

ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Application of New York Telephone)
Company (d/b/a Bell Atlantic-)
New York), Bell Atlantic)
Communications, Inc., NYNEX Long)
Distance Company, and Bell Atlantic)
Global Networks, Inc., for)
Authorization To Provide In-Region)
InterLATA Services in New York)

CC Docket No. 99-295

COMMENTS OF @LINK NETWORKS, INC.

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October 19, 1999

SUMMARY

Bell Atlantic has failed to provide a sufficient showing that it presently provides competitors with nondiscriminatory access to unbundled DSL-capable loops. Its belated agreement to commence a testing process, which should have been completed before the application was filed, cannot be countenanced by the Commission.

Bell Atlantic's New York tariff impermissibly limits the use of Enhanced Extended Loops ("EELs") to the provision of switched local exchange service and associated switched exchange access. EELs cannot be used to provide a data service or any service resembling special access. These are unlawful restrictions, and must be removed before Bell Atlantic can be found to comply with the Commission's rules and to satisfy item two of the competitive checklist.

Bell Atlantic has failed to provide evidence that it "is providing" cageless collocation in compliance with the Commission's Collocation Order. It has only recently modified its collocation tariff to remove onerous restrictions, and even if it is "on track" to provide cageless collocation within the tariffed intervals, this is no more than a promise of future performance, which the Commission has consistently rejected as insufficient in the Section 271 context.

Bell Atlantic's proposed anti-backsliding measures, which rely in large measure on bill credits potentially totaling \$269 million per year, will not be sufficient to deter any anticompetitive conduct on its part. In addition, there are currently no DSL-specific performance measures or penalties, because the NYPSC has not yet completed a necessary rulemaking to revise the "Critical Measures" category of the Bell Atlantic performance assurance plans. Until that proceeding has been successfully completed,

@link Networks, Inc.
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New York

there can be no assurance that any compensation available to CLECs who are the targets of Bell Atlantic's discriminatory and anticompetitive conduct will be adequate.

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	DISCUSSION.....	2
	A. The Nondiscriminatory Availability of Unbundled DSL-capable Loops Has Not Been Demonstrated by Bell Atlantic.....	2
	B. Tariff Restrictions Impermissibly Limit the Availability of “EELs”	4
	C. Bell Atlantic Has Not Demonstrated the Availability of Cageless Collocation	5
	D. The Self-Executing Penalties Designed To Deter Backsliding Are Wholly Inadequate.....	6
III.	CONCLUSION.....	7

I. INTRODUCTION

@link Networks, Inc. (“@link”), by its undersigned attorneys, respectfully submits its comments in opposition to the above-captioned application of Bell Atlantic for authority to provide in-region long distance services originating in New York. @link is a national data competitive local exchange carrier (“CLEC”) headquartered in Waukesha, Wisconsin. @link specializes in providing high-speed digital subscriber line (“DSL”) services, and plans to expand to 34 cities by the end of next year. As a data CLEC focused on the deployment of services based on DSL technologies, @link takes a particular interest in proceedings, such as this one, which have the potential to dramatically affect the relationship between data CLECs and the incumbent local exchange carriers (“ILECs”), including Bell Atlantic and the other Bell Operating Companies (“BOCs”).

The FCC has rejected each of the previous BOC applications for in-region long distance authority under Section 271, and in the process has provided detailed guidance concerning its expectations for future applications. In the latest effort, Bell Atlantic has clearly failed to follow the Commission’s guidance. Its application is long on rhetoric and massive in size, but it falls far short of satisfying the burden of producing evidence that Bell Atlantic has satisfied each of the fourteen points of the competitive checklist. The deficiencies are especially obvious in respect to the availability of unbundled loops suitable for the provision of DSL services, a topic of particular concern to @link and other data CLECs. By focusing, in these comments, on those portions of the Bell Atlantic application which most directly and substantially affect data CLECs, @link does not mean to suggest that the deficiencies it has identified are the only ones in the Bell

Atlantic application. Other parties are likely to have their own concerns, and @link expects that such concerns will be raised in those parties' separate comments. However, @link believes that the problems it has identified which relate to Bell Atlantic's offering of unbundled DSL-capable loops are sufficiently great that, wholly without regard to any other problem areas in Bell Atlantic's application, the Commission must conclude that Bell Atlantic has not satisfied its burden of proof and must dismiss the Bell Atlantic application.

II. DISCUSSION

A. The Nondiscriminatory Availability of Unbundled DSL-capable Loops Has Not Been Demonstrated by Bell Atlantic.

Bell Atlantic has effectively conceded that it is ill-equipped to provide competitors with unbundled DSL-capable loops, by characterizing DSL services as "still new" and asserting that they "require close cooperation from CLECs during the provisioning process" (BA Brief, p. 21). In addition, Bell Atlantic acknowledges that it is not yet providing, in commercial quantities, unbundled loops specifically conditioned to support DSL services. At p. 22 of its Brief, Bell Atlantic admits that, to date, it has only provided approximately 520 ADSL-specific loops to six carriers. The supporting affidavit submitted by Bell Atlantic further reveals that nearly all of these 520 loops -- 449, to be exact -- were provisioned in the month immediately preceding the filing of Bell Atlantic's application. (Lacouture/Troy Declaration ¶ 82). The evidence presented by Bell Atlantic is plainly insufficient to demonstrate that the pre-ordering, ordering, provisioning and repair and maintenance systems (collectively, operation support systems or "OSS") now in use can support any growth in demand for DSL-capable loops. Clearly, there is nothing in the Bell Atlantic application or the supporting documentation to show

that Bell Atlantic could satisfy CLECs' requirements if there is an explosive growth in demand for DSL services (as many in the industry, including the FCC, expect) as local exchange carriers race to deploy DSL to respond to competition from cable modems and other broadband technologies. The adequacy of any DSL-specific OSS can only be demonstrated through rigorous testing, but Bell Atlantic's application fails to provide any evidence that testing of DSL-specific OSS was undertaken in New York. @link understands that no such testing was included in the work plan of the consultants employed by the NYPSC, and that only within the past six weeks, on the eve of filing its application, did Bell Atlantic agree (after repeated refusals) to conduct joint testing with CLECs processing DSL-loop orders.

Bell Atlantic has failed to provide a sufficient showing that it presently provides competitors with nondiscriminatory access to unbundled DSL-capable loops. Its belated agreement to commence a testing process, which should have been completed before the application was filed, cannot be countenanced by the Commission. The Commission cannot simply accept Bell Atlantic's pledge of future performance, because any incentive Bell Atlantic has to cooperate with CLECs to develop DSL-specific OSS processes and related performance benchmarks will evaporate once it receives approval to provide in-region long distance services.

Bell Atlantic filed its application prematurely. A few months hence, with the cooperation of Bell Atlantic and interested CLECs, the DSL collaborative proceeding currently being conducted by the New York Public Service Commission ("NYPSC") will be completed, and DSL-specific OSS, performance metrics and backsliding measures

will be ready for Commission review. The Commission should dismiss Bell Atlantic's application as premature, without prejudice to refile when that process is complete.

B. Tariff Restrictions Impermissibly Limit the Availability of "EELs."

Section 51.309 of the Commission's rules, 47 C.F.R. § 51.309, prohibits incumbent LECs from imposing restrictions on the use of unbundled network elements ("UNEs") that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends. Section 51.309 of the Commission's rules was promulgated pursuant to Section 251(c)(3), which is specifically incorporated into Section 271(c)(2)(B)(ii), item two of the competitive checklist.

On September 15, 1999, the Commission issued a press release announcing the adoption of its decision in response to the Supreme Court's remand in *AT&T Corp. v. Iowa Utilities Board* (the "UNE Remand Decision.") Although the text of the Commission's UNE Remand Decision has not yet been released, it is clear from the Commission's press release that loops and interoffice transport, the principal components of EELs, are UNEs.

Bell Atlantic's New York tariff limits the use of EELs to the provision of switched local exchange service and associated switched exchange access. In other words, EELs are restricted to the provision of conventional voice telephony service and associated switched exchange access, and cannot be used to provide a data service or any service resembling special access. Until such unlawful restrictions are removed, Bell Atlantic will be unable to satisfy item two of the competitive checklist.

C. Bell Atlantic Has Not Demonstrated the Availability of Cageless Collocation.

Bell Atlantic asserts that it is providing interconnection in a manner fully consistent with the Act and the Commission's rules. (Bell Atlantic Brief, at 12). However, contrary to Bell Atlantic's assertions, there is not yet sufficient "real-world experience" (Id.) with respect to Bell Atlantic's collocation policies and practices to support its sweeping assertions. This is particularly true with respect to cageless collocation, a form of collocation that data CLECs and other CLECs providing specialized services may find particularly advantageous.

Bell Atlantic's original cageless collocation tariff offering contained provisions which severely limited the availability of this form of collocation. Two such provisions were a ten-foot minimum space requirement, which effectively required a minimum of 400 square feet of space to support cageless collocation, and a requirement that CLEC equipment be placed in lineups separate from Bell Atlantic's own equipment. On August 31, 1999, the NYPSC issued an Order Directing Tariff Revisions, which is appended to Bell Atlantic's application (App. I, Tab 19). The NYPSC required Bell Atlantic to modify its initial cageless collocation tariff to eliminate certain restrictions, including the two restrictions mentioned above, on the grounds that they violated the FCC's Collocation Order. Even if it is true, as Bell Atlantic claims, that it is "on schedule to provide 55 [cageless collocation] arrangements on a timely basis," it will be several months, given the tariffed installation intervals for cageless collocation (i.e., 76 days for secured locations 105 days for unsecured locations)(App. I, Tab 19, p. 9), before there will be any "real-world" evidence that Bell Atlantic has successfully implemented cageless collocation in compliance with the Commission's Collocation Order. The

application is bereft of any evidence that Bell Atlantic presently provides cageless collocation in compliance with the Commission's Collocation Order, and the record likewise fails to demonstrate that Bell Atlantic's collocation policies and practices are nondiscriminatory with respect to CLECs seeking cageless collocation.

D. The Self-Executing Penalties Designed To Deter Backsliding Are Wholly Inadequate.

Bell Atlantic proposed a system of bill credits to the NYPSC in its April 1998 Pre-Filing Statement. As described by Bell Atlantic, the bill credit provisions within its performance assurance plans provide a system of self-executing penalties, which will expose Bell Atlantic to potential aggregate penalties of no less than \$269 million annually. According to Bell Atlantic, the prospect of such penalties will be sufficient to deter any anticompetitive conduct on its part. Over the intervening months, the plan has been amended several times, partly in response to comments by interested parties as well as the staffs of the FCC and the Justice Department (See Bell Atlantic Brief at 77 and Dowell/Canny Declaration at ¶ 16). Although Bell Atlantic suggests that these changes have made the plan better, @link disagrees. The performance assurance plans now resemble the regulatory equivalent of the proverbial camel – a horse designed by a committee. Whatever the merits of the original plans may have been, the plans are presently deficient in at least two crucial respects. One, they are devoid of any DSL-specific performance measures or penalties, because (as Bell Atlantic concedes at page 78 of its Brief), the NYPSC has not yet completed a rulemaking designed to add specific “hot-cut” and DSL-related measures to the Critical Measures category of the plan. Two, the various plan amendments have served only to increase the complexity of the performance assurance plans, thereby reducing the likelihood that penalties will, in fact,

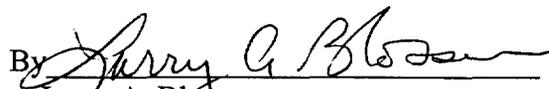
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Bell Atlantic
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be self-executing. The amount at risk remains the same. Even though the amendments give the NYPSC authority to reallocate funds from one category to another under appropriate circumstances, there is presently no assurance that such reallocation will occur, that it will appropriately compensate the CLECs who are the targets of Bell Atlantic's discriminatory and anticompetitive conduct, or that the size of the penalty will be sufficient to deter misconduct on the part of Bell Atlantic.

III. CONCLUSION

Bell Atlantic has failed to meet its burden of demonstrating that it has satisfied every item of the competitive checklist. Its failures are particularly glaring with respect to those elements of greatest concern to data CLECs such as @link. Accordingly, @link respectfully urges the Commission to dismiss Bell Atlantic's application for authority to provide in-region long distance service originating in New York.

Respectfully submitted,
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October 19, 1999

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Comments of @Link Networks, Inc. in the Matter of Application by New York Telephone Company (d/ba Bell Atlantic-New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company, and Bell Atlantic Global Networks, Inc., for Authorization to Provide In-Region, InterLATA Services in New York" was served on this the 19th day of October, 1999, on each of the persons listed below:

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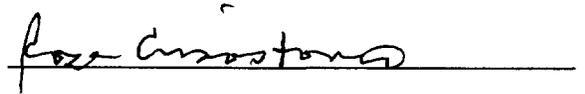
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A handwritten signature in cursive script, reading "Rose Crisostomo", is written over a solid horizontal line.