reconciliation was based on an intensive, independent NYDPS Staff review of results filed by parties.[1]

In particular, NYDPS Staff carried out an exhaustive review of AT&T and Bell Atlantic-NY hot cut performance data. The first stage of this review concerned a group of orders (submitted by AT&T between June 21 and July 16) that AT&T selected and placed in issue at the Fourth Technical Conference in July. This review evaluated AT&T's challenge to Bell Atlantic-NY's claims as to its hot cut performance. Staff found that although AT&T had accurately identified six hot cuts that Bell Atlantic-NY had incorrectly scored as "met," AT&T was mistaken with respect to a far larger number of challenged hot cut orders. For 62 orders that AT&T had claimed were Bell Atlantic-NY provisioning errors, Bell Atlantic-NY's score was confirmed by Staff.[2] Staff's results were appended to the ALJ Ruling closing the technical conference process with respect to loop issues.[3]

For the first reconciliation, AT&T submitted 132 unique orders for review. Of that number, AT&T and Bell Atlantic-NY agreed on 50 orders that had been scored as either a miss or an I-code (trouble reported within seven days post-installation), and Staff therefore did not further examine these orders. Another five orders were either cancelled or excluded from the reconciliation because of issues related to retail service (such as suspension for non-payment). Staff identified 51 orders that were not completed, and therefore not reported, during the review period. Only 26 orders remained to be scored by Staff; 20 were scored as misses.

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[1] NYPSC Rubino Aff., Exh. 2, ¶3.

[2] These orders were supplemented, cancelled, or excluded.

[3] Case 97-C-0271, Letter/Ruling Accepting Staff Analysis and Closing the Technical Conference Process (issued August 16, 1999), BA-NY Application, Appdx. C, Vol. 61, Tab 925.

For July and August, AT&T calculated that at least one out of every five hot cuts that Bell Atlantic performed for it had not been done on time.[1] In contrast, Staff has determined that Bell Atlantic-NY 's on-time performance for AT&T was above 88% for July and above 90% for August.[2]

As to July 1999, AT&T submitted to NYDPS Staff its complete data concerning hot cut timeliness[3], and charged that only 72% of hot cuts performed during the month of July 1999 were timely. But in calculating timeliness of a large proportion of the hot cut orders analyzed, AT&T neglected to subtract the one hour allowed time from the total time required for each hot cut. Therefore, in most cases, AT&T overstated the perceived lateness by one hour. For example, where AT&T's checklist showed that BA-NY completed its work in one hour and four minutes, AT&T reported the order as one hour and four minutes late. Accordingly, AT&T erroneously scored as late numerous hot cuts that were, in fact, timely.[4] After a cursory review by Staff revealed this, AT&T filed a revised affidavit citing a 76% on-time rate.

NYDPS Staff reviewed a sample of Bell Atlantic-NY hot cut checklists[5] against its reported performance and found that, with very few exceptions, the checklists supported the data. In addition, Staff reviewed the Bell Atlantic-NY Work Force Administration (WFA) logs. Staff then reviewed AT&T's checklists against Bell Atlantic-NY's for the same orders, and found that some of the times recorded for calls did not match. The result of the July reconciliation was that

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[1] AT&T Comments, p. 33.

[2] NYPSC Rubino Aff., ¶10.

[3] A number of orders submitted by AT&T in the July 1999 reconciliation were also considered in the first reconciliation.

[4] NYPSC Rubino Aff., Exh. 2, ¶6.

[5] The hot cut checklist refers to the data collection form used by BA-NY technicians to record certain events in the hot cut process.

Staff adjusted the on-time percentage to 90.79% for the overall industry, and 88.34% for AT&T. The processes employed in this Staff investigation are detailed in the Rubino Affidavit, Exhibit 2. The outcome was that, again, the striking discrepancy between the AT&T data and the Bell Atlantic-NY data was explained primarily by AT&T errors or idiosyncratic operational definitions of measurement terms.[1]

For August 1999, NYDPS Staff determined that Bell Atlantic NY's on-time performance for AT&T orders exceeded 90%. The on-time performance measure counts as late both late and incorrectly provisioned hot cuts (those reported as not working within the one-hour testing window).[2]

There appears to be considerable confusion as to how hot cut timeliness is scored. Several parties charge that early hot cuts—which have the potential to put customers out of service, as the physical loop cutover and the software translation may be out of sync—are scored as on time.[3] In fact, early hot cuts are counted against Bell Atlantic-NY, and NYDPS Staff has verified that Bell Atlantic-NY scores early cuts as misses through its Bell Atlantic-NY/AT&T data reconciliation process. DOJ raises additional questions about how Bell Atlantic-NY hot cut timeliness is scored, asserting the 88% on-time figure is overstated because it does not account for supplemented orders caused by Bell Atlantic-NY, and because NYDPS applies definitions of "met" or "missed" overly favorable to Bell Atlantic-NY.[1] In fact, the NYDPS Staff measurement process, is discussed and refuted in detail in the Rubino Affidavit, ¶¶3-11. The

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[1] NYPSC Rubino Aff., Exh. 2, ¶¶7-9.

[2] Allegiance credits BA-NY with dramatic improvements in hot cut performance over the last year; although it still charges a 20% "failure" rate, it has also not brought complaints to NYDPS Staff and we are unable to determine the basis for this claim.

[3] *See* Intermedia Comments, p. 7, ALTS Comments, p. 30, Choice One Comments, p. 5.

data currently reported by Bell Atlantic-NY include as misses some Bell Atlantic-NY process failures that resulted in supplemented orders; the Staff reconciliation identified two other Bell Atlantic-NY failures that will be captured as misses in the future.[2] The on-time performance results adduced by DOJ and other parties themselves illustrate the central point: Bell Atlantic-NY's on-time provisioning of hot cut loops has been close to, at, or above 90% since July 1999. This performance level cannot, under any definition, be considered discriminatory.[3]

B. Accuracy of Bell Atlantic-NY Hot Cuts and Percentage of Service Outages

Competitors, in particular AT&T, allege that Bell Atlantic-NY hot cuts result in an unacceptable level of service problems for end-use customers, including outages. AT&T defines an outage as a customer out of service for more than five minutes or lacking inbound or all service upon hot cut completion. AT&T asserts that from June 21 to August 31, 1999, Bell Atlantic-NY put one out of every 10 new AT&T customers out of service;[4] that is, during this period 170 new AT&T business customers were adversely affected by Bell Atlantic-NY

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[1] DOJ Evaluation, p.19.

[2] A miss is reported in cases where BA-NY failed to work an order due to a problem with its internal service orders, or where BA-NY first discovered a problem with either CLEC or BA-NY dialtone at the frame due time. The specific "failures" that are not included are late or inaccurate LSRCs, and failures to notify the CLECs at DD-2 of a no dialtone condition. The LSRC problems should largely be addressed with the system improvements discussed below; although NYDPS Staff has concluded that in the future failure to notify the CLEC of dialtone loss at DD-2 will result in a miss regardless of its cause, Staff observes that dialtone failures requiring supplements of orders often reflect CLEC failure to have dialtone properly installed.

[3] DOJ considers it "noteworthy" that it takes BA-NY longer to provision CLEC UNE loop orders with dispatch than its own retail service (DOJ Evaluation, p. 19, n. 42). Its concern is based upon metrics PR-2-03, PR-2-04, and PR-2-05. Although DOJ cites these metrics in its discussion of hot cut loops, these metrics measure new loop installation, not hot cuts. As the metrics reflect, there is no retail analogue for a hot cut (*see* PR-2-01, BA-NY Canny Aff., Att. D, p. 80).

[4] AT&T Comments, p. 32.

provisioning problems.[1] Of these, AT&T asserts, 61%, or 105, were out of service for more than 24 hours; and 55 for more than three days.[2]

An independent review by NYDPS Staff indicates that AT&T charges of excessive outages are not supported; indeed, the proffered evidence refutes the AT&T conclusions.[3]

First, AT&T included supporting documentation only for August, although AT&T provided NYDPS Staff with June 21-July 31, 1999 results as well. Looking solely at August, however, the AT&T affidavit states that 76 of 674 customers went "out of service as a result of BA provisioning errors." AT&T's own data, however, contradict this conclusion. NYDPS Staff analyzed each of the 76 orders submitted, and determined that 36 clearly were *not* outages that resulted from a failure by Bell Atlantic-NY to follow the provisioning process. In many cases, these were hot cuts that were accepted as successful by AT&T, with a subsequent trouble report on the lines in question. For another 14 orders, Staff was unable to determine from AT&T's logs whether BA was at fault.[4] Further, where Bell Atlantic-NY was at fault, the outages for the vast majority of customers were measured in hours, not days or weeks as AT&T alleges. In addition, it is unclear whether the delay in restoring service should be laid at Bell Atlantic-NY's door or AT&T's. In many cases AT&T took longer to identify and report the problem to Bell Atlantic-

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[1] AT&T Meek Aff. ¶¶83-86. The AT&T Affidavit analyzes only data for August 2-31, 1999, and these data are only a subset of those provided in the NYPSC proceeding; in the NYPSC proceeding, moreover, AT&T did not document 170 orders.

[2] The standard, suggested by AT&T, but not a metric standard, is that no more than one in 100 should have outages greater than five minutes; virtually all outages should be fixed in less than one hour (AT&T Meek Aff. ¶88, AT&T Mulligan Aff. ¶¶29, 43; AT&T Comments, p. 33).

[3] NYPSC Rubino Aff., Exh. 2, ¶13, 14.

[4] Nevertheless, NYDPS Staff adjusted the 10% outage figure reported by AT&T to between 4 and 6%. See Rubino Aff., Exh. 2, ¶ 13.

NY than Bell Atlantic-NY took to fix it.[1] AT&T suggests that outages are "nothing short of disastrous" for small and medium-sized business customers,[2] yet Staff's review of AT&T's trouble logs shows that AT&T, unlike other carriers Staff observed, generally does not perform any mechanized line test when it accepts a hot cut. AT&T attempts to call its customer and, if it cannot reach its customer, it waits until the customer calls AT&T.

AT&T asserts that Staff confirmed that, for the period June 21 to July 16, all but five of the 54 outages reported by AT&T were due to faulty BA-NY provisioning.[3] NYDPS Staff, however, cannot identify any documentation to support this assertion. While AT&T attributes outages in one out of every ten of its hot cut orders to a Bell Atlantic-NY failure to follow the hot cut checklist procedures,[4] these service troubles could also be caused by a number of other factors, none of which reflects upon the accuracy of the hot cut. As ALTS notes, the Local Competition First Report and Order requires a loop provided to competitors to be of the same quality as the loop the BOC uses to provide service to its own customer.[5] Many of AT&T's charges concerning the quality of hot cut loops reflect the fact that the CLEC receives the same loop that Bell Atlantic-NY used; troubles with the line will go with it, and may be exacerbated by the additional distance to the CLEC switch.

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1 *See* NYDPS Staff Analysis of AT&T Reported Service Outages--June 21-August 31, 1999, Exh. 5.

2 AT&T Comments, p. 33.

3 AT&T Meek Aff., ¶86; AT&T Comments, pp. 39-40.

4 AT&T Meek Aff. ¶¶31-74; ALTS Comments, pp. 25-26.

5 Local Competition First Report and Order, ¶¶312-316, ALTS Comments, p. 25.

In sum, the NYDPS Staff review of AT&T's evidence and the underlying documentation show that the service outage problem is nowhere near as severe or prolonged as AT&T asserts; moreover, it is not entirely attributable to Bell Atlantic-NY.

C. Confirmation Timeliness for UNE Loops

DOJ's Evaluation notes that Bell Atlantic-NY has had problems providing timely confirmations and rejections of hot cut orders, but acknowledges that, in September 1999, Bell Atlantic-NY improved its on-time performance for confirmations and rejections.[1] Bell Atlantic-NY's performance, includes both manual and flow-through orders. On a combined manual/flow-through basis, Bell Atlantic-NY's performance for both confirmations and rejects was 89% on time in September, which is up from 77% for August. This is a substantial improvement, attributable at least in part to improved operations, which automated practices previously performed manually. For example, Bell Atlantic-NY reps were formerly required to enter data manually multiple times; as of late August, they only do so once. Therefore, these process changes will enable Bell Atlantic-NY to sustain performance improvements. Regarding LSRC accuracy, we understand the parties are working to resolve problems on both sides of the interface.

D. Pre-Order Qualification and Provisioning of xDSL-capable Loops

Competitors providing Digital Subscriber Line services (xDSL) assert that Bell Atlantic-NY's current performance in pre-ordering, ordering, and provisioning xDSL-capable loops is discriminatory in comparison to its performance for voice services.

As currently configured—that is, absent a line-sharing requirement—ordering and provisioning xDSL-capable loops involve processes distinct from and more complex than

ordering voice loops. These processes have been agreed to by a collaborative group meeting regularly, facilitated by the NYPSC, to determine the most efficient methods for ordering, provisioning, and maintenance and repair. For new and innovative services, such as xDSL, that depend upon use of the incumbent's infrastructure and legacy systems, no one has yet devised a short cut to avoid the detailed, step-by-step work of merging new services with the incumbent's system. This work is currently being done by Bell Atlantic-NY and facilitated by the NYPSC. In addition, parties in the NYPSC carrier-to-carrier service quality proceeding are defining standards and metrics to accurately measure the level of Bell Atlantic-NY service for xDSL providers, and the NYPSC has stated its determination to include these measurements as critical measures under its Amended Performance Assurance Plan.[2]

1. Competitors' Access to Loop Qualification Information

Competitors providing xDSL service assert the need for additional information on loop length, number and location of analog load coils, bridged taps, presence and type of digital loop carrier (DLC), and central office location. Some also consider the Bell Atlantic-NY preorder process for xDSL-capable loops inadequate, noting that its mechanized loop qualification database provides only loop make-up information relevant to its own ADSL services, and is insufficient for CLECs providing broader or different xDSL services. Several competitors, including Northpoint, Covad, and MCI, urge Bell Atlantic-NY to make its internal database readable by CLECs, charging that the manual offerings are slow and costly.[3] As a result of the early collaborative meetings, Bell Atlantic-NY filed a tariff offering loop qualification

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[1] DOJ Evaluation, p. 16.

[2] Cases 97-C-0271 *et al.*, Order Adopting the Amended Performance Assurance Plan (issued November 3, 1999).

[3] MCI Comments, pp. 35-36.

information through a database and, in greater detail, through a manual search. The xDSL collaborative is currently meeting to determine what additional information or alternative methods the xDSL competitors want; failing a negotiated outcome, recommendations will be brought to the NYPSC.

DOJ expresses concern that DSL-capable loop orders do not flow through Bell Atlantic-NY's ordering systems, but must be manually processed. These orders are currently processed through a Web Graphical User Interface (GUI) system, similar to that used by the majority of CLECs for voice-grade loops.[1] Even at far greater xDSL volumes, however, it is unclear whether DSL providers are willing to shoulder the investment involved in developing an application-to-application system such as EDI to interface electronically with Bell Atlantic-NY's.

In sum, the concerns raised are being addressed in collaboration facilitated by the NYPSC and in formal tariff proceedings.

2. The Bell Atlantic-NY xDSL Provisioning Process

DSL competitors, echoed by DOJ, have raised serious concerns about Bell Atlantic-NY's provisioning of xDSL-capable loops. Covad asserts it has thousands of backlogged NY orders at this time.[2]

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[1] In addition, Bell Atlantic-NY provides daily electronic updates to CLECs on the status of each order five days after the firm order confirmation (FOC) date.

[2] Covad Conley/Poulicakos Decl ¶28. ALTS also cites the lack of performance metrics for xDSL-capable loops in New York; however, the NYPSC has ordered the inclusion of such metrics and the parties are in process of developing them. *See* NYPSC Cases 97-C-0271 *et al.*, Order Adopting the Amended Performance Assurance Plan (issued November 3, 1999). ALTS, among others, also comments on Bell Atlantic-NY's ability or obligation to provide high capacity loops, dark fiber, or line-sharing (ALTS Comments, pp. 25-26). Because Bell Atlantic-NY has expressly undertaken to comply with any forthcoming FCC mandate, we see no reason to comment on these issues in this Reply. See also. Prism Comments, pp. 13-15.

NYDPS Staff's preliminary investigation of Covad's concerns paints a somewhat different picture.[1] As to the backlogged orders, Staff has identified approximately 100 orders that it considers genuinely backlogged; for most of these, facilities (loops) were lacking or inoperative, a condition that may not be quickly or easily corrected within the provisioning interval.[2] More generally, difficulties with respect to xDSL are being addressed in the collaborative facilitated by the NYDPS .

The xDSL collaborative process is designed to improve the Bell Atlantic-NY wholesale xDSL offering, by improving communications and agreeing to common practices among Bell Atlantic-NY and CLEC xDSL providers. Largely thanks to the remarkably frank and hands-on efforts of all participants, this collaborative is yielding results. For example, in the course of these discussions, shortcomings in Bell Atlantic-NY's methods for doing central office wiring for xDSL orders have come to light. Data collected by Bell Atlantic-NY, and test results tracked by CLECs, indicated a chronic problem in completing central office work on time. This prompted Bell Atlantic-NY to institute a process change to simplify DSL central office cross connections. Similarly, shortcomings in CLEC operations also came to light—for example, problems with customer contact leading to some significant proportion of the "no access" for Bell Atlantic-NY dispatches.

Competitors also raise concerns about the trouble ticket system for maintenance and repair.[3] Some competitors assert that Bell Atlantic-NY forbids xDSL providers to open trouble

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[1] Staff review is preliminary; for example, parties have not agreed to a common operational definition of "backlog."

[2] Of course, at all times there is a "backlog" of orders placed but not yet filled. In addition, Covad may refer to its own estimated potential demand for its DSL services; orders actually placed with Bell Atlantic-NY reflect no such magnitude.

[3] Prism Comments, pp. 15-17.

tickets within 24 hours following issuance of the Bell Atlantic-NY order completion notice.[1] This assertion implies that Bell Atlantic-NY stalls or refuses to fix problems during or immediately after CLEC completion of an xDSL order. The collaborative, however, is addressing the timing of installation problems. Parties have also demonstrated that the closer the operational coordination between Bell Atlantic-NY and the CLEC, the smoother the installation and the less likely it is to later be reported as a trouble. For example, as of October 27, 1999, competitive providers and Bell Atlantic-NY both provided data concerning the results of the new cooperative testing procedures. The data illustrated that when Bell Atlantic-NY carries out the cooperative test, orders tend to complete successfully.

Bell Atlantic-NY must continue to respond to the requirements of the xDSL providers in New York, within the scope of the 1996 Act, and orders of the Commission and NYPSC. Refinement of the methods for it to do so is in progress in the DSL collaborative, and will be assured by the Amended Performance Assurance Plan administered by the NYPSC.

E. Conclusion

As parties point out, the Commission has interpreted the Checklist to require the incumbent to provide unbundled loops "in a reasonable amount of time and with minimum service disruption."[2] Based on the detailed review by NYDPS Staff of the data underlying parties' allegations to the contrary, we reiterate our conclusion that Bell Atlantic-NY is in compliance with the requirements of Checklist item (iv).

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[1] Covad Comments, p. 31.

[2] AT&T Comments, p. 29, citing Second BellSouth Louisiana Order, ¶279.

Checklist Item (v)—Unbundled Local Transport

A. Comments

In our Evaluation, we found that Bell Atlantic-NY is providing transport in a non-discriminatory manner and is, therefore, in compliance with checklist item (v). Bell Atlantic-NY has improved its capacity to fill orders for unbundled transport since July 1999, including the construction of additional SONET rings, so backlog orders were reduced. We found that orders were filled at parity with Bell Atlantic-NY's own orders.[1]

Focal-NY states that it has experienced delays in the provisioning of extended local loops, which it orders out of Bell Atlantic-NY's interstate special access tariffs.[2] Allegiance also claims that it has encountered delays in the delivery of loop and transport facilities. Allegiance states that 46% of all DS-1 level loops (other than those ordered with interconnection trunks) were delivered by Bell Atlantic-NY after the FOC during the third quarter of this year. In the same period, 40% of DS-3 level transport facilities were not delivered on time.[3]

Choice One claims that the interval for installation for transport has ranged from 98-109 days.[4] ALTS states that several of its members experienced delays in the provisioning of DS-3 and T1 circuits. The four-month delay experienced by one CLEC resulted in a customer cancelling the orders.[5]

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[1] NYPSC Evaluation, pp. 102-03.

[2] Focal-NY, pp. 5-6.

[3] Allegiance, p. 12.

[4] Choice One, pp. 9-10

[5] ALTS, pp. 41-42

B. Response

Focal-NY and Allegiance order loop and transport from the special access tariff. However, special access is not within the parameters of this Checklist item, and, therefore, it is not a basis to find that Bell Atlantic-NY is not in compliance with this item. Our preliminary evaluation shows that Allegiance orders combinations of loop and transport from this tariff as well; hence, its claim is likewise not a basis for finding non-compliance with Checklist item (v).

The claims that Bell Atlantic-NY delivers trunks late are the subject of our Checklist item (i) inquiry. As in the case of interconnection trunks, many factors impinge on the provisioning interval in the Product Interval Guide. We expect Bell Atlantic-NY to fully explain the circumstances of each claim concerning its failure to timely provision transport facilities.

We find, therefore, that the issues raised by the parties here with respect to checklist item (v) do not preclude a finding that Bell Atlantic-NY is in compliance with this Checklist item. We will, however, continue to monitor this issue.

Checklist item (viii)--White Pages Directory Listings

Some competitors assert that Bell Atlantic-NY fails to provide accurate directory listings following migration from its own to competitors' service using unbundled loops. AT&T charges that this is the result of the Bell Atlantic-NY procedure that, first, issues an order to drop the customer's directory listing, and second, issues a subsequent order to restore it, a procedure not in use for UNE-P or resale customers.[1] AT&T reiterates that its tests, analyzed in the NYPSC Evaluation,[2] indicate its customers, particularly small and medium-sized business customers, receive unacceptably inferior service.[3] In particular, AT&T attaches and analyzes an affidavit Bell Atlantic-NY filed with the NYPSC that concedes an error rate of 13.5% for AT&T directory listing requests during the AT&T study period, August 26 to September 9, 1999.[4] Of these errors, 25 in all, 18 were properly identified as errors by the Bell Atlantic-NY quality review team.[5] As to the remaining seven orders, Bell Atlantic-NY modified its quality assurance search process to ensure that similar errors are identified and corrected in the future.[6]

Others note that Bell Atlantic-NY has addressed the directory listings problems;[7] and only one party reports one customer complaint of a dropped listing in connection with the thousands of hot cuts performed by Bell Atlantic-NY.[8] Following the KPMG identification of

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1 AT&T Brief, pp. 42-44; AT&T Callahan/Connolly Aff. ¶¶4, 12.

2 NYPSC Evaluation, pp. 119-121.

3 AT&T Brief, p. 43.

4 AT&T Callahan/Connolly Aff. ¶¶22-23 & Attachment 1.

5 In addition, Bell Atlantic-NY states it increased the size of the review team in light of some delays in correcting these errors. BA-NY Stevens Aff.(October 12, 1999).

6 Id.

7 ALTS Brief, p. 17-18.

8 Choice One Brief, p. 7.

this problem, however, Bell Atlantic-NY instituted a software modification as well as a manual quality assurance program, and KPMG approved these solutions, which in fact remedy the overwhelming majority of cases of dropped listings.[1]

We see no need to revisit the KPMG Report conclusion, and our own Staff findings, that this procedure is adequate when supplemented with rigorous personnel training and quality review. Bell Atlantic-NY has undertaken to provide NYDPS Staff with the report of the percentage of errors discovered two days after the due date (DD+2), four days after the due date (DD+4), and seven days after the due date (DD+7) for all transactions performed that require the porting of a telephone number.[2] In addition, Bell Atlantic-NY has committed itself to expeditious restoration of dropped directory listings. The NYPSC will monitor the provision of directory listings, using data provided by Bell Atlantic-NY and any provided by CLECs; at any demonstration that an extraordinary percentage of listings are dropping out or that Bell Atlantic-NY fails to restore dropped listings expeditiously, the NYPSC will take further action.

Based on Bell Atlantic-NY's overall performance, the quality assurance process in place, the Bell Atlantic-NY commitment to restore and report any dropped listings, and our continued oversight, we reiterate our conclusion that Bell Atlantic-NY is in compliance with the requirements of the 1996 Act with regard to Checklist item (viii).

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[1] KPMG Closure Report, Exception 56.

[2] Letter to NYPSC General Counsel Lawrence G. Malone from Randal S. Milch, Bell Atlantic-NY (dated November 4, 1999). Bell Atlantic-NY will report the results of the quality assurance teams efforts to the NYPSC. We also acknowledge AT&T's November 4 letter which offers to provide further improvements.

Checklist Item (xiv) – Resale

TRA, ALTS, and e.spire/Net 2000 argue that termination penalties imposed by Bell Atlantic-NY in its contracts constitute an unreasonable restriction on resale, precluding a finding of compliance with this checklist item.[1] Noting that Bell Atlantic-NY itself acknowledges that it subjects customers taking service under term contracts to such penalties in the event they change carriers,[2] they maintain Bell Atlantic-NY has not shown its termination penalties to be just and reasonable. They assert that the NYPSC, having found the penalties to be improper, concluded that Bell Atlantic-NY was obligated to avoid imposing unreasonable restrictions on resale through excessive termination penalties.[3]

The NYPSC did not determine that termination penalties are unreasonable *per se*. In the proceeding cited in the CLECs' comments, the New York Commission held, among other things, that termination penalties may not be assessed in instances where the transaction involves an assignment to the reseller of the customer's contract with Bell Atlantic-NY, and that Bell Atlantic-NY may not unreasonably bar such an assignment. But while the NYPSC expressed concern about the use of termination penalties, it did not find Bell Atlantic-NY's past actions to have been an attempt to protect market position, and it found no violations of 47 U.S.C. §251(b)(1) or §251(c)(4).[4] The FCC likewise noted concerns with respect to termination

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[1] TRA, pp. 23-27; ALTS, pp. 64-67; e.spire/Net 2000, pp.

[2] BA-NY's Application, p. 36.

[3] Case 98-C-0426, Complaint of CTC Communications Inc., Order Granting Petition (issued September 14, 1998), Order Denying Motion to Compel and for Sanctions and Clarifying the Order Granting Petition (issued February 1, 1999)(CTC Clarification Order).

[4] CTC Clarification Order, p. 5.

penalties, but it did not find them unreasonably restrictive *per se*.[1] It is of course possible that a particular termination charge may be unreasonable in its amount or in the manner in which it is assessed. In any such instances, CLECs may obtain redress through the NYPSC's complaint process. But the prospect of those situations arising provides no basis for finding a lack of compliance with this checklist item.

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[1] Application of BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208, Memorandum Opinion and Order (rel. December 24, 1997), ¶222.

PRICING

AT&T contends that Bell Atlantic-NY "has completely failed to meet" the requirement of showing that its prices for unbundled network elements satisfy the applicable federal standards.[1] Several other parties raise more specific pricing issues, related primarily to charges for digital subscriber line (DSL) loops.[2]

In our Evaluation, we described in detail[3] our conclusion that "prices conforming to the FCC's requirements are in effect for resale, interconnection, and unbundled network elements provided by Bell Atlantic-NY."[4] We here respond to the allegations to the contrary.

AT&T contends that Bell Atlantic-NY's rates for unbundled loops and unbundled switching fail to reflect the FCC's TELRIC method and that Bell Atlantic-NY therefore could not have shown that its element prices are cost based and in compliance with the checklist standard.[5] For the reasons described below, AT&T's conclusions are wrong with respect to both elements. As a threshold matter, however, we urge the Commission not to entertain AT&T's collateral attack on the NYPSC's pricing decisions.

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1 AT&T, pp. 53-64 (quoted wording at p. 54).

2 MCI WorldCom, pp. 33-34; COVAD, p. 6; CoreComm, pp. 5-6; ALTS, pp. 36-37. ALTS also raises a concern regarding certain collocation charges. Id., pp. 62-63.

3 NYPSC Evaluation, pp. 152-162.

4 Id., p. 162.

5 AT&T, p.58.

A. Threshold Legal Issues

If AT&T felt aggrieved by the NYPSC's pricing decisions, it should have pursued its putative remedy in federal court pursuant to the 1996 Act.[1] That statute sets forth explicitly the procedures whereby prices for unbundled network elements are determined by the state commissions in the first instance.[2] The statute provides for review via an action in federal district court.[3] In contrast to these explicit procedures, nothing in §271 authorizes use of its process as a forum in which belated objections to state pricing decisions may be pressed.[4] AT&T failed to avail itself of its ostensible statutory remedy in a timely fashion.[5]

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[1] 47 U.S.C. §252 (e) (6). Notably, MCI did bring such an action for review of aspects of the NYPSC's pricing decisions; it remains pending. MCI Telecommunications Corp., et al. V. New York Telephone Co. et al., No. 97-CV-1600 (N.D.N.Y., filed October 31, 1997).

[2] 47 U.S.C. sec. 252 (d)(1).

[3] 47 U.S.C. sec. 252 (e)(6). While we and other state commissions regard such federal district court review of state agency actions as contravening the Eleventh Amendment to the U.S. Constitution, there is no indication AT&T shares that concern. Indeed, it has availed itself of such federal court review in other instances.

[4] AT&T's reliance on the Ameritech Michigan order to find authority for independent review pursuant to section 271 (pp. 54-56 of its comments) fails to recognize that, at the time of the Ameritech Michigan review, the Commission had been denied the authority to require the use of the TELRIC method pursuant to §252, Iowa Utilities Board v. Federal Communications Commission, 135 F.3d 535 (8th Cir. 1998). The Supreme Court has reinstated that authority in AT&T Corp. v. Iowa Utilities Bd., 119 S.Ct. 721 (1999), 119 S. Ct. 1022 (1999), and in the subsequent vacatur of the mandate to enforce.

[5] Because there is no statute of limitations governing this particular action, a federal court would borrow from closely related limitation statutes, such as the 30 days under 47 U.S.C. §401(c), 60 days under 28 U.S.C. §2344, or four months for state court review of NYPSC action under New York Civil Practice Law & Rules §217. Regardless of the choice, a greater period of time has expired since the NYPSC established the pricing rules of which AT&T complains and incorporated them into AT&T's interconnection agreement.

Precluding AT&T from relitigating its failed arguments here is mandated as well by the common-law doctrine of collateral estoppel, which applies fully to administrative decisions.[1] The issue of whether Bell Atlantic-NY's loop and switching prices comply with the FCC's TELRIC guidelines, raised here, has been thoroughly and fairly litigated in New York,[2] with AT&T's full participation in evidentiary hearings and briefing.

To borrow the Supreme Court's term much favored by AT&T in its comments,[3] it is "surpassing strange" for AT&T to challenge at this time and in this forum decisions by the NYPSC that it declined to challenge in the manner contemplated by the 1996 Act. The Commission should not permit it to do so.

B. Loop Costs

AT&T disputes the NYPSC's determination that a proper TELRIC analysis of loop costs in New York presumes all-fiber feeder. It insists that for relatively short loops (below 9,000 feet or so; the precise "cross-over point" is the subject of debate), copper feeder will be less costly and more efficient, and that our premise of fiber inflates rates above costs by about 15%.[4] It

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1 Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 107, 111 S.Ct. 2166, 2169 (1991); Callanan Road Improvement Co. v. United States, 345 U.S. 507, 512 (1953) (including ratemaking under the circumstances presented here), Allied Chemical v. Niagara Mohawk Power Corp., 72 N.Y.2d 271, 278 (1988); Long Island Lighting Co. v. IMO Industries, Inc., 6 F.3d 876, 886 (2d Cir. 1993).

2 Case 95-C-0657 et al., First Network Elements Proceeding, Opinion No. 97-2 (issued April 1, 1997)(the Phase 1 Opinion), BA-NY Application, Appdx . G, Vol. 1, Tab 9; Opinion No. 97-14 (issued September 22, 1997)(the Phase 1 Rehearing Opinion), BA-NY Application, Appdx. G, Vol. 2, Tab 12.

3 AT&T's Comments, pp. 55, 59.

4 AT&T, p. 59.

characterizes our determination as unsupported and "idiosyncratic,"[1] and at odds with the conclusions reached in other jurisdictions.

The issue was hotly litigated in Phase 1 of the NYPSC's First Network Elements Proceeding, where AT&T took the same position it takes here, and the New York Commission fully explained the reasons for its conclusion to the contrary.[2] Among other things, the NYPSC noted the substantially lower installation costs of fiber per unit of capacity (particularly important in large metropolitan areas, where facilities are installed in conduits) and the substantially lower maintenance costs associated with fiber, suggesting that they had been inadequately taken into account in the Hatfield Model that AT&T had relied on in Phase 1 and that showed lower costs associated with copper. The New York Commission pointed as well to the savings achievable by provisioning customers through the addition of electronics rather than through additional cabling or network reconfiguration and to fiber's operational advantages in comparison with copper.[3] It was unpersuaded by arguments relying on fiber/copper crossover practice in other jurisdictions, finding they "fail[ed] to take account of special needs in New

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[1] Id., fn. 25.

[2] Phase 1 Opinion, pp. 82-84; Phase 1 Rehearing Opinion, pp. 22-29.

[3] In this regard, the NYPSC recently required BA-NY to reduce two UNE rates to reflect technological innovations that capture anticipated additional savings made possible by use of the fiber/digital loop carrier-feeder construct. (The rates are the non-recurring charge for central office cross-connections, reduced to reflect the premise those connections can be made electronically rather than by manually cross-connecting wires; and the rate for basic rate integrated services digital network (ISDN-BRI) loops, reduced to reflect the use of integrated, rather than universal, digital loop carrier technology.) (Cases 95-C-0657, supra, Order Directing Rate Reductions (issued October 21, 1999). The rates at issue had initially been set at the higher level because the new technology on which the lower rates are based, though foreseeable, was not likely to be available soon enough to be taken into account in the original TELRIC analysis. The recent reduction of these rates, in light of technological progress, demonstrates the New York Commission's commitment to forward-looking TELRIC principles.

York City, where fiber's additional reliability and flexibility may be more important than they are elsewhere."[1]

AT&T's comments here appear to be oblivious to the New York Commission's account of the rationale for its determination on fiber feeder.[2] Far from being "idiosyncratic," the determination rests on a TELRIC study that encompasses a well-founded skepticism about the Hatfield Model's recognition of all pertinent factors along with a willingness to recognize that conditions in New York differ from those elsewhere and may be unique. As AT&T's experts themselves recognize, the economics of copper vs. fiber depend not only on loop length but also on capacity.[3] In New York City, and especially in Manhattan, where population per square mile is uniquely high,[4] there is ample reason to believe that the economies afforded by fiber's greater capacity will be dispositive, even where distances are short. At a minimum, the contrary results reached elsewhere suggest not that the NYPSC erred or failed to adhere to TELRIC but only that it appropriately exercised its power to take account of conditions in New York.

C. Switching Costs

With respect to switching, AT&T argues that Bell Atlantic-NY's rates are inflated, and fail to comply with TELRIC, in that they fail to recognize the cost savings associated with steep

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[1] Phase 1 Rehearing Opinion, p. 27.

[2] For example, AT&T alleges undue reliance on a 1991 study not introduced into the record of the First Network Elements Proceeding. (Id.) But the New York Commission fully explained that its reliance on that study was both limited (Phase 1 Rehearing Opinion, p. 22) and proper (id. pp. 26-27).

[3] Affidavit of Richard N. Clarke and Catherine Petzinger, AT&T's Comments, Appendix D, Attachment 3, ¶2.

[4] United States Census Bureau data show Manhattan's population per square mile to be 59419.4; the next highest figure outside New York City's other boroughs is San Francisco County's 15502.1. The data are available on the Census Bureau's website, at <http://www.census.gov/population/censusdata/90den_stco.txt>

discounts on new switches that an efficient carrier would receive from its vendors. In the NYPSC's First Network Elements Proceeding, the New York Commission initially was persuaded by Bell Atlantic-NY's position that these discounts had been available only in unusual circumstances and would not continue to be realized; later, in light of newly adduced evidence, it saw a need to reexamine the issue.[1] That reexamination will take place in the Second Network Elements Proceeding. In AT&T's view, the ongoing examination of the issue betokens a failure to set TELRIC-compliant rates, and the "speculative" prospect of a true-up to the now-temporary rates once the process is complete does not remedy that failing.[2]

AT&T bases its conclusion on a selective reading of the NYPSC's treatment of the new evidence on switching discounts. In deciding to reexamine switching costs instead of simply reducing them immediately on the basis of new evidence, the New York Commission referred to "the web of interconnected effects [that] argue[d] strongly against making [a] selective modification."[3] AT&T contends that even if ripple effects mitigated the effect of reducing switch prices to reflect greater discounts, they would not eliminate the effect entirely. But the NYPSC contemplated not only ripple effects of the discount adjustment, but also other adjustments that might raise switching costs. It noted it had rejected Bell Atlantic-NY's upward

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[1] Phase 1 Opinion, p. 85, fn. 1; Phase 1 Rehearing Opinion, p. 40; Case 98-C-1357, Second Network Elements Proceeding, Order Denying Motion to Reopen Phase 1 and Instituting New Proceeding (issued September 30, 1998)(New Proceeding Order), BA-NY Application, Appdx. G, Vol. 2, Tab 18.

[2] AT&T's Comments, p. 63. Notwithstanding AT&T's professed concern on this account, it concurred in BA-NY's recent request to defer the hearing in which the reexamination of this issue is to take place. Case 98-C-1357, supra, Ruling Modifying Module 3 Schedule (issued October 25, 1999).

[3] New Proceeding Order, p. 11. These effects include, among others, possible modification to the installation factor adjustment used in the NYPSC's analysis of switching costs and various adjustments, advanced by Bell Atlantic-NY in its petition for rehearing of the Phase 1 Opinion, to the data used in that analysis. See Phase 1 Rehearing Order, pp. 38-39.

adjustments to switching costs, proffered in a petition for rehearing of the Phase 1 Opinion, in part on the grounds that adjustments tending in the opposite direction also had to be considered.[1]

More fundamentally, AT&T implicitly mischaracterizes the New York Commission's treatment of switching costs in Phase 1. The decision was grounded on an analysis undertaken by the NYPSC's Staff after recognizing the serious flaws in both Bell Atlantic-NY's study and the Hatfield Model proffered by AT&T and MCI WorldCom.[2] The result of that analysis was adopted "not as a mathematically precise calculation of switching costs"[3] but as a figure, well within the range of reason as established by the TELRIC-based record, that was more reliable than the widely differing results of the parties' flawed, competing studies.[4] Thus, AT&T's criticisms appear misdirected in two respects. First, as the NYPSC itself observed,[5] the decision reflects a complex analysis that does not lend itself to simple arithmetic correction through adjustment of a single input. Second, the switching rates now in effect should not be seen as mere "placeholders." They embody a reasonable calculation of pertinent costs, arrived at by the NYPSC Staff's application of forward-looking TELRIC analysis. The evidence cited by AT&T may imply need to refine those rates in one direction; but, contrary to AT&T's suggestion, not only the magnitude but even the direction of the overall body of refinements that may prove warranted cannot now be foreseen. The rates remain temporary pending those refinements, but they are no less TELRIC-compliant on that account.

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[1] New Proceeding Order, pp. 10-11.

[2] Phase 1 Opinion, pp. 84-85.

[3] New Proceeding Order, p. 10.

[4] Id.; Phase 1 Rehearing Opinion, pp. 39, 41.

[5] Id.

D. DSL-Capable Loop Non-Recurring Charges

Several parties express concern about Bell Atlantic-NY's rates for xDSL-capable loops, especially the non-recurring charges related to loop qualification and conditioning.[1] They note that these rates remain under review by the NYPSC and argue that because rates found to comply with TELRIC are not yet in effect for xDSL loops, Bell Atlantic-NY cannot be found in compliance with the checklist.

As reported in our Evaluation,[2] we are reviewing Bell Atlantic-NY's proposed xDSL non-recurring charges in an expedited proceeding scheduled for NYPSC decision in December 1999. Pending that review, the charges are in effect on a temporary basis, subject to refund. Consistent with the NYPSC's commitment to TELRIC principles and to setting prices that satisfy the requirements of the 1996 Act and the Commission, we can safely say that rates meeting those requirements will have been set before the end of the year.

E. Collocation Costs

ALTS contends that Bell Atlantic-NY's collocation tariff fails to provide for the proration of site preparation and related up-front costs among the CLECs that will benefit from the improvement. Instead, it contends, the tariff appears to assign all such costs to the first CLEC seeking collocation, in violation of applicable FCC and NYPSC orders.[3]

ALTS' concern is misplaced. In setting collocation rates, the NYPSC declined to treat room construction costs on the basis proposed by Bell Atlantic-NY, including up-front payment, and instead estimated them on a TELRIC basis and provided for their recovery through recurring

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[1] E.g., MCI WorldCom, pp. 33-34; COVAD, pp. 6-7; CoreComm, pp. 5-6; ALTS, pp. 36-37.

[2] Pp. 79-80.

[3] ALTS, pp. 62-64.

charges.[1] Those charges are calculated, like most rates, on the basis of reasonable estimates of the likely number of users, thereby obviating any possibility that the full cost would be imposed on the first CLEC. The only up-front charge set forth in the tariff sections cited by ALTS is the charge for Adjacent Structures, in §5.6.4(c). Each such structure, however, is designed to be used by a single CLEC, and proration of costs among users accordingly does not arise.

F. Conclusion

We reiterate our conclusion that Bell-Atlantic-NY has met pricing requirements under the 1996 Act.

CONCLUSION

For the reasons set forth in our Evaluation and in this Reply, Bell-Atlantic-NY complies with the requirements of the 1996 Telecommunications Act §271(c).

Respectfully Submitted

S/ Maureen O Helmer

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[1] Case 95-C-0657, supra, Opinions Nos. 99-4 (issued February 22, 1999), 99-9 (issued July 26, 1999).