Spring 2000

Bell Atlantic Paves the Way for In-Region Inter-lata Long Distance Approval

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One of the most widely anticipated changes resulting from the passage of the Telecommunications Act of 1996[1] was the possibility of Regional Bell Operating Companies ("RBOCs")[2] being allowed to provide in-region, inter-LATA[3] long distance service to telecommunication customers. While prior to the passage of the Act, RBOCs were operating under the strict terms set forth under the 1984 Modification of Final Judgment,[4] the 1996 Act allowed the possibility of relaxing the prohibitions placed on the RBOCs as a result of the federal government's antitrust suit against AT&T.[5] Specifically, following the divestiture of AT&T, the terms of the Modification of Final Judgment mandated that RBOCs be prohibited from offering long distance services in their home states, until a series of statutory requirements were met.[6] Only then would state and federal authorities consider permitting entry into the market.

For approximately three years following the passage of the act, RBOCs attempted, albeit futilely, to pass through the regulatory hoops and be named the first telephone company granted approval for long distance service. These previous applications were all met by denials from FCC regulators, except for

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1 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. §151 et seq. The Telecommunications Act of 1996 amended the Communications Act of 1934.

2 Regional Bell Operating Company describes the regional telephone companies created by the breakup of AT&T by the 1983 Consent Decree. While there were originally seven RBOCs at the time of the divestiture, today through mergers, the RBOCs total four: Bell Atlantic, Bell South, SBC Communications and US West.

3 LATA stands for Local Access Transport Area, and is used to identify the local telephone exchange area established as a result of the divesture of AT&T and the Modification of Final Judgment. Telephone service provided between LATAs is called inter-LATA (long distance service). Service provided to customers within the same LATA is called intra-LATA (local service). In New York, there are seven LATAs or regions: New York Metro, Albany, Binghamton, Buffalo, Poughkeepsie, Rochester, and Syracuse.

4 United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd, 460 U.S. 1001 (1983).

5 Id.

6 Id.

one-Bell Atlantic,[7] in December 1999.[8] State and federal regulators gave the nod to the giant local telephone service provider, allowing it be become the first RBOC to be granted the permission to provide in-region inter-LATA long distance service within the New York State.

As part of the original restrictions placed on the RBOCs by *The Modification of Final Judgment*,[9] the operating companies were "prohibited from providing long distance and information services, and from manufacturing equipment used in the telecommunications industry."[10] The court held that should the newly divested operating companies be permitted to operate in these fields of service, there was a substantial risk that they would resort to the same monopolistic tactics to control the market and create significant barriers to entry just as AT&T had operated up until the government's lawsuit.[11] Since the court's decision, the RBOCs, including Bell Atlantic, have made strong economic strides in the area of local exchange services, and in some markets, have been in competition with several competitive local exchange carriers. However, the Telecommunications Act of 1996 allows the possibility of an RBOC offering in-region inter-LATA (long distance) service, whereas the Modification of Final Judgment eliminated any possibility for an RBOC to compete within the inter-LATA market. To qualify for in-region inter-LATA approval under the act, the RBOC must first show the FCC that it has opened its local calling market to competition. This showing is demonstrated by complying with several statutory provisions.[12]

The first step for an RBOC to be granted inter-LATA approval is an application to the state's public commission. The New York State Public Service Commission ("NYPSC"), Department of Public Service oversees and regulates the state's electric, gas, steam, water and telecommunication services.

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[7] Bell Atlantic, formed through the merger of Bell Atlantic and NYNEX (formally New York Telephone), maintains over 40 million access lines in 13 states from Maine to Virginia.

[8] In the Matter of Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act to Provide In-Region, Inter-LATA Service in the State of New York, CC Docket No. 99-295, FCC 99-404, 1999 FCC Lexis 6522 (1999).

[9] *See* United States v. American Tel. & Tel. Co. 604 F. Supp. 316 at 318 (1985). The government alleged monopolization by the telecommunications giant in violation of the Sherman Act. Judge Harold Greene's decision, which became known as the Modification of Final Judgment, divested AT&T's control of twenty three Bell Operating Companies, and created seven Regional Bell Operating companies.

[10] *See id.*

[11] *Id.*.

[12] *See* Telecommunications Act of 1996 at note 1, section 271-273.

Bell Atlantic filed its application for a Certificate of Public Convenience and Necessity to offer inter-exchange and inter-LATA services on September 29, 1999. The state Public Service Commission, after a lengthy review and analysis, granted Bell Atlantic's application, in October 1999, effective January 3, 2000.[13] Bell Atlantic argued that the approval of the application would permit the carrier to provide in-region long distance service in competition with dominant inter-exchange carrier, and that this competition was in the public's interest.[14]

As evidence that competition would be increased as a result of the state granting Bell Atlantic's application, the company argued that the approval would allow the company to bring a "meaningful choice" to customers for obtaining long distance.[15] While other inter-exchange carriers were offering long distance to New York customers, Bell Atlantic argued that its service would be high quality, competitively priced, "thus contributing to the downward pressure on rates offered by all carriers to consumers in the state."[16]

Following an analysis of Bell Atlantic's application to The New York State Public Service Commission, the commission issued an Analysis of Local Exchange Service Competition in New York State in 1999.[17] The report, which was meant to provide a detailed view into local competition in New York State during the 1997-1998 year, found, in part:

> (1) the number of Competitive Local Exchange Companies ("CLECs") serving over 1,000 local exchange lines increased from 13 at year end 1997 to 38 at year end 1998; (2) the number of local exchange lines served by CLECs grew from 288,000 lines or a market share of 2.3% at year end 1997 to 649,000 lines or a market share of 4.8% at year end 1998; (3) CLEC basic local service revenues for 1998 were approximately $ 246,750,000 or a market share of 6%. A meaningful comparison cannot be made with 1997 as the reports utilized covered only the second half of 1997; (4) 84% of the CLECs' local exchange lines at year end 1998 were business lines, and 16% were residential

[13] Petition of Bell Atlantic Communications, Inc. for an Original Certificate of Public Convenience and Necessity to conduct business as a resale telecommunications inter-exchange carrier within the state of New York, New York State Public Service Commission, Opinion, 1999 N.Y. PUC Lexis 718 (December 30, 1999).
[14] *Id.* at 2.
[15] *Id.* at 4.
[16] *Id.*
[17] New York State Public Service Commission, *Analysis of Local Exchange Service Competition in New York State* (1999) <http://www.dps.state.ny.us/e-summary.html>.

> lines; and (5) 45% of the CLECs' local exchange lines at year end 1998 were provided through resale of an Incumbent Local Exchange Company's ("ILEC's") services (primarily resale of Bell Atlantic - New York's services), while 55% were provided using some facilities owned by CLECs."[18] In addition, the report found that when it came to competitive carriers entering the New York State market, even though "incumbent LECs still account for the bulk of lines served, Teleport had become the state's fourth largest LEC overall by year-end 1998; BA-NY served 86% of the lines in New York; there were 11 CLECs in the top 20 LECs, while in 1997 there were 9; and there were 38 CLECs with more than 1,000 lines, while in 1997 there were only 13.[19]

In all, the report concluded that over 90% of New York State's telephone customers had a choice of local exchange companies. However, the ILECs continue to be the predominant suppliers of local exchange services within their respective franchise territories.[20]

Prior to filing its recommendation to the FCC, the Public Service Commission took several steps to further investigate and identify the competitive characteristics of the New York State telecommunication market. First, the commission was instrumental in overseeing the full and complete participation of Bell Atlantic as well as several CLECs in a series of workshops and sessions so as to resolve any issues and promote full cooperation throughout the process. Second, Bell Atlantic participated in a fifteen month study, and full third party testing of its Operations Support Systems ("OSS")[21] within the state. Once the test plan was in place, outside auditor KPMG Peat Marwick ("KPMG") was selected as a pseudo-competitive LEC, and Hewlett Packard was hired to build an interface between KPMG and Bell Atlantic.[22] This test plan, which evaluated 855 separate items relating to pre-ordering, provisioning, maintenance and repair, billing, and relationship management and infrastructure,[23] resulted in an identification of several issues that needed to be

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[18] *See id.* at 3.
[19] *Id.*
[20] *Id.* at 4.
[21] OSS are the systems, databases, and personnel used by incumbent LECs to provide services to customers in an accurate and timely manner as well as to ensure the quality of those services. Nondiscriminatory access to OSS is essential if competitive LECs are to be able to compete effectively with incumbent LECs. *See* TELCOM LINGO GUIDE, 148 (1998).
[22] KPMG, Bell Atlantic OSS Evaluation Project, Final Report, Aug. 6, 1999, at II-7 ("KPMG Report") (App. C, Tab 916) <http://www.dps.state.ny.us/ii-86.pdf>.
[23] *Id.*

corrected before Bell Atlantic could apply for approval, identified by the FCC as numerous shortcomings, which were corrected and subsequently re-tested.[24] KPMG released its conclusions in a final report on August 6, 1999, and determined that Bell Atlantic's OSS was available to competitors, and would be sufficient to handle reasonable commercial volumes. The Public Service Commission thereafter concluded:

> [t]he scope and depth of KPMG's review, and the conditions surrounding it, including KPMG's independence, military-style test philosophy, efforts to place themselves in the position of an actual market entrant, and efforts to maintain blindness when possible, lead us to treat the conclusions in the KPMG Final Report as persuasive evidence of Bell Atlantic's OSS readiness.[25]

This conclusion was a significant assertion, because in past RBOC applications to the FCC, the commission has cited several OSS problems. Thus, a claim by the New York State Commission citing independent evidence supported by KPMG's report was clearly seen as evidence weighing substantially in favor of support in this area. The study demonstrated that Bell Atlantic was sensitive to the prior concerns raised by the government, and that KPMG made a careful review of the OSS plan before reaching its conclusion.

Following review of New York State's Public Service Commission's recommendation and in granting Bell Atlantic approval to offer New York inter-LATA service, the FCC concluded:

> (1) New York State has some of the most intensely competitive local exchange access markets in the nation. This track record of successful competition places Bell Atlantic's section 271 application in a different light that prior filings; (2) competitors in New York serve at least 651,793 lines using their own facilities, 152,055 lines using the UNE platform, and 314,332 lines through resale for a total of at lease 1,118,180 lines; (3) and competitors in New York serve at least 35,753 residential lines over their own facilities, provide service to 137,342 residential customers using the UNE platform and resell another 63,547 lines.[26]

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[24] *Id.*

[25] *See id.* at 47.

[26] *See* Key Fact Regarding New York, (December 22, 1999) <http: //www.fcc.gov/Bureaus/ Common_Carrier /News_Releases/1999/nrc9101c.html>.

These numbers offer significant evidence of the existence of true competition throughout the state. In addition to the interconnection and access arrangements set up through Bell Atlantic and other local exchange carriers, the FCC determined that Bell Atlantic's OSS, as evaluated by KPMG, met the statutory requirements to allow for meaningful competition.

It is likely the evidence cited in Bell Atlantic's application will be mirrored by future RBOC applicants requesting in-region inter-LATA approval. And while the inter-LATA approval is recognized as a significant regulatory achievement, some rationalize that the approval for long distance offering in only one state has little economic significance. Ellen Van Cleve, Vice President of the Communications Managers Association stated:

> Bell Atlantic has the potential to become the vendor of choice from Maine to Virginia, but only if they can radically remake themselves in terms of marketing structure and rates...they need to be able to treat all company locations within their territory as a single entity for the application of discounts.[27]

Ultimately, time will tell whether Bell Atlantic's approval and future approvals for other RBOCs will result in a fully competitive telecommunication market, where customers will be afforded the opportunities and benefits flowing from open competition. As the FCC continues to evaluate future section 271 applications, the commission will likely keep in mind Chairman William Kennard's goal "to ensure that local phone markets are open so consumers can reap the benefits of real competition that enables them to pick the best deal."[28]

[27] David Rohde, *Bell Atlantic May Get Long Distance Nod,* NETWORK WORLD, Dec 20, 1999, at 14.

[28] Statement of FCC Chairman William E. Kennard Regarding Bell Atlantic's 271 Filing in New York, Federal Communication Commission, 1999 FCC Lexis 4772 (September 29, 1999).