

EX PARTE OR LATE FILED

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
GTE CORPORATION,)
)
Transferor,)
)
and)
)
BELL ATLANTIC CORPORATION,)
)
Transferee,)
)
For Consent to Transfer of Control)

CC Docket No. 98-184

MOTION FOR PUBLIC NOTICE

Pursuant to Sections 1.41 and 1.744(c) of the Commission's rules, 47 C.F.R. §§ 1.41, 1.744(c), AT&T Corp. ("AT&T") respectfully requests that the Commission issue notice and set for comment the *ex parte* request made by Bell Atlantic Corp. ("Bell Atlantic") and GTE Corp. ("GTE") (collectively "Applicants") on February 24, 1999 ("BA-GTE Request") for "interim relief" from the requirements of Section 271 of the Communications Act of 1934, 47 U.S.C. § 271, in the above captioned proceeding. As set forth below, such notice is required by Section 309 of the Communications Act, 47 U.S.C. § 309.

BACKGROUND

On October 2, 1998, Bell Atlantic and GTE filed an Application with the Commission to transfer control of GTE's licenses to Bell Atlantic.¹ The Commission on October 8, 1998, issued

¹ Application for Transfer of Control, GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer of Control, *GTE Corporation, Transferor, and Bell Atlantic*

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a Public Notice, 47 U.S.C. § 309, inviting interested parties to comment on whether the license transfer would serve the public interest and whether the Commission should approve the Application.²

It was apparent from the outset that Applicants' request to transfer control of GTE's licenses to Bell Atlantic was barred by Section 271 of the Telecom Act of 1996 both as to GTE's long distance services and as to its internet backbone. Nevertheless Applicants, in their initial Public Interest Statement, relegated their discussion of how they intended to comply with the requirements of Section 271 to a single, two sentence footnote. Public Interest Statement at 19 n.14. According to Applicants, Section 271 would not come into play because Bell Atlantic was confident that it would obtain authority to provide in-state, interLATA services prior to closing this transaction in all the states in its region where GTE currently provides such services. In the event that Bell Atlantic was unable to obtain the necessary Section 271 authorizations, the Applicants stated only that they would "request any necessary transitional relief from the Commission." *Id.* Applicants did not provide the Commission with *any* information regarding the scope of GTE's internet facilities in Bell Atlantic's regions or how Bell Atlantic could operate these in-region facilities without first obtaining authority from the Commission pursuant to Section 271.

Although several commenters pointed out that Applicants' cursory treatment of this issue

(. . . continued)

Corporation, Transferee, for Consent to Transfer of Control, CC Docket No. 98-184 (Oct. 2, 1998) ("Application").

² Public Notice, DA 98-2035 (FCC Oct. 8, 1998) ("Notice").

was manifestly inadequate and incomplete,³ their Reply Comments provided no significant details on the transitional relief they might request. Instead, they simply reiterated that Bell Atlantic's Section 271 applications would be approved in the "vast majority of its states prior to consummating its merger with GTE," BA-GTE Reply Comments at 15, and in the absence of such relief, that the Commission had authority to grant limited relief from Section 271's requirements, *id.* at 16-18. And just like their initial Application, Applicants' Reply Comments did not specify any details on the interim relief they might request other than to suggest that such relief would implicate the Commission's authority to modify LATA boundaries. *Id.*

Now, nearly 5 months after submitting their Application, Applicants have for the first time acknowledged that Bell Atlantic will *not* obtain Section 271 relief in the "vast majority of its states prior to consummating its merger with GTE." Likewise for the first time, Applicants have provided the details of the "limited, interim relief" they seek in response to claims that Section 271 presently bars this merger. More specifically, Applicants have asked the Commission to undertake the following actions in the order approving the license transfer: (i) "the establishment of a single LATA for GTE Internetworking's existing businesses," that would take effect "once Bell Atlantic obtains long distance authority covering at least one-quarter of its lines" and that would last "for a period of two years, unless extended for good cause by the Commission," (ii) a requirement that GTE Internetworking "operate as a section 272 separate affiliate," and (iii) authorization for GTE to continue serving its long distance customers in Bell Atlantic regions for

³ See, e.g., Petition to Deny of AT&T Corp. at 36-37; Petition to Deny of Sprint Communications Co. at 55; Petition to Deny of MCI WorldCom at 53-55; Opposition of e.spire Communications, Inc. at 6; Comments of RCN Telecom Services, Inc. at 20.

“a reasonable period following the closing of the merger” in direct violation of Section 271. BA-GTE Request at 1.

These requests raise substantial public interest issues, including: (1) whether or not granting such interim relief is permitted under Section 271 of the Telecom Act of 1996, and (2) whether even if allowed under that statute, granting such relief here would *threaten* competition rather than enhance it. Accordingly, the Commission should issue notice and set for comment the *ex parte* request made by Applicants.

ARGUMENT

Even if notice and public comment on Applicants’ proposal were not legally required, such a process would nevertheless be necessary here because of the striking importance and far-reaching implications of Applicants’ new request to be broadly excused from the requirements of Section 271. Without doubt, this new request raises important legal and policy issues and, if granted, would work fundamental changes in the telecommunications industry. Indeed, permitting Bell Atlantic to offer interLATA telecommunications throughout its region while it concededly still has monopoly control of the local exchange market (as Applicants request) would be in gross violation of the Congressional scheme set out in Section 271 and would *threaten* competition, not enhance it.⁴

⁴ See *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147 *et al.*, Memorandum Opinion and Order, ¶¶ 80-82 (declining similar requests for a “global LATA” for data services, and concluding that “[s]uch far-reaching and unprecedented relief could effectively eviscerate section 271 and circumvent the procompetitive incentives for opening the local market to competition that Congress sought to achieve in enacting section 271”).

In any event, the opportunity for notice and public comment by all interested parties is legally required in this instance. Section 309 of the Communications Act, 47 U.S.C. § 309, requires the Commission to issue a public notice for “any substantial amendment” of an application for transfer of licenses except when the amendment is “minor.”⁵ The BA-GTE Request cannot be viewed as anything other than a major amendment to the original Application. That Request sets forth for the first time the form of Section 271 relief Applicants seek for Bell Atlantic to operate GTE’s long distance facilities, and the legal basis that, according to Applicants, allows the Commission to grant this relief. Accordingly, the Commission must issue a Public Notice for additional comments on the BA-GTE request.

Any doubt that the Commission must notice Applicants’ new request for additional comment is resolved by the D.C. Circuit’s recent decision in *Air Transport Association of America v. FAA*, Docket No. 98-1109, 1999 WL 110689 (D.C. Cir., March 5, 1999). There, applying a similar statute,⁶ the court invalidated the Federal Aviation Administration’s approval of an application to impose charges on air passengers because that agency had relied on information provided by the applicant that was never made available for comment. *Id.* at *6-*7. Like the BA-GTE Request, the supplemental information was *not* contained in the original application and therefore was “in effect a fundamental amendment of the application.” *Id.* at *6.

⁵ 47 U.S.C. § 309(b)-(c). Similarly, Section 533 of the Administrative Procedure Act, codified at 5 U.S.C. § 553, requires agencies to “fairly apprise interested person of the ‘subjects and issues’” in an application process. *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983) (*quoting American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 293 (3d Cir. 1977)).

⁶ Like the Communications Act, the Federal Aviation Act requires that the Federal Aviation Administration “provide notice and an opportunity to . . . interested persons to comment” on certain applications. 49 U.S.C. § 40117(c)(3).

Similarly, in *Washington Assoc. for Television and Children v. FCC*, 665 F.2d 1264, 1271 (D.C. Cir. 1981), the court held that an amendment “designed to improve the applicant’s public interest showing” was a major amendment within the meaning of Section 309(b). The BA-GTE Request is plainly designed to “improve the applicant[s’] public interest showing” as it is the first time Applicants have attempted to explain how their merger can be squared with the requirements of Section 271. Indeed, in so arguing, Applicants effectively concede that this issue is of “decisional significance,” *id.* at 1271, because absent the requested interim relief, Bell Atlantic is barred from operating a substantial portion of GTE’s assets.

Requiring additional notice and comment on this issue is fully consistent with the Commission’s past treatment of requests for modifications to LATA boundaries. In each of these proceedings, the Commission has issued a public notice and sought comments on the proposed changes.⁷ Most recently, the Commission sought comment on requests by the Regional Bell Operating Companies that the Commission create a large-scale “LATA” for packet-switched services (which, as noted above, the Commission rejected as outside the scope of its authority and, in all events, undesirable because “[s]uch far-reaching and unprecedented relief could effectively eviscerate section 271”).⁸ The Commission also has issued public notices and sought

⁷ See Memorandum Opinion and Order, *Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service (ELCS) at Various Locations*, 12 FCC Rcd. 10646 (1997); Memorandum Opinion and Order, *Petitions for LATA Association Changes By Independent Telephone Companies*, 12 FCC Rcd. 11769 (1997); Order, *Petition for Declaratory Ruling Regarding US WEST Petitions to Consolidate LATAs in Minnesota and Arizona*, 12 FCC Rcd. 4738 (1997).

⁸ Memorandum Opinion and Order, and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, ¶¶ 80-82 (Aug. 7, 1998).

additional comments in merger proceedings when parties have submitted new proposals, or substantial new data, after the close of original notice and comment. For example, when reviewing the Bell Atlantic-NYNEX merger, the Commission issued a public notice on Bell Atlantic's proposal to offer Internet Access Service in NYNEX states following the merger and requested that interested parties file comments.⁹ In light of the extensive, unprecedented, and (to say the least) highly controversial relief that Bell Atlantic and GTE now have requested from the Commission, simple due process requires that all potentially interested parties receive notice of the BA-GTE Request and are afforded an opportunity to comment on the request.¹⁰

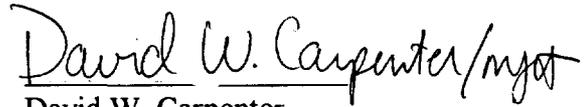
⁹ Public Notice, DA 97-1039 (FCC released May 16, 1997). *See also* Public Notice, DA 98-1059 (FCC June 4, 1998) (issuing public notice for comment on MCI WorldCom's *ex parte* regarding divestiture of MCI's internet facilities to C&W).

¹⁰ *National Soft Drink Ass'n v. Block*, 721 F.2d 1348, 1353 (D.C. Cir. 1983) (one of the primary purposes of the notice and comment requirements is "to insure fair treatment for persons to be affected by the regulations").

CONCLUSION

For the reasons stated above, the Commission should issue a Public Notice seeking comment on the BA-GTE Request.

Mark C. Rosenblum
Aryeh S. Friedman
295 North Maple Ave.
Basking Ridge, NJ 07920
(908) 221-2717


David W. Carpenter
Peter D. Keisler
C. Frederick Beckner III
Michael J. Hunseder
SIDLEY & AUSTIN
Chicago, IL 60604
(312) 853-7237

Attorneys for AT&T Corp.

March 16, 1999

CERTIFICATE OF SERVICE

I, Anishiya.. Anne Abrol, do hereby certify that, on this 16th day of March, 1999, I served a copy of the attached document via First Class mail on the following parties:

Maureen Lewis
Donald Vial
THE ALLIANCE FOR PUBLIC
TECHNOLOGY
901 15th Street, NW
Suite 230
Washington, DC 20005

John Vitale
BEAR, STERNS & CO.
245 Park Avenue
New York, NY 10167

David Ellen
CABLEVISION SYSTEMS, CORP.
One Media Crossways
Woodbury, New York 11797

Cherie R. Kiser
William A. Davis
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, NW
Washington, DC 20004-2608

Thomas K. Crowe
Elizabeth Holowinski
LAW OFFICES OF THOMAS K.
CROWE, P.C.
2300 M Street, NW
Suite 800
Washington, DC 20037

Debbie Goldman
George Kohl
COMMUNICATIONS WORKERS
OF AMERICA
501 Third Street, NW
Washington, DC 20001

James L. Gattuso
COMPETITIVE ENTERPRISE INSTITUTE
1001 Connecticut Avenue, NW
Suite 1250
Washington, DC 20036

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION
1900 M Street, NW
Suite 800
Washington, DC 20036

Patricia A. Stowell
DIVISION OF THE PUBLIC ADVOCATE
820 N. French Street
4th Floor
Wilmington, DE 19801

Charles W. Totto
DEPARTMENT OF COMMERCE
AND CONSUMER AFFAIRS
State of Hawaii
250 S. King Street
Suite 825
Honolulu, HI 96813

John Cook
INDIANA OFFICE OF UTILITY
CONSUMER COUNSELOR
100 North Senate Avenue
Room N501
Indianapolis, IN 46204-2208

Wayne R. Jortner
MAINE PUBLIC ADVOCATE OFFICE
112 State House Station
Augusta, ME 04333-0112

Theresa V. Czarski
MARYLAND PEOPLE'S COUNSEL
6 St. Paul Street
Suite 2102
Baltimore, MD 21202

Martha S. Hogerty
Michael F. Dandino
OFFICE OF THE PUBLIC COUNSEL
State of Missouri
Harry S. Truman Building
Suite 250
P.O. Box 7800
Jefferson City, MO 65102

Lawanda Gilbert
NEW JERSEY DIVISION OF
THE RATEPAYER ADVOCATE
31 Clifton Street
11th Floor
P.O. Box 46005
Newark, NJ 07101

Robert S. Tongren
Joseph P. Serio
Terry L. Serio
OHIO CONSUMER'S COUNSEL
77 South High Street
15th Floor
Columbus, OH 43266-0550

Robert T. Jenks
CITIZENS' UTILITY BOARD OF OREGON
921 Southwest Morrison
Suite 511
Portland, OR 97205-2734

Philip S. Porter
Nancy Vaughn Coombs
SOUTH CAROLINA DEPT.
OF CONSUMER AFFAIRS
2801 Devine Street
P.O. Box 5757
Columbia, SC 29250-5757

Rick Guzman
TEXAS OFFICE OF THE
PUBLIC UTILITY COUNSEL
P.O. Box 12397
Austin, TX 78711-2397

Billy Jack Gregg
Gene W. Lafitte, Jr.
CONSUMER ADVOCATE DIVISION
OF THE PUBLIC SERVICE
COMMISSION OF WEST VIRGINIA
700 Union Building
Charleston , WV 25301

Kathleen F. O'Reilly
MICHIGAN CONSUMER FEDERATION
414 A Street, SE
Washington, DC 20003

Ellis Jacob
DAYTON LEGAL AID SOCIETY
333 West 1st Street
Suite 500
Dayton, OH 45402

Christopher A. Holt
CORECOMM INC.
110 East 59th Street
New York, NY 10022

Eric J. Branfman
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, NW
Suite 300
Washington, DC 20007

Genevieve Morelli
THE COMPETITIVE
TELECOMMUNICATIONS ASSOCIATION
1900 M Street, NW
Suite 800
Washington, DC 20036

Robert J. Aamoth
Melissa M. Smith
KELLEY, DRYE & WARREN, LLP
1200 19th Street, NW
Suite 500
Washington, DC 20036

William L. Fishman
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, NW
Suite 300
Washington, DC 20007-5116

Martin O' Riordan
EMC CORP.
171 South Street
Hopkinton, MA 01748-9103

Riley M. Murphy
James F. Falvey
E.SPIRE COMMUNICATIONS
133 National Business Parkway
Suite 200
Annapolis Junction, MD 20701

Brad E. Mutschelknaus
Andrea D. Pruitt
KELLEY, DRYE & WARREN, LLP
1200 19th Street, NW
Suite 500
Washington, DC 20036

Renee Martin
Richard J. Metzger
FOCAL COMMUNICATIONS CORP.
200 N. LaSalle Street
Suite 820
Chicago, IL 60601

Russell M. Blau
Robert V. Zener
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, NW
Suite 300
Washington, DC 20007-5116

Eric J. Branfman
Morton J. Posner
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, NW
Suite 300
Washington, DC 20007-5116

Robert V. Zener
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, NW
Suite 300
Washington, DC 20007-5116

Barry Pinele
GST TELECOM, INC.
4001 Main Street
Vancouver, WA 98663

Janet S. Livengood
HYPERION TELECOMMUNICATIONS, INC.
DDI Plaza Two
500 Thomas Street
Suite 400
Bridgeville, PA 15017-2838

Dana Frix
Douglas G. Bonner
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, NW
Suite 300
Washington, DC 20007-5116

Angela D. Ledford
KEEP AMERICA CONNECTED
P.O. Box 27911
Washington, DC 20005

Kim D. Wallace
ALPHA ONE
127 Maine Street
South Portland, ME 04106

Sheldon E. Steinbach
AMERICAN COUNCIL ON EDUCATION
One Dupont Circle, NW
Washington, DC 20036

Florence Rice
HARLEM CONSUMER EDUCATION COUNCIL
Triborough Station
P.O. Box 1165
New York, NY 10035

Ann Gross
NATIONAL ASSOCIATION OF
COLLEGE AND UNIVERSITY BUSINESS OFFICERS
2501 M Street, NW
Suite 400
Washington, DC 20037

Patricia T. Hendel
NATIONAL ASSOCIATION OF
COMMISSIONS FOR WOMEN
8630 Fenton Street
Suite 934
Silver Spring, MD 20910-3803

Aliceann Wohlbruck
NATIONAL ASSOCIATION OF
DEVELOPMENT ORGANIZATIONS
444 North Capitol Street, NW
Suite 630
Washington, DC 20001

Garry A. Mendez, Jr.
THE NATIONAL TRUST FOR THE
DEVELOPMENT OF AFRICAN AMERICAN MEN
6811 Kenilworth Road
Riverdale, MD 20737

Milton J. Little, Jr.
NATIONAL URBAN LEAGUE
120 Wall Street
New York, NY 10005

Cherly Heppner
NORTHERN VIRGINIA RESOURCE CENTER
FOR THE DEAF AND THE HARD OF HEARING PERSONS
10363 Democracy Lane
Fairfax, VA 22030

Jordan Clark
UNITED HOMEOWNERS ASSOCIATION
655 15th Street, NW
Suite 460
Washington, DC 20005

Anne Werner
UNITED SENIORS HEALTH COOPERATIVE
409 3rd Street, SW
2nd Floor
Washington, DC 20024

Deborah Kaplan
WORLD INSTITUTE ON DISABILITY
510 16th Street
Oakland, CA 94612

Mary C. Albert
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, NW
Suite 300
Washington, DC 20007-5116

Terence J. Ferguson
LEVEL 3 COMMUNICATIONS, INC.
3555 Farnam Street
Omaha , NE 68131

Anthony C. Epstein
John B. Morris, Jr.
Stuart M. Rennert
JENNER & BLOCK
601 13th Street, NW
Washington, DC 20005

Lisa B. Smith
R. Dale Dixon, Jr.
MCI WORLDCOM, INC.
1801 Pennsylvania Avenue, NW
Washington, DC 20006

David N. Porter
Richard S. Whitt
MCI WORLDCOM, INC.
1120 Connecticut Avenue, NW
Washington, DC 20036

Linda F. Golodner
NATIONAL CONSUMERS LEAGUE
1701 K Street, NW
Suite 1200
Washington, DC 20006

Walter Fields
N.J. COALITION FOR
LOCAL TELEPHONE COMPETITION
P.O. Box 8127
Trenton, NJ 08650

Irwin W. Maloney
OCCIDENTAL PETROLEUM CORP.
1640 Stonehedge Road
Palm Springs, CA 92264

Eric J. Branfman
Eric N. Einhorn
SWIDLER, BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, NW
Suite 300
Washington, DC 20007-5116

Scott Blake Harris
Jonathan B. Mirsky
HARRIS, WILTSHIRE & GRANNIS, LLP
1200 18th Street, NW
Washington, DC 20036

Pat Wood, III
Judy Walsh
PUBLIC UTILITY COMMISSION OF TEXAS
1701 N. Congress Avenue
P.O. Box 13326
Austin, TX 78711-3326

Thomas A. Hart, Jr.
SHOOK, HARDY & BACON
1850 K Street, NW
Suite 900
Washington, DC 20006-2244

Russell M. Blau
William L. Fishman
Antony Richard Petrilla
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, NW
Suite 300
Washington, DC 20007-5116

Philip L. Verveer
Sue D. Blumenfeld
WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036

Eric J. Branfman
Harry N. Malon
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, NW
Suite 300
Washington, DC 20007-5116

Mark Buechele
David Dimlich
SUPRA TELECOMMUNICATIONS &
INFORMATION SYSTEMS, INC.
2620 S.W. 27th Avenue
Miami, FL 33133

Charles C. Hunter
Catherine M. Hannan
HUNTER COMMUNICATIONS LAW GROUP
1620 I Street, NW
Suite 701
Washington, DC 20006

TRICOM USA
One Exchange Place
Suite 400
Jersey City, NJ 07302

Judith D. O'Neill
Nancy J. Eskenazi
THELEN REID & PRIEST, LLP
701 Pennsylvania, Avenue, NW
Suite 800
Washington, DC 20004

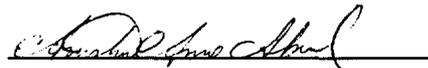
Leonard J. Kennedy
David E. Mills
Laura H. Phillips
DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, NW
Suite 800
Washington, DC 20036-6802

Alan Y. Naftalin
Peter M. Connolly
KOTEEN & NAFTALIN, LLP
1150 Connecticut Avenue, NW
Suite 1000
Washington, DC 20036

David J. Easter
US XCHANGE, LLC
20 Monroe Avenue, NW
Suite 450
Grand Rapids, MI 49503

Dana Frix
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, NW
Suite 300
Washington, DC 20007-5116

Eric J. Branfman
Morton J. Posner
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, NW
Suite 300
Washington, DC 20007-5116

A handwritten signature in black ink, appearing to read "Morton J. Posner", is written over a horizontal line.