BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee
April 25, 1997

In Re: BellSouth Telecommunications, Inc.'s Entry Into Long Distance (InterLATA) Service in Tennessee Pursuant to Section 271 of the Telecommunications Act of 1996

Docket No. 97-00309

Brief of NEXTLINK on Track A and Track B

Pursuant to the "Report and Recommendation of Hearing Officer," issued April 18, 1997, NEXTLINK, Tennessee, LLC ("NEXTLINK"), submits the following brief on whether BellSouth Telecommunications, Inc. ("BellSouth" or "Bell") may seek to enter the interLATA market in Tennessee through "Track A" or "Track B," pursuant to the Federal Telecommunications Act of 1996.

Argument

BellSouth has publicly announced its intention to offer interLATA, long-distance service to its Tennessee customers. Bell has been excluded from that market since 1984 under the terms of the Modified Final Judgment.[1] Now, with the passage of the 1996 Federal Telecommunications Act ("the Act"), Congress has determined that Bell may legally re-enter the interLATA market coincident with the opening of Bell's local exchange monopoly to competition from facilities-based carriers like NEXTLINK, so long as Bell has demonstrated that it has met the requirements of Section 271 of the Act.

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[1] *United States v. Am Tel. & Tel. Co.*, 552 F. Supp. 131, 187 (D.D.C. 1982), *aff'd sub. nom. Maryland v. United States*, 103 S. Ct. 1240 (1983).

The Act describes in a very simple and logical manner what is required before Bell can offer interLATA service: the presence of actual, facilities-based, local exchange competition for both business and residential customers as set forth in Section 271(c)(7)(A), or, if there are no competitors presently trying to enter the local market, Bell's unilateral offer to interconnect with competitors through a Statement of Generally Available Terms and Conditions ("SGAT") as described in Section 271(c)(1)(B).

There are other requirements as well. But for purposes of this brief, the only issue addressed is whether Bell must meet the "actual competition" test, called "Track A," or can qualify under the second, "unilateral offer" test, called "Track B."

The answer is spelled out in the Act itself. The Act states that Bell *must* proceed under Track A to attempt to qualify to enter the interLATA market "unless no such provider [i.e., competing carrier] has requested the access and interconnection" necessary to enter the local exchange market. *See* 47 U.S.C. § 271(c)(1)(A) and (B).

Section 271(c)(1)(A), (Track A), states, in part:

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

Section 271(c)(1)(B), (Track B), states, in part:

> (B) FAILURE TO REQUEST ACCESS--A Bell operating company meets the requirements of this subparagraph if, after 10 months after the date of enactment of the Telecommunications Act of 1996, no such provider has requested the access and interconnection described in [Track A] before the date which is 3 months before the date the company makes its application under subsection (d)(1), and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f). For purposes of this subparagraph, a Bell operating company shall be considered not to have received any request for access and interconnection if the State commission of such State certifies that the only provider or providers making such a request have (i) failed to negotiate in good faith as required by section 252, or (ii) violated the terms of an agreement approved under section 252 by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement.

As explained in the Act's legislative history (Appendix A), Congress wanted to induce Bell to treat its competitors fairly. Once those facilities-based, competing carriers have established themselves in the local exchange market, Bell will be allowed to enter the long-distance market. On the other hand, Congress recognized that in some states, there might be a "failure to request access" or some competitors might intentionally drag their feet, staying out of the local market in order to delay Bell's entry into the long-distance market. In those cases, the Act provides that Bell may qualify under Track B.

In Tennessee, there are a number of local exchange carriers seeking to compete against Bell, including NEXTLINK, AT&T, MCI, Brooks, and ACSI. Several have voluntarily signed interconnection agreements with Bell. Others have submitted their disputes with Bell to the TRA which has recently hammered out interconnection agreements between Bell and AT&T and between Bell and MCI. There is no evidence that such competitors have acted in bad faith

in negotiations or have "dragged their feet" regarding implementation of the agreements. Thus, under the Act, Tennessee is clearly a "Track A" state.

Bell's Position

BellSouth has conceded that, at this time, the company does not qualify under Track A to enter the interLATA market. The reason is simple: Track A requires that competitors be sufficiently well established to offer both business and residential service. Until Bell's competitors begin offering residential service[2] — and Bell meets the other Track A requirements — Bell cannot offer interLATA service.

As explained earlier, Track B applies only if "no such provider has requested" interconnection or if Bell's competitors are guilty of foot-dragging or bad faith. Bell is not, at this time, making any foot-dragging or bad faith allegations against its competitors. Bell argues instead that the company can qualify under Track B because, in the words of the statute, "no such provider has requested the access and interconnection" necessary to offer local exchange service in Tennessee.

Given the intense efforts of competitors like NEXTLINK to obtain reasonable interconnection and access agreements needed to offer local exchange service to both business and residential customers, Bell's contention is both inaccurate and bewildering. It is based on an implausible interpretation of the words "such provider" in the statute. What Bell argues is that, under Track A, the "provider" requesting interconnection must already be offering both

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[2] The absence of residential competition can be explained in large part by the fact that the price for unbundled loops charged by Bell to competitors is well above Bell's rate to residential end users for local exchange service, thus making it impossible for carriers like NEXTLINK to compete in the residential market.

local and residential *before* requesting an interconnection agreement with Bell. Otherwise, Bell argues, Track B is available.

In Bell's own words: "The 'no such provider' language refers to the 'competing provider' described in [Track A]. Thus, Track B remains open until a facilities-based competitor begins actually providing telephone exchange service to residential and business competitors [sic, should read "customers"] and [then] seeks access and interconnection[!]" *See* "BellSouth's Response to TRA Staff Report," filed February 10, 1997, at p. 6.

It is, of course, impractical for a competitor to offer local exchange service before requesting an interconnection agreement with Bell. Nevertheless, that is Bell's interpretation of the Act.[3]

The Act presumes that most states will follow Track A. That's why it's the first track described in the statute and why carriers are required to stay on Track A absent certain exceptions. Bell's interpretation turns the Act on its head. If Bell is correct, no state in the nation would be a Track A jurisdiction.

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[3] If Bell's interpretation were correct there would be no reason for the "bad faith" and "foot-dragging" exceptions. As described above, the Act recognizes that a competitor might try to delay Bell's progress along Track A by requesting an interconnection agreement but then refusing to negotiate in good faith or, having obtained an agreement, unreasonably delaying the introduction of service. In either circumstance, the statute allows Bell to abandon Track A and move to Track B.

But under Bell's interpretation of the Act, Track A applies only if a competitor is already offering both business and residential service before "requesting" interconnection. If the competitor is already serving business and residential customers and already exchanging traffic back and forth with Bell, how could the competitor ever be guilty of "foot-dragging" or negotiating in bad faith? Bell's interpretation would make both of those exceptions unnecessary.

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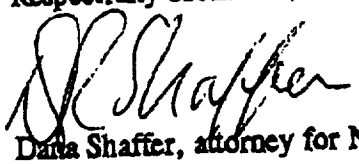
At least one state — Oklahoma — has reached this same conclusion. This week, an administrative judge has ruled that Southwest Bell must follow Track A. A copy of that decision is attached (Appendix C).

NEXTLINK has also attached copies of Section 271 as well as relevant legislative history of the Track A and Track B issue (Appendix A). Finally, NEXTLINK has attached, as Appendix B, a paper prepared by the national Association for Local Telecommunications Services (ALTS) on implementation of Section 271 which includes a more detailed discussion of the Track A/Track B debate at pages 4-15.

Conclusion

Because Bell has received multiple requests for access and interconnection by facilities-based competitors and there is no evidence of bad faith or foot-dragging by competitors, Tennessee is a Track A state.

Respectfully submitted,



Dana Shaffer, attorney for NEXTLINK

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Brief with Appendices has been forwarded via U.S. Mail to all parties of record. A copy of the Brief without Appendices has been forwarded via facsimile on this 25th day of April, 1997.

Dana Shaffer

APPENDIX A

Section 271 and Legislative History of the Telecommunications Act of 1996

104TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
104–458

TELECOMMUNICATIONS ACT OF 1996

JANUARY 31, 1996. Ordered to be printed

Mr. BLILEY, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 652]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 652), to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

SECTION 1. SHORT TITLE; REFERENCES.

(a) SHORT TITLE.—This Act may be cited as the "Telecommunications Act of 1996".

(b) REFERENCES.—Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 et seq.).

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

Conference agreement

Section 151 of the conference agreement establishes a new "Part III" of title II of the Communications Act. Part III contains new sections 271–276 of the Communications Act with respect to special provisions applicable to BOCs.

NEW SECTION 271—BELL OPERATING COMPANY ENTRY INTO INTERLATA SERVICES

Senate bill

Section 221(a) of the Senate bill adds a new section 255 to the Communications Act. Subsection (a) of new section 255 establishes the general requirements for the three different categories of service: in region interLATA; out of region interLATA; and incidental services.

New section 255(b) establishes specific interLATA interconnection requirements that must be fully implemented in order for the Commission to provide authorization for a BOC to provide in region interLATA services. The Commission is specifically prohibited from limiting or extending the terms of the "competitive checklist" contained in subsection (b)(2). The competitive checklist is not intended to be a limitation on the interconnection requirements contained in section 251, but rather, at a minimum, be provided by a BOC in any interconnection agreement approved under section 251 to which that company is a party (assuming the other party or parties to that agreement have requested the items included in the checklist) before the Commission may authorize the BOC to provide in region interLATA services.

Finally, section 255(b) includes a restriction on the ability of telecommunications carriers that serve greater than five percent of the nation's presubscribed access lines to jointly market local exchange service purchased from a BOC and interLATA service offered by the telecommunications carrier until such time as the BOC is authorized to provide interLATA services in that telephone exchange area or until three years after the date of enactment, whichever is earlier. New subsection 255(c) provides the process for application by a BOC to provide in region interLATA services, as well as the process for approval or rejection of that application by the Commission and for review by the courts. The application by the BOC must state with particularity the nature and scope of the activity and each product market or service market, as well as the geographic market for which in region interLATA authorization is sought. Within 90 days of receiving an application, the Commission must issue a written determination, after notice and opportunity for a hearing on the record, granting or denying the application in whole or in part. The Commission is required to consult with the Attorney General regarding the application during that 90 day period. The Attorney General may analyze a BOC application under any legal standard (including the Clayton Act, Sherman Act, other antitrust laws, section VIII(C) of the MFJ, Robinson-Patman Act or any other standard).

The Commission may only grant an application, or any part of an application, if the Commission finds that the petitioning BOC has fully implemented the competitive checklist in new section

255(b)(2), that the interLATA services will be provided through a separate subsidiary that meets the requirements of new section 252, and that the provision of the requested interLATA services is consistent with the public interest, convenience, and necessity. As noted earlier, the Commission is specifically prohibited from limiting or extending the terms used in the competitive checklist, and the Senate intends that the determination of whether the checklist has been fully implemented should be a straightforward analysis based on ascertainable facts. Likewise, the Senate believes that the Commission should be able to readily determine if the requested services will or will not be provided through a separate subsidiary that meets all of the requirements of section 252. Finally, the Senate notes that the Commission's determination of whether the provision of the requested interLATA services is consistent with the public interest, convenience, and necessity must be based on substantial evidence on the record as a whole.

Subsection (c) also requires a BOC which is authorized to provide interLATA services under this subsection to provide intraLATA toll dialing parity throughout the market in which that company is authorized to provide interLATA service. In the event that the Commission finds that the BOC has not provided the required intraLATA toll dialing parity, or fails to continue to provide that parity (except for inadvertent interruptions that are beyond the control of the BOC), then the Commission shall suspend the authorization to provide interLATA services in that market until that company provides or restores the required intraLATA toll dialing parity. Lastly, subsection (c) provides that a State may not order a BOC to provide intraLATA toll dialing parity before the company is authorized to provide interLATA services in that area or until three years after the date of enactment, whichever is earlier. However, this restriction does not apply to single LATA States or States that have ordered intraLATA toll dialing in that State prior to June 1, 1995.

BOC's (including any subsidiary or affiliate) are permitted under new section 255(d) to provide interLATA telecommunications services immediately upon the date of enactment of the bill if those services originate in any area in which that BOC is not the dominant provider of wireline telephone exchange service or exchange access service.

New subsection 255(e) establishes the rules for the provision by a BOC of in-region InterLATA services that are incidental to the provision of specific services listed in paragraph (1) of subsection (e). This list of specific services is intended to be narrowly construed by the Commission. A BOC must first obtain authorization under new section 255(c) before it may provide any in region InterLATA services not listed in subsection (e)(1). In addition, the BOC may only provide the services specified in subparagraphs (C) and (D) of subsection (e)(1), which in general are information storage and retrieval services, through the use of telecommunications facilities that are leased from an unaffiliated provider of those services until the BOC receives authority to provide InterLATA services under subsection (c). Finally, subsection (e) requires that the provision of incidental services by the BOC shall not adversely affect telephone exchange ratepayers or competition in any telecommunications market. The Senate intends that the Commission will ensure that these requirements are met.

New section 255(f) provides that a BOC may provide interLATA service in connection with CMS upon the date of enactment.

The terms "interLATA," "audio programming services," "video programming services," and "other programming services" are defined in new section 255(g).

House amendment

Section 245 provides the method by which a BOC may seek entry to offer interLATA or long distance, service on a State-by-State basis. Section 245(a) provides that a BOC may file a verification of access and interconnection compliance anytime after six months after the date of enactment. The verification must include, under section 245(a)(1), a State certification of "openness" or the so-called "checklist" requirements, and under section 245(a)(2), either of the following pursuant to section 245(a)(2)(A), the presence of a facilities-based competitor; or pursuant to section 245(a)(2)(B), a statement of the terms and conditions the BOC would make available under section 244, if no provider had requested access and interconnection within three (3) months prior to the BOC filing under section 245. For purposes of section 245(a)(2)(B), a BOC shall not be considered to have received a request for access and interconnection if a requesting provider failed to bargain in good faith, as required under section 242(a)(8), or if the provider failed to comply, within a reasonable time period, with the requirements under section 242(a)(1) to implement the schedule contained in its access and interconnection agreement.

Section 245(b) sets out the "checklist" requirements that must be included in the State certification that the BOC files with the Commission as part of its verification. These checklist requirements include the following: (1) interconnection; (2) unbundling of network elements; (3) resale; (4) number portability; (5) dialing parity; (6) access to conduits and rights-of-way; (7) no State or local barriers to entry; (8) network functionality and accessibility; and (9) good faith negotiations by the BOC. Section 245(c)(1) sets out the Commission review process for interLATA authorization on a Statewide, permanent basis. Under section 245(c)(2), the Commission may conduct a *de nova* review only if a State commission lacks, under relevant State law, the jurisdiction or authority to make the required certification, fails to act within ninety (90) days of receiving a BOC request for certification, or has attempted to impose a term or condition that exceeds its authority, as limited in section 243. Under section 245(c)(3), the Commission has ninety (90) days to approve, disapprove, or approve with conditions the BOC request, unless the BOC consents to a longer period of time. Under section 245(c)(4), the Commission must determine that the BOC has complied with each and every one of the requirements. As mandated in section 245(d), the Commission has continuing authority after approving a BOC's application for entry into long distance to review a BOC's compliance with the certification requirements under this section.

Section 245(f) prohibits a BOC from providing interLATA service, unless authorized by the Commission. Section 245(f) grandfathers any activity authorized by court order or pending before the court prior to the date of enactment. Section 245(g) creates exceptions for the provision of incidental services.

Section 245(g)(1) permits a BOC to engage in interLATA activities related to the provision of cable services. Section 245(g)(2) permits a BOC to offer interLATA services over cable system facilities located outside the BOC's region. Section 245(g)(3) allows a BOC to offer CMS, as defined in section 332(d)(1) of the Communications Act. Section 245(g)(4) allows a BOC to engage in interLATA services relevant to the provision of information services from a central computer. Section 245(g) (5) and (6) allow a BOC to engage in interLATA services related to signaling information integral to the internal operation of the telephone network.

Notwithstanding the dialing parity requirements of section 242(a)(5), as provided in section 245(i), a BOC is not required to provide dialing parity for intraLATA toll service ("short haul" long distance) before the BOC is authorized to provide long distance service in that State. Section 245(j) prohibits the Commission from exercising the general authority to forbear from regulation granted to the Commission under section 230 until five years after the date of enactment. Section 245(k) sunsets this section once the Commission and State commission, in the relevant local exchange market, determine that the BOC has become subject to full and open competition.

Conference agreement

The conference agreement adds a new section 271 to the Communications Act relating to BOC entry into the interLATA market. New section 271(b)(1) requires a BOC to obtain Commission authorization prior to offering interLATA services within its region unless those services are previously authorized, as defined in new section 271(f), or "incidental" to the provision of another service, as defined in new section 271(g), in which case, the interLATA service may be offered after the date of enactment. New section 271(b)(2) permits a BOC to offer out-of-region services immediately after the date of enactment.

New section 271(c) sets out the requirements for a BOC's provision of interLATA services originating in an in-region State (as defined in new section 271(i)). In addition to complying with the specific interconnection requirements under new section 271(c)(2), a BOC must satisfy the "in-region" test by virtue of the presence of a facilities-based competitor or competitors under new section 271(c)(1)(A), or by the failure of a facilities-based competitor to request access or interconnection (under new section 251) as required under new section 271(c)(1)(B). This test that the conference agreement adopts comes virtually verbatim from the House amendment.

With respect to the facilities-based competitor requirement, the presence of a competitor offering the following services specifically does *not* suffice to meet the requirement: (1) exchange access; (2) telephone exchange service offered exclusively through the resale of the BOC's telephone exchange service; and (3) cellular service. The competitor must offer telephone exchange service either exclusively

over its own facilities or predominantly over its own facilities in combination with the resale of another carrier's service.

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

The House has specifically considered how to describe the facilities-based competitor in new subsection 271(c)(1)(A). While the definition of facilities-based competition has evolved through the legislative process in the House, the Commerce Committee Report (House Report 104–204 Part I) that accompanied H.R. 1555 pointed out that meaningful facilities-based competition is possible, given that cable services are available to more than 95 percent of United States homes. Some of the initial forays of cable companies into the field of local telephony therefore hold the promise of providing the sort of local residential competition that has consistently been contemplated. For example, large, well established companies such as Time Warner and Jones Intercable are actively pursuing plans to offer local telephone service in significant markets. Similarly. Cablevision has recently entered into an interconnection agreement with New York Telephone with the goal of offering telephony on Long Island to its 650,000 cable subscribers.

For purposes of new section 271(c)(1)(A), the BOC must have entered into one or more binding agreements under which it is providing access and interconnection to one or more competitors providing telephone exchange service to residential and business subscribers. The requirement that the BOC "is providing access and interconnection" means that the competitor has implemented the agreement and the competitor is operational. This requirement is important because it will assist the appropriate State commission in providing its consultation and in the explicit factual determination by the Commission under new section 271(d)(2)(B) that the requesting BOC has fully implemented the interconnection agreement elements set out in the "checklist" under new section 271(c)(2).

New section 271(c)(1)(B) also is adopted from the House amendment, and it is intended to ensure that a BOC is not effectively prevented from seeking entry into the interLATA services market simply because no facilities-based competitor that meets the criteria set out in new section 271(c)(1)(A) has sought to enter the market. The conference agreement stipulates that a BOC may seek entry under new section 271(c)(1)(B) at any time following 10 months after the date of enactment, provided no qualifying facilities-based competitor has requested access and interconnection under new section 251 by the date that is 3 months prior to the date that the BOC seeks interLATA authorization. Consequently, it is important that the Commission rules to implement new sec-

tion 251 be promulgated within 6 months after the date of enactment, so that potential competitors will have the benefit of being informed of the Commission rules in requesting access and interconnection before the statutory window in new section 271(c)(1)(B) shuts.

New section 271(c)(2) sets out the specific interconnection requirements that comprise the "checklist" that a BOC must satisfy as part of its entry test.

In new section 271(d), the conference agreement adopts the basic structure of the Senate bill concerning authorization of BOC entry by the Commission, with a modification to permit the BOC to apply on a State-by-State basis.

New section 271(d) sets forth administrative provisions regarding applications for BOC entry under this section. In making an evaluation, the Attorney General may use any appropriate standard, including: (1) the standard included in the House amendment, whether there is a dangerous probability that the BOC or its affiliates would successfully use market power to substantially impede competition in the market such company seeks to enter; (2) the standard contained in section VIII(C) of the AT&T Consent Decree, whether there is no substantial possibility that the BOC or its affiliates could use monopoly power to impede competition in the market such company seeks to enter; or (3) any other standard the Attorney General deems appropriate.

New section 271(e)(1) prohibits joint marketing of local services obtained from the BOC under new section 251(c)(4) and long distance service within a State by telecommunications carriers with more than five percent of the Nation's presubscribed access lines for three years after the date of enactment, or until a BOC is authorized to offer interLATA services within that State, whichever is earlier.

New section 271(e)(2) requires any BOC authorized to offer interLATA services to provide intraLATA toll dialing parity coincident with its exercise of that interLATA authority. States may not order a BOC to implement toll dialing parity prior to its entry into interLATA service. Any single-LATA State or any State that has issued an order by December 19, 1995, requiring a BOC to implement intraLATA toll dialing parity is grandfathered under this Act. The prohibition against "non-grandfathered" States expires three years after the date of enactment.

The conference agreement in new section 271(f) adopts the House provision grandfathering activities under existing waivers. Both the House and Senate bill included separate grandfather provisions for manufacturing in the manufacturing section. The conference agreement combines these separate provisions into one provision covering both interLATA services and manufacturing, and that provision is included in the interLATA section. Because of the new approach to the supersession of the AT&T Consent Decree described below, this section was modified to clarify that requests for waivers pending with the court on the date of enactment are no longer included within this section. Instead, only those waiver requests that have been acted on before the date of enactment will be included. All conduct occurring after the date of enactment will no longer be subject to the AT&T Consent Decree and will be subject to the Communications Act, as amended by the conference agreement.

New section 271(g) sets out the "incidental" interLATA activities that the BOCs are permitted to provide upon the date of enactment.

NEW SECTION 272—SEPARATE AFFILIATE; SAFEGUARDS

Senate bill

Section 102 of the Senate bill amends the Communications Act to add a new section 252 to impose separate subsidiary and other safeguards on certain activities of the BOCs. Section 102 requires that to the extent a BOC engages in certain businesses, it must do so through an entity that is separate from any entities that provide telephone exchange service. Subsection 252(b) spell out the structural and transactional requirements that apply to the separate subsidiary, section 252(c) details the nondiscrimination safeguards, section 252(d) requires a biennial audit of compliance with the separate subsidiary requirements, sections 252(e) imposes restrictions on joint marketing, and subsection 252(f) sets forth additional requirements with respect to the provision of interLATA services.

The activities that must be separated from the entity providing telephone exchange service include telecommunications equipment manufacturing and interLATA telecommunications services, except out-of-region and incidental services (not including information services) and interLATA services that have been authorized by the MFJ court. A BOC also would have to provide alarm monitoring services and certain information services through a separate subsidiary, including cable services and information services which the company was not permitted to offer before July 24, 1991. In a related provision, section 203 of the bill provides that a BOC need not use a separate affiliate to provide video programming services over a common carrier video platform if it complies with certain obligations.

Under section 252(e) of this section the BOC entity that provides telephone exchange service may not jointly market the services required to be provided through a separate subsidiary with telephone exchange service in an area until that company is authorized to provide interLATA service under new section 255. In addition, a separate subsidiary required under this section may not jointly market its services with the telephone exchange service provided by its affiliated BOC entity unless such entity allows other unaffiliated entities that offer the same or similar services to those that are offered by the separate subsidiary to also market its telephone exchange services.

Additional requirements for the provision of interLATA services are included in new section 252(f). These provisions are intended to reduce litigation by establishing in advance the standard to which a BOC entity that provides telephone exchange service or exchange access service must comply in providing interconnection to an unaffiliated entity.

Section 252(g) establishes rules to ensure that the BOCs protect the confidentiality of proprietary information they receive and to prohibit the sharing of such information in aggregate form with

"PART III—SPECIAL PROVISIONS CONCERNING BELL OPERATING COMPANIES

"SEC. 271. BELL OPERATING COMPANY ENTRY INTO INTERLATA SERVICES.

"(a) GENERAL LIMITATION.—Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.

"(b) INTERLATA SERVICES TO WHICH THIS SECTION APPLIES.—

"(1) IN-REGION SERVICES.—A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating in any of its in-region States (as defined in subsection (i)) if the Commission approves the application of such company for such State under subsection (d)(3).

"(2) OUT-OF-REGION SERVICES.—A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating outside its in-region States after the date of enactment of the Telecommunications Act of 1996, subject to subsection (j).

"(3) INCIDENTAL INTERLATA SERVICES.—A Bell operating company, or any affiliate of a Bell operating company, may provide incidental interLATA services (as defined in subsection (g)) originating in any State after the date of enactment of the Telecommunications Act of 1996.

"(4) TERMINATION.—Nothing in this section prohibits a Bell operating company or any of its affiliates from providing termination for interLATA services, subject to subsection (j).

"(c) REQUIREMENTS FOR PROVIDING CERTAIN IN-REGION INTERLATA SERVICES.—

"(1) AGREEMENT OR STATEMENT.—A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.

"(A) PRESENCE OF A FACILITIES-BASED COMPETITOR.—A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 3(47)(A), but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier. For the purpose of this subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 et seq.) shall not be considered to be telephone exchange services.

"(B) FAILURE TO REQUEST ACCESS.—A Bell operating company meets the requirements of this subparagraph if, after 10 months after the date of enactment of the Telecommunications Act of 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1), and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f). For purposes of this subparagraph, a Bell operating company shall be considered not to have received any request for access and interconnection if the State commission of such State certifies that the only provider or providers making such a request have (i) failed to negotiate in good faith as required by section 252, or (ii) violated the terms of an agreement approved under section 252 by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement.

"(2) SPECIFIC INTERCONNECTION REQUIREMENTS.—

"(A) AGREEMENT REQUIRED.—A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought—

"(i)(I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A), or

"(II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B), and

"(ii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph.

"(B) COMPETITIVE CHECKLIST.—Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:

"(i) Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1).

"(ii) Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1).

"(iii) Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of section 224.

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

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

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

"(vii) Nondiscriminatory access to—

"(I) 911 and E911 services;

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

"(III) operator call completion services.

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

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

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

"(xi) Until the date by which the Commission issues regulations pursuant to section 251 to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations.

"(xii) Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3).

"(xiii) Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2).

"(xiv) Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3).

"(d) ADMINISTRATIVE PROVISIONS.—

"(1) APPLICATION TO COMMISSION.—On and after the date of enactment of the Telecommunications Act of 1996, a Bell operating company or its affiliate may apply to the Commission for authorization to provide interLATA services originating in any in-region State. The application shall identify each State for which the authorization is sought.

"(2) CONSULTATION.—

"(A) CONSULTATION WITH THE ATTORNEY GENERAL.—The Commission shall notify the Attorney General promptly of any application under paragraph (1). Before making any determination under this subsection, the Commission shall consult with the Attorney General, and if the Attorney General submits any comments in writing, such comments shall be included in the record of the Commission's decision. In consulting with and submitting comments to the Commission under this paragraph, the Attorney General shall provide to the Commission an evaluation of the application using any standard the Attorney General considers appropriate. The Commission shall give substantial weight

to the Attorney General's evaluation, but such evaluation shall not have any preclusive effect on any Commission decision under paragraph (3).

"(B) CONSULTATION WITH STATE COMMISSIONS.—Before making any determination under this subsection, the Commission shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c).

"(3) DETERMINATION.—Not later than 90 days after receiving an application under paragraph (1), the Commission shall issue a written determination approving or denying the authorization requested in the application for each State. The Commission shall not approve the authorization requested in an application submitted under paragraph (1) unless it finds that—

"(A) the petitioning Bell operating company has met the requirements of subsection (c)(1) and—

"(i) with respect to access and interconnection provided pursuant to subsection (c)(1)(A), has fully implemented the competitive checklist in subsection (c)(2)(B); or

"(ii) with respect to access and interconnection generally offered pursuant to a statement under subsection (c)(1)(B), such statement offers all of the items included in the competitive checklist in subsection (c)(2)(B);

"(B) the requested authorization will be carried out in accordance with the requirements of section 272; and

"(C) the requested authorization is consistent with the public interest, convenience, and necessity.

The Commission shall state the basis for its approval or denial of the application.

"(4) LIMITATION ON COMMISSION.—The Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B).

"(5) PUBLICATION.—Not later than 10 days after issuing a determination under paragraph (3), the Commission shall publish in the Federal Register a brief description of the determination.

"(6) ENFORCEMENT OF CONDITIONS.—

"(A) COMMISSION AUTHORITY.—If at any time after the approval of an application under paragraph (3), the Commission determines that a Bell operating company has ceased to meet any of the conditions required for such approval, the Commission may, after notice and opportunity for a hearing—

"(i) issue an order to such company to correct the deficiency;

"(ii) impose a penalty on such company pursuant to title V; or

"(iii) suspend or revoke such approval.

"(B) RECEIPT AND REVIEW OF COMPLAINTS.—The Commission shall establish procedures for the review of complaints concerning failures by Bell operating companies to meet conditions required for approval under paragraph (3).

APPENDIX B

ALTS

Association for Local Telecommunications Services

SECTION 271: CREATING SUSTAINABLE LOCAL COMPETITION BEFORE THE RBOCS ENTER LONG DISTANCE

Prepared by the Association for Local Telecommunications Services

Spring 1997

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EXECUTIVE SUMMARY

The Telecommunications Act of 1996 advances effective competition throughout America's telecommunications markets by directly dismantling the major barriers confronted by potential competitors. It removes governmental barriers to entry (Section 253), requires incumbents to enter into just and reasonable interconnection agreements with new entrants (Sections 251 and 252), and restructures the universal service system to make subsidies fair and explicit (Section 254).

But Section 271, which sets out the conditions under which Regional Bell Operating Companies ("RBOCs") can enter in-region long distance service, takes a different approach to advancing local competition. Before the RBOCs are allowed enter the long distance market, they must first show the implementation of sustainable local competition, in addition to showing that long distance competition will not be harmed. Thus, unlike interconnection, universal service, or the portion of Section 271 dealing with the effect of RBOC entry on long distance markets, which involve predictions about future events, the local competition portion of the Section 271 process turns on a historical question: have the necessary conditions for sustainable local competition been implemented in a state? The Section 271 test is also unique in that the RBOCs control both the timing and evidence needed for this inquiry.

The RBOCs supported passage of the 1996 Act, and accepted the competitive obligations placed upon them in Section 271 as part of the price of entering long distance service. The Association for Local Telecommunications Services ("ALTS") wants to make sure that price is properly calculated in accordance with Congress' expectations, and paid by the RBOCs in advance of their applications. The members of ALTS are raising the money and making the investments in competitive facilities that will turn local competition into a reality, provided Section 271 is interpreted and implemented as Congress intended.[1]

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[1] As the national trade association for over thirty facilities-based competitive local exchange carriers, ALTS champions an appropriate pro-competitive implementation of the 1996 Act on issues involving local markets. ALTS will not address any long distance (continued...)

But the critical competitive issues at stake in Section 271 are threatened by the procedural unfamiliarity of this process, and the many opportunities for RBOC manipulation absent vigilant agency oversight. The historical inquiry demanded by the local competition portion of the Section 271 process imposes a different and unfamiliar role on the FCC. The Commission usually relies upon rulemaking proceedings for its pro-competitive initiatives. In such proceedings, the issues tend to be future oriented, the Commission has considerable control over the specific timing and extent of its actions, and it can usually alter its course after gaining actual experience. Section 271 applications are very different. Decisions must be made within the mandated ninety days, the local competition portion involves an historical inquiry, and the pro-competitive motivation created when an RBOC is seeking long distance permission is effectively destroyed once entry is granted.

This uniqueness creates immense potential for manipulation by the RBOCs, opportunities they may be all too willing to exploit given their immense incentive to enter long distance quickly while forestalling any potential local competitors.[2] Ameritech has provided sad examples by burying the Commission under thousands of pages in its two Michigan applications (January 2, 1997, and January 17, 1997), yet never in all those pages getting straight a very simple fact -- the fact the Michigan PSC had not approved its agreement with AT&T.

In short, the Commission will be implementing its unfamiliar Section 271 functions at the same time the RBOCs will be trying to distort that process to minimize or eliminate their pro-competitive statutory obligations. Given the immense public policy issues at stake here, everyone who cares about effective local competition needs to be fully aware of these challenges. ALTS has prepared this document to assist the Commission, the Department of Justice, state agencies, and other parties in dealing with this problem by identifying many of the RBOCs' unfounded and self-serving arguments, and

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[1](...continued)
regulatory issues raised by RBOC entry inasmuch as most ALTS members do not participate in long distance markets.

[2] Ameritech's CFO recently stated in a Reuters interview (April 17, 1997): "We clearly want to be in the long distance business. It would significantly enhance our revenue growth."

proposing how the statute should be implemented consistent with its fundamental purpose. ALTS' principal conclusions include:

- Operational Compliance with the "Competitive Checklist" -- RBOCs must fully implement the "competitive checklist" in Section 271(c)(2)(B) rather than simply "offer" to provide the fourteen interconnection and access items.

  - Checklist items must be available at final rates, terms and conditions.

  - RBOC checklist implementation must comply with performance standards equal to the RBOCs' current and future internal provisioning standards, or (if the RBOC's internal standards are inadequate for the CLEC) equal to regulatory standards or industry standards, at the choice and expense of the requesting CLEC.

  - Checklist performance standards must be monitored and enforceable through regular reporting and expedited remedies.

  - Checklist information systems needed by CLECs must be specified, implemented, and accepted pursuant to normal procurement practices within the information systems industry. Mere beta testing of such systems is not checklist compliance. Rather, such systems must be proven operational under a full load; i.e., any checklist systems provided by RBOCs must be fully tested, accepted, and capable of supporting competitors on a large scale.

- Sustainable Facilities-Based Competition -- An RBOC must have entered into access and interconnection agreements with competing CLECs serving both business and residential customers either entirely over the CLEC's network facilities, or predominantly over such facilities.[3] This ensures that real, facilities-based sustainable competition can develop for all customers

[3] While the law provides an alternative to these agreements -- a Statement of Generally Available Terms approved by the state -- it can only be used when bona fide requests have not been made or when the CLEC bargains in bad faith or fails to timely implement an agreement. See the "Track A versus Track B" discussion infra.

throughout a state.[4] This test is met when customers actually possess, and fully appreciate that they possess, a reasonable choice of local telephone providers, i.e., they can obtain service from a CLEC without any delay or service problems beyond the control of the CLEC.[5]

- Public Interest Test -- An RBOC's entry into long distance must be found to be consistent with the public interest. The public interest test is a fixture in the Communications Act, and it requires a broad examination by the FCC. While the benefits from RBOC entry into the long distance market are certainly relevant under this test, the Commission has already declared this market to be competitive. Since local markets continue to be virtual monopolies, the public interest test should place greater scrutiny on circumstances that might impede sustainable local competition.

- Section 272 Safeguards -- An RBOC must establish a separate subsidiary for its proposed long distance operations in accordance with Section 272 of the Act, and the strict and explicit rules recently adopted by the Commission. Once the FCC authorizes long distance entry, this section provides the only truly effective way to detect potentially anticompetitive actions.

Completing so important and complex an analysis within the tight time limits imposed by Section 271 requires that applications be factually complete and accurate when they are filed, and any material alterations or supplements to an application requires a new ninety day period for FCC action. Since the RBOCs control the timing of their filings, and are free to file multiple applications for different states if they choose, there is no appreciable burden

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[4] See the remarks of Acting Assistant Attorney General Joel I. Klein on March 11, 1997, at 9: DOJ is looking to insure: "that the wholesale support systems for opening up local markets are not simply claimed to be in place, but that they will be real and not merely theoretical."

[5] See id. at 3: "But now we are charged with taking the next steps -- in particular, the Congress, together with the leadership provided by the Clinton Administration, established a statutory framework that is designed to open up local telephone markets to competition and that would also allow the local companies to move into in-region, long distance service for the first time. The goal of this process is to have full-scale competition in telephony throughout the nation."

to the RBOCs in complying with the "complete as filed" requirement.[6]

ALTS' conclusions are based on the statute, the legislative history, the FCC's experience with one Section 271 application (the Ameritech Michigan application),[7] and the experiences of ALTS' more than thirty member CLECs. Local telephone competition holds great promise for the American public. Now is the time for policy makers to ensure that the Section 271 review process turns this opportunity into a reality.

[6] The FCC has already required one RBOC to either withdraw its application or proceed without relying upon an "state-approved" agreement that did not exist at the time of its original filing. Application by Ameritech Michigan Pursuant to Section 271, CC Docket No. 97-1, FCC 97-40, released February 7, 1997.

[7] See FCC Dkt. No. 97-1.

1 Introduction

INTRODUCTION

The Telecommunications Act of 1996 (the "1996 Act") advances competition in local telecommunications markets through a multi-stage, sequential process. One key part of this process is its requirement that incumbent local exchange carriers ("ILECs") provide competitive local exchange carriers ("CLECs") with interconnection to the ILECs' networks and access to unbundled ILEC facilities and services. Sections 251 and 252 of the 1996 Act impose these requirements in broad language, while more detailed portions of these statutory provisions deal with number portability, access to ILEC rights-of-way, and physical collocation, among other things.

But Sections 251 and 252 do not guarantee prompt and effective local competition by themselves. As Congress clearly understood, there are significant impediments to local competition beyond any ability of Sections 251 and 252 to cure:

- First, the ILECs have immense economic incentives to keep competitors out of their local markets. They have the ability to act on those incentives, both because communications networks must be interconnected, and because the Act seeks to jump start competition by permitting competitors to access ILEC network facilities and services. Moreover, regulators have little ability to stop the ILECs from acting on those incentives (Judge Greene recognized this problem when he rejected regulatory enforcement as an adequate substitute for the MFJ's structural prohibitions on the RBOCs).[8] Currently, GTE is demonstrating how ILECs have the resources and willingness to fight competition every inch of the way in regulatory agencies and courts.

- Second, there have been and continues to be a vast array of entry barriers imposed on CLECs by governmental entities. While the new law may have mitigated more blatant refusals by cities and states to allow CLEC entry,

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[8] United States v. Western Electric Co., 673 F. Supp. 525, 568, 574-579 (D.D.C. 1987), citing with approval DOJ's conclusion that: " ... regulation would not and could not be made to work." United States v. AT&T, 552 F. Supp. 131, 187 n.229 (D.D.C. 1982): "If regulation could effectively prevent these practices, there would have been no need for the AT&T action."

many governmental bodies continue to unfairly burden CLEC entry under the guise of "right-of-way management."

- Third, there are institutional advantages the monopoly ILECs have accumulated over a century -- almost free use of municipal rights of way; access to virtually all privately owned multi-tenant buildings; and control over an extensive network of utility rights-of-way, ducts, and easements.

- Fourth, entry into the local telecommunications business is highly capital intensive, front-end loaded, and susceptible to harm from RBOC-caused delays. These large amounts of capital must be committed before any revenues start to flow, and they are "sunk costs" if the original investment decision proves unwarranted in light of subsequent regulatory decisions or RBOC-caused delays (i.e., CLECs can't pick up their fiber and leave).

The basic issue behind all these problems -- regulation's limited ability to permanently replace monopoly with competition -- was handled in the MFJ by divesting AT&T of its bottleneck monopolies, and prohibiting Regional Bell Operating Companies ("RBOCs") from entering long distance services (known as "interLATA services").[9] However, the central focus of the MFJ was on creating and preserving competition in long distance markets, not in local telecommunications.

Congress could have retained this limited focus on long distance competition when it created Section 271 of the 1996 Act to replace the MFJ.[10] Instead, Congress added a new and significant condition for RBOC entry into the in-region interLATA markets: sustainable facilities-based local competition. Congress fully understood the limitations of Sections 251 and 252, and concluded that the RBOCs' desire to enter long distance should be used as a "carrot" to motivate them to remove barriers to local competition with an

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[9] The approach of spinning off bottleneck facilities to escape regulation was subsequently used by Pacific Bell to free its wireless operations from MFJ requirements, and remains available to any RBOC that might wish to accelerate its interLATA entry through a similar spin-off of its bottleneck facilities, such as the local loop.

[10] A short legislative history of Section 271 is appended as Attachment A, and the text of Sections 271 and 272 as Attachment B. Other MFJ requirements were delegated to the FCC in Section 251(g).

enthusiasm and speed that would not be attainable through the Sections 251 and 252 "sticks" alone.[11]

The 271 entry test is thus robust, stringent, and not subject to waiver. For the purposes of Section 271, state-approved interconnection agreements with CLECs under Sections 251-252 are treated for what they are -- paper promises which prove nothing about the existence of effective local competition. Section 271 steps deliberately beyond the requirements of Sections 251 and 252, and insists upon creation of sustainable local competition prior to RBOC entry into in-region interLATA markets. This fundamental goal needs to be recognized and fully implemented by all of the expert agencies having responsibilities under Section 271: the Commission, the Department of Justice, and the states.

[11] While the basic goal of the facilities-based competition requirement is to alter the RBOCs' incentives, it does have an incremental effect on long distance competition. Facilities-based competitors seldom enter local markets without also entering access markets. Accordingly, requiring sustainable facilities-based local competition helps assure long distance providers they will enjoy competitive alternatives to the RBOC's access facilities.

Track A/Track B