

KEY PRINCIPLES OF SECTION 271

**A SUMMARY OF THE STATUTORY CONDITIONS FOR
BOC ENTRY INTO IN-REGION LONG DISTANCE
AS ESTABLISHED BY THE FCC AND DOJ
(AS OF MAY 1, 2000)**

**WORLDCOM, INC.
Federal Law and Public Policy**

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KEY PRINCIPLES OF SECTION 271 ^{*/}

A SUMMARY OF THE STATUTORY CONDITIONS FOR BOC ENTRY INTO IN-REGION LONG DISTANCE AS ESTABLISHED BY THE FCC AND DOJ

INTRODUCTION

- **Foundation** Section 271 of the Communications Act, added by the Telecommunications Act of 1996 (the “Act” or “1996 Act”),¹ provides the mechanism by which the Bell Operating Companies (“BOCs”^{**/}) may apply for and obtain authorization to provide long distance service originating in their regions. Section 271 replaced the general prohibition on BOCs providing in-region long distance that was established when the Bell System was broken up by the so-called Modification of Final Judgment (“MFJ”) in the early 1980s.
- **Purpose** Local exchange markets are historic monopolies in which the incumbents have bottleneck control of the local network, which necessitated the structural separation between local and long distance in the MFJ. BOCs

^{*/} This memorandum has been prepared to summarize in non-technical terms the current interpretations of section 271 by the FCC, DOJ, and the courts in their consideration of section 271 applications by BOCs to offer in-region interLATA service in the states of Oklahoma, Michigan, South Carolina, twice in Louisiana and New York. The FCC has only granted section 271 authorization once thus far, to Bell Atlantic in New York in December 1999. The FCC is currently considering a second section 271 application of SBC for Texas, after the first application was withdrawn by SBC on April 5, 2000.

Please note that this memorandum does not state WorldCom’s interpretation of section 271. Moreover, as decisions are made on an ongoing basis by the FCC, DOJ and the courts, the information contained herein will be updated. Future updates may be found on the Internet at http://www.wcom.com/about_the_company/public_policy/.

^{**/} A glossary of basic acronyms and terms is provided at the end of this document.

have no natural incentive to assist new entrants to compete in providing local service; section 271 creates such an incentive. (Mich. Order² ¶¶ 10-14.)

- Congress acknowledged the principles underlying the MFJ's approach of structural separation by requiring that local markets be fully open before BOCs are given authority to provide interLATA service in-region. (SC Order³ ¶ 9.)
- Competitive local exchange companies' ("CLECs'") entry into local markets is "handicapped" by their dependence on BOC cooperation. BOCs, on the other hand, will be able quickly and easily to enter the intensely competitive long distance market. (Mich. Order ¶ 17.)
- Open Local Markets The Federal Communications Commission ("FCC") states that it "must make certain that the BOCs have taken real, significant, and irreversible steps to open their markets" before authorizing their entry into in-region long distance. (Mich. Order ¶ 18.) The U.S. Department of Justice's Antitrust Division ("DOJ") similarly states that BOC section 271 applications "should be granted only when the local markets in a state have been fully and irreversibly opened to competition." (DOJ La. I Eval.⁴ at iii, 1-2; DOJ La. II Eval.⁵ at 1.)
- All methods of local entry -- resale, unbundled elements, interconnection of CLEC facilities, and combinations thereof -- must be "truly available." (Mich. Order ¶¶ 387, 391; SC Order ¶¶ 10, 11; DOJ La. II Eval. at 2.)
- The "most probative evidence" that all entry strategies are available is that CLECs are actually offering local services to different classes of customers, through a variety of arrangements, in different geographic regions of a state, and at different scales of operation. (Mich. Order ¶ 391.) Actual, broad-based local competition is the "best evidence" that local markets are fully and irreversibly open. (DOJ La. I Eval. at 2; DOJ La. II Eval. at xi.)
- Although not the exclusive means to demonstrate compliance with the Act's requirements, the FCC has found that state proceedings that include the following elements contribute to the success of opening the

local market: “(1) full and open participation by all interested parties; (2) extensive independent third party testing of the BOC’s operations support systems (OSS) offering; (3) development of clearly defined performance measures and standards; and (4) adoption of performance assurance measures that create a strong financial incentive for post-entry compliance with the section 271 checklist.”⁶ (NY Order ¶ 8.)

- Continued Compliance After Approval It is not enough that a BOC prove compliance with the requirements of the Act at the time of its section 271 application. It is essential that it can be relied on to remain in compliance. (NY Order ¶ 16; Mich. Order ¶ 22; DOJ La. I Eval. at 31.)
- If a BOC falters in compliance with its obligations under the Act after its application is approved, section 271(d)(6) provides specific tools that expand the FCC’s preexisting enforcement authority. Most notably, the FCC is authorized to suspend or revoke the authorization granted. (NY Order ¶ 16.)
- Four Requirements⁷ A BOC has the burden of proving that it has satisfied four basic requirements before the FCC (as the decision-maker) can grant section 271 authority on a state-by-state basis for the BOC to provide long distance originating in-region. (NY Order ¶ 18, La. I Order⁸ ¶ 8.)
 - I. Track A or Track B Unless a BOC can satisfy either “Track A” or “Track B” of section 271 the FCC need not address the remaining elements.
 - II. Checklist The Act provides a fourteen point checklist of the minimum steps a BOC must take to open its monopoly local exchange markets to competition.
 - III. Separate Affiliate A BOC must prove that if it gets section 271 authority, it will comply with section 272, which requires a BOC to deal at arm’s length with an independent affiliate that will handle the long distance business.

IV. Public Interest The final determination by the FCC is whether a BOC's entry into in-region long distance in a particular state is in the public interest.

These requirements are discussed in the following sections.

I. A BOC MUST QUALIFY FOR TRACK A OR TRACK B

- Threshold⁹ The first requirement that a BOC must meet is to prove that it has satisfied Track A (which requires checklist implementation through interconnection agreements with facilities-based competitors) or is eligible to proceed under Track B (which requires checklist implementation through approved statements of generally available terms). (La. I Order ¶ 8; Mich. Order ¶¶ 7-8; SBC Communications Inc. v. FCC, 138 F.3d 410, 413 (D.C. Cir. 1998).)
- Track A Preferred Consistent with its goal of developing competition, Congress intended Track A to be the primary vehicle for BOC entry under section 271, in order to create an incentive for BOCs to cooperate with new entrants and thereby facilitate local competition. (Okla. Order¹⁰ ¶¶ 41, 46, 52.)

Track A

- Requirements of Track A¹¹ Track A requires that a BOC applicant have an approved interconnection agreement with at least one competing provider that is providing local service to residential and business subscribers at least predominantly over its own facilities. (Mich. Order ¶ 8; DOJ La. I Eval. at 4; SBC v. FCC, 138 F.3d at 413.) Each of these terms is significant, as discussed below.
- Interconnection Agreements Any one qualifying interconnection agreement need not contain all checklist items. (Mich. Order ¶ 72.)
- “Competing” Providers There must be an actual commercial alternative to the BOC. (La. I Order ¶ 73; SBC v. FCC, 138 F.3d at 416.) At a minimum,

a competing carrier must actually be in the market, operational, and beyond the testing phase. (Mich. Order ¶ 75; SC Order ¶ 57.)

- The FCC concluded that PCS service (providing two-way mobile voice service) does not compete with the wireline telephone exchange service offered by the BOC, even though it does qualify as “telephone exchange service.” (La. II Order¹² ¶ 25.) In order to be a competing provider, the service must be used to replace, not merely supplement, the wireline service offered by the Bell Company. (La. II Order ¶ 31.)
- DOJ found that PCS and wireline services are not currently close substitutes from a competitive perspective, because PCS is substantially more expensive than, and priced differently from, wireline service (DOJ La. I Eval. at 5, 7-8.), and does not provide the full range of benefits expected from a competitive local market. (DOJ La. II Eval. at 6, n.9.)
- Competitor’s “Own” Facilities Track A can be satisfied only if competing providers predominantly use their “own” facilities, which has been interpreted to include facilities leased from the BOC, not merely facilities the CLECs actually own and control. (Mich. Order ¶ 101.) Thus, to the extent that a CLEC is not providing service through resale, it is by definition providing service over its own facilities.
- Predominantly Facilities-Based Service to Residential and Business Subscribers DOJ considers whether the competing service as a whole is provided predominantly over the CLEC’s own facilities, not whether residential service and business service are each predominantly provided over the CLEC’s own facilities. (Okla. Addendum¹³ at 3.) This does not mean DOJ would agree that a facilities-based provider serving business customers combined with a reseller serving residential customers would meet the statutory requirements. (DOJ La. II Eval. at 8, n. 13.)
- It is not necessary that one competitor provide both business and residential service, so long as CLECs collectively provide both kinds of service. (Mich. Order ¶¶ 82, 85; DOJ La. II Eval. at 8 n.13.)

- Nor is it clear that CLECs must provide facilities-based service to both residential and business customers. (La. II Order ¶ 47-48.) The FCC indicated that it may not deny an otherwise meritorious application solely due to the fact that competitors' service to residential customers is wholly through resale. (La. II Order ¶ 48.)
- The 1996 Act does not specify how many residential and business subscribers a CLEC must serve in order for a BOC to satisfy Track A. The FCC and DOJ have not required any specific level of geographic penetration or market share by CLECs. (Mich. Order ¶ 78.)
- Meaning of "Provide" A BOC "provides" a checklist item if it actually furnishes the item or, where no competitor is actually using the item, if the BOC makes the item available as both a legal and practical matter. (La. II Order ¶ 54; DOJ SC Eval.¹⁴ at 13; DOJ La. I Eval. at 9.)
- Legal and Practical Availability A BOC "provides" (for Track A) or "generally offers" (for Track B) a checklist item if it makes that item available as a legal and practical matter. (Mich. Order ¶ 107; SC Order ¶¶ 78, 81.) That means that the BOC has a concrete and specific legal obligation to furnish the item on request pursuant to approved interconnection agreements (for Track A) or SGATs (for Track B) that set forth prices and other terms and conditions, and that the BOC has demonstrated that it is ready to furnish the item in quantities that competitors may reasonably demand and at an acceptable level of quality. (NY Order ¶ 52; La. I Order ¶ 54; Mich. Order ¶ 110.)
- DOJ similarly states that a BOC applicant must show the availability of each checklist item as a "legal matter" and as a "practical matter," whether it proceeds under Track A or Track B.¹⁵ This means each checklist item must be "generally offered to all interested carriers, be genuinely available, and be offered at concrete terms." (DOJ SC Eval. at 13, emphasis in original.) Mere "paper promises" are not sufficient, nor are invitations to negotiate. (DOJ SC Eval. at 13; DOJ La. I Eval. at 9, 14.)
- Where the BOC uses identical processes and systems for ordering and for furnishing items in a multistate region, evidence that a BOC

actually is or is not capable of furnishing the item in another state is probative. (SC Order ¶ 81.) Where there is no commercial usage, a carrier could demonstrate practical availability through carrier-to-carrier testing, third- party testing, or internal testing. (SC Order ¶ 81)

- Ramp Up Required Congress expected there to be a “ramp up” period for CLECs to become operational competitors. Congress recognized that there may be a period of time where a BOC is precluded from proceeding under Track B due to a qualifying request, yet is not able to satisfy the requirements of Track A. (Okla. Order ¶ 45.)

Track B

- Availability of Track B¹⁶ Under the Act, a BOC may pursue section 271 authority under Track B on the basis of a statement of generally available terms (SGAT), instead of actual interconnection agreements, in three circumstances:
 - (i) if no CLEC has requested access and interconnection which, if implemented, would satisfy Track A (i.e., predominantly facilities-based and serving both residential and business);
 - (ii) if a state commission certifies that all requesting carriers negotiated in bad faith; or
 - (iii) if a state commission certifies that all requesting carriers failed to abide by implementation schedules in their interconnection agreements.
- Limited Exception Congress intended Track B to serve as a limited exception to Track A. (Okla. Order ¶ 46.)
- Qualifying Requests When a Track B application is filed, the FCC determines whether CLEC requests for access and interconnection were timely (made more than three months before the section 271 application is filed), and whether any of those requests is “qualifying,” which would preclude use of Track B. (SC Order ¶ 59.) A qualifying request is one that requests the kind of access and interconnection described in Track A (i.e.,

predominantly facilities-based service). (SC Order ¶¶ 59-60.) If it is not clear from the face of a request whether it is qualifying, the FCC may look to other evidence, such as the text of an interconnection agreement or negotiations between the parties. (SC Order ¶ 60.) The FCC will give particular weight to evidence of an interconnection agreement that includes provisions for facilities for the requesting carrier to serve residential and business customers. (SC Order ¶ 60.)

II. A BOC MUST SATISFY THE FOURTEEN POINT CHECKLIST

Fundamentals

- Checklist Requirements¹⁷ The Act requires the FCC to determine whether a BOC's qualifying agreements under Track A, or its approved SGAT under Track B, satisfy all of the items on the 14-point competitive checklist.
 - Non-compliance with a single checklist item is sufficient for denying an application. (La. II Order ¶ 50.)
- Role of the Agencies By statute, the FCC must consult with DOJ on every 271 application, and must give DOJ's evaluation substantial weight, but this does not preclude the FCC from reaching a different conclusion from DOJ. (NY Order ¶ 19.) Likewise, the FCC and not the state commission must determine whether the factual record supports a finding that the requirements of section 271 have been met. (NY Order ¶ 20; La. II Order ¶ 18; SBC v. FCC, 138 F.3d at 416-17.) However, the FCC "will look to the states to resolve factual disputes wherever possible." (NY Order ¶ 51; La. II Order ¶ 52.) The weight given to a state commission's verification rests with the FCC, but the FCC will carefully consider state determinations supported by a detailed and extensive record. (NY Order ¶ 20.) Further, the FCC has indicated that it would be helpful if DOJ analyzed compliance with all checklist items. (Mich. Order ¶¶ 40-41.)
- The FCC concluded that DOJ and the state commissions are like expert witnesses. The FCC may conclude that state's evidence is more persuasive than DOJ if the state has conducted an "exhaustive and rigorous investigation." (NY Order ¶ 51.)

- After rejection, if a BOC files a subsequent section 271 application the FCC requests the state commission to submit a factual record that addresses whether the BOC has corrected the problems identified in the previous application and whether there are any new facts that indicate the BOC is not in current compliance with checklist items it previously satisfied. (La. II Order ¶ 21.)
- Legal Standard “[F]or those functions the BOC provides to competing carriers that are analogous to the functions a BOC provides to itself in connection with its retail services offerings, the BOC must provide access to competing carriers in ‘substantially the same time and manner’ as it provides to itself”; i.e., at equal levels of quality, accuracy, and timeliness. (NY Order ¶ 44.) For those functions that have no retail analog, the BOC must demonstrate that the access it provides to competing carriers would offer an efficient carrier a “meaningful opportunity to compete.” (NY Order ¶ 44.)
- The two standards are equally rigorous, with the latter being a proxy for the former. (NY Order ¶ 45.) The FCC will not establish specific objective criteria for either standard. (NY Order ¶ 46.)
- Evidentiary Showing A BOC must make a *prima facie* case that it meets the requirements of a each checklist item, i.e., the BOC must plead, with appropriate supporting evidence, facts which if true, demonstrate that it is providing access or interconnection pursuant to the terms of that checklist item. (NY Order ¶ 49 & 52.) “The determination of whether a BOC’s performance meets the statutory requirements necessarily is a contextual decision based on the totality of the circumstances and information before [the FCC].” (NY Order ¶ 60.)
- The type of evidence a BOC presents to satisfy this standard may vary, but the FCC encourages performance data and performance measurements, and reiterates that “the most probative evidence that a BOC is providing nondiscriminatory access is evidence of actual commercial usage.” (NY Order ¶¶ 53-4)
- To evaluate actual commercial experience, the reliability of reported data is of critical importance. Metrics must be meaningful, with clear definitions that have real-world, practical significance. The metrics

must also be accurate so that they are correctly calculated and they must be reproducible for verification purposes on future dates. (DOJ TX Eval. at 5.)

- Although state findings are not determinative of compliance, the FCC encourages state processes to develop performance metrics and adopt performance standards. State findings that are the result of a rigorous collaborative proceeding are apt to be found “reasonable and appropriate measures of parity” and to be relied on by the FCC in its analysis. (NY Order ¶¶ 55-6; La. II Order ¶ 93.)
- The FCC has found it significant when both the state commission and DOJ stated that improved performance measurements were needed in order to determine nondiscriminatory access. (Mich. Order ¶ 213.) Proper performance measurement is an “essential” part of effective support systems. (DOJ La. I Eval. at 19-20, 31.)
- Noncompliance with a state-approved performance measure will not preclude approval if the FCC’s independent evaluation demonstrates that performance is good enough to “permit carriers to enter and compile in a meaningful way,” especially if the discrepancy can be attributed to factors outside the BOC’s control, such as CLECs requesting longer intervals. (NY Order ¶¶ 296-298.)
- Once a BOC establishes a prima facie case, opponents must produce evidence and not just arguments to demonstrate that the application does not satisfy section 271. Anecdotal evidence, unless demonstrating systemic failures, is unlikely to overcome the BOC’s prima facie case. (NY Order ¶¶ 49-50.)
- Evidence of compliance with performance standards in an interconnection agreement is sufficient only if those standards meet the nondiscrimination standards of the Act. (Mich. Order ¶ 142.) Regardless of the intervals agreed to in its interconnection agreements, a BOC must show that it is providing competing carriers with nondiscriminatory access to OSS functions. (SC Order ¶ 125.)

- Examples of Evidentiary Data BOCs are expected to provide performance data showing the average time from when the BOC first receives a CLEC order to when the BOC provisions service, and the equivalent information for the BOC's retail operations. (SC Order ¶ 137; La. II Order ¶ 124.) This data should provide evidence of the BOC performance for numerous carriers consistently over a specified period of time. (La. I Order ¶ 36.)
- Data gathering and computer systems are desirable, but must include important measurements such as actual installation intervals, or measurements relating to pre-ordering, billing timeliness, billing accuracy and billing completeness. (DOJ SC Eval. at 46-48.)
- A competing carrier must receive information concerning the status of its customers' orders in substantially the same time and manner as the BOC provides such information to itself for its retail operations. (La. I Order ¶ 30.) Such order status notices include order error and rejection, firm order confirmation, and order jeopardy notices. (La. I Order ¶ 31; DOJ La. II Eval. at 31.) The BOC must provide data on timeliness of its delivery of such notices and the amount of time it takes to provide equivalent information to its retail operations. (La. I Order ¶ 40.)
- Evaluation of Data If there is no statistically significant difference between the provision of BOC services to competitive LECs and the BOC's retail customers or the performance benchmarks, the FCC concludes the service is nondiscriminatory. If there is a statistically significant difference, the FCC will further examine evidence to determine if it is the result of discrimination and its competitive significance in the marketplace. (NY Order ¶¶ 58-9.)
- Sufficient disaggregation is required to be able to usefully determine what the performance measures purport to measure. (La. II Order ¶¶ 92, 111.) The FCC may itself disaggregate data to understand whether statistical differences in performance demonstrate discrimination. (NY Order ¶ 60).
- A BOC must explain any significant disparities in performance data on critical OSS functions, such as demonstrating statistically that the

differences are the result of random variations in data. (La. II Order ¶ 93.)

- The fact that the average installation time can be influenced by a number of variables does not justify the withholding of information on average installation intervals by the BOC, but rather goes to the weight of the information. (La. I Order ¶ 45.)
- Full Implementation For Track A applications, the BOC must show that it has “fully implemented” the competitive checklist.¹⁸ (Mich. Order ¶ 105.)

Pricing

- Nationwide Standards To implement the Act uniformly nationwide, the FCC determines whether the BOC has priced interconnection, unbundled elements, transport and termination, and resale in accordance with section 252(d), not just whether the state commission found the prices proper. (Mich. Order ¶¶ 282, 286.) The Supreme Court has confirmed the FCC’s authority to establish the nationwide pricing methodology for local service. AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721, 733 (1999).
- The DOJ regards an assessment of pricing arrangements as an important consideration in determining whether a market is fully and irreversibly open to competition. (DOJ La. II Eval. at 19.) In addition to assessing current prices, DOJ has stated that a market is not “irreversibly open” if there is a substantial risk that prices will be increased to inappropriate levels after section 271 entry. Such a risk can impair competition now. (DOJ SC Eval. at 39-40; DOJ La. I Eval. at 27.)
- Failure to Establish Any Price The FCC has the right to deny a checklist item, at least in part, due to the BOC’s failure to set any price at all for the item.¹⁹ (La. II Order ¶ 73 n. 205.) An application should not be rejected solely because permanent rates have not been established for each UNE or the nonrecurring cost of provisioning an element. (NY Order ¶ 258.)
- It is reasonable to allow a limited use of interim rates when a state has not yet completed a permanent rate case for a new service. (NY Order

¶ 259.) It may be appropriate, on a case by case basis, to approve an application based on interim rates if “interim rates are for a few isolated ancillary items, permanent rates that have been established are in compliance with our rules, and the state has made reasonable efforts to set interim rates in accordance with the Act and the Commission’s rules.” (NY Order ¶ 258.) However, the FCC will become more reluctant to continue approving applications containing interim rates. Interim rates should not be a substitute for significant rate setting proceedings at the state level. (NY Order ¶ 260.)

- Number Portability The FCC has pricing authority over both interim and long term number portability. (La. II Order ¶ 289.)
- Forward-looking Cost Methodology Prices for interconnection and UNEs must be based on forward-looking, long-run incremental costs for each network element. (NY Order ¶ 237.) The DOJ concludes that a local market is fully open to competition only if prices were derived through a forward-looking economic cost methodology, or an alternative standard that is “consistent with the procompetitive goals of the 1996 Act and permits entry and effective competition by efficient firms.” (DOJ La. II Eval. at 19.)
- “True-up” Insufficient Mere promises that prices will be cost-based at some point in the future, with adjustments made for excessive amounts paid by CLECs have been found insufficient. Where a state has not decided how it will determine final prices for UNEs, “the provision for a true-up is hardly sufficient assurance that competitors will in fact be charged cost-based prices now or later.” (DOJ Okla. Eval.²⁰ at 61-62.) If a state has a good record of establishing TELRIC rates for other prices, however, the availability of refunds or true-up if an interim rate exceeds TELRIC is an important factor in approving an application based in part on interim rates. (NY Order ¶ 259.)
- Geographic Deaveraging A ratemaking methodology that geographically averages rather than deaverages costs will produce above-cost prices for unbundled loops in densely populated areas, thus inefficiently imposing costs and impeding entry in those areas, and inefficiently subsidizing entry in other areas. (DOJ La. II Eval. at 21.) “The lack of geographic deaveraging, or even a transition plan towards deaveraging, may act as a barrier to efficient competition.” (DOJ La. II Eval. at 21-22.) Geographic deaveraging need not take place before section 271 authority can be granted. But it must at least be

clear that geographic deaveraging will be accomplished over some transition period. (DOJ La. Eval. at 25-26.)

Checklist Item 1: Interconnection

- **Interconnection**²¹ CLECs may connect to the ILEC's network at any technically feasible point, using any technically feasible method, including physical collocation, virtual collocation and meet point arrangements that are available on "just, reasonable and nondiscriminatory" terms. (La. II Order ¶ 62; NY Order ¶ 63.)
- **Importance** Equally important to the availability of UNEs and resale is the ability of a CLEC to interconnect its facilities with the BOC's network. (Mich. Order ¶ 132; DOJ TX Eval.²² at 44.)
- **Collocation** A BOC must demonstrate that it provides collocation to show that it has satisfied the first checklist item. The length of time the BOC takes to provide physical and virtual collocation is relevant for assessing compliance with this checklist item. (NY Order ¶ 66; La. II Order ¶ 62.)
 - A BOC must provide new entrants with "definite, concrete, and binding terms and conditions for collocation." (La. II Order ¶ 165.) Reasonable and predictable cost-based prices for each of the significant components of collocation are necessary in order to avoid the threat of a "formidable" barrier to entry. (DOJ La. I Eval. at 26.)
 - Virtual collocation is not an adequate substitute for physical collocation. (DOJ Okla. Eval. at 32-34.)
 - A BOC must include shared cage and cageless collocation arrangements as part of their physical collocation offering. (NY Order ¶ 66.)
- **Trunks** In order to demonstrate nondiscriminatory terms and conditions, a BOC must provide evidence that installation times for interconnection, provisioning of two-way trunks, and repair are comparable to its own retail. (NY Order ¶ 65). Interconnection facilities must meet "the same technical

criteria and service standards” as interoffice trunks, as shown by trunk group blockage and transmission standards. (NY Order ¶ 64.)

- Facilities-based CLECs cannot be limited or delayed by a BOC in receiving interconnection trunks. Limitations or delays can cause problems such as call blocking, customer complaints, and lost sales. (DOJ TX Eval. at 45-46.)
- A BOC has an obligation to cooperate with CLECs by sharing sufficient information about its network to remedy network blockage that effects CLECs’ customers. (Mich. Order ¶ 246.) If the trunks provisioned to CLECs experience more trunk blockage than those of the BOC, the BOC is not providing interconnection that is “equal in quality” to what it provides itself. (La. II Order ¶ 77.)

Checklist Item 2: Access to Network Elements

- Importance of UNEs²³ It is critical that CLECs have the ability to enter the local market through combinations of unbundled network elements (“UNEs”). (La. II Order ¶ 141.) UNEs and combinations of UNEs are “integral to achieving Congress’ objective of promoting competition” in the local market. (SC Order ¶ 195; NY Order ¶ 81.)
- UNE competition may be particularly important to developing broad-based competition, and the absence of such competition using UNEs creates a presumption that the market is not fully and irreversibly open. (DOJ La. II Eval. at 8-9.) Competitive entry would be seriously impeded if competing carriers could not obtain UNEs in combination on reasonable and nondiscriminatory terms. (DOJ SC Eval. at 24.)
- UNE Requirements A BOC must demonstrate that both individual network elements and those elements that it offers in combination can be ordered and provisioned in an efficient, accurate, and timely manner, and that its operations support systems (“OSS”) are designed to accommodate both

current and projected demand for UNEs and combinations of UNEs.^{*/} (SC Order ¶ 146.)

- The “nondiscriminatory access to network elements” requirement of the checklist is not met by an SGAT (in a Track B application) that fails to specify what the BOC will provide, the method in which it will be provided, and the terms on which it will be provided. (SC Order ¶ 197; DOJ SC Eval. at 20.)
- The BFR process should not serve as a substitute for demonstrating the availability of basic checklist requirements. This would create additional opportunities for delay and litigation. (DOJ SC Eval. at 25.) A vague offering that forms the basis for more negotiations undercuts the rationale for an SGAT. (SC Order ¶ 197.)
- Because the BOCs’ networks were not designed to provide UNEs to others, it should not be assumed that they can do so. (DOJ La. I Eval. at 15.) “[A]ctual provisioning or satisfactory evidence of testing” may demonstrate a BOC’s practical ability to provide UNEs. (DOJ La. I Eval. at 16.)
- Required UNEs On remand from the Supreme Court, the FCC determined that the following network elements must be made available to requesting carriers²⁴:
 - Loop (including subloop and dark fiber)
 - NID
 - Switching (with limitations, and including packet switches with limitations)
 - Transport (both shared and dedicated)
 - Signaling and call-related databases
 - OS/DA (only in limited circumstances)
 - OSS

^{*/} While the status of the Commission’s Rule 51.319(c)-(f) (regarding new combinations) is still pending before the Eighth Circuit, a BOC’s compliance with the state commission rules are sufficient.

- Combinations of UNEs The use of UNE combinations “is an important strategy for entry into the local telecommunications market” and an obligation under section 271. Applications will be examined to determine whether carriers can combine elements. (NY Order ¶ 230.)
- CLECs must be able to enter the local market by using combinations of UNEs. (NY Order ¶¶ 229-30.) A BOC must “explain clearly the method” by which CLECs can order and combine UNEs at cost-based rates. (La. II Order ¶ 141.)
- A BOC must demonstrate that it provides competitors combinations of network elements that are already preassembled in their network, in addition to nondiscriminatory access to unbundled network elements, in a manner that allows competing carriers to combine those elements.**/ (NY Order ¶ 231.)
- If UNEs are provided in a manner that requires CLECs to incur large costs to combine them, many customers (particularly residential customers) may lack a facilities-based alternative to the BOC for a much longer period of time. (DOJ La. I Eval. at 16.)
- A BOC cannot limit a CLEC to collocation as the only method for obtaining and combining UNEs. (La. II Order ¶¶ 164, 168-70.) CLECs are entitled to request any technically feasible method for combining network elements. (La II Order ¶ 162.) When collocation is offered as one means of CLECs combining UNEs, a BOC must provide new entrants with “definite, concrete, and binding terms and conditions for collocation.” (La. II Order ¶ 165.)
- The policy of requiring carriers that wish to combine network elements to collocate connecting equipment (such as a distribution frame) imposes unnecessary costs on competing carriers, impairs the ability of competing carriers to provide reliable service, and will substantially delay entry. These policies are not consistent with the open market

**/ The question of whether a BOC must provide elements in combination that are typically combined within the BOCs network, but not currently combined, is pending before the Eighth Circuit.

standard used by DOJ in evaluating applications under section 271.
(DOJ La. I Eval. at 10.)

OSS

- Importance of OSS An integral part of providing access to UNEs is a BOC's nondiscriminatory provision of operations support systems ("OSS"). (La. II Order ¶ 80.) A CLEC's decision to enter a local market in a particular state should be based on its business plan, not the availability or unavailability of particular OSS functions to support each mode of entry. (Mich. Order ¶ 73.) New entrants must be able to match the service quality of access to OSS enjoyed by the ILEC in order to compete effectively. (La. II Order ¶ 83; NY Order ¶ 83.)
- OSS itself is a network element. (La. II Order ¶ 84; Iowa Utils. Bd., 120 F.3d at 808.) In addition, the duty to provide nondiscriminatory access to OSS is part of the duty to provide other checklist items, including unbundled loops, unbundled transport, and unbundled switching (checklist items 4, 5 and 6). (SC Order ¶¶ 84-85; La. II Order ¶ 84; NY Order ¶ 84.)
- Equivalent access for CLECs is impeded by excessive BOC reliance on manual processing, especially for routine transactions. (La. II Order ¶ 110.) Although there may be limited instances in which it is appropriate for a BOC to intervene manually, excessive reliance on manual processing, especially for routine transactions, impedes the BOC's ability to provide equivalent access to basic OSS. (La. I Order ¶ 25.) Although flow-through rates are potential indicators of a wide range of problems that may exist and demonstrate a lack of nondiscriminatory access to OSS, flow-through rates standing alone are not a conclusive measure of nondiscriminatory access to ordering functions. (NY ¶¶ 161-62.)
- Efficient and effective OSS, as well as other wholesale support processes, are "critical" to opening local markets to meaningful competition, and must be available on a nondiscriminatory basis and scalable to meet future demand. (DOJ La. I Eval. at 16-18.) DOJ has noted the importance of system-to-system interfaces to connect a

BOC's systems to a CLEC's systems. (DOJ Okla. Eval. at 75-76; DOJ SC Eval. App. A at A4-5, A10-14; DOJ NY Eval.²⁵ at 33-35.) Industry standards bodies recognize the importance of such interfaces. (DOJ Okla. Eval. at 75-76.)

- OSS Requirements OSS includes “systems, information, and personnel”; competing carriers must have access to OSS that is equivalent to the BOC's for both UNEs and resale. (La. II Order ¶¶ 80, 83.) A BOC's OSS must sufficiently support each competitive entry strategy -- interconnection, UNEs, and resale -- and must not favor one strategy over another. (SC Order ¶ 141; Mich. Order ¶ 133.) CLECs' access to OSS must be nondiscriminatory. (SC Order ¶ 82; NY Order ¶ 85.)
- Nondiscriminatory access includes the gateway (point of interface), an electronic or manual processing link between the CLEC interface and the BOC's internal OSS (back office systems and personnel), and all internal OSS that the BOC uses. (Mich. Order ¶ 134.) The BOC must also provide: equivalent electronic (or manual, if BOC's own system is manual) access; necessary specifications that will enable CLECs to design their systems; all necessary information to format requests; and internal business rules. (Mich. Order ¶ 137; SC Order ¶ 111; NY Order ¶ 88.)
- A BOC must demonstrate that competing carriers are able to use or develop a machine-to-machine interface that is substantially similar to what the BOC uses. (La. I Order ¶ 55.)
- For OSS functions that are analogous to OSS functions that a BOC provides to itself, the BOC must offer access to competing carriers equivalent to the access the BOC provides itself, so that CLECs can perform OSS functions in “substantially the same time and manner” as the BOC. (NY Order ¶ 85; La. II Order ¶ 87.) If the OSS functions have no retail analogue (e.g., ordering and provisioning UNEs), a BOC must offer sufficient access to allow a CLEC to compete. (NY Order ¶ 86; La. II Order ¶¶ 87, 134.)
- A BOC has an obligation to provide interfaces that allow smaller as well as larger CLECs a meaningful opportunity to compete. (Mich.

Order ¶ 220.) A BOC does not have to provide multiple interfaces if it shows that a single interface is economically efficient for both small and large carriers. (Mich. Order ¶ 220.)

- Standard of Review First, the FCC will examine whether a BOC has deployed the necessary systems and personnel to provide sufficient access and whether the BOC is adequately assisting competing carriers to understand how to implement and use all of the OSS functions available. (NY Order ¶ 87; Mich. Order ¶ 136; La. II Order ¶ 85.) Second, the FCC assesses the operational readiness of OSS, as a practical matter. (NY Order ¶ 87.)
- Lack of an industry standard does not excuse a BOC from meeting its obligation to provide nondiscriminatory access to OSS functions. (La. II Order ¶ 137.) The FCC encourages, but does not require, adherence to industry standards. (NY Order ¶ 88.)
- Evidence of Operational Readiness Actual commercial usage is the best evidence of operational readiness of OSS. (Mich. Order ¶ 138; La. II Order ¶ 86; DOJ La. I Eval. at 26; NY Order ¶ 89.) In the absence of commercial usage, carrier-to-carrier testing, independent third-party testing, and internal testing will be used to evaluate operational readiness. (La. II Order ¶¶ 100, 166; NY Order ¶ 89.)
- Important BOC systems must be “*stress tested*” to establish their operational readiness, in order to ensure that the systems will be reliable for use at foreseeable levels of demand. (DOJ La. I Eval. at 20 (emphasis in original).) Past experience suggests that limited commercial usage at small volumes does not provide an adequate basis upon which to judge the performance of systems that will need to handle a much larger volume of orders. (DOJ La. II Eval. at 26.) With only low volumes of commercial usage, “it is crucial to have testing results that provide reliable and predictable” indications of how the BOC systems would respond to commercial usage. (La. II Order ¶ 140.)
- The FCC will look to performance measurements and other evidence of commercial readiness (La. II Order ¶ 85), such as whether the OSS is

handling current demand, and will be able to handle reasonably foreseeable demand. (Mich. Order ¶ 138; La. II Order ¶ 139.)

- Independent, Third Party OSS Testing An independent third party's report can be "persuasive evidence" of a BOC's OSS readiness. (NY Order ¶ 100.)
 - The experience, qualifications, and independence of the third-party tester, as well as the conditions and scope of the review, help demonstrate the persuasiveness of the third-party review. (NY Order ¶ 89.) The comprehensiveness, independence and blindness of the report factor into the weight the report is given. (NY Order ¶ 100.)
- Regional Review Relevant Commercial usage from other states in the BOC's region may be used where the OSS is "essentially the same." (La. II Order ¶ 86.) Determinations of any state commission in the BOC region may be relevant where OSS is region-wide. (SC Order ¶ 100; Mich. Order ¶ 156.)
 - When analyzing BOC region-wide systems such as OSS, DOJ will apply a uniform standard for all states in the region, although state commissions may be focused on their single state. (DOJ SC Eval. at 15.)
- Pre-Ordering Requirement Pre-ordering includes gathering and verifying the necessary information to formulate an accurate order for a customer and includes information about telephone number, services and features, due date, customer service record, and address. (NY Order ¶ 129; La. II Order ¶ 94.)
 - A BOC's pre-ordering interface must be stable and reliable in order for CLECs to serve their customers efficiently. (NY Order ¶ 154.) It is important for competitors to have equal access to due dates, which in turn requires on-time firm order confirmations, so that competitors do not appear to be less efficient and responsive to their potential customers than the BOC. (La. II Order ¶¶ 104-05.)
 - BOCs who have integrated pre-order and order functions for themselves must enable the same for competitors; otherwise, costs, delays, and risk of error from the need to manually re-enter information into ordering systems would create an impermissible competitive

disadvantage. (NY Order ¶ 137; La. II Order ¶¶ 94-100.) Substantial weight is given to the demonstrated ability of third-party testers “to build an application-to-application interface for all pre-ordering functions.” (NY Order ¶ 134.)

- Providing non-discriminatory access to OSS includes providing all of the processes and databases used by the BOC, including “access to the systems and processes for identifying loop characteristics.” (NY Order ¶ 141.) In connection with DSL services and the special loops those services require, the ability to access pre-ordering information is of particular importance. (DOJ NY Eval. at 25.)
- Ordering Flow-through is not the sole criteria of parity, but poor flow-through is a good indicator of other problems. (NY Order ¶ 161.) Flow-through rates should be used as an indicator of possible deficiencies in OSS that would deny a CLEC a meaningful opportunity to compete. (NY Order ¶ 162.) A BOC must substantiate any claim that competing carriers are to blame for low order flow-through rates. (NY Order ¶ 167; La. II Order ¶ 111.)
- A BOC must provide performance data comparing its delivery of firm order confirmation notices to CLECs with the time it takes for internal notices of its own orders. (NY Order ¶ 195; La. II Order ¶ 123.) Timeliness of order rejection notices, firm order confirmation notices, installation, completion notices, and order jeopardy notices is crucial for new entrants to compete effectively. (La. II Order ¶ 117.) A BOC sending rejection notices by fax is unacceptable, as is manual re-keying of rejection notices before electronic transmission. (La. II Order ¶¶ 114, 119.) A BOC must minimize delay between installation of service and a CLEC’s receipt of a completion notice. (NY Order ¶ 187.)
- A BOC also must demonstrate that the average installation intervals for itself and CLECs are substantially the same; taking twice as much time for CLECs is not good enough. (La. II Order ¶¶ 125-26.)
- A BOC must demonstrate that it offers nondiscriminatory ordering functionality even for complex directory listings, split accounts

(switching only some of a customer's lines to a CLEC), and number portability. (La. II Order ¶¶ 142-44.) Reliance on manual processing will likely not be adequate. (La. II Order ¶ 143.)

- A BOC must have a “stable, robust, and efficient automated” system to ensure effective competition through UNE-Platform. Heavy reliance on manual processes for UNE-Platform increases CLEC costs and may cause customer affecting problems. (DOJ NY Eval. at 29-30.) While the use of some manual processing alone does not per se indicate inadequacy in order processing, systems that rely on a great deal of manual processing may cause problems with timeliness and accuracy of order processing, as well as impede scaleability. (DOJ TX Eval. at 37-38.)
- Provisioning The key to evaluating provisioning is the average installation interval and percentage of due dates missed, but a BOC can show that facial differences between its service to competitors and to itself are due to differences in inputs, such as different types of service or longer requested intervals. (NY Order ¶¶ 194-95.)
- Maintenance and Repair A BOC must furnish access that permits competitors to provide all maintenance and repair functions in “substantially the same time and manner” as the BOC, using the same network information and diagnostic tools as the BOC. (NY Order ¶ 211-2; La. II Order ¶ 145.) Because BOC network problems appear to CLEC customers to be CLEC problems, the CLEC must be able to access and utilize the BOC's maintenance and repair functions to avoid “a severe anticompetitive effect.” (La. II Order ¶ 145)
- CLEC customers needing to submit repeat trouble reports more frequently would indicate that the BOC is providing inferior maintenance support. (La. II Order ¶ 147.)
- A nondiscriminatory maintenance interface must be capable of being used for all types of services. (La. II Order ¶ 149.) The inability to integrate the interface into the CLECs' back end systems is not automatically discriminatory, but the BOC must show that it otherwise

provides equivalent access to its maintenance and repair functions.
(La. II Order ¶¶ 151-52; NY Order ¶ 215.)

- Billing Access to billing information is vital so that competitors may provide accurate and timely bills to their customers. (NY Order ¶ 226; La. II Order ¶ 158.) Billing is one of the primary OSS functions and must include the information necessary for a CLEC to bill for exchange access and termination of local traffic. (La. II Order ¶ 208.)
 - A BOC must provide CLECs with complete and accurate reports on service usage of CLEC customers in the same manner the BOC provides the information to itself. (NY Order ¶ 226; La. II Order ¶ 158.) Failure to provide daily usage information to flat rate customers is discriminatory. A BOC must provide access to information on customer usage that competitors request and that is technically feasible to provide. (La. II Order ¶¶ 159-60.)
 - Double billing evidence shows that a BOC is not providing nondiscriminatory access to its billing functions. (NY Order ¶ 228.) The issue of double billing resulting from inadequate billing information “is a serious problem that has a direct impact on customers and, therefore, must be eliminated.” (Mich. Order ¶ 203.)
- Change Management Change management includes the procedures and methods that a BOC uses to communicate with CLECs about changes in the BOC’s OSS system or the performance of the system. Effective change management is an important factor in proving a BOC is offering competitors support for OSS and thus, a meaningful opportunity to compete. (NY Order ¶ 102.)
 - CLECs’ ability adequately to serve their customers is hindered by the failure of a BOC to provide complete, timely, and accurate notices of alterations to its processes and systems. (NY Order ¶ 113.)
 - The existence of an adequate change management process and evidence that a BOC has followed the process will be given substantial consideration. (NY Order ¶ 102.) An inadequate change management process allows the BOC to impose substantial costs and burdens on

competitors by making changes without adequate testing opportunities, notice, and documentation. (NY Order ¶ 103.)

- The showing of an adequate process should include “(1) evidence of competing carrier input in the design and continued operation of the change management process; (2) the memorialization of the change management process in a basic document; (3) the availability of a separate forum for change management disputes; (4) and the availability of a stable testing environment that mirrors production.” These factors are “indicative, but not dispositive” of an adequate change management process. (NY Order ¶ 111.)
- Technical Assistance and Help Desk Support In demonstrating that it provides nondiscriminatory access to OSS, a BOC must show that it adequately assists CLECs in using its OSS functions. Substantial consideration will be given to evidence showing that a BOC provides CLECs with adequate technical assistance and help desk support. (NY Order ¶ 126.)

Checklist Item 3: Poles, Ducts, Conduits, and Rights-of-Way

- Requirements²⁶ A BOC must demonstrate that it is providing nondiscriminatory access to its poles, ducts, conduits, and rights-of-way at just and reasonable rates, terms, and conditions. (NY Order ¶ 263; La. II Order ¶ 171.) This checklist item is satisfied if the BOC has nondiscriminatory procedures for: the evaluation of facilities requests by competitors; granting competitors nondiscriminatory access to information about its facilities; permitting competitors to use non-BOC workers to complete site preparation; and compliance with applicable rates. (La. II Order ¶¶ 174-83.)
- A BOC is not required to provide access to inside wiring that it does not own or control. (NY Order ¶ 266.)

Checklist Item 4: Loops

- Nondiscriminatory Access²⁷ A BOC must provide CLECs with the same quality of loops the BOC uses to provide service to its own customers, within a reasonable time and with minimal service disruption. (La. II Order ¶ 185.)

- A BOC must provide access to any technically feasible functionality of the loop, even if the BOC must take affirmative steps to condition the loop to enable CLECs to provide services not currently provided, such as xDSL. (NY Order ¶ 271; La. II Order ¶ 187.)
- A BOC must provide unbundled loops even if it uses remote concentration devices for the loops sought by the CLEC. (NY Order ¶ 271; La. II Order ¶ 187.)
- A BOC must provide cross-connect facilities between an unbundled loop and a requesting carrier's collocated equipment on reasonable and nondiscriminatory terms and conditions, as well as provide CLECs unbundled network interface devices. (NY Order ¶ 272; La. II Order ¶ 188.)
- Evaluation of loop access is generally based on whether an efficient competitor has a meaningful opportunity to compete. (NY Order ¶ 269.) But if a state commission adopts a retail analog, through a rigorous collaborative process, the FCC will use that as the means of comparison. (NY Order ¶ 279.)
- As to coordinated cutovers of an active loop, when there is no retail analogue, the FCC will continue to look at the BOC's provisioning of loops in terms of whether it gives competitors a meaningful opportunity to compete. (NY Order ¶ 279, 291.)
- A BOC must be capable of providing loop cutovers, or "hot cuts," based on reasonably foreseeable demand in a timely and reliable fashion. (La. II Order ¶ 192.)
- Loop cutovers must be completed on-time, as scheduled, due to the risk of a customer losing dial tone. (DOJ NY Eval. at 18.) Confirmations and rejections of hot cuts must be provided in a timely manner and the confirmations must be accurate. (DOJ NY Eval. at 15-16.) Additionally, customer directory listings cannot be dropped or delayed during the cutover. (DOJ NY Eval. at 19.)

- DSL Loops As part of section 271 approval, a BOC should “make a separate and comprehensive evidentiary showing with respect to the provision of xDSL-capable loops. . . .” (NY Order ¶ 330; DOJ TX Eval. at 10.) A BOC must show that it provides DSL-capable loops to CLECs in either substantially the same average interval in which it provides service to its retail customers or in an interval that offers CLECs a meaningful opportunity to compete. The FCC prefers this demonstration be made through the use of state or third-party verified performance data. (NY Order ¶ 335.) A BOC should be able to show that it will be capable of handling reasonably expected increases in DSL order volumes. (DOJ NY Eval. at 26.)
- The creation of a separate affiliate for DSL services may show that a BOC complies with the nondiscriminatory provisions of the checklist. A separate affiliate may be particularly appropriate for new offerings where it is difficult to show nondiscrimination through statistical evidence. (NY Order ¶ 331.)
- The FCC should “rigorously examine” the relationship between the BOC and its separate DSL affiliate to ensure nondiscrimination. Additionally, there must be adequate mechanisms in place to “detect, punish and deter any discrimination” between a BOC’s treatment of its affiliate and its treatment of CLECs. (DOJ TX Eval. at 25.)
- When a BOC has failed to provide nondiscriminatory treatment prior to the establishment of a separate DSL affiliate, the BOC should be required to demonstrate that the implementation of the separate affiliate has resulted in nondiscriminatory performance. (DOJ TX Eval. at 26.)
- Absent a separate DSL affiliate, a BOC must show that it provides nondiscriminatory access to DSL loops by a preponderance of the evidence through the use of performance data, in comparison to state performance standards. (NY Order ¶ 333.)
- Performance Measures for DSL Loops Performance measure reports that are accurate and comprehensive will help demonstrate nondiscriminatory access to DSL loops without a separate affiliate. (DOJ TX Eval. at 11.) A BOC should show evidence that it performs maintenance and repair functions for

CLECs' DSL loops in substantially the same time and manner as it does for its retail lines. (NY Order ¶ 335.)

- Through performance measurements, a BOC must show that it meets the same number of installation appointments for both retail customers and CLECs or that the level of missed appointments is sufficiently low to offer CLECs a meaningful opportunity to compete. (NY Order ¶ 335.)
- The quality of loops provisioned to CLECs should be substantially the same as the quality of the lines used for the BOC's provision of retail advanced services. (NY Order ¶ 335.)
- The BOC must demonstrate that it provides CLECs with nondiscriminatory access to pre-ordering and ordering OSS functions, including access to loop qualification information and databases. (NY Order ¶ 335.)
- Evidence A BOC may use performance data on ordering and provisioning intervals that is properly disaggregated and sufficiently detailed to support a determination of nondiscriminatory access. (La. II Order ¶¶ 186-199; NY Order ¶ 270.) A BOC should also identify any performance standards that have been adopted by the relevant state commission or agreed upon by the parties in an interconnection agreement as a basis for comparing the BOC's intervals. (La. II Order ¶ 198.)
- In determining the provision of loops in a nondiscriminatory manner, average installation intervals are of great importance. The FCC will look to other available data when average installation intervals are distorted by factors outside of the BOC's control. (NY Order ¶ 288.)

Checklist Item 5: Transport

- **Requirement**²⁸ Nondiscriminatory access to local transport is necessary for a CLEC to compete on a level playing field. A BOC must provide OSS functions that allow CLECs to order unbundled local transport in a nondiscriminatory fashion. Performance data specifically measuring the provisioning of dedicated and shared transport facilities would be persuasive evidence of nondiscriminatory access. (La. II Order ¶ 206.)
- **Shared Transport** A BOC must provide shared transport between end offices, between end office and tandem switches, and between tandem switches. (NY Order ¶ 337) The BOC must carry CLEC traffic over the same transmission path as the BOC's traffic. (La. II Order ¶ 204.) The BOC must provide shared transport for the purpose of carrying originating and terminating access traffic of the CLEC customers, as well as allow the CLEC to collect the associated access charges. (La. II Order ¶¶ 204, 201.)
- **Dedicated Transport** A BOC must provide CLECs with dedicated transport facilities between all central offices, end offices and tandem central offices, and central offices and interexchange POPs. (NY Order ¶ 337) A BOC must provide access to all the various transmission capabilities without unreasonable delays. (La. II Order ¶ 205.)
- **Special Access** The FCC will not consider the provision of special access for purposes of checklist compliance. (NY Order ¶ 340.) Delays in the provisioning of special access services should be addressed through the Commission's section 208 complaint process. (NY Order ¶ 341.)

Checklist Item 6: Switching

- **Requirement**²⁹ A BOC must provide access to the line-side and trunk-side facilities of the switch, the basic switching function, trunk ports on a shared basis, unbundled tandem switching, vertical features, customized routing, and usage information for billing for exchange access and reciprocal compensation. (NY Order ¶ 343; La. II Order ¶ 210.)
- **Vertical Features** A BOC is required to provide all vertical features loaded in the software of the switch, regardless of whether the BOC offers those

features to its own retail customers. (NY Order ¶ 343; La. II Order ¶ 217.) The BOC must activate any combination or package of vertical features requested by a CLEC, unless a state commission finds through “clear and convincing evidence” that activation is not technically feasible. (La. II Order ¶ 219.)

- Customized Routing A BOC must provide CLECs with technically feasible customized routing functions, so that the CLEC can designate the particular outgoing trunks that will carry certain classes of its customers’ originating traffic. (NY Order ¶ 346 n.1071; La. II Order ¶ 221.) The CLEC must tell the BOC how to route its customers’ calls. (La. II Order ¶ 224.)
- Shared Trunk Ports A BOC must provide trunk ports on a shared basis and the necessary routing tables. (NY Order ¶ 345; La. II Order ¶ 228.)
- Billing Information A BOC must provide billing information necessary for CLECs to bill for exchange access and termination of local traffic. The BOC must also provide the OSS functions to provide CLECs equivalent access to billing information. (NY Order ¶ 344; La. II Order ¶ 208.)

Checklist Item 7: Access to 911, Directory Assistance/Operator Services

- Requirement³⁰ Checklist item 7 covers several functions: 911 and E911; directory assistance; and operator services.
- 911 and E911 A BOC must populate and maintain 911 databases for competitors’ customers with the same accuracy and reliability as for its own customers. (Mich. Order ¶¶ 260, 262-64; La. II Order ¶ 235.) The BOC has the additional duty of providing nondiscriminatory access to the 911 database and 911 trunking. (NY Order ¶ 349; La. II Order ¶ 235; Mich. Order ¶ 278)
 - When the BOC operates the 911 service, a CLEC customer that calls 911 must get the same response as a BOC customer. (Mich. Order ¶¶ 260, 262-64.)
 - Although 911 databases need not be error-free, a BOC must show that errors are detected and remedied as quickly for entries submitted by CLECs as for its own entries. (Mich. Order ¶ 278.)

- Notifying competing carriers of 911 and E911 errors by fax could lead to untimely notification or inaccuracy (SC Order ¶ 230), but a problem must be demonstrated to overcome the BOC's assertion that this method is adequate. (La. II Order ¶ 238.)
- Directory Assistance and Operator Service. A BOC must provide CLECs access to its operator services and directory assistance on par with what it provides itself, and must either rebrand or unbrand these services. (NY Order ¶¶ 352-53; La. II Order ¶¶ 244-246.) When a CLEC wishes to use its own operator services and directory assistance, the BOC must provide access to its database on a "read only" or "per dip" basis and provide all subscriber listing information (except unlisted numbers) in a manner that allows the CLEC to incorporate the information into its own database. (NY Order ¶ 353; La. II Order ¶¶ 242, 248-49.)

Checklist Item 8: Inclusion in White Pages Directory Listings

- Requirement³¹ A BOC's "white pages directory listing" must be a nondiscriminatory alphabetical directory of residential and business listings, including at least the local customer's name, address, telephone number, or any combination. (NY Order ¶ 358; La. II Order ¶¶ 255-56.) The BOC must provide nondiscriminatory appearance and integration of white page listings for CLEC customers, and provide these listings with the same accuracy and reliability that it provides its own customers. (NY Order ¶ 359; La. II Order ¶ 253.)
- Because a CLEC will not be able to compete effectively if its white page listings are not as accurate and reliable as those provided to BOC customers, a BOC must at a minimum have procedures that minimize the potential for errors in CLEC listings. (La. II Order ¶ 257.)

Checklist Item 9: Access to Phone Numbers

- Requirement³² A BOC must demonstrate that it adheres to industry numbering administration guidelines and FCC rules, including provisions requiring the accurate reporting of data to the code administrator. (NY Order ¶¶ 362-4.)

Checklist Item 10: Access to Databases and Associated Signaling

- **Requirement**³³ Each LEC must provide requesting carriers nondiscriminatory access to signaling networks and call-related databases. A BOC must demonstrate it provides nondiscriminatory access to: signaling networks, including signaling links and signaling transfer points; call-related databases necessary for call routing and completion, or physical access to the signaling transfer point; service management systems; and design, create, test, and deploy Advanced Intelligent Network (AIN) based services as the SMS through a Service Creation Environment (SCE). (NY Order ¶ 365; La. II Order ¶¶ 266-67.)

Checklist Item 11: Number Portability

- **Importance**³⁴ The ability of customers to retain their existing telephone numbers without impairment of quality, reliability or convenience when switching local carriers -- local number portability (“LNP”) -- “is critical to the development of meaningful competition . . .” (Mich. Order ¶ 342; La. II Order ¶ 274.)
- **Requirement** A “BOC must demonstrate that it can coordinate number portability with loop cutovers in a reasonable amount of time and with minimum service disruption.” (NY Order ¶ 367; DOJ NY Eval. at 14; La. II Order ¶ 279.) The BOC must provide sufficient data to show that the customer will not be without service for an unreasonable period. (La. II Order ¶ 281.)
- **Permanent LNP** Within six months of a request, a BOC must deploy long-term number portability in switches in areas that were not on the FCC’s deployment schedule. (La. II Order ¶ 290.) Until then, LECs are required to offer interim LNP (“ILNP”) through remote call forwarding, flexible direct inward dialing, or any other comparable and technically feasible method. (NY Order ¶ 368; La. II Order ¶ 277.)
- **OSS** A BOC must show that CLECs have nondiscriminatory access to its operations support systems to order and provision number portability efficiently, both with and without unbundled loops. (La. II Order ¶¶ 285, 293.)

Checklist Item 12: Local Dialing Parity

- **Requirement**³⁵ A BOC must prove that customers of competing carriers are able to dial the same number of digits as the BOC's customers to complete a local telephone call, and that CLEC customers do not suffer inferior quality such as in call completion rate, transmission quality, or post-dialing delays compared to the BOC's customers. (NY Order ¶ 373; La. II Order ¶¶ 296-97.)

Checklist Item 13: Reciprocal Compensation

- **Requirement**³⁶ There must be "just and reasonable" reciprocal compensation agreements for transport and termination of calls between the BOC's and CLEC's networks. (Mich. Order ¶ 293.) A BOC must show that it is making all required reciprocal compensation payments in a timely manner. (NY Order ¶ 376.)
- **ISP Traffic** The FCC ruled that inter-carrier compensation for ISP-bound traffic is not governed by section 251(b)(5),³⁷ therefore making disputes over ISP-bound traffic irrelevant to a 271 determination. (NY Order ¶ 377.)
- **Inter-Carrier Compensation** BOCs must conform to state commission orders concerning inter-carrier compensation pending the completion of the FCC's rulemaking proceeding. (NY Order ¶ 377.)

Checklist Item 14: Resale

- **Requirement**³⁸ A BOC must make all "telecommunications services" available for resale. Any resale restriction is presumed to be unreasonable unless the BOC proves to the state commission it is reasonable and nondiscriminatory. (NY Order ¶¶ 378-79; La. II Order ¶¶ 306-07.)
- Voice mail and voice messaging services are information services rather than telecommunications services, so need not be offered for resale. (La. II Order ¶ 314.)

- Where a competitor seeks to resell vertical products that a BOC does not offer at retail to its subscribers, the BOC need only provide access to unbundled switching, resale does not apply. (NY Order ¶ 397.)
- OSS A BOC must show that CLECs have nondiscriminatory access to its operations support systems for resale. (La. II Order ¶¶ 308, 319; NY Order ¶ 380.)
- DSL-based services Generally, DSL services are subject to resale obligations when the services are designed for and sold to residential and business end-users. However, when a BOC offers DSL services to ISPs who combines those services with their own Internet service, the discount resale obligations do not apply. (NY Order ¶ 393.)
- Contract Service Arrangements (“CSAs”) A BOC must offer CSAs at a wholesale discount. (La. I Order ¶¶ 59, 65.) Any service sold to end users is a retail service and is subject to the wholesale discount requirement, even if it is already priced at a discount off the price of another retail service. (La. I Order ¶ 65.)
- A state commission need not apply the general wholesale discount rate to the resale of CSAs, and may instead apply a single discount rate based on the costs avoidable by offering CSAs at wholesale. (La. I Order ¶ 66.) As long as CSAs are provided at some state-determined wholesale discount, it does not matter if the state permits the BOC to change the discount. (La. II Order ¶ 313.)

III. A BOC MUST COMPLY WITH SEPARATE AFFILIATE REQUIREMENTS

- Requirement³⁹ A section 271 applicant must submit a plan for providing long distance service that demonstrates full compliance with the separate affiliate requirements of section 272 and the FCC’s regulations as set forth in the Non-Accounting Safeguards Order. The BOC has incentives to discriminate against rivals. Compliance with section 272 is “of crucial importance”, “because the structural, transactional, and nondiscrimination safeguards provided by this section of the Act seek to ensure that BOCs compete on a

level playing field.” (NY Order ¶ 402; Mich. Order ¶¶ 345-353.) The goal of this separation requirement is to make it easier to enforce the requirement that the BOC treat its long distance operation no better than unaffiliated long distance companies.⁴⁰

- Noncompliance with section 272 can be independent grounds for the denial of a section 271 application. (NY Order ¶ 402.)
- The FCC will look to the BOC’s past and present behavior to make a predictive judgment concerning whether the BOC will comply with section 272. (NY Order ¶ 402; Mich. Order ¶ 347.)
- Operate Independently A BOC and its 272 separate affiliate are restricted from jointly owning switching and transmission facilities, from jointly owning the land and buildings in which such facilities are located, and from operating, installing or maintaining each other’s facilities. (NY Order ¶ 406; La. II Order ¶ 325.) The 272 separate affiliate is also prohibited from provisioning operation, installation, and maintenance services with respect to the BOC’s facilities. (NY Order ¶ 406.)
- Separate Books, Records, and Accounts A BOC and its affiliate must separately maintain their books, accounts, and financial records in accordance with FCC requirements. (NY Order ¶ 408; La. II Order ¶ 328.)
- Separate Officers, Directors, and Employees A BOC and its affiliate must have independent management, which includes separate boards of directors if the corporations are wholly-owned subsidiaries of the same parent corporation. (NY Order ¶ 409; La. II Order ¶ 329.) The BOC is not required in its application to outline the reporting structure of the board or establish a minimum number of members. (La. II Order ¶ 330.)
- Credit Arrangements A BOC, a parent of the BOC, or any non-section 272 BOC affiliate is prohibited from co-signing a contract or other instrument with its section 272 affiliate that would permit a creditor recourse to the BOC’s assets in the event of default by the section 272 affiliate. (La. II Order ¶ 331; NY Order ¶ 410.)

- Affiliate Transactions All affiliate transactions that occurred after February 8, 1996 or will occur must be reduced to writing, publicly disclosed, and conducted on an arm's-length basis. (La. II Order ¶¶ 332-33, 337.)
 - Public disclosure consists of a detailed written description of the asset transferred or the service provided in the transaction that is sufficiently detailed to allow for FCC evaluation, that is available for public inspection on the Internet within ten days of the transaction or at the BOC's home office, and that is certified to be true and accurate. (La. II Order ¶ 333; NY Order ¶ 411.)
 - A BOC must submit with its section 271 application a description of its corporate policies, evidence of internal accounting training, full disclosure of all BOC and section 272 affiliate transactions, and an explanation of the valuation methodologies it applied to those transactions. (La. II Order ¶ 340; NY Order ¶ 411, n.1267.)
 - Compliance with the Part 32 affiliate transaction rules will satisfy the accounting requirements of section 272 which pertain to the BOC's dealings with its separate affiliates. (NY Order ¶ 415.)
- Nondiscrimination Safeguards A BOC must provide the same goods, services, facilities, and information to unaffiliated entities that it provides to its section 272 affiliate, including those that are not telecommunications-related and administrative and support services. (La. II Order ¶¶ 341-42; NY Order ¶ 417.) A BOC must fulfill those requests within the same time period as it fulfills requests for its section 272 affiliate. (NY Order ¶ 418.)
- Joint Marketing Restrictions A section 272 affiliate may not market BOC telephone exchange services unless the BOC permits competitors of the affiliate to market and sell the BOC's telephone exchange services. (La. II Order ¶ 356.) The BOC must provide new local customers with the names of all long distance companies, but if a consumer requests information regarding the affiliate's service, the BOC may provide the consumer accurate information. (La. II Order ¶¶ 357-58.)

- Biennial Audit Section 272 requires that, after a BOC receives section 271 authority, a biennial, independent audit must occur to determine continued compliance with section 272. The audit should involve a thorough and systematic evaluation of a BOC's compliance with section 272. (NY Order ¶ 416.)

IV. BOC LONG DISTANCE ENTRY MUST BE IN THE PUBLIC INTEREST

- Requirement⁴¹ After the other three requirements are satisfied, the public interest test is the final hurdle before BOC entry into in-region long distance. (Mich. Order ¶ 381.) The overriding goal in the public interest analysis is to ensure that nothing undermines the conclusion, suggested by checklist compliance, that markets are open. (NY Order ¶ 423.) The FCC has broad discretion in its public interest analysis, and the test requires a case by case analysis. (La. II Order ¶ 362.)
- Limiting or Extending Checklist⁴² The FCC is not permitted by the Act to “limit or extend” the competitive checklist. (Mich. Order ¶ 385; NY Order ¶ 424.) This restriction does not preclude the FCC from considering issues relating to local competition beyond the checklist as part of its public interest analysis. (Mich. Order ¶¶ 389-90.)
 - The public interest test is independent from the checklist and requires a review of the effect of section 271 entry on all markets, including local markets. (NY Order ¶ 423; La. II Order ¶ 362.) However, compliance with the checklist is a strong indicator that section 271 authorization is in the public interest. (NY Order ¶ 422.) But a strong public interest demonstration can not overcome non-compliance with one or more checklist items. (NY Order ¶ 424.)
- Market Analysis The FCC may examine both the local market and long distance market in this inquiry. (NY Order ¶ 423.) But if the local market is open and it is determined that reasonable assurances exist that the market will remain open, a BOC will not be required to make a substantial additional showing that its participation in the long distance market will produce public interest benefits. (NY Order ¶ 428.)

- Absence of Local Competition Although the FCC did not adopt a market share or other similar test for BOC entry into long distance, market facts that can be linked to an omission or commission by the BOC are relevant to the public interest analysis. (NY Order ¶ 427.) If a BOC lacks the “best” evidence of significant competition to show the local market is open, it must then prove “that significant barriers are not impeding the growth of competition” (DOJ La. I Eval. at 3.) The more vigorous local competition is in the local market the better, but in the absence of “broad-based competition,” the FCC will determine whether the problem is continuing BOC barriers to entry, lack of BOC cooperation, the business decisions of new entrants, or some other reason. (Mich. Order ¶ 402.) A BOC’s long distance entry should not be delayed because of business strategies of CLECs. (DOJ La. I Eval. at 3.) A BOC may demonstrate that it is not responsible for the absence of broad-based entry and instead is ready, willing and able to provide each type of entry method throughout the state. (Mich. Order ¶ 392.)
- Emphasis on Local The primary emphasis of the public interest test is whether local markets are open to competition and will remain open, although the FCC will also look at benefits that result from additional long distance competition. (Mich. Order ¶ 388.) The FCC rejected the argument that the public interest determination is limited to the effect on long distance market of granting a section 271 application. (Mich. Order ¶ 386; NY Order ¶ 428.)
 - The benefits from opening the BOC’s local markets prior to allowing long distance entry are likely to substantially exceed the benefits from more rapid BOC participation in long distance markets. (DOJ SC Eval. at 49; DOJ La. I Eval. at 35.)
 - The FCC should not delay BOC entry until the BOC’s market power is eliminated or until local competition is “fully effective.” (DOJ Okla. Eval. at vii, 44; DOJ Schwartz Aff. ¶ 52.)
- Impact on Long Distance In assessing the impact of BOC entry on long distance competition, it is critical to determine whether the local market is open to competition and to evaluate whether compliance with sections 271 and 272 has in fact reduced the BOC’s bottleneck control of local access. (Mich. Order ¶ 40.) When the local market has been opened to competition,

and there are reasonable assurances that it will remain open, BOC entry into the long distance market will further Congress's pro-competitive objectives. (Mich. Order ¶ 381; NY Order ¶ 427.)

- Anti-Backsliding Incentives The FCC will consider various indicia that a BOC will continue to comply in the future. BOCs are not required to show that they are subject to state monitoring and post-entry enforcement, but such enforcement is good evidence that the BOC will comply with the requirements of 271 in the future. (NY Order ¶ 429.)
- Under the public interest standard, the FCC states that it would be “particularly interested” in performance standards backed by self-executing enforcement mechanisms, and notes their importance to successful local exchange competition. (La. II Order ¶ 364.)
- Where a BOC relies on performance monitoring and enforcement mechanisms to show that it will not backslide, the FCC will review the mechanisms to ensure that they will perform as promised. Factors the FCC will look for include:
 - “potential liability that provides a meaningful and significant incentive to comply with the designated performance standards;
 - “clearly-articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance;
 - “a reasonable structure that is designed to detect and sanction poor performance when it occurs;
 - “a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal;
 - “and reasonable assurances that the reported data is accurate.” (NY Order ¶ ¶ 432-33.)
- In determining if liability provides a significant incentive, it is relevant to compare a BOC's net revenue from local service to maximum remedy amount. The FCC found a remedy amounting 36% of all local revenue to create a substantial deterrent. (NY Order ¶¶ 434-36.)

- Liability under a plan need not be sufficient, standing alone, to offset the BOC's incentive to discriminate. Other incentives for continued compliance include possible federal enforcement actions under 271(d)(6); liquidated damages under interconnection agreements; and remedies associated with antitrust and other legal actions. (NY Order ¶ 435).⁴³
- The FCC needs to look at possible real-life remedies, not those just theoretically possible under the plan. (NY Order ¶¶ 436-40.)
- Too many "waiver" rules might make a plan insufficiently self-executing. (NY Order ¶ 441.)
- Accounting rules for "market adjustments" should ensure that penalties under the performance plan are not passed on to ratepayers in the form of increased rates. (NY Order ¶ 443.)

Enforcement Authority

- **FCC Authority** As part of its enforcement authority, the FCC may order a BOC to correct the deficiency, impose a penalty, or suspend or revoke 271 approval.⁴⁴ The FCC may also use its enforcement authority under sections 206-209 of the Communications Act. (NY Order ¶ 447.)
- To suspend a BOC's 271 authority, the FCC will issue a "stand-still" order which would prohibit the BOC from enrolling new customers or from marketing its long distance service. (NY Order 449.)
- The language of the statute does not require formal, trial-type proceedings before the FCC can exercise its suspension authority. (NY Order ¶ 450.)
- Complaints about BOC compliance can also be made via the FCC's complaint process for damages. (NY Order ¶ 452.)
- **Swift Enforcement** Swift and effective post-approval enforcement is essential to achieving ongoing competition in local markets. (NY Order ¶ 446.)

V. PROCESS FOR REVIEWING BOC SECTION 271 APPLICATIONS

- Basics⁴⁵ The procedures for reviewing BOC section 271 applications are straightforward:
 - (i) a BOC must file a complete application with the FCC for the state for which it seeks interLATA authorization;
 - (ii) the FCC must consult with the Attorney General and with the public service commission for the state at issue;
 - (iii) the FCC generally requires the submission of any comments from the state commission and interested parties within 20 days after receipt of a section 271 application, comments from DOJ within 35 days, and all reply comments within 45 days⁴⁶; and
 - (iv) the FCC must approve or deny the application within 90 days of receiving it, and state its reasons. However, in appropriate circumstances, the FCC will consider “restarting the clock.”
- Burden of Proof The burden of proof is on the BOC to show that all requirements of section 271 have been satisfied. Opponents may then produce evidence and arguments showing why the requirements of section 271 are not met, but the ultimate burden of proof rests on the BOC. The “preponderance of the evidence” standard will apply. (NY Order ¶¶ 49-50; La. II Order ¶¶ 51-59.)
- Anecdotal evidence by opponents may not be sufficient to overcome a BOC’s initial demonstration of compliance with a section 271 requirement, and may itself be overcome by performance data. (La. II Order ¶¶ 57, 284; NY Order ¶¶ 49-50.) A BOC is not held to a “standard of perfection” but must establish methods to respond to problems and to prevent future recurrences. (La. II Order ¶ 57.)
- Complete Applications BOC section 271 applications should be complete when filed. A BOC may not at any time supplement its application with new factual evidence “that is not directly responsive to arguments raised by parties

commenting on its application.” If the BOC violates this rule, the FCC may re-start the 90-day clock or disregard the evidence. (NY Order ¶¶ 34-7; SC Order ¶¶ 38, 209.) However, this is a discretionary rule.

- A BOC may submit new evidence in reply if the sole purpose is to rebut arguments made or facts submitted by commenters, “provided the evidence covers only the period placed in dispute by commenters,” and does not post-date the comments of others. New facts relating to particular incidents raised by commenters are acceptable. (NY Order ¶¶ 34-7; Mich. Order ¶¶ 51-53; SC Order ¶¶ 42-45.)
- It was appropriate for the FCC to request clarification of matters through ex parte presentations and submissions. An ongoing dialog is critical to the FCC’s deliberative process. Like reply comments, ex partes must be directly responsive, but may respond to other ex partes or to requests from FCC staff. (NY Order ¶¶ 41-2.)
- If the FCC denies a section 271 application but finds compliance with some checklist items, in a future application the BOC may rely on the checklist items it previously satisfied as long as it certifies that it still meets those requirements. (La. II Order ¶ 8.) The presumption of continuing compliance is rebuttable. (La. II Order ¶ 8.)
- Paper Promises A BOC’s promises of future performance have “no probative value” as to present compliance with section 271. “Paper promises” cannot satisfy the BOC’s burden of proof (except that prospective assurances are required to demonstrate compliance with section 272). The BOC decides when to file, and it must be in full compliance at that time. (Mich. Order ¶¶ 55-59; SC Order ¶ 38; NY Order ¶ 37.) The FCC should avoid any precedent that would allow section 271 compliance to be satisfied by promises of future compliance. (DOJ NY Eval. at 43.)
- Role of FCC Unless the FCC concludes to its own satisfaction that the applying BOC has satisfied all of the statutory requirements, it “shall not approve the authorization.” (SBC v. FCC, 138 F.3d at 416.)
- Role of DOJ⁴⁷ The FCC is required to consult with the Attorney General at DOJ (which evaluates the application under any standard the Attorney

General considers appropriate) and to give DOJ's evaluation "substantial weight." (La. I Order ¶ 16.) The FCC will give substantial weight to DOJ's evaluation of each of the criteria for BOC entry, in addition to its evaluation of the effect of BOC entry on long distance competition. (La. I Order ¶ 16.)

- Role of State Commission⁴⁸ The FCC is also required to consult with the relevant state commission to verify BOC compliance with Track A or Track B and the checklist requirements (but nothing else). (La. I Order ¶ 7; DOJ SC Eval. at 14, 15.) In contrast with DOJ's evaluation, the Act does not direct the FCC to give the state's comments any special weight. (DOJ SC Eval. at 16.)
- The FCC will consider carefully those state commission findings that are supported by a detailed and extensive record. (La. I Order ¶ 9.) The FCC asks state commissions to develop a record analyzing the state of competition in the future, including the identity of providers and number and type of customers. (La. I Order ¶ 12; Mich. Order ¶¶ 31-34.) The FCC will not limit its consideration to issues or facts that were presented to the state commission, although parties should make every effort to present their views in the state forum. (SC Order ¶ 27.)
- When the state commission has "applied the proper legal standards" and "made reasoned decisions," the FCC may rely on the state commission's conclusions. (DOJ SC Eval. at 15.) Despite the Act's requirements to consult with the state commission and DOJ, however, "the Commission must determine checklist compliance" and whether all requirements have been met. (DOJ SC Eval. at 14, emphasis in original; SC Order ¶ 29; SBC v. FCC, 138 F.3d at 416-17.)

Glossary of Basic Terms

BFR -- bona fide request; a request by a CLEC to a BOC for additional forms of interconnection or access

BOC -- Bell Operating Company; one of the seven local exchange monopolies formed by the break-up of the Bell System in 1982; often used synonymously with the terms “RBOC” (Regional Bell Operating Company) and “Baby Bell”; recent mergers of the original BOCs leave Bell Atlantic (which acquired NYNEX), BellSouth, U S West, and SBC (which acquired PacBell and Ameritech, along with non-BOC SNET); Bell Atlantic has announced plans to merge with GTE (a non-BOC), if regulators approve

CLEC -- competitive local exchange company; CLECs compete with the BOCS and other ILECs to provide local exchange service, as well as other telecommunications services, by building their own local loops (wired or wireless) or other facilities, leasing local loops and other UNEs from the ILECs at wholesale rates, or reselling ILEC services

CSA -- Contract Service Arrangement; a contract between a carrier and its customer which is tailored to the customer’s individual needs, such as volume or term arrangements

DA -- directory assistance

DSL -- see xDSL

ILEC -- incumbent local exchange company; the local telephone monopoly, including the BOCs, GTE and others defined by section 251(h)

ILNP -- interim local number portability

InterLATA -- long distance

IXC -- interexchange carrier; another term for long distance or interLATA carrier

LATA -- Local Access Transport Area; area within which BOCs can provide telephone service without additional authority

LD -- long distance

LEC -- local exchange company; generic term for any company that provides local telephone service (compare ILEC and CLEC)

LNP -- local number portability; the ability of consumers to retain their existing numbers, without impairment of quality or convenience, when switching from one local exchange company to another

MFJ -- Modification of Final Judgment; the 1982 order which settled antitrust litigation between the Bell System and DOJ, which broke up the Bell System into AT&T and seven regional Bell Operating Companies, and which restricted the divested BOCs from providing long distance service

NID -- network interface device, which connects the loop to the customer's premises

NRC -- non-recurring charge; one-time fees imposed for establishing or setting up services

OSS -- operations support systems

OS -- operator services

PCS -- Personal Communication Service; wireless service that is a substitute for cellular service

SGAT -- statement of generally available terms

TELRIC -- Total Element Long Run Incremental Cost; a method for calculating the price a monopolist should charge based on the price a company would charge in a competitive market

UNE -- unbundled network element

xDSL -- a family of digital subscriber line services that allow customers to use higher bandwidths of the copper loop for advanced telecommunications services

Endnotes

1. Pub. L. No. 104-104, 110 Stat. 56 (codified throughout 47 U.S.C.). On September 4, 1998, the United States Court of Appeals for the Fifth Circuit upheld the constitutionality of sections 271-275 of the Act, overturning the decision of the United States District Court for the Northern District of Texas, which had found that the sections were an unconstitutional bill of attainder. *SBC Communications, Inc. v. FCC*, 981 F. Supp. 996 (N.D. Tex. 1997) (ruling applicable to SBC and U S West and subsequently extended to Bell Atlantic), reversed, 154 F.3d 226 (5th Cir. 1998), cert denied 525 U.S. 1113, 67 USLW 3458 (1999); 1999 US. IS 735 (Jan. 19, 1999).
2. Federal Communications Commission Memorandum Opinion and Order in the Matter of the Section 271 Application of Ameritech Michigan to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137 (August 19, 1997).
3. Federal Communications Commission Memorandum Opinion and Order in the Matter of the Section 271 Application of BellSouth Corporation to Provide In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208 (December 24, 1997).
4. United States Department of Justice Evaluation of the Section 271 Application of Bell South Corporation, et al., for Provision of In-Region, InterLATA Services in Louisiana, FCC CC Docket No. 97-231 (December 10, 1997) (Louisiana I).
5. United States Department of Justice Evaluation of the Second Section 271 Application of Bell South Corporation, et al., for Provision of In-Region, InterLATA Services in Louisiana, FCC CC Docket No. 98-121 (August 19, 1998) (Louisiana II).
6. Federal Communications Commission Memorandum Opinion and Order in the matter of the Section 271 Application of Bell Atlantic New York to Provide In-Region, InterLATA Service in the State of New York, FCC CC Docket No. 99-295 (Dec. 22, 1999).
7. Section 271(d)(3) of the Act sets forth the substantive test that the FCC must apply:

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.

8. Federal Communications Commission Memorandum Opinion and Order in the Matter of the Section 271 Application of BellSouth Corporation to Provide In-Region, InterLATA Services in Louisiana, CC Docket No. 97-231 (February 4, 1998) (Louisiana I).

9. The requirement that a BOC must meet either Track A or Track B is established by section 271(c)(1), which provides in relevant part:

(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.

10. Federal Communications Commission Memorandum Opinion and Order in the Matter of the Section 271 Application of SBC Communications Inc. to Provide In-Region, InterLATA Services in Oklahoma, FCC CC Docket No. 97-121 (June 26, 1997).

11. Section 271(c)(1)(A) establishes Track A by providing:

(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.

12. Federal Communications Commission Memorandum Opinion and Order in the Matter of the BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana, FCC Docket No. CC Docket No. 98-121 (October 13, 1998) (Louisiana II).

13. Addendum to the United States Department of Justice Evaluation of the Section 271 Application of SBC Communications Inc. et al. to Provide In-Region, InterLATA Services in the State of Oklahoma, FCC CC Docket No. 97-121 (May 21, 1997).

14. United States Department of Justice Evaluation of the Section 271 Application of Bell South Corporation, et al., for Provision of In-Region, InterLATA Services in South Carolina, FCC CC Docket No. 97-208 (November 4, 1997).

15. Citing Mich. Order ¶ 114, DOJ states that the FCC has decided that “the statutory distinction between ‘providing’ (under Track A) and ‘offering’ (under Track B) does not suggest a distinction in the meaning of those terms. . . .” (DOJ SC Eval. at 13 n.25.)

16. Section 271(c)(1)(B) establishes Track B by providing:

(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.

17. The checklist requirements are set forth in section 271(c)(2)(B) as follows:

(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:

[Subsections i - xiv are set forth below and discussed in Section II, A BOC MUST SATISFY THE FOURTEEN POINT CHECKLIST of this document.]

18. See section 271(d)(3)(A)(i).

19. Petition for review denied, Bell South Corp. v. FCC, 162 F.3d 678 (D.C. Cir. 1998).

20. United States Department of Justice Evaluation of the Section 271 Application of SBC Communications Inc. et al. to Provide In-Region, InterLATA Services in the State of Oklahoma, FCC CC Docket No. 97-121 (May 21, 1997).

21. The first item of the competitive checklist in section 271(c)(2)(B) is as follows: “(i) Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1).”

22. United States Department of Justice Evaluation of the Section 271 Application of SBC Communications, Inc., et al., for Provision of In-Region, InterLATA Services in Texas, FCC CC Docket No. 00-4 (February 14, 2000).

23. The second item of the competitive checklist in section 271(c)(2)(B) is as follows: “(ii) Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1).”

Section 251(c)(3) imposes duties on ILECs as follows:

(3) Unbundled access.--The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

Section 252(d)(1) states as follows:

(1) Interconnection and network element charges.--Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of Section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section--

(A) shall be--

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

24. In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking (rel. November 5, 1999) (“UNE Remand Order”); 47 C.F.R. section 51.319(a-g).

The Act treats elements in which the ILEC (not a third party vendor, per UNE Remand Order ¶ 38) has a proprietary interest differently from those which are non-proprietary. An element is proprietary if it contains material protected by patent, copyright or trade secret law (id. ¶ 35). For proprietary elements, the FCC must consider whether access to such elements is “necessary.” Access to an element is necessary where without such access, as a practical matter the CLEC is precluded from offering the service it seeks to offer. (Id. ¶ 44.)

For non-proprietary elements, the FCC must consider whether a CLEC would be “impaired” without access to the element. A CLEC is impaired when lack of access to an element “materially diminishes a CLEC’s ability to provide the service it seeks to offer.” (Id. ¶ 51.) In judging whether CLECs are impaired without access to an element, the FCC will consider several factors,

including cost, ubiquity, quality, timeliness and operational impediments. (Id. ¶ 63.)

In determining whether to unbundle an element, in addition to “necessary” and “impair,” the FCC also considers whether unbundling will: encourage CLECs rapidly to enter the market to serve greatest number of customers; encourage facilities-based competition; encourage investment in new technologies by ILECs and CLECs; reduce regulation; provide certainty in the marketplace; and be easy to administer. (Id. ¶¶ 103-105.)

The application of these standards produced the list of network elements that ILECs must unbundle set forth in the text: Loop (including subloop and dark fiber); NID; Switching (with limitations, and including packet switches with limitations); Transport (both shared and dedicated); Signaling and call-related databases; OS/DA (only in limited circumstances); and OSS.

25. United States Department of Justice Evaluation of the Section 271 Application of Bell Atlantic Communications, Inc., et al., to Provide In-Region, InterLATA Services in New York, CC Docket No. 99-295 (Nov. 1, 1999).

26. The third item of the competitive checklist in section 271(c)(2)(B) is as follows: “(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.”

27. The fourth item of the competitive checklist in section 271(c)(2)(B) is as follows: “(iv) Local loop transmission from the central office to the customer’s premises, unbundled from local switching or other services.”

28. The fifth item of the competitive checklist in section 271(c)(2)(B) is as follows: “(v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.”

29. The sixth item of the competitive checklist in section 271(c)(2)(B) is as follows: “(vi) Local switching unbundled from transport, local loop transmission, or other services.”

30. The seventh item of the competitive checklist in section 271(c)(2)(B) is as follows:

- (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.

31. The eighth item of the competitive checklist in section 271(c)(2)(B) is as follows: “(viii) White pages directory listings for customers of the other carrier’s telephone exchange service.”

32. The ninth item of the competitive checklist in section 271(c)(2)(B) is as follows: “(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."

In addition, section 251(b)(3) imposes the requirement of "nondiscriminatory access to telephone numbers" on all LECs on an ongoing basis.

33. The tenth item of the competitive checklist in section 271(c)(2)(B) is as follows: "(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion."

34. The eleventh item of the competitive checklist in section 271(c)(2)(B) is as follows: "(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."

"Number portability" is defined in section 153(3) as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another."

35. The twelfth item of the competitive checklist in section 271(c)(2)(B) is as follows: "(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)."

Section 251(b)(3) states as follows:

(3) Dialing parity.-- The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

36. The thirteenth item of the competitive checklist in section 271(c)(2)(B) is as follows: "(xiii) Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)."

Section 252(d)(2) provides as follows:

(2) Charges for transport and termination of traffic.--

(A) In general.-- For the purposes of compliance by an incumbent local exchange carrier with Section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--

(i) such terms and conditions provide for the mutual and reciprocal

recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction.-- This paragraph shall not be construed--

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

37. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Rulemaking and Notice of Proposed Rulemaking, 14 FCC Rcd 3689 (1999).

38. The fourteenth and final item of the competitive checklist in section 271(c)(2)(B) is as follows: "(xiv) Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)."

Section 251(c)(4) sets forth the resale obligation as follows:

(4) Resale.-- The duty--

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

Section 252(d)(3) provides as follows:

(3) Wholesale prices for telecommunications services.-- For the purposes of Section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

39. Sections 272(a)-(c) provide that a BOC must use a separate affiliate for providing long distance service:

(a) Separate Affiliate Required for Competitive Activities.--

(1) In general.--A Bell operating company (including any affiliate) which is a local exchange carrier that is subject to the requirements of section 251(c) may not provide any service described in paragraph (2) unless it provides that service through one or more affiliates that--

(A) are separate from any operating company entity that is subject to the requirements of section 251(c); and

(B) meet the requirements of subsection (b).

(2) Services for which a separate affiliate is required.--[OMITTED]

(b) Structural and Transactional Requirements.--The separate affiliate required by this section--

(1) shall operate independently from the Bell operating company;

(2) shall maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the Bell operating company of which it is an affiliate;

(3) shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate;

(4) may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the Bell operating company; and

(5) shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection.

(c) Nondiscrimination Safeguards.--In its dealings with its affiliate described in subsection (a), a Bell operating company--

(1) may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards; and

(2) shall account for all transactions with an affiliate described in subsection (a) in accordance with accounting principles designated or approved by the Commission.

40. Section 272(e) provides for nondiscriminatory treatment of the BOC's affiliate and CLECs, as follows:

(e) Fulfillment of Certain Requests.--A Bell operating company and an affiliate that is subject to the requirements of section 251(c)--

(1) shall fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such telephone exchange service and exchange access to itself or to its affiliates;

(2) shall not provide any facilities, services, or information concerning its provision of exchange access to the affiliate described in subsection (a) unless such facilities, services, or information are made available to other providers of interLATA services in that market on the same terms and conditions;

(3) shall charge the affiliate described in subsection (a), or impute to itself (if using the access for its provision of its own services), an amount for access to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange carriers for such service; and

(4) may provide any interLATA or intraLATA facilities or services to its interLATA affiliate if such services or facilities are made available to all carriers at the same rates and on the same terms and conditions, and so long as the costs are appropriately allocated.

41. Section 271(d)(3)(C) provides that the FCC shall not approve the authorization requested in a BOC section 271 application unless the FCC finds that “the requested authorization is consistent with the public interest, convenience, and necessity.”

42. Section 271(d)(4) provides:

(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).

43. The FCC and NY PSC took action in March 2000 against backsliding by Bell Atlantic in New York, imposing fines totaling \$13 million for Bell Atlantic’s significant problem with lost or mishandled CLEC orders.

44. Section 271(d)(6)(A) provides:

(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 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.

45. Section 271(d)(3) establishes the requirements for the FCC’s decision as follows:

(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 state the basis for its approval or denial of the application.

46. See Federal Communications Commission Public Notice, Revised Procedures for Bell Operating Company Applications Under Section 271 of the Communications Act (September 19, 1997).

47. Section 271(d)(2)(A) provides that the FCC must consult with DOJ, as follows:

(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).

48. Section 271(d)(2)(B) provides that the FCC must consult with state commissions, as follows:

(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).