

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

In the Matter of)	
)	
Application of SBC Communications, Inc.)	CC Docket No. 00-04
Pursuant to Section 271 of the)	
Telecommunications Act of 1996)	
To Provide In-Region, InterLATA Services)	
In Texas)	

AFFIDAVIT OF JERE THOMPSON

1. My name is Jere Thompson, Jr. My business address is 15601 Dallas Parkway, Suite 700, Dallas, Texas 75001.
2. I am Chairman and CEO of CapRock Communications, Corp. ("CapRock").
3. CapRock is a facilities-based integrated communications provider (ICP) offering local, long-distance, Internet, data and private line services to business customers in the southwest United States. CapRock also provides switched and dedicated access, regional and international long-distance, private lines, dark fiber and bandwidth to carrier customers. CapRock is building a 6,100-mile fiber network, as well as voice and data networks, throughout Texas, Louisiana, Arkansas, Oklahoma, New Mexico and Arizona.

4. In Texas, CapRock currently provides local service in Houston, Dallas, Ft. Worth, Austin and San Antonio and plans to expand into 21 total markets during 2000. CapRock offers facilities-based services to small, medium and large business customers within Texas

**OVERVIEW AND
PURPOSE OF THE AFFIDAVIT**

5. I have been asked by the Competitive Telecommunications Association (“CompTel”), of which CapRock is a member, to described my company’s experiences obtaining wholesale products and services from Southwestern Bell Telephone Company (“SWBT”) in Texas.
6. In this affidavit, I will address CapRock’s difficulties in obtaining local interconnection trunks from SWBT on a timely basis. I will also discuss SWBT’s inability to provision unbundled local loops in a reliable manner using SWBT’s “frame due time” cutover process. Finally, I will address our experience of not receiving UNE Combos that are equal in quality to that SWBT provides when it uses these elements to provide its own retail service.
7. For each of these issues, I will explain how SWBT’s deficient performance impedes CapRock’s ability to compete with SWBT and discriminates against CapRock by preventing us from offering the same level of service that SWBT offers to its own local customers. In particular, SWBT’s poor performance has harmed CapRock’s reputation

with its local service customers and negatively affected CapRock's marketing activities in the local market. This performance, and the impact of SWBT's deficiencies on CapRock customers, are not sufficiently reflected in SWBT's performance evidence presented in the Texas proceeding or this docket.

**SWBT CONSISTENTLY DELAYS
PROVISIONING OF LOCAL INTERCONNECTION TRUNKS**

8. CapRock currently provides local service in Houston, Dallas, Ft. Worth, Austin and San Antonio and plans to expand into 21 total markets during 2000. In our experience, SWBT has consistently delayed the provisioning of CapRock's local interconnection trunks, despite CapRock's compliance with the provisions of our interconnection agreement and SWBT's ordering procedures.
9. Installation of interconnection trunks has routinely taken much longer than SWBT's target interval, as I will explain below.
10. The first source of delay in obtaining local interconnection trunks occurs at the outset of the process, before SWBT officially considers CapRock's request a true order. According to SWBT's standard procedures, a CLEC such as CapRock is required to conduct a pre-ordering or interconnection meeting with SWBT in order to provide the technical specifications of the CLEC's requested trunking. During these meetings, CapRock provides a full description of the method of interconnection it needs, capacity requirements, and provides other technical specifications for its proposed

interconnection. Based upon this information provided by CapRock, SWBT prepares a Service Planning Document. The Service Planning Document is a PowerPoint presentation summarizing the requirements specified by CapRock in the initial interconnection meeting, and it serves as the baseline for an application for local interconnection trunking.

CapRock cannot submit an order for a local interconnection trunk without the Service Planning Document having first been completed by SWBT.

11. Unfortunately, SWBT often takes 30 days or more after our initial interconnection and planning meetings to provide the Service Planning Document.
12. This delay unreasonably restricts CapRock's ability to provide competing service in Texas. As noted, CapRock cannot formally order an interconnection trunk without this document, meaning that each day of delay is another day that CapRock cannot enter the local market in that area and cannot expand its local service offerings to meet customer demands. In addition, because this delay occurs *before* CapRock's "order," the delay is not captured in SWBT's performance measurements of its provisioning intervals for local interconnection trunks
13. Additional pre-ordering delays have resulted from SWBT's inconsistent installation and testing procedures regarding 911 trunks. On several occasions, SWBT has indicated that they will not turn up CapRock's local trunks until the 911 trunks have been tested. Unfortunately, CapRock is unable to test 911 trunks until the local trunks are operational. Although,

SWBT had been informed of this problem, and has admittedly been incorrect in their requirements of CapRock, SWBT has continued to insist that local 911 trunks be tested before the local trunks can be turned up.

14. Still another source of delay is SWBT's claim of a lack of available facilities to fulfill CapRock's order. In a majority of circumstances, SWBT claims that insufficient facilities are available to fulfill the order. Notably, in our experience, SWBT has claimed a lack of facilities for local trunks in each of the markets in which we have successfully ordered interconnection trunks. This has not been a problem isolated to a particular switch or tandem.
15. In those cases where facilities are not available for the capacity specified by CapRock, SWBT will offer to provide a lower capacity trunk (e.g., a DS-1 instead of a DS-3) and treat the order as "fulfilled" when it provides the DS-1. This consistent shortage of facilities negatively impacts CapRock's ability to provide specific services requested by our customers.
16. Importantly, CapRock receives claims of a lack of facilities even though it has accurately forecasted its local trunking requirements in advance, per SWBT's procedures.
17. Finally, CapRock orders both local interconnection trunks and interexchange trunks from SWBT. These two arrangements provide the same functionality (albeit for different traffic types) and require the same type of interconnection to SWBT facilities. The only difference is that local interconnection trunks are ordered from SWBT's LSC, while

interexchange trunks are ordered through SWBT's access provisioning group. Importantly, CapRock is *not* experiencing significant instances of a claimed lack of facilities for interexchange trunks at the same end office location where a lack of local interconnection trunks is being claimed.

**SWBT DOES NOT RELIABLY
PROVISION "HOT CUTS" USING
THE FRAME DUE TIME CUTOVER PROCESS**

18. For its facilities-based services, CapRock must rely upon SWBT to provide it with unbundled network element loops. For customer lines already in service on SWBT, CapRock orders these loops to be provisioned on a "hot cut" basis – that is, the conversion of the loop is to be coordinated with other activities so that the customer is not taken out of service during the cutover.
19. CapRock requests a hot cut using the "frame due time" process. Despite CapRock's request for a "hot cut," on CapRock's loop orders, SWBT does not follow its coordinated procedures. Specifically, we have found that SWBT frequently cuts over the customer's in advance of the designated frame due time.
20. These early cutovers impair CapRock's ability to provide quality service to its customers. First, these premature cutovers often occur prior to the provisioning of related changes necessary to provide service, including the provision of local number portability. As a result, CapRock's customer is unable to receive calls dialed to its "old" telephone number. Second, these

premature cutovers often occur before CapRock has completed installation and testing of *its* facilities for service to the customer. Because CapRock is expecting a cutover to occur at the time it designated, CapRock is not always prepared to serve the customer when SWBT cuts over his service. As a result, the customer can be “out of service” for one or more days before CapRock’s service is established.

21. SWBT’s poor performance has caused CapRock a delay in the pace of CapRock’s entry in local telecommunications markets. In particular, CapRock has been unable to provide service as promised and has had to quote longer installation time periods in order to compensate for SWBT’s inability to provide UNE loops as required.

**SWBT DOES NOT PROVISION THE
UNE COMBO IN COMPLIANCE WITH SECTION 251(C)(3)**

22. CapRock currently utilizes the UNE Combo as one of its means of providing local service to its customers. UNE Combo is available for a variety of service in Texas, including residential, single and multi-line business, PBX, and ISDN services.
23. CapRock submits UNE Combo orders through SWBT’s LEX system. For those orders that SWBT designates as “complex,” however, CapRock is unable to use the LEX interface and must submit these orders manually.
24. Although CapRock submits a single order requesting a UNE Combo for an existing service, SWBT separates this order into three separate orders. First, a “disconnect” (or “D”) order is created, instructing SWBT’s

systems to disconnect the service presently installed at the location.

Second, a “new” (or “N”) order is created, instructing SWBT’s systems to install new service to the location. The N order is installed per the information supplied by the CLEC on its Local Service Request (“LSR”), which is in turn populated with data obtained from the subscriber’s customer service record (“CSR”). Finally, a “change” (or “C”) order is created, instructing SWBT’s system to modify the billing on the line to UNE billing. In our experience, SWBT’s separation of a UNE Combo into three orders is unlawfully discriminatory, in that it subjects CapRock’s customers to a variety of service disruptions and interruptions that SWBT’s retail operations are not subject to.

25. First, although SWBT claims that its systems are designed to link these orders so that the disconnect (or D) order is not processed without the other orders, CapRock’s experience is the opposite. In many cases, a problem with the “N” or “C” order caused the order to be delayed or rejected, yet the corresponding “D” order was not held. As a result, CapRock’s customers were taken out of service completely, and were left with no service.
26. The persistence of these errors – despite SWBT’s procedures intended to prevent the problem – demonstrate that the deficiency is fundamental to SWBT’s three-step method of processing UNE Combo orders. These problems will continue to occur – and continue to relegate carriers using

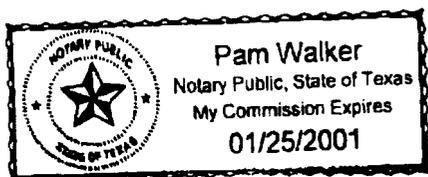
UNE Combo to sub-par performance – until SWBT modifies its systems to process UNE Combo orders “as is.”

27. A second type of service disruption is more prevalent, and more pernicious. As mentioned above, one of the three orders created by SWBT is a “new” or “N” order, instructing its systems to install new service at the location. This order is processed based upon the information presented in the CLEC’s LSR. Like most CLECs, prior to submitting an LSR, CapRock orders a customer service record (“CSR”) from SWBT. The CSR should contain all relevant information about a customer’s service, so that a CLEC will know all of the services the customer receives, as well as the technical details necessary for the CLEC to establish service.
28. Unfortunately, CapRock has found that the CSRs typically do not contain complete or accurate information about a customer’s service arrangements. Errors and omissions are especially prevalent with services such as ISDN, PBX trunks and any service configurations containing “hunt groups” for forwarding calls to particular lines.
29. Because SWBT disconnects the existing service, errors in CSRs adversely impact the customer and CapRock by installing service which does not match the service the customer previously had. Often, this results in services not functioning properly (e.g., hunt groups are re arranged or are routed to non-existent lines), if at all. In addition, it sometimes can take days or weeks to identify particular problems and to eliminate other possible causes from consideration.

30. Because only CLEC orders are processed using the CSR information, errors in the data discriminatorily impact CLECs. Moreover, if not for SWBT's refusal to migrate service "as is," and its decision to "disconnect" existing service before installing new service using UNEs, the problem would not exist at all.

31. This concludes my affidavit.

Executed this 31st day of January, 2000



[Handwritten Signature]
 Jere Thompson

SWORN TO and subscribed before me this 31st day of January, 2000

[Handwritten Signature]
 Notary Public

My Commission expires: 01/25/01

Exhibit C

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Pursuant to Section 271 of the)	
Telecommunications Act of 1996)	
To Provide In-Region, InterLATA Services)	
In Texas)	

AFFIDAVIT OF MITCH ELLIOTT

1. My name is Mitch Elliott. My business address is 5307 West Loop 289, Lubbock, TX 79414.
2. I am employed as Director - CLEC by NTS Communications, Inc. ("NTS").
3. NTS is a full-service communications provider, offering local, long distance, and international communications, paging, and Internet access services. NTS provides all types of local service from POTS to Centrex to ISDN to DSL. NTS offers service principally in Texas, New Mexico, Oklahoma, and Arizona. Our current emphasis on facility-based local operations is being directed toward the West Texas cities of Lubbock, Amarillo, Abilene, and Wichita Falls.
4. NTS offers facilities-based services to small and medium size business customers within Texas. NTS views its market as primarily customers

with approximately 2 to 50 lines. NTS also offers local services to residential customers in Texas, using total service resale and UNEs.

**OVERVIEW AND
PURPOSE OF THE AFFIDAVIT**

5. I have been asked by the Competitive Telecommunications Association (“CompTel”), of which NTS is a member, to described my company’s experiences obtaining wholesale products and services from Southwestern Bell Telephone Company (“SWBT”) in Texas.
6. In this affidavit, I will address NTS’s difficulties in obtaining local interconnection trunks from SWBT on a timely basis. In addition, I will address SWBT’s inability to provision unbundled local loops in a reliable manner using SWBT’s “frame due time” cutover process.
7. For each of these issues, I will explain how SWBT’s deficient performance impedes NTS’s ability to compete with SWBT and discriminates against NTS by preventing us from offering the same level of service that SWBT offers to its own local customers. In particular, SWBT’s poor performance has forced NTS personnel to sit at the customer’s premise for hours babysitting the customer during conversions. We have also been forced to spend an inordinate amount of time consoling customers who were either cut early or cut improperly. Importantly, the customers harmed in these conversions were NTS’s most loyal and longstanding customers. Now, these customers’ view of NTS has been diminished due to SWBT’s poor performance.

8. In response to these problems, NTS has cut back on its marketing efforts for local services. Whereas we have the capacity to handle twice as many local conversions as we currently process, NTS has cut its forecasts in half in order to ensure that we can successfully negotiate the customer through the myriad of delays and disruptions caused by SWBT's poor performance.

**SWBT CONSISTENTLY DELAYS
PROVISIONING OF LOCAL INTERCONNECTION TRUNKS**

9. NTS currently provides local service in Amarillo and Lubbock, Texas. We plan to be in Abilene and Wichita Falls by July. In our experience, SWBT has consistently delayed provisioning to NTS the local interconnection trunks we need, despite NTS's full compliance with our interconnection agreement and SWBT's ordering procedures.
10. As required by SWBT, NTS provides semi-annual trunk forecasts to SWBT. NTS provides these forecasts on January 1 and July 1 of each year. Each forecast shows, by market, the number of local interconnection trunks NTS anticipates it will need over the next four years.
11. NTS submits orders for local interconnection trunks to SWBT through the following process: First, before submitting an order for an interconnection trunk, NTS meets with SWBT to review the technical aspects of its trunking requirements. At this meeting, NTS and SWBT agree on the form of interconnection to be provided (one-way, two-way, mid-span, etc.), its capacity, and other specifications necessary to provide service.

This information is memorialized in a Service Planning Document prepared by SWBT. NTS cannot submit an order for a local interconnection trunk without the Service Planning Document. Once the Service Planning Document is received, NTS submits an interconnection trunk order. NTS submits this through an ASR. After receipt of the order, SWBT returns a Firm Order Confirmation (“FOC”) confirming that facilities are available and specifying an installation date. Unless the order is modified or a problem develops, the trunk is to be provided on the FOC date.

12. Per these procedures, SWBT’s standard installation interval is supposed to be 20 business days for trunk/facility orders and 5 business days for facility only orders. However, installation of interconnection trunks has routinely taken much longer than this target interval. The principal sources of these delays are described below.
13. First, in many cases, NTS does not receive timely confirmation of its service order. Per SWBT’s Guidelines for Local Interconnection, NTS should receive a FOC within 24 hours of receiving a complete and accurate Access Service Request (ASR) for DS1’s/DS3’s. NTS should receive FOC’s within 5 business days for all other trunk orders. The FOC will show the installation due date. However, for over 50 percent of its orders in January 2000 NTS did not receive a FOC within the 24 hour and/or 5 business day interval. If NTS has not received a FOC within this time period, NTS will supplement its order to move the installation date

back while it investigates the cause of the missed FOC. As a result, SWBT's performance measures show the "requested" date as later than NTS originally requested, leading its performance to appear "on time" if service is provisioned on that date. From NTS's perspective, however, the order has been delayed due to SWBT's failure to provide a timely FOC.

14. A second source of delay in obtaining local interconnection trunks occurs at the outset of the process, before SWBT officially counts NTS's request as an order. As explained above, after the initial planning meeting with SWBT, SWBT must prepare a Service Planning Document. The Service Planning Document essentially is a PowerPoint presentation summarizing the requirements specified by NTS in the initial interconnection meeting, and it serves as the baseline for an application for local interconnection trunking.
15. Unfortunately, SWBT often takes 30 days or more after our planning meetings to provide the Service Planning Document. This delay unreasonably restricts NTS's ability to provide competing service in Texas. As noted, NTS cannot formally order an interconnection trunk without this document, meaning that each day of delay is another day that NTS cannot enter the local market in that area or cannot expand its local services to meet customer demands. In addition, because this delay occurs *before* NTS's "order," the delay is not captured in SWBT's performance measurements of its provisioning intervals for local interconnection trunks.

16. Further, SWBT delayed every one of NTS's interconnection orders into Amarillo due to a "lack of facilities." Importantly, NTS received this claim of a lack of facilities even though it has accurately forecasted its local trunking requirements in advance, per SWBT's procedures. For example, in Amarillo, NTS provided interconnection forecasts on 08/02/1999. Nevertheless, when NTS submitted orders on 12/23/1999 within those forecasts, SWBT claimed a lack of facilities for 100% of NTS's orders. SWBT claimed it did not have enough multiplexing equipment available to fulfill NTS's order. As a result, as of today these trunks still have not been installed.

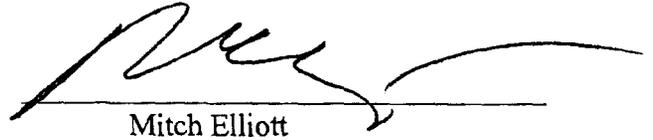
In addition, NTS also was delayed in receiving interconnection trunks in the Lubbock area due to SWBT's refusal to accept orders from NTS. Initially, NTS was told that it could not even place an order for interconnection trunks while its collocations were being constructed. This is because SWBT required NTS to specify on its order an additional point of termination (APOT) for the trunk. However, the APOT could not be assigned until the collocation was complete, meaning that NTS would have to await completion of its collocation before placing orders for interconnection trunks. Subsequently, SWBT finally offered to allow NTS to specify a Preliminary Point of Termination (PPOT) to order our interconnection trunks. However, in order to obtain the PPOT, NTS was required to pay the remaining balance on its collocation space long before the agreed-upon due date for payment. At first NTS refused to pay 100 % of the collocation charges for a collocation that was not complete; however, it became obvious that SWBT would force NTS to wait until completion of its collocation space before beginning the ordering process for interconnection trunks if PPOT was not acquired. NTS paid for the collocation weeks early. This is still SWBT's policy today.

**SWBT DOES NOT
PROVISION “HOT CUTS” RELIABLY OR
CONSISTENTLY USING
THE FRAME DUE TIME CUTOVER PROCESS**

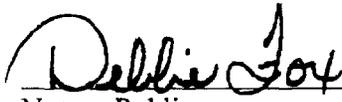
17. For its facilities-based services, NTS must rely upon SWBT to provide it with unbundled network element loops. For customer lines already in service on SWBT, NTS orders these loops to be provisioned as a coordinated cut – that is, the conversion of the loop is to be coordinated with other activities so that the customer is not taken out of service during the cutover.
18. Per its agreement and SWBT’s ordering procedures, NTS requests a coordinated cut using the “frame due time” process. Under this option, NTS submits an order with an exact time for the cutover to take place. SWBT then confirms this cutover time with a FOC, and SWBT is supposed to work the order within 30 minutes of the coordinated time.
19. NTS submits its orders using LEX. NTS began submitting “frame due time” orders to SWBT in October 1999. NTS has converted approximately 1500 lines in Lubbock since this time.
20. Despite the use of this agreed upon format for coordinating cuts, SWBT does not follow its coordinating procedures on as much as 30 percent of NTS’s loop orders. NTS has been forced to leave technicians at the customer premise for 3 or 4 hours waiting on the cut. This is a major drain on human resources. Hence, this problem coupled with many others has tremendously slowed NTS’s market entry.

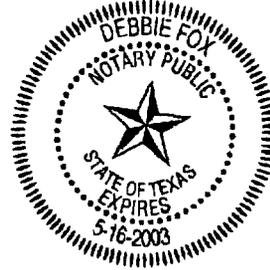
21. Most often, we have found that SWBT cuts over the customer's service one or more days in advance of the designated frame due time. These early cutovers impair NTS's ability to provide quality service to its customers. First, these premature cutovers often occur prior to the provisioning of related changes necessary to provide service, including the provision of local number portability. As a result, NTS's customer is unable to receive calls dialed to its "old" telephone number. Second, these premature cutovers often occur before NTS has completed installation and testing of *its* facilities for service to the customer. Because NTS is expecting a cutover to occur at the time it designated, NTS is not always prepared to serve the customer when SWBT cuts over his service. As a result, the customer can be "out of service" for one or more days before NTS's service is established.
22. SWBT's unacceptably poor performance has caused NTS to hold back on the volumes of orders it is capable of processing. NTS estimates that, due to SWBT's inability to correctly provision UNE cuts, NTS is submitting only about one-half the order volumes that NTS could handle if SWBT's performance were as promised. This has delayed the pace of NTS's entry in local telecommunications markets. In particular, NTS has turned away customers or promised them longer installation time periods in order to compensate for SWBT's inability to provide UNE loops as required.
23. This concludes my affidavit.

Executed this 31 day of January, 2000


Mitch Elliott

SWORN TO and subscribed before
me this 31 day of January, 2000


Notary Public



My Commission expires: 5-16-03



OVERVIEW OF THE COMMISSION'S AUTHORITY TO ADOPT CONDITIONS TO FACILITATE ENFORCEMENT

A. **The Commission Has Authority to Impose Conditions To Make the Application Consistent With the Public Interest, Convenience, and Necessity**

Section 271 of the Communications Act, as amended, precludes the Commission from approving a Section 271 application unless the requested authorization is consistent with the public interest, convenience and necessity.¹ However, the Commission has the authority to impose any conditions necessary to ensure that the requested authorization is consistent with the public interest. As the Commission has already found, “Congress did not repeal the MFJ in order to allow checklist compliance alone to be sufficient to obtain in-region, interLATA authority.”² Moreover, “[t]he legislative history of the public interest requirement in Section 271 indicates that Congress intended the Commission, in evaluating Section 271 applications, to perform its traditionally broad public interest analysis of whether a proposed action or authorization would further the purposes of the Communications Act.”³

Under well established precedent, if the Commission determines that an application would serve the public interest only if particular conditions are met, it can grant the application subject to compliance with those conditions.⁴ For example, the Commission

¹ 47 U.S.C. §271(d)(3)(C). See *Ameritech Michigan Order*, ¶ 386 (“In adopting Section 271, Congress mandated, in effect, that the Commission not lift the restrictions imposed by the MFJ on BOC provision of in-region, interLATA services, until the Commission is satisfied on the basis of an adequate factual record that the BOC has undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition.”).

² See *Ameritech Michigan Order*, ¶ 385.

³ *Id.*, ¶ 385.

⁴ See, e.g., *NYNEX-Bell Atlantic*, 12 FCC Rcd at 20002, ¶ 30 (“If the Commission is able to determine that the application would serve the public interest if particular conditions are met, the Commission can grant the application subject to compliance with the specified conditions.”); *GTE Serv. Corp. v. FCC*, 782 F.2d 263, 268 (D.C. Cir. 1986)

(continued...)

routinely imposes conditions deemed necessary to guard against possible anticompetitive conduct when approving applications for authority to transfer station licenses pursuant to Section 310(d).⁵ Section 310(d) is a particularly apt example because it, like Section 271, does not expressly instruct the Commission to impose conditions as the public interest, convenience and necessity may require.⁶ Nonetheless, the Commission has frequently exercised its authority

(...continued)

(holding that “the Commission may impose conditions whenever in the absence of such conditions the transfer would not be in the public interest. Indeed, in such circumstances unconditional approval would presumably be arbitrary and capricious and therefore could be set aside under the APA.” (footnotes omitted)); *California Ass’n of the Physically Handicapped, Inc. v. FCC*, 778 F.2d 823 (D.C. Cir. 1985) (dissent recognizing authority of Commission to impose conditions on grants of authority pursuant to Section 310); *Amendment of Section 2.106 of the Commission’s Rules To Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, 13 FCC Rcd 23949, 23956, ¶ 16 (1998) (“As an initial matter we note that, pursuant to the Communications Act of 1934, as amended, this Commission has authority to impose on Commission licensees conditions and obligations consistent with the public interest, convenience and necessity, including monetary obligations.”), citing *Mobile Communications Corp. v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 81 (1996); *New England Telephone & Telegraph Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), cert. denied, 490 U.S. 1039 (1989); *North American Telecommunications Association v. FCC*, 772 F.2d 1282 (7th Cir. 1985); *NYNEX-Bell Atlantic*, 12 FCC Rcd 19985. See also *Amendment of Section 73.3525 of the Commission’s Rules Regarding Settlement Agreements Among Applicants for Construction Permits*, 6 FCC Rcd 85 (1990) (finding that Section 311(c), which provides in relevant part that “[t]he Commission shall approve the agreement only if it determines that . . . the agreement is consistent with the public interest, convenience, or necessity”, permits it to impose settlement limitations in the public interest).

⁵ See, e.g., *Tele-Communications, Inc., and TeleCable Corporation Transfer of Control*, 10 FCC Rcd 2147, 2147, ¶ 1 (1995) (“[T]he Bureau finds that, subject to certain conditions, approving the proposed license transfers will serve the public interest, convenience and necessity. Therefore, the Bureau grants the transfer applications. In so doing, however, the Bureau imposes a condition that it determined to be necessary to guard against otherwise possible anticompetitive conduct.”); *Jefferson-Pilot Corp. v. Commissioner*, 995 F.2d 530 (4th Cir. 1993) (discussing FCC approval of assignment of licenses pursuant to Section 310(d) subject to certain conditions and payment of a transfer fee); *Ramsay v. Dowden (Central Arkansas Broadcasting Co.)*, 68 F.3d 213, 214-15 (8th Cir. 1995) (noting that an FCC license is granted and may be transferred pursuant to Sections 307(c) and (d) and 310(d) subject to restrictions and conditions). See also, e.g., *Infinity Broadcasting Corp.*, 12 FCC Rcd 5012 (1996) (imposing conditions on a license transfer pursuant to Section 310(d)); *Citicasters, Inc.*, 11 FCC Rcd 19135 (1996) (same); *Pyramid Communications, Inc.*, 11 FCC Rcd 4898 (1995) (same).

⁶ Section 310(d) provides in relevant part as follows: “No construction permit or station license . . . shall be transferred, assigned, or disposed of in any manner . . . to any person (continued...)”

under Section 310(d) to impose conditions intended to prevent future transgressions of 310(d) whenever in the absence of the conditions the transfer would not be in the public interest.⁷ In fact, where the requested transfer would not be in the public interest, “unconditional approval would presumably be arbitrary and capricious and could therefore be set aside under the APA.”⁸

Although Section 271 does not explicitly instruct the Commission to impose conditions, the only reasonable interpretation of Section 271 is that it authorizes the Commission to grant a BOC’s application subject to compliance with particular conditions that protect the statutory policy inherent in Section 271 and the public interest, convenience and necessity. This interpretation is confirmed by Section 271(d)(6), which explicitly contemplates that the Commission will grant Section 271 applications subject to “conditions.”⁹ Moreover, nothing in the language of Section 271 – or in the legislative history of Section 271¹⁰ – limits the

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except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.” 47 U.S.C. § 310(d).

⁷ *Office of Communication of the United Church of Christ v. FCC*, 911 F.2d 803, 809 (D.C. Cir. 1990) (explaining Commission’s broad discretion under Section 310(d) to impose conditions on transfers); *US West, Inc. v. FCC*, 778 F.2d 23 (D.C. Cir. 1985) (dismissing challenge of FCC order granting application subject to reporting condition and recognizing FCC authority to impose conditions solely pursuant to Section 310(d)); *SBC Communications, Inc. v. FCC*, 56 F.3d 1484, 1492-93 (D.C. Cir. 1995) (recognizing implicitly the Commission’s authority to impose conditions pursuant to 310(d)).

⁸ *GTE Serv. Corp.*, 782 F.2d at 268.

⁹ Subsection 271(d)(6), entitled “ENFORCEMENT OF CONDITIONS,” provides the Commission can take any of several enforcement actions if, after approving a 271 application, it “determines that a Bell operating company has ceased to meet any of *the conditions* required for such approval.” 47 U.S.C. §271(d)(6) (1999) (emphasis added). *See Ameritech Michigan Order*, ¶ 400 (finding that the term “conditions” in paragraph 6(A) do not refer to the explicit “requirements” for approval under subsection (c), in part because Section 271 consistently uses the term “requirements” – not the term “conditions” – to refer to the specific requirements of 271(c)).

¹⁰ As the Commission has recognized, “[t]he legislative history of the public interest requirement in Section 271 indicates that Congress intended the Commission, in evaluating Section 271 applications, to perform its traditionally broad public interest analysis of whether a proposed action or authorization would further the purposes of the Communications Act.” *Ameritech Michigan Order*, ¶ 385 n.992, *citing* S. Rep. No. 23,

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Commission's traditional authority to grant applications subject to conditions necessary to make the requested authorization consistent with the public interest, convenience and necessity.

By contrast, interpreting Section 271 as prohibiting the Commission from exercising its traditional authority under the public interest standard to grant applications subject to conditions would lead to absurd results that are contrary to Congressional intent as expressed by Section 271 in particular and the 1996 Act as a whole. If the Commission had no authority to grant Section 271 applications subject to particular conditions, it would have to deny an application outright unless the requested authorization is consistent with the public interest convenience and necessity, even if the applicant completely satisfied the 14-point checklist. Under these circumstances, the applicant would be forced to wait until market conditions changed so that mere compliance with the 14-point checklist would be consistent with the public interest, convenience and necessity, or propose additional conditions with which it would "voluntarily" comply so that the requested application would be consistent with the public interest, convenience and necessity. In either event, the applicant would be forced to submit an updated application, which would require the Commission to initiate a new proceeding to consider afresh whether the requested authorization is consistent with the public interest, convenience and necessity. This result would delay competition in both the local and long distance markets, which undoubtedly is directly contrary to the goals of Section 271 and the 1996 Act.

For these reasons, CompTel agrees with the Commission's conclusion that Section 271 authorizes it to impose conditions on the grant of a BOC's application in order to

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104th Cong., 1st Sess. 44 (1995) ("The public interest, convenience and necessity standard is the bedrock of the 1934 Act, and the Committee does not change that underlying
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ensure that the requested authorization is consistent with the public interest, convenience and necessity. As the Supreme Court as repeatedly explained, “the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong”¹¹ Far from compelling indications that it is wrong, the only reasonable conclusion is that Section 271 authorizes the Commission to impose conditions on the grant of a Section 271 application.

Apart from Section 271, the Commission derives authority to condition grant of a Section 271 application from Section 214(c).¹² In applying for authority to provide in-region interLATA services in a state pursuant to Section 271, a BOC is necessarily requesting Section 214 authority as well.¹³ Section 271 establishes the procedures pursuant to which BOCs can obtain Section 214 authority to provide in-region interLATA services. Section 271 did not repeal or replace Section 214, and nothing in Section 271 suggests that Section 214 does not

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premise through the amendments contained in this bill.”).

¹¹ *Red Lion Broad. Co., v. FCC*, 395 U.S. 367, 381 (1969), *quoted in FCC v. WNCN Listeners Guild et al.*, 450 U.S. 582, 598 (1981). *See also Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 121 (1973).

¹² Section 214(c) provides in relevant part as follows: “The Commission . . . may attach to the issuance of the [214] certificate such terms and conditions as in its judgment the public convenience and necessity may require.” 47 U.S.C. §214(c) (1999). *See New England Telephone and Telegraph Company*, 10 FCC Rcd 5346, ¶ 110 (1995) (“Section 214 does not set out specific requirements that the Commission must consider, but rather leaves the Commission ‘wide discretion’ in deciding how to make its public interest determination.”).

¹³ *See, e.g., 1998 Biennial Regulatory Review – Review of International Common Carrier Regulations*, 14 FCC Rcd 4909, ¶ 36 (1999) (“With respect to international Section 214 applications filed by the BOCs, we note that Section 271 of the Communications Act, as amended by the Telecommunications Act of 1996, prohibits the BOCs from providing interLATA services that originate in their respective in-region states until the Commission finds that they have satisfied the requirements of that Section. As we have previously recognized, international service is interLATA service subject to the requirements of Section 271. A BOC will not, therefore, be permitted to take advantage of the streamlined procedure to obtain authorization to provide international services

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apply when BOCs request authority to provide in-region interLATA services. Rather, Section 271 imposes additional requirements – satisfaction of track A/B and the competitive checklist – to the traditional public interest analysis under Section 214.

Section 214(c) explicitly authorizes the Commission to “attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require.”¹⁴ This authority granted by Section 214(c) is entirely consistent with both the statutory purpose and the specific language of Section 271, as explained above. Therefore, Section 214(c) provides yet another statutory basis upon which the Commission can rely to impose conditions on the grant of an application as necessary to make the requested authorization consistent with the public interest, convenience and necessity.

In addition to its authority under Sections 271 and 214, the Commission derives authority from multiple statutory provisions, including Sections 303(r), 154(i) and 201(b) of the Act.¹⁵ Section 303(r) expressly authorizes the Commission to “[m]ake such rules and regulations

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from any of its in-region states until the Commission approves its Section 271 application to provide interLATA services from that state.”).

¹⁴ 47 U.S.C. §214(c). *See, e.g., Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities*, 12 FCC Rcd 23891, 23898, ¶ 13 (1997) (“Although we find that our safeguards will generally provide sufficient protection against anticompetitive conduct, we recognize the possibility that circumstances might arise in which our safeguards might not adequately constrain the potential for anticompetitive harm in the U.S. market for telecommunications services. In such rare cases, the Commission reserves the right to attach additional conditions to a grant of authority, and in the exceptional case in which an application poses a very high risk to competition, to deny an application.”).

¹⁵ *See, e.g., Ameritech Michigan Order*, 12 FCC Rcd at 20741-45 (explaining breadth of Commission discretion in making public interest determinations). Sections 303(r) and 154(i) confer upon the Commission “‘not niggardly but expansive powers’ and wide discretion to adopt flexible procedures, rules and orders to meet ever-changing communications needs” *Washington Utilities & Transportation Commission v. FCC*, 513 F.2d 1142, n. 23 (9th Cir. 1975), *citing National Broadcasting Co. v. United States*, 319 U.S. 190, 210-214 (1943); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137-38 (1940); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-173 (1968); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202-203 (1956).

and prescribe such restrictions and conditions, not inconsistent with the law, as may be necessary to carry out the provisions of this Act”¹⁶ Similarly, Section 154(i) authorizes the Commission to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.”¹⁷ The Commission’s authority under Sections 303(r) and 154(i) unquestionably extend to Section 271, because Section 271 is a provision of the Communications Act, and certain conditions on the approval of an application may be necessary to ensure that the market is and will remain open to competition as required by Section 271.¹⁸ Moreover, because Section 271(d)(6)(A) expressly supports conditioning approval of Section 271 applications, conditions on 271 authority are “not inconsistent with law” or “this Act.”¹⁹ Finally, Section 201(b) authorizes the Commission to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act,”²⁰ which includes Section 271.

B. Nothing in Section 271 Limits the Scope of the Commission’s Discretion in Applying the Public Interest, Convenience and Necessity Standard

It is well settled that the public interest, convenience and necessity standard is to be “so construed as to secure for the public the broad aims of the Communications Act.”²¹ These

¹⁶ 47 U.S.C. §303(r) (1999).

¹⁷ 47 U.S.C. §154(i) (1999).

¹⁸ See *Ameritech Michigan Order*, ¶¶ 401-402 (finding that the Commission’s authority under Section 303(r) to prescribe conditions extends to Section 271, and that its public interest authority requires a careful examination of several factors, including the nature and extent of competition in the applicant’s local market, in order to determine whether that market is and will remain open to competition).

¹⁹ *Id.*, ¶ 401 (explaining why conditioning approval of Section 271 applications is “not inconsistent with law”).

²⁰ 47 U.S.C. § 201(b) (1999).

²¹ *NYNEX-Bell Atlantic*, 12 FCC Rcd at 20002, ¶ 31 citing *Western Union Division, Commercial Telegrapher’s Union, A.F. of L. v. United States*, 87 F. Supp. 324, 335

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broad aims include establishing a “pro-competitive, deregulatory national policy framework designed to . . . open[] all telecommunications markets to competition”²² and making “available . . . to all the people of the United States . . . a rapid, efficient, nationwide, and world-wide . . . communication service”²³

“[T]he public interest standard necessarily encompasses the goal of promoting competition”²⁴ As the Commission has correctly recognized, “failure to create competition among local service providers necessarily means a lack of competition to provide interstate switched access,” because “interstate switched access is generally provided over the same ‘bottleneck’ facilities and by the same providers as provide local exchange and exchange access service”²⁵ Accordingly, “the public interest analysis necessarily includes a review of the nature and extent of local competition, as exemplified by the fact that Section 271 of the Act specifically applies the public interest standard to, inter alia, a review of local market conditions.”²⁶

Courts have consistently found in the Act a Congressional intent to grant the Commission broad discretion in imposing conditions necessary to ensure that requested

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(D.D.C. 1949), *aff'd* 338 U.S. 864 (1949); *Washington Utilities and Transportation Comm'n v. FCC*, 513 F.2d 1142, 1147 (9th Cir. 1975); *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 93-95 (1953).

²² H.R. Rep. No. 104-458 at 1 (1996); Telecommunications Act of 1996, Pub. L. No. 104-104 (preamble), 110 Stat. 56 (1996).

²³ 47 U.S.C. § 151 (1997). These goals date to the original Communications Act of 1934. See H.R. Rep. No. 1918 (1934).

²⁴ *NYNEX-Bell Atlantic*, 12 FCC Rcd at 20002-03, ¶ 31.

²⁵ *Id.*

²⁶ *Id.* at 20007, ¶ 35.

authorizations are consistent with the public interest, convenience and necessity.²⁷ Because Congress has granted the Commission broad discretion in determining how to achieve the goals of the Act, courts decline to substitute their views on the best method of achieving those goals.²⁸ The Supreme Court has characterized the public-interest standard of the Act as “a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.”²⁹ The public interest, convenience and necessity standard “no doubt leaves wide discretion and calls for imaginative interpretation. Not a standard that lends itself to application with exactitude, it expresses a policy . . . that is ‘as concrete as the complicated

²⁷ See, e.g., *Atlantic Tele-Network, Inc. v. FCC*, 59 F.3d 1384, 1389-90 (D.C. Cir. 1995) (upholding FCC imposition of proportionate return condition on carrier’s 214 authorization to provide international service. “[W]e see no basis for concluding that the Commission acted arbitrarily and capriciously when, in the exercise of its judgment of what the public convenience and necessity required, it decided to offset the risk [that the carrier would use its ability and incentive to discriminate against competing domestic carriers] by imposing a proportionate return condition.”); *Western Union Tel. Co. v. FCC*, 541 F.2d 346, 355 (3rd Cir. 1976)(affirming FCC’s imposition of a waiver as a condition to issuance of a 214 certification. “The gravamen of the [Western Union] argument is that such an interpretation [allowing the FCC to impose a waiver of contract as a condition] would allow the Commission to do ‘indirectly’ by condition what it is forbidden to do ‘directly’ by tariff, viz., modify or abrogate contracts. The argument fails because of the brute fact that there is a significant difference between a voluntary waiver of rights in order to secure a benefit otherwise unobtainable, and the extinguishment of rights by tariffs which provide no *quid pro quo*”(citations omitted)).

²⁸ See, e.g., *National Broadcasting v. United States*, 319 U.S. 190, 217-18 (1943) (declining to substitute its views on the best method of encouraging how to achieve the statutory goals of the Act). See also *FCC v. WNCN Listeners Guild et al.*, 450 U.S. 582, 594 (1981) (explaining breadth of the Commission’s discretion in applying the public interest standard); *Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1406 (D.C. Cir. 1996) (same); *GTE Serv. Corp. v. FCC*, 782 F.2d 263, 268 (D.C. Cir. 1986) (“[B]ecause the scope of judicial review over such agency determinations is narrow, GTE bears a substantial burden in showing that a grant without the four conditions was arbitrary and capricious. It cannot be gainsaid that this court is required to give substantial deference to decisions of the FCC, particularly where, as here, the Commission has determined that a particular course is or is not in the public interest.”); *Committee to Save WEAM v. FCC*, 808 F.2d 113, 116-17 (D.C. Cir. 1986) (dismissing challenge to FCC’s public interest finding under Section 310(d)).

²⁹ *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940), quoted in *FCC v. WNCN Listeners Guild et al.*, 450 U.S. 582, 593-94 (1981).

factors for judgment in such a field of delegated authority permit.”³⁰ Therefore, the Commission may “implement its view of the public-interest standard of the Act ‘so long as that view is based on consideration of permissible factors and is otherwise reasonable.’”³¹ Finally, the Supreme Court has repeatedly recognized that “the Commission’s decisions must sometimes rest on judgment and prediction rather than pure factual determinations. In such cases complete factual support for the Commission’s ultimate conclusions is not required since ‘a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.’”³²

Nothing in this exercise conflicts with Section 271(d)(4), which prohibits the Commission from limiting or extending the terms used in the competitive checklist. The conditions which CompTel is proposing would not modify the substance of any of a BOC’s checklist obligations. Similar only in purpose, the requirements of the competitive checklist have nothing else in common with conditions that the Commission can impose to ensure effective enforcement of the Act. The pre-entry requirements of the competitive checklist apply to all BOCs in all markets, and cannot be varied based on local market conditions, past behavior of the BOC or agreement to voluntary “performance assurance plans.”³³ Moreover, application

³⁰ *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90 (1953), quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

³¹ *FCC v. WNCN Listeners Guild et al.*, 450 U.S. 582, 594 (1981), quoting *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 793 (1978). See *Office of Communication of the United Church of Christ v. FCC*, 911 F.2d 803, 809 (D.C. Cir. 1990) (“The Commission has broad discretion not only to define the public interest, but also to determine which *procedures* will best assure its protection.”).

³² *FCC v. WNCN Listeners Guild et al.*, 450 U.S. 582, 594-95 (1981), quoting *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978), in turn quoting *FPC v. Transcontinental Gas Pipe Line Corp.*, 364 U.S. 1, 29 (1961).

³³ 47 U.S.C. § 271(c). As the Commission has already noted, Section 271 consistently uses the term “requirements” to refer to the 14-point competitive checklist, and “conditions”
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of these requirements cannot be avoided under any circumstances until the Commission determines that they have been fully implemented.³⁴

By contrast, any conditions imposed by the Commission in order to address post-entry enforcement concerns would apply only to an individual BOC in a particular local market. These conditions necessarily would vary depending upon the local market conditions, the past behavior of the applicant itself, and any voluntary “performance assurance plans” the applicant has proposed. These conditions could also be removed at the request of the BOC, or on the Commission’s own motion, as soon as they are no longer in the public interest, convenience or necessity due to changed market conditions or because the BOC has proposed alternate conditions that would equally serve the same purposes.³⁵

Given these fundamental differences between statutorily imposed requirements of the competitive checklist and Commission imposed public interest conditions, the Commission can impose the proposed conditions without “limit[ing] or extend[ing] the terms used in the competitive checklist”³⁶ As the Department of Justice explained:

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to refer to measures imposed pursuant to the public interest standard. *See Ameritech Michigan Order*, ¶400.

³⁴ See 47 U.S.C. § 160(b).

³⁵ CompTel urges the Commission to keep this docket open to permit comments from all interested parties on conditions in the New York market, BA-NY’s compliance with Section 271 and the terms and conditions of its authorization, and necessary amendments, if any, to the terms and conditions of the authorization. *See Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, 7 FCC Rcd 3528, 3547, ¶ 98 (1992) (keeping docket open as a notice and comment rule making proceeding to receive additional comment on relevant issues).

³⁶ 47 U.S.C. § 271(d)(4). It is also important to note that Section 271(d)(4) prohibits the Commission from “limit[ing] or extend[ing] the terms used in the competitive checklist,” but it does not preclude the Commission from requiring actions necessary to open local markets to competition. The Commission is free to exercise its traditional public interest authority if it concludes that compliance with the competitive checklist will not ensure adequate competition in local services. Moreover, although Section 10(b) prohibits the Commission from limiting the competitive checklist itself by forbearing from “applying
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Section 271(d)(4) . . . prohibits the Commission from promulgating additional inflexible and mandatory access and interconnection requirements as prerequisites for approval of applications under Section 271, or from ignoring noncompliance with any of the requirements of the checklist. The Commission is not restricted, however, in determining whether particular access and interconnection arrangements are consistent with the requirements of Section 272, or in weighing the public interest factors or the Attorney General's recommendations. Section 271(d)(4) encourages the exercise of such *discretionary* judgments by limiting the Commission's authority to impose or reduce the *non-discretionary* requirements of Section 271.³⁷

Accordingly, post-entry conditions would not limit or extend the terms used in the competitive checklist because they relate to enforcement of the checklist and any performance conditions the Commission deems necessary, not to satisfaction of the terms of the competitive checklist itself.

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the requirements of Section . . . 271," 47 U.S.C. § 160(d), nothing in the Act prohibits the Commission from imposing additional conditions on particular carriers if required by the public interest, convenience and necessity to open specific local markets to competition.

³⁷ Evaluation of the United States Department of Justice, Application of SBC Communications Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of Oklahoma, CC Docket No. 97-121, 38 n.45 (filed May 16, 1997).