

**Before the
NEW YORK PUBLIC SERVICE COMMISSION**

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

**BRIEF OF
THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION**

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The Competitive Telecommunications Association (“CompTel”) hereby files its brief on Bell Atlantic-New York, Inc.’s, (“BA-NY’s”) application for interLATA authority in New York.

INTRODUCTION AND SUMMARY

Approval of BA-NY’s plea for interLATA authority is still premature. The record makes clear that significant problems remain with BA-NY’s provisioning of nondiscriminatory access to interconnection arrangements, unbundled network elements (“UNEs”), and operations support systems (“OSS”). In addition, the Pre-filing Statement does not provide the basis for compliance with Section 271 or a conclusion that the local market is “irreversibly open to competition” (the Department of Justice test). By denying CLECs full access to all of the entry methods mandated by the 1996 Act, the Pre-filing Statement violates the Act, the Supreme Court’s decision in AT&T Corp. v. Iowa Utilities Board, and the FCC’s rules. 1/

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

In this brief, CompTel has addressed, together, both outstanding legal issues and BA-NY's compliance with specific checklist items. ^{2/} CompTel focuses on the following key subjects: (1) the need to ensure full compliance with Section 271 and permit all entry strategies; (2) UNE combinations, including the UNE platform; (3) Expanded Extended Link ("EEL"); (4) collocation; (5) OSS; (6) unbundled local loops; and (7) performance remedies. CompTel relies on other parties to address additional problems in BA-NY's draft Section 271 application.

I. THE COMMISSION MUST ENSURE A 271 ENTRY MODEL THAT DEMONSTRATES FULL CHECKLIST COMPLIANCE AND PERMITS ALL ENTRY STRATEGIES AUTHORIZED BY THE ACT.

This Commission has been a leader in its efforts to open up the local market to competition. It has invested enormous resources in the tedious process of bringing BA-NY into compliance with its statutory obligations. Perhaps most important, the Commission has insisted on a thorough third-party test of BA-NY's OSS.

Because New York has been the leader in these efforts, BA-NY's Section 271 compliance showing, if blessed by this Commission, will be viewed as a model for other states to follow. The Commission must therefore be careful not to settle for less than full compliance with every checklist item, and must insist not only on promises to comply, but also on demonstrated actual compliance. The Commission also must recognize that the BA-NY Pre-filing Statement does not meet the requirements of the Act or the FCC's rules, and thus cannot be the yardstick by which the Commission measures BA-NY's Section 271 compliance.

BA-NY continues to fall short of Section 271 in many areas, including:

^{2/} See Letter Ruling of Hon. Eleanor Stein, August 3, 1999, in Case 97-C-0271.

- Restrictions on the use of UNE combinations that limit CLECs from using entry strategies that can bring rapid and widespread local competition to all New Yorkers and that violate the Act and the Supreme Court's decision.
- Restrictions on the use of EEL that restrict CLECs' ability to expand the availability of advanced, high speed data services at competitive prices to consumers throughout New York State.
- Failure to fully implement the FCC's cageless collocation rules, leaving it in doubt whether BA-NY's cageless offerings are even an improvement on the cage-based offerings it made available before, and limiting this entry strategy.

BA-NY's failure to meet the Section 271 checklist will have serious implications for vigorous, widespread and long-term competition in New York, and will be particularly harmful to CompTel's membership, which represents a true cross-section of the competitive local industry. CompTel's members range from the smallest to among the largest CLECs. Many own local facilities and have deployed substantial local networks in New York. Others are employing a strategy of using UNEs, alone or in combination with their own network facilities. Others employ service resale. Most, if not all, employ a combination of these strategies.

What all these companies share is a continuing dependence on interconnection with and lease of the incumbent local exchange network in order to be local telephone companies themselves. CompTel urges this Commission to encourage and promote *all* local entry strategies, without prejudging which are most likely to succeed in the marketplace and which are most likely to enable competitors to meet customer demands. By restricting the ability of CLECs to employ some of these strategies, and by limiting their ability to use these strategies to provide any telecommunications service, BA-NY's showing falls short of what the Act requires.

II. BA-NY'S RESTRICTIONS ON UNE COMBINATIONS ARE IMPERMISSIBLE UNDER THE SUPREME COURT'S DECISION.

A. The Restrictions on the Availability of UNE Combinations Are Unlawful.

The restrictions on the UNE platform in the Pre-filing Statement violate the FCC rules expressly reinstated by the United States Supreme Court. ^{3/} The Supreme Court affirmed the FCC's rule requiring incumbent local exchange carriers ("ILECs") to provide network elements in their combined form. ^{4/}

BA-NY has nevertheless asserted that "the state of law and regulation surrounding combinations of UNEs is in flux" ^{5/} and that "[w]hen the FCC completes its remand proceedings, BA-NY will conform its offerings accordingly." ^{6/} BA-NY seems to believe that the FCC's re-evaluation of the UNEs that ILECs must make available under Section 251(d)(2) of the Act ^{7/}

^{3/} AT&T Corp., 119 S.Ct. 721. See Case No. 97-C-0271, Affidavit of Carol Ann Bischoff on Behalf of CompTel (filed April 27, 1999) ("CompTel April 1999 Affidavit"), at 13-17; Case Nos. 98-C-0690, 95-C-0657, Memorandum of Law of CompTel (filed March 4, 1999) ("CompTel Direct Access Memorandum of Law"), at 7-10; Case No. 98-C-0690, CompTel Petition for Rehearing (filed Dec. 22, 1999), at 4-15; Case No. 97-C-0271, CompTel Response to Bell Atlantic-New York's September 11, 1998, Affidavit Updating its Section 271 Checklist Performance (filed Sep. 25, 1998), at 2; Case No. 98-C-0690, CompTel Reply Brief on Exceptions (filed Aug. 31, 1998), at 5-9, 22; Case Nos. 95-C-0657, 94-C-0095, 91-C-1174, CompTel Opposition to New York Telephone Company's June 23 Tariff Filing (filed Aug. 24, 1998), at 3-5; Case No. 98-C-0690, CompTel Brief on Exceptions (filed Aug. 18, 1998), at 12-21; Case No. 98-C-0960, CompTel Comments (filed June 17, 1999), at 2-6; Case No. 97-C-0271, CompTel Comments (filed March 23, 1999), at 2-9.

^{4/} AT&T Corp., 119 S.Ct. at 736-38, upholding 47 C.F.R. § 315(b).

^{5/} Joint Supplemental Affidavit of Donald E. Albert, Julie A. Canny, George S. Dowell, Karen Maguire and Patrick J. Stevens on Behalf of Bell Atlantic - New York, Case No. 97-C-0271 (filed April 13, 1999) at 35, 109-11 ("April 13 Filing"), at 35.

^{6/} Id.

^{7/} Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Second Further Notice of Proposed Rulemaking, CC Docket No. 9698, FCC 99-70 (rel. April 16, 1999) ("FCC UNE Remand FNPRM").

somehow changes both the Supreme Court's holding that ILECs must make UNEs available in combination, and the UNEs that ILECs must make available to satisfy Section 271.

BA-NY entirely misses the point of the Supreme Court's decision. The Supreme Court remanded the question of what network elements were mandatory under Section 251, but it *settled* the question of whether those elements must be provided in their combined form. 8/

If BA-NY wants to satisfy Section 271, it must provide all of the UNEs on the FCC's original Rule 319 list -- and thus the UNE-platform -- without restriction, regardless of the outcome of the FCC's UNE Remand Proceeding. 9/ This is so first, because Section 271 requires BA-NY to provide competitors with five of the seven UNEs in the FCC's mandatory list. 10/ Second, BA-NY also must provide CLECs with the remaining UNEs in the FCC's original mandatory list -- namely OSS and the network interface device ("NID"). The FCC's rules require BA-NY to provide OSS whenever a CLEC purchases a UNE, regardless of whether OSS is itself

8/ The Commission acknowledged as much in its recent Opinion No. 99-8 regarding the obligations of Frontier Telephone of Rochester, Inc., under various market-opening provisions of the 1996 Act. There, the Commission stated that "because the Supreme Court decision upheld the FCC's Rule 51.315(b), which prohibits the separation of network elements that incumbent LECs currently combine, FTR must fully comply with those requirements once the FCC completes its remand of Rule 51.319." Case Nos. 95-C-0657, 94-C-0095, 91-C-1174, 93-C-0033, 93-C-0103, 95-C-0725, 97-C-1738, 98-C-1375, 99-C-0936, Opinion and Order on Unbundled Network Elements, Thoroughfare Guide, and Legal Services Petition, Opinion No. 99-8 (Issued and Effective July 22, 1999), at 36. The Commission also acknowledged that the Supreme Court's decision impacts the Commission's earlier decision in Opinion No. 98-18 in which the Commission approved a menu of options that BA-NY offers for combining network elements. The Commission acknowledged that it is still in the process of considering the petitions for reconsideration of Opinion No. 98-18 filed by CompTel and other parties, as well as the memoranda of law filed by CompTel and other parties regarding the implications of the Supreme Court's decision on Opinion No. 98-18. Id. at 35-36.

9/ CompTel April 1999 Affidavit at 14-16; CompTel Direct Access Memorandum of Law at 7-10.

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

considered a UNE. ^{11/} BA-NY also must provide the NID because the NID is generally offered on an integrated basis with the loop, and thus is generally part of the loop. ^{12/}

By limiting the ability of CLECs to purchase the UNE platform, BA-NY is effectively stating that for certain services, facilities, customers, and locations, and after a certain period of time, BA-NY will provide UNEs only after first separating them from UNEs. As the Supreme Court has made clear, however, the *only* situation in which an ILEC may separate combinations of UNEs is upon request by a CLEC.^{13/} Thus, BA-NY's insistence on separating UNEs in certain circumstances is flatly impermissible under the Supreme Court's decision.

B. The Restrictions Would Hinder the Development of Broad Based Competition for Both Residential and Business Customers.

The experience of competitors also demonstrates, and CompTel has made clear, that competition for all classes of customers -- both business and residential -- cannot develop if

^{11/} 47 C.F.R. § 51.313(c).

^{12/} In addition, the NID would satisfy any reasonable reading of the "necessary and impair" standards in Section 251(d)(2). 47 U.S.C. § 251(d)(2). BA-NY has agreed, moreover, to provide competitors with all of the UNEs in the FCC's original list pending completion of the FCC's remand proceeding. Letter from Edward D. Young, III, Sr. Vice President and General Counsel, Bell Atlantic, to Lawrence Strickling, Chief, FCC Common Carrier Bureau, February 8, 1999. Although BA-NY has sent a "clarification letter" to the FCC stating that it has not agreed to make network elements available in combination (Letter from Edward D. Young, III, Sr. Vice President and General Counsel, Bell Atlantic, to Lawrence Strickling, Chief, FCC Common Carrier Bureau, March 25, 1999), the Supreme Court's holding does not give BA-NY this option.

^{13/} AT&T Corp., 119 S.Ct. at 736-38; 47 U.S.C. § 51.315(b); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 15647, para. 293 ("Local Competition Order"), vacated in part sub nom. Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), rev'd in part and remanded in part sub nom. AT&T Corp., 119 S.Ct. 721.

BA-NY is permitted to limit CLECs' access to UNE combinations. ^{14/} For example, RCN Telecom Services of New York, Inc., a facilities-based CLEC providing service in New York, has stated that "the demands of providing mass market service . . . require" a means of obtaining UNE combinations "that will allow CLECs to provide commercially reasonable quantities of service in a timely, reliable and efficient manner." ^{15/} Restrictions on access to UNE combinations will force CLECs to rely, in many cases, on manual collocation methods, which impose discriminatory limitations, costs, difficulties, delays, and potential for service disruptions on CLECs. ^{16/} Restrictions on access to UNE combinations will thus make it difficult for CLECs to provide service on a broad basis in a commercially reasonable time-frame. ^{17/}

MCI WorldCom's experience also demonstrates that access to UNE combinations is essential for CLEC entry on a broad scale. In the first two and a half years after Congress enacted the 1996 Act, the Eighth Circuit's decision in Iowa Utilities Board v. FCC gave BA-NY grounds to prevent CLECs from obtaining access to the UNE platform in New York. During that time, all CLECs combined had signed up only 49,442 access lines for competitive local service in

^{14/} Case No. 97-C-0271, CompTel Response to BA-NY's September 11, 1998 Affidavit Updating its Section 271 Checklist Performance (filed September 25, 1998), at 2; Case No. 97-C-0271, CompTel Comments (filed March 23, 1998); Case Nos. 98-C-0690, 95-C-0657, CompTel Petition for Rehearing (filed Dec. 22, 1998), at 16-18; Case No. 98-C-0690, Case Nos. 95-C-0657, 94-C-0095 and 91-C-1174, CompTel Opposition to New York Telephone Company's Time 23 Tariff Filing (filed Aug. 24, 1998), Case No. 98-C-0690, CompTel Brief on Exceptions (filed Aug. 18, 1998), at 17-21; Case No. 98-C-0690, CompTel Comments (filed June 17, 1998), at 16-20.

^{15/} Case No. 98-C-0690, Letter in Lieu of Petition for Rehearing from Russell M. Blau and Antony Richard Petrilla, Counsel for RCN Telecom Services of New York to Debra Renner, Acting Secretary, New York Public Service Commission (dated Dec. 11, 1998), at 2.

^{16/} Id. at 1-2.

^{17/} Id. at 2.

New York employing unbundled loops with CLEC switches. 18/ In the *four months* after even the limited UNE platform offering became available in New York, by contrast, MCI WorldCom alone had signed up 75,000 customers for its UNE-platform-based local exchange service offering. 19/ Moreover, access to the UNE platform permitted MCI Worldcom to do so despite problems with BA-NY's OSS and other obstacles. 20/

Even CLECs that have some of their own facilities cannot justify installing facilities in every location in which customers demand their services. In some cases, a mix of CLEC facilities and UNE combinations is needed to serve a customer's needs. This is true, for example, with multi-location business customers and with customers that need both high-capacity and low-capacity services. Unrestricted access to UNE combinations, therefore, is essential to a CLEC's ability to compete broadly for both business and residential customers.

III. THE RESTRICTIONS ON EEL ARE UNLAWFUL AND WOULD STIFLE THE EVOLUTION OF TECHNOLOGY.

CompTel has made clear 21/ that the restrictions on BA-NY's EEL offering 22/ violate both the 1996 Act and the FCC's rules. Requiring EELs to be used primarily to transmit

18/ Responses to the FCC's Fourth Voluntary Local Competition Survey (data as of Dec. 31, 1998), at 321 (response of Bell Atlantic regarding New York), available at <www.fcc.gov/ccb/local_competition/survey4/responses>.

19/ "MCI WorldCom Claims Local Success in N.Y. Despite OSS Problems," Telecommunications Reports, June 3, 1999, at 9.

20/ Id.

21/ Case No. 97-C-0271, CompTel April 1999 Affidavit at 17-22; Case Nos. 95-C-0657, 94-C-0095, 91-C-1174, CompTel Comments Regarding Proposals for the Provision of Extended Link by Bell Atlantic-New York, Inc. (filed Nov. 12, 1998), at 1-6; Case No. 97-C-0271, CompTel Response to BA-NY's September 11, 1998 Affidavit Updating its Section 271 Checklist Performance (filed September 25, 1998), at 2; Case Nos. 95-C-0657, 94-C-0095, 91-C-1174, CompTel Opposition to New York Telephone Company's June 23 Tariff Filing (filed Aug.

local exchange traffic violates a CLEC's right under Section 251(c)(3) of the Act to use UNEs to provide *any* telecommunications service. ^{23/} Making EEL available only when it will be connected to a CLEC switch that handles local traffic violates a CLEC's right under Section 251(c)(3) to connect UNEs to its own network in any way it chooses. ^{24/} These restrictions also violate Section 51.309(a) of the FCC's rules by impairing a CLEC's ability to offer service in the manner it intends. ^{25/} In addition, these restrictions violate the nondiscrimination requirements of Section 251(c)(3) ^{26/} because BA-NY is subject to no such restrictions.

The restrictions on BA-NY's EEL offering also will limit CLECs' ability to use innovative network configurations. The FCC has made clear that an ILEC's provision of access to UNEs "must accommodate changes in technology." ^{27/} The Commission should not attempt to pigeon-hole developing methods of providing service into antiquated notions of what those methods should entail. In addition, there is no way for the Commission (or BA-NY) to monitor the services being provided by a CLEC, and it makes no sense to do so. Consumers will benefit if CLECs are allowed to use the most effective and efficient configurations technology allows.

24, 1998), at 5-6; Case No. 98-C-0960, CompTel Comments (filed June 17, 1998), at 13-16; Case No. 97-C-0271, CompTel Comments (filed March 23, 1998), at 6.

^{22/} Proceeding on Motion of the Commission to Examine Methods by Which Competitive Local Exchange Carriers Can Obtain and Combine Unbundled Network Elements, Order Directing Tariff Revisions, et al., Case Nos. 98-C-0690, 95-C-0657, 94-C-0095, and 91-C-1174 (issued March 24, 1999) ("EEL Order").

^{23/} 47 U.S.C. § 251(c)(3). (emphases added).

^{24/} Id.

^{25/} 47 C.F.R. § 51.309(a).

^{26/} 47 U.S.C. § 251(c)(3).

^{27/} Local Competition Order, 11 FCC Rcd at 15631-32, para. 259.

IV. **BA-NY HAS NOT DEMONSTRATED FULL COMPLIANCE WITH THE FCC'S COLLOCATION ORDER.**

The FCC has created important new requirements for ILECs in their provisioning of collocation. These include a requirement that ILECs offer a cageless collocation option that:

- allows CLECs to collocate in any unused space in the ILEC's premises, to the extent technically feasible, without requiring the construction of a room, cage, or similar structure; without requiring a separate entrance to a competitor's space; and without requiring CLECs to collocate in a room or space separate from the ILEC's equipment;
- gives CLECs direct access to their equipment without any intermediate interconnection arrangement if technically feasible; and permits CLECs to purchase collocation space in single-bay increments. 28/

The FCC also requires ILECs to provide CLECs with access to their collocated equipment at all times and without requiring a security escort. 29/

BA-NY does not satisfy these requirements. First, BA-NY continues to require security escorts for CLECs who seek access to their collocated equipment. 30/ BA-NY has the audacity to assert that the FCC's order permits BA-NY to require an escort everywhere "outside of the collocation area." 31/ The FCC's order, however, means what it says: ILECs must allow CLECs "to access their equipment 24 hours a day, seven days a week, *without requiring [] a security escort of any kind.*" 32/ If the FCC had wanted to add "within the collocation area" to

28/ Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, First Report and Order, FCC 99-48 (rel. Mar. 31, 1999) ("FCC Collocation Order"), appeal docketed, Docket Nos. 99-1176, 99-1201 (D.C. Cir. 1999), at paras. 42, 43.

29/ Id. at para. 49.

30/ Case Nos. 99-C-0715 and 95-C-0657, Response of Bell Atlantic-New York on Comments to Revisions To Collocation Tariff (filed July 27, 1999) ("BA-NY Response to Collocation Comments"), at 4, 5.

31/ Id. at 5.

32/ FCC Collocation Order at para. 49 (emphasis added).

that sentence, it would have. Moreover, if BA-NY were right, BA-NY could force a CLEC to be accompanied by an escort in every part of the central office except the single bay increment of space purchased by a CLEC. Such an interpretation would render the FCC's prohibition on escort requirements meaningless. The FCC's Collocation Order forbids *any* escort requirements.

Second, BA-NY imposes unreasonable charges on CLECs for cageless collocation security measures. 33/ The FCC made clear that charges for security measures are unreasonable and thus prohibited if they prevent cageless arrangements from being made available at a substantially lower price than cage-based arrangements. 34/ BA-NY's charges fall within this prohibition because they make it impossible for a CLEC to obtain a cageless arrangement at a substantially lower price than would be required for a cage-based arrangement. 35/ BA-NY must therefore reduce the charges it seeks to impose for security measures before it can satisfy Section 271.

Third, BA-NY offers only a 105-day provisioning time frame for cageless collocation arrangements 36/ even though it offers a 76-day provisioning interval for cage-based collocation arrangements. 37/ Cageless collocation arrangements involve no cage construction and require far less conditioning than cage-based collocation arrangements. Thus, BA-NY's provisioning intervals for cageless arrangements should be significantly *shorter* than the 76-day

33/ See, e.g., Case Nos. 99-C-0715 and 95-C-0657, Letter from Rodney L. Joyce, Network Access Solutions Corporation, to the Honorable Deborah Renner, Acting Secretary, New York Public Service Commission (filed July 27, 1999) ("Network Access Solutions Letter"), at 1-2.

34/ See FCC Collocation Order at paras. 42, 48-49; Network Access Solutions Letter at 1-2.

35/ Network Access Solutions Letter at 2.

36/ Tariff P.S.C. No. 914 -- Telephone ("Tariff 914") § 5.8.4(C).

37/ Tariff 914 § 5.1.4(C).

interval for cage-based arrangements. Indeed, BA-NY admits that the provisioning intervals offered by other Regional Bell Operating Companies (“RBOCs”) for cageless arrangements are less than 76 days. ^{38/} BA-NY, therefore, must also make its cageless provisioning intervals substantially shorter than 76 days if it wants to satisfy Section 271.

In sum, to satisfy Section 271, BA-NY must both bring its collocation offerings into compliance with the FCC’s Collocation Order, and show, through real-world provisioning of cageless arrangements, that it is actually providing collocation in conformance with that order.

V. BA-NY’S OSS AND PROVISIONING OF UNES AND INTERCONNECTION ARRANGEMENTS REMAIN INADEQUATE.

A. BA-NY Does Not Provide CLECs with Parity of Access to UNEs or Interconnection Arrangements.

As the Attorney General stated in a recent letter, BA-NY is not providing CLECs with parity of access to UNEs and interconnection arrangements. ^{39/} This lack of parity is particularly evident in the Carrier-to-Carrier Performance Standards report for June 1999. This report reveals that 184 measurements of BA-NY’s performance show an unacceptable Z-Score that is at or below negative 2.00. ^{40/}

^{38/} BA-NY Response to Collocation Comments at 11.

^{39/} Letter from Charlie Donaldson, Assistant Attorney General, State of New York, to the Honorable Eleanor Stein and the Honorable Jaclyn Brilling, Administrative Law Judges, New York Department of Public Service (dated Aug. 3, 1999) (“Attorney General - Status of the Record as of Aug. 3, 1999”), at 1, 2.

^{40/} Id. at 2. Many of these metrics, moreover, relate to services critical to the ability of CLECs to compete in the local exchange market. Id. In particular, the metrics for the provisioning of UNE combinations and unbundled switching consistently show discriminatory treatment of CLECs in areas such as average completion intervals and percentage completed in one day and two days. Letter from Harry M. Davidow, Chief Regulatory Counsel, New York, to the Honorable Eleanor Stein, Administrative Law Judge, New York Department of Public Service (dated Aug. 3, 1999) (“AT&T Evidence Summary - July 26-30 Hearings”), at 2.

B. BA-NY Still Does Not Provide CLECs with Nondiscriminatory OSS.

In addition, KPMG's Final Report, issued August 6, 1999, shows that BA-NY has failed to correct many of the deficiencies in its OSS. With respect to Parity of Performance, for example, KPMG stated that BA-NY "did not meet the standard of parity set forth in the primary provisioning metrics and for many of the sub-metrics." ^{41/} With respect to service quality, KPMG stated that "on several occasions [it] believed [it] received better treatment than a normal CLEC." ^{42/} KPMG added that "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" that KPMG received. ^{43/} With respect to Release Management, KPMG stated that the quality of the software and documentation provided by BA-NY to operate the EDI interfaces "still falls short of that required by a CLEC in a production environment." ^{44/} KPMG's Final Report also shows

^{41/} KPMG Final Report (issued Aug. 6, 1999) ("KPMG Final Report"), Test Cross-references at P8-3.5.

^{42/} Id. at Executive Summary, Section 1.2.

^{43/} Id.

^{44/} Id. at Executive Summary, Section 1.3. KPMG also was not satisfied with BA-NY's performance on the change management process for BA-NY-initiated changes because BA-NY did not consistently meet the established intervals (id., Test Cross-references at R1-6), and because documentation regarding proposed changes had "not been provided to CLECs on a timely and consistent basis." See id. and Exception 6. In addition, KPMG stated that it had found a lack of parity in the Maintenance and Repair process that "causes CLEC customers to be served more poorly than BA-NY retail customers" and that KPMG had not seen any evidence that BA-NY had taken steps to correct this problem. Id., Test Cross-references at M5-2. KPMG also was not satisfied with BA-NY's Help Desk response times and documentation. Id., Test Cross-references at P9-16, Exception 45.

that several OSS issues remain unresolved. For example, KPMG was not able to find that the new process for carrier-to-carrier quality assurance testing “fully satisfies the test criteria.” ^{45/}

BA-NY’s continuing failure to produce a satisfactory report under the Carrier-to-Carrier Performance Standards and to get a clean report from KPMG highlights the need not only for re-testing of the problem areas in BA-NY’s OSS once BA-NY has corrected those problems, but also the need for an additional four months of data from actual commercial usage of BA-NY’s OSS following final completion of all testing and re-testing of BA-NY’s OSS. ^{46/} Data from actual commercial usage following the completion of all OSS testing is necessary to ensure that the OSS BA-NY provides to CLECs is actually equal in quality to the OSS that BA-NY provides to itself when service is provided to real customers, over live lines, at commercial volumes. ^{47/} Such data also is needed to ensure that the OSS BA-NY provides to CLECs is equally operable for both large and small CLECs.

Once BA-NY obtains in-region interLATA authority, BA-NY will be able to convert large volumes of customers rapidly using the software-based primary interexchange carrier (“PIC”) process in the long distance market. Combined with BA-NY’s ownership of the local network, this ability will make it possible for BA-NY to offer one-stop shopping packages of

^{45/} Id., Test Cross-references at P1-1, P1-2; Exceptions 21 & 22. KPMG also did not re-test and thus was not able to say whether BA-NY had corrected the problems it had found with BA-NY’s delivery of pre-order responses in a timely manner. Id., Test Cross-references at P5-3. With respect to New Entrant Certification, moreover, KPMG stated that BA-NY had no meaningful certification process at the beginning of the testing process and that while BA-NY had created a new process for new entrant certification, KPMG was “not able to actually test the new entrant process.” Id. at Executive Summary, Section 1.4.

^{46/} CompTel April 1999 Affidavit at 7, para. 16.

^{47/} See 47 C.F.R. § 51.312(b); Local Competition Order, 11 FCC Rcd 15499, 15658, para. 312.

local and long distance services to large numbers of customers almost immediately after obtaining interLATA authority. CLECs, by contrast, will not be able to convert commercial volumes of customers quickly if the OSS available from BA-NY remains inadequate. Consequently, CLECs will not be able to match BA-NY's one-stop shopping service offerings.

The Commission, therefore, cannot issue a positive recommendation on BA-NY's compliance with the competitive checklist until BA-NY can produce satisfactory reports under the Carrier-to-Carrier Performance Standards, a clean OSS test report, and four months of data from actual commercial usage showing satisfactory performance of its OSS.

VI. BA-NY DOES NOT PROVIDE ACCESS TO LOCAL LOOPS IN COMPLIANCE WITH CHECKLIST ITEMS (II) AND (IV).

The record in this proceeding demonstrates that BA-NY also does not provide CLECs with unbundled local loops as required by Checklist Items (ii) and (iv) in Section 271.

A. Hot Cuts

One critical deficiency in BA-NY's loop provisioning is BA-NY's provisioning of "hot cuts." For example, BA-NY has consistently failed to follow its own hot cut procedures. These on-going failures cause cuts to be unsuccessful and thus cause service outages. ^{48/} In addition, when BA-NY's failure to follow its own procedures causes BA-NY to give CLECs short notice of provisioning problems, CLECs often must change their ordering due date, thus increasing CLEC costs and preventing CLECs from meeting customer expectations. ^{49/}

^{48/} Letter from Curtis L. Groves, Attorney, Northern Region Public Policy, MCI Worldcom, Inc., to the Honorable Eleanor Stein and Jaclyn Brilling (dated Aug. 3, 1999) ("MCI Worldcom Summation of July 27-30 Technical Conference"), at 2.

^{49/} AT&T Evidence Summary - July 26-30 Hearings at 1.

BA-NY also concedes that 30 to 40 percent of BA-NY's LSRCs for hot cut loop orders have been inaccurate. 50/ In addition, the record shows that BA-NY provisioning errors caused loops to be left inoperable in 15 percent, 17 percent, and 13 percent, respectively, of the hot cut loop orders that BA-NY actually attempted to cutover to AT&T. 51/ Other hot cut provisioning problems include problems with pre-wiring and dial-tone checks related to the "Due Date Minus Two" that BA-NY has committed to make. 52/ BA-NY also fails to give CLECs important information in provisioning hot-cuts and new loops thus forcing CLECs to expend additional time and effort in order to obtain successful cutovers. 53/

More generally, the record shows that between March 23, 1999, and July 16, 1999, BA-NY was responsible for significant loss of dial tone for hot cuts performed by BA-NY. 54/ This very serious problem, moreover, remains unresolved because KPMG did not re-test loop provisioning beyond observing a limited number of central office installations. 55/

B. xDSL Loops

Another major deficiency in BA-NY's loop provisioning is its provisioning of xDSL loops. First, BA-NY's provisioning of xDSL-*capable* loops is inadequate. ("xDSL-

50/ Id. AT&T's data show that an even higher percentage -- 51 to 63 percent -- of BA-NY's LSRCs for hot cut loop orders have been inaccurate or incomplete. Id.

51/ Id.

52/ KPMG Final Report at P3-22, P3-24; MCI Worldcom Summation of July 27-30 Technical Conference at 2.

53/ AT&T Evidence Summary - July 26-30 Hearings at 1; MCI Worldcom Summation of July 27-30 Technical Conference at 2. BA-NY fails to give CLECs information such as telephone numbers, cable and pair information, IDLC loop information, and demarcation information. Id.

54/ Attorney General - Status of the Record as of Aug. 3, 1999, at 2.

55/ Id.

capable” loops are loops conditioned for connection to a CLEC’s DSLAM). BA-NY’s loop qualification database contains information from only 24 central offices in New York and does not contain all the information necessary to determine whether loops are xDSL capable. 56/ In addition, BA-NY has proposed unsupported non-recurring charges which could raise the price of a 2-wire xDSL-capable loop to more than \$4,000. 57/

Second, BA-NY unlawfully refuses to provide CLECs with access to xDSL-*equipped* loops. 58/ “xDSL-equipped” loops are simply another type of loop -- one that already has been equipped by the ILEC with the capability to provide xDSL services (because the ILEC has already connected the DSLAM). CLECs need access to xDSL-equipped loops for the same reasons they need access to conventional loops. 59/ Indeed, CLECs have a right to purchase xDSL-equipped loops. This is so, first, because UNEs include all the features, functions, and capabilities of the ILECs’ network facilities or equipment, as the Supreme Court has held and as the FCC’s rules provide. 60/ Second, BA-NY must provide access to its local loops under Section 271. 61/ Finally, as the FCC has concluded, Section 251 of the Act applies equally to UNEs used in the provision of advanced services as to UNEs used in the provision of

56/ MCI Worldcom Summation of July 27-30 Technical Conference at 2.

57/ Id.

58/ Id.

59/ CompTel has argued in the FCC’s UNE Remand Proceeding that xDSL-equipped loops would satisfy the test for mandatory network elements for all ILECs under any reasonable reading of the “necessary” and “impair” standards of Section 251(d)(2). FCC UNE Remand FNPRM, Comments of CompTel at 31-35.

60/ AT&T Corp., 119 S.Ct. at 734, affirming 47 C.F.R. § 51.5 (*Network element*).

61/ 47 U.S.C. § 271(c)(2)(B)(iv).

conventional services. ^{62/} To satisfy Section 271, therefore, BA-NY must offer, on a full and unrestricted basis, both xDSL-capable and xDSL-equipped loops.

VII. BA-NY'S PERFORMANCE ASSURANCE PLAN REMAINS INADEQUATE.

BA-NY's Performance Assurance Plan remains inadequate for the reasons already identified by CompTel and other parties in this proceeding. ^{63/} First, the remedies in BA-NY's proposal consist only of bill credits and do not create sufficiently large financial penalties. In addition, BA-NY's proposed remedies discriminate among entry methods, downplay important performance standards, do not sufficiently disaggregate performance measurements, and permit excessive non-compliance with performance standards. ^{64/}

It is essential that the Commission establish effective performance remedies *before* endorsing BA-NY's Section 271 application. This is so because the Department of Justice's "irreversibly open to competition" standard cannot be met until the Commission establishes an effective set of remedies that will deter BA-NY noncompliance with Section 271 and the other

^{62/} See Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, et al., Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188 (rel. Aug. 7, 1998) ("FCC Advanced Services Order") at paras. 11, 35, 40, 49, appeal docketed, Docket No. 98-1410 (D.C. Cir. 1998). The FCC has sought a voluntary remand of this order "to allow the FCC to consider further, on its own motion, the issues raised in the [petitioner's] brief." Motion of Federal Communications Commission for Remand to Consider Issues," filed June 22, 1999, at 1. The Commission also has opposed US West's request that the Advanced Services Order be vacated while the FCC considers any voluntary remand. To our knowledge, the Court has not yet acted on the FCC's motion.

^{63/} CompTel April 1999 Affidavit at 8-9.

^{64/} Id.; see also, e.g., Case No. 97-C-0271, MCI WorldCom's Comments on Bell Atlantic-New York's Petition for Approval of the Performance Assurance Plan and Change Control Assurance Plan (filed July 16, 1999); Case No. 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 (filed July 23, 1999).

market-opening provisions of the 1996 Act. ^{65/} Once BA-NY receives interLATA authority in New York, BA-NY will have an incentive *not* to comply with Section 271. It is critical, therefore, that the Commission reject BA-NY's Performance Assurance Plan and instead establish effective performance remedies that will:

- consist of financial remedies paid to CLECs, not bill credits;
- be substantial enough to ensure compliance with the performance standards prescribed by this Commission and the FCC and provide financial compensation to affected CLECs that goes beyond mere restitution and addresses additional damage suffered by CLECs, such as loss of customers, loss of reputation, loss of revenues, and a loss of ability to win new customers;
- be absorbed by BA-NY, not passed on to ratepayers; and
- impose financial remedies that are escalated and categorized, or tiered, to take into account extreme non-compliance, extended periods of non-compliance, and noncompliance at industry-wide, as well as CLEC-specific, levels.

In addition, the Commission should consider adopting market structure remedies for severe non-compliance, such as a requirement that BA-NY must structurally separate its network and retail service operations. The Commission cannot endorse BA-NY's Section 271 application until it has established performance remedies that incorporate these elements.

CONCLUSION

For the foregoing reasons, the Commission should reject BA-NY's application for interLATA authority in New York.

Respectfully submitted,

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^{65/} E.g., Second Application by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 98-121, Evaluation of the United States Department of Justice (filed April 19, 1998), at 1.

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