

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

In re Application of )  
)  
GTE Corporation, )  
Transferor, )  
)  
And )  
)  
Bell Atlantic Corporation, ) CC Docket Nos. 98-141 & 98-184  
Transferee )  
)  
For Consent to Transfer Control of )  
Domestic and International Section 214 )  
and 310 Authorizations and Application )  
to Transfer Control of a Submarine )  
Cable Landing License )

**COMMENTS OF VERIZON**

Mark L. Evans  
Evan T. Leo  
Kellogg, Huber, Hansen, Todd &  
Evans, P.L.L.C.  
Sumner Square.  
1615 M Street, N.W.  
Suite 400  
Washington, D.C. 20036  
(202) 326-7900

Michael E. Glover  
Edward Shakin  
Joseph DiBella  
Verizon  
1320 North Courthouse Road  
Eighth Floor  
Arlington, Virginia 22201  
(703) 974-6350

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## INTRODUCTION AND SUMMARY

Following a lengthy merger review that lasted more than twenty months and in which all interested parties had multiple opportunities to comment, the Commission approved the merger of Bell Atlantic and GTE subject to numerous conditions, many of which impose legal obligations far beyond those contained in the Communications Act. In reliance on the Commission's order, Bell Atlantic and GTE combined their companies. That integration — which took many months and cost at least hundreds of millions of dollars — is now complete, and cannot be undone.

Despite all this, WorldNet Telecommunications, Inc. (“WorldNet”) has asked the Commission to take the unprecedented step of reopening the Bell Atlantic/GTE merger proceeding in order to expand the merger conditions to make them applicable to Puerto Rico Telephone Company (“PRTC”). The Commission must reject WorldNet's extraordinary request. WorldNet's request comes long after the deadline for filing any petitions for reconsideration of the *Bell Atlantic/GTE Merger Order* has passed. Under well-settled precedent, WorldNet's failure to file a timely petition for reconsideration is fatal to its attempt to reopen the Commission's decision now.

Moreover, the Commission has no authority to add new merger conditions in order retroactively to grant the relief that WorldNet now seeks. Having already determined that the merger was in the public interest based on the conditions as adopted, any attempt to layer on additional obligations would plainly be barred by the doctrine of *res judicata*. In addition, the Commission lacks the statutory authority to expand the merger conditions, which were voluntary to begin with, and contain numerous requirements for which the Commission has no independent statutory authority to impose. Finally, given the great extent to which Bell Atlantic and GTE

relied on the conditions as approved in deciding to proceed with their merger, any attempt to change those conditions now would run afoul of well-established precedent precluding agencies from retroactively modifying decisions on which parties have acted in strong reliance.

**I. WORLDNET’S REQUEST TO EXPAND THE MERGER CONDITIONS IS PROCEDURALLY IMPROPER AND MUST BE REJECTED.**

PRTC is the incumbent local exchange carrier in Puerto Rico and its ownership is split among the state-run Puerto Rico Telephone Authority (43 percent), Verizon (40 percent), Popular Inc., the parent company of Banco Popular de Puerto Rico (10 percent), and an employee stock ownership plan (7 percent).<sup>1</sup> Under the terms of the *Bell Atlantic/GTE Order*, PRTC is not subject to the conditions that the Commission adopted in that proceeding.<sup>2</sup>

The Commission was, of course, fully aware of Verizon’s ownership interest in PRTC at the time it approved the merger between Bell Atlantic and GTE. Indeed, the *Bell Atlantic/GTE Order* itself notes that, “in 1999, GTE acquired a 40 percent ownership interest in [PRTC].”<sup>3</sup> Moreover, at the same time the Commission was considering the Bell Atlantic/GTE merger, it also was considering GTE’s application to acquire an ownership interest in PRTC.<sup>4</sup>

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<sup>1</sup> See *Applications of Puerto Rico Telephone Authority, Transferor, and GTE Holdings (Puerto Rico) LLC, Transferee, For Consent to Transfer Control of Licenses and Authorization Held by Puerto Rico Telephone Co. and Celulares Telefonica, Inc.*, 14 FCC Rcd 3122, ¶ 6 (1999) (“GTE/PRTC Order”); Puerto Rico Telephone Co., Inc., Amendment No. 1 to Form S-4, at 5 (SEC, filed Sept. 27, 1999).

<sup>2</sup> See *Application of GTE Corp., Transferor and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 14032, 14262-64 (App. D) (2000) (“Bell Atlantic/GTE Order”).

<sup>3</sup> *Bell Atlantic/GTE Order* ¶ 6.

<sup>4</sup> See *GTE/PRTC Order* ¶ 3 n.8.

Still, based on an exhaustive review that lasted more than twenty months, the Commission determined that the voluntary merger conditions, which did not include PRTC, were “sufficient to alter the public interest balance such that the application to transfer licenses and lines is, overall, in the public interest and should be approved.”<sup>5</sup> That decision has been final and in effect for more than ten months, the license transfers at issue have been completed, and WorldNet does not have legal standing to challenge the decision now.

WorldNet had the opportunity to participate in the merger proceedings, but elected not to. Nonetheless, it could have sought a petition for reconsideration of the *Bell Atlantic/GTE Order*, but only if it could show that it was “aggrieved” or “adversely affected” by that decision, 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(b)(1), and that it had “good reason why it was not possible . . . to participate in the earlier stages of the proceeding,” 47 C.F.R. § 1.106(b)(1).<sup>6</sup> Even assuming that WorldNet was able to meet these tests,<sup>7</sup> however, WorldNet’s request would still be barred. The time limit for filing a petition for reconsideration was “30 days from the date of public notice of the final Commission action,” *id.* § 1.106(f), which has long since passed.

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<sup>5</sup> *Bell Atlantic/GTE Order* ¶ 5.

<sup>6</sup> See *Application of Achernar Broadcasting Co.*, MM Docket No. 86-440, FCC 01-45 (rel. Feb. 12, 2001) (holding that a petition for reconsideration was properly dismissed on procedural grounds for failing to meet the requirements of section 1.106(b)(1)); *Application of KRRR License, Inc. (Assignor) and Multicultural Radio Broadcasting, Inc. (Assignee)*, 15 FCC Rcd 7192, ¶ 2 (1999) (same).

<sup>7</sup> WorldNet quite clearly does not meet these tests, however. Apart from generalized statements that telecommunications competition in Puerto Rico would benefit from the requested relief, WorldNet fails to offer any reasons how the *Bell Atlantic/GTE Order* “aggrieved” or “adversely affected” its interests. Moreover, WorldNet fails to offer any reasons why it could not participate in the earlier merger proceedings. Because WorldNet fails to meet the requirements of section 1.106(b)(1), its request to reopen the merger proceedings is procedurally barred.

Under well-settled precedent, WorldNet's failure to file a timely petition for reconsideration is fatal to its attempt to reopen the Commission's decision now.<sup>8</sup>

Despite all this, WorldNet claims that it is necessary for the Commission to extend the merger conditions to PRTC in order to accelerate the growth of local competition in Puerto Rico. But the fact of the matter is that PRTC is already subject to the full range of market-opening requirements that Congress in the 1996 Telecommunications Act deemed sufficient to open local markets. PRTC is an "incumbent local exchange carrier" under section 251(h), and is therefore subject to the full range of unbundling, interconnection, and resale obligations under section 251(c).

WorldNet has already entered into a resale agreement with PRTC, and to the extent that WorldNet claims that it expects to experience difficulty in reaching favorable interconnection terms with PRTC, it may ask the Puerto Rico Telecommunications Regulatory Board to mediate the negotiations, 47 U.S.C. § 252(a)(2), to arbitrate a final agreement, *id.* § 252(b), and it may appeal that decision in federal district court, *id.* § 252(e)(6). This is the procedural framework established by the 1996 Telecommunications Act and intended by Congress to govern interconnection disputes.

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<sup>8</sup> See, e.g., *Freeman Engineering Assocs., Inc. v. FCC*, 103 F.3d 169, 183-84 (D.C. Cir. 1997) (holding that the petitioner's claim was waived for failure to file a timely petition for reconsideration); *Agreement of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Macon and Walnut Grove, Mississippi)*, MM Docket No. 98-188, DA 01-185 (rel. Jan. 26, 2001) (holding that there was no basis to consider a challenge to an order publicly issued 16 months earlier that was, in effect, an untimely petition for reconsideration); *Application of Puerto Rico Telephone Company and GTE Holdings (Puerto Rico) LLC, Transferee, For Consent to Transfer Control of Licenses*, 15 FCC Rcd 2754, ¶ 2 (2000).

## II. THE COMMISSION HAS NO AUTHORITY TO EXPAND THE MERGER CONDITIONS RETROACTIVELY.

Just as the Commission must reject WorldNet's attempt to reopen the Bell Atlantic/GTE merger proceeding, the Commission may not reopen that proceeding on its own motion in order to apply the Merger Conditions retroactively to PRTC.<sup>9</sup>

First, the doctrine of *res judicata* would bar any attempt by the Commission to add new conditions now. Having already determined after more than twenty months of exhaustive review that Bell Atlantic and GTE's application was in the public interest based on the conditions that the parties submitted and the Commission adopted, the Commission may not reopen that proceeding and decide that its earlier decision was simply wrong, and that additional conditions are now needed. This would require relitigation of the very factual disputes that the Commission already resolved in the original merger proceedings, which is precisely what the doctrine of *res judicata* prevents.<sup>10</sup>

Second, the Commission lacks the statutory authority to expand the merger conditions in any way. The conditions were voluntary to begin with, and contain numerous requirements for

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<sup>9</sup> The Commission should also reject Worldnet's request to reopen the Bell Atlantic/GTE merger proceeding to declare that Verizon is subject to the D.C. Circuit's decision in *Ass'n of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001), which holds that a separate advanced services affiliate identical to the one created in the Merger Conditions qualifies as a successor or assign of its affiliated ILEC. To the extent an advanced services affiliate is a successor or assign of the ILEC, it is subject any requirement of section 251 that would apply to an ILEC by force of law. There is nothing additional for the Commission to do here.

<sup>10</sup> See, e.g., *United States v. Utah Construction and Mining Co.*, 384 U.S. 394, 422 (1966) ("When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate," the principle of *res judicata* applies "to prevent relitigation of factual disputes" resolved by the agency"); *Applications of Montgomery County Media Network, Inc. d/b/a Imagists et al.*, 4 FCC Rcd 2609, ¶ 6 (1989) ("In order to promote the goals of efficiency and finality in adjudication, federal agencies, like the federal courts, apply the doctrines of *res judicata* and collateral estoppel to administrative proceedings").

which the Commission has no independent statutory authority to impose. For example, the conditions require Verizon to provide wholesale discounts well beyond those specified in the Act; to make available terms of interconnection that go beyond those specified in the Act; to deploy advanced services in rural areas; and to spend at least \$500 million to compete out of region.<sup>11</sup> Given that the Commission did not have the authority to impose any of these conditions on its own in the initial merger proceeding, it certainly cannot impose additions to those conditions now by reopening that proceeding. Indeed, were the law to the contrary, the Commission could avoid the prohibition against acting *ultra vires* simply by reopening a license proceeding, which is obviously incorrect.<sup>12</sup>

Finally, the Commission would be barred from modifying the conditions retroactively in light of the great degree to which Bell Atlantic and GTE relied on the conditions as approved in deciding to proceed ahead with their merger. Bell Atlantic and GTE voluntarily agreed to the conditions in order to obtain authorization to combine their two companies.<sup>13</sup> On June 16, 2000, the Commission determined that, “given these significant and enforceable conditions,” the merger was in the public interest, and it granted approval of the applications to transfer control of Commission licenses and lines from GTE to Bell Atlantic.<sup>14</sup> In full reliance on this decision, on June 30, 2000, Bell Atlantic and GTE completed their merger. Since that time, the companies have undertaken extensive steps at enormous expense to integrate their operations. The courts

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<sup>11</sup> See *Bell Atlantic/GTE Order* App. D ¶¶ 13-15, 34-36, 43-48.

<sup>12</sup> See, e.g., *Sierra Club v. EPA*, 129 F.3d 137, 140 (D.C. Cir. 1997) (agency cannot act outside of statutory authority).

<sup>13</sup> See *Bell Atlantic/GTE Order* App. D, 15 FCC Rcd at 14262 (“As a condition of exercising the grant authorized herein, Bell Atlantic and GTE shall comply with the following enumerated Conditions. . . . The Conditions described herein shall be null and void if Bell Atlantic and GTE do not merge and there is no Merger Closing Date”).

<sup>14</sup> *Bell Atlantic/GTE Order* ¶ 4.

have held that where, as here, parties have acted in strong reliance on agency decisions, agencies are precluded from modifying those decisions retroactively.<sup>15</sup>

## CONCLUSION

For the foregoing reasons, the Commission should deny WorldNet's extraordinary request.

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Mark L. Evans  
Evan T. Leo  
Kellogg, Huber, Hansen, Todd &  
Evans, P.L.L.C.  
Sumner Square.  
1615 M Street, N.W.  
Suite 400  
Washington, D.C. 20036  
(202) 326-7900

Michael E. Glover  
Edward Shakin  
Joseph DiBella  
Verizon  
1320 North Courthouse Road  
Eighth Floor  
Arlington, Virginia 22201  
(703) 974-6350

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<sup>15</sup> See, e.g., *New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1110 (D.C. Cir. 1987) (“Under certain circumstances an agency may be prevented from applying a new policy retroactively to parties who detrimentally relied on the previous policy”). See also *Washington Water Power Company v. FERC*, 201 F.3d 497 (D.C. Cir. 2000) (“Because petitioners have failed to establish that they relied on the Commission’s prior policy to their detriment — in other words, that they would not have entered into these contracts had they known that the Commission would change its policy — they cannot prevail on this argument”); *Public Service Co. of Colorado v. FERC*, 91 F.3d 1478, 1490 (D.C. Cir. 1996) (in determining that it was permissible for Commission to apply new interpretation of law, “the apparent lack of detrimental reliance ... is the crucial point”), *cert. denied*, 520 U.S. 1224 (1997).