameritech merger would remove "another independent source of experimentation and diversity,"³⁴² and that regulators and competitors would lose the problem-solving opportunities that flow from this diversity of approaches.³⁴³ The Bell Atlantic/GTE merger exacerbates this problem by further diminishing our regulatory capabilities.

b. Loss of Independence of Operating Companies

147. We find that, although the actual number of operating companies may not diminish following the merger of Bell Atlantic and GTE, the combined entity will have greater incentive to unify the practices of these companies, resulting in an overall loss of independence at the operating-company level, and in fewer independent points of observation for regulators and competitors.

148. The merged firm also will have a greater incentive to coordinate decisions made at the local operating company level in order to affect the outcome of average-practices benchmarking. The merger of Bell Atlantic and GTE would create the largest incumbent LEC controlling more than one-third of access lines nationwide.³⁴⁴ Because the merged firm would be disproportionately large compared to other incumbent LECs, the aggregate data reported by it will have a direct impact on the industry's average benchmarks. Thus, the merged firm will have both the capability and incentive to skew its decisions in order to affect the average benchmark strategically. Moreover, the merged firm's size could cause it to dominate the standards-setting process and establish *de facto* standards that

³³⁹ See *SBC/Ameritech Order*, 14 FCC Rcd at 14761-62, para. 103; *Bell Atlantic/NYNEX Order* at 19994, para. 16.

³⁴⁰ *Trends in Telephone Service, March 2000*, Tables 20.2 & 20.3, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission. See also Sprint Apr. 12, 1999 *Ex Parte* Letter, Farrell & Mitchell Attachment, Table.

³⁴¹ Bell Atlantic/GTE Dec. 23, 1998 Joint Reply at 38.

³⁴² *SBC/Ameritech Order*, 14 FCC Rcd at 14781, para. 146.

³⁴³ See also *id.* at 14781, para. 147 (stating that "[t]he record from prior RBOC mergers shows that, after both mergers, the acquiring firm quickly eliminated certain policies of the acquired company that were in conflict with those of the acquiring company."); AT&T Mar. 1, 2000 Comments at 15.

³⁴⁴ *Trends in Telephone Service, March 2000*, Tables 20.1, 20.2 & 20.3, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission; Bell Atlantic/GTE May 22, 2000 *Ex Parte* Letter; Bell Atlantic 1999 Annual Report at 6. See also Sprint Apr. 12, 1999 *Ex Parte* Letter, Farrell & Mitchell Attachment – Table 2; BlueStar, et al. Mar. 1, 2000 Comments at 2.

advantage itself and disadvantage potential competitors or consumers. The proposed merger could thus seriously undermine the value of average-practices benchmarking among incumbent LECs.

c. Increased Risk of Coordination Among Remaining Major Incumbent LECs

149. The proposed merger, by reducing to four the number of major incumbent LECs, increases the incentive and ability of the remaining incumbents to coordinate their behavior, either explicitly or implicitly, to impede benchmarking, and to resist market-opening measures.³⁴⁵ As an initial matter, the merger of Bell Atlantic and GTE reduces by one the number of independent holding companies whose behavior must be coordinated, which simplifies the process of coordination.³⁴⁶ Coordination requires that the incentives of all parties are aligned, and reducing the number of companies reduces the number of incentives that must be aligned.³⁴⁷

150. Reducing the number of firms also increases each firm's incentive to coordinate its behavior to undermine regulatory processes.³⁴⁸ Specifically, the merged firm will have a greater incentive to enter into tacit agreement with the remaining firms to convey minimal information to regulators and/or competitors and to eliminate outlying policies and practices that could become industry benchmarks.³⁴⁹ Moreover, the merger will create a demonstrably large incumbent LEC that can act as an industry leader for collusive purposes.³⁵⁰

151. As a result of Bell Atlantic's merger with GTE, the other major incumbent LECs will also have more incentive to cooperate in attempts to impede comparative practices analysis.³⁵¹ Cooperative ventures, either explicit or implicit, involve the risk that one or more parties will deviate from the cooperative behavior, thereby spoiling the venture.³⁵² With the cooperation of fewer firms necessary, the merger reduces the risk that a venture will fail.³⁵³ By reducing the number of major incumbent LEC benchmark firms to four, each firm has more incentive to cooperate and less unilateral incentive to break an implicit or explicit agreement to impede benchmarking.³⁵⁴ Thus, the proposed merger will facilitate any attempts, especially implicit attempts, to coordinate behavior to conceal forms of competitive deterrence from regulators and competitors.³⁵⁵ The merger of Bell Atlantic and GTE

³⁴⁵ See *SBC/Ameritech Order*, 14 FCC Rcd at 14785, para. 156.

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 14785, para. 157.

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ See *id.* at 14785, para. 158.

³⁵² See *id.*

³⁵³ See *id.*

³⁵⁴ See *id.*

³⁵⁵ See *id.* at 14785-86, para. 158.

therefore increases the incentive and abilities of the merged firm and other incumbent LECs to cooperate in becoming less effective benchmarks for regulators and competitors seeking to promote competitive entry and rapid deployment of advanced services.³⁵⁶

4. Continued Need for Major Incumbent LEC Benchmarks

152. Benchmarking among the large incumbent LECs will continue to be a crucial market-opening tool as regulators and competitors carry out the objectives of the 1996 Act. We find that the loss of GTE and Bell Atlantic as relevant independent benchmarks, and the creation of a new merged entity, severely curtails the benchmarking ability of regulators and competitors.³⁵⁷

153. Comparative practices analyses are most effective when the firms under observation are similarly situated, including the size of the firms relative to the size of the market. With comparable firms – *e.g.*, in their customer base, access to capital, network configuration, and the volume and type of demands from competitors – regulators and competitors can establish more effectively that approaches and rates adopted by one incumbent would be equally feasible for other incumbents. Significant variation between the major incumbent LECs and the other carriers cited by the Applicants preclude the use of the latter categories as alternative benchmarks in evaluating the major incumbent LECs' compliance with their statutory obligations.

154. We agree with the broad principle that the methods of comparison may evolve over the course of the transition to full competition in local markets.³⁵⁸ Nonetheless, we find an acute present need for benchmarking to, among other tasks, facilitate implementation of the market-opening measures of the 1996 Act and promote the rapid deployment of advanced services.³⁵⁹ For these types of comparisons, we predict, as we did in the *SBC/Ameritech Order*, that the high percentage of access lines nationwide controlled by the RBOCs and GTE will keep them at the forefront in establishing benchmark rates, terms and conditions for an extended future period.³⁶⁰

a. Inadequacy of Other Firms As Benchmarks Against Major Incumbent LECs

155. We reject the Applicants' contention that other types of firms serve as adequate benchmarks to the major incumbent LECs.³⁶¹ We are not persuaded that the presence of small incumbent LECs and/or competitive LECs eliminate the need for regulators and competitors to make

³⁵⁶ See *id.* at 14786, para. 158.

³⁵⁷ We note that in the context of this merger, the new entity may have new practices, policies and behaviors. While these practices, policies, and behaviors evolve, there is a further loss of benchmarking capability.

³⁵⁸ See Bell Atlantic/GTE Arrow Decl. at paras. 6, 10, 14-19.

³⁵⁹ *SBC/Ameritech Order*, 14 FCC Rcd at 14786, para. 161.

³⁶⁰ *Id.*

³⁶¹ The Applicants repeatedly assert the notion that adequate alternative benchmarks can be found among independent LECs such as Sprint's operating subsidiaries, ALLTEL, Frontier and Cincinnati Bell. Bell Atlantic/GTE Arrow Decl. at para. 20. See also *SBC/Ameritech Order*, 14 FCC Rcd at 14787, para. 162 & n. 313.

direct comparisons among the RBOCs and GTE. The Applicants' arguments ignore vital differences in the 1996 Act's treatment of large incumbent LECs, the RBOCs in particular, as compared with other incumbents and competitive carriers. Equally important, structural and operational differences between these carriers and the major incumbent LECs also make direct comparisons between them inappropriate.

(i) Differences in Regulatory Treatment

156. We conclude that small incumbent LECs and competitive LECs cannot qualify as adequate alternatives to the RBOCs and GTE as benchmarks for implementation of the core market-opening provisions of the 1996 Act. The Applicants fail to explain how smaller incumbent LECs or competitive LECs could substitute for major incumbent LECs in assessing compliance with certain prominent provisions of the 1996 Act. At a minimum, both regulators and competitors have a strong continuing need for separate comparative practices analyses among major incumbent LECs in order to ensure compliance with the 1996 Act.

157. Equally important, we find a pivotal distinction between the section 251 obligations imposed on the major incumbent LECs versus those of competitive LECs. In contrast to the major incumbent LECs that are subject to section 251(c)'s market-opening requirements,³⁶² many of the competitive carriers cited by the Applicants are not subject to full section 251(c) obligations. First, by definition, competitive LECs do not fall within the 1996 Act's definition of an "incumbent local exchange carrier" for the given service area, nor do such carriers own the operative facilities for which interconnection and access is sought.³⁶³ Instead, competitive LECs are subject to the lesser requirements of section 251(b) that are applicable to all LECs.³⁶⁴

158. Second, many of the smaller incumbent LECs fall within section 251(f)'s exemption from certain section 251(c) obligations for rural carriers.³⁶⁵ In the *SBC/SNET Order*, for instance, we concluded that the proposed merger was not likely to adversely affect the public interest in part, because SBC and SNET were not comparable in size. The Commission noted that "SNET is substantially smaller than the 'first tier' LECs -- the BOCs and GTE -- and has long been subject to different regulatory treatment."³⁶⁶ Here, both Bell Atlantic and GTE are among the largest incumbent LECs, and thus are subject to the statutory obligations suitable to those entities. We reiterate, therefore, our finding in *SBC/Ameritech* that regulators and competitors are restricted largely to the class of large

³⁶² See 47 U.S.C. § 251(c) (requiring incumbent LECs to negotiate in good faith and provide, *e.g.*, interconnection, unbundled access to network elements, resale, and collocation).

³⁶³ See 47 U.S.C. § 251(h).

³⁶⁴ 47 U.S.C. § 251(b) (requiring all LECs to allow resale, number portability, dialing parity, access to rights of way, and reciprocal compensation).

³⁶⁵ Under section 251(f), a rural incumbent LEC is exempt from the requirements of section 251(c) until (i) it has received a "bona fide request for interconnection, services, or network elements," and (ii) the state commission determines that "such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254" universal service provisions. 47 U.S.C. § 251(f). See *SBC/Ameritech Order*, 14 FCC Rcd at 14788, para. 166 & n. 319.

³⁶⁶ *SBC/SNET Order*, 13 FCC Rcd at 21302, para. 21 (citing *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6818-20 (1990); 47 U.S.C. § 251(f)(2)).

incumbent LECs, principally the RBOCs and GTE, in making benchmark comparisons under section 251(c).³⁶⁷

(ii) Differences in Structure and Operation

159. We also find that crucial distinctions in structure and operation undermine the value of using smaller incumbents and competitors as benchmarks for the RBOCs and GTE.

160. *Small Incumbent LECs.* We find that, because their service areas include fewer large metropolitan areas and thus tend to be subject to less competitive entry and less demand for budding advanced services, smaller incumbent LECs are not likely to provide useful benchmarks for measuring the market-opening performance of major incumbent LECs. In contrast to the smaller incumbents, the major incumbents, including GTE, often operate in markets characterized by high population density or a large number of business lines, which generally are more attractive to new entrants. The level of competitive activity in a given area can implicate the network architecture or capability required of certain incumbent facilities such as OSS and physical collocation. A small incumbent facing little demand for interconnection, collocation or facilities for advanced services is less likely to have traffic levels or performance measurements that would render meaningful comparisons with a large incumbent who must employ more sophisticated management systems to meet greater demand. Moreover, different market structures may result in different network configurations that limit the usefulness of comparisons. For example, the loop costs of an urban/suburban major incumbent LEC, may not be comparable to those of a small rural incumbent LEC with longer average loops or less densely concentrated customers. Finally, in average-practices benchmarking, no small incumbent LEC could provide an adequate counterpoint to the combined entity's control of one-third of the nation's access lines.

161. *Competitive LECs.* We are not persuaded that competitive LECs presently stand as adequate firms with which to compare the market-opening performance of incumbents. The Applicants' suggestion that competitive LECs can be used as suitable benchmarks for the large incumbent LECs,³⁶⁸ defies the logic, structure, and reality of the 1996 Act.³⁶⁹ As discussed above, a primary motivation behind benchmarking is to increase the level of information regarding the incumbents' networks for competitors seeking access to those facilities, as well as for regulators. Moreover, competitive LECs are pursuing numerous strategies using a variety of wireline and wireless technologies, and their limited facilities are far from comparable to the millions of local lines controlled by the RBOCs and GTE.

162. Despite arguing that competitive LECs can serve as interconnection benchmarks by providing wholesale service to other competitive LECs,³⁷⁰ the Applicants provide no evidence demonstrating that competitive LECs actually are serving as wholesale suppliers in such a way as to generate useful comparisons for incumbent performance. Moreover, even if some competitive LECs

³⁶⁷ *SBC/Ameritech Order*, 14 FCC Rcd at 14788, para. 166.

³⁶⁸ Bell Atlantic/GTE Arrow Decl. at para. 20.

³⁶⁹ *See SBC/Ameritech Order*, 14 FCC Rcd at 14789, para. 170.

³⁷⁰ *See Bell Atlantic/GTE Arrow Decl.* at paras. 14-19.

decide to act as wholesalers, their incentives are likely to differ considerably from those of the incumbents. These new entrants' strategies are directed at expanding their reach and filling their vacant capacity, whereas incumbent LECs are likely to focus first on protecting their customer base from erosion by competitors. Competitive LECs cannot provide useful benchmarking information for the detection of incumbents' subtle forms of resistance to market-opening measures.

163. All of the foregoing factors suggest that comparisons between a major incumbent LEC and a small incumbent or a competitive LEC are less likely to yield the kind of benefits that would flow from comparisons among the RBOCs and GTE. In this regard, we note that the Applicants fail to provide examples where a regulator or competitor has relied on the performance of these claimed benchmark alternatives, as adequate benchmarks against an RBOC or GTE. We therefore reiterate our conclusion that the large incumbent LECs, because they face relatively similar market conditions, remain the principal sources of benchmarks for their own behavior.

b. Inadequacy of Parity Requirements

164. We are also not persuaded by the Applicants' argument that maintaining a large number of major incumbent LECs as benchmarks is no longer necessary because, the relevant benchmarks during the transition to competitive local markets are parity comparisons focusing on how an incumbent LEC treats competitive LECs vis-à-vis itself.³⁷¹ According to the Applicants, "the key inquiry is not whether the BOC is treating competitors as well as another BOC, but whether the BOC is treating competitors as well as it treats itself."³⁷²

165. We certainly agree with the notion that an incumbent LEC's treatment of its retail operations or its affiliates as compared with its treatment of competitors can provide useful benchmarks for regulators and competitors. In certain contexts, such as detecting discriminatory behavior in interconnection, provisioning, and maintenance, parity comparisons provide a useful, and minimally intrusive, way to obtain information regarding an incumbent's performance.³⁷³ As Sprint observes, however, implementation of a parity rule itself may require traditional benchmarking between major incumbent LECs³⁷⁴ -- e.g., in setting mutually acceptable performance standards to determine if an incumbent LEC has complied sufficiently with the parity requirement.

166. While we agree that parity rules are valuable, we nonetheless find that parity considerations cannot substitute for all forms of benchmarking. Parity rules will not serve the public and protect competition if, for example, an incumbent LEC deems it profitable to provide lackluster service

³⁷¹ *Id.* at paras. 7-8.

³⁷² *Id.* at para. 8.

³⁷³ See, e.g., *SBC/Ameritech Order*, 14 FCC Rcd at 14791, para. 175; *Local Competition Order*, 11 FCC Rcd at 15614, para. 224 (Section 251(c)(2)(C) requires an incumbent LEC to provide interconnection between its network and that of a requesting carrier at a level of quality that is at least indistinguishable from that which the incumbent provides itself or any other party). See *Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, Notice of Proposed Rulemaking, 13 FCC Rcd 12817 (1998), at para. 14.

³⁷⁴ Apr. 12, 1999 *Ex Parte* Letter, Farrell and Mitchell Attachment, *Response to Some Criticisms of Benchmarking Analysis*, at 2-4.

or charge excessive rates to both its own retail affiliates and its competitors. For example, without discriminating, the incumbent LEC may profit from imposing high loop charges, or access charges, on both its affiliates and its competitors, because the charges to its affiliates constitute only an internal transfer. While parity requirements attempt to level the playing field, therefore, traditional comparative practices analyses remain necessary to ensure that this level does not sink below an acceptable standard. Moreover, parity rules will not always suffice for innovative entrants. Exclusive reliance on parity rules, for example, could slow the provision of innovative services to the public.

167. For the foregoing reasons, we conclude that parity rules complement, but do not supplant, the use of traditional comparative practices analyses by regulators and competitors. Indeed, if parity alone mattered, as the Applicants' analysis suggests, then all the remaining major incumbent LECs would be permitted to merge into one entity, leaving regulators and competitors unable to compare distinct practices of several independently-owned firms.

c. Sufficiency of Remaining Benchmarks

168. We find that the merger would result in dangerously few major incumbent LEC benchmarks. As BlueStar, DSLNET, KMC and MGC note in their joint comments, after this merger, "there will be three giant carriers controlling 90% or more of the nation's access lines."³⁷⁵

169. With technical feasibility concerns, in particular, the loss of one source of observation could in fact eliminate the single observation that would have proven a particular arrangement feasible.³⁷⁶ This is especially true in making assessments regarding advanced services, where the major incumbent LEC benchmark firms have taken different strategies or are in different stages in terms of their own deployment or cooperation with others. Thus, reducing the number of potential benchmark firms increases the chance that regulators and competitors will lose the ability to observe the decisive benchmark.

170. Although we do not view the instant merger's reduction of the number of major incumbent LECs (the RBOCs and GTE) from five to four to be a presumptive trigger of benchmarking harms, we cautioned in the *SBC/Ameritech and Bell Atlantic/NYNEX Orders*, that these harms increase disproportionately with each additional decline in the number of major incumbent LECs.³⁷⁷ As explained above, along with further restricting diversity, each successive reduction in benchmark firms exponentially increases the risk that the remaining firms could successfully coordinate behavior, implicitly or explicitly, to reduce the effectiveness of comparative practices analyses.³⁷⁸ As the number of benchmarks decrease, the greater the likelihood the Commission must use increasingly intrusive and burdensome regulation to oversee the transition to competitive local markets. As such, each successive pair of major incumbent LEC applicants have a greater burden than the previous incumbent LEC applicants to demonstrate their merger serves the public interest. For example, a merger that reduced the number of major incumbent LECs from four to three would so severely diminish the Commission's

³⁷⁵ BlueStar, et al. Mar. 1, 2000 Comments at 2.

³⁷⁶ See *SBC/Ameritech Order*, 14 FCC Rcd at 14793, para. 181.

³⁷⁷ *Id.* at 14794, para. 183; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20062-63, para. 156.

³⁷⁸ See CompTel Mar. 1, 2000 Comments at 7.

ability to benchmark that it is difficult to imagine that any potential public interest benefit could outweigh such a harm.

5. Conclusion

171. We conclude that, by further reducing the number of separately-owned large incumbent LECs, the proposed merger of Bell Atlantic and GTE would significantly harm the ability of regulators and competitors to rely on comparative practices analyses to carry out their obligations under the Communications Act. The Commission warned in the *Bell Atlantic/NYNEX Order*, and reiterated in the *SBC/Ameritech Order* that “future applicants bear an additional burden in establishing that a proposed merger will, on balance, be pro-competitive and therefore serve the public interest, convenience and necessity.”³⁷⁹ Bell Atlantic and GTE have not overcome that burden.³⁸⁰

172. In particular, the proposed merger of Bell Atlantic and GTE poses a significant potential harm to the public interest by: (1) removing a source of potential diversity from independent major incumbent LECs during the transition to competition; (2) creating an incentive for the combined firm to coordinate behavior at the operating company level, thereby reducing other potential sources of innovation; and (3) increasing the incentive and opportunity for collusion and concealment of information among the few remaining major incumbent LECs.

D. Increased Discrimination

1. Overview

173. In the preceding section, we explained why this merger would seriously weaken oversight of the Applicants’ behavior toward competitors, thus frustrating the Commission’s ability to achieve two of the key public interest goals of the Telecommunications Act: increased competition and reduced regulation. In this section, we conclude that incumbent LECs, such as Bell Atlantic and GTE, have the incentive and ability to discriminate against competitors in the provision of advanced services,³⁸¹ interexchange services, and circuit-switched local exchange services,³⁸² and that such incentive and ability will increase as a result of the merger. This increased incentive and ability to discriminate potentially creates a public interest harm because it may adversely affect national competitors’ provision

³⁷⁹ *SBC/Ameritech Order*, 14 FCC Rcd at 14761, para. 102; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19994, 20061, paras. 16, 153.

³⁸⁰ *See also SBC/Ameritech Order*, 14 FCC Rcd at 14761, para. 102.

³⁸¹ For purposes of this Order, we define the term “advanced services” as we did in the *Advanced Services Further Notice*, to mean “high speed, switched, broadband, wireline telecommunications capability that enables users to originate and receive high-quality voice, data, graphics or video telecommunications using any technology.” *Advanced Services Further Notice*, 14 FCC Rcd at 4762, n.2. The Commission there stated: “[t]he term ‘broadband’ is generally used to convey sufficient capacity -- or ‘bandwidth’ -- to transport large amounts of information. As technology evolves, the concept of ‘broadband’ will evolve with it: we may consider today’s ‘broadband’ services to be ‘narrowband’ services when tomorrow’s technologies appear.” *Id.* For a further description of xDSL technology, *see id.* at paras. 9-12.

³⁸² Throughout this section, “local exchange service,” refers to circuit-switched local exchange service, otherwise known as Plain Old Telephone Service (POTS), rather than services, such as advanced services, based on digital subscriber line technology or packet-switched technology that may have a local component.

of services, and may force consumers to pay more for retail services, with reduced quality and choice.

174. We believe the merger may have particularly harmful, discriminatory effects on competition in the provision of new types of advanced services.³⁸³ Advanced services technologies and markets are still emerging and developing. To maintain the growth of this nascent industry, we must continue to ensure competition in the provision of advanced services. Therefore, we scrutinize carefully the possibility of an increase in incentive and ability to discriminate against competitive providers of such services.³⁸⁴ The information gleaned from this scrutiny informs the Commission, furthers its' efforts to encourage innovation and investment in advanced services,³⁸⁵ and comports with the Commission's obligations under section 706 to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."³⁸⁶

175. As in the SBC-Ameritech merger proceeding, we are concerned with the effects of discrimination on competition in the provision of interexchange services and local exchange services.³⁸⁷ Specifically, we conclude that the combined entity likely will discriminate to a greater extent against termination of interexchange calls by competing providers in the combined region, as well as against competitive LECs seeking to provide local exchange services in the combined region.³⁸⁸ With respect to local exchange competition, we believe that the likelihood of increased harmful discrimination is particularly acute with respect to competitive providers of local exchange services to mass market customers (smaller businesses and residential customers).³⁸⁹

176. Incumbent LECs in general have both the incentive and ability to discriminate against competitors in incumbent LECs' retail markets. This incentive exists in all retail markets in which they participate. Incumbent LECs' ability to discriminate against retail rivals stems from their monopoly control over key inputs that rivals need in order to offer retail services.

177. In many cases, discriminatory conduct by an incumbent LEC in its region affects competitors in areas both inside and outside the incumbent's region. The resulting effects on competitors, externalities or "spillover" effects,³⁹⁰ can directly or indirectly harm customers, whose business the incumbent LEC is seeking to gain. Spillover effects directly harm customers when the incumbent LEC's discrimination in one region negatively affects a customer's communications between

³⁸³ *SBC/Ameritech Order*, 14 FCC Rcd at 14795, para. 187.

³⁸⁴ *Id.* at 14796, para. 187.

³⁸⁵ *Id.* at 14796, para. 187, n.348.

³⁸⁶ *See* Pub.L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157.

³⁸⁷ *See SBC/Ameritech Order*, 14 FCC Rcd at 14796, para. 188.

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ Externalities, or spillovers, arise when an action by one party imposes costs or benefits on another party or parties. *See* Robert S. Pindyck & Daniel L. Rubinfeld, *Microeconomics* (Prentice Hall, 4th ed. 1998) at 648. A classic example of a negative externality is air pollution.

that region and another region.³⁹¹ Spillover effects indirectly harm customers when an incumbent LEC's discrimination in one region increases a national rival's general costs, thereby indirectly impairing the ability of this rival to provide service to customers in other regions.³⁹² Regardless of the nature of the spillover effects, the intended result is to reduce the ability of competitors to acquire and/or keep customers.³⁹³

178. Because after the merger the larger combined entity would realize more of the gains from such external effects, the marginal benefit and corresponding incentive to discriminate in each area would increase.³⁹⁴ As a result, the level of discrimination engaged in by the combined entity in each region within the combined territory would be greater than the sum of the level of discrimination engaged in by the two individual companies in their own, separate regions, absent the merger.³⁹⁵ Specifically, the combined entity will be better able to discriminate against competitors by coordinating its formerly separate local exchange operations and controlling both ends of a higher percentage of calls, which is relevant to the provision of interexchange services.³⁹⁶ As described above, regulators will have greater difficulty monitoring and detecting this misconduct because of the reduction in the number of benchmarks.³⁹⁷ Therefore, the combined company not only will have more incentive to discriminate against rivals, but also will have a heightened ability to inhibit competitors' provision of services within the combined region compared with the ability of each company currently to discriminate within its region.³⁹⁸ We explain below why the combined entity is likely to increase the level of discrimination that rivals must overcome to provide retail advanced services, interexchange services, and local exchange services.

2. Analysis

a. Advanced Services

179. Although the Commission issues rules to prevent discrimination, it is impossible for the Commission to foresee every possible type of discrimination, especially with evolving technologies.³⁹⁹ Within the past year, the Commission has adopted rules, most notably the *UNE Remand Order*, and the *Line Sharing Order*, that should enhance competition by reducing the ability of an incumbent LEC

³⁹¹ See *SBC/Ameritech Order*, 14 FCC Rcd at 14797-98, para. 192 (for a more detailed discussion of spillover effect).

³⁹² See *id.* at 14797, para. 192.

³⁹³ *Id.* at 14798, para. 192.

³⁹⁴ *Id.* at 14798, para. 193.

³⁹⁵ *Id.*

³⁹⁶ *Id.* at 14798, para. 194.

³⁹⁷ *Id.*

³⁹⁸ *Id.* at 14798-99, para. 194.

³⁹⁹ *Id.* at 14804, para. 206.

to discriminate in the provision of advanced services.⁴⁰⁰ It is too early for the Commission to discern the impact of these rules. Moreover, the advanced services market is still a nascent industry. Accordingly, we find that despite certain changes in the regulatory landscape, the increased discrimination theory we enunciated in the *SBC/Ameritech Order* still holds true today.⁴⁰¹

(i) Background

180. One of the fundamental goals of the 1996 Act is to promote innovation and investment by all participants in the telecommunications marketplace, in order to stimulate competition for all services, including advanced services.⁴⁰² Today, both incumbent LECs and new entrants are developing and deploying innovative new technologies to meet the ever-increasing demand for high-speed, high-capacity advanced services. For the advanced services market to develop in a robust fashion, it is critical that the marketplace for these services be conducive to investment, innovation, and meeting the needs of consumers.⁴⁰³ Moreover, we are required by section 706 to be particularly vigilant that a merger between two incumbent LECs such as Bell Atlantic and GTE will not harm the development of competition for such advanced services.⁴⁰⁴

(ii) Incentive and Ability to Discriminate

181. We find that incumbent LECs such as Bell Atlantic and GTE have ample ability and incentive to discriminate against advanced services providers, and that the increase in the incentive and ability to discriminate may frustrate substantially the realization of the 1996 Act's and the Commission's goals to encourage the deployment of advanced services. Specifically, we find that the combined entity will have an increased incentive and ability to discriminate against competitors providing retail services that rely on new technology, particularly advanced services like Sprint ION.⁴⁰⁵ Because incumbent

⁴⁰⁰ See *In the Matter of Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (rel. Nov. 5, 1999) (*Third Report and Order* and *Fourth FNPRM or UNE Remand Order*); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147 and 96-98, *Third Report and Order* and *Fourth Report and Order*, FCC 99-355 (rel. Dec. 9, 1999) (*Line Sharing Order*). The *UNE Remand Order* specifies which network elements must be unbundled by incumbent LECs. For example, the order unbundles subloops and packet switching in limited circumstances. The *Line Sharing Order* requires incumbent LECs to unbundle the high frequency portion of the loop in certain circumstances.

⁴⁰¹ See *SBC/Ameritech Order*, 14 FCC Rcd at 14800-07, paras. 197-211.

⁴⁰² See *Advanced Services Further Notice*, 14 FCC Rcd at 4762, para. 1 and n.2 (citing Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. 1 (1996) (*Joint Explanatory Statement*)).

⁴⁰³ See *Advanced Services Further Notice*, 14 FCC Rcd at 4762, para. 2.

⁴⁰⁴ See Section 706 (a), 47 U.S.C. § 157 nt (a) (Stating that the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.").

⁴⁰⁵ Sprint Nov. 23, 1998 Petition at 34-36. Sprint's ION service integrates voice, internet, frame relay and other data traffic on one customer access facility and carries all of this traffic in asynchronous transfer mode (ATM) data format through the Sprint network. Sprint Brauer Aff. at 3. Sprint states that Sprint ION "will focus customers on the efficiency gained by integrating all services on one access facility, increased functionality provided to customers (continued....)"

LECs either currently do, or in the future will, compete with other providers of advanced services, they have an incentive to discriminate against companies that depend on the incumbents' for evolving types of interconnection and access arrangements necessary to provide new services to consumers.⁴⁰⁶ They also have the incentive to limit or control the development of new services, to the extent new services compete with their current offerings.⁴⁰⁷ In addition, competitors often are totally dependent on incumbent LECs for last mile wireline access to end users.⁴⁰⁸

182. We note that in some cases, the incumbent's control over the loop may give it the ability to tailor the loop to any collocated or attached electronics, thereby forcing competitors to provide service identical to the incumbent's.⁴⁰⁹ Specifically, by choosing electronics that meet the incumbent's market need, without regard to that of its competitors, the incumbent may stifle competitors' ability to innovate.⁴¹⁰ Discrimination against competitors wishing to innovate and deploy technology different than that deployed by the incumbent LEC often is not easily detected by regulators.⁴¹¹

(iii) Post-Merger Incentive and Ability to Discriminate

183. We find that the instant merger, like the SBC/Ameritech merger, increases the ability and incentive of the merged entity to discriminate against the providers of advanced services.⁴¹² We agree with Sprint that there are spillover effects to discrimination against national providers of advanced services, and that, post-merger, the combined entity would internalize external effects to some extent, thus increasing its incentive to act in one area in a manner that produces these effects in another area.⁴¹³ Economies of scale and scope, and network effects imply that when incumbent LECs weaken a competitive service in one region, this weakens it in other regions as well.⁴¹⁴ For services with "multi-market dependence," discrimination in one market will have a ripple effect in other markets.⁴¹⁵ We are

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through increases in bandwidth, and innovations in customer control by providing the customer with easy-to-use service configuration functionality." *Id.* at 4.

⁴⁰⁶ *SBC/Ameritech Order*, 14 FCC Rcd at 14802, para. 202.

⁴⁰⁷ For example, Sprint is concerned not only by incumbent LECs' ability to discriminate against competitors or potential competitors by denying access to necessary inputs, but also by slow-rolling competitors in negotiations for such inputs. Sprint Nov. 23 Petition at 34-35. *See also SBC/Ameritech Order*, 14 FCC Rcd at 14802-05, paras. 202, 204 & n. 378.

⁴⁰⁸ *SBC/Ameritech Order*, 14 FCC Rcd at 14802, para. 202. Sprint states that its ION service will reach customers through either a dedicated access line purchased by Sprint from an incumbent LEC (in most instances), through an xDSL loop and collocation space leased from an incumbent LEC or through resale. Sprint Brauer Aff. at 14

⁴⁰⁹ *See SBC/Ameritech Order*, 14 FCC Rcd at 14804, para. 205.

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Id.* at 14805, para. 207.

⁴¹³ *See* Sprint Nov. 23, 1998 Petition at 29, 33-36.

⁴¹⁴ *See SBC/Ameritech Order*, 14 FCC Rcd at 14805, para. 207, n. 384.

⁴¹⁵ *Id.* at 14805, para. 207.

specifically concerned that the merger's large footprint will create more incentives for the merged entity to discriminate against competitors whose networks become more attractive with more customers.⁴¹⁶

184. After the merger, the combined company will be able internalize these external effects of discriminatory conduct in one area in the combined region on another area in that region.⁴¹⁷ By capitalizing on its monopoly control over loops, for instance, the combined entity can discriminate against an advanced services provider entering an area in the combined region.⁴¹⁸ This will reduce the customer base and revenues of the advanced services provider, thereby reducing its ability to enter another region.⁴¹⁹ Because of the possibility of internalizing such spillover effects, the incentive for the combined entity to discriminate against competitors providing retail advanced services in particular areas within the combined region will be greater than the sum of the incentives for the companies operating alone.⁴²⁰

185. As we stated in the SBC/Ameritech proceeding, we are particularly concerned about discrimination in the advanced services market, given the Commission's obligations under section 706 to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."⁴²¹ In the advanced services market, there is a continuing shift from a circuit switched to a packet switched environment, combined with the emergence of data LECs such as Rhythms and Covad, that are using advanced technologies to provide innovative new services.⁴²² Any discrimination against these competitors will likely cause a significant setback to current and future efforts to encourage competition and innovation.⁴²³

b. Long Distance Services

186. In this section, we examine potential effects of the merger on the provision of interexchange services. Commenters allege that discrimination may take two forms: price and non-price. We examine these cases separately and conclude that the merged firm's increased incentive and ability to engage in non-price discrimination will harm competition in the provision of interexchange services, and, therefore, consumers of such services. With respect to price discrimination, specifically discrimination through a price squeeze, we conclude that there are adequate safeguards in place to guard against such conduct.

⁴¹⁶ *Id.*

⁴¹⁷ *Id.* at 14805, para. 208.

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

⁴²⁰ *Id.* at 14806, para. 208. *See also id.* at 14806-07; paras. 209-210 (for a more detailed discussion about the merged entity's increased incentive and ability to discriminate).

⁴²¹ *Id.* at 14806-07, para. 210.

⁴²² *Id.* at 14807, para. 210.

⁴²³ *Id.*

(i) Non-Price Discrimination

187. Bell Atlantic has satisfied the requirements of Section 271 in New York, and is offering long distance services to its customers there.⁴²⁴ GTE has been in the long distance market since 1996. As Bell Atlantic is authorized to enter the long distance market in other states in its region, the merged entity will increasingly view interexchange carriers as retail competitors, not only as access customers.⁴²⁵ This will give the merged firm incentives to deny, delay, or degrade access service to interexchange carrier competitors.⁴²⁶ Because the merged entity will control more than one-third of all customers lines nationwide,⁴²⁷ we must examine carefully the claim that the merged firm will gain an increased ability to harm its interexchange rivals.

(a) Incentive and Ability to Discriminate

188. For the reasons discussed below, we conclude that the merged entity has the incentive and ability to discriminate against competing interexchange carriers.⁴²⁸ Specifically, given their monopoly control over exchange access services, each Applicant currently has the ability to discriminate against rivals providing interexchange services, in favor of its own interexchange operations, by denying, degrading, or delaying access on the originating and terminating ends.⁴²⁹ We focus our discussion on discrimination with respect to the potential for terminating access, because we find that the merged entity's incentive to engage in this type of discrimination will increase significantly as a result of the merger.

⁴²⁴ See *Bell Atlantic 271 Order*.

⁴²⁵ See *SBC/Ameritech Order*, 14 FCC Rcd at 14808, para. 214.

⁴²⁶ *Id.*

⁴²⁷ *Trends in Telephone Service, March 2000*, Tables 20.1, 20.2 & 20.3, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission; Bell Atlantic/GTE May 22, 2000 *Ex Parte* Letter; Bell Atlantic 1999 Annual Report at 6. See also Letter from Michael Jones, Wilkie Farr & Gallagher, Counsel to Sprint, to Magalie Roman Salas, Secretary, FCC, (filed Apr. 12, 1999) (Sprint Apr. 12 *Ex Parte* Letter), Farrell & Mitchell attachment – Table 2 (citing Federal Communications Commission, *1997 Statistics of Communications Common Carriers*, Table 1.1); BlueStar, et al., Mar. 1, 2000 Joint Comments at 2 (“The proposed merger would create a gargantuan ILEC controlling over one-third of the nation’s access lines.”).

⁴²⁸ See *SBC/Ameritech Order*, 14 FCC Rcd at 14808-09, para. 216. We note that GTE has not, in the context of this proceeding, been accused of any pattern of discrimination against rivals providing interexchange services. *But see* Sprint Brauer Aff. at 17-18 (citing GTE’s continued billing of its own retail interLATA toll to Sprint’s California local end user subscribers). We find, however, that prior to the merger, GTE’s incentive to engage in such behavior was minimal due to its insubstantial share of the long distance market, which dictated that any rewards GTE gleaned from such behavior would be slight. According to the *Trends in Telephone Service, March 2000*, Table 11.2, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission.

⁴²⁹ See *SBC/Ameritech Order*, 14 FCC Rcd at 14809, para. 217. The incentive to discriminate exists because, for calls originating in region, an incumbent LEC will be able to benefit from discrimination by securing more customers on the originating side. An incumbent LEC has the incentive to discriminate against termination of a particular call only to the extent that the call originated in the same incumbent’s region. If an incumbent LEC providing terminating access to an interexchange carrier denies or degrades that access, then the incumbent LEC competing with the interexchange carrier at the originating end may also benefit. *Id.* at 14809, para. 216.

189. As we found in the *SBC/Ameritech Order*, recent developments in local networks have enhanced incumbents' ability to discriminate operationally and technically in favor of their long distance affiliates, in particular with respect to larger business customers.⁴³⁰ The specific developments in the local network that have enhanced incumbents' ability to discriminate against rival interexchange providers that need different and generally more complex forms of network interconnection are: (1) the deployment of common channel signaling systems;⁴³¹ (2) the development of advanced intelligent networks (AIN), or software driven networks; and (3) further developments in multi-media applications (such as applications involving combinations of voice, data, image, and video traffic).⁴³² Incumbents may discriminate against interexchange carriers by, among other things: (1) refusing to provide interconnection at critical points in their intelligent network based on alleged harm to the network or refusing to convey certain types of control messages across the AIN; or (2) "slow rolling" their competitors who make requests for interconnection or technical information.⁴³³

190. We conclude that the ability for Bell Atlantic and GTE to discriminate will be greatest for customized or advanced interexchange access services for which detection of discrimination is most difficult.⁴³⁴ Greater network complexity, a paucity of operational experience and objective performance benchmarks, and the possibility of new types of discrimination, increase the difficulty of detecting discrimination. In such a situation, past experience with the interconnection of plain vanilla, or POTS service, becomes increasingly less useful as a regulatory tool for preventing, detecting, and remedying discrimination.⁴³⁵

(b) Post-Merger Incentive and Ability to Discriminate

191. We agree with Sprint that, as a result of the merger, the combined entity will have a greater incentive to discriminate in providing termination of in-region calls than either individual company would have absent the merger.⁴³⁶ After the merger, the combined entity can realize the benefits of

⁴³⁰ *Id.* at 14809, para. 218, n.399.

⁴³¹ These systems are referred to as "out of band" signaling networks, and they simultaneously carry signaling messages for multiple calls. In general, most LECs' signaling networks adhere to a Bellcore standard Signaling System 7 (SS7) protocol. SS7 networks use signaling links to transmit routing messages between switches, and between switches and call-related databases (such as the Line Information Database, Toll Free Calling Database, and Advanced Intelligent Network databases). These links enable a switch to send queries via the SS7 network to call-related databases, which return customer information or instructions for call routing to the switch. A typical SS7 network includes a signaling link that transmits signaling information in packets, from a local switch to a signaling transfer point (STP), which is a high-capacity packet switch. The STP switches packets onto other links according to the address information contained in the packet. These additional links extend to other switches, databases, and STPs in the incumbent LECs' networks. A switch routing a call to another switch will initiate a series of signaling messages via signaling links through a STP to establish a call path on the voice network between the switches. See *Local Competition Order*, 11 FCC Rcd at 15738-41, paras 479-83.

⁴³² See *SBC/Ameritech Order*, 14 FCC Rcd at 14809-10, para. 219.

⁴³³ *Id.* at 14810, para. 219.

⁴³⁴ See *id.* at 14810, para. 220.

⁴³⁵ *Id.*

⁴³⁶ See Sprint Nov. 23, 1998 Petition at 33. An incentive to discriminate on the originating end is not a significant issue in this proceeding because there will always be an incentive for an incumbent offering interexchange services (continued....)

discrimination against competing carriers on in-region calls on the terminating end, by making it more likely that a customer on the originating end would choose the combined entity for interexchange services.⁴³⁷ End users will be less likely to choose a competing carrier at the originating end whose service does not appear as good as the incumbent's service that is free from terminating problems.

192. We therefore agree with parties arguing that, with respect to interexchange calls, the merged firm will have an increased incentive to discriminate in terminating the calls of competing interexchange carriers, stemming from the fact that benefits will flow from controlling both ends of a higher percentage of interexchange calls.⁴³⁸ According to Sprint, the combined Bell Atlantic/GTE entity would terminate 43 percent of minutes that the combined entity controls on the originating end, a 20 percent increase from the 36 percent weighted average of minutes controlled cumulatively by the companies.⁴³⁹ Applicants assert that this increase "is no greater an increase than in the SBC/[Pacific] Telesis merger, where the Commission found that an increase of 'only six to seven percentage points' did not pose any anticompetitive risk."⁴⁴⁰ As we stated in the *SBC/Ameritech Order*, the Commission reached a different conclusion in the *SBC/Pacific Telesis Order*, where it stated that there was no anticompetitive risk from the increase in the percentage of minutes for which the combined entity would control both the originating and terminating end.⁴⁴¹ Here, the harm would be significant because of the substantial number of customers that will be affected by the discrimination made possible by the increase in the percentage of interLATA traffic originating and terminating in Bell Atlantic's and GTE's regions.⁴⁴² We therefore agree with MCI WorldCom that, because interexchange carriers would be more dependent on a single entity for exchange access than they would absent the merger, hard-to-detect methods of non-price discrimination would be even more crippling to competing long distance companies.⁴⁴³

193. We further agree with MCI WorldCom that the ability to engage in less detectable and

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to discriminate against traffic originating in its region, and this merger will not create a greater incentive. See *SBC/Ameritech Order*, 14 FCC Rcd at 14812, n.419.

⁴³⁷ See *SBC/Ameritech Order*, 14 FCC Rcd at 14812, para. 225.

⁴³⁸ See AT&T Mar. 1, 2000 Comments at 17, n.8; Sprint Nov. 23, 1998 Petition at 31-36; see also MCI WorldCom Nov. 23, 1998 Comments at 38.

⁴³⁹ See Sprint Nov. 23, 1998 Petition at 33.

⁴⁴⁰ See Bell Atlantic/GTE Oct. 2, 1998 Application at 46 (quoting *SBC/PacTel Order*, 12 FCC Rcd at 2647, paras. 46,53,57).

⁴⁴¹ See *SBC/Ameritech Order*, 14 FCC Rcd at 14812-13, para. 226, n.423 (stating that "[t]he result in the *SBC/PacTel Order* was correct, however, because in that merger, any resulting harm from that increase in percentage points would not, in and of itself, have been fatal to the merger.").

⁴⁴² See *id.* at 14812-13, para. 226, n.424. In the *SBC/Ameritech* merger, we reached the same conclusion and agreed with Sprint that "the combined entity would terminate 45 percent of minutes that the combined entity controls on the originating end, a 50 percent increase from the 30 percent of minutes for which Ameritech currently controls both the originating and terminating ends." *Id.* at para. 226, n.420.

⁴⁴³ See MCI WorldCom Nov. 23, 1998 Comments at 38 (asserting that common ownership facilitates Bell Atlantic's and GTE's ability to focus their non-price discrimination efforts across their regions); see also *SBC/Ameritech Order*, 14 FCC Rcd at 14813, para. 226, n.425.

more significant non-price discrimination would be greatly enhanced by the merger.⁴⁴⁴ For the same reasons discussed above with respect to advanced services, we conclude that, as a result of the merger, the ability to discriminate against rivals in the termination of interexchange calls will be enhanced.

194. We recognize that the Commission concluded in the *Bell Atlantic/NYNEX Order* that given existing safeguards, the merger between Bell Atlantic and NYNEX would not result in an increased incentive and ability to engage in non-price discrimination against long distance competitors.⁴⁴⁵

We note, however, that in the *Bell Atlantic/NYNEX Order*, the Commission did not specifically address the issue of discrimination on the terminating end of long distance calls, an issue that is significant here. We find that the larger scale of the instant merger as compared to that merger, however, increases the risks of non-price discrimination.⁴⁴⁶

195. This merger, like the SBC/Ameritech merger before it, continues a trend of coalescing large incumbent LECs, and reversing the breakup of the Bell System. The old Bell system, with its large footprint, made it difficult for rivals to obtain access to necessary inputs, thus prompting its ultimate breakup.⁴⁴⁷ This merger brings GTE into the old Bell footprint for the first time, and will result in a large footprint that would take another big step toward recreating the Bell System, whose discrimination against interexchange carriers led to divestiture in the first place.⁴⁴⁸

(ii) Price Discrimination (Price Squeeze)

196. In addition to non-price discrimination, opponents of the proposed merger have raised

⁴⁴⁴ See MCI WorldCom Nov. 23, 1998 Comments at 38.

⁴⁴⁵ *SBC/Ameritech Order*, 14 FCC Rcd at 14813, para. 228.

⁴⁴⁶ At the time of the Bell Atlantic/NYNEX merger, the two firms controlled about 24% of customer lines nationwide, while the merged Bell Atlantic/GTE entity will control more than 33% of customer lines nationwide. See *1997/1998 Statistics of Communications Common Carriers*, Tables 2.3 & 2.10, Federal Communications Commission; *Trends in Telephone Service, March 2000*, Tables 20.1, 20.2 & 20.3, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission; Bell Atlantic/GTE May 22, 2000 *Ex Parte* Letter; Bell Atlantic 1999 Annual Report at 6. Non-price discrimination is a violation of several provisions of the Communications Act, as well as a number of rules adopted by the Commission. Section 272(c) of the Communications Act states that a BOC, in dealing with its long distance affiliate: (1) may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards; and (2) shall account for all transactions with an affiliate described in subsection (a) of this section in accordance with accounting principles designated or approved by the Commission. 47 U.S.C. § 272(c). We have adopted a number of rules implementing these provisions and otherwise designed to prevent non-price discrimination. See 47 C.F.R. §§ 53.200, et seq. See also *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996, Report and Order*, 11 FCC Rcd 17539 (1996) (*Accounting Safeguards Order*); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*); *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61*, 12 FCC Rcd 15756 (1997) (*LEC In-Region, Interexchange Order*).

⁴⁴⁷ See *SBC/Ameritech Order*, 14 FCC Rcd at 14814, para. 229.

⁴⁴⁸ *Id.*

arguments about a particular form of strategic pricing involving the Applicants' leveraging monopoly control over bottleneck local loop facilities to inhibit competition from long distance rivals. For example, MCI WorldCom argues that once the combined entity begins selling in-region long distance service through an interexchange affiliate, it will take advantage of the "high" prices for interstate exchange access services (above cost prices), over which it has monopoly power (albeit constrained by regulation), by offering "low" prices for retail long distance services in competition with the other long distance carriers, thereby setting up a price squeeze.⁴⁴⁹ Because interstate exchange access services are a necessary input for long distance services, opponents argue that the relationship between the combined entity's "high" exchange access prices and its affiliate's "low" prices for long distance services forces competing long distance carriers either to lose money or to lose customers even if they are more efficient than the combined entity's long distance affiliate at providing long distance services.⁴⁵⁰ For the reasons discussed below, we conclude that price squeeze tactics are likely to fail under the circumstances presented here.

197. We conclude that because Bell Atlantic and GTE, either currently, or, in the future will, compete with interexchange carriers for the provision of interexchange services, the merged entity has the incentive to discriminate against these carriers through a price squeeze.⁴⁵¹ We also conclude that the combined entity will have a greater incentive to discriminate against the termination of calls through a price squeeze than either individual company would have absent the merger.⁴⁵²

198. We find, however, that, given the existing regulatory safeguards, the merged entity does not have significant ability to act on this incentive.⁴⁵³ Although we do not wish to rely on regulatory safeguards to prevent potential public interest harms, we note here that certain safeguards mitigate against harms in this circumstance. In the *Access Charge Reform Order*, the Commission addressed the contention that an incumbent's interexchange affiliate could implement a price squeeze once the incumbent began offering in-region, interexchange toll services, and concluded that, although an incumbent LEC's control of exchange and exchange access facilities may give it the incentive and ability to engage in a price squeeze, the Commission has in place adequate safeguards against such conduct.⁴⁵⁴

⁴⁴⁹ See MCI WorldCom Nov. 23, 1998 Comments at 36-38. A price squeeze, as opponents use the term, refers to a particular, well-defined strategy of predation that would involve the combined entity setting high prices for access services while charging relatively low prices for retail services. It is this relationship between the input prices and the affiliate's prices, and not the absolute levels of those prices, that defines a price squeeze. See *SBC/Ameritech Order*, 14 FCC Rcd at 14815, para. 231, n.429; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20044, para. 116.

⁴⁵⁰ We note that access charges already are above cost. Therefore, in order to implement a price squeeze, an incumbent need only offer low prices for its long distance services. *SBC/Ameritech Order*, 14 FCC Rcd at 14815, para. 231, n.430.

⁴⁵¹ See *SBC/Ameritech Order*, 14 FCC Rcd at 14815, para. 232.

⁴⁵² See *id.* at 14815-16, para. 232.

⁴⁵³ We reached the same conclusion in both the *Bell Atlantic/NYNEX Order* and the *SBC/Ameritech Order*. See *Bell Atlantic/NYNEX Order* at 20045, para. 117. See also *SBC/Ameritech Order*, 14 FCC Rcd at 14816, para. 233.

⁴⁵⁴ *Access Charge Reform Order*, 12 FCC Rcd at 16100-04, paras. 275-282. For example, the Commission noted that the prohibition on joint ownership of switching and transmission facilities reduces the risk of improper allocations of the costs of common facilities between the incumbent and its interexchange affiliate, and helps deter any discrimination in access to the incumbent's transmission and switching facilities by requiring the affiliates to follow the same procedures as competing carriers to obtain access to those facilities. See *id.* at 16102, para. 279 (citing *Non-* (continued....))

The Commission determined in that order that the existence of price caps reduces the ability to raise prices on access.⁴⁵⁵ We also note that, because it is relatively easy to compare an incumbent LEC's access charges with its own retail prices, price discrimination is relatively easy for the Commission and others to detect, and therefore, is unlikely to occur.⁴⁵⁶ Moreover, important non-regulatory safeguards exist. For example, as the Commission noted in the *AT&T/TCI Order*, the presence of extensive sunk facilities in both the local and interexchange markets suggests that the merged firm would be unable to successfully raise prices if any competitors were driven out of the market by the price squeeze.⁴⁵⁷ Thus, because existing regulatory and non-regulatory safeguards greatly reduce the ability of incumbent LECs, to engage in a price squeeze, we conclude that there is no substantial probable public interest harm resulting from the increased incentive that Bell Atlantic and GTE may have to discriminate against the termination of calls through a price squeeze as a result of the merger.

c. Circuit-Switched Local Exchange Services

199. For the reasons discussed below, we conclude that the merger will increase the combined entity's incentive and ability to discriminate against competitive LECs seeking to provide local exchange services in the combined region. We believe that this increased discrimination particularly will be aimed at, and harmful to, competitive providers of local exchange services to mass market customers (smaller businesses and residential customers).⁴⁵⁸

200. We also note that the local exchange market is just that, a *local* market. For the most part, companies competing with the incumbent LEC in the provision of retail local exchange service compete on a local basis, and focus on a particular area or region.⁴⁵⁹ For other competitive LECs, however, competing for local exchange service transcends local areas and takes a more national scope.⁴⁶⁰ For such nationally competitive LECs, reputation, scale and scope, and technology are significant for their national strategy; a company's reputation in one region may affect its reputation in another region, and experience it gains with a new technology in one region may help it in another

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Accounting Safeguards Order, 11 FCC Rcd at 21982-84, paras. 159-162). The Commission also noted that the requirement that an incumbent LEC offer services at tariffed rates, or on the same basis as requesting carriers that have negotiated interconnection agreements pursuant to section 251, reduces the risk of a price squeeze to the extent that an affiliate's long distance prices would have to exceed its costs for tariffed services. *See Access Charge Reform Order*, 12 FCC Rcd at 16102, para. 279.

⁴⁵⁵ *Id.* at 15993-94, para. 26 (stating that "price caps act as a transitional regulatory scheme until the advent of actual competition makes price cap regulation unnecessary.") Price caps fundamentally alter the process by which incumbent LECs determine the revenues they are permitted to obtain from interstate access charges for access services.

⁴⁵⁶ *SBC/Ameritech Order*, 14 FCC Rcd at 14816-17, para. 234, n. 436.

⁴⁵⁷ *See AT&T/TCI Order*, 14 FCC Rcd at 3215-16, para. 118.

⁴⁵⁸ *See* MCI WorldCom Nov. 23, 1998 Comments at 29. *See also SBC/Ameritech Order*, 14 FCC Rcd at 14817, para. 236 (noting that competitive LECs providing local services to larger business customers may still be discriminated against, but that these LEC generally have more experience negotiating with incumbent LECs).

⁴⁵⁹ *SBC/Ameritech Order*, 14 FCC Rcd at 14817, para. 237.

⁴⁶⁰ *See id.*

region.⁴⁶¹ It is this group of local exchange service competitors with a national scope, with which we are especially concerned.⁴⁶²

(i) Incentive and Ability to Discriminate

201. Because incumbent LECs compete with competitive LECs for the provision of retail local exchange services, incumbent LECs have the incentive to discriminate against competitive LECs that depend on the incumbents' inputs (such as interconnection and UNEs) to compete.⁴⁶³ We find that a discriminatory interconnection policy will be profitable for an incumbent LEC insofar as its revenue gains in the provision of retail local exchange services exceed whatever revenues it forgoes from wholesale interconnection with rivals.⁴⁶⁴

202. Incumbent LECs' control over access to interconnection and other essential inputs gives them the ability to discriminate against rivals providing local exchange services. According to Sprint, incumbent LECs can discriminate against rival local carriers either by raising the price of interconnection charged to rivals (price discrimination) or by impairing their access to interconnection and other essential inputs.⁴⁶⁵ We agree with Sprint that, because interconnection prices are subject to regulatory oversight, an incumbent's ability successfully to engage in price discrimination against competitive LECs seeking to enter its region is significantly weaker than its ability successfully to engage in non-price discrimination.⁴⁶⁶

As evidence of incumbents' ability to engage in non-price discrimination against rival competitive LECs, MCI WorldCom asserts, for example, that Bell Atlantic has failed to comply with conditions imposed by the Commission in connection with the BA/NYNEX merger;⁴⁶⁷ and that Bell Atlantic and GTE have: (1) failed to meet their obligations under section 251 to provide unbundled access to xDSL-capable loops and collocation on reasonable and nondiscriminatory terms;⁴⁶⁸ and (2) generally been "effective and obdurate" foes of local competition.⁴⁶⁹

203. Discrimination against competitive providers of local exchange services is more likely to occur in conjunction with services to mass market customers as opposed to larger business customers, because competitors serving larger business customers generally possess more experience dealing with

⁴⁶¹ See *id.*

⁴⁶² For example RCN Corporation is currently operating in, or has begun building in, seven of the top ten US cities as measured by population density – Boston, New York, Philadelphia, Washington, DC, San Francisco, Los Angeles, and Chicago. *RCN Press Release – May 1, 2000.*

⁴⁶³ See *SBC/Ameritech Order*, 14 FCC Rcd at 14818, para. 238.

⁴⁶⁴ See *id.*

⁴⁶⁵ See Sprint Nov. 23, 1998 Petition at 25.

⁴⁶⁶ See *id.*

⁴⁶⁷ See MCI WorldCom Mar. 1, 2000 Comments at 2.

⁴⁶⁸ See *id.*

⁴⁶⁹ See *id.*

incumbents for provision of such services.⁴⁷⁰ Moreover, competitive providers to business customers are better able to absorb the costs imposed by non-price discrimination, because they have a greater profit margin than providers to mass market customers.⁴⁷¹ In addition, because competitive LECs have little experience in successful provision of local exchange services to mass market customers, there exist few examples of incumbent LECs' best practices in provisioning inputs for competitive LECs to use for serving mass market customers that could be used as benchmarks to detect discriminatory and unreasonable behavior.⁴⁷²

204. It is important to recognize, however, that to serve both mass-market customers and larger businesses, competing local exchange carriers need access to inputs necessary to terminate local calls in the incumbent's network.⁴⁷³ Just as we determined that incumbents may deny or delay access to such inputs for competitors' provision of interexchange services, they may also do so for competitors' provision of local exchange services to all types of customers.⁴⁷⁴ This type of discrimination is subtle and not readily detectable.⁴⁷⁵

(ii) Post-Merger Incentive and Ability to Discriminate

205. As we found in the context of retail advanced services and interexchange services, there are external effects to discrimination in the provision of retail local exchange services on a multi-region basis. The merged entity, with a larger local footprint, would realize more of the gains from such external effects, thus increasing its incentive to act in a discriminatory manner in one area, to produce these effects in another.⁴⁷⁶ For national competitive LECs, such as large interexchange carriers, that plan to offer local service on a large scale in numerous major regions, entry into various areas likely will entail common research, product development, and marketing costs that must be covered by the sum of the competitive LEC's area-specific profits.⁴⁷⁷ For such national carriers, the discrimination practiced in one region may impair the competitor's national or multi-regional plans, by increasing the competitor's costs and rendering it unable to compete as effectively or comprehensively as it would absent the

⁴⁷⁰ See *SBC/Ameritech Order*, 14 FCC Rcd at 14819, para. 240. We note that this is changing in some areas, such as New York and Texas, where there is increasing residential entry via the unbundled network element platform (UNE-P), a combination of the loop, transport and switching.

⁴⁷¹ For example, if the cost of non-price discrimination to competitive providers is \$5.00 per customer, it is easier to pass that cost along to business customers than mass-market customers. The \$5.00 represents a much greater portion of a typical mass-market customer's bill than it does of a typical business customer's bill.

⁴⁷² See *SBC/Ameritech Order*, 14 FCC Rcd at 14819, para. 240.

⁴⁷³ See *id.* at 14819, para. 241.

⁴⁷⁴ See *id.* The incumbent LEC, for example, may fail to provision enough equipment for a competing LEC so that a higher percentage of the competitor's calls are blocked from terminating in the incumbent's region. When a competitor orders trunks in the incumbent's end office, the incumbent may fail to make available the number of trunks requested by competitor, or it may delay installing the trunks in the end office. *Id.*

⁴⁷⁵ See *id.*

⁴⁷⁶ See *id.* at 14820, para. 243.

⁴⁷⁷ See *id.*

discrimination.⁴⁷⁸ Therefore, actions that decrease the profitability of the competitive LEC in one area may make it forgo entry into another area, or make it a less effective competitor in another area.⁴⁷⁹

206. Bell Atlantic and GTE contend that the current competitiveness in the wireless telecommunications market, indicates that incumbent LECs have neither the ability nor the incentive to discriminate against rivals that rely on the incumbent LECs in order to provision these services.⁴⁸⁰ We disagree.⁴⁸¹ An incumbent that weakens a competitive carrier's chance of providing competitive local exchange service in one region weakens that carrier's chances of doing so in other areas as well, due to economies of scale and scope.⁴⁸² The merged entity will be able to internalize the external effects of discriminatory conduct. Because of the possibility of internalizing such spillover effects, the incentive for the combined entity to discriminate against competitors providing retail local exchange services in particular areas within the combined region will be greater than the incentive for each company acting as a single entity.⁴⁸³

207. Many of the conditions proposed by Bell Atlantic and GTE, and adopted today, address the concerns created by the public interest harms that are concomitant with this merger. For example, the conditions regarding performance measures, OSS reform, and collocation should constrain substantially the merged entity's ability to engage in discrimination against rival local exchange providers. The nexus between the aforementioned conditions and harms mitigates the damage caused by the merger and bolsters the competitive landscape in the merged entity's region.

d. Conclusion

208. For the reasons discussed above, we conclude that, as a result of the merger, the post-merger Bell Atlantic/GTE will have an increased ability and incentive to discriminate against rival providers of advanced services, and particularly new types of advanced services, in the combined region. We also conclude that the combined entity will have an increased incentive and ability to discriminate against rival providers of interexchange services, local services, and bundled local and long distance services. Although the Commission issues rules to prevent discrimination, and will continue to do so, it is impossible for the Commission to foresee every possible type of discrimination, especially with evolving technologies; therefore, we cannot rely on a regulatory solution to address unforeseeable competitive harms that may arise as a result of the merger. In this Order, we adopt a number of

⁴⁷⁸ See *id.*

⁴⁷⁹ See *id.*

⁴⁸⁰ Bell Atlantic/GTE Dec. 23, 1998 Joint Reply, Arrow Decl. at 23-25.

⁴⁸¹ See Sprint Apr. 2, 1999 *Ex Parte* Letter, Hayes, Jayaratne, and Katz Report at 21 (stating that incumbent LECs "have attempted to degrade the quality of interconnection facilities provided to their local cellular competitor," and citing that "it is clearly incorrect to assert there is no evidence of exclusionary behavior by ILECs in cellular markets. On the contrary, the history of cellular competition, like the history of intraLATA competition, shows that ILECs will work hard to prevent entry when they can capture the benefits of doing so.").

⁴⁸² See *SBC/Ameritech Order*, 14 FCC Rcd at 14821, para. 244.

⁴⁸³ See Sprint Nov. 23, 1998 Petition at 32 (noting that by internalizing the anticompetitive spillover benefits the merger makes discrimination more profitable and thus more likely); see also *See SBC/Ameritech Order*, 14 FCC Rcd at 14821, para. 244.

conditions that guard specifically against the discrimination harms identified above, without imposing cumbersome, detailed regulatory oversight.

VII. ANALYSIS OF PUBLIC INTEREST BENEFITS

A. Background

209. In addition to assessing the probable public interest harms of the proposed merger, we also must consider whether the merger is likely to generate redeeming public interest benefits.⁴⁸⁴ In doing so, we ask whether the merged entity is likely to pursue business strategies resulting in demonstrable and verifiable benefits to consumers that could not be pursued but for the merger. Public interest benefits also include any cost saving efficiencies arising from the merger if such efficiencies are achievable only as a result of the merger, are sufficiently likely and verifiable, and are not deemed the result of anti-competitive reductions in output or increases in price.⁴⁸⁵ Finally, merger specific benefits may also include beneficial conditions proffered by the Applicants or other parties or imposed by the Commission.

210. As detailed above, we conclude in this Order that the proposed merger of Bell Atlantic and GTE is likely to result in substantial harms to the public interest. In considering whether the overall effect of the merger is nevertheless to advance the public interest, we employ a balancing process that weighs probable public interest harms against probable public interest benefits. Applicants can therefore carry their burden of demonstrating that the proposed transaction is in the public interest under the Communications Act only if the transaction on balance will enhance and promote the public interest. As the harms to the public interest become greater and more certain, the degree and certainty of the public interest benefits must also increase commensurately in order for us to find that the transaction on balance serves the public interest.⁴⁸⁶ This sliding scale approach requires that where, as here, potential harms are indeed both substantial and likely, the Applicants' demonstration of asserted benefits also must reveal a higher degree of magnitude and likelihood than we would otherwise demand.

211. Applicants assert that the proposed merger will provide public interest benefits that are sufficient to satisfy our public interest balancing test.⁴⁸⁷ To satisfy their burden, the Applicants must demonstrate that their merger is a reasonably necessary means to enable them to achieve the asserted benefits, *i.e.*, that the benefits are specific to the merger.⁴⁸⁸ Should the Applicants be able to pursue the strategies identified as resulting in public interest benefits without merging, consumers could achieve the claimed benefits without suffering the harms of the merger. A mere recitation by the Applicants that they will provide some benefit only if their license transfer is approved therefore is insufficient to show that a

⁴⁸⁴ *SBC/Ameritech Order*, 14 FCC Rcd at 14825, para. 255; *AT&T/TCI Order*, 14 FCC Rcd at 3168, para 13; *MCI/WorldCom Order*, 13 FCC Rcd at 18134-35, para. 194.

⁴⁸⁵ *1992 Horizontal Merger Guidelines* at 30.

⁴⁸⁶ *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20063, para. 157.

⁴⁸⁷ *Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing* at 2.

⁴⁸⁸ *See SBC/Ameritech Order*, 14 FCC Rcd at 14829, para. 267.

particular benefit is merger specific.⁴⁸⁹ Rather, the Applicants must point to specific evidence that the benefit is dependent on the merger.⁴⁹⁰

212. The Applicants' initial and supplemental application claim several public interest benefits of the merger. First, Applicants assert that the merger will enable the combined company to attack the local markets of other incumbent LECs on a widespread and effective basis and that that the merger will add an important new competitor to the top tier of national providers that can offer consumers a full bundle of telecommunication services in all major markets. Second, Bell Atlantic and GTE maintain that the merger will enhance the competitiveness of GTE's Internet backbone and data services, and by doing so will promote competition in those markets. Third, the Applicants claim that the merger will increase competition in the long distance market by speeding the deployment of a national long distance network to compete with the "Big Three" facilities based providers. Finally, the Applicants argue that the merger will combine the companies' complementary wireless assets to enable to new company to offer a broader range of services more efficiently to customers. We discuss each of the asserted benefits in turn, concluding that the Applicants have provided insufficient evidence to support their claims and, therefore, have not demonstrated that the overall effect of the proposed merger will be to enhance the public interest.

213. We conclude that, without considering the conditions proposed by the Applicants, Bell Atlantic and GTE have not carried their burden of demonstrating that the proposed merger will create verifiable merger-specific public interest benefits that offset the merger's likely public interest harms. More specifically, we conclude that to the extent that Applicants have provided sufficient evidence to support the asserted public interest benefits, the resultant benefits are modest. Accordingly, we conclude that, in combination, the asserted potential public interest benefits are insufficient to offset the merger's potential public interest harms. As described further below, however, the addition of the stringent and enforceable merger conditions proposed by the Applicants alters the public interest balance and causes us to conclude that the proposed merger is in the public interest and may be approved.

B. Internet Backbone Services

214. We first conclude that the Applicants have not met their burden of demonstrating that the proposed merger will produce a public interest benefit by promoting competition in the provision of Internet backbone services.⁴⁹¹ First, as the Applicants' themselves point out, the ultimate recombination of GTE's Internet data business with Bell Atlantic's local customers is entirely speculative.⁴⁹² On one hand, Applicants argue that there is a genuine and substantial possibility that they will not exercise their option to reacquire Genuity,⁴⁹³ while at the same time they claim that the ultimate recombination of the

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.*

⁴⁹¹ See Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing at 4.

⁴⁹² See *id.* at 3-4. See also AT&T Mar. 1, 2000 Opposition at 19-20.

⁴⁹³ See Bell Atlantic/GTE Feb. 22, 2000 Response at 7. As described above, the ultimate recombination of GTE's Internet backbone network with Bell Atlantic's established in-region local customers is contingent upon the merged (continued....)

merged firm with Genuity will result in a significant benefit to the Internet and data services market.⁴⁹⁴ We agree with AT&T that the Applicants' cannot have it both ways.⁴⁹⁵ Indeed, Applicants themselves recognize that their strategy of bundling long distance data services with local services is dependent upon obtaining section 271 authority in Bell Atlantic's region.⁴⁹⁶ The uncertainty regarding section 271 approvals makes the claimed benefits speculative at best and, therefore, difficult to evaluate.⁴⁹⁷ Accordingly, we conclude that the dependency of the Applicants' recombination strategy upon section 271 approvals is a substantial constraint upon the implementation and success of such a plan, and, therefore the claimed benefit is neither likely nor credible.⁴⁹⁸

215. Second, we reject the Applicants' assertion that the ultimate recombination of Genuity and the merged firm will produce a public interest benefit as a result of increased competition in the Internet backbone market. As an initial matter, we conclude that the Applicants have not demonstrated any merger-specific benefits to the market for Internet backbone services. Although we agree with the Applicants that the Internet backbone market is highly concentrated,⁴⁹⁹ we nonetheless conclude that the Bell Atlantic and GTE have presented insufficient evidence regarding how their proposed merger would alleviate such concentration and benefit consumers of long-haul data services. Rather, Applicants simply assert that Genuity will be a critical competitor in a market controlled by the "Big Three" long distance providers.⁵⁰⁰ Although this may be the case, there is no indication in the record that the merger of Bell Atlantic and GTE will produce a public interest benefit by deconcentrating or otherwise altering the market, assuming that the merged firm ultimately recombines with Genuity. Indeed, all the merger could hope to accomplish would be to strengthen an existing competitor in an already concentrated market; it would not add a new competitor to that market.

216. Moreover, we reject the argument that a portion of the alleged benefits to the Internet

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entity obtaining section 271 authority covering 95 percent of the access lines within Bell Atlantic's region. *See supra* Section V.

⁴⁹⁴ *See* Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing at 3-4. *See also* AT&T Mar. 1, 2000 Opposition at 20.

⁴⁹⁵ *See* AT&T Mar. 1, 2000 Opposition at 20.

⁴⁹⁶ *See Ex Parte* Letter from Michael E. Glover, Associate General Counsel, Bell Atlantic, to Michael Kende and To-Quyen Truong, Federal Communications Commission (filed Jan. 15, 1999) at 8 (Bell Atlantic Jan. 15, 1999 *Ex Parte* Letter) ("[T]he merger will produce significant procompetitive benefits by strengthening GTE's Internet backbone business as a competitor of the Big Three backbone providers. To the extent this business is subject to Section 271, these benefits will depend on obtaining Section 271 relief."); Letter from Steven G. Bradbury, Counsel for GTE, Kirkland & Ellis, to Michael Kende and To-Quyen Truong, Federal Communications Commission (filed Jan. 15, 1999) at 13 (GTE Jan. 15, 1999 *Ex Parte* Letter) ("GTE-Bell Atlantic would not be able to realize fully the benefits of integrating both companies' long distance, Internet, and data traffic onto the GNI unless Bell Atlantic receives 271 approval. Without the ability to migrate Bell Atlantic's Northeast traffic, the company could not, for example, achieve the maximum possible unit cost reductions.").

⁴⁹⁷ *See SBC/Ameritech Order*, 14 FCC Rcd at 14842-43, paras. 303-06.

⁴⁹⁸ *See id.*

⁴⁹⁹ *WorldCom/MCI Order*, 13 FCC Rcd at 18025, para. 148. *See also* Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing at 4.

⁵⁰⁰ *See* Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing at 3-4.

backbone market will be realized during the period that Genuity remains an independent company.⁵⁰¹ Although Applicants contend that the merged entity will offer Internet services in New York and in the states outside of Bell Atlantic's region and enter into joint marketing agreements with Genuity in those areas,⁵⁰² Applicants have made no showing that such activities would produce any benefit to consumers or to the public interest. Nor have Applicants demonstrated why such asserted benefits would increase as the merged entity receives additional authority under section 271.⁵⁰³ We conclude that absent Bell Atlantic's full compliance with section 271, any pro-competitive benefits that might arise from combining Bell Atlantic's in-region local customers with GTE's long distance voice and data customers would be negligible.⁵⁰⁴ Further, we are unpersuaded by Applicants' attempt to distinguish its combination from that of SBC and Ameritech because Bell Atlantic has been granted section 271 authority in New York.⁵⁰⁵ Rather, we conclude that section 271 relief in one of thirteen states, although representing a significant percentage of access lines, is not likely to produce the level of competitive activity in the Internet backbone market necessary to achieve the asserted potential public interest benefit.

217. We do agree, however, that the merger of Bell Atlantic and GTE will produce the public interest benefit of increasing competition in Bell Atlantic's local markets by providing the merged company with a strengthened incentive to satisfy section 271.⁵⁰⁶ The merged entity has strong incentives to make reacquire Genuity's Internet backbone so that it can provide bundled services to its large business customers with a national presence.⁵⁰⁷ In order to do so, however, the merged firm would require authorization from the Commission to provide interLATA under section 271. Accordingly, the merged firm will have an increased incentive to pursue and receive section 271 authority in Bell Atlantic's in-region states. As a result, we conclude that the merged entity will pursue a course of action that will have the result of increasing competition and benefiting consumers in the markets for local telecommunications services in those states.⁵⁰⁸

C. Local Exchange and Bundled Services

218. With regard to the Applicants' contention that the proposed merger will promote greater competition in the market for local exchange services, we conclude that the merger is not necessary to obtain potential public interest benefits. Although we find that the merger may permit the Applicants to reach out-of-region local markets more rapidly than they could on their own, this potential benefit is extremely modest. Similarly, with respect to the Applicants' claimed benefits to the market for bundled telecommunications services, we conclude that, because it is dependent upon section 271

⁵⁰¹ Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing at 5-6.

⁵⁰² *See id.* at 6.

⁵⁰³ *Id.*

⁵⁰⁴ *See SBC/Ameritech Order*, 14 FCC Rcd at 14842-43, paras. 303-06.

⁵⁰⁵ Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing at 5-6.

⁵⁰⁶ *See Qwest/US WEST Order*, para. 56.

⁵⁰⁷ *Id.* at para. 57.

⁵⁰⁸ *See id.* at para. 56.

authority, the Applicants' strategy of offering Bell Atlantic's large business customers a complete bundle of local, long distance, and data services is too speculative to offer substantial public interest benefits.

219. In their initial and supplemental applications, the Applicants commit that within eighteen months of the merger's approval, they will provide a complete bundle of services—including advanced data and voice, Internet, long distance, and local services—to large business customers in twenty-one cities spanning the territories of every other BOC.⁵⁰⁹ This expansion would be accomplished by providing nationwide bundled services to the out-of-region offices and affiliates of Bell Atlantic's "anchor customers."⁵¹⁰

1. Entry into Out-of-Region Local Exchange Markets

220. We conclude that, whatever benefits might arise from the Applicants' proposed out-of-region strategy, they cannot be used to justify the merger because the merger is not a sufficiently necessary condition to pursuing out-of-region entry into local and bundled telecommunications markets. We find that each of the Applicants has both the ability and incentive to implement an out-of-region strategy on its own. The Applicants do not need to merge to become successful out-of-region competitive LECs, nor does their merger increase the likelihood that either or both will seek to implement an out-of-region strategy. We find the only merger-specific benefit to be the speed with which the Applicants can reach their goal of entering twenty-one markets outside of their traditional regions.

221. We conclude that the out-of-region local and bundled services plans contemplated by the Applicants could be obtained by either of the companies acting individually. Accordingly, any benefits accruing from those plans cannot be attributed to the merger. We concluded above that the merger causes a public interest harm by eliminating GTE as among the most significant potential participants in the mass market for local exchange and exchange access services in Bell Atlantic's region. Additionally, we found that both GTE and Bell Atlantic are most significant market participants in out-of-region larger business markets.⁵¹¹ Accordingly, as out-of-region competitors we consider Bell Atlantic and GTE to be unusually qualified. We are thus unpersuaded that neither could implement the out-of-region expansion without completing the proposed merger.⁵¹²

222. Although the Applicants claim that the proposed merger will make it possible for the combined company to enter a large number of new local markets by allowing it to building upon Bell Atlantic's existing account relationships with large businesses,⁵¹³ we find that each of the Applicants is fully capable of undertaking a strategy of the size and scope of their stated out-of-region plan. Many competitive LECs that lack the size, resources, and assets of either Bell Atlantic or GTE are presently

⁵⁰⁹ Bell Atlantic/GTE Dec. 23, 1998 Joint Reply at 18. *See also* Bell Atlantic/GTE Oct. 2, 1998 Application, Attach. A at 1-3, 6-14; Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing at 9-11.

⁵¹⁰ Bell Atlantic/GTE Dec. 23, 1998 Joint Reply at 19-20.

⁵¹¹ *See* Section VI.B.

⁵¹² *See SBC/Ameritech Order*, 14 FCC Rcd at 14833-33, paras. 278-86.

⁵¹³ Bell Atlantic/GTE Kissel Decl., 4, para. 7.

pursuing significant entry plans in multiple markets. Indeed, the evidence of prior out-of-region activity by GTE suggests that it already has exhibited the ability to expand absent this merger. As Applicants themselves recognize, GTE has an established and operational competitive LEC with approximately 60,000 customers outside its local service territory, including seventeen of the twenty-one markets the merged firm has targeted for out-of-region expansion.⁵¹⁴ Indeed, GTE's 1999 Annual reports touts its competitive LEC as being one of the largest in the nation.⁵¹⁵ Similarly, Bell Atlantic has an equity investment of more than \$700 million in Metromedia Fiber Network, an entity from which Bell Atlantic will purchase dark fiber in several out-of-region cities.⁵¹⁶ Such a transaction indicates both an ability and an intent on Bell Atlantic's part to expand out-of-region on its own.

223. Moreover, we conclude that the Applicants have failed to demonstrate that Bell Atlantic's Fortune 500 customers based in the northeastern United States are necessary to a successful launch of an out-of-region strategy. Applicants claim that they require a larger customer base because their out-of-region plans involves a facilities-based entry strategy that requires a broad base of customer relationships to support the large capital investments necessary to deploy new switches and networks and that neither firm by itself could support such investments without.⁵¹⁷ Although we recognize that spreading costs across a broader number of customers would reduce the cost per customer of geographic expansion, we question the Applicants' assertion that neither company individually has a sufficiently broad and large customer base to venture out-of-region.⁵¹⁸ Moreover, Bell Atlantic and GTE do not propose to bring these claimed benefits to mass market consumers of local and bundled services. Accordingly, the asserted benefit would be confined to larger business markets, further demonstrating the limited and modest nature of the Applicants' claimed benefit.

224. We also reject the argument that Bell Atlantic cannot reach its large business customers alone because it lacks the facilities, platform capability, and marketing and distribution channels required to reach far beyond its concentrated franchise.⁵¹⁹ According to the Applicants, the merged entity will be able to utilize Bell Atlantic's existing relationship with Bell Atlantic's large business customers to sell through to their subsidiaries or affiliates in out of region locations.⁵²⁰ Although combining with GTE may well enhance Bell Atlantic's ability to expand out-of-region, the Applicants have failed to demonstrate that either firm lacks the ability to do so alone and, therefore, that the merger is necessary to accomplish such an expansion.

225. We find that in the context of the Applicants' strategy to expand into markets for local and bundled telecommunications services out of region, the single primary benefit of the merger is

⁵¹⁴ Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing, Exhibit 2, Joint Declaration of Geoffrey C. Gould and Edward D. Young, III (Bell Atlantic/GTE Gould/Young Joint Decl.), paras 3-4.

⁵¹⁵ GTE 1999 Annual Report at 3.

⁵¹⁶ Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing at 10.

⁵¹⁷ Bell Atlantic/GTE Kissel Decl., paras. 8-10.

⁵¹⁸ See *SBC/Ameritech Order*, 14 FCC Rcd at 14835-36, para. 284.

⁵¹⁹ Bell Atlantic/GTE Kissel Decl., para. 8.

⁵²⁰ *Id.* at para. 7.

speed. By combining GTE's more geographically dispersed presence with Bell Atlantic's customer base, Applicants can likely achieve their goal of establishing a presence in the twenty-one targeted markets somewhat faster by completing the proposed transaction than by rolling out competitive services in these markets on their own.⁵²¹ As a result, those markets will receive the benefits of competition more rapidly as a result of the merger than without. We find this limited benefit, even when considered in combination with the remaining benefits claimed by the Applicants, is modest.

2. Provision of Nationwide Bundled Services

226. We similarly conclude that Bell Atlantic and GTE have made an insufficient showing that substantial potential public interest benefits will result from the merged firm entry into the nationwide bundled services market. Moreover, any benefits that might accrue from the merged firm's entry into out-of-region bundled services markets are dependent upon securing section 271 authority in Bell Atlantic's local markets and, therefore, remain speculative in nature.

227. The Applicants' out-of-region strategy is premised upon combining the local, long distance, Internet, and wireless businesses of Bell Atlantic and GTE.⁵²² As such, this strategy requires the Applicants to obtain authority to provide long distance services within Bell Atlantic's region. Without section 271 approval to offer long distance voice and data services, the Applicants would suffer from the same product constraints that prevent them today from competing for all of the voice and data business of their customers. Indeed, according to the Applicants' own reasoning, if the merged firm is not able to provide bundled interLATA services to Bell Atlantic's base of large business customers, it will also be unable to follow these customers into any of the twenty-one cities targeted for out-of-region expansion.⁵²³ We conclude, therefore, that for the Applicants' out-of-region strategy to be implemented successfully, the Applicants' own evidence indicates that they must possess and offer a full suite of services, which is dependent not on the merger, but on the Applicants gaining section 271 approval in-region.

228. The Applicants themselves recognize that their strategy of offering bundled services nationwide is dependent upon gaining section 271 authority in Bell Atlantic's region. With respect to out-of-region expansion, the Applicants have stated that the merged firm "may not be able to implement fully its plan to offer out-of-franchise service in twenty-one cities without 271 approval, because that plan relies in part on the combined company's ability to provide bundled services to large business customers without regard to geographic boundaries."⁵²⁴ The Applicants similarly recognized that if the

⁵²¹ *SBC/Ameritech Order*, 14 FCC Rcd at 14842, para. 301; *WorldCom/MCI Order*, 13 FCC Rcd at 18138, para. 199; *AT&T/TCG Order*, 13 FCC Rcd at 15262, para. 48.

⁵²² Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing at 11.

⁵²³ GTE Jan. 15, 1999 *Ex Parte* Letter at 13.

⁵²⁴ *Id.* at 13. Similarly, the Applicants have stated that "[T]he ability of the combined company to enter the markets of the other Bell companies on an economic basis will be enhanced by the ability to offer a complete bundle of services to customers in those markets. For example, a major multi-location business customer headquartered in New York would be more likely to choose Bell Atlantic if it can provide a full bundle of services, including long distance services originating from the customer's headquarters in New York. Relief in one or more states would permit Bell Atlantic to begin offering a full range of services to corporations that have offices in both regions, and thus to gain (continued....)

merged firm were to lack the ability to provide long distance, Internet, and data services on a national basis, it would be more difficult to market effectively to its customers.⁵²⁵ As the Applicants stated, Bell Atlantic/GTE “would be unable to serve residential customers out-of-franchise because residential target markets were selected based on long-distance affinities with cities in the Northeast.”⁵²⁶

229. Although, as we conclude above, the merged firm will have the incentive to pursue section 271 authority more quickly than would Bell Atlantic on its own, the timing of section 271 approval in the entirety of Bell Atlantic’s region remains uncertain. As a result, it is difficult to evaluate the extent of the Applicants’ claimed benefits from attempting to compete out-of-region because those benefits are speculative at best.⁵²⁷ Although we expect that the Applicants will move ahead aggressively to meet their out-of-region deployment schedule, it is impossible to predict obstacles they may encounter in obtaining section 271 authority. Any delays to section 271 approvals will affect implementation of the merged firm’s bundled services strategy, thereby resulting in delayed benefits to telecommunications markets and consumers. We therefore conclude that the dependency of the bundled services plan upon section 271 approvals is a substantial constraint to both the full implementation and success of the Applicants’ plans.

230. In addition, we conclude that the extent of the benefits of the merged firm’s entry into the nationwide market for voice and data products, even assuming swift section 271 authorization, are modest. Applicants argue that out-of-region expansion will promote competition in the national market for bundled services by creating a fourth national provider with the reach and mix of services necessary to compete effectively against the “Big Three” interexchange providers. The Applicants, therefore, maintain that the addition of another entrant, the merged Bell Atlantic/GTE, would bring more competition to customers seeking end-to-end voice and data solutions, both locally and nationally.

231. Although we conclude that the addition of another entrant to these new markets should benefit the competitive landscape, we question the extent of the benefit. The Applicants provide insufficient evidence that their entry in the larger business market for bundled and local services would produce any benefit to the market or to consumers. Accordingly, we conclude that any benefits accruing from the merged firm’s out-of-region local and bundled strategy would be extremely limited in both magnitude and probability.

D. Long Distance Services

232. We similarly conclude that the Applicants have not demonstrated with any specificity how their merger is likely to produce public interest benefits in the long distance market. Bell Atlantic and GTE claim that their merger will permit them to use long distance capacity to carry their combined volumes on GTE’s nationwide network and offer bundles of services to businesses with offices in both

(Continued from previous page) —————
more quickly the geographic footholds necessary to provide services to these and other customers on an economic basis.” Bell Atlantic Jan. 15, 1999 *Ex Parte* Letter at 13.

⁵²⁵ See *id.*

⁵²⁶ *Id.*

⁵²⁷ See *SBC/Ameritech Order*, 14 FCC Rcd at 14842-43, paras. 303-06.

New York and Los Angeles, Seattle, Dallas, Tampa, or other GTE areas.⁵²⁸ According to the Applicants, the merger will create an effective competitor in the market for long distance services and speed the deployment of a fourth national facilities-based long distance network to compete with the “Big Three” long distance providers.⁵²⁹

233. The Applicants, however, have provided no specific evidence demonstrating either that these claimed benefits are likely to result from the proposed merger or that the merger is at all necessary to achieve the claimed benefits.⁵³⁰ With respect to the likelihood of the claimed benefits, the Applicants have presented no facts indicating that the merged firm’s addition to the long distance market would result in any potential public interest benefit. As we made clear in the *SBC/Ameritech Order*, a mere recitation by the Applicants that some benefit will accrue only if their merger is consummated is insufficient to demonstrate that an asserted benefit is likely or merger specific.⁵³¹ Although we do believe that the ability of the merged firm to provide nationwide long distance services to Bell Atlantic’s largest New York business customers could result in potential public interest benefits in the long distance market, we are unable to evaluate the magnitude of the asserted benefits because of the lack of facts and evidence supporting the Applicants’ claims.⁵³² Because the merged firm would be permitted to utilize Bell Atlantic’s customer base to offer nationwide services only to customers in New York, however, we suspect that such benefits would be modest.

234. In addition, the Applicants have failed to demonstrate that their merger is necessary to achieve the asserted benefits in the long distance market, and, therefore, we conclude that the claimed benefits are not merger-specific. Bell Atlantic, for instance, is capable and has the incentive on its own to provide long distance services to business customers with offices both in New York and Los Angeles and any other city. Indeed, Bell Atlantic recently announced plans to offer long distance services to customers in thirty-three states outside of its region,⁵³³ and there is no indication in the record that the proposed merger is necessary for implementation of such plans. Similarly, GTE already boasts a nationwide long distance network,⁵³⁴ and, in view of the lack of section 271 authority in the majority of Bell Atlantic’s region, we do not believe, nor have the Applicants demonstrated, that GTE’s merger with Bell Atlantic is a necessary precursor to GTE’s ability to compete in the national long distance market.⁵³⁵ Accordingly, we conclude that the proposed merger is not necessary to achieve the modest potential benefits in the long distance market that have been asserted by the Applicants.

⁵²⁸ Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing at 7-6.

⁵²⁹ *Id.*

⁵³⁰ *See SBC/Ameritech Order*, 14 FCC Rcd at 14830, para. 270.

⁵³¹ *Id.* at 14829, para. 267.

⁵³² Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing at 6-7.

⁵³³ *Communications Daily* (Mar. 30, 2000) at 8.

⁵³⁴ Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing at 6-7.

⁵³⁵ In this regard, we also note, as detailed above, that many of the claimed benefits in the market for long distance services are entirely speculative because they are contingent upon the merged company obtaining section 271 relief in Bell Atlantic’s region.

E. Wireless Services

235. With respect to wireless communications services, we conclude that the proposed merger will likely generate benefits for consumers in these markets. These benefits will result primarily from significant additional progress that the combined firm's wireless business will achieve toward its goal of establishing a nationwide footprint. By lowering the cost of offering nationwide service plans, the larger footprint will enable it to compete with other nationwide wireless competitors more effectively, making possible more attractive rates and better network coverage.

236. In their applications, Bell Atlantic and GTE claim that the proposed merger will provide substantial benefits by creating a stronger and more efficient wireless competitor with coverage that would better enable it to compete with other nationwide competitors.⁵³⁶ The Applicants contend that this transaction enhances the overall benefits created by the recent merger of the U.S. wireless assets of Vodafone and Bell Atlantic.⁵³⁷ The combination of the three businesses will create a wireless entity with licenses capable of serving more than 90 percent of the U.S. population and 49 of the top 50 wireless markets. According to the Applicants, the combined company would have a footprint capable of serving 232 million people.⁵³⁸ Hence, this merger would advance the Applicants' competitive position vis-à-vis the service offerings of Sprint PCS, AT&T, Nextel, and VoiceStream. Nextel and Sprint PCS each have nationwide coverage capabilities reaching over 275 million people through their respective license holdings, AT&T can serve 253 million consumers with its licenses, and VoiceStream has the potential to provide service to 193 million customers given its current license footprint.⁵³⁹

237. We observe initially that the recently completed merger of the U.S. wireless assets of Bell Atlantic and Vodafone has already created a carrier with a substantial wireless footprint capable of offering service to 209 million potential customers, thereby achieving considerable pro-competitive market effects.⁵⁴⁰ Consequently, any claims regarding the public interest benefits arising from Bell Atlantic's merger with GTE must be evaluated carefully in light of the recent Vodafone transaction. The Applicants state that GTE will contribute "important wireless properties" in seventeen cities,⁵⁴¹ enabling the new entity to serve 232 million people, or about 23 million more than Bell Atlantic/Vodafone can serve at present. We conclude that these former GTE consumers in particular will now be afforded access to the range of services that the Bell Atlantic/Vodafone joint venture currently offers.

⁵³⁶ See Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing at 7, Bell Atlantic/GTE Oct. 2, 1998 Application, Public Interest Statement at 4, 20-21.

⁵³⁷ Bell Atlantic/GTE Jan. 27 2000 Supplemental Filing, Babbio Decl., para. 2.

⁵³⁸ See Letter from William D. Wallace, Esq., Crowell & Moring LLP, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 98-184 (filed May 4, 2000) (Bell Atlantic/GTE May 4, 2000 *Ex Parte* Letter); see also Morgan Stanley Dean Witter, *Urge to Merge* (May 22, 2000) at 36.

⁵³⁹ Morgan Stanley Dean Witter, *Urge to Merge* (May 22, 2000). VoiceStream's footprint will encompass 193 million consumers after it completes its acquisitions of Omnipoint and Aerial.

⁵⁴⁰ See *In re Vodafone AirTouch, Plc and Bell Atlantic Corporation*, Memorandum Opinion and Order, DA 00-721 (WTB/IB Mar. 30, 2000) at para. 6.

⁵⁴¹ See Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing, Babbio Decl., para. 3. GTE will contribute wireless properties in Chicago, San Francisco, Houston, Indianapolis, Richmond, Norfolk, Knoxville, Nashville, San Jose, Memphis, Louisville, Birmingham, Greensboro, Honolulu, Raleigh-Durham, Fresno, and St. Louis. *Id.*

238. Accordingly, we conclude that the combination of Bell Atlantic/Vodafone and GTE will result in certain public interest benefits arising from an expanded footprint. However, these benefits will not be sufficiently large to alter our overall conclusion that the proposed merger, absent conditions, would result in substantial harms to the public interest.

F. Efficiencies

239. Based upon the evidence in the record, we conclude that the Applicants have not demonstrated that the efficiencies and cost savings that they contend will result from the merger are merger-specific or will mitigate the competitive harms discussed above. Bell Atlantic and GTE claim that their merger will result in a variety of efficiencies in the form of revenue enhancements and cost savings. In their initial application, Bell Atlantic and GTE claim that three years from the merger's closing, the merged entity will achieve \$2 billion in annual expense savings and \$0.5 billion of annual capital expenditure savings.⁵⁴² The Applicants claim an additional \$2 billion in revenue enhancements from creating and deploying "innovative data and other services," improving the value and speeding the deployment of long distance services, and spreading best practices to more efficient market existing services.⁵⁴³

240. The Commission has in the past made clear that merger-generated efficiencies can offset unilateral effects to the extent that they enhance the merged firm's ability and incentive to compete and, therefore, result in lower prices, improved quality, and enhanced or new products.⁵⁴⁴ Claimed efficiencies, however, must be merger-specific, and, therefore, efficiencies that could be achieved through means less harmful to the public interest than the proposed merger cannot be considered true benefits of the merger.⁵⁴⁵ In addition, efficiencies resulting in reductions in marginal costs—as opposed to fixed or overhead costs—are more likely to offset competitive harms by counteracting the merged firm's incentive to elevate price.⁵⁴⁶

241. Although we recognize that the merger of Bell Atlantic and GTE would accelerate the realization of the Applicants' claimed efficiencies, we conclude that only a portion of these efficiencies are merger-specific. Elimination of duplicative or redundant administrative functions and the reduction of future equipment purchases, for instance, are direct consequences of the merger.⁵⁴⁷ The same is true with respect to some types of best practices, such as when superior methods of provisioning and maintenance operations are transferred between companies or when economies of scale are achieved as

⁵⁴² Bell Atlantic/GTE Oct. 2, 1998 Application, Attach. A at 22; Bell Atlantic/GTE Oct. 2, 1998 Application, Attach. A, Declaration of Doreen Toben at 1-2 (Toben Decl.).

⁵⁴³ *Id.*

⁵⁴⁴ *SBC/Ameritech Order*, 14 FCC Rcd at 14847, paras. 319-20; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20067, para. 169.

⁵⁴⁵ *Id.*

⁵⁴⁶ *SBC/Ameritech Order*, 14 FCC Rcd at 14847, paras. 319-20; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20066-67, paras. 169-70.

⁵⁴⁷ *See SBC/Ameritech Order*, 14 FCC Rcd at 14847, para. 320.

a result of the merger.⁵⁴⁸ Although these cost-savings may be merger-specific, they may nonetheless be the result of decreases in output or reductions in product differentiation.⁵⁴⁹ In the *Bell Atlantic/NYNEX* and *SBC/Ameritech Orders*, for instance, the Commission concluded that the elimination of parallel research and development efforts would eliminate a form of non-price competition in which firms attempt to differentiate products in either function or quality.⁵⁵⁰ As was the case with those transactions, both Bell Atlantic and GTE engage in research and development, and the merger's consolidation of functions could result in a reduction in competitive differentiation.⁵⁵¹

242. Similarly, Applicants have not demonstrated, or even stated, that these cost savings would be passed through to consumers in the form of lower prices or new or improved services.⁵⁵² As we recognized in the *SBC/Ameritech Order*, the absence of explicit pass-throughs committed to by the Applicants renders it difficult to evaluate the extent to which actual cost savings would benefit the public interest.⁵⁵³ Additionally, Bell Atlantic and GTE provide little detail regarding their claimed efficiencies. Although the Applicants have indicated the various sources of the claimed savings, the record nonetheless lacks sufficient evidence to support those claimed cost savings. As a result, we find it difficult to evaluate the Applicants' claims and find them unpersuasive.

243. Bell Atlantic and GTE also claim that the combination of their wireless properties will result in overall cost savings totaling \$1.9 billion, net of integration expenses, measured on a present value basis.⁵⁵⁴ It is not clear from parties' submissions in the record what share of these cost savings will likely be passed on to consumers in the form of lower prices.⁵⁵⁵ However, there has been significant new entry in the wireless telephony markets over the past few years, and average prices have declined substantially,⁵⁵⁶ suggesting that a significant proportion of these cost savings may be passed on to wireless consumers as the Applicants compete for business. For example, we would expect that after the merger, some Bell Atlantic/Vodafone customers will experience reduced charges when placing or receiving calls while traveling in GTE's former territory. The Applicants' estimate of prospective cost savings corresponds solely to the addition of GTE properties, and is independent of a separate estimate

⁵⁴⁸ See *id.*

⁵⁴⁹ *Id.* at 14849, para. 327; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20067, para. 171.

⁵⁵⁰ *SBC/Ameritech Order*, 14 FCC Rcd at 14849, para. 328; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20067, para. 171.

⁵⁵¹ *SBC/Ameritech Order*, 14 FCC Rcd at 14849, para. 328; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20067, para. 171.

⁵⁵² *SBC/Ameritech Order*, 14 FCC Rcd at 14849, para. 328.

⁵⁵³ *Id.*

⁵⁵⁴ *Id.* Specifically, the Applicants claim \$2.6 billion of expense savings and \$1.6 billion of capital savings. *Id.*

⁵⁵⁵ The Applicants claimed, prior to the completion of the Vodafone transaction, that reduced roaming charges resulting from the merger will enable the merged firm to offer national, one-rate wireless services at minimum monthly charges "other than" the \$159 per month being charged by Bell Atlantic at the time. *Id.*

⁵⁵⁶ *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Wireless Services*, 14 FCC Rcd 10145 (1999) (Fourth Annual CMRS Competition Report).

for cost savings associated with the Vodafone transaction.⁵⁵⁷

244. We are similarly unconvinced with respect to the Applicants' claimed revenue enhancements. During the course of the next three years, Bell Atlantic and GTE claim to realize \$2 billion in additional annual sales in the following areas: vertical services, long distance acceleration, large business, and data and web hosting.⁵⁵⁸ We conclude that these claimed revenue synergies are extremely speculative and difficult to verify. Although the Applicants' have indicated the amount of additional revenues they expect to derive from each claimed business line, they have provided no supporting evidence to persuade us as to their likelihood and verifiability. Accordingly, although we recognize that some portion of the Applicants' cost savings and revenue enhancements will result from the merger, we conclude that the Applicants' claimed efficiencies are insufficient to alter our overall conclusion that this merger does not provide significant and merger-specific public interest benefits.

G. Conclusion

245. We conclude that the merger brings few tangible merger-specific public interest benefits to the product markets discussed above. Considered in combination, the Applicants' claimed public interest benefits and efficiencies are insufficient to outweigh the significant public interest harms set forth above. Accordingly, we conclude that, absent the conditions proposed by the Applicants, this merger would cause significant potential interest harms that would not be outweighed by the combined weight of the modest benefits that the transaction may achieve.

VIII. CONDITIONS

246. We conclude above that the proposed merger of Bell Atlantic and GTE poses significant potential public interest harms by: (a) removing one of the most significant potential participants in local telecommunications mass markets both within and outside of each company's region; (b) eliminating an independent source for effective, minimally-intrusive comparative practices analyses among the few remaining major incumbent LECs as the Commission implements and enforces the 1996 Act's market-opening requirements; and (c) increasing the incentive and ability of the merged entity to discriminate against rivals, particularly with respect to advanced services. We also conclude that these concerns are not mitigated by the proposed transaction's potential public interest benefits. Thus, if our analysis ended at this point, we would have to conclude that the Applicants have not demonstrated that the proposed transaction, on balance, will serve the public interest, convenience and necessity.

247. As noted above, on January 27, 2000, the Applicants supplemented their initial Application to include, *inter alia*, a package of voluntary commitments that they submit are likely to augment the benefits of their proposed merger through promoting the widespread deployment of local advanced services, spurring local competition, and helping to ensure that consumers receive high quality and low cost telecommunications services.⁵⁵⁹ After receiving extensive public comment on their proposed conditions, Bell Atlantic and GTE modified their commitments on April 14, 2000, and in

⁵⁵⁷ Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing, Babbio Decl., para. 3.

⁵⁵⁸ Bell Atlantic/GTE Nov. 23, 1998 Joint Reply, Toren Reply Decl. at 5-6.

⁵⁵⁹ Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing at 2. *See also* Jan. 31, 2000 Public Notice.

subsequent filings.⁵⁶⁰ We believe that the Applicants' package of conditions, with the modifications by this Commission, alters the public interest balance of the proposed merger by mitigating substantially the potential public interest harms while providing additional public interest benefit. Accordingly, with the full panoply of conditions that we adopt in this Order, and assuming the Applicants' ongoing compliance with these conditions, we find that the Applicants have demonstrated that the proposed transfer of licenses and lines from GTE to Bell Atlantic will serve the public interest, convenience and necessity.

A. Adopted Conditions

248. The package of conditions that the Applicants present to bolster the benefits of their proposed merger is patterned closely after the set of conditions that we adopted less than a year ago in the *SBC/Ameritech Order*.⁵⁶¹ Of the 30 separate sections of the *SBC/Ameritech Conditions*, Bell Atlantic and GTE propose to retain 26.⁵⁶² As we did in reviewing the proposed merger of SBC and Ameritech, here we analyze the effect of the conditions on the public interest balance of the proposed merger, including the prospects for mitigating the potential public interest harms that we identify above.

249. In the paragraphs below, we summarize the conditions and describe changes thereto made a result of commenters' suggestions. We also note where changes were not made, despite commenters' concerns. Subsequently, we describe the benefits of the conditions. We explain why we

⁵⁶⁰ Bell Atlantic/GTE Mar. 14, 2000 *Ex Parte* Letter. The Applicants resubmitted their proposed conditions on April 28, 2000, encapsulating the revisions that they proffered on April 14 in addition to the contents of errata that they filed on April 17 and April 28. Bell Atlantic/GTE Apr. 28, 2000 *Ex Parte* Letter. See also Letter from Patricia Koch, Assistant Vice President, Bell Atlantic, to Magalie Salas, Secretary, Office of the Secretary, Federal Communications Commission, CC Docket No. 98-184, (filed Apr. 17, 2000). We solicited further public comment on the proposed conditions as clarified and modified by the revisions reflected in the Applicants' April 28 submission. See Apr. 28, 2000 Public Notice.

⁵⁶¹ See Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing at 17; *SBC/Ameritech Order*, 14 FCC Rcd at 14854-925, paras. 348-518 (section of the order discussing the conditions); App. C, Conditions, *id.* at 14964-15172 (*SBC/Ameritech Conditions*). See also NEXTLINK Mar. 16, 2000 Reply at 2-3, 5-6; BlueStar et al. Mar. 1, 2000 Comments at 3; Comptel Mar. 1, 2000 Comments at 2; IURC Mar. 1, 2000 Comments at 4, 13; MCI WorldCom Mar. 1, 2000 Supplemental Comments at 7; National ALEC Mar. 1, 2000 Comments at 1; NorthPoint Mar. 1, 2000 Comments at 3 (supporting treatment of the *SBC/Ameritech Conditions* as a framework for our analysis of Bell Atlantic's and GTE's commitments). But see AT&T May 5, 2000 Comments at 3.

⁵⁶² Sections of the *SBC/Ameritech Conditions* that Bell Atlantic and GTE do not include in their proffered commitments are: Access to Loop Information for Advanced Services, *SBC/Ameritech Conditions* Section IV; Restructuring OSS Charges, *SBC/Ameritech Conditions* Section IX; Carrier-to-Carrier Promotions: UNE Platform, *SBC/Ameritech Conditions* Section XVI; and Shared Transport in Ameritech States, *SBC/Ameritech Conditions* Section XIX. See *SBC/Ameritech Conditions*, 14 FCC Rcd at 14997-98, 15009-10, 15020-24, paras. 19-20, 35, 50-52, 55-56. See also *infra* Section VIII.C (refuting comments that the Applicants in this merger likewise should be subject to conditions relating to access to loop information for advanced services, restructuring of OSS charges, and carrier-to-carrier UNE-platform promotions). No commenter takes issue with the Applicants' omission of commitments relating to shared transport, and we agree with the Applicants that no such commitments warrant attachment to Bell Atlantic and GTE in the context of their proposed merger, in light of our requirement that incumbent LECs provide shared transport as a UNE. See Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing at 18 n.12; *UNE Remand Order* at para. 369. See also *infra* Conditions at para. 39 (commitment to continue making UNEs available until the date of a final, non-appealable judicial decision relieving incumbent LECs of UNE provision requirements). The Applicants fold components of one other separate section of the *SBC/Ameritech Conditions*, Section III relating to Advanced Services OSS, into a comprehensive section of OSS-related commitments. See Conditions at paras. 18-25. Compare with *SBC/Ameritech Conditions*, 14 FCC Rcd at 14992-96, paras. 15-18.

adopt the group of conditions as modified in their entirety and approve the merger subject to those conditions. Finally, we discuss why we agree with the Applicants that additional commitments beyond those proffered by the Applicants are not warranted.

250. We adopt, with some modification, the proffered commitments of Bell Atlantic and GTE as express conditions of our approval of the transfer of licenses and lines from GTE to Bell Atlantic.⁵⁶³ For the reasons set forth below, we conclude that, assuming the Applicants' ongoing compliance with these conditions, Bell Atlantic and GTE have demonstrated that their proposed transaction, on balance, will serve the public interest, convenience and necessity.

251. As indicated below, these conditions are designed to accomplish five primary public interest goals: (a) promoting equitable and efficient advanced services deployment; (b) ensuring open local markets; (c) fostering out-of-territory competition; (d) improving residential phone service; and (e) ensuring compliance with and enforcement of the conditions. These goals flow from our statutory objectives to open all telecommunications markets to competition, to promote rapid deployment of advanced services, and to ensure that the public has access to efficient, high-quality telecommunications services. Achieving these goals will also serve to ameliorate the potential public interest harms of the transaction described above.

252. Even though some of the conditions may relate to other requirements that Bell Atlantic and GTE are or will be subject to under the Act or our rules, the conditions that we adopt in this merger proceeding are not intended to prejudice, or override, Commission action in other proceedings. The Commission may, for example, adopt additional requirements in other more general proceedings that affect matters addressed by these conditions. In that case, because the conditions are intended to be a floor and not a ceiling,⁵⁶⁴ the merged firm would be subject to the general requirements as well as these conditions. We emphasize that the merged firm must comply with any applicable Commission orders or rules in addition to the requirements of these conditions.⁵⁶⁵

253. Nor are the conditions that we adopt today intended to be considered as an interpretation of sections of the Communications Act, especially sections 251, 252, 271 and 272, or the Commission's rules, or any other federal statute including the antitrust laws.⁵⁶⁶ The conditions are designed to address potential public interest harms specific to the merger of the Applicants, not the general obligations of incumbent LECs or the criteria for BOC entry into the interLATA services

⁵⁶³ The specific conditions that we adopt in this merger proceeding are set forth in Appendix D to this Order. In order to provide guidance to the industry on particular interpretive issues, as well as to facilitate implementation and enforcement of the conditions, in some instances we have annotated the Applicants' proffered conditions with explanatory footnotes that further reflect and clarify the intent of the particular condition.

⁵⁶⁴ See *SBC/Ameritech Order*, 14 FCC Rcd at 14857, para. 356. See also AT&T Mar. 1, 2000 Opposition at 35; Covad Mar. 1, 2000 Comments at 11-12 (conditions should supersede less stringent state certification requirements on the merged entity's separate advanced services affiliate); MCI WorldCom Mar. 1, 2000 Supplemental Comments at 8.

⁵⁶⁵ If Bell Atlantic/GTE is unable to comply simultaneously with both the requirements of any condition and the requirements of any Commission rule or order, it must so inform the Commission and seek guidance as to how it should proceed.

⁵⁶⁶ See *SBC/Ameritech Order*, 14 FCC Rcd at 14857, para. 357. See also MCI WorldCom Mar. 1, 2000 Supplemental Comments at 8.

market. For example, the Carrier-to-Carrier Performance Plan is not meant to substitute for any enforcement mechanisms that the Commission may adopt in the section 271 context (*i.e.*, anti-backsliding measures), nor substitute for state performance measure plans. All of the conditions that we adopt today are merger-specific and not determinative of the obligations imposed by the Act or our rules on Bell Atlantic, GTE or any other telecommunications carrier. In particular, we note that our adoption of Bell Atlantic/GTE's proposed conditions does not signify that, by complying with these conditions, Bell Atlantic/GTE will satisfy its nondiscrimination obligations under the Act or Commission rules.

254. The conditions are also not intended to limit the authority of state commissions to impose or enforce requirements that go beyond those adopted in this Order.⁵⁶⁷ Because these conditions serve as a baseline, the Applicants must abide by any applicable state rules, even if those rules address matters that are included within these conditions, unless the merged entity would violate one of these conditions by following the state rule. We do not preclude states from imposing additional rules, regulations, programs or policies that are not inconsistent with these conditions. As discussed below, however, to the extent that a requirement in these conditions duplicates a requirement imposed by a state pursuant to its review of the proposed merger, parties can elect to receive the benefit under either these conditions or the identical state conditions.

255. The conditions we adopt today will remain effective and enforceable for 36 months, unless otherwise specified in the relevant condition. Accordingly, for conditions that take effect a certain period of time after the merger closing, Bell Atlantic/GTE's obligations under those conditions would extend from their effective date for a full 36-month period of benefit, which would fall later than 36 months after the merger closing.

256. We expect that Bell Atlantic/GTE will implement each of these conditions in full, in good faith and in a reasonable manner to ensure that all telecommunications carriers and the public are able to obtain the full benefits of these conditions. If Bell Atlantic/GTE does not fulfill its obligation to perform each of the conditions, pursuant to our public interest mandate under the Communications Act we must take action to ensure that the merger remains beneficial to the public. We intend to utilize every available enforcement mechanism, including, if necessary, revocation of the merged firm's section 214 authority,⁵⁶⁸ to ensure compliance with these conditions. To this end, should the merged entity systematically fail to meet its obligations, we can and will revoke relevant licenses, or require the divestiture of Bell Atlantic/GTE into the current Bell Atlantic and GTE companies.⁵⁶⁹ Although such action would clearly be a last resort, it is one that would have to be taken if there is no other means for ensuring that the merger, on balance, benefits the public.

⁵⁶⁷ See *SBC/Ameritech Order*, 14 FCC Rcd at 14857, para. 358. See also MCI WorldCom Mar. 1, 2000 Supplemental Comments at 8.

⁵⁶⁸ See *CCN, Inc., et al.*, CC Docket No. 97-144, Order, 13 FCC Rcd 13599 (1998) (revoking the Fletcher Companies' section 214 operating authority for slamming and other violations of the Communications Act and Commission rules).

⁵⁶⁹ Cf. *SBC/Ameritech Order*, 14 FCC Rcd at 14858, para. 360 (granting section 214 application of SBC to acquire Ameritech subject to conditions, but stating that the Commission "can and will" revoke relevant licenses or require divestiture should the merged entity fail to meet its obligation to perform each of the conditions).

257. As the Commission previously has stated in the context of approving mergers between major incumbent LECs, our approval of this Application subject to conditions should not be considered as an indication that future applicants always will be able to rely on similar public interest commitments to offset potential public interest harms.⁵⁷⁰ Each case will present different facts and circumstances. Though the *SBC/Ameritech Conditions* provided a framework for the conditions that we adopt here, as we discuss above, our review of the merits of the commitments that Bell Atlantic and GTE proffer is limited to the context of the potential harms and benefits that are particular to this proposed merger.

258. The Commission also previously has expressed concern regarding consolidation among the major incumbent LECs, and how such consolidation could gravely impair our implementation of Congress's directive to open all telecommunications markets to competition.⁵⁷¹ Indeed, we conclude above that a merger between Bell Atlantic and GTE presents serious potential for public interest harms arising out of the loss of a significant benchmark, greater incentive and ability for the companies to discriminate against competitors as a merged entity, and the loss of a prospective competitor in each other's markets.⁵⁷² In the *SBC/Ameritech Order*, we held that "[t]he instant transaction, approved with a stringent set of conditions, removes yet another independent major incumbent LEC, thereby further escalating the burden on any future major incumbent LEC merger applicants" in establishing that a proposed merger will, on balance, be pro-competitive and therefore serve the public interest, convenience and necessity.⁵⁷³ Likewise, the burden on any major incumbent LEC merger applicants subsequent to today will be even greater.

259. With respect to the burdens on the applicants for the instant merger, though GTE is not a BOC, we are mindful that it is a major incumbent LEC.⁵⁷⁴ Compounding the loss of a key benchmark through merging with Bell Atlantic, another major incumbent LEC, is the fact that as a non-BOC, GTE is not subject to section 271. Thus, GTE does not have the same incentive as a BOC of gaining authorization to offer in-region, interLATA voice and data services in exchange for its demonstration that the local telecommunications market in the particular state is open to competition. Furthermore, several commenters express concern regarding the actual performance of GTE, in particular, in numerous areas of the realm of opening telecommunications markets to competition.⁵⁷⁵ Accordingly, some of these commenters argue that conditions to the instant merger should be especially strong with respect to the operation of the merged entity in GTE legacy service areas.⁵⁷⁶ In this regard, we have

⁵⁷⁰ See *id.* at 14858, para. 361; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19993, para. 15.

⁵⁷¹ See, e.g., *SBC/Ameritech Order*, 14 FCC Rcd at 14858-59, para. 362; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19994, para. 16.

⁵⁷² See, e.g., CompTel Mar. 1, 2000 Comments at 2 (conditions are necessary "to increase competitive opportunities in order to offset the loss of potential competition resulting from the merger").

⁵⁷³ 14 FCC Rcd at 14859, para. 362.

⁵⁷⁴ See *SBC/SNET Order*, 13 FCC Rcd at 21302, para. 21.

⁵⁷⁵ See, e.g., NEXTLINK Mar. 16, 2000 Reply at 16-18; Allegiance Mar. 1, 2000 Comments at 2; BlueStar et al. Mar. 1, 2000 Comments at 16-18; CoreComm Mar. 1, 2000 Comments at 41.

⁵⁷⁶ See Allegiance Mar. 1, 2000 Comments at 2; AT&T Mar. 1, 2000 Opposition at 27-28 (so as to offset the harms from lost benchmarks); CoreComm Mar. 1, 2000 Comments at 25-26 (so as to offset the lack of a section 271 inducement with respect to GTE); NEXTLINK Mar. 16, 2000 Reply at 10.

looked to the Applicants to offer commitments that would compel or reflect greater results on the part of GTE in opening its markets to competition.⁵⁷⁷ Without the bolstering of these commitments particularly with respect to GTE, we would be hard-pressed to find that the Applicants meet their already-escalated burden of establishing that the benefits of the merger will outweigh the harms.

1. Promoting Equitable and Efficient Advanced Services Deployment

260. *Separate Affiliate for Advanced Services.* Under this condition, Bell Atlantic and GTE will create, prior to closing the merger, one or more separate affiliates to provide all advanced services in the combined Bell Atlantic/GTE⁵⁷⁸ region on a phased-in basis. The structural and non-structural safeguards we adopt today will make engaging in anticompetitive misconduct more difficult.⁵⁷⁹

In addition, the separate affiliate condition will counterbalance Bell Atlantic/GTE's increased incentive to degrade services and facilities furnished to competitors by making such behavior readily apparent to the Commission and the public.⁵⁸⁰ We therefore expect that strict compliance with the separate affiliate condition will mitigate the substantial risk of discrimination faced by Bell Atlantic/GTE's competitors after the merger.

261. Establishing an advanced services separate affiliate will provide a structural mechanism to ensure that competing providers of advanced services receive effective, nondiscriminatory access to the facilities and services of the merged firm's incumbent LECs that are necessary to provide advanced services. Because the merged firm's own separate affiliate will use the same processes as competitors, wait in line for collocation space, buy the same inputs used to provide advanced services, and pay an equivalent price for facilities and services, the condition should ensure a level playing field between Bell Atlantic/GTE and its advanced services competitors.⁵⁸¹ In this regard, the competitive safeguards will provide Bell Atlantic/GTE's competitors substantial benefits. For example, to the extent a Bell Atlantic/GTE incumbent LEC allows its separate affiliate to collocate packet switches, routers, or other equipment, the nondiscrimination safeguards compel the incumbent LEC to allow unaffiliated carriers to

⁵⁷⁷ See, e.g., *infra* paras. 296-99.

⁵⁷⁸ We use the term "Bell Atlantic/GTE" to represent the entity that will result from the merger, consisting of today's Bell Atlantic Corporation, GTE Corporation, and each company's incumbent LEC telephone subsidiaries.

⁵⁷⁹ For example, the requirement to have separate officers, directors, and employees, as well as the requirements to operate independently and to deal at arm's length, will deter a Bell Atlantic/GTE incumbent LEC and its separate affiliate from coordinating activities to discriminate against competitors.

⁵⁸⁰ For example, the separate affiliate's section 272(b)(5) disclosure requirements will ensure that all dealings between the Bell Atlantic/GTE incumbent LECs and their separate affiliates will occur at arm's length and in the public eye. The relevant disclosure requirements will provide competitors the information needed to resolve disputes. See *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22021, para. 243. Moreover, we note that the Applicants' modified their proposal to allow the public access to data showing the performance BA/GTE's incumbent LECs provide to their Advanced Services Affiliate. See *infra* Appendix D at para. 9 (specifying that performance measurements regarding the separate affiliate shall be made available to other parties); see also MCI WorldCom Mar. 1, 2000 Comments at 8 (advocating stricter reporting requirements). In addition, we note that the rigorous audit requirements that apply to Bell Atlantic/GTE will further increase the probability of detecting discriminatory practices.

⁵⁸¹ See Advanced Telecom Mar. 1, 2000 Comments at 7-9 (addressing equal treatment for collocation of DSLAMs in remote terminals); Covad Mar. 1, 2000 Comments at 7-8; see also *SBC/Ameritech Order*, 14 FCC Rcd at 14859, n.674 (summarizing the collocation benefits arising out of the separate affiliate nondiscrimination safeguards).

collocate similar equipment on nondiscriminatory rates, terms, and conditions. Similarly, if a Bell Atlantic/GTE incumbent LEC works with its separate affiliate to develop new systems, products, or company-wide standards, it must cooperate with unaffiliated carriers in the same way.⁵⁸²

262. We expect that Bell Atlantic/GTE's competitors will benefit from the incumbent's incentive to assist its affiliate because the nondiscrimination safeguards and the rigorous audit requirements will ensure that they receive the same treatment as the separate affiliate. Because Bell Atlantic/GTE's Advanced Services Affiliate will have to order line sharing arrangements like any other advanced services provider, competitive LECs can expect Bell Atlantic/GTE's incumbent LECs to develop improvements and import best practices to make this ordering process as simple as possible. Given this expectation, we anticipate that this condition will greatly accelerate competition in the advanced services market by lowering the costs and risks of entry and reducing uncertainty, while prodding all carriers, including the Applicants, to hasten deployment.⁵⁸³ Consumers will ultimately benefit from this deregulated approach.

263. The separate advanced services affiliate will be distinct from Bell Atlantic/GTE's in-region telephone companies and operate largely in accordance with the structural, transactional, and nondiscrimination requirements of sections 272(b), (c), (e), and (g).⁵⁸⁴ The condition specifies certain activities that will be permitted between the Bell Atlantic/GTE incumbent LEC and the separate affiliate, some of which differ from section 272's requirements.⁵⁸⁵ Specifically, the Bell Atlantic/GTE incumbent LEC and its advanced services affiliate may jointly market the other's services and perform certain customer care services.⁵⁸⁶ In addition, the incumbent may perform certain operation, installation, and

⁵⁸² See Advanced Telecom Mar. 1, 2000 Comments at 9-10 (addressing risk of incumbent LEC and affiliate collaborating to develop a network that limited competitive access); Comptel Mar. 1, 2000 Comments at 8-9 (pointing out that competitors can opt into portions of the interconnection agreement between BA/GTE incumbent LECs and their Advanced Services Affiliate); see also *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22003, para. 210 (finding that the section 272(c) nondiscrimination safeguards obligate the BOC "to work with competitors to develop new services if it cooperates in such a manner with its section 272 affiliate) & 22013, para. 229.

⁵⁸³ See *SBC/Ameritech Order*, 14 FCC Rcd at 14859-60, para. 363.

⁵⁸⁴ 47 U.S.C. § 272(b), (c), (e), and (g); see also *Implementation of the Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539 (1996) (*Accounting Safeguards Order*), Second Order On Reconsideration, FCC 00-9 (rel. Jan. 18, 2000); *Non-Accounting Safeguards Order*, petition for review pending sub nom. *SBC Communications v. FCC*, No. 97-1118 (filed D.C. Cir. Mar. 6, 1997) (held in abeyance May 7, 1997), First Order on Reconsideration, 12 FCC Rcd 2297 (1997) (*First Order on Reconsideration*), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997) (*Second Order on Reconsideration*), aff'd sub nom. *Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), *Third Order on Reconsideration*, FCC 99-242 (rel. Oct. 4, 1999) (*Third Order on Reconsideration*); but see Covad Mar. 1, 2000 Comments at 7-14 (arguing that the Applicants' proposal does not adequately incorporate all section 272 safeguards).

⁵⁸⁵ See Conditions at paras. 3-4. As CompTel points out, the conditions prohibit joint ownership of advanced services equipment. Comptel Mar. 1, 2000 Comments at 9. Starting 30 days after the merger closing date, BA/GTE's incumbent LECs may no longer buy new advanced services equipment. Under certain conditions, BA/GTE incumbent LECs may continue to own and operate advanced services equipment bought and installed prior to that date. See Conditions at para. 4(n).

⁵⁸⁶ The customer care services permitted under the condition on an exclusive basis are: (1) ongoing customer notification of service order progress; (2) response to a customer's inquiry regarding the status of an order; (3) (continued....)

maintenance (OI&M) functions,⁵⁸⁷ pursuant to a tariff, written affiliate agreement,⁵⁸⁸ or approved interconnection agreement, and provide billing and collection services,⁵⁸⁹ pursuant to a written agreement, for its separate affiliate on a nondiscriminatory basis. The incumbent LEC may also transfer to the separate affiliate specified advanced services equipment⁵⁹⁰ on an exclusive basis during a limited grace period. Starting 90 days after the merger closing, all new advanced services equipment must be purchased and owned by the separate affiliate.⁵⁹¹ The affiliate may also use the Bell Atlantic/GTE

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changes to customer account information; and (4) receipt of customer complaints (other than receipt and isolation of trouble reports).

⁵⁸⁷ The OI&M functions subject to these conditions encompass the deployment and operation of a facilities-based telecommunications network. Many competitive carriers contract with third parties for some or all of these functions, and the conditions permit the Bell Atlantic/GTE separate affiliate to contract with the Bell Atlantic/GTE incumbent LEC for such functions, provided that the incumbent acts in a nondiscriminatory fashion. The OI&M activities performed by an incumbent LEC in the normal course of providing unbundled elements, services or interconnection are not subject to these conditions. Such normal OI&M activities will not be affected by the conditions and will be provided and priced in accordance with forward-looking rules applicable to the underlying service, unbundled element or interconnection.

⁵⁸⁸ We note that, in accordance with the Commission's accounting safeguards, any transactions or shared services performed pursuant to this written affiliate agreement must be valued in accordance with the affiliate transactions rules, reduced to writing and posted on the Internet, and made available to competitors on the same rates, terms and conditions. *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21992, para. 181.

⁵⁸⁹ The billing and collection services that the incumbent is permitted to provide on a nondiscriminatory basis include payment arrangements, account adjustment, responding to account balance inquiries, account closure, responses to legal action affecting or involving the customer, and receipt and resolution of customer billing and collection complaints. Bell Atlantic/GTE may, for example, include the affiliate's and other carriers' bills on a separate page in the same envelope with its bill, or it may choose to place the affiliate's and other carriers' bills in a separate envelope. Either way, Bell Atlantic/GTE must offer the same services that it provides to its affiliate to unaffiliated carriers at the same rates, terms and conditions, and on a disaggregated basis that permits the unaffiliated providers to select the particular services that they desire from the incumbent.

⁵⁹⁰ For purposes of this condition, the equipment that may be transferred consists of: (1) DSLAMs or functionally equivalent equipment; (2) spectrum splitters that are solely used in the provision of advanced services; (3) packet switches and multiplexers such as ATMs and frame relay engines used to provide advanced services; (4) modems used in the provision of packetized data; and (5) DACS frames used only in the provision of advanced services. Spectrum splitters used to separate the voice-grade channel from the advanced services channel are not permitted to be transferred. Such asset transfers must take place in accordance with the Commission's accounting safeguards. Consistent with the Commission's rules, if Bell Atlantic/GTE transfers to its separate advanced services affiliate a facility (e.g., copper loops, dark fiber, switching equipment) that is deemed to be an unbundled network element under 47 U.S.C. § 251(c)(3), the Commission's unbundling requirements will attach with respect to that element. *See* 47 C.F.R. § 53.207.

⁵⁹¹ This prohibition against joint ownership, as per the section 272(b)(1) non-accounting safeguards, is critical for ensuring that the Bell Atlantic/GTE incumbent LECs do not circumvent the nondiscrimination safeguards and that ratepayers of regulated services do not bear the costs of Bell Atlantic/GTE's competitive operations. *See* CompTel Mar. 1, 2000 Comments at 9. Under certain conditions, BA/GTE incumbent LECs may continue to own and operate advanced services equipment bought and installed prior to the 90 day deadline. *See* Conditions at para. 4(n).

With respect to ownership of new advanced services equipment, we note that several parties raise concerns about competitive access to the BA/GTE incumbent LEC remote terminals. *See, e.g.,* Letter from Patrick J. Donovan, Counsel for Mpower Communications Corporation, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 98-184 (filed June 6, 2000); Advanced Telecom Mar. 1, 2000 Comments at 7-10; CompTel Mar. 1, 2000 Comments at 5. These concerns stem from similar issues arising in the context of the *SBC/Ameritech Conditions*, as well as a previous description of the Applicants' proposal. *See* Bell Atlantic/GTE May 19, 2000 *Ex* (continued....)

incumbent LEC's name, trademarks or service marks on an exclusive basis, and employees of the separate affiliate may be located in the same buildings and on the same floors as the incumbent LEC's employees.⁵⁹² Moreover, although Bell Atlantic/GTE will comply with the Commission's section 272 accounting safeguards,⁵⁹³ it will be permitted to deviate from these only to the extent that it will not have to comply with the Commission's transaction disclosure requirements under section 272(b)(5) with respect to transactions conducted pursuant to interconnection agreements between a Bell Atlantic/GTE incumbent LEC and its advanced services affiliate. To ensure that all transactions between the advanced services affiliate and the incumbent are conducted on an arms-length basis, Bell Atlantic/GTE's compliance with this separate affiliate condition will be subject to an annual audit.

264. After a limited transition period, the responsibility to provide advanced services in the Bell Atlantic/GTE service area will rest with the separate affiliate, and the activities that it and the incumbent may undertake are specifically set forth in the conditions.⁵⁹⁴ Once the separate affiliate is operating in accordance with the "Steady-State Provisioning" requirements, it will be operating just like any other unaffiliated provider of advanced services. To ease the transition to providing all advanced services through a separate affiliate, the conditions permit a Bell Atlantic/GTE incumbent LEC to perform certain activities on behalf of its affiliate on an exclusive basis during the transition period. Specifically, for a limited period, a Bell Atlantic/GTE incumbent LEC may provide limited "network planning, engineering, design or assignment"⁵⁹⁵ services associated with advanced services to its affiliate, and receive and isolate troubles affecting an advanced services customer on behalf of the affiliate. We emphasize that the transition period is extremely limited with clear deadlines, and the services that a Bell Atlantic/GTE incumbent LEC may perform for its separate affiliate are a narrow set of services that may not subsume the main function of the affiliate. We recognize that the transition period differs from the one adopted in the *SBC/Ameritech Order* in that Bell Atlantic/GTE could receive up to 60 additional days.⁵⁹⁶ We find, however, that if the transition is not managed properly, existing advanced services

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Parte Letter, Attach. at para. 3d(1); *Common Carrier Bureau Seeks Comment on SBC's Request for Interpretation, Waiver, or Modification of the SBC/Ameritech Merger Conditions*, Public Notice, DA 00-335 (rel. Feb. 18, 2000). To address these concerns, the Applicants modified their proposal to state that they will comply with the Commission's resolution of this issue in the proceeding related to SBC. See Conditions at para. 3d.

⁵⁹² The Commission's nondiscrimination and accounting safeguards will continue to apply in these circumstances in order to protect competition from potential abuse.

⁵⁹³ See *Accounting Safeguards Order*, 11 FCC Rcd at 17588-618, 17652-55, paras. 111-70, 251-58.

⁵⁹⁴ To ensure Bell Atlantic/GTE implements its separate affiliate in a timely manner, the conditions establish a deployment schedule for interstate and intrastate advanced services. The deployment schedule varies depending on the type of customer, i.e., a new activation or an embedded customer. See Conditions at paras. 5-6. As a general matter, we expect Bell Atlantic/GTE to start providing interstate advanced services through the separate affiliate as quickly as possible, even though the separate affiliate may continue to outsource a number of functions during the transition period. See *id.* at para. 5(a) (requiring the incumbent LECs and the separate affiliate to operate pursuant to an interconnection agreement for interstate services within 90 days of filing such agreement with a state commission). The Bell Atlantic/GTE separate affiliate will be fully operational once it is acting in accordance with the "Steady-State Provisioning" requirements and after all transition periods have ended. See *id.* at para. 4.

⁵⁹⁵ By "network planning, engineering, design, and assignment services," we mean those functions described in subparagraphs 4(a), 4(c), and 4(d). Such activities are to be narrowly construed and do not include, for example, ordering any services or facilities. See Conditions at para. 4(f), 6(g)(3). All permissible forms of "network planning, engineering, design, and assignment" services, for example, end no later than 180 days after the merger closing date.

⁵⁹⁶ See *SBC/Ameritech Conditions*, 14 FCC Rcd at 14983, 14984-86, paras. 5(a), 6.

customers could experience uncalled-for disruption of service. We note, nevertheless, that competitors will benefit immediately from the separate affiliate conditions because of the “functional equivalent” requirements, which ensure that Bell Atlantic/GTE will start to operate in a manner functionally equivalent to a fully operational separate affiliate immediately after merger closing.⁵⁹⁷

265. Bell Atlantic/GTE’s obligation to provide all advanced services through a separate affiliate will sunset after either: (a) the later of 42 months after the merger’s closing, or 36 months after the incumbent ceases to process trouble reports for the affiliate on an exclusive basis; (b) the date on which Congress has enacted legislation that specifically prohibits the Commission from requiring an incumbent LEC to establish a separate advanced services affiliate and the Commission has modified its rules and regulations in a manner that would materially alter the structure or interaction between the incumbent and affiliate from that set forth in the conditions;⁵⁹⁸ or (c) nine months after a final, non-appealable judicial decision determines that the separate advanced services affiliate is deemed a successor or assign of the incumbent, unless that decision is based substantially on conduct by or between a Bell Atlantic/GTE incumbent and its affiliate that was not expressly permitted by these conditions.

266. If, after one of these three sunset events occurs, Bell Atlantic/GTE decides to no longer provide advanced services through a separate affiliate in a particular state, then Bell Atlantic/GTE will continue certain other obligations until 48 months after the merger closing date. In that case, Bell Atlantic/GTE must, for example, provide all advanced services through a separate office or division that will continue using the same OSS interfaces, processes and procedures that are made available to unaffiliated entities (including using the Electronic Data Interchange (EDI) interface for processing a substantial majority of pre-order inquiries and orders).⁵⁹⁹ In addition, Bell Atlantic/GTE will continue the surrogate line-sharing and advanced services OSS discounts, and its incumbent LECs will continue to provide unaffiliated carriers with the same OI&M services that its retail operations use, as well as those OI&M services that previously were made available under the conditions.

267. As in the *SBC/Ameritech Order*, we find, on the basis of the conditions as written, that the affiliate structure creates a rebuttable presumption that a Bell Atlantic/GTE advanced services affiliate will not be a “successor or assign” of an incumbent LEC under section 251(h)(1) or a BOC under section 3(4)(B) of the Act.⁶⁰⁰ At the same time, however, we note that if a Bell Atlantic/GTE

⁵⁹⁷ See Conditions at para. 6(g) (establishing the functional equivalent requirements as the minimum operating standard). We further note that the functional equivalent requirements guard against potential delays in the implementation of Bell Atlantic/GTE’s separate affiliate. Under the functional equivalent requirements, the separate affiliate must order all “facilities and/or services” used to provide advanced services, which will trigger immediately the Bell Atlantic/GTE incumbent LECs’ incentive to improve their processes and systems. Consistent with the scheme laid out in *SBC/Ameritech Order*, however, the functional equivalent requirements also allow the Bell Atlantic/GTE incumbent LECs to process orders for ADSL service and order the necessary facilities until the Steady-State Provisioning requirements go into effect. See Conditions at para. 6(g)(2)-(4).

⁵⁹⁸ Examples of such a material change would be if the Commission prohibits an incumbent LEC from providing joint marketing or operation, installation and maintenance services to an advanced services affiliate. See *SBC/Ameritech Order*, 14 FCC Rcd at 14862 n.685.

⁵⁹⁹ The separate office or division will, for example, wait in line for collocation space like unaffiliated carriers. In this way, unaffiliated parties will continue to receive the benefits of the separate affiliate condition.

⁶⁰⁰ 47 U.S.C. §§ 251(h)(1) & 153(4)(B). See *SBC/Ameritech Order*, 14 FCC Rcd at 14893, para. 445.

incumbent LEC and its advanced services affiliate behave in a manner inconsistent with the intent of the conditions or engage in activities beyond those expressly permitted in the conditions, the company bears the risk that the affiliate will be deemed a successor or assign of the incumbent LEC and, therefore, subject to incumbent LEC regulation under section 251(c). Accordingly, if a Bell Atlantic/GTE advanced services affiliate is found to be a successor or assign⁶⁰¹ based on activities that are expressly permitted in these conditions, then, nine months after such a finding becomes final and non-appealable, Bell Atlantic/GTE will no longer be obligated under the conditions to provide all advanced services through a separate affiliate, although it may choose to do so, but will continue to bear certain obligations.⁶⁰² If, however, the separate advanced services affiliate is deemed to be a successor or assign based substantially on conduct by or between a Bell Atlantic/GTE incumbent and its affiliate that was not expressly permitted by these conditions, then Bell Atlantic/GTE shall continue providing advanced services through the affiliate, operating as a successor or assign, for the full duration of the condition.⁶⁰³

268. We reject AT&T's argument that the separate advanced services affiliate created under these conditions necessarily will be a "successor or assign" of Bell Atlantic/GTE incumbent LECs and thereby subject to incumbent LEC regulation under section 251(c).⁶⁰⁴ In the *SBC/Ameritech Order*, we addressed these same issues as raised by the commenters there relative to the separate advanced services affiliate conditions that we applied to the combined SBC/Ameritech entity. Significantly, we note the separate affiliate conditions in the instant merger and those that we adopted in the SBC/Ameritech merger are identical in all relevant respects.⁶⁰⁵ Thus, our analysis in rejecting the assertion that the SBC/Ameritech separate advanced services affiliate is a successor or assign of an SBC/Ameritech incumbent LEC applies equally here. We hereby incorporate that analysis by reference.⁶⁰⁶

269. We find that, as a general matter, incumbent LECs have no market power in the

⁶⁰¹ We do not address in this proceeding the potential obligations or requirements with respect to third parties that may be imposed on Bell Atlantic/GTE in the event that its advanced services affiliate is found to be a successor or assign.

⁶⁰² *Id.* We note that, after that time, if Bell Atlantic/GTE decides to no longer provide advanced services through a separate affiliate in a particular state, it will provide them through a separate division that will comply with certain obligations until 48 months after the merger closing date. *See* Conditions at para. 12.

⁶⁰³ *See* Conditions at para. 11c.

⁶⁰⁴ 47 U.S.C. § 251(c). *But see* AT&T May 5, 2000 Comments at 8-15.

⁶⁰⁵ *Compare SBC/Ameritech Conditions*, 14 FCC Rcd at 14969-90, paras. 1-13 (SBC/Ameritech separate advanced services affiliate conditions) *with* Conditions at paras. 1-12 (Bell Atlantic/GTE separate advanced services affiliate conditions). In the *SBC/Ameritech Order*, we concluded that, in determining whether an advanced services affiliate is a successor or assign of an incumbent LEC, we must consider whether "substantial continuity" exists between the incumbent LEC and the affiliate. We identified four indicia of a lack of substantial continuity between an incumbent and its advanced services affiliate; specifically, whether: (1) there is identifiable physical separation between the entities; (2) the incumbent LEC has not transferred to its affiliate substantial assets or assets that are necessary for the continuation of the incumbent's traditional business operations; (3) transactions between the incumbent and affiliate are conducted at arms-length and are transparent; and (4) the affiliate does not derive unfair advantage from the incumbent. *SBC/Ameritech Order*, 14 FCC Rcd at 14899, para. 457 (citations omitted).

⁶⁰⁶ *See SBC/Ameritech Order*, 14 FCC Rcd at 14893-909, paras. 444-76.

advanced services market independent of their bottleneck control of those facilities, such as local loops, that are necessary to provide such services.⁶⁰⁷ As described above, however, we find that, as a result of the merger, the combined entity will have an increased incentive and ability to discriminate against other providers of advanced services.⁶⁰⁸ In view of this finding, we conclude that the merged entity has the ability to leverage its control over existing bottleneck facilities to gain market power in the advanced services market.

270. We find that by requiring the merged entity to provide advanced services through a separate affiliate, there is less likelihood that it will use its local market power to gain a competitive advantage in the advanced services market. Specifically, we believe that the merged entity's incentive to engage in such discrimination will be significantly curtailed by the possibility of detection. For example, the affiliate transaction rules and other transactional safeguards will ensure that all interaction between the incumbent LEC and separate affiliate is conducted on an arms-length basis and that any cross-subsidization is apparent. Similarly, to the extent the merged entity attempts to provide competitors inferior services or facilities than those which it furnishes to its affiliate, such discrimination would be detected by the reporting and performance requirements we adopt today.

271. The separate affiliate, because it does not control any bottleneck facilities,⁶⁰⁹ does not have the potential to leverage existing market power from one market into another. Specifically, the separate advanced services affiliate is operating on a level-playing field with all other advanced services competitors, of which there are many. As a new entrant in a nascent market, it lacks both the incentive and ability to discriminate against its competitors. It lacks the incentive and ability because, unlike the incumbent, it does not control any of the bottleneck inputs that are necessary for the provision of advanced services. Accordingly, we find it reasonable to conclude that the separate affiliate will not occupy a market position comparable to that of the incumbent LEC in the provision of advanced services and, therefore, should not be considered a successor or assign of the incumbent LEC.

272. By requiring Bell Atlantic/GTE to provide all of its advanced services through a separate affiliate, we are not permitting the incumbent to avoid any of its statutory obligations. For example, the incumbent is still subject to all of the obligations of section 251(c) for the services and facilities that the incumbent actually provides. The Eighth Circuit has stated, however, that section 251(c) does not require an incumbent to offer a particular service or a particular type of network element to competitors in the first instance, if the incumbent is not providing that service or element in connection with its own operations.⁶¹⁰ Thus, although under the separate affiliate condition the incumbent will no longer be

⁶⁰⁷ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, 2423, para. 48 (1999).

⁶⁰⁸ See *supra* Section VI.D.

⁶⁰⁹ We note that Bell Atlantic/GTE will not be transferring any network facilities that the Commission has found to be unbundled network elements to the separate affiliate. Rather, any facilities that will be transferred are those which the Commission has explicitly declined to unbundle. Of course, to the extent the incumbent LEC transfers a DSLAM in a remote terminal in which there is no collocation space, the separate affiliate will be considered to be a successor or assign with respect to this element. See 47 C.F.R. § 53.207.

⁶¹⁰ See *Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 812-13 (8th Cir. 1997), *aff'd in part and rev'd in part*, *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999), proceedings on remand pending, Eighth Circuit Nos. 96-3321, et al. (Section 251(c) requires incumbents to allow access only to their "existing network -- not to a yet unbuilt superior one"). But see *id.*, 120 F.3d at 813 n.33 (noting that ILECs may nevertheless be required under section 251(c) to develop more (continued....))

providing advanced services subject to the discounted resale obligation of section 251(c)(4), that is not because the incumbent is being relieved of the requirements of section 251(c)(4), but because the incumbent will no longer be offering advanced services on a retail basis.⁶¹¹ Moreover, as discussed above, because the separate advanced service affiliate does not raise the competitive concerns regarding the leveraging of market power with respect to advanced services that would exist if the incumbent continued to provide those advanced services on an integrated basis, the affiliate does not simply step into the shoes of the incumbent in providing such services so as to become a "successor or assign" of the incumbent. Rather, just as a BOC affiliate under section 272 would offer long-distance services (as a non-incumbent) free of the obligations of section 251(c)(4), the advanced services affiliate should be allowed to offer advanced services free of such obligations.

273. *Surrogate Line Sharing Discount.* By separating a line into a voice portion and an advanced services portion and carrying both voice and advanced services traffic simultaneously, line sharing enables each service to be provided by a different carrier. Conditions that we adopted in the *SBC/Ameritech Order* permitted SBC/Ameritech to provide line sharing exclusively to its advanced services affiliate on an interim basis, subject to SBC/Ameritech offering other carriers a second loop at a substantial discount in order to ensure that competitors received a benefit comparable to this "interim line sharing."⁶¹² Subsequent to our adoption of the *SBC/Ameritech Order*, however, we adopted a further order in our advanced services proceeding, in which we required all incumbent LECs to provide nondiscriminatory unbundled access to the high frequency portion of the local loop, thus promoting line sharing between different carriers.⁶¹³ Because incumbent LECs were expected to provide the high frequency portion of the loop UNE to competitors by June 6, 2000,⁶¹⁴ exclusive line sharing between an incumbent LEC and its affiliate is no longer permissible.⁶¹⁵

274. Thus, these provisions shall apply to the merged entity only if our line sharing rules are overturned by a final and non-appealable judicial decision.⁶¹⁶ In this manner, the conditions require Bell (Continued from previous page) _____ limited "modifications" to their network elements that are necessary to accommodate interconnection or access to network elements).

⁶¹¹ See 47 U.S.C. § 251(c)(4) (imposing discounted resale obligation on services the incumbent "provides at retail to subscribers").

⁶¹² See *SBC/Ameritech Order*, 14 FCC Rcd at 14861-64, paras. 365, 369-70; *SBC/Ameritech Conditions*, 14 FCC Rcd at 14987-92, paras. 8, 13a, 14.

⁶¹³ See *Line Sharing Order*.

⁶¹⁴ *Id.* at 20982-85, paras. 161-68.

⁶¹⁵ The line sharing compliance audit that Bell Atlantic and GTE agree to undergo will help to identify any delays on the part of Bell Atlantic and GTE in implementing line sharing.

⁶¹⁶ Cf. NorthPoint May 5, 2000 Comments at 1 (the proposed interim line sharing conditions, in effect, "would appear to sanction continued delays by Bell Atlantic/GTE in implementing the provision of line sharing to unaffiliated advanced service providers," and thus should be eliminated). United States Telecom Association has appealed the *Line Sharing Order* to the United States Court of Appeals for the District of Columbia Circuit. *United States Telecom Association v. FCC & USA*, No. 00-1012 (D.C. Cir. filed Jan 18, 2000) (held in abeyance, per order issued Apr., 3, 2000, pending Commission action on petitions for reconsideration of the *Line Sharing Order*). We note that in the Offering of UNEs Section of the conditions, Bell Atlantic and GTE commit to continue making UNEs, including the high frequency portion of the loop UNE, available in the event that the underlying rules are stayed or vacated, until such rules are overturned by a final and non-appealable judicial decision. See Conditions at para. 39.

Atlantic/GTE to offer unaffiliated carriers the economic equivalent of line sharing if our line sharing rules are rendered ineffective. This “safety net” presents the benefit of putting unaffiliated advanced services providers on comparable economic footing with the merged firm’s separate advanced services affiliate, and allowing these carriers to obtain reduced loop costs that otherwise would not be available to them if our line sharing rules are overturned.⁶¹⁷

275. In the event our line sharing rules are overturned by a final and non-appealable judicial decision and Bell Atlantic/GTE and its separate advanced services affiliate engage in exclusive line sharing, the merged firm will charge unaffiliated providers of advanced services surrogate charges for an additional unbundled loop, provided that the loop is used solely for the provision of advanced services (conforming to an industry-standard spectral mask) to a customer that is receiving voice-grade service, either on a retail or wholesale basis, from a Bell Atlantic/GTE incumbent LEC.⁶¹⁸ The “surrogate line-sharing charges,” which Bell Atlantic/GTE also would charge to its separate advanced services affiliate for line sharing, represent a 50-percent discount from the monthly recurring charge and the nonrecurring line or service connection charge.

276. In light of the ripening of incumbent LECs’ line sharing obligations, we disagree with commenters that suggest that the applicability of this discount be expanded beyond instances of exclusive line sharing.⁶¹⁹ In addition, we reject Covad’s request to tie expanded surrogate line sharing discounts to a line sharing provisioning benchmark.⁶²⁰ We find that the line sharing provisioning performance measurement to be proposed by Bell Atlantic/GTE, which will be backed by payment-based incentives,⁶²¹ is sufficient to ensure nondiscriminatory provisioning of line sharing.

277. *Loop Conditioning Charges and Cost Studies.* This condition is designed to ensure that Bell Atlantic/GTE will not erect a barrier to the competitive deployment of advanced services by charging excessive rates for loop conditioning. Within 180 days of the merger’s closing, Bell Atlantic/GTE will file with state commissions cost studies and proposed rates for conditioning loops used in the provision of advanced services, prepared in accordance with the methodology contained in

⁶¹⁷ This condition is designed to promote rapid deployment of advanced services by removing any cost advantages that the separate advanced services affiliate, which exclusively would receive line sharing capability from a Bell Atlantic/GTE incumbent LEC, would have over other advanced services providers that, because line sharing would no longer be required, would have to provide such services over a stand-alone line.

⁶¹⁸ The appropriate state commission has discretion to deny a carrier the surrogate line sharing charges on any loop for which it finds the use restriction or audit provision violated, and to remove a carrier’s entitlement to any future surrogate line sharing charges only upon a finding of an intentional and repeated violation.

⁶¹⁹ See Covad May 5, 2000 Comments at 16-17. But see Bell Atlantic/GTE Mar. 16, 2000 Reply App. C, Response to Comments on Specific Conditions at 9-10 (Bell Atlantic/GTE Response to Conditions Comments). We clarify that the OSS discounts which we agree should apply to all loops used to provide advanced services, and not just loops used for surrogate line sharing, are discounts that are altogether separate from and complementary to the surrogate line sharing discounts. See Conditions at para. 25; BlueStar et al. Mar. 1, 2000 Comments at 3, 5-6; CoreComm Mar. 1, 2000 Comments at 31-33.

⁶²⁰ See Covad May 5, 2000 Comments at 17.

⁶²¹ See Conditions at para. 9.

the Commission's pricing rules for UNEs.⁶²² Pending approval of state-specific rates, Bell Atlantic/GTE will immediately make available to carriers loop conditioning rates (provided that they are greater than zero) contained in any effective interconnection agreement to which a Bell Atlantic/GTE incumbent LEC is a party, subject to true-up. In addition, subject to true-up, Bell Atlantic/GTE will impose no loop conditioning charges on loops less than 12,000 theoretical feet during this period. Moreover, advanced services providers will have a choice in the amount and extent of conditioning on any particular loop.

278. *Nondiscriminatory Rollout of xDSL Services.* As a means of ensuring that the merged firm's rollout of advanced services reaches some of the least competitive market segments and is more widely available to low-income consumers,⁶²³ Bell Atlantic and GTE will target their deployment of xDSL services to include low-income groups in rural and urban areas. Specifically, for each Bell Atlantic/GTE in-region state, Bell Atlantic/GTE will ensure that at least 10 percent of the rural wire centers where it, or its separate advanced services affiliate, deploys xDSL service will be low-income rural wire centers, meaning those wire centers with the greatest number of low-income households. Similarly, at least 10 percent of the urban wire centers where the merged firm or its separate advanced services affiliate deploys xDSL service in each in-region state will be low-income urban wire centers. These requirements will become enforceable for any given state 180 days after the merger closes and after Bell Atlantic/GTE and/or its advanced services affiliate has deployed xDSL service in that state in at least 20 urban wire centers (to activate the urban requirement) or 20 rural wire centers (to activate the rural requirement). After the respective effective date, Bell Atlantic/GTE will provide nondiscriminatory deployment of xDSL services for at least 36 months thereafter.⁶²⁴ Bell Atlantic/GTE will consult with the appropriate state commission, within 90 days of the merger's closing, to classify all Bell Atlantic/GTE wire centers in that state as urban or rural.⁶²⁵ Furthermore, to assist in monitoring the merged firm's equitable deployment of xDSL, Bell Atlantic/GTE will file publicly a quarterly report with the Commission describing the status of its xDSL deployment, including the identity and location of each urban and rural wire center where it has deployed xDSL. We believe that the public interest benefits of this condition speak loudly and clearly for themselves, and the commenters resoundingly support it.⁶²⁶

⁶²² See 47 C.F.R. § 51.501 *et seq.* (requiring the total element long-run incremental cost standard for the pricing of network elements).

⁶²³ See Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing at 19 (*citing SBC/Ameritech Order*, 14 FCC Rcd at 14866, para. 376).

⁶²⁴ We reject IURC's request that we require Bell Atlantic/GTE to deploy xDSL service to 20 rural wire centers and 20 urban wire centers within 24 months after the merger closing date, subject to deployment benchmarks. See IURC Mar. 1, 2000 Comments at 13-14. Given the high market demand for advanced services, and that a number of other conditions are designed to spur deployment of advanced services and to benefit low-income consumers, we decline to subject Bell Atlantic/GTE to a specific timetable for advanced services deployment. We note, however, that Bell Atlantic/GTE will report the status of its xDSL deployment, including deployment to low-income areas, to the Commission on a quarterly basis. See *SBC/Ameritech Order*, 14 FCC Rcd at 14909-10, para. 480.

⁶²⁵ We further reject IURC request that we require state commission approval of urban and rural wire center classifications. See *id.* at 14. We believe that the condition as written provides state commissions with a sufficient vehicle for input into such classifications where they choose to provide it. Moreover, this condition (like all others) does not prevent a state from imposing additional consistent requirements.

⁶²⁶ See APT Mar. 16, 2000 Reply at 6 ("these commitments are a genuine step towards bridging the 'digital divide'"); APT Mar. 1, 2000 Further Comments at 2; American Telemedicine Association Mar. 1, 2000 Comments at 6; CWA Mar. 1, 2000 Comments at 4; IURC Mar. 1, 2000 Comments at 13; United States Hispanic Chamber of Commerce Mar. 1, (continued....)

2. Ensuring Open Local Markets

279. *Carrier-to-Carrier Performance Plan.* As a means of ensuring that Bell Atlantic/GTE's service to telecommunications carriers will not deteriorate as a result of the merger and the larger firm's increased incentive and ability to discriminate, and to stimulate the merged entity to adopt "best practices" that clearly favor public rather than private interests,⁶²⁷ Bell Atlantic/GTE will file publicly performance measurement data for each of its in-region states with this Commission, and make such data available over the Internet, on a monthly basis. The data will reflect Bell Atlantic/GTE incumbent LECs' performance of their obligations toward telecommunications carriers in 18 different measurement categories.⁶²⁸ These categories cover key aspects of pre-ordering, ordering, provisioning, maintenance and repair, and billing associated with UNEs, interconnection, and resold services. Many of the 18 measurement categories are divided into numerous disaggregated sub-measurements, thereby tracking Bell Atlantic/GTE's performance for different functions and different types of service. Furthermore, the list of measurements reported by Bell Atlantic/GTE under this condition is not static. This list is subject to addition or deletion, and the measurements themselves are subject to modification, by the Chief of the Common Carrier Bureau, through a joint semi-annual review with Bell Atlantic/GTE.⁶²⁹

280. Under this condition, Bell Atlantic/GTE will either achieve the stated performance goal for the agreed-upon measures in each state or, if Bell Atlantic/GTE fails to provide service that meets the stated performance goal, make a voluntary incentive payment to the U.S. Treasury in an amount varying according to the level and significance of discrimination detected. These voluntary incentive

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2000 Comments at 7 (these commitments "will have a positive impact on Hispanic-owned businesses and consumers"); World Institute on Disability Mar. 1, 2000 Comments at 4, 6.

⁶²⁷ Cf. MCI WorldCom Mar. 1, 2000 Supplemental Comments at 18 ("[c]omparative practices analysis, which the merger would undermine, dictates use of the best practice in both [Bell Atlantic and GTE legacy] regions").

⁶²⁸ This includes the line sharing provisioning performance measurement (or sub-measurement) that Bell Atlantic/GTE is required to propose and implement after the merger closing date. See Conditions at para. 9. The Applicants added this commitment in response to comments on their original proposal. See MCI WorldCom Mar. 1, 2000 Supplemental Comments at 18. As we did with the line sharing performance measurement proposed by SBC subsequent to its merger with Ameritech, see http://www.fcc.gov/ccb/mcot/misc_reports/, we will place Bell Atlantic/GTE's proposal on our website, thus affording competitive LECs the opportunity for public comment. See Covad May 5, 2000 Comments at 16. But see Bell Atlantic/GTE May 9, 2000 Response App. A, Responses to Specific Allegations Regarding Proposed Conditions at A-5 (Bell Atlantic/GTE Responses to Specific Conditions Allegations) (objecting based on the Applicants' assertion that the new performance measurement or sub-measurement will be based on measurements developed in collaborative proceedings in New York and California, in which competitive LECs participated, such that, in the Applicants' view, competitive LECs already "have had ample input" into the development of the new measurement or sub-measurement).

⁶²⁹ See, e.g., Conditions Attach. A, Carrier-to-Carrier Performance Assurance Plan at para. 4 (Performance Plan). Indeed, the scope of this semi-annual review is broad, and it encompasses the business rules associated with such measurements. Other elements of the plan also are subject to periodic review and modification by the Chief of the Common Carrier Bureau, including certain aspects of the payment calculation mechanism. Thus, we agree with the Applicants that AT&T's contention that the plan submitted by the Applicants is "fixed and inalterable" is incorrect. See Bell Atlantic/GTE Response to Conditions Comments at 11. But see AT&T Mar. 1, 2000 Opposition at 29-30. See also MCI WorldCom Mar. 1, 2000 Supplemental Comments at 17 (maintaining that the plan should allow the Commission to reallocate remedies to address severe performance deficiencies or add new measures if necessary to deter discrimination).

payments are subject to monthly state-specific caps that total, across all states, as much as \$259 million in the first year, \$389 million in the second year, and \$516 million in the third year (*i.e.*, a total of up to \$1.164 billion over three years), with a credit for amounts paid to states and competitive LECs under state-imposed performance monitoring plans or under liquidated damages provisions of interconnection agreements.⁶³⁰ Bell Atlantic/GTE's potential liability may be reduced by up to \$125 million in the third year if Bell Atlantic/GTE completes and deploys its OSS interface and business rule changes before their target date, depending upon the change and how early it is completed.

281. The specific performance measures that Bell Atlantic/GTE will implement in the Bell Atlantic legacy service areas are based upon performance measures developed in a New York collaborative process involving Bell Atlantic's application for in-region, interLATA relief. The performance measures that Bell Atlantic/GTE will implement in the GTE legacy service areas are based primarily upon performance measures applicable to GTE that were developed in a collaborative process in California.⁶³¹ Rather than develop a new set of measures for this merger proceeding, we find that relying upon these performance measures and corresponding business rules, which may be modified over time, will achieve the goals of the Performance Plan and conserve time and resources.⁶³² We emphasize that use of such measures in this merger review proceeding is not meant to affect, supplant, or supersede any existing or future state performance plan.⁶³³

282. These limited performance measures are intended to offset or prevent some of the

⁶³⁰ The payment caps proffered by the Applicants are intended to be "directly proportionate" to those that we adopted with respect to SBC and Ameritech in their merger. *See* Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing at 24. *Cf. SBC/Ameritech Order*, 14 FCC Rcd at 14868, para. 378; *SBC/Ameritech Conditions*, 14 FCC Rcd at 14999-15000, para. 23. As part of the calculation of voluntary payments, Bell Atlantic/GTE will increase the payments for performance measurements where observations are particularly low, as well as for specific sub-measurements representing low-volume, nascent services. For these sub-measurements, the per-occurrence payments will be tripled. The Applicants added these provisions subsequent to their initial proposal, in response to comments expressing concern regarding a lack of appropriate remedies for metrics with typically low monthly volumes. *See* MCI WorldCom Mar. 1, 2000 Supplemental Comments at 16. We find that this "low-volume" multiplier will help to ensure that the Applicants' proposed incentive mechanism will offer meaningful protections where service volumes are low. *See SBC/Ameritech Order*, 14 FCC Rcd at 14868 n.706. Particularly in light of these modifications, we find that the voluntary payment structure and cap are sufficient to address the limited purposes of the Carrier-to-Carrier Performance Plan – to neutralize the merged firm's increased incentive and ability to discriminate and to remedy other merger-specific potential harms such as the loss of a major incumbent LEC benchmark. Thus, we disagree with WorldCom's contention that the payment caps are inadequate to discourage the merged firm from providing substandard service to competitors. *But see* MCI WorldCom Mar. 1, 2000 Supplemental Comments at 15-17.

⁶³¹ *See* Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing at 24. As lines in the GTE legacy service areas in Pennsylvania and Virginia are converted to achieve network and OSS uniformity with Bell Atlantic's legacy systems in those states, *see* Conditions at para. 19f, performance for those lines will be measured using the performance measurements and business rules that apply to Bell Atlantic legacy service areas. *See* Conditions Attach. A-1b, BA/GTE Performance Measurements GTE States. *Cf. Allegiance* Mar. 1, 2000 Comments at 8 (suggesting that Bell Atlantic/GTE should implement Bell Atlantic systems and policies in GTE's Pennsylvania and Virginia service areas in accordance with the intervals that we adopted in the *SBC/Ameritech Order*).

⁶³² *See SBC/Ameritech Order*, 14 FCC Rcd at 14868, para. 379.

⁶³³ *But see* AT&T Mar. 1, 2000 Opposition at 34-36 (alleging that these conditions would as a practical matter serve as a *de facto* ceiling on state performance plans). State commissions may take appropriate actions to ensure that these conditions do not impede state-specific performance plans, either in the context of section 271 applications or outside of it.

merger's potential harmful effects; they are not designed or intended as anti-backsliding measures for purposes of section 271.⁶³⁴ Indeed, to the extent that GTE legacy service areas are not subject to the market opening requirements of section 271 in order for GTE to provide in-region, interLATA services originating from those areas, these performance measures constitute a significant benefit of these conditions where states have not implemented performance plans with respect to GTE.⁶³⁵ The present performance plan must be viewed in the context of the entire set of proposed safeguards that comprise the overall merger conditions package. In this regard, we expect – and we encourage – each state to adopt rigorous and extensive performance monitoring programs in connection with section 271 proceedings. Under these conditions, therefore, Bell Atlantic/GTE's obligations under the plan in a given Bell Atlantic legacy state will terminate upon the company's authorization to provide in-region, interLATA service in that state.⁶³⁶ In a similar vein, these obligations may cease to be effective in any Bell Atlantic/GTE state as determined by the Common Carrier Bureau Chief where the state commission has adopted a comprehensive performance plan applicable to Bell Atlantic/GTE.⁶³⁷ The condition will expire otherwise 36 months after the payment obligation arises in the state.⁶³⁸

283. We reject the suggestion of a number of commenters that we impose the complete list of measurements adopted by the New York commission and California commission.⁶³⁹ We also decline

⁶³⁴ See MCI WorldCom Mar. 1, 2000 Supplemental Comments at 19 (*citing SBC/Ameritech Order*, 14 FCC Rcd at 14868, para. 380).

⁶³⁵ See generally CoreComm Mar. 1, 2000 Comments at 26 (asserting that “[t]he absence of the Section 271 incentive with respect to GTE is a significant public convenience detriment”).

⁶³⁶ Cf. Bell Atlantic/GTE Response to Conditions Comments at 15 (“[t]he very fact that Bell Atlantic/GTE have designed the performance plan to sunset in a particular state when Bell Atlantic receives Section 271 authority for that state demonstrates that the plan is not intended as an ‘anti-backsliding’ plan for Section 271 purposes”). Consistent with the Applicants’ sentiments and our explicit holding above, we reject CoreComm’s argument that section 271 authority should not relieve Bell Atlantic/GTE of its responsibility to meet carrier-to-carrier performance standards in the Bell Atlantic legacy service areas subject to such authority. In support of its argument, CoreComm asserts that carrier-to-carrier performance standards become even more important following section 271 authority in order to prevent against backsliding. See CoreComm Mar. 1, 2000 Comments at 40. Likewise, we reject Covad’s averment that Bell Atlantic/GTE still should be subject to the Performance Plan in New York, notwithstanding Bell Atlantic’s section 271 authority there. But see Covad Mar. 1, 2000 Comments at 16.

⁶³⁷ The Common Carrier Bureau Chief shall determine whether a state-approved performance plan is “comprehensive” for the purpose of these conditions. A state-approved mechanism may be determined not to be “comprehensive” if, for example, it omits a particular measurement or category of measurements deemed important by the Common Carrier Bureau Chief. The Common Carrier Bureau Chief may decide to retain part of the reporting and penalty obligations associated with these conditions where a state-approved mechanism is determined not to be comprehensive. Cf. CoreComm Mar. 1, 2000 Comments at 41 (state performance plan “escape” only should be permitted if the state plan imposes noncompliance penalties that are at least equal to those in the Performance Plan); Covad Mar. 1, 2000 Comments at 16 (between the Performance Plan and a state plan, the stronger and more procompetitive of the plans should control).

⁶³⁸ The Applicants’ initial proposal also provided for termination of Bell Atlantic/GTE’s obligations under the Performance Plan on the date on which the merged firm completes 50 percent of its out-of-region investment commitment. The Applicants subsequently abandoned this facet of their proposal. See CoreComm Mar. 1, 2000 Comments at 40.

⁶³⁹ But see, e.g., NEXTLINK Mar. 16, 2000 Reply at 12; AT&T Mar. 1, 2000 Opposition at 33-34; CoreComm Mar. 1, 2000 Comments at 39-40; MCI WorldCom Mar. 1, 2000 Supplemental Comments at 17-18.

to adopt other specific performance measurements advocated by certain parties,⁶⁴⁰ or to make specific changes in the proposal, such as altering the benchmarks or statistical methodology.⁶⁴¹ We reiterate that the Performance Plan constitutes the Applicants' voluntary proposal for monitoring and remedying the specific potential public interest harms identified in the instant merger, including the potential for increased discrimination by the larger merged entity and the loss of another major incumbent LEC benchmark. The adoption of these measures in the present merger context does not signify that these performance measures would be sufficient in the context of a section 271 application. In contrast, performance plans that are being developed by state commissions in the context of section 271 proceedings serve a different purpose, and may be designed to cover more facets of local competition and to prevent a BOC from backsliding on section 271 obligations.⁶⁴² The Performance Plan that we adopt today serves a more limited purpose, and hence has a more limited scope. Moreover, we note that, to account for necessary revisions or updates, the plan includes a semi-annual review of the plan's measurements by the Chief of the Common Carrier Bureau and Bell Atlantic/GTE. Significantly, the Performance Plan is only one component of a broad package of voluntary merger safeguards proposed by the Applicants. Measures that are sufficient as part of a comprehensive package of safeguards in the present merger context may not be adequate in the section 271 context.

284. Similarly, we decline to require region-wide uniformity across measurements between different states, as suggested by several commenters.⁶⁴³ We find that the plan is sufficient, for merger purposes, to reduce the larger entity's increased incentive for discrimination by giving its individual operating companies incentives to treat competitors as they would Bell Atlantic's or GTE's own retail operations. Other merger commitments, such as the most-favored nation conditions, address uniformity and the spread of best practices across the merged firm's service region.

285. *Uniform Enhanced OSS (Including Advanced Services OSS).* Effective, nondiscriminatory access to OSS is critical for achieving the 1996 Act's local competition objectives. The commitments in this condition are intended to facilitate local services competition (including advanced services competition) in the merged entity's combined service area by providing entrants additional and more economical options for accessing the merged entity's OSS on a non-discriminatory basis as compared to its retail operations, and by encouraging constructive participation by local entrants in the development of the merged entity's systems used by those local entrants.⁶⁴⁴ This condition will thus guard against discriminatory treatment by the merged entity to its rivals, as well as

⁶⁴⁰ *But see, e.g.,* BlueStar et al. Mar. 1, 2000 Comments at 17.

⁶⁴¹ *But see, e.g.,* MCI WorldCom July 19, 1999 Comments at 17-19.

⁶⁴² *See* MCI WorldCom Mar. 1, 2000 Supplemental Comments at 19 (*citing SBC/Ameritech Order*, 14 FCC Rcd at 14910, para. 481).

⁶⁴³ *But see* NEXTLINK Mar. 16, 2000 Reply at 12; Allegiance Mar. 1, 2000 Comments at 2, 6-8 (asserting that Bell Atlantic/GTE should commit to implement the "best practices" of Bell Atlantic's carrier-to-carrier performance standards throughout the combined company's service territory); BlueStar et al. Mar. 1, 2000 Comments at 3; IURC Mar. 1, 2000 Comments at 11. *See SBC/Ameritech Order*, 14 FCC Rcd at 14910-11, para. 482.

⁶⁴⁴ *SBC/Ameritech Conditions*, 14 FCC Rcd at 15001, para. 25.

reduce the costs and uncertainty of providing competing services.⁶⁴⁵

286. Specifically, Bell Atlantic/GTE commits to establish uniform OSS interfaces and business rules within the former Bell Atlantic service areas and separately within the former GTE service areas. In addition, the merged entity will implement uniform transport and security protocols, uniform OSS functions and product ordering capabilities,⁶⁴⁶ and a uniform change management process across its combined service area. Although several commenters suggested we should require uniform interfaces and business rules across the entire combined region, as we did in the SBC/Ameritech proceeding, we find that such a condition is not appropriate under the facts of this proceeding. Unlike SBC and Ameritech, which were both Bell System companies, and therefore had relatively similar OSS, Bell Atlantic and GTE's systems "developed from significantly different sources and, as a result, . . . differ significantly [from each other]."⁶⁴⁷ Given these facts, the Applicants have asserted that to achieve uniformity through the combined region: (1) it likely will cost "hundreds of millions," if not "billions," of dollars; (2) it could take more than five years to achieve; and (3) "given the size of the work effort . . . and the unknowns about the true scope and scale of the project, there is no certainty that Bell Atlantic/GTE would be able to complete such a project."⁶⁴⁸ No commenter has provided any persuasive evidence rebutting the Applicants' claims.⁶⁴⁹ As such, we rely on the Applicants' assertions in concluding that it is, therefore, not appropriate to require complete uniformity in this proceeding because of the cost and uncertainty of establishing uniform OSS interfaces and business rules across the combined region.

287. In addition to the commitments described in the preceding paragraph and in response to the Comments, however, the Applicants have committed to implement uniform interfaces and business rules for at least 80 percent of the access lines for the combined Bell Atlantic and GTE service areas in Pennsylvania and Virginia within five years after the Merger Closing Date.⁶⁵⁰ Although this condition falls short of providing complete uniformity, we find that the Applicants' commitment to achieve uniform interface and business rules within Bell Atlantic's service areas and separately within GTE service areas, and commitment to convert systems to achieve such uniformity across most, if not all, of the Applicants' combined service areas in Pennsylvania and Virginia furthers the 1996 Act's local competition

⁶⁴⁵ We note, in addition, that the conditions we adopt today generally set the standard for the Applicants' obligations under those conditions. Although the details of implementation may be worked out in a collaborative session, or under the auspices of an independent arbitrator where necessary, the Commission at all times maintains final enforcement authority over Bell Atlantic/GTE's implementation of the OSS commitments. *See SBC/Ameritech Order*, 14 FCC Rcd at 14912 n.884.

⁶⁴⁶ Conditions, Attach. B-1 (specifying electronic OSS interface functions to be made uniform across the combined Bell Atlantic/GTE region); Conditions, Attach B-2 (specifying a region-wide, uniform products set which will be available through Bell Atlantic/GTE's application-to-application ordering capability). *See also* CoreComm Mar. 1, 2000 Comments at 35 (requesting like functionality throughout Applicants' combined service area).

⁶⁴⁷ Letter from Patricia E. Koch, Assistant Vice President Federal Regulatory, Bell Atlantic, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 98-184 (filed Apr. 14, 2000), Declaration of Paul A. Lacouture.

⁶⁴⁸ *Id.*

⁶⁴⁹ *E.g.*, WorldCom May 5, 2000 Further Supplemental Comments at 10-11.

⁶⁵⁰ *See* Allegiance Mar. 1, 2000 Comments at 8; Z-Tel Mar. 1, 2000 Comments at 4.

objectives by providing competitors with “one-stop shopping” within large areas of the Applicants’ region.

288. We find that Bell Atlantic/GTE has made other substantial commitments that, among other things, provide assurances competing carriers will have input into the development and deployment of the Applicants’ OSS through collaboratives, disputes will be arbitrated by a neutral third-party, the Applicants’ will make incentive payments for non-compliance, and competing carriers will have a role in the change management process. For example, prior to implementing its OSS commitments, the merged firm first will prepare a plan of record (“Plan”) outlining the steps it proposes to take in unifying its OSS in the separate Bell Atlantic and GTE legacy service areas, or in the combined service areas (including Pennsylvania and Virginia), as applicable.⁶⁵¹ Competitors shall have the opportunity to comment on the Plan and its scope, including the procedures for a collaborative process.⁶⁵² Following submission of the Plan, the merged firm will collaborate with participating competitive LECs to reach agreement on the interfaces, enhancements, business rules, data format specifications, transport and security protocols, and OSS functions and product ordering capabilities to be implemented.⁶⁵³ The merged entity must ensure that it makes available to competing carriers all information necessary for them to fully evaluate the Plan (including, but not limited to, information about its back-end systems, OSS interfaces, business rules, data specifications, and hardware capabilities) and to participate productively in collaborative sessions. Failure to provide a sufficient Plan will be considered a violation of these commitments and this order, and may subject the merged entity to penalties, fines, or forfeitures pursuant to general Commission authority.

289. Bell Atlantic/GTE and the participating competing carriers shall seek to reach a written agreement resolving any issues raised by the Plan and the competing carriers’ comments to the Plan. To the extent that Bell Atlantic/GTE and the competitors cannot reach agreement, or have disputes about the scope of the Plan, including the procedures governing the collaborative process, they may request resolution of such disputes by binding arbitration conducted by an independent third-party.⁶⁵⁴ We expect that the collaborative and arbitration processes will generally function in the same way as the processes specified in the conditions attached in the *SBC/Ameritech Order*. After completion of the collaboratives and any necessary arbitrations, Bell Atlantic/GTE will develop and deploy the agreed-

⁶⁵¹ In attempting to comply with the OSS requirements of these commitments, Bell Atlantic/GTE shall not reduce the existing functionality, products, or services available to competing carriers, or decrease the capability to flow through transactions to its OSS systems because these conditions are intended to result in “best practices.” If Bell Atlantic/GTE believes it cannot satisfy these commitments without doing so, this may be discussed in the collaborative sessions at the request of Bell Atlantic/GTE or participating competing carriers.

⁶⁵² We reject, however, the other more specific requirements for the plan of record suggested by commenters. Letter from Karen M. Johnson, Associate Counsel, MCI WorldCom, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket 98-184 (filed Apr. 14, 2000) at 2; MCI WorldCom Mar. 1, 2000 Supplemental Comments at 11-12; NorthPoint Mar. 1, 2000 Comments at 9. We find that these are details that will be addressed in the collaborative process. We find no reason to prevent the voluntary participants in the collaboratives from attempting to determine the best manner in which to implement the requirements of these conditions.

⁶⁵³ If the Plan of Record does not specify a collaborative process competitive LECs may, nonetheless, request that any issues they raise in their written comments to the Plan be addressed in a collaborative process.

⁶⁵⁴ Conditions at paras. 19(b), 21; *see also SBC /Ameritech Order*, 14 FCC Rcd at 15002-04, para. 28; *id.* at 14870, para. 383.

upon or arbitrated OSS requirements, such as, but not limited to, interfaces, enhancements, and business rules, within specified periods of time.⁶⁵⁵ Once deployed, Bell Atlantic/GTE will maintain these OSS requirements for not less than 36 months.⁶⁵⁶

290. The Applicants have also committed to arbitration of disputes concerning the implementation of the Applicants' commitments and payment for non-compliance. Bell Atlantic/GTE must substantially comply with the development and deployment requirements described in these commitments or will be subject to voluntary incentive payments to the U.S. Treasury of up to \$10,000 per business day per state per violation, or up to \$110,000 per day across all of its in-region states, for a missed target date.⁶⁵⁷ An arbitrator will determine if Bell Atlantic/GTE is in substantial compliance and the payment due.⁶⁵⁸ As payments will reach back to the date of the initial violation, Bell Atlantic/GTE has little incentive to delay arbitration.⁶⁵⁹ Subsequent to an arbitration finding that Bell Atlantic/GTE is not in compliance with the requirements of the condition, it may file a notice with the Chief of the Common Carrier Bureau that it has corrected the non-compliance and halt payments. If the arbitrator makes a written finding, and the Chief of the Common Carrier concurs in writing, that Bell Atlantic/GTE intentionally and willfully failed to comply with the relevant requirements, Bell Atlantic shall make additional payments of up to \$110,000, as determined by the arbitrator, for each business day of non-compliance.⁶⁶⁰

291. The commitments will counterbalance other difficulties that competing carriers encounter interfacing with Bell Atlantic/GTE's OSS. For example, Bell Atlantic/GTE will adopt, subject to state approval where necessary, throughout its region the current Bell Atlantic change management process originally developed through collaboratives with competitive LECs as part of the section 271

⁶⁵⁵ E.g., Conditions at para. 19(e). We agree with MCI WorldCom and Bell Atlantic, however, that nothing in this Order or these Conditions "excuses or modifies the obligations with respect to uniform interfaces established in the *Bell Atlantic/NYNEX Order* or the complaint proceeding referenced in paragraph 19 of the proposed conditions." Bell Atlantic/GTE Response to Conditions Comments at 19, n.7 (*citing* MCI WorldCom Mar. 1, 2000 Supplemental Comments at 12).

⁶⁵⁶ See Conditions at para. 64 (each condition is designed to yield at least 36 months of benefit). Thus, Bell Atlantic/GTE may not claim that its obligations under this set of conditions cease 36 months after the merger closing date, because that would allow for Bell Atlantic/GTE to stop providing these interfaces and enhancements merely six months after the two-and-a-half years post-merger closing that it has afforded itself to deploy such interfaces and enhancements.

⁶⁵⁷ We disagree with Commenters' concerns that the terms "up to" and "substantial compliance" inject uncertainty into this provision. See MCI WorldCom Mar. 1, 2000 Supplemental Comments at 13; NorthPoint Mar. 1, 2000 Comments at 11. Rather, we conclude that such language merely permits the arbitrator to match the voluntary payment amount to the nature and severity of the violation.

⁶⁵⁸ The Arbitrator may determine that more than one "violation" has occurred in a state on a given day. The total of all voluntary payments relating to any or all milestones under this condition may not, however, exceed \$20 million. Conditions at para. 24.

⁶⁵⁹ *SBC/Ameritech Order*, 14 FCC Rcd at 14911-12, para. 485 (interpreting same language).

⁶⁶⁰ Amongst the compliance issues that the arbitrator may consider under this provision is whether Bell Atlantic/GTE indeed corrected the non-compliance by the time that it filed a notice of correction with the Chief of the Common Carrier Bureau.

proceeding before the New York Public Service Commission.⁶⁶¹ Under this condition, states may choose whether to approve Bell Atlantic/GTE's plan for uniform change management.⁶⁶² Bell Atlantic/GTE will also offer -- for a period of 30 months from the Merger Closing Date -- to develop and deploy an electronic bonding interface (EBI) throughout its combined in-region service areas for maintenance and repair of resold local services and UNEs, including all enhancements that comport with industry standards. Specifically, the requesting carrier and Bell Atlantic/GTE must enter into a written contract wherein they agree to the nature of the EBI implementation and the requesting carrier agrees to pay Bell Atlantic/GTE for the costs of development of any enhancements *in advance of* industry standards.⁶⁶³ Disputes between a requesting carrier and Bell Atlantic/GTE relating to the development and deployment of the EBI shall be subject to the dispute resolution process for interfaces described in this condition.

292. This condition also provides incentive for Bell Atlantic/GTE to improve the systems and processes for pre-ordering and ordering of UNEs used to provide xDSL and other advanced services, and to compensate carriers for the difficulties associated with interfacing with divergent and unenhanced advanced services OSS. Bell Atlantic/GTE will offer telecommunications carriers a 25 percent discount from the recurring and nonrecurring charges for unbundled loops used in the provision of advanced services until: (1) Bell Atlantic/GTE has developed and deployed, in the manner described above, the advanced services OSS interfaces, including any agreed-upon or arbitrated enhancements; *and* (2) the Bell Atlantic/GTE separate advanced services affiliate uses such interfaces for pre-ordering and ordering at least 75 percent of the facilities it uses to provide advanced services.⁶⁶⁴ This discount will have the added benefit of lowering unaffiliated carriers' costs of providing competing advanced services. Though Covad objects to these provisions to the extent that they do not mirror the advanced services OSS commitments that we adopted in the SBC/Ameritech proceeding,⁶⁶⁵ competitive LECs may seek, in the collaboratives, advanced services OSS enhancements in advance of industry standards and expedited milestones for the development and deployment of advanced services OSS and enhancements to it.

293. Finally, commenters also suggest that the Commission should require third-party testing of the OSS interfaces (including enhancements) to ensure that they are uniform, comply with applicable standards and guidelines, and are scalable and workable, meaning that they support seamless end-to-

⁶⁶¹ Conditions at para. 20; *See Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404 (rel. Dec. 22, 1999) at para. 104; *see also* WorldCom May 5, 2000 Further Supplemental Comments at 14.

⁶⁶² Despite the benefits competing carriers derive from a uniform system of change management, the condition permits a state, if it so desires, to establish its own change management plan.

⁶⁶³ Requesting carriers will not have to pay for the costs of the development and deployment of EBI compliant with, but not exceeding, industry standards. For example, a requesting carrier will not have to pay for the development and deployment of an industry compliant EBI in a service area previously lacking an EBI at all.

⁶⁶⁴ Bell Atlantic must continue to provide the discount until it has filed an *ex parte* letter to the Chief of the Common Carrier Bureau certifying that it has reached the 75% threshold and specifying the evidence upon which it has relied.

⁶⁶⁵ Covad Mar. 1, 2000 Comments at 13; *see SBC/Ameritech Conditions*, 14 FCC Rcd at 14992-96, paras. 15-18.

end interoperability for all five core OSS functions.⁶⁶⁶ Although we find that comprehensive third-party testing is useful in other contexts, such as section 271 proceedings -- in fact, we strongly encourage the use of independent third-party testing as a means of ascertaining whether a BOC is meeting section 271's requirements⁶⁶⁷ -- we decline to require Bell Atlantic/GTE to submit its OSS interfaces to third-party testing as part of this merger proceeding. We find it sufficient that Bell Atlantic/GTE has committed to make voluntary incentive payments if it fails to deploy OSS upgrades in substantial compliance with the collaborative agreement. Moreover, we note that should Bell Atlantic/GTE fail to develop and deploy OSS interfaces consistent with the requirements of the conditions or any other conditions, it would be subject to an enforcement action at the Commission's discretion. We find that this potential liability should provide adequate incentive for the merged firm to develop and deploy OSS interfaces that fully comply with the collaborative agreement and are scalable and workable.⁶⁶⁸

294. *Training in the Use of OSS for Qualifying Carriers.* As a means of reducing the barriers to new entry in its combined region, Bell Atlantic/GTE will provide special OSS assistance to any "qualifying" competitive LEC. As in the *SBC/Ameritech Conditions*, the Applicants initially proposed to define a "qualifying" competitive LEC as a competitive LEC having less than \$300 million in total annual telecommunications revenues.⁶⁶⁹ The Applicants subsequently expanded their proposal, however, to include in the definition of a "qualifying" competitive LEC: any competitive LEC that presently serves end users in Bell Atlantic service areas and not in GTE service areas, but that seeks to extend its services into GTE service areas; any competitive LEC that presently serves end users in GTE service areas and not in Bell Atlantic service areas, but that seeks to extend its services into Bell Atlantic service areas; and any competitive LEC that does not presently serve end users in the service areas of either legacy company.⁶⁷⁰ This revised definition of a "qualifying" competitive LEC, which expands the field of competitive LECs that are eligible to take advantage of such special OSS assistance, substantially enhances the benefit of this condition by further reducing barriers to new local competitive entry.

295. As for the nature of this OSS assistance, the merged firm will designate and make available for a minimum of 36 months at no additional cost one or more team(s) of OSS experts to assist these qualifying carriers with OSS issues. The condition also obligates Bell Atlantic/GTE to identify and develop training and procedures beneficial to such qualifying carriers. Disputes regarding

⁶⁶⁶ See NEXTLINK Mar. 16, 2000 Reply at 13; BlueStar et al. Mar. 1, 2000 Comments at 16-17; CoreComm Mar. 1, 2000 Comments at 37-39; RCN Mar. 1, 2000 Comments at 2-3.

⁶⁶⁷ See *SBC/Ameritech Order*, 14 FCC Rcd at 14912, para. 486.

⁶⁶⁸ See *id.* But see BlueStar et al. Mar. 1, 2000 Comments at 16-17; CoreComm Mar. 1, 2000 Comments at 39.

⁶⁶⁹ See Bell Atlantic/GTE Jan. 27, 2000 Proposed Conditions at 30-31. See also *SBC/Ameritech Order*, 14 FCC Rcd at 14871, para. 385; *id.* at 15010, para. 36. The revenue restriction includes revenue from any affiliates, parents, subsidiaries and telecommunications joint ventures of the competitive LEC, but excludes revenues from wireless services.

⁶⁷⁰ In response to comments on their initial proposal, the Applicants also changed the language of their proposal, so that, like in the *SBC/Ameritech Conditions*, OSS assistance is made available to any competitive LECs that have "attended any OSS training required by their interconnection agreements," rather than limiting OSS assistance to competitive LECs that have "completed any available Bell Atlantic/GTE OSS training." See CoreComm Mar. 1, 2000 Comments at 34.

whether a carrier qualifies under this condition will be resolved by the appropriate state commission. We reject BlueStar et al.'s and CoreComm's request that this OSS assistance begin 30 rather than 90 days after the merger closing date.⁶⁷¹ We find that there is no material difference between 30 and 90 days given the fact that this commitment will be adhered to for a full three years.

296. *Collocation, Unbundled Network Elements, and Line Sharing Compliance.* The Applicants have agreed to implement a number of measures to ensure that the companies provide collocation to telecommunications carriers in a lawful manner.⁶⁷² Before the merger closing date, Bell Atlantic and GTE will file a tariff or offer to amend interconnection agreements in each Bell Atlantic/GTE state where Bell Atlantic and/or GTE have not done so already to demonstrate compliance with the Commission's collocation rules.⁶⁷³ In addition, prior to the merger closing date, an independent auditor, approved by the Chief of the Common Carrier Bureau, will conduct a review and determine whether each company is offering collocation terms and conditions, and has in place methods and procedures, that comply with the Commission's rules.⁶⁷⁴ The Applicants' original proposal provided that the attestation report emanating from this audit would be filed within 180 days after the merger closing. In response to protest from several commenters, however,⁶⁷⁵ the Applicants revised their proposal such that the attestation report will be filed within 10 days after the merger closing.⁶⁷⁶

297. After the merger closing, an independent auditor will develop and implement a comprehensive audit of the merged company's compliance with the Commission's collocation

⁶⁷¹ See BlueStar et al. Mar. 1, 2000 Comments at 3; CoreComm Mar. 1, 2000 Comments at 33-34. Compare *SBC/Ameritech Conditions*, 14 FCC Rcd at 15010, para. 36b (commencing assistance 30 days after the merger closing) with *Conditions* at para. 26b (commencing assistance 90 days after the merger closing).

⁶⁷² See NEXTLINK Mar. 16, 2000 Reply at 14-15; BlueStar et al. Mar. 1, 2000 Comments at 4; CoreComm Mar. 1, 2000 Comments at 42. See also *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 4771-94, paras. 19-60 (1999). Though the D.C. Circuit vacated certain rules adopted in that order, most of the collocation rules that we adopted there were affirmed. See *GTE Service Corporation v. FCC*, 205 F.3d 416 (D.C. Cir. 2000).

⁶⁷³ Bell Atlantic and GTE should work with the state commission in each Bell Atlantic/GTE state where the relevant company has not yet filed a tariff or offered to amend interconnection agreements to demonstrate compliance with the Commission's collocation rules, in order to determine which method of demonstrating compliance is preferred by the commission in the particular state. See IURC Mar. 1, 2000 Comments at 19 n.38.

⁶⁷⁴ We decline to impose the requirement sought by BlueStar et al. that the merged entity maintain uniform collocation practices based on Bell Atlantic "best practices." But see BlueStar et al. Mar. 1, 2000 Comments at 4. An attestation report resulting in a positive opinion, with few or no exceptions noted, presumptively would be an indication of sufficient collocation practices in GTE service areas.

⁶⁷⁵ See, e.g., *id.* (expressing "dismay[]" that Bell Atlantic and GTE "are not prepared to immediately certify that they are in compliance with the Commission's *Collocation Order*"); MCI WorldCom Mar. 1, 2000 Supplemental Comments at 19.

⁶⁷⁶ See *SBC/Ameritech Conditions*, 14 FCC Rcd at 15011, para. 39. We decline to grant the request of CoreComm and NEXTLINK that we require the attestation report to be filed prior to the merger closing date. But see NEXTLINK Mar. 16, 2000 Reply at 15; CoreComm Mar. 1, 2000 Comments at 42. We do not wish to suspend the timing of the merger closing date awaiting arrival of the attestation report. We believe that permitting the filing of the attestation report within 10 days after the merger closing date constitutes sufficient proximity to the merger closing date to render the report useful, and, in any event, the report is based on an audit conducted prior to the merger closing.

requirements for four full months after the closing.⁶⁷⁷ The audit requirements provide for Commission review of the audit program, which we expect will enhance the thoroughness and quality of the audit. The independent auditor will present its final audit report to the Commission, and publicly file a copy with the Secretary, no later than 210 days after filing of the methods and procedures audit attestation report.⁶⁷⁸ If the auditor's report reveals problems with Bell Atlantic/GTE's collocation practices and policies, we fully expect that Bell Atlantic/GTE will implement immediately any necessary corrective action. After reviewing the auditor's findings, the Commission may, of course, decide to take additional action as deemed necessary and appropriate. As an additional incentive for the merged firm to provide efficient collocation, Bell Atlantic/GTE will waive the nonrecurring charges for physical, virtual, adjacent and cageless collocation arrangements if the firm misses the collocation due date by more than 60 days.⁶⁷⁹

298. Also in response to public comment on their original proposal,⁶⁸⁰ the Applicants agreed to undergo an independent audit of their compliance with our UNE and line sharing rules.⁶⁸¹ These UNE and line sharing compliance audit provisions take virtually the same form as the collocation audit conditions.⁶⁸² One difference, however, is that unlike in the collocation compliance plan, there is no separate audit of Bell Atlantic and GTE's UNE and line sharing methods and procedures compliance.⁶⁸³ In addition, the independent auditor will present its final UNE and line sharing audit report to the Commission, and publicly file a copy with the Secretary, no later than 180 days after the merger closing date, unlike the approximately 220 days after merger closing afforded for submission of the final collocation audit report. Likewise with this audit, we fully expect Bell Atlantic/GTE to implement

⁶⁷⁷ The auditor will take into account any collocation audits performed within the 18 months prior to the merger closing date.

⁶⁷⁸ Cf. *SBC/Ameritech Conditions*, 14 FCC Rcd at 15012, para. 40e (requiring that final audit report be submitted no later than 10 months after the merger closing date). We believe that the filing date for the final collocation audit report in this merger presents the advantages of being expedited yet still covering a sufficient period to yield useful data.

⁶⁷⁹ See *SBC/Ameritech Order*, 14 FCC Rcd at 14872, para. 387. The Applicants qualify this incentive by adding that the merged entity would not be required to waive these charges if it can demonstrate that the missed due date was caused solely "by equipment vendor delay beyond Bell Atlantic/GTE control." Conditions at para. 27d. This exception only applies, however, where Bell Atlantic/GTE demonstrates to this Commission or to the relevant state commission(s) that no alternative vendor reasonably and timely could provide Bell Atlantic/GTE with necessary equipment.

⁶⁸⁰ See, e.g., NEXTLINK Mar. 16, 2000 Reply at 14-15; BlueStar et al. Mar. 1, 2000 Comments at 4-5, 7-9; CoreComm Mar. 1, 2000 Comments at 45.

⁶⁸¹ See *UNE Remand Order*; *Line Sharing Order*.

⁶⁸² Compare Conditions at para. 27c (collocation compliance examination engagement) with *id.* at para. 28a (UNE and line sharing compliance examination engagement). Consistent with the overall audit requirements contained in the conditions, these audits will be conducted in accordance with auditing industry standards. See American Inst. of Certified Pub. Accountants, ATTESTATION ENGAGEMENTS, AT § 100; COMPLIANCE ATTESTATION, AT § 500.01.

⁶⁸³ Rather, the methods and procedures audit will be collapsed into the comprehensive compliance audit. See Conditions at para. 28a(6) (the independent auditor will evaluate, *inter alia*, the sufficiency of Bell Atlantic/GTE's methods, procedures, and internal controls for compliance with the Commission's UNE and line sharing rules); see also American Inst. of Certified Pub. Accountants, CONSIDERATION OF INTERNAL CONTROL IN A FINANCIAL STATEMENT, AU § 319; COMPLIANCE ATTESTATION, AT § 500.04 (addressing examination of internal controls).

immediately any necessary corrective action in response to adverse findings by the auditor or we may take any necessary and appropriate action. This additional audit of Bell Atlantic/GTE's compliance with our UNE and line sharing rules will be particularly beneficial in assessing Bell Atlantic/GTE's adherence to these important procompetitive requirements.

299. We find that this condition will make it quicker and easier for the Commission and others to detect non-compliance with our collocation, UNE, and line sharing rules both prior to and following the merger.⁶⁸⁴ To the extent that the audits uncover one or more violations of our rules, the Commission's audit staff will refer the matter to the Commission's Enforcement Bureau. These audits thus will assist this Commission and state commissions⁶⁸⁵ in reducing barriers to competitive provisioning of local voice and advanced services.

300. *Most-Favored Nation Arrangements.* This condition, designed to facilitate market entry throughout Bell Atlantic/GTE's region as well as the spread of best practices (as that term is understood by Bell Atlantic/GTE's competitors), has two components. First, where it is feasible given technical limitations, Bell Atlantic/GTE will offer telecommunications carriers operating within its service area any interconnection arrangement⁶⁸⁶ or UNE that Bell Atlantic/GTE, as a competitive LEC outside of its incumbent service area, secures from the incumbent LEC after the merger closing date,⁶⁸⁷ and that was not previously made available by the incumbent.⁶⁸⁸ Bell Atlantic/GTE will make the interconnection arrangement or network element available on the same terms and conditions as the incumbent, with prices and performance measures determined on a state-specific basis.

301. Second, where it is feasible given technical limitations, Bell Atlantic/GTE will make available to any requesting telecommunications carrier in any of its in-region states any interconnection arrangement or UNE in any other of its in-region states, that was negotiated voluntarily subsequent to

⁶⁸⁴ See, e.g., BlueStar et al. Mar. 1, 2000 Comments at 4-5.

⁶⁸⁵ See Conditions at para. 27c(5) & (7). Pursuant to its delegated authority, the Common Carrier Bureau will work closely with the state commissions in this effort.

⁶⁸⁶ This commitment encompasses, both for out-of-region and in-region agreements, entire interconnection agreements or selected provisions from them.

⁶⁸⁷ We decline IURC request that competing carriers in the Bell Atlantic/GTE region be able to obtain interconnection agreements and UNEs that Bell Atlantic or GTE secured as an out-of-region competitive LEC prior to the merger closing date. But see IURC Mar. 1, 2000 Comments at 15-16. Given the unique facts and circumstances of the instant merger, we believe that the post-merger restriction is reasonable. Furthermore, as we stated in the *SBC/Ameritech Order*, the merged entity, "bearing in mind its commitment to implement best practices, will be on notice as to which systems and procedures could become uniform across its region." 14 FCC Rcd at 14914, para. 492.

⁶⁸⁸ To assist competitive LECs in exercising their options, each Bell Atlantic/GTE out-of-territory affiliate will post on the Internet all of its relevant interconnection agreements. We agree with the Applicants, however, that these conditions need not be expanded to encompass Internet posting of in-region interconnection agreements. But see NEXTLINK Mar. 16, 2000 Reply at 12; CoreComm Mar. 1, 2000 Comments at 47-48 (requesting that the conditions require Bell Atlantic/GTE to publish on Bell Atlantic/GTE websites all effective Bell Atlantic and GTE interconnection agreements and amendments within one month after the merger closing, and detailing other associated requirements). As the Applicants assert, interconnection agreements are available publicly in each state in which they are effective, and no commenter has claimed that it has any difficulty in obtaining access to such agreements. See Bell Atlantic/GTE Response to Conditions Comments at 25. See also 47 U.S.C. § 252(h) (providing for Internet posting of in-region interconnection agreements by incumbent LECs).

the merger closing date by a Bell Atlantic/GTE incumbent LEC, subject to state-specific pricing and performance measures. In addition, Bell Atlantic/GTE will make the interconnection arrangements or UNEs available on the same terms and conditions as those in the underlying agreement, provided that the interconnection arrangements or UNEs will not be available beyond the last date that they are available in the underlying agreement, and that the requesting carrier accepts all reasonably related terms and conditions as determined in part by the nature of the corresponding compromises between the parties to the underlying agreement.⁶⁸⁹ When a carrier selects an interconnection arrangement or network element for an in-region state in which no rate for a comparable arrangement or element has been established, Bell Atlantic/GTE will make the arrangement or element available at the rates in the originating state on an interim basis until the requisite rates are developed. Disputes regarding the availability of an interconnection arrangement or unbundled element will be resolved through negotiation between the parties or by the relevant state commission pursuant to section 252.

302. The Applicants revised their original proposal to allow that the most-favored nation commitments encompass in-region arbitrated agreements, provisions, and UNEs.⁶⁹⁰ Specifically, where a competing carrier seeks to adopt in an in-region Bell Atlantic/GTE service area any agreements, provisions or UNEs that resulted from an arbitration arising from the Bell Atlantic/GTE service area in another in-region state after the merger closing date,⁶⁹¹ either Bell Atlantic/GTE or the competing carrier

⁶⁸⁹ Several commenters take issue with this proviso requiring competitive LECs to accept “all reasonably related terms and conditions” of the underlying agreement. The crux of their concern is that this provision will encourage Bell Atlantic/GTE to attach extraneous terms and conditions to requested interconnection arrangements or network elements, under the guise of Bell Atlantic/GTE deeming such terms and conditions “reasonably related.” The inclusion of such “poison pills,” these commenters assert, then will deter competitors from exercising their rights under the most-favored nation commitments, or will force competitors to undergo the substantial costs and delays of going to arbitration to have such extraneous terms and conditions removed. See NEXTLINK Mar. 16, 2000 Reply at 11-12; Advanced Telecom Mar. 1, 2000 Comments at 4-5; AT&T Mar. 1, 2000 Opposition at 32; MCI WorldCom Mar. 1, 2000 Supplemental Comments at 15. In response to these comments, a footnote has been added to the Conditions, clarifying that this proviso is to be read in the context of the *Local Competition Order*, 11 FCC Rcd at 16137-42, paras. 1309-23. See Conditions at para. 32. Specifically, the *Local Competition Order* stipulates that in order to prevent discrimination, terms and conditions that an incumbent LEC seeks to require a competitive LEC to accept must be “legitimately related to the purchase of the individual [interconnection arrangement or network] element being sought. By contrast, incumbent LECs may not require . . . agreement to terms and conditions relating to other interconnection, services, or elements in the approved agreement.” 11 FCC Rcd at 16139, para. 1315. We believe that this clarification, to the extent that it tracks the language of the *Local Competition Order*, disposes of the matter.

⁶⁹⁰ See, e.g., Bell Atlantic/GTE Mar. 14, 2000 *Ex Parte* Letter at 2. These revisions came in response to the allegations of numerous commenters that unless arbitrated agreements are included in this condition, the Applicants will have an incentive to be recalcitrant in negotiations, in order to prevent extension of interconnection arrangements and UNEs that Bell Atlantic/GTE perceives as unfavorable from one in-region state to another. See NEXTLINK Mar. 16, 2000 Reply at 11; Advanced Telecom Mar. 1, 2000 Comments at 3; AT&T Mar. 1, 2000 Opposition at 30-33; BlueStar et al. Mar. 1, 2000 Comments at 10; CompTel Mar. 1, 2000 Comments at 7; CoreComm Mar. 1, 2000 Comments at 26-27, 46-47; Covad Mar. 1, 2000 Comments at 17; IURC Mar. 1, 2000 Comments at 15; MCI WorldCom Mar. 1, 2000 Supplemental Comments at 14.

⁶⁹¹ We observe that nothing in the conditions precludes IURC’s argument that carriers seeking to compete in Bell Atlantic/GTE’s incumbent service area should have made available to them interconnection arrangements and UNEs resulting from an arbitration involving Bell Atlantic/GTE, as a competitive LEC outside of its incumbent service area, after the merger closing date. See IURC Mar. 1, 2000 Comments at 15. In fact, SBC/Ameritech’s original out-of-region most-favored nation commitments would have *limited* the out-of-territory arrangements available to in-region competitors to agreements obtained through arbitration initiated by SBC/Ameritech. Though SBC/Ameritech subsequently removed that limitation, it did not preclude making out-of-region arbitrated agreements available to in- (continued....)

may submit the arbitrated agreements, provisions, or UNEs to immediate arbitration in the “importing” state without waiting for the statutory negotiation period of 135 days to expire,⁶⁹² where the “importing” state consents to conducting arbitration immediately.

303. This approach towards arbitrated agreements, provisions, and UNEs presents several potential advantages. First, it should remove any disincentive to negotiate that the bulk of the commenters fear would be caused by most-favored nation commitments that are limited to interconnection arrangements and UNEs that are negotiated voluntarily. Second, it will expedite the ability of competing carriers to resolve contested issues in “importing” states.⁶⁹³ Third, it addresses the concern that we expressed in the *SBC/Ameritech Order* that expanding the condition to encompass arbitrated arrangements without qualification could interfere with the state arbitration process under sections 251 and 252 of the Communications Act.⁶⁹⁴ We emphasize that Bell Atlantic/GTE must act in good faith in determining whether to agree voluntarily to the importation of such arbitrated agreements, provisions, or UNEs and whether to submit such arbitrated agreements, provisions, or UNEs to immediate arbitration in the “importing” state(s).⁶⁹⁵ Thus, Bell Atlantic/GTE may be subject to penalties, fines or forfeitures pursuant to general Commission authority if it attempted, in bad faith, to block or delay adoption in a Bell Atlantic/GTE state of any UNE, whole interconnection agreement, or interconnection agreement provisions arbitrated in any other Bell Atlantic/GTE state after the merger closing date.

304. We reject assertions by NEXTLINK and NorthPoint that the most-favored nation provisions should cover performance measures and standards.⁶⁹⁶ Because performance measures are determined by states individually outside of the merger context, we agree with the Applicants that performance measures should not be subject to the most-favored nation provisions, both out-of-region and in-region. As the Applicants explain, many states have adopted performance measures “that are unique to the regulatory environment in that state, including the particular systems, processes and service provisioning systems already implemented in that state. The performance measures that are integral to these systems will simply have no applicability in states with different systems.”⁶⁹⁷

305. We also reject the argument of several commenters that any in-region interconnection

(Continued from previous page) _____
region competitors. See *SBC/Ameritech Order*, 14 FCC Rcd at 14873 n.723. We read the conditions to the instant merger the same way.

⁶⁹² See 47 U.S.C. § 252(b)(1).

⁶⁹³ See Covad Mar. 1, 2000 Comments at 17-18 (expressing that the conditions should provide for a faster means than negotiation between the parties to resolve disputes).

⁶⁹⁴ See *SBC/Ameritech Order*, 14 FCC Rcd at 14914, para. 491. We also noted there, however, that where the merged entity has stipulated in arbitration proceedings that specific arrangements have been determined through negotiation, these arrangements will be available for “most-favored nation” treatment. *Id.*

⁶⁹⁵ For example, Bell Atlantic/GTE generally would not require a requesting telecommunications carrier to arbitrate in the “importing” state a provision that previously was arbitrated and decided in that state.

⁶⁹⁶ But see NEXTLINK Mar. 16, 2000 Reply at 12; NorthPoint Mar. 1, 2000 Comments at 12.

⁶⁹⁷ Bell Atlantic/GTE Responses to Specific Conditions Allegations at A-13; Bell Atlantic/GTE Response to Conditions Comments at 26.

arrangement or UNE, regardless of whether it was made available prior or subsequent to the merger closing, should be obtainable by requesting carriers in any other in-region service area.⁶⁹⁸ Similar to our finding in the *SBC/Ameritech Order*,⁶⁹⁹ we find it reasonable for this condition to be implemented across the merged firm's combined region on a going-forward basis only. In this way, Bell Atlantic/GTE will be on notice as to which systems and procedures could become uniform across its region. Moreover, under the conditions to this merger, any voluntarily negotiated, in-region interconnection arrangement or UNE will be made available to requesting carriers in any other in-region service area of the particular legacy company whose interconnection arrangement or UNE is being extended. Thus, for example, interconnection agreement provisions voluntarily negotiated by Bell Atlantic's incumbent LEC in New York prior to the merger closing date will be made available to a requesting carrier seeking to compete in the Bell Atlantic/GTE service area in Maryland, which is a legacy Bell Atlantic service area.

306. *Multi-State Interconnection and/or Resale Agreements.* Negotiating a separate interconnection agreement between the same parties in multiple states can impose substantial unnecessary costs and delays on competitors and provides incumbent LECs with an incentive to game the process.⁷⁰⁰ As we discuss above, this merger will increase the merged firm's incentive and ability to impose unnecessary negotiation costs on its competitors. To neutralize this incentive, in addition to promoting market entry and assisting telecommunications carriers that want to operate in more than one Bell Atlantic/GTE state, Bell Atlantic/GTE will offer requesting telecommunications carriers an interconnection and/or resale agreement covering multiple Bell Atlantic and/or GTE states,⁷⁰¹ subject to technical feasibility, state-specific pricing, and the provisions in applicable collective bargaining agreements.⁷⁰² Bell Atlantic/GTE will make a sample generic multi-state agreement available to any requesting carrier no later than 60 days after the merger closing. Carriers may elect that generic agreement for any number of Bell Atlantic/GTE states, or may negotiate a different multi-state agreement with Bell Atlantic/GTE. In addition, in conjunction with the in-region most-favored nation conditions described above, carriers that negotiate an interconnection agreement with a Bell

⁶⁹⁸ But see NEXTLINK Mar. 16, 2000 Reply at 11; Covad Mar. 1, 2000 Comments at 17; IURC Mar. 1, 2000 Comments at 15-16; MCI WorldCom Mar. 1, 2000 Supplemental Comments at 14.

⁶⁹⁹ 14 FCC Rcd at 14914, para. 492.

⁷⁰⁰ *SBC/Ameritech Order*, 14 FCC Rcd at 14873, para. 389.

⁷⁰¹ A multi-state agreement under this condition could extend to any in-region Bell Atlantic/GTE state. Even though Bell Atlantic/GTE will offer to negotiate a multi-state interconnection agreement, the affected Bell Atlantic/GTE incumbent LECs may separately sign the agreement, which shall constitute a separate contract for section 252 purposes.

⁷⁰² The Applicants' original proposal contained language, both with respect to this condition and the most-favored nation conditions, to the effect that interconnection arrangements and UNEs may be modified to reflect "differences caused by state regulatory requirements, product definitions, network equipment, facilities, and provisioning, and collective bargaining agreements." Bell Atlantic/GTE Jan. 27, 2000 Proposed Conditions at 35-37, paras. 32-35. In response to WorldCom's objections to this language, however, see MCI WorldCom Mar. 1, 2000 Supplemental Comments at 15, the Applicants removed all such language, and replaced it with language clarifying that interconnection arrangements and UNEs are subject to 47 U.S.C. § 251(c) (incumbent LEC interconnection obligations), Paragraph 39 of the Conditions (commitment to continue making UNEs available until the date of a final, non-appealable judicial decision relieving incumbent LECs of UNE provision requirements), and provisions in applicable collective bargaining agreements.

Atlantic/GTE incumbent LEC in one state may require Bell Atlantic/GTE to sign the same agreement (exclusive of price) throughout the Bell Atlantic/GTE region.⁷⁰³ We decline to require that Bell Atlantic/GTE file in each of its in-region states generic terms, such as a statement of generally available terms (SGAT),⁷⁰⁴ that include all procompetitive offerings required by the conditions.⁷⁰⁵ We find that such a requirement is unnecessary to achieve the procompetitive benefit of this condition and would pose unnecessary costs on Bell Atlantic/GTE.⁷⁰⁶

307. *Carrier-to-Carrier Promotions.* Among the conditions that we adopted in approving the merger between SBC and Ameritech were unbundled loop discounts and resale discounts designed specifically to encourage rapid development of local competition in residential and less dense areas.⁷⁰⁷ Although the Applicants' original conditions proposal did not provide for any such carrier-to-carrier promotional discounts, in response to commenters' protests,⁷⁰⁸ the Applicants have added these promotions to their package of conditions. We find that these promotions offset the loss of potential competition between Bell Atlantic and GTE for residential services in their regions and facilitate market entry by competitors.

308. Bell Atlantic/GTE will offer these promotions equally to all telecommunications carriers with which it has an existing interconnection and/or resale agreement in a Bell Atlantic/GTE state. Within 30 days after the merger closing, Bell Atlantic/GTE will provide each such telecommunications carrier a written offer to amend the carrier's interconnection agreement in that state to incorporate the promotions. The actual offering window for both promotions will begin 30 days after the merger closing date. For the unbundled loop discount, the offering window will run through the earliest of: (a) 24 months; (b) for the Bell Atlantic legacy service areas, the date on which Bell Atlantic/GTE is authorized to provide in-region, interLATA services in the relevant state; (c) for the GTE legacy service areas, the date on which competing carriers, in aggregate, offer service over their own facilities to at least 15 percent of incumbent LEC customer locations in the GTE legacy service areas in that state;⁷⁰⁹ or (d) the date on which Bell Atlantic/GTE has completed 50 percent of the out-of-territory competitive entry commitments in the conditions.⁷¹⁰ For the resale discount, the offering window will run through the earlier of 36 months, or one month after the date on which the number of resold lines subject to the promotion in a state reaches the maximum allowable for the relevant state under the conditions.

⁷⁰³ See *SBC/Ameritech Order*, 14 FCC Rcd at 14874, para. 389.

⁷⁰⁴ See 47 U.S.C. § 252(f).

⁷⁰⁵ But see IURC Mar. 1, 2000 Comments at 16-19.

⁷⁰⁶ Furthermore, Bell Atlantic may file state-specific SGATs for its legacy service areas. See 47 U.S.C. § 252(f).

⁷⁰⁷ See *SBC/Ameritech Order*, 14 FCC Rcd at 14874-75, paras. 390-92; *SBC/Ameritech Conditions*, 14 FCC Rcd at 15015-19, paras. 45-49.

⁷⁰⁸ See, e.g., BlueStar et al. Mar. 1, 2000 Comments at 3; CoreComm Mar. 1, 2000 Comments at 3, 28-29; Covad Mar. 1, 2000 Comments at 18; IURC Mar. 1, 2000 Comments at 4, 10-11.

⁷⁰⁹ See *Access Charge Reform*, CC Docket No. 96-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14,221 (1999).

⁷¹⁰ These factors likewise measure the duration of the initial period for the promotional resale discount. See *infra* paras. 310-15.

Notwithstanding these offering windows, the conditions specify the maximum number of lines per state for which Bell Atlantic/GTE must provide the promotions.⁷¹¹ Furthermore, each promotion will last 36 months from the date that the promotional loop or resold service is installed and operational, or for the duration of the period during which the loop or resold service remains in service at the same location and for the same carrier, whichever is shorter.

309. *Carrier-to-Carrier Promotions: Unbundled Loop Discounts.* Bell Atlantic/GTE will offer a promotional discount on the monthly recurring charges⁷¹² for unbundled local loops used in the provision of residential local service and not used as part of a UNE platform or in any other combination with Bell Atlantic/GTE's local switching. The promotional discounts (as well as illustrative rates) are set forth in the conditions and are, on average within each state, 25 percent below the lowest applicable monthly recurring price established by the state commission. Bell Atlantic/GTE will make the promotional loop discount available equally to all telecommunications carriers that request the discount prior to expiration of the offering window or satisfaction of the line threshold limitation, and the promotion will last 36 months for each loop requested in that period, or for the duration of the period during which the loop remains in service at the same location and for the same carrier, whichever is shorter.

310. *Carrier-to-Carrier Promotions: Resale Discounts.* As another means of encouraging residential competition in less dense areas, Bell Atlantic/GTE will offer a promotional resale discount on Bell Atlantic/GTE's retail telecommunications services, where such services are resold to residential customers. The promotional resale discount shall be 32 percent from retail rates for an initial period, and, for the remaining period of the promotion, a rate equal to 1.1 times the standard wholesale discount rate established for that service by the state commission (*i.e.*, a discount of ten percent more than the standard wholesale discount rate). Bell Atlantic/GTE will make the promotional resale discount available equally to all telecommunications carriers that request the discount prior to expiration of the offering window or satisfaction of the line threshold limitation, and the promotion will last 36 months from the date each resold service is installed and operational, or for the duration of the period during which the resold service remains in service at the same location and for the same carrier, whichever is shorter.

311. We decline to increase the resale discount.⁷¹³ As we found in the *SBC/Ameritech*

⁷¹¹ See Conditions at para. 38. In order to provide competitive LECs with advance planning information, the conditions require Bell Atlantic/GTE to provide written or electronic (*e.g.*, Internet) notice to competitive LECs when the unbundled loop and resale promotions reach 50 percent and 80 percent of a state's maximum lines. We disagree with WorldCom's contention that, due to uncertainty regarding the duration of the promotions in a specific state, competitive LECs cannot make reliable business plans based on the availability of a discount. *But see* WorldCom May 5, 2000 Further Supplemental Comments at 8. WorldCom cites as an example the provision allowing the unbundled loop discount promotion to end in a state upon Bell Atlantic/GTE's receipt of section 271 authority in that state. We believe that the 90 days afforded for the Commission's processing of section 271 applications provides competitive LECs with sufficient notice of the potential cessation of the unbundled loop discount in that state.

⁷¹² We decline to require that the unbundled loop discount also apply to non-recurring charges. *But see* WorldCom May 5, 2000 Further Supplemental Comments at 7-8. We believe that the discount on recurring charges for unbundled loops is sufficient to stimulate further competitive LEC penetration into the residential local market.

⁷¹³ *But see* National ALEC Mar. 1, 2000 Comments at 6-7 (requesting a discount in the range of 50-60 percent).

Order, the 32 percent discount should facilitate competitive entry in the residential market.⁷¹⁴ We also do not find it necessary at this juncture to take any affirmative steps to “ensure that [Bell Atlantic/GTE] does not attempt to offset the loss in revenue resulting from . . . [the] residential resale discount by increasing other charges.”⁷¹⁵ Any potential for such attempts does not undermine the public benefit of this condition, and we expect that state commissions will catch and suppress any such attempts in the course of their review of Bell Atlantic/GTE’s cost studies.

312. We reject commenters’ suggestions that we eliminate the restrictions on the availability of the carrier-to-carrier promotions. For example, commenters seek removal of the limitation that competitors receiving the promotional unbundled loop discount can only use these loops for voice services,⁷¹⁶ as well as the residential restriction and line limitation contained in both of the promotions.⁷¹⁷ Our desire to promote residential competition is consistent with Congress’s intent, through enacting the 1996 Act, to spur facilities-based competition to serve residential customers.⁷¹⁸ Moreover, we find that the promotions’ limited duration and line limitations will motivate competing carriers to enter the residential market faster to secure the benefit of the promotions, thereby accelerating the availability of competitive offerings to residential consumers.⁷¹⁹ Once a carrier secures the promotion, however, it is guaranteed the promotional terms for a full three-year period. Because our intent is for these promotions to ignite competition in the residential local exchange or exchange access markets in Bell Atlantic’s and GTE’s regions, we decline to expand this particular condition to cover loops used in the provision of advanced services.⁷²⁰ Indeed, we note that competitors that choose to use an unbundled loop to provide advanced services already receive a 25 percent discount elsewhere in the conditions, through the advanced services OSS discount.⁷²¹

313. We also reject AT&T’s arguments that the carrier-to-carrier promotions are discriminatory and therefore unlawful.⁷²² First, based on the manner in which Bell Atlantic/GTE will execute its obligations, we do not find that the residential and voice service restrictions transgress the

⁷¹⁴ See *SBC/Ameritech Order*, 14 FCC Rcd at 14915 n.898 (citing *Local Competition Order*, 11 FCC Rcd at 15955-56, 15963-64, paras. 910, 932-33).

⁷¹⁵ National ALEC Mar. 1, 2000 Comments at 7.

⁷¹⁶ See Covad May 5, 2000 Comments at 13-14; WorldCom May 5, 2000 Further Supplemental Comments at 8. Both Covad and WorldCom seek extension of the applicability of the unbundled loop discount to loops used for advanced services.

⁷¹⁷ See AT&T May 5, 2000 Comments at 5, 7 (arguing that the line limitations are unlawful); CoreComm Mar. 1, 2000 Comments at 29 (maintaining that the promotions likewise should apply to service rendered to small businesses).

⁷¹⁸ See *SBC/Ameritech Order*, 14 FCC Rcd at 14914-15, para. 494; (citing S. Conf. Rep. No. 104-230 at 148) (contemplating that the 1996 Act would promote facilities-based, “local residential competition”).

⁷¹⁹ See *SBC/Ameritech Order*, 14 FCC Rcd at 14915, para. 494.

⁷²⁰ *Id.* See also Bell Atlantic/GTE May 9, 2000 Response at 3 n.3 (citing *SBC/Ameritech Order*, 14 FCC Rcd at 14892, para. 440).

⁷²¹ See Conditions at para. 25.

⁷²² See AT&T May 5, 2000 Comments at 3, 4-7.

Act or corresponding Commission rules.⁷²³ Specifically, Bell Atlantic/GTE will implement the promotions by voluntarily offering to amend its interconnection agreements with telecommunications carriers to incorporate the promotional terms.⁷²⁴ Moreover, Bell Atlantic/GTE will make this offer in a nondiscriminatory manner to all telecommunications carriers with which it has an interconnection and/or resale agreement in any Bell Atlantic/GTE state.

314. The 1996 Act and corresponding Commission rules give incumbent LECs and their competitors certain latitude to enter into customized contractual arrangements, subject to section 252(i)'s requirement that any negotiated arrangement must be made available to all interested carriers in the same state upon the same terms and conditions.⁷²⁵ Section 252(a)(1) provides that "an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251."⁷²⁶ Likewise, although section 252(e)(2)(B) requires a finding of compliance with section 251 when state commissions review arbitrated agreements, there is no corresponding requirement with respect to negotiated agreements.⁷²⁷ We note, however, that as AT&T points out, pursuant to section 252(e)(2)(A)(i), a state commission may reject a negotiated agreement if it finds that the agreement "discriminates against a telecommunications carrier not a party to the agreement."⁷²⁸ Thus, the commission in each state in which Bell Atlantic/GTE will offer the promotions must make its own assessment of whether the promotions are discriminatory.

315. AT&T also contends⁷²⁹ that the line limitation on the number of discounted loops and

⁷²³ See 47 U.S.C. § 251(c)(3), (4)(B) (nondiscrimination requirements); 47 C.F.R. § 51.313(a) (requiring nondiscriminatory access to network elements); 47 C.F.R. § 51.603(a) (requiring nondiscriminatory resale); 47 C.F.R. § 51.503(c) (providing that an incumbent's rates shall not vary on the "basis of the class of customers served by the requesting carrier, or the type of services that the requesting carrier purchasing such elements uses them to provide"). See also *SBC/Ameritech Order*, 14 FCC Rcd at 14915, para. 495.

⁷²⁴ See 47 U.S.C. § 252(a)(1). With Bell Atlantic/GTE voluntarily offering to amend interconnection agreements, states will not be in the position of putting the discount into arbitrated agreements. Of course, the amended agreements still will be subject to state commission approval of voluntarily negotiated agreements pursuant to 47 U.S.C. § 252(e). In this regard, we reject the proposal of the Allegiance Joint Commenters that the promotional discounts be made automatic, without amending interconnection agreements. See Allegiance May 5, 2000 Joint Comments at 6-7. As the Applicants aptly respond, section 252 requires inter-carrier arrangements for UNEs and resale to be embodied in interconnection agreements. See Bell Atlantic/GTE Responses to Specific Conditions Allegations at A-14. See also, e.g., 47 U.S.C. § 252(e)(1), (h), (i).

⁷²⁵ See *SBC/Ameritech Order*, 14 FCC Rcd at 14915, para. 496.

⁷²⁶ 47 U.S.C. § 252(a)(1). See *Local Competition Order*, 11 FCC Rcd at 15528, paras. 54, 58 (stating that "parties that voluntarily negotiate agreements need not comply with the requirements we establish under sections 251(b) and (c), including any pricing rules we adopt").

⁷²⁷ 47 U.S.C. § 252(e)(2). The Supreme Court recognized this distinction in *AT&T Corp. v. Iowa Utilities Board*, stating: "When an entrant seeks access through [resale, leasing of unbundled network elements, or interconnection], the incumbent can negotiate an agreement without regard to the duties it would otherwise have under §251(b) or (c). But if private negotiation fails, either party can petition the state commission that regulates local phone service to arbitrate open issues, which arbitration is subject to §251 and the FCC regulations promulgated thereunder." *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 372-73 (1999) (footnote and citation omitted).

⁷²⁸ See 47 U.S.C. § 252(e)(2)(A)(i); AT&T May 5, 2000 Comments at 7 n.8.

⁷²⁹ AT&T May 5, 2000 Comments at 5, 7.

resale offerings that will be made available to competitive LECs would violate the “pick and choose” rule of section 252(i), as well as the nondiscrimination requirements of section 251(c)(3) and 252(d)(1).⁷³⁰ We note that, under the specific terms of the merger conditions, these promotions are being offered to competitors in a nondiscriminatory fashion. Specifically, in each of its states, Bell Atlantic/GTE will offer the promotion simultaneously to all telecommunications carriers that have an existing interconnection and/or resale agreement with Bell Atlantic and/or GTE. This should ensure that all competitive LECs operating in Bell Atlantic/GTE’s region will be afforded an equal opportunity to participate in the promotions. Moreover, carriers that begin operating in Bell Atlantic/GTE’s region, or decide to participate in the promotions, after this initial offer period will have the opportunity to participate in the offerings, and Bell Atlantic/GTE will respond to inquiries by all carriers within 10 business days. Finally, Bell Atlantic/GTE will notify all carriers operating in the state when 50 percent and 80 percent of the maximum lines in that state are reached.

316. *Offering of UNEs.* In order to reduce uncertainty to competing carriers from litigation that may arise in response to our orders in the UNE Remand and Line Sharing proceedings, from now until the date on which the Commission’s orders in those proceedings, and any subsequent proceedings, become final and non-appealable, Bell Atlantic and GTE will continue to make available to telecommunications carriers, in accordance with those orders, each UNE and combination of UNEs that is required under those orders, until the date of any final and non-appealable judicial decision that determines that Bell Atlantic/GTE is not required to provide the UNE or combination of UNEs in all or a portion of its operating territory. This condition only would have practical effect in the event that our rules adopted in the UNE Remand and Line Sharing proceedings are stayed or vacated. Compliance with this condition includes pricing these UNEs at cost-based rates in accordance with the forward looking cost methodology first articulated by the Commission in the *Local Competition Order*, until the date of any final and non-appealable judicial decision that determines that Bell Atlantic/GTE is not required to provide such UNEs at cost-based rates.

317. *Alternative Dispute Resolution Through Mediation.* As a means of streamlining and expediting resolution of carrier-to-carrier disputes, Bell Atlantic/GTE will offer telecommunications carriers, subject to the appropriate state commission’s approval, an option of resolving interconnection agreement disputes through an alternative dispute resolution mediation process that may be state-supervised. This mediation process supplements, rather than supersedes, any other options at the carrier’s disposal for addressing interconnection disputes with Bell Atlantic or GTE, including negotiated dispute resolution mechanisms. We note that no state or competitive LEC is required to adopt or participate in this process.⁷³¹ Furthermore, nothing in this condition in any way limits the ability of carriers to pursue enforcement remedies, including informal mediation, at the Commission pursuant to section 208.⁷³²

⁷³⁰ See 47 C.F.R. § 51.809(a) (implementing pick and choose rule of section 252(i)). See also 47 C.F.R. §§ 51.313(a), 51.603(a). As explained above, the nondiscrimination requirements of section 251(c) and corresponding Commission rules do not apply to voluntarily negotiated agreements.

⁷³¹ We also note, on the other hand, that states may choose to be involved in multi-state mediations of similar or common issues, though such participation, as with any state participation under this condition, is completely voluntary. See *SBC/Ameritech Order*, 14 FCC Rcd at 14917, para. 499.

⁷³² Cf. CoreComm Mar. 1, 2000 Comments at 49-50 (Commission should establish an informal staff mediation process in order to facilitate resolution of interconnection negotiation disputes).

318. *Access to Cabling in Multi-Unit Properties.* In order to provide information regarding possible options for additional competition in the provision of local service to multi-unit properties, Bell Atlantic/GTE will conduct a trial that will provide telecommunications carriers with access at a single point of interconnection to cabling owned or controlled by Bell Atlantic/GTE in multi-tenant residential and business properties.⁷³³ As a separate commitment, Bell Atlantic/GTE will design, install and provide all new cabling owned or controlled by Bell Atlantic/GTE in a manner so that it can be accessed by any telecommunications carrier at a single point of interconnection, located at the minimum point of entry.⁷³⁴ We decline to implement Covad's suggestion that Bell Atlantic/GTE implement a trial scheme identical to the one that we adopted in approving the merger between SBC and Ameritech.⁷³⁵ The Applicants represent that Bell Atlantic initiated a trial earlier this year in New York City allowing a competitive LEC to install cross-connects to house and riser cable, and that it has an existing tariffed service in New York and a tariff pending in Massachusetts that give competitive LECs access to such cabling.⁷³⁶ Moreover, as specified by the condition,⁷³⁷ Bell Atlantic/GTE will take the needed steps elsewhere to expand access at single points of interconnection to cabling owned or controlled by Bell Atlantic/GTE in multi-tenant residential and business properties.⁷³⁸ We believe that the Applicants' commitment to provide carriers with access to incumbent LEC owned or controlled cabling behind a single point of interconnection for multi-unit properties and campuses of garden apartment dwellings will further significantly competitors' access to cabling.⁷³⁹ We also note that, in addition to these conditions, Bell Atlantic/GTE must comply with the rules that we adopted in the *UNE Remand Order* regarding competitive LEC access to cabling at a single point of interconnection, located at the minimum point of entry.⁷⁴⁰

3. Fostering Out-of-Territory Competition

319. *Out-of-Territory Competitive Entry.* As a condition of this merger, between the merger closing date and the end of the 36th month thereafter, the combined firm will spend at least \$500 million to provide competitive local service and associated services outside of the Bell Atlantic and GTE

⁷³³ As with the *SBC/Ameritech Conditions*, the Chief of the Common Carrier Bureau will resolve any disputes that may arise regarding the trial. See *SBC/Ameritech Order*, 14 FCC Rcd at 14877 n.743; *SBC/Ameritech Conditions*, 14 FCC Rcd at 15024-25, para. 57.

⁷³⁴ This commitment also encompasses new cables installed or controlled by Bell Atlantic/GTE in a campus of garden apartment dwelling units. There may be, however, multiple points of entry where a property owner requests diversity.

⁷³⁵ But see Covad Mar. 1, 2000 Comments at 19. Compare *SBC/Ameritech Conditions*, 14 FCC Rcd at 15024-25, para. 57 (SBC/Ameritech to conduct trials in five "large cities" and complete them within two years after the merger closing) with *Conditions* at para. 41.

⁷³⁶ See Bell Atlantic/GTE Response to Conditions Comments at 26. The Applicants also submitted relevant portions of the publicly available New York tariff to Commission staff, and these submissions were placed in the Commission's record for this proceeding on June 12, 2000.

⁷³⁷ *Conditions* at para. 41.

⁷³⁸ See Bell Atlantic/GTE Response to Conditions Comments at 26-27.

⁷³⁹ See *SBC/Ameritech Order*, 14 FCC Rcd at 14917, para. 500.

⁷⁴⁰ See, e.g., *UNE Remand Order* at paras. 168-70, 226.

legacy service areas. Specifically, “competitive local service” is defined to include traditional local telecommunications services that compete with like services offered by incumbent LECs, provision of advanced services to the mass market, and resale. Additional expenditures that otherwise may count towards fulfillment of the out-of-region commitment include those devoted towards provision of “other telecommunications services” or information services that are offered jointly with competitive local service, as well as investments in, or contributions to, ventures that provide competitive local service activity in out-of-region markets. Bell Atlantic/GTE must devote at least 50 percent of the out-of-region expenditure commitment to facilities-based competitive service, and it may allot the remaining portion to acquire customers for competitive local service in those out-of-region markets. Notwithstanding the expenditures, the merged firm will be deemed to have satisfied the out-of-region commitment if it provides service, during the 36-month period described above, over at least 250,000 customer lines that are used to provide competitive local service in out-of-region markets.⁷⁴¹

320. Bell Atlantic/GTE will be subject to voluntary payments to the U.S. Treasury in the amount of 150 percent of any shortfall in its out-of-region expenditure. Similarly, the merged entity will pay 150 percent of any amount by which it falls short of devoting \$250 million to facilities-based service, though this payment for inadequate facilities-based service expenditures will be offset by half of the amount of any payment for a general shortfall in its out-of-region expenditure. Bell Atlantic/GTE would therefore be obligated to pay \$750 million for missing all of its out-of-region entry requirements. In addition, the Applicants have committed to annual benchmarks under which they must, pursuant to this condition, spend \$100 million or provide service over at least 50,000 customer lines between the merger closing date and the end of the first year thereafter, and spend \$300 million or provide service over at least 150,000 customer lines by the end of the second year. Furthermore, the Applicants have undertaken to devote at least 20 percent of their expenditures or customer lines specifically towards providing competitive local service to residential customers or towards providing advanced services. These benchmarks likewise are backed by voluntary payments in the amount of 150 percent of any shortfall, and these benchmark voluntary payments will offset any payments that the merged firm is obligated to make for not completing its out-of-region expenditure by the end of the 36 month period following the merger closing.

321. Notwithstanding the differences between the Applicants’ out-of-region competition commitment and SBC/Ameritech’s “National-Local Strategy” for out-of-territory competitive entry,⁷⁴² we disagree with AT&T’s characterization of the Applicants’ commitment as a “sham.”⁷⁴³ We believe that the Applicants’ out-of-region competition commitment is sufficient to ensure that residential

⁷⁴¹ Customer lines are defined as including telephone access lines, xDSL or other lines used to provide Advanced Services, cable lines, or “other lines of communications used to provide Competitive Local Service.” A line subject to line sharing will be considered one customer line even if Bell Atlantic/GTE, its affiliate, or the venture to which Bell Atlantic/GTE has contributed is providing both the voice and advanced services. Where Bell Atlantic/GTE counts cable or fixed wireless services towards satisfaction of the out-of-region commitment, each subscriber will be deemed to have one customer line.

⁷⁴² Compare *SBC/Ameritech Conditions*, 14 FCC Rcd at 15026-29, para. 59 (National-Local Strategy) with *Conditions* at paras. 43-48 (Bell Atlantic/GTE out-of-territory competitive entry commitment).

⁷⁴³ AT&T Mar. 1, 2000 Opposition at 29. See United States Hispanic Chamber of Commerce Mar. 1, 2000 Comments at 4 (“USHCC considers the out-of-region expenditure condition a distinct benefit of the proposed Bell Atlantic/GTE merger”); World Institute on Disability Mar. 1, 2000 Comments at 7 (“Bell Atlantic and GTE have committed to spending a substantial sum on out-of-territory competitive entry”).

consumers and business customers outside of Bell Atlantic/GTE's territory will benefit from meaningful, facilities-based competitive service.⁷⁴⁴ We also anticipate that this condition will stimulate competitive entry into the Bell Atlantic/GTE region by the affected incumbent LECs. Moreover, the Applicants have proposed annual expenditure benchmarks that are backed by payments to the U.S. Treasury for failure to meet the benchmarks. Although the Indiana commission maintains that it will be difficult to ensure compliance with the expenditure requirements,⁷⁴⁵ we are confident that the annual audit of Bell Atlantic/GTE's compliance with all of the conditions should uncover any non-compliance with the out-of-region expenditure commitment.⁷⁴⁶

322. In addition, we agree with the Applicants that we need not implement the Indiana Commission's prescription that at least half of the out-of-region expenditure commitment should be used for "local" service.⁷⁴⁷ Assuming, as the Applicants do, that by "local" the Indiana Commission means traditional voice services, we do not perceive the need to impose such a restriction.⁷⁴⁸ Indeed, section 706 of the 1996 Act mandates that the Commission encourage widespread deployment of advanced services nationwide,⁷⁴⁹ and the Applicants include advanced services among the services that the merged firm may deploy in attempting to satisfy the out-of-region competition commitment.

323. Similarly, we disagree with AT&T's contention that the "technology neutral" aspect of the out-of-region commitment undermines its benefit.⁷⁵⁰ As the Applicants explain, given the rapid pace of technological change, they expressly fashioned the commitment to be technology neutral in order to allow devotion of resources to evolving technologies.⁷⁵¹ Indeed, imposing additional restrictions could severely limit the Applicants' ability to undertake innovative business strategies or ventures with other firms. Finally, AT&T's concern that the Applicants may satisfy this commitment wholly by "implementing their existing pre-merger plans to offer out-of-region wireless services" is defeated by our clarification that commercial mobile radio services may not count towards satisfaction of the commitment.⁷⁵²

⁷⁴⁴ See LCLAA Mar. 1, 2000 Comments at 2 ("LCLAA believes that the \$500 million out-of-region commitment of the post-merger company will open the door to exactly the kind of facilities-based competition that Congress intended when it enacted the Telecommunications Act of 1996").

⁷⁴⁵ IURC Mar. 1, 2000 Comments at 11.

⁷⁴⁶ See Conditions at para. 56.

⁷⁴⁷ But see IURC Mar. 1, 2000 Comments at 11.

⁷⁴⁸ See Bell Atlantic/GTE Response to Conditions Comments at 29.

⁷⁴⁹ See Pub.L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157 (Section 706).

⁷⁵⁰ But see AT&T Mar. 1, 2000 Opposition at 29.

⁷⁵¹ Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing at 28.

⁷⁵² See Conditions at para. 43. But see AT&T Mar. 1, 2000 Opposition at 29.

4. Improving Residential Phone Service

324. *Pricing of InterLATA Services.* As a direct benefit to consumers, particularly low-income consumers and low-volume long distance callers, this condition provides that Bell Atlantic/GTE will not charge residential customers a minimum monthly or minimum flat rate charge for long distance service for a period of not less than three years.⁷⁵³ This requirement should not only benefit those customers that make few long distance calls, but also should help to ensure that long distance services continue to be available to all consumers at competitive prices.⁷⁵⁴

325. *Enhanced Lifeline Plans.* Designed specifically to ensure that the benefits of the merger extend to low-income residential customers throughout all of Bell Atlantic's and GTE's regions, this condition requires the merged firm to offer each of its in-region states a plan to provide discounts on basic local service for eligible customers.⁷⁵⁵ Bell Atlantic/GTE will offer a low-income Lifeline universal service plan modeled after the Ohio Universal Service Assistance (USA) Lifeline plan that Ameritech and Ohio community groups negotiated in 1994 and later revised to adjust to the 1996 Act. It also will incorporate elements from the December 1998 Ohio Commission Order addressing the Ohio USA plan.⁷⁵⁶ Specifically, Bell Atlantic/GTE will offer to provide a discount equal to the price of basic residential measured rate service, excluding local usage, in each state, up to a maximum discount of \$10.20 per month (including all federal, state and company contributions).

326. This condition not only applies to the subscriber eligibility, discounts and eligible services features of the Ohio USA Lifeline plan, but it also includes certain other commitments. Under the condition, Bell Atlantic/GTE will permit a Lifeline customer with past-due bills for local service to restore local service after payment of no more than \$25 and an agreement to repay the balance of local charges in six equal monthly payments. Lifeline customers also will not be required to pay a deposit for toll service if they elect toll restriction service. Bell Atlantic/GTE will allow prospective Lifeline customers to verify their eligibility on a written form, and Bell Atlantic/GTE will give those forms to state agencies that administer qualifying programs so that the agencies can distribute the forms to their clients.⁷⁵⁷ Bell Atlantic/GTE also will negotiate with state agencies administering qualifying programs to procure an on-line verification process. Easing the financial burden for prospective Lifeline customers, Bell Atlantic/GTE will provide both a toll-free telephone number for prospective customers to inquire

⁷⁵³ The Applicants originally proposed to extend this benefit immediately in the Bell Atlantic legacy states, and in the GTE legacy states only after AT&T ceased to apply such charges. See Bell Atlantic/GTE Jan. 27, 2000 Proposed Conditions at 40. In response to commenters, however, the Applicants agreed to extend the benefit throughout their combined service area as of the merger closing date. See Bell Atlantic/GTE Mar. 14, 2000 *Ex Parte* Letter at 2. See also IURC Mar. 1, 2000 Comments at 12; PUC of Texas Mar. 1, 2000 Comments at 3.

⁷⁵⁴ See *SBC/Ameritech Order*, 14 FCC Rcd at 14878, para. 400. This requirement does not prohibit the merged firm from offering its customers an optional, voluntary pricing plan that may include a minimum monthly charge, minimum flat rate charge, or a prepaid calling card.

⁷⁵⁵ See *id.* at para. 401. State commissions are free to accept or reject the plan outlined in these conditions. But see State Advocates Mar. 1, 2000 Comments at 15-17 (requesting that the Commission clarify that states may adopt the enhanced Lifeline plan without reducing any benefits offered under existing state plans).

⁷⁵⁶ See *SBC/Ameritech Order*, 14 FCC Rcd at 14878, para. 401.

⁷⁵⁷ We note that Bell Atlantic/GTE will provide these forms in English and such other languages as are prevalent in the applicable service area.

about or subscribe to the program and a toll-free fax line for customers to send program documentation, and new customers will not be required to pay a deposit to obtain local service. Bell Atlantic/GTE will publicize the program in each state with an annual promotional budget that is proportional to the annual promotional budget in Ohio. In addition to including Lifeline information on customer service center voice response units where technically possible and appropriate, Bell Atlantic/GTE also will automatically upgrade current Lifeline customers to the new program where it is evident that doing so will unambiguously improve the customer's situation. For each state that accepts Bell Atlantic/GTE's offer, the merged firm will maintain the plan for a period of not less than 36 months.⁷⁵⁸

327. We reject the request of the State Advocates that we expand subscriber eligibility criteria to include all households with income below 150 percent of the federal poverty level, and that we remove restrictions on the purchase of optional services.⁷⁵⁹ As the Applicants respond, states will continue to have the right to establish eligibility requirements for lifeline service as well as determine whether lifeline customers are eligible to subscribe to optional services.⁷⁶⁰ As for the subscriber eligibility requirements themselves, our rules establish eligibility criteria for states that have not established their own, and the eligibility criteria in our rules fall within the criteria in the Ohio USA Lifeline plan.⁷⁶¹ Furthermore, we believe that the eligibility criteria alternative presented by the State Advocates will be difficult to verify. We find that the Applicants' commitment to offer states an enhanced Lifeline plan will provide substantial direct benefits to low-income residential consumers, and thus, we see no need to add further requirements to the condition.⁷⁶²

328. *Additional Service Quality Reporting.* As a safeguard against potential deterioration in Bell Atlantic's or GTE's quality of service as a result of the merger, and to promote affirmative service quality improvements, this condition requires Bell Atlantic/GTE to report additional benchmark and service-quality information.⁷⁶³ First, Bell Atlantic/GTE will report, on a quarterly basis, the quality of service that it provides to customers. Specifically, Bell Atlantic/GTE will develop and file with this Commission, and post on a Bell Atlantic/GTE website or provide to the relevant state commissions, quarterly state-by-state service quality reports in accordance with the National Association of Regulatory Utility Commissioners (NARUC) Technology Policy Subgroup's November 1998 "Service Quality White Paper."⁷⁶⁴ Through this reporting program, Bell Atlantic/GTE will make publicly available in a timely manner key information about its service quality, including installation and repair performance,

⁷⁵⁸ See Conditions at para. 50j (providing that the obligations in this condition will not take effect until and unless the enhanced Lifeline tariffs are accepted and approved by a state commission) and para. 64 (each condition is designed to yield at least 36 months of benefit).

⁷⁵⁹ But see State Advocates Mar. 1, 2000 Comments at 4-15.

⁷⁶⁰ Bell Atlantic/GTE Response to Conditions Comments at 31.

⁷⁶¹ See 47 C.F.R. § 54.400(a).

⁷⁶² See *SBC/Ameritech Order*, 14 FCC Rcd at 14918, para. 502.

⁷⁶³ See *id.* at 14879, para. 403.

⁷⁶⁴ In the Preamble to the Service Quality White Paper, NARUC states that a service quality reporting program will "allow interested parties to assess current service quality levels among the states, and identify increasing or decreasing trends over time." National Association of Regulatory Utility Commissioners, SERVICE QUALITY WHITE PAPER (Nov. 1998); see also National Regulatory Research Institute, TELECOMMUNICATIONS SERVICE QUALITY 127-60 (1996) (noting that information facilitates competition on quality).

switch and transmission facility outages, consumer complaints, and answer time performance.⁷⁶⁵ We anticipate that, by providing consumers and states with information about Bell Atlantic/GTE's service quality, this condition will, at a minimum, deter any potential service quality degradation and motivate the merged firm to improve its service quality where possible.⁷⁶⁶

329. Bell Atlantic/GTE will also file reports showing the service quality provided to interexchange carriers, which will include data regarding the installation and maintenance of switched, high speed special, and special access services.⁷⁶⁷ By receiving such information on a quarterly basis, the Commission and others can take appropriate action in the event such reports show service quality degradation.⁷⁶⁸ Bell Atlantic/GTE also will continue reporting ARMIS data on an operating-company basis in order to preserve the number of observable points of operating-company behavior for benchmarking purposes.⁷⁶⁹

330. In addition, as described above, we require the merged entity to report, on a disaggregated, company-specific basis,⁷⁷⁰ certain measurements, all but one of which it currently provides as part of the Commission's ARMIS requirements.⁷⁷¹ With respect to its provision of high-speed special access and regular special access services, we require Bell Atlantic/GTE, or any applicable affiliate,⁷⁷² to report: the percent of commitments met; the average interval (in days); the average delay days due to lack of facilities;⁷⁷³ the average interval to repair service (in hours) and the trouble report rate. These measurements should be reported on a monthly basis and made available to the independent auditor.⁷⁷⁴ It is our expectation that this condition will ensure that any attempt by the merged entity to discriminate in favor of Genuity in the provision of these special access services will be

⁷⁶⁵ See *SBC/Ameritech Order*, 14 FCC Rcd at 14880, para. 403.

⁷⁶⁶ See *id.*

⁷⁶⁷ See ARMIS 43-05 Service Quality Report, Table 1. In the ARMIS 43-05 Service Quality Report, price cap incumbent LECs report the installation and maintenance of switched access, high speed special access, and special access services provided to interexchange carriers.

⁷⁶⁸ See *SBC/Ameritech Order*, 14 FCC Rcd at 14880, para. 404.

⁷⁶⁹ See *id.*

⁷⁷⁰ The merged entity, therefore, will report on its provision of these services to all companies, including Internet service providers, Internet backbone providers and interexchange carriers.

⁷⁷¹ See 47 C.F.R. § 43.21(g); ARMIS 43-05 Service Quality Report, Table 1 (establishing reporting requirements for special access provided to interexchange carriers).

⁷⁷² For example, these reporting requirements attach to the separate advanced services affiliate if it begins to provision these special access circuits to Genuity.

⁷⁷³ We note that average delay days due to lack of facilities is not currently reported through ARMIS. See ARMIS 43-05 Service Quality Report, Table 1.

⁷⁷⁴ See Conditions at para. 55(f). As provided in the Conditions, Bell Atlantic/GTE shall, in consultation with the Chief of the Common Carrier Bureau, modify these measurements and develop any applicable performance measurement business rules to the extent necessary. Any developed business rules, once approved by the Chief of the Common Carrier Bureau, will be made publicly available.

readily detectable.

331. *NRIC Participation.* Through this condition, we expect that Bell Atlantic/GTE will demonstrate and further its commitment to maintain reliable, high-quality networks and services, as well as to promote the deployment of advanced services. The Applicants will continue their participation in the Network Reliability and Interoperability Council (NRIC), a committee organized to make recommendations to the Commission on how to ensure “optimal reliability, interoperability and interconnectivity of, and accessibility to, the public telecommunications networks,” and also to advise the Commission on spectrum compatibility standards and spectrum management practices for the deployment of advanced services technologies.”⁷⁷⁵ Bell Atlantic/GTE’s continued participation will provide assurance that the merged firm will review the causes of network outages and advise on spectrum compatibility standards and spectrum management practices in a timely manner, and adopt industry best practices designed to promote reliable, high quality services.

5. Ensuring Compliance with and Enforcement of these Conditions

332. The Commission is firmly committed to enforcing the Communications Act and the public interest standard that forms its foundation. Attaching conditions to a merger without an efficient and judicious enforcement program would impair the Commission’s ability to protect the public interest.⁷⁷⁶ The conditions therefore establish compliance and enforcement mechanisms that not only will provide Bell Atlantic/GTE with a strong incentive to comply with each of its requirements, but also will facilitate the Commission’s oversight of the Applicants’ obligations under these conditions. As a general matter, the conditions place the responsibility of taking active steps to ensure compliance on Bell Atlantic/GTE by: (1) establishing a self-executing compliance mechanism; (2) requiring an independent audit of the Applicants’ compliance with the conditions; and (3) providing self-executing remedies for failure to perform an obligation.

333. *Compliance Program.* For the benefits of the conditions to outweigh the potential public interest harms of the merger, Bell Atlantic/GTE must take aggressive steps to implement every aspect of these conditions and to comply with both the letter and the spirit of its obligations. In our view, the benefits of these conditions depend entirely upon the Applicants’ compliance. Because the conditions that we adopt today are spelled out in detail with their satisfaction measured by objective criteria, and because failing to comply with the conditions could expose Bell Atlantic/GTE to a material loss of revenue, we believe that Bell Atlantic/GTE has a strong incentive to implement an aggressive and

⁷⁷⁵ Network Reliability and Interoperability Council, *NRIC V Goal* (visited June 13, 2000) <http://www.nric.org>; *Revised Network Reliability and Interoperability Council – V Charter* (effective Jan. 6, 2000). The NRIC is a federal advisory committee chartered to study the reliability of the public telecommunications network. See Network Reliability and Interoperability Council, *NRIC NETWORK INTEROPERABILITY: THE KEY TO COMPETITION* (1997). See also *Line Sharing Order*, 14 FCC Rcd at 20992-93, paras. 184-85 (establishing NRIC’s advisory function on advanced services spectrum compatibility and spectrum management matters).

⁷⁷⁶ See *NEXTLINK* Mar. 16, 2000 Reply at 8-9; *Allegiance* Mar. 1, 2000 Comments at 9-10 (recommending independent audit of compliance); *CoreComm* Mar. 1, 2000 Comments at 46 (supporting an audit); *MCI WorldCom* Mar. 1, 2000 Supplemental Comments at 19-20; *NorthPoint* Mar. 1, 2000 Comments at 10. See also *SBC/Ameritech Order*, 14 FCC Rcd at 14881, para. 406.

effective compliance program.⁷⁷⁷

334. As part of the conditions, Bell Atlantic and GTE will establish a corporate compliance program to identify all applicable compliance requirements, establish and maintain the internal controls needed to ensure compliance, evaluate the merged firm's compliance on an on-going basis, and take any corrective actions necessary to ensure full and timely compliance.⁷⁷⁸ Bell Atlantic/GTE will appoint a "Compliance Officer" with sufficient rank and experience to supervise its corporate operations and to ensure that the business units carry out their responsibilities under the conditions.⁷⁷⁹ This Compliance Officer will prepare and publicly file with the Commission an initial compliance plan and an annual compliance report addressing the corporation's compliance with the conditions and the sufficiency of the corporation's internal controls for ensuring continued compliance.⁷⁸⁰

335. We expect that Bell Atlantic and GTE will put into place a reasonably designed, implemented, and self-enforced compliance program that will detect potential noncompliance in time for Bell Atlantic/GTE to notify the Commission and take corrective action before such noncompliance impairs the benefits of these conditions. To provide additional assurances to the public regarding Bell Atlantic/GTE's compliance, however, the Commission plans to conduct targeted audits of various aspects of the Applicants' compliance programs.⁷⁸¹ Only a strong corporate compliance program, in conjunction with the independent audit and other enforcement mechanisms, will enable consumers to realize the full benefit of the conditions.

⁷⁷⁷ A corporate compliance program is a well-established technique for ensuring that an organization takes active steps to comply with legal and regulatory requirements. The Commission and others have used compliance programs as a tool for addressing potential problem areas. *See id.* at 14881-82, paras. 407-08. *See also SBC Communications*, Order, FCC 99-153 (rel. June 28, 1999); *U.S. v. 21st Century Bidding Corp.*, No. 98-2752, 1999 WL 135165 (D.D.C. Feb. 25, 1999).

⁷⁷⁸ Corporate compliance programs should both deter potential misconduct within the corporation, and provide a method for internal policing. Components of a corporate compliance program include, for example, corporate conduct codes, employee training, record-keeping, standard operating procedures followed by employees, individual work assignments, monitoring programs, and internal compliance audits. *See* Richard S. Gruner, *Designing Compliance Programs*, Practising Law Institute: Corporate Law and Practice Course Handbook Series, 1100 PLI/Corp 151 (1999); Don Zarin, *Doing Business Under the Foreign Corrupt Practices Act: Compliance Programs*, Practising Law Institute: Corporate Law and Practice Course Handbook Series, 943 PLI/Corp 525 (1996).

⁷⁷⁹ We note that, as an additional safeguard, the Board of Directors of Bell Atlantic/GTE will oversee the activities of the Compliance Officer. *See In re Caremark Internat'l Inc. Derivative Litigation*, 698 A.2d 959, 967-70 (Del. Ch. 1996) (establishing a duty for corporate directors to implement an effective compliance program); *see also* Blue Ribbon Committee on Improving the Effectiveness of Corporate Audit Committees, REPORT AND RECOMMENDATIONS (1999) (recommending actions by corporate boards to improve oversight and monitoring of corporate compliance).

⁷⁸⁰ The Compliance Plan will describe Bell Atlantic/GTE's plan for ensuring compliance with the separate affiliate requirements. *See* BlueStar et al. Mar. 1, 2000 Comments at 6-7. The Compliance Report also will include a statement of the cost-savings achieved during the course of the calendar year in order to assist the Commission and the public in assessing any efficiencies arising out of this merger. This report will constitute, as required by industry standards, Bell Atlantic/GTE's written assertion regarding its compliance with the conditions contained herein and the effectiveness of Bell Atlantic/GTE's internal control structure over compliance. *See* American Inst. of Certified Pub. Accountants, COMPLIANCE ATTESTATION, AT § 500.01.

⁷⁸¹ *See SBC/Ameritech Order*, 14 FCC Rcd at 14882, para. 409.

336. *Independent Auditor.* Because the public interest benefit of these conditions depends entirely upon Bell Atlantic/GTE's compliance, the conditions also establish an independent oversight program. Bell Atlantic and GTE will retain an independent auditor to conduct an annual audit to provide a thorough and systematic evaluation of Bell Atlantic/GTE's compliance with the conditions and the sufficiency of Bell Atlantic/GTE's internal controls.⁷⁸² We have ample experience using independent audits to supplement our usual investigative authority,⁷⁸³ and have extensive experience with this method for ensuring compliance with our rules. Independent audits, combined with targeted on-site audits conducted by Commission staff and thorough reviews of the auditor's working papers, have proven largely successful in ensuring compliance with the Commission's rules.⁷⁸⁴

337. Although the independent audit will provide a systematic means of evaluating Bell Atlantic/GTE's compliance, we are aware of inherent limitations in the audit process.⁷⁸⁵ Most notably, an independent audit does not guarantee discovery of noncompliance or illegal acts.⁷⁸⁶ Accordingly, an

⁷⁸² By "internal control," we mean the process implemented by a company's board of directors, management, and other personnel designed to provide reasonable assurance regarding, in this instance, the company's compliance with the requirements established in this Order and all applicable laws and regulations. See American Inst. of Certified Pub. Accountants, CONSIDERATION OF INTERNAL CONTROL IN A FINANCIAL STATEMENT, AU § 319.06 (1998); COMPLIANCE ATTESTATION, AT § 500.01, n.1 (1999). The independent auditor will examine, for example, Bell Atlantic/GTE's compliance with, as well as its ability to administer, the requirements of the Carrier-to-Carrier Performance Plan to report accurate and relevant performance data. See, e.g., U.S. GAO, ASSESSING THE RELIABILITY OF COMPUTER-PROCESSED DATA, GAO/OP-8.1.3 (Apr. 1991) (providing guidance for auditing computer-processed data). Strong internal controls are necessary both to ensure that Bell Atlantic/GTE takes affirmative steps to comply with the conditions and to counteract its incentive to delay local competition in its region. Managerial philosophy, commitment to employee competence, ethical values, oversight by the board of directors, assignment of authority, and human resources practices work together to provide the discipline and structure necessary for ensuring compliance with the conditions. See American Inst. of Certified Pub. Accountants, ATTESTATION ENGAGEMENTS AT § 100.11-.12, .33-40; CONSIDERATION OF INTERNAL CONTROL IN A FINANCIAL STATEMENT, AU § 319.

⁷⁸³ See 47 U.S.C. § 220(c) (providing that the "Commission may obtain the services of any person licensed to provide public accounting services under the law of any State to assist with, or conduct, audits"). See also *SBC/Ameritech Order*, 14 FCC Rcd at 14882-84, 14918-21, paras. 410-12, 503-07; *Separation of Costs of Regulated Telephone Services from Costs of Nonregulated Activities*, CC Docket No. 86-111, Report and Order, 2 FCC Rcd 1298, paras. 243-73 (1987) ("Joint Cost Order"), modified on recon., 2 FCC Rcd 6283 (1987) ("Joint Cost Reconsideration Order"), further recon., 3 FCC Rcd 6701 (1988), *aff'd sub nom.*, *Southwestern Bell Corp. v. FCC*, 896 F.2d 1378 (D.C. Cir. 1990). 47 C.F.R. §§ 64.904 (requiring independent audits of cost allocation procedures), 69.621 (establishing an independent audit requirement regarding certain universal service rules). Besides the audits noted above, the Commission has additional experience with independent evaluations of structural, transactional, and nondiscrimination requirements pursuant to the provisions of section 274. See 47 U.S.C. § 274(b)(8); *Accounting Safeguards Order*, 11 FCC Rcd at 17640-43, paras. 220-26.

⁷⁸⁴ See *Computer III Remand Order* at para. 52. See also *Pacific Bell*, Order to Show Cause, 10 FCC Rcd 5503 (1995), *Consent Decree Order*, 11 FCC Rcd 14813 (1996); *US West Communications, Inc.*, Order to Show Cause, 10 FCC Rcd 5523 (1995), *Consent Decree Order*, 11 FCC Rcd 14822 (1996); *The Bell Atlantic Telephone Operating Companies*, Order to Show Cause, 10 FCC Rcd 5099 (1995), *Consent Decree Order*, 11 FCC Rcd 14839 (1996).

⁷⁸⁵ *SBC/Ameritech Order*, 14 FCC Rcd at 14920, para. 505.

⁷⁸⁶ See American Inst. of Certified Pub. Accountants, COMPLIANCE ATTESTATION, AT § 500.28; see also U.S. GAO, GOVERNMENT ACCOUNTING STANDARDS § 4.17 (1999) (The Yellow Book).

auditor's report that fails to note any exceptions does not preclude potential enforcement action.⁷⁸⁷

338. Acting pursuant to its delegated authority, the Common Carrier Bureau will approve the independent auditor and oversee the conduct of the independent audit, which will include reviewing the scope and quality of the auditor's work.⁷⁸⁸ The independent auditor's final report, which will be publicly available, will contain sufficient detail for the Commission and the public to understand the extent of the auditor's testing and evaluation procedures. In addition, the findings in the auditor's report, or the review of the auditor's working papers, could form the basis of enforcement actions.⁷⁸⁹ Bell Atlantic/GTE and the independent auditor also will meet for a post-audit conference to assess the conduct of the audit and the need for any modifications to the audit program. Based on these requirements, we find that the conditions provide for effective Commission oversight of the audit process and a mechanism for revising the audit programs and procedures based on our experience over time.⁷⁹⁰

339. In addition to examining compliance with the market-opening conditions described in this section, the Applicants' proposal also calls for the independent auditor to examine their Internet spin-off proposal. In particular, the auditor will examine Bell Atlantic/GTE's implementation of the Internet spin-off proposal, as well as their post-merger dealings with the spin-off entity, Genuity.⁷⁹¹ In this way, the Applicants' proposal ensures that the Commission and the public receive reasonable assurances that the spin-off will occur in strict accordance with the terms specified herein, and that the merged entity will not engage in any post-merger misconduct that could undermine our conclusions in this order.

340. The independent auditor will conduct its examination in accordance with the standards of the American Institute of Certified Public Accountants ("AICPA").⁷⁹² Specifically, the independent auditor will conduct a "compliance attestation,"⁷⁹³ which requires issuing a report that "expresses a

⁷⁸⁷ See MCI WorldCom Mar. 1, 2000 Supplemental Comments at 19 (noting that audits do not guarantee immediate detection of noncompliance); CompTel Mar. 1, 2000 Comments at 4.

⁷⁸⁸ See 47 C.F.R. § 0.91; *Amendment of Parts 0, 1 and 64 of the Commission's Rules with Respect to Delegation of Authority to the Chief, Common Carrier Bureau, and Technical Corrections and Deletions*, Report and Order, 5 FCC Rcd 4601 (1990).

⁷⁸⁹ See *Contel Telephone Operating Companies*, Notice of Apparent Liability for Forfeiture, 6 FCC Rcd 1880 (1991) (initiating an enforcement action based on the review of an independent auditor's working papers).

⁷⁹⁰ See *SBC/Ameritech Order*, 14 FCC Rcd at 14882-83, para. 410.

⁷⁹¹ The independent auditor will examine, for example, execution of the contracts the Applicants' have submitted in this proceeding to ensure that the parties strictly abide by the terms of the agreements. In addition, the independent auditor will examine the full relationship between Bell Atlantic/GTE and Genuity, so that if the merged entity engages in any prohibited or questionable transactions, we can expect disclosure of the pertinent facts and potential enforcement action.

⁷⁹² The Commission's rules already require independent auditors to use generally accepted auditing standards ("GAAS") for conducting audits of an incumbent LEC's compliance with our accounting safeguards. 47 C.F.R. § 64.904(a); see *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, Report and Order, 6 FCC Rcd 7571, 7582-83, para. 24 (1991) (*Computer III Remand Order*).

⁷⁹³ American Inst. of Certified Pub. Accountants, COMPLIANCE ATTESTATION, AT § 500.

conclusion about the reliability of a written assertion that is the responsibility of another party.”⁷⁹⁴ For most conditions, the independent auditor will conduct this examination using the “examination engagement”⁷⁹⁵ method to evaluate Bell Atlantic/GTE’s compliance, and to issue a “positive opinion” (with exceptions noted) in its final report. The conditions, however, require the more thorough “agreed-upon procedures” engagement⁷⁹⁶ to evaluate Bell Atlantic/GTE’s compliance with the separate advanced services affiliate requirements. In this way, the conditions emulate the Federal-State joint audit required by section 272(d).⁷⁹⁷

341. The independent audit requirement establishes an efficient and cost-effective mechanism for providing reasonable assurances of Bell Atlantic/GTE’s compliance with its obligations under the conditions.⁷⁹⁸ Bell Atlantic/GTE is required to inform the auditor of its progress at meeting the specific deadlines and requirements set forth in the conditions, which will enable the independent auditor to detect potential noncompliance in a timely manner. Pursuant to its obligations as the designated auditor, the independent auditor will notify the Commission immediately of the problem areas and any corrective action undertaken.⁷⁹⁹ By requiring Bell Atlantic and GTE to pay for the audit, the conditions place the costs of compliance on the Applicants instead of their competitors or taxpayers. We note that, pursuant to our regulatory fee schedule, Bell Atlantic/GTE will reimburse the U.S. Treasury for any review and audit work performed by the Commission staff.⁸⁰⁰

342. We recognize that the state commissions have valuable insight into on-going issues and problems in the telecommunications industry,⁸⁰¹ and we stress that the Commission will work closely

⁷⁹⁴ *Id.* at § 100.01. For the purposes of these conditions, we consider Bell Atlantic/GTE’s annual Compliance Report to be its written assertion. Consistent with AICPA standards, the independent auditor’s report “does not provide a legal determination of [Bell Atlantic/GTE’s] compliance” with the specified requirements; however, the auditor’s findings may aid the Commission in making such a determination. American Inst. of Certified Pub. Accountants, COMPLIANCE ATTESTATION, AT § 500.03; *see also* American Inst. of Certified Pub. Accountants, ILLEGAL ACTS BY CLIENTS, AU § 317.03.

⁷⁹⁵ *See* American Inst. of Certified Pub. Accountants, COMPLIANCE ATTESTATION, AT § 500.27; ATTESTATION ENGAGEMENTS, AT § 100.53 (noting that an examination engagement is used to reduce the attestation risk to a low level).

⁷⁹⁶ *See* American Inst. of Certified Pub. Accountants, COMPLIANCE ATTESTATION, AT § 500.15-20; AGREED-UPON PROCEDURES ENGAGEMENTS, AT § 600. An agreed-upon procedures engagement is more thorough than an examination engagement because the concept of materiality does not apply to any reported findings. *See* American Inst. of Certified Pub. Accountants, AGREED-UPON PROCEDURES ENGAGEMENTS, AT § 600.27.

⁷⁹⁷ *See* 47 U.S.C. § 272(d). *See also* 47 C.F.R. §§ 53.209-213; *Accounting Safeguards Order*, 11 FCC Rcd at 17628-32, paras. 197-205.

⁷⁹⁸ *See SBC/Ameritech Order*, 14 FCC Rcd at 14884, para. 412.

⁷⁹⁹ AICPA standards recognize occasions in which an independent auditor has a duty to notify others, including regulatory agencies, of problems uncovered during an audit. *See* American Inst. of Certified Pub. Accountants, ILLEGAL ACTS BY CLIENTS, AU § 317.23-.24.

⁸⁰⁰ 47 C.F.R. § 1.1105.

⁸⁰¹ *See* 47 U.S.C. § 410(b) (authorizing the Commission to confer with State commissions regarding telecommunications policy matters and “to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission”).

with the state commissions regarding Bell Atlantic/GTE's compliance with these conditions. Pursuant to long-standing delegated authority, we expect the Common Carrier Bureau to cooperate with state commissions by coordinating compliance and enforcement activities and sharing information gathered in the course of audits.⁸⁰² Moreover, we note that, under the conditions, Bell Atlantic/GTE will ensure that the independent auditor provides access to its working papers to state commissions, thereby ensuring that state commissions can perform their own reviews of the audit work concerning the conditions.

343. *Voluntary Payment Obligations.* For many of the conditions, the Applicants proposed a voluntary incentive payment structure, which could expose Bell Atlantic/GTE to significant financial liability, if the merged firm fails to satisfy an obligation in a timely manner. For example, as described above, under its out-of-region competition commitment, Bell Atlantic/GTE will make voluntary incentive payments, valued at a maximum of \$750 million, for missing the targets specified in the condition. In addition, Bell Atlantic/GTE will incur similar voluntary payment obligations for failing to provide service to competitive LECs that meets the standards of the Carrier-to-Carrier Performance Plan (up to a total of \$1.64 billion over three years, with an offset for early OSS deployment), and for failing to meet the deployment schedule for its OSS enhancements (up to a total of \$20 million). We expect that the size and scope of these potential voluntary payments will provide a strong incentive for Bell Atlantic/GTE to ensure that it fully complies with both the letter and the spirit of the conditions.⁸⁰³ The conditions recognize that Bell Atlantic/GTE is strictly liable for making any and all payments arising out of its nonperformance.⁸⁰⁴ Moreover, failing either to satisfy the underlying obligation or to make timely voluntary payments will subject the Applicants to potential liability in the same way Bell Atlantic/GTE would be liable for violating any other Commission order, rule, or regulation.

344. We expect that Bell Atlantic/GTE will take all necessary measures, such as amending tariffs and interconnection agreements, to give the conditions their full legal effect in a timely manner. Although we note that the Commission may grant an extension of time for a requirement under the conditions, Bell Atlantic/GTE bears a heavy burden of demonstrating good cause.⁸⁰⁵ We expect that this heavy burden of persuasion, coupled with the compliance mechanisms and significant financial exposure, will ensure that the public enjoys the full benefits of these conditions in a timely manner. We also expect that the self-executing remedial measures, such as Bell Atlantic/GTE's voluntary incentive payment obligations, will limit any delay arising from extensive litigation arising from potential violations.

345. *Other Mechanisms.* We emphasize that the enforcement and compliance programs

⁸⁰² See 47 C.F.R. § 0.291(b). To improve operating and administrative efficiency, the Commission delegated authority to the Common Carrier Bureau to coordinate compliance and enforcement activities with state commissions when: (i) there is a shared policy interest, and (ii) the states have processes for protecting confidential information. *Amendment of Parts 0, 1, and 64 of the Commission's Rules with Respect to Delegation of Authority to the Chief, Common Carrier Bureau*, Report and Order, 5 FCC Rcd 4601 (1990); *Delegation of Authority to the Chief, Common Carrier Bureau*, Memorandum Opinion and Order, 50 Fed. Reg. 18487-03 (1985), *on reconsideration*, 104 FCC 2d 733 (1986).

⁸⁰³ See NEXTLINK Mar. 16, 2000 Reply at 19; NorthPoint Mar. 1, 2000 Comments at 10 (advocating monetary penalties to ensure compliance).

⁸⁰⁴ The Commission may, however, grant a waiver of Bell Atlantic/GTE's voluntary payment obligation if Bell Atlantic/GTE can demonstrate that the failure was due to an Act of God.

⁸⁰⁵ See 47 C.F.R. § 1.3.

established in these conditions in no way supersede or replace the Commission's enforcement and investigative powers, but merely supplement our usual processes. The Commission may, at its discretion and subject to its normal procedures, take additional enforcement action against Bell Atlantic/GTE for failing to comply with any provision of this Order, including extending the sunset provisions, imposing fines and forfeitures,⁸⁰⁶ issuing cease-and-desist orders, modifying the conditions,⁸⁰⁷ awarding damages,⁸⁰⁸ or requiring appropriate remedial action. In addition, members of the public may pursue a claim in accordance with either section 207 or section 208 of the Act.⁸⁰⁹ We do not expect that any enforcement penalties or compliance mechanisms will become merely an acceptable cost of doing business, and we note that the conditions require all such costs to be excluded from Bell Atlantic/GTE's rates. In this way, the enforcement plan rightly ensures that consumers will not be forced to bear the costs of Bell Atlantic/GTE's mistakes.

346. *Sunset.* Unless otherwise specified, each obligation under these conditions will sunset after 36 months of benefit, which may be tolled or extended by the Commission for a period of time commensurate with any noncompliance by Bell Atlantic/GTE. Maintaining a full three-year period of benefit is critical for the conditions to ameliorate the potential public interest harms of the merger. Thus, in the event that Bell Atlantic/GTE fails to comply fully with its obligations, the Commission may, in its discretion, either on its own motion or in response to a petition, toll the effective sunset date of the relevant condition, and related conditions, to ensure that the public enjoys the full three-year term of the benefits.

347. *Effect of The Conditions.* As discussed above, these conditions are intended to be a floor and not a ceiling.⁸¹⁰ The Applicants must abide by state rules, even though the rules may touch on identical subjects, unless the merged entity would violate one of these conditions by following the state rule. The conditions are also not intended to limit the authority or jurisdiction of state commissions to impose or enforce additional requirements stemming from a state's review of the proposed merger.⁸¹¹ To the extent that a requirement in these conditions duplicates a requirement imposed by a state such that these conditions and state conditions grant parties similar rights against Bell Atlantic/GTE, the affected parties must elect either to receive the benefit under either these conditions or state law. For example, Bell Atlantic/GTE will not be required to provide two promotional loop discounts simultaneously for the same loop. If, on the other hand, Bell Atlantic/GTE fails to meet a stated performance standard under the Carrier-to-Carrier Performance Plan for a measurement that is replicated in a state performance plan, Bell Atlantic/GTE would face repercussion under both plans.

348. Although the merged firm will offer to amend interconnection agreements or make certain other offers to state commissions in order to implement several of the conditions, nothing in the conditions obligates carriers or state commissions to accept any of Bell Atlantic/GTE's offers. The

⁸⁰⁶ 47 U.S.C. § 503.

⁸⁰⁷ 47 U.S.C. §§ 316, 416(b).

⁸⁰⁸ 47 U.S.C. § 209.

⁸⁰⁹ See CompTel Mar. 1, 2000 Comments at 4.

⁸¹⁰ See NorthPoint Mar. 1, 2000 Comments at 11.

⁸¹¹ See *SBC/Ameritech Order*, 14 FCC Rcd at 14857, para. 358.

conditions, therefore, do not alter any rights that a telecommunications carrier has under an existing negotiated or arbitrated interconnection agreement. Moreover, the Applicants also agree that they will not resist the efforts of state commissions to administer the conditions by arguing that the relevant state commission lacks the necessary authority or jurisdiction.

B. Benefits of Conditions

349. We conclude that, with the conditions that we adopt in this Order, the merger of Bell Atlantic and GTE is likely to be beneficial for consumers and spur competition in the local and advanced services markets. Given that the conditions will substantially mitigate the potential public interest harms of the proposed merger and will result in affirmative public benefit, we conclude that the Applicants have demonstrated that the proposed merger, on balance, will serve the public interest, convenience and necessity.

1. Mitigating Harm from Loss of Potential Competition

350. As noted above, the proposed merger will remove, in many local markets throughout Bell Atlantic's and GTE's territories, a current competitive threat and the significant potential for a future entrant. Armed with the inside knowledge of how to overcome roadblocks to local competition, Bell Atlantic and GTE are especially qualified to compete successfully against other incumbent LECs.

351. We find that, while not substituting fully for the loss of direct competition between Bell Atlantic and GTE, the conditions we adopt will significantly mitigate any potential public interest harms. After the merger, these conditions require the merged firm to open its markets to others while at the same time entering markets outside of its region. Specifically, the conditions require the merged Bell Atlantic/GTE to spend at least \$500 million and/or provide service over at least 250,000 lines as a competitive LEC, offering voice and/or advanced services, in out-of-region markets starting at the merger's closing at completing the commitment within 36 months thereafter. These conditions are punctuated by annual milestones during the commitment period, under which Bell Atlantic/GTE must achieve at least 20 percent of each milestone through providing service to residential customers or providing advanced services. Furthermore, the Applicants have agreed to voluntary incentive payments totaling 150 percent of any shortfall in their expenditures under these conditions. Thus, the merged firm will face notable economic repercussion if it fails to achieve a certain level of entry into out-of-region residential and/or advanced services markets according to a specified implementation schedule. These benefits to some extent counterbalance the loss of direct competition between Bell Atlantic and GTE, particularly if the outcome of Bell Atlantic/GTE's implementation of the conditions is faster retaliation within its home region by the incumbent LECs whose home territories the merged firm invades.⁸¹²

352. Further, by reducing the risk and costs associated with entry into Bell Atlantic and GTE territories, particularly with respect to residential and advanced services markets, other conditions stimulate entry into these markets, thereby offsetting the loss of potential competition between the Applicants resulting from the merger. Several conditions lower the entry barriers in the Bell Atlantic and GTE regions, especially for residential competition. For example, we anticipate that the carrier-to-carrier promotions for residential service will spur other entities to enter these markets and establish a

⁸¹² See *SBC/Ameritech Order*, 14 FCC Rcd at 14877, 14887, paras. 398, 421.

presence in residential markets that can be sustained after expiration of the promotional discounts.⁸¹³ In addition, Bell Atlantic/GTE's most-favored nation obligations, which cover certain arrangements that the company obtains as a competitive LEC outside its region as well as arrangements imported from other in-region states, and its agreement to enter into multi-state interconnection agreements should assist competitors in entering new markets within the Bell Atlantic/GTE region. Similarly, the Carrier-to-Carrier Performance Plan will provide competing carriers with additional protections by strengthening Bell Atlantic/GTE's incentive to provide quality of service at least equivalent to the merged firm's retail operations or a benchmark standard. These conditions and others make competition in Bell Atlantic/GTE's region more likely, thereby offsetting in part the competitive threat that each Applicant posed to the other.

2. Mitigating Harm from Loss of Benchmarks

353. As indicated above, by removing a major incumbent LEC, the merger of Bell Atlantic and GTE would result in fewer sources of diversity and experimentation at the holding company, operating company, and industry level from which regulators and competitors could draw comparisons particularly useful in implementing the 1996 Act's pro-competitive mandates. We doubt that any set of conditions could substitute fully for the loss of one of the few remaining major incumbent LEC benchmarks. The harm from diminution of the field for such comparative practices analyses, however, to some extent is mitigated by conditions that entail the spread of best practices throughout the merged firm's service areas, or that require the reporting of information regarding the incumbent's networks and performance that is useful to regulators and competitors.

354. We anticipate that several conditions will require the merged firm to spread best practices throughout its region, viewed as a whole or as two distinct parts based on legacy Bell Atlantic and GTE service areas. Significantly, "best practices," as we use the phrase here, will be identified in full or in part by the Applicants' customers and regulators, not by Bell Atlantic and GTE. In this regard, by affording competitive LECs input into Bell Atlantic and GTE's ultimate OSS commitments under these conditions, the OSS collaborative process should lead to an agreement that represents best practices.⁸¹⁴ Specifically, the stipulation in the conditions that Bell Atlantic/GTE and competitive LECs will seek to reach agreement on issues raised in collaboratives, and that competitive LECs can request a collaborative process where none is specified in the Plan of Record, offers assurance that the merged firm ultimately will take into account practices of certain operating companies that other carriers have found useful or beneficial in establishing the substance and implementation of OSS. In addition, the Applicants' commitment to rely on OSS industry standards for application-to-application interfaces, data formatting specifications, and transport and security protocols entails extending best practices, as determined by industry consensus standards groups, throughout the Bell Atlantic/GTE region.

355. The conditions requiring Bell Atlantic/GTE to continue participation in the NRIC similarly will encourage best practices based on industry concordance. The NRIC, whose composition

⁸¹³ Thus, we disagree with WorldCom's assessment that "[t]he low caps and restrictions associated with the promotions render any benefits insignificant. The promotional scheme would allow [competitive LECs] to compete (for a limited and uncertain time) for only a small portion of the market using the promotional rate for unbundled local loops and resold services." WorldCom May 5, 2000 Further Supplemental Comments at 7.

⁸¹⁴ As we discuss above, such best practices, for instance, may reflect a balance between maximizing OSS uniformity and not diminishing functionality or flow-through. See *supra* n.651.

represents a balancing of industry interests,⁸¹⁵ issues periodic reports concerning the reliability of public telecommunications network services, and regularly compiles detailed lists of industry best practices designed to reduce the number and scope of network outages. Through its continued participation in the NRIC, we fully expect Bell Atlantic/GTE to study and, to every extent possible, implement the industry best practices for network reliability. In this way, we anticipate that Bell Atlantic/GTE will be able to, at a minimum, maintain a high state of reliability after the merger and take aggressive steps to address network reliability in those areas where the company may need improvement.

356. Other examples of conditions that we anticipate will require the merged entity to spread best practices include the uniform OSS change management process, most-favored nation provisions, and Lifeline plan. Bell Atlantic/GTE will adopt in each of its states the current Bell Atlantic change management process originally developed through collaboratives with competitive LECs in New York. As we note above, competitive LECs favor implementation of this change management process, and they may seek to improve it even further through the collaborative process.⁸¹⁶ Both the out-of-region and in-region most-favored nation requirements are designed explicitly to assure carriers some ability to obtain beneficial arrangements, whether specifically requested by Bell Atlantic/GTE as an out-of-region competitor or simply offered by the firm in an in-region state, throughout the merged firm's service area. And the merged firm will offer to each of its in-region states a Lifeline plan based on features of the Ameritech Ohio plan.

357. Aside from the spread of best practices, the conditions also help ameliorate any potential loss of observable information to regulators and competitors. In particular, the Carrier-to-Carrier Performance Plan will generate valuable information for regulators and competitors for use in implementing and enforcing the Communications Act. The Performance Plan is even more beneficial with respect to measuring the performance of the GTE legacy companies because, as a non-BOC, GTE is not subject to a performance plan arising typically from the process of seeking authority to provide in-region, interLATA services under section 271.⁸¹⁷ Moreover, the GTE-specific performance plan in California notwithstanding, GTE may not otherwise be subject to performance plans at the state level. The merged firm will also continue to report ARMIS data separately for each of its operating companies, and will now report such data on a quarterly basis. The requirement that the Applicants develop and file state-by-state service quality reports in accordance with the recommendations of the NARUC Technology Policy Subgroup will facilitate comparative practices analysis by providing additional data for this Commission and state commissions in carrying out their statutory responsibilities and in detecting potential violations of the Communications Act. The Applicants also are obligated under the conditions to provide quarterly state-specific service quality reports regarding the quality of services provided to interexchange carriers, and to file a statement of the cost savings associated with the merger.

358. In addition to spreading best practices and helping to redeem potentially lost, valuable, observable information, some conditions will help to offset the potential loss of future diversity and

⁸¹⁵ See *Line Sharing Order*, 14 FCC Rcd at 20995, para. 188.

⁸¹⁶ See *supra* paras. 286-88.

⁸¹⁷ See generally *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, 15 FCC Rcd 3953, 4164-65, para. 429 (1999).

experimentation resulting from the merger. For example, through their out-of-region competitive entry commitment, Bell Atlantic and GTE could deploy, and experiment in the provision of, different forms of advanced services.⁸¹⁸ Or, Bell Atlantic/GTE could put into service in out-of-region markets some of the \$550 million in dark fiber that Bell Atlantic has committed to lease from Metromedia Fiber Network, Inc., in which Bell Atlantic also has a substantial equity investment.⁸¹⁹ Though the Applicants, notwithstanding the aforementioned examples of what they could do, do not specify precisely how they will fulfill their out-of-region competitive entry commitment, this lack of precision is due to their wanting, as a merged firm, “to be able to invest in the newest technologies available to compete in the local market and provide innovative services and options to its new customers.”⁸²⁰

3. Mitigating Harm from Potential Increased Discrimination

359. We find that several commitments will alleviate the concern that the merged firm will use its combined size and market power to discriminate more effectively against its rivals in its in-region markets for local services as well as advanced services. The conditions that we adopt today are carefully targeted at the types of discrimination the merger was otherwise most likely to engender. Moreover, they substantially reduce entry barriers to the merged entity’s region.

360. The combined entity’s incentive to discriminate, stemming from its larger geographic footprint, is especially likely, if left unchecked, to translate into an ability to discriminate against the provision of advanced services.⁸²¹ The requirements that the merged firm provide such services through a separate affiliate, and comply with reporting and performance obligations, decreases the ability of Bell Atlantic/GTE to discriminate successfully, and thereby neutralizes some of Bell Atlantic/GTE’s increased incentive to discriminate with respect to advanced services. Significantly, the merged entity will have to treat rival providers of advanced services the same way that it treats its own separate advanced services affiliate.

361. We expect that some conditions, most notably the line sharing, collocation and UNE compliance audits, also should lead to reduction of the costs and uncertainty of providing advanced services in Bell Atlantic/GTE’s region, and thereby remedy to a certain extent any effects of increased discrimination for national competitive LEC entrants. Similarly, the Applicants’ commitments to establish uniform advanced services and other OSS interfaces between their service areas in

⁸¹⁸ See generally *Line Sharing Order*, 14 FCC Rcd at 20915, 20946, 21000, paras. 3 n.5, 71, 197.

⁸¹⁹ See Bell Atlantic/GTE Response to Conditions Comments at 27-28.

⁸²⁰ *Id.* at 28. LCLAA also comments specifically on the innovative benefits which may ensue from the Applicants’ out-of-region competitive entry conditions:

Bell Atlantic and GTE’s determination to enter markets nationwide will eventually guarantee countless consumers access to a range of competitive alternatives for local, long distance, wireless and advanced services . . . Additionally, because this expansion will not be tied to the use of a specific telecommunications technology, the merged company will be free to implement the most advanced solutions as its buildout moves forward and, thus, provide the most capable systems available in the marketplace.

LCLAA Mar. 1, 2000 Comments at 2.

⁸²¹ See *supra* Section VI.D.2.a (increased discrimination in provision of Advanced Services).

Pennsylvania and Virginia also should reduce somewhat the costs and other barriers that local or advanced services competitors face in entering within these states.

362. The Carrier-to-Carrier Performance Plan also partially alleviates the Applicants' increased incentive and ability to discriminate against rivals following the merger. By requiring the merged firm to report results of 18 performance measures, and achieve the agreed-upon standard or voluntarily make incentive payments, the plan provides heightened incentive for the company not to discriminate in ways that would be detected through the measures. Competing carriers operating in or contemplating entry into Bell Atlantic/GTE territory will have an increased measure of confidence that the company will not engage in discrimination that would be detected through such measures. Moreover, if the results reveal unequal treatment, the voluntary payment scheme will create a direct economic incentive for Bell Atlantic/GTE to cure performance problems quickly.⁸²²

363. The Carrier-to-Carrier Performance Plan is designed specifically to permit monitoring for discriminatory conduct in Bell Atlantic/GTE's provision of elements and services utilized in providing advanced services. For instance, the line sharing provisioning measurement or sub-measurement that Bell Atlantic/GTE is required to propose and implement after the merger closing date⁸²³ is designed specifically to address the needs of advanced services providers. For many of the other measures, data will be reported distinctly for DSL loops. The availability of this information will assist entities that are contemplating providing advanced services in the Bell Atlantic/GTE region, as well as helping carriers already operating in the region to monitor and address any potential increased discrimination.

364. As explained above, with Bell Atlantic's new access to customer accounts in GTE's region (*e.g.*, New York business customers with branch offices in Los Angeles), and vice-versa, the merged firm gains an advantage in servicing multi-location business customers. Allowing competitors to import most-favored nation arrangements across Bell Atlantic/GTE's in-region states helps to safeguard against this increased potential for discrimination while reducing the merged firm's advantage of servicing multi-location customers.⁸²⁴ Furthermore, the Applicants have bolstered the strength of the most-favored nation commitments themselves by permitting carriers to opt into arbitrated as well as voluntarily negotiated agreements.

365. The enforcement mechanisms contained in these conditions also will aid in the detection of discriminatory behavior by Bell Atlantic/GTE. In particular, the conditions require the more thorough type of audit, an agreed-upon procedures engagement, for the separate advanced services affiliate provisions. Like the section 272(d) audit, the independent auditor will conduct a systematic and thorough examination into Bell Atlantic/GTE's compliance with the structural, transactional, nondiscrimination and other requirements of the separate advanced services affiliate. By pushing the due date of the independent auditor's separate affiliate compliance report to four months earlier than the due date committed to by SBC/Ameritech,⁸²⁵ the audit provisions in Bell Atlantic/GTE's conditions yield

⁸²² See *SBC/Ameritech Order*, 14 FCC Red at 14890, para. 432.

⁸²³ See Conditions at para. 9.

⁸²⁴ See *SBC/Ameritech Order*, 14 FCC Red at 14891, para. 434.

⁸²⁵ Compare *id.* at 15034-36, paras. 66-67 (September 1 annual due date under SBC/Ameritech conditions) with Conditions at para. 57 (May 1 annual due date under Bell Atlantic/GTE conditions).

a greater benefit in that they expedite the availability to regulators and competitors of precious information for detection of discriminatory behavior.

4. Additional Benefits from Conditions

366. While these conditions mitigate, in many important ways, the potential public interest harms of the proposed transaction, we also find that the conditions will result in affirmative public interest benefits that tip the public interest balance of the proposed transaction in the Applicants' favor. Collectively, these conditions will, we believe, create momentum for increasing competition and choice in telecommunications markets inside and outside Bell Atlantic's and GTE's territories.

367. As an initial matter, nearly all of the obligations under the conditions apply throughout Bell Atlantic's and GTE's in-region states, and others even extend to markets outside of the companies' traditional service areas. Because our public interest analysis is not limited to potential public benefit within a select geographic area or market, but also considers potential public interest benefits of applying conditions such as those imposed in this Order to a wider area, the breadth of the conditions helps the Applicants in carrying their burden of demonstrating how the merger advances competition.

368. We also find it significant that the conditions in general will last for a 36-month period. As addressed in the conditions, the duration of each commitment is tied to the initiation of the benefit of the condition. In other words, each of the conditions is designed to provide 36 months of benefit once its embedded obligations take effect. So, for instance, Bell Atlantic/GTE must provide unaffiliated carriers in its service areas with access to the OSS interfaces set forth in the conditions and agreed-upon enhancements for at least 36 months after such interfaces and enhancements are deployed. In the fast-changing world of telecommunications industries, these commitments, in our judgment, will last for a sufficient period to have real impact, but not so long as to threaten imposing obsolete responses to future issues.

369. *Fostering Out-of-Territory Competitive Entry.* GTE already has an established and operational competitive LEC with approximately 60,000 local customers outside its local service territory, and has invested significant sums in OSS and other assets needed to compete outside its traditional local service areas.⁸²⁶ While these conditions thus do not alter the basic fact that the parties do not need to merge in order to form out-of-region competitive LECs, the conditions do, however, reinforce the likelihood and increase the magnitude of a post-merger out-of-region entry strategy. These certainly enhance the public interest.

370. *Lower Entry Barriers for Residential Competition.* In broad terms, we anticipate that the conditions will prove beneficial in jumpstarting residential competition by lowering entry barriers for residential competition. For instance, the carrier-to-carrier promotions are designed specifically to induce more entry into residential markets quickly. Other conditions, such as those regarding collocation and UNE compliance, Carrier-to-Carrier Performance Plan, most-favored nation arrangements, and multi-state interconnection agreements will, in our judgment, greatly reduce the costs of entry over the long run. In addition, the commitment to reform the process of cabling new multi-tenant dwellings and business properties will increase access to customers by competitors not otherwise

⁸²⁶ See Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing at 10; Bell Atlantic/GTE Gould/Young Joint Decl. at paras. 3-4.

relying on the incumbent's wireline network.

371. *Accelerating Advanced Services Deployment.* Several conditions are aimed at increasing the availability of and broadening choices for advanced services for all Americans. The extensive commitments regarding advanced services all help to attain a single overriding goal: to encourage entry into the provision of advanced services by numerous firms, as well as the Applicants, while protecting against the risk that Bell Atlantic/GTE might cripple these services in their infancy by discriminating against rival advanced services providers. The provisions for expediting cost proceedings and immediately making available rates, conditions, and terms for conditioning xDSL loops, for a separate affiliate for the Applicants' provision of advanced services, including advanced services unbundled loop discounts for competitors tied to threshold use by the separate affiliate of certain advanced services OSS interfaces, for a line sharing compliance plan, and for a surrogate line-sharing discount in the event our line sharing rules are overturned in a final, non-appealable judicial decision will reduce the costs, including the risks, of entering these markets. In addition, the out-of-region competitive entry milestones established by the Applicants include a commitment to devote at least 20 percent of the expenditures or deployed customer lines towards providing advanced services or residential competitive local service.

372. *Improving Service to Residential and Low-Income Consumers.* Low-income consumers, in rural and urban areas alike, will realize direct benefits from the enhanced Lifeline plans offered to them and from the assurance that they will share in the benefits of new advanced services offerings. Moreover, through the Applicants' additional service quality reporting, the Commission, states, and consumers will have information needed to monitor the merged firm's service quality on a timely basis.

C. Other Requested Conditions or Modifications to Proffered Conditions

373. *Access to Advanced Services Loop Information.* In approving the merger between SBC and Ameritech, we adopted conditions designed to promote rapid deployment of advanced services by ensuring that carriers have nondiscriminatory access to certain specified information for loop qualification purposes, in order to make informed decisions about whether and how they can provide advanced services to a customer at a given location.⁸²⁷ Certain commenters request that we adopt the same requirements with respect to Bell Atlantic/GTE.⁸²⁸ We agree with the Applicants, however, that such conditions are unnecessary in the instant merger because, subsequent to our adoption of the SBC/Ameritech merger, we addressed this issue in the *UNE Remand Order* and imposed appropriate requirements.⁸²⁹

374. *Restructuring of OSS Charges.* Other conditions that we adopted in approving the merger between SBC and Ameritech included requirements that the merged firm recover electronic OSS costs on a strict usage basis rather than through a flat monthly fee, thereby eliminating any flat-rate,

⁸²⁷ See *SBC/Ameritech Order*, 14 FCC Rcd at 14865-66, paras. 373-74; *SBC/Ameritech Conditions*, 14 FCC Rcd at 14997-98, paras. 19-20.

⁸²⁸ See CoreComm Mar. 1, 2000 Comments at 45 (further seeking implementation of these commitments on the merger closing date); Covad Mar. 1, 2000 Comments at 15-16.

⁸²⁹ See Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing at 18 n.12; *UNE Remand Order* at paras. 426-431.

up-front charge for the right to use the company's standard electronic interfaces for accessing OSS. We explained that such conditions were necessary to that merger because SBC charged a flat monthly fee for access to electronic OSS, and commenting parties feared that SBC would spread this practice to Ameritech's region following the merger.⁸³⁰ BlueStar et al. and NALA request that such conditions likewise be applied to Bell Atlantic/GTE.⁸³¹ Because those factual circumstances are not present in the instant merger, however, we find that such conditions are not warranted here.

375. *UNE Platform.* We adopted, in approving the merger between SBC and Ameritech, carrier-to-carrier promotions pursuant to which SBC/Ameritech would offer end-to-end combinations of all network elements required to be unbundled as of January 24, 1999 (including the UNE platform) to competitive LECs providing residential local service.⁸³² Some commenters maintain that the conditions to the instant merger likewise should include these UNE platform conditions.⁸³³ We agree with the Applicants, however, that we need not attach to Bell Atlantic/GTE conditions relating to UNE platform promotions, because the *UNE Remand Order*, which we adopted subsequent to our approval of the SBC/Ameritech merger, confirms that incumbent LECs are required to make the UNE platform available to competitive LECs.⁸³⁴ Moreover, we decline to adopt, in the context of this merger, other requirements that commenters seek for us to impose on Bell Atlantic/GTE relating to provision of the UNE platform.⁸³⁵ We note that the comprehensive UNE compliance audit that the Applicants have agreed to undergo as a condition to the instant merger should reveal any noncompliance with the Commission's unbundling requirements.

IX. MOBILE COMMUNICATIONS SERVICES

376. We find that the proposed merger will be pro-competitive in its effects on wireless communications markets. In particular, this merger will promote competition in markets for mobile voice telephone services by extending the reach of a major nationwide service provider in a business in

⁸³⁰ *SBC/Ameritech Order*, 14 FCC Rcd at 14870, para. 384.

⁸³¹ See BlueStar et al. Mar. 1, 2000 Comments at 3; National ALEC Mar. 1, 2000 Comments at 7-8.

⁸³² See *SBC/Ameritech Order*, 14 FCC Rcd at 14875, para. 393; *SBC/Ameritech Conditions*, 14 FCC Rcd at 15020-22, paras. 50-52.

⁸³³ See BlueStar et al. Mar. 1, 2000 Comments at 3; CoreComm Mar. 1, 2000 Comments at 29-31 (adding that the UNE platform promotion should incorporate the unbundled loop discount and not be limited to residential POTS or ISDN service); IURC Mar. 1, 2000 Comments at 4, 10-11.

⁸³⁴ See Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing at 18 n.12; *UNE Remand Order* at paras. 475-490. Cf. *SBC/Ameritech Order*, 14 FCC Rcd at 14875, para. 393 (suggesting that disposition of issues with respect to the UNE platform would be part of the outcome of the *UNE Remand Order*).

⁸³⁵ See CoreComm Mar. 1, 2000 Comments at 30-31 (alleging that Bell Atlantic's UNE platform offerings have been deficient outside of states where it seeks or has sought section 271 approval, and suggesting therefore that the Commission require Bell Atlantic/GTE to offer, throughout its combined region, the same UNE platform offering that Bell Atlantic has made available in New York); Z-Tel Mar. 1, 2000 Comments at 7-11 (asserting that the Commission should require Bell Atlantic/GTE to implement a "best practices" UNE platform product throughout its combined service areas, at least some of which Bell Atlantic/GTE should base on the UNE platform offering in New York, which is "perhaps the most robust UNE Platform offering in the nation").

which national coverage is becoming more vital to compete effectively.⁸³⁶ The wireless service areas of the merging parties are largely complementary,⁸³⁷ and the companies employ compatible technologies. Upon consummation of this merger, Verizon Wireless (consisting of the U.S. wireless properties of Bell Atlantic, GTE, and Vodafone) will have a licensed footprint potentially serving 232 million people and 96 of the 100 largest U.S. cities. The new entity will have more than 24 million cellular and broadband PCS and four million paging customers.⁸³⁸

377. Moreover, combining these wireless businesses will likely produce cost savings and operating efficiencies by reducing the Applicants' collective dependence on costly roaming agreements. The combination should also produce system-wide efficiencies through common network engineering, management, purchasing, and administrative functions, leading to earlier and broader deployment of advanced wireless services.⁸³⁹

A. Licenses and Service Offerings

378. On April 3, 2000, pursuant to Commission approval,⁸⁴⁰ Bell Atlantic combined its domestic cellular and other wireless businesses with most of the U.S. wireless and paging operations of Vodafone. The combined entity, doing business as Verizon Wireless, operates cellular and broadband PCS systems in 48 states and the District of Columbia capable of serving 194 million people. Verizon Wireless also provides one-way and two-way paging services in numerous states and holds interests in fixed point-to-point microwave, business radio, and wireless communications service (WCS) licenses.⁸⁴¹

379. GTE operates cellular and broadband PCS systems in 18 states, covering approximately 74 million potential subscribers.⁸⁴² GTE also holds interests in licenses for other wireless services, including paging, fixed point-to-point microwave, business radio, experimental, rural radio, air-to-ground, and telephone maintenance radio service.⁸⁴³ Applications to transfer control of the entities holding these licenses from GTE to Bell Atlantic were filed with the Commission on October 2, 1998

⁸³⁶ This merger will add GTE's wireless assets to the extensive footprint established by Bell Atlantic and Vodafone AirTouch through the recent formation of their wireless joint venture, now providing service as Verizon Wireless. The other nationwide providers are AT&T Wireless Services, Inc., Sprint PCS, Nextel Communications, Inc., and VoiceStream Wireless Corporation.

⁸³⁷ See Application, Wireless Map, Ex. 3. We note, however, that this map does not include the properties that were recently contributed by Vodafone to the Verizon Wireless venture.

⁸³⁸ See Letter from William D. Wallace, Esq., Crowell & Moring LLP, to Magalie Roman Salas, Secretary, Federal Communications Commission (filed May 4, 2000) (Bell Atlantic/GTE May 4, 2000 *Ex Parte* Letter) at 1.

⁸³⁹ See Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing at 9.

⁸⁴⁰ *Vodafone AirTouch, Plc and Bell Atlantic Corporation*, Memorandum Opinion and Order, DA 00-721 (WTB/IB rel. Mar. 30, 2000) (*Vodafone/Bell Atlantic Order*).

⁸⁴¹ See Bell Atlantic/GTE May 4, 2000 *Ex Parte* Letter at 2.

⁸⁴² *Id.* at 1.

⁸⁴³ *Id.*

and March 1, 8, and 9, 2000.⁸⁴⁴

B. Analysis of Potential Competitive Harms

1. Overlapping Ownership Interests

380. While the wireless interests held by Verizon Wireless and GTE are to a large degree complementary, their respective properties overlap in numerous areas. Absent divestiture, many of these overlaps would violate certain Commission rules and raise the possibility of competitive harms in mobile voice telephony, in particular.⁸⁴⁵ In 19 markets, absent divestitures, Verizon Wireless and GTE together would hold a financial interest in both channel blocks in overlapping cellular service areas, implicating the Commission's cellular cross-ownership rule in those markets in which both parties' ownership interests exceed five percent.⁸⁴⁶ These strictly cellular overlaps are concentrated in California, Ohio, South Carolina, and a fourth group spanning several southwestern states.

381. In 77 other markets, Verizon Wireless and GTE currently hold interests in cellular and PCS licenses covering the same areas, potentially implicating the Commission's CMRS spectrum aggregation rule.⁸⁴⁷ A first collection of these overlaps involves cellular properties held by GTE and PCS properties formerly operated by PrimeCo Personal Communications, L.P (PrimeCo).⁸⁴⁸ These overlaps principally involve properties in Florida, Texas, Virginia, and the greater metropolitan Chicago area, as well as one in Alabama. Another collection of overlaps involves GTE's PCS properties and cellular businesses formerly operated by Vodafone centered in Ohio and Washington state. Several additional overlaps arise out of Vodafone's recent acquisition of certain CommNet Cellular businesses in Idaho and Montana.⁸⁴⁹

382. As discussed in detail below, the parties have committed to eliminate all existing overlaps of cellular and/or PCS properties to comply with the Commission's cellular cross-ownership and spectrum aggregation rules as well as the terms of a court-ordered Consent Decree between the

⁸⁴⁴ See Oct. 8, 1998 Public Notice; see also *Commission Seeks Comment on Additional Applications Submitted by GTE and Bell Atlantic*, CC Docket No. 98-184, Public Notice DA 00-608 (rel. Mar. 17, 2000) (Mar. 17, 2000 Public Notice).

⁸⁴⁵ We find no basis in the record to be concerned that this merger will harm competition in markets for mobile data services. These markets remain in the early stages of development, with service or new entry likely via numerous platforms and spectrum bands, including but not limited to narrowband PCS, 700 MHz, SMR (220 MHz, 800 MHz, and 900 MHz), cellular and broadband PCS, WCS, and possibly MMDS.

⁸⁴⁶ 47 C.F.R. § 22.942(a) ("A direct or indirect ownership interest of 5% or less in both systems is automatically excluded from the general rule prohibiting multiple ownership interests.").

⁸⁴⁷ 47 C.F.R. § 20.6.

⁸⁴⁸ At the time of its dissolution, PrimeCo was a business jointly controlled by Bell Atlantic and Vodafone.

⁸⁴⁹ See *In re Applications of BCP CommNet, L.P., Transferor, and Vodafone AirTouch, Plc, Transferee, For Consent to Transfer of Control of Licenses*, file nos. 0000018208 *et al.*, Memorandum Opinion and Order, DA 99-3009 (WTB, rel. Dec. 27, 1999).

parties and the U.S. Department of Justice (“DOJ”).⁸⁵⁰

2. Revised Consent Decree

383. On December 6, 1999, the DOJ filed with the United States District Court for the District of Columbia a Revised Consent Decree negotiated with Bell Atlantic, Vodafone, and GTE that requires the divestiture of overlapping wireless businesses in 96 markets in 15 states.⁸⁵¹ On April 18, 2000, the court approved the Revised Consent Decree, which replaces an earlier divestiture agreement reached in May 1999 among DOJ, Bell Atlantic, and GTE. The Revised Consent Decree requires the divestiture of one wireless business in any market in which the companies’ licenses overlap, even in cases in which the Commission’s rules are not implicated.⁸⁵²

384. The Revised Consent Decree is intended to ensure that the creation of the proposed national wireless network will not increase concentration in any geographic market, and establishes a schedule by which required divestitures are to be consummated. Where overlaps involve strictly cellular properties, businesses (including licenses and facilities) are to be divested prior to or concurrently with consummation of the merger.⁸⁵³ In other cases involving PCS/cellular overlaps, businesses are to be divested prior to or concurrently with consummation of the merger, or by June 30, 2000, whichever is later.⁸⁵⁴ In either case, the Revised Consent Decree requires Applicants to divest not just spectrum but facilities sufficient “to ensure that the divested wireless businesses remain viable, ongoing businesses.”⁸⁵⁵ Under the terms of the Revised Consent Decree, the Applicants may request, and DOJ in its sole discretion may grant, limited additional time to complete divestiture transactions involving the PCS/cellular overlap properties.⁸⁵⁶ Therefore, it is contemplated under the Revised Consent Decree (without reference to the requirements of our rules) that some PCS/cellular overlap divestitures may be completed after consummation of the merger, perhaps not until 60 days following such consummation.

3. Compliance with CMRS Ownership Rules

385. *Cellular Cross-Ownership Rule.* Our rules prohibit an entity from holding attributable

⁸⁵⁰ *United States of America v. Bell Atlantic Corporation, GTE Corporation, and Vodafone AirTouch Plc*, U.S. Dist. Ct. D.C. Circuit, Civil No. 1:99CV01119 (LFO), Final Judgment, filed April 18, 2000 at 2 (*Revised Consent Decree*).

⁸⁵¹ 65 Fed. Reg. 505 (Jan. 5, 2000).

⁸⁵² *Id.* at 508. The Revised Consent Decree requires more extensive divestitures than would be required under our rules. For instance, the Revised Consent Decree requires divestitures in numerous rural markets in which our spectrum cap rule permits the aggregation of spectrum up to 55 MHz. In five urban markets within the Seattle MTA, furthermore, divestitures are required although Applicants would jointly hold 45 MHz. In addition, there are several cases in which divestitures are required although one applicant holds an interest that is not attributable under our rules—e.g., Jacksonville, Florida-5, Dallas-Fort Worth, Sherman-Denison (TX), Texas-20, and Wisconsin-8.

⁸⁵³ *Revised Consent Decree* at Section IV.A.1.

⁸⁵⁴ *Id.* at Section IV.A.2.

⁸⁵⁵ *Id.* at Section II.G.

⁸⁵⁶ *Id.* at Section IV(A)(2) (authorizing DOJ to grant up to two 30-day extensions).

interests in both cellular licenses in any cellular service area (or portions thereof).⁸⁵⁷ Under the terms of the Revised Consent Decree, Bell Atlantic, Vodafone, and GTE have committed to eliminate the 19 cellular-cellular overlaps that would be created by this merger prior to, or concurrently with, consummation of the merger transactions.⁸⁵⁸ Fulfillment of these commitments would achieve compliance with our cellular cross-ownership rule, with the caveat that, under that rule, the divestitures of these cellular properties must be consummated *before* the Bell Atlantic – GTE merger may be consummated.⁸⁵⁹

386. To resolve the cellular-cellular overlaps, the parties have sold, or have agreed to sell, properties in 13 cellular markets to ALLTEL. On April 1 and May 15, 2000, Bell Atlantic and Vodafone consummated the assignment of six cellular properties to ALLTEL.⁸⁶⁰ On June 12, 2000, we granted applications to assign an additional seven cellular properties to ALLTEL.⁸⁶¹ Finally, Applicants have filed applications to transfer into a divestiture trust the remaining six cellular licenses.⁸⁶² We condition grant of the underlying applications to transfer control of licenses from GTE to Bell Atlantic on the consummation of the divestitures of these remaining thirteen cellular properties prior to the consummation of the merger. Further, pursuant to our rules, we delegate to the Wireless Telecommunications Bureau the authority to review the divestiture trust agreement for compliance with our rules.⁸⁶³

⁸⁵⁷ 47 C.F.R. § 22.942. For purposes of the cellular cross-ownership rule, direct and indirect interests of more than five percent are attributed. *Id.* at (a).

⁸⁵⁸ *Revised Consent Decree* at 12.

⁸⁵⁹ 47 C.F.R. § 22.942(c).

⁸⁶⁰ *See Wireless Telecommunications Bureau Grants Consent for Transfer of Control of Cellular and Related Microwave Licenses from Bell Atlantic Corporation and Vodafone AirTouch Plc to ALLTEL Corporation*, Public Notice, DA 00-731 (rel. Mar. 30, 2000); Wireless Telecommunications Bureau Action Report No. 523, Public Notice (rel. May 3, 2000); Wireless Telecommunications Bureau Action Report No. 546, Public Notice (rel. May 31, 2000). The divestiture of four of these properties—Phoenix, Tucson, Arizona-2, and Albuquerque—was required as a precondition for our approval of the Bell Atlantic-Vodafone joint venture transaction. *Vodafone/Bell Atlantic Order* at n.51. Also included were cellular properties providing service to Las Cruces, NM and El Paso, TX. These transfers were consummated on April 1, 2000, except for Las Cruces, which was consummated on May 15, 2000.

⁸⁶¹ *See Wireless Telecommunications Bureau Grants Consent to Bell Atlantic and GTE for Assignment and Transfer of Control of Certain Cellular and Microwave Licenses*, Public Notice, DA 00-1273 (rel. June 12, 2000). These seven properties are: Anderson and Greenville, SC; and Akron, Canton, Cleveland, Lorain-Elyria and Ashtabula, OH.

⁸⁶² *See Bell Atlantic, GTE and Vodafone Seek Consent to Transfer Control of or Assign Properties to Divestiture Trust*, Public Notice, DA 00-1076 (rel. May 12, 2000). These six California properties are Salinas-Monterey-Seaside, San Diego, San Francisco, San Jose, Santa Rosa-Petaluma and Vallejo-Napa-Fairfield. These applications will be acted on separately by the Wireless Telecommunications Bureau. We note that the Revised Consent Decree provides for the possibility of divesting to a trust as an interim measure. Revised Consent Decree at Section V.

⁸⁶³ *See In the Matter of 1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers, etc.*, WT Dkt Nos. 98-205 and 96-59, GN Dkt. No. 93-252, Report and Order, FCC 99-244, (rel. Sept. 22, 1999) (*Spectrum Cap Order*) at para. 117 (“Consistent with section 0.5(c) of the Commission’s rules, we delegate authority to the Wireless Telecommunications Bureau to review proposed trusts to ensure that they comply with our rules.” (footnote omitted)).

387. *CMRS Spectrum Aggregation Rule.* Under our CMRS spectrum aggregation rule, a single entity is generally permitted to hold an attributable interest in up to 45 MHz of CMRS spectrum in urban areas; in rural areas, an entity is generally permitted to hold up to 55 MHz of spectrum.⁸⁶⁴ The PCS licenses involved in the overlaps that are created by the proposed merger generally provide for authority over 30 MHz of PCS spectrum,⁸⁶⁵ while the cellular properties encompass 25 MHz of spectrum. Further, in most of these cases involving PCS-cellular overlaps, the Applicants' interests in these overlapping properties are attributable under our spectrum aggregation rule.⁸⁶⁶ Therefore, in the majority of these cases, absent divestitures, the merged entity would have attributable interests in licenses totaling 55 MHz of CMRS spectrum, which in most of the cases involved here would exceed our spectrum aggregation limits.

388. Under the terms of the Revised Consent Decree, Bell Atlantic, Vodafone, and GTE have committed to divest one wireless license and its associated business in each market in which an overlap would occur, without regard to the size or nature of the current interests.⁸⁶⁷ In addition, where our spectrum aggregation rule would permit the parties to keep a 25 MHz cellular license and 20 MHz of PCS spectrum in the same market, the Revised Consent Decree only permits the merged entity to keep 10 MHz of the PCS spectrum if it retains the cellular license.⁸⁶⁸

389. The parties intend to divest these properties directly to third parties, but have also requested authority to assign or transfer control of properties to the divestiture trust in the event that agreements with third-party buyers cannot be completed in time to file applications with us before consummating the underlying merger applications.⁸⁶⁹ We condition grant of the underlying applications

⁸⁶⁴ 47 C.F.R. § 20.6(a). Exceptions to the general rules are permitted under the significant overlap provision of the rule. 47 C.F.R. § 20.6(c).

⁸⁶⁵ In the Seattle MTA, GTE currently holds only 20 MHz as a result of a prior disaggregation to U S West.

⁸⁶⁶ 47 C.F.R. § 20.6(d). In several cellular markets, GTE holds a non-controlling, minority, and otherwise non-attributable interest. These interests are in cellular licenses for service to Jacksonville, Florida-5, Dallas-Fort Worth, Sherman-Denison (TX), Texas-20, and Wisconsin-8.

⁸⁶⁷ *Revised Consent Decree* at Section IV.A.

⁸⁶⁸ *Id.* at 10. Compliance with our spectrum aggregation rule does not necessarily end our analysis. *See Spectrum Cap Order.* We find here that the terms of the Revised Consent Decree resolve all potential instances of competitive issues going beyond the terms of our spectrum aggregation rule and, therefore, that we need not conduct further market-by-market inquiries.

⁸⁶⁹ *See Bell Atlantic, GTE and Vodafone Seek Consent to Transfer Control of or Assign Properties to Divestiture Trust*, Public Notice, DA 00-1076 (rel. May 12, 2000). Under our spectrum aggregation rule, parties must divest sufficient spectrum to remain in compliance with the aggregation limit before consummating an assignment or transfer of control. 47 C.F.R. § 20.6(e)(1). However, unlike in the context of the cellular cross-ownership rule, parties are considered to have met this requirement once they have submitted applications to the Commission for the transfer of control or assignment of license(s) such that, if consummated, the parties would not exceed the spectrum aggregation limit. 47 C.F.R. § 20.6(e)(4)(A). We note that several of the divestitures to which the parties have committed may be accomplished without filing an application or a subsequent notification with the Commission because the ownership change would not involve a controlling interest.

The parties have indicated to the Commission that they may seek approval to modify one or more divestiture applications currently on file, but that any amendments would not affect the ultimate divestiture of those properties. We note that, with the exception of the San Antonio MSA, consummation of the transactions that are the subject of (continued....)

to transfer control of licenses from GTE to Bell Atlantic on compliance with our spectrum aggregation rule. The Commission will separately rule on the parties' applications to divest wireless properties.⁸⁷⁰

4. Other Competitive Issues

a. Triton PCS and Sprint

390. Triton PCS, Inc. (Triton) claims that Bell Atlantic Mobile Services has behaved anticompetitively with respect to Triton by filing a "groundless" lawsuit against Triton.⁸⁷¹ Bell Atlantic states that it filed suit against Triton to protect against disclosure of confidential competitive information by former high-level Bell Atlantic Mobile employees that Triton hired.⁸⁷² This action is currently pending in the New Jersey Superior Court.⁸⁷³ We find that this is a civil dispute not relevant to our analysis under section 310(d) authority and best resolved in a state court of competent jurisdiction.⁸⁷⁴

391. Triton and Sprint Communications Company (Sprint) both complain that Bell Atlantic has engaged in anticompetitive roaming negotiations.⁸⁷⁵ We are currently considering in a separate docket whether any action is necessary with respect to automatic roaming agreements between PCS and cellular carriers.⁸⁷⁶ Accordingly, we decline to consider that issue in this proceeding.

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divestiture applications already on file would achieve compliance with our CMRS ownership rules. However, because the Applicants prefer to sell directly to third parties and are continuing to negotiate such transactions, we anticipate that a number of additional divestiture applications may be filed. Further, the Applicants have requested a waiver of our spectrum aggregation rule to permit them to continue to file divestiture applications after consummation of the merger. *See Wireless Telecommunications Bureau Seeks Comment on Vodafone AirTouch Plc, Bell Atlantic Corporation, and GTE Corporation Request for Temporary Waiver of Section 20.6 of the Commission's Rules*, Public Notice, DA 00-953 (rel. May 2, 2000); *Petition for Temporary Waiver of CMRS Spectrum Cap Rule*, filed April 6, 2000, by Vodafone AirTouch Plc, Bell Atlantic Corporation, and GTE Corporation, at Attach. 1. To the extent not rendered moot by additional divestiture applications filed prior to closing of the merger, this request will be addressed by separate order.

⁸⁷⁰ In addition to the applications currently on file to divest to the trust, an application is currently on file to divest 20 MHz of former PrimeCo PCS spectrum in Richmond to VA RSA 6 Limited Partnership. *See PrimeCo PCS, LP and Virginia RSA 6 Cellular Limited Partnership Seek FCC Consent for Assignment or Transfer of Control of Wireless Licenses to Comply with Spectrum Cap Rules and Department of Justice Consent Decree Regarding Pending Applications of Bell Atlantic, GTE, and Vodafone AirTouch*, Public Notice, DA 00-1138 (rel. May 23, 2000).

⁸⁷¹ *See* Triton Nov. 23, 1998 Comments at 12-14.

⁸⁷² Bell Atlantic/GTE Dec. 23, 1998 Joint Reply at 17.

⁸⁷³ *Cellco Partnership d/b/a Bell Atlantic Mobile v. Triton Communications, Inc. et al.*, Docket No. ESX-C-238-98 (Superior Ct. NJ).

⁸⁷⁴ *See, e.g., Listeners Guild, Inc. v FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987); *Applications of Centel Corp., Sprint Corp, and FW Sub Inc.*, 8 FCC Rcd 1829, 1831 (1993). The Commission has consistently refused to interject itself into private matters, finding that a court, and not the Commission, is the proper forum for resolving such disputes. *WorldCom/MCI Order*, 13 FCC Rcd at 18148, para. 214; *PCS 2000, L.P.*, 12 FCC Rcd 1681, 1691 (1997) (citing *United Tel. Co of Carolinas v. FCC*, 599 F.2d 720,732 (D.C. Cir. 1977)).

⁸⁷⁵ *Id.*; Sprint Nov. 23, 1998 Petition at 48.

⁸⁷⁶ *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, Second Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 9462 (1996).

b. Commonwealth of the Northern Mariana Islands

392. The Commonwealth of the Northern Mariana Islands asserts that Bell Atlantic affiliates have opposed the application of “rate integration” policy to CMRS carriers, and proposes that the Commission require Bell Atlantic/GTE to maintain rate integration across all subsidiaries and services, including wireless services.⁸⁷⁷ In a separate proceeding, we are currently considering whether to forbear from, or reconsider, rate integration for CMRS carriers.⁸⁷⁸ Therefore, we decline to consider this issue in this proceeding.

C. Conclusion

393. Based upon our review under section 310(d) of the Act, we determine that the proposed transfers of control from GTE to Bell Atlantic will not likely result in harm to competition in any relevant wireless market. We also determine that these transfers will likely result in public interest benefits. We therefore conclude that, on balance, Applicants have demonstrated that these transfers serve the public interest, convenience, and necessity. Accordingly, we grant the Applications, subject to the conditions set forth herein.

X. INTERNATIONAL ISSUES**A. General**

394. Consistent with our conclusion above that the proposed merger will not impact in any significant way the market for domestic long distance services, and under the same reasoning, we conclude that the proposed merger will not impact in any significant way the market for international long distance services.

395. Our conclusion that the proposed merger will not impact in any significant way the market for international long distance services is further supported by the absence of any evidence in the record to demonstrate that the proposed merger would affect competition adversely in any input market that is essential for the provision of international services, including the market for international transport services.⁸⁷⁹

396. For purposes of determining whether the merger would affect competition adversely in any input market that is essential for the provision of international services, we focus our analysis on submarine cable facilities.⁸⁸⁰ Bell Atlantic currently does not own any submarine cable capacity in the

⁸⁷⁷ See Commonwealth of Northern Mariana Islands Nov. 23, 1998 Petition.

⁸⁷⁸ *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Order, 12 FCC Rcd 15739 (1997); *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Memorandum Opinion and Order, DA 98-1763 (WTB, rel. Sept. 1, 1998).

⁸⁷⁹ See *WorldCom/MCI Order*, 13 FCC Rcd at 18071, para. 81 (stating that the “Commission appropriately has tended to focus its analysis on particular inputs in considering competitive effects on international routes”).

⁸⁸⁰ See *id.* at 18072-73, paras. 82-83 (finding submarine cable capacity, but not satellite capacity, to be the transport medium that warranted review in that merger proceeding). Many other inputs are essential for the provision of international services, but there is no evidence in the record to demonstrate that the proposed merger would affect (continued....)

Pacific Region or between the U.S. and the Caribbean and/or South America.⁸⁸¹ Therefore, Bell Atlantic's merger with GTE will not increase market concentration in those regions, regardless of the number of cable facilities GTE owns in those regions.⁸⁸² In the Atlantic region, Bell Atlantic currently owns a *de minimis* amount of total available cable capacity, and we project it will continue to own a *de minimis* amount of total available cable capacity in the Atlantic region through 2001.⁸⁸³ GTE's current and projected (through 2001) ownership of cable capacity in the Atlantic region is also *de minimis*.⁸⁸⁴ Therefore, upon consummation of the proposed merger, the merged entity's combined current and projected share in the Atlantic region is *de minimis*, and the merger will not increase significantly market power concentration in that region.

397. Only one party filed comments related to the effect of the proposed merger on the U.S. international services market. TRICOM USA, Inc. (TRICOM), a U.S. carrier licensed to provide local exchange service, long distance service, and international services, complains that "the combined

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competition adversely in any of these markets. *See generally WorldCom/MCI Order, id.* at 18091-093, paras. 115-17. As discussed in Section VI, *supra*, we concluded that, on balance, any potential anticompetitive effects of the proposed merger in the domestic local exchange and exchange access markets would be outweighed by the accompanying benefits of the conditions we impose on the merger.

⁸⁸¹ See Letter from Karen Corbett Sanders, Bell Atlantic, to Magalie Roman Salas, Federal Communications Commission, CC Docket No. 98-184 (filed May 3, 2000) (Bell Atlantic May 3, 2000 International Cable Capacity *Ex Parte* Letter).

⁸⁸² Compañía Dominicana de Teléfonos, C. por A. (CODETEL), a GTE subsidiary, owns 22 percent of a segment of the TCS-1 submarine cable system (the segment that extends from Puerto Rico to the Dominican Republic). *See* TCS-1 Construction and Maintenance Agreement Revised Schedules at Schedule C at 2 (effective Aug. 1, 1997); Letter from Gordon Maxson, GTE, to Magalie Roman Salas, Federal Communications Commission, CC Docket No. 98-184, Attachment 2 (filed May 11, 2000) (GTE May 11, 2000 International *Ex Parte* Letter). In addition, CODETEL owns approximately 22 percent of the ANTILLAS I cable, which links Puerto Rico and the Dominican Republic. *See* GTE May 11, 2000 International *Ex Parte* Letter at Attachment 2. Compañía Anónima Nacional Teléfonos de Venezuela (CANTV) owns a relatively large portion of cable segments from the U.S. Virgin Islands to Venezuela on the Americas I cable and the Pan American Cable (ownership varies from 19 percent to 56 percent on these two cables' sub-segments). *See* GTE May 11, 2000 International *Ex Parte* Letter at Attachment 1. A review of GTE's percentage ownership interests in other cables in the Caribbean region demonstrates that GTE's ownership of other cables in that region is *de minimis*. *See* Letter from Gordon Maxson, GTE, to Magalie Roman Salas, Federal Communications Commission, CC Docket No. 98-184 (filed May 3, 2000) at Attachment (GTE May 3, 2000 International *Ex Parte* Letter) (listing GTE's U.S. international carrier subsidiaries' ownership interests in all cables). Likewise, a review of GTE's percentage ownership interests in cables in the Pacific region shows that GTE's ownership of cables in that region also is *de minimis*. *See* GTE May 3, 2000 International *Ex Parte* Letter at Attachment.

⁸⁸³ We forecast supply for two years in accordance with the Department of Justice Merger Guidelines. *See United States Department of Justice Horizontal Merger Guidelines*, 57 Fed. Reg. At 41562, § 3.2, n.27. Bell Atlantic currently owns a .0248 percent interest in the TAT-12/TAT-13 cable system (three E-1 circuits, translating to three circuits with a speed of 2.048 megabits per second). Bell Atlantic owns 14.5 percent of the FLAG Atlantic-1 cable system, but has acquired only 12 STM-1 circuits (translating to 12 circuits with a speed of 155.52 megabits per second). *See* Bell Atlantic May 3, 2000 International Cable Capacity *Ex Parte* Letter.

⁸⁸⁴ GTE Corporation, including several of its international carrier subsidiaries, will own a very small percent of total available cable capacity in the Atlantic region by the end of 2001. After the spin-off of GTE Intelligent Network Services Inc., the projected GTE ownership of total available cable capacity in the Atlantic region will be even smaller because GTE Intelligent Network Services Inc. owns most of GTE's Atlantic cable capacity. *See* GTE May 3 International *Ex Parte* Letter, Attachment; FCC International Bureau 1998 Section 43.82 Circuit Status Data Report at 33 (Int'l Bur., Dec. 17, 1999).

facilities of the merged company would give it the potential to serve as a bottleneck to and from those overseas points where GTE and Bell Atlantic control the dominant carrier.”⁸⁸⁵ According to TRICOM, therefore, the merged company “would not only control facilities on the domestic end in the largest metropolitan areas of the United States, but also on the foreign and territorial end, particularly the Dominican Republic, Venezuela, and Puerto Rico in this Hemisphere.”⁸⁸⁶ TRICOM asks the Commission to require both GTE and Bell Atlantic to “make affirmative showings that each of their overseas affiliates or subsidiaries do not presently control and have no potential to control bottleneck facilities by virtue of the merger or otherwise.”⁸⁸⁷

398. Both GTE and Bell Atlantic have provided the Commission with all the information required under our rules, namely Sections 63.11 and 63.18(e), regarding investments in or by foreign carriers.⁸⁸⁸ Our rules recognize that U.S. carriers may have investments in or by foreign carriers, or may themselves be foreign carriers, and we have adopted a regulatory framework to address concerns about anticompetitive behavior by U.S. carriers and their foreign carrier affiliates. Indeed, in terms of control of bottleneck facilities on the foreign ends, TRICOM is most concerned about the Dominican Republic and Venezuela. As discussed in detail below in the foreign carrier affiliation section, currently we regulate GTE as a “dominant” international carrier both on the U.S.-Dominican Republic route and on the U.S.-Venezuela route.⁸⁸⁹ Not only will approval of the merger not disturb these classifications, but, as discussed below in approving the international license transfers that are part of the merger, we amend Bell Atlantic's authorizations to provide service on those routes to regulate them as dominant, where appropriate under our rules.⁸⁹⁰

399. TRICOM also requests that we require GTE and Bell Atlantic to demonstrate that all overseas affiliates or subsidiaries are now treating, and will continue to treat, all nonaffiliated U.S. carriers in a nondiscriminatory manner.⁸⁹¹ Section 63.14 of the Commission's rules, to which every U.S. international carrier is subject, specifically addresses TRICOM's concerns. That section prohibits any U.S. international carrier from agreeing to accept from any foreign carrier that possesses market power on a particular route special concessions of specified types.⁸⁹² With respect to TRICOM's concerns about the merged entity's control of bottleneck facilities on the U.S. end of international routes,⁸⁹³ as discussed above, we already have concluded that, on balance, any potential anticompetitive effects of

⁸⁸⁵ See TRICOM Nov. 23, 1998 Comments at 6.

⁸⁸⁶ See *id.*

⁸⁸⁷ *Id.* at 7.

⁸⁸⁸ See 47 C.F.R. §§ 63.11, 63.18(e).

⁸⁸⁹ See 47 C.F.R. § 63.10(c), (e) (setting forth international dominant carrier safeguards).

⁸⁹⁰ See 47 C.F.R. § 63.10(a).

⁸⁹¹ See TRICOM Nov. 23, 1998 Comments at 8.

⁸⁹² See 47 C.F.R. § 63.14.

⁸⁹³ TRICOM expresses concern, for example, that GTE “successfully bid on the purchase of control of PRTC.” See TRICOM Nov. 23, 1998 Comments at 8. We note that, since TRICOM filed its comments, GTE has actually purchased the Puerto Rico Telephone Company (PRTC).

the proposed merger in the domestic local exchange and exchange access markets would be outweighed by the accompanying benefits of the conditions we impose on the merger. Moreover, the Commission previously has addressed the proper regulatory treatment of incumbent local exchange carrier provision of U.S. international services.⁸⁹⁴

B. Foreign Affiliation

400. In considering the effects of the proposed merger in U.S. international services markets, we consider whether: (1) as a result of its acquisition by Bell Atlantic, GTE (and its operating subsidiaries)⁸⁹⁵ would become affiliated with a foreign carrier that has market power on the foreign end of a U.S. international route that GTE is authorized to serve; and (2) as a result of its acquisition of GTE, Bell Atlantic (and its international carrier subsidiaries)⁸⁹⁶ would become affiliated with a foreign carrier that has market power on the foreign end of a U.S. international route that Bell Atlantic is

⁸⁹⁴ See *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket Nos. 96-149, 96-61, Second Report in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, 15850 and 15858, paras. 163 and 179 (*LEC Classification Order*), Order on Reconsideration, 12 FCC Rcd 8730 (1997) (*LEC Classification Order on Reconsideration*), Order, 13 FCC Rcd 6427 (Comm. Car. Bur. 1998) (*LEC Classification Partial Stay Order*); Second Order on Reconsideration and Memorandum Opinion and Order, FCC 99-103 (rel. June 30, 1999) (*LEC Classification Second Reconsideration Order*) (deciding to classify BOCs' section 272 interLATA affiliates as nondominant in their provision of in-region, interstate, domestic, interLATA services and concluding that it should apply the same regulatory classification to the BOC interLATA affiliates' provision of in-region, international services). See also *Nynex Long Distance Co., et al., Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Provide International Service from Certain Parts of the United States to International Points Through Resale of International Switched Services*, *GTE Telecom Incorporated, Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, and Section 63.01 of the Commission's Rules and Regulations for International Resale Switched Service and Facilities-Based Service to Various Countries*, File Nos. ITC-96-125, 96-272, 96-181, 95-443, Memorandum Opinion and Order, 12 FCC Rcd 11654, 11660, paras. 11-12 (Int'l Bur. 1997) (*International Out-of-Region Nondominance Order*) (Bureau finding, consistent with the Commission's finding regarding BOC provision of in-region international services, that BOCs should be treated as nondominant in their provision of out-of-region international services).

⁸⁹⁵ GTE's international carrier subsidiaries that hold international authorizations that Bell Atlantic would control are: GTE Communications Corporation, GTE Hawaiian Tel International Incorporated, GTE Pacifica Incorporated, GTE Wireless Incorporated, GTE Airfone Incorporated, GTE Railfone Incorporated, Codetel International Communications Incorporated, GTE Telecommunication Services Incorporated, TELUS Communications (B.C.) Inc., and Celulares Telefónica, Inc. See *GTE May 3 International Ex Parte* Letter at 1. GTE notes that "TELUS Communications (B.C.) Inc." is the correct name for the entity holding the section 214 authorization originally granted to BC TEL. See *GTE May 3, 2000 International Ex Parte* Letter at 1 & n.1. GTE states that the Commission was notified of the name change by letter dated November 18, 1999, from counsel for BCT.TELUS Communications, Inc. (the parent of TELUS Communications (B.C.) Inc.) and that the control of BC TEL was transferred to BCT.TELUS Communications, Inc. in File No. ITC-T/C-19990114-00023. See *GTE May 3, 2000 International Ex Parte* Letter at n.1. GTE points out that BCT.TELUS Communications, Inc. is incorrectly shown as holding that authority in the list of GTE subsidiaries holding Section 214 authorizations attached to the GTE Letter of March 8, 2000, which amended the original list of entities holding international section 214 authorizations. See Letter from Gordon Maxson, GTE, to Magalie Roman Salas, Federal Communications Commission, CC Docket No. 98-184 (filed May 4, 2000) (correcting part of footnote 1 in *GTE May 3, 2000 International Ex Parte* Letter). We refer hereinafter to TELUS Communications (B.C.) Inc.

⁸⁹⁶ Bell Atlantic's international carrier subsidiaries are Bell Atlantic Communications, Inc. (BACI) and NYNEX Long Distance Company, Inc. (NYNEX-LD). In addition, Cellco Partnership is an international carrier affiliate of Bell Atlantic's.

authorized to serve.⁸⁹⁷

401. Both Bell Atlantic and GTE have ownership interests in carriers that operate on the foreign end of U.S. international routes that create “affiliations” within the meaning of section 63.09 of the Commission’s rules.⁸⁹⁸ Subsidiaries of Bell Atlantic are authorized under section 214 of the Act⁸⁹⁹ to provide out-of-region U.S. international service terminating at all international points.⁹⁰⁰ Subsidiaries of Bell Atlantic also are authorized to provide in-region international service originating in New York and terminating at all international points except Gibraltar.⁹⁰¹ Subsidiaries of GTE are authorized under section 214 of the Act to provide U.S. international service originating from points in the United States and terminating at various international points.⁹⁰² We note that, upon consummation of the proposed merger, except for services originating in the State of New York, section 271 of the Act will prohibit any of Bell Atlantic’s or GTE’s international carrier subsidiaries from providing international services originating in any Bell Atlantic “in-region State,” as that term is defined in section 271(i) of the Act.⁹⁰³ With the exception of New York, Bell Atlantic has not yet obtained permission to provide long distance

⁸⁹⁷ We do not address in this section the applications filed by GTE, pursuant to section 214 of the Communications Act and the Cable Landing License Act (in conjunction with the spinoff of GTE Internetworking into a separate corporation) requesting Commission approval to transfer control to Genuity of certain international section 214 authorizations and cable landing licenses currently held by various GTE subsidiaries. We address those applications above. *See supra* Section V. We also note that GTE, both as part of an application to transfer control of an international section 214 authorization to Genuity, and in a recent letter, has relinquished certain international 214 authorizations that are subsumed by later authorizations. *See* GTE Corporation, Transferor, Genuity Corporation, Transferee, Application for Transfer of Control of Global International Section 214 Authorization, ITC-214-19990708-00391 at n.1 (filed Apr. 28, 2000) (relinquishing authorizations held by GTE international carrier subsidiaries in File Nos. ITC-94-237, ITC-94-357-TC, ITC-95-443, ITC-96-313, ITC-96-314, and ITC-97-438); *see* GTE May 3, 2000 International *Ex Parte* Letter (relinquishing the authorizations held by GTE international carrier subsidiaries in File Nos. ITC-97-372, ITC-95-242, ITC-92-150, ITC-91-180, and ITC-91-037).

⁸⁹⁸ *See* 47 C.F.R. § 63.09(e). Section 63.09(e) provides, in relevant part, that: “[t]wo entities are *affiliated* with each other if one of them, or an entity that controls one of them, directly or indirectly owns more than 25 percent of the capital stock of, or controls, the other one.” 47 C.F.R. § 63.09(e).

⁸⁹⁹ 47 U.S.C. § 214.

⁹⁰⁰ For a complete listing of Bell Atlantic’s international section 214 authorizations, *see* Letter from Karen Corbett Sanders, Bell Atlantic, to Magalie Roman Salas, Federal Communications Commission, CC Docket No. 98-184, Attachment (filed May 3, 2000) (Bell Atlantic May 3, 2000 International 214 *Ex Parte* Letter).

⁹⁰¹ *See Bell Atlantic Communications, Inc. and NYNEX Long Distance Company, Applications for Global Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Provide all Authorized Facilities-Based Services Between the United States and all International Points Except Gibraltar, Bell Atlantic Communications, Inc. and NYNEX Long Distance Company, Applications for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Resell International Services of U.S. Carriers to Provide all Authorized Services Between the United States and all International Points Except Gibraltar*, FCC File Nos. ITC-214-19971223-00813 (previous File No. ITC-98-002) and ITC-214-19971223-00811 (previous File No. ITC-98-003), Order, Authorization and Certificate, DA 99-2989 (rel. Dec. 22, 1999) (*BACI/NYNEX-LD New York International 214 Order*).

⁹⁰² For a complete listing of GTE’s international section 214 authorizations, *see* filings in CC Docket No. 98-184.

⁹⁰³ Section 271(i) defines “in-region State” as follows: “[t]he term ‘in-region State’ means a State in which a Bell operating company or any of its affiliates was authorized to provide wireline telephone exchange service pursuant to the reorganization plan approved under the AT&T Consent Decree, as in effect on the day before the date of enactment of the Telecommunications Act of 1996.” 47 U.S.C. § 271(i).

services within any of the in-region States it currently serves. Therefore, upon consummation of the merger, in order to comply with section 271, GTE and its subsidiaries must cease originating international long distance traffic in Bell Atlantic's current in-region States other than New York. By this Order, we modify GTE's international section 214 authorizations to exclude the provision of international service originating in Bell Atlantic's in-region states other than New York.⁹⁰⁴

1. Standards

402. We welcome foreign participation in the U.S. market for telecommunications services. In the *Foreign Participation Order*, the Commission adopted an open entry policy for carriers from World Trade Organization (WTO) members. As part of this policy, the Commission adopted an open entry standard for applicants that request authority to serve a WTO member in which the applicants have a foreign carrier affiliate. Previously, the Commission had applied an "effective competitive opportunities" (ECO) test to certain applicants that sought to provide service on routes where an affiliated foreign carrier possessed market power.⁹⁰⁵ In the *Foreign Participation Order*, the Commission eliminated the ECO test in favor of a rebuttable presumption that requests for international section 214 authority from applicants affiliated with foreign carriers in WTO members do not pose concerns that would justify denial of the application on competition grounds.⁹⁰⁶ The Commission retained the ECO test for certain applicants that seek to serve non-WTO countries in which the applicant has an affiliation with a foreign carrier possessing market power in such countries.⁹⁰⁷

403. In the *Foreign Participation Order*, however, the Commission observed that the exercise of foreign market power in the U.S. market could harm U.S. consumers through increases in prices, decreases in quality, or a reduction in alternatives in end-user markets.⁹⁰⁸ Generally, this risk occurs when a U.S. carrier is affiliated with a foreign carrier that has sufficient market power on the

⁹⁰⁴ See *supra* Section V for an extensive discussion of section 271 issues as they relate to domestic long distance service provided by the merged entity.

⁹⁰⁵ The ECO analysis was developed and discussed in *Market Entry and Regulation of Foreign-Affiliated Entities*, IB Docket No. 95-22, Report and Order, 11 FCC Rcd 3873 (1995) (the *Foreign Carrier Entry Order*).

⁹⁰⁶ See *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, Market Entry and Regulation of Foreign Affiliated Entities*, IB Docket Nos. 97-142, 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891 23906-10, paras. 33-43, 23913-17, paras. 50-58 (1997) (*Foreign Participation Order*), recon. pending; *In the Matter of the Merger of MCI Communications Corporation and British Telecommunications plc*, 12 FCC Rcd 15351, 15409-10, paras. 154-55.

⁹⁰⁷ See *Foreign Participation Order*, 12 FCC Rcd at 23944-46, paras. 124-29; 23949-50, paras. 139-42. Section 63.18(j)-(k) of the Commission's rules applies the ECO test in situations in which: an applicant is a foreign carrier in a non-WTO country; an applicant controls a foreign carrier in a non-WTO country; any entity that owns more than 25 percent of the applicant, or controls the applicant, controls a foreign carrier in a non-WTO country; or, in specified circumstances, more than 25 percent of an applicant is owned by two or more foreign carriers. See 47 C.F.R. §§ 63.18(j)-(k).

⁹⁰⁸ See, *Foreign Participation Order*, 12 FCC Rcd at 23951-954, paras. 144-46 (1997); Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L.J. 209 (1986).

foreign end of a route to affect competition adversely in the U.S. market.⁹⁰⁹

404. *Entry Standard.* In a merger analysis, to determine whether the public interest is served by permitting the merged entity to provide U.S. international service on each affiliated route, we apply the entry standard adopted in the *Foreign Participation Order*. The Commission also considers other public interest factors that may weigh in favor of, or against, granting an international section 214 application, including national security, law enforcement, foreign policy and trade concerns.⁹¹⁰

405. *Regulatory Status.* If we determine that the public interest would be served by permitting the merged entity to provide U.S. international service on its affiliated routes, we next decide the terms under which the merged entity will provide service on these routes. Specifically, we examine whether it is necessary to impose the Commission's international dominant carrier safeguards on the merged entity's international operating subsidiaries in their provision of service on the affiliated routes.⁹¹¹

The standard for determining the regulatory status of the merged entity on affiliated routes also is governed by the *Foreign Participation Order*. Under rules adopted in that order, the Commission regulates U.S. international carriers as dominant on routes where an affiliated foreign carrier has sufficient market power on the foreign end to affect competition adversely in the U.S. market.⁹¹² A U.S. carrier presumptively is classified as nondominant on an affiliated route if the carrier demonstrates that the foreign affiliate lacks 50 percent market share in the international transport and local access markets on the foreign end of the route.⁹¹³

2. Specific Affiliations

406. We consider first Bell Atlantic's foreign carrier affiliations and the issues raised by those affiliations in this transfer proceeding. We then consider GTE's foreign carrier affiliations and issues raised by those affiliations. On April 11, 2000, Bell Atlantic's and GTE's international carrier subsidiaries notified the Commission, pursuant to sections 63.11(a)(1) and (a)(2) of the Commission's rules, that they will become affiliated with foreign carriers upon consummation of the pending merger between Bell Atlantic and GTE.⁹¹⁴ The Foreign Carrier Notification included a description of the foreign affiliations of both Bell Atlantic's and GTE's international carrier subsidiaries.

⁹⁰⁹ See *Foreign Participation Order*, 12 FCC Rcd at 23954, para. 147.

⁹¹⁰ See *id.* at 23919-21, paras. 61-66.

⁹¹¹ The Commission's international dominant carrier safeguards are set forth in section 63.10(c), (e) of the Commission's rules (as amended in *International Settlement Rates*, IB Docket No. 96-261, Report and Order on Reconsideration and Order Lifting Stay, 14 FCC Rcd 9256 (1999)), 47 C.F.R. § 63.10(c), (e).

⁹¹² See *Foreign Participation Order*, 12 FCC Rcd at 23951-52, para. 144; 47 C.F.R. § 63.10(a)(3).

⁹¹³ See 47 C.F.R. § 63.10(a)(3). Section 63.18 of the rules requires an applicant to demonstrate that it qualifies for nondominant classification on any affiliated route for which it seeks to be regulated as a nondominant international carrier. 47 C.F.R. § 63.18.

⁹¹⁴ See Bell Atlantic Communications, Inc. and NYNEX Long Distance Company, and the GTE International Carriers, Notification of Foreign Affiliations, Notification of Affiliation and Request for Waiver, FCN-NEW-20000411-00019 (filed Apr. 11, 2000) (April 2000 Foreign Carrier Notification). The International Bureau put this Notification of Foreign Affiliations on public notice on April 14, 2000. See *Foreign Carrier Affiliation Notification, Applications Accepted for Filing*, Report No. FCN-00020 (Apr. 14, 2000).

a. Bell Atlantic Foreign Carrier Affiliations

407. As a result of the merger, GTE's international carrier subsidiaries will become affiliated with all of Bell Atlantic's foreign carrier affiliates. Bell Atlantic's foreign carrier affiliates operate in Mexico (Iusacell) and Gibraltar (Gibraltar NYNEX Communications, Ltd).⁹¹⁵ GTE's international carrier subsidiaries currently are authorized to provide resold and facilities-based international telecommunications services to Gibraltar and Mexico (among other countries).⁹¹⁶ Applicants request that we authorize a transfer of control of GTE's international section 214 authorizations to Bell Atlantic.⁹¹⁷ Thus, approval of the merger Application would permit Bell Atlantic-controlled GTE subsidiaries to serve these affiliated routes.

408. This Application raises for our consideration the issue of whether the public interest would be served by permitting Bell Atlantic to provide U.S. international service between the United States and Gibraltar and Mexico through its acquisition of control of GTE's international section 214 authorizations. If we approve the proposed transfer of control of GTE's authorizations to Bell Atlantic, we also must inquire whether Bell Atlantic's affiliates in Gibraltar or Mexico have sufficient market power to warrant classifying the combined entity's U.S. international carrier subsidiaries as "dominant" U.S. international carriers on either of these routes. For the reasons discussed below, we conclude that the public interest would be served by transferring control of GTE's international section 214 authorizations to Bell Atlantic, subject to classification of the merged entity's subsidiaries as dominant international carriers in their provision of service on the U.S.-Gibraltar route.

(i) Entry Standard

409. *Mexico.* Mexico is a member of the WTO. Accordingly, we find that Bell Atlantic is entitled to a presumption that its affiliation with Iusacell does not raise competition concerns that would warrant denial of its request to serve the U.S.-Mexico route through its acquisition of control of GTE's international section 214 certificates.

410. *Gibraltar.* Regarding Gibraltar's status with respect to the WTO, we note that an opinion provided to us by the U.S. Department of State concludes that the 1994 Marrakesh Agreement Establishing the World Trade Organization applies to Gibraltar.⁹¹⁸ We also note that the United Kingdom maintains a different view, specifically, that the territorial application of the WTO Convention

⁹¹⁵ See April 2000 Foreign Carrier Notification at 4.

⁹¹⁶ See *id.* at 5.

⁹¹⁷ See Oct. 2, 1998 International 214 Application at 1; April 2000 Foreign Carrier Notification at Exhibit A (listing authorizations of GTE's international carrier subsidiaries). See also Oct. 2, 1998 International 214 Application at Exhibit 1 (listing GTE's international authorizations); Amendment to Application for Commission Consent to Transfer Control of Entities Holding International Section 214 Authorizations and Cable Landing Licenses From GTE Corporation to Bell Atlantic Corporation, CC Docket No. 98-184 (filed Mar. 8, 2000) (adding new authorizations); *Commission Seeks Comment on Supplemental Filing Submitted by Bell Atlantic Corporation and GTE Corporation*, CC Docket No. 98-184, Public Notice, DA 00-608 (rel. Mar. 17, 2000).

⁹¹⁸ See Letter from Robert E. Dalton, Assistant Legal Adviser for Treaty Affairs, United States Department of State, to Rebecca Arbogast, Chief, Telecommunications Division, International Bureau, Federal Communications Commission at 1 (Feb. 16, 2000) (State Department WTO Letter).

does not extend to the United Kingdom's overseas territories.⁹¹⁹ We defer to the opinion provided to us by the U.S. Department of State and therefore treat Gibraltar as a WTO Member for purposes of applying the proper entry standard to this transfer of control application.⁹²⁰ Accordingly, we find that Bell Atlantic is entitled to a presumption that its foreign carrier affiliation with Gibraltar-NYNEX does not raise competition concerns that would warrant denial of its request to serve the U.S.-Gibraltar route through its acquisition of control of GTE's international section 214 certificates.

(ii) Regulatory Status

411. We next examine whether it is necessary to impose our international dominant carrier safeguards on the merged entity's international carrier subsidiaries in their provision of service on these affiliated routes.

412. *Mexico.* Applicants request continued classification as nondominant on the U.S.-Mexico route, asserting that the Commission previously has determined under section 63.10(a)(3) of its rules that Bell Atlantic's foreign affiliate in Mexico, Iusacell, lacks sufficient market power in Mexico to affect competition adversely in the U.S. market.⁹²¹ Applicants certify further that GTE has does not have any ownership interest in a foreign carrier in Mexico, and the GTE international carriers will not be affiliated with any foreign carrier in Mexico other than Iusacell. Thus, they argue, the merger will not result in any increase in Iusacell's market power in Mexico or give Iusacell any greater ability to affect competition in the U.S. market than Iusacell currently has.⁹²² As Applicants point out, we previously have found that Iusacell does not control bottleneck services or facilities in Mexico, and therefore lacks the ability to discriminate against unaffiliated U.S. international carriers terminating traffic in Mexico.⁹²³ We therefore found Bell Atlantic Communications, Inc. (BACI), one of Bell Atlantic's international carrier subsidiaries, to be nondominant on the U.S.-Mexico route.⁹²⁴ We find no basis to conclude that the merger will result in an increase in Iusacell's market power. We therefore conclude that, after the merger with GTE, Bell Atlantic subsidiaries are entitled to continued classification as nondominant on the U.S.-Mexico route.

413. *Gibraltar.* BACI is classified as a dominant international carrier on the U.S.-Gibraltar route due to its affiliation with Gibraltar NYNEX Communications Ltd. (GNCL), the only carrier

⁹¹⁹ See Letter from Simon Towler, First Secretary (Trade Policy), British Embassy, Washington, to Rebecca Arbogast, Chief, Telecommunications Division, International Bureau, Federal Communications Commission at 1 (Jan. 20, 2000) (British Embassy WTO Letter).

⁹²⁰ See, e.g., *Cable and Wireless USA, Inc., Application for Authority to Operate as a Facilities-based Carrier in Accordance with the Provisions of Section 63.18(e)(4) of the Rules between the United States and Bermuda*, File No. ITC-214-19990709-00412, Order, Authorization and Certificate, DA 00-311, at para. 7 (Tel. Div. rel. Feb. 18, 2000) (deferring to the opinion of the U.S. Department of State in treating Bermuda as a WTO member for purposes of applying the proper entry standard).

⁹²¹ See April 2000 Foreign Carrier Notification at 8.

⁹²² See *id.* at 8.

⁹²³ See *BACI/NYNEX-LD Out-of-Region Facilities Order*, 12 FCC Rcd at 1889, para. 20.

⁹²⁴ See *id.*; 47 C.F.R. § 63.10(a)(3).

authorized to provide domestic wireline telecommunications services in Gibraltar.⁹²⁵ Applicants assert that dominant carrier regulation does not apply to BACI at this time, however, because BACI serves Gibraltar solely through resale of unaffiliated U.S. carrier international switched services.⁹²⁶ Section 63.10 of the Commission's rules specifically establishes a presumption of nondominance for carriers, in their provision of switched services on affiliated routes where they provide such services solely through the resale of an unaffiliated U.S. facilities-based carrier's international switched services.⁹²⁷ Although BACI is dominant on the U.S.-Gibraltar route, it has not needed to, and need not in the future, comply with the Commission's dominant carrier safeguards in its provision of switched services solely through the resale of an unaffiliated U.S. facilities-based carrier's international switched services.

414. GTE subsidiaries, like Bell Atlantic subsidiaries, are authorized to provide multiple types of service (including, but not limited to, facilities-based, resale of private line, and resale of switched services of unaffiliated facilities-based U.S.-authorized carriers). Upon consummation of the merger with Bell Atlantic, GTE's international carrier subsidiaries will be treated the same as Bell Atlantic's international carrier subsidiaries currently are treated with respect to service to Gibraltar. Therefore, upon consummation of the merger, GTE's international carrier subsidiaries will be classified as dominant on the U.S.-Gibraltar route. As with BACI, however, when they are only reselling the switched services of unaffiliated facilities-based U.S.-authorized carriers, they will not be subject to the Commission's international dominant carrier safeguards on the U.S.-Gibraltar route. Because several of GTE's international authorizations that include service to Gibraltar are not limited to the resale of switched services, we must amend, effective upon consummation of the proposed merger with Bell Atlantic, those authorizations of the GTE international carrier subsidiaries that include service to Gibraltar and are not limited to the resale of switched services to classify them as dominant on the U.S.-Gibraltar route.⁹²⁸ These modifications of authorizations will require that these subsidiaries of the merged entity comply with appropriate dominant carrier safeguards if the GTE international carrier subsidiaries elect to provide services on the U.S.-Gibraltar route other than by the resale of the switched services of an unaffiliated facilities-based U.S.-authorized carrier.

b. GTE Foreign Carrier Affiliations

415. GTE has investment interests in several foreign carriers that rise to the level of an affiliation under section 63.09 of the Commission's rules.⁹²⁹ GTE identifies the following foreign carriers (or holding companies of such carriers) with which it has such investment interests: (1) BCT. TELUS

⁹²⁵ See *Bell Atlantic Communications, Inc., Notification Pursuant to Section 63.11 of Foreign Carrier Affiliates*, FCN-97-011, Order, 14 FCC Rcd 1934, para. 5 (Tel. Div. 1998), Order on Reconsideration, 14 FCC 13418 (Int. Bur. 1998) (*BACI/Gibraltar Dominance Reconsideration Order*).

⁹²⁶ See April 2000 Foreign Carrier Notification at 7.

⁹²⁷ See *BACI/Gibraltar Dominance Reconsideration Order* at para. 4 and n.10, citing 47 C.F.R. § 63.10(a)(4); see also *Cable and Wireless, Inc., Application for Authority Pursuant to Section 214 of the Communications Act, as Amended, to Provide Resold and Facilities-Based Switched and Private Line Service between the United States and China*, File No. ITC-214-19980515-00326 (previous File No. ITC-98-380), Order, Authorization, and Certificate, DA 98-2498 at para. 19 (Tel. Div. rel. Dec. 8, 1998).

⁹²⁸ Specific amendments appear in the ordering clauses below.

⁹²⁹ See 47 C.F.R. § 63.09.

Communications, Inc. (Canada/British Columbia and Alberta); (2) Quebec-Telephone (Canada/Quebec); (3) Compañía Dominicana de Teléfonos, C. por A. (CODETEL) (Dominican Republic); (4) Compañía Anónima Nacional Teléfonos de Venezuela (CANTV) (Venezuela);⁹³⁰ (5) CTI Compañía de Teléfonos del Interior S.A. and CTI Norte Compañía de Teléfonos del Interior S.A. (collectively "CTI") (Argentina); and (6) GTE Far East (Services) Limited ("GTEFE") (Japan).⁹³¹ As a result of the proposed merger, Bell Atlantic would acquire indirectly GTE's ownership interests in the above-named foreign carriers. Applicants state that two of Bell Atlantic's subsidiaries, BACI and NYNEX-LD, currently are authorized to provide resold and facilities-based international telecommunications services originating in New York and outside of the Bell Atlantic in-region states to each of these countries (among others).⁹³²

(i) Entry Standard

416. Applying the entry standard in the *Foreign Participation Order*, we conclude that the public interest would continue to be served by Bell Atlantic's provision of service, through all of its authorized subsidiaries, on U.S. international routes to all of the countries in which GTE has investment interests in foreign carriers that rise to the level of an affiliation (as noted above, Argentina, Canada, Japan, the Dominican Republic, and Venezuela). Each of these countries is a member of the WTO, and we find no other public interest factors that would warrant a different conclusion.

417. *Argentina.* Applicants request continued classification as nondominant on the U.S.-Argentina route.⁹³³ They argue that all of their international carrier subsidiaries are entitled to a presumption of nondominance under Rule 63.10(a)(3) because GTE's foreign carrier affiliate, CTI, is a cellular carrier and a new entrant in the international services market and, indeed, has not yet begun to provide international long distance service. Applicants, assert, therefore, that CTI lacks international transport and local access market power in Argentina.⁹³⁴ We find that Applicants have submitted sufficient information to demonstrate that, upon consummation of the proposed merger, each of Bell Atlantic's international carrier subsidiaries will warrant continued regulation as nondominant carriers on the U.S.-Argentina route. As we have previously found in our 1998 Biennial Regulatory Review of international common carrier regulations, foreign carriers that have only mobile wireless (and no wireline) facilities are unlikely to raise market power concerns.⁹³⁵ Moreover, there is no evidence in the record that suggests that CTI, as a new entrant in Argentina's international long distance market,

⁹³⁰ Applicants state that GTE Corporation owns 100 percent of GTE International Telecommunications Incorporated, which owns 100 percent of GTE Venezuela Incorporated, which owns 51 percent of VenWorld Telecom C.A., a consortium that owns 40 percent of CANTV, which provides domestic and international telecommunications services in Venezuela. See April 2000 Foreign Carrier Notification at 3.

⁹³¹ See *id.*

⁹³² See *id.* at 3-4.

⁹³³ See *id.* at 6.

⁹³⁴ See *id.* at 6.

⁹³⁵ See 1998 Biennial Regulatory Review -- Review of International Common Carrier Regulations, IB Docket No. 98-118, Report and Order, 14 FCC Rcd 4909, 4922, para. 29 (1999), recon. pending (1998 International Common Carrier Biennial Regulatory Review Order).

possesses market power.

418. *Canada.* Applicants request continued classification as nondominant on the U.S.-Canada route.⁹³⁶ Applicants note that the Commission previously has found GTE subsidiaries nondominant on this route.⁹³⁷ They note that Bell Atlantic's international carrier subsidiaries currently are authorized to operate on the U.S.-Canada route as nondominant carriers for the provision of resold and facilities-based services originating in New York and outside of the other in-region states served by Bell Atlantic's local operating telephone companies.⁹³⁸ Applicants also assert that, other than the interests in BCT.TELUS Communications, Inc., and Quebec-Telephone that Bell Atlantic will acquire in the merger, Bell Atlantic has no ownership interest in a foreign carrier in Canada, and Bell Atlantic's international carrier subsidiaries have no affiliation with any foreign carrier in Canada.⁹³⁹ According to Applicants, therefore, the merger will not result in any increase in the foreign affiliates' market power in Canada or give them any greater ability to affect competition in the U.S. market than they currently have.⁹⁴⁰ The International Bureau, in a 1996 order, classified a GTE subsidiary, GTE Hawaii, as nondominant on the U.S.-Canada route.⁹⁴¹ We find no basis in the record in this proceeding not to extend this nondominant treatment to the merged entity's international carrier subsidiaries. We conclude, therefore, that, upon consummation of the proposed merger, the merged entity's international carrier subsidiaries will be classified as nondominant on the U.S.-Canada route. As with any finding of nondominance on a particular route, this finding is without prejudice to future Commission action.

419. *Japan.* Applicants request continued classification as nondominant on the U.S.-Japan route.⁹⁴² According to Applicants, all of the international carrier subsidiaries are entitled to a presumption of nondominance under section 63.10(a)(3) of the Commission's rules because GTE's foreign affiliate in Japan, GTEFE, is a start-up company that currently operates as a reseller and lacks market power in Japan.⁹⁴³ As we have previously found in our 1998 Biennial Regulatory Review of international common carrier regulations, foreign carriers that have only resale facilities are unlikely to raise market power concerns.⁹⁴⁴ On this basis, we find that Applicants have provided sufficient information to demonstrate that GTEFE lacks market power in Japan and that the merged entity's international carrier subsidiaries warrant nondominant treatment on the U.S.-Japan route.

420. *Dominican Republic and Venezuela.* Applicants acknowledge that CODETEL, a

⁹³⁶ See April 2000 Foreign Carrier Notification at 6-7.

⁹³⁷ See *id.* at 6, citing *Petition of GTE Hawaiian Telephone Company, Inc., for Reclassification as a Nondominant IMTS Carrier*, Order, 11 FCC Rcd 20354 (1996) (*GTE Hawaii Order*).

⁹³⁸ See April 2000 Foreign Carrier Notification at 6.

⁹³⁹ See *id.* at 6-7.

⁹⁴⁰ See *id.* at 7.

⁹⁴¹ See *GTE Hawaii Order*, 11 FCC Rcd at 20383, para. 63.

⁹⁴² See April 2000 Foreign Carrier Notification at 7-8.

⁹⁴³ See *id.* at 3, 7-8. Applicants assert that GTEFE has a Special Type 2 license in Japan. See *id.* at 3.

⁹⁴⁴ See 1998 *International Common Carrier Biennial Regulatory Review Order*, 14 FCC at 4922, para. 29.

foreign carrier affiliate of GTE's in the Dominican Republic, and CANTV, a foreign carrier affiliate of GTE's in Venezuela, have been found to have market power in their respective countries.⁹⁴⁵ Applicants assert, however, that Bell Atlantic's international carrier subsidiaries are entitled to a continued presumption of nondominance on the U.S.-Dominican Republic and U.S.-Venezuela routes under section 63.10(a)(4) of the Commission's rules because they provide switched service solely through the resale of the international switched services of unaffiliated U.S. carriers.⁹⁴⁶ Applicants assert that the GTE carriers have accepted dominant regulation on the U.S.-Dominican Republic route for facilities-based service, because GTE's foreign affiliate, CODETEL, has been found to have market power in the Dominican Republic.⁹⁴⁷ Applicants assert that the GTE carriers have accepted dominant regulation on the U.S.-Venezuela route for facilities-based service because GTE's foreign affiliate, CANTV, has been found to have market power in Venezuela.⁹⁴⁸

421. In the *GTE Venezuela/Dominican Republic Order*, the International Bureau's Telecommunications Division determined that a GTE subsidiary, GTE Telecom, would be subject to the Commission's international dominant carrier regulations for the provision of facilities-based services and resold, non-interconnected private line services to the Dominican Republic and Venezuela.⁹⁴⁹ In so determining, the Telecommunications Division noted that GTE Telecom had limited its request for nondominant status to its resale of switched services.⁹⁵⁰ The Telecommunications Division noted, however, that the presumption of nondominance for switched resale in section 63.10(a)(4) of the Commission's rules does not apply where a resale carrier also provides switched services on the affiliated route as a facilities-based carrier.⁹⁵¹ The Telecommunications Division stated, therefore, that GTE Telecom would be subject to dominant carrier regulation in its provision of switched service to the Dominican Republic and Venezuela upon initiation of facilities-based services to each country.⁹⁵²

422. Bell Atlantic subsidiaries are authorized to provide multiple types of service (including, but not limited to, facilities-based, resale of private line, and resale of switched services of unaffiliated facilities-based U.S.-authorized carriers). Upon consummation of the merger with GTE, Bell Atlantic's

⁹⁴⁵ See April 2000 Foreign Carrier Notification at 7 (Dominican Republic), 8 (Venezuela).

⁹⁴⁶ See *id.* at 7 (Dominican Republic), 8 (Venezuela).

⁹⁴⁷ See *id.* at 7.

⁹⁴⁸ See *id.* at 8.

⁹⁴⁹ See *GTE Telecom Incorporated, Application for Authority Pursuant to Section 214 of the Communications Act to Provide International Switched Resale, Facilities-Based Switched, Private Line Voice and Data Services and Resold Non-interconnected Private Lines to Venezuela and the Dominican Republic*, ITC-95-443, ITC-96-313, ITC-96-314, *GTE MobilNet Incorporated, on Behalf of Itself and Certain of its Corporate Affiliates, Application for Authorization Pursuant to Section 214 of the Communications Act to Operate as an International Resale Carrier for International Switched Voice Services to the Dominican Republic and Venezuela*, ITC-95-561, Order, Authorization and Certificate, 13 FCC Rcd 4378, 4390-92, paras. 29-34 (1998) (*GTE Venezuela/Dominican Republic Order*).

⁹⁵⁰ *Id.* at 4390-91, para. 31.

⁹⁵¹ *Id.* at 4390-91, para. 31.

⁹⁵² *Id.* at 4391, para. 31.

international carrier subsidiaries will be treated the same as GTE's international carrier subsidiaries currently are treated with respect to service to the Dominican Republic and Venezuela. Therefore, upon consummation of the merger, Bell Atlantic's international carrier subsidiaries will be classified as dominant on the U.S.-Dominican Republic and U.S.-Venezuela routes. However, when they are only reselling the switched services of unaffiliated facilities-based U.S.-authorized carriers, Bell Atlantic subsidiaries, like GTE subsidiaries, will not be subject to the Commission's international dominant carrier safeguards on these routes.⁹⁵³ Because several of Bell Atlantic's authorizations that include service to the Dominican Republic and Venezuela are not limited to the resale of switched services, we must, as we are doing with respect to several of GTE's authorizations to serve Gibraltar, amend, effective upon consummation of the proposed merger, several of the authorizations of the Bell Atlantic international carrier subsidiaries or affiliates that include service to the Dominican Republic and Venezuela to make them dominant on those routes.⁹⁵⁴ These modifications of authorizations will require that subsidiaries or affiliates of the merged entity comply with appropriate dominant carrier safeguards if these carriers elect to provide services on the U.S.-Dominican Republic and U.S.-Venezuela routes other than by the resale of the switched services of an unaffiliated facilities-based U.S.-authorized carrier.

3. Cable Landing Licenses

423. As part of the merger application, Applicants request authority to transfer control of several submarine cable landing licenses held by GTE's international carrier subsidiaries.⁹⁵⁵

424. Prior to the *Foreign Participation Order*, the Commission had evaluated cable landing license applications filed by foreign carriers or their affiliates under the analysis set forth in its ECO test.⁹⁵⁶ In the *Foreign Participation Order*, the Commission concluded that it would no longer require

⁹⁵³ Upon consummation of the merger, however, Bell Atlantic's international carrier subsidiaries will be required to file quarterly reports of their switched resale traffic on these routes. *See* 47 C.F.R. § 43.61(c).

⁹⁵⁴ Specific amendments appear in the ordering clauses below.

⁹⁵⁵ GTE's international carrier subsidiaries are licensees on the following 16 submarine cable systems for which Applicants request authority to transfer control to Bell Atlantic: Japan-U.S. (GTE Hawaiian Tel International Incorporated), Guam-Philippines, MTC Interisland Cable System, TAT-8, HAW-4/TPC-3, G-P-T, PacificRimEast, HAW-5, TAT-10, TAINO CARIB, TPC-5, COLUMBUS II, AMERICAS-I, HTC Interisland, TAT-12/TAT-13, and ANTILLAS I. GTE Intelligent Network Services, Inc. also holds a license on the Japan-U.S. cable system. Applicants request authority to transfer control of this license to Genuity. GTE Intelligent Network Services, Incorporated also holds a license in the TAT-14 cable system, which Applicants request to transfer control to Genuity, as well as the license that GTE Telecom Incorporated holds in the Americas II Cable. As noted above, we do not address in this section the applications filed by GTE, pursuant to section 214 of the Communications Act and the Cable Landing License Act (in conjunction with the spinoff of GTE Internetworking into a separate corporation) requesting Commission approval to transfer control to Genuity of certain international section 214 authorizations and cable landing licenses currently held by various GTE subsidiaries. We address those applications above. *See supra* Section V.

⁹⁵⁶ *See, e.g., Telefonica Larga Distancia de Puerto Rico, Inc., Review of Nondiscrimination Safeguards Imposed, Application for Submarine Cable Landing License for the COLUMBUS II Cable System, Section 214 Application to Provide Service to Spain on the COLUMBUS II Cable System*, File Nos. I-T-C-92-116-AL, S-C-L-93-001, I-T-C-93-029, Memorandum Opinion and Order, 12 FCC Rcd 5173 (1997). The "effective competitive opportunities" analysis was developed and discussed in the *Foreign Carrier Entry Order*. *See Market Entry and Regulation of Foreign-Affiliated Entities*, RM-8355, RM-8392, IB Docket No. 95-22, Report and Order, 11 FCC Rcd 3873 (1995) (*Foreign Carrier Entry Order*).

applicants with market power in WTO members (or applicants affiliated with such carriers) to demonstrate that the foreign markets offer effective competitive opportunities to obtain section 214 authority to serve those countries, or a cable landing license to land or operate a cable in those countries.⁹⁵⁷ The Commission determined that it would analyze foreign affiliation in the context of an application for a cable landing license in the same manner it evaluated section 214 authorizations.⁹⁵⁸ To that end, the Commission concluded that, where the applicant is a foreign carrier, or affiliated with a foreign carrier, that has market power in a WTO member where the cable lands, the application is evaluated under a strong presumption that it should be granted.⁹⁵⁹

425. In the *Foreign Participation Order*, the Commission found that, because of the implementation of the WTO Basic Telecom Agreement, foreign carriers from WTO members would rarely be able to harm competition in the U.S. market by acting anticompetitively. The Commission further noted that, “[e]ven if a particular application presents unusual risks to competition, most potential problems can be addressed by imposing conditions on the license,”⁹⁶⁰ and discussed examples of the kinds of conditions the Commission has imposed on cable landing licenses. For example, the International Bureau has imposed recordkeeping requirements on a licensee where it was deemed necessary to address anticompetitive concerns specific to one proposed submarine cable system.⁹⁶¹ The Commission also stated that, when considering an application to land and operate a submarine cable that will connect to a non-WTO member, it would consider whether the applicant is, or is affiliated with, a carrier that has market power in a market where the cable lands, and if so, would consider whether that destination market offers effective competitive opportunities for U.S. companies to land or operate a submarine cable in that country.⁹⁶² The Commission stated that it would also continue to consider, in addition to the *de jure* and *de facto* ECO criteria, other factors consistent with the Commission's discretion under the Cable Landing License Act that may weigh in favor of or against grant of a license.⁹⁶³

426. In seeking authority to transfer control of a cable landing license, a carrier must comply with criteria similar to what is required of a carrier seeking section 214 authorization. Specifically, pursuant to sections 1.767 and 63.18 of the Commission's rules, the carrier must certify whether it is affiliated with a foreign carrier and provide information as to whether the foreign carrier has market power in a country where the cable lands. We find that the proposed merger will not result in Bell Atlantic's acquiring an affiliation with a foreign carrier (*i.e.*, a GTE foreign carrier) that has market power on the foreign end of a submarine cable for which Bell Atlantic holds a license. We also observe

⁹⁵⁷ *Foreign Participation Order*, 12 FCC Rcd at 23932-35, paras. 87-96.

⁹⁵⁸ *Id.*

⁹⁵⁹ *Id.*

⁹⁶⁰ *Id.* at 23934, para. 94.

⁹⁶¹ See *id.* at 23934, para. 95 & n.188, citing *General Communication, Inc., Application for a License to Land and Operate in the United States a Digital Submarine Cable System Extending Between the Pacific Northwest United States and Alaska*, File No. SCL-97-003, Cable Landing License, 12 FCC Rcd 18292 (I.B., T.D., 1997).

⁹⁶² See *Foreign Participation Order*, 12 FCC Rcd at 23946, para. 130.

⁹⁶³ See *id.*

that the proposed merger will not result in GTE's acquiring an affiliation with a foreign carrier (*i.e.*, a Bell Atlantic foreign carrier) that has market power on the foreign end of a submarine cable for which GTE holds a license. Accordingly, we conclude that the transfer of control of the submarine cable landing licenses from GTE to Bell Atlantic is consistent with our rules and with the Cable Landing License Act.⁹⁶⁴

XI. OTHER ISSUES

A. Service Quality Issues

427. A number of commenters raise concerns regarding potential service quality problems resulting from the merger.⁹⁶⁵ These parties generally argue that service quality data and anecdotal evidence regarding Bell Atlantic's and GTE's performance demonstrate that mergers among large incumbent LECs adversely affect the public interest by hampering the delivery of service to consumers. The Applicants respond by asserting that these allegations are beyond the scope of this proceeding and submitting facts in an attempt to rebut commenters' claims.⁹⁶⁶

428. We reject claims that we should prohibit these license transfers because of speculation that service quality in the merged company's service areas will deteriorate as a result of the merger. We conclude that the commitments proffered by Bell Atlantic and GTE in supplementing their application sufficiently mitigate the service quality concerns raised in the record. These voluntary commitments include several measures designed to prevent potential service quality degradation after the merger.⁹⁶⁷ Moreover, we anticipate that the quarterly reporting requirements contained in the merger conditions will provide the Commission, state public service commissions, and the public with key service quality data in a timely manner. We expect that these conditions will assist the states in promoting a high quality telecommunications service by and assist this Commission in detecting any potential post-merger degradation in service quality.

B. Character Issues

429. Among the factors that the Commission considers in its public interest inquiry is whether the applicant for a license has the requisite "citizenship, character, financial, technical, and other qualifications."⁹⁶⁸ The Commission has previously determined that, in deciding character issues, it will consider certain forms of adjudicated, non-FCC related misconduct that includes: (1) felony convictions; (2) fraudulent misrepresentations to governmental units; and (3) violations of antitrust or

⁹⁶⁴ Pursuant to the Cable Landing License Act, the Department of State, after coordinating with the National Telecommunications and Information Administration and the Department of Defense, approved the transfers of control. *See* Letter from Geoffrey Chapman, United States Coordinator, Acting International Communications and Information Policy, United States Department of State, to Donald Abelson, Chief, International Bureau, Federal Communications Commission (filed May 23, 2000).

⁹⁶⁵ *See, e.g.*, New Jersey Coalition Nov. 23, 1998 Comments at 3; PUCT Nov. 23, 1998 Comments at 3-4.

⁹⁶⁶ Bell Atlantic/GTE Dec. 23, 1998 Joint Reply, Attach. K at 17-21.

⁹⁶⁷ *See supra* Section VIII.

⁹⁶⁸ *See SBC/Ameritech Order*, 14 FCC Rcd at 14948, para. 568; *SBC/SNET Order* 13 FCC Rcd at 21305, para 26.

other laws protecting competition.⁹⁶⁹ With respect to FCC-related conduct, the Commission has stated that it would treat any violation of any provision of the Act, or of the Commission's rules or policies, as predictive of an applicant's future truthfulness and reliability and, thus, as having a bearing on an applicant's character qualifications.⁹⁷⁰ In prior incumbent LEC merger orders, the Commission has used the Commission's character policy in the broadcast area as guidance in resolving similar questions in license transfer proceedings.⁹⁷¹

430. A number of commenters maintain that Bell Atlantic has a history of resisting competition in its existing monopoly markets. Commenters argue, for instance, that Bell Atlantic does not offer services throughout its region that would block directory assistance calls and toll calls on resold lines,⁹⁷² does not compensate competitive carriers for the termination of traffic bound for Internet service providers,⁹⁷³ fails to provide nondiscriminatory access to OSS,⁹⁷⁴ and fails to provide xDSL services to customers that choose to subscribe to another carrier's local voice service.⁹⁷⁵ Additionally, AT&T argues that Bell Atlantic has failed to comply with the conditions imposed by the Commission on the Bell Atlantic/NYNEX merger.⁹⁷⁶

431. Similarly, the record in this proceeding contains allegations by commenters that GTE has been extremely slow to implement the local competition provisions of the 1996 Act and has delayed competitive entry into its service areas.⁹⁷⁷ For example, many competitive LECs maintain that GTE does not provide collocation as provided in the Act and the Commission's rules.⁹⁷⁸ In addition, commenters' make claims relating to the availability of unbundled network elements,⁹⁷⁹ OSS issues,⁹⁸⁰

⁹⁶⁹ See *Bell Atlantic/NYNEX Order* 12 FCC Rcd at 20092-93, para. 236.

⁹⁷⁰ *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1209-10 at para. 57 (1986) (*Character Qualifications*), modified, 5 FCC Rcd. 3252 (1990) (*Character Qualifications Modification*), recon. granted in part, 6 FCC Rcd 3448 (1991), modified in part, 7 FCC Rcd 6564, (1992) (*Further Character Qualification Modification*); *MCI Telecommunications Corp.*, 3 FCC Rcd 509 (1998) (stating that character qualifications standards adopted in the broadcast context can provide guidance in the common carrier context). The Commission has also determined that allegations that an applicant has engaged in unreasonable or anticompetitive conduct is relevant to the Commission public interest analysis. *SBC/SNET Order* 13 FCC Rcd at 21306-07, paras. 28-30.

⁹⁷¹ See *SBC/Ameritech Order*, 14 FCC Rcd at 14948, para. 568; *SBC/SNET Order* 13 FCC Rcd at 21305, para. 26; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20092-93, para 236.

⁹⁷² National ALEC Nov. 23, 1998 Comments at 8-9.

⁹⁷³ Focal Nov. 23, 1998 Comments at 2-4.

⁹⁷⁴ CoreComm Nov. 23, 1998 Comments at 48-49; MCI WorldCom Nov. 23, 1998 Comments at 2.

⁹⁷⁵ MCI WorldCom Nov. 23, 1998 Comments at 5, n.7; CompTel Nov. 23, 1998 Comments at 3-4 & App. B.

⁹⁷⁶ AT&T Nov. 23, 1998 Comments at 25-26.

⁹⁷⁷ See RCN Nov. 23, 1998 Comments at 1-2; AT&T Nov. 23, 1998 Comments at 15; Allegiance Nov. 23, 1998 Comments at 5-6; MCI WorldCom Nov. 23, 1998 Comments at 2.

⁹⁷⁸ See Bluestar, et al. Mar. 1, 2000 Comments at 18; MCI WorldCom Nov. 23, 1998 Comments at 2; Covad Nov. 23, 1998 Comments at 4; CoreComm Nov. 23, 1998 Comments at 41.

⁹⁷⁹ Bluestar, et al. Mar. 1, 2000 Comments at 17.

delivery of unbundled loops,⁹⁸¹ implementation of line sharing,⁹⁸² resale, interconnection,⁹⁸³ reciprocal compensation,⁹⁸⁴ number portability,⁹⁸⁵ advanced services,⁹⁸⁶ universal service,⁹⁸⁷ and billing.⁹⁸⁸ Additionally, SCC Communications claims that both Bell Atlantic and GTE currently violate their statutory obligations under Section 222(g), which requires incumbent LECs to provide subscriber list information to providers of emergency services and emergency support services.⁹⁸⁹

432. We conclude that none of the foregoing allegations provides a basis for finding that Applicants lack the fitness to acquire licenses and authorizations currently held by GTE. The Applicants respond to each of these allegations by citing facts rebutting commenters' claims or by arguing that many of the allegations concern matters that are currently being addressed by this Commission or a state regulatory agency in other proceedings. Allegations concerning, for instance, certain obligations with respect to advanced services, collocation, and the Bell Atlantic/NYNEX conditions relate to matters addressed in separate Commission proceedings.⁹⁹⁰ In this regard, the Commission has previously stated that typically it will not consider in merger proceedings "matters that are the subject of other proceedings before the Commission because the public interest would be better served by addressing the matter in the broader proceeding of general applicability."⁹⁹¹ Alternatively, some of these allegations are best addressed in enforcement proceedings brought by aggrieved parties under section 208 of the Act. Accordingly, we do not consider such issues in determining whether the proposed transfers are in the public interest.

433. Thus, we decline to consider these allegations as part of our analysis of Bell Atlantic's fitness to acquire licenses and authorizations currently held by GTE. In reaching this conclusion, we emphasize that we are in no way condoning actions by an incumbent LEC that have the potential to impede the 1996 Act's goal of facilitating competition in all telecommunications markets. Indeed, as

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⁹⁸⁰ Covad Nov. 23, 1998 Comments at 13; Bluestar, et al. Mar. 1, 2000 Comments at 17-18.

⁹⁸¹ Allegiance Nov. 23, 1998 Comments at 5.

⁹⁸² Covad Nov. 23, 1998 Comments at 4.

⁹⁸³ See IURC Nov. 23, 1998 Comments at 6-9.

⁹⁸⁴ See Cox Nov. 23, 1998 Comments at 1-3; Focal Nov. 23, 1998 Comments at 2-3.

⁹⁸⁵ See Comments of Peggy Arvanitas at 1-2.

⁹⁸⁶ See NorthPoint Nov. 23, 1998 Comments at 9-10; MCI WorldCom Nov. 23, 1998 Comments at 2; IURC Nov. 23, 1998 Comments at 13-14.

⁹⁸⁷ See IURC Nov. 23, 1998 Comments at 6-7.

⁹⁸⁸ National ALEC Nov. 23, 1998 Comments at 15.

⁹⁸⁹ Letter from James L. Casserly, Mintz Levin Cohn Ferris Glovsky and Popeo PC, Counsel for SCC Communications Corp., to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141 (filed Apr. 14, 2000) (SCC Apr. 14, 2000 *Ex Parte* Letter) at Attachment.

⁹⁹⁰ See Bell Atlantic/GTE Mar. 16, 2000 Joint Reply, Ex. D 8 at & Ex. E at 4-5; Bell Atlantic/GTE Dec. 23, 1998 Joint Reply, Ex. J at 1-4.

⁹⁹¹ *SBC/SNET Order*, 13 FCC Rcd at 21306, para. 29. See also *SBC/Ameritech Order*, 14 FCC Rcd at 14950, para. 571.

noted above, without the Applicants' voluntary commitments aimed at opening its local markets to competition, the public interest benefits of the proposed merger would not outweigh the significant public interest harms. We believe that the Applicants' commitments on issues such as collocation, OSS enhancements, shared transport, and offering of UNEs, and performance measurements should facilitate the development of competition in the combined Bell Atlantic/GTE region.⁹⁹²

C. Requests for Evidentiary Hearing

434. We deny commenters' requests that the Commission designate the proposed merger, or specific issues raised by the merger, for a trial-type evidentiary hearing before an administrative law judge to determine whether approval of the transfer of control request resulting from the proposed merger would serve the public interest.⁹⁹³ Under the Communications Act, the Commission is required to hold an evidentiary hearing on transfer of control applications in certain circumstances.⁹⁹⁴ Parties challenging an application to transfer control by means of a petition to deny under section 309(d) must satisfy a two-step test.⁹⁹⁵ First, the petition to deny must set forth 'specific allegations of fact sufficient to show that . . . a grant of the application would be prima facie inconsistent with [the public interest];'.⁹⁹⁶ Second, the petition must present a 'substantial and material question of fact.'⁹⁹⁷ If the Commission concludes that the protesting party has met both prongs of the test, or if it cannot, for any reason, find that grant of the application would be consistent with the public interest, the Commission must formally designate the application for a hearing in accordance with section 309(e).⁹⁹⁸

435. To satisfy the first prong of the test, a petitioning party must set forth allegations, supported by affidavit, that constitute "specific evidentiary facts, not ultimate conclusionary facts or mere general allegations . . .".⁹⁹⁹ The Commission determines whether a petitioner has met this threshold inquiry in a manner similar to a trial judge's consideration of a motion for directed verdict: "if all the supporting facts alleged in the affidavits were true, could a reasonable fact finder conclude that the ultimate fact in dispute had been established."¹⁰⁰⁰ If the Commission determines that a petitioner has satisfied the threshold standard of alleging a *prima facie* inconsistency with the public interest, it must then proceed to the second phase of the inquiry and determine whether, "on the basis of the application,

⁹⁹² See *SBC/Ameritech Order*, 14 FCC Rcd at 14950, para. 571.

⁹⁹³ See CTC Nov. 23, 1998 Comments at iii, 33; CoreComm Nov. 23, 1998 Comments at 25; RCN Feb. 26, 1999 Petition for Evidentiary Hearing at 5.

⁹⁹⁴ See 47 U.S.C. § 309. See also *SBC/Ameritech Order*, 14 FCC Rcd at 14951, para. 575.

⁹⁹⁵ 47 U.S.C. § 309(d).

⁹⁹⁶ 47 U.S.C. § 309(d)(1); *Gencom Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987); see *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1562 (D.C. Cir. 1988).

⁹⁹⁷ 47 U.S.C. § 309(d)(2); *Gencom*, 832 F.2d at 181; see *Astroline*, 857 F.2d at 1562.

⁹⁹⁸ 47 U.S.C. § 309(e). See also *WorldCom/MCI Order*, 13 FCC Rcd at 18139-40, para. 202.

⁹⁹⁹ *United States v. FCC*, 652 F.2d 72, 89 (D.C. Cir. 1980) (en banc) (quoting *Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320, 323-24 (D.C. Cir. 1974)).

¹⁰⁰⁰ *Gencom*, 832 F.2d at 181.

the pleadings filed, or other matters which [the Commission] may officially notice,” the petitioner has presented a “substantial and material question of fact.”¹⁰⁰¹ If the Commission concludes that the “totality of the evidence arouses a sufficient doubt” as to whether grant of the application would serve the public interest, the Commission must designate the application for hearing pursuant to section 309(e).¹⁰⁰²

436. In evaluating whether a petitioner has satisfied the two-part test established in section 309(d),¹⁰⁰³ the D.C. Circuit has indicated that where petitioners assert only “legal and economic conclusions concerning market structure, competitive effect, and the public interest,” such assertions “manifestly do not” require a live hearing.¹⁰⁰⁴ Moreover, in deferring to the Commission’s determination not to hold an evidentiary hearing in *United States v. FCC*, the Court stated that “to allow others to force the Commission to conduct further evidentiary inquiry would be to arm interested parties with a potent instrument for delay.”¹⁰⁰⁵ In that case, the D.C. Circuit deferred to the Commission’s conclusion that the potential benefits of such a hearing would be outweighed by the delay and its attendant costs.¹⁰⁰⁶

437. As an initial matter, we note that some parties seeking an evidentiary hearing in this merger proceeding did not satisfy the procedural requirements of section 309(d)(1).¹⁰⁰⁷ First, several commenters included their requests for evidentiary hearings in general comments regarding the Application, not in a petition to deny, as section 309(d)(1) requires.¹⁰⁰⁸ Additionally, in many instances commenters failed to support any of their allegations with affidavits. Finally, and most importantly, the issues raised by commenters do not reflect disputes over material facts, but rather focus on issues concerning the competitive impact of the merger and the public interest. These types of issues “manifestly do not” require a live hearing.¹⁰⁰⁹

438. We conclude that none of the requests for evidentiary hearing has raised a substantial

¹⁰⁰¹ 47 U.S.C. § 309(d)(2). See also *Gencom*, 832 F.2d at 181; *SBC/Ameritech Order*, 14 FCC Rcd at 14951, para. 577.

¹⁰⁰² *Serafyn v. FCC*, No. 95-1385, 149 F.3d 1213, 1216 (D.C. Cir. 1998) (quoting *Citizens for Jazz on WRVR Inc. v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985)). A court may disturb the Commission’s decision to deny an evidentiary hearing only if, upon examination of the Commission’s statement of reasons for denial, the court determines the Commission’s decision to be arbitrary and capricious. *Astroline*, 857 F.2d at 1562.

¹⁰⁰³ 47 U.S.C. § 309(d).

¹⁰⁰⁴ *SBC Communications, Inc. v. FCC*, 56 F.3d at 1496-97 (D.C. Cir. 1995) (quoting *United States v. FCC*, 652 F.2d at 89-90) (affirming the Commission’s decision in the *AT&T/McCaw Order* not to hold a full evidentiary hearing before approving the merger). See *AT&T/McCaw Order*, 9 FCC Rcd 5836 at 5927-28, paras. 172-74.

¹⁰⁰⁵ *United States v. FCC*, 652 F.2d at 88-99.

¹⁰⁰⁶ The court deferred to the Commission’s judgment not to hold a hearing when the Commission had “on two different occasions, invited interested parties to submit whatever written material they wanted the Commission to consider, and on one occasion heard oral argument en banc on the antitrust issues of the SBS venture.” The court further noted that, “all of the business parties to this case, and others, participated in the argument, and submitted materials were voluminous.” *Id.* 652 F.2d at 92. Similarly, in this proceeding we note the voluminous record before us, including the numerous comments and ex parte filings we have received and the public forums we have conducted.

¹⁰⁰⁷ See 47 U.S.C. § 309(d)(1).

¹⁰⁰⁸ See *id.*

¹⁰⁰⁹ See *SBC Communications*, 56 F.3d at 1496-97.

and material question of fact that would require an evidentiary hearing.¹⁰¹⁰ The parties dispute the overall competitive impact of the merger and the ultimate public interest determination which, according to the D.C. Circuit, are claims that “manifestly do not” require a hearing.¹⁰¹¹ Accordingly, we find that no party has satisfied the two-step test set forth in section 309(d),¹⁰¹² either procedurally or substantively. We disagree with RCN, for instance, that there is a material issue of fact as to whether Bell Atlantic is implementing policies and positions that do not comply with section 251 of the Act. As discussed above, we conclude that such allegations should be properly raised before in an enforcement proceeding and are not a basis for denying the Applicants’ proposed transfers. In addition, the voluminous record before us in this proceeding, including the numerous comments and *ex parte* filings we have received and the public forums we have conducted, has provided sufficient evidence to conclude no substantial and material question of fact has been raised and that grant of the Applicants’ applications, as supplemented with the conditions imposed in this Order, serves the public interest, convenience and necessity.¹⁰¹³

XII. ORDERING CLAUSES

439. Accordingly, having reviewed the applications and the record in this matter, IT IS ORDERED, pursuant to Sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), and the Cable Landing License Act, 47 U.S.C. §§ 34-39, that the applications filed by GTE Corporation and Bell Atlantic Corporation in the above-captioned proceeding ARE GRANTED subject to the conditions stated below.

440. IT IS FURTHER ORDERED pursuant to Sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), and the Cable Landing License Act, 47 U.S.C. §§ 34-39, that the above grant shall include authority for Bell Atlantic to acquire control of:

- a) any authorization issued to GTE’s subsidiaries and affiliates during the Commission’s consideration of the transfer of control applications and the period required for consummation of the transaction following approval;
- b) construction permits held by licensees involved in this transfer that mature into licenses after closing and that may have been omitted from the transfer of control applications; and
- c) applications that will have been filed by such licensees and that are pending at the time of consummation of the proposed transfer of control.

441. IT IS FURTHER ORDERED that Bell Atlantic/GTE must complete the Genuity initial public offering (IPO) as described herein prior to the transfer of licenses and lines. Bell Atlantic/GTE

¹⁰¹⁰ See 47 U.S.C. § 309(d). See also *SBC/Ameritech Order*, 14 FCC Rcd at 14952, para. 580.

¹⁰¹¹ See *SBC Communications*, 56 F.3d at 1496. See also *SBC/Ameritech Order*, 14 FCC Rcd at 14953, para. 580.

¹⁰¹² 47 U.S.C. § 309(d).

¹⁰¹³ *SBC/Ameritech Order*, 14 FCC Rcd at 14953, para. 580; *WorldCom/MCI Order*, 13 FCC Rcd at 18141, para. 205.

shall make certification to the Commission that such IPO was completed prior to merger closing.

442. IT IS FURTHER ORDERED that the Applicants must cease providing the interLATA services described in the Letter from Alan F. Ciamporcero, Vice President, Regulatory Affairs, GTE Service Corporation, to Magalie R. Salas, Secretary, Federal Communications Commission, CC Docket No. 98-184 (filed Apr. 17, 2000), attached hereto as Appendix E, and the private-line resale services of GTE Telecom, described in the Letter from Alan F. Ciamporcero, Vice President, Regulatory Affairs, GTE Service Corporation, to Magalie R. Salas, Secretary, Federal Communications Commission, CC Docket No. 98-184 (filed Apr. 28, 2000), attached hereto as Appendix F, within Bell Atlantic's in-region states other than New York and shall certify to the Commission that such cessation of service was completed prior to merger closing.

443. IT IS FURTHER ORDERED that as a condition of this grant Bell Atlantic and GTE shall comply with the conditions set forth in Appendices B and D of this Order.

444. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 309, 310(d), the Petition to Condition Grant filed by the Commonwealth of Northern Mariana Islands on November 23, 1998, IS DENIED.

445. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 309, 310(d), the Comments of United States Cellular Corporation and Notice of Intention to Participate filed on November 23, 1998, with respect to a waiver of CMRS Spectrum Cap Rule, IS DENIED.

446. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 309, 310(d), the applications of Bell Atlantic and GTE to transfer control of wireless licenses referenced herein and related thereto ARE GRANTED, subject to the condition that the parties comply with 47 C.F.R. § 22.942.

447. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 309, 310(d), the applications of Bell Atlantic and GTE to transfer control of wireless licenses referenced herein and related thereto ARE GRANTED, subject to the condition that the parties come into compliance with 47 C.F.R. § 20.6 either within 60 days after merger closing, or within 180 days following release of this Order, whichever date is earlier.

448. IT IS FURTHER ORDERED that, as part of our approval of the merger, we approve the transfer of control to Bell Atlantic of all international section 214 authorizations (including pending applications) and all cable landing licenses (including pending applications), except those that will be transferred to Genuity as specified below, and subject to the modifications described below, which currently are held by the following international carrier subsidiaries of GTE: GTE Communications Corporation, GTE Hawaiian Tel International Incorporated, GTE Pacifica Incorporated, GTE Wireless Incorporated, GTE Airfone Incorporated, GTE Railfone Incorporated, Codetel International Communications Incorporated, GTE Telecommunication Services Incorporated, TELUS Communications (B.C.) Inc., and Celulares Telefónica.

449. IT IS FURTHER ORDERED that all the international section 214 authorizations of the GTE international carrier subsidiaries that will be transferred to Bell Atlantic as part of GTE's merger with Bell Atlantic are hereby modified, merger closing, to exclude the provision of international service originating in Bell Atlantic's in-region states other than New York.

450. IT IS FURTHER ORDERED that the following international section 214 authorizations granted to subsidiaries of GTE are amended to apply dominant carrier regulation, as specified in section 63.10 of the rules, to their provision of the authorized services on the U.S.-Gibraltar route effective upon consummation of GTE's merger with Bell Atlantic: GTE Communications Corporation, File No. ITC-214-19991104-00684; Codetel International Communications Incorporated, File No. ITC-214-19990303-00103; Celulares Telefónica, Inc., File No. ITC-T/C-19980902-00605; GTE Hawaiian Tel International Incorporated, File Nos. ITC-96-645 and ITC-97-078; GTE Pacifica Incorporated, File No. ITC-97-779-AL; and TELUS Communications (B.C.), Inc., File No. ITC-T/C-19990114-00023.

451. IT IS FURTHER ORDERED that the following international section 214 authorizations granted to subsidiaries and affiliates of Bell Atlantic are amended to apply dominant carrier regulation, as specified in section 63.10 of the rules, to their provision of the authorized services on the U.S.-Dominican Republic and U.S.-Venezuela routes effective upon consummation of GTE's merger with Bell Atlantic: Cellco Partnership, File Nos. ITC-96-246 and ITC-96-579; NYNEX Long Distance Company, File Nos. ITC-96-520, ITC-214-19971223-99813 (old File No. ITC-98-002), and ITC-214-19971223-99811 (old File No. ITC-98-003); and Bell Atlantic Communications, Inc., File Nos. ITC-96-451, ITC-214-19971223-99813 (old File No. ITC-98-002), and ITC-214-19971223-99811 (old File No. ITC-98-003).

452. IT IS FURTHER ORDERED that, as part of our approval of the merger, we approve the transfer of control to Genuity of the following international section 214 authorizations and cable landing licenses held by various GTE international operating subsidiaries, subject to the modifications described below: (1) File No. ITC-214-19990708-00391 (global facilities-based and resale authorization held by GTE Telecom Incorporated); (2) File No. SCL-98-003/SCL-98-003A (submarine cable landing license for AMERICAS-II Cable to be held by GTE Telecom Incorporated after a pro forma assignment from GTE Communications Corp.); (3) File No. SCL-LIC-19990303-00004 (submarine cable landing license for TAT-14 Cable from GTE Intelligent Network Services); (4) File No. SCL-LIC-19981117-00025 (submarine cable landing license for Japan-U.S. Cable from GTE Intelligent Network Services); and (5) ITC-98-342/ ITC-98-342A (international section 214 authorization, associated with the AMERICAS-II Cable landing license, to be held by GTE Telecom Incorporated after a pro forma assignment from GTE Communications Corp.).

453. IT IS FURTHER ORDERED that the international section 214 authorizations for which we here approve a transfer of control to Genuity, File Nos. ITC-214-19990708-00391 and ITC-98-342/ ITC-98-342A, are modified, effective upon completion of the transfer to Genuity, to classify GTE Telecom Incorporated as a nondominant international carrier on the U.S.-Dominican Republic and U.S.-Venezuela routes.

454. IT IS FURTHER ORDERED that pursuant to section 212 of the Communications Act, all of Bell Atlantic's and GTE's post-merger carrier subsidiaries will be "commonly owned carriers" as that term is defined in the Commission's rules.

455. IT IS FURTHER ORDERED that all motions to accept late-filed comments filed in CC Docket No. 98-184 ARE GRANTED.

456. IT IS FURTHER ORDERED that all petitions to deny the applications of Bell Atlantic and GTE for transfer of control and all requests to hold an evidentiary hearing ARE DENIED for the reasons stated herein.

457. IT IS FURTHER ORDERED that pursuant to section 1.103 of the Commission's rules, 47 C.F.R. § 1.103, this Memorandum Opinion and Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

Appendix A

List of Commenters

APPENDIX A: LIST OF COMMENTERS, CC DOCKET NO. 98-184**BELL ATLANTIC/GTE OCTOBER 2, 1998 APPLICATION FOR
TRANSFER OF CONTROL****Petitions/Comments (filed November 23, 1998):**

1. AT&T
2. Alliance for Public Technology (APT)
3. Bear Stearns & Co., Inc.
4. CTC Communications Corp. (CTC)
5. Cablevision LightPath, Inc. (Cablevision)
6. Communications Workers of America (CWA)
7. Competitive Enterprise Institute (CPI)
8. Consumers Union and the Consumer Federation of America
9. CoreComm Ltd. (CoreComm)
10. EMC Corp.(EMC)
11. Focal Communications Corporation (FOCAL)
12. Freedom ring Communications, LLC d/b/a BayRing Communications (BayRing)
13. GST Telecom Inc. (GST)
14. Hyperion Telecommunications, Inc. (Hyperion)
15. Indiana Utility Regulatory Commission (IURC)
16. Keep America Connected
17. KMC Telecom (KMC)
18. Level 3
19. MCI WorldCom, Inc. (MCI WorldCom)
20. National Consumers League
21. Pactec Communications (Pactec)
22. Pilgrim Telephone (Pilgrim)
23. Public Utility Commission of Texas (PUC of Texas)
24. RCN Telecom Services, Inc. (RCN)
25. Rainbow/Push Coalition
26. Sprint
27. Supra Telecommunications & Information Systems (Supra)
28. Telecommunications Resellers Association (TRA)
29. The Commonwealth of Northern Mariana Islands
30. The Consumer Groups
31. Tricom USA (Tricom)
32. Triton, PCS, Inc. (Triton)
33. United States Cellular Corporation
34. WorldPath Internet Services (WorldPath)
35. XChange, L.L.C. (XChange)

Oppositions/Reply Comments (filed December 23, 1998):

1. Bell Atlantic Corporation and GTE Corporation (Bell Atlantic/GTE)
2. Campaign for Telecommunications Access
3. Commonwealth of the Northern Mariana Islands
4. Competition Policy Institute (CPI)
5. Consumer Groups
6. CTC Communications, Corp (CTC)
7. Hyperion Telecommunications, Inc. (Hyperion)
8. Keep America Connected, et, al.
9. MCI WorldCom, Inc. (MCI WorldCom)
10. National Hispanic Council on Aging, et, al.
11. Progress & Freedom Foundation
12. Public Utilities Commission of Ohio (PUC of Ohio)
13. RCN Telecom Services, Inc (RCN)
14. Tricom USA, Inc. (Tricom)

**BELL ATLANTIC/GTE
January 27, 2000 SUPPLEMENTAL FILING**

Petitions/Comments on Internet Backbone Proposal (filed February 15, 2000):

1. Arvanitas, Peggy
2. Association For Local Telecommunications Services (ALTS)
3. AT&T
4. Communications Workers of America (CWA)
5. Competitive Telecommunications Associations (Comptel)
6. Covad Communications Company (Covad)
7. Lowenhaupt, Thomas, Vice Chair, Community Board 3Q
8. NEXTLINK Communications, Inc. (NEXTLINK)
9. Progress & Freedom Foundation
10. Telecommunications Resellers Association (TRA)

**Oppositions/Reply Comments on Internet Backbone Proposal
(filed February 22, 2000):**

1. Bell Atlantic/GTE
2. Cable & Wireless
3. Competition Policy Institute (CPI)
4. Pimmitt Run Research, Inc.

Petitions/Comments on All Other Issues (filed March 1, 2000):

1. Advanced Telecom Group, Inc. (Advanced Telecom)
2. Allegiance Telecom, Inc. (Allegiance)
3. Alliance for Public Technology (APT)
4. American Telemedicine Association
5. AT&T Corp.
6. BlueStar Communications, Inc, DSL.net Inc., KMC Telecom, Inc., and MGC Communications, Inc. (BlueStar et al.)
7. Commonwealth of Northern Mariana Islands
8. Communications Careers for Latinos
9. Communications Workers of America (CWA)
10. Competitive Telecommunications Association (CompTel)
11. CoreComm, Inc. (CoreComm)
12. Covad Communications Company (COVAD)
13. Focal Communications (FOCAL)
14. Indiana Utility Regulatory Commission (IURC)
15. Labor Council For Latino American Advancement (LCLAA)
16. MCI WorldCom
17. National ALEC Association/Prepaid Communications Association (National ALEC)
18. National Puerto Rican Coalition, The Cuban American National Council, MANA, The American G.I. Forum, The Hispanic Association of Colleges and Universities, ASPIRA Association, The League of United Latin American Citizens, and The National Association of Hispanic Publications (National Puerto Rican Coalition et al.)
19. NorthPoint Communications, Inc. (NorthPoint)
20. Office of Consumer Advocate, Pennsylvania
21. RCN Telecom Services (RCN)
22. Texas Office of Public Utility Counsel (Texas OPC)
23. United States Hispanic Chamber of Commerce
24. World Institute on Disability
25. Z-Tel Communications (Z-Tel)

Oppositions/Reply Comments on All Other Issues (filed March 16, 2000):

1. Bell Atlantic/GTE
2. NEXTLINK Communications, Inc. (NEXTLINK)
3. Telecommunications Advocacy Project (TAP)

Comments on Applicant's Further Submissions (filed May 5, 2000):

1. Allegiance Telecom, Inc., Bluestar Communications, Inc., CoreComm, Inc., DSLNET, Inc., MGC Communications, Inc., d/b/a MPower Communications Corporation
2. Association For Local Telephone Services (ALTS)
3. AT&T
4. Cavalier Telephone, LLC. (Cavalier)
5. Competition Policy Institute (CPI)
6. COVAD Communications Company (COVAD)
7. Fred Goldstein

8. Information Technology Association of America (ITAA)
9. NorthPoint Communications (NorthPoint)
10. SCC Communications Corp. (SCC)
11. WorldCom

Reply Comments on Applicant's Further Submissions (filed May 9, 2000):

1. Alexis Rosen
2. BA/GTE (correction, filed May 10, 2000)

Appendix B

Genuity Conditions

APPENDIX B**CONDITIONS FOR ESTABLISHMENT OF GENUITY AS A SEPARATE CORPORATION**

458. Bell Atlantic and GTE must implement the spin-off of Genuity to a separate public corporation in accordance with the following structure:

XIII. IPO OF GENUITY

459. Genuity's existing nationwide data business will be established as a separate corporation that will be publicly owned and controlled. Before merging with Bell Atlantic, GTE will exchange its common stock of Genuity for shares of a new class of common stock, the Class B common stock, and Genuity will sell 90.5% of its equity to public shareholders through an initial public offering ("IPO"). Following these transactions, the Class B stock will carry 9.5% of the voting rights and the right to receive 9.5% of any dividends or other distributions in Genuity, subject to the conversion rights and investor safeguards described below, and Genuity's Class A common stock, initially representing 90.5% of the equity in the company, will be owned by the public. The merger of Bell Atlantic and GTE (creating "NewCo") will not close until the IPO is completed.

XIV. CONVERSION RIGHTS

460. The extent of NewCo's rights to convert its Class B stock into a greater equity interest is as described below. NewCo will have five years from the closing of the merger (subject to any extension specifically contained herein or granted by the Commission at its discretion as specified in Section 2.D below) to satisfy the conditions associated with its conversion rights and to exercise those conversion rights.

A. No Conversion Right Above 10% Equity Interest If Threshold Not Met

461. Unless and until NewCo eliminates, as to at least 50% of Bell Atlantic in-region lines,¹⁰¹⁴ section 271 restrictions applicable to its operation of Genuity's business, NewCo will only have the right to convert its Class B stock into Class A stock representing a 10% equity interest in Genuity. Accordingly, if NewCo fails to meet the 50% threshold within the conversion period, NewCo will never have any right to convert its stock into more than a 10% interest, and the public shareholders' ownership of at least 90% of the company will be permanent. Likewise, if NewCo transfers its Class B shares to a third party before reaching the

¹⁰¹⁴ "Bell Atlantic in-region lines" shall equal the sum of the number of lines for each of the Bell Atlantic in-region states, and the number of lines for each Bell Atlantic state shall be the number of total billable access lines for the Bell Atlantic operating company in that state in Bell Atlantic's 1999 ARMIS reports (and reported in the FCC's 1999 ARMIS Report 43-04), except that because the entry for Bell Atlantic-New York Telephone includes Bell Atlantic lines in both New York and Connecticut, the number of lines for Connecticut shall be 54,087 and the number for New York shall be 11,088,712.

50% section 271 threshold, that third party will never be able to convert those shares into more than a 10% interest in Genuity.

B. Conversion Right Above 10% Equity Interest Once Threshold Is Met

462. Once NewCo has met the 50% section 271 threshold, its Class B shares become capable of converting into stock that will represent approximately 80% of the outstanding shares of Genuity following conversion, assuming no additional Class A shares are issued before conversion. Even after meeting this threshold, however, NewCo itself cannot exercise its conversion rights so as to own and control Genuity unless and until NewCo has eliminated all section 271 restrictions applicable to NewCo's operation of Genuity's business.

463. Once NewCo has eliminated such restrictions as to 95% of Bell Atlantic in-region lines, NewCo may require Genuity to reconfigure its operations in one or more Bell Atlantic in-region states where NewCo has not eliminated such restrictions in order to bring those operations into compliance with section 271 and allow NewCo to exercise its option and own and operate Genuity, *provided that* (i) NewCo gives the Commission at least 90 days advance notice of its intent to exercise its option and submits to the Chief of the Common Carrier Bureau a plan for the reconfiguration of Genuity's operations in the relevant state or states, (ii) the reconfiguration of Genuity's operations does not result in the loss to Genuity of more than 3% of its annual revenue, and (iii) NewCo reimburses Genuity for the cost of such reconfiguration (as provided for in an agreement between NewCo and Genuity).

464. NewCo's post-conversion interest will be lower than 80% if Genuity, as is anticipated, issues additional shares of Class A stock before NewCo exercises its conversion rights. Upon exercise of its conversion rights, NewCo's Class B shares shall be converted into the appropriate number of Class C shares. Each share of Class C stock will be identical to a share of Class A stock except that it will carry five votes; these enhanced voting rights will likely preserve NewCo's ability to obtain voting control of Genuity post-conversion in the event Genuity has issued substantial amounts of new Class A shares. If NewCo transfers its Class B shares to another party, that party may only convert them into Class A stock.

465. Subject to the limitation on sales proceeds below, NewCo will have the right at any time after it has met the 50% section 271 threshold to dispose of all or part of its Class B shares, or to exercise its conversion rights as part of a transaction by which it immediately disposes of all or part of its interest in Genuity so that its post-conversion interest in Genuity does not exceed a 10% equity interest. If NewCo seeks to sell all or part of its interest in the Class B shares after it has met the 50% section 271 threshold (but before it has eliminated applicable section 271 restrictions as to 95% of Bell Atlantic in-region lines), it shall offer to sell such shares to Genuity at a price equal to the lesser of the following: (a) the amount it would be able to retain under section 2(c) below, or (b) the fair market value of the shares (as determined by a nationally recognized independent investment banker selected jointly by Genuity and NewCo). The purchase price may be payable in the form of a marketable debt instrument which will not be subordinate and will have a fair market value equal to its face value. Such debt instrument shall bear interest at a commercially reasonable rate, comparable to rates under similar instruments held by companies with debt ratings comparable to Genuity, with a commercially reasonable time for repayment. Genuity shall have 90 days after the date it receives such an offer to agree to purchase NewCo's shares. If Genuity agrees to purchase

NewCo's shares within the 90 day period, Genuity shall have 180 days after the date it receives the offer to make any financial or other arrangements and to complete the purchase. NewCo will grant any consent necessary under the investor safeguards described below in order to complete such a sale to Genuity. The Applicants shall make such changes to their S-1 and other filings as necessary to provide that Genuity's holding of a debt instrument as described in this paragraph shall be an exception to any limitation on the aggregate amount of debt that NewCo may hold in Genuity, as otherwise provided in these conditions. If, before NewCo's conversion period would otherwise expire, NewCo has offered to sell Class B shares to Genuity, the conversion period will be extended to allow for sale of the Class B shares to Genuity or to another party.

466. In the event Genuity chooses not to purchase NewCo's shares within the 90-day period after it receives such an offer (or if Genuity is unable to complete the purchase), then NewCo will transfer the shares to a disposition trustee selected in accordance with the Commission's rules for sale to a third party purchaser. Upon completion of the sale, the disposition trustee will remit to NewCo as soon as reasonably practicable the proceeds of such a sale subject to the limitation on sales proceeds in section 2(c). To the extent Class B shares are purchased by someone who is not subject to applicable section 271 restrictions, that purchaser would be free to convert those Class B shares immediately into Class A shares.

467. After NewCo has eliminated applicable section 271 restrictions as to 100% of Bell Atlantic in-region lines and simultaneous with its conversion of the shares of Class B common stock, NewCo would, at its election, either make a payment to Genuity for distribution to the holders of Class A common stock or adjust the conversion ratio, in either event so that the holders of Genuity's Class A common stock receive a portion of the appreciation on the Class B common stock (and accompanying conversion rights). That portion would be determined as follows. First, NewCo's total appreciation would be determined; that would be an amount equal to the value of NewCo's Class B common stock on an as-converted basis (determined by a nationally recognized independent investment banker in proportion to the appreciation in the publicly traded Class A common stock but adjusting that appreciation so that it did not reflect anticipation of the payment or conversion change contemplated by this paragraph) less the initial value of NewCo's Class B stock (based on the original IPO price). Second, the appreciation attributable to a 10% interest in Genuity would be subtracted from NewCo's total appreciation (since NewCo could have owned that without regard to section 271 restrictions). Third, as of each anniversary of the closing of the IPO, a percentage will be determined equal to 25 percent¹⁰¹⁵ times a fraction, the numerator of which is the number of Bell

¹⁰¹⁵ Because Genuity operates its existing data business on a nationwide (indeed, worldwide) basis, the portion of appreciation attributable to Bell Atlantic's in-region states was calculated by dividing the number of Bell Atlantic's billable access lines in its in-region states by the number of billable access lines nationwide (as both reported in the FCC's 1999 ARMIS Report 43-04). The resulting percentage was then rounded up to 25% (putting a larger portion of the appreciation at risk). This provides a conservative estimate of the portion of the appreciation attributable to Bell Atlantic's in-region lines, particularly because it does not take into account the fact that a significant and growing portion of Genuity's revenues are attributable to international operations. If Genuity's international operations were taken into account, it would reduce the percentage further.

Atlantic in-region lines as to which applicable section 271 restrictions have not been eliminated and the denominator of which is the number of Bell Atlantic in-region lines.¹⁰¹⁶ Fourth, those annual fractions will be averaged. And fifth, the product of that average fraction times NewCo's appreciation (less the ten percent subtracted in step two) will either be paid in cash to Genuity, in which case it will be tax adjusted (to reflect the fact that NewCo would have to pay taxes if it sold Genuity stock or other assets to raise the cash), or translated into a number of shares of Genuity stock and forgone by NewCo in the conversion, in either event giving the appropriate amount of value to the public shareholders.

C. Limitation on Sales Proceeds

468. If NewCo sells all of its stock before it has eliminated applicable section 271 restrictions as to 95% of Bell Atlantic in-region lines, NewCo will not have a right to retain sale proceeds that exceed (i) the value of a 10% equity interest in Genuity (determined based on the sale proceeds), plus (ii) the amount NewCo would have if it had taken the amount of its initial investment in Genuity above a 10% interest (based on the IPO offering price for the Class A shares) and invested it at the time of closing in the S&P 500 Index. If, during such period, NewCo sells all of its stock except an amount convertible into a 10% equity interest in Genuity, NewCo will have a right to retain only the amount described in clause (ii) above.¹⁰¹⁷ In each of these cases, NewCo would pay an amount equal to sale proceeds in excess of those proceeds it can retain under the preceding two sentences, adjusted to reflect taxes due on that excess amount, or would pay such lesser amount as the Commission in its discretion may determine, into the general fund of the U.S. Treasury. Once NewCo has eliminated applicable section 271 restrictions as to at least 95% of Bell Atlantic's in-region lines, NewCo may sell its stock and retain the sales proceeds, except that NewCo (or the purchaser) shall make either the conversion payment or the conversion adjustment that would be required under the last paragraph of Section 2.B.

D. Extension of Five-Year Conversion Period

469. If, by the end of five years, NewCo has eliminated applicable section 271 restrictions as to all but 10% of Bell Atlantic in-region lines (or as to all but one state, irrespective of the percentage of Bell Atlantic in-region lines accounted for by that state, plus additional states accounting for up to 5% of Bell Atlantic in-region lines), NewCo may file a petition with the Commission requesting one additional year in which to eliminate the remaining restrictions and exercise its conversion rights. The Commission shall have discretion whether to approve such a petition. If, by the end of the conversion period, litigation is pending over whether NewCo has eliminated such restrictions as to certain lines, and if a court determines after the end of the conversion period that NewCo has eliminated such restrictions as to those

¹⁰¹⁶ "Bell Atlantic in-region lines" are as defined in note 1, *supra*.

¹⁰¹⁷ Likewise, if, during such period, NewCo sells a portion of its stock but retains stock convertible into more than a 10% equity interest in Genuity, NewCo will have a right to retain only a prorated portion of the amount described in clause (ii) above; and if, during such period, NewCo sells all of its stock except for an amount convertible into less than a 10% equity interest, NewCo will have a right to retain the proceeds from the number of shares sold that, together with the number of shares retained, would be convertible into a 10% equity interest, plus the amount described in clause (ii) above.

lines, then for purposes of these provisions NewCo shall be deemed to have eliminated those restrictions within the conversion period and shall be permitted a reasonable time to exercise or dispose of its conversion rights.

470. The Commission shall have discretion to toll or extend the running of the conversion period to account for intervening events that delay elimination of section 271 restrictions.

471. If, by the end of the conversion period, NewCo has eliminated applicable section 271 restrictions as to 100% of Bell Atlantic in-region lines, then NewCo shall be able to exercise its conversion rights at a time determined by NewCo (whether inside or outside the conversion period). Once Bell Atlantic/GTE has eliminated applicable section 271 restrictions as to 100% of Bell Atlantic in-region lines, it will comply with section 272 to the same extent that section 272 would apply if Bell Atlantic/GTE exercised its conversion rights, notwithstanding any delay in actual conversion of its shares of Class B stock.

E. Compliance with Legal Order

472. If, before NewCo satisfies the 50% section 271 threshold, a court or agency rules that NewCo's interest in Genuity results in a violation of section 271, NewCo's Class B shares shall be immediately convertible to the same extent as described above in section 2.B. In such event, NewCo shall be given a reasonable time extending beyond the date that such ruling becomes final and non-appealable in which to dispose of its Class B shares to the extent they are convertible into more than a 10% interest (or to convert those shares as part of a disposition), and may sell its shares to a third party subject to the limitation on sales proceeds described above.

XV. INDEPENDENCE OF GENUITY

473. Until NewCo eliminates the applicable section 271 restrictions and exercises its option to take ownership of Genuity, Genuity will be independent of NewCo. Genuity will have an independent board of directors that is periodically elected by the voting shareholders consistent with the requirements of applicable corporation laws. Before the IPO, Genuity will elect six directors, including the CEO of Genuity, one director elected by a class vote of the Class B shares, and four independent directors who have no prior relationship with GTE or Bell Atlantic. Within 90 days following the IPO, the four independent directors will select seven additional directors who have no prior relationship with GTE or Bell Atlantic, which will bring the total board membership to 13 directors, a majority of whom will have been selected after the IPO. In addition, as soon as practicable, but in any event within nine months following the IPO, all directors except the Class B director will stand for election by the public shareholders, and each year thereafter four such directors will stand for election. The Class B director will abstain from any vote before there are at least ten directors on the board and will at no time serve as chairman of the board. Exhibit B to the April 28, 2000 *ex parte* submission of William P. Barr describes more fully how the board of Genuity will be constituted and elected.

474. The board and officers of Genuity will owe fiduciary duties to the public shareholders. Incentive compensation for Genuity managers will be tied to the performance of Genuity and the value of Genuity's publicly traded stock, not to the financial performance or

stock value of NewCo. The initial source of financing for Genuity will be the proceeds from the IPO of Class A stock. Any additional funding required by Genuity during the period before NewCo converts its Class B stock would be raised from the public markets, possibly by issuing additional Class A shares, by issuing debt to the public, or by arm's-length commercial loans. During such period, if NewCo were to choose to make loans to Genuity, NewCo could provide no more than 25% of the aggregate debt financing that Genuity is permitted to incur.

XVI. INVESTOR SAFEGUARDS

475. NewCo's interests as a minority investor and potential future majority shareholder of Genuity will be protected by certain reasonable investor safeguards, which are described in Attachment 1 to these Conditions. NewCo's rights under these safeguards will remain in effect only until NewCo converts its Class B shares (or until NewCo no longer has a possibility of converting into more than a 10% interest). These include the right to approve certain fundamental business changes that adversely impact the value of NewCo's minority investment and conversion rights, including a change in control of Genuity or the sale of a significant portion of its assets.

476. Genuity's business includes Internet backbone and related IP services. Genuity does not provide traditional switched voice long-distance service, and Genuity's business plan does not contemplate the acquisition of a traditional voice long-distance service provider. NewCo agrees not to consent, pursuant to any applicable investor safeguard rights, to Genuity's acquisition of a traditional voice long-distance provider unless the Commission has first reviewed and approved such acquisition.

XVII. COMMERCIAL CONTRACTS BETWEEN NEWCO AND GENUITY

477. Consistent with the fact that Genuity and NewCo will each be independent public corporations whose directors and officers will owe duties of care and loyalty to their respective shareholders, all commercial interactions between NewCo and Genuity will be pursuant to commercially reasonable contracts. (*See* "Commercial Contracts Between NewCo and DataCo," submitted for the record on April 3, 2000, and revised agreements submitted on June 9, 2000.)

478. Because a significant portion of Genuity's business will be outside the Bell Atlantic region or in in-region states where Bell Atlantic has eliminated applicable interLATA restrictions, NewCo may enter into a marketing agreement with Genuity for the period before NewCo exercises its conversion rights. (*See* "Purchase, Resale and Marketing Agreement," submitted as part of the "Commercial Contracts Between NewCo and DataCo.") Both GTE and Bell Atlantic are legally free to enter into this kind of commercial relationship today with a similarly situated company. Pursuant to this agreement, NewCo will market Genuity's services (or the two companies will market their services jointly) as and where permitted by law. For example, in New York, where Bell Atlantic has already received section 271 approval, NewCo and Genuity will jointly market Genuity's Internet connectivity services. The agreement provides that NewCo will not provide or jointly market any interLATA Genuity service in any state where NewCo does not have interLATA authority. The agreement is non-

exclusive; either company may purchase from or sell to others.

479. NewCo and Genuity will also enter into certain additional commercial contracts, including contracts for transitional administrative support services to help ensure Genuity's stand-alone viability following the Genuity IPO. These transitional support contracts will have a term of one year or less and will be terminable at any time by Genuity without penalty. In addition, these transitional services contracts will not be renewed by the parties. The list of transitional services, with the timeframe for each service within which Genuity will transition from NewCo, is attached to these Conditions as Attachment 2. NewCo will not have any role in hiring or firing Genuity employees, and Genuity will not rely upon any network monitoring from NewCo after October 31, 2000.

XVIII. INDEPENDENT AUDITOR

480. NewCo will hire an independent auditor, acceptable to the Chief of the Common Carrier Bureau, to monitor NewCo's ongoing compliance with the terms of these conditions.

APPENDIX C: Summary of Confidential Information

[NOT TO BE RELEASED WITH PUBLIC VERSION]

This Appendix summarizes documents produced by the Applicants in connection with each Applicant's plans to compete in local exchange and exchange access markets outside its service areas and, in particular, within each other's service areas.

A. Applicants' Plans to Compete Outside Their Traditional Service Areas

- 1. GTE's Out of Region Plans**
- 2. Bell Atlantic's Out of Region Plans**

SEPARATE STATEMENT OF COMMISSIONER SUSAN NESS

Re: Applications of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License (CC Docket No. 98-184)

The Commission today approves the merger of two of the largest incumbent telephone companies. I believe that on balance the transaction, as finally structured, is consistent with the public interest. I write separately to underscore the importance that I place on ensuring that the transaction complies with both the letter and spirit of section 271 of the Communications Act. That provision lies at the very heart of Congress' efforts to promote competition and deregulation throughout all telecommunications markets.

While this transaction presents a close call, I believe that the modified proposal that we approve today satisfies the section 271 test. In particular, the merged entity is not allowed to profit from in-region long distance services prior to achieving section 271 approval. This will give the company the incentive to open its local markets as expeditiously as possible. Today's decision emphasizes that Bell companies may participate in the long distance market in their states, but only after they have fulfilled their statutory market-opening responsibilities.

**STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH
CONCURRING IN PART AND DISSENTING IN PART**

Re: GTE Corporation and Bell Atlantic Corporation, Application for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, Memorandum Opinion and Order, CC Docket No. 98-184.

I concur in the Commission's decision to approve Bell Atlantic's and GTE's application to transfer control of certain lines and licenses in connection with the parties' planned merger transaction. I agree that the parties have demonstrated that they will be in compliance with section 271 of the Telecommunications Act of 1996 when this transaction is complete and that Genuity will not be an "affiliate" of the merged company within the meaning of 47 U.S.C. § 153(1).

As I have said before, however, I do not endorse the quasi-antitrust analysis that this Commission has used to determine whether a license transfer is in the "public interest," and I do not join in those portions of this Order that follow this approach. Nor do I support those conditions that are essentially carbon copies of the conditions that the Commission imposed on the SBC/Ameritech transaction. I summarize below my objections to these conditions. I refer to the reader to my statement in the *SBC/Ameritech Order* for a more complete discussion of my concerns. See Statement of Commissioner Furchtgott-Roth, Concurring in Part & Dissenting in Part, *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, CC Docket 98-141 (rel. Oct. 6, 1999).

First, and most importantly, the Commission's "public interest" interest test is not grounded in the law. The Commission applies very different levels of review to license transfer applications that arise under identical statutory provisions, and it has never articulated a standard for distinguishing among those applications that receive extensive analysis and those that do not. Nor does the Commission have established procedures for processing license transfer applications. And, once it decides to subject a license transfer application to extensive review, it applies a framework that is so malleable the Commission can justify any conclusion it wishes. As a result, applicants lack advance notice regarding the extent to which this Commission will scrutinize their applications, the process by which their applications will be handled, and the substantive standard that will be applied should the Commission closely scrutinize their applications.

Not only is the Commission's free-wheeling approach to its review of license transfer applications arbitrary and inconsistent with fair notice requirements, but also it may well be at odds with the constitutional nondelegation doctrine. The Court of Appeals for the District of Columbia Circuit has held that where an agency fails to articulate "intelligible principles" to guide its implementation of a statutory provision,

as the Commission has here, it has effected an unconstitutional delegation of legislative power. *See American Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), *cert. granted sub nom., Browner v. American Trucking Associations, Inc.*, 120 S.Ct. 2003 (2000).

Second, even assuming the Commission had the authority to impose conditions on a license transfer application based on the “public interest” test, the legality of the conditions imposed in this Order is dubious. Indeed, some of the conditions are directly at odds with specific sections of the statute. For example, as with the SBC/Ameritech transaction, the parties have agreed to offer promotions to certain competing local exchange carriers. But many competing LECs will be unable to obtain these promotional deals, in violation of section 251(c)(3)’s and 251(c)(4)(B)’s nondiscrimination requirements. In addition, the carrier-to-carrier promotion condition violates section 251(i)’s pick-and-choose provision, since some carriers will not be able to access BA/GTE’s facilities on the “same terms and conditions” as other carriers. *Cf. American Tel. and Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214 (“[T]he policy of non-discriminatory rates is violated when similarly situated customers pay different rates for the same services. It is that non-discriminatory policy which lies at the heart of the Communications Act.”) (internal quotation marks omitted).

In addition, the enforcement conditions set forth in this order undermine the ability of state commissions to administer section 251’s market-opening provisions. Section 252 specifically confers upon state commissions the authority to oversee negotiation, arbitration, and approval of interconnection agreements. This Commission takes over this function only when a state commission fails to act to carry out its section 252 responsibilities. *See* 47 U.S.C. §252(e)(5). Contrary to this statutory scheme, this order interjects this Commission into many aspects of the section 252 process.

For these reasons, as well as for those set out in my statement in the *SBC/Ameritech Order*, I concur only in the Commission’s decision to approve these license transfer applications and in the analysis it applies to assess BA/GTE’s compliance with section 271 (Part V of this order).

**STATEMENT OF COMMISSIONER MICHAEL K. POWELL,
CONCURRING IN PART AND DISSENTING IN PART**

Re: Applications of GTE Corp., Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, CC Docket No. 98-184, Memorandum Opinion and Order

Just over eight months ago, I wrote separately and at length to criticize sharply the form and content of the Commission's analysis of another merger of major incumbent local exchange carriers (LECs), namely SBC's acquisition of Ameritech.¹⁰¹⁸ Among other shortcomings, this analysis allowed the applicants' "voluntary" conditions to compensate for largely unrelated alleged public interest harms. Because the majority persists in its reliance on this faulty analysis in evaluating Bell Atlantic's proposed acquisition of GTE, I must respectfully dissent from some aspects of this *Order* and only concur as to other aspects.¹⁰¹⁹ Specifically, although I again concur in the conclusion that there are public harms that might well result from this combination that are not entirely offset by the applicants' asserted benefits, I am unsatisfied that any one of these harms bears the weight assigned to it in this *Order*. Thus, I believe fewer conditions, tailored to address the specifically identified harms, would have been the correct result.

This *Order* suffers from the same flawed analytical framework as in the *SBC/Ameritech Order*. In that order, I expressed extreme discomfort with a merger review standard that places harms on one side of a public interest "scale" and then examines whether those harms are outweighed by beneficial conditions placed on the opposite side of that scale, regardless whether the compensating conditions actually *rectify* the harms. I explained that this approach results in a number of pernicious effects.¹⁰²⁰ Sadly, these effects are not significantly avoided in

¹⁰¹⁸ See Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 214 and Section 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, CC Docket No. 98-141, *Memorandum Opinion and Order* (Separate Statement of FCC Commissioner Michael K. Powell) (Oct. 8, 1999) ("SBC/Ameritech Separate Statement") [Available on the World Wide Web at < <http://www.fcc.gov/Speeches/Powell/Statements/stmkp930.doc>>].

¹⁰¹⁹ Although I dissent in part to the *Order*, I do concur with the item's Section 271 analysis.

¹⁰²⁰ See SBC/Ameritech Separate Statement at 1. This balancing approach leads to a number of problems: First, the approach creates a great temptation to load up the benefits side of the scale with a big wish list of conditions that are non-germane to the merger's harmful effects. Second, the approach makes it easier for identified harms, even significant ones, to be visited upon the public in exchange for other benefits. Third, the conditions that are sought are more often surrogates for policies and rules of general, rather than merger-specific, applicability, but without the extensive deliberative process and the check of judicial review normally afforded a rulemaking. And fourth, the process of obtaining "voluntary" conditions inevitably (continued....)

this *Order*.

For example, in the *SBC/Ameritech Order*, I lamented that the majority's faulty merger review framework would make it easier for regulators to visit identified harms upon the public in exchange for unrelated benefits. This problem evidences itself again in this *Order*. Despite the fact that the majority concludes that the merger will result in harms they characterize as significant, such as precluded competition, increased discrimination, and loss of major incumbent LEC benchmarks, the *Order* allows these purportedly significant harms to occur largely unmitigated by the proposed conditions. This leads me to question whether the majority truly believes that the harms are significant, or whether they believe, as do I, that the described harms are too speculative and thus may be exaggerated.¹⁰²¹

My skepticism surrounding the alleged harms of major LEC mergers is exacerbated in this proceeding because these harms should be, at least according to the majority's reasoning, more significant in this merger than in the *SBC/Ameritech* proceeding. For example, according to the majority's theory, the bigger the merged LEC is, the more incentive and ability to discriminate it will have. As such, it follows that there must be greater risk of potential harm associated with this merger than with respect to the *SBC/Ameritech* merger, which yielded a smaller merged entity than the one we sanction in this *Order*. Similarly, the majority's benchmarking rationale postulates that it will become increasingly difficult for regulators to find useful major LEC benchmarks as the number of these LECs declines. It follows, then, that the further consolidation among major LECs that the Bell Atlantic/GTE merger represents must involve greater risk of harm than that associated with the previously approved *SBC/Ameritech* merger. If I were convinced that the risk of these harms was as significant as the majority's analysis suggests, and that no conditions could correct them, I would be very hesitant to subject the public to these harms and would instead disapprove the merger, rather than try to offset it with commitments that are wholly unrelated to the harms.

Unfortunately, none of the shortcomings I address here or in my previous statement on these issues will ever be addressed unless the Commission begins to reform the majority's "balancing approach" to merger review that we apply again here, or seriously question the aforementioned specious theories of potential harm. At most, these theories evidence our reluctance to confront directly what appears to be an unstated distaste for horizontal mergers in

(Continued from previous page) _____
involves bilateral negotiations with the parties that leave the integrity of the Commission's process vulnerable to criticism.

¹⁰²¹ See *SBC/Ameritech* Separate Statement at 5-19. I would note, in addition, that I find little comfort in the fact that, in contrast to the proceeding leading to the *SBC/Ameritech Order*, this proceeding did not involve nearly as much haggling between the applicants and Commission staff regarding the proposed conditions. Among other things, I argued in that previous context that the process of obtaining "voluntary" conditions inevitably involves bilateral negotiations with the parties that leave the integrity of the Commission's process vulnerable to criticism. Although the proposed conditions here were not subject protracted negotiations with these two applicants, they are modeled so closely on the conditions negotiated by SBC and Ameritech that they carry the same taint. In short, we cannot turn a blind eye to the troubled origins of these conditions, simply because the applicants anticipated what would satisfy the Commission based on its previous negotiations with SBC and Ameritech. That said, I am at least pleased that the Commission did not pursue extensive negotiation with these applicants over the proposed conditions.

this area.¹⁰²² Until then, I must, with respect to both the majority's unworkable analytical framework, and as to their assessment of potential harms, respectfully dissent from application of this reasoning in our merger review.

¹⁰²² See SBC/Ameritech Separate Statement at 12 ("Sadly, all that one is left with after reading the [SBC/Ameritech] *Order*'s benchmarking analysis (and, indeed, its discrimination analysis) is the sense that, for some reason, the Bell Companies and perhaps GTE are on the 'too large to merge' side of the dividing line between permissible and impermissible mergers. If this was supposed to be the moral of the benchmarking and discrimination stories in this *Order*, I would have preferred to relay that moral more directly, rather than through these theoretical constructs.").

SEPARATE STATEMENT OF GLORIA TRISTANI

Re: In re Application of GTE Corp., Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License. CC Docket No. 98-184.

I vote to approve this merger in express reliance on the Parties' commitment to transfer the Internet and related assets of Genuity to an independently owned corporation in a manner that will not give Bell Atlantic/GTE either control over, or a prohibited ownership stake in, Genuity. Having determined that the contingent interest that Bell Atlantic/GTE will retain in Genuity will be consistent with Section 271 of the Telecommunications Act of 1996, I find the transaction to be in the public interest only because of the extensive market-opening and other commitments to which Bell Atlantic and GTE have agreed.

With this merger, two companies -- Bell Atlantic/GTE and SBC -- will control a staggering 69 percent of the nation's access lines. Bell Atlantic/GTE alone will control nearly forty percent of those lines, approximately 69 million local exchange access lines. The combined company will have the incentive and, absent conditions, the ability to deny, degrade, or delay competitive LEC access to a large number of consumers. Moreover, by reducing the number of major incumbent LECs to four, the merger will eliminate an independent source of observation and impair regulators' ability to use comparative practices analyses to facilitate implementation of the Communications Act.

The conditions to which GTE and Bell Atlantic have voluntarily agreed should, however, substantially mitigate the potential public interest harms of the proposed merger and result in an overall public benefit. In particular, the conditions related to advanced services should increase residential and rural broadband deployment. Along with other commitments, a properly-implemented separate affiliate for the provision of advanced services and provisions for expediting cost proceedings will provide competitors an increased ability to compete on fair and equitable terms. The commitment that at least 10% of the urban wire centers and 10% of the rural wire centers where Bell Atlantic/GTE provides xDSL will be low-income wire centers addresses redlining concerns. Finally, I note with approval the modifications to various conditions, as originally adopted in the context of the SBC/Ameritech merger, that the Parties crafted in response to concerns raised by commenters.

As with the SBC/Ameritech merger, I could not support the proposed transaction absent reporting requirements that will ensure the new company's accountability. These requirements will help the Commission to monitor GTE/Bell Atlantic's performance on critical measures of its market-opening performance and advanced services deployment. In particular, requiring Bell Atlantic/GTE to report certain service quality data on a disaggregated, company-specific basis should increase the Commission's ability to deter and detect any discrimination by the combined company in Genuity's favor. Moreover, extensive audit requirements related to the combined companies' compliance with our collocation, UNE, and line sharing rules should

prove useful in assessing Bell Atlantic/GTE's adherence to important procompetitive requirements.

By voting to approve the transaction based on the proffered conditions, I am accepting the companies' assurances that they will act in good faith to fully implement all their commitments in a reasonable and timely manner. Only then will the public and competing carriers realize the potential public interest benefits of this transaction.