

# Creating Better Incentives Through Regulation: Section 271 of the Communications Act of 1934 and the Promotion of Local Exchange Competition

Tim Sloan\*

I. Introduction 310

II. Constitutionality of Section 271 314

III. Preconditions to BOC Entry 321

*A. Facilities-Based Competitor 322*

1. Relationship Between Section 271(c)(1)(A) and

Section 271(c)(1)(B) 322

2. Characteristics of a Facilities-Based Competitor 334

*a. "Telephone Exchange Service" 335*

*b. "Over Their Own Facilities" 340*

*c. "Predominantly" 344*

*d. "Providing Service to Residential and*

*Business Subscribers" 346*

3. Compliance with the Competitive Checklist 356

4. Pricing of Interconnection, Unbundled Network

Elements, and Services for Resale 359

*B. The "Public Interest" Requirement 367*

1. Promoting Competition 369

*a. Elimination of Barriers to Entry 374*

*b. "Commercially Useful" Availability of All Items  
in the Competitive Checklist 376*

*c. Ensuring Continuing Compliance with the  
Competitive Checklist 380*

*d. Commitment to Competition 382*

2. Maintaining Service Quality and Protecting

Telephone Subscribers 383

IV. Procedural Issues 386

*A. Consultation with State Regulatory Commissions* 386

*B. Consultation with the DOJ* 390

1. Scope of DOJ Review 390

2. According "Substantial Weight" to the DOJ's Views 392

*C. Appellate Review* 394

V. Conclusion 396

I. Introduction

Section 271 of the Communications Act of 1934 establishes both the procedures by which a Bell Operating Company (BOC) may apply to provide interLATA services in one of its in-region States,<sup>1</sup> and the substantive standards by which that application must be judged. The provision reflects Congress's judgment that, under appropriate circumstances, the BOCs should be allowed to offer interLATA services. Section 271 cannot be fully understood or properly applied, however, unless it is viewed in the larger context of the Telecommunications Act of 1996 (Act or 1996 Act) and its underlying purposes.

The overriding goal of the 1996 Act is to promote competition in all telecommunications markets.<sup>2</sup> But Congress was particularly concerned about introducing and expanding competitive entry into local telecommunications service markets.<sup>3</sup> Consequently, the 1996 Act required the BOCs and other local exchange carriers (LECs) to "unbundle their networks and to resell to competitors the unbundled elements, features, functions, and capabilities that . . . new entrants need to compete in the local market."<sup>4</sup> More importantly, perhaps, Congress sought to create incentives for firms to cooperate in the opening of their monopoly markets to competition.<sup>5</sup> Section 271 is the most prominent example of that effort.<sup>6</sup> In essence, Congress held out interLATA entry as a reward for the BOCs' acceptance of and compliance with interconnection, unbundling, and resale obligations designed to facilitate entry by alternative providers of local telecommunications services. The floor manager of the telecommunications bill in the House of Representatives, Representative Bliley, succinctly summarized the bargain: "Once the [BOCs] open the local exchange networks to competition, [they] are free to compete in the long distance and manufacturing markets."<sup>7</sup>

Congress charged the Federal Communications Commission (FCC or Commission) with the task of reviewing and disposing of BOC interLATA applications.<sup>8</sup> The Commission may not act completely on its own, however. It must consult with the state commission implicated by each BOC application "in order to verify the compliance of the [BOC] with the requirements of [section 271]."<sup>9</sup> Section 271 also directs the Department of Justice (DOJ) to evaluate each BOC application and requires the Commission to give "substantial weight," though not preclusive effect, to that evaluation.<sup>10</sup> In the end, though, section 271 makes the BOCs the masters of their own fate, because it links the success of their interLATA applications directly to their commitment to opening their local markets to meaningful competition.<sup>11</sup>

The Commission has considered—and denied—three section 271 applications: one by Southwestern Bell (SBC) to provide in-region, interLATA services in Oklahoma; another by Ameritech to market such services in Michigan, and a third by BellSouth to commence long-distance operations in South Carolina.<sup>12</sup> In so doing, the Commission has given its answers to many, though by no means all, of the questions raised by the frequently ambiguous text of section 271. The Commission's decisions have not, however, terminated the many disputes about the meaning and application of that provision. SBC has appealed the Commission's denial of its Oklahoma application.<sup>13</sup> The Commission's order dismissing Ameritech's request has already sparked collateral litigation in the United States Court of Appeals for the Eighth Circuit<sup>14</sup> and may eventually be appealed to the District of Columbia Circuit Court of Appeals.<sup>15</sup> Other questions will doubtless arise as BOCs seek to offer interLATA services in other states.<sup>16</sup>

This Article examines the text and legislative history of section 271 in an effort to divine how Congress intended that provision to be applied. This Article also assesses whether the interpretations of section 271 that the Commission has issued to date are consistent with that congressional design. Part II addresses the claim that section 271 is an unconstitutional bill of attainder. Part III considers the preconditions to BOC entry—the legal and factual findings that the Commission must make in order to grant a BOC's application to offer in-region, interLATA services. Part IV discusses the procedural framework within which the Commission must operate—the agencies with whom it must consult, the standard of proof that it must apply, and the legal standard against which any Commission decision must be judged. The objective is to develop a construction of section 271 that is consonant with the text and intent of the statute, and that promotes the overriding goal of the 1996 Act—to promote competition in all telecommunications markets, particularly the market for local exchange services.

## II. Constitutionality of Section 271

On New Year's Eve 1997, a federal district court invalidated section 271, as well as the provisions in the 1996 Act that govern BOC entry into manufacturing, alarm services, and electronic publishing.<sup>17</sup> While the court intimated that the challenged provisions could be considered appropriate economic regulation, it judged them to be an unconstitutional bill of attainder.<sup>18</sup> A statute constitutes a bill of attainder when it "(1) identifies a specific individual or group (2) inflicts punishment on that individual or group (3) without the benefit of a judicial trial."<sup>19</sup> As demonstrated below, section 271 easily passes muster under each of these tests.

The first criterion is somewhat misstated, because the case law indicates that a statute must do more than specify an individual or group for punishment. The statutes that the Supreme Court has found to be bills of attainder were enactments that penalized individuals to one degree or another for some immutable past behavior or affiliation.<sup>20</sup> The individuals' place within the attainted class was thus irreversible or inescapable. For a statute to be considered a bill of attainder, therefore, the penalized class must be both "specified" and "fixed."<sup>21</sup>

Section 271 establishes no such closed class. To the contrary, the BOCs can escape the restriction by complying with the competitive checklist and, thereby, open their market to competition. By applying the language of *Selective Service System v. Minnesota Public Interest Research Group* to the section 271 analysis, the following results: "Far from attaching to . . . past and ineradicable actions, 'ineligibility' for interLATA entry "is made to turn upon continuously contemporaneous fact" in this case the lack of an open local exchange marketplace which a BOC desiring interLATA entry "can correct."<sup>22</sup> Because section 271 does not single out a fixed group, it does not constitute a bill of attainder.

As for the second criterion, section 271 cannot be said to "punish" the BOCs. Indeed, the alleged penalty it imposes is not even permanent. Again, a BOC can secure interLATA entry by complying with the market-opening provisions of the 1996 Act. "A statute that leaves open perpetually the possibility of [escaping the pertinent restriction] does not fall within the historical meaning of forbidden legislative punishment."<sup>23</sup> The court discounted the temporary nature of the interLATA restriction, concluding, without discussion or substantiation, that the principal statutory precondition for interLATA entry (*i.e.*, checklist compliance) is "onerous," "tainted with indefiniteness and replete with arbitrary standards," and "may never be met by the BOCs."<sup>24</sup> But *ipse dixit* cannot provide the "unmistakable evidence of punitive intent" required before a statute may be invalidated as a bill of attainder.<sup>25</sup>

The court's characterization of the competitive checklist, moreover, would doubtless surprise those Members of Congress who questioned the adequacy of the checklist as an entry condition because it could be complied with easily without producing meaningful local competition.<sup>26</sup> Further, the sponsor of the Senate telecommunications reform bill, Senator Pressler, indicated that the checklist was a less rigorous standard than the one that governed BOC interLATA entry prior to passage of the 1996 Act.<sup>27</sup> In short, the court's unsubstantiated assertions about the severity of the checklist requirements are contrary to Congress's understanding of those requirements.

The evidence demonstrates that Congress intended section 271 not to penalize the BOCs, but "to further nonpunitive

legislative purposes."<sup>28</sup> The fundamental goal of the 1996 Act was to promote competition in all telecommunications markets, notably local exchange service markets.<sup>29</sup> Congress therefore imposed on the LECs that dominate the latter markets certain obligations designed to facilitate competitive entry.<sup>30</sup> There is no question that Congress had the authority to establish the goal of greater competition and to prescribe mechanisms to achieve it. The legislature realized, however, that the path to expanded local competition would be smoother if the LECs could be induced to cooperate with the 1996 Act's market-opening provisions.<sup>31</sup> Section 271 was intended to create such incentives on the part of the BOCs, the principal providers of local service in the metropolitan areas where most Americans live and work.<sup>32</sup> Far from removing a carrot from the BOCs, as SBC claimed,<sup>33</sup> section 271 was a carrot that Congress held out to encourage the BOCs to collaborate in the effort to promote local competition.<sup>34</sup> Properly viewed, section 271 is not a punitive law but rather "a prophylactic measure—an incentive to comply with valid laws [to promote competition], enforced by withholding the enjoyment of various benefits (and even rights) until such compliance is evidenced."<sup>35</sup>

The court nonetheless determined that Congress meant for section 271 to "serve as punishment for the BOCs' presumed anticompetitive conduct."<sup>36</sup> But there is not a shred of evidence for that conclusion in the statute or the legislative history. To the contrary, the record is replete with congressional statements favoring expeditious BOC entry into the interLATA market.<sup>37</sup> Had Congress actually meant to enact a punitive statute, section 271 would have looked quite different from the provision that came before the court. For example, Congress would not have allowed the BOCs to provide, upon enactment of the 1996 Act, interLATA services outside of their monopoly service areas, a right they did not generally possess previously.<sup>38</sup> It would not have permitted the BOCs to offer, upon enactment, certain "incidental" interLATA services within their service areas, including wireless long-distance services.<sup>39</sup> It would not have established a standard for judging BOC requests to offer in-region, interLATA services that was, in the minds of many Members of Congress, more favorable to the BOCs than the test in effect before passage of the 1996 Act.<sup>40</sup>

Thus, section 271 displays none of the features that the Supreme Court has stated are necessary characteristics of a punitive statute.<sup>41</sup> It does not fall within the historical meaning of legislative punishment, because its restriction is escapable. There is no evidence that Congress enacted the provision to punish the BOCs. In the absence of such evidence, section 271 should be taken for what it appears to be—a mechanism for allowing the BOCs into the interLATA market in a way that promotes both long-distance and local competition. It is not a bill of attainder.

Finally, section 271 cannot be seen as a punishment imposed without a judicial trial. The 1996 Act, after all, did not impose the interLATA restriction on the BOCs. It first appeared in the 1982 *AT&T Consent Decree*, which was entered in settlement of a 1974 federal antitrust suit against the Bell System. That settlement was precipitated by the trial court's denial of AT&T's motion to dismiss the case. The court concluded, after months of trial, that the "evidence adduced by the government demonstrate[s] that the Bell System has violated the antitrust laws in a number of ways over a lengthy period of time."<sup>42</sup>

The *SBC* court response is that the consent decree and its restrictions were "born out of alleged antitrust violations by AT&T," not the BOCs.<sup>43</sup> But the *AT&T* court also concluded, in its order approving the proposed *AT&T Consent Decree*, that "[t]he key to the Bell System's power to impede competition has been its control of local telephone service."<sup>44</sup> It recognized, moreover, that after the divestiture contemplated by the decree, the Bell System's local service monopolies would pass from AT&T to the newly-created BOCs. The court therefore concluded that unfettered BOC entry into related markets such as long distance "carrie[d] with it a substantial risk that the [BOCs] will use the same anticompetitive techniques used by AT&T in order to thwart the growth of their own competitors."<sup>45</sup> Accordingly, the court also ratified provisions in the *AT&T Consent Decree* that barred each BOC from providing interLATA services until it could show that "there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter."<sup>46</sup>

Thus, contrary to the *SBC* court's assessment, the interLATA restriction is not some vestige of a parent's sins two decades old.<sup>47</sup> Nor was it imposed "for what offenses Congress believes the BOCs may (without any evidence)

commit in the future."<sup>48</sup> Rather, the restriction exists because a judicial tribunal concluded that it was necessary to prevent the recurrence of anticompetitive conduct documented in a lengthy antitrust trial. As the AT&T court put it, "[t]o permit the [BOCs] to compete in [the interLATA] market would be to undermine the very purpose of the proposed decree—to create a truly competitive environment in the telecommunications industry."<sup>49</sup>

When Congress was debating telecommunications reform legislation, it recognized that the BOCs' local exchange monopolies had not eroded much in the years after their separation from AT&T.<sup>50</sup> Congress also reasonably relied upon the court's previous findings that, left unchecked, the BOCs' dominant position in the local markets could enable them to forestall competition in interLATA and other markets. At the same time, however, the legislature was disturbed by the fact that, with the *AT&T Consent Decree* in place, the AT&T court and the DOJ were controlling national telecommunications policy in several important areas.<sup>51</sup> Congress also was frustrated with certain aspects of DOJ's administration of the decree.<sup>52</sup>

In the end, Congress chose not to terminate the *AT&T Consent Decree*.<sup>53</sup> It also retained the decree's interLATA restriction (albeit with some modifications), incorporating it into section 271.<sup>54</sup> To address the concerns described above, however, Congress transferred prospective administration and enforcement of the decree from the court to the Commission.<sup>55</sup> Further, Congress modified the legal standard governing BOC applications to remove the interLATA restriction from the "no substantial possibility" formulation in the *AT&T Consent Decree* to the standard that now appears in section 271.

Thus, the *SBC* court oversimplified the matter when it suggested that the 1996 Act replaced the *AT&T Consent Decree*.<sup>56</sup> As noted, the Act primarily altered the way in which the BOCs could seek and justify removal of the decree's continuing restrictions, and changed the forum in which those requests would be heard. Congress did not alter the decree's core interLATA restriction—its ban on BOC provision of long-distance services originating within their local service areas. In so doing, the legislature did not have to make any findings about the need for that restraint. That determination had been made years earlier by a court after a judicial trial.

Section 271 is not an unconstitutional bill of attainder. The *SBC* court's conclusion to the contrary rests on its misapplication of the relevant law, its lack of deference for an act of Congress, and its misunderstanding of the underlying facts. The court's opinion also results, however, from an overly broad reading of the Bill of Attainder Clause. The clause seems intended to protect individuals and groups from being singled out for punishment because of their beliefs or political affiliations.<sup>57</sup> Extending it to the realm of economic regulation—an application that likely was never intended by the Framers of the Constitution—would "cripple the ability of legislatures to respond to some perceived social or economic problem by imposing restrictions or limitations on individuals, corporations, or industries which are deemed responsible for the problem."<sup>58</sup> Section 271 provides no cause for such a dramatic step.

### III. Preconditions to BOC Entry

Under section 271, the Commission "shall not approve" a BOC application to offer in-region, interLATA services unless the Commission finds that:

1. The BOC has concluded agreements with one or more facilities-based competitors under which the BOC is offering access or interconnection that satisfies the requirements of section 271(c)(2)(B)—the so-called "competitive checklist." Alternatively, if a BOC has not received a qualifying interconnection request within a designated period of time, the BOC can satisfy this requirement by providing a statement of generally-available terms and conditions that complies with the competitive checklist and that "has been approved or permitted to take effect by the [relevant] State commission . . . ." <sup>59</sup>
2. The BOC will offer interLATA services through a separate affiliate that complies with the requirements of section 272. <sup>60</sup>
3. Grant of the BOC's application "is consistent with the public interest, convenience, and necessity." <sup>61</sup>

This Article will focus on the first and third conditions—the "facilities-based competitor" requirement and the "public interest" test.

### A. *Facilities-Based Competitor*

Section 271(c)(1), which sets out the facilities-based competitor requirement and the permissible exception from it, "comes virtually verbatim" from section 245(a)(2) of House Bill 1555, the telecommunications bill passed by the House of Representatives in August 1995.<sup>62</sup> Thus, the language and legislative history of House Bill 1555 provide the keys to unlocking the meaning of section 271(c)(1). That section commands explication because it raises a host of questions that the text leaves unanswered: What are the necessary characteristics of the facilities-based competitor mentioned in section 271(c)(1)(A)? What types of facilities must it possess? How many subscribers must it have? In how many markets must it operate?

#### 1. Relationship Between Section 271(c)(1)(A) and Section 271(c)(1)(B)

Section 271(c)(1) creates two "tracks" by which BOCs may seek authorization to offer in-region, interLATA services. In order to qualify for interLATA entry under subparagraph (A) (Track A), a BOC must provide access and interconnection to at least one facilities-based competitor that offers local exchange telephone service to residential and business subscribers.<sup>63</sup> If, by a certain date, "no such provider" has requested access or interconnection, a BOC can pursue interLATA entry via subparagraph (B) (Track B) by providing a state-ratified statement of generally available terms and conditions that satisfies the checklist requirements.<sup>64</sup>

When may a BOC choose Track B, which plainly charts an easier course than Track A, as its route to interLATA entry? By its terms, Section 271(c)(1) makes Track A the primary avenue for interLATA entry because the statute phrases Track B as an exception, to be invoked only if certain circumstances occur.<sup>65</sup> SBC notes correctly that Congress created Track B, in part, to prevent long-distance carriers from keeping the BOCs out of the interLATA market by avoiding local-market entry.<sup>66</sup> As stated in the House Conference Report, Track B "is intended to ensure that a BOC is not effectively prevented from seeking entry into the interLATA services market simply because no facilities-based competitor . . . has sought to enter the market."<sup>67</sup>

A BOC may take Track B "if, after 10 months after February 8, 1996 [the date the Telecommunications Act of 1996 was enacted], no such provider has requested the access and interconnection described in [Track A] before the date which is 3 months before the date the [BOC] makes its application" for interLATA entry.<sup>68</sup> Plainly, then, there was no Track B for a BOC to invoke until at least December 8, 1996, and then only if it did not receive an interconnection request by September 8. That date having come and gone, a BOC can now opt to proceed via Track B only if it received no qualifying request for access and interconnection more than three months prior to the date of its application.<sup>69</sup>

Not surprisingly, a debate rages over what type of provider can make a "qualifying" request that triggers Track A and, hence, forecloses Track B. Parties concerned about premature BOC entry into the interLATA market contend that virtually any interconnection request by a prospective competitor will be sufficient to vitiate Track B.<sup>70</sup> BOCs, on the other hand, assert that "only a timely request from a [competitive provider] that *actually qualifies* under Track A [for example, that is already providing facilities-based service to residential and business subscribers at the time the interconnection request is made] can foreclose Bell company entry under

Track B."<sup>71</sup> The Commission has rejected these antipodal positions in favor of a more moderate alternative:

[W]e conclude that the request from a potential competitor must be one that, *if implemented*, will satisfy [Track A]. That is, we find that a "qualifying request" must be one for access and interconnection to provide the type of telephone exchange service to residential and business subscribers described in [Track A].<sup>72</sup> That view is consistent with both the statutory text and the intent and underlying purposes of section 271(c)(1).

The BOCs' claim—that the party seeking interconnection must be fully operational when it first makes its request—is not without support in the statute and the associated legislative history. The statutory text indicates, for example, that Track B applies if "no such provider has requested the access and interconnection described in [Track A]" more than three months prior to the filing date of a BOC interLATA application.<sup>73</sup> The phrase "no such provider" arguably refers back to the entity described in Track A—a facilities-based provider of local exchange service to residential and business subscribers.<sup>74</sup> The reference in Track B to the requirements of Track A thus raises an inference that Congress intended for Track B to apply unless a BOC received a timely interconnection request from a provider that satisfies the criteria of Track A *at the time* that request is made.

A closer reading of the statute refutes that inference, however. Track B can indeed be read to incorporate the "criteria" of Track A if one considers only the operational characteristics of a qualifying "provider"—what it must provide ("telephone exchange service"), how it must provide (either "exclusively" or "predominantly" over its own facilities), and to whom it must provide ("residential and business subscribers"). The same cannot be said about the matter of timing (when the provider must exhibit the characteristics that Track A specifies).

On that question, Track A indicates only that a BOC's interLATA application fulfills section 271(c)(1) if the BOC "has entered into one or more binding agreements . . . under which [it] is providing access and interconnection to . . . one or more unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers."<sup>75</sup> The quoted language indicates only that the "criteria" of Track A can be satisfied if an unaffiliated provider offers qualifying services as of the filing date of the BOC's interLATA application. Track A thus cannot be read to require that the competing provider must be offering such services at some earlier date—such as when it first seeks an interconnection agreement with a BOC. If Track A does not contain such a requirement, *a fortiori* it cannot be incorporated by reference into Track B.

The notion that, in order to invalidate Track B, a competing provider must already be offering facilities-based service when it requests access and interconnection is also at odds with the structure and purpose of section 271(c)(1). As Congress recognized when it considered telecommunications reform legislation, few, if any, companies could provide, as of the enactment date of the 1996 Act, the facilities-based competition that Track A requires. In its report on House Bill 1555, the House Commerce Committee acknowledged that "[w]hile some competition has developed in the local business service and exchange access markets, local residential service remains a monopoly service."<sup>76</sup> Moreover, the BOCs and other local exchange carriers:

are frequently protected from competition by government barriers to entry. In fact, the Committee found that the majority of States restrict full and fair competition in the local exchange, either by statute or through the public utility commission's regulations.<sup>77</sup>

Although Congress understood that local competition was emerging, it concluded that such competition was not yet sufficient to meet the facilities-based competitor requirement. The House Report noted specifically that "[i]t is not sufficient for a competitor to offer exchange access service to business customers only, as presently offered by competitive access providers (CAPs) [such as Teleport Communications Group and MFS Communications] in the business community."<sup>78</sup> Similarly, while Congress believed that cable television systems "hold the promise of providing the sort of local residential competition that has consistently been contemplated,"<sup>79</sup> the examples cited in the Conference Report indicate that, in February 1996, the promise of cable competition was still just that. Time Warner and Jones Intercable were "actively pursuing *plans* to offer local telephone service in significant markets;" Cablevision Systems had "the *goal* of offering telephony on Long Island . . . ." <sup>80</sup>

Given Congress's awareness of, and dissatisfaction with, the general absence of local competition when it enacted section 271(c)(1),<sup>81</sup> a considerable leap of logic is required for the BOCs to argue that Congress chose to rely on an interconnection request by an existing facilities-based competitor as the only barrier to BOC interLATA entry ten short months after that enactment. That argument is also flatly inconsistent with the timetable that section 271 erects. As noted above, the BOCs could seek interLATA entry via Track B on December 8, 1996 if they had not received a qualifying interconnection request prior to September 8, 1996.<sup>82</sup> Because little, if any, facilities-based competition

existed on the date of enactment, it would have had to develop during the seven months between February and September.

As Congress understood, however, competition would not be possible unless and until new entrants could link their facilities with the BOCs' ubiquitous local exchange networks.<sup>83</sup> And interconnection, in most cases, was not feasible until the Commission promulgated rules implementing sections 251 and 252 six months after enactment.<sup>84</sup> As a practical matter, then, facilities-based entrants would not have had time to emerge soon enough to play the role in the section 271 process that the BOCs demand.<sup>85</sup> Viewed against this backdrop, the BOCs' insistence that, to nullify Track B, a facilities-based competitor must be offering qualifying services *at the time* it requests access and interconnection is tantamount to a claim that Congress intended Track B to be the operative provision in most instances, thereby rendering Track A nugatory.<sup>86</sup>

There is ample evidence that Congress did not intend such a result.<sup>87</sup> The House Commerce Committee, which inserted Tracks A and B into House Bill 1555, viewed Track A's facilities-based competitor requirement as:

the integral requirement of the checklist, in that it is the tangible affirmation that the local exchange is indeed open to competition. In the Committee's view, the "openness and accessibility" requirements are truly validated only when an entity offers a competitive local service in reliance on those requirements.<sup>88</sup>

The House Report, in discussing Track B, indicated that the provision was included in the bill because a BOC should not be denied interLATA entry "simply because no facilities-based competitor which meets the criteria specified in the Act [presumably meaning Track A] sought to enter the market."<sup>89</sup> The Report states further that, because access and interconnection negotiations could be commenced as of the date of the legislation's enactment, "it does not create an unreasonable burden on a *would-be competitor* to step forward and request access and interconnection" within the time period prescribed.<sup>90</sup> The foregoing language implies that the House of Representatives believed that a qualifying request for interconnection could be made by a firm that *intends* to offer facilities-based local residential and business telephone services, rather than solely by a company that is already providing such services.<sup>91</sup>

The House Conference Report provides evidence that the full Congress adopted that view. It states that the purpose of Track B was to facilitate BOC interLATA entry if no competitor "that meets the criteria set out in [Track A] has sought to enter the market."<sup>92</sup> The reference to a competitor seeking to enter the local exchange market makes no sense at all if a competitor can "meet the criteria" of Track A only if it is already in the market—that is, only if it is already providing facilities-based local telephone service to residential and business subscribers—when the competitor submits its interconnection request.

If the BOCs' construction of Track B cannot be squared with the language and intent of section 271(c)(1), the same can be said for competitors' claims that *any* interconnection request can suspend the operation of Track B. That argument effectively erases from Track B the cross-reference to Track A, contrary to the plain language of the statute.<sup>93</sup> Taken together, Tracks A and B clearly require the party requesting interconnection to exhibit certain specific characteristics: it must provide telephone exchange service; it must operate predominantly or exclusively over its own facilities; and it must serve both residential and business subscribers. The fact that the statute does not specify *when* the requestor must exhibit those characteristics, does not mean that it need *never* possess them.<sup>94</sup>

If a potential competitor can make a qualifying request under Track B,<sup>95</sup> how can the Commission distinguish *bona fide* requests from attempts to manipulate the statutory framework in order to bar the BOCs from the interLATA market? One approach would be to focus on the party making the request. If, for example, the firm is certificated by the relevant state regulatory commission to offer local residential and business services within the state, the FCC could take that fact as persuasive evidence that the prospective entrant is a "would-be competitor" to the incumbent BOC,<sup>96</sup> or a company that is "actively pursuing plans" to offer services that would satisfy Track A.<sup>97</sup> The Commission could also infer an intent to serve from a competitor's decision to file a tariff for residential and business services with the relevant state agency.<sup>98</sup> Finally, if the requestor is offering such services in another jurisdiction, the Commission could

reasonably assume that the company will do the same in the state in which it is seeking access and interconnection.

An alternative, but complementary, tactic would be to consider the interconnection request submitted. The Commission has opted for this approach; it will treat as qualifying any request that, if implemented, would produce "the type of telephone exchange service to residential and business subscribers described in [Track A]." <sup>99</sup> Under this standard, the Commission would presumably accept a prospective competitor's request for unbundled loop facilities that would allow it to serve residential and business customers as evidence that the new entrant intends to do just that.

To be sure, allowing potential competitors to make qualifying interconnection requests for purposes of Track B "will require the Commission, in some cases, to engage in a difficult predictive judgment" as to the true intent of party seeking access and interconnection. <sup>100</sup> Although that is cause for some concern, the fact remains that the Commission will have to make a raft of difficult factual determinations in deciding whether to grant a BOC's application to offer interLATA services. The question of whether or not a prospective entrant intends eventually to provide the services Track A requires seems no less susceptible to proffer and proof than any of the other issues that will likely arise during the section 271 review process.

The Commission's approach could create incentives for some potential entrants to "game" the system—to request interconnection so that a BOC must show the existence of a facilities-based competitor in order to gain authorization to offer interLATA services, and then to delay facilities-based entry to guarantee that the BOC can never satisfy that requirement. <sup>101</sup> Several provisions of the 1996 Act mitigate the potential for such opportunistic behavior. Section 252 provides, for example, that once a request for interconnection is made, the negotiations must proceed to conclusion according to an expeditious timetable. <sup>102</sup> Once discussions have begun, moreover, a party's refusal "to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith," <sup>103</sup> which would reopen Track B as a path to BOC interLATA entry. <sup>104</sup>

Additionally, section 251 directs the BOCs and other LECs to negotiate agreements with prospective entrants that fulfill the LECs' access and interconnection obligations under the 1996 Act. <sup>105</sup> That obligation includes "the duty to negotiate in good faith the terms and conditions of such agreements." <sup>106</sup> Thus, as the Commission has concluded, the BOCs have a right to insist that their agreements with new competitors contain a implementation schedule. <sup>107</sup> If a competitor refuses to negotiate such a schedule voluntarily, the BOC can ask the pertinent state commission to arbitrate the issue. And section 252 mandates that any interconnection agreement arbitrated by a state commission shall "provide a schedule for implementation of the terms and conditions by the parties to the agreement." <sup>108</sup>

In short, the 1996 Act gives the BOCs the means to inoculate themselves from the threat of dilatory conduct by prospective competitors. The BOCs need only ensure—whether through voluntary negotiations or by state arbitration—that their interconnection agreements require implementation of the incorporated terms within a reasonable time. <sup>109</sup> In the event that a competitor fails to comply with a binding implementation schedule, the BOC could petition the state commission to certify that fact, thereby reviving the BOC's option to pursue interLATA entry via Track B. <sup>110</sup>

## 2. Characteristics of a Facilities-Based Competitor

To satisfy Track A, a BOC must interconnect with or provide network access to companies that provide telephone exchange service to residential and business subscribers "either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier." <sup>111</sup> Given the centrality of Track A to the Commission's consideration of a BOC interLATA application, interested parties have vigorously contested each of the operative phrases in Track A.

### a. "Telephone Exchange Service"

As noted, Track A requires that there be an interconnection agreement between a BOC and a competing provider of "telephone exchange service." The statute then defines "telephone exchange service" by reference to section 3(47)(A); specifically excludes "exchange access;"<sup>112</sup> and, more obliquely, establishes that cellular telephone service may not be treated as telephone exchange service for purposes of Track A.<sup>113</sup> The exclusion of cellular service has prompted debate about the appropriate categorization of a "technically and commercially similar" mobile radio offering—personal communications service (PCS). Although it is a close question, the better reading of the statute and the relevant case law is that PCS should not at this time be considered telephone exchange service for purposes of Track A.

The Communications Act defines "telephone exchange service" as:

(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.<sup>114</sup>

Subparagraph (A), which is the operative definition for purposes of Track A, was formerly section 3(r) of the Communications Act of 1934.<sup>115</sup> Over the years, the Commission has construed section 3(r) very narrowly to limit the range of offerings that would be deemed telephone exchange service. Thus, it has described telephone exchange service as "the provision of two way voice communications between individuals by means of a central switching complex which interconnects all subscribers within a geographic area."<sup>116</sup> It has also equated telephone exchange service with "the ubiquitous, interconnected switched service that is characteristic of [traditional wireline] local exchange carriers."<sup>117</sup>

Prior to the passage of the 1996 Act, the Commission never ruled that cellular radio, PCS, or any other commercial mobile radio service (CMRS) is a telephone exchange service under section 3(r).<sup>118</sup> The general presumption is that Congress was aware of the Commission's construction of that provision when it enacted section 3(47) and that its decision to incorporate former section 3(r) into the new definition of "telephone exchange service" without change effectively adopted the Commission's interpretations as Congress's own.<sup>119</sup> Although the Commission concluded, subsequent to the passage of the 1996 Act, that CMRS providers do furnish telephone exchange service, it did so pursuant to section 3(47)(B) and not subparagraph (A).<sup>120</sup> Consequently, that decision is of no help in determining compliance with Track A.

The Commission and some BOCs cite other provisions of the Communications Act that allegedly confirm that PCS and other CMRS services constitute telephone exchange service.<sup>121</sup> Section 3(26), for example, defines a LEC to include any person that provides telephone exchange service, but specifically excludes CMRS providers until such time as the Commission determines that they should be included.<sup>122</sup> Similarly, section 253(f) permits states to impose certain obligations on firms that seek to offer telephone exchange service in rural areas, but then specifically exempts CMRS providers.<sup>123</sup> Neither of these exclusions would have been necessary, these parties assert, "if some CMRS were not telephone exchange service."<sup>124</sup>

The problem with that argument is that, unlike Track A, the sections cited rest on the broader definition of telephone exchange service—subparagraphs (A) and (B). The CMRS exclusions contained in sections 3(26) and 253(f) confirm nothing more than what the Commission has already found—that some CMRS offerings may constitute telephone exchange service under subparagraph (B). Those provisions in no way demonstrate that "mobile services, such as PCS and cellular, fall within the definition of telephone exchange services in Section 3(47)(A)."<sup>125</sup>

The language of Track A itself is less easily-dismissed. Recall that the provision requires a competing provider of telephone exchange service as defined by section 3(47)(A), but then declares that cellular service may not be

considered telephone exchange service for purposes of Track A.<sup>126</sup> As the Commission has pointed out, the cellular exception would have been unnecessary "if Congress did not believe that cellular providers were engaged in the provision of telephone exchange service" under section 3(47)(A).<sup>127</sup> Moreover, Congress's decision to exclude only cellular from the category of telephone exchange services that may satisfy Track A arguably implies that other CMRS offerings, such as PCS, would qualify.<sup>128</sup>

One should not assume, however, that the cellular exception reflects a congressional decision that cellular and other mobile services necessarily are telephone exchange service under section 3(47)(A) and, thus, for purposes of Track A. As noted above, by reenacting section 3(r) unchanged as section 3(47)(A), Congress presumably ratified previous Commission decisions limiting telephone exchange service to a narrow set of services that did not readily accommodate mobile services. Further, the legislative history indicates that Congress rejected cellular service as a potential competing service under Track A because "the Commission has not determined that cellular is a substitute for local telephone service."<sup>129</sup> Consequently, one could reasonably conclude that the cellular exclusion in Track A was not intended to define cellular as telephone exchange service, but rather to preclude the Commission from doing so at some later date.<sup>130</sup> Under this interpretation, Congress's limitation of the exception to cellular providers means only that the Commission would be free to conclude, under the appropriate circumstances, that other mobile radio services, including PCS, do constitute telephone exchange service under section 3(47)(A).

Invoking the venerable maxim "*expressio unius est exclusio alterius*,"<sup>131</sup> Ameritech argues that Congress's specific declaration that cellular radio should not be deemed telephone exchange service for purposes of Track A necessarily implies that PCS and other CMRS offerings must be so classified.<sup>132</sup> But if the purpose of the cellular exclusion was simply to bar the Commission from ruling that cellular is a telephone exchange service under section 3(47)(A), application of *expressio unius* merely confirms that the Commission is free to make that determination with respect to PCS or any other wireless service that it has not already found to satisfy subparagraph (A).

Furthermore, *expressio unius* is a canon of statutory construction; it is not a rule of law. Although the maxim carries weight, it is not conclusive.<sup>133</sup> More importantly, it "'has little force in the administrative setting,'" where [courts] defer to an agency's interpretation of a statute unless Congress has "directly spoken to the precise question at issue."<sup>134</sup> The maxim has also been criticized because "it stands on the faulty premise that all possible alternative or supplemental provisions were necessarily considered and rejected by the legislative draftsmen."<sup>135</sup>

There is reason to believe that Congress's failure to mention PCS in Track A was the result of oversight, rather than design. The Commission did not issue the first PCS licenses until June 1995,<sup>136</sup> some time after Congress first began drafting and debating the bills that would become the 1996 Act. PCS did not become commercially available until November 1995 (and then only in one market), several months after the House of Representatives had finalized the language that would become Track A.<sup>137</sup> Not surprisingly, then, the voluminous legislative history of the 1996 Act contains almost no mention of PCS. It is therefore difficult to argue that Congress's adoption of the cellular exception in section 271(c)(1)(A) reflected a conscious choice to treat a largely unknown (but "technically and commercially similar") PCS as local exchange service for purposes of Track A.

Accordingly, a BOC should not be allowed to claim PCS providers as facilities-based competitors until such time as the Commission decides that PCS constitutes local exchange service under section 3(47)(A). On the other hand, if the Commission should so decide, and assuming that the PCS providers possess the other characteristics required by Track A, the Commission should hold that a BOC has complied with Track A even if PCS is not a perfect substitute for traditional wireline local exchange service. Some have argued that the phrase "competing providers" in Track A requires that the alternative service(s) on which a BOC application rests be substitutable in the economic sense with the BOC's own local exchange service—that is, that the alternative service be comparable in price, quality, or convenience to the BOC's offerings.<sup>138</sup>

There is, however, nothing in the statutory text or the associated legislative history to suggest that Congress used the term "competing providers" in the technical sense to require economic substitutability between the alternative service

and a BOC's offerings. In fact, the evidence is to the contrary. As adopted the House Commerce Committee, Track A contained a requirement that services provided by competing providers be "comparable in price, features, and scope" to that of the BOC.<sup>140</sup> That language, which can be read to require a substantial amount of economic substitutability between the competing service, was deleted during the House debate on the bill in favor of the language that now appears in section 271(c)(1)(A). Thus, if the Commission should rule that PCS is a telephone exchange service under section 3(47)(A), BOCs can cite PCS providers as potential facilities-based competitors even if consumers do not view PCS as comparable service to wireline local telephone service.

*b. "Over Their Own Facilities"*

Ameritech has argued that "[a] facilities-based provider is one that uses facilities and equipment to which it has title to supply service to its customers, or that purchases access to such facilities and equipment from any other entity, . . . and thereby obtains the use of such facilities and equipment for the purchase period."<sup>141</sup> Under this view, if a competitor receives, for example, unbundled network elements (UNEs) from a BOC pursuant to a negotiated access agreement, those facilities can be treated as the competitor's "own" facilities for purposes of Track A.

The Commission adopted that view in construing section 214(e) of the 1996 Act, which contains "own facilities" language parallel to that in Track A.<sup>142</sup> In its *Order* dismissing Ameritech's Michigan application, the Commission extended that interpretation to the coinciding phrase in Track A.<sup>143</sup> A review of the statutory text and its legislative history confirms that the Commission's reading of the critical phrase is most likely what Congress intended.

As noted, the statutory text indicates that in order for Track A to be satisfied, competitors must provide telephone exchange service to residential and business subscribers "either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier."<sup>144</sup> Thus, the statute identifies only two ways in which a competitor may provide service to its subscribers—either over its own facilities or via service resale.<sup>145</sup> UNEs must fall within one of those categories. Otherwise, one is faced with an absurd result: the section 271 competitive checklist requires a BOC to provide interconnection, UNEs, and services for resale to prospective competitors,<sup>146</sup> but the BOC's provision of UNEs (and UNEs alone) is of no consequence for determining compliance with Track A and, thus, eligibility to provide interLATA service.<sup>147</sup>

The Commission properly concluded that a competitor's use of UNEs does not constitute resale of a carrier's telecommunications services. As the Commission determined in its *Universal Service Report and Order*, a "network element" is not a "telecommunications service;"<sup>148</sup> it is, instead, "a facility or equipment used in the provision of a telecommunications service."<sup>149</sup> If the competitor's use of network elements does not constitute resale, an absurd construction of the statute can be avoided only by treating those elements as the competitor's "own" facilities for purposes of Track A.

This interpretation is substantiated by the legislative history. In adopting the final language of Track A, Congress recognized that:

[I]t is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant. Some facilities and capabilities (*e.g.* central office switching) will likely need to be obtained from the incumbent local exchange carrier as network elements pursuant to new section 251. Nonetheless, the conference agreement includes the "predominantly over their own telephone exchange service facilities" requirement to ensure that a competitor offering service exclusively through the resale of the BOC's telephone exchange service does not qualify, and that an unaffiliated competing provider is present in the market.<sup>150</sup>

Thus, Congress understood that some new entrants would need to acquire BOC network elements in order to complete or to extend their competing networks. Yet Congress never suggested that an entrant's dependence on BOC facilities would disqualify it as a facilities-based competitor. In fact, Congress expressly reserved that fate for those firms that

entered entirely via resale of BOC services which, by definition, do not include UNEs.

The Commission also concluded that treating UNEs as a competitor's own facilities would further the purposes of the 1996 Act. It would, for example:

provide the BOCs a greater incentive to cooperate with competing providers in the provision of unbundled network elements [thereby advancing local competition], because they will be able to obtain in-region, interLATA authority under Track A regardless of whether competing carriers construct new facilities or provide service using unbundled network elements.<sup>151</sup>

The Commission continued:

If unbundled network elements are treated as a competing carrier's "own telephone exchange service facilities," it is more likely that a BOC will receive a request for access and interconnection from a competing carrier that, if implemented, would satisfy [Track A], thereby barring the BOC from proceeding under [Track B].<sup>152</sup>

That, in turn, would give effect to Congress's intent that Track A should be "the primary vehicle for BOC entry in section 271."<sup>153</sup>

*c. "Predominantly"*

The word "predominant" typically means "having the greatest ascendancy, importance, influence, authority, or force" or "most common or conspicuous; prevalent."<sup>154</sup> Thus, Congress's use of the word "predominantly" in Track A suggests that a facilities-based competitor's "own" facilities must comprise at least the majority of its overall local exchange network facilities, if it also resells services obtained only from a BOC, or a plurality of competitor's total network facilities, if it resells services procured from a BOC and one or more other carriers.<sup>155</sup>

The statute does not identify what parts of the competitor's network should be considered in determining whether its "own" facilities predominate.<sup>156</sup> SBC contends that the competitor's network "can be broken down into three principal network elements: local loops, local transport, and local switching."<sup>157</sup> If a competitor takes only one of those elements from a BOC, for example, local loops, "the test of predominance is met."<sup>158</sup> The only specific legislative history on the subject suggests a different conclusion. Representative Tauzin's "statement of intent" on the construction of the word "predominantly" indicates that the Commission should consider "only the local loop and switching facilities used by the competing provider to provide telephone exchange service."<sup>159</sup>

There is also evidence that Congress thought it important for subscriber loops to be provided on a competitive basis. Congress identified cable television systems as the most likely local exchange competitor, in part because the cable industry "has wired 95% of the local residences in the United States and thus has a network with the potential of offering" meaningful facilities-based local service competition.<sup>160</sup> The heart of that "network" is, of course, the distribution facilities that bring a second wire to the home and, therefore, offer a viable alternative to the lines (or loops) from the telephone switching office to the home, which comprises the bulk of the BOCs' monopoly local exchange plant. Given this characteristic of cable networks, Congress's emphasis on cable as the most probable facilities-based competitor evinces a desire to eliminate or to at least mitigate the BOCs' monopoly control over loop facilities. Consequently, it makes sense to require, for purposes of determining compliance with Track A, that a competitor's own facilities to the home, whether self-constructed or obtained from a BOC as network elements, should constitute the predominant share of its total local loop plant.<sup>161</sup>

*d. Providing Service to Residential and Business Subscribers*

In response to Ameritech's first application to provide interLATA service in the State of Michigan,<sup>162</sup> the Association for Local Telecommunications Services (ALTS) contended that the application was defective because, among other

things:

[Track A] requires that competitors serve residence customers as well as business customers, but residence customers currently have competitive choices only in a few Michigan communities in and around Grand Rapids. *None* of the 10 million people living in metropolitan Detroit . . . are currently able to order competitive residential service.<sup>163</sup>

Similarly, interested parties asserted that SBC should not be authorized to provide interLATA services in Oklahoma since it "remains the monopoly provider of telephone exchange service in Oklahoma,"<sup>164</sup> because it "is not challenged by even one statewide, facilities-based, local service provider,"<sup>165</sup> or because most Oklahomans cannot change local telephone companies.<sup>166</sup> At the root of these arguments is the assumption that a BOC's local market cannot be truly open unless residential and business customers in significant portions of a state can choose among alternative local exchange service providers. Although that claim has appeal as a matter of economics, it is flatly inconsistent with congressional intent.

As noted, Track A requires only that a facilities-based competitor provide telephone exchange service "to residential and business subscribers," without offering any guidance on how many subscribers must be served or where they must be located. The Conference Report is silent on the issue, but the discussion of Track A in the House Report reveals that the threshold is not high. As for the number and type of customers that a competitor must serve, the House Report states only that (1) "[i]t is not sufficient for a competitor to offer exchange access service to business customers only" and (2) a competitor may not "merely offer service in one business location that has an incidental, insignificant residential presence."<sup>167</sup> As for geographical coverage, the determinative question is whether "a competitive alternative is operational and offering a competitive service *somewhere in the State* prior to granting a BOC's petition for entry into long distance."<sup>168</sup> The fact that Congress used such flimsy phrases to describe the level of competition that would *not* satisfy Track A virtually commands the conclusion that a competitor need not do much more to clear the statutory hurdle.

The weakness of the statutory standard prompted objections by some Members of Congress that a BOC could conceivably satisfy Track A, and gain interLATA entry, by reaching an agreement with "only a single entity requesting interconnection, without regard to whether the requesting company is weak, undercapitalized, and lacking either expertise or a business plan."<sup>169</sup> Other members were of the view that "[r]eal competition will occur only when there are facilities-based companies serving many customers in major markets" throughout a state.<sup>170</sup> Consequently, those members made several attempts to define a competitor's minimum acceptable service level with more specificity and rigor. All were unsuccessful.

As approved by the House Commerce Committee, House Bill 1555 required that a competitive provider offer "telephone exchange service that is *comparable in price, features, and scope* [to that provided by a BOC] and that is provided over the competitor's own facilities to residential and business subscribers."<sup>171</sup> A manager's amendment adopted during the House floor debate on House Bill 1555 deleted that language and replaced it with the phrasing that now appears in Track A. In response to the changes proposed in the manager's amendment, Representative Bunn offered an amendment requiring that a competitor be available to at least ten percent of the customers within a state, whether or not they actually chose to subscribe. The House Rules Committee declared the amendment out of order, so it was never voted on.<sup>172</sup> On the other side of the Capitol, Senator Kerrey offered an amendment to Senate Bill 652 that would have conditioned BOC interLATA entry on its negotiation of agreements with "telecommunications carriers that have requested interconnection for the purpose of providing telephone exchange service or exchange access service, including telecommunications carriers capable of providing a substantial number of business and residential customers with telephone exchange or exchange access service."<sup>173</sup> His colleagues rejected the amendment by a vote of seventy-nine to twenty-one.

Thus, Track A can indeed be said to "set[] an extremely low standard for defining `competition.'"<sup>174</sup> But there is a standard. Essentially, Congress rejected a quantitative, market-share test in favor of a more qualitative standard: Facilities-based competitors must provide telephone service to some residential and business subscribers, and the

number served cannot be "incidental" or "insignificant."<sup>175</sup> The Commission determined that the standard was satisfied in Michigan, where Brooks had 21,786 lines in service in the Grand Rapids area at the time the Commission considered Ameritech's application, of which 5910 were residential.<sup>176</sup> While 22,000 subscribers in a metropolitan area of 985,000<sup>177</sup> hardly suggests the presence of effective competition, the legislative history discussed above indicates that Brooks's customer base was more than Track A demands, and the Commission so concluded.<sup>178</sup>

SBC's Oklahoma application presented a much different situation, however. The record in that proceeding indicated that Brooks had only twenty business customers (thirteen in Oklahoma City; seven in Tulsa) and four residential users (one in Oklahoma City and three in Tulsa).<sup>179</sup> Twenty-four customers in communities with a combined population in excess of 1.7 million could very well be deemed "insignificant."<sup>180</sup>

More importantly, the Commission properly ruled that Brooks's residential customers cannot be considered "subscribers" for purposes of Track A.<sup>181</sup> The company had stated—without contradiction in the record—that "Brooks is not now offering residential service in Oklahoma, nor has it ever offered residential service in Oklahoma."<sup>182</sup> Brooks's four residential "customers" were, in fact, Brooks employees who were receiving test circuits as part of a market trial using resold SBC local telephone service.<sup>183</sup> The employees "[did] not pay for the test circuit `service,'" and, in Brooks's view, the test was "in no way a general offering of residential service."<sup>184</sup>

SBC was aware of these facts<sup>185</sup> but asserted that they were "irrelevant" to SBC's interLATA application:

Section 271 makes no distinctions based upon the end user's employment, the label a carrier attaches to its local service, or the pricing of the service. Because Brooks Fiber serves both businesses and residences in competition with [SBC], it satisfies the "residential and business subscribers" requirement.<sup>186</sup>

SBC's own words are the rocks on which its argument founders. Section 271 makes no mention of "end users"—a term that encompasses a wide range of relationships between a supplier and a consumer. Nor does it refer vaguely to services furnished to "businesses" or "residences." Instead, it requires the provision of services to "subscribers"—a word that implies a commercial arrangement between a buyer and a seller in which money changes hands or the obligation to pay money arises.<sup>187</sup> Brooks's four customers may have been both "residences" and "end users;" they were not, however, "subscribers." That is not only relevant for purposes of Track A, but also establishes definitively that Brooks's activities in Oklahoma do not satisfy Track A.<sup>188</sup>

The statutory text also provides no definitive answers to two important questions concerning how competitors must serve their residential and business subscribers. First, does Track A require the presence of at least one competitor that serves both residential and business customers, or is the standard satisfied if all competitors, taken together, serve both groups of buyers? Second, must a competitor serve both its residential and business customers either exclusively or predominantly over its own facilities, or may the competitor serve one customer class entirely by resale as long as the majority of its total customer base is served exclusively or predominantly via the competitor's own facilities?

Concerning the first question, the Commission has concluded that "when a BOC relies upon more than one competing provider to satisfy [Track A], each such carrier need not provide service to both residential and business customers. . . . [I]f multiple carriers collectively serve residential and business customers."<sup>189</sup> That construction is both consistent with the legislative history of Track A and sound as a matter of policy.

When the provision that became Track A emerged from the House Commerce Committee, it required that there be "*an* unaffiliated competing provider of telephone exchange service that is comparable in price, features, and scope and that is provided over the competitor's own network facilities to residential and business subscribers."<sup>190</sup> The accompanying Committee Report stated that "the Commission must determine that there is *a* facilities-based competitor that is providing service to residential and business subscribers."<sup>191</sup> The conference committee, however, replaced the House phrasing with the "one or more binding agreements" language that now appears in Track A.<sup>192</sup> The Commission reasonably concluded that Congress made that alteration to give the BOCs "greater flexibility in complying with

[Track A], by eliminating the requirement that one carrier serve both residential and business customers, and allowing instead, multiple carriers to serve such subscribers."<sup>193</sup>

The Commission's interpretation is also consistent with the purposes of Track A. The plain text of that provision indicates that Congress did not want the BOCs to offer interLATA services until they faced some local competition, that is, until the BOCs' residential and business customers had at least one alternative for meeting their local communications needs. If the two classes of customers have that option, the procompetitive aims of Track A are furthered whether the two groups are served by a single provider or each group is served by a different firm.<sup>194</sup> Moreover, as the Commission notes, requiring at least one competitor to serve both residential and business customers could have the anomalous result that a large percentage of such customers can choose among competing providers in a state, but a BOC would still be precluded from interLATA entry because no one competitor made the business decision to serve both types of subscribers.<sup>195</sup>

As for the second question, the DOJ has argued that as long as a competitor offers local exchange service to its collective subscriber base predominantly over its own facilities, Track A is satisfied even if the carrier does not furnish facilities-based service to each customer class individually.<sup>196</sup> On the other hand, Representative Tom Bliley, Chairman of the House Commerce Committee, has stated that Track A is satisfied "if—and only if—a BOC faces facilities-based competition in both residential *and* business markets."<sup>197</sup> The Commission has elected not to address the issue,<sup>198</sup> and the legislative history provides no clear guide. Nevertheless, the most reasonable conclusion is that Chairman Bliley's interpretation best reflects the intent of Congress.

Facilities-based competition lies at the heart of the procompetitive, deregulatory vision that moved Congress to draft and pass the 1996 Act.<sup>199</sup> Local competition was a fundamental goal;<sup>200</sup> the interconnection, unbundling, and resale obligations of section 251 and the competitive checklist in section 271 were the tools that Congress chose to achieve that objective.<sup>201</sup> Facilities-based competition was Congress's litmus test for determining whether those tools were adequate to the task. The development of such competition would "validate" the "openness and accessibility" requirements of section 251<sup>202</sup> and provide proof that the competitive checklist actually works.<sup>203</sup>

Therefore, it is not surprising that Congress also made facilities-based competition central to the structure and operation of section 271 which, after all, links BOC interLATA relief to evidence of the emergence of competition in their local markets. Thus, Congress not only included a facilities-based competitor requirement, but also made Track A "the primary vehicle for BOC entry in section 271."<sup>204</sup> There is nothing in the statute or legislative history of Track A to suggest that Congress, having done so, would be satisfied with the development of facilities-based competition for business customers and not for residential customers. The evidence, in fact, is to the contrary. Recall that the text of Track A does not stop with the requirement that one or more competing providers offers telephone exchange service to residential and business subscribers. It states, further, that "such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier."<sup>205</sup>

The most reasonable construction of the quoted language is that it defines further the service that competitors must offer to residential and business customers in order for Track A to be satisfied. It indicates that Track A requires competitors to provide their customers with a particular type of service (*i.e.* local exchange service), and to furnish that service in a particular way (*i.e.* either exclusively or predominantly over their own facilities). That, in turn, prompts the conclusion that those service conditions apply equally to the competitors' offerings to both customer groups. To argue that competitors may, consistent with Track A, serve their residential subscribers entirely via service resale if the majority of their total customers are served on a facilities basis is no different from saying that competitors may provide something other than telephone exchange service to residential customers as long as most of their customers do receive that service. No one has advanced the latter proposition.

The legislative history also shows that Congress was particularly concerned that facilities-based service be offered to residential subscribers. Indeed, the legislative history is bereft of statements about business competition, with the

notable exception of the admonition in the House Report that service provided only to business customers would not satisfy Track A.<sup>206</sup> Congress probably was not overly concerned about the development of such competition because it assumed that new entrants would move fairly quickly to serve business customers.<sup>207</sup> On the other hand, Congress repeatedly displayed its interest in stimulating facilities-based competition for residential customers. Once again, Congress's emphasis on cable television as the most likely local competitor is instructive.<sup>208</sup> The Conference Report, after repeating the House Commerce Committee's assertion that "cable services are available to more than 95 percent of United States homes," stated that cable companies' "initial forays . . . into the field of local telephony therefore hold the promise of providing the sort of residential local competition that has consistently been contemplated."<sup>209</sup> In view of Congress's obvious interest in residential facilities-based competition, it strains credulity to contend that Congress intended a construction that would allow Track A to be satisfied even if competitors offered no facilities-based service whatsoever to their residential customers.

The weight of the evidence, then, supports Chairman Bliley's view that Track A is satisfied "if—and only if—a BOC faces facilities-based competition in both residential *and* business markets." This does not mean, however, that at least one competitor must furnish facilities-based service to both residential and business customers, any more than Track A in all instances requires at least one competitor to provide service to both classes of customers. Instead, if a BOC's application relies on the presence of multiple competitors,<sup>210</sup> the Commission should deem Track A satisfied if at least one of those competitors serves a sufficient number of residential subscribers either exclusively or predominantly over its own facilities and at least one does the same for a satisfactory number of business customers.<sup>211</sup>

### 3. Compliance with the Competitive Checklist

Section 271(c)(2) states that a BOC can qualify for interLATA entry if, within the state for which such authorization is sought, the BOC provides to competitors access and interconnection that satisfies the competitive checklist requirements of subsection (c)(2)(B).<sup>212</sup> Some parties read section 271(c)(2) to require that each of the BOCs' interconnection agreements must contain all of the checklist elements.<sup>213</sup> On the other hand, some BOCs suggest that they can comply with the checklist via a "mix and match" approach; (1) by including some checklist items in a negotiated agreement and offering the remaining items to competitors via a statement of generally available terms and conditions pursuant to section 252(f),<sup>214</sup> or (2) by negotiating multiple access and interconnection agreements that, taken together, contain all of the checklist elements.

The text of section 271(c)(2) indicates that parties requesting access and interconnection from a BOC are entitled to have all of the checklist elements included within their interconnection agreements, if they so choose. Section 271(c)(2)(A) directs the BOCs to provide access and interconnection that "meets the requirements of subparagraph (B) of this paragraph."<sup>215</sup> Subparagraph (B) provides, in turn, that "[a]ccess and interconnection provided or generally offered by a [BOC] to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes *each* of the following" elements in the competitive checklist.<sup>216</sup> The plain language of section 271(c)(2), then, creates a presumption that all items in the checklist should be included in a BOC's interconnection agreements with each of its competitors.

This reading of section 271(c)(2) is also consistent with congressional intent, as expressed in the bills that were merged to create the 1996 Act. House Bill 1555, for example, stated that a BOC could qualify for interLATA entry only by submitting to the Commission "a certification by a State commission of compliance with *each of the following conditions* [referring to the bill's competitive checklist] in any area where such company provides local exchange service or exchange access in such State."<sup>217</sup> Similarly, Senate Bill 652 indicated that a BOC could offer interLATA services only if it negotiated an interconnection agreement that "provides, at a minimum, for interconnection that meets the competitive checklist requirement of paragraph (2)."<sup>218</sup>

The proposed construction of section 271(c)(2) is also consistent with Congress's understanding of the purpose of the competitive checklist. A central objective of the 1996 Act was "opening the local telephone network to

competition." The competitive checklist, in turn, "set[s] forth what must, at a minimum, be provided by a [BOC] in any interconnection agreement . . . to which that company is a party . . . before the FCC may authorize the [BOC] to provide in region interLATA services."<sup>220</sup> The principal sponsor of Senate Bill 652, Senator Pressler, spoke of the checklist in similar terms:

This competitive checklist can best be described as a snapshot of what is required for these competitive services now and in the reasonably foreseeable future. In other words, these provisions open up the local loop from a technological standpoint as section [253] opens the local loop from a legal barrier to entry standpoint.<sup>221</sup>

The market-opening function of the checklist is confirmed further by the way in which the checklist items were selected:

The long distance companies came to us early on with a list of areas (such as number portability, dialing parity, interconnection, equal access, resale, and unbundling) that give monopolies their bottleneck in the local loop. We agreed to remove the monopoly power in each and every one of those areas [in House Bill 1555].<sup>222</sup>

Thus, the purpose of the checklist was to identify certain features, functions, and capabilities, the availability of which was essential to opening the local exchange bottleneck to competitive entry.<sup>223</sup> That objective would be frustrated if section 271(c)(2) were to be construed so as to allow a BOC to withhold one or more checklist items from one or more prospective entrants, so long as the BOC made each element available to at least one entrant.

Although section 271(c)(2) entitles all parties requesting access and interconnection to insist that every element in the competitive checklist be included in their final interconnection agreements,<sup>224</sup> it does not follow that an agreement must include each checklist item in order to satisfy section 271(c)(2). It is certainly conceivable, for example, that one or more prospective entrants would neither want nor need all of the features and capabilities set forth in the checklist.<sup>225</sup> Cable television companies could be such competitors. With their extensive local distribution facilities, cable systems might not have any need for unbundled local loops from a BOC (checklist item number 4).<sup>226</sup> Similarly, because many cable companies have already secured access to BOC poles and conduits in order to construct their distribution systems, they might not request such access (checklist item number 3) as part of an interconnection agreement with a BOC.<sup>227</sup> When that is the case, a BOC should not be penalized for the absence of such items in a final interconnection agreement. That agreement, therefore, should be treated as complying with the checklist.

ALTS contends that if section 271(c)(2) is not construed to require that each element of the competitive checklist be included within a BOC interconnection agreement, the Commission will face the demanding task of determining in each case whether an interconnector's decision not to request a checklist item was freely made, rather than a consequence of BOC manipulation.<sup>228</sup> Although that concern is not without merit, questions about checklist compliance would seem to be no less susceptible to proffer and proof than questions about a prospective competitor's intent to provide service to residential and business subscribers.<sup>229</sup>

#### 4. Pricing of Interconnection, Unbundled Network Elements, and Services for Resale

Section 251(c) of the 1996 Act requires BOCs and other LECs to provide prospective competitors with interconnection and UNEs on just, reasonable, and nondiscriminatory terms.<sup>230</sup> It also directs LECs to make any of their retail services available to competitors at discounted rates, so that the latter may resell those services to the competitors' own customers.<sup>231</sup> Section 252 indicates that a LEC's precise interconnection, unbundling, and resale obligations are to be established through negotiations between the LEC and its potential competitors, subject to review and, in some instances, arbitration by the public utility commission for the state implicated.<sup>232</sup> Section 252(d) indicates, however, that for arbitrated agreements, the prices charged must reflect costs incurred by the LECs (in the case of

interconnection and UNEs) or costs avoided by the LECs (with respect to resold services).

In its *Local Competition Report and Order*, the Commission promulgated detailed national rules governing the prices that LECs could charge competitors for interconnection, UNEs, and services for resale. Specifically, the Commission decreed that prices for interconnection and UNEs should reflect forward-looking, economic costs calculated in accordance with a methodology that the Commission dubbed "total element long run incremental cost" (TELRIC).<sup>234</sup> With respect to services for resale, the Commission directed state commissions to establish resale discounts in one of two ways. The first, and preferred, approach would be to calculate avoided costs using a cost study that satisfies certain Commission-specified minimum criteria. In the event that an acceptable avoidable-cost study is not available, the state commission must select a default discount from a range defined by the Commission.<sup>235</sup>

On appeal, the United States Court of Appeals for the Eighth Circuit in July 1997 held that the Commission had exceeded its authority in promulgating its pricing rules.<sup>236</sup> The court concluded that sections 252(c)(2) and 252(d) "undeniably" authorize state regulatory commissions, rather than the FCC, to determine the prices that LECs may charge for interconnection, UNEs, and resale.<sup>237</sup> The court also ruled that section 2(b) of the Communications Act of 1934—which generally gives states exclusive authority to regulate intrastate services<sup>238</sup>—erects a jurisdictional "fence that is hog tight, horse high, and bull strong, preventing the FCC from intruding on the states' intrastate turf."<sup>239</sup>

In the *Ameritech Order*, however, the Commission claimed its authority under section 271 to employ its nationwide pricing rules in its review of BOC interLATA applications. The Commission recognized the court's holding that "the Commission lacks jurisdiction to issue national rules establishing a methodology by which the states determine the rates for interconnection, unbundled network elements, resale, . . . in state-arbitrated interconnection agreements pursuant to section 252."<sup>240</sup> It nevertheless concluded that the court's ruling did not bar the Commission from applying those same rules for purposes of section 271. Noting that the competitive checklist requires BOCs to provide interconnection, UNEs, and resale "in accordance with the requirements of" sections 251(c) and 252(d) (including the latter section's mandate that rates be cost-based),<sup>241</sup> the Commission claimed that "Congress must have intended the Commission, in addressing section 271 applications, to construe the statute and apply a uniform approach to the phrase 'based on cost' when assessing BOC compliance with the competitive checklist."<sup>242</sup> Accordingly, the Commission concluded that a BOC would not be deemed in compliance with the checklist unless the BOC demonstrated that its prices for interconnection and UNEs are based on forward-looking costs and TELRIC principles.<sup>243</sup>

Predictably, the Commission's decision sparked a storm of protest. The BOCs and a number of state commissions petitioned the Eighth Circuit for a writ of mandamus compelling the Commission to comply with the Eighth Circuit's order, thereby invalidating the pricing rules reinstated in the *Ameritech Order*.<sup>244</sup> On January 22, 1998, the court issued a writ ordering the Commission to abide by the court's July order and "to refrain from subsequent attempts to apply either directly or indirectly its vacated pricing policies."<sup>245</sup> The court concluded that the *Ameritech Order* was a "vehicle by which [the Commission] could intimidate state commissions into complying with the substance of the rules we vacated in our July 18 decision."<sup>246</sup> The court also expressed its suspicion that by including within its order pricing principles that had "nothing to do with the actual denial of Ameritech's application," the Commission was attempting to create an opportunity to relitigate the jurisdiction issue before the United States Court of Appeals for the District of Columbia Circuit: "Having lost its bid to usurp the [states'] power to determine intrastate prices in the Eighth Circuit, the FCC now seeks to have a bite at the apple in the District of Columbia Circuit."<sup>247</sup>

The rift between federal and state regulators over the pricing of interconnection, UNEs, and services for resale is ironic because there is general agreement among them about the pricing principles that should be applied.<sup>248</sup> In the *Ameritech Order*, the FCC acknowledged that "a large majority of state commissions have stated that they have adopted or intend to adopt forward-looking economic cost approaches."<sup>249</sup> Similarly, many state commissioners downplayed the effect of the Eighth Circuit's decision because so many states already have adopted the forward-looking cost principles that the FCC espoused.<sup>250</sup> It would be unfortunate indeed if the federal-state consensus on

forward-looking pricing principles were not put into effect expeditiously because of an unseemly and counterproductive squabble over which level of government should implement them.

Even if state regulatory commissions are finally determined to have the authority to set the prices for interconnection, UNEs, and services for resale, it does not follow that those decisions are necessarily "conclusive" on the FCC for purposes of section 271.<sup>251</sup> The 1996 Act charges the FCC with deciding whether a petitioning BOC has satisfied the statutory prerequisites for gaining interLATA entry.<sup>252</sup> In particular, the Commission must verify a BOC's compliance with the competitive checklist, including its injunction that BOCs, among other things, provide interconnection, UNEs, and services for resale in accordance with the pricing standards of section 252(d).<sup>253</sup> While the Eighth Circuit made the states responsible for explicating and applying section 252(d), section 271 obligates the Commission to ascertain whether they have discharged that responsibility.

The FCC should therefore require state commissions to provide sufficient information to enable it to make that determination.<sup>254</sup> At a minimum, a state commission should specify what forward-looking, pricing principles it employed and should explain how those principles comport with the language of section 252 and the procompetitive aims of the 1996 Act.<sup>255</sup> The state commission should also detail the process by which it transformed the chosen pricing principles into the prices established. That discussion would include a description of the pricing methodology used, the cost studies reviewed, and the state commission's resolution of the evidence before it. If such information is lacking, the FCC should dismiss the associated BOC interLATA application as not in compliance with the requirements of section 271.

In the absence of uniform national pricing rules, there is a possibility that some state commissions might exercise their pricing authority to protect their incumbent LECs, rather than to promote competition.<sup>256</sup> The Commission can guard against such "rogue" state action without issuing national pricing rules that may undermine the cooperation among federal and state regulators that is essential to effective implementation of the 1996 Act or that spark complaints—whether credible or not—that the Commission is ignoring the mandate of a federal court.<sup>257</sup> As discussed below, in determining whether grant of a BOC's interLATA application will serve the public interest, the Commission should consider whether the state implicated by that application has taken all necessary steps to permit competitive entry in that jurisdiction.<sup>258</sup> The FCC could allow state commissions to adopt their own rules for pricing interconnection, UNEs, and services for resale which, in most instances, would result in practices that reflect the principles that the Commission has advocated. If, however, a state should adopt pricing standards that diverge significantly from those implemented in other jurisdictions, the FCC could reasonably conclude that the offending state was not discharging its obligation to promote competition and, thus, deny any BOC application to offer interLATA service within that jurisdiction.

### *B. The "Public Interest" Requirement*

Section 271(d)(3)(C) of the 1996 Act states that the Commission may not grant a BOC's interLATA application unless the Commission determines that "the requested authorization is consistent with the public interest, convenience, and necessity."<sup>259</sup> This "public interest" requirement was taken from the Senate bill, but its inclusion in Senate Bill 652 was the subject of extensive and contentious debate on the Senate floor.<sup>260</sup> Senator McCain offered an amendment to strip the public interest standard from the bill, portraying it as "an ill-defined, arbitrary standard which implies almost limitless policymaking authority to the FCC."<sup>261</sup> He also contended that its inclusion in Senate Bill 652 would "invite[] virtually endless litigation over whether [BOC interLATA] entry is in the public interest" and would tempt existing interLATA service providers "to use regulatory processes to protect their market."<sup>262</sup>

After spirited debate, the Senate defeated the McCain amendment by a vote of sixty-eight to thirty-one. Most members appeared to be persuaded by Senator Pressler and others that the public interest test was not a license for the Commission to commit mischief, but had been construed enough times by enough courts over the preceding six decades to give the crucial phrase—"public convenience, interest, and necessity"—a specificity that the words themselves may not convey.<sup>263</sup>

In fact, courts have ruled the public interest standard "not to be too indefinite for fair enforcement,"<sup>264</sup> but should be applied "so as to secure for the public the broad aims of the Communications Act [of 1934]."<sup>265</sup> One statement of those aims can be found in section 1 of the 1934 Act: "to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . ."<sup>266</sup> More immediately relevant to an understanding of section 271(d)(3) is the statement of purpose in the preamble to the 1996 Act: "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."<sup>267</sup> Thus, although the Commission's public interest examination is wide-ranging, it is not unconstrained. Further, while competitive issues are at the forefront of that examination, other values must also be considered and safeguarded.

## 1. Promoting Competition

Because Congress designated the advancement of competition as one of the main objectives of the 1996 Act,<sup>268</sup> the public interest review of a BOC's application to provide in-region, interLATA services must consider the potential effects of BOC entry on competition. That, of course, prompts the question of which markets should be the focus of that competitive analysis. The weight of the evidence indicates that Congress was concerned principally with the market for local telecommunications services, rather than that for interLATA services.

During the House debate on House Bill 1555, Representative Fields, a sponsor of that bill, stated that "central to competition to the consumer in this legislation is opening the local telephone network to competition."<sup>269</sup> It is not surprising, therefore, that Congress decided to condition BOC entry into new markets—including interLATA services—on the release of their stranglehold over local exchange telephone services.<sup>270</sup> In part, the linking of local exchange competition and BOC interLATA entry was intended to prevent the BOCs from leveraging their local monopolies to impede competition or to gain an unfair advantage in other markets.<sup>271</sup> Just as importantly, however, Congress viewed and used interLATA entry as a "carrot" to induce the BOCs to become active participants in the effort to foster local competition. As one Senator put it: "Complete elimination of barriers to competition will occur only if the [BOCs] have positive incentives to cooperate with the introduction of meaningful competition."<sup>272</sup>

Thus, if section 271 is a door for the BOCs between the local and the interLATA markets, Congress intended that door to swing inward—so that competing firms can enter the local exchange market before the BOCs pass through to exploit market opportunities on the other side. Accordingly, in conducting its public interest analysis of a BOC's application to provide interLATA services, the Commission should focus on the status of competition in the local exchange market and, in particular, on the BOCs' continuing incentives after interLATA entry to provide meaningful opportunities for competitive entry in the local market.<sup>273</sup>

Although Congress put local competition issues at the center of the public interest examination, it gave little guidance as to the substantive standards that the Commission should use in making its determination—with two notable exceptions. First, the Commission may not construe the public interest standard to require that a minimum level of local competition exists before a BOC's interLATA application may be granted.<sup>274</sup> As noted above, at least three separate attempts to establish a market share test for local competition were defeated during the congressional debates on telecommunications reform legislation.<sup>275</sup> One cannot assume that Congress, having repeatedly and explicitly rejected efforts to add such a test to the pending legislation, subsequently decided *sub silentio* to include it within the public interest test.<sup>276</sup>

Second, Congress did not, as BellSouth suggests, make compliance with the competitive checklist "the exclusive test for the sufficiency of local competition under section 271."<sup>277</sup> To the contrary, the Senate debate reveals that many members doubted the adequacy of checklist compliance as an indicator of local competition. Senator Kerrey expressed his reservations when he rose in opposition to the McCain amendment: "This checklist, such as it is, I do not know if the checklist is going to work."<sup>278</sup> Other Senators aired similar qualms during the lengthy discussion of amendments by Senators Thurmond and Dorgan to give the DOJ a larger role in reviewing BOC interLATA applications. Senator

Thurmond saw a need for greater DOJ involvement because he was "not confident that this checklist will be adequate to take the place of thorough antitrust analysis," also noting that "the checklist does not require that anyone actually compete with the local exchange monopoly."<sup>279</sup> Senator Leahy expressed similar doubts: "But what if [the checklist] does not work? What if the checklist is not long enough to ensure that the local monopoly power of the [BOCs] is broken and competition can develop?"<sup>280</sup>

A floor statement by Senator Gorton indicates that the Senate Commerce Committee, from which Senate Bill 652 emerged, was aware of the limitations of the checklist and took corrective measures:

[W]hat [Senate Bill 652] does is to set up a set of 14 reasonably objective conditions that must be met by the [BOCs] to open up their local exchange before they could get into the long distance business and provide competition and, one hopes, lower prices.

The committee was not absolutely satisfied . . . that the simple mechanical meeting of those 14 conditions would, under all circumstances, be sufficient to open up the local exchange.

So it added the public interest convenience and necessity condition, requiring the [Commission] . . . the Government entity and agency with expertise in this field, to determine in the broadest possible sense that the requested authorization was consistent with the public interest, convenience, and necessity.<sup>281</sup>

Senator Gorton also explicitly linked members' concerns about the adequacy of the checklist with the defeat of the McCain amendment:

Just last week, . . . in balancing this bill, we turned down an amendment which would have stricken [the public interest standard]. We did not feel, a majority of the Members did not feel, any more than a majority in the committee felt, that we could absolutely under all circumstances rely on the 14 categories.<sup>282</sup>

Thus, on the crucial question of whether local competition is sufficient to warrant granting a BOC's interLATA application, the Senate meant for the Commission's public interest analysis to supplement checklist compliance.<sup>283</sup> In the words of Senator Stevens, "We want to make sure that the checklist is met at a minimum and the public interest provision comes in at that point."<sup>284</sup> There is nothing in the conference report or in the congressional debate on the conference agreement that suggests that Congress rejected the Senate's view of the respective roles of the checklist and the public interest test in the local competition analysis.

If checklist compliance alone is not sufficient to support a finding that there is enough local competition to permit BOC interLATA entry, what more is required? Since Congress rejected a quantitative test—however meager—for sufficient local competition, the Commission must make a qualitative assessment. The Commission's task of course, is to determine whether the local exchange market is truly open to competition,<sup>285</sup> or whether the BOCs' historical monopoly in that market has been broken.<sup>286</sup> In other words, the Commission must find evidence that the door to the local exchange market place swings inward freely and easily for new entrants. Only if it finds such evidence can the Commission conclude that the fledgling local competition that has appeared to date is not a "false spring," but a harbinger of extensive and lasting market changes to come.

#### *a. Elimination of Barriers to Entry*

One essential feature of an open market is an absence of legal barriers to entry by new competitors. The need to remove such barriers is especially important in local exchange markets because "[f]or decades, U.S. telecommunications policy has relied on heavily regulated monopolies to provide communications services to businesses and consumers."<sup>287</sup> Although the Commission and many state regulators have moved in recent years to reduce or to remove legal barriers to competitive entry in local and other telecommunications markets, that process is far from complete.

Realizing the persistence of such impediments to expanded competition, Congress in the 1996 Act specifically outlawed any "State or local statute or regulation, or other State or local legal requirement, [that] may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."<sup>288</sup> That provision is not self-enforcing, however. Consequently, even plainly anticompetitive state and local restrictions can remain in force until they are preempted by the Commission or, in some instances, overturned by a federal district court.<sup>289</sup> Furthermore, the 1996 Act permits states to impose, "on a competitively neutral basis . . . requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."<sup>290</sup> In short, although a central purpose of the 1996 Act is to promote competition in all telecommunications markets, the Act did not sweep away existing legal barriers to competitive entry.

A number of states have moved aggressively to implement local competition. Indeed, some state initiatives predated passage of the 1996 Act by several years. Available evidence indicates, however, that in other states, old barriers persist while new barriers continually appear. Some state laws still prohibit the provision of telecommunications by any company other than the incumbent LEC, without that carrier's consent.<sup>291</sup> In 1995, the Texas State Legislature enacted a telecommunications statute that severely limits the ways in which some firms may offer competitive local telecommunications services in the state.<sup>292</sup> In 1997, Arkansas enacted telecommunications legislation that bars the Arkansas Public Service Commission from prescribing access and interconnection obligations for LECs in excess of those set forth in the 1996 Act and the Commission's implementing regulations.<sup>293</sup> This was enacted despite the fact that the 1996 Act explicitly authorized state commissions to adopt additional access and interconnection obligations that do not conflict with federal requirements.<sup>294</sup> Finally, there are increasing complaints that local governments are limiting access by new entrants to public rights-of-way or imposing unreasonable and discriminatory franchise obligations on those firms.<sup>295</sup>

Recognizing these facts, the Commission has decided that its public interest review of a BOC's application to offer interLATA services should include a comprehensive and independent analysis of the legal and regulatory environment in the state in which the BOC intends to operate.<sup>296</sup> Through that assessment, the Commission should satisfy itself that the state's laws and regulations afford new entrants maximum flexibility to pursue and to exploit market opportunities whenever and wherever they find them.<sup>297</sup> It should also ensure that where states have imposed requirements designed to preserve universal service, to protect consumers or public safety, or to maintain service quality, such requirements are competitively neutral in intent and in effect, and are no broader than necessary to achieve their stated ends.

*b. "Commercially Useful" Availability of All Items in the Competitive Checklist*

Removing legal barriers to entry is just one step toward fully opening the local exchange market to competition. There is also a need to address the economic and technical impediments that can deter or hinder new entrants from offering alternative local telecommunications services. That, of course, is the function of the access, interconnection, and resale provisions in sections 251 and 252 of the 1996 Act and the competitive checklist in section 271(c)(2). The checklist identifies "those things that a telecommunications carrier would need from a [BOC] in order to provide a service such as telephone exchange service or exchange access service in competition with the [BOC]."<sup>298</sup> As such, the checklist "provides the formula for removing the monopoly powers of local telephone exchange providers to allow real competition in the local loop."<sup>299</sup>

Section 271(c)(2)(B) requires the BOCs to "provide" or to "offer" each checklist item to other telecommunications carriers. There has been much debate and disagreement about when a BOC must "provide" the checklist items, and when it simply may "offer" them. As noted above, a BOC generally must provide (or supply) all of the checklist items to carriers requesting access and interconnection.<sup>300</sup> In the event that a BOC does not receive an interconnection request, it need only offer (or hold out) each checklist item for sale to prospective customers.

Whichever verb applies, however, the Commission has ruled that two basic requirements must be met before it will deem a BOC to be "providing" a particular checklist item. First, a BOC must "actually furnish[] the item [to

competitors] at rates and on terms and conditions that comply with the Act or, where no competitor is actually using the item . . . . [A] BOC must have a concrete and specific legal obligation to furnish the item upon request . . . ."301

Second, a BOC "must demonstrate that it is presently ready to furnish each checklist item in the quantities that competitors may reasonably demand and at an acceptable level of quality."302

The following standards should be employed, at a minimum, to determine whether a BOC is fulfilling those conditions:303

- The item must be available for immediate ordering, and the competing carrier can receive it in sufficient quantities. Quantities should generally be deemed sufficient if they enable the purchaser to satisfy current and reasonably foreseeable demand;
- All necessary testing of the checklist item must have been completed. Where testing has been conducted solely by the BOC, its test results should be subject to review by an independent entity;
- Regulatory authorities must be substantially certain that the checklist item will function as expected in a commercial setting;
- The BOC's provision of the item must be at least equal in quality to the service that it provides itself;
- Checklist items must be made available at rates that satisfy the pricing standards of section 252(d).

The Commission has also recognized that the competitors' ability to provide alternative local services via interconnection, UNEs, and resale will be "significantly impaired" if they do not have access to LECs' "operations support systems" (OSS).304 Accordingly, the Commission has classified OSS as a "network element" that must be provided to competitors under section 251(c)(3).305 It has also mandated that LECs offer competitors access to OSS functions "under the same terms and conditions that they provide these [functions] to themselves and their customers"306 and in a way that "would provide an efficient competitor with a meaningful opportunity to compete."307

To determine whether a BOC's provision of OSS functions satisfies its checklist obligation to afford nondiscriminatory access to network elements "in accordance with the requirements of section[] 251(c)(B),"308 the Commission has put a finer point on these general obligations. Specifically, it will conduct a two-step inquiry:

First, the Commission must determine whether the BOC has deployed the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions and whether the BOC is adequately assisting competing carriers to understand how to implement and use all of the OSS functions available to them. Second, the Commission must determine whether the OSS functions that the BOC has deployed are operationally ready, as a practical matter.309

To pass through the first stage of this evaluation, a BOC must comply with a series of very specific requirements:

- It must give competitors electronic access to OSS functions that the BOC itself accesses electronically, although the BOC may offer manual access as an alternative method of access in some instances.310
- The BOC must provide competitors enough information so that they may design or modify their OSS in a way that will allow them to interact seamlessly with the BOC's system.311
- The BOC must disclose to competitors sufficient information (including information relating to ordering codes and internal business rules) so that they can format, process, and transmit service requests that will flow into and through the BOC's system "as quickly and efficiently as possible."312

In the second stage of its evaluation, the Commission will consider how well a BOC is meeting its access obligations with respect to OSS. The central question, in the Commission's view, is current performance and future readiness

—"whether the OSS functions provided by the BOC to competing carriers are actually handling current demand and will be able to handle reasonably foreseeable demand volumes."<sup>313</sup> The Commission correctly concludes that the most reliable measure of a BOC's performance is commercial usage—evidence gathered from a BOC's actual provision of OSS functions to itself or to competitors.<sup>314</sup> It has therefore required, for example, that where a competitor requests an OSS function that a BOC currently employs in its retail operations, "the BOC must provide access to competing carriers that is equal to the level of access that the BOC provides to itself, its customers or its affiliates, in terms of quality, accuracy and timeliness."<sup>315</sup> For those OSS functions without retail analogues, such as ordering and provision of UNEs,<sup>316</sup> the Commission should require BOCs to establish specific performance measures and standards to make certain that BOC provisioning of those functions accords with their checklist obligations.<sup>317</sup>

### *c. Ensuring Continuing Compliance with the*

#### *Competitive Checklist*

Although the Commission must be able to determine whether a BOC is complying with the competitive checklist at the time it files its section 271 application, the BOC's future behavior is arguably more important to the goal of fostering meaningful local competition. The market-opening potential of the competitive checklist will be fully realized only if the BOCs' compliance is a continuing phenomenon, rather than a temporary course of conduct embarked upon to qualify them to provide interLATA services. One way to ensure continued compliance would be to require that each of the BOC's access and interconnection agreements contain specific performance standards that can be used to track the quality of the service that the BOCs provide their competitor-customers over time.<sup>318</sup>

Ameritech has asserted that its interconnection agreements in Michigan "contain specific performance benchmarks and standards that ensure that all checklist items are available to competing carriers on a nondiscriminatory basis and at parity with what Ameritech provides to its end users, its affiliates and any other competing carrier."<sup>319</sup> Those benchmarks and standards, which in most instances have been approved by the Michigan Public Service Commission, allegedly measure Ameritech's performance in critical areas such as service provisioning, service reliability, and service maintenance.<sup>320</sup> Ameritech then issues monthly reports that purportedly enable each of its competitor-customers "to compare Ameritech's performance for that carrier with the specified benchmarks and with the performance that Ameritech provides to other carriers and to itself."<sup>321</sup>

If Ameritech has described its practices accurately, they could provide a useful model for the sorts of performance standards that should be included in each interconnection agreement and that the Commission should insist upon as evidence of BOC compliance with the competitive checklist.<sup>322</sup> Requiring that all access and interconnection agreements contain effective and functional performance standards would not in any way extend the terms of the checklist, in violation of section 271(d)(4). As noted above, the checklist identifies the things that a BOC must provide to permit another carrier to furnish a competing service.<sup>323</sup> A performance standard is not a "thing" to be provided, but rather a mechanism for assessing the manner in which a checklist item is provided.

The first two elements of the competitive checklist, moreover, require the BOCs to furnish competitors with interconnection and UNEs in accordance with sections 251(c)(2) and 251(c)(3), respectively.<sup>324</sup> The latter provisions mandate, among other things, that the BOCs must furnish interconnection and network elements on just, reasonable, and nondiscriminatory terms and conditions.<sup>325</sup> And the Commission has concluded that performance standards "provide[] a mechanism by which to gauge a BOC's present compliance with its obligation to provide access and interconnection to new entrants in a nondiscriminatory manner."<sup>326</sup>

The BOCs will be more likely to adhere to their checklist obligations and to satisfy their performance standards if the penalties for violations of those standards and obligations are swift and certain.<sup>327</sup> To this end, BOC interconnection agreements should contain provisions for prompt resolution of complaints by competitor-customers (for example, binding arbitration). Alternatively, regulatory agencies could establish expedited processes for handling such complaints.<sup>328</sup> Whichever procedures are employed to identify violations, interconnection agreements should generally

provide for automatic penalties (including credits and liquidated damages) in the event that a violation occurs. As the Commission has pointed out, "The absence of such enforcement mechanisms could significantly delay the development of local exchange competition by forcing new entrants to engage in protracted and contentious legal proceedings to enforce their contractual and statutory rights to obtain necessary inputs from the [BOC]." <sup>329</sup>

#### *d. Commitment to Competition*

In the 1996 Act, Congress both established the goal of promoting competition in all telecommunications markets and provided the blueprint for a regulatory structure that will move the country toward that end. Conscientious and forward-thinking action by federal and state regulators will help accelerate the rate at which competition grows. The goal cannot be reached, however, unless members of the industry work cooperatively and in good faith to make the regulatory structure fashioned by Congress function as intended in the marketplace. <sup>330</sup> As the dominant firms in what is now the least competitive telecommunications market, the BOCs and other LECs are crucial to the success of this final implementing stage of the 1996 Act.

Recognizing that fact, the Commission, in determining whether granting a BOC's interLATA application would serve the public interest, wisely intends to assess that BOC's commitment to promoting competition, particularly within its local exchange market. <sup>331</sup> Relevant questions in this regard might include: How has the BOC conducted itself in negotiations with prospective competitor and in arbitrations before state commissions? Has it, like GTE, attempted at every turn to minimize its market-opening obligations under the Act or has it been receptive to additional access and interconnection requests? <sup>332</sup> Has the BOC worked with prospective competitors to resolve technical and operational problems expeditiously and in a mutually-acceptable manner? Although this line of inquiry is necessarily qualitative and impressionistic, it is essential nonetheless. In the end, a strong BOC commitment to the goals of the 1996 Act is the best evidence that its entry into the interLATA market will not come at the expense of competition in the local exchange market.

## 2. Maintaining Service Quality and Protecting

### Telephone Subscribers

Although competition issues are at the center of the public interest analysis, some Members of Congress were concerned that competition may not always be a benevolent force. During the Senate debate on the McCain amendment (which would effectively have stripped the public interest standard from Senate Bill 652), there was more than a little discussion about the potential adverse effects of competition for some customers and some areas. Senator Hollings, an influential supporter of Senate Bill 652, spoke at some length about the uneven effects of competition and market forces and linked those concerns with the need for a public interest test. <sup>333</sup> Later on, Senators Hollings, Rockefeller, Dorgan, and Snowe engaged in an extensive discussion of the detrimental effects of airline competition and deregulation on the price and availability of air service, particularly in rural areas. <sup>334</sup> The fact that this conversation occurred in the context of the general debate on the McCain amendment suggest that those Senators supported a public interest test to ensure that similar concerns would be addressed during the Commission's review of BOC interLATA applications.

In the House of Representatives, the concern was the possible effects of BOC interLATA entry on the quality of local service. Representative Wyden addressed the issue directly: "as telephone companies enter new fields, we must ensure current customers are not discarded and left without basic phone needs. The drive to streamline and to downsize has subjected local telephone customers in my region of the country [Oregon] to poor customer service." <sup>335</sup> To alleviate that concern, he successfully offered an amendment to House Bill 1555 that authorized state commissions, when they review BOC compliance with the bill's competitive checklist, to "establish[] or enforc[e] other requirements of State law . . . including requiring compliance with intrastate telecommunications service quality standards or requirements." <sup>336</sup> Although the Wyden amendment does not appear in the 1996 Act, its absence does not mean that Congress rejected his concerns about customer service after BOC interLATA entry. Section 253(b) of the 1996 Act, for example, permits states to impose competitively neutral requirements to "ensure the continued quality of telecommunications services." Members of Congress also could have assumed that any potential adverse effects of

BOC interLATA entry on service quality could be considered as part of the Commission's public interest analysis.

In fact, the Commission has consistently considered potential adverse effects on local telephone ratepayers and service quality in deciding whether a carrier's actions or a particular transaction among carriers would serve the public interest. For instance, in passing on GTE's application to acquire Telenet, an unregulated enhanced service provider, the Commission noted that "if the [GTE] telephone companies were to lend money to Telenet, the former's financial wellbeing and, hence, its ability to operate could be affected by the economic health of Telenet. Thus, a bankrupt Telenet could conceivably impair the lending telephone companies' operations . . . ." <sup>337</sup> Consequently, the Commission attached conditions to the merger designed, in part, "to allow Telenet as a subsidiary to obtain the economically desirable benefits of a parent-subsidiary relationship while ensuring that ratepayers and competitors are protected from abuse." <sup>338</sup>

Several years later, when the Commission reviewed the public interest implications of GTE's proposed purchase of Sprint, the Commission again addressed the question whether GTE could finance Sprint's growth "without adversely impacting [GTE's] ability to reasonably maintain and, if necessary, expand its present local telephone network." <sup>339</sup> The Commission also acknowledged concerns that "if needed capital for local telephone operations were diverted to finance the acquisition [of Sprint] . . . the quality of [GTE's] local service would invariably suffer." <sup>340</sup> In the end, it required GTE "to operate [Sprint] separately from its local exchange operations, thereby helping to assure that funds infused into [Sprint] will not be at the expense of the local telephone companies." <sup>341</sup>

When the Commission considered AT&T's application to implement the Bell System divestiture, the Common Carrier Bureau directed AT&T to answer a series of questions "on the impact of the divestiture upon ratepayers in terms of rates and quality of local and toll service." <sup>342</sup> In responding to AT&T's objections to the scope of the Commission's public interest review, the Commission noted that "[i]n determining whether the acquisition of a carrier's facilities or a transfer is in the public interest the Commission has considered a broad range of factors," including "the impact on the ratepayers of the carriers involved" and "whether services would continue to be available to the public in a satisfactory manner." <sup>343</sup> Although the Commission eventually concluded that "any service problems that may arise from the divestiture can be handled adequately by the concerted efforts of all carriers," it nonetheless conditioned its grant of AT&T's application on a commitment from AT&T and the BOCs to file periodic service reports. <sup>344</sup>

In short, the public interest standard gives the Commission ample authority to consider and, if necessary, to rectify potential harms to local service quality and local ratepayers resulting from the BOC's provision of interLATA services. <sup>345</sup> The legislative history discussed above suggests that Congress wanted the Commission to conduct just such an inquiry. Furthermore, to the extent that state commissions are concerned about BOC interLATA entry on local service, section 253(b) of the 1996 Act would seem to authorize them to condition their certification of a BOC's compliance with the competitive checklist on the BOC's acceptance of reasonable and competitively neutral service standards.

#### IV. Procedural Issues

Section 271(d) delineates the procedural framework governing the Commission's evaluation and disposition of BOC interLATA applications. It fixes the time frame within which the Commission must act, identifies the government agencies with which it must consult, and adumbrates the sort of order the Commission must issue. As was the case with section 271(c), however, the statutory text does not furnish definitive answers to a number of important questions—notably, the scope and effect of the Commission's consultation with the DOJ and state commissions and the scope of review.

##### *A. Consultation with State Regulatory Commissions*

Section 271(d)(2)(B) provides that before the Commission may act on a BOC's interLATA application, it "shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the

[BOC] with the requirements of subsection (c)." It cannot be said that the state commission's task is limited to factfinding;<sup>347</sup> in order to assess whether a BOC has complied with "the requirements of section (c)," the state commission must form some opinion of the legal standards that must be satisfied. At the same time, and in sharp contrast to the Act's provision concerning the FCC's consultation with the DOJ, section 271(d)(2)(B) does not require the FCC to accord any weight to the state commission's findings, whether factual or legal. The FCC must consult with the state commission "in order to verify" the BOC's compliance with section (c). Although the state commission advises, however, the task of verification is plainly the Commission's alone. In allocating decisionmaking authority in this fashion, Congress abandoned the approach taken by the House of Representatives in House Bill 1555, which charged state commissions with certifying a BOC's compliance with the competitive checklist and made the state's findings binding on the Commission in most instances.<sup>348</sup>

Although section 271(d) does not oblige the Commission to defer to a state commission's findings of fact, sound administrative practice and federal-state comity counsel against relegating states to a purely advisory role. Given the tight timetable that the Act establishes for considering a BOC's application, and the likelihood that there will be multiple applications pending before the Commission at any one time, the Commission may be hard pressed to resolve the myriad factual issues raised by the typical BOC application within the brief time allowed if it does not take advantage of the resources and expertise of state commissions. Additionally, because state commissions will be more familiar than the Commission with local competitive conditions and will have reviewed and, in many instances, arbitrated interconnection agreements between a BOC and potential competitors, state commissions should be well positioned to assist the Commission in determining whether a BOC has complied with its obligations under section 271(c).<sup>349</sup>

For these reasons, in determining whether a BOC has satisfied the requirements of section 271(c), the Commission should respect the factual findings of the state commissions with which it is legally obligated to consult.<sup>350</sup> A reasonable approach would be for the Commission to accord state commissions the same degree of deference that federal courts must give to the factual findings of state administrative agencies. The Supreme Court has articulated that standard as follows:

[w]hen a state agency "acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate," federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts.<sup>351</sup>

The Court has also stated that the suitability of "administrative estoppel" may vary from case to case "according to the specific context of the rights at stake, the power of the agency, and the relative adequacy of agency procedures."<sup>352</sup>

Thus, before deferring to the factual determinations of a state commission, the FCC should satisfy itself that (1) the state commission has the authority to act, (2) the procedures employed by the state commission to "resolve disputed issues of fact" have given interested parties "an adequate opportunity to litigate" their claims, and (3) state courts would be bound to accept the facts as found by the state commission.<sup>353</sup> With respect to the second requirement, the obligation to "act[] in a judicial capacity" suggests that a state commission must, at a minimum, conduct an adjudicatory hearing. Moreover, the case law indicates that such a hearing should also include rigorous procedural safeguards to ensure that each party has an opportunity to make its case.<sup>354</sup>

A fair process may not guarantee a reasonable decision on the merits, however. Procedures that allow the contending parties to present their cases fairly and completely will amount to nothing if the decisionmaker selectively reviews evidence gathered to substantiate a predetermined outcome, whether for or against the petitioning BOC. In this regard, opponents of BellSouth's interLATA application for South Carolina alleged that the state commission adopted almost without change a proposed order submitted by BellSouth and ignored evidence unfavorable to BellSouth's application.<sup>355</sup> If those assertions are true, the state commission's order merits little, if any, deference. As a general rule, the FCC should not give weight to a state commission's decision concerning a section 271 application unless the FCC assures itself that the state agency not only employed procedures that permit full discussion of the underlying

issues, but also conducted a searching and independent examination of the record developed.

## *B. Consultation with the DOJ*

Section 271(d)(2)(A) of the Act requires the Commission to notify the Attorney General of any BOC interLATA application, to consult with the Attorney General about that application, and to include any DOJ comments in the Commission's record of its decision. The Act also directs the DOJ to provide the Commission with "an evaluation of the [BOC's] application using any standard the Attorney General considers appropriate."<sup>356</sup> Finally, the Commission must give substantial weight, though not preclusive effect to the DOJ's evaluation.

### 1. Scope of DOJ Review

The question of the DOJ's proper role in the Commission's review of a BOC interLATA application pervaded the congressional debates over telecommunications reform legislation. The language of section 271(d)(2)(A) represents the culmination of repeated and bipartisan efforts by many Members of Congress to increase the DOJ's role beyond that contemplated in either Senate Bill 652 or House Bill 1555. That language demonstrates that they were at least partially successful. On its face, section 271(d)(2)(A) identifies an important and expansive role for the DOJ in the Commission's review of a BOC's application.

BOCs, however, contend that the DOJ's participation is circumscribed in important respects. BellSouth claims, for example, that the DOJ's role "is limited to an analysis of the competitive impact of BOC entry into the in-region, interLATA market."<sup>357</sup> The Commission properly rejected that argument.<sup>358</sup> As BellSouth concedes, Congress intended the DOJ to conduct a "substantial competition-oriented analysis" of a BOC's interLATA application.<sup>359</sup> There is nothing in the text of the Act or in the legislative history to suggest that the DOJ's examination must be limited to the interLATA market. As discussed above, Congress was principally concerned about the effects of BOC interLATA entry on the introduction and growth of competition in local—as opposed to interLATA—markets.<sup>360</sup> It is therefore difficult to believe that Congress would then have excluded local markets from the DOJ's competition analysis.

The legislative history confirms that Congress did not so restrict the DOJ's review. During the debate on the conference agreement, Senator Dorgan noted that "[t]here will now be a strong role for the Justice Department in evaluating competition in local exchanges before allowing the [BOCs] to go out and compete in long distance service."<sup>361</sup> Senator Kerrey stated that approval of a BOC's interLATA application: "requires an FCC finding that such entry is in the public interest, and that a facilities-based competitor is present. On both of these issues, the DOJ's expertise in telecommunications and competitive issues generally should be of great value to the FCC."<sup>362</sup> In contrast, there is nothing in the legislative history to support BellSouth's claim that the DOJ may only consider effects of BOC entry on interLATA markets.<sup>363</sup>

Both BellSouth and SBC allege that Congress restricted the DOJ's participation in the Commission's review of BOC application to consideration of antitrust issues.<sup>364</sup> As a result, they conclude that the DOJ has nothing to contribute to the question of whether a BOC has complied with the competitive checklist.<sup>365</sup> But, as the Commission determined, it is not at all clear that Congress confined the DOJ to an antitrust review of BOC applications.<sup>366</sup> Although one can easily cull statements to that effect from the congressional debates,<sup>367</sup> the statute plainly says that the DOJ may use "any standard the Attorney General considers appropriate."<sup>368</sup>

That this standard gives the DOJ considerable latitude is reinforced by a comparison of section 271(d)(2)(A) with the parallel language of the House and Senate bills. House Bill 1555, as passed by the House, required DOJ to evaluate "whether there is a dangerous probability that the [BOC] or its affiliates would successfully use market power to substantially impede competition" in the interLATA market—clearly an antitrust-type analysis.<sup>369</sup> As adopted by the Senate, Senate Bill 652 directed the DOJ to apply "any appropriate standard," thereby at least permitting an inference that the Senate meant for an antitrust agency to employ an antitrust standard.<sup>370</sup> Congress's retreat from these

formulations to the open-ended language that appears in section 271(c)(2)(A) defeats the claim that the latter provision restricts the DOJ to an antitrust examination of BOC applications.

## 2. According "Substantial Weight" to the DOJ's Views

Although Congress required the Commission to give substantial weight to the DOJ's evaluation of a BOC's application, it gave no clear guidance about how that standard should be applied in practice.<sup>371</sup> The statute merely recites the phrase with the added caveat that the Commission may not give preclusive effect to the DOJ's conclusions. The conference report is silent on the matter, and the legislative history is only slightly more illuminating.<sup>372</sup> Representative Goodlatte, a member of both the House Judiciary Committee and the conference committee, emphasized the limitations of the statutory standard: "the FCC is free to give substantial weight—indeed greater weight if justified by the proffer—to the evidence offered by the applicant [BOC]."<sup>373</sup> Representative Sensenbrenner, on the other hand, suggested that the Commission had considerably less freedom to reject the DOJ's conclusions and recommendations:

In those instances when the cumulative effect of all other factors clearly and significantly outweighs the Justice Department's competitive concerns, the FCC should not be precluded from acting accordingly. However, I expect that the FCC will not take actions that, in the Justice Department's view, would be harmful to competition.<sup>374</sup>

Senator Thurmond also addressed the standard at some length, but he was primarily concerned with consideration of DOJ's views on appeal of an FCC decision:

The substantial weight requirement will also ensure that the expertise of the Antitrust Division will be brought to bear in any appeal of a decision made on long distance entry. If the FCC rejects the Antitrust Division's recommendation, the court must look to the weight the FCC accorded the Attorney General's evaluation in ascertaining whether the FCC correctly followed the law.

Review of this legal requirement should be governed by the standard that generally applies to questions of law. As a practical matter, this legal requirement ensures that the reviewing court will consider the Antitrust Division's position on the merits—and will assess for itself the views and evidence put forward in support of that position—and will not discount that position out of customary judicial deference to the FCC's decision.<sup>375</sup>

That very day, on the other side of the Capitol, Representative Goodlatte, took the opposite position:

[The substantial weight] provision is also not intended to give the views of the Attorney General any special weight or entitle them to any special deference upon judicial review of an FCC decision under [section 271]. . . . The courts will accord that FCC determination "full-*Chevron* deference . . . ."<sup>376</sup>

Although it is difficult to conclude anything definitive from the available evidence, one can reasonably construe the substantial weight requirement as declaring Congress's intent that the DOJ's conclusions are sufficient to provide *prima facie* support for any Commission decision under section 271. If the DOJ concluded that a BOC's interLATA entry would harm competition in local or interLATA markets, a Commission decision to that effect should withstand appeal. If the Commission chooses not to follow a DOJ recommendation either for or against entry, it would need to justify that decision by citing clear and significant evidence to the contrary in the record.

### C. Appellate Review

Because section 271 establishes no procedures governing appeals of a Commission decision on a BOC's interLATA application, any such appeal will be subject to the terms of the Administrative Procedure Act (APA).<sup>377</sup> Section 10 of the APA states that, in most instances, a "court must uphold a federal agency's action unless it is `arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"<sup>378</sup> Court review under the more stringent

"substantial evidence" test occurs only when a federal agency issues a decision after an adjudicatory hearing<sup>379</sup> or if the governing statute requires the agency to conduct a rule making "on the record."<sup>380</sup>

Section 271 does not require the Commission to hold an adjudicatory hearing on the BOCs' interLATA application and the Commission has decided not to hold one on its own motion.<sup>381</sup> Similarly, the 1996 Act does not direct the Commission to conduct its review of a BOC's application "on the record." Indeed, in fashioning the final version of section 271(d), the conference committee rejected language in Senate Bill 652 that commanded the Commission to grant or deny a BOC application "on the record after a hearing and opportunity for comment . . . ." <sup>382</sup> The Senate bill would also have required the Commission's order to be based "on substantial evidence on the record as a whole."<sup>383</sup>

Thus, the APA's arbitrary and capricious standard—rather than its substantial evidence test—will control an appellate court's review of a Commission order disposing of a BOC's interLATA application. Although some recent court decisions have conflated the two standards,<sup>384</sup> in general, the former is a less exacting standard of review.<sup>385</sup> Although the court's inquiry under the arbitrary and capricious test "is to be searching and careful, the ultimate standard of review is a narrow one."<sup>386</sup> In particular, "[t]he court is not empowered to substitute its judgment for that of the agency."<sup>387</sup>

Furthermore, where the meaning of the statute is unclear, the reviewing court should defer to the construction given by the Commission, the agency charged by Congress to implement the statutory scheme that Congress adopted.<sup>388</sup> "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."<sup>389</sup> The court's task is to determine whether the agency's interpretation is a reasonable one and, again, the court "may not substitute its own construction . . . for a reasonable interpretation made by the agency."<sup>390</sup>

## V. Conclusion

Section 271 of the 1996 Act purports to provide a roadmap for BOC entry into the interLATA marketplace, but the routes are not all well-marked. Nevertheless, a careful reading of the statutory text and accompanying legislative history, informed by a knowledge of the fundamental goals of the Act, clarifies many ambiguities and, thus, facilitates construction of most of the central provisions of section 271—the interplay between Tracks A and B, the requirements for satisfying Track A, the basics and significance of checklist compliance. In this way, one can develop a sense of what a BOC must show, at a minimum, to make a plausible case for interLATA entry.

Although a thorough understanding of these threshold questions is important to implementation of section 271, the assessment of a BOC's interLATA application must go far beyond whether, for example, Track A applies and, if so, whether it has been satisfied. The overarching goal of the 1996 Act, after all, is to promote competition in all telecommunications markets. Consequently, a BOC's application ultimately must be judged by its effects on competition in the local and long-distance markets implicated by that request.

Whereas some degree of local competition is, under most circumstances, a statutory prerequisite to interLATA entry, Congress determinedly rejected any requirement that such competition be either robust or pervasive. On the other hand, the legislators also understood that the 1996 Act would be a failure if local competition only reached the modest levels necessary to support a BOC interLATA petition. Congress, moreover, conceived of section 271 as a mechanism for involving the BOCs in the quest for increased competition in the coming years. Thus, in implementing that provision, the Commission should develop an approach conducive to the growth in local competition from the limited amount required to satisfy Track A to the healthy levels desired for the future.

As the Commission well understands, one such approach would be for the Commission's review of BOC interLATA applications to be forward-looking in nature—where the agency's attention is focused less on what has happened before an application's filing and more on what will happen in the event that the request is granted. The fundamental objective is to ensure that the conditions are in place so that the local competition on which a BOC application is predicated can proliferate in the future. There must be evidence, for example, that legal

barriers to entry have been removed and that state authorities are committed to fostering competition. New entrants must be able to secure the facilities and services they need from incumbents on just, reasonable, and nondiscriminatory terms, in sufficient quantities, and in a timely fashion. Customers must be able to switch from carrier to carrier without significant service interruptions or billing problems. Standards and mechanisms should be in place to gauge BOC compliance with their service obligations and swift and certain penalties must be available in the event that they fail to do so. Perhaps most importantly, while the BOCs need not be enthusiastic participants in this process, they should give evidence that they are aware of their obligations and are prepared to fulfill them promptly and conscientiously.

A forward-looking assessment of BOC applications will require the Commission to make difficult factual and predictive judgments, as the agency itself has recognized. Accordingly, the Commission should not deliberate alone. The statute, of course, requires the Commission to consult with the DOJ and give substantial weight to the Department's recommendations. The FCC should also confer with the state commission connected with each BOC application. As former FCC Chairman Reed Hundt once pointed out "each state's knowledge of local conditions and experience in resolving factual disputes enables it to play a vital role" in the section 271 process.<sup>391</sup> Thus, where a state commission conducts a meticulous and disinterested investigation of a BOC application, the Commission should accord substantial weight to the state agency's factual findings and due respect to its policy recommendations. federal and state regulators should also work together to develop pricing principles that are consistent with the procompetitive purposes of the 1996 Act and that accommodate the state's jurisdictional authority as defined by the Eighth Circuit.

\* The Author is a Telecommunications Policy Analyst with the National Telecommunications and Information Administration (NTIA), an agency within the United States Department of Commerce that serves as the President's principal advisor on domestic and international telecommunications and information policy. The views expressed in this Article do not necessarily reflect the positions of the NTIA, the Clinton Administration, or any other person. The Article is based on a staff working paper released by the NTIA in January 1998. The Author would like to thank Kathryn Brown, Associate Administrator of NTIA's Office of Policy Analysis and Development, for her assistance in preparing the staff working paper, particularly those sections dealing with the public interest analysis under section 271. The Author is particularly indebted to Robert Cull, a former colleague now at the World Bank, for reading multiple drafts of this Article and offering many thoughtful comments. All errors are solely the responsibility of the Author.

1. Section 271(i) of the Telecommunications Act of 1996, sec. 151(a), § 271, 47 U.S.C.A. § 271 (West Supp. 1997), defines an in-region state to mean "a State in which a [BOC] or any of its affiliates was authorized to provide wireline telephone exchange service pursuant to the reorganization plan approved under the *AT&T Consent Decree*, as in effect on the day before the date of enactment of the Telecommunications Act of 1996." 47 U.S.C.A. § 271(i)(1). Pursuant to that decree, 22 BOCs owned by AT&T were dispersed among seven new and independent Regional Bell Operating Companies (RBOCs). NYNEX, for example, received the two companies that offer local telephone service in New York, Massachusetts, Rhode Island, Vermont, New Hampshire, and Maine. Thus, NYNEX would need to secure authorization pursuant to section 271 in order to market interLATA services originating within the State of New York.

2. The 1996 Act "provide[s] for a procompetitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans *by opening all telecommunications markets to competition . . .*" H.R. Conf. Rep. No. 104-458, at 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 124 (emphasis added). A conference report is "the most persuasive evidence of congressional intent besides the statute itself." *Resolution Trust Corp. v. Gallagher*, 10 F.3d 416, 421 (7th Cir. 1993); *accord* *Estate of Wallace v. Commissioner of Internal Revenue*, 965 F.2d 1038, 1045 (11th Cir. 1992).

Members of Congress understood that the 1996 Act would be judged by its success in bringing into full bloom the nascent competition that had appeared as of the date of enactment. 141 Cong. Rec. S700 (daily ed. Feb. 1, 1996) (statement of Sen. Burns) ("We must all be vigilant to ensure that competition can take root and that it grow and it prosper. If it does not, then this bill will be a failure.").

3. *See infra* notes 268-69 and accompanying text.

4. 141 Cong. Rec. H8465 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte); *see also* *Iowa Utils. Bd. v. FCC*, 120

F.3d 753, 816 (8th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3387 & 3459 (U.S. Jan. 26, 1998) (No. 97-826 et al.) ("Congress clearly included measures in the Act, such as the interconnection, unbundled access, and resale provisions, in order to expedite the introduction of pervasive competition into the local telecommunications industry.").

5. *See* 141 Cong. Rec. H8282 (daily ed. Aug. 2, 1995) (statement of Rep. Bliley) ("[K]ey to this bill is the creation of an incentive for the current monopolies to open their markets to competition."). As a sponsor of the House telecommunications reform bill, House Bill 1555, the Chairman of the Committee with jurisdiction over the bill, and the majority floor manager of that bill during the House debate, Representative Bliley's views on the meaning and purpose of the bill are entitled to substantial weight. *See, e.g.*, *Rice v. Rehner*, 463 U.S. 713, 728 (1983) (Sponsor's interpretation is "'authoritative guide to the statute's construction.'" (quoting *Bowsher v. Merck & Co.*, 460 U.S. 824, 832 (1983) (quoting *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 527 (1982)))); *Mills v. United States*, 713 F.2d 1249, 1253 (7th Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984) (floor manager's remarks afforded "substantial weight").

6. *See* 141 Cong. Rec. H8465 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte) (Bill's conditioning of BOC interLATA entry on the presence of local competition "is a strong incentive for [BOCs] to comply with the requirements of this legislation."); *id.* at S8464 (daily ed. June 15, 1995) (statement of Sen. Dorgan) ("Complete elimination of barriers to competition will occur only if the [BOCs] have positive incentives to cooperate with the introduction of meaningful competition."); *id.* at S8138 (daily ed. June 12, 1995) (statement of Sen. Kerrey) (Long-distance entry "is the carrot that is being offered" for opening local markets.). Statements of individual legislators can provide evidence of legislative intent when they are consistent with the statutory language and other legislative history. *See Grove City College v. Bell*, 465 U.S. 555, 567 (1984).

7. 141 Cong. Rec. H8282 (daily ed. Aug. 2, 1995) (statement of Rep. Bliley).

8. Section 271(b)(1) provides that a BOC may offer in-region, interLATA services "if the Commission approves the application of such company . . . under subsection [271](d)(3) . . ." Telecommunications Act of 1996, sec. 151(a), § 271, 47 U.S.C.A. § 271(b)(1) (West Supp. 1997).

9. *Id.* § 271(d)(2)(B).

10. *Id.* § 271(d)(2)(A).

11. *See Application of SBC Comm., Inc. to Provide In-region, InterLATA Servs. in Okla., Memorandum Opinion and Order*, 12 FCC Rcd. 8685, 8729, 8 Comm. Reg. (P & F) 198 (1997) [hereinafter *SBC Order*] (separate statement of Chairman Reed Hundt).

12. *See id.*; *Application of Ameritech Mich. to Provide In-region, InterLATA Servs. in Mich., Memorandum Opinion and Order*, 9 Comm. Reg. (P & F) 267 (1997) [hereinafter *Ameritech Order*] (reconsideration pending); *Application of BellSouth Corp., et al. to Provide In-Region, InterLATA Servs. in S.C., Memorandum Opinion and Order*, CC Dkt. No. 97-208, 1997 WL 799081 (Dec. 24, 1997) [hereinafter *BellSouth Order*]. The Commission dismissed SBC's application because the company failed to demonstrate "that it is providing access and interconnection to an unaffiliated, facilities-based competing provider of telephone exchange service to residential and business subscribers, as required by section 271(c)(1)(A) of the statute." *SBC Order*, 12 FCC Rcd. 8685, para. 1, 8 Comm. Reg. (P & F) 198. The Commission rejected Ameritech's request because the firm did not show that it had fully implemented the competitive checklist of section 271(c)(2)(B) or that its interLATA operations would be conducted in accordance with the structural separation requirements of section 272(b)(3) and 272(b)(5). *Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 5. The Commission turned down BellSouth's request for failure to comply with the competitive checklist. *See BellSouth Order*, 1997 WL 799081, paras. 2, 12.

13. *SBC Comm., Inc. v. FCC*, No. 97-1425 (D.C. Cir. argued Jan. 9, 1998).

14. *See Iowa Utils. Bd. v. FCC*, No. 96-3321 et al. (8th Cir. filed Jan. 22, 1998) [hereinafter *Iowa Utils. Mandamus Order*] (issuing a writ of mandamus directing the FCC, in reviewing BOC interLATA applications under section 271, to comply with a prior Eighth Circuit order declaring that the FCC has no jurisdiction over the pricing of

interconnection, unbundled elements, and resold services). For a discussion of the issues presented by the Eighth Circuit litigation, see *infra* notes 230, 233-49 and accompanying text.

15. Any Commission decision granting or denying a section 271 application may be reviewed only by the D.C. Circuit. 47 U.S.C.A. § 402(b)(6), (9).

16. BellSouth has applied for authorization to provide long-distance service in Louisiana. Application of BellSouth Corp. et al. to Provide In-Region, InterLATA Servs. in La. in CC Dkt. No. 97-231 (Nov. 6, 1997). BellSouth's request will require the Commission to determine, among other things, whether a BOC may rely on competing wireless telecommunications services—specifically personal communications services (PCS)—to satisfy the facilities-based competitor requirement of section 271(c)(1)(A). See *infra* Part III.A.2.a.

17. *SBC Comm., Inc. v. FCC*, 981 F. Supp. 996 (N.D. Tex. 1997) (motions for stay pending).

18. *Id.* at 1008. The court concluded that the Bill of Attainder Clause, U.S. Const., Art. I, § 9, cl. 3, applies to corporations as well as to individuals. *SBC Comm.*, 981 F. Supp. at 1008 n.4. The Supreme Court has not squarely addressed the issue, but it has noted that "courts have consistently regarded the Bill of Attainder Clause . . . only as protection[] for individual persons and private groups, those who are peculiarly vulnerable to nonjudicial determinations of guilt." *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966).

19. *SBC Comm.*, 981 F. Supp. at 1004 (citing *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 846-847 (1984)).

20. See, e.g., *United States v. Brown*, 381 U.S. 437 (1965) (statute barring anyone who had been a Communist Party member in the preceding five years from serving on the board of any labor union declared unconstitutional); *United States v. Lovett*, 328 U.S. 303 (1946) (law prohibiting further payment of salaries to three named federal government employees in retribution for past "subversive" conduct declared unconstitutional); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866) (law preventing former Confederate sympathizers from practicing law in federal courts unless they sign an oath denying any past allegiance to the Confederate cause rescinded); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866) (law requiring preachers to take similar oath also struck down).

21. See Laurence B. Tribe, *American Constitutional Law* § 10-5, at 655 (2d ed. 1988) (statute must "single out or 'specify' a fixed class of persons for disadvantageous treatment").

22. *Minnesota PIRG*, 468 U.S. 841, 851 (1984) (quoting *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 87 (1961)).

23. *Id.* at 853. The court attempted to distinguish *Minnesota PIRG* on the grounds that the statute challenged there involved ""the mere denial of a noncontractual governmental benefit,"" whereas section 271 denies the BOCs their right to participate in a particular employment or business (*i.e.*, interLATA services). *SBC Comm.*, 981 F. Supp. at 1006 (quoting *Minnesota PIRG*, 468 U.S. at 853 (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960))). One noted constitutional scholar has opined, however, that the quoted language "may have been a makeweight in the [*Minnesota PIRG*] Court's bill of attainder analysis," given the Court's prior finding that the contested statute did not specify a fixed class. Tribe, *supra* note 21, § 10-5, at 653 n.11.

24. *SBC Comm.*, 981 F. Supp. at 1007.

25. See *Minnesota PIRG*, 468 U.S. at 856 n.15 (quoting *Flemming*, 363 U.S. 603, 619); see also *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810) ("It is not on slight implication and vague conjecture, that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void.").

The court's haste to condemn section 271 and to impugn the motives of the Congress that enacted it cannot be squared with the court's duty "not to destroy [an act of Congress] if [it] can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations." *Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 571 (1973); accord *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (When an

act of Congress is drawn into question, "it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").

26. *See, e.g.*, 141 Cong. Rec. S8444 (daily ed. June 15, 1995) (statement of Sen. Kerrey). *See generally infra* notes 277-81 and accompanying text.

27. 141 Cong. Rec. S8195 (daily ed. June 12, 1995) (Checklist was a compromise between the entry standard in the *AT&T Consent Decree* and the date-certain standard favored by some senators.); *see also* 142 Cong. Rec. S713 (daily ed. Feb. 1, 1996) (statement of Sen. Breaux) (suggesting that some BOCs may be able to satisfy the statutory standard for interLATA entry (presumably including checklist compliance) shortly after enactment); 141 Cong. Rec. at S7888 (daily ed. June 7, 1995) (statement of Sen. Pressler) ("[A]t least one of the [BOCs]—NYNEX—can probably fulfill all the checklist's requirements very soon.").

28. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 475-476 (1977).

29. *See infra* notes 268-69 and accompanying text.

30. *See* Telecommunications Act of 1996, sec. 101(a), §251(c), 47 U.S.C.A. § 251(c) (West Supp. 1997).

31. *See supra* note 5 and accompanying text.

32. *See supra* note 6.

33. *SBC Comm., Inc. v. FCC*, 981 F. Supp. 996, 1001 (N.D. Tex. 1997) (motions for stay pending).

34. *See supra* note 6.

35. Tribe, *supra* note 21, §10-4, at 648 (suggesting that *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866) and *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866) would have been decided differently if the challenged statutes had had the goal of inducing Confederates to lay down their arms and to rejoin the Union).

36. *SBC Comm.*, 981 F. Supp. at 1007.

37. *E.g.*, 142 Cong. Rec. S713 (daily ed. Feb. 1, 1996) (statement of Sen. Breaux) ("The legislation contemplates that the FCC should act favorably and expeditiously on [BOC] petitions to compete in the long distance business."); *id.* at S711 (daily ed. Feb. 1, 1996) (statement of Sen. Thurmond) (BOCs "certainly should be allowed to enter long distance markets under appropriate circumstances, for it is generally desirable to have as many competitors as possible in each market."); 141 Cong. Rec. H8465 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte) (citing "the *AT&T Consent Decree* that prevents the [BOCs] from competing in the long distance market" as one of the "artificial government-imposed restraints [that] inhibit the development of real competition"); *id.* at H8463 (daily ed. Aug. 4, 1995) (statement of Rep. Berman) ("I do not think we should put artificial restrictions on the ability of the [BOCs] to go into long distance . . .").

38. *See* Telecommunications Act of 1996, sec. 151(a), § 271(b)(2), 47 U.S.C.A. § 271(b)(2) (West Supp. 1997).

39. *See id.* § 271(b)(3), (g).

40. The court also seems to condemn section 271 because it subjects the BOCs to restrictions that are not borne by other LECs. *See, e.g.*, *SBC Comm.*, 981 F. Supp. at 1005 (Statute "fail[s] to set forth a generally applicable rule requiring all local exchange carriers to comply with [the interLATA] restriction. . . . [A]ll other telecommunications carriers, including all other non specified similarly situated local exchange carriers, may offer any of the [interLATA] services forbidden to the BOCs."). The Supreme Court has made clear, however, that differential treatment, without more, is not sufficient to transform a legal restriction into a bill of attainder:

However expansive the prohibition against bills of attainder, it surely was not intended to serve as a variant of the

equal protection doctrine, invalidating every Act of Congress or the States that legislatively burdens some persons or groups but not all plausible individuals. In short, while the Bill of Attainder Clause serves as an important "bulwark against tyranny," it does not do so by limiting Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all.

*Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 471 (1977) (citations omitted).

41.

In deciding whether a statute inflicts forbidden punishment, we have recognized three necessary inquiries: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes"; and (3) whether the legislative record "evinces a congressional intent to punish."

*Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852 (1984) (quoting *Nixon*, 433 U.S. at 475-476, 478).

42. *United States v. AT&T*, 524 F. Supp. 1331, 1381 (D.D.C. 1981).

43. *SBC Comm.*, 981 F. Supp. at 1007.

44. *United States v. AT&T*, 552 F. Supp. 131, 223 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

45. *Id.* at 224.

46. *Id.* at 225 (modifying the parties' proposed decree by adding a new section VIII(C)). The court did not impose line-of-business restrictions on the BOCs lightly. Realizing that such restraints are themselves anticompetitive, the court scrutinized each one carefully before approving it:

The Court will not impose restrictions simply for the sake of theoretical consistency. Restrictions must be based on an assessment of the realistic circumstances of the relevant markets, including the [BOCs'] ability to engage in anticompetitive behavior, their potential contribution to the market as an added competitor for AT&T, as well as upon the effects of the restrictions on the rates for local telephone service.

*Id.* at 224.

47. *SBC Comm.*, 981 F. Supp. at 1005, 1007.

48. *Id.* at 1005.

49. *AT&T*, 552 F. Supp. at 188.

50. *See, e.g.*, H.R. Rep. No. 104-204, pt. 1, at 49 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 12 (1995) ("BOCs provide over 80% of local telephone service in the United States . . . . While some competition has developed in the local business service and exchange access markets, local residential service remains a monopoly service."); 141 Cong. Rec. H8289 (daily ed. Aug. 2, 1995) (statement of Rep. Conyers) ("The truth is, . . . very little has changed since 1984. The [BOCs] still have a firm monopoly over the local exchange market . . . ."); *id.* at S8361 (daily ed. June 14, 1995) (statement of Sen. Warner) (The heart of the Bell System's ability to engage in discriminatory conduct "was the control which the local [BOC] had—and still has—over the local telephone exchange."); *id.* at S8141 (daily ed. June 12, 1995) (statement of Sen. Leahy) (*AT&T Consent Decree* "left the [BOCs] with local exchange monopolies, which persist today."); *id.* at S7892 (daily ed. June 7, 1995) (statement of Sen. Pressler) (BOCs "are protected with monopoly status in the local residential phone service markets.").

51. *See, e.g.*, 142 Cong. Rec. S688 (daily ed. Feb. 1, 1996) (statement of Sen. Hollings) (*AT&T* court "has been doing

yeoman's work in attempting to ensure that monopolies do not abuse their market power. But it is time for Congress to reassert its responsibilities in this area . . ."); 141 Cong. Rec. H8274 (daily ed. Aug. 2, 1995) (statement of Rep. Dingell) ("One judge, a couple of law clerks, a gaggle of Justice Department lawyers . . . have been making the entirety of telecommunications policy for the United States since the breakup [of AT&T]."); *id.* at S7887 (daily ed. June 7, 1995) (statement of Sen. Pressler) ("[L]egislation reasserts congressional authority over [BOC] provision of long distance and restores the FCC authority to set communications policy over those issues.").

52. 141 Cong. Rec. H8463 (daily ed. Aug. 4, 1995) (statement of Rep. Dingell) ("The Justice Department is in good part responsible for the unfair situation which this country confronts in telecommunications."); *id.* at S8147 (daily ed. June 12, 1995) (statement of Sen. Pressler) (complaining of lengthy delays in DOJ's processing of BOC petitions to waive specific decree restrictions).

53. Congress recognized that terminating the decree would unlawfully deprive the *AT&T* court of its jurisdiction over decree violations occurring prior to passage of the 1996 Act. *See* H.R. Conf. Rep. No. 104-458, at 198 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 212 (Congress cannot retroactively overturn a judicial consent decree.).

54. Telecommunications Act of 1996, sec. 151(a), § 271(a), 47 U.S.C.A. § 271(a) (West Supp. 1997).

55. *See id.* § 271(d)

56. *SBC Comm., Inc. v. FCC*, 981 F. Supp. 996, 1000 (N.D. Tex. 1997) (motions for stay pending).

57. *See Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 860 (1984) (Powell, J., concurring) ("No minority or disfavored group is singled out by Congress [in the challenged statute] for disparate treatment."); *United States v. Brown*, 381 U.S. 437, 453 (1965) (The statute in question "inflicts its deprivation upon the members of a political group thought to present a threat to national security. . . . [S]uch groups were the targets of English and early American bills of attainder."); *Long Island Lighting Co. v. Cuomo*, 666 F. Supp. 370, 403 (N.D.N.Y. 1987) ("Bills of attainder historically have been passed in times of war or rebellion, or when some menace to domestic tranquility was perceived.").

The clause's narrow cast perhaps explains why it has seldom been used to void a federal statute. *See* Federal Defendants' Memorandum in Support of Motion for Stay Pending Appeal at 4, *SBC Comm.*, 981 F. Supp. 996 (N.D. Tex. 1997) (filed Jan. 6, 1998) (The "Supreme Court has only invalidated a law on bill of attainder grounds twice in this century, and, on both occasions, the law at issue was enacted in response to the perceived threat of the Communist Party.").

58. *Long Island Lighting Co.*, 666 F. Supp. at 403.

59. 47 U.S.C.A. § 271(c)(1)(B), (c)(3)(A)(ii).

60. *Id.* § 271(c)(3)(B).

61. *Id.* § 271(c)(3)(C).

62. H.R. Conf. Rep. No. 104-458, at 147 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 160.

63. 47 U.S.C.A. § 271(c)(1)(A).

64. *Id.* § 271(c)(1)(B).

65. *SBC Order*, 12 FCC Rcd. 8685, para. 41, 8 Comm. Reg. (P & F) 198 (1997). ("[L]egislative history surrounding [Track A] establishes that, consistent with its goal of developing competition, Congress intended Track A to be the primary vehicle for BOC entry in section 271.").

66. Brief in Support of the *Application of SBC Comm., Inc. et al. to Provide In-Region, InterLATA Servs. in Okla.* in CC Dkt. No. 97-121 (Apr. 11, 1997) [hereinafter *SBC Oklahoma Brief*].

67. H.R. Conf. Rep. No.104-458, at 148, *reprinted in* 1996 U.S.C.C.A.N. 124, 161; *accord* H.R. Rep. No.104-204, pt. 1, at 77 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 43.

68. 47 U.S.C.A. § 271(c)(1)(B).

69. If a BOC receives such a request, it may not invoke Track B unless the relevant state commission certifies that the prospective interconnector has failed to negotiate in good faith or has failed to implement within a reasonable time the terms of the negotiated agreement. Such conduct on the part of the competitor would terminate the BOC's obligation to proceed in accordance with Track A. *See id.*

70. *See, e.g.,* Motion To Dismiss and Request for Sanctions of the Ass'n for Local Telecomm. Servs., to the *Application of SBC Comm., Inc. et al. to Provide In-Region, InterLATA Servs. in Okla.* in CC Dkt. No. 97-121, at 4-8 (Apr. 23, 1997) [hereinafter *ALTS SBC Motion*]; *SBC Order*, 12 FCC Rcd. 8685, para. 26 & n.88, 8 Comm. Reg. (P & F) 198 (1997) (identifying myriad commenters that echoed ALTS's position).

71. Comments of BellSouth Corp., to the *Application of SBC Comm., Inc. et al. to Provide In-Region, InterLATA Servs. in Okla.* in CC Dkt. No. 97-121, at 5 (May 1, 1997) [hereinafter *BellSouth Oklahoma Comments*]; *see also SBC Oklahoma Brief, supra* note 66, at 14.

72. *SBC Order*, 12 FCC Rcd. 8685, para. 54, 8 Comm. Reg. (P & F) 198 (footnotes omitted). The Commission concluded that allowing potential competitors to make qualifying requests for access and interconnection could strengthen a BOC's commitment to fostering local competition:

Upon receipt of a "qualifying request," as we interpret it, the BOC will have an incentive to ensure that the potential competitor's request is quickly fulfilled so that the BOC may pursue entry under Track A. As long as the qualifying request remains unsatisfied, the requirements of [Track A] would remain unsatisfied, and Track B would remain foreclosed to the BOC.

*Id.* para. 57 (footnote omitted).

BellSouth contends that the Commission's "qualifying request" standard also includes the requirement that a prospective competitor "'tak[e] reasonable steps toward implementing its request in a fashion that will satisfy [Track A].'" Reply Brief in Support of the *Application of BellSouth Corp. et al. to Provide In-Region, InterLATA Servs. in S.C.* in CC Dkt. No. 97-208, at 10 (Nov. 14, 1997) (quoting *SBC Order*, 12 FCC Rcd. 8685, para. 57, 8 Comm. Reg. (P & F) 198). That argument misreads the *SBC Order*. At no point in its discussion of the qualifying request standard did the Commission even hint that the test also includes a "reasonable steps" requirement. *See SBC Order*, 12 FCC Rcd. 8685, paras. 54-57, 8 Comm. Reg. (P & F) 198; *see also, BellSouth Order*, CC Dkt. No. 97-208, 1997 WL 799081, para. 61 (Dec. 24, 1997) ("The Commission's statement concerning the relevance of 'reasonable steps' taken by a requesting carrier toward provision of the type of telephone exchange service described in [Track A], however, was made in a different context."). Indeed, such a requirement would be inconsistent with the statute, which plainly links the suspension of Track B with the occurrence of a single event—a request for access and interconnection that satisfies Track A.

Having made a qualifying request, a competitor must follow through on that request in good faith and in a timely fashion. A competitor's failure to negotiate in good faith or to comply with an implementation schedule contained in a final interconnection agreement can transform its interconnection request from qualifying to nonqualifying and resurrect Track B as a path to BOC interLATA entry. *See* 47 U.S.C.A. § 271(c)(1)(B). It is in this context that a "reasonable steps" obligation arises, as the Commission understood:

[I]n some circumstances, there may be a basis for *revisiting* our decision that Track B is foreclosed in a particular state. For example, if following such a determination a BOC *refiles* its section 271 application, we may *reevaluate* whether it is entitled to proceed under Track B in the event relevant facts demonstrate that none of its potential competitors is

taking reasonable steps toward implementing its request in a fashion that will satisfy [Track A].

*SBC Order*, 12 FCC Rcd. 8685, para. 58, 8 Comm. Reg. (P & F) 198 (emphasis added).

The "reasonable steps" requirement, then, is not part of the Commission's qualifying request standard, but instead provides protection against potential abuse of that standard. That safeguard, moreover, can be invoked, if at all, only at some point *after* the Commission determines whether a qualifying request has been made. Additionally, there is some question whether the Commission can create such a safeguard. While Track B can be revived if a competitor fails to negotiate in good faith or to implement a final interconnection agreement, that can occur only if the relevant state commission certifies that the competitor has engaged in such dilatory conduct. *See* 47 U.S.C.A. § 271(c)(1)(B). The statutory text nowhere authorizes the Commission to enforce a parallel safeguard.

73. 47 U.S.C.A. § 271(c)(1)(B).

74. *See* 142 Cong. Rec. H1152 (daily ed. Feb. 1, 1996) (statement of Rep. Hastert) (A BOC may petition for interLATA authorization 10 months after enactment if it has "not received . . . any request for access and interconnection from a facilities-based competitor that meets the criteria in [Track A].").

75. 47 U.S.C.A. § 271(c)(1)(A).

76. H.R. Rep. No. 104-204, pt. 1, at 49 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 12. Where the terms of a statute are unclear, committee reports provide authoritative evidence of congressional intent; *see, e.g.*, *Garcia v. United States*, 469 U.S. 70, 76 (1984); *Zuber v. Allen*, 396 U.S. 168, 186 (1969); *United States v. Hoslett*, 998 F.2d 648, 656 (9th Cir. 1993).

77. H.R. Rep. No. 104-204, pt. 1, at 50, *reprinted in* 1996 U.S.C.C.A.N. 10, 13-14.

78. *Id.* at 77, *reprinted in* 1996 U.S.C.C.A.N. 10, 43.

79. H.R. Conf. Rep. No. 104-458, at 148 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 160.

80. *Id.* (emphasis added). Time Warner apparently offers residential services only in Rochester, New York. It has put its other "local residential telephony plans on hold, because of uncertainty in the regulatory environment." *Comm. Daily*, Jan. 14, 1997, at 7. *But see* Elizabeth Corcoran, *Microsoft to Invest \$1 Billion in Comcast*, *Wash. Post*, June 10, 1997, at C1 (noting that Microsoft's investment may accelerate Comcast's deployment of fiber optic distribution facilities capable of delivering telecommunications services). It remains to be seen whether this latest effort by cable firms to provide competitive telecommunications services will be the one to bear fruit.

Representative Jack Fields, one of the foremost proponents of cable as a local exchange competitor and a principal author of the House telecommunications bill, has expressed disappointment that "cable hasn't emerged as [a] more aggressive local service provider because industry leaders continuously have promised offerings of local residential and business telephony." *Fields Blames Hundt for Interconnection Order*, *Comm. Daily*, Dec. 2, 1996, at 2.

81. *See SBC Order*, 12 FCC Rcd. 8685, para. 51, 8 Comm. Reg. (P & F) 198 (1997) ("[T]he very passage of the 1996 Act—which was designed to remove impediments to local entry—indicates that Congress believed that the degree of local telephone competition and interconnection prior to the passage of the 1996 Act was unsatisfactory.").

82. *See supra* text accompanying notes 68-69.

83. *See, e.g.*, H.R. Conf. Rep. No. 104-458, at 148, *reprinted in* 1996 U.S.C.C.A.N. 124, 160 (Because "it is unlikely that competitors will have a fully redundant network in place when they initially offer local service," they will need to obtain some facilities and capabilities from incumbent local telephone companies.); 141 Cong. Rec. S8191 (daily ed. June 12, 1995) (statement of Sen. Pressler) ("The problem with competition in telecommunications is that you have to use somebody else's wires to get where you are going."); *SBC Order*, 12 FCC Rcd. 8685, para. 33, 8 Comm. Reg. (P & F) 198. ("Potential competitors usually request access and interconnection under section 251 in order to become

operational." (emphasis added)); Comments of WorldCom, Inc., to the *Application of SBC Comm., Inc. et al. to Provide In-Region, InterLATA Servs. in Okla.* in CC Dkt. No. 97-121, at 18 (May 1, 1997) [hereinafter *WorldCom Comments*] ("[C]ompetitors need to be able to purchase interconnection and unbundled network elements *before* they can provide local exchange service . . .").

84. Congress directed the Commission to issue its interconnection rules within six months after enactment so that prospective entrants would "have the benefit of being informed of the Commission rules in requesting access and interconnection before the statutory window in [Track B] shuts." H.R. Conf. Rep. No. 104-458, at 148-149, *reprinted in* 1996 U.S.C.C.A.N. 124, 161.

85. As adopted by the House Commerce Committee, House Bill 1555 (from which section 271(c)(1) is taken) paired Track B with a version of Track A that required a facilities-based competitor providing residential and business services "comparable in price, features, and scope" to those offered by the incumbent BOC. *See* H.R. Rep. No. 104-204, pt. 1, at 7 (1995). Congressmen Dingell, Tauzin, Boucher, and Stupak, prominent Committee members who were closely involved in crafting House Bill 1555, expressed concern that the provision would force a BOC to "wait to apply for long distance relief until some competitor has duplicated the [BOC's] network and offers service of comparable 'scope' throughout the [BOC's] service territory." *Id.* at 210, *reprinted in* 1996 U.S.C.C.A.N. 10, 103. Those fears were groundless unless the Congressmen believed that a competitor could invoke Track A by requesting interconnection even though it would not offer qualifying services until sometime after the request was made.

Indeed, if a qualifying request could be made only by a firm that is already offering service, a stringent definition of the service that the requestor must provide will benefit the BOCs. The stricter the standard, the less likely any competitor will be to satisfy it and, therefore, the more likely the BOC will be able to pursue interLATA entry via Track B. The committee-passed bill was amended on the floor, but the change did not alter the relationship between Track A and Track B—it merely reduced the level of service that a competitor had to provide in order for Track A to be satisfied.

86. *See* *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) (explaining that courts "must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous"); *accord* *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

87. BellSouth attempts to harmonize Track A and Track B by claiming that Track A "creates an expedited route to apply for entry into long-distance [i.e., prior to December 8, 1996], but, in exchange, requires actual facilities-based competition to be present." Association for Local Telecomm. Servs., Section 271: Creating Sustainable Local Competition Before the RBOCs Enter Long Distance 7 (1997) (quoting BellSouth's "Statutory Avenues for Bell Operating Company Entry to the Long Distance Market"). If, however, Congress had intended to so limit Track A, it could easily have drafted section 271(c)(1) to say as much. It also would not have allowed timely-made interconnection requests to suspend the operation of Track B *after* December 8, 1996. Finally, BellSouth's interpretation cannot be reconciled with Congress's emphasis on facilities-based competition as evidence that the market-opening provisions of the 1996 Act were actually working in practice. *See infra* note 88 and accompanying text.

88. H.R. Rep. No. 104-204, pt. 1, at 77, *reprinted in* 1996 U.S.C.C.A.N. 10, 42. The author of Track B, Representative Hastert, took a similar position:

What's more, we have included a facilities based competitor requirement [in House Bill 1555]. This means there must be a competing company actually providing service over his or her own telephone exchange facilities. Just meeting the checklist isn't enough—there must be some proof that it works.

141 Cong. Rec. H8289 (daily ed. Aug. 2, 1995); *see also* 142 Cong. Rec. H1152 (daily ed. Feb. 1, 1996) (Representative Hastert identifies himself as the author of Track B.). The views of a provision's sponsor are generally given weight in construing that provision. *Simpson v. United States*, 435 U.S. 6, 13 (1978); *United States v. Anderson*, 59 F.3d 1323, 1327 (D.C. Cir. 1995).

89. H.R. Rep. No. 104-204, pt. 1, at 77, *reprinted in* 1996 U.S.C.C.A.N. 10, 43.

90. *Id.* at 77-78, *reprinted in* 1996 U.S.C.C.A.N. 10, 43 (emphasis added).

91. *See* H.R. Conf. Rep. No. 104-458, at 148 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 161 (Track B was designed to permit a BOC to seek interLATA authority if no qualifying competitor "has sought to enter the market."). *But see* 141 Cong. Rec. H8458 (daily ed. Aug.

4, 1995) (statement of Rep. Tauzin) (offering several examples of the workings of Tracks A and B, a number of which suggest that a facilities-based carrier must already be providing service when it requests interconnection from a BOC). The weight to be given Representative Tauzin's views is limited by the fact that they are inconsistent with the legislative history cited above. *See* *Grove City College v. Bell*, 465 U.S. 555, 567 (1984) (asserting that statements of individual legislators provide evidence of legislative intent when they are consistent with the statutory language and other legislative history and with his previously-expressed understanding of the statute); *see also supra* note 85. Furthermore, at least one of Representative Tauzin's examples (number six) describes a situation where a competitor seeks interconnection to begin providing alternative residential or business services, rather than to extend existing services to a new group of prospective customers.

92. H.R. Conf. Rep. No. 104-458, at 148, *reprinted in* 1996 U.S.C.C.A.N. 124, 161.

93. "The starting point in interpreting a statute is its language, for [i]f the intent of Congress is clear, that is the end of the matter." *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993) (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) (alteration in original)).

94. As the Commission points out, if any interconnection request can suspend Track B, a BOC could be exiled to a statutory "no-man's land." For example, a competitor seeking interconnection to provide facilities-based service only to business customers would preclude the BOC from pursuing interLATA entry via Track B. Yet, the BOC could not then apply for interLATA entry under Track A (assuming that no other competitor enters the market), because it would not face a facilities-based competitor that serves both residential and business subscribers. *See SBC Order*, 12 FCC Rcd. 8685, para. 54, 8 Comm. Reg. (P & F) 198 (1997).

95. The Commission tweaked SBC for suggesting that an interconnection request may become qualifying at some future date if it were not so when initially submitted: "SBC fails to explain how the meaning of the statutory term 'request' can vary according to the operational status of the requestor." *Id.* para. 49. Yet, as noted, operation of Track B hinges on the requestor's present or future operational characteristics—what services it offers or intends to offer, how, and to whom. If those operational characteristics should change over time, the Commission's treatment of the underlying request for purposes of Track B should change as well.

The Commission cannot let a request for interconnection evolve indefinitely, however. In fairness to the BOCs—who need to know whether their interLATA application must proceed via Track A or Track B—the Commission must at some point finally determine whether or not a competitor has submitted a qualifying request for access and interconnection. BellSouth suggests that that assessment must be made as of the date which is three months prior to the date of a BOC's interLATA application. Brief in support of the *Application of BellSouth Corp. et al. to Provide In-Region, InterLATA Servs. in S.C.* in CC Dkt. No. 97-208, at 10-11 (Sep. 30, 1997) [hereinafter *BellSouth South Carolina Brief*]. The statute appears to compel that result. *See* Telecommunications Act of 1996, sec. 151(a), § 271(c)(1)(B), 47 U.S.C.A. § 271(c)(1)(B) (West Supp. 1997) (BOC may proceed via Track B if no one has made a qualifying interconnection request "before the date which is 3 months before the date the company makes its [interLATA] application . . .").

96. H.R. Rep. No. 104-204, pt. 1, at 78 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 43.

97. H.R. Conf. Rep. No. 104-458, at 148, *reprinted in* 1996 U.S.C.C.A.N. 124, 160.

98. *See SBC Order*, 12 FCC Rcd. 8685, para. 18, 8 Comm. Reg. (P & F) 198.

99. *Id.* para. 54.

100. *Id.* para. 57.

101. The BOCs assert that interexchange carriers may have an incentive to engage in such strategic behavior to safeguard their interLATA market shares. *SBC Oklahoma Brief, supra* note 66, at 13; *BellSouth Oklahoma Comments, supra* note 71, at 6. That claim generally lacks force when directed at other potential local competitors (such as cable television companies) with no long-distance businesses to protect. Moreover, prospective competitors are not the only parties with incentives to "game" the situation. The BOCs are well-positioned to influence the pace at which competition develops because the BOCs control the bottleneck facilities that new entrants need to compete. *See supra* note 83. They would have every incentive to exercise that power if, by so doing, they knew that they could seek interLATA entry via Track B no later than December 8, 1996. *See SBC Order*, 12 FCC Rcd. 8685, paras. 47, 53, 8 Comm. Reg. (P & F) 198.

SBC contends that even alternative local competitors with no interLATA operations may be moved to manipulate the section 271 framework "to force [access and interconnection] concessions [BOCs] need not make under sections 251 and 252." Reply Comments and Opposition to Petitions To Deny of SBC Comm., Inc. et al., to the *Application of SBC Comm., Inc. to Provide In-Region, InterLATA Servs. in Okla.* in CC Dkt. No. 97-121, at 1 n.1 (May 27, 1997) [hereinafter *SBC Oklahoma Reply*]. SBC acts as if the requirements of sections 251 and 252 were frozen in amber upon enactment of the 1996 Act or upon promulgation of the Commission's implementing regulations. To the contrary, the provisions of section 251 "permit regulatory flexibility and are not limited to a 'snapshot' of today's technologies or requirements." 141 Cong. Rec. S8469 (daily ed. June 15, 1995) (statement of Sen. Pressler). Given that, one cannot, without more, ascribe nefarious motives to local competitors who are simply relying on the incentive structure embedded in section 271 (*i.e.*, using the prospect of interLATA entry to induce the BOCs to open their networks, see *supra* notes 5-7 and accompanying text) to secure from the BOCs access and interconnection arrangements that are needed for meaningful competitive entry, but may not yet be required by Commission regulations implementing section 251.

102. *See* Telecommunications Act of 1996, sec. 101(a), § 252(b), 47 U.S.C.A. § 252(b) (West Supp. 1997).

103. 47 U.S.C.A. § 252(b)(5).

104. *See id.* § 271(c)(1)(B)(i).

105. *Id.* § 251(c)(1).

106. *Id.*

107. *See SBC Order*, 12 FCC Rcd. 8685, para. 37 n.109, 8 Comm. Reg. (P & F) 198 (1997) ("BOCs are free to negotiate implementation schedules for their interconnection agreements."); *BellSouth Order*, CC Dkt. No. 97-208, 1997 WL 799081, para. 64 (1997) ("[N]othing in the Commission's rules precludes [BOCs] from negotiating, or states from imposing in arbitration, schedules for the implementation of the terms and conditions by the parties to the agreement."); *see also* Comments of the S.C. Cable TV Ass'n, to the *Application of BellSouth Corp. et al. to Provide In-Region, InterLATA Servs. in S.C.* in CC Dkt. No. 97-208, at 3-6 (Oct. 20, 1997) [hereinafter *SCCTA Comments*].

108. 47 U.S.C.A. § 252(c)(3).

109. *Id.* § 271(c)(1)(B)(ii). Ameritech contends that a BOC should be entitled to proceed via Track B unless "there is an interconnection agreement that commits the potential competitor to a reasonable schedule for the commencement of [service that would satisfy Track A] and that carrier complies with the schedule." Comments of Ameritech, to the *Application of BellSouth Corp. et al. to Provide In-Region, InterLATA Servs. in S.C.* in CC Dkt. No. 97-208, at 7 (Oct. 20, 1997). To hold otherwise would, in Ameritech's view, "relegate a BOC to such a blind alley based on an interconnection agreement that leaves provision of service pursuant to that agreement completely in the hands of a potential competitor that itself would benefit from such an absurd regulatory result." *Id.* at 6. Yet, given the way the statute operates, an interconnection agreement will lack an implementation schedule only if a BOC fails to request one.

See *SCCTA Comments*, *supra* note 107, at 6-7 (suggesting reasons why a BOC might choose not to insist upon a firm implementation schedule). Adopting Ameritech's proposal would thus reward a BOC that did not protect its own interests by giving the company an easier route to the interLATA marketplace. While the Commission should not construe section 271 so as to "relegate" a BOC to a "blind alley," neither should it protect a BOC that chooses to walk there on its own.

110. Section 271(c)(1)(B) narrowly defines the behavior that would warrant revival of Track B—a competitor's failure "to negotiate in good faith" or its failure "to comply, within a reasonable period of time, with the implementation schedule contained in" the competitor's interconnection agreement. 47 U.S.C.A. § 271(c)(1)(B)(i)-(ii). Thus, a state commission cannot, as BellSouth asserts, resurrect Track B by making a generalized finding that "potential competitors are [not] taking any reasonable steps towards implementing any business plan for facilities-based local competition . . . ." *BellSouth South Carolina Brief*, *supra* note 95, at 8 (quoting Entry of BellSouth Telecomm., Inc. into InterLATA Toll Market, *Order*, at 19 (Dkt. No. 97-101) (Order No. 97-640) (SCPSC July 31, 1997)). See *BellSouth Order*, CC Dkt. No. 97-208, 1997 WL 799081, para. 66 n.179 (Dec. 24, 1997) (rejecting BellSouth's argument for lack of evidence that the state commission had in fact certified that either of the two statutory exceptions was applicable).

111. 47 U.S.C.A. § 271(c)(1)(A).

112. *Id.* "Exchange access" refers to the provision of facilities or services that connect individual subscribers to the long-distance network. See *id.* § 153(16) ("The term 'exchange access' means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services."). Congress's specific exclusion of "exchange access" from "telephone exchange service" seems unnecessary because the two terms appear to be mutually exclusive. The definition of exchange access, for example, plainly distinguishes the former from the latter. More tellingly, the statutory definition of "local exchange carrier" encompasses "any person that is engaged in the provision of telephone exchange service or exchange access." *Id.* § 153(26). The inference is that Congress viewed exchange access as a separate and distinct offering, and not as a subcategory of telephone exchange service. Congress thus did not need to clarify that exchange access is not telephone exchange service for purposes of Track A because the definitional structure of the 1996 Act had already accomplished as much.

113. *Id.* § 271(c)(1)(A) ("services provided pursuant to subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 et seq.) shall not be considered to be telephone exchange services"). The Conference Report confirms that the quoted language was intended to refer to cellular service. H.R. Conf. Rep. No. 104-458, at 147 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 160.

114. 47 U.S.C.A. § 153(47).

115. The 1996 Act added subparagraph (B). There is nothing in the legislative history to indicate why Congress added the new provision or what services it was intended to encompass.

116. Amendment of Parts 21 and 43 of the Comm'n's Rules and Regs. Relative to Various Procedural Requirements for the Domestic Pub. Radio Serv., *Second Report and Order*, 76 F.C.C.2d 273, para. 13, 46 Rad. Reg. 2d (P & F) 1701 (1980); *accord* The Offshore Tel. Co., *Memorandum Opinion and Order*, 3 FCC Rcd. 4513, para. 30, 64 Rad. Reg. 2d (P & F) 1808 (1988).

117. Application of Teleport Comm.—N.Y., *Memorandum Opinion and Order*, 7 FCC Rcd. 5986, para. 17, 71 Rad. Reg. 2d (P & F) 250 (1992), *affirmed by Order on Reconsideration*, 8 FCC Rcd. 5464 (1993), *vacated sub nom.* United States Tel. Ass'n v. FCC, 38 F.3d 609 (D.C. Cir. 1994). Courts adopted similarly restrictive interpretations of section 3(r) in holding that a variety of communications offerings are not telephone exchange service. See, e.g., National Ass'n of Reg. Util. Comm'rs v. FCC, 533 F.2d 601, 607 n.23 (D.C. Cir. 1976) (two-way, nonvideo communications delivered via cable television); General Tel. Co. of the Southwest v. United States, 449 F.2d 846, 855 n.5 (5th Cir. 1971) (telephone company provision of transmission capacity for cable television service); *ATS Mobile Tel., Inc. v. General Comm.*, 282 N.W.2d 16, 18-19 (Neb. 1979) ("mobile radio telephone exchange services," specifically one-way paging).

118. Ameritech notes that a federal district court has ruled that mobile radio services are "exchange telecommunications services" for purposes of the *AT&T Consent Decree* and that the Commission has stated that such services are "exchange services" under sections 2(b) and 221(b) of the Communications Act. Comments of Ameritech to the *Application of BellSouth Corp. et al. to Provide In-Region, InterLATA Servs. in La.* in CC Dkt. No. 97-231, at 4-5 (Nov. 25, 1997) [hereinafter *Ameritech Louisiana Comments*]. Even if true, those assertions are irrelevant. In determining compliance with Track A, the determinative question is whether CMRS offerings such as cellular and PCS are telephone exchange services under 47 U.S.C.A. § 153(47)(A).

119. See *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.") (citation omitted); *Dutton v. Wolpoff & Abramson*, 5 F.3d 649, 655 (3d. Cir. 1993) ("[W]hen Congress reenacts legislation, it incorporates existing administrative and judicial interpretations of the statute into its reenactment.").

120. Implementation of the Local Competition Provisions in the Telecomm. Act of 1996, *First Report and Order*, 11 FCC Rcd. 15,499, para. 1013, 4 Comm. Reg. (P & F) 1 [hereinafter *Local Competition Report and Order*], modified by *Order on Reconsideration*, 11 FCC Rcd. 13,042, 4 Comm. Reg. (P & F) 1057, reconsidered by *Second Order on Reconsideration*, 11 FCC Rcd. 19,738, 5 Comm. Reg. (P & F) 420 (1996), reconsidered by *Third Order on Reconsideration and Further Notice of Proposed Rulemaking*, 8 Comm. Reg. (P & F) 1206, vacated in part *sub nom.* *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), cert. granted, 66 U.S.L.W. 3387 & 3459 (U.S. Jan. 26, 1998) (No. 97-826 et al.).

121. See, e.g., *id.* para. 1014; *Ameritech Louisiana Comments*, *supra* note 118, at 5-7.

122. 47 U.S.C.A. § 153(26).

123. *Id.* § 253(f).

124. *Local Competition Report and Order*, 11 FCC Rcd. 15,499, para. 1014, 4 Comm. Reg. (P & F) 1; see also *Ameritech Louisiana Comments*, *supra* note 118, at 6.

125. *Ameritech Louisiana Comments*, *supra* note 118, at 5-6.

126. 47 U.S.C.A. § 271(c)(1)(A).

127. *Local Competition Report and Order*, 11 FCC Rcd. 15,499, para. 1014, 4 Comm. Reg. (P & F) 1.

128. See, e.g., *Ameritech Louisiana Comments*, *supra* note 118, at 8-9; Brief in Support of the *Application of BellSouth Corp. et al. to Provide In-Region, InterLATA Servs. in La.* in CC Dkt. No. 97-231, at 11-12 (Nov. 6, 1997) [hereinafter *BellSouth Louisiana Brief*].

129. H.R. Rep. No. 104-204, pt. 1, at 77 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 43.

130. See Comments of ACSI, to the *Application of BellSouth Corp. et al. to Provide In-Region, InterLATA Servs. in La.* in CC Dkt. No. 97-231, at 10 (Nov. 25, 1997) [hereinafter *ACSI Louisiana Comments*] (Cellular exclusion "merely reflects Congress' desire to ensure that cellular services were not defined by the FCC to fall within the Section 3(47)(A) definition."); cf. Comments of MCI Telecomm. Corp., to the *Application of BellSouth Corp. et al. to Provide In-Region, InterLATA Servs. in La.* in CC Dkt. No. 97-231, at 8 (Nov. 25, 1997) [hereinafter *MCI Louisiana Comments*] ("Congress' exclusion of cellular providers from the definition of telephone exchange service merely shows that Congress thought that it was so clear that cellular providers do not and will not provide competing telephone exchange service that the Commission need not take any time to adjudicate the issue in section 271 proceedings.").

131. Literally, the expression of one thing is the exclusion of another. Black's Law Dictionary 581 (6th ed. 1990).

132. *Ameritech Louisiana Comments*, *supra* note 118, at 9.

133. *See, e.g.*, *Schmeling v. Nordam*, 97 F.3d 1336, 1344 (10th Cir. 1996); *Smart v. Gillette Co. Long-Term Disability Plan*, 70 F.3d 173, 179 (1st Cir. 1995).

134. *Mobile Comm. Corp. of Am. v. FCC*, 77 F.3d 1399, 1404-1405 (D.C. Cir. 1996) (quoting *Texas Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991) (quoting *Chevron, USA, Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 842 (1984))).

135. *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 676 (D.C. Cir. 1973); *see also Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983) (quoting *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1944) (rejecting application of *expressio unius* because "such canons `long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose'")); *American Reserve Corp.*, 840 F.2d 487, 492 (7th Cir. 1988) ("Why should we infer from the list of ways to do something that there are no others? The legislature does not tie up every knot in every statutory subsection."); *Director, Office of Workers' Compensation Programs v. Bethlehem Mines Corp.*, 669 F.2d 187, 197 (4th Cir. 1982) ("The maxim is to be applied with great caution and is recognized as unreliable.").

136. *See FCC Proposes Rules Changes for Entrepreneurs' Auction, Sets Aug. 29 Start*, *Comm. Daily*, June 26, 1995, at 1.

137. Mike Mills, *A Beginner's Guide to the Cellular Maze*, *Wash. Post*, Dec. 4, 1995, at F12 (reporting that PCS became commercially available in the Washington, D.C. metropolitan area on November 15, 1995). The House passed House Bill 1555 on August 4, 1995.

138. *See, e.g.*, Comments of the Competition Policy Inst., to the *Application of BellSouth Corp. et al. to Provide In-Region, InterLATA Servs. in La.* in CC Dkt. No. 97-231, at 2 (Nov. 25, 1997) ("PCS does not `compete' in the standard economic sense" with the BOCs' local services.); *ACSI Louisiana Comments*, *supra* note 130, at 11 (Agreements with PCS carriers do not satisfy Track A "absent a finding that PCS . . . is a substitute for wireline local telephone service."); Comments of AT&T Corp., to the *Application of BellSouth Corp. et al. to Provide In-Region, InterLATA Servs. in La.* in CC Dkt. No. 97-231, at 66-67 (Nov. 25, 1997) (Higher cost and reduced user flexibility means that PCS is not a "viable substitute" for wireline service.); *MCI Louisiana Comments*, *supra* note 130, at 5-7 (higher prices, and economic and technical limitations of PCS prevent it from being a real "commercial alternative" to the BOCs' offerings).

139. In the absence of evidence to the contrary, words in a statute are assumed to have their "ordinary, contemporary, common [i.e., nontechnical] meaning." *Walters v. Metropolitan Educ. Enters.*, 117 S.Ct. 660, 664 (1997); *accord Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 388 (1993).

140. H.R. 1555, 104th Cong., 1st Sess. § 101(a) (1995) (adding section 245(a)(2)(A) to the Communications Act of 1934), *reprinted in* H.R. Rep. No.104-204, at 7 (1995).

141. *See* Brief in support of the *Application of Ameritech Mich. to Provide In-Region, InterLATA Serv. in Mich.* in CC Dkt. No. 97-1, at 12-14 (Jan. 2, 1997) (withdrawn as premature on Feb. 11, 1997); *see also SBC Oklahoma Brief*, *supra* note 66, at 11-12; Brief in support of the *Application of Ameritech Mich. to Provide In-Region, InterLATA Servs. in Mich.* in CC Dkt. No. 97-137, at 12-14 (May 21, 1997) [hereinafter *Ameritech Michigan Brief*].

142. Federal-State Joint Bd. on Universal Serv., *Report and Order*, 12 FCC Rcd. 8776, paras. 154-68, 7 Comm. Reg. (P & F) 109 (1997) [hereinafter *Universal Serv. Report and Order*]. Section 214(e)(1)(A) provides that in order to be eligible to receive federal universal service support, a carrier must provide qualifying services throughout a designated service area "either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier)." Telecommunications Act of 1996, sec. 102(a), § 214(e)(1)(A), 47 U.S.C.A. § 214(e)(1)(A) (West Supp. 1997).

143. *Ameritech Order*, 9 Comm. Reg. (P & F) 267, paras. 91-101 (1997). The Commission was not obliged to construe the phrase "own facilities" in the same fashion in both places. As the Commission recognized, the words "own" and "owner" are broad and flexible concepts, whose meanings depend on the subject, object, and terms of the legislation in which they are found. *Universal Serv. Report and Order*, 12 FCC Rcd. 8776, para. 158 & nn.407-08, 7 Comm. Reg. (P & F) 109. Thus, there is no reason to assume *a priori* that Congress meant for the word "own" to have the same meaning in both places.

It is true that words generally are presumed to have the same meaning in all subsections of the same statute. *See, e.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995); *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *Morrison-Knudsen Constr. Co. v. Director, Office of Workers' Compensation*, 461 U.S. 624, 633 (1983).

Nevertheless, "[w]here the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law . . . ."

*District of Columbia v. Carter*, 409 U.S. 418, 421 (1973) (quoting *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932)); *accord NationsBank of N.C. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 262 (1995) (stating that "a characterization fitting in certain contexts may be unsuitable in others").

Interpreting the phrase "own facilities" differently for purposes of section 214(e) and Track A would both reflect the different functions of the two provisions and promote the procompetitive goals of the overall statute. Section 214(e)(1) states that to be eligible to receive universal service subsidies, a carrier must provide qualifying services, at least in part, using "its own facilities." Because new entrants would likely need the same access as incumbents to such subsidies in order to compete effectively, the procompetitive purposes of the 1996 Act would be better served by construing section 214(e) so as to maximize the number of carriers qualified to receive universal service support. Construing the words "own facilities" broadly to include network elements would serve that end. *See Universal Serv. Report and Order*, 12 FCC Rcd. 8776, paras. 161-66, 7 Comm. Reg. (P & F) 109.

On the other hand, Track A's role is to ensure that there is some degree of competition in the local marketplace before the BOC is permitted to offer interLATA services. Because the construction of network facilities by new entrants provides the surest evidence of such competition, it arguably would better serve the purposes of Track A to interpret "own facilities" narrowly to exclude network elements.

144. 47 U.S.C.A. § 271(c)(1)(A).

145. *Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 92.

146. *See* 47 U.S.C.A. § 271(c)(2)(B)(i)-(ii), (xiv).

147. In construing a statute, courts presume that Congress did not intend an absurd result. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994); *Pacific-Atl. Trading Co. v. United States*, 64 F.3d 1292, 1303 (9th Cir. 1995).

148. *Universal Serv. Report and Order*, 12 FCC Rcd. 8776, para. 158, 7 Comm. Reg. (P & F) 109. The Commission further distinguished network elements from resale of services:

The opportunity to purchase access to unbundled network elements . . . provides carriers with greater control over the physical elements of the network, thus giving them opportunities to create service offerings that differ from services offered by an incumbent. This contrasts with the abilities of wholesale purchasers, which are limited to offering the same services that an incumbent offers at retail. This greater control distinguishes carriers that provide service over unbundled network elements from carriers that provide service by reselling wholesale service . . . .

*Id.* para. 160 (footnotes omitted); *see also Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 100. It is worth noting, however, that the competitor's ability to "control" the network elements it leases from a BOC is maximized when those elements can be separated from the rest of the BOC's network and provided to a competitor on an exclusive basis. *See*

Application of Ameritech Mich. to Provide In-Region, InterLATA Servs. in Mich., *Petition To Deny* of Sprint Comm. Co. in CC Dkt. No. 97-137, at 10-11 (petition date June 10, 1997). Loop facilities may satisfy both of those criteria in many instances. Other network elements, however, such as transport and switching, are common and likely cannot be provided to requesting competitors on an exclusive basis. *See Local Competition Report and Order*, 11 FCC Rcd. 15,499, para. 258, 4 Comm. Reg. (P & F) 125 (1996). As a result, a competitor's ability to "control" them is more limited.

149. 47 U.S.C.A. § 153(29).

150. H.R. Conf. Rep. No. 104-458, at 148 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 160.

151. *Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 99.

152. *Id.* para. 99 n.230.

153. *SBC Order*, 12 FCC Rcd. 8685, para. 41, 8 Comm. Reg. (P & F) 198 (1997).

154. The American Heritage Dictionary of the English Language 976 (1979); *see also* Application of SBC Comm., Inc. et al. to Provide In-Region, InterLATA Servs. in Okla., *Petition To Deny* of Sprint Comm. Co. in CC Dkt. No. 97-121, at 10-11 (petition date May 1, 1997) [hereinafter *Sprint Oklahoma Petition*]; Initial Comments of Brooks Fiber Comm. of Okla., Inc. and Brooks Fiber Comm. of Tulsa, Inc., to the *Application of Ernest G. Johnson, Dir. of the Pub. Utils. Div., Okla. Corp. Comm'n, to Explore the Requirements of Section 271 of the Telecomm. Act of 1996* in Proceeding Cause No. PUD 970000064, at 11 (1997) [hereinafter *Brooks Oklahoma Comments*] (appended as exhibit 2 to the Opposition of Southwestern Bell to *ALTS SBC Motion*, *supra* note 70 (Apr. 28, 1997) [hereinafter *SBC Oklahoma Opposition*]).

155. *See* 141 Cong. Rec. E1699 (daily ed. Aug. 11, 1995) (statement of Rep. Tauzin) (delivered on Aug. 4, 1995) (indicating that to satisfy the "predominance" test, more than 50% of a competing provider's facilities must be "owned by the competing provider, or owned by entities not affiliated with" the incumbent BOC).

156. Without question, however, "predominance" is determined by reference to the composition of the competitor's own network, and no other. Thus, Brooks Fiber erred when it argued that its network cannot be considered predominant because it is so much smaller than SBC's. *Brooks Oklahoma Comments*, *supra* note 154, at 11.

157. *SBC Oklahoma Brief*, *supra* note 66, at 11.

158. *Id.*

159. 141 Cong. Rec. E1699 (daily ed. Aug. 11, 1995) (statement of Rep. Tauzin) (delivered on Aug. 4, 1995).

160. *See* H.R. Rep. No. 104-204, pt.1, at 77 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 43; 142 Cong. Rec. H1149 (daily ed. Feb. 1, 1996) (statement of Rep. Fields) ("[A] cable company would in most instances and in all likelihood be that facilities-based competitor in most States—even though our concept definition is more flexible and encompassing."); 141 Cong. Rec. H8476 (daily ed. Aug. 4, 1995) (statement of Rep. Fields) ("[T]he only competitor in the residential marketplace will be the cable company."); *id.* at H8475 (statement of Rep. Richardson) ("[C]able has the potential to offer our constituents a choice in how to receive information."); *id.* at H8474 (statement of Rep. Manton) ("[T]he cable television industry is poised to compete with local telephone companies in offering consumers advanced communications services.").

161. The Commission has not yet had occasion to offer its interpretation of the word "predominantly." *See Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 103 (1997).

162. This application was filed on January 2, 1997, but was withdrawn as premature on February 11, 1997 because Ameritech had relied on an interconnection agreement with AT&T that had not been approved by the Michigan Public Service Commission. *Id.* para. 25. Ameritech then refiled its application on May 21, 1997.

163. Motion to Dismiss of the Ass'n for Local Telecomm. Servs., to the *Application of Ameritech Mich. to Provide In-Region, InterLATA Servs. in Mich.* in CC Dkt. No. 97-1, at 4 (Jan. 14, 1997) [hereinafter *ALTS Ameritech Motion*].

164. *Sprint Oklahoma Petition*, *supra* note 154, at 5.

165. *MCI Urges FCC To Reject Southwestern Bell's Request To Offer Long Distance Service in Oklahoma*, at 2 (Apr. 11, 1997) (press release).

166. *Why SBC's Long Distance Application Is Premature* (Apr. 10, 1997) (AT&T Factsheet); *see also* Opposition of the Telecomm. Resellers Ass'n, to the *Application of SBC Comm., Inc. et al. to Provide In-Region, InterLATA Service in Okla.* in CC Dkt. No. 97-121, at 6 (May 1, 1997) [hereinafter *TRA Oklahoma Opposition*] (SBC "should not be awarded the authority it seeks here until it is facing established facilities-based competition in at least all of the major population centers within the State of Oklahoma.").

167. H.R. Rep. No. 104-204, pt. 1, at 77 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 43.

168. *Id.* (emphasis added). That position was predicated on the belief that once a facilities-based competitor is operating somewhere,:

[W]hatever agreement the competitor is operating under must be made generally available throughout the State. Any carrier in another part of the State could immediately take advantage of the "agreement" and be operational fairly quickly. By creating this potential for competitive alternatives to flourish rapidly throughout a State, with an absolute minimum of lengthy and contentious negotiations once an initial agreement is entered into, the Committee is satisfied that the "openness and accessibility" requirements have been met.

*Id.*

169. 141 Cong. Rec. S8319 (daily ed. June 14, 1995) (statement of Sen. Kerrey). Senator Kerrey was referring to provisions in the Senate telecommunications reform bill, Senate Bill 652, which did not include a facilities-based competitor requirement, but instead allowed a BOC to satisfy its interconnection obligations by negotiating an agreement with a potential competitor that complied with the bill's competitive checklist. Although the Senate bill differed from House Bill 1555 on this point, both bills raised the same concern—that a BOC could begin providing interLATA services without facing significant local competition.

170. 142 Cong. Rec. H1174 (daily ed. Feb. 1, 1996) (statement of Rep. Watts); *see also* 141 Cong. Rec. H8276 (daily ed. Aug. 2, 1995) (statement of Rep. Holden) (complaining the House Bill 1555 "does not require that there be any real, substantial competition in the local telephone loop prior to [BOC] entry into the long-distance business").

171. H.R. 1555, 104th Cong. § 101(a) (1995) (enacted), *reprinted in* H.R. Rep. No. 104-204, pt. 1, at 7 (1995) (adding section 245(a)(2)(A) to the Communications Act of 1934) (emphasis added).

172. 141 Cong. Rec. H8454 (daily ed. Aug. 4, 1995) (statement of Rep. Bunn). Under the Bunn amendment, a BOC could provide interLATA service, for example, in Pennsylvania, once a competitor was capable of providing alternative local exchange service to 530,000 of the state's 5.3 million access lines. *Id.* at H8276 (daily ed. Aug. 2, 1995) (statement of Rep. Holden).

173. *Id.* at S8319 (daily ed. June 14, 1995) (text of the Kerrey amendment).

174. Comments of the Tex. Ass'n of Long Distance Tel. Cos., to the *Application of SBC Comm., Inc. et al. to Provide In-Region, InterLATA Servs. in Okla.* in CC Dkt. No. 97-121, at 2 (May 1, 1997). This conclusion is not inconsistent with the structure of section 271(c)(1). Four members of the House Commerce Committee complained that the Committee's selection of Track A as the primary avenue for BOC interLATA entry, coupled with a requirement for extensive facilities-based competition, could create an entry requirement that "can never be met." H.R. Rep. No. 104-204, pt. 1, at 210 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 103. The Committee-passed bill was subsequently amended on the floor to insert the more lenient facilities-based

competition standard that now appears in Track A. That compromise can reasonably be interpreted as an effort to satisfy critics without sacrificing the more important requirement that the BOCs pursue interLATA entry in most cases via Track A.

175. H.R. Rep. No. 104-204, pt. 1, at 77, *reprinted in* 1996 U.S.C.C.A.N. 10, 43.

176. *Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 65 (1997).

177. The American Almanac 1996-1997: Statistical Abstract of the United States 47 (116th ed. 1996) [hereinafter Statistical Abstract]. The population of Grand Rapids proper was 190,000 in 1994. *Id.* at 44.

178. *Ameritech Order*, 9 Comm. Reg. (P & F) 267, paras. 76-78.

179. *Brooks Oklahoma Comments*, *supra* note 154, at 2.

180. Statistical Abstract, *supra* note 177, at 45-46 (1994 data for Oklahoma City (1.007 million) and Tulsa (743,000) metropolitan areas). In 1994, the cities of Oklahoma City and Tulsa had 463,000 and 375,000 residents, respectively. *Id.* at 41-42.

181. *SBC Order*, 12 FCC Rcd. 8685, para. 17, 8 Comm. Reg. (P & F) 198 (1997); *see also BellSouth Order*, CC Dkt. No. 97-208, 1997 WL 799081, para. 57 (Dec. 24, 1997) (holding that MCI's provision of service to 19 employees, at no charge and on a test-basis did not make MCI a competing provider for purposes of Track A).

182. Affidavit of John C. Shapleigh of Brooks Fiber, para. 3 (appended to *ALTS SBC Motion*, *supra* note 70).

183. *Id.* para. 5.

184. *Id.* There is nothing to be made of the fact that Brooks was providing residential service only on a trial basis when SBC filed its interLATA application. Brooks indicated that the purpose of the trial was "to allow Brooks to gain some limited 'hands-on' experience with [SBC's] resale systems (for example, billing, directory assistance) and coordination of those systems with Brooks's retail systems, and to troubleshoot any problems." Opposition of Brooks Fiber Properties, Inc., to the *Application of SBC Comm., Inc. to Provide In-Region, InterLATA Servs. in Okla.* in CC Dkt. No. 97-121, at 6 (May 11, 1997) [hereinafter *Brooks Oklahoma Opposition*]. Customer trials of prospective services are, of course, common in the telecommunications industry and enable a provider to identify and correct technical and operational problems with a service before exposing it to the rough and tumble of the marketplace. *See WorldCom Comments*, *supra* note 83, at 9. Brooks's rational decision to begin its residential operations in Oklahoma with a trial does not call into question its intent to provide residential service in the state.

185. *See* Letter from Edward J. Cadieux, Director, Regulatory Affairs-Central Region, Brooks Fiber, to Martin E. Grambow, Vice President and General Counsel, SBC (Mar. 4, 1997) (Attachment A) (appended to *ALTS SBC Motion*, *supra* note 70).

186. *SBC Oklahoma Opposition*, *supra* note 154, at 9-10.

187. *See, e.g.,* TCI Cablevision, Inc., *Memorandum Opinion and Order*, 10 FCC Rcd. 2925, para. 10, 77 Rad. Reg. 2d (P & F) 305 (1995) ("[A] cable operator provides cable service [to subscribers] in consideration for fees paid."); TCI TKR of Houston, Inc., *Memorandum Opinion and Order*, 10 FCC Rcd. 83, para. 4 (1995) (quoting Webster's Ninth New Collegiate Dictionary 1176 (1989) (defining subscriber as a person "receiving something of a continuing or periodic nature on a prepayment plan")); Implementation of Section 9 of the Comm. Act, 9 FCC Rcd. 5333, para. 88, 75 Rad. Reg. 2d (P & F) 399 (1994) (defining mobile service subscriber "as an individual or entity authorized by the mobile service provider to operate under its blanket license in exchange for monetary consideration"); Ballentine's Law Dictionary 1230 (3rd ed. 1969) (defining "subscriber" as one "who has subscribed to something" and "subscribe" as "[t]o agree to take and pay for corporate stock on the issuance thereof or for a newspaper or magazine to be issued periodically").

In the *SBC Order*, the Commission also pointed out that the term "telephone exchange service," which a competitor must provide for Track A to be satisfied, requires some form of payment by the user to the supplier. The Commission reached that conclusion because (1) telephone exchange service is a type of telecommunications service and because (2) the 1996 Act defines "telecommunications service" as requiring the offering of service "for a fee." *SBC Order*, 12 FCC Rcd. 8685, para. 17 & n.64, 8 Comm. Reg. (P & F) 198 (1997) (citing 47 U.S.C.A. § 153(46) (West Supp. 1997)).

188. The fact that Track A requires competitors to serve "subscribers" disposes of the argument that Track A can be satisfied if a competitor merely has an effective tariff in place for residential and business service. *See SBC Oklahoma Brief, supra* note 66, at 10. Although a tariff may evidence a competitor's intent to provide service, see text accompanying *supra* note 98, it means no more than that the company holds itself out to furnish service upon reasonable request. Track A demands that someone actually take—and pay for—the service offered. *See SBC Order*, 12 FCC Rcd. 8685, para. 18, 8 Comm. Reg. (P & F) 198.

Similarly, Track A is not satisfied simply because a competitor may have a legal obligation to provide service to residential and business customers. *See id.* para. 10 (citing assertions to that effect by SBC and the Oklahoma Corporation Commission). A duty to serve is of no consequence unless and until individuals find the competitor's offerings sufficiently attractive to put its duty to the test—by requesting service. On the other hand, if a competitor repeatedly refuses requests for service, without adequate explanation, the relevant state commission could reasonably treat the competitor's breach of its duty to serve as evidence of its failure to implement its interconnection agreement, thereby reviving the affected BOC's ability to seek interLATA authorization via Track B. *See Telecommunications Act of 1996*, sec. 151(a), § 271(c)(1)(B)(ii), 47 U.S.C.A. § 271(c)(1)(B)(ii) (West Supp. 1997).

189. *Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 82 (1997) (footnote omitted). By implication, if a BOC predicates its application only on the presence of a single competitor, that competitor must have both residential and business customers. *See Evaluation of the U.S. Dep't of Justice, of the Application of SBC Comm., Inc. et al. to Provide In-Region, InterLATA Servs. in the Okla.* in CC Dkt. No. 97-121, at 9-10 (May 16, 1997) [hereinafter *DOJ Oklahoma Evaluation*] ("While each qualifying facilities-based provider need not be serving both types of customers if the BOC is relying on multiple providers, it necessarily follows that if the BOC is relying on a single provider it would have to be competing to serve both business and residential customers.").

190. H.R. Rep. No. 104-204, pt. 1, at 7 (1995) (reprinting section 245(a)(2)(A) of House Bill 1555) (emphasis added).

191. *Id.* at 76-77, reprinted in 1996 U.S.C.C.A.N. 10, 42 (emphasis added).

192. The Commission erroneously stated that the language change occurred during the House debate on House Bill 1555. *See Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 84. The full House did indeed debate and approve a manager's amendment that substantially revised the Track A language adopted by the Committee. That amendment, however, did not modify the Committee's requirement that there be one affiliated competitor serving residential and business customers. *See* 141 Cong. Rec. H8445 (daily ed. Aug. 4, 1995) (text of amendment 7); *see also id.* at H9980 (daily ed. Oct. 12, 1995) (reprinting text of House Bill 1555 as adopted by the House, including the requirement in section 245(a)(2)(B) of a single competitor).

193. *Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 84.

194. *Id.* para. 85.

195. *Id.*

196. Addendum to the *DOJ Oklahoma Evaluation, supra* note 189, at 2-4 (May 21, 1997) [hereinafter *DOJ Oklahoma Addendum*].

197. Letter from Representative Tom Bliley, Chairman, House Commerce Committee, to Reed E. Hundt, Chairman, FCC (June 20, 1997). Mr. Bliley's views are of limited use in construing the statute because they were offered more than a year after the law was enacted. Courts generally afford little deference to postenactment statements of legislators and legislative committees. *Weinberger v. Rossi*, 456 U.S. 25, 35 (1982) ("Such *post hoc* statements of a

congressional Committee are not entitled to much weight."); Nevada Employees' Ass'n, Inc. v. Bryan, 916 F.2d 1384, 1389 (9th Cir. 1990) ("[P]ost-enactment letters from Congress are afforded little deference.").

198. *Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 85 n.190.

199. Consistent with congressional intent, the term "facilities-based competition" encompasses situations where a new entrant constructs its own transmission network and where it acquires UNEs from a BOC or another carrier. *See supra* Part III.A.2.b.

200. *See infra* notes 268-69 and accompanying text.

201. *See supra* note 4 and accompanying text.

202. *See* H.R. Rep. No. 104-204, pt. 1, at 77 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 42 ("[T]he openness and accessibility' requirements are truly validated only when an entity offers a competitive local service in reliance on those requirements.").

203. *See* 141 Cong. Rec. H8289 (daily ed. Aug. 2, 1995) (statement of Rep. Hastert) (facilities-based competitor requirement offers proof that the checklist works).

204. *SBC Order*, 12 FCC Rcd. 8685, para. 41, 8 Comm. Reg. (P & F) 198 (1997).

205. Telecommunications Act of 1996, sec. 151(a), § 271(c)(1)(A), 47 U.S.C.A. § 271(c)(1)(A) (West Supp. 1997).

206. H.R. Rep. No. 104-204, pt. 1, at 77, *reprinted in* 1996 U.S.C.C.A.N. 10, 43.

207. The Commerce Committee's insistence that competitors could not satisfy Track A by having "an incidental, insignificant residential presence," suggests that Congress anticipated that many competitors would devote much of their efforts to garnering business subscribers. H.R. Rep. No. 104-204, pt. 1, at 77, *reprinted in* 1996 U.S.C.C.A.N. 10, 43. Developments since passage of the 1996 Act have borne out those expectations. Ameritech's Michigan application, for example, rested on interconnection agreements with three competitors, Brooks Fiber, Teleport Communications, and MFS Worldcom. *See Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 64 (1997). Of those three only Brooks had any residential subscribers. *See id.*, paras. 65-67. And more than 70% of Brooks's 21,786 lines in service were business accounts. *Id.* para. 65.

208. *See* H.R. Rep. No. 104-204, pt. 1, at 77, *reprinted in* 1996 U.S.C.C.A.N. 10, 43 (indicating the Commerce Committee's expectation that the cable industry would "provide meaningful facilities-based competition").

209. H.R. Conf. Rep. No. 104-458, at 148 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 160; *see also* H.R. Rep. No. 104-204, pt. 1, at 77, *reprinted in* 1996 U.S.C.C.A.N. 10, 43 (Cable industry "has wired 95% of the local residences in the United States and thus has a network with the potential of offering this sort of competitive alternative.").

210. Of course, if a BOC's application rests on a single competitor, that competitor must furnish qualifying, facilities-based service to both its residential and business subscribers.

211. This reading of the facilities-based competitor requirement could erect a daunting barrier to BOC interLATA entry if Track A can be satisfied only if competitors enter by constructing their own local exchange networks. Because Congress decided to treat UNEs secured from a BOC as the competitor's own facilities, it should be considerably less difficult for competitors to enter on a facilities basis, thereby satisfying Track A.

212. Telecommunications Act of 1996, sec. 151(a), § 271(c)(2)(A)-(B), 47 U.S.C.A. § 271(c)(2)(A), (B) (West Supp. 1997).

213. *See, e.g., ALTS Ameritech Motion, supra* note 163, at 9-11; *TRA Oklahoma Opposition, supra* note 166, at 26-28.

214. *See, e.g., SBC Oklahoma Brief, supra* note 66, at 15-17; *Ameritech Michigan Brief, supra* note 141, at 18-21;

*BellSouth Oklahoma Comments*, *supra* note 71, at 7-12.

215. 47 U.S.C.A. § 271(c)(2)(A)(ii).

216. *Id.* § 271(c)(2)(B) (emphasis added).

217. H.R. 1555, 104th Cong., 1st Sess. § 101(a) (1995) (enacted), *reprinted in* 141 Cong. Rec. H9981 (daily ed. Oct. 12, 1995) (emphasis added) (adding section 245(b) to the Communications Act of 1934).

218. S. 652, 104th Cong., 1st Sess. § 221(a) (1995) (enacted), *reprinted in* 141 Cong. Rec. H9965 (daily ed. Oct. 12, 1995) (adding section 255(b)(1) to the Communications Act of 1934).

219. 141 Cong. Rec. H8284 (daily ed. Aug. 2, 1995) (statement of Rep. Fields); *see also id.* at H8282 (daily ed. Aug. 2, 1995) (statement of Rep. Bliley) ("[The] key to this bill is the creation of an incentive for the current monopolies to open up their markets to competition.").

220. S. Rep. No. 104-23, at 43 (1995). Many elements of the competitive checklist in section 271(c)(2)(B) of the 1996 Act are taken verbatim from the Senate bill. Nevertheless, the basic outlines of many essential checklist items (*e.g.*, UNEs, interconnection, dialing parity, and number portability) can be detected in both bills.

221. 141 Cong. Rec. S8469 (daily ed. June 15, 1995); *see also id.* at H8465 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte) (House Bill 1555 "requires the [BOCs] and other local exchange carriers . . . to unbundle their networks and to resell to competitors the unbundled elements, features, functions, and capabilities that those new entrants need to compete in the local market.").

222. *Id.* at H8289 (Aug. 2, 1995) (statement of Rep. Hastert).

223. *See id.* at H8153 (daily ed. June 12, 1995) (statement of Sen. Breaux) (Although the checklist requirement "is very complicated . . . what it essentially says is that [a BOC] has to do *all* of these things, give permission to *all* of your competitors to come in and use your equipment, use *all* of these things so you can compete for local customers . . .") (emphasis added).

224. *See* 142 Cong. Rec. E262 (daily ed. Feb. 29, 1996) (remarks of Rep. Paxon) (delivered Feb. 1, 1996) (The purpose of the checklist "is to ensure that a new competitor has the ability to obtain any of the items from the checklist that the competitor wants.").

225. *See id.* ("It is very possible that every new competitor will not want every item" on the checklist.); *SBC Oklahoma Brief*, *supra* note 66, at 16; *BellSouth Oklahoma Comments*, *supra* note 71, at 9-10; *see also* S. Rep. No. 104-23, at 43. (The checklist elements define the minimum level of service that a BOC must provide "assuming the other party or parties to that agreement have requested the items included in the checklist.").

226. Telecommunications Act of 1996, sec. 151(a), §271 (c)(2)(B)(iv), 47 U.S.C.A. § 271(c)(2)(B)(iv) (West Supp. 1997). In the same way, a party that seeks "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)" (47 U.S.C.A. § 271(c)(2)(B)(i) (checklist item number 1)) may have no use for "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)" (*Id.* § 271(c)(2)(B)(ii) (checklist item number 2)).

227. The way in which the checklist items are priced may also influence whether prospective competitors will request them from a BOC. Thus, the Commission's decision in its *Local Competition Report and Order* to impose a temporary surcharge on the price of the local switching UNE in order to collect certain universal service subsidies, may have deterred prospective interconnectors from seeking local switching from the BOCs while the surcharge remained in effect. *Local Competition Report and Order*, 11 FCC Rcd. 15,499, paras. 717-32, 4 Comm. Reg. (P & F) 1 (1996); *see, e.g., ALTS Ameritech Motion*, *supra* note 163, at 12 (quoting an affidavit by Gregory Dunny, appended to Ameritech's January 2, 1997 interLATA application) ("[N]ew entrants may prefer to provide their own switching as a means of avoiding access charges."). Similarly, below-cost pricing of residential telephone service in many jurisdictions may

induce competitors to enter the market via resale (because they will be assured of getting a discount from the tariffed rates, see 47 U.S.C.A. § 252(d)(3)), rather than by purchasing UNEs from the incumbent LECs or by constructing their own facilities (either of which may entail costs that exceed the below-cost, tariffed rates). See *Brooks Oklahoma Opposition*, *supra* note 184, at 11-12 (The effective price of unbundled loops in Oklahoma is more than \$19 per month, while the retail rate for SBC's residential local exchange service in the Oklahoma City and Tulsa metropolitan areas is approximately \$13 per month).

228. *ALTS Ameritech Motion*, *supra* note 163, at 11. In view of the fact that interconnection negotiations between BOCs and competitors are subject to review and, if necessary, arbitration by the relevant state regulatory commission, it would be difficult for a BOC to prevent a competitor from requesting and receiving a checklist item that the competitor truly wanted.

229. See *supra* note 100 and accompanying text; see also *Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 113 (1997) ("[T]he Commission is called upon in many contexts to make difficult determinations and has the statutory mandate to do so.").

230. 47 U.S.C.A. § 251(c)(2)(B). LECs are also obligated to provide interconnection and UNEs "at any technically feasible point" within their networks.

231. *Id.* § 251(c)(4).

232. A LEC must commence negotiations upon receipt of a request from a prospective entrant "for interconnection, services, or network elements . . ." *Id.* § 252(a)(1). A party to the negotiation may at any point ask the pertinent state commission to participate for the purpose of mediating any disagreements that arise during the discussions. *Id.* § 252(a)(2). During the period from the 135th to the 160th day after the original interconnection request, a party to the negotiation may petition the state commission to arbitrate any unresolved issues. *Id.* § 251(b)(1)-(3). The agency must decide the contested issues within nine months after the interconnection request was first made. *Id.* § 252(b)(4)(C). Lastly, all final interconnection agreements, including those with provisions established by arbitration, must then be submitted to the state commission for ratification. *Id.* § 252(e).

233. Rates for interconnection and UNEs:

(A) shall be

(i) based on the cost (determined without reference to a rate-of-return or

other rate-based proceeding) of providing the interconnection or

network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

47 U.S.C.A. § 252(d)(1). Section 252(d)(3) states that prices for resale services shall be determined "on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the [LEC]." See *id.* § 252(d)(3).

Rates contained in agreements negotiated by the parties without state commission arbitration need not comply with the standards of section 252. Section 252(e) directs a state commission to approve a voluntarily-negotiated agreement unless it finds that (1) the terms of the agreement discriminate against a telecommunications carrier not a party to that contract, or (2) implementation of the agreement would not be consistent with the public interest, convenience, and necessity. *Id.* § 252(e)(2)(A).

234. *Local Competition Report and Order*, 11 FCC Rcd. 15,499, paras. 672-73, 4 Comm. Reg. (P & F) 1 (1996). For an extensive discussion of the chosen methodology, see *id.* paras. 679-703. TELRIC is based on a "total service long-run incremental cost" (TSLRIC) methodology advocated by many commenters in the Commission's interconnection proceeding. See *id.* para 672 (Setting UNE prices in accordance with forward-looking, long-run economic cost will, in practice, "mean that prices are based on the TSLRIC of the network element, which we will call [TELRIC] . . ."). Some commenters, however, expressed concern that TSLRIC-based prices may not reflect the true economic costs of providing interconnection and UNEs, potentially deterring competitors from deploying their alternative local facilities and reducing the incumbents' incentives to maintain their existing networks. See, e.g., Reply Comments of the Nat'l Telecomm. Info. Admin., to the *Implementation of the Local Competition Provisions in the Telecomm. Act of 1996* in CC Dkt. No. 96-98, at 22-23 (May, 30, 1996). The NTIA recommended that the Commission use TSLRIC only to establish the lower bound of a zone of reasonableness (with the upper bound to be defined by "long run average incremental cost") within which LECs, and prospective entrants could negotiate a final price. *Id.* at 25-28; see also *Local Competition Order*, 11 FCC Rcd. 15,499, para. 631, 4 Comm. Reg. (P & F) 1 (indicating that several state commissions have used TSLRIC to establish a price floor for UNE rates); MFS Comm. Co., 175 PUR4th 362, 369 (Wash. Util. & Transp. Comm'n 1997) (in arbitration, state commission accepted a rate for unbundled local loops proposed by a prospective competitor that fell between TSLRIC and available evidence of the LEC's average service incremental cost).

235. *Local Competition Report and Order*, 11 FCC Rcd. 15,499, paras. 908-09, 4 Comm. Reg. (P & F) 1. For a discussion of the criteria used to identify a satisfactory cost study, see *id.* paras. 911-20. For an explanation of how the Commission derived its range of acceptable default resale discounts, see *id.* paras. 921-34.

236. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 792 (8th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3387 & 3459 (U.S. Jan. 26, 1998) (No. 97-826 et al.).

237. *Id.* at 794. The court found nothing in the 1996 Act or in any portion of the Communications Act of 1934 that would empower the Commission to supersede the states' jurisdiction and to issue its own regulations. *Id.* at 794-796.

238. 47 U.S.C.A. § 152(b) ("[N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . .").

239. *Iowa Utils. Bd.*, 120 F.3d at 800.

240. *Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 283 (1997). After acknowledging that the Eighth Circuit had invalidated federal pricing rules on jurisdictional grounds, the Commission asserted that the court "expressly did not address the substantive merits of the Commission's rules" and "made no ruling concerning the proper meaning of the statutory requirement in section 252(d) that rates must be cost-based." *Id.* But the court had no cause to examine the merits of the Commission's regulations. Indeed, having dismissed those rules on jurisdictional grounds, anything the court said as to their substantive merits would have been an advisory opinion, which federal courts are loath to give. Likewise, the court had no reason to opine on the meaning of section 252. Its jurisdictional ruling plainly implies, however, that the task of construing section 252, at least in the first instance, lies with the states and not the Commission.

241. See 47 U.S.C.A. § 271(c)(2)(B)(i)-(ii), (xiv) (addressing interconnection, access to UNEs, and resale respectively).

242. *Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 288. Although the Commission emphasizes the need for uniformity, the effect of the *Ameritech Order* is to create two sets of "requirements" for section 252(d)—the standards adopted by state commissions when they arbitrate interconnection agreements between LECs and prospective entrants under to section 252(b), and the requirements identified by the Commission when it reviews BOC interLATA applications. One obvious consequence is that BOCs will likely be subject to different pricing standards than other LECs that do not need section 271 authorization to offer long-distance services. Furthermore, if the federal and state pricing rules differ, a BOC may face the dilemma of having to comply with the state rules and foregoing an opportunity to enter the interLATA market. Similarly, states may have to choose between exercising their authority to

regulate interconnection rates or acceding to the Commission's rules so that a BOC may pursue interLATA entry. *See Iowa Utils. Mandamus Order*, No. 96-3321 et al., slip op. at 14 (8th Cir. filed Jan. 22, 1998). One should not assume that Congress intended such results in the absence of persuasive evidence to the contrary, of which there is none in the *Ameritech Order*.

243. *Ameritech Order*, 9 Comm. Reg. (P & F) 267, paras. 289-90.

244. Petition of the State Commission Parties and the National Association of Regulatory Utility Commissioners for Issuance and Enforcement of the Mandate, *FCC v. Iowa Utils. Bd.*, 120 F.3d 753 (8th Cir. 1997) (No. 96-3321 et al.) (filed Nov.19,1997).

245. *Iowa Utils. Mandamus Order*, No. 96-3321 et al., slip op. at 3.

246. *Id.* at 14.

247. *Id.* at 13. The 1996 Act specifies that appeals of any Commission order granting or denying a section 271 application must be filed in the D.C. Circuit. Telecommunications Act of 1996, sec. 151(b), § 402(b)(6)(9), 47 U.S.C.A. § 402(b)(6)(9) (West Supp. 1997). Parties appealing the *Ameritech Order* might be able to invoke the doctrine of collateral estoppel to bar the Commission from rearguing the jurisdictional issue during a D.C. Circuit appeal. Under collateral estoppel—or "issue preclusion"—"once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). The doctrine's purpose is to relieve parties of the costs and vexation of multiple lawsuits, to conserve judicial resources, and to minimize inconsistent decisions among courts. *Id.*; *Montana v. United States*, 440 U.S. 147, 153-54 (1979).

In deciding whether to invoke collateral estoppel in a particular case, courts typically undertake a three-part analysis:

First, the same issue now being raised [in a second case] must have been contested by the parties and submitted for judicial determination in the prior case. Second, the issue must have been actually and necessarily determined by a court of competent jurisdiction in that prior case. . . . Third, preclusion in the second case must not work a basic unfairness to the party bound by the first determination.

*Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992) (citations omitted).

Opponents of the *Ameritech Order* could argue that those three factors would apply to any effort by the Commission to reargue before the D.C. Circuit the question of its authority to promulgate nationwide pricing rules governing interconnection, UNEs, and resale. The issue that was at the core of the Eighth Circuit's assessment of the Commission's *Local Competition Report and Order* is identical to the question that would be presented in an appeal of the pricing provisions of the *Ameritech Order*—who has the power to determine the "requirements" of sections 251(c) and 252(d), whether it be for purposes of state-arbitrated interconnection agreements or compliance with section 271's competitive checklist? That issue was placed before the Eighth Circuit and vigorously debated by the Commission and virtually every segment of the telecommunications industry. The court could not have decided that case without addressing and, in some fashion, resolving the jurisdictional issue. Finally, giving preclusive effect to the court's ruling in any subsequent case would not be unfair to the Commission because it had ample opportunity to present its views during the Eighth Circuit appeal.

If collateral estoppel is appropriate, it can be applied even if the D.C. Circuit may have decided the case differently than the Eighth Circuit in the first instance. *See Yamaha Corp. of Am.*, 961 F.2d at 258 ("[T]he fact that the substantive law may be different in the two jurisdictions does not affect the application of issue preclusion."); *National Post Office Mail Handlers v. American Postal Workers Union*, 907 F.2d 190, 194 (D.C. Cir. 1990) ("The doctrine of issue preclusion counsels us against reaching the merits in this case . . . regardless of whether we would reject or accept our sister circuit's position.").

248. It is worth noting that the jurisdictional issue—who should select the applicable pricing principles—is separable from the substantive question—what principles would best promote the purposes of the 1996 Act. The FCC and the

states could jointly agree to implement a procompetitive pricing regime regardless of how the jurisdictional dispute is resolved. This does not mean, of course, that the jurisdictional issue is unimportant. The Solicitor General has petitioned the Supreme Court to review the Eighth Circuit's decision, asserting that "to the detriment of consumers, the [lower courts'] interpretation of the 1996 Act will subject aspiring new entrants to delay, uncertainty, and burdensome litigation on the basic methodological issues that the Commission sought to address well over a year ago." *Petition of the Federal Communications Commission and the United States for a Writ of Certiorari* at 24, *FCC v. Iowa Utils. Bd.*, 120 F.3d 753 (8th Cir. 1997) (No. 97-831) (filed Nov. 19, 1997), *cert. granted*, 66 U.S.L.W. 3387 & 3459 (U.S. Jan. 26, 1998) (No. 97-826 et al.).

249. *Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 288; *see also* National Ass'n of Reg. Util. Comm'n'rs, *Telecommunications Competition 1997: A State-by-State Report on Pro-Competitive Measures in Intrastate Communications*, pt. 1, 112-96 (Oct. 1997) (indicating that 34 states are using forward-looking cost methodologies, including TELRIC and TSLRIC, to price UNEs); *Local Competition Report and Order*, 11 FCC Rcd. 15,499, para. 631, 4 Comm. Reg. (P & F) 1 (1996) (noting that, even prior to the Commission's decision, a number of states already employed long-run, incremental-cost principles in setting prices for UNEs).

There is something to be said for affording states some flexibility to adopt their own procompetitive pricing methodologies. As the Commission has conceded, "[t]he core terms of section 252(d)—'just and reasonable' rates based on 'cost'—are elastic terms in ratemaking, for which 'neither law nor economics has yet defined generally accepted standards.'" Brief for Respondents Federal Communications Commission and United States at 47, *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) (No. 963321) (filed Dec. 23, 1996) (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968)). Similarly, the Department of Justice has pointed out that "there are a variety of forward-looking cost methodologies that are consistent with the statutory requirements." Evaluation of the U.S. Dep't of Justice, of the *Application of BellSouth Corp. et al. to Provide In-Region, InterLATA Servs. in S.C.* in CC Dkt. No. 97-208, at 36 (Nov. 4, 1997) [hereinafter *DOJ South Carolina Evaluation*]. *See also Local Competition Report and Order*, 11 FCC Rcd. 15,499, para. 636, 4 Comm. Reg. (P & F) 1 ("While many commenters agree that the proper economic cost standard for interconnection and unbundled elements is one based on forward-looking [long-run incremental cost], the record indicates a lack of consensus on the precise definition of such a methodology."). Where there is such uncertainty about the correct pricing methodology to employ, there is cause to question the wisdom of mandating a single methodology nationwide.

More importantly, there are substantial differences among the states in terms of market conditions, network topologies, cost characteristics, and pricing structures. Given these circumstances, a "one size fits all" approach to pricing interconnection, UNEs, and services for resale could cause significant dislocations for incumbent firms and the customers they serve. Affording states some latitude in selecting a procompetitive pricing methodology could help them minimize the potential for such dislocations and, thereby, chart a smoother course toward more local competition.

250. *State Regulators Say Appeal Court Decision Won't Hurt Competition*, *Comm. Daily*, July 22, 1997, at 1.

251. *BellSouth Louisiana Brief*, *supra* note 128, at 42 (State commission's "pricing determinations are conclusive with respect to particular rate levels.").

252. 47 U.S.C.A. § 271(c)(3).

253. *Id.* § 271(c)(2)(B)(i)-(ii), (xiv).

254. *See DOJ South Carolina Evaluation*, *supra* note 249, at 36.

255. *See BellSouth Order*, CC Dkt. No. 97-208, 1997 WL 799081 (Dec. 24, 1997) (separate statement of Commissioner Susan Ness) (offering to endorse state pricing decisions based on a "'reasoned application of an appropriate methodology'" (quoting the *DOJ South Carolina Evaluation*, *supra* note 249)).

256. *See NARUC, States Impose Tues. Deadline for Resolving Jurisdictional Dispute*, *Comm. Daily*, Sept. 16, 1997, at 2 (staff member of one FCC Commissioner quoted as asking "what [happens] if a state doesn't get it right" on pricing). That concern should not be exaggerated, however. As noted above, the vast majority of state commissions appear to

share the FCC's commitment to fostering effective local competition. Indeed, some state efforts in that direction predate both the 1996 Act and the Commission's attempts to stimulate greater local competition. *See, e.g.*, Regulatory Policies for Segments of the Telecommunications Industry Subject to Competition, *Opinion and Order*, 103 PUR4th 1 (N.Y. Pub. Serv. Comm'n 1989). Furthermore, even when state legislatures have enacted legislation controlling competitive entry, the relevant state regulatory commissions have in some cases construed those statutes so as to mitigate the potential anticompetitive effect. *See, e.g.*, Public Util. Comm'n of Tex., *Memorandum Opinion and Order*, CC Dkt. No. 96-13 et al., 1997 WL 603179, para. 7 (Oct. 1, 1997) [hereinafter *Texas Order*] (Commission opted not to preempt certain portions of the Texas Public Utility Regulatory Act of 1995 because the Texas Public Utility Commission "has interpreted or applied the specific provision in a manner that avoids or minimizes conflict with" the 1996 Act).

257. In the *Ameritech Order*, the Commission suggested the nationwide, TELRIC-based pricing of interconnection and UNEs was necessary to ensure that "prices for these inputs be set at levels that encourage efficient market entry." *Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 289 (1997). Promoting efficient entry is not a simple task, however. For example, if TELRIC pricing of UNEs produce rates that are artificially low (*e.g.*, those that do not recover the true economic costs of providing such facilities), see *supra* note 234, it may induce competitors to enter by purchasing UNEs, rather than by deploying their own efficient network facilities. Although Congress chose not to favor any particular form of entry (as between "pure" facilities-based, use of UNEs, or resale), see *Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 387; *Universal Serv. Report and Order*, 12 FCC Rcd. 8776, para. 163, 7 Comm. Reg. (P & F) 109 (1997), there is an important difference between them. Although entry via UNEs and resale can increase local competition, both modes of entry require substantial regulatory oversight to ensure that the rates LECs charge for such services are reasonable. "Pure" facilities-based entry, also promotes competition, but does not require the same government scrutiny of the LECs' practices, because the new entrant is less dependent on LEC facilities and services. Furthermore, substantial facilities-based entry can exert a disciplining effect on LEC rates for resale and UNEs that could reduce, if not eliminate, the need for regulators to monitor LEC rates for the latter offerings. In this way, pricing rules that foster efficient facilities-based local entry may be the best way to further the procompetitive and deregulatory goals of the 1996 Act.

258. *See infra* notes 286-96 and accompanying text.

259. Telecommunications Act of 1996, sec. 151(a), § 271(d)(3)(C), 47 U.S.C.A. § 271(d)(3)(C) (West Supp. 1997). Senator Hollings, a prominent supporter of the 1996 Act and the ranking minority member of the Senate Commerce Committee, stated, "The public interest test is fundamental to my support for the legislation." S. Rep. No. 104-23, at 68 (1995) (additional views of Sen. Hollings).

260. The Conference Report and the February 1, 1996 congressional debates on the final bill, did not address the public interest test in any detail. The House bill did not contain any public interest language. Consequently, Congress's intentions concerning the meaning and purpose of the public interest standard must be gleaned from deliberations in the Senate.

261. 141 Cong. Rec. S7960 (daily ed. June 8, 1995) (statement of Sen. McCain); *see also id.* at S7970 (daily ed. June 8, 1995) (statement of Sen. Packwood) (The public interest test is "amorphous" and "is anything the [FCC] wants it to be."); *id.* at S7966 (daily ed. June 8, 1995) (statement of Sen. Burns) ("Public interest is kind of like art or beauty; It is in the eye of the beholder."); *id.* at S7964 (daily ed. June 8, 1995) (statement of Sen. Craig) (The FCC has "open field to interpret the public interest any way it wishes.").

262. *Id.* at S7955 (daily ed. June 8, 1995) (statement of Sen. McCain) (quoting letter from Citizens for a Sound Economy).

263. *See id.* at S7970 (daily ed. June 8, 1995) (statement of Sen. Kerrey) (The Supreme Court understands the intent of the public interest standard "with a lot more clarity than meets the eye . . ."); *id.* at S7966 (daily ed. June 8, 1995) (statement of Sen. Pressler) ("The Communications Act specifies in some detail the kinds of regulatory tasks authorized or required under the act.").

264. *FCC v. RCA Comm., Inc.*, 346 U.S. 86, 90 (1953).

265. *General Tel. Co. v. United States*, 449 F.2d 846, 858 (5th Cir. 1971); *accord* *Western Union Div., Commercial Telegraphers' Union v. United States*, 87 F. Supp. 324, 335 (D.C. Cir.), *aff'd*, 338 U.S. 864 (1949).

266. 47 U.S.C. § 151 (although amended by the Telecommunications Act of 1996, the relevant language of 47 U.S.C. § 151 was retained).

267. This objective is stated in the preamble of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, pmb. (codified in scattered sections of 47 U.S.C.A. (West Supp. 1997)). A statement of congressional purpose or declaration of policy set out in the preamble of a statute can provide a sound basis for ascertaining the goals of the statute. *See* *Fort Worth & Denver Ry. v. Goldschmidt*, 518 F. Supp. 121, 124 n.3 (N.D. Tex. 1981); *Globe Fur Dyeing Corp. v. United States*, 467 F. Supp. 177, 180 (D.C. Cir. 1978); *see also* *American Trucking Ass'ns, Inc. v. Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 409-10 (1967) (The Court looked to the preamble of the Interstate Commerce Act to determine the scope of powers that Congress intended to give to the Interstate Commerce Commission.).

268. Competition was always a relevant factor in weighing the public interest under the Communications Act of 1934. *See, e.g., RCA Comm., Inc.*, 346 U.S. at 94.

269. 141 Cong. Rec. H8284 (daily ed. Aug. 2, 1995) (statement of Rep. Fields); *id.* at H8464 (daily ed. Aug. 4, 1995) (statement of Rep.

Fields) ("Central to opening up telecommunications to competition is to open the loop correctly and as quickly as possible.").

270. *See, e.g.,* 142 Cong. Rec. E204 (daily ed. Feb. 23, 1996) (statement of Rep. Forbes) (delivered Feb. 1, 1996) ("[B]efore any [BOC] enters the long-distance market, there must be competition in its local market."); *id.* at S688 (daily ed. Feb. 1, 1996) (statement of Sen. Hollings) (BOCs "should not be permitted to enter the long-distance market while they retain a monopoly over local telephone service."); *id.* at H1176 (daily ed. Feb. 1, 1996) (statement of Rep. Jackson-Lee) ("The bill allows the [BOCs] to enter the long-distance market as soon as there is actual competition in the local market."); *id.* at H1169 (daily ed. Feb. 1, 1996) (statement of Rep. Markey) (The bill "breaks down the last vestiges of monopoly control over local telephone service as a condition of Bell entry into new business opportunities."); *id.* at H1152 (daily ed. Feb. 1, 1996) (statement of Rep. Hastert) ("Fair competition means [BOCs] will not be able to provide long-distance service in the region where they have held a monopoly until several conditions have been met to break that monopoly."); 141 Cong. Rec. H8459 (daily ed. Aug. 4, 1995) (statement of Rep. Boucher) (The bill "establishes fair terms and conditions that will assure that the [BOCs] open their local telephone networks before they are permitted to enter into the long distance and equipment markets."); *id.* at H8458 (daily ed. Aug. 4, 1995) (statement of Rep. Bunning) (The FCC "should not allow the [BOCs] into the long-distance market until there is real competition in the local business and residential markets."); *id.* at H8282 (daily ed. Aug. 2, 1995) (statement of Rep. Bliley) ("Once the [BOCs] open the local exchange networks to competition, [they] are free to compete in the long distance and manufacturing markets."); *id.* at S8224 (daily ed. June 13, 1995) (statement of Sen. Hutchison) (The FCC "knows when there is competition at the local level so that [BOCs] can go into long distance."); *id.* at S8153 (daily ed. June 12, 1995) (statement of Sen. Breaux) ("[BOCs] may provide long distance service if, first, they . . . allow the long distance companies to provide local service.").

The foregoing should lay to rest the canard that Congress opted for simultaneous or symmetric entry by the BOCs and IXC's into each other's markets. *See SBC Oklahoma Brief, supra* note 66, at 13 (quoting Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 21,905, para. 8, 5 Comm. Reg. (P & F) 696 (1996)). Both the language and legislative history indicate that, in most instances, local entry by IXC's and other competitors would precede BOC provision of interLATA services. In the words of one Congressman, "It will take time for the [BOCs] to satisfy all of the conditions in the bill. This built-in delay will provide the long distance and cable companies a head start into the local exchange." 141 Cong. Rec. H8465 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte); *see also BellSouth Order*, CC Dkt. No. 97-208, 1997 WL 7990981, para. 9 (Dec. 24, 1997) ("Congress set up a framework that requires BOCs to demonstrate that their local markets are open to competition *before* they are permitted to enter the in-region long distance market.") (emphasis added).

271. See *Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 388 (1997).

272. 141 Cong. Rec. S8464 (daily ed. June 15, 1995) (statement of Sen. Dorgan); see also *id.* at H8465 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte) (The bill's conditioning of BOC interLATA entry on the presence of local competition "is a strong incentive for [BOCs] to comply with the requirements of this legislation."); *id.* at H8282 (daily ed. Aug. 2, 1995) (statement of Rep. Bliley) ("[T]he key to this bill is the creation of an incentive for the current monopolies to open their markets to competition.").

In its review of SBC's compliance with the competitive checklist, the Oklahoma Corporation Commission reversed the incentive structure established by the 1996 Act. It saw SBC's entry into the interLATA market as the means of increasing new competitors' incentives to enter the local exchange market. See *SBC Oklahoma Reply*, *supra* note 101, at ii (The state commission found that SBC's interLATA entry "is the best way to induce potential local providers to enter the local market in Oklahoma."); see also *BellSouth South Carolina Brief*, *supra* note 95, at 8 (quoting Entry of BellSouth Telecomm., Inc. into InterLATA Toll Market, *Order*, at 19 (Dkt. No. 97-101) (Order No. 97-640) (SCPSC July 31, 1997), that BellSouth's interLATA entry could speed up local competition considerably and would "create real incentives for the major [long-distance companies] to enter the local market rapidly").

273. In this regard, the Commission has recognized that "incumbent LECs have no economic incentive, independent of the incentives set forth in sections 271 and 274 [concerning BOC provision of electronic publishing] of the 1996 Act, to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services." *Local Competition Report and Order*, 11 FCC Rcd. 15,499, para. 55, 4 Comm. Reg. (P & F) 1 (1996). Significantly, GTE has steadfastly opposed all efforts to foster competition in its local markets. Ameritech's Chief Executive Officer, Richard Notebaert, has offered one reason why: "[T]hey're already in long distance. What's their incentive to cooperate?" Mike Mills, *Holding the Line on Phone Rivalry; GTE Keeps Potential Competitors, Regulators' Price Guidelines at Bay*, Wash. Post, Oct. 23, 1996, at C14.

274. The Commission has recognized that fact. See *Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 391 ("[W]e do not construe the 1996 Act to require that a BOC lose a specific percentage of its market share, or that there be competitive entry in different regions, at different scales, or through different arrangements, before we would conclude that BOC entry is consistent with the public interest.").

275. See *supra* notes 169-72 and accompanying text.

276. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *Immigration and Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (emphasis added) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting)). But see 141 Cong. Rec. S7964 (daily ed. June 8, 1995) (statement of Sen. Craig) (The Commission could "decide that a market share test is required before [BOC] entry into long distance on the grounds that the test is in the public interest.").

277. Reply Comments of BellSouth Corp., in Support of the *Application of SBC Comm., Inc. et al. to Provide In-Region, InterLATA Servs. in Okla.* in CC Dkt. No. 97-121, at 8-9 (May 27, 1997) [hereinafter *BellSouth Oklahoma Reply*]. BellSouth's argument did not necessarily expire with the Senate's rejection of the McCain amendment, which would have deemed the public interest test satisfied by a BOC's compliance with the competitive checklist. See 141 Cong. Rec. S7960 (daily ed. June 8, 1995) (text of the McCain amendment). One could argue that most Senators agreed that checklist compliance resolved the competitive questions presented by a BOC interLATA application, but voted to retain the public interest standard so that the Commission could consider and resolve other, noncompetition-related issues.

278. 141 Cong. Rec. S7970 (daily ed. June 8, 1995) (statement of Sen. Kerrey).

279. *Id.* at S8005 (statement of Sen. Thurmond).

280. *Id.* at S8141 (daily ed. June 12, 1995) (statement of Sen. Leahy); see also *id.* at S8470 (daily ed. June 15, 1995) (statement of Sen. Feingold) ("This checklist does not require that competition actually exist in local markets

dominated by the [BOCs] before they are able to use their substantial market power to enter long distance markets."); *id.* at S8464 (statement of Sen. Dorgan) ("A series of specified steps—for example, the competitive check list . . . is not by itself sufficient to bring real competition to local markets."); *id.* at S8164-S8165 (statement of Sen. Kerrey) ("Does [the checklist] mean I have competitive choice at the local level? . . . Well, I do not know if this 14-point checklist gets that job done?").

281. *Id.* at S8165 (daily ed. June 12, 1995) (statement of Sen. Gorton). Senator Gorton was not only a member of the Commerce Committee; the principal sponsor of the bill, Senator Pressler, described him as "key in moving this bill forward," *Id.* at S8450. As such, Senator Gorton's understanding of the committee's actions and the reasons therefore should be accorded weight in determining what the committee intended.

282. *Id.* at S8166 (daily ed. June 12, 1995).

283. The Commission has reached this same conclusion. *See Ameritech Order*, 9 Comm. Reg. (P & F) 267, paras. 389-90 (1997).

284. 141 Cong. Rec. S8321 (daily ed. June 14, 1995) (statement of Sen. Stevens); *see also* S. Rep. No. 104-23, at 43 (1995) ("[The] Committee intends the competitive checklist to set forth what must, at a minimum, be provided by a [BOC] . . . before the FCC may authorize the [BOC] to provide in region interLATA services.").

285. *See, e.g.*, 142 Cong. Rec. S688 (daily ed. Feb. 1, 1996) (statement of Sen. Hollings); 141 Cong. Rec. H8282 (daily ed. Aug. 2, 1995) (statement of Rep. Bliley).

286. *See* 142 Cong. Rec. H1152 (daily ed. Feb. 1, 1996) (statement of Rep. Hastert).

287. H.R. Rep. No. 104-204, pt. 1, at 47 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 11; *see also id.* at 50, *reprinted in* 1996 U.S.C.C.A.N. 10, 14-15 (LECs "are frequently protected from competition by government barriers to entry.").

288. Telecommunications Act of 1996, sec. 101(a), § 253, 47 U.S.C.A. § 253(a) (West Supp. 1997).

289. *Id.* § 253(d). Section 253(c) preserves the rights of state and local authorities to manage public rights-of-way and to require fair and reasonable compensation from telecommunications providers that use those rights-of-way. Section 253(d) bars the Commission from hearing claims that nonfederal regulation of public rights-of-way violate section 253(a). Such claims must instead be litigated in federal court.

290. *Id.* § 253(b).

291. *See, e.g.*, Comments of the Ass'n of Local Telecomm. Servs., to the Access Charge Reform, *Notice of Proposed Rulemaking*, in CC Dkt. No. 96-262, at 11-12 (Jan. 30, 1997).

292. *See* Texas Public Utility Regulatory Act of 1995, Tex. Rev. Civ. Stat. Ann. art. 1446c-0, §§ 3.251, 3.2531-.2532 (West 1997). The Commission recently preempted several provisions of the Texas statute. *Texas Order*, 1997 WL 603179 (1997). The Commission declined to invalidate other challenged sections of the law because the Texas Public Utilities Commission had interpreted and applied them "so as not to conflict with section 253 and other provisions of the Communications Act . . . ." *Id.* para. 8.

293. Telecommunications Regulatory Reform Act of 1997, 1997 Ark. Acts 77, § 9(d), (f), (i). Petitions seeking preemption of portions of the Arkansas Act are currently pending before the Commission. *See* Pleading Cycle Est. for Comments on MCI Petition Expedited Declaratory Ruling Regarding Preemption of Ark. Telecomm. Reg. Reform Act, *Public Notice*, 1997 WL 298071 (1997); Pleading Cycle Est. for Comments on ASCI Petition for Declaratory Ruling Regarding Preemption in Ark. Pub. Serv. Comm'n, *Public Notice*, 12 FCC Rcd. 3765 (1997).

294. 47 U.S.C.A. § 251(d)(3). Editorializing against the Arkansas statute when it was being considered by the state legislature, the state's largest newspaper opined that the pending bill "could be considered environmental legislation; it seems designed to protect the [local] phone companies' revenue stream." *Hold the Phone: Why Rush Telecom*

*Legislation?*, Ark. Democrat-Gazette, Jan. 23, 1997, at 6B.

295. See, e.g., Comments of the Michigan Cable Telecomm. Ass'n to the *Application of Ameritech Mich. to Provide In-region, InterLATA Servs. in Mich.* in CC Dkt. No. 97-137, at 19-26 (June 9, 1997); Reply Comments of the Competition Policy Inst., to the *Application of SBC Comm., Inc. to Provide In-Region, InterLATA Servs. in Okla.* in CC Dkt. No 97-121, at 7 (May 27, 1997) [hereinafter *CPI Oklahoma Reply*].

296. *Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 396 (1997).

297. As noted above, the Commission should assure itself that a state's pricing policies for interconnection, UNEs, and resale are compatible with the goals of the 1996 Act and consistent with the pricing principles employed by other state commissions. See *supra* text accompanying notes 258-59. The Commission should also consider whether new entrants have a fair opportunity to qualify as "eligible telecommunications carriers" (ETCs), so that they can receive universal service support payments that will enable them to compete fully with incumbent carriers. See *CPI Oklahoma Reply*, *supra* note 295, at 9 ("[E]ligibility for universal service support is sometimes limited is [sic] to the incumbent local telephone company . . ."). See also Telecommunications Regulatory Reform Act of 1997, 1997 Ark. Acts 77, § 5(b)(5), (d) (barring the Arkansas Public Service Commission from certifying multiple ETCs in nonrural areas unless it finds that the public interest will be served thereby; precluding the certification of a second ETC in areas served by a rural telephone company unless the incumbent waives its "right" to be the only ETC). In its review of state laws and regulations, the Commission intends to consider "whether a state has adopted policies and programs that favor the incumbent, for example, those relating to universal service." *Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 396.

Of course, as the Commission points out, the best evidence of a procompetitive legal and regulatory environment is the appearance and growth of new alternative service providers. *Id.* para. 391.

298. 141 Cong. Rec. S8469 (daily ed. June 15, 1995) (statement of Sen. Pressler). The 1996 Act makes compliance with the interconnection, unbundling, and resale requirements in section 251 an explicit part of the competitive checklist. See 47 U.S.C.A. § 271(c)(2)(B)(i)-(ii), (xiv).

299. 141 Cong. Rec. H8289 (daily ed. Aug. 2, 1995) (statement of Rep. Hastert); see also *id.* at S8469 (daily ed. June 15, 1995) (statement of Sen. Pressler) (The checklist "open[s] up the local loop from a technological standpoint as section [253] opens the local loop from a legal barrier to entry standpoint.").

300. See *supra* Part III.A.3.

301. *Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 110 (footnote omitted).

302. *Id.* (footnote omitted).

303. See *Illinois Hearing Examiner Says Ameritech Falls Short on InterLATA Requirements*, Telecomm. Rep., Mar. 10, 1997, at 13.

304. *Local Competition Report and Order*, 11 FCC Rcd. 15,499, para. 522, 4 Comm. Reg. (P & F) 1 (1996). The Commission has defined OSS to encompass "those systems and databases required for pre-ordering, ordering, provisioning, maintenance and repair, and billing." *Id.* para. 505.

305. *Id.* paras. 516-525. That portion of the Commission's order was upheld on appeal. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 808-810 (8th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3387 & 3459 (U.S. Jan. 26, 1998) (No. 97-826 et al.).

306. *Local Competition Report and Order*, 11 FCC Rcd. 15,499, para. 316, 4 Comm. Reg. (P & F) 1.

307. *Id.* para. 315.

308. Telecommunications Act of 1996, sec. 151(a), § 271(c)(2)(B)(ii), 47 U.S.C.A. § 271(c)(2)(B)(ii) (West Supp.

1997).

309. *Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 136 (1997).

310. *Id.* para. 137. Electronic access would permit, for example, a competitor to order one or more network elements via computer-to-computer interaction with the BOC's OSS database. Under manual access, the same order would involve at least some human interaction, such as a telephone call or a facsimile transmission.

311. *Id.*

312. *Id.* "Business rules refer to the protocols that a BOC uses to ensure uniformity in the format of orders." *Id.* para. 137 n.335.

313. *Id.* para. 138.

314. *Id.*; see also *DOJ Oklahoma Evaluation*, *supra* note 189, at 29-30 (In determining whether a BOC's OSS processes can provide the necessary functionality to competitors, the most persuasive evidence is "commercial operation."). In the event that competitors freely choose not to use a particular OSS function, the Commission may allow a BOC to demonstrate operational readiness through "carrier-to-carrier testing, independent third-party testing, and internal testing, without commercial usage . . ." *Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 138. Because a BOC would have an incentive to manipulate the conduct and results of its own tests, the Commission should consider internal testing to be the least reliable of the three.

315. *Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 139. The Commission has determined that "OSS functions associated with pre-ordering, ordering and provisioning for resale services, and repair and maintenance for both resale services and unbundled network elements all have retail analogues." *Id.* para. 140.

316. *Id.* para. 141.

317. A number of parties have petitioned the Commission to initiate a rule making to prescribe such standards. See, e.g., Letter from Larry Irving, Assistant Secretary, National Telecommunications and Information Administration, to Reed E. Hundt, Chairman, FCC (Aug. 12, 1997).

318. See *Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 393 ("[P]erformance monitoring establishes a benchmark against which new entrants and regulators can measure performance over time to detect and correct any degradation of service once a BOC is authorized to enter the in-region, interLATA services market."); see also *DOJ Oklahoma Addendum*, *supra* note 196, at 4-6; *Ameritech Michigan Brief*, *supra* note 141, at 30-34.

319. *Ameritech Michigan Brief*, *supra* note 141, at 30.

320. *Id.* at 31-33.

321. *Id.* at 31.

322. See Evaluation of the U.S. Dep't of Justice, of the *Application of Ameritech Mich. to Provide In-Region, InterLATA Servs. in Mich.* in CC Docket No. 97-137, at 39-40 (June 25, 1997) (Although the DOJ noted "important gaps" in Ameritech's proposed performance measures, it nonetheless "fully endorse[d] Ameritech's commitment to measuring and reporting its performance and [found] its efforts to be significant, especially because Ameritech appears to have implemented specific business policies consistent with that commitment.").

323. 141 Cong. Rec. S8469 (daily ed. June 15, 1995) (statement of Sen. Pressler).

324. Telecommunications Act of 1996, sec. 151(a), § 271(c)(2)(B)(i)-(ii), 47 U.S.C. § 271(c)(2)(B)(i)-(ii) (West Supp. 1997).

325. Section 251(c)(2) adds the requirement that the interconnection provided must be "at least equal in quality to that

provided by the [BOC] to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection." *Id.* § 251(c)(2)(C).

326. *Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 393 (1997).

327. *See id.* para. 394 ("[A]s part of our public interest inquiry, we would want to inquire whether the BOC has agreed to private and self-executing enforcement mechanisms that are automatically triggered by noncompliance with the applicable performance standard without resort to lengthy regulatory or judicial intervention.").

328. The 1996 Act states that, unless the parties agree otherwise, the Commission must act on complaints concerning BOC failures to comply with their checklist obligations within 90 days. 47 U.S.C.A. § 271(6)(B).

329. *Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 394.

330. *See id.* para. 397 ("[T]he success of the market opening provisions of the 1996 Act depends, to a large extent, on the cooperation of incumbent LECs, including the BOCs, with new entrants and good faith compliance by such LECs with their statutory obligations.").

331. *Id.*

332. *See* Erik R. Olbeter, *Competition Partnership*, J. Com., Sept. 11, 1997, at 8A (noting that GTE has filed court challenges against state arbitration decisions in 23 jurisdictions); *Mills, supra* note 273. Similarly, SBC's stated strategy for local competition is "to make our welcome mat smaller than anyone else's." Peter Burrows, *Pick of the Litter: Why SBC Is the Baby Bell To Beat*, Bus. Wk., Mar. 6, 1995, at 70 (quoting J. David Gallemore, SBC Vice-President for Marketing). Although SBC should not be condemned for a statement that would elicit nods in most corporate headquarters, it has also taken steps to put its words into action. Thus, SBC lobbied heavily for the Texas statute that makes it more difficult for some firms to enter the local marketplace in Texas. *See* Mike Mills, *The Bells' Fastest Operator*, Wash. Post, Jan. 16, 1998, at D4; Edmund L. Andrews, *SBC Communications Chief Tests Deregulation's Limits*, Austin Am.-Statesman, Apr. 7, 1996, at D1. Similarly, SBC pushed for passage of the Arkansas law that limits the ability of the Arkansas Public Service Commission to adopt access and interconnection requirements beyond those prescribed by the 1996 Act and the Commission's implementing regulations. *See* Andrew Moreau, *Law Hogties Competition, Phone Firms Say*, Ark. Democrat-Gazette, Mar. 28, 1997, at 1A; *see also supra* notes 291-94 and accompanying text.

333. 141 Cong. Rec. S7962-63 (daily ed. June 8, 1995).

334. *Id.* at S7973-74 (statements of Sen. Hollings, Sen. Rockefeller); *id.* at S7975-77 (statement of Sen. Dorgan); *id.* at S7978 (statement of Sen. Snowe); *id.* at S7979-80 (statement of Sen. Rockefeller) (daily ed. June 8, 1995). Senator Dorgan's remarks neatly summarize that discussion:

Airline deregulation had at its roots the notion of let the marketplace decide who gets air service, at what price, and what convenience in this country.

We know what has happened with airline deregulation despite all the little statistics and charts people keep bringing to my attention. If you live in rural America and you access airline service, you have less choice and higher prices. It is a plain fact.

*Id.* at S7976 (daily ed. June 8, 1995) (statement of Sen. Dorgan).

335. *Id.* at H8287 (daily ed. Aug. 2, 1995) (statement of Sen. Wyden).

336. *See* H.R. 1555, 104th Cong., § 101(a) (1995) (enacted), *reprinted in* 141 Cong. Rec. H9980 (daily ed. Oct. 12, 1995) (adding section 244(b)(1) to the Communications Act of 1934).

337. Application of Gen. Tel. and Elecs. Corp. to Acquire Control of Telenet Corp. and its Wholly-Owned Subsidiary

Telenet Comm. Corp., *Memorandum Opinion and Order*, 72 F.C.C.2d 111, para. 101, 45 Rad. Reg. 2d (P & F) 1021, modified by *Memorandum Opinion and Order*, 72 F.C.C.2d 516, 45 Rad. Reg. 2d (P & F) 1346 (1979).

338. *Id.* para. 135.

339. Application of GTE Corp. and S. Pac. Co. for Consent to Transfer Control of S. Pac. Comm. Co. and S. Pac. Satellite Co., *Memorandum Opinion and Order*, 94 F.C.C.2d 235, para. 25, 54 Rad. Reg. 2d (P & F) 161 (1983) (footnote omitted).

340. *Id.*

341. *Id.* para. 29.

342. Consolidated Application of Am. Tel. and Tel. Co. and Specified Bell Sys. Cos. for Authorization under Sections 214 and 310(d) of the Comm. Act of 1934, *Memorandum Opinion and Order*, 96 F.C.C.2d 18, para. 54, 55 Rad. Reg. 2d (P & F) 435 (1983).

343. *Id.* para. 68 (footnotes omitted).

344. *Id.* para. 176 (condition 11).

345. The Commission could, of course, determine (as in the cases cited) that any potential problems could be addressed adequately by conditioning, rather than denying, a BOC's application.

346. Telecommunications Act of 1996, sec. 151(a), § 271(d)(2)(B), 47 U.S.C.A. § 271(d)(2)(B) (West Supp. 1997). Because the statute refers to the requirements of section (c), the federal-state consultation must address both checklist issues (subsection (c)(2)) and the facilities-based competitor requirement (subsection (c)(1)). Thus, the Commission erred when it concluded that the checklist "is the one subject on which the Commission is required to consult with the state commissions." *Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 34 (1997).

347. See Reply Comments of Sprint Comm. Co., to the *Application of SBC Comm., Inc. et al. to Provide In-Region, InterLATA Servs.* in *Okl.* in CC Dkt. No. 97-121, at 3 (May 27, 1997) ("The specific task set out for the states is one of factfinding.").

348. H.R. 1555, 104th Cong., § 101(a) (1995), reprinted in 141 Cong. Rec. H9980-81 (daily ed. Oct. 12, 1995) (adding sections 245(b)(1) and 245(c)(1), (2) to the Communications Act of 1934). Under the House bill, the Commission could conduct a *de novo* review of the state commission's certification "only if a State commission lacks, under relevant State law, the jurisdiction or authority to make the required certification, fails to act within ninety (90) days of receiving a BOC request for certification, or has attempted to impose a term or condition that exceeds its authority." H.R. Rep. No. 104-204, pt. 1, at 78 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 44.

The Senate bill did not create any role for the states in the Commission's review of a BOC's interLATA applications. See S. 652, 104th Cong., § 221(a) (1995) (enacted), reprinted in 141 Cong. Rec. H9966 (daily ed. Oct. 12, 1995) (adding section 255(c) to the Communications Act of 1934).

349. See *SBC Oklahoma Reply*, *supra* note 101, at ii-iii.

350. There is less reason for the Commission to defer to a state commission's views on the legal requirements of section 271(c). The Commission is arguably under no legal obligation to do so. *Cf. Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997) (Federal courts do not need to afford state agency's interpretation of a federal statute the same deference that courts must give to construction of the same law by the federal administrative agency charged with its implementation and enforcement.); *accord* *AMISUB (PSL), Inc. v. Colorado Dept. of Soc. Servs.*, 879 F.2d 789, 795-96 (10th Cir. 1989), *cert. denied*, 496 U.S. 935 (1990); *Turner v. Perales*, 869 F.2d 140, 141 (2d Cir. 1989).

Further, while state commissions can contribute much to the FCC's assessment of the factual questions presented by

section 271 applications, they have no special expertise concerning the interpretation of a federal statute. Finally, whereas the same factual issues (for example, checklist compliance) will tend to recur with each BOC application (because the underlying facts themselves will generally differ), the doctrine of *stare decisis* will ensure that the same will not be true of legal questions. As a result, legal issues should not impose the sort of demands on the Commission's time and resources that militate in favor of close federal-state cooperation to resolve factual questions.

The Commission should also not be bound in any respect by a state commission's conclusions as to whether granting a BOC's application will or will not be in the public interest. As noted, section 271(d)(2) only mandates federal-state consultations concerning the requirements of section (c). The public interest test is contained in section 271(d)(3).

351. *University of Tenn. v. Elliott*, 478 U.S. 788, 799 (1986) (quoting *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966)).

352. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 110 (1991).

353. The Commission has decided to adopt a variant of this approach, which links the degree of deference afforded to the factfinding procedures that a state commission employs:

The Commission, therefore, has discretion in each section 271 proceeding to determine what deference the Commission should accord to the state commission's verification in light of the nature and extent of state proceedings to develop a complete record concerning the applicant's compliance with section 271 and the status of local competition. We will consider carefully state determinations of fact that are supported by a detailed and extensive record, and believe the development of such a record to be of great importance to our review of section 271 applications.

*Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 30 (1997).

354. *See, e.g., Plough v. West Des Moines Community Sch. Dist.*, 70 F.3d 512, 515 n.8 (8th Cir. 1995) (Administrative estoppel applied when agency conducted a two-day evidentiary hearing that was adversarial and adjudicative in nature and that allowed parties to call witnesses, to testify under oath, and to cross-examine.); *Kleenwell Biohazard Waste and Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 394-395 (9th Cir. 1995) (Administrative estoppel applied to factual findings of Washington regulatory commission after it held an adjudicatory hearing in accordance with the state's Administrative Procedure Act; gave proper notice and opportunity to be heard; accepted briefs and exhibits; allowed both direct and cross-examination; and heard evidentiary objections.).

If multiple state agencies should consider a particular BOC application, the amount of deference that the Commission affords to their factual findings should depend on the degree of agreement as to the facts found and the conclusions to be drawn from those facts. In Oklahoma, although the state commission decided by a 2-1 vote that SBC had satisfied the competitive checklist, the Administrative Law Judge who held hearings on SBC's applications concluded otherwise. *See Comments of the Okla. Corp. Comm'n, to the Application of SBC Comm. Inc., et al. to Provide In-Region InterLATA Servs. in Okla.* in CC Dkt. No. 97-121, at 3 (May 1, 1997). Indeed, of the Oklahoma officials that considered SBC's application, the two-man majority of the Corporation Commission appears to have been alone in its conclusion that SBC had satisfied the checklist. *DOJ Oklahoma Evaluation, supra* note 189, at 25-26.

355. *See, e.g., Comments of AT&T Corp., to the Application of BellSouth Corp. et al. to Provide In-Region, InterLATA Servs. in S.C.* in CC Dkt. No. 97-208, at 47-48 (Oct. 20, 1997); *Comments of MCI Telecomm. Corp., to the Application of BellSouth Corp. et al. to Provide In-Region, InterLATA Servs. in S.C.* in CC Dkt. No. 97-208, at 9-10 (Oct. 20, 1997).

356. Telecommunications Act of 1996, sec. 151(a), § 271(d)(2)(B), 47 U.S.C.A. § 271(d)(2)(B) (West Supp. 1997).

357. *BellSouth Oklahoma Reply, supra* note 277, at 2.

358. *Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 37.

359. *BellSouth Oklahoma Reply*, *supra* note 277, at 2 n.1 (quoting with approval *DOJ Oklahoma Evaluation*, *supra* note 189, at 39 n.46).

360. *See supra* notes 268-72 and accompanying text.

361. 142 Cong. Rec. S690 (daily ed. Feb. 1, 1996) (statement of Sen. Dorgan).

362. *Id.* at S698 (daily ed. Feb. 1, 1996) (statement of Sen. Kerrey).

363. The statements that BellSouth cites indicate only that some in Congress wanted the DOJ to conduct an "antitrust" review of a BOC's application. *BellSouth Oklahoma Reply*, *supra* note 277, at 3 & nn. 3-4 (referencing remarks by Representatives Sensenbrenner and Hyde). The statements contain nothing to suggest that such antitrust review must be limited to only one of the markets implicated by a BOC's application for interLATA services.

364. *Id.* at 3-4; *SBC Oklahoma Reply*, *supra* note 101, at 14.

365. *BellSouth Oklahoma Reply*, *supra* note 277, at 6-7; *SBC Oklahoma Reply*, *supra* note 101, at 14-15 (suggesting that issues of checklist compliance are "outside" the DOJ's "area of specialized knowledge"). The notion that the DOJ is "quite obviously ill suited to play the role of evaluating compliance with the checklist" or is "beyond its expertise when assessing the details of network operations," *BellSouth Oklahoma Reply*, *supra* note 277, at 7, is fatuous. In fact, the DOJ has spent at least two decades learning the intricacies of telephone operations—first to litigate the AT&T antitrust case, then to draft, implement, and enforce the consent decree that terminated that litigation. During that time, the agency has likely acquired considerable knowledge and expertise about network operations and the access and interconnection arrangements that could foster local telephone competition. While the DOJ's views may not represent the final word on any question, they are, at a minimum, deserving of respect.

BellSouth's statement that the DOJ's views on the legal interpretation of section 271 "are no more important than anyone else's" is likewise without merit. *BellSouth Oklahoma Reply*, *supra* note 277, at 5. Because the DOJ is the federal agency responsible for enforcing the nation's laws, it probably has developed some facility for construing the statutes it is charged with enforcing. More importantly, the DOJ was actively involved, on behalf of the Administration, in the congressional debates, deliberations, and negotiations on the 1996 Act. As such, it arguably is *more* qualified than most to assist the Commission in determining what the statute means.

366. *Ameritech Order*, 9 Comm. Reg. (P & F) 267, paras. 38-39 (1997).

367. *See, e.g.*, 142 Cong. Rec. H1175 (daily ed. Feb. 1, 1996) (statement of Rep. Goodlatte) (The DOJ "may submit an evaluation to the FCC using any antitrust statute that the Attorney General believes the FCC should consider . . ."); *id.* at H1157 (daily ed. Feb. 1, 1996) (statement of Rep. Hyde) (The DOJ "will apply any antitrust standard it considers appropriate.").

368. Telecommunications Act of 1996, sec. 151(a), § 271(d)(2)(A), 47 U.S.C.A. § 271(d)(2)(A) (West Supp. 1997) (emphasis added). BellSouth correctly cites the conference report as indicating that the DOJ can employ the "dangerous probability" or "substantial possibility" tests, which are indeed antitrust standards. *BellSouth Oklahoma Reply*, *supra* note 277, at 3. It neglects to mention, however, that the report then repeats the "any standard" verbiage that appears in the statute. *See Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 39.

369. H.R. 1555, 104th Cong., § 101(a) (1995) (enacted), *reprinted in* 141 Cong. Rec. H9981 (daily ed. Oct. 12, 1995) (adding section 245(c)(3) to the Communications Act of 1934).

370. S. 652, 104th Cong., § 221(a) (1995) (enacted), *reprinted in* 141 Cong. Rec. H9966 (daily ed. Oct. 12, 1995) (adding section 255(c)(2)(A) to the Communications Act of 1934).

371. BellSouth asserts that the Commission must give substantial weight "only to an evaluation grounded in the DOJ's expertise in antitrust matters." *BellSouth Oklahoma Reply*, *supra* note 277, at 3. However, the statute plainly instructs the DOJ to evaluate a BOC application using "any standard the Attorney General considers appropriate," even

nonantitrust standards. The Commission must then give substantial weight to that evaluation and, implicitly, the standard on which the evaluation is based. Further, as the Commission observed, while Congress limited state commissions to addressing the requirements of section (c), it imposed no such constraints on the DOJ. *Ameritech Order*, 9 Comm. Reg. (P & F) 267, para. 37. Thus, while some statements can be found suggesting that substantial weight may be accorded only to the DOJ's antitrust conclusions, see 142 Cong. Rec. H1178 (daily ed. Feb. 1, 1996) (statement of Rep. Sensenbrenner), the weight of the evidence indicates that the Commission's reliance on the DOJ's conclusions should extend further. *Id.* at S711 (daily ed. Feb. 1, 1996) (statement of Sen. Thurmond) ("Through its work investigating the telecommunications industry and enforcing the MFJ, [DOJ] has accumulated important knowledge, evidence, and experience that can be constructively brought to bear on these evaluations."); *id.* at S698 (daily ed. Feb. 1, 1996) (statement of Sen. Kerrey) ("DOJ's expertise in telecommunications and competitive issues generally should be of great value to the FCC."); *id.* at H1175 (daily ed. Feb. 1, 1996) (statement of Rep. Goodlatte) (The Commission must give substantial weight to DOJ's evaluation.).

372. Because the substantial weight standard did not appear until the conference committee's deliberations, evidence as to its meaning can only be gleaned from the statute itself, the conference report, or the congressional debates on the conference agreement. In the latter debates, most of the Members of Congress who addressed the issue simply restated the standard or indicated how its inclusion strengthened the DOJ's role in the section 271 process.

373. 142 Cong. Rec. H1175 (daily ed. Feb. 1, 1996) (statement of Rep. Goodlatte).

374. *Id.* at H1178 (daily ed. Feb. 1, 1996) (statement of Rep. Sensenbrenner).

375. *Id.* at S711 (daily ed. Feb. 1, 1996) (statement of Sen. Thurmond).

376. *Id.* at H1175 (daily ed. Feb. 1, 1996) (statement of Rep. Goodlatte).

377. Administrative Procedure Act, 5 U.S.C. § 551 (1994). That appeal must be filed in the United States Court of Appeals for the District of Columbia Circuit. Telecommunications Act of 1996, sec. 151(b), § 402(b)(6) n.9, 47 U.S.C.A. § 402(b)(6) n.9 (West Supp. 1997).

378. *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1160 (D.C. Cir 1995) (quoting 5 U.S.C. § 706(2)(A)).

379. 5 U.S.C. §§ 556-557.

380. *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971).

381. In the absence of a specific statutory mandate, federal agencies have broad discretion to choose the procedures they will use. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978) ("Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them.").

382. S. 652, 104th Cong., 1st Sess. § 221(a) (1995) (enacted), *reprinted in* 141 Cong. Rec. H9966 (daily ed. Oct. 12, 1995) (adding section 255(c)(2)(A) to the Communications Act of 1934).

383. S. Rep. No. 104-23, at 44 (1995).

384. *See, e.g., Kisser v. Cisneros*, 14 F.3d 615, 619 (D.C. Cir. 1994) (Under the arbitrary and capricious standard, "[t]he court must determine whether the agency has articulated a `rational connection between the facts found and the choice made'" and "may reverse only if the agency's decision is not supported by substantial evidence, or the agency has made a clear error in judgment.") (quoting *Bowman Transp. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 285 (1974)).

385. *See, e.g., S. Rep. No. 104-23*, at 44; 141 Cong. Rec. S7961 (daily ed. June 8, 1995) (statement of Sen. Stevens).

386. Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

387. *Id.*

388. "The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." Morton v. Ruiz, 415 U.S. 199, 231 (1974).

389. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984) (footnote omitted).

390. *Id.* at 844. Section 271(d)(3) provides that the Commission "shall issue a written determination approving or denying" a BOC's interLATA application "[n]ot later than 90 days after receiving" that application. Given the many difficult and controversial issues raised by the typical BOC application, such a tight deadline might be at war with reasoned decision making, especially with respect to the first applications. Although the Commission should obviously process each BOC application with all deliberate speed, its principal objective should be a complete and thorough evaluation of the application. It is worth noting, therefore, that despite the mandatory language of section 271(d)(3), the deadline specified is not inviolable. The Supreme Court has ruled that when a statute creates a seemingly mandatory schedule for agency action, but (like section 271(d)(3)) does not specify any consequence for noncompliance, the agency will not lose jurisdiction to act if it fails to meet that deadline. *See Brock v. Pierce County*, 476 U.S. 253, 258-66 (1986). The Commission should not hesitate to take additional time to complete its evaluation of a BOC application, if the alternative is to dismiss the application and compel the BOC to begin again, or to forego a complete, thorough, and sustainable review of that application.

391. Chairman Reed Hundt, Address to the Communications Committee of the National Association of Regulatory Utility Commissioners (Feb. 24, 1997).