DOCKET FILE COPY ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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

OPPOSITION OF SPRINT COMMUNICATIONS COMPANY, L.P.
TO PETITIONS FOR RECONSIDERATION

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

October 9, 1997

Cat

TABLE OF CONTENTS

PAGE

INTRODUCTION AND SUMMARY 1

I. THE COMMISSION'S ORDER COMPORTS FULLY WITH THE REQUIREMENTS OF ADMINISTRATIVE LAW. 3

II. UNDER THE "PUBLIC INTEREST" PROVISION OF SECTION 271, THE COMMISSION MAY CONSIDER ISSUES RELATING TO LOCAL COMPETITION, INCLUDING PRICING AND THE "PICK AND CHOOSE" RULE. 10

III. THE COMMISSION'S DECISIONS REGARDING OSS AND TRUNK BLOCKING DO NOT RESULT IN AN IMPERMISSIBLE EXTENSION OF THE COMPETITIVE CHECKLIST. 17

IV. THE COMMISSION'S GUIDANCE ON MARKETING SCRIPTS COMPORTS WITH SECTIONS 251 AND 252 AS WELL AS COMMISSION PRECEDENT. 19

CONCLUSION 20

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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 to Michigan	)	CC Docket No. 97-137

OPPOSITION OF SPRINT COMMUNICATIONS COMPANY, L.P. TO PETITIONS FOR RECONSIDERATION

Sprint Communications Company, L.P. ("Sprint"), by its undersigned attorneys, files this opposition to the petitions for reconsideration of the Commission's order denying Ameritech Michigan's application in the above-captioned proceeding.[1]

INTRODUCTION AND SUMMARY

The petitions for reconsideration filed by BellSouth Corporation, U S West, Inc., and the New York State Department of Public Service offer little of substance. The petitioners, especially U S WEST and BellSouth, have tried to find authority where there is none to support their view that the Order is procedurally and substantively defective.

As to procedure, the petitioners have simply mischaracterized the case law interpreting an agency's authority

---

1 See 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 (released August 19, 1997) ("Order").

to adopt binding rules of general applicability in an adjudicative proceeding. In fact, the law fully supports the Commission's decision to include in the Order some guidance for future Section 271 applicants that were not parties to the proceeding. U S WEST's strangely contradictory argument that the Commission should have ruled on all of the issues raised by the Ameritech Michigan application is also meritless. The Commission may obviously choose those issues which it finds appropriate subjects for guidance to future applicants.

Moreover, the Commission acted well within its jurisdiction in announcing that it will consider as part of its public interest inquiry issues relating to local competition, such as pricing and the inclusion of "pick and choose" provisions in BOC interconnection agreements. Public interest provisions have long been understood to grant administrative agencies broad discretion to consider any issue relevant to a particular proceeding. Petitioners' reliance on the presence of a checklist and the prohibition against extending the checklist fails to meet the substantial burden imposed on any party attempting to limit the public interest jurisdiction.

Nor does U S WEST adequately support its view that the Commission's detailed requirements on OSS and trunk blocking impermissibly extend the checklist. Those requirements merely ensure that BOCs offer nondiscriminatory access to unbundled network elements, a checklist requirement.

Finally, BellSouth's attempt to rewrite the Commission's rules regarding inbound telemarketing must be rejected. The Commission's rules clearly require BOCs to list long distance carriers in random order to new local exchange customers.

I. THE COMMISSION'S ORDER COMPORTS FULLY WITH THE REQUIREMENTS OF ADMINISTRATIVE LAW.

The petitions for reconsideration assert that the Commission violated the Administrative Procedure Act by adopting general rules concerning Section 271 applications outside a rulemaking proceeding.[2] Both U S WEST and the New York Department of Public Service ("NYDPS") argue that the Commission cannot establish binding, substantive rules in an adjudication. U S WEST cites case law purportedly holding that when an agency's policy statement is "binding", it must be promulgated pursuant to a rulemaking proceeding.[3] NYDPS states that inadequate notice was given by the FCC.

These petitions are mistaken in their attempts to equate the Section 271 application process with the agency policy statements at issue in the cases they cite.[4] More importantly, their

---

2 U S West Petition at 7-10; NYDPS Petition at 2-3.

3 See U S WEST Petition at 9-10.

4 The cases cited by U S West concerned agency statements which were not adopted in either a rulemaking or an adjudicative proceeding. See Community Nutrition Institute v. Young, 818 F.2d 943 (D.C. Cir. 1987); Vietnam Veterans of America v. Secretary of the Navy, 843 F.2d 528 (D.C. Cir. 1988); United States Telephone Assoc. v. FCC, 28 F.3d 1232 (D.C. Cir. 1994); Public Citizen, Inc. v. U.S. Nuclear Regulatory Comm., 940 F.2d 679 (D.C. Cir. 1991); American Bus Assoc. v. U.S., 627 F.2d 525 (D.C. Cir. 1980).

arguments ignore Supreme Court precedent which grants agencies the discretion to announce new binding principles in adjudicatory proceedings.

In National Labor Relations Board v. Bell Aerospace Co., the Supreme Court concluded that the choice between rulemaking and adjudication "lies primarily in the informed discretion of the administrative agency."[5] The Court stated:

> The views expressed in Chenery II and Wyman-Gordon make plain that the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion.

The Supreme Court further stated that where the Board is proceeding on a case-by-case basis, "the Board's judgment that adjudication best serves this purpose is entitled to great weight."[6] While both NYDPS and U S WEST cite Wyman-Gordon for support of their assertion that the Commission cannot issue decisions in an adjudicatory proceeding that establish principles for entities not parties to the adjudication to follow in the future, they completely ignore the Supreme Court's subsequent decision in Bell Aerospace which permits the Commission to do so. In fact, it is recognized by legal scholars that the split of the

---

5 National Labor Relations Board v. Bell Aerospace Co., 416 U.S. 267, 293 (1974).

6 Id. at 294. The Court noted that there may be situations where an agency's reliance on an adjudication constitutes an abuse of discretion, but it also noted that adjudications may be appropriate in some instances and that courts should give "great weight" to an agency's decision.

justices in Wyman-Gordon "left considerable room for confusion concerning the meaning of the [Wyman-Gordon] case" and that the Court removed that ambiguity in Bell Aerospace.[7] Moreover, the U.S. Court of Appeals for the D.C. Circuit has relied upon Bell Aerospace in holding that the Commission may reasonably determine whether to proceed by rulemaking or adjudication.[8] Notably, since Bell Aerospace, the Supreme Court has not constrained an agency's choice between rulemaking and adjudication.

Neither U S WEST nor NYDPS has demonstrated that the Commission abused its discretion in setting out principles for Section 271 applications in the Order. In fact, due to the tight deadlines imposed by the Act for the Commission to consider Section 271 applications and the enormous volume of information provided in the Section 271 proceedings, it is appropriate that the Commission established some guidelines for future applications at the earliest opportunity. Because the Commission

---

7 See Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise, 272-73 (3d ed. 1994). See also William F. Fox, Jr., Understanding Administrative Law, 139 (2d ed. 1992).

8 See Chisolm v. FCC, 538 F.2d 349, 365 (D.C. Cir. 1976), cert. denied, 429 U.S. 890 (1976) (holding that the FCC could reverse its policy pursuant to an adjudication rather than a rulemaking, especially where there is no advantage to be gained when issues are fully aired by interested parties); Office of Communication of the United Church of Christ v. FCC, 590 F.2d 1062 (D.C. Cir. 1978); see also Bechtel v. FCC, 957 F.2d 873, 881 (D.C. Cir. 1992), cert. denied, 506 U.S. 816 (1992) (Bell Aerospace stands "for the proposition that an agency may, in its discretion, choose to make new policy through either rulemaking or adjudication.").

has the discretion to announce new principles in adjudicatory proceedings and because it did not abuse that discretion, the Commission should reject U S WEST's argument that the Commission violated the APA.

Curiously, U S WEST also claims that the Commission failed to resolve all of the issues presented by Ameritech's Section 271 application, in violation of 5 U.S.C. § 557(c)(3)(A). That provision requires an agency decision to include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record."[9] However, the procedural requirements of Section 557 apply only to formal adjudications i.e., those adjudications required by statute to be determined "on the record after opportunity for an agency hearing."[10] Section 271(d)(3) requires simply that the Commission "issue a written determination approving or denying" the application and to "state the basis for

---

9 U S West Petition at 6.

10 See 5 U.S.C. §§ 557, 556. Specifically, Section 557, by its terms, is triggered only when a hearing is required pursuant to 5 U.S.C. § 556. For adjudications, Section 556 only applies when the governing statute requires a determination "on the record after opportunity for an agency hearing." Additionally, contested facts must actually be in dispute, another condition absent here. See Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise, 379 (3d ed. 1994) (emphasis added); Railroad Commission of Texas v. U.S., 765 F.2d 221 (D.C. Cir. 1985) (formal adjudicative proceeding requirements of the APA attach only where there is a statutory requirement for a "hearing on the record"); Yong v. Regional Manpower, 509 F.2d 243 (9th Cir. 1975) (same).

its approval or denial."[11] Absent express language that would require the Commission to make a determination "on the record after opportunity for an agency hearing," Section 557(c)(3)(A) does not apply.[12]

Of course, U S WEST's invocation of Section 557 is not at all an effort to establish formal hearing procedures, but rather to require the Commission to resolve all possible issues presented by Ameritech's application in the hopes of foreclosing comprehensive reviews of future 271 applications. U S WEST laments that the Order does not "make clear what Ameritech or any other applicant would have to do to satisfy the Commission's interpretation of the three checklist items that were the basis for denying Ameritech's application."[13] It is ironic that U S WEST's Petition takes the position that the Commission exceeded its administrative authority by issuing rules without a rulemaking proceeding on some issues,[14] yet is not satisfied that the Commission did *not* set out its requirements for other issues.

---

11 Significantly, not even revocation of interLATA authority requires "on the record" hearing procedures, but simply "notice and opportunity for a hearing." 47 U.S.C. § 271(d)(6)(A).

12 If a formal adjudication is not required, then 5 U.S.C. § 555 applies. Davis & Pierce, supra, 379. Tracking the straightforward requirement of Section 271(d)(3), Section 555(e) requires merely that the agency provide a brief statement of the grounds for denial except where the denial is self-explanatory. See 5 U.S.C. § 555(e).

13 U S WEST Petition at 5.

14 Id. at 7-10.

One might well ask what would be gained by having the Commission resolve "all" issues that might be raised in the Ameritech Section 271 proceeding, if those resolutions could not be lawfully used to bind other applicants.

Pursuant to the terms of Section 271, the Commission need only state the basis for its approval or denial of such applications. Significantly, the terms of the section forbid the FCC from approving any application unless it affirmatively finds that each and every condition has been met.[15] Under the terms of the section, then, the Commission is perfectly within the statute if, having found any one condition lacking, to dismiss the application on that single determination alone. Any additional guidance given by the Commission in its decision for future applications or applicants is at the sole discretion of the Commission.[16]

It is established law that "courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach."[17] While U S WEST

---

15 See 47 U.S.C. § 271(d)(3) ("The Commission shall not approve . . .unless it finds that...").

16 Section 47 U.S.C. § 154(j) of the Communications Act provides that the Commission "may conduct its proceeding in such manner as will best conduce to the proper dispatch of business and to the ends of justice." See Nader v. FCC, 520 F.2d 182 (D.C. Cir. 1975) (Regulatory agencies are free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.)

17 INS v. Bagamasbad, 429 U.S. 24, 25 (1976) (citations omitted).

suggests that resources would be saved by the Commission ruling on all issues (explicitly and implicitly) presented, the suggestion does not hold up under analysis. First, Section 271 is not a rote exercise; the subissues in a Section 271 proceeding may raise complex factual, economical, and legal issues. A decision on such subissues cannot always, indeed cannot generally, be determined in advance, based on a set of preexisting "rules." Further, the analysis required of the Commission, most especially under the public interest portion of the statute, demands careful consideration of the interweaving of various individual factors so that an overall determination can be made on the record as a whole. As a matter of common sense alone, it is clear that the Commission, of necessity, must await specific factual contexts in which to resolve at least some issues. And straightforward principles of jurisprudence have accommodated this need. Thus, the courts have upheld the Commission's "long standing policy of refusing to issue interpretative rulings or advisory opinions whenever the critical facts are not explicitly stated or there is a possibility that subsequent events will alter them."[18]

U S WEST's argument devolves to an effort to induce the FCC into listing *all* of its concerns in a single 271 proceeding and

---

[18] Yale Broadcasting Co. v. FCC, 478 F.2d 594, 602 (D.C. Cir. 1973), cert. denied 414 U.S. 914 (1973) (holding that the FCC did not abuse its discretion in refusing to "clarify" its policy and rule on a broadcaster's proposed plan of compliance with such policy).

thereby somehow estop itself from considering public interest concerns in future applications. The FCC's statutory obligation to determine the public interest does not permit it to do this.

II. UNDER THE "PUBLIC INTEREST" PROVISION OF SECTION 271, THE COMMISSION MAY CONSIDER ISSUES RELATING TO LOCAL COMPETITION, INCLUDING PRICING AND THE "PICK AND CHOOSE" RULE.

BellSouth and U S WEST argue that the Commission may not consider issues relating to local telephone competition as part of its public interest review of Section 271 applications.[19] The parties also raise the related arguments that the Commission lacks the authority under the public interest inquiry to consider pricing issues or whether a BOC applicant permits CLECs to adopt interconnection agreements on a "pick and choose" basis.[20] Of

---

[19] See BellSouth Petition at 11-15; U S WEST Petition at 17-18.

[20] See BellSouth Petition at 15-16; U S WEST Petition at 18-19. NYDPS also argues that the Eighth Circuit's decision in Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997) prohibits the Commission from relying on its authority to ensure checklist compliance to impose pricing requirements for intrastate services as a condition for Section 271 approval. See NYDPS Petition at 3-4. Several incumbent LECs, including U S WEST and BellSouth, have petitioned the Eighth Circuit to enforce the mandate of Iowa Utils. Bd. v. FCC by ordering the FCC not to impose such pricing requirements as a condition for Section 271 approval. Sprint and other intervenors in support of the FCC have opposed that petition, and Sprint does not address checklist pricing issues in this opposition. It should be pointed out, however, that in addition to the fundamental jurisdictional defect of the LEC petition, their general argument, adopted here by NYDPS, must fail because (1) the Court in Iowa Utils. Bd. did not address the FCC's jurisdiction under Section 271; (2) the FCC is not seeking to supplant state authority to set rates for intrastate services, but only to determine under what conditions BOCs may enter the interLATA market; and (3) Section 271 gives the Commission independent authority to apply the statutory pricing requirements whose meaning must ultimately be determined by the federal courts,

course, a complete review of the Commission's administration of the public interest provision is only possible where the Commission actually relies on such an analysis as part of its decision on the merits. That has not happened here, making the objections academic and unripe. These objections are, in any case, meritless.

Although the term "public interest, convenience, and necessity" is not defined in the Communications Act, the Supreme Court has characterized this touchstone of the Act as a "supple instrument" granting broad powers to the FCC.[21] Those powers call for "imaginative interpretation"[22] and dispense "broad" authority to the FCC to act as an "overseer" and "guardian" of the public interest.[23] Courts are thus required to give

---

not the states. See Intervenors Opposition To Petitions For Writ Of Mandamus To Enforce The Court's Mandate, filed Sept. 26, 1997 in Iowa Utils. Bd. v. FCC, No. 96-3321 and consol. cases (8th Cir).

21 See Federal Communications Commission v. WNCN Listeners Guild, 450 U.S. 582, 593 (1981) (quoting FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940)(the public interest serves "as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy")). See also National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (holding that "public interest" confers broad powers upon the FCC); Public Utilities Com'n of Cal. v. FERC, 900 F.2d 269 (D.C. Cir. 1990)("public interest" standard grants broad powers to FERC).

22 See FCC v. RCA Communications, Inc., 346 U.S. 86, 90 (1953)("The statutory standard [of the public interest] no doubt leaves wide discretion and calls for imaginative interpretation").

23 See CBS v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973). See also National Cable Television Ass'n v. United States and FCC, 415 U.S. 336, 341 (1974)("There is no doubt that

"substantial judicial deference" to the Commission's "judgment regarding how the public interest is best served."[24]

The reach of the public interest is minimally defined by the policies inherent in the delegation of substantive law granted by Congress to the agency. See discussion n.23. Here, of course, one of the principal policies established in the Telecommunication Act of 1996 is to effectuate the necessary and complex conditions that will allow for local telephone competition. One of the key provisions to implement this policy is to provide the reward of interLATA authority as an inducement to a BOC to cooperate in creating the conditions for a competitive local market in a particular state. To suggest that the Congress foreclosed to the FCC any ability to analyze the opportunities for local competition under section 271 is simply silly given this context.

---

the main function of the Commission is to safeguard the public interest").

Although extensive, the "public interest" standard is not limitless. The Court has held that the public interest does not give administrative agencies a "broad license to promote the general public welfare." See NAACP v. FPC, 425 U.S. 662, 669 (1976). Rather, the exact shape and breadth of an agency's public interest authority varies with the aims and goals of the statute in which the public interest provision is lodged. See id. at 669 (the public interest derives its "content and meaning" from "the purposes for which the Act[] [was] adopted"); Public Utilities Com'n of Cal., 900 F.2d 269 at 281 (same). 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).

24 See WNCN Listeners Guild, 450 U.S. at 596 (cites omitted).

The legislative history of the Act demonstrates that Congress was specifically aware that the Commission's public interest review under section 271 would include consideration of issues relating to local competition. The Senate (whose bill in this respect was adopted) rejected an amendment proposed by Senator McCain which would have eliminated the Commission's authority to conduct a public interest review.[25] Senator McCain's amendment stripped out the public interest by providing that: "Full implementation of the checklist . . . shall be deemed in full satisfaction of the public interest, convenience, and necessity requirement[s]."[26] The amendment was required, according to Senator McCain and other supporters, because the public interest standard would "negate[] the entire checklist"[27]

---

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

26 See 141 Cong. Rec. S7960 (daily ed. June 8, 1995). See also 141 Cong. Rec. S7954 (daily ed. June 8, 1995) (statement of Sen. McCain) (The FCC's public interest authority "should be eliminated, or at least amended so that compliance with the competitive checklist is deemed to be in compliance with the public interest test").

27 See 141 Cong. Rec. S7969 (daily ed. June 8, 1995) (statement of Sen. McCain). Senator Craig made similar statements. See, id. at S7964-65 (statement of Sen. Craig) (The public interest standard would permit the Commission to "block"

as it was an "ill-defined, arbitrary standard" which would expand, rather than lessen, the Commission's authority.[28] In short, the amendment's backers believed that, without the amendment, the Senate bill permitted the Commission to use its public interest mandate to consider, when appropriate, issues relating to local competition that are not listed in the checklist. The amendment was, of course, defeated.

The petitioners assert that Congress would not have gone to the trouble of carefully crafting the competitive checklist if it suspected the checklist would not, by itself, suffice to open the local market.[29] The introduction and rejection of Senator McCain's Amendment refute this point. Moreover, the more natural reading of the statute is that Congress included the competitive checklist to ensure that, at the very least, a BOC Section 271 application would not be granted until the BOC demonstrated compliance with the 14 enumerated requirements. Thus, in no event can an application be granted without meeting the public interest requirement. The checklist was added to make sure that

---

BOCs from offering interLATA services even if the BOC satisfied the competitive checklist).

28 See 141 Cong. Rec. S7960 (daily ed. June 8, 1995) (statement of Sen. McCain). See also id. S7966 (daily ed. June 8, 1995) (statement of Sen. Burns, R-MT.) (Public interest is in "the eye of the beholder."); id. at S7967 (statement of Sen. Thomas, R-WY.) ("The public interest is a vague and subjective standard."); id. at S7970 (statement of Sen. Packwood, R-OR.) (Public interest is "amorphous"); id. at S7965 (statement of Sen. Craig) (The public interest is "subjective" and "a standard that has no standard").

29 See BellSouth Petition at 11-15.

the public interest analysis (whatever else it might include) could never be conducted without reference to the checklist requirements.

The petitioners' argument also proves too much. It could just as easily be argued that Congress would not have gone to the trouble of enacting all of the detailed provisions of Section 272, designed to protect local ratepayers *and* the long distance market,[30] if it had suspected that these protections would be inadequate by themselves to protect competition in long distance. The truth, of which Congress was well aware, is that preventing anticompetitive behavior in both the local and the long distance markets is a complex business. In both cases, the Commission needs the full discretion available to evaluate whether, in each state, the statutory goal of enabling competition has been achieved.

Petitioners' reliance on the provision that prohibits the Commission from extending the checklist[31] is equally unconvincing. That provision would prevent the Commission from adding a new interconnection requirement, for example, the obligation to interconnect with information service providers, as

---

30 See, e.g., 47 U.S.C. § 272(b) (establishing structural and transaction requirements that protect regulated ratepayers and long distance competition from the effects of cross-subsidy); § 272(c) (establishing nondiscrimination safeguards to prevent vertically integrated BOCs from discriminating against downstream competitors in the long distance market); § 272(d) (establishing further non-discrimination requirements).

31 See BellSouth Petition at 11; U S West Petition at 17-18.

a precondition for approval of all Section 271 applications. The prohibition against extending the checklist does not, however, prohibit the Commission from *considering*, as part of the public interest inquiry, other factors that *may* be relevant to whether the local market in a particular state is open to competition. A case-by-case consideration of the relevance of certain aspects of local competition is not the same thing as imposing a checklist condition on approval of all applications.

It follows that Section 271 does not prevent the Commission from considering the effect of pricing, the application of the "pick and choose" rule or any number of issues when determining whether an application comports with the public interest. Nothing in the statute prevents the Commission from considering the effect of prices adopted in interconnection agreements and approved by a state commission on the prospects for local competition. Thus, if the prices for interconnection and unbundled elements appear too high to make competitive entry via these arrangements sustainable, the Commission must be able to consider this fact. If prices are above cost as a result of the exercise of market power (and ineffective regulation), the Commission must withhold Section 271 approval until BOC cooperation lowers interconnection prices to efficient levels.

As to "pick and choose," BellSouth is incorrect that the Iowa Utils Bd. case prohibits FCC consideration of whether such provisions are contained in a BOC's interconnection agreements. In Iowa Utils. Bd., the court found that imposing a pick and

choose *requirement* on all incumbent LECs would undermine the statutory goal of encouraging voluntarily negotiated agreements.[32] But the Commission did not propose such a requirement in the instant Order. It only stated that, in states where competition is not emerging, it would consider whether the BOC offers its interconnection agreements to others on a "pick and choose" basis. Many other considerations will be relevant to such a review. Moreover, the BOCs are free under the Commission's Order to refuse to include "pick and choose" provisions in their interconnection agreements. It is indeed conceivable that a BOC that has done so could receive Section 271 approval, if other conditions in the state support such a decision. In short, their relevance under Section 271 does not mean that voluntarily negotiated agreements will be disrupted.

III. THE COMMISSION'S DECISIONS REGARDING OSS AND TRUNK BLOCKING DO NOT RESULT IN AN IMPERMISSIBLE EXTENSION OF THE COMPETITIVE CHECKLIST.

U S WEST argues that the Commission has impermissibly extended the checklist by establishing detailed rules regarding OSS access and trunk blocking.[33] U S WEST essentially argues

---

32 See Iowa Utils. Bd. v. FCC, 120 F.3d at 800-801 (8th Cir. 1997).

33 U S WEST also argues that the Commission may not require BOCs to provide shared transport as a condition of Section 271 approval. See U S WEST Petition at 19-21. U S WEST argues that this requirement is inconsistent with the Iowa Utils. Bd. decision. As it acknowledges, U S WEST raised this argument in its pending petition for stay of the FCC's Third Order on Reconsideration in the CC Docket Nos. 96-98, 95-185. It is in that context that this issue is properly considered.

that the Commission must leave the details of access to unbundled network elements to interconnection negotiations. This argument is easily rejected.

The checklist requires that BOCs provide nondiscriminatory access to network elements in accordance with Sections 251(c)(3) and 252(d)(1).[34] As the Eighth Circuit has held, the Commission has the authority to define the network elements to be made available pursuant to Section 251(c)(3).[35] Moreover, both OSS and transport are unquestionably unbundled elements.[36] The Commission therefore has the authority to determine, for the purposes of interconnection in general and Section 271 approval in particular, whether OSS and unbundled transport have been provided in accordance with the requirements of Section 251(c)(3). The detailed requirements set forth in the Order are not an impermissible addition of a new checklist requirement but merely a legitimate exercise of the Commission's authority to ensure BOC compliance with the unbundling requirements already contained in the checklist.

---

34 See 47 U.S.C. § 271(c)(2)(B)(ii). The checklist also imposes an independent obligation to provide unbundled access to transport. See 47 U.S.C. § 271(c)(2)(B)(v).

35 See Iowa Utils. Bd. v. FCC, 120 F.3d at 794 n.10.

36 See id. at 808-810 (upholding FCC decision to require access to OSS as an unbundled element).

IV. THE COMMISSION'S GUIDANCE ON MARKETING SCRIPTS COMPORTS WITH SECTIONS 251 AND 252 AS WELL AS COMMISSION PRECEDENT.

BellSouth argues that the discussion of Ameritech Michigan's inbound telemarketing script violates the rules adopted by the Commission in the Non-Accounting Safeguards proceeding. This argument is unpersuasive.

As BellSouth concedes, the Non-Accounting Safeguards Order requires that when a new local exchange customer calls the BOC to initiate service, the BOC must provide the customer with a list in random order of the long distance carriers serving the area in question.[37] Nevertheless, BellSouth seems to think (as did Ameritech) that a BOC ought to be able to inform new local exchange customers of their right to choose their long distance carrier and then mention the BOC long distance affiliate *in every case* before mentioning any other long distance provider.[38] As the Commission stated in the Order, such an approach violates the unambiguous requirement that the BOC list long distance carriers available to a new local exchange customer in random order. Indeed, rather than seeking clarification, BellSouth is seeking a reconsideration of a clear FCC rule. The time has long passed for such a request.[39]

---

[37] See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order, CC Docket No. 96-146 at ¶ 292 (released December 24, 1996).

[38] See BellSouth Petition at 7-9.

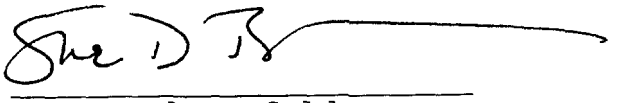
[39] Nor is BellSouth correct that "[a]ny requirement that the BOC's long distance affiliate be mentioned only as part of a random list would nullify the BOC's statutory joint

CONCLUSION

For the reasons explained above, the Commission should deny the petitions for reconsideration in the above-captioned proceeding.

Respectfully submitted,

SPRINT COMMUNICATIONS COMPANY, L.P.



Sue D. Blumenfeld
Thomas Jones
Angie Kronenberg

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

ITS ATTORNEYS

October 9, 1997

---

marketing right." Id. at 8. The requirement at issue only applies to inbound telemarketing. There are many other aspects of marketing in which the BOCs may exercise their "statutory right."

CERTIFICATE OF SERVICE

I, Catherine M. DeAngelis, do hereby certify that on this 9th day of October, 1997, copies of the foregoing "Opposition of Sprint Communications Company, L.P. To Petitions For Reconsideration" were mailed, first class postage prepaid, unless otherwise indicated, to the following parties:

Walter H. Alford
B. Barfield
M. Robert Sutherland
BellSouth Corporation
1155 Peachtree Street, N.W.
Suite 1700
Atlanta, GA 30309-3610

Michael K. Kellogg
Austin C. Schlick
Jonathan T Molot
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, NW
Suite 1000 West
Washington, DC 20005

Counsel for BellSouth Corporation

William T. Lake
John H. Harwood II
Jacquelynn Ruff
Michael A. McKenzie
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, DC 20037-1420

Counsel for U S WEST, Inc.

Robert B. McKenna
Laurie J. Bennett
U S WEST, Inc.
Suite 700
1020 19th Street, N.W.
Washington, DC 20036

Lawrence G. Malone
General Counsel
New York State
Dept. of Public Service
Three Empire State Plaza
Albany, New York 12223-1350

John G. Strand
John C. Shea
David A. Svanda
Dorothy Wideman
Michigan Public Service Commission
6545 Mercantile Way
P.O. Box 30221
Lansing, MI 48909-7721

Commissioner Rachelle Chong **
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, DC 20554

Commissioner Susan Ness **
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, DC 20554

** Filing was hand-delivered, not sent via U.S. Mail

Chairman Reed E. Hundt **
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, DC 20554

A. Richard Metzger **
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 500
Washington, DC 20554

Don Russell **
Chief, Telecommunications
Task Force
Antitrust Division
U.S. Department of Justice
Room 8104, Judiciary Center
555 4th Street, NW
Washington, DC 20001

Commissioner James H. Quello **
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, DC 20554

International Transcription Service **
Room 140
2100 M Street, N.W.
Washington, D.C. 20554

Catherine M. DeAngelis

** Filing was hand-delivered, not sent via U.S. Mail
0046796.01