COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

New England Telephone and Telegraph Company, d/b/a Bell Atlantic-Massachusetts - Section 271 of the Telecommunications Act of 1996 Compliance Filing	D.T.E 99-271

SUPPLEMENTAL COMMENTS OF
AT&T COMMUNICATIONS OF NEW ENGLAND, INC.

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I. INTRODUCTION AND OVERVIEW

In a Hearing Officer Memorandum dated January 26, 2000, the Department requested comments from participants in this docket on the question of whether Bell Atlantic-Massachusetts ("BA-MA" or "Bell Atlantic") has satisfied the requirements and standards set forth in the order of the Federal Communications Commission ("FCC") approving Bell Atlantic New York's Section 271 application (Memorandum Opinion and Order, released December 22, 1999, in FCC 99-404, CC Docket No. 99-295 – "FCC BA-NY Order"). In the Hearing Officer Memorandum, the Department requested that commentors describe factual disputes with respect to BA-MA's satisfaction of the 14-point competitive checklist set forth in Section 271. In doing so, the Department explicitly recognized that "certain disputes may not become apparent to the applicant or to the participants until KPMG's testing of BA-MA's operation support systems ("OSS") is further along or complete."

The original schedule for submitting comments in response to the Hearing Officer memorandum has been amended several times. Pursuant to the most recently amended schedule, Bell Atlantic submitted its "Supplemental Comments" on May 26, 2000, and AT&T now submits its responsive comments. In these comments, AT&T identifies the specific Section 271

checklist items that Bell Atlantic has not yet satisfied, identifies factual disputes that require further development, and makes recommendations to the Department for further proceedings required to properly complete the Department's investigation in this docket. At the outset, it is important to take note of the crucial significance of the Department's fact-finding role in the Section 271 process.

A. The FCC, In Effect, Relies On The Department To Develop A Complete Factual Record With Respect To Bell Atlantic's Compliance With The Requirements Of § 271.

From the outset of its review of Section 271 applications, the Federal Communications Commission ("FCC") has made it clear that it will look to state commissions to conduct evidentiary proceedings in order to develop the detailed evidentiary record with respect to the compliance of a Regional Bell Operating Company ("RBOC") with the 14 point checklist requirements of § 271. Order Re: Ameritech Michigan Section 271 Application, CC Docket No. 97-137, FCC 97-298 ("Ameritech Michigan Order") at ¶ 30. FCC BA-NY Order at, e.g., ¶ 20. Under the abbreviated 90-day review period provided by the Telecommunications Act for FCC action on § 271 applications, the FCC itself has inadequate time to develop its own factual record with respect to each application. The FCC also implicitly acknowledges the superior position of state commissions to develop the detailed information required to determine whether the RBOC has satisfied each of the 14 checklist items in a particular state, if the commissions devote the substantial time and effort necessary to do so. Thus, because of both time constraints and its limited access to information, the FCC depends heavily on state commissions to perform the essential fact-finding function for Section 271 applications. (In the FCC BA-NY Order the FCC stated that it "placed substantial weight" on the New York Commission's conclusions).

The FCC's deference to state commissions highlights the crucial role of the Department with respect to Bell Atlantic's application for In-Region InterLATA authority pursuant to § 271.

The current proceeding is the only opportunity for a deliberate, detailed, factual inquiry into Bell Atlantic's compliance with the 14 point checklist in Massachusetts. The FCC itself makes clear that it will conduct no parallel or subsequent fact-finding of its own. Moreover, once § 271 authorization has been granted, there is generally no subsequent state review of the incumbent LEC's compliance with the checklist requirements. In other words, it is crucial that the current inquiry be thorough and complete, because once Bell Atlantic has received FCC authorization to provide interLATA service in Massachusetts, it is unlikely that there will be further occasion for this Commission to review Bell Atlantic's overall compliance with the requirements of § 271, and certainly no sanction of comparable significance to enforce such compliance.

The importance of ensuring Bell Atlantic's actual compliance with the requirements of § 271 cannot be overstated. For well over a decade the Department has been a strong advocate of opening local telecommunications markets to competition in Massachusetts. Bell Atlantic's monopoly stranglehold on the local phone market in Massachusetts continues, however. The only current leverage that might compel BA-MA to actually open that market to competition is the incentive of entry into the long distance market created by the 1996 Act. In short, the Act has established that Bell Atlantic and other RBOCs are entitled to enter long distance markets only as the *quid pro quo* after they open their monopoly local markets fully, effectively and irreversibly to competition. The failure to assure that local markets are irreversibly open now, before BA-MA has received Section 271 relief, will leave BA-MA's historic monopoly intact and will provide it the opportunity to extend that monopoly into the currently competitive long distance market.

Without the incentive of Section 271 relief, the likelihood that Bell Atlantic would encourage, or even allow, effective competition for its monopoly local businesses is virtually nil.

Bell Atlantic has every incentive to maintain, not to weaken, its monopoly position in local markets. Once it has received interLATA authorization, there will be no counterbalancing incentive to force Bell Atlantic to permit competition with its local service businesses. For these reasons, it is imperative that Bell Atlantic not be authorized to enter long distance markets until the Department completes the most thorough and careful review and determines that BA-MA's monopoly has actually been broken and that local markets in Massachusetts are irreversibly open to competition.

B. The Department Must Permit the Development of a Full and Complete Evidentiary Record.

From the outset, the Department has deemed this case not to be an adjudicatory proceeding. *See*, Legal Notice dated June 29, 1999, at page 2. Notwithstanding that determination, given the essential fact finding role of the Department under § 271, it is crucial that the Department permit a thorough examination of BA-MA's performance before developing its recommendation to the FCC.

No case is better suited than this one for the use of traditional adjudicatory procedures for the development of a detailed record. The determinations that the Department must make are almost entirely fact-specific. Each of the 14 checklist items requires a detailed factual investigation into Bell Atlantic's operations, systems and actual support delivered to CLECs. These are quintessentially factual determinations. Given the importance of the Department's determinations in this docket, and given Bell Atlantic's incentives to overstate its own performance, the Department should insure that interested parties have every opportunity to test the adequacy of Bell Atlantic's performance on the 14 point checklist. Equally important, the Department must assure that the information it relies upon is factually correct and independently verified, as opposed to self-certified results or promises of future performance. Otherwise the

Department risks basing a decision that has far reaching and irreversible consequences for consumers upon an uncertain foundation.

Until as recently as the end of last week, the Department's procedural schedule has generally been appropriate in relation to the scope and importance of the matters at issue in this case. To date, the Department has sought CLEC input through pre-technical sessions, position statements and technical sessions. Those mechanisms have been useful in educating the Department and staff on the factual issues in dispute. The July 14 Revised Procedural Schedule, however, raises serious concerns about the Department's plans for bringing this case to a conclusion. Unfortunately, the new schedule appears to deviate from the Department's prior pronouncements. There are now serious questions whether the proposed schedule will be adequate to permit a thorough and proper review of whether BA-MA has satisfied the Section 271 checklist. Indeed, the proposed schedule appears to represent a "rush to judgment" that is entirely inappropriate given the significance of the issues to be decided in this case.

There are several concerns raised by the recently announced procedural schedule. First, almost three years after initially promising its filing for Section 271 approval (see Vote To Open Investigation, DPU 97-38, March 21, 1997, at p. 2), BA-MA has still not certified that its submissions are complete and final with respect to *any* of the 14 points on the Section 271 checklist. The Department has explicitly required that BA-MA make such certification before the Department can make any final determination of Section 271 compliance. The Department also explicitly promised that, while it would conduct technical sessions even before BA-MA had certified the completeness of its filing, it would conduct a "full final inquiry, including Panel Hearings," only *after* BA-MA had provided the required certification. The Department's pronouncement on this crucial procedural issue was as follows:

> While the Department intends to conduct Technical Sessions on all issues as outlined below, we will not conduct final review through Panel Hearings on any issue that is to be supplemented until supplementation is complete. It is within Bell Atlantic's control to determine when the Department begins its final review of the checklist items by providing the Department with a complete filing. Therefore, at the time that Bell Atlantic certifies to the Department that its presentation on any checklist item is complete (and thus forfeits its ability to supplement the record on that issue), the Department will proceed on that checklist item with its full final inquiry, including Panel Hearings.

See Hearing Officer Decision and Procedural Schedule dated August 19, 1999.

The schedule issued on July 14 appears not to conform to the Department's prior pronouncements. BA-MA has not certified that its filings on any checklist item are complete. The newly issued schedule makes no provision for a "full, final, inquiry" (as distinct from "technical sessions,") subsequent to such certification. There is no express provision in the procedural schedule for the submission of *evidence* (as opposed to "comments") by the parties. It is clear that the current "comments" represent only an opportunity to flag issues requiring further examination. While "comments" are useful, they are not evidence.[1]

The need for real hearings is at least as acute today as it was when the Department promised such hearings last year. BA-MA's untested assertions that it has satisfied all the checklist items must be subject to rigorous examination, and the other parties must be given a complete opportunity to submit affirmative evidence of BA-MA's non-compliance. Neither "comments" nor technical sessions satisfy this crucial requirement. AT&T urges the Department

[1] It must be noted that the non-BA-MA parties were notified that witness statements were not expected to be submitted with these comments. See Hearing Officer memo dated July 12, 2000.

to adhere to its prior pronouncements on the process to be followed, including full panel hearings to be held after BA-MA certifies the completeness of its submissions on checklist compliance.[2]

Another crucial step that remains to be completed is the KPMG third-party test of BA-MA's OSS. From the outset of this case, the Department has recognized the significance of a thorough, comprehensive third party OSS testing process. In the January 26, 2000 Hearing Officer Memorandum, the Department promised the parties "another opportunity to present factual disputes arising from the KPMG test by conducting technical sessions with KPMG representatives." Hearing Officer Memorandum at p. 2. KPMG has not yet issued its final report on the OSS test process and results. When it does so, the parties need a reasonable opportunity to review and analyze the report before engaging in the promised technical sessions.

The July 14 schedule contemplates the submission of KPMG's draft report to the Department and BA-MA on July 17, followed on July 27 with its submission to the CLECs "for comment." The CLEC comments are due by August 3, only seven days later. This schedule is both unfair and inadequate to permit adequate review of KPMG's report. In the first place, providing BA-MA the opportunity to review and comment on the KPMG draft report before CLECs are even allowed to see it denies CLECs the opportunity to review, and object to, changes proposed by BA-MA. At a minimum, CLECs should be informed of changes proposed by BA-MA and given an opportunity to comment on such changes.

Moreover, the time allowed for CLEC review is wholly inadequate. The OSS test process has been going on for many months. While CLECs participated on calls with KPMG, they were not informed on many aspects of the test so as to protect its "blindness." Thus, the

[2] The Department has stated that the transcripts of the technical sessions would not be part of the formal record, making more acute the need for on-the-record panel hearings.

Draft Final Report will be a first look for CLECs on many aspects of KPMG's test. The adequacy of BA-MA's OSS is one of the most important market-opening issues the Department must review. The CLECs should be given more than seven days to review this crucial (and likely voluminous) piece of evidence.[3] In New York, for example, review of KPMG's findings was spread out over more than three months.

In sum, the July 14 revised schedule appears to be inconsistent with the Department's prior representations and, more important, will preclude the Department from conducting the full factual inquiry necessary to support its recommendation to the FCC. The importance of the issues before the Department is far too great to allow speed to trump thoroughness. The Department has, prior to now, provided adequate time for full CLEC involvement in each stage of this case. It is not at all clear why the Department sees a need to accelerate the process at the most important phase of the case. Ultimately, the quality of the Department's review is much more important than the speed with which it is conducted. The benefits to Massachusetts ratepayers that will result from vigorous local service competition are too important to put at risk simply for the sake of speed.

II. BA-MA CANNOT BE AUTHORIZED TO ENTER THE LONG DISTANCE MARKET UNTIL ITS ANTICOMPETITIVE UNE RATES ARE BROUGHT INTO COMPLIANCE WITH CORRECT PRICING PRINCIPLES

In addition to the procedural steps described above, there is another crucial determination that must be made before the Department can certify BA-MA's compliance with Section 271.

[3] AT&T continues to be concerned with the Department's decision on conducting the final, and most important, steps in the case almost entirely in a six-week period. See AT&T request to postpone technical sessions, dated July 7, 2000. The newly-proposed schedule exacerbates the problem of requiring the parties to conduct extensive reviews of material, and to prepare for and attend technical sessions, in a very tight time frame. AT&T will file an appeal of the denial of its request to postpone technical sessions in the hope that the Department, on reflection, will reconsider the current ill-advised schedule

Specifically, the Department must review, and reduce, BA-MA's current Massachusetts rates for unbundled network elements ("UNE's"). Until UNE rates are properly determined in accordance with total element long run incremental cost ("TELRIC") principles, BA-MA cannot be certified as having satisfied the 14-point checklist. To do otherwise would permit BA-MA to enter the long distance market in Massachusetts while the principal means of entry into local markets is completely foreclosed by excessive, anticompetitive UNE rates.

Four months ago, AT&T filed with the Department a petition to reduce BA-MA's current UNE rates. *See*, Petition of AT&T Requesting the Department to Review and Reduce Existing Recurring Charges for Unbundled Network Elements, dated March 13, 2000. The Department has taken no formal action to date on that petition. Because the issue of TELRIC-based UNE pricing is so crucial to the ability of CLECs to compete with BA-MA in the local service market in Massachusetts, and because the issue of local service competition is crucial to Section 271 certification, AT&T repeats here the basic allegations of its pending petition.

A. CLECS Cannot Compete With BA-MA Because UNE Rates Are Too High.

UNE rates are currently so high in Massachusetts that UNE-based competitive entry into the local exchange market is not economically viable. Most of the initial competitive entry in New York has been by CLECs that purchase the UNE Platform (or "UNE-P") from Bell Atlantic, which means that they are leasing the local loop and local switching functions as a package. Massachusetts UNE rates make it impossible for CLECs to do the same here.

Under current UNE rates in Massachusetts, the amount of money that a CLEC would have to pay to lease UNE-P from BA-MA for each customer significantly exceeds the retail price at which BA-MA offers retail service to the same customer. For example, the current UNE wholesale prices that a CLEC would have to pay BA-MA to provide basic local service

(assuming 740 minutes of use) would be almost $11 greater than BA-MA's average retail revenue per line. (UNE costs of $31.49 compared to BA-MA revenues per line of only $20.84). With every dollar of additional costs that a CLEC must incur for its own operations, the competitive disadvantage that CLECs will suffer from current UNE rates is even greater. Thus, CLECs could not offer competitive service in Massachusetts without losing money. Under these circumstances, today's excessive UNE rates are a significant barrier to the development of robust retail competition in the Massachusetts local exchange market.

B. Switching Rates, Among Others, Are Too High And Are Based On Inputs Which Do Not Comport With TELRIC.

In setting switching UNE rates for Massachusetts, the Department permitted BA-MA (then NYNEX) to estimate costs under the assumption that it would pay for its switching investment at the prices that apply when purchasing switching upgrades, which are also known as "growth parts." These prices are substantially higher than the prices Bell Atlantic pays to purchase new switches to serve forecasted demand.

It is now clear that the methodology followed by the Department is incorrect, and does not comport with TELRIC. The FCC has carefully considered the issue, and in a decision issued in November 1999 it determined that when estimating the forward-looking economic cost of switching, one must look to the cost of installing new switches to serve anticipated demand, and must not factor in the much higher cost of providing the same switching services by purchasing and installing switching equipment upgrades. *See* FCC 99-304, *In the Matter of Federal Joint Board on Universal Service* (CC Docket 96-45) and *Forward-Looking Mechanism for High Cost Support for Non-Rural LECs* (CC Docket No. 97-160), Tenth Report and Order (released Nov. 2, 1999), ¶¶ 315-317. As a result, the switch investment prices that Bell Atlantic used as inputs to its switching cost analysis are approximately 7.5 times higher than they should be. If this one

item were corrected, switching UNE rates in Massachusetts would be approximately one-third of what they are today. It is noteworthy that BA-MA's Massachusetts UNE switch rates are 80% higher than the grossly inflated rate that BA is *proposing* in a UNE rate proceeding currently ongoing in New York. There could be no clearer evidence of just how outlandish BA-MA's current switch rates are.

In addition, NYNEX based its switch cost estimates on an installation factor of 65.41 percent. In other words, the Massachusetts UNE switching rates are based on the premise that in a forward-looking network, the cost of installing switching material is equal to 65.41 percent of the cost of the switch investment. This figure is grossly overstated. The average cost of performing the same installation work in every other region in the country, including the Bell Atlantic-South region, is only about 20 percent.[4] If this one item were corrected, switching UNE rates in Massachusetts would be approximately three-quarters of what they are today.

The switch investment costs and the installation factor, discussed above, are the two most egregious problems with the current switching UNE rates in Massachusetts, but they are not the only ones. For example, the switching rates are inflated because they are based on an excessive cost of capital, as discussed below. If Massachusetts switching rates were recalculated by correcting only the switch price input, the installation factor, and the cost of capital – and

[4] This 20 percent figure encompasses all EF&I costs (*i.e.*, the costs to Engineer, Furnish, and Install) for switches, and thus is not directly comparable to the installation factor that would be applicable in costs studies for ILECs outside of the old NYNEX region, Bell Atlantic-North. All other ILECs – including the old Bell Atlantic, now Bell Atlantic-South – use switch vendors to perform much of this work, and only perform the site-specific work themselves. The EF&I performed by the vendor is incorporated in the final price charged for the switch. The installation work performed by other ILECs amounts to only 8-10 percent of the switch investment cost. The 20 percent figure cited here is used in order to be consistent with the very unusual methodology reflected in NYNEX's switch cost studies, and covers both the engineering and installation work performed by switch vendors for all other ILECs (but which NYNEX assumes that it would perform on its own in a forward-looking network) as well as the 8-10 percent factor that other ILECs use to price out the remaining installation work that they perform themselves.

keeping all other aspects of the NYNEX switch cost estimate unchanged – switching UNE rates would be only about 20 to 25 percent of what they are today. The Department can and should correct several other aspects of the current calculation of switching rates, including: (i) the need to take into account the more efficient integrated digital loop carrier ("IDLC") called GR-303, which has been available for some time and which even Bell Atlantic now acknowledges it will be using on a going forward basis; (ii) the fact that NYNEX's use of a utilization factor resulted in double counting, since the SCIS ("Switch Cost Investment System") model that NYNEX used to estimate uninstalled investment costs already takes this into account; (iii) that fact that NYNEX improperly capitalized and thereby double-counted all right-to-use or software costs associated with switches, when many of these costs were also reflected in NYNEX's expense factors; and (iv) the fact that NYNEX improperly calculated its per minute-of-use switch rates based on estimates of then-current demand, rather than on the future demand levels (from all sources, whether Bell Atlantic or CLECs) over the life of the UNE rates.

C. The Cost of Capital Incorporated in BA-MA's UNE Rates Is Too High, Does Not Comport With TELRIC, And Drives Up All UNE Rates.

In early 1997, the Department ordered that BA-MA's UNE rates be based on the assumption of a weighted average cost of capital equal to 12.16 percent. This figure is excessive, and does not comport with the FCC's TELRIC methodology. Nine other states in the Bell Atlantic territory have adopted costs of capital for use in setting UNE rates in accordance with TELRIC, and all have settled on rates that are substantially lower than the one selected in Massachusetts. Those nine states and their TELRIC costs of capital are: Delaware (10.28%), Maryland (10.13%), New Hampshire (10.61%), New Jersey (10.40%), New York (10.18%), Pennsylvania (9.83%), Vermont (9.99%), Virginia (10.12%), and West Virginia (11.24%). The average of the cost of capital decisions in those nine states is 10.31 percent.

In real life, Bell Atlantic's cost of capital is the same throughout the region. Bell Atlantic borrows money or issues stock at a corporate level, not at a state-by-state level. Thus, the forward-looking cost of capital for TELRIC purposes should be essentially the same throughout the Bell Atlantic region. The Department previously chose a higher cost of equity capital and a lower debt-to-equity ratio (which raises the weighted average cost of capital) based on the assumption that Bell Atlantic's wholesale operations of providing UNEs – either to itself or to CLECs – would be substantially riskier going forward. In fact, however, Bell Atlantic's risk levels have not risen, and its debt-to-equity ratio has not decreased.

In its Phase 4 Order in the *Consolidated Arbitrations* docket, the Department initially adopted a cost-of-capital methodology that produced a cost of equity capital for BA-MA of 11.38 percent. On reconsideration in the Phase 4-A Order, however, the Department choose to put aside the methodology it had adopted and selected 13.5 percent as the cost of equity capital for the purpose of calculating UNE rates. In the real world, the cost of equity capital has fallen substantially since 1996. Today, the cost of equity capital for Bell Atlantic is closer to 9.0 percent.

In addition, in 1997 the Department adopted a debt-to-equity ratio of 23.51 percent to 76.49 percent (23.51/76.49). In other words, it assumed that on a going forward basis Bell Atlantic would finance its investments and operations with a mix of 23.51 percent of debt capital (bonds) and 76.49 percent equity capital (stocks). The average debt-to-equity ratio in the other nine Bell Atlantic states that have made UNE rate decisions is approximately 40/60. This is approximately the ratio that Bell Atlantic itself has used in recent cost-of-service filings.

The net effect of these cost of capital elements upon UNE rates in Massachusetts is significant. If the Department had maintained its original cost of equity capital of 11.38 percent,

and had adopted a more appropriate debt-to-equity ratio of 40/60, the resulting weighted average cost of capital would have been 9.95 percent, rather than the 12.16 percent selected by the Department. Since the time of the Department's decision, the actual cost of equity capital has fallen substantially because of the significant rise in stock market prices. Based on current data, the forward-looking weighted average cost of capital for Bell Atlantic is approximately 8.59 percent. The effect of using a weighted average cost of capital that is overstated by approximately 3.5 percentage points today, and was substantially overstated at the time that it was adopted, is that all of BA-MA's UNE rates are substantially overstated as well.

BA-MA's UNE rates must be set in accordance with TELRIC principles *before* final action is taken on its Section 271 application. As a practical matter, only the Department can remedy the existing inflated, competition-foreclosing UNE rates because the FCC has generally declined to review state commissions' UNE rate calculations. In the FCC BA-NY Order, the FCC "stressed" that it accorded "great weight" on the New York Commission's determination of UNE rates for BA-NY. The FCC, in fact, relied entirely on the New York Commission's rate determination and conducted no independent review or analysis of BA-NY's UNE prices.

It is apparent that the UNE rate-setting responsibility is left entirely in the hands of state commissions. If the UNE mode of entry into local markets is going to become a reality in Massachusetts, BA-MA's current UNE rates must be reduced substantially, and the necessary reductions must occur before BA-MA is authorized to enter the long distance market. To do otherwise would unfairly tip in BA-MA's favor the delicate competitive balance struck in the Telecommunications Act between local market entry for CLECs and long distance market entry for RBOCs.

AT&T strongly urges the Department to move forward promptly on the pending petition

to reduce UNE rates, either in this docket or separately. In all events, the Department may not reach a final determination on BA-MA's Section 271 application until UNE rates are brought into conformance with TELRIC standards.

III. BA-MA DOES NOT PROVIDE NONDISCRIMINATORY ACCESS TO OPERATIONS SUPPORT SYSTEMS.

Nondiscriminatory access to OSSs, required by checklist Item 2, does not yet exist in Massachusetts. As soon as BA appears to resolve one problem, a new one develops or an old one reappears. Experience in New York after BA received Section 271 approval demonstrates the continuing problems BA has experienced in trying to provision UNEs to CLECs. Indeed, within days of the FCC's approval of BA-NY's Section 271 application to provide long distance service in New York, a myriad of problems developed in BA's OSSs as volumes increased in a competitive environment. Thousands of AT&T UNE-P orders in New York were lost and status and completion notices were not timely provided for many of the orders that were processed. BA was unable to resolve these problems on a timely basis.

These problems led to the filing of a complaint by AT&T with the New York Public Service Commission ("PSC") on December 23, 1999. The New York PSC issued an order on February 11, 2000 in which it stated that it had "confirmed the allegations" that "deficiencies in BA's operation support systems were, among other things, causing wholesale orders to drop out of the normal OSS system and substantially delaying the ability of consumers to move their service to competitive local exchange companies," and entered specific orders to assist in resolving the problem. NYPSC cases 00-C-0008 and 00-C-0009, February 11, 2000 order. These serious OSS service problems also led to an FCC investigation and subsequent consent decree in which the FCC expressly noted that BA's own data "suggested that BA's performance in providing order acknowledgements, confirmations and rejection notices and order completion

notices for UNE-P local service orders deteriorated following BA's entry into the New York long distance market." FCC 00-92 at ¶ 7, released March 9, 2000.

CLECs continue to encounter serious problems with BA's OSSs. As discussed below, recent experience in New York reveals that problems continue to exist there, despite the various fixes BA claims to have initiated. Moreover, AT&T conducted its own production testing in Massachusetts from mid May through mid June of this year, after the roll-out by BA of the Local Service Ordering Guidelines, Release 4 ("LSOG 4"). As explained below, problems were again experienced in this Massachusetts production testing with regard to late or missing status and completion notices, as well as inaccurate billing information.

BA will have no incentive to correct any OSS problem after it has obtained Section 271 approval. If the Department makes a premature approval, it will face the same crisis situation encountered by the New York PSC, which had to intervene to assist in sorting out the many OSS problems affecting both competitors and consumers and competition that appeared after Section 271 approval was granted in New York.[5] Because the Department here does not have the level of staff resources necessary to assist in the day-to-day resolution of OSS problems, it is even more important that Section 271 approval not be granted prematurely. The adverse consequences of such a premature Section 271 approval will be visited on those Massachusetts consumers who seek to take advantage of competitive alternatives. Those consumers should not have to bear the burden of BA-MA's inherent desire to stifle its competition. Massachusetts should learn from the New York experience and make favorable factual findings under Section 271 only when BA-MA has truly demonstrated that the OSSs are functioning adequately to

[5] February 11, 2000 Order in New York PSC Cases 00-C-0008 and 0009

provide nondiscriminatory access to all CLECs attempting to provide service using UNEs. That time has not yet come.

The recent problems AT&T experienced with its production testing in Massachusetts also emphasizes the need to do volume and stress testing of LSOG 4 before Section 271 approval is given. The problems experienced in the limited production test environment are harbingers of more serious problems that may occur when LSOG 4 is used for commercial volumes. As AT&T has explained previously, the LSOG 4 system differs substantially from the LSOG 2. As BA has acknowledged, the change to LSOG 4 involved replacing DCAS, an important part of BA-North's OSSs, with an entirely different system, Request Manager, used in BA-South. Given that the Request Manager system has already been the subject of failed volume testing in Pennsylvania, and that AT&T has experienced problems in its production testing, it is likely that failures will occur in the real world without the safeguard of rigorous, formal volume testing of the LSOG 4 production environment. The LSOG 4 systems also include for the first time new functionality, such as fielded complex completions, that do not and will never exist in the LSOG 2 environment. Volume production testing of LSOG 4 is needed to ensure that these entirely new and substantially revised systems work as they should. This testing is necessary to help ensure that CLECs and their customers in Massachusetts are not subjected to the kinds of Bell Atlantic systems failures that have occurred in New York.

A. AT&T Has Experienced Problems in the Preorder Process.

Preorder functionality is critical for a CLEC attempting to provide competitive local service. A CLEC's customer service representative needs to have real-time access to the information necessary to place an order when a potential customer calls. As the FCC recognized, "given that pre-ordering represents the first exposure that a prospective customer has

to a competing carrier, it is critical that inferior access to the incumbent's OSS does not render a carrier a less efficient or responsive service provider than the incumbent."[6]

AT&T continues to experience problems in the New York preorder process that inhibit service to customers and cause more time and expense to be incurred by AT&T to process customer orders. When AT&T cannot properly utilize BA's preorder systems, AT&T's customer service representatives must take orders manually. This manual order process is extremely time consuming. The AT&T representative must write up an order form that then must be typed into the order system and sent to BA. This workaround is also subject to human errors inherent in a manual process and causes order rejects that further delay service to AT&T customers.

In May, AT&T could not process pre-order transactions in New York for over three consecutive days due to BA connectivity and maintenance problems. During the month of June, 2000, there were six separate occasions on which AT&T in New York experienced shutdown of BA's preorder service, ranging from one hour to a full day, forcing AT&T customers service representatives to process orders manually. These real-time outages, as opposed to statistical averages, are important to provide a perspective on what CLECs experience during peak business hours. AT&T continually experiences time-outs when trying to access BA's preorder system. When these troubles are reported to BA, the remedy invariably seems to be that BA must re-boot or "bounce" their servers. BA-MA does not provide any underlying root cause analysis for these outages. Without an identified root cause, which can then be addressed, a continual cycle of trouble tickets and server re-boots result. Such conditions make it impossible

[6] Order on BA-NY Section 271 Application, FCC 99-404; ¶ 129 (December 22, 1999).

for a CLEC to offer timely service to its customers. BA-MA must demonstrate that these problems have been properly fixed before its Section 271 application is approved.

B. Lost Orders and Late or Never Received Acknowledgments, Confirmation and Rejects Remain a Problem.

Acknowledgements notify the CLEC that BA has received an order. A confirmation tells the CLEC that the order will be performed on a specific date, while a Reject notifies the CLEC that the order cannot be processed and the reason therefor. Without this critical information, the CLEC does not know what has happened to the order it placed and so cannot keep its customers informed or take the appropriate steps to rectify any problem. AT&T has encountered continuing problems in both New York and in the Massachusetts production testing with these notices either never being received or being received late. As a result, AT&T was not able to identify promptly those orders that were lost completely from BA's system.

BA asserts that the problems that CLECs in NY encountered with missing orders was merely a paper flow problem, with little to no affect on CLEC customers. To the contrary, AT&T's customers were severely impacted by these problems. BA-MA's allegation that 97% of all orders they received were successfully processed during the months of the so called NY Service Crisis reflects only the orders that made it to their back end systems. When BA's front end application lost the orders, BA's statistics never even reflected such orders. This myopic reporting by BA was part of the reason that BA eventually was required by the New York PSC to credit $10 million to its wholesale customers and had to pay $3 million to the federal government

as part of the March 9 FCC Consent decree.[7] BA spent more time denying there was a problem than promptly addressing the root causes involved.

BA-MA is having similar problems in Massachusetts now with respect to notifications not being sent back to CLECs accurately and promptly. As AT&T sent higher volumes of orders in June in its production testing with the LSOG 4 interface, BA's OSS performance with respect to timely notices deteriorated. This pattern indicates that there may be additional problems that have not been identified by KPMG or any CLEC conducting business at the current low volumes in Massachusetts. As explained above, until there is proper volume and stress testing of LSOG 4, it is impossible to know whether the BA-MA system can, in fact, handle commercial volumes. Massachusetts consumers should not be placed at risk that such problems will only be discovered when a CLEC generates significant volumes of orders for BA-MA to process. A volume and stress testing of LSOG 4 is critical to assure that customer orders are not impacted later.

The following information summarizes BA's OSS performance during the recent production testing that AT&T conducted in Massachusetts:

Acknowledgements – AT&T did not receive an acknowledgement from BA-MA for more than 5% of the orders sent during the high volume week of production testing in Massachusetts. As was documented in New York during the service crisis there, this is a critical notification requirement because without it CLECs do not know if the order is going to be processed or was even received by BA. AT&T cannot afford to have customers in

[7] After-the-fact fines, while necessary if there are problems, are obviously not the preferred way to deal with inadequacies in BA's OSS systems. Those inadequacies should be corrected and true nondiscriminatory access must be provided to CLECs before BA-MA is granted Section 271 approval.

Massachusetts suffer the same delays that occurred in New York when AT&T never knew that an order had not been received.

Confirmations/Rejects – Another troubling aspect of BA's performance during AT&T's production testing in Massachusetts was the gradual increase in late receipt of Confirmations/Rejects. Only 66% of the orders that should have received a Confirmation actually received them within 24 hours during the highest volume week of testing. CLECs rely on these reports to be sure that their order is being processed and that the customer due date will be met. If the Confirmation is not received, then the CLEC has to assume that BA will make the order on time. If the order in fact had been rejected, the problem is particularly acute, because the CLEC needs to, but cannot, take action to fix the order.

BA also did not provide Confirmations or Rejects at all for 22% of the orders sent. If this status notification is never received, the CLEC is left wondering if the previously Acknowledged order has been lost between systems in BA and will never be performed. Customers may have to be notified of a new appointment date and their expectations of expeditious service will not be met.

C. BA-MA is Failing to Provide Completion Notices on Time.

An order completion notice from BA to the CLEC is the means by which the CLEC learns that it now has responsibility for the customer's care and can begin billing that customer. As the FCC has recognized, "[u]ntimely receipt of order completion notices directly impacts a competing carrier's ability to serve its customers at the same level of quality that Bell Atlantic provides to its retail customers."[8]

[8] FCC BA-NY § 271 Order, ¶ 187.

Only 54% of the provisioning completion notices received by AT&T in its Massachusetts production testing were on time. This is obviously inadequate. More disturbing is the fact that only 91% of all AT&T orders in the Massachusetts production testing that were eligible to be completed actually ever received either a provisioning or billing completion notice at all. Only 88% of the orders received a billing completion notice. If the CLEC does not receive timely completion notices from BA-MA, it cannot bill and service those customers adequately. The CLEC will not know whether the work has been completed, *i.e.* if the customer's service has been moved to the CLEC or not. The customer may have actually been provisioned, but until the completion notice is received the CLEC cannot begin servicing the customer. Without this information, a customer calling with a service problem may be incorrectly told that he is still a BA customer. Furthermore the customer cannot be billed by the CLEC on a timely basis. Instead, the CLEC is then forced to send a late and unexpectedly high first bill to the customer, creating the impression with the customer that the CLEC cannot properly bill. These situations obviously creates serious problems for the CLEC seeking to establish a good relationship with its new customers.

The frequency of missing acknowledgements, confirmations, rejections, and completion notices experienced by AT&T in its Massachusetts testing was much higher than currently exists in New York. AT&T's testing involved 2,000 orders in Massachusetts submitted over several weeks. The problems experienced by AT&T in its actual Massachusetts testing belie the claim that Bell Atlantic's performance in Massachusetts is as good as it is in New York. It appears from AT&T's testing experience that flow through rates in Massachusetts are significantly worse than in New York, thus suggesting that BA-MA's poor performance on these critical notice requirements is a result of the unexpectedly high level of manual intervention needed. Until

BA-MA can, in actual practice, deliver all of the required notices on a timely basis, CLECs are not being provided with nondiscriminatory access.

D. Poor Flow-Through and Invalid Rejects by the TISOC are Also Adversely Affecting Services to CLECs.

AT&T's recent production test experience in Massachusetts showed that a large number of orders did not flow through as expected during several weeks of testing. This same problem was found in KPMG's third party testing (see KPMG observation #111). Many of AT&T's test orders were then improperly rejected by the TISOC, causing further order delays. Of the total of 478 rejects that AT&T received during its Massachusetts production testing, over 50 percent of these were due to errors by TISOC personnel. No CLEC can expect to run an efficient business with this level of errors from its supplier. In fact, the 247 erroneous rejects represent over 12 percent of orders submitted by AT&T during its Massachusetts testing. Since it took an average of over 8 days to close these problems through BA's help desk, any CLEC entering production in Massachusetts would rapidly develop a backlog of orders that miss the customer promised due date. The size (12 percent of orders) and duration (more than 8 days delay) of this backlog threatens to create the kind of problem that developed during the first quarter of this year in New York. Massachusetts consumers should not be exposed to the same kind and quality of service disruption.

E. Improperly Issued Completion Notices on Cancelled Orders Also Adversely Affect CLECs.

When BA-MA receives a cancellation request from a CLEC, it is supposed to generate a confirmation that advises the CLEC that BA is processing the cancellation of the order. Under BA-MA business rules, no completion notice is supposed to be issued on such orders. AT&T has found in Massachusetts that instead of confirming the cancelled order, BA has issued a completion notice against the cancelled order in almost every case. This unexpected completion

notice will create problems for CLECs, who will not know if their order was cancelled or worked to completion, and if a subsequent order is required to correct the situation. This situation must be fixed so that appropriate status notices are received in order to close out cancelled orders correctly.

F. BA's Loss of Line Reports are Inaccurate.

AT&T's recent experience in New York demonstrates the inadequacies of the BA Loss of Lines report. Loss of Lines reports are used by BA to notify CLECs using UNE-P or Resale of customers that migrate to another service provider and leave the original CLEC. This notification must happen promptly so that the old CLEC can cease billing the customer for service. This notification is often the only way the CLEC knows that the customer has gone to another provider.

BA has been notified by several CLECs in New York of problems with the Loss of Lines report it currently uses, but has not fully fixed the problem with this important notification. As a result of the deficiencies, customers have complained to the CLECs and the New York PSC about over-billing that occurs when the CLEC does not know the line has been transferred. Furthermore, in New York AT&T has also received Loss of Lines reports for another CLEC. On other occasions, AT&T has received Loss of Lines reports that inaccurately included lines that had been newly migrated to AT&T. AT&T was misled into terminating these new customers' service as a result of the erroneous loss report. AT&T has also received incorrect information on the Loss of Lines report that misrepresents a disconnect by AT&T as a line loss, causing further confusion. BA should be required to provide accurate Loss of Line reports before the Department finds that BA-MA is providing nondiscriminatory access to CLECs.

G. BA's Change Control Processes are Inadequate.

Given the dynamic nature of OSSs, it is to be expected that changes, both large and small, will have to be implemented regularly. Because of the importance of proper change control processes, BA-MA should be required to demonstrate that it can manage the change control process in an efficient and nondiscriminatory manner before favorable findings are issued on checklist item 2. KPMG's testing, as well as AT&T's own experiences, demonstrate that BA-MA still cannot properly manage the change control process. The BA Change Management process does not provide consistent notification of changes and does not implement CLEC-sponsored as fast as BA-sponsored changes. These continuing problems in managing change control means that CLECs are not receiving nondiscriminatory access to UNEs.

1. CLECs Are Not Properly Notified of Changes.

BA has had several problems related to notification of changes for LSOG4 and LSOG2 that have been documented by KPMG as part of their review of BA Change Management. *See, e.g.*, KPMG Exceptions 5 and 7 and KPMG Observations 55, 76, 92, 100 and 105. AT&T has experienced first hand the problems that result from faulty change management in connection with both the February, 2000 LSOG 4 release and the subsequent June LSOG4 release. In February, BA was unable to maintain a stable test environment due to numerous changes and fixes that were being introduced during testing. This caused AT&T to expend additional resources and significantly delayed testing of LSOG 4. During the June release testing, BA did not follow proper change control procedures to notify AT&T of a late change BA made to its business rules concerning the Account Telephone Number (ATN) that effectively shut down AT&T production orders for LSOG 4 until the change was removed. This change was instituted on Wednesday, June 14th, but was not announced by Change Management until Monday, June 19th, a day after it was put into the production release. AT&T actually sent in orders on Friday,

June 16th to the CLEC Test Environment that were inconsistent with this business rule change, but, adding to the confusion, those orders were confirmed and completed by BA. BA agreed to remove this change only after several escalation calls to both BA upper management and the NY PSC. In the meantime, BA's unannounced business rule change shut down AT&T local ordering in New York for a full day, resulting in the instant development of a backlog of several thousand orders. This change should never have been made without consultation with the CLECs about its impact and without documentation which clearly showed what was being changed.

2. BA Discriminates Against CLEC-Sponsored Changes.

AT&T has had to continually escalate to have CLEC-sponsored changes(Type 5) implemented in upcoming BA interface releases. CLEC Type 5 requests are typically scheduled as tentative for an upcoming release and then mysteriously fall off the list for that release when the specifications are provided. CLECs need a process that provides clear timelines for every release and progress reports for each change request ("CR") associated with a release, so that the CR development effort can be monitored by all Change Management participants. Until there is a process in place to assure that CLEC CR's are provided nondiscriminatory treatment with BA's CRs, Section 271 approval should not be granted.

Fielded Completions and Jeopardy Notification are two examples of Type 5 requests that have languished on BA's Change Request(CR) list until escalations took place involving the New York PSC. Fielded Completions, which CLECs have been requesting for more than a year, were actually ordered by the PSC for an April, 2000 implementation date, which BA ignored. Fielded Completions were finally included in the June LSOG 4 release.

AT&T and many other CLECs have also been asking for electronic jeopardy notices for two years, precisely because the current processes do not work effectively. BA relies on phone calls under some circumstances and a proprietary report in other situations to inform the CLEC

when an order is in jeopardy. This bifurcated process is neither timely nor efficient and requires CLECs to devote an inordinate amount of resources to the process. AT&T has had to work in this inefficient manner to clear over one thousand orders in New York that were in a jeopardy status. Resolution of those orders was delayed primarily because BA failed to institute an electronic jeopardy notifier via EDI last year as AT&T had requested. BA has now promised to provide this electronic notice in two phases beginning in August with completion in October. Testing by KPMG to validate that this needed capability has been implemented correctly by BA should precede any Section 271 approval.

H. Bell Atlantic's System Help Desk Take Too Long to Resolve Problems.

Accepting that some problems will inevitably occur, it is critical that BA's System Help Desk provide a timely resolution of the problem CLECs encounter. Until BA's Help Desk performance improves, BA is not providing nondiscriminatory access to CLECs and it should not receive Section 271 approval. AT&T continues to be frustrated by the performance of the BA Systems Help Desk. Significant delays are being experienced for trouble tickets issued on AT&T's Massachusetts production test orders. During this testing, AT&T opened 85 trouble tickets, representing 1,228 customer orders. Only 18 of those tickets have yet been closed. The average duration of these trouble tickets before closure is 26 days. Proper service cannot be provided to customers if this kind of delay is experienced in resolving troubles.

BA claims in New York to close trouble tickets involving missing notifiers within 3 days, as was ordered by the FCC. In fact, BA often simply cancels the order and requires AT&T to resubmit. This does not provide AT&T with a root cause for the problem to ensure that it will not reoccur.

Moreover, when AT&T has pre-order problems and establishes a technical bridge to discuss the problem, BA will not allow their systems personnel on the call. BA continually insists on screening their personnel from AT&T technical people, thereby causing further delays in trouble identification.

In the last year AT&T has had to deal with a continually changing list of people at the System Help Desk and the inevitable inexperience that changing personnel breeds. Often, it is several days before system troubles are understood clearly by the Help Desk personnel to be able to have someone isolate the problem within BA. This lack of stability causes additional delays

BA has advertised the fact that they have developed a tracking system called PONTRACKER that is supposed to provide immediate status information and assist in troubleshooting internal problems with CLEC orders. We see no evidence that this capability has provided any significant improvement with respect to BA's turnaround time to close trouble tickets.

I. BA Does Not Provide Non-Discriminatory Access to Its Billing Functions.

As the FCC recognizes, "competing carriers need access to billing information to provide accurate and timely bills to their customers." FCC BA-NY Section 271 Application Order, ¶226. AT&T has numerous problems with Wholesale Billing in New York and it appears that there are significant billing issues in Massachusetts as well. In New York AT&T has received bills from BA that improperly reflect data for other resellers, and this has also occurred in connection with BA-MA UNE-P invoices.

The accuracy of the Daily Usage Feed (DUF) and Wholesale bills has also been poor and indicates further problems with BA's OSS System. In its Massachusetts production testing AT&T has found that the first outgoing DUF it received from BA was only 88% accurate, due to

incorrectly including billing from other resellers. The access DUF was also inaccurate, with 19% of the records having a mismatch between the bill time and conversation time. Also, the ADUF was missing approximately 12% of the call records expected. The Wholesale bill was also inaccurate due to billing for other resellers lines. AT&T cannot reliably bill customers if there are these kinds of inaccuracies in the DUFs and Wholesale bills from Bell Atlantic. Customer dissatisfaction with CLEC billing practices can easily cause a customer to drop service, thus adversely affecting the CLEC's profitability.

AT&T also has serious problems with the responsiveness of BA when it raises billing claims and inquiries. Often AT&T claims go unanswered and require constant follow-up on the part of AT&T to ensure they are resolved. There does not appear to be any effort to close billing claims or inquiries in an expeditious manner.

AT&T has also discovered several thousand customers in New York for whom BA has not recorded usage whatsoever. This has been identified as a result of manual order processing in the BA TISOC and switch provisioning problems. Since BA has lost this usage data , AT&T will never be able to bill customers for it. As documented previously, there are missing call records in MA that may indicate similar problems here.

CLEC customers demand billing accuracy from their chosen provider. BA is unable to provide CLECs the accurate usage information they must have to provide appropriate billing to the customer. Section 271 approval should not be granted until accurate billing records are provided by BA to CLECs.

IV. BELL ATLANTIC DOES NOT PROVIDE ACCESS TO UNE-LOOPS ON A NONDISCRIMINATORY BASIS.

Bell Atlantic has not met its burden of proving that it is provisioning UNE-Ls to CLECs in a non-discriminatory manner. Instead of presenting any real evidence that it has fulfilled its

obligations under the Act, Bell Atlantic has presented tables and statistics that it contends tabulate real transactions and represent real performance. Without the underlying data, however, such a contention is mere unsupported assertion. AT&T has been trying to obtain such data from Bell Atlantic with only limited success. Bell Atlantic provided on July 7 ***no*** data underlying its claims in response to the discovery as was required of it. Only after numerous phone calls and the loss of valuable days has Bell Atlantic made available to AT&T a ***small*** part of the data underlying its claims. AT&T has not had sufficient time to analyze these data in order to prepare a response to Bell Atlantic's tabulations. AT&T is now analyzing the data and will present its response as soon as possible. In addition, AT&T is seeking to require Bell Atlantic to provide additional information that the Department asked for, at AT&T's request, on June 22, 2000, and that Bell Atlantic has so far not provided in any usable form. In fact, Bell Atlantic may never be able to provide all of the supporting data. After preparing its tables, Bell Atlantic apparently threw out some of the information and documentation underlying them, making it impossible to test their validity. *See*, DTE-ATT-5 ("Please note that not all data is available due to the age of some of the hot cuts in question."). *See also*, DTE-ATT 4-6, 4-9, 4-12. Any assertions based on the discarded data should be stricken from the record. AT&T looks forward to reviewing and responding to any such data that are made available in the future but, for present purposes, will attempt to provide comments to the Department that are as helpful as possible under the circumstances.

A. Bell Atlantic Has Not Provided Underlying Data That Supports Its UNE-L Performance Claims.

Despite numerous requests by the CLECs and the Department over the year that this case has been pending, Bell Atlantic has refused until literally one week ago to provide any data underlying its UNE-L performance claims in usable form. Moreover, the data that Bell Atlantic

provided within the last week represent a small fraction of the underlying data the Department had requested. The fact that Bell Atlantic has sought at every turn to delay or avoid providing the requested data raises serious questions about the validity and reliability of the summary performance data Bell Atlantic actually reports. Bell Atlantic should ***want*** to provide the Department and the CLECs with usable data so that the data can be tested and Bell Atlantic can satisfy the Department that it has met its burden of proof. Bell Atlantic in fact has most of the data and, if the data supported Bell Atlantic's claims, Bell Atlantic would surely have provided it. The fact that Bell Atlantic has not provided the data in usable form suggests that the data do not support Bell Atlantic's claims. As it now stands, without the underlying data, Bell Atlantic's claims are merely unsupported assertions that cannot be tested by the Department or the CLECs. As a result, there is simply no way that Bell Atlantic can claim to have met the heavy burden of proof that is placed squarely on its shoulders in these proceedings.

B. Bell Atlantic's Filing Overstates Its Performance In Massachusetts By Ignoring Orders That Are Supplemented Due To Problems Caused By Bell Atlantic.

In its Checklist Affidavit, Bell Atlantic claims that it has completed 97% of all hot cuts for Massachusetts CLECs on time. *See* Checklist Affidavit, ¶ 174. Bell Atlantic also claims that this on time percentage rises to 99% for the months of December 1999 through the present. *Id.*, ¶ 175. However, Bell Atlantic's scoring system simply does not tell the whole UNE-L story and, in fact, Bell Atlantic's self-scoring allows it to overstate significantly its true performance.

For example, Bell Atlantic's UNE-L scoring is distorted by the fact that Bell Atlantic does not count as "misses" orders that are supped due to problems caused by Bell Atlantic. This is seen most clearly in Bell Atlantic's "AT&T Hot Cut Scorecard," located at ¶ 177 of its Checklist Affidavit. In this "scorecard," Bell Atlantic calculates its percentage of "met" orders by comparing "Total Orders Met" with "Total Orders Worked" instead of with "Total Orders

Scheduled." For July 1999, this leads to an on-time provisioning rate of 98% instead of the 61% rate that would result from a comparison with "Total Orders Scheduled." Bell Atlantic tries to explain its use of "Total Orders Worked" instead of "Total Orders Scheduled" by claiming, in a footnote, that there are fewer "Total Orders Worked" than "Total Orders Scheduled" due to a number of causes, including supplements ("supps") requested by AT&T. What Bell Atlantic does not reveal, however, is that the reason why some of the scheduled hot cuts were not worked in a particular month was because Bell Atlantic errors forced AT&T to request a supplement. If those Bell Atlantic caused supps were counted as misses, as they should be, Bell Atlantic's on-time provisioning percentage would drop dramatically. To use an extreme example, if all 32 of the hot cuts that were scheduled for July 1999, but were not worked in July 1999, were supped to a later month due to problems caused by Bell Atlantic, the actual on-time provisioning rate would be 61% instead of the – literally incredible – 98% that Bell Atlantic now claims. Even if only one-third (11) of the 32 hot cuts that were scheduled but not worked in July 1999 were supped due to Bell Atlantic problems, Bell Atlantic's success rate would only be 86%. Similar calculations could be performed for all of the months listed in the "Hot Cut Scorecard."

Unfortunately, Bell Atlantic has not timely provided the data that would allow the Department to determine whether a scheduled order was not worked in a particular month due to a supp caused by Bell Atlantic. A supp requested by a CLEC does not necessarily mean that the CLEC, or its customer, was the cause. Indeed, Bell Atlantic's usual practice is to call AT&T when there is a Bell Atlantic problem (or a problem whose origin is undetermined) and tell AT&T to request a supp for the order because of the problem. AT&T is then forced to request the supp in order to avoid a customer outage. It has been AT&T's experience that, when this occurs, Bell Atlantic's logs usually reflect simply that AT&T requested a supp. The logs

conveniently do not record the fact that it was Bell Atlantic that forced AT&T to request the supp in the first place. The Department should keep this in mind if Bell Atlantic ever does produce any logs in support of its claims.

C. Bell Atlantic's Failure To Provide Accurate And Complete LSRCs Is Not Reflected in Bell Atlantic's " Hot Cut Scorecard."

Another problem that is not reflected in Bell Atlantic's "AT&T Hot Cut Scorecard" is Bell Atlantic's continued failure to provide the correct information on LSRCs. This problem most often takes the form of Bell Atlantic's exclusion of the correct cable and pair assignments from the LSRC. This information is essential to ensure that Bell Atlantic has assigned the correct cable identification in its internal orders. Without such verification, there is the possibility that the order could be assigned to the wrong cable in Bell Atlantic's down stream systems, forcing AT&T to engage in costly "work-arounds" in order to avoid delays or potential customer outages. Although these "work-arounds" usually allow AT&T to avoid customer outages, they are an unnecessary expense that would be avoided if Bell Atlantic would follow its own process and provide proper information. When this information is excluded from the LSRC, AT&T's agents are required to research this information by accessing Bell Atlantic's Service Order Inquiry ("SOI"), DCAS, or by placing a phone call to the Bell Atlantic TISCOC – all additional steps which place a significant burden on the AT&T provisioning process. The exclusion of this information can also result in delays when trouble shooting customer outages.

In fact, as Bell Atlantic noted in its filing, on December 18, 1999, in response to concerns raised by a number of CLECs in the Industry Change Control meetings, Bell Atlantic implemented a "fix" for this problem in the form of Change Control Bulletin CR# 928, issued on December 12, 1999. *See* BA Affidavit, ¶ 186. Specifically, the bulletin stated that "a fix has been identified to return the Cable ID and CHAN/PAIR on the LSCs. Starting on 12/18, LSCs

will be returned with the Cable ID and CHAN/PAIR." Further, in Bell Atlantic's high level summary, the change was describe as a means to "[p]rovide automated population of Cable ID and CHAN/PAIR information to the LSC."

In spite of the documented change in process and Bell Atlantic's representation in its filings, in May 2000, AT&T received 232 LSRCs from Bell Atlantic that contained incorrect information. On the majority of those orders the cable assignment reflected the Access Customer Termination Location ("ACTL") instead of the Cable ID and CHAN/PAIR. The ACTL information is neither identical to, nor an adequate surrogate for, the Cable ID and CHAN/PAIR since it only provides the 'address' of the collocation cage from which the customer will be served. Since it is not unlikely that a CLEC has more than one Cable ID in a collocation, the ACTL is not specific enough to confirm that Bell Atlantic and the CLEC are dealing with the same customer facility. In other cases the LSRC contained the wrong due date, the wrong pairs, or was missing a cable and pair assignment altogether.

The May 2000 results discussed above demonstrate that Bell Atlantic's systems change has not come close to solving all of the problems that exist with Bell Atlantic LSRCs. Further, rather than correcting problems that have led to its failure to comply with its own process "fix," on May 11, 2000, Bell Atlantic issued CR # 1435, entitled "Clarification of the LSC CABLE ID value returned to CLECs." In this "clarification" Bell Atlantic states that "[t]he value returned on the LSC CABLE ID (field # 44), for LSOG 2 North, is not the same as the CABLE ID value input on the LS or LSNP form. The difference is due to a Bell Atlantic conversion of the value during the Service Order processing to the last five characters of LSR form ACTL (field #30) value. This conversion does not imply assignment of a different cable."

Unfortunately, what Bell Atlantic's clarification does not state is that by providing the ACTL rather than the Cable ID, Bell Atlantic is not providing the information necessary to avoid the problems described above. Instead, Bell Atlantic's clarification appears to be an attempt to renege on the commitment it made to the CLEC community last year to provide this essential information on the LSRC.

The ongoing problems with LSRCs demonstrate that Bell Atlantic is not meeting its obligations under the Act. Instead it appears that Bell Atlantic is trying to show compliance by modifying its business rules to conform with its inability to provide CLECs essential information on the LSRC. As they now exist, Bell Atlantic's systems are designed not to encourage competition in the local service market, but instead to make it as difficult and costly as possible for CLECs to enter the market. In light of this, Bell Atlantic can hardly claim to have met its burden of proof on this issue.

D. Bell Atlantic's Failure To Provide An Adequate Solution To The IDLC Problem Violates The Spirit Of The Act.

Bell Atlantic's failure to meet its obligations under the Act is also seen in its handling of the issue of IDLC. This issue is probably more significant in Boston than anywhere else in Bell Atlantic North's territory. Therefore, the Department should take a hard look at Bell Atlantic's performance in this area.

The existence of IDLC presents a serious problem because Bell Atlantic has taken advantage of its deployment to prevent CLECs from having an opportunity to provide local service to subscribers who are currently served by IDLC. Because IDLC cannot be unbundled the way that traditional copper loops can be, CLECs are not able to provide UNE-L service to subscribers who are served by IDLC. Thus, Bell Atlantic simply claims that there is a "facilities problem" and refuses to provide alternate facilities, effectively preventing CLECs from having

access to a substantial segment of the market. Such action is in direct violation of the FCC's Orders which specifically affirmed the obligation to provide access to loops served on IDLC. *See* Local Competition First Report and Order at ¶ 385; UNE Remand Order at ¶ 217.

As a result, Bell Atlantic is not meeting its obligation to open up the local market to competition. By deploying IDLC so substantially and refusing to work out an acceptable solution to the IDLC problem, Bell Atlantic has been able to shut out the CLECs from a substantial market segment. Such conduct represents a very effective obstacle to the development of competition. Bell Atlantic can hardly claim to have irreversibly opened the local market to competition by making UNEs, including loops available, when it declines to provide those loops on the grounds that "facilities are not available." Because the customer is presently being served by Bell Atlantic, the "facilities not available" condition applies only to CLECs, not to Bell Atlantic.

E. Bell Atlantic's Attacks On AT&T's Data Are Irrelevant And Are A Transparent Attempt To Cover Up Bell Atlantic's Own Inability To Support Its Unsupported Claims.

Bell Atlantic devotes a number of pages in its affidavit to an attack on data presented by AT&T in both this proceeding and in New York. *See* BA Affidavit, ¶¶ 176-181, 185-191. However, this criticism is irrelevant for a number of reasons. First, this Department's inquiry is into *Bell Atlantic's* compliance with the requirements of Section 271. Therefore, the burden of proof remains with Bell Atlantic to show that it is providing non-discriminatory access to UNE loops, and cannot be shifted merely by making unsubstantiated allegations regarding the quality of AT&T's data. As noted earlier, Bell Atlantic provided only summary accounting of its performance between August 1999 and February 2000 and did not submit underlying documentation. Further, in response to AT&T's request for supporting data, Bell Atlantic first

stalled in submitting the data, and then only provided the most basic information regarding the claims it makes.

There is a second, and perhaps more compelling reason why the Department cannot rely on Bell Atlantic's assertions regarding the quality of AT&T data. Bell Atlantic is trying to rely on the outcome of its New York 271 application, rather than on an independent review of current data in Massachusetts. Although AT&T disputes Bell Atlantic's contention that the FCC found AT&T's data unreliable in the reconciliation attempts before the New York Public Service Commission, there is no need to resolve that dispute here. Instead, AT&T recommends a process similar to the one developed in Texas under the auspices of the Texas Public Utilities Commission ("TPUC") in its review of Southwestern Bell's ("SWBT") Section 271 application, recently approved by the FCC.

Last summer, just as the Bell Atlantic New York application was moving to the FCC for review, AT&T submitted data to the Texas PUC regarding severe deficiencies in SWBT's provision of unbundled loops, and in particular, information suggesting that a significant number of AT&T customers were experiencing outages at the time of the hot cut. This information conflicted with SWBT's self reported data indicating that it was meeting its obligations to provide unbundled loops in a manner that allowed CLECs a meaningful opportunity to compete.

Recognizing this discrepancy, and the difficulty of resolving it without a clear comparison of all relevant information, the TPUC established an AT&T/SWBT task force, known as the Provisioning Process Improvement Group ("PPIG"), charged with reviewing hot cut provisioning errors and identifying their "root cause." The PPIG task force commenced work in late September 1999. To conduct its analysis, the group compared provisioning logs in

which both parties identified problems, and then attempted to reach agreement on the existence and cause of provisioning errors, in particular, service outages.

Fundamental to the usefulness of the data developed by the PPIG process was the careful identification of the actual "pool" of orders to be reconciled, the definition of each type of error or problem, and then the detailed review of all relevant information from both AT&T and SWBT. In contrast, Bell Atlantic's allegations in its Checklist Affidavit rely solely on assertions which are neither supported by its own documentation or reconciled with AT&T's records. [9]

This deficiency is apparent in even a high level review of Bell Atlantic's criticism of AT&T's data. In ¶ 180 of the Checklist Affidavit, Bell Atlantic disputes, without documentation, AT&T's claims regarding a number of specific orders. However, as explained below, AT&T's own records support AT&T's original characterization.

- **BOSY9901702** – Bell Atlantic claims that this order was delayed in accordance with the mutually accepted hot cut process, and that no reportable problem occurred. AT&T's records show that the customer reported the outage to AT&T only after being told to do so by Bell Atlantic, suggesting Bell Atlantic believed that the customer belong to AT&T and that, therefore, Bell Atlantic had implemented the cut. However, when Bell Atlantic's RCC was notified of the problem by AT&T, Bell Atlantic stated that the cut had not yet occurred and the customer's problem was a cable failure due to weather and not the conversion process.[10]

[9] In the FCC's order approving SWBT's application to provide In-Region, InterLATA Services in Texas, the FCC relied heavily on the data developed through the PPIG task force. *See* SWBT Order, FCC 00-238 (June 30, 2000).

[10] While it is not entirely clear from the records exactly what happened, it is clear that this cut was not a routine matter as claimed by Bell Atlantic.

- **BOSY9901756** – Bell Atlantic claims that it has no record of any trouble report, yet AT&T's records indicate several trouble tickets, including Ticket CL009775, opened on October 21, seeking the removal of translations from the Bell Atlantic switch because customer could not receive incoming calls. In other words, Bell Atlantic failed to implement the routine procedure necessary for AT&T's new customer to receive telephone calls (*i.e.*, removal of switch translations after the customer is ported to AT&T).
- **BOSY9901844** – Bell Atlantic states that its records indicate that the order was successfully cut on November 29, and that it did not receive notification of any trouble until December 8. However, AT&T logs show that in addition to the Trouble Ticket opened on December 8, on November 30, the day following the cut, AT&T opened Trouble Ticket CLO11253 with the RCMC, and that a duplicate ticket, CLO11341, was opened on December 2.
- **BOSY9901860** – Bell Atlantic states that it did not find trouble on the facility after receiving notification from AT&T of the customer losing dial tone. However, AT&T's log indicates that Bell Atlantic notified AT&T that there was no dial tone coming off the collocation block . Before AT&T was able to arrange a dispatch to correct this alleged problem, the customer's dial tone was restored.
- **BOSY9901664** – Bell Atlantic states that it could not find a trouble in the AT&T referenced time period. However, AT&T's log notes indicate that Bell Atlantic identified the cause of the customer's problem as a "software issue on their [Bell Atlantic's] end" and prior to the resolution of the customer's problem, informed AT&T that a software change was completed.

Even a sample of the orders on Bell Atlantic's Exhibit E shows similar discrepancies that cannot be dismissed merely by Bell Atlantic's unsupported declaration. For example, Bell Atlantic disputes AT&T's classification of PON # BOSY9901705 as a missed hot cut and instead claims that the due date for the order was changed at AT&T's request. However, AT&T's records indicate that on September 21, a Bell Atlantic TISOC agent informed AT&T that Bell Atlantic was unable to work the order on that date because of a facilities issue. Although on September 22 AT&T did request a new due date, this request was made in response to Bell Atlantic's inability to meet the original due date.

Thus, the validity of Bell Atlantic's performance claims is the primary concern of the Department. The existence of errors in a particular CLEC's logs does not prove that Bell Atlantic is provisioning loops in a manner that complies with the Act. In order for Bell Atlantic to meet its burden of proof, Bell Atlantic must show that its data are both real and accurate (*i.e.*, represents what really happened in real transactions). Nit-picking another party's data does not accomplish that.

Bell Atlantic also attacks AT&T because AT&T stated during the technical sessions that AT&T did not use Harris testing equipment for hot cuts. *See* BA Affidavit, ¶ 189, n. 19. Bell Atlantic implies that it should not be held to the process it has committed to because ATT does not use such testing. *See* BA Affidavit, ¶ 189. Not only is this illogical and irrelevant, but it is also no longer true. AT&T now uses Harris testing for Massachusetts hot cuts and has installed Harris testing equipment at all certified collocations in Massachusetts.

Bell Atlantic's attempts to distract the Department with accusations against the data and testing of other parties should be rejected. Bell Atlantic is simply trying to cover up the fact that it has provided no underlying data to support its own claims and has continuously refused to

provide such data despite numerous requests by the Department and the CLECs. Bell Atlantic's failure to provide the data is another indication of how Bell Atlantic has failed to meet its burden of proof in these proceedings.

V. BA-MA IS NOT APPROPRIATELY PROVIDING INTERCONNECTION TRUNKING TO AT&T.

AT&T detailed in its November 30, 1999 Initial Comments on Checklist Item 1 a number of problems it had experienced with trunking.[11] AT&T has continued to experience problems with the provision of interconnection trunks by BA-MA. AT&T's records demonstrate that in the same time period that BA-MA was professing a nearly flawless performance record in the provisioning of interconnection trunking, AT&T was continuously experiencing missed due dates for the completion of trunking orders whether those orders were initiated by AT&T to address AT&T's originating traffic or by BA-MA to handle calls initiated by BA-MA customers.[12] AT&T today continues to experience problems with the provisioning of interconnection trunks by BA-MA.

AT&T is in the process of installing a new switch in South Boston to lighten the traffic load of AT&T's Boston Congress Street 4th switch in order to more efficiently serve customers on the south shore of Massachusetts. BA-MA's inability to provide trunking in a timely manner has delayed placing this switch on line for over a year. Despite forecasting a need for the trunking in question, BA-MA has continuously failed to meet due dates, often not issuing a firm order commitment until after the desired due date for the provisioning of the trunking.

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[11] Comments on Checklist Item 1 – Interconnection Trunking by Kenneth Morin on Behalf of AT&T Communications of New England, Inc., November 30, 1999 ("Initial Comments").

[12] *Id*. at 7-18.

BA-MA has itself ordered eight trunk groups from their tandem offices to terminate on the new AT&T switch. Seven of these eight trunk groups are experiencing facility problems. BA-MA can only provide degraded service from its Cambridge Tandem to the new South Boston switch due to BA-MA's inability to provide digital equipment until August, 2000. As a result, BA-MA can only provide D4/AMI service (56 Kbs) as opposed to the B8ZS (64 Kbs) service requested by AT&T. This has severely encumbered AT&T's ability to provide service to AT&T customers that will utilize the AT&T network using the South Boston switch.

Despite the forecasted need for the trunking surrounding the South Boston switch, BA-MA has been informed by BA-MA that it has no interoffice capacity to provide E-911 service. As the Department is aware, the South Boston switch, or any switch for that matter, cannot be placed into service without E-911 trunks. AT&T has been waiting for over 14 months for the availability of these E-911 facilities from BA-MA.

The same inefficiency in trunk provisioning that AT&T outlined in its original comments remains today. In the March through June 2000 time period, 64 missed due dates were caused solely by BA-MA out of a total of 422 orders (15 percent)[13]. AT&T's attempt to meet due dates has been hampered by BA-MA's lack of responsiveness to its original commitments. On many occasions, these were BA-MA initiated orders. AT&T would engineer and commit equipment and people to meet the due date, only to find that BA-MA had not issued orders due to a lack of facilities or had arbitrarily assigned a "customer not ready" designation to the order, although BA-MA was the customer ordering the service.

[13] The 15 percent failure rate is a conservative figure. AT&T's missed due dates do not charge BA-MA for the considerable number of failures where AT&T agreed to a new due date at the insistence of BA-MA after BA-MA had already clearly missed the due date. AT&T agreed to amend the date in order to prevent further delays in testing and completion of the order process. If BA-MA had to account for all these failures, the 15 percent failure rate would be substantially higher.

In March, 2000 for example, in seven separate orders initiated by BA-MA, BA-MA arbitrarily changed its due dates 18 times because BA-MA was not ready to test trunks. When BA-MA is not able to timely provision trunks it has ordered, BA-MA customers will not be able to complete calls to CLEC customers, thus severely impeding the emergence of local competition in Massachusetts.

There is a substantial divergence between the performance metrics relating to trunking placed on the record by BA-MA and the experience of AT&T in ordering trunking from BA-MA. In April and May of this year for instance, the percentage of missed trunking dates experienced by AT&T was 25% and 32% of the total trunking orders, respectively. BA-MA attributes AT&T's concerns to an inadequacy in its record keeping. AT&T, however, lives with these problems every day. AT&T's trunking organization spends a good deal of its time doing nothing but tracking down these trunking orders in a futile attempt to get BA-MA to live up to its commitments.

BA-MA's metrics and AT&T's records differ because of the "flexibility" BA-MA gives itself in applying the rules it operates under with respect to the provisioning of trunking. As AT&T indicated in its Initial Comments, BA-MA will arbitrarily aggregate a number of orders into a "project", thus masking its inability to timely deliver trunks pursuant to individual orders.[14] A good example of this aggregation can be found in paragraph 47 of BA-MA's Checklist Affidavit where BA-MA inexplicably manages to turn 113 orders into 22 orders.

[14] *Id*. at ¶¶ 14-16.

Of course, to get to the 0% missed appointment ratio BA reports with respect to AT&T orders,[15] BA-MA must be much more creative. In paragraph 48 of the Checklist Affidavit, BA-MA alludes to a number of unspecified supplements or changes issued allegedly by AT&T against its original orders. BA-MA claims this causes a delay in trunk provisioning. AT&T's experience, on the other hand, is that the vast majority of these "changes" or "supplements" involve missed due dates by BA-MA. If a CLEC does not accede to the changed due date, then the order is "backlogged" and further delays can be expected. These are often orders which are held because BA-MA lacks the facilities to complete the order.

BA-MA also charges that many of AT&T's orders had a Customer Not Ready ("CNR") condition, indicating that AT&T was not ready to accept the trunks. This is untrue. In every order outlined in AT&T's Initial Comments and in these Comments, AT&T was not only ready to accept the order from BA-MA, it was actively pursuing BA-MA to complete the order or issue the "FOC". As AT&T pointed out in its Initial Comments, BA-MA unilaterally and arbitrarily declares CNR status whenever BA-MA is unable to meet a due date.[16]

47 U.S.C. § 251(c)(2) requires BA-MA to provide interconnection trunking to CLECs on a non discriminatory basis, and checklist item 1 requires compliance with this provision before Section 271 approval. Without adequate trunking, a CLEC cannot provide service to its customers. BA-MA does not provide non discriminatory trunking to AT&T. The fact that BA-MA alleges a flawless completion rate with respect to interconnection trunking to a customer that continually experiences delay and frustration in the trunking provisioning process, requires this

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[15] Checklist Affidavit, ¶ 50.

[16] Initial Comments, ¶ 18.

Department to closely scrutinize BA-MA's trunking performance, and for that matter, all BA-MA's performance, before the Department issues an affirmative finding under Section 271.

VI. BELL ATLANTIC DOES NOT PROVIDE NONDISCRIMINATORY ACCESS TO xDSL LOOPS.

A. Bell Atlantic Does Not Comply With Its Obligation to Permit Line Splitting In A UNE-P Type Arrangement.

BA-MA has the burden of proving that it is providing nondiscriminatory access to xDSL-capable loops. *E.g.*, FCC Texas 271 Order, ¶282.[17] As the FCC made clear in the recent Texas 271 Order, an ILEC cannot satisfy the requirements of Section 271 unless it permits CLECs to provide both voice and data services over a UNE-P type arrangement, where the voice services provided by the CLEC are routed on the ILEC loop and switch, and the high frequency portion of the signal is split off and routed to a CLEC's DSLAM. *See* FCC's Texas 271 Order, ¶ 325. BA-MA cannot yet obtain Section 271 approval because it has not yet complied with this requirement.

BA-MA says that it is in the process of developing procedures for *line sharing*, where BA-MA provides voice service to a customer and a data CLEC provides advanced services over the high frequency portion of the same loop. *See* BA-MA's Checklist Affidavit, ¶¶ 225-226.[18] But BA-MA ignores its further obligation to permit CLECs to perform *line splitting*, so that a CLEC may provide voice services using a UNE-P type arrangement.

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[17] *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 Telecommunictions Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order FCC 00-238 (released June 30, 2000) ("SWBT Order").

[18] BA-MA's plan to provide line sharing in the future is not sufficient to comply with its Section 271 requirements. The FCC established June 6, 2000, "as an outside deadline" for BA-MA to make line sharing available, and thus BA-MA must prove that it has complied with this obligation as a condition of Section 271 approval. *See* FCC's Texas 271 Order, ¶¶ 321-322.

The FCC has made quite clear that the availability of such a line splitting arrangement is a precondition of Section 271 approval. *See* FCC's Texas 271 Order, ¶ 325. It recently stated as follows:

> The Commission's rules require incumbent LECs to provide requesting carriers with access to unbundled loops in a manner that allows the requesting carrier "to provide any telecommmunications service that can be offered by means of that network element." As a result, incumbent LECs have an obligation to permit competing carriers to engage in line splitting over the UNE-P where the competing carrier purchases the entire loop and provides its own splitter.

Id. The FCC found that Southwestern Bell Telephone complied with this obligation by permitting CLECs to "order an unbundled xDSL-capable loop terminated to a collocated splitter and DSLAM equipment and unbundled switching combined with shared transport to replace its UNE-P with a configuration that allows provisioning of both data and voice service" by a CLEC using a combination of a loop, swithcing, and shared transport leased from the ILEC. *Id.*

BA-MA has not made any such arrangement available to its competitors in Massachusetts, and has not offered any evidence in this proceeding of even attempted compliance with this requirement.[19] It is therefore not yet eligible for Section 271 approval. To the contrary, BA-MA has proposed that it would not provide xDSL capacity together with voice service capacity on a single loop unless the voice services are provided by BA-MA. *See* Proposed Tariff No. 17, Part B, §§ 19.1.1.A, 19.1.2.C.2. Although BA-MA proposes to offer

[19] The Department should further order BA-MA to offer line splitting that a CLEC may use with either a UNE-P or UNE-L arrangement. As AT&T has demonstrated in Docket 98-57 Phase III, it will often be substantially more efficient for BA-MA to provide the line splitter than for a CLEC to have its own splitter installed in a virtual or physical collocation arrangement. BA-MA could deploy splitter shelves that would be made available to CLECs on a per-line basis. This is technically feasible, and would permit much more efficient deployment of splitter equipment. Both GTE and SBC provide common splitters. The network architecture used to deploy splitters for UNE-P CLECs providing their own voice services in conjunction with a data offering should be no less efficient or more cumbersome than that used to deploy splitters for data CLECs engaged in line sharing with BA-MA voice services. In parallel with its Section 271 review, the Department should act in Docket 98-57 Phase III to require non-discriminatory and efficient provisioning of line splitting functionality by BA-MA in connection with a UNE-P arrangement.

such xDSL line sharing arrangements, it has not included any provision for permitting line splitting of loops leased to CLECs in connection with a UNE-P arrangment. This means that under the proposed tariff only BA-MA would be able to use the existing network to provide customers with both local voice service as well as data service via xDSL over an existing loop. CLECs would be barred from doing so, which would hinder the growth of competition, harm consumers, and contravene the law. Furthermore, it is flatly inconsistent with BA-MA's Section 271 requirements.

B. Bell Atlantic Has Not Proven That It Meets FCC Requirements Regarding xDSL Loops.

Furthermore, the evidence that Bell Atlantic has so far adduced falls far short of the FCC's requirements regarding proof of Section 271 compliance with respect to stand-alone xDSL-capable loops. BA-MA must "make a separate and comprehensive evidentiary showing with repect to the provision of xDSL-capable loops." FCC BA-NY 271 Order, ¶ 330. The FCC has emphasized its "strong preference for a record that contains data measuring a BOC's performance pursuant to state-adopted standards that were developed with input from the relevant carriers and that include clearly-defined guidelines and methodology." FCC Texas 271 Order, ¶ 282. Based on those standards, the FCC expects "a BOC to demonstrate, preferably through the use of state or third-party verified performance data, that it provides xDSL-capable loops to competitors either in substantially the same average interval in which it provides xDSL service to its retail customers or in an interval that offers competing carriers a meaningful opportunity to compete." FCC's BA-NY 271 Order, ¶ 335 (footnote omitted). The FCC has also indicated that "establishment of a 'fully operational' separate affiliate for advanced services" may also constitute evidence of nondiscrimination. *Id.* BA has failed to meet its

burden of proving that it makes advanced xDSL capable loops available to competitors in a nondiscriminatory manner.

Bell Atlantic's promise to establish a separate subsidiary is just that – a promise and nothing more. BA has offered the Department no information regarding how the subsidiary will be established, or what space, employees, data bases, systems and management it will share with the parent company. Nor is there any evidence of its operation and day-to-day relationship with the parent company. Nor are there any comparative statistics showing the parent company's performance for its own affiliate compared to its performance for unrelated CLECs. In the absence of such information , Bell Atlantic's case hardly constitutes the "separate and comprehensive evidentiary showing" of a "fully operational separate advanced services affiliate" required by the FCC in 330 of its FCC BA-NY Order. A promise of performance is not proof of performance.

Bell Atlantic's case regarding its performance in actually provisioning xDSL capable loops is no better. In its Checklist Affidavit, ¶¶ 192-193, Bell Atlantic states that it provides three unbundled loop products designed for CLEC xDSL services and provides certain tariff offerings, and states the total number of digital 2-wire loops (including both DSL and ISDN) that it has provisioned to CLECs. The affidavit then provides measurements of its performance for ***one*** month – March 2000 -- and merely promises more in the future. *Id*., ¶ 200. Again, this hardly constitutes a "comprehensive evidentiary showing… of nondiscrimination in accordance with the guidance provided herein." FCC's BA-NY 271 Order ¶ 330. Nor can Bell Atlantic rely on the fact that it has only just begun collecting this performance data as an excuse. The FCC has stressed that the mere fact that a BOC does not presently collect particular data is not a valid basis for failing to provide performance data that is needed to determine whether

nondiscriminatory performance is being provided to CLECs. *See* Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 to Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd. 20543 (1997) ("*Ameritech Michigan Order*"), ¶ 210.

VII. THERE IS NO PERFORMANCE MONITORING AND SELF-ENFORCEMENT PLAN IN PLACE FOR MASSACHUSETTS.

In the Section 271 context, the FCC has repeatedly emphasized the importance of creating real financial disincentives that offset the incumbent LEC's strong incentives to provide degraded wholesale services to its competitors. As the FCC explained in its *Ameritech Michigan Order*, in order to provide the most effective possible deterrent against discriminatory performance after a Section 271 application is granted, a Performance Plan should include "appropriate, self-executing enforcement mechanisms that are sufficient to ensure compliance with the established performance standards." *Ameritech Michigan Order*, 394. *See also Second BellSouth Louisiana Order*, 364; *Evaluation of U.S. Dept. of Justice of Ameritech Michigan Section 271 Application*, pp. 38-40 (June 25, 1997). As the Common Carrier Bureau told SBC:

> The Bureau believes that the potential liability under such a plan must be high enough that an incumbent could not rationally conclude that making payments under an enforcement plan is an acceptable price to pay for hindering or blocking competition.

Letter from L. Strickling, Chief, FCC Common Carrier Bureau, to P. Hill-Ardoin, SBC, dated September 28, 1999, p. 2 ("Strickling Letter to SBC").

Indeed, the FCC made clear in the FCC BA-NY Order the importance of a performance monitoring and enforcement mechanism that is in-place and operational when it approved BA-NY's application for Section 271 relief. The FCC's exact language warrants repeating:

> As set forth below, we find that the performance monitoring and enforcement mechanisms in place in New York, in combination with other factors, provide strong assurance that the local market will remain open

> after Bell Atlantic receives section 271 authorization. The Commission previously has explained that one factor it may consider as part of its public interest analysis is whether a BOC would continue to satisfy the requirements of section 271 after entering the long distance market. The standard of review employed by the Department of Justice in evaluating Bell Atlantic's application – whether the local market is fully and *irreversibly* open – also supports this approach. Although the Commission strongly encourages state performance monitoring and post-entry enforcement, we have never required BOC applicants to demonstrate that they are subject to such mechanisms as a condition of section 271 approval. The Commission has, however, stated that the fact that a BOC will be subject to performance monitoring and enforcement mechanisms would constitute probative evidence that the BOC will continue to meet its section 271 obligations and that its entry would be consistent with the public interest.

Id, ¶ 429 (footnotes omitted).[20]

In its May 26 Supplemental Comments, Bell Atlantic of course referred to the FCC's approval of its Section 271 application for New York and to the FCC's recognition of the "value of the C2C service measurements developed in New York through a lengthy and open collaborative process." *See*, pp. 166-167. Bell Atlantic then notes that the Department has adopted the C2C metrics in Massachusetts "to evaluate BA-MA's compliance with the Section 271 checklist." *Id*., p. 167. Finally, Bell Atlantic notes that it has filed a performance plan in Massachusetts and asserts that it is "substantially the same as the New York Performance Assurance Plan." *Id*. The inference that Bell Atlantic would like the Department to reach is that the Department need only approve the plan filed in Massachusetts to ensure that (a) Bell Atlantic's performance will be controlled by remedies flowing from violations of the C2C

[20] AT&T also notes that the modifying phrase, "in combination with other factors," which the FCC used in this paragraph refers in part to the willingness of a state commission to aggressively investigate and impose additional penalties for inadequate and anticompetitive ILEC performance. *See generally* Pre-filing Statement of Bell Atlantic- New York in NYPSC Case 97-C-0271, April 6, 1998; *see also* New York PAP at 1, n. 1 and n.2; Order Directing Market Adjustments and Amending Performance Assurance Plan, NYPSC 00-C-0008, March 23, 2000 at 2, 5. (NYPSC ordered BA-NY to pay a $10 million fine above and beyond the PAP).

metrics and (b) there is no factual dispute that its performance plan satisfies FCC requirements. Neither inference, however, would be correct.

First, the plan that Bell Atlantic has proposed as the basis for generating self-enforcing remedies contains substantially fewer metrics than those covered by the New York C2C metrics.

Second, and more important for purposes of identifying factual disputes, the plan that Bell Atlantic has proposed in Massachusetts is ***not*** substantially similar to the New York plan that was reviewed favorably by the FCC. AT&T identified significant differences in detail in its May 23, 2000 filing, Response of AT&T Communications of New England, Inc. To The Performance Assurance Plan Filed By Bell Atlantic. *See, e.g.*, pp. 23, 28-30. Some of those differences are:

- additional adjustments beyond those found in the New York plan in Bell Atlantic's favor for certain types of statistical error;
- a different relationship between the summed performance scores and the level of penalties from that found in the New York plan (the relationship in Massachusetts appears to have no rational basis and the penalties that it produces for the same level of performance will be different in Massachusetts than it will be for New York);
- unlike in New York, there is no incentive to provide accurate metric and credit reports.

Thus, even if the FCC would be content with a "New York" plan in Massachusetts,[21] Bell Atlantic did not file such a plan here. At a minimum, there are significant factual disputes regarding whether the plan that Bell Atlantic has proposed will accomplish the objectives that the ***FCC*** believes are important in its Section 271 review. Moreover, even if the Department were to approve a plan for Massachusetts, it would still need to be in place and operational. There is still

[21] It is not at all clear that the FCC will be content with a New York "look alike" plan now. The New York Plan was inadequate to deal with the crisis in the first quarter of 2000 and had to be supplemented with additional penalties from the New York Public Service Commission and the FCC.

significant work that remains before there is any Massachusetts plan that the FCC could reasonably rely upon in a Section 271 review.

VIII. BELL ATLANTIC DOES NOT PROVIDE NONDISCRIMINATORY ACCESS TO POLES, DUCTS, CONDUITS AND RIGHTS OF WAY.

The FCC BA-NY Order provides very little discussion or guidance regarding the requirements or standards for nondiscriminatory access to poles, ducts, conduits and rights of way. The lack of attention given to this issue in the decision apparently results from the failure of the participants in the New York proceeding to provide substantial evidence of discrimination with regard to this checklist item.

In marked contrast, AT&T and the other CLECs involved in the Massachusetts proceeding have repeatedly raised concerns regarding discriminatory access to poles, ducts, conduits and rights of way in this state. These parties have communicated their concerns in written submissions to the Department, during testimony at the technical sessions, and in direct communications with Bell Atlantic concerning Bell Atlantic's draft pole and conduit agreement. Moreover, these parties have documented their concerns with specific examples from their experiences in dealing with Bell Atlantic in Massachusetts. Bell Atlantic's Supplemental Comments Filing does not address all of these concerns.

The differences between Bell Atlantic's and AT&T's position on what constitutes non-discriminatory access to poles and conduits is highlighted by a form of master license agreement that Bell Atlantic has proposed in connection with "negotiations" which Bell Atlantic has been conducting with CLECs in a "workshop format." *See, e.g.*, Bell Atlantic's supplemental response to DTE 2-56 in docket D.T.E. 99-271. *See also*, 11/1/99 Technical Session Tr. Vol. 1, pp. 97-103, in D.T.E. 99-271. In connection with the "workshop" sessions Bell Atlantic presented its position on master aerial and underground license agreements during December,

1999. In AT&T's view, the Bell Atlantic proposal fell short of the standards of non-discrimination required by the Telecommunications Act of 1996. AT&T proposed modifications to the underground license agreement in a transmittal to Bell Atlantic on January 28, 2000, in a redlined copy of the contract. A copy of AT&T's transmittal letter, together with the redlined contract, is attached to these supplemental comments as Attachment A.

Some of the differences between AT&T and Bell Atlantic with regard to the underground license agreement as reflected in the redlined copy of the contract are:

- Bell Atlantic proposes that its license be entirely revocable. AT&T disagrees, because it provides CLECs with no assurance that they can rely on the license. *See*, p. 5 of redlined contract.

- Bell Atlantic seeks to limit its obligations to provide access if such access, in Bell Atlantic's unilateral view, would interfere with Bell Atlantic's "service requirements." AT&T asks that Bell Atlantic's proposed language be replaced with a straightforward provision obligating Bell Atlantic to provide non-discriminatory access, subject to safety, reliability, and engineering considerations. *See*, p. 6 of redlined contract.

- Bell Atlantic seeks the right to terminate without notice its license in certain situations. AT&T requests that there be a specific notice period to enable CLECs to find alternatives. *See*, pp. 10-11 of redlined contract.

- Bell Atlantic has not proposed the inclusion of an affirmative obligation on its part to provide additional space if space is insufficient for a CLEC's needs or, alternatively, to provide certain other options. AT&T seeks explicit treatment of this issue, in order to ensure that its access to additional space is comparable to the access that Bell Atlantic provides itself. *See*, p. 11 of the redlined contract.

- Bell Atlantic requires all make-ready work to be performed by itself, at rates and charges over which it has sole control. AT&T proposes that it be permitted to perform the make ready work if it can do it more cheaply than Bell Atlantic. *See*, p. 12 of the redlined contract.

- AT&T proposes changes to the process for applying for, conducting, and paying for records searches, manhole surveys and make ready work in order to reduce the burdens that Bell Atlantic's proposed process would impose on CLECs seeking to enter the market in Massachusetts. *See, e.g.*, p. 13 of the redlined contract.

- Bell Atlantic's proposed master license agreement fails to include explicitly rights of way to and within buildings and building complexes. AT&T seeks non-discriminatory access to such rights of way as well. *See*, p. 17 of redlined contract.
- Despite AT&T's commercially reasonable request, Bell Atlantic refuses to be held responsible for damage it may cause to AT&T facilities. *See*, p. 24 of redlined contract.

Bell Atlantic has not remedied any of the defects that AT&T has identified in the proposed master license agreement.

In addition to the above referenced specifics, there are general problems with Bell Atlantic's method of providing access to poles, conduits and rights of way. First, Bell Atlantic treats applicants for access to its facilities as second-class users whose licenses can be easily revoked. Moreover, Bell Atlantic does not recognize that CLECs should have the same right of access and right of occupancy that it recognizes for itself. Second, Bell Atlantic's standards for processing applications for access are discriminatory. Unlike Bell Atlantic, CLECs are subject to an application process involving a series of steps which leaves them at the mercy of their competitor. For example, applicants are not allowed equal access to records necessary for route planning and are not allowed to use approved contractors or their own employees to perform pre-inspection, re-arrangement, or make-ready work. Third, Bell Atlantic continues to assert the right to reserve space for its own use while not permitting CLECs the right to do the same. Fourth, Bell Atlantic continues to insist upon one-sided indemnities in its draft pole and conduit agreements which insure protection of its plant and rights against damage, but which leave the licensees' facilities largely unprotected. Fifth, Bell Atlantic requires a party using its poles, ducts, conduit and rights of way to bear all expenses associated with rearranging facilities to accommodate the party or to accommodate Bell Atlantic's own needs, but provides the party with no credit if Bell Atlantic realizes additional revenue from the additional space that results from the rearrangement. Sixth, Bell Atlantic grants itself broad preferences in emergency

conditions, and allows Bell Atlantic to displace or rearrange a CLEC's facilities to accommodate its own. CLECs are granted no reciprocal rights in emergency situations.

These discriminatory practices hinder a CLEC's ability to do business and to effectively compete with Bell Atlantic. While Bell Atlantic professes to be providing nondiscriminatory access and to making improvements to further this end, the record thus far shows a pattern of discriminatory treatment and resistance to implementing changes that will improve access. Without the changes to its pole and conduit access policies necessary to achieve nondiscriminatory access, as presented in nondiscriminatory pole and conduit agreements, the Department should recommend that Bell Atlantic not be granted Section 271 relief.

IX. CONCLUSION

After numerous requests for extensions, Bell Atlantic has filed reams of paper filled with glowing, self-reported statistics. These statistics, however, are untested assertions based on undisclosed records. In the absence of a process that allows Bell Atlantic's claims and promises to be tested, Bell Atlantic has not met its burden of demonstrating it is entitled to Section 271 relief. The Department should avoid a "rush to judgment" and establish a process that will produce a record on which the FCC can rely.

Respectfully submitted,

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