

FCC 99-404 - MEMORANDUM OPINION AND ORDER
RELEASED: December 22, 1999

Bell Atlantic New York Section 271 Application

I. INTRODUCTION AND OVERVIEW

The FCC stated that its decision builds on fundamental principles adopted in the prior Section 271 orders. Additionally, the Commission pointed out that it considers the overall picture presented by the record rather than limiting its focus "on any one aspect of performance."

The New York Public Service Commission was applauded and the state of New York was characterized as having "some of the most intensely competitive exchange and exchange access markets in the nation." Elements that made the process a success were specified as:

- (1) full and open participation by all interested parties;
- (2) extensive independent third party testing of Bell Atlantic's operations support systems (OSS) offering;
- (3) development of clearly defined performance measures and standards; and
- (4) adoption of performance assurance measures that create a strong financial incentive for post-entry compliance with the section 271 checklist by Bell Atlantic.

The FCC also noted that the level of competition in New York greatly exceeded that in the other states for which BOCs have filed Section 271 applications. According to BA, CLECs serve at least 1,118,180 lines in New York, with at least 651,793 lines served over the CLEC's own facilities.

II. BACKGROUND

Statutory Framework - No preset standards exist governing the Commission's consideration of a state commission's verification in a Section 271 proceeding. The Commission acknowledged that substantial weight was given to the New York Commission's evaluation, again noting the rigorous process taken by that state.

History of this Application - The New York process has been

lengthy, beginning on February 13, 1997 with BA's filing of a draft 271 application and Statement of Generally Applicable Terms and Conditions with the New York Commission. For almost one year, numerous technical conferences and collaborative sessions to resolve numerous OSS issues were held. In April 1998 BA filed a Pre-Filing Statement containing commitments to provide combinations of elements, to engage a third-party to test its OSS, and to establish "a self-effectuating system to prevent backsliding." Third-party testing was completed with KPMG's final report on August 6, 1999. BA filed its Section 271 application with the FCC on September 29, 1999.

New York Commission and Department of Justice Evaluations - The New York Commission filed its evaluation in support of BA on October 18, 1999; the Department of Justice (DOJ) filed its evaluation on November 1, 1999, citing two major deficiency areas - OSS and access to local loops.

Regarding perceived areas of deficiency, the FCC noted that DOJ reserved judgement as to whether "the facts in the record established compliance with the legal requirements of the competitive checklist or the Commission's rules." ¶ 24 The FCC also pointed out that DOJ noted the possibility that the Reply Comments (filed November 8) and *ex parte* submissions could provide additional support for BA's claims and justify a conclusion different from DOJ's.

III. ANALYTICAL FRAMEWORK

Absence of Unbundling Rules - In determining which UNEs Bell Atlantic had to demonstrate that it provides, the FCC used the original seven elements identified in former rule 319 as the standard. Bell Atlantic will be expected to comply with new rules and obligations established in the *UNE Remand* proceeding once those rules take effect.

Scope of Evidence in the Record

Procedural Framework - A Section 271 application, as originally filed, must include all the factual evidence on which the Commission is to make its determination. New factual information submitted may only be considered to rebut arguments raised by other commenters; such information must be limited to the period placed in dispute and may not post-date the filing of the comments.

The FCC stated its expectation that through state proceedings, BOCs will be able to anticipate certain arguments parties will make before the Commission.

Motions to Strike - The FCC denied motions by AT&T and Covad to strike or disregard portions of Bell Atlantic's and the New York Commission's reply and *ex parte* submissions. The arguments were that the material post-dated Bell Atlantic's application and due date for comments and that Bell Atlantic's submission contained new promises of future performance. The FCC stated that it did not rely on this evidence in its decision.

Ex Parte Submissions - The Commission pointed out that *ex partes* may provide additional explanation in response to a request by Commission staff on in direct response to post-reply *ex parte* filings.

Framework for Analyzing Compliance with Statutory Requirements

Legal Standard - Where there is a retail analogue, the BOC must provide access in substantially the same time and manner that it provides to itself. For functions without a retail analogue, the BOC must demonstrate that it provides an efficient carrier a meaningful opportunity to compete. The FCC did not find it appropriate to establish specific objective criteria for these standards. Instead, it emphasized that each application is reviewed on a case-by-case basis and that the totality of the circumstances determine whether the nondiscrimination requirements of the Act are met.

Evidentiary Case - The FCC stated its expectation that a BOC will be as thorough as possible in its demonstration of compliance and that the BOC needs only to prove each element by a preponderance of the evidence.

When considering commenters' opposition, the FCC will look for evidence that the BOC's policies, procedures, or capabilities preclude it from satisfying the requirements of the checklist item. Mere unsupported evidence in opposition will not suffice.

The FCC will look to the state to resolve factual disputes. It views the roles of the state and DOJ to both be similar to that of an "expert witness." In appropriate circumstances, the FCC may conclude that a state commission's evidence is more persuasive than DOJ, especially if the state has conducted a rigorous analysis of the evidence.

The FCC reiterated that performance measurements are especially effective means of providing evidence of the quality and timeliness of the access provided by a BOC to requesting carriers and strongly encouraged the collaborative process. However, the Commission does not expect to see uniform standards across states.

IV. COMPLIANCE WITH SECTION 271 (C) (1) (A) - The FCC determined that BA meets the "Track A" Section 271 requirements based on implemented interconnection agreements.

V. COMPLIANCE WITH CHECKLIST

CHECKLIST ITEM 1 - INTERCONNECTION*

Non-Pricing Aspects of Interconnection - The FCC concluded that BA met the requirement to provide interconnection under "just, reasonable, and nondiscriminatory" terms and conditions by providing interconnection in a manner no less efficient than the manner the ILEC provides the comparable function to its own retail operations.

Interconnection Trunking - Based on performance data, trunk group blockage for competitors is lower than for Bell Atlantic's retail operations, and the rate of missed installation appointments is lower for service to competitors than for service to IXCs. Also, the Commission found no significant difference between BA's provisioning of interconnection trunks to local competitors and to IXCs.

In response to claims of unreasonable delays in provisioning of new and large orders, BA identified significant errors in its New York Carrier-to-Carrier Performance Reports and submitted revised data. Also, although BA submitted supplementary data showing that although its provisioning performance has deteriorated, the provisioning of trunks for CLECs is comparable to BA's performance for IXCs. The FCC concluded that evidence of such provisioning delays does not preclude a showing of compliance for section 271 purposes, "so long as the equal-in-quality requirement is met."

For the benefit of future applications, the FCC emphasized that it based its conclusion in this case by weighing various factors; a different combination of factors in a different case might lead to the conclusion that a BOC does not meet the requirements of this checklist item.

Collocation - BA provides physical and virtual collocation through a state-approved tariff. Also, BA has taken steps to implement the collocation requirements in the *Advanced Services First Report and Order* and procedures are in place to ensure that BA's business units implement the Commission's collocation rules. Regarding timeliness, performance data indicated that BA responds to applications for collocation space in a timely manner.

Technically Feasible Points of Interconnection - BA was found to be providing interconnection at all technically feasible points. Its approved state tariff specifies readily available points of interconnection and provides a process for requesting interconnection at additional, technically-feasible points. Sprint made allegations of violations with this obligation, but the FCC agreed with the New York Commission that a pending arbitration between the companies was the appropriate forum for discussing the allegations.

Pricing of Collocation - The Commission determined that BA offers cageless physical collocation at just, reasonable, and nondiscriminatory prices. In reviewing the only two issues raised by commenters, the Commission determined that the commenters misinterpreted BA's tariffs and that their concerns were unfounded.

CHECKLIST ITEM 2 - UNBUNDLED NETWORK ELEMENTS*

Operations Support Systems - The FCC stated that it differs from DOJ primarily in instances where it assessed the totality of the evidence differently or where the FCC had more information available.

The FCC stated that it will first examine whether performance standards exist for functions and whether appropriate standards have been adopted by the relevant state commission or agreed upon by the BOC in an interconnection agreement. If such standards exists, the FCC will evaluate whether the BOC's performance is sufficient to allow an efficient competitor a meaningful opportunity to compete.

The FCC analyzed BA using the two-step inquiry approach outlined in prior orders. First, the Commission determined whether the BOC has deployed the necessary systems, information and personnel to provide sufficient access to and understanding of the necessary OSS functions. The FCC encouraged the use of industry standards for OSS. Second, the Commission assesses whether those OSS functions are operationally ready through commercial usage data (viewed as the most "probative" evidence), carrier-to-carrier testing, independent third-party testing, or internal testing.

Independent Third-Party Testing - The FCC praised the comprehensiveness of KPMG's third-party test, pointing out the scope, depth and military-style testing philosophy. KPMG's independence and efforts to place themselves in the position of an

actual market entrant and to maintain blindness when possible was also mentioned. The FCC noted that a test failing to be as comprehensive, independent and blind may be deemed unpersuasive and could be accorded less weight.

Change Management and Technical Assistance - The Commission noted the substantial role of competing carriers in the development of BA's "Telecom Industry Services--Change Management Process" (Change Agreement). The FCC based its determination that the change management process provides carriers with a meaningful opportunity to compete on the following factors:

- (1) evidence of competing carrier input in the design and continued operation of the change management process;
- (2) the memorialization of the change management process in a basic document;
- (3) the availability of a separate forum for change management disputes;
- (4) and the availability of a stable testing environment that mirrors production.

BA was found to have adhered to its change management process over time. Additionally, the Commission found that the Change Agreement establishes reasonable intervals for the distribution of change management notification. BA and the New York Commission were commended for developing metrics that report its compliance with these intervals. Although KPMG's Final Report found that BA was unable to meet documentation intervals set for BA changes, BA contends that it has addressed the problem and is deemed to have made considerable improvement since the KPMG review.

In acknowledging its differing conclusion from DOJ, the FCC stated that it separately assessed the underlying issues associated with each of the BA change types identified in the Change Agreement. With respect to the limited number of changes made, the FCC determined that BA established a pattern of general compliance with the notification of changes.

Technical Assistance and Help Desk Support

The Commission determined that BA provides the technical assistance and help desk support necessary to give competing carriers nondiscriminatory access to its OSS. BA has produced a separate three volume handbook for resellers and purchasers of UNEs, both available on CD-ROM. Release updates are made and are available on BA's website. Additionally, BA conducts regular training courses for competing carriers in key areas. BA's "Systems Support Help Desk" provides a single point of contact for competing carrier

reports of system outages and software defects and provides help to ensure that any problems are resolved as quickly as possible. KPMG reported confusion regarding contact lists and help desk numbers, but BA fixed this problem by posting on its website a comprehensive and descriptive list of the different support features available to competing carriers, including the time of day these support functions are available.

Pre-Ordering - BA demonstrated that its pre-ordering interfaces and systems are operationally ready and capable of sustaining reasonably foreseeable demand volumes.

Application-to-Application Functionality - In prior orders the FCC emphasized the necessity of an application-to-application interface to enable carriers to conduct real-time processing and to integrate per-ordering and ordering functions in the same manner as the BOC. BA demonstrated through actual commercial usage and third-party testing results that it makes application-to-application functionality available for the pre-ordering functions that it provides to itself.

Integration - The FCC based its conclusion that BA's pre-ordering and ordering interfaces are readily integratable on evidence of successful commercial usage data and KPMG's findings. BA was able to demonstrate that CTC Communications was able to develop an integrated EDI pre-ordering and ordering system for parsed CSR information. The FCC specifically described the demonstration in a commercial setting as "probative evidence that carriers are capable of integrating the remaining pre-ordering functions."

Access to Loop Qualification Information - The FCC found that BA demonstrated that it offers nondiscriminatory access to pre-ordering functions associated with determining whether a loop is capable of supporting xDSL advanced technologies. Competing carriers were found to have access to the same database available to BA's retail representatives, allowing requesting carriers to access loop qualification information in substantially the same time and manner as BA.

Response Times - Based on performance data, the FCC found that BA processes pre-order inquiries from competing carriers in substantially the same time it takes to process analogous retail transactions. Also, BA's pre-ordering systems and interfaces are scalable to handle current and reasonably foreseeable demand volumes, based on BA's current performance and KPMG's findings.

Interface Availability - The FCC based its conclusion that

BA's interfaces are generally available as scheduled on performance data from July through September 1999. Although there was a three percent drop of availability in September during non-prime time hours, the FCC stated that it does not consider unavailability for three percent of non-prime time hours to present a barrier to an efficient competitor's ability to meaningfully compete.

Ordering - The FCC determined that the standards established in the Carrier-to-Carrier proceedings at the New York Commission in conjunction with BA and competing carriers were reasonable measures and that BA generally met those standards. Where BA fell short, the shortfalls were not deemed significant.

Unlike in prior Section 271 orders, the FCC did not begin its analysis of ordering functions with a discussion of "flow through rates" because certain factors present in BA's application weighed against doing so. Specifically, in prior orders substantial disparities between the BOC's flow-through rates and those of the competing carriers were noted, demonstrating a lack of parity. Circumstances in BA's record make it "unnecessary to focus on order flow-through rates to the same degree we have in past orders." Specifically, the FCC determines that BA's provision of access to its ordering functions is substantially better than in any other prior application and that "When considered in the context of such performance, we find that it would be inappropriate to consider order flow-through rates as the sole indicia of parity."

Unbundled Network Element Orders - BA supported its application with Carrier-to-Carrier performance data. BA either met or came very close to meeting the strict benchmark standards for on-time processing of unbundled network element orders established in the Carrier-to-Carrier proceeding. Additionally, BA improved its on-time performance despite the increase in volumes of UNE orders from over 8,600 January orders to almost 70,000 orders in September. The FCC concluded that BA's ability to process nearly all competing carrier UNE orders in less than 24 hours, and a majority of such orders within two hours of submission, provide an efficient competing carrier with a meaningful opportunity to compete. The FCC also described BA's ability to process such large order volumes in a timely manner as a "stark contrast" to any BOC's performance in previous section 271 proceedings.

In response to concerns that the level of manual processing in BA's systems suggests that the systems are not scalable, the FCC found that the totality of the evidence, based on performance data and KPMG's final report, demonstrates BA's systems are scalable. According to the Commission, BA has shown its commitment to maintain and improve upon its current level of performance. For

example, BA has committed to initiate monthly workshops to address order quality.

The FCC acknowledged its different conclusion from the DOJ and commenters with regard to BA's accuracy for manually processed orders, but found no reliable evidence that BA's manual processing injects a level of error that prevents efficient competitors a meaningful opportunity to compete.

Resale Ordering - The FCC noted that there were virtually no objections from commenters to BA's provision of access to its ordering functions for resale services. Also, neither DOJ nor the New York Commission found problems.

Provisioning - The FCC found that BA's systems are set up to provide parity of service for provisioning wholesale and retail orders. Evidence from the Carrier-to-Carrier metrics shows that BA is missing fewer CLEC customer appointments and is providing equal or better quality installations, compared to appointments for its own retail customers.

Provisioning Processes - Based on performance data, BA was found to be providing CLECs and its retail operations with equivalent access to information on available service installation dates. ¶ 200 Although performance data showed that competing carriers experience longer average completed intervals than BA retail customers, BA presented sufficient evidence to demonstrate that the disparity was not the result of discriminatory conduct, but was due to factors outside of its control. The FCC determined that the data was flawed and should be accorded little weight in the analysis.

Maintenance and Repair - The FCC found that BA has deployed the necessary interfaces, systems, and personnel to enable requesting carriers to access the same maintenance and repair functions that BA provides to itself and in substantially the same time and manner as BA's retail operations. Service restoration to customers of competing carriers was found to be done in substantially the same time and manner as for BA's own customers. Also, BA was found to be performing maintenance and repair work at substantially the same quality level to competing carrier customers that it provides to its own customers.

Functionality - By reviewing commercial usage data and testing by KPMG, the FCC concluded that maintenance and repair interfaces and systems offered by BA enable a requesting carrier to access all the same functions available to BA's retail representatives.

The FCC disagreed with AT&T's assertion that Bell Atlantic must demonstrate that it provides an integratable, application-to-application interface for maintenance and repair. Although the Commission indicated that carriers might have a more complete opportunity to compete with an integratable, application-to-application maintenance and repair interface, it found that the lack of integration did not necessarily constitute discriminatory access.

Response Times - Based on performance data, BA's systems process trouble inquiries from competing carriers in substantially the same time and manner as Bell Atlantic processes inquiries concerning its own retail customers.

Time to Restore - The FCC determined that based on performance data, Bell Atlantic repairs trouble complaints for competing carriers in substantially the same time and manner that it repairs complaints from its own customers.

Quality of Work Performed - Performance data revealed that customers of competing carriers reported a lower rate of network trouble than Bell Atlantic's retail customers. Also, data on the rate of repeat trouble reports indicates that BA repairs trouble for competitors at the same level of quality that it provides to itself, or better.

KPMG found that BA technicians were closing out loop trouble tickets even when a customer was not back in service if they found no trouble at the specific dispatch location without checking other locations. BA has implemented processes to safeguard against premature closing of trouble tickets.

Billing - The FCC determined that BA provides nondiscriminatory access to its billing functions. Carrier-to-Carrier metrics indicate that, during the period from July to September 1999, Bell Atlantic's actual commercial performance consistently exceeds these standards. In addition, KPMG found BA's wholesale billing systems, processes and operational support satisfactory.

Combinations of Unbundled Network Elements - BA demonstrated that it provides combinations of network elements that are already preassembled in their network, as well as nondiscriminatory access to UNEs, in a manner that allows competing carriers to combine those elements themselves. The FCC based its conclusions on evidence of actual commercial usage and the results of KPMG's third party test.

Pricing of Network Elements - The FCC found that BA had worked with the New York Commission to establish UNE prices based on TELRIC.

CHECKLIST ITEM 3 - POLES, DUCTS, CONDUITS, AND RIGHTS-OF-WAY

BA was determined to be providing nondiscriminatory access to its poles, ducts, conduits, and rights-of-way at just and reasonable rates, terms, and conditions in accordance with Section 224.

BA refuted an argument by ALTS that it did not provide nondiscriminatory access to conduits, and rights-of-way within multiple tenant environments. BA responded that it did not control the conduits and rights-of-way within the multiple tenant environments cited by ALTS. Section 271(c)(2)(B)(iii) is limited to the requirements set forth in Section 224 and thus does not require the ILEC to provide access to wiring it does not control inside buildings.

CHECKLIST ITEM 4--UNBUNDLED LOCAL LOOPS

The FCC concluded that BA is providing unbundled local loop transmission, for the provision of both traditional voice services and various advanced services, in a nondiscriminatory manner. With respect to BA's provision of unbundled loops, the FCC stated its conclusions vary from DOJ's in instances where it assessed the totality of the evidence differently or where it took an analytical approach distinct from that taken by DOJ.

Provisioning of Unbundled Local Loops - The FCC concluded that BA demonstrated presented sufficient evidence that it provisions loops in the quantities that competitors reasonably demand, at an acceptable level of quality, and within a reasonable time frame.

Hot Cuts - BA demonstrated that it is provisioning unbundled loops through the use of coordinated conversions of active BA customers to competing carriers. Based on performance data, the FCC concluded that BA provisions hot cuts in sufficient quantities, at an acceptable level of quality, and with a minimum of service disruption, meeting the standard to allow competitors a meaningful opportunity to compete.

After there were challenges to BA's data, the New York Commission conducted a reconciliation of the conflicting data. DOJ criticized the New York Commission's conclusion, but did not perform any analysis to provide an alternative figure in the record.

xDSL-Capable Loops - Ordering and provisioning of xDSL-capable loops has not been addressed in prior Section 271 orders. The obligation to provide access to loops supporting xDSL technologies was adopted in the *Local Competition First Report and Order*, but the FCC stated that it had not provided guidance to BOCs as to the type of proof necessary to show compliance with Section 271.

The Commission chose to look at BA's overall performance due to the unique circumstances present in this application. Specifically, the FCC stated its expectation that circumstances present in BA's case would change over time or not be present at all. Instead, the Commission expects that a future applicant will make "a separate and comprehensive evidentiary showing with respect to the provision of xDSL-capable loops" either through a fully operational separate advanced services affiliate or through a showing of nondiscrimination. The FCC then emphasized its encouragement of the deployment of advanced services and stated its intention to examine such capabilities closely in the future.

CHECKLIST ITEM 5 -- UNBUNDLED LOCAL TRANSPORT*

Based on performance data concerning missed appointments, the FCC concluded that BA provides nondiscriminatory access to both shared and dedicated transport in compliance with the checklist. Also, none of the commenting parties challenged BA's showing of its provisioning of shared transport.

There were allegations of failure to provide dedicated local transport in a timely manner, but BA refuted this by stating that with the exception of Choice One, those commenters had not ordered unbundled local transport from BA, but rather have requested special access services from BA's IXC access tariffs.

CHECKLIST ITEM 6 -- UNBUNDLED LOCAL SWITCHING*

The FCC referred back to specifications made in the *Second BellSouth Louisiana Order*. ¶ 343-345. Based on the evidence in the record, BA demonstrated compliance by showing that it provides: (1) line-side and trunk side facilities; (2) basic switching functions; (3) vertical features; (4) customized routing; (5) shared trunk ports; (6) unbundled tandem switching; (7) usage information for billing exchange access; and (8) usage information for billing for reciprocal compensation.

CHECKLIST ITEM 7 -- 911/E911; DA; OPERATOR SERVICES

911 and E911 Access - No commenter disputed BA's compliance with

this portion of this item.

Directory Assistance*/Operator Services - AT&T submitted studies to show that BA's systems drop more than 10 percent of the directory listings associated with the unbundled loop orders from Bell Atlantic's directory assistance database. BA responded that the studies were flawed and did not reflect improvements made to its systems. No other commenter raised this objection. The FCC noted that several parties supported BA's assertion of compliance with this item and concludes that the objections were not sufficient to conclude a failure to comply with checklist item 7. The FCC stated that its opinion differs somewhat from DOJ. However, the Commission points out that DOJ "did not have the benefit of Bell Atlantic's Reply, which we believe sufficiently rebuts AT&T's claims." The Commission also pointed out the DOJ did not argue BA's failure to comply with this item, but only cited BA's difficulties in this area as evidence that its hot cut performance needs improvement.

CHECKLIST ITEM 8 --WHITE PAGES DIRECTORY LISTINGS

Bell Atlantic demonstrated that it is providing white pages directory listings for customers of CLECs that are nondiscriminatory in appearance and integration, and have the same accuracy and reliability that BA provides for its own customers. Although AT&T alleged that BA consistently drops directory listing orders associated with UNE loop orders, the FCC stated that AT&T provided no evidence of problems with the white pages directory listings themselves as a result. Choice One's evidence of one listing was determined to be an isolated incident and not reflective of a systemic problem with BA's provisioning of their listings.

CHECKLIST ITEM 9 - NUMBERING ADMINISTRATION

No commenters alleged that BA failed to meet the requirements of this item. The New York Commission stated that BA demonstrated that it complies with the FCC's number assignment rules and Industry Numbering Committee Central Office Code Guidelines, and that it accurately reports data to the Central Office Code Administrator.

CHECKLIST ITEM 10 -- DATABASES AND ASSOCIATED SIGNALING

Although a commenter stated that verification of this provision was impossible since no carrier presently purchases the services from BA, the FCC found that BA met its obligation to demonstrate that it is 'presently ready to furnish each item in the quantities that

competitors may reasonably demand and at an acceptable level of quality.'

CHECKLIST ITEM 11 -- NUMBER PORTABILITY

The FCC found RCN's claim that BA will not provide number portability to customers with RCN-issued telephone numbers to be unsupported assertions and not indicative of a systemic failure. The FCC found Adelphia and AT&T's claims of problems coordinating number portability with loop cutovers to be unsupported, conclusory allegations that did not warrant a finding of noncompliance with this checklist item.

CHECKLIST ITEM 12 -- LOCAL DIALING PARITY

No commenter challenged BA's assertion of compliance with this item.

CHECKLIST ITEM 13 -- RECIPROCAL COMPENSATION

BA demonstrated that it (1) has reciprocal compensation arrangements in accordance with section 252(d)(2), and (2) is making all required payments in a timely fashion.

CHECKLIST ITEM 14 -- RESALE*

The FCC determined that BA resells at wholesale rates any telecommunications service it provides at retail to its own subscribers. The Commission further found the offers to be nondiscriminatory, including access to OSS.

CCA argued that BA did not comply with this item by alleging that the difference between BA's wholesale rates and retail rates is so narrow that it precludes a profit and hinders competition. However, the FCC determined that CCA provided no evidence that the New York Commission failed to adhere to the statutory requirements in setting the wholesale rates with respect to marketing, billing, collection and other avoided costs, and that BA makes telecommunications services available at wholesale rates established by the New York Commission as required by statute.

Termination Liabilities - Commenters argued that the termination liability provisions contained in BA's contracts are "anti-competitive, unjust, unreasonable, excessive or unfair." The Commission acknowledged its adoption of "fresh look" requirements in prior proceedings, but stated that it had not adopted one for the CSAs at issue in this proceeding, which are generally regulated by the states. The FCC further stated that the New York Commission

had already addressed BA's policy of imposing termination charges specified in an original CSA and concluded that the record did not support a finding that such provisions constituted an unreasonable or discriminatory condition or limitation on the resale of its telecommunications services."

Resale of xDSL-based services - The FCC was not persuaded by TRA's argument that Bell Atlantic is restricting resale because it does not make volume and term offerings of xDSL-based services available for resale. TRA contended that declining to make volume and term offerings of xDSL-based services available for resale, BA is creating a general exemption from the wholesale requirement. The FCC stated that it addressed this issue in the *Deployment of Wireline Services Offering Advanced Telecommunications Capability* in which it found that where the ILEC offers DSL services as an input component to ISPs who combine the DSL service with their own Internet service, the discount resale obligations of section 251(c)(4) do not apply. The FCC agreed with BA that since this is not a retail service subject to the discount obligations of that section, BA is not required to provide an avoided-cost discount on its wholesale ADSL offering.

Other resale conditions and limitations - The FCC was not persuaded by NALA's argument that BA imposed an unreasonable condition on resale because it does not provide a flat-rate local service option for resale in New York City. (They found that NALA did not make a persuasive argument.

CCA argued that BA's resale tariff is highly restrictive, bundles services and prices, and only allows resale of tariffed end-user services that have been designated by BA's retail marketing department. However, the FCC reiterated that BA demonstrated that it offers for resale at wholesale rates any telecommunications services that it offers at retail to subscribers and pursuant to discounts set by the New York Commission.

Provisioning - Additionally, there were various claims that BA fails to provision resale services in a nondiscriminatory manner, but the FCC found the examples given by commenters to be occasional incidents and not evidence of systemic problems.

VI. SECTION 272 COMPLIANCE

According to Section 271(d)(3)(B) of the Act, the FCC is prohibited from approving a Section 271 application unless the BOC demonstrates that the interLATA authorization will be carried out

in accordance with the requirements of section 272. Standards for compliance with section 272 are in the *Accounting Safeguards Order* and the *Non-Accounting Safeguards Order*, and are designed to facilitate the detection of improper cost allocation and cross-subsidization between the BOC and its section 272 affiliate. Another purpose of the safeguards is to ensure that BOCs do not discriminate in favor of their section 272 affiliates. The FCC's findings regarding Section 272 compliance constitute independent grounds for denying an application.

The FCC determined that BA demonstrated that it will comply with the requirements of section 272. Neither the New York Commission nor the Department of Justice addressed BA's showing of section 272 compliance.

VII. PUBLIC INTEREST ANALYSIS

Competition in Local Exchange and Long Distance Markets

Impact on Local Competition - Noting that Congress declined to adopt a market share test for BOC entry into long distance, the FCC stated that it has no intention of doing so in this proceeding. The FCC ascertained the desire of Congress to condition Section 271 approval on full checklist compliance rather than on whether CLECs have actually taken advantage of the opportunity to enter the market.

Impact on Long Distance Competition - The FCC declined to address comments and economic studies submitted by BA and by parties opposing BA's application, which seek to demonstrate alternately that BA's entry will have a positive, or a negative, impact on long distance market competition.

Assurance of Future Compliance - Performance standard monitoring and enforcement mechanisms in place in New York provide strong assurance that the local market will remain open. The FCC encouraged state performance monitoring and post-entry enforcement, but also stated that such mechanisms are not expected to alone provide full protection against potential anticompetitive behavior by the BOC.

Summary of Performance Reporting and Enforcement Mechanisms - BA is required by the New York Commission to report performance data on a monthly basis. Additionally, the commission required BA to submit a comprehensive performance enforcement mechanism upon receiving Section 271 approval. The plans establish an automatic process under which affected competitors receive bill credits if BA fails to satisfy pre-determined performance standards.

Key Elements of the Enforcement Plan - The FCC stated that it will review performance monitoring and enforcement mechanisms to ensure that such methods work in the manner promised. The possibility that plans may vary widely at the state level was acknowledged, but the Commission will examine key aspects "to determine whether they fall into a zone of reasonableness." The FCC highlighted characteristics of the New York plan it deemed makes it effective:

- potential liability that provides a meaningful and significant incentive to comply with the designated performance standards;
- clearly-articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance;
- a reasonable structure that is designed to detect and sanction poor performance when it occurs;
- a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal;
- and reasonable assurances that the reported data is accurate

Total Liability At Risk - The FCC concluded that the \$269 million in potential bill credits provides a meaningful incentive for BA to maintain a high level of performance. Additionally, BA faces the consequences of federal enforcement action, liquidated damages under certain interconnection agreements, and antitrust and other legal actions.

VIII. SECTION 271(D)(6) ENFORCEMENT AUTHORITY - The FCC described its Section 271(d)(6)(A) powers should a BOC cease to meet any of the conditions required for approval. This authority includes the issuance of an order to correct the deficiency, impose a penalty, or suspend or revoke Section 271 approval.

**Denotes items BellSouth failed in the FPSC's October 1998 Section 271 decision.*