

Finally, GTE and BA each already had the capability to market competitive long distance service packages to business customers without the other's assistance.<sup>56</sup> Although BA's 271 authority is limited to New York, BA will be extremely competitive in its other states as it receives its 271 authority. "These activities, therefore, are not dependent on the merger and could be accomplished individually."<sup>57</sup>

**C. GTE and BA Are Already Competitive Regional Wireless Providers - Other Means of Expansion Are Available that Do Not Harm the Public Interest**

Joint Applicants, as established and growing regional wireless providers, contend that the combined wireless business of the merged company and Vodafone is required to compete effectively with AT&T and Sprint on a national basis.<sup>58</sup> Additionally, Joint Applicants submit that consumers will benefit from the merger because the combined wireless business will produce significant cost savings and operating efficiencies and promote faster and broader deployment of new advanced wireless services.<sup>59</sup> The FCC previously addressed similar arguments espoused by SBC and Ameritech when it considered their merger and found few tangible, merger-specific benefits.<sup>60</sup>

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<sup>56</sup> See also *id.* at ¶¶ 345, 347.

<sup>57</sup> *Id.* at ¶ 347.

<sup>58</sup> BA/GTE Supplemental Filing at 7-9.

<sup>59</sup> *Id.*

<sup>60</sup> See SBC/Ameritech Order at ¶¶ 342, 347.

In particular, the FCC suggested that the only SBC/Ameritech merger-specific benefits in wireless markets were “those related to speed of expansion and reductions in unit costs, such as with the consistency of advanced features in the wireless services market.”<sup>61</sup> The FCC further stated, however, that “[o]ther than these benefits, we find that each company could expand geographically or offer products on its own. *Specifically, each company individually could expand its respective wireless footprints through other acquisitions or joint ventures that do not threaten equivalent public interest harms.*”<sup>62</sup> Similarly, BA and GTE could individually expand their wireless footprints through other acquisitions that would not create the largest ILEC in the country, and the associated public interest harms that result from one entity controlling over 58 million<sup>63</sup> of the nations switched lines. Therefore Joint Applicants’ claimed merger benefits in the wireless market are not merger-specific and cannot counterbalance the harm to the public interest.

**D. The Applicants’ Assertion that the Merger Will Promote Competition in the Local and Bundled Services Markets is Dubious**

Joint Applicants claim that the merger will benefit the public by promoting competition in out-of-region local and unbundled services markets.<sup>64</sup> Nevertheless, similar to the SBC/Ameritech

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<sup>61</sup> *Id.* at ¶ 347.

<sup>62</sup> *Id.* at ¶ 347 (emphasis added).

<sup>63</sup> FCC Trend Report at 9-18 (total of BA’s and GTE’s switched lines).

<sup>64</sup> BA/GTE Supplemental Filing at 9-11.

merger, whatever benefits may be associated with merger cannot be used to justify it because "either of the parties could implement this strategy on their own."<sup>65</sup>

Both GTE and BA have already invested enormous sums in out-of region operations. GTE has a CLEC with approximately 60,000 local customers outside of its service territory within 17 of the 21 markets it has targeted for out-of-region expansion.<sup>66</sup> GTE has also invested hundreds of millions of dollars in OSS and other assets, including customer acquisitions to compete out-of-region.<sup>67</sup> BA has an equity investment in Metromedia Fiber Network, a carrier that aggressively markets its fiber facilities to CLECs,<sup>68</sup> that will build fiber networks in 50 out-of-region cities. These investments alone demonstrate that both parties already have the ability and means to compete for local customers in out-of-region territories, but also that they have the achieved the goal of competing out-of-region absent the merger.

Furthermore, Joint Applicants wrongly imply that unlike the SBC/Ameritech merger, the present merger is not as harmful because it does not involve the combination of adjacent regional Bell companies.<sup>69</sup> Instead, they claim that GTE's service areas, spread throughout other RBOC territories, provide a catalyst for the merged company to expand on a national basis into markets

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<sup>65</sup> SBC/Ameritech Order at ¶¶ 270, 347

<sup>66</sup> BA/GTE Supplemental Filing at 10.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*; Joint Declaration of Gould and Young, at 5. Some of the CLECs include Winstar, Allegiance, Focal Communications and Time Warner. *Id.*

<sup>69</sup> BA/GTE Supplemental Filing at 10.

outside of its traditional telephone service area.<sup>70</sup> First of all, such an argument does not support the merger because BA and GTE have already demonstrated that they have the capability individually to expand into out-of-region territories and through various other means that do not threaten equivalent public interest harms associated with the merger.

In addition, the classic Supreme Court decision on monopoly leveraging points out the potential harm to competition with respect to the Joint Applicants' desire to strategically utilize GTE's in-region areas as a "springboard" to enter new competitive markets.<sup>71</sup> The Supreme Court explained how a monopoly in one area may be used to leverage the monopolist's entry into another area where the monopoly faces competitors:

A man with a monopoly of theaters in any one town commands the entrance for all films in that area. If he uses that strategic position to acquire exclusive privileges in a town where he has competitors, he is employing his monopoly power as a trade weapon against his competitors. It may be a feeble, ineffective weapon where he has only one closed or monopoly town. But as those towns increase in number throughout a region, his monopoly power in them may be used with crushing effect on competitors in other places.<sup>72</sup>

The fact that BA/GTE is strategically planning to capitalize on GTE's dispersed in-region areas to expand into competitive out-of-region markets is a forewarning of the anti-competitive conduct that will arise with the merger. For example, in *United States v. Grinnell*, 384 U.S. 563, 571 (1966), the Supreme Court held that the existence of monopoly power "ordinarily may be inferred

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *United States v. Griffith*, 334 U.S. 100, 107 (1948).

from" the defendant's market share of 87% of the market. Both BA and GTE on average retain market shares in their respective incumbent franchise areas that greatly exceed this 87% threshold. If and when the merged entity begins to compete in out-of-region local exchange markets, it will be able to leverage BA's or GTE's existing relationships with large customers from their respective in-region markets into new business relationships in out-of-region ones. The merged entity will be able to use BA's and GTE's strategic position to acquire privileges in out-of region markets, potentially precluding CoreComm and other CLECs who lack such leverage from gaining market share. If the merged entity's monopoly leveraging is not checked, its out-of-region market entry plans may therefore thwart, not enhance, competition in these markets.

**VI. THE FCC MUST IMPOSE ADDITIONAL MARKET-OPENING CONDITIONS ON BA AND GTE BEFORE THE BENEFITS OF THE MERGER WILL OUTWEIGH THE HARMS**

Until now, the public has not had the opportunity to comment on the conditions proposed by BA and GTE. In connection with their proposed merger, SBC and Ameritech engaged in a collaborative effort with the FCC Staff and the industry. As the FCC found, the final conditions attached to the SBC/Ameritech merger were substantially influenced by the public through an "open negotiation" process designed to permit constructive bargaining."<sup>73</sup> In contrast, the conditions offered by BA and GTE in this proceeding are not yet the product of such a process, although CoreComm hopes that such a process will be forthcoming.

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<sup>73</sup> SBC/Ameritech Order at ¶ 352.

The Conditions offered by the Joint Applicants do not outweigh the public convenience harms that would result from the merger. In the absence of a strong showing that differences over time or differences between the merging parties warrant a weakening of merger conditions, the Commission should require BA/GTE to meet all of the market-opening commitments it adopted as a condition of finding that the SBC/Ameritech merger will promote the public convenience. As the FCC stated, the conditions attached to the SBC/Ameritech merger “flow from our statutory objectives to open all telecommunications markets to competition, to promote rapid deployment of advanced services, and to ensure that the public has access to efficient, high-quality telecommunications services.”<sup>74</sup> Those same considerations are equally applicable here. Despite the FCC’s endorsement of the SBC/Ameritech conditions as necessary to promote the public interest, the Joint Applicants chose not to include in their Proposed Conditions a large number of the SBC/Ameritech incentives critical to promoting competition, especially facilities-based competition. The FCC should not permit BA/GTE to game the merger approval process by selecting only the pro-competitive commitments they are willing to implement.

In approving the SBC/Ameritech merger, the FCC found it necessary to impose certain pro-competitive, market-opening conditions on SBC/Ameritech in order to ensure that the benefits of the merger would outweigh the harms. In addition to applying those conditions to Joint Applicants, the FCC should incorporate additional and more stringent requirements to offset the lack of a Section 271 inducement with respect to GTE. If the merged entity were to be subject to Section 271 entry

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<sup>74</sup> SBC/Ameritech Order at ¶ 355.

requirements in GTE service areas, the Commission would have a later opportunity to review BA/GTE's continued compliance with both its legal obligations and its market-opening commitments through its entire region. As the FCC noted,

on a going forward basis, as SBC and Ameritech receive section 271 authority, their ability to discriminate successfully against rival local service providers should diminish.<sup>75</sup>

The absence of the Section 271 incentive with respect to GTE is a significant public convenience detriment, weighing against merger approval. Unless the Commission establishes *in this proceeding* the monitoring and enforcement procedures necessary to measure the merged entity's compliance with its merger commitments, the Commission can expect GTE to continue its current anti-competitive behavior and litigious strategy. The FCC should therefore impose conditions on it that not only parallel SBC/Ameritech merger conditions, but should add several pro-competitive conditions to offset the absence of the assurance that comes from the Section 271 process that will "diminish" Joint Applicants' "ability to discriminate successfully against rival local service providers."

Moreover, even though a majority of BA/GTE's Proposed Conditions resemble those adopted by the FCC in the SBC/Ameritech merger, it is becoming evident that at least one such condition was not appropriately crafted and may be impeding competition rather than advancing it. The most favored nations ("MFN") condition, which requires that SBC/Ameritech make available to any CLEC interconnection arrangements that have been *negotiated* in one SBC/Ameritech state

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<sup>75</sup> SBC/Ameritech Order at ¶ 242.

in other SBC/Ameritech states, is promoting gridlock rather than competition.<sup>76</sup> CoreComm has observed that the MFN condition has made SBC/Ameritech less willing to negotiate reasonable arrangements in one state, for fear that the reasonable, negotiated term may be imported into other SBC/Ameritech states. By contrast, should it force the CLEC to arbitrate the provision, even if it loses the arbitration, SBC/Ameritech will only be forced to suffer the consequences in the single state in which it arbitrated the issue. BA/GTE have proposed a similar MFN condition, and CoreComm believes that this condition must be strengthened in order to have the pro-competitive effect that the FCC anticipated.<sup>77</sup>

For this particular merger to pass the public interest standard, the FCC must adopt conditions in a manner to provide proper, practical and easily implementable short-term and long-term benefits which dramatically foster and accelerate competition and the deployment of new and advanced services in BA and GTE service areas. Moreover, the FCC should construct conditions that provide the most efficient and effective method to address immediately and resolve on-going operational problems CLECs currently have with BA and GTE across their respective regions. CoreComm

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<sup>76</sup> Then-Chairman Glazer of the Public Utilities Commission of Ohio recognized that large-scale ILEC mergers could create a “gridlock problem.” See *In the Matter of the Joint Application of SBC Communications Inc., SBC Delaware Inc., Ameritech Corporation, and Ameritech Ohio for Consent and Approval of a Change of Control*, Case No. 98-1082-TP-AMT, Opinion and Order, Glazer Concurrence, 6 (Ohio P.U.C., April 6, 1999) (“‘gridlock’ problem -- an unwillingness on the part of a multi-state corporation to compromise a position in a given state, not on the merits, but solely out of fear of it eroding its ‘litigation position’ in other states.”).

<sup>77</sup> As discussed in Section V.H., *infra*, CoreComm advocates that this condition be modified by expanding CLECs’ MFN rights to arbitrated, as well as negotiated, agreements.

summarizes below the most important of the missing conditions that should be incorporated into BA/GTE's Proposed Conditions.

**A. Promotional Discounts on Loops, Resale Services and UNE-P**

Conspicuously absent from BA/GTE's proposal is a condition that would jump start competition by offering carrier-to-carrier promotions, including discounts on voice grade residential loops and resale services, and the UNE-Platform (UNE-P).<sup>78</sup> Joint Applicants argue that the purpose of the SBC/Ameritech carrier-to-carrier promotions was to offset the loss of probable competition between SBC and Ameritech for residential services in their regions as a result of the merger.<sup>79</sup> BA/GTE argue that such conditions are unnecessary because neither BA nor GTE planned to compete with one another for residential services and thus there will be no loss of residential competition to offset.<sup>80</sup> However, the FCC also noted that the promotions would facilitate market entry and encourage competition for consumers in less dense areas. Because facilitating market entry and promoting competition in less dense areas are worthy public interest benefits regardless of any evidence that BA and GTE would have independently entered each other's territory, the FCC should require BA/GTE to provide promotional discounts.

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<sup>78</sup> BA/GTE Supplemental Filing at 26; See SBC/Ameritech Order, Appendix C ("SBC/Ameritech Merger Conditions") at ¶¶ 45-52.

<sup>79</sup> BA/GTE Supplemental Filing at 26. Joint Applicants' contention that this rationale was the sole means of justifying the promotions is weakened by the fact that the record in the SBC/Ameritech merger showed actual consideration of competitive entry in only a small portion of the SBC/Ameritech region. SBC/Ameritech Order at ¶¶ 71, 78, 82.

<sup>80</sup> *Id.*

Joint Applicants' argument is undermined by the voluntary commitment that BA/GTE made to the Public Utilities Commission of Ohio to offer a promotional resale discount.<sup>81</sup> Any contention that it is appropriate for them not to offer the discounts (except in Ohio) is also undermined by the simple fact that BA and GTE have the ability and means (not shared by a significant number of other entities) to compete against each other in their respective regions.<sup>82</sup> Accordingly, BA/GTE should be required to offer carrier-to-carrier promotions, at the same levels required of SBC/Ameritech. In addition, the FCC should require that the discounts apply to both residential and business customers as the Ohio Commission requires.<sup>83</sup>

The FCC should also require that BA/GTE offer a UNE-P promotion that incorporates the unbundled loop discount mentioned above and that is not limited to residential POTS and ISDN as

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<sup>81</sup> See *In the Matter of the Joint Application of Bell Atlantic Corporation and GTE Corporation for Consent and Approval of a Change in Control*, Case No. 98-1398-TP-AMT, Amended Joint Application, Exhibit 9 at 6-7 (Ohio P.U.C., filed July 28, 1999) (offering promotional avoided cost discount on all resold lines for a period of three years following merger closing)(CoreComm Ex. 1). This condition was adopted and lengthened by the Public Utilities Commission of Ohio. *In the Matter of the Joint Application of Bell Atlantic Corporation and GTE Corporation for Consent and Approval of a Change in Control*, Case No. 98-1398-TP-AMT, Opinion and Order, 40 (Ohio P.U.C., Feb. 10, 2000) (revising discount to apply for a three-year period for each CLEC that elects the discount prior to the close of the three-year period following merger closing).

<sup>82</sup> See *supra* Section V.D.

<sup>83</sup> At this time, ILECs still face very little competition, not only with respect to the residential, but also with respect to the small business, market *i.e.*, businesses with 20 lines or less. At a minimum, the discounts should be extended to businesses of this size to stimulate competitive entry of CLECs into this market segment.

is the SBC/Ameritech condition.<sup>84</sup> Although the Commission addressed UNE-P in the *UNE Remand Order*,<sup>85</sup> and ILECs are already required to offer UNE-P pursuant to 47 C.F.R. 51.315(b), the FCC is not prohibited from requiring that BA/GTE offer a UNE-P promotion as a condition to this merger to accelerate its deployment. In fact, the FCC came to this conclusion when it imposed promotional conditions on the SBC/Ameritech merger, finding that the conditions were not intended to interpret Sections 251, 252, 271 and 272 of the Communications Act, but were "designed to address potential public interest harms specific to the merger of the Applicants."<sup>86</sup>

Although BA has made UNE-P concessions in states where it seeks Section 271 approval,<sup>87</sup> BA and GTE have not generally offered UNE-P terms, conditions, and rates to CLECs throughout their regions. To offset potential delays and spur competition in the residential and small business markets, the FCC should require a UNE-P promotion that incorporates the unbundled loop discount and that is not limited to residential POTS or ISDN service. This promotion should be available to both small business and residential customers with no service restrictions and should permit the

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<sup>84</sup> See SBC/Ameritech Merger Conditions at ¶ 51.

<sup>85</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98 & 95-185, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, ¶ 145 (rel. Nov. 5, 1999) ("*UNE Remand Order*").

<sup>86</sup> SBC/Ameritech Order at ¶ 357.

<sup>87</sup> For instance, BA offers UNE-P in New York pursuant to its 271 commitments. See BA-New York P.S.C. No. 916 Tariff, Section 5.12.1. In paving the way for 271 approval in Massachusetts, BA filed a UNE-P tariff on January 14, 2000 which is currently pending. See BA's January 14, 2000 Compliance Filing in the *Consolidated Arbitrations*, D.P.U./DTE 96-73/74, 96-75, 96-80/81, 96-83, 96-94, Phase 4-P Order (Jan.10, 2000).

transmission of any type of voice or data services over UNE-P lines.<sup>88</sup> In short, the FCC should require BA and GTE to offer, throughout their service territories, the UNE-P offering BA has made available in New York and proposed in Massachusetts. BA/GTE should not be permitted to dictate the pace of competitive entry in their territories by prohibiting CLEC access to the UNE-P until BA requests Section 271 authority.

**B. 25% OSS Discount on All Loops Used to Provide Advanced Services, Including Loops Used for Both Voice and Data**

Until they have deployed OSS interfaces to support advanced services pre-ordering and ordering, and the interfaces are used by their advanced services affiliate for a majority (75%) of its orders, Joint Applicants propose to offer a 25 percent discount for certain loops.<sup>89</sup> However, Joint Applicants' proposed condition appears to limit this discount to "surrogate line sharing loops" provided pursuant to Proposed Condition 7. In comparison, the FCC required SBC/Ameritech to provide the OSS discount on *any* loop used to provide advanced services and did not limit the discount to surrogate line sharing loops.<sup>90</sup> At a minimum, the FCC should require that the OSS discount apply to all unbundled loops used to provide advanced services, not just surrogate line

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<sup>88</sup> BA has already proposed a similar non-restricted UNE-P offering in Massachusetts although there is no promotional discount associated with it. *See id.*

<sup>89</sup> *See In Matter of GTE CORPORATION, Transferor, and BELL ATLANTIC CORPORATION, Transferee, For Consent to Transfer of Control*, CC Docket No. 98-184, Proposed Conditions for Bell Atlantic/GTE merger, at ¶¶ 25, 7 (filed Jan. 27, 2000) ("BA/GTE Proposed Merger Conditions").

<sup>90</sup> Compare BA/GTE Proposed Merger Conditions at ¶¶ 25, 7, with SBC/Ameritech Merger Conditions at ¶ 18.

sharing loops. In addition, the FCC should clarify that the discount applies even if the line is used to provision both advanced and voice services.

The significance of Joint Applicants' proposed modification to this condition is tremendous. For instance, the SBC/Ameritech condition applies the 25 percent OSS discount to all ADSL and xDSL lines whereas Joint Applicants' Proposed Condition does not. The FCC adopted the SBC/Ameritech merger condition "to compensate other carriers for the unenhanced OSS and provide SBC/Ameritech with an incentive to improve the systems and processes as quickly as possible."<sup>91</sup> Limiting the loops subject to this discount undermines this objective entirely. In their Supplemental Brief, BA/GTE imply that their conditions are similar to the SBC/Ameritech merger conditions by stating they will provide "a discount on unbundled loops used to provide advanced services" until such OSS pre-ordering and ordering interfaces are operational. Joint Applicants fail to disclose, however, that they propose to limit the discount to surrogate line sharing loops<sup>92</sup> - which in itself is a limited offering because ILECs are required to offer line sharing by June 6, 2000.<sup>93</sup> The FCC must remove this limitation to ensure that Joint Applicants have adequate incentives to upgrade their OSS for advanced services.

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<sup>91</sup> SBC/Ameritech Order at ¶ 153.

<sup>92</sup> BA/GTE Supplemental Filing at 19.

<sup>93</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capabilities*, CC Docket No. 98-147, Third Report and Order in CC Docket No. 98-147 Fourth Report and Order in CC Docket No. 96-98, FCC 99-355 ¶ 161 (rel. December 9, 1999) ("*Line Sharing Order*") (establishing that line sharing must be implemented within 180 days after the release of the Order).

Moreover, the FCC should clarify that the discount applies to all lines that CLECs use to provide advanced services, even if voice services are carried over the same line. Where it does not have access to interfaces that support pre-ordering and ordering of advanced services, the CLEC will experience cost and delay in provisioning service to the customer regardless of whether it provides voice in addition to advanced services over the same loop. As long as the line is being used provide any of the advanced services defined in Joint Applicants' proposal, CLECs that wish to offer both advanced services and voice services over the same line should be eligible to receive the discount.

**C. OSS Assistance to Small CLECs**

BA/GTE propose to make OSS assistance available to CLECs with revenues under \$300 million *90 days* after the merger closing date if a requesting and qualifying CLEC has contracted for OSS in its interconnection agreement with BA/GTE and has completed *any available* BA/GTE OSS training.<sup>94</sup> In comparison, the SBC/Ameritech merger conditions made this condition available *30 days* following the merger closing date if a requesting and qualifying CLEC has contracted for OSS in its interconnection agreement with SBC/Ameritech and has attended the OSS training *required by its interconnection agreement*.<sup>95</sup> The FCC found that such assistance benefits the public interest because it reduces barriers to new entry in the merged entity's region.<sup>96</sup> The Commission should require that BA/GTE, like SBC/Ameritech: (1) offer this assistance 30, rather than 90, days after the

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<sup>94</sup> BA/GTE Proposed Merger Conditions at ¶ 26.

<sup>95</sup> SBC/Ameritech Merger Conditions at ¶ 36.

<sup>96</sup> SBC/Ameritech Order at ¶ 385.

merger closing date and (2) offer such training to all requesting CLECs that have attended the OSS training required by their interconnection agreement, rather than limiting assistance to CLECs that have completed all available GTE/BA OSS training.

**D. Accelerated Implementation of OSS with Revised Incentives to Prosecute Non-compliance**

Joint Applicants propose to establish uniform interfaces, electronic interfaces and related business rules across each of their service areas; however, Joint Applicants do not propose to extend that uniformity throughout both service areas as did SBC/Ameritech.<sup>97</sup> In addition, SBC/Ameritech merger conditions, except for Connecticut, require OSS implementation within 24 months of *merger closing*, whereas Joint Applicants propose OSS implementation within 24 months of *completing OSS collaborative processes*. Because Joint Applicants make no representations or commitments about when the collaborative proceedings will be completed, it is possible that their OSS compliance could be substantially later than 24 months following merger closing. Therefore, at a minimum, the FCC should require that Joint Applicants implement OSS interfaces in their respective service areas within 24 months of the merger closing date.

In addition to claiming that region-wide OSS integration would be prohibitively expensive, Joint Applicants contend that they should not be required to implement uniform OSS because there will be no loss in LEC-to-LEC competition following the merger, the merger does not create a massive contiguous territory where regional CLECs operate, and many CLECs have already

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<sup>97</sup> Compare BA/GTE Proposed Merger Conditions at ¶¶ 18-20, with SBC/Ameritech Merger Conditions at ¶¶ 25-33.

designed their systems to work with systems BA and GTE have already deployed.<sup>98</sup> While CoreComm does not necessarily agree with all of these arguments, if the FCC nevertheless determines that BA may offer uniform OSS in its territory that is separate and distinct from the uniform OSS offered in GTE's territory, the FCC should clarify and strengthen Joint Applicants' proposed condition. The FCC should require Joint Applicants' OSS to provide CLECs with like functionality throughout the merged entity's service territory. For instance, if CLECs can obtain loop qualification information from BA's uniform OSS, they should also be able to obtain the same loop qualification information from GTE's uniform OSS. In short, the FCC must ensure that different OSS interfaces or processes do not permit Joint Applicants to escape their duty to provide identical business information that CLECs need for pre-ordering, ordering, provisioning, maintenance and repair, and billing.

Finally, the FCC should revise the proposed enforcement mechanism for BA/GTE noncompliance with its OSS deployment commitments. Joint Applicants have proposed a scheme under which a CLEC may enforce Joint Applicants' compliance by requesting binding arbitration.<sup>99</sup> Under Joint Applicants' proposal, a CLEC must advise the Chief of the Common Carrier Bureau of the alleged noncompliance, pay 100% of its costs to prosecute the arbitration, and pay 50% of the costs of the arbitrator and experts. If, however, BA/GTE is not in compliance, all fines are paid to the U.S. Treasury, and nothing is paid to the prevailing CLEC who may have suffered harm as a

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<sup>98</sup> BA/GTE Supplemental Filing at 21-23.

<sup>99</sup> See BA/GTE Proposed Merger Conditions at ¶ 21.

result of BA/GTE's conduct. While the CLEC will presumably gain a prospective benefit of BA/GTE's compliance with respect to the issue arbitrated, that benefit may not compensate the CLEC for past harms, nor outweigh the substantial cost of prosecuting the arbitration, especially for smaller CLECs. Although the FCC must balance the need to encourage CLEC monitoring of BA/GTE compliance with the need to prevent frivolous actions, Joint Applicants' proposal is weighted heavily against encouraging CLEC actions. CoreComm submits that BA/GTE should be obligated to pay 100% of the costs of the arbitrator and expert if the CLEC prevails. Additionally, the CLEC should be entitled to reimbursement for past harms resulting from BA/GTE's conduct and should be able to recover its attorneys' fees and costs from BA/GTE (in addition to the penalties BA/GTE pays to the U.S. Treasury). Because the CLEC will be taking action that benefits the public interest in increasing local competition and the penalty resulting from the CLEC's successful action are paid to the government, it is entirely appropriate to reimburse the CLEC for such fees.<sup>100</sup> Without these modifications, CLECs, as a practical matter, will be reluctant to pursue binding arbitration at the FCC. Finally, the parties eligible to request arbitration should not be limited to CLECs. State commissions and FCC staff, especially enforcement staff, should also be permitted to initiate the binding arbitration process.

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<sup>100</sup> Although the general American rule is that attorney fees are not recoverable by prevailing litigants, there are certain exceptions to that rule. One of those exceptions permits the prevailing party to recover costs, including attorneys' fees, when the prevailing party recovers monies for the benefit of others. *See Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240, 257 (1975) (citations omitted); *cf.* 47 U.S.C. § 206 (providing for attorneys fees in cases involving violations of the Communications Act).

**E. Require GTE to Undergo Third Party OSS Testing**

Noticeably lacking from Joint Applicants' proposed OSS conditions is a requirement that GTE undergo third-party OSS testing. GTE, like all other ILECs, has an obligation under Section 251(c) of the Act to provide requesting carriers with unbundled access to its OSS.<sup>101</sup> Among other things, CLECs like CoreComm have an essential need for access to timely, accurate, and effective OSS to place customer orders, provision service, write trouble tickets, and bill customers. For example, if the ILEC has quicker and more reliable access to information regarding the availability of new telephone numbers or the existence of available lines to a new customer's neighborhood, CoreComm may not be able to provision service to a new customer in the same time frame in which the ILEC can provide the same customer with service. While CoreComm's service delay may be caused entirely by substandard access to the ILEC's OSS, the customer will most likely fault CoreComm, not the ILEC, for the delay in establishing service and CoreComm may subsequently suffer financially as customers encountering such delays return to the ILEC.

In its Section 271 evaluation of whether Bell Atlantic-New York had met its obligations under Section 251 to provide unbundled access to OSS, the Department of Justice found that "[t]he third-party test of Bell Atlantic's wholesale support systems has been particularly valuable in

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<sup>101</sup> See, *UNE Remand Order* at ¶ 433 ("Lack of access to the incumbent LEC's OSS impairs the ability of requesting carriers to provide the services they seek to offer. The incumbents' OSS provides access to key information that is unavailable outside the incumbents' network and is critical to the ability of other carriers to provide local exchange and exchange access service.").

opening the New York Market."<sup>102</sup> Third-party testing is valuable because the testers seek to replicate conditions faced by CLECs in order to identify any problems with the ILEC's performance by reviewing the processes by which market entrants establish and maintain a wholesale relationship with the ILEC. Third-party testers independently develop interfaces to the ILEC's OSS, prepare test data, submit test transactions, and review the ILEC's documentation, software testing and change-management processes.<sup>103</sup> Although BA has agreed to third-party testing in at least four states as part of the Section 271 process, GTE has never agreed to submit to third-party testing.

GTE's refusal to submit to third-party testing is particularly egregious for several reasons. First, as the Department of Justice recognized, OSS testing by a neutral third party unearths valuable evidence about problems with existing processes and systems as well as propels system changes necessary to address failures.<sup>104</sup> Second, because CLECs are purchasing so few wholesale services from GTE as compared to BA,<sup>105</sup> there is not a sufficient body of evidence to evaluate whether

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<sup>102</sup> *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 Service in New York*, CC Docket No. CC 99-295, Evaluation of the United States Department of Justice, 4 (Nov. 1, 1999) ("DOJ Evaluation").

<sup>103</sup> DOJ Evaluation at 5.

<sup>104</sup> DOJ Evaluation at 4-5.

<sup>105</sup> According to aggregate local competition statistics published by the FCC, as of December 31, 1998, GTE had provided only 100,000 of its 17 million access lines to CLECs for resale and 23,000 of its access lines to CLECs as UNE loops. In contrast, BA provided 619,000 of its 41.5 million access lines to CLECs for resale and 91,000 of its access lines to CLECs as UNE loops. See FCC Trend Report at 9-10, 9-18.

GTE's OSS are performing adequately. Third, GTE is required to deploy OSS just as any other ILEC is. Yet because GTE is not subject to the Section 271 process, where third-party OSS testing is typically performed,<sup>106</sup> GTE has, to date, been able to avoid submitting itself to such testing. Fourth, by deploying different OSS interfaces in GTE territory than BA territory, Joint Applicants ensure that CLECs in GTE service areas will not benefit from the third-party testing that has improved BA's OSS. The FCC should not permit the merged entity to discriminate against wholesale customers in GTE's service areas. CLECs in GTE service areas deserve to have access to the same third-party OSS testing as do CLECs in BA service areas. The FCC should either require GTE to undergo third-party testing or require the merged entity to deploy uniform OSS interfaces throughout its merged service territory.

**F. Strengthen Carrier-to-Carrier Performance Conditions**

Similar to their OSS deployment commitments, Joint Applicants propose to adopt performance measurement plans specific to GTE's service areas and BA's service areas rather than adopt one uniform plan.<sup>107</sup> While CoreComm does not object to a non-uniform set of performance measurements, it does object to the proposed measurements and to additional conditions that permit BA/GTE to escape compliance altogether. CoreComm objects to Joint Applicants' representation that the 17 measurement categories and sub-measurements are "based on" those adopted by the New York Public Service Commission and the California Public Utilities Commission. In fact, without

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<sup>106</sup> Dockets involving third party testing of RBOC OSS as part of the Section 271 process are in varying stages in numerous states throughout the country.

<sup>107</sup> See BA/GTE Proposed Merger Conditions at ¶¶ 16-17.

explanation, Joint Applicants have revised the performance measurements adopted by those Commissions. Because both state commissions developed their performance measurements through detailed collaborative processes involving the ILECs, CLECs, and commission staff, CoreComm urges the FCC to require Joint Applicants to implement the state commission measurements, rather than the watered down measurements proposed by Joint Applicants.

Joint Applicants' proposed Carrier-to-Carrier Performance Assurance Plan ("the Plan") would last, at most, 36 months from its effective date. There are, however, a number of triggering events that would permit Joint Applicants to escape compliance with the Plan at much earlier dates. For instance, because Bell Atlantic-New York has received Section 271 approval, it will never be subject to the Plan. Similarly, BA will cease complying with the Plan in other states if and when it receives Section 271 authority in that state. CoreComm submits that Section 271 authority should not relieve BA of its responsibility to meet carrier-to-carrier performance standards. To the contrary, carrier-to-carrier performance standards become even more important following Section 271 authorization to prevent against backsliding. This means of escaping compliance with the Plan should be deleted.

Escape number two is similarly misplaced. Joint Applicants propose to stop complying with the Plan if and when they complete 50% of the out-of-region investment they have committed to make. Because their out-of-region investment does nothing to improve their in-region performance under the Plan, this conditions should also be deleted.

Finally, escape number three must be modified. Joint Applicants propose to stop complying with the Plan on a state-by-state basis on the effective date of any performance plan adopted by a state commission. Because Joint Applicants do not adequately define what qualifies as such a state plan, this condition must be revised. Joint Applicants should only be permitted to end compliance with the federal merger Plan if the state performance plan imposes penalties on Joint Applicants for noncompliance that are at least equal to those contained in the FCC conditions. Without such clarification, Joint Applicants could easily escape compliance with the Plan by voluntarily agreeing to implement performance measurements, without penalties or with minimal penalties, under state commission supervision.

**G. Framework to Accelerate BA/GTE's Implementation of FCC Orders**

ILECs in general, and GTE in particular, have proven reluctant to negotiate agreements to implement newly ordered interconnection obligations prior to the effective date of the obligation and often fail to complete preparations necessary to implement the new service or UNE on its effective date. For example, despite repeated requests from CoreComm, GTE did not provide CoreComm with proposed interconnection provisions incorporating the FCC's new collocation rules and the FCC's *UNE Remand Order* until after they had been in effect. Indeed, in the case of the new collocation rules, GTE did not provide its draft proposal until the rules had already been in effect for *four months*. Because these types of delays in implementation harm the public interest in promoting competition in local exchange markets, the FCC should adopt, as a merger condition, a framework that requires BA and GTE to accelerate implementation of FCC orders.

**(1) Immediate Proof of Compliance with the FCC's New Collocation Rules**

BA/GTE propose that an independent auditor will file an attestation that BA/GTE's collocation terms and conditions and/or tariffs comply with the FCC's new collocation rules within *180 days* after the merger closing date.<sup>108</sup> The SBC/Ameritech merger conditions required, however, that this report be filed no later than *10 days* after the merger closing date.<sup>109</sup> Given that BA/GTE has had more time to comply with the FCC's collocation rules than did SBC/Ameritech, the interval should be shorter, not longer. In fact, both GTE and BA should already be in compliance with these rules. Therefore, Joint Applicants should be required to offer collocation to CLECs in compliance with FCC rules as confirmed by an independent auditor *prior* to merger approval.

**(2) UNE Remand Order**

In the *UNE Remand Order*, the FCC reevaluated the network elements that the ILECs must make available on an unbundled basis, and required that several new elements be made available, including dark fiber and subloop unbundling.<sup>110</sup> The FCC also required ILECs to provide certain specified information for loop qualification purposes such as information that identifies the physical attributes of the loop plant, *e.g.*, loop length, the presence of load coils, bridged taps, and Digital Loop Carriers ("DLCs"), that enable a carrier to determine whether the loop is capable of supporting xDSL and other advanced technologies. Some of the new UNEs must be made available on

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<sup>108</sup> BA/GTE Proposed Merger Conditions at ¶ 29.

<sup>109</sup> SBC/Ameritech Merger Conditions at ¶ 39.

<sup>110</sup> *UNE Remand Order* at ¶¶ 196, 209.

February 17, 2000, while others need not be made available until May 17, 2000. But even as to this latter group of UNEs, ILECs have a statutory obligation to negotiate in good faith prior to the effective date<sup>111</sup> and, as a practical matter, they must undergo certain preparatory activities if they intend to make these new UNEs available on May 17, 2000.

Joint Applicants argue that they should not be required to meet certain SBC/Ameritech merger conditions because the *UNE Remand Order*<sup>112</sup> obviates the need for such conditions.<sup>113</sup> Joint Applicants argue that these “superseded” conditions include the requirements to provide: (1) specific information for loop qualification purposes; (2) the UNE-P; (3) certain UNEs pending the result of the remand proceeding; and (4) shared transport as a UNE.<sup>114</sup> Neither Joint Applicants’ supplemental filing nor their efforts to implement the *UNE Remand Order* present a compelling case for removing these conditions. CoreComm therefore urges the FCC to reject their argument and require Joint Applicants to comply with the same commitments, as modified below, imposed on SBC/Ameritech.

Both BA and GTE have begun offering CLECs a template UNE amendment (posted on their websites) that sets forth terms and conditions for some, but not all, of the UNEs the FCC adopted

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<sup>111</sup> 47 U.S.C. § 251(c)(1).

<sup>112</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98 & 95-185, Third Report and Order and Fourth Further Notice of Proposed Rulemaking (rel. Nov. 5, 1999) (“*UNE Remand Order*”).

<sup>113</sup> See Supplemental Filing of BA/GTE at 18 & n.12.

<sup>114</sup> *Id.* at n.12.

in the *UNE Remand Order*. Neither BA's nor GTE's template includes rates, terms or conditions for UNEs that must be made available as of May 17, 2000.<sup>115</sup> BA's template does not include pricing for the February 17 UNEs, and states that the interim prices BA will set (at a later date) will only be subject to true-up if a state commission first approves the rates as interim and then later changes them. No true-up is available for UNEs purchased prior to the effective date of the first order approving the BA rates.

Any delay in providing the new UNEs, such as dark fiber, subloop unbundling, and access to loop qualification information, is contrary to the spirit and intent of the *UNE Remand Order* and Section 251 of the Act. Only by being offered the rates, terms and conditions for providing the new UNEs will CLECs such as CoreComm be in a position to begin negotiating for the provision of the new UNEs. If CLECs are not entitled to request the new UNEs until the rules become effective, or if ILECs refuse to provide template terms and conditions for the new UNEs until the rules' effective date, then CLECs that seek agreements will be forced to wait until May 17, 2000 before they can even begin to negotiate terms. If the parties are unable to reach agreement on the terms and

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<sup>115</sup> BA's template simply contains no mention of the UNEs that must be made available by May 17, 2000. GTE's template agreement defines or includes reference to subloops, inside wire, packet switching, dark fiber transport, call-related databases, loop qualification databases, and line sharing in its list of UNEs. By signing the GTE agreement, however, a CLEC does not obtain the right to order any of these UNEs, even after the FCC's Rules as to these UNEs go into effect on May 17. In addition, the GTE proposal does not contain any proposed rates, terms, or conditions for such UNEs. Rather, signing GTE's proposed agreement merely entitles the CLEC to make a written request to enter into good faith negotiations with GTE to enter into yet another agreement, pursuant to which the CLEC will actually obtain the right to order such UNEs, and pursuant to which the parties will presumably spell out the rates, terms, and conditions that will govern GTE's provisioning of such UNEs.