COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

INQUIRY BY THE DEPARTMENT PURSUANT TO SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996 INTO THE COMPLIANCE FILING OF BELL ATLANTIC-MASSACHUSETTS	)	D.T.E. 99-271

COMMENTS OF THE NEW ENGLAND CABLE TELEVISION ASSOCIATION, INC. ON FCC'S *BELL ATLANTIC NEW YORK ORDER* AND STATUS OF THIS PROCEEDING

INTRODUCTION

The New England Cable Television Association, Inc. ("NECTA") submits this set of comments pursuant to the Department's January 26, 2000, April 24, 2000 and June 9 procedural orders (the "Orders"). As requested in the Orders, NECTA's comments first address the legal standards articulated in the FCC's order in *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region InterLATA Service in the State of New York*, CC Docket 99-295 (rel. Dec. 22, 1999)(the "New York Order"). They then focus in detail on aspects of the May 26, 2000 Supplemental Comments and supporting affidavits regarding the BA-NY Order by Bell Atlantic-Massachusetts ("Bell Atlantic" or "BA") and the current status of this proceeding (collectively referred to as the "May 2000 Comments"), as amplified by subsequent discovery responses.[1]

[1] These Comments will also address the recent FCC decision that approved the Section 271 application of SBC Communications in Texas. *Application by SBC Communications et al*., CC Docket 00-65, FCC 00-238 (rel. June 30, 2000) (hereinafter "Texas Order").

The May 2000 Comments contain a substantial volume of argument and affidavits that purport to identify the relevant standards articulated by the FCC in the New York Order and to demonstrate full compliance by BA with Section 271 requirements in accordance with those standards. These claims cannot be taken at face value. Bell Atlantic's page-and-a-half summary of the standards articulated in the FCC's BA-NY Order (BA Supplemental Comments, pp. 2-3) provides one-sided and insufficient guidance regarding the FCC's recommendations for State Commission proceedings that should be taken into account in Massachusetts. Additionally, as we have learned from the Company's predecessor filing in May 1999—which also asserted full compliance with Section 271 standards--and from the many subsequent changes to BA policies, procedures and documents over the past 12 months that attempted to solve problems uncovered during the Department's review and the KPMG audit, the Company's claims must be examined thoroughly. The Department should not accept BA's claims until BA demonstrates that it truly has met its burden of proof on all 14 checklist items.

In its Comments, NECTA will focus mainly on the extent of BA's compliance with checklist item three, which requires that it provide "nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned by [the BOC] at just and reasonable rates in accordance with the requirements of section 224." Section 271(c)(2)(B)(iii). The FCC has construed this to include just and reasonable terms and conditions of access. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order*, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15499 at ¶ 1156 (Aug. 8, 1996)("*Local Competition Order*").

Within this area, NECTA will focus on compliance issues arising in connection with attachments by cable operators or CLECs to utility poles owned or controlled by Bell Atlantic. *See* Supplemental Comments, pp. 37-39, 41-42, 44-45, 48-50; Joint Checklist Aff., paras. 143-44, 145-53, 156, 159-160.[2] NECTA has prepared these comments with the help of Paul Glist of the Washington D.C. law firm of Cole Raywid & Braverman, a nationally-known pole attachment expert and litigator.[3] These comments can serve as a witness statement by Mr. Glist on NECTA's concerns with Bell Atlantic pole attachment policies, procedures and agreements. [4]

PROCEDURAL HISTORY

On May 24, 1999, Bell Atlantic submitted a so-called "compliance filing" to the Department on or about May 24, 1999 that consisted of (1) a cover letter from Wayne Budd, Group President; (2) affidavit testimony from seven witnesses; and (3) a voluminous set of exhibits. Bell Atlantic claimed it fully complied with its obligations under Section 271 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. §271 (hereinafter "Section 271" of the "1996 Act") and requested a favorable ruling from the Department within 90 days.

On June 29, 1999, the Department opened the instant docket to review Bell Atlantic's filing. The Department recognized the filing was "incomplete" (June 29 Order

[2] If NECTA does not challenge pole attachment procedures or provisions in this Statement or in its March 29, 2000 critique of BA's March 7 draft pole agreement (BA's agreement and NECTA's critique were attached to our proposed discovery requests to the Department as Exhibits B and C), the Department should presume they are acceptable to NECTA. For example, NECTA generally supports BA's proposals to introduce a unit cost approach to facilitate pole attachment processing and does not does oppose the limits proposed by BA on the number of poles to be handled in a single application.

[3] A copy of Mr. Glist's curriculum vitae is attached hereto as Exhibit A.

[4] NECTA's decision not to present specific argument on checklist three issues pertaining to access to underground conduit or to rights of way should not be taken to mean that we agree with Bell Atlantic's positions. To the contrary, we share many of the concerns raised by AT&T, Conversent and other interested parties about BA's conduit policies which were unreasonable, burdensome and discriminatory at

at p. 1) and established a schedule calling for Letters of Participation, Initial Written Comments, five public hearings, and a Procedural Conference. The Department subsequently assigned special docket number 99-271; hired KPMG Peat Marwick ("KPMG") to conduct independent third party testing of Bell Atlantic's operational support systems ("OSS") in Massachusetts; and designated the Department of Justice, the Attorney General, NECTA and more than forty other providers and associations as interested parties.

Since then, this case has proceeded on two main tracks. On the litigation track, in Fall 1999 the interested parties conducted discovery on Bell Atlantic and submitted pre-filed statements of one or more witnesses from the following parties: AT&T, Conversent, Covad, Global NAPs, MCIWorldCom, MediaOne, Network Plus/TRA, RCN-BECoCom, Rhythmn Links, RNK, Teligent, Vitts, and Z-Tel. In November and December 1999, Department staff conducted approximately 20 days of informal technical sessions that allowed Department personnel, Bell Atlantic and the interested parties to explore the basis of claims made by Bell Atlantic and CLEC witnesses. Following several delays needed to allow Bell Atlantic to attempt to correct serious problems with its OSS systems that serve New York and New England and to develop proposals for line sharing practices and policies, Bell Atlantic submitted another comprehensive filing dated May 26, 2000 consisting of (1) Supplemental Comments, (2) a Checklist Affidavit, (3) a Measurements Affidavit, and (4) an OSS Affidavit, and associated exhibits and attachments. Bell Atlantic responded to limited discovery requests approved by the

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the start of this docket and, after substantial and multiple revisions, still require close investigation by the Department. *See also* Section III below.

Department on July 7, July 11, 2000 and subsequent dates. This May 2000 filing and the recently filed discovery responses are addressed in NECTA's comments below.

On the KPMG OSS testing track, the accounting firm prepared a draft master test plan in September. The Department adopted the plan in modified form in orders issued on November and December, 1999, with some subsequent adjustments. "Military-style" testing on Bell Atlantic's OSS systems began in early 2000. The final KPMG report is expected in the near future, depending on the success of the final testing and validation process and review of drafts. NECTA will not address the OSS testing track and related issues in these Comments.

COMMENTS

I. KEY LEGAL STANDARDS IN THE FCC'S BA-NY ORDER

Bell Atlantic provides a short and one-sided summary of some of the standards identified in the FCC's New York Order at pages 2-3 of the Supplemental Comments. The Department should keep some additional points in mind in reviewing BA's application in Massachusetts.

First, the FCC found that state proceedings should be "rigorous" in order to contribute to the success of a section 271 application. Among other elements of such proceedings found by the FCC to be "particularly important" in the New York case were "(1) full and open participation by all interested parties; (2) extensive independent third party testing of Bell Atlantic's [OSS] offering; (3) development of clearly defined performance measures and standards; and (4) adoption of performance assurance measures that create a strong financial incentive for post-entry compliance with the section 271 checklist by Bell Atlantic." New York Order, para. 8; *see also id.* at para. 51

(the State Commission and the Department of Justice have a role similar to that of an "expert witness, " a critical role since the FCC "does not have the time or the resources to resolve the enormous number of factual disputes that inevitably arise from the technical details and data involved in such a complex endeavor"). The Department seems to be well on its way in meeting these requirements. In particular, with respect to the "full and open participation" requirement, the Department appears to be largely following the procedures adopted in the New York case. NECTA initially viewed the Department's proposed technical session phase with trepidation, see NECTA Initial Comments (July 19, 1999 at pp. 9-10), but the sessions have been proven to be useful for staff and all parties. So long as interested parties now are (1) given a full opportunity in the remaining technical sessions to go beyond mere discovery and actually ask direct cross-examination questions that test the sufficiency of BA's arguments and facts, and (2) allowed to present arguments to the Department at an oral argument (if appropriate) and final briefing stage, such as was done in New York, the Department should have a solid record on which to obtain deference from the FCC on its reasonable findings.[5]

Second, as a corollary point, the Department should take care to avoid risking its credibility with the FCC by over-reliance on the factual and legal findings in the New York Order itself. The findings in the New York Order originated in holdings of the New York Commission based on the record presented to it that the FCC found were sufficiently well-reasoned to merit deference. The Department should similarly decide

[5] NECTA notes that the procedural schedule issued on July 14, 2000 fails to provide an opportunity for written briefs. NECTA hopes this is an oversight. As the New York Commission found, interested parties should have a final opportunity to explain in writing their position on all Section 271 compliance issues that take into account record evidence developed in the hearings.

this case on the record before presented to it by the parties and the staff. Adoption of conclusions issued in New York or elsewhere without adequate consideration of the differing evidence and argument that will be presented to the Department in this case should be avoided at all costs.

Third, the FCC also made clear some of the types of evidence that a BOC cannot rely on in proving Section 271 compliance. While the BOC must address "all facts that the BOC reasonably should anticipate will be at issue," New York Order, para. 36, promises of future performance by the BOC have no probative value. *Id*., para. 37. Thus, "[i]n order to gain in-region interLATA entry, a BOC must support its application with actual evidence demonstrating its present compliance with the statutory conditions for entry, instead of prospective evidence that is contingent on future behavior." *Id.*

A final important point is that the FCC clarified the scope of the public interest test of Section 271(d)(3)(C). New York Order, paras. 422-25. Among other things, the public interest requirement is an "opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress intended." *Id*. at para. 422. Contrary to Bell Atlantic's claims in its 1999 filings, parties and the Department have discretion to introduce evidence on non-checklist items, including public interest issues, at the State Commission level. *See* New York Order, para. 404 (noting that the New York Commission chose not to submit evidence on structural separation requirements of Section 272, thereby implicitly acknowledging that State Commissions have authority to consider evidence and make findings on issues beyond the competitive checklist if they

wish); *see also* NECTA Initial Comments (July 19, 1999) at pp. 10-13 (discussing legal authority for State Commissions to allow evidence or make findings on public interest element and pointing out that, despite Bell Atlantic's claims, public interest evidence was affirmatively introduced in its direct case).

II. BELL ATLANTIC DOES NOT AFFORD REASONABLE AND NON-DISCRIMINATORY ACCESS TO ITS POLES AS REQUIRED BY CHECKLIST ITEM THREE.

A. BACKGROUND

Poles owned in whole or in part by Bell Atlantic are critically important pathways in the development of competitive telecommunications services and enhanced video and high speed data products. The cable television industry in particular is forced to rely heavily on aerial plant to deliver services to its residential customer base, and must take steps to upgrade its existing plant in order to provide local telephony, high speed cable modem Internet service and other products. This places the cable and competitive telecom industries in the uncomfortable position of relying on Bell Atlantic, our direct competitor in telephony, high speed Internet and even video markets (Bell Atlantic has a marketing arrangement with the Direct TV satellite service), in order to have access to utility poles to enhance the competitiveness of our service offerings. Congress properly placed the terms and conditions for third party access to this competitive choke point at issue in Section 271 cases by requiring BOC compliance with checklist item 3 prior to entry into the in-state intraLATA market.

BA's current form of pole agreement provides little basis for structuring non-discriminatory arrangements today. The standard pole contracts originated decades ago during the infancy of the cable industry and have remained in almost exactly the same

form up to the present day. These agreements remain highly one-sided contracts of adhesion, as recognized by the Massachusetts Supreme Judicial Court in the conduit context. *Greater Media Cable v. D.P.U.*, 415 Mass. 409 (1993), affirming *Greater Media Cable*, D.P.U. 91-218 (1992). They treat attaching parties as bare licensees, subject to preemption and removal at virtually any time and for even immaterial forms of non-compliance. They impose numerous indemnification and insurance obligations for pole related problems without regard for fault and without reciprocal obligations imposed on the pole owners. In the 1996 Act, Congress recognized the importance of poles to fostering competition by amending the pole attachment statute, 47 U.S.C. 224, to require pole owners to offer non-discriminatory access to third parties and by including checklist item 3 in Section 271.

Despite the one-sided agreements under which cable operators and CLECs are forced to operate, the cable industry has a long history of trying to work pole attachment-related problems cooperatively out in the field without escalating disputes through the filing of complaints. The industry hopes to continue to make those efforts in the future. But Bell Atlantic's resistance to embracing a non-discriminatory regime; its lack of real efforts to update its terms, conditions and procedures for pole attachment access to accord with legal requirements; and its present efforts to sweep those deficiencies under the rug in an effort to skate through to long-distance markets leave us acutely concerned that Bell Atlantic will exercise control over poles in a way that will disadvantage its competitors, particularly once they receive Section 271 approval and the Department's scrutiny in this area diminishes.

NECTA's key concerns are that (1) BA will not only retain its existing, burdensome, process for approving requests for overlashing of plant but will continue to insist on their new, even more burdensome procedures. *See* Response to DTE-ATT-18, at Appendix VI (proposed final overlash exhibit). These new provisions have been strenuously opposed by cable and CLEC participants in the monthly licensee meetings (see Response to DTE-NECTA 4-8, Attachment 2 (revision to overlash exhibit 7, dated May 29, 2000, which rejects most of BA's efforts to micromanage the overlashing process) and if maintained would further impede our ability to overlash plant, a pro-competitive approach favored by cable industry and by FCC that allows for cost effective upgrades to offer enhanced services; (2) BA will micromanage our installation efforts in the field, slowing construction or raising costs; (3) BA will not complete requested "makeready" work on poles in a timely and predictable manner; and (4) BA will maintain a host of discriminatory conditions that individually and collectively benefit them more than the competing attachers. The record developed in this case has alleviated few of our concerns and, to some extent, has increased them.

As of today, nearly four-and-a-half years after the enactment of the 1996 Act, BA has done very little to make its pole attachment agreements legally compliant or revise its procedures to speed up the attachment process. Among other problems:

- Bell Atlantic didn't begin collecting data on relative timeliness of processing of applications between Bell Atlantic and attaching parties until first quarter 1999, just before this case was about to begin. *See generally* May 1999 Harrington Affidavit; response to DTE-NECTA 1-32.

- It did not even begin a process to update its agreements to reflect 1996 Act nondiscrimination requirements until the Spring of 1999, when it was planning its May 1999 initial filing. *See* May 1999 Harrington Affidavit; response to DTE-NECTA 1-21.
- It proposed monthly meetings with the field staff of attaching parties with lawyers barred from attendance, response to DTE-NECTA 1-35, an ill-considered and improper approach in light of the non-discriminatory access issues that needed to be considered during the revision process.
- At the monthly meetings, Bell Atlantic proposed a new draft agreement in December 1999 and revised key overlashing, rebuilds and power supply attachments that introduced burdensome new provisions that had not been previously brought up in the monthly meetings and that ran contrary to the views expressed by attaching parties in those meetings. *Compare* Bell Atlantic's "final draft" overlash and rebuild attachments (response to DTE-ATT-1-18 (Attachments) to the very substantial mark ups offered by licensees at June 2000 meeting (response to DTE-NECTA 4-8, Attachments 2 and 3). (The "final drafts" of these attachments are the same as BA's March 2000 drafts and incorporate no elements proposed by the licensees in last month.)
- At NECTA's request, Bell Atlantic personnel and counsel met with NECTA counsel and expert, Paul Glist, in February 2000 to discuss our concerns with the draft agreement and attachments (*see* January 14, 2000 NECTA letter to Gloria Harrington, Exhibit A to NECTA's proposed

discovery requests on Bell Atlantic; *see also* response to DTE-NECTA 4-5 (i)), but Bell Atlantic did not follow through on commitments made during the meeting, including failing to give unit cost back up to our expert (including the Standard Time Increments used in developing unit costs), and failing to perform promised due diligence on the nature of Bell Atlantic's joint agreements with electric companies.

- Bell Atlantic then forwarded a new draft on March 7 (Exhibit B to NECTA's proposed discovery requests) that made minor revisions, to which NECTA responded in a memo from our expert dated March 29, 2000 (Exhibit C to NECTA's proposed discovery questions). The March 29 memo observed that Bell Atlantic made no significant changes on issues identified as key to NECTA's members, failed to address a dozen or so commitments made during the meeting, and did not seem to reflect "a serious effort to resolve our differences." *Id.* We requested a response and, failing that, an electronic copy of the draft agreement to allow NECTA to create our own red-lined draft. *Id.*
- In the May 2000 Comments, filed two months after NECTA's final but unanswered comprehensive critique, Bell Atlantic noted that it had met with NECTA in February and claimed to be actively working "as of May 19" to "finalize" the agreement with NECTA (Checklist Affidavit, para. 144).
- In its response to NECTA and AT&T discovery, the Company submitted another draft that incorporated more minor improvements to the draft

reviewed by NECTA (response to DTE-AT&T 4-18) but Bell Atlantic admits it did not respond to NECTA's substantial critique of that March draft or provide the requested electronic copy. Response to DTE-NECTA 4-6.

The following subsections detail our major concerns with Bell Atlantic's pole-related agreements and practices. The current agreements do not comply with checklist three and need to be significantly revised in order to merit Section 271 approval. NECTA notes that the Department should not rely on the checklist three approvals in the New York and Texas orders. In each of these cases, poles were not joined as an issue. See Texas Order, para. 245 ("No commenter raised allegations challenging SWBT's compliance with this checklist item."); New York Order, paras. 265-67 (commenters only challenged access to multiple dwelling unit internal wiring and Manhattan conduit). In this case, we have quite the opposite record. As the discussion below demonstrates, BA's substantive positions are not in compliance with pole attachment requirements. The Department should deny BA's request that it be deemed to comply with checklist three as applied to poles, or alternatively condition approval on compliance with specific pro-competitive changes discussed in Section II.F below.

B. UNNECESSARY OVERLASHING/REBUILD RESTRICTIONS

Overlashing is the procedure that cable operators have used throughout their history to upgrade and improve their cable systems by attaching new communications wires to existing wires. "Overlashing, whereby a service provider physically ties its wiring to another wire already secured to the pole, is routinely used to accommodate

additional strands of coaxial cable on existing pole attachments."[6] What a cable operator physically attaches to the pole is not usually the coaxial or fiber conductor itself, but a wire support strand attached to the pole with a clamp and through bolt. The operator then places communications conductors on the strand and secures them by wrapping the strand and the conductor(s) with a thin filament applied by a lashing machine. Through the life of the plant, the communications conductors are then periodically altered. Deteriorated coaxial cables may be replaced. The bandwidth of the system may be increased electronically--that is, more channels may be offered--by installing new (strand-mounted) amplifiers which electronically propagate more signal through the conductors. New neighborhoods may be served by lashing additional or rerouted trunk cables to the existing strand, using another filament lashing the new line to the existing strand. Coaxial cables or fiber optic sheath may be 'overlashed" to the coaxial cables in order to increase bandwidth and to provide capacity to offer new services. In practical effect, overlashing does not use more pole space, but it allows cable operators to expand their channel capacity, eliminate points of unreliability, and improve their signal quality by overlashing new or replacement conductors and amplifiers to the messenger cable attached to the pole.

Overlashing only became controversial when pole owners became concerned that the ***fiber optic*** cables that cable operators were overlashing could be used for services that the pole owner was providing, or might want to provide in the future. By “overlashing” fibers to the support strand for coaxial cable, the system is able to expand bandwidth and

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[6] *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket 97-151, 13 F.C.C.R. 6777 (1998), ¶ 60 (Feb. 6, 1998).

create an infrastructure which can offer CLEC-telephony and other advanced telecommunications services. It is no coincidence that rival firms like BA have sought to restrict such overlashing and maximize the first chokepoint of competition.

The FCC has repeatedly endorsed overlashing as pro-competitive and warned utility pole owners not to restrict it. The FCC has found that:

> We believe overlashing is important to implementing the 1996 Act as it facilitates and expedites installing infrastructure essential to providing cable and telecommunications services to American communities. Overlashing promotes competition by accommodating additional telecommunications providers and minimizes installing and financing infrastructure facilities. We think that overlashing is an important element in promoting the policies of [the 1996 Act] to provide diversity of services over existing facilities, fostering the availability of telecommunications services to communities, and increasing opportunities for competition in the marketplace.[7]

Unfortunately, BA has failed to heed this specific federal directive. Bell Atlantic made no changes to its overlashing process in the wake of the 1996 Act. Response to DTE-NECTA 1-22. Instead, it has proposed a monstrosity of process, in which overlashing can occur, if at all, only with the advance approval and permission, license, post-inspection and all of the attendant delays, of BA. Response to DTE-ATT-4-18, Attachment, at Appendix VI (revision 6 dated March 16, 2000). BA proposes the same process even when a cable operator seeks to overlash in part to provide capacity to an affiliated company. *See id.* This is not necessary or appropriate to protect BA's interests as a pole owner. Bell Atlantic also proposes to restrict overlashing indirectly through

[7] 1998 FCC Pole Rate Order at para. 62. Even before its order issued in February 1998, the FCC encouraged overlashing as an efficient means to utilize available pole space, *Common Carrier Bureau Cautions Owners of Utility Poles,* Public Notice, DA 95-35 (Jan. 11, 1995), and rejected utility efforts to apply a surcharge for overlashed fiber. *Heritage Cablevision Assocs. of Dallas, L.P. et al v. Texas Utils. Elec. Co*., 6 FCC Rcd. 7099 (1991), *recon dismissed*,7 FCC Rcd. 4192 (1992), *aff'd, Texas Utils Elec. Co. v. FCC*, 997 F.2d 925 (D.C.Cir. 1993). *Marcus Cable Assocs., L.P. v. Texas Utils. Elec. Co.*, PA No. 96-004, 12 FCC Rcd 10362, 8 CR 1293, 1997 FCC LEXIS 3803 (July 21, 1997).

insistence on onerous “rebuild” procedures that are triggered once an operator begins a project that requires work on more than a handful of poles.

Normally, once the strand has been licensed it may be overlashed. The engineering of fiber plant is the same as it has always been for overlashed facilities, only fiber is much lighter than the coaxial attachments that cable has always been allowed to overlash without impediment. Cable operators have always been responsible for making sure that their overlashed plant met applicable engineering standards, including clearances, and they have extensive quality control-procedures to protect their investment in this plant. As a matter of engineering and construction routine, cable operators take significant pains to ensure that the overlashing of new fiber-optic communications facilities to existing strand and conductors is safe, by employing such procedures and techniques as pre-construction ride-outs and facilities measurements to protect clearances, and strand re-tensioning. Cable strand is typically over-sized upon installation, and readily accommodates the nominal additional load of overlashed fiber. There should be no reason for BA to have a veto or a right to delay the installation of overlashed cable.

For example, cable operators have reached agreement with some of BA’s joint pole owning electric companies, including Massachusetts Electric Company (now National Grid), that no notice be given of overlashing activities so long as the existing attachment is properly licensed, the operator conforms to engineering standards, and the size of the overlashed bundle remains below a maximum size. (A copy of relevant language is attached as Exhibit B). The proposal submitted to BA by the cable and CLEC representatives to the monthly licensee meetings last month—which BA has rejected in its entirety in its Final Draft Agreement attached to its response to DTE-ATT-

18—adopts a very similar approach. Response to NECTA 4-8, Attachment 2 (revision 7 dated May 29, 2000 and given to BA at June meeting). The attaching parties delete most of the micromanagement provisions in BA's previous March draft – the one that BA continues to propose to the Department as its final version. They instead offer reasonable measures to ensure pole safety and proper administrative handling of pole data by proposing a system of (1) self-survey, (2) adherence to specified engineering standards, (3) notice to BA of the poles to be overlashed and (4) and agreement for the attaching parties to yield in the unlikely event the overlashing work conflicts with pre-planned BA work on such poles. *See id.*

Just this week, Bell Atlantic-Maryland agreed to allow overlashing to occur with nothing more than one-day notice to BA-MD, removing all delay, trusting in the engineering expertise of the cable industry to "do it right," and leaving whatever inspections BA thought necessary for its own peace of mind to BA to do at its own expense. (A copy is attached as Exhibit C.) BA's protestations that its overlashing provisions are necessary and appropriate are contradicted by the actions of its affiliated companies, as well as by the arrangements advocated for or currently in place by the licensees and by the electric companies.

BA has been so extreme that it continues to insist that a cable operator who titles certain of its overlashed fiber to its affiliate (such as a CLEC affiliate) must first obtain an entirely new pole contract with BA. There is no justification for such delaying tactics. The FCC has fully endorsed overlashing. The fiber occupies no additional space. The accident of placing title in one corporate division versus another should not delay

competition by one minute. BA had promised to reconsider its position, and then never followed through.

BA-MA's extreme, unnecessary and expensive proposal is entirely out of compliance with the standards which have evolved under Section 224, 251, and the 1996 Act, as well as standards it has voluntarily agreed to elsewhere in its service territory. BA has refused the repeated entreaties of NECTA and other attaching parties to bring its conduct into conformity with industry standards. The Department should find unreasonable Bell Atlantic's proposed overlashing and rebuild attachments and deny compliance with checklist three unless Bell Atlantic agrees to less burdensome overlashing/rebuild provisions. With respect to overlashing, NECTA would request an order that Bell Atlantic adhere in Massachusetts to the overlashing arrangements adopted in Maryland. Failing that, NECTA would support the Massachusetts Electric provisions or the redrafted attachment submitted by the attaching parties to BA last month. With respect to rebuilds, NECTA supports the redraft submitted by the monthly licensees in June. All are much more reasonable than the onerous provisions that BA continues to insist on in this litigation over the objections of NECTA and the field staff in the monthly meetings.

C. DEADLINE/UNION CONTRACT ISSUES

In pole attachments, as in other aspects of CLEC competition, performance standards are key. In fact, in the FCC's recent Texas Order approving SBC's entry to long-distance, the Commission lauded the Texas PUC for having "developed clearly defined performance measurements and standards, and adopted a performance remedy plan to discourage backsliding. In a continuing effort to refine and monitor performance

measurements, the Texas Commission has a six month review process in place." Texas Order at para. 3.

BA-MA has fiercely resisted any performance standards for its compliance with pole attachment obligations. Accessing poles requires a great deal of cooperation by BA, most importantly, in performing the "makeready" rearrangments, or pole replacements, which may be needed to fit a new entrant (a CLEC, or a cable line extension) on to an existing pole. BA refuses to accept any meaningful deadlines on BA performance or any right by cable or CLEC to remedy delays in BA fulfilling its work.

The discriminatory treatment is most obvious by comparing the treatment BA expects and the treatment it affords its competitors. If a competitor is on the pole, and BA needs space to attach new lines, the competitor must move within 15 days or BA will do it for them. By contrast, if BA is on the pole and a competitor seeks access for new lines, then after a 45 day application period, BA will use "every reasonable effort" to perform the rearrangements and makeready within 6 months of advance payment, except for reasons beyond its control. If BA fails even that open-ended and very long timetable, the applicant has no right to do the work itself. Compare Final Draft, section 5.4 with section (no firm six month commitment) with section 7.16 (move within 15 days or BA will do it). Obviously, BA is mistaken when it testifies that performance standards for makeready are not "practical or equitable." Supplemental Affidavit, p. 41. They seem perfectly practical when they benefit BA.

Yet BA will not agree to reciprocate. It will not accept performance deadines, nor allow us to use qualified contractors for pole placement, pole removal, moving lines or, in the conduit context, rodding or innerduct placement, even if the BA workforce does

not meet "expected" timetables. BA's proposed agreement exacerbates the problem by proposing to increase the demands on the BA workforce, such as through overlash and rebuild "makeready" procedures, and through an artificially expanded definition of what constitutes a rebuild. BA may not be permitted to simultaneously claim that there is no practical performance standard **and no remedy.**

This regime is obviously discriminatory. A non-discriminatory regime would provide for interim performance benchmarks. For example, requests for information of general availability should be answered within 10 days (20 if a field survey is required), and makeready must be completed within a specified timetable. Then it would match each party's responsibilities to the other. BA would perform within 15 days, as it expects its competitors to do. If BA fails to meet the timetables, then cable operators and CLECs may use their own personnel and independent contractors to perform all necessary work themselves and to work on BA poles and facilities, if they are qualified under non-discriminatory, reasonable and objective standards (e.g. OSHA). BA should be required to maintain a list of approved contractors who are qualified to respond, to perform makeready, and to install lines. NECTA would even be willing to accept a more generous deadline (e.g., 30-60 days to perform) if they are reciprocal and if NECTA members have the right to cure BA's non-performance by using qualified personnel to do the makeready themselves.

In this context, it is obvious that a BA promise to treat attaching parties no more slowly than it treats itself is nothing but a prescription for delaying competition to its established business. It is not a sign of non-discrimination, but a barrier to entry.

To effectively remove that barrier, NECTA has sought that BA permit qualified contractors to perform work at least if BA crews cannot or will not perform within performance timelines. California and the FCC have adopted this approach as the generic solution to access disputes: the utility may not specify that only utility crews may perform the work.[8] Cable and CLECs should be allowed to use their own personnel or contractors to work on utility facilities if they are qualified under non-discriminatory, reasonable and objective standards (e.g. OSHA). California requires ILECs to maintain a list of approved contractors who are qualified to respond, to perform makeready, and to install lines. *Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service*, R. 95-04-043, I.95-04-044, Decision 98-10-058 at page 112 ¶ 41 (California P.U.C., October 22, 1998). In its recent order in D.T.E. 98-89, the Department approved a similar approach and rejected Boston Edison's claim that only its power crews should be allowed in the power space on streetlight poles purchased by municipalities, and suggested that the best solution was to require adequate training of municipal crews.

In contradiction of these precedents, including the DTE's own decision in docket 98-89, BA insists that union rules contracts—which it refuses to provide in discovery, see response to DTE-NECTA 4-11—will not allow it to assure prompt access or allow a remedy for BA crews' failure to meet their job. This argument should be rejected for lack of proof. Even if BA produces that contract, and it turns out that BA failed to

[8] 1996 Order at para. 1182. ("we will not require parties seeking to make attachments to use the individual employees or contractors hired or pre-designated by the utility. A utility may require that individuals who will work in the proximity of electric lines have the same qualifications, in terms of training, as the utility's own workers, but the party seeking access will be able to use any individual workers who meet these criteria. Allowing a utility to dictate that only specific employees or contractors be used would impede the access that Congress sought to bestow on telecommunications providers and cable operators and would inevitably lead to disputes over rates to be paid to the workers.")

account for legal requirements when it signed its labor agreements, BA is still subject to the 1996 Act, and it must respect performance obligations with meaningful remedies, including the right to bring in qualified crews. BA's failure to comply with the 96 Act and Section 271 obligations renders it in violation of checklist item 3.

D. NON-DISCRIMINATION ISSUES

BA has an overall obligation under Sections 251 and 224 of the Communications Act not to discriminate in favor of itself. BA has testified that all of its terms are non-discriminatory (page 37) and that it has discontinued enforcement of the provisions that are in conflict with the Act (page 39). This promise is not reassuring because BA has never identified the particular discriminatory provisions that it no longer purports to enforce. *See* BA response to DTE-NECTA 1-21. Incredibly, BA's pole attachment manager, Gloria Harrington, couldn't even identify the purportedly unenforced provisions at the November technical sessions. More fundamentally, BA's promise to eliminate discrimination has not been fulfilled because it insists on maintaining several forms of discrimination. We offer these examples to illustrate.

- BA insists on a series of remedies against cable, including total contract termination without explicit rights of notice or opportunity to cure. It has resisted, until its answers in discovery, all but the most modest of compromises. By contrast, BA admits that it has yet to resolve—more than **two-and-a-half years** after the disputes were identified--stunning acts of defiance by the CLEC affiliates of BA's joint pole owners, Boston Edison and New England Electric System, who have attached communications facilities to BA poles without license or compliance with the NESC. Responses to DTE-NECTA 1-24 and 25; DTE-MCIW-1-21, 22 and 26; Harrington

technical session testimony (acknowledging BA's belief that these facilities are not in compliance but stating that BA has not undertaken enforcement action as of late 1999); DTE-NECTA 4-12 (still no agreements reached as of Summer 2000). Yet these illegal facilities remain on the poles, in business, with no termination at all. In *Cavalier Telephone, LLC v. Virginia Electric Power Co.*, PA No. 99-005, June 7, 2000, the FCC found that Virginia Power discriminated against the CLEC Cavalier by denying it attachment methods that it was allowing other companies (including power company CLEC affiliates) to use, and unlawfully delayed Cavalier's access to VEPCo poles. BA's preference to pole owning partners is unlawful.

- BA has an overall obligation of non-discrimination with which it is clearly not complying. BA has testified it may reserve space for itself (page 43). Under FCC rules an ILEC is not permitted to "reserve" space for its own use at all, because that reservation extends preferential treatment which discriminates against the unaffiliated party in favor of the ILEC competitor.[9] BA insists on reserving capacity on its poles for far longer than a third-party applicant is afforded to attach to space it has applied for. Response to DTE-NECTA 1-30 (BA reserves space for one year, while CLECs only get 90 days). By contrast, the California PUC has applied the non-discrimination rule to limit SBC's reservation to the same period given an applicant to begin work under a pole license, and then only for imminent construction. *Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service*, R. 95-04-043, I.95-04-044, Decision 98-10-058 at page 75-76 (Cal PUC, October 22, 1998). Likewise, BA insists on reserving the capacity on anchors.

[9] Local Competition Order at paras. 1165-1170.

BA has not changed its position in 7.1.5 that anchor rods may be used only on a preemptible basis. Until its answers to discovery, BA also insisted on a discriminatory indemnity.

- BA insists that cable and CLEC "tag" their lines to permit ease of identification, but it will not tag its own lines. Its explanation in discovery is that BA crews can recognize BA lines by the nature of the equipment installed. This is incredible, because CLECs order from the same vendors. It is an unlawful discrimination in preference to BA. *Cavalier* specifically held that an attaching party cannot be forced to pay for engineering work that other parties are not required to perform.
- BA continues to insists upon subordinating third-party attachment rights to other parties' rights. It insists that cable remain a "licensee," which by law means a pre-emptible user without property rights of permanency. We submit that this is fundamentally inconsistent with the 1996 Act, which provides for rights of access. After much resistance, BA agreed to determine whether it had the authority under its joint ownership agreements to upgrade cable to at least a "customer" with greater rights. BA admits that it never followed up with NECTA.
- BA also has acknowledged that its internal requests for access to poles go through a process entirely different from that of unaffiliated attachers. Response to DTE-NECTA 1-33. Indeed, BA's witness, Gloria Harrington, acknowledged in hearings she has no responsibility for attachments requested by BA itself. BA's failure to adopt the same process for internal and third party requests is discriminatory.

E. ATTEMPTED NEGOTIATIONS

Under federal law, BA is required to take "all reasonable steps to accommodate requests for access and that before denying access based on a lack of capacity, the utility must explore potential accommodations in good faith with the party seeking access." *Cavalier Telephone, LLC v. Virginia Electric Power Co.*, PA No. 99-005, June 7, 2000; Local Competition Order at ¶1163. Perhaps knowing that its position was untenable under federal law, it has pursued a strategy of obfuscation and delay to try to skate past Checkist item three. This should not be accepted by the Department. The fact that BA has tried to misstate in its Supplemental Comments and discovery responses the dissatisfaction of NECTA and the licensee meeting participants with the revisions BA is proposing to make to its decades-old agreement bears on its credibility and should be taken into account in deciding whether BA has made a serious effort to comply with checklist three obligations.

Let us look at the undisputed record of the "negotiations." These discussions are documented in the three documents attached to NECTA's recently filed proposed discovery as Exhibits A (January 14, 2000 NECTA letter to BA), B (March 7, 2000 revised draft agreement from BA following February meeting) and C (March 29, 2000 memo from NECTA's expert to BA critiquing the draft and action items from February meeting). BA met with NECTA counsel, listened to our concerns, then lapsed into a pattern of broken promises and unyielding demands for improper contracts terms. BA offered no meaningful deadlines on BA performance or any right to remedy delays. Although NECTA identified overlashing and flexibility in titling cable plant to affiliates as important issues, the draft only makes the process more difficult. NECTA asked for clarification about the nature of the rights that BA has over poles jointly owned by BA

and electric utilities, which are the vast majority of the poles. Bell Atlantic had agreed to review BA Joint Ownership agreements to see if there were constraints on BA's ability to change cable's status, timetables and rights, or whether there were opportunities to change the JO agremeements. BA did not provide any followup. NECTA asked BA to change the legacy classification of cable and CLEC attachments from "licensee" to lessee, or customer. BA made no change to the status or its substantive aspects. BA agreed to put some overall statement into the document regarding BA's duty of care towards cable, but until called to account in discovery, offered nothing. NECTA asked for Gloria Harrington to produce the STI's (Standard Time Increments) behind the unit prices for due diligence, and BA claimed to be considering it. The data has never been produced.[10] The contract requires cable to pay a unit cost for post inspection, but leaves the amount blank. NECTA asked for a price quote, and has never received it until the latest discovery responses.

NECTA detailed its concerns in writing on March 29, 2000. Despite follow-up calls, BA has never responded to our critique. Instead, it continued to meet with cable and CLEC engineers, without the presence of the lawyers known to be representing NECTA members on these issues. It made no significant progress there. The open issues, including efforts to handicap overlashing and delay attachments, remain open and troubling. *Compare* BA Response to DTE-NECTA 4-7(c)(proclaiming how the new overlash and rebuild procedures were developed "in collaboration" with monthly licensees) and BA "Final Drafts" in response to DTE-ATT 1-18); with red-lined versions

[10] In response to DTE-NECTA 4-5(d) BA finally claimed to "attach" the information subject to protective order. The materials, however, were not attached or forwarded to our outside expert, Paul Glist.

submitted to BA for June meeting which strike out substantial portions of BA's proposed procedures for overlashing and rebuilds.

Now, in testimony BA attempts to paint a picture of rosy negotiations with NECTA and rosy discussions with licensees, while in discovery is attempts to offer a drib here and a drab there of contract changes. [11] BA did not make a serious effort to address the core cable and CLEC concerns articulated by NECTA and licensees about overlashing and rebuild restrictions and micromanagement of construction practices in the field without performance deadlines. These facts plus the discriminatory provisions that remain in the standard agreement justify denial of BA's request for certification of compliance with checklist item 3 as it relates to access to BA owned and controlled utility poles.

F. RELIEF REQUESTED FOR POLE ATTACHMENT VIOLATIONS

NECTA requests that the Department reject Bell Atlantic's application outright for non-compliance with checklist three in relation to access to pole attachments. Alternatively, the Department should expressly condition approval of BA's application on the following enumerated conditions:

1. BA should adopt the overlashing process agreed to by Bell Atlantic in Maryland (attached as Exhibit C) or, alternatively, the Massachusetts Electric (Exhibit B) or monthly licensee meeting (response to DTE-NECTA 4-8, Attachment 2).

[11] For example, although NECTA has been urging BA to conform its cost-reimbursement standards to Section 224(i) of the federal Communications Act, BA refused to do so—until its most recent filing in the case. Supplemental Comments, p. 49.

2. BA should adopt the rebuild provisions as modified by the licensees during the June 2000 hearing (response to DTE-NECTA 4-8, Attachment 3).

3. Attaching parties must be granted the right to perform makeready using contractors from an approved list in the event BA does not complete work within sixty days.

4. BA should eliminate all discriminatory clauses noted in Section II above including, but not limited to, (1) provisions that allow for termination of the agreement for any form of non-compliance so long as BA continues to permit affiliates of its joint pole owners to remain on poles without complying with legal requirements (2) any tagging requirement so long as BA does not require tagging of its own lines, and (3) any space reservation policies that provide BA with more time than that allowed for CLECs to attach their facilities to poles.

5. BA should file a revised agreement reflecting the above changes within 30 days after the Department's final order as a compliance filing. The Department should direct Bell Atlantic thereafter to negotiate in good faith with NECTA and other attaching parties to resolve remaining disputes about terms and conditions. If agreement is not reached within 180 days after the Department's final order, parties may petition the Department to resolve such disputes.

6. BA should file an approved list of contractors within 30 days of the Department's final order as a compliance filing.

The above requests will ensure that the most critical competitive issues (overlashing, rebuilds, deadlines, discrimination and the right to use contractors) are resolved immediately, and a process is established for finalizing language issues and resolving the remaining disputes.

III. OTHER CHECKLIST ITEM ISSUES

As discussed above, NECTA has focused its checklist compliance comments on checklist item three as it relates only to poles. This emphasis should not be understood to mean that NECTA has no concerns with Bell Atlantic's performance in other areas. To the contrary, the Department should investigate claims raised by other parties to ensure that Bell Atlantic truly complies with its obligations under Section 271. Although NECTA is not going to offer comprehensive argument, it notes at least the following areas as meriting special Department attention.

- The Department should review closely the remaining claims regarding conduit access raised by parties in this round of comments. Conduit is used by many of NECTA's members and affiliates. The serious issues associated with Bell Atlantic's access to conduit forced Bell Atlantic to revise its procedures approximately a half-dozen times over the past year. The Department should look at the remaining issues closely. Moreover, if the Department orders Bell Atlantic to amend pole attachment agreement provisions in order to comply with checklist three requirements, the Department also should ensure that counterpart provisions in the standard conduit agreement are amended as well.

- Testimony from MediaOne (a NECTA member) and other CLECs seems to suggest recurring problems with local number portability, particularly regarding out of service conditions on customers who order and then cancel or reschedule MediaOne's service on the day of install. This harms the customers involved and the reputation of MediaOne in its target markets. The Department should identify the root cause of these problems and ensure they are corrected before certifying that Bell Atlantic has complied with checklist item 11.
- BA's insistence on switched access rates rather than TELRIC rates for transport over BA's network has been contested by MediaOne and is under review in the latest phase of the long-standing arbitration between these parties. This is a serious issue that threatens to render uneconomic MediaOne's entry into the local telephone market. The Department should not find that Bell Atlantic has complied with its interconnection and UNE transport obligations pursuant to checklist items 1 and 5 without considering this issue.

IV. PUBLIC INTEREST CONCERNS

NECTA is concerned about a competitive imbalance that is occurring in Massachusetts and should be taken into account in the public interest process. As the Department is well aware, there are virtually no NXX codes remaining in the 508 and 617 area codes in Eastern Massachusetts. Relief won't occur at the earliest until May 2, 2001, one month after the end of the mandatory dialing periods for the new overlay codes, and over eight months from now. This shortage has prevented carriers (including

MediaOne) from securing numbers needed to launch local telephone service in competition with Bell Atlantic in many towns in these NPAs. Bell Atlantic, with its multiple NXX codes in every rate center, is not subject to this constraint.

This is precisely the type of situation that falls within the language of the New York Order that seeks to identify situations where "factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist," and thereby would not accord with the public interest. *Id*. at para. 422. The Department considered the evidence in the DTE 99-11 and related dockets and determined that area code relief can't be implemented until the Spring of 2001 and that no cost-effective conservation or pooling methods were available to help CLECs get numbers before that time. Due to this difficulty, Bell Atlantic is getting a competitive free ride in large portions of Eastern Massachusetts, and will continue to have one well into Spring 2001. NECTA recommends that the Department order that Bell Atlantic's entry into the in-region interLATA market not become effective until after other carriers obtain access to adequate numbering resources, namely, not earlier than May 2, 2001.

CONCLUSION

NECTA respectfully submits these comments on the substantive and procedural issues raised by the Department in its Orders dated January 24, April 24, 2000 and June 9, 2000. NECTA is pleased to participate in the critical docket for the development of local competition in Massachusetts and New England.

NEW ENGLAND CABLE TELEVISION ASSOCIATION, INC.

By its attorneys,

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