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

In the Matter of	)	
	)	
GTE CORPORATION,	)	
	)	
Transferor,	)	
	)	
and	)	CC Docket No. 98-184
	)	
BELL ATLANTIC CORPORATION,	)	
	)	
Transferee,	)	
	)	
For Consent to Transfer of Control	)	

COMMENTS OF THE
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby submits these comments on the Supplemental Filing of Bell Atlantic Corporation ("Bell Atlantic") and GTE Corporation ("GTE"), collectively, "Applicants."[1]

CompTel is a national industry association representing competitive telecommunications carriers and their suppliers. With approximately 350 members, including large nationwide suppliers and scores of smaller regional carriers, CompTel has a direct interest in this proceeding. Many of its members today compete in the local market against GTE and Bell Atlantic, and in the long distance market against GTE, as well as Bell Atlantic in New York. Throughout its history, CompTel has advocated policies and rules to promote the development of competition in an ever-expanding number of telecommunications markets, including telecommunications equipment, information services, long distance services, and, accelerating

[1] Supplemental Filing of Bell Atlantic and GTE, CC Docket No. 98-184 (filed Jan. 27, 2000) ("Supplemental Filing"); *see Public Notice*, DA 00-165 (rel. Jan. 31, 2000).

with the 1996 Act, local services. It is CompTel's fundamental policy mandate to see that competitive opportunity is broadly maximized for all of its members. In particular, CompTel has consistently participated in regulatory proceedings, before Courts, and on Capitol Hill to ensure that the Bell Companies fully comply with the market-opening provisions of Section 271 before they are permitted to enter the in-region interLATA market.

As discussed below, although CompTel does not object to the divestiture of GTE-Internetworking ("GTE-I") from GTE prior to the consummation of the merger, CompTel strongly opposes the divestiture as proposed by the Applicants. Specifically, the Applicants' 10% interest in the divested company (known as DataCo), their right to acquire a large majority interest as soon as Bell Atlantic obtains Section 271 authority in the necessary states, and other factors show that the Applicants would exercise *de facto* "control" over DataCo. As a result, they would be providing in-region interLATA services on the date of divestiture in violation of Section 271.

In the event the Commission permits the proposed merger to proceed (which CompTel previously has opposed), the Commission must require the full and complete divestiture of GTE-I. Such a full and complete divestiture requires eliminating the Applicants' conversion rights, prohibiting Applicants from reacquiring a controlling interest for five years, and adopting the conditions necessary to ensure that the divested entity can operate as a strong, stand-alone competitor in the Internet backbone market on the day of divestiture. In the alternative, should the Commission decide not to require the full and complete divestiture of DataCo as recommended by CompTel, it should require the merged entity to exercise its conversion rights within two years—instead of the proposed five years—from the consummation of the merger. Such a requirement would provide a strong incentive for Bell Atlantic to accelerate its efforts to

open its local markets to competitive entry in compliance with Sections 251 and 271 of the Communications Act.

I. DATACO WILL BE AN AFFILIATE OF THE MERGED BELL ATLANTIC/GTE.

Section 271 of the Act prohibits a Bell Operating Company ("BOC") or any of its affiliates from providing in-region interLATA services until such BOC has obtained appropriate authority.[2] The term "affiliate" is defined as "a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership with, another person."[3] Because the divestiture as proposed will enable the merged entity to exercise *de facto* control over DataCo, the divested entity will be an "affiliate" of the merged entity, and as such, may not provide interLATA services in any of the merged entity's in-region states until the merged entity obtains the necessary Section 271 approvals.

A. The Commission must examine the totality of the circumstances to determine whether *de facto* control exists.

To determine whether the merged entity will control DataCo, the Commission must examine the totality of the circumstances of the relationship between the merged entity and DataCo.[4] The Commission consistently has held that case-by-case rulings are required to determine *de facto* control, and that it will consider a variety of factors in making its

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2 *See* 47 U.S.C. § 271. The Commission has only granted Bell Atlantic authority to enter the interLATA long distance market in the State of New York. *See Application of 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, FCC 99-404 (rel. Dec. 22, 1999).

3 47 U.S.C. § 153(1).

4 *See Baker Creek Communications*, 13 FCC Rcd 18709, 18713, para. 6 (1998) (citations omitted). The Commission previously has examined whether *de facto* control exists in the context of a broadcast license application for transfer of control. The Commission also examines, pursuant to section 101.1112(h), whether *de facto* control exists for determining whether a company satisfies the designed entity criteria.

determinations.[5] The Commission has further stated that "it is immaterial whether [control] is exercised so long as the power to control exists."[6]

B. Review of the totality circumstances indicates that the merged Bell Atlantic/GTE will have *de facto* control over DataCo.

The merged entity's 10% equity interest and conversion rights, when considered with the totality of the circumstances of the relationship between the merged entity and DataCo, indicate that the merged entity will exercise *de facto* control over DataCo. In particular, the investor protections, reliance on the merged entity after divestiture, and the inherent difficulty of divesting an integrated asset indicate that the merged entity will have *de facto* control over DataCo.

1. *Equity Interest and Investor Protections.*

The merged entity's 10% equity interest and so-called investor protections, by themselves, will enable it to control DataCo. In particular, the Applicants have structured the spin-off to guarantee that they will be the single largest shareholder. Class A shares of stock—which will be issued through an initial public offering—contain a provision that prevents "any single holder or group (as defined under SEC rules) from voting more than 10% of the Class A stock."[7] In the event such person or group "acquires over 10% of the Class A stock, the votes represented by the shares in excess of 10% shall be apportioned among the remaining Class A

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5 *See, e.g., Applications of Univision Holdings, Inc., Transferor and Perenchio Television, Inc., Transferee, Memorandum Opinion and Order*, 7 FCC Rcd 6672, 6675, para. 15 (1992); *Stereo Broadcasters, Inc.*, 55 F.C.C.2d 819, 821 (1975) (stating that the determination as to whether a party has de facto control "transcends formulas, for it involves an issue of fact which must be resolved by the special circumstances presented."). *See Lockheed Martin Corporation Regulus, LLC and COMSAT Corporation, Application for Transfer of Control of COMSAT Government Systems, Inc.*, FCC 99-237 (rel. Sept. 15, 1999) (stating that since a determination of *de facto* control is made on a case-by-base basis, the decision regarding *de facto* control is fact specific).

6 *Baker Creek Communications, L.P.*, 13 FCC Rcd at 18712, para. 6 (citing 47 C.F.R. § 101.1112(h)(1)).

7 *Supplemental Filing* at Schedule A (Investor Safeguards).

shareholders."[8] The restriction on the Class A shares does not expire until the conversion of a majority of the Class B shares. Class B stock—only issued to the merged entity—gives the merged entity a 10% equity interest in DataCo.[9] Therefore, no investor can obtain control through the purchase of equity, because no investor can obtain a greater share than the merged entity's 10% equity interest.

The class structure proposed by Applicants ensures that other shareholders will be passive investors, thereby effectively guaranteeing that the merged entity has influence over DataCo far beyond its 10% voting rights. In *Application for Transfer of Control of COMSAT*, the Commission stated that "as a publicly traded corporation with a large number of shareholders, it is likely that a substantial percentage of shareholders do not participate in any given shareholder vote."[10] Similarly, although the merged entity only will have 10% of the voting rights, by virtue of the diffusion of the shares and the fact that many shareholders may not vote, the merged entity will have far more than 10% of the actual voting power. For similar reasons, no entity can acquire control over DataCo through the purchase of debt. The merged entity's approval is required prior to DataCo incurring debt beyond a stated level.[11]

Applicants argue that reasonable investor protections do not constitute an exercise of control.[12] However, the Commission has found that not all investor protections are permissible or harmless. In *Baker Creek Communications, L.P.*, the Commission specifically stated that "[t]he ability to determine the business plan is **not** one of the typically permissible investment

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8 *Id.*

9 *See id.* at 30. Applicants propose that the merged entity will receive Class B shares of DataCo that will have 10% of the voting rights and the right to receive 10% of any dividends or other distributions.

10 *Application for Transfer of Control of COMSAT Government Systems, Inc.* at para. 34.

11 *See Supplemental Filing* at Schedule A (Investor Safeguards).

12 *See Supplemental Filing* at 46 (citing *Applications of Roy H. Speer, Transferor, and Silver Management Co., Transferee*, 11 FCC Rcd 14147 (1996)).

protections."[13] In that case, the Commission found that such an investor protection enabled the shareholder to dominate Baker Creek's business affairs by determining the policies and operations of the business.[14]

Similarly, many investor protections proposed by Applicants provide the merged entity with great control not only over day-to-day operations but also over major changes. In particular, a vote of Class B shareholders is required for a material change in the nature or scope of DataCo's business as well as for either bankruptcy or liquidation. Additionally, the merged entity's approval is required in certain situations, including the declaration of extraordinary dividends or other distribution arrangements with employees that would require payments or trigger other rights upon the exercise of the merged entity's conversion right. Accordingly, these investor protections, which provide either a Class B vote or the approval of the merged entity for decisions integral to the control of the company, ensure that no person or entity could obtain control over DataCo through the purchase of either debt or equity. Thus, these investor protections guarantee that the merged entity alone would control DataCo.

2. *Conversion Rights.*

In combination with its 10% equity interest and investor protections, the merged entity's conversion rights will enable it to control DataCo. These conversion rights only are exercisable within five years from the close of the merger, and the Applicants have made it clear to the investing public that they intend to exercise the conversion rights as soon as the merged entity obtains appropriate interLATA authority.[15] As a result, the merged entity's conversion rights plainly give it the incentive to exercise control over DataCo during the interim period, at the

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13 *See Baker Creek Communications*, 13 FCC Rcd at 18725, para. 29 (emphasis added).

14 *See id.*

same time as they guarantee that the only public investors willing to buy shares in DataCo will be those that have no intention of seeking to exercise control or opposing the merged entity's wishes. Certainly, the officers, directors and employees of DataCo, knowing that the merged entity already has a 10% interest and will seek to reacquire a large majority interest quickly, will have strong incentives to acquiesce to the desires of the merged entity if they wish to retain their positions with the company.

3. *GTE-I is an integrated asset.*

The tight integration between GTE-I and GTE will make it difficult if not impossible for DataCo to function as a strong, stand-alone competitor in the Internet backbone market on the day of divestiture. Certainly, nothing in the Supplemental Filing indicates that GTE-I is operated on a stand-alone basis so that it could easily be divested from GTE. To the contrary, GTE-I shares many resources with GTE, and it will remain critically dependent upon GTE for post-divestiture operations.[16] To say the least, it is a daunting task to divest an integrated Internet backbone entity so that it is capable of functioning as a strong, stand-alone competitor on the day of divestiture.

Although the Applicants studiously avoid discussing in detail whether and to what extent GTE-I is integrated into the other telecommunications business activities of GTE, they concede,

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15 *See News International*, 97 F.C.C.2d 349, 356, para. 17 (1984) (stating that the Commission must consider materials before it as well as representations about future conduct, including conversion rights).

16 In the normal situation where a company operates an integrated Internet backbone business, there are numerous areas of inter-dependence: (i) the same sales people (and associated support staff) sell both Internet backbone services and other telecommunications services; (ii) the Internet backbone operation relies upon the parent company for billing and collection services; (iii) the same engineering and technical staff support all operations; (iv) the Internet backbone business obtains some or all of its underlying capacity from the parent company; (v) customer contracts include multiple services in addition to Internet backbone services; (vi) the same account representative interacts with the customer for all types of services; (vii) the databases necessary for critical customer support functions may be used jointly for GTE-I and GTE services; and

as they must, that DataCo will remain dependent upon the merged entity in numerous critical ways. In Appendix B, the Applicants note that DataCo will receive the following services from the merged entity: employee benefits support; billing and collections; procurement; treasury services; and information technology support.[17] In addition, the Applicants note that DataCo will continue to rely upon its agency and reseller arrangements with Bell Atlantic, and that such arrangements may extend to "volume purchase commitments" for customers who purchase services from both DataCo and the merged entity. The Applicants make clear that continued joint marketing between DataCo and the merged entity is central to DataCo's business plan.[18]

The Applicants seek to deflect scrutiny of these ongoing ties between the merged entity and DataCo by making the unsupported, self-serving statement that all contracts with DataCo will be "commercially reasonable."[19] The key fact is that DataCo will depend upon the merged entity for a wide array of critical inputs necessary to conduct its business, and such dependence, whether on "commercially reasonable" terms or not, is indicative of the merged entity's control of DataCo. CompTel observes that this dependence is compounded by the Applicants' failure to establish any concrete plan to transfer to DataCo the personnel, resources, contracts, etc. for it to operate as a stand-alone Internet backbone provider. Absent such a plan, DataCo will be at the mercy of the merged entity for the ongoing operation of its business, and hence the merged entity will exercise *de facto* control over DataCo.

(viii) the Internet backbone business uses routers and other equipment that is located at or inside the POPs of the parent company.

17 *See Supplemental Filing* at Schedule B.

18 *See id.* at 33.

19 *See id.* CompTel notes that the Applicants have not indicated any formal requirement that they enter into commercially reasonable contracts with DataCo. Hence, their statement of an intention to enter into such contracts is non-binding and wholly gratuitous.

The Commission has held that the circumstances surrounding a newly created company's creation is relevant to a determination of *de facto* control.[20] In the present case, the circumstances indicate that the merged entity will control DataCo. At a minimum, the Commission must require further data from the Applicants regarding the extent of DataCo's ongoing dependence upon the merged entity, the plan for divesting DataCo as a stand-alone competitor, and copies of any contracts between Bell Atlantic and GTE today that will form the basis for the future relationship between DataCo and the merged entity. Such an inquiry will underscore the extent to which GTE-I will not be a stand-alone competitor on the day of divestiture and, as such, the extent to which the merged entity will exercise *de facto* control over its operations.

4. The Solution

The proposed divestiture will not cure the Section 271 problems with the Bell Atlantic/GTE merged because, as just shown, the merged entity would exercise *de facto* control over the divested entity. Therefore, in the event the Commission determines to approve the merger, it must require the full and complete divestiture of GTE-I. While CompTel does not object to permitting the merged entity to retain a 10% equity interest, it must relinquish its conversion rights. To ensure that the divested company is not intimidated by the possibility that the merged entity could re-acquire control, any such reacquisition must be prohibited for at least five years. Finally, the Applicants must submit a plan for converting GTE-I from an integrated GTE business operation into a stand-alone Internet backbone competitor. The Commission should seek comments on the plan and approve any such plan, with modifications if necessary, as a condition of approving the merger.

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[20] *See Univision Holdings, Inc.*, 7 FCC Rcd at 6675, para. 15 (citing *La Star Cellular Telephone Company*, 7 FCC Rcd 3762 (1992)).

III. IN THE ALTERNATIVE, COMPTEL REQUESTS THAT THE COMMISSION REQUIRE THE MERGED ENTITY TO EXERCISE ITS CONVERSION RIGHTS WITHIN TWO YEARS OR NOT AT ALL.

In the event the Commission decides to approve the merger subject to the proposed divestiture (which CompTel opposes as noted above), the Commission should, at a minimum, require the merged entity to exercise its conversion rights within two years from the close of the merger, instead of within five years as now specified. Such an approach would further the goals of the Communications Act by forcing the merged entity to accelerate its efforts to open its local markets in compliance with Section 251 and 271 in order to qualify to reacquire DataCo.

IV. CONCLUSION

For the foregoing reasons, the Commission should prevent the merged Bell Atlantic/GTE entity from obtaining conversion rights in the divested company DataCo.

Respectfully submitted,

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