

AT&T v. Ameritech, US West, Qwest

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

In the Matter of
File No. E-98-41
AT&T CORPORATION, et al.,
Complainants,
v.
AMERITECH CORPORATION,
Defendant, and
QWEST COMMUNICATIONS CORPORATION,
Defendant-Intervenor;

File No. E-98-42
AT&T CORPORATION, et al.,
Complainants,
v.
U S WEST COMMUNICATIONS, INC.,
Defendant, and
QWEST COMMUNICATIONS CORPORATION,
Defendant-Intervenor;

File No. E-98-43
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., et al.,
Complainants,
v.
U S WEST COMMUNICATIONS, INC.,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: September 28, 1998;
Released to the Parties: September 28, 1998;
Released to the Public: October 7, 1998

By the Commission:

TABLE OF CONTENTS

Subject

- I. Introduction
 - A. Statutory Framework
 - B. Ameritech's and U S WEST's Business Arrangements
 - 1. Ameritech's CompleteAccess Program

2. U S WEST's Buyer's Advantage Program
II. Procedural Background

III. Discussion

A. Section 271

1. Scope of the Prohibition on Providing InterLATA Service
2. Legality of CompleteAccess and Buyer's Advantage Program

B. Section 251(g)

IV. Conclusion

V. Ordering Clauses

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we resolve three formal complaints brought by several interexchange and competitive local exchange carriers (complainants)(1) that challenge the lawfulness of two separate business arrangements between Ameritech Corporation (Ameritech) and Qwest Communications Corporation (Qwest), and between U S WEST Communications, Inc. (U S WEST) and Qwest.(2) We are asked to decide whether, consistent with sections 271 and 251(g) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996,(3) defendants can provide under their own brand names a combined package of services, which includes Qwest's long distance service, prior to demonstrating that their local service markets have become open to competition. The evidence demonstrates that Ameritech and U S WEST (a) designed and developed a package of services that would include a long distance service component; (b) selected the carrier to transmit the long distance service; (c) established, and exercised prospective control over, the price, terms, and conditions under which the long distance component would be offered; (d) served as the initial and primary point of contact for the customer for all service inquiries for the combined offering; (f) relied on their brand names in marketing the combined offering; and (g) expressly recommended Qwest's long distance service.(4) We conclude, based on this record, that, although certain limited marketing arrangements are permissible under the Act, Ameritech and U S WEST are providing in-region, interLATA service without authorization, in violation of section 271 of the Act.(5) We further conclude that, as discussed below, although the underlying arrangements raise considerable concerns that Ameritech and U S WEST may have violated their equal access and nondiscrimination obligations under section 251(g) of the Act,(6) we need not reach the issue because we have found that the arrangements violate section 271.

2. Our actions today do not upset the specific long distance offering available to consumers through these business arrangements in the short term. Indeed, Qwest may still independently offer its long distance service to consumers at the same prices available under the Ameritech and U S WEST business arrangements. By restricting U S WEST's and Ameritech's involvement in the long distance market, however, we further Congress' intent to withhold from the BOCs the authority to enter the long distance market until they have opened their local markets to competition. Because neither Ameritech nor US WEST has satisfied the market-opening criteria established by Congress, we are required to prohibit their involvement in the long distance market under the arrangements with Qwest at issue here. Thus, our

decision preserves the careful balance struck by Congress in the 1996 Act and thereby ensures that consumers will enjoy the long term benefits of true competition among telecommunications providers and telecommunications service offerings.

A. Statutory Framework

3. Prior to the 1996 Act, the service offerings of the BOCs, including Ameritech and U S WEST, were governed by the Modified Final Judgement (MFJ or Consent Decree).(7) Arising from the settlement of the Department of Justice's antitrust suit against AT&T, the MFJ required the divestiture of the BOCs from AT&T and prohibited the BOCs from entering certain lines of business, including interexchange service.(8) These line-of-business restrictions were based upon the theory that, if the BOCs were allowed to enter the long distance market, they could use their bottleneck control in the local and exchange access markets to obtain an unfair advantage in the long distance market.(9) The MFJ also required the BOCs to provide exchange access services, which are necessary to originate or terminate an interexchange service, that are "equal in type, quality, and price" among the interexchange carriers.(10) This requirement responded to the government's contentions that, in interconnecting their local networks with the long distance networks of the various interexchange carriers, the BOCs provided inferior interconnection to AT&T's competitors. Although the MFJ Court recognized that, after divestiture, the BOCs would not have the same incentive to favor AT&T as before, the court found that a "substantial AT&T bias" had been designed into the network.(11) The court therefore found that it was imperative that any disparities in interconnection be eliminated so that all interexchange and information service providers would be able to compete on an equal basis.(12) In addition, the MFJ prohibited the BOCs from discriminating between AT&T and its affiliates and their products and services and other carriers and their products and services in the interconnection and use of the BOCs' telecommunications services and facilities or in the BOCs' charges for service.(13)

4. Congress overhauled many aspects of federal regulation of communications services with the passage of the Telecommunications Act of 1996. In particular, Congress chose to modify the line-of-business restrictions established under the MFJ. In enacting the Telecommunications Act of 1996, Congress established a pro-competitive and deregulatory framework designed to benefit "all Americans by opening all telecommunications markets to competition."(14) Congress sought to foster this competition by fundamentally changing the conditions and incentives for market entry and by attempting to break any remaining local service bottlenecks.(15) As a result, the 1996 Act sets the stage for a new competitive regime in which carriers in previously segmented markets will be able to compete in a dynamic and integrated telecommunications market that promises lower prices and more innovative services to customers. Central to the new statutory scheme, and expressly departing from prior jurisprudence developed under the MFJ,(16) are provisions designed to open the local services market to competition and ultimately to permit all carriers, including those that had previously enjoyed a monopoly or competitive advantage in a particular market, to provide a combined telecommunications offering that includes both local and long distance services.

5. Congress set forth a particular framework and process through which entry will occur. Specifically, sections 251,(17) 252,(18) and 253(19) remove legislative and regulatory impediments to competition, particularly in the local telephone market, and generally seek to reduce inherent economic and operational advantages possessed by incumbent local exchange carriers (LECs).(20) Toward this end, sections 251 and 252 impose specific market opening mechanisms, such as mandatory

interconnection,(21) unbundling(22) and resale requirements,(23) on all incumbent LECs, including Ameritech and U S WEST, in order to break the incumbent LECs' bottleneck control over local facilities. Due to the continued and extensive market dominance of the BOCs in their regions, Congress chose to maintain many of the MFJ's restrictions on the BOCs, until the BOCs open their local markets to competition as provided in various sections of the Act.(24) In section 271, for example, Congress prohibited the BOCs from entering the in-region, interLATA market immediately.(25) Instead, Congress set forth in section 271 a checklist of market-opening criteria and other requirements that a BOC must satisfy before it may enter the in-region, interLATA market.(26) Section 271 contemplates that to permit the BOCs' immediate entry into the long distance market would allow the BOCs to leverage their bottleneck control in the local market into the long distance market and thus both threaten competition in the long distance market and entrench their monopoly in the local market. Moreover, Congress recognized that, unless the BOCs had some affirmative incentive to open their local markets to competition, it would be highly unlikely that competition would develop expeditiously in the local exchange and exchange access markets. Accordingly, section 271(a) allows a BOC to enter the in-region, interLATA market, and thereby offer a comprehensive package of telecommunications services (i.e., one-stop shopping for local and long distance service), only after it demonstrates, among other things, compliance with the interconnection, unbundling, and resale obligations that are designed to facilitate competition in the local market.(27) Congress thus chose to forego whatever short term benefits might result from immediate BOC entry into long distance, and instead decided to use the promise of long distance entry as an incentive to prompt the BOCs to open their local markets to competition. Separately, section 251(g) requires the BOCs, both pre- and post-entry, to treat all interexchange carriers in accordance with their preexisting equal access and nondiscrimination obligations, and thereby neutralize the potential anticompetitive impact they could have on the long distance market until such time as the Commission finds it reasonable to revise or eliminate those obligations.(28)

6. Congress also sought to encourage the BOCs to open their markets expeditiously by enacting section 271(e).(29) This section creates a three-year period during which the large interexchange carriers are prohibited from offering combined packages of long distance and resold BOC local services in states where the BOC has not received authorization to provide long distance services.(30) Once this three-year period expires, however, BOCs that have not opened their local markets sufficiently to obtain section 271 approval may not offer a combined package of services that includes a long distance service component and may face competition from large IXCs that are permitted to offer a combined package of services that includes resold BOC local exchange service.(31) Thus, section 271(e) provides a substantial market incentive to open the local markets and obtain section 271 approval within three years of enactment.(32)

7. Under this statutory framework, carriers will achieve significant competitive advantages when they can provide customers with combined packages of local and long distance services.(33) These advantages are key to understanding the competitive harm that could result from premature BOC entry into the long distance market. Premature entry would reduce the BOCs' incentives to open their local markets, which was one of the major goals that Congress sought to achieve in the 1996 Act. The obvious result is less local competition. The perhaps less obvious, but equally serious, result is less long distance competition. If BOCs unlawfully offer combined packages of local and long distance services that competing IXCs cannot duplicate, either because they are barred by section 271(e) or because the local markets are not yet open, then the BOCs will have used their control of the local bottleneck to gain an unfair advantage against long distance carriers.(34) The ultimate result will be less competition in both the local and long distance markets.

B. Ameritech's and U S WEST's Business Arrangements

8. Neither Ameritech nor U S WEST has received section 271 authorization from the Commission.(35) At some point in late 1997 or early 1998, both carriers, recognizing the material benefits of being able to provide combined packages of services to their customers, began considering ways in which they could offer interLATA service to their in-region customers immediately. In its declarations, for example, Ameritech refers to three internal documents that "were created when Ameritech was first exploring the concept of teaming arrangements with long distance carriers."(36) U S WEST also apparently considered ways to offer combined service packages that included long distance service by entering into what it termed "teaming" agreements with long distance carriers.(37)

1. Ameritech's CompleteAccess Program

9. During the course of its deliberations, Ameritech determined that being able to provide its in-region customers with a combined offering that included long distance service would generate increased sales of vertical features such as call waiting, caller ID, and automatic redial, as well as promote customer winback and retention programs.(38) Ameritech recognized that it would retain customers by satisfying the needs and desires of customers who want the simplicity and convenience of a one-stop service offering and at the same time would enhance its goodwill in the marketplace.(39) Ameritech decided to pursue this strategy by developing a program under which it could design and market a comprehensive package of telecommunications services that would include local and intraLATA services, additional features such as call waiting and caller ID, as well as long distance service. Accordingly, Ameritech sought to find a long distance carrier that would provide the long distance component of the Ameritech program in accordance with the type of business agreement Ameritech envisioned.(40) More specifically, Ameritech sought a carrier that would agree to its terms on, inter alia, pricing, billing options, and network and transport requirements.(41) Ameritech further recognized that it could obtain a "first mover's advantage" by launching a successful marketing program of this kind.(42) Indeed, Ameritech viewed the "first mover's advantage" as a way to "beat [the] Big-3 IXC's to the mass market with a full service offer before IXCs can leverage their customer relationship to sell local."(43)

10. On February 20, 1998, after developing the proposed terms of the combined offering, Ameritech sent a Request for Proposal (RFP) to 164 long distance carriers, soliciting responses from carriers that would be agreeable to its terms.(44) Two carriers responded to this request: Frontier and Qwest. After negotiations reached a stalemate with Frontier, Ameritech began discussions with Qwest. Within 24 hours, Ameritech and Qwest agreed to enter into a business arrangement in which Qwest agreed to allow Ameritech to market Qwest's interLATA service within Ameritech's region in conjunction with a package of Ameritech-supplied services, under many of the same terms that were set forth in Ameritech's RFP.(45) In exchange, Qwest agreed to pay Ameritech a per-customer fee of \$30 for each residential customer it obtained and \$100 for each business customer it obtained.(46) The compensation received by Ameritech from Qwest is designed to recover marketing expenses solely, according to those two parties.(47)

11. On May 14, 1998, Ameritech and Qwest announced the resulting business arrangement--the CompleteAccess program--through which Ameritech would market Qwest's interLATA services to Ameritech customers under Ameritech's "CompleteAccess" brand name.(48) Ameritech agreed to market

Qwest's interLATA service in conjunction with Ameritech's local and intraLATA toll services and enhanced features such as caller ID and call waiting.(49) Therefore, customers subscribing to the program could obtain all of their telecommunications services from one source, thereby enabling Ameritech to offer "a combined local and long distance package of services" that would be "supported by a single customer service number."(50)

12. Ameritech states that, by responding to customers' needs and desires for a combined package of telecommunications services, it hopes to more effectively market, "and hence increase its sales of its own local services, especially 'vertical services' such as Call Waiting, Caller ID, and Automatic redial, which offer a higher profit margin than basic local service."(51) In addition, Ameritech states that it hopes to increase its sales of intraLATA toll services.(52) To obtain the benefits of being a CompleteAccess customer, the customer must purchase at least one Ameritech service.(53) Ameritech's sales strategy manual instructs telemarketers to try to sell the entire CompleteAccess package with all of the features first, and if the customer declines, to attempt to sell a package with fewer options.(54)

13. Ameritech is solely responsible for the marketing of the CompleteAccess package, including the interLATA services.(55) The agreement contemplates that the CompleteAccess program will be marketed through both inbound (when customers initiate contact with Ameritech) and outbound (when Ameritech initiates contact with customers) telemarketing(56) using Ameritech's customer base.(57) In marketing the CompleteAccess program, Ameritech specifically recommends Qwest long distance customers and, in some instances, engages in price comparisons of Qwest's service to that of other IXCs.(58) When marketing the CompleteAccess program, Ameritech would refer to the long distance component of the program as either CompleteAccess long distance or Qwest long distance.(59)

2. U S WEST's Buyer's Advantage Program

14. During its own internal strategy sessions, U S WEST similarly determined that offering a package of services that includes in-region, interLATA service would afford it a means to "[target] high value customers for retention, winback and competitive response reasons . . . ," "[i]mprove U S WEST value proposition in its toll markets by 'packaging' competitive intraLATA calling plans with a compelling long distance offer," and "[p]re-position customers for U S WEST Long Distance by providing the convenience of one-stop shopping."(60) U S WEST stated further in its marketing plans that "[U S WEST's] endeavor with Qwest will initially allow [U S WEST] to become an interLATA carrier for customers" (61) U S WEST began negotiating with Qwest in early March 1998(62) to include Qwest's interLATA telephone service in a combined package of communications services that U S WEST planned to offer to both existing and new customers within its region. In the course of these discussions, U S WEST proposed the price terms that would be acceptable for the interLATA service component of its package,(63) and U S WEST established customer service requirements that had to be met, the means for monitoring whether such requirements were met, and significant consequences for the failure to meet such requirements.(64) Under the terms of the agreement, an increase in price or a failure to provide adequate customer service would be sufficient cause to terminate the business arrangement.(65)

15. On May 6, 1998, U S WEST introduced "a local and long distance marketing alliance" with Qwest under which U S WEST would market Qwest's interLATA services to U S WEST's customers.(66) Under the business arrangement, termed the "Buyer's Advantage" program, customers would be able to

obtain in one packaged offering U S WEST local exchange and intraLATA toll services and Qwest's interLATA services.(67) Similar to the requirements of CompleteAccess, customers must subscribe to at least one U S WEST service to become Buyer's Advantage customers.(68)

16. On May 11, 1998, U S WEST began a comprehensive marketing campaign of the program in six of its fourteen states,(69) which included running television and newspaper advertisements promoting the program. U S WEST also marketed the package through both inbound and outbound telemarketing.(70) As a result of this comprehensive marketing campaign, the Buyer's Advantage program obtained at least 130,000 long distance subscribers in less than one month.(71)

II. PROCEDURAL BACKGROUND

17. Shortly after Ameritech and U S WEST launched their respective programs, actions against them alleging the same substantive violations of the Act at issue here were filed in two federal district courts. On May 13, 1998, AT&T, MCI, ALTS, McLeodUSA, ICG, and GST filed a complaint against U S West in the United States District Court for the Western District of Washington, seeking "preliminary and final injunctive relief, and [] damages, for U S West's violation of sections 251(g) and 271 of the [Act]."(72) On May 14, 1998, AT&T, MCI, ALTS, McLeodUSA, Focal Communications Corporation, KMC Telecom II, Inc., and NEXTLINK Communications, Inc. filed a complaint against Ameritech in the United States District Court for the Northern District of Illinois, also seeking "preliminary and final injunctive relief, and damages, for Ameritech's threatened or actual violation of sections 251(g) and 271."(73) This Commission filed amicus briefs in both proceedings, seeking referrals under the doctrine of primary jurisdiction.(74)

18. The Washington district court subsequently referred the questions raised in the complaint before it to the Commission, stating that determinations to be made under sections 251 and 271 of the Act concern issues of communications policy that should be considered by the Commission "in the interests of a uniform and expert administration of a regulatory scheme laid down by the [Act]."(75) The Washington district court also issued a preliminary injunction, stating that "while it is neither possible nor desirable to decide the merits at this stage, the court finds on both claims the plaintiffs have shown serious questions going to the merits and a balance of hardships 'tipping sharply in their favor.'"(76) Additionally, the court noted that the legality of the teaming agreement should be decided before the program takes over a greater share of the market.(77) The Illinois district court also referred the proceeding to the Commission. It declined to grant the plaintiffs' request for preliminary injunctive relief, however, stating that "the FCC has the authority to issue interim injunctive relief" and that it would be inappropriate to comment on the merits of a case referred to the Commission.(78)

19. Following the primary jurisdiction referrals, the Commission, by Public Notice, concluded that expedited resolution of the issues referred would best be achieved "in the context of formal complaint proceedings pursuant to section 208 of the Act."(79) On June 15, 1998, pursuant to that Public Notice, AT&T and other complainants(80) filed a consolidated formal complaint against Ameritech, alleging that the CompleteAccess program violates sections 271 and 251(g).(81) The AT&T complainants also sought an interim standstill order and preliminary injunction to prohibit Ameritech from further marketing, promoting, or subscribing additional customers under its business arrangement with Qwest.(82) The Commission granted the AT&T complainants' motion for interim relief on June 30, 1998, thereby requiring Ameritech to refrain from marketing or obtaining new customers for its CompleteAccess

program for a period of 90 days.(83) On June 16, 1998, AT&T and others filed a consolidated formal complaint against U S WEST, alleging that the Buyer's Advantage program also violates sections 271 and 251(g).(84) On June 19, 1998, McLeodUSA and others also filed a consolidated formal complaint against U S WEST, alleging the same violations as in AT&T's complaint against U S WEST.(85)

20. Complainants seek: (1) a ruling that Ameritech and U S WEST have "provided" interLATA services in violation of section 271; (2) a declaratory ruling that Ameritech and U S WEST may not endorse or otherwise market the in-region, interLATA services of Qwest or any other carrier until Ameritech and U S WEST have obtained permission to provide in-region, interLATA services pursuant to section 271 of the Act; (3) a ruling that, by endorsing or otherwise marketing Qwest's interLATA services, Ameritech and U S WEST have discriminated among long distance carriers in violation of section 251(g) of the Act; and (4) a declaratory ruling that section 251(g) prohibits Ameritech and U S WEST from endorsing or otherwise marketing interLATA services of Qwest or another carrier.(86) Complainant McLeodUSA asks that the Commission "declare [the Buyer's Advantage] arrangement illegal, order U S WEST to immediately cease and desist from its activities under the [arrangement], and direct that U S WEST not enter into a similar [arrangement] without first meeting the requirements under the 1996 Act."(87)

21. On June 17, 1998, Qwest filed motions "to intervene in support of the defendant" in both of the proceedings filed by the AT&T complainants, and sought additional time beyond that granted to Ameritech and U S WEST to file its answer in each proceeding.(88) On June 18, 1998, the Formal Complaints and Investigations Branch (Branch) granted Qwest's motions, in part, allowing Qwest to file the same pleadings as the defendants, but requiring that such pleadings be filed in accordance with schedules applicable to Ameritech and U S WEST.(89)

22. On June 24, 1998, AT&T Corp. et al. and McLeodUSA filed a joint motion to consolidate the proceedings against U S WEST. On June 25, 1998, the Branch granted the joint motion, thereby reversing the deferral status accorded to that proceeding,(90) stating that to do so would promote economy by facilitating the Commission in resolving these identical issues in one proceeding.(91) McLeodUSA did not seek to consolidate its formal complaint against Ameritech with the AT&T complainants' formal complaint against Ameritech; that proceeding, File No. 98-44, remains in deferral status.

23. On August 12, 1998, a status conference was held with the parties to the three complaints.(92) At the status conference all parties were provided an opportunity to present their arguments orally and Commission staff directed questions regarding the underlying facts and the parties' legal arguments.(93)

III. DISCUSSION

A. Section 271

1. Scope of the Prohibition on Providing InterLATA Service

24. Statutory Context and History. Section 271(a) states that neither a BOC nor a BOC affiliate "may provide interLATA services except as provided in [section 271]."(94) Generally, under section 271(b)(1), a BOC or a BOC affiliate "may provide interLATA services originating in any of its in-region States" only "if the Commission approves the application of such company for such state under [section

271(d)(3)].⁽⁹⁵⁾ Neither Ameritech nor U S WEST has been granted such approval.⁽⁹⁶⁾ Accordingly, our consideration of whether Ameritech's and U S WEST's respective arrangements with Qwest violate section 271(a) requires that we look to the provision's scope and determine the nature of the activities that Congress intended be prohibited through its restriction that no BOC or BOC affiliate "may provide interLATA services except as provided in [section 271]."⁽⁹⁷⁾

25. The parties argue that the restriction contained in section 271 is clear. Not surprisingly, however, they suggest opposite "plain meaning" interpretations. Complainants contend that the term "provide" generally means to "make available," and, consequently, urge us to interpret the restriction broadly to encompass a wide range of activities, including "simply marketing" interLATA services.⁽⁹⁸⁾ As support, complainants rely on MFJ precedent, which appears to equate "marketing" with "providing."⁽⁹⁹⁾ They also cite the 1996 Act's legislative history, which uses the term "offer" in place of "provide," as evidence that Congress intended for "provide" to be construed broadly.⁽¹⁰⁰⁾ In addition, the complainants contend that the structure of the Act establishes that, when Congress used the term "provide" in setting forth a restriction, it intended to prohibit a wide range of activities, including marketing.⁽¹⁰¹⁾

26. Defendants argue, conversely, that the restriction in section 271 must be narrowly construed. Specifically, defendants assert that the plain meaning of the term "provide" is to "furnish," which they contend restricts BOCs only to the extent they actually transmit, or act as a reseller of, interLATA services, prior to receiving requisite 271 approval.⁽¹⁰²⁾ According to the defendants, any other activity, particularly their "mere marketing" of interLATA service, is permissible under the Act.⁽¹⁰³⁾ Defendants further claim that, as a matter of statutory construction, the term "provide" cannot be read more broadly to include "marketing" because, throughout the Act, these terms are used separately and, they contend, deliberately to address different boundaries of permitted and restricted conduct.⁽¹⁰⁴⁾ They argue that, if Congress intended the terms to have synonymous meaning, there would have been no need to use both terms together in the same statute. Indeed, defendants maintain that, under established principles of statutory construction, we are required to give these terms different meanings.⁽¹⁰⁵⁾ Finally, defendants point to two Commission orders in which, they argue, the Commission has distinguished the term "provide" from "marketing."⁽¹⁰⁶⁾

27. Although we agree that Congress used the term "provide" to identify the scope of the section 271 restriction, we reject the parties' assertions that its meaning is clear and unambiguous. The Act does not define the term "provide," and we find the parties' attempts to use dictionary definitions to support their conclusions unilluminating and incomplete. Rather, the term "provide" can, depending on its context, mean a variety of things.⁽¹⁰⁷⁾ It can support a narrow meaning, such as when used to convey the transmission of service. It can also mean something broader such as "make available." The fact that the term "provide" in the abstract can support any number of meanings confirms our view that we must look elsewhere to determine its precise scope under section 271(a).⁽¹⁰⁸⁾ As the D.C. Circuit recently noted, "[t]he literal language of a provision taken out of context cannot provide conclusive proof of congressional intent, any more than a word can have meaning without context to illuminate its use."⁽¹⁰⁹⁾

28. We conclude that, in the context of our interpretation of section 271(a), the term "provide" is ambiguous. Accordingly, using the traditional tools of statutory construction, we look next to the context in which the term is used and any relevant legislative history to determine a reasonable meaning.⁽¹¹⁰⁾ Contrary to the defendants' contentions, this approach is fully consistent with the Commission's analysis in the Ameritech Michigan 271 Order and the Alarm Monitoring Order, interpreting, in different

contexts, the term "provide" and the phrase "engaged in the provision of." The Commission in both the Ameritech Michigan 271 Order and the Alarm Monitoring Order generally recognized, as we do again here, that the term "provide" is inherently ambiguous and that we must, therefore, consider the statutory context in which the term is used to give it precise meaning.(111) We, therefore, disagree with defendants that the specific interpretations of the term "provide" in these orders are controlling here. Rather, because they involve different statutory contexts, simply importing the definitions the Commission adopted in the Ameritech Michigan 271 Order or the Alarm Monitoring Order would be contrary to the Commission's approach in those orders to giving meaning to the term "provide."

29. In the Ameritech Michigan 271 Order, the Commission interpreted the term "provide" within the context of section 271(d)(3)(A)(i), which requires a BOC to demonstrate that it is "providing" access and interconnection pursuant to the terms of the competitive checklist.(112) In this context, the Commission concluded that a BOC "provides" a checklist item if it "actually furnishes" the item or, where no carrier is using the item, if the BOC makes it available "as both a legal and practical matter."(113) Recognizing that the term "provide" is used in section 271(d)(3)(A)(i) to describe an affirmative obligation to provide checklist items, the Commission declined to construe the term broadly and, instead, determined that, in order to satisfy section 271(d)(3)(A), a BOC must demonstrate, among other things, that it has "a concrete and specific legal obligation to furnish" checklist items upon request and that "it is presently ready to furnish each checklist item in the quantities that competitors may reasonably demand and at an acceptable level of quality."(114) The Commission concluded that such an interpretation would ensure that a BOC is actually furnishing checklist items in a manner that enables competing carriers to effectively serve local exchange customers, and thereby further Congress' goal of facilitating competition in the local exchange market.(115)

30. In contrast to its use in section 271(d)(3)(A)(i), the term "provide" is used in sections 271(a) and (b) to describe a restriction or limitation on a BOC's ability to enter the in-region, interLATA market. The use of the term "provide" in such different contexts may reasonably require us to interpret the term differently in sections 271(d)(3)(A)(i) and sections 271(a) and (b). Consistent with the Commission's analysis in the Ameritech Michigan 271 Order, for example, we interpret the term "provide" in sections 271(a) and (b) in view of the goals Congress sought to achieve by enacting these provisions. In particular, we find that the term "provide" must encompass activities that, if otherwise permitted, would undermine Congress' method of promoting both local and long distance competition by prohibiting BOCs from full participation in the long distance market until they have open their local markets to competition pursuant to section 271's competitive checklist. Such an analysis may reasonably require us to adopt an interpretation of the term "provide" in sections 271(a) and (b) that is more comprehensive than the definition adopted by the Commission in the Ameritech Michigan 271 Order. Indeed, as we conclude herein, a BOC need not be legally or contractually responsible for furnishing interLATA services upon request in order to engage in the kind of conduct that sections (a) and (b) seek to prohibit.(116)

31. In the Alarm Monitoring Order, the Commission did not expressly define what it meant to be "engag[ed] in the provision of" alarm monitoring services, but, instead, concluded that it would determine, on a case-by-case basis, whether a BOC is engaged in the provision of alarm monitoring services in contravention of section 275.(117) The Commission stated that it would take into account a variety of factors in making this determination, including whether the terms and conditions of a sales agency and marketing arrangement between a BOC and an unaffiliated alarm monitoring service entity are made available to other alarm monitoring companies on a nondiscriminatory basis and whether the

BOC's compensation under such an arrangement is tied to the unaffiliated firm's performance in offering alarm monitoring services.(118) We conclude in this Order, as did the Commission in the Alarm Monitoring Order, that, in determining what it means to "provide" interLATA service, we must consider factors that are particularly relevant in the context of section 271(a). Thus, if we limited our analysis of the scope of the in-region, interLATA restriction to the factors the Commission deemed relevant in the context of section 275, we would not be fulfilling our obligation to interpret the term "provide" in the particular context it is used.(119)

32. Although we thus reject defendants' attempts to import as controlling here specific definitions or conclusions concerning the meaning of "provide," which were considered by the Commission in different statutory contexts, we agree with defendants that Congress' use of both the terms "market" and "provide" in different provisions of the 1996 Act provides guidance as a matter of statutory construction. Specifically, we are persuaded that this suggests Congress did not intend for the terms to be used synonymously. We find it significant that section 272(g)(2) states that: "[a] Bell operating company may not market or sell interLATA service provided by an affiliate required by this section within any of its in-region States until such company is authorized to provide interLATA services in such State under section 271(d)."(120) Since section 272(g)(2) thus expressly prohibits a BOC from marketing long distance services prior to obtaining authorization under section 271(d), it is unlikely that Congress implicitly intended sections 271(a) and (b) to achieve the same result. As defendants correctly contend, under such an interpretation, BOCs and their affiliates would already be precluded from marketing interLATA services under sections 271(a) and (b) and, therefore, the restriction on marketing set forth in section 272(g)(2) would be superfluous. Moreover, we find some force to Ameritech's position that, if one became a "provider" by "simply marketing" another carrier's services, then those who merely market and sell interLATA services, such as telemarketers and cellular sales agents, could be considered to be "providing" such services.(121)

33. We do not agree with the defendants further, however, that our finding that the terms are not synonymous means that we must construe them as mutually exclusive, that is, as suggesting wholly different meanings. As discussed above, we believe the term "provide" can support multiple and related meanings. Nor do we accept the defendants' view that section 272(g)(2) means that only BOC joint marketing of its own long distance affiliate is restricted until after 271 approval, and that all other marketing arrangements with non-affiliates must therefore be permissible under the Act. We furthermore reject the defendants' contention that the Commission suggested as much in the Non-Accounting Safeguards Order.(122) Instead, the Commission determined there that section 272(g) does not prohibit the BOCs, prior to section 271 authorization, from entering into teaming arrangements that involve the marketing of an unaffiliated entity's interLATA services. This conclusion was based on the Commission's determination that "section 272(g) only restricts the BOC's ability to market and sell interLATA services 'provided by an affiliate required by [section 272]'" and in view of NYNEX's representation that teaming arrangements in which a BOC and an unaffiliated entity would market their respective services were permitted by the MFJ.(123) The Commission was not presented with, and did not address in that Order, whether an arrangement in which a BOC would market its own local services as well as an unaffiliated entity's long distance services was permissible under section 272(g) or any other provision of the Act, including section 271. Thus, neither the language of section 272(g)(2) nor the Commission's decision in the Non-Accounting Safeguards Order is dispositive of the issue squarely presented here -- whether, and the extent to which, a BOC can enter into arrangements with non-affiliated entities to provide a package of services that includes another carrier's long distance service component, and market that package

under the BOC's brand name.

34. On this issue, we agree with the complainants that the relevant legislative history offers some general guidance. The history suggests that the restriction in section 271 should not be limited to prohibiting only the transmission or resale of interLATA service. Significantly, the Conference Report accompanying the final version of the 1996 Act states that BOCs are required to obtain authorization from the Commission "prior to offering interLATA services" in their regions.(124) The term "offer" is also used in numerous floor statements referring to the in-region interLATA restriction found in section 271, although the term "provide" is used in the final text of those sections of the Act.(125) Ameritech contends that Congress' use of the term "offer" in the legislative history is meant only to establish that "a BOC cannot offer to provide its own services (or those of its affiliate) before obtaining Commission authorization."(126) We disagree with this construction of the legislative history. We find nothing in the legislative history that suggests that Congress was using the term "offer" in this limited context or that we should recognize that Congress implicitly intended to use this limiting phrase. Rather, we find that Congress' interchangeable use of the terms "provide" and "offer" suggests that Congress understood the prohibition to be broader in scope than mere transmission.

35. Statutory Purpose and Structure. Based on the context of the term "provide," along with the relevant legislative history, we can reasonably conclude that the restriction contained in sections 271(a) and (b) neither prohibits nor permits all forms of marketing relationships. Although this information supplies us with some direction in defining the general parameters of the restriction, it is not sufficient on its own. Since neither the context of the statutory provision nor its legislative history is dispositive, we examine the statutory purpose and structure of section 271 to give meaning to the scope of the restriction.

36. As discussed above, section 271 has two underlying objectives.(127) First, section 271 seeks to bring additional competition to the long distance market by offering the BOCs the potential opportunity to participate in that market. Second, by conditioning BOC entry into the in-region, interLATA market on whether the BOCs' local markets are open to competition, section 271 seeks to facilitate entry by new entrants into the BOCs' local exchange markets. Together, these objectives further the overall purpose of the Act, which is to make all telecommunications markets competitive by fundamentally changing the incentives for market entry and by eliminating remaining monopoly bottlenecks.

37. Thus, in giving meaning to the scope of the in-region, interLATA restriction, we must consider the dual objectives of section 271, as well as the careful balance struck by Congress in the Act's overall structure and framework. In particular, in order to determine whether a BOC is providing interLATA service within the meaning of section 271, we must assess whether a BOC's involvement in the long distance market enables it to obtain competitive advantages, thereby reducing its incentive to cooperate in opening its local market to competition. In making this determination, we balance several factors, including, but not limited to, whether the BOC obtains material benefits (other than access charges) uniquely associated with the ability to include a long distance component in a combined service offering, whether the BOC is effectively holding itself out as a provider of long distance service, and whether the BOC is performing activities and functions that are typically performed by those who are legally or contractually responsible for providing interLATA service to the public. In evaluating the BOC's actions, we consider the totality of its involvement, rather than focus on any one particular activity.(128)

2. Legality of CompleteAccess and Buyer's Advantage Programs

38. We conclude, based on the totality of Ameritech's and U S WEST's involvement in the in-region, interLATA market, that they are providing in-region, interLATA services in violation of section 271. Consistent with our interpretation of the scope of the in-region, interLATA restriction, this conclusion is based on our determination that: (1) the inclusion of Qwest's long distance services in CompleteAccess and Buyer's Advantage enables the defendants to obtain material benefits uniquely associated with the ability of the BOCs to include a long distance component of service, including the ability to become a one-stop shopping entity for local and long distance service, the opportunity to win back customers lost to intraLATA toll competitors, the opportunity to sell additional vertical features, and the opportunity to realize additional intraLATA toll and billing and collection revenue, before demonstrating that their local markets are open to competition; (2) the defendants are holding themselves out as providers of long distance services by marketing and selling, under a single brand name, Qwest's long distance services and their own local services and by performing various customer care functions in connection with the long distance services offered under CompleteAccess and Buyer's Advantage; (3) the defendants are performing various functions and activities under their business arrangements with Qwest that are typically performed by those who resell interLATA services, such as marketing, customer care, and establishing the prices, terms, and other conditions for the long distance services to be provided under their respective programs. We examine each of the foregoing factual circumstances more fully below.

39. In our view, one of the most significant factors in our determination that the defendants are providing in-region, interLATA services in violation of section 271 is that, by including Qwest's long distance services in their CompleteAccess and Buyer's Advantage programs, Ameritech and U S WEST each become a comprehensive "one-stop shopping" source for local and long distance services when the defendants have not adequately opened their local markets and thus have not enabled new entrants to also compete in the combined services market. Although Congress contemplated that the framework it enacted would enable the BOCs to obtain the benefits associated with being a provider of long distance services, such as the ability to offer one-stop shopping, we do not find that Congress intended for the BOCs to obtain these benefits, prior to demonstrating compliance with the market opening provisions in section 271. Indeed, Congress held out the possibility of the BOCs being able to participate in the long distance market as a critically important incentive for the BOCs to cooperate in opening their local markets to competition. By conditioning BOC entry into the in-region, interLATA market on whether the local market is open to competition, Congress sought to ensure that, when the BOCs obtain authorization to provide long distance services, and thereby offer one-stop shopping, new entrants would also have the opportunity to provide a combined package of telecommunications services to consumers. In order to ensure that this carefully balanced incentive structure remains intact, we interpret section 271 as prohibiting the BOCs from obtaining the benefits uniquely associated with being able to participate in the long distance market, prior to demonstrating compliance with section 271.

40. We need not speculate upon the extent to which BOCs would receive benefits uniquely associated with the fact that the package of services they offer their in-region customers includes a long distance component, as opposed to other services, prior to section 271 authorization. Indeed, the defendants themselves acknowledge that such benefits take many forms. First, the ability presently to be the sole provider of a package of services that includes a long distance component affords these BOCs, prior to their receiving section 271 approval, an enormous benefit in strengthening their position in the telecommunications marketplace. Indeed, Ameritech expressly recognized that its business arrangement with Qwest would give it what it termed a "first mover's advantage."⁽¹²⁹⁾ More specifically, Ameritech

reasoned that a combined service offering would enable it to "build an entrenched full service base" before the three major interexchange carriers could "leverage their customer relationship to sell local." (130) Similarly, in announcing the Buyer's Advantage program, U S WEST expressly recognized that its arrangement with Qwest "is about serving the customer and bringing them closer to one-stop shopping, which they are demanding." (131) U S WEST further stated in its marketing plans that "[its] endeavor with Qwest will initially allow [it] to become an interLATA carrier" for its in-region subscribers. (132)

41. Second, the defendants' ability to provide a combined offering of local and long distance services, prior to demonstrating that their local markets are open to competition, affords them a significant "jumpstart" when they do obtain 271 authorization. U S WEST acknowledges, for example, that a combined local and long distance offering would afford it a means to "[p]re-position customers for U S WEST Long Distance by providing the convenience of one-stop shopping." (133) Indeed, through their branding of the combined offering, both Ameritech and U S WEST are well poised to substitute the long distance service offered by their section 272 affiliate, when they obtain section 271 approval, into the CompleteAccess or Buyer's Advantage package in the future.

42. Third, the defendants expressly concede that a key benefit associated with being able to provide a combined service offering is the opportunity to strengthen and entrench their relationships with their in-region local customers. Ameritech has stated, for example, that the CompleteAccess program enables it to better satisfy those customers "who want simplicity and convenience" and, at the same time, "enhance its own goodwill in the marketplace." (134) U S WEST described Buyer's Advantage as "a marketing tool and . . . a way of adding value when [it] deal[s] with [its] customers." (135) More precisely, U S WEST testified that Buyer's Advantage enables it to "keep [its] customers happy." (136) We recognize that a competitive environment demands that carriers strive to satisfy their customers' needs. Indeed, one of the main benefits of competition is that customers' desires are satisfied more effectively. In our view, however, Congress did not intend to permit the BOCs to enhance their relationships with their local customers by offering a telecommunications package that includes long distance services in a way that violates section 271.

43. Finally, the defendants acknowledge that they will derive material financial benefits from each sale of CompleteAccess and Buyer's Advantage. Ameritech states, for example, that "by responding to customers' needs and desires, [it] hopes to more effectively market, and hence increase its sales of, its own local services, especially 'vertical services' such as Call Waiting, Caller ID, and Automatic Redial, which offer a higher profit margin than basic local service." (137) Ameritech further admits that vertical features will "market better in combination with the . . . CompleteAccess offer." (138) U S WEST has stated that Buyer's Advantage will enable it to "[target] high value customers for retention, winback and competitive response reasons . . ." and "[i]mprove U S WEST value proposition in its toll markets by 'packaging' competitive intraLATA calling plans with a compelling long distance offer." (139) Under these particular agreements, the BOCs also realize additional intraLATA toll and billing and collection revenue. (140) U S WEST has testified, for example, that Buyer's Advantage is designed both to "win back" customers who have been lost to intraLATA toll competitors, such as AT&T and MCI, and to prevent further losses to these carriers. (141) Ameritech has similarly testified that its CompleteAccess program will enable it to regain customers who have been lost to intraLATA toll competitors but who are attracted to a one-stop shopping offer. (142) Moreover, the defendants' involvement in establishing the prices Qwest would charge for the long distance services offered under CompleteAccess and Buyer's

Advantage was specifically designed to make these packages more profitable to the BOCs. Ameritech has conceded that: "[t]he better the price [for the long distance services offered under CompleteAccess] the more we sell and the more money we make."(143) Thus, these arrangements demonstrate the significance of combined service offerings as a vehicle for the BOCs to maintain their pre-eminence in the intraLATA market and, ultimately, to compete aggressively in the intraLATA toll market.

44. Thus, the defendants' business arrangements with Qwest enable them to compete prematurely in the in-region, interLATA market through the provision of one-stop shopping, and to advance their position in the telecommunications marketplace, regardless of whether the defendants derive direct customer payments for the transmission of Qwest's long distance services. Indeed, the record indicates that, in the four weeks preceding the issuance of the preliminary injunction against the defendants, U S WEST successfully persuaded approximately 130,000 of its customers to purchase Qwest's long distance services under its Buyer's Advantage program.(144) And, even with limited in-bound marketing calls, Ameritech successfully persuaded more than 10,000 customers to subscribe to Qwest's long distance services offered under its CompleteAccess program.(145) Moreover, by expressly acknowledging the competitive advantage that they would obtain over the major interexchange carriers by offering a one-stop shopping solution to their in-region subscribers, prior to section 271 authorization, the BOCs have effectively conceded that they sought to compete with interexchange carriers for the provision of interLATA services. Congress expressly created in the statutory scheme, however, a framework for ensuring that the BOCs open their local markets before they may compete in the in-region, interLATA market.

45. A second critical factor is that, by offering one-stop shopping for local and long distance services, under a single brand name, the defendants are effectively holding themselves out to customers as providers of long distance services. Most notably, the defendants have taken several specific steps to brand CompleteAccess and Buyer's Advantage as their exclusive combined service offerings. Under their contracts with Qwest, for example, the defendants have the exclusive right to market and sell Qwest's long distance services in conjunction with the marketing and sale of their own local services under the CompleteAccess or Buyer's Advantage brand name.(146) In marketing and selling these combined offerings, the defendants expressly identify themselves as one-stop shopping entities. For example, U S WEST's marketing scripts include statements, such as "U S WEST Communications has teamed up with Qwest . . . to provide you and your company long distance service,"(147) "With U S WEST Buyer's Advantage, Qwest and U S WEST are able to provide you with a one stop telecommunications solution,"(148) and "Thank you for calling U S WEST Communications, your local, long distance and inter-net provider."(149) Ameritech even sends a letter thanking customers for subscribing to CompleteAccess. In this letter, Ameritech explains the benefits of subscribing to CompleteAccess as including "the convenience of one customer service number to call and just one bill to pay for . . . local and long distance services."(150) When customers dial the number referred to in the Ameritech letter, they will be connected to Ameritech, as Ameritech serves as the initial point of contact for customers who have questions or problems with any of the services purchased under CompleteAccess, including the long distance services offered under the package.(151) By holding themselves out to consumers as being able to provide long distance service, under their exclusive brand name, the BOCs are competing in the in-region, interLATA marketplace before they are authorized to enter this market.

46. We are also persuaded by the fact that, in bringing the CompleteAccess and Buyer's Advantage one-stop shopping offers to their in-region subscribers, the defendants engaged in various actions that are

typically performed by those who resell interLATA services.(152) For example, the defendants had a significant degree of involvement in designing and developing the long distance component of their respective combined service offerings. Most notably, Ameritech and U S WEST selected Qwest as the provider of the long distance component of CompleteAccess and Buyer's Advantage on the basis of criteria Ameritech and U S WEST established.(153) The defendants also had a role in establishing the prices at which Qwest would offer long distance services under CompleteAccess and Buyer's Advantage. Although the defendants both state that the rates set forth in their agreements with Qwest were negotiated, facts in the record indicate that Ameritech and U S WEST had structured, prior to entering into negotiations with Qwest, the prices at which long distance services should be offered under CompleteAccess and Buyer's Advantage in order to make these combined service offerings most profitable to the BOCs.(154) Evidence in the record further suggests that Qwest essentially agreed to join the arrangement under the defendants' terms and conditions.(155) In short, the evidence strongly suggests that it is defendants, not Qwest, that established the prices and terms for the long distance services to be provided under CompleteAccess and Buyer's Advantage.

47. We further note that these business arrangements effectively enable the defendants to exercise strong prospective influence over the prices, terms, and conditions of the long distance services provided under CompleteAccess and Buyer's Advantage. For example, Qwest may not increase its prices during the term of its agreement with U S WEST(156) and may increase its prices under its agreement with Ameritech only after giving Ameritech sixty days notice.(157) Notably, if Qwest does, in fact, raise its prices beyond those specified in its agreement with Ameritech, Ameritech may terminate the contract.(158) Both contracts also contain several specific network and service requirements Qwest must meet in order to continue providing long distance service under CompleteAccess and Buyer's Advantage.(159) Ameritech may terminate its contract with Qwest if Qwest deviates from the "minimum network and operations specifications and requirements" set forth in the contract, and such deviation "impacts Ameritech operations or its brand image or values."(160) U S WEST reserves the right to terminate its contract with Qwest if Qwest "[f]ail[s] . . . to meet the service standards set forth [in the contract]."(161)

48. The defendants also perform other functions and activities under their respective business arrangements with Qwest that are typically performed by resellers. For example, the defendants serve as the exclusive marketing and sales agents of CompleteAccess and Buyer's Advantage.(162) The defendants, therefore, seek to induce their in-region subscribers to select the long distance services offered by Qwest under CompleteAccess and Buyer's Advantage, rather than the services offered by a competing interLATA service provider. If a customer does, in fact, subscribe to CompleteAccess or Buyer's Advantage, he or she will primarily interface with the defendants, as the defendants serve as initial point of contact for customers' billing and collection and service inquiries.(163) Qwest interacts with the customer only after Ameritech or U S WEST has determined that the customer's question or concern relates to a problem in Qwest's long distance service network.(164) In addition, Ameritech requires Qwest to provide status and resolution information about any trouble ticket Ameritech refers to Qwest so that Ameritech can provide feedback to the end-user "as necessary and appropriate."(165) Under the U S WEST-Qwest contract, Qwest is required to provide U S WEST "with the status and disposition of its customer service activities."(166) The only long distance function the defendants do not perform under their respective business arrangements is the actual transmission of calls across LATA boundaries; this function is performed by Qwest.

49. We further note that Ameritech's and U S WEST's business arrangements with Qwest enable them to

provide the type of combined service offering that is prohibited to certain interexchange carriers under section 271(e). In section 271(e), Congress prohibited large IXCs from entering the combined services market through the resale of the BOC's local service for three years, or until the BOCs could likewise enter the market through a long distance affiliate after obtaining 271 approval.(167) This provision appears to have several objectives. First, it seeks to diminish the likelihood that the large IXCs would gain a "first mover's advantage" by merely reselling the BOC's local services as part of a combined service offering. Second, it acts to encourage the IXCs to become facilities-based providers of local services because the prohibition does not extend to IXCs that seek to provide a package of services that includes local services provisioned through the use of their own facilities. Third, it encourages the BOCs to act expeditiously to open the local market because the prohibition, unless nullified by a BOC's receipt of section 271 authorization, expires three years from the date of enactment. We cannot reasonably interpret section 271 as prohibiting IXCs, who lack monopoly power, from competing in the combined services market through the resale of the BOC's local services for three years, while permitting a BOC, who has not yet opened its local market to competition, to provide a similarly packaged combined service offering immediately.

50. Based on this factual record, we reject defendants' attempts to label the functions and activities they perform under their business arrangements with Qwest as "simply marketing" or "merely marketing." Although it is not clear what the defendants mean when they refer to such terms, we believe that an arrangement in which a BOC would offer the services of its marketing department to market and sell a long distance product or service would be one example of a permissible marketing arrangement. Provided the BOC would make no representation that such product or service is associated with its name or services, such an arrangement would be analogous to billing and collection arrangements and would be permissible under section 271.(168) The business arrangements Ameritech and U S WEST have entered into with Qwest are fundamentally different from this permissible type of marketing, as they involve marketing and selling, under a single brand name, their own local services and Qwest's long distance services. Moreover, the defendants do not just market their own local, and Qwest's long distance, services, under a single brand name, but they also perform various customer care functions in connection with the long distance services purchased under their respective programs. We further find that the defendants' business arrangements with Qwest are distinguishable from permissible marketing arrangements in view of Ameritech's and U S WEST's role in establishing the prices and other specific terms of the long distance services provided under CompleteAccess and Buyer's Advantage.(169) Indeed, in view of the nature and extent of the defendants' involvement in their respective one-stop shopping programs and Qwest's limited, secondary role, we find that the defendants have effectively positioned themselves as the sole providers, rather than the mere marketers, of a package of services that includes a long distance component.

51. Finally, we reject Ameritech's contention that "[t]he public interest will be substantially impaired if its [contractual arrangement with Qwest] is enjoined."(170) To the contrary, we conclude that the public interest will be served by our finding that Ameritech's and U S WEST's premature entry into the long distance market is unlawful under section 271 because we are preserving the intent of Congress that local markets be opened to competition before BOCs may enter into the long distance market.(171) Moreover, our decision need not impact those customers who wish to subscribe to Qwest's long distance services at the same prices offered to CompleteAccess or Buyer's Advantage subscribers. They can simply subscribe to Qwest's long distance services directly, rather than through Ameritech or U S WEST.

52. In conclusion, based on the evidence presented and applied to our interpretation of the scope of the prohibition under section 271, we find that the defendants' business arrangements with Qwest permit Ameritech and U S WEST to provide in-region, interLATA services, prior to section 271 authorization. It is clear on this record that Ameritech's and

U S WEST's business arrangements with Qwest pose the competitive concerns that section 271 seeks to address, and we accordingly find them unlawful under the Act.

B. Section 251(g)

53. The second issue presented by Ameritech's and U S WEST's marketing and recommending of Qwest's long distance service under the CompleteAccess and Buyer's Advantage programs is whether these arrangements comply with the equal access and nondiscrimination requirements under section 251(g).(172) Section 251(g) expressly preserves all pre-existing equal access and nondiscrimination requirements that were established "under any court order, consent decree, or regulation, order or policy of the Commission" prior to passage of the 1996 Act until such restrictions are explicitly superseded by the Commission.(173) Section 251(g) further affirmatively grants the Commission authority to prescribe regulations superseding these pre-existing equal access and nondiscrimination obligations.(174) All parties here concede that the Commission has not yet issued any such superseding regulations, and that therefore the MFJ's equal access and nondiscrimination provisions and court orders interpreting those provisions are enforceable "as regulations of the Commission."(175) The parties disagree, however, whether the CompleteAccess and Buyer's Advantage programs presently violate the MFJ precedent carried forward under section 251(g). Because we conclude that these programs constitute the unlawful provision of interexchange service in violation of section 271, we need not reach the issue whether they also violate Ameritech's and U S WEST's equal access and nondiscrimination obligations under section 251(g). We believe, rather, that the more prudent course would be to initiate a rulemaking to consider carrier obligations under section 251(g) and determine which obligations the Commission should properly retain under the new competitive paradigm contemplated by the 1996 Act.(176) Indeed, through this rulemaking, the Commission can consider more broadly the proper scope of the equal access and nondiscrimination requirements in the post-Act environment.

54. So as not to prejudge that future rulemaking, we choose not to decide the present legality of these business arrangements under section 251(g). In considering the record before us, however, we believe the facts raise serious concerns that Ameritech and U S WEST, through the CompleteAccess and Buyer's Advantage programs, may have violated their existing equal access and nondiscrimination obligations. Specifically, MFJ precedent, which would expressly control an analysis under section 251(g) prior to our future rulemaking, would appear to prohibit a BOC's endorsement or promotion of one IXC's services over another IXC's services. The MFJ Court specifically applied the equal access and nondiscrimination requirements to the BOCs' dealings with their customers in a case involving the treatment of undesignated long distance traffic(177) during the period equal access initially was phased in.(178) Indeed, the MFJ Court made clear that the BOCs were permitted to assist customers in locating a long distance carrier, "provided that no favoritism is shown to any particular carrier."(179)

55. The MFJ Court also appeared to articulate broadly a principle of non-favoritism underlying the BOCs' equal access and nondiscrimination obligations in the Endorsement case.(180) In that case, Southwestern Bell leased a PBX (essentially a switch placed on a business customer's premises) as well

as maintenance and support services to National Telecommunications, a reseller of interexchange service. Southwestern Bell provided National Telecommunications with the following "endorsement of quality:"

National Telecommunications of Austin is a new discount long distance company servicing the Austin free-calling area. With National, every call you make is handled by switching equipment provided and maintained by Southwestern Bell Telecom. Then, your call is transmitted over the Southwestern Bell Telephone Company and AT&T Communications network system. This system is completely compatible with the system National Telecommunications is utilizing.(181)

The court held that, "by granting to National an endorsement of quality, Southwestern Bell has violated the nondiscrimination provision of section II(B) of the decree."(182)

56. In a case examining the propriety of BOC practices relating to calling cards, the court determined that the BOCs could issue calling cards usable for both local and long distance calls, provided that they did not discriminate among the various interexchange carriers with respect to the calling cards.(183) The court found that the preferential treatment afforded to AT&T by the BOCs in that instance violated the equal access and nondiscrimination provisions of the MFJ.(184) In reaching its conclusion, the court relied on, among other things, the fact that any advertising or marketing of the calling card by the BOC effectively promoted AT&T's service over that of other interexchange carriers' services.(185) Indeed, the court noted that any advertising by the BOCs of the calling card service when AT&T was the only long distance provider associated with that service would have the "direct foreseeable effect of promoting AT&T services over those of the other interexchange carriers."(186)

57. Taken together, these cases appear to stand for the proposition that BOCs may not favor an interexchange carrier by endorsing or promoting the services of one interexchange carrier over another. Specifically, these decisions factored in, among other things, that BOCs maintain both a ubiquitous brand name awareness and unparalleled access to customers that, without constraints, easily could be used to steer customers' decisions and, as a result, influence competition in the long distance market. Accordingly, to make sure that customers make their long distance choices based solely on the merits of a long distance offering, the MFJ Court determined that the BOCs must facilitate the ability of customers to choose, but remain neutral as a participant in that decision.

58. Applying this MFJ precedent to the record before us raises serious concerns that Ameritech and U S WEST, under the CompleteAccess and Buyer's Advantage programs, are endorsing and promoting Qwest's long distance service over that of other IXCs' services in violation of the existing equal access and nondiscrimination requirements.

59. In particular, the record indicates that Ameritech and U S WEST are actively recommending Qwest's long distance service over other interexchange carriers' service. For example, Ameritech's marketing script specifically states,

"You have many companies to choose from to provide your long distance service. I can read from a list of available carriers, but I'd like to recommend Qwest Communications, and I can provide more details on the Qwest offer, if you wish."(187)

Additionally, Ameritech's training materials instruct its representatives to market CompleteAccess to

small business customers who call Ameritech inquiring about, among other things, additional lines and adding or deleting features to their existing service.(188) Ameritech's marketing scripts state that Qwest's rates "offer[] significant savings over MCI, AT&T, and Sprint."(189) Through the Buyer's Advantage program, U S WEST also is actively endorsing and recommending Qwest's long distance service. For example, during outbound telemarketing, U S WEST informed its customers about its "special one stop shopping offer on all your calls whether they are local or long distance."(190)

60. Ameritech's training materials also instruct its representatives to tell its customers that Ameritech invited all the major IXCs to participate in the review process, and that it "selected" Qwest as the long distance provider for the CompleteAccess package because Qwest "satisfied the rigorous requirements [Ameritech] established for quality, value and convenience."(191) Such representations may encourage use of Qwest and may even suggest that other IXCs' services are inferior to Qwest's, while failing to acknowledge that most of the major long distance carriers elected not to participate in the review process.(192) Finally, Ameritech's training materials instruct its representatives to state that, by entering into its arrangement with Qwest, Ameritech will be offering its customers long distance service "with the best price, performance, and quality available in the marketplace."(193) U S WEST's marketing materials instruct its representatives to encourage its customers to select Qwest over all other long distance carriers.(194)

61. In addition to Ameritech's and U S WEST's active endorsement of Qwest's long distance service, their branding of the respective total package of services as their own program places them in the position of endorsing, at least implicitly, Qwest's long distance service. Indeed, Ameritech acknowledges that CompleteAccess is attractive to small carriers, like Qwest, that "[lack] brand recognition."(195) Presumably, this is so because, although many local customers may not recognize Qwest's brand name, they undoubtedly will recognize Ameritech's; thus, the mere association of Qwest's long distance service with Ameritech's services would suggest to customers that Ameritech endorses Qwest's services over other IXCs'. The same is true with regard to U S WEST's promotion of Qwest's long distance service. These marketing arrangements allow Qwest to have its name and long distance service associated with the BOC's local service brand name, and to enjoy the same unparalleled access to customers as the BOC. Ameritech's and U S WEST's marketing of Qwest's long distance service under their own brand, in conjunction with their own local and intraLATA toll services, at least implicitly demonstrates that Ameritech and U S WEST are endorsing and promoting Qwest's long distance service.

62. We also find it difficult to foresee how Ameritech and U S WEST could recommend the services of multiple IXCs, while also fulfilling the terms of their contractual agreements with Qwest. In fact, Ameritech acknowledges that it has not developed a plan for this situation.(196) Because the CompleteAccess program includes only Ameritech's intraLATA toll offering and requires that Qwest employ Ameritech's billing and collection services, again, we question whether the arrangement is truly available to all interexchange carriers.(197) The practical effect of an arrangement that requires an IXC to package its long distance service with the BOC's intraLATA toll service is that carriers offering both intraLATA toll and interLATA services would be forced to pay Ameritech each time a customer selected the CompleteAccess package, even though the carrier may have lost one of its intraLATA customers to Ameritech in the process.(198) Furthermore, that carrier effectively would be funding its competitor's (the BOC's) intraLATA toll service campaign.(199) Finally, although Ameritech and U S WEST claim that they are willing to negotiate different terms with other carriers,(200) we question whether the intraLATA toll component of the CompleteAccess and Buyer's Advantage programs is negotiable

because of the material benefit the BOCs obtain from this particular term.

63. For these reasons, we seriously question whether these arrangements would be permissible at present under the equal access and nondiscrimination requirements carried over from the MFJ, embodied in section 251(g). Whether such arrangements should be permitted in the future, however, properly awaits the intended Commission rulemaking, as contemplated under section 251(g), on the scope of carriers' equal access and nondiscrimination obligations in the post-Act environment.

IV. CONCLUSION

64. For the reasons discussed above, we find that Ameritech's and U S WEST's offering of Qwest's long distance service as part of a combined package of services under the CompleteAccess and Buyer's Advantage programs is a violation of section 271 of the Communications Act of 1934, as amended.

V. ORDERING CLAUSES

65. Accordingly, IT IS ORDERED that, pursuant to sections 1, 4(i), 4(j), 208, and 271 of the Act, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, 271, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the formal complaints filed by AT&T Corporation, MCI Telecommunications Corporation, Association of Local Telecommunications Services, MGC Communications, Time Warner Communications Holdings, Inc., NEXTLINK Illinois, Inc., and NEXTLINK Ohio, L.L.C. against Ameritech Corporation and Qwest Communications, Defendant-Intervenor, by AT&T Corporation, MCI Telecommunications Corporation, Association of Local Telecommunications Services, and NEXTLINK Washington, L.L.C. against U S WEST Communications, Inc. and Qwest Communications Corporation, Defendant-Intervenor, and by McLeodUSA Telecommunications Services, Inc., ICG Communications, Inc., and GST Telecom, Inc. against U S WEST Communications, Inc. ARE GRANTED to the extent described herein and ARE OTHERWISE DENIED.

66. IT IS FURTHER ORDERED that the Motions for Leave to File Comments as Amicus Curiae filed by Advanced Communications Group, Inc., the Bell Atlantic telephone companies, BellSouth Corporation and BellSouth Telecommunications, Inc., the Public Utility Commission of Oregon, SBC Communications, Inc., the Public Utility Commission of Texas, the Washington Utilities and Transportation Commission, and Williams Communications, Inc. ARE GRANTED.

67. IT IS FURTHER ORDERED that resolution of the Motion for Confidential Treatment and Entry of Protective Order filed by Qwest Communications Corporation IS DEFERRED pending resolution of the confidentiality of certain information referred to herein that has been designated as confidential by Ameritech Corporation and US WEST Communications, Inc.

68. IT IS FURTHER ORDERED that all other motions filed in these formal complaint proceedings but not specifically ruled upon are DISMISSED AS MOOT.

69. IT IS FURTHER ORDERED that this Memorandum Opinion and Order shall be effective upon adoption and release to the parties to these formal complaint proceedings.

70. IT IS FURTHER ORDERED that the Chief, Formal Complaints and Investigations Branch,

Enforcement Division, Common Carrier Bureau, shall forward a copy of this decision to the United States District Court for the Western District of Washington, and to the United States District Court for the Northern District of Illinois, promptly upon release of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Secretary

Separate Statement

of

Commissioner Susan Ness

Re: Ameritech's and U S WEST's Business Arrangements with Qwest

I firmly believe that consumers whose local telephone service is provided by a Bell company will benefit greatly when that company can offer them an array of services like those at issue here. One-stop shopping, a single point of contact for service problems or billing inquiries, the ability to obtain any service from any supplier, low prices -- these are all good things. But the way to get there is by following the law.

Section 271 of the Communications Act specifies the steps the Bell companies must follow before they may provide long distance services. Their primary responsibility is to open their local markets. The sooner they demonstrate that they have done so, the sooner they may bring consumers beneficial packages of local, long distance, and other services.

Separate Statement of

Commissioner Gloria Tristani

Re: AT&T Corp., v. Ameritech Corp. and Qwest Communications Corp.; AT&T Corp. v. U S WEST Communications Inc., and Qwest Communications Corp.; McLeod Telecommunications Services, Inc. v. U S WEST Communications, Inc., Memorandum Opinion and Order.

I fully agree with the Commission's conclusion that U S WEST and Ameritech have violated section 271 by providing in-region long distance service through their arrangements with Qwest. I support this finding with reluctance and optimism. On the one hand, consumers thus far have benefitted little from the Telecommunications Act of 1996. A decision to deprive them of a popular service, when viewed in isolation, is counter-intuitive. In that sense, I vote to approve this Order with some reluctance. Yet it must be emphasized that our decision today reflects our fidelity to Congress's carefully constructed framework for achieving the larger goal of meaningful local competition.

This proceeding also leaves me with a sense of optimism. The long distance market, in my view,

continues to exhibit oligopolistic behavior. I am not convinced that consumers today are receiving the benefits of full competition. That will change when the power of Bell Companies' brand names and marketing capability is lawfully brought to bear on the long distance market. Bell Company entry into the long distance business portends a major shakeup for the current market leaders, and I believe that upheaval will result in new products, lower prices and better service for consumers. I hope that day will come sooner rather than later.

###

JOINT STATEMENT OF COMMISSIONERS

MICHAEL K. POWELL AND HAROLD FURCHTGOTT-ROTH

Re: Memorandum Opinion and Order, In the Matter of AT&T Corporation, et al. v. Ameritech Corp. et al. (File Nos. E-98-41 et al.).

We write separately to express our firm support for the conclusions reached in this Order and to highlight some of the concerns we hope will shape the Commission's consideration of future business dealings like the teaming arrangements we deem unlawful today.

By adopting the Telecommunications Act of 1996, Congress sought to unleash the resources, expertise and creative energy of firms that have been legally or practically barred from certain markets, all in the pursuit of one important goal: bringing the benefits of competition to the American public. Thus, we should expect that firms will continue to vie with each other to bring newer and better product offerings to their own customers and, if they are successful, their competitors' customers. Indeed, it is this urge to compete and innovate that is essential to the proper functioning of a competitive market. And it is this urge to compete and innovate that has led the defendants to develop the teaming arrangements at issue, by which they could have brought the benefits of "one-stop shopping" in telecommunications to their customers and, thus, to themselves.

Yet the Act does not give the Commission a blank slate. In our struggle to implement the pro-competitive, deregulatory framework envisioned by Congress, fundamental decisions have been made for us. One of these decisions is that the Bell Operating Companies (BOCs) may not provide in-region, interLATA telecommunications service until they comply with the requirements of section 271.(201) Thus, we are duty-bound to ensure that the BOCs' urge to compete and innovate in the long distance market does not lead them to violate the strictures of section 271. Because we believe the instant teaming arrangements do, according to the detailed factual record they have spawned, violate these strictures, it is without hesitation that we join our colleagues in concluding that the arrangements are barred under section 271.

We also are pleased to support this Order for what it does not conclude. As our support of this Order suggests, we agree that serious questions remain regarding whether or not the instant teaming arrangements violate the BOC defendants' equal access and nondiscrimination obligations under section 251(g). We believe nonetheless that it is both responsible and prudent that we have expressly declined to make conclusions regarding section 251(g). First, it is not necessary to reach the section 251(g) question to resolve fully the dispute before us. As the Order makes clear, the section 271 issues are dispositive

with respect to the legality of these teaming arrangements.

Second, we believe that by declining to reach the section 251(g) question in the context of this proceeding, we have successfully resisted the temptation to reaffirm unnecessarily a legal and regulatory regime that Congress required us to reconsider in light of the changing marketplace. Telecommunications policy is steeped in the history of the Modified Final Judgment (MFJ). We are all too familiar with the struggles to break up AT&T and to restrain the pieces of that former monopoly from engaging in anticompetitive behavior. While we may not, in the short-term, be able to walk completely away from that history, neither can we allow ourselves to be haunted by "the ghost of the MFJ." Instead, we must work to exorcise that specter. We must strive to leave behind the fears and rituals of the MFJ era and adopt new approaches and modes of thinking that are consistent with a competitive marketplace.(202)

By declining to reach the section 251(g) question in this Order, the Commission has avoided unnecessarily prejudging our consideration of the equal access and nondiscrimination obligations contemplated under section 251(g).(203) In light of the relatively tight time frame occasioned by the referral of these matters from the district courts, we believe it would have been difficult for us to think through carefully all the complex issues of interpretation that are associated with applying some of the pre-Act precedent to the facts presented to us in this proceeding. We also believe that we did not have time, in the context of this proceeding, to consider all of the issues concerning what equal access or nondiscrimination obligations should apply to BOCs once they have satisfied section 271. We describe some of these issues below. Our intention in describing these issues is not to criticize the other valid questions raised in the Order itself, but rather to share our views regarding the kinds of considerations we should factor into any future consideration of the requirements of section 251(g).

Differences in Factual Context. Because the 1996 Act mandates such a radical change in the framework for regulating telecommunications, we believe we should be circumspect about how we rely on and extrapolate from MFJ judicial precedent. As the Qwest teaming arrangements dramatically illustrate, the drive to compete and innovate fueled by the Act will feed regulators a constant diet of novel and, in many respects, pro-competitive business arrangements. As such, we will constantly find ourselves, as we do here, with facts that the MFJ court did not consider and perhaps could not have even imagined.

In light of the likely absence of MFJ precedent directly on point, we do not believe we would be constrained to give effect to every sentence of every equal access case if we believe the present facts and circumstances are distinguishable from those of the MFJ era; rather, we believe we should look to the broad context and purposes of the Act to determine which general principles should be imported from that precedent and which should not.

Similarly, we should remain cognizant that the overall factual context in which the pre-Act cases described in section 251(g) were decided is very different from the facts we see now. These differing facts should, in our view, suggest different expectations that we should have regarding the threat of anticompetitive conduct and the precautions we should take to prevent such conduct.(204) Many of the pre-Act cases focused on tearing apart one of the world's largest, most powerful and most integrated monopolies, i.e., separating "Ma Bell" from her babies. In contrast, the arrangements we see today and will see in the future may involve new entrants like Qwest that do not have strong historical ties to the incumbent. The precedent also originates in a world in which the BOCs were essentially walled off from several lines of business -- a world that eventually began to erode prior to the 1996 Act(205) and that was

eroded in a more fundamental way by the Act itself.

Strength of the Precedent. Related to this unique, factual context of the equal access and nondiscrimination precedent is our concern that the psychology of breaking up deeply entrenched monopolies sometimes led, quite understandably, to sparse analysis and occasionally vague pronouncements by the courts whose duty was to enforce the MFJ. This sparseness and vagueness also may have resulted from the fact that the MFJ court conducted its analysis unconstrained by the intricate web of deregulatory and market-opening requirements woven into the 1996 Act.(206) Simply put, we believe there are reasonably sound arguments that some of the MFJ cases do not provide compelling support for importing propositions that one could glean from these cases to the post-Act context.(207) Thus, we hope we will consider the strength and weakness of the precedent itself in developing and applying equal access and nondiscrimination requirements pursuant to section 251(g).

Equal Access in a Post-271 World. In reviewing the legality of future business arrangements, we also hope we will be especially careful about how equal access and nondiscrimination requirements apply to companies that are legally authorized to provide long distance service themselves. For example, as the Order indicates, BOCs are currently subject to the requirements of both section 271 and section 251(g). Once a BOC satisfies the requirements of section 271, the question would remain whether a BOC's section 251(g) obligations would permit it to team or joint venture with other companies to enable BOC customers to obtain long distance service.

From the perspective of preventing anticompetitive conduct, it seems counter-intuitive that a BOC, having satisfied section 271, would be able to provide long distance itself through a section 272 separate subsidiary, but would not be able to team with Qwest to offer its customers such service. Presumably, we should be more concerned that a BOC will have the incentive and ability to favor unfairly its own section 272 long distance affiliate as opposed to a non-affiliated long distance company.(208) In addition, it would strike us as odd, given the deregulatory emphasis of the Act, that Congress could have intended to preclude BOCs from being involved in the long distance market in any way other than through a section 272 separate subsidiary.(209) Similarly, section 251(g) should not be used to impose any new or additional barriers on carriers entering new markets.

Relationship to Interconnection Obligations in General. In addition, as the Commission contemplates the requirements under section 251(g), we hope we will think through carefully how such obligations relate to the interconnection requirements we have already imposed under section 251 generally.(210) As the Order notes, equal access obligations originally were meant to respond to the government's contentions that, in interconnecting their local networks with the networks of the various long distance companies, the BOCs provided inferior interconnection to AT&T's competitors.(211) In the interest of avoiding duplicative requirements, the Commission should think carefully about whether the goals underlying section 251(g) are achieved through the requirements we have already imposed pursuant to the other provisions of section 251. We also should be circumspect about expanding obligations under section 251(g) and should be cautious about imposing equal access and nondiscrimination obligations on BOCs that are different from those imposed on other incumbent LECs.

Procompetitive Benefits. Finally, in developing and applying the requirements contemplated under section 251(g), we should not lose sight of the ultimate goal of equal access and nondiscrimination, which is to bring the benefits of competition to the public. While new business arrangements involving

large incumbent LECs like the BOCs potentially raise anticompetitive concerns, these arrangements also promote competition by allowing smaller entrants in long distance or other markets to establish viability in those markets through creative business relationships with established firms. Such relationships, in turn, may benefit consumers in the form of lower prices and stronger incentives on all market participants to match or surpass the new technologies and services used by the entrants. We believe we also should recognize that entrants' incentive and ability to gain such footholds through arrangements with the incumbent may turn, in part, on the degree to which the entrant can differentiate itself in the marketplace.

Thus, in thinking through the extent to which equal access and nondiscrimination requirements should apply to carriers in the post-Act world, it is our sincere hope that we will be as sensitive to these concerns as we believe the Commission has been in this proceeding. Most of all, we must keep in mind that the equal access and nondiscrimination requirements need to be consistent with the transition from monopoly to a competitive paradigm and should not invalidate or further burden carriers' current activities. It is because of the Commission's wise decision to postpone resolution of these and other issues related to section 251(g) until we can examine them more thoroughly that we are happy to support the Order as strongly as we do here.

We commend the Commission staff for its diligent and speedy work on these complex and elusive issues. Moreover, we look forward to working together with everyone at the Commission as we revisit the issues of equal access and nondiscrimination and as we consider the many novel business arrangements that competition will no doubt bring us.

1. Complainants AT&T and MCI Telecommunications Corporation (MCI) are interexchange carriers (IXCs) engaged in the provision of interLATA telecommunications services as well as other telecommunications and non-telecommunications services. InterLATA service is defined by the Act as "telecommunications between a point located in a local access and transport area and a point located outside such area." 47 U.S.C. § 153(21). Complainant Association of Local Telecommunications Services (ALTS) is a non-profit trade association comprised of companies that construct and operate local telecommunications networks and that use those networks to provide local exchange services in competition with incumbent local exchange carriers. Complainant MGC Communications, Inc. (MGC) is a provider of both local exchange and interLATA telecommunications services as well as other telecommunications and non-telecommunications services. Complainant Time Warner Communications Holdings, Inc. (Time Warner) is a provider of competitive local exchange and exchange access service as well as other telecommunications and non-telecommunications services. Complainants NEXTLINK Illinois, Inc. and NEXTLINK Ohio, L.L.C. (collectively NEXTLINK) are facilities-based competitive local exchange carriers who compete with Ameritech. Complaint, AT&T, MCI, ALTS, MGC, Time Warner, and NEXTLINK v. Ameritech Corporation (Ameritech) File No. E-98-41 (filed June 15, 1998) (AT&T Complaint (Ameritech)) at 4-5. Complainants McLeodUSA Telecommunications Services, Inc. (McLeodUSA), ICG Communications, Inc. (ICG), and GST Telecom, Inc. (GST) are providers of local exchange and interLATA telecommunications services, as well as other telecommunications and non-telecommunications services. Complaint, McLeodUSA, ICG, and GST v. U S WEST, File No. E-98-43 (filed June 19, 1998) (McLeodUSA Complaint (U S WEST)) at 1.

2. 2 Ameritech and U S WEST (defendants) are Bell operating companies (BOCs). 47 U.S.C. § 153(4) (defining "Bell operating company"). Ameritech provides local exchange and exchange access services in five Midwestern states. U S WEST provides local exchange and exchange access services in a region

comprised of 14 Western states. Defendant-Intervenor Qwest is a facilities-based provider of multimedia communications services to interexchange carriers, other communications entities, businesses, and consumers. Qwest provides facilities-based services in 11 states, operates as a switch-based reseller in 37 other states, and competes directly with certain of the Complainants in the provision of interLATA services. Motion of Qwest Communications Corporation for Leave to Intervene, File No. E-98-41, at 3 (Qwest Motion to Intervene (Ameritech)).

3. 47 U.S.C. §§ 271, 251(g). The Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et. seq., amended the Communications Act of 1934 (Communications Act or Act). References to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), will be referred to as the "1996 Act."

4. Unless otherwise stated, the term "long distance" means "in-region, interLATA." In-region, interLATA services are interLATA services that originate within a BOC's in-region states. 47 U.S.C. § 271(b)(1). Out-of-region, interLATA services are interLATA services that originate outside of a BOC's in-region states. 47 U.S.C. § 271(b)(2). In-region states are defined as states in which a BOC was authorized to provide exchange services under the MFJ. 47 U.S.C. § 271(i)(1).

5. 47 U.S.C. § 271.

6. 47 U.S.C. § 251(g).

7. *United States v. Western Elec. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983); see also *United States v. Western Elec.*, Civ. Action No. 82-0192 (D.D.C. Apr. 11, 1996) (terminating the MFJ as of February 8, 1996). Local exchange areas were created by the BOCs pursuant to criteria set forth in the MFJ, and came to be known as LATAs (local access and transport areas). See 47 U.S.C. § 153(25) (defining "local access and transport area").

8. 552 F. Supp. at 188. See also *SBC Communications Inc. v. FCC*, 138 F.3d 410, 413 (D.C. Cir. 1998). These are referred to as the line-of-business restrictions, section II.D. of the MFJ. Although prohibiting the provision of interexchange services, the MFJ did not bar BOCs from providing intraLATA toll services. The MFJ was focused on the market power of the BOCs in the local exchange market and the anticompetitive impact of that power in the long distance market. Unlike the 1996 Act, the MFJ was not concerned with bringing competition to local exchange markets.

9. 552 F. Supp. at 185.

10. *Id.* at 196 (citing section II.A of the MFJ); see also *United States v. Western Elec.*, 846 F.2d 1422, 1427 (D.C. Cir. 1988). This is referred to as the equal access obligation, section II.A of the MFJ.

11. 552 F. Supp. at 195.

12. *Id.*

13. 552 F. Supp. at 227. This is referred to as the nondiscrimination obligation, section II.B. of the MFJ.

14. Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) (Joint Explanatory Statement) (emphasis added). See *SBC Communications, Inc. v. FCC*, 138 F.3d at 413.

15. See *BellSouth Corp. v. FCC*, 144 F.3d 58, 61 (D.C. Cir. 1998) ("The 1996 Act rescinded the MFJ . . . and changed the entire telecommunications landscape.").

16. Section 601 of the 1996 Act states that the "restrictions and obligations" imposed by the AT&T Consent Decree shall, as of February 8, 1996, give way to the "restrictions and obligations imposed by [the Act]." Pub. L. 104-104, Title VI, § 601(a)(1), Feb. 8, 1996, 110 Stat. 143 (codified at 47 U.S.C. § 152 note). Section 601(a)(1) provides, in pertinent part:

Any conduct or activity that was, before the date of enactment of [the 1996 Act], subject to any restriction or obligation imposed by the AT&T Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by [the 1996 Act] and shall not be subject to the restrictions and the obligations imposed by such Consent Decree.

Id.

17. 47 U.S.C. § 251.

18. 47 U.S.C. § 252.

19. 47 U.S.C. § 253.

20. H.R. Conf. Rep. No. 104-458, at 1 (1996). See also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15612, 15658 (1996) (Local Competition Order), aff'd in part and vacated in part sub nom. *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), writ of mandamus issued sub nom. *Iowa Utilities Bd. v. FCC*, No. 96-3321 (8th Cir. Jan. 22, 1998), petition for cert. granted, Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, and 97-1141 (U.S. Jan. 26, 1998) (collectively, *Iowa Utils. Bd.*), Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295 (rel. Aug. 18, 1997), aff'd, *Southwestern Bell Telephone Co. v. FCC*, --F.3d--, 1998 WL 459536 (8th Cir., Aug. 10, 1998) further recons. pending.

21. Incumbent LECs are required to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with its network at any technically feasible point that is at least equal in quality to that provided to itself (or its subsidiary), and on rates, terms and conditions that are just, reasonable, and nondiscriminatory. 47 U.S.C. § 251(c)(2).

22. Incumbent LECs are required to provide to any requesting carrier nondiscriminatory access to network elements on an unbundled basis in a manner that allows the requesting carriers to combine such elements in order to provide telecommunications service. 47 U.S.C. § 251(c)(3).

23. Incumbent LECs are required to offer for resale at wholesale rates any telecommunications service

that they provide at retail to non-carrier subscribers, and have a duty not to prohibit or to impose unreasonable limitations on the resale of such telecommunications services. 47 U.S.C. § 251(c)(4).

24. See, e.g., 141 Cong. Rec. S8057 (1995) (statement of Sen. Dorgan):

The Bell operating companies are not now free to go out and compete with the long distance companies because they have a monopoly in most places in local service. It is not fair for the Bell operating companies to have a monopoly in local service, retain that monopoly and get involved in competitive circumstances in long distance service.

Accord, S. 652, 104th Cong., § 5(3) (1995) ("[b]ecause of their monopoly status, local telephone companies and the [BOCs] have been prevented from competing in certain markets") (emphasis added). See also 141 Cong. Rec. S8138 (1995) (statement of Sen. Kerrey) ("[t]he question is whether or not to grant long-distance competitive opportunity, and that question is answered by determining whether or not there is competition at the local level"); 141 Cong. Rec. H8281 (1995) (statement of Rep. Bliley) ("[o]nce the [BOCs] open the local exchange networks to competition, the Bell companies are free to compete in the long distance and manufacturing markets"). See also *BellSouth Corp. v. FCC*, 144 F.3d at 61 ("In general these provisions simply maintained, and in most cases loosened, various restrictions to which the BOCs were already subject under the MFJ.").

25. The court recounted in *SBC Communications v. FCC* that:

[T]he question of how best to achieve th[e] goal [of opening all markets to competition], however, was the subject of great debate. Some thought that the local and long distance markets should be open to all competitors immediately. Others believed that the BOCs should have to wait until actual competition was introduced in their local markets before providing interLATA service, since it was claimed that the long-distance market is already competitive. As might be expected for an issue of this economic significance, an extended lobbying struggle ensued. The end product was a compromise between the competing factions.

138 F.3d at 413.

26. Section 271 establishes particular criteria that the BOC must satisfy in order to receive authorization to enter the in-region, interLATA market for a particular state in its region. Specifically, a BOC must show that it satisfies the requirements of either section 271(c)(1)(A), known as "Track A," or section 271(c)(1)(B), known as "Track B." To proceed under Track A, a BOC must show that it "is providing access and interconnection" under a duly approved interconnection agreement to "one or more unaffiliated competing providers of telephone exchange service [other than exchange access] to residential and business subscribers" that offer their services either "exclusively" or "predominantly" over their own facilities. 47 U.S.C. § 271(c)(1)(A). To proceed under Track B, a BOC must show that "no such provider has requested the access and interconnection described in [Track A]" at least three months prior to the BOC's section 271 application. A BOC that has received such requests may still proceed under Track B if the state commission of the applicable state certifies that the only parties making those requests have failed either to negotiate in good faith or to comply with an implementation schedule contained in an interconnection agreement. 47 U.S.C. § 271(c)(1)(B). Depending on whether the BOC is proceeding under Track A or Track B, the BOC must show that it has "fully implemented" or is

"generally offer[ing]" each of the fourteen items specified in the competitive checklist. 47 U.S.C. §§ 271(d)(3)(A), 271 (c)(2)(B).

27. In order for the Commission to grant a BOC's section 271 application, the Commission must also find that the requested authorization will be carried out in accordance with the requirements of section 272, and that the BOC's entry into the in-region, interLATA market is "consistent with the public interest, convenience, and necessity." 47 U.S.C. §§ 271(d)(3), 272. Section 272 seeks to diminish any remaining post-entry competitive risks by requiring an authorized BOC to provide long distance services only through a separate affiliate that is subject to particular safeguards. The Commission implemented the safeguards Congress enacted in section 272, governing entry by the BOCs into new markets, including long distance, through separate affiliates in Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (Non-Accounting Safeguards Order), petition for review pending sub nom. SBC Communications v. FCC, No. 97-1118 (filed D.C. Cir. Mar. 6, 1997) (held in abeyance May 7, 1997), First Order on Reconsideration, 12 FCC Rcd 2297 (1997), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997), aff'd sub nom. Bell Atlantic Telephone Companies v. FCC, 131 F.3d 1044 (D.C. Cir. 1997), recon. pending; see also Implementation of the Accounting Safeguards Under the Telecommunications Act of 1996, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539 (1996), recon. pending.

28. Section 251(g) provides in pertinent part: "each local exchange carrier [] shall provide exchange access, information access, and exchange services for such access to interexchange carriers . . . in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations . . . that apply to such carrier [prior to enactment of the 1996 Act]." 47 U.S.C. § 251(g). See discussion infra at part III. B.

29. 47 U.S.C. § 271(e).

30. Section 271(e) states that:

Until a Bell operating company is authorized pursuant to subsection (d) to provide interLATA services in an in-region State, or until 36 months have passed since the date of enactment of the Telecommunications Act of 1996, whichever is earlier, a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) with interLATA services offered by that telecommunications carrier.

47 U.S.C. § 271(e)(1). The large interexchange carriers are free, however, to offer a combined package of long distance service and local service provided through use of unbundled network elements.

31. We note that, without nondiscriminatory access to a BOC's operations support systems, competing carriers, including large interexchange carriers, may be severely disadvantaged, if not precluded altogether, from competing effectively in the local exchange market through the offering of resold local services. See Local Competition Order, 11 FCC Rcd at 15764; see also Application of BellSouth Corporation, Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region InterLATA Services in South Carolina, CC Docket No. 97-208, Memorandum Opinion and

Order, 13 FCC Rcd 539, 585, 588, 597 (1997) (BellSouth South Carolina 271 Order); Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, Memorandum Opinion and Order, 12 FCC Rcd 20543, 20613-14 (1997), recon. pending (Ameritech Michigan 271 Order).

32. Although the large IXCs will be free to offer combined packages of telecommunications services after February 8, 1999, the BOCs will still be bound by their obligations in section 271 to demonstrate that their local markets are open to competition before offering such packages.

33. Ameritech Michigan 271 Order at 20552 ("[G]iven the BOCs' strong brand recognition and other significant advantages from incumbency, advantages that will particularly redound in the broad-based provision of bundled local and long distance services, we expect that the BOCs will be formidable competitors in the long distance market and, in particular, in the market for bundled local and long distance services.")

34. In contrast, the BOCs are permitted to provide interLATA services originating outside of their states where they currently provide local service. The extremely limited efforts by the BOCs to offer such long distance services strongly suggests the advantages (or perceived advantages) of a carrier's competing in a region where it can provide multiple services and build upon substantial name recognition, such as the BOCs have in their in-region states.

35. On January 7, 1997, Ameritech became the first BOC to file an application with the Commission for authorization to provide in-region, interLATA service, pursuant to section 271(d). This initial application was terminated without prejudice at the request of Ameritech on February 12, 1997. See Application by Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, As Amended, to Provide In-Region, InterLATA Services in Michigan, Order, CC Docket 97-1, 12 FCC Rcd 2088 (1997). On May 21, 1997, Ameritech Michigan filed its second application to provide in-region interLATA services in the state of Michigan pursuant to section 271. Ameritech Michigan 271 Order at 20545. The Commission determined that Ameritech had not demonstrated that its local markets were sufficiently open to competition and denied the application. *Id.* at 20558-59 (concluding that "Ameritech [had] not yet demonstrated that it [had] fully implemented several items of the competitive checklist in section 271(c)(2)(B) or that the requested authorization [would] be carried out in accordance with the requirements of section 272").

U S WEST has not yet filed an application with the Commission seeking section 271 approval to provide in-region, interLATA services.

36. Declaration of Scott P. Alcott, in Support of Ameritech Corporations's Brief in Opposition to the Motion of AT&T Corporation and MCI Telecommunications Corporation for Interim Relief in the Form of a Standstill Order (Alcott Interim Relief Declaration) at Exhibit D. One such document is labeled "Project Pathfinder." *Id.* at ¶ 8. See also *id.* at ¶¶ 6-9 (noting that Ameritech explored "teaming" agreements with long distance carriers and discussing some of the early teaming agreement proposals).

37. See Deposition of Kathy Stephens, Appendix 9, Tab 39, Record of Proceeding in AT&T Corp. et al. v. U S West Communications, Inc., No. C98-634WD (filed May 13, 1998) (U S West District Court Complaint) (Record of Proceeding)., Case No. C98-634 WD at 124.

38. See, e.g., AT&T and MCI Brief in Support of Motion for Interim Relief in the Form of a Standstill Order (AT&T and MCI Brief) at Exhibit 35 (Ameritech, RDA Customer Services Practice, CompleteAccess Overview at 1-2) (stating that the "goal [of marketing the package] is to package the long distance portion of CompleteAccess with local service usage" and that "CompleteAccess packages should be offered as an opportunity to upsell local service usage"). See also *id.* at 8 (reiterating in the ordering procedures that the goal is to package the long distance portion of the service with at least one Ameritech service). Alcott Interim Relief Declaration at Exhibit A, AM 03890 (Jan. 21, 1998) (stating in LD Opportunity Assessment that "[t]he ability to offer LD, even on an agency basis, would significantly enhance our Winback and Retention Programs by allowing us to offer solutions in the largest price aggressive segment of business telecom - the segment driving the bulk of defections."). Declaration of Neil M. Briskman in Support of Ameritech Corporation's Brief in Opposition to the Motion of AT&T Corporation and MCI Telecommunications Corporation for Interim Relief in the Form of a Standstill Order (Briskman Interim Relief Declaration) at ¶ 4 (stating that "by marketing its local services together with the long distance services of other carriers, Ameritech hopes to more effectively market, and hence increase its sales of, its own local services, especially 'vertical services' such as Call Waiting, Caller ID, and Automatic Redial, which offer a higher profit margin than basic local service").

39. Ameritech Corporations's Brief in Opposition to the Motion of AT&T Corporation and MCI Telecommunications Corporation for Interim Relief in the Form of a Standstill Order (Ameritech Brief) at 2-3.

40. Ameritech Brief at Exhibit 13, Ameritech Request for Proposal Number PR-002-98 (discussing terms of the proposal); see also Briskman Interim Relief Declaration at ¶ 5 (stating that the "RFP described the type of teaming arrangement then envisioned by Ameritech and the possible terms of a teaming arrangement").

41. Ameritech Brief at Exhibit 13, Ameritech Request for Proposal at 2.3.3, 2.3.8, 2.3.11; see also Transcript of Status Conference of August 12, 1998 (Phillips Testimony) (Status Conference Transcript) at 66-67 (stating that Ameritech initially proposed rates that Qwest should offer).

42. See Alcott Interim Relief Declaration at Exhibit B (Deposition of Scott P. Alcott) at 52-53, 61-64 (discussing Ameritech's desire to obtain a "first mover advantage" and discussing whether Ameritech could obtain a first mover advantage by providing a full service offering before IXCs could use their customer relationships to obtain local customers).

43. *Id.* at Exhibit D, AM 06332 (Mar. 16, 1998).

44. Ameritech Brief at 12.

45. See, e.g., Status Conference Transcript at 66-67. At the Status Conference, counsel for both Ameritech and Qwest indicated that, while the agreement grew out of Qwest's response to the RFP, not all of the terms from the RFP were made part of the final agreement. On the issue of price, however, very little change occurred. According to AT&T, Qwest has stated that Ameritech, in negotiating their agreement, described to it an offer which it would want its long distance partner to make; specifically Ameritech sought an arrangement in which Qwest would charge its Ameritech customers 9 to 10 cents

per minute for business customers and 7 and 15 cents per minute, respectively, for off-peak and peak residential service. Status Conference Transcript at 18 (Murphy Testimony), Qwest has further testified that the negotiation period, which lasted only 24 hours, was "fast and furious," stating that "[w]henver someone like Ameritech says they're interested in doing business with you, you move quick." AT&T and MCI Reply Brief in Support of Their Motion for Interim Relief in the Form of a Standstill Order at Exhibit 2, Deposition of Stephen Jacobsen (Jacobsen Deposition) at 308. The actual rates established the long distance services provided under the CompleteAccess program are: 7 cents per minute for off-peak residential service; 15 cents per minute for peak residential service; and 9.5 cents per minute at all times for business service. Ameritech Brief at Exhibit 1, Teaming Agreement at 2.

46. Answer of Qwest Communications Corp., File No. E-98-41, at 9 (filed June 25, 1998) (Qwest Answer) (stating that Qwest compensates Ameritech on a per customer basis for Ameritech's marketing efforts on behalf of Qwest, and also will purchase billing and collection services from Ameritech on the same basis as other IXCs purchase those services); Ameritech Brief at 27 (specifying amount of compensation).

47. AT&T Complaint (Ameritech) at Exhibit A, Volume 1, Tab 6, Affidavit of Scott Alcott Affidavit at ¶ 3 (stating that the agreement caps the amount Ameritech can be paid to an amount no greater than its actual marketing costs, and requires Ameritech to perform quarterly audits of such costs and to provide any excess amount to Qwest in the form of a rebate).

48. See AT&T and MCI Brief at Exhibit 1, Press Release, "Ameritech and Qwest Team to Provide Customers a Combined Local, Long Distance Offer" (rel. May 14 1998).

49. Ameritech Corp's Answer and Affirmative Defenses, File No. E-98-41, at 12 (filed June 25, 1998 (Ameritech Answer); see also Status Conference Transcript at 101 (Phillips Testimony) (stating that Ameritech is selling vertical services when marketing CompleteAccess).

50. AT&T Complaint (Ameritech), Declaration of John A McMaster at 20 (McMaster Declaration) (quoting Ameritech/Qwest Press Release (May 14, 1998)).

51. Ameritech Brief at 3.

52. Id. at 3, 64.

53. See, e.g., AT&T and MCI Brief at Exhibit 40, AM 07870 (stating that "to take advantage of this [long distance] rate, your local service must be with Ameritech"), Status Conference Transcript at 111-12 (Livingston testimony) (stating that a customer that does not take Ameritech's intraLATA service would still be a CompleteAccess customer, but not with respect to that service).

54. AT&T and MCI Brief at Exhibit 35, AM 10578. See also id. at Exhibit 39, AM 05379.

55. Ameritech Brief at 21-24 (describing Ameritech's marketing of the CompleteAccess Program). See also AT&T and MCI Brief at 2, 49.

56. Ameritech Brief at 21-24; see also AT&T and MCI Reply Brief at Exhibit 3, Transcript of Qwest

Press Conference at 2 (May 14, 1998) (stating that the teaming agreement contemplates that the marketing of the CompleteAccess program will be conducted through both inbound and outbound telemarketing); AT&T and MCI Brief at 17.

57. See Transcript of Qwest Press Conference at 2.

58. See, e.g., Ameritech Brief at 22 (stating that when it is time for the customer to order long distance service, the service representative states the following, "[y]ou have many companies to choose from to provide your long distance service. I can read from a list of available carriers, but I'd like to recommend Qwest Communications").

59. AT&T and MCI Brief at Exhibit 40, AM 07851.

60. Record of Proceeding at Tab 39, Appendix 6, Q00393.

61. Id. at Tab 39, Appendix 10, Q00520.

62. Id. at Tab. 39, Appendix 7 (U S WEST-Qwest Teaming Agreement).

63. Id. at Tab 39, Appendix 12, (Deposition of Michael Murphy at 30).

64. Id. at Tab 39, Appendix 7 (U S WEST-Qwest Teaming Agreement at Exhibit B).

65. Id.

66. 66 McMaster Declaration at 11; Record of Proceeding (U S WEST) at Tab 20 (U S WEST's Memorandum in Opposition to AT&T's Motion for Temporary Restraining Order, or in the Alternative Preliminary Injunction on an Expedited Basis at 1) (May 26, 1998)(U S WEST TRO Opposition); Complaint, AT&T, MCI, and NEXTLINK Washington v. U S WEST, File No. E-98-42, at 10 (filed June 16, 1998)(AT&T Complaint U S WEST)).

67. 67 Answer of U S WEST Communications, Inc., File Nos. E-98-42 and E-98-43 at 7 (filed June 26, 1998) (U S WEST Answer).

68. Status Conference Transcript at 107 (Lake Testimony) (acknowledgement by U S WEST that the only way to be a Buyer's Advantage customer is to take some U S WEST service).

69. 69 Record of Proceeding (U S WEST) at Tab 8, 15 (Memorandum of Points and Authorities in Support of Motion for Temporary Restraining Order, or, in the Alternative, Preliminary Injunction on an Expedited Basis) (AT&T TRO Memorandum); Transcript of Qwest Press Conference at 2 (stating that by the end of the month (which would have been May) this service will be available in 14 states).

70. Record of Proceeding (U S WEST) at Tab 8 (AT&T TRO Memorandum); Record of Proceeding (U S WEST) at Tab 20 (U S WEST TRO Opposition at 6). U S WEST's marketing scripts provide in relevant part:

I would be happy to share information with you regarding U S WEST Buyer's Advantage, a new long distance service available to our customers. We are very excited to offer you a single point of contact for your local and long distance service. U S WEST Communications has teamed up with Qwest Communications to provide you and your company long distance service.

There are no monthly fees, you will only have one bill - your U S WEST Communications local phone bill, there is no monthly minimum, billing is accrued in 6 second increments after the initial 18 seconds of usage and we are currently waiving the carrier change charge of \$5.00 per line.

Thank you for calling U S WEST Communications, your local, long distance and inter-net provider.

Record of Proceeding at Tab 21, Declaration of Julia L. Parsons, Attachment B-1 (last page of attachment).

71. 71 See AT&T and MCI Brief at 5 (citing Declaration of John A. McMaster at ¶ 38); see also Record of Proceeding at Tab 20 (U S WEST Opposition at 6) (stating that approximately 100,000 customers have signed up for this program).

72. 72 AT&T Corp. et al. v. U S WEST Communications, Inc., No. C98-643 (filed in W.D. Wash. May 13, 1998) (U S WEST District Court Complaint).

73. 73 AT&T Corp. v. Ameritech Corp., No. 98 C 2993, at 2 (filed May 14, 1998) (Ameritech District Court Complaint).

74. 74 Memorandum of the Federal Communications Commission as Amicus Curiae in Support of Primary Jurisdiction Referral, AT&T v. U S WEST (May 29, 1998); Memorandum of Federal Communications Commission as Amicus Curiae in Support of Primary Jurisdiction Referral, AT&T v. Ameritech (June 5, 1998). The doctrine of primary jurisdiction is typically invoked when the enforcement of a claim, which is cognizable in the courts, requires the resolution of issues that are within the special competence of an administrative body. See WATS Int'l Corp. v. Group Long Distance (USA), Inc., 11 FCC Rcd 3720, 3722 n.12 (1997) (citing Western Union Telephone Co. v. Graphic Scanning Corp., 360 F. Supp. 593, 595 (S.D.N.Y. 1973)).

75. AT&T Corp. v. U S WEST Communications, Inc., Order Granting Preliminary Injunction, Referring Legality Issue to FCC, and Staying Proceedings, No. C98-634WD, slip op. at 4 (W.D. Wash. June 4, 1998) (U S WEST Referral Order).

76. Id. at 3.

77. Id.

78. AT&T Corp. v. Ameritech Corp., No. 98 C 2993, slip op. at 10-11 (N.D. Ill. June 10, 1998)

(Ameritech Referral Order).

79. Procedures Established for Resolution of Primary Jurisdiction Referrals by the U.S. District Court for the Western District of Washington in *AT&T Corp. v. U S WEST Communications, Inc.*, and by the U.S. District Court for the Northern District of Illinois in *AT&T Corp. v. Ameritech Corp.*, DA 98-1109 at 1 (rel. June 11, 1998).

80. Joining AT&T in its complaint against Ameritech are MCI, ALTS, MGC, Time Warner, and NEXTLINK.

81. 47 U.S.C. §§ 271, 251(g).

82. AT&T Complaint (Ameritech) at 17; see also AT&T and MCI Brief.

83. See *AT&T Corp. v. Ameritech Corp.*, Memorandum Opinion and Order, FCC 98-141 (rel. June 30, 1998) (Standstill Order).

84. AT&T Complaint (U S WEST). Joining AT&T in its complaint against U S WEST are MCI, ALTS, and NEXTLINK Washington, L.L.C.

85. McLeodUSA Complaint (U S WEST). Joining McLeodUSA in its complaint against U S WEST are ICG and GST. McLeodUSA also filed a complaint against Ameritech alleging that its business arrangement with Qwest violates sections 271 and 251(g). Resolution of both of McLeodUSA's formal complaints were deferred until further notice on June 23, 1998. Letter from Kurt A. Schroeder, FCC, to Richard M. Rindler, Counsel for McLeodUSA (dated June 23, 1998).

In a related matter, on June 11, 1998, Ameritech and U S WEST each filed a petition for declaratory ruling seeking a Commission determination that its business arrangement with Qwest is lawful. Previously, Sprint Communications Corp. had filed a petition for declaratory ruling that the business arrangement contemplated in Ameritech's RFP was unlawful under sections 271 and 251(g). Pleading Cycle Established for Comments on Sprint's Petition for Declaratory Ruling Regarding Ameritech RFP Practices, Public Notice, CC Docket No. 98-62, DA 98-849 (rel. May 5, 1998). The Common Carrier Bureau (Bureau) consolidated Sprint's petition for declaratory ruling with the Ameritech and U S WEST petitions, noting that the issues raised therein are substantially similar. Change in Ex Parte Treatment of Sprint's Petition for Declaratory Ruling Regarding Ameritech RFP Practices, Common Carrier Bureau Consolidates Ameritech's and U S WEST's Petitions for Declaratory Ruling into Single Proceeding with Sprint's Petition for Declaratory Ruling, Public Notice, CC Docket No. 98-62, DA 98-1183 (rel. June 18, 1998). Resolution of that proceeding is still pending.

86. AT&T Complaint (Ameritech) at 17-18; AT&T Complaint (U S WEST) at 15-17.

87. McLeodUSA Complaint (U S WEST) at 16.

88. 88 Qwest Motion for Leave to Intervene in Support of the Defendant in AT&T Complaint, File No. E-98-41 (filed June 17, 1998) (Ameritech); Qwest Motion for Leave to Intervene in Support of the Defendant in AT&T Complaint, File No. E-98-42 (filed June 17, 1998) (U S WEST).

89. 89 Letter from Diane Griffin Harmon, FCC, to Roy E. Hoffinger, AT&T Corp., Lisa B. Smith, MCI Telecommunications Corp., Richard J. Metzger, ALTS, Kent F. Heyman, MGC Communications Inc., Thomas Jones, Counsel for Time Warner Communications Holdings, Inc., Cathey Massey, Counsel for NEXTLINK, John T. Lenahan, Counsel for Ameritech, William R. Richardson, Jr., Counsel for U S West, Charles H. Kennedy, Counsel for Qwest (dated June 18, 1998). The pleading schedules were set forth in two Public Notices issued by the Common Carrier Bureau. Pleading Cycle Established for AT&T Corp. et al. v. Ameritech Corporation, File No. E-98-41, DA 98-1164 (rel. June 16, 1998); Pleading Cycle Established for AT&T Corp. et al. v. U S WEST Communications, Inc., File No. E-98-42, DA 98-1188 (rel. June 18, 1998).

90. See supra note 86.

91. Consolidated Order, DA 98-1252, File Nos. E-98-42 and E-98-43 (CCB Enforcement Div. June 25, 1998).

92. See Status Conference Transcript.

93. Id.

94. 47 U.S.C. § 271(a).

95. Id. § 271(b)(1).

96. See supra note 35.

97. 47 U.S.C. § 271(a) (emphasis added).

98. AT&T and MCI Reply Brief at 30 (citing Random House Unabridged Dictionary 1556 (2d ed. 1993) (defining "provide" to mean, among other things, to "make available" or "arrange for"))).

99. AT&T and MCI Brief at 25-27. In one case cited by the complainants, the Department of Justice argued that, when the court modified the AT&T Consent Decree to permit the BOCs to "'provide' CPE . . . the Court may have intended to allow them some limited role in the design and development of CPE." United States v. Western Electric Co., 675 F. Supp. 655, 665 (D.D.C. 1987) (emphasis added). The court, however, rejected this contention, reasoning that the term "'provide or 'provision' was to be synonymous with marketing or selling." Id. at 666 & n.46. The court observed that such an interpretation was necessary to ensure that the term "provide" as used in section VIII(A) was consistent with the use of that term in the remainder of the MFJ, including section II(D)'s restriction on BOC provision of interexchange services. Id. The complainants also cite United States v. American Telephone and Telegraph Co., Civil Action No. 82-0192 (filed Apr. 11, 1985), wherein the court decided, among other things, that a BOC violated section II(D)(2) of the AT&T Consent Decree, which provides that "no [BOC] shall provide telecommunications products," by selling an unaffiliated entity's switching equipment to an unaffiliated long distance service provider. According to the complainants, by enacting section 271, Congress obviously intended to restrict the BOCs from engaging in some of the same functions and activities that had been prohibited under the MFJ, including marketing. As support, the complainants rely on Lorillard

v. Pons, 434 U.S. 575, 581 (1978), in which the Supreme Court held that it is appropriate to presume that Congress was aware of and incorporated prior judicial interpretations where it "exhibited both a detailed knowledge of the [prior] provisions and their judicial interpretation" and departed from those provisions "regarded as undesirable or inappropriate for incorporation."

100. AT&T and MCI Brief at 28 (citing Joint Explanatory Statement at 147). The Joint Explanatory Statement states that section 271 is intended to prohibit a BOC from "offering interLATA service within its region" prior to obtaining authorization from the Commission. Joint Explanatory Statement at 147 (emphasis added).

101. Complainants argue that, throughout the Act, Congress used the term "marketing" when it intended to restrict only marketing activities and used the term "provide" to prohibit the full range of activities that the term "provide" encompasses, including marketing. AT&T and MCI Reply Brief at 31 (citing 47 U.S.C. §§ 271(e)(1), 272(g), and 271(a)).

102. The defendants argue that the only carriers that "provide" interLATA services within the meaning of section 271 are those that have a legal or contractual obligation to "furnish" interLATA services upon request. The defendants claim that this obligation extends only to carriers who transmit or resell interLATA services. Ameritech Brief at 42-46; U S WEST Answer at 44-45.

103. Ameritech Brief at 42-50; U S WEST Answer at 44-45.

104. Ameritech Brief at 42-44 (citing 47 U.S.C. § 251(c)(2)-(6) ("provide"), 260(a) ("provides"), 271(a) ("provide"), 271(e)(1) ("market"), 272(g)(1)-(3) ("market" and "marketing")); U S WEST Answer at 47-48.

105. Ameritech Brief at 43 (citing *Transbrasil S.A. Lineas Aereas v. Department of Transportation*, 791 F.2d 202, 205 (D.C. Cir. 1986)); U S WEST Answer at 48.

106. Ameritech and U S WEST cite to the Alarm Monitoring Order and the Non-Accounting Safeguards Order. In the Alarm Monitoring Order, the Commission concluded that a marketing arrangement between a BOC and an unaffiliated alarm monitoring service provider, under which a BOC would market the latter's alarm monitoring services, does not necessarily constitute the "provision" of alarm monitoring services by the BOC. In the Matter of Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, CC Docket No. 96-152, Second Report and Order, 12 FCC Rcd 3824 (1997) (Alarm Monitoring Order). Ameritech and U S WEST contend that the Commission implicitly recognized in the Non-Accounting Safeguards Order that section 271 does not prohibit the BOCs from entering into teaming arrangements with unaffiliated long distance service providers, prior to section 271 authorization, by stating that section 272(g)(2) "is silent with respect to the question of whether a BOC may align itself with an unaffiliated entity" to market interLATA services prior to section 271 authorization. Ameritech Brief at 47; U S WEST Answer at 48-49 (citing Non-Accounting Safeguards Order, 11 FCC Rcd at 22047).

107. We independently note that The American Heritage College Dictionary defines provide, among other things, as, alternatively, "to furnish; supply" or "to make available; afford." The American Heritage College Dictionary 1102 (3rd ed. 1993).

108. As the D.C. Circuit recently noted, in reversing the Commission's interpretation of the term "alarm monitoring service entity," the sole reliance on a dictionary definition to find plain meaning "reflects no consideration of other possible interpretations, no assessment of statutory objectives, no weighing of congressional policy, no application of expertise in telecommunications." *Alarm Monitoring Communications Committee v. FCC*, 131 F.3d 1066, 1069 (D.C. Cir. 1997).

109. *Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997). We note that the court in this case used the term "deliver" as synonymous with the term "provide" when, in describing the section 271 restriction, the court stated that, under section 271(a), "a BOC may not deliver interLATA services not authorized therein." *Id.* at 1046 (emphasis added).

110. See *id.* at 1047; *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984).

111. In the *Ameritech Michigan 271 Order*, the Commission determined that the term "provide" is commonly understood to mean both "furnish" and "make available." *Ameritech Michigan 271 Order*, 12 FCC Rcd at 20601-02.

112. Before the Commission may grant a BOC's application to provide in-region, interLATA services, the Commission must determine, among other things, that the BOC has met the requirements of section 271(c)(1)(a) and, "with respect to access and interconnection provided pursuant to [section 271 (c)(1)(A)], has fully implemented the competitive checklist in [section 271 (c)(2)(B)]." 47 U.S.C. § 271(d)(3)(A)(i).

113. *Ameritech Michigan 271 Order*, 12 FCC Rcd at 20601-02.

114. *Id.* Notably, in the *Ameritech Michigan 271 Order*, the BOCs and IXC's each urged the Commission to adopt a meaning of the term "provide" that is the exact opposite of the meaning they urge us to adopt in this proceeding. In the *Ameritech Michigan 271 Order*, for example, the BOCs argued that the term "provide" should be broadly construed so that they could fulfill their obligation to provide checklist items either by actually furnishing the item or by making it available. *Ameritech Michigan 271 Order* 12 FCC Rcd at 20600-01. The IXC's, on the other hand, argued that the term "provide" should be narrowly construed to require BOCs to actually furnish checklist items.

115. Specifically, the Commission noted that such an interpretation of section 271(d)(3)(A)(i) "further[ed] the Congressional purpose of maximizing the options available to new entrants, without foreclosing BOC long distance entry simply because . . . [the BOC's] competitors choose not to use all of the options." *Id.* at 20602.

116. See *infra* ¶ 37 for a discussion of the scope of the in-region, interLATA restriction in section 271.

117. *Alarm Monitoring Order*, 12 FCC Rcd at 3841-42.

118. *Id.*

119. We note that the approach we adopt herein to determine the scope of the section 271 restriction is consistent with the approach the Commission adopted in the Alarm Monitoring Order. Indeed, similar to the result reached in the Alarm Monitoring Order, we conclude below that the mere marketing of interLATA services does not necessarily constitute the provision of such services within the meaning of section 271. See *infra* ¶ 50. We reached this conclusion, just as the Commission did in the Alarm Monitoring Order, by examining the totality of the circumstances, including the language, history, and purpose of the statute.

120. 47 U.S.C. § 272(g)(2) (emphasis added).

121. Ameritech Brief at 42; see also U S WEST Answer at 45; see also *infra* ¶ 50 for a discussion of what we understand constitutes "mere marketing." As addressed more fully below, because we ultimately conclude that the defendants would be doing much more than marketing Qwest's service, this finding does not end our inquiry into the lawfulness of the defendants' respective arrangements with Qwest.

122. Ameritech Brief at 47; U S WEST Answer at 49.

123. See Non-Accounting Safeguards Order, 11 FCC Rcd at 22047 (citing NYNEX Reply Comments at 15-16). NYNEX argued in the Non-Accounting Safeguards Order, that: "Nothing in the MFJ prohibited . . . and nothing in the Act prohibits, a BOC from entering into a teaming arrangement with an unaffiliated interLATA provider to market their respective services to the same customers, provided all applicable nondiscrimination requirements are satisfied and provided the BOC's activity under the particular teaming arrangement does not amount to the provision of interLATA service by the BOC itself. NYNEX Reply Comments at 15-16 filed in Non-Accounting Safeguards Order, CC Docket No. 96-149 (internal citations omitted). As support, NYNEX cited a brief submitted by the Department of Justice in the Shared Tenant Services proceeding, in which the Department of Justice stated: "[T]here are a variety of ways, including 'teaming' arrangement,' for example, by which [a BOC] may participate in the provision of shared service arrangements by providing permitted products and services which comprise elements of such arrangements." *Id.* (citing Response of the United States to Ameritech's Motion for Clarification and Waiver of the Decree Regarding the Provision of Shared Telecommunications and Other Services, June 29, 1984, p.10 n.8 filed in *United States v. Western Elec.*, 627 F. Supp. 1090 (D.D.C. 1986).

124. Joint Explanatory Statement at 147.

125. See, e.g., *id.* ("[section 271(b)(2)] permits a BOC to offer out-of-region services immediately after the date of enactment") (emphasis added); see also *id.* at 152 (stating that the three year "sunset" period of the separate affiliate requirements under section 271 commences "on the date on which the BOC is authorized to offer interLATA services") (emphasis added).

126. Ameritech Brief at 45 (emphasis in original).

127. See generally Statutory Framework discussion, *supra*, part I.A.

128. We emphasize that the factors we consider here in assessing whether a BOC's involvement in the long distance market rises to the level of "provision" are not necessarily exhaustive. In particular, we make no determination here regarding the extent to which, after a BOC obtains section 271 authorization,

we should consider such authorization in evaluating whether a BOC's involvement in a teaming, or other business, arrangement constitutes the "provision" of interLATA service.

129. Alcott Interim Relief Declaration at Exhibit C, AM 00930 (Project Pathfinder Briefing, Weekend Draft).

130. See e.g., *id.*; *id.* at Exhibit D, AM 06332 (Project Pathfinder Briefing).

131. Economy, U S WEST Strikes Marketing Alliance with Qwest in Bold Move Skirting Rules, Wall St. J., May 7, 1998, at A2 (Statement of Solomon Trujillo, President of U S WEST Communications Group).

132. Record of Proceeding (U S WEST) at Tab 39, Appendix 10, Q00520. Moreover, we agree with AT&T that a decision to permit the BOCs to compete here effectively transforms the market "from one in which long distance carriers compete with each other for the favor of customers into one in which [long distance carriers] compete for the favor of the BOC, to be its chosen ally and to get preferential access to that channel rather than aggressively competing against the BOC." Status Conference Transcript at 13 (Keisler Testimony).

133. Recording of Proceeding (U S WEST) at Tab 39, Appendix 6, Q00392, Q00393.

134. Ameritech Brief at 2-3.

135. Status Conference Transcript at 65-66 (Abernathy Testimony).

136. *Id.* See also U S WEST Answer at 5-6.

137. Ameritech Brief at 3.

138. Briskman Interim Relief Declaration at Exhibit 16, 146-47 (Deposition of Neil Briskman).

139. Record of Proceeding (U S WEST) at Tab 39, Appendix 6, Q00392.

140. We further note that Ameritech has testified that its billing and collection agreement with Qwest differs from its agreements with other IXC's in that: (1) start-up costs are not being directly recouped under the billing and collection agreement but are recouped as part of the marketing co-payment; (2) Ameritech does not require Qwest to meet the minimum use levels that it ordinarily requires; (3) Ameritech sets the initial "bad-debt" at 5% pending true-up, whereas in other agreements, this amount is ordinarily set at 10%; and (4) Qwest's billing and collection agreement with Ameritech last for two years, whereas other such agreements normally last for one year. Briskman Interim Relief Declaration at Exhibit 16, 149-50 (Deposition of Neil Briskman). See also Ameritech-Qwest Teaming Agreement at 2.

141. U S WEST Answer at 44-45.

142. Briskman Interim Relief Declaration at Exhibit 16, 148 (Deposition of Neil Briskman).

143. Status Conference Transcript at 68 (Phillips Testimony).

144. U S WEST Answer at 2.

145. AT&T and MCI Brief at 2 (citing Deposition of Scott Alcott, attached as Exhibit at 24).

146. Both of the defendants' respective contracts with Qwest provide that, in order to be considered a customer of CompleteAccess or Buyer's Advantage, the customer must purchase Qwest's long distance services and at least one service provided by Ameritech or U S WEST. See generally Status Conference Transcript at 104-110.

147. Record of Proceeding (U S WEST) at Tab 21, Appendix 4 (Declaration of Julia Parsons, Attachment B-1) (emphasis added).

148. Id. (Declaration of Julia Parsons, Attachment B-3) (emphasis added).

149. Id. (Declaration of Julia Parsons, Attachment B-1) (emphasis added).

150. AT&T and MCI Brief (Ameritech) at Exhibit 2 (Letter from Ameritech to CompleteAccess Subscribers).

151. Ameritech Brief at 20.

152. See generally Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, Report and Order Docket No. 20097, 60 FCC 2d 261, 262 (1976), for a discussion of the kinds of activities that fall within the definition of "resale."

153. Specifically, Ameritech and U S WEST each sought to enter into an arrangement in which they would exclusively market and sell, under the CompleteAccess or Buyer's Advantage brand name, their own local and intraLATA toll services and a long distance company's long distance services. Any carrier wishing to participate in such an arrangement would have to pay Ameritech and U S WEST a marketing fee, permit Ameritech and U S WEST to serve as the initial point of contact for customers subscribing to the defendants' programs, enter into a billing and collection agreement, and comply with certain network service and transport requirements. See Ameritech Request for Proposal Number PR-002-98; see also Briskman Interim Relief Declaration ¶ 5; see also U S WEST Answer at 5-9.

154. The record indicates, for example, that Ameritech originally began negotiating with Frontier, an interexchange carrier. In so doing, Ameritech expressly told Frontier that it would have to meet certain price points: 15 cents per minute for peak residential service and 7 cents per minute for off-peak residential service. In a letter dated May 4, 1998, apparently to address Frontier's concerns that Ameritech's suggested pricing "may be perceived as 'predatory,'" Ameritech states: "[A]lthough we have reached our own conclusions on what price points will make this teaming offer successful, the choice of the prices that you are willing to offer is obviously yours." AT&T and MCI Brief at Exhibit 15, AM 00822 (Letter from Diane Primo, Ameritech, to Brian Fitzpatrick, Frontier, dated May 4, 1998). Ameritech went on to state in this same letter, however, that industry research confirmed that its suggested price points were consistent with "other aggressive account acquisition price points." Id. When negotiations with Frontier broke down, Ameritech began negotiating with Qwest. In its initial

negotiations with Qwest, Ameritech suggested that Qwest offer long distance service under CompleteAccess at the same rates it had proposed to Frontier, i.e., 7 and 15 cents per minute, respectively, for off-peak and peak residential service. In describing its negotiations with U S WEST, Qwest testified that: "[T]hey were looking for a consumer offer in the 10-cent-a-minute range. They were looking for a business offer in the 10- to 12-cent-a-minute range." Record of Proceeding (U S WEST) at Tab 39, Appendix 12 (Deposition of Michael Murphy).

155. Similar to the rates initially proposed by Ameritech, for example, the Ameritech-Qwest contract specifies that Qwest initially will charge CompleteAccess subscribers 7 cents per minute for off-peak residential service; 15 cents per minute for peak residential service; and 9.5 cents per minute for business service. Ameritech-Qwest Teaming Agreement § 1.02. We further note that Ameritech concedes that Qwest had proposed prices that were higher than what Ameritech suggested but, as the contract reflects, Qwest will provide long distance services under CompleteAccess at the rates initially proposed by Ameritech. See Ameritech Brief at 69-70 (citing Alcott Deposition at 106); Ameritech-Qwest Teaming Agreement § 1.02. Qwest has further testified that its negotiations with Ameritech were "fast and furious," stating that "[w]henver someone like Ameritech says they're interested in doing business with you, you move quick." AT&T and MCI Reply Brief, Jacobsen Deposition at 308. Qwest further states that the negotiation period lasted only twenty-four hours. *Id.* Qwest testified that, in its initial negotiations with U S WEST, U S WEST outlined the general structure of the Buyer's Advantage offer, including the price points they were expecting. Qwest characterized its response to U S WEST's offer as: "Yeah, we think we can do that, and endorsing the notion and expressing an interest in moving ahead quickly, which eventually we did." Record of Proceeding (U S WEST) at Tab 39, Appendix 12 (Deposition of Michael Murphy).

156. U S WEST Answer at 11; U S WEST-Qwest Teaming Agreement § 2.3.

157. Ameritech-Qwest Teaming Agreement § 1.03.

158. *Id.* Ameritech Brief at 15.

159. Ameritech-Qwest Teaming Agreement, Attach. A (describing the minimum network and service specifications Qwest must meet in order to continue providing long distance service under CompleteAccess); U S WEST-Qwest Teaming Agreement, Ex. B (describing the customer service and service standards with which Qwest must comply in order to continue providing long distance service under Buyer's Advantage).

160. Ameritech-Qwest Teaming Agreement § 1.02.

161. U S WEST Teaming Agreement, Ex. B, § 1(d).

162. Ameritech Brief at 21; U S WEST Answer at 7.

163. Ameritech Brief at 19-20; U S WEST Answer at 13.

164. Ameritech Brief at 20 (citing Briskman Testimony ¶ 46); U S WEST Answer at 13.

165. Ameritech-Qwest Teaming Agreement, Attach. A at 17.

166. U S WEST-Qwest Teaming Agreement, Ex. B, § 1(d).

167. 47 U.S.C. § 271(e)(1); see also *supra* note 30.

168. We recognize, as complainants argue, that the MFJ Court would have found the arrangements before us to be unlawful on the basis that the BOCs were prohibited under the Consent Decree from "marketing" or "selling" a product or service they were prohibited from "providing." 675 F.Supp. at 665-66. For the reasons described above, however, we believe that the 1996 Act contemplates that certain business arrangements between BOCs and non-affiliated long distance entities, that may include some marketing dimension, would be permissible. Accordingly, insofar as the Act supplants the MFJ in the "line-of-business" jurisprudence, see, e.g., 47 U.S.C. § 601, we do not believe these cases are controlling here. As we concluded in the Ameritech Michigan 271 Order, however, we find that the principles underlying MFJ case law, which identify the anticompetitive concerns associated with premature BOC entry into long distance prior to local markets being open are nevertheless instructive. Ameritech Michigan 271 Order, 12 FCC Rcd at 20553. In this regard, we agree with complainants that the MFJ cases further support our view that certain marketing arrangements can, in effect, permit BOCs to compete in the long distance market, and in so doing, reduce their incentive to bring about free and fair competition in the local market. See, e.g., *Shared Tenant Services*, 627 F. Supp. 1090, 1099 (D.D.C. 1986) (noting that the Consent Decree prohibited the BOCs not only from providing interLATA transmissions but also from "engaging in activities that comprise the business of interexchange services," the MFJ court reasoned that the restriction was necessary "in order to prevent [the BOCs] from becoming competitors of the interexchange carriers").

169. In this regard, we find persuasive the complainants' line of reasoning to distinguish Ameritech's and U S WEST's agreements with Qwest from marketing:

AT&T has hired lots of telemarketing firms over the years and signed lots of marketing contracts. None of them has ever tried to tell us what price we should set. None of them has ever said they will terminate marketing for us if we raised our price. None of them has ever said they want to insert themselves as the customer interface after the customer signed up for the service.

Status Conference Transcript at 19 (Keisler Testimony).

170. Ameritech Brief at 121.

171. See, e.g., U S WEST Referral Order. Upon finding, among other things, that the plaintiffs had raised "serious questions" concerning the legality of the U S WEST-Qwest business arrangement, the court concluded that "U S WEST's argument that [its] teaming arrangements benefits consumers cannot prevail at this state." *Id.* at 3-4. In reaching this conclusion, the court noted that, "if the agreements violates [the Act], it will harm consumers' interests, as identified by Congress, because of its anticompetitive nature." *Id.* at 4.

172. Specifically, section 251(g) of the Communications Act of 1934, as amended, provides, in pertinent part, that:

each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers . . . in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations . . . that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

47 U.S.C. § 251(g). This statutory language tracks section II(A) and section II(B) of the MFJ. Specifically, section II(A) required that each BOC "provide to all interexchange carriers and information service providers exchange access, information access, and exchange services for such access on an unbundled, tariffed basis, that is equal in type, quality, and price to that provided to AT&T and its affiliates." *United States v. AT&T*, 552 F. Supp. at 227. Section II(B) of the Consent Decree further provided that "no BOC shall discriminate between AT&T and its affiliates and their products and services and other persons and their products and services in the . . . interconnection and use of the BOC's telecommunications service and facilities or in the charges for each element of service . . ." *Id.*

173. 47 U.S.C. § 251(g).

174. *Id.*

175. Although the MFJ and related judgments and orders rendered by the MFJ Court were replaced by the 1996 Act generally, the legislative history of section 251(g), like its express language, clearly indicates that Congress intended for the equal access and nondiscrimination requirements under the MFJ and the rules promulgated by the Commission to remain in effect until superseding regulations are adopted. The Joint Explanatory Statement states that the Senate bill and the House amendments "assumed that the BOCs would continue to be required to provide equal access and nondiscrimination to interexchange carriers . . ." Joint Explanatory Statement at 122-23.

176. Contrary to the defendants' assertions, the Commission has not previously described what the full scope of the equal access and nondiscrimination obligations are under the 1996 Act, as carried over from the MFJ by section 251(g). The Commission did not anticipate in the Non-Accounting Safeguards Order, as defendants assert, that BOC teaming arrangements with IXCs generally are consistent with the equal access and nondiscrimination requirements. 11 FCC Rcd 21905. Rather, the Commission merely acknowledged that any "teaming" arrangements previously allowed under MFJ precedent continue to be permissible under section 251(g), and did not modify or revise the equal access and nondiscrimination provisions of the MFJ, as carried forward by the 1996 Act. Nor did the Commission address the full scope of the BOCs' equal access and nondiscrimination obligations in the BellSouth South Carolina 271 Order. 13 FCC Rcd 539. Instead, the Commission balanced the obligation to read in random order a list of interexchange carriers, which is among the specific rules adopted by the MFJ Court pursuant to the equal access and nondiscrimination obligations, with the express statutory language in section 272(g)(2) permitting a BOC to jointly market its long distance affiliate's services. *Id.*

177. The term "undesigned traffic" refers to inter-LATA calls made by subscribers who do not designate an interexchange carrier either by presubscription or by use of an access code. *United States v. Western Elec.*, 578 F. Supp. 668, 669.

178. *United States v. Western Elec.*, 578 F. Supp. 668. In that same case, the court found that the "basic purpose of the decree [was] to place all interexchange carriers on an equal footing." *Id.* at 677.

179. *Id.*

180. *United States v. AT&T*, Civ. Action No. 82-0192, slip op., (D.D.C. Apr. 11, 1985) (Endorsement).

181. *Id.* at 2 n.2.

182. *Id.* at 3.

183. *United States v. Western Electric*, 698 F. Supp. 348, 353 (D.D.C. 1988) (BOC Calling Card).

184. *Id.* at 353. The preferential treatment included: (1) assigning to AT&T all of the long distance calls made on BOC calling cards; (2) making calling card validation information available only to AT&T; (3) marketing and advertising of BOC-issued calling cards in a manner that promoted AT&T's interexchange service over the service of other carriers; and (4) providing an international number on their calling cards that credits calls only to AT&T where other interexchange carriers could not obtain comparable international numbers.

185. 185 *Id.* at 356. See, e.g., *id.* at 354 (finding that AT&T derived a "considerable competitive advantage from its sole access to the validation databases it shares with the [regional BOCs]"); *id.* at 357 n.50 (finding that "use of an international number which has the effect of crediting calls only to AT&T tends to promote the use of AT&T international carriage and service").

186. *Id.* at 356. The court further concluded that the BOCs' failure to inform customers that they had a choice among interexchange carriers, combined with the BOCs' practice of automatically routing interexchange services to AT&T -- because AT&T was the only carrier capable of handling the traffic at the time -- was misleading to customers. *Id.* at 356-57, 357 nn.44-45. The court noted that such advertising may mislead customers into believing that long distance calls made with the BOC calling card would be carried by the BOCs themselves. *Id.* at 356 n.38.

187. Ameritech Brief at 22.

188. Ameritech Brief at Exhibit 22, AM 10579-85.

189. *Id.* at AM 10590-91. Arguably, Ameritech's price comparison of long distance carriers' plans and the suggestion that Ameritech customers would benefit most from the Qwest plan, as opposed to the other IXCs' plans, place Ameritech in the position of endorsing Qwest's long distance service over the IXCs' service.

190. U S WEST Answer at Tab 4B2 at 1, Appendix (outbound marketing script); see also U S WEST

Answer at 17.

191. Ameritech Brief at Exhibit 22, AM 10591.

192. Based upon Ameritech's endorsement, one might reasonably conclude, although wrongly, that the major carriers participated in the review process, and that, upon thorough evaluation, Ameritech concluded that none of the major carriers met its rigorous requirements for quality, value, and convenience. In fact, Ameritech did not have an opportunity to make such a determination because none of the major carriers actually participated in the review process. Ameritech Brief at 12 (stating that only two IXCs, Qwest and Frontier, responded favorably to Ameritech's RFP regarding participation in the underlying arrangement).

193. Ameritech Brief at Exhibit 23 , AM 10771.

194. U S WEST Answer at Tab 4B1 at 2, Appendix (offering script); see also U S WEST Answer at 16.

195. Ameritech Brief at Exhibit 16, 66-68.

196. See Ameritech Brief at Exhibit 16, 143-45 (acknowledging that Ameritech has not outlined specific procedures to market the interLATA services of multiple carriers). Additionally, when asked how a BOC could market multi-carrier interLATA services, Qwest's CEO stated, "[t]o be perfectly honest with you, Alvin, I don't know how they'll do it." See AT&T and MCI Brief at Exhibit 27, 9 (Qwest/U S WEST Press Conference).

197. Ameritech-Qwest Teaming Agreement § 1.02.

198. See AT&T and MCI Brief at 47.

199. Id. We also are concerned that, by requiring that Ameritech and U S WEST to serve as the center for all customer contact for their respective programs, the BOCs' arrangements with Qwest may weaken the IXCs' relationship with their existing customer base, while providing the BOC with the opportunity to hold itself out as the source for "one-stop shopping." AT&T and MCI Brief at 50.

200. Ameritech Brief at 6; U S WEST Answer at 8.

201. 1 As the Order correctly indicates, section 271 has two underlying objectives. First, section 271 seeks to bring additional competition to the long distance market by offering BOCs the potential opportunity to participate in that market. Second, by conditioning BOC entry into the in-region interLATA market on whether the BOCs' local exchange markets are open to competition, section 271 also seeks to facilitate entry into those markets. See generally 47 U.S.C. § 271.

202. 2 Of course, one can debate the level and permanence of competition in telecommunications today. It is undeniable, however, that competition is and will continue to be more robust and extensive than it was at the time of AT&T's divestiture.

203. 3 See 47 U.S.C. § 251(g).

204. 4 The idea of considering factual differences in assessing what precautions regulators should take against unlawfully discriminatory conduct was not unknown to the MFJ court. For example, in approving a consent decree for GTE that was less burdensome than the MFJ, Judge Green noted expressly that facts that are different from those implicated in the breakup of AT&T could justify different methods of preventing anticompetitive behavior than were used in the AT&T cases. See *United States v. GTE Corp.*, 603 F. Supp. 730, 736 (D.D.C. 1984) ("For these reasons, the Court concludes that the GTE situation is sufficiently different from that which was before the Court when it was presented with a consent decree in AT&T that the public interest does not necessarily require here the remedy that was adopted there."); see also *id.* at 733-37.

205. 5 See, e.g., *United States v. Western Electric Co.*, 993 F.2d 1572 (1993) (affirming judgment removing information services line of business restriction from MFJ).

206. 6 Thus, for example, one could argue that it would be easy for a court to make unconditional statements regarding BOC favoritism when all marketing of long distance was considered provision of long distance. As the Order recognizes, marketing and provision are not synonymous under the Act. Compare 47 U.S.C. § 272(g)(2) with 47 U.S.C. § 271(a) and 47 U.S.C. § 271(b).

207. 7 See, e.g., *United States v. AT&T*, No. 82-0192, slip op. at 3 (D.D.C. Apr. 11, 1985) (concluding without explanation that "by granting to National an endorsement of quality, Southwestern Bell has violated the non-discrimination provision of section II(B) of the decree"). One also could reasonably argue that the court deciding the BOC Calling Card case meant to limit its consideration of the appropriateness of the restrictions it enforced to the time and the facts before it. See *United States v. Western Electric Co., Inc.*, 698 F. Supp. 348, 356 (D.D.C. 1988) ("Any Regional Company advertising at this juncture will have the direct foreseeable effect of promoting AT&T services over those of the other interexchange carriers.") (emphasis added).

208. 8 Likewise, it would seem counter-intuitive if equal access obligations designed primarily for BOCs had the collateral effect of prohibiting GTE (which has similar obligations) from teaming with unaffiliated long distance companies; GTE does not have to satisfy section 271 and it has been able to provide long distance in some fashion since before the Act was passed. *United States v. GTE Corp.*, 603 F. Supp. 730, 733 (D.C. Cir. 1984) (approving consent decree permitting GTE to acquire Sprint long distance company). Again, from the perspective of preventing unlawfully discriminatory conduct, we should presumably be more concerned that an incumbent LEC will have the incentive and ability to favor unfairly its own long distance affiliate as opposed to a non-affiliated long distance company.

209. 9 We fully recognize, however, that other glosses on Congress' intent are not without support in the statute.

210. 10 We note that some parties have recognized the potential overlap between interconnection and equal access obligations. See, e.g., *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15677, ¶ 353 (1996) (DOJ and MCI arguing that "superseding regulations" referred to in section 251(g) were the regulations that Commission would issue to implement section 251), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa*

Utilities Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), writ of mandamus issued sub nom. Iowa Utilities Bd. v. FCC, No. 96-3321 (8th Cir. Jan. 22, 1998), petition for cert. granted, Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, and 97-1141 (U.S. Jan. 26, 1998), Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295 (rel. Aug. 18, 1997), further recons. pending.

211. 11 United States v. Western Electric Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom., Maryland v. United States, 460 U.S. 1001 (1983), vacated. Indeed, one could argue that the nondiscriminatory interconnection obligations imposed on all incumbent LECs by section 251(c)(2) were meant to encompass the duty to provide equal access and nondiscriminatory treatment to long distance companies. See 47 U.S.C. § 251(c)(2) (requiring incumbent LECs to provide to "any telecommunications carrier" interconnection that is "equal in quality" to the interconnection LEC provides itself and that is "on rates, terms, and conditions that are . . . nondiscriminatory"). This could mean, for example, that the Commission merely needs to clarify that the interconnection obligations imposed in the Local Competition Order were sufficient to satisfy section 251(g).