

ORIGINAL

EX PARTE OR LATE FILED

Ex Parte

December 17, 1999

VIA HAND DELIVERY

Chairman William E. Kennard
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RECEIVED
DEC 17 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: *Bell Atlantic-New York Long Distance Application,
CC Docket No. 99-295*

Dear Chairman Kennard:

On behalf of CoreComm Limited and CoreComm New York Inc. (jointly, "CoreComm"), we are writing to express grave reservations about the Public Notice released December 10, 1999, in which the Commission solicited comments on a new proposal filed that same day by Bell Atlantic in the above-referenced proceeding.¹ CoreComm strongly believes that the Commission must not disregard established precedent by accepting new evidence at this late stage of the proceeding. Changing the rules of the Section 271 process at this juncture would jeopardize the integrity of the Commission's decisionmaking process.

It has become apparent that even Bell Atlantic now recognizes that, despite the significant and commendable progress it has made in opening its New York market to competition, satisfaction of the competitive checklist was *not* achieved as of the date of Bell Atlantic's application. Under the Commission's consistent and long-standing practice, this fact compels that the pending application be denied.

- Before *any* Section 271 applications had been filed, the Commission made clear 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."²

¹ Ex Parte Letter Filed in Connection with Bell Atlantic's Section 271 Application for New York, CC Docket No. 99-195, DA 99-2779 (Dec. 10, 1999).

² Procedures for Bell Operating Company Applications Under New Section 271 of the Communications Act, Public Notice, 11 FCC Rcd 19708, 19709 (1996).

No. of Copies rec'd 071
List ABCDE

- When the *first* Section 271 application was filed, the Commission refused to consider an interconnection agreement that had not been approved by the state commission as of the date of the application.³ The Commission emphasized that, “[b]ecause of the strict 90-day statutory review period, the section 271 review process is keenly dependent on . . . an applicant’s submission of a complete application at the commencement of a section 271 proceeding.”⁴
- Immediately before the *instant* application was filed, the Commission reiterated that a Section 271 application must be complete when filed and that “in no event shall [an applicant submit] evidence [that] post-date[s] the filing of the relevant comments.”⁵

It is against this backdrop that the Commission must evaluate Bell Atlantic’s current effort to persuade the Commission to change the rules of the game at the 11th hour.

Already it is becoming clear that the Commission’s willingness to consider the possibility of changing the procedural rules is leading to increased gaming of the system. Earlier in the course of this proceeding, one deficiency that was widely noted was that the anti-backsliding measures that Bell Atlantic had portrayed as being in effect⁶ were in fact *proposed* plans that had not been adopted by the New York Commission at the time of the application.⁷ Numerous parties, including the Department of Justice, noted problems with Bell Atlantic’s performance in a number of other critical areas. Bell Atlantic has attempted to cure these deficiencies with late-filed evidence, various parties are submitting competing analyses of Bell

³ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-1, Order, 12 FCC Rcd. 3309, 3318 (1997).

⁴ *Id.* at 3320-21.

⁵ Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act, Public Notice, at 3, DA 99-1994 (released Sept. 28, 1999).

⁶ Application by Bell Atlantic – New York For Authorization to Provide In-Region, InterLATA Services in New York, CC Docket No. 99-295, at 77 (“the [Amended Performance Assurance P]lan enforces compliance . . .”).

⁷ See, e.g., Comments of CoreComm Limited and CoreComm New York Inc., CC Docket No. 99-295, at 8-12 (Oct. 19, 1999) This, of course, is very much akin to the situation in the Ameritech Michigan application, cited above.

Atlantic's post-application performance and projections as to its future performance,⁸ and the Commission has solicited comment on whether to consider this evidence.⁹

It is this willingness to consider changing the rules of the game that has set the stage for the latest development. Apparently conceding that the record shows significant problems in meeting the needs of carriers who wish to provide data services, Bell Atlantic – with less than three weeks remaining in the statutory 90-day timetable for decision – has tendered a new and sweeping proposal to create a “separate data affiliate” to provide “advanced services.” The Commission has allotted just seven days for comment.

To permit such gaming of the system would be wrong in this instance and would establish a dangerous precedent for future Section 271 applications.

One obvious danger is that the Commission will discover, only too late, the unintended consequences of last-minute proposals that were not fully thought through before acceptance and approval. Failure to follow the right *process* may lead to errors or misjudgments of *substance*. Another significant danger is that accepting late-filed proposals will induce future applicants to file incomplete or second-rate applications with the notion that they will be able to cure any deficiencies that may be identified by others by horse-trading “concessions” late in the decisional process.

Clearly the latest proposal raises as many questions as it answers. Will the affiliate be subject to Section 251(c) and, if not, why not? Will it have privileged access to customer proprietary network information of Bell Atlantic customers? Assuming that the data affiliate would not provide any interLATA services,¹⁰ what would be the relationships between Bell Atlantic, the data affiliate, and the 272 affiliate?¹¹ Also, whatever the merits of the SBC-

⁸ It is telling that the New York Commission has recently predicted that, due to unspecified “changes to BA-NY plans . . . , UNE flow-through will increase to 74 percent by the end of the year and will be about 81 percent by the second quarter of 2000.” Letter from Penny Rubin, New York Public Service Commission, to Magalie Roman Salas (Dec. 8, 1999). Section 271 decisions should be driven by facts, not prognostications.

⁹ Ex Partes Requested in Connection with Bell Atlantic's Section 271 Application for New York, CC Docket No. 99-295, DA 99-2721 (Dec. 3, 1999).

¹⁰ To do so would be unlawful because the degree of separation proposed by Bell Atlantic does not comply with Section 272.

¹¹ If the ILEC portion of Bell Atlantic is not subject to broad nondiscrimination requirements in its dealings with the advanced services subsidiary, and the advanced services subsidiary is not

Ameritech merger conditions as compared to the requirements of Section 272, why is Bell Atlantic proposing that it be subject to an even lesser degree of structural separation than resulted from the SBC-Ameritech merger proceeding? Further, how can Bell Atlantic use a separate affiliate proposal to strengthen its Section 271 application when the separation requirements will be fully effective not on Day 1 or even on Day 90, but only 180 days *after* approval of the long distance application? And why – even at this late date – does Bell Atlantic refuse to say which entity will own critical pieces of property (splitters)?¹²

It is difficult to evaluate all of the many consequences and ramifications of the Commission's recent rulings in the advanced services rulemaking, the UNE remand proceeding, the DSL tariff order, and the linesharing proceeding. The complex interrelationships among these various rulings and their individual and cumulative effects on the competitive landscape have not yet been carefully and comprehensively discussed. Overall, CoreComm is concerned that competitive local exchange carriers who desire to provide *voice* services to *residential* customers may be adversely affected by those rulings in ways not intended by the Commission. Bell Atlantic's 11th hour proposal complicates the analysis further, and creates an increased risk that Bell Atlantic's monopoly in residential voice services will be strengthened. If the Commission acts in haste, there is a substantial danger that an effort to fix one problem, for one group of competitors, will create new impediments to the success of other market participants.

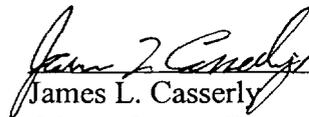
subject to broad nondiscrimination requirements in its dealings with Section 272 affiliate, then the broad nondiscrimination requirement that Section 272 establishes between the ILEC and the 272 affiliate can easily be circumvented.

¹² Compare Letter from Thomas J. Tauke, Bell Atlantic, to William E. Kennard, FCC, attachment at Para. 7 (Dec. 10, 1999) with Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, CC Docket No. 98-141, FCC 99-279, at 150 n.682 (“[s]pectrum splitters used to separate the voice-grade channel from the advanced services channel are not permitted to be transferred”) (Oct. 8, 1999).

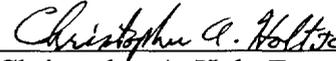
Chairman William E. Kennard
December 17, 1999
Page 5

CoreComm salutes the Commission for the manner in which it has administered the Section 271 process over the past several years. CoreComm urges you to adhere to well-established Commission precedent, to maintain the integrity of the Commission's decisionmaking processes, and to decline to consider late-filed information and proposals.¹³ CoreComm encourages you to inform Bell Atlantic of which checklist items it has fulfilled, on the basis of the application *as originally filed*, and then consider a revised application to address all remaining issues under the procedures established in the Louisiana II order.¹⁴

Respectfully submitted,



James L. Casserly
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
Counsel for CoreComm Limited



Christopher A. Holt, Esq.
Assistant General Counsel
CoreComm Limited

cc: Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Commissioner Michael Powell
Commissioner Gloria Tristani
Magalie Roman Salas (for inclusion in the public record of CC Docket No. 99-295)

¹³ CoreComm also urges the Commission – despite any real or perceived political pressure to approve a Section 271 application -- *not to diminish the substantive standards* applied to evaluation of the competitive checklist, Section 272 compliance, and the public interest standard.

¹⁴ Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana, 13 FCC Rcd. 20599, 20,638 (Para. 58) (1998).