August 25, 1999

D.T.E. 99-42/43, 99-52

Petitions of MediaOne Telecommunications of Massachusetts, Inc. and New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for arbitration, pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement.

and

Petition of Greater Media Telephone, Inc. for arbitration, pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement with New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts.

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I. INTRODUCTION

This arbitration proceeding is held pursuant to the Telecommunications Act of 1996, 47 U.S.C. § 252 ("Act"). The proceeding is a consolidated arbitration between MediaOne Telecommunications of Massachusetts, Inc. ("MediaOne") and New England Telephone and Telegraph Company d/b/a/ Bell Atlantic-Massachusetts ("Bell Atlantic"). A portion of the proceeding (as described below) has been consolidated with D.T.E. 99-52, an arbitration between Greater Media Telephone, Inc. ("Greater Media") and Bell Atlantic, in order to address similar issues.

Bell Atlantic is an incumbent local exchange carrier ("ILEC"), as defined by the Act, within the Commonwealth of Massachusetts. MediaOne and Greater Media are both facilities-based[1] competitive local exchange carriers ("CLECs"). MediaOne has been offering residential local exchange service to customers in eastern Massachusetts since September 1998, under a negotiated interconnection agreement approved by the Department on December 2, 1998.[2] Greater Media is arbitrating its initial interconnection agreement with Bell Atlantic and is not currently providing telecommunications services. Greater Media is in the process of completing its network design, and plans to provide local exchange and other telecommunications services, initially in the Worcester area.

On April 22, 1999, both MediaOne and Bell Atlantic filed Petitions for Arbitration pursuant to

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[1] The carriers' networks comprise (or will comprise in Greater Media's situation) a combination of cable plant and telecommunications facilities, including switching equipment.

[2] That term of that interconnection agreement expired on April 18, 1998, but pursuant to Section 21, Term and Termination, of the expired interconnection agreement, the parties continue to operate under the agreement until a new agreement is in place.

Section 252(b) of the Act.[3] The MediaOne petition was docketed as D.T.E. 99-42 and the Bell Atlantic petition was docketed as D.T.E. 99-43. The Arbitrator[4] consolidated the two Petitions for Arbitration ("MediaOne/Bell Atlantic Arbitration") on May 6, 1999. On June 9, 1999, the Arbitrator granted a motion filed by Greater Media for Partial Consolidation stating that the issues involved common questions of law and fact.

On June 4, 1999, Greater Media[5] filed a Motion for Partial Consolidation of Arbitration proposing that the Department consolidate six issues included in the Greater Media arbitration petition with the MediaOne/Bell Atlantic Arbitration. The six issues are: (1) Rate Demarcation Point Definition, (2) Interpretation and Construction, (3) Geographic Relevance, (4) Physical Architecture, (5) Trunk Group Connections and Ordering, and (6) Network Interface Device. The Arbitrator also accepted a request by the parties that should a consolidated issue be resolved between MediaOne and Bell Atlantic (but not Greater Media), that issue would continue to be investigated, and decided, in the Greater Media Arbitration. Since the consolidation ruling, Bell Atlantic and MediaOne have resolved the Rate Demarcation Point and the Network Interface Device issues.

On June 18, 1999, the parties submitted prefiled direct testimony, and on June 24, 1999, rebuttal testimony was filed. On June 28, June 29, and July 8, 1999, the Department conducted

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3 Section 252(b) of the Act permits a carrier to petition a state commission to arbitrate any issue left unresolved after voluntary negotiations between the carriers have occurred. 47 U.S.C. § 252(b)(1).

4 The Commission designated Department Hearing Officer Joan Foster Evans as the Arbitrator.

5 Greater Media filed a Petition for Arbitration of an interconnection agreement with Bell Atlantic on May 10, 1999.

arbitration hearings at its offices. In support of its proposal, MediaOne presented the testimony of David Kowolenko, its director of telecommunications, regarding interconnection and performance standards, incentives for local number portability ("LNP"), and certain trunk forecasting issues; and the testimony of Gerry Coe, its service interconnection manager, regarding transit traffic. Bell Atlantic presented Jeffrey A. Masoner, Bell-Atlantic's vice-president, interconnection services (adopting the prefiled testimony of John E. Howard); Donald E. Albert, its network services director of competitive local exchange carrier implementation; Alice Shocket, a Bell Atlantic senior analyst, interconnection services, on the issues of interconnection, transit service, and porting metrics; and Ken Garbarino, its director of operations regulatory requirements, on the issue of porting standards and remedies. Greater Media presented the testimony of Dr. Francis R. Collins, president of CCL Corporation, who addressed interconnection and physical architecture issues, and trunk group ordering. The parties also filed Position Statements which addressed issues generally not discussed in testimony.

The parties submitted initial briefs on July 16, 1999, including proposed findings of fact and conclusions of law, and reply briefs on July 22, 1999. The record consists of 17 exhibits, 52 record request responses, and responses to all discovery requests filed in this proceeding.[6]

A. MediaOne Motion for Interlocutory Order

On June 10, 1999, MediaOne filed with the Department a Motion for Interlocutory Order ("Motion"). In its Motion, MediaOne requested that the Department issue an interlocutory order resolving a dispute between itself and Bell Atlantic regarding the relationship between the

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[6] The parties agreed that all discovery responses submitted in this proceeding would be entered as evidence. Those responses are referred to in this Order by their information request designations.

interconnection agreement that is the subject of this arbitration, and Bell Atlantic's Interconnection Tariff No. 17.[7] On June 18, 1999, Bell Atlantic filed an Opposition to MediaOne's Motion. Also on June 18, 1999, Greater Media filed a "Position Statement on the Issue of Interpretation and Construction of Proposed Interconnection Agreement in Light of MediaOne's Motion" ("Position Statement").

The Arbitrator issued a Ruling on MediaOne's Motion on July 30, 1999 ("Ruling"). In her Ruling, the Arbitrator reaffirmed the Department's rule of interpretation as stated in Resale Tariff, D.T.E. 98-15, at 13 (Phase I) (1998) ("Resale Tariff"), and applied it to govern the relationship between the interconnection agreements which are the subject of this arbitration and tariffs approved or to be filed by the parties (Ruling at 5). The Arbitrator outlined the rules regarding this relationship as follows: (1) the interconnection agreement entered into by the parties generally controls the relationship of the parties; (2) the parties have the ability to choose to incorporate terms of a tariff, and that choice should be specified in the interconnection agreement; (3) the parties may elect to purchase services under tariff that are not otherwise in an interconnection agreement; (4) in the event of a conflict between provisions of a tariff and the interconnection agreement, the interconnection agreement controls; and (5) where the Department orders a local exchange carrier ("LEC") to include certain terms in a tariff, either through an arbitration proceeding or other proceeding, Department-ordered provisions control (id.).

B. Motions for Clarification of Arbitrator's Ruling

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[7] Bell Atlantic filed Tariff No. 17 with the Department on April 2, 1999, and filed additional tariff provisions on May 28, June 11, and August 13, 1999. See D.T.E. 98-57 ("Tariff 17 Proceeding"). The Department suspended the tariff for investigation until November 2, 1999. Bell Atlantic Tariffs Nos. 14 and 17, D.T.E. 98-57 (May 18, 1999). This matter is still pending before the Department.

MediaOne, Greater Media, and Bell Atlantic each filed, on August 4, 1999, motions for clarification with respect to various components of the Ruling.[8] MediaOne seeks clarification as to whether the first sentence of Bell Atlantic's proposed Section 2.2 should be included in the interconnection agreement (MediaOne Motion for Clarification at 2). Although the Ruling did not explicitly provide that this first sentence[9] should not be included in the interconnection agreement, MediaOne argues that it does not comport with the Ruling and, therefore, seeks clarification on this matter (id.). Moreover, MediaOne requests the Department to determine that MediaOne's proposed first sentence for Section 2.2 is in fact consistent with the Ruling and should be included in the interconnection agreement (id. at 2-3).

MediaOne also requests clarification of the Arbitrator's ruling that the terms and conditions of an interconnection agreement will be superseded when the Department orders a LEC to include certain terms in a tariff, either through an arbitration proceeding or other proceeding. MediaOne contends that this ruling may have the effect of violating its due process rights by denying it adequate notice of an investigation that would substantially and specifically affect it (id. at 3). Consequently, MediaOne requests that the Department define more fully the scope and intent of this portion of the Ruling (id.).

In its motion for clarification, Greater Media argues that it is unclear whether the Arbitrator intended to resolve Greater Media's dispute with Bell Atlantic about the language governing the

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8 Although Bell Atlantic labeled its motion "Appeal and Motion for Clarification of Arbitrator Ruling," we find only a request for clarification contained in this filing, and not an appeal of the Ruling.

9 The first sentence of Bell Atlantic's proposed Section 2.2 reads as follows: "Each party hereby incorporates by reference those provisions of its tariff that govern the provision of any services or facilities provided hereunder."

interpretation and construction of their interconnection agreement (Greater Media Motion for Clarification at 3). Greater Media asserts that the Ruling did not specifically address Greater Media's proposed interconnection agreement language for Section 2.2, which it argues is consistent with the Ruling, and that it would be erroneous to treat the Ruling as resolving the issue (id. at 3-4). With respect to the Ruling's determination that Department-ordered provisions supersede conflicting interconnection agreement provisions, Greater Media seeks clarification that an "other proceeding" does not include the Department's review of a tariff filed by Bell Atlantic without a prior order of the Department either (1) requiring such a filing or (2) requiring the specific terms and conditions included by Bell Atlantic in such a tariff filing (id. at 4). Lastly, Greater Media argues that even after the guidance contained in the Ruling, ambiguities exist in Bell Atlantic's proposed Section 2.2 language and that Greater Media's proposed language is clear and should be adopted (id. at 5).

Bell Atlantic seeks to clarify the effect of the Ruling on Bell Atlantic's proposed language in Sections 2.2 and 20 (Bell Atlantic Motion for Clarification at 2). Furthermore, Bell Atlantic requests clarification of the status of incorporating the relevant tariff provisions into the MediaOne interconnection agreement and the "open" issues requiring Department resolution in this Order (id.). Bell Atlantic argues that in the Ruling, the Arbitrator implies that other than the removal of the language providing the specific prevails over the general, the remainder of that section and all of Section 20 are acceptable[10] (id. at 3). Finally, Bell Atlantic argues that if the three sections cited by MediaOne as open (i.e., Sections 11.7, 11.9, and 19) remain unresolved, the Department should adopt Bell

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[10] The Department notes that the Arbitrator specifically directed the parties to incorporate language into their interconnection agreements that comports with the Ruling (Ruling at 5).

Atlantic's proposed language for those sections (id. at 3-4).[11]

C. Standard of Review

Clarification of previously issued orders may be granted when an order is silent as to the disposition of a specific issue requiring determination in the order, or when the order contains language that is so ambiguous as to leave doubt as to its meaning. Boston Edison Company, D.P.U. 92-1A-B at 4 (1993); Whitinsville Water Company, D.P.U. 89-67-A at 1-2 (1989). Clarification does not involve reexamining the record for the purpose of substantively modifying a decision. Boston Edison Company, D.P.U. 90-335-A at 3 (1992), citing Fitchburg Gas & Electric Light Company, D.P.U. 18296/18297, at 2 (1976).

D. Analysis and Findings

The Department grants in part and denies in part the motions for clarification. We agree that in certain respects the Ruling is ambiguous, creating doubt as to the Ruling's meaning and the Department's intent. To clarify, we reiterate our finding, set forth in our Resale Tariff Order, that the Act established a preference for negotiated, as opposed to arbitrated, agreements. See Resale Tariff, at 13-14. In that Order, we determined that a benefit of this preference is that subsequently adopted resale tariffs may not supersede the negotiated terms and conditions of an existing resale agreement unless the parties mutually agree otherwise. Id. at 14. We found that arbitrated terms and conditions should be treated differently: "Where parties have sought [an arbitration], the Department-arbitrated provisions in the tariff shall supersede corresponding provisions in the existing resale agreements

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[11] Subsequently, the Department was informed by the parties that Sections 11.7, 11.9, and 19 were resolved and, therefore, are negotiated Sections of the interconnection agreement. The rule clarified here applies to these negotiated provisions.

between those parties," and "any future Department-arbitrated changes to the resale discount will govern and supersede existing interconnection agreements." Id.

While the subject matter of the Resale Tariff Order concerned resale exclusively, we find that the policy set forth in that Order is sound and applicable to the interconnection matters covered by Tariff No. 17. Department-arbitrated provisions included in a tariff, resale or otherwise, shall supersede corresponding arbitrated provisions in interconnection agreements between those parties. See Resale Tariff at 14. However, we further clarify that the Department in certain circumstances may explicitly direct that a tariff provision supercede negotiated provisions on the same subject matter (see, Collocation Order, D.T.E. 98-58 (1999)). This does not mean that a negotiated provision in MediaOne's interconnection agreement, for example, would be superseded by a corresponding provision from a subsequent Department arbitration of a different carrier's interconnection agreement. We decline to incorporate Greater Media's suggested language with respect to what is an "other proceeding," as contained in the Ruling (see Greater Media Motion for Clarification at 4). Our Order makes clear that the Department-ordered provisions contained in Department-approved tariffs shall supersede corresponding arbitrated provisions in interconnection agreements, and that there may be circumstances where the Department explicitly requires that a tariff provision supercede negotiated provisions on the same subject matter.

The Arbitrator directed the parties, which the Department determines to include Greater Media in addition to MediaOne and Bell Atlantic, to incorporate language in their interconnection agreements that comports with the Ruling. Specifically, the Arbitrator determined that the following Bell Atlantic proposed phrase in Section 2.2 should not be included: "the specific shall prevail over the more

general" (Ruling at 5). In its motion for clarification, Bell Atlantic agreed to delete that phrase from both its MediaOne and Greater Media interconnection agreements (Bell Atlantic Motion for Clarification at 3). However, Bell Atlantic, MediaOne, and Greater Media remain unclear about which party's proposed language for Section 2.2 should be approved by the Department (id. at 3; MediaOne Motion for Clarification at 2-3; Greater Media Motion for Clarification at 3-5).

MediaOne argues that the first sentence of Bell Atlantic's proposed Section 2.2 should be deleted and replaced with the first sentence of MediaOne's proposal filed on June 8, 1999 (MediaOne Motion for Clarification at 2). We agree with MediaOne that Bell Atlantic's first sentence, provided above in footnote 9, involves a general incorporation by reference, and is inconsistent with the specific incorporation favored by the Department in this instance. Therefore, that wording does not comport with the Ruling and shall be removed from Section 2.2 (see id.). MediaOne's proposed first sentence for Section 2.2, "The Agreement governs the provisions of all services or facilities provided hereunder unless the Parties have specifically referenced an applicable provision of their Tariff in this Agreement, in which case the referenced Tariff provision applies," accurately reflects the Department's policy that tariffs do not supersede the corresponding negotiated rates, terms, and conditions of interconnection agreements unless the parties mutually agree that the tariff does so or may do so (see id.; Resale Tariff at 14). Therefore, the first sentence of Section 2.2 of the MediaOne/Bell Atlantic interconnection agreement shall use MediaOne's proposed sentence, referred to above.

But for disputing Bell Atlantic's proposed first sentence in Section 2.2, MediaOne does not argue against incorporating the remainder of Bell Atlantic's proposal, as amended by the Ruling (see MediaOne Motion for Clarification at 2-3). However, the Department finds that the rest of Section 2.2

should also reflect Department policy, clarified above, with respect to terms and conditions of Department-approved tariffs superseding corresponding arbitrated terms and conditions of interconnection agreements. Therefore, we approve the following language for Section 2.2, which other than the new first and last sentences, Bell Atlantic proposed in exhibit B of its Petition:

> The Agreement governs the provisions of all services or facilities provided hereunder unless the Parties have specifically referenced an applicable provision of their Tariff in this Agreement, in which case the referenced Tariff provision applies. Subject to the terms set forth in Section 20 regarding rates and charges, if any provision of this Agreement and an applicable tariff cannot be reasonably construed or interpreted to avoid conflict, the provision contained in this Agreement shall prevail.
>
> If any provision contained in this main body of the Agreement and any Schedule or Exhibit hereto cannot be reasonably construed or interpreted to avoid conflict, the provision contained in the main body of the Agreement shall prevail. The fact that a condition, right, obligation, or other term appears in this Agreement but not in any such Tariff or in such Tariff but not in this Agreement, shall not be interpreted as, or be deemed grounds for finding, a conflict for purposes of this Section 2. Terms and conditions of Department-approved tariffs (which are derived from a Department arbitration or other proceeding) shall supersede corresponding arbitrated terms and conditions of this Agreement. Terms and conditions of Department-approved tariffs (which are derived from a Department arbitration or other proceeding) shall supersede corresponding negotiated terms and conditions of this Agreement upon explicit direction of the Department.

As mentioned above, the Department confirms in this Order that the Arbitrator's finding - - that Bell Atlantic's proposed phrase, "the specific shall prevail over the more general," should not be included in the interconnection agreement - - applies to both MediaOne's and Greater Media's interconnection agreements. Greater Media argues that the Department should adopt Greater Media's proposed Section 2.2 and not Bell Atlantic's version (as amended by the Ruling) (Greater Media Motion for Clarification at 3-4). Greater Media's Section 2.2 language provides that the rates and charges set forth in Exhibit A to the agreement are subject to the continuing jurisdiction of the

Department and may be modified if ordered or authorized by the Department (see Greater Media Position Statement at 13). Its proposal contains language that the parties agree to expeditiously modify any such ordered or authorized rate or charge (id.). We note that Greater Media's proposal was similar to that initially proposed by MediaOne in its petition, but that MediaOne later modified its language, bringing it closer to that which we adopted above.

In its motion for clarification, Greater Media implicitly argues that the Department must adopt its language because it is "consistent with the statement in the [Ruling] that the parties should incorporate language into their interconnection agreements which comports with the [Ruling]" whereas Bell Atlantic's proposal is inconsistent (see Greater Media Motion for Clarification at 3-4). We find that the Section 2.2 language we approve today for the MediaOne/Bell Atlantic interconnection agreement is consistent with both the Ruling and the clarification of that ruling provided in this Order. While we do not decide that Greater Media's proposal is inconsistent with the Ruling, we do find that the new MediaOne/Bell Atlantic Section 2.2 is a more accurate representation of Department policy.

We note that Greater Media's proposal for Section 2.2, contained in its June 18, 1999 Position Statement, differs from the version it filed with its petition on May 10, 1999. Moreover, in its Position Statement, Greater Media requests that we use identical language for Sections 2.2 and 20. Again, we note that its proposed language for Section 20, contained in its Position Statement and which is not the subject of MediaOne's Motion, differs from its proposed language for Section 20 contained in its petition. We find that Greater Media's proposed language for Section 2.2 contained in its Position Statement is more appropriate for discussion on Section 20 because it applies specifically to "rates and charges." Section 2.2 concerns the interpretation and construction of the entire interconnection

agreement, not just rates and charges therein. Moreover, we decline to address the substance of Greater Media's proposed Section 20 in this context (i.e., granting the motions for clarification) because that section was not the subject of MediaOne's Motion (see MediaOne Motion for Clarification at 1). In sum, we direct Greater Media and Bell Atlantic to include language identical to that which we approved above for Section 2.2 of their interconnection agreement.

According to Bell Atlantic, the last issue we must address in our clarification of the Ruling is what effect the Ruling has on Section 20 of the interconnection agreement (see Bell Atlantic Motion for Clarification at 3-4). Again, we decline to provide such clarification in this context. As noted by Bell Atlantic in its motion for clarification, Department precedent provides that it will "grant clarification of previously issued orders when an order is silent as to the disposition of a specific issue requiring determination in the order . . ." (citation omitted). MediaOne's Motion requested an interlocutory order only on Section 2.2 (see MediaOne Motion for Clarification at 1). Since the Arbitrator was not asked in her initial Ruling to render a determination on Section 20 cited by Bell Atlantic in its motion for clarification, we find it inappropriate to address this matter here. Therefore, this part of Bell Atlantic's and Greater Media's motion for clarification is denied.

B. MediaOne Motion to Strike

1. MediaOne's Motion to Strike

On July 30, 1999, MediaOne filed a Motion to Strike the affidavit of Donald E. Albert ("Motion to Strike"). The affidavit, which was appended to Bell Atlantic's reply brief, addressed Bell

Atlantic's costs of establishing a mid-span fiber meet[12] interconnection.[13] MediaOne requests that the Department strike the affidavit because the affidavit purports to present statements of fact that are not on the record and have not been subject to cross-examination or rebuttal (Motion to Strike at 2). MediaOne asserts that Bell Atlantic submitted the affidavit without notice to the parties, without a motion, and without good cause shown, ignoring the Department's procedures and rules governing admission of evidence and the ground rules of this arbitration (id.). MediaOne argues that if the affidavit is admitted into evidence, MediaOne will be prejudiced by its admission and be denied its rights to due process (id.).

2. Bell Atlantic's Opposition

On August 2, 1999, Bell Atlantic filed its Opposition to MediaOne's Motion to Strike the affidavit of Donald E. Albert ("Opposition"). In its Opposition, Bell Atlantic argues that MediaOne wrongly proposes to strike Mr. Albert's affidavit, and maintains that MediaOne's argument to prohibit the inclusion of the cost data as evidence is without merit and must be dismissed (Opposition at 2). Bell Atlantic contends that Mr. Albert's affidavit was in direct response to MediaOne's new "compromise" proposal presented for the first time in MediaOne's Initial Brief, filed after the record was closed (id.).

Bell Atlantic asserts that it must be allowed to respond to MediaOne's new proposal, since the

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[12] A mid-span fiber meet is an interconnection architecture whereby two carriers' transmission facilities meet at a mutually agreed upon point of interconnection with the POI in the middle of a fiber ring. Each party builds half a fiber ring and purchases and maintains all the fiber and electronics for its half of the ring (Bell Atlantic Brief at 2; Bell Atlantic Response to Petition at 9).

[13] In the affidavit, Mr. Albert testified regarding the equipment that Bell Atlantic would need to install to establish a mid-span meet interconnection arrangement, and the estimated installed cost for one such "typical" arrangement.

proposal contains cost consequences for Bell Atlantic in its interconnection arrangement with MediaOne and in possible interconnection arrangements with other CLECs (id.). Bell Atlantic claims that the new proposal conflicts with the earlier testimony of MediaOne's witness, and that this conflict would have significant consequences for Bell Atlantic (id., citing Bell Atlantic Reply Brief at 10-12). Bell Atlantic insists that denying Bell Atlantic the opportunity to address this conflict, by presenting the facts in Mr. Albert's affidavit, is "patently unfair" (id. at 3).

Bell Atlantic maintains that MediaOne's new proposal is another attempt on MediaOne's part to impose it own notion of an interconnection arrangement on Bell Atlantic (id.). Bell Atlantic asserts that, under the new proposal, it would incur significant transportation cost to carry traffic to MediaOne's interconnection points, which could average a ten mile distance from Bell Atlantic tandem offices (id. at 3-4, citing Bell Atlantic Reply Brief at 10). Bell Atlantic refers to Mr. Albert's testimony regarding the total additional equipment cost of $1.5 million for MediaOne's demand for mid-span meet interconnection arrangements and contends that this cost could be multiplied many times if other CLECs demand the same mid-span interconnection arrangements (id. at 4).

Bell Atlantic maintains that MediaOne's demand for solely mid-span meet interconnection arrangements is actually a retreat to MediaOne's original position, which Bell Atlantic did not respond to, because, during the proceeding, MediaOne's representations no longer included this demand (id.). Bell Atlantic argues that MediaOne cannot bring forth its new compromise proposal for mid-span interconnection arrangements at such a late date and request that Bell Atlantic be denied its response to the proposal without unduly prejudicing Bell Atlantic (id. at 4-5).

3. Analysis and Findings

Throughout this proceeding, the Department encouraged the parties to negotiate to resolve their differences. The Department has in the past noted that the Act evinces a preference for negotiated agreements. Resale Tariff Order at 13 (Phase I) (1998). We support the parties efforts at resolving as many of the terms and conditions of their agreement themselves as they can (see Section V.I., infra). To the extent that the parties were able to resolve certain issues, this effort was successful, and we do not review the parties' resolution in this proceeding. However, to the extent that parties were unable to resolve certain issues, the Department is required to make a determination on the unresolved issues. 47 U.S.C. § 252(b)(4).

Those determinations must be based on record evidence in this proceeding. Where a party shifted positions in this proceeding after the record had closed, it ran the risk that there would be no record evidence to support its new position, and therefore the Department might have no evidence on which to base a finding in its favor. Here, the parties continued to negotiate after the close of hearings, and on some issues, changed position after the close of the record.

Bell Atlantic states that it filed its affidavit is in response to MediaOne's "new" proposal included for the first time in its brief (Opposition at 2). According to Bell Atlantic, this new proposal included the following provisions: (1) MediaOne's proposal to establish mid-span meets at each Bell Atlantic tandem; (2) MediaOne's proposal to use mid-span meet as its sole interconnection arrangement; and (3) MediaOne's proposal to establish mid-span meets at an average of 10 miles from each tandem. Finally, Bell Atlantic also contends that MediaOne's proposal conflicts with the testimony of MediaOne's witness (Opposition at 2-4).

Regarding whether these provisions are first presented on brief, MediaOne indicated in its

Petition that it intended to interconnect via mid-span meets or entrance facilities (MediaOne Petition at 18). The parties had discussed the "footprint" proposal prior to briefing (Exh. MediaOne-3, at 5). Thus, MediaOne's proposal to establish mid-span meets at each tandem did not appear for the first time on brief. However, with respect to the distance from the tandem, both MediaOne and Bell Atlantic proposed a specific maximum mileage for the distance from the tandem switch for a mid-span meet arrangement in their briefs (see MediaOne Brief at 15; Bell Atlantic Brief at 28). At the time of the hearings, MediaOne's proposal was to locate its mid-span meet within Bell Atlantic's tandem serving area (Exh. MediaOne-3, at 5). Thus, the specific mileage proposals are new on brief. Regarding the last point, MediaOne had testified that it would want the mid-span meet as close as possible to the tandem office to be able to control as much as its network as possible (Tr. 2, at 283). However, MediaOne's witness did not specify a distance at that time.

Bell Atlantic attempted to put evidence into the record, after it closed, on the cost of the electronics and equipment needed for a "typical" mid-span meet arrangement (Bell Atlantic Reply Brief at Affidavit of Donald E. Albert). However, we cannot tell if this submittal bases its cost estimates on the distance of a mid-span meet from the tandem office. The affidavit simply identifies the costs as those of a "typical" mid-span meet. Therefore, the affidavit addresses the issue of the cost to Bell Atlantic of MediaOne's proposal to establish mid-span meets in the footprint of Bell Atlantic tandem serving areas, which was the subject of cross examination at the hearings. As such, Bell Atlantic's affidavit responded to the subject of mid-span meets that was discussed at the hearings, and not to new information presented by MediaOne for the first time on brief.

There is no evidence on the record regarding specific distances from the tandem switch for the

mid-span meet arrangements. There is no evidence on the record quantifying the cost of a mid-span meet. On the record before us, we cannot determine whether Bell Atlantic's quarter mile distance, or MediaOne's average ten mile proposal is reasonable. Both proposals are unsupported by the record.

To the extent that any party argued a new position on brief that was unsupported by evidence taken in this proceeding, the Department may not accept those positions. To the extent that a party attempted to introduce new evidence on brief, that purported evidence is stricken from the record, in compliance with the Department's procedural rules, prior decisions, and the Ground Rules in this arbitration.[14] Accordingly, the Motion to Strike of MediaOne is granted. Where applicable, we note in the Order parties' positions that were made after the close of the record and which are not supported by evidence.

IV. STANDARD OF REVIEW

Section 252(c) of the Act sets out the standards for arbitrations by state commissions. 47 U.S.C. § 252(c). Section 252(c) states, in relevant part, that a state commission shall

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[14] The Department set forth its policy on late-filed exhibits in Boston Gas Company, D.P.U. 88-67, Phase II at 7 (1989), stating: "A party's presentation of extra-record evidence to the fact-finder long after the record has closed and after all briefs have been filed is an unacceptable tactic, potentially prejudicial to the rights of other parties even when the evidence is ultimately excluded. Facts or allegations of facts, once learned, cannot readily be unlearned . . . . In the future, once the record in a docket has closed, proper procedure will require that a party seeking to offer a late-filed exhibit or testimony move to reopen the record to introduce new evidence. (An exception is the Department's practice to permit updating of routine information already provided on the record -- for example, the most recent property tax bills -- or to permit filing responses to outstanding record requests.) The motion should state the subject or issue that the proffered exhibit or testimony would address. Only if such a motion were granted by the hearing officer, would it then be proper to present the exhibit or testimony itself."

> (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [Federal Communications Commission ("FCC")] pursuant to section 251;
> (2) establish any rates for interconnection, services, or network elements according to [section 252(d).]

Section 251(c)(2) of the Act defines the obligations for ILECs to interconnect with other carriers. Each ILEC has the duty

> to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network -- (A) for the transmission and routing of telephone exchange service and exchange access; (B) at any technically feasible point within the carrier's network; (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of [section 251] and section 252.

Furthermore, § 252(e)(3) provides that "nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards and requirements."

V. UNRESOLVED ISSUES

A. Statement Regarding Compliance with Section 251 of the Act

1. Introduction

The parties disagree whether to include wording indicating that the terms of the interconnection agreement satisfy Bell Atlantic's obligations to provide interconnection under § 251 of the Act. The language proposed by Bell Atlantic is as follows:

> Whereas Sections 251 and 252 of the Communications Act of 1934 as amended by the Telecommunications Act of 1996 have specific requirements for interconnection, unbundled Network Elements and resale service and the Parties intend that this

Agreement meet these requirements.

2. Positions of the Parties

a. MediaOne

MediaOne gives several reasons why it cannot agree, at the time that it signs its interconnection agreement, that the terms of the interconnection agreement will satisfy Bell Atlantic's obligations under the Act (MediaOne Brief at 8). First, MediaOne argues that it is not MediaOne's obligation to make that determination, but the obligation of the Department and the FCC (id.). Second, it is impossible for MediaOne to determine at the time of signing the interconnection agreement whether Bell Atlantic's performance will in fact comply with § 251 (id.). Third, MediaOne asserts that Bell Atlantic has taken positions in the negotiations which MediaOne contends are not in compliance with the Act (id.). Fourth, MediaOne cites FCC regulations which prohibit demands that a party attest that its obligations under the Act are being satisfied by the interconnection agreement (id. at 9, citing 47 C.F.R. § 51.301(c)(2)).

b. Bell Atlantic

Bell Atlantic explains that the purpose of its proposed section on compliance with § 251 obligations, which it states is standard language for its interconnection agreements, is to recognize the parties' obligations to provide services in compliance with the Act (Bell Atlantic Brief at 12). Bell Atlantic complains that it is disingenuous for MediaOne to assert its rights under the Act, and then to refuse to acknowledge that the specific arrangements which it is insisting upon satisfy Bell Atlantic's obligations under the Act (id. at 13). Finally, Bell Atlantic argues that MediaOne's position fails to recognize the fact that a fully executed and implemented interconnection agreement would, by definition,

meet § 251 requirements (id. at 13-14).

3. Analysis and Findings

MediaOne is correct that one of the Department's obligations under the Act, when reviewing a final interconnection agreement, is to make a determination that the interconnection agreement meets the requirements of § 251 of the Act. See 47 U.S.C. § 252(c)(1). In addition, the FCC regulations cited by MediaOne, and not addressed by Bell Atlantic, make it clear that "demanding that a requesting telecommunications carrier attest that an agreement complies with all provisions of the Act, federal regulations, or state law" is a violation of the duty of an ILEC to negotiate in good faith. 47 C.F.R. § 51.301(c)(2). See also NYNEX/MFS Intelenet Interconnection Agreement, D.P.U. 96-72, at 18 (1996). In D.P.U. 96-72, the Department stated that "[a]lthough the Department does not believe that approval of [a similar provision to that at issue here] in any way predetermines the issue of [Bell Atlantic's] satisfaction of its obligations under Sections 251 and 271, such approval may give the impression of a Department finding on the issue." Granted, Bell Atlantic's proposed provision does not require that MediaOne attest that the interconnection agreement complies with *all* provisions of the Act. However, it does suggest that MediaOne in a lesser way acknowledges that the agreement meets the requirements of Section 251. Therefore, the language regarding compliance with Section 251 shall be removed from the interconnection agreement.

B. Interconnection and Physical Architecture

1. Points of Interconnection/Geographic Relevance/Physical Architecture

a. Introduction

In order for customers of two different local exchange carriers to call each other, the network

facilities of the carriers need to be interconnected. The FCC has defined interconnection under § 251(c)(2) of the Act as the physical linking of two networks for the mutual exchange of traffic. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499 (1996) ("Local Competition Order") at ¶ 176. The carriers must physically interconnect at a location where they hand off traffic to one another, and also must designate a point on their respective networks where each assumes responsibility for transport and termination of traffic from the other carrier. The Act requires the carriers to establish reciprocal compensation arrangements for the transport and termination of local traffic. 47 U.S.C. § 251(b)(5).

The parties disagree on several fundamental issues concerning how to interconnect their respective networks. These issues (and the corresponding sections in the proposed interconnection agreement) are: Points of Interconnection (Section 4.2.3), Geographic Relevance (Section 4.2.4), and Physical Architecture (Sections 4.3.1, 4.3.5, 4.3.9). The Department will address these sections together, since each relates to the parties' positions on interconnection issues and pertains to the other sections. Combining these sections results in a more coherent discussion and analysis.

Certain definitions are important to this discussion of interconnection issues. Bell Atlantic's interconnection agreements revolve around the concepts of Points of Interconnection ("POI") and Interconnection Points ("IP"). Bell Atlantic defines the POI as the physical point or points on local exchange carriers networks at which those networks interconnect (Bell Atlantic Brief at 16-17).[15] By contrast, according to Bell Atlantic, the IP is a specific point designated by each carrier on its

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[15] Depending on the interconnection option selected by the carriers, they may share a POI (i.e., a shared mid-span fiber meet) or they may establish a POI at the other carrier's network (i.e., a collocation site) (Exh. BA-MA-7, at 6).

respective network from which the terminating carrier provides the transport (and termination) to complete a local call (Bell Atlantic Brief at 17; Exh. BA-MA-7, at 5). In Bell Atlantic's proposal, reciprocal compensation charges are based and applied upon the designation of the IP (Exh. BA-MA-7, at 5). Bell Atlantic explains that POIs and IPs may be the same point; however, this is not always the case as illustrated by MediaOne's mid-span meet IP in Lawrence, Massachusetts (Exh. BA-MA-7, at 6).

In MediaOne's network, its current POI is its mid-span fiber meet near Bell Atlantic's Lawrence tandem switch (Exh. MediaOne-3, at 4). MediaOne also designates its IP as the same point as the POI under this arrangement (Exh. MediaOne-3, at 4). However, Bell Atlantic's IPs for the exchange of local traffic are located either at the end office[16] or at the access tandem[17] serving that particular end office (Exh. BA-MA-7, at 5). Bell Atlantic would define the POI between its network and MediaOne's network as the mid-span meet in Lawrence and its IP as either the Lawrence Tandem or the relevant Bell Atlantic end office that is connected to and serviced by that tandem (Tr. 2, at 235-236).

Greater Media plans to designate its POI and IP as the same point on its network, at either its

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16 An end office is a Bell Atlantic switching facility that exclusively serves customers in a specific geographic location corresponding to a specific NXX exchange code. The first three digits in a seven digit telephone number is the NXX exchange code. Generally speaking, all calls to and from customers are routed by the particular end office that is designated for that specific exchange code. Bell Atlantic has 286 end offices in Massachusetts.

17 A Bell Atlantic tandem office (or tandem switch) either connects trunks to and from (1) a Bell Atlantic end office and another tandem or (2) CLEC and/or interexchange carrier ("IXC") switches to a Bell Atlantic tandem. Bell Atlantic has six tandem switches serving Eastern Massachusetts. The tandem switches are located in Lawrence, two in Cambridge, Framingham, Worcester, and Brockton.

proposed switch in Worcester, or at a mid-span meet (Greater Media Brief at 18).

The parties' positions on interconnection issues focus primarily on (1) the specific method of interconnection, (2) the number of interconnection points MediaOne and Greater Media will establish, and (3) the locations of the IPs. Below, we first describe Bell Atlantic's interconnection proposals for MediaOne and Greater Media. We then describe interconnection proposals made by MediaOne and Greater Media to Bell Atlantic. After describing the parties' critiques of each other's proposals, we analyze and resolve the open issues.

b. Bell Atlantic Proposals

The basis of Bell Atlantic's interconnection proposal is the proposition that the parties should exchange local traffic with each other within a reasonable geographic proximity to the terminating end user customer, defined by Bell Atlantic as a "geographically relevant point" (Bell Atlantic Brief at 15). According to Bell Atlantic, each party would be responsible for the transport to and from the geographically relevant point, and once traffic is delivered to an IP, reciprocal compensation charges would apply (id. at 15, 18).

i. MediaOne

Bell Atlantic's proposal to MediaOne includes the following provisions: 1) both Parties mutually agree on the establishment of mid-span arrangement(s) within a twelve month transition period from the execution of the new interconnection agreement[18] (Bell Atlantic Brief at 29; Tr. 2, at 344); 2)

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[18] On brief, Bell Atlantic proposed that during the twelve month transition period, the parties would execute a Memorandum of Understanding ("MOU") within three months of MediaOne's request to establish a mid-span IP and the mid-span IP would be implemented within six months of executing an MOU unless certain problems arise (Bell Atlantic Brief at 29). This (continued...)

the mid-span arrangements will be located at or near each Bell Atlantic tandem[19] (Bell Atlantic Brief at 29; Tr. 2, 332); 3) during the twelve month transition period, Bell Atlantic would provide transport [20] at no charge from MediaOne's existing mid-span arrangement in Lawrence to all other relevant Bell Atlantic IPs (Bell Atlantic Brief at 29; Tr. 2, at 332); 4) Bell Atlantic would limit the traffic volumes eligible for free transport during the twelve month transition period (Bell Atlantic Brief at 29; Tr. 2, at 332); 5) once the volume of traffic delivered by MediaOne for termination to a specific Bell Atlantic end office exceeds a threshold of one DS-1,[21] MediaOne would provision direct trunks on the mid-span meet facilities to that end office and bypass the tandem switch[22] (Bell Atlantic Brief at 29; Tr. 2, at 365-366); 6) both parties would apply an equal and symmetrical reciprocal compensation rate of $.008 per minute of use (Bell Atlantic Brief at 29; Exh. BA-MA-8, at 6); and 7) Bell Atlantic would provide mid-span meet arrangements as a method of interconnection as long as the location and terms of the mid-span meet are mutually agreed upon by the parties (Exh. BA-MA-7, at 15).

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[18](...continued)
proposal does not appear on the record. To the extent that Bell Atlantic's position is not supported on the record, the Department will not accept it.

[19] On brief, Bell Atlantic proposes that the mid span meet arrangement will be located within one quarter mile of each Bell Atlantic tandem (Bell Atlantic Brief at 29). This proposal does not appear on the record. To the extent that Bell Atlantic's position is not supported on the record, the Department will not accept it.

[20] Transport is a service whereby one carrier hauls traffic over its network for another carrier.

[21] Digital Signal Level 1 ("DS1") refers to the speed at which a T-1 circuit will run. A T-1 is a single telephone circuit that carries up to 24 voice or data communications.

[22] See Section V.C.3. for our discussion on direct trunking from MediaOne's IP to a Bell Atlantic end office.

ii. Greater Media

Bell Atlantic's proposal to Greater Media is almost identical to the one approved by the Department in the Cablevision Lightpath, Inc. ("CLI")/Bell Atlantic interconnection agreement[23] (Bell Atlantic Brief at 31). This interconnection agreement includes the following provisions: 1) Bell Atlantic's IP would be the terminating Bell Atlantic end office serving that Bell Atlantic customer (id. at 31); 2) the Greater Media IP would be the Greater Media Collocation site(s) established at or near each Bell Atlantic tandem(s)[24] (id. at 32; Tr. 2, at 332); 3) Greater Media would establish an initial IP at a collocation[25] site at the Bell Atlantic tandem in that LATA (Bell Atlantic Brief at 32); 4) Bell Atlantic would provide to Greater Media, at no additional charge, for an interim period, transport from the Bell Atlantic tandem IP to the other Bell Atlantic tandems in the LATA[26] (id. at 32; Tr. 2, at 332);

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23 The Department approved the BA/CLI negotiated interconnection agreement on September 10, 1998, effective December 2, 1998.

24 At the hearing, Bell Atlantic's witness stated that under its proposal to both MediaOne and Greater Media, Greater Media could establish an IP at or near the Bell Atlantic tandem location (Tr. 2, at 332).

25 Collocation is an arrangement whereby one LEC resides and connects its equipment in the end office of another LEC, for purposes of obtaining interconnection and/or access to unbundled network elements ("UNEs").

26 LATA refers to a Local Access and Transport Area. The Act defines a LATA as "a continuous geographic area '(A) established before February 8, 1996. by a Bell operating company such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or (B) established or modified by a Bell operating company after February 8, 1996, and approved by the [FCC]." 47 U.S.C. § 153 (25). Massachusetts has two LATAs: a Western LATA that corresponds to the area served by the 413 area code; and an Eastern LATA that corresponds to the area served by the 617/508/978/781 area codes.

5) after the earlier of 24 months[27] following initial exchange of traffic to the other Bell Atlantic tandems, or ii) the date by which the volume of Greater Media traffic serving other end offices connected to other Bell Atlantic tandems exceeds a DS1 facility,[28] Greater Media will have two options. Greater Media could either compensate Bell Atlantic for the transport from the initial Bell Atlantic IP to other Bell Atlantic tandem IPs in the LATA, or Greater Media could establish an IP at the other Bell Atlantic tandem IP (Bell Atlantic Brief at 32-33; Tr. 2, at 366).

c. MediaOne Proposal

MediaOne's proposal to Bell Atlantic contains the following provisions: 1) it will establish additional IPs in the "footprint"[29]of each Bell Atlantic tandem within one year from the effective date of the new interconnection agreement (MediaOne Brief at 11; Exh. MediaOne-3, at 5); 2) MediaOne will establish mid-span meets at its IPs located within the "footprint" of each of Bell Atlantic's six tandems (MediaOne Brief at 15; Exh. MediaOne-3, at 5-6; Tr. 2, at 278); 3) if it is unable to agree with Bell Atlantic on the location of a mid-span meet, MediaOne would have the right to select the precise location of the additional IPs (MediaOne Brief at 15; Exh. MediaOne-3, at 6); 4) during the twelve-month transition period to establish the additional IPs, Bell Atlantic would not charge MediaOne for

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27 The CLI/Bell Atlantic interconnection agreement provides for an 18 month period.

28 The CLI/Bell Atlantic interconnection agreement provides for a DS-3 threshold. A DS-3 circuit will carry up to 672 voice or data communications.

29 MediaOne argues that its "footprint" proposal would establish MediaOne IPs at each Bell Atlantic tandem within an average of 10 miles from each tandem location (MediaOne Brief at 15). As stated earlier, MediaOne's position on mileage was first introduced on brief. To the extent that MediaOne's position is not supported on the record, the Department may not accept it. MediaOne testified that it is already in the process of establishing another IP in Brockton (Tr. 2, at 289-290).

transport between MediaOne's POI in Lawrence and Bell Atlantic's IPs for all trunks currently in place (MediaOne Brief at 13; Tr. 2, at 297-298); 5) transport charges would apply for any incremental trunks added during this period (MediaOne Brief at 13); 6) a direct trunk group volume threshold of three DS-1s worth of traffic would apply before MediaOne would be responsible to build out a direct trunk connection to a Bell Atlantic end office (MediaOne Brief at 13; Exh. MediaOne-3, at 11); 7) the blended[30] reciprocal compensation rate of $.008 would apply for all Bell Atlantic originated traffic that would be terminated by MediaOne instead of the higher tandem rate of $.021,[31] if Bell Atlantic adopts MediaOne's ten mile proposal; otherwise, the tandem rate would apply (MediaOne Brief at 13; Tr. 2, at 271); and 7) the parties would agree to undertake commercially reasonable efforts and be bound by a time frame to establish additional IPs (MediaOne Brief at 13).

d. Greater Media Proposal

Greater Media proposes to define its IP as the point closest to the Bell Atlantic customers to which it is directing calls where Greater Media interconnects with Bell Atlantic (Exh. GMT-2, at 7). Greater Media's proposal to Bell Atlantic includes the following: 1) Greater Media will designate its

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30 Bell Atlantic states that the existing reciprocal compensation rate of $.008 per minute of use is a blended end office and tandem reciprocal compensation rate that takes into account the balance of traffic delivered by MediaOne to a Bell Atlantic tandem or end office and Bell Atlantic's delivery of its traffic to MediaOne's end office switches (Exh. BA-MA-8, at 6; IR MediaOne-BA-2-5; Bell Atlantic Brief at 29).

31 MediaOne states that it has the right to receive tandem termination rates ($.021) as supported by both federal and state law and initially included this rate in its tandem footprint proposal (MediaOne Brief at 11, 14). However, MediaOne has modified its position on tandem termination rates and has agreed to use Bell Atlantic's proposed reciprocal compensation rate of $.008 if Bell Atlantic agrees to other elements of its compromise proposal (MediaOne Reply Brief at 6).

POIs and IPs with Bell Atlantic as the same location where Greater Media has a switch or remote switching module, which may be at the Worcester Tandem location or at a mid-span meet (Greater Media Brief at 5; Exh. GMT-2, at 8; Tr. 2, at 206, 209); 2) Greater Media would not be required to establish more than one IP/POI in each LATA -- eliminating from Section 4.2.2.1 the phrase "in each NPA" would accomplish this point (Greater Media Brief at 5; Exh. GMT-2, at 8); and 2) Greater Media would eliminate Bell Atlantic's entire proposed section on geographic relevance (Greater Media Brief at 5). Greater Media also proposes that when it expands to western Massachusetts, it will add an IP in the Western LATA (Exh. GMT-2, at 8).

Greater Media would modify Bell Atlantic's proposal, which incorporates terms from the CLI/Bell Atlantic interconnection agreement, by eliminating the requirement that it interconnect through collocation at the Bell Atlantic tandem (Greater Media Brief at 5). Greater Media proposes that it be permitted to interconnect at any technically feasible point, including, but not limited to, mid-span meet arrangements (id. at 5).

e. Positions of the Parties

i. Bell Atlantic

Bell Atlantic contends that its proposals to both MediaOne and Greater Media are in full compliance with the requirements of the Act and the FCC's Local Competition Order[32] (Bell Atlantic Brief at 15). Bell Atlantic's proposal provides that when either CLEC assigns telephone numbers

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[32] In the Local Competition Order, the FCC implemented the key provisions of the Act concerning, among other things, interconnection, access to UNEs, and pricing.

representing a geographic area and rate center,[33] the CLECs should permit Bell Atlantic to deliver its traffic to each CLEC within a reasonable geographic proximity to the area represented by the CLEC customers' telephone numbers (id. at 19). Bell Atlantic claims that it is reasonable to assume that if the CLEC has active telephone numbers in a Bell Atlantic rate center to which calls are terminating, the CLEC also has or leases facilities in that geographic area (id. at 20). Bell Atlantic argues that if the CLEC imposes a network architecture that does not provide for geographically relevant IPs, the additional transport costs to haul the CLEC's traffic to all of Bell Atlantic's tandems from a single IP would be substantial (id. at 20, 25). Furthermore, Bell Atlantic maintains that such transport costs were not considered in developing the existing reciprocal compensation rates (id. at 25; Bell Atlantic Reply Brief at 13 n.7).

Bell Atlantic contends that MediaOne's footprint proposal, which would allow MediaOne to locate its mid-span meet IPs anywhere within the serving area of the tandem, is too broad (Bell Atlantic Brief at 26). Under MediaOne's footprint proposal, Bell Atlantic maintains that MediaOne would still be able to locate its IPs in locations that have little or no relation to where its customers originate or terminate calls, thereby shifting substantial transport costs to Bell Atlantic (id. at 27). Further, Bell Atlantic maintains that the FCC has found that, in the case of new market entrants requesting interconnection with the ILEC, it is reasonable to require each party to bear a reasonable portion of the economic costs of that arrangement and that state commissions are in a better position to determine the appropriate distance an incumbent LEC should be required to build out facilities for meet point

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[33] Rate centers are geographic areas (usually corresponding closely to end offices) that Bell Atlantic uses to determine distance-sensitive pricing. Bell Atlantic has 261 rate centers in the Eastern LATA.

arrangements (Bell Atlantic Reply Brief at 9, citing Local Competition Order at ¶ 553).

Bell Atlantic contends that the FCC, by requiring that a "requesting carrier that wishes a 'technically feasible' but expensive interconnection would ... be required to bear the cost of that interconnection, including a reasonable profit", recognizes that CLECs cannot locate their IPs at arbitrary points (id. at 8, citing Local Competition Order at ¶ 199). Bell Atlantic argues that its geographic relevance proposal is consistent with this requirement (id.). Bell Atlantic states that the 12-month transition period would be acceptable to it as long as MediaOne agreed to a reasonable traffic volume limitation during the 12-month period (Bell Atlantic Brief at 26).

Lastly, Bell Atlantic contends that MediaOne's attempt to impose both the type of interconnection arrangement and the location of that arrangement on Bell Atlantic is unreasonable and unacceptable (id. at 27). Bell Atlantic insists it is not refusing to provide a meet point interconnection, but it is requesting that a mid-span arrangement be mutually selected by the parties and agreed to in writing (id. at 35-36). Bell Atlantic argues that the mutual agreement of the location of the mid-span meet is important because it allows Bell Atlantic to manage and control its network costs (id. at 27). Bell Atlantic claims that a mid-span meet should take into consideration where Bell Atlantic has fiber available because the ILEC is not required to construct facilities regardless of the cost or location (Bell Atlantic Reply Brief at 11). Moreover, Bell Atlantic insists that MediaOne's efforts to preclude Bell Atlantic from even furnishing its own facilities and collocating at MediaOne's end office switch are unreasonable (Bell Atlantic Brief at 36).

Bell Atlantic maintains that Greater Media's proposal to establish only a single switch as its POI and IP would force Bell Atlantic to incur extensive additional transport costs to deliver local traffic from

every exchange in the LATA to Greater Media (Bell Atlantic Reply Brief at 14). Bell Atlantic argues that such a result would be inefficient and unfair (id.).

Bell Atlantic responds to Greater Media's contention that it would need to make major capital investment in switching equipment if it had to comply with the geographic relevance provision proposed by Bell Atlantic by noting that Greater Media is only required to provide a hand-off of traffic to Bell Atlantic at a geographically relevant IP[34] (id. at 7).

Bell Atlantic contends that its proposal to Greater Media, which contains almost identical terms as the interconnection arrangement in the CLI/Bell Atlantic Agreement, addresses Greater Media's concerns as a new market entrant (Bell Atlantic Brief at 31, 33). Bell Atlantic claims that its proposed interconnection arrangement allows Greater Media to avoid increased capital costs until its customer base warrants additional capital investment by not requiring it to establish multiple IPs in a LATA (id. at 33). Bell Atlantic explains that allowing a CLEC to establish its IP close to but not at a geographically relevant point is a significant compromise because Bell Atlantic would incur added costs to transport calls to Greater Media's initial IP (id.). Bell Atlantic claims that the proposal allows the parties to share transport costs and is reasonable (Bell Atlantic Reply Brief at 14).

Bell Atlantic claims that Greater Media's concern about sharing of transport costs would be resolved by Greater Media collocating at a single Bell Atlantic tandem in the LATA initially (Bell Atlantic Brief at 33). Greater Media would only provide transport to and from its collocation site at the

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[34] Bell Atlantic states that each party should (1) be responsible for the transport to and from the geographically relevant point by providing its own transport, (2) compensating the other party for transport, (3) purchasing transport from a third party, or (4) negotiating a mid-span meet or other facility sharing arrangement, such as collocation (Bell Atlantic Brief at 15).

Bell Atlantic tandem, Bell Atlantic purports, while Bell Atlantic would provide most of the transport until Greater Media expands its network to other local calling areas (id.).

Lastly, Bell Atlantic argues that Greater Media's request to insert language in section 4.3.1 of the agreement that would not limit Greater Media's interconnection possibilities exclusively to collocation, has already been agreed to by the parties and included in Section 4.4[35] (id. at 34). Bell Atlantic insists that while Greater Media has already agreed in one section of the agreement (Section 4.4) to negotiate alternative interconnection arrangements with Bell Atlantic, it should not be allowed to confuse another section of the agreement (Section 4.3.1) by seeking additional interconnection options other than those already negotiated in that section (id. at 34-35).

ii. MediaOne

Although MediaOne contends that the Act does not require it to establish additional IPs within Bell Atlantic's tandem serving areas, MediaOne is willing to undertake this "expensive" task to address Bell Atlantic's concerns about excess transport costs (MediaOne Brief at 14). MediaOne maintains that the FCC has found that a requesting carrier may chose any method of technically feasible interconnection and that meet point arrangements (its preferred method of interconnection) are, in general, technically feasible (MediaOne Brief at 10). MediaOne states that the FCC has also found that an incumbent LEC's interconnection obligations may require it to build out its facilities to accommodate these meet point arrangements (MediaOne Brief at 10, citing Local Competition Order at ¶ 553). In addition, MediaOne points out that the FCC has specifically stated that "CLECs should

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[35] Section 4.4 (Alternative Interconnection Arrangements) provides for alternative interconnection arrangements, including mid-span meets, upon mutual agreement of the parties (Bell Atlantic Brief at 34).

be allowed to choose 'the most efficient points at which to exchange traffic with the incumbent LECs', thereby lowering' the competing carriers' costs' of transport and termination of traffic" (MediaOne Brief at 11, citing Local Competition Order at ¶ 172). MediaOne notes that nowhere in the FCC's discussions of the incumbent LECs' interconnection obligations does it require CLECs to establish multiple interconnection points (MediaOne Brief at 10). Based upon these FCC statements, MediaOne argues that it is reasonable and not unduly expensive to require Bell Atlantic to interconnect via mid-span fiber meet and to pay for half the build-out expense (i.e., the portion of the fiber construction costs from the tandem to the mid-span meet IP) for each new mid-span meet IP (MediaOne Brief at 15).

MediaOne claims that although the FCC has stated that if a carrier requests a technically feasible, but expensive interconnection, that carrier would be required to "bear the cost of that interconnection, plus a reasonable profit", this qualification would not apply to MediaOne's proposal (MediaOne Brief at 10). MediaOne explains that the reason for the additional interconnection costs associated with establishing the supplementary mid-span meets at Bell Atlantic's tandems is to address Bell Atlantic's concerns about transport costs associated with MediaOne's original proposal[36] (MediaOne Brief at 10).

MediaOne argues that it should ultimately have the final decision on the location of its IP if the parties cannot agree (MediaOne Brief at 11; Tr. 2, at 296). However, MediaOne states that it intends to establish an iterative, collaborative process to decide upon the best location for any mid-span meet IPs (Tr. 2, at 294-296). MediaOne explains that it needs to have some certainty that, if the parties

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[36] MediaOne originally proposed one IP at its existing mid-span meet IP in Lawrence. This original IP would eventually be supplemented by an additional mid-span meet IP in Brockton that is in progress (Tr. 2, at 263-264).

cannot agree to a particular location within a reasonable time frame, MediaOne can make the decision to support and proceed with its business initiatives (MediaOne Brief at 11). Moreover, MediaOne states that Bell Atlantic's objection to the meet point location is based only on issues of technical feasibility which violates Bell Atlantic's obligation to interconnect with MediaOne at any technically feasible point (MediaOne Brief at 11-12).

iii. Greater Media

Greater Media argues that Bell Atlantic has improperly tried to force Greater Media to establish IPs in each NPA in each LATA in which Greater Media has customers (Greater Media Brief at 18). Greater Media claims that the permissible points of interconnection should be, as the Act and the FCC provide, at any technically feasible point in the network, including mid-span meets, remote switching modules or remote network nodes[37](Greater Media Brief at 17). Greater Media contends that if these interconnection points are not made available, Greater Media would be forced to emulate Bell Atlantic's network through costly construction of additional IPs and /or leasing arrangements (i.e., leasing facilities from Bell Atlantic, a third party, or collocating) (Greater Media Brief at 18).[38] Likewise, Bell Atlantic's proposal under Section 4.2.2.1, requiring Greater Media to designate at least one IP in each area code in each LATA in which it has customers, would also be burdensome and

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[37] A remote switching module is switching equipment that is physically remote from a host switch (e.g., an end office switch). The remote switch provides some switching capability but the rest of the switching capability, including operating and call processing functions, resides in the host switch. A network node is the building that contains a remote switching module.

[38] Greater Media also objects to Bell Atlantic's proposal to pay Greater Media less than full reciprocal compensation fees when Bell Atlantic transports calls originated by its customers to Greater Media's one IP (Greater Media Brief at 3).

further require Greater Media to replicate Bell Atlantic's network architecture (Greater Media Proposed Findings of Fact and Conclusions of Law at 9).

In addition, Greater Media states that it "opposes the inclusion of Bell Atlantic's geographic relevance provision" (Greater Media Brief at 19). Greater Media indicates that initially it only plans to serve the 21 communities in the Worcester area ("Worcester Cluster"), that receive cable television service from its affiliate Greater Media Cable (Greater Media Brief at 19). Greater Media maintains that although this area would not conform exactly to Bell Atlantic's "geographically relevant" proposal, it is not that much larger and does not justify construction of additional switching investment (Exh. GMT-2, at 5, 8). Greater Media argues that establishing these additional IPs would constitute an economic barrier to market entry for Greater Media and an obstacle to vigorous competition (Greater Media Brief at 3-4). Greater Media states that even though Bell Atlantic has modified its original position and would allow Greater Media to designate a remote switching module as a Greater Media-IP[39], Greater Media states that Bell Atlantic's language on establishing multiple IPs in the LATA is too restrictive (Greater Media Brief at 18).

Greater Media asserts that while Bell Atlantic's compromise proposal, based upon language included in the CLI/Bell Atlantic interconnection agreement, is an improvement over Bell Atlantic's original proposal, it is still unfavorable in comparison to Greater Media's original position for two reasons (Greater Media Brief at 22-23). First, Greater Media claims that it would incur the expense

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[39] Bell Atlantic states that Greater Media has incorrectly assumed that Bell Atlantic would agree to use Remote Switching modules for interconnection points (Bell Atlantic Reply Brief at 15)

and delay of collocating at Bell Atlantic's tandem offices in each LATA[40] (Greater Media Brief at 23). Greater Media claims that collocating at Bell Atlantic tandem offices requires Greater Media to incur substantial nonrecurring and recurring costs and provisional delays (Greater Media Brief at 4). Greater Media also states that Bell Atlantic's collocation requirement is not reciprocal in that Bell Atlantic would not have to collocate at Greater Media's switch and, thus, also incur collocation costs (Greater Media Brief at 5). Second, Greater Media states that it would be required to pay all the costs of transport between its switches and the Bell Atlantic tandems (Greater Media Brief at 4).

Finally, Greater Media argues that the reciprocal compensation scheme of § 251(b)(5) does not presuppose that CLECs will have the same network architecture as ILECs (Greater Media Reply Brief at 9). According to Greater Media, if an inequity exists because of these different network architectures as asserted by Bell Atlantic, they should be addressed through the costing of the reciprocal compensation rates under § 252(d)(1) (id.). Greater Media notes that the "expensive interconnection" referenced in the Local Competition Order at ¶ 199 when a CLEC requests a specific method of interconnection that causes the ILEC to incur additional costs in order to effectuate interconnection with that CLEC, in which case the CLEC pay for the costs associated with interconnection based upon just and reasonable rates (id. at 10).

f. Analysis and Findings

Our analysis of the points of interconnection, geographic relevance, and physical architecture

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40 Bell Atlantic proposes that Greater Media would not have to deploy an additional IP per tandem serving area until the earlier of 24 months from the first exchange of traffic to another tandem serving area or 6,000,000 minutes of use per month of traffic in that other tandem serving area (Greater Media Brief at 22-23; Bell Atlantic Brief at 32).

issues will proceed as follows. First, we consider Bell Atlantic's obligation to provide technically feasible interconnection. Second, we analyze Bell Atlantic's proposal that the CLECs establish additional IPs, or pay for Bell Atlantic's transport costs. Third, we address Bell Atlantic's obligation to provide the CLECs with a reasonable accommodation of interconnection and the effect of that obligation on mid-span meet build out costs. Finally, we consider the appropriate reciprocal compensation rate to be paid by the parties.

i. Bell Atlantic's obligation to provide technically feasible interconnection

Section 251 (c)(2)(b) of the Act states that it is the duty of each incumbent local exchange carrier "to provide for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network -- (2) at any technically feasible point within the carrier's network." 47 U.S.C. § 251(c)(2).

The FCC elaborated on the Act's language regarding technical feasibility by stating that "the Act does not permit [ILECs] to deny interconnection or access to unbundled elements for any reason other than a showing that it is not technically feasible." Local Competition Order at ¶ 206. "We conclude that, under sections 251(c)(2) and 251(c)(3), any requesting carrier may choose any method of technically feasible interconnection or access to unbundled elements at a particular point. Section 251(c)92) imposes an interconnection duty at any technically feasible point; it does not limit that duty to a specific method of interconnection or access to unbundled elements." Id. at ¶ 549. See also ¶ 550.

In its Local Competition Order, the FCC found that the term technically feasible refers solely to technical and operational concerns rather than economic, space, or site limitations. Id. at ¶ 198. The

definition of "technical feasibility" states that "a determination of technical feasibility does not include consideration of economic, accounting, billing, space, or site concerns, ..." 47 C.F.R. § 51.5. The FCC found that "the 1996 Act bars consideration of costs in determining a 'technically feasible' point of interconnection or access." Local Competition Order at ¶ 199.

Regarding proof of technical feasibility, the FCC stated that pre-existing interconnection or access at a particular point evidences the technical feasibility of interconnection or access at substantially similar points. Id. at ¶ 198. The FCC's interconnection rules state that "[an ILEC] that denies a request for interconnection at a particular point must prove to the state commission that interconnection at that point is not technically feasible". 47 C.F.R. § 51.305 (e); see also Local Competition Order at ¶ 198, 205, 554.

Therefore, consistent with the requirements of the Act and the FCC's guidelines, the Department finds as a threshold matter that Bell Atlantic must provide MediaOne and Greater Media with requested interconnection unless Bell Atlantic can prove to the Department that the requested interconnection is not technically feasible.

MediaOne is requesting a mid-span meet arrangement as its preferred method of interconnection. Greater Media has not chosen a particular method of interconnection, but it has requested the ability to choose among several options, including mid-span meet, and interconnection at remote network nodes and remote switching modules. Bell Atlantic does not argue that a mid-span meet arrangement is not technically feasible, but raises questions about the cost of mid-span meet

interconnection. However, the FCC has indicated that meet point arrangements[41] are technically feasible, and also indicated that cost is not a factor to be considered when determining technical feasibility. Local Competition Order at ¶¶ 199, 553. In the Local Competition Order, the FCC observed "other methods of technically feasible interconnection ... such as meet point interconnection, ... must be available to new entrants upon request. ... we believe such arrangements are technically feasible." Id. at ¶ 553. Therefore, the Department finds that because a mid-span meet arrangement is technically feasible, Bell Atlantic must provide this method of interconnection to MediaOne and Greater Media. Bell Atlantic cannot condition this type of interconnection, as it claims, on the mutual agreement of the parties, or on the availability of facilities. See Id. at ¶ 199.

Regarding Greater Media's request that we require Bell Atlantic to allow it to interconnect at remote network nodes and remote switching modules, the Department approves Greater Media's requested language that Greater Media may specify methods of interconnection at any of Bell Atlantic's IPs, and any other technically feasible interconnection point. However, we cannot make a determination on the record before us whether interconnection at remote network nodes and remote switching modules is technically feasible. The FCC did not make a finding on these particular methods of interconnection, so such a determination must by made by the Department if the parties do not agree. Once Greater Media is operating, it may request its preferred method of interconnection from Bell Atlantic. Should Bell Atlantic deny the requested interconnection method, Bell Atlantic would be required to prove to us at that time that Greater Media's request is not technically feasible. Therefore,

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41 The FCC includes mid-span meet arrangements in its discussion of meet point arrangements. Local Competition Order at ¶ 553.

a determination of technical feasibility would be made at that time.

ii. Additional IPs and Transport Costs

Bell Atlantic argues that the FCC has stated that "the requesting carrier must bear the cost of the interconnection" and therefore Bell Atlantic should not have to pay for transport costs between its IPs (at the end office or tandem locations) and the IPs designated by MediaOne (its mid-span meet in Lawrence) and Greater Media (possibly a mid-span meet). In support of its position, Bell Atlantic maintains that MediaOne or Greater Media must either (1) establish IPs near Bell Atlantic's IPs, or (2) bear the cost of transport to their respective IPs.

Regarding Bell Atlantic's request that the Department approve its proposal to require MediaOne and Greater Media to provide IPs at or near each of Bell Atlantic's tandems, neither the Act nor the FCC's rules requires MediaOne or any CLEC to interconnect at multiple points within a LATA to satisfy an incumbent's preference for geographically relevant interconnection points. See Id. at ¶¶ 198-199.

Therefore, we find that a CLEC may designate a single IP for interconnection with an incumbent even though that CLEC may be serving a large geographic area that encompasses multiple ILEC tandems and end offices.[42] There is no requirement or even preference under federal law that a CLEC replicate or in a lesser way mirror an ILEC's network. Indeed, the Act created a preference for CLECs to design and engineer in the most efficient way possible, which Congress envisioned could be

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[42] Bell Atlantic argues that if MediaOne and Greater Media are allowed to establish a single IP, they could assign telephone numbers to customers without regard to the customer's location, and require Bell Atlantic to provide toll free transport for those calls (Bell Atlantic Brief at 25). For the reasons discussed below, such costs, if they are in fact real, are addressed by reciprocal compensation rates.

markedly different than the ILECs networks. Id. at ¶ 172. We find that MediaOne's existing mid-span meet IP in Lawrence satisfies its obligation under federal law for interconnecting with Bell Atlantic.[43] In addition, Greater Media's proposal to establish one IP per LATA also satisfies its interconnection obligation.

Regarding Bell Atlantic's argument that if MediaOne and Greater Media do not establish "geographically relevant" IPs, they would be obligated to pay Bell Atlantic's transport costs,[44] Bell Atlantic has pointed to nothing in the Act or FCC rules requiring CLECs to pay the transport costs that Bell Atlantic will incur to haul its traffic between Bell Atlantic's IP and the meet point. The FCC envisioned both carriers paying their share of the transport costs to haul traffic to the meet point under the interconnection rules. Bell Atlantic's cite to the FCC's language regarding "expensive interconnection" is not on point because the FCC there was referring to interconnection costs -- not transport costs.[45]

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43 The Department notes that MediaOne has chosen to offer an alternative interconnection arrangement to Bell Atlantic. This compromise proposal would have MediaOne establish additional IPs at Bell Atlantic tandems in the Eastern LATA (MediaOne's "footprint" proposal). While we have determined that Bell Atlantic cannot force MediaOne to establish additional IPs in the LATA, MediaOne may nonetheless decide to negotiate a compromise with Bell Atlantic. We would encourage such negotiations in that they may result in an overall more efficient interconnection of the two networks.

44 We note that the record, including citation to relevant FCC precedent, on the transport costs issue was not well developed by the parties.

45 "Of course, a requesting carrier that wishes a "technically feasible" but expensive interconnection would, pursuant to section 252(d)(1) [pricing standards for interconnection and network elements charges - standards for state determinations for the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2)] be required to bear the cost of that interconnection, including a reasonable profit." Local Competition

(continued...)

Bell Atlantic is correct that "to the extent [ILECs] incur costs to provide interconnection or access under sections 251(c)(2) or 251(c)(3), [ILECs] may recover such costs from requesting carriers." Local Competition Order at ¶ 200. However, ¶ 200 refers to the cost of establishing and maintaining an interconnection arrangement for a CLEC, not to transport costs. Transport and termination costs within a local service area are covered by the reciprocal compensation rates under § 252(d)(2). Local Compensation Order at ¶ 1034. Traffic originating or terminating outside of the applicable local area would be subject to interstate and intrastate access charges. Id. at ¶ 1035.

iii. Bell Atlantic's obligation to make a reasonable accommodation for interconnection and the effect of that obligation on mid-span meet build out costs

The FCC has stated that ILECs must make a reasonable accommodation for interconnection. Local Competition Order at ¶ 202. "We further conclude that the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to [ILEC] facilities to the extent necessary to accommodate interconnection ..." Id. at ¶ 198.

> That is, use of the term "feasible" implies that interconnecting or providing access to a LEC network element may be feasible at a particular point even if such interconnection or access requires a novel use of, or some modification to, [ILEC] equipment ... Congress intended to obligate the [ILEC] to accommodate the new entrant's network architecture ... Consistent with that intent, the [ILEC] must accept the novel use of, and modification to, its network facilities to accommodate the interconnector or to provide access to unbundled elements.

Id. at ¶ 202.

Furthermore, the FCC's definition of "technically feasible" states that "the fact that an [ILEC]

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[45](...continued)
Order at ¶ 199. See also section VII ("concluding that requesting carriers must pay [ILECs] the cost of interconnection and unbundling"). Id. at ¶ 199, n. 426.

must modify its facilities or equipment to respond to such request does not determine whether satisfying such request is technically feasible." 47 C.F.R. § 51.5. Therefore, Bell Atlantic must make a reasonable accommodation for interconnection, which may include some modifications to its facilities.

The FCC has specific rules for accommodation of interconnection in the meet point arrangement context. Bell Atlantic is required to make "some" buildout or a "limited" buildout of facilities as a reasonable accommodation for interconnection. The FCC has stated "although the creation of meet point arrangements may require some build out of facilities by the [ILEC], we believe such arrangements are within the scope of the obligations imposed by sections 251(c)(2) and 251(c)(3) ... the limited build-out of facilities from that point may then constitute an accommodation of interconnection. In a meet point arrangement, each party pays its portion of the costs to build out the facilities to the meet point." Local Competition Order at ¶ 553. The FCC based this position on the following reasoning: "In this situation, the [ILEC] and the new entrant are co-carriers and each gains value from the interconnection arrangement." Id.

What constitutes a reasonable accommodation is based, at least in part, on the distance of the build out. The FCC stated "[r]egarding the distance from an [ILEC's] premises that an incumbent should be required to build out facilities for meet point arrangements, we believe that the parties and state commissions are in a better position than the [FCC] to determine the appropriate distance that would constitute the required reasonable accommodation of interconnection." Id. at ¶ 553.

Therefore the Department must determine whether a particular build out distance constitutes a reasonable accommodation of interconnection. The record in this matter indicates that the expenses of a mid-span meet build out will likely vary from project to project (IR-BA-M1-1-5). Until the

Department has a record of a particular build out and the associated costs, we cannot make the determination whether those costs constitute a reasonable accommodation of interconnection and must therefore be borne by Bell Atlantic. At such time as the parties establish a new mid-span meet, and to the extent they are unable to agree on cost sharing, the parties may come before the Department with the actual figures for a particular build out. At that time, the Department would determine whether a particular build out constitutes a "reasonable accommodation of interconnection."

iv. Reciprocal Compensation Rate

Regarding the parties' dispute on the appropriate rate to be paid for reciprocal compensation, the Department addressed this issue in its Consolidated Arbitrations, Phase 4 Order. In that Order, the Department stated that "the appropriate rate for the carrier other than the [ILEC] is the [ILEC's] tandem interconnection rate." Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-94-Phase 4, at 70, (1996), ("Consolidated Arbitrations"), citing 47 C.F.R. § 51.711(a)(3). The parties have presented us with no reason to deviate from this position.[46] Therefore, the reciprocal compensation rate to be paid between the parties is the tandem rate. The other remaining issue – direct trunking – is discussed in Section V.C.3., supra.

2. Interconnection Activation Dates

a. Introduction

MediaOne and Bell Atlantic disagree on the appropriate interconnection activation date for IPs when MediaOne expands its services into a new LATA. The interconnection activation date is the date

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[46] Bell Atlantic has not shown with record evidence that the current reciprocal compensation rates do not appropriately compensate it for transport and termination related to the mid-span meet form of interconnection.

when a CLEC may begin exchanging traffic between its network and Bell Atlantic's network.

b. Positions of the Parties

i. MediaOne

MediaOne contends that Bell Atlantic must agree to commit to establish firm interconnection activation dates for IPs in each LATA (MediaOne Brief at 16). MediaOne agrees with Bell Atlantic that standard intervals should apply for the purchase of interconnection facilities and collocation (id., citing Exh. M-4, at 2-3). However, if the interconnection is by mid-span meet, MediaOne proposes interconnection activation dates no sooner than 60 days and no later than 120 days, after receipt by Bell Atlantic of a trunk order (id.). MediaOne contends that it needs the deadline to ensure that Bell Atlantic will follow through on its commitment to implement MediaOne's network configuration plan (id.). Without such a time commitment, MediaOne contends that it will be unable to implement any plan to expand its services and service territory within a particular time frame (id., citing Tr. 2, at 316; Exh. M-4, at 3). MediaOne argues that while not all details of a mid-span meet arrangement can be identified in advance, the parties can still agree on a general time frame (id.). Finally, MediaOne argues that Bell Atlantic's proposal on activation dates violates its obligation to provide interconnection on terms and conditions that are just and reasonable (id.).

ii. Bell Atlantic

Rather than agree on a specific time interval in the agreement, Bell Atlantic proposes that MediaOne and Bell Atlantic agree on an activation date within ten business days from the date Bell Atlantic receives MediaOne's transport orders (facilities orders and routing information) for interconnection in a new LATA (Bell Atlantic Brief at 40-41, citing Exh. BA-MA-7, at 16). Bell

Atlantic contends that that activation date should be no earlier than 60 days after Bell Atlantic receives the necessary information (id. at 40). Bell Atlantic states that this is consistent with language contained in approved interconnection agreements (id.). Bell Atlantic argues that a firm date to complete all interconnection orders is not feasible because it ignores the fact that activation will be determined by the method of interconnection selected and Bell Atlantic's overall interconnection activity at the time MediaOne submits its facilities orders and routing information to Bell Atlantic (id.). Bell Atlantic also contends that interconnection activations are affected by standard provisioning intervals for interconnection facilities and collocation, and are also contingent on the availability of facilities (id. at 40-41). Finally, Bell Atlantic contends that a decision by MediaOne to purchase transport facilities from a third party could also affect the timing of interconnection activation (id.).

c. Analysis and Findings

We agree with MediaOne that its ability to make its service expansion plans is hindered by Bell Atlantic's refusal to establish, in the interconnection agreement, an overall date certain by which MediaOne can expect the interconnection process to be complete. Unless a CLEC knows with certainty when its interconnection with Bell Atlantic will be operational, it cannot finalize sales and marketing, and operational support planning, which are critical components to any business plan.

We recognize that certain facilities provisioning and collocation are governed by timetables established under the Department's wholesale performance standards. See Consolidated Arbitrations, Phase 3-B (1998). However, Bell Atlantic's proposed language would give Bell Atlantic too much discretion over the timing of mid-span meet interconnections, by not requiring a deadline for activating MediaOne's trunks. We believe MediaOne's proposed language better balances the parties' interests,

in that it gives MediaOne a date certain for activation while giving Bell Atlantic flexibility to complete the activation on any date within a period between 60 to 120 days after receipt of an error-free trunk order. Therefore, we find that the interconnection activation date for a mid-span meet arrangement shall be no sooner than 60 days, and no later than 120 days, after receipt of the associated trunk order. The 120 days should be ample time for the parties to work out the various technical and other issues. In addition, with four months advance notice, Bell Atlantic should be able to plan properly for the availability of facilities for mid-span meets.[47] If MediaOne decides to purchase transport facilities from a third party, MediaOne shall use reasonable efforts to ensure that the third-party provider does not unreasonably delay Bell Atlantic's efforts to complete the interconnection by the deadline.

3. Collocation at MediaOne Site

a. Introduction

The issue in dispute is whether MediaOne is required under the Act to provide collocation at MediaOne's facilities for Bell Atlantic to interconnect with MediaOne.

b. Positions of the Parties

i. MediaOne

MediaOne argues that as a CLEC, it has no obligation under § 251(c) of the Act to provide Bell Atlantic with collocation at its facilities (MediaOne Reply Brief at 7). MediaOne contends that Bell Atlantic can interconnect with MediaOne through an entrance facility leased from MediaOne or a mid-

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[47] The Department recognizes that there may be exceptional circumstances that prevent Bell Atlantic from meeting this deadline, including delays caused by third-party vendors. Therefore, we will allow Bell Atlantic to petition the Department for relief in appropriate circumstances. We note that our reasoning here applies to establishment of each IP, not only those in a new LATA.

span meet arrangement (MediaOne Brief at 17). In addition, MediaOne argues that CLECs have the obligation under § 251(a) of the Act to interconnect with other carriers directly or indirectly without any specific interconnection method defined, and this obligation is met by providing the above-mentioned methods of interconnection (MediaOne Reply Brief at 7).

ii. Bell Atlantic

Bell Atlantic contends that MediaOne should be required to allow Bell Atlantic to collocate at MediaOne's facilities so that Bell Atlantic may terminate traffic to MediaOne using Bell Atlantic's own facilities (Bell Atlantic Brief at 37-38). Bell Atlantic argues that in the absence of the option to collocate, Bell Atlantic is forced to build a mid-span meet arrangement or to purchase transport from MediaOne (id.). Bell Atlantic claims that its inability to collocate at MediaOne's facilities hinders efficient interconnection by Bell Atlantic (id.). In addition, Bell Atlantic maintains that MediaOne is not fulfilling its broad obligations under Section 251(a) of the Act, which places a duty on all carriers to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers" (Bell Atlantic Reply Brief at 17, citing 47 U.S.C. § 251(a)).

c. Analysis and Findings

MediaOne has a general duty as a telecommunications carrier under §251(a) of the Act to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. 47 U.S.C. § 251(a). However, the specific obligation to provide collocation applies only to ILECs, such as Bell Atlantic, not to MediaOne. 47 U.S.C. § 251(c)(6).[48] Therefore, we conclude that

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[48] In addition, contrary to Bell Atlantic's suggestion that the FCC's rules impose reciprocal terms and conditions on ILECs and CLECs, the FCC in the Local Competition Order stated that § (continued...)

MediaOne is not required by the Act to offer Bell Atlantic collocation at its facilities.

However, as we noted earlier, § 252(e)(3) provides that "nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards and requirements." Therefore, we do have authority under state law to consider whether to require MediaOne to offer collocation to Bell Atlantic, but we will not do so because such a requirement would conflict with MediaOne's right to interconnect with Bell Atlantic at any technically feasible location its chooses.

C. Transmission and Routing of Telephone Exchange Service Traffic

1. Monitoring of Trunk Traffic/Prevention of Blocking

a. Introduction

Currently, Bell Atlantic establishes one-way trunk groups from its network to a CLEC network; CLECs also establish one-way trunks from their networks to Bell Atlantic's network (RR-DTE-22). Both the CLECs and Bell Atlantic are responsible for monitoring their respective one-way trunk groups for blocking[49] (id.). Bell Atlantic provides trunk group connections at either a DS-1 or DS-3 level (RR-DTE-20). When a DS-1 trunk facility becomes blocked during the busy hour, the parties

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[48](...continued)
251(c)(2) does not impose on non-incumbent LECs the duty to provide interconnection. Local Competition Order at ¶ 220.

[49] Blocking is a condition in a network when, due to heavy traffic, all trunk circuits are busy, or a switching path is unavailable. The Information Age Dictionary, at 31. From a customer standpoint, blocking can result is delays in completing calls and, in more extreme cases, an inability to complete calls. Trunks are engineered or designed to be free of blocking for all but a small number of calls.

disagree about whether they must commit to (1) a notification requirement for trunk blocking, and (2) a specific period for remedying trunk blocking on trunk groups between Bell Atlantic and MediaOne.

b. Positions of the Parties

i. MediaOne

MediaOne proposes that both parties notify one another within seven days after a party determines that the Common Channel Signaling ("CCS") busy hour equivalent[50] of a DS-1 has been exceeded in a trunk group (MediaOne Brief at 19). In addition, MediaOne proposes that the parties also commit to remedying the problem by adding trunks or establishing new direct trunk groups within 15 days after trunk blocking to reduce the blocking of calls between the two networks (id.). MediaOne argues that 15 days is a reasonable period of time to remedy a blocking situation, balancing the costs to correct the blocking situation with the inconvenience to the customers of both parties (id.). According to MediaOne, it is imposing a reasonable requirement, on both itself and on Bell Atlantic, to ensure that the public is not adversely affected by blocking for a long period of time (id. at 19-20). MediaOne also argues that the trunk provisioning metrics in Bell Atlantic's performance standards, as established in the Consolidated Arbitrations, do not apply here because they were not established to address the specific issues of trunk requests associated with a blocking situation, but to address trunk requests made in the regular course of business and to ensure the parity of provisioning required by the Act (id. at 20).

ii. Bell Atlantic

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[50] A busy-hold equivalent exists when there are twenty-four simultaneous voice or data calls (i.e., DS-1) during the busy hour.

Bell Atlantic argues that MediaOne's proposed notification requirements for trunk blocking are unreasonable and have no factual basis (Bell Atlantic Reply Brief at 18). In addition, Bell Atlantic asserts that the 15-day interval proposed by MediaOne is too short because it does not account for the different courses of corrective action upon which the parties might decide (e.g., augment an existing trunk group, build a new trunk group, install additional transport facilities, add switching capacity) and, at any rate, is not appropriate for any of those actions (id. at 19).

In describing its trunk monitoring process, Bell Atlantic states that it collects trunking data and analyzes them on a monthly basis (RR-DTE-22). Bell Atlantic asserts that its proposal, described below, addresses MediaOne's timing issues, including a 15-day notice provision, and balances the need for maintaining adequate trunking with the availability of underlying trunk facilities (Bell Atlantic Reply Brief at 18-19).

Bell Atlantic proposes to monitor its final trunk groups carrying traffic to the CLECs based on actual traffic data and to analyze the data, after each monthly reporting period, to determine if final trunk groups are exceeding their engineered blocking design (id. at 19). Bell Atlantic proposes to investigate the causes for trunk groups that exceed their engineered blocking design (id.). When it determines trunk capacity relief is required, it will contact MediaOne within 15 business days after the end of the month to initiate trunk group additions or the creation of new end office trunk groups (id.). Bell Atlantic argues that its proposal to notify MediaOne within 15 days after the end of the month and to negotiate a suitable course of corrective action is reasonable and appropriate (id.).

Bell Atlantic argues that MediaOne's proposal expands the current standards for trunk provisioning, as set forth in the Consolidated Arbitrations, by adding new language (Bell Atlantic Brief

at 46). According to Bell Atlantic, MediaOne's proposal differs significantly from the current standard trunk installation interval of 18 business days applicable to long distance carriers and CLECs for an addition to an existing trunk group of 192 or fewer trunks (id.). All other trunk activity is based on negotiated intervals (id.). Bell Atlantic states that the current trunk installation intervals should apply to MediaOne (id.).

c. Analysis and Findings

As an initial matter, we note that both parties recognize their obligation to monitor, engineer, and maintain their dedicated trunk groups for delivering traffic from their network to the other carrier. Moreover, the carriers agree that they are responsible for ordering additional trunk capacity to prevent trunk blocking on their respective networks when traffic on either carrier's network exceeds a certain level. However, the parties disagree on how quickly a carrier should notify the other carrier about blocking and respond to trunk provisioning requests.

As noted by MediaOne, the Department's existing performance standards relate only to provisioning new trunks under normal circumstances and do not address the more urgent situation of network blocking. See Consolidated Arbitrations, Phase 3-B (1998). Bell Atlantic's proposal, summarized above, addresses the process for augmenting final trunk groups, but does not provide a specific time period for corrective action after blocking occurs on the carrier's network. Blocking is an issue that goes beyond the normal competitive concerns of carriers; it may have serious customer service impacts. Therefore, the Department finds that we must establish specific time intervals for interconnection trunk provisioning in a blocking situation in order to minimize any inconvenience to the public resulting from blocking.

When traffic on a carrier's network exceeds the blocking threshold (i.e., the CCS busy hour equivalent of a DS-1) and that carrier can remedy the blocking itself, we direct the carrier to provision additional trunks within fifteen days of when the problem first develops (i.e., when the blocking threshold is exceeded). The carrier is also required to notify the other carrier of the blocking occurrence and corrective action when the new trunks are installed and made operational.

In situations where the remedy requires that new trunks be provisioned by one carrier to another, we believe Bell Atlantic's proposal is inadequate. Under that proposal, Bell Atlantic would gather and analyze data on blocking on its network on a monthly basis, with the analysis being completed at the end of each month. This part of the process, we find, is reasonable.[51] However, after determining blocking, Bell Atlantic would have 15 days to notify MediaOne of the problem and begin negotiating a solution. Bell Atlantic should not need 15 days to notify MediaOne and begin working on fixing the problem. Notification and preliminary discussions with MediaOne should occur immediately (i.e., within two business days after the last day of the month). Moreover, the current 18-day trunk provision interval is inadequate for these types of more urgent situations. Reflecting the increased urgency of a blocking situation, Bell Atlantic should provision additional trunks and correct the blocking situation within 15 days of discovering the problem (i.e., within 15 days of completing its monthly analysis). The two-day notification deadline is subsumed within the 15-day provisioning interval. Since Bell Atlantic's ability to meet the 15-day deadline may be affected, to some extent, by MediaOne's

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[51] If either carrier becomes aware of blocking through other means, the 15 day interval described below applies from the date the carrier became aware of the blocking.

cooperation, we direct MediaOne to assist Bell Atlantic in the process.[52]

2. Access to Call-Related Database through Commercial SS7[53] Provider

a. Introduction

The FCC observed in its Local Competition Order that "[a]ccess to signaling systems continues to be a critical element to providing competing local exchange and exchange access service," and therefore LECs should provide nondiscriminatory access on an unbundled basis to signaling systems to CLECs. Local Competition Order at ¶¶ 482, 479. The FCC found that access to call-related databases[54] is crucial to CLECs' entry into the local exchange market and concluded that "ILECs should provide nondiscriminatory access on an unbundled basis to their call-related databases for the purpose of switch query and database response through SS7 network." Id. at ¶ 484. The parties disagree whether Bell Atlantic has an obligation to provide access to call-related databases at a parity level when MediaOne chooses to use a commercial third-party SS7 provider, instead of directly

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52 If MediaOne's cooperation is lacking, Bell Atlantic should bring this matter to the attention of the Department, to be handled informally with the assistance of the Telecommunications Division.

53 "Signaling systems facilitate the routing of telephone calls between switches. Most ILECs employ signaling networks that are physically separate from their voice networks, and these "out-of-band" signaling networks [also known as Common Channel Interoffice Signaling] simultaneously carry signaling messages for multiple calls. In general, most LECs' signaling networks adhere to a Bellcore standard Signaling System 7 ("SS7") protocol." Local Competition Order at ¶ 455.

54 "Call-related databases are those SS7 databases used for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." Local Competition Order at ¶ 484 n. 1126.

interconnecting their own Common Channel Signaling facilities to Bell Atlantic.[55]

b. Positions of the Parties

i. MediaOne

MediaOne argues that Bell Atlantic has an obligation under the Act to provide CLECs with access and updates to call-related databases at parity to what Bell Atlantic provides to itself (MediaOne Brief at 21). MediaOne proposes wording that would allow either party to use a commercial SS7 provider and permit that party to gain access "to the same databases as would have been accessible if [that party] had connected directly to the other Party's CCS network" (MediaOne Petition at Attachment 2, Template, Section 17.0). MediaOne acknowledges that it is the commercial SS7 provider that dictates the service MediaOne receives, not Bell Atlantic, but that Bell Atlantic does, nonetheless, have control over the type of access it provides to the third party, and when it makes the access available (MediaOne Brief at 21).

ii. Bell Atlantic

Bell Atlantic argues that it can provide CLECs with access to its call-related databases and associated signaling necessary for the routing and completion of CLEC traffic at parity only for CLECs that (1) interconnect with Bell Atlantic's own Common Channel Interoffice Signaling facilities, and (2) establish an interconnection agreement with Bell Atlantic or purchase out of Bell Atlantic's tariffs (Bell Atlantic Reply Brief at 20-21). Bell Atlantic contends that if MediaOne chooses to access Bell

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55 The FCC states that "[c]ompetitors should be able to interconnect their own switches to the incumbent LEC's signaling system in any technically feasible manner." Local Competition Order at ¶ 483 n.1125.

Atlantic's database through a commercial third-party SS7 provider, Bell Atlantic cannot guarantee access at a parity level (Bell Atlantic Brief at 50).

Bell Atlantic argues that under MediaOne's proposal, Bell Atlantic would become a "middle man," as Bell Atlantic would have a business relationship with MediaOne under its interconnection agreement and a separate business relationship with the SS7 provider under a separate contract or tariff (RR-DTE-11; IR DTE-BA-1-9). As a "middle man," Bell Atlantic contends that it cannot be responsible for the quality of service that MediaOne receives from the SS7 provider (Bell Atlantic Reply Brief at 21). Bell Atlantic also claims that due to third-party interconnection agreements, the speed of the interconnection arrangement, and the performance level of the SS7 provider's network, Bell Atlantic cannot dictate to the third-party provider the level of service it is providing to MediaOne (id.). Furthermore, Bell Atlantic argues that it has no obligation under the Act to provide a CLEC with access to its databases on a parity basis if the CLEC employs a third-party SS7 provider (id.).

c. Analysis and Findings

For the reasons cited below, we find that Bell Atlantic's obligation to provide access to databases at parity does not change even if MediaOne chooses to use a third-party provider. First, the Act requires ILECs to provide requesting carriers "nondiscriminatory access to databases and associated signaling necessary for call routing and completion" as a checklist item for receiving approval to provide in-region interLATA services under Section 271. 47 U.S.C. § 271(c)(2)(B)(i). Nowhere in the Act, the FCC's rules, or relevant court precedent, do we find that this requirement is conditioned upon the CLEC using the ILEC as the provider, rather than a third party commercial provider.

Second, MediaOne is free to contract with a different SS7 provider rather than interconnecting its own Common Channel Interoffice Signaling facilities to Bell Atlantic. We agree with MediaOne that Bell Atlantic does not have control over the level of service MediaOne's vendor provides to MediaOne. However, Bell Atlantic certainly has control over the quality of service it provides to MediaOne's vendor.[56] That service quality must be at parity to what Bell Atlantic provides to itself. 47 U.S.C. § 251(c)(2)(C). Finally, although Bell Atlantic raises technical arguments about why it cannot provide parity to MediaOne unless MediaOne interconnects with Bell Atlantic and takes Bell Atlantic's SS7 service, there is no record evidence to support those claims. Therefore, we find that Bell Atlantic is obligated to provide access to call-related databases to MediaOne's commercial SS7 provider at parity to what Bell Atlantic provides itself.[57]

3. Direct Trunking Threshold Level[58]

a. Introduction

Bell Atlantic argues that the capacity of its tandem switches is beginning to exhaust. Bell Atlantic contends that the exhaust is caused by an unrestricted volume of CLEC local traffic delivered to Bell Atlantic end offices through Bell Atlantic's tandem switches[59] (which are not designed for such

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56 In this case, MediaOne is hiring the SS7 provider and MediaOne's agreement with that provider controls. Any other agreement Bell Atlantic has with the SS7 provider does not apply.

57 The level of service that MediaOne's commercial SS7 provider provides to MediaOne is not covered by this finding.

58 This issue is a consolidated issue with Greater Media.

59 Bell Atlantic's witness testified that Bell Atlantic's tandems are designed to route roughly 90 (continued...)

purpose but rather for switching excess traffic from direct end office trunks). In order to prevent further tandem capacity exhaust, Bell Atlantic proposes that there should be a limit on the amount of traffic between Bell Atlantic's end offices and CLECs switches. Further, Bell Atlantic maintains that CLECs should be required to establish direct trunks between Bell Atlantic's end offices and CLECs' end offices once traffic volumes reach a threshold level. The parties disagree on the appropriate direct trunking threshold and the period of time over which traffic volumes should be measured to determine whether the threshold level has been met.

b. Positions of the Parties

i. MediaOne

MediaOne argues that as a new carrier experiencing substantial traffic fluctuations, it requires a higher direct trunking threshold level to take into consideration these fluxuations and therefore proposes to establish direct trunking to Bell Atlantic's end office once MediaOne's traffic volume reaches the equivalent of three DS-1s, as measured over three consecutive months (MediaOne Proposed Findings of Fact and Conclusions of Law at 3). MediaOne argues that Bell Atlantic's network design principles, that recommend direct trunking when traffic reaches the DS1 level, don't apply to MediaOne (MediaOne Reply Brief at 9). MediaOne argues that Bell Atlantic's witness acknowledged during hearings that it would be reasonable to set a period of time instead of one point in time for measuring traffic volumes to establish this threshold (MediaOne Reply Brief at 10; Tr. 2, at 349). On a related issue, MediaOne requests that Bell Atlantic's transport and termination bundled rate for direct trunks

[59](...continued)
percent of local calls directly between end offices. Only approximately ten percent of local calls go through the tandem switch (Tr. 1, at 48).

be unbundled since MediaOne will not be buying transport from Bell Atlantic when it establishes direct trunking (MediaOne Brief at 12).

In response to Bell Atlantic's claims that the exhaust of Bell Atlantic's tandem switches is due to an increase in CLEC traffic routed over them, MediaOne provides two reasons why Bell Atlantic's analysis is wrong (MediaOne Reply Brief at 10-11). First, MediaOne argues that the data show an increase in the number of trunks over a 14 month-period but do not reflect the total percentage of trunks that are attributable to CLEC traffic (id.). MediaOne claims that it cannot compare CLEC-trunk demand with total trunk demand over Bell Atlantic's tandem switches from the data that Bell Atlantic has provided (id. at 11). Second, MediaOne argues that the data do not show why the three DS-1 level is "excessive" (id. at 11). According to MediaOne, its proposal of a three DS-1 threshold, for three consecutive months, addresses both Bell Atlantic's concern about excessive levels of traffic through its tandem and MediaOne's concern about ensuring that it has enough trunks to meet its planning and growth needs (id. at 11).

ii. Greater Media

While Greater Media also argues that Bell Atlantic's one DS-1 direct trunking threshold is unreasonable, Greater Media contends that a DS-3 threshold, which represents 672 simultaneous calls, or, in the alternative, a level of 15 DS-1s, which represents 360 simultaneous calls is appropriate (Greater Media Brief at 26-27). In addition, Greater Media claims that Bell Atlantic's argument that a DS-1 level is consistent with its internal network design rules has not been supported by any written evidence (id. at 27). Furthermore, Greater Media believes that Bell Atlantic has not shown why Greater Media's proposal would be detrimental to Bell Atlantic's network (id.). Greater Media argues

that Bell Atlantic's revised position to require end office direct trunking when Greater Media experiences a DS-1 level of traffic for three consecutive months is arbitrary (Greater Media Reply Brief at 12). Greater Media claims that "it would be equally appropriate for the Department to average the three year term of the proposed interconnection agreement with three months and afford Greater Media a period of 19½ months of consecutive traffic at DS-1 level" (id.).

iii. Bell Atlantic

Bell Atlantic argues that if the traffic volume between a Bell Atlantic end office and a CLEC's switch exceeds a DS-1 threshold level, the CLEC should be required to build direct trunking to Bell Atlantic's end office (Bell Atlantic Brief at 47). First, Bell Atlantic claims, "[t]andem switches are generally engineered to switch overflow traffic from direct end office high usage trunk groups. They are not engineered or designed to handle the major portion of local traffic that is carried over the Public Switched Network" (Exh. BA-MA-3, at 9; Bell Atlantic Brief at 47). Second, Bell Atlantic maintains that the DS-1 threshold has been used for more than ten years as the threshold for Bell Atlantic's own network to establish direct end office trunks in order to maximize efficiency (Tr. 1, at 40; Exh. BA-MA-3, at 10; Bell Atlantic Brief at 47).

Bell Atlantic claims that the need for a DS-1 threshold is shown by the 59 percent increase in tandem trunks for CLECs to Bell Atlantic's tandems from April 27, 1998 through June 25, 1999 (RR-DTE-3; Bell Atlantic Brief at 47). According to Bell Atlantic, routing excessive volumes of traffic through Bell Atlantic's tandem switch instead of relying on direct trunking between end offices results in additional tandem switching and trunking capacity, thereby causing Bell Atlantic unnecessary costs and network inefficiency (Bell Atlantic Brief at 48).

c. Analysis and Findings

As an initial matter, Bell Atlantic's evidence that CLECs have created the tandem exhaust problem is inconclusive, but Bell Atlantic has persuaded us that CLECs are a significant contributing factor. Bell Atlantic presented evidence of its recent addition of two new access tandems in 1999 as proof that a tandem exhaust problem exists.[60] During hearings, Bell Atlantic stated that the exhaust problem at its access tandems is attributed to a combination of demand for actual trunk termination, the circuits that are physically terminated on the tandems, and the calls that are placed over those trunks (Tr. 1, at 19). Bell Atlantic provided evidence that over 66,000 trunks, or 59 percent, of the increase in tandem trunks from April 1998 through June 1999, was attributable to CLEC trunking requirements[61] (RR-DTE-3). Bell Atlantic did not provide evidence on the other element of tandem exhaust: the volume of CLEC calls routed through the tandem to another CLEC, as measured by the ratio of CLEC tandem transit minutes of use to total tandem minutes of use. Moreover, Bell Atlantic's witness testified that the increase in trunk terminations had a larger effect on its current tandem exhaust problem than increased traffic volume (Tr. 1, at 20). Therefore, we conclude that CLEC trunk terminations were a significant factor in the current tandem exhaust situation, though certainly not the only factor. Because of other potential causes of tandem exhaust, it is not clear whether Bell Atlantic's proposal to limit CLEC use of its tandems will correct the tandem exhaust problem.

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60 Bell Atlantic added a new tandem switch in Newton supplementing the two Cambridge tandem switches and will add another switch in Brockton to supplement the existing Brockton tandem switch (Tr. 1, at 16; Bell Atlantic Brief at 56).

61 However, only 40,000 of the 66,000 trunks were CLEC-dedicated tandem interconnection trunks that could potentially be used for tandem transit traffic.

In addition, we are reluctant to rely on Bell Atlantic's economic break point study as proof of the appropriate threshold for direct trunking. Bell Atlantic claims that although its analysis of the break-even point for direct trunking was completed roughly 10 years ago, the analysis is still applicable because current technology has influenced the tradeoff between direct trunking costs and tandem switching costs making it more economical for Bell Atlantic to establish direct trunks when traffic is less than one DS-1.

Consequently, we find that some limit on the amount of traffic that a CLEC may route through a tandem switch is appropriate to address the exhaust of those tandems. However, the DS-1 standard, which represents 24 simultaneous calls, would penalize new entrants that experience traffic fluctuations during the early stages of their development. We agree with MediaOne that a level of three DS-1s, which represents 72 simultaneous calls, is a more reasonable cap for MediaOne and Greater Media. We think that the three DS-1 standard will significantly improve Bell Atlantic's tandem exhaust situation. We reject Greater Media's DS-3 or 15 DS-1 thresholds (which represent 672 and 360 simultaneous calls, respectively) because under either standard Bell Atlantic's tandem could be severely burdened with significant levels of traffic, not just from MediaOne and Greater Media but also other CLECs,[62] before direct trunking would be required.

In addition, the Department finds that to account for fluctuations in traffic volumes for new carriers, the three DS-1 standard should apply when the carriers' traffic exceeds the level for three consecutive months. Indeed, Bell Atlantic's own witness recognized the importance of a period of

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[62] Other CLECs could elect this provision of the Petitioners' interconnection agreements through the "pick and choose" rule of Section 252(i).

time, rather than a single point in time, to measure traffic volumes to account for fluctuations in new carrier traffic (MediaOne Reply Brief at 10; Tr. 2, at 349). We believe that three consecutive months will serve as an appropriate period for evening out fluctuations.

4. Reciprocal Compensation Applicability

a. Introduction

In MCI WorldCom, D.T.E. 97-116-C (1999), the Department found that Bell Atlantic was no longer required to pay reciprocal compensation to CLECs for Internet Service Provider ("ISP")-bound traffic. See also In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Declaratory Ruling (rel. Feb. 26, 1999) ("Internet Traffic Order"); Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, Notice of Proposed Rulemaking (rel. Feb. 26, 1999) ("NPRM"). In addition, the Department found that if traffic sent by one LEC to another exceeds a 2:1 terminating-to-originating traffic ratio, the excess is presumed to be ISP traffic. The Department concluded that "Bell Atlantic-Massachusetts shall not be required to make reciprocal compensation payments, in excess of the 2:1 traffic ratio, beginning with any payments made or to be made after (and including payments undisbursed as of) February 26, 1999." D.T.E. 97-116-C at 41. The parties to this arbitration dispute two issues concerning our MCI WorldCom Order: (1) whether they may audit each other's traffic to determine if it is ISP-bound traffic, even though the traffic imbalance is less than 2:1; and (2) whether, if such an audit is conducted, reciprocal compensation is due for traffic found to be ISP-bound traffic.

b. Position of the Parties

i. MediaOne

MediaOne argues that the Department's Order in D.T.E. 97-116-C concluded that unless the traffic imbalance ratio between two parties exceeds a terminating-to-originating traffic ratio of 2:1, the traffic should not be regarded as ISP-bound traffic and reciprocal compensation should apply (MediaOne Brief at 18-19). MediaOne contends that there is no need to conduct a traffic study when the traffic imbalance ratio is below 2:1 (id.). But, according to MediaOne, the parties may audit traffic once the traffic imbalance reaches the 2:1 ratio to identify whether any portion of the traffic in excess of 2:1 ratio is ISP-bound traffic (id.).

ii. Bell Atlantic

Bell Atlantic claims that the Department's MCI WorldCom Order allows it to conduct a traffic study to identify ISP-bound traffic regardless of whether the 2:1 imbalance exists (Bell Atlantic Reply Brief at 17-18). Bell Atlantic further contends that if that study reveals that certain traffic is ISP-bound, Bell Atlantic should not have to pay reciprocal compensation for that traffic (id. at 18).

c. Analysis and Findings

As noted above, we found in MCI WorldCom that Bell Atlantic was required to pay reciprocal compensation for traffic where a CLEC's terminating-to-originating traffic ratio was less than 2:1. The Department, however, was very clear in MCI WorldCom that Bell Atlantic was not required to make payments in excess of the 2:1 ratio unless CLECs could rebut the presumption that such traffic was not ISP-bound traffic. D.T.E. 97-116-C at 28, n.31 ("this 2:1 proxy is rather like a rebuttable presumption, allowing any carrier to demonstrate adduce [sic] evidence in negotiations, or ultimately arbitration, that its terminating traffic is not ISP-bound, even if it is in excess of the 2:1 proxy"). Although not stated explicitly, the Order also created a corresponding rebuttable presumption that

CLEC traffic is local traffic if the CLEC's traffic imbalance is less than 2:1. If Bell Atlantic is able to rebut that presumption, it does not have to pay reciprocal compensation for traffic that is shown to be ISP-bound. It is reasonable to allow Bell Atlantic, if it so chooses, to conduct an audit of CLEC traffic to make such a determination.

D. Tandem Transit Service

1. Introduction

Tandem transit service is a service provided by Bell Atlantic to CLECs who do not directly interconnect with one another but whose facilities do connect to the same Bell Atlantic tandem switch (MediaOne Brief at 21). The service allows CLECs to terminate traffic on each others' networks without directly interconnecting with each other; instead the CLECs only have to interconnect at the same tandem location with Bell Atlantic (Bell Atlantic Brief at 53). Tandem transit service would allow a facilities-based CLEC more rapid entry into the local exchange market and minimizes overall interconnection costs. This service does not involve the origination or termination of traffic to a Bell Atlantic customer (Bell Atlantic Brief at 53). Bell Atlantic currently applies a transit charge to the originating CLEC for Bell Atlantic's cost of switching these calls to the terminating CLEC in addition to any other charges assessed by the terminating carrier to Bell Atlantic for terminating the calls (id.).

Under Bell Atlantic's proposal to MediaOne, it will route transit traffic from MediaOne to the terminating CLEC via Bell Atlantic's tandem provided that both CLECs are connected to the same Bell Atlantic tandem and the level of terminating traffic between those carriers does not exceed one DS1 trunk capacity (Bell Atlantic Brief at 53). When traffic exceeds one DS1 on average for three consecutive months, MediaOne would be required to establish direct end office trunk groups with

minor overflow going through the tandem (Bell Atlantic Brief at 53). Bell Atlantic states that MediaOne would have up to 180 days to negotiate an interconnection agreement with the CLEC to which it sends transit traffic (id. at 53-54). If an agreement is not reached in that time frame, Bell Atlantic would have the right to block traffic between MediaOne and that CLEC (MediaOne Proposed Findings of Fact and Conclusions of Law at 8).

2. Positions of the Parties

a. MediaOne

MediaOne maintains that although the Act does not expressly address tandem transit traffic, Bell Atlantic's refusal to transit CLEC-to-CLEC traffic through tandem switches would impliedly violate Section 251(c)(2) of the Act (MediaOne Brief at 23-24). Moreover, MediaOne claims that the FCC's rules implementing the "pick and choose" provision under Section 252(i) of the Act[63] would apply, and MediaOne could elect to use the tandem transit provision in the Bell Atlantic/AT&T interconnection agreement (MediaOne Brief at 26). MediaOne notes that none of the three exceptions established by the FCC to using the pick-and-choose provision would apply here (MediaOne Brief at 26). Specifically, the third exception, which allows an ILEC to make a particular interconnection available "for a reasonable period of time" after state commission approval would not pertain to MediaOne (MediaOne Brief at 27). MediaOne states that Bell Atlantic signed the AT&T agreement only 15 months ago and has also entered into agreements that did not contain a restriction on tandem

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63 Section 252(i) states that "[a] local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement. 47 U.S.C. § 252(i).

transit as late as December 1998 (MediaOne Brief at 27). MediaOne contends that it will exercise its right to incorporate the tandem transit traffic provision of the AT&T agreement in its agreement, if the Department does not approve MediaOne's proposal on tandem transit traffic (MediaOne Brief at 31).

According to MediaOne, Bell Atlantic's proposed DS-1 trunk limitation on tandem transit service applies to only one of the 49 interconnection agreements Bell Atlantic currently has in place[64] (MediaOne Brief at 22). MediaOne argues that while Bell Atlantic has presented evidence illustrating that it engineers its network in Massachusetts in accordance with the DS1 trunk standard it has proposed for tandem transit traffic, Bell Atlantic has not presented evidence that that standard is appropriate for any CLEC, in general, or for MediaOne's network in particular (MediaOne Proposed Findings of Fact and Conclusions of Law at 8).

MediaOne explains that its proposal provides for the following: (1) MediaOne will begin the process of implementing direct trunks to another CLEC once it originates a volume of traffic to that CLEC sufficient to fill three DS-1 circuits for three consecutive months; (2) the proposal will take effect twelve months after the effective date of the interconnection agreement; (3) Bell Atlantic must provide MediaOne with the necessary information to identify the CLECs with whom MediaOne exchanges traffic and the volumes of that traffic[65] (MediaOne Proposed Findings of Fact and Conclusions of Law

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64 The Bell Atlantic/Metromedia Fiber Network Interconnection Agreement, which was executed on April 19, 1999 and approved by the Department on May 29, 1999, provides for the DS-1 limitation on Tandem Transit Service (RR-MediaOne-1).

65 MediaOne proposes six months beginning on the effective date of an interconnection agreement between MediaOne and the other CLEC to establish direct trunks to that CLEC (MediaOne Proposed Findings of Fact and Conclusions of Law at 8). This proposal was submitted on brief and does not appear on the record. To the extent that MediaOne's position is not

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at 8). According to MediaOne, since nothing in the Act requires CLECs to negotiate interconnection agreements, MediaOne cannot agree to a specific time line for negotiating interconnection with other CLECs once the three DS-1 threshold is met (MediaOne Brief at 30).

MediaOne states that it appreciates the problem Bell Atlantic is trying to resolve by limiting the volume of traffic transiting its tandems. MediaOne contends that its compromise provision gives Bell Atlantic a meaningful opportunity to limit the amount of CLEC-to-CLEC traffic routed through its tandem switches while maintaining MediaOne's ability to plan its network in a reasonable fashion (MediaOne Brief at 31).

b. Bell Atlantic

Bell Atlantic claims that tandem transit service is a voluntary offering, tendered on a transitional basis, to assist start-up CLECs in completing calls in the short-term until they are able to complete their own interconnection arrangements with other CLECs (Bell Atlantic Brief at 54). Bell Atlantic argues that it is under no legal obligation under the Act or the FCC rules to provide this service (id.). Bell Atlantic states that Section 251(c)(2) of the Act requires that Bell Atlantic, as an incumbent, must provide interconnection with its network "for the facilities and equipment of any requesting telecommunications carrier" (id.). Bell Atlantic explains that because the FCC defined the term "interconnection" under this section specifically as "the physical linking of two networks for the mutual exchange of traffic," the requirement would not apply to transit service which does not involve the mutual exchange of traffic between Bell Atlantic and any CLEC, including MediaOne (id. at 55).

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[65](...continued)
supported by evidence on the record, the Department may not accept it.

In addition, Bell Atlantic argues that transit service is not available for the "pick and choose" provision under Section 252(i) of the Act because that provision only allows a carrier to pick and choose services, network elements and interconnection as required under Section 251 of the Act, and that tandem transit service is not required by the Act (Bell Atlantic Reply Brief at 22). Moreover, Bell Atlantic argues that a carrier's right under the "pick and choose" section of the Act is not unlimited; an individual interconnection, service or network element may only be available for a reasonable period of time after the approved agreement is available for public inspection (id. at 22-23). Bell Atlantic argues that the AT&T agreement was approved on May 18, 1998, and the reasonable period of time for making the provisions available for adoption by other carriers may have expired (id.). Bell Atlantic also claims that if the "pick and choose" rule were to apply to transit service, MediaOne would be required to take all integrally-related sections of the interconnection agreement (Bell Atlantic Reply Brief at 23 n.11).

According to Bell Atlantic, its proposed DS-1 trunk limitation only requires CLECs to establish direct trunks when Bell Atlantic believes it is economically efficient to do so (i.e., when calling volumes exceed a DS1 of trunk capacity) (Bell Atlantic Brief at 56). Bell Atlantic explains that its tandem transit restriction is designed to ensure that non-Bell Atlantic traffic originating from CLECs does not cause network congestion or exhaust Bell Atlantic's tandems (id.). Bell Atlantic claims that evidence of tandem exhaustion is illustrated by its need to increase trunk capacity by adding two new tandems in 1999 (id.). Bell Atlantic argues that when a DS1 threshold of transit traffic, on average, is met for three consecutive months, CLECs should be required to establish direct, end office trunk group connections between the two CLECs, with only minor overflow going through the tandems (id. at 57). Lastly, Bell

Atlantic contends that adopting a DS-1 threshold would maximize trunking efficiency, reduce tandem network costs, and be consistent with Bell Atlantic's longstanding "economic breakpoint" for network engineering design standards[66] (id.). Bell Atlantic insists that the three DS1 threshold recommended by MediaOne would overburden its tandem switches, especially if applied to all CLECs and would be costly and inefficient (Bell Atlantic Reply Brief at 23).

Concerning reciprocal compensation agreements, Bell Atlantic claims that MediaOne would force Bell Atlantic into a "middle man" role and would not permit Bell Atlantic to recover from MediaOne any charges assessed by a terminating carrier (Bell Atlantic Brief at 55). Bell Atlantic claims that if MediaOne and another CLEC have not agreed upon a mutually acceptable billing arrangement, Bell Atlantic should not be required to continue to route transit traffic (id.). Bell Atlantic insists that requiring MediaOne to reach a reciprocal local traffic exchange arrangement with other CLECs in a 180-day period is reasonable in light of the 160-day period required under the Act for negotiating an interconnection agreement (id. at 55-56).

Regarding MediaOne's request that Bell Atlantic identify the CLECs with which MediaOne exchanges traffic, according to Bell Atlantic, it is unable to give MediaOne the requested SS7 originating point codes,[67] which identify CLECs with whom MediaOne exchanges traffic, because those

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66 Bell Atlantic's "economic breakpoint" is based on its network engineering design standards that indicate the threshold (i.e., one DS-1 trunk) when Bell Atlantic believes it is economically efficient to establish a direct trunk group connection from one end office to another instead of routing the calls from the end office through the Bell Atlantic tandem (Tr. 1, at 76-78).

67 SS7 originating point codes are 9-digit numbers sent by an originating CLEC's switch to a Bell Atlantic tandem switch; point codes are initiated by a CLEC's customer calling a MediaOne customer (Exh. BA-MA-3, at 6). The point codes identify the CLEC's network by this switch

(continued...)

codes are lost during tandem transit service; Bell Atlantic does not – and cannot – retain that data (id. at 58). Moreover, Bell Atlantic argues that MediaOne does not need the originating point codes for billing purposes because Bell Atlantic bills the originating CLEC and then remits payment to MediaOne (id.).

3. Analysis and Finding

a. Bell Atlantic's obligation to provide tandem transit service

Neither the Act nor the FCC's rules specifically address tandem transit traffic, and the parties are unable to cite any precedent on point from other jurisdictions. Thus, the issue of whether Bell Atlantic has an obligation to provide tandem transit service appears to be an issue of first impression.

Both parties point to Section 251(c)(2) as support for their positions. That Section states that ILECs have:

> [t]he duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network ... for the transmission and routing of telephone exchange service ....

The FCC defined the term "interconnection" under this section as "the physical linking of two networks for the mutual exchange of traffic." Local Competition Order at ¶ 176. Bell Atlantic contends that this definition proves that Section 251(c)(2) does not apply to its tandem transit service since tandem transit service does not involve the mutual exchange of traffic between Bell Atlantic and any CLEC.

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[67](...continued)
(id.). The SS7 point codes sent by the originating CLEC switch are lost once Bell Atlantic performs tandem transit switching because the Bell Atlantic tandem switch would have to send its own separate SS7 message to MediaOne, identifying the Bell Atlantic switch (id.). However, Bell Atlantic does record billing information that would identify the originating CLECs (Tr. 1, at 166-167).

However, we conclude that the above definition is not dispositive of the question, because it does not indicate whether such traffic exchange must include an ILEC as one of the exchanging parties.

The Act is silent on this issue, and the FCC definition provides limited guidance on this point. In Section 251(c), Congress manifested an intent to promote local exchange competition by imposing obligations on incumbent carriers to provide access to their networks to new entrants (for a fee) so that entrants could provide telecommunications services without having to duplicate the incumbent's ubiquitous network. See e.g., § 251(c)(2)(B) (duty to allow interconnection at any technically feasible point); § 251(c)(3) (duty to provide access to network elements); § 251(c)(6) (duty to provide collocation for interconnection or access to unbundled network elements). In light of the above, we find that Section 251(c)(2) requires, not just permits, Bell Atlantic to make available to new entrants its network for the purpose of allowing new entrants to exchange traffic with other CLECs without having to interconnect with each and every CLEC.[68, 69]

However, Bell Atlantic's obligation is not absolute. Bell Atlantic should not be required to provide this service indefinitely for a given CLEC. Tandem transit service should, generally speaking, only be made available as a transition service until a CLEC sufficiently expands its business as demonstrated by increased levels of traffic (see discussion supra), to warrant direct interconnection to other CLECs. At that time, CLECs should cease using Bell Atlantic's transit service and establish

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[68] We also note that requiring a CLEC to establish direct trunks to other CLECs prematurely, before traffic volumes warrant this investment, may constitute an economic barrier to market entry.

[69] Because we find that Bell Atlantic is obligated, pursuant to Section 251(c)(2) of the Act, to make tandem transit service available to CLECs, we do not need to address MediaOne's "pick and choose" argument.

direct trunks to those CLECs with which it originates or terminates substantial traffic.

b. MediaOne's obligation to establish reciprocal local traffic exchange arrangements

Before discussing what level of traffic justifies direct trunking, we must first address two related issues: (1) Bell Atlantic's requirement that CLECs using Bell Atlantic's tandem transit service must enter into reciprocal local traffic exchange arrangements with other CLECs within 180 days of first using the service or Bell Atlantic may terminate the transit arrangement; and (2) MediaOne's request for information to identify CLECs with whom it must establish reciprocal local traffic exchange arrangements. We find Bell Atlantic's proposal to terminate transit arrangements unilaterally to be unreasonable. While we are sensitive to Bell Atlantic's argument about serving as a "middle man" for compensation for CLECs exchanging traffic, Bell Atlantic should not have the ability to avoid its interconnection obligation based on a CLEC's inability to establish reciprocal compensation agreements in a timely manner. Therefore, the Department directs the parties to negotiate additional reasonable incentives (e.g., increased charges) that may be applied to MediaOne if it has not established a reciprocal compensation agreement with other carriers within 180-days of the start of tandem transit service.

Second, we accept Bell Atlantic's evidence that it is not possible at this time for Bell Atlantic to provide originating point code information to MediaOne. However, Bell Atlantic testified that it does retain billing information (Tr. 1, at 167). We accept MediaOne's request for information from Bell Atlantic to identify the CLECs with whom it exchanges traffic.

c. Appropriate threshold for direct trunking

The parties disagree as to the appropriate threshold for direct trunking. MediaOne proposes a three DS1 threshold; Bell Atlantic proposes a threshold of one DS1.

As an initial matter, we have found that Bell Atlantic's evidence that CLECs have created the tandem exhaust problem is inconclusive, but Bell Atlantic has persuaded us that CLECs are a significant contributing factor (see Section V.C.3., above). We concluded that CLEC trunk terminations were a significant factor in the current tandem exhaust situation, though certainly not the only factor. Because of other potential causes of tandem exhaust, it is not clear whether Bell Atlantic's proposal to limit CLEC use of its tandems will correct the tandem exhaust problem.

In addition, we are reluctant to rely on Bell Atlantic's economic break point study as proof of the appropriate threshold for direct trunking. Bell Atlantic claims that although its analysis of the break-even point for direct trunking was completed roughly 10 years ago, the analysis is still applicable because current technology made it more economical for Bell Atlantic to establish direct trunks when traffic is less than one DS-1 (Tr. 1, at 76).

However, there are several weaknesses with Bell Atlantic's use of this study. First, this study was completed over 10 years ago and we cannot determine if the assumptions used are current because Bell Atlantic states that the study is not available (IR-MediaOne-BA-2-10).[70] This study was based on assumptions derived from NYNEX's network and associated calling volumes, and would not have taken into account differences between NYNEX's more mature network and the network of a start-up CLEC with varying calling volumes. Second, while technology may have made it more

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[70] Bell Atlantic's witness stated that the study could not be located, but that he was able to testify about the contents of the study from personal knowledge (Tr. 1, at 87-88).

economical to establish direct trunks at a lower calling volume threshold, the costs this study is predicated upon involve trunking costs from a Bell Atlantic end office to another Bell Atlantic end office. Direct trunking costs from one CLEC switch to another CLEC switch may differ significantly from Bell Atlantic's costs because of the difference in distance between CLEC switches compared to the distance between Bell Atlantic end-office switches. Other potential differences include additional and higher costs for obtaining necessary rights-of-way as well as potential lack of available facilities that might not have existed at the time the study was completed. Therefore, we find that applying the economic break point study based on NYNEX's network to all CLECs is not appropriate.

MediaOne presented evidence regarding the burden it would face if the Department adopted Bell Atlantic's DS-1 proposal. MediaOne described the steps involved in establishing direct trunking with another CLEC to support its argument that the three DS-1 level is more appropriate. Before establishing direct trunks to another CLEC, MediaOne must: (1) monitor traffic volumes before concluding a significant volume of traffic exists between its network and another CLECs; (2) sign an interconnection agreement with that CLEC (complicated by the fact that the other CLEC may not be required under its contract with Bell Atlantic to establish direct trunking with other CLECs); and (3) arrange for the facilities between its network and the other CLEC's network, which may not be readily available (Tr. 1, at 106-109).

The Department has determined, above, that Bell Atlantic has an obligation to provide tandem transit service until such time as MediaOne generates a level of traffic that warrants migration to direct interconnection with other CLECs. Bell Atlantic proposes to impose restrictions on this obligation by limiting MediaOne's traffic over the tandem transit service to one DS-1 level of volume. However, Bell

Atlantic's support for this limitation is flawed, and we decline to accept it. MediaOne, on the other hand, has presented support for its contention that the restriction proposed by Bell Atlantic would have an adverse effect on it. In light of the burdensome nature of Bell Atlantic's proposed limitation, we find that Bell Atlantic has not sufficiently justified its proposed tandem traffic limitation, and we reject it. Accordingly, we accept MediaOne's proposed three DS-1 limitation on tandem transit traffic.

d. Appropriate time period to establish direct trunking

Although we agree with MediaOne's proposed three DS-1 standard, we reject its proposed timeline for establishing direct trunks with CLECs once the traffic threshold is attained. MediaOne proposes the following: 1) an initial 12-month waiting period to allow traffic to stabilize; 2) once traffic remains above the threshold level for three consecutive months at the end of the initial 12-month stabilization period, then MediaOne would be required to establish an interconnection agreement with the CLEC; and (3) once MediaOne establishes an interconnection agreement with the CLEC, it would have time to build and activate the trunks (MediaOne Brief at 29-30). Assuming MediaOne needed six months to establish an interconnection agreement with the CLEC, this process could take more than two years from when traffic volumes initially exceed the three DS-1 threshold. We find that period to be excessive and unresponsive to the need for MediaOne to move this CLEC-to-CLEC traffic from Bell Atlantic's network to the CLECs' networks. The Department recognizes that MediaOne's traffic patterns will vary during the start-up phase in its development. However, six months should be adequate for MediaOne to determine whether the traffic volumes are stable or whether they continue to vary significantly. We agree that three consecutive months worth of traffic should be used in order to rule out anomalous months. If, at the end of the initial six-month stabilization period, traffic volumes

have exceeded the threshold for three consecutive months, MediaOne would be required to begin planning for building direct trunks, including starting to negotiate an interconnection agreement. There are no federal deadlines for negotiating CLEC-to-CLEC interconnection agreements. We believe six months is more than adequate for negotiation of these agreements, which gives MediaOne longer than the 160-day negotiation period allowed under the Act for ILEC/CLEC interconnection agreements. Lastly, the Department agrees with MediaOne that it should be allowed time to establish direct trunks so as to provide for adequate time for planning and implementation. However, MediaOne's six month proposal is not supported by the record. However, Bell Atlantic's witness testified that Bell Atlantic's standard interval to establish brand new trunk groups is 60 days (Tr. 1, at 82). Therefore, we find that MediaOne shall have 60 days beginning from the effective date of an interconnection agreement with another CLEC to establish direct trunks.

E. Network Maintenance and Management Standards

1. Outage Repair Standard

a. Introduction

Section 9.5 of the Agreement addresses the appropriate procedures that the parties follow in the event of a service outage or issuance of a trouble report.[71] While the parties agree on most aspects of this process, they disagree on two points: (1) whether there should be specific deadlines for correcting outages and other service problems raised in trouble reports; and (2) whether the parties should exchange "escalation" lists (i.e., lists that indicate which employees at each company are

[71] A trouble report is the means by which CLECs report to Bell Atlantic problems with provisioning, and maintenance and repair of Bell Atlantic UNEs and resale services.

responsible for fixing service problems, including those more senior (either in title or responsibility) employees to whom a carrier could "escalate" matters if the problem has not been corrected in a timely fashion).

b. Positions of the Parties

i. MediaOne

MediaOne proposes that each party provide the other with time frames and escalation lists in the event of an outage or trouble, and plan and coordinate repair procedures (RR-DTE–23). MediaOne states that this requirement is not burdensome to either party but provides the other with necessary information to ensure that troubles and outages are efficiently resolved (id.). MediaOne argues that Bell Atlantic's CLEC Handbook[72] does not provide the necessary level of detail to ensure that troubles are handled in a timely and coordinated fashion (id.).

ii. Bell Atlantic

Bell Atlantic argues that the parties should follow Bell Atlantic's standard procedures for isolating and clearing the outage or trouble, as described in the CLEC Handbook, and that the parties may agree to modify those procedures periodically based on experience with comparable interconnection agreements with other carriers (Bell Atlantic Brief at 59-60). Bell Atlantic notes that although these standard procedures do not include time frames, the CLEC Handbook does state that UNE trouble reports for CLECs are placed in the same work queues as Bell Atlantic's trouble reports, and priorities are set based on service impact and type of service, without regard to the carrier (IR-

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[72] The CLEC Handbook is a set of guidelines put together by Bell Atlantic to inform CLECs on following areas: getting started, technical specifications and business rules.

MediaOne-BA-2-27). Bell Atlantic argues that inclusion of wording requiring the parties' exchange of escalation lists is unwarranted since it is already provided for in Bell Atlantic's CLEC Handbook (Bell Atlantic Brief at 60).

c. Analysis and Findings

Bell Atlantic's standard procedures for isolating and clearing troubles, as set forth in its CLEC Handbook, describe the roles and responsibilities of Bell Atlantic and CLECs; information on how to use Bell Atlantic's repair system and electronic interface to enter trouble reports; the process from the diagnosis of a trouble to its repair; and, when necessary, the coordination of activities between Bell Atlantic and CLECs. CLEC Handbook, Vol. III, § 8.0 Trouble Administration. MediaOne claims that the CLEC handbook does not provide the necessary detail to ensure that troubles are handled in a timely and coordinated fashion. We disagree and find that the referenced Bell Atlantic standard procedures in the CLEC Handbook provide detailed information needed in the event of an outage or trouble.

We also disagree with MediaOne's suggestion that the parties share time frames and escalation lists. If Bell Atlantic was forced to set specific time frames for repairs with MediaOne that are different than those guaranteed to other CLECs, Bell Atlantic may be forced to favor MediaOne and MediaOne's customers over its own or other CLECs' customers. MediaOne's proposal goes beyond what is necessary to ensure parity. In addition, we believe that MediaOne has the ability to assess incident-based payments[73] to Bell Atlantic, as defined in Bell Atlantic's performance standards

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[73] Incident and performance payments are designed to ensure that parity is achieved. Performance payments provide an incentive for Bell Atlantic to achieve general levels of parity, (continued...)

compliance filing, and these payments give Bell Atlantic the appropriate incentive to ensure that MediaOne's customers receive service at parity with service Bell Atlantic provides to itself, and that troubles are resolved in a timely manner. In summary, we find that Bell Atlantic's "first-in, first-out" procedure for repair is fair. Finally, because escalation lists are provided in the CLEC handbook, we conclude that MediaOne's proposal to add wording requiring the parties to exchange escalation lists is unnecessary.

F. Joint Network Configuration and Management Standards

1. Scope of the Joint Grooming Process

a. Introduction

The joint grooming process is designed to enable parties to assemble the appropriate technical experts to determine jointly the most efficient interconnection architecture and point of interconnection based on forecasted and actual traffic patterns, existing facilities, the location of interconnection points, and scheduling concerns of a particular interconnection agreement (see Bell Atlantic Brief at 61). The parties disagree whether the existing joint grooming process and plan should be incorporated into the new interconnection agreement, and amended as necessary, or whether the parties should develop a new joint grooming process and plan.

b. Positions of the Parties

i. MediaOne

MediaOne asserts that it currently has a joint grooming process in place with Bell Atlantic as

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[73](...continued)
and incident payments help to ensure that CLEC customers receive service parity. See Phase 3-B Order at 25.

part of its existing interconnection agreement, which was cooperatively developed by the parties (MediaOne Brief at 31). MediaOne proposes that the current joint grooming process and plan remain in place and be amended, as necessary, for any inconsistencies between the former process and the new interconnection agreement (id.). MediaOne maintains that it is concerned that important rules at the heart of the entire interconnection agreement contained in the joint grooming process would not be in place at the commencement of the new interconnection agreement if a new process has to be developed (id.). In response to Bell Atlantic's concerns that the existing joint grooming process may be inconsistent with the new interconnection agreement, MediaOne suggests the inclusion of wording in the interconnection agreement providing that in the event of a conflict between the existing plan and the terms of the new interconnection agreement, the terms of the new interconnection agreement prevail (id.).

ii. Bell Atlantic

Bell Atlantic maintains that a joint grooming process is an interactive, not static, process that should materially change as conditions warrant (e.g., as traffic volumes increase, traffic patterns change, capacity is reached, or the need to interconnect at additional interconnection points arises) (Bell Atlantic Brief at 61). According to Bell Atlantic, the existing joint grooming process that was developed under the parties' first interconnection agreement contains provisions that are either duplicative or inconsistent with the proposed interconnection agreement

(RR-DTE-7). In addition, using the existing plan as the starting point in developing a new plan would mean that either party could use the current provisions to try and undercut the provisions of the new interconnection agreement (id.). Bell Atlantic states that though both parties may agree to use some

language from the existing plan in the course of developing the new joint grooming process, both parties should start from a blank piece of paper and build a plan based upon the terms and conditions established by the new interconnection agreement (id.).

c. Analysis and Findings

We agree with MediaOne that the joint grooming plan establishes rules for development and growth of the network that will change over the term of the interconnection agreement. In order to provide the parties with rules relating to this growth and development, a joint grooming plan should be in place when the parties begin to operate under the new interconnection agreement (see MediaOne's Proposed Findings of Fact and Conclusions of Law at 9-10). Bell Atlantic has not provided a deadline by which a new joint grooming process will be in place, nor has it indicated what rules will govern in the interim.

We share MediaOne's concern that if the parties adopt Bell Atlantic's proposal, there would be no plan in place once they begin operating under the new interconnection agreement. Consequently, we agree that the existing plan should remain in effect, to the extent that it does not conflict with any provisions of the new interconnection agreement. The existing plan can be updated as the parties agree is necessary, and replaced when a new plan is developed. In order to address Bell Atlantic's concern, we direct the parties to include language providing that in the event of a conflict between the old joint grooming plan and the terms of the new interconnection agreement, the terms of the new interconnection agreement prevail.

2. Forecasting Requirements for Trunk Provisioning

a. Introduction

Forecasting for trunk provisioning by MediaOne allows Bell Atlantic to plan and prepare adequately for demand for trunks that deliver traffic from Bell Atlantic to MediaOne.[74] The parties disagree on several provisions relating to trunk forecasting. Specifically, the parties disagree when MediaOne's first trunk forecast should be required and whether Bell Atlantic can condition provisioning of trunks on its capacity constraints and the proven accuracy of MediaOne's forecasts in the past. The parties also disagree whether MediaOne should be required to provide Bell Atlantic with additional demand management forecasts relating to UNEs by wire center[75], interconnection, and resale products. In addition, Bell Atlantic proposes to disconnect "underutilized" trunks after a certain period of time. The parties also dispute how long Bell Atlantic may monitor its trunk group usage before disconnecting "underutilized" trunks.

b. Positions of the Parties

i. MediaOne

MediaOne proposes that it will provide its initial forecasting for trunks covering a two-year period, to be updated as needed but no less frequently than quarterly, within 120 days from the effective date of the interconnection agreement, instead of 90 days as proposed by Bell Atlantic (MediaOne Brief at 32). MediaOne does not believe that 90 days is a reasonable period given the network reconfiguration involved in implementing Bell Atlantic's IP proposal (id.). MediaOne argues that while it can provide forecasts for both inbound and outbound traffic based on reasonable

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74 These are trunks from Bell Atlantic to MediaOne that carry calls that terminate to MediaOne customers.

75 A wire center is a building housing one or more end office switches.

engineering criteria, the forecasts should be taken only as an estimate, and their inaccuracy should not be used against MediaOne (Exh. MediaOne-4, at 6). Additionally, MediaOne disagrees with Bell Atlantic's attempt to condition the provisioning of trunks on capacity constraints because it contends Bell Atlantic has an obligation under the Act to provide interconnection unless it is technically infeasible (MediaOne Proposed Findings of Fact and Conclusions of Law at 10).

As to additional forecast requirements, MediaOne claims that its forecasts will provide the information necessary for Bell Atlantic to plan trunk group availability, and argues that demand forecasts by wire center of UNEs, interconnection, and resale products proposed by Bell Atlantic are neither reasonable nor necessary (MediaOne Brief at 32). In particular, MediaOne argues that it would not be able to provide UNE forecasts by wire center with any type of accuracy (id. at 32-33).

MediaOne also argues that Bell Atlantic should wait 180 days to review the utilization levels of trunk groups that Bell Atlantic provisions to MediaOne based on MediaOne's forecasts before disconnecting underutilized trunks (id. at 34). MediaOne's witness testified that within a 30-day period, a trunk group can go from 25 percent to 80 percent utilization and that the 90-day period does not consider the type of traffic fluctuation that MediaOne faces as a new carrier (Exh. MediaOne-4, at 7). In addition, MediaOne states that prior to disconnecting trunks, MediaOne should have the opportunity to explain the need to keep the trunk groups (MediaOne Brief at 34). MediaOne agrees that after the initial 180 day period, it should be financially responsible for any trunk group in excess of four DS-1s that Bell Atlantic determines is underutilized, and also liable for disconnected trunks retroactive to the start date of the 180 day period (MediaOne Proposed Findings of Fact and Conclusions of Law at 11).

ii. Bell Atlantic

Bell Atlantic states that its provisioning proposal is a standard requirement (Bell Atlantic Brief at 63). Bell Atlantic argues that MediaOne should provide an initial traffic forecast covering a two-year period within 90 days of the effective date of the interconnection agreement (id. at 62). Bell Atlantic's proposal conditions trunk provisioning on several factors: (1) that such forecast is based on reasonable engineering criteria, (2) there are no capacity constraints, and (3) MediaOne's previous forecasts have proven to be reliable and accurate (Bell Atlantic Proposed Interconnection Agreement Section 10.4.1; Bell Atlantic Brief at 63). Bell Atlantic claims that in order to prepare for the demand that MediaOne will generate, MediaOne should provide a demand management forecast that includes, but is not limited to, the expected needs for service volumes by wire center for UNEs, interconnection and resale products (Bell Atlantic Brief 66-67).

Bell Atlantic proposes to monitor traffic on each trunk group for a period of 90 days; at the end of that period, Bell Atlantic could disconnect trunks if they were not warranted by the actual traffic volume experienced. After the initial 90 days, regardless of whether the trunks were adequately utilized,[76] up to four DS-1s would be maintained at Bell Atlantic's expense, and MediaOne would be held financially responsible for the excess DS-1s (Bell Atlantic Brief at 64-65). Bell Atlantic states that MediaOne would have the option to maintain those underutilized trunks but MediaOne would be financially responsible (Bell Atlantic Proposed Findings of Fact and Conclusions of Law at 14). Bell Atlantic argues that MediaOne could, at any time during the 90-day

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[76] Bell Atlantic regards a trunk group as underutilized if "at the end of the 90 day period the ratio of 'trunks required' (based on actual traffic usage) versus 'trunks in service' is less than 60 percent" (RR-DTE-17).

period, request Bell Atlantic to disconnect the excess facilities to avoid further charges (id. at 65). Furthermore, Bell Atlantic proposes that any time after the 90-day period, if MediaOne requests Bell Atlantic to disconnect trunks, MediaOne would be financially responsible for the disconnected trunks retroactive to the start of the 90-day period through the date such trunks are disconnected (id. at 64-65).

Bell Atlantic argues that MediaOne's counterproposal of a 180-day period is too long and is unsubstantiated because MediaOne is not a new company without experience but, rather, has been providing telecommunications services in Massachusetts for more than one year (Bell Atlantic Reply Brief at 25).

c. Analysis and Findings

We find that MediaOne's request for 120 instead of 90 days to produce an initial forecast covering a two-year period has merit. Given the possible adoption of MediaOne's compromise proposal to establish additional IPs, it is reasonable to allow MediaOne the additional 30 days to produce an initial forecast that would reflect this network configuration. Regarding the conditions on trunk provisioning proposed by Bell Atlantic, the Act permits exemptions to ILEC interconnection obligations only when the ILEC demonstrates technical infeasibility. Local Competition Order at ¶199. Because of the Act's narrow exemption, we need only examine whether Bell Atlantic's proposed conditions meet this "technical infeasibility" test. While we agree with Bell Atlantic that it will initially rely on MediaOne for MediaOne's forecasts for inbound and outbound traffic, we are not convinced that this desire for accuracy of MediaOne's forecasts is a sufficient reason for limiting Bell Atlantic's obligation to provide interconnection. We conclude that MediaOne's proposal of providing Bell

Atlantic with traffic forecasts based on reasonable engineering criteria, to be updated no less than quarterly, should assure Bell Atlantic that MediaOne's forecasts remain reasonably current. Therefore, Bell Atlantic cannot condition the provisioning of trunks on the proven accuracy of MediaOne's past forecasts.

We also find that, in general, Bell Atlantic may not condition trunk provisioning on capacity constraints. As long as MediaOne and other CLECs provide reasonably accurate forecasts, Bell Atlantic should be able to plan adequately for additional capacity. However, if Bell Atlantic can demonstrate to the Department that MediaOne's forecasts are substantially inaccurate over a sustained period of time, Bell Atlantic may petition the Department for relief. Bell Atlantic will have the burden of demonstrating that such relief is warranted.

Regarding the question of whether MediaOne is required to provide Bell Atlantic with its forecast on interconnection-related products by wire center, we find that such additional forecasting detail should be provided. CLECs cannot have it both ways. If they do not want to be held to the accuracy of their forecasts, then Bell Atlantic must have some additional mechanism on which to base its capacity planning. On its face, such additional information would appear to be useful in further determining for what additional facilities Bell Atlantic may need to prepare. Although MediaOne argues that it cannot provide this information, we do not find that claim to be credible. Such information is crucial for any CLEC in developing a business plan.

We find merit in MediaOne's argument that it is a new carrier facing an unpredictable growth pattern and as such, Bell Atlantic should wait 180 days to review the utilization level of trunk groups by MediaOne. MediaOne has been providing service for only about one year. Until MediaOne becomes

more established and experiences more consistent growth patterns, we find that 180 days is appropriate.

Lastly, MediaOne has requested that it be given the opportunity to substantiate its continued need to keep trunks that Bell Atlantic has identified as underutilized. We find this request to be reasonable. Bell Atlantic's definition of underutilization is arbitrary, and MediaOne should be given the opportunity to demonstrate why MediaOne believes that the trunks are necessary in the future, before Bell Atlantic disconnects those trunks.

G. Unbundled Access

1. Extent of Obligation to Provide UNEs

a. Introduction

In response to a remand decision from the United States Supreme Court, the FCC is reconsidering its list of seven UNEs that ILECs must offer to CLECs. In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket Nos. 96-98, 95-185, Second Further Notice of Proposed Rulemaking, April 8, 1999. As a result of that decision, Bell Atlantic may no longer be required under federal law to provide certain UNEs that it is provisioning to Massachusetts CLECs. In that event, the parties disagree whether Bell Atlantic should be able to immediately discontinue provisioning of such UNEs.

b. Positions of the Parties

i. Bell Atlantic

Bell Atlantic argues that its proposed language, allowing Bell Atlantic to discontinue any UNE it may no longer be required to provide once the FCC remand proceeding is concluded, is reasonable

(Bell Atlantic Brief at 69). Bell Atlantic contends that MediaOne seeks to require Bell Atlantic to continue to provide the UNEs identified in the interconnection agreement even if the FCC no longer requires Bell Atlantic to do so (id.).[77]

ii. MediaOne

MediaOne argues that Bell Atlantic must provide a reasonable transition period in the event that it is no longer obligated to provide certain UNEs (MediaOne Brief at 35). MediaOne contends that the parties must await a final decision on the issue and then modify the interconnection agreement to be consistent with the change in law (id.). According to MediaOne, this process ensures that customers will not be affected negatively by the change because MediaOne will have the opportunity to arrange for the alternative provision of any UNEs that may no longer be provided by Bell Atlantic, and comports with the public interest (id.). MediaOne also maintains that Bell Atlantic's proposal would adversely affect MediaOne's ability to retain customers, which is contrary to the intent and spirit of the Act (id.).

c. Analysis and Findings

We find Bell Atlantic's proposal to unilaterally discontinue provisioning UNEs, without notice and a transition period, to be patently unreasonable. First, a change in law may involve interpretation of the extent and impact of the change, and the parties certainly may disagree on the applicability of a change. One need only to look at the debate surrounding the provision and combination of UNEs to

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[77] In its reply brief, Bell Atlantic included a new proposal to provide a transition period for MediaOne in the event that an FCC order or change in other applicable law eliminates Bell Atlantic's obligations (Bell Atlantic Reply Brief at 26). Because this proposal is not supported by record evidence, we cannot accept it.

get a sense of the level of disagreement possible under the Act and court opinions interpreting the Act.[78] Second, the Department has a responsibility under the Act to ensure that interconnection agreements meet the requirements of § 251 of the Act. 47 U.S.C. § 252(c)(1). This responsibility includes changes to interconnection agreements, especially when those changes may materially affect service under the agreement. Bell Atlantic's interpretation of a change of law and the resulting impact on the provision of service under an interconnection agreement is subject to the Department's jurisdiction. Id.

Furthermore, in the changing environment of telecommunications, it is likely that this provision will be evoked, and customers may be affected negatively while the parties battle over their differences. In its filings on this subject, Bell Atlantic does not address the potential effect on customers (but see Section V.L.2., infra where Bell Atlantic proposes a 30-day notice period for changes in law that affect its services). The Department may enforce requirements of state law, including compliance with intrastate telecommunications service quality standards or requirements. 47 U.S.C. § 252(e)(3); see G.L. c. 159, § 16. No party disputes the Department's authority to review Bell Atlantic's provision of service, including service provided pursuant to an interconnection agreement, to determine whether service quality is affected. Furthermore, it is reasonable to allow affected CLECs an opportunity to make alternative arrangements in the event Bell Atlantic will no longer provide certain UNEs under the interconnection agreement.

Accordingly, the Department finds that MediaOne's proposal, which requires the parties to negotiate modifications to interconnection agreements and submit such changes to the Department for

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[78] As the Supreme Court has noted, even the Act itself is "not a model of clarity. It is in many important respects a model of ambiguity or indeed self-contradiction." AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999).

approval, is reasonable and in the public interest.[79] Until the changes are approved, Bell Atlantic is required to continue its provision of the affected UNEs. The parties shall include language in their interconnection agreement to reflect this finding.[80] We recognize Bell Atlantic's concern that its obligation to provide UNEs no longer mandated by law may continue indefinitely if the parties are unable to agree on application of a change in law. However, we note that the Bell Atlantic may invoke the Dispute Resolution provision in the interconnection agreement, and if it desires, seek appropriate relief from the Department. Bell Atlantic will have the burden of showing that MediaOne is not negotiating the change of law in good faith.[81]

2. Bona Fide Request Applicability/Available Network Elements

a. Introduction

The bona fide request ("BFR") process is a procedure whereby one party may request access to a UNE not identified in the interconnection agreement. The BFR process is set forth in Exhibit B of the interconnection agreement and includes procedures for Bell Atlantic to analyze and consider requests for UNEs "not already available." The parties disagree when a UNE should be considered

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79 But see MCI WorldCom, D.T.E. 97-116-B, at 24-25 (1999) (Department found that a just-released FCC decision relieved Bell Atlantic of its obligation to pay reciprocal compensation for ISP-bound traffic). This arbitration can be distinguished from the MCI WorldCom ruling because, in the former, Bell Atlantic was required to petition the Department for authority to change its operations in response to a change in law.

80 The Department has approved such language in AT&T/Bell Atlantic Interconnection Agreement, D.T.E. 98-35 (1998); MCImetro Access Transmission Services/Bell Atlantic Interconnection Agreement, D.T.E. 98-104 (1998) (see RR-DTE-31).

81 Bell Atlantic has not explained the purpose of its proposed 40 percent premium, and we decline to impose this burden on CLECs while they negotiate modifications to their interconnection agreement in response to a change to the provisions of UNEs.

"not already available" under the BFR process, the meaning of the FCC's "pick-and-choose" rule,[82] and how this FCC rule affects the BFR process.

b. Positions of the Parties

i. MediaOne

MediaOne argues that the BFR mechanism would only apply if a particular UNE were "not already available" anywhere in Bell Atlantic's operating territory, and therefore could not be obtained by the "pick and choose" rule (MediaOne Brief at 36). MediaOne asserts that the phrase "not already available" means that the UNE is not already provided anywhere in Bell Atlantic's operating territory, and Bell Atlantic has not been ordered by the FCC or a state commission to provide that UNE (IR-DTE-MediaOne-6). MediaOne argues that its position is consistent with the FCC's pick-and-choose rule, which states that an ILEC shall make available without unreasonable delay any interconnection service or network element arrangement contained in any agreement to which it is a party (MediaOne Brief at 36, citing 47 C.F.R.

§ 51.809).

ii. Bell Atlantic

Bell Atlantic argues that the purpose of establishing a BFR process is to provide for UNEs not already covered by the interconnection agreement between MediaOne and Bell Atlantic (Bell Atlantic Brief at 70). According to Bell Atlantic, which UNEs are available may vary depending on the requesting CLEC, the CLEC's network, or the provisioning or use for that UNE (Bell Atlantic Brief at 70; RR-DTE-24). Bell Atlantic argues that the fact that a CLEC may have ordered a UNE elsewhere

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[82] This "pick-and-choose" rule is set forth in 47 C.F.R. § 51.809.

does not mean that this UNE is readily available under the terms, conditions and rates established for provisioning to MediaOne (Bell Atlantic Brief at 71).

Bell Atlantic argues that MediaOne's assertion that the sole basis for providing a UNE is whether that UNE is available elsewhere in Bell Atlantic's region overlooks numerous factors that bear on the technical feasibility and cost of providing a UNE that has not been made generally available in a particular state (id.). Bell Atlantic contends that such factors include: (1) whether the element is a standard component of the Bell Atlantic network in the relevant jurisdiction; (2) whether MediaOne is requesting the element to the same specifications, and in the same context, as in another jurisdiction; (3) whether the same work efforts or business processes are needed or can be used under the operations systems and processes in that jurisdiction to make the requested element available in the new jurisdiction; and (4) whether the same cost factors and rates apply in the new jurisdiction (id.). Bell Atlantic adds that the BFR process allows Bell Atlantic to consider these factors, and includes a dispute mechanism should MediaOne disagree with Bell Atlantic's determinations (id. at 71-72).

Bell Atlantic contends that MediaOne's position contradicts FCC rules (id. at 72). According to Bell Atlantic, the "pick and choose" rule does not address the provision of UNEs ordered by the FCC or a state commission, but only addresses UNEs that are provided under an interconnection agreement approved under § 252 of the Act, regardless of whether Bell Atlantic was ordered to provide that UNE (id.).

Bell Atlantic maintains that even if it provides a particular UNE to one CLEC, the BFR process may be "permissible and appropriate" to evaluate whether or how Bell Atlantic would provide that UNE to a second CLEC because there may be different technical feasibility and cost considerations

associated with providing that UNE to a second CLEC (id.). Bell Atlantic asserts that the FCC has recognized that such considerations may apply and has specifically provided that the "pick-and-choose" rule would not apply if an ILEC demonstrates to the state commission that different costs apply or technical infeasibility exists with respect to providing that UNE to a second CLEC (id.). Bell Atlantic argues that the BFR process provides a method for evaluating such considerations and, in any event, individual UNEs made available through the "pick-and-choose" rule are only available for a reasonable period of time under 47 C.F.R. § 51.809(c) (Bell Atlantic Brief at 72; RR-DTE-24).

Bell Atlantic concludes that MediaOne is unreasonable in its demand that Bell Atlantic be required to offer any element on the basis of its availability in another state, outside the framework of the standard BFR process (Bell Atlantic Brief at 73). Lastly, Bell Atlantic argues that if the UNE that is the subject of the BFR is technically feasible, the BFR process is flexible enough to ensure that the particular UNE is provided in a timely fashion (RR-DTE-24).

c. Analysis and Findings

The initial issue the Department must resolve is under what circumstances the BFR process applies and how MediaOne accesses UNEs that are not addressed in the interconnection agreement. MediaOne argues that it would access UNEs through the BFR mechanism only if the particular UNE were "not already available" anywhere in Bell Atlantic's operating territory. In support of its position, MediaOne argues that the FCC's "pick-and-choose" rule enables it to request and, with certain limitations, receive any UNE offered by Bell Atlantic in any state within Bell Atlantic's territory. Bell Atlantic argues for a narrower interpretation of the "pick-and-choose" rule and for a more expansive view of the applicability of the BFR process. We agree, to some extent, with both parties.

MediaOne is correct in noting that the FCC's "pick-and-choose" rule, which was reinstated by the Supreme Court in AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999), provides that "[a]n [ILEC] shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement." 47 C.F.R. § 51.809(a) (emphasis added). In its Local Competition Order, the FCC explained that requesting carriers have the ability to choose among individual provisions contained in publicly-filed interconnection agreements and that a requesting carrier should be permitted to obtain its statutory rights on an expedited basis. Local Competition Order at ¶¶ 1310, 1321.

The Department can find no provision in the Act or in the FCC's rules or orders limiting the availability of the "pick-and-choose" rule only to UNEs contained in Department-approved interconnection agreements. Subject to the conditions imposed by the FCC in 47 C.F.R. § 51.809(b) and (c), the Department finds that Bell Atlantic shall provide to MediaOne in Massachusetts, and to any other requesting CLEC, pursuant to the "pick-and-choose" rule, the UNEs that Bell Atlantic[83] makes available in any of its state-approved interconnection agreements, without regard to which state commission approved the interconnection agreement.

Bell Atlantic is correct that it may demonstrate to the Department that it cannot provide the

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83 Bell Atlantic, as used here, indicates the company that signs the interconnection agreement with MediaOne. For example, if the agreement is signed by "New England Telephone and Telegraph Company," then the "pick-and-choose" rule applies only to provisions in any other agreements signed by "New England Telephone and Telegraph Company," including such agreements from Maine, New Hampshire, Rhode Island, and Vermont.

requested UNE at the same cost as it does to a CLEC with which it has an approved interconnection agreement, or that the provision of this UNE to MediaOne is not technically feasible. However, the Department finds that this showing by Bell Atlantic is to be made within the context of the "pick-and-choose" rule, not the BFR process. It is our view that the BFR process applies to the UNEs that are not the subject of any state-approved interconnection agreement and that are, thus, "not already available."

H. Local Number Portability

1. Introduction

The Act defines number portability as the ability of end-user customers to change local service providers and retain their telephone number while remaining at the same location. See 47 U.S.C. § 153(30).

2. Description of the Porting Process

Provisioning LNP requires certain activities of both the customer's current provider ("porting provider") and the customer's new provider (Exh. MediaOne-3, at 14). The LNP process begins when the new provider receives an order for service from a new customer and immediately sends a local service request ("LSR") to the porting provider (id.). Once the porting provider receives the LSR, it 1) generates its own E911 record to ensure the ALI database[84] is properly updated and 2) sends a firm order confirmation ("FOC") back to the new service provider within 24 hours receipt of the LSR (id. at 15). Once the new provider receives the FOC from the porting provider, it will 1)

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[84] The automatic line identification ("ALI") database ensures that 911 calls placed from the service will carry the appropriate identification information to the Public Safety Answering Point (Exh. MediaOne-3, at 14).

create the appropriate translations[85] in its switch; and 2) requests that the porting provider install a "ten-digit trigger" in its switch[86] (id.). Twenty-four hours before the porting due date, the porting provider must release the telephone number in Number Portability Administration Center ("NPAC") and install the ten-digit trigger (id. at 16). The new service provider must update the translations in its switch to include the newly ported number before 11.59 p.m. on the porting day; the ten-digit-trigger will only forward a ported number until this time. A ten-digit trigger ensures that the customer will be able to receive calls during the porting process by forcing the switch to launch a database query whenever the number is dialed (id.). If the number has not been ported, the porting provider's switch will route the call as if the customer is still receiving service from its current provider (id.). Once the porting is complete, a call sent to the porting provider's switch will be forwarded to the new carrier's switch for completion (id.). The porting provider removes its switch translations at 11:59 p.m. on the actual porting due date (id.). On the day after the porting due date, the porting provider "unlocks" the E911 record which enables the new provider to update the ALI record to reflect the new service provider.

3. Need for Performance Standards and Remedies

a. Positions of the Parties

i. MediaOne

MediaOne asserts that there is a compelling reason to adopt porting performance standards for

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85 Switch translations refers to the computer programming changes Bell Atlantic must perform in the switch when making changes to a customer's service.

86 A ten digit trigger is a switch translation installed by the porting provider that ensures that the customer will be able to receive calls from the porting provider's customers (Exh. MediaOne-3, at 15).

MediaOne (MediaOne Brief at 37). MediaOne argues that the rationale for establishing porting standards and remedies in this arbitration is based on the stated rationale for adopting performance standards in the Consolidated Arbitrations,[87] and seeks to extend this rationale to the porting process (MediaOne Reply Brief at 15). MediaOne maintains that the Department stated that it would consider changes to the established performance standards if parties could show a compelling reason why such changes are necessary (MediaOne Brief at 37). MediaOne asserts that although it was not a party to the Consolidated Arbitrations, and is not seeking to add a porting standard to the Consolidated Arbitrations list of performance standards, it can nonetheless demonstrate that a compelling reason exists to adopt such a standard in its interconnection agreement with Bell Atlantic (id. at 37-38).

According to MediaOne, the absence of standards for the porting process is critical for MediaOne, noting that the Department did not review or address in the Consolidated Arbitrations any activities associated with the number porting process for a carrier like MediaOne that does not purchase resale services or unbundled loops from Bell Atlantic (id. at 37). MediaOne describes the detrimental effects that failed ports have on customers by stating that when a port is not done properly, the customer either has no dial tone or cannot receive calls from others (id. at 38). Besides negatively affecting customers' service, failed ports also damage MediaOne's reputation, especially where one of the first experiences a new MediaOne customer has is with the porting process (id.). MediaOne cites

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87 Specifically, MediaOne contends that in the absence of normal commercial incentives to maintain high levels of service quality to its customers (which, in this case, are also its competitors) the Department established performance standards to provide Bell Atlantic with the incentives to conform to the interconnection requirements of the Act (MediaOne Reply Brief at 15, citing Consolidated Arbitrations - Phase 3-B at 22).

to actual experience with number porting problems and the negative affect those problems had on its marketing abilities (see Exh. MediaOne-3, at 16-17; IR-BA-M1-11).

ii. Bell Atlantic

Bell Atlantic makes two arguments against establishing number porting standards. First, Bell Atlantic states that the FCC is the regulatory body with jurisdiction over number portability issues. However, Bell Atlantic also states that it would comply with Department orders on this issue (Bell Atlantic Brief at 74). Second, Bell Atlantic highlights its current number porting performance success rate, which it states is in excess of 99 percent on-time performance, based on current porting procedures (id. at 75). In light of its current performance, Bell Atlantic maintains that it is unfair and unreasonable to assume that the only way to ensure that Bell Atlantic continues to maintain that level of performance is to impose performance standards and penalties (id. at 75-76). Bell Atlantic states that it already provides the Department with more than 400 performance measurements, and there is no basis for adding to that list (id.).

b. Analysis and Findings

In the Consolidated Arbitrations, the Department established a method to evaluate whether more or fewer performance measures are necessary than those established in the Consolidated Arbitrations. The Department stated that

> "[i]f, after at least six months of experience, there is an indication that more or fewer measures are necessary to support the parity standard, … parties may petition the Department to that effect. However, the Department will only consider changes to the standards adopted here if parties can show [a] compelling reason why such changes are necessary."

Phase 3-B Order at 34. We also stated that the specific monetary remedies provided in the

interconnection agreements established in that proceeding should not be the sole damage remedy available, and that there may be instances where other damages (e.g., consequential damages) may be appropriate. Id. at 22.

There are many performance standards that have been established under the Consolidated Arbitrations proceeding. However, that is not a sufficient reason to refrain from establishing additional standards where necessary. MediaOne is correct when it states that number porting standards were not considered when performance standards were established, and MediaOne has made a compelling case that these standards are appropriate here given the adverse affect on MediaOne and its customer for failed number ports. If Bell Atlantic maintains its current high level of porting performance, as it states it will, these additional performance standards will not adversely affect it.

Bell Atlantic has indicated that it is not opposed to negotiating performance standards for number porting, and has made a proposal for those standards. We now turn to each of the parties' proposals for appropriate standards and remedies for number porting.

4. Standards to be Established for Local Number Portability (Performance Criteria)

a. Introduction

Several of the performance measures discussed by the parties have been resolved.[88]

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88 Bell Atlantic argues that one measurement proposed by MediaOne, consisting of a 24 hour turn around time for issuance of a service order confirmation or FOC, has been established in the Consolidated Arbitrations (Bell Atlantic Brief at 77-78). The FOC metric measures the components of the ordering process, as well as a local service request (id. at 78). Bell Atlantic presented testimony that processing a porting order is analogous to the UNE ordering process, and therefore, it is reasonable to use the same metrics adopted by the

(continued...)

However, the parties disagree on (1) whether to establish a measurement for E911[89] unlock, and (2) whether to track Local Subscription Management System ("LSMS")[90] downtime and LNP trouble resolution.

b. Positions of the Parties

i. Bell Atlantic

Bell Atlantic has proposed a method to measure a successful port (Bell Atlantic Brief at 76). Bell Atlantic favors a measurement to determine whether service was transitioned from one provider to the other without service interruption, referred to as "Percent on Time - LNP" (id. at 81). Bell Atlantic explains that in applying the "Percent On Time - LNP" metric, an LNP order would be considered on

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[88](...continued)
Department (id.). MediaOne agrees that there is no reason to duplicate FOC standards and measurements, and will accept the FOC metric as established in the Consolidated Arbitrations based on the understanding that LNP orders will be included in Bell Atlantic's performance reports and payments (MediaOne Brief at 41). The FOC metric states that FOCs should be returned within 24 hours from receipt of an error-free local service request (id.).

Bell Atlantic contends that another three measurements, the 10-digit trigger, switch translation removal, and E911 unlock, essentially evaluate a single result, the overall successful completion of the porting process (Bell Atlantic Brief at 79). MediaOne has agreed to adopt the "Percent On Time - LNP" metric, where it incorporates measurement and remedies for timely installation of the 10-digit trigger, and the switch translation removal activities (MediaOne Brief at 40-41). Therefore, only the E911 unlock measurement is still in dispute.

[89] This metric would measure when the porting provider "unlocks" the E911 record, which allows the new provider to update the database that contains E911 information (Exh. MediaOne-3, at 16). Updating the E911 database is referred to as "migrating" the E911 record (id.).

[90] "LSMS" is an administrative database that downloads ported telephone routing data to the system that processes LNP queries (Bell Atlantic Brief at 86).

time if a 10 digit trigger is in place before the porting due date and the removal of the telephone number translations (i.e., the retail disconnect) is completed on or after 11:59 p.m. of the porting date (Bell Atlantic Brief at 82). Orders disconnected early are considered "not met" (id.). Bell Atlantic testified that this proposed "Percent On Time - LNP" measurement has been adopted in New York as part of the collaborative process and could be established as a metric in Massachusetts in October 1999 (id.).

Bell Atlantic argues that MediaOne's proposal to measure interim steps in the porting process is not an appropriate reflection of the LNP process (id. at 76). Specifically, Bell Atlantic contends that the interim steps proposed by MediaOne do not, for the most part, affect customers, and would require Bell Atlantic to track intermediate steps not currently captured by the system as designed (id.).[91]

Regarding the E911 unlock metric, Bell Atlantic maintains that the post-provisioning activity to unlock the E911 records associated with a customer's line do not affect the customer's service during the porting process (id. at 81). Bell Atlantic explains that the E911 unlocking transaction does not remove the customer information from the E911 database (Bell Atlantic Reply Brief at 29).

Bell Atlantic opposes MediaOne's proposal for tracking LNP trouble resolution and LSMS downtime, stating that these metrics are not relevant to Bell Atlantic's performance for MediaOne (Bell Atlantic Brief at 86). Bell Atlantic asserts that the LSMS deployed by Bell Atlantic's network

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[91] Bell Atlantic argues that it is proposing the "Percent On Time - LNP" metric in exchange for the elimination of Bell Atlantic's existing performance standards for unbundled loops (Bell Atlantic Brief at 81). In essence, MediaOne would be trading LNP standards for unbundled loop standards. MediaOne states that it will not be ordering unbundled loops from Bell Atlantic (Tr. 3, at 488). The Department did not establish the Performance Standards in the Consolidated Arbitrations in order for the parties to trade these items. Bell Atlantic will be required to meet the Performance Standards for unbundled loops under this interconnection agreement in the event that MediaOne orders such loops from Bell Atlantic.

conforms to industry-defined requirements, that the LSMS may be inoperative for reasons beyond Bell Atlantic's control, and that LSMS downtime will not affect either MediaOne transactions nor its customers (id.).

Finally, regarding the proposal that Bell Atlantic check with the NPAC prior to switch translations removal, Bell Atlantic claims that its procedure that removes switch translations at 11:59 p.m. on the order date is an efficient process that gives a CLEC all day to complete customer work before translations removal (Bell Atlantic Reply Brief at 28). According to Bell Atlantic, it is MediaOne's responsibility to notify Bell Atlantic of any service changes prior to this time (id. at 29).

ii. MediaOne

MediaOne argues that the parties disagree (1) whether the new provider should check with the NPAC prior to removing switch translations, and (2) when the new provider should unlock the E911 record (MediaOne Brief at 41).[92] Regarding switch translations removal, MediaOne maintains that the company from which a number is ported should check with NPAC prior to removing switch translations as a way to ensure that switch translations are not removed (causing customer disconnects) in certain situations (id. at 41). MediaOne states that it does not recommend measurement or imposition of penalties for this activity (id.). According to MediaOne, its proposal for performance standards is necessary to ensure that disconnects are minimized and that reconnects take place in a

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92 MediaOne recommends (1) that the interconnection agreement should require Bell Atlantic to report LSMS downtime and the amount of time the system works properly, because when the LSMS is not operating, certain routing information is not communicated and a customer cannot receive calls; and (2) that the interconnection agreement should require Bell Atlantic to provide the number of LNP-related trouble tickets where the originator of the trouble is a CLEC (Exh. MediaOne-3, at 24). MediaOne did not brief these two issues.

timely manner (id. at 42).

Regarding E911 unlocking, MediaOne proposes that the porting provider unlock the E911 record on the due date, as opposed to Bell Atlantic's current practice to unlock the E911 record on the day after the due date (id.).[93] MediaOne maintains that its proposal is consistent with the National Emergency Number Association ("NENA") standards associated with unlocking and migrating E911 records during the porting process (id.). MediaOne states that Bell Atlantic's current procedure causes MediaOne to be unable to migrate the E911 record until two days after the due date of the port (id. at 43). MediaOne explained the negative consequences that could result from this delay. According to MediaOne, in the event that the database (which provides customer location) is inoperative during a number port, emergency personnel would not have the correct service provider name needed to verify the correct address of the person contacting E911 (id.). MediaOne states that a similar problem could occur, if law enforcement officials needed to place a tap on a line (id.).

Finally, MediaOne indicates that, because Bell Atlantic is in the process of developing the database system, reporting of the E911 record unlocks could be added to the system without significant extra work on the part of Bell Atlantic (id. at 44).

c. Analysis and Findings

Regarding MediaOne proposal that the old carrier check with NPAC prior to removing a translation and disconnecting the porting customer, Bell Atlantic's current process of disconnecting a

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93 MediaOne argues, in the alternative, that the Department should require Bell Atlantic to indemnify MediaOne for any damages occurring as a result of the delay in migrating the E911 record (MediaOne Brief at 43).

customer at 11:59 p.m. is generating a 98 percent success rate by MediaOne's data.[94] This current process is successful, and we see no reason to change it. If a customer decides at 11:58 p.m. on the scheduled date of the port that he does not wish to change providers, he does so at his own risk. Therefore, we decline to require that provider check with NPAC prior to removing switch translations.

Regarding the proposal that the E911 record be unlocked on the same date as the completion of the switch translations, in light of our finding above, it would be impossible for this to happen when translations are removed at one minute before the end of the day. We understand that the current industry standard requires an unlock on the same day as the switch translation work (Tr. 1, at 182-183). However, we are persuaded by Bell Atlantic testimony that NENA is reevaluating the timing between the old provider's completion of work, and the new provider's completion of installation work (Tr. 3, at 185).

We also note that MediaOne presented testimony on possible problems with the current E911 unlock process, but no evidence of any actual problems experienced by customers. Bell Atlantic has explained that customers may still reach E911 during the porting process (assuming there is no improper disconnect), and that the instances where incorrect provider information could affect a customer are rare. There is insufficient evidence for us to change the current process in order to allow the porting provider to unlock the E911 record on the same day as the port.[95]

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94 Bell Atlantic's witness testified that it experienced an increase in performance and decrease in complaints when it changed its procedure to remove switch translations at 11:59 p.m. (Tr. 1 at, 181-182).

95 The Department notes that New York has not adopted a process similar to MediaOne's E911 proposal (see RR-DTE-4).

(continued...)

5. Appropriate Threshold

a. Introduction

The parties disagree on the appropriate threshold for imposing penalties on an underperforming porting provider.

b. Positions of the Parties

i. Bell Atlantic

Bell Atlantic proposes that its "Percent On Time - LNP" metric should incorporate a minimum 90 percent standard (Bell Atlantic Brief at 81). Bell Atlantic argues that the same 90 percent metric established for UNE ordering in the Consolidated Arbitrations is applicable for LNP porting because of the similarities in the ordering processes (Bell Atlantic Reply Brief at 30). Bell Atlantic contends that, although its current performance level with MediaOne is approximately 98 percent,[96] this level is too high to set as a performance metric because it reflects limited experience (two months) with just one CLEC (MediaOne) (id.). Bell Atlantic relates that the comparable LNP measurement is being developed in New York has a 95 percent standard (id.).

Bell Atlantic states that it based its recommended 90 percent "Percent On Time - LNP" on several factors (Tr. 3, at 465). Specifically, the 90 percent standard was based on Bell Atlantic's history for missed installation appointments because Bell Atlantic did not have a history of LNP completions for a basis, and on the complexity of the LNP process (id.). In general, Bell Atlantic

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[95](...continued)

[96] Bell Atlantic indicates that the current porting success rate of approximately 98 percent does not include E911 unlocks or FOC performance (Bell Atlantic Brief at 79).

explains that its proposed standard is based on its "judgment and experience in the business" (id.).

ii. MediaOne

MediaOne proposes a quarterly average performance standard of 98 percent on time[97] (MediaOne Brief at 45). MediaOne argues that this standard relates to Bell Atlantic's current performance, reflects a level of performance which does not adversely affect the new provider, and reflects a level of performance that assures consumers that they can change providers without unnecessary inconvenience (id. at 45). MediaOne cites the "devastating effect" on MediaOne's operations and ability to market its services that Bell Atlantic's proposed 90 percent standard would have (id. at 47). MediaOne further argues that the fact that the Department established a 90 percent standard for another measure in the Consolidated Arbitrations is irrelevant for a standard for a different activity (LNP performance) for which Bell Atlantic's current performance is higher (id. 46-47).

MediaOne states that its proposal for a 98 percent standard was based on current performance and its business judgment about a penalty that Bell Atlantic would consider more than the cost of doing business (Tr. 3, at 410).

c. Analysis and Findings

As noted above, the current porting process is successful. Bell Atlantic has a 98 percent success rate for number porting. We do not want to change the process, but provide incentives for Bell Atlantic to keep up its high level of performance. Currently, Bell Atlantic has dedicated a representative for MediaOne to resolve problems in a timely manner. MediaOne's witness testified

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[97] MediaOne clarifies that this proposal is for an average of 98 percent per quarter, and does not require Bell Atlantic to maintain a 98 percent standard at all times (MediaOne Brief at 45).

that Bell Atlantic indicated that this contact person will remain (Tr. 3, at 406). However, we share MediaOne's concern that as porting requests increase, this specialized manual intervention may not be able to address LNP on a large scale. The results could be increased porting failures, and more customers out of service. The automation Bell Atlantic is developing in New York should help when applied to Massachusetts, but we believe additional incentives are useful.

MediaOne has convinced us that the 90 percent standard is too low a threshold for LNP performance. A failure rate exceeding ten percent puts too many customers out of service during the porting process, and adversely affects operations for both companies (MediaOne Brief at 46-47). A rate of 90 percent also is not reflective of current levels, and allows Bell Atlantic to provide service at a much lower level than it provides now. Conversely, maintaining a 98 percent success rate for a sustained period may unduly burden the porting provider (Tr. 3, at 468, 473-474). Therefore, we find that the 95 percent on time standard, as adopted through a collaborative process in New York, addresses the parties' need for a high level of successful porting without unduly burdening the porting provider.

6. Appropriate Penalties

a. Introduction

The parties disagree on the appropriate penalties for substandard number porting.

b. Positions of the Parties

i. Bell Atlantic

Bell Atlantic opposes MediaOne's proposed two-tiered penalty scheme, and instead proposes a sliding scale scheme based on a 90 percent "Percent On Time - LNP" standard (Bell Atlantic Brief at

83). Bell Atlantic states that MediaOne's penalties amount to a double penalty, and would require changes to the existing LNP process (Bell Atlantic Reply Brief at 30).

Bell Atlantic argues that, in practice, MediaOne's proposed "Customer Compensation" credit to be paid to MediaOne each day a customer remains without dialtone or cannot receive incoming calls would require extensive investigation to determine the responsible party for each event (Bell Atlantic Brief at 83). Bell Atlantic argues that this "Customer Compensation" credit is not comparable to the incident-based credit established by the Department in the Consolidated Arbitrations because these credits apply 24 hours after the installation appointment is missed or the customer is out of service, and are based on a sliding scale (Bell Atlantic Reply Brief at 31). In addition, Bell Atlantic criticizes MediaOne's "Performance Credit" proposal as requiring Bell Atlantic to pay penalties even if the LNP was completed on time and without service interruption (for example, late installation of a 10-digit trigger or a late E911 unlock) (Bell Atlantic Brief at 84).

Bell Atlantic proposes a performance credit based on the credit calculation for percent missed UNE installation appointments from the Consolidated Arbitrations (id. at 86). The credit provides a sliding scale, which is based on the number of lines affected as well as the degree to which Bell Atlantic's performance is below the performance standard[98] (id.). Bell Atlantic contends that its proposal would achieve the results of timeliness because it creates a performance mechanism based on a standard three business-day interval for LNP orders (Exh. BA-MA-1, at 38).

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[98] Performance credits would begin for results below 90 percent. Credits per affected line range from $10 to $50 based on a sliding scale of one percent to ten percent below the performance standard (Bell Atlantic Brief at 85).

ii. MediaOne

MediaOne proposes to establish a two-tiered penalty mechanism for failed number ports. First, MediaOne proposes a "Customer Credit" of $25 for each day the customer is without dialtone for at least two hours (Exh. MediaOne-3, at 23). The purpose of the "Customer Credit" is to compensate the customer for the inconvenience of the failed port, and to provide the porting provider an incentive to work to restore a customer's service (MediaOne Brief at 49-50). MediaOne maintains that the "Customer Credit" is consistent with the establishment of incident-based credits in the Consolidated Arbitrations (id.).

Second, MediaOne proposes a "Performance Credit" which would consist of a $2000 penalty for each percentage point (or fraction thereof) by which the porting provider's quarterly average falls below the standard[99] (98 percent recommended by MediaOne) (Exh. MediaOne-3, at 23-24).

MediaOne argues that its proposed "Performance Penalties" and "Customer Credits" are needed to provide Bell Atlantic with incentives for meeting and sustaining performance standards, and address the issue of the need of disconnected customers to be provided with service again in a timely manner (MediaOne Brief at 48). MediaOne cites the principles employed by the Department when establishing performance standards and remedies in the Consolidated Arbitrations (id.). However, MediaOne distinguishes the standards and remedies adopted there, stating that Bell Atlantic's proposal is based on a different proceeding and for different measurements than this arbitration (id.). Further, MediaOne notes that, unlike the Consolidated Arbitrations, MediaOne has agreed to give up the UNE

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[99] The provider must port at least 100 numbers to be liable for the "Performance Credit" (Exh. MediaOne-3, at 23).

standards in return for the adoption of porting standards and remedies, and MediaOne has proposed to be bound by the porting standards and remedies (id.). MediaOne urges the Department to reject the performance remedies established in the Consolidated Arbitrations, and establish a higher remedy amount (id. at 49).

Moreover, MediaOne contends that Bell Atlantic's proposed penalties are not high enough to serve as a true incentive for ensuring adequate performance (id.). MediaOne counters Bell Atlantic's argument that imposing the "Customer Credit" would involve extensive investigation to determine the party responsible for a customer's lack of service, by stating that a simple review of the porting record would identify the responsible party (MediaOne Reply Brief at 16).

c. Analysis and Findings

In the Consolidated Arbitrations, the Department outlined its principles for performance standards and remedies. In our Phase 3-B Order, we stated that the performance remedies established there should provide Bell Atlantic with a monetary incentive to ensure good service, as well as supply a certain, timely payment to carriers for possible damages incurred as a result of substandard service. Phase 3-B Order at 22. We added that the amounts should be sufficiently high that they are not viewed by Bell Atlantic merely as a cost of doing business that Bell Atlantic feels comfortable paying to prevent competitors from making inroads into the local service market. Id.

We find that a greater incentive for adequate service is appropriate where the effect of a failure may be greater. In addition, MediaOne has persuaded us that Bell Atlantic's proposed remedy may be too low to provide adequate incentive to Bell Atlantic to maintain a high level of successful ports. Therefore, we find that MediaOne's proposed penalties would provide an appropriate level of incentive

to Bell Atlantic to conduct successful number ports. We note that if Bell Atlantic sustains its current level of service, the financial effect of adopting MediaOne's proposal should be minimal.

I. Dialing Parity

1. Introduction

On August 8, 1996, the FCC adopted rules implementing the dialing parity[100] requirements of the Act for LECs, including Bell Operating Companies ("BOCs"), such as Bell Atlantic. See In re Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 19392, at ¶ 62 (1996). In NYNEX ILP, D.P.U. 96-106 (1997) and D.P.U./D.T.E. 96-106-A (1998), the Department implemented the FCC's dialing parity rules concerning Bell Atlantic. Then in ILP for Non-BOC LECs, D.T.E. 98-9 (1999), the Department established dialing parity requirements for CLECs and other Massachusetts ILECs. The parties disagree whether to include in the interconnection agreement a provision requiring them to comply not only with the dialing parity requirements of the Act and of the FCC, but also the Department's requirements.

2. Positions of the Parties

a. MediaOne

MediaOne argues that the parties should agree to comply with any dialing parity requirements set forth by the Department as well as those set forth in the Act (MediaOne Petition at 48).

b. Bell Atlantic

Bell Atlantic claims that it will comply with the dialing parity requirements set forth in the Act

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[100] Dialing parity, also know as intraLATA presubscription ("ILP"), allows telephone customers to access the long-distance carrier of their choice without having to dial an access code or 800 telephone number.

(Bell Atlantic Brief at 87). Bell Atlantic argues that compliance with any applicable Department orders or rulings is assumed, and therefore it is unnecessary to refer in the interconnection agreement to any dialing parity rules established by the Department (id.).

3. Analysis and Findings

Bell Atlantic cannot dispute its obligation to comply with dialing parity requirements established by the Department, in addition to those imposed by the Act and the FCC. 47 U.S.C. § 251(b)(3). We do not understand why Bell Atlantic would refuse MediaOne's request to reference compliance with the Department's ILP rules in the agreement, when it references similar Department compliance obligations in other sections of the interconnection agreement (see Proposed Interconnection Agreement, § 28.8.5). We, therefore, agree with MediaOne and direct the parties to include a provision in the interconnection agreement that makes explicit their compliance with the Department's dialing parity requirements.

Finally, as guidance for Bell Atlantic and CLECs in subsequent negotiations, we note our displeasure that such a minor, and easily resolved, issue as this was put before us for determination. At a time when the Department's resources are being severely taxed with much more important matters, we can ill afford to devote time to such insignificant disputes.

J. Coordinated Service Arrangements

1. Coordinated Repair Calls and Business Procedures

a. Introduction

The interconnection agreement addresses mutual obligations when a customer, intending to call his or her carrier for repairs, product information, or customer service assistance, mistakenly calls the

other carrier. With respect to misdirected repair calls, the parties agree to provide the correct carrier's telephone number to the customer who mistakenly called the wrong carrier, and that "neither party shall make disparaging remarks about the other party" during such calls (Bell Atlantic Reply Brief at 31-33). However, they disagree on whether employees in such situations should be prohibited from marketing their company's products and services, and whether the prohibition against disparaging comments should apply to all employees, not just repair personnel.

b. Positions of the Parties

i. MediaOne

MediaOne proposes that the parties agree that they will not use misdirected repair calls as the basis for internal referrals or to market their services (MediaOne Brief at 50). MediaOne states that using misdirected repair calls to market services is clearly contrary to the spirit of the Act, constitutes anticompetitive marketing, and is also an unreasonable practice that should not be allowed pursuant to G.L. c. 159, § 16 (MediaOne Brief at 52; MediaOne Proposed Findings of Fact and Conclusions of Law at 17). MediaOne argues that Bell Atlantic proposes to comply with "applicable law" on the marketing of services without setting forth an explanation of the "applicable law" (RR-DTE-25). In addition, MediaOne argues that there should be a prohibition in these situations against disparaging remarks about the other company's products and services (MediaOne Brief at 54-55). MediaOne maintains that this provision should apply to all company personnel (MediaOne Proposed Findings of Fact and Conclusions of Law at 17).

ii. Bell Atlantic

Bell Atlantic argues that the prohibition against marketing of services during misdirected calls is

adequately addressed in language directing the parties to comply with applicable law and, thus, further change is not required (Bell Atlantic Reply Brief at 31). Bell Atlantic contends that carriers are not prohibited by the Act or FCC rules from making internal referrals or from marketing their services in these types of situations (IR-MediaOne-BA-2-35). Bell Atlantic also argues that a provision prohibiting the marketing of services is also unnecessary since Bell Atlantic will comply with applicable law as noted elsewhere in the interconnection agreement (see Bell Atlantic's Proposed Findings of Facts and Conclusions of Law at 19). Bell Atlantic argues that MediaOne's proposed language is too restrictive and would require all Bell Atlantic personnel to refer misdirected callers without any further contact (Bell Atlantic Reply Brief at 33). Finally, Bell Atlantic contends that MediaOne's proposal to prohibit disparaging remarks under the Business Procedures section is redundant because that language is already included in the Coordinated Repair Calls section (Bell Atlantic Brief at 95).

c. Analysis and Findings

Neither party cites to any federal requirements addressing this issue and we are not aware of any. Thus, the Department, under its authority under G.L. c. 159, §§ 12 and 16, may prescribe its own requirements. In the emerging stages of local exchange competition, we believe it is important to establish a rule that prevents Bell Atlantic from using misdirected telephone calls as the basis for internal referrals or for marketing its services. Bell Atlantic's responsibility as an incumbent network provider should not be used to its advantage in the competitive retail market place. The Department, in the intraLATA toll competition context, has previously found a need to place limits on Bell Atlantic's ability to take advantage of its longstanding monopoly relationship with customers to unfairly market its services (see NYNEX ILP, D.P.U. 96-106, at 37-38 (1997)). We see an analogous situation here.

Accordingly, we find that the parties shall include specific wording in the agreement that prevents them from using misdirected repair calls as the basis for internal referrals or to solicit end-users to market services. In addition, we find that the parties shall also include language that prevents all of their employees, not just repair personnel, from making disparaging comments about the other company and its product and services in these types of situations.

2. Customer Proprietary Network Information Audits

a. Introduction

Section 222(c) of the Communications Act of 1934 prohibits (with some exceptions[101]) disclosure by telecommunications carriers of confidential Customer Proprietary Network Information ("CPNI") of individual customers.[102] 47 U.S.C. § 222(c). The parties disagree about whether Bell Atlantic should be allowed to monitor or audit MediaOne's access to and use and/or disclosure of CPNI.[103]

b. Positions of the Parties

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101 See Section 222(c)(2) providing that "[a] telecommunications carrier shall disclose customer proprietary network information, upon affirmative written request by the customer, to any person designated by the customer".

102 Section 222(f)(1) of the Act defines CPNI as "(A) information that relates to the "quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer" of a carrier, and that is made available to the carrier by the customer solely because of the carrier-customer relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier." 47 U.S.C. § 222(f)(1).

103 In its initial pleadings, Bell Atlantic disagreed about whether the rights and obligations under § 222 were mutual. However, in its reply brief, Bell Atlantic stated that it would agree to MediaOne's mutuality provision (Bell Atlantic Reply Brief at 32).

i. Bell Atlantic

Bell Atlantic proposes the following language in the interconnection agreement; "[it] shall have the right to monitor and/or audit MediaOne's access to and use and/or disclosure of [CPNI] that is made available by Bell Atlantic to MediaOne pursuant to this Agreement to ascertain whether MediaOne is complying with the requirements of Applicable Law and this Agreement with regard to such access, use, and/or disclosure" (Bell Atlantic Brief at 89-90). Bell Atlantic argues that it should be allowed to monitor and/or audit in order to be able to take precautions to protect that data and that safeguarding that information is in the public interest (Bell Atlantic Brief at 90; Bell Atlantic Reply Brief 32).

ii. MediaOne

MediaOne opposes Bell Atlantic's proposal that Bell Atlantic be permitted to monitor or to audit MediaOne's access to and use and/or disclosure of Bell Atlantic's CPNI (MediaOne Brief at 52.). MediaOne argues that "Bell Atlantic is not the CPNI policeman, and [Bell Atlantic] has no obligation (or right) to monitor other carriers' use of CPNI" (id.). According to MediaOne, should a violation of the use of CPNI ever occur, it would be the customer who would request damages for the violation (id.).

c. Analysis and Findings

Section 222 does not contain a provision that permits (or requires) carriers to audit the use and/or disclosure of CPNI by another carrier. We are not inclined to create such a rule here. There is no evidence that MediaOne, or any other CLEC, would improperly use or disclose CPNI in violation of Section 222. Therefore, we find in favor of MediaOne. The interconnection agreement shall not

include a provision allowing Bell Atlantic to audit MediaOne's use of CPNI. If Bell Atlantic has reason to believe the CPNI is being misused by any CLEC, Bell Atlantic may bring that concern to the Department's attention for possible further action.

3. Unauthorized Carrier Changes and Customer Authorization

a. Introduction

The Parties disagree about whether they should reference in their interconnection agreement only existing state and federal rules on the unauthorized change of a customer's telecommunications service provider (i.e., slamming), or create additional remedies.

b. Positions of the Parties

i. MediaOne

MediaOne proposes that the parties agree to follow both the FCC's and the Department's rules on slamming (MediaOne Brief at 51). MediaOne notes that the FCC has developed rules on this issue,[104] that Massachusetts enacted anti-slamming legislation,[105] and that the Department recently proposed rules to implement the state law[106] (Exh. MediaOne-5, at 9). MediaOne argues that Bell Atlantic has proposed to include remedies in addition to those provided by law, and that the federal and state remedies are adequate and sufficient (MediaOne Brief at 51).

ii. Bell Atlantic

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104 Implementation of the Subscriber Carrier Selection Change Provisions of the Telecommunication Act of 1996, CC Docket No. 94-129 (1998).

105 G. L. c. 93, §§ 108-113.

106 Order Instituting Rulemaking, D.T.E. 99-18 (June 10, 1998).

Bell Atlantic claims that the Unauthorized Carrier Changes Section of Bell Atlantic's proposed interconnection agreement is reasonable because it does not preclude other rights available under law in addition to those required under the applicable slamming rules (Bell Atlantic Brief at 90). In addition, Bell Atlantic creates an additional remedy whereby the party that makes an unauthorized change (i.e., slams a customer) would be liable to the other party for certain damages (id. at 90-91). According to Bell Atlantic, MediaOne inaccurately characterizes Bell Atlantic's proposed slamming language as expanding rights and remedies (Bell Atlantic Reply Brief at 31). Bell Atlantic argues that its proposal merely acknowledges that, in addition to the specific penalties contained in the applicable state and federal slamming laws, other remedies may exist which could be invoked in the event of a slamming violation (id. at 31-32).

c. Analysis and Findings

The Massachusetts' new slamming law, which went into effect December 10, 1998, provides procedures for investigation, determination, and remedies for slamming. G. L. c. 93, §§ 108-113. In particular, Section 112 provides for penalties to be assessed against violating companies, and compensation for slammed customers and their original carriers. G. L. c. 93, § 112. In addition, federal and state laws and regulations provide for carrier-to-carrier remedies. The Department finds that it would be inappropriate for Bell Atlantic to create additional remedies in this interconnection agreement. See Implementation of the Subscriber Carrier Selection Change Provisions of the Telecommunication Act of 1996, CC Docket No. 94-129 (1998); G. L. c. 93, §§ 108-113. Bell Atlantic has not proven why the existing requirements are inadequate to meet its needs. We find that the existing slamming law, FCC regulations, and pending Department regulations provide for adequate

remedies; Bell Atlantic's additional language is not needed.

K. Directory Services Arrangements

1. Operator Services and Directory Assistance Transport

a. Introduction

Bell Atlantic provides Operator Services ("OS") through five switch locations dispersed throughout Massachusetts and Directory Assistance ("DA") through nine switch locations serving the Eastern Massachusetts LATA only. Operator services include call completion services such as credit card, collect, and bill-to-third-number calls, and busy line verification/interruption. Intercept services, which provide a telephone number once a line has changed or been disconnected, are also covered under Operator services. Directory Assistance includes Directory Assistance Call Completion services.

The parties' dispute which carrier has the obligation to provide the necessary trunking and transport to and from these OS/DA switches. Bell Atlantic identifies the relevant OS/DA IPs in Schedule 4.2, and will include this information in Schedule 4.1 of the Interconnection Agreement (RR-DTE-10).

b. Positions of the Parties

i. MediaOne

MediaOne maintains that its obligations to provide transport to and from OS and DA switch locations should be the same as its obligations to provide transport for other types of traffic as set forth in Section 4.2 (Interconnection Point Section) of the interconnection agreement (MediaOne Brief at 52). As in the Interconnection Points section, where each carrier would deliver local traffic originated

by its customer to the IP or POI of the other carrier and that other carrier would pay for the transport of the call to its customer, MediaOne proposes to pay for a portion of the transport, up to the OS/DA switch locations, and Bell Atlantic would be required to pay to transport the traffic back to the relevant MediaOne's IP. MediaOne claims that since it will be providing a geographically relevant IP within the footprint[107] of each of Bell Atlantic's tandems, MediaOne has reasonably addressed Bell Atlantic's transport concerns regarding establishing only one IP and requiring Bell Atlantic to pay for transport costs to haul all types of traffic to this IP (MediaOne Brief at 52-53).

ii. Bell Atlantic

Bell Atlantic proposes that MediaOne should be responsible for arranging at its own expense the trunking and other facilities required to transport to and from Bell Atlantic's designated DA and OS switch locations[108] (Bell Atlantic Brief at 91). Bell Atlantic argues that MediaOne's designation of only one IP for eastern Massachusetts would force Bell Atlantic to haul traffic to this single IP and incur considerable transport costs (Bell Atlantic Brief at 91-92). Bell Atlantic also contends that the UNE rates for DA and OS do not include transport costs to deliver the OS/DA messages to MediaOne's IP (Bell Atlantic Reply Brief at 32). Lastly, Bell Atlantic argues that MediaOne's proposal to link the OS and DA transport issue to the interconnection issues in Section 4.2 (on geographic relevance) is unreasonable (Bell Atlantic Brief at 92-93).

c. Analysis and Finding

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[107] MediaOne's footprint proposal would establish IPs at each BA tandem (MediaOne Brief at 15). However, as previously discussed, the Department is not relying on this MediaOne proposal.

[108] Bell Atlantic specifies, in Schedule 4.1, its IP for OS and DA traffic (RR-DTE-10).

The Department finds that if MediaOne elects to purchase the OS and DA UNEs, it is reasonable to require MediaOne to pay the transport costs to and from Bell Atlantic's OS and DA switch IPs. While MediaOne's footprint proposal does provide additional IPs that may be located closer to Bell Atlantic's OS/DA IPs, Bell Atlantic's interconnection obligations with MediaOne should not be confused with Bell Atlantic's obligation to provide MediaOne access to a UNE, namely OS and DA. MediaOne's purchase of the OS/DA UNE involves only MediaOne's customers, whereas interconnection between MediaOne and Bell Atlantic's networks is for the exchange of traffic between Bell Atlantic's and MediaOne's customers. In the Local Competition Order, the FCC states that it requires that an incumbent LEC to provide access to operator service and directory assistance where technically feasible. Local Competition Order at ¶¶ 534-540. Providing access to a particular UNE does not necessitate Bell Atlantic paying a portion of the CLEC's transport costs for access to that UNE. If MediaOne elects to purchase the OS and DA UNE, it will be providing its customers access to this service. Thus, it should pay both legs of the transportation costs to obtain this service. MediaOne's proposal that Bell Atlantic be required to pay for the return leg of transport for OS and DA is unreasonable.

The proposed rates for OS and DA UNE's are reflected in Bell Atlantic's Tariff 17. Those rates are based on the FCC's Total Element Long-Run Incremental Cost ("TELRIC") method for pricing UNEs, and do not contain a cost component for transport from the Os and DA IPs to MediaOne's IP (see Miscellaneous TELRIC study attachment B).

L. Contractual Issues

1. Termination of Agreement

a. Introduction

The parties disagree about their respective obligations upon expiration of the interconnection agreement. MediaOne argues that the parties should continue operating under the expired interconnection agreement. Bell Atlantic contends that after a certain period of time, service arrangements made available under the interconnection agreement should be provided pursuant to standard or tariffed interconnection terms and conditions until execution of a new interconnection agreement.

b. Positions of the Parties

i. Bell Atlantic

Bell Atlantic proposes that, when the parties' interconnection agreement expires, and either party requests renegotiation of the interconnection agreement, the parties will continue to operate under the terms of the expired agreement for a maximum of nine months while the parties renegotiate a new agreement (Bell Atlantic Brief at 92). If a new interconnection agreement is not negotiated within nine months, the service arrangements made available under the interconnection agreement would be provided under (1) generally available standard interconnection terms and conditions, (2) tariff terms and conditions, or (3) the terms of the expired interconnection agreement on a month-to-month basis, if none of the above is available (id. at 92-93). Bell Atlantic explains that it would give 30-days notice before terminating the provision of any service under the expired interconnection agreement (Bell Atlantic Reply Brief at 33).

Bell Atlantic asserts that it is in the interest of both parties to promptly reach a new interconnection agreement, and its proposal provides the opportunity to renegotiate, and the incentive

to reach a new agreement (Bell Atlantic Brief at 93). This new interconnection agreement would properly reflect the bargained-for exchange of provisions representing the resolution of a complex variety of issues between the parties (id.). According to Bell Atlantic, it is important that reasonable limitations be placed on the continuing effectiveness of the prior interconnection agreement in order to facilitate the efficient and successful negotiation of a new interconnection agreement (id.). Bell Atlantic asserts that the Department-approved standard terms and conditions are a readily-available and reasonable substitute offering all the components of an interconnection agreement (id. at 94).

ii. MediaOne

MediaOne argues that the parties' obligations under the interconnection agreement should remain in full force and effect pending the execution of a new interconnection agreement (MediaOne Brief at 53). In describing the potential impact of Bell Atlantic's proposal on MediaOne and its customers, MediaOne contends that implementing an interim set of terms and conditions between the parties as proposed by Bell Atlantic could "wreak havoc" on the interconnection operations between the parties (id. at 54). According to MediaOne, Bell Atlantic would need to determine what changes MediaOne should expect in Bell Atlantic's interconnection provisions, and to notify MediaOne of those changes (id.).[109] Second, MediaOne maintains that there could be operational, engineering or provisioning changes that MediaOne may be required to implement immediately during this interim period under different terms and conditions, which might drastically affect MediaOne's ability to continue marketing and providing service (id.). Third, MediaOne argues that there could be changes to

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[109] MediaOne argues that identifying the differences between the approved agreement and the tariff would be both time consuming and subject to dispute (MediaOne Brief at 54).

customer services that must be addressed with customers (id.). MediaOne concludes that Bell Atlantic's proposal ignores the complex practices and procedures involved with interconnection between the parties, and Bell Atlantic's interim proposal would adversely affect both MediaOne and its customers (id.).

MediaOne contends that Bell Atlantic's proposal eliminates MediaOne's ability to freely negotiate a new interconnection agreement because MediaOne must either agree to Bell Atlantic's various proposals for a new agreement, or be penalized for failure to agree by having its current agreement terminated and an entirely new set of terms, conditions and rates imposed on it until the new interconnection agreement is resolved (id. at 53). In addition, MediaOne notes that there may be factors outside of its control, such as a Bell Atlantic appeal of a timely arbitration decision, that affect its ability to execute a new agreement (id. at 54).

c. Analysis and Findings

The parties agree that the interconnection relationship as defined by the interconnection agreement is a complex arrangement (see MediaOne Brief at 54; Bell Atlantic Brief at 93). In this arbitration, in addition to the time spent negotiating and resolving a wide variety of issues, the parties have devoted significant time to developing, refining and presenting their positions on many of the aspects of their relationship to be defined in the interconnection agreement. MediaOne has persuaded us that wholesale changes in that relationship, such as terminating the arrangement as defined in the interconnection agreement and imposing a different arrangement defined by generally available terms and conditions, has the potential to affect substantially the way the parties interconnect and, ultimately, the service provided to customers. Bell Atlantic does not address this point, other than to say that its

generally available terms and conditions are a "reasonable" substitute for negotiated and arbitrated terms and conditions.

We agree with Bell Atlantic, however, that there must be a mechanism in place that reasonably limits the length of time the parties may continue to operate under an expired interconnection agreement. Such a mechanism already exists. Under the Act, parties that cannot agree on interconnection terms, conditions and rates may petition the state commission to arbitrate any open issue. See 47 U.S.C. § 252(b). In addition, a state commission must conclude its resolution of any unresolved issue within a specific period of time, at most no longer than 165 days. See 47 U.S.C. § 252(b)(4)(C). Therefore, if Bell Atlantic is concerned that its negotiations with MediaOne for a new interconnection agreement will not produce results in a reasonable period of time, it may, in accordance with the provisions of the Act, petition the Department for arbitration.

Accordingly, we find that Bell Atlantic's proposal to impose standard terms and conditions upon MediaOne after nine months of renegotiating a new interconnection agreement is unnecessary. Bell Atlantic's proposal is therefore denied.

2. Compliance with Laws

a. Introduction

The parties disagree whether in the event of a change of law that relieves Bell Atlantic of any of its obligations relating to services provided pursuant to this interconnection agreement (1) Bell Atlantic may cease providing the affected services upon 30-days notice, or (2) the parties must negotiate modification of the interconnection agreement and submit the modification to the Department for approval.

b. Positions of the Parties

i. MediaOne

MediaOne asserts that the parties should agree to meet and modify the interconnection agreement to be consistent with any further change in law (MediaOne Brief at 55). MediaOne predicts a negative effect on customers if the parties immediately change their provision of services based on their interpretation of any change in law (id.). According to MediaOne, it may need to negotiate and implement an alternative agreement to cover services no longer provided by Bell Atlantic (id. at 56). MediaOne argues that its proposal would preserve the Department's ability to review and approve interconnection agreement changes (MediaOne Proposed Findings of Fact and Conclusions of Law at 18).

ii. Bell Atlantic

Bell Atlantic proposes to include a provision in the interconnection agreement that provides that "if, as result of any decision, order or determination of any judicial or regulatory authority … it is determined that [Bell Atlantic] is not required to furnish any service, facility or arrangement, or to provide any benefit [that is required to be provided] to MediaOne [under the interconnection agreement], then Bell Atlantic may discontinue the provision of such service, facility, arrangement or benefit" (Bell Atlantic Brief at 95-96). First, Bell Atlantic objects to MediaOne's insistence that absent a final decision affecting Bell Atlantic's obligations, Bell Atlantic should not be relieved of its obligations (id.). Bell Atlantic argues that absent an order that legally stays the applicability of a regulatory or court decision affecting either party's obligations, the fact that an order is subject to further appeal rights does not alter an order's fundamental legal enforceability (pending the result of an appeal) (id. at 96).

Second, differentiating between a typical commercial contract and an interconnection agreement entered into pursuant to the Act, Bell Atlantic argues that MediaOne's proposal would impose requirements on Bell Atlantic that exceed the applicable law (Bell Atlantic Response at 36). Third, in response to MediaOne's concern regarding immediate changes in service, Bell Atlantic would give MediaOne 30-days prior written notice before discontinuing any service due to a change in law (Bell Atlantic Brief at 96-97). Fourth, Bell Atlantic argues that MediaOne's proposal does not include a date certain for discontinuation of its provision of services when those services are no longer mandated by law (Bell Atlantic Reply Brief at 34).

c. Analysis and Findings

This issue is closely related to the "Extent of Obligation to Provide UNEs" issue that we decided in Section V.G., above. For the same reasons as stated in the earlier section, we find that Bell Atlantic's proposal to terminate the provision of certain services upon 30-days notice in the event of a change of law is unreasonable. The parties shall comply with the directives stated in Section V.G.

M. Billing and Payment Dispute Amounts

1. Introduction

Section 28.8 of the Agreement governs the parties rights and responsibilities with respect to billing, payment and collection for services rendered by one carrier to the other. Although in agreement on many of the provisions of this Section, the parties contest four specific issues: whether (1) the payment due date should take into account when a bill is received; (2) one party may escrow amounts in dispute only after providing a billing inquiry response to the other party; (3) the billing dispute resolution period should be 60 or 90 days; and (4) a party can discount disputed bills held in escrow

that are later determined to be in error.

2. Positions of the Parties

a. MediaOne

To protect itself from incurring penalties for late payments because Bell Atlantic did not issue its billing statements on time, MediaOne proposes that "the bills are due on the later of thirty days from the date of the statement or twenty days from the date of receipt of the statement" (MediaOne Brief at 56). MediaOne states that it has experienced significant delays and found Bell Atlantic to be unresponsive to billing issues (Exh. MediaOne-5, at 55). For example, MediaOne claims that certain billing issues are still unresolved after four months of working with Bell Atlantic (id.).

In order to provide Bell Atlantic with the incentive to produce accurate bills and respond promptly to billing inquiries from MediaOne, MediaOne proposes to put disputed billed amounts into an interest-bearing escrow account, if Bell Atlantic agrees to respond to billing inquiries within a reasonable period of time (MediaOne Brief at 56). MediaOne suggests two days is a reasonable period of time (id.).[110] In addition, MediaOne argues that it would agree to Bell Atlantic's proposed 60-day period for dispute resolution of billing matters if Bell Atlantic agrees to tie the escrow obligation to a reasonable response time for MediaOne's billing inquiries (MediaOne Reply Brief at 17).

As an alternative to tying a reasonable response time for billing inquiries with an escrow obligation, MediaOne proposes that "Bell Atlantic be subject to penalties if its bills are determined to be

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[110] In its brief, MediaOne proposed five days (MediaOne Proposed Findings of Fact and Conclusions of Law at 19). Because that proposal is not supported by record evidence, we cannot accept it.

more than 30 % in error; the penalty would be equal to 5% of the total accurate amount" (MediaOne's Proposed Findings of Facts and Conclusions of Law at 18).

b. Bell Atlantic

Bell Atlantic maintains that its escrow requirement is a standard provision (Bell Atlantic Brief at 97).[111] Bell Atlantic contends that MediaOne's proposal of requesting two days as a reasonable time to respond to billing inquiries is too rigid (id. at 98; Bell Atlantic Reply Brief at 34). Bell Atlantic contends that the proposed two day response time "fails to consider the nature and complexity of the claim, investigation of billing issues, including the collection of necessary supporting documentation" (Bell Atlantic Reply Brief at 34). In addition, Bell Atlantic argues that MediaOne's proposed 90-day dispute resolution period is too long and that Bell Atlantic's proposed 60-day period is standard (id.). Finally, Bell Atlantic contends that MediaOne's proposal to impose severe penalties on disputed bill amounts is inappropriate (Bell Atlantic Brief at 99).

3. Analysis and Findings

First, we find that MediaOne's proposal that payment be due on the later of thirty days from the date of the billing statement or twenty days from the date of receipt of the statement is reasonable.

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[111] Bell Atlantic's proposal reads, in its entirety, "If any portion of an amount due to a Party (the "Billing Party") under this Agreement is subject to a bona fide dispute between the Parties, the Party billed (the "Non-Paying Party") shall within thirty (30) days of its receipt of the invoice containing such disputed amount give notice to the Billing Party of the amounts it disputes ("Disputed Amounts") and include in such notice the specific details and reasons for disputing each item. The Non-Paying Party shall pay when due (i) all undisputed amounts to the Billing Party and (ii) all Disputed Amounts into an interest bearing escrow account with a third party escrow agent mutually agreed upon by the Parties" (Bell Atlantic Brief at 97; Bell Atlantic Petition Exhibit B, Section 28.8).

MediaOne should not be disadvantaged because of Bell Atlantic's failure to send a bill out within the regular time frame or for third-party errors relating to the receipt of mail.

Second, we find that MediaOne's proposal to put all disputed bill amounts into an interest-bearing escrow account, as long as Bell Atlantic agrees to respond to billing inquiries within two days, is a creative way to ensure more accurate bills and a timely response to billing inquiries. However, we think the two-day turnaround time is too short to address those billing disputes that are complex and require detailed investigation, and more time may be required. We find that ten business days is more reasonable.[112]

N. Grant of License and Indemnification

1. Introduction

MediaOne and Bell Atlantic disagree on whether the interconnection agreement should reflect that an implied limited license to use Bell Atlantic's facilities arising from the interconnection agreement. In addition, the parties disagree as to whether they should indemnify each other for any third party claims that the use of the service, facilities, or equipment pursuant to the agreement infringes a copyright, trademark, patent or trade secret of a third party.

Section 28.13.1 of Bell Atlantic's proposal states, in pertinent part, that:

> Nothing in this Agreement shall be construed as the grant of a license with respect to any patent, copyright, trademark, trade name, trade secret or any other proprietary or intellectual property now or hereafter

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[112] Since we provide MediaOne the relief it seeks regarding a reasonable response time for billing inquiries, we will hold MediaOne to its offer to accept a 60-day period for dispute resolution of billing matters. In addition, we need not address MediaOne's proposal for discounting disputed bills held in escrow that are later determined to be in error, since that proposal was submitted as an alternative to its proposal for expedited response to billing inquiries.

> owned, controlled or licensable by either Party. Neither Party may use any patent, copyrightable materials,
> trademark, trade name, trade secret or other intellectual property right of the other Party except in accordance with the terms of a separate license agreement between the Parties granting such rights.

2. Positions of the Parties

a. MediaOne

MediaOne contends that the interconnection agreement gives rise to an implied license to use Bell Atlantic's facilities, equipment, and services and this implied license necessarily includes a limited license to any underlying intellectual property rights required for the use of the facilities (MediaOne Brief at 57).

According to MediaOne, it is therefore reasonable to include an indemnification in the event that such use is claimed to infringe the intellectual property rights of a third party (id.). MediaOne claims that a party offering use of its facilities and charging for such use, should also be required to stand behind their offering in the form of an indemnity (id.). MediaOne argues that the party providing the services, facilities and equipment (and charging a fee therefore) is in the best position to provide such indemnity because it has control over, and knowledge about the services, facilities and equipment (id.). MediaOne asserts that Bell Atlantic can best assume the risk of infringement, take appropriate measures to avoid the risk (e.g., by modifying the service, facilities or equipment) and allocate the risk among users of the services, facilities and equipments (e.g., in the form of fees) (id. at 57-58).

b. Bell Atlantic

Bell Atlantic contends that the interconnection agreement does not create a grant of license of any kind (Bell Atlantic Brief at 100). Since no licensing rights are created, according to Bell Atlantic, it

is not necessary for the parties to defend, indemnify or hold harmless one another regarding infringement claims (id.). Bell Atlantic claims that MediaOne's proposal contradicts Bell Atlantic's longstanding tariffs on such matters (id.). To the extent that an implied license is assumed by MediaOne, Bell Atlantic would include language that would expressly deny that any license, express or implied, is granted under the Agreement (Bell Atlantic Reply Brief at 35).

3. Analysis and Findings

On the basis of representations made by the parties that the issue of implied license and indemnification was settled, the Department did not question the parties on this matter.[113] Only after the Department received briefs from the parties did it realize that the parties did not, in fact, reach agreement on this section, Section 28.13, of the interconnection agreement. Consequently, the Department must decide this issue on the basis of the scant information contained in MediaOne's Petition, Bell Atlantic's Response, and the briefs filed in this proceeding. Bell Atlantic argues that MediaOne's position (that the agreement should reflect the existence of an implied license for use of Bell Atlantic's intellectual property rights and a corresponding indemnification clause) contradicts its longstanding tariffs on such matters but does not provide us with any citation to those tariffs. Likewise, MediaOne cites no Department precedent or other authority for its position.

Bell Atlantic's Department-approved access services tariff contains the following provision:

No license under patents (other than the limited license to use) is granted by [Bell

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[113] At the hearing on July 8, 1999, the Arbitrator asked whether the "grant of license and indemnification section" remained open. Bell Atlantic's witness responded, "That was agreed . [o]n July 6th." The Arbitrator replied, "Then I will not ask a question about that" (Tr. 3, at 505-506).

> Atlantic] or shall be implied or arise by estoppel, with respect to any service offered under this tariff. [Bell Atlantic] will defend the customer against claims of patent infringement arising solely from the use by the customer of services offered under this tariff and will indemnify such customer for any damages awarded based solely on such claims.

DTE MA No. 15 at 2.3.2.G.

On the basis of such language, it appears to the Department that at least one of Bell Atlantic's tariffs expressly provides for a limited license to use Bell Atlantic's patents. Moreover, Bell Atlantic clearly agreed in Tariff No. 15 to indemnify the customers (IXCs) against patent infringement claims arising from the customer's use of Bell Atlantic's services. This appears to undermine Bell Atlantic's contention that its tariffs do not include an implied license. We recognize, however, that the issues surrounding Bell Atlantic's the provision of access services may differ from those which are the subject before us in this proceeding. Therefore, without further elaboration from the parties on this issue, we are reluctant to direct Bell Atlantic and MediaOne to license their intellectual property, absent a separate intellectual property licensing agreement granting the parties such rights. Accordingly, we decline to accept MediaOne's proposed language.

Since we do not find that an implied limited license to use a party's intellectual property exists in the interconnection agreement, we also agree with Bell Atlantic that it is unnecessary for the parties to indemnify each other from third party infringement claims. The Department notes that Bell Atlantic has proposed language identical to that contained in its access tariff for its Tariff No. 17, which encompasses, among other things, collocation and interconnection. However, the Tariff No. 17 is still under review (D.T.E. 98-57). Should the Department adopt Bell Atlantic's liability proposal in Tariff

No. 17, which differs from the language proposed by Bell Atlantic for the interconnection agreement that we adopt today, the parties would be required to comply with the licensing and indemnification language contained in Tariff No. 17, if approved.

Finally, under the FCC's pick-and-choose rules[114] MediaOne may request that Bell Atlantic make available to MediaOne the intellectual property provision contained in Bell Atlantic's Department-approved interconnection agreement with MCImetro Access Transmission Services, Inc. ("MCIm"). This provision, contained Section 12 of the agreement, reads as follows:

> 12.1 Any intellectual property which originates from or is developed by a Party shall remain in the exclusive ownership of that Party. Except for a limited license to use a Party's patents or copyrights to the extent necessary for the Parties to use any facilities or equipment (including software) or to receive any service solely as provided under this Agreement, no license in patent, copyright, trademark or trade secret, or other proprietary or intellectual property right now or hereunder owned, controlled or licensable by a Party, is granted to the other Party or shall be implied or arise by estoppel.
>
> 12.2 BA shall indemnify MCIm with respect to MCIm's use, pursuant to the terms of this Agreement, of intellectual property associated with any new BA network equipment or software acquisitions. BA warrants that it will not enter into any licensing agreements with respect to new BA network equipment or software acquisitions that contain provisions that would disqualify MCIm from using or interconnecting with such network equipment or software pursuant to the terms of this Agreement. BA also warrants that it has not and will not intentionally modify any existing licensing agreements for existing network equipment or software in order to disqualify MCIm from using or interconnecting with such network equipment or software pursuant to the terms of this Agreement. To the extent that the providers of equipment or software in BA's network provide BA with indemnities covering intellectual property liabilities and those indemnities allow a flow through of protection to third parties, BA shall flow those indemnity provisions through to MCIm. BA will inform MCIm of any pending or threatened intellectual property claims relating to BA's network of which BA is aware and will update that notification periodically as needed, so that MCIm receives

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[114] A summary of these rules is provided above, under Section G.2., Bona Fide Request Applicability.

maximum notice of any intellectual property risks it might want to address. Notwithstanding any part of this Section 12, MCIm retains the right to pursue legal remedies against BA if BA is at fault in causing intellectual property liability to MCIm.

12.2.1 For purposes of Section 12.2, BA's obligation to indemnify shall include the obligation to indemnify and hold MCIm harmless from and against any loss, cost, expense or liability arising out of a claim that MCIm's use, pursuant to the terms of this Agreement, of such new BA network equipment or software infringes the intellectual property rights of a third party. Moreover, should any such network equipment or software or any portion thereof provided by BA hereunder become, or, in BA's reasonable opinion, be likely to become, the subject of a claim of infringement, or should MCIm's use thereof be finally enjoined, BA shall, at its immediate expense and at its choice:

12.2.1.1 Procure for MCIm the right to continue using such material; or
12.2.1.2 Replace or modify such material to make it non-fringing provided such replacement or modification is functionally equivalent.

O. Audits

1. Introduction

The parties' proposed interconnection agreement contains a number of provisions that allow the parties to conduct audits of each other concerning specific issues, but does not contain a general provision that allows auditing of the other party's overall compliance with terms and conditions of the interconnection agreement. MediaOne seeks such a provision.

2. Positions of the Parties

a. MediaOne

To ensure Bell Atlantic's compliance with the terms of the Agreement, MediaOne argues the parties should be allowed a general audit of each other, once a year (MediaOne Brief at 58). MediaOne states that the parties would be required to give each other 30-days notice prior to

commencement of the audit and would bear the cost of their respective audits (id.). MediaOne argues that without a general audit, there is no way to know whether the other party is complying the with terms of the agreement (id.). MediaOne asserts that the dispute resolution provision is only useful when a party knows there is a compliance problem (id.).[115]

b. Bell Atlantic

Bell Atlantic opposes adding a provision that would allow MediaOne to conduct an annual yearly audit of Bell Atlantic's compliance with the interconnection agreement (Bell Atlantic Brief at 102). First, Bell Atlantic notes that the proposed interconnection agreement already contains audit provisions for those sections, such as the reciprocal compensation, meet-point billing, and CPNI [116] sections, where the parties have identified a specific need for an audit (id.). Second, Bell Atlantic claims the interconnection agreement contains a dispute resolution mechanism, which includes a right to petition the Department for an audit (id. at 103; Bell Atlantic Reply Brief at 35).

3. Analysis and Findings

We find that Bell Atlantic's proposal is reasonable. Broad audit rights to examine a party's general compliance with the terms of the interconnection agreement do not appear to be necessary at this time. As noted by Bell Atlantic, audit provisions already exist for those issues where audits are necessary and appropriate, and we encourage the parties to take advantage of those existing audit

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[115] In its initial brief, MediaOne proposed a compromise to Bell Atlantic, that the party requesting the audit would have to demonstrate, and the Department would have to find, "good cause" for such an audit (id.). Because this proposal was made after the evidentiary record closed and is not supported by record evidence, we will not accept it.

[116] In Section V.J.2, supra, we rejected Bell Atlantic's proposal for an audit of MediaOne's use of CPNI.

provisions. If MediaOne believes that additional specific audit provisions are necessary, it should negotiate such provisions with Bell Atlantic. Finally, if MediaOne can demonstrate credible evidence of a sustained pattern of noncompliance, the Department may reconsider its finding here and grant MediaOne general audit rights.

VI. ORDER

Accordingly, after hearing and due consideration, it is

ORDERED: That the issues under consideration in this arbitration be determined as set forth in this Order; and it is

FURTHER ORDERED: That MediaOne and Bell Atlantic incorporate these determinations into a final interconnection agreement, setting forth both the negotiated and arbitrated terms and conditions, to be filed with the Department pursuant to Section 252(e)(1) within 21 days from the date of this Order.

FURTHER ORDERED: That Greater Media and Bell Atlantic incorporate these determinations into a final interconnection agreement, setting forth both the negotiated and arbitrated terms and conditions, to be filed with the Department pursuant to Section 252(e)(1) after completion of the balance of their separate arbitration.

By Order of the Department,

_____
Janet Gail Besser, Chair

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James Connelly, Commissioner

_____
W. Robert Keating, Commissioner

_____
Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner