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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC 20554**

In the Matter of)	
)	
Application by New York Telephone Company)	CC Docket No. 99-295
(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)	

Comments of Covad Communications Company and Motion to Strike

In a recent flurry of submissions, Bell Atlantic has supplemented the evidentiary record in this adjudicatory proceeding with a frequency and ferocity that rivals the pre-Christmas bidding wars for Pokemon memorabilia on Ebay. These last-minute efforts—most notably, Bell Atlantic’s offer to establish a “separate data affiliate”—attempt to paper over an obvious defect in its September 29, 1999 application.

Covad is a strong supporter of true structural separation as a means of preventing anticompetitive conduct by an incumbent LEC offering both retail and wholesale services, given the conflicting economic motives of such integration. Indeed, in the course of this proceeding, Covad has shared its view with the Commission that in a post-271 world, structural separation is one of the best means available to regulators of ensuring against anticompetitive conduct by Bell Operating Companies. But such separation cannot serve as a substitute for checklist compliance, no matter what form it takes. Bell Atlantic has now proposed a weak form of structural separation – a separate affiliate similar to that established by SBC/Ameritech – as a solution to its failure to

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comply with the checklist. For the reasons outlined below, Covad cannot support such a proposal.

This proceeding is an adjudication. The Commission is charged with determining whether, on September 29, 1999, Bell Atlantic “has fully implemented the competitive checklist.”¹ Unless it can make that finding, “[t]he Commission shall not approve” the application.² One critical checklist item is whether Bell Atlantic is providing nondiscriminatory access to unbundled network elements—in particular, loops.³ Bell Atlantic’s obligation does not simply extend to certain types of loops – voice loops, platform loops, or whatever loops Bell Atlantic chooses to provide – rather, it extends to all loops to all telecommunications providers. This Commission has been a vocal and active supporter of the deployment of advanced services to all Americans – and Covad is trying to meet the exploding demand for high-speed broadband services, in New York and throughout the nation. The Commission must not permit Bell Atlantic to delay the deployment of competitive broadband services by validating its failure to provide unbundled loops to DSL providers like Covad. The consumers of New York who would benefit from broadband services will suffer as a result.

As Covad has clearly shown, Bell Atlantic’s application does not prove – as it must – that Bell Atlantic provides nondiscriminatory access to UNEs, as well as access to unbundled loops in the State of New York—indeed, the evidence shows that in New York, Bell Atlantic does not even deliver 1/3 of Covad’s loops on time. As Covad has

¹ 47 U.S.C. sec. 271(d)(3)(A)(i).

² 47 U.S.C. sec. 271(d)(3).

³ 47 U.S.C. sec. 271(c)(2)(B)(ii), (iv). Covad also takes issue, as detailed in its comments and reply comments, with Bell Atlantic’s OSS.

demonstrated in its filings and in meetings with Commission staff and Commissioners, this abysmal performance is not a minor glitch—it evidences systemic failures in Bell Atlantic’s DSL loop provisioning system that were not tested by KPMG, are not subject to any performance metrics or remedies, and which are only now being addressed by the NYPSC through the on-going DSL Collaborative. And, as Covad has pointed out on numerous occasions, these provisioning failures are fixable; Bell Atlantic need only to show up for work—to finish simple central office wiring or to drop a loop at a customer’s home. Bell Atlantic’s loop delivery performance is singularly and irreparably fatal to this application.

The Department of Justice—in a pleading that the Commission must give “substantial weight” to—agrees. The proper response for Bell Atlantic to this evidence should be to fix its loop delivery problems and re-submit its application when those problems are resolved. That is the method envisioned by the 1996 Act.

But that’s not the route Bell Atlantic has taken. Instead of concentrating on fixing these problems, Bell Atlantic wants to whitewash the issue by floating an unenforceable, outside-the-record promise to create a flawed “separate data affiliate” that cannot save this application.

Theoretically, divestiture of ILEC wholesale and retail assets may solve ongoing discrimination issues with regard to the provision of UNEs to CLECs. Indeed, Covad is a strong supporter of the right kind of structural separation. Bell Atlantic’s 11th hour promise to establish a milquetoast “separate affiliate” by July, 2000—*after* it gains entry into the long distance market in New York—simply cannot bootstrap Bell Atlantic’s woeful DSL loop delivery performance to date into compliance with checklist items (ii)

and (iv). It defies the legal requirements of Section 271 for the Commission to rely upon an unenforceable “commitment” by Bell Atlantic to re-structure its operations by July 2000 as proof that Bell Atlantic was providing nondiscriminatory access to loops in September, 1999. Covad would welcome the opportunity to assist the Commission in directing Bell Atlantic to establish the right kind of separate structure, but Covad would hope to have more than one week to do so.

I. MOTION TO STRIKE: THE ACCEPTANCE OF LATE-FILED EVIDENCE IS IMPROPER IN THIS ADJUDICATORY PROCEEDING

In the past few weeks, Bell Atlantic has treated this Commission with a rolling 271 application, supplementing the record with late-filed data and additional legal arguments that it believes should be considered. As the Commission noted in its Public Notice seeking comment on this latest Bell Atlantic submission, “the Commission has stated on numerous occasions its expectation that a section 271 application, as originally filed, will include all of the factual evidence on which the applicant would have the Commission rely in making its findings thereon.”⁴ There is a simple reason why the Commission has developed this requirement—a section 271 proceeding is an adjudication that the Commission must complete within a Congressionally-mandated 90-day decision period. During that period, the Commission must assess and weigh highly detailed and factual evidence from the applicant, the parties, the state commission, and the Department of Justice. The Commission cannot hope to properly adjudicate the record within the statutory time period if the evidentiary record continually shifts and changes.

⁴ “*Ex Parte* Letter Filed in Connection With Bell Atlantic’s Section 271 Application for New York,” Public Notice, DA 99-2779 (rel. Dec. 10, 1999) (citing *Ameritech Michigan 271 Order* at ¶ 49).

In past section 271 orders, the Commission has adopted procedural protections against last minute distractions. For example, in the *BellSouth South Carolina 271 Order*, the Commission concluded that commenters replying to arguments raised in the record “may not raise new arguments” that could have been addressed either in the application or the initial comments, because such a tactic “immun[izes]” such new proposals from attack.⁵

The “complete-as-filed” rule is fair to both applicant and all parties. Because of the statutory 90-day adjudication period, it is not overly burdensome to re-start the clock on an application if the applicant believes that facts change in its favor. And if the applicant somehow “falls out” of compliance, Congress has (in its wisdom) provided for a similar 90-day deadline on proceedings that would suspend or revoke the applicant’s interLATA authority.⁶

Covad (and other parties) have strictly followed the “complete-as-filed” rule in its comments in this proceeding—cutting off our detailed loop delivery information to September 28, 1999, the day before Bell Atlantic filed its application. Covad respected this rule, even though it could have provided this Commission with further, detailed

⁵ *BellSouth South Carolina 271 Order* at para. 52. The Commission reiterated this requirement in its September 29, 1999 Public Notice at 7 (“Reply Comments may not raise new arguments that are not directly responsive to arguments that other participants have raised.”) The prejudice that the Commission sought to prevent is clear, and this sound policy is even more applicable to Bell Atlantic’s late-filed separate affiliate gambit, dropped on parties and the Commission slightly more than 2 weeks from the end of the statutory consideration period. Bell Atlantic certainly cannot make the argument that it did not know until December 10 that discriminatory loop provisioning practices were at issue in this proceeding. No waiver of the Commission’s *ex parte* rules can cure Bell Atlantic’s egregious attempt to rewrite the procedures by which the Commission considers section 271 applications. Covad doesn’t even yet know at this late date if the Commission is going to consider Bell Atlantic’s proposal or ignore it, making it impossible to determine if the focus of these comments should be on the propriety of the Commission addressing Bell Atlantic’s proposal or on the merits of the proposal itself.

⁶ 47 U.S.C. sec. 271(d)(6).

evidence that in the months of October and November Bell Atlantic's "new" DSL loop delivery processes have yet to bear fruit and that in some instances Bell Atlantic's performance has actually gotten worse over time.

On the whole, the "complete-as-filed" rule benefits all parties and the administrative process. Indeed, permitting the continual updating of the factual record would make the 271 process unmanageable. The DOJ, state commissions, the applicant, and other parties would be unfairly prejudiced in their ability to address the moving target of assertions.

Therefore, Covad respectfully files this motion to strike the following submissions by Bell Atlantic from this record: Letter from Thomas J. Tauke, Senior Vice President – Government Relations, Bell Atlantic, to William E. Kennard, Chairman, Federal Communications Commission, dated December 10, 1999.

II. THE SEPARATE DATA AFFILIATE PROPOSAL CANNOT REMEDY BELL ATLANTIC'S FAILURE TO FULLY IMPLEMENT THE CHECKLIST

In response to an inquiry concerning Bell Atlantic's willingness to provision its own DSL services through a separate affiliate, on December 10, 1999, Bell Atlantic submitted a new proposal for a "separate affiliate" as a means to ensure future nondiscriminatory treatment of DSL competitors like Covad. Bell Atlantic's new proposal is irrelevant to this proceeding for two principal reasons. First, the separate affiliate does nothing to alleviate the *current* discriminatory practices, detailed at length by Covad in this proceeding, that represent a severe anticompetitive bar to true broadband competition in New York. Second, Bell Atlantic's proposal to establish a separate

affiliate in July of 2000 does not, and cannot, remedy its failure to comply with the section 271 competitive checklist at the time it filed its application. Above all, Bell Atlantic has done nothing more than promise to set up an affiliate at some time in the future, subject to numerous as yet undefined parameters. Moreover, Bell Atlantic's promise is unenforceable, because this proceeding is not a rulemaking proceeding and because the Commission cannot lawfully condition interLATA entry. The Commission simply cannot entertain such a malleable proposal as anything more than a distraction from the important checklist issues at hand.

That said, divestiture of Bell Atlantic's wholesale and retail operations should be examined closely—but in the context of a general rulemaking or declaratory ruling proceeding, not a fact-specific adjudication.⁷ Covad stands ready to assist the Commission in crafting a divestiture plan for Bell Atlantic—and, indeed, all ILECs—that would address the discrimination issued that Covad has raised.

However, the Commission need not trammel on the Section 271 process to accomplish this public interest goal. As proposed by Bell Atlantic, the affiliate would not fully be in place until July 2000—a time frame fundamentally irrelevant as to whether Bell Atlantic was in compliance with the checklist at the time Bell Atlantic filed its application with the Commission. In this harried and improper context, the Commission has no opportunity to hear parties fully on this issue, discuss the merits of particular

⁷ The First NPRM in the *Advanced Wireline Services* docket (CC Docket No. 98-147) specifically requested comment on structural separation, and the Commission has not taken any further action on that topic in that docket. In 1998, the Commission sought comment on a structural separation proposal by LCI. See Commission seeks Comments on LCI Petition for Declaratory Ruling Concerning Bell Operating Company Entry into In-Region Long Distance Markets, CC Docket No. 98-5, Public Notice, DA 98-130 (rel. Jan. 26, 1998). Incidentally, Bell Atlantic has opposed structural separation in both of those dockets.

parameters of separate affiliates, or determine exactly which current discriminatory practices can or should be directly addressed in the divestiture plan.⁸

There is ample, unrebutted evidence in the record of Bell Atlantic's noncompliance with items (ii) and (iv) of the checklist.⁹ Covad has been ordering unbundled loops—and experiencing these significant delivery problems—for over a year. Had Bell Atlantic rectified the loop provisioning problems that Covad has been bringing to its attention for well over a year, Bell Atlantic's last minute gambit would not be necessary. Indeed, Bell Atlantic now admits that there is more work to be done on loop provisioning issues in New York, even today.¹⁰ A majority of parties to this proceeding agree that Bell Atlantic's loop provisioning process is still a work in progress.

⁸ Most notably, Covad points out that the “separate data affiliate” proposal, because it does not address circuit-switched voice services, would do *nothing* to remedy the two other significant flaws the DOJ pointed out in Bell Atlantic's application—flow-through of UNE Platform orders and loop “hot cuts.”

⁹ Until December 6, 1999, Bell Atlantic had made no effort whatsoever to rebut the detailed loop delivery evidence proffered by Covad on October 19, 1999—despite the fact that the Commission's schedule specifically gave Bell Atlantic a reply comment opportunity on November 8, 1999. Indeed, in its replies, Bell Atlantic simply ignored the majority of Covad's data, choosing to argue instead that Covad erroneously counted orders that were actually Covad's own fault, without offering a single example of such an order. This contrasts with Covad's concrete, order by order analysis of Bell Atlantic's loop performance. Why couldn't Bell Atlantic present its own evidence as to how Covad's orders were actually Covad's fault? Clearly, Bell Atlantic is in possession of *even more* information about the loop orders placed by Covad than Covad itself – why is it that Bell Atlantic chose to make sweeping generalizations, rather than present concrete data? On December 6, 1999, during a joint meeting between Covad, Bell Atlantic, and FCC Staff, it was clearly demonstrated that Bell Atlantic's loop performance claim was based upon a manipulation of data, a self-selected “sample” of loops designed to exclude from consideration Bell Atlantic's most egregious loop failures. For example, Bell Atlantic admitted in the course of this debate that its loop performance data counted only the number of loops Bell Atlantic billed CLECs for in a particular month, rather than the number of loops CLECs ordered in a particular month. As a result, it is not surprising that Bell Atlantic reported near-100% on time performance – all loop orders that it billed for were, obviously, loop orders that Bell Atlantic had completed. Excluded from the data were loop orders that Bell Atlantic had not completed – as such, the total of number of digital loops (ISDN and ADSL loops) Bell Atlantic reported for *all* CLECs each month were consistently lower than the number of loops ordered by *Covad alone* each month. This method of reporting performance is misleading, erroneous, unfair, and results in grossly inaccurate performance data.

¹⁰ See Letter dated Dec. 10, 1999, from Randal S. Milch, Associate General Counsel, State Regulatory North, Bell Atlantic, to Lawrence G. Malone, General Counsel, New York State Public Service Commission, at 4 (“As a result of the DSL collaborative, BA-NY has implemented a plan related to CLEC education and BA-NY training and manpower additions that has already increased provisioning

But instead of choosing to come into compliance—and resubmit its application—Bell Atlantic now thinks its unenforceable separate affiliate idea should somehow assuage the Commission’s concerns about its current noncompliance. For a Commission so dedicated to the breaking down of barriers to competition in the local telecommunications marketplace, there can be only one answer to Bell Atlantic’s regulatory slight-of-hand: No. Last minute proposals and promises are not on the path to a “yes.” Only full compliance with the checklist. And Bell Atlantic is not there yet.

III. THE FORM OF STRUCTURAL SEPARATION PROPOSED WOULD NOT REMEDY DISCRIMINATORY PRACTICES

Although Covad strongly opposes the use of the affiliate proposed by Bell Atlantic in this proceeding as a substitute for checklist compliance, Covad feels compelled to address briefly the merits of Bell Atlantic’s proposal. The Commission must recognize the shortcomings of Bell Atlantic’s proposal in order to address better the issue of structural separation in other contexts. Should the Commission chose to utilize the separate affiliate in the context of this adjudication, Covad respectfully requests that it take note of the problems with Bell Atlantic’s proposal highlighted below, and seek solutions to those problems.

It is noteworthy that until December 10, 1999, Bell Atlantic had been an adamant opponent of structural separation, filing opposing comments to the Commission’s August 1998 notice into such separation, and filing no less than two legal challenges to the recent

Pennsylvania Public Utility Commission Order that Bell Atlantic structurally separate its retail and wholesale operations.¹¹

A. The Bell Atlantic Proposal does not Divest Retail/Wholesale Operations

Covad's vision of structural separation is not the fully integrated version of "separation lite" that Bell Atlantic volunteers to adopt. Properly constructed, divestiture of retail and wholesale operations can be an effective means of addressing discriminatory practices. Indeed, the FCC concluded as much in the *First Advanced Services Order and NPRM*. In what it termed an "optional alternative pathway," the Commission outlined a truly structurally separate entity that would operate "on the same footing as any of their competitors."¹² In order for that affiliate to be "truly separate," the Commission determined that it must satisfy "adequate structural separation requirements" and acquire "facilities used to provide advanced services" on its own.¹³ If it failed to satisfy these requirements, the Commission concluded, the affiliate should be treated no differently than the incumbent LEC itself.

The Commission outlined the specific parameters that an incumbent LEC separate affiliate must meet in order to be deemed a truly separate affiliate.

¹¹ See, e.g. *Application for Extraordinary Relief of Bell Atlantic* (Penn. Supr. Ct., dated Oct. 21, 1999) ("the PUC announced that it will break Bell Atlantic into two separate corporations even though the PUC has no legal authority to require this draconian corporate dismemberment. . . . The PUC is plainly an agency run amok Unless reversed, the September 30 Order will financially devastate Bell Atlantic . . . and have severe consequences for the millions of employees, businesses, and consumers across Pennsylvania who depend on Bell Atlantic and the telephone services it provides.") Will the real Bell Atlantic please stand up?

¹² *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188 at ¶¶ 83, 86 (rel. Aug. 7, 1999).

¹³ *First Advanced Services Order and NPRM* at ¶ 92.

- (1) The incumbent must “operate independently from its affiliate.” The incumbent and affiliate may not “jointly own switching facilities or . . . land and buildings . . .” In addition, the incumbent may not “perform operating, installation, or maintenance functions for the affiliate.”¹⁴
- (2) Affiliate/incumbent transactions must be “on an arm’s length basis, reduced to writing, and made available for public inspection.”¹⁵
- (3) Incumbent and parent must maintain separate books, records, and accounts.
- (4) Incumbent and parent must have separate officers, directors, and employees.
- (5) Upon credit default by the affiliate, no recourse may be had to the assets of the incumbent.
- (6) The incumbent LEC, may not discriminate in favor of its affiliate in the provision of any goods, services, facilities, information, or the establishment of standards.
- (7) The affiliate must interconnect with the incumbent pursuant to tariff or interconnection agreement, and any UNEs, facilities, interfaces, and systems provided to the affiliate must be provided to any unaffiliated entity.

The SBC/Ameritech affiliate, with numerous of its safeguards removed by Bell Atlantic’s “caveats,” offers little or no protection against the type of discrimination that Covad has suffered since its entry into the New York market. Few, if any, of these matters are addressed by the provisions of the SBC/Ameritech affiliate that Bell Atlantic has agreed to meet, and those that are addressed have as their only enforcement mechanism Bell Atlantic’s agreement to form the affiliate in six months time. In short, the model of separation advanced by Bell Atlantic is an inappropriate model for the Commission to use as a remedy for Bell Atlantic’s discriminatory UNE practices. To truly serve the worthy goal of ensuring nondiscrimination, the structurally separate entity must be legally separate—no common officers, employees, personnel, facilities, finances, or other assets.

¹⁴ *First Advanced Services Order and NPRM* at ¶ 96.

¹⁵ *First Advanced Services Order and NPRM* at ¶ 96.

To ensure true separation, the Retail Entity cannot be the sole shareholder of the Wholesale Entity (or vice versa). Otherwise, every transaction would simply be an internal accounting transfer not subject to true nondiscrimination. Moreover, if management is compensated by stock options, as is commonplace in the private sector, then management would have incentive to direct or condone any anticompetitive behavior that would increase the value of the combined entity's stock. As a result, nothing short of divestiture—separate ownership—of the wholesale and retail arms would serve to promote the public interest. The creation of a true wholesale “carrier’s carrier” with dominion over the local plant and central office assets (but no role or interest in *any* retail service provision) would provide substantial public interest benefits and would certainly serve to “free” the BOC retail company from ILEC status, and perhaps even from the Section 271 interLATA restrictions.

There is ample market precedent for this construct. For example—

- Faced with a similar “competitor as customer” concern, AT&T successfully spun off Lucent Technologies. AT&T is now in the process of creating a separate “tracking stock” for its mobile wireless business.
- Intelsat engages exclusively in the provision of wholesale satellite transport services. New satellites and services are funded by securitization of long-term contractual commitments by its customers.
- The Trans-Alaska Pipeline System is jointly owned by major oil companies and is operated in a nondiscriminatory manner by a wholesale operating company that has no retail or exploration interests.

Further, Bell Atlantic's "separation lite" proposal offers absolutely no assurance that CLECs will get true nondiscriminatory treatment from the wholesale entity. As is clear on the record in this proceeding, Bell Atlantic's version of parity would allow CLECs to provide no more or better advanced services than its retail entity.¹⁶ In Bell Atlantic's view, bad parity is parity nonetheless. Any divestiture ordered by the Commission would have to ensure that CLECs are afforded of parity of opportunity to provide whatever services consumers want and need.

B. The SBC/Ameritech Affiliate Was Implemented in a Different Context

It is important to remember the SBC/Ameritech separate affiliate condition for what it really is—a regulatory construct proposed by two merging parties as a “public interest benefit” of their transaction. In that transaction, the Commission found that the merger of SBC and Ameritech would substantially harm the public interest. To counterbalance that finding, SBC and Ameritech offered up dozens of what it contended were pro-competitive and pro-consumer conditions, of which the affiliate proposal was only one.

¹⁶ For example, in response to an investigation into Bell Atlantic's discriminatory practices against competitive broadband service providers commenced by the U.S. House of Representatives Committee on Commerce, Bell Atlantic noted the following: (a) “Bell Atlantic offers only asynchronous DSL, ADSL, to its retail customers” and (b) “. . . Bell Atlantic will not provide its own ADSL service to retail customers who are served by loops that are longer than 12,000 feet.” See Letter dated Dec. 2, 1999, from Thomas J. Tauke, Senior Vice President-Government Relations, Bell Atlantic, to The Honorable Tom Bliley, Chairman, Committee on Commerce, U.S. House of Representatives, at 1. Covad, on the other hand, offers a wide range of DSL products – ADSL, HDSL, IDSL, for example – over loops tens of thousands of feet in length. Bell Atlantic's separate affiliate, which it contends would offer parity of performance to CLECs, would actually serve to bring down Covad's offerings to Bell Atlantic's level. The affiliate as proposed by Bell Atlantic would thus have the perverse effect of making Bell Atlantic's retail ADSL offering the standard by which its performance is judged, despite the fact that Bell Atlantic's retail service is significantly narrower than Covad's offerings.

The Commission never intended the affiliate as a safeguard against the merged entity's failure to comply with the competitive checklist of section 271. Indeed, the Commission specifically concluded in the SBC/Ameritech merger order that "the structure of the separate advanced services affiliate that is required under the conditions would not be adequate for SBC/Ameritech's provision of in-region, interLATA services following section 271 authorization."¹⁷ In addition, the Commission implemented a "comprehensive" and "rigorous" annual audit of SBC/Ameritech's new affiliate in order to ensure that all transactions between the affiliate and parent were in compliance with the numerous additional conditions imposed by the Commission.

In the instant proceeding, Bell Atlantic has agreed to abide by some, but not all, of the parameters of this separate affiliate and only for three years.¹⁸ It has agreed to exactly none of the additional conditions imposed on SBC/Ameritech. Without knowing exactly what Bell Atlantic proposes to do out of this affiliate, and without having witnessed the affiliate in operation, the Commission cannot seriously consider relying on the as yet nonexistent affiliate to remedy the range of anticompetitive practices documented in the record of this proceeding.¹⁹

IV. SAYING YES TO SAYING NO

¹⁷ SBC/Ameritech Order at para. 357.

¹⁸ Even within the limited procompetitive parameters of the SBC/Ameritech separate affiliate, Bell Atlantic has further limited those restrictions it is willing to abide by. Thus, Bell Atlantic adds the caveat to its December 10, 1999 *ex parte* that it will only subscribe to paragraphs 1-14 of the Commission's SBC/Ameritech affiliate condition – ensuring that it doesn't have to comply with such procompetitive requirements as OSS (¶¶ 15-18, 25-34), loop information (¶¶ 19-20), loop conditioning charges (¶¶ 21) and collocation (¶¶ 37-41).

¹⁹ Cf. "FCC May Be Close to Approving Bell Atlantic Long-Distance Bid," Wall Street Journal, Dec. 17, 1999 at B6 ("Some competitors have complained it takes too long for Bell Atlantic to make the proper [loop] connections. The company has recently set up a separate subsidiary to handle such requests, and the FCC is monitoring its performance.").

The Commission need not bend over backwards to assist Bell Atlantic in the process of getting into the long distance market in New York. The fact that Bell Atlantic is not in compliance with the checklist today does not mean that it cannot be very soon— if it decided to act within the strictures of existing law.

Bell Atlantic can remedy its discriminatory practices, and the Commission can provide a pathway into the long distance market. The Commission should take advantage of the precedent it has established in prior section 271 adjudications and provide Bell Atlantic the clearest possible “path to yes”—

- For the checklist items that the Commission is convinced Bell Atlantic has met, the Commission should validate that compliance. Upon reapplication, Bell Atlantic would only have to certify to continued compliance, thus freeing it from the burden of re-proving that compliance. The Commission could substantially limit comment on these checklist items in any re-submitted application.
- The Commission should find that with regard to nondiscriminatory access to UNEs and access to unbundled loops, Bell Atlantic has not fully implemented the checklist and must re-submit its application.²⁰ The Commission should give strong guidance to Bell Atlantic that any re-submission should occur *after* completion of the DSL collaborative and

²⁰ As outlined by Covad in its Reply Comments at pp. 7-12, Bell Atlantic should be required to prove, at a minimum that it provides: (1) firm order commitments within 72 hours of the CLEC’s first submission of an order, for 95% of loop orders, (2) functional loops, provisioned within 5 business days, for 95% of all loop orders, (3) resolution of trouble tickets within 24 hours, for 95% of tickets, and (4) cooperative testing of 100% of loops. Bell Atlantic has already agreed to this last commitment in New York, but Covad has submitted evidence to the Commission that on any given day, Bell Atlantic only tests from 11% to slightly more than half of Covad’s loops.

should contain no fewer than 60 days of actual performance under any revised methods and procedures that results from this collaborative.

- In the meantime, the Commission should act swiftly—within the next 60 days—to begin the process of divesting Bell Atlantic's wholesale and retail operations.

* * *

No late-filed evidence, no unenforceable promise by Bell Atlantic that it will do something by July 2000 can change the facts: Bell Atlantic consistently fails to provide timely functional loops to Covad in New York. Checklist items (ii) and (iv) are not met. With these hard and uncontroverted facts, Section 271 of the Act tells the Commission what it must do: reject the pending application. The Commission should then act swiftly to implement a Bell Atlantic divestiture plan and process for remedying these current discriminatory practices.

For the reasons outlined above, the Commission should strike or, in the alternative, give no weight to the late-filed evidence, including the data affiliate proposal, submitted by Bell Atlantic in this docket.

Respectfully submitted,



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