

# THE PUBLIC INTEREST AND BELL ENTRY INTO LONG-DISTANCE UNDER SECTION 271 OF THE COMMUNICATIONS ACT

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"The heart of the Communications Act is its clear emphasis on the public interest. Whatever the temptations to abandon this notion — and they are many — the stakes are too high. Without commitment to the public interest, all government action vis-à-vis communications would be without meaning."<sup>1</sup>

## I. INTRODUCTION

The Telecommunications Act of 1996 was

designed to open all telecommunications markets to competition by removing legal and regulatory entry barriers.<sup>2</sup> The 1996 Act added new Section 271 to the Communications Act specifically allowing the Bell Operating Companies ("BOCs") to participate in activities from which they previously were precluded by the Modification of Final Judgment ("MFJ").<sup>3</sup> Pursuant to the new Section

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<sup>1</sup> NEWTON MINOW, *Commemorative Message*, in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at xv (Max D. Paglin ed. 1989).

<sup>2</sup> See S. CONF. REP. NO. 104-230, at 1 (1996) [hereinafter *Conference Report*] (The Act provides "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 . . ."). See also Implementation of the Non-Accounting Safeguards of Sections 271 and 272, *First Report and Order and Further Notice of Proposed Rulemaking*, 5 Comm. Reg. (P & F) 696 (1996) [hereinafter *Non-Accounting Safeguards Order*] ("The fundamental objective of the 1996 Act is to bring to consumers of telecommunications services in all markets the full benefits of vigorous competition.").

<sup>3</sup> *In re* Implementation of the Non-Accounting Safeguards of Sections 271 and 272, *Notice of Proposed Rulemaking*, FCC 96-308, CC Docket 96-149 paras. 1, 5 (1996) [hereinafter *Non-Accounting Safeguards Notice*]. Judge Harold Greene,

271(d) of the Communications Act, a BOC may apply to the Federal Communications Commission ("FCC" or "Commission") for permission to provide long-distance service originating in any of the BOC's in-region States.<sup>4</sup> In order for the Commission to grant such a BOC application, the Commission must find, among other things, (1) that the BOC has satisfied the terms of the "competitive checklist"<sup>5</sup> and (2) that, pursuant to Section 271(d)(3)(C), granting of the BOC application would be "consistent with the public interest, convenience, and necessity."<sup>6</sup> Section 271(d)(4), however, provides that the FCC shall not "by rule or otherwise" limit or extend the terms of the competitive checklist.<sup>7</sup>

This article explores the potential tension between Congress' mandate that the Commission grant only those applications consistent with the "public interest, convenience, and necessity," and it is common that the commission not limit or extend the competitive checklist. Construed broadly, the Commission could use its grant of public interest authority to require that all BOCs

perform certain actions, in addition to those required by the checklist, in order to receive Section 271 approval from the Commission. Imposition of such extra requirements upon all BOCs seeking Section 271 authority would constitute an alteration of the checklist in contravention of Section 271(d)(4). On the other hand, BOCs have argued for a much broader reading of Section 271(d)(4)'s prohibition against altering the checklist.<sup>8</sup> The BOCs' reading essentially would preclude the Commission from utilizing its public interest authority to require the BOCs to do anything more than meet the checklist and other express requirements of Section 271(d)(3). Such a miserly reading of the public interest would frustrate the FCC's ability to undertake any meaningful public interest review.<sup>9</sup>

As explained below, the possible tension between Section 271's public interest and no-alteration provisions is eliminated if the two provisions are construed such that for any Section 271 application, the Commission may impose conditions or require actions in addition to those in the check-

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who administered the MFJ, which superseded the BOC's from AT&T since its inception, has observed that the Telecommunications Act of 1996 asks the Commission to "perform a role akin to that which the Court and the [Department of Justice] had previously performed under the [AT&T consent] decree." See *United States v. Western Elect. Co.*, 2 Comm. Reg. (P&F) 1388 (1996).

<sup>4</sup> Such applications must be filed on a state-by-state basis. See *Procedures For Bell Operating Company Applications Under New Section 271 of the Communications Act*, Public Notice (Dec. 6, 1996). Thus, for example, Bell Atlantic would have to file a separate application to provide in-region long-distance services in each of the states it serves. See 47 U.S.C.A. § 271(d)(1) (West Supp. 1996).

<sup>5</sup> Section 271(d)(3)(A) of the United States Code requires that BOCs satisfy the fourteen point "competitive checklist" contained in Section 271(c)(2)(B). The checklist delineates the minimum requirements that BOCs must offer other telecommunications carriers pursuant to Section 271. See *Conference Report*, *supra* note 2, at 144-45. One of the major requirements is that BOCs offer interconnection in accordance with Sections 251(c)(2) and 252(d)(1). As such, the Eighth Circuit has stayed the Commission's order implementing interconnection requirements insofar as it pertains to pricing and certain other elements. See *Iowa Util. Bd. v. FCC*, 4 Comm. Reg. (P&F) 1360-61 (1996) [hereinafter *Eighth Circuit Stay Order*], *motion to vacate stay denied*, 117 S. Ct. 429 (1996).

<sup>6</sup> See 47 U.S.C.A. § 271(d)(3)(C) (West Supp. 1996).

<sup>7</sup> See *comment* 47 U.S.C.A. § 271(d)(4) (West Supp. 1996).

<sup>8</sup> Ameritech has filed pleadings before the Illinois Commerce Commission asserting that the FCC may not add requirements for the approval of a Section 271 application other than those expressly stated in the 1996 Act. See *Amer-*

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*itech Illinois' Legal Memorandum In Response to Order Initiating Investigation*, Dkt. 96-0404, at 28-30 (Sept. 27, 1996) [hereinafter *Ameritech Illinois Memorandum*] (stating in part that the FCC may not use Section 271(d)(4) to "impose conditions on entry that effectively supplement the 'competitive checklist' under the guise of declaring such conditions necessary to support a 'public interest' finding.") *Id.* at 30. Bell Atlantic and Pacific Telesis have made similar comments. See *Videotape: Office of the General Counsel/Common Carrier Bureau Open Forum re: Section 271* (Federal Communications Commission July 9, 1996) (on file with the FCC) [hereinafter *FCC Videotape*]; see also *Telecom Industry Shows Disagreement on RHC Entry Into Long-distance*, COMM. DAILY, July 10, 1996, at 2.

<sup>9</sup> Ameritech has asserted that Section 271(d)(4) forbids the FCC from using its "public interest" authority to impose conditions on BOC entry that "supplement" the checklist, such as concluding that BOCs must: (1) enter into more than one interconnection agreement; (2) lose a certain amount of market share; (3) face competition throughout the state; (4) compete with carriers which provide local exchange service over their own facilities-based network; (5) interconnect with a large competitor such as MCI or AT&T; or (6) comply with stricter separation requirements or nondiscrimination safeguards than those set forth in Section 272. See *Ameritech Illinois Memorandum*, *supra* note 8, at 30. Bell Atlantic has likewise argued that the FCC may not use the public interest to require additional unbundling requirements or to create new requirements such as mandating that the BOC face competition over a defined geographic scope. See *FCC Videotape*, *supra* note 8 (statement of Michael Kellogg for Bell Atlantic). Pacific Telesis has also contended that "once the checklist is met, the degree and effectiveness of local competition is not a factor." See *FCC Videotape*, *supra* note 8 (statement of Richard E. Wiley for Pacific Telesis).

list, provided that the conditions are warranted by the public interest, convenience and necessity. The imposition of new conditions or requirements on a case-by-case basis does not constitute the kind of unlawful alteration of the checklist contemplated by Section 271(d)(4).<sup>10</sup> Instead, the ban on altering the checklist is construed most properly as precluding the Commission from imposing new conditions or requirements upon *all* BOC Section 271 applications.

Part II of this article traces the evolution of the public interest standard and, in particular, its development along separate lines with respect to communications common carrier and radio regulation. Part III demonstrates that the public interest has typically been interpreted by the courts as conferring generous powers upon regulatory agencies charged with its administration, including the Commission.

Part III begins with an analysis of Section 271's BOC entry provisions. The section then looks at the statute's plain language and uses various canons of statutory construction in order to determine the relationship between the Commission's authority to review applications for their consistency with the public interest and the agency's statutory inability to alter the competitive checklist.

Part IV concludes that there is no tension between the two provisions, and that Section 271(d)(3)(C) gives the Commission both the authority and the responsibility to examine all BOC Section 271 applications to ensure that grant of such applications is consistent with the public interest.

Part V examines the legislative history to Section 271 and similarly concludes that Congress intended for the Commission to use the public interest to look beyond a BOC's compliance with the competitive checklist and other express provisions of Section 271.

Lastly, Part VI explains that the Commission's

public interest analysis, both legally and practically, must encompass a review of competition levels in the local exchange market. The section then suggests various factors that the Commission should examine under its public interest powers and discusses how such factors should be weighed by the agency. Part VI also details the propriety of, and legal authority, for the Commission to impose metric requirements (*i.e.*, that a BOC face competition in a certain percentage of the state, that competitors are able to reach a certain percentage of the BOC's customers, etc.) upon individual Section 271 applications should such requirements be warranted by the public interest and necessary to the Commission's execution of its duties.

## II. HISTORY OF THE PUBLIC INTEREST STANDARD CONCERNING COMMUNICATIONS

The "public interest" was first referenced by Lord Hale in his late 1600s treatise on seaports in which he observed that when private property, such as a wharf or loading dock, is affected with a public interest, it ceases to be subject only to private control.<sup>11</sup> In 1877, the Supreme Court made the "public interest" part of American jurisprudence in *Munn v. Illinois*,<sup>12</sup> through its following Lord Hale's teaching, and by upholding a state law setting maximum rates for grain elevators. In so doing, the Court recognized that Lord Hale's views have been accepted without objection as an essential element in the law of private property.

### A. Origin of "Public Interest" in Common Carrier Regulation

Former FCC Commissioner Glen O. Robinson has observed that the phrase, "public interest, convenience and necessity" first appeared<sup>13</sup> in federal legislation in the Transportation Act of

<sup>10</sup> The imposition of public interest requirements on a case-by-case basis does not run afoul of the well-established rule that agency adjudications must be applied consistently. The public interest will vary with the facts of each BOC application. The Commission must simply ensure that analogous facts should lead to analogous outcomes.

<sup>11</sup> For a more in-depth discussion of Lord Hale's treatise, see Policy and Rules Concerning Rates for Competitive Common Carrier Services, *Further Notice of Proposed Rulemaking*, 84 FCC.2d 445, 523-24 (1981) (quoting *De Portibus Maris*, HARGROVE LAW TRACTS (1787)); see also GLEN O. ROBINSON, *The*

*Federal Communications Act: An Essay on Origins and Regulatory Purpose*, in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 3, 15 n.54 (Max D. Paglin ed., 1989).

<sup>12</sup> 94 U.S. 113 (1877).

<sup>13</sup> The "public interest, convenience, and necessity" or its companion phrase "common interest" were originally used as the test for determining whether public funds could be spent on certain projects, such as highway construction. See *City of Hartford v. Day*, 64 Conn. 250, 254-55 (1894); see also Robinson, *supra* note 11, at 15 n.54. The two phrases were also used in early state statutes requiring franchises for the con-

1920 which extended federal oversight of railroads to include a requirement of government approval for the construction and operation of any railroad.<sup>14</sup> The public interest language subsequently was incorporated into Sections 1(18) through (24) of the Interstate Commerce Act. Those sections, however, involved only transportation;<sup>15</sup> thus, at that time, the authority to regulate in the "public interest" was denied to the Interstate Commerce Commission ("ICC") with respect to its supervision over telephone companies and other communications common carriers.<sup>16</sup> The ICC, however, paid scant attention to that deficiency because its supervision of railroads rendered its telephony activities at best *laissez-faire*.<sup>17</sup>

In fact, the "public interest" was not made a part of federal oversight of communications common carriers until the passage of the 1934 Communications Act which consolidated authority over radio and telecommunications common carriers in one entity, the newly-created Federal Communications Commission.<sup>18</sup> In so doing, Congress specifically modeled the Commission's common carriage responsibilities on those borne by the ICC in relation to transportation:

In this bill many provisions are copied verbatim from the Interstate Commerce Act because they apply directly to communications companies doing a common

carrier business, but in some paragraphs the language is simplified and clarified. These variances or departures from the text of the Interstate Commerce Act are made for the purpose of clarification in their application to communications, rather than as a manifestation of congressional intent to attain a different objective.<sup>19</sup>

Thus, for example, Section 214 of the Communications Act, specifically requires, like its predecessor Section 1(18) of the Interstate Commerce Act, that carriers seeking to construct, acquire, operate or transfer any line must obtain a certificate of public convenience and necessity from the FCC.<sup>20</sup>

#### B. Origin of "Public Interest" with Respect to Radio Regulation

Radio regulation was originally entrusted to the Secretary of Commerce by the Radio Act of 1912.<sup>21</sup> However, in 1923, the Act of 1912 was interpreted to grant the Secretary of Commerce only ministerial powers concerning licensing, such that the Secretary could not deny a license on public interest grounds or on any other basis, for example, to protect other licensees against interference.<sup>22</sup> That same year, then-Secretary of Commerce Herbert Hoover suggested that radio be considered a public utility and regulated as

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struction of railroads. See *In re Application of Shelton St. Ry.*, 69 Conn. 626, 38 Atl. 362 (1897). See also *supra* note 12.

<sup>14</sup> See Robinson, *supra* note 11, at 15 n.54. The Transportation Act of 1920, ch. 91 § 402, 41 Stat. at 476-78 (codified at 49 U.S.C. § 1(18) (1994)), "requir[ed] a certificate of public interest, convenience and necessity as a condition of constructing, acquiring, or abandoning any line of railroad." *Id.*

<sup>15</sup> See Cox and Byrnes, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 25, 40 (Max D. Paglin ed., 1989).

<sup>16</sup> The ICC had been vested with power over telephones by the Mann-Elkins Act of 1910. See Mann-Elkins Act, ch. 309 § 7, 36 Stat. 544-45 (adding telephony oversight to ICC). Although the Postmaster General took over operations of the telephone and telegraph companies as a wartime measure from August 1918 through July 1919, oversight was thereafter returned to the ICC. See LEON KNAUER, TELECOMMUNICATIONS ACT HANDBOOK, 13, 41 (1996); Cox and Byrnes, *supra* note 15, at 25, 29.

<sup>17</sup> See 78 CONG. REC. S. 4139 (daily ed. Mar. 10, 1934) (statement of Sen. Dill) (The ICC has "not had time to give real consideration" to telephony regulation.). See also Robinson, *supra* note 11, at 4 n.7. ("Virtually all observers thought that telephone . . . services had been ignored" by the ICC.); Cox and Byrnes, *supra* note 15, at 25. (noting that ICC conducted only a small number of telecommunications proceedings).

<sup>18</sup> The FCC was created in order to strengthen federal oversight over telephony and to increase the efficacy of gov-

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ernment communications regulation overall. See Robinson, *supra* note 11 at 3, 4.

<sup>19</sup> See S. REP. NO. 73-781, at 2 (1934). The House Report similarly stated that Communications Act was designed to "preserve the value of court and commission interpretation of [the Interstate Commerce Act], but at the same time modifying the provisions so as to provide adequately for the regulation of communications common carriers." See H. R. REP. NO. 37-1850, at 4 (1934). See also *Ivy Broad. Co. v. AT&T*, 391 F.2d 486, 490-91 (2d Cir. 1968) (cases decided prior to 1934 under the Interstate Commerce Act "retain their importance for purposes of determining the scope of the Communications Act of 1934").

<sup>20</sup> 47 U.S.C. § 214 (formerly 49 U.S.C. § 1(18)). AT&T's then-president testified before Congress during hearings on the 1934 Act that Section 214 was designed "to take provisions of the present law that are applicable only to railroads and apply them to telephone companies." *A Bill to Provide for the Regulation of Interstate and Foreign Communications by Wire or Radio and for Other Purposes: Hearings on S. 2910 Before the Senate Comm. on Interstate Commerce*, 73rd Cong. 88 (1934) (statement of Walter S. Gifford, President, AT&T) (1934).

<sup>21</sup> See *Nat'l. Broad. Co., Inc. v. United States*, 319 U.S. 190, 210 (1943) (discussing history of radio regulation).

<sup>22</sup> See *Hoover v. Intercity Radio Co.*, 286 F. 1003 (D.C. Cir. 1923); see also *United States v. Zenith Radio Comm.*, 12 F.2d 614 (N.D. Ill. 1926) (The 1912 Radio Act did not grant Secretary of Commerce authority to promulgate rules for the exclusive assignment of frequencies).

such "in the public interest."<sup>23</sup> In 1925, the Fourth National Radio Conference endorsed the public interest concept and recommended legislation incorporating it.<sup>24</sup>

In 1926, the Attorney General opined that the Secretary of Commerce also had no authority under the Radio Act of 1912 to regulate radio stations' power, frequency or hours of operation and, at that point, the Secretary dropped all efforts to regulate radio.<sup>25</sup> In response to the resultant chaos, Congress passed the Radio Act of 1927,<sup>26</sup> which created the Federal Radio Commission and conferred upon that Commission the authority to grant or deny applications for station licenses as well as for the renewal or modification of such licenses as the public interest, convenience, and necessity might require.<sup>27</sup> The "basic provisions" of the 1927 Act were "incorporated" into the Communications Act of 1934.<sup>28</sup> Like the Federal Radio Commission, the criteria governing the then new FCC's licensing power was the "public interest, convenience, and necessity."<sup>29</sup>

<sup>23</sup> See Robinson, *supra* note 11, at 3, 9 (noting repeated iterations of that idea by the secretary).

<sup>24</sup> *Id.* The Conference did, however, reject the view that radio stations were public utilities. *Id.*

<sup>25</sup> See *Nat'l Broad. Co.*, 319 U.S. at 212.

<sup>26</sup> See 74 AM. JUR. 2D *Telecommunications* § 158 (1974); see also *Nat'l Broad. Co.*, 319 U.S. at 213. See also *Federal Radio Comm. v. Nelson Bros. Bond & Mortg. Co.*, 289 U.S. 266 (1933); *Technical Radio Lab. v. Fed. Radio Comm'n.*, 36 F.2d 111 (D.C. Cir. 1929).

<sup>27</sup> Some variation of "public interest, convenience or necessity" appears throughout the Radio Act of 1927. See Radio Act of 1927, ch. 169 §§ 4(F), 9, 11, 21, 44 Stat. 1162.

<sup>28</sup> See *Nat'l Broad. Co.*, 319 U.S. at 213. See also *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 137 (1940) ("In its essentials the Communications Act of 1934 [with respect to radio] derives from the Federal Radio Act of 1927."); see also 47 U.S.C. § 307 (1994).

<sup>29</sup> See 47 U.S.C. §§ 307(a), 309(a), 310(b) (4), 310(d) (1994).

<sup>30</sup> See Donna Morris Duvall, Comment, *Moving Toward a Better-Defined Standard of Public Interest in Administrative Decisions To Suspend Government Contractors*, 36 AM. U.L. REV. 693, 700 n.47 (Spring 1987) (citing RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW AND PROCESS* § 7.5.1, at 381 (1985)).

<sup>31</sup> The "public interest" is a hallmark of many regulatory statutes. Some general examples include: Federal Power Act, 16 U.S.C. § 824c(a) (1994) (emphasizing that the Federal Power Commission may authorize the issuance of a security by a public utility "only if it finds that such issue . . . is for some lawful object . . . and compatible with the public interest . . ."); Motor Carriers Act, 49 U.S.C. § 13702(b) (5) (1994) (allowing ICC to grant various forms of relief from filing requirements when relief is "consistent with the public interest and the transportation policy."); Immigration and Nationality Act, 8 U.S.C.A. § 1182(d) (5) (A) (West Supp.

### III. BROAD POWERS GRANTED UNDER THE "PUBLIC INTEREST" RUBRIC

The "public interest" standard is used by Congress where an agency is to implement major goals and policy objectives within the agency's domain.<sup>30</sup> Thus, Congress has incorporated the "public interest" into a variety of different statutes and for a variety of different purposes.<sup>31</sup> For example, the Communications Act of 1934 requires the agency to grant common carrier and radio licenses only when such licenses are consistent with the public interest.<sup>32</sup>

The term, "public interest, convenience, and necessity," is not defined in the 1934 Act.<sup>33</sup> The Supreme Court, however, has characterized the public interest touchstone of the Communications Act as a "supple instrument" granting broad powers to its wielder.<sup>34</sup> The Court held that those powers call for "imaginative interpretation"<sup>35</sup> and dispense broad authority to the FCC to act as an "overseer" and "guardian" of the public interest.<sup>36</sup>

(1996) (permitting Attorney General "for reasons deemed strictly in the public interest" to parole into the United States any alien applying for admission); Federal Aviation Act, 49 U.S.C. § 44709(b) (1) (A), (b) (2) (1994) (allowing FAA to suspend airman's certification as required by safety in air transportation and the "public interest"); Interstate Commerce Act, 49 U.S.C. § 11324(c) (1994) (permitting railroad mergers if consistent with the public interest). See also *The Business Roundtable v. SEC*, 905 F.2d 406 (D.C. Cir. 1990) (noting that SEC has the authority in registering an exchange or association of brokers to consider whether its rules "generally . . . protect investors and [the] public interest" (citing, *inter alia*, 15 U.S.C.A. §§ 78f(b) (5), 78o-3(b) (6) (1994 & Supp. 1996)).

<sup>32</sup> See 47 U.S.C. §§ 214(a) (common carriers), 307(a) (station license), 309(a) (West Supp. 1996).

<sup>33</sup> See *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 593 (1981).

<sup>34</sup> *Id.* at 593 (quoting *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940) (the public interest "serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy")); see also *Nat'l. Broad. Co. v. United States*, 319 U.S. 190 (1943) (holding that "public interest" confers broad powers upon the FCC). See also *Public Util. Comm'n. of Cal. v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990) (stating in part that the "public interest" standard grants broad powers to FERC).

<sup>35</sup> See *FCC v. RCA Comm., Inc.*, 346 U.S. 86, 90 (1953) ("The statutory standard [of the public interest] no doubt leaves wide discretion and calls for imaginative interpretation.").

<sup>36</sup> See *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 117 (1973); see also *Nat'l. Cable Television Ass'n v. United States*, 415 U.S. 336, 341 (1974) ("There is no doubt that the main function of the Commission is to safeguard the public interest[.]").

Although extensive, the "public interest" standard is not limitless; the Court has held that the public interest does not give administrative agencies a "broad license to promote the general . . . welfare."<sup>37</sup> Rather, the exact shape and breadth of an agency's public interest authority varies with the aims and goals of the given statute in which the public interest provision is lodged.<sup>38</sup>

The chief goal of the 1934 Act is to "make available . . . to all people of the United States . . . a rapid, efficient, nation-wide, and world-wide wire and radio communication service."<sup>39</sup> The public interest standard gives the Commission "broad discretion" in determining how that goal is achieved.<sup>40</sup> For that reason, courts are required to give "substantial judicial deference" to the Commission's "judgment regarding how the public interest is best served."<sup>41</sup> Thus, courts have upheld the Commission's use of its "public interest" powers in numerous instances, including the Commission's creation of a policy to require reciprocity in its consideration of international common carrier questions<sup>42</sup> and its promulgation of rules generally prohibiting telephone companies from providing cable service in their telephone service areas.<sup>43</sup> Other examples of the Commission's use of its "broad" public interest powers in the common carrier arena include (1) the estab-

lishment of a policy favoring the entry of new common carriers in the specialized communications field<sup>44</sup> and (2) the requirement that telephone carriers furnish certain interconnection facilities to specialized common carriers.<sup>45</sup>

With respect to radio regulation, the courts have been similarly lenient of the Commission's public interest powers.<sup>46</sup> For example, the "public interest" has been considered "sufficiently broad" to allow the Commission to consider applicants' past or proposed violations of criminal statutes.<sup>47</sup> In *National Broadcasting Company*, the Court upheld the Commission's authority to issue chain broadcasting regulations on the grounds that the Act's public interest powers do not limit the Commission to the role of "traffic officer," but instead extend beyond engineering and technical aspects of radio regulation.<sup>48</sup> The Court has also held that "questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked . . . were explicitly and by implication left to the Commission's own devising."<sup>49</sup>

There is nothing atypical about the Commission enjoying broad powers under its public interest authorization. For example, courts have reached similar conclusions with respect to the scope of the ICC's public interest powers.<sup>50</sup> Also,

<sup>37</sup> See *NAACP v. FPC*, 425 U.S. 662, 669 (1976).

<sup>38</sup> *Id.* at 670 (explaining that the public interest derives its content and meaning from "the purposes that Congress had in mind when it enact[s] legislation."); *Public Util. Comm'n of Cal.*, 900 F.2d at 281. See also *Western Union Div. v. United States*, 87 F. Supp. 324, 335 (D.D.C. 1949) ("The standard of 'public convenience and necessity' is to be so construed as to secure for the public the broad aims of the Communications Act."), *aff'd* 338 U.S. 864 (1949).

<sup>39</sup> See 47 U.S.C. § 151 (1994); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981).

<sup>40</sup> The D.C. Circuit has said that Congress "[i]n lieu of specific legislative directives" gave the Commission the power to act according to its view of the "public interest." See *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1423 (D.C. Cir. 1983). Accord *General Tel. Co. of the Southwest v. FCC*, 449 F.2d 846, 853, 858 (5th Cir. 1971) (explaining that the public interest standard of the Communications Act grants "elastic powers" to the Commission and "is to be construed so as to secure for the public the broad aims of the Communications Act."); *Washington Util. and Transp. Comm'n. v. FCC*, 513 F.2d 1142, 1157 (9th Cir. 1974).

<sup>41</sup> See *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981) (citations omitted).

<sup>42</sup> See *Atlantic Tele-Net, Inc. v. FCC*, 59 F.3d 1384, 1389 (D.C. Cir. 1995); see also *Udall v. FPC*, 387 U.S. 428, 449 (1967) (citing 16 U.S.C.A. § 797(e) (West Supp. 1996)) (explaining that the Anadromous Fish Act permits FPC to con-

sider environmental and conservation issues even absent explicit authority to do so in FPC's enabling acts).

<sup>43</sup> See *General Tel. Co. of the Southwest v. United States*, 449 F.2d 846, 858 (5th Cir. 1971) ("We feel the public interest is sufficiently broad to permit the Commission to issue these rules" prohibiting telephone companies from furnishing cable service in their telephone service areas.).

<sup>44</sup> *Wash. Util. and Transp. Comm'n. v. FCC*, 513 F.2d 1142 (9th Cir. 1974).

<sup>45</sup> See *Bell Tel. of Pa. v. FCC*, 503 F.2d 1250, 1270-73 (3rd Cir. 1974).

<sup>46</sup> *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 137-38 (1940) ("public . . . interest" touchstone is as "concrete as the complicated factors for judgment in such a field of delegated authority permit"). But see *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (striking down FCC's rules requiring cable systems to make certain channels available to third parties).

<sup>47</sup> See *FCC v. ABC*, 347 U.S. 284, 289-90 n.7 (1954).

<sup>48</sup> See *Nat'l Broad. Co., Inc. v. United States*, 319 U.S. 190, 215-160 (1943). This position represented a change in the Court's views as it had originally thwarted attempts to expand the meaning of regulation in the public interest. See also *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940) (public interest did not permit FCC to consider economic impact on existing licensees in determining whether to grant a new license).

<sup>49</sup> *Pottsville Broad. Co.*, 309 U.S. at 138.

<sup>50</sup> See *ICC v. Ry. Labors Executives Ass'n*, 315 U.S. 373 (1942) (reversing ICC's decision that it lacked authority

the public interest has been held to allow agencies to impose conditions on the grant of licenses where such conditions were within the scope of the agency's enabling act. Thus, the ICC,<sup>51</sup> FERC,<sup>52</sup> and the FCC<sup>53</sup> have all been found to have liberal authority to condition the granting of licenses in accordance with the public interest standard. In summary, the courts have found repeatedly that the grant of "public interest" authority to an administrative agency conveys broad powers to the agency to act in accordance with both the goals of the agency's organic statute and the statutory provisions bequeathing the "public interest" powers to the agency.

#### IV. SECTION 271

##### A. BOC Entry Provisions

It is well-established that the interpretation of a statute begins with its plain language.<sup>54</sup> By its terms, Section 271 permits a BOC to offer long-distance services within its home region.<sup>55</sup> More technically, it allows BOCs to provide "interLATA services originating in any of its in-region States."<sup>56</sup> Section 271 therefore allows BOCs to offer both local exchange and long-distance serv-

ices to the BOC's local exchange customers.<sup>57</sup> However, to ensure that the BOCs do not abuse their market power in the local exchange market against long-distance competitors, Congress placed various safeguards in Section 271 which must be satisfied in order for a BOC to provide in-region long-distance services.<sup>58</sup>

For example, BOCs must apply to, and obtain authorization from, the Commission as a prerequisite to providing in-region interLATA services.<sup>59</sup> Such applications are to be made on a state-by-state basis.<sup>60</sup> Prior to making any determination on a BOC's application, the Commission must consult with the Department of Justice and the appropriate State public utility commission concerning the BOC's application.<sup>61</sup> Pursuant to the statute, the Justice Department is permitted to review Section 271 applications under "any standard the Attorney General considers appropriate" and such evaluation must be accorded "substantial weight by the Commission."<sup>62</sup>

Aside from the above consultations, Commission approval is predicated on a determination that: (1) the applicant-BOC provides access and interconnection to its network facilities to a facilities-based competitor;<sup>63</sup> (2) the BOC's agree-

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under the "public interest" standard to issue rules for the protection of fired employees). *See also* Chesapeake & Ohio Ry. Co. v. United States, 283 U.S. 35, 42 (1931) (upholding ICC's authority to issue new railroad licenses provided that the new service was in the public interest).

<sup>51</sup> *See Railway Labor Executives Ass'n*, 315 U.S. at 376-77.

<sup>52</sup> *See United Gas Improvement Co. v. Callery Properties*, 382 U.S. 223 (1965) (authority to condition certificates where warranted by the public convenience and necessity permits agency to require regulatees to make appropriate refunds); *see also* Atlantic Refining Co. v. Pub. Serv. Comm'n., 360 U.S. 738 (1959).

<sup>53</sup> *See Western Union Tel. v. United States*, 87 F. Supp. 324, 355 (D.D.C. 1949) (FCC's power to impose conditions in accordance with the public convenience and necessity pursuant to Section 214 encompasses conditions requiring a waiver of private contractual rights).

<sup>54</sup> *See INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *see also* Catholic Social Svs. v. Meese, 664 F. Supp. 1378, 1383 (E.D. Cal. 1987) ("[T]he first step in statutory construction is application of the plain meaning rule.").

<sup>55</sup> Section 271's scope is limited to BOC provision of long-distance services to customers located in states in which the BOC was authorized to provide service pursuant to the MFJ, as amended. *See* 47 U.S.C.A. § 271(i) (West Supp. 1996). The BOCs were permitted to offer long-distance services outside of their home region upon enactment of the 1996 Telecommunications Act. *See* 47 U.S.C.A. § 271(b) (2) (West Supp. 1996).

<sup>56</sup> *See* 47 U.S.C.A. § 271(b) (1). Pursuant to the Modification of Final Judgment, the continental United States was

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divided into local access and transport areas ("LATAs") in which only a specified BOC was permitted to provide telecommunications services (*i.e.*, intraLATA services). *See Non-Accounting Safeguards Notice*, *supra* note 3. LATAs are much larger than the area in which a local call may be made. *Id.*

<sup>57</sup> *See Non-Accounting Safeguards Order*, *supra* note 2, para. 7.

<sup>58</sup> The Commission previously detailed some of the methods by which BOCs could abuse their power when providing in-region long-distance services. *See Non-Accounting Safeguards Notice*, *supra* note 3, paras. 5-8.

<sup>59</sup> *See* 47 U.S.C.A. §§ 271(b), 271(d) (West Supp. 1996); *see also* AT&T Corp.- Production of Section 271 Documents, CC Docket, Order DA 96-1750 para. 4 (1996) (Section 271 permits the Bell companies to provide in-region long-distance services "if the Commission finds that certain conditions have been met.").

<sup>60</sup> *See FCC Public Notice*, Procedures For Bell Operating Company Applications Under New Section 271 Of The Communications Act, (Dec. 6, 1996); *see also* Jonathan E. Canis and Enrico C. Soriano, *The Telecommunications Act of 1996: A Global Analysis*, 4 COMM'LAW CONSPECTUS 147, 151-52 (Winter 1996).

<sup>61</sup> *See* 47 U.S.C.A. § 271(d) (2) (West Supp. 1996). *See also Non-Accounting Safeguards Notice*, *supra* note 3, at para. 10.

<sup>62</sup> *See* 47 U.S.C.A. § 271(d) (2) (A) (West Supp. 1996).

<sup>63</sup> A facilities-based competitor is a carrier providing telephone exchange service either exclusively over its own facilities or predominantly over its own facilities in combination with resale of another carrier's services. 47 U.S.C.A. § 271(c) (1)(A) (West Supp. 1996). As noted in the Conference Re-

ments with local exchange competitors satisfy the fourteen points of the competitive checklist contained in Section 271(c)(2)(B);<sup>64</sup> (3) the requested authorization will be carried out in accordance with the separate subsidiary and nondiscrimination requirements of Section 272;<sup>65</sup> and (4) "the requested authorization is consistent with the public interest, convenience, and necessity."<sup>66</sup> Although Section 271(d)(3)(C) obligates the Commission to grant only those applications consistent with the "public interest," Section 271(d)(4) provides expressly that the "Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist . . . ."<sup>67</sup>

## B. Plain Language Analysis

Although a superficial reading of the public interest and non-alteration provisions might suggest some tension between them, a deeper analysis reveals no such conflict. Section 271(d)'s plain language contains, among other things, two distinct commands; the first, Section 271(d)(3)(C), requires the Commission to grant only those applications that are consistent with the public interest, while the second, Section (d)(4), forbids the agency from altering the competitive checklist "set forth in subsection C(2)(B)." Notably, the no-alteration provision does not reach the "facilities-based" competitor provisions of subsection

(c)(1)(A) and (B) or the separate affiliate requirements of Section 272. Yet, both of those requirements must be satisfied for a Section 271 application to be granted. Consequently, the no-alteration provision does not circumscribe the Commission's public interest authority with respect to the presence (or lack thereof) of facilities-based competitors or to the sufficiency of the BOC's compliance with the separate affiliate safeguards of Section 272.

As for the competitive checklist, it sets forth the minimum requirements which BOCs must provide to competitors in order for the BOC to be eligible, assuming all other requirements are met, to receive Section 271 authority.<sup>68</sup> The no-alteration provision simply precludes the Commission from raising the floor for all BOC Section 271 applications. Nowhere in Section 271 is there language stating to the effect that the Commission may not, on a case-by-case basis, impose additional requirements where necessary to render a Section 271 application consistent with the public interest. Instead, the plain language binds the Commission to grant only those applications consistent with the public interest.

That the Commission may impose additional conditions where warranted by the public interest is supported by reading Section 271 through the lens of certain bedrock canons of statutory construction. Foremost, statutes are to be read in their entirety so that no part is rendered mere sur-

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port, Congress saw cable companies as the most likely candidate to become facilities-based competitors. *See* S. REP. NO. 104-230, at 148 (1996); *see also* H.R. Rep. No. 104-204, at 77 (1995) (The "Committee notes that the cable industry . . . is expected to provide meaningful facilities based competition . . ."). Likewise, the Chairman of the House Telecommunications and Finance Subcommittee, Rep. Fields, also made repeated statements indicating that cable companies were considered the most likely facilities-based competitor. *See, e.g.*, 141 CONG. REC. H8281, 8284 (daily ed. Aug. 2, 1995) (Telephone companies must "enter a good faith negotiation with a facilities-based competitor, like a cable company."); 141 CONG. REC. H8460, 8476 (daily ed. Aug. 4, 1995) ("The checklist in Title I envisions a facilities-based competitor . . . . The cable companies are ready to be that competitor."). If the BOC does not face a facilities-based competitor, it may, under certain circumstances, satisfy that requirement by proffering a statement of its general terms and conditions for such access and interconnection. *See* 47 U.S.C. § 271(d)(3)(A)(ii) (requiring compliance with Section 271(c)(1)(B)). However, as discussed below, there are strong public interest considerations weighing against permitting a BOC to enter the in-region long-distance market under this provision. *See infra* Part VI (discussing importance of actual local exchange competitors to temper BOC's ability to commit anticompeti-

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tive acts in the long-distance market). Additionally, this provision was designed to operate only where "no qualifying facilities-based competitor has requested access and interconnection . . . by the date that is 3 months prior to the date that the BOC seeks interLATA authorization." *See* S. REP. NO. 104-230, at 148 (1996). Generally, IXCs will have requested such access thereby limiting BOC interLATA entry to the procedures in Section 271(c)(1)(A). *See* 47 U.S.C.A. § 271(c)(1)(A) (West Supp. 1996).

<sup>64</sup> 47 U.S.C.A. § 271(d)(3)(A) (West Supp. 1996); *see also supra* note 4.

<sup>65</sup> 47 U.S.C.A. § 271(d)(3)(B) (West Supp. 1996).

<sup>66</sup> 47 U.S.C.A. § 271(d)(3)(C) (West Supp. 1996); *see also Non-Accounting Safeguards Order, supra* note 3, at paras. 331, 336 (The Commission must find that BOC entry into the in-region interLATA market is, among other things, "consistent with the public interest, convenience, and necessity.").

<sup>67</sup> 47 U.S.C.A. § 271(d)(4) (West Supp. 1996).

<sup>68</sup> *See* S. Rep. No. 104-230, at 144 (1996) ("The competitive checklist is . . . [what] at a minimum, [must] be provided by a BOC in any interconnection agreement approved under Section 251 . . . before the Commission may authorize the BOC to provide in region interLATA services.").



plusage.<sup>69</sup> The above view, that the Commission may impose conditions on an ad-hoc basis, but may not do so across the board, accords with that canon. In contrast, the BOCs view<sup>70</sup> – that the FCC is powerless to impose any public interest conditions outside of those contained in the statute – flies in the face of that precedent:

To read out of a statutory provision, a clause setting forth a specific condition [such as one requiring grant of only those applications that are consistent with the public interest, convenience, and necessity] is an entirely unacceptable method of construing statutes.<sup>71</sup>

Consequently, a construction of Section 271 which emasculates the public interest requirement is especially impermissible.<sup>72</sup>

Further undercutting the BOCs' reading of Section 271 is the fact that their construction, essentially precluding the FCC from acting on public interest considerations outside of the express requirements of the checklist, contravenes the language of the Justice Department consultation provisions contained in Section 271(d)(2)(A).<sup>73</sup> That provision, on its face, (1) permits the Justice Department to evaluate Section 271 applications under "any standard the Attorney General considers appropriate" including, therefore, public interest standards and (2) requires the Commission

to accord "substantial weight" to the Department's evaluation.<sup>74</sup> It would be nonsensical of Congress to have enacted a statute which (1) permits the Justice Department's evaluation to encompass public interest considerations and (2) requires the Commission to place substantial weight on that evaluation, but which then (3) precludes the Commission from taking action on the Department's evaluation to the extent the evaluation is based on public interest considerations outside of the checklist.<sup>75</sup>

If the BOCs are correct that the public interest is to be interpreted narrowly, then there would be little reason for Congress to have required the Commission to consult with the Justice Department, even less reason for Congress to have given the Justice Department the authority to analyze Section 271 applications under whatever rubric the Department deems appropriate, and no reason for Judge Greene to have held that the Justice Department was entitled to retain and share with the FCC any documents which it obtained pursuant to the consent decree that are "relevant to the FCC's new responsibilities" under Section 271.<sup>76</sup> Moreover, the BOCs' strained reading eliminates entirely the Department's ability to use "any stan-

<sup>69</sup> See 2A Sutherland, STATUTES AND STATUTORY CONSTRUCTION, § 46.06 at 119 (5th ed. 1992 rev.); see also *Astoria Fed'l Sav. & Loan v. Solimino*, 501 U.S. 104, 112 (1991) (Courts must "construe statutes, where possible, so as to avoid rendering superfluous any parts thereof.").

<sup>70</sup> See *supra* notes 7, 8.

<sup>71</sup> See *Natural Resources Defense Council v. EPA*, 822 F.2d 104, 113 (D.C. Cir. 1987) (citing 2A Sutherland, STATUTES AND STATUTORY CONSTRUCTION at 46.05, 46.06 (C. Sands rev. 4th ed. 1984)).

<sup>72</sup> See *Pennsylvania Dep't. of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990) ("Our cases express a deep reluctance to interpret a statutory provisions so as to render superfluous other provisions in the same enactment."); see also *Bailey v. United States*, 116 S. Ct. 501 (1995) (all words in a statute are to have meaning).

<sup>73</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, § 271(d)(2)(A), 110 Stat. 56, 89 (codified at 47 U.S.C.A. § 271(d)(2)(A) (West Supp. 1996)).

<sup>74</sup> *Id.*

<sup>75</sup> The legislative history also undercuts the BOCs' arguments. The Conference Report observed that the Justice Department was permitted to evaluate Section 271 applications under "any appropriate standard" and included three specific examples, all of which allowed for public interest components. *Conference Report*, *supra* note 2, at 149 (permitting evaluation pursuant to: (1) whether there is "a dangerous probability" that the BOC could impede competition in the long-distance market the BOC seeks to enter; (2) whether there is "no substantial possibility" of such obstruction; or (3) "any other standard the Attorney General deems appropri-

ate."). Furthermore, several members of the House stated specifically that the purpose of the Commission's consultation with the Department of Justice was to help determine whether the grant of the Section 271 application was consistent with the public interest. See 142 CONG. REC. H1165 (daily ed. Feb. 1, 1996) (statement of Rep. Berman) ("The FCC must consult with the Attorney General in determining whether RBOC entry is in the public interest, a requirement designed to ensure that the FCC gives proper regard to the Justice Department's special expertise in competition matters and in making judgments regarding the likely marketplace effects of RBOC entry into the competitive long-distance markets."); *Id.* at H1171 (statement of Rep. Conyers); see *id.* at H1175 (statement of Rep. Goodlatte) (The "Attorney General's evaluation does not have a preclusive effect on the FCC." The "FCC is free to give substantial weight – indeed greater weight if justified by the proffer to the evidence offered by the applicant, Bell operating company. This is also true both of the conclusions and the recommendations concerning public interest, convenience and necessity or concerning competitive issues.").

<sup>76</sup> See *U.S. v. Western Elec. Co.*, 2 Comm. Reg. (P & F) 1388 (1996). Judge Greene issued his ruling over the objections of several BOCs, explaining that "Congress contemplated that the FCC would have ready access to information in the Department's possession" and that such materials may be used by the Commission in making its Section 271 determinations or for "any other section of the Act that requires . . . a competitive analysis." *Id.* at 1389. Under Section 271's plain language, the public interest is part of the Commission's competitive analysis.

dard" because it effectively forces the Department to use only those standards upon which the FCC may act. Thus, the BOCs' construction cannot be squared with the statute's plain language.<sup>77</sup> The only sensible reading of the Justice Department consultation provision is that it requires the Commission to place "substantial weight" on findings made by the Justice Department, no matter what criteria the Department employs, including that of the public interest. This very construction has been adopted by the Department of Justice.<sup>78</sup>

Further supporting the Commission's authority to go beyond the checklist in individual cases is the canon holding that Congress preemptively knows the meaning of the words which it uses. The Supreme Court has held that,

where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.<sup>79</sup>

As discussed in Part III, the term "public interest" has a rich history of conveying broad powers to regulatory agencies.<sup>80</sup> Consequently, Congress is presumed to have intended the "public interest" to bequeath its usual meaning to the Commission.<sup>81</sup>

Finally, had Congress desired that the Commission consider only a narrow range of issues when conducting its public interest analysis, it could have designed the statute in a manner providing

such specificity. Congress is certainly no stranger to such provisions. In the Federal Land Policy and Management Act ("FLPMA"), for example, Congress permitted the Secretaries of Agriculture and Interior to trade any public lands for other land, where the Secretary concerned determines that the public interest will be well served by making the exchange:

Provided, That when considering public interest the Secretary concerned shall give full consideration to better Federal land management and the needs of State and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife and the Secretary concerned finds that the values and the objectives which Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the values of the non-Federal lands or interests and the public objectives they could serve if acquired.<sup>82</sup>

Instead of providing similar specificity, Section 271 obligates the Commission to review the broader "public interest" (and all that term entails) prior to granting a BOC's application. Thus, the BOCs' interpretation of Section 271 cannot stand. Rather, the statute plainly requires that the Commission have the authority to impose conditions required by the public interest, so long as the agency does not attempt to place such conditions on all Section 271 applications, thereby impermissibly altering the checklist. Such a reading would give effect to both the public interest and no-alteration provisions.<sup>83</sup>

<sup>77</sup> See *Pennsylvania Dep't. of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.").

<sup>78</sup> The Justice Department has released a letter reiterating its authority to "evaluate individual applications under any standard we consider appropriate" and seeking comment on five general factors pertaining to BOC entry into in-region long-distance, all of which impact upon the public interest. See Letter from Joel I. Klein, Acting Assistant Attorney General, to All Interested Parties (Nov. 11, 1996) [hereinafter *Justice Department Letter*] (seeking comment on the various benefits and harms from BOC entry into long-distance). Likewise, David Turetsky, Deputy Assistant Attorney General for Civil and Regulatory Affairs, has stated that the public interest "allows full consideration of all competitive issues" and that neither the FCC nor the Department is limited in terms of the issues which they may consider under the public interest test. See *FCC Videotape*, *supra* note 8. See also 142 CONG. REC. H1178 (Feb. 1, 1996) (statement of Rep. Sensenbrenner) (expressing the view that "the FCC will not take actions that, in the Justice Department's view, would be harmful to competition.").

<sup>79</sup> *Morissette v. United States*, 342 U.S. 246, 263 (1952).

See also *McDermott Int'l., Inc. v. Wilander*, 498 U.S. 337, 342 (1991) (courts presume that when using terms of art, Congress intends for them to have their established meaning).

<sup>80</sup> See *supra* notes 30-53 and accompanying text.

<sup>81</sup> As discussed *infra* notes 84-115 and accompanying text, Congress was well aware of the broad powers conveyed through the grant of "public interest" powers to regulatory agencies.

<sup>82</sup> See 43 U.S.C.A. § 1716(a) (West 1995). The Bank Holding Company Act is another example in which Congress provided specific guidance for the analysis of the public interest. See 12 U.S.C. § 1843(c) (8) (1994) (permitting banks to acquire non-banking enterprises where "performance by an affiliate of a holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices.") *Id.*

<sup>83</sup> See *United States Dep't. of Treasury v. Fabe*, 508 U.S. 491, 504 n.6 (1993) (noting that a court should "give effect, if possible, to every clause and word of a statute." (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)).

## V. LEGISLATIVE HISTORY

The legislative history reveals that Congress purposely and with full knowledge of the consequences gave the Commission the statutory responsibility to review Section 271 applications in light of the public interest. In promulgating the BOC application procedures of Section 271, Congress rejected the House bill<sup>84</sup> which did not expressly confer any public interest authority to the Commission<sup>85</sup> in favor of the Senate Bill which did.<sup>86</sup> That choice was deliberate; Congress was aware of the differences between the two bills,<sup>87</sup> but nonetheless adopted the Senate provision requiring satisfaction of the public interest as a distinct element of Commission approval.<sup>88</sup> Congress' decision to favor the Senate bill over the House bill confirms Congress' desire for the Commission to subject Section 271 applications to a public interest review.<sup>89</sup>

The above point is underscored by an examination of the origin of the public interest provision in the Senate. The public interest provision originated<sup>90</sup> in the Senate and, along with the bar

on altering the checklist, remained largely unchanged throughout the legislative process culminating in the adoption of Section 271.<sup>91</sup> Although the Senate Commerce Committee Report ("Commerce Committee Report") endorsed the notion that the FCC should not be permitted to alter the checklist,<sup>92</sup> that same report also exhibited a strong commitment to the public interest standard, stating expressly that the public interest standard "is the bedrock of the 1934 Act and the Committee does not change that underlying premise through the amendments contained in this bill."<sup>93</sup> That language clarifies Congress' intent with respect to the public interest, namely, that the FCC was to have broad powers akin to those enjoyed under the 1934 Communications Act.<sup>94</sup>

That the Commission's public interest review was to be something more than a mere rubber-stamp of applications meeting the checklist is demonstrated by the Senate's rejection of an amendment by Senator McCain (R-AZ), which would have eliminated the Commission's author-

<sup>84</sup> H R. 1555 was enacted by a vote of 305-117 on August 4, 1995.

<sup>85</sup> See H.R. REP. NO. 104-204, at 7-10 (1995). See also JON HEALEY, *Rejecting Further Regulation, Senate Easily Passes Bill*, 53 CONG. Q. 1727, 1730 (June 17, 1995) (detailing the differences between the House and Senate bills concerning the FCC's public interest authority to scrutinize BOC entry).

<sup>86</sup> See S 652, 104th Cong. (1995).

<sup>87</sup> See *Conference Report*, *supra* note 2, at 149 ("[I]n new Section 271(d), the conference agreement adopts the basic structure of the Senate Bill concerning authorization of BOC entry by the Commission . . .").

<sup>88</sup> The Conference Report uses the conjunctive "and" to make clear that the public interest is a separate component to Section 271 approval. It provides that the Commission may grant a Section 271 application "if the Commission finds that the petitioning BOC has fully implemented the competitive checklist . . . that the interLATA services will be provided through a separate subsidiary . . . and that the provision of the requested interLATA services is consistent with the public interest . . ." *Conference Report*, *supra* note 2, at 144-45 (emphasis added).

<sup>89</sup> In *MacDonald v. Gen. Motors Corp.*, 784 F. Supp. 486, 498 (M.D. Tenn. 1992), the court held that the enactment of a bill passed by the state Senate instead of a conflicting bill passed by the House "indicates that the Tennessee legislature did not intend the bill to include the provisions embodied in the rejected amendment" (citing 2A SANDS, *SUTHERLAND ON STATUTORY CONSTRUCTION*, § 48.18 at 341). See also *Cardoza-Fonseca*, *supra* note 54, at 442-43 ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language.") (citations omitted).

<sup>90</sup> See, e.g., Senate Commerce Comm. Discussion Draft at 89-96 (Mar. 23, 1995) (on file with the Senate Commerce Committee); see also Senate Discussion Draft, 141 CONG. REC. S4090 (Mar. 16, 1995). Unlike Section 271, the discussion drafts' bar on altering the checklist preceded the subsection detailing the process for Commission approval. See, Senate Commerce Comm. Discussion Draft, at 95 (Mar. 23, 1995); Senate Discussion Draft, 141 CONG. REC. S4090 (Mar. 16, 1995). The public interest requirement was the first requirement contained in the March 16, 1995 Senate Discussion Draft, See 141 CONG. REC. S4090, and the third in the March 23, 1995 Commerce Committee Discussion Draft, see Commerce Comm. Discussion Draft, at 96.

<sup>91</sup> See Senate Commerce Comm. Discussion Draft, § 221(a) (adding new Section 255(c) (2) (B)) (on file with Senate Commerce Comm.); S.652, 104th Cong., 1st Sess. (as reported by the Commerce Comm.) § 221(a) (adding new Section 255(c) (2) (B)); S.652, 104th Cong., 1st Sess. (as passed by the Senate) § 221(a) (adding new Section 255(c) (2) (B)) (June 15, 1995).

<sup>92</sup> The Commerce Committee Report explains that Section 255(b) (the Senate predecessor to Section 271(d)(4)) is intended to ensure that the "FCC is specifically prohibited from limiting or extending the terms of the 'competitive checklist.'" See Senate Commerce Comm. Rep., S. REP. NO. 104-23, 104th Cong., 1st Sess. 43 (Mar. 30, 1995).

<sup>93</sup> *Id.* at 44. In floor debates, Senator Pressler, Chairman of the Commerce Committee reviewed the history of the phrase "public interest, convenience, and necessity" and the broad powers typically granted pursuant to the use of that phrase. See 141 CONG. REC. S7966-67.

<sup>94</sup> That is particularly relevant for determining the scope of the Commission's public interest authority. See *infra* notes 116-227 and accompanying text.

ity to conduct a public interest review.<sup>95</sup> Senator McCain's amendment stripped out the public interest by providing that "[f]ull implementation of the checklist . . . shall be deemed in full satisfaction of the public interest, convenience, and necessity requirements."<sup>96</sup> The amendment was required, according to Senator McCain and his supporters, because the public interest standard would "negate the entire checklist"<sup>97</sup> as it was an "ill-defined, arbitrary standard" which would expand, rather than lessen, the Commission's authority.<sup>98</sup> In short, the amendments' backers believed that, without the amendment, the Senate bill permitted the Commission to use its public interest mandate to impose requirements on Section 271 applications in addition to those contained in the checklist.<sup>99</sup>

The amendment encountered significant opposition prior to its death by tabling.<sup>100</sup> Senator Pressler (R-SD), the Chair of the Commerce Committee, expressed his surprise that the public interest standard was under attack because it was the "bedrock" of the Communications Act of 1934 and "the foundation of all common carrier regulation."<sup>101</sup> Depriving the FCC of its traditional public interest authority would, in Senator

Pressler's opinion, force the FCC to sanction action that it would otherwise have found inconsistent with the public interest.<sup>102</sup> Senator Pressler also explained that it was highly unlikely that the FCC would arbitrarily use the public interest standard to keep BOCs out of the long-distance market because the Commission's decisions were required to be supported by substantial evidence<sup>103</sup> and:

[t]he FCC's functions and powers are not open-ended. The Communications Act specifies in some detail the kinds of regulatory tasks authorized or required under the act. In addition, the act specifies procedures to be followed in performing these functions. Such delineations of authority and responsibility define the context in which the public interest standard shall be applied. By specifying procedures, the act sets further boundaries on the FCC's regulatory authority.

S. 652 is no different. The bill would require the FCC to make two findings before granting a Bell company's application to provide interLATA telecommunications service: first, that the Bell operating company has fully implemented the competitive checklist in new Section 255(b)(2); second, that the interLATA services will be provided through a separate affiliate that meets the requirements of new Section 252. In addition, the commission must determine that the requested authority is consistent with the public interest convenience, and necessity . . . .

The FCC's public-interest review is constrained by

<sup>95</sup> It is well-established that "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." See *Rusello v. United States*, 464 U.S. 16, 23-24 (1983); see also *United States Ex. Rel. Stinson v. Prudential Ins. Co.*, 944 F.2d 1149, 1156 (3rd Cir. 1991). The Ninth Circuit has applied this rule specifically to the Communications Act. See *Century Southwest Cable Television, Inc. v. CIIF Assocs.*, 33 F.3d 1068, 1071 (9th Cir. 1994) (rejecting argument that the 1984 Cable Act permitted a cable operator to provide service to apartment buildings against the wishes of the buildings' owners because Congress had dropped a proposal which would have authorized such actions).

<sup>96</sup> See 141 CONG. REC. S7960 (daily ed. June 8, 1995). See also 141 CONG. REC. S79054 (daily ed. June 8, 1995) (statement of Sen. McCain) (The FCC's public interest authority "should be eliminated or at least amended so that compliance with the competitive checklist is deemed to be in compliance with the public interest test.").

<sup>97</sup> See 141 CONG. REC. S7969 (daily ed. June 8, 1995) (statement of Sen. McCain). Senator Craig made similar statements. See e.g., *Id.* at S7964-65 (statement of Sen. Craig) (The public interest standard would permit the Commission to "block" BOCs from offering interLATA services even if the BOC satisfied the competitive checklist.).

<sup>98</sup> See 141 CONG. REC. S7960 (daily ed. June 8, 1995) (statement of Sen. McCain). See also 141 CONG. REC. S7965 (daily ed. June 8, 1995) (statement of Sen. Burns (R-MT)) (Public interest is in "the eye of the beholder."); 141 CONG. REC. at S7976 (statement of Sen. Thomas, R-WY.) ("The public interest is a vague and subjective standard."); *Id.* at S7970

(statement of Sen. Packwood (R-OR)) (Public interest is "amorphous"); *Id.* at S7965 (statement of Sen. Craig) (The public interest is "subjective" and "a standard that has no standard").

<sup>99</sup> Fueling further support for the McCain amendment was the belief that the Commission would take years to complete its "public interest" review of each application, thereby delaying BOC's ability to provide-region interLATA services. See e.g., 141 CONG. REC. S7964-65 (daily ed. June 8, 1995) (statement of Sen. Craig) (It takes an "extraordinary time" for the Commission to make a public interest determination); 141 CONG. REC. S7971 (daily ed. June 8, 1995) (statement of Sen. Packwood) (applicants will be "tie[d] up . . . for years."); *id.* at S7967 (statement of Sen. Thomas) ("This public interest test will certainly cause unnecessary delays in the deregulation of the telecommunications industry."). That aspect was dealt with in Section 271(d)(3) which requires that the FCC issue a written decision granting or denying BOC Section 271 applications within 90 days of receiving the application.

<sup>100</sup> The amendment was tabled by a vote of 68 to 31. See 141 CONG. REC. S7971 (daily ed. June 8, 1995).

<sup>101</sup> 141 CONG. REC. S7966 (daily ed. June 8, 1995) (statement of Sen. Pressler).

<sup>102</sup> See *id.* at S7966-97 ("Those who oppose public interest review would ask us to sanction action that the FCC affirmatively finds to be inconsistent with the public interest. How could this be good policy?").

<sup>103</sup> *Id.* at S7977 (characterizing the substantial evidence standard as entailing "heightened judicial scrutiny").

the statute providing the agency's authority. For example, the FCC is specifically prohibited from limiting or extending the terms used in the competitive checklist. In addition, the procedures established in S. 652 ensure that the FCC cannot arbitrarily deny Bell company entry into new markets.<sup>104</sup>

Other Senators also expressed strong disagreement with the elimination of the public interest test. For example, Senator Stevens (R-AK) declared that Commission involvement was necessary to ensure proper scrutiny of the public interest, especially in terms of "whether or not anyone is going to be harmed by the availability of the new service . . . and under what conditions those people are going to be harmed."<sup>105</sup> Senator Lott (R-MS) opined that the "public interest" was "an important part of putting together the [congressional] agreement on the entry test" and that, once a BOC meets the checklist requirements, "there is this one additional thing, the public interest."<sup>106</sup> He explained that the public interest test "was important to make sure that we have a fair and level playing field" between BOCs and their local exchange and long-distance competitors.<sup>107</sup> Senator Hollings (D-SC) maintained that the removal of the public interest standard would permit abuses by the BOCs and would result in public harm.<sup>108</sup> Senator Kerrey, (D-NE) expres-

sing similar sentiments, asserted that the public interest test was integral to the advent of competition in the local market.<sup>109</sup> In short, senators opposing the McCain amendment believed that satisfaction of the public interest was separate and distinct from compliance with the checklist and other express requirements of Section 271.<sup>110</sup>

As shown, the legislative history demonstrates that the public interest was meant to confer broad powers upon the Commission.<sup>111</sup> Congress chose the Senate bill conferring public interest powers upon the Commission over a House bill which contained no such express grant to the FCC. At every turn, the Senate chose to include a public interest provision despite ample opportunity to do away with it. The Senate flatly rejected the McCain amendment which sought to narrow the public interest such that satisfaction of the checklist was deemed to meet the public interest.<sup>112</sup> It also rejected, by tabling an amendment by Senator Thurmond (R-SC) which retained the public interest language but precluded the Commission from conducting an antitrust analysis, instead giving that power to the Justice Department.<sup>113</sup> At minimum, the Senate believed the public interest conferred vast powers upon the FCC; that was cer-

<sup>104</sup> *Id.* at S7966-67.

<sup>105</sup> *Id.* at S7962 (statement of Sen. Stevens); *see also* 141 CONG. REC. S8163 (daily ed. June 12, 1995) (statement of Sen. Pressler) (consumers "are protected by the FCC with the public interest necessity and convenience standard."). Senator Stevens also expressed his view that elimination of the public interest standard would invite abuse and increased litigation. *Id.* at S7961-62.

<sup>106</sup> 141 CONG. REC. S7969 (daily ed. June 8, 1995) (statement of Sen. Lott) ("In my opinion, [the public interest] is sort of part of the checklist.").

<sup>107</sup> *Id.* (statement of Sen. Lott).

<sup>108</sup> *Id.* at S7963 (daily ed. June 8, 1995) (statement of Sen. Hollings).

<sup>109</sup> *Id.* at S7970 (daily ed. June 8, 1995) (statement of Sen. Kerrey) (The public interest test "is an effort to make certain that in fact we do get competition at the local level.").

<sup>110</sup> Several members of the House stated their belief that the public interest was a requirement separate and apart from satisfaction of the checklist. For example, Rep. Hastert, believed that BOCs must meet the checklist *and then* the FCC must determine entry is in the public interest. *See* 142 CONG. REC. H.1152 (daily ed. Feb. 1, 1996). *See also* 142 CONG. REC. H.1165 (daily ed. Feb. 1, 1996) (statement of Rep. Berman) (FCC must consult with Department of Justice to determine whether BOC entry is in the public interest); 142 CONG. REC. H.1171 (daily ed. Feb. 1, 1996) (statement of Rep. Conyers). Representative Costello, who originally was opposed to the House bill, voted in support of the bill because it required the FCC to perform a public interest determination. 142

CONG. REC. H.1176 (daily ed. Feb. 1, 1996) ("I originally opposed the measure when it came before the House last August because I felt the manager's amendment weakened the standards to promote effective competition and provide fair, reasonable rates for consumers. I am pleased that the conference report includes a reasonable checklist of requirements and requires that a FCC public interest test be met before applying for long-distance entry."). *Id.*

<sup>111</sup> To ensure that the Commission did not abuse the public interest standard, Congress required it to justify its decisions concerning Section 271 applications by "substantial evidence" as opposed to the lesser arbitrary and capricious standard. *See* Senate Commerce Comm. Rep., S. REP. NO. 104-23, 104th Cong., 1st Sess. 44 (Mar. 30, 1995).

<sup>112</sup> Senator Pressler agreed that the rejection of the McCain amendment was a vote to preserve the public interest test and that every Senator had been consulted in the crafting of the bill. *See* 141 CONG. REC. S 8220 (daily ed. June 13, 1995).

<sup>113</sup> Senator Thurmond's amendment (#1265) was submitted for consideration on June 5, 1995. *See* 141 CONG. REC. S7972, 8001 (June 8, 1995). It was tabled by a vote of 57-43 on June 13, 1995. *See* 141 CONG. REC. S8225 (June 13, 1995). In opposing the amendment, Senator Lott noted that "we have already fought this battle. We had an amendment to knock out the public interest finding [and it was defeated]. But we have the hurdle of the checklist, we have the State regulators and we also have the public interest test. So that is three hurdles already." *See* 141 CONG. REC. S 8207 (daily ed. June 13, 1995).

tainly the view of those seeking to narrow the Commission's public interest powers as well as the belief of those favoring a public interest test.<sup>114</sup> Thus, it was relatively uncontroverted in the Congress that the public interest provision afforded considerable powers to the Commission and constituted a separate and distinct factor which must be satisfied prior to BOCs receiving Section 271 authorization.<sup>115</sup>

## VI. COMMISSION EXAMINATION OF THE PUBLIC INTEREST

### A. Requirement That Local Exchange Market Be Examined

As an initial matter, there is some dispute concerning the proper scope of the Commission's public interest powers under Section 271. Several BOCs have asserted that the public interest analysis to be performed is limited to an examination of the effects of BOC entry into the long-distance market.<sup>116</sup> In contrast, the interexchange carriers ("IXCs") and other parties have contended that the Commission's public interest powers under Section 271 are not so limited and that any such Section 271 public interest analysis must encompass an assessment of competition in the local ex-

change market as well as in the interLATA market.<sup>117</sup> The Commission has apparently endorsed the IXC view, stating that Section 271 "links the effective opening of competition in the local market with the timing of BOC entry into the long-distance market."<sup>118</sup> As shown below, BOC entry into interLATA markets necessarily requires an appraisal of the level of competition in the local exchange market.<sup>119</sup>

The D.C. Circuit has explained that when conducting an "analysis of what is in the 'public interest,'" the Commission must focus on "fulfilling the congressional view of the public interest."<sup>120</sup> Additionally, the assessment of whether a particular Section 271 application is consistent with the public interest must be made against the backdrop of the new Telecommunications Act of 1996.<sup>121</sup> That backdrop – discussed both above and below – reveals a strong congressional preference that BOCs not be permitted into in-region long-distance until competition not only exists in the local exchange market, but also is sufficient to render the BOCs incapable of leveraging their power in the local exchange market to gain an anticompetitive advantage in the long-distance market.<sup>122</sup> Nothing in Section 271's plain language is

<sup>114</sup> See 141 CONG. REC. S8165-66 (daily ed. June 12, 1995) (statement of Sen. Gorton) (FCC's power in making its public interest determination concerning long-distance entry "is essentially unlimited.").

<sup>115</sup> See 142 CONG. REC. S688 (Feb. 1, 1996) (unanimous consent for introduction of a table of resolved issues among which was that BOC applications to provide in-region long-distance must be in the public interest).

<sup>116</sup> See *FCC Videotape*, *supra* note 8, (Richard Wiley, partner of Wiley, Rein & Fielding contended that the FCC's public interest powers under Section 271 are limited to reviewing the likely effects of BOC in-region entry into long-distance and not on an assessment of the state of local competition). See also *Ameritech Illinois Legal Memorandum*, *supra* note 8, at 26 ("focus" of FCC's public interest inquiry is on "whether authorization under Section 271 would promote competition and benefit long-distance users.").

<sup>117</sup> The Telecommunications Carriers For Competition which includes AT&T, MCI, LDDS Worldcom and Comptel, have asserted that the Section 271 public interest analysis includes an analysis of local exchange competition. See, e.g., *FCC Videotape*, *supra* note 8; TELECOMM. REP., *Provisions For Bell's Entry Into In-Region InterLATA Markets Disputed By LECs, IXCs*, July 15, 1996). The Department of Justice has expressed similar views. See *FCC Videotape*, *supra* note 8; WARREN'S TELECOM REGULATIONS MONITOR, *Telecom Industry Shows Disagreement On RHC Entry Into Long-distance* (July 15, 1996).

<sup>118</sup> *Non-Accounting Safeguards Order*, *supra* note 2, at para. 8.

<sup>119</sup> Even if BOCs were correct in asserting that the public interest showing was to focus on the long-distance market, the Commission's public interest review must include an examination of both the benefits and harms of new BOC entry. In order to assess the potential harms, the Commission would need to understand whether the BOC had the ability to unfairly leverage its power in the local exchange market into the long-distance market. That evaluation requires the Commission to examine the BOC's strength as compared to its competitors in the local exchange market.

<sup>120</sup> See *Mobile Comm. Corp. v. FCC*, 77 F.3d 1399, 1406 (D.C. Cir. 1995). See also *Pub. Util. Comm'n. of Cal. v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990) (holding that "broad public interest standards" in the Communications Act are "limited to the 'purposes that Congress had in mind when it enacted this legislation.'" (quoting *Bob Jones Univ. v. United States*, 461 U.S. 575, 611 (1983) (Powell, J., concurring) (scope of agency's public interest powers is delineated by the areas in which the agency has expertise)).

<sup>121</sup> See *Mobile Comm. Corp.*, 77 F.3d at 1406 (whether it was in the public interest to impose an auction-based licensing fee upon a PCS applicant was to be determined in relationship to the new statutory amendments granting auction authority to the FCC and not against the 1934 Act's more typical public interest backdrop of comparative hearings).

<sup>122</sup> See *supra* notes 84-115 and accompanying text (discussing legislative history). See also *Non-Accounting Safeguards Notice*, *supra* note 3, at para. 5 (The 1996 Act permits BOCs to enter the long-distance market if "they satisfy certain statu-

to the contrary.<sup>123</sup>

The Conference Report notes that the 1996 Act was aimed at "opening all telecommunications markets to competition."<sup>124</sup> To ensure that competition takes root in the local exchange markets and that the long-distance markets remain competitive, the Commission must be certain that BOC entrants into long-distance lack the authority to use their market power in the local exchange to commit anticompetitive acts in the long-distance market.<sup>125</sup> Consequently, Commission scrutiny of the local market is permitted under the 1996 Telecommunications Act.<sup>126</sup>

That conclusion is further supported by the floor statements of several members of both Houses. Senator Hollings, for example, stated:

The basic thrust of the bill is clear: competition is the best regulator of the marketplace. Until that competition exists, monopoly providers of services must not be able to exploit their monopoly power to the consumer's disadvantage . . . Telecommunications services should be deregulated after, not before, markets become competitive.<sup>127</sup>

Senator Kerrey was even more explicit, noting

tory conditions that are intended to prevent them from improperly using their market power in the local exchange market against their competitors in the interLATA telecommunications [market] . . . and if they have taken sufficient steps to open their local exchange networks to competition.").

<sup>123</sup> Certainly the prohibition on altering the checklist cannot foreclose the agency from reviewing local competition levels given the fact that the Department of Justice is permitted to conduct and is conducting such review, thereby obligating the Commission to place "substantial weight" upon its findings. See *Justice Department Letter, supra* note 78; see also 142 CONG. REC. H1178 (Feb. 1, 1996) (statement of Rep. Sensenbrenner) (expressing view that "the FCC will not take actions that, in the Justice Department's view, would be harmful to competition.").

<sup>124</sup> See *Conference Report, supra* note 2, at 1.

<sup>125</sup> Professor Lawrence A. Sullivan notes that if BOCs "gain IX access while their local monopolies remain substantially intact" then "a great opportunity to open local markets will be lost and RBOC IX entry, far from being a boon to IX competition may lead to serious distortion in a now competitive market." Lawrence A. Sullivan, *Antitrust Symposium: Antitrust Issues In The Telecommunications and Software Industries*, 25 SW. U. L. REV. 487, 490 (1996) (asserting that time for RBOC entry is after not before the BOC's local monopoly erodes). See *id.* at 493 ("Premature RBOC entry into IX would not enhance but might well reduce the current, aggressive IX price competition.").

<sup>126</sup> The Commission's powers under the public interest standard are those which accord with Congress' intent in enacting the legislation bestowing such powers upon the agency. See *Mobile Comm. Corp.*, 77 F.3d 1399, 1406 (D.C. Cir. 1995); *Pub. Util. Comm'n. of Cal.*, 900 F.2d 269, 281 (D.C. Cir. 1990).

<sup>127</sup> 142 CONG. REC. S688 (daily ed. Feb. 1, 1996) (state-

ment of Sen. Hollings).  
that the conference bill "had sufficient provisions to ensure that the local telephone market was open to competitors before the RBOCs entered long-distance."<sup>128</sup> Similar sentiments were expressed by members of the House. Representative Bunning declared that "[w]e should not allow the regional Bells into the long-distance market until there is real competition in the local business and residential markets."<sup>129</sup> Likewise, Representative Forbes opined that "before any regional Bell company enters the long-distance market, there must be competition in its local market. That is what fair competition is all about."<sup>130</sup>

On a practical level, it is difficult to understand how a public interest analysis of BOC entry into in-region long-distance could be made without an examination of the local market.<sup>131</sup> It should be indisputable that the public interest favors in preventing BOCs from using their existing market power in the local exchange to obtain an anticompetitive advantage in a competitive market such as long-distance.<sup>132</sup> As stated by the Commission's

ment of Sen. Hollings).

<sup>128</sup> 142 CONG. REC. S697 (Feb. 1, 1996) (statement of Sen. Kerrey).

<sup>129</sup> 141 CONG. REC. H8458 (Aug. 4, 1995) (statement of Rep. Bunning).

<sup>130</sup> 142 CONG. REC. E204 (Feb. 23, 1996) (statement of Rep. Forbes).

<sup>131</sup> The Justice Department has solicited comment concerning "the risks that the Bell Companies market power in local markets could be used to hamper competition in . . . both local and long-distance services." *Justice Department Letter, supra* note 78.

<sup>132</sup> Professor Robert Willig has recognized that BOC's have "sharp economic incentives" to abuse their local market power into the long-distance market" and that they have had and will continue to have significant chances to harm competition in following their incentives. See *Economic Forum: Antitrust and Economic Issues*, Willig Transcript at 60-61 (Wash. D.C. July 23, 1996) [hereinafter *FCC Economic Forum*]. One particular example provided by Professor Willig is the BOCs' ability to unfairly raise their long-distance rivals' costs (via imposition of extra charges) thereby allowing the BOCs to set their prices below their rivals and gain market share or price at the same level and reap higher profits. *Id.* at 66-68. Similarly, Nina Cornell, the former Chief of the FCC's Office of Plans and Policies, has stated that BOCs' "technical discrimination" is "rampant." *Id.* at 103. Such discrimination includes the denial or slow rolling of provisioning and repair in which the BOC takes a long time to provide or repair competitor's lines. See *id.* As examples, Cornell cited the following: (1) BOCs take from nine-13 months to build a co-location cage which takes a contractor only six hours; (2) would-be local entrants in Oregon and Washington have been told by the LECs that there is no more capacity at the tandem, no more ports, and no more trunk capacity; and (3) competitors of US West and other BOCs have filed numerous complaints

### Chief Economist:

The BOCs' incentives and ability to discriminate against rivals in long-distance . . . depend on their market power in the local bottleneck. If we can open up the bottleneck and implement vigorous competition there, then BOCs will have little or no incentive to raise the costs of their long-distance partners – and if they do so, those long-distance carriers and their customers will have other choices, so the harm to consumers will be limited. Thus, when there is enough competition in what is now the local bottleneck, it will make good sense to let the BOCs into complementary businesses such as manufacturing and long-distance.<sup>133</sup>

Thus, a review of the competition levels in the local exchange market is critical to understanding the impact of BOC entry into long-distance and, therefore, a necessary predicate to fulfilling Congress' goal of granting BOC Section 271 applications only when such applications are consistent with the public interest.

Another important reason for reviewing competition levels in the local exchange market is the fact that long-distance entry was designed by Con-

gress as a reward for BOCs opening up their local exchange markets to competition. As noted by the Commission, the BOCs hold nearly 99.1% of all local exchange revenues in their in-region states.<sup>134</sup> Like most monopolists, the BOCs generally have nothing to gain by opening their markets to competition,<sup>135</sup> however they do have every incentive to hinder unfairly any new competition.<sup>136</sup> Section 271, therefore, represents the type of incentive regulation designed to change the BOCs' behavioral calculus. That is, Congress enacted Section 271 to provide BOCs with an incentive to open local exchange markets by rewarding them with the ability to provide in-region long-distance services.<sup>137</sup> As recognized by the Commission,<sup>138</sup> its chief economist,<sup>139</sup> other economists,<sup>140</sup> the major interexchange carriers,<sup>141</sup> cable companies,<sup>142</sup> and by the BOCs themselves<sup>143</sup>, there is little reason for the BOCs to open their markets outside of the incentive of in-

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alleging that the BOCs are providing poor service to the competitors in terms of breakdowns, repair time, etc. *Id.* at 103-116. To temper the BOCs' ability to "price squeeze" and commit other forms of technical discrimination, the Commission promulgated separate affiliate and non-discrimination safeguards pursuant to Sections 271 and 272. *See Non-Accounting Safeguards Order*, *supra* note 2.

<sup>133</sup> JOSEPH FARRELL, *Creating Local Competition*, 49 FED. COMM. L. J. 201, 207-08 (1996).

<sup>134</sup> *See Non-Accounting Safeguards Order*, *supra* note 2, at para. 10.

<sup>135</sup> The *Wall Street Journal* notes that competition in the local market could lower rates by as much as 60%. *See* John J. Keller, *Home Court: Local Markets Will Soon Be Hit By an Unfamiliar Force: Competition*, WALL ST. J., Sept. 16, 1996, at R14 (telecom. Supp.). Such a reduction would seriously impact BOCs' profits from the local exchange market. *Id.*

<sup>136</sup> *See* Testimony of Dr. Carl Shapiro on behalf of Sprint before the Illinois Commerce Commission, *Investigation Concerning Illinois Bell Telephone Co.'s Compliance with Section 271(c) of the Telecommunications Act of 1996*, Nov. 7, 1996, at 3 ("[N]o monopolist [regulated or not] lightly relinquishes its dominant position.") [hereinafter *Shapiro Testimony*].

<sup>137</sup> *See* 141 CONG. REC. H8282 (daily ed. Aug. 2, 1995) (statement of Rep. Bliley) ("[t]he key to this bill is the creation of an incentive for the current monopolies to open their markets to competition").

<sup>138</sup> *See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1995, Report and Order*, 4 Comm. Reg. (P & F) 1, para 55 (Aug. 8, 1996), *appealed* Iowa Util. Bd. v. FCC, 4 Comm. Reg. (P&F) 1360-61 (1996), *motion to vacate stay denied*, 117 S. Ct. 429 (1996). ("[I]ncumbent LECs have no economic incentive, independent of the incentives set forth in Sections 271 and 274 of the 1996 Act, to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and facilities.")

<sup>139</sup> *See FCC Economic Forum*, *supra* note 132, at 15 (statement of Joe Farrell) (explaining that once a BOC has been

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permitted into the long-distance market, it may be "less inclined to cooperate with opening up the [local exchange] bottleneck.").

<sup>140</sup> Former FCC Office of Plans and Policies Chief Nina Cornell stated that interLATA entry is the only "carrot" the agency possesses vis-à-vis local exchange competition. *Id.* at 113.

<sup>141</sup> AT&T's Chairman has noted that LECs which are allowed to provide long-distance service, such as SNET, are "not in a hurry to open up their local service monopoly." *See Local Competition: European and Local Phone Monopolies Delay Competition, AT&T Chairman Allen Tells Connecticut Business Leaders*, EDGE, ON & ABOUT AT&T, Nov. 18, 1996. Similarly, MCI's Chief Policy Counsel has stated that "if you let the RBOCs into the long-distance market prematurely, their incentive to open local markets to competition is dramatically reduced." *See RBOCs Should Not Be Allowed To Enter Long-distance Market Until True Competition Exists For Local Markets, MCI Says*, BUS. WIRE, July 22, 1996; *see also MCI's Legal Memorandum In Response To Order Initiating Investigation before the Illinois Commerce Commission*, at 5-6 (Nov. 8, 1996) [hereinafter *MCI Brief*]. On behalf of Sprint, Dr. Carl Shapiro, former deputy assistant attorney general in the Antitrust Division of the Department of Justice, observed that the only incentive a BOC has to open up its local market is that, in exchange, the BOC is permitted to provide interLATA services. *See Shapiro Testimony*, *supra* note 136, at 3.

<sup>142</sup> *See generally* Comments of Time Warner Cable, to *Notice of Inquiry* in CC Docket No. 96-149, at 6-8 (August 15, 1996) ("[P]rior to the 1996 Act, BOCs had no incentive" to open their local exchange to competitors.)

<sup>143</sup> *See generally* Comments of SBC Comm. Inc., to *Notice of Inquiry* in CC Dkt No. 96-98. Similarly, NYNEX has allowed that it provides access to its network not simply because "we're good guys," but in order to "get into new areas of business." *See TELECOMM. REP.*, at 16 (Dec. 11, 1995) (quoting William Allan, NYNEX, Vice-President for Regulatory Affairs). Analogously, Ameritech's CEO has observed that the "big difference between us and [GTE] is they're already in



terLATA entry.<sup>144</sup>

It should be recognized that the reward of long-distance entry is not a universal panacea in terms of curing the BOCs' anticompetitive behavior in the local exchange market. The Wall Street Journal notes that the "Bells have slowed the spread of local competition by dragging their feet in negotiating with AT&T and others" concerning entry into the Bells' local markets.<sup>145</sup> In Texas, Southwestern Bell is "resisting incursions" into its local market by 'pitching a battle to delay the entrance of the big long-distance companies' into the local market.<sup>146</sup> Likewise, MCI has been thwarted by Pacific Bell<sup>147</sup> and U.S. West<sup>148</sup> in its attempts to bring local competition to California and Minnesota. And, for more than a year, Ameritech has managed to stall negotiations with Time Warner, thereby preventing the cable company from providing local exchange service in Ohio.<sup>149</sup>

Nor are the Baby Bells unique. Many smaller and medium-sized LECs, none of which are covered by the Section 271 limitations, are also attempting to fend off new local competition.<sup>150</sup> GTE, the largest local phone company in the country,<sup>151</sup> and Southern New England Telephone Company ("SNET"), which serves the State of Connecticut, essentially have refused to cooperate with prospective local exchange competitors.<sup>152</sup> Moreover, for customers of such carriers, local competition promises to be especially bene-

ficial. For example, customers of Alltel Corporation, which has 1.6 million customers in fourteen states, pay \$9 more per month for local service in the suburbs of Houston, Texas, than do residents of Houston, who are instead served by SBC Communications.<sup>153</sup> Similarly, Frontier Corporation of Genesee, Pennsylvania, charges an extra long-distance fee to certain small-town customers to connect them to the town's lone high school.<sup>154</sup>

In light of the above, it would surely frustrate the goals of the 1996 Telecommunications Act – to "open . . . all telecommunications markets to competition"<sup>155</sup> – for the Commission's public interest analysis not to include scrutiny of the local exchange market, because it is almost universally recognized that the reward of long-distance entry is the single most important regulatory tool in ensuring that competition takes root in the local exchange market.<sup>156</sup> Consequently, for any given state, BOC long-distance entry should be withheld until the promise of Section 271 – significant competition in the local exchange market – is realized.

#### B. Suggested Factors To Be Analyzed Concerning the Local Exchange Market

The Commission's public interest determination under Section 271 should include a weighing of the potential benefits of having the BOC, as a

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long-distance. What's their incentive to cooperate." See Michael Mills, *Holding the Line on Phone Rivalry, GTE Keeps Potential Competitors, Regulators' Price Guidelines at Bay*, WASH. POST, Oct. 23, 1996, at C12, C14.

<sup>144</sup> William Irby of the Virginia State Corporation Commission has noted that because the 1996 Act's long-distance prohibitions apply only to BOCs, "[t]here's nothing in [Section 271] for [LECs such as GTE], so they're doing everything they can to fight competition." *Id.*

<sup>145</sup> See Keller, *supra* note 135.

<sup>146</sup> See generally Ann de Rouffignac, *AT&T Breaking Barrier to Local Phone Competition*, HOUSTON BUS. J., Dec. 13, 1996.

<sup>147</sup> Among other things, PacBell has told customers signing up for MCI's service that MCI lacks the authority to provide local service, that the service is not available for several months, that the customers should pay PacBell because it owns the local network, that the customers must also use MCI for long-distance, and that MCI's local service is not as reliable as PacBell's. See Karen Kaplan, *The Cutting Edge*, L. A. TIMES, Dec. 16, 1996, at D3. More importantly, PacBell has admitted that there might be some problems with the manner in which certain employees have handled competition from MCI. *Id.*

<sup>148</sup> U.S. West "want[s] to stall local competition as long as possible while maximizing their ability to handle both local and long-distance . . ." See Steve Alexander, *U.S. West*

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*Seeks Change in Rules*, MINNEAPOLIS-ST. PAUL STAR-TRIB., Nov. 23, 1996, at 1D.

<sup>149</sup> See *Local Competition: Time Warner Says Ameritech Deal With MFS Will Not Satisfy Competitive Checklist Requirement*, EDGE, ON & ABOUT AT&T, May 27, 1996.

<sup>150</sup> Leslie Cauley, *Why Phone Rivals Can't Get Into Some Towns*, WALL ST. J., Aug. 19, 1996, at B1; see also *FCC Economic Forum*, *supra* note 130, at 113 (statement of Nina Cornell).

<sup>151</sup> Mills, *supra* note 143, at C12.

<sup>152</sup> See also *FCC Economic Forum*, *supra* note 132, at 113, 159. See also *supra* note 141 (noting GTE's recalcitrance).

<sup>153</sup> Cauley, *supra* note 150, at B1.

<sup>154</sup> *Id.*

<sup>155</sup> Joint Statement of the Comm'n. of Conf., S. CONF. REP. NO. 104-230, at 1 (1996); see also 141 CONG. REC. S8165 (daily ed. June 12, 1995) (statement of Sen. Gorton) ("The goal of the bill . . . is to create added competition in both telephone fields, in both long-distance and in the local exchange."). The Eighth Circuit has also recognized that "[i]n the Telecommunications Act of 1996, Congress enacted a plan to alter the monopolistic structure of local telephone service markets with an injection of competition." See *Iowa Util. Bd. v. FCC*, 4 Comm. Reg. (P&F) 1360 (1996).

<sup>156</sup> See, e.g., *FCC Economic Forum*, *supra* note 132, at 10-11 (statement of Joe Farrell).

new entrant, in the long-distance market against the potential harms created should the BOC leverage its monopoly power in the long-distance market. The latter review should include an assessment of the level of competition in the local exchange market, including scrutiny of the BOC's treatment of competing local exchange carriers, *i.e.*, are the BOC's actions anticompetitive. In the end, the Commission must determine that competition in the local exchange market is sufficient to prevent BOCs from utilizing their power in the local exchange to gain an unfair advantage in the long-distance market.<sup>157</sup>

The question then arises as to how the Commission may determine that competition is in fact sufficient in order to temper the BOCs' ability to commit anticompetitive acts. Such determination should focus on, among other things, the following factors:

- (1) the type and quality of "access and interconnection" provided by the BOC to its local exchange competitors;
- (2) the status of competing local exchange carriers, *i.e.* are they actually providing local exchange services;
- (3) the number of competing local exchange providers;
- (4) the ability of local exchange competitors to compete with the BOC in terms of service offerings, scope of service, capitalization, etc.;
- (5) the extent to which the BOC's local exchange competitors are or plan in the very near-term to provide local exchange services over their own networks;
- (6) the relationship between the BOC's access charges and its costs; and
- (7) the amount of market share possessed by the BOC's local exchange competitors both individually and in the aggregate.

The public interest mandates that the Commis-

sion examine the type and quality of "access and interconnection" provided by the BOC to its local exchange competitors. Section 271(d)(3)(A) provides expressly that the BOC must show that any interconnection agreement "fully implements" the competitive checklist.<sup>158</sup> The Conference Report explains that the requirement that the BOC "is providing 'access and interconnection' means that the competitor has implemented the agreement and the competitor is operational."<sup>159</sup> Experience teaches, however, that the signing of an interconnection agreement does not indicate the advent of actual competition. For example, the first company to enter into an interconnection agreement with Southwestern Bell has been unable to actually enter and offer residential services because of the Bell's high prices on access to the last mile wire (between the customers' home and the LEC's switch).<sup>160</sup> Thus, the public interest would therefore favor BOC entry when the BOC's interconnection agreements have been fully implemented as exhibited by the presence of competing local exchange competitors.<sup>161</sup> Otherwise, neither the Commission nor the relevant state commission will have the ability to decide whether the BOC has provided appropriate access and interconnection to its competitors.<sup>162</sup>

There are several additional reasons that the public interest favors the presence of actual competing providers of local exchange services as opposed to carriers who have completed an interconnection agreement but who have not yet entered the market or are in other similar formative stages.<sup>163</sup> That is not to say that the Commis-

<sup>157</sup> See Reed E. Hundt, Chairman Federal Communications Commission, Speech before the Competition Policy Institute (Jan. 14, 1997) (FCC's decision on Section 271 applications "will, of course, turn in large part on whether the [applicant's] local market is open to competition."). See also Lawrence A. Sullivan, *Antitrust Symposium*, *supra* note 125, at 531-32 (The "public interest will be poorly served" if BOCs "gain IX entry with LX power intact.").

<sup>158</sup> Section 271(c) (1) (B) permits the BOC to provide a statement of generally offered terms and conditions for access and interconnection in lieu of facing a facilities-based competitor, but such an option is available only where no prospective providers of local exchange service have requested access and interconnection. Telecommunications Act of 1996, Pub. L. 104-104, § 271(c) (1) (B), 110 Stat. 56 (coedified 47 U.S.C.A. § 271(c) (1) (B) (West Supp. 1996)). The availability of this option is clarified by the fact that the "predominance" element of Section 271 (c) (1) (A) applies only to that subparagraph and thus, subparagraph (c) (1)

(B) would be inapplicable where a carrier providing local exchange services predominantly over its own network requests interconnection.

<sup>159</sup> *Conference Report*, *supra* note 2, at 148.

<sup>160</sup> See Rouffignac, *supra* note 146.

<sup>161</sup> In fairness to the BOCs, the Commission should institute rules to ensure that prospective local exchange competitors do not "game" the system by declining one or more of the checklist requirements. Such rules could, for example, permit BOCs to show that they have offered all checklist items to competitors under reasonable terms and conditions and the competitors have nonetheless chosen not to accept the item or items.

<sup>162</sup> *Conference Report*, *supra* note 2, at 148 (observing that requiring local exchange competitors to be operational assists the appropriate State commission in its consultation and the FCC in its factual determinations).

<sup>163</sup> MCI and Sprint have noted the importance of this factor in reducing the risks of BOC long-distance entry. See

sion should give no heed to the imminence of various entrants into the local exchange market, but the benefits stemming from competition – additional consumer choice, lower prices, product innovations, etc. – are best realized if competitive pressures stem from actual competitors as compared to those still in the formative stages.<sup>164</sup> Furthermore, a greater number of competing providers will increase the likelihood that some or all such carriers are able to bring competitive pressures to bear on the BOC.<sup>165</sup>

The public interest also requires that all of the BOC's local exchange competitors operate on as level a playing field as possible with the BOC. The BOCs have recognized the importance of level playing fields in instances of BOC entry as the fledgling competitor against powerful incumbents into telecommunications markets.<sup>166</sup> The BOCs' local exchange competitors must be able to offer services similar to those provided by the BOC.<sup>167</sup> Also, such similar services should be available to wide numbers of consumers throughout the state.<sup>168</sup> The Commission need not require that competitors offer service in every town and hamlet within the state; rather, a significant majority of citizens should have the immediate

ability to switch their local exchange service to a provider of such services in competition with the BOC. It is simply inconsistent with the public interest for the BOC to face competition from only a few small competitors which are able to provide local exchange service in only a narrow portion of the state, or from competitors who are unable to offer services comparable to those of the BOC.<sup>169</sup> Competition will not flourish where the BOC's competitors are able to offer only inferior services or where the BOC remains the sole local exchange carrier for large areas within the state.

To that end, the Commission should also look into the identity of the competing local exchange carriers in order to gauge their actual ability to compete against the incumbent BOC. As noted, Ameritech has asserted that it faces local exchange competition in Illinois from the entrance of a single local exchange competitor with only 2,500 lines, as compared to the six million held by Ameritech in that state.<sup>170</sup> In contrast, the Commission's Chairman Reed E. Hundt has said that local exchange competition will not develop until the BOCs have signed interconnection agreements with large IXCs, such as AT&T or MCI.<sup>171</sup> It is these larger types of IXCs which have the abil-

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*MCI Brief, supra* note 139, at 32; *Shapiro Testimony, supra* note 136, at 12, 18 (noting that "a CLEC – actually providing service – is far more meaningful than a paper agreement that has yet to be tested commercially.").

<sup>164</sup> See Farrell, *supra* note 131, at 202. See also *MCI Brief, supra* note 141, at 29 ("If local competition is sparse and embryonic, it will not provide an adequate check on the BOC's ability . . . to use its bottleneck power to stymie competition."); *Shapiro Testimony, supra* note 136, at 6 ("[T]he introduction of competition into local exchange markets will generate substantial consumer benefits in the form of new services and lower prices.").

<sup>165</sup> See *Shapiro Testimony, supra* note 136, at 12 (observing that "the greater the number of actual [competitors], the more confident" one could be in assuming that workable competition exists).

<sup>166</sup> With respect to competition in open video systems, the United States Telephone Association ("USTA"), which represents the BOCs and other local exchange carriers, has said that "parity of access is an essential pre-condition for LECs to provide meaningful competition to incumbent cable operators, due to concentration of control over vast portions of . . . programming among a handful of vertically integrated cable operators." See *In re Implementation of Section 302 of the Telecommunications Act of 1996 – Open Video Systems, Third Report and Order and Second Order on Reconsideration*, 4 Comm. Reg. (P&F) 380, para. 163 (1996). USTA's statement is even more relevant here where new entrants will face a market concentrated not among a handful of competitors but in the hands of the incumbent monopolist BOC.

<sup>167</sup> The more inferior competitors' service offerings are in comparison to the BOC's, the less competitive pressures

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exerted by the competing local exchange carriers. See *MCI Brief, supra* note 141, at 32-33 ("[S]ervice is not equally available unless the CLEC can provide service within the same amount of time at the same price as the BOC.").

<sup>168</sup> See *id.* See also *Shapiro Testimony, supra* note 136, at 12 (the more widespread local competition is permitted to be, the greater the chance that that market will be competitive).

<sup>169</sup> See *MCI Brief, supra* note 141, at 32. Also of importance is the fact that Ameritech believes that the FCC lacks the authority to require "viable local competition" in all major markets in a state as a condition precedent to Section 271 authority. See *Ameritech Illinois Legal Memorandum In Response To Order Initiating Investigation, Illinois Commerce Commission Investigation Concerning Illinois Bell Compliance With Section 271(c)*, at 28 (Sept. 27, 1996) (No. 96-0404). Although that view is rebutted in Section VI.C, *infra*, of this article, Ameritech has already begun to take actions in accordance with its belief. In Illinois, it has begun the process leading up to Section 271 approval even though the sole local exchange carrier actually offering local service has but 2,500 access lines as compared to Ameritech's six million. See *Shapiro Testimony, supra* note 136, at 14. In that proceeding, one of the two interconnection agreements negotiated by Ameritech, neither of which was with one of the "BIG THREE" IXCs, had not yet been approved by the State PUC. *Id.*

<sup>170</sup> See *Shapiro Testimony, supra* note 136, at 14.

<sup>171</sup> See *Hundt Says Interconnection Deals With AT&T, MCI Needed For Real Competition, TELCO COMPETITION REP.* (June 20, 1996) ("The only truly significant interconnection agreement for those interested in competition is one between AT&T or MCI and one of the Bells.").

ity, financially, technically and otherwise, to best compete with the BOCs, especially, as discussed in Section VI.D, *infra*, in the provision of bundled services. Ameritech's CEO has acknowledged this truism, characterizing Chairman Hundt's remark as "stating the obvious."<sup>172</sup> Thus, all parties appropriately recognize that the public interest is best served by a BOC facing actual competition throughout the majority of the State from at least one large local exchange competitor (in addition to several smaller such competitors) able to provide services comparable to those offered by the BOC.<sup>173</sup>

Another significant public interest factor is the extent to which new entrants have constructed their own network facilities. The importance of facilities-based competitors is recognized in Section 271(c)(1)(A), which expressly requires that competing local exchange carriers provide service exclusively, or at least "predominantly," over their own network facilities before the BOC may qualify for Section 271 entry. The public interest aspects of this requirement are many. The more construction and the greater the sunk costs committed by competitors, (i.e., the more extensive the competitors' networks, the more repair crews it possesses, etc.) the more independent the competitor is from the BOC and the less successful the BOC will be in attempting to commit anticompetitive acts.<sup>174</sup> Furthermore, the more sunk investment by competitors, the more assurance that the competitor intends to, and will be able to, compete successfully against the BOC.<sup>175</sup> For that rea-

son, the House, in discussing the predecessor to Section 271(c)(1)(A), explained that requiring an actual facilities-based competitor "that is providing service to residential and business subscribers" constituted "tangible affirmation that the local exchange is indeed open to competition."<sup>176</sup> Hence, the public interest counsels in favor of the presence of facilities-based carriers. In their absence, *i.e.*, where most local exchange competitors provide services by reselling the BOC's own network,<sup>177</sup> greater local competition must be operating because resale generally "insulate[s]" BOCs from the effects of actual facilities-based competition.<sup>178</sup>

Finally, the public interest requires some consideration of the BOC's access charges – the amount paid by long-distance carriers to originate and terminate traffic over the BOC's network. The Wall Street Journal reports that access charges make up as much as forty-five cents of every dollar spent on long-distance.<sup>179</sup> It is well-recognized that BOC interconnection rates are significantly above cost<sup>180</sup> and must be brought down in order to prevent BOCs from discriminating against long-distance carriers. The FCC's chief economist has explained that otherwise BOCs may discriminate against their long-distance rivals by forcing them to pay more for access than the costs incurred by the BOC, thereby permitting the BOC to price aggressively and gain telephone calls that would otherwise not have been made.<sup>181</sup> Although access charge reform is cur-

<sup>172</sup> See Notebaert *Unruffled by Hundt's Interconnection Remark*, TELECOMM. REP. (June 24, 1996).

<sup>173</sup> The Commission's chief economist has stated that the above conditions are unlikely to occur for some time: "[I]f the issue [of BOC interLATA entry] arises any time soon, it also seems unlikely that the access market will [be] very highly competitive with all or most consumers able to switch readily among multiple access suppliers." See *FCC Economic Forum*, *supra* note 132, at 12 (statement of Joe Farrell).

<sup>174</sup> As explained by Professor Willig, the "only one answer" to ensure competition in the local exchange market is "facilities-based competition." *FCC Economic Forum*, *supra* note 132, at 85 ("I really don't think the new environment, without facilities-based competition, will be solving in any substantial way the traditional problems that we see."). FCC Economics Forum participants Professor Jerry Hausman of MIT and Nina Cornell echoed Professor Willig's view that facilities-based competition is important for competition. See *id.* at 130-31. See also *Shapiro Testimony*, *supra* note 136, at 12-13 (detailing the importance of facilities-based competition).

<sup>175</sup> See *Shapiro Testimony*, *supra* note 136, at 15-16 (explaining the importance of sunken investments by prospective local exchange entrants).

<sup>176</sup> H.R. REP. NO. 104-204, at 76-77 (1995).

<sup>177</sup> See, e.g., Mike Mills, *Former Antitrust Official to Join LCI of McLean*, WASH. POST, Jan. 4, 1997, at C2 ("LCI said that it "plans to offer local service solely on a resale basis, rather than building its own facilities.").

<sup>178</sup> *FCC Economic Forum*, *supra* note 132, at 14 (statement of Robert Farrell). Sprint has echoed that view with respect to BOC entry into long-distance, noting that to the extent the BOC is "a reseller of long-distance services rather than a facilities-based competitor, its impact on long-distance markets is less-pronounced." See *Shapiro Testimony*, *supra* note 136, at 8-9.

<sup>179</sup> See Bryan Gruley, *Lobbying Battle Looms as FCC Studies Issue of Access Fees For Bell Networks*, WALL ST. J., Dec. 18, 1996, at A3, A11; see also *RBOCs Should Not Be Allowed To Enter Long-distance Market Until True Competition Exists For Local Markets*, MCI Says, BUS. WIRE, July 22, 1996.

<sup>180</sup> *FCC Economic Forum*, *supra* note 132, at 9 (statement of Robert Farrell) ("traffic-sensitive access charges . . . are well-above incremental costs"); see also BUS. WIRE, *supra* note 179.

<sup>181</sup> See *FCC Economic Forum*, *supra* note 132, at 10 (statement of Robert Farrell); BUS. WIRE, *supra* note 179 (BOCs could use their unfair access charge advantage to substan-

rently the subject of a Commission rulemaking,<sup>182</sup> the public interest does not permit the agency to sit idle until completion of the proceeding. Instead, it compels the Commission to examine the BOC's access charges in order to understand the potential for anticompetitive pricing.<sup>183</sup> Once the rulemaking is complete, presumably the agency will have a more bright-line test concerning access charges.

After reviewing the above criteria – and any other factors the FCC deems necessary to its public interest examination — the Commission must decide if competition in the State is sufficient to preclude the BOC from leveraging anticompetitively its market power in the local exchange market into the long-distance market. In making that determination, the Commission should examine the amount of market share obtained by the BOC's local exchange competitors (the amount lost by the BOC).<sup>184</sup> Should the Commission find that the BOC's market share has fallen to less than 33%, it could conclude safely that the BOC no longer possesses substantial market power.<sup>185</sup> The fact that no appreciable market share has been lost is a strong signal that the BOC's power in the local exchange market is unrestrained by the current levels of competition. In those circumstances, the public interest should be construed to take a dim view of BOC entry.

However, the public interest could still be satisfied if the BOC demonstrated that, despite its overwhelming market share, it was competitively vulnerable. Professor Robert Willig argues that a BOC could show competitive vulnerability by

demonstrating that (1) a 10% price increase by the BOC would not be profitable because of "expansion of existing rivals or new entrants taking away its business;" (2) there are multiple competitors in operation such that the market is not "conducive to implicit collusion;" (3) at least 90% of end users have the ability to switch immediately to one of the BOC's local exchange competitors; and (4) the BOC lacks the ability to levy monopoly prices on those 10% of end users for whom the BOC is the sole local exchange provider.<sup>186</sup> Professor Willig's test could be further strengthened by requiring the BOC to make its demonstration by clear and convincing evidence.<sup>187</sup> Incorporation of that standard into Professor Willig's test should ensure that grant of a Section 271 application where the BOC possesses a market share higher than 33% will not be inconsistent with the public interest.

### C. Metric Measures Are Not De Facto Impermissible

As discussed above, the Commission may conclude that an individual BOC application is not consistent with the public interest until such time as certain 'metric measures' are satisfied.<sup>188</sup> Such measures could include any of the following type: (1) the BOC facing competition in a certain portion of the state; (2) the BOC facing competition with a set number of end-users; (3) the loss of a designated amount of market share; or (4) the actual presence of a specified number of local exchange competitors. Ameritech, and presumably

tially cut costs); see also *RHCs and GTE Offer FCC Consensus Position on Interconnection*, WARREN'S TELECOM REGULATION MONITOR, Apr. 1, 1996 (expressing view of AT&T, CompTel, LDDS and MCI that BOCs high access charges force competitors to pay more than the BOC does).

<sup>182</sup> *In re Access Charge Reform, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry*, 5 Comm. Reg. (P&F) 604 (1996).

<sup>183</sup> FCC officials have acknowledged this fact. See Bryan Gruley, *Lobbying Battle Looms as FCC Studies Issue of Access Fees For Bell Networks*, WALL ST. J., Dec. 18, 1996, at A3.

<sup>184</sup> See *Pennsylvania Dental Ass'n v. Med. Serv. Ass'n of Pa.*, 745 F.2d 248, 260 (3d Cir. 1984) (market share is a "primary determinant" in assessing market power).

<sup>185</sup> Absent other factors, a 33% market share does not demonstrate monopoly power. See *Fineman v. Armstrong World Indus.*, 980 F.2d 171, 201-02 (3d Cir. 1992) ("A significantly larger market share that 55 percent has been required to demonstrate *prima facie* monopoly power."); *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 489 (5th Cir. 1984) (suggested a market share of at least fifty percent

to constitute monopolization.).

<sup>186</sup> See *FCC Economic Forum*, *supra* note 132, at 87-90.

<sup>187</sup> The clear and convincing standard is higher than the preponderance of evidence. It is the weight of "evidence which 'produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.'" *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 285 n.11 (1990); see also *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 961 (5th Cir. 1995).

<sup>188</sup> There should be no dispute over the FCC's authority to condition Section 271 applications. Congress, in adopting the Senate bill, recognized that it permitted the Commission to "grant an application or any part of an application" so long as the application was consistent with the public interest and satisfied the other requirements of Section 271. See *Conference Report*, *supra* note 2, at 144-45; See also Section III, *supra* (discussing power of agencies to condition applications).

the other BOCs, believe that the imposition of the above criteria, even if required to satisfy the public interest, is unlawful. That argument is predicated on the erroneous belief that Congress rejected the imposition of such "metric" requirements and therefore such power is denied to the Commission no matter what the circumstances.<sup>189</sup>

First, the BOCs place undue emphasis on Congress' supposed rejection of metric measurements by the Commission. However, Congress did no such thing. In the House, Representative Bunn's amendment, requiring that BOCs compete with at least one competitor which is able to provide service to 10% of the BOC's customers, was ruled out of order. No vote was therefore taken on the merits of that amendment.<sup>190</sup> In the Senate, Senator Kerrey offered an amendment which would have required that BOCs enter into interconnection agreements with carriers capable of providing service to a "substantial number of business and residential customers."<sup>191</sup> Senator Stevens, the only Senator to express opposition, fought the amendment primarily because he believed the amendment would make it more difficult for small telecommunications carriers to enter the lo-

cal exchange market.<sup>192</sup> He specifically noted that the Kerrey amendment would result in the Commission "delay[ing] a smaller company [from entering the local exchange market] if there is another one coming through the process that would provide a greater service in the area involved."<sup>193</sup> Consequently, Senator Stevens successfully pushed to table the Kerrey amendment.<sup>194</sup> In light of the above, it cannot be said that Congress rejected metric measurements because it did not want the Commission to have such power.

Second, even if Congress had let die a bill that would have imposed such qualifying factors upon Section 271 entry, such action does not preclude the FCC from promulgating the same or similar requirements provided that the regulation is in the public interest and necessary to the effectuation of the Commission's functions pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934.<sup>195</sup> In *National Broadcasting Company*,<sup>196</sup> for example, the Supreme Court upheld the Commission's use of its public interest powers to promulgate regulations (the "chain broadcasting regulations") significantly limiting network arrangements,<sup>197</sup> despite the fact that, in 1934, Congress had vetoed proposed amendments to the

<sup>189</sup> See *Ameritech Illinois Legal Memorandum*, *supra* note 9, at 5, 29 (Congress rejected FCC's ability to impose "metric" or other viable competition requirements including the requirement that competing providers serve a "substantial number of business and residential customers.").

<sup>190</sup> 141 CONG. REC. H8425, H8454 (daily ed. Aug. 4, 1995) (statement of Rep. Bunn) (noting that amendment was ruled out of order).

<sup>191</sup> 141 CONG. REC. S8310, S8319 (daily ed. June 14, 1995) (introducing amendment number 1307).

<sup>192</sup> *Id.* at S8320 (statement of Sen. Stevens) (expressing repeatedly that Senator Kerrey's amendment would "preclude a small company" from entering the local exchange market).

<sup>193</sup> *Id.* at S8321 (Senator Kerrey's amendment "means that [a] small carrier cannot enter [the local exchange market] until there is a larger carrier that would be able to handle the substantial test of the Senator's amendment.").

<sup>194</sup> *Id.* at S8326 (amendment tabled by a vote of 79-21).

<sup>195</sup> Section 4(i) of the Communications Act of 1934 authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the Communications Act] as may be necessary in the execution of its functions." Communications Act of 1934, 47 U.S.C. § 152 4(I) (as amended by Telecommunications Act of 1996). That provision has been described as the "necessary and proper clause" of the Communications Act. See *New England Tel. and Tel. Co. v. FCC*, 826 F.2d 1101, 1108 (D.C. Cir. 1987), and as permitting the Commission to "stray a little way beyond the apparent boundaries of the Act - to the extent necessary to regulate effectively those matters already within [the Act's] boundaries." *North American*

*Telecomm. Ass'n v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985). Section 4(i), in conjunction with the Commission's public interest powers, has been held to convey authority for the agency to prescribe a rate of return for AT&T even though the Act makes no mention of any authority to prescribe a rate of return. *Nader v. FCC*, 520 F.2d 182, 204 (D.C. Cir. 1975) (The Commission's action "was in the public interest [and] necessary for the Commission to carry out its functions.").

Pursuant to the public interest standard of the Act, the Commission has also relied upon Section 303(r), which authorizes it 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." Communications Act of 1934, 47 U.S.C. § 303(r) (as amended by the Telecommunications Act of 1996). Section 303(r) granted the Commission the power to promulgate cross-ownership limitations, see *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 793-801 (1978); institute the fairness doctrine, see *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 379-80 (1969); and to create EEO standards, see *Metropolitan Television Co. v. FCC*, 289 F.2d 874 (D.C. Cir. 1961).

<sup>196</sup> *Nat'l. Broad. Co. v. U.S.*, 319 U.S. 190 (1943).

<sup>197</sup> Using the public interest standard, the Commission forbid various network practices including exclusive contracts (which prevented an affiliate from broadcasting other network's programs), long term contractual arrangements (which tied a local station to a network for a term of years), and rejection provisions (which restricted stations' ability to refuse to air network programming). *Id.* at 190 (summarizing the Commission's public interest findings with respect to

Communications Act aimed at granting regulatory authority over the networks to the Commission.<sup>198</sup>

The Court's decision in *National Broadcasting Company* was not unusual. It subsequently upheld the Commission's regulation of cable television despite the fact that the agency had earlier concluded that it lacked such authority and had been turned down twice by Congress in efforts to obtain statutes expressly conveying such authority.<sup>199</sup> Similarly, in *North American Telecommunications Association*, the Seventh Circuit upheld the Commission's order requiring the Bell Holding Companies, the BOCs' parents, to file capitalization plans for subsidiaries selling phone equipment even though the Communications Act did not expressly cover holding companies and the legislative history demonstrated that Congress had considered, but ultimately declined, to enact a provision which would have granted the Commission full authority over holding companies.<sup>200</sup>

each now-precluded network practice).

<sup>198</sup> See William T. Mayton, *The Illegitimacy of the Public Interest Standard at the FCC*, 38 EMORY L.J. 715, 740 (Winter 1989). Professor Mayton notes that the chain broadcasting rules were predicated on the FCC's conclusion that "better programming might be achieved by restricting network participation in local programming. But this same argument had been made in Congress and had been rejected." *Id.* at 742 (discussing defeat of proposed amendment).

<sup>199</sup> *United States v. Southwestern Cable Co.*, 392 U.S. 157, 169-78 (1968). See also *New England Tel.*, 826 F.2d at 1107-09 (upholding FCC order requiring telephone companies to refund charges they had collected in excess of their authorized rate of return because refunds were necessary to remedy the violation of the Commission's order even though the Act's only provision concerning refunds did "not apply to the circumstances of this case.").

<sup>200</sup> See *North American Telecomm. Ass'n v. FCC*, 772 F.2d at 1291-93 (7th Cir. 1985). See also *Lincoln Tel. And Tel. Co. v. FCC*, 659 F.2d 1092, 1108-09 (D.C. Cir. 1981) (affirming Commission order requiring certain tariff filings by a telephone company, assumed to be acting as a "connecting carrier," even though the only provision in the Communications Act expressly requiring carriers to file tariffs, 47 U.S.C. Section 203(a), specifically exempted "connecting carriers").

<sup>201</sup> *Supra* note 118, at 1406.

<sup>202</sup> See *id.* The Commission was "unable to determine that a grant of a license to Mtel without payment would serve the public interest, convenience, and necessity as imposition of the payment was "necessary" to fulfill the FCC's public interest mandate to promote fair competition in new services such as narrowband PCS. See 9 FCC Rcd. at 3643, para. 33.

<sup>203</sup> The Commission required Mtel to pay 90% of the lowest winning bid in the narrowband PCS auction or \$3 million dollars less than the lowest winning bid, whichever was lower. *Supra* note 118, at 1403.

<sup>204</sup> Under the Commission's rules, a "pioneers preference" was given to certain license applicants which had devel-

The most recent and most analogous case is that of *Mobile Communications Corporation*<sup>201</sup> In that case, the Commission relied upon its "statutory responsibility to grant a license only where the grant would serve the public interest, convenience, and necessity"<sup>202</sup> in order to impose a thirty million dollar payment<sup>203</sup> upon Mtel, the sole narrowband PCS pioneers preference holder.<sup>204</sup> The D.C. Circuit upheld the Commission's authority to impose the payment<sup>205</sup> even though Congress had: (1) let die a bill which would have expressly granted such authority to the Commission;<sup>206</sup> (2) integrated into the Uruguay Round Agreements Act ("GATT") a provision granting authority to require payment from *broadband* and all future pioneer preference holders;<sup>207</sup> and (3) expressed doubts about the Commission's authority, independent of the GATT provisions, to charge Mtel and other pioneer preference holders for their licenses.<sup>208</sup>

Of course, the Commission could not use Sec-

oped a new service or technology. See *Pioneers Preference Procedures Order*, 6 FCC Rcd. 3488, 3492 (1991), *recon.* 7 FCC Rcd. 1808 (1992), *further recon.* 8 FCC Rcd. 1659 (1993). The preference entitled the applicant to bypass the Commission's traditional licensing method (comparative hearings) and receive a license without having to pay. At the time of the *Mobile Communications Corporation* decision, there were three broadband PCS pioneers preference holders in addition to Mtel, the sole narrowband PCS pioneer preference holder.

<sup>205</sup> Although the court remanded the case to the Commission for consideration of whether Mtel's reliance interests justified granting a license free of charge, the court affirmed the fundamental premise that the "Commission . . . has the statutory authority to require payment." *Mobile Comm. Corp.*, *supra* note 120, at 1407.

<sup>206</sup> Congressman Dingell, then-Chairman of the House Commerce Committee, had sponsored H.R. 4700 which would have required Mtel and all other pioneer preference holders to pay 90% of the highest bid received for a comparable license at auction in order to receive their license. See CCH Cong. Index 103d Cong. 28, 428-29 (1993-94). The court was well aware of this fact. See *Mobile Comm. Corp.*, *supra* note 120, at 1412 (Edwards, C.J., dissenting) (recognizing that legislation was "proposed" but "never enacted" which would have imposed payment obligations upon pioneer's preference holders.).

<sup>207</sup> The GATT legislation, codified at 47 U.S.C. § 309(j) (13), granted the FCC the authority to compel payment from all the existing and future pioneer preference holders except those whose applications "have been accepted for filing on or before September 1, 1994." See 47 U.S.C. § 309(j) (13) (B), (D) (iv). Mtel was the sole application meeting the above criteria, *i.e.*, it had been accepted for filing prior to September 1, 1994.

<sup>208</sup> Congress admitted that it was expressly granting such power to the Commission because "there may be some question about the authority of the Commission to require pioneer's preference holders to pay." See H.R. REP. NO. 103-826,

tion 4(i) in conjunction with Section 271(d)(3)(C) to impose a metric measurement without demonstrating that the measurement was "necessary in the execution of its functions" under *other* provisions of the Act.<sup>209</sup> This demonstration would not seem too difficult in that entry by a monopolist BOC (or a BOC obstructing entry by local exchange competitors) would certainly run afoul of Section 271(d)(3)(C)'s mandate that the Commission grant only those Section 271 applications consistent with the public interest. In light of the interplay between the long-distance and local exchange markets, the Commission could conclude, much like its decision in *Mobile Communications*, that long-distance entry by a monopolist and/or obstructionist BOC would advantage the BOC to the detriment of its competitors and would distort the long-distance market. In such circumstances, Section 4(i) is particularly "appropriate."<sup>210</sup> Additionally, to the extent that such distortion might ultimately reduce consumer choices in either market, it would conflict with Section 1 of 47 U.S.C. § 151's instruction for the Commission to make communications services available to all the people and thereby further justify use of Section 4(i). Consequently, the mere fact that Congress has declined to adopt a provision does not mean that the Commission is

barred from adopting the same or similar provision especially where, as would be the case here, such action is pursuant to the Commission's statutory duties to grant licenses in the public interest.

Also, metric measurements would not conflict with Section 271(d)(4)'s admonishment not to modify the checklist. Neither the checklist nor Section 271 provide that the checklist is the exclusive statutory authority under which the Commission may examine BOC entry.<sup>211</sup> Indeed, Section 271(d)(3) expressly requires something more than the checklist, i.e. consistency with the public interest. Thus, while the checklist may not displace the authority to impose metric measurements, both sections 271(d)(3) and 4(i) in fact do just that.<sup>212</sup> Accordingly, imposition of a metric measurement – provided it is warranted by the public interest and/or necessary to the execution of the Commission's functions – does not constitute an unlawful modification of the checklist.<sup>213</sup>

#### D. Suggested Factors To Be Examined In Analyzing The Long-distance Market

With respect to the examination of the BOC's entry into long-distance, the Commission must keep in mind that, contrary to the views of the BOCs, the long-distance markets are relatively

at 7 (1994), reprinted in 108 U.S.C.C.A.N. 4013, 4019. The president's message likewise stated that the provision "eliminates the uncertainty arising from current legislation by mandating" payments for some licensees. See H.R. Dkt. No. 103-316, at 1123 (1994).

<sup>209</sup> 47 U.S.C.A. § 154(i) (West Supp. 1996); *North American Telecom Ass'n. v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985).

<sup>210</sup> In upholding the Commission's actions under Section 4(i) of the Telecommunications Act of 1996, the D.C. Circuit has held that it is appropriate to use Section 4(i) to regulate "bitter rivals" – such as IXCs and BOCs – when one such rival has both the incentive and interest to limit the competition posed by [competitors]" by "attempting to set unreasonable terms and conditions" for interconnection and other similar charges. *Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1093, 1109.(D.C. Cir. 1981).

<sup>211</sup> As noted, the Conference Report explains that the checklist is merely the minimum access and interconnection which must be offered by a BOC. See *Conference Report*, *supra* note 2, at 144.

<sup>212</sup> Analogous reasoning was used in *Lincoln*, 659 F.2d at 1092, wherein the court stated:

We can without deciding, assume that AT&T is a connecting carrier for purposes of Section 203(a), and is therefore exempt from any tariff filing requirement that the section might otherwise impose. Section 203(a)'s terms do not, however, in any way suggest that the section provides the exclusive authority under which the

Commission can require a tariff to be filed. Thus, while Section 203(a) did not grant the Commission the requisite authority [to require a tariff to be filed], Section 154(i) did.

*Id.* at 1108-09.

Similar reasoning was used in *North American Telecomm. Ass'n v. FCC*, 772 F.2d 1282 (7th Cir. 1985), in which the court reasoned that Congress's denial of comprehensive authority over holding companies precluded the Commission from adopting blanket rules concerning such companies. However, it did not prevent the agency, pursuant to its Section 4(i) powers, from enacting regulations over holding companies regarding the Commission's express authority relating to these holding companies' use of separate subsidiaries to provide certain services. *Id.* at 1292. Likewise, in *Mobile Communication Corporation*, the court rejected arguments that the Commission's statutory obligation to impose certain small administrative licensing fees erased its ability to require a \$30 million dollar payment from Mtel. *Supra* note 120, at 1404-05.

<sup>213</sup> See *Mobile Comm. Corp.*, *supra* note 120, at 1406 (upholding payment condition on grounds that it was necessary to execution of Commission's functions to "grant a license only where the grant would serve the public interest, convenience and necessity."). See also *North American*, 772 F.2d at 1292 (To preclude absolutely the imposition of metric measures, the Act must say "hands off" metric measures as opposed to failing to grant the express authority to impose such measures.).



competitive.<sup>214</sup> This is evidenced by the fact that AT&T has lost more than 40% of the market to MCI and other competitors in the twelve years since long-distance competition has heated up.<sup>215</sup> Furthermore, AT&T's share is expected to drop to 45.8% in 1997 from 51.1% in 1995,<sup>216</sup> and, as recently reported, smaller long-distance companies are continuing to steal market share from AT&T, Sprint and MCI.<sup>217</sup> Consequently, the incremental public interest benefits from BOC entry into the already-competitive long-distance market would be less than the benefits to the public from finally having competitors enter the local exchange market.<sup>218</sup> This is especially true if the Commission were to give BOCs a headstart over new local exchange competitors with respect to the ability to bundle both local and long-distance services.

Research shows that most people would prefer to obtain local and long-distance service from a single provider.<sup>219</sup> For this reason, the Commission's Chief Economist has characterized as a "quite weighty" argument the belief that premature long-distance entry by BOCs is especially dangerous since the BOCs will have the opportunity to offer bundled local and long-distance services throughout the State before any statewide local entrant has similar ability.<sup>220</sup> In other words, once a BOC receives Section 271 authority, it has an immediate incentive to hinder or delay local exchange entry by large IXCs (including AT&T, MCI and Sprint) because such IXCs are likely the most capable of competing in the local exchange

market and, more importantly, the delay gives the BOC a significant headstart over its IXC rivals in the offering of bundled services.

The danger in granting a headstart to the BOCs is amplified by the fact that nearly 40% of all revenue for long-distance companies comes from calls that begin and end within a single Bell's territory (for example a call from Boston to New York would be made entirely within NYNEX's region).<sup>221</sup> Thus, entry into the long-distance market alone provides BOCs with significant expansion opportunities.<sup>222</sup> For example, within five months of entering the long-distance market, GTE had signed up over 300,000 long-distance customers,<sup>223</sup> and continues to add approximately 6,000 new customers each day.<sup>224</sup> SNET's long-distance subsidiary, Merrill Lynch, reportedly captured 30% of SNET's local customers within two years of long-distance entry, an entry achieved without regard to competition in the local market. Thus, it cannot be overemphasized that the public interest weighs heavily against BOCs possessing a headstart over local exchange competitors in offering bundled services. Rather, the BOCs should not be granted long-distance entry until, among other things, local exchange competitors have the ability to bundle both local and long-distance services to much the same customers as the BOC.

Finally, the Commission must satisfy itself that the entering BOC lacks the ability to leverage unfairly its power in the local exchange market into the long-distance market.<sup>225</sup> The Commission's

<sup>214</sup> Professor Willig, for example, has observed that the long-distance market is competitive and "has been for quite a while." See *FCC Economic Forum*, *supra* note 132, at 144 (statement of Robert Farrell).

<sup>215</sup> See Keller, *supra* note 135.

<sup>216</sup> See *Local Competition: Big Three Increasing Revenues But Losing Shares to Smaller Competitors*, EDGE, Nov. 4, 1996 (assessment of Atlantic-ACM, a strategy consulting firm).

<sup>217</sup> See *supra* note 213.

<sup>218</sup> See *Shapiro Testimony*, *supra* note 136, at 8 ("The benefits from adding another competitor to the long-distance market are muted in comparison with adding a competitor to [a] monopolized market" such as the local exchange market.). *Id.*

<sup>219</sup> See Gautam Naik, *Going Long: The Baby Bells All Have Their Sights Set On the Long-distance Market*, WALL ST. J., Sept. 16, 1996 (Telecommunications Supplement). Sprint pointed out that there appears to be an "industry consensus" that many customers will prefer to purchase their telecommunications services – local, long-distance, wireless, etc. – from a single company. See *Shapiro Testimony*, *supra* note 136, at 10. The former head of the Commission's Office of Plans and

Policy has likewise noted that the central issue between the BOCs and IXCs is which carrier will control the customer, *i.e.*, have the ability to sell the customer an entire package of services. See *FCC Economic Forum*, *supra* note 132, at 110.

<sup>220</sup> See *FCC Economic Forum*, *supra* note 132, at 15 (statement of Joe Farrell) (Premature "long-distance entry may enable the BOC to sew up much of the one-stop shopping market, and that such a sewing up might somehow be hard to challenge.").

<sup>221</sup> See Naik, *supra* note 219.

<sup>222</sup> *Id.* Analysts believe that the BOCs will seize from 10-30% of the long-distance market within three years of entering. *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> See Christina Lambert, *Editorial*, THE PANTAGRAPH OF BLOOMINGTON, ILL., Nov. 10, 1996, at A15.

<sup>225</sup> See 141 CONG. REC. S8464 (daily ed. June 15, 1995) (statement of Senator Dorgan) ("The fact is that the long-distance market is a truly competitive market. We risk damaging that competitive market if the RBOCs are permitted to enter the long-distance market prematurely.").

Chief Economist, Joe Farrell, has explained the importance of this point, observing that there are two primary problems for BOC entry into interLATA markets so long as the BOC has market power in the local exchange:

First, if a [BOC] favors its long-distance affiliate by subtly withdrawing full cooperation from other long-distance companies, it can make excess profits in long-distance because it has hamstrung its long-distance rivals. It may make less money in its bottleneck as a result, but that may not deter it, and then "infectious monopoly" results. Second, if a regulated monopolist . . . reports as bottleneck costs what are really long-distance costs, it may be able to defraud ratepayers who are committed to covering the costs of the bottleneck.

These problems are hard to regulate away, because the withdrawal of cooperation from rivals may be subtle, shifting, and temporary . . . .<sup>226</sup>

In a subsequent statement, Chief FCC Economist Farrell discussed the methodology for preventing BOCs from discriminating or committing other anticompetitive acts:

[T]he discrimination problem[s], as a matter of incentives, will vanish only when a BOC faces enough access competition that it would expect to lose more in business and margins to other local and access providers than it gains in long-distance, were it to withdraw the fullest cooperation from the long-distance rivals.<sup>227</sup>

Consequently, the public interest determination for BOC entry into long-distance hinges on the BOC's power in the local exchange market. If the BOC lacks power, its entry will benefit the public interest; otherwise, BOC entry is simply the beginning of the transformation of a competitive long-distance market into a monopoly market dominated by the BOC.

## VII. CONCLUSION

As shown, the Telecommunications Act of 1996 was designed to open telecommunications markets to competition. In promulgating this Act, Congress specifically intended for competition to take hold and flourish in the local exchange market which, until now, has been almost solely the province of the monopoly BOCs. To that end, Congress offered BOCs the reward of long-distance (interLATA) entry once their local exchange market was competitive. Competition in the local exchange was a prerequisite to BOC in-

terLATA entry because Congress realized that such a requirement would prevent BOCs from using their local exchange power in anti-competitive ways against interLATA rivals and that, without the incentive of interLATA entry, BOCs would not suffer local exchange competitors.

To assist the Federal Communications Commission in assessing when competition was sufficient to temper a BOC's local exchange power, Congress promulgated the checklist, required the presence of facilities-based competitors, and imposed separate affiliation requirements. However, as it often does, Congress left the final determination to the expert agency, the FCC, by mandating that all Section 271 applications must be consistent with the "public interest, convenience, and necessity." In so doing, Congress specifically intended for the agency to have the authority to fully review all aspects of Section 271 applications.

The BOCs' misunderstanding of the public interest is exhibited in their contention that the bar on altering the checklist limits the Commission's public interest powers to review of the express requirements of Section 271. That view would remove the fluidity of the public interest, rendering it static and unchanging. However, the BOCs' reading (or misreading) of the public interest is unsupported by Section 271's plain language and legislative history. Indeed, more than twenty years ago, the Ninth Circuit explained why grant of "public interest" authority conferred dynamic and fluid powers:

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. Regulatory practice and policies that will serve the 'public interest' today may be quite different from those that were adequate to that purpose in [the past] or that may further the public interest in the future.<sup>228</sup>

Section 271 plainly obligates the Commission to scrutinize all BOC interLATA applications to ensure that the grant of such applications is consistent with the public interest. The heart of public interest is fair and workable competition. Thus, the public interest counsels that the grant of Sec-

<sup>226</sup> Farrell, *supra* note 133, at 207.

<sup>227</sup> See *FCC Economic Forum*, *supra* note 132, at 14. See also Farrell, *supra* note 133, at 208 (The "conditions laid down by the Telecommunications Act [of 1996] mean that, when BOC entry [into interLATA long-distance] is contemplated,

it supposedly won't be a pure bottleneck monopoly . . ." in the local exchange market.)

<sup>228</sup> See *Wash. Util. and Transp. Comm'n. v. FCC*, 513 F.2d 1142, 1157 (9th Cir 1974).

tion 271 applications should occur only when a BOC would be unable to use its local exchange power to unfairly disadvantage its rivals. Otherwise, BOC interLATA entry will not herald the advent of local exchange competition, but instead the end of competition in the long-distance markets. Such an undesirable result would be consistent, not with the public interest, but with the interest of the BOCs. In sum, Section 271's public interest mandate obligates the Commission to en-

sure that BOCs receiving interLATA authority lack the ability to compete unfairly against their rivals. Pursuant to its statutory obligations, the Commission may – in the context of a given BOC application – scrutinize areas or impose conditions outside of those contained in the checklist in order to be certain that grant of interLATA authority will result in more, rather than less, interLATA and intraLATA competition. That is the essence of the public interest under Section 271.

