CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February 2000, I served copies of the foregoing Response of Bell Atlantic and GTE in Support of Proposal To Transfer GTE Internetworking to a Separate Corporation Owned and Controlled By Public Shareholders either by hand or by mail, first-class postage prepaid, on the following:

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

In the Matter of	)	
	)	
GTE Corporation,	)	
	)	
Transferor,	)	
	)	
and	)	CC Docket No. 98-184
	)	
Bell Atlantic Corporation,	)	
	)	
Transferee,	)	
	)	
For Consent to Transfer of Control	)	

DECLARATION OF PROFESSOR RONALD J. GILSON

Introduction

1. I, Ronald J. Gilson, am the Charles J. Meyers Professor of Law and Business at Stanford Law School and the Marc and Eva Stern Professor of Law and Business at the Columbia University School of Law. I am also a Fellow of the American Academy of Arts and Sciences. I have taught at Yale Law School, the University of Michigan Law School, the University of Tokyo School of Law, Hebrew University Law School, the economics faculty of Vietnam National University, Stanford Graduate School of Business, and Columbia University Graduate School of Business. I have been a Visiting Scholar at the Hoover Institution and a Resident Scholar at the Rockefeller Foundation Bellagio Study Center, a Distinguished Visiting Scholar at the University of Toronto Law School, and have served as the Olin Distinguished Visiting Professor at the University of Virginia Law School. Prior to joining the Stanford Law School faculty in 1979, I was a partner in a corporate law firm with a corporate and transactional practice. As an academic and

as a practicing corporate lawyer, I have had extensive experience in corporate acquisitions and transactions and have made this subject, and particularly understanding the fundamental economic structure of different types of organizational, transactional, and contractual relationships, a focus of my legal and economic work. I have also specialized in the law and economics of corporate governance – the internal and external elements of the decision making structure of a corporation.

2. I have written and lectured widely on the law and economics of corporate transactions and of corporate governance, including the economics of typical transaction patterns and their financing structure. I am the author of <u>The Law and Finance of Corporate Acquisitions</u> (Foundation Press, 2d ed. 1995) (with B. Black), the leading text integrating the economic, legal, and transactional issues bearing on the structure of acquisition transactions. I am also the author of <u>Cases and Materials on Corporations</u> (Little Brown & Co., 4th ed. 1995) (with J. Choper & J. Coffee), and <u>(Some of) the Essentials of Finance and Investment</u> (Foundation Press, 1994) (with B. Black). I have published over 40 articles in law and economic journals.

3. Among my editorial responsibilities, I am an Associate Editor of the Journal of Corporate Finance, co-editor of the Journal of Law and Economics Abstracts, and co-director of the Legal Scholarship Network. I have regularly acted as a referee for the Journal of Financial Economics, the Journal of Law, Economics, and Organization, and the National Bureau of Economic Research.

4. My teaching reflects the same central issues as my scholarship. Among other offerings, I teach a course entitled "Deals: The Economic Structure of Transactions and Contracts" to graduate business and law students at both Stanford and Columbia. This course, like my research, has as its goal understanding the fundamental economic structure of different types of organizational,

transactional, and contractual relationships. I also teach a course on the Law and Finance of Corporate Acquisitions which, on a more specialized basis, has the same orientation as the course on "Deals," as well as seminars on the Economics of Venture Capital Contracting and on Comparative Economic Organization.

5. I served as one of the Reporters of the American Law Institute's Principles of Corporate Governance: Analysis and Recommendations ("Corporate Governance Project"), a restatement-type project undertaken by the ALI to codify the law of corporate governance. In particular, I had principal responsibility for Part VI of the Corporate Governance Project, dealing with corporate acquisitions like the transaction that gives rise to this proceeding. I have served as a member of the California Senate Commission on Corporate Governance, Shareholders Rights and Securities Transactions, of the California State Bar Committee on Corporations, and of the Shadow Securities and Exchange Commission at the Simon Graduate School of Business, University of Rochester. I currently serve on the Board of Advisers of the Center for Research on Contracts and the Structure of Enterprise, Katz Graduate School of Business, University of Pittsburgh, and on the Board of Directors of the American Law and Economics Association. I am the chair of the Business Association Section of the American Association of Law Schools, a position I hold for the second time.

6. I have been asked by Bell Atlantic Corporation ("Bell Atlantic") and GTE Corporation ("GTE") to assess whether the receipt by NewCo, the company arising out of the merger of Bell Atlantic and GTE, of convertible Class B stock ("Class B stock") representing 10 percent of the voting and dividend rights in DataCo, a newly formed corporation to which GTE Internetworking ("GTE-I") will be transferred, would violate section 271(a) of the Communications Act, 47 U.S.C.

§ 271(a). Stated more precisely, section 271(a) prohibits NewCo from providing long distance service originating in an in-region state, directly or through an affiliate, without first receiving approval under section 271(b). Thus, if NewCo's Class B stock would render DataCo a NewCo affiliate, section 271(a) would be violated. Under section 3(1) of the Communications Act, 47 U.S.C. § 153(1), DataCo would be a NewCo affiliate if NewCo's Class B stock in DataCo represented "an equity interest (or the equivalent) of *more* than 10 percent." (emphasis added). Because NewCo's Class B stock represents only a 10 percent voting and income interest in DataCo, Section 271(a) would be violated on this basis only if the conversion right under the Class B stock constituted an additional "equity interest" under Section 3(1), thereby increasing NewCo's interest in DataCo above Section 3(1)'s 10 percent definitional safe harbor. As set out more fully below, in my opinion the conversion right associated with Class B stock is not itself an equity interest or its equivalent in DataCo and, therefore, NewCo's contemplated holding of DataCo Class B stock would not violate section 271(a).

7. DataCo would also be a NewCo affiliate, and section 271(a) would therefore be violated, if under section 3(1) NewCo "controls" DataCo. As set out more fully below, in my opinion NewCo's Class B stock, together with the provisions protecting the Class B conversion right and the pre-conversion consent rights to be granted NewCo, do not cause NewCo to control DataCo under section 3(1).

Transactional Background

8. In anticipation of the Bell Atlantic/GTE merger (the "Merger"), GTE will transfer substantially all of GTE-I's assets to DataCo. Contemporaneously with the closing of the Merger, NewCo will receive Class B convertible stock representing 10 percent of DataCo's voting and

distribution rights. At the same time, shares of DataCo Class A common stock, representing 90 percent of DataCo's voting and distribution rights, will be sold in an initial public offering (the "IPO").[1] Provided that NewCo has received the requisite interLATA relief, including approvals under section 271(b), NewCo's Class B common stock will be convertible for a period of five years into shares of stock representing 80 percent of NewCo's voting and distribution rights (reduced by any future issuances of Class A common stock).[2] As with any convertible security, no additional payment is required on conversion, the consideration having been paid when the convertible security was first issued. In this case, NewCo will have paid for the right to convert its Class B shares by the initial transfer of GTE-I's assets to DataCo. If section 271(b) approval or other interLATA relief has not been received within the requisite five-year period, NewCo's option will terminate.

9. DataCo's board of directors will be entirely independent of NewCo. Nine of the ten DataCo board members will be selected by the public holders of Class A common stock; only one of these (the CEO of DataCo) will have any past affiliation (and will have no current affiliation) with NewCo. As the holder of the Class B stock, NewCo will select one board member. Bell Atlantic and GTE necessarily will select the initial DataCo directors. To assure that the public Class A shareholders will have selected the core of the DataCo board, the term of at least five of the

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[1] If the necessary regulatory approvals for the IPO have not been obtained by the time the Merger closes, or if the market is unfavorable to the IPO at that time, I understand that the Class A common stock will be irrevocably transferred to a consortium of at least three investment banks for sale to the public as promptly as possible, but in no event later than 150 days from the transfer.

[2] If future issuances of Class A common stock reduce the stock into which NewCo's Class B common stock can be converted to below 80 percent but more than 70 percent of DataCo's voting and distribution rights, NewCo will have the further option to acquire at fair market value the number of additional shares of stock necessary to give it 80 percent of DataCo's voting and distribution rights.

unaffiliated directors will end within six months after the IPO. To assure that control of DataCo remains in the public market, no shareholder of Class A common stock will be allowed to cast more than 10 percent of the total Class A votes.

10. The directors of DataCo, including the director named by NewCo, will owe a fiduciary duty to the holders of Class A common stock. In particular, they will have no fiduciary duty to protect the Class B stock's conversion right, nor may they take into account the impact on the Class B stock's conversion right of such things as the declaration of dividends on Class A stock. Additionally, basic principles of corporate law dictate that any DataCo director who is currently affiliated with NewCo (*i.e.*, the director elected by the Class B shareholder) would be obligated to recuse him or herself from participation in any discussion or decision that affects NewCo's interests.

11. DataCo's initial funding will be provided by the proceeds of the IPO. Additional funding will be raised in the manner determined by DataCo's board of directors, including arm's length commercial loans by NewCo should DataCo's board conclude that this source of financing is advantageous.

12. Because a significant portion of DataCo's business will be outside Bell Atlantic's region (and therefore not subject to section 271) or in states within the region for which section 271(b) approval has already been received (ıch as New York), NewCo (or NewCo and DataCo jointly) will market DataCo's services in these geographical areas. In all other respects, DataCo's board of directors will have sole discretion concerning the operation of DataCo's business. However, NewCo will provide, at DataCo's request and under terms approved by the DataCo Board, a variety of administrative support services to facilitate DataCo's effective operation. These services may include, for example, employee benefit support, billing and collections, procurement, treasury

services, information technology support, and real estate management. Additionally, should DataCo's board of directors believe it advantageous, DataCo may enter into commercial arrangements with NewCo such as research and development support, international data services, cross-licensing agreements with respect to intellectual property, and capacity and network support.

13. To protect the Class B common stock's conversion rights, the approval of the Class B shareholders will be required for the following actions: DataCo's merger, consolidation, or the sale of substantially all of its assets; DataCo's liquidation or the filing of a voluntary petition in bankruptcy; the authorization or issuance of additional stock or stock equivalents; charter or bylaw amendments that affect the rights of Class B common stock; a material change in the nature or scope of DataCo's business; and action that would make conversion of Class B stock unlawful. It is apparent that none of the actions for which a class vote is required involve DataCo's ordinary business or strategic decisions, and therefore do not allow NewCo to influence the operation of DataCo's business. Rather, they provide only for a veto right over extraordinary changes in DataCo's business that would adversely affect the Class B conversion rights.

Analysis and Opinions

14. Under standard analysis, a convertible stock is composed of two parts: an equity security carrying voting and distribution rights; and an option to acquire the security into which the original stock is convertible at an exercise price equal to the value of the original stock. Thus, for present purposes the question posed is whether this option constitutes "equity" for purposes of determining whether NewCo owns more than 10 percent of DataCo and is therefore an affiliate for purposes of section 271(a).

15. As a matter of corporate law, an equity interest – and its "equivalent" within the meaning of section 3(1) – consists of a combination of three participation rights: *voting rights* – the right to participate in corporate decision making through voting; *earnings rights* – the right to participate in corporate earnings through receipt of dividends; and *liquidation rights* – the right to participate in the proceeds of the corporation's liquidation on dissolution. The right to participate in the appreciation in the value of the corporation is not, itself, an equity interest (or its equivalent) since securing the opportunity to share in this appreciation can be accomplished through derivative products that plainly are not equity interests under corporate law.

16. An option, whether formal or the constructive option inherent in a convertible security, lacks all three participation rights: the holder of an option cannot vote, does not participate in corporate dividends, and does not participate in the proceeds of the corporation's liquidation. To acquire participation rights, the option must be exercised, the holder thereby giving up the option and accepting in its place an equity security. Thus, for corporate law purposes the boundary between an equity security and an option is quite explicit and sharp. Only the exercise of the option transmutes the holder's interest into an equity security with corporate participation rights.[3]

17. This sharp boundary between an option and an equity security, reflecting both the corporate law and economic significance of the act of exercise, is illustrated by the consequences of exercising an option under a regulatory regime more directly concerned with the regulation of

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[3] The fact that the existence of an outstanding option may affect the value of the outstanding equity does not alter this conclusion. Where a company has outstanding warrants that have an exercise price below the market value of the company's publicly traded stock, the market value will reflect the warrant's likely exercise and resulting dilution of the public shareholders' equity ownership. While the value of the warrant is therefore reflected in the pre-exercise value of the stock, the warrant holder has no participation rights and, thus, no equity in the company, until the warrants are exercised and exchanged for stock.

securities than the Federal Communications Act. Rule 144 under the Securities Act of 1933 draws just this boundary between options and equity interests. Securities that are sold in a private placement without a public offering are exempt from registration with the Securities and Exchange Commission under the Securities Act of 1933. However, resales of privately placed securities must be policed, lest subsequent sales turn the original private placement into only the first step in a public distribution of the securities, in effect operating as a device to avoid the statute's registration requirement. Rule 144 protects the registration requirement by requiring that the purchasers of privately placed securities demonstrate that the initial placement was not a sham by bearing the full economic risk of their investment for a specified holding period before the securities can be resold. In doing so, the Rule draws a sharp line between options and equity interests. The holding period does not begin to run for the holder of an option until the option is exercised – until the holder bears the full risk of the investment.

18. An option or conversion interest is likewise not an "equivalent" of an equity interest within the meaning of section 3(1). The phrase "(or the equivalent thereof)" in that section must be read to capture interests that may not be styled as common stock or that may lack voting rights, but nevertheless carry traditional economic rights of equity ownership -- *i.e.*, distribution or liquidation rights. For example, in appropriate circumstances partnership interests, debt interests that confer the right to participate in earnings rather than receive simple interest, and nonvoting preferred stock that also participates in earnings as well as receiving a fixed dividend, may serve as equity equivalents.

19. Thus, for corporate and securities law purposes, neither an option nor the constructive option represented by a conversion right constitutes an equity interest or the equivalent thereof. Only exercise or conversion transforms an option into equity.

20. The same result should follow under sections 271(a) and 3(1) of the Federal Communications Act. Section 271 serves to assure that a Bell operating company does not provide long distance service in an in-region state whether directly or, to avoid circumvention, through an affiliate, without FCC approval. Section 3(1) makes section 271(a) operational by defining, for this purpose, the term affiliate as a person that "owns" another person. "Owns," in turn, "means to own an equity interest (or the equivalent thereof) of more than 10 percent." Congress thus has determined that acquisition of 10 percent or less of the participatory rights in a corporation is insufficient ownership to require FCC approval. Because an option or conversion right confers no participatory rights in a corporation – neither voting rights, dividend rights nor liquidation rights – such instruments are not "equity interests" for purposes of corporate law. The same result should obtain for purposes of the Federal Communications Act. Because an option or conversion right confers no participation rights, it cannot contribute to the holder's ability to exercise the influence that requires FCC approval under the Federal Communications Act.

21. This outcome is reinforced by the section 271 approval process. NewCo will not be able to exercise its option and take ownership and control of DataCo until it has received sufficient interLATA relief, such as by the granting of 271 approvals by the FCC.

22. Accordingly, it is my opinion that the conversion right associated with the Class B stock to be received by NewCo is not itself an equity interest (or the equivalent thereof) in DataCo and, therefore, NewCo's contemplated ownership of Class B stock in DataCo, representing only a 10 percent equity interest in DataCo, will not violate section 271(a).

23. Although DataCo is therefore not an affiliate of NewCo for purposes of section 271(a) by virtue of NewCo's ownership of DataCo Class B stock, DataCo nonetheless may be an affiliate

of NewCo under section 3(1) if NewCo "controls" DataCo. Standing alone, NewCo's holding of DataCo Class B stock, representing 10 percent of NewCo's participation rights, with the remaining 90 percent held by the public, does not amount to control of DataCo under section 3(1) any more than it counts as ownership of more than 10 percent of DataCo's equity under the same statute. As with ownership, a conversion right does not count toward "control" under section 3(1) until converted; only conversion conveys actual corporate participation rights sufficient to influence the governance of DataCo. Similarly, veto rights over extraordinary transactions to protect the conversion feature, which do not allow NewCo to influence the operation of DataCo's business, do not amount to control.[4]

24. It might be argued, however, that certain pre-conversion consent rights contemplated to be given to the Class B shareholders might themselves give NewCo the power to "control" DataCo for purposes of section 3(1). As contemplated, NewCo's consent would be required for the following DataCo actions: (a) agreements or arrangements that bind NewCo or any of its affiliates or that contain provisions that materially adversely affect DataCo's results of operations; (b) employment agreements with triggers keyed to the conversion of Class B stock; (c) the declaration of extraordinary dividends or other distributions; (d) acquisitions or joint ventures involving an investment of more than $100 million individually or $500 million in the aggregat over any 12 month period; (e) strategic alliances that are not terminable on conversion of the Class B stock; (f) dispositions of more than $50 million of assets in DataCo's first two years of operation, and

[4] The presence of a single NewCo representative on the DataCo board also would not amount to control, in itself or in combination with the items described in the text. First, an overwhelming proportion of the DataCo board will be entirely independent of NewCo. Second, the NewCo director would nonetheless owe a fiduciary duty to the Class A shareholders and, in all events, could not participate in any discussions or decisions that would affect NewCo's interests.

thereafter dispositions of more than $50 million of assets annually or $250 million in the aggregate over any 12 month period; and (g) incurrence, in any calendar year, of debt that exceeds the debt level projected in the prospectus for Class A stock by the lesser of 20 percent of projected debt level or $500 million.

25. These consent requirements take the same basic form and serve the same basic purpose as the covenants in a standard acquisition agreement that govern the target company's operation during the period between the agreement's execution and the satisfaction of the conditions to the agreement's closing, frequently including the securing of required regulatory approvals. In this post-execution, pre-closing period, the target company must not be allowed to make any material changes in its business without the consent of the acquiring company, since the purchase price has already been set by reference to the target company's then current operations.[5] In short, this post-execution, pre-closing, consent requirement serves to maintain the status quo with respect to the target company pending regulatory approvals and closing. Thus, the consent requirements serve both the acquiring company's need to assure that on closing it will get the business it agreed to purchase, and the regulatory agency's concern that the target company's business not change in response to the execution of the acquisition agreement before approval is granted.

26. Indeed, the post-execution, pre-closing structure created by a corporate acquisition agreement can be understood as granting an option to the acquiring company. After executing the acquisition agreement, the acquiring company has an option to purchase the target company at the price set out in the acquisition agreement, exercisable when the acquisition is approved under section

[5] Ronald J. Gilson & Bernard S. Black, The Law and Finance of Corporate Acquisitions 1565-66 (2nd ed. 1995); James Freund, Anatomy of a Merger 153-161 (1975).

271 and other conditions to closing satisfied. During the period the acquiring company holds this option, a set of covenants restricts the target company's behavior without the consent of the acquiring company, just as a set of covenants will restrict DataCo's behavior with respect to extraordinary decisions without NewCo's consent. As an example of the parallel between the post-execution, pre-closing option held by an acquiring company, and the post-closing, pre-conversion option held by NewCo, I set out below the covenants in the AT&T-MediaOne Merger Agreement that govern MediaOne's actions during the post-execution, pre-closing period relating to its acquisition by AT&T, alongside the covenants governing DataCo's actions during the post-closing, pre-conversion period relating to NewCo's Class B stock.[6] As is apparent, the two sets of consent requirements in the two circumstances are functionally identical. Neither serves to transfer control under section 3(1).

[6] Agreement and Plan of Merger between AT&T Corp, Meteor Acquisition Inc., and MediaOne Group, Inc., dated May 6, 1999. The restrictions contained in the table are illustrative, rather than exhaustive of the lengthy list of restrictions contained in Section 6.1 of this document.

AT&T Must Consent to the Following Pre-Closing *MediaOne* Actions	**NewCo Must Consent to the Following Pre-Conversion *DataCo* Actions**
Amendment of any MediaOne security.	
Adoption of any material reorganization, including a merger.	Any merger, consolidation, or sale of substantially all assets.
Issuance of any common stock or other securities.	Authorization or issuance of additional stock.
Incurrence of any capital expenditure.	
Acquisition of any assets, by acquisition or otherwise, with a market value exceeding $25 million in any one transaction.	Acquisitions or joint ventures involving an investment of more than $100 million individually.
Sale or other transfer of any domestic assets with a market value exceeding $25 million in any one transaction.	Dispositions of more than $50 million in assets annually or $250 million in the aggregate over 12 months.
The making of any loan.	
Entering into or amending any material contract.	Entering into any agreement that binds NewCo, or materially adversely affects DataCo.
Incurring indebtedness other than in the ordinary course and in amounts and on terms consistent with past practices.	Incurring indebtedness that exceeds the level projected in the Class A prospectus by more than the lesser of 20% or $500 million.
Entering into any contract that would restrict AT&T from providing cable television, telephony or data transmission anywhere in the world.	
Entering into any contract providing severance pay to any MediaOne employee.	Entering into any employment agreements with triggers keyed to the conversion of Class B stock.
Entering into any joint venture that cann(be terminated as of closing.	Entering into strategic alliances that cannot be terminated on conversion of Class B stock.
Settling any litigation.	
Paying any dividend other than ordinary dividends on outstanding preferred stock.	Paying any extraordinary dividend.

27. Consistent with this analysis, I understand that the FCC does not treat such post-execution, pre-closing consent requirements as independently involving the acquisition of control of the target company for purposes of FCC transactional approval rights. This makes perfect sense, since the transaction structure does no more than preserve the status quo pending the FCC's approval of the acquisition itself.

28. As is apparent from the comparison in Paragraph 26 above, the creation of DataCo and the issuance to NewCo of convertible Class B stock with such pre-conversion consent requirements serves the same purposes as the similar consents in a standard acquisition agreement like the AT&T-MediaOne Merger Agreement. The convertibility of Class B stock, like an executory acquisition agreement, gives NewCo the right to acquire control of DataCo when the FCC approves that acquisition (through 271 approvals). As with a executory acquisition agreement, NewCo (the acquiring company) cannot exercise control of DataCo (the target company) until conversion (closing of the acquisition) following FCC approval. The consent requirements associated with the Class B stock prior to FCC approval and conversion maintain the status quo with respect to DataCo's business just as the consent requirements given an acquiring company maintain the status quo with respect to the target company's business prior to regulatory approval and the acquisition's closing.

29. Accordingly, I am of the opinion that the pre-conversion consent requirements associated with DataCo Class B stock operate analogously to post-acquisition, pre-closing consents associated with a standard acquisition agreement. Therefore, these consent requirements do not cause NewCo to control DataCo within the meaning of section 3.1.

I declare under penalty of perjury that the foregoing is true and correct.

Ronald J. Gilson

Executed on February 22, 2000

B

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

In the Matter of	)	
	)	
GTE Corporation,	)	
	)	
Transferor,	)	
	)	
and	)	CC Docket No. 98-184
	)	
Bell Atlantic Corporation,	)	
	)	
Transferee,	)	
	)	
For Consent to Transfer of Control	)	

DECLARATION OF RAYMOND F. ALBERS

1. I, Raymond F. Albers, am Vice President, Network Architecture, for Bell Atlantic Network Services, Inc. I am familiar with the technology that Bell Atlantic uses to provide Asymmetrical Digital Subscriber Line ("ADSL") service and associated services that Internet Service Providers ("ISPs") use to obtain digital connections to their customers to provide connection to the Internet. These associated services include Asynchronous Transfer Mode ("ATM") Permanent Virtual Circuits that are connected to DSLAMs.

2. In its Comments, AT&T claims that Bell Atlantic, in its ADSL offering, can discriminate in favor of DataCo by preferentially assigning higher-quality ATM circuits to ISPs that interconnect with DataCo than to ISPs that interconnect with other Internet backbone providers. AT&T is wrong, for the reasons I will discuss below.

3. First, AT&T mischaracterizes the service that Bell Atlantic provides to ISPs. Contrary to AT&T's allegation (at page 30), Bell Atlantic does not provide ISPs "transport from the

DSLAM in the central office to their Internet backbone provider." In fact, traffic from Bell Atlantic's DSLAMs is not directly connected to any Internet backbone provider. Instead, data traffic from the DSLAMs is aggregated in Bell Atlantic's ATM network and delivered to the ISP's premises, where it generally connects to the ISP's routers or other termination devices. From that point, the ISP is in complete control of the manner in which its traffic is connected to its chosen Internet backbone provider or providers. And ISPs have a variety of options to reach the Internet backbone provider, few of which involve Bell Atlantic facilities or services. That is because the link from an ISP's routers to the Internet backbone provider is generally an interLATA link, and, except in the one state where Bell Atlantic has been granted interexchange authority, Bell Atlantic is prohibited from providing that service.

4. Instead, the ISP selects the service and the service provider that it wishes to use to connect to the Internet backbone. The ISP may choose to connect via a traditional DS1, DS3, or SONET connection, or it might subscribe to a data service such as SMDS, frame relay, or ATM. In either event, there are dozens of interexchange service providers that the ISP may use for that connection, but in most cases Bell Atlantic will not be one of them.

5. Second, even in those few instances where Bell Atlantic does provide the ISP with service to the Internet backbone, the ISP, not Bell Atlantic, specifies the type and bandwidth of the service. With robust competition for the services listed in the last paragraph, any ISP that receives substandard service from Bell Atlantic would simply switch to a competitor. Bell Atlantic would thus have no incentive to give an ISP inferior service.

6. Third, in the overwhelming majority of cases – those in which Bell Atlantic does not provide the connection to the backbone – Bell Atlantic would not know which Internet backbone

provider the ISP has chosen, so it would have no opportunity to give any preference in any other service to an ISP that chooses to use DataCo as its Internet backbone provider. An ISP has no reason to share with Bell Atlantic either the nature of its Internet backbone connections or its minute-by-minute traffic routing changes. Even if Bell Atlantic knew what Internet backbone provider an ISP used at any given time and attempted to provide superior service when it was using DataCo – a practical impossibility – any such attempt would be easily detected by the ISP, which would likely complain to regulators or at least change service providers.

7. If, despite its portrayal in its pleading, AT&T is really claiming that Bell Atlantic would provide ISPs that choose to use DataCo superior service for other parts of its service, such as the ATM virtual circuits that connect Bell Atlantic's ADSL DSLAMs with its gateway routers and the ISP's premises, its argument fares no better.

8. Traffic in Bell Atlantic's network from individual DSL users is transported from the DSLAM to ATM switches and Gateway Routers via individual ATM Permanent Virtual Circuits. There is and can be no discrimination among ISPs in this portion of the network. This is because, when Bell Atlantic receives an order for DSL services, it assigns *pre-engineered* virtual circuits, without regard to the identity of the customer, ISP, or backbone provider ordering those services. This assignment is made through Bell Atlantic's automated systems, without manual intervention, and this assures that, even if there were performance differences among virtual circuits of the same type (which there are not), they will not be preferentially assigned to any particular customer.

9. The aggregated traffic of each ISP is transported from the Gateway Router to the ISP's premises. This is usually done via ATM virtual circuits provided by Bell Atlantic, although Bell Atlantic has offered to unbundle this link, should any ISP so request.

10. Under Bell Atlantic's tariffs, ISPs may obtain these ATM virtual circuits at one of several ATM qualities of service, including Constant Bit Rate or Unspecified Bit Rate. Constant Bit Rate circuits, as the name implies, are engineered to provide the customer with a guaranteed throughput at the particular bit rate selected, and Bell Atlantic reserves capacity in the network for the sum of all Constant Bit Rate virtual circuits that are installed. Unspecified Bit Rate circuits do not guarantee a particular throughput. However, they are engineered to industry standards, such as those set by the ATM Forum, assuring that there is no difference in performance among circuits.

11. If AT&T's allegation is that, for those ISPs that purchase Unspecified Bit Rate ATM virtual circuits to their premises, Bell Atlantic could discriminate against ISPs that do not use DataCo for backbone services, it is wrong for several reasons.

12. First, as discussed above, it is the ISP, not Bell Atlantic, that specifies the performance of the virtual circuits in question. The ISP may order Constant Bit Rate service, with guaranteed throughput, or Unspecified Bit Rate service, in which case it will receive the same industry standard performance as will all other ISPs that have ordered that service.

13. Second, as also discussed, Bell Atlantic would not know what Internet backbone provider or providers the ISP uses at any particular time. If it does not know whether an ISP intends to use DataCo, it clearly could not g ; users of DataCo's backbone a preference.

14. Third, in order for discriminatory conduct to have an impact in the marketplace, it must be sufficient to affect the level of service provided to customers. But providing poor service on ATM lines served by ADSL would discourage customers from using Bell Atlantic's ADSL and would risk driving them to use cable modems or competitive DSL providers instead. As a result, the discriminatory strategy posited by AT&T would be self-defeating.

15. Fourth, contrary to AT&T's claim, any attempt to selectively degrade service would be readily detectable by the effected ISPs, because ISPs are fully aware of the industry standards applicable to Unspecified Bit Rate ATM virtual circuits. Any effort selectively and persistently to degrade service below those standards would not escape notice and therefore would not be attempted.

16. Finally, if an ISP believes that it is receiving inferior service, it can simply bypass Bell Atlantic by obtaining both DSL service and the ATM circuits from a competitor. Or it could subscribe to Bell Atlantic ADSL and ask Bell Atlantic to unbundle its ATM virtual circuits from that offering, as Bell Atlantic said it would upon request. It can then obtain the ATM circuits from a competitor. In sum, any attempted discrimination of the type posited by AT&T would be counterproductive and could be detected and avoided in any event.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 22, 2000

Raymond F. Albers

Raymond F. Albers