

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

In the Matter of)	
)	
Application by New York Telephone Company (d/b/a Bell Atlantic - New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company, and Bell Atlantic Global Networks, Inc., for Authorization To Provide In-Region, InterLATA Services in New York)	CC Docket No. 99-295

Application by Bell Atlantic - New York
For Authorization to Provide In-Region InterLATA Services
In New York

COMMENTS OF THE COMPETITION POLICY INSTITUTE

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Comments of Competition Policy Institute

I. Introduction and Summary

Bell Atlantic has applied to the Federal Communications Commission (Commission) for authorization to provide in-region interLATA service in New York. Leading up to this application, the New York Public Service Commission has shown impressive leadership by conducting a most thorough process in which Bell Atlantic has been asked to demonstrate that it has fully opened the local exchange market in New York and that it is providing to its competitors interconnection, resale, network elements and system interfaces on the same terms it provides these items to itself.

In this case, the Commission must make two separate determinations: i) whether Bell Atlantic has fully satisfied the provisions of the “competitive checklist,”¹ in New York; and ii) whether granting Bell Atlantic’s application is “consistent with the public interest, convenience, and necessity.”² In these Comments, the Competition Policy Institute (CPI)³ focuses on this second determination, the “public interest test,” the fulfillment of which is vitally important if consumers are to benefit from the entry of Bell Atlantic into the interLATA telecommunications market.

In filed comments, the Commission will be besieged by theories of whether Bell Atlantic’s application will serve the public interest. Parties will argue about whether the local exchange

¹ 47 U.S.C. § 271(c)(2)(B).

² 47 U.S.C. § 271(d)(3)(C).

³ CPI is an independent, non-profit organization that advocates state and federal policies to promote competition in telecommunications and energy services in ways that benefit consumers. Complete information about CPI can be obtained from our web site at <www.cpi.org>.

market is irreversibly open to competition, about the effect Bell Atlantic's entry will have on long distance markets, and about Bell Atlantic's attitude toward its competitors. These are all worthy considerations. Even so, CPI believes that the single most important factor in the Commission's public interest determination must be this: do New York consumers have a competitive choice for *local* service? We are convinced that the benefits of Bell Atlantic's long distance entry will flow to consumers only if there is also competition in local markets — only if consumers have a *realistic choice* of competing local service providers.

As we explained fully in our *Realistic Choice Petition*,⁴ there are at least three reasons why the Commission should insist that competitive choice in local service exists before it permits a Bell company to enter the interLATA market.

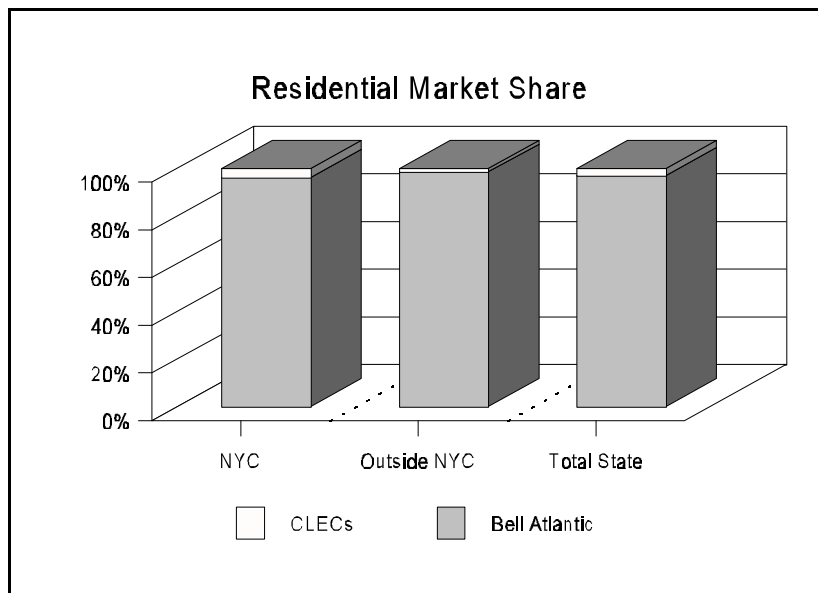
- If consumers have a choice for local telephone service, the Commission will have substantial evidence that the market for local telephone service is open to competitive entry, allowing the Commission to conclude that the provisions of Section 271, including the competitive checklist, are functioning.
- If consumers have a choice for local telephone service, the incumbent BOC will have far less incentive and ability to discriminate against its potential long distance competitors, increasing the public interest effect of the BOC's entry into long distance.
- If consumers have a choice for local telephone service, they will have choices for "one-stop-shopping." This makes it much more likely that all competitors will be forced to cut prices to cost. On the other hand, if BOC long distance entry occurs before consumers have competitive options for local service, consumers will also have only one choice for bundled services, permitting the BOC to keep bundled prices higher than they would be in a competitive market.

In order to determine whether New York consumers have a competitive choice for local

⁴ *Petition by the Competition Policy Institute for Declaratory Rulings on the Realistic Choice Standard for Implementing the Public Interest Test in Section 271 of the Communications Act*, CCBPol. 98-4, released July 22, 1998, DA 98-1467. (*Realistic Choice Petition*).

telephone service, we examined two sources of data. First, Bell Atlantic, in the Declaration of William E. Taylor, presents important statistics about the number of residential customers served by competing local exchange carriers in New York. We analyze that data and consider its meaning separately for the New York City metropolitan area and for the rest of New York state. Second, CPI surveyed a random sample of 1,002 residential customers in the Bell Atlantic territory in New York. The purpose of the survey was to determine 1) how well-equipped are New York consumers to select a competing local carrier for residential service; 2) what are the attitudes of New York consumers about competition in the local and long distance markets; and 3) what fraction of residential customers in New York have switched to a competing carrier.

The conclusion of our research is this: residential local exchange competition has a long way to go in New York. Dr. Taylor's statistics show that statewide only about 3% of residential customers have actually chosen a competing supplier. Outside of the New York City metropolitan area, this percentage is only 1.56%. Here is a graphical representation of that data:



Our survey of New York consumers also shows that consumers are not well-positioned to choose a competing local carrier. Nearly two-thirds of New Yorkers reported either that they have only one choice of local carrier or that they did not know if a competitive carrier was available; of those who said they had a choice of more than one local carrier, 40% could not name a competitor to Bell Atlantic. These results are even stronger outside of the New York City area: 81% of New York residents outside of the New York City area were unaware of a CLEC in their area; of those who said that a CLEC served them, more than half could not name a competitor to Bell Atlantic.

We asked consumers about their relative views of the long distance and local telephone markets. New York consumers rate the long distance market as very competitive (7.5 on a scale where 0 = no competition, 10 = a lot of competition), but view the local exchange market as non-competitive (2.8 on the same scale).

The conclusion that must be drawn from this data is unmistakable: the residential telephone market in New York is in its infancy. New York consumers do not today have a realistic choice of competing local exchange carriers. If the Commission believes, as we do, that the public interest is served only if consumers have the ability to choose a local competitor prior to Bell Atlantic's entry into long distance, then it should deny the Company's application. Even assuming the competitive checklist has been fully met, the public interest will not be served by Bell Atlantic's entry into long distance unless the local market is also competitive. After all, **the essential promise of the Telecommunications Act of 1996 is that consumers will have competitive choices for local telephone service, not merely that the Bell companies will meet a set of fourteen technical requirements.**

We recognize that, even though New York consumers do not now have a realistic choice of competing local service providers, the Commission might be persuaded to approve Bell Atlantic's application. For that reason, we recommend that the Commission insist on several strong assurances from Bell Atlantic before giving its approval to the application. These include:

- Increased penalties for backsliding. The promise of long distance entry provides a substantial incentive to Bell Atlantic to open its network to competition. Approving its long distance application eliminates that incentive because the threat that approval might be rescinded later is not credible. The penalties offered by Bell Atlantic in its application are not sufficient to deter anti-competitive behavior.
- Rebates to *consumers* if Bell Atlantic thwarts local competition. Consumers, not just competing carriers, are harmed if Bell Atlantic reneges on its commitments to keep local markets open following approval of its long distance application.
- An assurance that Bell Atlantic cannot recoup any penalties in higher rates.

II. Comments

A. The Commission Should Examine Whether Consumers Have a Realistic Choice of Competing Local Providers When Determining Whether Bell Atlantic's Provision of InterLATA Services in New York Is In the Public Interest.

CPI respectfully submits these initial comments on Bell Atlantic's application to provide in-region, interLATA services in New York.⁵ Our review of this application leads us to conclude that Bell Atlantic's application is not consistent with the public interest, convenience and necessity at this time. As developed below, if consumers are to benefit from Bell Atlantic's entry into the New York long distance market, they must have a competitive choice of local exchange carriers. This is not yet the case in New York. For that reason, the Commission should deny Bell Atlantic entry into the New York interLATA service market at this time.

⁵ See *Application of Bell Atlantic for Authorization Under Section 271 of the Communications Act to Provide In-region, InterLATA services in the State of New York*, submitted September 29, 1999

This doesn't mean there is no competition in New York. Clearly, there is significant competition in the business market, particularly in New York City and its suburbs. But residential local competition is still in its infancy. Bell Atlantic's own data show that residential consumers in New York do not yet have a choice of an unaffiliated, competing carrier for local telephone service. Until local exchange competition develops more fully, residential consumers are unlikely to benefit from Bell Atlantic entry into the long distance market.

1. Statutory and Legal Framework for the Public Interest Test

The Telecommunications Act of 1996 ("1996 Act") establishes a three-part test for approval of a BOC application to provide in-region, interLATA service. Section 271(d)(3) states that the Commission shall not approve a BOC application unless it finds that:

- (A) the petitioning Bell operating company has met the requirements of subsection (c)(1) and-
 - (i) with respect to access and interconnection provided pursuant to subsection (c)(1)(A), has fully implemented the competitive checklist in subsection (c)(2)(B); or
 - (ii) with respect to access and interconnection generally offered pursuant to a statement under subsection (c)(1)(B), such statement offers all of the items included in the competitive checklist in subsection (c)(2)(B);
- (B) the requested authorization will be carried out in accordance with the requirements of section 272; and
- (C) the requested authorization is consistent with the public interest, convenience, and necessity.⁶

Since passage of the 1996 Act, the Commission has considered and rejected four BOC applications for section 271 relief. In two of those orders, the Commission carefully developed

⁶ 47 U.S.C. § 271(d)(3)(A).

the *legal and statutory basis* for its public interest analysis. In its *Ameritech Michigan Order*, the Commission explored the *meaning and scope* of its public interest inquiry.⁷ Subsequently, the Commission reaffirmed those principles in its order denying BellSouth in-region, interLATA authorization in Louisiana.⁸

In these two orders, the Commission affirmed that its public interest inquiry was separate and distinct from determining the applicant's compliance with the checklist.⁹ The Commission indicated it would, in future applications under section 271, continue to undertake a "broad public interest analysis of whether a proposed action or authorization would further the purpose of the Communications Act."¹⁰ Further, the Commission said it would assess whether section 271 relief will "foster competition in all relevant telecommunications markets."¹¹ This includes both the local exchange market and the long distance market to which Bell Atlantic seeks entry. CPI supports this analysis, since we believe that the most significant objective of the 1996 Act was its goal to open local telecommunications markets to competition.

A broad public interest inquiry that furthers the purposes of the Communications Act is consistent with both the Act's legislative history and judicial precedent. It is important to note

⁷ *In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-region, InterLATA Services in Michigan, Memorandum Opinion and Order*, CC Docket No. 97-137, August 19, 1997, FCC 97-298 par. 381. (*Ameritech Michigan Order*).

⁸ *In the Matter of Application of BellSouth Louisiana Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Louisiana, Memorandum Opinion and Order*, CC Docket No. 98-121, October 13, 1998, FCC 98-271 (*BellSouth Louisiana Order*).

⁹ See *Ameritech Michigan Order*, par 389.

¹⁰ *Id* par. 385.

¹¹ *BellSouth Louisiana Order* par. 361.

that, when Congress included the “public interest” language in section 271, it did not define the scope of the Commission’s public interest inquiry. Through this omission, Congress recognized that the Communications Act is replete with references to this same public interest standard,¹² and that the Courts have given the Commission wide latitude to exercise its judgment under the public interest test.

Specifically, the Courts have required the Commission to implement the public interest test consistent with the “purposes that Congress had in mind when it enact[s] legislation.”¹³ When the Commission implements the public interest test it may weigh all factors that determine whether the application benefits or harms consumers.¹⁴ When it weighs these factors, the Commission has the discretion to accord greater weight to some factors and less weight to others.¹⁵

There is much evidence that the opening of local exchange markets was Congress’ central goal when it adopted the 1996 Act. For example, section 251 explicitly requires incumbent local exchange companies to open their networks to new entrants. Sections 251, 252 and 271 contain detailed requirements for state and federal regulators to implement the technical aspects of interconnection and resale. In addition, section 253 preempts state and local governments from erecting barriers to entry into the local telecommunications market. Further, the Conference

¹² See e.g. 47 U.S.C. § 214(a) (requires Commission to determine whether construction or addition of a line is in the public interest).

¹³ See *Nat’l. Broad. Co. v. United States*, 319 U.S. 190 (1943) (public interest standard confers broad powers upon the Commission).

¹⁴ See *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981) (public interest authority gives the Commission latitude to consider broad range of factors).

¹⁵ See *FCC v. RCA Comm., Inc.*, 346 U.S. 86, 90 (1953) (public interest standard leaves wide discretion and calls for imaginative interpretation).

Report on the 1996 Act explicitly states that the purpose of the Act is to “open all telecommunications markets to competition.”¹⁶ Since the local market was the only market *not* open to competition when the Act was passed, this statement meant chiefly that barriers to local competition were being removed. Finally, many members of Congress, particularly members of the Commerce Committees that did the bulk of the work on the 1996 Act, stated in floor remarks that opening local telephone markets was the fundamental goal of the bill.¹⁷

CPI urges the Commission to maintain its resolve to employ a broad inquiry when determining whether Bell Atlantic’s application serves the public interest and to keep in mind the purposes of Congress in passing the 1996 Act. A broad inquiry must balance many factors, including the extent to which Bell Atlantic’s efforts to open its local network to competition have resulted in competitive choices for customers. Only such an inquiry is consistent with the mandate Congress gave the Commission in section 271(d)(3)(B).

In its application, Bell Atlantic reminds the Commission that section 271(d)(4) provides that “[t]he Commission may not, by rule or otherwise, limit or extend the terms used in the

¹⁶ S. Conf. Rept. No. 104-230, at 1. (1996)

¹⁷ See 141 Cong. Rec. S7886 (June 7, 1995) (Statement from Senate Commerce Committee Chairman, Sen. Larry Pressler, that Act would “allow competition for local telephone service by cable companies, long distance companies, electric companies and other entities”); 141 Cong. Rec. S7970 (June 8, 1995) (Statement from Senator John Kerry (“this [public interest test] is an effort to make certain that in fact we do get competition at the local level). 141 Cong. Rec. S8464 (June 15, 1995) (Statement from Senator Dorgan) “The fundamental policy goal confronting Congress as we develop telecommunications reform legislation is how do we employ competition in markets which are currently controlled by regulated monopolies, such as the local exchange. The fact is that the long distance market is a truly competitive market. We risk damaging that competitive market if the RBOC’s are permitted to enter the long distance market prematurely. Our goal should be to promote the same level of competition in the local exchange that currently exists in long distance.. [T]he competitive checklist...is not by itself sufficient to bring real competition to local markets.”

competitive checklist set forth in subsection (c)(2)(B)”¹⁸. As the Commission noted in prior orders, however, this language does not limit its ability to “consider and balance a variety of factors in each case.”¹⁹ Clearly, the Commission can consider items other than the checklist; otherwise, the public interest inquiry would be an empty exercise. Just as clearly, the Commission can avoid running afoul of the “limit or extend” prohibition in its public interest examination since no single factor need be dispositive and “the presence of any one factor would not dictate the outcome of the public interest inquiry.”²⁰

2. *The Realistic Choice Standard*

In 1998, CPI joined with the American Association of Retired Persons and consumer advocates from California, Iowa, Maine and South Carolina (“Joint Petitioners”) in filing a Petition for Declaratory Rulings concerning the public interest standard for Bell Operating Company applications under section 271 of the Communications Act.²¹ The Joint Petitioners urged the Commission to focus its public interest analysis on the perspective of residential and business consumers. We asked the Commission to consider whether residential and business consumers have a realistic choice of a carrier other than the BOC for local service as the most important component of its public interest analysis. The Commission declined at that time to set in advance specific standards and criteria to define how it will analyze whether an application is in

¹⁸ *Bell Atlantic Application FN 46, citing 47.U.S.C. § 271 (c)(2)(B).*

¹⁹ *BellSouth Louisiana Order* par. 362.

²⁰ *Id.*

²¹ *See, Realistic Choice Petition*

the public interest. Instead, the Commission retains broad discretion to “identify and weigh all relevant factors” on a case-by-case basis.²²

Nonetheless, CPI continues to believe the Commission should consider whether consumers have a competitive choice for local service when it makes its public interest inquiry. CPI does not suggest that this standard should be dispositive, but instead a significant factor for the Commission to consider.²³ We believe that the realistic choice approach provides the best means for the Commission to focus the public interest inquiry on the consumer interest and that this approach, more than any other, aligns the public interest consideration with the “factors relevant to the achievement of the goals and objectives of the 1996 Act”.²⁴ There are several reasons why we hold this view.

First, including the realistic choice standard in its section 271 public interest inquiry affords the Commission with the chance to examine whether the local market in New York is truly open. Since opening the local market is a main goal of the 1996 Act, this means the Commission, when making this finding, will adhere to the judicial requirement that its public interest examination be consistent with the purposes Congress had in mind when it enacted the legislation.

Second, determining whether consumers have competitive choices for local service is possibly the best method for assessing whether the market opening requirements of sections 251

²² *BellSouth Louisiana Order* par. 362.

²³ CPI is not suggesting that the realistic choice standard supplant the Department of Justice’s irreversibly open standard or other factors the Commission will consider. Instead, we think that the Commission should consider the realistic choice standard as one factor in its inquiry in order to give weight to the interest of consumers, not simply the interests of competitors in the market.

²⁴ *Ameritech Michigan Order* par 385.

and 271 have been fully implemented and are actually working. In other words, the proof of the pudding is in the eating.

Third, if consumers have a choice for local service, it is more likely that long distance consumers will benefit from Bell Atlantic's entry into the long distance market. This follows because Bell Atlantic will be much less able to leverage any residual market power to discriminate against long distance competitors. In short, long distance competitors will have other channels to customers besides Bell Atlantic. This will put additional pressure on exchange access prices, leading to lower long distance rates.

Lastly, if consumers have choices for local telephone service they will also have choices for bundled services. Conversely, if Bell Atlantic enters the long distance market before consumers have such a choice, the only option for bundled services will be Bell Atlantic. In that case, Bell Atlantic will be able to keep prices of bundled services above market levels. If, instead, local consumers have choices for local service and bundled offerings, prices will be pushed down and consumers will benefit.

In determining whether consumers have a realistic choice of competing local carriers, the Commission must consider several issues, including the availability and comparability of competitive services. Consumers must be able to receive service from carriers that are ready, willing and able to provide service. That choice cannot be theoretical. For instance, it is not enough if a competitor is authorized to provide service, has built facilities, and has ordered access and interconnection. If alternative carriers simply have an authorization to provide service but are not actually soliciting customers or providing service, then the consumers in that state cannot be said to have a truly competitive choice. Competitors' services must be operational, and

consumers must be able to subscribe to such services.²⁵

The Commission's inquiry into whether Bell Atlantic's application meets the realistic choice standard should also focus on the types of consumers that have competitive choices. We suggest that the Commission should consider whether various subgroup of consumers (large business, small business and residential) across various income levels, in a variety of settings (urban, suburban, and rural) and living situations (office buildings, multiple dwelling units, single-family homes) have competitive options.

Finally, realistic choice means that the consumer would be able to obtain service that is comparable in quality and price to the service of the existing provider. The service that a competitor offers must be a sufficiently close substitute to provide a marketplace check on Bell Atlantic.

The Commission should review the information Bell Atlantic and commenters provide about each of these categories of customers to make its judgment about whether consumers in the state of New York have competitive choices for local telephone service. In the case of this application in New York, CPI believes the most critical customer segment to analyze is the residential market.

B. New York Residential Consumers Do Not Have Competitive Choices For Local Exchange Service

When assessing whether New York consumers have a realistic choice of local exchange

²⁵ The realistic choice approach has been described as a "yellow pages" test. In other words, consumers would have a realistic choice if they could open the yellow pages, find an advertisement for a competing local telephone provider, call and sign up for service just as easily as the consumer could call the BOC serving that region.

competitors, it is reasonable to consider two sources of data: 1) what are customers actually doing in the marketplace; and 2) what is the state of their knowledge about competitive options and their ability to employ them.

Bell Atlantic witness William Taylor has dedicated much effort to estimating the number of lines Bell Atlantic’s competitors provide to residential and business customers.²⁶ In his Declaration, Dr. Taylor concludes that “[c]ompeting carriers have entered the market on a large scale.”²⁷ CPI agrees with Dr. Taylor that it is useful to consider the number of customers that have switched in order to assess whether market-opening efforts of Bell Atlantic are actually working. But it is difficult to know how much weight to give these raw numbers without putting them in the context of the entire New York local exchange market.

Dr. Taylor’s Exhibit A contains data about the number of CLEC access lines by area code for both residential and business consumers. He uses these data to conclude that competition in New York is really happening because Bell Atlantic’s local exchange competitors are serving customers. Here is a table containing the raw numbers, grouped into two geographic areas: the New York City metropolitan area (NPAs 212, 516, 718, and 917) and New York State outside NYC Metro (NPAs 315, 518, 607, 716 and 914).²⁸

Area	Residential CLEC Lines
New York City Metro	193,266
New York State <i>outside NYC Metro</i>	43,376

²⁶ See, Attachment A — Declaration of William E. Taylor (“*Local Competition Report*”)

²⁷ Declaration of William E. Taylor at 22.

²⁸ *Local Competition Report*

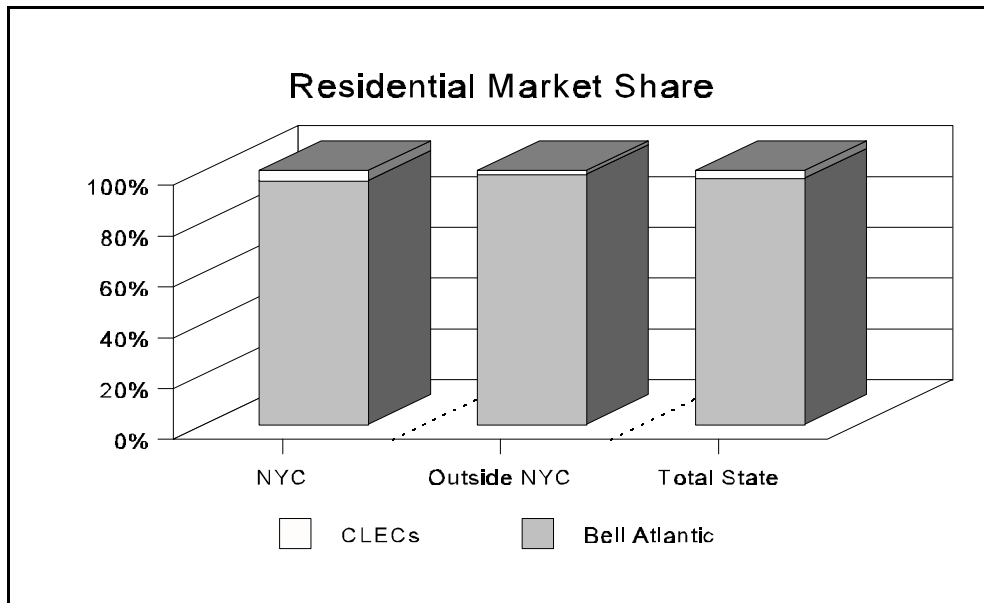
Total State	236,642
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Before jumping to the same conclusion as Dr. Taylor, though, we think these statistics must be considered in context of the total number of access lines in the Bell Atlantic region in New York. There were approximately 7.7 million residential access lines in New York in July 1999. Of those, about 5 million were in the New York City metropolitan areas. Using this additional information, here are the Residential CLEC line numbers reported by Dr. Taylor stated as a percentage of the residential market:²⁹

Area	Residential CLEC Lines
New York City Metro	3.89%
New York State <i>outside NYC Metro</i>	1.56%
Total State	3.05%

And here is a graphical representation of the same data:

²⁹ From *Local Competition Report* and New York PSC report at www.dps.state.ny.us/telanalysis with access lines assumed to grow at annual rate of 4%.



When put in context, we see that Dr. Taylor’s numbers show that competitors have hardly dented the residential market in New York. Such a small market share by CLECs casts considerable doubt on whether residential consumers actually have a competitive option in most parts of New York. We also doubt whether anyone could claim that the current level of competition in the residential market is sufficient to place any marketplace checks on Bell Atlantic.

We expect that Bell Atlantic will object to the Commission considering “market share” in the local exchange market when considering their long distance application. After all, they will argue, Congress declined to include local market share as a standard the Commission should use in evaluating a BOC’s application under Section 271. Even Dr. Taylor rather pointedly left the market share calculation out of his study.

CPI is not advocating the use of residential market share to determine definitively whether

Bell Atlantic, or any BOC, should be permitted to enter the long distance market. On the other hand, this market share information is invaluable to the Commission as it “weighs all factors” in its public interest evaluation. It gives important insight into whether consumers have a realistic choice among competing local service providers.

To shed further light on the question of whether New York consumers in the Bell Atlantic territory have a realistic choice of competing local exchange companies, CPI commissioned a telephone survey of over one thousand residential consumers in New York. The survey was conducted by Talmey-Drake Research & Strategy, Inc. of Boulder, Colorado, a research firm with substantial experience in survey work on telecommunications issues.³⁰ The report’s findings, methodology and survey instrument are included as Attachment A to these Comments.

The New York State Telephone Competition Survey was designed to:

- Assess whether consumers have adequate information to permit them to switch local telephone carriers;
- Assess what factors would cause a customer to switch local telephone providers when the option is available;
- Compare consumer opinions about competition in the local telephone market with opinions about competition in the long distance market;
- Estimate the percentage of customers that have switched from Bell Atlantic to a competing provider;
- Assess the level of consumer understanding of the organization of local and long distance markets in New York as a check on the validity of other responses;
- Measure differences in response based on age, income, ethnicity and location of

³⁰ Talmey-Drake serves clients in all sectors of the telecommunications industry. For example, in 1997 Talmey-Drake conducted an in-depth study of consumer attitudes about various telephone area code relief options in Colorado. The survey was sponsored and paid for by the entire Colorado telecommunications industry, including ILECs, CLECs, IXCs and wireless carriers.

respondents rural/urban, homeowner/renter and type of dwelling.

Over one-thousand randomly-selected residential customers living in the Bell Atlantic territory in New York were contacted by telephone between September 1 and October 10. The survey employed rigorous sampling techniques and call-back procedures. Here are some of the findings of the survey:

- Most respondents (65%) think that the changes in the telecommunications industry over the past few years have been positive, or at least not negative.
- Half (53%) of the respondents thought their local phone rates were high; 35% thought their long distance rates were high.
- Consumers view the long distance market in New York as much more competitive than the local telephone market (7.5 vs. 2.8 where 0 = no competition, 10 = a great deal of competition).
- 62% of respondents statewide either thought no CLEC served them or did not know. Of those who reported they had a choice of CLECs, but had not switched, 40% could not name a competitor.
- Outside the NYC metropolitan area 74% of households either thought no CLEC served them or did not know; of those who reported they have more than one choice, but had not switched, 52% could not name a competitor to Bell Atlantic.
- 33% of respondents reported they had switched long distance carriers within the past two years.
- 4% of the households surveyed report having a competitive local exchange carrier other than AT&T for their telephone services, 4% report having AT&T, 3% say they don't know who their local carrier is, and 90% report their local carrier is Bell Atlantic. (Note: actual CLEC market share, using independent data, is estimated to be approximately 3% of residential lines. See note below about confusion between Bell Atlantic and AT&T.)

Based on the responses of the New York consumers, CPI draws the following reasonable conclusions about competition for residential consumers in the New York telecommunications market:

- Residential consumers in New York have an incomplete and sometimes confused understanding of their options for local telecommunications service. Respondents sometimes reported that they had switched local carriers when, in fact, they had not switched.³¹
- A large majority of respondents, especially outside the New York City area, were unaware of any competitive option for local service. Taken together with those respondents who erroneously thought they had switched to a competitive carrier, we conclude that the residential market does not offer a realistic competitive option.
- New York residential consumers are interested in local telephone competition. They believe that it will lower prices for service and will take the time to consider alternative local carriers. However, much of this discussion was theoretic: residential consumers are not currently very aware of any existing competitive options.
- Customers value the prospect of one-stop-shopping for telecommunications services. This should provide a substantial benefit to Bell Atlantic if it is allowed to enter the long distance market in New York.
- A potential price reduction in a bundled offering will strongly influence a consumer's choice of local and long distance carrier.

Combining these conclusions from the consumer survey with the market share data provide by Dr. Taylor, CPI is of the firm opinion that the residential market in New York does not meet the “realistic choice” standard discussed above. There are some hopeful signs that the local market will develop over time, especially in the New York City metropolitan area. But that time has not yet arrived.

³¹ In one sample, for instance, 38 respondents reported having switched to AT&T local service. When these respondents were asked to check their telephone bill, 36 changed their reported local carrier to “Bell Atlantic.” Additional research is underway to re-interview respondents on this issue, improve the data, and determine the characteristics of those who have misreported their local carrier.

C. The Commission’s Public Interest Inquiry Should Also Include Analysis of Bell Atlantic’s Commitments to Performance Monitoring and Penalties.

CPI recognizes that, although New York consumers do not have a realistic choice of competing local service providers, the Commission might be persuaded to approve Bell Atlantic’s application. For that reason, we recommend that the Commission insist on strong assurances from Bell Atlantic before approving the application in order to effectively prevent Bell Atlantic from renegeing on market opening steps it has taken to date.

First, Bell Atlantic and the New York Public Service Commission (NYPSC) have made enormous progress towards full compliance with section 271 through their extraordinary work in developing the Performance Assurance Plan (PAP) and the Change Control Assurance Plan (CCAP), currently before the NYPSC in Case 97-C-0949. We are encouraged that Bell Atlantic accepted self-executing performance remedies in its interconnection agreements with competitors.³² However, we think these remedies need to be strengthened since, as structured in the current application, they will not will be sufficient to deter Bell Atlantic from retarding competition in New York.

The Commission previously stated that it would examine the applicant’s performance monitoring commitments as part of its public interest inquiry. In the *BellSouth Louisiana Order*, the Commission held that “evidence that a BOC has agreed to performance monitoring . . . would be proactive evidence that a BOC will continue to cooperate with new entrants, even after it is

³² See *Application of Bell Atlantic, Pursuant to Section 271 of the Communications Act, as amended, to Provide In-region, InterLATA services in New York*, Appendix A, Vol. 3, Joint Declaration of George Dowell and Julie Canny, submitted September 29, 1999.

authorized to provide in-region, interLATA services.”³³ The Commission further explained that insufficient mechanisms that require lengthy regulatory or judicial intervention might not be enough and that “the absence of such enforcement mechanisms could significantly delay the development of local exchange competition”.³⁴

We agree with this analysis and assert that there is sufficient basis for the Commission to review the proposed performance measures and penalties as part of its public interest review and require modifications that make the performance measures and penalties fully consistent with the public interest, convenience and necessity.

Before the Commission approves any BOC application for 271 relief it must be sure that the BOC retains strong incentives to keep its markets open to competition *post approval*. While granting a section 271 application obviously sharply reduces the positive incentive to open markets and keep them open, the BOC still has very real incentives to inhibit competition in both the local exchange and long distance market. Unless the BOC is effectively prevented from engaging in anti-competitive conduct *post entry*, consumers and competitors will face legal and regulatory battles, while the BOC continues to use its local market presence to lock up more customers for local and long distance. Since we expect that many customers will switch to Bell Atlantic for bundled local and long distance service, the threat of rescinding section 271 authorization is not credible.

CPI believes that Bell Atlantic’s performance commitments and the resulting penalties are currently insufficient. We suggest that the performance measures and penalties are deficient in

³³ *BellSouth Louisiana Order* par. 363.

³⁴ *Id.* par 364.

three significant areas. First, the total penalties Bell Atlantic faces are too low. Second, if Bell Atlantic engages in anti-competitive behavior, the penalties do not compensate an important aggrieved party: consumers who are denied the benefits of competition. Finally, there are currently no assurances that Bell Atlantic will not pass on these penalties to its consumers in the form of higher rates.

1. The cap on penalties in Bell Atlantic's current PAP and CCAP is insufficient and should be raised.

In its most recent revision of the PAP, Bell Atlantic committed to risk a total of \$269 million in penalties if it fails to meet various performance standards.³⁵ Several parties, including the New York Attorney General, contend that these penalties are insufficient, especially when viewed in the context of revenues Bell Atlantic achieves in the New York local exchange market.³⁶ We agree with the New York Attorney General that, until there is a significant increase in the total cap, the PAP/CCAP is not sufficient to ensure Bell Atlantic's continued cooperation with new entrants in the New York local exchange market.

The total penalties in the plan should effectively deter Bell Atlantic from conducting a risk-benefit calculation to conclude that paying a penalty is more cost effective than cooperating with competitive entrants. In other words, the penalties Bell Atlantic would pay must be greater

³⁵ See *Bell Atlantic Application*, p. 76.

³⁶ See 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, *In the Matter of 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*; Case 97-C-0271; and *Petition filed by Bell Atlantic-New York for approval of a Performance Assurance Plan and Change Control Assurance Plan in 97-C-0271*, Case 99-C-0949. (Filed October 4, 1999) P. 5. (*New York Attorney General Comments*)

than the profits it would gain through discriminatory action. As Bell Atlantic recognizes, “the plan must contain incentives that induce [Bell Atlantic] to provide service to CLECs that is comparable to that [Bell Atlantic] provides its own customers.”³⁷ If the penalty is too low, Bell Atlantic may be willing to accept the smaller cost of some penalties rather than lose a substantial portion of its annual net revenue. The current cap of \$269 million does not present such a deterrent, considering that Bell Atlantic generates over \$4.9 billion in gross revenue and \$495 million in net revenue from its intrastate business each year.³⁸

We respectfully suggest that the Commission scrutinize the available data on Bell Atlantic’s revenue from its intrastate business in New York to derive a higher ceiling on penalties that will effectively deter Bell Atlantic from discriminating against CLECs who will continue to rely on Bell Atlantic’s bottleneck facilities to compete with Bell Atlantic in the retail local services market.

2. A portion of any penalties Bell Atlantic would pay under the PAP or CCAP should go to retail consumers.

CPI agrees that, since the measurements in the PAP and the CCAP reflect Bell Atlantic’s performance in carrier-to-carrier relations, competitors should be compensated when Bell Atlantic

³⁷ See reply Comments of Bell Atlantic-New York on Notice of Proposed Rulemaking and Amended Performance Assurance Plan and Change Control Assurance Plan, *In the Matter of 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*; Case 97-C-0271; and *Petition filed by Bell Atlantic-New York for approval of a Performance Assurance Plan and Change Control Assurance Plan in 97-C-0271*, Case 99-C-0949. Case 99-C-0949, Affidavit of Dr. Gregory M. Duncan In Support of Bell Atlantic-New York’s Petition for Approval of the Amended Performance Assurance Plan and Change Control Assurance Plan, par. 7 (Filed October 8, 1999).

³⁸ See *New York Attorney General Comments*, p. 5 citing Attachment 1, page 3 of 9 of Bell Atlantic’s July 22, 1999 Performance regulatory Plan, year 3 Annual Filing revisions in case 92-C-0665.

does not meet its performance goals. However we also think the current plan has a glaring omission: there is no provision for compensation directly to consumers whose interests will be damaged if Bell Atlantic is able to thwart local exchange competition. Recall that the primary goal of the 1996 Act was to open markets to competition for the benefit of consumers. If a BOC's entry into long distance has the effect of stifling local competition, it is retail consumers who ultimately suffer. Common sense dictates that, if retail consumers suffer as a result of a BOC's abuse of its market power, they ought to be compensated.

We think that a system of fair, consistent and competitively neutral consumer rebates can be included in the remedies in any performance plan. If Bell Atlantic's behavior thwarts competition and denies consumers the benefits of local competition, consumers should be justly compensated.

Finally, if it becomes necessary for the NYPSC to impose performance penalties following Bell Atlantic's entry into interLATA services, fairness obviously requires that the system of penalties not permit Bell Atlantic from passing through the cost of these penalties to either its wholesale or retail customers. This should be an explicit provision of any penalty scheme.³⁹

³⁹ CPI is aware that Bell Atlantic currently operates under an Incentive Regulatory Plan in New York that might prohibit Bell Atlantic from including the PAP/CCAP penalties in rates. The Incentive Regulatory Plan, however expires next year and there is no assurance that its replacement will contain a similar restriction.

III. Conclusion

The Commission should require that consumers in New York have a competitive choice of local telephone service providers before approving the application of Bell Atlantic to enter the interLATA market in New York. Since consumers do not have such a choice at this time, the application should be denied. If, instead, the Commission approves the application, it should require additional assurances from Bell Atlantic in the form of penalties for backsliding and ensure that a portion of those penalties are paid to consumers who are denied the benefits of competition.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this nineteenth day of October 1999, copies of the foregoing Comments of the Competition Policy Institute were served by electronic filing or by first-class, United States mail, postage prepaid, upon each of the following:

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Attachment A
to the
Comments of the Competition Policy Institute

New York State Telephone
Competition Survey
October 1999

by
Talmey-Drake Research and Strategy, Inc.