IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AT&T CORP., Appellant, v. FEDERAL COMMUNICATIONS COMMISSION, Appellee.	No. 99-1538
COVAD COMMUNICATIONS COMPANY, Appellant, v. FEDERAL COMMUNICATIONS COMMISSION, Appellee.	No. 99-1540

RESPONSE OF THE UNITED STATES TO
EMERGENCY MOTION OF AT&T AND COVAD FOR STAY

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AT&T CORP.,	)	
Appellant,	)	
v.	)	No. 99-1538
FEDERAL COMMUNICATIONS COMMISSION,	)	
Appellee.	)	
COVAD COMMUNICATIONS COMPANY,	)	
Appellant,	)	
v.	)	No. 99-1540
FEDERAL COMMUNICATIONS COMMISSION,	)	
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This Court, by Order of December 28, 1999, directed the United States, through the Antitrust Division of the Department of Justice, to respond to AT&T's motion for emergency stay of the Federal Communications Commission's December 22, 1999 decision granting Bell Atlantic authority under Section 271 of the Communications Act to provide interLATA services in the State of New York.[1] The Act gives the FCC the authority to rule on Bell

[1] *Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act To Provide In-Region InterLATA Service in the State of New York,* CC Docket No. 99-295,

operating company ("BOC") applications to provide in-region interLATA services under Section 271, and AT&T's appeal from the FCC order granting such authority to Bell Atlantic is not a case in which the United States is a statutory respondent.[2] The Department of Justice, however, has a statutorily mandated role in Section 271 proceedings. The Act specifically requires that the Attorney General evaluate Section 271 applications, using "any standard the Attorney General considers appropriate," and that the Commission "give substantial weight to the Attorney General's evaluation." 47 U.S.C. 271(d)(2)(A). Accordingly, this response addresses issues related to the Department of Justice's evaluation of Bell Atlantic's application.[3]

1. The Department of Justice's evaluations of applications under Section 271 focus on whether local markets in the state for which a BOC seeks interLATA authority have been "fully and irreversibly opened to competition." This standard implements the incentives to local competition that Congress provided in Section 271. It considers whether barriers to competition that

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Memorandum Opinion and Order (released Dec. 22, 1999), FCC 99-404 ("Order").

[2] *See* 47 U.S.C. 402.

[3] Evaluation of the United States Department of Justice, *Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act To Provide In-Region InterLATA Service in the State of New York,* filed Nov. 1, 1999 ("DOJ Eval.").

Congress sought to eliminate in the 1996 Act have in fact been fully eliminated and whether there are objective criteria to ensure that competing carriers will continue to have nondiscriminatory access to the facilities and services that they will need from the incumbent BOC so that they can compete by offering services that may be the same as or different from those the incumbent offers. *See* DOJ Eval. at 7. In applying this competition standard, the Department's evaluations may discuss elements that appear in the Section 271(c)(2)(B) "checklist."

The Department of Justice's evaluation of Bell Atlantic's New York application was, for the most part, positive. The Department concluded that Bell Atlantic had completed most of the steps necessary fully and irreversibly to open local telecommunications markets in New York to competition. We found that "[b]ecause of the vigorous leadership of the New York Public Service Commission ('NYPSC') and the extensive efforts of Bell Atlantic and numerous competing carriers, most of the necessary preconditions for local competition are in place in New York." DOJ Eval. at 1.

But the Department also found that a few important obstacles to competition remained. We expressed specific concerns about two areas: 1) access to unbundled local loops, including coordinated "hot cuts" for loops used in the provision of voice telephone service, and access for digital subscriber line ("DSL"

or "x-DSL") technology used to provide a variety of advanced services, *see* DOJ Eval at 14-28, and 2) Bell Atlantic's systems for handling orders for the unbundled network element ("UNE") "platform," *see id.* at 28-36. As to each, we noted that the problems were competitively significant but that there was reason to believe they could be solved in a short time, and that Bell Atlantic had taken or committed to take actions to do so. *See id.* at 2, 14-36.

The Department further concluded that "Bell Atlantic should be required to remove the few but important obstacles to local competition in New York before it enters the long distance market," and that "the Commission properly could deny this application." DOJ Eval at 3. The Department added, however, that "in light of the substantial record of progress in New York reflected in the record, we do not foreclose the possibility that the Commission may be able to approve this application at the culmination of these proceedings." *Id.* at 3, 43.

The Commission's decision acknowledged and discussed the views of the Department of Justice. The Commission expressly stated that it was giving the Department's evaluation substantial weight (*see* Order ¶¶ 51, 274, 328), although it nonetheless decided to grant the application.

2. The analysis underlying the FCC's conclusion that Bell Atlantic satisfied the 271 checklist and the Department of

Justice's competition analysis are not necessarily irreconcilable. The FCC may have relied to some extent on information that was not in the record before November 1, 1999, when the Department filed its evaluation. *See* Order ¶¶34-37. The Commission also resolved disputes concerning the significance of various alternative compliance measures and other disputed evidentiary issues.

The FCC's treatment of the DSL loop access question diverged from, but did not disregard, the Department of Justice's competition analysis. *See* Order ¶¶316-36. The Department's evaluation had noted that demand for high speed digital services was growing very rapidly as consumers and businesses increasingly use "broadband" applications on the Internet and that Bell Atlantic already was providing many such services. The Department also pointed out that the FCC's 1996 Local Competition Order and subsequent orders clearly required incumbent local exchange carriers to provide competitors with access to loops for the provision of digital services, and prohibited incumbent local exchange carriers from dictating the particular uses that competitors may make of these facilities. The Department further noted that several competitively significant issues related to the provision of DSL services were the subject of ongoing proceedings before the NYPSC. The Department expressed hope that these issues would be resolved in the future and noted that

recent developments provided reasons to anticipate documented improved performance. *See* DOJ Eval. at 23-28.

As to Bell Atlantic's historical performance in provisioning DSL loops, the Department was unable to conclude on the available record that Bell Atlantic had demonstrated an acceptable level of performance. The Department noted the possibility that the Commission might obtain information not yet available in the record that would support such a conclusion. But because Bell Atlantic had filed its New York application before the results of recent efforts could be documented in the record, the Department could not conclude that competitive local exchange carriers had the access to DSL loops necessary for them to compete effectively. *See* DOJ Eval. at 26-28.

The FCC did not resolve the disputed issues concerning the record as to provisioning of DSL loops that the Department's evaluation had highlighted. Rather, it found and took into account circumstances unique to this application. It reasoned that "although the obligation to provide access to unbundled loops capable of supporting xDSL technologies was adopted in 1996, we have not previously provided guidance to the BOCs as to the type and level of proof necessary in this area to establish compliance with section 271." Order ¶316. Further, "competitors have been ordering DSL-capable loops in New York for a relatively short period of time; there has been a recent surge in demand;

and xDSL-capable loops remain a small percentage of loop orders." *Id.* ¶327. Moreover, the FCC noted, processes are underway in New York to resolve DSL problems. *Id.*

Because of these "unique factual circumstances," Order ¶¶322, 330, the FCC decided that it would assess Bell Atlantic's overall performance in providing local loops, which it found satisfactory, and would not resolve more specific factual disputes concerning Bell Atlantic's past or current DSL loop provisioning. *See id.* ¶¶329, 3330. The FCC emphasized, however, that in future applications, it would require "a separate and comprehensive evidentiary showing with respect to the provision of xDSL capable loops" and would "examine this issue closely in the future." *Id.* ¶330. The Commission also noted Bell Atlantic's December 10, 1999, commitment to establish a separate affiliate through which it will offer retail advanced services. *Id.* ¶¶ 331, 332.

Whatever the merits of the Commission's justifications for its conclusions with respect to DSL loops, its reasoning is based on prudential factors that the Department of Justice did not address. Accordingly, we cannot conclude from the face of the Commission's order -- which acknowledged the significant factual disputes the Department had identified -- that it failed to give substantial weight to the Department's views when it decided to resolve the DSL issue on other grounds.

3. If the Court concludes that movants have shown a sufficient likelihood of prevailing on the merits to warrant consideration of equitable factors, it will be necessary to weigh the harm to affected interests that may result from grant or denial of a stay. In that regard, the United States addresses the primary consideration that should affect whether a stay pending the outcome of these proceedings is warranted, i.e., whether a stay would serve the public interest.[4] In the circumstances of this case, it does not appear that either the grant or denial of a stay in this case would materially affect the public interest in competition.

In particular, Congress designed Section 271 to foster competition in local telephone markets by offering the BOCs a strong incentive to open their local markets as soon as possible. Accordingly, in evaluating a possible stay, it is important to consider whether grant or denial would distort the Section 271 incentives. That question, of course, cannot be answered across the board because it depends on the circumstances of the particular Section 271 order at issue. Congress imposed strict time limits for consideration of and decisions on Section 271 applications so that BOCs will be able to enter the long distance

[4]The United States declines to assess the impact of a stay on the interests of the private parties. The main focus here should be on the public interest, and, in any event, the private parties and the FCC are better situated to assess any relevant private concerns.

market soon after they satisfy the statutory requirements. *See* 271(d)(3). Routinely delaying, especially for substantial periods of time, the effective dates of FCC decisions granting 271 authority that are likely to be upheld on appeal could distort the Congressional scheme and diminish the BOCs' incentives to open their local markets in order to obtain 271 authority. Conversely, however, failing to stay a decision granting an application in circumstances involving clear disregard of the required preconditions for BOC in-region interLATA service also could undermine BOCs' incentives to satisfy those conditions in the future.

In the circumstances of this case, if a stay were granted, premised on a likelihood that the Commission would be reversed on the DSL issue, other BOCs would know that the stay decision related to Bell Atlantic's failure to make its case on the record as to that performance question. Denial of a stay, on the other hand, would not suggest to other BOCs that they could avoid meeting their obligations to provide DSL loops, for the Commission has made it quite clear that future applications must demonstrate full compliance in this area and that other BOCs will not be able to rely on a "lack of notice" argument. Accordingly, the United States does not believe that either a grant or a denial of a stay in this case would undermine any BOC's incentives to open its local markets to competition.

Respectfully submitted,

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January 3, 2000

Certificate of Service

I hereby certify that on this day, January 3, 2000, I served a copy of the accompanying RESPONSE OF THE UNITED STATES TO EMERGENCY MOTION OF AT&T AND COVAD FOR STAY *by fax before 12:00 noon* to the numbers listed below and by United States first class mail, postage prepaid, on counsel listed below. *Counsel agreed to accept service by fax in lieu of hand delivery.*

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3. If the Court concludes that movants have shown a sufficient likelihood of prevailing on the merits to warrant consideration of equitable factors, it will be necessary to weigh the harm to affected interests that may result from grant or denial of a stay. In that regard, the United States addresses the primary consideration that should affect whether a stay pending the outcome of these proceedings is warranted, i.e., whether a stay would serve the public interest.[4] In the circumstances of this case, it does not appear that either the grant or denial of a stay in this case would materially affect the public interest in competition.

In particular, Congress designed Section 271 to foster competition in local telephone markets by offering the BOCs a strong incentive to open their local markets as soon as possible. Accordingly, in evaluating a possible stay, it is important to consider whether grant or denial would distort the Section 271 incentives. That question, of course, cannot be answered across the board because it depends on the circumstances of the particular Section 271 order at issue. Congress imposed strict time limits for consideration of and decisions on Section 271 applications so that BOCs will be able to enter the long distance

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January 3, 2000

Certificate of Service

I hereby certify that on this day, January 3, 2000, I served a copy of the accompanying RESPONSE OF THE UNITED STATES TO EMERGENCY MOTION OF AT&T AND COVAD FOR STAY *by fax before 12:00 noon* to the numbers listed below and by United States first class mail, postage prepaid, on counsel listed below. *Counsel agreed to accept service by fax in lieu of hand delivery.*

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