COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Inquiry by the Department of Telecommunications and Energy pursuant to Section 271 of the Telecommunications Act of 1996 into the Compliance Filing of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts as part of its application to the Federal Communications Commissions for entry into the in-region interLATA (long distance) telephone market.	)	D.T.E. 99-271

COMMENTS OF THE ASSOCIATION OF COMMUNICATIONS ENTERPRISES ON BELL ATLANTIC'S MAY 26, 2000 FILING

I. INTRODUCTION

The Association of Communications Enterprises ("ASCENT")[1], f/k/a the Telecommunications Resellers Association ("TRA")[2], on behalf of its members, submits these Comments regarding the May 26, 2000 filing by Bell Atlantic – Massachusetts (hereinafter "Bell Atlantic"), in response to the Department Hearing Officer Memoranda, including the Memorandum dated July 12, 2000.

These Comments demonstrate that Bell Atlantic has yet to open its local markets to meaningful and irreversible competition as required by the Telecommunications Act of 1996 (the "Act"). The extensive record in this case makes it clear that Bell Atlantic must achieve

[1] ASCENT is a national trade association representing over 700 telecommunications service providers and their suppliers, including nineteen Massachusetts members engaged in providing a variety of value-added interexchange, local wireless, and enhanced telecommunications services. Several ASCENT members are authorized by the Commission to provide interexchange and local telecommunications services within Massachusetts.

[2] The Telecommunications Resellers Association formally assumed the ASCENT name on May 10, 2000.

better performance relative to service to CLECs if it is to hit the compliance "bull's eye" and to allow for real competition in the local telecommunications market in Massachusetts.

Bell Atlantic's new filing fails to meet any reasonable burden of showing that Bell Atlantic meets the requirements for long distance market entry in Massachusetts, as set forth in the FCC's decisions for SBC's §271 application in Texas[3] ("FCC–TX") or Bell Atlantic's §271 application in New York[4] ("FCC-NY").

II. APPLICABLE STANDARDS

It is clear that the Department can and should look to the reports generated in the §271 review proceedings conducted by the New York and Texas Commissions, and the FCC orders on those reports. However, it is equally clear that the Department must conduct its own state specific review, considering the competition status of the local telecommunications market in Massachusetts. See FCC-NY, ¶¶ 398, 399. Bell Atlantic's performance in New York, much less its preliminary activities in Massachusetts that have not yet created an open market, is no more proper support for a §271 grant than is evidence of its discriminatory action in other states proper grounds for denial. *Id*. (FCC finding that evidence of discriminatory practices in other states had no bearing on findings of Bell Atlantic's performance in New York.)

The 1996 Act requires, and the FCC has stressed, that each state commission in any §271 review must conduct a review that specifically focuses on the ILEC's performance in that state. Though other states' reviews and orders thereon may set forth some factors to be

[3] In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas; CC Docket No. 00-65

[4] In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Services in New York; CC Docket No. 99-295

considered in assessing whether a local market is irreversibly open to competition, the Department cannot rely on Bell Atlantic's bare assertions that a certain system, level of performance or collaborative effort in New York proves that those same systems or performance levels in Massachusetts satisfies the relevant standards under the Act.

If Bell Atlantic's suggestion of such heavy reliance on the New York findings were a proper approach, why have this proceeding at all? The Department (presumably along with commissions in Pennsylvania and any other states in the Bell Atlantic footprint) could simply have taken administrative notice of the New York Report and the FCC approval. The Department then could obtain statements from Bell Atlantic that it operated in the same manner in such states as it did in New York. Then the Department could make its favorable report and there could be one more long distance competitor (though likely many fewer local service competitors). This, in essence is Bell Atlantic's approach. Unfortunately, it is an approach that is neither consistent with governing law and FCC orders, nor is likely to allow for the development of a truly competitive local market.

Additionally, statistics do not tell the whole story. In fact, statistics may be used in a manner that seems to show wholesale performance at parity with Bell Atlantic's retail performance, while actual market conditions show insufficient opportunities for open competition and even anti-competitive actions by Bell Atlantic. Obviously, statistics of an ILEC's performance on a broad level have been relied upon by the New York and Texas Commissions and the FCC. However, the Department must take very seriously any evidence of anti-competitive actions by Bell Atlantic, and must not disregard such evidence due to its often anecdotal nature. Often the small CLECs putting forth such evidence are unable to

produce the level of documentation or broad statistics that the much larger Bell Atlantic, which is able to devote tens of millions of dollars of resources to this single end, is able to muster.

Further, the Department must look carefully at such statistics and the underlying definitions and calculations Bell Atlantic uses to develop such statistics. A 95% or better level of performance is meaningless if Bell Atlantic defines the statistical universe in a manner that excludes extensive failed efforts by CLECs to obtain the necessary wholesale or interconnection performance necessary for CLECs to establish meaningful competitive inroads on Bell Atlantic's monopoly over local telecommunications services. For example, regarding hot cut data, Bell Atlantic cites over a 95% on time completion rate, but 100% is not 100% of scheduled hot cuts. Where postponements occurred, Bell Atlantic's statistics did not consider them. Bell Atlantic Response to Information Requests DTE-ATT-4-2, 4-3 and 4-4.

It is also important that the Department recognize some of Bell Atlantic's tactics for what they are. In its May 26, 2000 filing Bell Atlantic repeatedly dismisses serious performance problems as the fault of the CLECs – not of Bell Atlantic. That tiresome refrain simply strains credulity. For example, Bell Atlantic would have the Department absolve it of any shortcomings, where ASCENT member Network Plus sought an augment of entrance facilities due to higher than anticipated demand for its services. Not only is it highly questionable that Bell Atlantic is so rarely the root of the problems identified, but it is clear that Bell Atlantic has a burden to design and implement systems that work in terms of allowing for real and effective competition. Such competition is not present, however, and Bell Atlantic has failed to satisfy its obligations under the 1996 Act. As described in section III.B., below,

in the Network Plus example, Bell Atlantic non-responsively applied intervals that related to different, more time intensive tasks. The result was delayed competition.

Finally, ASCENT must stress again the need for a level of testing beyond the current KPMG OSS process. That process is certainly necessary and useful. However, that process alone is insufficient to assure that the local telecommunications market is open with respect to operational support systems and that CLECs have a level playing field on which to compete against the one-hundred year monopoly incumbent that has innumerable advantages. In addition to the OSS testing now being conducted by KPMG, it is necessary that independent third party testing be conducted at real commercial levels. Such an approach will better be able to ensure that Bell Atlantic's OSS will work properly once numerous carriers are all using such OSS in an increasingly competitive market. Testing at commercial levels was a critical and integral part of the Texas review (and grant) of the SBC §271 bid. CC Docket No. 00-4, pp. 27-31. See also FCC-Texas, ¶ 101 CC Docket No. 00-65. Had such testing been part of the New York review of the Bell Atlantic §271 application there, New York (and Bell Atlantic) would have avoided the terrible problems of poor post-§271 service that harmed many CLECs and harmed the competitive marketplace in New York. Instead of granting a §271 approval prematurely as was apparently the case in New York, and having to rely on the after-the-fact performance penalties[5], the Department should require a three month testing period at commercial levels.

[5] *In the Matter of 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*, File No. EB-00-IH-0085, FCC 00-92 (rel. March 9, 2000).

III. SPECIFIC COMMENTS ON BELL ATLANTIC'S SUPPLEMENTAL FILING

A. Carrier to Carrier Statistics

While Bell Atlantic makes much of its statistics in various areas, it is also necessary to note Bell Atlantic's carrier to carrier ("C2C") statistics. Contrary to the glowing image of Bell Atlantic's performance conveyed by the selected statistics in Bell Atlantic's May 26, 2000 filing, Bell Atlantic's C2C statistics show a very different story.

Despite Bell Atlantic's heavy reliance on statistics to show performance at or approaching parity, Bell Atlantic's monthly Carrier to Carrier Statistics show significant deficiencies. Even looking at just the May 2000 statistics, there is too high a level of order rejects, too slow a response time and other deficiencies that are not compatible with the sort of open and competitive market necessary for the Department to make favorable findings in this case.

Regarding various POTS Special Services provisioning, order rejects still are about one-half of all orders (Metric OR-3-01). In the same category, order accuracy (Metric OR-6-01) is still poor – about 20% below standard. POTS Provisioning (Metric PR-3-01 through 8, PR-1-01, PR 2-01, Business and Residential) remains significantly slower than Bell Atlantic has agreed is reasonable by virtue of established standard.

Further, in many cases, Bell Atlantic has poor performance relative to missed appointments (Special Services) (Metric PR 4-02) and Installation Quality (Metric PR 6-03). Bell Atlantic's maintenance performance for competitive carrier clients is abysmal, falling far behind performance levels for retail service. Numerous metrics in these regards are missed by wide margins (for POTS/Complex and Special Services) in Metrics MR 3-01 through 05 and

MR 2-01, 2-05, 4-01 through 05. The same performance problems pertain to maintenance of POTS Loop with unacceptably high levels of missed appointments and long trouble durations (Metrics MR 3-01 through 3-05 and MR 4-01 through MR-10).

UNE POTS Provisioning is also well below the parity level (Metrics PR 3-01, 02, 03, 09; PR 4-02) and the same is true for Special Services Provisioning in the case of over 20 Metrics (Metrics PR 1-01 through 1-11; 2-01 through 2-11 and 4-01).

Even to the extent that Bell Atlantic's C2C statistics are better in recent months than before, the mere fact of improvement is not sufficient. The Department should and must require a sustained level of high performance to ensure that the local market is sufficiently opened.

B. Miscellaneous Trunking Issues

Though Bell Atlantic seeks to characterize the issues regarding delays in provisioning entrance facilities as a non-checklist item (Filing, p. 14), it appears that the FCC considers such issues to be part of Checklist Item 5. FCC-NY, ¶ 342. As it does so often throughout its filing, Bell Atlantic asserts that the issues raised concerning entrance facilities are not problems caused by Bell Atlantic, but rather problems caused by the CLECs. Bell Atlantic's characterization is misleading at best. ASCENT member Network Plus showed that Bell Atlantic's procedures for augmenting entrance facilities institutionalized unnecessarily long provisioning periods and that Bell Atlantic was generally unresponsive. Contrary to Bell Atlantic's characterization in its May 26, 2000 filing, this was not a matter of a CLEC failing to make forecasts reasonably. Network Plus made forecasts as required by Bell Atlantic. Network Plus Response to Record Requests 228, 237 and 238. When Network Plus' growth

showed the need (in advance) for greater capacity, Network Plus promptly submitted an augment request. There can be no question that Network Plus acted reasonably. In contrast, and contrary to Bell Atlantic's assertions, it is Bell Atlantic that acted unreasonably and in an anti-competitive manner. Bell Atlantic treated Network Plus's augment request essentially as though it were a new trunk order, even though all the work associated with a new trunk order had already been completed and Bell Atlantic had ample capacity to accommodate Network Plus' augment request on an expeditious basis. As the ASCENT (then TRA)/Network Plus witness explained:

> BA regularly provisions trunks on an unduly slow basis. Such process is fraught with bureaucratic delays and requires time-consuming efforts on behalf of CLECs that are unnecessary. In this statement, I will describe just one of many examples of BA's dilatory actions…
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> As of November 23 Bell Atlantic contacted Network Plus and told us they had no new status on the project. We did, however, learn that BA was putting our requested augmentation on the same time schedule as the requests of other carriers where considerably more work, such as the installation of wholly new fiber, was necessary. Given the disparate tasks and associated time frames, BA's approach is unreasonable.
>
> Such delay could not be reasonably anticipated by Network Plus given the ease with which the order could have been filled. No fiber installation is necessary and even if BA was reasonable in having to order the electronics to turn up the additional DS3s, my experience is that such orders can easily be filled in a 3 to 6 week period. With one week at most needed for the turn-up, BA should have been able to complete the requested provisioning in less than one-half the time they claim is required.

> The unduly slow pace at which BA fulfills orders for provisioning is wholly inconsistent with the current pace of business development in the telecommunications industry and effects a serious obstacle to the full entry into the local telecommunications markets by carriers like Network Plus. Both the long time interval for installation of the requested DS3s and the process of having top submit detailed forecasts delays and denies customers' ability to take service from competitive carriers. Notably this problem will also restrict the ability of CLECs such as Network Plus, to roll out their DSL offerings. This in turn will stifle the development of an important facet of evolving communications offerings.
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> Affidavit of Edward J. Fox, III, ¶¶ 5, 12, 13 and 14.

Nor is this a matter of an isolated "anecdotal" incident. Rather, this example uncovers a Bell Atlantic policy designed (at the least) to slow down competitors' ability to serve additional customers and to perpetuate Bell Atlantic's monopoly position. There was no reason shown for Bell Atlantic to refuse an expeditious augment, other than to slow down competition[6]. Nor is there any showing by Bell Atlantic that such action was isolated rather than an established policy pervasively applied with the effect of stifling competition.

C. Resale

Bell Atlantic would have the Department believe that no problems exist in the resale arena except for the billing issues of a single carrier, RNK, who could solve those problems by

[6] Bell Atlantic 's generalized statements about ordering time for electronics also fails to support the delays Network Plus encountered. Further, Bell Atlantic's argument that its tariff allows for a longer interval is beside the point – there's no evidence that interval is proper generally or should be applicable to a request for an augment.

investing in additional software.[7] In truth, Bell Atlantic's presentation minimizes serious problems brought to light by RNK. Bell Atlantic would have the Department believe the referenced billing and crediting problems exist no longer because Bell Atlantic is addressing them by giving its billing department different direction. However, the Department should be satisfied with nothing less than a proven solution that is shown by actual experience – in this case resolution of past problems without any recurrence of such problems. Also, Bell Atlantic's characterization conveys a grievously false picture of the status of the resale marketplace. Unfortunately, it is true that resellers have not participated in these proceedings to a great extent. This fact, however, reflects not a lack of problems, but rather a lack of resources. The more established CLECs that may have the resources to participate have, in many cases, shifted their focus from pure resale to building their own networks. Other resellers are, for the most part, emerging companies whose limited resources, out of necessity, must be devoted to getting their businesses up and running.

The Department must not mistake a lack of participation as a lack of problems. The Department is obligated to consider Bell Atlantic's performance in this regard, and Bell Atlantic is obligated to show that it has satisfied the requirements of the Act. CC Docket No. 99-295, p. 13. Bell Atlantic's burden of proof cannot be satisfied by the mere lack of parties able to devote the significant resources to an active participation.

The evidence presented in the case, though it may be limited, nevertheless clearly demonstrates that Bell Atlantic entirely fails to meet its burden of proof on the resale checklist

[7] Even this argument by Bell Atlantic raises issues. If Bell Atlantic offers various ways of exchanging data with CLECs, all those ways should work. Bell Atlantic should not be able to impose prohibitive charges on getting that information. See RNK Response to DTE-RR-248.

item. Not only does Bell Atlantic refuse to resell voicemail[8], contrary to the approach of certain other ILECs (and of its New York state arm) and not only will Bell Atlantic revert to its anti-competitive contract termination charge policy in early 2001[9] (see D.T.E. 98-18), but Bell Atlantic engages in anti-competitive activity and has serious resale billing issues and regularly uses anti-competitive tactics in resale situations. The comments offered by ServiSense are a good platform to see Bell Atlantic's problems in the area of resale.

Mr. McKeown, President and Founder of ServiSense, testified at length about serveral prime examples of resale problems that Bell Atlantic has not even addressed. One significant showing of anti-competitive actions and lack of parity concerns initiation of service. Mr. McKeown stated at the August 4, 1999 public hearing in Newton (the "Newton Public Hearing"):

> "When establishing service to a new renter or homeowner, we consistently, and I emphasize "consistently," encounter difficulty. For example", Bell Atlantic's OSS system frequently indicates that dispatching a Bell Atlantic technician is required, even though a premises has or recently had working telephone service. The need to dispatch means a one- to Two-week delay in initiating service to the consumer. When this happens, we then call Bell Atlantic retail, order service at the same premise, and are told 100 percent of the time, "That will be turned on by tomorrow at 2:00 o'clock." No dispatch required, no wait. This is just one example of the many problems we encounter while initiating service. I'll go through a long list with anyone independently if they choose to."

[8] Though the Department ultimately ruled that Bell Atlantic did not have to resell voicemail (DPU/DTE 97-101 (1998)), the Department by no means barred such resale and Bell Atlantic could resell voicemail if it choose to.
[9] This issue has been one that the FCC has taken very seriously in its section 271 reviews. FCC-NY ¶¶ 389, 390. Unlike New York, Massachusetts has not established guidelines on permissible termination liability, so the FCC's concerns must apply here.

Newton Public Hearing Tr. 20.

Another persistent problem, indicative of a lack of parity between wholesale and retail service, concerns weekend installations. For wholesale requests, Bell Atlantic takes the position of no installation service on the weekend, even if no dispatch is required. But for the identical services and locations, Bell Atlantic retail responds to Friday afternoon calls and effects the install on Saturday. Newton Public Hearing Tr. 22. Similar lack of parity exists where network interface device connections must be made. For its own retail service, Bell Atlantic does the work, for competitive resellers, Bell Atlantic refuses. Sometimes Bell Atlantic goes to the extent of providing a free service to a retail customer, but requires the competitor to make its connection at a remote point that causes considerable cost just to take on the customer. Newton Public Hearing Tr. 24.

As Mr. McKeown indicated, there are numerous problems with Bell Atlantic resale service that are of considerable severity. Newton Public Hearing Tr. 26. In Mr. McKeown's words:

> [s]ome specific performance issues that quite frankly cripple my company. Some are pervasive, while other are single instances that seem to betray entrenched anti-competitive policies.

The Department must consider these examples and, even more importantly, take efforts to ensure that these are not just the tip of the iceberg, and refrain from issuing favorable findings until such matters are resolved in a manner that will allow the promise of the Act to bear fruit for smaller competitors and their potential customers.

D. DSL Issues

Bell Atlantic's showing, with respect to DSL, basically that it is engaged in a Collaborative process in New York and that its performance is improving, is wholly inadequate. If the New York DSL Collaborative is such a significant part of Bell Atlantic's showing, then Bell Atlantic should not be deigned to have made a satisfactory showing in this proceeding until the Collaborative concludes with a showing that Bell Atlantic's provision of DSL services is consistent with an open, competitive market. Unfortunately, even Bell Atlantic's most-recent C2C statistics demonstrate a woeful performance level with respect to DSL maintenance. Specifically, the difference between Bell Atlantic retail performance and wholesale for Trouble Report Rates and Trouble Duration Intervals regarding Missed Repair Appointments raises serious anti-competitive concerns. See May, 2000 C2C Report.

Thus, with respect to DSL, Bell Atlantic's performance falls far short of the level required to allow for the necessary 271 checklist compliance.

E. Unbundled Network Elements and Line-Sharing

Bell Atlantic's May 26, 2000 filing discusses at some length how Bell Atlantic makes available Unbundled Network Elements and Line-Sharing in theory. However, that filing is notably short on details of Bell Atlantic's sustained performance in those areas. There is simply insufficient information regarding the adequacy of Bell Atlantic's performance in provisioning crucial Unbundled Network Elements and Line-Sharing services. A mere Bell Atlantic "offering" of such services is not sufficient. Bell Atlantic must be making the services available in a manner consistent with Bell Atlantic's own retail offerings, and in such a way that CLECs do not suffer poor service and undue delays that undermine their ability to serve

their customers. Bell Atlantic's superficial showings in these regards simply do not meet a reasonable burden of proof standard that Bell Atlantic must carry to be granted its §271 prize.

In fact, there is evidence that Bell Atlantic's UNE and Line-Sharing offerings are inadequate. While the level of repeated trouble calls by CLECs to Bell Atlantic's Help Desk might be indicative of CLECs' inexperience, as Bell Atlantic would have the Department believe more likely it is a result of Bell Atlantic's own inadequate performance. Bell Atlantic should be held to meet the burden of proof that instances of sub-par performance are not due to Bell Atlantic's actions or inactions. Further, if CLECs' actions contribute, Bell Atlantic should be required to show that it has tried to help the CLECs and/or simplified the process. Satisfaction of Bell Atlantic's burden of proof cannot be achieved simply by finger-pointing at alleged CLEC inadequacies.

F. Operations Support Systems

Bell Atlantic's support for its compliance with the OSS checklist item almost entirely relies on its bald assertions that the systems in Massachusetts are the same as in New York. Regardless of whether that is so, as shown in Section II above, Bell Atlantic must make its showing of compliance for Massachusetts specifically. Participants in this proceeding have already demonstrated significant billing problems and ASCENT is familiar with considerable ordering problems experienced by its members – facts likely to be further developed at the upcoming technical sessions. In any event, the Department must be sure that CLECs are not hindered in turning up their customers or disadvantaged in billing matters by Bell Atlantic's inadequate OSS. Yet to date, Bell Atlantic has failed to make any Massachusetts specific showing of how its OSS functions are compliant.

G. Performance Assurance Plan

As ASCENT noted in its filing of April 25, 2000 it is critical that a strong Performance Assurance Plan ("PAP") be implemented to provide sufficient incentives for Bell Atlantic's continued compliance with the Act. A strong PAP will avoid backsliding on a wide variety of metrics that measure Bell Atlantic's performance relative to the Massachusetts telecommunications market remaining open to competition after Bell Atlantic's interLATA entry in Massachusetts. Specifically, maintenance of a competitive market requires a PAP with: (a) strong incentives to Bell Atlantic to ensure non-discriminatory treatment of CLECs and a high level of performance; (b) meaningful compensation to CLECs for substandard performance by Bell Atlantic; and (c) meaningful reporting and auditing requirements. Bell Atlantic's proposal falls far short. The incentives are insufficient, the recompense to CLECs may well not make them whole and the auditing is too weak to be meaningful. Allowance of a PAP less strong than that suggested by ASCENT, the Attorney General, RNK, AT&T and others, will completely undermine the Department's goal of open and fair local competition.

IV. CONCLUSION

In sum, Bell Atlantic's May 26, 2000 supplemental filing still falls far short of its mark of showing the local telecommunications market in Massachusetts to be irreversibly open to competition. Though the Department may properly be guided by the New York and Texas applications reviews, the Department may not find that Bell Atlantic met its burden of proof by its extensive reliance on its processes in New York. If that were a proper approach, the Department could have skipped all the efforts of the past 6 – 12 months and relied on the New York Commission.

Further, ASCENT and other CLECs have shown that serious problems exist that significantly hinder achievement of an open and competitive telecommunications market.

Bell Atlantic's "answers" to these problems have been inadequate. The Department must require full and final solutions to such problems, along with a showing that processes are in place to avoid recurrence of such problems. The Department must require sustained performance at a level consistent with an irreversibly competitive market, as well.

At this time, however, favorable findings by the Department would delay or cripple further development of competition in the Massachusetts local telecommunications markets. Therefore, unless Bell Atlantic is able to conclusively prove that it has put all problems and performance shortfalls behind it, the Department must refrain from issuing a favorable report regarding Bell Atlantic's compliance with the checklist.

Respectfully submitted,
ASSOCIATION OF COMMUNICATIONS ENTERPRISES
By Its Counsel,

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