



STATE OF NEW JERSEY

Board of Public Utilities

*Two Gateway Center
Newark, NJ 07102*

		<u>TELECOMMUNICATIONS</u>
IN THE MATTER OF THE JOINT)	
PETITION OF BELL ATLANTIC)	<u>ORDER APPROVING MERGER</u>
CORPORATION AND GTE)	
CORPORATION FOR APPROVAL OF)	
AGREEMENT AND PLAN OF MERGER)	DOCKET NO. TM98101125

(SERVICE LIST ATTACHED)

BY THE BOARD:

BACKGROUND AND PROCEDURAL HISTORY

By Joint Petition filed with the Board of Public Utilities ("Board") on October 2, 1998, Bell Atlantic Corporation ("Bell Atlantic") and GTE Corporation ("GTE") (collectively "petitioners"), pursuant to N.J.S.A. 48:2-51.1 and N.J.A.C. 14:1-5.14, requested approval of a transaction that would result in GTE becoming a wholly-owned subsidiary of Bell Atlantic. Bell Atlantic is the parent corporation of Bell Atlantic-New Jersey, Inc. ("BA-NJ"), which is an incumbent local exchange carrier authorized by the Board to provide both local and intraLATA toll services throughout most of the State. GTE is a corporation created and existing under the laws of the State of New York, with its headquarters in Irving, Texas.

Through local exchange company subsidiaries in 28 states, not including New Jersey, petitioners state that GTE has more than 22 million access lines in service as an incumbent local exchange carrier. GTE is the parent corporation of GTE Communications ("GTECC") and GTE Telecommunications Service, Inc. ("GTE-TSI"). Petitioners state that through GTECC, GTE provides or is authorized to provide long distance, operator and/or pre-paid calling card services on a resold basis in all 50 states and also provides resold long distance service in New Jersey. At present, in New Jersey, GTECC and GTE-TSI together have about 6,520 non-residential customers, which generate approximately \$600,000 in revenues.

Petitioners assert that the legal status of BA-NJ, GTECC and GTE-TSI will remain unchanged following the merger, and will, therefore, remain subject to the authority of the Board. They also note that GTECC is authorized or has applied for authority to provide competitive local exchange services in a number of states, but has made no such application in New Jersey, has no local tariffs on file with the Board, and is not offering local exchange service to customers in New Jersey.

Bell Atlantic and GTE have executed an "Agreement and Plan of Merger" ("Merger Agreement"), dated July 27, 1998. Petitioners state that the proposed transaction is structured so that GTE will, as noted above, become a wholly-owned subsidiary of Bell Atlantic, and as a result, ultimate control of GTECC and GTE-TSI will transfer to Bell Atlantic. Petitioners also say that control of BA-

NJ will remain unchanged following the transaction, because it will continue to be a wholly-owned subsidiary of Bell Atlantic.

Petitioners state that the Merger Agreement has been approved by both boards of directors. On May 18, 1999 and May 19, 1999 respectively, the shareholders of GTE and Bell Atlantic approved the proposed merger. The Merger Agreement provides that GTE shareholders will receive 1.22 shares of Bell Atlantic stock for each GTE share they own and no bonds, notes or other forms of indebtedness will be issued to finance the transaction.

Petitioners say that headquarters for the combined company will remain in New York City and that the combined company's board of directors will have equal numbers of directors designated by Bell Atlantic and GTE. Petitioners also state: (1) that the merger will not change the manner in which BA-NJ, GTECC and GTE-TSI are regulated by the Board or provide service to customers; (2) that the companies will continue to operate as separate legal entities; (3) that each company will honor commitments to customers; (4) that each company will continue to be governed by any regulations applicable to them and will continue to abide by their filed tariffs; and (5) that the companies will continue to be governed by any regulations that the Board establishes for their individual operations.

Petitioners claim that the proposed merger will benefit the public in several ways: among them, cost savings that will occur as the result of reducing overall expenses, through such means as enhancing purchasing power, eliminating duplicative systems, and reducing corporate overhead. Petitioners also say that the merger is not expected to have a material impact on employment levels of Bell Atlantic associates or GTE hourly employees, and that all existing union contracts will be honored. However, they also indicate that some redundant employees may be consolidated over time to the extent possible through attrition, retirements and other voluntary measures. Petitioners also represent that the merger will accelerate the combined company's ability to serve the high-speed data transmission and Internet services market.

On November 19, 1998, AT&T Communications of New Jersey, Inc. ("AT&T") submitted a "letter motion" requesting that the Board establish a proceeding, including a schedule for the submission of comments and hearings, with respect to the merger. On November 25, 1998, Sprint Communications Company, L.P. ("Sprint") filed a motion to intervene in this matter, stating that the merger threatened to perpetuate monopoly control over local telecommunications facilities and services and substantially impact Sprint's ability to compete as a provider of interexchange service and competitive local exchange service in New Jersey.

By letter dated December 14, 1998, the Division of the Ratepayer Advocate (the "Advocate") propounded its first set of discovery requests. In response, by letter dated December 18, 1999, BA-NJ stated: "[q]uite aside from the substantive issues of relevance that most of your questions present, the request is premature in that N.J.A.C. 1:1-10.4 does not at this time apply to this matter." By letter dated December 17, 1998, the Advocate also submitted comments to the Board in support of AT&T's letter motion seeking a formal proceeding. By letter dated February 3, 1999, the Advocate again asked for a formal proceeding which would allow for the presentation of evidence, comments and formal hearings, as well as a schedule for discovery. Finally, by letter dated April 27, 1999, the Advocate referenced the correspondence submitted to date by the parties, and argued that the Board should not consider the proposed merger in a summary fashion without first conducting public hearings.

At our agenda meeting of April 28, 1999, as memorialized in our Order of May 3, 1999, we denied Sprint's motion to intervene but granted participant status to both Sprint and AT&T. We also ruled that the petitioners respond to the Advocate's discovery requests. The Board then ordered the following discovery and comment schedule:

BA-NJ shall respond to the Advocate's discovery requests, including any objections in light of the limitations on discovery noted above, in not more than ten (10) days of the date of this Order;

The Advocate shall have five (5) days from the date of in hand receipt of BA-NJ's responses to propound any follow-up discovery, subject to the limitations on all discovery noted above;

BA-NJ shall have not more than two (2) days from the date of in hand receipt of the Advocate's follow-up discovery to respond to same; and

The parties may file and serve comments on the proposed merger within fifteen (15) days of the close of the discovery period.

[Board's Order in Docket No. TM98101125 at 4 (May 3, 1999)]

On May 13, 1999, Sprint filed a Motion for Reconsideration of the Board's decision to grant it participant status but deny intervention. For similar reasons, on May 13, 1999, having not done so before, AT&T filed a Motion to Intervene in the matter. In addition, the Telecommunications Resellers Association (TRA) and MCI WorldCom, Inc. filed for participant status in this matter.

On May 18, 1999, the Advocate moved to adjourn this proceeding for 30 days. On May 20, 1999, Sprint and AT&T filed a joint motion requesting that the Board issue an order at the time that discovery is closed which would, among other things, notify the parties of the date for the close of discovery and the due date for the submission of comments.

At our open public meeting of June 9, 1999, we ruled on the above motions. Orders memorializing these decisions were issued on June 21, 1999. For the reasons outlined in our Order, we denied Sprint's motion for reconsideration and AT&T's motion to intervene, upheld our decision to grant participant status to both entities, and, consistent with our decision in our May 3, 1999 order, granted MCI WorldCom's and TRA's motions for participant status. With regard to the Advocate's motion to adjourn, we denied in part and granted in part its motion for a 30-day adjournment, extending the 15-day comment period for all parties in this matter an additional 7 days, with comments due on June 16, 1999. We also denied Sprint's and AT&T's joint motion to issue a scheduling Order.

COMMENTS

In conformance with our directive, on or before June 16, 1999, comments were filed by petitioners, the participants and the Advocate. The following is a summary of their arguments.

Petitioners' Comments

Petitioners argue in their comments filed on May 23, 1999, that the merger will not cause any rates to change, that it is not expected to have a material impact on employment levels and that it will not have an adverse effect on the provision of safe, adequate and proper service. They also argue that the merger will allow the combined company to operate more effectively by using the best practices of the two organizations more efficiently due to reduced overall expenses, enhanced purchasing power, elimination of duplicative systems and reduced corporate overhead.

Citing Re Orange and Rockland Utilities Inc., Docket No. EM98070433 (April 1, 1999) and Re Atlantic City Electric Company, Docket No. EM97020103, 183 PUR 4th 22 (January 7, 1998) for support, Petitioners also argue that approval of their joint petition would be in keeping with the standard applied by the Board in prior merger reviews. Petitioners further assert that public utility commissions in New York and West Virginia where, like New Jersey, GTE is not an ILEC, have already approved the merger and that the Massachusetts commission, where GTE is also not an ILEC, concluded that no review was warranted.

Advocate's Comments

The Advocate asserts that in evaluating the proposed merger, the Board must follow the "best interests of the public" test as set forth in our Orders in Petition of New Jersey Resources Corp. and New Jersey Natural Gas Co. v. NUI Corp. and Elizabethtown Gas Co., BPU Docket No. 8312-1093 (January 31, 1984), and Re: New Jersey Gas Company, 80 PUR 3d 337, 339 (1969). This means, it argues, that the Board must find the proposed merger furthers the public interest before final approval. Using this standard, the Advocate cites In Re Hackensack Water, BPU Docket No. 8312-1096, Decision and Order (November 1, 1984), and other Board decisions to support its argument that the public interest requires that approval of the proposed merger should not occur without conditions that would implement a sharing of merger savings between ratepayers and shareholders.

The Advocate also argues that the Board should hold evidentiary hearings, as it did in In the Matter of the Board's Review of the Amended and Restated Agreement and Plan of Merger Dated as of April 21, 1996 By and Between NYNEX Corporation and Bell Atlantic Corporation, Docket No. TM96070504 (May 22, 1997)(hereinafter "Bell/NYNEX"), to explore the issues which may have an impact on New Jersey ratepayers, including service quality standards, employment levels, economic development measures and the ability of Bell to continue to meet its Opportunity New Jersey ("ONJ") commitments. It argues that another reason for holding such hearings is to quantify any cost savings resulting from the proposed merger before it occurs and determined how those savings would be passed along to customers. The Advocate asserts in this regard that quantification of savings should be done now because its analysis shows that the cost savings to Bell Atlantic resulting from the Bell Atlantic/NYNEX merger are much greater than originally anticipated and that the savings resulting from the Bell Atlantic/GTE merger will actually be in excess of those derived from the Bell Atlantic/NYNEX merger. The Advocate also argues, in view of the greater anticipated cost savings in this case when compared to Bell/NYNEX, that public interest considerations require that the Board condition the approval of the proposed merger on the sharing of the merger benefits with shared cost savings flowed through to ratepayers immediately following the merger rather than at some future date.

Even if the Board determined not to hold hearings, the Advocate recommends that the Board, based on the information provided in this matter, not approve the proposed merger unless it first imposes specific conditions which would allow for ratepayer sharing of merger benefits relating to: expanded local calling areas; extension of rate caps; lower access charges; the establishment of a state universal fund to provide matching funding for maximum lifeline benefits for low income customers, including flat rate offerings and automatic enrollment; and the restriction of GTE's long distance service in New Jersey following consummation of the merger until BA-NJ receives authority to provide interLATA service.

The Advocate concludes that a Board decision to approve the proposed merger absent an examination of the above areas, with or without an evidentiary proceeding needed to quantify and determine a sharing mechanism of the public benefit, will do nothing to promote competition, will not result in any consideration of the current rate structure, the impact on employees or the continued

provision of safe, adequate and proper service. Finally, the Advocate points to other state jurisdictions where extensive proceedings on the proposed merger were conducted or are being conducted. The Advocate argues that the Board should proceed in a similar fashion and investigate some of the same issues, which were raised by the public utility commissions in those other states.

AT&T's Comments

AT&T argues that the merger would enable the two merging entities to combine resources that could be used to enhance their efforts to build barriers to lawful competitive local exchange carrier entry and that it would also eliminate a potential competitor in New Jersey just as the Bell/NYNEX merger eliminated NYNEX as a potential competitor. Specifically, AT&T states that approval of the merger at this time will hurt the Board in its efforts to open local markets to competition through the Technical Solutions Facilitation Team ("TSFT") process, a process which seeks to remedy problems associated with, among other things, use of the UNE platform and Bell Atlantic's present charges for intrastate access lines. Because these and other areas of concern remain unresolved, and because it believes that the post-merger conditions imposed by the FCC relating to the Bell/NYNEX merger are useless because they have not been complied with, AT&T argues that approval of the merger should occur only after specific and enforceable conditions are imposed which require that BA-NJ open its local exchange markets to competition and reduce intrastate rates to cost.

AT&T also argues that the Board's approval of the merger would be in violation of Section 271 of the Telecommunications Act of 1996 because such approval would in effect be an "end run" of the law by allowing Bell Atlantic to gain an advantage in the long distance market in New Jersey without compliance with the Section 271 checklist. Another AT&T argument is that since the Petitioners have stated that there will be savings resulting from the merger, the Board should, if it opts to approve the merger, establish a procedure, as it did in Bell/NYNEX, for BA-NJ to track and report to the Board on the level of savings achieved by the merger. It also argues that the Board should determine either as part of the proceeding before the Board wherein the Board will review BA-NJ's compliance with the Plan for Alternative Regulation or in another appropriate proceeding, to what extent Petitioners will share any cost savings resulting from the merger with New Jersey ratepayers.

As it did in its earlier motion, AT&T asserts that the Board should conduct an evidentiary hearing, open to full intervention by all parties, which would enable the Board to develop a record upon which to determine whether the merger is in the public interest. It claims that such a proceeding would not unduly disadvantage the petitioners, especially in view of media reports indicating that the actual merger will not occur for several months.

Sprint's Comments

Sprint complains that petitioners do not adequately address the criteria set forth in N.J.S.A. 48:2-51.1, which requires a review by the Board of the impact of the merger on competition, rates and service. Thus, Sprint argues that Petitioners provide no credible explanation showing that the merger will not jeopardize competition in the local exchange market, and include only general statements on the proposed merger's affect on rates and service. On this point, Sprint concludes that the Board can only fully comply with the statute by holding evidentiary hearings, if it is to render its decision based on adequate evidence in the record.

Sprint asserts that the Board should be able, given the deficiencies in petitioners' petition, to simply dismiss this matter given what is currently known about petitioners. Thus, Sprint argues that it is

clear that the merger would strengthen monopoly control over local exchange services and facilities and increase Petitioners' incentive to deny, delay and even degrade services and hinder the development of competition. Sprint also suggests that the elimination of GTE as a potential competitor of BA-NJ in the local exchange market in New Jersey will in fact be injurious to competition. In this regard, Sprint argues that there are reasons to believe that GTE would probably enter into the local exchange market in New Jersey as a competitor of BA-NJ if there were no merger, given GTE's position as the owner of facilities in Pennsylvania adjacent to Bell Atlantic's facilities. Sprint also notes that GTE is not just another competitor, but a very large ILEC with significant resources, which could make it a more viable competitor of BA-NJ than many other CLECs.

Sprint also argues that petitioners have not shown how they intend to comply with the check list requirements of Section 271 prior to approval of the merger. Sprint concludes that absent approval of the Section 271 checklist by the FCC, which would allow Bell to provide interLATA service, the petition must be dismissed. Short of dismissal, Sprint suggests that the Board should, at a minimum, require that petitioners supplement their filing to show, absent Section 271 approval, how they will divest GTE's interLATA long distance businesses operating in Bell Atlantic's service territories.

Sprint further argues that the petitioners offer no support for their statements that the merger will increase efficiencies resulting in savings or how these savings are to be passed on to customers. Finally, citing complaints made before the FCC in which AT&T and MCI WorldCom allege that Bell Atlantic has not complied with the post-merger conditions imposed by the FCC relating to the Bell/NYNEX merger, Sprint argues that it is useless to impose post-merger conditions in an effort to govern future conduct of two monopolies after their merger, and that if the Board should find that the merger as filed is contrary to the public interest, it should be denied rather than approved with conditions.

MCI's WorldCom's Comments

MCI WorldCom states that it is opposed to the merger primarily because of the merger's adverse impact on competition in the intrastate, interstate, and long distance markets and because it would reduce incentives for Bell Atlantic to open its local markets to effective competition. In this regard, it argues that Bell Atlantic should not be permitted to offer intrastate or interstate long distance service in Bell Atlantic's territory before it satisfies Section 271 because, if it were allowed to do so, it would have every incentive to choke off competition in the long distance market. MCI WorldCom therefore concludes that the Board should tie Section 271 approval to the merger approval process because this will serve to protect the long distance competitive market and help to create a strong incentive for Bell Atlantic to open its local market to full and effective competition.

TRA's Comments

TRA states in its comments that while it does not necessarily oppose the proposed merger, the Board should take into consideration the experience of non-competition in BA-NJ's service territory and, in particular, hold the Petitioners to the same standards as set forth in Section 271. In this regard, TRA asks that certain specific pre-merger conditions be imposed, including compliance with Section 271, before approving the merger.

DISCUSSION

N.J.S.A. 48:2-51.1 provides in pertinent part:

No person shall acquire or seek to acquire control of a public utility directly or indirectly through the medium of an affiliated or parent corporation or organization, or through the purchase of shares, the election of a board of directors, the acquisition of proxies to vote for the election of directors, or through any other manner, without requesting and receiving the written approval of the Board of Public Utilities. Any agreement reached, or any other action taken, in violation of this act shall be void. In considering a request for approval of an acquisition of control, the Board shall evaluate the impact of the acquisition on competition, on the rates of ratepayers affected by the acquisition of control, on the employees of the affected public utility or utilities, and on the provision of safe and adequate utility service at just and reasonable rates. The Board shall accompany its decision on a request for approval of an acquisition of control with a written report detailing the basis for its decision, including findings of fact and conclusions of law.

Therefore, we must consider the effect of the acquisition on (1) competition, (2) the rates of ratepayers affected by the acquisition of control, (3) the employees of the affected public utility, and (4) the provision of safe and adequate utility service at just and reasonable rates.

As a threshold issue, we must also determine the proper standard of review. Contrary to the Advocate's argument, we see no reason to require that petitioners meet a "positive benefits" standard and in doing so, require that petitioners verify real quantifiable savings or other benefits developed through an evidentiary process before the merger is approved. In this regard, we note that the Board has in an overwhelming number of cases used what is referred to as the "no harm" standard in considering merger transactions. This means that it has approved acquisitions and mergers of utilities only after it was satisfied that there would be no adverse impact on the provision of safe, adequate and proper service at just and reasonable rates, with no adverse impact on the other factors listed in N.J.S.A. 48:2-51.1. Re Atlantic City Electric Company, 183 PUR 4th 22. By contrast, the Board has used the "positive benefit" test on only two occasions. Re New Jersey Natural Gas Company, 80 PUR 3d 337 (1969); In the Matter of the Petition of New Jersey Resources Corporation and New Jersey Natural Gas Company v. NUI Corporation and Elizabethtown Gas Company, Docket No. 8312-1093 (January 31, 1984). In Re Atlantic Electric Company and Re Orange and Rockland Utilities Inc., which are more recent Board decisions, the Board concluded that the "no harm" standard is the better approach for cases involving mergers and we are, therefore, using the same standard in the instant matter.¹

It is clear after a review of the comments submitted that the participants and the Advocate are primarily concerned with issues involving local competition, merger savings and compliance with Section 271 of the Telecommunications Act of 1996. Additionally, for the most part, they argue that full evidentiary hearings should be held in this case. The following is a discussion of these areas of concern.

Competition

With regard to the local competition issue, we note that there are currently other ongoing proceedings before the Board (TSFT proceedings) in which local competition issues are being

¹ For a fuller discussion of "standard of review" see Re: Atlantic City Electric Company, Docket No. EM97020103, 183 PUR 4th 22 (January 7, 1998). See also, Re: Orange and Rockland Utilities, Inc., Docket No. EM98070433 (April 1, 1999).

addressed. Even though the Board is currently conducting such proceedings, as noted above, the participants argue in this case that the elimination of GTE as a potentially strong competitor of BA-NJ in the local market will have an adverse impact on the development of local competition and that the newly merged company places Bell Atlantic in a stronger position to erect barriers to competition in the local and interstate markets and hurt the Board's efforts to open local markets to competition through the TSFT process.

After review, we do not agree that the participants' concerns constitute serious problems regarding the development of local exchange competition in New Jersey. While the participants refer to other states where GTE is a facilities-based local exchange carrier with a large presence in the area, GTE has only a minimal presence in New Jersey and is not at this time a competitor in the local exchange market. Moreover, the Board will continue to have full jurisdiction over BA-NJ and the GTE subsidiaries operating in New Jersey as regulated entities with the same level of oversight through the TSFT proceedings as currently exists. It appears that the participants' real concern involves their respective roles as competitors of Bell Atlantic and GTE in other jurisdictions and not New Jersey. However, it is clear that the United States Department of Justice ("DOJ") is the lead authority on the impact the proposed merger might have on competition on a nation-wide basis. In this regard, the DOJ, pursuant to Section 7 of the Clayton Act, filed a complaint regarding petitioners' proposed transaction, and on May 6, 1999, entered into a consent decree with petitioners which was submitted to the United States District Court for the District of Columbia in USA v. Bell Atlantic Corporation and GTE Corporation, in Civ. Case No. 99-1119. Because petitioners have jointly moved that entry of final judgment be deferred pending further action with regard to a proposed merger transaction involving Bell Atlantic, GTE and Vodafone Airtouch PLC., judgment has not been entered by the Court. Even though there is not as of yet a final judgment entered by the District Court, given the DOJ's action to date, we can find no basis for concluding that the proposed transaction will have an adverse impact on competition in New Jersey.

Merger Savings

As noted above, several of the participants and most notably the Advocate, argue that savings associated with merger should be determined at this time and shared with ratepayers. The Advocate estimates the level of savings attributable to the merger and argues that hearings should be held at this time to quantify savings on a going forward basis so that the amounts involved are immediately shared with ratepayers after consummation of the merger.

While it is possible that the combined companies may realize savings after the merger and that these savings may indeed be substantial, we do not agree that it is possible or appropriate to determine the merged entity's costs absent an analysis of actual and verifiable expenses and savings associated with post-merger operations. Moreover, because a judgment as to what benefits may flow from the merger depends on many variables associated with a future business environment which is not subject to verification, rather than determine savings in an effort to show the level of benefits that would flow to ratepayers, which would require a determination in this regard without the benefit of actual savings figures, we believe it is more appropriate to track merger costs and savings as they develop and once this is done, consider the issue of merger savings in a future proceeding. In doing so, the Board will also be able to consider to what extent such savings should be shared between customers and shareholders.

Section 271

Despite the participants and the Advocate's arguments that our approval of the merger before the Federal Communications Commission ("FCC") considers petitioners' status pursuant to the

requirements of Section 271 would give Bell Atlantic an unwarranted competitive advantage, it is clear that our approval of the merger herein has no bearing on the Section 271 approval process and does not bestow additional competitive advantages on petitioners. Thus, because petitioners must seek and gain FCC approval under Section 271 before offering in-region long distance services and must also garner the FCC's approval of the merger itself before Bell Atlantic can offer such services through GTE, our approval herein is completely contingent on such action by the FCC. Moreover, as we have not as of yet evaluated BA-NJ's compliance with Section 271, our approval of the proposed merger herein does not prejudice in any respect our view of BA-NJ's compliance with that Section.

In this regard, it is important to note that pursuant to our Status Report and Action Plan in Docket No. 98010010, we have begun a process which would lead to a determination as to what steps BA-NJ must take to provide non-discriminatory access to its Operations Support Systems (OSS) and Unbundled Network Elements (UNE's). These steps will ensure that the obstacles to mass market local competition that we identified are removed. In addition, the TSFT process will lead to appropriate performance measurements and remedies to ensure that competitors have continued open access to these markets. As to Section 271 relief, BA-NJ will be obliged to demonstrate compliance with any Board ordered requirements and the "competitive checklist" established in the Act before we will support its application to the FCC for in-region long distance service.

Hearings

While there have been arguments calling for evidentiary hearings in this case, as will be shown below, there is no legal requirement mandating that such hearings be held. Moreover, all participants and the Advocate were given a full opportunity to be heard through the filing of comments and extensive discovery was conducted. As a result of this process, the Board has before it a significant amount of data, and when considered together with the fact that GTE's New Jersey operations are relatively small (approximately 6500 business customers), sufficient information has been submitted by petitioners to allow the Board to act on this matter without first holding evidentiary hearings.

To begin, this matter does not constitute a contested case as defined under the Administrative Procedure Act ("APA"). N.J.S.A. 52:14B-1 et seq. The APA sets forth the definition of a contested case providing, in pertinent part, as follows:

"Contested case" means a proceeding, including any licensing proceeding, in which the legal rights, duties, obligations, privileges, benefits, or other legal relations of specific parties are required by constitutional right or by statute to be determined by an agency by decisions, determinations or orders, addressed to them or disposing of their interests, after opportunity for an agency hearing,....

[N.J.S.A. 52:14B-2(b)]

Therefore, a matter is deemed contested when there is a requirement by statute or constitution that there be a hearing. However, the APA does not itself create a substantive right to an administrative hearing, but instead just prescribes the procedure to be followed if an administrative hearing is otherwise required by law or constitutional mandate. See, In Re: Application of Modern Indus. Waste Serv., Inc., 153 N.J. Super. 232 (App. Div. 1977).

As noted above, transactions such as the one proposed in the within matter are reviewed pursuant

to the requirements of N.J.S.A. 48:2-51.1. That statute contains no requirement that evidentiary hearings be held, but as explained below, there are still established court determined standards which require consideration when determining the amount of process which is due in a particular proceeding.

The Supreme Court of New Jersey considered this issue in High Horizons Development Co. v. State Department of Transportation, 120 N.J. 40 (1990). In that case, the Court, in an effort to clearly delineate those kinds of matters where evidentiary hearings are necessary and those where such hearings would be of little practical assistance, distinguished between facts which pertain to a particular party, called adjudicatory facts, which normally would require a trial-type hearing because they involve questions which must be answered with absolute certainty such as who did what, where, how and why, with what motive or intent; and legislative facts, which would not normally require a trial-type evidentiary hearing because they do not concern the immediate parties, but are facts which help the agency decide questions of law, policy and discretion. Id. at 50. The Court noted that it has regularly followed the three-prong test set forth in Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct.893, 47 L.Ed.2d 18(1976), when determining what process would be due in a particular case. That test includes consideration of "(1) the private interest at stake; (2) the risk of erroneous deprivation through the use of agency procedures and the probable value of additional or substitute safeguards; and (3) the state interest, including the burdens entailed by additional procedural requirements." High Horizons, supra at 52. In applying the Eldridge test, the Court stated that the question that should be asked "is whether the contested issues ...are ones that ordinarily should be determined without providing the parties an opportunity for a trial," Id. The Court also found that due process is satisfied if there is "a chance to know opposing evidence, and to present evidence and argument in response." Id. at 53. However, it also clearly distinguished between the requirements of due process and the question of how much process is due, stating with regard to the necessity of evidentiary hearing that "in sum, it is the presence of disputed adjudicative facts, not the vital interests at stake, that requires the protection of a formal trial procedure." Id.

Application of the above standards in this matter confirms that there is sufficient information in the record of this matter to allow for the approval of the proposed merger without first holding evidentiary hearings. While AT&T, Sprint and the Advocate generally argue that evidentiary hearings are required so that the Board can develop a full record pursuant to the standards set forth in N.J.S.A. 48:2-51.1, it is clear that aside from the quantification of savings issue, the participants have failed to provide arguments that show that there are adjudicatory factual issues in dispute which can only be resolved through cross-examination of witnesses in evidentiary trial-type hearings. As explained above, the Board's analysis of competition under the statute is based on a settlement entered into between DOJ and petitioners, while Section 271 issues are dependent upon a future determination by the FCC. Therefore, neither analysis involves the consideration of disputed issues of adjudicatory fact. With regard to the quantification of savings issue, while the Advocate points to the need to determine the level of savings associated with the merger, as noted above, this Board is not rendering its decision herein based on presumed savings and will revisit this issue in a future proceeding when it is possible to verify savings through an analysis of actual post-merger expenditures and operations.

Moreover, our primary focus in this matter is on the entity being purchased; that is, GTE and not on Bell Atlantic's or BA-NJ's operations. GTE's presence in New Jersey is very small with two subsidiaries serving approximately 6500 customers and our review uncovered no concerns regarding the continued provision of safe, adequate and proper service by those GTE subsidiaries. The participants' and the Advocate's focus, however, is on Bell Atlantic. To support its argument that more extensive hearings should be held in the within matter, the Advocate points to the Board's handling of the Bell/NYNEX merger case in Docket No. TM96070504, wherein the Board

conducted a fairly extensive review of BA-NJ's operations to determine the impact of Bell Atlantic's purchase of a controlling interest in NYNEX.

Bell/NYNEX is distinguishable from this one because the Board, at the time, had real concerns about Bell Atlantic's continuing ability to meet its obligations under its Alternative Plan of Regulation, especially as it related to Bell Atlantic's ONJ commitments. Thus, the Board commenced the ONJ proceedings in 1996 in BPU Docket No. TX96100707 and only consolidated that matter with the Bell/NYNEX merger proceeding after concerns were raised that the purchase of NYNEX, a company with a history of service problems, might drain resources from New Jersey and interfere with BA-NJ's continuing obligations under ONJ. Therefore, there were clear extenuating circumstances which caused the Board to examine the impact on BA-NJ itself. Also, because the Board will soon be considering BA-NJ's Alternative Plan of Regulation pursuant to its original Order and subsequent Orders in Docket TO99120934, and in view of the fact that the Board in 1999 reviewed ONJ, and found BA-NJ to be in compliance with all its ONJ commitments, we see no reason to hold yet another extended proceeding to once again review BA-NJ's operations in the context of the overall impact of the proposed GTE/Bell Atlantic merger.

Sprint cites Petition of MCI Telecommunications Corporation, 264 N.J. Super. 313 (App. Div.1993), as support for its argument that the Board should hold evidentiary hearings in this matter. In MCI, the Appellate Division was clearly concerned that the Board had afforded very little process in a matter which required more extensive fact-finding than the Board in fact conducted and found that a hearing should have been held. However, the instant matter is very different from MCI. In MCI it was argued by MCI Corporation that the facts and circumstances regarding the telecommunications industry had changed enormously in the intervening six years since the Board considered and rejected the introduction of intraLATA telephone competition in New Jersey, and that a review of the issues through a hearing process was necessary. In contrast, as stated above, the Board's consideration of this merger does not involve adjudicatory facts such that hearings must necessarily be held. In fact, as discussed above, all factual issues which may be a matter of dispute regarding the potential savings benefits of the merger are to be considered in a future proceeding once sufficient information is available and not in this proceeding. Therefore, the Appellate Division's finding in MCI does not apply to this case. Also, as stated above, the Board in this case, unlike MCI, did in fact consider the discovery promulgated and the comments filed by the participants and the Advocate before concluding that the merger met the requirements of N.J.S.A. 48:2-51.1.

CONCLUSION

Therefore, we FIND, that the record in this matter is sufficiently developed to allow for an adequate review of the proposed merger without first holding evidentiary hearings. We also FIND, pursuant to N.J.S.A. 48:2-51.1, that GTE's presence in New Jersey is very limited in that its subsidiaries provide on a resale competitive basis, operator, calling card and long distance services to only 6,520 customers. Given this limited presence and also in view of DOJ's actions to date regarding its review of the proposed merger, we FIND no significant impact on telecommunications competition in New Jersey. Moreover, we note that petitioners will continue to be regulated to the full extent that they are currently regulated, and will continue to be required to abide by filed tariffs and the Board's regulations regarding the individual operations of the utilities involved. We also FIND that there will be no material impact on employment levels and that all existing union contracts will be honored.

This Order of Approval is subject to the following conditions:

We reserve our right to revisit and reconsider our decision herein approving the merger should the FCC and/or another federal governmental entity deny petitioners' request for approval of the merger.

Bell Atlantic and BA-NJ shall compile cost and savings data related to the merger including a comprehensive review of the merger related costs, savings, structural and operation changes and economic impacts on New Jersey ratepayers. As stated in our January 27, 2000 Order in Docket No. TO99120934, BA-NJ is required to address the issue of savings and other impacts relating to its merger with GTE in its modified Plan for Alternative Regulation proceeding. In that proceeding, the Board will consider the issue of merger savings and to what extent said savings are to be shared between New Jersey Ratepayers and Shareholders.

To the extent that Section 271 relief is a condition precedent to closing the merger, it would be up to BA-NJ to fulfill that condition or to seek a waiver of that condition. Nothing in this Order can be used in any way as an argument that BA-NJ's Section 271 checklist obligations in New Jersey have been satisfied or addressed. Any concerns regarding compliance therewith are federal questions which must be decided by the FCC. BA-NJ will not therefore be permitted to continue the existing GTE long distance resale operations in New Jersey following the close of the merger, unless and until the FCC grants such relief.

DATED: 3/15/00

BOARD OF PUBLIC UTILITIES
BY:

(signed)
HERBERT H. TATE
PRESIDENT

ATTEST:

(signed)
CARMEN J. ARMENTI
COMMISSIONER

(signed)
EDWARD D. BESLOW
ACTING BOARD SECRETARY

(signed)
FREDERICK F. BUTLER
COMMISSIONER