

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

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

**COMMENTS OF NEXTLINK MASSACHUSETTS, INC.
REGARDING BELL ATLANTIC’S PERFORMANCE ASSURANCE PLAN**

NEXTLINK Massachusetts, Inc. (“NEXTLINK”), by its attorneys, herein sets forth its comments on Bell Atlantic-Massachusetts’s (“Bell Atlantic”) proposed Performance Assurance Plan (“PAP”) and the Change Control Performance Assurance Plan (“CCPAP”). NEXTLINK is a facilities-based CLEC providing high capacity fiber optic networks to customers in 52 markets spread throughout 19 states.

I. INTRODUCTION AND SUMMARY

The FCC has made clear in the context of several prior 271 decisions that a BOC requesting 271 authority must demonstrate that it is subject to “appropriate self-executing enforcement mechanisms that are sufficient to ensure compliance with the established performance standards.”¹ The rationale behind *self-executing* enforcement mechanisms is promotion of swift development of local exchange competition by preventing competitors from

¹ *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan,*

being driven out of business because of forced litigation over operational issues each time they arise.² While NEXTLINK is cognizant that regulation alone will never be sufficient to deter anticompetitive conduct by a monopolist, it is imperative that the D.T.E. ensure that an appropriately tough regulatory backstop is in place to deal with the inevitable lapses in performance that will occur when and if 271 authority is granted to Bell Atlantic. Bell Atlantic-New York's post 271 failures demonstrate that the proposed PAP is inadequate and must be strengthened in order to realistically deter Bell Atlantic's discriminatory behavior. NEXTLINK submits herein that the proposed PAP be substantially modified to provide adequate financial disincentives including special access provisioning and provide for annual third party audits.

II. BELL ATLANTIC-NEW YORK'S POST 271 FAILURES DEMONSTRATE THAT THE PAP MUST BE STRENGTHENED IN ORDER TO DETER AND COMPENSATE FOR BELL ATLANTIC'S DISCRIMINATORY BEHAVIOR

The Bell Atlantic PAP and CCAP proposals, which mirror the New York plans, may be a start toward implementation of the self-executing remedies envisioned by the FCC. However, they also clearly fall far short of what is necessary to deter Bell Atlantic from engaging in discriminatory behavior, as evidenced by competitors' experience in New York over the past several months. The post-271 experience of competitors in New York already has taught competitors harsh lessons about the pitfalls that accompany premature grants of 271 authority.

Memorandum Opinion and Order, 12 FCC Rcd 20543, ¶ 394 (1997) (“*Ameritech Michigan Order*”).

² *In the Matter of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order (rel. October 13, 1998, ¶ 364).

The New York PAP, which relies almost exclusively upon the use of billing credits for competitive carriers who have suffered discrimination at the hands of Bell Atlantic-New York, has proven to be a woefully inadequate incentive for Bell Atlantic-New York to meet its wholesale performance obligations. Indeed, the ink was barely dry on the FCC's order granting Bell Atlantic-New York's 271 application when its wholesale performance began deteriorating. For example, Bell Atlantic-New York "lost" more than 2,300 AT&T orders between January 1 and February 11, 2000.³ As a result of complaints regarding Bell Atlantic-New York's abysmal OSS performance, the New York Commission conducted an investigation which concluded that "software defects and processing deficiencies have resulted in lost competitor carrier orders and/or missing and delayed status notifiers."⁴ Accordingly, Bell Atlantic-New York was ordered by the New York Commission to provide daily performance reports to the New York Commission regarding Bell Atlantic-New York's OSS performance, and further, the New York Commission reallocated certain relevant billing credits pursuant to the PAP.⁵ Besides incurring penalties imposed by the New York Commission, Bell Atlantic-New York was also fined substantially by the FCC. The FCC, apparently recognizing that the penalties under the New York PAP alone were inadequate to deter discriminatory behavior, entered into a consent decree with Bell Atlantic under which Bell Atlantic-New York agreed to

³ See *Comments of AT&T Communications of New York, Inc.*, Case 00-C-0008 (Feb. 23, 2000).

⁴ See *Order Directing Market Adjustments and Amending Performance Assurance Plan*, N.Y.P.S.C. Case 00-C-0008, *et al.* (Mar. 23, 2000).

⁵ *Id.*

pay a \$3 million fine to the U.S. Treasury.⁶ Under the terms of the consent decree, Bell Atlantic-New York faces additional liability up to \$24 million.⁷

As evidenced by Bell Atlantic's poor wholesale performance, within *days* of the FCC's grant of its 271 application on December 22, 1999, the PAP offers Bell Atlantic no incentive to perform in a nondiscriminatory fashion. The competitive local market in Massachusetts is now acutely susceptible to anticompetitive and discriminatory behavior by Bell Atlantic, and clearly, the PAP as it now stands will not prevent or deter such behavior. Bell Atlantic-New York has proven wrong the FCC's conclusion that "the total of \$269 million in potential bill credits placed at risk, on an annual basis, under all components of the performance plans represents a meaningful incentive for Bell Atlantic to maintain a high level of performance."⁸ Although local competition is continuing to develop in Massachusetts, NEXTLINK submits that the D.T.E. should learn from New York's experience and adopt a PAP that will ensure the development of robust competition for business and residential services. To that end, NEXTLINK suggests that the D.T.E. modify the PAP in the following ways: (1) the PAP must have sufficient monetary consequences to deter Bell Atlantic from behaving in a discriminatory fashion; (2) the PAP metrics must incorporate those that are most critical to competitors; and (3) the PAP must be modified so that the weighting and aggregation of performance metrics does not mask discriminatory performance.

⁶ See *FCC Release* "FCC Ensures Bell Atlantic Compliance With Terms of Long Distance Approval; Bell Atlantic Agrees to Pay Up to \$27 Million," (Mar. 9, 2000).

⁷ *Id.*

⁸ *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, CC Docket 99-295, Memorandum Opinion and Order __ FCC Rcd __, ¶ 435 (rel. Dec. 22, 1999) ("*Bell Atlantic-New York Order*").

III. THE PROPOSED PAP MUST BE SUBSTANTIALLY MODIFIED TO PROVIDE ADEQUATE FINANCIAL DISINCENTIVES, INCLUDE SPECIAL ACCESS PROVISIONING AND PROVIDE FOR ANNUAL THIRD PARTY AUDITS

A. Financial Disincentives to Engage In Discriminatory Behavior Must be Substantial

The FCC observed in the *Bell Atlantic-New York Order* that “potential liability under a performance enforcement plan matters.”⁹ NEXTLINK agrees that potential liability is a critically important component of an effective PAP. However, as proven in New York, the proposed cap on Bell Atlantic’s liability under the PAP will not deter Bell Atlantic from engaging in discrimination against competitors. The monetary consequences of Bell Atlantic’s discriminatory behavior unquestionably are outweighed by the benefits that Bell Atlantic will enjoy when it engages in behavior that prevents competitors like NEXTLINK from competing in the marketplace. When compared to the multi-million dollar revenue flows that Bell Atlantic will realize from local and long distance revenue streams in Massachusetts once Section 271 relief is granted, the \$269 million maximum annual penalty (*i.e.* billing credit) proposed by Bell Atlantic and adopted in New York is clearly insignificant.

NEXTLINK submits that the annual cap on the PAP must bear some rational relationship to the size of the benefits Bell Atlantic can and will gain when it engages in behavior that stifles competition. As the FCC’s Common Carrier Bureau Chief indicated in a letter to SBC, “the potential liability under a [performance assurance] plan must be high enough that an incumbent could not rationally conclude that making payments under an enforcement plan is an acceptable price to pay for hindering or blocking competition.”¹⁰ The proposed PAP does not

⁹ *Bell Atlantic-New York Order*, ¶ 436.

¹⁰ Letter from Lawrence E. Strickling, Chief, Common Carrier Bureau to P. Hill-Ardoin, SBC (Sept. 28, 1999).

come close to passing the test. Adoption by the D.T.E. of the \$269 million cap used in New York is inadequate for several reasons.

First, under the proposed PAP, even in those instances where discriminatory activity might lead to financial penalties, those penalties are far below the levels necessary to incent Bell Atlantic to provide nondiscriminatory service. Further, the PAP's use of billing credits, instead of monetary penalties, provides little incentive for Bell Atlantic to avoid discriminatory behavior toward CLECs. CLECs who receive a nominal bill credit from Bell Atlantic can never hope to restore the loss of credibility that the CLEC will suffer with their (former) customer. Thus, billing credit cannot under any circumstances come close to making a CLEC whole. This point cannot be over emphasized. It is NEXTLINK's desire to obtain quality performance from Bell Atlantic and hopes never to suffer the type of inadequate service that would result in a bill credit.

Besides relying upon inadequate financial penalties to encourage Bell Atlantic to provide nondiscriminatory wholesale service, the PAP allows Bell Atlantic to hide discriminatory practices through a weighting and penalty scheme that is tied to statistics rather than to the occurrence of discrimination. That is, Bell Atlantic's plan relies on an approach that utilizes aggregate measurements of performance. Under the proposed PAP, Bell Atlantic will be allowed to offset poor performance in one performance category with good performance in another category. Similarly, Bell Atlantic will be allowed to use good performance in a subsequent or prior month to offset poor performance in any other given month. Such offsets do not accurately depict Bell Atlantic's true performance, and do not deter poor performance and protect competitors from discriminatory behavior.

B. The Proposed PAP Permits Bell Atlantic To Discriminate Against CLECs and Masks Bell Atlantic's True Performance By Excluding Special Access Circuits Ordered By CLECs

In order for the PAP to accurately and effectively capture Bell Atlantic's true performance, the D.T.E. should close a significant "loop hole" and require the PAP metrics to include Bell Atlantic's performance in provisioning special access circuits to ensure nondiscriminatory treatment of CLECs regardless of the method by which they obtain a circuit, or how much it costs.

The proposed PAP has two parts. The first part evaluates the resale, UNE, interconnection, and collocation modes of market entry from a broad, market perspective. If Bell Atlantic fails to perform in any category or "mode of entry" it is subject to penalties in the form of a bill credit. The second part of the PAP evaluates Bell Atlantic's performance pursuant to eleven specific "Critical Measures." If Bell Atlantic fails a particular Critical Measure, CLECs that received substandard performance with respect to that measure will receive billing credit. As discussed above, BA's experience with lost and delayed CLEC orders in New York underscores the inadequacy of the proposed New York-style PAP, and the unreasonableness of merely transplanting that program in Massachusetts. NEXTLINK submits that the metrics included in the PAP in its current formulation do not adequately reflect or assess the consequences of Bell Atlantic's discriminatory behavior upon CLECs, and as a result, the proposed PAP will not effectively deter Bell Atlantic's discriminatory behavior.

Specifically, the PAP is deficient in that it excludes a metric to assess Bell Atlantic's performance in provisioning special access circuits to CLECs. Increasingly, facilities-based CLECs, investing in permanent telecommunications infrastructure in Massachusetts, serve customers through the purchase of circuits from the ILEC's special access

tariffs. These special access circuits are used to carry traffic between the ILEC's serving wire center and the CLEC's Point of Presence ("POP"), as well as large end-user customers of CLECs. On the other hand, circuits providing equivalent functionality are purchased by CLECs as combinations of unbundled network elements at TELRIC prices. Whether a CLEC purchases special access circuits or UNE combination circuits is transparent to the CLEC's end-user customer, who relies upon the circuit in any event. However, despite the critical role special access circuits play in a CLEC's ability to provide reliable service to customers, the existing PAP provides a loop hole for Bell Atlantic because it does not measure Bell Atlantic's performance in provisioning special access circuits to CLECs. Rather, the existing performance metrics are designed to capture only Bell Atlantic's performance in the provisioning of these circuits when purchased as combinations of UNEs.¹¹

The establishment of such a false dichotomy in the PAP metric is unreasonable. Indeed, for several reasons, it makes no sense to exclude special access circuits from the PAP metrics designed to capture Bell Atlantic's performance. The UNE and special access circuits ordered from Bell Atlantic are exactly the same circuits. The equipment used to service those circuits is located in the same Bell Atlantic central offices and use the same optical carrier systems. Moreover, many of the same Bell Atlantic engineering and outside plant personnel service these circuits. The propensity for an end-user customer of a CLEC to suffer service outages or network degradation is the same regardless of whether the customer's service is provisioned over a special access circuit, or whether provisioned over a circuit consisting of a UNE combination. In order for the PAP to accurately and effectively capture Bell Atlantic's true

¹¹ The FCC recently reaffirmed that combinations of elements may be purchased as UNEs. *See, e.g., In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, Supplemental Order, ¶ 4 (rel. Nov. 24, 1999).

performance, the D.T.E. should require that a PAP metric include Bell Atlantic's performance in provisioning special access circuits to ensure nondiscriminatory treatment of CLECs regardless of the method by which they obtain a circuit, or how much it costs. NEXTLINK's experience in New York underscores the need for special access circuits to be included in the proposed metrics. For example, Bell Atlantic's on-time performance for NEXTLINK's orders of special access circuits in New York has been as low as 19% and has never exceeded 67% in any given month. Yet, this poor performance is not included in the New York metrics, and would not be included in the proposed Massachusetts metrics, despite its significant impact on NEXTLINK's customers. NEXTLINK hopes that the D.T.E. would desire better protection for its consumers from this type of discriminatory service. Exclusion of these critical measurements from the PAP will serve only to grossly distort Bell Atlantic's true performance.

**C. The Proposed PAP Should Be Amended To Provide For Random
Third-Party Audits Of Bell Atlantic's Reports Within The First Two
Years Of Bell Atlantic's Entry Into the InterLATA Market**

In addition to supplementing the PAP metrics to include special access provisioning measurements, NEXTLINK submits that the PAP should be amended to provide for penalties in the event that Bell Atlantic is found to have inaccurately recorded and reported CLEC and Bell Atlantic service quality data. The PAP essentially puts the fox in charge of the hen house in that the PAP relies upon Bell Atlantic to "police" itself and provide accurate information about the quality of its performance. The only defense against Bell Atlantic misrepresenting its performance numbers is limited D.T.E. Staff audits of "selected portions of the [PAP] to assess whether [Bell Atlantic] is accurately recording and reporting CLEC and [Bell

Atlantic] service quality data”¹² In addition, the PAP allows “CLECs upon a showing of good cause” the right “to challenge the accuracy of the data and/or scores related to any measure [Bell Atlantic] reports in the monthly summary reports.”¹³ The audit is performed by an outside auditor and paid for by Bell Atlantic if the CLEC’s claim is substantiated.¹⁴ Missing from the PAP is any penalty in the event that Bell Atlantic is proven to have been lying or materially misrepresenting its performance. NEXTLINK submits that the mere threat of paying for an audit in the event Bell Atlantic is found to have misreported performance data is a wholly inadequate incentive for Bell Atlantic to provide accurate reports. Accordingly, NEXTLINK submits that the PAP should be amended to provide for random third-party audits of Bell Atlantic’s reports within the first two years of Bell Atlantic’s entry into the interLATA market. Audits would occur without advance notice to Bell Atlantic, and Bell Atlantic could not be audited more than two months in a twelve-month period. In addition, treble bill credits would be assessed for each occurrence where the audit revealed that Bell Atlantic had materially misrepresented its performance.

CONCLUSION

Implementation of the changes proposed by NEXTLINK herein may significantly improve the performance of BA and deter discrimination. The wholesale adoption of the New York PAP by the Massachusetts D.T.E. is not in the best interest of Massachusetts consumers, and will deter competition in the local telecommunications market. The D.T.E. should modify the proposed plan in the manner suggested by NEXTLINK prior to supporting any Bell Atlantic application for relief from Section 271 of the Telecommunications Act.

¹² See *Amended Performance Assurance Plan*, 18.

¹³ *Id.*

¹⁴ *Id.*

Respectfully submitted,

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