Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
AT&T Corporation,	)	
	)	File No. E-98-05
Complainant,	)	
v.	)	
	)	
Bell Atlantic Corporation,	)	
	)	
Defendant,	)	
	)	
and	)	
	)	
In the Matter of	)	
	)	
MCI Telecommunications Corporation and MCImetro Access Transmissions Services, Inc.	)	File No. E-98-12
	)	
Complainants,	)	
v.	)	
	)	
Bell Atlantic Corporation,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: August 15, 2000 Released: August 18, 2000

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we dismiss with prejudice the formal complaints filed by AT&T Corporation ("AT&T") and MCI Telecommunications Corporation and MCImetro Access Transmissions Services, Inc. (collectively, "MCI") against Bell Atlantic Corporation ("Bell Atlantic"), alleging that Bell Atlantic violated the pricing requirement set forth by the Commission in its order approving the merger of Bell Atlantic and NYNEX Corporation ("NYNEX").[1] The objectives that the Commission sought to achieve in establishing the pricing condition have now been met, both by the

[1] *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985 (1997) *("Merger Order").*

methodological decisions of the relevant state public service commissions and by the U.S. Supreme Court's reinstatement of our forward-looking cost requirement for purposes of state arbitration proceedings under 47 U.S.C. §§ 251 and 252. For that reason, for reasons of comity, and in light of the procedural framework established in the Telecommunications Act of 1996 ("1996 Act"),[2] we therefore dismiss the complaints with prejudice.

II. BACKGROUND

2. On August 14, 1997, the Commission granted a number of applications from Bell Atlantic and NYNEX seeking approval to transfer control of certain licenses and authorizations from NYNEX to Bell Atlantic in connection with their proposed merger. We approved the license transfers subject to several conditions that were proffered in the first instance by the merging companies.[3] The Commission incorporated these conditions into the *Merger Order* and made them "express conditions of our approval of the transfer of licenses and certificates."[4]

3. One of these conditions relates to Bell Atlantic's pricing of unbundled network elements ("UNEs"), interconnection, and transport and termination. This condition states that "Bell Atlantic-NYNEX must offer in negotiations, and in certain instances in proposals to state commissions, rates for interconnection, UNEs, and transport and termination that are based upon the forward-looking cost of providing these items."[5] At the time, the U.S. Court of Appeals for the Eighth Circuit had only recently vacated on jurisdictional grounds the pricing rules the Commission had previously adopted for all incumbent local exchange carriers; those rules employed a particular species of forward-looking cost known as Total Element Long-Run Incremental Cost ("TELRIC").[6] Through the pricing condition, the Commission sought, with respect to Bell Atlantic, to alleviate the uncertainty caused by the Eighth Circuit's decision and mitigate any potential harm to competition. In particular, the Commission was concerned that, freed from the Commission's vacated pricing rules and in the absence of this merger condition, Bell Atlantic might charge UNE rates based on historical rather than forward-looking costs.

4. AT&T and MCI filed separate formal complaints against Bell Atlantic alleging violations of the *Merger Order's* pricing condition in seven jurisdictions: Delaware, the District of Columbia,

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2 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.*

3 *Merger Order.*, 12 FCC Rcd at 19992, ¶ 12; *id.*, 12 FCC at 20069, ¶ 178.

4 *Id.*, 12 FCC Rcd at 20070, ¶ 180.

5 *Id.*, 12 FCC Rcd at 20072-73, ¶ 185 (footnote omitted). *See also id.*, 12 FCC Rcd at 19992, ¶ 13 ("[Bell Atlantic] also commit[s] to offer interconnection, unbundled network elements and transport and termination at rates based on forward-looking economic cost"); *id.*, 12 FCC Rcd at 20111, Appendix C (Condition 6).

6 *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* First Report and Order, 11 FCC Rcd 15499 (1996) (*"Local Competition Order"), vacated in part, Iowa Utilities Bd. v. FCC,* 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub. nom. AT&T Corp. v. Iowa Utilities Bd.,* 525 U.S. 366 (1999), *vacated in part on remand sub. nom. Iowa Utilities Bd. v. FCC,* No. 96-3321, 2000 WL 979117 (8th Cir. July 18, 2000).

Maryland, New Jersey, Pennsylvania, Virginia, and West Virginia.[7] According to complainants, the *Merger Order* requires Bell Atlantic to propose rates for UNEs and interconnection based on the TELRIC standard. Complainants allege that, following the effective date of the *Merger Order*, Bell Atlantic refused to make new proposals that met the TELRIC standard, but instead pressed on with the rates it had previously proposed in each jurisdiction. AT&T and MCI contend that these proposals were inconsistent with TELRIC both on general grounds and with respect to numerous specific cost inputs. They maintain that, to varying degrees, Bell Atlantic's proposed rates have been accepted in each of the seven relevant jurisdictions and incorporated into its interconnection agreements. According to complainants, the resulting UNE prices have effectively prevented them from competing in those jurisdictions.

5. Bell Atlantic denies these allegations.[8] Bell Atlantic first asserts that the complaints fail to state a claim because complainants have not alleged that Bell Atlantic made any pricing proposals subject to the *Merger Order*. Bell Atlantic also argues that AT&T and MCI are simply attempting to re-litigate issues already presented to, and resolved by, the state commissions.[9] Finally, Bell Atlantic states that the *Merger Order* does not require the use of TELRIC pricing in particular but rather forward-looking cost generally. Bell Atlantic contends that its proposals are consistent with such a methodology and that, in any event, its rate proposals also conform to TELRIC on both a general basis and with respect to the specific inputs identified by AT&T and MCI.

III. DISCUSSION

6. Before reaching AT&T's and MCI's claims, we first must address Bell Atlantic's motions to dismiss the complaints. Under our rules, a formal complaint shall be dismissed if it does not state a cause of action under the Communications Act of 1934, as amended (the "Act").[10] Bell Atlantic asserts four arguments in favor of dismissal: (1) that complainants have failed to allege that Bell Atlantic made any proposals subject to the *Merger Order*; (2) that complainants' claims are moot because Bell Atlantic's proposals have already been reviewed by the state commissions; (3) that we should dismiss the complaints on the basis of comity in light of the state commissions' ratemaking proceedings; and (4) that the complaints are wrong on the merits. We find that AT&T and MCI's complaints should be dismissed because of the U.S. Supreme Court's reinstatement of our forward-looking cost requirement and the state commissions' adoption of their own mechanisms for determining UNE prices based on forward-looking economic cost. As explained below, these events have fulfilled the *Merger Order's* parallel pricing requirement. We therefore grant Bell Atlantic's motions to dismiss the formal complaints filed by AT&T and MCI.

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7 *See* Complaint of AT&T Corp. ("AT&T Complaint"), *AT&T Corp. v. Bell Atlantic Corp.*, File No. E-98-05 (filed Nov. 10, 1997); Complaint of MCI Telecommunications Corp. and MCImetro Access Transmissions Services, Inc., *MCI Telecommunications Corp., et al. v. Bell Atlantic Corp.*, File No. E-98-12 (filed Dec. 19, 1997).

8 *See* Answer of Bell Atlantic Corp., *AT&T Corp. v. Bell Atlantic Corp.*, File No. E-98-05 (filed Dec. 15, 1997); Motion to Dismiss by Bell Atlantic Corp., *AT&T Corp. v. Bell Atlantic Corp.*, File No. E-98-05 (filed Dec. 15, 1997); Answer of Bell Atlantic Corp., *MCI Telecommunications Corp., et al. v. Bell Atlantic Corp.*, File No. E-98-12 (filed Jan. 23, 1998); Motion to Dismiss by Bell Atlantic, *MCI Telecommunications Corp., et al. v. Bell Atlantic Corp.*, File No. E-98-12 (filed Jan. 23, 1998).

9 We will refer to the public utility commissions for the seven relevant jurisdictions collectively as "the state commissions."

10 47 C.F.R. § 1.728(a).

7. In the 1996 Act, Congress authorized the state commissions, subject to review in the federal district courts, to resolve intercarrier disputes concerning the rates that incumbent LECs may charge their competitors for interconnection and UNEs. When resolving such disputes, the state commissions must set such rates under the substantive standards of sections 251 and 252.[11] In our *Local Competition Order*, we required the state commissions to set interconnection and UNE prices based on TELRIC.[12]

8. Soon after we released the *Local Competition Order*, a number of incumbent LECs and state commissions challenged our rules, both on jurisdictional grounds and on the merits. The U.S. Court of Appeals for the Eighth Circuit stayed and later vacated our pricing rules on jurisdictional grounds, finding that the states had exclusive authority over the pricing of interconnection and UNEs and that the Commission therefore lacked authority to establish a nationwide pricing regime.[13]

9. Less than a month after the Eighth Circuit vacated our pricing rules, we issued the *Merger Order*.[14] In that order, we observed that, by vacating our rules requiring the states to adopt final rates based on forward-looking economic cost, the Eighth Circuit's decision had "created even greater uncertainty as to the pace of the development of competition."[15] This merger condition was designed to reduce that uncertainty in order to mitigate the negative impacts of the proposed merger on competition. With Bell Atlantic's assent, and consistent with the Eighth Circuit's decision, we required Bell Atlantic at least to propose rates for UNEs and interconnection in accord with a forward-looking methodology. Our object was to assure new entrants that they would not have to pay rates inconsistent with that methodology. Where a state adopted such a methodology in setting rates for interconnection and UNEs, however, that objective would be fulfilled and challenges to allegedly deficient proposals by the merged company rendered academic.[16]

10. During or shortly after this same period, in the markets served by the merged company, each of the state commissions in the jurisdictions at issue here announced that it would follow pricing standards

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[11] 47 U.S.C. §§ 251, 252; see also *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. at 384-85.

[12] *Local Competition Order*, 11 FCC Rcd at 15844, ¶ 672.

[13] *Iowa Utilities Bd.*, 120 F.3d at 800.

[14] The Eighth Circuit vacated our pricing rules on July 18, 1997. *Id.*, 120 F.3d at 784. We adopted and released the *Merger Order* on August 14, 1997. *Merger Order*, 12 FCC Rcd at 19985.

[15] *Id.*, 12 FCC Rcd at 19988, ¶ 4.

[16] The *Merger Order* explicitly requires Bell Atlantic to propose rates based on "forward-looking economic cost" generally, rather than TELRIC in particular. *See id.*, 12 FCC Rcd at 19992, ¶ 13; *id.*, 12 FCC Rcd at 20072-73, ¶ 185. Complainants nonetheless argue that the merger conditions in fact impose a requirement to follow TELRIC; they rely on an accompanying footnote in which, citing several passages from our prior orders, we noted that "[t]he Commission has outlined the theory of 'forward-looking economic cost' in its *Local Competition* and *Universal Service* orders." *Id.*, 12 FCC Rcd at 20073, ¶ 185 n.345. In citing past examples of approaches to forward-looking cost, we did not somehow confine the term "forward-looking economic cost" to those examples, nor did we convert the requirement in the text of the *Merger Order* -- that Bell Atlantic employ forward-looking costs as a general matter -- into a more rigorous requirement that Bell Atlantic employ a particular variant of forward-looking economic cost, such as TELRIC. If we had intended to impose the latter kind of requirement, we would have put Bell Atlantic on notice of that fact by saying so.

consistent with the theory of forward-looking economic cost.[17] As a result, the gap that we designed the merger condition to fill never emerged. Moreover, the Supreme Court's reinstatement of our pricing rules in 1999 restored an explicit federal legal *requirement* that the states employ a forward-looking cost methodology and ensured that, under the well-established procedures of section 252(e)(6) of the Act, the federal courts would enforce that methodology on review.[18]

11. AT&T and MCI assert that the state commission decisions should have no effect on this case because those decisions relied on Bell Atlantic's allegedly improper proposals to reach -- in complainants' view --

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[17] As demonstrated below, each of the state commissions adopted the theory of forward-looking economic cost as its pricing methodology.

- **Delaware:** *See, e.g., Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F. Supp.2d 218, 235 (D. Del. 2000) (noting that, following Eighth Circuit's decision, the Delaware public service commission "voluntarily adopted the *Local Competition Order's* TELRIC methodology even though that portion of the *Local Competition Order* had never gone into effect.")

- **District of Columbia:** *See Consolidated Issues Raised in Petitions for Arbitration Pending Before the Public Service Commission*, Telecommunications Arbitration Case, Order No. 5, at 5-6, 1996 WL 694995 (D.C. Pub. Serv. Comm'n Nov. 8, 1996) (adopting FCC's TELRIC "proxy rates" as interim rates based on the unanimous agreement of "all the parties to this proceeding").

- **Maryland:** *See Approval of Agreements and Arbitration of Unresolved Issues Arising Under Section 252 of the Telecommunications Act of 1996*, Case No. 8731, Phase II, Order No. 73707, 180 P.U.R. 4th 521 (Md. Pub. Serv. Comm'n Sept. 27, 1997) (adopting forward-looking cost pricing methodology).

- **New Jersey:** *See In the Matter of the Investigation Regarding Local Exchange Competition for Telecommunications Services*, Telecommunications Decision and Order, Docket No. TX95120631, at 9, 1997 WL 795071 (N.J. Bd. Pub. Utils. Dec. 2, 1997) ("[T]he Board hereby adopts the principles upon which the FCC's TELRIC model is based. Adopting a methodology based on forward-looking, economic costs . . . will best replicate to the extent possible the conditions of a competitive market").

- **Pennsylvania:** *See Application of MFS Intelenet of Pennsylvania, Inc.*, MFS Phase III, Interim Order, Docket Nos. A-310203F0002, *et al.*, at 13 (Pa. Pub. Util. Comm'n April 10, 1997) ("we will continue to use TELRIC as a tool to evaluate the proposals before us and view the [*Local Competition Order*] as instructive in the proper application of a long-run incremental cost methodology"; final order adopted Interim Order conclusion).

- **Virginia**: *See, e.g., GTE South, Inc. v. Morrison*, 199 F.3d 733, 739, 747 (4th Cir. 1999) (finding that, following the Eighth Circuit's decision, the Virginia state commission nevertheless adopted forward-looking economic cost methodology that complied with TELRIC).

- **West Virginia:** *See Petition to Establish a Proceeding to Review the Statement of Generally Available Terms and Conditions Offered by Bell Atlantic in Accordance with Sections 251, 252, and 271 of the Telecommunications Act of 1996*, Order on Arbitration, Case Nos. 96-1516-T-PC, *et al.*, at 34 (W.Va. Pub. Serv. Comm'n April 21, 1997) ("[T]he Commission will adopt rates and prices for interconnection, UNEs and collocation based on a TELRIC methodology.").

[18] *See* 47 U.S.C. § 252(e)(6) ("In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.").

incorrect and conflicting results with respect to numerous cost inputs.[19] Complainants argue that competition has been harmed because, they contend, the state commissions have erroneously failed to ensure rates based on forward-looking economic cost.[20] According to complainants, the Commission should order Bell Atlantic to revise its rates to correct the alleged errors.

12. But complainants are already pursuing (or have had the opportunity to pursue) review of those rates in the federal district courts pursuant to section 252(e)(6).[21] The *Merger Order*, moreover, does not require us to conduct such an examination here. Rather, the *Merger Order* was designed to fill the gap created by the Eighth Circuit's jurisdictional decision, which has now been reversed. In accordance with the 1996 Act's directives and our rules, the state commissions have affirmed their commitment to forward-looking pricing, and, under the Supreme Court's decision, the federal district courts are available to enforce that methodology on review. Put another way, the substance of the pricing methodology that the state commissions have employed (and must continue to employ) in section 252 proceedings wholly subsumes the substance of the merger condition at issue here. Because that merger condition imposes no cost methodology requirement that is not independently applicable in section 252 proceedings, the only question is whether, as a procedural matter, the merger condition compels us to duplicate the rate inquiry that Congress entrusted to the state commissions and the federal courts on review. The answer is no: the merger condition was designed to ensure the use of a forward-looking cost methodology as a substantive matter; it was not independently designed to bypass the statutory procedural framework for ensuring compliance with that methodology under section 252. Complainants' contrary position misconstrues the purpose of the *Merger Order* and could unnecessarily raise substantial comity concerns.

13. Finally, the Eighth Circuit's decision on remand from the Supreme Court[22] (to the extent that it is relevant to the period covered by these complaints) is fully consistent with our decision here. In January 1999, the Supreme Court reaffirmed our general pricing jurisdiction and then remanded to the Eighth Circuit for review of our pricing rules on the merits. Oral argument was held in September 1999, but the Eighth Circuit's decision was not issued until July 18, 2000. Although the Eighth Circuit invalidated some aspects of our pricing rules, it affirmed our requirement that UNE rates be based on forward-looking rather than historical costs.[23] Even in the absence of further review of the Eighth Circuit's decision, that requirement will therefore remain binding on Bell Atlantic for purposes of sections 251 and 252 and will continue to be enforced by the procedures set forth in section 252. As noted above, we interpret the *Merger Order* to require use of forward-looking costs in general

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19 *See* Supplemental Brief of AT&T Corp. in Support of Complaint ("AT&T Supplemental Brief"), *AT&T Corp. v. Bell Atlantic Corp.*, File No. E-98-05, at 5, 23-25 (filed Feb. 26, 1999); Reply Brief of MCI Telecommunications Corp. *et al.* in Support of Complaint, *MCI Telecommunications Corp. et al. v. Bell Atlantic Corp.*, File No. 98-12, at 8 (filed April 1, 1998); Supplemental Reply Brief of MCI Telecommunications Corp. *et al.* In Support of Complaint, *MCI Telecommunications Corp. et al. v. Bell Atlantic Corp.*, File No. E-98-12, at 5 (filed March 19, 1999).

20 *See, e.g.*, AT&T Complaint at ¶¶ 79-82.

21 *See* Status Report of AT&T Corp. and MCI Telecommunications Corp., *AT&T Corp. v. Bell Atlantic Corp., MCI Telecommunications Corp. et al. v. Bell Atlantic Corp.*, File Nos. E-98-05, E-98-12 (filed July 29, 1999) (listing appeals to district courts). *See, e.g., McMahon*, 80 F. Supp.2d at 249-51 (granting AT&T challenge to certain decisions by the Delaware commission in its review of Bell Atlantic's pricing proposals).

22 *Iowa Utilities Bd. v. FCC*, No. 96-3321, 2000 WL 979117 (8th Cir. July 18, 2000).

23 *See id.*, 2000 WL 979117, at *5-6 (approving forward-looking cost methodology).

rather than any particular species of forward-looking cost methodology, such as TELRIC.[24] There is thus no inconsistency between the Eighth Circuit's decision and our rationale for dismissing these complaints.

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 201(b), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201(b), 208, and Section 1.728(a) of the Commission's rules, 47 C.F.R. § 1.728(a), that the formal complaints filed by AT&T Corporation, MCI Telecommunications Corporation and MCImetro Access Transmissions Services, Inc., ARE DISMISSED WITH PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

[24] *See* note 16, *supra*.