

March 22, 1999

BY HAND

Magalie Roman Salas, Esq.
 Secretary
 Federal Communications Commission
 The Portals
 445 12th Street, SW
 Washington, DC 20554

RECEIVED
 MAR 22 1999
 FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

Re: GTE-Bell Atlantic Merger, CC Docket No. 98-184 /

Dear Ms. Salas:

This letter responds to Sprint's "Petition To Process Bell Atlantic-GTE Request for Relief As a Major Amendment To Application and for Issuance of Further Public Notice," filed on March 12, 1999.

Sprint argues, first, that our proposal for limited interim relief for BBN's Internet backbone and related businesses and for a 90-day transition period for GTE's long distance customers requires separate notice and comment. Second, without waiting for any such process, Sprint offers its own comments on the merits of the requested relief, arguing that the Commission has no legal authority to entertain the proposal. Sprint is wrong on both counts. Indeed, Sprint's filing only shows that all interested parties have already received adequate notice of our interim relief proposal.

A. *Public Notice and Comment.*

Sprint claims that our February 24th request for interim relief constitutes a "major amendment" to the companies' application for transfer of radio licenses and requires public notice under sections 309(b) and (c). Sprint Petition at 5-9. That is not so.

The proposal for interim relief does not require any amendment to the underlying application. The application disclosed all required information and fully anticipated the public interest issues implicated by the merger – including, in particular, the benefits for the Internet and for competition in long distance voice and data markets, among others, as well as the need for Bell Atlantic to obtain section 271 relief. Indeed, back in November, in response to the application, numerous third parties and opponents, including Sprint, filed extensive comments and petitions to deny that addressed the precise issue of 271 relief and argued that the merger cannot be in the public interest so long as Bell Atlantic has yet to receive all of its 271 approvals. GTE and Bell Atlantic, in turn, devoted an entire section of their December 23 joint reply comments to whether the 271 restriction poses an impediment to the Commission's approval of

No. of Copies rec'd 0412
 List A B C D E

Ms. Magalie Roman Salas

March 22, 1999

Page 2

the merger. Our February 24th submission simply elaborated on these comments. It was made at the request of the staff to propose a specific way for the Commission to complete its review of the merger and act on the license transfers before Bell Atlantic obtains full 271 authority. The proposal we made, moreover, closely tracked the solution we earlier outlined in our joint reply. The Commission has the authority to consider such proposals for resolution of specific issues in the context of the overall license transfer proceeding without initiating a whole new cycle of public notice and comment.¹

Even if the Commission determined that some special notice were appropriate in this instance, adequate public notice of the request for interim relief has already been given. In an adjudicatory proceeding, such as a license transfer review, notice requirements are satisfied so long as the Commission employs a procedure reasonably calculated to achieve notice, even if all parties do not actually receive notice. *See Katzen Bros., Inc. v. EPA*, 839 F.2d 1396, 1400 (10th Cir. 1988). That standard has been more than fully met here. GTE and Bell Atlantic placed their February 24th submission on the public record and served copies on all 43 parties to this proceeding. Moreover, the fact that the request was made and the specifics of the relief requested have been widely reported in the national press, with multiple stories carried by various newswire services, including Reuters, AP and Bloomberg, as well as articles published in national papers such as the *New York Times*. As shown by Sprint's March 12th filing, any party with an interest in the question of interim relief is on notice that the proposal is under consideration and is free to make any submission on the question the Commission deems appropriate.²

¹ In any event, even if our request for interim relief were treated as an amendment to the application, it would certainly not be a "major" amendment as classified by the Commission. *See* 47 CFR § 21.23(c) (1999), 47 CFR §§ 1.962(c), 22.123, 90.164, 101.29(c) (removed Dec. 14, 1998, *see* 63 FR 68904).

² If the Commission decided to solicit more formal comment on the proposal, it should set a prompt schedule for receiving comments, such as 10 days. The Commission used a similar procedure in connection with the Internet-related remedy proposed by the applicants in the MCI/WorldCom merger proceeding. *See Commission Seeks Comment on MCI Ex Parte Describing Internet Aspects of Proposed WorldCom and MCI Merger*, CC Docket No. 97-211 (June 4, 1998) (requesting comments in 7 days).

B. *The Commission's Legal Authority.*

On the merits, Sprint argues, predictably, that the Commission has no legal authority to grant the requested interim relief. This argument is not surprising, since Sprint operates one of the top three or four Internet backbone networks and has a clear interest in hobbling GTE's BBN business. In any event, Sprint is off the mark.

1. *90-Day Transition Period.*

Sprint devotes considerable effort to challenging our proposal for a 90-day period in which to transition GTE's voice long distance customers to other interexchange carriers in any state where Bell Atlantic still lacks 271 authority at the time of closing. Sprint Petition at 9-13. Contrary to Sprint's characterization, such a transition period would not constitute a "waiver" of section 271. Rather, it would be a perfectly appropriate exercise of the Commission's exclusive authority to enforce section 271.

As part of its enforcement authority, the Commission necessarily has the power to craft equitable remedies for achieving compliance with section 271 that impose minimal disruptions on customers. This enforcement authority is similar to the equitable remedial authority of courts to design enforcement decrees. The exercise of such authority here would be analogous to a situation where any company discovers in good faith that it is unwittingly in violation of a statutory requirement or where a requirement changes or is reinterpreted, and the Commission orders the company to come into compliance under a transition arrangement that avoids any unnecessary disruption of service to customers.³

As a practical matter, a reasonable transition period is necessary in this case to minimize disruptions for GTE's existing long distance customers, since GTE will have no way of knowing with certainty until the day the merger closes those Bell Atlantic states where it must exit the

³ The use of such transition arrangements by the Commission is common in the context of a transfer of control. For example, in the broadcast context, the Commission has granted applicants a temporary, fixed-period during which the applicant was directed to cure a violation of Commission's rules. Thus, where a broadcaster has acquired a series of stations nationwide, some of which lead to violations of the Commission's duopoly rule in certain markets, the Commission has granted the applicant a grace period in which to divest itself of the property. See, e.g., *Granite Broadcasting Corporation*, 13 FCC Rcd 13035 (1998); *Providence Journal Co.*, 12 FCC Rcd 2883 (1997), *Argyle Television, Inc.*, 12 FCC Rcd 10737 (1997). The Commission has also acted in a similar fashion, in at least one case, with respect to wireless licensees. See *Request of WirelessCo, L.P., PhillieCo, L.P., and Sprint Corporation For Limited Waiver of Section 24.204 of the Commission's Rules*, 10 FCC Rcd 11111 (1995) (permitting a one year period for divestiture purposes).

long distance business. Bell Atlantic expects to obtain 271 authority in one or more of its states by closing and expects to have additional 271 applications pending at the Commission, which could be granted right up until the moment of closing or very soon thereafter. The public interest is certainly not served by imposing disruptions on customers in anticipation of the closing if, in fact, those customers do not ultimately need to be transferred. Moreover, a short transition period for coming into compliance with section 271 can have no meaningful impact whatsoever on Bell Atlantic's continuing incentives to meet the 271 checklist requirements.

2. *Temporary Grandfather Protection for BBN.*

The limited temporary relief proposed for the BBN Internet-related businesses is also well within the policy discretion of the Commission. Sprint claims that such relief would be identical to the LATA modifications the Commission declined to approve in its *Advanced Services Order*, see Sprint Petition at 13-18, but that is not the case.

Whether styled as requests for forbearance or for LATA modifications, the petitions at issue in the *Advanced Services Order* sought an unconditional, categorical exclusion from 271 for all data services, for all Bell companies, for all time. In effect, such relief would have been a "blank check" for de novo entry by the Bell companies into all long distance data markets. No extensive record was developed in that proceeding to support the public interest benefits of such an upfront, categorical exclusion, and no existing businesses or existing customers were at stake. Under those circumstances, the Commission concluded that such blanket relief for data services would eviscerate, or at least substantially undermine, the Bell companies' incentives to comply with the requirements of section 271, and the Commission accordingly refused to grant the petitions for LATA "modifications." *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 Comm. Reg. (P&F) 1, ¶¶ 81-82 (1998) ("*Advanced Services Order*").⁴

At the same time, however, the Commission expressly recognized in the rulemaking proposal accompanying the *Advanced Services Order* that section 3(25)(B) of the Act does give the Commission independent authority to establish new LATAs or modify existing LATAs for particular services on a targeted basis, provided it does not undermine the Bell companies' 271 incentives. *Id.* ¶¶ 190-96. The present proposal fits easily within that authority.

⁴ Similarly, the *US WEST Order* that Sprint relies on, see Sprint Petition at 16, involved a very different sort of proposal than ours – one that would have created unconditional state-wide LATAs for all purposes, for all services. See *Petition for Declaratory Ruling Regarding US WEST Petitions To Consolidate LATAs in Minnesota and Arizona*, 12 FCC Rcd 4738 (1997).

First, Sprint ignores the fact that the proposed relief involves an exercise of the Commission's power to "establish" new LATAs, not "modify" existing LATAs. Section 3(25)(B) uses two separate terms – "establish" and "modify" – and under ordinary principles of statutory construction, it is presumed that those terms have distinct meanings and confer substantively distinct authority on the Commission. It is for the Commission, in its discretion, to determine the scope of this authority. GTE Internetworking (the former BBN) operates today without LATAs. Once it becomes an affiliate of Bell Atlantic, the Commission will need to "establish" one or more LATAs that apply to the BBN businesses for purposes of section 271. BBN's Internet backbone and related data networks, however, were never designed with traditional telephone LATAs in mind. There are no geographic borders on the Internet, and BBN's various categories of customers demand ubiquitous network coverage. Quite simply, BBN's services and networks cannot be conformed to "local access and transport areas" that were created to match the hierarchical structure of conventional circuit-switched networks. The Commission has the ability to create an appropriate new LATA for BBN under section 3(25)(B).

Second, the proposed relief would not be a categorical exclusion for all data services for all purposes; rather, it would be a case specific (and temporary) transitional "grandfather" protection for BBN's existing Internet and related data businesses. There is a strong public interest basis for this "grandfather" protection that is supported by the extensive record in the present merger proceeding, as well as by the Commission's earlier review of the MCI/WorldCom merger. Temporary relief for BBN will help protect the vitally important competitive balance of the Internet during a critical transition period, and will avoid needless service disruptions for the many businesses that rely on GTE's Internet service. Competition on the Internet is threatened by rapid consolidation in the backbone market, as the Commission recognized in its MCI/WorldCom order. The largest long distance carriers have quietly ballooned their positions on the Internet by gobbling up numerous smaller backbones. BBN's continued viability is critical to the competitive balance among backbones, since BBN (which is currently a distant fifth in the backbone market) is the only top-tier provider that is *not* one of the big long distance carriers. To hold its own in that market, BBN must continue to grow the amount of traffic it carries on its network if it is to keep pace with the top tier providers, and that imperative is one of the drivers behind the merger of GTE and Bell Atlantic. Whether BBN succeeds and the Internet remains competitive may well be determined over the next two to three years, as the long distance carriers rapidly solidify their market positions.

Third, we have proposed several critical conditions on the interim relief for BBN, none of which was proposed in the *Advanced Services* proceeding:

- The narrow relief for BBN would be conditioned on Bell Atlantic's first demonstrating its commitment to satisfying the section 271 requirements by obtaining long distance approval

from the Commission for states that account, at a minimum, for one-quarter of Bell Atlantic's local access lines.

- The relief would only be effective for a period of two years following the closing of the GTE/Bell Atlantic merger. This two-year limitation will create a powerful additional incentive for Bell Atlantic to move aggressively to obtain long distance approval in all of its remaining states.
- The BBN business covered by the relief would have to be operated as a fully separate affiliate meeting the requirements of section 272 of the Act.
- The BBN affiliate would not market or sell any voice-only products over IP, either on a stand-alone basis or as part of a bundled package of services, in any states where Bell Atlantic lacks 271 authority. This limitation will further increase the pressure on Bell Atlantic to achieve full 271 authority during the period of interim relief, since even BBN's existing data services will rapidly become non-competitive if the new company cannot offer voice as part of BBN's suite of services.⁵

These conditions will ensure that Bell Atlantic maintains every incentive to satisfy the checklist, and, indeed, they will actually reinforce and *increase* that incentive.

Finally, comparing the size of the Internet backbone market in which BBN is a participant to the overall traditional long distance market clearly shows that, even with the interim relief, the vast bulk of the long distance business within the Bell Atlantic states will remain forbidden to the new company until Bell Atlantic obtains full 271 authority. We estimate that the total annual revenues generated by the Internet backbone market nationwide are between \$4 and \$5 billion. By contrast, total nationwide revenues generated by traditional long distance services are approximately \$100 billion. *See* James Zolnierok, Katie Rangos, James Eisner, Industry Analysis Division, Common Carrier Bureau, FCC, "Long Distance Market Shares – Third Quarter 1998," Dec. 1998, table 3.1 (total operating revenues for long distance service providers, 1997). In addition, of course, until Bell Atlantic obtains full 271 authority, the new company will continue to be disadvantaged against competitors who can provide a full complement of bundled services, including voice service.

⁵ *See also* Joint Letter of GTE and Bell Atlantic to Thomas Krattenmaker, CC Docket No. 98-184 (filed March 8, 1999); Joint Letter of GTE and Bell Atlantic to Thomas Krattenmaker, CC Docket No. 98-184 (filed March 15, 1999).

Ms. Magalie Roman Salas

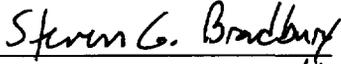
March 22, 1999

Page 7

Conclusion

Sprint's petition should be rejected. The proposed relief does not require any formal or drawn-out notice and comment procedure, and the authority to grant the relief is well within the policy discretion of the Commission. Under the proposal we have made, Bell Atlantic would be required to demonstrate that it is seriously committed to satisfying section 271 as an upfront condition of any relief for BBN. And while the limited relief will protect BBN's existing business during a critical interim period, the two-year limitation on that protection and the bar on marketing or selling voice-only products actually will *strengthen* Bell Atlantic's incentive to meet the requirements for full 271 relief as promptly as possible.

Very truly yours,

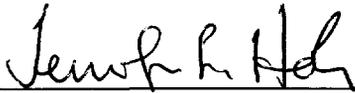

Steven G. Bradbury (by meq)
Counsel for GTE


Michael E. Glover
Counsel for Bell Atlantic

cc: T. Krattenmaker
C. Wright
W. Rogerson
D. Stockdale
M. Carey
M. Kende
T. Troung
J. Lanning
S. Diskin

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March, 1999, copies of the foregoing Letter Responding to Sprint's "Petition To Process Bell Atlantic-GTE Request for Relief As a Major Amendment To Application and for Issuance of Further Public Notice" were sent by first class mail, postage prepaid, to the parties on the attached list.



Jennifer L. Hoh

* Via hand delivery.

ITS*
1919 M Street, NW
Washington, DC 20554

Chief*
International Bureau
Federal Communications Commission
2000 M Street, NW
Room 800
Washington, DC 20554
(2 copies)

Chief
Commercial Wireless Division
Federal Communications Commission
2100 M Street, NW
Room 7023
Washington, DC 20554

CTC Communications Corp.
William L. Fishman
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW
Suite 300
Washington, DC 20007-5117

Consumers Union and CFA
Gene Kimmelman
Consumers Union
1666 Connecticut Ave., NW
Washington, DC 20009

Janice Myles*
Michael Kende*
To-Quyen Truong*
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW, Room 544
Washington, DC 20554

Jeanine Poltronieri
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW
Room 5002
Washington, DC 20554

John Vitale
Bear, Stearns & Co., Inc.
245 Park Avenue
New York, NY 10167

Cablevision Lightpath, Inc.
Cherie R. Kiser
William A. Davis
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo
701 Pennsylvania Ave., NW
Washington, DC 20004-2608

Corecomm LTD.
Eric Branfman
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW
Suite 300
Washington, DC 20007-5116

Dr. Mark Cooper
Consumer Federation of America
1424 16th Street, NW
Washington, DC 20036

Communications Workers of America
Debbie Goldman
George Kohl
501 Third St., NW
Washington, DC 20001

e.spire Communications, Inc.
Brad E. Mutchelknaus
Andrea Pruitt
Kelly, Drye & Warren, LLP
1200 19th Street, NW
Suite 500
Washington, DC 20036

Commonwealth of the Northern Mariana Islands
Thomas K. Crowe
Elizabeth Holowinski
Law Offices of Thomas K. Crowe, PC
2300 M Street, NW
Suite 800
Washington, DC 20037

GST Telecom, Inc.
Barry Pineles
GST Telecom, Inc.
4001 Main Street
Vancouver, WA 98663

Competitive Enterprise Institute
James L. Gattuso
Competitive Enterprise Institute
1001 Connecticut Ave., NW
Suite 1250
Washington, DC 20036

EMC Corporation
Martin O'Riordan
171 South Street
Hookinton, MA 01748-9103

Consumer Groups
Patricia A. Stowell
Public Advocate
Division of the Public Advocate
820 N. French Street
4th Floor
Wilmington, DE 19801

Focal Communications
Russell M. Blau
Robert V. Zener
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW
Suite 300
Washington, DC 20007-5116

Freedom Ring Communications
Morton J. Posner
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW
Suite 300
Washington, DC 20007-5116

Competitive Telecommunications Association
Robert J. Aamoth
Melissa Smith
Kelley, Drye & Warren, LLP
1200 19th Street, NW
Suite 300
Washington, DC 20036

Hyperion Telecommunications
Douglas G. Bonner
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW
Suite 300
Washington, DC 20007-5116

National Small Business United
Todd McCracken
1156 15th Street, NW
Suite 1100
Washington, DC 20005

International Brotherhood of Electrical Workers
J.J. Barry
1125 Fifteenth Street, NW
Washington, DC 20006

USDA
Christopher A. McLean, Deputy Administrator
Rural Utilities Service
Washington DC 20250

Keep America Connected, et al.
Angela D. Ledford
Keep America Connected
PO Box 27911
Washington, DC 20005

KMC Telecom, Inc.
Mary C. Albert
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW
Suite 300
Washington, DC 20007-5116

Indiana Utility Regulatory Commission
William McCarty
302 West Washington Street
Suite E306
Indianapolis, IN 46204

Level 3 Communications, Inc.
Terence Ferguson
3555 Farnam Street
Omaha, NE 68131

MCI WorldCom, Inc.
Lisa B. Smith
R. Dale Dixon, Jr.
MCI WorldCom, Inc.
1801 Pennsylvania Ave., NW
Washington, DC 20006

David N. Porter
Richard S. Whitt
MCI WorldCom, Inc.
112 Connecticut Ave., NW
Washington, DC 20036

National Consumers League
Linda F. Golodner
National Consumers League
1701 K Street, NW
Suite 1200
Washington, DC 20006

PaeTec Communications, Inc.
Eric Branfman
Eric Einhorn
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW
Suite 300
Washington, DC 20007-5116

Pilgrim Telephone, Inc.
Harris Wiltshire & Grannis, LLP
Scott Blake Harris
Jonathan B. Mirksy
1200 18th Street, NW
Washington, DC 20036

Public Utility Commission of Texas
Pam Whittington
1701 N. Congress Ave.
PO Box 13326
Austin, TX 78711-3326

RCN Telecom Services, Inc.
Russell M. Blau
Antony Richard Petrilla
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW
Suite 300
Washington, DC 20007-5116

Sprint Communications Company, LP
Philip L. Verneer
Sue D. Blumenfeld
Michael G. Jones
Willkie, Farr & Gallagher
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036

State Communications, Inc.
Harry M. Malone
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW
Suite 300
Washington, DC 20007-5116

Supra Telecommunications and Information
Systems
Mark E. Buechele
Supra Telecom & Information Systems, Inc.
2620 SW 27th Avenue
Miami, FL 33133

WorldPath Internet Services
Eric J. Branfman
Morton J. Posner
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW
Suite 300
Washington, DC 20007-5116

Telecommunications Resellers Association
Charles C. Hunter
Catherine M. Hannan
Hunter Communications Law Group
1620 I Street, NW
Suite 701
Washington, DC 20006

Occidental Petroleum Corporation
Irvin W. Maloney
Occidental Petroleum Corporation
1640 Stonehedge Road.
Palm Springs, CA 92264

New Jersey Coalition for Local Telephone
Competition
Walter Fields
NJ-CLTC
PO Box 8127
Trenton, NJ 08650

Alliance for Public Technology
Donald Vial
901 Fifteenth Street, NW
Suite 230
Washington, DC 20005

Triton PCS, Inc.
Leonard J. Kennedy
David E. Mills
Laura H. Phillips
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Ave., NW
Suite 800
Washington, DC 20036-6802

AT&T
C. Frederick Beckner, III
Sidley & Austin
1722 Eye Street, NW
Washington, DC 20006

TRICOM USA, Inc.
Judith D. O'Neill
Nancy J. Eskenazi
Thelen Reid & Priest, LLP
701 Pennsylvania Ave, NW
Suite 800
Washington, DC 20004

United Cellular Corporation
Alan Y. Naftalin
Peter M. Connolly
Koteen & Naftalin, LLP
1150 Connecticut Ave., NW
Suite 1000
Washington, DC 20036

US Xchange, LLC
Dana Frix
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW
Suite 300
Washington, DC 20007-5116