

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

Petition for Declaratory Rulings on the)
Realistic Choice Standard for Implementing)
the Public Interest Test in Section 271)
of the Communications Act of 1934.)

To: The Commission

Petition for Declaratory Rulings
on the
Realistic Choice Standard for Implementing the
Public Interest Test in Section 271
of the Communications Act of 1934
of the
Competition Policy Institute,
American Association of Retired Persons,
Iowa Office of Consumer Advocate,
Maine Office of Public Advocate,
South Carolina Department of Consumer Affairs, and
Utility Consumers' Action Network

July 20, 1998

SUMMARY

1. **The Commission should issue Declaratory Rulings to clarify the meaning of the public interest standard outside of a ruling on any specific BOC application under Section 271.**

To date, the FCC has ruled on four BOC applications under section 271 of the Communications Act. In these orders, the FCC has provided extensive discussion of the requirements of the Tracks A and B, the “competitive checklist,” and the separate affiliate requirements. But it has not defined the public interest “prong” of the three-part test that governs whether a BOC application to provide long distance service can be granted. The public interest test is intended to ensure that each BOC application satisfies the overriding purpose, not just the technical details, of the legislation. Furthermore, the public interest test is the most important provision of section 271 for consumers. The failure to interpret the public interest test outside of a ruling on a BOC application that meets the checklist could render the public interest test meaningless. For these reasons, the FCC should open a proceeding, and issue declaratory rulings, on the public interest standard separate from any particular BOC 271 application.

2. **The FCC should declare that it will use the public interest test to examine each BOC application from the perspective of residential and business consumers.**

In section 271, the operations of Tracks A and B and the “competitive checklist” are critically important to competing *carriers*. In contrast, the public interest test is critically important to *residential and business consumers*. Examining the overall merit of each BOC application from the perspective of consumers is necessary to give the public interest standard meaning that is separate and independent of the “competitive checklist.” The Commission should state affirmatively that it will not find that a BOC application meets the public

interest test unless *both residential and business consumers* will benefit from entry of the BOC into the long distance market.

- 3. The FCC should declare that the most important factor in its public interest analysis is whether residential and business consumers in the state have a “realistic choice” of an alternative local telephone provider.**

The FCC must interpret the public interest standard in a manner consistent with the purposes of the legislation. The overriding purpose of the legislation is to promote local telephone competition. The FCC can best promote this objective by ensuring that both residential and business consumers have a “realistic choice” of a competitive local exchange carrier before granting a BOC application under section 271. Consumers are likely to benefit from the entry of the BOC into long distance only if the BOC faces a competitive threat from another local telephone company before it enters the long distance market.

The FCC should declare that each BOC application will be presumed to pass the public interest test if residential and business consumers have a realistic choice of an alternative carrier, or presumed to fail if consumers do not have such a choice. In the alternative, the FCC should declare that, among all the factors it considers under the public interest standard, the FCC will give primary importance to whether residential and business consumers have a realistic choice of a competitive local exchange carrier.

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PETITION FOR DECLARATORY RULINGS

The Competition Policy Institute, American Association of Retired Persons, Iowa Office of Consumer Advocate, Maine Office of Public Advocate, South Carolina Department of Consumer Affairs, and Utility Consumers' Action Network (collectively "Joint Petitioners")¹ hereby request that the Federal Communications Commission ("FCC" or "Commission") issue two rulings pursuant to Section 1.2 of its Rules (47 C.F.R. § 1.2). First, Joint Petitioners ask the Commission to declare that it will use the public interest test in Section 271 of the Communications Act of 1934 to examine each Bell Operating Company ("BOC") application to provide in-

¹ A summary description of each of these organizations is provided in the Appendix.

region, interLATA service from the perspective of residential and business telephone consumers. Second, Joint Petitioners ask the Commission to declare that BOC applications will be presumed to satisfy the public interest test if residential and business consumers have a “realistic choice” of alternative local telephone carriers and presumed to fail if consumers do not have such a choice. In the alternative, the FCC should declare that, among all the factors it considers under the public interest test, it will give primary importance to whether residential and business consumers have a “realistic choice” of alternative local telephone providers before granting a BOC application under section 271.

Joint Petitioners urge the Commission to seek comment on this petition and to issue the requested rulings.

I. INTRODUCTION

To date, the FCC has focused its section 271 efforts on the status of the BOCs’ implementation of the competitive checklist, the operations of Track A and Track B, and the separate affiliate requirements. While these efforts are tremendously important, they have overshadowed the third (and arguably the most significant) prong of the three-part interLATA entry test — the public interest test.

Joint Petitioners believe that the public interest test is the most important provision of section 271 for residential and business consumers.

The requirements of Track A and Track B and the competitive checklist are of tremendous importance to *competitors*. The public interest test, on the other hand, allows the FCC to analyze directly the effects of each application on *consumers*.

The Commission should take the opportunity provided by the public interest test to step back from the technical details of the Telecommunications Act of 1996 and ask the fundamental question of each application: Will granting the application benefit residential and business consumers?

Joint Petitioners believe that consumers are likely to benefit from BOC entry into the interLATA market only if they first have a “realistic choice” of alternative providers of local telephone service. If consumers have a “realistic choice,” the BOC will have incentives to flow through the benefits of its long distance entry to consumers. Further, the realistic choice approach will reduce the need for post-entry regulation to protect consumers. Finally, the realistic choice approach will serve as a bottom line test of whether the local telephone market is truly open to competition.²

It is now time for the FCC, the Department of Justice (DOJ), state commissions and all policy makers to focus on the meaning and importance of the public interest test in section 271. After all, **the essential promise of the Telecommunications Act of 1996 is that consumers will have competitive choices for local telephone service, not merely that the Bell companies will meet a set of fourteen technical requirements.** By declaring that it will examine BOC applications from a consumer perspective and by adopting the “realistic choice” approach to the public interest test, the FCC can ensure that BOC

² Joint Petitioners propose that the “realistic choice” approach should govern the FCC’s examination of the public interest standard only for applications under Track A, not applications under Track B.

applications satisfy both the letter and the *purpose* of the 1996 Act.

II. BACKGROUND

A. **The Legal Boundaries of the Public Interest Test in Section 271.**

The Telecommunications Act of 1996 (“the 1996 Act”) establishes a three-part test for approval of a BOC application to provide in-region, interLATA service.

Section 271(d)(3) states that the Commission shall not approve a BOC application unless it finds that —

(A) the BOC has fully implemented the competitive checklist (Track A) or offers all items of the competitive checklist in a statement of generally available terms and conditions (Track B);

(B) the BOC’s interLATA services will be carried out in accordance with the separate affiliate requirements of section 272; *and*

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

In short, the statutory language requires that the FCC make an affirmative finding that the BOC application is consistent with the public interest before the application can be granted. Even if the BOC demonstrates that it has complied with the requirements of Track A/Track B, the checklist, and the separate subsidiary requirements, the FCC must reject the application if it cannot find that the application is consistent with the public interest, convenience, and necessity.³

³ During the Senate floor debate on S. 652, Senator McCain (R-AZ) offered an amendment that would have deemed the public interest test to be satisfied by implementation of the checklist. After extensive debate, the amendment was tabled by a vote of 68-31. The rejection of the McCain amendment confirms that the public interest test must mean something separate from the competitive checklist and the

Congress did not define the public interest test in section 271. Neither the statutory language nor the Conference Report describes how the FCC should interpret its public interest responsibilities under this section. The only statutory constraint on the public interest test is contained in Section 271(d)(4), which provides that “[t]he Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B).” This provision means that the FCC cannot use the public interest test, for example, to require the BOC to provide an additional component of its network on an unbundled basis that is not already included among the 14-point checklist items as a precondition to interLATA entry.⁴

In the absence of a statutory definition of the public interest test in section 271, the FCC must look to the history of judicial opinions on the public interest test to determine the scope of its public interest authority under section 271.⁵ In general, the courts have given the FCC wide latitude to exercise its judgment under the public interest test. The public interest test allows the FCC to examine all

other features of the long distance entry test. *See*, 141 Cong. Rec. S 7971 (June 8, 1995).

⁴ The Commission may, as discussed below, *consider* actions taken by the BOC to open its network to competition that are not included in the checklist as additional factors to weigh in the balance under its public interest analysis. But the Commission may not *require* the BOC to take any specific action, or establish an additional unbundling *precondition*, as a necessary prerequisite to approving a section 271 application.

⁵ The public interest standard appears throughout the Communications Act and has an extensive history of interpretation by the Commission and the courts. By not defining the public interest standard in section 271, Congress left this body of law intact and can be said to have endorsed this prior history.

factors that determine whether the application benefits or disadvantages consumers.⁶ Further, the public interest test grants the FCC discretion to give different factors different degrees of importance. Thus, in conducting its public interest analysis, the FCC can accord greater weight to some factors than to others.⁷

In general, the courts have required only that the FCC implement the public interest test in a manner consistent with “the purposes that Congress had in mind when it enact[s] legislation.”⁸ Thus, to determine the scope of the FCC’s public interest authority in considering applications under section 271, we must examine Congress’s purposes in passing the Telecommunications Act of 1996 and section 271 in particular.

The legislative history reveals that **the overriding purpose of the 1996 Act was to allow consumers to benefit from a more competitive marketplace for local telephone service.** Congress’s intent to promote *local* telephone competition is apparent in several provisions of the Act, in the Conference Report, and in the floor debates.

⁶ See, *FCC v. WNCN Listeners Guild*, 450 582, 593 (1981) (The public interest “serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.”); see also, *Nat’l. Broad. Co. V. United States*, 319 U.S. 190 (1943) (holding that the “public interest” standard confers broad powers upon the FCC).

⁷ See, *FCC v. RCA Comm., Inc.*, 346 U.S. 86,90 (1953) (“The statutory [public interest] standard no doubt leaves wide discretion and calls for imaginative interpretation.”).

⁸ See, *NAACP v. FPC*, 425 U.S. 662, 670 (1976); see also, *Western Union Div. v. United States*, 87 F. Supp. 324, 335 (D.D.C. 1949) (“The standard of ‘public convenience and necessity’ is to be so construed as to secure for the public the broad aims of the Communications Act.”), *aff’d* 338 U.S. 864 (1949).

For instance, sections 251 and 252 provide detailed provisions directing the incumbent local exchange carriers to open their local networks to competitors. Section 253 preempts all state and local barriers to the provision of interstate and intrastate telecommunications service. Section 254 directs states and the FCC to ensure that universal service support is explicit and sufficient in order to ensure that consumers in non-competitive markets are not harmed by the growth of local telephone competition in other markets. All these provisions confirm that Congress's primary goal was to open the *local* telephone market to competition for the benefit of telecommunications consumers.

Further, the oft-quoted phrase in the first sentence of the Conference Report on the 1996 Act states that the purpose of the legislation is to accelerate rapidly the deployment of telecommunications services "by opening all telecommunications markets to competition."⁹ The long distance market, the equipment market, the wireless market, and several others were already open at the time of passage of the legislation. The only market not "open" to competition at the time of passage of the 1996 Act was the *local* telephone market. The Conference Report thus emphasizes the need for the FCC to open local telephone markets to competition. Significantly, this stated purpose does not require that all *companies* must be able to provide all services; the goal is to open *markets* that were previously closed to competition.

In addition, many Members of Congress described the purpose of the

⁹ S. Conf. Rep. No. 104-230, at 1 (1996).

legislation as promoting full and fair competition for local telephone services. For instance, Senator Pressler (R-S.D.) stated that one of the chief reform features of the 1996 Act was to “allow competition for local telephone service by cable companies, long distance companies, electric companies and other entities.”¹⁰

Senator Hollings (D-S.C.) stated “The basic thrust of this bill is clear. Competition is the best regulator of the marketplace. But until that competition exists, until the markets are opened, monopoly-provided services must not be able to exploit the monopoly power to the consumers’ disadvantage.”¹¹ Similarly, Sen. Kerrey (D-NE), speaking against the amendment from Sen. McCain, stated:

The most difficult thing to have happen in the law that we are deliberating here is the competition at the local level. That is the most perplexing and most difficult part of all. . . . This checklist, such as it is, I do not know if the checklist is going to work. . . . **This [public interest test] is an effort to make certain that in fact we do get competition at the local level.** I assure my colleagues, if we do not get competition at the local level, our consumers, our citizens, households are not going to be happy because their rates will not come down for overall information services. Their quality will not go up. Only in the competitive environment will that happen. Only if the provider of services knows that the customer can walk and go someplace else is there going to be a competitive environment, and only if the law encourages and allows new entrepreneurs and startup companies, as I believe the language in this bill allows, and that the amendment will strike.¹²

¹⁰ 141 Cong. Rec. S7886 (June 7, 1995). In contrast, Sen. Pressler described the long distance sections as “establish[ing] a *process* under which the regional Bell companies may apply to the FCC to enter the long distance or interLATA market.” *Id.*, at S7887. (Emphasis added)

¹¹ 141 Cong. Rec. S7894 (June 7, 1995)

¹² 141 Cong. Rec. S7970 (June 8, 1995) (emphasis added). *See also*, the following statement of Senator Dorgan (D.-N.D.):

The fundamental policy goal confronting the Congress as we develop telecommunications reform legislation is how do we employ competition in markets which are currently controlled by regulated monopolies, such as the local exchange. The fact is that the long distance market is a truly

To summarize, an analysis of the scope of the FCC's public interest authority supports the following conclusions:

- Congress's overriding purpose in passing the Telecommunications Act of 1996 was to promote local telephone competition for the benefit of consumers.
- Congress did not define the public interest test in section 271, but the Commission cannot use the public interest test to expand or limit the competitive checklist.
- In the absence of a legislative definition, courts require the FCC to interpret the public interest test in a manner consistent with the purposes of Congress in passing the legislation.
- The FCC may examine all factors relevant to its public interest analysis, but it may accord greater weight to some factors than others.
- The public interest test must mean something more than the checklist because it is a separate prong of the three-part entry test and because the Senate rejected an amendment that would have equated the public interest test with the checklist.
- The statutory language, the legislative history of the Act, and the discretion afforded to the FCC by the courts in interpreting the public interest test, all permit the FCC to use the public interest test in section 271 to ensure that consumers benefit from competition for local telephone services.

B. The FCC's *Ameritech Order*.

The FCC's only significant discussion of the public interest standard in

competitive market. We risk damaging that competitive market if the RBOC's are permitted to enter the long distance market prematurely. Our goal should be to promote the same level of competition in the local exchange that currently exists in long distance. . . [T]he competitive checklist . . . is not by itself sufficient to bring real competition to local markets.

141 Cong. Rec. S8464 (June 15, 1995).

section 271 is contained in its decision denying the application of Ameritech to provide interLATA service in Michigan.¹³ In that decision, the FCC denied the Ameritech application because Ameritech did not demonstrate that it had complied with the “competitive checklist” and the requirements of section 272. As a result, the Commission did not reach the question of whether the application was consistent with the public interest. Nevertheless, the Commission found it would be “useful to identify certain issues and make certain inquiries for the benefit of future applicants and commenting parties . . . relating to the meaning and scope of the public interest inquiry.” (Para 381) The Commission made clear that its discussion was not intended to be “an exhaustive analysis of the scope of our public interest inquiry generally.” (Id.)

The Commission noted that several parties had proposed various standards for analyzing the public interest test. In particular, it noted the standards proposed by the DOJ (“irreversibly open to competition”), Sprint (local competition must be “enabled”), CPI (“realistic choice”), and Ameritech (“whether the local market . . . is open to competition.”) It also noted that several BOCs argued that the relevant inquiry is limited to the effect of BOC entry on competition in the long distance marketplace.

The Commission began its discussion of the public interest test in the

¹³ In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan, *Memorandum Opinion and Order*, CC Docket No. 97-137, August 19, 1997, FCC 97-298. (“*Ameritech Order*”)

Ameritech Order by noting that it has “broad discretion” to identify and weigh all relevant factors in determining whether BOC entry is in the public interest. It noted that it must give substantial weight, but not preclusive effect, to the DOJ’s recommendation.

The Commission also noted that “Congress did not repeal the MFJ in order to allow checklist compliance alone to be sufficient to obtain in-region, interLATA authority.” The Commission thus rejected the argument of some BOCs that the public interest inquiry “is limited narrowly to assessing whether BOC entry would enhance competition in the long distance market.” (Para 385)

The Commission nevertheless stated that it would *consider* the effect of BOC entry on competition in the long distance market. It noted that the entry of the BOC into the interLATA market had the “potential” to increase price competition and lead to innovative new services. But it also noted that Congress determined that, in order for this “potential” to become a reality, “local telecommunications markets must first be open to competition.” (Para. 388)

The Commission noted that the public interest test is a “separate, independent requirement for entry.” The Commission reasoned that relying upon satisfaction of the checklist alone as proof that a market was open to competition, “would effectively read the public interest requirement out of the statute.” (Para 389)

The Commission further noted that whether the beneficial effects of the BOC’s entry into the interLATA market are “sustainable” will depend on whether

the local market remains open after BOC entry. The Commission concluded that “we must consider whether conditions are such that the local market will remain open as part of our public interest analysis.” (Para 390) The Commission noted that Congress provided for three modes of entry into the local exchange market -- facilities-based, use of unbundled network elements, and resale. The Commission concluded that “Our public interest analysis . . . must include an assessment of whether all procompetitive entry strategies are available to new entrants.” (Para 387)

The Commission stated that it would examine many different categories of consumers to determine whether the market is open:

The most probative evidence that all entry strategies are available would be that new entrants are actually offering competitive local telecommunications services to different classes of customers (residential and business) through a variety of arrangements (that is, through resale, unbundled elements, interconnection with the incumbent’s network, or some combination thereof), in different geographic regions (urban, suburban, and rural) in the relevant state, and at different scales of operation (small and large).

(Para. 391)

The Commission indicated that, in the absence of data showing actual competitive entry, it would look for other evidence that the market is open. For instance, the Commission stated that it would be interested in evidence that a BOC is making available individual interconnection arrangements to others throughout the state, under the same rates, terms, and conditions. It stated it would also examine performance monitoring and self-executing enforcement mechanisms, optional payment plans for the payment of non-recurring charges, state and local

laws that impede competitive entry, and anticompetitive conduct by the BOC.

The Commission concluded by stating that

this list is merely illustrative, and not exhaustive, of the factors we may consider when determining whether a BOC's local market is open to competition. We encourage interested parties, . . . to identify other factors that we might consider in the context of a specific application, *and the weight that we should attach to the various factors*, in making this assessment.

(Para. 398) (emphasis added)

In summary, the FCC made the following statements about the public interest test in its *Ameritech Order*:

- The public interest test gives the FCC broad discretion;
- The public interest test is not restricted to examining the effects of BOC entry into the long distance market.
- The public interest test can be used to examine the openness of the local telephone market to all forms of entry and to all types of consumers.
- Other parties are invited to suggest additional factors, and the amount of weight that should be given to these factors, in implementing the public interest test.

III. REQUESTED ACTIONS

Pursuant to the invitation of the FCC in its *Ameritech Order*, Joint Petitioners submit the following proposals and request the FCC to take the following actions:

- issue declaratory rulings to clarify the meaning of the public interest standard in section 271;
- declare that the Commission will use the public interest test to examine BOC applications under section 271 from the perspective of residential and business consumers; and

- declare that it will implement the public interest test in section 271 by determining whether residential and business consumers have a “realistic choice” of alternative local telephone providers.
- A. The Commission should issue declaratory rulings to clarify the meaning of the public interest test in section 271.**

To date, the FCC, the Department of Justice, and state commissions have concentrated most of their effort on the requirements of Tracks A and B, the “competitive checklist,” and the separate affiliate requirements. The FCC has considered and rejected four BOC applications to provide in-region, interLATA service under section 271. Each of these decisions contained a significant discussion of issues surrounding checklist compliance and the interpretation of Track A and Track B. The FCC responded to a letter from Senators McCain and Brownback by providing 44 pages of detailed explanation of the requirements of the competitive checklist.¹⁴ The Commission staff is continuing to engage in discussions about checklist compliance with the carriers.¹⁵

Similarly, the Department of Justice has provided extensive analysis of the checklist requirements in its comments on the four BOC applications. Many state regulatory commissions have held hearings and invited written comment on the BOCs’ efforts to comply with the checklist items.

¹⁴ Letter from FCC Chairman William E. Kennard to Chairman John McCain and Senator Sam Brownback, July 13, 1997.

¹⁵ “Common Carrier Bureau Announces Meetings on Section 271 of the Communications Act,” DA 98-139, January 27, 1998.

These efforts are essential to opening local markets to competitive entry, and all the organizations that have focused on these requirements are to be commended for their attention to the details of this list. The effort to explain the meaning of the checklist, however, cannot and should not substitute for the important decisions that must be made concerning the public interest test.

Of the four decisions on BOC section 271 applications, only one discussed the public interest standard in any detail. In the *Ameritech Order*, the FCC discussed several factors that it indicated it will consider in its public interest analysis. As discussed above, the factors listed by the Commission included the openness of the local market to all three entry modes, the availability of competitive alternatives to different types of consumers, and the effects of the BOC's entry into long distance. In general, Joint Petitioners support the discussion contained in the *Ameritech Order*.

Other than listing some factors that it would consider in its public interest analysis, however, the Commission did not articulate any approach to the public interest test. In fact, the Commission expressly indicated that its list was not exhaustive, and it invited parties to suggest additional factors, and suggest the weight that should attach to each factor, in unspecified future proceedings. The FCC has not spelled out any particular approach to the public interest test in any subsequent orders or materials.

It is perhaps understandable that the FCC has not articulated an approach to the public interest standard. The Commission has not yet received a BOC

application that has complied with the 14-point checklist and thus the Commission has not been required to reach the public interest test in its decisions to date. Further, the FCC staff and Commissioners have expended considerable time and effort examining the complexities of the items on the competitive checklist, especially those surrounding the implementation of operational support systems (OSS). As stated earlier, these efforts to understand and describe the checklist requirements have been extremely important and deserve the priority they have received.

Though the initial delay in formulating an approach to the public interest test is understandable, the continued absence of an approach to the public interest standard is now causing harm in two ways. **First, it creates substantial uncertainty for both telecommunications carriers and consumers.** Neither the BOC applicants nor commenters on those applications know what information or analysis they should gather because they do not know what information will be important to the Commission's analysis. The BOCs, other industry participants and consumer organizations face the risk that they will be unable to make their best case, or present the most appropriate information, to the Commission. This problem is particularly acute because the tight 90-day time frame does not allow the Commission and the parties to engage in the typical exchange of information that normally accompanies a proceeding of this magnitude.

A second and more serious concern is that the absence of an approach to the public interest test may effectively render it meaningless.

To understand this concern, first realize that, if the public interest test is truly to be separate from the other requirements of section 271, then it must be possible for a BOC application to pass the first two prongs (checklist and separate affiliate requirements) while failing to meet the third prong (public interest).

Joint Petitioners find it difficult to imagine that the Commission could find that a BOC application meets the checklist and affiliate requirements but fails the public interest test *unless the Commission has given prior notice of its approach to the public interest test*. To illustrate, suppose that a state commission and the Department of Justice both find that a BOC meets the checklist and the separate affiliate requirements. In this case, political support and momentum for the application could be so great that it will be very difficult for the Commission (assuming that it agrees with the DOJ and the states on compliance with the checklist and affiliate requirements) to give fair consideration to whether the application satisfies the public interest test. In making this observation, we simply state the obvious: the consideration of BOC applications under section 271 takes place in an increasingly charged political atmosphere.

Joint Petitioners do not mean to suggest that any particular BOC application should or will fail to meet the public interest test: as we argue below, BOC entry into long distance is likely to benefit consumers if they have a choice of local service providers. Rather, we strongly suggest that the Commission should articulate its view of the public interest test *before* an otherwise qualified BOC application is submitted. If this does not occur, the public interest test will likely become

meaningless. This result would conflict with Congress's intent in including the public interest test as a separate prong of the three-part entry test and in defeating the McCain amendment. Furthermore, this outcome would deny residential and business consumers their rightful opportunity to participate in the process of evaluating BOC applications and to ensure that granting the BOC application will yield consumer benefits.

The Commission, the Department of Justice, state commissions and all policy makers should turn their attention to the public interest test at this time. Now that the Commissioners and the Commission staff have enhanced their understanding of the checklist, it is appropriate to focus on the meaning and significance of the public interest test.

For all these reasons, the FCC should seek comment on this Petition and issue declaratory rulings to clarify how it will implement and enforce the public interest standard as it applies to BOC applications under section 271.

B. The FCC should declare that it will use the public interest test to examine BOC applications under section 271 from the perspective of residential and business consumers.

The operations of Tracks A and B and the "competitive checklist" are critically important to *carriers* that seek to compete with the BOCs. These provisions set forth the terms under which the BOCs must open their networks to new entrants seeking to compete for local telephone services. The FCC should use the public interest to examine the advantages and disadvantages of each BOC

application from the perspective of *residential and business consumers*. This manner of enforcing the public interest standard will give it meaning that is separate and independent of the requirements of the “competitive checklist,” as is required by the 1996 Act. In other words, Joint Petitioners ask the Commission to consider the “public” when considering the “public interest test.”

Joint Petitioners believe that the public interest test is the most important provision of section 271 for consumers. The Commission should use the public interest test as an opportunity to step back from the technical details of the Telecommunications Act of 1996 and ask the fundamental question of each application: Will granting the application benefit residential and business consumers?

The FCC should use the public interest test to focus primarily on the needs of residential and business consumers. This consumer focus is particularly important because some parties have, at times, appeared to equate the concerns of carriers with the concerns of consumers. For instance, in its comments on the BOC applications to date, the DOJ’s discussion of the public interest prong has largely repeated issues (such as OSS, performance benchmarks, and the provision of unbundled network elements (UNEs)) that it already discussed in its comments on the BOC’s compliance with the checklist.¹⁶ This kind of approach to the public interest test blurs the distinction between the needs of carriers and the needs of

¹⁶ See, e.g., DOJ Comments on the BellSouth-Louisiana Application, Dec. 10, 1997; DOJ Comments on the Ameritech-Michigan Application, June 25, 1997.

consumers. When this distinction is blurred, the vitality of the public interest prong is lost.

Joint Petitioners' concern about the independent meaning of the public interest test was heightened recently by documents issued by the New York Public Service Commission (NYPSC) in the course of examining the application of Bell Atlantic-NY for section 271 approval in New York. On March 17, 1998, the staff of the NYPSC issued a Draft Pre-Filing of Bell Atlantic in which the staff proposed that, if Bell Atlantic complied with certain commitments to open its network to competitors, Bell Atlantic would be found to satisfy "not only the competitive checklist of Section 271(c)(2)(B), but the public interest standard found in Section 271(d)(3)(C)."¹⁷ In other words, consideration of the public interest test was folded into the checklist analysis. Under this staff proposal, the public interest prong evaporates entirely.

Both the DOJ comments and the proposals from the NYPSC staff fail to give meaning to the statutory language that requires the public interest test to be evaluated *independent* of the competitive checklist. More generally, these statements demonstrate the risk of continuing to examine the public interest test

¹⁷ Draft Pre-Filing of Bell Atlantic Pursuant to Section 271 of the Telecommunications Act of 1996, Case 97-C-0271, p. 38 (March 17, 1998). This Draft Pre-Filing was superseded by a "Pre-Filing Statement of Bell Atlantic-New York" issued on April 6, 1998, that was subsequently endorsed by the DOJ. Although this "Statement" does not contain any explicit reference to the public interest standard, it suggests that the NYPSC will endorse the entire application of Bell Atlantic to provide in-region, interLATA service in New York based upon Bell Atlantic's commitments to open its network alone, without any discussion of the public interest test or the impact of Bell Atlantic's application on consumers. Thus, the NYPSC and the DOJ appear to have given tentative endorsement of Bell Atlantic-NY's entry into the long distance market without an independent consideration of the public interest test.

from the perspective of carriers, rather than consumers. Only by examining the BOC application from the perspective of consumers, and by announcing that it will adopt this perspective outside of a ruling on a particular BOC section 271 application, will the Commission be certain to give the public interest test meaning that is separate from the checklist.

For these reasons, the Commission should issue a declaratory ruling that it will not find that a BOC application meets the public interest test unless *both residential and business consumers* will benefit from entry of the BOC into the long distance market.

C. The Commission should declare that the most important factor in its public interest analysis will be whether residential and business consumers have a “realistic choice” of alternative local telephone providers.

The Commission invited parties in its *Ameritech Order* to suggest additional factors, and the weight that should be given each factor, for consideration under the public interest test. Joint Petitioners have already suggested that the Commission should use the public interest test to examine BOC applications under section 271 from a consumer perspective. Joint Petitioners here offer a more specific proposal for implementing the public interest test that is consistent both with the purposes of the 1996 Act and with the consumer perspective suggested above.

Joint Petitioners believe that the most important factor the Commission should examine under the public interest test is whether residential and business

consumers in the state have a “realistic choice” of alternative providers of local telephone service. The FCC should declare that each BOC application will be presumed to pass the public interest test if consumers have a realistic choice of an alternative carrier, or presumed to fail if consumers do not have such a choice. In the alternative, the FCC should declare that, among all the factors it considers under the public interest standard, the FCC will give primary importance to whether consumers have a realistic choice of a competitive local exchange carrier.¹⁸

As stated earlier, the FCC must interpret the public interest test in a manner consistent with “the purposes that Congress had in mind when it enact[s] legislation.”¹⁹ The overriding purpose of this section of the legislation is to promote competition for local telecommunications services. Joint Petitioners believe that the realistic choice approach provides the best way to implement the public interest test from a consumer perspective and to carry out the purposes of the 1996 Act.

The following discussion provides a more detailed explanation of how the realistic choice concept could be applied by the Commission.

1. What does “realistic choice” mean?

“Realistic choice” means that consumers in a state must have the ability to

¹⁸ Joint Petitioners recognize that using the “realistic choice” standard to create a presumption in the public interest test places a great deal of importance on the standard itself. For that reason, Joint Petitioners support this approach (establishing a presumption) only if the Commission has adopted an appropriate interpretation of the “realistic choice” standard. See further discussion of this point below.

¹⁹ See note 8, *supra*.

subscribe to a carrier other than the local BOC for the provision of local telephone service. Consumers must be able to receive service from carriers that are ready, willing and able to provide service. That choice cannot be theoretical; it is not enough if a competitor is authorized to provide service, has built facilities, and has ordered access and interconnection. If alternative carriers simply have an authorization to provide service but are not actually soliciting customers or providing service, then the consumers in that state cannot be said to have a *realistic choice*.²⁰ Competitors must be operational, and consumers must be able to subscribe to competitors at the time the BOC application is filed.

Further, “realistic choice” means that the consumer would be able to obtain service that is comparable in quality and price to the service provided by the BOC. Determining whether a competitor’s service offering is comparable in quality and price to the BOC’s offering does not require a lot of work. For instance, the Commission has already found that Personal Communications Service (PCS) is generally not an alternative to the BOC’s local telephone service today because of differences in service quality and price.²¹ Joint Petitioners also assert that “reconnection companies” or “phone sharks” that target service to customers with poor credit ratings (at very high rates) would not provide a realistic choice for

²⁰ The realistic choice approach is sometimes described as a “yellow pages” test. In other words, consumers would have a realistic choice if they could open the yellow pages, find an advertisement for a competing local telephone provider, call and sign up for service just as easily as the consumer could call the BOC serving that region.

²¹ Memorandum Opinion and Order, CC Docket No. 97-231, FCC 98-17, February 4, 1998 (“*Louisiana Order*”).

consumers because of the very special market niche these companies inhabit. The service offered by the competitor must be a close enough substitute for the service provided by the BOC as to provide a marketplace check on the activities of the BOC. Some may argue that examining whether consumers have a realistic choice for local telephone service is the type of market share analysis that was rejected by Congress. This would be inaccurate for two reasons. First, “realistic choice” does not measure market share. The realistic choice approach does not require any particular percentage of consumers to have switched to a competitive provider of local telephone service. The realistic choice approach only depends upon consumers having a competitive carrier available to them, even if no consumer actually subscribes to that carrier.²² Second, the realistic choice approach is consistent with Congress’s purposes in including the public interest test in the statute. As was demonstrated above, Congress included the public interest test in the statute in part to allow the Commission to review the growth of local telephone competition when considering BOC applications to enter the long distance market. Allowing consumers to choose from alternative local telephone providers is exactly what the Telecommunications Act of 1996 was intended to achieve.

²² Although there is some debate about whether Congress explicitly rejected a market share test, the fact remains that a market share test alone may not be a meaningful way to measure the market power of the incumbent local telephone company. See, “The Public Interest and Bell Entry into Long Distance Under Section 271 of the Communications Act,” Michael F. Finn, *CommLaw Conspectus*, Vol. V, No. 2, Summer 1997.

2. Why will consumers benefit from having a realistic choice prior to BOC entry into the long distance market?

Joint Petitioners maintain that consumers are likely to benefit from BOC entry into the interLATA market only if they first have a realistic choice of an alternative local exchange carrier. There are several reasons why Joint Petitioners hold this view.

First, the ability of consumers to make a realistic choice among competing providers of local telephone service will demonstrate that the BOC is not discriminating against local service competitors for access and interconnection to the BOC's network. If consumers have a realistic choice for local telephone service, that will provide the best possible evidence that the market for local telephone service is truly open to competitive entry and demonstrates that the incentives contained in section 271 have actually functioned.

Second, if consumers have a realistic choice for local telephone service, the BOC will have less incentive and ability to discriminate against its potential long distance competitors because these competitors will have options other than the BOC for reaching the local customer. On the other hand, if there is no choice for local service, this will demonstrate that long distance carriers are still dependent on the BOC, now their long distance competitor, for access to customers.

Third, if consumers have a realistic choice for local telephone service, they will have choices other than the BOC for "one-stop-shopping." This type of competition makes it much more likely that all competitors will be forced to cut

rates to cost. On the other hand, if BOC long distance entry occurs before consumers have a realistic choice for local service, consumers will have only one choice for one-stop-shopping, permitting the BOC to keep bundled prices higher than they would be in a competitive market.

Fourth, the realistic choice approach will reduce the need for post-entry regulation to protect consumers. If consumers have a realistic choice of local service providers, the BOC will have fewer opportunities and incentives to engage in anticompetitive and anti-consumer behavior.

In conclusion, if consumers have a realistic choice for local telephone service, the BOC is *much more likely* to flow any efficiency gains through to consumers, and *much less likely* to harm the competitiveness of the local and long distance markets.

3. How much importance should the Commission attach to the realistic choice standard?

As discussed above, the public interest test allows the FCC to consider all factors relevant to the question of whether or not consumers would benefit from granting the application. But the Commission has the authority under the public interest test to give different factors different degrees of weight.

The only constraint that the statutory language places on the FCC's public interest authority is that the FCC may not extend or limit the competitive checklist. The FCC may not, therefore, use the public interest test to require the BOC to unbundle an additional piece of its network as a condition of entry into the

interLATA market. Nor, for that matter, may the FCC use the public interest manner to demand any other action by the BOC as a *quid pro quo* for interLATA entry. Thus, no single factor considered in the public interest analysis can be determinative.

In view of this analysis, Joint Petitioners do not propose that the realistic choice approach should be the *only* factor considered under the public interest test or that the realistic choice approach be given preclusive effect. Rather, Joint Petitioners propose that the realistic choice approach should be the *most important* factor in the FCC's public interest analysis.²³ There are two ways to do this:

Joint Petitioners' preference is for the Commission to create a presumption either in favor of or against the BOC's application under the public interest test based upon whether consumers have a realistic choice of competing carriers. In other words, if the Commission finds that consumers in the State have a realistic choice of alternative carriers, then the BOC application should be presumed to meet the public interest test. If, instead, the Commission finds that consumers do not have a realistic choice, the BOC's application should be presumed to fail the public interest test.

Meeting or failing the realistic choice standard should create a presumption that could be overcome by other factors, but only if the parties present evidence and arguments that are especially convincing. In other words, the realistic choice

²³ This suggestion is similar to the statute's requirement that the Commission give substantial weight to the evaluation of the Department of Justice.

standard would not be, and should not be, dispositive.

Joint Petitioners recognize that using the “realistic choice” standard to establish a presumption as to whether the public interest test is met places significant importance on the standard itself. For that reason, Joint Petitioners recommend and support the “presumption” approach only if the Commission also adopts a reasonable interpretation of the “realistic choice” standard. As discussed further below, the interpretation of “realistic choice” must be sufficiently stringent that local exchange market conditions are robust enough to ensure that consumers see the benefits of BOC entry into long distance markets. If the adopted standard is too weak, creating a presumption that the public interest is satisfied obviously will hurt, and not help, residential and business consumers.

The Commission may wish to consider an alternative to the “presumption” approach outlined above. The Commission could find that whether consumers in the state have a realistic choice is the factor entitled to the greatest weight in its public interest evaluation. Under this approach, if the factors in support of the BOC’s application were relatively equal to the factors against the BOC’s application, then the answer to the realistic choice question would tip the balance in favor of or against the application.

4. How many consumers should have a realistic choice?

Joint Petitioners do not at this time propose any specific number of consumers that must have a realistic choice in order to establish the presumption in

favor of or against the application. There are two reasons for this.

First, there is a range of numbers that could satisfy the purposes of the realistic choice approach. The number, or range of numbers, chosen by the FCC should reflect a tradeoff between two sets of benefits: the benefits of BOC entry into long distance versus the benefits of strengthened market constraints against misbehavior by the BOC. A more stringent measurement of realistic choice will go further in constraining the BOC from engaging in anticompetitive behavior but will deny consumers the benefits of BOC entry for a longer period of time. A more lenient approach will allow consumers to enjoy the benefits of BOC interLATA entry sooner, but it will not form as strong a constraint on the incentives of the BOC to discriminate.

Second, Joint Petitioners believe it would be inappropriate to focus solely on the *number* of consumers that have a realistic choice. The analysis of whether the realistic choice standard is met should focus on the types of consumers that have realistic choice (quality) as well as the number (quantity). Ideally, each subgroup of consumers (large business, small business and residential) across all income levels (high, middle, and low-income), in a variety of settings (urban, suburban, and rural) and living situations (large office buildings, multiple dwelling units, single-family homes) should have a realistic choice. It is unrealistic and unnecessary, however, to expect consumers in every single subcategory to have a choice of alternate carriers before allowing the BOC into long distance. Instead, the Commission should gather information about each of these categories and examine

the information to make an informed judgment about how many consumers in each of these categories have a choice. The more consumers in each category have a choice, the stronger would be the presumption in favor of the application.

In short, the FCC should find that enough residential and business consumers in the state have a realistic choice to demonstrate that the local market is open, that additional consumers are likely to have a realistic choice in the near future, and that there is sufficient competitive pressure on the BOC from the availability of these choices to predict that the BOC will have market-based incentives to flow the benefits of its long distance entry through to consumers.

Even though Joint Petitioners do not propose a specific number, we can discuss some of the possible ways of measuring whether consumers have a realistic choice. For instance, the availability of realistic choice for only two consumers in a state (one business customer and one residential customer) would not be enough; requiring that every consumer in a state have a competitive alternative would require too much.

One possible approach would essentially split the difference between these two extremes and allow the realistic choice test to be met once 50% of subscribers have a realistic choice. The 50% number is significant enough to ensure that the market for local telephone services is open and that it is likely to remain open. The 50% figure is also consistent with the notion that the public interest test is a balancing test that allows the FCC to determine, on average, whether consumers would benefit or be disadvantaged by entry of the BOCs into the interLATA

market. If more than 50% of consumers have a realistic choice, then it is relatively easy for the Commission to conclude that consumers, on balance, will benefit from BOC entry, and that the remaining 50% of customers will have a choice in the near future.

One disadvantage of a 50% threshold is that, in some states, this threshold could be satisfied if consumers in a large urban center have a realistic choice even if consumers in the remainder of the state have no alternative at all. An approach that helps to address this issue would be to require that a percentage (perhaps less than 50%) of subscribers have a realistic choice in each of several different regions of the state. For instance, the FCC could declare that a presumption in favor of the public interest test would be established once a certain percentage of consumers in each LATA in a multi-LATA state have a realistic choice. Requiring a certain percentage of customers to have a realistic choice in each region of the state would help to ensure that both rural and suburban consumers obtain the benefits of competition.

Joint Petitioners provide these examples of how realistic choice might be implemented for discussion purposes only. We do not necessarily suggest that the 50% figure is the correct number, or even that the Commission should rely upon any particular percentage in its analysis. Strict percentages, for instance, do not reflect the importance of examining whether different types of consumers, particularly residential and business customers, have a realistic choice. Whatever approach the FCC settles upon, it must reflect a balance: it should be stringent

enough to ensure the market is functioning to give consumers choice, while not being so difficult to meet that consumers are denied the benefits of BOC entry into long distance past the point in time when BOC entry could realistically cause competitive harm. If the FCC endorses the realistic choice standard, it can exercise its judgment as to how many consumers, and what types of consumers, should have a choice available to them in order to trigger the presumption in favor of the application. Most important, however, is that the Commission articulate a version of this test and adopt a view that recognizes the importance of the realistic choice concept.

5. Can the realistic choice standard be satisfied by all entry modes?

Joint Petitioners support the discussion in the *Ameritech Order* in which the FCC emphasizes the importance of all three entry modes — facilities-based, UNE-based, and resale. It is absolutely essential that each of these entry modes be available to competitors in the local telephone market.

From the perspective of consumers, however, the distinction among these three modes of entry is less apparent. Consumers will not generally know whether their carrier is providing service via its own facilities, via UNEs provided by the BOC, or by resale of the BOC's retail services. All three entry modes contribute to enhancing the competitive dynamic of the local telephone market, and all three entry modes have the potential to provide consumers with competitive alternatives

and new services.

It is also true, however, that the incentives and the ability of the BOC to discriminate against competitors differ depending upon whether it faces competition from facilities-based or from resale-based carriers. For instance, the BOC will have greater incentives and ability to discriminate against competing long distance companies that provide local service via resale of the BOC's local services than against long distance companies that reach the customer using UNEs or their own, non-BOC facilities. Joint Petitioners support the Commission's consideration of all three entry modes, and the choices they provide to consumers, in evaluating whether the realistic choice approach is met.

6. How is the realistic choice standard different from the Department of Justice's "irreversibly open to competition" standard?

The Department of Justice has evaluated each BOC application to date under a standard that measures whether the relevant BOC market is "fully and irreversibly open to competition." In its comments on the Ameritech-Michigan application, the DOJ explained its view of this standard as follows:

In applying [the "irreversibly open"] standard, the Department will consider whether all three entry paths contemplated by the 1996 Act -- facilities-based entry involving construction of new networks, use of the unbundled elements of the BOC's network, and resale of the BOC's services -- are fully and irreversibly open to competitive entry to serve both business and residential consumers. To do so, the Department will look first to the extent of actual local competition as evidence that local markets are open, and whether such entry is sufficiently broad-based to support a presumption of openness. If broad-based commercial entry involving all three entry paths has not

occurred, the Department will examine competitive conditions more carefully, and consider whether significant barriers continue to impede the growth of competition, focusing particularly on the history of actual commercial entry.²⁴

There are several similarities between the DOJ's "irreversibly open to competition" approach and the realistic choice approach.²⁵ Both approaches focus on the competitiveness of the local exchange market. Both would look for the presence of actual, operational competitors in the local market as evidence that the local market is open. Joint Petitioners strongly support the DOJ's approach of conditioning approval of BOC interLATA applications upon the openness of the local telephone market.

"Realistic choice" is different in degree, not in kind, from "irreversibly open." The difference between the two approaches is nevertheless significant because the DOJ's approach may not go far enough to ensure that consumers benefit from BOC entry into the long distance market. In other words, Joint Petitioners believe that the realistic choice approach provides stronger assurance to consumers that the

²⁴ DOJ Evaluation of the Ameritech-Michigan application, June 25, 1997, pp.30-31.

²⁵ The DOJ has filed an affidavit by Prof. Marius Schwartz in support of its "irreversibly opened to competition" standard. See, "Competitive Implications of Bell Operating Company Entry into Long-Distance Telecommunications Services," Affidavit of Marius Schwartz, May 14, 1997 (*Schwartz Affidavit*) While Joint Petitioners have some differences of opinion with the DOJ standard, we support much of the analysis contained in the Schwartz Affidavit. For instance, the Schwartz affidavit recognizes that consumers have much more to gain from competition for local telephone services than from the addition of one more competitor (the BOC) into the long distance market. (Paras. 18, 158-169) The Schwartz Affidavit also recognizes that factors such as state legislation, municipal regulation, contracts that limit access to buildings, and other "artificial barriers" could significantly delay local competition. (Para. 189)

goal of local telephone competition -- a goal which Joint Petitioners share with the DOJ — will actually be achieved.

The differences between “irreversibly open” and “realistic choice” involve both the wording and the application of the standard. First, the wording of the “irreversibly open” standard presents some logistical issues. For instance, it is difficult to see how a BOC could *ever* satisfy its burden of proof that its market is *irreversibly* open to competition. As long as competitors must interconnect with the existing BOC network to complete calls (and all competitors, whether using resale, UNEs, or separate facilities, are likely to require such interconnection), it could be argued that any steps to open markets could be reversed as easily as they are implemented. Thus, the language proposed by the DOJ is problematic because it could, if taken literally, be impossible to meet. In contrast, the “realistic choice” standard is very direct and it is clear how a company would comply with the standard.

Second, determining whether a market is “open” to competition may be difficult to accomplish. Analyzing all the factors that affect whether a market is open may overwhelm the resources of the FCC or any regulator. To determine whether a market is open to competing carriers, policy makers would have to examine actions by the BOCs in addition to those contained in the checklist, such as: whether the BOC has locked customers into long-term contracts with termination penalties to prevent customers from switching to other carriers; whether the BOC has imposed “PIC-freezes” in an anticompetitive manner so that

consumers cannot switch easily to a different local or long distance provider; whether intraLATA toll dialing parity is being provided (in those states that are permitted to order dialing parity under the 1996 Act), and many others.

In addition, the FCC would have to examine other factors outside the control of the BOC to determine whether or not the market is open, such as: whether municipal governments have imposed excessive taxes or other discriminatory regulations on telecommunications providers; whether landlords of multiple dwelling units have allowed competitors to obtain access to their buildings; and whether state legislation imposes discriminatory terms on competitors (such as build-out requirements (e.g., Texas) or limitations on eligibility for universal service funding for competitors (e.g., Arkansas)).

Simply gathering the information to evaluate all these factors would be a daunting task, but the FCC's job would not end there. The Commission would also have to evaluate the relative importance of these factors to competition. This analysis will vary for each state. For instance, the receptivity of building owners to competitive entrants is likely to be more significant in New York than in Wyoming. Actions by cities to impede entry may be more important where state governments have delegated authority over telecommunications issues to the local governments than in states where regulatory authority is retained by the State. And the relative importance of discrimination in universal service plans in a state may depend upon the size of the subsidies.

Gathering all the information, and evaluating the significance of that

information, to determine whether a market is “open” to competition could simply be too great a task for the FCC, or any regulator. This task will be especially challenging because of the tight 90-day time frame in which the Commission must rule on each application.²⁶

The DOJ’s comments on the four BOC applications to date reveal the difficulty of implementing this standard. In considering whether the relevant market was open, the DOJ focused on the BOC’s ability to provide OSS, implement performance monitoring and measurements, and offer permanent, cost-based and rational prices for interconnection and unbundled elements.²⁷ As noted earlier, the DOJ’s public interest discussion repeats many of the same issues that were already

²⁶ Furthermore, should the Commission adopt the “irreversibly opened to competition” approach and then fail to be able to gather all the relevant evidence and information that informs that decision, the FCC’s ultimate decision could be vulnerable to reversal on appeal to the courts.

²⁷ For instance, in its Louisiana comments, the DOJ concluded that BellSouth’s application should be denied because it had not demonstrated that its market was “fully and irreversibly opened to competition.” The DOJ reached this conclusion after finding that 1) BellSouth had not demonstrated that all of its current or future prices for unbundled elements and resale of certain retail services would permit efficient entry or effective competition; and 2) BellSouth had failed to institute performance measurements needed to ensure consistent wholesale performance. The DOJ reasoned that, since BellSouth was not providing what competitors require for entry and at appropriate prices, BellSouth had not met the public interest test:

In short, our view is that as soon as, but not before, the preconditions of the 1996 Act are met and a BOC is willing and able to provide -- at appropriate prices -- what competitors require for entry at various scales of operation, using interconnected separate facilities, unbundled elements, and resale, section 271 authority should be granted. Because BellSouth has not made this necessary showing, it would not be in the public interest to grant its section 271 application for Louisiana. (DOJ Comments, p. 36) In brief, the DOJ has applied its proposed standard by examining *some* of the actions of the BOC to make its network available to competitors. The DOJ’s comments lack any discussion of the other factors listed above that affect whether competitors can enter a market (such as excessive municipal regulation, the state’s universal service system, access to buildings, etc.) and other BOC actions that may also affect the pace of local telephone competition (such as PIC-freezes, long-term contracts, etc). Finally, the DOJ analysis considers the openness of the market solely from the competitors’ point of view, rather than from consumers’ point of view.

covered in its competitive checklist analysis. Thus, the discussion gives little meaning to the public interest approach separate from the checklist, as is required by the statute. Further, the discussion also generally approaches the public interest test from the perspective of carriers, not consumers.

Most important, however, the DOJ does not provide a complete analysis of its own standard. By focusing primarily on the BOC's inability to provide OSS, performance benchmarks and rational prices, the DOJ omits from its discussion a host of other factors that affect the openness of the local market.²⁸ The DOJ has applied its proposed standard by examining only *some* of the actions of the BOC to make its network available to competitors. The DOJ does not discuss the many other factors listed above that affect whether competitors can enter a market (such as excessive municipal regulation, the state's universal service system, access to buildings, etc.) The lack of an analysis of these factors by the DOJ in its comments is particularly striking given that Dr. Schwartz states in his affidavit, "Finally, in order to be confident that the local market is irreversibly open, one must ascertain that there remain no major state regulatory or other artificial barriers likely to significantly delay local competition."²⁹ In the same way that DOJ did not provide a comprehensive analysis of its own standard, it is difficult to believe that any other regulator could do so.

²⁸ To be sure, the DOJ has found each of the four BOC applications submitted to date to be so deficient that it has not had to reach these other issues. The DOJ's discussion of its standard, however, does not recognize the myriad other factors that can affect the openness of a market.

²⁹ *Schwartz Affidavit*, para. 189.

In contrast, determining whether consumers in a state have a realistic choice for local telephone service is much easier to measure. The realistic choice approach would allow the FCC simply to determine whether consumers have an alternative provider of local telephone services available to them. The FCC can gather this information from the carriers and from consumers who comment in each BOC section 271 proceeding. It will also be relatively easy for state regulators to gather this information as they consider each BOC application.

In short, the DOJ standard suggests that the FCC use an *inductive* approach. This approach requires that the FCC gather substantial amounts of evidence and build a case demonstrating whether or not the market is “irreversibly open.” In contrast, the realistic choice approach employs a *deductive* approach; if competitors are actually offering to provide service to consumers, the FCC can deduce from that evidence alone that the market is open to competition and is likely to remain so.

The third difference between the two standards relates to the fact that the DOJ standard asks the FCC to make a prediction about the future. It asks the FCC to assume that, if the market is “open,” consumers will be protected because competitors are likely to enter. The FCC should be cautious about assuming it can make such predictions with accuracy. Legislators and policy makers have offered many predictions of consumer benefits from passage of the 1996 Act that have not yet materialized. Consumers cannot be assured that competition will develop unless competitors are, in fact, providing service and providing consumers with a choice of carriers. For this reason, the DOJ’s approach, even if it could be

accurately and efficiently measured, may not provide sufficient certainty to ensure that consumers will, in fact, benefit from granting a BOC application. Joint Petitioners suggest that the “realistic choice” approach directly measures whether consumers are benefitting from the openness of local markets and directly assesses whether consumers will realize additional benefits from a BOC’s entry into long distance markets.

Despite the practical difficulties of implementing the DOJ standard, Joint Petitioners do not suggest that the Commission reject or ignore the DOJ’s analysis. The DOJ’s evaluation of each BOC application, particularly the competitive implications of each application, is tremendously important. As mentioned earlier, the “irreversibly opened” standard and the DOJ’s comments properly focus the Commission’s attention on the competitiveness of the local telephone market and the effect of the application on the growth of competition. For this reason, Joint Petitioners do not propose that “realistic choice” substitute for or replace “irreversibly open.”

Rather, Joint Petitioners believe that the “realistic choice” approach should be the most important factor used to implement the *public interest test*, while the DOJ’s “irreversibly open” standard is the standard that DOJ has chosen to evaluate the *entire application*. In this way, the “realistic choice” analysis can supplement the DOJ’s analysis of its standard.³⁰ After all, the DOJ and consumers share the

³⁰ There is no legal or logistical impediment to the Commission’s use of both the “realistic choice” approach and the DOJ’s “irreversibly opened to competition” approach. The statutory language requires the DOJ provide “an evaluation of the application using any standard the Attorney General

commitment to seeing competition develop for local telephone service. The realistic choice approach, together with the DOJ's "irreversibly opened to competition" standard, can ensure that this goal is achieved.

IV. CONCLUSION

To date, consumer benefits from passage of the Telecommunications Act of 1996 have been negligible at best. Reductions in per-minute long distance charges have been offset by increases in monthly fees. Payphone rates have risen, both for coin calls and long distance calls made from payphones. Cable television rates have risen and may rise faster in April of 1999 once the rates for additional services are deregulated. In the meantime, several local exchange telephone companies have merged or are seeking to merge rather than compete with each other.

These results are ironic, to say the least, because consumers were intended to be the ultimate beneficiaries of the Telecommunications Act of 1996. Congress intended first and foremost for residential and business consumers to enjoy the benefits of competition for all communications services, and especially local telephone services. Competition is expected to lead to lower prices, higher quality services, and greater efficiency. To date, however, local telephone competition has not developed as quickly as many observers predicted.

considers appropriate," but does not link the DOJ's evaluation to any part of the three-part entry test. Further, the statute directs the Commission to give substantial weight to the Attorney General's *evaluation*, not the Attorney General's *standard*. Thus, the FCC can give "substantial weight" to the DOJ's "evaluation" of the entire application, while at the same time giving primary importance to the "realistic choice" approach to the public interest standard. *See*, Section 271(d)(2)(A).

The Commission should take advantage of every opportunity to help local telephone competition become a reality. Last year, the Commission announced that local telephone competition was a priority and that it would seek comment on actions it could take to remove barriers to entry by local telephone competitors. To date, however, the Commission has not yet determined what action it should take to accomplish that goal. The public interest test in section 271 provides an important vehicle by which the Commission can accomplish the objectives of the 1996 Act and help spur the growth of local telephone competition.

The public interest test is the most important provision of section 271 for consumers. How the Commission carries out its public interest analysis is critical to whether or not residential and business consumers are likely to benefit from approval of a BOC application and from the 1996 Act in general.

If the FCC fails to articulate its approach to the public interest standard outside of a proceeding on a specific BOC application, the public interest is likely to be rendered meaningless. A finding that the BOC has met the competitive checklist is likely to create such momentum in favor of the application that the FCC will be in a poor position to give the public interest test the fair and independent consideration that it deserves. Of particular concern is the fact that so many parties have maintained that the public interest test can be satisfied by completion of the competitive checklist, despite the statutory language and the legislative history that requires the public interest test to be treated as a separate and independent prong of a three-part test. As a result, it is essential for the FCC to

articulate how it intends to enforce the public interest standard in advance of reaching this issue in a particular BOC application.

Consumers' best hope for seeing local telephone competition in the near future rests in the FCC's adoption of the realistic choice approach to the public interest standard in section 271. Allowing the BOCs to enter the long distance market before they face some competitive pressures for local telephone services will likely diminish the chances that residential and business consumers will ever benefit from local telephone competition. Once the BOC has been allowed to enter the long distance market, it will have even stronger incentives to delay the growth of local telephone competition and to discriminate against competing long distance providers.

If, on the other hand, the FCC withholds long distance relief for the BOCs until consumers have a "realistic choice" of alternative local telephone carriers, consumers are likely to benefit in two significant ways. First, competition for local telephone services is likely to develop more quickly. Second, consumers are more likely to benefit from the BOC's entry into long distance services because the BOC will face competitive pressures to flow their efficiency gains through to consumers.³¹

In conclusion, the Telecommunications Act of 1996 was intended to promote local telephone competition and benefit consumers. The FCC can best implement these goals by clarifying that it will approach the public interest standard from the

³¹ Again, Joint Petitioners propose that the "realistic choice" approach should govern the FCC's examination of the public interest standard only for applications under Track A, not applications under Track B.

perspective of consumers, and by establishing a presumption in favor of or against a BOC application under section 271 depending on whether residential and business consumers have a “realistic choice” of alternative local telephone providers.

Joint Petitioners respectfully request the FCC to take comment on this petition and to issue the two declaratory rulings discussed above.

Respectfully Submitted,

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APPENDIX

Information on Organizations Filing FCC Petition for Declaratory Rulings on Realistic Choice

Competition Policy Institute (CPI)

The Competition Policy Institute is an independent, non-profit organization that advocates policies to bring competition to telecommunications and energy markets in ways that benefit consumers. CPI receives grants from a broad range of telecommunications and energy companies and associations and is advised by a panel of consumer advocates from across the country. Complete information about CPI is available on its web site, at www.cpi.org.

American Association of Retired Persons (AARP)

AARP, celebrating 40 years of service to Americans of all ages, is the nation's leading organization for people age 50 and older. It serves their needs and interests through information and education, advocacy and community services which are provided by a network of local chapters and experienced volunteers throughout the country.

Iowa Office of Consumer Advocate (OCA)

The Office of Consumer Advocate is a division of the Iowa Department of Justice. The OCA has the duty to represent all consumers and the public generally in proceedings before the Iowa Utilities Board, federal agencies such as the Federal Communications Commission, and state and federal courts concerning the regulation of telecommunications and energy utilities.

Maine Office of Public Advocate

The Office of Public Advocate, State of Maine, is authorized to represent utility consumers in proceedings before the Maine Public Utilities Commission, federal agencies regulating utility service and the courts. The Public Advocate is a gubernatorial appointee, subject to legislative confirmation.

South Carolina Department of Consumer Affairs

The South Carolina Department of Consumer Affairs represents the public before the state and federal regulatory agencies that set prices for public utilities and insurance companies, and assists consumers with complaints against businesses. The Office is also responsible for enforcing laws that deal with health spas, motor clubs, pawn shops, mortgage loan brokers, rent-to-own businesses, athletic and personnel agencies, continuing care retirement communities, and staff leasing.

Utility Consumers' Action Network (UCAN)

UCAN is a non-profit, San Diego-based utility consumer advocacy group that has represented energy and telecommunications utility customers since 1984 before state and federal regulatory agencies. It has 38,000 small business and residential members, most of whom live in San Diego County.