Before the
NEW YORK PUBLIC SERVICE COMMISSION

Petition of New York Telephone Company for Approval of its Statement of Generally Available Terms and Conditions Pursuant to Section 252 of the Telecommunications Act of 1996 and Draft Filing of Petition for InterLATA Entry Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of New York	)	Case No. 97-C-0271

AFFIDAVIT OF CAROL ANN BISCHOFF ON BEHALF OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

April 27, 1999

TABLE OF CONTENTS

Before the
NEW YORK PUBLIC SERVICE COMMISSION

Petition of New York Telephone Company for Approval of its Statement of Generally Available Terms and Conditions Pursuant to Section 252 of the Telecommunications Act of 1996 and Draft Filing of Petition for InterLATA Entry Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of New York	)	Case No. 97-C-0271

AFFIDAVIT OF CAROL ANN BISCHOFF ON BEHALF OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

I. INTRODUCTION AND QUALIFICATIONS

1. My name is Carol Ann Bischoff. My business address is: the Competitive Telecommunications Association, 1900 M Street, N.W., Washington, D.C. 20036.

2. I am the Executive Vice President and General Counsel for the Competitive Telecommunications Association ("CompTel"). I also have served as the Vice President of Legislative and Regulatory Affairs for CompTel. Before joining CompTel, I worked as Telecommunications Counsel to Senator Bob Kerrey (D-NE), for whom I covered telecommunications and related appropriations matters from 1993 to 1996. Prior to my job with Senator Kerrey, I specialized in telecommunications at Preston Gates Ellis & Rouvelas Meeds (1991 to 1993), Swidler & Berlin (1990 to 1991), and Reed Smith Shaw & McClay (1987 to 1990).

From 1982 to 1984, I served as Legislative Assistant to U.S. Representative William F. Goodling (R-PA), for whom I covered all communications issues.

3. In addition to my current position at CompTel, I serve as a member of the Federal Communications Commission's ("FCC's") Rural Task Force and as a member of the North American Numbering Counsel.

4. I am a graduate of the University of Virginia School of Law and I hold a Bachelor of Science in Journalism from Boston University School of Public Communication.

5. I have not previously filed an affidavit or testimony in this proceeding. This affidavit is not intended to supplement or replace any testimony previously filed in this proceeding.

II. STATEMENT OF SCOPE AND SUMMARY

6. The purpose of my statement is to comment on the Joint Supplemental Affidavit of Donald E. Albert, Julie A. Canny, George S. Dowell, Karen Maguire and Patrick J. Stevens on Behalf of Bell Atlantic - New York ("BA-NY"), filed April 13, 1999, in the Section 271 docket ("April 13 filing").

7. As a national industry association, CompTel represents a variety of competitive telecommunications service providers and suppliers. CompTel's 335 members include both large, nationwide companies and scores of smaller, regional carriers providing local, long distance, and Internet services. Many of CompTel's members provide services in New York, including local services, using a diverse mix of entry strategies.

8. It is critical that companies of different sizes and with different entry strategies have the ability to compete in New York. Indeed, wide-open competitive entry is precisely what the Telecommunications Act of 1996 ("1996 Act") -- and particularly Section 271 -- are all about. This Commission has been a leader in promoting local competition and in establishing the conditions necessary to open local markets. CompTel supports and applauds the Commission's efforts, which have set an example for other states to follow.

9. However, as CompTel has pointed out repeatedly in this and other New York proceedings, the Pre-filing Statement submitted last year by BA-NY does not comply with Section 271 of the Act. The Pre-filing Statement therefore does not provide the basis for full competition in New York, nor will it provide the basis for a conclusion that the local market is "irreversibly open to competition" (the Department of Justice test).

10. BA-NY's filing also is incomplete. Many of the requirements in Section 271 have yet to be satisfied and many fundamental issues remain unresolved. Any action by the Commission on BA-NY's Section 271 filing at this time, therefore, would be premature. In addition, if the Commission measures BA-NY's performance only against the Pre-filing Statement, and not against Section 271's competitive checklist, then any Commission approval will carry little weight before the FCC.

11. I will focus in this affidavit on six important issues: (1) BA-NY's misguided focus on compliance with the Pre-filing Statement rather than on compliance with Section 271; (2) operations support systems ("OSS"); (3) anti-

backsliding measures; (4) collocation; (5) combinations of unbundled network elements ("UNEs") and the UNE platform; and (6) Expanded Extended Link ("EEL"). I rely on other parties to identify and comment on other problems in BA-NY's April 13 filing.

III. A RECOMMENDATION BASED ON BA-NY'S LATEST FILING WOULD BE OF LITTLE VALUE TO THE FCC.

12. As an initial matter, what is striking about BA-NY's April 13 filing is that it focuses not on BA-NY's compliance with Section 271, but rather on BA-NY's fulfillment of the Pre-filing Statement. CompTel has repeatedly demonstrated in this and other New York proceedings that BA-NY's Pre-filing Statement does not provide the basis for full competition in New York and certainly has not permitted the development of a market that is irreversibly open to competition. More importantly, it does not comply with Section 271 (or Sections 251 and 252). As a result, one has to question how meaningful any Commission recommendation based on BA-NY's April 13 filing could be in any FCC review of BA-NY's Section 271 application.

13. The FCC requires that applications be reviewed on the basis of the facts in those applications on the date they are filed. Because BA-NY's compliance is still based on unfulfilled promises to a great extent (particularly with respect to OSS), a Commission conclusion that BA-NY has satisfied the checklist would be based on a moving target, and thus cannot inform the FCC's decision. In addition, BA-NY's New York filing describes its compliance not with Section 271, but with the Pre-filing Statement. The Pre-filing Statement was based on the law

as it stood a year ago, before the Supreme Court reinstated many of the previously vacated FCC Section 251/252 rules. 1/ The Pre-filing Statement also contained many legal infirmities even under the state of the law at the time, as CompTel and others pointed out to the Commission on numerous occasions. BA-NY's application must be evaluated under the test of Section 271, not the Pre-Filing Statement, yet BA-NY has not even attempted to prove its compliance with Section 271 itself. The Commission has no choice but to refuse approval of BA-NY's application.

IV. A HOST OF OSS ISSUES REMAIN UNRESOLVED.

14. KPMG Peat Marwick has identified a host of problems in its testing of BA-NY's OSS, many of which arise in critically important OSS functions. In the Live CLEC Functional Evaluation of KPMG's Draft Final Report, for example, KPMG states that

> [t]he major findings from this test indicate that although BA-NY has made significant progress in implementing procedures to allow effective interfaces with the CLECs, [BA-NY's] systems and procedures are still flawed in several major areas. These procedural and system flaws are demonstrated most clearly for services that require a higher level of coordination such as UNE-loop Hot Cut Orders. 2/

1/ AT&T Corp. v. Iowa Utilities Board, ___ U.S. ____; 119 S.Ct. 721 (1999) ("AT&T Corp.").

2/ KPMG Peat Marwick, Final Report (DRAFT), Live CLEC Functional Evaluation (POP 3) (issued April 15, 1999), at IV-29.

Indeed, of the 30 test criteria tested in the Live CLEC Functional Evaluation, only five were satisfied. 3/ Eleven of the test criteria were not satisfied 4/ These criteria included some of the most important OSS functions, including the provisioning of Hot Cut orders and collocation orders. 5/ Thirteen of the test criteria were satisfied *with qualifications*, indicating that these criteria were partially, but not completely satisfied. 6/ These criteria also included critically important OSS functions, such as the provisioning of EELs and utilizing the Web GUI. 7/

15. BA-NY claims that it will address or has addressed the deficiencies identified in KPMG's tests, 8/ but such assurances are not enough. As CompTel and other parties have made clear in this proceeding, BA-NY must demonstrate that it has in fact corrected the problems reported by KPMG through both re-testing by KPMG and through data from actual commercial usage. 9/ Specifically, CompTel and other parties have made clear that end-to-end testing, as

---

3/ Id. at IV-18 - IV-27.

4/ Id.

5/ E.g., id. at IV-20 (P3-09), IV-21 (P3-11), IV-23 (P3-20), IV-24 (P3-22), IV-25 (P3-24), IV-26 (P3-29), IV-26 (P3-30).

6/ Id. at IV-18 - IV-27.

7/ E.g., id. at IV-19 (P3-05, P3-07), IV-26 (P3-28).

8/ Joint Supplemental Affidavit of Donald E. Albert, Julie A. Canny, George S. Dowell, Karen Maguire and Patrick J. Stevens on Behalf of Bell Atlantic - New York, Case No. 97-C-0271 (filed April 13, 1999) at 35, 109-11 ("April 13 Filing").

9/ Letter Listing Competitive Issues filed by the Competitive Telecommunications Association and America's Carriers Telecommunications Association ("CompTel/ACTA"), Case No. 97-C-0271 (filed March 4, 1999) at 5-6.

well as re-testing of individual OSS functions, should be performed at the conclusion of the testing process, after BA-NY has taken steps to correct all of the reported deficiencies.

16. In addition, BA-NY should be required to provide the Commission with at least four months of data from actual commercial usage showing satisfactory performance. Such data is needed to ensure that the OSS BA-NY provides to competitors is actually equal in quality to the OSS that BA-NY provides to itself when service is provided to real customers, over live lines, at commercial volumes. 10/ Such data also is needed to ensure that the OSS BA-NY provides to competitors is equally operable for both large and small carriers. Without end-to-end testing and data from actual commercial usage, BA-NY cannot show that it has corrected the deficiencies identified by KPMG and satisfied the requirements of Section 271.

17. Until the problems reported by KPMG are corrected, and until actual OSS performance under commercial conditions has been proven, with results that meet the requirements of Sections 251 and 271, the Commission cannot endorse BA-NY's Section 271 application.

10/ See 47 C.F.R. § 51.312(b); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 15658, para. 312 ("Local Competition Order"), vacated in part sub nom. Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), rev'd in part and remanded in part sub nom. AT&T Corp, 119 S.Ct. 721.

V. THE COMMISSION MUST ESTABLISH ANTI-BACKSLIDING MEASURES BEFORE IT CAN ISSUE A POSITIVE RECOMMENDATION.

18. The Department of Justice's "irreversibly open to competition" standard also cannot be met in New York's local exchange market until the Commission establishes and implements both meaningful performance standards and effective enforcement mechanisms. 11/ Once BA-NY complies with Section 271 and receives interLATA authority in New York, there will be little incentive for BA-NY to remain in compliance with Section 271. In fact, as a competitor in the telecommunications market, BA-NY will have an affirmative incentive *not* to comply with Section 271 once it receives in-region, interLATA authority. It is therefore critical that the Commission establish mechanisms to prevent backsliding *before* the incentive created by Section 271 is removed.

19. Implementation of the performance standards established in the Carrier-to-Carrier Service Quality Proceeding, however, will not be completed for another full year 12/ and the Commission is still in the process of working with the parties to develop enforcement mechanisms. Moreover, the enforcement mechanisms that BA-NY has proposed to date would be entirely inadequate and ineffective. As demonstrated by AT&T and other parties in this proceeding, the penalties for non-compliance in BA-NY's proposal would have no deterrent effect on

---

11/ E.g., Second Application by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 98-121, Evaluation of the United States Department of Justice (filed April 19, 1998), at 1.

12/ April 13 Filing at 7-8.

BA-NY. In addition, BA-NY's proposed enforcement mechanisms discriminate among entry methods, downplay important performance standards, create prohibitive monitoring burdens for CLECs, do not sufficiently disaggregate performance measurements, and permit excessive non-compliance with performance standards.

20. It is essential that the Commission establish effective performance standards and enforcement mechanisms before endorsing BA-NY's Section 271 application. These standards, in general, should:

- ensure performance at parity with the performance enjoyed by BA-NY for every market-opening obligation in the 1996 Act,
- reflect the highest level of disaggregation possible, and
- ensure parity of performance not only for all competitive entry strategies, but also for all sizes of carriers.

Enforcement mechanisms, in turn, generally should:

- consist of financial damages or penalties paid to CLECs, not the state;
- be substantial enough to ensure compliance with performance standards;
- be absorbed by BA-NY, not passed on to ratepayers;
- be escalated and categorized, or tiered, to take into account severe non-compliance, extended periods of non-compliance, and noncompliance at industry-wide, as well as CLEC-specific, levels; and
- be rapid and self-executing.

21. New York's local exchange market cannot be considered irreversibly open to competition until the Commission and the parties complete their work on establishing these critically important anti-backsliding measures.

VI. BA-NY'S COLLOCATION OFFERINGS DO NOT SATISFY THE FCC'S REQUIREMENTS.

22. BA-NY does its best in its April 13 filing to divert attention away from the FCC's March 31, 1999, order imposing on ILECs, such as BA-NY, new requirements for the provision of collocation to competitors. 13/ BA-NY states, only in the last sentence of its discussion on collocation issues, that it will comply with the FCC's order. 14/ Yet no where in the April 13 filing does BA-NY even mention the changes it must make to do so, nor does it attempt to compare its current collocation performance with the FCC's requirements. BA-NY must prove its compliance with the FCC's rules on collocation and the Commission (and the parties) must have an opportunity to evaluate that alleged compliance before a positive Section 271 recommendation can be made.

23. The FCC's collocation order states, *inter alia,* that ILECs, such as BA-NY, must make available to competitors a cageless collocation option that:

- Allows competitors to collocate in any unused space in the ILEC's premises, to the extent technically feasible, *without requiring the construction of a room, cage, or similar structure* (and without requiring a separate entrance to the competitor's space). ILECs may not require competitors to collocate in a room or isolated space separate from the ILEC's own equipment. 15/

13/ In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-147, FCC 99-48 (rel. March 31, 1999) ("FCC Collocation Order").

14/ April 13 Filing at 33.

15/ FCC Collocation Order at para. 42.

- Permits CLECs to have direct access to their equipment. ILECs may not require CLECs to use an intermediate interconnection arrangement in lieu of direct connection to the ILEC's network if technically feasible. 16/

- Permits competitors to purchase collocation in single-bay increments (space increments that are small enough to collocate a single rack, or bay, of equipment). 17/

BA-NY also must provide CLECs with access to their collocated equipment 24 hours a day, seven days a week, without requiring a security escort and without delaying a CLEC employee entry into the ILEC's premises by requiring, for example, the presence of an ILEC employee. 18/

24. In complying with these requirements, the FCC states that an ILEC may take reasonable steps to protect its own equipment, such as enclosing the equipment in its own cages, installing security cameras or other monitoring systems, and requiring CLEC personnel to use badges with computerized tracking systems. 19/ An ILEC may also require CLEC employees to undergo the same or an equivalent level of security training that the ILEC's own employees or third party contractors providing similar functions must undergo. 20/

16/ Id.

17/ Id. at para. 43.

18/ Id. at para. 49.

19/ Id. at paras. 42, 48.

20/ Id. at para. 48. The ILEC may not, however, require CLEC employees to receive such training from the ILEC itself. Rather, the ILEC must provide information to the CLEC on the specific type of training required so the CLEC's employees can complete such training by, for example, conducting their own security training.

25. With respect to space exhaustion, the FCC established, *inter alia*, the following requirements:

- ILECs that deny requests for physical collocation due to space limitations must not only provide the state commission with detailed floor plans but also allow *representatives of the CLEC* to tour the entire premises in question, not just the room in which the space was denied. In addition, the ILEC must permit such tours without charge and within 10 days of the denial of space. 21/

- ILECs must remove obsolete unused equipment from their premises upon reasonable request by a CLEC or upon the order of a state commission. 22/

26. BA-NY does not, as mandated by the FCC, offer a collocation option that satisfies the FCC's requirements. BA-NY offers no cageless collocation option in which BA-NY permits a CLEC to collocate in unused portions of a BA-NY premises using single bay increments of space without also requiring the construction of a room, cage, or similar structure; the use of an isolated space separate from BA-NY's equipment; or an escort of some sort. BA-NY also does not offer a cageless collocation option that permits competitors to connect directly with its network. Rather, BA-NY requires an intermediate interconnection arrangement in every instance.

27. BA-NY's policies with respect to space exhaustion also do not comply with the FCC's requirements. After denying a request for physical collocation based on space limitations, BA-NY does not allow representatives of the CLEC to tour the entire premises in question, much less permit such tours without

---

21/ Id. at para. 57 (emphasis added).

22/ Id. at para. 60.

charge and within ten days of the denial of space. BA-NY also has not instituted a policy under which it will remove obsolete unused equipment from its premises upon reasonable request by a competitor or upon the order of the Commission.

28. In sum, BA-NY must demonstrate actual compliance with the FCC's collocation requirements before it can be deemed to have satisfied Section 271.

VII. BA-NY'S RESTRICTIONS ON COMBINATIONS OF NETWORK ELEMENTS ARE IMPERMISSIBLE UNDER THE SUPREME COURT'S DECISION.

29. BA-NY continues to ignore, in its discussion of UNE combinations and the UNE platform (a combination of all network elements), the FCC Section 251 requirements expressly reinstated by the United States Supreme Court in AT&T Corp. v. Iowa Utilities Board. Despite the Supreme Court's clear rulings on UNE combinations, BA-NY suggests that it need offer nothing more to satisfy the network element checklist item than what it originally offered in its Pre-filing Statement: a series of restrictions on availability of UNE combinations.

30. The Supreme Court affirmed the FCC's rule prohibiting incumbent local exchange carriers ("ILECs") from separating existing combinations of network elements, 47 C.F.R. § 315(b). 23/ BA-NY nevertheless pretends that the Supreme Court decision does not exist, or that it does not control BA-NY's behavior, asserting that "the state of law and regulation surrounding combinations of UNEs

23/ AT&T Corp., 119 S.Ct. at 736-38.

is in flux" 24/ and stating that "[w]hen the FCC completes its remand proceedings, BA-NY will conform its offerings accordingly." 25/ BA-NY seems to believe that any uncertainty regarding FCC Rule 51.319 -- which listed the mandated network elements -- somehow calls into question the right to obtain combinations of elements -- a right expressly reinstated by the Supreme Court. 26/

31. BA-NY entirely misses the point of the Supreme Court's decision. As CompTel has demonstrated in Case No. 98-C-0690, 27/ BA-NY must provide all of the original seven UNEs in the FCC's Section 319 list, for the following reasons. First, Section 271 by its own terms requires BA-NY to provide competitors with five of the seven UNEs in the FCC's mandatory list. 28/ Second, BA-NY must also make available the remaining network elements in the FCC's original mandatory list -- namely OSS and the NID. The FCC's rules require that OSS be provided whenever a carrier purchases a network element, regardless of

---

24/ April 13 Filing at 35.

25/ Id.

26/ Letter from Edward D. Young, III, Sr. Vice President and General Counsel, Bell Atlantic, to Lawrence Strickling, Chief, FCC Common Carrier Bureau, February 8, 1999.

27/ Proceeding on Motion of the Commission to Examine Methods by Which Competitive Local Exchange Carriers Can Obtain and Combine Unbundled Network Elements, Order Directing Tariff Revisions, et al., Case Nos. 98-C-0690, 95-C-0657, Memorandum of Law of the Competitive Telecommunications Association and America's Carriers Telecommunication Association ("CompTel/ACTA") (filed March 4, 1999), at 7-10.

28/ 47 U.S.C. §§ 271(c)(2)(B)(iv) (loops), (v) (transport), (vi) (switching), (vii) (911, E911, directory assistance, and operator services), and (x) (databases and associated signaling).

whether OSS constitutes a network element in its own right. 29/ The NID also is a mandatory network element for BA-NY because it is essentially part of another network element included in the Section 271 checklist -- the loop -- and, to the best of our knowledge, is generally offered by BA-NY on an integrated basis with the loop (unless a carrier requests otherwise). The NID also would satisfy any reasonable reading of the Section 251(d)(2) standard ("necessary and impair").

32. In any case, BA-NY has agreed to make all of the UNEs in the FCC's mandatory list available to competitors pending completion of the FCC's remand proceeding. 30/ BA-NY's "clarification letter" to the FCC is an unlawful attempt to avoid BA-NY's obligation to comply with valid FCC rules. 31/ In that letter, BA-NY states, in part, that while it has agreed to make the FCC's original list of network elements available to competitors, it has not agreed to make them available in combination. 32/ BA-NY's attempt must fail. Once BA-NY agrees to make network elements available, it must comply with the Supreme Court's ruling and the FCC's rules and allow competitors to purchase those elements in their

---

29/ 47 C.F.R. § 51.313(c).

30/ Letter from Edward D. Young, III, Sr. Vice President and General Counsel, Bell Atlantic, to Lawrence Strickling, Chief, FCC Common Carrier Bureau, February 8, 1999.

31/ Letter from Edward D. Young, III, Sr. Vice President and General Counsel, Bell Atlantic, to Lawrence Strickling, Chief, FCC Common Carrier Bureau, March 25, 1999.

32/ Id.

combined state. Any restriction on combination of elements that an ILEC makes available violates FCC Rule 51.315(b).

33. The Vermont Public Service Board and Massachusetts Department of Telecommunications and Energy have made the same determination. The absence of an FCC-prescribed list of UNEs neither frees ILECs of their obligation to provide competitors with combinations of network elements, including the UNE platform, 33/ nor allows ILECs to limit the instances in which they will provide UNE combinations.

34. By limiting the ability of competitors to purchase the UNE platform, BA-NY essentially is stating that for certain services, facilities, customers, and locations, and that after a certain period of time, BA-NY will provide network elements only after first separating them from other network elements. The Supreme Court, however, has made clear that ILECs such as BA-NY may *not*, under any circumstance but one, separate requested network elements

---

33/ In the Matter of Consolidated Petitions of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Teleport Communications Group, Inc., et al., pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration of interconnection agreements between Bell Atlantic-Massachusetts and the Aforementioned Companies, Order, Docket Nos. D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-J (Massachusetts Dept. of Telecom. and Energy March 19, 1999), at 9-10; see also Investigation into New England Telephone and Telegraph Company's (NET's) Tariff Filing Re: Open Network Architecture, Including the Unbundling of NET's Network, Expanded Interconnection, and Intelligent Networks in Re: Phase II, Order Re: Procedural Schedule for Further Proceedings on the UNE Platform (Vermont Pub. Serv. Bd. March 16, 1999), at 5.

that the incumbent currently combines. 34/ The *only* situation in which an ILEC may separate combinations of network elements is upon request by the requesting carrier. 35/ Thus, BA-NY's attempt to insist on separating network elements for certain services, facilities, customers, and locations, and after a certain period of time, is flatly impermissible under the FCC's rules and the Supreme Court's decision.

VIII. THE RESTRICTIONS ON EXTENDED LINK ARE UNLAWFUL AND SIGNIFICANT ISSUES REMAIN UNRESOLVED.

35. CompTel has made clear in this and other New York proceedings that restrictions on EEL also are unlawful. Moreover, restrictions on EEL will stifle the evolution of technology and hamstring competitors' ability to use innovative and efficient network configurations. The restrictions on BA-NY's EEL offering must be removed before BA-NY can satisfy Section 271.

36. No restrictions can lawfully be placed on a CLEC's use of network elements. The Commission-sanctioned restrictions on BA-NY's EEL offering violate both Section 251(c)(3) of the 1996 Act 36/ and the FCC's rules. Specifically, the restrictions permitted in the Commission's March 24, 1999, "EEL

34/ AT&T Corp., 119 S.Ct. at 736-38; 47 U.S.C. § 51.315(b); Local Competition Order, 11 FCC Rcd at 15647, para. 293.

35/ Id.

36/ 47 U.S.C. § 251(c)(3).

Order" 37/ violate (1) a requesting carrier's right to use network elements to provide any telecommunications service; (2) its right to provide telecommunications services using any combination of network elements; and (3) the nondiscrimination requirements of Section 251(c)(3).

38. *Service Restrictions:* Requiring EELs to be used primarily to transmit local exchange traffic violates the dictate in Section 251(c)(3) of the Act that CLECs may use network elements to provide any telecommunications service. A network element is intended as a *generic* capability that can be used by a CLEC to offer *any* service of its choosing. As confirmed by the Supreme Court, Section 3(29) of the Act defines "network element" broadly to include all "features, functions, and capabilities" of a "facility or equipment used in the provision of a telecommunications service." 38/ Section 251(c)(3) of the Act states that an ILEC must provide requesting carriers nondiscriminatory access to network elements "for the provision of *a telecommunications service*" and that requesting carriers must be allowed to use those network elements in combination "to provide such *telecommunications service*." 39/ Nothing in this provision allows an ILEC or any other entity to limit the services that a requesting carrier may provide over the

---

37/ Proceeding on Motion of the Commission to Examine Methods by Which Competitive Local Exchange Carriers Can Obtain and Combine Unbundled Network Elements, Order Directing Tariff Revisions, et al., Case Nos. 98-C-0690, 95-C-0657, 94-C-0095, and 91-C-1174 (issued March 24, 1999) ("EEL Order").

38/ 47 U.S.C. § 153(29); AT&T Corp., 119 S.Ct. at 734.

39/ Id. § 251(c)(3) (emphases added).

network elements that it purchases. Furthermore, Section 51.309(a) of the FCC's rules states that:

> [a]n incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends. 40/

39. Neither BA-NY nor the Commission, therefore, may place restrictions on the services a CLEC may offer over the network elements it purchases. As made clear by the Act and the FCC's rules, the types of services offered by a CLEC over the network elements it purchases are *solely* the decision of the CLEC.

40. *Facility Restrictions:* Making EEL available only when it will be connected to a CLEC switch that handles local traffic also violates Section 251(c)(3). CLECs have the right under Section 251(c)(3) to connect UNEs to their own networks in any way they choose. 41/ CLECs also have the right under Section 251(c)(3) to use combinations of network elements in any way they choose. Imposing restrictions on the equipment to which UNEs may be connected, therefore, violates the Act. In addition, such restrictions violate Section 51.309 of the FCC's rules by impairing the ability of a requesting carrier to offer a telecommunications service in the manner the requesting carrier intends. 42/

40/ 47 C.F.R. § 51.309(a).

41/ 47 U.S.C. § 251(c)(3).

42/ See 47 C.F.R. § 51.309.

41. *Service, Facility, and Customer Class Restrictions:* Service restrictions, facility restrictions, and restrictions on a CLEC's use of EEL based on customer class -- in this instance, when it is provided to customers other than residential end users and small businesses -- also violate the nondiscrimination requirements of Section 251(c)(3). Section 251(c)(3) requires ILECs to provide competitors with "nondiscriminatory access to network elements" on terms and conditions that are just, reasonable, and nondiscriminatory. 43/ By restricting the availability of EEL to certain customer classes, BA-NY is discriminating on the basis of the identity of the end user served by a CLEC -- a form of discrimination prohibited by Section 251(c)(3). Furthermore, BA-NY is subject to no restrictions whatsoever on its use of network elements to provide services to its customers. Competitive carriers, therefore, must also be free of restrictions in their use of network elements to provide communications services.

42. *Effect on Technology and Innovation:* By limiting the ability of competitors to use innovative network configurations, restrictions on the use of EEL will inhibit the evolution of communications technology. The FCC has made clear that an ILEC's provision of access to network elements "must accommodate changes in technology." 44/ Indeed, in a dynamic industry like telecommunications, competitors would be at a severe competitive disadvantage if they could not employ new capabilities of the ILEC network as it evolves. The Commission does not have

---

43/ 47 U.S.C. § 251(c)(3).

44/ Local Competition Order, 11 FCC Rcd at 15631-32, para. 259.

the prescience, moreover, to predict the network element configurations that will be used by carriers to provide communications services in the future. Thus, the Commission should not attempt to pigeon-hole developing configurations and methods of providing service into antiquated categories and notions of what those configurations or methods should entail. Rather, consumers would benefit in the form of both reduced prices and enhanced choice if, as required by the Act, competitors were allowed to compete and provide services using network elements in the most effective and efficient configurations that technology allows.

43. Important EEL issues also still remain to be resolved by the Commission before it can evaluate BA-NY's compliance with Section 271. Specifically, the Commission must conclude its examination of BA-NY's EEL Connection Charge 45/ and BA-NY must comply with the FCC's order that it submit tariff amendments implementing the Commission's orders that it provide EEL with DS0 equivalent transport. 46/ Until these issues are resolved, BA-NY's remaining obligations are met, and the restrictions on BA-NY's EEL offering are removed, BA-NY cannot be considered in compliance with Section 271.

45/ Id. at 11-12, 13,

46/ Id. at 12; Letter from Sandra DiIorio Thorn, General Counsel, NY, Bell Atlantic, to Secretary Debra Renner, April 16, 1999 (requesting an extension of the deadline for complying with the concentration and DS0 equivalent transport requirements until May 7, 1999).

IX. CONCLUSION

44. For the foregoing reasons, BA-NY's Section 271 filing remains incomplete and any recommendation on BA-NY's Section 271 filing at this time would be premature. As CompTel has demonstrated repeatedly in this proceeding, BA-NY must satisfy every requirement in Section 271 of the Act -- not merely the BA-NY Pre-filing Statement -- before it can be eligible for interLATA entry in New York. To date, however, BA-NY has not done so.

45. This concludes my Affidavit.

_____
Carol Ann Bischoff

Subscribed and sworn to before me
this ____ day of April, 1999.

_____
Notary Public