Promoting Competition in the Telecommunications Markets: Why the FCC Should Adopt a Less Stringent Approach to Its Review of Section 271 Applications

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PROMOTING COMPETITION IN THE TELECOMMUNICATIONS MARKETS: WHY THE FCC SHOULD ADOPT A LESS STRINGENT APPROACH TO ITS REVIEW OF SECTION 271 APPLICATIONS

Eric M. Swedenburg†

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INTRODUCTION

More competition! That slogan was the battle cry of those in favor of legislation to deregulate the telecommunications industry. On February 8, 1996, they got their wish—or did they? On that day President Clinton signed the Act designed to revolutionize the telecommunications industry. The Telecommunications Act of 1996 ("1996 Act") outlined the new playing field for telecommunications services and promised "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers." Various commentators spoke grandiosely of the forthcoming consumer savings and improvements in telecommunications services. To date, however, the 1996

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2 110 Stat. at 56.

3 See, e.g., Editorial, Congress Maps a Telecom Future, CHI. TRIB., Feb. 6, 1996, at A14 ("[The] overall thrust [of the 1996 Act] is clearly deregulatory and pro-competitive . . . [and] eventually, nearly every American should experience the benefits of increased competition: lower prices, more choice and new technologies."); Bryan Gruley & Albert R. Karr, Telecom Vote Signals Competitive Free-for-All: Bill's Passage Represents Will of Both Parties, WALL ST. J., Feb. 2, 1996, at B1 (claiming that "after a year or so, if it's going to be great for consumers because they're going to get more competition, lower prices, more choice and better technology" (internal quotation marks omitted)); see also THOMAS J. DUESTERBERG & KENNETH GORDON, COMPETITION AND Deregulation IN TELECOMMUNICATIONS 2 (1997) ("The Telecommunications Act was more than two decades in the making, but its proponents . . . had high hopes that a rapid harvest of benefits would follow upon its passage.").
Act has proved to be a boon only for lawyers and regulators, while consumers have felt few benefits. The primary players in the industry—the Bell Operating Companies (BOCs) and the major long-distance service providers—have fought bitterly and incessantly over every detail of the 1996 Act. In the meantime, the Federal Communications Commission (FCC or "the Commission"), charged with implementing the 1996 Act's procompetition prescriptions, thus far has failed to speed up the deregulation process. As a result, consumers continue to wait for the promised benefits, which hopefully will arrive once the 1996 Act begins to affect the marketplace in earnest.

In the core provisions of the 1996 Act, Congress sought to change the regulatory landscape by introducing competition to the local telephone markets, which the BOCs currently monopolize. In return for stripping the BOCs of their local-service monopoly, the 1996 Act permits them to compete in the long-distance service market—an area from which the prior regulatory scheme had banned them. By removing the legal barriers to entry and allowing players in each industry segment to invade the other's turf, Congress designed the 1996 Act to spark intense competition in both the local and long-distance markets. Industry analysts estimate that the local telephone market generates revenues of $110 billion and that the long-distance market

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4 See, e.g., Laurence H. Tribe, Editorial, The FCC vs. the Constitution, WALL ST. J., Sept. 9, 1997, at A18 ("[T]he law isn't working as intended, and the American consumers are still waiting for free and healthy competition in communications services.").

5 BOCs are a creature of the 1983 AT&T divestiture. Prior to the 1996 Act, there were seven regional BOCs (Ameritech, Bell Atlantic, BellSouth, NYNEX, Pacific Telesis, SBC Communications, and US West). The BOCs currently provide approximately 99% of all local telephone service in the United States. See Michael F. Finn, The Public Interest and Bell Entry into Long-Distance Under Section 271 of the Communications Act, 5 COMM. L. COMPSPECTUS 203, 218 (1997). See infra Part I.A.2 for a detailed discussion of the creation and regulation of the BOCs.

6 Long-distance service providers also are known as interexchange carriers (IXCs). There are three major carriers—AT&T, MCIWorldcom, and Sprint. The term "interexchange carrier" derives from the nature of how long-distance service providers operate. They must take a phone call originating from one local exchange network, switch it to their long-distance network, and then switch it back to the appropriate local exchange network where the call terminates. They, thus, "exchange" the phone call between two local networks.


8 Prior to the 1996 Act, the law did not allow BOCs to provide certain long-distance telephone services, while long-distance carriers could not provide local telephone services. See infra notes 63-65 and accompanying text.

TELECOMMUNICATIONS REGULATION

generates equally staggering revenues of $80 billion. With such huge sums at stake, many commentators and industry experts anticipated the barrage of legal jockeying that followed the passing of the landmark legislation. Unfortunately, the FCC has contributed to the delays and the legal uncertainty surrounding the impending deregulation.

Congress charged the FCC with moving the deregulatory process along quickly, and while the Commission already may have failed to fulfill this mandate, it must alter its current strategies if it hopes to eventually achieve the anticipated deregulation. The FCC needs to shrink into the background. As the FCC loosens its grip on the key players, the market forces that Congress envisioned when drafting the 1996 Act will be able to take hold more quickly.

Section 271 of the 1996 Act requires the BOCs to apply to the FCC for permission to enter the long-distance market. Until the FCC grants them permission, the BOCs may not provide long-distance service. This Note focuses on the § 271 application process. It argues that the FCC must minimize its regulatory role under the 1996 Act to best promote competition in the telecommunications markets. To achieve this goal, this Note proposes that the FCC lower the standards it has set for BOC entry into the long-distance market. The FCC itself recently acknowledged that its original § 271 regulations need

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10 See Aaron Pressman, After Two Years, Telecom Act's Promise Unfulfilled, Reuters, Feb. 8, 1998.

11 See, e.g., Gruley & Karr, supra note 3 ("Businesses already are gearing up to deluge the agency with lawyers and lobbyists. Many of the FCC's decisions are certain to be challenged in court.").

12 See Duesterberg & Gordon, supra note 3, at 75 ("One can . . . make [a] case that several important FCC actions to date have impeded both the rapid deregulation sought by the authors of the act and the general process of introducing broad, facilities-based competition to the industry.").

13 Congress made the opening of local markets to competition the first step towards deregulation. See 47 U.S.C. § 271(d) (requiring BOCs to obtain Commission approval prior to providing long-distance service). Congress also directed the FCC to "complete all actions necessary to establish regulations" detailing that the FCC would open local markets for competition within six months after the enactment of the 1996 Act. Id. § 251(d)(1).

14 See id. § 271(d).

15 The FCC has numerous obligations under the 1996 Act. Other FCC actions and promulgations largely are, however, beyond the scope of this Note. There is an argument that the FCC has been regulating too extensively since the passage of the 1996 Act through its many administrative orders. See generally Duesterberg & Gordon, supra note 3, at 73-79 (complaining that the FCC has micromanaged the entire deregulatory process). This Note, however, specifically highlights § 271 applications as both a specific example of how the FCC has taken an overly detailed approach to the deregulatory process and an example of how the FCC can use its statutory authority to promote competition more quickly.

16 Interestingly, a district court in Northern Texas held that § 271, as well as other provisions of the 1996 Act, represents an unconstitutional bill of attainder. See SBC Communications, Inc. v. FCC, 981 F. Supp. 996, 1008 (N.D. Tex. 1997), rev'd, 154 F.3d 226 (5th Cir. 1998), cert. denied, 119 S. Ct. 889 (1999).
revamping.\textsuperscript{17} The FCC's proposed strategy does not go far enough, however. Adequate safeguards already exist to ensure competition will prosper when the BOCs enter the long-distance market. The FCC, therefore, should adopt a minimalist approach. Such an approach will lead more quickly to an approved § 271 application and to the concomitant consumer benefits, bringing the lofty aims of the 1996 Act closer to fruition.

Part I of this Note briefly looks at the history of both the telecommunications industry and its regulation. An historical perspective of the industry's evolution allows for a fuller appreciation of the contentiousness that has developed among the various parties. Part I also sheds light on the concerns that have guided the FCC's actions since the passage of the 1996 Act. Part II focuses on the § 271 applications that BOCs filed with the FCC during the first two years after passage of the 1996 Act. BOCs filed four applications during this time, and the FCC rejected each of them.\textsuperscript{18} This Part analyzes the FCC's grounds for rejecting each application, demonstrating that the FCC has chosen to take an overly skeptical and detailed approach to the § 271 process. Part III argues that the FCC need not maintain such a stringent attitude towards the BOCs' applications. This Part suggests that the FCC safely could take a more minimalist approach. It outlines several reasons why there should be little concern that BOC entry into the long-distance market would cause the telecommunications industry once again to succumb to monopolization. The statutory regime Congress has established, coupled with the technological and economic changes in the industry, adequately can prevent a monopoly from forming. The potential benefits of lowering the § 271 standards are the subject of Part IV. Under a minimalist approach, the FCC more quickly could grant BOCs permission to provide long-distance service. This Part also discusses the potential benefits BOC entry into the long-distance market will foster. The overarching purpose of the 1996 Act was, and still is, to unleash competition throughout the telecommuni-
cations industry. By regulating less, the FCC would go a long way toward achieving this goal.

I

THE EVOLUTION OF TELECOMMUNICATIONS LAW IN THE UNITED STATES

A. The Telecommunications Industry and Its Regulation Prior to the 1996 Act

The 1996 Act itself, its terms, its concerns, and its goals all stem largely from the various regulatory frameworks imposed on the telecommunications industry as it evolved. This evolution shows that the key players consistently have demonstrated monopolistic tendencies. These tendencies have plagued regulators and ultimately spawned the lawsuit that culminated with the divestiture of the American Telephone & Telegraph Co. (AT&T).

1. Origins of the Telecommunications Industry and the FCC

Perhaps not surprisingly, "[g]overnment has involved itself in telecommunications in the United States since the beginning of telegraphy";19 moreover, throughout the history of telecommunications, the industry participants always have attempted to build monopoly power.20 In 1876 Alexander Graham Bell received a patent—granting him a statutory monopoly—for his "new and useful Improvements in Telegraphy,"21 and thus began the storied association between "telephone" and "monopoly."

In the years immediately following the expiration of Bell's original patents, 1893 and 1894, sufficient competition existed such that few worried about a monopoly forming.22 Indeed, in 1907 non-Bell-operated companies owned forty-nine percent of the telephone stations in the United States.23 This relatively competitive state of affairs

20 See James M. Herring & Gerald C. Gross, Telecommunications: Economics and Regulation 3 (1996) (pointing out that by 1880, one entity, Western Union, carried 92% of all telegraph messages and accounted for 89% of the industry's revenue).
21 The Telephone Cases, 126 U.S. 1, 6 (1888) (internal quotation marks omitted); see also Hamburg & Brotman, supra note 19, § 1.04[2], at 1-20 to 1-21 (providing a brief history of the telephone's invention).
22 See Jim Chen, The Legal Process and Political Economy of Telecommunications Reform, 97 Colum. L. Rev. 835, 837-38 (1997) ("Contrary to the conventional view of telephony as the quintessential natural monopoly, the rise of the Bell octopus was neither natural nor inevitable. Indeed, one century ago, an informed observer might have expected competition to discipline the telephone industry . . . ."); see also Hamburg & Brotman, supra note 19, § 1.04[3][a]-[b], at 1-22 to 1-23 (describing AT&T's patent monopoly from 1876 to 1893 and the rise of industry competition between 1893 and 1913).
23 See Hamburg & Brotman, supra note 19, § 1.04[3][b], at 1-23.
did not persist for long, however. When the Bell system formed AT&T as its parent company in 1899, it commenced an aggressive and relentless program aimed at buying local, independent phone companies throughout the country. In so doing, AT&T gained control of a significant number of the local exchange carriers (LECs). Because of the substantial capital investment required to construct a local exchange network, most telephone markets had only a single LEC. As a result, any telephone service carrier wanting to complete calls for its customers that lived in an area with an AT&T-controlled LEC had to negotiate an “interconnection” agreement with AT&T. AT&T often would refuse to provide the necessary interconnection, or it would charge exorbitant interconnection rates to push the prospective competitor out of business. Either way, AT&T thwarted any potential competition through its growing network of local companies that formed its nascent monopoly.

In the early 1900s Congress made a halfhearted attempt at regulating AT&T’s growing monopoly by defining telephone companies as “common carriers,” thereby subjecting AT&T to Interstate Commerce Commission regulation. This move required AT&T to provide, upon request, interconnection service at reasonable rates and without unjust discrimination or preference. Congress failed, however, to

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24 See id.
25 See Chen, supra note 22, at 838.
26 Cf., e.g., HAMBURG & BROTMAN, supra note 19, § 1.04[3][c], at 1-24 to 1-25 (describing regulators’ efforts to improve telephone efficiency and quality, a policy which, combined with high capital costs, led to market consolidation).
27 See Chen, supra note 22, at 839 (noting that interexchange carriers, like AT&T, could “refuse interconnection to nonaffiliated LECs” and that AT&T “favor[ed] its affiliates and . . . squeeze[d] out rival LECs until they folded or sold out at a distressed price”).
28 See HAMBURG & BROTMAN, supra note 19, § 1.04[3][b], at 1-23. Pundits used to refer to the provision of local services as a “natural monopoly.” A natural monopoly can be simply defined as “the situation in which one firm can serve a market more cheaply than two or more firms can.” WILLIAM A. McEACHERN, ECONOMICS 87 (1988) (typeface altered). In more elaborate economic terms:

In a competitive market structure, microeconomic theory says that producers will price at or near marginal costs because they will expand output until their average costs equal marginal costs. In some situations, however, the most efficient producer faces declining marginal costs throughout the full range of expected demand. . . . Less efficient producers are put out of business by the most efficient producer because there is no point on their cost curves that is as low as the price for which the most efficient producer can sell.

HENRY H. PERRITT, JR., LAW AND THE INFORMATION SUPERHIGHWAY 302 (1996) (footnote omitted). Most now agree that the local exchange service is no longer a natural monopoly. See, e.g., DUETERBERG & GORDON, supra note 3, at 73-74 (refuting the natural monopoly notion). The evolution away from a natural monopoly was the product of “[t]he vast addition of new transmission capacity through fiber-optic cable, wireless technologies, and new, more efficient cable-telephone technologies.” Id. at 34.

30 See id.
"extend tariff filing obligations to telecommunications carriers
[thereby, i]n the most meaningful respects, [leaving] ‘AT&T . . . free
to determine its rates, its return on investment, and its service obligation.’"31 Courts followed the congressional lead and also failed to
check AT&T’s growth. In particular, both state and federal courts per-
mittted AT&T to refuse interconnection to rival local service provid-
ers,32 leaving AT&T ample leeway to pursue its monopolistic
ambitions.

With AT&T’s dominance of the telecommunications industry
firmly established,33 Congress passed the Communications Act of
1934.34 Under this Act, Congress created the Federal Communica-
tions Commission to represent Congress’s national policy interests in
developing and regulating the telecommunications field.35 The Act
gave the FCC jurisdiction over all interstate communications and at
the same time confirmed the state public utilities commissions’
(PUCs) control over intrastate communications.36 A tug-of-war be-
tween local PUCs and the FCC defined the regulatory climate during
the next several decades. Each agency sought to dominate the regula-
tory scene, but neither attempted to make any significant dents in
AT&T’s continuously growing monopoly.37

The emergence of Microwave Communications Inc. (MCI) in the
1960s heralded the next phase of regulation. During this phase, the

31 Id. at 839 (quoting Essential Communications Sys., Inc. v. AT&T, 610 F.2d 1114,
1119 (3d Cir. 1979)).

32 See, e.g., Pacific Tel. & Tel. Co. v. Anderson, 196 F. 699, 703 (E.D. Wash. 1912)
(‘[E]ach telephone company is independent of all other telephone companies . . . and
hence . . . it is not bound to accord to any such outside organization or its patrons con-
nections with its switchboard on an equality with its own patrons . . . .’); Home Tel. Co. v.
People’s Tel. & Tel. Co., 141 S.W. 845, 848 (Tenn. 1911) (‘But [the requirement of impar-
tiality] does not mean that a telephone company is bound to permit another telephone
company to make a physical connection with its lines for the purpose of using them as its
own subscribers use them.’); see also Chen, supra note 22, at 839 & n.26 (citing Pacific
Telephone and Home Telephone as evidence of judicial leniency towards AT&T’s monopolistic
practices).

33 See HAMBURG & BROTMAN, supra note 19, § 1.04[4], at 1-26 (‘By 1934 . . . AT&T and
its affiliated operating companies generated 94.3% of all local exchange messages.’).

34 Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47

35 See 47 U.S.C. § 151 (Supp. II 1996) (‘[F]or the purpose of securing a more effective
execution of this policy by centralizing authority heretofore granted . . . to several agencies
. . . there is created a commission to be known as the ‘Federal Communications Commis-
sion’ . . .’.

36 See id. § 253.

37 See generally Chen, supra note 22, at 840-45 (describing how AT&T’s monopoly re-
ained relatively untouched while the PUCs and the FCC took turns being the dominant
regulatory authority).
FCC opened the long-distance market to limited competition. Initially the FCC sought to restrain MCI's growth, clinging to the theory that the long-distance market could not be competitive and that the FCC should continue to regulate it as a public utility. MCI, however, successfully challenged several of the FCC's policies and rulings. The D.C. Circuit twice ruled in MCI's favor, setting the stage for full-scale competition in the long-distance market. In *MCI Telecommunications Corp. v. FCC*, the D.C. Circuit forced Bell LECs to interconnect long-distance services provided by non-Bell-affiliated companies. At this point, "[a] chastened Commission . . . conceded that [long-distance] service could be provided on a competitive basis and began ordering interconnection as a matter of course.

2. The Divestiture of AT&T

With the entry of MCI and other long-distance service providers, the long-distance industry began to show signs of competitiveness. AT&T, however, still controlled seventy-five to eighty-five percent of the long-distance market in the early 1980s. Although the courts required AT&T to provide interconnection to competing long-distance carriers, AT&T's monopoly persisted. Two economic phenomena largely accounted for AT&T's ability to maintain its monopoly: cross-subsidization and self-preference.

Cross-subsidization (sometimes referred to as cost misallocation), for this Note's purposes, occurs when one entity enjoys monopoly power in a regulated industry while simultaneously competing in a nonregulated industry. AT&T was so thoroughly integrated that it

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38 See Microwave Communications, Inc., 18 F.C.C.2d 953, 967 (1969) (permitting MCI to provide long-distance service and compete with AT&T via microwave frequencies in certain markets).

39 See HAMBURG & BROTMAN, supra note 19, § 1.04[5], at 1-26 to 1-27 (reviewing the FCC's policy conclusions that the long-distance market required "continued surveillance" and should be regulated as a public utility).

40 See MCI Telecomm. Corp. v. FCC, 580 F.2d 590 (D.C. Cir. 1978) (directing the FCC and AT&T to comply with the earlier court mandate that AT&T provide interconnections for MCI's Execunet service); MCI Telecomm. Corp. v. FCC, 561 F.2d 365 (D.C. Cir. 1977) (reversing the FCC's cease-and-desist orders advising MCI to stop offering and operating its Execunet service).

41 See MCI, 580 F.2d at 591.

42 Chen, supra note 22, at 846 (footnote omitted).

43 See id. at 850.


could take advantage of several cross-subsidies. AT&T’s ability to shift costs between its local and long-distance service-providing subsidiaries deeply concerned regulators. Because the PUCs exercised jurisdiction over AT&T’s local-calling rates, while the FCC regulated AT&T’s long-distance rates, AT&T had to separate joint costs before setting its rates. Joint costs are those costs that are not directly allocable to the provision of either local or long-distance service. Therefore, to measure accurately how much it costs a company to provide long-distance service versus local service, a company must measure the joint costs and attribute them to each type of service. This allocation necessarily requires a certain degree of estimation. AT&T could, therefore, effectively allocate—or misallocate—a large portion of its joint costs to the regulated local exchange market. At the time, PUCs calculated AT&T’s allowable local rates based substantially on the company’s reported costs; therefore, an increase in costs did not necessarily diminish AT&T’s profits. As AT&T’s reported costs increased, PUCs would allow it to charge higher prices to consumers to offset its supposedly declining rate of return. Moreover, because AT&T shifted costs away from its long-distance service, it could cut prices in that market without affecting its overall net profits. The cross-subsidization was complete: AT&T could undercut any potential competitor in the long-distance market. And due to the highly technological and complicated nature of the industry, AT&T effectively could accomplish this cross-subsidization “in ways extremely hard for regulators to detect.”

AT&T also resisted competition through self-preference. As described above, long-distance carriers can operate only through interconnection with local networks. Although the MCI court required

47 Other forms of cross-subsidies include cost shifting from business to residential customers, from urban to rural customers, and from heavily to lightly used routes. See id. at 349-50.
48 See id. at 349.
49 See Brenner, supra note 45, at 171-72.
50 Cf. Finn, supra note 5, at 228 (“‘[I]f a regulated monopolist ... reports as bottleneck costs what are really long-distance costs, it may be able to defraud ratepayers who are committed to covering the costs of the bottleneck.’” (quoting Joseph Farrell, Creating Local Competition, 49 Fed. Comm. L.J. 203, 207 (1996))).
51 See Hamburg & Brozman, supra note 19, § 4.04[1][e], at 4-37 to 4-40.
53 Lawrence A. Sullivan, Elusive Goals Under the Telecommunications Act: Preserving Long Distance Competition upon Baby Bell Entry and Attaining Local Exchange Competition: We’ll Not Preserve the One Unless We Attain the Other, 25 Sw. U. L. Rev. 487, 518 (1996).
54 See supra text accompanying notes 26-28.
AT&T to provide this access on a nondiscriminatory basis, it quickly became apparent that AT&T could circumvent the court's mandate by delaying the process or even by refusing to provide to any competing carriers the required interconnection. As with cross-subsidies, regulators often had an extremely difficult time policing these tactics. The system AT&T had built up and ferociously defended dominated both the local and long-distance markets.

AT&T's anticompetitive tactics and their deleterious effects on consumers obviously did not escape the government's notice. In 1974 the Justice Department renewed its antitrust suit against AT&T. This lawsuit eventually would result in the divestiture of the telecommunications Goliath. In 1982 AT&T agreed to settle the case and divest its local operating companies. The result was the Modification of Final Judgment (MFJ), which one commentator referred to as the "crowning achievement of American telecommunications law's first century."

The MFJ's provisions sought to ensure that an unregulated telecommunications monopoly never would exist again. The MFJ turned AT&T into primarily a long-distance service provider, stripping the company of its local exchange interests and allocating those interests among the newly established regional BOCs. Each BOC operated in its own geographically designated area, which the MFJ further divided into Local Access Transport Areas (LATAs). The MFJ imposed specific line-of-business restrictions that, most importantly, explicitly barred the BOCs from providing service for calls that occurred between LATAs ("interLATA" calls). This limitation restricted the BOCs to providing service only for calls originating and terminating within the same LATA ("intraLATA" calls). These line-of-business restrict-
tions constituted the heart of the MFJ and dramatically changed the structure of the telecommunications industry by forcing the BOCs out of the long-distance market. Congress "conditionally eliminated [all of these] restrictions" when it passed the 1996 Act.66

B. The Events Leading to Congress's Passing of the 1996 Act

The MFJ lasted twelve years and at least according to one commentator "accomplished precisely what [earlier regulatory efforts] had failed to do—impose structural changes in the Bell System that impaired AT&T's ability to stifle competition."67 During the MFJ era, the FCC continued its deregulatory efforts, and one of its most substantial achievements during this time was replacing rate-of-return regulation with price-cap regulation.68 Under price-cap regulation, the FCC sets a limit on the ultimate price, rather than the profit, that the regulated entity can charge.69 Price-cap regulation changes the regulated entity's behavioral calculus, providing it an incentive to minimize its costs.70 Some state commissions followed the FCC's lead and also began changing how they regulated the BOCs.71 This shift in regulatory policy substantially eliminated the attractiveness of cross-subsidizing. It no longer behooved the regulated entity to shift costs because a shift would not necessarily result in a higher allowable rate—the price it could charge consumers had a cap. Thus, to maximize profits, the regulated entity must either lower its costs, thereby increasing its profit margin, or increase its consumer base.72

66 Id. The elimination is called conditional because the Act permits BOCs to enter the long-distance market for calls originating in their service areas only after satisfying the requirements of 47 U.S.C. §§ 271-272 (Supp. II 1996). See Hamburg & Brotman, supra note 18, § 4.05[2][a], at 4-54 n.55; infra notes 90-124 and accompanying text.
68 See Chen, supra note 22, at 857 ("One of the FCC's finest moments came when it approved price-cap regulation for dominant [long-distance] carriers (read: AT&T). This technique freed the FCC from bothersome and ineffective techniques for computing the rate base and guarding against cross-subsidies to unregulated affiliates." (footnotes omitted)).
69 See Hamburg & Brotman, supra note 19, § 4.04[1][f], at 4-40 to 4-41.
70 See id. at 4-41 ("Under price-cap regulation, . . . [t]he firm . . . selects rates at or below the cap. This allows carriers to increase profits through increased efficiency and market innovation, which, ideally, results in savings for consumers." (footnote omitted)).
71 See id.
72 Of course, regulated entities still had some incentive to cross-subsidize. See, e.g., Hamburg & Brotman, supra note 19, § 4.04[1], at 4-43. Nonetheless, price-cap regulation certainly removed considerable benefits previously available under the rate-of-return regulation.
The FCC also sought to enact other regulations to increase competition in the long-distance market. In the early 1990s, the FCC reverted to its 1983 policy and announced plans to relieve all nondominant long-distance carriers (read: everyone but AT&T) from tariff-filing requirements.\textsuperscript{73} Tariffs are statements to the FCC detailing the rates a long-distance carrier intends to charge customers. The FCC had required tariffs to verify that the carriers' rates complied with Commission regulations.\textsuperscript{74} This proposed change provided nondominant carriers with two substantial benefits. First, nondominant carriers would save the expense and time involved with filing. Second, and more importantly, because the FCC still required AT&T to file tariffs, the other carriers could review AT&T's rates and then undercut AT&T's prices.\textsuperscript{75} However, the Supreme Court invalidated this policy in 1994, holding that the Commission had overstepped its statutory bounds.\textsuperscript{76} The Court recognized, however, that blame should not rest necessarily on the Commission because it unfortunately had to continue laboring under an Act written for obsolete technology.\textsuperscript{77}

While the Court was charging Congress with ducking its public duties, telecommunications technology continued to evolve.\textsuperscript{78} In particular, cellular and Personal Communications Services (PCS) gradually became viable wireless alternatives to traditional wireline service.\textsuperscript{79} As the FCC's efforts to promote competition in the long-distance market met judicial resistance, the BOCs' wireline empire looked increasingly vulnerable to the new communications technologies.\textsuperscript{80} It finally had become apparent that real competition could exist within and between the local and long-distance markets. As a result, "the MFJ court and the FCC had reached the limits of their legal authority and institutional competence . . . . [Therefore, t]he task of 'introduc[ing] . . . a whole new regime of regulation (or of free-market competition)' would fall upon Congress."\textsuperscript{81}

\textsuperscript{73} See Chen, supra note 22, at 857-58.
\textsuperscript{74} Cf. id. (noting that other long-distance companies used AT&T's tariff filings to set their prices).
\textsuperscript{76} See id. at 234.
\textsuperscript{77} See id. (noting that the FCC must act within the authority of the Act because its "estimations[ ] of desirable policy cannot alter the meaning of the federal Communications Act of 1934").
\textsuperscript{78} See Chen, supra note 22, at 855 ("As had previous regimes of telecommunications law, the MFJ fell victim to technological change.").
\textsuperscript{79} See id. at 855-56.
\textsuperscript{80} Chen argues that BOCs "are in fact the more vulnerable players in any competitive scenario combining wireless [local-exchange] service with fiber optic [long-distance] transmission." Id. at 856.
\textsuperscript{81} Id. at 858-59 (quoting MCI, 512 U.S. at 234) (second and third alterations in original); accord Southwestern Bell Corp. v. FCC, 43 F.3d 1515, 1519 (D.C. Cir. 1995).
Against this background, Congress passed the Telecommunications Act of 1996. Title I of the Act contains sweeping changes designed to introduce competition to all aspects of the telephony industry. The 1996 Act requires the BOCs to cooperate with competitors in opening the local markets to competition, and § 271 of the Act replaces the MFJ’s line-of-business restrictions on long-distance markets. Under § 271, the BOCs once again may enter the long-distance markets. Mindful of the industry’s monopolistic history, Congress conditioned the BOCs’ re-entry on a number of requirements. Congress also charged the FCC with reviewing the BOCs’ applications for compliance with these requirements. Undoubtedly, the crux of the 1996 Act is to facilitate competition within and between the local and long-distance markets. The media praised the Act as promising increased services and lower prices for American consumers. Unfortunately, the consumer has yet to reap any significant benefit the 1996 Act allegedly sowed. Indeed, many have commented that the effect of the 1996 Act thus far has been the exact opposite of what Congress intended.

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83 The primary vehicle by which the 1996 Act seeks to open the local markets is the requirement that BOCs negotiate interconnection agreements with competitors. See id. §§ 251-252. In the words of FCC Chairman Kennard, “One of the Telecom Act’s potentially most powerful provisions is its requirement that incumbent telephone companies lease portions of their networks to competitors.” William E. Kennard, Speech to the Annual Convention of the National Association of Regulatory Utility Commissioners, Nov. 10, 1997, available in 1997 FCC LEXIS 6138, at *11.
84 See Hurdit Subcomm. Statement, supra note 7, at 17 (“Section 271 is, of course, the Telecom Act’s successor to the line of business restrictions contained in the Consent Decree that broke up AT&T in 1982.”).
86 See Chen, supra note 22, at 861 (“Demonstrating persistent concerns over cross-subsidies and self-preference, the Act conditions full [BOC] entry into [the long-distance market] upon a showing of significant competition in the [BOCs’ local] markets.”).
88 See supra note 3.
89 See, e.g., Mark Landler, After a Year of Law, Scant Competition, N.Y. TIMES, Dec. 23, 1996, at D1 (“Since the Telecommunications Act of 1996 became law, the cable television industry has largely abandoned its foray into the telephone business. The regional phone companies have shelved their efforts to get into television. And the three big long-distance carriers have put through their steepest rate increases in several years.”); see also, e.g., Mike Mills & Paul Farhi, This Is a Free Market? The Telecommunications Act So Far: Higher Prices, Few Benefits, Wash. Post, Jan. 19, 1997, at H1 (noting that “1996 was hardly a bellwether for the kind of consumer benefits promised by the law’s supporters”).
II

Under the 1996 Act, a BOC must apply to the FCC for permission to enter the long-distance market.90 This procedure is referred to as the § 271 application process. Nineteen ninety-seven marked the first year in which any BOC filed a § 271 application with the FCC; that year three different BOCs filed a total of four applications.91 The FCC denied all four applications.92 Additionally, one BOC refiled its § 271 application in July 1998, which the FCC also rejected.93 In short, the Commission has yet to allow a BOC to provide long-distance service, even though three years have passed since Congress enacted the 1996 Act.

This Part starts by detailing both the statutory framework that governs the application process and the various hurdles a BOC must clear prior to receiving permission to enter the long-distance market. This Part also examines the respective roles Congress assigned to the FCC, the Department of Justice (DOJ), and the state PUCs.94 Finally, this Part reviews in detail the four § 271 applications BOCs filed in

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91 Southwestern Bell, Ameritech, and BellSouth are the three BOCs to have filed applications. SBC filed in Oklahoma, Ameritech filed in Michigan, and BellSouth filed in both South Carolina and Louisiana. See Brief in Support of Application by BellSouth for Provision of In-Region, InterLATA Services in Louisiana, BellSouth Corp., 13 F.C.C.R. 6245 (1998) (No. 97-231) [hereinafter BellSouth Louisiana Application] (on file with FCC); Brief in Support of Application by BellSouth for Provision of In-Region, InterLATA Services in South Carolina, BellSouth Corp., 13 F.C.C.R. 539 (1997) (No. 97-208) [hereinafter BellSouth SC Application] (on file with FCC); Brief in Support of Application by Ameritech Michigan for Provision of In-Region, InterLATA Services in Michigan, Ameritech Mich., 12 F.C.C.R. 20,543 (1997) (No. 97-137) [hereinafter Ameritech Michigan Application] (on file with FCC); Brief in Support of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Oklahoma, SBC Communications, Inc., 12 F.C.C.R. 8685 (1997) (No. 97-121) [hereinafter SBC Oklahoma Application] (on file with FCC).
93 See BellSouth Corp., 13 F.C.C.R. 20,599 (1998) (Second BellSouth Louisiana Order). Notwithstanding the FCC's recognition of the improvements BellSouth had made since its last Louisiana filing, the Commission again rejected BellSouth's application. See id. at 20,601-03. At the time this Note went to print, no other BOC had filed a § 271 application with the FCC.
94 Congress gave all three organizations an integral role in the § 271 process. See 47 U.S.C. § 271(d)(2) (stating that the FCC is to consult with the Attorney General and the state commission); id. § 271(d)(3) (charging the FCC with "approving or denying the authorization requested" by the BOC). Some controversy exists as to the roles of each entity and what weight the FCC must accord to their respective decisions. See discussion infra Part II.A.2.
1997 and the accompanying FCC denial orders. The analysis highlights certain common issues that dominate the FCC's orders and demonstrates how the FCC has adopted an extraordinarily stringent review process. While the analysis shows that the FCC has justification for resolving certain issues to the detriment of the BOCs, it also shows that the FCC could have exercised considerably more leniency in several instances.

A. The Mechanics of Section 271

The overarching purpose of § 271 is to ensure that the requesting BOC adequately has opened its own local market to competition. The 1996 Act does not require that potential local market entrants establish their own local wireline networks; economic reality precludes this requirement. Instead, the Act propounds a framework in which an incumbent BOC must allow access to its network for new competitors. A BOC, therefore, must permit a new local-service market entrant to interconnect with its network, and the BOC further must provide nondiscriminatory access to many of its basic network functions. Section 271's purpose is ensuring that a requesting BOC has taken adequate steps to comply with these underlying requirements, thereby genuinely allowing new entrants the opportunity to compete in the local markets. The critical question becomes: How should the FCC define "opened"?

95 This Note does not discuss in great detail the fifth application filed with the FCC. This application largely mirrors the first BellSouth Louisiana application, discussed infra Part II.B.4, and therefore does not appreciably add to the overall analysis.

96 See Ameritech Mich., 12 F.C.C.R. at 20,551.

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

98 See Sullivan, supra note 53, at 496 ("Technological and economic barriers to [local-exchange] markets are high. Neither the presence of competitive access providers[,] prospective entry by [long-distance] carriers, nor the possibility of future bypass through cellular, PCS, or enhanced mobile radio systems . . . alter this reality.").

99 See Ameritech Mich., 12 F.C.C.R. at 20,551 ("[Sections 251-253] of the Act require incumbent LECs, including BOCs, to share their networks in a manner that enables competitors to choose among three methods of entry into local telecommunications markets, including those methods that do not require a new entrant, as an initial matter, to duplicate the incumbents' networks.").

100 See 47 U.S.C. § 251(a) (Supp. II 1996); see also Chen, supra note 22, at 860 (discussing the requirements § 251 of the 1996 Act imposes on incumbent local exchange service providers).

101 See Ameritech Mich., 12 F.C.C.R. at 20,551 ("[The 1996 Act] requir[es] BOCs to demonstrate that they have opened their local markets to competition before they are authorized to enter into the in-region long distance market . . . ").
1. The Four Requirements BOCs Must Satisfy in a Section 271 Application

Section 271 imposes four types of requirements on BOCs requesting permission from the FCC to provide long-distance service. As a threshold matter, an applicant must meet either the Track A or Track

\[\text{(c) Requirements for providing certain in-region interLATA services}\]

\[\text{(2) Specific interconnection requirements}\]

\[\text{(B) Competitive checklist}\]

Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:

(i) Interconnection in accordance with the requirements of [47 U.S.C. §§ 251(c)(2) and 252(d)(1)].

(ii) Nondiscriminatory access to network elements in accordance with the requirements of [47 U.S.C. §§ 251(c)(3) and 252(d)(1)].

(iii) Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of [47 U.S.C. § 224].

(iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.

(v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

(vi) Local switching unbundled from transport, local loop transmission, or other services.

(vii) Nondiscriminatory access to—

(I) 911 and E911 services;

(II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and

(III) operator call completion services.

(viii) White pages directory listings for customers of the other carrier's telephone exchange service.

(ix) Until the date by which telecommunications numbering administration guidelines, plan, or rules are established, nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers. After that date, compliance with such guidelines, plan, or rules.

(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.

(xi) Until the date by which the Commission issues regulations pursuant to [47 U.S.C. § 251] to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning,
B requirements of § 271(c)(1). A BOC must show that either (1) a facilities-based competitor currently exists within its market (Track A) or (2) the BOC has offered to provide competitors with access and interconnection to its network but no alternative provider has elected to accept the offer (Track B). More specifically, Track A examines whether the BOC "has entered into one or more binding [interconnection] agreements . . . under which the Bell operating company is providing access and interconnection to its network facilities for . . . one or more unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers." In short, a BOC can meet this requirement if it faces competition in its local-service market from a new, unaffiliated entrant. On the other hand, a BOC can satisfy Track B if both (1) "no [competing] provider has requested the access and interconnection described in [Track A]," and (2) the BOC has filed an approved "statement of the terms and conditions that the company generally offers" to any provider who eventually desires interconnection with the BOC. Track B contemplates that the FCC should not preclude a BOC's entering the long-distance market merely because no competitors have sought to compete with it. In sum, this initial threshold requirement ensures that either some modicum of competition exists in the BOC's market or the BOC is not at fault for the lack of competitive inroads.

quality, reliability, and convenience as possible. After that date, full compliance with such regulations.

(xii) Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of [47 U.S.C. § 251(b)(3)].

(xiii) Reciprocal compensation arrangements in accordance with the requirements of [47 U.S.C. § 252(d)(2)].

(xiv) Telecommunications services are available for resale in accordance with the requirements of [47 U.S.C. §§ 251(c)(4) and 252(d)(3)].


103 See id. § 271(c)(1). Section 271(c)(1) is divided into two subparts. A BOC may satisfy either of two subparts, commonly discussed as Track A (referring to 47 U.S.C. § 271(c)(1)(A)) and Track B (referring to 47 U.S.C. § 271(c)(1)(B)). See, e.g., Ameritech Mich., 12 F.C.C.R. at 20,548 (discussing the Track A and Track B requirements).


105 Id. § 271(c)(1)(A).

106 See SBC Communications Inc., 12 F.C.C.R. 8685, 8695 (1997) ("We find that the use of the term 'competing provider[ ]' in section 271(c)(1)(A) suggests that there must be an actual commercial alternative to the BOC in order to satisfy section 271(c)(1)(A)."

(alteration in original)).


108 See BellSouth Corp., 13 F.C.C.R. 589, 566 (1997) (BellSouth SC Order) ("[Track B should] ensure that potential competitors will not be permitted to delay indefinitely BOC entry by failing to provide the type of telephone exchange service described in Track A." (internal quotation marks omitted)).
The second § 271 requirement asks the FCC to determine whether the BOC satisfies the "[c]ompetitive checklist" in § 271(c)(2)(B). The checklist represents the heart of the § 271 application process. Its fourteen, discrete requirements each strive to guarantee that the BOC fairly and equitably provides competitors with access and interconnection. Essentially, the BOC must treat competitors' customers as it treats its own customers. The checklist requirements range from requiring nondiscriminatory access to both network elements and 911 services to mandating that BOCs allow competitors to choose and assign telephone numbers to their customers.

As discussed further below, the FCC has focused most of its energy on condemning the BOCs' compliance with a handful of the checklist items.

Section 271's third requirement demands that the BOC demonstrate how, should the FCC approve its application, it will provide interLATA service in accordance with § 272. Section 272 stipulates, in pertinent part, that approved BOCs provide long-distance service through separate affiliates. For example, BellSouth established separate corporate entities to operate its local and long-distance services: BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. This provision addresses the issue of self-preference and seeks to "prevent a Bell company from providing its long distance affiliate with an unfair advantage over competitors." Several reporting and auditing requirements in § 272 help ensure that the BOC adhere to these provisions.

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110 Cf. Sullivan, supra note 53, at 492 ("The competitive checklist in Section 271(c)(2) and the FCC regulations attempt to assure that local competition is in fact occurring through interconnection, unbundling, and nondiscriminatory access."). As the discussion below shows, the checklist requirements comprise the bulk of the FCC's discussion in its orders. The FCC has focused on clarifying this area of the § 271 process. See infra Part II.B.
111 See, e.g., 13 F.C.C.R. at 585 (BellSouth SC Order) ("To compete effectively in the local exchange market, new entrants must be able to provide service to their customers at a quality level that matches the service provided by the incumbent LEC.").
113 See id. § 271(c)(2)(B)(vii)(I).
114 See id. § 271(c)(2)(B)(xi).
115 See infra Part II.B (highlighting that the FCC repeatedly has reproached the BOCs for inadequate Operational Support Systems, access to network elements, and policies for reselling certain already-discounted services).
117 See id. § 272(a)(2)(B)-(C).
118 See BellSouth SC Application, supra note 91, at 1, 58.
119 BellSouth Louisiana Application, supra note 91, at 74. For a discussion concerning the principle of self-preference, a prevalent concern when addressing perceived monopolies, see supra notes 54-57 and accompanying text.
120 See 47 U.S.C. § 272(b)-(d). Certain structural safeguards deal with the organizational structure of the BOC and its separate affiliate. See, e.g., id. § 272(b)(2) (requiring
Finally, § 271 requires the FCC to approve only those BOC applications "consistent with the public interest, convenience, and necessity." Because the FCC has rejected on the basis of other § 271 requirements all BOC applications to date, it has yet to definitively interpret this requirement. However, the Commission, to provide guidance for future BOC applicants, extensively discussed the issue in its *Ameritech Michigan Order.* In that order, the FCC indicated that it views the public interest requirement as another potentially substantial hurdle for a BOC applicant to clear. The Commission summarized its view of the requirement by stating: "[O]ur public interest inquiry requires us to examine carefully a number of factors, including the nature and extent of competition in the applicant's local market, in order to determine whether that market is and will remain open to competition."

2. The Role of the State PUCs and the DOJ

Under § 271(d)(2) the FCC must consult with both the Attorney General and the applicable state commission when evaluating a BOC application. The Attorney General may use "any standard [she] considers appropriate" to evaluate the application. The state commission's role is more marginal: The FCC must consider only the state PUC's determination concerning the BOC's compliance with either Track A or Track B and with the competitive checklist requirements—the first two of the four requirements highlighted above.

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3. Id. § 271(d)(2)(A).
4. Section 271(d)(2)(B) requires the FCC to "consult with the State commission . . . in order to verify the compliance of the [BOC] with the requirements of subsection (c)." Id. § 271(d)(2)(B). Section 271(c)(1) details the Track A and Track B requirements, and § 271(c)(2) outlines the competitive checklist. See id. § 271(c).
The 1996 Act does not state specifically what weight the FCC should accord either party's evaluation. The importance of a collaborative effort, however, is unmistakable. Each party possesses certain strengths that Congress wished to utilize. Certainly the 1996 Act anticipates that the FCC will be the dominant decision-making agency. Almost equally certain, however, is that Congress did not intend for the FCC to ignore the knowledge and expertise of these other state and federal agencies.

B. The First Wave of BOC Applications

During the 1996 Act’s first two years of operation, BOCs filed a total of four applications to provide interLATA service: SBC applied to provide service in Oklahoma, Ameritech applied to provide service in Michigan, and BellSouth applied to provide service in both South Carolina and Louisiana. The FCC rejected all four applications. An analysis of the applications and accompanying rejection orders shows how remarkably wide the gulf between the FCC and the BOCs remains. To be sure, they are making some progress: the FCC pointed out, in the various BOC applications, several deficiencies that could have anticompetitive effects in the telecommunications market, and the BOCs have often responded to the FCC’s concerns in a positive manner. The analysis does show, however, that the FCC has contributed immensely to the delay in the 1996 Act’s implementation. Indeed, the FCC’s § 271 orders have led many commentators to describe its approach as overly detail-oriented.

1. SBC’s Oklahoma Application

Of the four BOC applications filed in 1997, SBC’s application to provide service in Oklahoma was the weakest, and the FCC accorded it curt treatment. SBC argued that it faced facilities-based competi-
tion, satisfying the Track A requirements, as a result of a single competitor, Brooks Fiber, that had an approved interconnection agreement.\textsuperscript{134} At the time of the application, Brooks Fiber offered local service to a handful of its own employees on a test basis.\textsuperscript{135} The initial skirmish between the FCC and SBC focused on the meaning of the phrase “competing providers of telephone exchange service” in § 271’s Track A provision.\textsuperscript{136} SBC maintained that Brooks Fiber \textit{would be} providing residential service.\textsuperscript{137} The FCC rejected this argument\textsuperscript{138} and chose to interpret “competing providers” as requiring “an actual commercial alternative to the BOC[’s local service].”\textsuperscript{139} A single competitor providing local service to a group of employees did not satisfy this standard. The FCC correctly reasoned that Congress surely envisioned that some appreciable level of competition must exist prior to allowing a BOC’s entry into the long-distance market under Track A, and no such competition existed in Oklahoma at the time.

The FCC also summarily rejected SBC’s interpretation of Track B.\textsuperscript{140} The FCC interpreted the phrase “qualifying request” to mean a request for interconnection that can lead to the type of facilities-based competition Track A specifies.\textsuperscript{141} For example, the FCC likely would consider as a qualifying request a MCIWorldcom proposal to SBC that the two companies negotiate an interconnection agreement to allow MCIWorldcom to compete with SBC in Oklahoma City. The FCC noted that SBC had received several of these requests and thereby could not proceed under Track B.\textsuperscript{142} As with the FCC’s Track A determination, its Track B interpretation comports much more comfortably with the statute than SBC’s alternative.\textsuperscript{143}

By finding that SBC did not satisfy either Track A or B, the FCC did not need to elaborate on how it intended to interpret the remaining § 271 requirements. It is notable, however, that the FCC refused

\begin{itemize}
  \item \textsuperscript{134} See SBC Oklahoma Application, \textit{supra} note 91, at 8-12.
  \item \textsuperscript{135} See SBC Communications Inc., 12 F.C.C.R. at 8691, 8696-99.
  \item \textsuperscript{136} 47 U.S.C. § 271(c)(1)(A) (Supp. II 1996).
  \item \textsuperscript{137} See SBC Communications Inc., 12 F.C.C.R. at 8697-98.
  \item \textsuperscript{138} See id. at 8698 (“[W]e cannot conclude for purposes of section 271(c)(1)(A) that a carrier is a competing provider of telephone exchange service to residential subscribers if it is not even accepting requests for that service.”).
  \item \textsuperscript{139} Id. at 8695.
  \item \textsuperscript{140} See id. at 8703.
  \item \textsuperscript{141} See id. at 8701-02 (“We conclude that a ‘qualifying request’ under section 271(c)(1)(B) is a request for negotiation to obtain access and interconnection that, if implemented, would satisfy the requirements of section 271(c)(1)(A).”).
  \item \textsuperscript{142} See id. at 8723-24. The FCC also noted that SBC had frustrated their competitors’ “efforts to enter the local exchange market.” \textit{Id.} at 8724.
  \item \textsuperscript{143} SBC argued that a competitor must not only request interconnection, but also must have begun to provide facilities-based service. See SBC Oklahoma Application, \textit{supra} note 91, at 14. The FCC characterized this argument by stating that, “SBC seems to take the position that, if it has not satisfied the requirements of section 271(c)(1)(A), then it must be eligible to proceed under Track B.” SBC Communications Inc., 12 F.C.C.R. at 8700.
\end{itemize}
to follow the determination of the Oklahoma Corporation Commission (OCC), the state body in charge of regulating SBC's activities within Oklahoma.\textsuperscript{144} Although the FCC certainly must "make an independent determination of the meaning of statutory terms in section 271,"\textsuperscript{145} the statutory scheme expressly envisions a role for the state commission. This role requires the FCC to consult with the state commission on Track A and Track B matters.\textsuperscript{146} In this case, the OCC conducted hearings in front of an administrative law judge and found that SBC satisfied the Track A requirements.\textsuperscript{147} The FCC rejected this judgment and rebuked the OCC for not enunciating precisely how it made its determination.\textsuperscript{148} In this particular case, the FCC appears to have had valid grounds for not following the state commission's findings and recommendations. The FCC's quick disposal of the OCC's determination nonetheless is telling: the FCC established that it will not hesitate to ignore the findings of a state commission with which § 271 mandates it to consult.

The FCC also indicated to future applicants that it might wait some time before ultimately approving the first BOC application. In discussing SBC's contention that it could proceed under Track B, the FCC stated that its rules implementing § 251, the statutory provisions requiring BOCs to arrive at interconnection agreements with competing carriers, "envisioned that incumbent [BOCs] would need some time to complete these necessary steps."\textsuperscript{149} The FCC then reiterated that it had issued previous orders implementing the 1996 Act in anticipation that some time would pass before a BOC could satisfy them.\textsuperscript{150} It bolstered its argument by claiming that Congress envisioned a "'ramp-up' period during which" new entrants in the local market could implement their interconnection agreements.\textsuperscript{151} These state-

\textsuperscript{144} See SBC Communications Inc., 12 F.C.C.R. at 8695 ("[W]e find that the Oklahoma Commission's determination on this issue is not dispositive.").
\textsuperscript{145} Id.
\textsuperscript{147} See SBC Oklahoma Application, supra note 91, at 6-12.
\textsuperscript{148} See SBC Communications Inc., 12 F.C.C.R. at 8695 ("Moreover, based on the record before us, we find that it is unclear what standard the Oklahoma Commission applied or what specific facts it relied on in making its determination . . . ."); see also id. at 8698 ("[W]e do not attach significant evidentiary weight to the Oklahoma Commission's unsubstantiated assertion that [a potential competitor] has begun media advertisements seeking to attract both business and residential customers." (internal quotation marks omitted)).
\textsuperscript{149} Id. at 8710.
\textsuperscript{151} Id. at 8723.
ments provided the first hints of the FCC's intent to adopt a detailed approach to the § 271 process.

2. Ameritech's Michigan Application

In May 1997, Ameritech filed an application to provide long-distance service in Michigan. The FCC's order denying Ameritech the right to provide long-distance service constitutes the most elaborate and thorough of the four FCC orders this Note addresses. In the Ameritech Michigan Order, the FCC laid out its position on a number of the § 271 requirements to provide guidance to future applicants. Embodied in this guidance, which undoubtedly will prove beneficial in certain respects, are the seeds of the FCC's plan to review applications in excruciating detail.

a. Compliance with Track A Requirements

The FCC found that Ameritech satisfied the Track A requirements, thereby clearing the first statutory hurdle. The evidence in the record demonstrated that Brooks Fiber, one of three facilities-based competitors Ameritech's application cited, provided substantial service to both business and residential customers in several Michigan cities. As it did in its SBC Oklahoma Order, the FCC adopted interpretations of various Track A provisions in a manner that favored the BOC. Predictably, numerous long-distance carriers submitted comments advocating novel constructions of the Track A requirements under which Ameritech would fail to comply. The FCC, however, took a more reasonable approach. It looked only to see if the compet-

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152 See Ameritech Michigan Application, supra note 91.
154 See id. at 20,578.
155 The data supplied by Brooks Fiber show that it had 15,876 business lines and 5,910 residential lines in service in Grand Rapids, Michigan. See Opposition of Brooks Fiber Communications of Michigan to Ameritech's Application at 8, Ameritech Mich. (No. 97-137). These data alone, without regard to other cities Brooks Fiber serves, satisfy the Track A requirements. Track A simply requires a competitor to have a binding interconnection agreement with the incumbent BOC under which the competitor is providing competing access service to residential and business customers. See 47 U.S.C. § 271(c)(1)(A) (Supp. II 1996).
156 See, e.g., Ameritech Mich., 12 F.C.C.R. at 20,581-83 (rejecting the argument that the phrase "binding agreement" within § 271(c)(1)(A) excludes interconnection agreements with only interim prices rather than final prices); id. at 20,584-86 (rejecting the argument that the phrase "competing provider" in § 271(c)(1)(A) contemplates a certain level of geographic penetration or market share).
157 See, e.g., Comments of AT&T Corp. in Opposition to Ameritech's Section 271 Application for Michigan at 35-37, Ameritech Mich. (No. 97-137) [hereinafter AT&T Ameritech Comments] (claiming that a competitor that chooses to purchase network elements from the incumbent BOC, and then combines the purchased elements to provide competitive access service, does not satisfy § 271's requirement that the competing carrier provide service using its own facilities).
ing carrier represented “an actual commercial alternative to the BOC” and offered “service exclusively over its own telephone exchange service facilities.” However, the FCC laid the groundwork for a potentially contentious issue in the future. In finding that Track A does not require the BOC to face any specific level of competition, the FCC expressly noted its intent to review competition levels in the local markets as part of any future public interest analysis under § 271(d)(3)(C). Whether Congress intended the statute’s public interest analysis to include this type of searching, data-oriented review remains debatable.

b. Checklist Compliance

The FCC denied Ameritech’s application on the ground that it did not fully satisfy the checklist requirements of § 271(c)(2)(B). The FCC clearly reveals in this part of the order its decision to review applications in great detail. Tellingly, its voluminous discussion on the checklist requirements begins by noting that “a complete discussion of only certain checklist items [is included].” It then devotes over eighty pages of the FCC Record to discussing three of the fourteen checklist items.

A bulk of the order discusses Ameritech’s Operational Support Systems (OSS). BOCs use OSS to execute pre-ordering, ordering, provisioning, maintenance and repair, and billing functions. The second checklist item requires the BOC to provide competing carriers

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159 Id. at 20,599.
160 See id. at 20,584 n.168 ("Information on the level of geographic penetration is relevant to our assessment of whether 'the requested authorization is consistent with the public interest.' We therefore expect parties to provide this information in future section 271 applications.” (quoting 47 U.S.C. § 271(d)(3)(C) (citation omitted)).
161 Compare Finn, supra note 5, at 216-23 (advocating that the FCC’s public interest analysis include an examination of factors bearing on the level of competition present in the local exchange market), with Ameritech Michigan Application, supra note 91, at 67 n.77 (asserting that Congress “emphatically rejected” a proposal for the FCC to add metric requirements, bearing on the extent of local competition, under the guise of a public interest analysis).
162 See Ameritech Mich., 12 F.C.C.R. at 20,599.
163 Id.
164 See id. at 20,612-93.
165 See id. at 20,612-61.
166 See id. at 20,613. As a simple example of what each of these functions would include, consider an average residential consumer. Before a carrier provides service to the consumer it must perform a background check to confirm the address and other relevant information. This type of activity is the pre-ordering function. During the ordering phase, the carrier places the customer order and tells her when she can expect to have the service installed. The carrier then installs her service as a part of the provisioning phase. Should she ever need her service repaired, the carrier will enter the request, send instructions to the repair personnel, and tell her when she can expect to have her problem resolved. Finally, in the billing phase, the carrier’s relevant systems generate the customer’s bill.
with nondiscriminatory access to these systems. In outlining what compliance entails, the FCC divided its inquiry into two parts:

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.

A sample of the FCC's deliberations illustrates how comprehensive the Commission intends to be under both prongs of its proffered analysis. For example, the FCC stated that the BOC must provide "nondiscriminatory access" to the OSS ordering function. Ameritech provided extensive empirical evidence of the degree to which competitors have been able to use Ameritech's ordering and provisioning systems. This evidence included a comparison between competing carriers and Ameritech of three ordering and provisioning benchmarks: the percentage of customer due dates each met, the percentage of new service failures, and the percentage of installations each completed outside of a six-day interval. Ameritech further noted that competing providers include required performance standards as part of their negotiated interconnection agreements with Ameritech. These agreements often provide for penalties if Ameritech fails to meet the contractual performance standards. Despite

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169 Id. at 20,630.

170 See Ameritech Michigan Application, supra note 91, at 32-33.

171 See Ameritech Mich., 12 F.C.C.R. at 20,630 n.410. Ameritech succinctly described how it generated and provided performance measures:

With respect to resale, Ameritech has agreed to (a) measure in a clearly defined manner the quality and timeliness of services it provides to resellers using the same criteria that it uses to measure the comparable services it provides to its own retail customers, and (b) generate monthly reports for each competing carrier that (i) numerically and graphically show these measurements (and the underlying data) for the carrier and (ii) compare those measurements to the same measurements for services provided to Ameritech's retail customers, and for services provided to Ameritech's affiliates and other competing carriers.

Ameritech Michigan Application, supra note 91, at 33-34.

172 See Ameritech Michigan Application, supra note 91, at 31-33.

173 See id. at 35.
Ameritech’s data and potential contractual liability for penalties, the FCC wanted to see specific data reporting and comparing average installation intervals for Ameritech’s and competing providers’ retail customers.\(^{174}\) Despite the data that Ameritech did provide, the absence of this particular type of performance measure prompted the FCC to state that “[b]y failing to provide such data in this application, Ameritech has failed to meet its evidentiary burden.”\(^{175}\) By not meeting this burden, Ameritech failed to prove that it “is providing nondiscriminatory access to [the] OSS [ordering] function[.]”\(^{176}\)

The FCC also questioned the operational readiness of Ameritech’s billing systems. Ameritech acknowledged that it inadvertently had double-billed some customers of competing carriers.\(^{177}\) As Ameritech pointed out, however, it immediately made resolution of the double-billing problem a priority and diligently sought a solution.\(^{178}\) Nonetheless, the FCC found “that the double-billing problem is compelling evidence that Ameritech’s OSS for ordering and provisioning for resale services is not operationally ready, and therefore, Ameritech is not providing nondiscriminatory access to OSS functions.”\(^{179}\) Ameritech argued that the FCC was holding it to an impossibly high standard.\(^{180}\) Given the complexity of the technology involved, Ameritech maintained that some errors were unavoidable.\(^{181}\) The company contended that these errors did not affect materially the overall operational readiness of its systems.\(^{182}\) The FCC rejected this contention, reiterating that it found the double-billing issue problematic.\(^{183}\)

These perceived shortfalls formed the primary basis of the FCC’s determination that Ameritech had failed to satisfy the checklist requirements.\(^{184}\) All of these shortfalls occurred in only the second


\(^{175}\) Id. at 20,634.

\(^{176}\) Id.

\(^{177}\) See id. at 20,650.

\(^{178}\) See id. at 20,651.

\(^{179}\) Id. at 20,652.

\(^{180}\) See Ameritech Michigan Application, supra note 91, at 27 (“[T]he complaints of AT&T and other carriers suggest that they seek to hold Ameritech’s OSS interfaces to an impossibly high ‘bug-free’ standard that no information technologies system or application could ever meet.”).

\(^{181}\) See id. (“No information technologies system or application—whether designed for and used by the telecommunications industry, state or federal governments, the personal computer industry or some other manufacturing or service sector of the economy—is completely devoid of troubles or bugs.” (internal quotation marks omitted)).

\(^{182}\) See id. at 28 & n.25.

\(^{183}\) See Ameritech Mich., 12 F.C.C.R. at 20,652 (“While we agree that Ameritech should not be held to a standard of perfection in demonstrating that its OSS functions are operationally ready, we find that double-billing, as well as [other problems previously discussed], constitute[s] problems fundamental to Ameritech’s ability to provide nondiscriminatory access to OSS functions.”).

\(^{184}\) See id. at 20,612.
checklist requirement: the one stating that the BOC must provide "[n]ondiscriminatory access to network elements."\textsuperscript{185} While the FCC also questioned Ameritech's compliance with other checklist requirements, it devoted minimal discussion to each of them.\textsuperscript{186}

c. Compliance with Separate Affiliate Requirements

The FCC next found that Ameritech did not satisfy § 272's requirement that the applicant provide long-distance service only through a separate affiliate.\textsuperscript{187} Section 272(b)(3) requires a BOC's long-distance affiliate to "have separate officers, directors, and employees from the [BOC] of which it is an affiliate."\textsuperscript{188} As it noted in the application, no Ameritech entities have boards of directors.\textsuperscript{189} Without questioning Ameritech's assertion that its local and long-distance affiliates did not share any officers or employees, the FCC zeroed in on the separate directors requirement.\textsuperscript{190} After parsing Ameritech's corporate structure, Michigan corporate law, and Delaware corporate law, despite conceding that "complete independence of management of the subsidiary will not always be possible,"\textsuperscript{191} the FCC determined that Ameritech and its long-distance affiliate did not have sufficiently separate management.\textsuperscript{192}

In addition, the Ameritech Michigan Order states that Ameritech failed to demonstrate its intention to comply with § 272(b)(5),\textsuperscript{193} which requires the BOC and its affiliate to consummate all transactions at arm's length and make them "available for public inspection."\textsuperscript{194} Notably, § 272 imposes structural and operational requirements that apply to the BOC after it receives permission to provide long-distance service.\textsuperscript{195} The FCC must make predictive judgments about whether the applicant will satisfy the various § 272

\textsuperscript{186} See Ameritech Mich., 12 F.C.C.R. at 20,662-724 (exhibiting a far shorter discussion to other checklist items).
\textsuperscript{187} See id. at 20,725. For a more detailed discussion of the § 272 requirements and a brief explanation of the economic rationale underlying them, see supra notes 117-20 and accompanying text.
\textsuperscript{188} 47 U.S.C. § 272(b)(3).
\textsuperscript{189} See Ameritech Michigan Application, supra note 91, at 61.
\textsuperscript{190} See Ameritech Mich., 12 F.C.C.R. at 20,728.
\textsuperscript{191} Id. at 20,731.
\textsuperscript{192} See id. at 20,728-32 (discussing Michigan and Delaware corporate law, and concluding that Ameritech Corporation, the parent company of all Ameritech affiliates, has the "responsibilities of a 'director' for both" the local and long-distance service affiliates).
\textsuperscript{193} See id. at 20,734.
\textsuperscript{195} See id. § 271(d)(3)(B) (stating that, when reviewing a § 271 application, the FCC must find that "the requested authorization \textit{will} be carried out in accordance with the requirements of section 272 of this title" (emphasis added)).
requirements, including § 272(b)(5). This order indicates that the FCC stands ready to use its “predictive judgment” as another tool to scrutinize exceedingly closely BOC applications.

Perhaps the most telling example of the FCC’s adoption of detailed evaluation standards is the Commission’s finding that Ameritech would not satisfy the § 272(g) restriction on joint marketing. Under this provision, a BOC may market its long-distance affiliate’s services only if it informs customers that other long-distance service providers are available. The FCC examined the script Ameritech’s telemarketers would use when talking to potential customers. The proposed script read:

You have a choice of companies, including Ameritech Long Distance, for long distance service. Would you like me to read from a list of other available long distance companies or do you know which company you would like?

The FCC concluded that this script violated § 272(g) and demanded that Ameritech adopt a script that randomly listed long-distance carriers with each new customer’s call. Based on this discussion, the FCC presumably stood ready to reject a § 271 application because it disapproved of a telemarketing script. The Commission apparently realized the foolhardiness of this finding and reversed its position in its BellSouth South Carolina Order. Ameritech’s proposed script now would pass muster.

d. The Public Interest Inquiry

The Ameritech Michigan Order did not opine whether Ameritech met the statutory requirement that its “requested authorization [be] consistent with the public interest, convenience, and necessity.” The FCC took the occasion, however, to explain what future BOC ap-

196 See Ameritech Mich., 12 F.C.C.R. at 20,734 (“[S]ection 271(d)(3)(B) requires the Commission to make a predictive judgment regarding the future behavior of a section 271 applicant.”).
197 See 47 U.S.C. § 272(g)(1) (“A [BOG] affiliate . . . may not market or sell telephone exchange services provided by the [BOC] unless that company permits other entities offering the same or similar service to market and sell its telephone exchange services.”).
199 Id. at 20,737.
200 See id. at 20,738 (concluding that Ameritech did not satisfy § 272(g) because “not only are BOCs required to provide customers requesting new local exchange service the names of competing [long-distance] carriers, but they must provide these names in random order”).
201 See id.
202 See BellSouth Corp., 13 F.C.C.R. 539, at 671 (1997) (BellSouth SC Order) (“[W]e find that the Commission’s decision in the Ameritech Michigan Order placed too much weight on the equal access obligations, and too little weight on the BOCs’ right to jointly market local and long distance services.”).
applicants would have to do to satisfy this provision.\textsuperscript{204} Even if a BOC clears the first three § 271 hurdles, the Commission strongly indicated that its public interest analysis would be quite probing and would require a BOC to submit myriad information.\textsuperscript{205} The FCC rejected in favor of its own broad interpretation both Ameritech’s and the DOJ’s views concerning the proper scope of the public interest inquiry.\textsuperscript{206}

The FCC articulated a standard by which it assesses various factors bearing on competition within both the local and the long-distance markets.\textsuperscript{207} It expressly rejected the argument that it should view the competitive checklist as limiting its public interest inquiry.\textsuperscript{208} Instead, it enunciated certain, specific requirements that it expects from future BOC applicants. For example, the FCC expects future § 271 applications to contain (1) evidence that BOCs have “provided new entrants with optional payment plans for the payment of non-recurring charges,”\textsuperscript{209} (2) information regarding state and local laws “that may constitute barriers to entry... or that are intended to promote such entry,”\textsuperscript{210} and (3) evidence bearing on whether the “applicant has engaged in discriminatory or other anticompetitive conduct.”\textsuperscript{211}

3. BellSouth’s South Carolina Application

BellSouth’s application marked the first time a BOC applied for § 271 approval primarily on the basis of Track B.\textsuperscript{212} BellSouth claimed that the lack of substantial competition in South Carolina could be attributed wholly to strategic business decisions made by potential market entrants.\textsuperscript{213} BellSouth pointed out that nothing ap-

\textsuperscript{204} See Ameritech Mich., 12 F.C.C.R. at 20,742 (explaining that, while not pertinent to this particular order, the FCC felt “it would be useful to identify certain issues and make certain inquiries for the benefit of future applicants... relating to the meaning and scope of the public interest inquiry mandated by Congress”).

\textsuperscript{205} See id. at 20,743-47.

\textsuperscript{206} See id. at 20,743-45. The FCC claimed that “Congress intended the Commission, in evaluating section 271 applications, to perform its traditionally broad public interest analysis of whether a proposed action or authorization would further the purposes of the Communications Act.” Id. at 20,744.

\textsuperscript{207} See id. at 20,746.

\textsuperscript{208} See id. at 20,747 (“[W]e believe that compliance with the checklist will not necessarily assure that all barriers to entry to local telecommunications market have been eliminated, or that a BOC will continue to cooperate with new entrants after receiving in-region, interLATA authority.”).

\textsuperscript{209} Id. at 20,749.

\textsuperscript{210} Id.

\textsuperscript{211} Id.

\textsuperscript{212} Note that SBC’s application to provide long-distance service in Oklahoma sought approval on the basis of Track B, see SBC Oklahoma Application, supra note 91, at 12-15, and the FCC did discuss extensively the merits of this contention, see SBC Communications Inc., 12 F.C.C.R. 8685, 8699-724 (1997). SBC first argued for Track A approval, however, and its arguments under this track were considerably more extensive than those BellSouth put forth.

\textsuperscript{213} See BellSouth SC Application, supra note 91, at 14. As BellSouth argued:
proaching the competition the 1996 Act envisioned existed in South Carolina.\footnote{214} Relying on this argument, and armed with unconditional approval and support from its state commission,\footnote{215} BellSouth urged the FCC to let market forces "jump-start competition" in both the local and long-distance markets.\footnote{216} BellSouth also advanced a test-market theory, hypothesizing that South Carolina gave the FCC an excellent opportunity to test the effects of approving a § 271 application.\footnote{217} The FCC declined the opportunity and denied BellSouth's application.\footnote{218}

The separate statements that several FCC commissioners attached to the denial order demonstrate the strength of BellSouth's application. Three of the FCC's five commissioners, including the Chairman, recognized the positive steps BellSouth had taken and acknowledged that the § 271 application process has faults.\footnote{219} Moreover, only a short time after issuing this order, the FCC released its statement call-

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The [South Carolina Public Service Commission (SCPSC)] has confirmed that [the competitor's] failure to move more quickly to launch facilities-based local service—particularly for residential customers—is due solely to their own business decisions, for BellSouth has not "taken any action to prevent or to retard the development of local competition in South Carolina." Id. (quoting BellSouth Telecomm., Inc., Order No. 97-640, No. 97-101-C, at 20 (Pub. Serv. Comm'n S.C., July 31, 1997) (SCPSC compliance order) (on file with SCPSC)). As an affiant for BellSouth pointed out, "The fact that facilities-based carriers have not entered [BellSouth's] local markets in South Carolina . . . is a product of the state's market and demographic conditions." Affidavit of Glenn A. Woroch at 35, BellSouth Corp., 13 F.C.C.R. 539 (1997) (No. 97-208) [hereinafter BellSouth Woroch Affidavit].
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\textit{Cf.} BellSouth SC Application, \textit{supra} note 91, at i ("Twenty months of experience under the 1996 Act show[s] it is futile and enormously costly to delay interLATA competition while waiting for facilities-based local competition to spread to both business and residential customers.").
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As more fully discussed \textit{infra} Part IL.B.3(a), the SCPSC found that BellSouth satisfied the Track B and competitive checklist requirements, and it recommended that the FCC approve BellSouth's § 271 application.\footnote{216}

BellSouth SC Application, \textit{supra} note 91, at i ("Rather than relying solely on regulation, the Commission can use its authority under section 271 to let market forces jump-start competition in local and interLATA services.").\footnote{217}

\textit{See id.} ("South Carolina is the perfect laboratory for proving this more promising approach . . . .")\footnote{218}

Commissioner Furchtgott-Roth quipped that "[i]t has been a good year for those who earn a living through the industry of telecommunications regulation," and pointed out that the Commission "commends BellSouth for its efforts and the progress that it has made in opening its local market to competition." \textit{Id.} at 682 (separate statement of Commissioner Harold Furchtgott-Roth). Commissioner Powell echoed the sentiments and recognized the deficiencies in the current § 271 process. \textit{See id.} at 683 (separate statement of Commissioner Michael K. Powell) ("I believe we must do more or adopt a new approach to this process if we hope to provide the clarity that BOCs and new entrants need to open up local markets."). Chairman Kennard joined the chorus, stating that "BellSouth has made significant progress towards opening the market for local telephone service in South Carolina." \textit{Id.} at 676 (separate statement of Chairman William E. Kennard).
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ing for a "collaborative approach" to the application process. These signs are positive for the BOCs, but only time will tell whether the FCC's statements are truly a commitment to opening the markets or merely rhetoric. The BellSouth South Carolina Order itself suggests that they are the latter. The FCC rejected the state commission's recommendations and denied BellSouth's application for failing to meet both the Track B and the OSS-related checklist requirements.

a. Rejecting the South Carolina Commission's Recommendations

As in the SBC Oklahoma Order, the FCC chose to ignore the state commission's recommendation that it allow BellSouth to compete in the long-distance market. It is worth reiterating that the state commission is the agency with the most intimate knowledge concerning competition within its jurisdiction. As BellSouth pointed out in its application, "the [South Carolina Public Service Commission] has been 'doing the hard job of promoting competition in [its] jurisdiction' and thus is intimately familiar with the activities of BellSouth and new entrants alike." Although the FCC certainly considered the state commission's findings, it apparently did not give them significant weight. Instead, the FCC's order once again contained several decisions directly contrary to those the state commission offered in its compliance order. The FCC rendered its own decisions despite acknowledging that the South Carolina Public Service Commission

220 Collaborative Approach; supra note 17; infra notes 271-73 and accompanying text.

221 It may be instructive to note that the commissioners' statements cited above, see supra note 219, fell well short of advocating either a less active role for the FCC or the immediate approval of a BOC application. Instead, they seemed intent on maintaining significant barriers to BOC entry, but conceded that the FCC should and will be available to provide more guidance to the BOCs prior to the filing of an application. See, e.g., 13 F.C.C.R. at 683-94 (BellSouth SC Order) (separate statement of Commissioner Michael K. Powell) (pointing out that "BellSouth's application is deficient in certain important areas," but stating that the Commission "could do much more to help develop and implement a workable, collaborative framework for promoting compliance with section 271").


224 Compare 13 F.C.C.R. at 585 (BellSouth SC Order) ("[W]e find that BellSouth does not generally offer[ ] . . . to provide certain of the checklist items." (internal quotation marks omitted) (first alteration in original)), with BellSouth Telecomm., Inc., Order No. 97-640, No. 97-101-C, at 6 (Pub. Serv. Comm'n S.C. July 31, 1997) (SCFSC Compliance Order) ("[BellSouth has] demonstrated that it is functionally able to provide these [checklist] items in South Carolina when ordered by a [competing provider].").
(SCPSC) held extensive public hearings, which included testimony, cross-examination, and over 1500 pages of pleadings.\textsuperscript{225}

b. \textit{Finding BellSouth in Noncompliance with Track B Requirements}

BellSouth filed its application under the theory that it complied with § 271(c)(1)(B)—Track B.\textsuperscript{226} Track B allows an applicant to continue the § 271 process even though it does not yet face a facilities-based competitor in its local market.\textsuperscript{227} BellSouth noted, and the FCC agreed, that Congress enacted this provision to prevent potential competitors from "gaming" the system.\textsuperscript{228} That is, a competitor should not be able to delay a BOC's entry into the long-distance market merely by refusing to compete with the BOC in its local exchange market. Gaming represents a very real concern, and BellSouth legitimately argued that, without Track B, "companies such as AT&T, MCI, and Sprint would have a strong incentive to continue delaying facilities-based local entry so as to protect their own shares of the [long-distance] market against Bell company competition."\textsuperscript{229}

To follow Track B, BellSouth filed a statement of the terms and conditions it generally offers to any potential competitor,\textsuperscript{230} and the state commission approved this statement.\textsuperscript{231} Nonetheless, the FCC found that BellSouth failed to comply with Track B because the BOC had received "qualifying requests."\textsuperscript{232} As the FCC originally articulated in the \textit{SBC Oklahoma Order}, a request is qualifying when potential competitors expressly seek to negotiate binding interconnection

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\item[\textsuperscript{225}] See 13 F.C.C.R. at 555 & n.53 (BellSouth SC Order); see also BellSouth SC Application, \textit{supra} note 91, at 2-3 ("Acting as the trier of fact, the SCFSC adduced evidence, evaluated the credibility of witnesses who were exposed to cross examination under oath, and reached conclusions on a record containing over 1600 pages of live and prepared sworn testimony and another 1500 pages of pleadings.").
\item[\textsuperscript{226}] See BellSouth SC Application, \textit{supra} note 91, at 4-15. BellSouth also argued that it complied with Track A; however, this argument was half-hearted. See \textit{id.} at 15-17 (proposing that information held by competitors might indicate that BellSouth could proceed under Track A).
\item[\textsuperscript{227}] See 47 U.S.C. § 271(c)(1)(B) (Supp. II 1996); \textit{supra} notes 107-08 and accompanying text.
\item[\textsuperscript{228}] See 13 F.C.C.R. at 566 (BellSouth SC Order) (describing the purpose of Track B as that of preventing potential competitors' ability to delay indefinitely BOC entry into the long-distance market by simply not seeking to compete with the BOC in its local market); BellSouth SC Application, \textit{supra} note 91, at 8 (claiming that "[t]he House Commerce Committee . . . drafted Track B 'to ensure that a BOC is not effectively prevented from seeking entry into the long distance market [simply] because no facilities-based carrier which meets the criteria specified in the Act sought to enter the market'" (quoting H.R. REP. No. 104-204, at 77 (1995), \textit{reprinted in} 1996 U.S.C.C.A.N. 10, 45)).
\item[\textsuperscript{229}] BellSouth SC Application, \textit{supra} note 91, at 9.
\item[\textsuperscript{230}] See 47 U.S.C. § 271(c)(1)(B).
\item[\textsuperscript{231}] See BellSouth SC Application, \textit{supra} note 91, at 7.
\item[\textsuperscript{232}] 13 F.C.C.R. at 571, 574-77 (BellSouth SC Order).
\end{itemize}
agreements with a BOC.233 The statutory question, therefore, is at what point the FCC should deem a request “qualifying.” BellSouth took the position “that a request can preclude an application under Track B only if the requester . . . has made a request . . . [and] is ‘taking reasonable steps toward implementing its request in a fashion that will’” lead to facilities-based local competition.234 The FCC demurred: “Rather, we find that a request can be qualifying by its terms and need not be accompanied by reasonable steps.”235 This interpretation departed from the standard the Commission applied in the SBC Oklahoma Order236 in which it appeared to accept a reasonable-steps approach.237 Instead, the FCC concluded that there could exist only two situations in which the BOC has received a request for interconnection but still may proceed under Track B: the requesting party must either (1) breach an already negotiated agreement or (2) fail to negotiate in good faith.238 This standard, which arguably undermines Congress’s efforts to quash incentives to game the Act, puts a considerably greater onus on any BOC seeking to proceed under Track B.

c. Finding BellSouth in Noncompliance with the Competitive Checklist

As with the Ameritech Michigan Order, the majority of the FCC’s BellSouth South Carolina Order addresses concerns over the BOC’s compliance with the competitive checklist.239 Specifically, the FCC questioned whether BellSouth had provided competitors with nondiscriminatory access to its OSS.240 The FCC adhered to its view that a competitor’s reputation may suffer because of customer service problems that are the fault of the incumbent BOC’s OSS.241 The Commission ruled that the BOC’s OSS must provide potential com-

234 BellSouth SC Application, supra note 91, at 10 (quoting SBC Communications Inc., 12 F.C.C.R. at 8718-19).
235 13 F.C.C.R. at 573 (BellSouth SC Order).
236 See id. at 574 (stating that “[u]pon further reflection, we observe that there may be other more efficient ways of assessing requests . . . for purposes of Track B” than the reasonable-steps approach).
237 See SBC Communications Inc., 12 F.C.C.R. at 8716 (rejecting the notion “that any request from a potential competitor forecloses Track B”).
238 See id.
239 See supra notes 162-64 and accompanying text (pointing out that a bulk of the Ameritech Michigan Order focused on the competitive checklist).
240 See 13 F.C.C.R. at 585 (BellSouth SC Order) (“A competing carrier that lacks access to operations support systems equivalent to those the incumbent [local carrier] provides to itself, its affiliates or its customers, ‘will be severely disadvantaged, if not precluded altogether, from fairly competing.’” (quoting Local Competition Provisions in Telecomm. Act of 1996, 11 F.C.C.R. 15,499, 15,764 (1996))). For a brief explanation of what comprises OSS, see supra notes 165-68 and accompanying text.
241 See 13 F.C.C.R. at 588 (BellSouth SC Order).
petitors with a service level identical to that which the BOC receives, or competitors cannot truly compete with the incumbent BOC.

The discussion of BellSouth's OSS largely paralleled the Ameritech Michigan Order. The FCC found that BellSouth's pre-ordering and ordering OSS did not provide the same degree of access and accuracy to its competitors that BellSouth itself enjoyed. Many of these problems existed because BellSouth's OSS were not yet integrated for competitors. Because BellSouth, at the time of its application, recognized that problems did exist, it proposed several methods by which a competitor could overcome them, all of which the FCC rejected.

To illustrate the sequence of events, consider one problem competitors identified: they had difficulty transferring customer information from their systems to those of the BOC because of integration problems with the BOC's OSS. Upon notice of the difficulty, BellSouth proposed, as one alternative, that competitors cut and paste information from one interface to the other until their systems worked seamlessly with BellSouth's—a project BellSouth was working on. The FCC found this option unsatisfactory, stating that it forced "new entrants [to] take an extra step between the pre-ordering and ordering processes that BellSouth does not face in the case of its own retail operation, thereby increasing the likelihood of errors and delay for new entrants but not for BellSouth's retail operation." The FCC reasoned that this cut-and-paste delay might cause the new entrant "a significant competitive disadvantage.

The FCC also extensively addressed one non-OSS-related checklist requirement. The fourteenth checklist requirement stipulates that a BOC must make its telecommunications services available for resale. BellSouth claimed that this provision does not cover special Contract Service Arrangements (CSAs). CSAs are specially negotiated agreements that give high-volume customers significant discounts. BellSouth argued that the resale requirement should not apply to CSAs if it would have an unreasonable or discriminatory effect. The FCC's requiring BellSouth to provide these heavily discounted services to a competitor at an even lower rate severely would

242 See, e.g., id. at 598 ("Evidence in the record suggests that, for example, AT&T and MCI must submit orders an average of 1.7 times before acceptance by BellSouth's systems, adding significant delay to the ordering process.").
243 See id. at 602.
244 See id. at 620-29.
245 Id. at 620.
246 Id. at 621.
248 See BellSouth SC Application, supra note 91, at 53.
249 See id.
250 See id. at 52.
hampers its ability to compete for these contracts. The FCC rejected BellSouth's contentions and found the BOC in noncompliance with the resale provision. The FCC pointed out that it previously had required CSAs to be available for resale in the same manner as all other telecommunications services. By failing to comply, the FCC stated, BellSouth impermissibly impaired competition.

4. BellSouth's Louisiana Application

BellSouth's Louisiana Application coincided with its South Carolina application. In fact, BellSouth filed this application before the FCC even issued its BellSouth South Carolina Order. The FCC immediately recognized that the two applications did not differ materially; therefore, the Louisiana application and the resulting order add little to the foregoing analysis. The FCC rejected the findings of the Louisiana Public Service Commission (LPSC), which had examined a 6200-page record with 3800 pages of testimony. The FCC also found that the same OSS issues existed. Because BellSouth's systems were identical throughout its entire region, a presumption of noncompliance resulted from the findings in the BellSouth South Carolina Order.

251 See 13 F.C.C.R. at 659 (BellSouth SC Order) (noting BellSouth's argument that CSA prices were already discounted from the tariff rate).
252 See id. at 658-63 ("We find that BellSouth fails to comply with item fourteen of the competitive checklist by refusing to offer CSAs at a wholesale discount.").
253 See id. at 657.
254 See id. at 662 ("BellSouth's CSA restriction may have significant competitive effects.").
255 In fact, BellSouth filed this application before the FCC even issued its BellSouth South Carolina Order. BellSouth filed its Louisiana application on November 6, 1997. See BellSouth Louisiana Application, supra note 91. The FCC issued its determination of BellSouth's South Carolina application on December 24, 1997. See BellSouth Corp., 13 F.C.C.R. 539 (1997) (BellSouth SC Order).
256 See BellSouth Corp., 13 F.C.C.R. 6245 (1998) (BellSouth Louisiana Order) ("In many respects, the instant application is materially indistinguishable from BellSouth's application to provide interLATA services in South Carolina.").
257 See id. at 6251-52 & n.31. As BellSouth noted, the Louisiana commission considered a multitude of factors, "adduced evidence, evaluated the credibility of witnesses who were exposed to cross examination under oath, and reached conclusions on a nearly 6,200-page record that included over 3,800 pages of testimony." BellSouth Louisiana Application, supra note 91, at 3. In fact, after receiving this evidence, "[t]he Louisiana Commission broadened the scope of the [proceeding] to encompass specific consideration of BellSouth's [application]." 13 F.C.C.R. at 6251-52 (BellSouth Louisiana Order). BellSouth further argued that "[t]he FCC must not countenance efforts to end-run the investigations of state commissions that are most familiar with the facts and best positioned to determine local competition issues. It should, instead, accord the findings of the Louisiana PSC the deference to which they are properly entitled under section 271." BellSouth Louisiana Application, supra note 91, at 5.
258 See 13 F.C.C.R. at 6258 (BellSouth Louisiana Order).
Finally, the FCC again noted that BellSouth treated CSAs in contravention of the FCC's prior determinations regarding resale of services. BellSouth did raise one novel argument in its Louisiana application. It asserted that it satisfied the Track A requirements because it faced competition from PCS providers in Louisiana. BellSouth had negotiated interconnection agreements with three wireless service providers. These agreements forced the FCC to consider whether wireless service companies qualified under Track A's requirements as "competing providers of telephone exchange service." The Commission previously had held that PCS services are telephone exchange services, BellSouth also argued that while Congress expressly excluded cellular services from Track A's purview, it conspicuously did not exclude PCS services. The FCC elected not to address this issue in detail, finding instead that BellSouth did not satisfy the competitive checklist requirements. The order ends by noting that the FCC considered PCS providers still to be in transition from providing a complementary service to providing a competitively equivalent service.

5. Summary of the First Four Section 271 Applications

As is readily apparent from the above analysis, both the FCC and the BOCs must cope with an extensive and cumbersome statutory scheme. Certain issues dominate each application and order. On the technical side, the FCC seems intent primarily on requiring the BOCs

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259 See id. ("We use the determinations we made about BellSouth's operations support systems in our BellSouth South Carolina Order as a starting point."); supra notes 239-46 and accompanying text.

260 See 13 F.C.C.R. at 6281-84 (BellSouth Louisiana Order).

261 See BellSouth Louisiana Application, supra note 91, at 5 ("BellSouth ... is eligible to apply for interLATA relief under Track A based on its interconnection agreements with several wireless carriers.").

262 See id. at 9.

263 47 U.S.C. § 271(c)(1)(A) (Supp. II 1996); see BellSouth Louisiana Application, supra note 91, at 10.


265 See BellSouth Louisiana Application, supra note 91, at 10-12. Section 271(c)(1)(A) states that "services provided pursuant to subpart K of part 22 of the Commission's regulations ... shall not be considered to be telephone exchange services." 47 U.S.C. § 271(c)(1)(A). While the FCC's rules governing cellular services are contained in part 22, the Commission has placed the PCS rules in part 24. See 13 F.C.C.R. at 6289-90 (BellSouth Louisiana Order).

266 See 13 F.C.C.R. at 6289 (BellSouth Louisiana Order) ("Given our conclusion that BellSouth does not meet the competitive checklist, we need not and do not decide in this Order whether, for purposes of section 271(c)(1)(A), the PCS carriers listed above are 'competing providers of telephone exchange service' in the State of Louisiana.").

267 See id. at 6290.
to improve considerably their OSS. The Commission has interpreted the 1996 Act to require the BOCs to provide virtually identical OSS to their local-service competitors. Despite the complexity of the systems involved, the FCC has exhibited little tolerance for errors. To say that the FCC has assumed a stubbornly inflexible stance would be a considerable understatement.

A significant nontechnical issue appears to be the interaction between the FCC and the state commissions. It is difficult to assess precisely what weight the FCC has given the state commissions' recommendations. What does seem clear is that the FCC approaches state commissions' findings with a strong dose of skepticism, which has led it to reject the state commissions' support for SBC's and BellSouth's entries into the Oklahoma, South Carolina, and Louisiana long-distance markets.

Both disputes, and particularly the controversy over the 1996 Act's assignment of responsibilities between the FCC and state commissions, seem well suited for resolution under the new collaborative approach the FCC promised. Nonetheless, the FCC must go further in adopting a new § 271 approach to address criticisms such as Judge Kendall's in *SBC Communications, Inc. v. FCC*: "[P]erhaps most significantly, it is conceivable that [the § 271] requirements may never be met by the BOCs. Not only is the 'Competitive checklist' in § 271 extremely onerous, the process for applying to have the numerous restrictions removed is tainted with indefiniteness and replete with arbitrary standards." It is conceivable that the FCC does not feel the need to rid itself or the process of this sort of castigation. If it does wish to answer its many critics, however, adopting a less stringent approach to its application reviews would go a long way toward achieving this goal.

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268 Chairman Kennard recognized as much in a speech to state utility commissioners in November 1997. During that speech he stated: "The goal of assuring competition . . . will only be achieved if the FCC and the states work together. . . . [T]he FCC and the states [must find] common ground to achieve these goals. I intend to continue to work closely with the States to forge common solutions that deliver choice . . . for American consumers." William Kennard, *Statement on the Filing of Petition for Writ of Certiorari*, Nov. 19, 1997, available in 1997 FCC LEXIS 6388.

269 See *Collaborative Approach*, supra note 17, at *8 ("[W]e must also] defer[ ] to [the State Commissions' and the Justice Department's] judgments, according to the unique strengths and perspectives they each bring to the local market-opening process").

III.
ENCOURAGING THE FCC TO RELAX ITS SCRUTINY OF SECTION 271 APPLICATIONS: THE STATUTORY SCHEME AND TECHNOLOGICAL LANDSCAPE

The FCC need not take such a detailed approach to the § 271 application process. The 1996 Act contains sufficiently vague language and a broad mandate, which the FCC could use to justify several approaches to its review of BOC applications. In addition, the FCC's proposed collaborative approach is not necessarily the answer. Although this strategy addresses several problems stemming from the current, overly stringent approach, a collaborative effort still requires too much FCC intervention. Moreover, it is improbable that the proposed collaborative effort in fact will lead to an approved application materially faster than the FCC's current policy. As an alternative to both the current and proffered policies, the FCC should take a minimalist approach.

Under a minimalist approach, the FCC would exercise forbearance and its powers of oversight. The focus would be on allowing market forces, as opposed to regulatory actions, to guide the telecommunications industry. The FCC would still have to review § 271 applications for statutory compliance; however, it would perform this duty in a considerably more flexible manner. It would not, for ex-

271 See, e.g., supra text accompanying notes 136-43 (highlighting instances in which the FCC had to decide the proper interpretation to give to certain statutory provisions).
272 See DUESTERBERG & GORDON, supra note 3, at 74-75 (arguing that "Congress was unduly vague in giving the FCC its mandate and that this vagueness left the commission ample room for . . . expansive interpretation").
273 Commissioner Powell himself, an original advocate of the collaborative approach, stated:

I am not calling for a process that will make it easy for BOCs to get into long distance, without first having to comply fully with the local market opening measures set out by Congress and this Commission. What I am calling for is a process that will clearly place in the hands of the BOCs the seeds of their own success, which will ultimately bear fruit for the American consumer.

Collaborative Approach, supra note 17, at *2-3 (internal quotation marks omitted).
274 See DUESTERBERG & GORDON, supra note 3, at 23. Duesterberg and Gordon note:

Moving immediately to reliance on market forces, rather than on traditional regulatory direction, is necessary if a truly efficient interconnected network is to evolve, new investment is to take place at the proper rate (and by those best able to do it), and customers are to receive the full benefits of the dynamic new technologies.

Id.
275 There are some commentators who advocate a substantial or complete reduction of the FCC's regulatory role. See, e.g., id. at 99-95 (arguing for sunsetting the FCC's regulatory power); Chen, supra note 22, at 870 (advocating "immediate, unfettered [BOC] entry into [long-distance] carriage"). This Note argues that these approaches go too far. By
ample, reject an application because of a telemarketing script. Nor would it demand that incumbent BOCs provide flawless OSS to new entrants in the local markets. Instead of reviewing an application with a single-minded focus on past monopolistic evils, the FCC would place more emphasis on moving as rapidly as possible to a fully competitive marketplace.

This Part describes how legal and economic conditions favor this more minimalist, deregulatory solution. It argues that the current statutory scheme and technological landscape adequately protect the industry from the monopolistic conduct the opponents of BOCs' entry into the long-distance market fear. The FCC, therefore, has little reason to persist with the overly burdensome approach it has insisted upon thus far.

A. Statutory Safeguards

The most significant statutory safeguard in the 1996 Act is § 272. This section takes effect once the FCC grants a BOC permission to provide long-distance service. It requires the BOC to provide long-distance and local exchange services through separate affiliates. It also subjects the BOC to various requirements relating to corporate structure, to reporting, and to auditing. In sum, § 272 enacts safeguards designed to ensure that the BOC does not engage in anticompetitive conduct. Section 272 directly responds to concerns that a BOC providing long-distance service might engage in both cost misallocation and improper discrimination.
The FCC addressed the problem of cost misallocation, or cross-subsidization, well before the 1996 Act and § 272 went into effect. By substituting price caps for the previous cost-based regulation, the FCC largely removed incentives for a BOC to misallocate costs. Cost misallocation occurs when the BOC realizes some advantage from shifting costs to its local services that it more properly should attribute to its long-distance services. Under the earlier system of cost-based regulation, the regulating agencies tied the BOC's allowable rate of return to its reported costs. The BOC could earn more revenue by reporting higher costs, thereby avoiding net losses after an increase in expenses and having an incentive for cross-subsidization. Because under a price-cap regime the BOC's allowable rate of return is not directly tied to its reported costs, shifting costs will not produce higher ceiling prices. As a result, an increase in expenses will produce a net loss, which removes a substantial incentive to misallocate costs.

Section 272 further ensures that BOCs will not allocate costs improperly by mandating specific reporting and accounting requirements. It requires the BOC to disclose all transactions with its long-distance affiliate. The BOC also is subject to biennial compliance audits. By taking these additional steps, Congress sharply reduced any remaining opportunities for cost-shifting.

... enacted section 272 to respond to the concerns about anticompetitive discrimination and cost-shifting that arise when a BOG enters the interLATA services market in an in-region state in which the local exchange market is not yet fully competitive.

See Declaration of Professor Jerry A. Hausman at 27-28, BellSouth Corp., 13 F.C.C.R. 539 (1997) (No. 97-208) [hereinafter BellSouth Hausman Affidavit] ("Almost all economists agree that 'pure' price caps remove cost misallocation problems. Since the regulatory cost basis does not affect prices under price cap regulation, cost allocations do not matter."); see also supra text accompanying notes 68-71 (describing the shift to price-cap regulation).

See SBC Oklahoma Application, supra note 91, at 75.

See supra notes 50-52 and accompanying text (describing cost-based regulation).

See BellSouth SC Application, supra note 91, at 86 ("There is no 'reward for shifting costs from unregulated activities into regulated ones, for the higher costs will not produce higher legal ceiling prices.'" (citing National Rural Telecomm. Ass'n v. FCC, 988 F.2d 174, 178 (D.C. Cir. 1993)). As Jerry Hausman pointed out, some economists question the effectiveness of price-cap regulation because it is not "pure." BellSouth Hausman Affidavit, supra note 285, at 27-28. However, as Hausman further explains, "most economists recognize that the price cap plans do substantially decrease any incentives for a BOG to cross subsidize or misallocate costs." Id. at 28.

Section 272(b)(5) requires that the long-distance affiliates and BOCs shall conduct all transactions "on an arm's length basis with any such transactions reduced to writing and available for public inspection." 47 U.S.C. § 272(b)(5) (Supp. II 1996).

See id. § 272(d).

See BellSouth Louisiana Application, supra note 91, at 104 ("In section 272 of the 1996 Act, Congress sharply reduced opportunities for cost-shifting by requiring that a Bell company provide long distance through an affiliate that has separate facilities, employees, and record-keeping from the local telephone company. Moreover, Congress reinforced structural separation with demanding accounting requirements." (citation omitted)).
Some commentators argue that BOCs still have both the incentive and the ability improperly to allocate costs. They argue that regulators will be unable to detect these misallocations. This argument has become much less tenable because of both the FCC's accumulated experience in monitoring the BOCs and the increased effectiveness of independent audits. In addition, the long-distance providers now have over a decade of experience scrutinizing BOCs' actions and have a strong incentive to police the BOCs' activities for possible cost misallocations. Taken in the aggregate, these factors indicate that cost misallocation is a remote possibility and should not substantially concern the FCC.

Section 272 also flatly forbids all types of discrimination that BOCs might attempt to use to gain an unfair competitive advantage. Discrimination refers to conduct in which the BOC favors for access to its local network its long-distance affiliate over long-distance competitors. Price discrimination, for example, would result if a BOC charged a long-distance competitor a higher rate to terminate calls than what it charged its own long-distance affiliate. While price discrimination may have warranted significant concern in the past, even the FCC recognizes the minimal threat it poses today. Section 272(e)(3) expressly requires a BOC to charge its long-distance affiliate, or to impute to itself, "an amount for access to its telephone exchange service and exchange access that is no less than the amount...".

292 See, e.g., Affidavit of Robert H. Bork on Behalf of AT&T Corp. at 11, 15 n.1, BellSouth Corp., 13 F.C.C.R. 539 (1997) (No. 97-208) [hereinafter AT&T Bork Affidavit] (arguing that BOCs can still gain a competitive advantage by misallocating costs); Sullivan, supra note 53, at 520 ("[T]he cold fact is that price caps and other weaker incentive systems do not significantly reduce cross-subsidy incentives . . . .").

293 See AT&T Bork Affidavit, supra note 292, at 11-12 (hypothesizing that improper cost allocations by a BOC would be "particularly hard to detect"); Sullivan, supra note 53, at 520 (claiming that refinements in regulatory practices and auditing do not solve the problem of cross-subsidies).


295 See Chen, supra note 22, at 871 ("After twelve years of patrolling [local exchange] prices charged by GTE and the [BOCs], regulators and incumbent [long-distance carriers] alike have a benchmark by which to detect potential predation.").

296 See SBC Oklahoma Application, supra note 91, at 73-76; BellSouth SC Application, supra note 91, at 86-89.

297 See 47 U.S.C. § 272(c)(1) (Supp. II 1996) ("In its dealings with its affiliate[,] . . . a Bell operating company may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards . . . ."); Affidavit of Richard J. Gilbert at 31, BellSouth Corp., 13 F.C.C.R. 539 (1997) (No. 97-208) [hereinafter BellSouth Gilbert Affidavit] (citing § 272(c)(1)-(2), (e)(2)(A), and (e)(3) as "safeguards of the 1996 Act [designed to] ensure that BOC entry [into the long-distance market] will not result in discrimination").

298 See supra notes 54-57 and accompanying text.

299 See Pacific Telesis Group, 12 F.C.C.R. 2624, 2648 (1997) (finding that price discrimination "is relatively easy for [the FCC] and others to detect, and is therefore unlikely to occur").
charged to [its competitors]." 300 The clear intent of this section, coupled with sophisticated policing by both the FCC and BOC's competitors, works to thwart a BOC's possible efforts to violate the mandate against price discrimination.

In contrast, technical discrimination is more subtle and troubling. As the FCC stated in its *Ameritech Michigan Order*:

"[A] BOC may have an incentive to discriminate in providing exchange access services and facilities that its affiliate's rivals need to compete in the interLATA telecommunications services . . . markets. For example, a BOC may have an incentive to degrade services and facilities furnished to its affiliate's rivals, in order to deprive those rivals of efficiencies that its affiliate enjoys." 301

Section 272 recognizes this concern and flatly forbids such conduct. 302 The statute backs up this prohibition by requiring regular compliance audits. 303 Still, many observers question the efficacy of the statutory proscriptions and audits. 304 These apprehensions have some merit; however, they fail to recognize the unlikelihood that a discrimination scheme would succeed to the extent necessary truly to achieve an anticompetitive effect. 305 A BOC's activity must withstand not only the FCC's and state commissions' scrutiny, but also monitoring by long-distance providers, which have vendor management programs to detect discriminatory conduct. 306 The combination of overlapping statutory and market safeguards more than adequately protects against any significant form of discrimination.

One additional statutory safeguard warrants brief discussion: §271(d)(6). This section gives the FCC the power, after it has approved a § 271 application, to "correct [any] deficiency," "impose . . . penalt[ies]," and "suspend or revoke" the BOC's approval to provide

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303 See id. § 272(d).

304 See, e.g., AT&T Bork Affidavit, *supra* note 292, at 6 (arguing that the level of technological complexity inherent in the BOCs' networks would allow a BOC to exercise discriminatory discretion, which "would be largely beyond the ability of regulators to control").

305 See BellSouth Hausman Affidavit, *supra* note 285, at 30-31 ("The key insight here is that for possible discrimination to distort competition, the discrimination must be visible to the customer, but not visible to the competitor.").

306 See BellSouth Gilbert Affidavit, *supra* note 297, at 35-36. As Professor Gilbert stated: [T]o have an anti-competitive effect, the degradation in service would have to be significant enough for customers to notice it. These vendor management programs make it likely that [a long-distance carrier] would detect any degradation in BellSouth's access service long before any customer could notice that degradation and attribute it to the [long-distance carrier].

*Id.*
long-distance service.\textsuperscript{307} The FCC has ninety days to act on any complaint asserting that the BOC is violating conditions its § 271 approval required.\textsuperscript{308} By compelling a quick FCC response, the statute effectively guarantees that a BOC could not gain even a short-term advantage by violating its statutory duties.\textsuperscript{309} Furthermore, the FCC already has indicated that it intends to interpret its § 271(d)(6) power broadly.\textsuperscript{310} The FCC's willingness to use this section to impose sanctions and the drastic effect these sanctions can have on a BOC's business afford yet another reason why the FCC need not apply such stringent standards to § 271 applications.

B. Technological and Other Economic Safeguards

Aside from the numerous statutory provisions Congress designed to prevent anticompetitive conduct, current technological constraints and market conditions in the telecommunications industry make it increasingly difficult for a BOC to hinder the development of competition.\textsuperscript{311} The technological complexity and automation of the BOCs' systems make it increasingly difficult for a BOC to circumvent its systems to discriminate against competitors.\textsuperscript{312} As BellSouth pointed out in both its South Carolina and Louisiana applications, a BOC's adversely affecting a competitor's network services in a way that would not be readily detectable would require an exceptional effort.\textsuperscript{313}

Current market conditions impose even greater constraints on a BOC's ability negatively to impact competition in either the local or long-distance market. First, the major long-distance providers are powerful foes that will cling tenaciously to their market shares.\textsuperscript{314}

\textsuperscript{308} See id. § 271(d)(6)(B).
\textsuperscript{309} See Ameritech Michigan Application, \textit{supra} note 91, at 92-93 ("[T]he Commission must act upon any complaints about a BOC's behavior within 90 days, ensuring that a BOC cannot reap even short-term rewards for any anticompetitive behavior.").
\textsuperscript{310} SeeAmeritech Mich., 12 F.C.C.R. 20,543, 20,750 (1997) (pointing out that the FCC interprets § 271(d)(6) as granting the Commission broad authority to remedy any perceived BOC violations).
\textsuperscript{311} SeeAmeritech Michigan Application, \textit{supra} note 91, at iv ("The statutory and regulatory safeguards established under the 1996 Act, as well as economic and technological constraints, make it virtually impossible for [a BOC] to use its position to obstruct competition in the provision of either local or long distance services."); DUISTERBERG & GORDON, \textit{supra} note 3, at 24 ("Recent technological, regulatory, and market developments have made clear that monopolized local-exchange access . . . can be dealt with by allowing competition to develop at the local level.").
\textsuperscript{312} See BellSouth Louisiana Application, \textit{supra} note 91, at 108.
\textsuperscript{313} See id.; BellSouth SC Application, \textit{supra} note 91, at 91-92.
\textsuperscript{314} See SBC Oklahoma Application, \textit{supra} note 91, at 78 ("Realistically, . . . any attempt to drive out large and well-financed incumbent carriers who have made mammoth sunk investments would be doomed. AT&T itself has conceded that there is little reason to fear that [a Bell company] could monopolize the interexchange market by driving the major
These competitors enjoy strong, nationwide brand names, and they actively will protect their established markets while aggressively making inroads into the BOCs’ lucrative business-customer base. Second, to protect their interests and their customers, these competitors will scrutinize the BOCs’ performance for possible statutory violations. Finally, smaller access providers are beginning to apply noticeable competitive pressure on the BOCs’ local exchange markets. At the second anniversary of the 1996 Act, FCC Chairman William Kennard boasted that the number of competitive local exchange carriers exceeded one hundred, and investment in these carriers amounted to $14 billion.

BOCs also face competition from rapidly developing technologies such as cellular telephony and PCS. This competition will restrain further the BOCs’ ability successfully to inhibit competition in the local and long-distance markets. Additionally, cable companies are poised to join the fray and begin marketing local telephone service.

315 See BellSouth Gilbert Affidavit, supra note 297, at 13-14 (“The primary long distance carriers have very strong brand name recognition. . . . An MTA-EMCI study found that the AT&T brand was recognized nationwide by 97% of consumers, followed by 84% for MCI and 75% for Sprint.”).

316 See Chen, supra note 294, at 566 (“Any supracompetitive profits that [local carriers] enjoy from their command of local markets are being whittled away . . . [by, among other things,] cream-skimming competitors . . . .”); cf BellSouth Louisiana Application, supra note 91, at 122 (pointing out that BellSouth’s revenue base is highly concentrated and that “[t]his geographic concentration of revenues means that the threat of competition imposes significant competitive constraints on BellSouth”).

317 See supra note 295 and accompanying text.


319 See BellSouth Louisiana Application, supra note 91, at 16 (“Market surveys of PCS service in Louisiana indicate that about 17 percent of [PCS customers in Louisiana] chose to subscribe to PCS service instead of subscribing to wireline service. . . . Each of these study results indicates that substitution between wireless and wireline calling is occurring.” (citations omitted) (typeface altered)); SBC Oklahoma Application, supra note 91, at 88 (“Cellular subscribership has soared from near zero in the early 1980s to 34 million in early 1996.”).

320 See Robert W. Crandall & Leonard Waverman, Talk Is Cheap 239-40 (1995) (concluding that wireless systems can pose significant competition to BOCs’ basic telephony service and that they “could discipline the telephone companies that attempt to raise residential access rates for voice services”).

321 See BellSouth Louisiana Application, supra note 91, at 121 (“[C]able television companies . . . have facilities that could be utilized to offer telephone exchange service and are likely to be a source of facilities-based competition in a matter of months.” (emphasis omitted)). Cable companies are not only looking to enter the local telephony market by themselves but also through strategic mergers. The recent AT&T and TCI merger provides a perfect example. AT&T’s desire to take advantage of TCI’s network to provide local telephone service largely drove this merger; the FCC readily recognized the substantial possibilities of mergers with cable companies:

We recognize that cable systems possess an important asset—a “second wire” into most homes—that may have permitted TCI in the long term to
In sum, the increasing proliferation of telecommunications alternatives will provide a natural check on any BOCs’ attempts to garner an unfair competitive advantage.  

Largely in recognition of the increasingly competitive marketplace, BOCs recently have begun consolidating. The recent spate of mergers—Bell Atlantic merged with NYNEX and is now seeking to merge with GTE; SBC merged with PacTel and is now seeking to merge with Ameritech—has sparked much debate. What has emerged from this debate is the recognition that the government must allow BOCs to consolidate in order for them to remain competitive as the telecommunications industry continues to evolve.  

become a sustained and effective competitor for residential telecommunications customers. Here, however, the complementary nature of the merging firms’ assets means that the combined firm will be able to provide an alternative to the incumbent LECs’ services for residential customers far more quickly and effectively than either could separately. TCI possesses the “last mile” assets, while AT&T possesses a brand name, experience, and financial resources that improve TCI’s ability to capitalize on its network assets. We are committed to ensuring that residential local exchange competition becomes a reality sooner rather than later. One way this may occur more quickly is through combinations of complementary assets by emerging entrants such as AT&T and TCI.


322 See Chen, supra note 22, at 871 (“The aggregate effect of emerging [local exchange] competition from [competitive accord providers], cable system operators, [long-distance carriers], and wireless carriers will likely keep incumbent [local carriers] busy defending their home turf, much less contemplating predatory raids on the [long-distance] market.”). But see Sullivan, supra note 53, at 507 (arguing that “no such [technological] state of affairs is currently in place”). While Professor Sullivan is obviously correct that traditional, wireline telephony still overwhelmingly dominates the market, he neglects the broader point: BOCs are facing threats to competition from an increasing number of sources, and the concern that they can stifle all competition in local markets is becoming increasingly unfounded. Equally untenable is Professor Sullivan’s assertion that “[w]e simply do not know whether further developments will break down the technological and economic barriers adequately to cause an implosion of [competitive access providers], cable, [long-distance] operations, or cellular technologies into [local exchange] markets sufficiently to effectively constrain [BOC] monopoly power.” Id. According to Professor Chen, “[Sullivan] neglects to mention perhaps the most important dynamic affecting the market for alternatives to the [BOCs’] wireline [local exchange] service: the ability of these would-be competitors to combine, collude and combat incumbent [local carriers].” Chen, supra note 294, at 557-58. Duesterberg and Gordon add that “[i]t is . . . difficult to sustain the argument that incumbent providers can abuse their position for any significant period of time even to stifle competition or to extort unjustified rents from customers.” DUESTERBERG & GORDON, supra note 3, at 74.  

323 See, e.g., James R. Weiss & Martin L. Stern, Serving Two Masters: The Dual Jurisdiction of the FCC and the Justice Department over Telecommunications Transactions, 6 COMM L.M. CON-SPECTUS 195, 200 (1998) (“[W]ithin the merger context, [the FCC and the DOJ] have been finding lately that they are targets of intensified political pressure. This pressure is rooted primarily in a growing Congressional perception that anti-competitive mergers are passing muster at the agencies without the imposition of adequate protections for consumers.”).

324 See, e.g., Klein Perceives Most Telco Mergers as Lawful Reactions to Changing Technology, 75 Antitrust & Trade Reg. Rep. (BNA) No. 1885, at 543 (Nov. 12, 1998) (discussing comments made by Joel I. Klein, Chief of the DOJ Antitrust Division, that “the vast majority” of
C. Examples of the Efficacy of Existing Safeguards

Because the FCC has yet to approve a § 271 application, obviously no actual examples indicate how effective the statutory safeguards will prove to be. The brief history of the § 271 application process, however, provides numerous indicators that the statutory safeguards will work as Congress intended. Throughout each § 271 proceeding, parties opposing BOCs' entry into the long-distance market have been extremely quick to direct the FCC's attention to perceived statutory shortcomings.325 As a result, BOCs frequently have adjusted their procedures to address these concerns.326 The BOCs certainly have not addressed all of their opponents' complaints, or even a majority of them.327 Nonetheless, the experience shows that the major long-distance providers and other interested parties intensely scrutinize the BOCs' actions, and that they will not hesitate to address before the FCC or in the courts unfairness they perceive.328 Nothing militates thinking that this scrutiny will wane after the FCC permits a BOC to compete in the long-distance service market.

It is equally apparent that market conditions will provide significant safeguards against anticompetitive conduct. For example, Southern New England Telephone Company (SNET) provides both local

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325 See, e.g., Comments of AT&T Corp. in Opposition to BellSouth's Section 271 Application for South Carolina at 8-19, BellSouth Corp., 13 F.C.C.R. 539 (1997) (No. 97-208) [hereinafter AT&T BellSouth SC Comments] (citing an abundance of perceived faults in BellSouth's application).

326 See, e.g., BellSouth Louisiana Application, supra note 91, at 51 (stating that BellSouth is providing certain network alternatives to competitors as a result of AT&T's complaints during proceedings in front of the Louisiana Public Service Commission); Affidavit of Warren L. Mickens on Behalf of Ameritech Michigan at 17-18, Ameritech Mich., 12 F.C.C.R. 20,543 (1997) (No. 97-137) ("Ameritech has recently agreed to provide "mean time to repair" information, in response to requests of its wholesale customers . . .").

327 See, e.g., 13 F.C.C.R. at 608-09 (BellSouth SC Order) (explaining that the FCC specifically asked BellSouth to provide certain data with its § 271 application, which BellSouth did not supply).

328 AT&T's introduction to its comments in reply to BellSouth's South Carolina application may best illustrate the competitors' resolve to contest all perceived BOC statutory violations. In arguing that the FCC should give little weight to the South Carolina Commission's finding that BellSouth satisfied the § 271 checklist requirements, AT&T stated that [t]he state commission's supposedly in-depth analysis of BellSouth's checklist offerings is nothing more than a verbatim, commission-stamped recirculation of BellSouth's proposed order, with factual misstatements, legal errors, and even typos all intact. . . . The results of the Potemkin-proceedings below thus merit no deference because the South Carolina PSC exercised no independent judgment.

AT&T BellSouth SC Comments, supra note 325, at 1-2 (internal quotation marks omitted) (citation omitted).
and long-distance services in the same geographical market.\textsuperscript{329} A discussion of the significant benefits to consumers resulting from SNET's competition with the Big Three long-distance providers are discussed below.\textsuperscript{330} It is instructive to note here that, to a large extent, companies like SNET have the same theoretical incentives and ability to engage in anticompetitive conduct as would the BOCs upon entry into the long-distance market.\textsuperscript{331} Yet throughout the § 271 process thus far, no party has cited examples of actions SNET has taken to impede competition.\textsuperscript{332}

Further illustrations are also available. For example, BOCs currently may provide cellular service that arguably could foster anticompetitive conduct despite interconnection requirements similar to those in the long-distance market.\textsuperscript{333} Indeed, competitors issued grim predictions of the deleterious market effects that would stem from BOCs' entry into the cellular business.\textsuperscript{334} These predictions never came to pass, and the wireless industry remains intensely competitive.\textsuperscript{335} In the end, there exist numerous well-founded reasons to believe that the statutory scheme Congress enacted, coupled with the evolution of technology and current market conditions, adequately ensure against a monopoly in the telecommunications industry. These factors will guarantee healthy and competitive markets even after the FCC grants BOCs permission to provide long-distance service. Moreover, these safeguards militate in favor of the FCC's adopting a minimalist approach to the § 271 application review process.\textsuperscript{336}

\textsuperscript{329} SNET is not bound by §§ 271-275 of the 1996 Act because AT&T was only a minority owner at the time of the divestiture, only rendering SNET not subject to the MFJ.

\textsuperscript{330} See infra notes 372-75 and accompanying text.

\textsuperscript{331} See BellSouth SC Application, supra note 91, at 99-100 (discussing GTE's incentives for anticompetitive conduct).

\textsuperscript{332} See id. at 99 (noting that AT&T "attributes SNET's success to lower prices").

\textsuperscript{333} See BellSouth Louisiana Application, supra note 91, at 118 ("[G]iven that cellular carriers and [long-distance] carriers have similar local interconnection requirements, Bell companies have had essentially the same incentive and ability to act anticompetitively against rival cellular carriers as they would have to act anticompetitively against other [long-distance] carriers in in-region states.").

\textsuperscript{334} See id. ("As with [long-distance] services, moreover, predictions of future harm to the public interest preceded Bell company participation in the cellular business.").

\textsuperscript{335} See id. ("Yet, this theoretical incentive of wireline carriers to inhibit cellular growth has not created any actual problems. . . . Indeed, 'the wireless communications business is one in which relatively small, entrepreneurial competitors have often been as successful as . . . the BOCs.'" (citing McCaw, 9 F.C.C.R. 5836, 5881-62 (1994)) (second alteration in original)).

\textsuperscript{336} See DuESTERBERG & GORDON, supra note 3, at 74 ("Congress and the FCC have laid the essential groundwork for competition, and the FCC ought now to let the process proceed on its own.").
IV
THE ADVANTAGES OF A MINIMALIST APPROACH: BENEFITS FROM FASTER BOC ENTRY INTO THE LONG-DISTANCE MARKET

The 1996 Act indisputably seeks to benefit consumers by opening the telecommunications markets to competition. As FCC Chairman William Kennard stated in his Senate confirmation hearings: “Competition is the cornerstone of the 1996 Act, and the FCC must continue to promote competition in every sector of the communications marketplace . . . .” Discussion of how the new chairman and commissioners intended to accelerate the deregulatory process dominated those hearings. This pervading theme is not at all remarkable given the substantial benefits that everyone anticipates will accompany widespread competition.

By easing the § 271 standards, the FCC more quickly can allow the benefits of competition to take hold in the telecommunications marketplace. This Part first addresses some commentators’ concerns about the perceived need for extensive competition in the local arena prior to a BOC’s entry into the long-distance market. These apprehensions are misplaced. As the latter half of this Part outlines, substantial advantages would accrue if the FCC allowed a BOC to provide long-distance services sooner, rather than later. Achieving these consumer benefits as quickly as possible should be the FCC’s overriding goal.

A. Common Criticisms of a Less Stringent Section 271 Review

One of the most pervasive arguments against the FCC’s conducting more lenient reviews is that § 271 represents a type of incentive regulation. Those supporting this proposition argue that
Congress enacted § 271 so that "the FCC would use the incentive of long-distance entry to draw the BOCs into cooperating with local exchange competitors."\(^{341}\) According to this view, if the FCC allows a BOC's entry into the long-distance market too quickly, then the BOC will no longer have any substantial incentive to comply with many of the 1996 Act's requirements.\(^{342}\) The BOC therefore will not cooperate with competitors' attempts to enter the local markets as the statute requires.\(^{343}\) BOC opponents have dubbed this argument "the 'first things first' rule,"\(^{344}\) and have referred to § 271 as providing a "carrot" for the BOCs.\(^{345}\) They also appear to take pleasure in consistently citing Senator Hollings's proclamation that "[t]elecommunications services should be deregulated after, not before, markets become competitive."\(^{346}\)

The first-things-first argument, however, does not give enough credit to the Act's express requirements or to the additional safeguards already in place.\(^{347}\) Predictions that BOCs will drag their feet or cease compliance with their statutory obligations are based on the assumption that BOCs will choose the dangerous game of overtly breaching their duties—duties that the FCC and the BOCs' competitors closely monitor.\(^{348}\) It further assumes that the BOCs would get

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\(^{341}\) See AT&T BellSouth SC Comments, supra note 325, at 66-67 (claiming that, in the context of the BellSouth's § 271 proceeding, the "only incentive to open local markets is the prospect of long distance entry[, and] ... [o]nce BellSouth is granted interLATA authority, its sole incentive will be to further impede the development of local competition" (citation omitted)).

\(^{342}\) E.g., FCC Should Keep First Things First in Louisiana, Says MCI, PR NEWSWIRE, Nov. 6, 1997, available in LEXIS, Wire Service Stories File.

\(^{343}\) For an example of current requirements, see BellSouth Woroch Affidavit, supra note 213, at 22-23 ("The Act ... mandates that [BOCs] interconnect their networks with rivals and provide some form of collocation.").

\(^{344}\) See id. at 23 ("The new Telecom Act does not tolerate refusals to interconnect, and is vigilant against more subtle strategies such as inferior interconnection or discriminatory pricing of network elements.").
away with the breach of their duties. However, the same market forces that might compel BOCs to engage in activities that disadvantage their competitors also will prompt their competitors to (1) battle the disadvantageous BOC policies, (2) use their own competitive advantages to stifle BOCs' efforts to provide long-distance service, and (3) seek alternative ways of providing customers with local service. Therefore, it is inaccurate to characterize the BOCs' future competitors as helpless against any potential anticompetitive practices by the incumbent BOCs.

Despite the oft-cited quote from Senator Hollings, there is ample evidence that Congress is not as wed to the first-thing-first argument as its proponents would suggest. The vague statutory language of § 271 certainly supports a variety of interpretations. More importantly, certain provisions indicate Congress's awareness that a BOC might receive § 271 approval before facing significant competition in its local market. A prime example is § 271(c)(1)(B)—the Track B provision—which specifically allows the FCC to approve a BOC's application despite a recognized lack of facilities-based competition.

The first-things-first argument's prominence seems to come from the understandable defensiveness of the main opponents to BOCs' entry into the long-distance service market—the major long-distance carriers. These carriers will grab at anything in their aggressive assault on BOC applications. While it is not improper for these companies to make this argument—indeed it would be odd if they did not—the FCC should not substitute its judgment with the judgment of those who have everything to gain from keeping the BOCs out of the long-distance market.

349 See supra notes 136-43 and accompanying text.
350 For a description of the Track B provision, see supra notes 107-08 and accompanying text and supra Part ILB.3(b).
351 See BellSouth Woroch Affidavit, supra note 213, at 6 ("Track B was created to grant interLATA authority in states where no legitimate facility-based carriers had stepped forward—provided the [BOC] demonstrates that its local exchange markets are open to efficient competitors." (internal quotation marks omitted)); see also SBC Communications Inc., 12 F.C.C.R. 8685, 8717 (1997) (recognizing that Congress enacted Track B to ensure that a BOC is not foreclosed from providing long-distance service simply because no facilities-based competitor has chosen to make inroads into the BOC's local market).
352 Cf. Chen, supra note 294, at 542 ("The opposing sides have dug intricate trenches and 'worn deep grooves repeating the same basic arguments and counter arguments over and over.'" (quoting Daniel A. Farber, Missing the "Play of Intelligence," 86 WM. & MARY L. REV. 147, 159 (1994))).
353 Compare Give the Telecom Act Time To Work, AT&T CEO Says, PR NEWSWIRE, Feb. 10, 1998, available in LEXIS, Wire Service Stories File ("We should not let [the Act's] benefits to consumers and competition slip away because we got tired of removing the obstacles created by the opponents of competition. . . . [W]e need the patience and perseverance to put the Act to work in local markets." (internal quotation marks omitted)), with Commissioner Michael K. Powell, Section 271 Review: The Challenge of Charlie Brown, Remarks
Other criticisms to the FCC's taking a less-detailed approach focus on the possibility that an approved BOC will engage in some form of cost misallocation or discrimination. Part III of this Note addressed this issue, noting that these arguments have become increasingly non-viable. In the end, all of the protestations to BOCs' entry into the long-distance market prior to the existence of significant local competition seem to lose sight of the target of § 271's "reward": the consumers. While the FCC and its supporters continue to advocate a stringent review of BOC applications, the consumers consequently must wait longer for the promised benefits of the Act.

B. Benefits of BOCs' Entry into the Long-Distance Market

One industry expert, Robert Crandall, estimated that the U.S. economy could gain nearly $30 billion net a year if the telecommunications industry became fully deregulated. Much of this anticipated windfall would come from an expected decline in long-distance rates. According to Professor Paul W. MacAvoy, Michigan consumers, for example, stood to realize a total benefit of nearly $450 million annually if the FCC had granted Ameritech's application. In South Carolina, one study estimated that long-distance rates would have dropped by 25%, resulting in a benefit of approximately $1.2 billion after five years, if the FCC had granted BellSouth's application.

Even without assessing the accuracy of these specific estimates, it is indisputable that significant gains for long-distance consumers would result from BOCs' entry into the long-distance market. Both the FCC and the DOJ have conceded that competition within the long-distance market is imperfect and would benefit from additional

Before the United States Telephone Association (Jan. 22, 1998), available in Michael K. Powell, "Section 271 Review: The Challenge of Charlie Brown" (visited Jan. 15, 1999) <http://www.fcc.gov/Speeches/Powell/spmkp801.html> ("The Act's goal of opening local telephone markets to competition is a lofty one, and ... [w]e will all need to be patient as we unravel [the regulatory] system.").

BellSouth Hausman Affidavit, supra note 285, at 6 (internal quotation marks omitted).

See BellSouth Gilbert Affidavit, supra note 297, at 41 ("Any delay in granting [long-distance] authority because local competition is not sufficiently established ... will deny telecommunications consumers the benefit of increased choice and increased competition in long distance . . . .").


See Affidavit of Paul W. MacAvoy in Support of the Application of Ameritech Michigan for Provision of In-Region, InterLATA Services in Michigan, at 2, Ameritech Mich., 12 F.C.C.R. 20,543 (1997) (No. 97-137) (hereinafter Ameritech MacAvoy Affidavit). MacAvoy calculated the estimated benefits that would flow to the entire Ameritech region were the FCC to grant Ameritech permission to provide long-distance service throughout. He placed the total benefit in the range of $1.9 to $2.1 billion annually. See id.

See BellSouth SC Application, supra note 91, at 83 (citing WEFA group study in support of its estimates).
entrants. Though some commentators question whether the long-distance market in fact lacks vibrant competition, substantial evidence demonstrates that the market is far from perfectly competitive. MacAvoy makes this point by analyzing the major long-distance service providers’ price-cost margins over a twelve-year period. In theory, price-cost margins should decrease as the competitiveness in the industry increases because prices will approach costs. Margins also should decrease as a market becomes less concentrated because decreased concentration increases competition among more competitors of similar size. MacAvoy’s study, however, shows precisely the opposite of what theory suggests: the long-distance industry has become less concentrated, yet price-cost margins show no corresponding decrease. In many instances, the margins actually have increased. The data support an inference that the long-distance market is not as competitive as the major carriers claim. AT&T and

359 See, e.g., SBC Communications Inc., 12 F.C.C.R. 8685, 8728 (1997) (separate statement of Chairman Reed E. Hundt). Former FCC Chairman Hundt first points out the statement of the DOJ that “it is reasonable to conclude that additional entry, particularly, by firms with the competitive assets of the [Bell Operating Companies], is likely to provide additional competitive benefits.” Id. (quoting Dep’t of Justice Evaluation (filed May 16, 1997)). Hundt then agrees by saying: “[T]he entry into the long distance market by SBC or a carrier with similar assets would promote competition and benefit consumers. The Commission has previously noted concern about evidence . . . suggesting that there may be tacit price coordination among AT&T, MCI and Sprint.” Id.

360 See, e.g., Finn, supra note 5, at 227 (claiming that there will only be “incremental public interest benefits from BOC entry into the already-competitive long-distance market”); Sullivan, supra note 53, at 510-17 (arguing that BOC entry into the long-distance markets will not be as beneficial as many claim).

361 See generally MacAvoy, supra note 56, at 105-74 (explaining how his exhaustive study of trends in the long-distance markets over the past decade supports the conclusion that significant competition in the provision of long-distance service has yet to truly materialize).

362 See Ameritech MacAvoy Affidavit, supra note 357, at 2. (defining price-cost margins as “the percentage by which prices exceed the marginal costs of providing various services”).

363 See id.

364 See id. This concept is relatively simple and is obviously not limited to the telecommunications industry. Suppose, for example, that A and B each own a convenience store that sells packages of nuts for the monopoly price of $3. Suppose further that each buys these packages for $1. If the industry remains concentrated, as the cost of nuts increases to $2, both will increase their prices to $4 to maintain the $3 monopoly profit—the price-cost margin does not change. If C and D enter the convenience store market, however, each will have to lower his prices to compete with the others as the market becomes less concentrated. In this scenario, D’s nuts will sell for less than $4, thereby reflecting a smaller price-cost margin.

365 See MacAvoy, supra note 56, at 85-98. MacAvoy measures the concentration levels for four different types of long-distance service. Data on each service show that concentration levels are decreasing. See id. at 85-89 & fig.4-1.

366 See id. at 117-21. MacAvoy concludes that price-cost margins for AT&T, Sprint, and MCI “across all four sets of markets . . . increased by substantial percentages each year.” Id. at 121.

367 See id. at 171-74.
the other major carriers attack MacAvoy's study and his conclusions as "inconclusive." to which MacAvoy responds in detail. Even if MacAvoy's study overstates the noncompetitiveness of the long-distance market, his study, combined with common sense, compels the conclusion that it will be more competitive upon BOCs' entry. The experience of SNET provides additional evidence that long-distance consumers will benefit from BOCs' entry into the market. In Connecticut, competition between SNET and AT&T led to the decline of long-distance rates. In its efforts to compete, SNET offered an additional consumer benefit in the form of innovative billing practices. While economists argue over the extent of competition in the long-distance market, one confidently may conclude that upon entering the market, BOCs aggressively will lure customers away from the current long-distance providers—a move that undoubtedly will spark various forms of competition, all of which should benefit consumers. BOCs' entry into the long-distance market also may have the effect of stimulating competition in the local markets. Currently, major long-distance providers have little incentive to proceed quickly in developing and implementing their local service plans.

368 AT&T Ameritech Comments, supra note 157, at 49 n.26 (alleging that the FCC twice rejected MacAvoy's findings).
369 E.g., id. at 48.
370 See Ameritech MacAvoy Affidavit, supra note 357, at 25. As an example of the disagreements between the parties, one persistent criticism of MacAvoy's study is that his price-cost margin analysis does not account for the significant discounts available to a large number of long-distance customers. MacAvoy responds to this by analyzing the margins under some of the key discount plans and concluding that the same anticompetitive trend exists. See id.
371 As Commissioner Susan Ness stated in separate statement to the FCC's order denying BellSouth's § 271 application, "I agree... that the American consumer will benefit from intensified competition in the long distance market, and I look forward to the day when I can cast my vote to approve a Section 271 application." BellSouth Corp., 13 F.C.C.R. 539, 678 (BellSouth SC Order) (separate statement of Commissioner Susan Ness).
372 SNET is allowed to provide both local and long-distance services. See supra note 329 and accompanying text.
373 See BellSouth Gilbert Affidavit, supra note 297, at 27-28 (noting that SNET's encroachment on AT&T's market share spawned a price war in which one competitor tried to outdo the other by offering more attractive rates). Gilbert also estimates that the benefits provided by SNET's entry approach $127 million per year. See id. at 29.
374 See Ameritech Michigan Application, supra note 91, at 72-73 (noting that new "entry into long distance will bring the benefits of increased efficiency to groups of consumers that are not the principal targets of the long distance carriers").
375 See Ameritech MacAvoy Affidavit, supra note 357, at 33 ("These new entrants [(BOCs)] will struggle for share of market revenues by attracting customers from the incumbent long-distance carriers[, which] could bring about entirely new competitive interactions among incumbents that effectively reduce prices.").
376 See BellSouth Woroch Affidavit, supra note 213, at 7 (recognizing that the long-distance carriers have substantial incentives to refrain from establishing significant local-
hand, the opportunity to tap into the $110 billion local service mar-
ket creates a substantial incentive for the long-distance carriers to
move rapidly into the local markets. Given the tremendous uncertain-
ties and risks involved, however, the long-distance carriers’ most ra-
tional strategy may in fact call for a slow, careful procession into the
local markets. The threat that a vertically integrated BOC would pose
could persuade the current long-distance providers to move rapidly
into the local markets. On the other hand, by delaying their incur-
sion into BOCs’ territories, the major long-distance carriers aggres-
sively can protect their own markets by vehemently maintaining their
first-things-first argument and opposing BOCs’ entry through the
§ 271 process.

Although this defensive strategy may be in the long-distance carri-
ers’ best interests, it does not necessarily benefit consumers. Under a
more lenient review of § 271 applications, the FCC could increase the
incentives for long-distance carriers to enter local service markets
more hastily. Just as BOCs’ entry into the long-distance market will
have marked benefits, so too will the entry of competitors into the
local telephony markets. The FCC Commissioners thus far have re-
jected this logic. If the FCC maintains its stance, it will lose yet an-
other opportunity to ignite fierce local competition and further
loosen the BOCs’ grip on the local markets.

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377 See Pressman, supra note 10.
378 Cf. Chen, supra note 22, at 872 (“[T]he story of telecommunications reform—from
empire-building to divestiture to a hopeful future of open networks—suggests that the
threat of entry acts as a greater spur to invention than does monopoly.”).
379 See BellSouth SC Application, supra note 91, at 67 (“The SCPSC found that ‘[t]he
entities with the financial and marketing resources to provide effective [local] competition
are the same [long-distance carriers] that have a direct financial interest in delaying [Bell-
South’s] competing in their long distance market.’” (quoting BellSouth Telecomm., Inc.,
ond, and fourth alterations in original)); see also FCC Should Keep First Things First in Louisi-
a, Says MCI, supra note 344 (claiming that the local markets are not yet open in
Louisiana and, therefore, BellSouth’s application was premature).
380 See BellSouth Hausman Affidavit, supra note 285, at 3 (“BOC entry into long dis-
tance creates incentives for faster local entry, especially by [long-distance carriers].”).
381 See Kennard Dismisses Idea of Bells’ InterLATA Entry as Spur for Local Competition, Telco
Competition Rep., Dec. 18, 1997 (“FCC Chairman William E. Kennard last week rejected
the theory that letting Bell companies offer in-region interLATA services would spur inter-
exchange carriers to move into local exchange markets.” (internal quotation marks
omitted)).
382 Cf. Duesterberg & Gordon, supra note 3, at 83 (noting the effect of current poli-
cies on competition). Duesterberg and Gordon elaborate:

A reluctance to let go of the traditional approach to regulation out of fear
that customers or the competitive process itself will be injured is under-
standable in light of the historical mission of regulation, but it is not consis-
In addition to decreased prices, intense competition can lead to tremendous technological innovation.383 As Thomas Duesterberg and Kenneth Gordon note, "[a] serious problem is that regulation can and does sometimes delay introduction of new technologies."384 One cannot overstate the significance of delay in an industry so dependent on continued technological improvement. Businesses and residential consumers alike have come to expect and depend upon continued improvements in their telecommunications services.385 For example, the explosion of the Internet has spawned continued pleas for increased bandwidth, which accelerates Internet travel.386

Aside from advances in technology, competition promises to afford additional consumer products. One example is the popular practice of "bundling."387 Bundling—or one-stop shopping—refers to the ability of a carrier to provide a consumer with local, long-distance, and other requested services, eliminating the need of dealing with separate entities for these telecommunications products.388 A 1997 survey by J.D. Power and Associates found that sixty-five percent of households are likely to choose a single company for all of their telecommunications needs.389 Market surveys in other countries also show that consumers will choose to bundle their services if they have the opportunity with permitting new technologies and services to bring down prices and displace existing monopolies.

*Id.*

383 See *id.* at 5.

384 Id. The authors allege that the "FCC's extreme caution" in its cellular licensing procedures resulted in a cost of $85 billion to the economy. *Id.*

385 Cf. *id.* at 11 ("[C]onstant improvement in the telecommunications sector is a key to maintaining the worldwide leadership and associated high standard of living the U.S. now enjoys.").

386 See, e.g., *Hundt Subcomm. Statement, supra* note 7, at 18 ("Local competition is particularly important now because our local networks need to evolve to adapt to the country's growing data needs."). Commissioner Ness remarks: "It's been estimated that as of [June 1997], 51 million Americans were online, up 46 percent from June 1996. And that's predicted to grow to 135 million people—or half the nation's population—by 2001." Commissioner Susan Ness, From Hype to Reality in the Emerging Digital Age, Remarks Before the Wall Street Journal Technology Summit (Oct. 15, 1997), *available in 1997 FCC LEXIS 5732*, at *7-8* (citations omitted).

387 See, e.g., *BellSouth Gilbert Affidavit, supra* note 297, at 4-13 (discussing the long-distance carriers' plans to offer bundled services and quoting the various carriers which speak to the tremendous perceived advantages of bundling).

388 See *SBC Oklahoma Application, supra* note 91, at 67-69 (describing the advantages of bundling).

And bundling surely will not be the only innovative product increased competition will generate.391

Professor Chen wrote that "[s]ubstantial doubt clouds the often contradictory predictions of what tomorrow’s telecommunications markets will do in fact."392 Though this warning undoubtedly is true, the broader point is that whatever benefits the market ends up valuing, they will arrive more quickly with competition than without it; they also will outweigh any possible anticompetitive effects that BOCs’ premature entry might have on the long-distance market.393 The FCC can precipitate a net gain by adopting a less stringent approach to the § 271 process and by allowing BOCs’ entry into the long-distance market soon.394 The FCC should seize opportunities to rely on market forces as these arise.395 The sooner it takes advantage of these opportunities, the sooner new investment will take place, and the sooner consumers will realize the benefits the 1996 Act promised.396

CONCLUSION

More competition? The Telecommunications Act of 1996 promised deregulation, more competition, and increased consumer welfare. To realize these ambitions, the 1996 Act removed the legal barriers that previously ruled the industry. Congress anticipated that

390 See BellSouth Hausman Affidavit, supra note 285, at 4 ("[M]arket data from the UK and Canada demonstrate that a significant proportion of consumers will choose the one-stop shopping package if it is made available.").
391 See, e.g., BellSouth Gilbert Affidavit, supra note 297, at 4-5 (quoting a speech by AT&T CEO Robert Allen in which he said, "we’ll differentiate ourselves not on price, but on service features, applications and value that enrich people’s lives and make businesses more successful" (internal quotation marks omitted)).
392 Chen, supra note 294, at 543.
393 See BellSouth Hausman Affidavit, supra note 285, at 7-8 (concluding that the marginal benefits of allowing BOC entry outweigh the marginal costs of continued regulation); Chen, supra note 22, at 871 ("The potential gains in consumer welfare outweigh whatever anticompetitive consequences might flow from premature [BOC] entry into this market.").
394 See BellSouth Hausman Affidavit, supra note 285, at 19-21. Hausman uses an economic model to show the damaging effects of continued regulation, provided that BOCs cannot charge supracompetitive prices in either the local or long distance markets. See id. & n.27. He concludes by saying that "consumer welfare would be increased if BOC entry were permitted because the consumer welfare gains from increased competition in long distance will more than outweigh the incremental gain from the last step to regulatory perfection that the Commission’s Ameritech decision demands." Id. at 21.
395 Cf. id. at 7 ("If all significant barriers . . . to local entry have been removed, the Commission should permit BOC entry into long distance markets.").
396 See DUESTERBERG & GORDON, supra note 3, at 23. Duesterberg and Gordon advise: Moving immediately to reliance on market forces, rather than on traditional regulatory direction, is necessary if a truly efficient interconnected network is to evolve, new investment is to take place at the proper rate (and by those best able to do it), and customers are to receive the full benefits of the dynamic new technologies.
the industry heavyweights would invade each others’ turf, bringing about a deluge of consumer benefits. The reality after two years of FCC administration of the 1996 Act, unfortunately, has tempered the excitement. Two years of experience also have led to a fundamental questioning of the FCC’s proper role within the new statutory regime.397

Evidence of the FCC’s failure to accept the change readily can be seen in the § 271 application process. The FCC’s review of these applications evidences a decidedly detail-oriented approach. So stringent is this approach that commentators and courts alike have questioned whether any BOC feasibly can meet the FCC’s § 271 requirements. The FCC has told us to wait. It has told us to be patient. It has told us that it is tired of hearing how long the process is taking. These admonitions are nonsense. We have had enough waiting and patience—over three years at this point—but not nearly enough regulatory forbearance. The FCC must change course. Competition must be allowed to flourish.

397 See id. at 3 (“Have regulators failed to be aggressive enough in implementing the act, or have they attempted to undermine its intent?”).