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November 23, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: CC Docket 98-184

Dear Ms. Salas:

Enclosed for filing in the above captioned matter, please find an original and twelve (12) copies of **Comments of Focal Communications Corporation In Opposition to Application For Transfer of Control**.

Please acknowledge receipt by date-stamping the enclosed extra copy of this filing and returning it to me in the envelope provided. If you have any questions regarding this filing please contact me at 202/424-7791.

Sincerely,

Bob Zener

Robert V. Zener

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of	)	
	)	
GTE CORPORATION,	)	
Transferor	)	
and	)	CC Docket 98-184
	)	
BELL ATLANTIC CORPORATION,	)	
Transferee	)	
	)	
For Consent to Transfer of Control	)	

COMMENTS OF FOCAL COMMUNICATIONS CORPORATION IN OPPOSITION TO APPLICATION FOR TRANSFER OF CONTROL

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November 23, 1998

EXECUTIVE SUMMARY

1. This merger must be viewed in conjunction with the merger of SBC and Ameritech. Together, the two mergers would create a local market dominated by two giant companies, controlling over two-thirds of the access lines nationwide and an even larger share of business lines. The result would go a long way towards recreating the old Bell monopoly. Without the merger, GTE might well compete in the territories of the RBOCs with adjacent service territories. But after the merger, GTE would be deterred by the threat of retaliation against its newly-acquired urban service areas. A market dominated by two ILECs, with only two other ILECs of significant size, is likely to exhibit the classic oligopolistic feature of tacit mutual coordination. The ILECs remaining after these mergers are likely to continue the present geographic division of markets, as each ILEC realizes that any serious competitive challenge to another ILEC will elicit a retaliatory response.

In addition, the parties' record of abusing their monopoly position within their present regions should heighten the Commission's concern over the effects of this merger.

2. The merger will not make Bell Atlantic or GTE more likely to bring significant additional local exchange competition to other ILECs' regions; instead, they are less likely to do so, because in a market with only four major participants the prospect of retaliation is likely to induce a tacit market-sharing arrangement. Moreover, Bell Atlantic and GTE are already huge companies. Each individually has the assets and expertise to become significant competitors out-of-region. They obviously prefer to acquire out-of-region customers through the less risky

merger route. But once the Commission makes it clear that the merger route is no longer available, each company individually has the ability to compete out-of-region.

In any event, the merged company's initial plans for competition out-of-region are concededly focused on the satellite offices of Bell Atlantic's existing large business customers. But the large business segment of the local exchange market is already experiencing the development of significant competition. The merged company is not likely to bring serious out-of-region local exchange competition to smaller businesses or residential customers – the market segment where significant additional competition is most needed.

3. Approval of the merger subject to conditions would not be an effective way of addressing its anticompetitive effects. Bell Atlantic is already subject to conditions arising out of its merger with NYNEX; yet this has not been effective in halting the company's obstructive tactics. Additional conditions are unlikely to improve the situation significantly.

4. If the merger is approved, stringent market-opening conditions should be imposed, in addition to the conditions imposed in connection with the Bell Atlantic-NYNEX merger.

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

In the Matter of GTE CORPORATION, Transferor and BELL ATLANTIC CORPORATION, Transferee For Consent to Transfer of Control	))))))))))	CC Docket 98-184

COMMENTS OF FOCAL COMMUNICATIONS CORPORATION IN OPPOSITION TO APPLICATION FOR TRANSFER OF CONTROL

Focal Communications Corporation ("Focal") is a competitive local exchange carrier. It is authorized to provide resold and facilities-based local exchange service in California, Delaware, the District of Columbia, Florida, Illinois (in the Chicago LATA), Indiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Pennsylvania, and Virginia. Focal's affiliates have negotiated interconnection agreements with Bell Atlantic in New York, Delaware, New Jersey, and Pennsylvania; with Pacific Bell and GTE in California; and with Ameritech in Illinois and Indiana.

Focal opposes the Bell Atlantic-GTE merger. In conjunction with the SBC-Ameritech merger, the result will be to subject over two-thirds of the access lines in the country, including most of the major urban centers, to the control of two giant companies with a demonstrated propensity to resist the opening of their markets to competition. Given these companies' record of continued adherence to the monopoly model of the local exchange market, the Commission should not approve a merger which will extend their reach, increase their incentive to resist the market-opening measures required by law, and decrease whatever incentives might otherwise have developed for each company to compete in the other's region.

I. THE MERGER WILL HAVE AN ADVERSE EFFECT ON LOCAL COMPETITION

This merger, in combination with the merger of SBC and Ameritech, will transform the face of local competition in this country, creating a market in which two giant companies together control over two-thirds of the access lines and an even larger share of business access lines. Bell Atlantic already controls over 41 million access lines.[1] After merging with GTE, the combined company will have 63 million access lines,[2] or over one-third of the access lines in the country [3] and a larger share of large business access lines.[4]

The result will be to go a long way towards recreation of the old Bell system. But the Telecommunications Act of 1996 was designed to introduce competition into local exchange markets, not to resurrect the old Bell monopoly. The result is particularly egregious because

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1 Bell Atlantic Media Fact Sheet, http://www.ba.com/kit/ (visited Oct. 30, 1998)

2 "Bell Atlantic and GTE Agree to Merge," Press Release July 28, 1998.

3 FCC, Statistics of Common Carriers, Table 2.10.

4 SBC claims that "224 Fortune 500 companies are headquartered in the 13 states served by SBC, Ameritech, and SNET." Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation, Transferee, to SBC Communications Inc., Transferor, CC Docket 98-141 ("SBC/Ameritech Merger Proceeding"), Affidavit of James S. Kahan, ¶ 49 (atch. to SBC-Ameritech Description of the Transaction, Public Interest Showing and Related Demonstrations ("SBC/Ameritech Public Interest Statement"). Bell Atlantic serves 175 Fortune 500 headquarters. "Bell Atlantic and GTE Agree to Merge," Press Release July 28,1998, http://www.ba.com/nr/1998/Jul/19980728001.html That makes a total of 399 Fortune 500 headquarters for the two merged companies combined.

neither GTE nor Bell Atlantic has opened its own markets to competition by providing the network access and interconnection required by the 1996 Act. In particular, GTE has strenuously resisted implementation of the market-opening measures required by the Act, and has succeeded in keeping its current service areas totally untouched by significant competition. The Commission should not approve a consolidation of the two monopolies giving them increased market power, and an increased incentive not to allow competition in their own regions and not to engage in meaningful competition elsewhere.

Under section 7 of the Clayton Act, which the Commission must consider in reviewing proposed mergers,[5] the Commission is required to consider "not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future." United States v. Philadelphia National Bank, 374 U.S. 321, 362 (1963). The impact of the merger on future competition is a particularly important consideration in the dynamic and changing telecommunications market, and in light of the Congressional policy expressed in the Telecommunications Act of 1996 to develop a competitive local exchange market. There are at least two respects in which the extreme concentration that these mergers will bring about can be expected to have a severe adverse impact on the future of competition in the local exchange market.

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[5] Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc., CC ocket No. 97-211 (Sep. 14, 1998) ("MCI-WorldCom Order."), ¶ 9.

A. The merger will increase the incentive of the merged company to resist market-opening measures.

In Bell Atlantic/NYNEX, the Commission recognized that a merger between two large LECs may have an effect on the parties' willingness to cooperate with market-opening measures. That is because "[o]n any particular issue . . ., one incumbent LEC may have an incentive to cooperate with its competitors, contrary to the interests of the other LECs."[6] But the precedent set by cooperation on that issue "will reduce the others' ability to refuse to cooperate the same way." Id. "If two major incumbent LECs merge, however, this incentive [to cooperate] may be reduced. To the post-merger incumbent LEC, cooperation in one area may have untoward consequences in another and cooperation may be against the firm's overall interests." Id. As the Commission noted, "[t]his may result in the post-merger LEC cooperating less than the pre-merger incumbent LECs would have in enabling competition to grow."[7]

The danger of reducing incentives to cooperate with market-opening measures is particularly acute in this merger. At present, Bell Atlantic is seeking Section 271 approval for entry into the long-distance market in New York State, and presumably will do so in other States if its application for New York State is approved. Thus Bell Atlantic has at least some incentive to co-operate with market-opening measures, and has co-operated to some extent in market-opening measures (although, as described below, we do not believe it has done so sufficiently to comply with the 1996 Act). By contrast, GTE is already in the long-distance market. As a

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[6] Applications of NYNEX Corporation, Transferor and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, 12 FCC Rcd 19985 (1997) (" Bell Atlantic/NYNEX Merger Order"), ¶ 154.

[7] Id.

consequence, GTE has taken a totally recalcitrant attitude toward competition.[8] GTE's "scorched-earth" tactics have been extremely successful in keeping significant competition out of its service areas, where competitive penetration is significantly lower than in Bell Atlantic's region.[9] After the merger, the merged company will have to consider whether the possible benefits from agreement to market-opening measures that might have been persuasive for Bell Atlantic are offset by the "adverse" precedent set in terms of opening up the closed market in GTE service areas. With control of over one-third of the nation's access lines at stake, the merged company may well conclude that the benefits of cooperation in terms of Section 271

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[8] The difference between GTE and the RBOCs became apparent soon after the 1996 Act was passed. Ameritech's CEO was quoted as saying: "The big difference between us and them [GTE] is they're already in long distance. What's their incentive to cooperate?" "Holding the Line on Phone Rivalry, GTE Keeps Potential Competitors, Regulators' Price Guidelines at Bay," Washington Post, October 23, 1996, at C12.

[9] The success of GTE's tactics is well documented. In its response to the Second CCB Survey on the State of Local Competition, GTE reported the total of local lines it has provided to other carriers and the total lines it has in service, as of June 30, 1998. The number of total local lines GTE provided other carriers (Total Service Resale and UNE), as a percentage of its total lines in service, is: California - 0.9%; Florida - 1.7%; Hawaii - .02%; Illinois - .005%; Indiana - .0007%; Kentucky - 0.2%; Michigan - 0%; North Carolina - 0.2%; Ohio - .004%; Oregon - .03%; Pennsylvania - .01%; Texas - 1.1%; Virginia - .02%; Washington - .02%; Wisconsin - .06%. http://www.fcc.gov/ccb/local-competition/survey/responses Of the total lines GTE provided other carriers, slightly under1% were UNEs. Id.

The comparable figures for Bell Atlantic, while also disturbingly low, are an order of magnitude higher than GTE's figures. The number of total local lines Bell Atlantic provided other carriers (Total Service Resale and UNE), as a percentage of its total lines in service, is: Washington, D.C. - 0.75%; Delaware - 1.4%; Massachusetts - 2%; Maryland - 0.4%; Maine - 0.3%; New Hampshire - 1.1%; New Jersey - 0.4%; New York - 2%; Pennsylvania - 1.4%; Rhode Island - 0.8%; Virginia - 0.3%; Vermont - 0.2%; West Virginia - 0%. Id. Of the total lines Bell Atlantic provided other carriers, 12.3% were UNEs. Id.

approval are not worth the cost in terms of losing its total control over access lines in GTE service areas.

The merged company, in deciding whether to cooperate on particular market-opening issues, will also have to consider the impact of what it does on the CLEC it is dealing with. Many CLECs plan to operate in several markets and thereby achieve efficiencies by spreading overhead costs. Focal currently serves 13 MSA's (metropolitan statistical areas) in Chicago, New York, Philadelphia, and San Francisco; is under construction in 21 MSA's; and on track to reach a total of 42 MSA's in ten metropolitan markets by the end of 1999. If an ILEC, from which a CLEC such as Focal is seeking network access or interconnection can make entry in one market prohibitively expensive, a collateral effect may be to make entry in other markets more costly by increasing the overhead burden that the CLEC must recover from other markets. If those other markets are in another ILEC's territory, this collateral effect would not figure into the ILEC's calculation on how hard to resist market-opening measures. But where the ILEC covers a third of the country, it is likely that some of the other markets targeted by the CLEC will also be in its region. In these circumstances, making it more costly for the CLEC to operate in other markets within the merged company's expanded region would be an additional reason to resist and delay market-opening measures.

In short, the merger will give the merged company a huge and immensely valuable monopoly, which it will have every incentive to defend with all the considerable means at its disposal. Where the merger creates incentives for merged company to adopt the lowest common denominator of the parties' past attitude toward market-opening measures, rather than equalling or improving upon the parties' past behavior, the effect will be anticompetitive and the merger should be disapproved.

B. The merger will increase the incentive of the merged company to maintain the present geographical division of markets between ILECs.

1. The Commission has recognized that "[a]s the number of most significant market participants decreases, all other things being equal, the remaining firms are increasingly able to arrive at mutually beneficial market equilibria, to the detriment of consumers."[10] To date, the present ILECs, with few exceptions, have maintained a geographical division of markets by refraining from significant competitive forays into each other's territories – despite the fact that each ILEC has far more assets and far greater managerial and technical expertise in the provision of local exchange service than any CLEC. For the ILECs, that geographical division of markets represents a "mutually beneficial market equilibrium, to the detriment of consumers."

The present geographical division of markets, however, will not necessarily last. For example, in the SBC/Ameritech merger application, the applicants have told the Commission that the prospect of significant competition from large non-ILEC companies (such as MCI WorldCom) for the local exchange business of their large corporate customers has led them to conclude that they must compete out-of-region for these customers or risk losing their business in-region.[11] The evidence in that case also shows that Ameritech made a serious out-of-region competitive foray into the St. Louis market, and has obtained CLEC certification in several

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10 Bell/Atlantic/NYNEX, ¶ 121.

11 Affidavit of James S. Kahan, ¶ 13 (atch. to SBC/Ameritech Public Interest Statement).

states.[12] In this case, GTE acknowledges that it has "an imperative to compete given its island-like service areas in the other Bells' seas," and consequently "already has established a separate corporate unit to plan for entry into territory close to its own few urban franchise areas near Los Angeles, Dallas, Tampa, and Seattle."[13] GTE is also "currently testing the use of its own wireless switch in San Francisco to provide local wireline service in SBC territory."[14] In addition to those cities, GTE also shares an MSA or serves neighboring suburbs with several other urban areas presently controlled by various RBOCs: San Francisco, San Diego, Houston, Chicago, Cleveland, Indianapolis, Detroit, Orlando, Jacksonville, and Portland.[15] These areas are natural targets for competitive forays by GTE. GTE's Chairman and CEO has said he is "confident about GTE's ability to succeed in the competitive marketplace <u>without</u> entering into a major transaction or combination with another company. In other words, we can go it alone and win."[16]

But this merger, in conjunction with the SBC/Ameritech merger, lessens the likelihood that the merged companies will find it in their interest to disturb the "mutually beneficial equilibrium" represented by the existing geographical division of markets. In the SBC/Ameritech merger application, the parties candidly acknowledge that they expect any out-

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12 <u>SBC/Ameritech Merger Proceeding</u>, Ex Parte Letter dated October 13, 1998 from Antoinette Cook Bush, Counsel for Ameritech.

13 Application at 7.

14 Kissell Aff't ¶ 13.

15 SBC/Ameritech Public Interest Statement at 2.

16 GTE Corporation, Annual Report 1997, "Chairman's Message" (emphasis in original).

of-region competitive foray by the merged company to elicit retaliation by the incumbent LEC.[17] But neither they nor GTE and Bell Atlantic acknowledge the implications of the prospect of retaliation. An ILEC planning an out-of-region competitive foray has to consider whether the benefits of the possible additional business to be garnered outweigh not only the direct costs of conducting the competitive business, but also the cost of defending against a retaliatory competitive raid and the loss of business that might result.

For example, if GTE/Bell Atlantic were considering a competitive foray into Chicago and Los Angeles, it would have to consider whether the prospective benefits outweigh the losses from a retaliatory raid by SBC/Ameritech into New York City.

In these circumstances, the likely result is that both parties will find it mutually beneficial to refrain from competitive forays into each other's territory – thereby continuing to collect the profits from their own monopolies, while avoiding the risk and expense of competitive warfare in each other's territory. By increasing the degree of concentration and the prospect of one ILEC retaliating against the other's competition, the two mergers lessen the chance that the preliminary signs we are now seeing of a possible break in the present geographical division of markets among the ILECs will actually result in serious inter-ILEC competition.

2. This analysis is particularly relevant to the merger of GTE with another ILEC. The Commission has recognized, if a market participant has "something to lose" from

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[17] SBC/Ameritech Public Interest Statement at 7-8.

competition, it is more likely to participate in tacit market-sharing arrangements.[18] Absent the merger, GTE might not have much to lose by mounting competitive challenges in urban areas such as Los Angeles or Chicago or San Francisco. Given GTE's predominantly rural and suburban service areas, it would have less to lose if SBC/Ameritech were to retaliate; and SBC/Ameritech might decide that GTE's service areas are simply not an attractive enough target for retaliation.

But the calculation changes dramatically once GTE merges with Bell Atlantic. At that point, the possible targets for retaliation include New York City and the entire Boston-Washington corridor – markets teeming with lucrative business customers, presenting an attractive target for retaliation should the merged company ignite competitive warfare.

In addition, the two mergers would reduce the number of significant participants in the local exchange market from six to four (Bell Atlantic/GTE, SBC/Ameritech, US West and BellSouth). In the past, mergers have been disapproved because they would reduce the number of significant firms in the market to four and thereby increase the likelihood of tacit collusion.[19]

3. Both SBC and Ameritech, and Bell Atlantic and GTE, have argued that merger is necessary to give them the necessary resources to engage in out-of-region competition. As we discuss in more detail in Point II infra, this argument is specious. All these ILECs have

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18 Bell Atlantic/NYNEX Merger Order, ¶ 123.

19 FTC v. Elders Grain, Inc., 868 F.2d 901, 905 (7th Cir. 1989) (reduction to four firms "will make it easier for leading members of the industry to collude"); Hospital Corp. of America v. FTC, 807 F.2d 1381, 1387 (7th Cir. 1986) ("As a result of the acquisitions the four largest firms came to control virtually the whole market, and the problem of coordination was therefore reduced to one of coordination among these four.").

resources and revenues vastly exceeding several CLECs in the market, as well as much more experience in providing local exchange service.

But even if the argument were correct, it would cut the other way. If the larger size of SBC/Ameritech makes it a more credible competitive threat to Bell Atlantic/GTE, that is an additional reason for Bell Atlantic/GTE not to ignite a competitive battle between the two companies. And for the same reason, the additional resources of Bell Atlantic/GTE would help deter SBC/Ameritech from raiding its territory. For this reason as well, the sheer size and resources of the combined companies increase the incentive to adhere to a tacit agreement to maintain a geographical division of territory.

Recognizing that competition can be harmed "if a merger increases the potential for coordinated interaction by firms remaining in the post-merger market,"[20] the Commission has concluded that the local telecommunications market is a likely arena for merger-induced coordinated action because the incumbent LEC has information about its rival's activities, making it difficult for its rival to "cheat" on a tacit agreement.[21] The same analysis applies to the ILECs' geographical division of territories. SBC/Ameritech will obviously know when BellAtlantic/GTE is invading its territories, and vice versa, since each company's CLEC will need to have certification, interconnection agreements, collocation, and in many cases will have to lease local loops, before even beginning to solicit customers in the other's territory. In these circumstances, it would be impossible for either to "cheat" on a tacit agreement to maintain a

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[20] Bell Atlantic/NYNEX Merger Order, ¶ 121.

[21] Bell Atlantic/NYNEX Merger Order, ¶ 122.

geographical division. In short, a tacit mutual non-aggression pact between two giants, rather than competition, is the likely result of these mergers.

C. The Commission's concern over the anti-competitive effects of the merger should be heightened by the parties' past record of abusing their monopoly position within their current regions to resist implementation of the market-opening measures of the Telecommunications Act of 1996.

In reviewing this merger and the SBC/Ameritech merger, the Commission's principal focus should be the failure of the ILECs proposing merger to implement meaningfully the measures required by the Telecommunications Act of 1996 to open local exchange markets to competition. While other telecommunications markets are becoming competitive, the local market has remained stubbornly resistant to competitive reform – and this is the market that is of most concern to the average consumer.

Focal has had first-hand experience in dealing with Bell Atlantic's resistance to the market-opening measures required by the Telecommunications Act of 1996. In March, 1998, Focal formally notified Bell Atlantic of its intention to opt-in to the previously state commission approved interconnection agreements between Bell Atlantic and MFS in the states of Delaware, New Jersey, and Pennsylvania. Pursuant to its statutory right under Section 252(i), Focal requested that Bell Atlantic provide it with interconnection, access to unbundled network elements, and wholesale services for resale in Delaware, New Jersey and Pennsylvania "upon the same terms and conditions as those provided in" Bell Atlantic's approved interconnection agreements with MFS in those states, including all amendments to the agreements. Bell Atlantic responded by submitting to Focal versions of the MFS Agreements containing completely revised rate schedules and certain other minor changes.

Despite the fact that the MFS Agreements contained express language stating that certain rates were fixed for the term of the agreements, Bell Atlantic took the position that the rates contained in the agreements were superseded by subsequent state commission approval of its SGAT in Delaware, and rate decisions in New Jersey and Pennsylvania in which the respective state commissions established permanent rates to be provided to competitive LECs. Bell Atlantic unilaterally denied Focal's right to obtain the rates contained in the MFS agreements, and refused to execute such agreements unless Focal capitulated. Focal filed complaints in each of the states and has prevailed in Delaware, after being delayed for over seven months from obtaining an interconnection agreement in that state.[22] Focal's complaints against Bell Atlantic in New Jersey and Pennsylvania are still pending.[23] The identical issue arose in Maryland with another CLEC who also filed a complaint that prevailed.[24]

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22 In the Matter of the Complaint Filed by Focal Communications Corporation of Pennsylvania for Relief Against Bell Atlantic - Delaware, Inc. for Violating Section 252(i) of the Telecommunications Act of 1996 – PSC Complaint No. 312-98 (DE P.S.C. oral decision issued October 27, 1998).

23 In the Matter of the Petition for Relief of Focal Communications Corporation of New Jersey Against Bell Atlantic - New Jersey, Inc. for Violating Section 252(i) of the Telecommunications Act of 1996, Docket No. TC98060401. Petition of Focal Communications Corporation of Pennsylvania for Relief Against Bell Atlantic - Pennsylvania, Inc. for Violating Section 252(i) of the Telecommunications Act of 1996, Docket No. C-00981641.

24 Starpower Communications, LLC's Petition for Commission Determination of Rates, Order, ML Nos. 62554, 62269, 62639, and 62703 (MD. P.S.C. Sep. 14, 1998). It is Focal's understanding that even now, numerous other similar disputes have arisen with other CLECs in Bell Atlantic states.

In this case, Bell Atlantic's obstruction resulted in substantial delays to Focal's market entry. And in Pennsylvania and New Jersey, Focal still cannot obtain the interconnection terms to which it is entitled as a matter of law, nine months after its original request.

Focal has not yet had the opportunity to have significant dealings with GTE. But it recognizes that GTE, unlike Bell Atlantic, does not have to obtain Section 271 approvals for its long-distance service and thus lacks the incentive Bell Atlantic has to co-operate in market-opening measures. In addition, as described above (see footnote 9), GTE has an established record of keeping its own service areas almost entirely free from local exchange competition.

Given the apparent management philosophy of both companies -- particularly GTE -- of dedication to the continuing viability of the monopoly model of local telephone service, it is particularly likely that the merged company will succumb to the anti-competitive incentives created by this merger, rather than responding in a competitive manner to the forces of change currently at work in the telecommunications market.

II. THE MERGER IS NOT LIKELY TO BENEFIT THE PUBLIC BY MAKING THE MERGED COMPANY A VIGOROUS COMPETITOR IN OUT-OF-REGION LOCAL EXCHANGE MARKETS

1. Bell Atlantic and GTE argue that the merger will benefit local competition, claiming that the merged company will undertake an ambitious campaign to provide facilities-based local competition against other ILECs. They argue that neither merger partner alone could undertake such a campaign, but the merged company can and will.

The argument is not credible. GTE is already a huge company, fully capable of an out-of-region competitive campaign. Its 1997 revenues were \$23.2 billion and net income \$2.7

billion.[25] Bell Atlantic is also huge, with 1997 revenues of $30.2 billion and net income of $2.4 billion.[26] GTE and Bell Atlantic name AT&T, MCI WorldCom and Sprint as their principal competitors. Of these three, the 1997 figures show that GTE and Bell Atlantic are both larger than Sprint ($14 billion revenue, $952 million net income[27]), comparable to MCI WorldCom ($27 billion revenue, $592 million net income[28]), and smaller than AT&T ($51 billion revenue, $4.3 billion net income[29]). In terms of both revenues and net income, GTE and Bell Atlantic individually dwarf even the largest companies in the next tier of CLEC competitors.[30] They can hardly argue that they need to merge because one of their competitors (AT&T) is larger than they are. Under that rationale, mergers would always be allowable until only two companies were left in each market. And in any event, AT&T's larger size has not yet resulted in significant success in the local exchange market.

Moreover, the very substantial investments in foreign countries that GTE and Bell Atlantic have made abroad belie the assertion that they are incapable -- without this merger -- of

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25 GTE Corporation, 1997 Annual Report

26 Bell Atlantic, Investor Information, http://www.bell-atl.com/invest/financial/statements/income annual.htm (visited November 10, 1998)

27 Sprint 1997 Annual Report

28 WorldCom, SEC Form 10-K (1997); MCI, SEC Form 10-K (1997).

29 AT&T Earnings Commentary: October 26, 1998 3Q 1998 Appendices, http://www.att.com/ir/commentary/983q-cmnt-a.html#appendix-ii

30 A recent Merrill Lynch report estimated that as of the end of the first quarter of 1998, the CLECs collectively had a 3.5% share of the $101 billion annual local market revenues – amounting to approximately $ 3.85 billion. Merrill Lynch, "Telecom Services – Local, CLECs: What's Really Going On" (June 19, 1998), at pp. 5, 9.

doing business outside of their own regions. GTE's international operations "stretch from British Columbia and Quebec in the north, to the Dominican Republic, Puerto Rico and Venezuela to the south." Public Interest Statement at 14 n.10. Bell Atlantic has "wireless investments in Mexico, Italy, Greece, Slovakia and the Czech Republic, and wireline investments in the UK, Thailand, Indonesia and the Philippines." Id. The applicants have not explained why, if they can enter new markets abroad without merging, they cannot also do so in this country.

2. The applicants admit that GTE is already well-positioned to provide facilities-based competition in many cities where its network comes close to the city and/or it is already providing service in an adjacent area. Public Interest Statement at 1-2, 6-7. But, they contend, GTE lacks the relationship to major corporate customers that Bell Atlantic already has. GTE does not want to compete until it can obtain the advantage of "anchor customers" through a Bell Atlantic connection. Kissell Aff't ¶ 7.

But several of the CLECs already competing for large corporate customers do not have the advantage of existing "anchor customers." And yet the Commission has recognized that CLEC competition for large corporate customers is beginning to become significant.[31] Moreover, the "anchor customers" that MCI WorldCom and Sprint have were originally acquired the old fashioned way – by competing for them in the open market. There is no reason why GTE and Bell Atlantic cannot seek "anchor customers" in the same way. Basically, the "anchor customer" argument is a proposal by Bell Atlantic to use the customer relationships it obtained as a local exchange monopolist within its present region to leverage its way into out-of-region

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[31] MCI/WorldCom Merger Order, ¶¶ 172-182.

markets. Under this proposal, the merged company would be "employing [its] monopoly power as a trade weapon against [its] competitors." United States v. Griffith, 334 U.S. 100, 107 (1948). That does not represent a benefit of the proposed merger; instead, it is another anticompetitive effect.

GTE has ample resources to support an aggressive marketing campaign. It is already in several suburban markets adjacent to prime urban markets now controlled by RBOCs. It is already in a position to offer corporate customers long-distance and advanced data-transmission services. It should not need existing "anchor customer" relationships to mount a credible marketing campaign for out-of-region corporate customers, and to use that campaign as a platform for reaching smaller businesses and residential customers. The fact that it has not done so probably reflects the fact that the merger route is cheaper and less risky than competitive marketing, and thus will be pursued unless and until the Commission makes it clear that the merger wave in this industry has gone far enough.

3. Moreover, even if the merged company does engage in out-or-region competition, that competition will be focused on large business customers -- the one segment of the local exchange market which, the Commission has found, is already on the road to becoming competitive. GTE admits that the initial focus of the merged company's out-of-region competition will be to "build on Bell Atlantic's existing account relationships with large businesses." Kissell Aff't ¶ 7. In the MCI/WorldCom Merger Order, the Commission found that, while the incumbent LECs still dominate the larger business market, "they face increasing

competition from numerous new facilities-based carriers in serving the larger business market."[32] Thus, to the extent that the merged company's out-of-region competition plan is limited to a segment of the local market that is already becoming competitive – rather than bringing competition to the residential and small business segments where significant competition is not yet on the horizon -- the public benefit is limited.

The applicants argue that once they have built facilities to serve large business customers, they will have a platform from which to mount a credible competitive campaign for small business and residential customers. But other CLECs have built their own facilities to serve large corporate customers, without success in using this platform to bring significant competition to the market for small business and residential customers. In this segment of the market, it is still necessary to lease unbundled loops or engage in resale, and ILEC resistance has been successful in keeping competitive access to UNEs or resale at insignificant levels. Applicants have not claimed that their facilities will avoid the necessity of leasing unbundled loops to reach small business and residential customers, and there is no reason to believe that they will be any more successful at overcoming ILEC resistance than other CLECs have been.

Moreover, the merged company will face an disincentive to expanding any out-of-region competitive campaign beyond the large corporate customers with which Bell Atlantic has an existing relationship. As previously discussed, any out-of-region competitive campaign by the merged company's CLEC would carry the danger of retaliation by the incumbent LEC – a danger other CLECs do not incur, because they have no home region against which retaliation

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[32] MCI/WorldCom Merger Order at ¶ 172.

could be targeted. It is likely that, because of the danger of retaliation, the merged company will continue to participate in the present tacit agreement to divide territories, and refrain from any serious out-of-region competition.

SBC and Ameritech have argued that unless they pursue their own large corporate customers out-of-region, they will lose these customers to non-ILEC competitors offering to supply the customer's total communications needs in a nationwide package. If that is right, competition from "outsiders" may break down the present tacit division of territories among the ILECs as to large business customers. But there is no reason to believe that the tacit division would not still hold as to other market segments. The incumbent LEC will know when the merged company's CLEC is moving from the limited goal of serving large business customers with which it has an existing relationship within its home region, to the broader goal of competing for the rest of the incumbent's customer base. Thus the incumbent will have ample opportunity to develop retaliatory plans. And the prospect of retaliation – when added to all the problems that have prevented other CLECs that are not burdened with fear of retaliation from providing significant competition for smaller business and residential customers – is likely to keep the merged company's out-of-region campaign, if it occurs at all, confined to pursuit of large corporate customers.

In short, the merged company, if it competes out-of-region at all, is not likely to bring competition to the segments of the local exchange market that most need it. Thus the claimed public benefit from the merger in the local exchange market is very limited, and not sufficient to outweigh the merger's anticompetitive effects. The solution to the problems of local competition is to enforce the market-opening requirements of the Telecommunications Act of 1996 — not to approve an anti-competitive merger on the basis of a dubious promise that the merged company will successfully become a significant local competitor in markets where other large and well-financed CLECs have not yet been able to overcome the incumbent's resistance to market-opening measures.

III. THE ANTICOMPETITIVE EFFECTS OF THE MERGER CANNOT BE ALLEVIATED BY APPROVAL SUBJECT TO CONDITIONS

In the Bell Atlantic/NYNEX merger, the Commission took the approach of approving the merger subject to certain market-opening conditions. However, that approach has not been a success, as evidenced by MCI's recent complaint filed with the Commission charging Bell Atlantic with numerous violations of those conditions,[33] as well as by Focal's own experience with Bell Atlantic, described above. The essential problem with approval conditions is that the merger cannot be undone once it is approved, and the prospect of other penalties is unlikely to deter the merged company from resisting implementation of market-opening measures – particularly when monopoly control over one-third of the access lines in the country is at stake.

The likelihood that conditions to merger approval will be ineffective is particularly high where the merger, as here, is between parties with a history of resistance to the market-opening requirement of the Telecommunications Act of 1996. Given the parties' management philosophy which this history demonstrates, it is fair to expect that the merged company will also resist implementation of any market-opening conditions the Commission may attach to approval of the merger.

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[33] Complaint of MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc., File No. E-98-32 (filed Mar. 17, 1998).

IV. IF THE MERGER IS APPROVED, IT SHOULD BE SUBJECT TO STRINGENT MARKET-OPENING CONDITIONS

If this merger is approved, approval should be subject not only to the conditions imposed on the Bell-Atlantic/NYNEX merger, but also additional conditions needed to ensure that the merged company will truly open its markets to competitive entry. In addition, swift and certain sanctions are essential to address any failure to comply with these market-opening conditions.

A. Pre-Condition: Long-Distance Divestiture

Before the merger can become effective, GTE must divest itself of long-distance customers in every State in which Bell Atlantic or NYNEX provided wireline local exchange service, including customers in GTE's service areas in Virginia and Pennsylvania. The merged company and its operating affiliates will be either successors and assigns or affiliates of Bell Atlantic, and as such will be prohibited from providing interLATA service in any "in-region State" without Commission approval under Section 271. 47 U.S.C. § 271(b). "In-region State" includes any State in which Bell Atlantic of NYNEX (or its affiliates) were authorized to provide wireline local exchange service pursuant to the AT&T Consent Decree. 47 U.S.C. § 271(i)(1). The definition encompasses the entire State, including those areas in which GTE was providing service. Alternatively, if the new Bell Atlantic-GTE wants to retain these interLATA long distance operations in any of these States, it should be required to demonstrate compliance with Section 271 for the entire State.

B. Additional Conditions

If the merger is to be approved, further measures are needed to ensure that competition takes root in the new super-ILEC's service territories. Specifically, the Commission should address the following concerns in structuring conditions for merger approval:

1. Resale Restrictions and Pricing. The Commission should require the new Bell Atlantic-GTE to commit to eliminate unreasonable restrictions on resale and to provide greater wholesale discounts on resold services in accordance with the avoidable cost standard set forth in the Local Competition Order. For example, Bell Atlantic has repeatedly taken the position that whenever a customer under a contract service arrangement ("CSA") wants to switch the contracted service to a reseller, the customer may not avail itself of this competitive service option. While Bell Atlantic has already litigated and lost on this issue in several states,[34] it is still seeking to enforce this policy in other jurisdictions, and to impose termination penalties upon customers even if it will let them switch their contract services to a reseller. These unreasonable restrictions have no basis in law and serves only to deter end users from availing themselves of the competitive opportunities envisioned by the Act.

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[34] See, e.g., Complaint and Request of CTC Communications, Inc. for emergency relief against New York Telephone d/b/a/ Bell Atlantic-New York for violation of sections 251(c)(4) and 252 of the Communications Act of 1934, as amended, section 91 of the N.Y. Pub. Serv. Law, and Resale Tariff PSC No. 915, Case 98-C-0426, Order Granting Petition (N.Y.P.S.C. Sept. 14, 1998); CTC Communications Corporation Petition for Enforcement of Resale Agreement and to Permit Assignment of Retail Contracts, DR 98-061, Order No. 23,040 (N.H.P.U.C. Oct. 7, 1998).

2. Availability of Arbitrated Rates. In a number of states, GTE is declining to make available to other carriers those UNE prices and resold discounts that are the product of its arbitrations with AT&T. Because AT&T and GTE have not executed final interconnection agreements in many states, GTE prevents other CLECs from purchasing UNEs and resold services from GTE at the arbitrated rates. In essence, GTE would require each CLEC to relitigate the same cost studies to obtain these rates.[35] Quite simply, this is a barrier to entry that GTE has erected out of legal fiction. Requiring GTE to make its arbitrated rates available to all competitors will dramatically reduce the legal costs associated with competitive entry and spare state commissions the administrative burden of repetitive arbitration proceedings.

3. Special Construction Charges. The Commission should require the new Bell Atlantic-GTE to refrain from charging special construction charges to CLECs – or to the CLECs' end users – when such charges would not be charged to the merged company's own end user customers. Moreover, to the extent that such charges are imposed upon CLECs or their end users, the merged company should be required to provide justification for imposing these charges and forward-looking TELRIC analyses supporting their imposition if challenged.

4. IntraLATA Toll Dialing Parity. The Commission should require the new Bell Atlantic-GTE to provide 1+ intraLATA dialing parity in all states throughout its combined region by no later than February 8, 1999, if not otherwise required to implement dialing parity

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[35] See, e .g., US Xchange of Indiana, L.L.C. Petition for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions With GTE North Incorporated and Contel of the South, Inc. d/b/a GTE Systems of the South, Cause No. 41034-INT-01 (I.U.R.C. Feb. 11, 1998) (adopting AT&T-GTE arbitrated rates on an interim basis after GTE attempted to compel US Xchange to take higher rates).

sooner. In state after state, Bell Atlantic has litigated and lost on the position that it is not required to implement toll dialing parity by this date under the Act. While proceedings to consider this matter are pending in several states, clear direction from this Commission would remove any uncertainty in all jurisdictions going forward and save CLECs further costs in prosecuting such claims.

5. Interim Number Portability. Despite the fact that this Commission has ruled that interim number portability ("INP") costs should be recovered from competitors in a competitively neutral manner,[36] GTE has proposed in state after state that it should be permitted to recover the full incremental cost of providing INP from its competitors.[37] The Commission specifically rejected such a proposal in its Number Portability Order, and instead set forth a number of alternative mechanisms for states to consider in deciding how INP costs should be recovered. Rather than making competitors fight this issue all over again with GTE in yet another jurisdiction, this Commission should compel the new Bell Atlantic-GTE, as a condition of merger approval, to establish a competitively neutral INP cost recovery mechanism that is consistent with those set forth in the Number Portability Order.

6. Winback Programs. The Commission should issue a clear directive regarding the use of winback programs by Bell Atlantic-GTE, and the sharing of information between its retail and wholesale operations. To stop this anticompetitive, backdoor sharing of information, the

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[36] Telephone Number Portability, CC Docket No. 95-116, First Report and Order (rel. July 2, 1996), at ¶ 138 ("Number Portability Order").

[37] Docket 7702 (Hawaii P.U.C.); Cause No. 40618 (Indiana U.R.C.); Docket No. P-100, Sub133d (North Carolina U.C.).

Commission should establish that the merged company's winning back of a customer prior to switching over to the competitor's retail service is *prima facie* evidence of a violation of section 251 of the Act. Moreover, to ensure that Bell Atlantic-GTE's incentives to engage in such conduct are minimized, the Commission might consider establishing a window of time – perhaps 30 days – during which the merged company would be prohibited from contacting any customer that has switched to a competitor's service.

7. Combinations of UNEs. The Commission should require the new Bell Atlantic-GTE to provide technically feasible combinations of network elements at forward-looking cost-based rates. The refusal to provide network element combinations – or alternatively, the placement of limitations on the use of UNE combinations – has no basis in technology or in economics, and is merely a legal hurdle used to inhibit competitive entry.

8. Operations Support Systems. The Commission should require the new Bell Atlantic-GTE to commit to immediate development of operational support systems ("OSS") that will enable CLECs and other new entrants to provide service to their end users in parity with the service that the new ILEC provides to its end users.

9. Collocation Arrangements. The Commission should direct the new Bell Atlantic-GTE to provide more flexible collocation arrangements if the merger is approved. For example, the Commission should require the merged company to: (i) offer carriers access to less than 100 square feet of collocation space; (ii) allow carriers to use "cageless collocation;" and (iii) allow carriers to collocate equipment that is necessary for interconnection and the use of unbundled network elements, even if that equipment could also be used for other purposes.

10. Non-Recurring Charges. Bell Atlantic-GTE should be required to impose only reasonable, cost-based non-recurring charges ("NRCs") for services provided to competitors. In the resale context, where there is a retail analogue to the charge that would be imposed upon the reseller, these NRCs should be developed on the basis of an avoided cost analysis that applies a wholesale discount to the retail NRC. In the context of UNEs and where a retail analogue does not exist for a resale NRC (*e.g.*, a service migration charge), the NRCs should be developed using TELRIC principles.

11. Resale of Voicemail. If the merger is to be approved, Bell Atlantic-GTE should be required to make its voicemail services ("VMS") available for resale at an avoided cost discount, or at the very least, at the retail price for those services. Technical limitations and economic barriers prevent resellers from offering VMS in the same manner and at the same level of quality that the ILEC offers to its own customers. The inability to provide VMS places resellers at a competitive disadvantage, as they cannot offer an entire segment of the ILEC's customer base the VMS they have come to expect from the incumbent. Requiring Bell Atlantic-GTE to provide VMS for resale would eliminate the tying arrangement between the ILEC's local exchange service and its VMS, and provide resellers with the opportunity to compete for each and every customer in the ILEC's embedded customer base.

12. Performance Reports. The Commission should also require the combined Bell Atlantic-GTE to submit *monthly* performance reports, in lieu of the quarterly reports required in the context of the BA-NYNEX merger.[38] Since Bell Atlantic is already compiling data on a

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[38] Bell Atlantic/NYNEX Merger Order, at Appendix C.1.d.

monthly basis under the existing merger conditions, it should not be a significant additional burden to publish those results on a monthly basis as well. By contrast, a span of even three months can make a substantial difference in deciding whether to enter a market or in attempting to withstand the continuing anticompetitive conduct of an incumbent – especially one like the proposed Bell Atlantic-GTE company, which would have a monopolistic level of market share and bottleneck control of essential facilities across such a large span of the nation.

13. Performance Standards. Finally, the Commission should attach conditions to the merger compelling Bell Atlantic-GTE to satisfy certain levels of performance in providing interconnection services, UNEs, and resold services to competitors. For each reporting category imposed as part of Condition 12, the merged company should be required to meet a certain threshold of performance (whether it be a set interval or a specific success rate) so that carriers can determine with certainty when Bell Atlantic-GTE is discriminating in the provision of service.

We realize that the Commission tentatively concluded in its OSS rulemaking that it would be "premature" to develop performance standards.[39] There is no other means available, however, to ensure that Bell Atlantic-GTE will provide service in a nondiscriminatory manner. If the Commission believes there is not enough evidence on the record to establish sufficiently detailed performance standards, it could adopt interim performance standards that are based upon how Bell Atlantic-GTE provides service in the context of their retail operations. Specifically, the

[39] Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance, CC Docket No. 98-56, RM-9101, Notice of Proposed Rulemaking (rel. Apr. 17, 1998), at ¶125.

Commission could first direct Bell Atlantic-GTE to identify a level of performance that mirrors its own self-provisioning of service, and after several months of reports, the Commission could revisit this issue and adjust the standards as necessary. Alternatively, the Commission could utilize a "floating" standard of performance for each category, such that the standard for each month would be set by looking at Bell Atlantic-GTE's performance in running its retail operations during that month. In either case, these standards could be superseded once permanent performance benchmarks are established in the Commission's OSS proceeding.

C. Sanctions

More detailed conditions and more stringent reporting requirements are only a means to an end in minimizing the merged company's ability to discriminate against competitors. The larger question is whether CLECs will be able to do anything if they discover that the new Bell Atlantic-GTE is in fact engaging in discriminatory conduct or violating the merger conditions. Unfortunately, as the MCI Complaint demonstrates, reliance upon the Commission's complaint procedures may not bring speedy resolution. Thus, the Commission should establish a system of reasonable yet strict financial sanctions for failure to adhere to the performance standards incorporated in the merger conditions. For example, if the combined Bell Atlantic-GTE's performance in any category in which it is required to report falls below the level of performance it provides for its own operations for two consecutive months, the Commission should assess a fine of $75,000 for each month thereafter that the substandard performance in that category continues. The proposed amount of this fine has a sound basis, as Bell Atlantic has previously entered into interconnection agreements that provide for such liquidated damages in cases of performance breaches.[40]

Moreover, the Commission should create an entirely separate system of penalties to be imposed if Bell Atlantic-GTE violates any of the other, non-performance related merger conditions. For example, in instances in which the merged company ILEC fails to provide reports on a monthly basis or refuses to resell VMS to competitors, the Commission should impose a penalty of $500 per day for a continuing violation. As in the case of performance breaches, this amount also has a sound basis; 47 U.S.C. § 502 allows the Commission to impose such a fine for each and every day that a person willingly and knowingly violates any Commission rule, regulation, restriction, or condition. Such sanctions will avoid the need for lengthy, time-consuming, and expensive litigation in each case when Bell Atlantic-GTE fails to satisfy a condition of the merger.

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[40] *See* Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996 Dated as of June 25, 1996 by and between New York Telephone Company and MFS Intelenet of New York, Inc., at §27.3 (providing for liquidated damages of $75,000 for each specified performance breach by New York Telephone).

CONCLUSION

For the foregoing reasons, the merger should be disapproved. If it is approved, approval should be subject to stringent market-opening conditions.

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CERTIFICATE OF SERVICE

I, Teri Lee Amaya, hereby certify that on November 23, 1998, a true copy of **Comments of Focal Communications Corporation In Opposition to Application For Transfer of Control** was served on the following people via United States Postal Service first-class mail, postage pre-paid:

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