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Dugan

Before the
Federal Communications Commission
Washington, D.C. 20554

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**BELL ATLANTIC'S REPLY TO AT&T'S OPPOSITION
TO BELL ATLANTIC'S MOTION TO STRIKE OR TO DISREGARD
PORTIONS OF AT&T'S SUBMISSIONS**

Bell Atlantic previously demonstrated not only that AT&T's motion to strike lacks merit but also that AT&T's theories would require large portions of AT&T's own reply submissions to be stricken. AT&T's opposition to Bell Atlantic's motion elevates AT&T's already high level of bombast to a new, feverish pitch. AT&T's tone is all the more remarkable because it does not have a sufficient response to explain why even a single one of the items in AT&T's submissions that Bell Atlantic challenged is consistent with AT&T's own theory of what can and cannot be included in reply comments. AT&T simply cannot have it both ways.

I. AT&T'S REPLY SUBMISSIONS INCLUDE NEW EVIDENCE.

In its December 2 opposition to AT&T's motion to strike, Bell Atlantic showed that none of the evidence in its reply submissions post-dated any of the comments to which Bell Atlantic was responding, and that Bell Atlantic's reply submissions therefore did not even

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bring into play the Commission's rule concerning new evidence. At the same time, Bell Atlantic demonstrated that portions of AT&T's reply submissions contained a considerable amount of evidence post-dating October 19, so that, if -- as AT&T itself mistakenly claimed -- a hard-and-fast rule barring new evidence existed, those portions should be stricken. Despite its overblown rhetoric, AT&T's latest filing provides no meaningful answer with respect to any of the items Bell Atlantic identified.

1. In its Motion to Strike, Bell Atlantic challenged the October order data in AT&T's Crafton/Connolly Reply Affidavit as "address[ing] the supposed handling of . . . orders [submitted by AT&T in October] all the way up to the date of filing reply comments." Bell Atlantic's Motion at 11. AT&T's response is two-fold. First, apparently in an effort to take advantage of the fact that the DoJ's Evaluation was not filed until November 1, AT&T suggests that its new data "was submitted in response to . . . the comments of the Department of Justice." Opp. at 9. But the Commission has stated that, for new evidence to be able to tag onto other commenters' comments for purposes of the new-evidence rule, the evidence must "rebut arguments made, or facts submitted, by [those] commenters." Sept. 28, 1999, Public Notice at 7; see also Bell Atlantic's Motion at 12 n.13. AT&T's new information plainly was not submitted to rebut the DoJ's Evaluation -- it was submitted to support the DoJ's Evaluation. See Crafton/Connolly Rep. Aff. ¶ 76 (DoJ's "conclusion is . . . supported . . . by AT&T's recent commercial experience").

Second, AT&T argues that the October orders that are described in Part IV of the Crafton/Connolly Reply Affidavit were submitted (i.e., transmitted by AT&T to Bell Atlantic)

no later than October 16. Opp. at 9. But it is entirely beside the point when these orders were submitted. For purposes of the new-evidence rule, the relevant question is whether, with respect to these orders, AT&T provided evidence post-dating October 19. AT&T nowhere denies that the Crafton/Connolly Reply Affidavit testifies to Bell Atlantic's handling of these orders all the way through the reply filing date (November 8). Nor could it: even a casual glance at the affidavit shows that this is so. See, e.g., Crafton/Connolly Rep. Aff. Att. 16 (providing data past November 5); see also id. ¶ 79 n.39 (affiants chose orders with due dates before October 24 so that they could include data “for all status notices received at the time this reply affidavit was filed”) (emphasis added).

2. As to evidence relating to the October 25 Change Management meeting (see Bell Atlantic's Motion at 12), AT&T argues merely that this evidence “was in direct response to the extensive reliance by the New York PSC in its comments on promises made by Bell Atlantic in a ‘Joint October Reply Affidavit’ filed by Bell Atlantic on October 8, 1999.” Opp. at 10. That is of course no answer at all. To stay outside of the scope of the rule as AT&T itself interprets it, new evidence not only must be responsive to comments, but also must ante-date those comments. See Sept. 28, 1999, Public Notice at 7. Arguing that one requirement is met while ignoring the other gets AT&T nowhere.

Moreover, Bell Atlantic's motion challenged more than just AT&T's discussion of the October 25 meeting: it broadly pointed out that the affidavit was “replete with references to specific incidents that occurred after October 19. See, e.g., [Crafton/Connolly Rep. Aff.] ¶¶ 89, 90-92, 93, 94 (new claims regarding certain notices); id. ¶¶ 98, 101 n.50 (new billing

claims up to reply date).” Bell Atlantic’s Motion at 12. AT&T does not even address this other new evidence.

3. Although the challenged evidence is thus within the scope of the Commission’s rule restricting the submission of new evidence, that admittedly does not necessarily mean that the Commission may not consider it. The rule governing new evidence is not an inexorable 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 ¶ 59.¹ Thus, the fact that AT&T has submitted new evidence that is within the scope of the rule does not mean that the Commission must ignore it -- only that the Commission may ignore it if it deems this appropriate.

Moreover, this Commission has expressly “encourage[d]” other parties to submit additional argument and evidence while retaining discretion to decide what weight to assign them. See Dec. 3, 1999, Public Notice at 1; see also Dec. 10, 1999, Public Notice at 1. No doubt the new evidence contained in AT&T’s reply submissions could be considered in that context, either if AT&T resubmits it in ex parte form or if the Commission decides to treat

¹ 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”); 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”); South Carolina Order ¶ 42 (“we exercise our discretion in determining whether to accord new factual evidence and arguments that are made on reply any weight”); 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.”).

AT&T's reply submissions to this extent as though they were ex parte submissions responsive to the December Public Notices.

In any event, even if AT&T's evidence were to be considered, it can make no difference: as both Bell Atlantic and the PSC already explained on reply, AT&T's claims on the issues covered by its new evidence are wholly unpersuasive. As a result, AT&T's so-called evidence should carry no weight under any circumstances.

II. AT&T HAS VIOLATED THE RULE AGAINST LEGAL AND POLICY ARGUMENT IN AFFIDAVITS.

In the tradition of counselors pounding the table when they have neither the law nor the facts on their side, AT&T labels Bell Atlantic's motion "frivolous" insofar as it challenges legal and policy arguments in AT&T's affidavits. Opp. at 11. But neither of the two arguments on which AT&T relies holds any water at all.

First, AT&T argues that Bell Atlantic's motion "is based on an obvious misreading of the Commission's September 28 Public Notice." Id. According to AT&T, that Notice does not prohibit legal and policy argument in affidavits, but merely requires that each legal and policy argument contained in an affidavit also be reflected in the brief. See id. at 11-12. In AT&T's reading of the rules, then, a brief is little more than a table of contents: it need do no more than summarize the legal and policy arguments set forth in the affidavits.²

² AT&T even has the temerity to accuse Bell Atlantic of violating (AT&T's version of) the rule: it claims that Bell Atlantic did so by including evidence relating to the provisioning of hot cuts only in the Lacouture/Troy Declaration, and not in its opening brief. See Opp. at 12 n.9; see also id. at 2-3. The easy answer is of course that the Commission's rule requires that briefs contain all "substantive legal and policy arguments," Sept. 28, 1999, Public Notice at 4

Plainly, it is AT&T that misreads the September 28 Public Notice.³ That Notice unambiguously states that “commenters must make all substantive legal and policy arguments in their comments, rather than in supporting documentation.” Sept. 28, 1999, Public Notice at 6 (emphasis added); see also id. at 7 (same for replies). Moreover, the Notice makes crystal clear that the purpose of the rule is to ensure that commenters do not evade the page limitations that apply to comments (but not to affidavits).⁴ That purpose is of course entirely inconsistent with AT&T’s “table of contents” theory, which would render any page limit on briefs an empty shell.

Second, AT&T (in effect acknowledging that its wrong-headed legal argument could not possibly carry the day) argues that, in any event, there is no prohibited substantive legal

(emphasis added) -- not all factual material. To the contrary, factual material plainly belongs in affidavits. See id. In any event, hot-cut-related issues were extensively addressed in Bell Atlantic’s brief. See Application at 17-19.

³ Puzzlingly, AT&T itself appears to concede as much in the reply portion of its December 7 filing. See AT&T Reply at 3 (“The Commission’s rules are plain that substantive arguments must appear in the brief, not in the affidavit.”) (emphasis added).

⁴ See Sept. 28, 1999, Public Notice at 6 (“There is no page limit on supporting documentation. As discussed in section B of this Public Notice, however, commenters must make all substantive legal and policy arguments in their comments, rather than in supporting documentation.”) (emphasis added); id. at 6 & n.11 (after describing 100-page limit, immediately cautioning commenters that all substantive arguments must be contained in comments); id. at 7 (“There is no page limit on supporting documentation. As discussed in section B of this Public Notice, however, participants submitting replies must make all substantive legal and policy arguments in their replies, rather than in affidavits or other supporting documentation.”) (emphasis added); see also 47 C.F.R. § 1.48(a) (“Affidavits . . . which are submitted with and factually support a pleading are not counted in determining the length of the pleading.”) (emphasis added).

and policy argument in the affidavits Bell Atlantic has challenged. See Opp. at 12-13. Again, AT&T is wrong.

Affidavits are for factual assertions and expert opinion. See Sept. 28, 1999, Public Notice at 4 (“factual assertions, as well as expert testimony, . . . must . . . be supported by an affidavit or verified statement of a person or persons with personal knowledge thereof”).⁵

AT&T in effect concedes that, in the targeted affidavits, the only material of that nature consists of a few snippets concerning Bell Atlantic's web postings in the Kargoll affidavit. See Opp. at 11 n.7. AT&T mentions no other items, and it surely would have marshaled them if any existed.⁶

AT&T acknowledges that the balance of the challenged affidavits consists of (a) exposition of legal requirements, and (b) argument as to why (in the affiants' view) the evidence submitted by Bell Atlantic is insufficient to justify long distance relief under those legal requirements. See id. at 12. AT&T asserts, however, that the latter category is “factual

⁵ Some of AT&T's affidavits consist primarily of just such material. See, e.g., Aquilina Aff. ¶ 13 (“AT&T . . . began taking orders . . . on August 2, 1999.”); Clarke/Petzinger Aff. ¶ 5 (“copper feeder is less costly and more efficient than fiber for shorter loop lengths”).

⁶ Factual assertions concerning web postings are arguably contained in the Kargoll Affidavit at footnotes 12, 17, 25-31, 34, 41-45, 47, 49-54, 63, 69-71, 75, 79. AT&T complains that “Bell Atlantic makes no attempt to identify the particular paragraphs of [the three challenged] affidavits that it claims are objectionable.” Opp. at 11 n.7. To clarify, Bell Atlantic deems the targeted affidavits objectionable in their entirety, except for the footnotes mentioned above and any paragraphs containing biographical data (see Kargoll Aff. ¶¶ 1-5; Pfau/Kalb Aff. ¶¶ 1-6; Pfau/Kalb Rep. Aff. ¶¶ 1-2). Bell Atlantic submits, however, that it is improper for AT&T to put the Commission to the task of “scouring the affidavits for rare factual snippets that might be salvageable,” and therefore persists in the view that “the Commission [should] simply strike them in toto.” Bell Atlantic's Motion at 15 n.17.

material," id. at 11 n.7, and argues that commenters should have some leeway with respect to the former category to the extent it is helpful in presenting the latter category, see id. at 12-13.

But AT&T's premise is fundamentally mistaken.⁷ An opponent's comment upon the legal sufficiency of the evidence contained in a 271 application is not "factual material" -- it is quintessential substantive argument. There is no apparent reason why affiants should be permitted (as AT&T believes they should be) to "discuss material that is omitted from Bell Atlantic's submissions," id. at 11 n.7, or to "testif[y] that Bell Atlantic's performance data is deficient because it did not provide comparative data regarding its performance for its own retail operations," id. at 12. This is simply comment on another party's filing: "substantive argument" that sets forth "the positions of parties." Sept. 28, 1999, Public Notice at 4. If it were appropriate to include such comment in affidavits, there would be nothing left to say in comments themselves. AT&T's attempt to smuggle this material into affidavits (as it unquestionably has done⁸) should therefore be rejected.

⁷ Moreover, although AT&T is plainly correct in saying that a legal citation here and there is not objectionable, the targeted affidavits go well beyond that: each reads much more like a legal brief than like a factual submission. See, e.g., Kargoll Aff. ¶¶ 6-10, 13, 15-16, 19, 21, 29-33, 40, 44, 49, 52, 58, 60-70, 72-86; Pfau/Kalb Aff. ¶¶ 10-17, 21-24, 27-31, 33-34, 38, 40, 65, 74-75, 80, 84, 100-101, 106, 112-113, 117, 120, 122-126, 137, 151, 153-154, 168, 172-176, 205-206, 225-226; Pfau/Kalb Rep. Aff. ¶¶ 6, 8, 11-12, 14, 18, 22-24, 33, 39, 44, 50. Indeed, the Kargoll Affidavit goes so far as to include extensive legal argument to the effect that the Commission's previous decisions were wrongly decided and should be reconsidered. See Bell Atlantic's Motion at 14.

⁸ See, e.g., Kargoll Aff. ¶¶ 11-12, 14, 17-20, 22, 26-28, 34-51, 53-57, 59, 69, 71-73, 85-86; Pfau/Kalb Aff. ¶¶ 7-9, 16, 18-20, 22, 25-32, 35-116, 118-171, 177-238; Pfau/Kalb Rep. Aff. ¶¶ 3-10, 12-17, 19-21, 25-75.

CONCLUSION

For the reasons set forth above, the Commission should grant Bell Atlantic's motion to strike.

Respectfully submitted,

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December 14, 1999

CERTIFICATE OF SERVICE

I hereby certify that, on this 14th day of December 1999, I caused copies of the foregoing document (Bell Atlantic's Reply to AT&T's Opposition to Bell Atlantic's Motion to Strike or to Disregard Portions of AT&T's Submissions) to be served upon the parties on the attached service list either by hand (designated by an asterisk -- *) or by first-class mail, postage prepaid, and facsimile (designated by two asterisks -- **).



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