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

In the Matter of	)	
Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan	)	CC Docket No. 97-137

MEMORANDUM OPINION AND ORDER

Adopted: August 19, 1997 **Released: August 19, 1997**

By the Commission: Chairman Hundt and Commissioners Quello, Ness, and Chong issuing separate statements.

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I. INTRODUCTION

1. On May 21, 1997, Ameritech Michigan (Ameritech)[1] filed an application for authorization under section 271 of the Communications Act of 1934, as amended,[2] to provide in-region, interLATA services in the State of Michigan.[3] For the reasons set forth below, we deny Ameritech's application.

2. Before summarizing our conclusions, we wish to acknowledge the efforts to date of the State of Michigan and Ameritech in opening that state's local exchange markets to competition. The State of Michigan has been at the forefront of state efforts to foster the emergence of effectively competitive local exchange markets.[4] In 1991, the Michigan Legislature

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[1] Ameritech Michigan is the Bell operating company that provides local exchange service in Michigan. Ameritech Michigan is a wholly-owned subsidiary of Ameritech Corporation. For the purposes of this Order, we will refer to Ameritech Michigan as "Ameritech," and to its parent company as "Ameritech Corporation."

[2] 47 U.S.C. § 271. Section 271 was added by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), *codified at* 47 U.S.C. §§ 151 *et seq.* We will refer to the Communications Act of 1934, as amended, as "the Communications Act" or "the Act."

[3] Application of Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Service in Michigan, CC Docket No. 97-137 (filed May 21, 1997) (Ameritech Application). Unless an affidavit appendix reference is included, all cites to the "Ameritech Application" refer to Ameritech's "Brief in Support of Application." *See Comments Requested on Application by Ameritech Michigan for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Michigan*, Public Notice, DA 97-1072 (rel. May 21, 1997) (*May 21st Public Notice*). A list of parties that submitted comments or replies is set forth in the Appendix.

[4] *See* Evaluation of the United States Department of Justice, CC Docket No. 97-137 at 2 (filed June 25, 1997) (Department of Justice Evaluation). The Department of Justice notes that, "[i]n some urban areas of the state, new entrants have made notable progress . . ." *Id*.

passed legislation designed to remove barriers to local competition, five years before Congress's 1996 overhaul of the federal telecommunications act. Ameritech, too, long has been among the leaders in its segment of the telecommunications industry working toward opening local markets to competition. Ameritech's Customer First Plan, for example, announced in March 1993, constituted a major advance in telecommunications policy by proposing a framework to eliminate legal, economic and technical barriers to local competition.[5]

3. Since then, as the Department of Justice noted in its assessment, Ameritech "has made significant and important progress toward meeting the preconditions for in-region interLATA entry."[6] The Department of Justice, with which Ameritech has worked closely, has also noted Ameritech's cooperation, particularly with respect to the development of processes for nondiscriminatory access to Ameritech's operations support systems.[7] Such access is critically important to the development of effective, sustained competition in the local exchange market.

4. That we ultimately conclude, as did the Michigan Public Service Commission (Michigan Commission) and the Department of Justice, that Ameritech's May 21, 1997 application to provide in-region interLATA service in Michigan does not demonstrate compliance with all of section 271's requirements, as we explain herein, does not diminish the efforts Ameritech has made thus far. Rather, our decision here recognizes the complexity of opening historically monopolized local markets to competition, and the clear mandate of Congress that such markets must be open to competition before the Bell Operating Companies (BOCs) are to be permitted to provide in-region, interLATA services.

5. In this Order, we find that Ameritech has met its burden of demonstrating that it is providing access and interconnection to an unaffiliated, facilities-based provider of telephone exchange service to residential and business subscribers in Michigan, as required by section 271(c)(1)(A) of the statute. We further conclude, however, that Ameritech has not yet demonstrated that it has fully implemented the competitive checklist in section 271(c)(2)(B). In particular, we find that Ameritech has not met its burden of showing that it meets the competitive checklist with respect to: (1) access to its operations support systems; (2) interconnection; and (3) access to its 911 and E911 services. We do not decide whether Ameritech has met its burden of demonstrating compliance with the remaining items on the competitive checklist. In addition, we find that Ameritech has not demonstrated that its "requested [in-region, interLATA

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5 *See* Ameritech Application at 4.

6 Department of Justice Evaluation at iv.

7 *See, e.g., id.* at 2.

authorization] will be carried out in accordance" with the structural and transactional requirements of sections 272(b)(3) and 272(b)(5), respectively.[8]

6. In light of our conclusions that Ameritech has not demonstrated that it satisfies the competitive checklist or that it would carry out the requested authorization in accordance with section 272, we deny, pursuant to section 271(d)(3), Ameritech's application to provide in-region, interLATA services in Michigan. Thus, we need not, and do not, address the issue of whether Ameritech has demonstrated that the authorization it seeks is consistent with the public interest, convenience, and necessity. Accordingly, we do not base the denial of Ameritech's application on a public interest determination. Nevertheless, in order to give Ameritech and other interested parties guidance concerning the public interest standard that we will apply in evaluating future section 271 applications, we set forth our views on the meaning and scope of certain aspects of the public interest inquiry mandated by Congress.

II. BACKGROUND

A. Statutory Framework

7. The 1996 Act conditions BOC entry into the provision of in-region interLATA services on compliance with certain provisions of section 271.[9] BOCs must apply to the Federal Communications Commission (Commission) for authorization to provide interLATA services originating in any in-region state.[10] The Commission must issue a written determination on each application no later than 90 days after receiving such application.[11] In acting on a BOC's application for authority to provide in-region interLATA services, the Commission must consult with the Attorney General and give substantial weight to the Attorney General's evaluation of the

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[8] *See* 47 U.S.C. § 271(d)(3)(B).

[9] For purposes of this proceeding, we adopt the definition of the term "Bell Operating Company" contained in 47 U.S.C. § 153(4).

[10] 47 U.S.C. § 271(d)(1). For purposes of this proceeding, we adopt the definition of the term "in-region state" that is contained in 47 U.S.C. § 271(i)(1). We note that section 271(j) provides that a BOC's in-region services include 800 service, private line service, or their equivalents that terminate in an in-region state of that BOC and that allow the called party to determine the interLATA carrier, even if such services originate out-of-region. *Id.* § 271(j). The 1996 Act defines "interLATA services" as "telecommunications between a point located in a local access and transport area and a point located outside such area." *Id.* § 153(21). Under the 1996 Act, a "local access and transport area" (LATA) is "a contiguous geographic area (A) established before the date of enactment of the [1996 Act] by a [BOC] such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or (B) established or modified by a [BOC] after such date of enactment and approved by the Commission." *Id.* § 153(25). LATAs were created as part of the Modification of Final Judgement's (MFJ's) "plan of reorganization." *United States v. Western Elec. Co.*, 569 F. Supp. 1057 (D.D.C. 1983), *aff'd sub nom. California v. United States*, 464 U.S. 1013 (1983). Pursuant to the MFJ, "all [BOC] territory in the continental United States [was] divided into LATAs, generally centering upon a city or other identifiable community of interest." *United States v. Western Elec. Co.*, 569 F. Supp. 990, 993-94 (D.D.C. 1983).

[11] 47 U.S.C. § 271(d)(3).

BOC's application.[12] In addition, the Commission must consult with the applicable state commission to verify that the BOC has one or more state-approved interconnection agreements with a facilities-based competitor, as required in section 271(c)(1)(A), or a statement of generally available terms and conditions, as required in section 271(c)(1)(B), and that either the agreement(s) or general statement satisfy the "competitive checklist," as described below.[13]

8. Section 271 requires the Commission to make various findings before approving BOC entry. A BOC must show that it satisfies the requirements of either section 271(c)(1)(A), known as Track A, or 271(c)(1)(B), known as Track B.[14] Section 271(c)(1)(A), which is the pertinent section for purposes of this Order, states that a BOC must provide access and interconnection to one or more unaffiliated competing providers of telephone exchange service to residential and business subscribers. The section further specifies that the competing carrier's telephone exchange service may be offered either exclusively over its own telephone exchange service facilities or predominantly over its own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier.

9. In order to obtain authorization under section 271(c)(1)(A), the BOC must also show that: (1) it has "fully implemented the competitive checklist" contained in section 271(c)(2)(B);[15] (2) the requested authorization will be carried out in accordance with the requirements of section 272;[16] and (3) the BOC's entry into the in-region interLATA market is "consistent with the public interest, convenience, and necessity."[17]

B. The Purpose of Section 271

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12 *Id.* § 271(d)(2)(A).

13 *Id.* § 271(d)(2)(B).

14 *Id.* § 271(d)(3)(A).

15 *Id.* §§ 271(c)(2)(B), 271(d)(3)(A)(i).

16 *Id.* § 272. *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*), *recon.*, Order on Reconsideration, 12 FCC Rcd 2297 (1997), *review pending sub nom., SBC Communications v. FCC*, No. 97-1118 (D.C. Cir., filed Mar. 6, 1997) (held in abeyance pursuant to court order filed May 7, 1997), *remanded in part sub nom., Bell Atlantic Telephone Companies v. FCC*, No. 97-1067 (D.C. Cir., filed Mar. 31, 1997), *on remand*, Second Order on Reconsideration, FCC 97-222 (rel. June 24, 1997), *petition for review pending sub nom. Bell Atlantic Telephone Companies v. FCC*, No. 97-1423 (D.C. Cir. filed July 11, 1997); *Implementation of the Telecommunications Act of 1996; Accounting Safeguards Under the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 17539 (1996), *recon. pending.*

17 47 U.S.C. § 271(d)(3)(C).

10. The 1996 Act's overriding goal is to open all telecommunications markets to competition and, ultimately, to deregulate these markets.[18] Before the 1996 Act's passage, major segments of the telecommunications industry were precluded, by law and economics, from entering each others' markets. The BOCs, the local progeny of the once-integrated Bell system, were barred by the terms of the MFJ from entering certain lines of business, including long distance services.[19] The ban on BOC provision of long distance services was based on the MFJ court's determination that such a restriction was "clearly necessary to preserve free competition in the interexchange market."[20] The court found that, if the BOCs were permitted to compete in the interexchange market, they would have "substantial incentives" and opportunity, through their control of local exchange and exchange access facilities and services, to discriminate against their interexchange rivals and to cross-subsidize their interexchange ventures.[21]

11. For many years, the provision of local exchange service was even more effectively cordoned off from competition than the long distance market. Regulators viewed local telecommunications markets as natural monopolies, and local telephone companies, the BOCs and other incumbent local exchange carriers (LECs), often held exclusive franchises to serve their territories. Moreover, even where competitors legally could enter local telecommunications markets, economic and operational barriers to entry effectively precluded such forays to any substantial degree. Lifting statutory and regulatory barriers to local competition was thus a necessary prerequisite to local competition, but not enough to bring competition to the local market. Equally important to the goal of competition was the elimination of economic and operational barriers to entry.

12. These economic and operational barriers largely are the result of the historical development of local exchange markets and the economics of local telephone networks. An incumbent LEC's ubiquitous network, financed over the years by the returns on investment under rate-of-return regulation, enables an incumbent LEC to serve new customers at a much lower

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[18] The purpose of the 1996 Act is to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans *by opening all telecommunications markets to competition*." Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) (Joint Explanatory Statement) (emphasis added).

[19] The MFJ contained the terms of the settlement of the Department of Justice's antitrust suit against AT&T. *See United States v. Western Elec. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983). Specifically, the MFJ prohibited BOCs from providing interLATA services. The MFJ did not bar BOCs from providing intraLATA toll services.

[20] *Id.* at 188.

[21] *Id.* Although never called upon to make final evidentiary conclusions, the court found it appropriate "to consider whether the state of proof at trial was such as to sustain th[e] divestiture as being in the public interest." *Id.* at 161.

incremental cost than a facilities-based entrant that must install its own network components.[22] Additionally, the value of a telephone network increases with the number of subscribers on the network. Congress recognized that duplicating the incumbents' local networks on a ubiquitous scale would be enormously expensive.[23] It also recognized that no competitor could provide a viable, broad-based local telecommunications service without interconnecting with the incumbent LEC in order to complete calls to subscribers served by the incumbent LECs' network.

13. Against this backdrop Congress enacted the sweeping reforms contained in the 1996 Act, the first comprehensive reform of the federal telecommunications statute in over sixty years. Congress, primarily through sections 251, 252 and 253 of the Act, sought to open local telecommunications markets to previously precluded competitors not only by removing legislative and regulatory impediments to competition, but also by reducing inherent economic and operational advantages possessed by incumbents. The provisions 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. Pursuant to the Act, the BOCs must offer at cost-based rates nondiscriminatory interconnection with their networks and access to unbundled elements of their networks for use by competitors. The Act also requires BOCs to make their retail services available at wholesale rates so that they can be resold by new entrants.

14. A salient feature of these market-opening provisions is that a competitor's success in capturing local market share from the BOCs is dependent, to a significant degree, upon the BOCs' cooperation in the nondiscriminatory provisioning of interconnection, unbundled network elements and resold services pursuant to the pricing standards established in the statute. Because the BOCs, however, have little, if any, incentive to assist new entrants in their efforts to secure a share of the BOCs' markets, the Communications Act contains various measures to provide this incentive, including section 271. Through this statutory provision, Congress required BOCs to demonstrate that they have opened their local telecommunications markets to competition *before* they are authorized to provide in-region long distance services.[24] Section 271 thus creates a

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[22] An incumbent LEC has a lower incremental cost of serving any group of customers because of the economies of scope that come from serving all other LEC customers (*i.e.*, because of the incumbent LEC's ubiquitous network). A new entrant has a higher incremental cost of serving the same group of customers with the facilities it constructs because it serves fewer customers overall and cannot achieve the same economies of scope. This is the rationale behind the Total Element Long-Run Incremental Cost (TELRIC) pricing methodology. TELRIC pricing for unbundled network elements enables the new entrant to serve its customers at the incumbent LEC's incremental costs and avoids inefficient duplication of the incumbent LEC's network. We discuss TELRIC pricing principles *infra* at Section VI.F.1.

[23] Joint Explanatory Statement at 148 ("This conference agreement recognizes that 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").

[24] The Act permitted BOCs to begin providing long distance service originating outside of their regions upon the Act's enactment. 47 U.S.C. § 271(b)(2).

critically important incentive for BOCs to cooperate in introducing competition in their historically monopolized local telecommunications markets.[25]

15. By requiring 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, the 1996 Act enhances competition in both the local and long distance markets. We believe that entry into the long distance market by BOCs that have opened their local markets would further competition in the long distance market and benefit consumers.[26] Indeed, given the BOCs' strong brand recognition and other significant advantages from incumbency, advantages that will particularly redound in the broad-based provision of bundled local and long distance services, we expect that the BOCs will be formidable competitors in the long distance market and, in particular, in the market for bundled local and long distance services. The recent successes of Southern New England Telecommunications Corporation (SNET) and GTE in attracting customers for their long distance services illustrates the ability of local carriers to garner a significant share of the long distance market rapidly.[27] Further, recent studies have predicted that AT&T's share of the long distance market may fall to 30 percent with BOC entry.[28] Such additional competition in the long distance market is precisely what the 1996 Act contemplates and is welcomed.

16. In this regard, the development of a substantially competitive market for interstate interexchange services has enabled us to seek to reduce regulation in this area by eliminating tariffs for non-dominant interexchange carriers.[29] We remain concerned, however, that not all

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[25] Ameritech's Chief Executive Officer, Richard Notebaert, has recognized the power of this incentive. In commenting on the difference between Ameritech and GTE, which is not subject to the section 271 requirements, Mr. Notebaert is quoted as stating: "The big difference between us and them is they're already in long distance - What's their incentive to cooperate?" Mike Mills, *Holding the Line on Phone Rivalry; GTE Keeps Potential Competitors, Regulators' Price Guidelines at Bay*, Wash. Post, Oct. 23, 1996, at C12.

[26] In its evaluation of the application by SBC to provide in-region interLATA services in Oklahoma, the Department of Justice noted: "InterLATA markets remain highly concentrated and imperfectly competitive . . . and it is reasonable to conclude that additional entry, particularly by firms with the competitive assets of the BOCs, is likely to provide additional competitive benefits." Evaluation of the United States Department of Justice Evaluation, CC Docket No. 97-121 at 3-4 (filed May 16, 1997) (Department of Justice SBC Oklahoma Evaluation).

[27] Merrill Lynch has reported that SNET's long distance affiliate captured 35% of SNET's local customers within two years of entry. Merrill Lynch, *Telecom Services -- RBOCs and GTE. Fourth Quarter Review: Defying the Bears Once Again, Reporting Robust EPS Growth; Regulatory Cloud Beginning to Lift*, at 8 (Feb. 19, 1997)). It has been reported that GTE converted one million of its local customers into GTE long distance customers and is signing up customers at the rate of 6,000 a day. *Companies Release Financials*, Comm. Today, Apr. 16, 1997; John J. Keller, *Telecommunications: BT-MCI Merger Reshapes Telecom Industry*, Wall St. J., Nov. 5, 1996, at B1.

[28] *See Strong RHC Brand Identity, Sharp Drop in AT&T's Market Share Predicted*, Comm. Daily, July 9, 1997. Currently, AT&T's share of the long distance market is 51% as measured by revenue and 54% as measured by switched access minutes. *Long Distance Market Shares*, Federal Communication Commission, Common Carrier Bureau, Industry Analysis Division, Report, July 18, 1997.

[29] *Policy and Rules Concerning the Interstate, Interexchange Marketplace;Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730 (1996) (*Interexchange Second Report and Order), recon. pending*. The *Interexchange Second Report*

segments of this market appear to be subject to vigorous competition.[30] For example, we remain concerned about the relative lack of competition among carriers to serve low volume long distance customers.[31] We expect that BOCs entering the long distance market will compete vigorously for all segments of the market, including low volume long distance customers. We note that, in determining the extent to which BOC entry into the long distance market would further competition, we would find it more persuasive if parties presented specific information as to how such entry will bring the benefits of competition, including lower prices, to *all* segments of the long distance market.

17. Significantly, however, the 1996 Act seeks not merely to enhance competition in the long distance market, but also to introduce competition to local telecommunications markets. Many of the new entrants, including the major interexchange carriers, and the BOCs, should they enter each other's territories, enjoy significant advantages that make them potentially formidable local exchange competitors.[32] Unlike BOC entry into long distance, however, the competing carriers' entry into the local market is handicapped by the unique circumstance that their success in competing for BOC customers depends upon the BOCs' cooperation. Moreover, BOCs will have access to a mature, vibrant market in the resale of long distance capacity that will facilitate their rapid entry into long distance and, consequently, their provision of bundled long distance and local service. Additionally, switching customers from one long distance company to another is now a time-tested, quick, efficient, and inexpensive process. New entrants into the local market, on the other hand, do not have available a ready, mature market for the resale of local services or for the purchase of unbundled network elements, and the processes for switching customers for local service from the incumbent to the new entrant are novel, complex and still largely untested. For these reasons, BOC entry into the long distance market is likely to be much easier than entry by potential BOC competitors into the local market, a factor that may work to a BOC's advantage in competing to provide bundled services.

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and Order was stayed by the United States Court of Appeals for the District of Columbia Circuit in *MCI Telecommunications Corp. v. FCC*, No. 96-1459 (D.C. Cir. Feb. 13, 1997).

[30] *See Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271, 3313-3314 (1995) (*AT&T Reclassification Order*).

[31] Earlier this year, AT&T committed in writing to flow through proportionately to its basic schedule customers the savings it would obtain in the access charge reform proceeding, and AT&T and MCI subsequently reduced their basic schedule rates for residential customers. These decreases represented the first general reduction in basic schedule residential interstate long distance rates since the early 1990s. *See* Letter from Gerald M. Lowrie, Senior Vice President, AT&T, to Reed E. Hundt, Chairman, Federal Communications Commission (May 3, 1997). *See generally Access Charge Reform*, CC Docket No. 96-262, First Report and Order, FCC 97-158 (rel. May 16, 1997) (*Access Charge Reform Order*). As we noted in the *AT&T Reclassification Order*, "since 1991, basic schedule rates for domestic residential service have risen approximately sixteen percent (in nominal terms), with much of the increase occurring since January 1, 1994." *AT&T Reclassification Order*, 11 FCC Rcd at 3313.

[32] AT&T's Chairman, Robert Allen, was reported to have predicted that AT&T would "take at least a third" of the $90 billion local telephone market within several years. John J. Keller, *AT&T Challenges the Bell Companies*, Wall St. J., June 12, 1996, at A3.

18. If the local market is not open to competition, the incumbent will not face serious competitive pressure from new entrants, such as the major interexchange carriers. In other words, the situation would be largely unchanged from what prevailed before passage of the 1996 Act. That is why we must ensure that, as required by the Act, a BOC has fully complied with the competitive checklist.[33] Through the competitive checklist and the other requirements of section 271, Congress has prescribed a mechanism by which the BOCs may enter the in-region long distance market. This mechanism replaces the structural approach that was contained in the MFJ by which BOCs were precluded from participating in that market. Although Congress replaced the MFJ's structural approach, Congress nonetheless acknowledged the principles underlying that approach -- that BOC entry into the long distance market would be anticompetitive unless the BOCs' market power in the local market was first demonstrably eroded by eliminating barriers to local competition. This is clear from the structure of the statute, which requires BOCs to prove that their markets are open to competition before they are authorized to provide in-region long distance services. We acknowledge that requiring businesses to take steps to share their market is an unusual, arguably unprecedented act by Congress. But similarly, it is a rare step for Congress to overrule a consent decree, especially one that has fostered major advances in technology, promoted competitive entry, and developed substantial capacity in the long distance market. Congress plainly intended this to be a serious step. In order to effectuate Congress' intent, we must make certain that the BOCs have taken real, significant, and irreversible steps to open their markets. We further note that Congress plainly realized that, in the absence of significant Commission rulemaking and enforcement, and incentives all directed at compelling incumbent LECs to share their economies of scale and scope with their rivals, it would be highly unlikely that competition would develop in local exchange and exchange access markets to any discernable degree.

19. Unless such competition emerges, one of the ultimate goals of the 1996 Act, telecommunications deregulation, cannot be realized, at least not without risking monopoly prices for consumers. It is often easy to lose sight of the fact that deregulation will affect not only federal regulation of the telecommunications industry, but state regulation as well. Indeed, because regulation of the prices that consumers pay for local telecommunications services is a matter of state control, Congress's goal of deregulation will be most strongly felt at the state level.

20. In addition to deregulation, the opening of all telecommunications markets to competition will have other profound benefits. Consumers will have the choice of obtaining all of their telecommunications services from a single provider, so-called one-stop shopping. Telecommunications providers will be able to bundle packages of services to meet specific customer demands. Additionally, as we have recently noted, competition in the local

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[33] *See* 47 U.S.C. § 271(d)(3)(A) (requiring, *inter alia*, the Commission to determine that a BOC has "fully implemented" the competitive checklist).

telecommunications markets may help remove implicit subsidies in access charges.[34] In the end, consumers will benefit greatly by the removal of market barriers allowing firms the opportunity for full and fair competition in both the local and long distance markets on the basis of price, quality of service, and technological innovation.

21. In order to obtain these benefits, we must apply the statutory conditions designed to ensure that local telecommunications markets are open to competition such that previously precluded competitors in local and in long distance markets may now become competitors in each market. It is essential for local competition that the various methods of entry into the local telecommunications market contemplated by the Act -- construction of new facilities, purchase of unbundled network elements, and resale -- be truly available. Therefore, an open local market is one in which, among other things, new entrants have nondiscriminatory access to interconnection, transport and termination, and unbundled network elements at prices based on forward-looking economic costs, and the opportunity to obtain retail services at an appropriate discount for resale.[35] New entrants cannot compete effectively if, for example, the price of unbundled network elements precludes efficient entry by not allowing new entrants to take advantage of the incumbent's economies of scale, scope and density. Moreover, we need to ensure that the ability of efficient new entrants to garner market share is not obstructed by a BOC's failure to provide these essential inputs. We would question whether a BOC's local telecommunications market is open to competition absent evidence that the BOC is fully cooperating with new entrants to efficiently switch over customers as soon as the new entrants win them. This entails, among other things, the ability of new entrants to obtain the same access to the BOCs' operations support systems that the BOCs or their affiliates enjoy.

22. Moreover, we need to ensure that the market opening initiatives of the BOCs continue after their entry into the long distance market. It is not enough that the BOC prove it is in compliance at the time of filing a section 271 application; it is essential that the BOC must also demonstrate that it can be relied upon to remain in compliance. This may be demonstrated in various ways. For example, we must be confident that the procedures and processes requiring BOC cooperation, such as interconnection and the provision of unbundled network elements, have been sufficiently available, tested, and monitored. Additionally, we will look to see if there are appropriate mechanisms, such as reporting requirements or performance standards, to measure compliance, or to detect noncompliance, by the BOCs with their obligations. Finally, the BOC may propose to comply continually with certain conditions, or we may, on a case-by-case basis, impose conditions on a BOC's entry to ensure continuing compliance. The section 271 approval process necessarily involves viewing a snapshot of an evolving process. We must be confident that the picture we see as of the date of filing contains all the necessary elements to sustain growing competitive entry into the future.

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[34] *Access Charge Reform Order*, FCC 97-158, at para. 7.

[35] For a discussion of TELRIC pricing principles for checklist items, see *infra* Section VI.F.1.

23. The requirements of section 271 are neither punitive nor draconian. They reflect the historical development of the telecommunications industry and the economic realities of fostering true local competition so that all telecommunications markets can be opened to effective, sustained competition. Complying with the competitive checklist, ensuring that entry is consistent with the public interest, and meeting the other requirements of section 271 are realistic, necessary goals. That is not to say, however, that they are easy to meet or achievable overnight. Given the complexities of the task of opening these local markets to true, sustainable competition, it is not surprising that companies that are earnestly and in good faith cooperating in opening their local markets to competition have not yet completed the task. It is through such earnest, good faith efforts that BOCs will obtain authorization to provide in-region long distance service. Section 271 primarily places in each BOC's hands the power to determine if and when it will enter the long distance market. This is because it is the BOC's willingness to open its local telecommunications markets to competition pursuant to the requirements of the Act that will determine section 271 approval.

C. History of Ameritech's Efforts to Obtain In-Region, InterLATA Authorization for Michigan

24. Ameritech's efforts to obtain authority to provide in-region, interLATA services in Michigan began more than four years ago, when Ameritech announced its unique Customers First Plan in March 1993. In that plan, Ameritech proposed a framework for eliminating legal, economic, and technical barriers to entry to local exchange competition, in return for obtaining a waiver from the line of business restrictions in the MFJ in order to provide interLATA services, *inter alia*, in Grand Rapids, Michigan. Before judicial action was taken on Ameritech's proposal, however, the 1996 Act was enacted.

25. On January 2, 1997, Ameritech filed with the Commission its initial application to provide in-region, interLATA services in the state of Michigan, pursuant to section 271 (initial application).[36] Ameritech's initial application proved to be premature, however, because it relied on an interconnection agreement with AT&T Communications of Michigan that had not been approved by the Michigan Commission, as required by section 271, and that did not appear to be a legally binding contract.[37] As a result, Ameritech's initial application contained certain procedural irregularities that led in the first instance to the Commission restarting the 90-day

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[36] 47 U.S.C. § 271. Ameritech's initial application was docketed by the Commission as CC Docket No. 97-1.

[37] *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-1, Order, 12 FCC Rcd 3309, 3318 (1997) (*Ameritech February 7th Order*).

period of review for that application.[38] Then, on February 7, 1997, the Commission concluded that, for purposes of satisfying section 271, Ameritech could not rely on Ameritech's purported interconnection agreement with AT&T that was filed with its application.[39]

26. In reaching this conclusion, we noted that, "[b]ecause of the strict 90-day statutory review period, the section 271 review process is keenly dependent on both final approval of a binding agreement pursuant to section 252 as well as an applicant's submission of a complete application at the commencement of a section 271 proceeding."[40] We emphasized that an application's completeness was essential to permit state commissions and the Department of Justice to meet their respective statutory consultative obligations, as well as to allow interested parties to comment on, and the Commission to evaluate, an enormous and complex record in a short period of time.[41]

27. On February 11, 1997, Ameritech asked the Commission to dismiss its application without prejudice.[42] On February 12, 1997, the Common Carrier Bureau granted Ameritech's request, and terminated review of Ameritech's application without reaching the merits.[43]

28. On May 21, 1997, Ameritech filed with the Commission an application to provide in-region, interLATA services in the state of Michigan.[44] Ameritech represents that its application satisfies the requirements of section 271(c)(1)(A), because it has entered into interconnection

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[38] Specifically, due to discrepancies between the AT&T Agreement filed with Ameritech's January 2nd application and a version of the agreement filed with the Michigan Commission on December 26, 1996, Ameritech filed an amendment to its initial application (amended application) on January 17, 1997, which relied on a new version of the AT&T Agreement that had been filed with the Michigan Commission on January 16. *Id.* at 3312-14. At Ameritech's request, the Commission restarted the 90-day review period, effectively treating the amended application as a newly filed application. *Id.* at 3310.

[39] *Id.* at 3318. On January 29, 1997, Ameritech filed with the Michigan Commission a new version of the AT&T agreement, which Ameritech claimed superseded all agreements previously filed with the Michigan Commission, and which was the first version of the agreement that had been executed by both parties. *Id.* at 3312-14. Ameritech did not, however, withdraw the January 16th version or request the Commission to consider the January 29th version for purposes of evaluating its Amended Application. *Id.* at 3314. On February 3, 1997, the Association for Local Telecommunications Services (ALTS) filed a motion to strike Ameritech's reliance on the AT&T Agreement for purposes of satisfying section 271. *Id.* at 3314.

[40] *Id.* at 3320-21.

[41] *Id.*

[42] Letter from John T. Lenahan, Assistant General Counsel, Ameritech, to William F. Caton, Acting Secretary, Federal Communications Commission (Feb. 11, 1997).

[43] *Application by Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-1, Order, 12 FCC Rcd 2088 (Com. Car. Bur. rel. Feb. 12, 1997) (*Ameritech Termination Order*).

[44] *See supra* note 4.

agreements with three carriers (Brooks Fiber, MFS WorldCom, and TCG) that have been approved by the Michigan Commission.[45] Ameritech also represents that it has "'fully implemented the competitive checklist in section 271(c)(2)(B)' . . . by providing each of the checklist items to its Section 271(c)(1)(A) competitors . . . at rates and on terms and conditions that comply with the Act."[46] In addition, Ameritech states that it has established a separate affiliate, Ameritech Communications, Inc. (ACI), to provide in-region, interLATA services in Michigan, and that it and ACI will abide by the structural and transactional requirements of section 272.[47] Finally, Ameritech argues that grant of its application is consistent with the public interest, because Ameritech's entry into the in-region, interLATA services market in Michigan will produce substantial benefits for consumers.[48] Accordingly, Ameritech requests the Commission to grant its application to provide in-region, interLATA services in the state of Michigan.[49]

29. As noted above, our review of the extensive record compiled in this proceeding indicates that Ameritech has made considerable progress toward satisfying the requirements of section 271. In this Order, we conclude that Ameritech is providing access and interconnection to an unaffiliated, facilities-based provider of telephone exchange service to residential and business subscribers in Michigan, as required by section 271(c)(1)(A). In addition, the record evidence shows that Ameritech has made substantial efforts to implement the competitive checklist. We conclude in this Order, however, that Ameritech has not yet demonstrated that it has fully implemented several items of the competitive checklist in section 271(c)(2)(B) or that the requested authorization will be carried out in accordance with the requirements of section 272. We, therefore, must deny, pursuant to section 271(d)(3), Ameritech's application to provide in-region, interLATA services in Michigan. We, nevertheless, commend Ameritech for its efforts to date, and urge Ameritech to continue to work closely with new entrants, the Department of Justice, and the Michigan Commission to satisfy the requirements of section 271 for entry into the interLATA services market in Michigan.

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[45] Ameritech Application at 2-3. Ameritech further represents that these carriers are competing, unaffiliated providers of telephone exchange services that together serve residential and business customers in Michigan either exclusively or predominantly over their own facilities. *Id.* at 8.

[46] *Id.* at 15.

[47] *Id.* at 55-56.

[48] *Id.* at 3. Ameritech represents that "[t]he new competition that Ameritech will bring to the long distance industry will drive prices toward competitive levels, increase consumer choice, stimulate improved customer service and product innovation, and bring the benefits of advances in telecommunications services to a broader group of consumers." *Id.* at 67. Ameritech asserts that "Ameritech's entry into long distance in Michigan will create a $450-500 million annual benefit for Michigan consumers -- in present value terms, a consumer welfare benefit of more than $5.5 billion." *Id.* Ameritech does not specifically assert, however, that its retail prices for interLATA services will be lower than existing prices, nor does it make clear how any particular group of consumers will share in the foregoing, alleged consumer benefits.

[49] *Id.* at 4.

III. CONSULTATION WITH THE MICHIGAN PUBLIC SERVICE COMMISSIONAND THE UNITED STATES DEPARTMENT OF JUSTICE

A. State Verification of BOC Compliance with Section 271(c)

30. Under section 271(d)(2)(B), the Commission "shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c)."[50] In requiring the Commission to consult with the states, Congress afforded the states an opportunity to present their views regarding the opening of the BOCs' local networks to competition. In order to fulfill this role as effectively as possible, state commissions must conduct proceedings to develop a comprehensive factual record concerning BOC compliance with the requirements of section 271 and the status of local competition in advance of the filing of section 271 applications. We believe that the state commissions' knowledge of local conditions and experience in resolving factual disputes affords them a unique ability to develop a comprehensive, factual record regarding the opening of the BOCs' local networks to competition. The state commission's development of such a record in advance of a BOC's application is all the more important in light of the strict, 90-day deadline for Commission review of section 271 applications. Most state commissions, recognizing the importance of their role in the section 271 process, have initiated proceedings to develop a comprehensive record on these issues.[51] Others, however, have not yet initiated such proceedings, or have undertaken only a cursory review of BOC compliance with section 271. We note that the Act does not prescribe any standard for Commission consideration of a state commission's verification under section 271(d)(2)(B). The Commission, therefore, has discretion in each section 271 proceeding to determine what deference the Commission should accord to the state commission's verification in light of the nature and extent of state proceedings to develop a complete record concerning the applicant's compliance with section 271 and the status of local competition. We will consider carefully state determinations of fact that are supported by a

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[50] 47 U.S.C. § 271(d)(2)(B). Subsection (c) states that a Bell operating company meets the requirements of paragraph (c)(1) if it has, for each state for which authorization is sought: (A) entered into one or more binding agreements that have been approved under section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service to residential and business subscribers; or (B) a statement of the terms and conditions that the company generally offers to provide such access and interconnection, which has been approved or permitted to take effect effect by the State commission under section 252(f). *Id.* § 271(c)(1). Subsection (c) further states that a Bell operating company meets the requirements of paragraph (c)(2) if, within the state for which authorization is sought, the "[a]ccess or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of [the competitive checklist]." *Id.* § 271(c)(2).

[51] *See State Regulators Call for Prompt InterLATA Reviews*, Telecommunications Reports, Feb. 17, 1997, at 7 (reporting that three state utility commissioners had urged other state utility commissioners to be prepared promptly to review BOC compliance with the requirements of section 271 so that the state utility commissions could fulfill the "crucial role assigned to [them]" by the 1996 Act, and comply with the Commission's schedule for reviewing section 271 applications) (citing Letter of Kenneth McClure, Missouri Public Service Commissioner; Cheryl L. Parrino, Chairman of the Wisconsin Public Service Commission; and Joan H. Smith, Oregon Public Utilities Commissioner, to various state public utilities commissioners (Jan. 24, 1997)).

detailed and extensive record, and believe the development of such a record to be of great importance to our review of section 271 applications. We emphasize, however, that it is our role to determine whether the factual record supports a conclusion that particular requirements of section 271 have been met.

31. On June 10, 1997, the Michigan Commission submitted its comments concerning Ameritech's application.[52] The Michigan Commission greatly assisted the Commission in this section 271 application by developing an extensive record and making factual findings based on that record concerning each of the requirements of section 271(c).

32. In its comments on Ameritech's initial January 1997 application, the Michigan Commission evaluated Ameritech's compliance with the requirements of section 271(c), and, based on available evidence at that time, found that Ameritech had entered into state-approved interconnection agreements that satisfied each of the elements of the competitive checklist.[53] After Ameritech withdrew its initial application, the Michigan Commission was able to develop a more complete record on Ameritech's compliance with the requirements of section 271(c). In its consultation on Ameritech's current application, the Michigan Commission updated its comments to account for new information contained in Ameritech's application and the record in Michigan Case No. U-11104 as of the date the Michigan Commission's consultation was filed, June 10, 1997.[54] Based on its continued review, the Michigan Commission concluded that Ameritech has not fully implemented four checklist items. In particular, the Michigan Commission found that Ameritech fails to provide nondiscriminatory access to its operations support systems, transport and switching, and access to its 911 and E911 services, as required by the competitive checklist.

33. The Michigan Commission provides a detailed, critical assessment of Ameritech's provision of access to its operations support systems, based on information produced in an informational hearing on Ameritech's operations support systems conducted on May 28, 1997.[55] In addition, the Michigan Commission recommends a comprehensive list of factors that should be considered in the development of performance standards for operations support systems.[56] The

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[52] Comments of the Michigan Public Service Commission, CC Docket No. 97-137 (filed June 10, 1997) (Michigan Commission Consultation).

[53] Comments of the Michigan Public Service Commission, CC Docket No. 97-1 (filed Feb. 5, 1997) (February 5 Michigan Commission Comments).

[54] Michigan Commission Consultation at 2. The Michigan Commission established Michigan Case No. U-11104 on June 5, 1996, to receive information relating to Ameritech's compliance with section 271(c).

[55] *Id.* at 13-34. The Michigan Commission decided to conduct this hearing because competing providers had gained considerable experience using Ameritech's operations support systems following the dismissal of Ameritech's original application. *Id.* at 14 (noting that, at the time of Ameritech's original application, little experience had been garnered with much of Ameritech's operations support systems).

[56] *Id.* at 31-32.

Michigan Commission's consultation also includes a detailed analysis of other checklist-related issues that arose after withdrawal of Ameritech's initial application, such as Ameritech's provision of access to 911 and E911 services.[57] The Michigan Commission also noted that some competing local exchange carriers have complained about higher blockage rates on trunks that interconnect such carriers' facilities to Ameritech's network.[58] The Michigan Commission's clear and incisive evaluation of these and other issues has been extremely helpful to our analysis of Ameritech's compliance with the competitive checklist.

34. We note, however, that the Michigan Commission's consultation did not include an analysis of the state of local competition in Michigan. This information is not germane to the competitive checklist, which is the one subject on which the Commission is required to consult with the state commissions. But this information will be valuable to our assessment of the public interest, and it is information which the state commissions are well-situated to gather and evaluate. Accordingly, in future applications, we suggest that the relevant state commission develop, and submit to the Commission, a record concerning the state of local competition as part of its consultation. In particular, state commissions should, if possible, submit information concerning the identity and number of competing providers of local exchange service, as well as the number, type, and geographic location of customers served by such competing providers. We recognize that carriers may view much of this information as proprietary and that different states have different procedures for obtaining and handling such information. Nevertheless, we encourage states to develop and submit to the Commission as much information as possible, consistent with state procedural requirements.

B. Department of Justice's Evaluation

35. Section 271(d)(2)(A) requires the Commission, before making any determination approving or denying a section 271 application, to consult with the Attorney General.[59] The Attorney General is entitled to evaluate the application "using any standard the Attorney General considers appropriate,"[60] and the Commission is required to "give substantial weight to the Attorney General's evaluation."[61] Section 271(d)(2)(A) specifically provides, however, that "such evaluation shall not have any preclusive effect on any Commission decision."[62]

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57 *Id.* at 41-44.

58 *Id.* at 12.

59 47 U.S.C. § 271(d)(2)(A).

60 *Id.*

61 *Id.*

62 *Id.*

36. Several of the BOCs maintain that the Department of Justice's evaluation in this proceeding is entitled to no special weight, because, they claim, the Commission is required to give substantial weight only to the Department of Justice's evaluation of the effect of BOC entry on long distance competition. These BOCs contend that the Department of Justice's evaluation of Ameritech's application impermissibly includes an assessment, among other things, of Ameritech's implementation of the competitive checklist.[63] SBC, for example, argues that "[i]t was only with respect to the effect of [BOC] entry on long distance competition that Congress provided a role for the Department of Justice."[64] SBC claims that the Joint Explanatory Statement indicates that, while the Department is free to choose a standard for evaluating a section 271 application, "the focus of its analysis should be the competitive effects of Bell company interLATA entry."[65] SBC concludes that the Department's discretion thus extends only to selecting an antitrust standard and evaluating the competitive effects of Bell company entry into the interLATA market under that standard.[66]

37. We find that the Commission is required to give substantial weight not only to the Department of Justice's evaluation of the effect of BOC entry on long distance competition, but also to its evaluation of each of the criteria for BOC entry under section 271(d)(3) if addressed by the Department of Justice. As noted above, section 271(d)(2) provides that, "[b]efore making any determination" under subsection (d) approving or denying a BOC application for authorization to provide in-region, interLATA services, "the Commission shall consult with the Attorney General, and . . . shall give substantial weight to the Attorney General's evaluation, but such evaluation shall not have any preclusive effect on any Commission decision."[67] Significantly, section 271(d)(2) does not limit the Attorney General's evaluation to any one of the conditions for BOC entry, to any particular portion of a BOC application, or to an appraisal of the competitive effects of BOC entry on the long distance market. Rather, that section states that the Attorney General is to provide an evaluation of the "application" using any standard the Attorney General considers appropriate. In addition, subsection (d)(2) does not limit the Commission's consultation with the Attorney General only to particular requirements for BOC entry, but rather provides that the Commission may not make "*any determination*" under subsection (d) before consulting with the Attorney General. We note that Congress limited the consultative role of state commissions to

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63 *See* SBC Reply Comments at 4; BellSouth Reply Comments at 1-2; *see also* Bell Atlantic/NYNEX Reply Comments at 8 (while section 271(d)(2)(A) "allows the Department of Justice [to evaluate the long distance authorization being sought] it cannot alter the substantive standard that governs the Commission's own determination," *e.g.*, by expanding the checklist).

64 SBC Reply Comments at 2 (citing legislative history).

65 *Id.* (citing Joint Explanatory Statement at 149, offering examples of antitrust standards that would be appropriate).

66 *Id.* at 3.

67 47 U.S.C. § 271(d)(2).

verification of BOC compliance with section 271(c), but imposed no such constraint on the Attorney General.[68] Therefore, the plain language of section 271(d) requires the Commission to accord substantial weight to the Department of Justice's entire evaluation, including its evaluation of each of the criteria for BOC entry under section 271(d)(3) if addressed by the Department of Justice, under whatever standard the Department of Justice considers appropriate.

38. Despite the plain language of section 271(d), several BOCs contend that the legislative history makes clear that the focus of the Department of Justice's analysis under section 271(d)(2) should be the competitive effects of BOC interLATA entry on long distance competition. In support of their interpretation of section 271(d)(2), these BOCs contend that Congress offered in the Joint Explanatory Statement specific examples of the type of antitrust standard and inquiry the Department of Justice could appropriately pursue, including: "(1) the standard included in the House amendment, whether there is a dangerous probability that the BOC or its affiliates would successfully use market power to substantially impede competition in the market such company seeks to enter; [or] (2) the standard contained in section VIII(C) of the AT&T Consent Decree, whether there is no substantial possibility that the BOC or its affiliates could use monopoly power to impede competition in the market such company seeks to enter."[69] Additionally, these BOCs maintain that floor statements by several legislators confirm that the substantial weight to be accorded to the views of the Department of Justice is limited to its "expertise in antitrust matters."[70]

39. These BOCs fail, however, to quote completely the relevant Joint Explanatory Statement language. The quoted passage goes on specifically to state that, "[i]n making an evaluation, the Attorney General may use . . . (3) any other standard the Attorney General deems appropriate."[71] This passage does not limit such other standard to an antitrust standard. Thus, read in its entirety, the legislative history cited by these BOCs does not support their position that the Department of Justice's evaluation must be limited solely to the competitive effects of BOC entry on the interLATA market, or even to antitrust-related matters. It is a fundamental canon of statutory construction that the legislative history of a statute cannot undermine the plain meaning of a statute unless it clearly and unequivocally expresses a legislative intent contrary to that

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[68] *See id.* § 271(d)(2)(B).

[69] *See* SBC Reply Comments at 2-3 (quoting Joint Explanatory Statement at 149); BellSouth Reply Comments at 3.

[70] SBC Reply Comments at 3 (citing 142 Cong. Rec. H1176 (daily ed. Feb. 1, 1996) (Statement of Rep. Jackson-Lee); 142 Cong. Rec. H1178 (daily ed. Feb. 1, 1996) (Statement of Rep. Sensenbrenner) ("FCC's reliance on the Justice Department is limited to antitrust related matters")); BellSouth Reply Comments at 3 (citing 142 Cong. Rec. H1176 (Statement of Rep. Jackson-Lee); 142 Cong. Rec. H1178 (Statement of Rep. Sensenbrenner); 142 Cong. Rec. H1157 (Statement of Rep. Hyde)).

[71] *See* Joint Explanatory Statement at 149.

language.[72] Because we find the legislative history does not clearly and unequivocally manifest an intent by Congress to limit the Commission's reliance on the Attorney General's evaluation to the competitive effects of BOC interLATA entry on long distance competition, contrary to the plain language of section 271, we reject these BOCs' interpretation of section 271(d).[73]

40. Even if we were to accept these BOCs' position, however, we would still be required to give substantial weight to the Attorney General's evaluation of, among other things, the state of local competition and the applicant's compliance with the competitive checklist.[74] Assessing the effects on long distance competition of BOC entry into the in-region, interLATA services market necessarily includes an analysis of whether the BOC retains the ability to leverage market power, if any, in the local exchange into the long distance market, because a BOC could use its control over bottleneck local exchange facilities to undermine competition in the long distance market. For example, a BOC could limit competition in the long distance market by providing its long distance competitors lower quality access services, by raising its competitors' costs in order to effect a price squeeze, or by improperly shifting costs from its long distance affiliate to the local exchange.[75] In addition, we note that each of the antitrust standards cited

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[72] *Burlington No. R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) ("Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity, but '[i]n the absence of a "clearly expressed legislative intention to the contrary," the language of the statute itself "must ordinarily be regarded as conclusive."'") (citations omitted); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987).

[73] The remarks of individual members of Congress during floor debates, such as those relied on by these BOCs to support their contention that the Commission's reliance on the Department of Justice is narrowly circumscribed, are entitled to less weight than other types of legislative history. *See Allen v. Attorney General of State of Maine*, 80 F.3d 569, 575 (1st Cir. 1996) ("As a general matter, courts must be chary of overvaluing isolated comments by individual solons.") (citations omitted); *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 537 (7th Cir. 1991); *In re Kelly*, 841 F.2d 908, 912 n.3 (9th Cir. 1988) ("To the extent that legislative history may be considered, it is the official committee reports that provide the authoritative expression of legislative intent. . . . Stray comments by individual legislators, not otherwise supported by statutory language or committee reports, cannot be attributed to the full body that voted for the bill.") (citations omitted). Thus, we generally do not rely on floor statements of individual members of Congress to ascertain the meaning of an ambiguous statutory provision. In any event, in this case, we note that floor statements by other legislators support a conclusion contrary to that posited by these BOCs. *See, e.g.*, 142 Cong. Rec. S698 (daily ed. Feb. 1, 1996) (Statement of Sen. Kerrey) ("In conjunction with [its] evaluation, the Attorney General may submit any comments and supporting materials under any standard she believes appropriate. Through its work in investigating the telecommunications industry and enforcing the MFJ, DOJ has important knowledge, evidence, and experience that will be of critical importance in evaluating proposed long-distance entry -- which, as I indicated earlier, requires an FCC finding that such entry is in the public interest, and that a facilities-based competitor is present. On both of these issues, the DOJ's expertise in telecommunications and competitive issues generally should be of great value to the FCC.").

[74] In its evaluation of Ameritech's application, the Department of Justice submitted an analysis of the state of local competition in Michigan and provided a detailed analysis of Ameritech's compliance with four checklist items. Department of Justice Evaluation at 7-27. The Department of Justice did not evaluate Ameritech's compliance with the remaining checklist items.

[75] We recently observed that a BOC may have an incentive to allocate costs from its competitive interLATA services to regulated services so long as the BOC is subject to price cap rules that retain elements of cost of service regulation (*e.g.*, if the BOC can select an option that requires it to share earnings that exceed specified benchmarks with its customers, or that permits it to make a low-end adjustment if earnings fall below a specified threshold). *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket Nos. 96-149, 96-61,

with approval by these BOCs focuses specifically on whether a BOC can use monopoly or market power *in the local exchange* to impede competition in the market the BOC seeks to enter (that is, the market for in-region, interLATA services).[76] Thus, a critical question in assessing the effects of BOC entry on long distance competition is whether the local exchange is open to competition. As a practical matter, that analysis would require the Attorney General to evaluate whether the BOC has complied with the competitive checklist and other requirements of sections 271 and 272, and whether such compliance has, in fact, sufficiently reduced the BOC's bottleneck control of the local exchange. Thus, in order to give substantial weight to the Attorney General's evaluation of "the effect of Bell company entry on long distance competition," as advocated by these BOCs,[77] we must accord substantial weight to the Attorney General's assessment of BOC compliance with the competitive checklist and other requirements of sections 271 and 272, as well as the impact of such compliance on the state of competition in the local exchange.

41. In its evaluation of Ameritech's current application, the Department of Justice focused on certain deficiencies in Ameritech's application. The Department of Justice concluded that, although Ameritech has made significant progress toward satisfying the requirements of section 271, Ameritech has failed in several respects. First, the Department of Justice concluded that Ameritech has not fully implemented several elements of the competitive checklist, including the requirements that it provide unbundled local switching, unbundled transport, interconnection equal in quality to that provided to itself, and access to operations support systems.[78] The Department of Justice's detailed and thoughtful evaluation on these issues has been very helpful to our analysis.[79]

42. Second, the Department of Justice concluded that granting Ameritech's application would not be consistent with the public interest, because local markets in Michigan are not irreversibly open to competition. Specifically, the Department of Justice found that, although limited competitive entry is occurring in Michigan under all entry paths contemplated by the 1996

Second Report and Order in CC Docket No. 96-149, and Third Report and Order in CC Docket No. 96-61, FCC 97-142, at paras. 103-08 (rel. Apr. 18, 1997) (*LEC Classification Order*).

[76] *See, e.g.*, SBC Reply Comments at 2-3 ("The Conference Report even offers specific examples of antitrust standards that would be appropriate, 'including: (1) . . . whether there is a dangerous probability that the BOC or its affiliates would successfully use *market power* to substantially impede competition in the market such company seeks to enter; [or] (2) . . . whether there is no substantial possibility that the BOC or its affiliates could use *monopoly power* to impede competition in the market such company seeks to enter.'") (emphasis added) (quoting Joint Explanatory Statement at 149).

[77] *See* SBC Reply Comments at 2; *see also* BellSouth Reply Comments at 3 ("The DOJ's role under Section 271(d)(2)(A) is limited to analyzing the competitive impact BOC entry will have on the in-region, interLATA market.").

[78] Department of Justice Evaluation at 7-27.

[79] In future applications, we encourage the Department of Justice to examine the applicant's compliance with each checklist item, as the Michigan Commission did in this case.

Act (construction of networks and interconnection with incumbent LECs, use of unbundled elements, and resale), there is not yet sufficient local competition to presume the market is open to competition.[80] The Department of Justice, therefore, examined whether barriers to entry in Michigan exist that would impede the growth of local competition, and concluded that such barriers remain.[81] In addition, the Department of Justice concluded that the absence of adequate performance measures and enforceable benchmarks suggests that local competition in Michigan is not yet irreversible.[82] Although we do not reach the question of whether the authorization requested by Ameritech is consistent with the public interest, convenience, and necessity, the Department of Justice's examination of the state of local competition in Michigan is the type of analysis that we will find useful in its evaluations of future applications. We also would find it useful in such evaluations for the Department of Justice to assess the impact of BOC entry on long distance competition, and, in particular, to analyze the expected consumer welfare benefits resulting from additional long distance competition.

IV. STANDARD FOR EVALUATING SECTION 271 APPLICATIONS

A. Burden of Proof for Section 271 Applications

43. Section 271 places on the applicant the burden of proving that all of the requirements for authorization to provide in-region, interLATA services are satisfied. Section 271(d)(3) provides that "[t]he Commission shall not approve the authorization requested in an application . . . *unless* it finds that [the petitioning BOC has satisfied all the requirements of section 271]."[83] Because Congress required the Commission affirmatively to find that a BOC application has satisfied the statutory criteria, the ultimate burden of proof with respect to factual issues remains at all times with the BOC, even if no party opposes the BOC's application.[84]

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80 Department of Justice Evaluation at 31.

81 *Id.*

82 *Id.*

83 47 U.S.C. § 271(d)(3) (emphasis added).

84 *See Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma*, CC Docket No. 97-121, Memorandum Opinion and Order, FCC 97-228, para. 13 (rel. June 26, 1997) (*SBC Oklahoma Order*). In the Commission's *Non-Accounting Safeguards Order*, the Commission noted that the term "burden of proof" has been used to describe two separate but related concepts. First, it has been used to describe the burden of persuasion with respect to a particular issue, which never shifts from one party to the other. Second, it has been used to describe the burden of production, which requires a party to go forward with sufficient evidence to avoid an adverse ruling on an issue -- this burden may shift back and forth between the parties. *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22072 (citing Black's Law Dictionary 136 (Abridged 6th ed. 1991)). In this context, we use the term "burden of proof" to refer to the "burden of persuasion."

44. In the first instance, therefore, a BOC must present a *prima facie* case in its application that all of the requirements of section 271 have been satisfied.[85] Once the applicant has made such a showing, opponents of the BOC's entry must, as a practical matter, produce evidence and arguments necessary to show that the application does not satisfy the requirements of section 271 or risk a ruling in the BOC's favor.[86] We emphasize, however, that the BOC applicant retains at all times the ultimate burden of proof that its application satisfies section 271.

45. With respect to assessing evidence proffered by a BOC applicant and by opponents to a BOC's entry in a section 271 proceeding, neither section 271 nor its legislative history prescribes a particular standard of proof for establishing whether a BOC applicant has satisfied the conditions required for authorization to provide in-region, interLATA services. The standard of proof applicable in most administrative and civil proceedings, unless otherwise prescribed by statute or where other countervailing factors warrant a higher standard, is the "preponderance of the evidence" standard.[87] Accordingly, we conclude that the "preponderance of the evidence" standard is the appropriate standard for evaluating a BOC section 271 application.

46. Generally, the preponderance of the evidence standard in civil and administrative actions means the "greater weight of evidence, evidence which is more convincing than the

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[85] Thus, a BOC must plead, with appropriate supporting evidence, facts which, if true, are sufficient to establish that the requirements of section 271 have been met. *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 22070.

[86] *See, e.g., Hale v. Dep't of Transp., FAA*, 772 F.2d 882, 885 (Fed. Cir. 1985) ("Proving a prima facie case compels the conclusion sought to be proven unless evidence sufficient to rebut the conclusion is produced."). *See also Non-Accounting Safeguards Order*, 11 FCC Rcd at 22072. We believe that shifting the burden of production once a BOC has presented a *prima facie* case that its application satisfies section 271 is appropriate, because parties opposing a BOC's application have the greatest incentive to produce, and generally have access to, information that would rebut the BOC's case. In addition, absent such a shift in the burden of production, a BOC applicant would be in the untenable position of having to prove a negative (that is, of coming up with, and rebutting, arguments why its application might not satisfy the requirements of section 271). We emphasize, again, that, although the burden of *production* on a particular issue may shift to the opponents of BOC entry, the ultimate burden of *persuasion* never shifts from the BOC to the opponents of BOC entry.

[87] *See, e.g., Bender v. Clark*, 744 F.2d 1424 (10th Cir. 1984) ("The traditional standard required in a civil or administrative proceeding is proof by a preponderance of the evidence. . . . The traditional preponderance standard must be applied unless the type of case and the sanctions or hardship imposed require a higher standard.") (citations omitted); *Sea Island Broadcasting Corp. of S.C. v. FCC*, 627 F.2d 240, 243 (D.C. Cir.) ("The use of the 'preponderance of the evidence' standard is the traditional standard in civil and administrative proceedings. It is the one contemplated by the APA, 5 U.S.C. § 556(d)."), *cert. denied*, 449 U.S. 834 (1980); *Steadman v. SEC*, 450 U.S. 91 (1981) (reversing prior law to apply the preponderance of the evidence standard to cases under the Administrative Procedures Act (APA) even where a proceeding imposes stringent sanctions); *General Plumbing Corp. v. New York Tel. Co. and MCI*, Memorandum Opinion and Order, 11 FCC Rcd 11799 (1996); *see also Gorgan v. Garner*, 498 U.S. 279, 286 (1991) (because the "preponderance of the evidence" standard results in roughly equal allocation or risks of error between litigants, the Supreme Court presumes that such a standard is applicable in civil actions between private litigants unless particularly important interests or rights are at stake) (citations omitted); Davis & Pierce, II *Administrative Law Treatise* § 10.7, at 171 (3rd Ed. 1994) ("the preponderance of the evidence standard applies to the vast majority of agency actions").

evidence which is offered in opposition to it."[88] As discussed above, the Commission must accord substantial weight to the Department of Justice's evaluation of a section 271 application. Consequently, if the Department of Justice concludes that a BOC has not satisfied the requirements of sections 271 and 272, a BOC must submit more convincing evidence than that proffered by the Department of Justice in order to satisfy its burden of proof. If we find that the evidence is in equipoise after considering the record as a whole, we must reject the BOC's section 271 application, because the BOC will not have satisfied its burden of proof.

47. In our December 6, 1996, Public Notice describing the procedures we would follow in processing section 271 applications, we required each application to "conform to the Commission's general rules relating to applications," and to include an "affidavit signed by an officer or duly authorized employee certifying that all information supplied in the application is true and accurate."[89] We did not, however, direct parties commenting on a section 271 application to include such an affidavit or verified statement in support of the factual assertions in their comments. While our *December 6 Public Notice* did not require parties that comment on section 271 applications to certify the accuracy of the factual assertions in their comments, we will consider the lack of such a certification in assessing the probative value of their comments. Thus, we will attach greater weight to comments and pleadings supported by an affidavit or sworn statement than we will to an unsupported contrary pleading.

48. On July 7, 1997, Ameritech filed a motion to strike in its entirety the opposition of Brooks Fiber Communications of Michigan to Ameritech's application, on the ground that Brooks Fiber's opposition did not include an affidavit or verified statement certifying the accuracy of the factual assertions in its opposition.[90] Ameritech argues that the Commission should strike Brooks Fiber's opposition in its entirety, because "Brooks' unsupported factual assertions are inextricably intertwined with, and indeed form the basis for, each of the legal arguments in the Opposition."[91] Because we believe that the failure by a party to certify the accuracy of the factual assertions

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[88] *Hale v. Dep't of Transp.*, 772 F.2d at 885; *St. Paul Fire and Marine Ins. Co. v. United States*, 6 F.3d 763, 769 (Fed. Cir. 1993). *See, e.g.*, 5 C.F.R. § 1201.56 (1997) ("*Preponderance of the evidence.* The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue."). *See also* 2 Kenneth S. Broun et al., McCormick on Evidence § 339, at 439 (John W. Strong ed., 4th ed. 1992) ("The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads the [finder of fact] to find that the existence of the contested fact is more probable than its nonexistence."); 21 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence § 5122, at 557-58 (1977) ("the normal burden of proof in a civil case is measured by a 'preponderance of the evidence.' In effect, this means that if the [finder of fact] cannot make up its . . . mind, it should find against the party with the burden of proof.") (citations omitted).

[89] *Procedures for Bell Operating Company Applications Under New Section 271 of the Communications Act*, Public Notice, 11 FCC Rcd 19708, 19709-10 (1996) (*December 6th Public Notice*).

[90] Ameritech Michigan's Motion to Strike the Opposition of Brooks Fiber Communications of Michigan to Ameritech's Application (filed July 7, 1997) (Ameritech Motion to Strike).

[91] *Id.* at 4.

contained in its comments goes to the weight, and not the admissibility, of its comments, we decline to grant Ameritech's motion. In any event, we note that, on August 4, 1997, Brooks Fiber filed an affidavit verifying the accuracy of the facts contained in the comments, reply comments, and *ex parte* communications submitted by Brooks Fiber in this docket.[92]

B. Compliance with Requirement that Application Be Complete When Filed

1. Weight Accorded to New Factual Evidence

49. In our *December 6th Public Notice* announcing procedures governing BOC section 271 applications, we unequivocally stated that "[w]e expect that a section 271 application, *as originally filed*, will include *all of the factual evidence* on which the applicant would have the Commission rely in making its findings thereon."[93] We affirmed this requirement in our *Ameritech February 7th Order* where we recognized that, "[b]ecause of the 90-day statutory review period, the section 271 review process is keenly dependent on . . . an applicant's submission of a complete application at the commencement of a section 271 proceeding."[94]

50. In this proceeding, Ameritech submitted over 2,200 pages of reply comments (including supporting documentation), portions of which several parties challenged in two motions to strike.[95] These parties contend that Ameritech has presented material new information that should not be considered by the Commission in making its decision. In light of these disputes, we find it necessary once again to emphasize the requirement that a BOC's section 271 application must be complete on the day it is filed. As AT&T asserts, this "is the only workable rule given the unique scheme of accelerated and consultative agency review that Congress crafted for [s]ection 271."[96] We stress that an applicant may not, at any time during the pendency of its application, supplement its application by submitting new factual evidence that is not directly responsive to arguments raised by parties commenting on its application. This includes the submission, on reply, of factual evidence gathered after the initial filing. If a BOC applicant chooses to submit such evidence, we reserve the discretion either to restart the 90-day clock, as

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92 Letter of John C. Shapleigh, Executive Vice President, Brooks Fiber Communications, to William F. Caton, Acting Secretary, Federal Communications Commission, Attachment D (Affidavit of Martin W. Clift, Jr., on Behalf of Brooks Fiber Communications of Michigan, Inc.) (August 4, 1997).

93 *December 6th Public Notice*, 11 FCC Rcd at 19709 (emphasis added).

94 *Ameritech February 7th Order*, 12 FCC Rcd at 3320.

95 *See* Motion of AT&T to Strike Portions of Ameritech's Reply Comments and Reply Affidavits in Support of its Section 271 Application for Michigan, filed July 15, 1997 (AT&T Motion to Strike); Joint Motion of MCI, WorldCom, and ALTS to Strike Ameritech's Reply to the Extent it Raises New Matters, or, in the Alternative, to Re-Start the Ninety-Day Review Process, filed July 16, 1997 (Joint Motion to Strike).

96 AT&T Motion to Strike at 9.

was done with respect to Ameritech's initial, January 2, 1997, application,[97] or to accord the new evidence no weight in making our determination.

51. Under our procedures governing BOC applications, all participants in a proceeding, including the BOC applicant itself, may file a reply to any comment made by any other participant. We explicitly stated in our *December 6th Public Notice*, however, that reply comments "may not raise new arguments that are not directly responsive to arguments other participants have raised . . . ."[98] That same principle applies to the submission of new factual information by the BOC after the filing of its application: a BOC may not submit new evidence after its application has been filed that is not directly responsive to evidence or arguments raised by other parties. The right of the applicant to submit new factual information after its application has been filed is narrowly circumscribed. A BOC may submit new factual evidence if the sole purpose of that evidence is to rebut arguments made, or facts submitted, by commenters, *provided the evidence covers only the period placed in dispute by commenters and in no event post-dates the filing of those comments*.[99] That is, a BOC is entitled to challenge a commenter's version of certain events by presenting its own version of those same events. In an effort to meet its burden of proof, therefore, a BOC may submit new facts relating to a particular incident that contradict a commenter's version of that incident. A BOC's ability to submit new information, however, is limited to this circumstance. Because parties are required to file comments within 20 days after a BOC files its section 271 application, commenters will not have placed at issue facts which post-date day 20 of the application. For this reason, under no circumstance is a BOC permitted to counter any arguments with new factual evidence *post-dating* the filing of comments. As indicated, such evidence, if submitted, will not receive any weight. For example, in the instant order we give no weight to the May interconnection data that Ameritech filed on reply because it reflects performance for a period after Ameritech submitted its application and no party submitted May interconnection data or otherwise raised arguments concerning Ameritech's compliance with this checklist item during that month.[100]

52. We hold that it is appropriate to accord new factual evidence no weight for several reasons. First, as we have stated before, we find that allowing a BOC to supplement its

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[97] *See Revised Comment Schedule for Ameritech Michigan Application, as amended, for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Michigan*, Public Notice, DA 97-127 (rel. Jan. 17, 1997). *See also supra* at paras. 24-27.

[98] *December 6th Public Notice*, 11 FCC Rcd at 19711.

[99] *See* Joint Motion to Strike at 10 (recognizing that Ameritech has a right to submit new evidence in reply to respond to evidence of post-application matters submitted by interested parties in their comments and stating that Ameritech should not be barred from submitting such information in its reply); AT&T Motion to Strike at 13 (acknowledging that, to the extent comments filed on day 20 contain new factual evidence that occurred between day 1 and day 20, the BOC may reply to it with "a focused, fact-specific response" that does not go beyond day 20).

[100] *See infra* para. 237.

application with new information at any time during the proceeding would be "unfair to interested third parties seeking to comment on a fixed record triggered by the date that a section 271 application is filed."[101] When new factual information is filed either in the applicant's reply comments, or after the reply period, other parties have no opportunity to comment on the veracity of such information except through the submission of *ex partes*. Even if we were to waive the current 20-page limit on written *ex parte* submissions,[102] "reliance on [*ex partes*] to 'update the record' would simply exacerbate the problem, since each attempt by commenting parties to correct [alleged] BOC misstatements or oversights would unquestionably prompt the BOCs to file new *ex partes* themselves."[103] In addition, we agree with MCI that allowing BOCs to rely on new factual evidence to demonstrate compliance with the requirements of section 271 may "encourage [them] to game the system by withholding evidence until the reply round of comments, when they are immune from attack."[104]

53. Second, we find that permitting the BOC applicant to submit new information, particularly at the reply stage, would "impair the ability of the state commission and of the Attorney General to meet their respective statutory consultative obligations."[105] As we recognized in the *Ameritech February 7th Order*, it is essential that these parties have the ability to evaluate a full and complete record. Under our procedures for BOC applications, neither the state commission nor the Department of Justice would have the opportunity to comment upon new factual evidence submitted in the BOC's reply on day 45.[106]

54. Third, we find that during a 90-day review period, the Commission has neither the time nor the resources to evaluate a record that is constantly evolving.[107] We examine the comments of the parties as part of our assessment of the credibility and accuracy of the BOC's assertions. An applicant's submission of new evidence after the filing of its application, particularly when such information is submitted in reply comments, impairs the Commission's

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[101] *Ameritech February 7th Order*, 12 FCC Rcd at 3321. For example, AT&T states that, given the opportunity, it "could readily demonstrate that Ameritech's new June-based record is every bit as misleading and inadequate as the one it submitted in May." AT&T Motion to Strike at 3.

[102] *See December 6th Public Notice* at 19711-12.

[103] AT&T Motion to Strike at 12-13.

[104] Joint Motion to Strike at 10.

[105] *Ameritech February 7th Order*, 12 FCC Rcd at 3320-21; *see* AT&T Motion to Strike at 12; Joint Motion to Strike at 8.

[106] *See* AT&T Motion to Strike at 11; Joint Motion to Strike at 8.

[107] Joint Motion to Strike at 5 (asserting that an application must be complete when filed in order to allow interested parties and governmental entities to aim at a stationary target).

ability to evaluate the credibility of such new information.[108] As we observed in the *Ameritech February 7th Order*, allowing a BOC applicant continually to file new evidence would undermine this Commission's ability to render a decision within the 90-day statutory period.[109] Given these concerns, we find that using our discretion to accord BOC submissions of new factual evidence no weight will ensure that our proceedings are conducted in "such manner as will best conduce to the proper dispatch of business and to the ends of justice."[110]

55. On a separate but related matter, we find that a BOC's promises of *future* performance to address particular concerns raised by commenters have no probative value in demonstrating its *present* compliance with the requirements of section 271. Paper promises do not, and cannot, satisfy a BOC's burden of proof.[111] In order to gain in-region, interLATA entry, a BOC must support its application with actual evidence demonstrating its present compliance with the statutory conditions for entry, instead of prospective evidence that is contingent on future behavior. Significantly, the timing of a section 271 filing is one that is solely within the applicant's control. We therefore expect that, when a BOC files its application, it is already in full compliance with the requirements of section 271 and submits with its application sufficient factual evidence to demonstrate such compliance. Evidence demonstrating that a BOC *intends to come into compliance* with the requirements of section 271 by day 90 is insufficient. If, after the date of filing, the BOC concludes that additional information is necessary, or additional actions must be taken, in order to demonstrate compliance with the requirements of section 271, then the BOC's application is premature and should be withdrawn.[112] Thus, for instance, we conclude in this order that we cannot find that Ameritech presently provides nondiscriminatory access to its 911 database based on the fact that it "is developing" a service to allow competitors equivalent access.[113]

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[108] Further, as demonstrated by the instant proceeding, such a submission also leads to the filing of motions to strike that generate additional pleadings and consume agency resources.

[109] *See Ameritech February 7th Order*, 12 FCC Rcd at 3321; Joint Motion to Strike at 8. Similarly, as Ameritech itself recognizes in the context of unsupported factual assertions, "the need to ascertain the reliability of [unverified allegations] would undermine [the] Commission's ability to render a decision within [the] 90-day period." Ameritech Motion to Strike at 4.

[110] 47 U.S.C. § 154(j).

[111] We note, however, that section 271(d)(3) requires that the BOC demonstrate that its "requested [in-region, interLATA] authorization *will be carried out* in accordance with the requirements of section 272." 47 U.S.C. § 271(d)(3) (emphasis added). As explained below, this is, in essence, a predictive judgment regarding the future behavior of the BOC. In making this determination, we will look to past and present behavior of the BOC as the best indicator of whether the BOC will carry out the requested authorization in compliance with the requirements of section 272. *See infra* Section VII.A.

[112] *See* Joint Motion to Strike at 5; AT&T Motion to Strike at 15.

[113] *See infra* para. 269. Although promises of future performance cannot demonstrate present compliance, we find that promises by a BOC applicant that it will continue to be in compliance with the requirements of section 271 once entry is authorized, particularly promises to take various steps to ensure its continued cooperation with

56. We find that enforcing our requirement that all BOC applications be factually complete when filed is fair and does not pose an undue hardship to the BOC.[114] We note that our procedural requirements governing section 271 applications have been in effect since December 6, 1996. Moreover, they were recently enforced against Ameritech in February 1997.[115] Thus, there can be no doubt that Ameritech and other BOCs have had sufficient notice of the Commission's procedural requirements and our intention of enforcing them.[116] Further, if a BOC elects to withdraw its application during the 90-day review period, we would consider this, as we have done in the past, to be a withdrawal without prejudice.[117] In this instance, barring the imposition of any conditions on refiling,[118] we would expect Ameritech to refile its application once it has a factual basis to demonstrate fully in its initial filing that it complies with the requirements of section 271.[119] Once it has refiled, Ameritech will then obtain a determination on its application in the next 90 days that is based on a full and complete submission. Ameritech, therefore, is "not at the mercy of either an indefinite agency proceeding or a dismissal with prejudice."[120]

57. By retaining the discretion to accord new factual evidence no weight, we do not suggest that Ameritech should have included all 2,200 pages of its reply submission in its initial application. We agree with Ameritech's contention that it is not obligated in its initial application to anticipate and address every argument and allegation its opponents might make in their comments.[121] Indeed, we are mindful of the page limits that we have placed on an applicant's brief

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new entrants, would be an important consideration in our determination whether the BOC's local market will remain open to competition once it has received interLATA authority. Such promises, therefore, will be a factor we will consider in our public interest analysis. *See infra* para. 399.

114 *See* Joint Motion to Strike at 5.

115 In June 1997, we reiterated our requirement in the *SBC Oklahoma Order* where we stated that, "[g]iven the expedited time in which the Commission must review these [section 271] applications, it is the responsibility of the BOC to submit to the Commission a full and complete record upon which to make determinations on its application." *SBC Oklahoma Order* at para. 60.

116 *See* Joint Motion to Strike at 4-5, 10; AT&T Motion to Strike at 13.

117 *See Ameritech Termination Order*, 12 FCC Rcd 2088.

118 Should a BOC withdraw its section 271 application at any time during the 90-day statutory period, we reserve our discretion to impose conditions governing when a BOC may refile its application. *See* 47 U.S.C. § 154(j).

119 *See SBC Oklahoma Order* at para. 66 (noting that SBC may refile its section 271 application in the future once it has demonstrated that it satisfies the requirements of section 271(c)(1)).

120 AT&T Motion to Strike at 15.

121 *See* Ameritech Michigan's Response to Motions to Strike at 3-5 (filed July 30, 1996) (Ameritech Response to Motions to Strike).

in support.[122] At the same time, however, we find that a BOC must address in its initial application all facts that the BOC can reasonably anticipate will be at issue. As mentioned above, it is our expectation that state commissions will initiate proceedings to evaluate a BOC's compliance with the requirements of section 271 prior to the BOC filing a section 271 application with the Commission.[123] In those proceedings, certain factual disputes will come to light, and certain concerns will likely be expressed by the state commission. Although we expect that a BOC will take appropriate efforts to settle any factual disputes and rectify concerns expressed by the state commission prior to its section 271 filing, there are likely to be outstanding areas of contention. Through these state proceedings, therefore, BOCs are able to identify and anticipate certain arguments and allegations that parties will make in their filings before the Commission.[124]

58. Similarly, if a formal complaint against a BOC is pending before us or the state commission, the BOC should be able to anticipate that the subject matter of the complaint will be at issue in the section 271 proceeding and should, therefore, include in its initial filing before the Commission facts and arguments addressing this issue. For example, because Ameritech's 911 service is the subject of a formal complaint before the Michigan Commission, Ameritech, at the very least, should have acknowledged in its initial application that it has experienced problems in its 911 database and anticipated the arguments that commenters raised regarding Ameritech's provision of 911 service. We therefore disagree with Ameritech that it would have to be "marvelously -- indeed, perfectly -- clairvoyant" to foresee certain comments and address them in its initial application.[125]

59. Because we will exercise our discretion in determining whether to accord new factual evidence any weight, we deny AT&T's motion and the Joint Motion of MCI, MFS WorldCom, and ALTS to strike from the record the portions of Ameritech's reply that contain new evidence. Because we deny the motions to strike, we do not address Ameritech's argument that these motions are improper because they lack specificity. We also deny MCI's motion to restart the 90-day clock because we find that such a remedy is not necessary in this case to preserve the integrity of the section 271 process.

2. Obligation To Present Evidence and Arguments Clearly

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122 *December 6th Public Notice*, 11 FCC Rcd at 19709 (limiting the BOC's brief in support to 100 pages).

123 *See supra* para. 30. For example, as we note above, the Michigan Commission established Michigan Case No. U-11104 on June 5, 1996, to receive information relating to Ameritech's compliance with section 271(c). *See supra* note 54.

124 Indeed, we note that the comments filed before the state commission may well be the same or similar to the comments filed before the Commission.

125 Ameritech's Response to Motions to Strike at 5.

60. When a BOC presents factual evidence and arguments in support of its application for in-region, interLATA entry, we expect that such evidence will be clearly described and arguments will be clearly stated in its legal brief with appropriate references to supporting affidavits. Although we are mindful of the page limitations on the BOC applicant, we nevertheless find that evidence and arguments, at a minimum, should be referenced in the BOC's legal briefs and not buried in affidavits and other supporting materials. We note that Ameritech's initial application totalled over 10,000 pages and, as noted above, its reply comments totalled over 2,200 pages. As the United States Court of Appeals for the District of Columbia Circuit recently found, "[t]he Commission 'need not sift pleadings and documents to identify' arguments that are not 'stated with clarity' by a petitioner."[126] The petitioner has "the 'burden of clarifying its position' before the agency."[127] We find this to be particularly true in the context of section 271 proceedings in which the Commission is operating under a 90-day statutory deadline and the BOC applicant bears the burden of proof. Moreover, the obligation to present evidence and arguments in a clear and concise manner also extends to commenting parties. The Commission simply has neither the time nor the resources to search through thousands of pages to discern the positions of the parties, particularly that of the applicant. For example, although there was no indication in Ameritech's reply brief that it intended to respond to the allegations made in the record with respect to its provision of intraLATA toll service, careful examination of Ameritech's supporting documentation revealed five pages of arguments on this issue in one of Ameritech's 28 reply affidavits.

61. In addition, we conclude that, when a BOC submits factual evidence in support of its application, it bears the burden of ensuring that the significance of the evidence is readily apparent. During the short 90-day review period, the Commission has no time to review voluminous data whose relevance is not immediately apparent but can only be understood after protracted analysis. For example, in the instant application, although Ameritech submits performance data on trunk blockage that appears on its face to be Michigan-specific, further investigation revealed that the data was actually calculated on a region-wide basis.[128] As stated above, a BOC has the burden of demonstrating by a preponderance of the evidence that it is in compliance with the requirements of section 271. A BOC cannot meet its burden of proof without clearly establishing the relevance and meaning of the data it submits to rebut arguments made in the record.

V. COMPLIANCE WITH SECTION 271(c)(1)(A)

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[126] *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279 (D.C. Cir. 1997) (quoting *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972)).

[127] *See id.* at 279-80 (quoting *Northside Sanitary Landfill, Inc. v. Thomas*, 849 F.2d 1516, 1519 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989)).

[128] *See, e.g., infra* note 615.

A. Introduction

62. In order for the Commission to approve a BOC's application to provide in-region interLATA services, a BOC must first demonstrate that it satisfies the requirements of either section 271(c)(1)(A) or 271(c)(1)(B).[129] In this instance, Ameritech contends that "it has met all of the requirements of Section 271(c)(1)(A) of the Act."[130] Section 271(c)(1)(A) provides:

> (A) PRESENCE OF A FACILITIES-BASED COMPETITOR.--A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 3(47)(A), but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier.[131]

63. According to Ameritech, its implemented agreements with Brooks Fiber, MFS WorldCom, and TCG satisfy "all of the requirements of subsection 271(c)(1)(A)."[132] Because Ameritech relies exclusively on Brooks Fiber, MFS WorldCom, and TCG for purposes of satisfying section 271(c)(1)(A), we will focus in this section only on the record evidence concerning these carriers' activities in Michigan. We conclude below that Ameritech has demonstrated that it complies with section 271(c)(1)(A).

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129 47 U.S.C. § 271(d)(3)(A).

130 Ameritech Application at 8. Section 271(c)(1)(B) of the Act allows a BOC to seek entry under Track B if "no such provider has requested the access and interconnection described in [section 271(c)(1)(A)]" and the BOC's statement of generally available terms and conditions has been approved or permitted to take effect by the applicable state regulatory commission. In this instance, Ameritech has not sought entry under Track B, claiming instead that competitors have requested the access and interconnection described in section 271(c)(1)(A). Ameritech Application at 7; *see also SBC Oklahoma Order* at para. 27 (concluding that if a BOC has received "a request for negotiation to obtain access and interconnection that, if implemented, would satisfy the requirements of section 271(c)(1)(A)," the BOC is barred from proceeding under Track B); Michigan Commission Consultation at 3 n.5 (indicating that the Michigan Commission rejected Ameritech's statement of generally available terms and conditions on the ground that Ameritech does not qualify for Track B because competitors had made timely requests for access and interconnection).

131 47 U.S.C. § 271(c)(1)(A).

132 Ameritech Application at 8-14.

B. Factual Summary of Competing Providers' Operations in Michigan

64. For purposes of demonstrating compliance with section 271(c)(1)(A), Ameritech relies on its negotiated interconnection agreements with Brooks Fiber and MFS WorldCom, and its interconnection agreement with TCG that was negotiated in part and arbitrated in part.[133] The Michigan Commission, pursuant to section 252, approved Ameritech's agreement with Brooks Fiber on November 26, 1996; with MFS WorldCom on December 20, 1996; and with TCG on November 1, 1996.[134]

65. Brooks Fiber currently serves both business and residential customers through either: (1) fiber optic rings, which are connected to its switches; or (2) unbundled loops obtained from Ameritech, which are connected to Brooks Fiber's switches.[135] Brooks Fiber does not provide service through resale of Ameritech's telecommunications services.[136] Brooks Fiber's major area of operation is in the Grand Rapids area, and it has also recently begun offering service in a few other Michigan cities.[137] According to Brooks Fiber, as of June 6, 1997, it had 21,786 access lines in service in Grand Rapids -- 15,876 business lines and 5910 residential lines.[138] Brooks Fiber states that it serves 61 percent of its business lines, *i.e.*, approximately 9864 lines, and 90 percent of its residential lines, *i.e*., approximately 5319 lines, through its switch along with the purchase of unbundled loops from Ameritech.[139] The other lines -- approximately 6192

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133 Ameritech Application at 7; Michigan Commission Consultation at 5.

134 Ameritech Application at 5; *see also id.*, Vol. 1.3, Interconnection Agreement between Brooks Fiber Communications of Michigan, Inc. and Ameritech Michigan (Brooks Fiber Interconnection Agreement); *id.*, Vol. 1.4, Interconnection Agreement between MFS Intelenet of Michigan, Inc. and Ameritech Michigan (MFS WorldCom Interconnection Agreement); *id.*, Vol. 1.6, Interconnection Agreement between TCG Detroit and Ameritech Michigan (TCG Interconnection Agreement).

135 Ameritech Application at 10, and Vol. 2.3, Edwards Aff. at 5; Brooks Fiber Comments at 6-7; Brooks Fiber Reply at 4. Ameritech relies on data provided by the competing carriers to estimate the number of lines that each competitor serves. We find the evidence submitted by the competitors to be more reliable information on the actual number of access lines served by those carriers.

136 Ameritech Application at 11, and Vol 2.3, Edwards Aff. at 5; Brooks Fiber Comments at 6-7; Brooks Fiber Reply Comments at 4.

137 Brooks Fiber states that is serving customers in Grand Rapids, Holland, and Lansing. Brooks Fiber Comments at 1 n.2, and 6 n.18. Ameritech claims that Brooks Fiber is serving customers in those cities, as well as in Traverse City and Ann Arbor. Ameritech Application at 10.

138 Brooks Fiber Comments at 6-7. In its application, Ameritech claims that, as of March 31, 1997, Brooks Fiber served 20,297 access lines. Ameritech Application, Vol. 3.3, Harris and Teece Aff., at 48-49. There are no data in the record on the number of lines that Brooks Fiber serves in other Michigan cities.

139 Brooks Fiber Comments at 6-7.

business and 591 residential -- are served exclusively through facilities constructed by Brooks Fiber.[140]

66. TCG serves business customers in the Detroit metropolitan area through either: (1) its switch and fiber optic network; or (2) dedicated DS1 and DS3 lines purchased under Ameritech's interstate access tariff, which are connected to TCG's switch in the Detroit area.[141] TCG is not offering service through the resale of Ameritech's telecommunications services.[142] According to Ameritech, TCG serves 5280 business lines.[143]

67. MFS WorldCom serves business customers in the Detroit metropolitan area through the following three methods: (1) its switch and fiber optic ring; (2) unbundled loops obtained from Ameritech, which are connected to MFS WorldCom's switch; and (3) resale of Ameritech's telecommunications services.[144] Ameritech claims that MFS WorldCom serves 26,400 business lines exclusively through facilities constructed by MFS WorldCom and 2145 non-Centrex business lines through resale.[145]

68. MFS WorldCom contends that Ameritech used unrealistic assumptions to estimate the number of access lines served by MFS WorldCom, and as a result, vastly overstated the number of lines.[146] MFS WorldCom claims that it actually serves 79 percent of its business lines through resale of Ameritech's services, 2.2 percent of its business lines exclusively through MFS facilities, and the remaining lines -- approximately 19 percent -- through its switching facilities and

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[140] *Id.* Ameritech claims in its application that Brooks Fiber serves 9000 access lines over facilities it has constructed and installed. Ameritech Application, Vol. 3.3, Harris and Teece Aff. at 48-49.

[141] Ameritech Application at 11, and Vol. 2.3, Edwards Aff. at 6; TCG Comments at 25-26.

[142] Ameritech Application at 11-12, and Vol 2.3, Edwards Aff. at 6; TCG Comments at 25-26.

[143] Ameritech Application at 11, and Vol 2.3, Edwards Aff. at 6. TCG neither provides record evidence on the number of access lines it serves, nor disputes Ameritech's estimates. We encourage competing LECs, in future section 271 proceedings, to provide to the Commission information about their operations in the relevant state, including the number of access lines served. For those carriers that are concerned about disclosing what they consider to be confidential information, we have established procedures for the submission of confidential information. *See Application by Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Service in Michigan*, CC Docket No. 97-137, Protective Order, DA 97-1073 (rel. May 21, 1997) (attachment to *May 21st Public Notice*). In fact, we note that MFS WorldCom submitted data on a proprietary basis regarding the number of access lines it serves.

[144] Ameritech Application, Vol. 2.3, Edwards Aff. at 5-6; MFS WorldCom Comments at 4.

[145] Ameritech Application at 11-12.

[146] MFS WorldCom Comments at 4. MFS WorldCom, in its comments, submitted data on a proprietary basis regarding the actual number of access lines it serves through each method.

the purchase of unbundled loops from Ameritech.[147] In reply, Ameritech does not contest MFS WorldCom's statements, contending instead that MFS WorldCom has "purchased or constructed . . . local switching facilities, fiber optic networks, and thousands of loops and trunk lines over which [it] predominantly or exclusively provide[s] local service."[148]

C. Ameritech's Compliance with Section 271(c)(1)(A)

69. Ameritech claims that it has "met the requirements of Section 271(c)(1) by entering into interconnection agreements with MFS WorldCom, TCG, and Brooks Fiber, all of which have been approved by the [Michigan Commission] under Section 252(e) of the Act."[149] Moreover, Ameritech maintains that "[t]hese agreements satisfy the requirements of Section 271(c)(1)(A) that they be with competing providers of telephone exchange service, offered exclusively or predominantly over their own facilities, to residential and business customers."[150]

70. In response, numerous parties argue that Ameritech has failed to satisfy various aspects of the section 271(c)(1)(A) requirement. In particular, these parties contest: (1) whether Ameritech has signed one or more binding agreements that have been approved under section 252; (2) whether Ameritech is providing access and interconnection to unaffiliated competing providers of telephone exchange service; (3) whether there are unaffiliated competing providers of telephone exchange service *to residential and business customers*; and (4) whether the unaffiliated competing providers offer telephone exchange service exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier. We address these issues separately in order to determine whether Ameritech meets section 271(c)(1)(A).

1. Existence of One or More Binding Agreements That Have Been Approved Under Section 252

71. Section 271(c)(1)(A) requires Ameritech to have entered into binding interconnection agreements that have been approved by the Michigan Commission. Ameritech contends, and the Michigan Commission concurs, that Ameritech meets this requirement through its agreements with Brooks Fiber, MFS WorldCom, and TCG.[151] Only one party disputes

147 *Id.*

148 Ameritech Reply Comments at 2.

149 Ameritech Application at 7.

150 *Id.*

151 Ameritech Application at 8-9; Michigan Commission Consultation at 3-6.

Ameritech's claim. Brooks Fiber argues that Ameritech's interconnection agreements cannot be considered binding agreements, because: (1) the agreements contain interim prices rather than final cost-based prices;[152] and (2) the agreements do not contain all of the elements necessary to satisfy the competitive checklist, but instead rely on a "most favored nation" provision to incorporate missing elements into the agreements.[153] Brooks Fiber maintains that it has not yet exercised its rights under this provision.[154] In addition, Brooks Fiber argues that, because competing carriers have experienced difficulties using the "most-favored nation" clauses in their interconnection agreements, there is "significant doubt" as to whether these clauses actually provide competing carriers with access to checklist items in other agreements.[155]

72. We conclude that Ameritech's agreements with Brooks Fiber, MFS WorldCom, and TCG that have been approved by the Michigan Commission pursuant to section 252 are "binding agreements" within the meaning of section 271(c)(1)(A). These agreements specify the rates, terms, and conditions under which Ameritech will provide access and interconnection to its network facilities.[156] Moreover, according to the uncontroverted record in this proceeding, Brooks Fiber, MFS WorldCom, and TCG are currently receiving access and interconnection to Ameritech's network facilities pursuant to these agreements.[157] We reject Brooks Fiber's contention that Ameritech cannot be found to have entered into a binding agreement with competing providers until the agreements include final cost-based prices and all items of the competitive checklist. The agreements define the obligations of each party and the terms of the relationship as they currently exist. Although the rates, terms, and conditions in the agreements may be modified through an action of the Michigan Commission, or by action of Brooks Fiber,

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[152] Brooks Fiber Comments at 10-11; Brooks Fiber Reply Comments at 3-4. At the time Ameritech filed its application and at the time Brooks Fiber filed its comments, the Michigan Commission had not yet issued a decision in its rate proceeding. *See* Michigan Commission Consultation at 8-9. On July 14, 1997, the Michigan Commission issued a decision in this rate proceeding and adopted a cost methodology for determining rates. *See In the matter, on the Commission's own motion, to consider the total service long run incremental costs and to determine the prices of unbundled network elements, interconnection services, resold services, and basic local exchange services for Ameritech Michigan*, Michigan Public Service Commission Case No. U-11280, Opinion and Order (rel. July 14, 1997) (*Michigan Rate Proceeding*). On July 24, 1997, Ameritech submitted rates based on the Michigan Commission's order. Letter from Nancy M. Short, Director, Public Policy, Ameritech, to William J. Celio, Director, Communications Division, Michigan Public Service Commission (July 24, 1997).

[153] In this instance, the parties to each interconnection agreement have negotiated "most-favored nation" clauses that, according to Ameritech, readily allows competing LECs to modify their agreements with Ameritech by incorporating provisions from other approved interconnection agreements. *See* Ameritech Application at 16-17.

[154] Brooks Fiber Comments at 10-11.

[155] Brooks Fiber Reply Comments at 3-4.

[156] *See* Ameritech Application, Vol. 1.3, Brooks Fiber Interconnection Agreement, Vol. 1.4, MFS WorldCom Interconnection Agreement, and Vol.1.6, TCG Interconnection Agreement.

[157] *See* Michigan Commission Consultation at 5-6.

MFS WorldCom, or TCG, if they exercise their rights under the "most-favored nation" clauses, that does not affect the binding nature of the current agreements or provide a reason for nonperformance of a party's obligation under an agreement.[158] Moreover, we find nothing in section 271(c)(1)(A) that requires each interconnection agreement to include every possible checklist item, even those that a new entrant has not requested, in order to be a binding agreement for purposes of section 271(c)(1)(A). We therefore agree with Ameritech that its interconnection agreements with Brooks Fiber, MFS WorldCom, and TCG are "binding agreements."

73. In addition, although section 271(c)(1)(A) does not require that each agreement contain all elements of the competitive checklist and permanent cost-based prices to be "binding" agreements, we note that our decision here does not resolve issues raised in the record as to the effect of the interim nature of certain prices in the agreements or Ameritech's reliance on "most-favored nation" provisions on our evaluation of whether Ameritech has met the other requirements of section 271.[159] To the extent Brooks Fiber is contending that Ameritech has not fully implemented the competitive checklist in section 271(c)(2)(B), we address these concerns in our discussion below of Ameritech's compliance with the competitive checklist.

2. Provision of Access and Interconnection to Unaffiliated Competing Providers of Telephone Exchange Service

74. We next consider Ameritech's assertions that it is providing access and interconnection to Brooks Fiber, MFS WorldCom, and TCG, and that those carriers are "unaffiliated competing providers of telephone exchange service."[160] Several parties contest this assertion, arguing that Brooks Fiber, MFS WorldCom, and TCG cannot be considered to be "competing providers" as required by section 271(c)(1)(A), because they serve a small number of the access lines in Michigan and because the majority of customers in Michigan do not have a choice for local exchange service.[161] Ameritech responds that section 271(c)(1)(A) does not

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158 The Eighth Circuit recently concluded that interpreting section 252(i) to allow competing carriers with existing interconnection agreements to incorporate individual provisions from other interconnection agreements would mean that "negotiated agreements will, in reality, not be binding, because . . . an entrant who is an original party to an agreement may unilaterally incorporate more advantageous provisions contained in subsequent agreements negotiated by other carriers." *Iowa Utils. Bd. v. FCC*, No. 96-3321 *et al.*, 1997 WL 403401, at *11 (8th Cir., July 18, 1997). In Ameritech's case, the parties have negotiated "most-favored nation" provisions that, according to Ameritech, allow a competing carrier to seek a modification to the agreement in order to incorporate more advantageous provisions from other agreements. *See* Ameritech Application at 16-17. We believe that the Eighth Circuit's determination with respect to section 252(i) does not foreclose the rights of parties to negotiate freely a binding agreement that contains a contractual term, such as a "most-favored nation" clause, that enables those parties to modify the terms of the agreement.

159 *See infra* note 247.

160 Ameritech Application at 8-9.

161 ALTS Comments at 26-27; AT&T Comments at 32-34; CompTel Comments at 29-30; CompTel Reply Comments at 8-9; MCTA Comments at 17-18; NCTA Reply Comments at 9-10; Ohio Consumers' Counsel Comments at 5-6; Ohio Consumers' Counsel Reply Comments at 4; TRA Comments at 11-12; TRA Reply

require that a competing carrier "be a certain size, serve any particular number of customers, or cover a certain geographic area."[162] Moreover, Ameritech argues that, even if section 271(c)(1)(A) requires a specified level of local competition, Ameritech has met the requirement, because Brooks Fiber, MFS WorldCom, and TCG compete against Ameritech in Detroit and Grand Rapids -- the two most populous local markets in Michigan.[163]

75. We determined in the *SBC Oklahoma Order* 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."[164] We further concluded that "the existence of [a carrier's] effective local exchange tariff is not sufficient to satisfy section 271(c)(1)(A)."[165] Rather, we determined that, at a minimum, a carrier must actually be in the market and operational (*i.e.*, accepting requests for service and providing such service for a fee), although we did not address whether a new entrant must meet additional criteria to be considered a "competing provider" under section 271(c)(1)(A).[166] Specifically, we did not determine whether a competing LEC must attain a certain size or geographic scope.[167]

76. We do not read section 271(c)(1)(A) to require any specified level of geographic penetration by a competing provider.[168] The plain language of that provision does not mandate any such level, and therefore, does not support imposing a geographic scope requirement. Consistent with this interpretation, we note that the House Commerce Committee's Report indicated that "[t]he Committee expects the Commission to determine that a competitive

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Comments at 14-15; MFS WorldCom Reply Comments at 4-5. At the end of 1995, there were approximately 6.2 million access lines in Michigan, including over 5.5 million switched access lines. Report, *Statistics of Communications Common Carriers*, Federal Communications Commission, 1995/1996 Edition, at Table 2.5 (1996) (*Common Carrier Statistics*). Ameritech served approximately 5.5 million of the total access lines, including over 4.8 million switched access lines, with the vast majority of the remaining lines being served by other incumbent local exchange carriers in separate areas, rather than competitors in Ameritech's service area. *Id.* at Table 2.10; *see also* Department of Justice Evaluation, Appendix B, at B-1. For a summary of the number of lines served by Brooks Fiber, MFS WorldCom, and TCG, see *supra* paras. 65-67.

[162] Ameritech Reply Comments at 2 n.3; *see also* Competition Policy Institute Comments at 3.

[163] Ameritech Reply Comments at 2 n.3.

[164] *SBC Oklahoma Order* at para. 14.

[165] *Id.* at para. 18.

[166] *Id.* at paras. 14, 17.

[167] *Id.* at para. 14.

[168] Information on the level of geographic penetration is relevant to our assessment of whether "the requested authorization is consistent with the public interest." *See infra* para. 391; 47 U.S.C. § 271(d)(3)(C). We therefore expect parties to provide this information in future section 271 applications.

alternative is operational and offering a competitive service *somewhere in the State* prior to granting a BOC's petition for entry into long distance."[169]

77. We also do not read section 271(c)(1)(A) to require that a new entrant serve a specific market share in its service area to be considered a "competing provider." Consistent with this interpretation, we note that the Senate and House each rejected language that would have imposed such a requirement in section 271(c)(1)(A).[170] Nevertheless, we recognize that there may be situations where a new entrant may have a commercial presence that is so small that the new entrant cannot be said to be an actual commercial alternative to the BOC, and therefore, not a "competing provider."[171]

78. In this Order, we need not and do not reach the question of whether a carrier that is serving a *de minimis* number of access lines is a "competing provider" under section 271(c)(1)(A). In this instance, Ameritech relies on three operational carriers, each of which is serving thousands of access lines in its service area.[172] Because Brooks Fiber, MFS WorldCom, and TCG are each accepting requests for telephone exchange service and serving more than a *de minimis* number of end-users for a fee in their respective service areas, we find that each of these carriers is an actual commercial alternative to the BOC. We therefore agree with Ameritech that

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[169] House Report at 77 (emphasis added). The House Report further explains why the Commerce Committee did not believe a geographic scope requirement is necessary:

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

Id. We note that the section 271(c)(1)(A) requirement "comes virtually verbatim from the House amendment." Joint Explanatory Statement at 147.

[170] The Senate rejected an amendment that would have required the presence of competing carriers "capable of providing a *substantial* number of business and residential customers with telephone exchange or exchange access service" prior to in-region interLATA entry by the BOC. 141 Cong. Rec. S8319-26 (daily ed. June 14, 1995) (emphasis added). The House also rejected a scale and scope requirement for local competition in section 245(a)(2)(A) of its bill, which became section 271(c)(1)(A). The bill that was reported out of the House Commerce Committee required the presence of "an unaffiliated competing provider of telephone exchange service that is comparable in price, features, and scope" to that offered by the BOC. House Report at 7. When it considered the bill, the House adopted an amendment that eliminated the "comparable in price, features, and scope" language. 141 Cong. Rec. H8444-60 (daily ed. Aug. 4, 1995).

[171] Commenters use various terms to describe the number of customers that they contend would be so small that a new entrant could not be considered a "competing provider." *See, e.g.*, CompTel Comments at 29-30 ("*de minimis*"); TRA Comments at 11-12 ("minuscule"); NCTA Reply Comments at 9-10 ("minuscule"); Ohio Consumers' Counsel Comments at 5-6 ("token").

[172] For details on the operations of Brooks Fiber, MFS WorldCom, and TCG in Michigan, see *supra* paras. 65-67.

it is providing access and interconnection to Brooks Fiber, MFS WorldCom, and TCG, and that these carriers are "competing providers of telephone exchange service."[173]

79. We note that numerous parties also argue that we should consider the state of local competition in Michigan, as a whole, as part of our determination of whether "the requested authorization is consistent with the public interest, convenience, and necessity" under section 271(d)(3)(C).[174] Our decision here interpreting section 271(c)(1)(A) does not preclude us from considering competitive conditions or geographic penetration as part of our inquiry under section 271(d)(3)(C).[175]

3. Provision of Telephone Exchange Service to Residential and Business Subscribers

80. Having determined that Ameritech has "binding agreements" under which it is providing access and interconnection to Brooks Fiber, MFS WorldCom, and TCG, and that these carriers are "unaffiliated competing providers," we next consider whether Brooks Fiber, MFS WorldCom, and TCG are providing "telephone exchange service . . . to residential and business subscribers." Ameritech claims that it has "satisfied this requirement because Brooks Fiber, MFS, and TCG are unaffiliated competing providers of telephone exchange services that together serve business and residential customers."[176] ALTS, CompTel, the Department of Justice, TRA, and MFS WorldCom disagree with this statutory interpretation, arguing that neither MFS WorldCom nor TCG can be deemed to satisfy this aspect of section 271(c)(1)(A), because these providers compete to serve only business customers.[177] These parties argue that section 271(c)(1)(A)

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[173] As we noted above, Ameritech is providing access and interconnection pursuant to its interconnection agreements. *See supra* para. 72; *see also* Michigan Commission Consultation at 5-6. Several parties contend, however, that Ameritech is not "providing access and interconnection" as required by section 271(c)(1)(A), because competing providers have experienced specific problems with such access and interconnection. *See* Brooks Fiber Comments at 11-12; Michigan Attorney General Comments at 5-6, 9; TCG Comments at 2. Because these arguments concern specific problems experienced by competitors, these parties are, in fact, contending that Ameritech has not "fully implemented the competitive checklist in subsection (c)(2)(B)." *See* 47 U.S.C. § 271(d)(3)(A)(i). Thus, we address these concerns about Ameritech's provision of specific checklist items in our discussion below of Ameritech's compliance with the competitive checklist.

[174] *See, e.g.*, ALTS Comments at 32-34; AT&T Comments at 41-42; Competition Policy Institute Comments at 10-12; MCI Comments at 48-49; Sprint Comments at 32-34; TCG Comments at 39-40.

[175] Section 271(d)(3)(C) requires the Commission to determine that "the requested authorization is consistent with the public interest, convenience, and necessity." 47 U.S.C. § 271(d)(3)(C). For a discussion of the Commission's inquiry under this provision, see *infra* Section IX.

[176] Ameritech Application at 9.

[177] ALTS Comments at 22-23; CompTel Comments at 28-29; Department of Justice Evaluation at 5-6; TRA Reply Comments at 13-14; MFS WorldCom Comments at 5; MFS WorldCom Reply Comments at 3. We note that, in its evaluation submitted with respect to SBC's application for authorization to provide in-region interLATA services in Oklahoma, the Department of Justice stated: "While each qualifying facilities-based provider need not be serving both types of customers if the BOC is relying on multiple providers, it necessarily follows that if the

requires that a BOC provide access and interconnection to its network facilities for the network facilities of one or more carriers, each of which serves both residential and business subscribers.[178] These parties further contend that the fact that MFS WorldCom and TCG are certified by the Michigan Commission to provide service to residential subscribers and have an effective local exchange tariff in place for the provision of residential and business services is not adequate to satisfy section 271(c)(1)(A).[179] They therefore contend that only Brooks Fiber is a "competing provider of telephone exchange services . . . to residential and business subscribers."[180]

81. In response, Ameritech argues that "[n]othing in section 271(c)(1)(A) requires that residential and business customers be served by the *same* competitor."[181] Ameritech further contends that the 1996 Act's goal of opening the local exchange and exchange access markets is achieved "whether there is (1) a single competitor serving both residential and business customers, or (2) two competitors, one serving business customers and the other residential customers."[182] SBC and BellSouth agree with Ameritech, arguing that "Congress' goal of ensuring that facilities-based service is feasible for all types of subscribers is achieved just as effectively by multiple carriers as by one."[183]

82. We conclude that, when a BOC relies upon more than one competing provider to satisfy section 271(c)(1)(A), each such carrier need not provide service to both residential and business customers.[184] We conclude, for the reasons stated below, that this aspect of section 271(c)(1)(A) is met if multiple carriers collectively serve residential and business customers. We therefore find that Brooks Fiber, MFS WorldCom, and TCG collectively are "unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers."

BOC is relying on a single provider it would have to be competing to serve both business and residential customers." Department of Justice SBC Oklahoma Evaluation at 9-10.

[178] Department of Justice Evaluation at 5-6; ALTS Comments at 22-23; CompTel Comments at 28-29; MFS WorldCom Comments at 5.

[179] Department of Justice Evaluation at 6 n.9; ALTS Comments at 22-23; CompTel Comments at 29.

[180] Department of Justice Evaluation at 6; ALTS Comments at 23; CompTel Comments at 29.

[181] Ameritech Reply Comments at 2.

[182] *Id.*

[183] BellSouth/SBC Comments at 2-3.

[184] We note that, because Brooks Fiber serves both residential and business subscribers, we need not reach this issue to determine that Ameritech satisfies this aspect of section 271(c)(1)(A). Nevertheless, we address this issue to provide guidance for future section 271 applications.

83. To interpret this part of section 271(c)(1)(A), we begin with the language of the statute. This section requires the BOC to establish that it has entered into "one or more binding agreements" under which it is providing access and interconnection for the facilities of "one or more unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers."[185] The statutory language, read alone, can support either interpretation of the statute: (1) one or more competing providers must collectively serve residential and business subscribers; or (2) each individual competing carrier must provide service to both residential and business subscribers. In light of the legislative history and Congress' policy objective in the 1996 Act of promoting competition in all telecommunications markets, as discussed below, we conclude that the former is the better interpretation of the statute and will further to a greater extent Congress' objectives.

84. The Report that accompanied the bill that was reported out of the House Commerce Committee contains the only unambiguous indication in the legislative history of the Act that Congress intended to require that one competitor individually serve both residential and business subscribers. As reported by the House Commerce Committee, the bill required that there be "*an* unaffiliated competing provider of telephone exchange service . . . to residential and business subscribers."[186] The Committee Report explained that "the Commission must determine that there is "*a* facilities-based competitor that is providing service to residential and business subscribers."[187] This provision was amended on the floor of the House to require, as does the 1996 Act as enacted, that there be "*one or more* unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers."[188] In our view, this amendment gave the BOCs greater flexibility in complying with section 271(c)(1)(A), by eliminating the requirement that one carrier serve both residential and business customers, and allowing instead, multiple carriers to serve such subscribers. In light of this legislative history, we find that our interpretation of this aspect of section 271(c)(1)(A) is more consistent with congressional intent than the approach advocated by ALTS, CompTel, and others.

85. Moreover, as a matter of policy, we believe that interpreting section 271(c)(1)(A) to allow one or more competing providers collectively to serve both residential and business subscribers more effectively promotes Congress' objective in the 1996 Act of opening the local exchange and exchange access markets to competition and promoting competition in those

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185 47 U.S.C. § 271(c)(1)(A).

186 House Report at 7.

187 *Id.* at 76-77.

188 The requirements in section 271(c)(1)(A) were taken "virtually verbatim from the House amendment." Joint Explanatory Statement at 147.

markets already open to competition, including the long-distance market.[189] Section 271 demonstrates that Congress intended to allow the BOCs into the in-region interLATA market upon their demonstration that their in-region local markets are open to competition and the other statutory requirements have been met. Interpreting section 271(c)(1)(A) to require competing carriers collectively to serve business and residential customers fulfills Congress' objective in section 271(c)(1)(A) by ensuring the presence of a competing provider for both residential and business subscribers.[190] We agree with Ameritech that requiring one carrier to serve both residential and business customers is not necessary to further Congress' objectives, because the local market would be as effectively open to competition whether one competitor is serving both residential and business subscribers, or multiple carriers are collectively serving both types of subscribers. Indeed, a requirement that each competitor individually serve both types of customers would raise the illogical possibility that there could exist several competing providers serving a large percentage of residential and business subscribers in a state, but the BOC would still not meet the requirements for in-region interLATA entry, simply because of business decisions made by competing providers with respect to which segments of the market to serve. For these reasons, we conclude that this requirement of section 271(c)(1)(A) is satisfied if one or more competing providers collectively serve residential and business subscribers. We therefore find that Brooks Fiber, MFS WorldCom, and TCG collectively are "unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers."

4. Offer by Competing Providers of Telephone Exchange Service Either Exclusively Over Their Own Telephone Exchange Service Facilities or Predominantly Over Their Own Telephone Exchange Service Facilities in Combination with Resale

86. Section 271(c)(1)(A) further requires that competing providers offer telephone exchange service "either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier."[191] Ameritech claims that neither Brooks Fiber nor TCG offers any services through resale, and therefore, they each satisfy the requirements of section 271(c)(1)(A).[192] Ameritech asserts that MFS WorldCom also meets the requirements of section 271(c)(1)(A), because its "resale of service of approximately 2145 non-

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189 *See id.* at 1, 113.

190 Because no party disputes that Brooks Fiber, MFS WorldCom, and TCG are providing at least some facilities-based service to both residential and business subscribers, we need not and do not reach the question of whether it is sufficient under section 271(c)(1)(A) for a competing provider to provide local service to residential subscribers via resale, as long as it provides facilities-based service to business subscribers.

191 47 U.S.C. § 271(c)(1)(A).

192 Ameritech Application at 12.

Centrex lines is modest in comparison to the facilities-based service that MFS WorldCom provides."[193] In arguing that it satisfies this aspect of section 271(c)(1)(A), Ameritech notes that these competing providers all provide telephone exchange services to some customers through the use of unbundled network elements, in combination with facilities these carriers have constructed. Ameritech maintains that the term "own telephone exchange service facilities" includes the provision of service through the use of unbundled network elements.[194] Other parties, in response, contend that unbundled network elements obtained from a BOC are not a competing carrier's "own telephone exchange service facilities,"[195] and that under this interpretation, Brooks Fiber, MFS WorldCom, and TCG cannot be deemed to be exclusively or predominantly facilities-based.[196] Accordingly, we must first construe "own telephone exchange service facilities," and in particular, consider whether that phrase includes unbundled network elements obtained from Ameritech.

87. In support of its claim that unbundled network elements are a competing carrier's "own telephone exchange service facilities," Ameritech argues that section 271(c)(1)(A) juxtaposes two possible arrangements to provide telephone exchange service: (1) through a carrier's own telephone exchange service facilities; and (2) through resale.[197] As a result, Ameritech contends that "facilities-based" encompasses all telephone exchange services other than resold services.[198] Thus, Ameritech argues that "own telephone exchange service facilities" includes both facilities to which a carrier has title and unbundled elements obtained from a BOC.[199] Ameritech further maintains that unbundled network elements are a carrier's own facilities because resellers do not have control over the facilities they use to provide service, whereas carriers have control over facilities they construct and over unbundled network elements

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193 *Id.* at 12.

194 *Id.* at 10-14; *cf.* Ameritech Reply Comments at 3 n.5 (arguing that the Commission need not reach this issue to determine that all three competing providers serve local customers either exclusively or predominantly over their own facilities).

195 AT&T Comments at 34-36; AT&T Reply Comments at 16-17; Brooks Fiber Comments at 6-7; Brooks Fiber Reply Comments at 4; MCI Comments at 6; MCI Reply Comments at 3-4; MCTA Comments at 17-18; NCTA Reply Comments at 4-8; Ohio Consumers' Counsel Comments at 4; Sprint Comments at 7; Sprint Reply Comments at 5-8; TRA Comments at 20.

196 ALTS Comments at 23-26; AT&T Comments at 34-36; AT&T Reply Comments at 16-17; Brooks Fiber Comments at 6-8; Brooks Fiber Reply Comments at 4; MCI Comments at 6-8; NCTA Reply Comments at 4-8; Ohio Consumers' Counsel Comments at 4-6; Ohio Consumers' Counsel Reply Comments at 3; Sprint Comments at 6-12; TCG Comments at 25; Time Warner Comments at 15-23; TRA Comments at 13-20; TRA Reply Comments at 9-14; MFS WorldCom Comments at 6-7; MFS WorldCom Reply Comments at 5-6.

197 Ameritech Application at 12.

198 *Id.*

199 *Id.* at 13-14.

they purchase.[200] Ameritech further notes that, in the Commission's recent *Universal Service Order*, we interpreted a substantially similar term "own facilities," in section 214(e), to include unbundled network elements obtained from an incumbent LEC.[201] Ameritech argues that there is no reason to interpret differently the language in section 271(c)(1)(A).[202] Ameritech points out that, although we stated in the *Universal Service Order* that we were not interpreting "the language in section 271," we noted that "the 'own facilities' language in section 214(e)(1)(A) is very similar to language in section 271(c)(1)(A)."[203]

88. The Michigan Commission, BellSouth, and SBC support Ameritech's argument.[204] BellSouth and SBC contend that not treating unbundled network elements as a competing provider's "own telephone exchange service facilities" would mean that, even if a BOC makes all items on the competitive checklist available to competing providers, that BOC may not be able to enter the in-region interLATA market, simply because competing providers choose to buy an unbundled network element from the BOC instead of constructing a particular facility.[205] BellSouth and SBC argue that Congress intended to treat unbundled network elements as a competing provider's own facilities in order to give the BOC the incentive to make all checklist items available and provide competing providers with the flexibility to choose whether to build a particular facility or purchase unbundled network elements from the BOC.[206]

89. Competing providers and other parties dispute these claims that the purchase of unbundled network elements from the BOC is sufficient to meet the section 271(c)(1)(A) "own

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200 *Id.*

201 Ameritech Application at 12-14. In the *Universal Service Order*, we determined that "a carrier that offers any of the services designated for universal service support, either in whole or in part, over facilities that are obtained as unbundled network elements pursuant to section 251(c)(3) . . . satisfies the [own] facilities requirement of section 214(e)(1)(A)." *In the Matter of Federal State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157, at para. 154 (rel. May 8, 1997) (*Universal Service Order*). Section 214(e)(1) provides that, in order to be eligible to receive universal service support, a telecommunications carrier must "offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities, or a combination of its own facilities and resale of another carrier's services." 47 U.S.C. § 214(e)(1).

202 Ameritech Application at 12-14; *see also Sullivan v. Stroop*, 496 U.S. 478, 484 (applying "the normal rule of statutory construction that identical words in different parts of the same act are intended to have the same meaning") (citations omitted).

203 *Universal Service Order* at para. 168.

204 Michigan Commission Consultation at 11; BellSouth/SBC Comments at 3-4; *see also* SBC Reply Comments at 10-12.

205 BellSouth/SBC Comments at 3-4.

206 *Id.*

telephone exchange service facilities" requirement.[207] Several of these parties argue that the Commission need not define this term in section 271 in the same manner as it defined the term "own facilities" in section 214(e) in the *Universal Service Order*, because the two statutory provisions serve different purposes.[208] Several parties argue that the language of section 271(c)(1)(A), which states that a BOC must provide "access and interconnection to *its* network facilities for the network facilities of one or more unaffiliated competing providers" demonstrates that unbundled network elements are not the competitor's facilities, but the BOC's facilities.[209] Furthermore, these parties contend that the "own telephone exchange service facilities" requirement in section 271 is intended to distinguish between the facilities constructed by a competing provider and the facilities that a BOC provides, because facilities obtained from the BOC are still subject to the BOC's control.[210] They argue that there can be meaningful competition only when a competing provider builds facilities through which it can offer unique services and provide consumers with genuine competitive choices.[211] Thus, these parties contend that the term "own telephone exchange service facilities" means only those facilities that are independent of the BOC, and not unbundled network elements that are *leased* from the BOC.[212]

90. The Department of Justice argues that the Commission need not decide whether the use of unbundled network elements constitutes facilities-based service.[213] The Department of Justice contends that, because Brooks Fiber, which serves both residential and business customers, does not serve any local customers through resale and provides significant switching

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[207] ALTS Comments at 23-26; AT&T Comments at 34-36; AT&T Reply Comments at 16-17; Brooks Fiber Comments at 6-8; Brooks Fiber Reply Comments at 4; MCI Comments at 6-8; NCTA Reply Comments at 4-8; Ohio Consumers' Counsel Comments at 4-6; Ohio Consumers' Counsel Reply Comments at 3; Sprint Comments at 6-12; TCG Comments at 25; Time Warner Comments at 15-23; TRA Comments at 13-20; TRA Reply Comments at 9-14; MFS WorldCom Comments at 6-7; MFS WorldCom Reply Comments at 5-6.

[208] ALTS Comments at 25 n.15; Brooks Fiber Comments at 7-8; MCI Comments at 8 n.13; NCTA Reply Comments at 6-8; Sprint Comments at 7-8; Time Warner Comments at 16-17, 21-22; TRA Comments at 15-17.

[209] 47 U.S.C. § 271(c)(1)(A) (emphasis added); AT&T Comments at 34-36; Ohio Consumers' Counsel Reply Comments at 3; Sprint Comments at 10 n.20.

[210] ALTS Comments at 24-25; AT&T Comments at 36; Brooks Fiber Comments at 6; Brooks Fiber Reply Comments at 4; MCI Comments at 7; MCTA Comments at 17-18; NCTA Reply Comments at 5-6; Sprint Comments at 9-10; TCG Comments at 25; Time Warner Comments at 18-19; TRA Comments at 14-15; TRA Reply Comments at 9-10; MFS WorldCom Comments at 6; MFS WorldCom Reply Comments at 6.

[211] Brooks Fiber Comments at 6; MCI Comments at 7; NCTA Reply Comments at 5; Ohio Consumers' Counsel Comments at 4-5; Sprint Comments at 10-12; Time Warner Comments at 18.

[212] *See, e.g.,* ALTS Comments at 24; Sprint Comments at 10-12.

[213] Department of Justice Evaluation at 7 n.11; *see also* Ameritech Reply Comments at 3 n.5 (agreeing with the Department of Justice that the Commission need not reach this issue to determine that the requirements of section 271(c)(1)(A) are satisfied).

and transport facilities, "it is reasonable to conclude that Brooks [Fiber] is predominantly a facilities-based provider," thereby meeting the requirements of section 271(c)(1)(A).[214]

91. Despite the Department of Justice's argument that we need not determine whether unbundled network elements are treated as a competing carrier's "own telephone exchange service facilities" for purposes of this application, we think it is useful to decide the issue in this Order to provide guidance to future applicants. We note that the determination of whether competing providers are offering telephone exchange service exclusively or predominantly "over their own telephone exchange service facilities" will in many instances depend on the construction of the phrase "own telephone exchange service facilities." Indeed, in this application, as discussed below, the determination of whether Brooks Fiber offers telephone exchange services "exclusively over [its] own telephone exchange service facilities" turns on whether the phrase "own telephone exchange service facilities" in section 271(c)(1)(A) includes unbundled network elements.[215]

92. To determine whether "own telephone exchange service facilities" includes unbundled network elements, we look first to the text of the statute. We agree with Ameritech that section 271(c)(1)(A) recognizes only two methods of providing service: through a carrier's own telephone exchange service facilities and through resale. Undoubtedly, facilities that a carrier constructs would be that carrier's own telephone exchange service facilities, and service provided through resale of Ameritech's telecommunications services pursuant to section 251(c)(4) would be resale. Section 271(c)(1)(A) does not discuss a third category for provision of service through unbundled network elements. The question, then, is whether service using unbundled network elements purchased from Ameritech counts as service over a competing provider's own telephone exchange service facilities or resale.

93. Neither the statute nor the legislative history expressly defines "own telephone exchange service facilities." Thus, it is not clear from the text of the statute whether the phrase "own telephone exchange service facilities" includes only those facilities to which a competing carrier has legal title or which a competing carrier leases from a provider not affiliated with a BOC, or, alternately, also includes unbundled network elements obtained from a BOC, because the competing carrier has the "use of that facility for a period of time."[216] As we stated in the

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[214] Department of Justice Evaluation at 7. As noted above, the Department of Justice does not address this issue with respect to MFS WorldCom and TCG, because it takes the position that a carrier must provide service to both business and residential customers, and those carriers are not serving residential customers. The Department of Justice therefore maintains that "MFS [WorldCom] and TCG cannot be considered facilities-based providers that can be used to satisfy Track A of Section 271." *Id.*

[215] *See infra* para. 102.

[216] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, CC Docket No. 96-98, 11 FCC Rcd 15499, 15635 (1996) (*Local Competition Order*), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), *aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, No. 96-3321 *et al.*, 1997 WL 403401 (8th Cir., July 18, 1997) (*Iowa Utils. Bd.*), *Order on Reconsideration*, 11 FCC Rcd 13042 (1996) (*Local Competition First*

Universal Service Order, "the word 'own' . . . is a 'generic term' that 'varies in its significance according to its use' and 'designate[s] a great variety of interests in property.'"[217] We further noted in the *Universal Service Order*, that the use of the term "own facilities," rather than facilities "owned by" a carrier, suggests that the term "own facilities" could refer "to property that a carrier considers its own, such as unbundled network elements, but to which the carrier does not hold absolute title."[218] Thus, the phrase "own telephone exchange service facilities" in section 271(c)(1)(A) is ambiguous with respect to whether it includes unbundled network elements.

94. Because the meaning of the phrase "own telephone exchange service facilities" is unclear from the text of section 271(c)(1)(A), we look to other sections of the Act, the legislative history, and the underlying policy objectives to resolve the ambiguity. In light of the specific context in which this language is used, the broader statutory scheme, and Congress' policy objectives, we conclude that the only logical statutory interpretation is that unbundled network elements purchased from a BOC are a competing provider's "own telephone exchange service facilities."

95. Specifically, section 271(c)(1)(A) refers to "resale of *the telecommunications services* of another carrier," and not resale of the *facilities* of another carrier. As we determined in the *Universal Service Order*, the provision of an unbundled network element is not the provision of a telecommunications service.[219] A "network element" is defined in the Act as a "facility or equipment used in the provision of a telecommunications service."[220] Thus, use of unbundled network elements is not resale of the telecommunications services of another carrier.

96. Furthermore, section 251 clearly distinguishes between resale and access to unbundled network elements. The Act contemplates three paths of entry into the local market -- the construction of new networks, the use of unbundled elements of the incumbent's network, and resale. The term "resale" in section 251 refers to an incumbent local exchange carrier's duty to

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Reconsideration Order), *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996) (*Local Competition Second Reconsideration Order*), *Third Order on Reconsideration and Further Proposed Rulemaking*, FCC 97-295 (rel. Aug. 18, 1997) (*Local Competition Third Reconsideration Order*), *further recon. pending*; 47 C.F.R. § 51.309.

[217] *Universal Service Order* at para. 158 (citing Black's Law Dictionary 1105 (6th Ed. 1990), and 73 C.J.S. Property § 24 (1972)).

[218] *Universal Service Order* at para. 159.

[219] *Id.* at para. 157; *see also Iowa Utils. Bd*, 1997 WL 403401, at *19-20 (upholding the Commission's determination that "the term 'network element' includes all of the facilities and equipment that are used in the overall commercial offering of telecommunications [services]").

[220] 47 U.S.C. § 153(29). The definition of "telecommunications service" also makes clear the distinction between "service" and "facilities": a "telecommunications service" is defined as "the offering of telecommunications for a fee . . . regardless of the facilities used." *Id.* § 153(46).

offer at wholesale rates "any telecommunications service that the carrier provides at retail."[221] As we recognized in the *Universal Service Order*, section 251 imposes an obligation on incumbent LECs to offer retail services at wholesale rates for resale, and in a different subsection, imposes an independent obligation on incumbent LECs to provide "nondiscriminatory access to network elements on an unbundled basis."[222] Given that the term "resale" is defined and distinguished from the provision of unbundled network elements in section 251, Congress' use of the term "resale" in section 271(c)(1)(A) suggests that Congress did not intend that term to encompass unbundled network elements. Rather, it appears that telephone exchange service provided through unbundled network elements is service over the competing provider's "own telephone exchange service facilities."

97. We are not persuaded by the argument that the requirement in section 271(c)(1)(A) that a BOC "is providing access . . . to its network facilities" means that unbundled network elements must be considered the facilities of the BOC, not the competitor. This phrase does not clarify the meaning of the words "own telephone exchange service facilities" used later in the section. The requirement that a BOC provide access to its network facilities does not indicate whether or not those facilities should be deemed the BOC's facilities or the competing provider's facilities, once the competing provider has obtained them.

98. We are also not persuaded by the argument, advanced by several parties,[223] that the following statement in the Joint Explanatory Statement supports the interpretation that the provision of service through unbundled network elements should be considered resale:

> This conference agreement recognizes that 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. Some facilities and capabilities (*e.g.*, central office switching) will need to be obtained from the incumbent local exchange carrier as network elements pursuant to new section 251. Nonetheless, the conference agreement includes the "predominantly over their own telephone exchange service facilities" requirement to ensure a competitor offering service exclusively through the resale of the BOC's telephone exchange service does not qualify, and that an unaffiliated competing provider is present in the market.[224]

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221 *Id.* § 251(c)(4)(A).

222 *Universal Service Order* at para. 157; *see also* 47 U.S.C. § 251(c)(3)-(4).

223 *See* MFS WorldCom Reply Comments at 5; NCTA Reply Comments at 5; Sprint Comments at 6; Time Warner Comments at 19-20; TRA Comments at 14; TRA Reply Comments at 11.

224 Joint Explanatory Statement at 148.

Although this statement makes clear that a new entrant offering service exclusively through *resale of the BOC's telephone exchange service* does not satisfy section 271(c)(1)(A), the quoted passage does not address whether unbundled network elements constitute a competing carrier's "own telephone exchange service facilities." As discussed above, use of unbundled network elements is not resale of the BOC's telephone exchange service.[225] Thus, the statement does not clarify whether "own telephone exchange service facilities" includes unbundled network elements.[226]

99. Furthermore, as a matter of policy, we believe that interpreting "own telephone exchange service facilities" to include unbundled network elements will further Congress' objective of opening the local exchange and exchange access markets to competition.[227] Congress sought to ensure that new entrants would be able to take advantage of any, or all three, of the entry strategies which the Act established.[228] Interpreting the phrase "own telephone exchange service facilities" to include unbundled network elements will provide the BOCs a greater incentive to cooperate with competing providers in the provision of unbundled network elements, because they will be able to obtain in-region interLATA authority under Track A regardless of whether competing carriers construct new facilities or provide service using unbundled network

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[225] Other statements in the legislative history further demonstrate that use of unbundled elements does not constitute resale. The House Commerce Committee Report, in discussing the precursor to section 271(c)(1)(A), states that "resale, as described in section 242(a)(3), would not qualify [as a facilities-based competitor] because resellers would not have their own facilities in the local exchange over which they would provide service." House Report at 77. In turn, section 242(a) of the House bill, which imposed interconnection and access obligations, distinguished between resale (section 242(a)(3)) and the provision of unbundled network elements (section 242(a)(2)) in much the same manner as the statutory language ultimately enacted as section 251 of the Act. *Id.* at 3.

[226] Time Warner also points to a floor statement that it claims supports its view that unbundled network elements obtained from a BOC are resold facilities, while unbundled network elements obtained from another carrier and facilities constructed by the competing provider would be the competing provider's "own telephone exchange service facilities." *See* Time Warner Comments at 20-21; *see also* 141 Cong. Rec. H8458 (daily ed. Aug. 4, 1995); 141 Cong. Rec. E1699 (daily ed. Aug. 11, 1995). We note that this reading of the statute appears inconsistent with the statutory scheme, because: (1) the statute is written in terms of the resale of telecommunications services, not facilities; and (2) the statute does not differentiate between unbundled network elements purchased from the BOC and those elements purchased from a third party. Thus, we conclude that statements of an individual member of Congress do not overcome the other evidence discussed in this section that indicates Congress' intention to treat unbundled network elements as a competing carrier's "own telephone exchange service facilities." *See Bath Iron Works Corp. v. Office of Workers Compensation Programs*, 506 U.S. 153, 166 (1993); *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 536-37 (7th Cir. 1991); *see also supra* note 73.

[227] *See* Joint Explanatory Statement at 1, 113.

[228] Joint Explanatory Statement at 1; *see also Iowa Utils. Bd.*, 1997 WL 403401, at *28 (concluding that "Congress clearly included measures in the Act, such as the interconnection, unbundled access, and resale provisions, in order to expedite the introduction of pervasive competition into the local telecommunications industry).

elements.[229] Thus, on balance, we find that this statutory interpretation will better promote Congress' objectives.[230]

100. We reject the argument raised by several parties that, because competing providers can offer unique services and provide consumers with genuine competitive choices only when they build facilities, policy considerations support the conclusion that "own telephone exchange service facilities" do not include unbundled network elements. A new entrant using solely unbundled network elements has the incentive and ability to package and market services in ways that differ from the BOC's existing service offerings in order to compete in the local telecommunications market. In contrast, carriers reselling an incumbent LEC's services are limited to offering the same services that the incumbent offers at retail.[231] As a result, many of the benefits that consumers would realize if competing providers build facilities can also be realized through the use of unbundled network elements. Moreover, competing providers may combine unbundled network elements with facilities they construct to provide a wide array of competitive choices.

101. Thus, for the foregoing reasons, we interpret the phrase "own telephone exchange service facilities," in section 271(c)(1)(A), to include unbundled network elements that a competing provider has obtained from a BOC. Although we define this term in the same manner as we defined "own facilities" in section 214(e) in the *Universal Service Order*, we base our decision here on the text of section 271(c)(1)(A), the legislative history of this provision, and the overall statutory scheme of the 1996 Act. Thus, the issue, raised by several parties, of whether we may interpret "own telephone exchange service facilities" in section 271(c)(1)(A) in a different manner than we interpreted "own facilities" in section 214(e) is moot, and therefore, we need not decide this issue.

102. Having determined that unbundled network elements are a competing provider's "own telephone exchange service facilities" for purposes of section 271(c)(1)(A), we find that Brooks Fiber is offering service "exclusively over [its] own telephone exchange service facilities." Brooks Fiber is not offering service through resale of the telecommunications services of another

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[229] A contrary reading of "own telephone exchange service facilities" could lead the BOCs to discourage the use of unbundled network elements by new entrants, because a BOC could only obtain in-region interLATA authority if new entrants actually construct facilities.

[230] Interpreting "own telephone exchange service facilities" to include unbundled network elements will also promote Congress' objective that BOCs obtain approval to enter their in-region interLATA markets primarily by satisfying section 271(c)(1)(A), rather than section 271(c)(1)(B). *See SBC Oklahoma Order* at paras. 41-42 ("[C]onsistent with its goal of developing competition, Congress intended Track A to be the primary vehicle for BOC entry in section 271."). If unbundled network elements are treated as a competing carrier's "own telephone exchange service facilities," it is more likely that a BOC will receive a request for access and interconnection from a competing carrier that, if implemented, would satisfy section 271(c)(1)(A), thereby barring the BOC from proceeding under section 271(c)(1)(B). *See id.* at para. 27. As a result, this interpretation of "own telephone exchange service facilities" would make it more likely that a BOC seeking in-region interLATA entry would be able to proceed under section 271(c)(1)(A).

[231] *See* 47 U.S.C. § 251(c)(4).

carrier, but instead, currently serves both business and residential customers through either: (1) fiber optic rings, which are connected to its switches; or (2) unbundled loops obtained from Ameritech, which are connected to Brooks Fiber's switches.[232]

103. Because we find that Brooks Fiber is offering service "exclusively over [its] own telephone exchange service facilities," we need not determine whether MFS WorldCom and TCG are also offering service "exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier."[233] Accordingly, we need not reach the issue, raised by certain parties, of the meaning of the term "predominantly" as used in section 271(c)(1)(A).

5. Summary and Conclusion

104. We find, for the reasons discussed above, that Ameritech has entered into binding agreements with Brooks Fiber, MFS WorldCom, and TCG that have been approved under section 252 and that specify the terms and conditions under which Ameritech is providing access and interconnection to its network facilities for the network facilities of these three competing providers of telephone exchange service to residential and business subscribers. In addition, we determine that Brooks Fiber is offering such telephone exchange service exclusively over its own telephone exchange service facilities. Thus, we conclude that Ameritech has satisfied the requirements of section 271(c)(1)(A) through its interconnection agreement with Brooks Fiber. Because Ameritech has satisfied section 271(c)(1)(A) through its agreement with Brooks Fiber, we need not determine whether Ameritech has also satisfied this provision through its agreements with MFS WorldCom and TCG.

VI. CHECKLIST COMPLIANCE

105. Because we have concluded that Ameritech satisfies section 271(c)(1)(A), we must next determine whether Ameritech has "fully implemented the competitive checklist in subsection (c)(2)(B)."[234] For the reasons set forth below, we conclude that Ameritech has not yet demonstrated by a preponderance of the evidence that it has fully implemented the competitive

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232 *See supra* para. 65.

233 TCG serves business customers in the Detroit metropolitan area through either: (1) its switch and fiber optic network; or (2) dedicated DS1 and DS3 lines purchased from Ameritech, which are connected to TCG's switch in the Detroit area. Ameritech Application, Vol. 2.3, Edwards Aff. at 6; TCG Comments at 25-26. Ameritech maintains that TCG "offer[s] local exchange service exclusively or predominantly over [its] own telephone exchange service facilities," because TCG is not serving any local customers through resale. Ameritech Application at 10-11. No party disputes this claim on the ground that TCG purchases some DS1 and DS3 lines out of Ameritech's access tariff. We need not reach this issue, however, because, as discussed above, Ameritech would satisfy section 271(c)(1)(A) in any event through its interconnection agreement with Brooks Fiber.

234 47 U.S.C. § 271(d)(3)(A)(i).

checklist. In particular, we find that Ameritech has not met its burden of showing that it is providing access to operations support systems functions, interconnection, and access to 911 and E911 services, in accordance with the requirements of section 271(c)(2)(B). Like the Department of Justice, which observed that "Ameritech has made significant and important progress toward meeting the preconditions for in-region interLATA entry under [s]ection 271 in Michigan, and has satisfied many of those preconditions,"[235] we do recognize, however, Ameritech's considerable efforts to implement the 1996 Act's goal of opening local markets to competition.

106. Given our finding that Ameritech has not demonstrated that it has fully implemented the competitive checklist, we need not decide in this Order whether Ameritech is providing each and every checklist item at rates and on terms and conditions that comply with the Act. Accordingly, we include here a complete discussion of only certain checklist items -- access to operations support systems functions, interconnection, and access to 911 and E911 services. Nonetheless, in order to provide further guidance with respect to Ameritech's checklist compliance, we briefly summarize in Section B Ameritech's showing on several checklist items for which there is very little comment, and highlight below, in Section F, our concerns regarding certain other checklist items.[236] We note that we make no findings or conclusions with respect to those checklist items addressed in Sections B and F.

A. Implementation of the Checklist

1. Introduction

107. Before turning to an examination of Ameritech's showing on specific checklist items, we first must address what it means to "provide" checklist items. We conclude that a BOC provides a checklist item if it makes that item available as a legal and practical matter, as described below.

2. Discussion

108. As noted above, to satisfy the requirement of section 271(d)(3)(A)(i), Ameritech must demonstrate that it has fully implemented the competitive checklist by providing access and

[235] We note that the Department of Justice only evaluated Ameritech's showing with respect to the provision of unbundled switching, unbundled transport, interconnection, and operations support systems.

[236] Issues discussed below include: pricing of checklist items, unbundled local transport, unbundled local switching, combinations of unbundled network elements, number portability, reciprocal compensation.

interconnection as described therein.[237] Accordingly, we must consider whether Ameritech "is providing" access and interconnection pursuant to the terms of the checklist.[238]

109. The parties advocate divergent views regarding what it means to "provide" a checklist item. Ameritech cites dictionary definitions of "provide" to argue that the term may mean "make available" or "furnish."[239] Ameritech and Bell Atlantic contend that a BOC "provides" a given checklist item either by actually furnishing the item to carriers that have ordered it or by making the item available, through an approved interconnection agreement, to carriers that may elect to order it in the future.[240] The interexchange carriers and competing LECs participating in this proceeding generally construe "provide" to mean "actually furnish," not merely "offer" or "make available."[241] The Department of Justice concludes, however, that, "[i]n a situation where a BOC is not furnishing a checklist item due to the absence of current orders, it can still `provide' that item by making it available both as a legal matter (i.e., contractually through complete terms in binding approved interconnection agreements that comply with all applicable legal requirements) as well as a practical matter (i.e., it must stand ready to fulfill a competitor's request on demand)."[242] Several parties endorse the statutory analysis of the Department of Justice.[243]

110. We agree with Ameritech that "provide" is commonly understood to mean both "furnish" and "make available."[244] Therefore, we must look to the statutory context in which the term is used to determine its precise meaning in this instance. For the reasons discussed below, we conclude that a BOC "provides" a checklist item if it actually furnishes the item at rates and on

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237 *See* MCI Comments at 11-12 (citing *Webster's Seventh New College Dictionary* for the definition of "implement" -- "to give practical effect to and ensure of actual fulfillment by concrete measure").

238 *Accord* LCI Comments at 1.

239 Ameritech Application at 19.

240 *Id.*; Bell Atlantic Comments at 5-6; *see also* BellSouth/SBC Comments at 5-7.

241 *See, e.g.*, CompTel Comments at 11-12; LCI Comments at 1-2; MCI Comments at 12-13; NCTA Reply Comments at 14; Sprint Comments at 4; TCG Comments at 19; TRA Comments at 26; MFS WorldCom Comments at 9.

242 Department of Justice Evaluation at 11; *see also* Department of Justice SBC Oklahoma Evaluation at 23-24 ("a BOC is `providing' a checklist item only if it has a concrete and specific legal obligation to provide it, is presently ready to furnish it, and makes it available as a practical, as well as formal, matter").

243 *See, e.g.*, Ameritech Application at 19 (citing the Department of Justice SBC Oklahoma Evaluation); Brooks Fiber Comments at 2-4, 12; Time Warner Comments at 10; *see also* MFS WorldCom Reply Comments at 13 n.41 (contending that, if the Commission rejects MFS WorldCom's definition of "provide," the Commission should adopt the Department of Justice's proposal at a minimum).

244 For instance, *The American Heritage College Dictionary* defines "provide" alternately as "[t]o furnish; supply" and "[t]o make available; afford." *The American Heritage College Dictionary* at 1102 (3d ed. 1993).

terms and conditions that comply with the Act or, where no competitor is actually using the item, if the BOC makes the checklist item available as both a legal and a practical matter.[245] Like the Department of Justice, we emphasize that the mere fact that a BOC has "offered" to provide checklist items will not suffice for a BOC petitioning for entry under Track A to establish checklist compliance.[246] To be "providing" a checklist item, a BOC must have a concrete and specific legal obligation to furnish the item upon request pursuant to state-approved interconnection agreements that set forth prices and other terms and conditions for each checklist item.[247] Moreover, the petitioning BOC must demonstrate that it is presently ready to furnish each checklist item in the quantities that competitors may reasonably demand and at an acceptable level of quality.[248] For instance, the BOC may present operational evidence to demonstrate that the operations support systems functions the BOC provides to competing carriers will be able to handle reasonably foreseeable demand volumes for individual checklist items. As discussed below, such evidence may include carrier-to-carrier testing, independent third-party testing, and internal testing of operations suppport systems functions, where there is no actual commercial usage of a checklist item.[249]

111. Like the Department of Justice, we conclude that this interpretation of section 271(d)(3)(A)(i) "furthers the Congressional purpose of maximizing the options available to new entrants, without foreclosing BOC long distance entry simply because . . . [the BOC's] competitors choose not to use all of the options."[250] Requiring a BOC petitioning for entry under Track A actually to furnish each checklist item would make BOC entry contingent on competing LECs' decisions about when to purchase checklist items and would provide competing carriers

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245 *See* Department of Justice SBC Oklahoma Evaluation at 23.

246 *See id.*; *see also* Brooks Fiber Comments at 3-4.

247 *See* Department of Justice SBC Oklahoma Evaluation at 23; *see also* Brooks Fiber Comments at 2. We note that we are not at this time determining whether the agreements must contain prices adopted in permanent cost proceedings, as opposed to interim prices, in order to establish checklist compliance. The Department of Justice expressed concern that, at the time Ameritech filed its application, the prices in Michigan were for the most part still interim and had not been finally determined to be cost-based. *See* Department of Justice Evaluation at 41-43. Numerous parties also raised this issue, urging the Commission not to rely on interim prices to establish checklist compliance. *See*, *e.g.*, ALTS Comments at 20-21; ALTS Reply Comments at 13-14; Brooks Fiber Comments at 10; CompTel Comments at 14-16; KMC Comments at 4-9; MCI Comments at 23-25; NCTA Reply Comments at 12-13; Sprint Reply Comments at 4; TRA Comments at 36. We need not resolve this issue in the context of the Ameritech application, because the Michigan PSC has approved final prices for Michigan, as stated above. *See supra* note 152. We note that a number of other states have issued orders adopting a cost methodology for permanent prices, and we expect additional states to issue similar decisions shortly.

248 *See* Department of Justice SBC Oklahoma Evaluation at 23; *see also* Brooks Fiber Comments at 12; TRA Comments at 21 (stating that checklist items should be ubiquitously available in sufficient capacity with sufficient operational support).

249 *See infra* para. 138.

250 *See* Department of Justice SBC Oklahoma Evaluation at 22.

with an opportunity to delay BOC entry.[251] We believe that such a result would be contrary to congressional intent.[252] We do not believe that competing LECs and interexchange carriers necessarily will purchase each checklist item in every state, as AT&T and MCI suggest.[253] Competitors may need different checklist items, depending upon their individual entry strategies. The Act contemplates three methods of entry into the local market -- the construction of new networks, the use of unbundled elements of the incumbent's network, and resale -- but does not express a preference for one particular strategy.[254] We thus believe that the reading of section 271(d)(3)(A)(i) proposed by the interexchange carriers is inconsistent with the statutory scheme, because it could create an incentive for potential local exchange competitors to refrain from purchasing network elements in order to delay BOC entry into the in-region, interLATA services market.

112. AT&T suggests that interpreting "provide" to mean "furnish" is not an unreasonably narrow reading of the statute, because BOCs have ultimate control over a competing LEC's decision to purchase a checklist item.[255] Contrary to AT&T's suggestion, however, a BOC cannot compel a competing LEC to contract to purchase a specific checklist item, absent an implementation schedule for the purchase of that item in the interconnection agreement between the BOC and competing LEC. AT&T asserts that a BOC has a legal remedy if competing LECs refuse to purchase a particular checklist item covered by their interconnection agreements with a BOC. AT&T states the remedy is the ability "to invoke the exceptions to Track A which trigger Track B."[256] We disagree, because the failure of a competing LEC to purchase a particular checklist item is not grounds for proceeding under Track B unless the competing carrier's failure amounts to a breach of the interconnection agreement. Once a BOC has received a qualifying request for access and interconnection, Track B is available, by its terms, only "if the provider or providers making such a request have (i) failed to negotiate in good faith .

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[251] *See, e.g.,* Ameritech Application at 18-19; Bell Atlantic Comments at 5-6; BellSouth/SBC Comments at 5-7.

[252] As stated above, the goal of the Act is to bring robust competition not only to the local market but to all telecommunications markets, and increasing competition in long distance through BOC entry serves this goal. Section 271 gives BOCs the power to determine when they will enter the long distance market, based on their efforts to open the local telecommunications market to competition. *See supra* Section II.B.

[253] *See* AT&T Reply Comments at 22-23; MCI Comments at 13.

[254] *See Iowa Utils. Bd.*, 1997 WL 403401 at *27-28 (concluding that facilities-based competition is not the exclusive goal of the Act).

[255] AT&T Reply Comments at 22-24.

[256] *Id.* at 22-24.

. . , or (ii) violated the terms of an [approved] agreement . . . by failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement."[257]

113. Several parties contend that operational implementation is necessary to expose the limitations and omissions in a BOC's offering of a network element.[258] They assert that interpreting "provide" to mean something less than "furnish" allows incumbent LECs to delay competitors' access to particular network elements and otherwise avoid checklist obligations.[259] Others maintain that competitors may not have requested a given checklist item because the BOC's offering is deficient, unusable, or unreasonably priced.[260] We emphasize that the Commission will examine the terms and conditions, as well as the prices, for the BOC's offering of individual checklist items, regardless of whether the BOC is actually furnishing the checklist items. With regard to each checklist item, the Commission must first determine whether the terms of the interconnection agreement establishing the BOC's obligation to provide a particular checklist item comply with the Act. In the case of checklist items that have not been furnished, the Commission must make a predictive judgment to determine whether a petitioning BOC could actually furnish the requested checklist item upon demand.[261] Although we recognize that such a judgment may be difficult to make, we believe that it is required by the terms of section 271 and is consistent with the statutory scheme that Congress envisioned. As we noted in the *SBC Oklahoma Order*, "the Commission is called upon in many contexts to make difficult determinations and has the statutory mandate to do so."[262]

114. Several parties claim that Congress's contrasting use of "provide" and "generally offer" throughout section 271 reflects the fundamental structural difference between entry under Track A and entry under Track B. They assert that the critical difference is that, under Track A, a

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257 *See* 47 U.S.C. § 271(c)(1)(B); *SBC Oklahoma Order* at paras. 27-59.

258 *E.g.*, CompTel Comments at 11-12; MCI Comments at 11-15 (asserting that Congress rejected reliance on regulatory judgments about what might or might not work if put into practice and decided to trust the market), and Exhibit G at 5; TRA Reply Comments at 7-8.

259 *See, e.g.*, AT&T Reply Comments at 24; MCI Comments at 15-16 (suggesting that BOCs may delay competitors' access to particular network elements to prevent them from being in a position to purchase the element by an established date and alleging that Ameritech has delayed its competitors' access to unbundled local switching).

260 *See, e.g.*, ALTS Comments at 14-15; AT&T Reply Comments at 22; CompTel Comments at 13; LCI Comments at 2-3; MFS WorldCom Comments at 12; *see also* MFS WorldCom Reply Comments at 10 (stating that withholding availability of a network element should not support checklist compliance).

261 *See* AT&T Reply Comments at 24 (urging the Commission to examine implementation issues); TRA Reply Comments at 8.

262 *SBC Oklahoma Order* at paras. 57-58 and n.181 (citing Supreme Court case law recognizing that the Commission may be required to make difficult predictive judgments in order to implement certain provisions of the Communications Act).

BOC must actually be furnishing each of the elements in a timely and nondiscriminatory fashion; in contrast, under Track B, the BOC need not actually furnish an element that has not yet been requested, but must nonetheless prove that it could do so if asked.[263] Reading the statute as a whole, we think it is clear that Congress used the term "provide" as a means of referencing those instances in which a BOC furnishes or makes interconnection and access available pursuant to state-approved interconnection agreements and the phrase "generally offer" as a means of referencing those instances in which a BOC makes interconnection and access available pursuant to a statement of generally available terms and conditions. A statement of generally available terms and conditions on its face is merely a general offer to make access and interconnection available, reflecting the fact that no competing provider has made a qualifying request therefor. Because we conclude that Congress used the terms "provide" and "generally offer" to distinguish between two methods of entry, we believe that the contrasting use of "provide" and "generally offer" in section 271 does not require us to define "provide" to mean only "furnish."

115. Several parties cite legislative history to support their contention that Congress intended a BOC petitioning for interLATA entry under section 271(c)(1)(A) to be furnishing each checklist item.[264] In particular, they point to the Joint Explanatory Statement of the Conference Committee, which states that "[t]he requirement that the BOC `is providing access and interconnection' means that the competitor has implemented the agreement and the competitor is operational."[265] We conclude that the requirement that a BOC petitioning for entry under Track A demonstrate the presence of a facilities-based competitor is consistent with congressional intent that a BOC face competition from an operational competitor before gaining entry into the in-region, interLATA services market. The fact that the legislative history refers to operational competition does not mean that a competitor of the BOC must actually be using every checklist item in order to be operational. Moreover, we conclude that a BOC may be found to have implemented an agreement without a competing LEC's having actually requested every item provided for therein. Given the varying needs of competing LECs, we believe that Congress did not intend to require a petitioning BOC to be actually furnishing each checklist item.

B. Checklist Items of Limited Dispute

116. As noted above, before discussing Ameritech's failure to comply with certain checklist items, we summarize here those checklist items for which there is very little comment in the record. Specifically, few parties raise issues regarding Ameritech's provision of:

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263 *See* AT&T Reply Comments at 19-21; CompTel Comments at 11-12; LCI Comments at 1-2; MCI Comments at 12-13; MFS WorldCom Comments at 9-10; MFS WorldCom Reply Comments at 13. *But see* Bell Atlantic/NYNEX Reply Comments at 3-4 (contending that there is "no statutory link between the method for showing checklist compliance under paragraph [272](c)(2) and the track available under paragraph [272](c)(1)").

264 *E.g.*, ALTS Comments at 13-14; AT&T Reply Comments at 19-21; MCI Comments at 13 n.17.

265 Joint Explanatory Statement at 148.

nondiscriminatory access to poles, ducts, conduits, and rights of way (section 271(c)(2)(B)(iii)), nondiscriminatory access to directory assistance and operator call completion services (section 271(c)(2)(B)(vii)(II) and (III)), white pages directory listings for competing LECs' customers (section 271(c)(2)(B)(viii)), nondiscriminatory access to telephone numbers (section 271(c)(2)(B)(ix)), nondiscriminatory access to databases and associated signaling necessary for call routing and completion (section 271(c)(2)(B)(x)), services or information necessary to allow a requesting carrier to implement local dialing parity (section 271(c)(2)(B)(xii)) and reciprocal compensation arrangements (section 271(c)(2)(B)(xiii)).[266] We urge Ameritech to work with those few parties that raised concerns about these checklist items to resolve any remaining disputes prior to filing a new section 271 application. We are encouraged by the fact that at least one competing provider -- Brooks Fiber -- contends that Ameritech has met checklist items (iii), (viii), and (ix). In order to assist us in future proceedings, we urge commenters, including the relevant state commission and the Department of Justice, to analyze the applicant's compliance with each of the fourteen checklist items.

117. Section 271(c)(2)(B)(iii) requires BOCs to provide "nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned by the [BOC] at just and reasonable rates in accordance with the requirements of section 224."[267] Section 224(f)(1) of the Act imposes upon all utilities, including LECs, the duty to "provide . . . any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit or right-of-way owned or controlled by it."[268] Ameritech states in its application that it provides nondiscriminatory access to poles, ducts, conduits and rights-of-way by three means: by providing access to its maps and records; by employing a nondiscriminatory methodology for assigning existing spare capacity between competing carriers; and by ensuring comparable treatment in completing the steps for access to these items through Ameritech's "Structure Access Coordinator."[269] Ameritech also asserts that it will comply with the applicable state requirements of any state, such as Michigan, that elects to regulate directly poles, ducts, conduits, and rights-of-way.[270]

118. The Michigan Commission finds, based on Ameritech's provision of this checklist item to Brooks Fiber, that it "appears Ameritech satisfies this checklist item."[271] The Department

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266 *See* 47 U.S.C. §§ 271(c)(2)(B)(iii), (vii), (viii), (ix), (x), (xii), (xiii).

267 *Id.* § 271(C)(2)(B)(iii).

268 *Id.* § 224(f)(1). We note that the *Local Competition Order* adopted rules on this requirement. *See Local Competition Order*, 11 FCC Rcd at 16058-74.

269 Ameritech Application at 41.

270 *Id.*

271 Michigan Commission Consultation at 36.

of Justice states that it does not have sufficient independent information to conclude whether Ameritech is presently in compliance with this checklist item.[272] In contrast, MCTA contends that Ameritech is not providing nondiscriminatory access to poles at just and reasonable rates.[273] Similarly, AT&T asserts that Ameritech has no record of "proven compliance" with its obligation to provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way, and in the absence of such a record, the Commission may find compliance with this checklist item only if there are adequate written procedures for access to poles, ducts, conduits, and rights-of-way in Michigan as well as enforceable provisioning intervals at just and reasonable rates.[274] Nonetheless, Brooks Fiber, the carrier to whom Ameritech is actually furnishing access to poles, ducts, conduits, and rights of way, states that Ameritech is in compliance with this checklist item.[275]

119. Section 271(c)(2)(B)(vii) requires BOCs to provide "[n]ondiscriminatory access to - . . . (II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and (III) operator call completion services."[276] With respect to its provision of directory assistance and operator services, Ameritech asserts that it furnishes directory assistance services to Brooks Fiber, MFS WorldCom, and MCI, and operator services to Brooks Fiber.[277] Ameritech maintains that it has established procedures to ensure that these services are provided at parity with the service that Ameritech provides to itself.[278] The Michigan Commission finds that "Ameritech appears to comply with the directory assistance and operator call completion requirements of the checklist."[279] The Department of Justice did not evaluate Ameritech's showing on these checklist items. Several commenters object to Ameritech's failure to provide the "customized routing" capability of its local switch that allows directory assistance and operator services to be routed to the directory assistance and operator services platform of the

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272 Department of Justice Evaluation at 9-10 n.16.

273 MCTA Comments at 12-13.

274 AT&T Comments, Vol. XI, Tab N, Lester Aff. at 7-11.

275 Letter from John C. Shapleigh, Executive Vice President, Brooks Fiber, to William F. Caton, Acting Secretary, Federal Communications Commission at Attachment A (Aug. 4, 1997) (Brooks Fiber *Ex Parte*); Ameritech Application, Vol. 2.3, Edwards Aff. at 40.

276 47 U.S.C. § 271(c)(2)(B)(vii). We note that the Commission adopted rules regarding directory assistance and operator services. *See Local Competition Order*, 11 FCC Rcd at 15768-74 and Appendix B; *Local Competition Second Reconsideration Order*, 11 FCC Rcd at 19447-64 and Appendix B.

277 Ameritech Application at 47.

278 *Id.* at 48.

279 Michigan Commission Consultation at 45.

requesting carrier. We address that issue in our discussion below regarding unbundled local switching.[280]

120. In addition to that concern, MCI asserts that Ameritech will only provide unbundled access to its directory assistance database through the bona fide request process, and that this adds unnecessary expense and delay. Instead, MCI contends, access to directory assistance databases should be provided through established procedures on a predictable basis.[281] In response, Ameritech maintains that a bona fide request process is necessary because Ameritech has no idea what specific type of electronic access a carrier wants to access Ameritech's directory assistance services until it receives an order for such access.[282] Ameritech states further that this type of request is one that is best defined, designed, and priced through the bona fide request process.[283] Consequently, Ameritech asserts, it would make no sense to design a standard product.[284] The record contains no comments with respect to Ameritech's provision of operator services.

121. Section 271(c)(2)(B)(viii) requires BOCs to provide "white pages directory listings for customers of the other carrier's telephone exchange service."[285] Ameritech asserts that it satisfies this requirement by ensuring that its directory publishing affiliate will: publish the listings of competing LECs in the same geographic scope at no charge; provide initial and secondary delivery of white page directories to customers of resellers on the same basis as its own customers; license its white pages listing on a current basis to competing carries for use in publishing their own directories; and provide access to its directory listings in readily accessible magnetic tape or electronic format for the purpose of providing directory assistance.[286] The Michigan Commission finds that it "appears that Ameritech meets this checklist item."[287] The Department of Justice did not evaluate Ameritech's showing on this checklist item. No commenters, with the exception of Brooks Fiber, addressed Ameritech's compliance with this

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280 *See infra* para. 331.

281 MCI Comments, Exh. G, Sanborn Aff. at 15-16.

282 Ameritech Reply Comments, Vol. 5R.6, Edwards Reply Aff. at 42.

283 *Id.*

284 *Id.*

285 47 U.S.C. § 271(c)(2)(B)(viii).

286 Ameritech Application, Vol. 2.3, Edwards Aff. at 63.

287 Michigan Commission Consultation at 46.

checklist item in the instant proceeding. Brooks Fiber asserts that Ameritech complies with this checklist requirement.[288]

122. Section 271(c)(2)(B)(ix) provides that "[u]ntil the date by which telecommunications numbering administration guidelines, plan, or rules are established, [a BOC must provide] nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers." After that date, this section further provides, a BOC must comply with such guidelines, plan, or rules.[289] Ameritech states that in its capacity as Central Office Code Administrator in Michigan, it furnishes nondiscriminatory access to telephone numbers for assignment to the networks of competing carriers, in accordance with the Central Office Code Assignment Guidelines and the NPA Code Relief Planning Guidelines, under the oversight and complaint jurisdiction of the Commission. Ameritech states that it has furnished, and continues to furnish, telephone numbers to Brooks Fiber, MFS WorldCom and TCG.[290] In addition, Ameritech maintains it has assigned 150 NXX codes to new local exchange providers including Brooks Fiber, MFS WorldCom, TCG, MCI, and Phone Michigan.[291] The Michigan Commission contends that Ameritech "has responded to requests for numbers in each area code and has the capability to meet the demand when asked by known providers." The Michigan Commission concludes that "[i]t therefore continues to appear that Ameritech has met this checklist item."[292] Brooks Fiber also maintains that Ameritech satisfies the requirements of this checklist item.[293] The Department of Justice did not evaluate Ameritech's showing on this checklist item. Phone Michigan, however, asserts that "Ameritech delayed Phone Michigan's entry in the Saginaw, Bay City, and Midland exchanges by several months by refusing to assign . . . NXX's for its collocation site" at Ameritech's Saginaw tandem switch.[294]

123. Section 271(c)(2)(B)(x) requires the BOC to provide "[n]ondiscriminatory access to databases and associated signaling necessary for call routing and completion."[295] Ameritech asserts that it provides unbundled nondiscriminatory access to its signaling networks, its call-

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288 Brooks Fiber *Ex Parte* at Attachment A.

289 47 U.S.C. § 271(c)(2)(B)(ix).

290 Ameritech Application at 49.

291 Ameritech Application, Vol. 2.3, Edwards Aff. at 66.

292 Michigan Commission Consultation at 47.

293 Brooks Fiber *Ex Parte* at Attachment A.

294 Phone Michigan Comments at 5.

295 47 U.S.C. § 271(c)(2)(B)(x). We note that the *Local Competition Order* adopted rules on databases and signaling systems. *See Local Competition Order*, 11 FCC Rcd at 15722-51 and Appendix B.

related databases used in its signaling networks for billing and collection or the transmission, routing or other provision of telecommunications service, and to its Service Management System (SMS).[296] Ameritech maintains that it is currently furnishing access to call-related databases and signaling to several carriers, including Brooks Fiber, MFS WorldCom, and TCG. Each of its call-related databases, according to Ameritech, is accessed in the same manner and via the same signaling links that are used by Ameritech itself.[297] The Michigan Commission finds that Ameritech "appears to comply with this checklist item."[298] The Department of Justice did not evaluate Ameritech's showing on this checklist item. According to Brooks Fiber, it has experienced recent problems in coordinating the provision of Ameritech's signaling network that have caused serious service interruptions for customers of Brooks Fiber. For example, Brooks Fiber asserts that, on one occasion, more than 14,000 telephone calls were blocked.[299] MCI questions whether competing LECs "could get access to Ameritech's Advanced Intelligent Network databases today, much less create programs via Ameritech's Service Creation Environment/SMS."[300]

124. Section 271(c)(2)(B)(xii) requires a BOC to provide "[n]ondiscriminatory 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 section 251(b)(3)."[301] Section 251(b)(3), in turn, imposes on all LECs the duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service with "nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays."[302] Ameritech maintains that it meets these requirements, and that local dialing parity is currently being furnished in 100 percent of Ameritech's switches and access lines.[303] The Michigan Commission finds that "it appears that Ameritech complies with this checklist item."[304] The Department of Justice did not evaluate Ameritech's showing on this checklist item. Although

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296 Ameritech Application, Vol. 2.3, Edwards Aff. at 70.

297 *Id.*

298 Michigan Commission Consultation at 48.

299 Brooks Fiber Comments at 32.

300 MCI Comments, Exh. G, Sanborn Aff. at 37.

301 47 U.S.C. § 271(c)(2)(B)(xii).

302 *Id.* § 251(b)(3). We note that the Commission adopted rules regarding this requirement. *See Local Competition Second Report and Order*, 11 FCC Rcd at 19405-64 and Appendix B.

303 Ameritech Application, Vol. 2.8, Mayer Aff. at 121-24.

304 Michigan Commission Consultation at 51.

a number of commenters find fault with Ameritech's provision of intraLATA toll dialing parity in Michigan,[305] only MCI addresses Ameritech's provision of local dialing parity. MCI asserts that, because Ameritech does not provide unbundled directory assistance databases on an equal-in-quality basis, it is not in compliance with the checklist requirement of dialing parity.[306]

125. Section 271(c)(2)(B)(xiii) requires a BOC to provide "[r]eciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)."[307] Ameritech asserts that it currently furnishes reciprocal compensation for the exchange of local traffic to Brooks Fiber, MFS, and TCG under their respective interconnection agreements. Ameritech explains that it provides reciprocal compensation rates for both tandem office-based and end office-based transport and termination of local traffic originating on the other carriers' network.[308] Despite the existence of a formal complaint against Ameritech presently pending before the Michigan Commission filed by Brooks Fiber regarding Ameritech's compliance with its reciprocal compensation obligations,[309] the Michigan Commission states that it "continues to believe that Ameritech complies with the checklist item."[310] The Department of Justice did not evaluate Ameritech's showing on this checklist item.

126. Parties have raised two areas of factual dispute regarding Ameritech's compliance with this obligation. First, TCG and Brooks Fiber claim that they have not been paid funds due to them under the reciprocal compensation provisions of their interconnection agreements with Ameritech.[311] Second, MCI claims that the Michigan Commission failed to take into account the fact that MCI's switches perform essentially the same functions as Ameritech's tandem switches, therefore entitling MCI to Ameritech's tandem termination rate rather than Ameritech's end office

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305 *See infra* Section VIII.B.

306 MCI Comments, Exh. G, Sanborn Aff. at 37.

307 47 U.S.C. § 271(c)(2)(B)(xiii). Section 252(d)(2) provides that "[f]or the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless- (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls. " 47 U.S.C. § 252(d)(2).

308 Ameritech Application, Vol 2.3, Edwards Aff. at 78.

309 This complaint, filed on April 23, 1997, pertains to whether Ameritech is obligated to provide reciprocal compensation for certain types of cellular and paging calls classified as "Type 2" calls. *See* Michigan Commission Consultation at 52.

310 *Id.* at 53.

311 TCG Comments at 17-18; Brooks Fiber Comments at 34-35.

termination rate when MCI terminates Ameritech traffic.[312] Although Ameritech admits on reply that it has not paid TCG and Brooks Fiber for certain reciprocal compensation bills, it claims that it has not done so because these bills contain obvious errors and are presently in dispute.[313] In response to MCI's claims, Ameritech argues that the Michigan Commission twice found against MCI on the subject of tandem interconnection rates, and that MCI is merely attempting to relitigate this issue in the instant proceeding.[314]

127. Finally, we note that, in light of our findings with respect to Ameritech's failure to satisfy other checklist requirements as discussed below, we are not required to make, and we do not make, any findings or conclusions with respect to Ameritech's compliance with the foregoing checklist items. We recognize, however, the considerable steps that Ameritech has taken in many of these areas, and we urge Ameritech and the other parties to continue to resolve any remaining disputes.

C. Operations Support Systems

1. Summary

128. As discussed below, we conclude that Ameritech has failed to demonstrate that it provides nondiscriminatory access to all of the operations support systems (OSS) functions provided to competing carriers, as required by the competitive checklist. First, we outline our general approach to analyzing the adequacy of a BOC's operations support systems. Second, we briefly describe the evidence in the record on this issue. Third, we analyze Ameritech's provision of access to OSS functions. We emphasize our expectation that Ameritech or any other BOC applicant must adequately document in any future section 271 application that it is able to provide OSS functions to support the provision of network elements, including combinations of network elements. We conclude that Ameritech has not demonstrated that the access to OSS functions that it provides to competing carriers for the ordering and provisioning of resale services is equivalent to the access it provides to itself. Because Ameritech fails to meet this fundamental obligation, we need not decide, in the context of this application, whether Ameritech separately complies with its duty to provide nondiscriminatory access to each and every OSS function. Therefore, although we do not address every OSS-related issue raised in the context of this application, we wish to make clear that we have not affirmatively concluded that those OSS functions not addressed in this decision are in compliance with the requirements of section 271. Fourth, we conclude that Ameritech has failed to provide us with empirical data necessary for us to analyze whether Ameritech is providing nondiscriminatory access to all OSS functions, as

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312 MCI Comments at 32.

313 Ameritech Reply Comments, Vol. 5R.26, Springsteen Reply Aff. at 2-3.

314 *Id.*, Vol. 5R.6, Edwards Reply Aff. at 52.

required by the Act. Finally, we conclude by highlighting a number of other OSS-related issues that we do not reach as a decisional basis, but which we raise as concerns in order to provide guidance for any future Ameritech applications.

2. Background

129. In order to compete in the local exchange market, new entrants must be able to provide service at a price and quality level that is attractive to potential customers. Incumbent LECs use a variety of systems, databases, and personnel to ensure that they provide telecommunications services to their customers at a certain level of quality, timeliness and accuracy. New entrants that use resale services or unbundled network elements obtained from the incumbent LEC depend heavily on the incumbent LEC to be able to provide a competitive level of service. In particular, new entrants must have access to the functions performed by the systems, databases and personnel, commonly referred to collectively as operations support systems,[315] that are used by the incumbent LEC to support telecommunications services and network elements.[316]

130. Indeed, in the *Local Competition Order*, the Commission concluded that operations support systems and the information they contain are critical to the ability of competing carriers to use network elements and resale services to compete with incumbent LECs.[317] The Commission determined that providing access to OSS functions falls squarely within an incumbent LEC's duty under section 251(c)(3) to provide unbundled network elements under terms and conditions that are nondiscriminatory, just and reasonable, and its duty under section 251(c)(4) to offer resale services without imposing any limitations or conditions that are discriminatory or unreasonable.[318] The Commission concluded that, in order to meet the nondiscriminatory standard for OSS, an incumbent LEC must provide to competing carriers access to OSS functions for pre-ordering, ordering, provisioning, maintenance and repair, and

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315 We note that the Department of Justice, in its evaluation, uses the term "wholesale support processes," which it defines as "the automated and manual processes required to make resale services and unbundled elements, among other items, meaningfully available to competitors." Department of Justice Evaluation, Appendix A at 1. We believe the terms "operations support systems," as used by the Commission, and "wholesale support processes," as used by the Department of Justice, are the same.

316 *See Local Competition Order*, 11 FCC Rcd at 15763.

317 *Id.* As noted in that order, Ameritech itself recognized that "[o]perational interfaces are essential to promote viable competitive entry." *Id.* (quoting Letter from Antoinette Cook Bush, Counsel, Ameritech, to William Caton, Acting Secretary, Federal Communications Commission (July 10, 1996)).

318 *Local Competition Order*, 11 FCC Rcd at 15660-61, 15763; *Local Competition Second Reconsideration Order*, 11 FCC Rcd at 19742-43. We note that the Court of Appeals for the Eighth Circuit has affirmed our determination that operations support systems qualify as network elements that are subject to the unbundling requirements of section 251(c)(3) of the Act. *See Iowa Utils. Bd.*, 1997 WL 403401, at *19.

billing that is equivalent to what it provides itself, its customers or other carriers.[319] Additionally, the Commission concluded that incumbent LECs must generally provide network elements, including OSS functions, on terms and conditions that "provide an efficient competitor with a meaningful opportunity to compete."[320]

131. Section 271 requires the Commission to determine whether a BOC has satisfied its duty under section 251 to provide nondiscriminatory access to OSS functions. First, sections 271(c)(2)(B)(ii) and (xiv) expressly require a BOC to provide "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)" and to demonstrate that "telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)."[321] Because the duty to provide access to network elements under section 251(c)(3) and the duty to provide resale services under section 251(c)(4) include the duty to provide nondiscriminatory access to OSS functions, an examination of a BOC's OSS performance is necessary to evaluate compliance with section 271(c)(2)(B)(ii) and (xiv).

132. Second, the duty to provide nondiscriminatory access to OSS functions is embodied in other terms of the competitive checklist as well. As discussed above, the duty to "provide" items under the checklist requires a BOC to furnish the item at rates and on terms and conditions that comply with the Act or, where no competitor is actually using the item, to make the item available as both a legal and practical matter.[322] In the *Local Competition Order*, the Commission concluded that providing nondiscriminatory access to OSS functions was a "'term or condition' of unbundling other network elements under section 251(c)(3), or resale under section 251(c)(4)."[323] In order for a BOC to be able to demonstrate that it is providing the items enumerated in the checklist (*e.g.*, unbundled loops, unbundled local switching, resale services), it must demonstrate, *inter alia*, that it is providing nondiscriminatory access to the systems, information, and personnel that support those elements or services. Therefore, an examination of a BOC's OSS performance is integral to our determination whether a BOC is "providing" all of the items contained in the competitive checklist. Without equivalent access to the BOC's operations support systems, many items required by the checklist, such as resale services,

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319 *Local Competition Order*, 11 FCC Rcd at 15766; *Local Competition Second Reconsideration Order*, 11 FCC Rcd at 19742-43. *See* 47 C.F.R. § 51.5 for definitions of the five functions.

320 *Local Competition Order*, 11 FCC Rcd at 15660.

321 47 U.S.C. §§ 271(c)(2)(B)(ii), (xiv).

322 For a discussion of the meaning of "provide," see *supra* Section VI.A.

323 *Local Competition Order*, 11 FCC Rcd at 15763.

unbundled loops, unbundled local switching, and unbundled local transport, would not be practically available.[324]

3. General Approach to Analyzing Adequacy of OSS

133. In determining whether a BOC has met its OSS obligation under section 271, the Commission generally must determine whether the access to OSS functions provided by the BOC to competing carriers sufficiently supports each of the three modes of competitive entry strategies established by the Act: interconnection, unbundled network elements, and services offered for resale. In so doing, we seek to ensure that a new entrant's decision to enter the local exchange market in a particular state is based on the new entrant's business considerations, rather than the availability or unavailability of particular OSS functions to support each of the modes of entry. Currently, competitive carriers in Michigan are pursuing a mix of entry strategies, including the use of resale services, unbundled network elements, and facilities they have installed themselves. The OSS functionalities to which Ameritech provides access, as part of its OSS obligations, must support each of the three modes of entry and must not favor one strategy over another.

134. In assessing a BOC's operations support systems, we conclude that it is necessary to consider all of the automated and manual processes a BOC has undertaken to provide access to OSS functions to determine whether the BOC is meeting its duty to provide nondiscriminatory access to competing carriers. A BOC's provision of access to OSS functions necessarily includes several components, beginning with a point of interface (or "gateway")[325] for the competing carrier's own internal operations support systems to interconnect with the BOC; any electronic or manual processing link between that interface and the BOC's internal operations support systems (including all necessary back office systems and personnel); and all of the internal operations support systems (or "legacy systems") that a BOC uses in providing network elements and resale services to a competing carrier.

135. In contrast to our approach, Ameritech appears to claim that its duty to provide nondiscriminatory access to OSS functions extends only to the interface component.[326] We conclude that Ameritech's interpretation of our rules is incorrect. The Commission's rules clearly

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[324] In the *Local Competition Order*, the Commission noted that "[w]e believe. . .that the massive operations support systems employed by incumbent LECs, and the information such systems maintain and update to administer telecommunications networks and services, represent a significant potential barrier to entry. It is these systems that determine, in large part, the speed and efficiency with which incumbent LECs can market, order, provision, and maintain telecommunications services and facilities." *Local Competition Order*, 11 FCC Rcd at 15763.

[325] *See id.* at 15766-67. Nondiscriminatory access "necessarily includes access to the *functionality* of any internal gateway systems the incumbent employs in performing OSS functions for its own customers." *Id.* (emphasis added).

[326] *See, e.g.*, Ameritech Application, Vol. 2.13, Rogers Aff. at 23; Ameritech Reply Comments, Vol. 5R.24, Rogers Reply Aff. at 11.

require that an incumbent LEC's duty to provide nondiscriminatory access extends beyond the interface component.[327] It is the access to all of the processes, including those existing legacy systems used by the incumbent LEC to provide access to OSS functions to competing carriers, that is fundamental to the requirement of nondiscriminatory access.[328] For example, although the Commission has not required that incumbent LECs follow a prescribed approach in providing access to OSS functions, we would not deem an incumbent LEC to be providing nondiscriminatory access if limits on the processing of information between the interface and the legacy systems prevented a competitor from performing a specific function in substantially the same time and manner as the incumbent performs that function for itself.[329] Accordingly, we conclude that our rules require that we review all of the processes used by the BOC to provide access to OSS functions.

136. In making this evaluation, we generally agree with the Department of Justice and the Michigan Commission that we must make a two-part inquiry.[330] 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.[331]

137. Under the first part of this inquiry, a BOC must demonstrate that it has developed sufficient electronic and manual interfaces to allow competing carriers to access all of the necessary OSS functions. For those functions that the BOC itself accesses electronically, the BOC must provide equivalent electronic access for competing carriers.[332] We recognize, however, that for some functions, manual access may need to remain available as an additional

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[327] This obligation extends only to those existing legacy systems used by the incumbent LEC to provide the necessary access to OSS functions to competing carriers. *See Local Competition Order*, 11 FCC Rcd at 15763 (recognizing that "the massive operations support systems employed by incumbent LECs, and the information such systems maintain and update to administer telecommunications networks and services, represent a significant potential barrier to entry"); 47 C.F.R. § 51.319(f)(1) ("operations support systems functions consist of . . . functions supported by an incumbent LEC's *databases and information*") (emphasis added).

[328] *See Local Competition Second Reconsideration Order*, 11 FCC Rcd at 15742-43.

[329] *See Local Competition Order*, 11 FCC Rcd at 15763-64.

[330] Department of Justice Evaluation, Appendix A at 1; Michigan Commission Consultation at 33.

[331] Department of Justice Evaluation, Appendix A at 1; Michigan Commission Consultation at 33; *see also* Ameritech Application, Vol. 2.13, Rogers Aff. at 10.

[332] *See Local Competition Order*, 11 FCC Rcd at 15767 ("[A]n incumbent that provisions network resources electronically does not discharge its obligation under section 251(c)(3) by offering competing providers access that involves human intervention, such as facsimile-based ordering."); *Local Competition Second Reconsideration Order*, 11 FCC Rcd at 19739.

mode of access.[333] A BOC also is obligated to provide competing carriers with the specifications necessary to instruct competing carriers on how to modify or design their systems in a manner that will enable them to communicate with the BOC's legacy systems and any interfaces utilized by the BOC for such access.[334] The BOC must provide competing carriers with all of the information necessary to format and process their electronic requests so that these requests flow through the interfaces, the transmission links, and into the legacy systems as quickly and efficiently as possible. In addition, the BOC must disclose to competing carriers any internal "business rules,"[335] including information concerning the ordering codes[336] that a BOC uses that competing carriers need to place orders through the system efficiently.[337] Finally, the BOC must ensure that its operations support systems are designed to accommodate both current demand and projected demand of competing carriers for access to OSS functions.

138. Under the second part of the inquiry, the Commission will examine operational evidence to determine whether the OSS functions provided by the BOC to competing carriers are actually handling current demand and will be able to handle reasonably foreseeable demand volumes. We agree with the Department of Justice that the most probative evidence that OSS functions are operationally ready is actual commercial usage.[338] Carrier-to-carrier testing,

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[333] For example, there may be a number of smaller competing carriers that prefer to fax or phone in their orders because the number of customers they serve would not support the amount of investment required to build a form of electronic access.

[334] As the Commission noted in the *Local Competition Second Reconsideration Order*, "[i]nformation regarding interface design specifications is critical to enable competing carriers to modify their existing systems and procedures or develop new systems to use these interfaces to obtain access to the incumbent LEC's OSS functions. For example, if an incumbent LEC adopted the Electronic Data Interchange (EDI) standard to provide access to some or all of its OSS functions, it would need to provide sufficiently detailed information regarding its use of this standard so that requesting carriers would be able to develop and maintain their own systems and procedures to make effective use of this standard." *Local Competition Second Reconsideration Order*, 11 FCC Rcd at 19742.

[335] Business rules refer to the protocols that a BOC uses to ensure uniformity in the format of orders. "Business rules define valid relationships in the creation and processing of orders, as well as numerous other interactions." For example, Ameritech's systems are programmed not to allow orders previously rejected by Ameritech's systems to be corrected and resubmitted using the same order number. Instead, Ameritech requires each order, whether new or resubmitted, to have its own unique order number. AT&T Comments, Vol. III.F, Connolly Aff. at 21.

[336] Such ordering codes include universal service ordering codes ("USOCs") and field identifiers ("FIDs"). These codes are used by local carriers to identify the different services and features used in offering telecommunications services to customers. *See* Department of Justice Evaluation, Appendix A at 24.

[337] As AT&T argues, we do not believe that a BOC's disclosure of business rules necessary for seamless access to OSS functions will require it to divulge confidential or competitively sensitive information. *See* AT&T Comments, Vol. III.E, Bryant Aff. at 12-13. Moreover, to the extent that certain business rules may constitute confidential or sensitive information and, at the same time, be necessary to provide seamless access to OSS functions, a BOC must develop some alternative so that the BOC is still able to provide nondiscriminatory access to OSS functions.

[338] *See* Department of Justice SBC Oklahoma Evaluation at 29-30.

independent third-party testing, and internal testing also can provide valuable evidence pertaining to operational readiness, but are less reliable indicators of actual performance than commercial usage.[339] We recognize that, although a BOC has a duty to provide items on the checklist to competing carriers, this duty does not include the duty to ensure that competing carriers are currently using each and every OSS function.[340] As long as the BOC can demonstrate that the reason competing carriers are not currently using a particular OSS function is because of the competing carriers' business decisions, rather than the lack of the practical availability of the necessary OSS functions, the Commission may consider carrier-to-carrier testing, independent third-party testing, and internal testing, without commercial usage, as evidence of commercial readiness.

139. For those OSS functions provided to competing carriers that are analogous to OSS functions that a BOC provides to itself in connection with retail service offerings, the BOC must provide access to competing carriers that is equal to the level of access that the BOC provides to itself, its customers or its affiliates, in terms of quality, accuracy and timeliness. We conclude that equivalent access, as required by the Act and our rules, must be construed broadly to include comparisons of analogous functions between competing carriers and the BOC, even if the actual mechanism used to perform the function is different for competing carriers than for the BOC's retail operations. We reject Ameritech's contention that equivalent access is not the appropriate standard for measuring access to certain OSS functions because competing carriers obtain access to these functions through a gateway, whereas Ameritech obtains access to them directly.[341] Ameritech's approach would allow an incumbent LEC to avoid its duty to provide equivalent access by claiming that the form of access it has adopted does not permit a parity comparison.[342] As discussed above, Ameritech's approach would render the nondiscriminatory access standard meaningless, given that the Commission has not required that incumbent LECs follow a prescribed method of providing access to OSS functions.[343]

140. We find that OSS functions associated with pre-ordering, ordering and provisioning for resale services, and repair and maintenance for both resale services and unbundled network elements all have retail analogues. Similarly, because measuring daily customer usage for billing purposes requires essentially the same OSS functions for both

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339 With regard to third-party evaluation, see *infra* Section VI.C.7.

340 *See* discussion of the meaning of "provide" *supra* Section VI.A.

341 For example, as part of pre-ordering function, both Ameritech and competing carriers may access customer service records (CSR). It is the activity of accessing a CSR that is analogous and, therefore, equivalent access is the appropriate standard for measuring nondiscriminatory access, even though competing carriers access CSRs via a gateway.

342 The terms "equivalent access" and "parity of access" are used synonymously in this section.

343 *See* discussion regarding scope of OSS requirement *supra* para. 135.

competing carriers and incumbent LECs, equivalent access is the standard required by section 271 and section 251 of the Act for this billing subfunction as well.

141. For those OSS functions that have no retail analogue, such as the ordering and provisioning of unbundled network elements,[344] the BOC must demonstrate that the access it provides to competing carriers satisfies its duty of nondiscrimination because it offers an efficient competitor a meaningful opportunity to compete.[345] In examining whether the quality of access provided to such functions "provides an efficient competitor a meaningful opportunity to compete," we will, in the first instance, examine whether specific performance standards exist for those functions.[346] In particular, we will consider whether appropriate standards for measuring the performance of particular OSS functions have been adopted by the relevant state commission or agreed upon by the parties in an interconnection agreement or during the implementation of such an agreement. As a general proposition, specific performance standards adopted by a state commission in an arbitration decision would be more persuasive evidence of commercial reasonableness than a standard unilaterally adopted by the BOC outside of its interconnection agreement.[347] Win-backs of customers serviced by unbundled network elements might provide sufficient data with which to develop an appropriate measurement of equivalent access when there has been enough churn in the marketplace.[348] In addition, the Commission determined in the *Local Competition Order* that, for the provisioning of unbundled local switching that only involves software changes, customers should be changed over in the same interval as LECs currently change over end users between interexchange carriers.[349]

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[344] Because of the lack of evidence in this record regarding the ordering and provisioning of combinations of network elements, as noted *infra* Section VI.C.5.b., we make no finding on whether ordering and provisioning combinations of network elements have a retail analogue.

[345] *See Local Competition Order*, 11 FCC Rcd at 15660; *Local Competition Second Reconsideration Order*, 11 FCC Rcd at 19742-43. We also recognize that there may be situations in which a BOC contends that, although equivalent access has not been achieved for an analogous function, the access that it provides is still nondiscriminatory within the meaning of the statute. We need not reach this issue in rendering our decision on to this application.

[346] We note that the Commission has initiated a proceeding in response to a petition filed by LCI requesting the Commission to adopt performance standards and reporting requirements for OSS functions provided by incumbent LECs to competing carriers. *See Comments Requested on Petition for Expedited Rulemaking to Establish Reporting Requirements and Performance and Technical Standards for Operations Support Systems*, Public Notice, DA 97-1211 (rel. June 10, 1997) (*Performance Standards Public Notice*).

[347] Ameritech itself notes the limitations of unilaterally-adopted performance standards in disputing the merits of performance measures proposed by the Local Competitors User Group (LCUG). "[T]he LCUG proposals were unilaterally arrived at by interexchange carriers without any input from Ameritech, any other RBOC, or any local exchange carrier." Ameritech Reply Comments, Vol. 5R.18, Mickens Reply Aff. at 31.

[348] For example, we would be concerned if it is taking a BOC an average of five days to provision unbundled loops for competing carriers, while it is taking one day to switch customers, previously serviced by competing carriers using unbundled loops (*i.e.*, win-backs), back to Ameritech's retail service.

[349] *See Local Competition Order*, 11 FCC Rcd at 15711-12.

142. Because section 271 of the Act requires BOCs to comply with the statutory standard of providing nondiscriminatory access to OSS functions, evidence showing that a BOC is satisfying the performance standards contained in its interconnection agreements does not necessarily demonstrate compliance with the statutory standard. If a BOC chooses to rely solely on compliance with performance standards required by an interconnection agreement, the Commission must also find that those performance standards embody the statutorily-mandated nondiscrimination standard. Regardless of the existence of contractually-based performance standards, however, the Commission presumes, as noted above, that a number of the OSS functions provided to competing carriers have an analogue associated with a BOC's retail operations and, therefore, equivalent access, as measured by those analogues, would be the standard of performance required by section 271 for those OSS functions.[350]

143. In sum, our requirements with respect to access to OSS functions are readily achievable. We require, simply, that the BOC provide the same access to competing carriers that it provides to itself.

4. Evidence in the Record

144. Ameritech represents that it "has developed, tested, and implemented access to its OSS functions and other support processes which are used in providing checklist items."[351] With respect to the five broad categories of OSS functions -- pre-ordering, ordering, provisioning, maintenance and repair, and billing -- Ameritech claims that it is providing competing carriers with "equivalent access to information, elements, products and services that Ameritech provides to itself, its affiliates, and other carriers . . . ."[352] Ameritech also claims that the interfaces it has deployed to allow competing carriers to obtain access to OSS functions comply with existing industry standards and guidelines.[353]

145. Ameritech further contends that: (1) it has made available the technical and business information that carriers can use to access Ameritech's interfaces; (2) all of the interfaces are operationally ready, and many are being used on a commercial basis; and (3) there is sufficient electronic and manual capacity to meet expected future usage volumes.[354] Ameritech claims that it has provided competing carriers with detailed specifications that contain the technical information necessary for other carriers to be able to build systems that can communicate with

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350 *See supra* para. 139.

351 Ameritech Application at 21.

352 *Id.* at 22.

353 *Id.* at 23.

354 *Id.* at 24.

Ameritech's interfaces.[355] Ameritech also contends that it maintains close and regular contact with competing carriers in order to assure that those carriers understand how Ameritech's OSS interfaces and processes operate.[356]

146. Ameritech asserts that "operational readiness is properly defined as whether [its OSS] interfaces have undergone sufficient testing or use to provide reasonable assurance that requesting carriers can obtain timely access to the OSS functions needed to enter the marketplace and successfully service end users at anticipated demand levels."[357] Ameritech claims that its OSS interfaces work properly, as demonstrated by the results of internal testing, carrier-to-carrier testing, and/or actual commercial usage.[358] Ameritech emphasizes that systems experts from Andersen Consulting have independently reviewed the results from both testing and actual use to conclude that Ameritech's interfaces are operationally ready.[359]

147. Commenters generally dispute Ameritech's assessment that all of its OSS functions are operationally ready. Several parties complain about the delay in receiving Ameritech's OSS specifications and the inadequacy of the information provided to competing carriers in order to use Ameritech's OSS interfaces.[360] MCI also complains about Ameritech's use of proprietary and non-industry standard interfaces for OSS access.[361] Phone Michigan asserts that Ameritech's interfaces for OSS access are complicated and expensive, and therefore unworkable for small businesses.[362] Several parties also contend that Ameritech's systems cannot be considered operational until they are used successfully in a commercial setting and, therefore, internal and carrier-to-carrier testing is not sufficient.[363]

148. Commenters, in general, assert that Ameritech's provision of access to its operations support systems for requesting carriers is not equivalent to the OSS access it provides

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355 *Id.*

356 *Id.* at 25.

357 *Id.* at 28.

358 *Id.* at 25.

359 *Id.* at 25-26.

360 AT&T Comments at 21; Sprint Comments, Reeves Aff. at 15.

361 MCI Comments at 22; Sprint Comments, Reeves Aff. at 16.

362 Phone Michigan Comments at 7; TRA Comments at 32.

363 CompTel Comments at 23-24; LCI Comments at 17; TCG Comments at 12-13; MFS WorldCom Comments at 35.

to itself,[364] and object to the amount of manual intervention that is involved in processing many of the orders that requesting carriers submit via the electronic interfaces.[365] AT&T, for example, contends that there are two fundamental defects with Ameritech's operations support systems: (1) Ameritech has not performed the systems design, development, and implementation work to ensure that, after a competing carrier's order moves through the interface, it will be processed properly by Ameritech's legacy systems; and (2) the access Ameritech provides to its operations support systems is overly dependent on manual processing, which is labor intensive, time consuming, costly, error prone, and inconsistent.[366]

149. The Communications Workers of America (CWA) asserts that, "[a]t this time, backlogs in service orders, very low service levels, and billing errors indicate that CLECs do not receive OSS service at parity with Ameritech's own customers, and that [m]ore time is necessary to improve the computer systems and to hire and to train sufficient numbers of employees to handle the growing volume of orders."[367] The CWA contends that Ameritech is experiencing a number of problems with its electronic interfaces, causing Ameritech to process manually many of the orders placed by competing carriers.[368] The CWA argues that, as a result, many orders have been backlogged and have not been processed by the expected due date.[369] In addition, the CWA asserts that the wholesale service center established by Ameritech to service competing carriers is understaffed and inadequately staffed by a large number of new hires and temporary contract employees.[370] Moreover, the CWA contends that the service representatives assigned to the service center receive insufficient training in comparison to those service representatives who work for Ameritech's retail operations.[371]

150. Other commenters contend that Ameritech's operations support systems do not have sufficient capacity to process efficiently orders submitted by competing carriers, and that the access Ameritech is providing to OSS functions is not actually meeting the performance standards

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364 CompTel Comments at 24; MCI Comments at 17; Michigan Consumer Federation at 3.

365 Brooks Fiber Comments at 12-13; AT&T Comments at 24; LCI Comments at 17.

366 AT&T Comments, Vol. V.F, Connolly Aff. at 8-9.

367 CWA Reply Comments at 3.

368 *Id.* at 10.

369 *Id.* at 11-14.

370 *Id.* at 16-18.

371 *Id.* The CWA contends that service representatives who work in the wholesale service center receive only two days of training before working with customers, in comparison to the eight weeks of training received by service representatives who work for Ameritech's retail operations. *Id.* at 17.

Ameritech claims to be satisfying.[372] Several parties assert that Ameritech's OSS systems are failing, and not meeting the expectations of competing carriers.[373] Parties complain about recurring problems such as inconsistent ordering results, late-delivered bills, double-billing of new customers of competing carriers, and high order rejection rates.[374] Other parties contend that Ameritech has not deployed adequate OSS functions for the ordering, provisioning, and billing of combinations of unbundled network elements.[375] Sprint contends that Ameritech appears to have devoted its resources to supporting resale services and not unbundled network elements.[376] Finally, many parties contend that Ameritech does not have adequate performance measures in place to allow Ameritech to demonstrate that it is providing nondiscriminatory access.[377]

151. In its reply, Ameritech submits new OSS-related performance data (*i.e.*, data tracking OSS performance after May 21st), and states that it is now committed to reporting its performance on a number of the measures requested by the Department of Justice and the Michigan Commission.[378] Ameritech also claims that it has undertaken a number of remedial measures to resolve recurring problems with certain of its operations support systems.[379] In addition, Ameritech has made a number of new commitments to provide additional information and analysis upon request.[380] Finally, Ameritech relies heavily on the proposed order issued by an Illinois Commerce Commission (Illinois Commission) hearing examiner on June 20, 1997, which concluded that Ameritech's operations support systems are available and operational.[381]

152. Before examining the specific concerns we have with Ameritech's OSS showing, we emphasize again that we judge Ameritech's checklist compliance based on the evidence

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372 Brooks Fiber Comments at 12-13; Sprint Comments, Reeves Aff. at 4; MCI Comments at 17.

373 CompTel Comments at 24; LCI Comments at 18; Michigan Consumer Federation Comments at 3; Time Warner Comments at 11; TCG Comments at 12.

374 CompTel Comments at 26; AT&T Comments at 22.

375 *See, e.g.,* AT&T Comments at 22-23; MCI Comments, Exh. D, King Aff. at 56.

376 Sprint Comments, Reeves Aff. at 15.

377 *E.g.*, Brooks Fiber Comments at 12-13; AT&T Comments at 26-27; CompTel Comments at 23; LCI Comments at 18.

378 *See, e.g.*, Ameritech Reply Comments at 5-10, and Vol. 5R.7, Gates and Thomas Reply Aff. at 12-13.

379 *See, e.g.*, Ameritech Reply Comments, Vol. 5R.7, Gates and Thomas Reply Aff. at 28-30, and Vol. 5R.18, Mickens Reply Aff. at 48.

380 *See* Ameritech Reply Comments, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 17-27.

381 *See, e.g.*, Ameritech Reply Comments at 6-9, and Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 6-9.

submitted in its application.[382] Given the statutory time constraints, it is unacceptable for Ameritech to present new evidence and make new commitments at a point more than half-way through the 90-day statutory review period.[383] It also is not acceptable for Ameritech to claim on reply that it has resolved a number of OSS-related problems that were recurring problems at the time of, or prior to, the filing of its application.[384]

153. We recognize that the development of OSS functions is not a static process, and we encourage and expect Ameritech continually to make improvements to its operations support systems, even after it has filed a section 271 application. There is, however, a fundamental difference between making improvements to the OSS access that, at the time of the application, meets the nondiscriminatory requirement, and taking post-filing remedial measures to try to bring the OSS access into compliance during the pendency of the application. The record in this case shows that at least some of the post-filing actions Ameritech has taken likely fall under this latter category.[385] By filing new information on reply and making new commitments on reply that go beyond supporting the arguments made in its original application, Ameritech in effect seeks to supplement its original case. As we made clear in our *December 6th Public Notice* regarding section 271 applications, and subsequently emphasized in our *Ameritech February 7th Order*, "[w]e expect that a section 271 application, as originally filed, will include all of the factual evidence on which the applicant would have the Commission rely in making its findings thereon."[386]

154. Accordingly, in our analysis in this Order of the adequacy of Ameritech's OSS, we scrutinize carefully the factual information that post-dates the filing of the application, submitted by Ameritech on reply, to determine whether it is directly responsive to arguments or factual information submitted by commenters.[387] To the extent Ameritech's submission is not directly

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382 *See* discussion regarding the weight given to new evidence *supra* Section IV.B..

383 *See* AT&T Motion to Strike at 5-8 and Exhibit A (Portions of Ameritech Reply Containing Improper Data, Documents or Events); Joint Motion to Strike at 5-8. *See, e.g.*, Ameritech Reply Comments, Vol. 5R.7, Gates and Thomas Reply Aff. at 12-15, 20-21, and Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 4, 15-17, 23-27.

384 We also note that Ameritech presents little or no evidentiary substantiation to support many of these claims.

385 *See, e.g.*, AT&T Motion to Strike at 5-8 and Exhibit A (Portions of Ameritech Reply Containing Improper Data, Documents or Events).

386 *December 6th Public Notice* at 2; *Ameritech February 7th Order*, 12 FCC Rcd at 3309 ("Because of the strict 90-day statutory review period, the section 271 review process is keenly dependent on . . . an applicant's submission of a complete application at the commencement of a section 271 proceeding.").

387 Of the new evidence submitted by Ameritech in its reply comments, we find that the performance data, jointly submitted by Ameritech and AT&T to the Department of Justice on June 18, 1997, is directly responsive to contentions made by AT&T in its comments. The data tracks Ameritech's OSS performance for AT&T resale

responsive, we will give it no weight. Any information filed on reply must not go beyond the time-frame covered by the information submitted by commenting parties and in any event must not post-date the filing of their comments.[388] Similarly, we do not consider any new commitments made by Ameritech or remedial measures taken by Ameritech after May 21, 1997, the date Ameritech filed its application, in evaluating whether Ameritech has demonstrated it provides nondiscriminatory access to its OSS.

155. Finally, we note that Ameritech's reliance in its reply on the Illinois Commerce Commission hearing examiner's proposed order issued on June 20, 1997 is now irrelevant. Subsequent to the proposed order issued by the hearing examiner on June 20, 1997, the hearing examiner issued a further revised proposed order on August 4, 1997. In the August 4th proposed order, the hearing examiner revises the findings made with regard to OSS and concludes that "more time is needed before [the Illinois Commission] can find that OSS is being provided at parity."[389] The hearing examiner's August 4th proposed order also finds that "[a]t this point in time, the record does not support a finding that OSS will function as expected without serious problems" and that "the record does not establish that Ameritech can handle increases in demand without serious delays."[390] Therefore, because the conclusions in the hearing examiner's June 20th proposed order regarding Ameritech's OSS have been revised, Ameritech reliance in its reply on the June 20th proposed order to support its claim that it provides nondiscriminatory access to OSS functions has been rendered moot.

156. As a general matter, we acknowledge that any determinations regarding OSS made by state commissions in the Ameritech region may be relevant to our inquiry in this application because Ameritech provides access to OSS functions on a region-wide basis from a single point of contact.[391] We note that the Illinois Commission hearing examiner's August 4th proposed order is not a final order as it has not been adopted by the Illinois Commerce Commission, and therefore,

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orders during April and May, an issue that AT&T addressed in its comments. Moreover, consideration of this data should not be prejudicial to any party, as the data has been jointly verified and reworked by both Ameritech and AT&T. *See* Ameritech Reply Comments, Vol. 5R.7, Gates and Thomas Reply Aff. at Exhibit 8. In the future, however, Ameritech and other BOCs should endeavor to reach consensus on performance measures with other parties prior to filing a section 271 application to allow the Commission and other parties sufficient time during the limited 90-day review period to scrutinize fully such data.

388 *See supra* Section IV.B.1.

389 Illinois Commerce Commission, *Order*, Docket 96-0404 at 44 (August 4, 1997). In the June 20th proposed order the hearing examiner concluded that "[t]he record indicates that Ameritech's OSS is provided to competitors at a quality level that is within reasonable parity of the quality level that it provides to itself." Illinois Commerce Commission, *Hearing Examiner's Revised Second Proposed Order*, Docket 96-0404 at 51 (June 20, 1997).

390 Illinois Commerce Commission, *Order*, Docket 96-0404 at 43 (August 4, 1997).

391 Section 271 of the Act, however, specifically requires us to consider only the findings of the Michigan Commission for this application. 47 U.S.C. § 271(d)(2)(B).

although it provides evidence relevant to our inquiry regarding the readiness of Ameritech's OSS for Michigan, it does not carry the same weight as a final order or decision issued by a state commission.

5. Analysis of Ameritech's Provision of Access to OSS Functions

a. Introduction

157. Like the Department of Justice, we recognize that Ameritech has undertaken numerous measures to construct the interfaces, both electronic and manual, necessary to provide OSS functions to competing carriers.[392] In general, as problems or complications have appeared, Ameritech has sought to implement solutions in an expeditious manner.[393] Moreover, Ameritech has attempted to ensure that its systems have undergone some form of testing, whether internal, carrier-to-carrier, or independent third party, in order to determine the readiness of its systems.[394] Finally, Ameritech has committed to measuring and reporting its performance for a number of OSS-related activities in order to demonstrate its compliance with the Act's nondiscrimination requirement.[395]

158. Nevertheless, we conclude that Ameritech has not proven by a preponderance of the evidence that, as of the filing of its application, it provides nondiscriminatory access to all OSS functions, as required by section 271 and section 251 of the Act. As noted above, Ameritech has the burden of demonstrating that it has met all of the requirements of section 271.[396] We find, on the basis of the record developed in this proceeding, that Ameritech has not met this burden. We first discuss the evidentiary showing on provision of OSS functions for unbundled network elements that we expect Ameritech to make in its next section 271 application. We then focus our discussion on Ameritech's OSS functions for the ordering and provisioning of resale services. Because competing carriers have used resale OSS functions more than the other OSS functions made available by Ameritech, the evidence in the record regarding the quality of access provided by Ameritech to the resale OSS functions is more fully developed. We are unable to find that the access Ameritech currently provides for resale services is equivalent to the access that it provides to itself in connection with its retail local exchange operations, nor are we sufficiently confident that the access it will provide in the future will be nondiscriminatory. Moreover, we conclude that the evidence strongly suggests that, at least with regard to the OSS functions for the ordering and

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392 *See* Department of Justice Evaluation, Appendix A at 4.

393 *Id.*

394 *Id.*

395 *See id.*

396 *See supra* Section IV.A. (discussing the burden of proof on the applicant).

provisioning of resale services, the quality of access that Ameritech is currently providing to competing carriers may decline as commercial usage increases. Utilizing the framework outlined in the preceding section, we conclude that, because Ameritech has failed to demonstrate that its OSS functions for the ordering and provisioning of resale services are operationally ready, Ameritech is unable to demonstrate that it is providing nondiscriminatory access to its OSS, as required by section 271(c)(2)(B)(xiv).

b. OSS Functions for Unbundled Network Elements

159. Although we focus our decision in this section on the OSS functions associated with the ordering and provisioning of resale services, we wish to make clear that, in future applications, Ameritech also must be able to demonstrate that it is providing nondiscriminatory access to OSS functions associated with unbundled network elements. As we noted above, a BOC must be able to demonstrate that the OSS functions that it has deployed adequately support each of the modes of entry envisioned by the Act.[397] Therefore, a BOC has not met its OSS obligation, under section 271 of the Act, until it demonstrates that its provision of OSS for unbundled network elements, as well as for resale, complies with the nondiscrimination requirement of the Act. We share the Department of Justice's concern about the paucity of Ameritech's showing on the issue of whether Ameritech's provision of OSS functions for unbundled network elements complies with the nondiscrimination duty required by the Act.[398]

160. As part of its duty to provide unbundled network elements to competing carriers, Ameritech must be able to provide to competing carriers individual network elements. Ameritech also must be able to provide combinations of network elements, including the combination of all network elements, which some parties refer to as the "UNE Platform" or the "Platform."[399] Deploying the necessary OSS functions that allow competing carriers to order network elements and combinations of network elements and receive the associated billing information is critical to provisioning those unbundled network elements. In Ameritech's application, Ameritech relies on internal testing as evidence that its OSS functions for the ordering, provisioning and billing of combinations of network elements are operationally ready.[400] During the pendency of its

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397 *See supra* para. 133.

398 As the Department of Justice notes, "Ameritech does not offer sufficiently detailed evidence, beyond the general discussion of internal testing in Kocher's affidavit, internal or other testing to demonstrate its ability to provide local switching alone or in combination with other elements." Department of Justice Evaluation, Appendix A at 21.

399 *See infra* Section VI.F.4. Issues concerning the definition of the unbundled transport network element recently have been decided in the *Local Competition Third Reconsideration Order*.

400 *See* Ameritech Application, Vol. 2.5, Kocher Aff. at 23-35.

application, Ameritech began carrier-to-carrier testing of some, but not all, of these functions.[401] Currently, AT&T, as well as others, are testing the OSS functions for the ordering, provisioning, and billing of combinations of network elements with Ameritech.[402] There is no dispute in the record, however, regarding the lack of commercial usage of OSS functions associated with combinations of network elements.

161. As discussed above, we find that commercial usage is the most probative type of empirical evidence when considering whether a BOC has met its burden of demonstrating compliance with this checklist item.[403] Absent data on commercial usage, we will examine carefully the results of carrier-to-carrier testing.[404] With regard to Ameritech's OSS functions for the ordering, provisioning and billing of combinations of network elements, we note that carrier-to-carrier testing began after the submission of Ameritech's application and even now has not yet been completed. Evidence in the record clearly indicates that a number of competing carriers, prior to the filing of Ameritech's application, sought to develop and test the necessary OSS functions to order, provision, and bill combinations of network elements.[405] Under such circumstances, we are unwilling to make a decision, based only on evidence relating to internal testing, regarding the readiness of Ameritech's OSS functions to support the provision of combinations of network elements. Given the demand by competing carriers to purchase combinations of network elements, we would expect to examine evidence other than mere internal testing results in any future section 271 application. We would expect Ameritech to demonstrate, at a minimum, that both individual and combinations of network elements can be ordered, provisioned, and billed in an efficient, accurate, and timely manner, and that its operations support systems supporting such functions are designed to accommodate both current demand and projected demand of competing carriers.[406]

c. OSS Functions for the Ordering and Provisioning of Resale Services

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401 *See* Ameritech Reply Comments, Vol. 5R.12, Kocher Reply Aff. at 40-53.

402 Ameritech represents in its reply comments that it is separately testing the combination of network elements with AT&T and MCI. *Id.* Because we give no weight to new evidence filed by Ameritech after the date of the application, we do not analyze the actual results of Ameritech's ongoing test with AT&T or the results of its test with MCI, both of which Ameritech discusses on reply. *See supra* Section IV.B.1.

403 *See supra* para. 138.

404 *Id.*

405 *See, e.g.*, AT&T Comments, Vol. III.E, Bryant Aff. at 17-28; MCI Comments, Exh. G, Sanborn Aff. at 13-14; Letter from Linda Oliver, Counsel for LCI International Telecom Corp., to William F. Caton, Acting Secretary, Federal Communications Commission (July 28, 1997).

406 *See supra* Section VI.C.3.

162. Competing carriers have primarily used Ameritech's OSS functions for the ordering and provisioning of resale services. Ameritech has deployed an interface utilizing an Electronic Data Interchange (EDI) protocol to receive resale service orders electronically from competing carriers.[407] In its application, Ameritech represents that, between January 1, 1997, and May 1, 1997, it received 19,671 resale orders electronically over the EDI interface, and that it accepted and processed 17,879 of those orders.[408] Since the beginning of the year, most of these orders have been placed by AT&T. The interface also is currently being used by MCI Metro, Network Recovery Services, and USN Communications.[409]

163. For the reasons set forth below, we conclude that Ameritech has failed to provide the type of data necessary to establish that it is providing nondiscriminatory access to OSS functions for the ordering and provisioning of resale services. Moreover, we conclude that Ameritech's reliance on manual processing for the ordering and provisioning of resale services has resulted in a number of problems with its OSS performance that preclude us from finding that Ameritech has met its burden of demonstrating compliance with this checklist item.

(1) Need to Provide Actual Installation Intervals

164. In order to demonstrate that it provides nondiscriminatory access to OSS functions for the ordering and provisioning of resale services, Ameritech provides empirical evidence in its application showing due dates not met and installations completed outside of a six-day interval, for both competing carriers and itself.[410] Ameritech contends that, in its experience as a local exchange carrier, it has determined that "when Ameritech performs well on these measures, its end user customers are satisfied."[411] Therefore, Ameritech claims that, because it measures those factors that have the most direct impact on the customer, its performance measurements are the most appropriate standards for demonstrating nondiscriminatory access, in the context of ordering

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[407] EDI has been adopted by the Alliance for Telecommunications Industry Solutions (ATIS) as the industry standard for the ordering and provisioning of resale services. *See* Transcript of Forum on Operations Support Systems for Unbundled Network Elements and Resale Services in Docket No. 96-98 (May 28-29, 1997), Ordering and Billing Forum Attachment, "Overview: Industry Guidelines for Operations Support Systems Functions."

[408] Ameritech Application, Vol. 21.3, Rogers Aff. at 21. Ameritech also notes in its reply comments that the number of resale orders received during the months of May and June increased to 79,300. Ameritech Reply Comments at 6. As noted above, we give no weight to new evidence submitted by Ameritech in its reply that is not directly responsive to evidence submitted by the commenting parties or that pertains to developments after May 21, 1997. *See supra* Section IV.B.1.

[409] Ameritech Application, Vol. 2.13, Rogers Aff. at 20.

[410] *Id.*, Vol. 2.10, Mickens Aff. at 15, 35. Ameritech also provides a number of other resale measurements including percentage of missed appointments, percentage of new service failures, percentage of repairs not completed within interval, percentage of initial trouble reports, percentage of outside plant failures, percentage of firm order confirmations not provided within interval, percentage of calls to service and repair centers not answered within interval, and speed of answer for operator services. *Id.* at 15-16.

[411] *Id.*, Vol. 2.10, Mickens Aff. at 16.

and provisioning resale services.[412] Ameritech contends that its data measuring such performance demonstrate that Ameritech is providing nondiscriminatory access to OSS functions to competing carriers.

165. Commenters generally contend that Ameritech's performance measurements for the ordering and provisioning of resale services do not demonstrate that Ameritech provides access to OSS functions on a nondiscriminatory basis.[413] To the contrary, commenters argue that the measurements chosen by Ameritech could easily mask discriminatory conduct.[414] In addition, both the Department of Justice and the Michigan Commission assert that performance measurements tracking average intervals are necessary to make a finding that Ameritech is providing nondiscriminatory access to OSS functions.[415] Specifically, the Michigan Commission notes that "[m]easurements must permit determinations of parity to be made with Ameritech's own retail operations. Measuring rates of completion within a target period of time rather than determining actual average time to complete a task does not permit direct comparisons to Ameritech's retail performances."[416]

166. Because the ordering and provisioning of resale services is analogous to the ordering and provisioning of Ameritech's retail services, we find that Ameritech must provide to competing carriers access to such OSS functions equal to the access that it provides to its retail operations. In our view, the performance data submitted by Ameritech fail to demonstrate that Ameritech is providing such equivalent access. Most significantly, Ameritech does not measure and report average installation intervals for Ameritech's retail operations or for competing carriers. We conclude that Ameritech's failure to submit such evidence prevents the Commission from making a decision based on this factual record, and provides Ameritech with an ability to mask discriminatory behavior. Because Ameritech only tracks installations completed outside of a six-day interval, rather than average installation intervals, the Department of Justice notes that, "if 100 percent of Ameritech's retail customers receive service on day one, while 100 percent of the CLEC's customers do not receive their service until day five, then a report of installations outside of six days will show parity of performance, not revealing the discriminatory difference in performance between Ameritech and the CLEC."[417] We conclude, therefore, that in order to demonstrate nondiscriminatory access to OSS functions, Ameritech must demonstrate that it is

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412 *See id.*

413 AT&T Comments, Vol. III.Q, Pfau Aff. at 14.

414 *Id.*, Vol. III.Q, Pfau Aff. at 11-13.

415 Department of Justice Evaluation, Appendix A at 24-26; Michigan Commission Consultation at 31.

416 Michigan Commission Consultation at 31.

417 Department of Justice Evaluation, Appendix A at 25.

provisioning resale orders within the same average installation interval as that achieved by its retail operations.

167. As the Department of Justice notes, "[p]roviding resale services in substantially the same time as analogous retail services is probably the most fundamental parity requirement in Section 251."[418] If Ameritech is, to a significant extent, processing retail orders for itself more quickly than it is processing resale orders for competitive carriers, Ameritech would not be meeting its obligation to provide equivalent access to those OSS functions. Without data on average installation intervals comparing Ameritech's retail performance with the performance provided to competing carriers, the Commission is unable to conclude that Ameritech is providing nondiscriminatory access to OSS functions for the ordering and provisioning of resale.

168. The average installation interval is a critical measurement in determining whether nondiscriminatory access to these OSS functions has been provided to competing carriers. Ameritech has not provided such evidence in this record. While Ameritech's argument that customers are most concerned about due dates missed and installations completed outside of one week may apply in a single-supplier market, it is likely, in a competitive marketplace, that customer decisions increasingly will be influenced by which carrier is able to offer them service most swiftly. While we acknowledge that due dates missed and installations completed outside of one week may supply useful information regarding the quality of access that Ameritech is providing to competing carriers, such measurements do not, in and of themselves, demonstrate that Ameritech is providing equivalent access to OSS functions.

169. We also fundamentally disagree with Ameritech's position that measuring average installation intervals for both competitive carriers and Ameritech's retail operations is meaningless as a measurement of nondiscriminatory access because the circumstances and business objectives of each carrier are different.[419] Ameritech argues that, because some customers may not choose the first available installation date, and Ameritech cannot independently determine which customers served by competing carriers request dates other than the first available, average installation intervals may differ between carriers, depending upon the number of customers who choose due dates beyond the first available.[420] Ameritech also contends that, because orders may

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418 *Id.*, Appendix A at 12.

419 Ameritech commits, however, to participate in any reasonable audit process to ensure that it is offering the same due dates to other carriers. Ameritech Application, Vol. 2.10, Mickens Aff. at 21.

420 *Id.*, Vol. 2.10, Mickens Aff. at 20. Ameritech further argues that it is unrealistic for it to try to exclude those orders that do not use the first available due date, because Ameritech cannot determine after the fact whether the due date submitted by the competing carrier was actually the first available at the time of the order. Ameritech Reply Comments, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 18.

vary in level of complexity, average installation intervals can be further skewed, depending upon the different types of orders received by particular carriers.[421]

170. We believe Ameritech's arguments disputing the probative value of data measuring average installation intervals should be made in conjunction with the filing of such data in its application, rather than as a justification for not filing such data at all. In order for the Commission to determine if Ameritech's arguments have some validity, we must first be able to examine data that measure average installation intervals. As noted by the Department of Justice, Ameritech can and should exclude from its data those customers who requested due dates beyond the first available due date.[422] In addition, Ameritech can and should disaggregate its data to account for the impact different types of services may have on the average installation interval.[423] Moreover, Ameritech is free to use data on due dates not met to explain any inconsistencies between the average installation intervals for itself and other carriers.[424] For example, if a particular competing carrier consistently requests a standard, longer interval for completion of all of its orders, rather than the first available installation date, such data may explain that any differences in the average installation intervals between Ameritech and the other carrier are not due to discriminatory conduct on the part of Ameritech. Finally, we recognize that Ameritech is willing to audit, upon request, the due dates offered to its retail units and to competing carriers to determine whether such dates are offered on a nondiscriminatory basis.[425] We agree with the Department of Justice that a commitment to conduct an audit in the future does not constitute evidence of current nondiscriminatory treatment.[426] In addition, although an audit may provide useful information, Ameritech has not fully explained the parameters of such an audit for us to conclude that its audit proposal would provide an adequate substitute for measuring actual installation intervals.[427]

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421 Ameritech Application, Vol. 2.10, Mickens Aff. at 20-21.

422 Department of Justice Evaluation, Appendix A at 25; *see also* Michigan Commission Consultation at 31-32.

423 *See* Michigan Commission Consultation at 31-32.

424 We note that it appears that Ameritech is already tracking the due dates requested by competing carriers. Ameritech currently is able to report the number of due dates it changes because the requested date has already passed or the requested date falls on a weekend or a holiday. *See* Ameritech Reply Comments, Vol. 5R.7, Gates and Thomas Reply Aff. at Exhibit 8 ("Reasons for Changed Due Dates").

425 *See* Ameritech Application, Vol. 2.10, Mickens Aff. at 21; Ameritech Reply Comments, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 19-20.

426 *See* Department of Justice Evaluation, Appendix A at 26.

427 *See id.*

171. In sum, we find that submission of data showing average installation intervals is fundamental to demonstrating that Ameritech is providing nondiscriminatory access to OSS functions. Such data is direct evidence of whether it takes the same time to complete installations for competing carriers as it does for Ameritech, which is integral to the concept of equivalent access. By failing to provide such data in this application, Ameritech has failed to meet its evidentiary burden. We conclude that, if Ameritech chooses to resubmit its application for Michigan, Ameritech should submit data measuring the average installation intervals for its retail operations and competing carriers so that the Commission may determine whether Ameritech is providing nondiscriminatory access to OSS functions for the ordering and provisioning of resale services.[428]

(2) Reliance on Manual Processing

172. We further conclude that Ameritech has failed to demonstrate it is providing nondiscriminatory access to its OSS functions because there is convincing evidence in the record indicating that Ameritech's OSS functions for the ordering and provisioning of resale services may contain serious system deficiencies that will likely magnify as the volume of commercial use increases. In particular, commenters argue that there is a direct correlation between Ameritech's reliance on manual processing and both Ameritech's inability to return a significant number of firm order confirmations (FOCs) and order rejections on time,[429] as well as Ameritech's modification of a significant number of due dates.[430] Commenters contend that experience has shown that, as the number of resale orders increases, more orders will be processed manually and, as a result, more orders will be backlogged, remain pending, or processed more slowly than Ameritech's own orders.[431]

173. As discussed more fully below, we find that Ameritech's reliance on manual processing is substantial and appears to cause a significant deterioration in Ameritech's

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[428] We note that, in conjunction with its merger application, Bell Atlantic and NYNEX have committed to providing performance data measuring average installation intervals. *See* Letter from G. R. Evans, Vice President, Federal Regulatory Affairs, NYNEX, to William F. Caton, Acting Secretary, Federal Communications Commission, at Attachment (July 21, 1997). We adopted this commitment, among others, as a condition for approval of the merger. *See In the Applications of NYNEX Corporation and Bell Atlantic Corporation for Consent to Transfer Control of NYNEX Corporation and its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order, at Appendix D (rel. Aug. 14, 1997).

[429] A FOC informs a competing carrier that an order has been accepted by Ameritech and confirms the due date for completion. An order rejection notice alerts a competing carrier that it must make changes or edits to the order before it can be processed by the interface.

[430] AT&T Comments, Vol. III.E, Bryant Aff. at 43-50. AT&T also notes that a staff member of the Wisconsin Public Service Commission recently testified that there is direct causal relationship between manual review and missed due dates. *Id.*, Vol. III.F, Connolly Aff. at 66-67 (citing Direct Testimony of Anne Wiecki in Wisconsin Public Service Commission Docket 6720-TI-120 at 8-9 (March 18, 1997)).

[431] AT&T Comments at 24, Vol. III.E, Bryant Aff. at 73, and Vol. III.F, Connolly Aff. at 67-68, 80.

performance as orders increase.[432] Given that the problems currently faced by Ameritech generally have arisen from a limited number of orders for simple POTS resale service,[433] we are concerned that the problems Ameritech is experiencing will multiply, as more competing carriers enter the marketplace and increase both the total number of orders and the number of orders involving more complex services. We identify and discuss below the major problems that have been, at least partially, caused by Ameritech's reliance on manual processing for the ordering and provisioning of resale services.

(a) Orders in "1PE" Status and Split Accounts

174. Evidence in the record indicates that Ameritech processes manually a significant number of the orders that it receives over its EDI interface.[434] For example, Ameritech's own data indicate that, from January through April of this year, approximately 39 percent of the resale orders received electronically over the EDI interface were processed manually before the orders entered Ameritech's legacy systems.[435] The rest of the orders were either rejected electronically by the interface or were processed electronically into the legacy systems.

175. Ameritech represents that the most significant number of orders processed manually are orders that the interface accepts, but that could not be processed into the legacy systems without additional changes or edits being made to the orders, known as orders in "1PE" (or "1P") status.[436] Ameritech explains that, "'1PE' status occurs because Ameritech's service

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[432] For purposes of this discussion, we focus on manual intervention that Ameritech uses to process orders received from competing carriers from the EDI interface into the legacy systems. *See supra* para. 134. Because "Ameritech enters orders directly into the legacy systems," its orders do not require similar processing from an interface to its legacy systems. *See* Ameritech Reply Comments, Vol. 5R.24, Rogers Reply Aff. at 21; *see also* Ameritech Application, Vol. 2.13, Rogers Aff. at 22-23.

[433] The term "POTS" or "plain old telephone service" refers to the most basic types of telecommunications services offered by local exchange carriers to their customers.

[434] AT&T Comments, Vol. III.F, Connolly Aff. at 8-9; MCI Comments at 21, Exh. D, King Aff. at 34; TRA Comments at 29-30.

[435] Ameritech Reply Comments, Vol. 5R.7, Gates and Thomas Reply Aff. at 13-14. In its application, Ameritech presented evidence that shows that, during the period from January 1, 1997 to May 1, 1997, of the 19,671 orders received electronically over the EDI interface, 8,901 were processed with manual review. Ameritech Application, Vol. 2.13, Rogers Aff. at 21. In its reply comments, Ameritech notes that, for the months of May and June, the level of manual review decreased to approximately 29 percent of all orders placed over the EDI interface. Ameritech Reply Comments, Vol. 5R.7, Gates and Thomas Reply Aff. at 13-14. We find, at a minimum, that the data measuring Ameritech's June performance are new data that are not directly responsive to any factual assertions made by commenters, and we therefore will not consider such evidence. If we were to consider such evidence, however, we would find that manually processing close to one-third of the resale orders placed over an electronic interface is still significant, in light of the problems associated with manual processing, discussed below.

[436] During the months of April and May, Ameritech received 45,851 orders from AT&T, of which 11,499 were manually reviewed. Of those orders, 4,620 were manually processed because of "1PE" status. Ameritech Reply Comments, Vol. 5R.7, Gates and Thomas Reply Aff. at Exhibit 8 ("Manual Review - April and May"). *See id*, Vol. 5R.24, Rogers Reply Aff. at 27 ("1Ps accounted for approximately 39% of manual reviews during April

order processing system edits determine that manual review is required on an order that the interface thought could be processed electronically."[437] In addition, Ameritech manually processes all orders involving split accounts (namely, when resellers provide service to some, but not all, of a customer's lines) that are received over the electronic interface.[438] Of the total number of resale orders that are received electronically over the EDI interface, approximately 9 percent are reviewed manually because they involve split accounts.[439] Ameritech acknowledges that a competing carrier has little control over whether an order will require manual review, and that the manual processing of orders placed in "1PE" status and orders involving split accounts results solely from decisions made by Ameritech.[440] Ameritech's own data indicate that orders in "1PE" status and orders involving split accounts together constitute over 60 percent of the total number of AT&T orders requiring manual review.[441]

176. Ameritech contends that, in general, whether orders are processed electronically or manually is not relevant to determining operational readiness in compliance with the competitive checklist.[442] Ameritech also claims, however, that the problems associated with "1PE" status are not confined to competing carriers, but also affect Ameritech's retail operations.[443] Ameritech asserts that the corrections made to orders during manual review are generally "simple and quick" and made in the same time it takes to make similar adjustments to retail orders.[444] Ameritech also

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1997").

[437] Ameritech Reply Comments, Vol. 5R.7, Gates and Thomas Reply Aff. at 16.

[438] A split account "occurs when a reseller obtains some, but not all, of a customer's telephone lines, while the balance remains with the original carrier." *Id.*, 5R.7, Gates and Thomas Reply Aff. at 17.

[439] *Id.*, Vol. 5R.7, Gates and Thomas Reply Aff. at 17, Exhibit 8 ("Manual Review - April and May).

[440] Ameritech's own performance measures indicate that other than those orders that contain an entry in the "Remarks" field, competing carriers have no control over the necessity for manual review. *Id.*, Vol. 5R.7, Gates and Thomas Reply Aff. at Exhibit 8 ("Manual Review - April and May).

[441] *Id.*, Vol. 5R.7, Gates and Thomas Reply Aff. at Exhibit 8 ("Manual Review - April and May"). Ameritech indicates that there are several additional reasons for manual processing of orders received from competing carriers. *See id.* at 18; Ameritech Application, Vol. 2.13, Rogers Aff. at 25-31.

[442] Ameritech Application, Vol. 2.13, Rogers Aff. at 23 ("Ameritech's manual processing of certain orders, after they are received through the appropriate electronic interface, has absolutely no bearing on compliance with the checklist and the Commission's First Report and Order and Second Order on Reconsideration in CC Docket 96-98. . . . The checklist and the Commission's pronouncements do not address how Ameritech processes transactions internally after the transaction over the interface with the CLEC is complete.").

[443] Ameritech Reply Comments, Vol. 5R.24, Rogers Reply Aff. at 20. Ameritech represents that, although "retail orders do not fall into 1P[E] status because the same adjustments to orders which occur during 1P status for CLEC orders are made to retail orders during the order entry process," "the same flaws that cause CLEC orders to drop into IP[E] status prevent retail orders from being entered at all." *Id.*

[444] *Id.*, Vol. 5R.24, Rogers Reply Aff. at 20.

argues that, when orders have fallen into "1PE" status in sufficient volume, Ameritech has added an additional edit to its interface to resolve the problem electronically.[445] In addition, Ameritech contends that its decision whether to mechanize certain functions, such as processing orders involving split accounts, is a business decision made solely by Ameritech.[446]

177. Commenters argue that Ameritech's reliance on manual processing of a significant number of resale orders is directly relevant to determining whether Ameritech is able to demonstrate that it is providing nondiscriminatory access to OSS functions.[447] Commenters contend that manual processing consistently has been the cause of undue delays in order processing and order completions.[448] Commenters explain that such delays have a direct impact on their ability to serve their customers.[449]

178. Although it may be true, as Ameritech suggests, that the corrections made to "1PE" orders are generally "simple and quick" and made in the same time it takes to make similar adjustments to retail orders, this statement does not account for the time that elapses between the identification of the problem at the interface and the resolution of the problem through manual intervention. Evidence in the record indicates that the time that elapses until a particular order is eventually reviewed and processed manually into the legacy systems may be, and has been, significant, depending on the number of existing orders that are pending or backlogged and the resources Ameritech has allocated to manual processing.[450] As a consequence, the time it takes to process manual orders is generally much longer than the time it takes to process an equivalent Ameritech retail order. Although there may be limited instances in which it is appropriate for Ameritech to intervene manually in the processing stage so that orders are processed correctly into the legacy systems, excessive reliance on this type of manual processing, especially for routine transactions, impedes Ameritech's ability to provide equivalent access to these fundamental OSS functions. Because competing carriers have no control over whether their

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445 *Id.*, Vol. 5R.7, Gates and Thomas Reply Aff. at 16-17 (Ameritech states that it has added fifteen such edits in "recent months").

446 *Id.*, Vol. 5R.7, Gates and Thomas Reply Aff. at 17-18. Gates and Thomas also note that "Ameritech has informed us that it is currently in the process of developing additional software upgrades, with a scheduled implementation date of September 1997, which will allow more transactions to be processed electronically." *Id.* As discussed above, we do not find probative any new commitments made by Ameritech in its reply comments.

447 AT&T Comments, Vol. III.F, Connolly Aff. at 55.

448 *Id.*, Vol. III.E, Bryant Aff. at 43-50; CWA Reply Comments at 10.

449 AT&T Comments, Vol. III.E, Bryant Aff. at 71-73; MCI Comments at 21.

450 For a more detailed discussion of the delays Ameritech has experienced in processing orders, see *infra* Sections VI.C.5.c.(2).(c) and (d); *see also* AT&T Comments, Vol. III.E, Bryant Aff. at 44-50. *See generally* Ameritech Reply Comments, Vol. 5R.7, Gates and Thomas Reply Aff. at Exhibit 8.

orders will be put into "1PE" status,[451] we would generally expect that the percentage of orders placed in "1PE" status for competing carriers should be equivalent or close to the percentage of orders rejected by the legacy systems for Ameritech's retail operations, although we recognize that Ameritech is not responsible for errors made by competing carriers.

179. In addition, in light of the fact that orders for split accounts have consistently constituted close to 10 percent of the total resale orders, we question Ameritech's continued reliance on manual processing for these types of orders. Although we recognize that Ameritech has committed to implementing a mechanized solution, this commitment was first made by Ameritech in its reply comments.[452] As discussed above, we will not consider commitments regarding future actions, particularly those made on reply, to demonstrate current compliance with the checklist requirements. If Ameritech chooses to resubmit its application for Michigan, we would expect to see evidence demonstrating that it has carried out this commitment.

180. We are not persuaded by Ameritech's argument that whether orders are processed electronically or manually is not relevant to our determination of whether Ameritech is providing nondiscriminatory access to OSS functions, given that there appears to be a direct correlation between manual processing and the time it takes Ameritech to process and provision orders for resale. While we understand that Ameritech undertakes a cost-benefit approach to determine when to mechanize order processing, it appears that Ameritech's analysis does not adequately account for the potential impact manual processing has on competing carriers.[453] We agree with the Department of Justice that "manual processing that results in the practicable unavailability of services or elements at foreseeable demand levels can impede the development of competition, and thus obviously has a direct bearing on compliance with the competitive checklist and the Commission's rules."[454]

(b) Modified Due Dates

181. In addition to the problems with orders in "1PE" status and orders involving split accounts, we find that Ameritech's reliance on manual processing has caused Ameritech to modify, in a significant number of instances, the due dates for order completions requested by

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451 *See supra* note 440.

452 *See* Ameritech Reply Comments, Vol. 5R.7, Gates and Thomas Reply Aff. at 17-18.

453 Ameritech essentially weighs the costs and benefits of rewriting its software versus the costs and benefits of using service representatives to do manual processing. Ameritech Application, Vol. 2.13, Rogers Aff. at 24, 31-32.

454 Department of Justice Evaluation, Appendix A at 2-3.

competing carriers placing orders over the EDI interface.[455] The record indicates that, as a result of resource issues, many orders that fall out to manual processing remain pending past the requested due date for order completion. As a result, Ameritech must then modify the due dates for those orders. We also note that Ameritech's data tracking "due dates met" appear to hide the full impact of Ameritech's modification of due dates on competing carriers because Ameritech considers meeting modified due dates as due dates met.[456]

182. In response to commenters' criticism regarding changed due dates,[457] Ameritech contends that it modifies due dates for the following types of orders: (1) those specifying a due date that has already passed at the time of submission; (2) those processed after 3 p.m. but requesting completion the same day; (3) those specifying a due date that falls on a weekend or holiday; (4) those dependent upon "force and load" levels because they require the dispatch of engineering personnel;[458] and (5) those that cannot be completed by the requested due date because of Ameritech service center resource issues.[459] Ameritech represents that competing carriers have access to the same due dates available to Ameritech retail representatives through the pre-ordering interface. Ameritech claims that these dates are distributed on a first-come-first-served basis and, therefore, if more carriers made use of the pre-ordering interface for obtaining due dates, Ameritech's need to modify due dates would diminish.[460]

183. The evidence shows that Ameritech's need to modify due dates because of Ameritech resource issues is directly related to Ameritech's extensive reliance on manual review to process orders. Ameritech's own data show that the most prevalent cause of due date modification has been the lack of adequate resources available to process the orders by the original due date when the orders have fallen out to manual processing. Ameritech itself admits that the original due dates requested for these orders were valid at the time the orders were placed, but had to be changed when the orders were ultimately processed because, by that time

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455 Ameritech itself admits that one reason that due dates are modified is because of service center resource issues. Ameritech Reply Comments, Vol. 5R.7, Gates and Thomas Reply Aff. at 23.

456 Under the Department of Justice's extrapolation of various performance measurements, "[i]f Ameritech-changed due dates are discounted, Ameritech met due dates *requested by AT&T* roughly 76% of the time in April." Department of Justice Evaluation, Appendix A at 14.

457 *See* AT&T Comments at 25, Vol. III.E, Bryant Aff. at 87; CWA Reply Comments at 13-14.

458 "Force and load" levels refer to the work force that is available given the current volume of work.

459 Ameritech Reply Comments, Vol. 5R.7, Gates and Thomas Reply Aff. at 23; *see also* Ameritech Application, Vol. 2.10, Mickens Aff. at 43-44.

460 Ameritech represents that its pre-ordering interface includes a due date selection subfunction that allows competing carriers to reserve due dates for those service orders that require a field visit. Ameritech Application, Vol. 2.13, Rogers Aff. at 13. *See also* Ameritech Reply Comments, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 29.

the original due date had already passed.[461] From the week of March 31, 1997 through the week of May 26, 1997, the percentage of AT&T orders requiring due date modifications ranged from 7 percent to 61 percent of the total AT&T orders received each week.[462] Of those orders requiring modified due dates, the percentage modified due to a lack of Ameritech resources ranged from 17.1 percent to 69.3 percent per week.[463] We believe that the need to modify due dates is symptomatic of a Ameritech's broader inability to process a significant number of orders from competing carriers without continual delays.[464]

184. We also find that the record does not support Ameritech's claim that increased usage of the pre-ordering interface by competing carriers would significantly reduce the number of modified due dates.[465] If provisioning an order does not require a field visit, there is no need for a competing carrier to use the pre-ordering interface to reserve a due date.[466] Ameritech does not dispute that the vast majority of resale orders placed by AT&T have not required a field visit. Yet, Ameritech has continually modified the due dates for a significant percentage of the resale orders placed by AT&T.[467] As a result, increased usage of the pre-ordering interface would have little impact on the number of AT&T orders that currently are being processed manually. We acknowledge that, in general, it may be necessary for Ameritech to modify due dates when the dates requested by competing carriers are for some reason invalid, such as when the date requested has already passed, or when the order requires the dispatch of engineering personnel so that the requested due date cannot be met. In addition, while it may be appropriate to modify due

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461 Ameritech Application, Vol. 2.10, Mickens Aff. at 43-44.

462 Ameritech Reply Comments, Vol. 5R.7, Gates and Thomas Reply Aff. at Exhibit 8 ("Changed Due Dates") (3/31 - 46%; 4/7 - 15%; 4/14 - 32%; 4/21 -7%; 4/28 - 22%; 5/5 - 37%; 5/12 - 16%; 5/19 - 61%; 5/26 - 48%).

463 *Id.*, Vol. 5R.7, Gates and Thomas Reply Aff. at Exhibit 8 ("Reasons for Changed Due Dates") (3/31 - 29.9%; 4/7 - 17.4%; 4/14 - 37.2%; 4/21 - 57.5%; 4/28 - 68.9%; 5/5 - 60.3%; 5/12 - 49.8%; 5/19 - 65.5%; 5/26 - 69.3%). *See also* CWA Reply Comments at 10-14 (CWA's discussion of reasons for backlogged orders).

464 *See, e.g.* AT&T Comments, Vol. III.E, Bryant Aff. at 36 ("AT&T's service orders continue to be mistakenly rejected despite the fact that they are fully consistent with Ameritech's ordering specifications"). Ameritech changed only 10.3% of the due dates for competing carrier orders that it processed electronically, but 42.4% of the due dates for orders that it received electronically and processed manually. *Id.* at 47.

465 *See also* Ameritech Reply Comments, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 19-20 (Ameritech commits to participating in a reasonable audit to determine whether competing carriers have equal access to available due dates in order to demonstrate that competing carriers are receiving "parity of treatment" with regard to installations.).

466 *See supra* note 460.

467 *See* Ameritech Reply Comments, Vol. 5R.7, Gates and Thomas Reply Aff. at Exhibit 8 ("Changed Due Dates").

dates because of a lack of resources in certain limited circumstances,[468] we believe that a continual, consistent trend of significant due date modification for this reason calls into question whether Ameritech is providing nondiscriminatory access to its OSS functions.

185. While Ameritech's recurring need to modify due dates, in and of itself, causes us great concern, the modification of due dates only reinforces our view that Ameritech should measure average installation intervals for the ordering and provisioning of resale services, as discussed above.[469] Because Ameritech largely controls both the availability of due dates and the use of manual review to process orders for resale services, we must be persuaded by a preponderance of the evidence that it is not engaging in discriminatory behavior when, as Ameritech admits, there is a direct correlation between these two activities.[470] Ameritech's argument that average installation intervals are not relevant as a measurement of parity is hardly persuasive, given that Ameritech is modifying a large number of due dates because of a lack of Ameritech resources. In this context, it is especially important for Ameritech to measure average installation intervals because evidence of how due date modification is affecting average installation intervals would be relevant to the question of whether Ameritech is providing equivalent access to OSS functions.[471]

(c) Untimely Firm Order Confirmation Notices and Order Rejection Notices

186. The record indicates that Ameritech's reliance on manual processing has affected its ability to deliver in a timely fashion a significant number of firm order confirmation notices and order rejection notices.[472] A firm order confirmation is sent by Ameritech to competing carriers over the EDI interface when an order has been entered into Ameritech's legacy systems.[473] An

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[468] For example, there may be an instance where the number of orders received by Ameritech is beyond the capacity limits of its systems because actual demand has exceeded projected demand. As long as Ameritech had made a reasonable attempt to project levels of demand, its use of manual processing in this instance may be warranted.

[469] *See supra* Section VI.C.5.c.(1).

[470] Ameritech Reply Comments, Vol. 5R.7, Gates and Thomas Reply Aff. at Schedule 8 ("Reasons for Changed Due Dates").

[471] Average interval information would provide context to existing information regarding due dates met and the number of due dates modified. *See* discussion regarding need for average installation intervals *supra* Section VI.C.5.c.(1) *supra*.

[472] *See, e.g.*, AT&T Comments, Vol. III.E, Bryant Aff. at 57-58; MCI Comments, Exh. D, King Aff. at 60-61.

[473] Ameritech has testified that the EDI "855 transaction" it uses to provide a FOC to a competing carrier should be generated by Ameritech's interface within minutes of receipt of a valid order. *See* AT&T Comments, Vol. III.E, Bryant Aff. at 55, Attachment 16 (quoting testimony of Joe Rogers in Illinois Commerce Commission

order rejection notice is sent by Ameritech to competing carriers over the EDI interface when an order has been rejected by Ameritech via the interface or by Ameritech personnel. FOCs and order rejection notices allow competing carriers to monitor the status of their resale orders and to track the orders for both their customers and their own records.[474] As the Department of Justice notes,

> Orders that flow through electronically, and do not require manual review, trigger an almost immediate FOC or rejection. Because an order cannot be completed prior to its entry into Ameritech's systems, and the wait for a FOC or rejection indicates the time required for such entry, the time it takes to return FOCs or rejections is an indication of the absolute minimum time Ameritech would have required to complete the order. In addition, beyond their use as barometers of performance, FOC and rejection notices play a critical role in a CLEC's ability to keep its customer apprised of installation dates (or changing thereof) and modify a customer's order prior to installation.[475]

187. In its application, Ameritech submits evidence that shows that the percentage of FOCs not returned to competing carriers within 96 hours increased from approximately 14 percent in January 1997 to 45 percent in April 1997.[476] In its reply comments, Ameritech submits evidence that shows that, from the week of March 31, 1997 through the week of May 26, 1997, the percentage of FOCs returned to AT&T in over 96 hours ranged from 10 percent to 60 percent.[477] We agree with the Department of Justice that this is an indication that Ameritech is requiring more time to process orders as the volume of orders has increased.[478] We are troubled by Ameritech's failure to submit comparative data indicating how long it takes Ameritech to receive the equivalent of a FOC for its own orders.[479] We would expect Ameritech to submit such

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Section 271 hearing). Ameritech designates a FOC as an "855."

474 AT&T Comments, Vol. III.E, Bryant Aff. at 54.

475 Department of Justice Evaluation, Appendix A at 17.

476 Ameritech Application, Vol. 2.10, Mickens Aff. at 48. *See also* AT&T Comments, Vol. III.E, Bryant Aff. at 59 (citing Mickens Affidavit at 48-49) ("Ameritech's heavy reliance on manual processing has meant that Ameritech has been unable to provide AT&T with 855 notices within four days of order submission approximately 15% of the time in February, 25% of the time in March, and 45% of the time in April.").

477 Ameritech Reply Comments, Vol. 5R.7, Gates and Thomas Reply Aff. at Exhibit 8 ("855 Performance") (3/31 - 26%; 4/7 - 10%; 4/14 - 23%; 4/21 - 29%; 4/28 - 37%; 5/5 - 17%; 5/12 - 40%; 5/19 - 60%; 5/26 - 17%).

478 Department of Justice Evaluation, Appendix A at 17. *See* AT&T Comments, Vol. III.E, Bryant Aff. at 58.

479 Evidence in the record suggests that the appropriate retail analogue for a FOC would be the time that elapses between when an Ameritech order is placed into the legacy systems and when the order is recognized as a valid order by the legacy systems. We believe that the BOC performs the functional equivalent of a "FOC" for

data in a future application in support of its claim that it is providing nondiscriminatory access to OSS functions. In addition, whether or not FOCs received within 96 hours is an appropriate benchmark,[480] we are concerned about how often that standard is not met. This is significant because, as long as a competing carrier has not received a FOC, the competing carrier, as well as the customer, is unaware of the status of its order. Moreover, we are also concerned that the data regarding the percentage of FOCs returned outside of 96 hours do not indicate that Ameritech's performance has improved over time or, even, that its performance has stabilized.

188. Similarly, the evidence indicates that order rejection notices have been significantly delayed during the months prior to the filing of Ameritech's application. As the Department of Justice notes, average order rejection notices were taking over six days in April.[481] Ameritech claims in its reply comments that the return time for order rejection notices has since decreased and that the increased processing time in April was caused by a sudden increase in demand at the end of the month.[482] We find Ameritech's explanation to be only partially adequate, however, because order rejection notices generated electronically by the interface should be relatively instantaneous.[483] Only those orders that are received by the interface, but manually processed, receive delayed rejection notices. Therefore, to the extent an increase in demand strains Ameritech's resources so that manually generated order rejection notices are backlogged, we believe that this is another example of the negative impact that manual processing has on Ameritech' ability to provide to competing carriers equivalent access to OSS functions.[484]

(d) OSS Capacity Constraints in Response to Increased Demand

itself even if it does not do so in an identical manner. *See* discussion on equivalent access *supra* para. 139.

480 We make no finding in this Order regarding whether FOCs returned within 96 hours is an appropriate benchmark. As discussed *supra* note 346, a petition is pending before the Commission requesting that the Commission adopt performance standards and reporting requirements for OSS functions provided by incumbent LECs to competing carriers. *See Performance Standards Public Notice.*

481 Department of Justice Evaluation, Appendix A at 18; *see also* AT&T Comments, Vol. III.E, Bryant Aff. at Attachment 21, 22.

482 Ameritech Reply Comments, Vol. 5R.7, Gates and Thomas Reply Aff. at 20. Ameritech represents that the return time for order rejection notices decreased to under 4 days in May and to 1.87 days in June. *Id.* at 20-21. As discussed above, we give no weight to new evidence that has been generated since the date of filing the application. Therefore, we discount the June data. The issue regarding increased order demand in April is discussed more fully below in section VI.C.5.c.(2).(d).

483 *See* AT&T Comments, Vol. III.E, Bryant Aff. at 55 (citing Rogers Testimony in Illinois Commerce Commission Hearings, Docket No. 96-0404 (May 7, 1997)).

484 *See* Department of Justice Evaluation, Appendix A at 18.

189. Although evidence in the record indicates that Ameritech's reliance on manual processing has required it, on an ongoing basis, to modify due dates and send late FOCs and rejection notices in response to a significant number of orders, the evidence further demonstrates that these problems have been exacerbated as the volume of orders has increased. Ameritech represents that it is currently able to process electronically approximately 368,000 orders for resale service per month over the EDI interface.[485] Ameritech also asserts that Andersen Consulting has independently reviewed its capacity requirements and determined that Ameritech's plan for adding electronic capacity for receiving orders is reasonable.[486] In addition, Ameritech represents that Andersen Consulting has reviewed its plan for adding manual capacity and concluded that Ameritech would need to add between 330 and 410 service representatives before the end of the year in order to meet its projected requirements for manual processing.[487] On behalf of Ameritech, Andersen Consulting avers that "it appears reasonable that Ameritech could hire (or transfer internally) an appropriate number of service representatives to meet demand."[488]

190. AT&T represents that, shortly before Ameritech filed its section 271 application for Michigan, over a period of two weeks, AT&T submitted 4,541 resale orders over Ameritech's EDI interface for Michigan and a total of 13,325 resale orders region-wide.[489] Ameritech's own data show that Ameritech was unable to process all of these orders electronically, and therefore, a substantial number of orders required manual processing. A significant number of these orders remained pending or were backlogged for days.[490] For example, Ameritech's data indicate that 22 percent of the due dates requested by AT&T during the week of April 28th were modified by Ameritech.[491] The same data indicate that, during the next week, 37 percent of the due dates

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485 Ameritech Application, Vol. 2.9, Meixner Aff. at 18.

486 *See id.*, Vol. 2.9, Meixner Aff. at 16-18.

487 *Id.*, Vol. 2.13, Rogers Aff. at 51, and Vol. 2.9, Meixner Aff. at 24-25.

488 *Id.*, Vol. 2.9, Meixner Aff. at 25. In its reply comments, Ameritech represents that it added 37 service representatives in May and has additional plans to increase the total number of service representatives to 391 by the end of the year in order to meet its capacity needs for manual processing. Ameritech Reply Comments, Vol. 5R.7, Gates and Thomas Reply Aff. at 32. As discussed above, we give no weight to information that Ameritech has updated after the submission of its application.

489 AT&T represents that, during the month of April, it increased order volumes in Michigan from 1,124 orders the week of April 13th, to 1,763 orders the week of April 20th, and to 2,778 orders the week of April 27th. AT&T Comments, Vol. III.E, Bryant Aff. at 44. The total number of resale orders placed by AT&T over the EDI interface was actually 13,325 for the entire Ameritech region. During this same time period, AT&T increased order volumes in Illinois from 602 orders the week of April 13th, to 3,066 orders the week of April 20th, and to 5,718 orders the week of April 27th. *Id.*

490 Ameritech's data indicate that during the week of April 28th, 37 percent of all AT&T orders did not receive a FOC within 96 hours. Ameritech Reply Comments, Vol. 5R.7, Gates and Thomas Reply Aff. at Exhibit 8 ("855 Performance").

491 *Id.*, Vol. 5R.7, Gates and Thomas Reply Aff. at Exhibit 8 ("Changed Due Dates").

requested by AT&T were modified by Ameritech, even though the total number of orders placed by AT&T during this week was significantly less than the previous week.[492] Moreover, Ameritech's data indicate that during the weeks of April 21st, April 28th, and May 5th, 57.5 percent, 68.9 percent, and 60.3 percent, respectively, of the total modified due dates were changed because of Ameritech resource problems.[493] Such evidence suggests that Ameritech's resources were still committed to clearing the backlog of orders that remained from the previous week.

191. We find that Ameritech's inability to process adequately the increased volume of orders from AT&T at the end of April is further indication that Ameritech is unable to demonstrate that it is providing nondiscriminatory access to OSS functions for the ordering and provisioning of resale services. Moreover, we find that this incident calls into question Ameritech's ability to process on a timely basis the number of orders reflected by its stated monthly electronic capacity. As a result, the record causes us to have significant doubts about Ameritech's ability to handle an increasing volume of orders, which will be a critical component in order for competition to develop in the Michigan local exchange market.[494]

192. Although the number of orders placed by AT&T over the EDI interface at the end of April was substantially more than the number of orders it had placed during the previous weeks, we find it significant that the total number of orders was still well within the range of Ameritech's stated capacity.[495] In addition, the vast majority of the orders placed by AT&T were, and apparently continue to be, almost exclusively residential POTS resale migration orders.[496] Ameritech attempts to place significance on the fact that most of the AT&T orders are not the most simple migration orders because, in addition to requiring billing changes, many include

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[492] *Id.*, Vol. 5R.7, Gates and Thomas Reply Aff. at Exhibit 8 ("Changed Due Dates"). The total number of AT&T orders during the week of April 28th was just under 8,000, while the total number of AT&T orders the following week was just over 5,000.

[493] *Id.*, Vol. 5R.7, Gates and Thomas Reply Aff. at Exhibit 8 ("Reasons for Changed Due Dates"). We also note that, between the week of May 12th through the week of May 26th, the percentage of orders with modified due dates caused by Ameritech resource problems continued to range between approximately 50 and 70 percent of the total orders requiring modified due dates. The actual numbers ranged from approximately 1,000 to almost 4,000 orders. *Id.*

[494] By way of comparison, based on 1995 data, it is reasonable to assume that, approximately, more than 20,000 Michigan consumers per week currently change their interexchange carrier. In deriving this figure, we assume that Michigan has approximately 3.75 percent of the total access lines in the United States (6,195,898/164,861,912), and that consumers change interexchange carriers at least 30,000,000 times in a year. *See* Report, *Statistics of Communications Common Carriers*, Federal Communications Commission, 1995/1996 Edition, at table 2.5 (rel. Dec. 1, 1996) (*Common Carrier Statistics)* (total number of access lines in Michigan and in the United States) and *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3305 (1996) (total number of consumer changes of interexchange carriers).

[495] In addition, AT&T argues that the increase was within the overall trend of increasing orders for the year as a whole. *See* AT&T Comments, Vol. III.E, Bryant Aff. at 48-51.

[496] *Id.*, Vol. III.E, Bryant Aff. at 33-34.

changes in features.[497] We find it more significant, however, that Ameritech does not contend that the AT&T orders generally involved more complex services or required field visits, given that Ameritech points to these factors as the major reasons, other than a lack of Ameritech resources, for the need for manual processing and the modification of due dates.[498]

193. The evidence in the record indicates that Ameritech was unable to process in a timely fashion all of the AT&T orders because the increased order volume triggered a simultaneous increase in the number of orders requiring manual processing, which severely strained Ameritech's available resources. Because Ameritech lacked the resources to handle this increase, orders were backlogged, delaying Ameritech's ability to deliver FOCs and order rejection notices, and requiring Ameritech to modify the due dates for those orders it was unable to process within the time-frame defined by the requested due date. As noted above, competing carriers have little control over which orders require manual processing.[499] As a result, because competing carriers can do little to reduce the number of orders that are manually processed, Ameritech's decision whether to mechanize the processing of orders directly impacts its ability to provide nondiscriminatory access to OSS functions.

194. If, as discussed above, 30 to 40 percent of the resale orders placed by competing carriers over the EDI interface continue to require manual review, Ameritech's capacity to receive electronic orders over the interface may be unaffected, but its capacity to process those orders electronically will be reduced. We agree with the Department of Justice that, "[i]f Ameritech relies on manual procedures to process a significant portion of orders received via its EDI interface, the capacity of the electronic processes becomes less important than that of its manual procedures, as the events in April indicate."[500]

195. Ameritech contends that, because its capacity planning is based on relatively stable increases in order volume, the "spike" caused by AT&T's unannounced increase in order volumes must be discounted as reliable evidence of Ameritech's ability to process large volumes of orders.[501] As the Department of Justice aptly notes, however, ". . . the competitive marketplace,

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497 Ameritech Reply Comments, Vol. 5R.24, Rogers Reply Aff. at 27.

498 Ameritech Application, Vol. 2.13, Rogers Aff. at 29; *see also* AT&T Comments, Vol. III.E, Bryant Aff. at 67-68.

499 *See supra* notes 325, 440.

500 Department of Justice Evaluation, Appendix A at 15.

501 Ameritech Application, Vol. 2.10, Mickens Aff. at 43-44; Ameritech Reply Comments, Vol. 5R.24, Rogers Reply Aff. at 39, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 10, 30-31, and Vol. 5R.7, Gates and Thomas Reply Aff. at 33.

especially during the early stages of entry, may not accommodate Ameritech's expectations."[502] Using Ameritech's capacity assumptions, Ameritech's daily capacity for handling electronic orders placed over the EDI interface is approximately 15,000 orders per day.[503] In this instance, the total number of orders placed by AT&T was well within Ameritech's stated electronic capacity. Specifically, AT&T placed 4,541 orders for Michigan and 13,325 region-wide over the two-week period.[504] The number of Michigan orders placed by AT&T over the EDI interface during the two-week period was approximately 15 percent of Ameritech's stated electronic capacity. The number of region-wide orders placed by AT&T over the EDI interface was only a little more than half of Ameritech's stated capacity. As a result, we find Ameritech's assertion that it has the electronic capacity to process 368,000 orders per month to be unsupported by the existing evidence.

196. As demonstrated by this incident, Ameritech's significant reliance on manual processing directly impacts its actual ability to provision orders on a timely basis. We conclude that the reliance on a substantial amount of manual processing may violate Ameritech's duty to provide equivalent access when Ameritech's retail operation processes essentially all of its orders electronically. Because it is virtually impossible for orders that are processed manually to be completed in the same time as orders that flow through electronically, it is difficult to see how equivalent access could exist when Ameritech processes a significant number of orders from competing carriers manually. Although additional manual processing may constitute a reasonable and necessary short-term solution to address capacity concerns, we do not believe that substantial and continued reliance on manual capacity as a long-term solution to the ordering and provisioning of resale services is consistent with the requirement that there be equivalent access.

197. Moreover, although Ameritech argues that its plan for adding manual capacity has been reviewed and deemed reasonable by Andersen Consulting,[505] this does not provide us with a

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[502] Department of Justice Evaluation, Appendix A at 15; *see also* AT&T Comments, Vol. III.E, Bryant Aff. at 51 ("In a multi-CLEC environment, where general advertising will be a primary means of winning new customers, unpredictable and fluctuating ordering volumes will be the rule, not the exception.").

[503] Because orders are not processed on weekends or holidays, we presume that Ameritech excludes those days from the volume of orders that Ameritech can process each day. *See* Ameritech Reply Comments, Vol. 5R.7, Gates and Thomas Reply Aff. at 23; *see also* AT&T Comments, Vol. V, Connolly Aff. at 112 ("Assuming that Ameritech's systems operate six days a week, that computes to more than 15,000 orders per day.")

[504] Because AT&T currently is by far the most active reseller using the EDI interface in the Ameritech region, the total number of resale orders received over the interface was not significantly higher than the total number of resale orders sent by AT&T during this period of time. Ameritech has not indicated that orders from other competing carriers in combination with the orders received from AT&T exceeded its stated capacity levels.

[505] We note that Andersen Consulting conducted a review of Ameritech's OSS interfaces, including analyses of both manual and electronic capacity, both before the filing of Ameritech's application and during the pendency of Ameritech's application. As discussed *supra* Section IV.B.1, we do not give no weight to new evidence filed after the filing date of the application and that goes beyond the time-frame covered by information filed by commenting parties. Therefore, we give no weight to the review conducted by Andersen Consulting during the pendency of this application because it is not directly responsive to issues raised by commenting parties. *See also*

basis for concluding that Ameritech's problems with manual processing would not have occurred if only Ameritech had added more personnel. Although an independent review of capacity is helpful in assessing operational readiness, we cannot simply rely on a hypothetical analysis of Ameritech's future abilities in the face of actual evidence that calls into question its current capabilities.

198. Ameritech contends that, when AT&T and other competing carriers plan to add a significant number of customers in a short period, these carriers should forewarn Ameritech, so that it is adequately able to allocate resources to meet the expected demand.[506] We recognize that it may be reasonable for Ameritech to request advance notice if a competing carrier seeks to increase its order volumes to such an extent that the total volume of orders received over Ameritech's EDI interface would exceed Ameritech's stated capacity, so long as the stated capacity is reasonable in light of expected demand. We find, however, that Ameritech's proposed solution of requiring competing carriers to provide advance notice, even when the total volume of orders remains well within the range of Ameritech's stated capacity, to be unreasonable. Ameritech should be able to handle, without receiving advance notice from competing carriers, volumes of orders that fall within its stated capacity. If Ameritech's reliance on manual processing continues to reduce its ability to process orders from competing carriers in a timely fashion, then Ameritech should adjust its capacity claims accordingly.[507]

199. We conclude that Ameritech's OSS functions for ordering and provisioning must be able to handle reasonable fluctuations in service orders by competing carriers as well as reasonably foreseeable general increases in ordering volumes. This is especially true when a short-term surge in orders does not result in the total number of orders exceeding or even approaching Ameritech's stated capacity. We find that Ameritech's inability to handle adequately AT&T's increase in order volume indicates that Ameritech has not demonstrated that its systems are capable of handling the order volumes and fluctuations reasonably expected in a competitive

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discussion of third-party review of OSS functions *infra* para. 216.

[506] Ameritech Reply Comments, Vol. 5R.24, Rogers Reply Aff. at 39, and Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 30-31.

[507] We also question Ameritech's contention that advance notice from AT&T would have changed significantly Ameritech's ability to process the orders in April 1997. Given Ameritech's standard training requirements for adding new personnel, we assume that Ameritech would need warning well in advance of a competing carrier's plan to increase substantially its volume of orders. Ameritech represents that "[b]asic training on these order entry systems can be accomplished in about two days if the employee is familiar with Ameritech's business operations. It takes about 30 days before an employee is assumed to function at a fully efficient level, but orders would be processed during that entire period." Ameritech Application, Vol. 2.13, Rogers Aff. at 52. Even if Ameritech were staffing its positions from within the company, we assume that Ameritech would need adequate lead time to recruit employees and transfer them to their new position before beginning any type of training. *See also* CWA Reply Comments at 9, 15-18.

marketplace.[508] Our concern is heightened by the fact that Ameritech handles OSS functions on a region-wide basis from a single location. As more competing carriers enter the local markets in each state in Ameritech's region, we expect order volumes to continue to be relatively volatile. In any future application, we would expect to see data indicating that Ameritech has processed in a timely fashion orders falling within the range of its stated capacity.

(3) Double-Billing Problems

200. Ameritech acknowledges that there have been a number of instances in which new customers of competing carriers have been double-billed by both Ameritech and the competing carrier.[509] Ameritech concedes that not all customers potentially affected by this problem have yet been identified.[510] In assessing the cause of double-billing, Ameritech explains that in some cases, its billing systems rejected orders[511] for which order completion notices had already been transmitted to the competing carrier.[512] Because the billing system has rejected the order, Ameritech continues to bill the customer, while, at the same time, the competing carrier also has begun to bill the customer.

201. Nonetheless, Ameritech argues that other parties have overstated the double-billing problem, while, at the same time, understating the measures Ameritech has taken to resolve the problem.[513] Although Ameritech recognizes that double-billing directly affects end user customers, it claims, without further elaboration, that "most of the customers [double-billed] will

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[508] We note that Ameritech represents in its reply that, as order volumes increased in June, it received 9,100 orders during the week of June 2nd, nearly 10,500 orders during the week of June 9th, and almost 23,500 orders during the week of June 23rd. In addition, Ameritech asserts that, on June 26th, it processed over 7,300 orders in a single day. *See* Ameritech Reply Comments at 6, and Vol. 5R.7, Gates and Thomas Reply Aff. at 12-13. As discussed above, we give no weight to new evidence that pertains to events occurring after comments were filed, and we only consider evidence that pertains to events occurring between the date an application is filed and the date comments are filed when such evidence is directly responsive to arguments or evidence presented in comments. *See supra* Section IV.B.1.

[509] In its reply, Ameritech indicates that, to date, it has analyzed 3,011 AT&T orders submitted between January 8, 1997 and April 16, 1997, involving 1,402 customers who were candidates for double billing. Ameritech states it has identified 435 who were billed in error by Ameritech. Ameritech also represents that it currently is analyzing orders for an additional 24,111 AT&T customers. Ameritech Reply Comments, Vol. 5R.24, Rogers Reply Aff. at 36-37.

[510] Ameritech Reply Comments, Vol. 5R.24, Rogers Reply Aff. at 37.

[511] When orders are rejected by the billing system, Ameritech assigns such orders "3E" status. Ameritech Application, Vol. 2.13, Rogers Aff. at 46.

[512] Order completion notices are notices that Ameritech sends to competing carriers over the EDI interface after an order has been processed and completed by Ameritech. Ameritech Application, Vol. 2.13, Rogers Aff. at 36. An order completion notice, *inter alia*, triggers the competing carrier to begin billing the customer.

[513] Ameritech Reply Comments, Vol. 5R.24, Rogers Reply Aff. at 37. Ameritech states that "there are always going to be some problems and 'bugs' in any major information systems, whether new or existing." *Id.*, Vol. 5R.16, Mayer, Mickens and Rogers Reply Aff. at 9.

prove to have been AT&T or MCI employees, not commercial accounts."[514] In addition, Ameritech claims that, when it realized that there was a potential double-billing problem, it attached the highest priority to resolving the problem.[515] In its application, Ameritech asserts that, beginning on May 12th, it implemented solutions to resolve the problem.[516] Ameritech represents that it assigned specialists to clear any existing orders in potential double-billing status and to verify any erroneous billing, added edits to the interface to catch format errors before the order reaches the billing system, and dedicated a group of service representatives to review any future orders in this status.[517] In its reply, Ameritech further explains that it has identified the type of order that is the largest contributor to the double-billing problem, and that it has implemented an electronic fix to prevent these orders from being backlogged in "3E" status[518] for more than one day, thereby reducing the potential for double-billing.[519]

202. Commenters, including the Department of Justice, contend that double-billing is a serious problem that directly impacts the competing carriers' relationships with end-user customers.[520] Commenters argue that the double-billing problem is likely to be a symptom of a broader systemic problem, which involves the legacy systems' ability to process smoothly orders from competing carriers delivered over the interface, and that Ameritech's solution to "fix" the double-billing problem does not address the root causes of the underlying systemic problem.[521] Commenters also note that the double-billing problem has been identified as significant by other state commissions in the Ameritech region.[522]

203. We find 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. While we agree that Ameritech should not be held to a standard of perfection in demonstrating that its OSS functions

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514 *Id.*, Vol. 5R.24, Rogers Reply Aff. at 35.

515 Ameritech Application, Vol. 2.13, Rogers Aff. at 46.

516 *Id.*, Vol. 2.13, Rogers Aff. at 46 and Exhibit 14.

517 *Id.*, Vol. 2.13, Rogers Aff. at 46.

518 *See supra* note 511.

519 Ameritech Reply Comments, Vol. 5R.24, Rogers Reply Aff. at 36.

520 Department of Justice Evaluation, Appendix A at 23; AT&T Comments, Vol. III.E, Bryant Aff. at 7.

521 AT&T Comments, Vol. V, Connolly Aff. at 8-9, 35-36, and Vol. III.E, Bryant Aff. at 93-98.

522 *See, e.g.*, Public Service Commission of Wisconsin, Second Order in Docket 6720-TI-120 at 17 (May 29, 1997).

are operationally ready, we find that double-billing, as well as the problems associated with manual processing discussed above, constitute problems fundamental to Ameritech's ability to provide nondiscriminatory access to OSS functions. Although, based on the record before us, it is unclear whether the double-billing problem is a symptom of a larger systemic problem, we do find that, in and of itself, double-billing is a serious problem that has a direct impact on customers and, therefore, must be eliminated. Because Ameritech took action to solve the problem only nine days before it filed its application, it was unable to demonstrate by the date of its filing that it had successfully fixed the problem. Although we give no weight to new evidence filed after the submission of Ameritech's application, we note that, during the pendency of its application, Ameritech has only been able to collect preliminary data regarding the extent of the problem and the impact of the changes it has made to correct the problem. Ameritech cannot rehabilitate its deficient showing on this issue merely by elaborating further in its reply on the solutions it has implemented. Rather, we would expect Ameritech to submit evidence in any future application demonstrating that the corrective actions it so recently implemented have in fact significantly reduced the number of double-billing incidents.

6. Absence of Substantial Evidence to Support Statutory Finding

204. In addition to our conclusion that Ameritech has failed to demonstrate that it is providing nondiscriminatory access to particular OSS functions, we also find that Ameritech has failed to meet a broader and even more fundamental duty with regard to the evidentiary burden required to demonstrate that it is providing nondiscriminatory access to all OSS functions. Consistent with the findings of the Department of Justice and the Michigan Commission, we conclude that Ameritech has not provided the Commission with all of the empirical data necessary to substantiate Ameritech's asserted provision of nondiscriminatory access to the OSS functions required by section 271 and section 251 of the Act. For the Commission to conclude that Ameritech is providing nondiscriminatory access to OSS functions, we must have a proper factual basis upon which to make such a finding. In this case, Ameritech has failed to provide all of the data that we believe are necessary in order to evaluate its compliance with the statutory nondiscrimination standard. As the Department of Justice stated, "proper performance measures with which to compare BOC retail and wholesale performance, and to measure exclusively wholesale performance, are a necessary prerequisite to demonstrating compliance with the Commission's 'nondiscrimination' and 'meaningful opportunity to compete standards.'"[523]

205. In its evaluation, the Department of Justice states that it is unable to make an affirmative determination regarding the operational readiness of Ameritech's operations support systems without further data. The Department of Justice concludes, *inter alia*, that Ameritech must provide data for a number of performance measures (in addition to those already provided by Ameritech), as well as clearer and more specific definitions for the performance measures it already uses, before the Department of Justice could render a positive recommendation regarding

[523] Department of Justice Evaluation, Appendix A at 3.

Ameritech's OSS functions. Specifically, the Department of Justice finds that Ameritech currently fails to provide data on the following measures that the Department of Justice views as fundamental to making a demonstration of nondiscrimination: (1) average installation intervals for resale;[524] (2) average installation intervals for loops; (3) comparative performance information for unbundled network elements; (4) service order accuracy and percent flow through; (5) held orders and provisioning accuracy; (6) bill quality and accuracy; and (7) repeat trouble reports for unbundled network elements.[525] In addition, the Department of Justice finds that, "before Ameritech's proposed performance measures can be considered sufficient to judge non-discrimination and detect post-entry backsliding, they must be specifically and clearly defined."[526]

206. Similarly, the Michigan Commission concludes that "complete and appropriate performance standards" must be in place "before a positive determination can be made" regarding whether Ameritech's OSS functions comply with the nondiscrimination requirements of the Commission's rules.[527] The Michigan Commission recommends that the development of such performance standards take account of the following: (1) performance assessments of both the interface and the internal operations support systems; (2) performance measures that track those factors within Ameritech's control; (3) performance measures that permit comparisons with Ameritech's retail operations, such as data measuring the average time to complete a task; (4) the use of substantially analogous functions for parity measurements; (5) the availability of alternative interfaces for smaller competing carriers; (6) identification of the functions that Ameritech performs manually and electronically for its customers; (7) sufficient disaggregation of the data to permit meaningful parity comparisons; (8) precise clarity in defining the measurements; (9) OSS performance data for directory assistance, white pages listings, number portability, operator services and 911; (10) specified reporting schedules and formats; (11) an agreed-upon period of time in which to measure relevant performance; and (12) remedies and/or penalties for noncompliance.[528]

207. In response to the Department of Justice's concern that its performance measures are not sufficiently detailed and clear, Ameritech contends in its reply that it will begin to provide more detailed explanations of its performance measures to competing carriers, but that it has not

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524 *See supra* Section VI.C.5.c.(1).

525 Department of Justice Evaluation, Appendix A at 24-28.

526 *Id.*, Appendix A at 29.

527 Michigan Commission Consultation at 33-34.

528 *Id.* at 31-32.

previously included them in as part of its monthly performance reports.[529] Ameritech also disputes the need for the additional data suggested by the Department of Justice and the Michigan Commission. For several measures, Ameritech asserts that there are too many variables involved that prevent those measures from providing meaningful comparisons. For example, as discussed above, Ameritech asserts that resale orders vary so greatly in complexity and in the processing required for their completion as to render average installation intervals meaningless.[530]

208. Ameritech also argues that certain measures proposed by the Department of Justice are not relevant measures of parity, or that in any case, Ameritech does not monitor performance under those measures for its own retail operations.[531] For instance, Ameritech disputes the need to measure the accuracy of its ordering performance, as suggested by the Department of Justice.[532] In addition, Ameritech asserts that it does not provide information regarding competing carriers' pending orders because it does not provide such information for its own retail operations.[533] With regard to a number of the performance measurements suggested by the Department of Justice and the Michigan Commission, Ameritech claims that it already is providing similar data through other measures,[534] or that it will provide the data, either as a special analysis upon request,[535] or on a recurring basis in the future.[536] Additionally, in response to the

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[529] Ameritech Reply Comments, Vol. 5R.16, Mayer, Mickens and Rogers Reply Aff. at 15-16, and Vol. 5R.7, Gates and Thomas Reply Aff. at 22-23, Schedule 8. In its reply comments, Ameritech asserts that it will now include these explanations in its monthly reports. *Id.*

[530] Ameritech Application, Vol. 2.10, Mickens Aff. at 20-21; Ameritech Reply Comments, Vol. 5R.16, Mayer, Mickens and Rogers Reply Aff. at 17-18 ("Some orders require a field dispatch; others do not. Some require construction of facilities; others do not. Some wire centers can support complex features; others cannot"); Ameritech Reply Comments, Vol. 5R.18, Mickens Reply Aff. at 12. Ameritech also argues that average intervals for unbundled loop installation are not a good measure because there are many variables to the provisioning of unbundled loops. *Id.*, Vol. 5R.16, Mayer, Mickens and Rogers Reply Aff. at 21. Ameritech argues that the provisioning time for POTS services, for example, typically range from six hours to six days. *Id.*

[531] For example, Ameritech argues that OSS performance is not an end in itself; rather, its interfaces and legacy systems are of secondary importance to whether competing carriers are receiving timely and accurately provisioned products and services. Ameritech Reply Comments, Vol. 5R.18, Mickens Reply Aff. at 10, 15-16.

[532] *Id.*, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 24 (competing carriers may verify order accuracy by using the CSR function of the pre-ordering interface to retrieve their customers' CSRs after the orders have been completed).

[533] *Id.*, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 24 (Ameritech will provide this information upon request by a requesting carrier, the Michigan Commission, or this Commission).

[534] In response to the Department of Justice, Ameritech argues that it does measure unbundled loop performance for "trouble report rate," "receipt to restore," and "out of service over 24 hours." Ameritech Reply Comments, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 22.

[535] For example, Ameritech disputes the need to examine "order flow-through," arguing that flowthrough as a measure is not as important as Ameritech's actual performance in meeting its obligations; at the same time, it commits to providing this information upon special request. Ameritech Reply Comments, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 25. Ameritech asserts that, in response to the Department of Justice's Evaluation, Ameritech prepared such an analysis. *See* id., Vol. 5R.7, Gates and Thomas Reply Aff. at Schedule 3-

Michigan Commission, Ameritech argues that there should be no disagreement among the parties on what standards should be used to judge the performance of OSS functions because such standards are specifically addressed in its interconnection agreements.[537] Finally, Ameritech asserts that the performance measurements required by its interconnection agreements do not represent all of the performance information that Ameritech is currently providing to competing carriers. In this regard, Ameritech states that it has voluntarily and publicly committed to reporting several other measurements of performance to ensure that requesting carriers can fairly monitor Ameritech's performance.[538]

209. Like the Department of Justice and the Michigan Commission, we find that the evidence in the record regarding Ameritech's provision of access to OSS functions is plagued by unclear data and conflicting interpretations. As an initial matter, we agree with the Department of Justice and the Michigan Commission that many of the performance measurements that Ameritech has submitted in its application are not clearly explained in order to make them meaningful to us and commenting parties. We find that this is at least partially caused by the ambiguity in several of the explanations provided by Ameritech to describe the data included in its performance measures. For example, as noted by the Department of Justice, "Ameritech's definition of due dates not met, relating 'the number of missed appointments to the total number of appointments in the reporting period' does not reveal that the measure includes only installations completed past due and excludes orders which are pending past due."[539] As a result, we are unable to conclude from the data whether Ameritech is providing nondiscriminatory access to OSS functions. Clear and precise performance measurements are critical to ensuring that competing carriers are receiving the quality of access to which they are entitled.[540] Therefore, we agree with the Department of Justice and the Michigan Commission that the meaning and scope of the performance measurements submitted by Ameritech to demonstrate compliance with the statutory

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8. Ameritech also asserts that it will provide a special analysis comparing retail repair performance against unbundled loop repair performance. *Id.*, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 23.

536 For instance, Ameritech states that it is developing a means of reporting billing accuracy information which should be available in the third quarter of 1997. Ameritech Reply Comments, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 26.

537 *Id.*, Vol. 5R.18, Mickens Reply Aff. at 5-6.

538 *Id.*, Vol. 5R.18, Mickens Reply Aff. at Schedule 1. *See id.*, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at Schedule 1.

539 Department of Justice Evaluation, Appendix A at 30.

540 We also note that Ameritech includes in its reply comments a document it had jointly prepared with AT&T, for submission to the Department of Justice, that provided a more detailed explanation of Ameritech's performance measures and agreement on the data contained within. *See* Ameritech Reply Comments, Vol. 5R.7, Gates and Thomas Reply Aff. at Exhibit 8.

standard must be clearly explained before we can properly evaluate whether the empirical data substantiate Ameritech's claim.

210. We also conclude that Ameritech's refusal to provide particular data solely on the basis that it does not currently collect that information in connection with its retail operations is unpersuasive. The empirical evidence necessary to demonstrate that Ameritech is providing nondiscriminatory access to OSS functions may not necessarily be the same as those performance measurements that Ameritech currently provides to its retail operations. For example, as discussed above, we believe that data measuring average installation intervals are necessary to demonstrate parity for those OSS functions in which timeliness is critical, even though Ameritech represents that it does not currently measure such performance for its own retail operations.[541] While the performance measurements that Ameritech has historically tracked for its retail operations provide some support for its claim that it is providing nondiscriminatory access to OSS functions to competing carriers, such measurements alone will not provide us with sufficient information to decide whether the statutory standard has been met. To find otherwise, would permit Ameritech to limit the scope of our inquiry to an examination of the information that Ameritech believes is relevant, rather than what we deem is both relevant and necessary.

211. The Commission must be satisfied that the performance measures that Ameritech relies on in support of its section 271 application actually measure performance in a manner that shows whether the access provided to OSS functions is nondiscriminatory. Otherwise, discriminatory conduct may be masked or go undiscovered.[542] Therefore, we must find that both the quantity and quality of the evidence is sufficient in order to make a determination of whether Ameritech is in compliance with its duty to provide nondiscriminatory access to OSS functions, as required by section 271.

212. We therefore conclude that, in order to provide us with the appropriate empirical evidence upon which we could determine whether Ameritech is providing nondiscriminatory access to OSS functions, Ameritech should provide, as part of a subsequent section 271 application, the following performance data, in addition to the data that it provided in this application: (1) average installation intervals for resale;[543] (2) average installation intervals for

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[541] The necessity for average installation intervals in the context of the OSS functions for the ordering and provisioning of resale services is discussed more fully above in Section VI.C.5.c.(1).

[542] For example, Ameritech provides many performance measures in the form of intervals met, which can mask discrimination within the interval target. *See supra* Section VI.C.5.c.

[543] The necessity for average installation intervals in the context of the OSS functions for the ordering and provisioning of resale services is discussed more fully above in Section VI.C.5.c.(1).

loops; (3) comparative performance information for unbundled network elements;[544] (4) service order accuracy and percent flow through; (5) held orders and provisioning accuracy; (6) bill quality and accuracy; and (7) repeat trouble reports for unbundled network elements.[545] In addition, Ameritech should ensure that its performance measurements are clearly defined, permit comparisons with Ameritech's retail operations, and are sufficiently disaggregated to permit meaningful comparisons.[546] We recognize that such data alone may not be wholly dispositive, and that parties may have potentially conflicting interpretations of the data. We find, however, that it is essential for us, as both fact-finder and decision-maker, to have the empirical evidence necessary to make a reasoned and informed decision. We believe that Ameritech, or any applicant under section 271, has ample opportunity to present, at the time of its application, additional measurements or explanatory information to correct any perceived misperceptions that such data may arguably create.

213. Section 271 requires the Commission to consider the written evaluation of the state commission and to give substantial weight to the written evaluation of the Department of Justice.[547] We find it significant that both the Michigan Commission and the Department of Justice have concluded that Ameritech should present additional and improved performance measurements before they can decide whether Ameritech has satisfied its obligation to provide nondiscriminatory access to OSS functions. Ameritech has not persuaded us to diverge from the findings made by the Department of Justice and the Michigan Commission.

7. Other Concerns

214. The Commission has a number of other concerns relating to the OSS functions provided by Ameritech to competing carriers. As discussed above, one of our major concerns regards the readiness of OSS functions for the provision of combinations of unbundled network elements.[548] We highlight a number of other issues below to provide guidance to Ameritech before it files another section 271 application.

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[544] For those performance measures for unbundled network elements that can be compared to Ameritech's retail operations, such as trouble report rate, receipt to restore, and out of service over 24 hours, Ameritech's performance report should permit a direct comparison between Ameritech and competing carriers.

[545] As noted above at note 346, the Commission has initiated a proceeding in response to a petition filed by LCI requesting the Commission to adopt performance standards and reporting requirements for OSS functions provided by incumbent LECs to competing carriers. *See Performance Standards Public Notice*.

[546] *See* Michigan Commission Consultation at 31-32.

[547] *See* 47 U.S.C. §§ 271(d)(2)(A), (B).

[548] *See supra* Section VI.C.5.b.

215. In general, we believe that Ameritech's publication of its electronic service ordering guide ("ESOG"), coupled with its cooperative training and consultation with competing carriers on their use of Ameritech's offered interfaces, comports with the spirit of Ameritech's obligations.[549] The Commission believes that Ameritech's approach to updating information in its ESOG and adding supplemental sources of information (*i.e.*, Ameritech's world wide web site) is appropriate as systems are upgraded and refined. We are troubled, however, by the apparent emphasis on providing information and support for OSS functions that support resale as compared to that offered for the use of network elements.[550] Ameritech must offer sufficient access to all methods of entry envisioned by Congress in the 1996 Act, including network elements and resale services.

216. We agree with the Department of Justice that, as a general matter, third-party review of a BOC's OSS functions is relevant, although not required, to determine whether its systems are operationally ready.[551] In particular, an independent evaluation of OSS functions from an objective third-party may provide additional support demonstrating the operational readiness of those OSS functions that have otherwise only undergone internal testing by the incumbent. The persuasiveness of a third-party review is dependent, however, on the conditions and scope of the review itself.[552] We emphasize that third-party reviews should encompass the entire obligation of the incumbent LEC to provide nondiscriminatory access, and, where applicable, should consider the ability of actual competing carriers in the market to conduct business utilizing the incumbent's OSS access.[553]

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549 Ameritech Application, Vol. 2.13, Rogers Aff. at 5-9. *See* Michigan Commission Consultation at 17 (Ameritech's provision of user guides appears to be a reasonable interpretation of the Act's requirements). *But see* ALTS Comments at 7-8 (disputing Ameritech's, and other BOCs', assertions that the obligation to provide access to OSS functions can be met through unilateral implementation of an interface without mutual agreement with competing carriers over whether the interface meets competing carriers' needs).

550 As discussed above in Section VI.C.5.b., we note that Ameritech has only begun to test provisioning combinations of network elements. The Michigan Commission notes that far more of the functions and subfunctions of Ameritech's interfaces are currently being utilized by resellers than by purchasers of unbundled loops. Michigan Commission Consultation at 17. Sprint notes that all of the specifications that have been provided to Sprint have dealt with total service resale, not the ordering or provisioning of unbundled elements. Sprint Comments, Reeves Aff. at 15.

551 Department of Justice SBC's Oklahoma Evaluation, Appendix A at 83-84.

552 Department of Justice Evaluation at Appendix A at 7 n.11.

553 Andersen Consulting, as part of its review, did not interview any of the competing carriers using the ordering and provisioning interfaces and operating in the Michigan market. *See*, *e.g.*, Illinois Commerce Commission Investigation, Concerning Illinois Bell Telephone Company Compliance with Section 271(c) of the Telecommunications Act of 1996, Docket No. 96-0404, Transcript of Proceedings at 1777 (May 6, 1997).

217. The Commission previously has stated that it did not consider national standards a prerequisite to the provision of access to any particular OSS function.[554] The Commission continues to believe, however, that the use of industry standards is the most appropriate solution to meet the needs of a competitive local exchange market.[555] We are encouraged by Ameritech's commitment to transition to recently agreed-upon industry standards in a timely manner.[556] We will continue to monitor the progress of industry groups in achieving agreement on standards for the provision of OSS access, and will, if necessary, consider appropriate additional Commission action in the future.[557]

218. With regard to Ameritech's OSS pre-ordering functions, we note that industry standard setting bodies expect to arrive at initial agreement on standards by the end of 1997.[558] We believe that the record in this application raises general concerns about the capacity of Ameritech's interface for pre-ordering. We note that Ameritech represents in its reply that it made changes to its pre-ordering interface during the pendency of its application to increase its capacity.[559] We expect that, in any future application, Ameritech will present clear evidence supporting its capacity claims for its pre-ordering interface, as of the date of filing.

219. We base our decision on this application, in part, on our finding that Ameritech has not demonstrated that it is providing nondiscriminatory access for the ordering of resale services. Although not reaching other specific ordering function issues, we note that there is conflicting evidence in the record concerning the access to OSS functions that Ameritech provides to competing carriers for the ordering of unbundled loops.[560] Our concerns are focused on the level of manual processing involved in the access service request (ASR) process utilized by Ameritech, and the need for competing carriers to utilize three separate interfaces when moving a customer

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554 *Local Competition Second Reconsideration Order*, 11 FCC Rcd at 19744-45.

555 *Local Competition Order*, 11 FCC Rcd at 15768.

556 Ameritech Application, Vol. 2.13, Rogers Aff. at 7-8 (Ameritech commits to implementing the Telecommunications Industry Forum (TCIF) Electronic Data Interchange Issue 7.0 standard for local service within 120 days after TCIF adopts it. Ameritech has also committed to adopt the use of EDI for the ordering of loops no later than January 1, 1998).

557 As noted above at note 346, the Commission has initiated a proceeding in response to a petition filed by LCI requesting the Commission to adopt performance standards and reporting requirements for OSS functions provided by incumbent LECs to competing carriers. *See Performance Standards Public Notice*.

558 *See* Transcript of Forum on Operations Support Systems for Unbundled Network Elements and Resale Services in Docket No 96-98 (May 28-29, 1997), Ordering and Billing Forum Attachment, "Overview: Industry Guidelines for Operations Support Systems Functions."

559 Ameritech Reply Comments, Vol. 5R.24, Rogers Reply Aff. at 17.

560 *See, e.g.*, Brooks Comments at 17-21; Ameritech Reply Comments, Vol. 5R.16, Mickens Reply Aff. at 34-40.

with existing Ameritech service to a competing carrier's service utilizing an existing Ameritech unbundled loop.[561] We recognize that Ameritech has made a public commitment to migrate to the industry-adopted standard for ordering loops via EDI.[562] Ameritech, in its reply, has submitted evidence indicating that it has begun meeting with interested competing carriers to plan the transition to the industry standard.[563] We believe that this is a proper approach for Ameritech to take, as the development and adoption of industry standards continues. We expect Ameritech to migrate to the EDI interface as expeditiously as possible, given the apparent limitations associated with Ameritech's current use of the ASR interface. We also expect that, in any future application, Ameritech would provide a detailed explanation of the actions it has undertaken, as of the date of filing, to transition to the EDI standard.

220. For repair and maintenance functions, Ameritech provides competing carriers with access to its T1M1 interface, and in addition, it provides graphical user interface (GUI) software as an alternative tool to access the T1M1 interface. The Department of Justice states that it believes incumbent LECs have an obligation to provide smaller competitors with an alternative to expensive interfaces such as T1M1.[564] We generally agree with the Department of Justice that incumbent LECs have an obligation to provide interfaces that allow competing carriers of all sizes a meaningful opportunity to compete in the local exchange market.[565] We do believe Congress intended an incumbent's nondiscriminatory obligation to apply to smaller carriers as well as larger carriers.[566] Nevertheless, we find that an incumbent LEC does not have an affirmative obligation to provide multiple interfaces to competing carriers if it is able to demonstrate that its interface is economically efficient to use by both larger and smaller entrants. Although we do not make a specific determination regarding Ameritech's interface for repair and maintenance functions, we would expect Ameritech to submit, in any future application, detailed evidence regarding the operational readiness of both Ameritech's T1M1 interface and the graphical user interface (GUI)

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561 Department of Justice Evaluation, Appendix A at A-20 to A-21 ("Finally, the Department shares the concerns raised by many parties regarding Ameritech's fragmented approach to automating the loop ordering and provisioning process via a combination of ASR (loop order), EDI (number portability), and facsimile (disconnect) mechanisms"); Brooks Comments at 19.

562 *See* Ameritech Reply Comments, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 11-12; *see also supra* note 556.

563 Ameritech Reply Comments, Vol. 5R.24, Rogers Reply Aff. at 13-15, Attachment 2.

564 Department of Justice Evaluation, Appendix A at A-22. The Department of Justice cites testimony by USN, a smaller competing carrier, that the T1M1 interface is too expensive to justify for its operations. *See* Michigan Commission Transcript of OSS Hearing, May 28, 1997 at 154-55.

565 Department of Justice Evaluation, Appendix A at A-22.

566 The Commission would have concerns that an interface could potentially be discriminatory to smaller businesses' ability to enter the local exchange market if building the interface required significant expenditures by competing carriers in order to use.

tool that Ameritech represents it provides as an alternative method of access to the T1M1 interface.

221. Finally, Ameritech commits, in its reply, to implementing future changes to its billing systems that will provide competing carriers with more timely and accurate billing data. As discussed above, Ameritech represents that it will also add capabilities to measure billing accuracy in the near future. The evidence in the record indicates that, especially for the delivery of wholesale bills, Ameritech's performance appears to have been deficient. Ameritech claims to have resolved this problem in June, during the pendency of this application.[567] We would expect to review carefully evidence regarding actual improvements made to Ameritech's billing performance in a future application. Because competing carriers that use the incumbent's resale services and unbundled network elements must rely on the incumbent LEC for billing and usage information, the incumbent's obligation to provide timely and accurate information is particularly important to a competing carrier's ability to serve its customers and compete effectively. We expect that, in its next application, Ameritech will provide detailed evidence to support its claim that it is providing billing on terms and conditions that are nondiscriminatory, just and reasonable. Finally, we would expect Ameritech to provide data that compare its performance in delivering daily usage information for customer billing to both Ameritech's retail operation and competing carriers.

D. Interconnection in Accordance with Sections 251(c)(2) and 252(d)(1)

1. Summary

222. Section 271(c)(2)(B)(i) of the Act, item (i) of the competitive checklist, requires a section 271 applicant to provide "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)."[568] Section 251(c)(2) imposes upon incumbent LECs "the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access."[569] Such interconnection must be: (1) provided "at any technically feasible point within the carrier's network;"[570] (2) "at least equal in quality to that provided by the local exchange carrier to itself or . . . [to] any other party to which the carrier

567 Ameritech Reply Comments, Vol. 5R.7, Gates and Thomas Reply Aff. at 31, and Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 14; Ameritech Application, Vol. 2.10, Mickens Aff. at 48.

568 47 U.S.C. § 271(c)(2)(B)(i).

569 *Id.* § 251(c)(2)(A).

570 *Id.* § 251(c)(2)(B).

provides interconnection;"[571] and (3) provided on rates, terms, and conditions that are "just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of [section 251] . . . and section 252."[572]

223. In our *Local Competition Order*, we concluded "that the equal in quality standard of section 251(c)(2)(C) requires an incumbent LEC to provide interconnection between its network and that of a requesting carrier that is at least indistinguishable from that which the incumbent provides itself, a subsidiary, or any other party." We stated that an incumbent LEC must design its "interconnection facilities to meet the same technical criteria and service standards, such as probability of blocking in peak hours and transmission standards, that are used within [its] . . . own network[]." Moreover, we clarified that the equal-in-quality obligation is not limited to quality perceived by end users.[573] In *Iowa Utilities Board v. FCC*, the court generally upheld the Commission's decision regarding incumbent LECs' obligations to provide access to network elements on an unbundled basis.[574] Although the court rejected the Commission's rules requiring incumbent LECs to provide superior interconnection upon request, the court recognized that the statute requires incumbent LECs to provide interconnection that is equal in quality to the interconnection they provide themselves.[575]

224. Based on our review of the record on this issue, we conclude that Ameritech has not established by a preponderance of the evidence that it is providing interconnection in accordance with the requirements of the Act. First, we find that the data Ameritech submitted provide us with an inadequate basis to compare the quality of the interconnection that Ameritech provides to other carriers to that which Ameritech provides itself. For example, Ameritech's data contain insufficient information regarding the actual level of trunk blockage and no information about the rate of call completion. Next, we conclude that, even if we were to evaluate the quality of interconnection that Ameritech provides based solely on the data that Ameritech submitted, the difference between the blocking rates on trunks that interconnect competing LECs' networks with Ameritech's network and the blocking rates on Ameritech's retail trunks suggests that Ameritech's interconnection facilities do not meet the technical criteria and service standards that Ameritech uses within its own network, contrary to the requirements imposed by 251(c)(2)(C).[576] Finally,

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571 *Id.* § 251(c)(2)(C).

572 *Id.* § 251(c)(2)(D). Section 252(d)(1) states that "the just and reasonable rate for the interconnection of facilities and equipment . . . shall be . . . based on the cost . . . of providing the interconnection . . . and . . . nondiscriminatory, and . . . may include a reasonable profit." *Id.* § 252(d)(1).

573 *Local Competition Order*, 11 FCC Rcd at 15614-15.

574 *Iowa Utils. Bd.*, 1997 WL 403401, at *27-28.

575 *Id.* at *23-24.

576 *See* 47 U.S.C. § 251(c)(2)(C); Department of Justice Evaluation at 26 n.35.

we question whether Ameritech is providing interconnection arrangements on nondiscriminatory terms and conditions, as required pursuant to section 251(c)(2)(D).[577]

2. Evidence on the Record

225. Ameritech exchanges traffic with Brooks Fiber, MFS WorldCom, and TCG -- the three carriers on which Ameritech relies to demonstrate compliance with this checklist item -- through end office interconnection (EOI) trunks, which are the trunks that connect Ameritech end offices and tandems with competing LECs' networks.[578] In its application and accompanying affidavits, Ameritech provides extensive narrative evidence concerning its EOI trunk offerings and the associated wholesale support processes, as well as its recommendations regarding trunk provisioning and engineering.[579]

226. Ameritech asserts that it measures the quality of its interconnection arrangements with other carriers in the same manner that it evaluates the quality of interoffice trunking in its own network. In particular, Ameritech states that it measures: installation intervals for new trunk groups, the time required to restore trunk outages, and trunk blockage.[580] Ameritech provides little general explanation regarding the trunk blocking data that it submitted with its application.[581] Ameritech indicates that EOI trunk blocking data measure the blocking on trunk groups carrying traffic from an Ameritech end office or tandem to a competing LEC's end office.[582] Ameritech reports the data separately for trunk groups designated for exchange access traffic (alternately referred to as interLATA traffic) and for trunk groups designated for local and intraLATA toll traffic. Ameritech reports blockage when more than 2 percent of the traffic routed to a particular trunk group is blocked. To calculate and report trunk blockage on a percentage basis, Ameritech divides the number of trunk groups blocking more than 2 percent of the traffic, measured during

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577 *See* 47 U.S.C. § 251(c)(2)(D).

578 Ameritech states that it provides interconnection at local and tandem switches, as well as virtual collocation in a number of wire centers, pursuant to approved agreements with those competing LECs. Moreover, Ameritech contends that it provides interconnection at any "technically feasible point" on Ameritech's network pursuant to approved agreements with AT&T and Sprint. Ameritech Application at 37, Vol. 2.3, Edwards Aff. at 9-21.

579 *See, e.g., id.*, Vol. 2.8, Mayer Aff. at 14-18, and Vol. 2.10, Mickens Aff. at 11-12.

580 *Id.*, Vol. 2.10, Mickens Aff. at 11-12. Ameritech asserts that its installation intervals for provisioning EOI trunks reflect Ameritech's actual experience in provisioning network trunking arrangements to itself and are comparable to intervals established for similar access service requests. *Id.* at 10.

581 Ameritech included basic information regarding the data it submitted upon the staff's request that the information no longer be considered proprietary. Letter from Lynn S. Starr, Ameritech, to William F. Caton, Acting Secretary, Federal Communications Commission (July 31, 1997).

582 *See* Ameritech Reply Comments, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff., Attachment 6 (section 2, page 4); Ameritech Application, Vol. 2.8, Mayer Aff. at 7-8 (providing background on EOI trunks).

the busy hour of the day (*i.e.*, the hour when traffic is heaviest), by the total number of trunk groups in the reporting period.[583] Ameritech compares the EOI trunk blocking percentages to the percentage of Ameritech Retail trunks -- presumably referring to the transport links within Ameritech's network -- that block more than 2 percent of the traffic. Ameritech does not provide separate data for Ameritech Retail's interLATA and intraLATA trunks, but rather provides a single "Ameritech Retail" blocking rate.[584]

227. In its original filing, Ameritech provides some discussion regarding EOI trunk blocking rates, as well as some proprietary trunk blocking data, in a supporting affidavit.[585] The publicly-filed information included in that affidavit report trunk blocking rates on a region-wide basis. Ameritech reports that, for a two-month period between March 1 and April 30, 1997, trunk blocking occurred in 9.4 percent of the EOI trunk groups used to transport interLATA traffic and 6.6 percent of the EOI trunk groups used to transport local and intraLATA traffic in Ameritech's region.[586] In other words, Ameritech claims that, during the reporting period, 9.4 percent of the EOI interLATA traffic trunk groups and 6.6 percent of the EOI local and intraLATA toll traffic trunk groups in Ameritech's five-state region experienced incidents where more than 2 percent of the calls routed to those trunk groups were blocked during the busy hour of the day. The comparable blocking rate for Ameritech Retail, Ameritech's retail sales division, was 1.5 percent during that time period.[587]

228. Brooks Fiber and TCG assert in their comments in this proceeding that calls to their customers that originate on Ameritech's network are frequently blocked. The competing LECs indicate that they continue to receive complaints from customers regarding blocked incoming traffic in both Michigan and Illinois.[588] Brooks Fiber contends that Ameritech has failed to monitor existing EOI trunks that connect Brooks Fiber's end offices with Ameritech tandem switches and to coordinate the installation of additional trunks as needed to ensure that the interconnection facilities between their networks are adequate to handle the volume of traffic. Specifically, Brooks Fiber states that, although Ameritech installed additional EOI trunks to alleviate the network blockage, the trunks were improperly installed, resulting in the total failure

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583 Ameritech Reply Comments, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 38, Attachment 6 (section 3, page 1).

584 *See* Ameritech Reply Comments at 10-12, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 36-55, Attachment 6 (section 2, pages 2-3), and Vol. 5R.18, Mickens Reply Aff. at 43-45.

585 Ameritech Application, Vol. 2.10, Mickens Aff. at 25-26.

586 As stated above, Ameritech reports network blockage above a 2 percent threshold, *i.e.*, when more than 2 percent of the traffic is blocked. In the proprietary data filed with Ameritech's application, Ameritech reports separately the trunk blocking percentages for each month. *See id.*, Vol. 2.10, Mickens Aff., Schedule 17.

587 The comparable rate is the rate for blockage on Ameritech's own interoffice trunking, measured during the same time period.

588 *See* Brooks Fiber Comments at 28-29; TCG Comments at 4-8, Exhibit A at 2-4.

of Ameritech's intraLATA toll trunks to Brooks Fiber and, ultimately, in the loss of an important Brooks Fiber customer.[589] TCG further alleges that network blockage occurs within Ameritech's network. TCG suggests that traffic to TCG customers is blocked on trunk groups connecting Ameritech's end offices to Ameritech's tandem switches, so that traffic is blocked before it reaches an Ameritech tandem or the interconnection point between that tandem and TCG's network.[590] Citing the record and the interconnection performance data that Ameritech submitted in its application in particular, the Department of Justice concludes that Ameritech has failed to demonstrate that it has satisfied this checklist requirement.[591] Moreover, the Department of Justice concludes that the evidence suggests that Ameritech has not provided competing LECs with sufficient ability to control EOI trunk blockage.[592]

229. The Michigan Commission concludes that Ameritech "appears to comply" with this checklist item because it provides interconnection and collocation to Brooks, MFS WorldCom, and TCG pursuant to their agreements. In reaching this conclusion, the Michigan Commission notes competing LECs' allegations, raised in the state proceeding, regarding network blockage. The Michigan Commission, however, does not analyze the merits of, or make factual findings with respect to, the competing LECs' allegations. Nor does it assess whether Ameritech is providing competing LECs interconnection equal in quality to that which it provides itself.[593]

230. In its reply comments and accompanying affidavits, Ameritech contends that the actions, omissions, and network architecture choices made by competing LECs themselves, and by TCG in particular, have created existing EOI network blockage problems.[594] Ameritech introduces into the public record trunk blocking data for May 1997 that were not included in its original filing.[595] Moreover, Ameritech revises its originally reported data. Ameritech states in its reply affidavits that an audit of the EOI trunk blocking data submitted in its original filing, which was conducted "[a]s a result of Department of Justice's expressed concerns about EOI trunk group blockage," revealed that the blocking rates on EOI intraLATA trunking groups for the months of March and April 1997 were higher than Ameritech originally reported in its application. In particular, Ameritech reports blockage of 10.7 percent region-wide in March (instead of 9.4

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589 Brooks Fiber Comments at 28-29.

590 TCG Comments at 4.

591 Department of Justice Evaluation at 24.

592 *Id.*, Appendix A at A-31.

593 Michigan Commission Consultation at 11-13.

594 Ameritech Reply Comments at 12, and Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 49-51.

595 *Id.*, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 37-38, Attachment 6, and Vol. 5R.18, Mickens Reply Aff. at 43-45, and Schedule 8.

percent, as Ameritech originally reported on a proprietary basis in its application) and 6.2 percent region-wide in April (instead of 4.4 percent, as originally reported on a proprietary basis).[596] In addition, Ameritech introduces Michigan-specific interconnection data for March, April, and May of 1997 into the public record of this proceeding for the first time in its reply comments and accompanying affidavits.[597]

231. The Michigan-specific data indicate that none of the EOI trunk groups used to transport interLATA traffic in Michigan blocked more than 2 percent of calls during the busy hour, for the three-month period from March 1 to May 31, 1997.[598] The data show, however, that, in March 1997, 7.9 percent of the EOI trunk groups used to transport local and intraLATA traffic in Michigan blocked more than 2 percent of the calls routed to the group (as compared to .4 percent of Ameritech Retail trunks in Michigan). The Michigan figure for April was 4.5 percent (as compared to 1.2 percent of Ameritech Retail trunks in Michigan) and for May was 0.0 percent (as compared to 0.6 percent of Ameritech Retail trunks in Michigan).[599]

3. Inadequacy of Data Submitted

232. Based on its review of Ameritech's publicly-filed information regarding network blockage rates, the Department of Justice stated that it could not conclude that Ameritech satisfied the checklist standard for interconnection.[600] We agree. We find that Ameritech has provided the Commission with inadequate data by which to compare the quality of the interconnection that Ameritech provides to others to that which Ameritech provides itself. Ameritech has supplied trunk blocking data in a way that neither the Commission nor Ameritech's competitors can validate it or evaluate its significance, as Ameritech's own analysis indicates.[601]

233. As Ameritech explains, a reported figure for EOI interLATA final trunk group blocking of 9.4 percent indicates that on 9.4 percent of the interLATA trunk groups during the busy hour of the day, more than 2 percent of the calls that travelled over that trunk group were

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596 In its original filing, Ameritech included in the public record only the average blocking rate for the two-month period. Ameritech Application, Vol. 2.10, Mickens Aff. at 25-26. Ameritech has withdrawn its claim of confidentiality for the data cited in the text. *See* Letter from Lynn S. Starr, Ameritech, to William F. Caton, Acting Secretary, Federal Communications Commission (July 31, 1997).

597 *See* Ameritech Reply Comments at 11-12, and Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 37-38.

598 Ameritech Reply Comments at 10-12, and Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 38-39.

599 *Id.*, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 37-39, and Attachment 6.

600 Department of Justice Evaluation at 26-27; *see also* Ameritech Application, Vol. 2.10, Mickens Aff. at 25-26.

601 *See* TCG July 16 *Ex Parte* at 2-4.

blocked, but that report does not specify either the actual rate of blockage (*i.e.*, whether 3 percent or 30 percent of the calls were blocked) or the absolute number of calls that were blocked.[602] Ameritech contends that the EOI trunk blockage figures overstate the amount of blockage that competing LECs experience. Ameritech asserts that, due to the low number of interLATA trunks for which Ameritech reports, "an isolated and intermittent problem on one or two groups can have a wildly disproportionate effect" on the region-wide blockage figures.[603] We agree with Ameritech that the trunk blocking data may not accurately reflect the impact of trunk group blockage, but we are unconvinced that the figures overstate the amount of blockage. Because the number of trunks in a trunk group may vary by trunk group, the Commission cannot evaluate the impact of the reported trunk blockage without knowing the number of trunks in the particular blocked trunk groups.[604] Clearly, blockage on a large trunk group serving a major metropolitan area could result in a greater number of blocked calls than would blockage on a smaller trunk group. In addition, without more information, the Commission cannot determine the magnitude of the reported blockage. Because Ameritech's data only show the percentage of trunk groups in which more than 2 percent of the calls were blocked during the busy hour, the Commission cannot ascertain whether these trunk groups blocked closer to 2.1 percent of the calls or 50 percent of the calls during the system busy hour.[605]

234. Moreover, Ameritech acknowledges that its reports of the frequency with which call blocking in a particular trunk group exceeds 2 percent do not indicate the actual percentage or number of calls that are not completed.[606] Therefore, there is no evidence in the record regarding the extent to which blockage on EOI trunk groups delivering traffic to competing LECs has resulted in uncompleted calls. Even if a call routed to a particular trunk group is blocked, whether or not a call is ultimately completed depends in part on network architecture. A blocked

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602 Ameritech Reply Comments, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 38. As discussed below, the fact that a call was blocked does not necessarily mean that it was not completed, because some calls may be re-routed.

603 *Id.*, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 38-39.

604 *See* TCG July 16 *Ex Parte* at 2-3.

605 *See id.* at 3. We note that TCG contends that Ameritech appears to aggregate local and intraLATA calls and thereby "dilut[e] the nature of the local call blocking problem." In addition, TCG states that "since half the trunks run from TCG to Ameritech, and TCG has not experienced any significant blocking within its own network, half of the trunk groups in the sample will show no blocking, artificially inflating Ameritech's performance." *Id.* It is not clear from Ameritech's data what the effect of aggregating local and intraLATA data is on EOI trunk blocking rates or whether the Ameritech EOI blocking rates account for blockage on trunks carrying traffic from TCG to Ameritech. Therefore, we cannot evaluate the merits of these contentions. TCG further asserts that, because Ameritech only measures trunk blockage during the busy hour, we cannot ascertain the extent to which blocking occurs outside that time period. TCG implicitly suggests that such information would aid the Commission in evaluating the magnitude of the blockage problem and in determining whether Ameritech is providing interconnection equal in quality to that which it provides itself. *See id.* We believe that such information could be useful.

606 Ameritech Reply Comments, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 40, and Vol. 5R.18, Mickens Reply Aff. at 45.

call may be re-routed and completed over another trunk group, if the network architecture is redundant.

235. Ameritech contends that the local and intraLATA EOI trunk group blockages reflected in the EOI trunk blocking data did not uniformly result in uncompleted calls, because Ameritech instituted network management re-routes for these EOI trunks.[607] We note that Ameritech presents this argument for the first time in its reply comments.[608] Moreover, Ameritech provides evidence only regarding Illinois to support this contention.[609] In addition, Ameritech does not even indicate the point at which it began to engage in such re-routing or the percentage of calls that are successfully completed through such re-routing. Indeed, Ameritech has not submitted any data by which the Commission could compare the call completion rates for calls originating from Ameritech customers and terminating on Ameritech's or competing LECs' networks, respectively. Lacking such data, we are unconvinced by Ameritech's unsubstantiated assertion that, "even if a call is blocked, that does not mean that the customer was prevented from ultimately completing a call" or that the competing LEC lost the associated revenue, because "in most instances, the originating caller receives a `fast busy signal' when placing the call, and then places and completes a call shortly thereafter."[610] As stated above, there is evidence in the record indicating that the customers of competing LECs have reported call blocking of in-bound calls, suggesting that the scenario that Ameritech describes has created unfavorable marketplace perceptions regarding the service that competing LECs provide.[611] We conclude that call completion data would be useful in evaluating whether a petitioning BOC provides interconnection at parity in accordance with the statutory requirements.

4. Evaluation of EOI Trunk Blocking Data

236. Even if we were to assume that the data that Ameritech submitted is a sufficient measure of whether Ameritech provides interconnection equal in quality to that which it provides itself, the difference between the blocking rates on trunks that interconnect competing LECs' networks with Ameritech's network and the blocking rates on Ameritech's retail trunks suggests that Ameritech's interconnection facilities do not meet the technical criteria and service standards that Ameritech uses within its own network.

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607 Ameritech Reply Comments at 12, and Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 40.

608 Indeed, several parties move to strike this evidence. *See* AT&T Motion to Strike, Exhibit A; Joint Motion to Strike, Proposed Order. *Compare* Ameritech Michigan's Response to Motions to Strike, Appendix A at 6-7.

609 Ameritech Reply Comments at 12, and Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 40.

610 *See id.*, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 38.

611 *See* Brooks Fiber Comments at 28-29; TCG Comments at 4-8.

237. We note that several parties have urged the Commission to strike the May trunk blocking data from the record.[612] We reiterate that, to preserve the integrity of the statutory 90-day review period, we will not consider data that a BOC submits after filing its section 271 application that is not directly responsive to arguments or factual evidence submitted by other parties.[613] Accordingly, because no party submitted May trunk blocking data or otherwise raised arguments concerning Ameritech's record of trunk blocking that month, we will not consider Ameritech's May data, which reflect performance for a time period after Ameritech submitted its application.

238. Ameritech contends that, when evaluating Ameritech's interconnection performance, the Department of Justice improperly focused on consolidated data for the five-state Ameritech region, rather than examining Michigan data. Ameritech asserts that, "[u]nlike Ameritech's regional operational support systems, it is not reasonable to assume that if an EOI trunking problem exists in another state, it is fair to assume that the problem exists in Michigan."[614] We note that Ameritech itself not only relies on region-wide interconnection data in its original filing, but also continues to cite region-wide data in its reply comments and accompanying affidavits to demonstrate its performance.[615]

239. Moreover, Ameritech's revision of its originally-submitted data in its reply comments calls into question the accuracy of the data that Ameritech has supplied. We emphasize that a petitioning BOC has an obligation to ensure that data submitted in connection with its application are correct at the time of filing to ensure that parties have an adequate opportunity to analyze and respond to the relevant information. In the instant case, however, the changes in the reported blocking rate percentages buttress the Commission's basic conclusion that Ameritech has not demonstrated compliance with this checklist item.

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612 AT&T Motion to Strike at 6-7; Joint Motion to Strike at 6. *Compare* Ameritech Michigan's Response to Motions to Strike, Appendix A at 6-7 (contending that data respond to the Department of Justice and TCG's arguments regarding EOI trunk blockage).

613 *See supra* Section IV.B.1.

614 Ameritech Reply Comments at 11-12, and Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 37-38 (quotation omitted).

615 We are concerned that Ameritech claimed the Michigan-specific data are proprietary in its initial filing, but submitted the data publicly on reply. This practice undermines the ability of the Michigan Commission and the Department of Justice to effectively consult with the Commission, hampers other parties in filing useful comments, and undermines our ability to issue a decision in the short 90-day timeframe. Moreover, given the extent of the record and the short statutory deadline for reviewing 271 applications, the Commission lacks the resources to engage in the sort of protracted analysis required to make sense of Ameritech's interconnection performance data. We note, for instance, that Ameritech describes the May network blockage statistics as follows: "2.3% in the five-state region and 0.0% in Michigan (compared to 1.0% for Ameritech retail)." Only on further examination does the reader discern that the 1.0 percent figure for Ameritech's retail trunks is calculated on a region-wide, rather than a Michigan-specific basis. Ameritech Reply Comments, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 39-40. As part of its burden of proof, a petitioning BOC must clearly establish the relevance and meaning of the data it submits. *See supra* Section IV.B.1.

240. Regardless of whether we consider region-wide or Michigan data, we find the Ameritech data indicate that trunk blocking rates on Ameritech's EOI trunking groups carrying local and intraLATA toll traffic have been significantly higher than blocking rates for Ameritech's interoffice trunking groups that carry traffic destined for Ameritech retail customers. The region-wide data indicate that, in March 1997, the percentage of EOI trunks carrying local and intraLATA toll traffic that experienced blockage greater than 2 percent was 10.7 percent, as compared to 1.1 percent of Ameritech Retail trunks. In April 1997, the EOI blocking rate for local and intraLATA toll trunks was 6.2 percent, as compared to 1.8 percent for Ameritech Retail. The Michigan data indicate that the percentage of trunks carrying local and intraLATA toll traffic that experienced blockage greater than 2 percent was 7.9 percent in March 1997, as compared to .4 percent of Ameritech Retail trunks, and 4.5 percent in April 1997, as compared to 1.2 percent of Ameritech retail trunks. Whether we compare the region-wide blocking rates for EOI trunks carrying local and intraLATA toll traffic to the region-wide Ameritech Retail figures, or the Michigan-specific blocking rates for EOI trunks to the Michigan-specific Ameritech Retail figures, we conclude there are substantial differentials. These differentials suggest that Ameritech's interconnection facilities do not meet the technical criteria and service standards that Ameritech uses within its own network.[616] Moreover, for the reasons discussed below, we find unpersuasive Ameritech's justifications for the higher blocking rates on EOI trunks.

241. In its initial filing, Ameritech argues that a disparity of five to eight percentage points between blocking rates on EOI trunk groups and blocking rates on Ameritech's interoffice trunk groups reflected in its interconnection performance data establish no basis for concern.[617] Ameritech attributes such differentials in part to the relatively smaller size of the competing LEC networks as compared to Ameritech's network, which Ameritech asserts causes increased volatility in competing LEC traffic volumes.[618] Ameritech does not explain the relevance of traffic volatility to the quality of the interconnection that Ameritech provides but seems to imply that unanticipated increases in traffic volumes can exhaust the capacity of the interconnection facilities that competing LECs obtain from Ameritech.[619] Indeed, Ameritech provides no empirical or other factual information to support this claim or to explain why it could not compensate for such traffic

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[616] In our analysis, we do not consider data regarding blocking rates on EOI trunks carrying interLATA traffic. The region-wide data indicate that, in March 1997, the percentage of EOI trunks carrying interLATA traffic that experienced blockage greater than 2 percent was 9.7 percent, as compared to 1.1 percent of Ameritech Retail trunks. In April 1997, that EOI blocking rate was 9.1 percent, as compared to 1.8 percent for Ameritech Retail. The Michigan data for EOI trunks carrying interLATA toll traffic indicate that no such trunks blocked more than 2 percent of calls in either March or April 1997.

[617] Ameritech Application, Vol. 2.10, Mickens Aff. at 25-26. As discussed above, on reply, Ameritech acknowledged that the differentials are actually greater than those initially reported.

[618] *Id.*

[619] *See* Ameritech Reply Comments, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 41 (stating simply "[t]he greater the traffic volatility, the more trunks are required"); Ameritech Application, Vol. 2.10, Mickens Aff. at 25-26.

volatility as it does in engineering its network to carry its own customers' traffic.[620] Like the Department of Justice, we question this explanation for the differentials in call blockage rates, because it is unsupported by factual evidence on the record.[621] We emphasize that, even if differences in traffic volatility exist between Ameritech's and competing LECs' networks, such differences would not justify Ameritech's provision of inferior interconnection facilities. As stated above, pursuant to our *Local Competition Order*, an incumbent LEC is required to provide interconnection facilities to meet the same technical criteria and service standards used in the LEC's network, including the probability of blocking during peak hours.[622]

242. Ameritech also asserts that the competing LECs' failure to advise Ameritech of future significant increases in traffic has contributed to the higher call blocking rates on trunks carrying traffic to competing LECs' customers in March through April, as compared with trunks carrying traffic to Ameritech's retail customers.[623] We agree with the Department of Justice "that EOI trunk blocking rates could potentially be reduced with improved traffic forecasts" and, like the Department of Justice, urge competing LECs to provide such data to the fullest extent possible.[624] Nonetheless, we find that Ameritech has not established on this record that the competing LECs' failure to provide forecast data has been a primary cause for call blocking to competing LECs' customers. Indeed, Ameritech provides only two specific examples of instances in which competing LECs failed to notify Ameritech of the addition of a large customer in advance, one of which took place in Illinois.[625] We note that the Michigan Commission found that Ameritech's performance measures for interconnection are inadequate precisely because they "do not distinguish things over which Ameritech has control so deviations from the goal can be explained away."[626]

243. We reject Ameritech's suggestion that differentials in call blocking rates on EOI trunks and Ameritech's interoffice trunks are unimportant because the blockage on EOI trunks is

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620 *See* Ameritech Reply Comments, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 41.

621 *See* Department of Justice Evaluation at 26 and n.35.

622 *See Local Competition Order*, 11 FCC Rcd at 15614-15.

623 Ameritech Application, Vol. 2.8, Mayer Aff. at 19-20; Ameritech Reply Comments, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 40-41, 45-46.

624 *See* Department of Justice Evaluation at 27.

625 *See* Ameritech Application, Vol. 2.8, Mayer Aff. at 19-20; Ameritech Reply Comments, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 45-47.

626 Michigan Commission Consultation at 23-24, 26; *see also* Department of Justice Evaluation at 25 n.32.

not "service-affecting."[627] We reiterate that the relevant question is whether Ameritech is providing interconnection equivalent to the interconnection it provides itself, not whether a competing LEC continues to acquire customers or whether a customer notices the difference in quality in terms of service received from a competing LEC. As stated above, an incumbent LEC's duty to provide interconnection equal in quality is not limited to quality perceived by end-users.[628]

244. We recognize that Ameritech's performance in providing interconnection to competing LECs in Michigan (and in the region) has improved over time. We commend Ameritech for its improved service, but we cannot ignore the differentials in call blocking rates simply because Ameritech's performance data indicate that blocking rates on EOI trunks declined between March 1 and May 31, 1997.[629] Ameritech states that the total number of one-way trunk groups from Ameritech's network to the competing LECs' networks increased by 34 percent in the first quarter of 1997.[630] The provision of additional EOI trunks may account for the reported reduction in EOI trunk blocking rates. Nonetheless, we emphasize that, in order to satisfy its checklist obligation, Ameritech must demonstrate at the time its application is filed that it is providing interconnection equivalent to the interconnection it provides itself, not merely that its interconnection performance data have improved. Moreover, as discussed above, in order to ensure the integrity of the 90-day review process, we shall not consider data from Ameritech demonstrating performance after the date on which Ameritech filed its application, when no party has put performance during that time at issue.[631] Even if we were to rely on Ameritech's data establishing that the EOI blockage rate in Michigan for both intraLATA and interLATA final trunk groups was 0.0% in May, the figures for May represent only one month of Ameritech's performance. We would find such evidence to be more persuasive if a BOC provides such data over a sufficiently long time to establish stable trends.

245. In sum, we emphasize that we do not conclude here that Ameritech must meet particular interconnection performance benchmarks, except as required pursuant to approved agreements. Nonetheless, we find that the difference between the blocking rates on trunks interconnecting competing LECs with Ameritech's network and the blocking rates on Ameritech's retail trunks suggests that Ameritech interconnection facilities do not meet the technical criteria

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627 Ameritech Reply Comments, Vol. 5R.24, Mickens Reply Aff. at 45 (contending that TCG has made "no credible showing that the shortcomings it alleges are service-affecting" and that TCG could not do so "as TCG continues to successfully expand its customer base at an enviable pace").

628 *See Local Competition Order*, 11 FCC Rcd at 15614-15.

629 Ameritech Reply Comments at 12, and Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 39 (criticizing the Department of Justice for failing to account for the significant improvement in Ameritech's trunk blocking data that has occurred over time).

630 *See* Ameritech Application, Vol. 2.8, Mayer Aff. at 20-21.

631 *See supra* Section IV.B.1.

and service standards that Ameritech uses within its own network. Lacking more information, we cannot conclude that Ameritech has established that it provides competing LECs interconnection equal in quality to that which it provides itself.

5. Efforts to Resolve Blockage Problems

246. Pursuant to section 251(c)(2)(D), Ameritech must provide interconnection arrangements on nondiscriminatory terms, rates, and conditions.[632] When there are network blockage problems, incumbent LECs and competing LECs may resolve the problems by, for example, modifying their network architectures. Establishing appropriate trunking architecture and proper interconnection arrangements is the responsibility of both carriers. In order to provide interconnection on nondiscriminatory terms, however, Ameritech has an obligation to ensure that a competing LEC has sufficient information about its network to remedy network blockage that occurs within Ameritech's network, but affects both Ameritech's customers and the competing LEC's customers. Therefore, Ameritech has an obligation to cooperate with competing LECs to remedy such network blockage.

247. While expanding the capacity of EOI trunk groups can help reduce blockage on the trunks between an Ameritech tandem and a competing LEC's switch, we agree with TCG that such capacity expansions would not address network blockage within Ameritech's network on common trunk groups that deliver competing LEC-bound traffic to Ameritech's tandems.[633] Alternate routing is one possible solution to minimize the impact of such network blockage. An in-bound call to a competing LEC's customer often must be carried across several segments of a link between Ameritech's end office and the competing LEC's switch, of which the EOI trunk group may be but one. For instance, the call may travel from the Ameritech end office to the Ameritech tandem over a common trunk group and then travel from the Ameritech tandem to the competing LEC's end office over an EOI trunk group. Ameritech contends that any blocking that occurs on a common final trunk group behind Ameritech's tandem has an equivalent impact on competing LECs' and Ameritech's customers.[634] As TCG suggests, however, the level of blockage may disproportionately affect competing LECs' customers in some circumstances, where the network blockage results in a disproportionate number of calls not completing to competing LECs' customers.[635]

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632 *See* 47 U.S.C. §§ 251(c)(2)(D), 271(c)(2)(B)(i).

633 TCG Comments at 5.

634 Ameritech Application, Vol. 2.10, Mickens Aff. at 22, 24; Ameritech Reply Comments, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 43.

635 TCG Comments at 5-6.

248. To the extent that Ameritech has a robust network of end office interconnection, a call originating from an Ameritech end office may be connected via other interoffice trunk groups, if the common final trunks to which the call is first routed are blocked. Therefore, a call to an Ameritech customer could complete over one of several alternative paths. If there is no alternate routing connecting the same Ameritech end office where calls originate to the competing LEC's end office, however, calls to the competing LEC's customers originating in that end office and travelling over the common trunk groups may not be completed. Such calls may be blocked before they reach the EOI trunk groups connecting Ameritech's tandem to the competing LEC's end office. Alternate routing could be established by, for example, providing a direct trunk between the Ameritech and competing LEC's end offices. Alternatively, as TCG suggests, calls from Ameritech's customers to a competing LEC's customers could be routed through more than one Ameritech tandem in the event of blockage.[636] If there is no alternate routing and traffic designated for a TCG NXX is blocked, the call may not be completed without further interference such as the network management re-routes described above.

249. TCG contends that it has attempted to resolve problems related to blockage behind Ameritech's tandem for more than six months.[637] TCG asserts that Ameritech has installed trunks to carry traffic from Ameritech's network to TCG's network in such a way that there is a single point of failure at each of the points of interconnection between the two networks.[638] That is, TCG maintains that, although Ameritech provides alternative routing for traffic designated for its own NXXs, there is no alternative routing designated for traffic bound for a TCG NXX that is blocked in Ameritech's network. Thus, TCG claims that Ameritech's handling of traffic destined for TCG's switch is inherently inferior to the multiple routing architecture used to route traffic to Ameritech's NXXs.[639] TCG asserts that Ameritech also has been resistant to working to find a solution to the network blockage problem and has reneged on a mutual agreement that would change the routing for TCG's NXXs.[640] TCG also alleges that Ameritech has failed to provide the trunk group-specific traffic data that TCG needs to assess trunk blocking problems in Detroit, as well as Chicago.[641]

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636 *See* TCG Reply Comments at 14.

637 TCG Comments at 8, Attachment A at 2-5.

638 *Id.* at 5-6.

639 *Id.*

640 TCG claims to have attempted to resolve the blocking problems through each of the alternatives described in the Mayer affidavit. *See* Department of Justice Evaluation, Appendix A at A-31, A-32; TCG Comments at 6-8.

641 TCG Comments at 6-7, Exhibit A at 2-5 (setting forth TCG's requests for "(1) the percentage of trunk groups blocked by route in Ameritech's network, (2) traffic usage data for each TCG NXX to determine which TCG traffic by NXX is getting blocked, and (3) the point(s) in Ameritech's network where the blocking is occurring").

250. In its reply comments and affidavits, Ameritech responds that Ameritech is exclusively responsible for managing traffic flows through its public switched network.[642] Ameritech further contends that it has worked jointly with TCG to establish direct trunks between Ameritech and TCG's end offices and to augment EOI tandem trunking, alleging that TCG itself has been the source of problems and delays.[643] Ameritech relies largely on a letter to TCG dated June 17, 1997, as evidence of these efforts to remedy the network blockage problems that competing LECs have experienced.[644] In particular, Ameritech relies on that letter to establish its commitment to provide direct trunking between Ameritech end offices and the TCG switch.[645] Moreover, Ameritech cites the letter to establish that, in May and June, Ameritech and TCG resolved TCG's complaints relating to the competing LEC's efforts to obtain two-way trunking.[646]

251. Based on our review of the entire record, we question whether Ameritech has provided requested interconnection arrangements to competing LECs, and TCG in particular, in a nondiscriminatory fashion. We are unpersuaded by Ameritech's reliance on the actions it has undertaken to remedy network blockage that are described in its June 17, 1997, letter to TCG and that did not occur until after the date Ameritech filed its application.[647] As discussed above, we judge Ameritech's application as of the date it was filed and give no weight in our evaluation of the sufficiency of the May 21, 1997, application, to the post-filing actions that Ameritech has taken to correct problems identified by its competitors. Accordingly, although we are encouraged by Ameritech's efforts to resolve TCG's complaint regarding two-way trunking, which Ameritech contends the parties resolved after the application was filed, we do not consider them in our assessment of whether Ameritech satisfies the requirements of section 271 as of the date of its filing.[648] Moreover, we are not persuaded by Ameritech's future commitments to establish

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642 Ameritech Reply Comments, Vol. 5R.12, Kocher Reply Aff. at 27; *see also* Ameritech Application, Vol. 2.8, Mayer Aff. at 22-25 (describing the monitoring and network management tools that Ameritech has used to remedy network blockage; acknowledging that Ameritech "can no longer simply rely upon its automated systems to service and forecast the network capacities required to support end office integration," and stating that Ameritech "has instituted new procedures [which are not described in any detail] to determine when and where direct trunk groups should be established between Ameritech end office switches and CLEC end office switches").

643 Ameritech Reply Comments, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 48-55, and Vol. 5R.19, Monti Reply Aff. at 2-4.

644 *See, e.g., id.*, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 43-44, 47-51.

645 *Id.* at 49.

646 *See id.* at 51 (citing June 17, 1997 letter).

647 *See* AT&T Motion to Strike, Exhibit A; Joint Motion to Strike at 7.

648 *See* Ameritech Reply Comments, Vol. 5R.6, Edwards Reply Aff. at 16-17, and Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 51 (citing June 17, 1997 letter). *Compare* TCG Comments at 8; TCG July 16 *Ex Parte* at 4-5; *see also* MCI Comments at 26, Sanborn Aff. at 10 (alleging that Ameritech has provided only one-way trunks).

checklist compliance. The June 17 letter offers vague future promises regarding Ameritech's efforts to provide direct trunking between Ameritech end offices and the TCG switch.[649]

252. In response to TCG's allegation regarding its inability to obtain data needed to remedy network blockage, Ameritech describes the "typical report" containing trunk blocking data that it provides to competing LECs.[650] Ameritech fails to establish, however, that it has actually provided such data to competing LECs in Michigan or to TCG in particular.[651] Indeed, Ameritech relies on a future commitment to TCG to furnish necessary call flow data to demonstrate compliance with interconnection requirements.[652] As discussed above, Ameritech cannot meet its burden of proof with regard to checklist compliance by relying on promises of future action.

253. We find that Ameritech has not shown that it provides interconnection on nondiscriminatory terms, because it has not provided competing LECs with the data they need to control trunk blockage, data that Ameritech possesses and may use for itself.[653] Like the Department of Justice, we are concerned that competing LECs may not have access to information about the network needed to solve blocking problems when the blocking occurs on the Ameritech side of the point of interconnection.[654] We recognize that competing LECs cannot identify which Ameritech end offices are likely candidates for augmenting existing EOI trunks or

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649 The Ameritech representative states: "We have jointly identified many candidate offices for direct trunking. We anticipate implementing most of these groups." Ameritech Reply Comments, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 49.

650 *Id.*, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 45. Ameritech likewise describes the "Grade of Service Report," which lists trunk blocking data on a state-by-state and competing LEC-specific basis, that Ameritech is "currently putting together." *Id.*, Vol. 5R.12, Kocher Reply Aff. at 27. We believe that such information would be extremely useful to competing LECs seeking to remedy trunk blocking problems.

651 Nor does Ameritech show that the half page of data reporting network blocking rates on a consolidated basis for trunks within Ameritech's network in Illinois and Michigan is sufficient to alleviate the Department of Justice's concern that competing LECs possess insufficient data by which to solve EOI blocking problems. *See id.*, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 44.

652 *Id.*, Vol. 5R.16, Mayer, Mickens, and Rogers Reply Aff. at 44-45. The commitment to which Ameritech refers, however, appears to be no more than a statement that, by June 23, 1997, "Ameritech will provide TCG examples of specific trunk group data that can be used in the regular service meetings [between TCG and Ameritech]." *Id.*, Attachment 7. Several parties move to strike this evidence in any case, because it was submitted at such a late date. *See* AT&T Motion to Strike, Exhibit A; Joint Motion to Strike at 7. *Compare* Ameritech's Response to Motions to Strike, Appendix A at 6-7.

653 *See* Department of Justice Evaluation, Appendix A at A-31 (concluding that there is evidence to suggest that Ameritech has not provided competing LECs with sufficient ability to control trunk blockage).

654 *Id.*, Appendix A at A-32 and n.57; *see* ALTS Reply Comments at 8 (stating that Ameritech's inability to produce supporting data for its trunk sizing decisions is fatal to its claim of compliance with this checklist item); TCG Comments at 4 (asserting that TCG has no way of measuring the amount of traffic destined to terminate on TCG's network where the traffic is blocked within Ameritech's network and behind Ameritech's tandem).

adding direct trunking without access to Ameritech network call flow data.[655] Moreover, we agree with the Department of Justice that, without information by which to identify the sources of blocking, competing LECs may be unable to propose appropriate network reconfigurations.[656]

6. Conclusion

254. We conclude that Ameritech has not established by a preponderance of the evidence that it is providing interconnection that is equal in quality to that which it provides itself and that is available on nondiscriminatory rates, terms, and conditions, as required under section 271(c)(2)(B)(i).

255. The data that Ameritech does provide suggest that Ameritech's interconnection facilities do not meet the technical criteria and service standards that Ameritech uses within its own network. We expect that Ameritech will submit more relevant and reliable interconnection performance data in a future application for Michigan. In particular, we encourage Ameritech to provide information by which we can gauge the impact of trunk blocking data. For example, Ameritech might indicate the size of the trunk groups that are experiencing blockage and the percentage of calls that were blocked. We would find data regarding call completion rates for calls originating on Ameritech's network and terminating with Ameritech customers and competing LECs' customers, respectively, to be useful for measuring parity. Likewise, we urge Ameritech to provide more detailed information on the extent to which it re-routes calls to competing LECs' NXXs when they are blocked, as compared to the extent to which it re-routes calls to its own NXXs.

E. Nondiscriminatory Access to 911 and E911 Services

1. Introduction

256. Section 271(c)(2)(B)(vii)(I) of the competitive checklist requires Ameritech to provide "nondiscriminatory access to . . . 911 and E911 services."[657] In the *Local Competition Order*, we interpreted the word "nondiscriminatory" to include a comparison between the level of service the incumbent LEC provides competitors and the level of service it provides to itself.[658]

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655 As the Department of Justice noted, Ameritech claims that competing LECs could monitor Ameritech's performance using their own OSS data and Ameritech's public regulatory reports (Ameritech Application at 91), a solution that appears inapplicable where competing LECs lack such information. Department of Justice Evaluation, Appendix A at A-32 and n.57.

656 *Id.*, Appendix A at A-32 and n.57.

657 47 U.S.C. § 272(c)(2)(B)(vii)(I). Enhanced 911 or "E911" service enables emergency service personnel to identify the approximate location of the party calling 911.

658 *Local Competition Order*, 11 FCC Rcd at 15612.

We interpret the term "nondiscriminatory" for the purposes of section 271 in an identical fashion and find that section 271 requires a BOC to provide competitors access to its 911 and E911 services in the same manner that a BOC obtains such access, *i.e.*, at parity. Specifically, we find that, pursuant to this requirement, Ameritech must maintain the 911 database entries for competing LECs with the same accuracy and reliability that it maintains the database entries for its own customers.[659] This duty includes populating the 911 database with competitors' end user data and performing error correction for competitors on a nondiscriminatory basis. For facilities-based carriers, nondiscriminatory access to 911 and E911 services also includes the provision of unbundled access to Ameritech's 911 database and 911 interconnection, including the provision of dedicated trunks from the requesting carrier's switching facilities to the 911 control office at parity with what Ameritech provides to itself.[660]

257. One of the Commission's statutory mandates under the Communications Act is "promoting safety of life and property through the use of wire and radio communication."[661] As the Commission has previously recognized, "[i]t is difficult to identify a nationwide wire or radio communication service more immediately associated with promoting safety of life and property than 911."[662] We would therefore be remiss in our statutory duties, particularly given the expressed concerns of the Michigan Commission, which are discussed below, if we did not closely examine the steps Ameritech has taken to maintain the accuracy and integrity of the 911 database for competitors in the state of Michigan.

258. Ameritech represents that it provides customers of competing LECs with access to the type of 911 service selected by the municipality in which those competing LEC customers reside in a manner identical to the 911 service supplied to Ameritech's own retail customers.[663] Further, Ameritech asserts that competing LECs interconnect to Ameritech's 911 service in the same manner as Ameritech and receive the same service quality.[664] Specifically, Ameritech contends that its E911 arrangements provide competing carriers with access to its 911 services

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659 The "911 database" actually consists of two separate databases, the Management System, which contains the Master Street Address Guide, and the Selective Routing/Automatic Location Identification (SR/ALI) database, which forwards the 911 call to the appropriate Public Safety Answering Point (PSAP). A PSAP is a centralized agency or facility operated by the local government that receives and responds to emergency calls.

660 With the exception of one district, Ameritech provides E911 service throughout the state of Michigan. *See* Ameritech Reply Comments, Vol. 5R.11, Jenkins Reply Aff. at 4 n.1. We will, however, use the terms 911 and E911 interchangeably.

661 47 U.S.C. § 151.

662 *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, Notice of Proposed Rulemaking, 9 FCC Rcd 6170, 6171 (1994).

663 Ameritech Application, Vol. 2.3, Edwards Aff. at 57.

664 Ameritech Reply Comments, Vol. 5R.11, Jenkins Reply Aff. at 4.

and trunking from the competing carriers' collocation point to the E911 control office.[665] Moreover, Ameritech maintains that it has established "detailed processes and procedures to ensure 911 database integrity in a multi-carrier environment."[666]

259. No commenters dispute that Ameritech is providing unbundled access to its 911 database. Numerous parties, including Brooks Fiber, MFS WorldCom, and TCG, however, assert that Ameritech has failed to maintain properly its 911 database with correct end user information for competing LEC customers.[667] In addition, Brooks Fiber alleges that Ameritech has failed to provide nondiscriminatory access and interconnection to its 911 database.[668] Significantly, the Michigan Commission found the quality of Ameritech's 911 database to be "suspect" and Ameritech's coordination of data entry with competing carriers and error correction to be "at best, poor."[669] In concluding that Ameritech did not satisfy this checklist item, the Michigan Commission maintained that it would "indicate compliance with [section 271(c)(2)(B)(vii)(I)] only after Ameritech has shown the [Michigan Commission] and/or the FCC that it has established and pursued methods to ensure accurate 9-1-1 databases and proof that it is in fact performing the data entry and error correction coordination role required by its interconnection agreements."[670] The Department of Justice concluded that, because it lacked sufficient information, it was unable to determine whether Ameritech is providing E911 services on an adequate and nondiscriminatory basis.[671]

260. We conclude that Ameritech has not met its burden of demonstrating, by a preponderance of the evidence, that it is providing nondiscriminatory access to its 911 services. Specifically, based on the record in this proceeding, we find that Ameritech maintains entries in its

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665 Ameritech Application, Vol. 2.3, Edwards Aff. at 57.

666 Ameritech Application at 47; *see also* Ameritech Reply Comments, Vol. 5R.11, Jenkins Reply Aff., Schedule 4.

667 *See* Brooks Fiber Comments at 26-28; Brooks Fiber Reply Comments at 6; Michigan Consumer Federation Comments at 13; Michigan Attorney General Comments at 6-7; TCG Comments at 20-21; MFS WorldCom Comments at 38-39 and Schroeder Aff. at 11-15. We note that Ameritech has entered into 911 interconnection agreements with AT&T, Brooks Fiber, MFS WorldCom, MCI Metro, Sprint, and TCG. *See* Ameritech Reply Comments, Vol. 5R.11, Jenkins Reply Aff. at 14.

668 Brooks Fiber Comments at 26-28.

669 Michigan Commission Consultation at 43.

670 *Id.* at 43-44. We note that, while the Michigan Commission, in its consultation, focuses on Ameritech's obligation to provide 911 service as required by its interconnection agreements, our focus in the instant proceeding is whether Ameritech is providing competitors "nondiscriminatory access" to its 911 service as required by section 271(c)(2)(B)(vii)(I). The following analysis, therefore, is confined solely to the issue of whether Ameritech is providing 911 service as required by the terms of the competitive checklist.

671 *See* Department of Justice Evaluation at 9 n.16.

911 database for its own customers with greater accuracy and reliability than entries for the customers for competing LEC entries. In reaching this conclusion, we find it significant that there have been at least three instances involving customers of competing carriers, one as recently as May 21, 1997, where incorrect end user information was sent to emergency services personnel. Ameritech, which has acknowledged fault in all three incidents, has presented no evidence to demonstrate the 911 database error rate for competing LEC information is equivalent to the error rate for Ameritech's own customers. We also conclude that Ameritech has not demonstrated that it provides facilities-based competitors that physically interconnect with Ameritech access to the 911 database in a manner that is at parity with the access it provides itself. In addition to these parity issues, we have concerns regarding Ameritech's efforts to detect and remedy errors in competitors' end user 911 data and in the proper functioning of competitors' trunking facilities. In particular, it appears that Ameritech has not taken adequate preventative measures to do its part in avoiding future errors in competitors' data in the 911 database.[672] In view of our findings that Ameritech does not maintain the accuracy of the 911 database or provide access to this database in a nondiscriminatory manner, we agree with the Michigan Commission that Ameritech has failed to demonstrate its compliance with this checklist item.

2. Discussion

261. According to Ameritech, there are essentially two key aspects of providing 911 to end users in Michigan. First, Ameritech must establish and test the trunks of those facilities-based competing carriers that physically interconnect with Ameritech. Second, Ameritech must maintain the 911 databases by populating them, updating them, and serving in a coordination role for error resolution.[673] The provision of 911 service also requires a cooperative effort between Ameritech and competing LECs that are responsible for, among other things, ordering a sufficient number of trunks, jointly testing the trunks with Ameritech, and delivering accurate and complete end user information to Ameritech.[674]

262. All the commenters on this issue object to the manner in which Ameritech is maintaining its 911 database. Several point to the formal complaint, pending before the Michigan Commission, filed against Ameritech by the City of Southfield, Michigan, which calls into question the manner in which Ameritech provides access to its 911 database and the accuracy of

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672 As discussed below, Ameritech has a duty to maintain the 911 databases and serve in a coordination role for error resolution. We emphasize that it is not our intention to hold Ameritech responsible for errors made by its competitors.

673 *See* Ameritech Reply Comments, Vol. 5R.11, Jenkins Reply Aff. at 10, 12.

674 *Id*., Vol. 5R.11, Jenkins Reply Aff. at 12.

its database.[675] According to the Michigan Commission, the record in the complaint proceeding identifies two specific instances, both potentially life threatening, where incorrect automatic location identification information was given to the Public Safety Answering Point (PSAP) or emergency calls were routed to the improper PSAP.[676] The Michigan Commission also cites a third event that occurred on May 21, 1997, the date Ameritech filed its section 271 application. We find that these incidents, all of which were the result of errors made by Ameritech, call into question whether Ameritech maintains the accuracy and integrity of competing LEC entries in the 911 database in the same manner as it does for its own entries.

263. According to Ameritech, all three incidents stemmed from incorrect competitor end user information in Ameritech's billing records, which led to errors in competitors' service records in the 911 database. Ameritech acknowledges that all three incidents were caused by separate errors on the part of Ameritech. The first incident, which occurred October 12, 1996, involved an end user served by TCG's facilities. Ameritech explains that, in the situation where the competing LEC uses its own local switch, the competing LEC is responsible for providing its end users' information to Ameritech. These 911 data records are provided to Ameritech by the competitor on either a manual or mechanized basis.[677] At the time that TCG was originally assigned NXX codes for its use, Ameritech's billing system automatically generated service orders that reserved these telephone numbers.[678] These service orders, when sent to the 911 database, populated the 911 records with TCG's name and TCG's collocation address (the Ameritech central office) as if that were the name and address of the TCG end users to whom the numbers were ultimately assigned.[679] Thus, when any of those TCG customers placed a 911 call, "TCG" would appear on the PSAP display screen as the end user name and TCG's collocation address

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675 *See* Michigan Commission Consultation at 41-43; Michigan Consumer Federation Comments at 13; Michigan Attorney General Comments at 6-7; TCG Comments at 20; *Complaint of the City of Southfield Against Ameritech Michigan*, Michigan Public Service Commission Case No. U-11229 (filed Oct. 24, 1996). According to the Michigan Commission, a decision in this proceeding is still pending. Michigan Commission Consultation at 42. We note that on July 9, 1997, an Administrative Law Judge of the Michigan Commission issued a "Proposal for Decision" in the Southfield Complaint case. In this decision, the Administrative Law Judge adopted the Michigan Commission staff's "Rehabilitation Plan for Ameritech's 9-1-1 Service." This plan requires Ameritech to improve the accuracy of its 911 database by, among other things, making Ameritech responsible for the correct information appearing on the PSAP screen and requiring Ameritech to take measures to ensure the verification, correction, and ultimate accuracy of this information. *See In the Matter of the Complaint of the City of Southfield against Ameritech Michigan*, Michigan Public Service Commission Case No. U-11229, Proposal for Decision (July 9, 1997) (Proposal for Decision).

676 *See* Michigan Commission Consultation at 42; Michigan Consumer Federation Comments, Attachment A (*911 Errors Fuel Debate*, The Detroit News, June 5, 1997, at B1) (*911 Article*).

677 Brooks Fiber is currently the only competing LEC that provides Ameritech with 911 records on a mechanized basis. *See* Ameritech Application, Vol. 2.8, Mayer Aff. at 98; Ameritech Reply Comments, Vol. 5R.11, Jenkins Reply Aff., Schedule 8.

678 Ameritech Reply Comments, Vol. 5R.11, Jenkins Reply Aff. at 18 ("[t]he root cause for the situation was identified in Ameritech Michigan's billing system.").

679 *Id.*, Vol. 5R.11, Jenkins Reply Aff. at 18.

appeared as the end user address. The October 12th incident occurred because, while in the process of resolving this problem, Ameritech inadvertently deleted some TCG customer information from the 911 database, including the information for a TCG end user.[680] This created a potentially life threatening situation when that end user was the victim of a shooting.[681]

264. Another incident occurred on January 30, 1997, and involved a MFS WorldCom end user served via resold Centrex service. Ameritech explains that, if a competing LEC operates as a reseller or purchases unbundled local switching, Ameritech inputs the competing LEC's end user's name and address into the 911 database via Ameritech's service order system based on the competing LEC's service order.[682] Ameritech claims that the second incident occurred because Ameritech's service billing records did not contain a special field identifier indicating that the competing LEC's customer had a different address from the competitor's billing address.[683] For example, although MFS WorldCom's end users were provisioned using Ameritech's Centrex resale services, when they placed a 911 call, "MFS" would appear on the PSAP display screen as the end user name and MFS WorldCom's billing address would appear as the end user's address. The third incident, which occurred on May 21, 1997, also involved a MFS WorldCom end user. Ameritech claims that human error caused one of MFS WorldCom's end user records not to be updated in the manual review of MFS WorldCom's Centrex accounts.[684]

265. In response to allegations that it does not provide nondiscriminatory access to its 911 services, Ameritech cites various statistics concerning its provision of 911 service, including overall error rates for its 911 database, and describes at length the procedures that it either has established, or is in the process of establishing, to ensure that its competitors' 911 data are accurately populated and that errors are detected and remedied quickly. Ameritech does not, however, provide any statistics or other evidence reflecting the accuracy rate for Ameritech's own 911 records or otherwise demonstrate that it is maintaining the 911 database entries for competitors' end users with the same accuracy and reliability that it maintains the database entries for its customers. Noting the absence of such information, the Michigan Commission observed that "no actual reports have been provided to the [Michigan Commission] on which [OSS

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680 *Id.*, Vol. 5R.11, Jenkins Reply Aff. at 25.

681 *Id.*, Vol. 5R.11, Jenkins Reply Aff. at 23; *see also* Proposal for Decision at 19.

682 Ameritech explains that competing LECs have three options for updating their end user information in the 911 database. They can use a mechanized send, a manual send, where the competing LEC completes a form and faxes it to Ameritech, or contract directly with Ameritech's database vendor for its clearinghouse service. Ameritech Reply Comments, Vol. 5R.11, Jenkins Reply Aff. at 13-14.

683 *Id.*, Vol. 5R.11, Jenkins Reply Aff., Schedule 4, Appendix F (stating that "Ameritech has since recognized this processing error and is currently developing a data check in the processing of service orders").

684 *Id.*, Vol. 5R.11, Jenkins Reply Aff. at 20.

performance relative to 911] can begin to be assessed."[685] Without more information, we are unable to find that Ameritech has met its burden of demonstrating by a preponderance of the evidence that it is maintaining the accuracy of its 911 database at parity.

266. With respect to the evidence in the record, Ameritech observes that the overall accuracy rate for its 911 database in each of the months between October 1996 and May 1997 was at or near 99.8%.[686] Ameritech does not indicate, however, what portion of the remaining .2% is the result of inaccuracies in Ameritech customer records and what portion results from inaccuracies in competing LEC customer records.[687] For example, as evidence of its 99.8% accuracy rate for these months, Ameritech provides a chart entitled "9-1-1 Database Statistics," that summarizes, among other things, the number of trouble tickets submitted to Ameritech from PSAPs each month and the percentage of calls received with reported trouble.[688] Notably, Ameritech does not disaggregate these statistics so that one can identify terms of the errors reported for customers of competing carriers versus the errors reported for its own customers.[689]

267. Moreover, although Ameritech submits statistics on the error rates for some competing LECs detected through its verification and reconciliation process, *i.e.*, comparisons of the data in Ameritech's service billing records or competing LEC data files with the end user information contained in the 911 database and the correction any discrepancies, it does not submit similar statistics with respect to its own error rates.[690] For example, according to Ameritech, the percentage of errors discovered in a review of the accuracy of end user information in the 911

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685 Michigan Commission Consultation at 32.

686 Ameritech Reply Comments, Vol. 5R.11, Jenkins Reply Aff., Schedule 3. The Joint Motion to Strike moves to strike this and other new evidence submitted by Ameritech regarding its 911 services. *See* Joint Motion to Strike, Proposed Order at 2. We conclude that most of this new evidence is directly responsive to commenters' arguments that Ameritech has failed to maintain properly its 911 database with correct end user information. As noted above, however, we also find that, given the formal complaint pending before the Michigan Commission concerning Ameritech's 911 services, Ameritech should have anticipated that its provision of 911 service would be at issue in the instant proceeding. *See supra* at para. 58. We therefore believe that much of the new evidence filed on reply with respect to 911 services should have been submitted in Ameritech's initial application. Nonetheless, even considering all the evidence that Ameritech has put forth on reply, it does not meet its evidentiary burden of demonstrating that it provides nondiscriminatory access to its 911 services.

687 Needless to say, competing LEC errors in their own customer records are not the responsibility of Ameritech. As mentioned above, these carriers are obligated to deliver accurate and complete end user information to Ameritech. *See supra* para. 261.

688 Ameritech Reply Comments, Vol. 5R.11, Jenkins Reply Aff., Schedule 3.

689 According to news reports, data errors are five times more likely for competing LEC customers than they are for Ameritech customers. *See* Michigan Consumer Federation Comments, Attachment A, *911 Article*.

690 Similarly, with respect to its obligation to provide nondiscriminatory 911 interconnection, although Ameritech provided 911 trunk installation data with respect to trunks provided to competing carriers, it does not offer corresponding data for trunks installed for itself. Ameritech Reply Comments, Vol. 5R.11, Jenkins Reply Aff., Schedule 5.

database with respect to MFS WorldCom customers who are served on a facilities basis was 37%.[691] Without corresponding information concerning the error rates for Ameritech end users, we have no way to measure Ameritech's performance. Further, although TCG contends that many of the errors found with respect to TCG end user data in the 911 database were the result of "improper loading of the data by Ameritech,"[692] we have no way of knowing how many of the errors in the 911 database involving competing LEC end user data result from improper loading on the part of Ameritech as opposed to incorrect data submitted by competing LECs. Nor is there any evidence in the record to suggest that any 911 database errors resulted from incorrect data submitted by competing LECs. Accordingly, we have no basis in this record for concluding that Ameritech is providing nondiscriminatory access to its 911 database.

268. The only data Ameritech submits by which we can judge its performance for others against its performance for itself is a chart reflecting 911 database processing statistics for mechanized sends, *i.e*., data that is sent to Ameritech electronically.[693] Specifically, this chart summarizes the number of minutes from the time a 911 record is received by Ameritech until it is entered into the 911 database, as well as the percentage of new 911 service records that Ameritech processes in a single business day. Although, according to this chart, Ameritech processes 100% of the mechanized sends it receives in one business day,[694] including its own, these statistics provide no indication of Ameritech's *accuracy rate* in processing its own 911 data, as opposed to anyone else's 911 data.

269. In addition to the shortcomings we have identified with respect to the evidence on which Ameritech relies to establish nondiscrimination, we believe that certain evidence submitted by Ameritech actually demonstrates that Ameritech is not presently providing access to its 911 database at parity. First, Ameritech explains that, in response to "expressed interest" to have query access to the 911 database, it is developing a service that will provide competing LECs with electronic, view-only access to the 911 database in order to allow them real-time data

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691 *See id.*, Vol. 5R.11, Jenkins Reply Aff., Schedule 10. We note that the verification and reconciliation performed for competing LEC 911 end user data varies according to how the end user is served, i.e., whether the end user is served via Centrex resale, wholesale resale, or facilities-based service arrangement. Thus, a separate review is performed for each type of end user. *See id.*

692 TCG Comments, Exh. A, Pelletier Aff. at 6.

693 *See* Ameritech Reply Comments, Vol. 5R.11, Jenkins Reply Aff., Schedule 8. In a "mechanized send" the competing LEC provides Ameritech its 911 end user data electronically in an industry standard format, or via diskette, and the data is mechanically input into Ameritech's 911 database. In a "manual send" a competing LEC completes a standard form containing its 911 end user data and provides it to Ameritech via fax. The data is then manually input into the 911 database by Ameritech. *Id.* at 13-14.

694 Ameritech, however, fails to provide any data on how quickly and efficiently it processes manual sends which, as noted above, is the method used by most facilities-based LECs that have interconnection agreements with Ameritech. *See supra* note 677.

validation.[695] Ameritech then asserts that this query access "will be the same as used by Ameritech 911 personnel."[696] This statement suggests that Ameritech, as of the day of its section 271 filing, and indeed as of the day of its reply comments, was not providing competing carriers equivalent access to the 911 database. As discussed above, the fact that it "is developing" such a service is inadequate to meet Ameritech's evidentiary burden of demonstrating that it currently provides equivalent 911 database access to competitors.[697] Paper promises of future nondiscrimination are not sufficient.

270. Second, Brooks Fiber asserts that Ameritech has been providing, and continues to provide, it with a mechanized feed to Ameritech's 911 system that is inferior to the one Ameritech uses for its own 911 database entries.[698] Although there is a dispute in the record as to *when* Brooks Fiber actually requested an upgrade to its 911 feed, Ameritech does not deny that Brooks Fiber has requested such an upgrade.[699] In fact, in its reply comments, Ameritech asserts that implementation of this upgrade, which may address data exchange needs for other services as well, "is still in progress."[700] There is no indication in the record that the access that Brooks Fiber is presently receiving is equivalent to Ameritech's access to the 911 database.[701] Moreover, there is no evidence in the record to suggest that, once Brooks Fiber receives the upgrade, it *will be*

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695 Ameritech Reply Comments, Vol. 5R.11, Jenkins Reply Aff. at 22-23.

696 *Id*., Vol. 5R.11, Jenkins Reply Aff. at 23 and n.7 (noting that only Ameritech 911 personnel and not Ameritech's sales and service employees have query access).

697 *See supra* para. 55.

698 *See* Brooks Fiber Comments, Exh. H, Brooks Fiber Communication's Submission of Additional Information in Response to Ameritech Michigan Regarding 911 Services and Service Order Performance, Michigan Public Service Commission Case No. U-11104, at 4 (filed June 5, 1997) (Additional Information Regarding 911 Services); *see also* Michigan Commission Consultation, Vol. 2, Entry # 154, Transcript of May 28, 1997, hearing at 169-172 (testimony of Mary Bogue, IT Application Development Manager for Brooks Fiber) (Bogue Testimony).

699 Brooks Fiber claims that it initially requested an upgrade in November 1996 and the upgrade was to have been completed by January 15, 1997. Ameritech, on the other hand, maintains that Brooks Fiber did not request an upgrade until February 1997. Brooks Fiber Comments at 28; Ameritech Reply Comments, Vol. 5R.11, Jenkins Reply Aff. at 28.

700 *Id.*, Vol. 5R.10, Heltsley, Hollis, and Larsen Reply Aff. at 18-19; Michigan Commission Consultation, Vol. 3, Entry #155, Ameritech Michigan's Submission of Additional Information in Response to Brooks Fiber Concerning 911 Services and Service Order Performance, Michigan Public Service Commission Case No. U-11104, at 5-7 (filed June 2, 1997) (Ameritech June 2 Comments). We note that this upgrade would be capable of handling both 911 and directory assistance transmissions between Brooks Fiber and Ameritech. Brooks Fiber Comments at 28.

701 In fact, it appears that Brooks Fiber's present feed, which is a dial-up service, is not equivalent to Ameritech's access to the 911 database. *See* Michigan Commission Consultation, Vol. 2, Entry #154, Bogue Testimony at 169.

receiving equivalent access.[702] Ameritech, in response, points only to the fact that Brooks Fiber has been submitting 911 data to Ameritech in a mechanized format since 1995, "using an alternative process developed by [Ameritech] specially for Brooks Fiber."[703] The relevant issue for checklist compliance, however, is not whether Brooks Fiber has the capability to submit 911 data to Ameritech in a mechanized format, but whether Ameritech is presently providing equivalent access to its 911 database. We find that, even if we were to assume that the requested upgrade would provide Brooks Fiber with equivalent access to the 911 database, Ameritech has failed to satisfy its burden of proving by a preponderance of the evidence that it is "providing" nondiscriminatory access to its 911 database.

271. As discussed above, a BOC "provides" a checklist item if it provides the item at rates and on terms and conditions that comply with the Act.[704] In order to be "providing" an item, the petitioning BOC must demonstrate that it is *presently* ready to furnish each checklist item in the quantities that competitors may reasonably demand and at an acceptable level of quality.[705] Thus, even if Brooks Fiber requested an "inferior" feed in 1995, in order for Ameritech to demonstrate in its section 271 application that it is providing nondiscriminatory access to its 911 database, Ameritech must be "presently ready to furnish" equivalent access to its 911 database upon request. Although Ameritech contends that Brooks Fiber did not make the request for an upgrade until February 1997, it admits that as of July 1, 1997, the implementation of Brooks Fiber's request was "still in progress."[706] The exact status of the "implementation," however, is unclear from the record. That is, it is not evident whether Ameritech has actually developed the upgrade, whether the upgrade has been tested, or when the upgrade will be available to Brooks Fiber. There is no basis in the record, therefore, to conclude that Ameritech is "presently ready to furnish" equivalent access its 911 database. For this reason, we conclude that Ameritech is not providing nondiscriminatory access to its 911 database.

272. In addition to the parity issues discussed so far with respect to 911 database accuracy and access, we have concerns regarding the manner in which Ameritech detects and remedies errors in competitors' end user 911 data and in the proper functioning of competing LEC's trunking facilities. With regard to error detection, the record indicates that Ameritech stopped providing Brooks Fiber the daily error reports necessary for Brooks Fiber to correct

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[702] Similarly, Ameritech does not contend that this upgrade would result in access to the 911 database that is superior to its own access.

[703] Ameritech Reply Comments, Vol. 5R.10, Heltsley, Hollis, and Larsen Reply Aff. at 18.

[704] *See supra* para. 110.

[705] *See supra* at para. 110.

[706] Ameritech Reply Comments, Vol. 5R.10, Heltsely, Hollis, and Larsen Reply Aff. at 18.

discrepancies in its customers' 911 data for a period of six months.[707] According to Ameritech, it was unaware that Brooks Fiber had not been receiving error reports until April 25, 1997, when it learned of the situation from a Brooks Fiber representative at an industry forum in Michigan.[708] Further, despite Ameritech's contention that no errors went uncorrected during this time, Brooks Fiber asserts that it received an error report totalling over several hundred pages from Ameritech's vendor shortly after the provision of reports was restored. [709] The Michigan Commission found this breakdown in the provision of error reports to be indicative of the fact that there is "little or no confirmation of data entry or error correction" provided to competitors with respect to their customers.[710] Although Ameritech ultimately reinstated the provision of daily reports, it has not indicated what actions it has taken to detect such a breakdown in a more timely manner or identified what procedures it has implemented to ensure that a similar breakdown will not occur. Moreover, we note that it was nearly two weeks later, May 7, 1997, before the provision of these reports was reinstated.[711]

273. In another incident, Ameritech, in order to complete "call-through" testing on Brooks Fiber's dedicated trunking facilities,[712] unilaterally deactivated all 911 trunks serving Brooks Fiber's switch without notice.[713] As a result, according to Brooks Fiber, Ameritech terminated 911 service to all of Brooks Fiber's Lansing customers for nine days.[714] Although Ameritech claims that it was unaware that the trunks it deactivated were carrying live traffic, there is no evidence to suggest that Ameritech has taken any actions to ensure that, in the future, it will

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[707] Michigan Commission Consultation, Vol. 3, Entry #155, Ameritech June 2 Comments, at 6. These reports reflect the number of records processed and the number of existing errors in those records. Ameritech Application, Vol. 2.8, Mayer Aff. at 98.

[708] Ameritech Reply Comments, Vol. 5R.11, Jenkins Reply Aff. at 16; Michigan Commission Consultation, Vol. 3, Entry #155, Ameritech June 2 Comments at 6-7. Brooks Fiber asserts that, beginning in January, it repeatedly notified Ameritech of the breakdown and Ameritech repeatedly failed to respond. *See* Brooks Fiber Comments, Exh. H, Additional Information Regarding 911 Services, at 4.

[709] Brooks Fiber Comments, Exh. H, Additional Information Regarding 911 Services, at 4 (stating that Brooks Fiber received a 389 page error report on May 28, 1997).

[710] Michigan Commission Consultation at 43.

[711] *See id.*; Ameritech Application, Vol. 2.8, Mayer Aff. at 98; Ameritech Reply Comments, Vol. 5R.11, Jenkins Reply Aff. at 16; Brooks Fiber Comments, Exh. H, Additional Information Regarding 911 Services, at 4.

[712] Ameritech explains that "call-through" testing ensures that a 911 call is appropriately routed to the PSAP and that the call transmission quality is acceptable. Ameritech Reply Comments, Vol. 5R.11, Jenkins Aff. at 27.

[713] Brooks Fiber Comments at 26-27; Ameritech Reply Comments, Vol. 5R.11, Jenkins Reply Aff. at 27-28.

[714] Brooks Fiber Comments at 27; Michigan Commission Consultation, Vol. 3, Entry #155, Ameritech June 2 Comments, at 3-4.

determine whether there is live traffic on 911 trunks before proceeding to deactivate them.[715] Similarly, Ameritech has provided no evidence indicating what procedures it has implemented to ensure that it will not deactivate a competitor's 911 trunks without warning.

274. This incident, as well as the other incidents described above, pose very serious public safety and competitive concerns. For example, by deactivating Brooks Fiber's 911 trunks in the manner that it did, Ameritech placed the health, safety, and welfare of Brooks Fiber's customers in jeopardy for the nine days they were without 911 service. Moreover, it is indisputable that any adverse disparity between the type of 911 service received by competitors' customers and the 911 service received by Ameritech's customers places competing carriers at a competitive disadvantage. As MFS WorldCom asserts, "competitors like [MFS] WorldCom clearly stand to lose more good will than Ameritech when the public is alerted to [these 911 problems]."[716] Incidents such as the ones described above inevitably give customers the impression that a competing LEC's network is not as reliable as the incumbent's when matters of life and death are at stake. Errors by Ameritech in the provision of 911 service, therefore, threaten the ability of its competitors to effectively compete. More importantly, such errors, as demonstrated by the record in this proceeding, endanger lives.

275. With respect to remedial measures, as TCG points out, "it is not only the error checking routines prior to entry of the information into the [911] database which is critical, but how . . . rapidly and effectively discovered errors are corrected which is of great concern."[717] For example, Ameritech's solution to the problems discovered in its service billing records was to manually reload the data of the competing carriers' customers.[718] This, however, was an extremely time-consuming, and in Ameritech's own words, "laborious" process.[719] In fact, it took Ameritech nearly four months to reload manually the 911 data related to TCG end users. Notably, it was while Ameritech was reloading this data that a TCG customer's life was placed in jeopardy when 911 dispatchers were unable to receive information as to the customer's location because the record had been inadvertently purged from Ameritech's database. It is far from clear that Ameritech would undertake this type of "laborious" manual reload if it were correcting its own 911 data.

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[715] We note that, in its reply, Ameritech merely claims that when a similar situation occurred, its 911 service manager "was aware that there was live traffic on the trunks" and was able to coordinate the trunk testing with Brooks Fiber. Ameritech Reply Comments, Vol. 5R.11, Jenkins Reply Aff. at 28.

[716] MFS WorldCom Comments, Schroeder Aff. at 15.

[717] TCG Comments at 21.

[718] As TCG contends "[t]he need to reload the database has resulted in a lack of confidence in the future integrity of the database." TCG Comments, Exh.A, Pelletier Aff. at 6.

[719] Ameritech Reply Comments, Vol. 5R.11, Jenkins Reply Aff. at 29.

276. According to Ameritech's reply, it has "instituted a number of checks, balances, and verification procedures to address database integrity and is continuously searching for process improvements."[720] We agree with MFS WorldCom, however, that, although Ameritech appears to be genuinely trying to resolve the problems it has thus far experienced in integrating competing LEC customer information into the E911 system, the continuing difficulties show that the problems have not yet been resolved.[721] We recognize, as Ameritech repeatedly indicates, that the maintenance of the 911 database is a cooperative process that is dependent on competing LECs providing accurate and complete data to Ameritech in a timely manner.[722] As mentioned above, however, by Ameritech's own admission, none of the three incidents described by the Michigan Commission was the fault of a competing carrier. It appears therefore that, as the Michigan Commission suggests, it is incumbent upon Ameritech to take additional preventative measures. Preventative, rather than remedial, measures are particularly imperative where, as Brooks Fiber points out, matters of health, safety, and welfare are at issue. Until such measures are taken, we agree with the Michigan Attorney General that the emergency services situation in Michigan will continue to be "fraught with significant public health and safety concerns."[723]

277. Ameritech states that accuracy in the 911 database is its "primary objective." We applaud this goal and note that Ameritech appears to have taken significant actions to address database integrity concerns when it became aware of them.[724] We note, however, that some of these actions have not gone far enough. Although we have no doubt that Ameritech is "constantly working to make [its procedures and safeguards] better,"[725] it cannot meet its burden of proof with paper promises of actions it plans to take either during the 90-day review process for this application or at some future date. For example, Ameritech asserts that it "is developing" a reporting mechanism to be provided to competing LECs summarizing the accuracy of Ameritech's manual inputs for each competing LEC on a business day,[726] that it "will continue to

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720 *Id.*, Vol. 5R.11, Jenkins Reply Aff. at 10.

721 MFS WorldCom Comments, Schroeder Aff. at 15.

722 *See* Ameritech Reply Comments, Vol. 5R.11, Jenkins Reply Aff. at 13, 21.

723 Michigan Attorney General Comments at 7.

724 By its own admission, Ameritech only instituted procedures to perform an accuracy review of all competing LEC end user data in its 911 database after the events occurred which gave rise to the formal complaint filed by the City of Southfield. Ameritech Application, Vol. 4.1, Ameritech Michigan's Submission of Additional Information, Michigan Public Service Commission Case No. U-11104, Tab 110 at 18 (filed Mar. 27, 1997); Ameritech Reply Comments, Vol. 5R.11, Jenkins Reply Aff. at 17.

725 Ameritech Reply Comments, Vol. 5R.11, Jenkins Reply Aff. at 25.

726 *See* Ameritech Reply Comments, Vol. 5R.11, Jenkins Reply Aff. at 16 (stating that it plans to have such a reporting mechanism in place by July 10, 1997). We note that competing LECs that choose to update their customer end user information on a manual (as opposed to a mechanized) basis are responsible for faxing accurate and complete end user data to Ameritech. Ameritech is then responsible for manually inputting this data into the

pursue and develop processes to mechanically verify the data for end users served via Centrex resale,"[727] that it "is developing" an electronic, view-only access to the 911 database for competitors,[728] and that the implementation of Brooks Fiber's 911 upgrade "is still in progress."[729] Should Ameritech refile its section 271 application at some future date and provide evidence of its completion of these improvements as part of its showing to demonstrate its compliance with this checklist item, we will fully consider such evidence.

278. We do not suggest, however, that Ameritech's 911 database must be error free in order to achieve checklist compliance.[730] We recognize, as Ameritech asserts, that holding Ameritech to an absolute-perfection standard is not required by the terms of the competitive checklist.[731] Rather, Ameritech's statutory obligation under section 271(c)(2)(B)(vii)(I) is to do what is necessary to ensure that its 911 database is populated as accurately, and that errors are detected and remedied as quickly, for entries submitted by competing carriers as it is for its own entries. For facilities-based carriers that physically interconnect with Ameritech, Ameritech has the additional duties of providing nondiscriminatory access to the 911 database and dedicated 911 trunking. We cannot find on the current record that Ameritech is providing nondiscriminatory access to 911 services because, as discussed above, it has not demonstrated by a preponderance of the evidence that it provides competitors with the same level of accuracy and access that it provides to itself.

279. We do not, based on the record received in the instant proceeding, enunciate specific actions that Ameritech should take to demonstrate its compliance with this checklist item. As mentioned above, the manner in which 911 access is provided and the accuracy of the 911 database is at issue in a formal complaint before the Michigan Commission. It appears that a far more extensive record on this topic has been submitted to the Michigan Commission in that complaint action and, according to the Michigan Commission, the record there presents options

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911 database. *See supra* note 693.

[727] *See* Ameritech Reply Comments, Vol. 5R.11, Jenkins Reply Aff., Schedule 10 (July 1, 1997 letter to MFS). We note that, in the Jenkins Reply Affidavit, dated July 2, 1997, however, Ameritech asserts that it "*has [ ] developed a mechanized procedure* to verify that the appropriate data appears in the 9-1-1 database for resold Centrexes." *See id.*, Vol. 5R.11, Jenkins Reply Aff. at 20 (emphasis added). There is no description on such a mechanized procedure in the record and no other indication that one exists.

[728] *Id.*, Vol. 5R.11, Jenkins Reply Aff. at 22-23.

[729] *Id.*, Vol. 5R.10, Heltsley, Hollis, and Larsen Reply Aff. at 18.

[730] At the same time, however, we do not purport to limit the obligation to maintain an error free 911 database that may be imposed on Ameritech under state or local law, or by the Michigan Commission. *See* Proposal for Decision at 11 (describing "Rehabilitation Plan for Ameritech's 9-1-1 Service" adopted by an Administrative Law Judge for the Michigan Commission which requires Ameritech, among other things, to perform 100% verification of the systems and databases used to provide 911 service).

[731] Ameritech Reply Comments, Vol. 5R.11, Jenkins Reply Aff. at 24.

that "should minimize the potential for . . . difficulties [like the ones experienced by the City of Southfield] in the future."[732] We expect that Ameritech will work closely with the Michigan Commission to take the appropriate steps to improve the accuracy of and access to its 911 database and to protect the integrity of competitors' end user data. Then and only then can Ameritech fulfill its obligation to provide competitors with nondiscriminatory access to 911 and E911 services. Although we recognize that Ameritech has already instituted some processes and procedures to achieve these objectives, we nevertheless concur with the City of Southfield that "[i]t is unacceptable to jeopardize public safety as Ameritech struggles to integrate their network with their competitors."[733]

F. Additional Concerns

280. Because we find that Ameritech has not demonstrated that it has fully implemented the competitive checklist with respect to OSS, interconnection, and 911 and E911 services, we need not decide in this Order whether Ameritech is providing the remaining checklist items.[734] Still, as stated above, in order to provide further guidance with respect to Ameritech's checklist compliance, we address here our concerns regarding certain other checklist items. We reiterate that we make no findings with respect to Ameritech's compliance with those items discussed herein.

1. Pricing of Checklist Items

281. We do not reach the question of whether Ameritech's pricing of checklist items complies with the requirements of section 271 given our findings above concerning Ameritech's failure to comply with the checklist on other grounds. Nonetheless, given that efficient competitive entry into the local market is vitally dependent upon appropriate pricing of the checklist items, we believe it important to discuss our general concerns about pricing. Our hope is that this discussion will help expedite Ameritech's entry into long distance in Michigan and the entry of the other BOCs into the in-region interLATA market by providing more guidance as to what showing is required in future applications to demonstrate full compliance with the checklist. We hope that Ameritech will demonstrate compliance with the principles set forth below in its

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732 Michigan Commission Consultation at 42.

733 MFS WorldCom Comments, Exh. 3, Letter from Robert R. Block, City Administrator, City of Southfield, to John Strand, Chairman, Michigan Public Service Commission, at 1 (Oct. 21, 1996).

734 We note that Ameritech's compliance with section 271(c)(2)(B)(ii), its duty to provide nondisriminatory access to unbundled network elements in accordance with sections 251(c)(3) and 252(d)(1), and section 271(c)(2)(B)(xiv), its duty to provide resale in accordance with sections 251(c)(4) and 252(d)(3), is discussed in the OSS section above. *See supra* Section VI.C. As we also discuss in that section, we have concerns about Ameritech's compliance with section 271(c)(2)(B)(iv), its duty to provide unbundled local loops. *See supra* para. 219.

next application, and we urge the Department of Justice and the state commission to address Ameritech's showing on pricing of checklist items in the future.

282. Section 271(d) requires the Commission to determine that Ameritech has fully implemented the competitive checklist. The competitive checklist, in turn, requires the BOC to provide interconnection, access to unbundled network elements, transport and termination, and resale at prices that are "in accordance with" section 252(d).[735] Section 252(d) provides that rates for interconnection, unbundled network elements, and transport and termination must be cost-based.[736] Specifically as to interconnection and unbundled network elements, section 252(d) provides that rates must be "based on the cost . . . of providing the interconnection or network element . . . and may include a reasonable profit."[737] Section 252(d)(3) provides that the price for resold service pursuant to section 251(c)(4) shall be based on "retail rates . . . excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier."[738] The Act vests in the Commission the exclusive responsibility for determining whether a BOC has in fact complied with the competitive checklist.[739] In so doing, we must assess whether a BOC has priced interconnection, unbundled network elements, transport and termination, and resale in accordance with the pricing requirements set forth in section 252(d) and, therefore, whether the BOC has fully implemented the competitive checklist.

283. We recognize that the Eighth Circuit has held that the Commission lacks jurisdiction to issue national rules establishing a methodology by which the states determine the rates for interconnection, unbundled network elements, resale, and transport and termination in state-arbitrated interconnection agreements pursuant to section 252.[740] The court, however, addressed the challenge to the Commission's pricing rules on jurisdictional grounds and expressly did not address the substantive merits of the Commission's rules. The court, therefore, made no

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735 47 U.S.C. §§ 271(c)(2)(B)(i), (ii), (xiii), (xiv).

736 *Id*. §§ 252(d)(1)("Determination by a State commission of the just and reasonable rates" for interconnection and unbundled network elements "shall be . . . based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element . . . "); 252(d)(2) ("a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless . . . such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and . . . such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls").

737 *Id*. § 252(d)(1).

738 *Id.* § 252(d)(3).

739 In making this determination, we are required to consult with the relevant state commission and the Department of Justice. *Id.* § 271(d)(2).

740 *Iowa Utils. Bd.*, 1997 WL 403401.

ruling concerning the proper meaning of the statutory requirement in section 252(d) that rates must be cost-based.

284. Because the Eighth Circuit concluded that the Commission lacked authority to prescribe a national pricing methodology to implement the requirements of section 252(d), if that decision stands, the meaning of section 252(d) ultimately will be determined through *de novo* review of state determinations by the federal district courts. The Act provides that parties aggrieved by state determinations under section 252 may sue in federal district court.[741] Consequently, the district courts will review numerous interconnection agreements from some, if not all, of the states and the District of Columbia.[742] The Courts of Appeals and, perhaps ultimately, the Supreme Court, will resolve the issue of what the statutory requirement that rates be cost-based means. This litigation will take years, however, and inevitably will run the risk of impeding or significantly delaying the development of competition in the local exchange market, and, consequently, delaying the deregulation of the telecommunications markets that Congress envisioned.

285. While the question of what constitutes cost-based pricing under section 252(d) wends it way through the courts, the Commission, pursuant to section 271, must determine whether the BOCs have fully implemented the competitive checklist, which incorporates the section 252(d) cost-based standard. The BOCs will file section 271 applications in the meantime, and the Commission is obligated by section 271 to issue a written determination approving or denying the authorization requested not later than 90 days after receiving an application.[743]

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

742 *See, e.g., U S WEST v. Jennings, et al.,* Civ. Nos. 97-0026, 97-0027 (D. Ariz. filed Jan. 7, 1997) (challenging, *inter alia*, Arizona commission's resale and transport and termination pricing determinations); *GTE v. Conlon, et al.,* Civ. No. 97-0061 (E.D. Cal. filed Jan. 31 1997) (challenging, *inter alia,* California commission's use of forward looking cost methodology); *AT&T v. BellSouth, et al.,* Civ. No. 97-130 (N.D. Fla. filed April 18, 1997) (alleging, *inter alia*, state commission erred in not deaveraging prices for unbundled network elements); *AT&T v. U S WEST, et al.,* Civ. 97-917 (D. Minn. filed April 16, 1997) (same); *Southwestern Bell Telephone Col. v. McKee, et al.*,Civ. No. 97-2197 (D. Kan. filed April 11, 1997) (challenging, *inter alia*, state commission's resale price discount); *Southwestern Bell Telephone v. Zobrist, et al.,* Civ. No. 97-0140 (W.D. Mo. filed Feb. 6, 1997) (alleging, *inter alia*, state commission improperly relied on TELRIC methodology); *MCI Telecommunications Corp. v. Southwestern Bell Telephone Co., et al.,* Civ. No. 97-132 (W.D. Tex. filed Feb. 28, 1997) (alleging, *inter alia*, state commission erred in not using forward looking cost methodology). GTE has filed suits in numerous states, including Michigan, alleging, *inter alia*, that the rates established by state commissions in arbitrations for unbundled network elements and interconnection improperly preclude GTE from recovering historical costs. *See, e.g., GTE v. Strand, et al.,* Civ. No. 97-20 (W.D. Mich. filed Feb 25, 1997); *GTE v. Johnson et al.,* Civ. No. 4:97CV26 (N.D. Fla. filed Jan. 31, 1997); *GTE v. Naito, et al.,* Civ. No. 97-00162 (D. Haw. filed Feb. 14, 1997); *GTE v. Miller, et al.,* Civ. No. 96-1584 (C.D. Ill. filed Dec. 19, 1996); *GTE v. Mortell, et al.,* Civ. No. 97-0066 (N.D. Ind. filed Feb. 20, 1997); *GTE v. Breathitt, et al.,* Civ. No. 97-7 (E.D. Ky. filed Jan. 29, 1997); *GTE v. Zobrist, et al.,* Civ. No. 97-0193 (W.D. Mo. filed Feb. 19, 1997).

743 47 U.S.C. § 271(d)(3).

286. The cost-based standard is contained in a federal statute. It is, therefore, presumed to have a uniform meaning nationwide.[744] As the Supreme Court has often stated, "federal statutes are generally intended to have uniform nationwide application."[745] Moreover, there is nothing in section 271 to suggest that the Commission's bases for determining checklist compliance should be vary throughout the country. The Commission, pursuant to its responsibility under section 271, therefore must apply uniform principles to give content to the cost-based standard in the competitive checklist for each state-by-state section 271 application.

287. Such a reading of our responsibilities under section 271 is also sound policy. Determining cost-based rates has profound implications for the advent of competition in the local markets and for competition in the long distance market. Because the purpose of the checklist is to provide a gauge for whether the local markets are open to competition, we cannot conclude that the checklist has been met if the prices for interconnection and unbundled elements do not permit efficient entry. That would be the case, for example, if such prices included embedded costs. Moreover, allowing a BOC into the in-region interLATA market in one of its states when that BOC is charging noncompetitive prices for interconnection or unbundled network elements in that state could give that BOC an unfair advantage in the provision of long distance or bundled services.

288. We believe that Congress did not intend us to be so constrained in conducting our prescribed assessment of checklist compliance in section 271. We conclude that Congress must have intended the Commission, in addressing section 271 applications, to construe the statute and apply a uniform approach to the phrase "based on cost" when assessing BOC compliance with the competitive checklist. We will consider carefully the state commission's assessment of pricing contained in its checklist compliance verification, the methodology used to derive prices for checklist items, and the allegations of interested parties in the section 271 proceeding. It is our understanding that a large majority of state commissions have stated that they have adopted or intend to adopt forward-looking economic cost approaches. Our ultimate objective, for the purpose of section 271 compliance, is to determine whether the BOC's prices for checklist items in fact meet the relevant statutory requirements. We note, moreover, that even if it were decided that we lacked authority to review BOC prices as an aspect of our assessment of checklist compliance under section 271(d)(3)(A), we would certainly consider such prices to be a relevant

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744 *See, e.g., U.S. v. Phipps*, 68 F.3d 159, 161 (7th Cir. 1995) ("Language in federal statutes and regulations usually has one meaning throughout the country").

745 *See, e.g., Mississippi Bank of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989) (citations omitted); *see also Jerome v. United States*, 318 U.S. 101, 104 (1943). Occasionally, the federal courts have concluded that an ambiguous federal statutory term was to be given meaning by reference to state law. *See, e.g., De Sylva v. Ballentine*, 351 U.S. 570 (1956); *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204 (1946). But that approach has been applied only in cases in which the ambiguous federal statutory term is a familiar state law term with a history of state law jurisprudence interpreting it. Indeed, it is only in such cases that the issue of national uniformity is even raised; in all other cases involving ambiguous federal statutory terms, national uniformity is simply taken for granted. The general rule plainly applies here.

concern in our public interest inquiry under section 271(d)(3)(C). We discuss below our conclusions concerning the appropriate pricing for these checklist items.

289. TELRIC-Based Pricing of Interconnection Services, Unbundled Network Elements, and Transport and Termination. In ascertaining whether a BOC has complied with the competitive checklist regarding pricing for interconnection, unbundled network elements, and transport and termination pursuant to section 251, it is critical that prices for these inputs be set at levels that encourage efficient market entry. New entrants should make their decisions whether to purchase unbundled elements or to construct facilities based on the relative economic costs of these options. New entrants cannot make such decisions efficiently unless prices for unbundled elements are based on forward-looking economic costs. Similarly, prices for interconnection and transport and termination must be based on forward-looking economic costs in order to encourage efficient entry. In order for competition to drive retail prices to cost-based levels, as occurs in efficient, competitive markets, new entrants must be able to purchase interconnection services, unbundled network elements, and transport and termination at rates that reflect forward-looking costs. Adopting a pricing methodology based on forward-looking costs best replicates, to the extent possible, the conditions of a competitive market. In addition, a forward-looking cost methodology reduces the ability of an incumbent to engage in anticompetitive behavior, permits new entrants to take advantage of the incumbent's economies of scale, scope, and density, and encourages efficient market entry and investment by new entrants. We conclude, therefore, that a BOC cannot be deemed in compliance with sections 271(c)(2)(B)(i), (ii), and (xiii) of the competitive checklist unless the BOC demonstrates that prices for interconnection required by section 251, unbundled network elements, and transport and termination are based on forward-looking economic costs.

290. We have previously set forth our view that the requirement for the use of foward-looking economic costs is to be implemented through a method based on total element long-run incremental cost or TELRIC. TELRIC principles ensure that the prices for interconnection and unbundled network elements promote efficient entry decisions. Pursuant to TELRIC principles, prices for interconnection and unbundled network elements recover the forward-looking costs over the long run directly attributable to the specified element, as well as a reasonable allocation of forward-looking common costs.[746] TELRIC pricing also specifically provides for a reasonable profit.[747] We conclude that, for purposes of checklist compliance, prices for interconnection and unbundled network elements must be based on TELRIC principles. We emphasize, however, that

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[746] Section 252(d)(2) states that reciprocal compensation rates for transport and termination shall be based on "a reasonable approximation of the additional costs of terminating such calls." 47 U.S.C. § 252(d)(2)(A)(ii). The determination of "additional costs" of transport and termination must also be based on TELRIC principles.

[747] TELRIC includes what is called "normal" profit, which is the total revenue required to cover all of the costs of a firm, including its opportunity costs. The concept of normal profit is embodied in forward-looking costs because the forward-looking costs of capital, that is, the cost of obtaining debt and equity financing, is one of the forward-looking costs of providing the network elements. This forward-looking cost of capital is equal to a normal profit.

it is not the label that is critical in making our assessment of checklist compliance, but rather what is important is that the prices reflect TELRIC principles and result in fact in reasonable, procompetitive prices. It is our understanding that the large majority of state commissions have stated that they have adopted or intend to adopt forward-looking economic cost approaches. For instance, the principles that the Michigan PSC applied in its recent decision on permanent prices for interconnection appear to be fully consistent with TELRIC principles.[748]

291. We recognize that use of TELRIC principles will necessarily result in varying prices from state to state because the parameters of TELRIC may vary from state to state. Costs may vary, for example, due to differences in terrain, population density, and labor costs from one state to the next. TELRIC principles will not generate the same price in every state; indeed it will not even generate the same formula for pricing in every state. But such principles are fair and procompetitive and should create even opportunities for entry in every state, while permitting, indeed obliging, each state commission to determine prices on its own.[749] In order for us to conduct our review, we expect a BOC to include in its application detailed information concerning how unbundled network element prices were derived.

292. Establishing prices based on TELRIC is a necessary, but not sufficient, condition for checklist compliance. In order for us to conclude that sections 271(c)(2)(B)(i) and (ii) are met, rates based on TELRIC principles for interconnection and unbundled network elements must also be geographically deaveraged to account for the different costs of building and maintaining networks in different geographic areas of varying population density. Deaveraged rates more closely reflect the actual costs of providing interconnection and unbundled elements. Deaveraging should, therefore, lead to increased competition and ensure that competitors make efficient entry decisions about whether they will use unbundled network elements or build facilities.

293. There also must be "just and reasonable" reciprocal compensation for the transport and termination of calls between an incumbent's and a new entrant's network.[750] In order for us to find that the statutory standard has been met for section 271(c)(2)(B)(xiii), the rates not only must be based on TELRIC principles, but new entrants and BOCs must also each be compensated for use of the other's network for transport and termination.

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748 *See Michigan Rate Proceeding*. *See also, supra* note 152

749 We note that Ameritech states that its arbitrated rates for unbundled network elements, interconnection, local transport and termination, and collocation, "are, in fact, lower than a conservative estimate of forward-looking economic costs determined in accordance with the Commission's now-stayed pricing rules." *See* Ameritech Application at 35 n.37. As we previously indicated, we urge the Michigan Commission and the Department of Justice to address Ameritech's compliance with TELRIC principles when Ameritech refiles its application.

750 *See* 47 U.S.C. § 252(d)(2).

294. Finally, we believe that it is important to our assessment of checklist compliance to know the basis for the prices submitted by the BOC in the application. In particular, we would want to know whether those prices were based on completed cost studies, as opposed to interim prices adopted pending the completion of such studies.

295. Pricing for Resold Services. We conclude that a BOC cannot demonstrate compliance with the competitive checklist unless it has appropriate rates for resale services, which the Act defines as "wholesale rates [based on] retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier."[751] Accordingly, resellers should not be required to compensate a BOC for the cost of services, such as marketing, that resellers perform. Moreover, just as recurring wholesale rates should not reflect reasonably avoidable costs, neither should non-recurring charges associated with the service being resold reflect costs that would be reasonably avoidable if the BOC were no longer to offer the service on a retail basis. We will not consider a BOC to be in compliance with section 271(c)(2)(B)(xiv) of the competitive checklist unless the BOC demonstrates that its recurring and non-recurring rates for resold services are set at the retail rates less the portion attributable to reasonably avoidable costs.

296. Non-recurring Charges. Unreasonably high non-recurring charges for unbundled loops and other essential inputs can have as much of a chilling effect on local competition as unreasonably high recurring fees. Both types of charges must be cost-based in order for local competition to take root and flourish. Non-recurring charges may be assessed in the provision of unbundled network elements and interconnection (in providing collocation, for example), and in the provision of resale. Consequently, we conclude that a BOC will not be deemed in compliance with sections 271(c)(2)(B)(i),(ii) and (xiv) of the competitive checklist unless it has shown that its non-recurring charges reflect forward-looking economic costs.[752]

297. Continuing Compliance. We must be confident that a BOC will continue to comply with the pricing requirements contained in the competitive checklist after it has been authorized to provide in-region interLATA service. We anticipate, therefore, that it may be necessary to require, as a condition of authorization, that the BOC continue to price interconnection, unbundled network elements, transport and termination, and resold services in accordance with the competitive checklist as we have described above if it wishes to remain in the long distance market. Imposition of such conditions may be particularly important where we

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751 *Id*. § 252(d)(3).

752 With regard to non-recurring charges associated with services made available for resale, charges that have a retail equivalent are to be priced based on the avoided cost standard in section 252(d)(2) as discussed in the preceding paragraph. Non-recurring charges associated with resale that have no retail equivalent, *e.g.*, development of billing systems for resellers, however, should be based on forward-looking economic costs as discussed in this paragraph.

anticipate continuing negotiations with individual carriers over pricing terms and conditions such as non-recurring charges. We believe that we have authority to impose such conditions pursuant to sections 271(d)(6) and 303(r) of the Communications Act.[753]

2. Unbundled Local Transport

a. Introduction

298. Section 271(c)(2)(B)(v) of the competitive checklist requires Ameritech to provide "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services."[754] The checklist further requires Ameritech to provide [n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)."[755] In the *Local Competition Order*, the Commission required incumbent LECs to provide requesting telecommunications carriers with access to both dedicated and "shared" interoffice transmission facilities as an unbundled network element pursuant to section 251(c)(3).[756]

299. There was significant controversy in this proceeding concerning whether Ameritech's shared transport offerings satisfy the requirements of section 251(c)(3) and our implementing regulations, as mandated by sections 271(c)(2)(B)(ii) and (v) of the Act.[757] In light

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[753] 47 U.S.C. §§ 271(d)(6), 303(r); *see also infra* Section IX (discussing the Commission's authority to impose conditions).

[754] 47 U.S.C. § 271(c)(2)(B)(v).

[755] *Id.* § 271(c)(2)(B)(ii).

[756] *Local Competition Order*, 11 FCC Rcd at 15718. 47 C.F.R. § 51.319(d)(2) states:

> The incumbent LEC shall:
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> (i) Provide a requesting telecommunications carrier exclusive use of interoffice transmission facilities dedicated to a particular customer or carrier, or *use of the features, functions, and capabilities of interoffice transmission facilities shared by more than one customer or carrier*;
> (ii) Provide all technically feasible transmission facilities, features, functions, and capabilities that the requesting telecommunications carrier could use to provide telecommunications services;
> (iii) Permit, to the extent technically feasible, a requesting telecommunications carrier to connect such interoffice facilities to equipment designated by the requesting telecommunications carrier, including, but not limited to, the requesting telecommunications carrier's collocated facilities . . . .

47 C.F.R. § 51.319(d)(2) (emphasis added).

[757] Section 51.319(d) of the Commission's rules requires that incumbent LECs provide access on an unbundled basis to interoffice transmission facilities shared by more than one customer or carrier. 47 C.F.R. § 51.319(d). In this Order, we refer to such shared interoffice transmission facilities as "shared transport."

of our conclusions in this Order that Ameritech has failed to satisfy other checklist requirements of section 271(c)(2)(B), we need not reach this issue. As discussed below, we believe, however, that Ameritech is not in compliance with the requirements that were established in the *Local Competition Order*.

300. Since the release of the *Local Competition Order*, moreover, the Commission has, on reconsideration, clarified the incumbent LECs' obligation to provide shared transport pursuant to section 251(c)(3) of the Act. Although the *Local Competition Order* clearly required incumbent LECs to provide shared transport between incumbent LEC end offices and the tandem switch, the order was not clear on all other portions of the network to which the shared transport obligation applied. As discussed below, the Commission, on reconsideration in the *Local Competition Third Reconsideration Order*, concluded that incumbent LECs are required to provide "shared transport among all end offices or tandem switches in the incumbent LEC's network (*i.e.*, between end offices, between tandems, and between tandems and end offices)."[758] We also concluded that "a requesting carrier may use the shared transport unbundled element to provide exchange access service to customers for whom the carrier provides local exchange service." In this Order, we are not evaluating Ameritech's application against the requirements the Commission established in the *Local Competition Third Reconsideration Order*. We note, however, that all BOCs, including Ameritech, are now on notice as to the clarified shared transport obligations and are required to comply with the revised rules prior to filing any future applications for interLATA entry pursuant to section 271 of the Act.[759]

b. Background

301. Section 251(c)(3) of the Act requires incumbent LECs to "provide, to any requesting telecommunications carrier . . . nondiscriminatory access to network elements on an unbundled basis."[760] In the *Local Competition Order*, the Commission identified seven network elements that incumbent LECs were required to provide to requesting carriers on an unbundled basis. These network elements included unbundled local switching and interoffice transmission facilities. In *Iowa Utilities Board v. FCC*, the United States Court of Appeals for the Eighth Circuit, while vacating certain provisions of the *Local Competition Order*, affirmed the Commission's authority to identify network elements to which incumbent LECs must provide access on an unbundled basis.[761]

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758 *Local Competition Third Reconsideration Order*, FCC 97-295 (rel. August 18, 1997).

759 *Id.* at paras. 24-25, 31-34, 39-49.

760 47 U.S.C. § 251(c)(3).

761 *Iowa Utils. Bd.*, 1997 WL 403401, at *27-28.

302. In the *Local Competition Order,* the Commission defined "interoffice transmission facilities" as:

> incumbent LEC transmission facilities dedicated to a particular customer or carrier, or shared by more than one customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers. [762]

The Commission stated that, "[f]or some elements, especially the loop, the requesting carrier will purchase exclusive access to the element for a specific period," and for "other elements, especially shared facilities such as common transport, carriers are essentially purchasing access to a functionality of the incumbent's facilities on a minute-by-minute basis."[763] The Commission found that "the embedded features and functions within a network element are part of the characteristics of that element and may not be removed from it. Accordingly, incumbent LECs must provide network elements along with all of their features and functions, so that new entrants may offer services that compete with those offered by incumbents as well as new services."[764]

303. Ameritech contends that the Act defines "network element" as "a facility or equipment" used to provide a telecommunications service.[765] Ameritech states that a network element also includes features, functions, and capabilities that are provided by "such facility or equipment."[766] Ameritech claims, however, that, in order to obtain a feature, function, or capability of a network element, the requesting carrier must first designate a discrete facility or piece of equipment, in advance.[767]

304. Several competitive carriers and the Department of Justice dispute Ameritech's assertion that unbundled network elements are limited to a discrete facility or piece of

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762 *Local Competition Order*, 11 FCC Rcd at 16210-11; 47 C.F.R. § 51.319(d)(1).

763 *Local Competition Order*, 11 FCC Rcd at 15631.

764 *Id.* at 15632. That determination was affirmed by the Eighth Circuit. *Iowa Utils. Bd.*, 1997 WL 403401, at *18-22.

765 Ameritech Application, Vol. 2.3, Edwards Aff. at 46.

766 *Id.*, Vol. 2.3, Edwards Aff. at 46.

767 *Id.*, Vol. 2.3, Edwards Aff. at 46

equipment.[768] These competitive carriers further contend that Ameritech is not offering shared transport as required by the Commission's rules. These carriers argue that Ameritech's view of shared transport is transport shared among competitive carriers only, not transport shared with Ameritech.[769] These commenters further assert that Ameritech's view of shared transport violates the requirements of our *Local Competition Order*.[770] CompTel, for example, contends that the Commission's rules require incumbent LECs to provide shared interoffice transmission facilities on an unbundled basis to requesting carriers. CompTel claims that this includes the right to share the transport facilities that Ameritech uses to provide service to its own subscribers.[771]

305. In the *Local Competition Order*, we concluded that the requirement that incumbent LECs provide access to shared transport on an unbundled basis encompassed the sharing of facilities between the incumbent LEC and requesting carriers, and not just, as Ameritech asserts, sharing among requesting carriers.[772] The *Local Competition Order* thus requires incumbent LECs to offer requesting carriers access, on a shared basis, to the same interoffice transport facilities that the incumbent LEC uses for its own traffic, between the incumbents' end offices and tandems.

306. In the *Local Competition Third Reconsideration Order*, we affirmed that the our initial *Local Competition Order* requires incumbent LECs to provide requesting carriers with access to the same transport facilities, between the end office switch and the tandem switch, that incumbent LECs use to carry their own traffic. We further affirmed that, when a requesting carrier obtains local switching as an unbundled network element, it is entitled to gain access to all

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768 *See, e.g.*, AT&T Comments, Vol. IX, Tab J, Falcone and Sherry Aff. at 10 ("Under neither of Ameritech's tranport proposals does a CLEC obtain unbundled access to the full functionality of Ameritech's transport network . . ."); MCI Comments at 27-28 ("Ameritech continues to refuse to provide at cost-based rates *common* transport over the same trunks that carry Ameritech's traffic. . . . Ameritech's refusal to provide common transport forces CLECs to purchase dedicated transport between specified points, rather than terminating traffic throughout Ameritech's network on a call-by-call basis, and thus prevents CLECs from reaching new customers in the most cost-effective manner."); Department of Justice Evaluation at 14 ("The Commission's Local Competition Order specifically allowed new entrants to 'purchase all interoffice facilities on an unbundled basis as part of a competiting local network,' or 'combine its own interoffice facilities with those of the incumbent LEC.'").

769 MFS WorldCom Comments at 22; AT&T Comments at 11.

770 AT&T Comments at 11; Department of Justice Evaluation at 12; MCI Comments at 27-28; MFS WorldCom Comments at 22.

771 CompTel Comments at 21.

772 In the *Local Competition Order*, the Commission stated that with "shared facilities such as common transport, [carriers] are essentially purchasing access to a functionality of the incumbent's facilities on a minute-by-minute basis." *Local Competition Order*, 11 FCC Rcd at 15631. The Commission also stated in its rules that incumbent LECs must provide access to transport facilities "shared by more than one customer or carrier." 47 C.F.R. § 51.319(d)(2)(i). The term "carrier" includes both an incumbent LEC as well as a requesting telecommunications carrier. Moreover, the Commission required incumbent LECs to provide access to other network elements, such as signalling, databases, and the local switch, which are shared among requesting carriers and incumbent LECs, consistent with our view that transport facilities "shared by more than one customer or carrier" must be shared between the incumbent LECs and requesting carriers. *Id.* at 15705-13, 15738-46.

of the features and functions of the switch, including the routing table resident in the incumbent LEC's switch. In that order, we also reconsidered the requirement that incumbent LECs only provide "shared transport" between the end office and tandem. On reconsideration, we concluded that incumbent LECs should be required to provide requesting carriers with access to shared transport for all transmission facilities connecting incumbent LECs' switches -- that is, between end office switches, between an end office switch and a tandem switch, and between tandem switches. We further reaffirmed our conclusion in the *Local Competition Order* that incumbent LECs must permit requesting carriers that purchase unbundled shared transport and unbundled switching to use the same routing table that is resident in the incumbent LEC's switch. We further concluded that the incumbent LEC must provide access not only to the routing table in the switch but also to the transport links that the incumbent LEC uses to route and carry its own traffic.[773] By requiring incumbent LECs to provide requesting carriers with access to the incumbent LEC's routing table and to all its interoffice transmission facilities on an unbundled basis, we ensure that requesting carriers can route calls in the same manner that an incumbent routes its own calls and thus take advantage of the incumbent LEC's economies of scale, scope, and density. Finally, we required that incumbent LECs permit requesting carriers to use shared transport as an unbundled element to carry originating access traffic from, and terminating access traffic to, customers to whom the requesting carrier is also providing local exchange service.[774]

c. Ameritech's Transport Offerings

307. Ameritech contends that it offers both shared and dedicated transport as a network element. It states that it offers dedicated transport at a flat monthly rate, and that it offers three "pricing options" that satisfy its obligation to provide "shared transport." First, Ameritech offers "a flat-rate circuit capacity charge based on the pro-rata capacity of the shared facility."[775] According to Ameritech, this option "required use of dedicated facilities at a DS1 or higher level for direct connections to other end offices or to a tandem on either a dedicated or shared basis with other [requesting] carriers."[776]

308. Second, Ameritech states that it offers an option it calls "Shared Company Transport" that permits requesting carriers to "obtain dedicated transport services at less than the

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773 *Local Competition Third Reconsideration Order*, at para. 26.

774 *Id.* at paras. 38-39.

775 Ameritech Application, Vol. 2.3, Edwards Aff. at 43, 47-48.

776 *Id.*, Vol. 2.3, Edwards Aff. at 47-48.

DS1 level."[777] Ameritech states that it offers Shared Company Transport with two billing options: a flat rate per trunk monthly charge that is 1/24th of the DS1 rate, and a usage sensitive option, based on minutes of use.[778] In conjunction with Shared Company Transport, Ameritech states that it will make available single activated trunk port increments up to a total of 23, so that purchasers of Shared Company Transport do not have to pay for a full DS1 trunk port.[779]

309. Third, Ameritech states that it offers a per-minute-of-use option under its FCC Tariff No. 2, section 6.9.1 (switched transport).[780] Ameritech claims that no competing carriers have "properly" ordered unbundled local transport pursuant to their interconnection agreements.[781] Rather, Ameritech asserts that it "currently is furnishing local transport to Brooks Fiber, MFS and TCG under Ameritech's access tariff, along with other services included in that tariff."[782] Ameritech further asserts that "the transport service under Ameritech's access tariff is identical to unbundled local transport . . . ."[783]

310. Finally, Ameritech contends that, contrary to the claims of some requesting carriers, it is not required to provide what it calls "common transport" as a network element.[784] According to Ameritech, "common transport" is a service, not a discrete network element, because it "is in fact undifferentiated access to transport and switching blended together."[785]

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[777] Shared Company Transport enables requesting carriers that purchase unbundled local switching to obtain up to 23 dedicated trunks between any two Ameritech offices. At 24 trunks, a requesting carrier would subscribe to a DS1. A DS1 provides the equivalent of 24 voice-grade circuits. *Id*.

[778] *Id.* at 48-49. According to Ameritech, the minute-of-use option is based on TELRIC transport rates that apply under reciprocal compensation arrangements for traffic terminated through a tandem, including per-minute termination charges and per-mile per-minute facility mileage charges. *Id.* AT&T maintains that the MOU price "would not be a TELRIC-based charge," but rather, "would be the same as the reciprocal compensation rates approved in the AT&T arbitration agreement for traffic terminating through a tandem, including per-MOU termination charges and per mile/per MOU transport facility mileage charges." AT&T Reply Comments, Vol. IX, Tab J, Falcone and Sherry Aff. at 9.

[779] Ameritech Application, Vol. 2.3, Edwards Aff. at 49. Each activated trunk port will be priced at 1/24th of the DS1 port charge. *Id.*

[780] *Id.* at 43.

[781] Ameritech Application at 45. *See also id.*, Vol. 2.3, Edwards Aff., Schedule 2 at 5.

[782] Ameritech Application at 36, 45, and Vol. 2.3, Edwards Aff. at 44-45.

[783] *Id.* Vol. 2.3, Edwards Aff. at 44-45.

[784] *Id.* at 45 n.50, and Vol. 2.3, Edwards Aff. at 45-48; Ameritech Reply Comments, Vol. 5R.6, Edwards Reply Aff. at 26-40.

[785] Ameritech Application, Vol. 2.3, Edwards Aff. at 45-46. *See also id.* at 45 n.50; Ameritech Reply Comments at 18.

Ameritech adds that it "stands ready to provide this service when ordered as such, but not as an unbundled element."[786]

d. Discussion

311. Ameritech does not dispute that it is required to provide both shared and dedicated transport in order to satisfy its obligations under the competitive checklist. For the reasons given below, we conclude that Ameritech's current shared transport offerings do not satisfy the obligation of incumbent LECs to provide shared transport.[787] The three options that Ameritech offers do not constitute shared transport as defined in the *Local Competition Order* and the *Local Competition Third Reconsideration Order*.

312. The first option, under which a requesting carrier uses, and pays for, an entire transport facility, does not constitute shared transport, because, as Ameritech concedes, this option does not permit requesting carriers to use the same transport facilities that Ameritech uses to transport its own traffic.[788] Thus, this option does not comply with the definition of "shared" transport set forth in the *Local Competition Order* and clarified in the *Local Competition Third Reconsideration Order*.[789] The only distinction between Ameritech's first "shared" transport option and dedicated transport is that Ameritech would act as the billing agent for multiple requesting carriers that use a dedicated transport facility, rather than assess the entire cost of the transport facility to a single requesting carrier.

313. Ameritech's second option, "Shared Company Transport," appears to be almost identical to Ameritech's first "shared" transport option and suffers from the same flaws. The only substantive difference that Ameritech has identified is that, under Shared Company Transport, requesting carriers may obtain access to dedicated facilities that are divided into units smaller than a DS1 capacity trunk. Ameritech also states that it will provide Shared Company Transport either on a flat-rated or a minute-of-use basis.[790] The method of pricing is not dispositive to determining

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786 Ameritech Reply Comments at 18.

787 We do not reach the issue of whether Ameritech has satisfied its obligation to offer dedicated transport as a network element.

788 *See* Ameritech Application, Vol. 2.3, Edwards Aff. at 47-48 (conceding that, "[a]s originally proposed, any sharing would have been between other carriers but not with Ameritech").

789 *See supra* para. 302.

790 Ameritech does not explain how or on what basis it will determine usage-sensitive charges.

whether a facility is shared or dedicated, however.[791] The cost of a dedicated facility may be recovered through a flat-rate charge or through a minute-of-use charge that is based on the cost of the dedicated facility divided by the estimated average minutes the facility will be used.[792] Whether the cost of a dedicated transport facility is recovered on a flat-rated or minute-of-use basis does not therefore change the fact that the facility is dedicated to the use of a particular customer or carrier. In fact, Ameritech itself describes Shared Company Transport as access to "*dedicated transport* services at less than the DS1 level."[793] As we explained above, however, shared transport facilities are transport facilities that are shared among the incumbent LEC and requesting carriers.[794] We thus conclude that Ameritech's Shared Company Transport option constitutes dedicated transport, and fails to meet Ameritech's obligation to provide unbundled shared transport for the same reasons as Ameritech's first option.

314. Ameritech suggests, but does not affirmatively contend, that requesting carriers that purchase Shared Company Transport use the same transport facilities that Ameritech uses to transport its own traffic.[795] Ameritech does not assert, however, that, under this option, requesting carriers can use the same DS-0 level transmission paths as Ameritech or the same trunk ports as Ameritech. In fact, as we previously noted, Ameritech concedes that under this option, requesting carriers would obtain "dedicated transport services."[796] Accordingly, we reiterate our finding that Ameritech's Shared Company Transport does not fall within the definition of shared transport, as required by our *Local Competition Order* and the *Local Competition Third Reconsideration Order*.

315. As a third option, Ameritech contends that its tariffed "switched transport" access service also satisfies its obligation to provide shared transport.[797] Ameritech further asserts that it

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[791] For example, our original pricing rule regarding shared transport permitted rates to be based either on a minute-of-use basis, or in another manner consistent with the manner in which costs are incurred. 47 C.F.R. § 51.509(d). We note, however, that we are not addressing the issue of whether both cost recovery methods that Ameritech offers represent efficient rate structures for the recovery of the costs of dedicated facilities.

[792] For example, our access charge rules estimate a "loading factor of 9,000 minutes per month per voice-grade circuit" for certain transport facilities. 47 C.F.R. § 69.111.

[793] Ameritech Application, Vol. 2.3, Edwards Aff. at 47-48. (emphasis added).

[794] *See supra* para. 305.

[795] Ameritech states that, "as *originally* proposed, any sharing would have been between other carriers, but not with Ameritech." Ameritech Application, Vol. 2.3, Edwards Aff. at 47-48 (emphasis added). The original proposal referenced is presented as a comparison to Ameritech's Shared Company Transport option.

[796] *Id.*, Vol. 2.3, Edwards Aff. at 47-48.

[797] Ameritech relies on its tariffed access service to show that it satisfies its obligation to provide shared transport, but also notes that it provides shared transport in the form of wholesale usage service. *See id.*, Vol. 2.3, Edwards Aff. at 44-45. Ameritech further asserts that "an access tariff is by definition a wholesale tariff."

currently provides what it refers to as "common transport" in the form of tariffed wholesale and access usage services.[798] Ameritech argues at length, however, that it is not required to provide such services under section 251(c)(3).[799] Ameritech nevertheless asserts that, if required to provide its access service (in the form of "common transport") as a network element, it "is both committed and operationally ready to do whatever the law requires."[800]

316. We find that Ameritech's tariffed "switched transport" access service does not satisfy its obligation to provide shared transport as an unbundled network element in accordance with the competitive checklist. Ameritech concedes that it does not currently offer its access service as a network element, but rather as a service.[801] We find that Ameritech's obligation to provide access to shared transport as a network element is independent of, and in addition to, any service it may offer.[802] Therefore, until Ameritech demonstrates that it offers its access service in accordance with sections 251(c)(3) and 252(d)(1), it cannot rely on that service to demonstrate compliance with subsections (ii) and (v) of the competitive checklist.

317. Even assuming that Ameritech were offering its "switched transport" access service as a network element, we find that Ameritech has not demonstrated that this service complies with the competitive checklist. In particular, Ameritech has presented no evidence that its "switched transport" access service satisfies the requirement, set forth in section 252(d)(1) (as required by subsection (ii) of the competitive checklist) that the rates for unbundled network elements be "based on the cost . . . of providing the . . . network element."[803] Moreover,

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Ameritech Reply Comments, Vol. 5R.6, Edwards Reply Aff. at 37.

798 Ameritech Reply Comments at 21; Ameritech Application, Vol. 2.3, Edwards Aff. at 45-46.

799 *See, e.g.*, Ameritech Reply Comments at 18-21, and Vol. 5R.6, Edwards Reply Aff. at 26-40. *See also* Ameritech Application at 45 n.50 (Ameritech "stands ready to provide this service when ordered as such, *but not as an unbundled element*") (emphasis added).

800 Ameritech Reply at 21.

801 Ameritech Application at 45 n.50.

802 The Eighth Circuit, in affirming several of the Commission's unbundling rules, stated that, "[s]imply because these capabilities can be labeled as 'services' does not convince us that they were not intended to be unbundled as network elements." *Iowa Utils. Bd.*, 1997 WL 403401, at *21. The court stated that, even though section 251(c)(4) provides for the resale of services, "in some circumstances a competing carrier may have the option of gaining access to features of an incumbent LEC's network through either unbundling or resale." *Id.* Based on the record in this proceeding, however, we find that Ameritech has not demonstrated that its wholesale or access service tariffs satisfy the requirements of sections 251(c)(3) and 252(d)(1).

803 *See generally supra* Section VI.F.1. Even if Ameritech's tariff for interstate switched transport service has satisfied the requirements of sections 201 and 202 that rates be just and reasonable and not unjustly or unreasonably discriminatory, it has not necessarily satisfied the requirements of sections 251 and 252 that the price of an unbundled network element must be "just, reasonable, and nondiscriminatory" and "based on the cost" of providing the element. 47 U.S.C. §§ 201, 202, 251(c)(3), 252(d)(1).

because Ameritech offers "switched transport" as a service, rather than a network element, it does not permit requesting carriers that use "switched transport" to collect access charges for exchange access service provided over the transport facilities.[804] In the *Local Competition Order*, however, we concluded that requesting carriers that provide exchange access service over network elements are entitled to collect access charges associated with those network elements.[805] Contrary to Ameritech's contention,[806] we find that this is relevant to determining whether Ameritech satisfies the competitive checklist, and in particular, subsection (ii) of the checklist. Section 251(c)(3), and by implication, subsection (ii) of the checklist, require incumbent LECs to provide access to network elements "in a manner that allows requesting carriers to combine such elements in order to provide" a telecommunications service.[807] Ameritech's refusal to permit requesting carriers that purchase its "switched transport" service to provide exchange access service (and collect access charges) as well as local exchange service over its transport facilities violates the requirement that incumbent LECs provide access to unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide telecommunications services, including exchange access service.

318. As set forth in its application, none of the options discussed in Ameritech's application permits requesting carriers to obtain nondiscriminatory access to shared transport, that is, access to the same interoffice transport facilities that Ameritech uses to transport traffic between end offices and tandem switches. After examining all of Ameritech's offerings, we find that none of Ameritech's current shared transport offerings meets subsections (ii) and (v) of the competitive checklist.

3. Local Switching Unbundled from Transport, Local Loop Transmission, or Other Services

a. Introduction

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804 Although Ameritech recognizes that requesting carriers that use shared transport as a network element are entitled to collect access charges if they provide exchange access service using those transport facilities, Ameritech does not extend this conclusion to requesting carriers that use "switched transport" access service. Ameritech Application, Vol. 2.3, Edwards Aff. at 50-51; *see also* Ameritech Reply Comments at 21-22.

805 *Local Competition Order*, 11 FCC Rcd at 15682 n.772. *See also Local Competition Third Reconsideration Order* at para. 36.

806 Ameritech Reply Comments at 21.

807 47 U.S.C. § 251(c)(3). As we said in the *Local Competition Order*, this language in section 251(c)(3) "bars incumbent LECs from imposing limitations, restrictions, or requirements on requests for, or the sale or use of, unbundled elements that would impair the ability of requesting carriers to offer telecommunications services in the manner they intend." *Local Competition Order*, 11 FCC Rcd at 15646. *See also* 47 C.F.R. § 51.315(b) ("Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines"); *Iowa Utils. Bd.*, 1997 WL 403401, at *32 (affirming 47 C.F.R. § 51.315(b)).

319. Section 271(c)(2)(B)(vi) of the Act, item (vi) of the competitive checklist, requires a section 271 applicant to provide "[l]ocal switching unbundled from transport, local loop transmission, or other services."[808] In addition, section 271(c)(2)(B)(ii) of the Act, item (ii) of the competitive checklist, requires section 271 applicants to provide "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)."[809] Section 251(c)(3) establishes an incumbent LEC's "duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of [section 251] . . . and section 252." That section further provides that an incumbent LEC "shall provide such unbundled elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."[810] Because we concluded in our *Local Competition Order* that "incumbent LECs must provide local switching as an unbundled network element,"[811] to fully implement items (ii) and (vi) of the competitive checklist, an incumbent LEC must provide nondiscriminatory access to unbundled local switching.

320. In our *Local Competition Order*, we defined unbundled local switching to include "line-side and trunk-side facilities plus the features, functions, and capabilities of the switch."[812] We explained that the features, functions, and capabilities of a "local switch include the basic switching function of connecting lines to lines, lines to trunks, trunks to lines, trunks to trunks." Moreover, we stated that "[i]t also includes the same basic capabilities that are available to the incumbent LEC's customers, such as a telephone number, directory listing, dial tone, signaling, and access to 911, operator services, and directory assistance."[813] We concluded that "the local switching element includes all vertical features that the switch is capable of providing, including custom calling, CLASS features, and Centrex, as well as any technically feasible customized routing functions."[814] As we explained, "when a requesting carrier purchases the unbundled local

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808 47 U.S.C. § 271(c)(2)(B)(vi); *see also* 47 C.F.R. § 51.319(c).

809 47 U.S.C. § 271(c)(2)(B)(ii).

810 *Id.* § 251(c)(3). Section 252(d)(1) states that "the just and reasonable rate for the interconnection of facilities and equipment . . . shall be . . . based on the cost . . . of providing the interconnection . . . and . . . nondiscriminatory, and . . . may include a reasonable profit." *Id.* § 252(d)(1).

811 *Local Competition Order*, 11 FCC Rcd at 15705.

812 *Id.* at 15706.

813 *Id.*

814 *Id.*

switching element, it obtains all switching features in a single element on a per-line basis."[815] We clarified, in our *Local Competition First Reconsideration Order*, that "a carrier that purchases the unbundled local switching element to serve an end user effectively obtains the exclusive right to provide all features, functions, and capabilities of the switch, including switching for exchange access and local exchange service, for that end user."[816] As stated above, in *Iowa Utilities Board v. FCC*, the court generally upheld the Commission's decision regarding incumbent LECs' obligations to provide access to network elements on an unbundled basis.[817]

321. Although we do not reject Ameritech's application based upon Ameritech's unbundled local switching offering, we are concerned that Ameritech has not provided this unbundled network element in a manner consistent with its obligations under sections 251 and 271 of the Act, the Commission's regulations, and our *Local Competition Third Reconsideration Order* on shared transport. As explained above and discussed in our recent order on shared transport, the Commission has concluded that shared transport is a network element and has rejected Ameritech's arguments to the contrary.[818] Ameritech has publicly committed to provide unbundled local switching in a manner consistent with the Act and the Commission's requirements.[819] Accordingly, we expect that Ameritech will take the appropriate steps to provide unbundled local switching in accordance with our requirements and the terms of the Act, prior to refiling its application. We expect that the Michigan Commission and the Department of Justice will examine this issue very carefully in their consideration of Ameritech's next application for Michigan.

b. Discussion

322. In its application, Ameritech acknowledges that it does not currently furnish unbundled local switching to any of its local exchange competitors.[820] Ameritech asserts that, although no competitor has chosen to order unbundled local switching, it makes this checklist

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815 *Id.*

816 *Local Competition First Reconsideration Order*, 11 FCC Rcd at 13048. In our *Local Competition Order*, we concluded that telecommunications carriers purchasing unbundled network elements to provide interexchange services or exchange access services are not required to pay federal or state access charges except during a temporary transition period. *Local Competition Order*, 11 FCC Rcd at 15682.

817 *See Iowa Utils. Bd.*, 1997 WL 403401, at *27-28.

818 *Local Competition Third Reconsideration Order* at paras. 22, 41, 43.

819 *See, e.g.,* Ameritech Reply Comments at 21-22.

820 Ameritech Application at 15.

item available through its interconnection agreements and would provide it upon request.[821] The Michigan Commission agreed with these assertions and found Ameritech's unbundled local switching offering in compliance with the checklist requirements.[822] Several potential competitors, including MCI, AT&T, and LCI, assert that they have sought unbundled switching, in connection with other elements, when requesting interconnection agreements.[823] They contend that Ameritech is not "providing" unbundled local switching for a variety of reasons, including Ameritech's refusal to allow competing LECs purchasing unbundled switching to collect access charges in some circumstances, to purchase trunk ports on a shared basis, or to access routing tables resident in the local switch.[824] The Department of Justice concluded that Ameritech has not provided unbundled local switching as a legal or a practical matter to competing LECs in Michigan.[825] Moreover, the Department of Justice found that Ameritech has not yet demonstrated its practical ability to provide unbundled local switching in the manner required by the checklist.[826]

323. The Department of Justice rejected Ameritech's legal position regarding what constitutes unbundled local switching largely because Ameritech does not allow competing carriers that purchase local switching to collect access charges from interexchange carriers if the competing carriers' calls are transported from an interexchange carrier's point of presence to the unbundled switch over trunks that also carry Ameritech's customers' calls.[827] Ameritech sets forth the conditions under which it would permit purchasers of unbundled local switching to collect access charges in affidavits accompanying its Brief.[828] Ameritech explains that competitors that purchase what it describes as its "Network Platform-UNE" offering may collect both originating and terminating access charges. This network configuration includes unbundled local switching in combination with unbundled interoffice transport facilities that are dedicated or "shared" with

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821 *Id.* at 46.

822 *See* Michigan Commission Consultation at 40 (incorporating by reference the Michigan Commission Comments of February 5, 1997, at 33-34).

823 *See* AT&T Comments at 8-9; LCI Comments at 1, 8-10; MCI Comments at 13, Exh. G, Sanborn Aff. at 24-27.

824 *E.g.*, AT&T Comments at 12-14, Vol. IX, Tab J, Falcone and Sherry Aff. at 40-47; AT&T Reply Comments at 5; CompTel Comments at 18-19; MFS WorldCom Comments at 16-17.

825 Department of Justice Evaluation at 11.

826 *Id.* at 19-21.

827 *Id.* at 11.

828 *See* Ameritech Application, Vol. 2.3, Edwards Aff. at 56, and Vol. 2.5, Kocher Aff. at 33-35.

other competing LECs on a per-minute of use or per DS-O basis.[829] In contrast, Ameritech explains that competitors purchasing its "Network Combination-Common Transport Service," which Ameritech describes as "unbundled switching-line ports in conjunction with wholesale usage services," would not be entitled to collect access charges for exchange access traffic.[830]

324. Thus, Ameritech appears to take the position that unless a competing LEC that purchases the local switching element also purchases a dedicated trunk terminating on a dedicated trunk port -- *i.e.*, purchases both a line port and a dedicated trunk port on the local switch -- Ameritech is entitled to collect both originating and terminating access.[831] Pursuant to Ameritech's approach, a competing LEC can only collect terminating access if it purchases dedicated transmission facilities or transmission facilities shared only with other competing LECs.[832] This view reflects Ameritech's position that shared transport is a service, not a network element, and that, when a competing LEC purchases the shared transport service, it must likewise purchase exchange access service.

325. AT&T contends that Ameritech's position improperly ties the right of a purchaser of local switching to charge for access services to its purchase of a dedicated trunk port and dedicated transmission facilities.[833] Moreover, the interexchange carriers and competing LECs participating in this proceeding generally contend that Ameritech's position denies purchasers of local switching the right to use the entire switching capability provided by the LEC's switch, as the Commission intended.[834]

326. We conclude that Ameritech's position on unbundled local switching is contrary to section 251(c)(3) of the Act and the Commission's rules. Ameritech's definition of local switching as an unbundled network element is inconsistent with the Commission's, because Ameritech does not define unbundled local switching to include access to the "line-side and trunk-side facilities plus the features, functions, and capabilities of the switch."[835] In particular, Ameritech improperly

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829 *See* Ameritech Application, Vol. 2.3, Edwards Aff. at 56, and Vol. 2.5, Kocher Aff. at 33-35.

830 *See* Ameritech Application, Vol. 2.3, Edwards Aff. at 56, and Vol. 2.5, Kocher Aff. at 33-35.

831 *See* Ameritech Reply Comments, Vol. 5R.12, Kocher Reply Aff. at 21-22, 33-40.

832 *See* AT&T Comments, Vol. IX, Tab J, Falcone and Sherry Aff. at 43.

833 *See id.*, Vol. IX, Tab J, Falcone and Sherry Aff. at 38-39, 47. *Compare* Ameritech Reply Comments, Vol. 5R.12, Kocher Reply Aff. at 22.

834 *See, e.g.*, AT&T Comments at 12-13, and Vol. IX, Tab J, Falcone and Sherry Aff. at 40-47; AT&T Reply Comments at 5; CompTel Comments at 18-19; MFS WorldCom Comments at 16-17.

835 *Local Competition Order*, 11 FCC Rcd at 15706.

limits the ability of competitors to use local switching to provide exchange access.[836] The Commission has established "that where new entrants purchase access to unbundled network elements to provide exchange access services, whether or not they are also offering toll services through such elements, the new entrants may assess exchange access charges to IXCs [interexchange carriers] originating or terminating toll calls on those elements."[837] Moreover, the Commission has stated that, "[i]n these circumstances, incumbent LECs may not assess exchange access charges to such IXCs because the new entrants, rather than the incumbents, will be providing exchange access services, and to allow otherwise would permit incumbent LECs to receive compensation in excess of network costs in violation of the pricing standard in section 252(d)."[838] The Commission's rules make clear that competing LECs may use unbundled network elements to provide exchange access service, as well as local exchange service.[839]

327. Ameritech's position on unbundled local switching likewise denies competitors access to the trunk-side facilities of the switch.[840] As AT&T contends, Ameritech's position denies competing LECs access to the trunk port facilities that are part of the unbundled switch.[841] We held in the *Local Competition Order* that some network elements, such as loops, are provided exclusively to one requesting carrier, and some network elements, like shared transport, are provided on a minute-of-use basis and are shared with other carriers.[842] In our *Local Competition Order*, we required incumbent LECs "to provide unbundled access to shared transmission facilities between end offices and the tandem."[843] In addition, as we clarified in our recent order on shared transport, incumbent LECs must provide unbundled access to shared transmission

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836 *See id.*; *Local Competition First Reconsideration Order*, 11 FCC Rcd at 13048; *see also* AT&T Comments, Vol. IX, Tab J, Falcone and Sherry Aff. at 38-47; CompTel Comments at 18-19.

837 *Local Competition Order*, 11 FCC Rcd at 15682 n.772.

838 *Id.* at 15682 and n.772; *see also Access Charge Reform Order* at para. 337 (reaffirming that sections 251(c)(3) and 252(d)(1) do not compel telecommunications carriers using unbundled network elements to pay access charges or restrict the ability of carriers to use network elements to provide originating and terminating access).

839 The Commission's rules require incumbent LECs to provide unbundled network elements "in a manner that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element." 47 C.F.R. § 51.307(c). Moreover, the rules implementing section 251(c)(3) define unbundled network elements "as providing purchasers with the ability to provide originating and terminating interexchange access to themselves and to be the sole access provider to" themselves or unaffiliated providers. *Id.* §§ 51.307(c); 51.309(b)).

840 *See Local Competition Order*, 11 FCC Rcd 15706.

841 *See* AT&T Comments at 12-13.

842 *Local Competition Order*, 11 FCC Rcd at 15631.

843 *Id.* at 15718.

facilities between two end office switches and between two tandem switches.[844] Given that an incumbent LEC must make such transport facilities available on a shared basis, the trunk ports to which such trunks are attached must likewise be made available on a shared basis. Therefore, Ameritech may not, consistent with the Commission's requirements, require a purchaser of unbundled switching to purchase a dedicated trunk port.

328. We note that several parties indicate that Ameritech's unbundled local switching offering does not grant purchasers the ability to employ the existing routing instructions resident in Ameritech's end office switches.[845] Both end office and tandem switches contain routing tables, which provide information about how to route each call. The routing instructions notify the switch as to which trunks are to be used in transporting a call.[846] Since we defined unbundled local switching in our *Local Competition Order* to include the "features, functions, and capabilities of the switch,"[847] purchasers of unbundled local switching are entitled to obtain access to the same routing table that the incumbent LEC uses to route its own traffic over its switched network.[848] As we explain in our order on shared transport, routing is a critical and inseverable function of the local switch.[849] Accordingly, Ameritech must grant requesting telecommunications providers that purchase local switching access to its routing tables.

329. We emphasize that Ameritech must establish by a preponderance of the evidence that it provides the entire switching capability on nondiscriminatory terms in order to comply with the competitive checklist. As part of this obligation, Ameritech must permit competing carriers to provide exchange access, to purchase trunk ports on a shared basis, and to access the routing tables resident in its switches.

330. Other issues. The parties raise other factual and legal issues on the record regarding Ameritech's provision of unbundled local switching. For instance, MCI has expressed concerns regarding Ameritech's technical ability to provide unbundled local switching in a manner consistent with its entry strategy.[850] We anticipate that many such issues will be resolved as

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844 *Local Competition Third Reconsideration Order* at paras. 25-29.

845 *See, e.g.*, CompTel Comments at 19-20; TRA Comments at 35; MFS WorldCom Comments at 21, 24-25.

846 *Local Competition Third Reconsideration Order* at para. 23 and n.69.

847 *Local Competition Order*, 11 FCC Rcd at 15706.

848 *Local Competition Third Reconsideration Order* para. 23.

849 *Id.* at para. 45.

850 *E.g.*, MCI Comments at 28-31, Exh.G, Sanborn Aff. at 34-35 (contending that Ameritech has not resolved processes regarding traffic flows, customized routing, and numbering; raising questions regarding the interoperability of Ameritech's unbundled switch offering). *Compare* Ameritech Reply Comments, Vol. 5R.12,

Ameritech conforms its provision of unbundled local switching to the Commission's requirements. We also expect that the Michigan Commission and the Department of Justice will provide clear and specific records on these issues, to the extent that they arise in Michigan's next application. We are particularly concerned, however, about the dispute in the record regarding Ameritech's technical ability and obligation to provide usage information to competing LECs purchasing unbundled local switching with shared transport in a manner that permits competing LECs to collect access revenues.[851] We note that Ameritech asserts that it is not now technically feasible for Ameritech's local switches to provide precise usage data or originating carrier identity for terminating local usage or to identify terminating access usage with the called number.[852] AT&T asserts that Ameritech could develop appropriate software to generate such data.[853] Ameritech proposes an interim approach for estimating terminating usage, pursuant to which it has said it will continue to bill interexchange carriers for terminating usage based upon a mutually agreed-upon factor that would establish a ratio of originating to terminating access minutes of use. Moreover, Ameritech proposes to begin developing a long-term solution for providing such data when the Commission enters a reconsideration order on shared transport. Ameritech states that it will implement a long-term solution only after it has exhausted its judicial remedies.[854] If these issues arise in future applications, as we expect they will, we will look at them very closely.

331. We are likewise concerned by AT&T's allegation that Ameritech has restricted its competitors' ability to access the vertical features of the switch by constructing a burdensome "Switch Feature Request" process.[855] While we do not determine the merits at this time, we would examine carefully any such allegations in any future Ameritech application.[856] In addition, we would consider the interexchange carriers' allegation that Ameritech has refused to provide the

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Kocher Reply Aff. at 26-28 (responding to allegations).

851 *See* Department of Justice Evaluation at 19-20; *see* AT&T Comments, Vol. IX, Tab J, Falcone and Sherry Aff. at 44-45, 48-49. *See also Local Competition Third Reconsideration Ordeer* at para. 26 n.77.

852 Ameritech Comments, Vol. 2.5, Kocher Aff. at 37-38; Ameritech Reply Comments at 22, and Vol. 5R.12, Kocher Reply Aff. at 34-40. AT&T and others have moved to strike portions of Ameritech's reply comments and accompanying affidavit support on this point. AT&T Motion to Strike, Exhibit A; Joint Motion to Strike, Proposed Order. *Compare* Ameritech Michigan's Response to Motions to Strike, Appendix A at 4.

853 *See* AT&T Comments, Vol. IX, Tab J, Falcone and Sherry Aff. at 48-49.

854 Ameritech Comments,Vol. 2.5, Kocher Aff. at 35-41; Ameritech Reply Comments at 22, and Vol. 5R.12, Kocher Reply Aff. at 73, 76-84.

855 AT&T Comments at 16, and Vol. IX, Tab J, Falcone and Sherry Aff. at 50-53. *Compare* Ameritech Reply Comments, Vol. 5R.12, Kocher Reply Aff. at 22-26.

856 *See* Ameritech Reply Comments, Vol. 5R.12, Kocher Reply Aff. at 22-26.

customized routing capability of the unbundled switch element, as required by the *Local Competition Order*, should this complaint persist.[857]

4. Combinations of Unbundled Network Elements

332. In the 1996 Act, Congress sought to hasten the development of competition in local telecommunications markets by including provisions to ensure that new entrants would be able to choose among three entry strategies -- construction of new facilities, the use of unbundled elements of an incumbent's network, and resale.[858] Congress included the second entry strategy because it recognized that many new entrants will not have constructed local networks when they enter the market.[859] As a result, the ability of new entrants to use unbundled network elements, as well as combinations of unbundled network elements, is integral to achieving Congress' objective of promoting competition in the local telecommunications market.

333. To achieve its objective of ensuring that new entrants would have access to unbundled network elements, as well as combinations of such elements, Congress adopted section 251(c)(3). This provision establishes an incumbent LEC's "duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of [section 251] . . . and section 252."[860] That section further provides that an incumbent LEC "shall provide such unbundled elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." We concluded in the *Local Competition Order* that section 251(c)(3) does not require a new entrant to construct local exchange facilities before it can use

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857 *See* AT&T Comments at 14-15, Vol. IX, Tab J, Falcone and Sherry Aff. at 95-101; AT&T Reply Comments at 5; MCI Comments, Exh. G, Sanborn Aff. at 34-35. *Compare* Ameritech Reply Comments, Vol. 5R.12, Kocher Reply Aff. at 20 (contending that Ameritech provides customized routing "on a standardized basis where facilities permit, which includes the vast majority of switches"). AT&T reports that the Michigan Commission relegated the provisioning of customized routing to the bona fide request process on the grounds that technical feasibility is a legitimate concern in Ameritech's switches. AT&T has challenged that decision in federal court pursuant to section 252(e)(6) of the Act. *See* AT&T Comments at 15 n.9 (citing *AT&T Communications of Michigan, Inc. v. Michigan Bell Telephone Co.*, No. 97-60018 (E.D. Mich)).

858 *See Iowa Utils. Bd.*, 1997 WL 403401, at *28 ("Congress clearly included measures in the Act, such as the interconnection, unbundled access, and resale provisions, in order to expedite the introduction of pervasive competition into the local telecommunications industry.").

859 *See id.* ("Congress recognized that the amount of time and capital investment involved in the construction of a complete local stand-beside telecommunications network are substantial barriers to entry, and thus required incumbent LECs to allow competing carriers to use their networks in order to hasten the influence of competitive forces in the local telephone business.").

860 47 U.S.C. § 251(c)(3).

unbundled network elements to provide a telecommunications service.[861] We determined that such limitations on access to combinations of unbundled network elements would seriously inhibit the ability of potential competitors to enter local telecommunications markets through the use of unbundled elements, and would therefore significantly impede the development of local exchange competition.[862] We further determined that incumbent LECs may not separate network elements that the incumbent LEC currently combines.[863] The Eighth Circuit recently upheld these determinations.[864]

334. Congress required the Commission to verify that a section 271 applicant is meeting its obligation to provide nondiscriminatory access to unbundled network elements, as well as combinations of networks elements, prior to granting in-region interLATA authorization to the applicant. Section 272(c)(2)(B)(ii) of the Act, item (ii) of the competitive checklist, requires the Commission to ensure that a section 271 applicant is meeting its obligation to provide to provide "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)."[865]

335. Ameritech claims that it meets checklist item (ii), because it is providing "all of the individual network elements that the Commission requires to be unbundled, as well as combinations of elements."[866] Numerous parties vigorously dispute Ameritech's claim that it meets checklist item (ii). These parties argue that Ameritech's refusal to provide unbundled local transport and unbundled local switching in accordance with the Act and the Commission's regulations seriously impairs the ability of new entrants to enter the local telecommunications markets in Michigan through the use of combinations of unbundled network elements.[867] These

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861 *Local Competition Order*, 11 FCC Rcd at 15666.

862 *Id.*; *see also Iowa Utils. Bd.*, 1997 WL 403401, at *28 (upholding "the remaining unbundling rules as reasonable constructions of the Act, because, as we have shown, the Act itself calls for the rapid introduction of competition into the local phone markets by requiring incumbent LECs to make their networks available to. . . competing carriers").

863 *Local Competition Order*, 11 FCC Rcd at 15647; *see also* 47 C.F.R. § 51.315(b).

864 *Iowa Utils. Bd.*, 1997 WL 403401, at *26, *28; *see also Local Competition Third Reconsideration Order* at para. 44.

865 47 U.S.C. § 271(c)(2)(B)(ii).

866 Ameritech Application at 39-40.

867 AT&T Comments at 17-20; CompTel Comments at 4; LCI Comments at 4-10; MCI Comments at 26; MCI Reply Comments at 5; MFS WorldCom Comments at 21; MFS WorldCom Reply Comments at 11.

parties further contend that Ameritech has not deployed adequate OSS functions for the ordering, provisioning, and billing of combinations of unbundled network elements.[868]

336. As discussed elsewhere in this Order, we determine that Ameritech has failed to provide access to OSS functions in accordance with the Act and the Commission's regulations.[869] In addition, although we do not reject Ameritech's application based on Ameritech's provision of access to unbundled local switching and unbundled local transport, we discuss above our concerns about Ameritech's provision of these unbundled network elements.[870] We anticipate that many of these disputes concerning the ability of competing carriers to enter the local telecommunications markets through the use of combinations of unbundled network elements will be resolved as Ameritech conforms its provision of these elements to the Act's and the Commission's requirements. We emphasize that, under our rules, when a competing carrier seeks to purchase a combination of network elements, an incumbent LEC may not separate network elements that the incumbent LEC currently combines.[871]

337. We note also that Ameritech is currently involved in a series of carrier-to-carrier tests of its OSS functions for the ordering, provisioning, and billing of combinations of unbundled network elements.[872] We expect that, in future applications, Ameritech will present the results of these tests and demonstrate that new entrants are able to combine network elements to provide telecommunications services, as required by the Act and the Commission's regulations. Because the use of unbundled network elements, as well as the use of combinations of unbundled network elements, is an important entry strategy into the local telecommunications market, we will examine carefully these issues in any future section 271 applications.

5. Number Portability

338. Section 271(c)(2)(B)(xi), item (xi) of the competitive checklist, states that "[u]ntil the date by which the Commission issues regulations pursuant to section 251 to require number portability," a section 271 applicant must provide "interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements,

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868 *See, e.g.*, AT&T Comments at 22-23; MCI Comments, Exh. D, King Aff. at 56.

869 *See supra* Section VI.C.5.b.

870 *See supra* Sections VI.F.2 (unbundled local transport), VI.F.3 (unbundled local switching).

871 47 C.F.R. § 51.315(b); *see also Iowa Utils. Bd.*, 1997 WL 403401, at *28; *Local Competition Third Reconsideration Order* at para. 44.

872 *See supra* para. 160.

with as little impairment of functioning, quality, reliability, and convenience as possible."[873] Section 271(c)(2)(B)(xi) further provides that, after the Commission issues such regulations, a section 271 applicant must be in "full compliance with such regulations."[874] The Commission adopted regulations implementing the number portability requirements in section 251 on June 27, 1996.[875] The rules for interim number portability adopted in the *Number Portability Order* provide, in relevant part:

> All LECs shall provide transitional measures, which may consist of Remote Call Forwarding (RCF), Flexible Direct Inward Dialing (DID), or any other comparable and technically feasible method, as soon as reasonably possible upon receipt of a specific request from another telecommunications carrier, until such time as the LEC implements a long-term database method for number portability in that area.[876]

339. Ameritech claims that it meets the requirements of checklist item (xi) because it is providing interim number portability to competing carriers primarily via Remote Call Forwarding and Direct Inward Dialing and "plans to begin implementation of long-term number portability in Michigan in the fourth quarter of 1997."[877] The Michigan Commission states that "[i]nterim number portability (INP) continues to be available via remote call forwarding and direct inward dialing . . . . As of April 30, 1997, Ameritech represents over 24,000 numbers have been ported in Michigan."[878] The Michigan Commission further notes that "[i]mplementation of true or long-term number portability in Michigan is to take place when implementation in Illinois takes place."[879] Based on the foregoing, the Michigan Commission concludes that "[i]t appears

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873 47 U.S.C. § 271(c)(2)(B)(xi).

874 *Id.*

875 *Telephone Number Portability*, CC Docket No. 95-116, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352 (1996) (*Number Portability Order), pet. for review pending sub nom. U S WEST, Inc. v. FCC*, No. 97-9518 (10th Cir. filed Apr. 24, 1997), First Memorandum Opinion and Order on Reconsideration, FCC 97-74 (rel. Mar. 11, 1997) *(Number Portability First Reconsideration Order), pet. for review pending sub nom. Bell Atlantic Nynex Mobile, Inc. v. FCC,* No. 97-9551 (10th Cir. filed July 30, 1997), *recon. pending.*

876 *Number Portability Order*, 11 FCC Rcd at 8481; 47 C.F.R. § 52.7(a).

877 Ameritech Application at 51-52; Ameritech Application, Vol. 2.3, Edwards Aff. at 72; *see also* Michigan Consultation at 48-49. For a description of these and other methods of providing number portability, see *Number Portability Order*, 11 FCC Rcd at 8494-8500.

878 Michigan Commission Consultation at 48.

879 *Id.* at 49.

Ameritech complies with check list item (xi)."[880] The Department of Justice did not evaluate Ameritech's showing on this checklist item.

340. AT&T, Brooks Fiber, and Sprint raise a number of factual and legal issues on the record regarding Ameritech's provision of number portability. Specifically, these parties contend that Ameritech fails to comply with its obligation to provide number portability by: (1) not offering Route Index - Portability Hub as an interim number portability method;[881] (2) delaying for more than a year the provision of Direct Inward Dialing with signalling using Signalling System 7 (SS7) protocol;[882] and (3) using interim rates for number portability, pending the Michigan Commission's decision on the appropriate cost recovery for number portability.[883]

341. In light of our conclusion that Ameritech does not satisfy other elements of the competitive checklist, we do not reach the merits of these allegations at this time. Nevertheless, we will examine carefully such disputes among the parties if they arise in any future section 271 application. As we recognized in the *Number Portability Order*, "number portability is essential to meaningful competition in the provision of local exchange services."[884] As a result, we will take very seriously any allegation that a BOC is failing to meet its current obligation to provide number portability through transitional measures pending deployment of a long-term number portability method.

342. Sprint also argues that Ameritech has failed to demonstrate that it will be able to implement long-term number portability.[885] Because number portability is critical to the development of meaningful competition, we must be confident that the BOC will meet its obligations to deploy long-term number portability consistent with the Commission's deployment schedule, as modified in the Commission's *Number Portability First Reconsideration Order*.[886] When reviewing a section 271 application, we will examine carefully the status of the BOC's implementation of a long-term number portability method. It is not sufficient for an applicant to assert summarily in its application that it plans to deploy long-term number portability, without providing adequate documentation that it has undertaken reasonable and timely steps to meet its

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880 *Id.*

881 AT&T Comments at 29-30; AT&T Comments, Vol.VIII, Tab H, Evans Aff. at 9-10; AT&T Reply Comments at 14-15.

882 Brooks Fiber Comments at 32-33.

883 Sprint Comments at 16-17.

884 *Number Portability Order*, 11 FCC Rcd at 8367.

885 Sprint Comments at 23-24.

886 *Number Portability First Reconsideration Order* at paras. 48, 78-99, 104-107, and Appendix E.

obligations in this area. We would expect to review a detailed implementation plan addressing, at minimum, the BOC's schedule for intra- and inter-company testing of a long-term number portability method, the current status of the switch request process, an identification of the particular switches for which the BOC is obligated to deploy number portability, the status of deployment in requested switches, and the schedule under which the BOC plans to provide commercial roll-out of a long-term number portability method in specified central offices in the relevant state. We also would expect to review evidence demonstrating that the BOC will provide nondiscriminatory access to OSS to support the provision of number portability.

343. Finally, we note that, although our rules do not require a LEC to provide wide-scale commercial deployment of long-term number portability prior to the deadline for the relevant phase in our deployment schedule, any carrier that chooses to deploy long-term number portability on a flash-cut basis at a time close to the deadline for a particular phase will not be in a position to request an extension of the deadline if unforeseen problems arise upon commercial deployment. Our rules specify that "[i]n the event a carrier . . . is unable to meet the Commission's deadlines for implementing a long-term number portability method, it may file with the Commission *at least 60 days in advance of the deadline* a petition to extend the time by which implementation in its network will be completed."[887] Any BOC that is unable to meet its long-term number portability implementation obligations, and has failed to file in a timely fashion a request for an extension of the deadline, would not be deemed in compliance with item (xi) of the competitive checklist.

VII. COMPLIANCE WITH SECTION 272 REQUIREMENTS

A. Introduction

344. In light of our conclusion that Ameritech has not fully implemented the competitive checklist, as required by section 271(d)(3)(A), we need not address whether Ameritech has satisfied the other requirements of section 271(d)(3). Nevertheless, because section 271(d)(3)(B) sets forth a separate determination that we must make to approve an application, we believe it is appropriate to decide whether Ameritech has complied with the requirements of this provision. Section 271(d)(3)(B) provides that the Commission shall not approve a BOC's application for authorization to provide interLATA services unless the BOC demonstrates that "the requested authorization will be carried out in accordance with the requirements of section 272."[888] Section 272 requires a BOC to provide certain interLATA telecommunications services through a separate affiliate, and establishes structural and

887 47 C.F.R. § 52.31(d) (emphasis added).

888 47 U.S.C. § 271(d)(3)(B).

nondiscrimination safeguards that are designed to prevent anticompetitive discrimination and cost-shifting.[889]

345. As we observed in the *Non-Accounting Safeguards Order*, "BOC entry into in-region interLATA services raises issues for competition and consumers, even after a BOC has satisfied the requirements of section 271(d)(3)."[890] We further noted that:

> 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 and information 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. Moreover, to the extent carriers offer both local and interLATA services as a bundled offering, a BOC that discriminates against the rivals of its affiliates could entrench its position in local markets by making these rivals' offerings less attractive.[891]

346. For these reasons, Congress required us to find that a section 271 applicant has demonstrated that it will carry out the requested authorization in accordance with the requirements of section 272.[892] We view this requirement to be of crucial importance, because the structural and nondiscrimination safeguards of section 272 seek to ensure that competitors of the BOCs will have nondiscriminatory access to essential inputs on terms that do not favor the BOC's affiliate.[893] These safeguards further discourage, and facilitate detection of, improper cost allocation and cross-subsidization between the BOC and its section 272 affiliate.[894] These safeguards, therefore, are designed to promote competition in all telecommunications markets, thereby fulfilling Congress' fundamental objective in the 1996 Act.

347. Section 271(d)(3)(B) requires the Commission to make a finding that the BOC applicant will comply with section 272, in essence a predictive judgment regarding the future behavior of the BOC. In making this determination, we will look to past and present behavior of the BOC applicant as the best indicator of whether it will carry out the requested authorization in

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889 *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21913-14.

890 *Id.* at 21911-12.

891 *Id.* at 21912.

892 47 U.S.C. § 271(d)(3)(B).

893 *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21913.

894 *See Accounting Safeguards Order*, 11 FCC Rcd at 17546, 17550.

compliance with the requirements of section 272. Moreover, section 271 gives the Commission the specific authority to enforce the requirements of section 272 after in-region interLATA authorization is granted.[895]

348. For the reasons set forth below, we conclude that, based on its current and past behavior, Ameritech has failed to demonstrate that it will carry out the requested authorization in accordance with the requirements of section 272. In addition, we indicate areas of concern that we may examine more closely when Ameritech files another application pursuant to section 271 in the future. To the extent this Order does not expressly address every section 272-related issue raised in the context of this application, we make no findings with respect to those issues.

B. Compliance with Section 272(b)(3) Requirements

1. Introduction

349. Section 272(b)(3) requires that ACI (Ameritech's in-region interLATA affiliate) and Ameritech Michigan (the local exchange company) "have separate officers, directors, and employees . . . ."[896] Ameritech claims that it satisfies this obligation, stating that ACI and Ameritech Michigan (as well as all other Ameritech Bell operating companies) each "has no board of directors" and, as a result, ACI complies with the separate director requirement.[897] Ameritech's affiant Patrick J. Earley states that "[n]either ACI nor any of the AOCs currently has a Board of Directors," and therefore "no director of ACI is also a director of an AOC."[898]

350. Several parties argue that Ameritech's application is deficient because Ameritech Michigan and ACI do not have separate boards of directors.[899] These parties argue that because Ameritech Corporation apparently manages both Ameritech Michigan and ACI, ACI lacks the kind of independent decision-makers Congress demanded. In particular, Sprint argues that ACI is ultimately managed by the same board of directors that controls Ameritech Michigan.[900] Sprint points out that, pursuant to ACI's certificate of incorporation, Ameritech Corporation, ACI's sole

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895 47 U.S.C. § 271(d)(6).

896 *Id.* § 272(b)(3). We note that section 272(b)(3) directly refers to the 272 affiliate and the "Bell operating company." Section 3(4) of the Act explicitly states that "Michigan Bell Telephone Company" and its successor (Ameritech Michigan) is a "Bell operating company." *Id.* § 153(4).

897 Ameritech Application at 57, and Vol. 2.2, Earley Aff. at 10-13.

898 Ameritech Application, Vol. 2.2, Earley Aff. at 10.

899 KMC Telecommunications Comments at 10-12; Sprint Comments at 25-28; MFS WorldCom Comments at i, 45-46.

900 Sprint Comments at 25.

shareholder, controls the business of ACI, and that Ameritech Corporation "'may exercise all such powers of the corporation and do all such lawful acts and things as the corporation [ACI] might do.'"[901] Disputing Ameritech's argument that the absence of *any* directors for ACI and Ameritech is sufficient to be in compliance with section 272(b)(3), KMC Telecommunications argues that, absent Ameritech's explanation of the management structure it employs in lieu of a board of directors, the Commission must assume that both subsidiaries operate by direct stockholder management, and therefore Ameritech Michigan's and ACI's shareholder, Ameritech Corporation, manages both those companies.[902]

351. These parties argue that the separate board requirement of section 272(b)(3) represents Congress' determination that separation is necessary to ensure that the interLATA subsidiary is run independently of the BOC.[903] KMC and MFS WorldCom also state that Congress deliberately decided not to allow the Commission to waive this requirement.[904] Sprint argues that independence is critical because directors owe an unyielding fiduciary duty to the corporation, have a duty to monitor the corporation in order to ensure that it is run according to the law, and have a duty to make decisions on behalf of that company.[905] TCG expresses concern that ACI has shared employees and officers with other Ameritech affiliates.[906] TCG also asserts that the reporting relationships between ACI, Ameritech Michigan and Ameritech Corporation are interdependent, because the Presidents of Ameritech and ACI report to the same Ameritech Corporation Vice President and that Ameritech Vice President-Regulatory reports to the same Ameritech Corporation Vice President as the ACI Regulatory Director.[907]

352. Ameritech responds to these arguments by stating that Ameritech Michigan and ACI "are not required" to have separate directors under section 272(b)(3) or the Commission's rules implementing that provision, and therefore the fact that these entities both have *no* directors indicates compliance with this provision.[908] Ameritech also states that the requirement of separate

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[901] Sprint Comments at 25 n.57.

[902] KMC Telecommunications Comments at 11-12.

[903] Sprint Comments at 26-27; KMC Telecommunications Comments at 11-12; MFS WorldCom Comments at 45-46.

[904] KMC Telecommunications Comments at 12; MFS WorldCom Comments at 45-46.

[905] Sprint Comments at 26-27.

[906] TCG Comments at 28.

[907] *Id.* at 33-35.

[908] Ameritech Reply Comments at 24-25; Letter from Gary L. Phillips, Director of Legal Affairs, Ameritech, to William F. Caton, Acting Secretary, Federal Communications Commission, at 1 (Aug. 5, 1997) (Ameritech August 5 Letter).

directors is "to guard against improper commingling between a BOC and its long distance affiliate, not to impose an affirmative obligation for each to form its own board of directors."[909] Ameritech also responds to TCG's contentions regarding ACI and Ameritech Michigan's reporting relationships. Ameritech states that although Ameritech Michigan's Vice President-Regulatory used to report to the same Ameritech Corporation Vice President as ACI's Regulatory Director, that is no longer the case. Instead, the Ameritech Michigan Vice President-Regulatory reports to the President of Ameritech Michigan and to a Senior Vice President of Ameritech Corporation. According to Ameritech, the position of Regulatory Director at ACI has been eliminated, and those responsibilities have been transferred to the ACI General Counsel, who reports to the President of ACI and Ameritech Corporation's General Counsel. Ameritech acknowledges, however, that the President of Ameritech Michigan and the President of ACI report to the same Executive Vice President of Ameritech Corporation.[910]

2. Discussion

353. We conclude that Ameritech's corporate structure is not in compliance with the section 272(b)(3) requirement that its interLATA affiliate (ACI) maintain "separate" directors from the operating company (Ameritech Michigan). In particular, we find that under Delaware and Michigan corporate law, Ameritech Corporation has the duties, responsibilities, and liabilities of a director for both ACI and Ameritech Michigan. As a result, ACI lacks the independent management that Congress clearly intended in enacting the separate director requirement.

354. As Ameritech describes in its application, ACI is a Delaware close corporation, originally incorporated in 1994 as "Ameritech Global Link, Inc." (changed in 1995 to "Ameritech Communications, Inc.", or "ACI").[911] Ameritech states that the stock of ACI is 100 percent owned by Ameritech Corporation.[912] Ameritech Michigan is a Michigan close corporation, originally incorporated in 1904 as the "Michigan State Telephone Company."[913] Ameritech

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[909] Ameritech Reply Comments at 25.

[910] Ameritech Reply Comments, Vol 5R.14, LaSchiazza Reply Aff. at 5-6, and Vol 5R.5, Earley Reply Aff. at 5-6.

[911] Ameritech Application, Vol. 2.2, Earley Aff., Attachments 1-2.

[912] *Id.*, Vol. 2.2, Earley Aff. at 4; Ameritech August 5 Letter at 2.

[913] *See* Letter from Gary L. Phillips, Director of Legal Affairs, Ameritech, to William F. Caton, Acting Secretary, Federal Communications Commission, Articles of Association of the Michigan State Telephone Company, dated Jan. 26, 1904 (August 1, 1997) (Ameritech August 1 Letter). The predecessor to Ameritech Corporation originally had a board of directors of five people. *Id.* at Article 7.

Corporation owns 100 percent of Ameritech Michigan's stock.[914] The certificates of incorporation of both companies do not provide for boards of directors.[915]

355. Ameritech argues that ACI, being a closely-held corporation, is not required by Delaware law to have a separate board of directors.[916] Ameritech also argues that it is not required by section 272(b)(3) or Commission rule to have a board of directors for ACI.[917] The implication of this argument is that, because there are no formal directors for ACI, the separate director requirement of section 272(b)(3) is not at issue. We agree with Ameritech that section 272 and our rules do not require that ACI maintain any particular form of corporate organization. However, the relevant state corporate law of Delaware and Michigan assign the responsibilities and liabilities of directors to shareholders under the form of organization that Ameritech has chosen for ACI and Ameritech Michigan.

356. We believe that in passing section 272(b)(3), with its express reference to corporate "directors," Congress clearly intended for the Commission to read section 272(b)(3) in concert with relevant state law regarding corporate governance. Therefore, to the extent that state corporate law deems or imposes upon other entities the responsibilities of corporate directors in the absence of a formal board, we believe that section 272(b)(3) requires that those other entities be "separate." Since ACI is incorporated pursuant to Delaware law and Ameritech Michigan is incorporated pursuant to Michigan law, we must look to Delaware and Michigan corporate law to determine whether ACI has "separate" directors from Ameritech Michigan.

357. Ameritech correctly argues that Delaware law does not require that a "closely held" corporation, such as ACI, maintain a separate board of directors.[918] Section 351 of the Delaware General Corporate Law states that "[t]he certificate of incorporation of a close corporation may provide that the business of the corporation shall be managed by the stockholders of the corporation rather than by a board of directors."[919] Section 7 of the Articles

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914 Ameritech August 5 Letter at 2; Ameritech August 1 Letter, Articles of Association of the Michigan State Telephone Company, Article VIII, as amended on March 27, 1990 (list of stockholders).

915 *See* Ameritech Application, Vol. 2.2, Earley Aff., Attachments 1-2; Ameritech August 1 Letter, Articles of Association of the Michigan State Telephone Company.

916 Ameritech August 5 Letter at 2.

917 In support of its position, Ameritech relies on our *Non-Accounting Safeguards Order*, in which we stated, "the arguments of the BOCs that the section 272(b)(3) requirement that a BOC and a section 272 affiliate have separate officers, directors, and employees simply dictates that the same person may not simultaneously serve as an officer, director, or employee of both a BOC and its section 272 affiliate." Ameritech Reply Comments at 24 (quoting *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21990).

918 Del. Code Ann. tit. 8, § 342 (1996) (defining "close corporation").

919 *Id.* tit. 8, § 351 (1996).

of Incorporation of Ameritech Global Link, Inc. (later renamed ACI) states that "the business of the corporation shall be managed by the stockholders of the corporation rather than a board of directors, as permitted under section 351 . . . ."[920]

358. In the event that a close corporation does not appoint a board of directors, Delaware law establishes that the shareholders of close corporations adopting this management structure are deemed directors for purposes of corporate governance and liability. Section 351(2) states that the stockholders of such a corporation "shall be deemed to be directors for purposes of applying provisions of this chapter," and section 351(3) states that "[t]he stockholders of the corporation shall be subject to all liabilities of directors."[921] Indeed, section 7 of the ACI Certificate of Incorporation restates these obligations of the stockholders of ACI and designates the stockholders of ACI as directors for purposes of Delaware law and for director liability.[922] Therefore, we conclude that Ameritech Corporation (the sole shareholder of ACI) is, by operation of Delaware corporate law, the "director" of ACI.[923]

359. The same result holds for Ameritech Michigan. As indicated above, Ameritech Michigan is incorporated pursuant to Michigan corporate law, and Ameritech Corporation is the sole shareholder of Ameritech Michigan.[924] Like Delaware law, Michigan law permits corporations to elect direct management by the shareholders in lieu of appointing a board of directors.[925] Michigan law also imposes upon the shareholders of such a corporation the responsibilities and liabilities of corporate directors. In particular, section 450.1463(3) of the Michigan Compiled Laws states that, if the articles of incorporation do not create a board, that action "impose[s] upon the shareholders the liability for managerial acts or omissions that is imposed on directors by law . . . ."[926] Therefore, we conclude that, in effect, Ameritech

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[920] Ameritech Application, Vol. 2.2, Earley Aff., Attachment 1 (Section 7 of the Certificate of Incorporation of Ameritech Global Link, Inc. (June 28, 1994) (later renamed Ameritech Communications, Inc.)).

[921] Del. Code Ann. tit. 8, §§ 351(2)-(3) (1996).

[922] *See* Ameritech Application, Vol. 2.2, Earley Aff., Attachment 1 (Certificate of Incorporation).

[923] Ameritech appears to agree with this finding. *See* Ameritech August 5 Letter at 2 ("[P]ursuant to ACI's certificate of incorporation and Section 351, Ameritech Corporation 'shall be deemed to be' ACI's director for purposes of Delaware corporate law.").

[924] *See* Ameritech August 1 Letter, Articles of Association of the Michigan Bell Telephone Company (Ameritech Michigan), Articles VI, VIII, as amended on March 27, 1990; Ameritech August 5 Letter at 2.

[925] Mich. Comp. Laws Ann. § 450.1463(1) (1996) ("[T]he articles of incorporation may provide that there shall not be a board . . .").

[926] *Id.* § 450.1463(3) (1996). *See also* Article VI of Articles of Association of Ameritech Michigan ("The effect of this provision is to impose upon the shareholders the liability for managerial acts or omissions that is imposed on directors by law."). Ameritech August 1 Letter, Articles of Association of the Michigan Bell Telephone Company (Ameritech Michigan), Article VI, as amended on March 27, 1990.

Corporation is, by operation of Michigan corporate law, the "director" of Ameritech Michigan. Because Ameritech Corporation has the managerial obligations and liabilities of a director of both ACI and Ameritech Michigan, ACI does not satisfy the requirement of section 272(b)(3) that it have "separate . . . directors . . . from the Bell operating company of which it is an affiliate."

360. Ameritech argues that Michigan corporate law does not explicitly "deem" Ameritech Corporation to be a director, but only "impose[s]" director responsibilities on Ameritech Corporation. Accordingly, Ameritech concludes that, even as a legal matter, Ameritech Michigan and ACI do not have the same directors.[927] We are not persuaded by Ameritech's argument, and we do not consider the assignment of director obligations and liabilities of Ameritech Michigan and ACI to Ameritech Corporation to be a "purely formal matter."[928] By requiring that the BOC and the interLATA affiliate have "separate" directors, Congress required that there be some form of independent management and control of the two entities. As a general matter of corporate law, directors have the formal legal power to manage the corporation.[929] The separation between shareholders and directors in modern corporations reflects the separation of ownership and management that the corporate structure offers.[930] The corporate law of some states such as Delaware and Michigan recognizes that, for closely-held corporations, ownership and control need not be separated and permits shareholders to manage and control the corporation directly.[931] Although Michigan law does not formally "deem" the shareholders of such a corporation to be directors, those shareholders do have the managerial obligations and liabilities of directors "impose[d]" on them. Therefore, the legal and practical effect of both the Delaware and Michigan statutes is to effectively *transfer* the management duties and liabilities of directors to the shareholders of the corporation when a corporation chooses this form of corporate governance.

361. We recognize that corporations are ultimately responsible to their shareholders and that, in the context of any parent-subsidiary relationship, complete independence of management

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927 Ameritech August 5 Letter at 2 ("Even if Ameritech Corporation is deemed, as a purely formal matter under Delaware law, to be ACI's director, Ameritech Corporation is *not* deemed to be Ameritech Michigan's director. Thus, there is no overlapping director problem under Section 272(b)(3).").

928 *See id.*

929 *See, e.g.*, Del. Code Ann. tit. 8, § 141(a) (1996); Mich. Comp. Laws Ann. § 450.1501 (1996) ("The business and affairs of a corporation shall be managed by or under the direction of its board, except as otherwise provided in this act or in its articles of incorporation."); Robert C. Clark, *Corporate Law* § 3.2.1 (1986); *see also Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985); *Ayres v. Hardaway*, 303 Mich. 589, 594, 6 N.W.2d 905. 970 (Mich. 1942); Craig W. Palm & Mark A. Kearney, "A Primer on the Basics of Directors' Duties in Delaware: The Rules of the Game (Part I)," 40 Vill. L. Rev. 1297, 1300 (1995).

930 *See* Clark, *Corporate Law* at § 1.2.4.

931 *Id.* at § 1.3.

of the subsidiary will not always be possible.[932] However, in enacting section 272(b)(3), Congress obviously required that the BOC and the interLATA affiliate be separately managed to at least some degree, and one of the affirmative requirements of that provision is the separate director requirement. Since Delaware and Michigan law impose on Ameritech Corporation -- the sole shareholder of both ACI and Ameritech Michigan -- the responsibilities of a "director" of both corporations, we conclude that Ameritech's application is not in accordance with section 272(b)(3). Simply because state law permits Ameritech to vest traditional director duties and liabilities in the shareholders of these corporations does not relieve Ameritech of the 272(b)(3) obligation that the entities that possess those rights and obligations of directors to be separate entities. In short, we find that Congress intended that its separate director requirement not be easily nullified merely through a legal fiction.

362. We do not find it necessary to examine in detail the various corporate reporting relationships that TCG and Ameritech debate in their pleadings to find that Ameritech does not comply with section 272(b)(3).[933] The fact, however, that the Presidents of both Ameritech Michigan and ACI report to the same Ameritech Corporation Executive Vice President, as Ameritech acknowledges, underscores the importance of the separate directors requirement. Generally, corporate officers report to their board of directors, and, in the case of the BOC interLATA affiliate, that board is to be a separate body than the BOC's board. Given that the principal corporate officers of Ameritech Michigan and ACI report to the same Ameritech Corporation officer, it is clear that as a practical matter (as well as a matter of law), Ameritech Corporation is the corporate director for both Ameritech and ACI.

C. Compliance with Section 272(b)(5) Requirements

1. Introduction

363. Section 272(b)(5) of the Communications Act provides that the BOC's section 272 affiliate "shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection."[934] To satisfy the requirement that transactions between a BOC and its section 272 affiliate be "reduced to writing and available for public inspection," the *Accounting Safeguards Order* requires the section 272 affiliate, "at a minimum, to provide a detailed written description of the asset or service transferred and the terms and conditions of the transaction on the Internet

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932 *See* Ameritech August 5 Letter at 3.

933 *See* TCG Comments at 33-35; Ameritech Reply Comments, Vol 5R.14, LaSchiazza Reply Aff. at 5-6, and Vol 5R.5, Earley Aff. at 5-6.

934 47 U.S.C. § 272(b)(5).

within 10 days of the transaction through the company's home page."[935] In addition, this information concerning the transaction "must also be made available for public inspection at the principal place of business of the BOC."[936] We further determined that "the description of the asset or service and the terms and conditions of the transaction should be sufficiently detailed to allow us to evaluate compliance with our accounting rules."[937]

364. In its application, Ameritech asserts that it has complied, and will continue to comply, with the requirements of section 272(b)(5) and the *Accounting Safeguards Order*.[938] Ameritech states that, although the accounting and public disclosure requirements of the *Accounting Safeguards Order* were not scheduled to become effective until July 21, 1997, at the earliest,[939] Ameritech implemented the requirements on May 12, 1997.[940] Ameritech therefore maintains that it had implemented the requirements of the *Accounting Safeguards Order* before it filed its application, and that it currently complies with all the requirements of section 272(b)(5) and the *Accounting Safeguards Order*.[941]

365. AT&T and TCG contest this assertion, contending that Ameritech does not comply with the requirements of section 272(b)(5) and the *Accounting Safeguards Order*. AT&T argues that several of the transactions that Ameritech and ACI have publicly disclosed do not

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935 *Accounting Safeguards Order*, 11 FCC Rcd at 17593.

936 *Id.*

937 *Id.*

938 Ameritech Application at 58.

939 The *Accounting Safeguards Errata* amended paragraph 268 of the *Accounting Safeguards Order* to include the following:

> [T]he requirements and regulations established in this decision with regard to part 32 of our Rules, 47 C.F.R. Part 32, shall become effective upon approval by OMB of the new information collection requirements adopted herein, but no sooner than six months after publication in the Federal Register [on January 21, 1997]. . . . The remaining new and/or modified information collections established in this Order shall become effective upon approval by OMB of the new information collection requirements adopted herein, but no sooner than thirty days after publication in the Federal Register.

Implementation of the Telecommunications Act of 1996; Accounting Safeguards Under the Telecommunications Act of 1996, CC Docket No. 96-150, Errata, 12 FCC Rcd 2993, 2993 (1997) (*Accounting Safeguards Errata*). The rules adopted in the *Accounting Safeguards Order* took effect on August 12, 1997. *See Accounting Safeguard Rule Changes Requiring OMB Approval Soon to be Effective*, Public Notice, DA 97-1669 (rel. Aug. 5, 1997); Accounting Safeguards Under the Telecommunications Act of 1996, 62 Fed. Reg. 43,122 (Aug. 12, 1997).

940 Ameritech Application, Vol. 2.14, Shutter Aff. at 4-5; Ameritech Reply Comments, Vol.5R.25, Shutter Reply Aff. at 5-6. We encouraged, but did not require, BOCs to implement the requirements before the rules' effective date. *Accounting Safeguards Errata*, 12 FCC Rcd at 2993.

941 Ameritech Reply Comments at 23-24.

include rates. AT&T and TCG also argue that it appears that Ameritech and ACI have not disclosed all of their transactions with each other, including those related to preparations by ACI to enter the interLATA market.[942]

2. Discussion

366. As discussed above, section 271(d)(3)(B) requires the Commission to make a predictive judgment regarding the future behavior of a section 271 applicant. We further indicated that the past and present behavior of the BOC applicant is highly relevant to this assessment. Ameritech maintains that, since May 12, 1997, it has complied fully with section 272(b)(5) and the requirements in the *Accounting Safeguards Order*, even those requirements that were not in effect on that date. Because Ameritech asserts that it has complied with the *Accounting Safeguards Order*, we examine Ameritech's compliance with the requirements adopted in that order. We emphasize, however, that we examine Ameritech's asserted compliance with the requirements in the *Accounting Safeguards Order* that had not yet taken effect on the date of Ameritech's application only as an indicator of Ameritech's future behavior.

367. After examining the record evidence in this proceeding, we conclude that Ameritech has failed to demonstrate that it will carry out the requested authorization in accordance with section 272(b)(5), because it has failed to disclose publicly the rates for all of the transactions between Ameritech and ACI. Moreover, it appears that Ameritech and ACI have not disclosed publicly all of their transactions as required by section 272(b)(5). Accordingly, if Ameritech continues its present behavior, and does not remedy these problems, it would not be in compliance with the requirements of section 272(b)(5).

368. In response to AT&T's assertion that Ameritech has not disclosed rates for transactions between Ameritech and ACI, Ameritech maintains that "there is no requirement in the *Accounting Safeguards Report and Order* to disclose rates for services to ensure compliance with the Commission's accounting rules."[943] Rather, Ameritech argues that "the specific requirement is to provide a '. . . detailed written description of the asset or service transferred and the terms and conditions of the transaction . . . .'"[944] Ameritech further maintains that the terms and conditions of the transaction include only the valuation rules that will be applied to the

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[942] AT&T Comments at 37-39; AT&T Comments, Vol. XII, Exh. O, Goodrich and McClelland Joint Aff. at 11-25; TCG Comments at 29, 31-32, 35-36; *see also* Department of Justice Evaluation at 28 (stating that the lack of information available regarding transactions between Ameritech and ACI "raises questions about whether Ameritech has sufficiently documented the affiliated transactions to allow detection of discrimination, cross-subsidization, or any other anticompetitive behavior.").

[943] Ameritech Reply Comments, Vol. 5R.25, Shutter Reply Aff. at 7.

[944] *Id.*, Vol. 5R.25, Shutter Reply Aff. at 7 (citing *Accounting Safeguards Order*, 11 FCC Rcd at 17593).

transaction, and do not include the actual rates.[945] Ameritech therefore argues that it has complied with the requirements of section 272 and the *Accounting Safeguards Order* by posting the terms and conditions of the transaction, including a description of the valuation method used, but not the actual rates.[946]

369. We find, contrary to Ameritech's claim, that our *Accounting Safeguards Order* requires Ameritech to disclose the actual rates for its transactions with its section 272 affiliate. Ameritech's argument fails to acknowledge the *Accounting Safeguards Order*'s directive that "the description of the asset or service and the terms and conditions of the transaction should be sufficiently detailed to allow us to evaluate compliance with our accounting rules."[947] Instead, Ameritech appears to be relying on the terminology in the Commission's *Joint Cost Order* for describing affiliate transactions in a cost allocation manual (CAM), which specifically stated that disclosure of the price of a transaction was not necessary.[948] In the *Accounting Safeguards Order*, however, we expressly stated that the information contained in a BOC's CAM is not sufficiently detailed to satisfy section 272(b) because the BOC's CAM contains only a general description of the asset or service and does not describe the terms and conditions of each individual transaction.[949] Therefore, a statement of the valuation method used, without the details of the actual rate, does not provide the specificity we required in the *Accounting Safeguards Order*. Because Ameritech has failed to provide a sufficiently detailed description of the transactions to allow us to evaluate compliance with our accounting rules, we are unable to find that Ameritech will carry out the requested authorization in accordance with section 272.

370. In addition, we are concerned about the complaint that Ameritech has failed to disclose all of the transactions between Ameritech and ACI. Ameritech responds that it has disclosed on its Internet website all transactions entered into between Ameritech and ACI that occurred on or after May 12, 1997, and all transactions entered into prior to that date that were still in effect on that date.[950] Ameritech further maintains that all transactions entered into between these parties and concluded prior to May 12, 1997, were accounted for in accordance

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945 *Id.*, Vol. 5R.25, Shutter Reply Aff. at 7.

946 *See id.*, Vol. 5R.25, Shutter Reply Aff. at 6-7.

947 *Accounting Safeguards Order*, 11 FCC Rcd at 17593.

948 *Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities*, CC Docket No. 86-111, Report and Order, 2 FCC Rcd 1298, 1304, 1328 (1987) (*Joint Cost Order*), *recon.*, 2 FCC Rcd 6283, *further recon.*, 3 FCC Rcd 6701, *aff'd sub nom. Southwestern Bell Corp. v. FCC*, 896 F.2d 1378 (D.C. Cir. 1990).

949 *Accounting Safeguards Order*, 11 FCC Rcd at 17594.

950 Ameritech Reply Comments, Vol. 5R.25, Shutter Reply Aff. at 5-6.

with the Commission's existing accounting rules.[951] Ameritech, however, does not affirmatively state that this latter group of transactions was disclosed publicly.

371. Although BOCs need not comply with the requirements we adopted in the *Accounting Safeguards Order* prior to the effective date of that order, BOCs were still obligated to comply with the statute as of the date it was enacted. Section 272(b)(5) expressly states that all transactions between a BOC and its section 272 affiliate shall be "available for public inspection."[952] Consequently, although Ameritech and ACI need not disclose transactions in the manner specified in the *Accounting Safeguards Order* prior to that order's effective date, Ameritech and ACI must make those transactions available for public inspection in some manner, as required by section 272(b)(5). Accordingly, in order to demonstrate compliance with section 272(b)(5) in a future application, we expect that Ameritech and ACI will make available for public inspection all transactions between them that occurred after February 8, 1996.

372. Furthermore, Ameritech maintains that "transactions entered into between ACI and any of its non-BOC affiliates not involving the BOC affiliates are not required to be disclosed on Ameritech's Internet website nor are they required to be made available for public inspection."[953] We note that Ameritech has established two divisions that will process orders for network elements and wholesale services, Ameritech Information Industry Services (AIIS) and Ameritech Long Distance Industry Services (ALDIS).[954] AIIS offers, at wholesale, "services for resale and network components" to competing telecommunications carriers and to ACI.[955] Ameritech states that "ALDIS is an Ameritech business unit that serves as Ameritech's exclusive sales channel for the sale of switched and special access services to interexchange carriers," including ACI.[956]

373. We concluded in the *Non-Accounting Safeguards Order* that "a BOC cannot circumvent the section 272 requirements by transferring local exchange and exchange access facilities and capabilities to an affiliate."[957] We therefore determined that, "if a BOC transfers to an affiliated entity ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3), we will deem such entity to be an 'assign' of the BOC under

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951 Ameritech Application, Vol. 2.14, Shutter Aff. at 4; Ameritech Reply Comments, Vol. 5R.25, Shutter Reply Aff. at 6 n.9.

952 47 U.S.C. § 272(b)(5).

953 Ameritech Reply Comments, Vol. 5R.25, Shutter Reply Aff. at 6.

954 Ameritech Application, Vol. 2.2, Earley Aff. at 15.

955 *Id.*, Vol. 2.10, Mickens Aff. at 1-2.

956 *Id.*, Vol. 2.6, Kriz Aff. at 1.

957 *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22054.

section 3(4) of the Act with respect to those network elements. Any successor or assign of the BOC is subject to the section 272 requirements in the same manner as the BOC."[958] We do not have adequate information in the record to determine whether Ameritech has transferred local exchange and exchange access facilities and capabilities to AIIS or ALDIS. We expect that, in any future section 271 application, Ameritech will state whether it has transferred to AIIS or ALDIS, at any time, any network facilities that are required to be unbundled pursuant to section 251(c)(3), and if so, the timing and terms of any such transfer. If Ameritech has transferred facilities and capabilities such that AIIS or ALDIS is a successor or assign of Ameritech, we expect Ameritech to disclose the transactions between these divisions and ACI, in compliance with section 272(b)(5) and our implementing rules.

VIII. OTHER CONCERNS RAISED IN THE RECORD

374. Several other issues have arisen in the context of Ameritech's application. These issues are based on allegations made by various commenters that Ameritech has violated certain Commission rules and has engaged in anticompetitive conduct. These issues include Ameritech's inbound telemarketing script, its provision of intraLATA toll service, and its compliance with the customer proprietary network information (CPNI) requirements of section 222. As we discuss in Section IX below, evidence that a BOC applicant has violated federal telecommunications regulations or engaged in anticompetitive conduct is relevant to our inquiry under section 271, and would be considered in the public interest analysis to the extent it arises in future applications.[959]

375. With respect to its inbound telemarketing script, Ameritech states that, once it receives section 271 authorization, when a customer calls Ameritech to establish new local exchange service or switch the location of its existing service, Ameritech's service representative will inform the customer:

> 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?[960]

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958 *Id.*

959 As discussed *infra* Section IX, we do not address Ameritech's public interest showing, but highlight here some issues raised in the context of this application in order to provide further guidance to Ameritech.

960 Ameritech Application, Vol. 2.2, Earley Aff., Schedule 7. Ameritech states that, in accordance with the Commission's accounting rules, ACI will reimburse Ameritech Michigan for the time spent by the Ameritech Michigan service representative to mention "Ameritech Long Distance" and its services when reciting the script. *See id.*, Vol. 2.2, Early Aff. at 19.

If the customer chooses Ameritech Long Distance or another long distance company, the order will be processed accordingly. If the customer requests a listing or telephone numbers of other available companies, the service representative will read from the entire list and ask the customer for its choice of long distance carrier.[961]

376. We conclude that this script, if actually used by Ameritech, would violate the "equal access" requirements of section 251(g). Mentioning only Ameritech Long Distance unless the customer affirmatively requests the names of other interexchange carriers is inconsistent on its face with our requirement that a BOC must provide the names of interexchange carriers in random order.[962] Such a practice would allow Ameritech Long Distance to gain an unfair advantage over other interexchange carriers.[963] As explained in our *Non-Accounting Safeguards Order*, "the obligation to continue to provide such nondiscriminatory treatment stems from section 251(g) of the Act."[964] In that order, we concluded that a BOC must "provide any customer who orders new local exchange service with the names and, if requested, the telephone number of all the carriers offering interexchange services in its service area."[965] Moreover, we concluded that the "BOC must ensure that the names of the interexchange carriers are provided in random order."[966] Thus, not only are BOCs required to provide customers requesting new local exchange service the names of competing interexchange carriers, but they must provide these names in random order.

377. We also have concerns about allegations that Ameritech is effectively stifling competition in the local exchange market by refusing to provide intraLATA toll service to competing LEC customers.[967] Such actions on the part of Ameritech have led to the filing of

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961 *Id.*, Vol. 2.2, Early Aff., Schedule 7.

962 *See* Sprint Comments at 28-29 (maintaining that the listing of all interexchange carriers' names is mandatory, and Ameritech's script, by not listing the names of competing interexchange carriers, is designed to steer customers to Ameritech's long distance affiliate, ACI).

963 *See* Sprint Comments at 28-30 (alleging that Ameritech's inbound telemarketing script is indicative of Ameritech's plan to exploit its local exchange monopoly power into the long distance market).

964 *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22046.

965 *Id.*

966 *Id.*

967 *See* Michigan Commission Consultation at 56 ("Ameritech has . . . begun a process in Michigan of exiting certain portions of the intraLATA toll market."); Brooks Fiber Comments at 28, 33-34; LCI Comments at 24-25; MFS WorldCom Comments at 8 and Schroeder Aff. at 18-19; Michigan Attorney General Comments at 6.

several complaint proceedings before the Michigan Commission.[968] For example, in its complaint before the Michigan Commission, Brooks Fiber alleges that although Ameritech provides intraLATA toll service to customers of certain independent LECs that do not compete with Ameritech in its service area, it has refused to allow customers of Brooks Fiber's local exchange service to elect Ameritech for the provision of intraLATA toll services.[969] Ameritech, in its answer to Brooks Fiber's complaint, contends that whether to provide intraLATA toll service to Brooks Fiber customers is a management decision solely within the discretion of Ameritech.[970] In addition, Brooks Fiber, LCI, and MFS WorldCom allege that Ameritech has used its intraLATA "Value Link Calling Plus Plans" (ValueLink)[971] to lock in its customers to Ameritech as their local exchange provider.[972] For example, they claim that, if Ameritech ValueLink customers want to switch to a competing LEC for local service and still retain Ameritech for intraLATA toll service, they must terminate their ValueLink plan, which contain significant termination penalties,[973] in

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968 *Id.* These complaints were filed by Climax Telephone Company, Brooks Fiber, and Frontier Communications of Michigan on March 10, 1997, March 21, 1997, and April 18, 1997, respectively. The Michigan Commission states that, with respect to the Climax complaint, an arbitration panel determined that the Michigan Commission was empowered to order Ameritech to continue the provision of intraLATA toll services to Climax customers residing in Climax's Metro exchange. *Id.* at 56-57.

969 Brooks Fiber Comments, Exh. I, Complaint of Brooks Fiber, Case No. U-11350, at 5. MCI filed a Petition for Leave to Intervene in Brooks Fiber's Complaint before the Michigan Commission. *See* LCI Comments at Exh. N. We note that, although Brooks Fiber and Ameritech have agreed to settle this dispute, the settlement has not been approved by the Michigan Commission. Brooks Fiber Comments at 28 n.50.

970 *Id.*

971 According to Ameritech, this is a volume and term discount contract that allows customers to obtain intraLATA toll service at a discounted rate based upon the commitment to purchase specific volumes of services for a specified period. Brooks Fiber Comments, Exh. I, Answer and Affirmative Defenses of Ameritech, Case No. U-11350 at 5. Brooks Fiber and LCI allege that this calling plan is a long-term agreement, varying in length from twelve to thirty-six months, in which the customer commits to a minimum monthly usage to secure a reduced rate for intraLATA toll calls. *See* Brooks Fiber Comments, Exh. I, Complaint of Brooks Fiber, Case No. U-11350 at 6-7; LCI Comments, Exh. K, Lockwood Declaration at 2.

972 According to LCI, at least 50 to 60% of the available local business customer base in Michigan is on a ValueLink plan. *See* LCI Comments at 22-23 and Exh. K., Lockwood Declaration at 2. Ameritech, in a letter to LCI, denies that 50% of Ameritech's business customers are bound by long-term exclusivity agreements. Rather, Ameritech claims that "an extremely small share of the relevant market is subject to agreements which may be considered long-term in nature." *See* LCI Comments, Exh. O, Letter from Neil Cox, President, Ameritech Information Industry Services, to Anne K. Bingaman, LCI (June 9, 1997) (Cox Letter). In its reply, Ameritech questions LCI's percentages, but does not put forth any of its own. *See* Ameritech Reply Comments, Vol. 5R.6, Edwards Reply Aff. at 63.

973 MFS WorldCom Comments, Schroeder Aff. at 18-19; Brooks Fiber Comments, Exh. I, Complaint of Brooks Fiber, Case No. U-11350, at 7-8; *see* LCI Comments, Exh.C, Charity Aff. at 7-8, and Exh. L, Letter from Anne K. Bingaman, Senior Vice President, LCI to Neil Cox, President, Ameritech Information Industry Services (June 5, 1997) (Bingaman Letter). LCI notes that it has "growing list of customers" whose orders for local exchange service have been placed on hold because the potential termination liability under the ValueLink is so high. LCI Comments at 22. For example, LCI contends that the 1997 version of Ameritech's ValueLink Plan locks customers into minimum revenue commitments of between $50,000 and $200,000 annually for two- or three-year terms. The termination charge in these contracts is the entire lifetime value of the contracts, with no discount. Accordingly, if an Ameritech ValueLink customer asks to switch to LCI after the first year of the ValueLink contract, either the customer or LCI must pay Ameritech $400,000 to switch local service to LCI. *Id.*, Exh. L,

order to switch to another local service provider. In response, Ameritech asserts that it has put in place arrangements that will allow customers to switch to Brooks Fiber as their local carrier and retain their intraLATA toll service under their ValueLink plan and that it is "fully prepared to arrange similar solutions for other [competing LECs]."[974]

378. Despite Ameritech's assurances that it is willing to work out arrangements similar to the one it arranged for Brooks Fiber, it remains unclear from the record the extent to which this issue has been resolved. For example, although Ameritech appears to have implemented a solution for Brooks Fiber,[975] there is no evidence to suggest that it has implemented similar arrangements any other competing carriers. Regardless of how the Michigan Commission resolves the pending complaints, we have concerns that discontinuing or refusing to provide intraLATA toll service to customers that elect to switch to another local service provider may threaten a competing LEC's ability to compete effectively in the local market and thus may be inconsistent with the procompetitive goals of the 1996 Act. Moreover, we are also concerned about the potentially anticompetitive effects of Ameritech's ValueLink plans.

379. Raising a third issue, Brooks Fiber and CWA contend that Ameritech has instituted a "Winback program," pursuant to which Ameritech representatives call former Ameritech customers that have switched their local service to competing LECs to offer more competitive pricing packages.[976] Specifically, Brooks Fiber alleges that, after Brooks Fiber has sent Ameritech requests for the customer service records of Ameritech customers, Ameritech retail sales representatives have telephoned those same customers.[977] We are concerned about Brooks Fiber's suggestion that Ameritech has misused confidential and proprietary information to gain a competitive advantage. We emphasize that Ameritech's use of customer information for

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Bingaman Letter.

[974] *See* Ameritech Reply Comments, Vol. 5R.6, Edwards Aff. at 61, and Vol. 5R.10, Heltsley, Hollis, and Larsen Aff. at 26-27. As an exhibit to its comments, LCI submitted a letter from Ameritech to LCI that, without any explanation, states that "there is no tie of local service to Ameritech's ValueLink product because customers may, in a 2-PIC state, elect Ameritech as their intraLATA toll carrier while electing a different local exchange provider." *See* LCI Comments, Exh. O, Cox Letter.

[975] On reply, Ameritech submits a letter to Brooks Fiber dated May 29, 1997, stating that it is still in progress of implementing a solution. Ameritech also includes a *draft* letter dated June 11, 1997, from Ameritech to Brooks Fiber confirming implementation of a solution. Ameritech Reply Comments, Vol. 5R.6, Edwards Aff., Tab 37. In contrast, Brooks Fiber comments, filed on June 10, 1997, make no mention of a solution and reiterate its complaint that Ameritech refuses to accept intraLATA toll traffic from Brooks Fiber. *See* Brooks Fiber Comments at 33-34.

[976] Brooks Fiber Comments at 39-40; CWA Comments at 20-21.

[977] *See* Brooks Fiber Comments at 39-40; *see also* Letter from Heather Burnett Gold, President, ALTS, to William F. Caton, Acting Secretary, Federal Communications Commission (July 24, 1997), at Attachment (Letter from Larry Vanderveen, Great Lakes Regional Vice President, Brooks Fiber, to Ted Edwards, Vice President-Sales, Ameritech Information Industry Services (July 9, 1997)).

marketing purposes must comply with section 222 of the Act and the Commission's implementing regulations.[978]

380. In the affidavits accompanying its application, Ameritech notes that some customers have authorized Ameritech to share CPNI with Ameritech affiliates (including ACI). Ameritech states, however, that ACI will not request or receive any CPNI from the Ameritech operating companies pursuant to such approval until the Commission issues its rules implementing section 222 of the Act, or ACI has obtained directly customer authorization to receive the information.[979] Like the Department of Justice, we support Ameritech's commitment and believe that it is necessary pending the Commission's adoption of regulations clarifying Ameritech's obligations under section 222 of the Act.[980]

IX. PUBLIC INTEREST

381. In the preceding sections of this Order, we concluded that Ameritech has not implemented fully the competitive checklist and has not complied with the requirements of section 272. We, therefore, must deny Ameritech's application for authorization to provide in-region, interLATA telecommunications services in Michigan. As a result, we need not reach the further question of whether the requested authorization is consistent with the public interest, convenience and necessity, as required by section 271(d)(3)(C). We believe, however, that, provided the competitive checklist, public interest, and other requirements of section 271 are satisfied, BOC entry into the long distance market will further Congress' objectives of promoting competition and deregulation of telecommunication markets.[981] In order to expedite such entry, we believe it would be useful to identify certain issues and make certain inquiries for the benefit of future applicants and commenting parties, including the relevant state commission and the Department of Justice, relating to the meaning and scope of the public interest inquiry mandated by Congress. We emphasize, however, that we are not here examining the public interest showing made in Ameritech's application, nor is our discussion intended to be an exhaustive analysis of the scope of our public interest inquiry generally.

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978 47 U.S.C. § 222. Section 222 establishes restrictions on the use of CPNI obtained by telecommunications carriers in providing telecommunications service to customers, as well as requirements related to the availability of subscriber list information. We note that, at the request of certain carriers, the Commission has commenced a rulemaking to clarify obligations under this section of the Act. *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Notice of Proposed Rulemaking, 11 FCC Rcd 12513 (1996).

979 Ameritech Application, Vol. 2.2, Earley Aff. at 19-20, and Vol. 2.7, LaSchiazza Aff. at 8-9, 13.

980 *See* Department of Justice Evaluation at 28-29.

981 *See* Joint Explanatory Statement at 1 (stating that the intent of the 1996 Act is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. . . .").

382. Commenters in this proceeding have proposed various standards for analyzing whether granting an application for in-region, interLATA authority is consistent with the public interest requirement. The Department of Justice, for example, states that grant of a section 271 application is not consistent with the public interest absent a demonstration that the local market is "irreversibly open to competition."[982] Sprint suggests that the public interest requirement is satisfied once a BOC shows that local competition has been "enabled,"[983] and CPI maintains that the Commission "should examine . . . whether consumers in the state have a realistic choice for local telephone service."[984] Ameritech asserts that the "proper 'public interest' standard for approval of [a section 271] Application is whether the local exchange market . . . is open to competition."[985] Several other BOCs, however, contend that the relevant inquiry is limited to the effect of BOC entry on competition in the long distance marketplace.[986] It is clear from the variety of standards proposed that there is substantial disagreement among the parties about the scope and meaning of this critical requirement in section 271.

383. As discussed below, we believe that section 271 grants the Commission broad discretion to identify and weigh all relevant factors in determining whether BOC entry into a particular in-region, interLATA market is consistent with the public interest. Before making a determination of whether the grant of a particular section 271 application is consistent with the public interest, we are required to consult with the Attorney General, and to give substantial

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982 Department of Justice Evaluation at 3. The Department of Justice also enunciates this standard as "fully and irreversibly open to competition." *See* Department of Justice SBC Oklahoma Evaluation at 41 ("a BOC must establish that the local markets in the relevant state are fully and irreversibly open to the various types of competition contemplated by the 1996 Act . . ."); *see also* Department of Justice Evaluation at 29.

983 Sprint Comments at 32.

984 CPI Comments at 5. *See also* Michigan Attorney General Comments at 8 (the Commission must examine whether the presence of competitive carriers in the local market: (1) demonstrates that barriers to local entry have been lowered and genuine facilities-based competition has emerged; and (2) effectively restrains the incumbent from using its local monopoly to harm competition in the long-distance market); Brooks Comments at 4 (the public interest standard requires the Commission "to look beyond an applicant's apparent compliance with enumerated requirements, and assure itself that the BOC cannot use its continuing control of the local exchange bottleneck to strangle local competition in its cradle"); KMC Comments at 2-3 (the public interest test includes an assessment of competitive conditions in the local market to determine whether the BOC possesses bottleneck monopoly power that it could use to impede competition in the interLATA market); LCI Comments at 21 (to satisfy the public interest standard, Ameritech must demonstrate that the benefits of its entry into the long distance market outweigh any harm that it might cause to competition in the local market); Time Warner Comments at 23-30 (the Commission should examine whether the local market is irreversibly open to competition); Bell Atlantic Comments at 9 (Commission should examine whether the requested authorization is compatible with purposes of the Communications Act other than opening markets to competition, such as universal service, rate averaging and rate integration).

985 *See* Ameritech Reply Comments at 28 ("The DOJ agrees with Ameritech that the 1996 Act does not 'requir[e] any specific level of local competition' as a precondition to BOC entry into long distance, and that the proper 'public interest' standard for approval of this Application is whether the local exchange market in Michigan is open to competition.") (citing Department of Justice Evaluation at 29-31).

986 BellSouth/SBC Comments at 10 (the public interest inquiry must focus on whether Ameritech's interLATA entry will, on balance, enhance or hinder long distance competition).

weight to the Attorney General's evaluation.[987] The Commission, therefore, must give substantial weight to the Department of Justice's recommendation concerning what factors we should consider when determining whether the public interest criterion is satisfied, including the standard that the Department of Justice urges us to use in evaluating such factors, its analysis of the evidence going to that issue, and its conclusion on whether authorization should be granted. Section 271, however, expressly provides that the Commission should not give "any preclusive effect" to the Department of Justice's evaluation.[988] Accordingly, section 271 ultimately obligates the Commission to decide which factors are relevant to our public interest inquiry, how to balance these factors, and whether BOC entry into a particular in-region, interLATA market is consistent with the public interest. In short, the Commission will determine, based upon the record before it, whether the statutory requirement in section 271(d)(3)(C) is met.

384. The Communications Act is replete with provisions requiring the Commission, in fulfilling its statutory obligation to regulate interstate and foreign communications by wire and radio, to assess whether particular actions are consistent with the public interest, convenience, and necessity.[989] Courts have long held that the Commission has broad discretion in undertaking such public interest analyses.[990] For example, in *Washington Utilities and Transportation Commission v. FCC*, the United States Court of Appeals for the Ninth Circuit, in addressing the public interest standard under section 214, stated that "this broad standard is to be interpreted in light of the Commission's sweeping mandate to regulate" pursuant to the underlying purposes of the Communications Act as stated in section 151, and that the Commission's "authority is stated broadly to avoid the need for repeated congressional review and revision of the Commission's authority to meet the needs of a dynamic, rapidly changing industry."[991]

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987 47 U.S.C. § 271(d)(2)(A).

988 *Id.*

989 *See, e.g.*, 47 U.S.C. § 214(a) (requiring the Commission to assess whether the construction or extension of a line is consistent with the public interest); *id.* § 303 (generally requiring the Commission to undertake various actions to regulate the broadcast industry as "the public convenience, interest, or necessity requires"); *id.* § 309(a) (requiring the Commission to assess whether the public interest, convenience, and necessity will be served by granting an application for a broadcast license); *id.* § 310(d) (prohibiting the Commission from authorizing the transfer or assignment of a broadcast construction permit or license unless the transfer or assignment is consistent with the public interest, convenience, and necessity).

990 *See, e.g., FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90 (1953) ("The statutory [public interest] standard no doubt leaves wide discretion and calls for imaginative interpretation."); *Washington Utilities and Transp. Comm'n v. FCC*, 513 F.2d 1142, 1157 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975); *Network Project v. FCC*, 511 F.2d 786, 793 (D.C. Cir. 1975); *Western Union Div. Commercial Tel. Union, Am. Fed. of Labor v. United States*, 87 F. Supp. 324, 335 (D.D.C.), *aff'd*, 338 U.S. 864 (1949) (stating that "[t]he standard 'public convenience and necessity' is to be construed as to secure for the public the broad aims of the Communications Act."). *See generally FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981) (holding that the "public interest" standard under the Communications Act gives the Commission authority to consider a broad range of factors).

991 *See Washington Util. and Transp. Comm'n*, 513 F.2d at 1157 (citing *National Assoc'n of Theatre Owners v. FCC*, 420 F.2d 194, 199 (D.C. Cir. 1969) (noting that "[r]egulatory practices and policies that will serve the 'public interest' today may be quite different from those that were adequate to that purpose in 1910, 1927, or 1934,

385. The legislative history of the public interest requirement in section 271 indicates 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.[992] We also conclude that Congress granted the Commission broad discretion under the public interest requirement in section 271 to consider factors relevant to the achievement of the goals and objectives of the 1996 Act.[993] Moreover, requiring petitioning BOCs to satisfy the public interest standard prior to obtaining in-region, interLATA authority demonstrates, in our view, that Congress did not repeal the MFJ in order to allow checklist compliance alone to be sufficient to obtain in-region, interLATA authority. In section 271, Congress granted the Commission the authority to exercise its expert judgment as to relevant issues in determining whether BOC entry into a particular in-region, interLATA market is consistent with the public interest. We believe that such an inquiry should focus on the status of market-opening measures in the relevant local exchange market.[994] In so doing, the Commission may not, of course, "limit or extend the terms used in the competitive checklist."[995]

386. We reject the view that our responsibility to evaluate public interest concerns is limited narrowly to assessing whether BOC entry would enhance competition in the long distance market. We believe that our inquiry must be a broader one. The overriding goals of the 1996 Act are to open all telecommunications markets to competition by removing operational, economic, and legal barriers to entry, and, ultimately, to replace government regulation of telecommunications markets with the discipline of the market.[996] In order to promote competition in the local exchange and exchange access markets in all states, Congress required incumbent LECs, including the BOCs, to provide access to their networks in a manner that allows new

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or that may further the public interest in the future.")).

992 *See* S. Rep. No. 23, 104th Cong., 1st Sess. 44 (1995) ("The public interest, convenience and necessity standard is the bedrock of the 1934 Act, and the Committee does not change that underlying premise through the amendments contained in this bill."). The Senate report also states that, "in order to prevent abuse of [the public interest] standard, the Committee has required the application of greater scrutiny to the FCC's decision to invoke that standard as a basis for approving or denying an application by a Bell operating company to provide interLATA services." *Id.* Although the Senate Committee appears, at one time, to have intended to require courts to apply greater scrutiny to Commission decisions approving or denying section 271 applications that are based on the public interest standard, ultimately no such requirement was incorporated into the statute.

993 *See WNCN Listeners Guild*, 450 U.S. at 593 ("the public-interest standard . . . [is] 'a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.'") (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940)); *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 216 (1943) (the "[public interest] requirement is to be interpreted by its context"); *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669 (1976).

994 We note that the Commission's public interest analysis is not confined solely to a consideration of traditional antitrust issues.

995 47 U.S.C. § 271(d)(4).

996 *See* Joint Explanatory Statement at 1.

entrants to enter local telecommunications markets through a variety of methods.[997] In adopting section 271, Congress mandated, in effect, that the Commission not lift the restrictions imposed by the MFJ on BOC provision of in-region, interLATA services, until the Commission is satisfied on the basis of an adequate factual record that the BOC has undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition.[998]

387. In providing new entrants multiple avenues for entry into local telecommunications markets, Congress recognized that new entrants will adopt different entry strategies that rely to varying degrees on the facilities and services of the incumbent, and that such strategies are likely to evolve over time.[999] Moreover, Congress did not explicitly or implicitly express a preference for one particular entry strategy, but rather sought to ensure that all procompetitive entry strategies are available.[1000] Our public interest analysis of a section 271 application, consequently, must include an assessment of whether all procompetitive entry strategies are available to new entrants.

388. In addition, our public interest analysis will include an assessment of the effect of BOC entry on competition in the long distance market. We believe that BOC entry into that market could further long distance competition and benefit consumers.[1001] As we have previously observed, "the entry of the BOC interLATA affiliates into the provision of interLATA services has the potential to increase price competition and lead to innovative new services and marketing efficiencies."[1002] Section 271, however, embodies a congressional determination that, in order for this potential to become a reality, local telecommunications markets must first be open to competition so that a BOC cannot use its control over bottleneck local exchange facilities to

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997 As previously noted, these methods include: (1) construction of networks and interconnection with incumbent LECs; (2) use of unbundled network elements obtained from incumbent LECs; (3) resale of the retail services of the incumbent LEC purchased at wholesale rates; and (4) any combination of the foregoing three methods of entry.

998 Congress did, however, lift certain, other restrictions imposed on the BOCs by the MFJ immediately upon enactment of the 1996 Act. *See, e.g.*, 47 U.S.C. § 271(b) (authorizing the BOCs to provide interLATA services originating outside their in-region states and incidental interLATA services originating in any state after the date of enactment of the 1996 Act).

999 *See, e.g.*, Joint Explanatory Statement at 148 ("This conference agreement recognizes that 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. Some facilities and capabilities (*e.g.*, central office switching) will likely need to be obtained from the incumbent local exchange carrier as network elements pursuant to new section 251.").

1000 *See supra* note 997.

1001 *See* Department of Justice Evaluation of SBC Oklahoma Application at 3-4 ("InterLATA markets remain highly concentrated and imperfectly competitive . . . and it is reasonable to conclude that additional entry, particularly by firms with the competitive assets of the BOCs, is likely to provide additional competitive benefits.").

1002 *LEC Classification Order*, FCC 97-142 at para. 92.

undermine competition in the long distance market. Only then is the other congressional intention of creating an incentive or reward for opening the local exchange market met.

389. In making our public interest assessment, we cannot conclude that compliance with the checklist alone is sufficient to open a BOC's local telecommunications markets to competition. If we were to adopt such a conclusion, BOC entry into the in-region interLATA services market would always be consistent with the public interest requirement whenever a BOC has implemented the competitive checklist. Such an approach would effectively read the public interest requirement out of the statute, contrary to the plain language of the section 271, basic principles of statutory construction, and sound public policy. Section 271(d)(3) provides that the Commission "shall not approve [a BOC application to provide in-region, interLATA services] . . . unless it finds that -- (A) the petitioning [BOC] has . . . fully implemented the competitive checklist . . . ; *and* (C) the requested authorization is consistent with the public interest, convenience, and necessity."[1003] Thus, the text of the statute clearly establishes the public interest requirement as a separate, independent requirement for entry. In addition, Congress specifically rejected an amendment that would have stipulated that full implementation of the checklist satisfies the public interest criterion.[1004] Consequently, Congress' adoption of the public interest requirement as a separate condition for BOC entry into the in-region, interLATA market demonstrates that Congress did not believe that compliance with the checklist alone would be sufficient to justify approval under section 271.

390. Although the competitive checklist prescribes certain, minimum access and interconnection requirements necessary to open the local exchange to competition, we 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. While BOC entry into the long distance market could have procompetitive effects, whether such benefits are sustainable will depend on whether the BOC's local telecommunications market remains open after BOC interLATA entry. Consequently, we believe that we must consider whether conditions are such that the local market will remain open as part of our public interest analysis.

391. In making a case-by-case determination of whether the public interest would be served by granting a section 271 application, we anticipate that we would examine a variety of factors in each case. We emphasize that, unlike the requirements of the competitive checklist, the presence or absence of any one factor will not dictate the outcome of our public interest inquiry. Because such factors are not preconditions to BOC entry into the in-region, interLATA market, our consideration of such factors does not "limit or extend the terms used in the competitive

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[1003] 47 U.S.C. § 271(d)(3) (emphasis added).

[1004] The Senate rejected, by a vote of 68-31, an amendment that would have added the following language to S. 652, which was the source of the public interest requirement in section 271: "Full implementation of the checklist in subsection (b)(2) shall be deemed in full satisfaction of the public interest, convenience, and necessity requirement of this subparagraph." 141 Cong. Rec. S7971, S8043 (June 8, 1995).

checklist," contrary to section 271(d)(4). Accordingly, in conducting our public interest inquiry, we will consider and balance various factors to determine if granting a particular section 271 application is consistent with the public interest. For example, as we noted at the outset of this Order, it is essential to local competition that the various methods of entry contemplated by the 1996 Act be truly available. The most probative evidence that all entry strategies are available would be that new entrants are actually offering competitive local telecommunications services to different classes of customers (residential and business) through a variety of arrangements (that is, through resale, unbundled elements, interconnection with the incumbent's network, or some combination thereof), in different geographic regions (urban, suburban, and rural) in the relevant state, and at different scales of operation (small and large). We emphasize, however, that we do not construe the 1996 Act to require that a BOC lose a specific percentage of its market share, or that there be competitive entry in different regions, at different scales, or through different arrangements, before we would conclude that BOC entry is consistent with the public interest. Rather, we believe that data on the nature and extent of actual local competition, as described above, are relevant, but not decisive, to our public interest inquiry, and should be provided. If such data are not in the record or available for official notice, we would be forced to conclude that the BOC is not facing local competition. Our inquiry then would necessarily focus on whether the lack of competitive entry is due to the BOC's failure to cooperate in opening its network to competitors, the existence of barriers to entry, the business decisions of potential entrants, or some other reason.

392. Evidence that the lack of broad-based competition is not the result of a BOC's failure to cooperate in opening local markets could include a showing by the BOC that it is ready, willing, and able to provide each type of interconnection arrangement on a commercial scale throughout the state if requested. We believe that the existence of certain other factors conducive to efficient, competitive entry would indicate that local telecommunications markets are and will remain open to competition, even if broad-based competitive entry has not yet occurred. We would, for example, be interested in evidence that a BOC is making available, pursuant to contract or otherwise, any individual interconnection arrangement, service, or network element provided under any interconnection agreement to any other requesting telecommunications carrier upon the same rates, terms, and conditions as those provided in the agreement. Such evidence would demonstrate that competitive alternatives can flourish rapidly throughout a state, by assuring that new entrants can enter the market quickly without having to engage in lengthy and contentious negotiations or arbitrations with the BOC.

393. In addition, evidence that a BOC has agreed to performance monitoring (including performance standards and reporting requirements) in its interconnection agreements with new entrants would be probative evidence that a BOC will continue to cooperate with new entrants, even after it is authorized to provide in-region, interLATA services. Performance monitoring serves two key purposes. First, it provides a mechanism by which to gauge a BOC's present compliance with its obligation to provide access and interconnection to new entrants in a nondiscriminatory manner. Second, performance monitoring establishes a benchmark against

which new entrants and regulators can measure performance over time to detect and correct any degradation of service once a BOC is authorized to enter the in-region, interLATA services market.

394. We would be particularly interested in whether such performance monitoring includes appropriate, self-executing enforcement mechanisms that are sufficient to ensure compliance with the established performance standards. That is, as part of our public interest inquiry, we would want to inquire whether the BOC has agreed to private and self-executing enforcement mechanisms that are automatically triggered by noncompliance with the applicable performance standard without resort to lengthy regulatory or judicial intervention. The absence of such enforcement mechanisms could significantly delay the development of local exchange competition by forcing new entrants to engage in protracted and contentious legal proceedings to enforce their contractual and statutory rights to obtain necessary inputs from the incumbent.

395. Moreover, we would be interested in knowing whether a BOC has provided new entrants with optional payment plans for the payment of non-recurring charges that would allow new entrants, upon request, to avoid having to pay such charges as a single, up-front payment. As we noted above, unreasonably high non-recurring charges could chill competition.[1005]

396. We would also want to know about state and local laws, or other legal requirements, that may constitute barriers to entry into the local telecommunications market, or that are intended to promote such entry. We would, for example, be interested in knowing whether state or local governments have imposed discriminatory or burdensome franchising fees or other requirements on new entrants. We also would want to know if states or municipalities have denied new entrants equal access to poles, ducts, conduits, or other rights of way. In addition, we would be interested in whether a state has adopted policies and programs that favor the incumbent, for example, those relating to universal service. Although we recognize that a BOC may not have the ability to eliminate such discriminatory or onerous regulatory requirements, we believe that local competition will not flourish if new entrants are burdened by such requirements.

397. Furthermore, we would be interested in evidence that a BOC applicant has engaged in discriminatory or other anticompetitive conduct, or failed to comply with state and federal telecommunications regulations.[1006] Because the success of the market opening provisions of the 1996 Act depend, to a large extent, on the cooperation of incumbent LECs, including the

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[1005] Revenue-neutral optional payment plans could include plans whereby the BOC recovers amounts equivalent to the non-recurring charges through installments payments or, for those items for which there are also recurring charges, through an increase in the recurring charges.

[1006] As part of our public interest analysis, we would, therefore, consider allegations, such as those discussed above, regarding Ameritech's inbound telemarketing script, Value Link Calling Plus Plans, and Winback Program. *See supra* Section VIII.

BOCs, with new entrants and good faith compliance by such LECs with their statutory obligations, evidence that a BOC has engaged in a pattern of discriminatory conduct or disobeying federal and state telecommunications regulations would tend to undermine our confidence that the BOC's local market is, or will remain, open to competition once the BOC has received interLATA authority.

398. In the preceding paragraphs, we have identified various factors that we believe would be probative of whether a BOC's local telecommunication market is open to competition. We emphasize that this list is merely illustrative, and not exhaustive, of the factors we may consider when determining whether a BOC's local market is open to competition. We encourage interested parties, including the Department of Justice and the relevant state commission, to identify other factors that we might consider in the context of a specific application, and the weight that we should attach to the various factors, in making this assessment.

399. Moreover, as we have previously noted, we need to be confident that we can rely on the petitioning BOC to continue to comply with the requirements of section 271 after receiving authority to enter into the long distance market. A BOC could alleviate substantially these concerns by making specific commitments in its application that would ensure its continued cooperation with new entrants. A BOC could, for example, commit to comply with reporting requirements, performance standards, and appropriate, self-executing enforcement mechanisms, to the extent such requirements, standards and mechanisms are not included in the BOC's interconnection agreements.

400. In the absence of adequate commitments from a BOC, we believe that we have authority to impose such requirements as conditions on our grant of in-region, interLATA authority. We believe that at least two separate statutory provisions give us authority to impose such conditions. First, section 271 expressly contemplates that Commission approval of a section 271 application might contain "conditions." Subsection 271(d)(6), which is captioned "ENFORCEMENT OF CONDITIONS," provides that if, after approval of an application, "the Commission determines that a Bell operating company has ceased to meet any of *the conditions* required for such approval," it may take any of several actions, including requiring correction of the deficiency, suspending or revoking the approval, or imposing a penalty.[1007] We find that the term "conditions" in paragraph (6)(A) should not be read to mean simply those explicit "requirements" for approval under subsection (c). Rather, we note that, elsewhere in section 271, when reference is made to the specific requirements of section 271(c), the statute consistently uses the term "requirements" and not the term "conditions."[1008]

[1007] 47 U.S.C. § 271(d)(6)(A) (emphasis added).

[1008] *See, e.g.*, 47 U.S.C. § 271(d)(3)(A) ("the petitioning Bell operating company has met the *requirements* of subsection (c)(1) . . . ") (emphasis added).

401. Second, the Commission independently derives authority for the imposition of conditions in the section 271 context from Section 303(r) of the Communications Act, which expressly grants the Commission the authority to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . . ."[1009] Because section 271 is part of the Communications Act, the Commission's authority under section 303(r) to prescribe conditions plainly extends to section 271. Moreover, as noted, we do not read section 271 as containing any prohibitions on conditions but, rather, find express support for conditioning approval of section 271 applications in the language of section 271(d)(6)(A).

402. In sum, our 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. The more vigorous the competition is in the BOC's local market, the greater is the assurance that the BOC is cooperating in opening its market to competition and that entry through the various methods set forth in section 251(c) of the 1996 Act is possible. In the absence of broad-based competition, however, we will carefully examine the record, and weigh the evidence before us, to determine whether the lack of such competition is the result of continuing barriers to entry, the BOC's lack of cooperation, the business decisions of new entrants, or some other reason.

X. CONCLUSION

403. For the reasons discussed above, we deny Ameritech's application for authorization under section 271 of the Act to provide in-region, interLATA services in the state of Michigan. In making this decision, however, we recognize that Ameritech has made a number of strides in fulfilling its obligation under the Telecommunications Act of 1996 to open the local exchange market to competition. Ameritech has committed considerable resources and has expended tremendous effort in implementing many of the steps necessary to receive in-region, interLATA authority. For example, although we conclude above that Ameritech has not demonstrated that it provides nondiscriminatory access to all OSS functions, we acknowledge that Ameritech has taken substantial measures to develop the electronic interfaces necessary to facilitate the use of resale services and unbundled network elements by competing carriers. We also are aware of the effort and expense associated with preparing the actual application on which Ameritech bases its claim for authorization, and expect that our decision will provide substantial guidance for future applications.

XI. ORDERING CLAUSES

404. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 4(j), and 271 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 154(j), 271, Ameritech Michigan's

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[1009] 47 U.S.C. § 303(r).

application to provide in-region interLATA service in the State of Michigan filed on May 21, 1997, IS DENIED.

405. IT IS FURTHER ORDERED that the motion to dismiss filed by the Association for Local Telecommunications Services on June 10, 1997, IS DENIED.

406. IT IS FURTHER ORDERED that the motion to strike filed by Ameritech Michigan on July 7, 1997, IS DENIED.

407. IT IS FURTHER ORDERED that the motion to strike filed by AT&T Corp. on July 15, 1997, IS DENIED.

408. IT IS FURTHER ORDERED that the joint motion to strike filed by MCI Telecommunications Corporation, et al. on July 16, 1997, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Ameritech Michigan's 271 Application for Service in Michigan
CC Docket No. 97-137
List of Commenters

1. Ameritech
2. Association for Local Telecommunication Services (ALTS)
3. AT&T Corp. (AT&T)
4. Bell Atlantic Telephone Companies (Bell Atlantic)
5. Bell Atlantic and NYNEX
6. BellSouth Corporation and SBC Communications Inc.
7. Brooks Fiber Communications (Brooks Fiber)
8. Communications Workers of America (CWA)
9. Competition Policy Institute (CPI)
10. Competitive Telecommunications Association (CompTel)
11. Governor of Michigan
12. Intermedia Communications Inc. (Intermedia)
13. KMC Telecommunications, Inc. (KMC)
14. LCI International Telecom Corp. (LCI)
15. MCI Telecommunications Corporation (MCI)
16. Michigan Attorney General Frank J. Kelley
17. Michigan Cable Telecommunications Association (MCTA)
18. Michigan Consumer Federation (MCF)
19. Michigan Public Service Commission (Michigan Commission)
20. National Association of Commissions for Women (NACW)
21. National Cable Television Association (NCTA)
22. Ohio Consumers' Counsel
23. Paging & Narrowband PCS Alliance of the Personal Communications Industry Association (PCIA)
24. Phone Michigan
25. SBC Communications Inc. (SBC)
26. Sprint Communications Company L.P. (Sprint)
27. Telecommunications Resellers Association (TRA)
28. Teleport Communications Group Inc. (TCG)
29. Time Warner Communications Holdings, Inc. (Time Warner)
30. Triangle Coalition for Science and Technology Education (Triangle)
31. Trillium Cellular Corporation (Trillium)
32. United Homeowners Association (UHA)
33. United Seniors Health Cooperative (USHC)
34. WorldCom, Inc. (MFS WorldCom)

SEPARATE STATEMENT OF CHAIRMAN REED HUNDT

Re: Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, To Provide In-Region, InterLATA Services in Michigan

In today's decision, we provide a detailed, comprehensive roadmap that makes clear what Bell Operating Companies (BOCs) must do in order to satisfy the open market checklist enacted by Congress in the Telecommunications Act of 1996. I applaud the work of our talented and dedicated Common Carrier Bureau, which, working within the tight time limits mandated by Congress, has drafted the clearest, most comprehensive roadmap that any pro-competition cartographer has ever produced within 90 days.

This Order describes in great detail the steps the BOCs must take to satisfy Congress' checklist. The Order reaffirms that where a Bell Operating Company has the will, there is a way. Any BOC that wishes to take the steps necessary to follow the roadmap will have the opportunity to enter the long distance market. This is the bargain Congress struck in the Telecom Act: when a BOC has reliably, practically, and fully opened its local market to competition and permanently allowed competitors fair access to the economies of scale and scope it generated during the previous monopoly era, it should be permitted to enter the long distance market.

When a BOC is supplying network elements or services to competitors, it must make available those elements and services on the same nondiscriminatory basis it provides to itself. Because incumbents characteristically use these elements in combination, incumbents must therefore offer the elements in combination to their competitors in order to meet the requirements of section 271.

The standard for evaluating the incumbents' offerings is parity, not perfection. A BOC cannot merely announce, moreover, that it is capable of selling or leasing its network services and elements. The BOC must demonstrate that it has the operations support systems actually to deliver those services and elements to competitors. The prices that a BOC charges its competitors for interconnection, unbundled elements, and resale are also extremely relevant. We believe that in order to promote efficient, competitive entry and comply with section 271, a BOC must offer its competitors prices that are set on the basis of forward-looking economic costs, using TELRIC (total element long run incremental cost) principles.

Moreover, a uniform national reading of section 271, of course, is necessary. This necessitates having a single national pricing methodology (which would generate different specific prices within states and within regions inside states), as is set forth in our Order. A uniform pricing methodology has flexibility to accommodate local issues, such as varying costs of capital

and other parameters. But the statute cannot be fairly read to permit different states to use different pricing methodologies for the purpose of compliance with section 271. Such an approach would be an insupportable reading of the statute.

Interpreting section 271 to encompass different and conflicting pricing methodologies would generate inequities among the different BOCs, in that some might enter long distance only when a pro-competition pricing methodology for unbundled elements and interconnection truly and effectively opened that BOC's local market. By contrast, other BOCs would be able to enter when their local markets were less open to new entry as a result of a state's election of a pricing methodology that was more inimical to new entry (such as a methodology that sought to recover historic cost from new entrants, instead of in some competitively neutral manner). Such a result would be bad policy as well as a bad reading of the law.

I recognize and applaud the steps that Ameritech and the state of Michigan have taken to open the local market in Michigan to competition, and I welcome the competition that BOC entry into long distance should promote in that market. It also is possible that the anticipation of BOC entry into long distance in a particular market could create a greater incentive for the long distance companies to respond by entering the local market in that state.

It should also be noted that today's roadmap plainly extends to Ameritech and the other BOCs the opportunity to enter the long distance market well before the three-year "date certain" deadline (which would have been February 1999, given the date the law was signed) that the BOCs lobbied Congress to adopt -- and which Congress in fact rejected.

Statement of Commissioner
James H. Quello

Re: *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*

Although today's Order by the Commission rejects Ameritech's application to enter the long distance market in Michigan, I am pleased that it provides Ameritech and other Bell operating companies with clear guidance on the Commission's 271 review process. It would be unreasonable, in my opinion, for this Commission to reject Ameritech's application without also providing our interpretation of many of the key elements of section 271. In addition to furnishing substantial guidance on checklist items that we found Ameritech did not meet, we have interpreted several other provisions of section 271, including the public interest test. I believe this guidance will assist BOC applicants and their competitors in understanding their rights and obligations under the pro-competitive framework established by Congress.

I commend Ameritech for its efforts to open its network to competitors. Even before Congress passed the Telecommunications Act of 1996, it had become clear that incumbent local telephone companies would not retain their monopolies forever. Ameritech understood this and responded by seeking to work reasonably with its competitors through its Customers First initiative in 1993, which would have permitted competitors to gain access to Ameritech's network. It has been my experience, both in the private sector and as a regulator, that the most successful companies try to embrace and manage change rather than resist it at every turn. Since the passage of the 1996 Act, we have seen plenty of resistance from some incumbent local carriers. I believe a progressive approach, as demonstrated by Ameritech in this application, will ultimately prove the more effective model.

Nonetheless, I fully support the Commission's decision to reject Ameritech's 271 application. The Order we adopt today identifies several important defects in Ameritech's application. If we were to grant Ameritech's application at this time, other carriers would be significantly disadvantaged in competing with Ameritech.

This would be contrary to Congress' intent and unfair to Michigan's local telephone customers. I am committed to faithfully implementing our directive from Congress as described in section 271.

Some of the deficiencies in Ameritech's application appear easily fixed -- for example, Ameritech must furnish more complete data on trunk blockage rates for calls between its network and its competitors' networks. Other shortcomings, such as the need for Ameritech to improve its operations support systems to accommodate fluctuating volumes of competitors' orders, may require more significant effort before Ameritech complies with our requirements. I am confident that none of the problems that we have identified in Ameritech's application is insurmountable, and I hope that Ameritech will take the necessary steps as soon as possible.

Finally, I wish to acknowledge the tremendous effort of the Commission's Common Carrier Bureau in this proceeding. They have taken a nearly unmanageable record and produced, under significant time pressure, a clear, well-reasoned blueprint for future 271 applications.

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Separate Statement
of
Commissioner Susan Ness

Re: Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, To Provide In-Region, InterLATA Services in Michigan

I look forward to the day when I can cast my vote to approve a petition by a Bell company to offer in-region, interLATA service. When that day comes, the conditions for robust and enduring local competition within a state will have been created, and to the benefits of that competition will be added the introduction of a powerful new competitor in the long distance market and the elimination of a restriction that will have outlived its usefulness.

That time has not yet arrived, despite commendable progress in the State of Michigan. The state commission has been a pioneer in the development and implementation of competition policy. In the new state-federal partnership that is still being forged, Michigan remains a leader. Ameritech, too, deserves recognition for its early commitment to a pro-competitive course. The company has made enormous progress over the past few years, although the immense task of transforming the local telephone network to accommodate efficient competitive entry remains as yet unfinished. Today's decision provides valuable guidance that will help Ameritech to reach its desired goal more expeditiously.

Our decision today is faithful to the statutory scheme established by Congress. Aided by the record developed in the pre-application proceeding conducted by the Michigan commission and the detailed and insightful analysis furnished by the Department of Justice, our staff has conducted a painstaking review of a lengthy record to evaluate Ameritech's compliance with the mandatory elements of the "competitive checklist." The detailed discussion of checklist compliance in our order will enable Ameritech to focus its energies on those tasks that need to be completed before interLATA entry can be approved.

Although not strictly necessary for purposes of today's decision, our order also sets forth our initial views on the additional statutory requirement that Ameritech prove that its entry satisfies the public interest. Again, this guidance should help to pave the way for a successful application in the future. I emphasize, as does the order, that we are <u>not</u> adding to the competitive checklist. Instead, we are merely identifying various pertinent considerations that have the potential to influence, positively or negatively, our overall conclusion as to whether Bell company entry into the interLATA market within a particular state will serve the public interest.

As our decision demonstrates, the Commission intends to apply the statutory scheme rigorously but fairly. This will not be welcome news for any company that might have hoped to secure authority for interLATA entry without really opening its local market to competition -- or that might have hoped to game the process to forestall entry indefinitely. But, for those that really intend to live up to the bargain that is embodied in the Telecommunications Act, today's decision should accelerate fulfillment of both parts of that bargain.

Separate Statement of

Commissioner Rachelle B. Chong

Re: In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan

It is a rare privilege to interpret a new piece of major legislation. As this Commission has implemented the historic Telecommunications Act of 1996 (1996 Act) over the last year and a half, our work has been arduous and controversial. In today's decision, we provide significant guidance on how we view our responsibilities pursuant to section 271 of the 1996 Act. I write separately to discuss my support of this decision, and to emphasize why the Commission is taking a strict approach on section 271 applications. Without such an approach, local networks will not be opened to competitors any time soon, competition will not be fair, and the careful statutory scheme set up by Congress will not be successfully implemented.

In today's order, we have interpreted the language of section 271 as viewed in the context of the 1996 Act as a whole. To best understand Congress' goals in section 271, some background is necessary to put Bell Operating Company (BOC) entry into long distance into perspective. In the era following the breakup of the AT&T telephone monopoly, regulators viewed the local telephone markets as natural monopolies. Most local telephone companies, including the seven BOCs and other incumbent local exchange carriers (LECs), held exclusive franchises for their service areas. The ban on BOC entry into the long distance market was based on the belief that the restriction was necessary to preserve competition in the newly competitive long distance market. If the BOCs were permitted to compete in the long distance market, it was believed they would have substantial incentives and opportunities through their bottleneck control of local exchange facilities to unduly discriminate against their long distance competitors and to cross subsidize their long distance ventures to the detriment of local telephone consumers.

The 1996 Act represents the first major comprehensive reform of the federal telecommunications statute since the 1930's. The 1996 Act radically departs from the monopoly mindset and directs the FCC to establish a new "procompetitive, deregulatory" framework[1] that, in time, allows any player to participate in any telecommunications market. In the past year and a half, the Commission has been engaged in interpreting sections 251, 252 and 253 of the 1996 Act, which, in effect, open local telecommunications markets to previously precluded competitors by removing legal impediments and inherent economic and operational advantages possessed by the incumbents. These provisions require incumbent LECs, including the BOCs, to share their local networks in a manner that allows competitors to swiftly enter the local telecommunications market,

[1] *See* H.R. Rep. No. 104-458, at 1 (1996).

without initially having to completely duplicate the incumbent LEC's entire local network.[2] Congress clearly intended that new entrants be able to compete on a fair playing field with the incumbent LECs, and thus these provisions include strict requirements to ensure that the incumbent LEC will open its local network to competition. Because the BOCs have little natural incentive to help new rivals gain a foothold in the local telephone market, the 1996 Act contains various measures to provide this incentive. The key measure is section 271.

Section 271 is the "carrot" that is offered to the BOCs to cooperate in the opening of their local network to competitors. Congress conditioned BOC entry into the in-region long distance market in a particular state on compliance with the section 271 application process. After consultation with the relevant state commission and the Department of Justice (DOJ), the Commission is required by section 271 to make various findings within a 90-day timeframe from the filing date of the BOC's application. Specifically, the Commission "shall not approve" a 271 application unless it finds that: (1) the BOC meets the requirements of Track A or Track B;[3] (2) the BOC has fully implemented the competitive checklist contained in section 271(c)(2)(B); (3) the requested authorization will be carried out in accordance with the requirements of section 272; and (4) the BOC's entry into the in-region interLATA market is "consistent with the public interest, convenience and necessity."

To date, we have had three section 271 applications filed. Ameritech's first application for Michigan was withdrawn voluntarily, and we recently rejected SBC's section 271 application for Oklahoma as not meeting Track A.[4] In this Ameritech Michigan application, we find that Ameritech meets the Track A requirement, but has not yet demonstrated full compliance with the checklist. Although we ultimately deny Ameritech's application, Ameritech's progress deserves praise. It is my view that Ameritech has made significant, good faith efforts to open its networks to competitors. In addition, I want to commend the work of DOJ and the Michigan Public Service Commission for their invaluable input in this proceeding.

As we prepared this decision, many have asked the Commission to provide more guidance as to how we will evaluate compliance with section 271 in future applications. I am glad that we have made a substantial effort in this decision to provide guidance on a number of the issues in the record before us. We hope this guidance proves helpful to the BOCs, DOJ, the state commissions, and other interested parties.

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[2] New competitors have four basic entry strategies: construction of networks and interconnection with incumbent LECs, use of unbundled network elements, resale, or any combination of the foregoing methods.

[3] Track A and B refer to the two methods by which a BOC can comply with the requirements of section 271(c)(1). Track A refers to the presence of a facilities-based competitor as provided in section 271(c)(1)(A) and Track B refers to a statement of generally available terms and conditions as provided in section 271(c)(1)(B).

[4] *Application of SBC Communications Inc., et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of Oklahoma*, CC Docket No. 97-121, FCC 97-228, Memorandum Opinion and Order (rel. June 26, 1997)(*SBC Oklahoma Order*).

For example, in this decision, we have provided some new guidance on the Track A requirements contained in section 271(c)(1)(A). We build upon our finding in *SBC Oklahoma* that the use of the term "competing provider" in that subsection suggests that there must be an actual commercial alternative to the BOC.[5] Today, we make it clear that this subsection does not require a new entrant to attain any specified level of market share or geographic penetration to be considered a "competing provider." I believe this interpretation is consistent with Congressional intent, and that any contrary interpretation would not be faithful to the plain statutory language or the legislative history.

Today's decision also reflects the Commission taking a "hard line" as to BOC provision of access to operations support system (OSS) functions that comply with sections 251(c)(3) and (c)(4), as required by the checklist. New entrants have made a strong case to me that provision of access to OSS functions is absolutely critical to their competitive entry. In this decision, we found that Ameritech did not establish by a preponderance of evidence that it is providing access to all OSS functions in a way that is nondiscriminatory. Along with the Michigan Public Service Commission and DOJ, we find that Ameritech did not provide adequate OSS performance measurements for competing carriers and for itself, which is a necessary prerequisite for us to make an informed decision on OSS compliance. In the future, it will be helpful if the BOCs file the necessary information to allow us to make a reasoned decision on this key point. Given the Commission's deep concern about this item, we expect to see detailed and verifiable evidence that this checklist item has been met.

Although we do not reach a decision on the merits of Ameritech's pricing of checklist items, we recognize that efficient pricing of checklist items is vitally important to competitive entry into the local market. Under section 271(c)(2)(B), the Commission is required to determine whether an applicant has complied with the pricing standards set forth in sections 251(c) and 252(d) of the Act. In this order, we state that such determinations by the Commission must be made in a uniform manner nationwide. I recognize that this section of today's order may be considered controversial, but this is not our intent. I agree with my colleagues that the Commission must be concerned about the uniformity of our section 271 decisions on the issue of pricing. I hope that when states are addressing pricing issues pursuant to their authority under section 252(d), they will consider our views on the appropriate pricing methodology.[6] I am very encouraged that many states to date have indicated that they have adopted or plan to adopt forward-looking economic cost approaches. I emphasize my view that the FCC and the state commissions have been given the same ultimate

[5] *SBC Oklahoma Order* at para. 14.

[6] The Commission has set forth its views on a recommended pricing methodology in our Local Competition Order. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499 (1996), *aff'd in part and vacated in part sub nom. Iowa Utilities Board v. FCC and consolidated cases*, No. 96-3321 *et al*., 1997 WL 403401 (8th Cir. July 18, 1997). Although the Eighth Circuit found that the Commission lacks jurisdiction to issue national pricing standards, that court notably did not address the merits of the Commission's pricing methodology.

assignment by Congress -- to introduce competition into the local market -- and the best way to achieve this goal is to put aside jurisdictional disputes and work together to make this goal a reality.

In this decision, we also have provided some guidance on how we plan to approach the public interest component of section 271. I read section 271 as requiring our traditional broad public interest review, weighing the overall benefits of BOC entry versus any detriments. We set forth in this item the types of factors that we believe are relevant in determining whether the grant of an application is in the public interest. These factors include (but are not limited to) the impact on both the local and long distance markets, whether the evidence reflects that the BOC will remain in compliance with section 271, the scope of local competition in the state and efforts by the BOC to facilitate entrance by competitors into the local market. I emphasize that the factors we discuss are for illustrative purposes only and that no one factor *must* be met in order for an application to be granted. Thus, we are consistent with Congress' directive that we do not "limit or expand the checklist."

Although we have denied two section 271 applications to date, this Commission is committed to helping the BOCs achieve the "carrot" they so desire -- entry into long distance. Thus, this order goes beyond those issues on which we based our denial of the application to provide additional guidance on other issues raised in the record. We expect that, as a result, a BOC should be able to make a persuasive and factually-supported showing that it has complied with both the letter and the spirit of section 271, and the 1996 Act as a whole. Thus, I remain confident that BOCs will be able to achieve long distance entry in the near future. Finally, our decision to set the bar high for section 271 applications is the right one, because the very success of the 1996 Act depends on local networks being open, in order for competition in all markets to be fair and to flourish.