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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
Application by New York Telephone	)	
Company (d/b/a/ Bell Atlantic - New	)	
York), Bell Atlantic Communications,	)	
Inc., NYNEX Long Distance Company,	)	**CC Docket No. 99-295**
and Bell Atlantic Global Networks, Inc.,	)	
for Authorization to Provide In-Region,	)	
InterLATA Services in New York	)	
	)	

ORIGINAL

MOTION OF AT&T CORP. FOR STAY PENDING JUDICIAL REVIEW

Pursuant to Rules 1.41 and 1.44(e) of the Commission's Rules, 47 C.F.R. §§ 1.41, 1.44(e), AT&T Corp. ("AT&T") respectfully requests that the Commission stay its order granting Bell Atlantic Corp. ("Bell Atlantic") authorization to provide long-distance service in the State of New York, pending judicial review of that Order.[1] As shown below, AT&T more than satisfies the applicable legal standards for grant of a stay pending judicial review.

First, there is an overwhelming likelihood that the Order will be set aside on appeal. The Act provides that a Bell Operating Company ("BOC") may not be granted long-distance authorization until it establishes, inter alia, that it is providing its competitors with access to its facilities and services on non-discriminatory terms and at cost-based prices -- i.e., that other carriers that seek to compete with the BOC receive operational and economic parity with the BOC when they

[1] See Memorandum Opinion and Order, In the Matter of Application by New York Telephone Company (d/b/a/ Bell Atlantic - New York), Bell Atlantic Communications, inc., NYNEX Long Distance Company, and Bell Atlantic Global Networks, Inc., for Authorization to Provide In-Region InterLATA Services in New York, CC Docket No. 99, 295 (rel. December 22, 1999) ("Order").

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use its monopoly network to provide service to their customers. Without such parity, a BOC would possess an unlawful and insurmountable advantage in competing for the large and growing number of customers that want bundled long-distance and local service, and would be positioned, if permitted to provide long-distance service, to substantially frustrate competition in both markets.

The Order ignores that standard. It grants Bell Atlantic interLATA authority despite the fact that in several critical areas -- business and residential, voice and data -- Bell Atlantic falls short of providing parity. The Commission's decision to grant this application is both arbitrary and contrary to law, and will likely be reversed on appeal. While Bell Atlantic has made significant advances in New York since 1996, the Act and the Commission's precedents require that the serious deficiencies that remain be remedied *before* interLATA authority is granted, and prohibit such authority from being granted on the express or implied basis of promises of improved future performance.

Second, even if the case on the merits were less overwhelming, the balance of harms and the public interest would still require a stay. Bell Atlantic has been excluded from the long-distance market since 1984. There patently will be no colorable harm to it if that 15-year period is extended by the brief period required for the Court of Appeals to review the Order. By contrast, the harm to competitors and customers of permitting Bell Atlantic's premature entry, if the Commission's decision is later reversed or vacated, would be immense.

Bell Atlantic currently controls over 90% of the local exchange business within its service areas, and, if the Order takes effect, will be able to sell to its customers a bundled package of local and long-distance services. Because there are no facilities-based alternatives to Bell Atlantic's monopoly for virtually all small and medium-sized business customers and residential customers, the only way AT&T and other carriers can even attempt to compete on a broad basis will be by leasing network elements from Bell Atlantic to provide the local service component of their own service packages. But Bell Atlantic today provides unbundled loops and switches to competitors only at prices that exceed their economic costs, only on terms that are far less favorable than those on which it obtains such access itself, and only using systems that are inferior to those which Bell Atlantic uses for its own customers and that have not yet been demonstrated to be capable of handling adequate volumes with acceptable accuracy. These serious problems assure that any service AT&T offers would be regarded as inferior by large numbers of customers, and that AT&T's reputation for quality would suffer enormous harm.

Thus, while Bell Atlantic aggressively markets its bundled services, AT&T and others will be forced into a Hobson's choice: either ramp up their marketing efforts to respond and risk the enormous damage to their marketplace reputation and customer goodwill that the inferior performance that Bell Atlantic provides them will cause, or cede substantial portions of the market to Bell Atlantic unchallenged. Either alternative would cause great harm to AT&T and other CLECs, to consumers, and to the public interest in fair and vigorous competition.

In short, both the law and the equities strongly support a stay. As the Commission has held in a similar context, permitting Bell Atlantic to go forward "before these important questions of lawfulness are resolved imposes a strong risk of upsetting the balance struck by Congress in section 271," for, in the absence of a stay, "it will be virtually impossible to 'unscramble' the effects of the [Order]."[2] At a minimum, the in-again, out-again status of Bell Atlantic that would result from a

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[2] See Memorandum Opinion and Order, AT&T v. Ameritech, No. E-98-41 (June 30, 1998), ¶24 ("Qwest Order").

judicial decision vacating the Order would cause "widespread customer uncertainty and confusion" that would itself disserve the public interest.[3] The Commission should therefore grant a brief stay so that the lawfulness of its Order can be resolved before these irreparable consequences begin.[4]

ARGUMENT

The Commission considers four criteria in evaluating requests that one of its orders be stayed: (1) the likelihood of success on the merits in the appeal of that order; (2) the threat of irreparable harm absent the grant of a stay; (3) the degree of injury to other parties if a stay is granted; and (4) the public interest.[5] Further, "no single factor is necessarily dispositive," and the 'Commission and courts will thus also grant a stay when there are "'serious questions going to the merits'" and the "'balance of hardships tip[s] sharply'" in favor of such relief.[6]

Here, all four factors strongly support the issuance of a stay. There is a powerful likelihood that the Order will be reversed on appeal; there is substantial irreparable harm facing AT&T, other competitors, consumers, and the public interest in the interim; and Bell Atlantic faces no remotely comparable harm if its longstanding exclusion from the long-distance market continues for a short time. Thus, even if the likelihood of reversal were less strong, the balance of hardships would still tip overwhelmingly in favor of a stay.

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[3]See id., ¶25.

[4]Because of the imminence of the effective date of the Order, in the event the Commission does not act on this Motion by close of business on Monday, December 27, 1999, AT&T will be compelled to seek a stay from the Court of Appeals.

[5]See Qwest Order, ¶ 14. These are the same factors that a Court considers in deciding whether to issue a stay or other preliminary relief. See Virginia Petroleum Jobbers v. Federal Power Comm'n, 259 F.2d 921 (D.C. Cir. 1958).

[6]See Qwest Order, ¶ 14 (citation omitted).

I. THE ORDER IS LIKELY TO BE REVERSED ON APPEAL

The Order is likely to be vacated by the Court of Appeals because it repeatedly fails to apply the statutory standards for granting interLATA relief. The 1996 Act prohibits the Commission from authorizing a BOC to provide long-distance service until the BOC establishes that it is providing competitive carriers with access to its network at cost-based rates and at parity with the access that it provides to itself. Congress recognized that if a parity standard were not applied, then the BOC would be able to foreclose competition in large segments of telecommunications markets by leveraging its monopoly power over the local exchange to obtain an overwhelming advantage among those customers that seek bundled, end-to-end communications services. By authorizing Bell Atlantic to provide long-distance service at a time when it is does not provide facilities to its competitors at parity, the Order will permit Bell Atlantic to obtain precisely that unlawful advantage.

Congress included two particularly critical requirements both in Section 251 and in the "competitive checklist" -- that access to the BOCs' facilities be non-discriminatory, and that such access be provided at nondiscriminatory cost-based rates. The Commission has correctly determined that the non-discrimination requirement mandates that the network access the BOC provides to its competitors be equal in quality to the access it provides to itself,[7] and that the requirement of nondiscriminatory cost-based rates mandates forward-looking prices under which those competitors

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[7]See First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, ¶ 312.

will incur the same economic costs to use network elements as the BOC itself incurs.[8] These requirements thus establish the central standard of operational and economic parity. The Order departs dramatically from the statutory standard on matters relating to unbundled loops, wholesale support systems, pricing, and xDSL services.

A. Loops

The record establishes that Bell Atlantic fails to provision hot cut loops to AT&T in a commercially reasonable manner. As demonstrated in this proceeding, significant numbers of AT&T customers suffer service outages as a result of Bell Atlantic hot cut loop provisioning errors. In addition, Bell Atlantic fails to provide on-time provisioning for at least 10 percent of orders. Finally, Bell Atlantic drops 11-15 percent of the directory listings of UNE-L customers migrating to AT&T service. These and other hot cut loop provisioning problems led DOJ to conclude that "collectively, the number and magnitude of the deficiencies . . . are imposing a real constraint on competition through the use of unbundled loops and that significant improvement is needed in this area." DOJ Eval. p. 20. Bell Atlantic has not resolved these problems, and the evidence thus establishes that AT&T and other CLECs do not receive commercially reasonable hot cut provisioning.

First, Bell Atlantic provisioning errors continue to put a significant number of AT&T customers out of service during the hot cut. AT&T's evidence showed that almost 12% of AT&T customers lost service as a result of Bell Atlantic provisioning errors. Meek Initial Aff. ¶ 83-85. The NYPSC Staff conducted its own review and concluded that Bell Atlantic caused 4-6 percent outages for AT&T customers during the month of August. NYPSC Reply p. 29 & Rubino Aff. Even if the 4-6% figure (which AT&T believes substantially underestimates the reality) were relied upon, it would still demonstrate totally unacceptable provisioning performance. CLECs cannot provision hot

[8] See id., ¶¶ 674-703.

cut loops at commercial volumes if one out of twenty customers goes out of service and must be attended to by CLEC personnel to resolve the outage situation, and they cannot compete fairly for customers if potential customers believe there is a significant chance that they will suffer such outages. By contrast, Bell Atlantic can switch over customers to its long distance service using a PIC change process that has a negligible failure rate.[9]

Bell Atlantic also fails to resolve service outages on a commercially reasonable basis. Bell Atlantic conceded that half of AT&T customers suffering outages as a result of Bell Atlantic provisioning errors were out of service for one day or longer and that one quarter were out of service for two days or longer. Fair competition in the small and mid-sized business market cannot occur if one of twenty CLEC orders suffers an outage and half of those outages last for one or more days.

Second, the record evidence demonstrates that Bell Atlantic fails to complete scheduled hot cuts on time for at least approximately 10 percent of its orders. Indeed, AT&T's evidence showed that Bell Atlantic's on-time percentage for July was 76% (81% for August), Meek Initial Aff., ¶ 118, and DOJ concluded that the 10% failure rate was based on "statistics most favorable to Bell Atlantic." DOJ Eval. p. 18-19. DOJ also noted that Bell Atlantic had benefited because the NYPSC Staff had announced more rigorous on-time scoring rules as part of the July reconciliation but elected not to apply those more rigorous on-time rules to Bell Atlantic's July performance. Id. p. 19 n.42. Neither Bell Atlantic nor the NYPSC seriously challenged DOJ's conclusion about Bell Atlantic 10% on-time failure rate, but instead argued that such performance was "excellent" and not discriminatory. Bell Atlantic Reply p. 7; NYPSC Reply p. 28. Nonetheless,

[9]The Commission expressed concern about outages, Order ¶ 309, but failed to explain why outages in the range of five percent were acceptable. Moreover, the Commission relied on the NYPSC's rebuttal evidence establishing the 4-6 percent outage figure but failed to consider evidence from AT&T showing a higher outage figure and directly responding to the NYPSC information that was first presented in the NYPSC Reply Comments. Order ¶ 302-04.

DOJ concluded that the same 10% failure rate constituted a "significant number" in a situation where "[r]eliable performance in completing hot cuts correctly and at the time scheduled is extremely important because of the risk to the customer of losing dial tone for more than a brief period." DOJ Eval. p. 19.[10]

Third, DOJ concluded that 10% or more of CLEC hot cut loop customers had their directory listings dropped from the directory listing database as a result of Bell Atlantic's hot cut loop provisioning, DOJ Eval. p. 19-20, and AT&T studies demonstrated that 11-15% of its customers lost their directory listings during Bell Atlantic hot cut loop provisioning. Affidavit of Robert Callahan and Timothy Connolly, ¶ 15-26. Bell Atlantic claimed that quality assurance teams and software fixes had resolved the dropped directory listing problem, Bell Atlantic Reply, pp. 8-9, but AT&T's studies showed that these steps did not prevent the loss of directory listings by 13-15% of its UNE-Loop customers.[11]

B. Operations Support Systems

The Department of Justice also concluded that "Bell Atlantic's systems for handling orders for unbundled network element 'platform' ('UNE-platform' or 'UNE-P') orders rely to a disturbing extent on manual processes that are prone to error and delay." DOJ Eval. at 2. DOJ

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[10] The Commission's Order fails to address the on-time provisioning issues adequately. It finds that the 90% on-time provisioning figure is part of a "minimally acceptable showing," and states that it would consider enforcement action if the on-time percentage fell below 90%, Order ¶ 309, but ignores evidence presented by DOJ, AT&T, and others showing that the 90% on-time figure for July, and by analogy the on-time figures for August and September, were overstated. DOJ Eval. p. 18-19; Meek Initial Aff. ¶ 124-36.

[11]The Commission dismisses AT&T's concern regarding dropped directory listings by stating that AT&T presented no evidence of the effect of the dropped directory listing on the directory listing itself. In fact, AT&T presented evidence that the white pages directory will not include the dropped directory listing if the directory is prepared at a time when a UNE-Loop customer listing does not appear in the directory listing database. Callahan/Connolly Aff. ¶ 31.

further concluded that there "remains significant doubt that Bell Atlantic has provided the stable and efficient electronic systems that will be needed to support a competitive market." *Id.* These problems, the DOJ found, "will impose a significant constraint on competition if they are not adequately resolved." *Id.* The problems that DOJ reported were representative of, but did not fully set forth, all of the problems that CLECs reported.

For example, with respect to the "high rate of manual processing" involved with UNE-P orders, the Department noted that such manual handling slowed the processing of orders and resulted in "much higher numbers of mistakes." DOJ Eval. at 31-32. In addition, the DOJ noted that "one-third of the UNE orders that CLECs submit are rejected by Bell Atlantic," imposing delays and costs on CLECs that impede their ability to compete. *Id.* at 30-31. These problems presented serious risks of customer-affecting problems as CLECs increased the volume of their orders.[12] Bell Atlantic's ability to provide CLECs with "the stable and efficient electronic systems that will be needed to support a competitive market" (*id.* at 2) is further compromised, the DOJ found, by its failure to distribute documentation to CLECs about system changes on a timely basis, and its failure to provide CLECs with an adequate testing environment. *Id.* at 33-36.

Nothing in the reply submissions of Bell Atlantic and the New York PSC contradicted the basic facts underlying the DOJ's concerns. Bell Atlantic made no attempt to explain the causes of the high rejections or to support its allegation that CLECs were responsible for them. *Cf.* DOJ

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[12]DOJ noted that "The record indicates that Bell Atlantic is not finding it easy to provision UNE-platform service when CLECs request the standard interval, and order processing delays engendered by heavy reliance on manual processing may exacerbate the problem." DOJ stated that it "causes us some concern" that, according to BA-NY's data, it took BA-NY an average half a day longer than the standard interval to provision UNE platform orders in August. DOJ Eval. at 32 & n.89.

Eval. at 30 (noting many reasons for rejections preclude conclusion, without evidence, that they are the CLECs' "fault"). Similarly, Bell Atlantic's data showed declines in the flow through of its orders, and hence an increase in the manual processing that was of concern to the Department. Bell Atlantic again provided no data to support its allegation that the continuing high degree of manual processing was due to CLEC errors, and its explanation that its mistakes in manually processing CLEC orders in fact reflected its efforts to correct CLEC errors was based only on a cursory and unverified analysis of 35 orders that do not appear to reflect CLECs' actual order mix. Indeed, Bell Atlantic effectively conceded the need to improve its flow through rate by promising to implement a series of system upgrades and to provide monthly workshops for CLECs all designed to rectify problems that have kept CLECs from enjoying the level of electronic processing that Bell Atlantic enjoys. As the Department emphasized, however welcome such promises may be, they do not demonstrate that Bell Atlantic is currently in compliance with its statutory obligations. To the contrary, as this Commission has made clear, such promises are themselves evidence that a BOC's application is premature and must be withdrawn. *Ameritech Michigan Order* ¶¶ 55-56.

Although the Department did acknowledge that Bell Atlantic should be able, in time, to demonstrate compliance with section 271, the Department stated that "[i]t is clear to the Department that Bell Atlantic should be required to demonstrate additional progress in solving the remaining problems before it is permitted to enter the long distance market," such as by "taking specified steps and demonstrating that its performance has met appropriate requirements" that would be set out in "carefully crafted conditions." DOJ Eval. 41 42-43. The Commission has not, however, imposed any conditions, required any "specified steps" or demanded proof of compliance with any performance requirements designed to address DOJ's concerns; indeed, the Commission's Order purports not to rely on any such new evidence. The record as considered by the Commission thus provides no basis for disregarding the Department's evaluation.

The Commission's decision responds to these realities by attempting to minimize them. With respect to rejection rates, the Commission simply states that it "does not share" DOJ's concerns, because the "wide variation" in rejection rates among CLECs "strongly implies that the care a competing carrier takes in submitting its orders makes a significant difference in the rate its orders are rejected." Order, ¶ 175. Yet the Commission does not dispute DOJ's observation that rejections may be attributable to a variety of causes, some of which may be attributable to Bell Atlantic -- and Bell Atlantic presented no evidence as to the causes of rejections. Id.

Similarly flawed is the Commission's flow-through analysis. "Clarify[ing]" prior decisions where it held that there is a direct correlation between flow-through rates and a BOC's ability to provide nondiscriminatory access to OSS (see, e.g., Louisiana II, ¶ 107), the Commission states that it is "unnecessary to focus" on flow-through rates to the same degree as it did in the past, in view of BA-NY's overall performance Order, ¶ 161. Instead, the Commission focuses on the capability of BA-NY's systems to provide high flow-through rates -- a standard that it never used in the past -- and attributing lack of flow-through to CLEC errors despite any evidence to support that contention. Id., ¶¶ 166-167.

Moreover, the record compiled since the Department's evaluation demonstrates that Bell Atlantic's systems remain unstable and continue to provide CLECs with service far inferior to that which Bell Atlantic enjoys. Bell Atlantic has lost and continues to lose thousands of AT&T orders, its pre-ordering interfaces repeatedly suffer outages, and it continues to be unable to provide AT&T with timely and accurate status notices about the processing of orders. These problems are customer- and competition- affecting. The record therefore precludes a finding that Bell Atlantic has fully implemented its obligation to provide CLECs with non-discriminatory access to its OSS.

C. Pricing

"Efficient competitive entry into the local market is *vitally dependent* upon appropriate pricing of the checklist items." *Ameritech Michigan Order*, 12 FCC Rcd. 20543, ¶ 281 (1997) (emphasis added). Congress determined that a BOC's entry into long distance markets would harm competition unless other carriers then had the unqualified ability to obtain the components of the BOC's network at their economic cost and to use these unbundled network elements to offer competing local and long distance services. In particular, Congress prohibited any BOC from providing in-region interLATA services unless and until it demonstrated, and the Commission found, that the BOC, among other things, is currently charging rates for unbundled network elements that are "in accordance with the requirements of sections 251(c)(3) and 251(d)(1)." 47 U.S.C. § 271(c)(2)(B)(ii). Under these requirements, a BOC's network element rates must be "based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration." 47 C.F.R. § 51.505(c). The Commission has found that these are the costs the BOC incurs in using the elements, and that if higher rates were charged, it would subject new entrants to anticompetitive "price squeezes" and would preclude effective competition and efficient entry alike. *Local Competition Order*, 11 FCC Rcd. 15499, ¶¶ 674-703 (1996).

The Order itself recognizes that the Commission must "reject the application" where "basic TELRIC principles are violated" (¶ 244). Nevertheless, the Commission has now approved Bell Atlantic's application despite the fact that Bell Atlantic's loop and switching rates in New York fail to satisfy basic TELRIC standards and would threaten meaningful local and long distance competition. It did so without conducting the independent analysis, and making the independent determination, that the statute requires, but instead abdicated that responsibility to the NYPSC. The Commission's approval of Bell Atlantic's application is therefore arbitrary and contrary to law.

Loop Rates. Bell Atlantic's loop prices are based on the assumption that all feeder plant is comprised exclusively of fiber. But an all fiber feeder network design plainly violates the basic TELRIC requirement that network element prices reflect "the lowest cost network configuration." 47 C.F.R. § 51.505(c). The reason is straightforward. It is undisputed that fiber cable requires expensive digital loop carrier equipment at the Feeder-Distribution Interface. *See* BA Reply at 53; PSC Reply at 44-45. This means that a fiber facility incurs large fixed costs regardless of the length of the feeder run. By contrast, there are no such fixed costs for copper cable. Thus, only when feeder cables are sufficiently long do the costs of the DLC equipment for fiber feeder outweigh fiber's maintenance or line termination savings.

AT&T provided a quantitative analysis of the relative costs and benefits of fiber versus copper cable. Even under the most conservative assumptions, including using Bell Atlantic's preferred inputs reflecting the alleged "uniqueness" of New York City, that analysis demonstrated that copper was *always* more efficient that fiber for loop lengths less than 9,000 feet. Clarke/Petzinger Aff. ¶¶ 22-25 & Att. 3. Thus, the only "specific quantitative information on the relative economics of the two transmission media" in the record in this proceeding unambiguously demonstrates that the all-fiber assumption on which Bell Atlantic's New York loop rates are based violates the basic TELRIC principle of least cost network configuration. That is why the all fiber feeder assumption has been rejected by nearly every state regulatory commission that has considered it.[13]

Bell Atlantic provided no quantitative analysis to support its contrary position.[14] Instead Bell Atlantic argued on reply that its all fiber feeder assumption was justified on the ground that there are "unique circumstances" in New York City, especially Manhattan. Lacouture/Troy Reply Dec. ¶¶ 183-86 (App. A, Vol. I, Tab 1 to BA Reply Comments).[15] But the all fiber-based loop rates at issue here apply to the entire state of New York, not just to New York City or Manhattan. By seeking to justify the assumption of an all fiber feeder only in some or all of New York City, Bell Atlantic has effectively conceded that its rates are inappropriate for the rest of the state of New York.

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[13]Clarke/Petzinger Aff. ¶¶ 26-37 (citing and discussing decisions) (Vol. I to AT&T's Comments).

[14]When the New York PSC approved Bell Atlantic's rates, it expressly acknowledged that there was *no* evidence in any record that supported even the claim that all fiber was appropriate for just New York City. In the 1997 *Rehearing Order*, Opinion No. 97-14, Case 95-C00657, *et al.*, at 23 (PSC Sep. 22, 1997), that upheld Bell Atlantic's loop prices, the PSC stated that the evidence before it "did not itself set forth specific quantitative information on the relative economics of the two transmission media." Indeed, the PSC on rehearing could point only to a 1991 "study" of Bell Atlantic's plan to modernize its network to provide broadband services. *Rehearing Order* at 26-27. *See also PSC UNE Pricing Order*, Case 95-C-0657, *et al.*, at 83 (PSC Apr. 1, 1987). Bell Atlantic claimed that this 1991 study is proprietary, and it was thus not introduced into the record in the PSC's pricing dockets (*Rehearing Order* at 20) or in this proceeding.

[15]Bell Atlantic offered only unsupported speculation that because of New York City's high population density "there is ample reason to believe" that the greater capacity of fiber will give it cost advantages over copper "even where distances are short." Lacouture/Troy Reply Dec. ¶¶ 183-86. But the claim that the population density of New York City is unique is based on apples and oranges comparisons (*i.e.*, comparing the borough of Manhattan to the entire *county* of San Francisco, PSC Reply at 45 n.4)). There are downtown areas of Chicago, San Francisco, and many other major cities that have densities comparable to Manhattan and where state commissions have recognized that copper remains the lower cost technology for shorter distances.

The Order makes precisely the same mistake in suggesting that "New York's population per square mile supports the economies afforded by fiber's greater capacity . . . even where distances are short" (¶ 248). Whatever may be true of New York City, there is no basis in the record or elsewhere for abandoning the fundamental TELRIC requirement of "lowest cost network configuration" for the majority of the state of New York that has rural and suburban population densities no different from the rest of the country.

Switching Element Rates. Bell Atlantic's switching rates are likewise contrary to the basic TELRIC principle that rates must be based on the "long run" costs of a "reconstructed local network" (*Local Competition Order* ¶ 685) using the "lowest cost network configuration" (47 C.F.R. § 51.505(c)). In the long-run, a carrier's "present plant and equipment will have been worn out or rendered obsolete and will therefore need replacement." *Local Competition Order* ¶ 677 n.1682. Thus, as the Commission has held, the long run costs of providing switching is based on the cost of replacing all the BOCs' switches using the most efficient technology. *Inputs Order*, CC Dockets 96-45, 97-160, ¶¶ 315, 317 (FCC Nov. 2, 1999).

There can be no dispute that the switching rates set by the New York PSC and approved by the FCC here are not based the "lowest cost network configuration." That is because, as the New York PSC acknowledged in this proceeding, the rates did not apply the TELRIC method, but instead were based on the substantially higher per unit costs incurred in adding incremental capacity to the embedded network. It did this, at least in part, because Bell Atlantic withheld from the PSC the evidence of the extensive discounts Bell Atlantic actually receives on new switch purchases. PSC Reply at 47. *See also Re-Open Order*, Case 95-C00657, *et al.*, at 8-11 (PSC Sep. 30, 1998). After AT&T's efforts brought this evidence to light, the PSC refused to reduce the rates to reflect these conceded and substantial discounts despite the fact that Bell Atlantic's own cost expert testified that had he been aware of the true discount levels, he "would certainly change [the] numbers" in the switching cost study. *Re-Open Order* at 9. Instead, the PSC concluded it would only consider the evidence in a future pricing proceeding and make switching rates interim subject to true-up *if* they should be changed in that proceeding. PSC Reply at 47. As a result, there is simply no basis for any finding today that Bell Atlantic's New York switching rates are TELRIC-compliant.

In this proceeding, Bell Atlantic's sole defense of its switching rates was its unsupported speculation that the failure to use the actual efficient replacement cost of Bell Atlantic's switches *may* not have unreasonably inflated the switching element rate because of unspecified errors in the other direction. Bell Atlantic speculated that if the PSC used the actual forward-looking switch costs and discounts, it could have had "ripple effects" that *might* raise other switching costs." Lacouture/Troy Reply Dec. ¶¶ 192. Tellingly, Bell Atlantic offered no evidence of whether these "ripple effects" would in fact occur and whether or how they could offset the obvious and significant impact of using the proper switch discounts.

The Order attempts to excuse this obvious defect by suggesting that, whatever the methodological defects, the approved switch prices are "very close to AT&T's estimated switching prices" (¶ 246). In fact, as the Order itself confirms, the approved prices are nearly *50 percent higher* than the TELRIC-compliant rates proposed by AT&T (¶ 242). With differences of that magnitude, rank speculation that the PSC might, through some combination of offsetting errors, have happened upon TELRIC-compliant rates obviously cannot satisfy the Commission's statutory mandate to assure that Bell Atlantic is currently charging rates for unbundled network elements that are *in fact* "in accordance with the requirements of" the Act. 47 U.S.C. § 271(c)(2)(B)(ii).

D. xDSL Services

The Order's treatment of advanced, or "xDSL" services, which are used by business and residential customers for high-speed data telecommunications, is likewise fatally flawed. The market for advanced services is already large and is expected to grow very rapidly. AT&T as well as numerous other CLECs want to provide advanced services in competition with Bell Atlantic's retail offerings, but competing carriers currently must rely on Bell Atlantic to provide nondiscriminatory access to unbundled elements to do so. In particular, Bell Atlantic is required by the Act and the Commission's orders to provide unbundled loops that have technical specifications that make them capable of providing advanced services.

However, as the comments of numerous CLECs showed and as the Evaluation of the Justice Department concluded, Bell Atlantic is not in fact currently providing CLECs with "access to DSL loops necessary for them to compete effectively." DOJ Eval. at 28. In particular, Bell Atlantic does not provide nondiscriminatory access to pre-ordering information that is required to determine whether loops in Bell Atlantic's network are capable of being used to provide advanced services. See AT&T Ex Parte Letter, filed Dec. 17, 1999. Rather, the only automated pre-ordering information that Bell Atlantic provides for xDSL services is limited and was specifically designed to serve the needs of Bell Atlantic's own retail advanced services, making the information far less useful for competing carriers.[16]

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[16]The Commission has found, "[i]f new entrants are to have a meaningful opportunity to compete, they must be able to determine during the pre-ordering process as quickly and as efficiently as can the incumbent, whether or not a loop is capable of supporting xDSL-based services." Memorandum Opinion and Order, In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 FCC Rcd 24012, CC Docket 98-147 (Aug. 7, 1998) (emphasis added); see also DOJ Eval. at 25 ("Access to preordering information is particularly (continued...)

Moreover, the Justice Department, citing the comments of other CLECs, found that Bell Atlantic failed to demonstrate that its "performance in provisioning DSL loops" is at "an acceptable level." DOJ Eval. at 28. As with other order types, Bell Atlantic is unable to provide timely or accurate order confirmations for unbundled loops used to provide advanced services -- the relevant data for August and September, 1999, showed that "Bell Atlantic confirmed only 59.37 percent and 55.4 of ADSL orders on time." Id. at 26. Bell Atlantic's performance in providing unbundled access to facilities used by CLECs to provide advanced services is thus patently discriminatory.

II. AT&T WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF A STAY AND THE BALANCE OF EQUITIES STRONGLY SUPPORTS A STAY

Finally, for the reasons set forth more fully in the attached affidavit of Robert Aquilina and Clifford Holtz, it is incontrovertible that, unless stayed, the order will cause irreparable harm to AT&T and the public that is certain and great and that the balance of hardships overwhelmingly favors a stay. Indeed, the Commission has previously held the equities virtually mandate a stay to preserve the status quo whenever there is a substantial claim that a BOC is providing services that have not been authorized properly under § 271. Qwest Order, ¶¶ 22-30. Here, moreover, the irreparable harm to public and private interests is much greater than in the Qwest cases and the need for a stay is otherwise far more substantial.

First, as the Commission has held, a BOC's marketing of long distance services will inevitably cause a "substantial migration" of long distance customers to the BOC-marketed service

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[16](...continued)
important with DSL services because of the special loop requirements for such services. CLECs need detailed information about available loops so that they can quickly determine whether a prospective customer can be served and what grade of service can be offered.") (emphasis added).

and away from AT&T and other long distance carriers, and the Commission held that the damages that long distances carriers will incur cannot be adequately remedied even in a damages action against the BOC for violation of § 271(a) of the Act. Qwest, ¶ 27. Here, the damage is far greater and far more clearly irreparable.

Preliminarily, the Order allows Bell Atlantic not just to market long distance service, but to resell for a profit services that the BOC can order from any one of dozens of long distance carriers at competitively set wholesale rates. And unlike the Qwest case, AT&T and other competitors will have no damages remedy at all, for the harms will be a product not of Bell Atlantic's violation of § 271(a), but of the Commission's Order.

Further, the harms are not just lost customers, but reputational injuries that are inherently irreparable. As more fully explained in the attached affidavit, Bell Atlantic has overwhelming advantages over AT&T and others in marketing and providing the packages of local and long distance services that customers demand. Bell Atlantic can have any volume of orders for AT&T and other carriers' long distance service seamlessly filled in a day's time, and receive the same quality transmission service that long distance carriers offer. By contrast, under the local facility leases that Bell Atlantic now offers, local carriers receive such markedly inferior rights that AT&T has not yet been able to offer broad-based local services. In the case of small and medium business customers, AT&T has targeted only a small subset of customers and AT&T could not offer a broad based service to this class of customers without incurring serious harm to its reputation for quality service. In the case of residential customers, AT&T is not remotely in a position where it can be certain of its ability to offer packages of local and long distance services ubiquitously at all, much less to do so without incurring reputational harm.

Second, as in Qwest, a stay will prevent harm to consumers and protect the public interest, for, as the Commission held, the adverse effects of premature BOC long distance entry on consumers can never be adequately rectified after the fact. That is so, in part, because customers will switch to BOC long distance services if the Order takes effect, and it will be "virtually impossible to 'unscramble' the effects of the [order] and return to the current status quo" if the order is hereafter vacated, and it will lead to "widespread consumer uncertainty and confusion." if the order is vacated after it takes effect. Id. ¶¶ 25-26. More fundamentally, it inevitably upsets the competitive balance struck by Congress if a BOC provides long distance service before the requirements of § 271 are met and that "'will harm consumer interests, as identified by Congress, because of its anticompetitive nature.'" Id. ¶ 26.

Finally, while Bell Atlantic will claim it will suffer "some harm" if the order is stayed, this will consist of nothing more than the brief continuation pending appeal of the status quo that has prevailed in New York since 1984 and that continues to exist in each of Bell Atlantic's many other states. Because the harm that will result to AT&T, other carriers, and the public if a stay is denied is "substantially greater" than any harm that Bell Atlantic would suffer from the grant of a stay, there is no question that the "balance of hardship tips sharply in favor of granting a stay" during the relatively brief period of time required for a court to determine if the prerequisites to long distance authority have in fact been validly determined to exist. Id ¶¶ 27-28.

CONCLUSION

For the foregoing reasons, the Commission should stay the Order pending judicial review.

Respectfully submitted,

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C.

In the Matter of

Application by New York Telephone Company (d/b/a Bell Atlantic-New York), Bell Atlantic Communications, Inc. NYNEX Long Distance, and Bell Atlantic Global Networks, Inc., for Provision of In-Region InterLATA Services in New York	)	CC Docket 99-295

JOINT DECLARATION OF
ROBERT AQUILINA AND CLIFFORD HOLTZ
ON BEHALF OF AT&T CORP.

Robert Aquilina (Consumer Services)

1. My name is Robert Aquilina.[1] I am Vice President, Eastern Region, AT&T Consumer Services. My responsibilities include the development and implementation of AT&T's business plan to enter the local services market and serve residential customers in New York. I am responsible both for developing AT&T's market entry strategy and for ensuring AT&T's commercial and operational readiness to provide local residential telephone service in New York.

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[1] Mr. Aquilina is attesting to the following paragraphs of this declaration: 1-3, 8-26, and 45-48.

2. I have been employed by AT&T since 1980 and have held numerous assignments in various organizations. My most recent assignment prior to my current one was as President and Managing Director of AT&T's operations in Europe, the Middle East and Africa. I assumed my present position on August 30, 1999. Previously, I led a variety of divisions providing services to AT&T's business customers. I also spent five years in various marketing positions in AT&T's Consumer Services organization.

3. I hold a Bachelor of Engineering degree from Cooper Union for the Advancement of Science and Art and an MBA from the University of Chicago.

Clifford S. Holtz (Small and Mid-Size Business Customers Market)

4. My name is Clifford S. Holtz.[2] I am President - Metro Markets, AT&T Business Services. Metro Markets serves business customers who bill between $0 - $1,000 monthly on telecommunications. I am responsible for supporting the marketing of AT&T services to small businesses.

5. I received a Bachelor of Science degree in Business Administration from Albany State University, and an MBA degree from the University of Chicago. I began my career at AT&T in

[2] Mr. Holtz is attesting to the following paragraphs of this declaration: 4-12 and 27-48.

1984 as a sales account executive and developed experience in personnel, sales support, product marketing and management. In 1990, I was appointed Division Manager - Inbound Architecture / Business Planning. I was later responsible for the deployment and lifecycle management of all network components for Data Communications Services.

6. In 1993, I became Director - Strategy & Planning, Business Communications Services, where I supported the development of a national strategy and action plan for AT&T's focus on business customers. I was appointed Director of Mass Markets in June of 1994, and became responsible for managing the marketing of telecommunications services to small business customers billing between $0 - $200 monthly.

7. My responsibilities include the development and implementation of AT&T's business plan for expanding our presence in the local services market for small to mid-size business customers in New York. I am responsible both for developing AT&T's market entry and expansion strategy and for ensuring AT&T's commercial and operational readiness to provide local telephone service for business customers in New York. In this role, I am responsible for the planning necessary to broaden AT&T's reach into the local market arena. This planning includes working closely with my colleagues in our Network

Organization to ensure sufficient collocation deployment; Code Administration; E911 coverage; Directory Assistance and Listings; Operator Services; and several other key network infrastructure elements necessary to both support and operate AT&T's local product offering. Further, my teams also are involved in the development of Web-based ordering tools for the AT&T sales teams and electronic gateways for ordering and provisioning both access and UNE elements from ILECs such as Bell Atlantic-New York ("BA-NY"). Finally, my teams work with other AT&T units and incumbent local exchange carriers, including BA-NY, to develop and implement processes for the efficient provisioning of AT&T orders for, among other things, BA-NY UNE loops.

INTRODUCTION

8. We make this affidavit in support of AT&T's motion to stay the FCC's order authorizing Bell Atlantic to provide long distance services originating in the State of New York. Unless this order is stayed, it will cause immediate, and irremediable, harm to AT&T and other long distance carriers -- and to competition in the long distance market in general -- and the magnitude of the harm will increase with each passing day.

9. The Order allows the firm with over 90% of the local service business in its service areas to offer any and all of its customers a "one stop shopping" package of local and long distance service that many customers demand. Under the Order, Bell Atlantic will be able to obtain the long distance component of its service (within a day of placing each order) from any one of dozens of long distance carriers who charge competitively established wholesale rates. Long distance carriers, by contrast, do not have remotely comparable opportunities to obtain the local service component needed to offer competing packages. There are no alternatives to Bell Atlantic's local facilities for nearly all small and medium sized business customers and nearly all residential customers. AT&T thus can serve these customers only by leasing Bell Atlantic's local loops (for business customers) or combinations of its loops, switching, and other facilities (for residential customers).

10. It is uncontroverted that Bell Atlantic causes substantial numbers of business customers to suffer, among other things, outages and loss of directory listings when they switch to AT&T or other carriers. In consequence, AT&T has to date offered service only to carefully targeted subclasses of these customers whose desire for a single supplier is sufficient to allow them to assume certain risks, and AT&T has not yet even

been able to announce that it will make a general offer to provide local service to all such customers at any time in the future. If the FCC order takes effect, it is certain to cause massive artificial shifts of small and medium sized business customers from AT&T's long distance service to Bell Atlantic's bundle of local and long distance and to harm AT&T's reputation for quality service among these customers to whatever extent AT&T seeks aggressively to compete with Bell Atlantic with a broad-based bundled offer of AT&T's own.

11. Similarly, when Bell Atlantic provides the combinations of local facilities (called the UNE-Platform or UNE-P) that AT&T and others use to serve residential customers, the orders of AT&T and other carriers receive decidedly inferior treatment as compared to Bell Atlantic's, and cause AT&T to incur costs Bell Atlantic does not. This has been a tolerable situation in a context where AT&T is not competing with a one stop shopping offer of Bell Atlantic's that has none of these shortcomings, and Bell Atlantic has promised improvements sufficient to allow AT&T to announce a launch of a broad based offer in January. But if the order becomes effective, AT&T will have to compete with a Bell Atlantic one stop shopping offer and will be threatened both with irremediable losses of long distance business that result solely from Bell Atlantic's denial

of nondiscriminatory access and parity and with harm to its reputation for quality service.

12. These obstacles to full competition in the small to mid-sized business market and in the residential market are further exacerbated by Bell Atlantic's refusal to set prices for unbundled loops and switches at cost-based rates, and by its inability to provide competitors with nondiscriminatory access to the facilities and services they need to compete with Bell Atlantic in connection with the provision of advanced data services. Both individually and collectively, all of these problems impede AT&T's ability to enter and compete with Bell Atlantic on an equal footing.

A. Irreparable Harm To AT&T In The New York Residential Market

13. As described below, AT&T's principal (and for now effectively only) entry vehicle into the residential market for local voice services in New York is the so-called "UNE Platform," which is a combination of unbundled network elements provided by BA-NY. First, AT&T does not currently own and operate any cable properties in New York, and it currently has no agreements with other cable providers that would enable it to offer local service through the use of their cable facilities. Second, there are no other options such as fixed wireless