

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

In the Matter of	)	
	)	
Application by New York Telephone	)	
Company (d/b/a Bell Atlantic – New York),	)	
<i>Et al.</i> Pursuant to Section 271 of the	)	CC Docket No. 99-295
Communications Act of 1934, as amended,	)	
To Provide In-Region, InterLATA Services	)	
In New York	)	
	)	

**COMMENTS OF THE  
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## **SUMMARY**

One of the principal purposes of Section 271 is to provide a mechanism to ensure that the market-opening initiatives of the 1996 Act are fulfilled. “Track A,” the competitive checklist, and the public interest test share as their underlying focus a desire to see proof that opportunities to provide local service are genuine, widespread and sufficient. As the primary industry association representing all types of competitive providers, it is CompTel’s fundamental policy mandate to see that the Act’s competitive opportunities are maximized for *all* its members, both today and in the future.

In New York, we are beginning to see the fruits that the 271 tree can bear. Twenty three of CompTel’s members are providing or preparing to provide local service within New York, at varying stages of entry. With some of Bell Atlantic’s commitments in New York, the results of third party testing performed by KPMG, and the New York Commission’s pro-competitive orders, we finally are beginning to see the cracks in Bell Atlantic’s obstacles to entry in the local market. This progress is proof that – if backed by the firm resolve of the FCC and by the leadership of state commissions like the New York Public Service Commission – the interLATA incentive can achieve its desired results. But recognition of just how far BOC compliance has progressed compared to previous applications does not lessen in any way the rigorous standards of Section 271.

Despite progress that clearly exceeds that exhibited by previous Section 271 applications, there are still unacceptable barriers to competitive local exchange entry in New York. Very real problems remain – problems that result from Bell Atlantic policies that restrict competition; from inadequate or unreliable ordering and provisioning capabilities; and from incomplete remedies for non-performance. These problems deny New York consumers the

benefits of full and fair competition for local exchange service. Unless and until these problems are addressed, Bell Atlantic's attempt does not achieve the goals established by Section 271.

Although CompTel is encouraged by the progress to date, a faithful application of Section 271 requires the Commission to deny the Bell Atlantic application.

### **BELL ATLANTIC HAS NOT SATISFIED THE CHECKLIST**

Bell Atlantic's showing of checklist compliance continues to suffer from three main defects:

Unlawful Restrictions: Even after the Supreme Court, last January, reinstated Bell Atlantic's obligation to offer end-to-end combinations of unbundled network elements (the so-called UNE "platform") and other partial combinations such as the Enhanced Extended Link ("EEL"), Bell Atlantic continues to place unlawful restrictions on access to these elements critical to widespread market entry. CompTel demonstrates that the "primarily local" restriction on use of extended links, "glue charges," and the denial of the platform for all business customers in many end offices contradict the Act and the Commission's rules. Accordingly, until Bell Atlantic offers unrestricted access to these elements, it is not in compliance with the checklist.

Failure to Address the UNE Remand: Related to Bell Atlantic's refusal to modify its proposals after the Supreme Court's decision, Bell Atlantic makes only a passing reference to the FCC's reaffirmation of the unbundling requirement in the UNE Remand proceeding. Because the UNE Remand order interprets the same statutory requirements on which the FCC must make affirmative findings in this proceeding, the Commission cannot let Bell Atlantic ignore whether, how, or when it would comply with this order. Therefore, if the FCC does not deny the application for its complete failure to address this foreseeable issue, it must require Bell

Atlantic to submit in the record of this proceeding a compliance plan, and must afford all interested parties an opportunity to comment.

While CompTel's concerns about Bell Atlantic's existing restrictions on UNEs and future compliance with the Commission's UNE Remand may seem like mere legal technicalities, the practical effect of failing to consider these problems may be that New York consumers, by virtue of Bell Atlantic's self-serving claims of ignorance of the law, will not get the benefit of a rigorous 251(c)(3) compliance analysis that the Commission will almost certainly apply to every subsequent Bell Atlantic 271 application.

Continued Deficient Provisioning of UNEs: Bell Atlantic continues to be unable to provision network elements reliably or in a commercially acceptable manner. For the most customer-affecting type of UNE orders -- a "hot cut" of a functioning loop from the ILEC to a CLEC -- Bell Atlantic continues to put an unacceptable number of customers out of service for extended periods and fails to follow the coordination procedures it has agreed to follow in order to minimize such errors. In addition, Bell Atlantic fails to provide transport in a reasonable, timely and non-discriminatory manner. Finally, Bell Atlantic is imposing unlawful and discriminatory restrictions on loops used for xDSL services, thereby impeding the deployment of this widely popular technology.

### **BLUEPRINT FOR ANTI-BACKSLIDING ENFORCEMENT**

Bell Atlantic's present failure to provision UNEs in a non-discriminatory manner and to otherwise comply with the checklist is exacerbated by the fact that a comprehensive performance assurance mechanism does not exist. To date, Bell Atlantic's performance assurances have been limited to the development of "self-enforcing" remedies under the auspices

of the New York Commission. However, these assurances fail to ensure adequate legal and equitable remedies for the entire spectrum of potential post-271 performance deficiencies.

The Commission cannot conclude that the application will serve the public interest unless it adopts a comprehensive anti-backsliding blueprint. These conditions must work with all three methods of enforcement under the Act: (1) private, self-enforcing remedies, (2) carrier instituted complaints and arbitrations, and (3) agency-initiated enforcement, such as forfeitures, suspensions and revocation of authority.

The Commission has a strong legal basis to condition Bell Atlantic entry on compliance with such a blueprint. As CompTel explains, such conditions are contemplated by Section 271, have traditionally been imposed under the Commission's authority pursuant to Section 310(d) over radio licenses, and find additional support pursuant to Sections 201(b), 214, 303(c) and 154(i) of the Communications Act. Moreover, the scope of the Commission's authority is as broad as its traditional public interest analysis, and CompTel's proposal does not implicate Section 271(d)(4)'s prohibition on limiting or extending the terms of the checklist. Because the conditions will take the economic incentive out of substandard performance and will assist the processes of addressing persistent or egregious problems, they will further the public interest in this case. Only with these conditions can the Commission receive adequate assurance that local markets will be open to all methods of entry and will remain so after Section 271 is satisfied.

Specifically, CompTel proposes the following additional remedies be made available as a blueprint for effective enforcement.

#### **Self-Executing Remedies**

- Apply matching *federal* guarantees of performance in addition to those remedies available under the P.A.P.

- Apply *additional remedies* if Bell Atlantic’s performance in a Critical Measure is significantly worse than the benchmark, such as refunds equal to all charges the CLEC billed to the affected end users.
- Apply additional remedies for deficient performance that is *industry-wide*.

#### **Carrier-Initiated Remedies**

- Deem repeated failures to meet Critical Measure performance metrics in the P.A.P. – *e.g.*, failure to meet any performance metric twice in a three consecutive reporting periods, or three times in any six consecutive reporting periods – to be prima facie evidence in complaint proceedings of a violation of BA-NY’s interconnection agreements.
- Deem Critical Measure performance that is significantly worse than the benchmarks to be prima facie evidence of a failure to provide interconnection or access under Section 251.
- Address non-quantitative failures by presumptions of non-compliance. For example, prima facie evidence of discrimination could be provided by evidence that Bell Atlantic does not devote equivalent resources to wholesale and retail businesses or that it applies discriminatory performance bonuses and incentives for executives in the wholesale and retail businesses.
- Deem certain failures to comply with basic obligations under Section 251 to be prima facie evidence of liability to CLECs. For example, failure to respond to an interconnection request within 14 days or failure to provide opt-in under Section 252(i) within 14 days shall be deemed to be bad faith by Bell Atlantic. Similarly, failure to provide collocation within the time frames specified in the *Collocation Order* will be deemed a breach of its obligation under Section 251(c)(2) to provide interconnection.
- “Ordinary” poor service, as described above, when coupled with “intent” evidence that Bell Atlantic is seeking to profit its retail arm by exploiting competitor’s poor service, for which it may be at least partially responsible. *E.g.*, Bell Atlantic provides poor repair and maintenance intervals to a CLEC, and sends CLEC retail customers a “winback” letter asking them whose service they would trust during the next big storm.

#### **Agency-Initiated Remedies**

- Repeated failures to meet any Mode of Entry performance metric *on an industry-wide basis* should trigger a performance improvement evaluation under the supervision of the FCC’s Common Carrier Bureau. For example, upon a repeated failure to meet a metric, Bell Atlantic should be required to submit a performance improvement plan to the Common

Carrier Bureau, and the Bureau should submit public comment on the improvement plan.

- Significant non-compliance with performance metrics should trigger forfeiture proceedings with substantial (\$1 million or more) penalties. Each day under the reporting period should be deemed a separate event subject to the forfeiture authority of the agency.
- Whenever wholesale provisioning problems are either so egregious or pervasive as to be, in the Commission's opinion – industry affecting, such that the public policy goals of Congress may be jeopardized, the FCC should take whatever action it needs to implement the goals of Congress, including, possibly, consideration of a structural separation between Bell Atlantic's wholesale and retail businesses.

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**COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION**

The Competitive Telecommunications Association (“CompTel”), by its attorneys, hereby submits these comments in response to the Application by New York Telephone Company (d/b/a Bell Atlantic – New York) (“Bell Atlantic” or “BA-NY”) to provide in-region, interLATA services in the state of New York.<sup>1</sup>

Bell Atlantic’s application reflects the significant progress toward open competition that has resulted from the FCC’s and New York Commission’s steadfast determination to implement the 1996 Act’s initiatives. Although this application is closer to satisfying Section 271 than any previous application, Bell Atlantic still is not provisioning network elements on a nondiscriminatory basis and otherwise not complying with the competitive checklist. For the reasons explained below, the Commission must conclude that Bell Atlantic’s application does not yet satisfy Section 271.

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<sup>1</sup> *Application by Bell Atlantic – New York for Authorization to Provide In-Region, InterLATA Services in New York*, (filed September 29, 1999) (“Bell Atlantic App.”); *see Public Notice*, DA 99-2014.

## I. INTRODUCTION

For over 18 years, CompTel has been the principal national industry association representing competitive telecommunications carriers. 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 with the 1996 Act, local telecommunications services. It is CompTel's fundamental policy mandate to see that competitive opportunity is maximized for *all* its members, both today and in the future.

The 1996 Act demands no less. The Act “neither explicitly nor implicitly expresses a preference for one particular entry strategy.”<sup>2</sup> Instead, its goal is to eliminate all barriers to entry and to lower entry costs wherever possible, in order to maximize the potential competitive benefits to telecommunications subscribers. In short, the principal goal of the Act – and therefore, the Commission's primary obligation in implementing the Act– is to “ensure that *all* pro-competitive entry strategies may be explored.”<sup>3</sup>

The importance of this goal is underscored by the diversity of its members' entry strategies. At over 350 member companies, the CompTel membership cannot be described with a single label. Its members provide local telecommunications services, but they also provide interexchange services, international services and Internet services. Its members provide voice services, but they also provide data services including ATM, frame relay and xDSL. Its members are resellers, facilities-based providers, applications providers, or a combination of all

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<sup>2</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 12 (1996) (“Local Competition Order”)

<sup>3</sup> *Id.*

of the above. As a result, its members rely on all three of the entry strategies made available under the 1996 Act: facilities deployment, use of unbundled network elements and resale.

Increasingly, CompTel's membership is expanding to encompass an emerging class of carrier known as an Integrated Communications Provider ("ICP"). ICPs defy easy classification, because their principal focus is on providing an integrated suite of telecommunications services which meet all of the customer's needs for voice and data, wherever and whenever required by the customer. The ICP offers local services, including LAN connectivity and data transmission, in addition to long distance services, enhanced services and advanced telecommunications capacity, in a seamless suite of services. These carriers share a belief in being a full service provider to the customer, and therefore view local telecommunications capability to be critical to their success.

CompTel members are aggressively pursuing opportunities in New York state. Twenty three of CompTel's members are providing or preparing to provide local service within New York, at varying stages of entry at this time. Of these carriers, approximately a dozen will be filing comments separately in this docket. This degree of input from the CompTel membership will give the Commission a full perspective of competitive experiences in New York to date.

It is undeniable that Bell Atlantic has made significant progress toward satisfaction of the Act's requirements. This progress is proof that – if backed by the firm resolve of the FCC and by the leadership of state commissions like the New York Public Service Commission -- the interLATA incentive can achieve its desired results. But recognition of just how far BOC compliance has progressed compared to previous applications does not lessen in any way the rigorous standards of Section 271.

Despite its progress, Bell Atlantic does not provide new competitors with reliable and nondiscriminatory OSS, unrestricted access to unbundled network elements or nondiscriminatory interconnection arrangements. In addition, Bell Atlantic has not committed to sufficient and effective performance remedies to ensure that its performance will continue to meet Section 271's standards even after interLATA entry by the BOC. These defects are described below.

However, before describing its concerns with the application, CompTel wishes to reiterate that it shares the Commission's desire to finally reach the point where Section 271 has been satisfied. If the local market is opened as required by the Act, CompTel expects to see an explosion of new and innovative services which will challenge all traditional boundaries between services. This vigorous competition will benefit all consumers, large and small, in the form of lower prices and added value. CompTel's members welcome the participation of Bell Atlantic in the broad markets to be made available by these market opening initiatives, provided the conditions of that competition are fair and the playing field is level. The three years it has taken thus far already is too long, and CompTel sincerely hopes that the needed improvements will be made promptly.

## **II. BELL ATLANTIC'S RESTRICTIONS ON UNES VIOLATE THE ACT**

Commission to ensure that, prior to interLATA entry, a Section 271 applicant is meeting its obligation to provide "[n]ondiscriminatory access to network elements in accordance with the

<sup>4</sup> By denying competitors full access to all

combinations, Bell Atlantic is not meeting its obligation, and thus, the Commission cannot approve the application as filed.

The essential ingredients of Bell Atlantic's application were fixed in its April 1998 Pre-filing Statement, several months prior to the Supreme Court's affirmation of the Commission's rulemaking authority to carry out Sections 251 and 252 and reinstatement of the Commission's UNE rules. At that time, Bell Atlantic took the position that combining UNEs was voluntary. Now, post-*AT&T Corp.*, Bell Atlantic hides behind a claim that "the state of the law and regulation surrounding combinations of UNEs is in flux" to avoid the need to modify its offerings.<sup>5</sup> This claim is specious.

Bell Atlantic limits the availability of the unbundled network element "platform" ("UNE-P") to residential and certain types of business customers and restricts the availability of the Enhanced Extended Link ("EEL") to "primarily local" traffic.<sup>6</sup> Specifically, Bell Atlantic will provide the UNE-P for certain services without additional charges to residential customers for four and six years, depending on the geographic region.<sup>7</sup> Similarly, it restricts the UNE-P to business customers with a glue charge varying by region, with the exception that in New York City central offices where there are two collocated CLECs providing service, the UNE-P will not be available at all to serve business customers.<sup>8</sup> These restrictions are unlawful and fatal to the development of broad-based local competition.

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(...continued)

<sup>4</sup> 47 U.S.C. § 271(c)(2)(B)(ii) (1999).

<sup>5</sup> 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.

<sup>6</sup> Bell Atlantic Brief at 32.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at n.10.

Furthermore, Bell Atlantic unlawfully restricts the availability of EELs. Although the New York Commission recognizes that access to EELs is critical to the development of facilities-based competition and the ability of new entrants to expand the geographic reach of their service offerings, the commission nevertheless sanctioned restrictions on the EEL.<sup>9</sup> In the March NY EEL Order, the commission required connection of EELs containing loops at above the DS-1 level to a CLEC switch handling local exchange traffic and transmission of “primarily local traffic” by such EELs.<sup>10</sup> After several parties filed petitions for rehearing, in the August NY EEL Order, the commission clarified that the “primarily local standard” consists of a channel count test at the transport and loop level. Specifically, “[w]hen some local traffic is carried on 50% or more of DS-1 level and above loop channels that are connected to a transport facility, the transport will qualify for EEL rates as will the loops, to the extent the loops serve customers whose local needs are being satisfied by the EEL circuit.”<sup>11</sup> This is a use restriction that violates the 1996 Act and the Commission’s rules.

The Act does not permit any limitations on the use of UNEs, individually or in combination. Section 251(c)(3) of the 1996 Act requires ILECs to provide “nondiscriminatory access to network elements on an unbundled basis at any technically feasible point” and to do so “in a manner that allows requesting carriers to combine such elements in order to provide [any]

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<sup>9</sup> *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, Case Nos. 98-C-0690, 95-C-0657, 94-C-0095 and 91-C-1174 (issued March 24, 1999) (“March NY EEL Order”).

<sup>10</sup> March NY EEL Order at 8.

<sup>11</sup> *Proceeding on Motion of the Commission to Examine Methods by Which Competitive Local Exchange Carriers Can Obtain and Combine Unbundled Network Elements*, , Order Denying Rehearing and Clarifying Primarily Local Traffic Standard, Order, at 11 Case Nos. 98-C-0690, 95-C-0657, 94-C-0095, 91-C-1174 at 11 (issued August 10, 1999) (“August NY EEL Order”).

telecommunications service.” As CompTel has explained in previous proceedings, the use of UNEs provides a wholesale market entry strategy that lowers the cost of entry in a way that and services an entrant may provide. Under this strategy, a new entrant purchases underlying facilities from existing providers and uses that capacity to provide its own service. This wholesale capacity can either be combined with other facilities leased or deployed by the carriers. The use of UNEs allows a new entrant to enter the market quickly, with minimal cost, and to increase its customer base over time.

*not* require a new entrant to construct any local exchange

<sup>14</sup> Indeed, requesting

and entirely through UNEs.<sup>15</sup>

*Local Competition Order* was upheld by the

requesting carrier may achieve the capability to provide telecommunications services completely through access to the unbundled elements of an incumbent LEC’s network.” Further, the Commission recently concluded that “[t]he ability of requesting carriers to use unbundled

*including combinations of unbundled network elements*, is integral to

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<sup>12</sup> 47 U.S.C. § 251(c)(3) (1999).

*In Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Comments of the Competitive Telecommunications Association, CC Docket No. 96-98 (filed May 26, 1999) (“UNE Comments”).  
*Local Competition Order*

<sup>15</sup> ¶¶ 328-41.

*Iowa Utils. Bd. v. Iowa Utils. Bd.*, 120 F.3d 753, 814 <sup>th</sup> Cir. 1997), *sub nom.*, *AT&T Corp.*, *aff’d in part, rev’d in part*,

achieving Congress' objective of promoting rapid competition in the local telecommunications market.”<sup>17</sup>

Commission Rule 309 is clear that ILECs may not impose any restrictions “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 carrier intends.”<sup>18</sup> In other words, it is the CLEC, not the ILEC, that decides whether and in what manner it will use UNE combinations to provide service. Furthermore, Section 251(c)(3) permits CLECs to use network elements to provide any telecommunications service – the types of services to be provided is the choice of the CLEC. Thus, taken together, any limitations on access to UNE combinations are unacceptable and contrary to the Act and the Commission's rules.

As a policy matter as well, an ILEC's failure to provide combinations impedes local competition. If competitors must combine UNEs themselves, their ability to provide service will be impaired as a result of: (1) unnecessary service outages when a customer changes local carriers; (2) the additional costs to separate combined elements; (3) the additional costs to reconnect separated elements; (4) the higher probability of human error caused by the insertion of unnecessary manual processes; and (5) an additional delay transferring customers to new local providers.<sup>19</sup> The result will be fewer customers for whom service is economically feasible, and

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<sup>17</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, FCC 99-70, CC Docket No. 96-98, ¶2 (Second Further Notice of Proposed Rulemaking) (rel. April 16, 1999) (“UNE FNPRM”) (emphasis added).

<sup>18</sup> 47 C.F.R. § 51.309(a).

<sup>19</sup> *In re Application by BellSouth Corp. et al. for Provision of In-Region, InterLATA Services in South Carolina*, Opposition of the Competitive Telecommunications Association, CC Docket No. 97-208, Affidavit of Joseph Gillan ¶ 9 (Oct. 20, 1997).

slower, manually intensive cutovers limiting competitive alternatives to all but the largest end

Many months ago, the Supreme Court affirmed the Commission’s interpretations concluding that the 1996 Act encourages methods of competitive entry and approved of the Commission’s efforts to guard against anticompetitive practices. The Court confirmed the solely on the elements in an incumbent’s network.<sup>20</sup> The Court also held that Rule 315 is a reasonable interpretation of the statute. Under reinstated Commission Rule 315(b), ILECs are prohibited from separating currently combined network elements. Taken together, these findings allow competitors access to an entire preassembled network and to elements such as the

*AT&T Corp.* put to rest any doubts that ILECs are required to provide access to

Rule 315(b), aimed (wisely) at preventing ILECs from “disconnect[ing] previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to

<sup>22</sup> In , the Supreme Court made clear that UNEs must be made available to competitors in combinations, , via the UNE-P, and that Rule 315(b) entitles entrants to obtain “an entire preassembled network” through

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<sup>20</sup> *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 736-737 (1999)(“ ).  
47 C.F.R. § b).

<sup>22</sup> *AT&T Corp.* at 737, quoting Reply Brief for Federal Petitioners at 23.

UNE combinations.<sup>23</sup> Bell Atlantic’s restrictions on the availability of UNE combinations are in utter disregard of the Supreme Court’s ruling, and thus, unlawful.

**III. THE COMMISSION CANNOT MAKE THE REQUIRED FINDINGS OF CHECKLIST COMPLIANCE WITHOUT TAKING ITS UNE REMAND ORDER INTO ACCOUNT**

In order to obtain in-region, interLATA entry, a BOC must support its application with “actual evidence demonstrating its present compliance with the statutory conditions for entry, instead of prospective evidence that is contingent on future behavior.”<sup>24</sup> Because the filing of a Section 271 application is entirely within the BOC’s control, the Commission (logically) expects the BOC to submit sufficient factual evidence to demonstrate compliance with Section 271 at the time of filing. That is, “[e]vidence demonstrating that a BOC *intends to come into compliance* with the requirements of Section 271 by day 90 is insufficient.”<sup>25</sup> Mere intentions do not satisfy the BOC’s burden of proof. Given the 90-day statutory review period, it is vital that a BOC submit a complete application that demonstrates statutory compliance at the commencement of a proceeding.<sup>26</sup>

Bell Atlantic’s application misses the mark in its treatment of the UNE Remand. Under the plain language of Section 271, Bell Atlantic must demonstrate its compliance with the 1996 Act’s obligations, separate and apart from the Commission’s rules implementing the statute. Indeed, the words of Congress in the 1996 Act have remained in full force and effect –

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<sup>23</sup> *Id.* at 736. Although the status of Rules 315(c)-(f) is uncertain at this time, what is certain is that access to UNE combinations is mandatory.

<sup>24</sup> *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, 12 FCC Rcd 20543, at ¶ 55 (1997)(“Ameritech Michigan Order”).

<sup>25</sup> *Ameritech Michigan Order*, at ¶ 55.

<sup>26</sup> *Ameritech Michigan Order*, at ¶ 49.

Bell Atlantic is obligated to heed those words.<sup>27</sup> To determine Bell Atlantic's compliance with the statute, therefore, the Commission must consider the UNE Remand Order.<sup>28</sup> Without it, the Commission cannot make its findings of compliance with the competitive checklist. Unlike an ordinary rule change, the new UNE rules address *fundamental, statutory* obligations under the 1996 Act. In addition, the new UNE rules are not only fundamental to local competition and interconnection, but they are quite complex and will not be easy to implement. In fact, ILECs will be required to offer the UNE-P for a broader class of services (including CENTREX, PBX trunks, ISDN lines). Thus, past experience with the UNE-P as applicable to residential services will not necessarily be probative. In other words, the new UNE rules are not self-executing, but will require supervision to implement, and, ultimately, will require this Commission's careful consideration when making its assessment of whether Bell Atlantic has complied with its Orders implementing the Act. However, Bell Atlantic has intentionally left the FCC with no record on which to make this determination in the present matter.

Bell Atlantic makes only a fleeting reference to the Commission's UNE Remand Order, stating: "if this Commission's recently announced (but not yet released or effective) order on remand from the Supreme Court *requires* modifications to the previously approved terms for Bell Atlantic's platform and EEL offerings, Bell Atlantic will comply with the Commission's rules when they become effective *absent further relief*."<sup>29</sup> While it is understandable that Bell Atlantic does not want to draw attention to its glaring deficiency, this

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<sup>27</sup> That the Supreme Court's order required changes in at least an ILEC's provisioning of EELs and UNE-P is no surprise at all. Southwestern Bell, for example, voluntarily agreed to provide these elements in Texas on a largely unrestricted basis after the *AT&T Corp.* decision.

<sup>28</sup> News Release, FCC Promotes Local Telecommunications Competition, Report No. CC 99-41, CC Docket No. 96-98 (Sept. 15, 1999).

<sup>29</sup> Bell Atlantic App. at 32-33 (emphasis added).

meager offer of future compliance – which is quite qualified – ignores one (if not the most) central issue involved in making a Section 271 determination: access to UNEs.

Commission precedent is consistent -- when a BOC presents its case to the Commission, it “must address in its initial application all facts that the BOC *can reasonably anticipate* will be at issue.”<sup>30</sup> For example, when the Commission rejected Ameritech’s Michigan application, it concluded that it could not find that Ameritech “presently provides nondiscriminatory access to its 911 database based on the fact that it ‘is developing’ a service to allow competitors equivalent access.”<sup>31</sup> There, despite that fact that 911 issues were a contentious subject at the state commission level, Ameritech seemed to believe that it would have had to be “marvelously – indeed, perfectly – clairvoyant” to address the 911 database issues in its initial comments.<sup>32</sup> The Commission swiftly dismissed this disingenuous claim. Like Ameritech’s statements that it was “developing” a service to comply with the statute, Bell Atlantic’s paper promise to comply in the future with the Commission’s interpretation of the statute absent relief is a half-baked response for an experienced BOC.

Similarly, in rejecting BellSouth’s South Carolina application, although the Commission noted that “[the Commission] and the industry are still in the early stages of evaluating the implications of the Eighth Circuit’s ruling,” the Commission still faulted BellSouth for being vague and indefinite with respect to the terms and conditions for recombining network elements. “Because the SGAT does not adequately specify what BellSouth will provide, the method in which it will be provided, or the terms upon which it will

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<sup>30</sup> *Ameritech Michigan Order*, ¶ 57 (emphasis added).

<sup>31</sup> *Id.* ¶ 55.

<sup>32</sup> *Id.* ¶ 58, citing Ameritech’s Response to Motions to Strike at 5.

be provided, there is no basis for a finding that BellSouth is offering nondiscriminatory access as the checklist requires.”<sup>33</sup>

The Commission must analyze Bell Atlantic’s application according to its compliance with *AT&T Corp.* and the UNE Remand Order. As explained above, the Supreme Court’s reinstatement of Rule 315(b) affirms that ILECs must provide UNE combinations. The Commission’s conclusions in the UNE Remand Order require UNE combinations. To pass muster, Bell Atlantic must explain in its application how it intends to provide UNE combinations.<sup>34</sup> An explanation is nowhere to be found. Bell Atlantic’s failure to submit any information regarding CLECs’ access to combinations of UNEs is, at bottom, a request that the Commission make a leap of faith on issues integral to effective local competition. Under established Section 271 procedures,<sup>35</sup> because Bell Atlantic’s application did not address these issues, it should be denied.

CompTel recognizes, of course, that the FCC had not released the text of the UNE Remand Order when Bell Atlantic filed its application.<sup>36</sup> Nevertheless, Bell Atlantic certainly

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<sup>33</sup> *Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In South Carolina*, 13 FCC Rcd 539, ¶ 197 (1997) (“BellSouth South Carolina Order”), citing Department of Justice Analysis at 20. It is well settled that a BOC must demonstrate it has a “concrete and specific” obligation in order to meet the Act’s requirement that it “is providing” a network element. *See Application of BellSouth Corporation et. Al. For Provision of In-Region Inter-LATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, at ¶ 54 (rel. Oct. 13, 1998) (“Second BellSouth Louisiana Order”), *citing Ameritech Michigan Order* at ¶ 110.

<sup>34</sup> Similarly, the UNE Remand Order specifically identifies certain UNEs, including many loop types, that the BOCs previously had contended they had no obligation to provide. Bell Atlantic must address these issues as well.

<sup>35</sup> *See, e.g., Public Notice*, Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act, DA 99-1994 (Sept. 28, 1999).

<sup>36</sup> As of noon on October 19, 1999, the FCC had yet to release the text of this Order. Its release, however, appears imminent.

knew of the order – which was adopted at the FCC’s open meeting on September 15, 1999 – and had a general idea from the open meeting and News Release what types of changes the order would require. Further, Bell Atlantic personnel had numerous informal contacts with the Commission prior to filing its application. Thus, Bell Atlantic reasonably could have anticipated the need to address the changes required by the UNE Remand decision.<sup>37</sup>

In light of these circumstances, CompTel believes that the only fair alternative to dismissal (which would be justified, for the reasons discussed above) would be for the Commission to give Bell Atlantic and the parties an opportunity to address the changes required by the new UNE rules. The most suitable vehicle for this would be for the Commission to require Bell Atlantic to supplement its application by filing a detailed compliance statement explaining how it will eliminate restrictions on access to UNE combinations and how it will comply with the new UNE rules. Parties should be given a reasonable time to file comments addressing only the consistency of Bell Atlantic’s compliance statement with the UNE Remand Order.

When Bell Atlantic files its compliance statement, if necessary, the Commission could exercise its discretion to restart the 90-day statutory clock so as to afford interested parties the opportunity to comment on the statement. That way, the Commission will ensure that Bell Atlantic is truly in compliance with the checklist as required under the statute. CompTel notes that the Commission has a duty to conduct an independent assessment of BOC compliance,

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<sup>37</sup> CompTel does not mean to suggest that every FCC order or rule announced prior to a 271 application must be fully addressed. However, the Commission’s adoption of the UNE Remand Order is a substantial intervening event that, unlike ordinary regulatory changes, goes directly to the statutory findings the Commission is required to make in reviewing the application. The potential precedential value attached to the Commission’s decision on this application and the significance of the new UNE rules to local competition require more information from Bell Atlantic.

separate and apart from the state commission’s determination of compliance. The Commission has stated that “[b]ecause it is the Commission’s statutory duty to determine whether the requirements of Section 271 have been satisfied, the Commission is not limited to considering only the issues and facts that were presented in the state commission proceeding.”<sup>38</sup> Indeed, the Commission must consider any information pertinent to its evaluation. Certainly, information regarding Bell Atlantic’s lawful provision of UNE combinations is an absolute necessity for the Commission.<sup>39</sup>

Indeed, notwithstanding the requirements that the Commission consult the state commission and the Attorney General, “under the plain language of the 1996 Act, *the Commission* must determine checklist compliance; it ‘shall not approve . . . an application . . . unless *it* finds checklist compliance, in addition to compliance with Section 272 requirements and the public interest standard.”<sup>40</sup> Thus, the buck stops with the Commission. The Commission would be wise to heed the words and the warning of the Justice Department: “The most economically efficient means for CLECs to serve a large segment of customers in the foreseeable future may be through the use of combinations of unbundled elements, whether a CLEC uses only combinations of elements purchased from incumbent LECs, or uses such elements in conjunction with network elements of its own . . . if unbundled elements are provided in a manner that requires CLECs to incur large costs in order to combine them, many customers –

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<sup>38</sup> *Second BellSouth Louisiana Order*, ¶ 27, citing a number of commenters that agree that the Commission must make its own independent findings and can use evidence outside that presented in the state commission 271 proceeding.

<sup>39</sup> In the alternative, if the Commission decides to grant Bell Atlantic’s application, it could approve the application but delay the order’s effective date until such time as Bell Atlantic demonstrates compliance with the new UNE rules.

especially residential customers – may not have any facilities-based competitive alternative for local service. . .”<sup>41</sup>

**IV. BELL ATLANTIC DOES NOT PROVIDE ACCESS TO UNBUNDLED NETWORK ELEMENTS IN COMPLIANCE WITH CHECKLIST ITEMS (II) AND (IV)**

The record in this proceeding demonstrates that Bell Atlantic is not providing nondiscriminatory access to unbundled network elements in accordance with the requirements of the competitive checklist.<sup>42</sup> Bell Atlantic has not demonstrated its ability to provision unbundled network elements reliably and in accordance with its performance standards. In critical areas such as loop “hot cuts,” trunk provisioning and commercial volumes, Bell Atlantic’s performance falls well below that which is necessary for a full and open local marketplace. Further, Bell Atlantic’s offerings of xDSL loops does not comply with the Act’s requirements. Accordingly, despite its significant improvement compared to previous applications, Bell Atlantic has not yet fully implemented these checklist items.

**A. Bell Atlantic’s Performance in Provisioning UNE Loops Remains Below Acceptable Levels**

One of the most critically important tasks Bell Atlantic must perform is the “hot cut” of existing loops in service to UNEs provided to a CLEC. Despite careful scrutiny by KPMG on this measure, however, Bell Atlantic still fails to provision hot cuts at acceptable levels. Critically, the root of these problems continues – despite several iterations of revised

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(...continued)

<sup>40</sup> *In re Application by BellSouth et al. for Provision of In-Region, InterLATA Services in South Carolina*, Evaluation of the U.S. Dept. of Justice, CC Docket No. 97-208, 14 (filed (internal endnotes omitted, emphasis in original).

<sup>41</sup> *Id.* at 23-24.

procedures and months of military style “test until you pass” scrutiny by KPMG<sup>43</sup> – to be Bell Atlantic’s failure to follow its own hot cut loop procedures.

Loop hot cuts are critical to competition because they directly affect the ability of competitors to migrate existing customers quickly and without disruption. In order for a hot cut to be performed successfully, a series of tasks must be performed at the appointed cutover time and must be coordinated between the Bell Atlantic service technician, the Bell Atlantic Recent Change Memory Administration Center (RCMAC), and the CLEC technician. Essentially, at the designated cutover time, the RCMAC must perform translation updates to disconnect dial tone from the subscriber’s loop, the Bell Atlantic technician must remove Bell Atlantic’s switch cross connections and perform a cross-connect to the CLEC switch, and the CLEC must provision dial tone to the customer. During this time, other related functions, such as the provisioning of number portability, revisions to directory listings, and updates to line class codes or routing tables also may have to be performed. Any failures to coordinate these activities can result in a disruption of service to the CLEC’s customer for a period that can range from hours to days.<sup>44</sup> Recognizing the importance of hot cuts, KPMG designed tests to determine Bell Atlantic’s ability to perform these functions reliably.

Before reviewing KPMG’s examination of Bell Atlantic’s hot cut procedures, it is important to understand the limitations of KPMG’s testing. First, despite KPMG’s desire to “live the CLEC experience,” it found that it was “virtually impossible” to receive treatment that

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(...continued)

<sup>42</sup> 47 U.S.C. §§ 271(c)(2)(B)(ii) and (iv) (1999).

<sup>43</sup> KPMG, Bell Atlantic OSS Evaluation Project, Final Report, Executive Summary, II-4 (1999) (“KPMG Final Report”).

<sup>44</sup> See, KPMG, Bell Atlantic OSS Test Exceptions, Exception 54 (1999) (“KPMG Exception 54”) (available on the NYPSC web site) (visited Oct. 19, 1999) <<http://www.dps.state.ny.us/tel271.htm#except>>.

was truly blind.<sup>45</sup> Second, it is clear that Bell Atlantic was on its “best behavior” – like a student in school who knows when a teacher will be observing his actions. As KPMG explained,

[O]n several occasions, we believe that we received better treatment than a normal CLEC. For example, BA-NY resources assigned to handle many of our problem escalations were very senior BA-NY resources. It would appear from our CLEC visits and observations that other CLECs do not always get the same level of resources on their problem escalations.<sup>46</sup>

Even so, however, in some instances, KPMG intentionally avoided some types of testing, including notably, the “provisioning of large volumes of test transactions that would exceed the manual capacity of BA-NY’s work centers.”<sup>47</sup> Finally, some exceptions, including exceptions relating to Bell Atlantic’s hot cut procedures, were subjected to observation rather than further re-testing, leaving those areas “in a less than fully satisfied state.”<sup>48</sup>

KPMG’s initial review of Bell Atlantic’s hot cut procedures revealed numerous glaring deficiencies. As KPMG noted, among others, the following problems:

With regard to provisioning Hot Cut Orders, KPMG has observed BA-NY technicians processing switch translations disconnects and Main Distribution Frame (MDF) rewiring are [sic] not performing their activities in a synchronized manner at the requested Frame Due Time of the order and performs some portion of the cut either late or early.

KPMG has observed instances where BA-NY has systematically not followed their prescribed process of performing tests on

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<sup>45</sup> KPMG Final Report, Executive Summary, II-5. As KPMG explained, because each CLEC is assigned a unique set of IDs, it was possible for Bell Atlantic to identify KPMG as the source of any particular order. *Id.*

<sup>46</sup> *Id.*, II-8.

<sup>47</sup> *Id.*, II-7.

<sup>48</sup> *Id.*, II-5.

processes are not followed, provisioning problems that could have been corrected are not identified until the customer is out of

<sup>49</sup>

Following identification of these problems, Bell Atlantic revised its hot cut

intended to reduce hot cut problems was a requirement that two days before the due date, Bell Atlantic would conduct a check for dial tone on the CLEC's assigned port and report the results

KPMG observed 229 hot cuts performed over a two-week period in early July.

Significantly, even though KPMG was observing these hot cuts, Bell Atlantic still

two days before frame due time.”<sup>50</sup>

strictly, “trouble-shooting efforts can be hindered and potential provisioning problems can result.” Moreover, in only 90 percent of the observed instances did Bell Atlantic place the required phone calls in a timely manner before and after the frame due time. KPMG also “discovered evidence that BA-NY was not performing dial tone checks of CLEC lines before the

<sup>53</sup> Accordingly, KPMG provided only a “qualified” satisfaction

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<sup>49</sup> See KPMG Final Report, P3-22 and P3-24, POP3 IV-61.

KPMG Final Report, P3-22, POP3 IV-61.

*Id.*

*Id.*

<sup>53</sup> , P12-3, POP12 IV-291.

rating on this factor, based primarily on Bell Atlantic’s failure to follow its own procedures strictly.<sup>54</sup>

As a result, there is no firm assurance that Bell Atlantic is able to provide unbundled loop “hot cuts” on a consistent and reliable basis.<sup>55</sup> As explained above, in order to show compliance with the checklist, a BOC must make the checklist item available “as both a legal and a practical matter.”<sup>56</sup> Put another way, a BOC must have a “concrete and specific legal obligation” to furnish a checklist item.<sup>57</sup> As KPMG observed, Bell Atlantic is not consistently providing unbundled loop hot cuts as a practical matter. This deficient performance does not meet the Commission’s standard.

## **B. Trunking Deficiencies**

Bell Atlantic has not demonstrated that it is providing interconnection trunking in the non-discriminatory manner required by the Act. In fact, as calculated by the NYPSC staff for the three months prior to filing its Application, Bell Atlantic only demonstrated parity provisioning of interconnection trunks for one of the prior three months.<sup>58</sup> Several CompTel members report that this sub-parity performance remains a significant competitive issue.<sup>59</sup>

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<sup>54</sup> *Id.*, P3-22, POP3 IV-60 (providing a “Satisfied with Qualifications, Exception Addressed” rating).

<sup>55</sup> Comments of Choice One Communications in this proceeding pp. 3-6.

<sup>56</sup> *Ameritech Michigan Order* at ¶ 110, citing Department of Justice SBC Oklahoma Evaluation at 23.

<sup>57</sup> *Id.*

<sup>58</sup> *See Petition filed by Bell Atlantic-New York for Approval of a Performance Assurance Plan and Change Control Assurance Plan in 97-C-0271*, Comments of Attorney General Eliot Spitzer On the Performance Assurance Plan And The Change Control Assurance Plan Proposed By The New York Telephone Company D/B/A Bell Atlantic of New York, Attachment A. (NY PSC filed October 4,1999). Case Nos. 97-C-0271 and 99-C-0949. The scoring for modes of competition are “0” for service as good as BA-NY provides to itself; “-1.0” or less for service that may or may not be equal to that which BA-NY provides itself; and “-2.0” or less for services that are clearly inferior to that  
(continued...)

Interconnection trunking is a competitively critical checklist item which must be provisioned at parity if there is to be any possibility for facilities-based local competition. Without adequate trunk/circuit design, and timely provisioning of augments from the CLEC collocation in the Bell Atlantic central office to the CLEC switch, the CLEC network will suffer unacceptably high call blocking, so that Bell Atlantic customers trying to reach the CLEC customers will receive a higher incidence of “fast busy” signals. Similarly, without reliable and timely installation of entrance facility trunking, CLECs are delayed in being able to activate and begin offering service from installed collocation arrangements. Delay in activating service from collocations, once they are built and equipment is installed, can cause severe cash flow problems for the new entrant, especially when the problem affects several collocations scheduled to be turned up at the same time.

Another, equally damaging, competitive effect resulting from disparate provisioning of local transport trunking is the effect on the CLECs’ ability to compete head-to-head with Bell Atlantic for large retail customers who are, themselves, heavy consumers of dedicated transport trunks. But, the competitive disadvantage suffered by the CLEC that receives worse service than Bell Atlantic provides itself is even more stark inasmuch as these customers are very sophisticated telecommunications purchasers who demand timely and accurate installation. These customers are very knowledgeable and very sensitive to whether they could receive better service from Bell Atlantic. Importantly, while these larger customers are interested in reducing their already sizable telecommunications expenses, they also tend to be

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(...continued)

which BA-NY provides to itself. p. 7. BA-NY’s interconnection trunking score for August was “-1.0”; for July “0”; and for June “-3.0”. See *Id.*, Attachment A, pp. 4, 9, and 4 of 14.

very dependent on reliable communications for their businesses and, therefore, less able to tolerate poor service, even at cheaper prices.<sup>60</sup>

Poor wholesale service in the provisioning of interconnection trunking is always competitively significant because poor service either means that many customers will receive noticeably worse service or a large, frequently time-sensitive, customer will not get its service switched or its capacity expanded in a timely manner. The end result of Bell Atlantic's inability to provision interconnection trunking in commercially reasonable volumes, in a non-discriminatory manner, is a formidable and certain impediment to the development of "irreversible" local exchange competition in New York.

**C. Bell Atlantic Does Not Offer Non-Discriminatory Access to xDSL Loops**

Bell Atlantic also imposes unreasonable restrictions on competitors' access to xDSL loops and discriminates in favor of its own retail services.

As the Commission is well aware, xDSL is a technology which enables high-speed digital communications to be provided over ordinary copper wires. xDSL technology is used to provide a variety of advanced telecommunications services, including Internet access at speeds several times than which is possible with analog modems. Network elements used or useful to the provision of xDSL services are fully subject to the unbundling provisions of Section 251.<sup>61</sup> This obligation is reflected in, among other things, Bell Atlantic's own interconnection

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(...continued)

<sup>59</sup> See Comments of ChoiceOne Communications, Focal Communications, Prism Communications, and RCN, to be filed in this proceeding.

<sup>60</sup> Declaration of Mary Jane Burke, ¶¶ 9-16, Comments of Focal Communications, to be filed in this proceeding.

<sup>61</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC 98-188, ¶¶ 50-58, Memorandum Opinion and Order and Notice of Proposed Rulemaking, (rel. August 7, 1998) ("Advanced Services Order").

<sup>62</sup> Moreover, the FCC reaffirmed the ILECs' obligation to capable loops.<sup>63</sup>

of new entrants to provide xDSL services in competition with Bell Atlantic's services.

Bell Atlantic's xDSL provisions in its New York tariff are, on their face, may use on xDSL loops they obtain from Bell Atlantic.<sup>64</sup> speeds correspond to the speeds at which Bell Atlantic offers its "InfoSpeed" ADSL service to end users offer a faster product than Bell Atlantic's retail service. Moreover, Bell Atlantic also artificially limits ADSL loops to 12,000 feet and HDSL loops to 18,000 feet. Competitors are rapidly developing equipment and technologies which can operate on loops longer than these lengths, and Bell Atlantic's tariff stands as an impediment

These restrictions directly contravene the FCC's *Advanced Services Order* which the FCC concluded that, "if [the Commission is] to promote the deployment of advanced telecommunications capability to all Americans, competitive LECs must be able to obtain access

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<sup>62</sup> See, e.g., Choice One Communications, Inc./Bell Atlantic Interconnection Agreement, 14.2, App. Appendix F, Tab 60; e.spire Communications, Inc./Bell Atlantic Interconnection Agreement, §

<sup>63</sup> C 99-238, News Release, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket 15, 1999).

<sup>64</sup> New York Telephone Company d/b/a Bell Atlantic – New York Tariff NY P.S.C. No. 916. See *ADSL-Qualified, HDSL-Qualified, and Digital-Designed Links*, Case 98-C-1357 (Sept. Joint Affidavit in Support of DSL Tariff")

<sup>65</sup> 17.4.3(B)(3) and Tariff FCC No. 1, Section 16.8(C)(2)(c). Joint Affidavit in Support of DSL Tariff, ¶ 15.

to incumbent LEC xDSL-capable loops on an unbundled and nondiscriminatory basis.”<sup>67</sup> The restrictions also contravene Section 51.309 of the Commission’s interconnection rules. Rule 309 states that ILECs may not impose any restriction:

“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 carrier intends.”<sup>68</sup>

Because of these restrictions, Bell Atlantic is not in compliance with the FCC’s rules for the provision of unbundled network elements. Consequently, Bell Atlantic has not “fully implemented” checklist items (ii) and (iv) at this time.<sup>69</sup>

Furthermore, Bell Atlantic discriminates against competitors employing xDSL technologies other than the ADSL and HDSL technologies used in its own retail products. First, Bell Atlantic’s tariff prohibits carriers from using ordinary POTS loops for the provision of DSL service, although there is no technical reason for this prohibition.<sup>70</sup> This restriction discriminates against providers using ADSL-light or “G-lite” technologies. These forms of DSL only require an ordinary POTS loop, and do not need any special conditioning (other than the removal of load coils). This restriction also discriminates against providers who offer both voice and data services over the same loop. For these providers, use of a POTS loop is all that is necessary to provide the service which they seek to offer.

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<sup>67</sup> *Advanced Services Order*, ¶ 52.

<sup>68</sup> 47 C.F.R. § 51.309(a).

<sup>69</sup> The obligation to provide nondiscriminatory access to DSL loops has been in place since at least the FCC’s *Advanced Services Order*. Therefore, regardless of the significance of the pending UNE Remand Order in this proceeding, Bell Atlantic’s application was not complete as filed on September 29, 1999.

<sup>70</sup> NY P.S.C. No. 916 Tariff at 26. Bell Atlantic claims this restriction serves to avoid interference, but there is no evidence that xDSL – which operates at a different frequency than voice service – interferes in any way with POTS telephony.

Similarly, Bell Atlantic disqualifies as “DSL loops” any loop containing fiber facilities or which passes through a Digital Loop Carrier system.<sup>71</sup> However, some forms of DSL service – notably “IDSL” service<sup>72</sup> -- may be provided over these loops. Bell Atlantic’s tariff restricts the ability of these providers to offer service. The obvious reason for these restrictions is a desire to favor Bell Atlantic’s own retail services and to thwart competitors’ efforts to offer superior services.

Bell Atlantic’s policy of not offering “hot cuts” on DSL loops also is discriminatory.<sup>73</sup> DSL carriers that offer both voice and data services over the same line must be able to convert customers’ existing voice lines to DSL service. Typically, this is done by first “hot cutting” the loop for voice service and, the next day, activating DSL service. However, Bell Atlantic’s tariff requires the carrier to disconnect the voice line and go out of service for some undetermined period before being able to provide DSL service. This prospect of lack of service for an undetermined period of time is a major deterrent for customers who will resist switching DSL service providers. Consequently, competitors offering both voice and data services will face a discriminatory barrier to their ability to compete.<sup>74</sup>

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<sup>71</sup> NY P.S.C. No. 916 Tariff at 5.5.2.

<sup>72</sup> IDSL, which stands for ISDN DSL, is a “new use for ISDN which primarily switches ISDN data connections from the ordinary phone connection to the Internet or an overlay data network through a modem pool.” Carina Björklind, Technology: xDSL-Family, FASTLANE MAGAZINE [www.fastlane-mag.com/special.asp?artid=131&page=4](http://www.fastlane-mag.com/special.asp?artid=131&page=4) (last visited October 19, 1999). ISDL can operate through a loop carrier arrangement.

<sup>73</sup> NY P.S.C. No. 916 Tariff at §§ 5.5.1.1(A)(2)(i), 5.5.1.1(C)(2)(i).

<sup>74</sup> Bell Atlantic’s “justification” for its prohibition on hot-cuts for DSL loops – the pre-qualification requirements – is without foundation. NY P.S.C. No. 916 Tariff at §§ 5.5.1.1(A)(2)(i), 5.5.1.1(C)(2)(i). First, in many cases, it would not be necessary to pre-qualify a loop already providing DSL services. *Proceeding on Motion of the Commission to Examine New York Telephone Company’s Rates for Unbundled Network Elements*, Comments of CoreComm New York, Inc., Case 98-C-1357, at 6 (Sept. 22, 1999). Second, pre-qualification of the loop can be completed prior to the hot-cut through other methods. *Proceeding on Motion of the Commission to Examine New York*  
(continued...)

Finally, Bell Atlantic does not provide loop qualification information on a nondiscriminatory basis. Bell Atlantic's loop qualification database for xDSL-capable loops is both incomplete and discriminatory. First, Bell Atlantic, *as of the date of the application*, had surveyed only a very few of its end offices. Although Bell Atlantic's application does not state exactly how many offices it has surveyed, as of early August, it had reviewed only 24 offices.<sup>75</sup> Bell Atlantic states that its "survey process is being conducted" and, by the end of 1999, "93 percent of [its] central offices" will be surveyed. And, by the end of the first quarter of 2000, "99 percent of BA-NY's central offices. . . will be surveyed."<sup>76</sup> These paper promises are not enough for the Commission to make a finding of checklist compliance.

Moreover, the content of the database is discriminatory, as the Pennsylvania PUC recently has determined.<sup>77</sup> The database not only contains information from only 24 central offices in New York, but also it does not contain all of the information necessary for CLECs to determine whether loops are xDSL-capable.<sup>78</sup> As a result, CLECs will be forced in many

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(...continued)

*Telephone Company's Rates for Unbundled Network Elements*, Comments of Prism New York Operations, LLC, Case 98-C-1357, at 10 (Sept. 22, 1999).

<sup>75</sup> *Petition of New York Telephone Co. for Approval of its Statement of Generally Available Terms and Conditions Pursuant to Section 252 of the Telecommunications Act of 1996*, Brief of the Competitive Telecommunications Association, Case No. 97-C-0271, at 28 (NY PSC filed Aug. 16, 1999) ("CompTel New York Brief").

<sup>76</sup> Joint Declaration of Paul A. Lacouture and Arthur A. Troy at ¶ 84, App. Appendix A (filed Sept. 29, 1999).

<sup>77</sup> The Pennsylvania PUC has found that the information Bell Atlantic proposes to provide in its loop qualification database is insufficient because it "was developed to support the specific needs of BA-PA's more limited ADSL retail offering and does not include crucial loop information needed for other xDSL services." Partial Settlement Order at 100-111. Significantly, the database will be of questionable value at all to CLECs because "the database is essentially structured with loop qualification information that will be of primary value to the provision of BA-PA's own retail ADSL services." *Id.*

<sup>78</sup> *CompTel New York Brief* at 29.

instances to obtain loop qualification information manually.<sup>79</sup> The added time and cost involved in manually determining the necessary loop information discriminates to the disadvantage of CLECs.

V. **THE BELL ATLANTIC APPLICATION IS NOT CONSISTENT WITH THE PUBLIC INTEREST, CONVENIENCE, AND NECESSITY BECAUSE IT FAILS TO PROVIDE EFFECTIVE MEASURES TO ENSURE AGAINST BACKSLIDING AND POST-ENTRY DISCRIMINATORY CONDUCT**

As the Commission has long recognized, one of the purposes of Section 271 is to provide an incentive for the BOCs to fulfill their obligations under Section 251 to open local markets to competition.<sup>80</sup> Section 271 employs a “carrot and stick” approach, with the “carrot” of in-region interLATA entry offered as an incentive for compliance, backed by the “stick” of FCC and state enforcement of its interconnection obligations. Once a BOC receives approval to provide in-region interLATA authority, the Act’s “carrot” to encourage BOC compliance with Section 251’s interconnection obligations disappears or diminishes significantly.

Any possible doubt as to the incentive effect of Section 271 – and the absolute lack of a compliance incentive outside of Section 271 – is erased by Bell Atlantic’s refusal to guarantee its performance under *any* performance assurance plan prior to receiving interLATA authority. Bell Atlantic has admitted that its willingness to commit even to the inadequate plan it proposed in New York is based “only on the condition that it obtains permission to enter the long

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<sup>79</sup> *Joint Affidavit in Support of DSL Tariff* ¶ 10.

<sup>80</sup> *See, e.g.,* Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, To Provide In-Region, InterLATA Services in Michigan, Memorandum Opinion and Order, 12 FCC Rcd 20543, 20551, ¶ 14 (1997) (“*Ameritech Michigan Order*”); Application by SBC Communications, Inc. Pursuant to Section 271 of the Communications Act of 1934, as Amended, To Provide In-Region, InterLATA Services in Oklahoma, Memorandum Opinion and Order, 12 FCC Rcd 8685, 8702, ¶ 28 (1997).

<sup>81</sup> In other words, Bell Atlantic is not willing to live up to its guarantees as it

even less reason for it to live up to those guarantees.

It is for this reason that the Commission's public interest analysis must consider,

eliminated, and whether a BOC will continue to fulfill its obligations after receiving in-region authority in a state. As the Commission emphasized in its *Ameritech Michigan* even though the interLATA market is competitive, whether BOC entry in that market will produce procompetitive benefits depends upon the development of local competition:

procompetitive effects, whether such benefits are sustainable will depend on whether the BOC's local telecommunications market

believe that we must consider whether conditions are such that the local market will remain open as part of our public interest

<sup>83</sup>

Thus, even if, despite the demonstrated failures addressed above and in other

checklist, there are serious problems with the requested authorization.<sup>84</sup>

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*See, Petition of Bell Atlantic – New York for Approval of a Performance Assurance Plan*, Case No. 97-C-0271, Reply Comments of Bell Atlantic – New York on Notice of Proposed Rulemaking and Amended Performance filed Oct. 8, 1999) (refusing to make Plan effective prior to 271 authority).

<sup>82</sup> *See, e.g., Ameritech Michigan Order*, ¶ 390.

*Id.*

*See id.*

interconnection requirements necessary to open the local exchange to competition, we believe that compliance with the checklist will not necessarily assure that all barriers to

continue to cooperate with new entrants after receiving in-region, interLATA authority.”).

the incentive and the ability to stifle competition in the local market by engaging in various types of discriminatory or other anticompetitive conduct not directly implicating checklist items.

Second, Bell Atlantic has the incentive and the ability to backslide so that it no longer satisfies the 14-point checklist in ways that will be difficult to detect and remedy. These and other serious problems directly affect whether the local market will remain open if Bell Atlantic's application is approved.

One key protection against such anticompetitive activities is the existence of rapid and effective enforcement mechanisms to address BOC violations of their interconnection obligations. Local competition cannot develop or continue as envisioned in the Act if new entrants are forced "to engage in protracted and contentious legal proceedings to enforce their contractual and statutory rights to obtain necessary inputs from the incumbent."<sup>85</sup> Therefore, as a part of its public interest analysis, the Commission must consider whether effective conditions are in place to ensure that Bell Atlantic does not fall below Section 271's standards and to provide efficient means for competitors and regulators to redress any deficiencies if they occur.

Specifically, as discussed more fully below, CompTel recommends that the Commission adopt as explicit conditions to an approval order (assuming Bell Atlantic were to correct the checklist compliance problems discussed above) strong performance guarantees to ensure that continued enforcement of Bell Atlantic's obligations is available, efficient, and adequate to deter against backsliding. The Commission has already found that one relevant factor in its public interest analysis is whether a BOC has committed to performance monitoring standards and remedies.<sup>86</sup> CompTel submits that this inquiry must also address whether *all*

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<sup>85</sup> *Id.*, ¶ 394.

<sup>86</sup> *Id.*, ¶ 393.

enforcement mechanisms, including carrier-initiated and agency-initiated enforcement, are sufficient to ensure that “a BOC will continue to cooperate with new entrants, even after it is

<sup>87</sup> Effective enforcement is contingent

where expeditious resolution of both types of disputes is guaranteed.

As the Commission has correctly recognized, interconnection agreements contain

<sup>88</sup> Therefore, a truly comprehensive enforcement mechanism

contractual obligations. Although the contractual remedies contained in interconnection agreements are designed to address compensatory remedies, they are often inadequate to

they cannot prevent BOCs from concluding that the benefits to be gained from violating their statutory obligations are greater than the cost of any compensatory damages.

BOC compliance with their statutory obligations under the Act, because Congress mandated the substantive terms of interconnection agreements not with the intent of benefiting BOCs or

*competition* to the American public. The Commission thus

interconnection agreements, by attaching significant liability to failures by BOCs to comply with their statutory and contractual obligations. This liability should take the form of significant

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*Id.*

*Id.*

damages to CLECs that result when BOC breaches prevent them from delivering services to the their subscribers, the American public. Because financial and social well-being is increasingly dependent upon telecommunications services in America today, the damages to CLECs from BOC breaches is greatly magnified. Equally important, the Commission must assess very significant (*e.g.*, three times compensatory damages) punitive damages in the form of forfeitures to deter economically profitable breaches.

**A. The Performance Assurance Commitments Made by Bell Atlantic Are Insufficient**

Under the Communications Act, there are three ways that breaches of statutory and contractual rights can be addressed. First, interconnection agreements can contain performance measurements and consequences for a BOC's failure to meet the performance criteria. The remedies in these agreements are frequently in the nature of "self-enforcing" provisions. Second, the FCC, a state or an arbitrator can be asked by a CLEC to enforce an obligation in the Act or an agreement, and to award damages and other remedies for non-compliance. These remedies include carrier-initiated proceedings, such as complaints, petitions and arbitrations. Third, regulatory agencies themselves can initiate proceedings, such as forfeitures, show cause proceedings, suspension proceedings, or, ultimately, 271 revocation.

To date, Bell Atlantic's attempt to address backsliding concerns has focused solely on "self-executing" remedies contained in a voluntary performance commitments. The only post-entry assurance that Bell Atlantic has agreed to is the Performance Assurance Plan ("P.A.P.") it has proposed in New York.<sup>89</sup>

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<sup>89</sup> See *Petition Filed by Bell Atlantic – New York for Approval of a Performance Assurance Plan and Change Control Assurance Plan*, Notice of Proposed Rulemaking, Case No. 99-C-0949 (NY PSC issued August 30, 1999). Simultaneous with the Performance Assurance Plan, Bell Atlantic proposed a Change Control Assurance Plan ("CCAP") for  
(continued...)

Although Bell Atlantic's P.A.P. is a step in the right direction, it is far from sufficient to demonstrate that the requested authorization is consistent with the public interest, discriminatory or other anticompetitive conduct, and it does not contain sufficient enforcement measures to deter this behavior. Specifically, the measures themselves do not seek to establish, or report upon, the proper incentives for Bell Atlantic's wholesale division to treat its customers of certain transactions are reported, there is no way of knowing how many phone calls to how many supervisory levels were required to successfully provision a given trunk group. Also, staffing on wholesale vs. retail accounts of similar size are also not reported. Additionally, it is compensation is so disparate that as soon as an employee gets any seniority, he or she migrates to another part of the business, then Bell Atlantic is not providing non-discriminatory staffing. sufficient commitments to ensure that violations of its obligations under the Act can be adequately and timely addressed. The P.A.P. addresses only one of three methods to remedy *no* commitments that would have

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software changes to Bell Atlantic's interfaces. These comments do not address the CCAP proposal.

Declaration of Mary Jane Burke, ¶¶  
this proceeding (explaining that Bell Atlantic has resisted efforts to monitor performance in the provisioning of critical hi-capacity circuits, which Focal is dependent on to serve

In addition, as CompTel demonstrated in comments filed with the New York Public Service Commission, Bell Atlantic's P.A.P. fails to incorporate elements that must be included in any effective performance assurance plan.<sup>92</sup> Among other things, the P.A.P. is deficient because it relies on bill credits, rather than financial payments, as performance remedies and permits increased levels of noncompliance with its provisioning obligations when Bell Atlantic receives large order volumes.

As will be explained in more detail in subsection D, *infra*, incentives for Bell Atlantic's performance should be increased with the following additional remedies for non-performance:

#### **Self-Executing Remedies**

- Apply matching *federal* guarantees of performance in addition to those remedies available under the P.A.P.
- Apply *additional remedies* if Bell Atlantic's performance in a Critical Measure is significantly worse than the benchmark, such as refunds equal to all charges the CLEC billed to the affected end users.
- Apply additional remedies for deficient performance that is *industry-wide*.

#### **Carrier-Initiated Remedies**

- Deem repeated failures to meet Critical Measure performance metrics in the P.A.P. – *e.g.*, failure to meet any performance metric twice in a three consecutive reporting periods, or three times in any six consecutive reporting periods – to be *prima facie* evidence in complaint proceedings of a violation of Bell Atlantic's interconnection agreements.

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(...continued)

<sup>91</sup> See *id.* ¶¶ 10-15. See also Comments of ChoiceOne Communications in this proceeding ¶¶ 4, 8 (discussing problems of reported escalations in obtaining both UNE loops and directory listings).

<sup>92</sup> New York Public Service Commission, Case Nos. 97-C-0271 and 99-C-0949, CompTel Comments (filed Oct. 1, 1999), *citing* Case Nos. 97-C-0271, CompTel Brief (filed Aug. 19, 1999), at 19; Case No. 97-C-0271, Affidavit of Carol Ann Bischoff on Behalf of the Competitive Telecommunications Association (filed April 27, 1999), at 9.

- Deem performance in a Critical Measure that is significantly worse than the benchmarks to be prima facie evidence of a failure to provide interconnection or access under Section 251.
- Address non-quantitative failures by presumptions of non-compliance. For example, prima facie evidence of discrimination could be provided by evidence that Bell Atlantic does not devote equivalent resources to wholesale and retail businesses or that it applies discriminatory performance bonuses and incentives for executives in the wholesale and retail businesses.
- Deem certain failures to comply with basic obligations under Section 251 to be prima facie evidence of liability to CLECs. For example, failure to respond to an interconnection request within 14 days or failure to provide opt-in under Section 252(i) within 14 days shall be deemed to be bad faith by Bell Atlantic. Similarly, failure to provide collocation within the time frames specified in the *Collocation Order* will be deemed a breach of its obligation under Section 251(c)(2) to provide interconnection.
- “Ordinary” poor service, as described above, when coupled with “intent” evidence that Bell Atlantic is seeking to profit its retail arm by exploiting competitor’s poor service, for which it may be at least partially responsible. E.g., Bell Atlantic provides poor repair and maintenance intervals to a CLEC, and sends CLEC retail customers a “winback” letter asking them whose service they would trust during the next big storm.

#### **Agency-Initiated Remedies**

- Repeated failures to meet any Mode of Entry performance metric *on an industry-wide basis* should trigger a performance improvement evaluation under the supervision of the FCC’s Common Carrier Bureau. For example, upon a repeated failure to meet a metric, Bell Atlantic should be required to submit a performance improvement plan to the Common Carrier Bureau, and the Bureau should submit public comment on the improvement plan.
- Significant non-compliance with performance metrics should trigger forfeiture proceedings with substantial (\$1 million or more) penalties. Each day under the reporting period should be deemed a separate event subject to the forfeiture authority of the agency.
- Whenever wholesale provisioning problems are either so egregious or pervasive as to be, in the Commission’s opinion – industry affecting, such that the public policy goals of Congress may be jeopardized, the FCC should take whatever action it needs to implement the goals of Congress, including, possibly, consideration of a structural separation between Bell Atlantic’s wholesale and retail businesses.

**B. The Commission Has Authority to Remedy These Deficiencies by Imposing Conditions To Make the Application Consistent With the Public Interest, Convenience, and Necessity**

Bell Atlantic has not satisfied its burden of demonstrating that the requested authorization is consistent with the public interest, convenience and necessity.<sup>93</sup> Section 271 precludes the Commission from approving a Section 271 application unless the requested authorization is consistent with the public interest, convenience and necessity.<sup>94</sup> However, in the absence of adequate commitments from Bell Atlantic, the Commission has the authority to impose any conditions necessary to ensure that the requested authorization is consistent with the public interest. As the Commission has already found, “Congress did not repeal the MFJ in order to allow checklist compliance alone to be sufficient to obtain in-region, interLATA authority.”<sup>95</sup> Moreover, “[t]he legislative history of the public interest requirement in Section 271 indicates that Congress intended the Commission, in evaluating Section 271 applications, to perform its traditionally broad public interest analysis of whether a proposed action or authorization would further the purposes of the Communications Act.”<sup>96</sup>

Under well established precedent, if the Commission determines that an application would serve the public interest only if particular conditions are met, it can grant the

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<sup>93</sup> See, e.g., *Ameritech Michigan Order*, ¶ 43 (finding that Section 271 places on the applicant the burden of proving that all of the requirements for authorization to provide in-region, interLATA services are satisfied); *NYNEX Corp., and Bell Atlantic Corp.*, 12 FCC Rcd 19985, 20007, ¶ 36 (1997) (“NYNEX-Bell Atlantic”).

<sup>94</sup> 47 U.S.C. §271(d)(3)(C). See *Ameritech Michigan Order*, ¶ 386 (“In adopting Section 271, Congress mandated, in effect, that the Commission not lift the restrictions imposed by the MFJ on BOC provision of in-region, interLATA services, until the Commission is satisfied on the basis of an adequate factual record that the BOC has undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition.”).

<sup>95</sup> See *Ameritech Michigan Order*, ¶ 385.

<sup>96</sup> *Id.*, ¶ 385.

application subject to compliance with those conditions.<sup>97</sup> For example, the Commission routinely imposes conditions deemed necessary to guard against possible anticompetitive conduct when approving applications for authority to transfer station licenses pursuant to Section 310(d).<sup>98</sup> Section 310(d) is a particularly apt example because it, like Section 271, does not expressly instruct the Commission to impose conditions as the public interest, convenience and

<sup>97</sup> See, e.g., *NYNEX-Bell Atlantic*, 12 FCC Rcd at 20002, ¶ 30 (“If the Commission is able to determine that the application would serve the public interest if particular conditions are met, the Commission can grant the application subject to compliance with the specified conditions.”); *GTE Serv. Corp. v. FCC*, 782 F.2d 263, 268 (D.C. Cir. 1986) (holding that “the Commission may impose conditions whenever in the absence of such conditions the transfer would not be in the public interest. Indeed, in such circumstances unconditional approval would presumably be arbitrary and capricious and therefore could be set aside under the APA.” (footnotes omitted)); *California Ass’n of the Physically Handicapped, Inc. v. FCC*, 778 F.2d 823 (D.C. Cir. 1985) (dissent recognizing authority of Commission to impose conditions on grants of authority pursuant to Section 310); *Amendment of Section 2.106 of the Commission’s Rules To Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, 13 FCC Rcd 23949, 23956, ¶ 16 (1998) (“As an initial matter we note that, pursuant to the Communications Act of 1934, as amended, this Commission has authority to impose on Commission licensees conditions and obligations consistent with the public interest, convenience and necessity, including monetary obligations.”), citing *Mobile Communications Corp. v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 81 (1996); *New England Telephone & Telegraph Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), cert. denied, 490 U.S. 1039 (1989); *North American Telecommunications Association v. FCC*, 772 F.2d 1282 (7<sup>th</sup> Cir. 1985); *NYNEX-Bell Atlantic*, 12 FCC Rcd 19985. See also *Amendment of Section 73.3525 of the Commission’s Rules Regarding Settlement Agreements Among Applicants for Construction Permits*, 6 FCC Rcd 85 (1990) (finding that Section 311(c), which provides in relevant part that “[t]he Commission shall approve the agreement only if it determines that . . . the agreement is consistent with the public interest, convenience, or necessity”, permits it to impose settlement limitations in the public interest).

<sup>98</sup> See, e.g., *Tele-Communications, Inc., and TeleCable Corporation Transfer of Control*, 10 FCC Rcd 2147, 2147, ¶ 1 (1995) (“[T]he Bureau finds that, subject to certain conditions, approving the proposed license transfers will serve the public interest, convenience and necessity. Therefore, the Bureau grants the transfer applications. In so doing, however, the Bureau imposes a condition that it determined to be necessary to guard against otherwise possible anticompetitive conduct.”); *Jefferson-Pilot Corp. v. Commissioner*, 995 F.2d 530 (4<sup>th</sup> Cir. 1993) (discussing FCC approval of assignment of licenses pursuant to Section 310(d) subject to certain conditions and payment of a transfer fee); *Ramsay v. Dowden (Central Arkansas Broadcasting Co.)*, 68 F.3d 213, 214-15 (8<sup>th</sup> Cir. 1995) (noting that an FCC license is granted and may be transferred pursuant to Sections 307(c) and (d) and 310(d) subject to restrictions and conditions). See also, e.g., *Infinity Broadcasting Corp.*, 12 FCC Rcd 5012 (1996) (imposing conditions on a license transfer pursuant to Section 310(d)); *Citicasters, Inc.*, 11 FCC Rcd 19135 (1996) (same); *Pyramid Communications, Inc.*, 11 FCC Rcd 4898 (1995) (same).

necessity may require.<sup>99</sup> Nonetheless, the Commission has frequently exercised its authority under Section 310(d) to impose conditions intended to prevent future transgressions of 310(d) whenever in the absence of the conditions the transfer would not be in the public interest.<sup>100</sup> In fact, where the requested transfer would not be in the public interest, “unconditional approval would presumably be arbitrary and capricious and could therefore be set aside under the APA.”<sup>101</sup>

Although Section 271 does not explicitly instruct the Commission to impose conditions, the only reasonable interpretation of Section 271 is that it authorizes the Commission to grant Bell Atlantic’s application subject to compliance with particular conditions that protect the statutory policy inherent in Section 271 and the public interest, convenience and necessity. This interpretation is confirmed by Section 271(d)(6), which explicitly contemplates that the Commission will grant Section 271 applications subject to “conditions.”<sup>102</sup> Moreover, nothing in

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<sup>99</sup> Section 310(d) provides in relevant part as follows: “No construction permit or station license . . . shall be transferred, assigned, or disposed of in any manner . . . to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.” 47 U.S.C. § 310(d).

<sup>100</sup> *Office of Communication of the United Church of Christ v. FCC*, 911 F.2d 803, 809 (D.C. Cir. 1990) (explaining Commission’s broad discretion under Section 310(d) to impose conditions on transfers); *U S West, Inc. v. FCC*, 778 F.2d 23 (D.C. Cir. 1985) (dismissing challenge of FCC order granting application subject to reporting condition and recognizing FCC authority to impose conditions solely pursuant to Section 310(d)); *SBC Communications, Inc. v. FCC*, 56 F.3d 1484, 1492-93 (D.C. Cir. 1995) (recognizing implicitly the Commission’s authority to impose conditions pursuant to 310(d)).

<sup>101</sup> *GTE Serv. Corp.*, 782 F.2d at 268.

<sup>102</sup> Subsection 271(d)(6), entitled “ENFORCEMENT OF CONDITIONS,” provides the Commission can take any of several enforcement actions if, after approving a 271 application, it “determines that a Bell operating company has ceased to meet any of *the conditions* required for such approval.” 47 U.S.C. §271(d)(6) (1999) (emphasis added). See *Ameritech Michigan Order*, ¶ 400 (finding that the term “conditions” in paragraph 6(A) do not refer to the explicit “requirements” for approval under subsection (c), in part because Section 271 consistently uses the term “requirements” – not the term “conditions” – to refer to the specific requirements of 271(c)).

<sup>103</sup> – limits the

the requested authorization consistent with the public interest, convenience and necessity.

By contrast, interpreting Section 271 as prohibiting the Commission from

to conditions would lead to absurd results that are contrary to Congressional intent as expressed by Section 271 in particular and the 1996 Act as a whole. If the Commission had no authority to

application outright unless the requested authorization is consistent with the public interest convenience and necessity, even if the applicant completely satisfied the 14-point checklist.

changed so that mere compliance with the 14-point checklist would be consistent with the public interest, convenience and necessity, or propose additional conditions with which it would

interest, convenience and necessity. In either event, the applicant would be forced to submit an updated application, which would require the Commission to initiate a new proceeding to

convenience and necessity. This result would delay competition in both the local and long

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ed, “[t]he legislative history of the public interest requirement in Section 271 indicates that Congress intended the Commission, in

analysis of whether a proposed action or authorization would further the purposes of the Communications Act.” ¶ 385 n.992, *citing*

104<sup>th</sup> Sess. 44 (1995) (“The public interest, convenience and necessity standard premise through the amendments contained in this bill.”).

distance markets, which undoubtedly is directly contrary to the goals of Section 271 and the 1996 Act.

For these reasons, CompTel agrees with the Commission's conclusion that Section 271 authorizes it to impose conditions on the grant of Bell Atlantic's application in order to ensure that the requested authorization is consistent with the public interest, convenience and necessity. As the Supreme Court as repeatedly explained, "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . ." <sup>104</sup> Far from compelling indications that it is wrong, the only reasonable conclusion is that Section 271 authorizes the Commission to impose conditions on the grant of the Bell Atlantic application.

Apart from Section 271, the Commission derives authority to condition grant of the Bell Atlantic application from Section 214(c). <sup>105</sup> Bell Atlantic does not currently have authority under Section 214 to provide in-region interLATA services. In applying for authority to provide in-region interLATA services in New York pursuant to Section 271, Bell Atlantic is necessarily requesting Section 214 authority as well. <sup>106</sup> Section 271 establishes the procedures

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<sup>104</sup> *Red Lion Broad. Co., v. FCC*, 395 U.S. 367, 381 (1969), *quoted in FCC v. WNCN Listeners Guild et al.*, 450 U.S. 582, 598 (1981). *See also Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 121 (1973).

<sup>105</sup> Section 214(c) provides in relevant part as follows: "The Commission . . . may attach to the issuance of the [214] certificate such terms and conditions as in its judgment the public convenience and necessity may require." 47 U.S.C. §214(c) (1999). *See New England Telephone and Telegraph Company*, 10 FCC Rcd 5346, ¶ 110 (1995) ("Section 214 does not set out specific requirements that the Commission must consider, but rather leaves the Commission 'wide discretion' in deciding how to make its public interest determination.").

<sup>106</sup> *See, e.g., 1998 Biennial Regulatory Review – Review of International Common Carrier Regulations*, 14 FCC Rcd 4909, ¶ 36 (1999) ("With respect to international Section 214 applications filed by the BOCs, we note that Section 271 of the Communications Act, as amended by the Telecommunications Act of 1996, prohibits the BOCs from providing interLATA services that originate in their respective in-region states until the Commission finds that they have satisfied the requirements of that Section. As we have  
(continued...)





**Nothing in Section 271 Limits the Scope of the Commission's Discretion in Applying the Public Interest, Convenience and Necessity Standard**

It is well settled that the public interest, convenience and necessity standard is to be “so construed as to secure for the public the broad aims of the Communications Act.”<sup>114</sup> These broad aims include establishing a “pro-competitive, deregulatory national policy framework designed to . . . open[] all telecommunications markets to competition”<sup>115</sup> and making “available . . . to all the people of the United States . . . a rapid, efficient, nationwide, and world-wide . . . communication service . . . .”<sup>116</sup>

“[T]he public interest standard necessarily encompasses the goal of promoting competition . . . .”<sup>117</sup> As the Commission has correctly recognized, “failure to create competition among local service providers necessarily means a lack of competition to provide interstate switched access,” because “interstate switched access is generally provided over the same ‘bottleneck’ facilities and by the same providers as provide local exchange and exchange access service . . . .”<sup>118</sup> Accordingly, “the public interest analysis necessarily includes a review of the

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<sup>113</sup> 47 U.S.C. § 201(b) (1999).

<sup>114</sup> *NYNEX-Bell Atlantic*, 12 FCC Rcd at 20002, ¶ 31 citing *Western Union Division, Commercial Telegrapher's Union, A.F. of L. v. United States*, 87 F. Supp. 324, 335 (D.D.C. 1949), *aff'd* 338 U.S. 864 (1949); *Washington Utilities and Transportation Comm'n v. FCC*, 513 F.2d 1142, 1147 (9<sup>th</sup> Cir. 1975); *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 93-95 (1953).

<sup>115</sup> H.R. Rep. No. 104-458 at 1 (1996); Telecommunications Act of 1996, Pub. L. No. 104-104 (preamble), 110 Stat. 56 (1996).

<sup>116</sup> 47 U.S.C. § 151 (1997). These goals date to the original Communications Act of 1934. See H.R. Rep. No. 1918 (1934).

<sup>117</sup> *NYNEX-Bell Atlantic*, 12 FCC Rcd at 20002-03, ¶ 31.

<sup>118</sup> *Id.*

nature and extent of local competition, as exemplified by the fact that Section 271 of the Act specifically applies the public interest standard to, inter alia, a review of local market conditions.”<sup>119</sup>

Courts have consistently found in the Act a Congressional intent to grant the Commission broad discretion in imposing conditions necessary to ensure that requested authorizations are consistent with the public interest, convenience and necessity.<sup>120</sup> Because Congress has granted the Commission broad discretion in determining how to achieve the goals of the Act, courts decline to substitute their views on the best method of achieving those goals.<sup>121</sup> The Supreme Court has characterized the public-interest standard of the Act as “a supple

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<sup>119</sup> *Id.* at 20007, ¶ 35.

<sup>120</sup> *See, e.g., Atlantic Tele-Network, Inc. v. FCC*, 59 F.3d 1384, 1389-90 (D.C. Cir. 1995) (upholding FCC imposition of proportionate return condition on carrier’s 214 authorization to provide international service. “[W]e see no basis for concluding that the Commission acted arbitrarily and capriciously when, in the exercise of its judgment of what the public convenience and necessity required, it decided to offset the risk [that the carrier would use its ability and incentive to discriminate against competing domestic carriers] by imposing a proportionate return condition.”); *Western Union Tel. Co. v. FCC*, 541 F.2d 346, 355 (3<sup>rd</sup> Cir. 1976) (affirming FCC’s imposition of a waiver as a condition to issuance of a 214 certification. “The gravamen of the [Western Union] argument is that such an interpretation [allowing the FCC to impose a waiver of contract as a condition] would allow the Commission to do ‘indirectly’ by condition what it is forbidden to do ‘directly’ by tariff, viz., modify or abrogate contracts. The argument fails because of the brute fact that there is a significant difference between a voluntary waiver of rights in order to secure a benefit otherwise unobtainable, and the extinguishment of rights by tariffs which provide no *quid pro quo* . . . .” (citations omitted)).

<sup>121</sup> *See, e.g., National Broadcasting v. United States*, 319 U.S. 190, 217-18 (1943) (declining to substitute its views on the best method of encouraging how to achieve the statutory goals of the Act). *See also FCC v. WNCN Listeners Guild et al.*, 450 U.S. 582, 594 (1981) (explaining breadth of the Commission’s discretion in applying the public interest standard); *Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1406 (D.C. Cir. 1996) (same); *GTE Serv. Corp. v. FCC*, 782 F.2d 263, 268 (D.C. Cir. 1986) (“[B]ecause the scope of judicial review over such agency determinations is narrow, GTE bears a substantial burden in showing that a grant without the four conditions was arbitrary and capricious. It cannot be gainsaid that this court is required to give substantial deference to decisions of the FCC, particularly where, as here, the Commission has determined that a particular course is or is not in the public interest.”); *Committee to Save WEAM v. FCC*, 808 F.2d 113, 116-17 (D.C. Cir. 1986) (dismissing challenge to FCC’s public interest finding under Section 310(d)).

instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.”<sup>122</sup> The public interest, convenience and necessity standard “no doubt leaves wide discretion and calls for imaginative interpretation. Not a standard that lends itself to application with exactitude, it expresses a policy . . . that is ‘as concrete as the complicated factors for judgment in such a field of delegated authority permit.’”<sup>123</sup> Therefore, the Commission may “implement its view of the public-interest standard of the Act ‘so long as that view is based on consideration of permissible factors and is otherwise reasonable.’”<sup>124</sup> Finally, the Supreme Court has repeatedly recognized that “the Commission’s decisions must sometimes rest on judgment and prediction rather than pure factual determinations. In such cases complete factual support for the Commission’s ultimate conclusions is not required since ‘a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.’”<sup>125</sup>

Nothing in this exercise conflicts with Section 271(d)(4), which prohibits the Commission from limiting or extending the terms used in the competitive checklist. The conditions which CompTel is proposing would not modify the substance of any of Bell Atlantic’s checklist obligations. Similar only in purpose, the requirements of the competitive checklist have nothing else in common with conditions that the Commission can impose to

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<sup>122</sup> *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940), *quoted in FCC v. WNCN Listeners Guild et al.*, 450 U.S. 582, 593-94 (1981).

<sup>123</sup> *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90 (1953), *quoting FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

<sup>124</sup> *FCC v. WNCN Listeners Guild et al.*, 450 U.S. 582, 594 (1981), *quoting FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 793 (1978). *See Office of Communication of the United Church of Christ v. FCC*, 911 F.2d 803, 809 (D.C. Cir. 1990) (“The Commission has broad discretion not only to define the public interest, but also to determine which *procedures* will best assure its protection.”).

ensure effective enforcement of the Act. The requirements of the competitive checklist apply to all BOCs in all markets, and cannot be varied based on local market conditions, past behavior of the BOC or agreement to voluntary “performance assurance plans.”<sup>126</sup> Moreover, application of these requirements cannot be avoided under any circumstances until the Commission determines that they have been fully implemented.<sup>127</sup>

By contrast, any conditions imposed by the Commission in order to address post-entry enforcement concerns would apply only to an individual BOC in a particular local market. These conditions necessarily would vary depending upon the local market conditions, the past behavior of the applicant itself, and any voluntary “performance assurance plans” the applicant has proposed. These conditions could also be removed at the request of the BOC, or on the Commission’s own motion, as soon as they are no longer in the public interest, convenience or necessity due to changed market conditions or because the BOC has proposed alternate conditions that would equally serve the same purposes.<sup>128</sup>

Given these fundamental differences between statutorily imposed requirements of the competitive checklist and Commission imposed public interest conditions, the Commission

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(...continued)

<sup>125</sup> *FCC v. WNCN Listeners Guild et al.*, 450 U.S. 582, 594-95 (1981), *quoting FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978), *in turn quoting FCC v. Transcontinental Gas Pipe Line Corp.*, 364 U.S. 1, 29 (1961).

<sup>126</sup> 47 U.S.C. § 271(c). As the Commission has already noted, Section 271 consistently uses the term “requirements” to refer to the 14-point competitive checklist, and “conditions” to refer to measures imposed pursuant to the public interest standard. *See Ameritech Michigan Order*, ¶400.

<sup>127</sup> *See* 47 U.S.C. § 160(b).

<sup>128</sup> CompTel urges the Commission to keep this docket open to permit comments from all interested parties on conditions in the New York market, BA-NY’s compliance with Section 271 and the terms and conditions of its authorization, and necessary amendments, if any, to the terms and conditions of the authorization. *See Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, 7 FCC Rcd 3528, 3547, ¶ 98 (1992) (keeping docket open as a notice and comment rule making proceeding to receive additional comment on relevant issues).

can impose the proposed conditions without “limit[ing] or extend[ing] the terms used in the competitive checklist . . . .”<sup>129</sup> As the Department of Justice explained:

Section 271(d)(4) . . . prohibits the Commission from promulgating additional inflexible and mandatory access and interconnection requirements as prerequisites for approval of applications under Section 271, or from ignoring noncompliance with any of the requirements of the checklist. The Commission is not restricted, however, in determining whether particular access and interconnection arrangements are consistent with the requirements of Section 272, or in weighing the public interest factors or the Attorney General’s recommendations. Section 271(d)(4) encourages the exercise of such *discretionary* judgments by limiting the Commission’s authority to impose or reduce the *non-discretionary* requirements of Section 271.<sup>130</sup>

Moreover, the conditions that CompTel is proposing would not limit or extend the terms used in the competitive checklist because they relate to enforcement of the checklist and any performance conditions the Commission deems necessary, not to the terms of the competitive checklist itself.

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<sup>129</sup> 47 U.S.C. § 271(d)(4). It is also important to note that Section 271(d)(4) prohibits the Commission from “limit[ing] or extend[ing] the terms used in the competitive checklist,” but it does not preclude the Commission from requiring actions necessary to open local markets to competition. The Commission is free to exercise its traditional public interest authority if it concludes that compliance with the competitive checklist will not ensure adequate competition in local services. Moreover, although Section 10(b) prohibits the Commission from limiting the competitive checklist itself by forbearing from “applying the requirements of Section . . . 271,” 47 U.S.C. § 160(d), nothing in the Act prohibits the Commission from imposing additional conditions on particular carriers if required by the public interest, convenience and necessity to open specific local markets to competition.

<sup>130</sup> Evaluation of the United States Department of Justice, Application of SBC Communications Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of Oklahoma, CC Docket No. 97-121, 38 n.45 (filed May 16, 1997).

**D. The Commission Should Condition Grant of the Bell Atlantic Application On Compliance With Performance Measures, Backed by a Three-Part Enforcement Mechanism**

Given the serious problems with the authorization Bell Atlantic has requested, the Commission must exercise particular care in determining which conditions are necessary to ensure that the requested authorization is consistent with the public interest, convenience and necessity. The Commission should exercise its broad discretion first by conditioning approval of Bell Atlantic's application specifically on compliance with the New York P.A.P. (with any amendments adopted in response to comments by the parties). By adopting the P.A.P. as a condition for approval, the Commission will subject Bell Atlantic to all of the enforcement measures available under the Act, which will serve as an independent *federal* enforcement mechanism to supplement state enforcement actions.

Conditions placed on approval of Bell Atlantic's application will be effective only if the Commission exercises its broad discretion by imposing an enforcement mechanism to ensure that Bell Atlantic complies with the conditions and the requirements of Section 271. Nothing in Section 271 limits the Commission's broad discretion in imposing appropriate enforcement mechanisms. Rather, Section 271 augments the Commission's enforcement authority by requiring it to implement expedited procedures for certain types of enforcement actions in order to ensure that Section 271 complaints are addressed within 90 days, regardless the length of time required to address non-Section 271 complaints, whether due to complaint backlogs or the need for trial-type hearings. Specifically, Section 271(d)(6)(A) provides that if, at any time after approval of a BOC application, the Commission determines that the BOC has ceased to meet any of the conditions of its approval to provide interLATA services, the

Commission may, after notice and opportunity for a hearing: (1) issue an order to the BOC to “correct the deficiency;” (2) impose a penalty pursuant to Title V;<sup>131</sup> or (3) suspend and revoke the BOC’s approval to provide in-region interLATA services.<sup>132</sup>

The Commission had the authority to exercise its discretion by taking any or all of the steps enumerated in Section 271, including establishing procedures for reviewing certain complaints within 90 days,<sup>133</sup> before Congress adopted Section 271 as part of the 1996 Act.

However, Section 271 now mandates that the Commission review 271 complaints and address violations of Section 271 by taking any of the enumerated steps within 90 days, unless the parties agree otherwise. Nonetheless, Section 271 has no effect on the Commission’s authority under Title II to enforce the Act, grant monetary relief for violations of the Act (including violations of Section 271 itself), or tailor its complaint and enforcement proceedings as necessary to serve the public interest.<sup>134</sup> Therefore, the additional enforcement authority

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<sup>131</sup> Pursuant to Section 503(b)(1)(B), any person who “willfully or repeatedly” fails to comply with any of the provisions of the Communications Act or any rule, regulation, or order issued by the Commission under the Communications Act, is liable to the United States for a forfeiture penalty. Section 503(b)(2)(B) authorizes the Commission to assess forfeitures against common carriers of up to one hundred thousand dollars for each violation, or each day of a continuing violation, up to a statutory maximum of one million dollars for a single act or failure to act. In exercising such authority the Commission is required to take into account “the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.” 47 U.S.C. §§ 503(b)(1)(B), (b)(2)(B). *See also Rocky Mountain Radar, Inc. v. FCC*, 158 F.3d 1118, n.7 (10<sup>th</sup> Cir. 1998) (discussing FCC forfeiture authority and explaining FCC’s forfeiture rules).

<sup>132</sup> 47 U.S.C. § 271(d)(6)(A).

<sup>133</sup> *See, e.g., Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, 13 FCC Rcd 17018 (1998) (creating accelerated docket procedures).

<sup>134</sup> *See, e.g., Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, 12 FCC Rcd 22497, ¶¶ 18-19 (1997) (“We find that Congress’ actions in specifying certain complaint procedures and deadlines for those procedures do not  
(continued...)”).

enforcement authority under the Act.<sup>135</sup>

approval of the Bell Atlantic application on compliance with a three-part enforcement mechanism consisting of self-executing remedies, carrier-initiated remedies, and agency-initiated

simultaneously to address violations of Section 271, including conditions imposed thereunder, and violations of other Sections of the Act that are based on the same act or transaction, or on

plan.<sup>136</sup>

a blueprint for effective enforcement.

### **Self-Executing Remedies**

Apply matching guarantees of performance in addition to those remedies available under the P.A.P.

Apply if Bell Atlantic's performance in a Critical Measure is significantly worse than the benchmark, such as refunds equal

- industry-wide.

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(...continued)

208.”).

<sup>135</sup> See *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended* Proposed Rulemaking, 11 FCC Rcd 21905, 22066 (1997) (“*Non-Accounting Safeguards*”) (finding that “Section 271(d)(6) augments the Commission’s existing enforcement authority.”).

Although not every violation of the Act will also be a violation of Section 271, every but not limited to Sections 201, 251 and 214.

### **Carrier-Initiated Remedies**

- Deem repeated failures to meet Critical Measure performance metrics in the P.A.P. – *e.g.*, failure to meet any performance metric twice in a three consecutive reporting periods, or three times in any six consecutive reporting periods – to be prima facie evidence in complaint proceedings of a violation of BA-NY’s interconnection agreements.
- Deem Critical Measure performance that is significantly worse than the benchmarks to be prima facie evidence of a failure to provide interconnection or access under Section 251.
- Address non-quantitative failures by presumptions of non-compliance. For example, prima facie evidence of discrimination could be provided by evidence that Bell Atlantic does not devote equivalent resources to wholesale and retail businesses or that it applies discriminatory performance bonuses and incentives for executives in the wholesale and retail businesses.
- Deem certain failures to comply with basic obligations under Section 251 to be prima facie evidence of liability to CLECs. For example, failure to respond to an interconnection request within 14 days or failure to provide opt-in under Section 252(i) within 14 days shall be deemed to be bad faith by Bell Atlantic. Similarly, failure to provide collocation within the time frames specified in the *Collocation Order* will be deemed a breach of its obligation under Section 251(c)(2) to provide interconnection.
- “Ordinary” poor service, as described above, when coupled with “intent” evidence that Bell Atlantic is seeking to profit its retail arm by exploiting competitor’s poor service, for which it may be at least partially responsible. *E.g.*, Bell Atlantic provides poor repair and maintenance intervals to a CLEC, and sends CLEC retail customers a “winback” letter asking them whose service they would trust during the next big storm.

### **Agency-Initiated Remedies**

- Repeated failures to meet any Mode of Entry performance metric *on an industry-wide basis* should trigger a performance improvement evaluation under the supervision of the FCC’s Common Carrier Bureau. For example, upon a repeated failure to meet a metric, BA-NY should be required to submit a performance improvement plan to the Common Carrier Bureau, and the Bureau should submit public comment on the improvement plan.

- Significant non-compliance with performance metrics should trigger forfeiture proceedings with substantial (\$1 million or more) penalties. Each day under the reporting period should be deemed a separate event subject to the forfeiture authority of the agency.
- Whenever wholesale provisioning problems are either so egregious or pervasive as to be, in the Commission's opinion – industry affecting, such that the public policy goals of Congress may be jeopardized, the FCC should take whatever action it needs to implement the goals of Congress, including, possibly, consideration of a structural separation between Bell Atlantic's wholesale and retail businesses.

These conditions are necessary to ensure that the requested authorization is consistent with the public interest, convenience and necessity. These limited prophylactic measures are intended to prevent any future violations of Section 271 and the Act. The Commission has repeatedly recognized that it has the authority in actions that are inherently prospective, like licensing actions, to condition approval in a manner that protects statutory policy.<sup>137</sup> Unless the Commission conditions approval on compliance with these conditions, grant of the Bell Atlantic application would not protect the statutory policy of Section 271 or the Act, and thus would be arbitrary and capricious in violation of the APA and Section 271 itself.

A finding that these conditions are necessary to ensure that the requested authorization is consistent with the public interest, convenience and necessity is the key to the Commission's authority under Sections 154(i), 201(b), 214(c), 271 and 303(r) to condition grant of the Bell Atlantic application on compliance with these conditions. Upon so finding, the Commission must either grant the Bell Atlantic application subject to these conditions, or deny it

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<sup>137</sup> *The Seven Hills Television Company*, 3 FCC Rcd 826, 827 (1998) ("As emphasized above and again, the limited prophylactic measures imposed upon Seven Hills are intended to prevent future transgressions of 47 U.S.C. § 310(b). To the extent that these conditions have any slight impact on petitioners, they are necessary and incidental to the Commission's statutory responsibilities, responsibilities that invariably affect the scope of activities of those subject to federal regulation. As we stated in our *Seven Hills* decision, 'we believe that the Commission clearly has authority in a licensing action, an (continued...)

outright. By granting the Bell Atlantic application subject to these conditions rather than denying it outright, the Commission gives Bell Atlantic the choice of either voluntarily complying with the conditions, or choosing not to provide in-region interLATA services until market conditions have changed so that the Commission could find that the requested authorization is consistent with the public interest, convenience and necessity without the conditions.

As explained in the previous Section, Congress intended the Act to grant the Commission extremely broad discretion in determining what the public interest, convenience and necessity requires. The Court of Appeals for the Fifth Circuit recently reiterated this point, observing that “[j]udicial deference to agency judgments is near its zenith where issues of the public interest are involved.”<sup>138</sup> The Supreme Court has explained that its opinions have “repeatedly emphasized that the Commission’s judgment regarding how the public interest is best served is entitled to substantial judicial deference.”<sup>139</sup> Accordingly, “[t]he Commission’s implementation of the public-interest standard, when based on a rational weighing of competing policies, is not to be set aside by the Court of Appeals, for the ‘weighing of policies under the “public interest” standard is a task that Congress has delegated to the Commission in the first instance.’”<sup>140</sup> Given these precedents, CompTel submits that the courts would affirm the Commission’s policy choice if the Commission considers competing arguments and articulates a

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(...continued)

action prospective by its very nature, to condition a license renewal in a manner that protects the statutory policy inherent in 47 U.S.C. § 310(b)(3).”)

<sup>138</sup> *City of Dallas, Texas v. FCC*, 165 F.3d. 341, 354 (5<sup>th</sup> Cir. 1999).

<sup>139</sup> *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981), *citing FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978); *FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946).

<sup>140</sup> *FCC v. WNCN Listeners Guild*, 450 U.S. at 596, *quoting FCC v. National Citizens Committee for Broadcasting*, 436 U.S. at 810.

requested authorization is consistent with the public interest, convenience and necessity.

Apart from challenging the Commission's determination that granting Bell authorization is consistent with the public interest, convenience and necessity, Bell Atlantic<sup>141</sup> initial matter, Bell Atlantic would have no incentive to challenge the Commission's authority to impose these conditions if a court affirms the Commission's judgment regarding how the public application outright if it accepted Bell Atlantic's argument that the Commission exceeded its authority by imposing the conditions.

More importantly, however, Bell Atlantic would have no legal basis to challenge the Commission's authority to impose these or any other conditions pursuant to Sections 154(i), authority to impose conditions on the grant of applications is well-established, and granting Bell Atlantic's application subject to these conditions would in no way "limit or extend the terms

Bell Atlantic, and not generally applicable rules or regulations, the Commission need not initiate a separate notice and comment proceeding in order to grant the Bell Atlantic application subject

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<sup>141</sup> CompTel notes that because the conditions would apply only to Bell Atlantic and would history of Bell Atlantic's behavior, and the specific conditions of the New York market, no other parties would have standing to challenge the imposition of these conditions. As explained in the previous section, Section 271 prohibits the Commission from public interest, convenience and necessity.

to compliance with them. In any event, the proposed conditions – unlike the checklist requirements – will have absolutely no effect on Bell Atlantic if it complies with Section 271 and keeps the promises it made in its application.<sup>143</sup> The conditions increase the burden on Bell Atlantic only if it violates Section 271 and the performance commitments it made in its application.<sup>144</sup>

### **1. Self-Executing Remedies**

CompTel urges the Commission to impose the proposed self-executing remedies. These remedies should be triggered by bright-line measurements designed to ensure that Bell Atlantic promptly sends order confirmations, performs scheduled cutovers at the appointed time, etc. The Commission has already recognized that “the establishment of substantive standards or ‘bright-line’ tests could assist in expediting the ultimate disposition of complaints invoking the 90-day statutory resolution.”<sup>145</sup> The Commission should clearly define the triggering event in order to eliminate controversy over whether a self-executing remedy has in fact been triggered.<sup>146</sup>

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<sup>143</sup> Limiting or extending the terms of the competitive checklist, in sharp contrast to imposing consequences for failure to fulfill these obligations, would increase or decrease the “performance” burden of Bell Atlantic independent of whatever enforcement measures are imposed.

<sup>144</sup> Although the Commission may not “limit or extend the terms of the competitive checklist,” it has a statutory duty to determine what minimum performance measurements are necessary to prove compliance with Section 271. Bell Atlantic may also commit to exceeding the minimum requirements of Section 271, which would subject BA-NY to enforcement proceedings for violating these commitments even when the same performance might not be a violation of Section 271 in the absence of the commitments.

<sup>145</sup> *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22068.

<sup>146</sup> *See Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, 12 FCC Rcd 22497, ¶ 278 (1997) (“[T]he Commission has considerable discretion to tailor sanctions to the individual circumstances of a particular violation.”).

When a triggering event occurs, the CLEC should send written notification to Bell Atlantic,<sup>147</sup> which will then immediately comply with the self-executing remedy.<sup>148</sup> If Bell Atlantic believes that the self-executing remedy should not apply due to extenuating circumstances, it may file an appeal with the Commission after complying with the self-executing remedy. If the Commission subsequently determines that the self-executing remedy was not justified due to extenuating circumstances, it can reverse the self-executing remedy and order that Bell Atlantic be made whole (refund forfeitures or payments made to other carriers).<sup>149</sup>

The Commission should condition grant of the Bell Atlantic application on compliance with the P.A.P. at both the state and the federal level. Thus, a violation of the P.A.P., which would subject Bell Atlantic to enforcement of the P.A.P. by the NY PSC, would also violate the mirror federal Plan, which would subject Bell Atlantic to enforcement of the federal Plan by the Commission. Because the mirror federal Plan would be entirely independent from the state Plan, interpretation and enforcement of the federal Plan would have no effect at the state level, and thus would not interfere with the NY PSC's interpretation and enforcement of the Plan.

The benefits of adopting a mirror federal plan are numerous. First, it would provide the Commission with a performance monitoring and enforcement framework, based on Bell Atlantic's own offer, which the Commission could oversee and supplement as needed

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<sup>147</sup> The Commission should require the CLEC to file a copy of the notification with the Commission in order to assist it in monitoring BA-NY's performance.

<sup>148</sup> *See Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, 12 FCC Rcd 22497, ¶ 159 (1997) (recognizing that the Commission has the authority "to act promptly to restrain, on a temporary or interim basis, apparent or prima facie violations of the Act and our rules and orders without resorting to Section 312 procedures.").

<sup>149</sup> *Id.*

without interfering with operation of the NY PSC. Second, it would double the payments for damages and penalties to which Bell Atlantic would be subject for violations of Section 271, which is an absolute necessity because the level of payments that Bell Atlantic has proposed is insufficient and grant of the requested authorization thus would not be consistent with the public interest, convenience and necessity.

The Commission should amend the *federal* Plan by clarifying enforcement triggers and enforcement measures, including self-executing remedies, as necessary to ensure that the requested authorization is consistent with the public interest, convenience and necessity. For example, if Bell Atlantic's score under the *federal* Plan is significantly worse than the benchmark, then Bell Atlantic should give an affected CLEC a refund in an amount equal to all charges that the CLEC billed to affected end users, which the CLEC must then pass-through to those end users. Moreover, if Bell Atlantic's score under the Plan is deficient on an industry-wide basis, then Bell Atlantic should refund all NRCs charged for the affected services during the relevant time period.

In other contexts, the Commission has attempted to remove economic incentives for unlawful behavior. For example, in its most recent order implementing its slamming rules,<sup>150</sup> the Commission stated that its goal was to take the profit out of slamming by absolving subscribers of liability for some slamming charges, and also to compensate subscribers for the confusion and inconvenience they experience as a result of being slammed.<sup>151</sup> Remedies under a

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<sup>150</sup> See *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, 14 FCC Rcd 1508 (1998).

<sup>151</sup> See, e.g., *id* at ¶ 4.

find the consequences of non-compliance palatable.

In instances of repeated failures or egregious behavior, self enforcing remedies sub-par performance. Performance assurance criteria here would use presumptions of bad faith or egregious behavior to increase (perhaps multiply) remedies to the CLEC, and perhaps would

## 2. Carrier-Initiated Remedies

be well-suited for some types of violations. Therefore, carriers will in many instances want to present violations directly to a third party for adjudication. Adjudications would include the private arbitrations, and perhaps court adjudication of interconnection violations. Under these circumstances, a violation of the Plan – which by definition gauges present compliance using benchmark designed to measure performance over time – would be prima facie evidence that Bell Atlantic is not in compliance with its authorization and therefore is subject to the appropriate enforcement measure upon which its authorization is conditioned. CompTel

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<sup>152</sup> *Ameritech Michigan Order*, 12 FCC Rcd at 20748-49, ¶  
performance monitoring (1) provides a mechanism by which to gauge present compliance

<sup>153</sup> uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but which may be contradicted by other evidence. . . . That quantum of evidence that a trier of fact is faced with conflicting evidence, it must weigh the prima facie evidence with all of the other probative evidence presented. . . . Evidence which, standing alone which it is introduced.” *Black’s Law Dictionary* <sup>th</sup> Ed. 1990).

therefore urges the Commission: (1) to establish bright-line conditions and performance measurements; (2) to announce that violations of these conditions and performance measurements will be deemed prima facie evidence in subsequent enforcement actions; and (3) to clarify the payment for damages or penalties that Bell Atlantic must pay for each type of violation.

An effective performance plan would identify activities which demonstrate bad faith, discrimination, egregious conduct, and/or presumptive failures to provide UNEs and/or interconnection. The FCC, states or arbitrators could then use these presumptions to make findings of liability, or to impose punitive damages and/or injunctive relief. For example, Bell Atlantic's failure to meet any Critical Measure performance metric twice in a three consecutive reporting periods, or three times in any six consecutive reporting periods should be deemed prima facie evidence that Bell Atlantic has breached its obligation to provide interconnection, unbundled network elements, or resale under Section 251.<sup>154</sup> A score under the Plan that is significantly below a performance metric should be deemed prima facie evidence of a failure to provide interconnection or access under Section 251. Prima facie evidence of discrimination can be provided by evidence that Bell Atlantic does not devote equivalent resources to wholesale and retail businesses. Discriminatory bonuses and incentives for executives in the wholesale and retail businesses also will constitute prima facie evidence of discrimination. Failure to respond to an interconnection request within 14 days or failure to provide opt-in under Section 252(i) within 14 days should be deemed to be bad faith by Bell Atlantic. Likewise, failure to provide collocation within the time frames specified in the *Collocation Order* will be deemed a breach of its obligation under Section 251(c)(2) to provide interconnection. Failure to provide on-time

performance over three months, for example, could be deemed prima facie evidence of bad faith performance. Or, any failure to meet a scheduled date by more than 24 hours (or any out-of-that element at all.

CompTel is not asking the Commission to shift the burden of proof. Rather,

*federal* Plan – the facts

authorization and the legal consequences therefore.<sup>155</sup>

requested authorization is consistent with the public interest, convenience and necessity because it will minimize disputes about the definition of a violation, the evidence needed to establish a

<sup>156</sup> all of which are crucial to streamline

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This evidence can be rebutted by evidence provided by Bell Atlantic that it did not breach

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*Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers* 54 (1998) (“The majority of the parties commenting on [the proposed slamming liability test] support the adoption of

for unauthorized carrier changes, but also establishes clear standards for when liability will be imposed. With these clear standards, carriers can take appropriate measures to

whether intentional or inadvertent.” ). *See also Implementation of the*

*Followed When Formal Complaints Are Filed Against Common Carriers*, 12 FCC Rcd 295 (1997) (recognizing the Commission’s “discretion to effectively shift the burden of production in particular cases by directing defendant carriers to produce

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particular violation as the public interest, convenience and necessity requires. For example, if a carrier can provide evidence that its monetary damages exceed the amount *federal* plan, the carrier should be able to recover the

disputes and enable the Commission to address complaints within 90 days as Section 271 explicitly requires.

The Commission has already concluded that the burden of production with respect to an issue should shift to the BOC after the complainant has demonstrated a prima facie case that a defendant BOC has ceased to meet the conditions of entry.<sup>157</sup> Now is the time to prescribe specific elements and factors that would warrant enforcement action.<sup>158</sup> The Commission has already found that the phrase “opportunity for hearing” in Section 271(d)(6)(A) does not require a trial-type hearing before an ALJ prior to the imposition of non-forfeiture enforcement measures.<sup>159</sup> The conclusion that Section 271(d)(6)(A) does not require a trial-type hearing to be used to prosecute violations is fully supported by the precedent.<sup>160</sup> In the words of the Commission:

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<sup>157</sup> *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22072.

<sup>158</sup> *Cf. Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 22076 (1997) (“*Non-Accounting Safeguards Order*”) (“As to non-forfeiture enforcement measures, we conclude that it is impractical, at this point in time, to prescribe the specific elements and factors that would warrant issuance of an order to “correct the deficiency” or an order suspending or revoking a BOC’s approval to provide in-region interLATA service.”).

<sup>159</sup> *Non-Accounting Safeguards Order* at 22077 (finding that regardless whether the Commission is imposing a non-forfeiture sanction in a proceeding commenced on its own motion or in the context of a complaint proceeding, the Commission can satisfy the hearing requirement of Section 271(d)(6)(A) through written submissions rather than oral testimony.)

<sup>160</sup> Courts have consistently interpreted the phrase “notice and opportunity for hearing” as not automatically requiring a trial-type hearing. *See, e.g., New England Fuel Inst. v. Economic Regulatory Admin.*, 875 F.2d 882, 886-87 (D.C. Cir. 1989) (holding that in the absence of disputed material facts, a trial-type hearing is not necessary despite statutory provision requiring “opportunity for hearing”); *Sierra Association for Environment v. FERC*, 744 F.2d 661, 663-64 (9<sup>th</sup> Cir. 1984) (holding that 5 U.S.C. §§ 554-557 does not automatically require a trial-type hearing and that agencies may exercise discretion in not holding formal evidentiary hearings); *Buttrey v. United States*, 690 F.2d 1170, 1174-75 (5<sup>th</sup> Cir. 1982) (interpreting statute which provides that agency “may issue permits, after notice and opportunity for public hearings” as not requiring trial-type hearings).

Federal agencies have wide discretion to fashion procedures that

has recognized that “[the] ultimate choice of procedures (in the absence of a statutory mandate) is left to the discretion of the

Commission with flexibility to determine the necessary procedural requirements “as will best conduce to the proper dispatch of

such procedures are consistent with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559. The

[5 U.S.C.] §§ 554, 556, and 557 is always dependent on § 554(a): ‘This Section applies . . . in every case of adjudication required by *on the record* after opportunity for an

determination on the record, §§ 554, 556, and 557 do not apply.’”<sup>161</sup>

and therefore a trial-type hearing is not required. In the overwhelming majority of cases, Bell Atlantic can adequately protect its rights on a paper record if it disputes the facts relied upon by a particular case.<sup>162</sup>

the dispute. Therefore, the proposed enforcement measures are within the Commission’s authority to adopt.

### 3. Agency-Initiated Remedies

In this category falls all of a regulator’s traditional enforcement mechanisms,

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3 FCC Rcd 7247, 7254, ¶ 46 (1998) *citing Bell Tel. Co. of Pa. v. FCC*, 503 F.2d 422 U.S. 1026 (1975); *United States v. Florida*, 410 U.S. 224, 244-46 (1973); 2 K. Davis, *Administrative Law* Treatise, § <sup>nd</sup> ed. 1979); *Resources Defense Council, Inc.*, 435 U.S. 519 (1978) (“even apart from the APA, the *ITT World Communications, Inc. v. FCC*, 595 F.2d 897, 900-01 (2<sup>nd</sup> Cir. 1979); *Comark* 104 FCC 2d 451, 460-61 at n.20 (1985).

including forfeitures, Show Cause proceedings, proceedings to suspend Bell Atlantic's authority to provide in-region interLATA services, (and/or of marketing activities) and 271 revocation procedures. As with carrier-initiated remedies, a violation of the *federal* Plan would be prima facie evidence that Bell Atlantic is not in compliance with its authorization and therefore is subject to the appropriate enforcement measure upon which its authorization is conditioned. As explained above, CompTel therefore urges the Commission: (1) to establish bright-line conditions and performance measurements; (2) to announce that violations of these conditions and performance measurements will be deemed prima facie evidence in subsequent enforcement actions; and (3) to clarify the consequences for each type of violation if the agency initiates an enforcement proceeding.

Bell Atlantic's failure to meet any Critical Measure performance metric on an industry-wide basis twice in any three consecutive reporting periods, or three times in any six consecutive reporting periods should be deemed prima facie evidence that Bell Atlantic has breached its obligation to provide interconnection, unbundled network elements, or resale under Section 251. Upon the occurrence of such an event, Bell Atlantic should be required to submit a performance improvement plan to the Common Carrier Bureau, and the Bureau should submit public comment on the improvement plan. (The Common Carrier Bureau could be delegated the authority to require submission of the plan to the state commission.)

If Bell Atlantic's score under the Plan is significantly below a performance metric, an agency with regulatory authority may begin forfeiture proceedings against Bell Atlantic. Each day under the reporting period should be deemed a separate event subject to the

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(...continued)

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The Commission can also initiate a proceeding if the paper record is inadequate to resolve a dispute.

forfeiture authority of the agency.<sup>163</sup> Moreover, if a BOC fails to provide collocation within specified intervals or if it is found to have unreasonably refused a collocation request, the agency could initiate forfeiture proceedings against the BOC. Systematic problems, such as a failure to devote resources to the wholesale product, could generate Show Cause proceedings and specific future relief.

Finally, whenever wholesale provisioning problems are either so egregious or pervasive as to be, in the Commission's opinion – industry affecting, such that the public policy goals of Congress may be jeopardized, the FCC should take whatever action it needs to implement the goals of Congress, including, possibly, consideration of a structural separation between Bell Atlantic's wholesale and retail businesses.

None of these recommendations would require the Commission to amend the rules for its forfeiture, suspension or revocation proceedings. Rather, these recommendations would merely expedite the resolution of complaints as required by Section 271 by clarify the consequences that will follow if Bell Atlantic violates the terms and conditions of its authorization.

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<sup>163</sup> Each day of a continuing violation is considered a separate violation for purposes of computing a forfeiture. *See American Beeper Company of the Virgin Islands*, Notice of Apparent Liability for Forfeiture, 1999 FCC Lexis 3612 (July 29, 1999), *citing Eastern Carolina Broadcasting, Inc.*, 6 FCC Rcd 6154, 6155 (1991).

**CONCLUSION**

For the foregoing reasons, Bell Atlantic's application does not yet satisfy the standards of Section 271. Therefore, the Commission is unable to make the findings required under Section 271(d)(3), and must deny the application.

Respectfully submitted,

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