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Dee May  
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EX PARTE OR LATE FILE



December 16, 1999

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Ex Parte

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

*Re: In the Matter of Application of Bell Atlantic-New York To Provide In-Region, InterLATA Services in New York, CC Docket No. 99-295*

Dear Ms. Salas:

Bell Atlantic is filing the attached response to arguments that we understand have been made orally by AT&T and other parties in ex parte meetings. Because AT&T has avoided making these arguments on the record, we are handicapped in responding. Nonetheless, we will address what appear to be the key points.

Please feel free to contact me with any questions.

Sincerely,

A handwritten signature in cursive script that reads "Dee May".

Attachment

cc: A. Kearney  
C. Matthey

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## ATTACHMENT

In a series of oral ex partes, AT&T has apparently argued that Bell Atlantic has violated the so-called "complete when filed" principle. Although AT&T has studiously avoided placing its arguments on the record, its theory appears to be that Bell Atlantic has submitted "new" evidence in its reply submissions or in post-comment ex partes. AT&T apparently argues that, because of its procedural claim, consumers should continue to be denied the benefit of added long distance competition while AT&T and its fellow long distance incumbents add local customers in New York at a rate of more than 110,000 per month (and growing).

AT&T's claims are entirely misplaced. As an initial matter, much of what we understand to be AT&T's argument is factually unfounded: the vast majority of the evidence at issue is not "new" at all, but merely repeats, clarifies, elaborates on, and/or updates material already included as part of the prima facie showing Bell Atlantic made in its September 29 Application, or that was properly included in reply submissions in response to comments of other parties. To the extent that some of the evidence Bell Atlantic has submitted can be characterized as "new," however, this Commission is unquestionably within its broad discretion to consider it and to attribute to it the weight it deserves.

1. As an initial matter, the complete-when-filed "rule" is not a substantive rule of decision at all.<sup>1</sup> Rather, it is a procedural guideline, intended to aid the Commission in gathering and reviewing in an orderly manner all facts and arguments needed to allow it to reach an informed and reasoned decision.<sup>2</sup> Moreover, this Commission has never suggested that the rule requires it to ascertain 271 compliance as of the date of application (instead of the date of decision). Nor could it. By its terms, the statute requires that an applicant be compliant on the date when relief is granted, not 90 days before that time. See, e.g., 47 U.S.C. § 271(c)(2)(A) (asking whether the BOC "is providing" or "is generally offering" access and interconnection in compliance with the checklist) (emphasis added).<sup>3</sup>

Thus, the complete-when-filed rule is designed merely to ensure that applicants make an initial prima facie showing in their application and to prevent them from presenting part of their initial prima facie showing for the first time on reply. See, e.g., Michigan Order ¶¶ 52-55. For example, the complete-when-filed rule by its terms permits an applicant's reply submissions to include new evidence "to rebut arguments made, or facts submitted, by commenters." Sept. 28, 1999, Public Notice at 7. Once an applicant makes a prima facie showing, therefore, any genuinely new evidence it introduces to respond to arguments of other parties is expressly excluded from the scope of the complete-when-filed rule.

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<sup>1</sup> Nor could it be treated as such. It was announced in informal adjudication, was not preceded by notice and comment, and was never codified in the Code of Federal Regulations.

<sup>2</sup> See, e.g., South Carolina Order ¶ 45 ("these procedures governing section 271 applications are necessary in light of the 90-day statutory time deadlines") (emphasis added).

<sup>3</sup> Moreover, given the strong public interest in improving long distance competition, it would be arbitrary to turn down a fully compliant applicant on the strength of nothing more than that the applicant may not have been compliant 90 days earlier.

Even when an applicant makes a prima facie showing in its application (as Bell Atlantic did here), the Commission's staff of course does not take that showing at face value. Instead, it will (as the staff did here) conduct an extensive investigation and evaluation probing every aspect of the applicant's showing. As part of its investigation, the staff will continuously request clarification and additional detail concerning countless aspects of the applicant's initial showing. It would be preposterous for AT&T to argue that the complete-when-filed rule prohibits an applicant from complying with such requests.

Indeed, the complete-when-filed rule is hardly an inflexible command. Even when new evidence falls within the scope of the rule, the Commission still has broad authority to "exercise [its] discretion in determining whether to accord new factual evidence any weight." Michigan Order ¶ 59 (emphasis added); see also Dec. 10, 1999, Public Notice at 1 n.1 ("if parties choose to submit new evidence, [the Commission] retains the discretion to accord new evidence no weight") (emphasis added); Dec. 3, 1999, Public Notice at 1 (same); Sept. 28, 1999, Public Notice at 3 ("the Commission reserves the right to . . . accord such evidence no weight in making its determination"); Louisiana II Order ¶ 111 ("Given the complexity of this data and the fact that interested parties have not had an opportunity to address it, we exercise our discretion to accord the information minimal weight.") (emphasis added); South Carolina Order ¶ 38 ("if a BOC applicant chooses to submit such evidence, the Commission reserves the discretion . . . to accord the new evidence no weight") (emphasis added); Michigan Order ¶ 50 ("If a BOC applicant chooses to submit such evidence, we reserve the discretion . . . to accord the new evidence no weight in making our determination.") (emphasis added).

In the exercise of this discretion, the Commission has indeed denied motions to strike targeting evidence that, in the Commission's view, fell within the rule's scope. For example, in the Louisiana II Order, the Commission expressly refused to grant a motion to strike post-application evidence that, according to the Commission, had been filed "improperly . . . in the reply phase." Louisiana II Order ¶ 368. The Commission found that "special circumstances" existed in that "consideration of this material will permit us to provide BellSouth and the other BOCs with more complete guidance concerning their statutory obligations under section 271." Id.; see also id. ("unique circumstances"). Similarly, in the Michigan Order, the Commission denied motions to strike even while finding that new evidence had been submitted. See Michigan Order ¶ 59.

2. AT&T appears to have argued that Bell Atlantic has submitted "new evidence" in ex parte letters on three discrete issues: flow through, hot cuts, and DSL loop provisioning. Many of AT&T's claims appear to be warmed-over versions of arguments AT&T made in its wrong-headed Motion to Strike. Bell Atlantic's December 2 Opposition to that motion already answers AT&T's arguments. Suffice it to say here that much of the targeted evidence is not "new" at all, but rather repeated, elaborated on, or provided additional explanation or detail typically in response to requests from the Commission's staff or in direct response to post-rely ex partes by other parties.

Flow Through. Bell Atlantic's Application made a prima facie showing by demonstrating that it had implemented all the flow-through capabilities agreed to in the Pre-Filing Statement; that flow-through levels are substantial (especially for the mass-market platform orders that have been the focus of concern); that flow-through capabilities are comparable for wholesale and retail orders; and that flow-through and reject rates for individual carriers vary widely in that some carriers have achieved materially better levels of performance than others. See, e.g., Application at 41-43; Miller/Jordan Decl. ¶¶ 42-43, 56-58; Dowell/Canny Decl. Att. D. In response to claims by commenters, Bell Atlantic properly demonstrated on reply that flow-through rates would be even higher if adjusted to account for CLEC errors, and that the rates would likewise be significantly higher if measured in the same way as prior applicants did. See, e.g., Reply Comments at 15-16; Miller/Jordan/Zanfini Rep. Decl. ¶¶ 33-38 & Atts. C, D.

Although Bell Atlantic has submitted ex partes addressing flow-through issues, they provided additional clarification and elaboration in response to specific staff requests. On December 2, Bell Atlantic submitted an ex parte that merely summarized the arguments that Bell Atlantic properly included in its reply comments in response to the DoJ's concerns regarding DSL loops and flow through. See Ex Parte Letter from Dee May to Linda Kinney (Dec. 2, 1999). On December 3, Bell Atlantic submitted an ex parte that compared Bell Atlantic's flow-through percentages with those of BellSouth in a way that recapitulated and provided additional explanation of points properly made in Bell Atlantic's reply comments. See Ex Parte Letter from Dee May to Magalie Salas (Dec. 3, 1999). And, on December 4, Bell Atlantic submitted an ex parte providing charts demonstrating the level of flow through for individual CLECs from June through October, again merely elaborating on and adding one month of data to support a point that was already properly contained in Bell Atlantic's reply submissions. See Ex Parte Letter from Dee May to Eric Einhorn (Dec. 4, 1999).

Hot Cuts. Bell Atlantic's Application made a prima facie case by demonstrating that Bell Atlantic consistently followed PSC-prescribed hot-cut procedures; that these procedures had resulted in an on-time performance rate of more than 94 percent; that CLECs' complaints about the accuracy of hot-cut performance reporting were meritless; and that hot-cut delays were overwhelmingly attributable to CLECs. See Application at 17-19; Lacouture/Troy Decl. ¶¶ 69-75; id. Atts. F-I. In response to claims by commenters, Bell Atlantic reiterated and amplified on reply that Bell Atlantic's performance data were accurate and did not overstate Bell Atlantic's performance; that Bell Atlantic provided accurate and timely confirmation and reject notices with respect to hot cuts; that Bell Atlantic does not drop or delay directory listings in connection with hot cuts; and that Bell Atlantic's hot-cut procedures do not result in CLEC customers being put out of service. See Reply Comments at 6-11; Lacouture/Troy Rep. Decl. ¶¶ 36-64.

Although Bell Atlantic has submitted ex partes addressing hot-cut issues, those submissions again provided merely additional clarification and elaboration in response to requests from the staff. On November 5, Bell Atlantic submitted an ex parte discussing Bell Atlantic's provisioning performance measures (including those for hot cuts), which tracked virtually identical information contained in the Dowell/Canny Declaration (¶¶ 68, 70, 73, 140). See Ex Parte Letter from Dee May to Magalie Salas (Nov. 5, 1999). On November 12, Bell

Atlantic submitted an ex parte reviewing Bell Atlantic's hot-cut performance in July and August, the same period covered in Bell Atlantic's Application (at 18). See Ex Parte Letter from Dee May to Magalie Salas (Nov. 12, 1999). On November 24, Bell Atlantic submitted an ex parte that did no more than correct a few small inadvertent errors in the Lacouture/Troy and Dowell/Canny Reply Declarations regarding the number of hot-cut orders for the month of September. See Ex Parte Letter from Dee May to Magalie Salas (Nov. 24, 1999).

DSL. Bell Atlantic's Application made an exhaustive prima facie case by demonstrating that Bell Atlantic provides competitors with non-discriminatory access to loops; that it provides loop-conditioning services; and that it provides competitors loop "qualification" information that goes beyond what it provides even to its own retail operations. See Application at 19-21; Lacouture/Troy Decl. ¶¶ 77-86. In response to claims by commenters, Bell Atlantic demonstrated on reply that the data submitted by those commenters was inaccurate and misleading; again demonstrated that it continued to provide competitors with non-discriminatory access to loops; and also demonstrated that Bell Atlantic and its CLEC customers were working cooperatively to improve their respective processes further still through a collaborative process under the auspices of the New York PSC. See Reply Comments at 11-15; Lacouture/Troy Rep. Decl. ¶¶ 73-110.

Although Bell Atlantic has submitted ex partes addressing DSL-loop-provisioning issues, those submissions again provided additional clarification, elaboration, and updating of its prior submissions in response to requests from the staff or in direct response to allegations made by CLECs in their own post-reply ex partes. On November 12, Bell Atlantic submitted an ex parte reviewing and explaining material addressed in the original Application, including Bell Atlantic's loop provisioning and the loop-qualification processes. See Ex Parte Letter from Dee May to Magalie Salas (Nov. 12, 1999). On December 7, Bell Atlantic submitted an ex parte regarding Bell Atlantic's unbundled digital loop provisioning performance vis-à-vis Covad. See Ex Parte Letter from Dee May to Magalie Salas (Dec. 7, 1999). Bell Atlantic demonstrated in its Reply Comments (at 11-15) that it was meeting required performance standards, and the material Bell Atlantic filed with this ex parte merely supplemented and confirmed this showing in response to extensive new submissions by various CLECs. On December 10 and 16, Bell Atlantic submitted ex partes responding to additional ex parte filings by various CLECs and updating previous submissions to demonstrate that Bell Atlantic remained in compliance with its checklist obligations and that it was continuing to work cooperatively with CLECs under the auspices of the PSC to further improve the CLECs' and Bell Atlantic's processes. Finally, on December 10, 1999, Bell Atlantic submitted an ex parte committing to provide xDSL services in New York through a separate affiliate, thereby providing additional assurance of Bell Atlantic's continued compliance in the future in response to claims by CLECs in their own ex partes that Bell Atlantic would have no incentive to cooperate with CLECs once it received long distance authority. See Ex Parte Letter from Thomas J. Tauke to William E. Kennard (Dec. 10, 1999).

In sum, on each of these three issues, Bell Atlantic's Application made a fully sufficient prima facie showing, and Bell Atlantic properly provided additional evidence on reply in a way that both comported with the complete-when-filed rule and further established Bell Atlantic's entitlement to long distance relief. To the extent Bell Atlantic provided additional evidence in ex

parte submissions, that evidence clarified and expounded upon a showing that was already sufficient to begin with and responded either to staff requests or to allegations and arguments made by other parties in their own ex parte submissions. Accordingly, none of the challenged evidence should even implicate the complete-when-filed rule.

3. If, however, the Commission were to determine that some of Bell Atlantic's evidence is "new," the Commission would still be well within the broad scope of its discretion if it were to assign this evidence the weight that is due. Bell Atlantic's New York Application differs materially from each of the 271 applications that preceded it. Bell Atlantic waited more than three-and-a-half years after the passage of the 1996 Act to submit its Application. During that period, Bell Atlantic -- closely scrutinized by a staunchly pro-competitive state commission conducting wide-ranging proceedings -- took costly and precedent-setting steps to open its local markets, which ultimately caused New York to become the first State in which competitive telephone service is being mass-marketed. When Bell Atlantic finally filed its Application on September 29, it made a comprehensive prima facie showing of plenary checklist compliance. All of this is fundamentally different from what the Commission found to be the case with prior applications.

Under these circumstances, both the Commission and the public have a strong interest in ensuring that all probative evidence on both sides is before the Commission when it renders its decision. AT&T, in contrast, would have the Commission reject the 271 application of a fully compliant applicant (thereby denying consumers the benefit of improved long distance competition) on the theory that a procedural rule rigidly requires it to don blinders that block relevant evidence from view. Its argument, however, is not only utterly nonsensical but also affirmatively harmful to the public interest. That is particularly so where the "rule" urged by AT&T involves merely a decisional rule announced in informal adjudication (i.e., was not preceded by notice and comment and was never codified in the Code of Federal Regulations), where that rule is without any express grounding in the statute, and where that rule was intended merely to facilitate (not obstruct) the Commission's truth-finding processes.

Moreover, in the circumstances of this case, the reasons to which the Commission has pointed as supporting the complete-when-filed rule simply are not implicated. First, there is no reason for concern that the Commission will lack the "time [or] the resources to evaluate a record that is constantly evolving." Michigan Order ¶ 54. For one thing, to the extent "new" evidence is before the Commission at all, Bell Atlantic submitted almost all of it at the express request of the Commission's own staff. See Dec. 3, 1999, Public Notice at 1 ("The Commission . . . has requested information from Bell Atlantic."). Implicit in those requests is a determination that the Commission possesses both the "time" and the "resources" to evaluate the new evidence. For another thing, evidence submitted in response to Commission request provides no opportunity for improper gamesmanship. Cf. Sept. 28, 1999, Public Notice at 8 (waiving page limitation on ex partes "filed in response to direct requests from Commission staff"). Finally, the remaining issues here involved are both narrow and focused. Thus, there is no reason for concern that tolerating new evidence would open the floodgates and give rise more generally to "a record that is constantly evolving."

Second, there is no danger of “impair[ing] the ability of the state commission and of the Attorney General to meet their respective statutory consultative obligations.” Michigan Order ¶ 53. The PSC itself has already submitted new evidence, see Dec. 3, 1999, Public Notice at 1 (“[t]he Commission has recently received . . . supplemental evidence in the Bell Atlantic section 271 proceeding from the State of New York”), thereby plainly indicating that it does not oppose new evidence being accorded appropriate weight. Similarly, in its November 1 Evaluation, the DoJ observed that “information from Reply Comment and ex parte submissions [might] provide additional support for Bell Atlantic’s claims and justify a [grant].” DoJ Eval. at 41.

Finally, after the filing of comments and reply comments in this proceeding, the Commission issued two separate public notices asking parties to comment on any new evidence. See Dec. 10, 1999, Public Notice at 1; Dec. 3, 1999, Public Notice at 1. On both occasions, the Commission expressly “waiv[ed] the normal page limitation for ex parte filings.” Third parties therefore have had ample opportunity to comment on whatever “new” evidence might be before the Commission. See Michigan Order ¶ 52. Even AT&T has in effect conceded that, where third parties are afforded an opportunity to comment on new evidence, there simply is no reason to apply the complete-when-filed rule. See AT&T Motion to Strike at 8, 9.

In sum, to the extent new evidence is before the Commission at all, the Commission has every reason to exercise its discretion to give weight to that evidence in rendering a decision on Bell Atlantic’s Application.

4. If the Commission chooses to exercise its discretion to assign weight to new evidence, it is inconceivable that any court would fault the Commission for doing so. It is a “basic tenet of administrative law that agencies should be free to fashion their own rules of procedure.” Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 544 (1978); see also Salzer v. FCC, 778 F.2d 869, 873 (D.C. Cir. 1985) (“It is well known that agencies have wide latitude to establish their own procedures.”). No one could argue that the Commission has acted unlawfully by embracing a procedural guide that by its terms has a measure of discretion built into it.

Nor could anyone argue that any decision by the Commission exercising that discretion amounts to a change in policy requiring special explanation. Cf. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 850-51 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971). Such an exercise of discretion would be not a change in the Commission’s policy but a confirmation of the Commission’s policy. See, e.g., Brees v. Hampton, 877 F.2d 111, 119 (D.C. Cir. 1989) (“the regulation by its terms vested discretion in the agency over the matter”), cert. denied, 493 U.S. 1057 (1990). Moreover, because the complete-when-filed principle was never announced through notice-and-comment rulemaking, the Commission of course remains free to make reasoned refinements in adjudication. See, e.g., Telephone & Data Sys. v. FCC, 19 F.3d 42, 49 (D.C. Cir. 1994).

Indeed, even if the Commission had adopted through notice-and-comment rulemaking a complete-when-filed rule not expressly allowing for discretion, the result would still be the same: the Commission is always “entitled to a measure of discretion in administering its own

procedural rules in such a manner as it deems necessary.” American Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 538 (1970). In American Farm Lines, the Supreme Court held that an agency was entitled to excuse compliance with a close analog to the complete-when-filed rule, stating that, except where this would cause “substantial prejudice to the complaining party,” it “is always within the discretion of . . . an administrative agency to relax or modify its procedural rules . . . when in a given case the ends of justice require it.” Id. at 539 (internal quotation marks omitted).<sup>4</sup>

For all the reasons set forth above, AT&T could not possibly argue that, by taking account of new evidence, this Commission will either abuse its discretion (see 5 U.S.C. § 706(2)(A)) or inflict “substantial prejudice” on AT&T. In fact, AT&T itself included significant genuinely new evidence in its own reply submissions, directly contradicting the strained interpretation of the complete-when-filed rule it urges here. In any event, the simple and undeniable fact is that the December public notices expressly afforded AT&T an opportunity for additional comment. Accordingly, AT&T has in no way been prejudiced. That being the case, it is unthinkable that any court would second-guess the exercise of this Commission’s sound discretion.

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In sum, AT&T’s argument that Bell Atlantic’s Application must be denied on purely procedural grounds is meritless. Bell Atlantic is in compliance with the competitive checklist today and should be granted authority to provide long distance today.

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<sup>4</sup> See also Fried v. Hinson, 78 F.3d 688, 690-91 (D.C. Cir. 1996); Neighborhood TV Co. v. FCC, 742 F.2d 629, 636 (D.C. Cir. 1984); Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221, 1235 (D.C. Cir. 1980), cert. denied, 451 U.S. 920, 976 (1981); Associated Press v. FCC, 448 F.2d 1095, 1104 (D.C. Cir. 1971).