Before the
NEW YORK PUBLIC SERVICE COMMISSION

Petition of New York Telephone Company for Approval of its Statement of Generally Available Terms and Conditions Pursuant to Section 252 of the Telecommunications Act of 1996 and Draft Filing of Petition for InterLATA Entry Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of New York	)	Case No. 97-C-0271
Petition filed by Bell Atlantic-New York for Approval of a Performance Assurance Plan and Change Control Assurance Plan, in 97-C-0271.	)	Case No. 99-C-0949

COMMENTS OF
THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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October 1, 1999

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The Competitive Telecommunications Association ("CompTel") hereby files its comments on the Notice of Proposed Rulemaking ("NPRM"), issued August 30, 1999, in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

CompTel is a national industry association representing 350 competitive telecommunications service providers and suppliers. CompTel's members include nationwide companies as well as smaller, regional carriers providing local, long distance, and Internet services using a diverse mix of entry strategies. Since its inception in 1981, CompTel has advocated policies to promote the development of full and fair competition in the provision of communications services. CompTel's role in both federal and state proceedings is to ensure that companies of different sizes and with different entry strategies have a full and

equal opportunity to compete in all communications service markets. CompTel has been an active participant in Case No. 97-C-0271 and other New York proceedings.

The NPRM in this proceeding proposes to adopt, with some modifications, the petition of Bell Atlantic-New York ("BA-NY") for approval of its Performance Assurance Plan ("PAP") and Change Control Assurance Plan. 1/ CompTel focuses in these comments on the performance remedies in the proposed PAP. CompTel relies on other parties to address both other aspects of the PAP and the proposed Change Control Assurance Plan.

Even with the modifications proposed by the Commission, the PAP remains inadequate to ensure that BA-NY is satisfying the nondiscrimination requirements of Sections 251 and 271 of the Telecommunications Act of 1996 ("1996 Act"). 2/ The modified PAP will not ensure that BA-NY is providing competitors with access to unbundled network elements ("UNEs"), interconnection, collocation, and services for resale that is at parity with the access that BA-NY provides to itself and its affiliates.

This is so because the PAP fails to incorporate in its performance remedies elements that CompTel has demonstrated must be included in any performance assurance plan. 3/ Specifically, the PAP, as proposed:

1/ Case Nos. 97-C-0271, 99-C-0949, Notice of Proposed Rulemaking (Issued Aug. 30, 1999), at 1 ("NPRM")

2/ 47 U.S.C. §§ 251, 271.

3/ Case No. 97-C-0271, CompTel Brief (filed Aug. 19, 1999), at 19 ("CompTel Brief"); Case No. 97-C-0271, Affidavit of Carol Ann Bischoff on Behalf of the

(1) does not become effective until BA-NY "obtains long distance entry pursuant to Section 271" of the 1996 Act; 4/

(2) relies on bill credits, rather than financial payments, as performance remedies;

(3) does not make clear that BA-NY must absorb performance remedy payments rather than passing them through to end users or competitors;

(5) does not make sufficiently clear that the PAP applies to the provisioning of cageless collocation as well as to cage-based collocation; and

(6) permits increased levels of BA-NY noncompliance with BA-NY's provisioning obligations when BA-NY receives large order volumes.

As a result, the PAP, as proposed, would not give BA-NY an adequate incentive to comply with its obligations under this Commission's orders, the orders of the Federal Communications Commission ("FCC"), or the 1996 Act.

I. THE PAP, AS PROPOSED, MUST BECOME EFFECTIVE *BEFORE* BA-NY APPLIES FOR SECTION 271 AUTHORITY.

One initial and fundamental problem with the PAP, as proposed, is that it will not become effective until *after* BA-NY obtains interLATA entry authority. 5/ The Department of Justice has stated that in-region, interLATA entry

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Competitive Telecommunications Association (filed April 27, 1999), at 9 ("CompTel April 1999 Affidavit").

4/ NPRM at 1-2; BA-NY Petition for Approval of the Performance Assurance Plan and Change Control Assurance Plan for Bell Atlantic-New York (filed July 16, 1999) (electronic version) ("BA-NY July 16, 1999, PAP") at 11, as amended on September 24, 1999 ("BA-NY Amended PAP").

5/ Id.

by a Regional Bell Operating Company ("RBOC") should not be permitted until the local markets in a state have been "fully and irreversibly opened to competition." 6/ The "irreversibly open to competition" standard, however, cannot be met until a state commission has established and implemented both meaningful RBOC performance standards and effective enforcement mechanisms. 7/

Experience in the three years since passage of the 1996 Act shows that even the prospect of in-region, interLATA authority is not enough to achieve RBOC compliance with the 1996 Act. Close monitoring of an RBOC's compliance with performance standards, coupled with the imposition of rapid, self-effectuating performance remedies are therefore critical to ensuring that an RBOC is complying with its statutory obligations and that it will continue to do so after interLATA authority is obtained.

Once an RBOC complies with Section 271 and receives interLATA authority in a market, there will be little incentive for the RBOC to remain in compliance with either Section 271 or Section 251 of the 1996 Act. Indeed, as a competitor in the full service telecommunications market, the RBOC will have an affirmative incentive *not* to comply with Sections 251 and 271 once it receives in-region, interLATA authority.

6/ 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 Nos. 98-121, Evaluation of the United States Department of Justice (filed April 19, 1998), at 1.

7/ CompTel Brief at 18-19; CompTel April 1999 Affidavit at 8.

For these reasons, the PAP must be implemented and become fully effective *before* BA-NY can obtain Section 271 authority in New York. The Commission should thus require the PAP to become effective immediately upon approval by the Commission. The New York local exchange market cannot be considered "irreversibly open to competition" until the Commission requires this basic revision in the PAP.

II. THE PAP, AS PROPOSED, FAILS TO INCORPORATE CERTAIN FUNDAMENTAL ELEMENTS.

The PAP, as proposed, also suffers from several other fundamental flaws. CompTel demonstrated in Case No. 97-C-0271 that to ensure an RBOC's compliance with its market-opening obligations under the 1996 Act, a performance assurance plan must incorporate certain essential elements. 8/ These elements include a set of performance remedies that will create a meaningful deterrent to BA-NY noncompliance. 9/ Specifically, the performance remedies in any performance assurance plan should, among other things:

- consist of financial remedies paid to CLECs, not bill credits;
- be absorbed by the ILEC, not passed on to ratepayers or competitors;
- ensure compliance with all of an ILEC's market-opening requirements under the 1996 Act, including an ILEC's cageless collocation provisioning obligations; and
- ensure compliance with an ILEC's obligation to provide competitors with nondiscriminatory access to UNEs, interconnection, collocation, and

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8/ See CompTel Brief at 19; CompTel April 1999 Affidavit at 9.

9/ Id.

services for resale to real customers, over live lines, at commercial volumes. 10/

As discussed below, the remedies for non-compliance in the currently proposed PAP lack these basic elements. 11/ Consequently, the PAP, as proposed, would not give BA-NY an adequate incentive to comply with its obligations under this Commission's orders, the FCC's orders, or the 1996 Act.

III. BILL CREDITS ARE INADEQUATE AS PERFORMANCE REMEDIES.

The remedies in the proposed PAP are inadequate, in part, because they consist of bill credits, not financial penalties. Bill credits are inadequate as performance remedies because they do not compensate CLECs for the harms they suffer as a result of poor provisioning by incumbent local exchange carriers ("ILECs"). When an ILEC fails to adequately provide a competitor with access to UNEs, interconnection, collocation, or services for resale, that competitor will suffer not only a loss of revenues, but also more far-reaching damages. These additional damages include the loss of customers, damage to the carrier's reputation, and damage to the carrier's ability to win new customers. The receipt of future bill credits from an ILEC will not compensate a carrier for the harm it suffers as a result of an ILEC's substandard performance.

10/ CompTel has also proposed that state commissions should consider including in their performance assurance plans, market structure remedies for severe non-compliance, such as a requirement that the ILEC must structurally separate its network and retail service operations.

11/ See Summary, supra.

Moreover, if the ILEC is able to pay remedy payments into a fund, rather than to its injured competitor, it will have succeeded in its goal of deterring its competitor's ability to take customers away from it, a goal that may be worth incurring the remedy payments (since those payments do not go to the competitor). Only by requiring financial payments to the harmed competitor will the commission ensure that CLECs will receive both restitution and compensation for all the damages they suffer, and that the ILEC will be deterred from impeding its competitor's ability to provide high quality service.

IV. THE PAP FAILS TO MAKE CLEAR THAT BA-NY CANNOT PASS PERFORMANCE REMEDY PAYMENTS THROUGH TO END USERS OR COMPETITORS.

CompTel has demonstrated in Case No. 97-C-0271 that ILECs should not be permitted to recover, through rates paid by either end users or competitors (for UNEs, interconnection, collocation, or services purchased for resale), any revenue/earnings reductions that result from performance remedy payments or credits that they must make to competitors. Rather, ILECs should be required to absorb the performance remedy payments they must make. 12/

The PAP, as proposed, does not make clear that BA-NY must absorb the payments or bill credit amounts that it must pay as penalties for noncompliance with the Commission's performance standards. Indeed, the PAP, as proposed, simply does not address this issue.

12/ Id.

Even assuming that the terms of BA-NY's existing Incentive Regulatory Plan ("IRP") in New York prohibit BA-NY from recovering performance remedy payments from ratepayers or competitors, the IRP is scheduled to expire next year. Thus, there is no guarantee that such a prohibition will continue, unless it is specified in the PAP.

It is necessary to prevent the pass-through of such payments because pass-throughs would defeat the deterrent and remedial purpose of performance remedies. In addition, it is important to prevent the pass-through of such payments to competitors, as well as to end users, because to the extent BA-NY could pass such payments through to competitors, those payments ultimately would be borne by end users.

For these reasons, the Commission should include in the PAP language that expressly requires BA-NY to absorb the payments or reductions in earnings/revenues that it must make for failing to comply with the Commission's performance standards. Without this clarification, the performance remedies in the PAP could eventually become for BA-NY just another cost of doing business, which BA-NY could recover through its rates to end users and competitors.

V. THE PAP, AS PROPOSED, DOES NOT MAKE CLEAR THAT IT ALSO APPLIES TO CAGELESS COLLOCATION.

Another problem with the PAP is its failure to make clear that the performance standards and remedies it contains apply to BA-NY's provisioning of *cageless* collocation arrangements, as well as to *cage-based* collocation arrangements. The NPRM and the PAP refer only to cage-based collocation

arrangements. For example, the NPRM states that the Mode of Entry performance measures in the PAP will monitor only BA-NY's "construction of collocation *cages*." 13/ In addition, the NPRM states that the market adjustments applicable to the collocation category in the Mode of Entry mechanism are based only "upon the number of *cages* completed in the market adjustment month." 14/ Similarly, the PAP filed by BA-NY on July 16, 1999, states that the measurement units for collocation in the Mode of Entry mechanism is "*[c]ages* completed during month." 15/ Although a footnote to that statement refers to "[c]ollocation arrangements completed," 16/ it is not clear that the PAP will also monitor and impose penalties for BA-NY's noncompliance with its cageless collocation obligations.

To satisfy its obligations under the 1996 Act,17/ BA-NY must provide competitors with cageless collocation in compliance with the FCC's recent "Collocation Order" 18/ and this Commission's Order Directing Tariff Revisions in

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13/ NPRM at 5 (emphasis added).

14/ Id. at 7 (emphasis added); see also id. at 18.

15/ BA-NY July 16, 1999, PAP at 6, Amended PAP at 7 (emphasis added); Appendix E at 2 n.*;.

16/ Id. at 6 n.7; Amended PAP at 7 n.7.

17/ See 47 U.S.C. § 251(c)(6).

18/ Deployment of Wireline Services Offering Advanced Telecommunications Capability, Federal Communications Commission CC Docket No. 98-147, FCC 99-48 (rel. 98-147) ("FCC Collocation Order").

Case Nos. 99-C-0715 and 95-C-0657.19/ The FCC's Collocation Order required ILECs to make cageless collocation arrangements available to competitors because the FCC "agree[d] with commenters that the use of a caged collocation space results in the inefficient use of the limited space in a LEC premises," and because the FCC considered the "efficient use of collocation space to be crucial to the continued development of the competitive telecommunications market." 20/

Indeed, the availability of cageless collocation arrangements will make it easier, faster, and cheaper for competitors to collocate. It also will reduce the amount of space required for collocation. As a result, BA-NY's provisioning of cageless collocation arrangements in the manner required by this Commission and the FCC is critical to the ability of many CLECs to compete in New York's local exchange market.

The Commission should clarify this aspect of the currently proposed PAP. Without performance standards that are clearly applicable to BA-NY's provisioning of cageless collocation, it will be difficult to determine whether BA-NY is fulfilling its obligations in this regard. Moreover, without performance remedies that are clearly applicable to cageless collocation, the PAP will not give BA-NY an adequate incentive to comply with its cageless collocation obligations. In short, the PAP cannot be considered complete until it is modified to make clear that the

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19/ Case Nos. 99-C-0715, 95-C-0657, Order Directing Tariff Revisions (Aug. 31, 1999) ("Collocation Order").

20/ FCC Collocation Order at para. 42.

performance standards and remedies for collocation apply to BA-NY's provisioning of *cageless* collocation, as well as to BA-NY's provisioning of *cage-based* collocation.

VI. THE PAP, AS PROPOSED, WOULD PERMIT HIGHER LEVELS OF NONCOMPLIANCE WHEN BA-NY ENCOUNTERS LARGE ORDER VOLUMES.

The PAP, as proposed, also is inadequate because it would permit increased levels of BA-NY noncompliance with BA-NY's provisioning obligations when BA-NY receives large order volumes. Specifically, the NPRM explains that BA-NY has expressed concerns about its ability to provide competitors with timely order confirmations. 21/ Responding to those concerns, the NPRM tentatively concludes that an "adjustment" -- presumably a lowering -- of the standards that BA-NY must meet for this item would be appropriate "[w]hen competitive carriers submit large volumes of non-flow through orders and create significant spikes in order volumes without notifying BA-NY." 22/ Unless the source of the failure to flow-through orders is directly attributable to CLEC errors, BA-NY should be held accountable. The mere existence of large volumes of orders, or spikes in orders, or failure to notify BA-NY of an increase in orders, should not be a basis for forgiveness of BA-NY's meeting of this critical performance measure.

Permitting additional BA-NY noncompliance with performance standards when BA-NY receives large order volumes runs counter to one of BA-NY's most fundamental obligations under Sections 251 and 271 of the 1996 Act.

21/ NPRM at 17.

22/ Id. at 17-18.

That is, to provide competitors with nondiscriminatory access to UNEs, interconnection, collocation, and services for resale in the real world, at commercial volumes. Indeed, a basic purpose of any performance assurance plan is to help ensure that an ILEC will provide such nondiscriminatory access when it processes the large order volumes that are to be expected in an actual commercial setting. 23/

To comply with its obligations under the 1996 Act, BA-NY should be able to provide CLECs with access to UNEs, interconnection, collocation, and services for resale in a manner that permits competitors to convert customers at the same speed and volumes, and with the same level of quality, that exist today in the interexchange market. Once BA-NY obtains in-region, interLATA authority under Section 271, BA-NY will be able to convert large volumes of customers rapidly using the software-based primary interexchange ("PIC") process established in the long distance market. When added to BA-NY's ownership of the local exchange network, this ability will make it possible for BA-NY to offer one-stop shopping packages of local and long distance services to large numbers of customers almost immediately after obtaining interLATA authority. Competitive carriers, in contrast, will not be able to convert commercial volumes of customers quickly in the local exchange

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23/ Ensuring that BA-NY could provide nondiscriminatory access in a real-world commercial setting was also a basic purpose of the operations support system ("OSS") testing in which the Commission and the parties to Case No. 97-C-0271 have invested so much time and so many resources. Because of potential problems in real-world settings, moreover, CompTel has repeatedly emphasized in Case No. 97-C-0271 that it is impossible to accurately evaluate whether BA-NY's OSS is actually adequate to support competition in a real-world commercial setting without first obtaining data from at least four months of actual commercial usage of BA-NY's OSS. CompTel Brief at 14-15, CompTel April 1999 Affidavit at 7.

market if the Commission allows large order volumes to justify inadequate provisioning by BA-NY. Consequently, competitive carriers will not be able to match BA-NY's one-stop shopping offerings.

BA-NY has the audacity to suggest that an "adjustment" of the standards it must meet in providing order confirmations would be appropriate when BA-NY encounters large order volumes because spikes in order volumes would constitute "events beyond BA-NY's ability to reasonably control." 24/ The problem with this rationale and BA-NY's solution for it is that the effect would be to essentially excuse BA-NY from complying with its statutory obligations under real-world market conditions. In addition, by seeking relief from performance remedies on the ground that it will not be able to provide timely order confirmations when it receives large order volumes, BA-NY is essentially admitting that it will not be able to handle the order volumes that should be expected in an actual commercial setting. The 1996 Act requires BA-NY to provide competitors with nondiscriminatory access to interconnection and UNEs *in the real world*. If BA-NY cannot yet comply with those obligations, the imposition of performance remedies is particularly appropriate. Furthermore, if BA-NY cannot comply with these obligations under real-world conditions, BA-NY is not ready for interLATA authority under Section 271.

Finally, although the NPRM indicates that an adjustment would be made to the PAP's performance standards only when a CLEC submits large order

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24/ NPRM at 17.

volumes "without notifying BA-NY," 25/ a lack of notification prior to the submission of large order volumes would not justify inadequate provisioning by BA-NY. It would be unreasonable for BA-NY to expect prior notification of incoming orders in a commercial setting because a CLEC generally will submit an order as soon as it knows it has a need for the items ordered. Indeed, requiring a CLEC to delay its submission of orders until some period of time after first notifying BA-NY of an intent to submit orders likely would subject the CLEC to a loss of both customers and reputation. This kind of notification requirement would be just as unreasonable with large order volumes, moreover, because large order volumes should be expected – and encouraged – in a competitive local exchange market. Accordingly, regardless of whether BA-NY is notified of impending orders, it would be contrary to both the 1996 Act and the development of competition for the PAP to permit an "adjustment" in performance standards when BA-NY encounters large order volumes.

25/ Id. at 17-18.

CONCLUSION

For the foregoing reasons, the Commission should correct the deficiencies in the PAP by adopting the modifications discussed herein.

Respectfully submitted,

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