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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of the Petition of)
)
Bell Atlantic Corporation)
for Approval of Agreement)
and Plan of Merger)
with GTE Corporation)

CC Docket No 98-184

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COMMENTS OF CABLEVISION LIGHTPATH, INC. FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Cablevision Lightpath, Inc. ("Lightpath"), by its attorneys, hereby submits these comments in response to the Public Notice of the Federal Communications Commission ("Commission") in the above-referenced proceeding.^{1/} The transfer of control of GTE Corporation ("GTE") to Bell Atlantic Corporation ("Bell Atlantic") raises two major concerns for Lightpath. The first is the potential negative effect this merger will have on competitive local exchange carriers' ("CLECs") ability to secure pro-competitive interconnection arrangements. Given that interconnection agreements are approved by the state utility, Lightpath is specifically addressing this concern in state proceedings on the GTE/Bell Atlantic merger and brings it to the Commission's attention through the attached comments submitted to the New York Public Service Commission.² The second concern, which is addressed here, is the apparent intention of GTE and Bell Atlantic to contravene Bell Atlantic's legal obligations pursuant to section 271 of

^{1/} GTE Corporation and Bell Atlantic Corporation Seek FCC Consent for a Proposed Transfer of Control and Commission Seeks Comment on Proposed Protective Order Filed By GTE and Bell Atlantic, CC Docket No. 98-184, Public Notice (rel. Oct. 8, 1998).

² See Attachment, In the Matter of Petition of Bell Atlantic Corporation for Approval of Agreement and Plan of Merger with GTE Corporation, Comments of Cablevision Lightpath, Inc., New York Public Service Commission Case 98-C-1443 (filed November 20, 1998).

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the Telecommunications Act of 1996 to fully open its markets prior to its entry into the in-region long distance market.

INTRODUCTION AND SUMMARY

Lightpath is a facilities-based CLEC that provides basic and advanced telecommunications services in several states, including residential local exchange service in New York.³ As a CLEC competing against Bell Atlantic to provide telecommunications services, Lightpath seeks unimpeded entry into the local market. The entry of local competitors such as Lightpath will provide consumers with additional choices and spur further competition. Contrary to these goals, Bell Atlantic and GTE (collectively “the Parties”) seek Commission approval of a plan to circumvent the statutory requirement that Bell Atlantic open its local markets to competition before it may provide in-region interLATA services. To achieve this end, the Parties plan to seek “transitional relief” not contemplated in section 271 of the Telecommunications Act.

Lightpath urges the Commission to reject the Parties’ attempt to side-step the requirements of section 271. Both the Telecommunications Act and the Commission’s pronouncements concerning section 271 clearly indicate that the Commission cannot waive or suspend the 271 checklist requirements. Therefore, the Commission should either (i) condition its approval on Bell Atlantic gaining 271 approval throughout its region; or (ii) require GTE to divest its interest in GTE Long Distance customers that would be considered in-region, interLATA customers for Bell Atlantic post-merger.

³ Lightpath has introduced commercial service in Connecticut and will roll-out residential service there as well in the near future. It also has plans to further expand these services into its other key markets.

DISCUSSION

Due to their monopoly status, Bell Operating Companies (BOCs) have long been prohibited from entering the interexchange market within their regions. Prior to the passage of the Telecommunications Act, the Modification of Final Judgment prohibited the BOCs from providing in-region interexchange service, among other services, because of the likelihood that they would use their monopoly power in the local and exchange access markets to compete inequitably in the long distance market.^{4/} Congress deliberately retained this prohibition when it passed the Telecommunications Act.^{5/} Section 271 is the roadmap for BOCs seeking to lift that restriction. As the Commission has recently acknowledged: “Congress used the promise of long distance entry as an incentive to prompt the BOCs to open their local markets to competition.”^{6/}

To ensure that local markets open, section 271 of the Telecommunications Act sets forth fourteen stringent checklist requirements, among others, that Bell Atlantic and other BOCs must meet before the Commission can lift in-region interLATA services restrictions.^{7/} The Telecommunications Act does not compel compliance with the fourteen point checklist. Rather, it sets up an incentive-driven compliance regime: in exchange for voluntarily opening up their networks to local competition, BOCs are allowed to compete in the in-region interLATA services

^{4/} United States v. American Telephone and Telegraph Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom., Maryland v. United States, 460 U.S. 1001 (1983) (MFJ); see also United States v. Western Elec. Co., Civil Action No. 82-0192 (D.D.C. Apr. 11, 1996) (vacating the MFJ).

^{5/} H.R. Conf. Report No 104-458 at 1 (emphasis added). See also SBC Communications, Inc. v. FCC, 138 F.3d 410, 413 (D.C. Cir. 1998); see also 141 Cong. Rec. S8057 (daily ed. June 9, 1995) (statement of Sen. Dorgan) (“It is not fair for the Bell Operating Companies to have a monopoly in local service, retain that monopoly and get involved in . . . long distance.”).

^{6/} Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana, 1998 FCC LEXIS 5298 (October 13, 1998).

^{7/} See 47 U.S.C. § 271(c)(2)(B).

market. Although some BOCs have sought 271 authority, none of the applications, to date, have been successful. Bell Atlantic and GTE seek to avoid the checklist's challenging requirements and, at the same time, take advantage of section 271's prize.

Specifically, the Parties give little consideration to GTE's long distance customers in Bell Atlantic's region.⁸ The Joint Petition addresses the interest of these customers in a two-sentence footnote, stating that "Bell Atlantic *hopes* to have the needed Section 271 approvals by the time this merger closes. If that process is not complete, applicants will request any necessary *transitional relief* from the Commission."^{9/} However, as we explain immediately below, Bell Atlantic must either obtain 271 approval or GTE must divest its interest in GTE long distance. The granting of *transitional relief* is unprecedented and contrary to the Telecommunications Act; it would allow Bell Atlantic to reap the benefits of entering the interLATA services market while avoiding the checklist requirement to open its market.

Unlike the detailed state-by-state showing required by section 271, Bell Atlantic suggests that the Commission may "relieve" it of filing section 271 applications for certain areas in its 13-state region in order for it to provide long distance service in parts of that home region. Allowing GTE and Bell Atlantic to circumvent section 271 will diminish its incentive to open local networks, thereby slowing the development of local competition.^{10/} This result is neither

^{8/} One exception is the exploitative statement that "GTE's customer base alone will not generate sufficiently large volumes of long distance traffic to achieve the economies necessary to deploy a fully national long distance network." Joint Petition, Public Interest Statement at 19.

^{9/} Joint Petition, Public Interest Statement at 19 (emphasis added).

^{10/} Even with the full incentive of section 271 in place, Bell Atlantic has been slow to open its networks to competition. See Attached Comments of Cablevision Lightpath, Inc. filed with the New York Public Service Commission that detail how the proposed merger of Bell Atlantic and GTE will slow local competition in New York.

consistent with the intent of Congress nor a reasonable interpretation of the Telecommunications Act.

When Congress granted the Commission sweeping forbearance authority in section 10 of the Telecommunications Act, it specifically exempted the section 271 interLATA services restriction.^{11/} The Commission has repeatedly confirmed the absolute nature of the section 271 framework.^{12/} In section 271(g), Congress chose, instead, to enumerate specific statutory exemptions to the 271 prohibition.^{13/} These exemptions, however, only apply to “incidental services” and “are to be narrowly construed.”^{14/} The Parties’ suggestion that “transitional relief” is available ignores the specific limits of 271(g) and threatens to carve an exception that would swallow the rule.

In the absence of 271 approval throughout Bell Atlantic’s region, GTE must divest its holding in GTE Long Distance where it would result in the provision by Bell Atlantic, post-merger, of in-region interLATA service, prior to consummating the merger. GTE boasts that GTE Long Distance provides “long distance services in all 50 states, both within and outside the franchise areas served by GTE’s local telephone operations.”^{15/}

^{11/} 47 U.S.C § 160(d) (“the Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those requirements have been fully implemented.”).

^{12/} See, e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability; Petition of Bell Atlantic Corporation For Relief from Barriers to Deployment of Advanced Telecommunications Services, 1998 FCC LEXIS 4127 (August 7, 1998) (concluding that the Commission lacked the authority to forbear from section 271 prior to its full implementation); see also Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service (ELCS) at Various Locations, 1997 FCC LEXIS 3725, CC Docket No. 96-159 (July 15, 1997) (“while the Commission may forbear from applying certain provisions of the Act under certain circumstances, the Commission may not forbear from Section 271.”).

^{13/} 47 U.S.C. § 271(g).

^{14/} 47 U.S.C. § 271(h).

^{15/} <http://www.gte.com/AboutGTE/sbu/longdis.html> (visited November 19, 1998).

Despite the nationwide reach of GTE Long Distance, Bell Atlantic and GTE do not propose divestiture as an option to resolve the post-merger conflict with section 271. This is striking in light of the Parties' acknowledgment of the need to divest themselves of certain assets in other contexts. In two instances where the merger of their operations runs contrary to the Commission's rules, Bell Atlantic and GTE propose divestiture. The Parties admit that "GTE and Bell Atlantic currently hold interests in the cellular licenses for both channel blocks in [four separate] overlapping service areas."^{16/} Holding these assets would violate section 22.942 of the Commission's rules which prohibits the ownership of both cellular licenses in an overlapping area. To avoid conflict with section 22.942, the Parties agree that either Bell Atlantic or GTE will "divest its interest in each of these four markets at or prior to closing."^{17/} Similarly, the Parties hold attributable interests in broadband PCS and cellular spectrum, in eight markets, that exceed the spectrum cap of section 20.6 of the Commission's rules.^{18/} Once again, the Parties indicate that either Bell Atlantic or GTE may "divest sufficient interests in the licensed spectrum to comply with the CMRS spectrum cap."^{19/}

^{16/} Joint Petition at 3-4 (These four markets are: Greenville, SC- MSA #67; El Paso, TX- MSA #81; Anderson, SC- MSA #227; and Las Cruces, NM- MSA#285).

^{17/} *Id.* at 4.

^{18/} These markets include Miami and Tampa, FL; San Antonio and Houston, TX, New Orleans, LA; Richmond, VA; Chicago, IL; and Honolulu, HI.

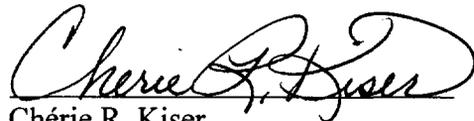
^{19/} Joint Petition at 6. The Parties indicate that they may seek waivers to avoid running afoul of Section 20.6. Unlike requirements of 271, the Commission has waiver authority over Section 20.6.

GTE and Bell Atlantic fail to propose divestiture of GTE Long Distance, however. The Commission has ample authority to condition approval of a merger on the divestiture of certain assets.^{20/} Lightpath urges the Commission to require divestiture absent timely 271 approval.

CONCLUSION

For the above reasons, the Commission should reject the Parties request for “transitional relief” from section 271, and either (i) condition its approval of the merger on Bell Atlantic obtaining 271 authority in the affected states; or (ii) require GTE to divest its interest in GTE Long Distance customers where such service would result in the provision by Bell Atlantic of in-region interLATA service, prior to consummating the merger.

Respectfully submitted,
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^{20/} See, e.g., Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc., 1998 FCC LEXIS 4774 (September 14, 1998)(conditioning the approval of the WorldCom/MCI merger on MCI's divestiture of its Internet assets to Cable & Wireless prior to the close of the transaction).

**Before the
STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

In the Matter of the Petition of)	
Bell Atlantic Corporation)	Case 98-C-1443
for Approval of Agreement)	
and Plan of Merger)	
with GTE Corporation)	

COMMENTS OF CABLEVISION LIGHTPATH, INC.

Pursuant to the New York Public Service Commission's ("PSC's") Ruling Requesting Comments issued October 30, 1998 ("Ruling"), Cablevision Lightpath, Inc. ("Lightpath"), by its attorneys, hereby files these comments in the above-referenced proceeding. Lightpath is a facilities-based competitive local exchange carrier ("CLEC") offering a range of high-quality, high-value telephone services in New York, including residential services,¹⁷ and has been making substantial investments in its plant and infrastructure in order to become a true competitor to the incumbent Bell Atlantic.

The basis for these comments is Lightpath's unfortunate experience in seeking to put in place interconnection arrangements with Bell Atlantic against the backdrop of the prior Bell Atlantic/NYNEX merger ("BA/NYNEX merger"), a merger that brought with it noted changes in attitude toward interconnection and distractions from the opening of markets. Now, Bell Atlantic proposes to expand even more, further increasing its market dominance and increasing the risk that Bell Atlantic's focus will be taken further away from the provision

¹⁷ Lightpath has introduced commercial service in Connecticut, will roll-out residential service as well in the near future, and has plans to further expand into other markets.

of services to CLECs. Given these forces, and given Lightpath's recent experiences negotiating interconnection arrangements with Bell Atlantic, Lightpath urges the PSC to protect in this decision against the slowdown of competitive entry by ensuring that existing interconnection arrangements in New York remain in place and can be renewed on the same terms and conditions. Without this protection, Bell Atlantic will have the ability to "hold up" competitive entry at the very time facilities-based carriers are making substantial investments in the market and are poised to roll out services broadly.

DISCUSSION

Before the Bell Atlantic/NYNEX merger and with the procompetitive policies of the NYPSC, Lightpath negotiated a comprehensive interconnection agreement with then-NYNEX. In New York, while Lightpath spent many months and many thousands of dollars in legal fees to obtain a fair interconnection agreement with NYNEX, NYNEX did ultimately sign an interconnection agreement prior to the need for a full arbitration process in August 1997, just days before the BA/NYNEX merger received final approval. NYNEX finally agreed to such critical procompetitive provisions as incident-based liquidated damages for poor performance, Extended Link at a fair blended provisional rate and a procompetitive interconnection architecture.

The ink was barely dry on the merger before it became clear that the "new" Bell Atlantic would adopt a considerably different and more litigious approach towards interconnection agreements. In October 1997, for example, Bell Atlantic notified Lightpath and other CLECs that, in light of the Eighth Circuit decision interpreting the local competition provisions of the Telecommunications Act of 1996 ("1996 Act"), it would no longer be honoring NYNEX's contractual commitments -- such as the commitment that Lightpath had secured in its New York

agreement -- for network element combinations, including Extended Link. What made such action especially noteworthy in Lightpath's case was that NYNEX had signed the New York interconnection agreement with Lightpath *after* the Eighth Circuit's decision and with full knowledge of it. (The matter remains in litigation before the PSC.)

More important, when Lightpath sat down to negotiate with Bell Atlantic for similar interconnection arrangements in New Jersey, Connecticut, and Massachusetts, it appeared to make sense to expedite the negotiations and ensure consistency to negotiate agreements with modifications for each state's specific requirements based on the New York template. The "new" Bell Atlantic, however, made clear it had no intention of working off of the New York interconnection agreement as the basis for agreements in these other states, even though just prior to the Bell Atlantic merger it had voluntarily signed the New York agreement. Rather, Lightpath would have to start its negotiations from scratch in each individual state, and the provisions of the New York agreement would not be on the table. In the post-merger Bell Atlantic view, Bell Atlantic would only agree to the key procompetitive provisions of the New York agreement if ordered to by a state commission.

At the same time that Bell Atlantic refused to agree to the procompetitive provisions of the New York agreement in these other states, it insisted on including certain provisions of its own that violate the letter and spirit of the Telecommunications Act of 1996. For example, Bell Atlantic insisted on including a provision that Lightpath make unbundled network elements available to Bell Atlantic, even though the 1996 Act is clear that only *incumbent* local exchange carriers are subject to unbundling requirements (all carriers, by contrast, are subject to resale requirements).

The upshot was that it took nine long months, *hundreds of thousands* of dollars in legal fees and other expenses, and the initiation of arbitration before state commissions for Lightpath to finally secure comprehensive interconnection agreements in these states on the terms and conditions similar to those it had agreed to in New York. Indeed, in one state -- New Jersey -- it took two decisions by the arbitrator to ensure that Bell Atlantic would enter into an agreement with Lightpath on the terms that an arbitrator and the Board has approved.²⁷

Given Lightpath's specific experience in dealing with BA in New York, Connecticut, Massachusetts, and New Jersey, Lightpath is very concerned that when it comes time (in less than two years) to renegotiate Lightpath's New York interconnection agreement, Lightpath will face a lengthy and expensive arbitration process over an agreement NYNEX voluntarily signed.

Bell Atlantic now comes to the PSC seeking to expand further by merging with GTE. If recent experience is any guide, the merger increases significantly the risk that Bell Atlantic will further be distracted from its focus on intercarrier arrangements, and that negotiating interconnection agreements will be even more difficult and problematic. This will be occurring just at the time Lightpath is making the investments and rolling out service in a broad-based way.

For these reasons, it is imperative that the PSC protect against the likely slowdown of competitive entry due to a merger by ensuring that existing interconnection arrangements in

²⁷ Bell Atlantic's approach to negotiating interconnection in New Jersey was the most troubling. Lightpath asked only that BA enter into an agreement modeled on the parties' New York agreement, adjusted as necessary to reflect differences in New Jersey regulatory policy. BA refused. From that point, it took Lightpath eleven months and a full evidentiary arbitration hearing, followed by still more post-hearing briefing, to obtain an interconnection agreement with BA in New Jersey. Not surprisingly, the final result in New Jersey was, again, an interconnection agreement much like the New York agreement, thanks in no small part to the Board of Public Utilities' pro-competitive arbitration. Yet, BA's strategy of delay again

New York remain in place and can be renewed automatically on the same terms and conditions. Without this protection, the enlarged Bell Atlantic will have the ability to "hold up" -- even if unintentionally -- competitive entry at the very time facilities-based carriers are making substantial investments in the market and are poised to roll out broadly.

Finally, Bell Atlantic and GTE justify their merger by claiming that the combined entity will enjoy significant efficiencies that will help reduce overall costs and give the company the necessary resources and confidence to enter new markets, such as high-speed data transmission, Internet services and long distance³⁷ -- markets which, Lightpath notes, are considerably more competitive at this point in time⁴⁴ than is the local phone market. Therefore, it would be ironic if Bell Atlantic and GTE were to refuse to commit, as part of their merger, to procompetitive measures (such as the one proposed here) that seek to give full-service CLECs a similar confidence to enter their new markets.

footnote continued

succeeded by requiring Lightpath to waste many months and incur substantial additional expenses to achieve a result that BA should have offered voluntarily.

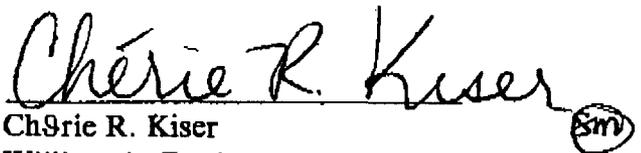
³⁷ Petition of Bell Atlantic Corp. for Approval of Agreement and Plan of Merger with GTE Corp. at ¶¶ 20-21, Case 98-C-1443 (filed with NYPSC Oct. 2, 1998).

⁴⁴ See Comments of the National Cable Television Ass'n, CC Docket No. 98-146 (filed with FCC on Sept. 14, 1998).

For the reasons stated above and in furtherance of the NYPSC procompetitive policies -- that have resulted in comprehensive and procompetitive interconnection agreements -- Lightpath urges the PSC to ensure, in the context of its merger review and approval, that Bell Atlantic cannot step away from its commitments in interconnection agreements to which it voluntarily agreed.

Respectfully submitted,

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November 20, 1998

CERTIFICATE OF SERVICE

I, A. Sheba Chacko, certify that on November 20, 1998, I caused an original and ten (10) copies of the Comments to be served by hand delivery on Debra Renner, Acting Secretary, New York State Department of Public Services, Empire State Plaza, Albany, New York, 12223-1350; and one (1) copy on each of the following parties via first class mail, postage prepaid.


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I, Lee A. Sawyer, hereby certify that on this 23rd day of October, 1998, I caused a copy of the foregoing "Comments of Cablevision Lightpath, Inc." to be sent by first class mail, postage prepaid to the following:



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