

FCC 97-298 - MEMORANDUM OPINION AND ORDER
RELEASED: August 19, 1997

Ameritech Michigan 271 Application

I. INTRODUCTION

On 05/21/1997, Ameritech Michigan filed an Section 271 applications to provide in-region, inter-LATA services in the State of Michigan. The FCC, the DOJ and the Michigan Public Service Commission, however, all found that Ameritech's application failed to demonstrate compliance with all of section 271 requirements.

The FCC concluded that although Ameritech has met its burden of demonstrating that it is providing access and interconnection to an unaffiliated, facilities-based provider of telephone exchange service, yet, it has not demonstrated that it has fully implemented the competitive checklist with respect to: (1) access to its operations support system; (2) interconnection; and (3) access to its 911 and E911 services. In addition, the FCC has not decided whether Ameritech has met the remaining requirements on the competitive checklist.

Thereby, the FCC has denied Ameritech's application to provide in-region, interLATA services in Michigan.

II. LEGAL FRAMEWORK

The 1996 Act conditions BOC entry into in-region, interLATA markets on compliance with certain provisions of section 271. BOCs must apply to the FCC for authorization to provide such interLATA services originating in any in-region state. The FCC must consult with the Attorney General and give substantial weight to the AG's evaluation of the BOC's application. Also, the FCC must consult with the applicable state commission to verify that the BOC has one or more state-approved interconnection agreements with a facilities-based competitor, as required in section 271(c)(1)(A), or a statement of generally available terms and conditions, as required in section 271(c)(1)(B). Either the agreement(s) or general statement satisfy the competitive checklist.

A BOC must show that it satisfies the requirements of either section 271(c)(1)(A), known as Track A, or 271(c)(1)(B), known as Track B. Section 271(c)(1)(A) states that a BOC must provide access and interconnection to one or more unaffiliated competing providers of exchange service. In addition, a BOC

must show that: (1) it has fully implemented the competitive checklist contained in section 271(c)(2)(B); (2) the required authorization will be carried out in accordance with the requirements of section 272; and (3) the BOC's entry into the in-region interLATA market is "consistent with the public interest, convenience, and necessity."

III. CONSULTATION WITH THE MPSC AND THE DOJ

Consultation with State Commission.

The MPSC greatly assisted the FCC in this section 271 application by developing an extensive record and making factual findings based on that record concerning each of the requirements of section 271(c).

Based on its continued review, the MPSC concluded that Ameritech has not fully implemented four checklist items; that is, Ameritech failed to provide nondiscriminatory access to its operations support systems, transport and switching, and access to its 911 and E911 services.

The MPSC's consultation, however, did not include an analysis of the state of local competition in Michigan. The FCC believes that this information will be valuable to assessment of the public interest, and it is information which the state commissions are well-situated to gather and evaluate. The FCC suggested that, in future section 271 applications, the relevant state commission develop, and submit to the FCC, a record concerning the state of local competition as part of its consultation, particularly information concerning the identity and number of competing providers of local exchange service, as well as the number, type, and geographic location of customers served by such competing providers.

DOJ's Evaluation.

In its evaluation of Ameritech's application, the DOJ focused on certain deficiencies in Ameritech's application and concluded that although Ameritech has made significant progress toward satisfying the requirements of section 271, Ameritech failed in several respects: (1) Ameritech has not fully implemented several elements of the competitive checklist, including unbundled local switching, unbundled transport, interconnection with equal quality, and access to operations support systems; (2) granting Ameritech's application would not be consistent with the public interest because local markets in Michigan are not irreversibly open to competition and barriers to entry into local exchange markets still remain; and (3) there are no adequate performance

measures and enforceable benchmarks that can be used to ensure local competition in Michigan is irreversible.

IV. Standard for Evaluating Section 271 Applications

1. Burden of Proof

Section 271 places on the applicant the burden of proving that all of the requirements for authorization to provide in-region, interLATA services are satisfied. Section 271(d)(3) provides that "[t]he Commission shall not approve that authorization requested in an application...unless it finds that [the petitioning BOC has satisfied all the requirements of section 271]."

2. Compliance with Requirement that Application Be Complete when Filed

In the 12/06/1996 Public Notice announcing procedures governing BOC section 271 applications, the FCC stated that it expects that a section 271 application, as originally filed, will include all of the factual evidence on which the applicant would have the FCC rely in making its findings. Now the FCC finds it necessary once again to emphasize the requirement that a BOC's section 271 application must be complete on the day it is filed and an applicant may not, at any time during the pendency of its application, supplement its application by submitting new factual evidence that is not directly responsive to arguments raised by parties commenting on its application.

In addition, when a BOC presents factual evidence and arguments in support of its application for in-region, interLATA entry, we expect that such evidence will be clearly described and arguments will be clearly stated in its legal brief with appropriate references to supporting affidavits.

V. COMPLIANCE WITH SECTION 271(c)(1)(A)

1. Existence of One or More Binding Agreements

For purposes of demonstrating compliance with section 271(c)(1)(A), Ameritech relies on its interconnection agreements with Brooks Fiber, MFS WorldCom, and TCG. These agreements are approved by the MPSC under section 252(e) of the Act.

The FCC concluded that Ameritech's agreements with these three competing providers are binding agreements within the meaning of section 271(c)(1)(A). These agreements have specified the rates, terms, and conditions under which Ameritech will

provide access and interconnection to its network facilities. The FCC rejected Brooks Fiber's contention that Ameritech cannot be found to have entered into a binding agreement with competing providers until the agreements include final cost-based prices and all items of the competitive checklist. The FCC finds that section 271(c)(1)(A) does not require that each interconnection agreement to contain all elements of the competitive checklist and permanent cost-based prices in order to be a binding agreement.

2. Provision of Access and Interconnection to Unaffiliated Competing Providers

Ameritech asserted that it is providing access and interconnection to Brooks Fiber, MFS WorldCom, and TCG and that those carriers are unaffiliated competing providers of exchange service.

In the SBC Oklahoma Order, the FCC determined that "the use of the term 'competing provider[]' in section 271(c)(1)(A) suggests that there must be an actual commercial alternative to the BOC." Since these three carriers are each accepting requests for telephone exchange service and serving more than a de minimis number of end-users for a fee in their respective service areas, the FCC finds that each of these carriers is an actual commercial alternative to the BOC and therefore agrees with Ameritech that it is providing access and interconnection to these three carriers, and these three carriers are competing providers of telephone exchange service.

3. Provision of Telephone Exchange Service to Residential and Business Subscribers

Ameritech claims that it has satisfied this requirement because Brooks Fiber, MFS WorldCom, and TCG are unaffiliated competing providers of telephone exchange services that together serve business and residential customers. Numerous parties, however, argue that MFS WorldCom and TCG compete to serve only business customers, thus Ameritech has not satisfied this requirement.

The FCC concludes that when a BOC relies upon more than one competing provider to satisfy section 271(c)(1)(A), each such carrier need not provide service to both residential and business customers, and that this aspect of section 271(c)(1)(A) is met if multiple carriers collectively serve residential and business customers. Therefore, the FCC finds that Brooks Fiber, MFS WorldCom, and TCG collectively are

unaffiliated competing providers of telephone exchange service to residential and business subscribers.

4. Offer by Competing Providers of Telephone Exchange Service Either Exclusively over Their Own Telephone Exchange Service Facilities or Predominantly over Their Own Telephone Exchange Service Facilities in Combination with Resale.

Ameritech claims that neither Brook Fiber nor TCG offers any service through resale, and therefore, they each satisfy the requirements of section 271(c)(1)(A). Also, MFS WorldCom's resale portion is modest in comparison to its facilities-based service, hence, MFS WorldCom also meets the requirements of section 271(c)(1)(A). Ameritech, however, maintains that the term "own telephone exchange service facilities" includes the provision of service through the use of unbundled network elements.

The issue is whether the own telephone exchange service facilities include unbundled network elements. Based on the Congress' policy objectives, the FCC agrees with Ameritech that unbundled network elements purchased from a BOC are a competing provider's own exchange service facilities.

5. Summary and Conclusion

The FCC's conclusion with regard to 271(c)(1)(A) is that Ameritech has satisfied the requirements of section 271(c)(1)(A) through its interconnection agreement with Brooks Fiber. Because Ameritech has satisfied section 271(c)(1)(A) through its agreement with Brooks Fiber, the FCC believes it need not determine whether Ameritech has also satisfied this provision through its agreements with MFS WorldCom and TCG.

VI. CHECKLIST COMPLIANCE

Since the FCC concluded that Ameritech has satisfied section 271(c)(1)(A), next it needs to be determined whether Ameritech has "fully implemented the competitive checklist in section 271(c)(2)(B).

The FCC's findings lead to conclusion that Ameritech has not fully implemented the competitive checklist. In particular, Ameritech has not met its burden of showing that it is providing access to operations support systems functions, interconnections, and access to 911 and E911 services, in accordance with the requirements of section 271(c)(2)(B).

1. Operations Support Systems

The FCC concludes that Ameritech has not demonstrated that the access to OSS functions that it provides to competing carriers for the ordering and provisioning of resale services is equivalent to the access it provides to itself. Because Ameritech failed to meet this fundamental obligation, the FCC needed not decide whether Ameritech separately complies with its duty to provide nondiscriminatory access to each and every OSS function.

For any future 271 application, the FCC emphasizes its expectation that BOC applicants must adequately document that it is able to provide OSS functions to support the provision of network elements, including combinations of network elements. In addition, the FCC expects that in any future applications BOCs must be able to demonstrate that it is providing nondiscriminatory access to OSS functions associated with, not only the ordering and provisioning of resale services, but also unbundled network elements.

Specifically, Ameritech believes that its duty to provide nondiscriminatory access to OSS functions extends only to the interface component, but the FCC asserted that this interpretation was incorrect and pointed out that the FCC rules require this duty to extend beyond the interface component. It should cover the access to all of the processes, including those existing legacy systems used by the ILEC to provide access to OSS functions to competing carriers.

Other issues regarding OSS that are discussed by the FCC include: (1) need to provide actual installation intervals; (2) reliance on manual processing; (3) modified due dates; (4) untimely firm order confirmation notices and order rejection notices; (5) OSS capacity constraints in response to increased demand; and (6) other concerns relating to OSS functions.

2. Interconnection in Accordance with Section 251(c)(2) and 252(d)(1)

Section 271(c)(2)(B)(i), a checklist item, requires an applicant to provide "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1). Such interconnection must be: (1) provided at any technically feasible point within the carrier's network; (2) at least equal in quality to that provided by the local exchange carrier to itself or to any other party to which the carrier provides interconnection; and (3) provided on rates, terms, and conditions that are just, reasonable, and

nondiscriminatory.

Based on review of the record, the FCC concluded that Ameritech has not established by a preponderance of the evidence that it is providing interconnection in accordance with the requirements of the Act. The FCC found that data Ameritech submitted was inadequate to do quality comparison between interconnection that Ameritech provides to other carriers and that which Ameritech provides itself. Even such inadequate data suggest that Ameritech's interconnection facilities do not meet the technical criteria and service standards that Ameritech uses within its own network, contrary to the requirements imposed by 251(c)(2)(C). In addition, the FCC questioned whether Ameritech is providing interconnection arrangements on nondiscriminatory terms and conditions, as required by section 251(c)(2)(D).

3. Nondiscriminatory Access to 911 and E911 Services

The competitive checklist also requires Ameritech to provide nondiscriminatory access to 911 and E911 services. The word "nondiscriminatory" is interpreted to include a comparison between the level of service the ILEC provides competitors and the level of service it provides to itself.

Again, the FCC found that Ameritech has not met its burden of demonstrating, by preponderance of the evidence, that it is providing nondiscriminatory access to its 911 services. The record showed that Ameritech maintains entries in its 911 database for its own customers with greater accuracy and reliability than entries for the customers of competing carriers. Besides this parity issues, the FCC has concerns regarding Ameritech's efforts to detect and remedy errors in competitors' end user 911 data and in the proper functioning of competitors' trunking facilities. It appears to the FCC that Ameritech has not taken preventative measures to do its part in avoiding future errors in competitors's data in the 911 database. Based on these reasons, The FCC concluded that Ameritech has failed to demonstrate its compliance with this checklist item.

4. Additional Concerns

Since Ameritech has failed to demonstrate that it has implemented the competitive checklist with respect to OSS, interconnection, and 911 and E911 services, the FCC need not decide further whether Ameritech is providing the remaining checklist items. For purposes of future applications, however, the FCC addresses its concerns regarding certain other checklist items.

a. Pricing of Checklist Items

The competitive checklist requires BOCs to provide interconnection, access to UNEs, transport and termination, and resale at cost-based prices (section 252(d)). The cost-based standard is contained in a federal statute and it is therefore presumed to have a uniform meaning nationwide. The FCC, pursuant to its responsibility under section 271, must apply uniform principles to give content to the cost-based standard in the competitive checklist for each state-by-state section 271 application.

In regard to pricing competitive checklist items of interconnection, UNEs, and transport and termination pursuant to section 251, it is critical that prices for these inputs be set at levels that encourage efficient market entry so that new entrants could make their decisions whether to purchase UNEs or to construct facilities based on the relative economic costs of these options. Adopting a pricing methodology based on forward-looking costs best replicate the conditions of a competitive market and reduces the ability of an ILEC to engage in anticompetitive behavior. Therefore, the FCC concludes that a BOC cannot be deemed in compliance with section 271(c)(2)(B)(I), (ii), and (xiii) of the competitive checklist unless the BOC demonstrates that prices for interconnection, UNEs and transport and termination are based on forward-looking economic costs, i.e., TELRIC. In addition, both new entrants and BOCs must each be compensated for use of the other's network for transport and termination based on just and reasonable reciprocal principle.

The FCC asserts that a BOC cannot demonstrate compliance with the competitive checklist unless it has appropriate rates for resale services. In particular, it is required that the BOC demonstrate that its recurring and non-recurring rates for resold services are set at the retail rates less the portion attributable to reasonably avoidable costs. It is further required that a BOC show that its non-recurring charges reflect forward-looking economic costs. Finally, the FCC anticipates that it may be necessary to require, as a condition of authorization, that the a BOC continue to price interconnection, UNEs, transport and termination, and resold services based on forward-looking economic costs if the BOC wishes to remain in the long distance market.

b. Unbundled Local Transport

Section 271(c)(2)(B)(v) of the competitive checklist requires A BOC to provide local transport from the trunk side of a wireline local exchange carrier switch unbundled from

switching to other service. The checklist also requires a BOC to provide nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1). In its *Local Competition Order*, the FCC required ILECs to provide requesting carriers with access to both dedicated and shared interoffice transmission facilities as an unbundled network element pursuant to section 251(c)(3). In its *Local Competition Third Reconsideration Order*, the FCC required an ILEC to provide shared transport among all end offices or tandem switches in the ILEC's network, and concluded that a requesting carrier may use the shared transport unbundled element to provide exchange access service.

In this regard, the FCC believed that Ameritech was not in compliance with the requirements that were established in the *Local Competition Order*. According to the FCC analysis, none of Ameritech's options in its application permits requesting carriers to obtain nondiscriminatory access to shared transport, that is, access to the same interoffice transport facilities that Ameritech uses to transport traffic between end offices and tandem switches. Therefore, none of Ameritech's shared transport offerings meets subsections (ii) and (v) of the competitive checklist.

The FCC also notes that all BOCs are now on notice as to the clarified shared transport obligations and are required to comply with the revised rules prior to filing any future section 271 applications.

c. Local Switching Unbundled from Transport, Local Loop Transmission, Or Other Services

Item (vi) of the competitive checklist requires a section 271 applicant to provide local switching unbundled from transport, local loop transmission, or other services. Item (ii) of the competitive checklist requires section 271 applicants to provide nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1).

The FCC is concerned that Ameritech has not provided local switching, this unbundled network element, in a manner consistent with its obligations under section 251 and 271 of the Act, the FCC's regulations, and *Local Competition Third Reconsideration Order* on shared transport. The FCC concluded that shared transport is a network element and has rejected Ameritech's arguments to the contrary.

d. Combinations of Unbundled Network Elements

Section 251 (c) (3) establishes an ILEC's duty to provide any requesting carrier nondiscriminatory access to unbundled network elements at any technically feasible point on rates, terms, and conditions of the agreement and the requirements of sections 251 and 252. It further requires an ILEC to provide such unbundled elements in a manner that allows requesting carriers to combine such elements in order to provide services. Item of the competitive checklist requires the FCC to ensure that a section 271 applicant is meeting its obligation to provide nondiscriminatory access to network elements in accordance with the requirements of sections 251(c) (3) and 252(d) (1).

The FCC determines that Ameritech has failed to provide access to OSS functions in accordance with the Act and the FCC's regulations. Although the FCC did not reject Ameritech's application based on Ameritech 's provision of access to unbundled local switching and unbundled local transport, the FCC was concerned about Ameritech's provision of these unbundled network elements.

The FCC emphasizes that under its rules, when a competing carrier seeks to purchase a combination of network elements, an ILEC may not separate network elements that the ILEC currently combines. Because the use of unbundled network elements and combination of these elements is an important entry strategy into the local telecommunications market, the FCC will examine carefully these issues in any future section 271 applications.

e. Number Portability

Item (xi) of the competitive checklist states that until the date by which the FCC issues regulations pursuant to section 251 to require number portability, a section 271 applicant must provide interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible.

Ameritech claims that it meets the requirements of checklist item (xi), other parties contend that Ameritech fails to comply with its obligation to provide number portability.

Due to its conclusion that Ameritech does not satisfy other elements of the competitive checklist, the FCC believes that it needs not reach the merits of these allegations at this

time. The FCC, however, states that it will examine carefully such disputes among the parties if they raise in any future section 271 application.

VII. COMPLIANCE WITH SECTION 272 REQUIREMENTS

Section 271(d)(3)(B) provides that the FCC shall not approve a BOC's application for authorization to provide interLATA services unless the BOC demonstrates that "the requested authorization will be carried out in accordance with the requirements of section 272." Section 272 requires a BOC to provide certain interLATA telecommunications services through a separate affiliate, and establishes structural and nondiscrimination safeguards that are designed to prevent anticompetitive discrimination and cost-shifting. The FCC views this requirement to be of crucial importance, because the structural and nondiscrimination safeguards of section 272 seek to ensure that competitors of the BOCs will have nondiscriminatory access to essential inputs on terms that do not favor the BOC's affiliate.

Based on Ameritech's current and past behavior, the FCC concludes that Ameritech has failed to demonstrate that it will carry out the request authorization in accordance with the requirements of section 272.

VIII. OTHER CONCERNS RAISED IN THE RECORD

Several other issues have arisen in the context of Ameritech's Application. These issues include Ameritech's inbound telecommunications script, its provision of intraLATA toll service, and its compliance with the customer proprietary network information (CPNI) requirements of section 222. The FCC believes that evidence that a BOC applicant has violated federal telecommunications regulations or engaged in anticompetitive conduct is relevant to its inquiry under section 271, and would be considered in the public interest analysis to the extent it arises in future applications.

IX. PUBLIC INTEREST

Since the FCC concluded that Ameritech has not implemented fully the competitive checklist and has not complied with the requirements of section 272 and therefore must deny Ameritech's application for authorization to provide in-region, interLATA telecommunications services in Michigan, the FCC need not reach the further question of whether the requested authorization is consistent with the public

interest, convenience and necessity, as required by section 271(d) (3) (C) .

For the benefits of future applicants, the FCC has made it clear that its public interest inquiry requires it to examine carefully a number of factors including the nature and extent of competition in the applicant's local market, in order to determine whether that market is and will remain open to competition. The more vigorous the competition is in the BOC's local market, the greater is the assurance that the BOC is cooperating in opening its market to competition and that entry through the various methods set forth in section 251(c) of the 1996 of the 1996 Act is possible. In the absence of broad-based competition, however, the FCC shall carefully examine the record, and weigh the evidence before us, to determine whether the lack of such competition is the result of continuing barriers to entry, the BOC's lack of cooperation, the business decisions of new entrants, or some other reason.

X. CONCLUSION

For the reasons discussed above, the FCC denied Ameritech's application for authorization under section 271 of the Act to provide in-region, interLATA services in the state of Michigan.