Florida Cable Telecommunications Association

Steve Wilkerson, President

July 31, 1997

ORIGINAL
FILE COPY

VIA HAND DELIVERY

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

RE: DOCKET NO. 960786-TL

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are an original and fifteen copies of the Rebuttal Testimony of Dr. Patricia L. Pacey on Behalf of the Florida Cable Telecommunications Association, Inc. ("FCTA"). Copies of the testimony have been served on the parties of record pursuant to the attached certificate of service.

Please acknowledge receipt and filing of the above by date stamping the duplicate copy of this letter and returning the same to me.

Thank you for your assistance in processing this filing.

Yours very truly,

Laura L. Wilson
Vice President, Regulatory Affairs

Enclosures

cc: Mr. Steven E. Wilkerson
All Parties of Record

ACK
AFA
APP
CAF
CMU
CTR
EAG
LEG 2
LIN 5+org
OPC
RCH
SEC 1
WAS
OTH

DOCUMENT NUMBER-DATE
07733 JUL 31 97
FPSC-RECORDS/REPORTING

310 North Monroe Street • Tallahassee, Florida 32301 • (904) 681-1990 FAX (904) 681-9676

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

REBUTTAL TESTIMONY

OF

DR. PATRICIA L. PACEY

ON BEHALF OF

FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION

DOCKET NO. 960786-TL

JULY 31, 1997

Q. **PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

A. My name is Patricia L. Pacey and my business address is 6688 Gunpark Drive, Suite 200, Boulder, Colorado, 80301.

Q. **WHAT IS YOUR EDUCATIONAL BACKGROUND AND WORK EXPERIENCE?**

A. I received a Bachelor of Arts in mathematics from the University of Florida in 1971 and went on to obtain a Ph.D. in economics from the University of Florida College of Business and Administration in 1976. Upon receiving my Ph.D., I became a cost analyst for the Congressional Budget Office in Washington, D.C., preparing cost estimates of proposed legislation related to education and human resources. I left this government service to join the faculty of the

University of Colorado, initially on the Colorado Springs campus and then the Boulder campus where I primarily taught courses in microeconomics, statistics/ econometrics, and antitrust/regulatory issues.

I am now President of Pacey Economics, Inc., a privately held corporation involved in economic and business analysis. Over the years, projects have included studies in the telecommunications, insurance, and sports industries, among others. I continue to teach intermittently in the Business School at the University of Colorado Boulder. Also, I am a member of the University of Colorado, Boulder Business School Advisory Council and the State of Colorado Governor's Revenue Advisory Commission.

Q. **HAVE YOU TESTIFIED BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION BEFORE?**

A. Yes. I testified on behalf of Florida Cable Telecommunications Association (FCTA) in Docket No. 950696-TL relating to the establishment of an interim universal service mechanism.

Q. **FOR WHOM DO YOU APPEAR IN THIS PROCEEDING?**

A. My testimony is being sponsored by FCTA.

Q. **WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

A. I was asked to evaluate the merits of Mr. Varner's positions regarding BellSouth's request for entry into the in-region interLATA market.

Q. **DO YOU CONCUR WITH THE ECONOMIC IMPLICATIONS FORWARDED BY MR. VARNER REGARDING BELLSOUTH'S INTERPRETATIONS OF SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996 (FEDERAL ACT)?**

A. No. I strongly disagree with the economic implications forwarded in Mr. Varner's direct testimony and will explain my differences in my rebuttal testimony outlined below.

Q. **MR. VARNER'S DIRECT TESTIMONY "PROVIDES AN OVERVIEW OF THE REQUIREMENTS BELLSOUTH MUST FULFILL TO ACHIEVE IN-REGION INTERLATA RELIEF" (PAGE 2, LINES 9 THROUGH 11). DO YOU AGREE WITH HIS ANALYSIS?**

A. It is my position that a determination of whether BellSouth must proceed under Track A or B is a legal issue for the attorneys and Commission to determine. However, economic principles can be applied to assist the Commission in making its determination of

whether BellSouth has qualified under Track A or B and there are certainly economic implications that result from any such determinations. I will be addressing these principles and implications in my rebuttal testimony.

Q. **BASED UPON YOUR REVIEW OF SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996, DO YOU AGREE WITH MR. VARNER'S INTERPRETATION OF WHAT IS REQUIRED FOR REGIONAL BELL OPERATING COMPANIES (RBOCs) TO ENTER (ACTUALLY, REENTER) THE IN-REGION INTERLATA MARKET?**

A. No, I do not agree with Mr. Varner's interpretation (Page 8, Line 13 through Page 9, Line 20). As an economist, my reading of Section 271 indicates that there are basically four conditions that must be met by any RBOC, in this case BellSouth, in order to qualify for reentry into the in-region interLATA markets.

Q. **PLEASE DESCRIBE WHAT YOUR UNDERSTANDING ARE THE REQUIREMENTS FOR REENTRY UNDER SECTION 271 FROM AN ECONOMIC PERSPECTIVE.**

A. My understanding is the first condition is that an RBOC must meet the requirements of Track A [Section 271(c)(1)(a)] or of Track B

[Section 271(c)(1)(b)]. In other words, an RBOC must demonstrate that it is providing interconnection to competitive local exchange providers (where at least one is an unaffiliated, facilities-based competing provider of telephone exchange service to residential and business customers) pursuant to an agreement that satisfies the competitive checklist or under certain limited circumstances, interconnection is generally available to potential competitors under terms and conditions which conform to the standards established by the competitive checklist contained in the Act. Mr. Varner believes Track A and Track B are not mutually exclusive, but I prefer to leave legal conclusions to the attorneys and Commission.

The second condition requires the RBOC to comply with the Act's non-discriminatory and structural separation requirements and meet certain specified non-accounting safeguards, while the third condition requires the FCC to seek the advice of the U.S. Department of Justice (DOJ) concerning each RBOC application. This third condition indicates that, although DOJ recommendations are not binding on the FCC decision, the Act appears to require that substantial weight be given to DOJ position and analysis.

The fourth condition outlined in Section 271 of the Act instructs the FCC to deny the application of any RBOC unless it finds that the requested entry is consistent with the "public interest." In this case, "public interest" would be defined when the benefits accruing to telecommunications consumers exceed any potential harm to those consumers as a result of reentry into the in-region interLATA market by the RBOC. While Mr. Varner asserts that BellSouth's entry will benefit the public (Pages 62-63), his analysis fails to make the distinction between competitive behavior and competitive market structure. That is, Mr. Varner's conclusion can only be realized if the market structure is truly open, present and fully operational.

Q. **DOES MR. VARNER'S ASSERTIONS THAT BELLSOUTH HAS MET TRACK A (PAGE 16, LINES 18-19) COMPLY WITH THE GENERAL ECONOMIC PRINCIPLES THAT SHOULD BE APPLIED BY THE COMMISSION IN EVALUATING THE EXISTENCE OF A QUALIFYING FACILITIES-BASED COMPETITOR UNDER TRACK A?**

A. Mr. Varner states that "Under Track A, actual facilities-based competition must be present in the local market" (Page 11, Lines 20-22). He also encourages the Commission to "assess the

current market conditions existing in Florida" as part of the Commissions consultation to the FCC as to whether BellSouth has met the requirements of Track A or B (Page 3, Line 23 through Page 4, Line 2). However, in support of his conclusions that there are facilities-based alternatives, Mr. Varner provides nothing more than vague references to the types of services competitors may be providing or may be planning to provide in the future (Page 22, Line 4 through Page 23, Line 15).

Q. **WHAT IS PROBLEMATIC ABOUT THIS?**

A. Mr. Varner provides no verifiable criteria for the Commission to apply when assessing market conditions or when determining whether a qualified competing provider of telephone exchange service to residential and business customers exists.

Q. **DO YOU HAVE ANY RECOMMENDATIONS AS TO WHAT PRINCIPLES SHOULD BE APPLIED IN PLACE OF MR. VARNER'S VAGUE REFERENCES?**

A. Yes. for the most part, these principles are drawn from the FCC's recent order denying Southwestern Bell's petition for 271 authority (see, for example, Pages 10-15 of the Memorandum Opinion and Order in CC Docket No. 97-121 attached to my testimony as

Exhibit PLP-2). The Florida Commission, in determining the presence of a qualifying competitor providing residential and business services, could apply and consider the following criteria:

1. Whether the competitor is providing exchange service to residential and business customers pursuant to an agreement approved under Section 252;
2. The nature and size of the presence of the competing provider;
3. Whether an actual competitor exists, i.e. whether the competitor has implemented the agreement and is operational versus whether the competitor has only paper commitments to provide service;
4. Whether the competitor is functioning in the market as opposed to merely providing services on a test or promotional basis;
5. Whether the competitor has an effective tariff or price list on file with the Commission by which it presently bills customers; i.e., whether billing systems are fully functional;

6. Whether the competitor provides and offers services to the public at large as opposed to a select group or company employees;

7. The scope and nature of any marketing activity.

These criteria are not intended to be all-inclusive. For example, Commission may also wish to evaluate whether and the extent to which prices have dropped for consumers in the relevant market and whether the quality of local service is improved by the presence of a competitor.

Q. **WHAT IS THE SIGNIFICANCE OF THESE PRICE AND QUALITY CRITERIA?**

A. As Mr. Varner points out, "The goal of the Act is to promote the development of competition across all telecommunications markets," (Page 2, Line 22-23). Economic principles would suggest that the introduction of a competitive market will likely reduce price and increase quality to telecommunication consumers. Mr. Varner has not provided any evidence that such benefits have, are, or will be accruing to the telecommunication consumer. He simply indicates that to ensure these benefits, the 14 point checklist is or will be provided in the future. As I discuss

later in my testimony, if BellSouth cannot demonstrate a competitive market structure, the benefits of competition are not going to be realized by allowing BellSouth into the interLATA market at this time.

Q. **BASED ON YOUR PREVIOUS ANSWER, DO YOU AGREE WITH MR. VARNER THAT A THRESHOLD LEVEL OF COMPETITION IS NOT NEEDED PRIOR TO BELLSOUTH BEING ALLOWED INTO THE INTERLATA MARKET (PAGE 33, LINE 14-15)?**

A. Not specifically, the point is that the Commission should apply verifiable and objective criteria in its consultation with the FCC and that is what is missing in Mr. Varner's analysis. From the economic perspective, Mr. Varner ignores the reality that a state of competition cannot be instantly provided in the market even with the elimination of legal, technical and operational barriers. For example, the interexchange market took nearly two decades before there was what economists would consider a truly competitive market environment. Indeed, even with the legal barriers eliminated in the local exchange market via the Telecommunications Act of 1996, a review of market conditions make it quite clear that competitive offerings in the local exchange

market are not yet available. Surely, this Commission will recognize that the technical elimination of legal barriers does not create an overnight market for competition. Business requirements are such that it takes a substantial amount of startup time to implement the offering of various telecommunications services to both residential and business customers before an irreversible competitive market can be established. The early stages of opening markets to competition are clearly fragile and sensitive to the subsequent actions and policies of competitors, regulators, and other players in the market. Thus, I do not agree with Mr. Varner's statement that "granting BellSouth entry into the interLATA business (at this juncture) will likely hasten the development of local competition rather than hinder it," (Page 62, Lines 4-5).

Consider the following analogy: You have cleared land, poured and smoothed fresh cement for a foundation for a floor in a building. If you allow people to walk into that cement before it has set, you have effectively ruined your foundation. This is no different than eliminating the legal and technical barriers to entry into the local exchange market. Once clearing the way, it will take some time not only to lay the foundation but also to have this

foundation set; i.e., provide for an irreversible competitive market. Clearly, if you allow premature entry into the interLATA market, the potential for a competitive market structure (foundation) can be ruined quite quickly, eliminating the opportunity for any benefits to accrue to the consumers.

Q. **DO YOU AGREE WITH MR. VARNER'S DIRECT TESTIMONY (PAGE 34, LINES 5-11) WHERE HE STATES THE FOLLOWING, "THE INTENT OF THE ACT IS FOR ALL MARKETS TO BE OPEN TO COMPETITION. PUBLIC POLICY WOULD BEST BE SERVED BY HAVING FULL COMPETITION IN ALL MARKETS. ONCE LOCAL MARKETS ARE OPEN TO COMPETITION, THE NECESSARY CONDITIONS FOR ALL PARTIES TO COMPETE ARE AVAILABLE. NEW ENTRANTS MUST DETERMINE HOW QUICKLY THEY WILL ENTER THE LOCAL MARKET. DELAYING BELLSOUTH'S ENTRY INTO THE LONG-DISTANCE MARKET DOES NOT ENHANCE A LEVEL OF COMPETITION IN THE LOCAL MARKET; INSTEAD, IT ONLY LESSENS THE BENEFITS YET TO BE FULLY REALIZED BY CONSUMERS IN THE LONG-DISTANCE MARKET IN FLORIDA?"**

A. I certainly agree with Mr. Varner's position that the intent of the Act is for all markets to be open to competition and that public policy would best be served by having full competition in all markets. However, I would disagree with Mr. Varner's analysis in that he concludes and/or infers specific competitive market results but fails to recognize the lack of a competitive market structure in the local exchange services market. Clearly, it is a well established economic principle that without a competitive market structure, disincentives exist for companies to engage in competitive behavior. As noted earlier in my testimony, even if all the terms and conditions on the competitive checklist (14 point checklist) have been met and are both operational and meet performance criteria, it would still not instantly convert a long-standing monopoly market into a competitive market. Consequently, premature entry into this complementary long-distance market can quickly erode the potential for a competitive market structure to exist in the local exchange market. Consumers cannot benefit unless a competitive market structure exists both in reality as well as on paper. Under the present circumstances, the potential offerings identified on the competitive checklist and the future promises of compliance does not ensure competition but, in fact, with the premature entry by BellSouth is

likely to erode the competitive opportunities in both the local exchange market as well as the interLATA market.

Q. IS IT NOT GENERALLY IN THE PURVIEW OF THE ECONOMIST TO PROVIDE INFORMATION REGARDING PUBLIC INTEREST "ISSUES;" THAT IS, THE POTENTIAL BENEFITS OR HARMS THAT WOULD RESULT FROM THE COMMISSION APPROVING BELLSOUTH'S ENTRY INTO THE IN-REGION INTERLATA MARKET?

A. Yes. It is typically an arena where economists provide substantial information but it is my understanding that in this particular docket, the Commission prefers to defer any public interest issues to the FCC. However, where Mr. Varner's direct testimony made inferences regarding the economic implications from BellSouth's entry or delay of entry, I feel compelled to either confirm or correct any economic conclusions that Mr. Varner has drawn.

Q. MR. VARNER ARGUES THAT IT IS NOT NECESSARY FOR COMPETITION TO BE FULLY DEVELOPED PRIOR TO RBOC ENTRY IN THE LONG-DISTANCE MARKET (PAGE 8, LINES 5-6; PAGE 32, BEGINNING AT LINE 11; PAGES 60-61). IN GENERAL, WHAT WOULD BE THE ECONOMIC

CONSEQUENCES OF THE COMMISSION ALLOWING BELLSOUTH TO ENTER THE IN-REGION INTERLATA MARKET IF THE MARKET IS NOT TRULY OPEN TO COMPETITION?

A. It is my opinion that there would be serious negative economic consequences to allowing entry into the long-distance market prior to a true opening of local exchange competition.

Q. **DO YOU HOLD THIS OPINION WHETHER BELLSOUTH MEETS TRACK A OR TRACK B?**

A. Both Track A and B require factual and legal criteria to be determined and noncompliance with either Track A or B will result in serious anticompetitive consequences if entry is allowed without such compliance.

Q. **HAVING COMMENTED ON SOME OF THE ECONOMIC PRINCIPLES THE COMMISSION SHOULD APPLY IN DETERMINING COMPLIANCE WITH TRACK A AND THE ECONOMIC IMPLICATIONS OF ALLOWING BELLSOUTH INTO THE INTERLATA MARKET IF THE LOCAL MARKET IS NOT TRULY OPENED TO COMPETITION, LET'S TURN TO TRACK B. DO YOU AGREE THAT BELLSOUTH'S DRAFT**

STATEMENT OF GENERALLY AVAILABLE TERMS (SGAT) PROVIDES THE CONDITIONS FOR WHICH COMPETITORS CAN PURCHASE THE PRODUCTS AND SERVICES NECESSARY TO PROVIDE LOCAL EXCHANGE SERVICES?

A. The economist is not in a position to determine whether these items on the competitive checklist (referred to in direct testimony as the 14 point checklist) have been met. Mr. Varner claims that BellSouth "has fully implemented the items in the checklist" and, for items not yet requested, Bell South is making them available through its SGAT (Page 41, Lines 14-23). However, it is a crucial economic issue as to whether this competitive checklist is both present and fully operational.

Q. **WHAT DO YOU MEAN BY PRESENT AND FULLY OPERATIONAL?**

A. The competitive checklist is designed as a guideline to determine if opportunities for competitors to enter the market are legally, technically, and operationally available. Mr. Varner claims the checklist is "fully implemented." Contrary to what Mr. Varner suggests (see also Page 35, Lines 25 through Page 36, Line 6, among other cites), the existence of a competitive checklist does not create a competitive market. It simply indicates that there are

certain structural barriers that have been removed so that the avenue for competition is no longer blocked. A promise to provide or simply good intentions is not sufficient.

Q. **HOW WOULD YOU DETERMINE IF THE ITEMS ON THE 14 POINT CHECKLIST ARE PRESENT AND FULLY OPERATIONAL?**

A. It is necessary to determine if the methods and procedures for implementation of the items on the 14 point checklist have been established and if operational testing indicate that they perform at acceptable levels. Also, performance benchmarks must be established to evaluate these operations. It is my understanding that few of the terms and agreements identified in this draft SGAT have been tested to determine if they are operational at any level, let alone at a level similar to the quality BellSouth can provide its customers. Absent standard methods and procedures, new entrants cannot effectively plan and deliver services to consumers. Operational testing will permit the parties to examine the established methods and procedures and make any changes necessary for real time operations and must go beyond simply internal testing.

In order for BellSouth to demonstrate that it has fully complied with the Act, it must prove that it has made each of the required items available in a timely and nondiscriminatory manner, not merely assert that it has done so or will do so in the future. To allow BellSouth to enter the interLATA market without such determination and performance evaluation criteria, it is certainly likely to lead to serious deterioration of a competitive market structure, both in the interLATA market as well as the local exchange market.

Q. **WHY MUST BELLSOUTH DEMONSTRATE THAT ITS DRAFT OF THE STATE OF GENERALLY AVAILABLE TERMS (SGAT) IS BOTH OPERATIONAL, IN A REAL TIME SENSE, AS WELL AS MEETING CERTAIN PERFORMANCE MEASUREMENTS BEFORE THE COMMISSION SHOULD CONSIDER A STATE OF COMPETITION IN THE LOCAL EXCHANGE MARKET AND FOR THE INTERLATA MARKET TO BE OPEN TO BELLSOUTH?**

A. If the local exchange market is not truly "open to competition," then premature entry by BellSouth into the interLATA market will surely erode the competitive market structure that is presently existing in the long-distance market which took over two decades

to develop. It is also likely to deter competition in the local exchange market. Given that BellSouth has a significant amount of monopoly power still in place in the local exchange market and if the competitive checklist is more a promise than a reality, then it will be very difficult, if not impossible, to halt BellSouth's exploitation of their anticompetitive potential.

Q. **WHAT ANTICOMPETITIVE POTENTIAL EXISTS IF BELLSOUTH IS PERMITTED TO ENTER INTO THE INTERLATA MARKET BEFORE A "TRUE STATE OF COMPETITION" EXISTS?**

A. Two undesirable consequences will follow. First, contrary to Mr. Varner's assertions (Page 60, Lines 1-3), incentives from monopoly leveraging in long-distance will emerge and competition in the interexchange market will be subsequently impaired. Second, also contrary to Mr. Varner's assertions (Page 53, Lines 17-18), once permitted into the interLATA market, BellSouth will have incentives to cease any efforts that may have been exhibited to date to treat interexchange carriers as customers who's interest they have no incentive to harm. Moreover, it is my understanding that this Commission has found it has no authority to award monetary damages if BellSouth breaches any terms of the

interconnect agreements, rendering the CLECs limited recourse.

Certainly BellSouth should view interexchange carriers as direct competitors that through a true competitive process they will seek to displace in the local exchange market. This is a normal desire to replace rivals (competitors) and is an inherent and typically healthy effect of competition. However, if BellSouth retains significant monopoly power in the local exchange market, this incentive to displace rivals is distorted and is likely to manifest itself in anticompetitive strategies. Under these circumstances, premature entry by BellSouth into the interLATA market while they still maintain significant monopoly power in the local exchange market will erode rather than promote competition, both in the interLATA market as well as in the local exchange market.

Q. **HOW OR WHY WOULD A PREMATURE ENTRY BY BELLSOUTH INTO THE INTERLATA MARKET CREATE ANTICOMPETITIVE POTENTIAL THROUGH MONOPOLY LEVERAGING OPPORTUNITIES?**

A. In the case of the telecommunications market, monopoly leveraging occurs when a firm (BellSouth) with significant monopoly power in one market (the local exchange market) is

able to extend that monopoly power into related markets (the interLATA market). The market conditions and the characteristics of BellSouth certainly suggest that not only do they have monopoly power in the local exchange market, but because of the complementary or vertical relationship among products, the presence of price or profit regulation in the leveraging market (local exchange market) and the firm's influence on pricing and/or investment decisions enhance the likelihood that they will and/or can engage in such monopoly leveraging. Also, in markets where consumers prefer to purchase a vertically related bundle of services from a single provider (e.g., the full array of telecommunications offerings from one company), conditions from monopoly leveraging are further enhanced. Without the local exchange market being truly open to "competition" via operational reality and performance criteria assuring quality of service, etc., this concept of the existence of a "state of competition" is simply that; a concept, not a market reality.

Q. **DOES THAT CONCLUDE YOUR TESTIMONY?**

A. Yes, it does.

EXHIBIT PLP-1

CURRICULUM VITA

PATRICIA L. PACEY, Ph.D.

6688 GUNPARK DRIVE, SUITE 200
BOULDER, CO 80301
(303) 530-5333

EDUCATION

PH.D. in Economics (*Human Resources/Industrial Organization/Econometrics/Taxation*)
University of Florida, 1976

B.A. in Mathematics, *cum laude*
University of Florida, 1971

PROFESSIONAL ACTIVITIES

Pacey Economics, Inc., Economic and Business Consultant

Provide economic evaluation of loss in personal injury and wrongful death matters for both plaintiffs and defendants, integrating issues of occupational mobility, labor force participation, age-earnings profiles, disabled workers in the labor market, etc. Incorporate the value of homemaker services given private and public surveys and specific family circumstances of the time contributions to such a household. Specify costs for additional medical care or services required of an injured party.

Provide analysis of employment termination matters for both plaintiffs and defendants, including statistical analysis of various employment practices as well as economic evaluation of damages. Prepare bar charts, graphs and other demonstrative tools. Developed computer macro models for more efficient analysis of multi-client claims.

Projects include valuing acquisitions and diversification as strategy. Examine the critical variables employed in financial techniques utilized in investment decisions. Utilize econometric modeling in the evaluation of optimal dividend payout policies and the identification of the underlying criteria associated with stock price variation. Provide reviews of academic literature and synthesize/ translate the implications for business use. Assess economic impact of specific events on local areas. Utilize economic principles to develop pricing policies and forecast market conditions.

Prepare evaluations of lost profits and/or other economic damages as they relate to specific business interruptions (breach of contract, defective product, etc.) for both plaintiffs and defendants. Identify economic indicators relevant to the specific industry business life cycle issues and economic environment which provides economic foundation and data for basis of assumptions utilized. Develop economic projects and often coordinate analysis with accounting firms.

Examine antitrust matters involved in identifying relevant markets, monopoly power and issues of corporate conduct as they relate to market performance. Develop necessary economic foundation and statistical support for assumptions regarding market performance (revenue levels, variable costs, profit margins, etc.) Integrate assumptions to determine economic damages and often team with national accounting firms to combine economic and accounting expertise.

potential competitors in local telecommunications markets the power to deny the BOC entry into the in-region interLATA market.[95]

30. As discussed below, on the basis of the record before us, we find that SBC has received, at the very least, several qualifying requests for access and interconnection that, if implemented, will satisfy the requirements of section 271(c)(1)(A). We therefore conclude that SBC, at this time, may not pursue in-region interLATA entry in Oklahoma under section 271(c)(1)(B).

2. Standard for Evaluating "Qualifying Requests"

31. Section 271(c)(1)(B) provides that a BOC meets the "requirements of [section 271(c)(1)(B)] if . . . no such provider has requested the access and interconnection described in [section 271(c)(1)(A)] . . . ."[96] The threshold question here is whether Congress has tied the availability of Track B to a request for access and interconnection from a carrier that is already competing in the local exchange market, as SBC contends, or whether Congress intended to preclude a BOC from proceeding under Track B upon its receipt of a request for access and interconnection from a prospective competing provider of the type of telephone exchange service described in section 271(c)(1)(A).[97] We find the most natural reading of the statute, and the only interpretation consistent with the statutory goal of facilitating competition in the local exchange market, is the latter interpretation.

32. According to SBC, "such provider" refers to an already operational facilities-based provider of telephone service to residential and business subscribers.[98] Thus, although it

---

[95] *See* U S West Apr. 28 Comments at 4, 6-7.

[96] 47 U.S.C. § 271(c)(1)(B).

[97] In support of its interpretation, SBC cites a floor statement from Congressman Tauzin indicating that the phrase "such provider" refers to the "exclusively" or "predominantly" facilities-based carrier described in the second sentence in Track A. SBC Brief in Support at 14; SBC Apr. 28 Comments at 14. *See also* Ameritech Apr. 28 Comments at 4; Bell Atlantic Apr. 28 Comments at 5; BellSouth Apr. 28 Comments at 3. In contrast, potential competitors contend that the phrase "such provider" refers to the unaffiliated competing provider described in the first sentence in section 271(c)(1)(A). Thus, according to potential competitors, the "such provider" need not be facilities-based at the time it makes a request for access and interconnection. *See* AT&T May 1 Comments at 18; CompTel Reply Comments at 6-7; MCI Apr. 28 Comments at 2; Sprint Apr. 28 Comments at 8-9. We find the issue of whether the phrase "no such provider" refers to the first or the second sentence in section 271(c)(1)(A) to be immaterial because, as discussed in detail below, the relevant question is whether "such provider" as used in section 271(c)(1)(B) refers to an already competing provider or a potential competing provider.

[98] *See* SBC Brief in Support at 14. *See also* Ameritech Apr. 28 Comments at 4; Bell Atlantic May 1 Comments at 9; BellSouth Apr. 28 Comments at 4.

has received at least 45 requests for "local interconnection and/or resale" in Oklahoma,[99] SBC claims that none of these requests, with the exception of the one from Brooks, is a qualifying request.[100] With respect to Brooks, SBC claims that Brooks' request was not a qualifying request when it was submitted in March 1996, but rather became a qualifying request on January 15, 1997, because on that date, according to SBC, Brooks became an operational facilities-based provider of telephone service to residential and business subscribers. Since this event occurred within three months of the filing of its section 271 application, however, SBC asserts that its application can proceed under Track B.

33. We find implausible SBC's assertion that Congress tied the availability of Track B to a request for access and interconnection from a carrier that was already competing in the local exchange market. Potential competitors usually request access and interconnection under section 251 in order *to become* operational.[101] Even if a competing provider has a fully redundant network, it would need interconnection from the BOC prior to becoming operational in order to complete calls to, and receive calls originating from, BOC customers. Indeed, SBC does not dispute that Brooks requested access and interconnection from SBC in March 1996 in order to be able to offer local exchange service in competition with SBC. In keeping with its interpretation of the words "such provider," however, SBC maintains that this request was not transformed into a qualifying request for purposes of Track B until ten months later, when SBC began providing access and interconnection to Brooks in January 1997. There is nothing in the text of the statute, or its legislative history, to suggest that a request for access and interconnection must be perfected at some unknown future date before it may become a qualifying request for the purposes of Track B. Nor does SBC provide any support for this assertion. We therefore find SBC's theory of a "post-dated" request to be without merit.

34. We conclude that Congress intended to preclude a BOC from proceeding under Track B when the BOC receives a request for access and interconnection from a prospective

---

[99] SBC Application, Appendix-Volume I, Tab 18 at 7, para. 13.

[100] As described above, SBC argues that, if the Commission does not find Brooks to be a qualifying carrier for purposes of section 271(c)(1)(A), then SBC may proceed under Track B. Even if the Commission does find Brooks to be a qualifying carrier for purposes of section 271(c)(1)(A), however, SBC asserts it is eligible for both Track A and Track B because Brooks' request was made within the three month statutory window under section 271(c)(1)(B).

[101] As we noted in the *Local Competition Order*, to become operational, all new entrants will require interconnection with a BOC in order to complete calls to BOC customers, and most will need access to unbundled network elements and other BOC facilities in order to begin offering service. *See Local Competition Order*, 11 FCC Rcd at 15509-10. *See also* AT&T Reply Comments at 24; CPI May 1 Comments at 9-10; Oklahoma AG Apr. 28 Comments at 7; TRA Apr. 28 Comments at 8. As discussed in detail below, SBC does propose hypothetical scenarios in which carriers would be operational carriers when they requested access and interconnection from the BOC. SBC does not suggest, however, that one of those scenarios is present in the instant proceeding.

competing provider of telephone exchange service, subject to the exceptions in section 271(c)(1)(B) discussed below.[102] Thus, we interpret the words "such provider" as used in section 271(c)(1)(B) to refer to a potential competing provider of the telephone exchange service described in section 271(c)(1)(A). We find it reasonable and consistent with the overall scheme of section 271 to interpret Congress' use of the words "such provider" in section 271(c)(1)(B) to include a potential competing provider. This interpretation is the more natural reading of the statute because, unlike SBC's strained interpretation, it retains the meaning of the term "request." By its terms, Track B only applies where "no such provider *has requested* the access and interconnection described in [section 271(c)(1)(A)]."[103] Under SBC's reading, however, Track B is available to a BOC if it is not already providing access and interconnection to competing carriers, no matter how many *requests* for access and interconnection the BOC has received. To give full effect to the term "request," we therefore interpret the words "such provider" to mean any such potential provider that has requested access and interconnection.

35. Indeed, we note that the phrase "competing provider" is commonly used to refer to both potential and actual competing providers. For example, in our *Local Competition Order*, we frequently referred to potential competitors of local exchange service as "competing providers" despite the fact that they were not yet actually offering service in competition with the incumbent LEC.[104] Similarly, in the instant proceeding, we note that SBC itself consistently uses the terms "competitors" and "CLECs" when referring to potential providers of local exchange service. For example, SBC refers to a "CLEC that wishes to provide local services in Oklahoma," "CLECs' decisions to postpone providing local telephone service," and "competitors [that] can make a business decision whether to enter the local exchange."[105]

36. SBC asserts that, if Congress had meant to refer in section 271(c)(1)(B) to any party *seeking to begin negotiations* for access and interconnection, it would have used the phrase "requesting telecommunications carrier" as it did in section 251(c), rather than the term

---

[102] *See infra* at para. 37.

[103] 47 U.S.C. § 271(c)(1)(B) (emphasis added). Indeed, we note that the caption of section 271(c)(1)(B) is entitled "Failure to Request Access." *See* Sprint Apr. 28 Comments at 11.

[104] *See, e.g., Local Competition Order*, 11 FCC Rcd at 15608, 15642, 15692, 15710, 15749, 15767, 15774, 16131, 16163.

[105] *See* SBC Brief in Support at 8; SBC Apr. 28 Comments at 18; SBC Reply Comments at 1; *see also* SBC Apr. 28 Comments at 17 ("Congress ensured that competitors could not strategically block interLATA entry by timing their interconnection requests or introduction of their local services."); SBC Brief in Support at 17 ("[SBC] has satisfied the checklist requirements . . . through its [Oklahoma Commission]-approved agreements with Brooks and other CLECs.") SBC Reply Comments at 14 ("When accepting competitors' allegations as proof of supposed misconduct by [SBC], DOJ never even acknowledges responses that the [Oklahoma Commission] found persuasive . . . .").

"such provider."[106] We find, however, that Congress' use of the phrase "requesting telecommunications carrier" in section 251 provides additional support for our interpretation. A "telecommunications carrier" is defined in section 3(44) of the Act as a "provider of telecommunications services . . . ."[107] Thus, read literally, a "requesting telecommunications carrier" in section 251 is a provider of telecommunications services that requests interconnection or access to unbundled elements. SBC, however, does not assert that the requesting telecommunications carrier in section 251 must be an operational provider of telecommunications services at the time it makes its request. To the contrary, SBC appears to agree that Congress used the term "requesting telecommunications carrier" to refer to a potential entrant seeking to begin negotiations for access and interconnection.[108] In the context of section 271, however, SBC inconsistently rejects the very same interpretation of "such provider" that it has conceded is correct with respect to the term "requesting telecommunications carrier" in the context of section 251. In our view, Congress used the term "requesting telecommunications carrier" in section 251 to refer to a *potential* telecommunications carrier that was requesting access and interconnection and, in the same fashion, used the term "such provider" in section 271(c)(1)(B) to refer to a potential provider that "has requested the access and interconnection [described in section 271(c)(1)(A)]." In fact, to have used the adjective "requesting" before the noun "provider" in section 271(c)(1)(B) would have been superfluous because the sentence already incorporates the concept of a requesting provider by using the verb "requested."

37. Similarly, we find that SBC's interpretation of this provision effectively reads the exceptions in section 271(c)(1)(B) out of the statute. The exceptions provide that the BOC "shall be considered not to have received any request for access and interconnection" if the applicable state regulatory commission certifies that the provider making the request fails to negotiate in good faith or fails to comply, within a reasonable time, with the implementation schedule set forth in the interconnection agreement.[109] These exceptions ensure that, if, after a request for access and interconnection, facilities-based competition does not emerge because

---

[106] SBC Reply Comments at 5 n.10.

[107] 47 U.S.C. § 153(44).

[108] SBC Reply Comments at 5 n.10.

[109] *See* 47 U.S.C. § 271(c)(1)(B). BOCs are free to negotiate implementation schedules for their interconnection agreements. In the *Local Competition Order*, we declined to impose a "bona fide request" process on requesting carriers. We found that incumbent LECs may not require requesting carriers, *as a condition to begin negotiations*, to commit to purchase services or facilities for a specified period of time. *Local Competition Order*, 11 FCC Rcd at 15578. We concluded that forcing carriers to make such a commitment before critical terms, such as price, have been resolved would be likely to impede new entry. We note, however, that nothing in the Commission's rules precludes incumbent LECs from negotiating, or states from imposing in arbitration, schedules for the implementation of the terms and conditions by the parties to the agreement. *See also* 47 U.S.C. § 252(c)(3).

the potential competitor fails either to bargain in good faith or to implement its interconnection agreement according to a negotiated or arbitrated schedule, Track B would become available to the BOC. Such certifications by a state commission, in effect, would amount to a determination that the BOC had not received a qualifying request. Under SBC's theory of a "post-dated" request, a qualifying request that forecloses Track B would occur only after the initial request has resulted in a negotiated and implemented interconnection agreement with the BOC. Consequently, there would be virtually no need for exceptions that make Track B available in the event of bad faith negotiations or failure to comply with an implementation schedule.

38. SBC only identifies two scenarios, neither of which is present here, where the exceptions in section 271(c)(1)(B) might come into play under its interpretation: (1) where a competing LEC that is already providing facilities-based telephone exchange service completely over its own network requests access and interconnection from the BOC; or (2) where a competing LEC that has obtained an interconnection agreement prior to the 1996 Act makes such a request.[110] SBC asserts that the exceptions in section 271(c)(1)(B) exist to ensure that a qualifying carrier (i.e., an already competing provider) "cannot foreclose interLATA entry by requesting, but then failing to negotiate or implement, an agreement."[111] As described below, however, we find that these scenarios are extremely rare.[112] It seems implausible that Congress would have created the exceptions in section 271(c)(1)(B) to apply to circumstances that would almost never arise. We conclude therefore that adhering to SBC's interpretation would virtually strip these exceptions of their meaning.

39. We also find unpersuasive the few passages of legislative history on which SBC relies in support of its argument that "such provider" in section 271(c)(1)(B) refers to an operational competing provider. For example, SBC relies on references in the Joint Explanatory Statement to a "qualifying facilities-based competitor," and a "facilities-based competitor that meets the criteria set out in [section 271(c)(1)(A) that] has sought to enter the market."[113] Notably, this latter reference to the Joint Explanatory Statement equally supports our interpretation of "such provider" because it refers to a carrier that "has sought to enter the market."

40. In addition, SBC relies on a floor statement indicating that the phrase "such provider" refers to the facilities-based provider described in the second sentence of section

---

[110] *See* SBC Apr. 28 Comments at 16-17.

[111] *Id.* at 15.

[112] *See infra* paras. 48-53.

[113] *See* SBC Apr. 28 Comments at 14 & n.24 (citing Joint Explanatory Statement at 148); *see also* SBC Reply Comments at 5 (citing Joint Explanatory Statement at 147).

271(c)(1)(A).[114] SBC also cites a floor statement stating that a BOC may pursue entry under Track B if it has not received "any request for access and interconnection from a facilities-based carrier that meets the criteria in section 271(c)(1)(A)."[115] We decline to attach the weight to these and other citations to the legislative history that SBC assigns because other passages in the legislative history refer to "would-be" or "potential" competitors. These passages indicate that Congress assumed carriers would not yet be operational competitors when they requested the access and interconnection arrangements necessary to enable them to compete.[116] For example, as discussed below,[117] the Conference Committee emphasized the importance of "*potential* competitors" having the benefit of the Commission's rules implementing section 251.[118] In addition, the House Commerce Committee indicated that Track B would not create an "unreasonable burden on a *would-be* competitor" to request access and interconnection under section 271(c)(1)(A).[119] SBC cites no support for its contention that this language "simply reflects a belief that [competing LECs] would be full competitors in the local market only after they implement interconnection agreements under section 251."[120]

41. Contrary to SBC's claim that its reading of section 271 is supported by legislative history, we conclude that the legislative history surrounding section 271(c)(1)(A) establishes that, consistent with its goal of developing competition, Congress intended Track A to be the primary vehicle for BOC entry in section 271. As discussed below, by tying BOC in-region, interLATA entry to the development of local competition in this manner, Congress expected that there would be a "ramp-up" period during which requests from potential competitors would preclude BOCs from applying under Track B while requesting carriers are in the process of becoming operational competitors. We find, therefore, that the statutory scheme established by Congress supports our conclusion that the term "such provider" in

---

[114] *See* SBC Brief in Support at 14 (citing 141 Cong. Rec. H8425, H8458 (daily ed. Aug. 4, 1995) (statement of Rep. Tauzin)).

[115] *See* SBC Apr. 28 Comments at 14 & n.25 (citing 142 Cong. Rec. H1152 (daily ed. Feb. 1, 1996) (statement of Rep. Hastert)).

[116] *See* Department of Justice Evaluation at 16; AT&T Reply Comments at 24-25.

[117] *See infra* at para. 43.

[118] *See* Joint Explanatory Statement at 148-49 (emphasis added).

[119] *See* H.R. Rep. No. 204, 104th Cong., 1st Sess., pt. 1, at 77-78 (emphasis added) (House Report).

[120] SBC Reply Comments at 6 n.11.

section 271(c)(1)(B) refers to a potential competitor that is seeking access and interconnection in order to enter the local exchange market.[121]

42. That Congress intended BOCs to obtain approval to enter their in-region interLATA markets primarily by satisfying the requirements of section 271(c)(1)(A) is evidenced not only by the stated purpose of the 1996 Act which was to "open[ ] all telecommunications markets to competition,"[122] but also by statements in the Report of the House Commerce Committee.[123] These statements are particularly relevant because the text of section 271(c)(1) was adopted almost verbatim from the House bill.[124] The House Committee Report states that the existence of a facilities-based competitor that is providing service to residential and business subscribers "is the integral requirement of the checklist, in that it is the tangible affirmation that the local exchange is indeed open to competition."[125] Moreover, that Report observes that "the Committee expects the Commission to determine that a competitive alternative is operational and offering a competitive service somewhere in the State prior to granting a BOC's petition for entry into long distance."[126] Thus, we find that Congress regarded the presence of one or more operational competitors in a BOC's service area as the most reliable evidence that the BOC's local markets are, in fact, open to competitive entry.[127]

43. At the same time, Congress, by intending Track A to be the primary entry vehicle, understood that there would be some delay between the passage of the 1996 Act and actual entry by facilities-based carriers into the local market.[128] For example, it expressly

---

[121] *See* TRA Apr. 28 Comments at 8 (contending that Track B's reference to a "provider" describes a potential facilities-based competitor seeking entry into the local exchange market through network access and interconnection); TRA May 1 comments at 14-15; WorldCom Apr. 28 Comments at 8-9.

[122] Joint Explanatory Statement at 1.

[123] *See, e.g.*, ALTS Motion at 6-7; CompTel Apr. 28 Comments at 3-4; NCTA May 1 Comments at 7 n. 12; Sprint Apr. 28 Comments at 5.

[124] The Conference Committee expressly adopted the language contained in section 271(c)(1) from the House bill. *See* Joint Explanatory Statement at 147 (stating that the "test that the conference agreement adopts comes virtually verbatim from the House amendment").

[125] House Report at 76-77.

[126] *Id.* at 77.

[127] *See* CompTel Apr. 28 Comments at 3.

[128] *See* Department of Justice Evaluation at 10; Sprint Apr. 28 Comments at 9; Time Warner May 1 Comments at 10-11. Congress' expectation that section 271 relief may take some time is also evidenced by section 271(e)(1) which states that the joint marketing restriction applicable to larger interexchange carriers would

recognized that it would take time for competitors to construct or upgrade networks and then to extend service offerings to residential and business subscribers.[129] As the Joint Explanatory Statement observes, "it is unlikely that competitors will have a fully redundant network in place when they initially offer service, because the investment necessary is so significant."[130] Rather, as many commenters recognize, because potential competitors must accomplish a number of things before they may begin to provide telephone exchange service, such as obtaining a certificate of convenience and necessity from the state commission, negotiating (and arbitrating, if necessary) an interconnection agreement with the BOC, obtaining state approval of that agreement, filing and obtaining approval of a tariff for local exchange service, and implementing their interconnection agreement, it will inevitably take some time before these carriers can actually begin to provide telephone exchange service.[131] Congress' recognition that this transformation to operational status would not be an instantaneous one is evidenced by the Joint Explanatory Statement's observation that, "it is important that the Commission rules to implement new section 251 be promulgated within 6 months after the date of enactment so that *potential* competitors will have the benefit of being informed of the Commission rules in requesting access and interconnection before the statutory window in new section 271(c)(1)(B) shuts."[132]

44. That Congress expected there to be a "ramp-up" period for requesting carriers to become operational competitors is further evidenced by section 251 itself. In adopting section 251, Congress acknowledged that the development of competition in local exchange markets is dependent, to a large extent, on the opening of the BOCs' networks.[133] Under section 251, incumbent LECs, including BOCs, are required to take certain steps to open their networks including "providing interconnection, offering access to unbundled elements of their networks, and making their retail services available at wholesale rates so that they can be resold."[134] Our rules implementing section 251 envisioned that incumbent LECs would need

---

expire once a BOC "is authorized . . . to provide interLATA services in an in-region State, or [once] 36 months have passed since the date of enactment of the Telecommunications Act of 1996, *whichever is earlier.*" *See* 47 U.S.C. § 271(e)(1) (emphasis added); Sprint Apr. 28 Comments at 10-11 n. 9.

[129] *See* Sprint Apr. 28 Comments at 9-10.

[130] Joint Explanatory Statement at 148.

[131] Department of Justice Evaluation at 13; CPI Apr. 28 Comments at 8; MCI Reply Comments at 4-5; WorldCom Apr. 28 Comments at 11.

[132] Joint Explanatory Statement at 148-49 (emphasis added).

[133] As the Department of Justice observes, a "fundamental premise of the 1996 Act is that the development of local exchange competition will require opening up the possibilities for access and interconnection to the BOC's local network." Department of Justice Evaluation at 10.

[134] *Local Competition Order*, 11 FCC Rcd at 15506.

some time to complete these necessary steps. For example, in the *Local Competition Order*, we stated that incumbent LECs must have made modifications to their operational support systems (OSS) necessary to provide access to OSS functions by January 1, 1997.[135] Moreover, in the *Second Order on Reconsideration*, we declared that we would not take enforcement action against incumbent LECs "making good faith efforts to provide . . . access [to OSS functions]."[136] In reaching these conclusions, we recognized that some incumbent LECs would require some time before they would be able to provide potential competitors access to their OSS.

45. Moreover, we find that the very language of section 271(c)(1)(B) confirms that Congress envisioned the existence of a "ramp-up" period.[137] The exceptions in section 271(c)(1)(B) are indicative of Congress' recognition that there would be a period during which good-faith negotiations are taking place, interconnection agreements are being reached, and the potential competitors are becoming operational by implementing their agreements.[138] By delineating the circumstances under which Track B becomes available to the BOC, Congress must have understood that there would often be some time when Track B is unavailable, but the BOC has not yet satisfied the requirements of section 271(c)(1)(A).[139] This would not be the case, however, under SBC's theory that only a request for access and interconnection from an operational facilities-based provider will foreclose Track B.

46. Further, as a matter of policy, we find that our interpretation of "such provider" is consistent with the incentives established by Congress in section 271. In order to gain entry under Track A, a BOC must demonstrate that it has "fully implemented" the competitive checklist in section 271(c)(2)(B).[140] Thus, by expecting Track A to be the primary means of BOC entry, Congress created an incentive for BOCs to cooperate with potential competitors in the provision of access and interconnection and thereby facilitate competition in local exchange

---

[135] *Id.* at 15767-68.

[136] *Local Competition Order, Second Order on Reconsideration*, CC Docket No. 96-98, FCC 96-476 at para. 11 (rel. Dec. 13, 1996).

[137] Dobson Apr. 28 Comments at 3 (asserting that the language of section 271(c)(1)(B) confirms that Congress envisioned the existence of a hiatus during which pending requests would preclude BOCs from applying under Track B even though the requesting carriers are not yet operational); WorldCom Apr. 28 Comments at 11-12.

[138] *See* 47 U.S.C. § 271(c)(1)(B). *See also* Brooks Apr. 28 Comments at 5-6; Dobson Apr. 28 Comments at 3; WorldCom Apr. 28 Comments at 11-12.

[139] *See* Cox May 1 Comments at 7 n. 9 (stating that the exceptions in section 271(c)(1)(B) demonstrate that Congress understood there would be a lag between requesting interconnection and providing service, and that it did not intend for normal delays to permit BOCs to jump to Track B).

[140] 47 U.S.C. § 271(d)(3)(A)(i).

markets. In contrast, Track B, which requires only that a BOC "offer[ ]" the items included in the competitive checklist, does not contemplate the existence of competitive local entry and, therefore, does not create such an incentive for cooperation.[141] Rather, as discussed more fully below, Congress intended Track B to serve as a limited exception to the Track A requirement of operational competition so that BOCs would not be unfairly penalized in the event that potential competitors do not come forward to request access and interconnection, or attempt to "game" the negotiation or implementation process in an effort to deny the BOCs in-region interLATA entry.[142]

47. In addition, if we were to find that only a request from an operational competing facilities-based provider of residential and business service forecloses Track B, this would guarantee that, after ten months, the BOC either satisfies the requirements of section 271(c)(1)(A) or is eligible for Track B.[143] As the Department of Justice asserts, "[s]uch an interpretation of [s]ection 271 would radically alter Congress' scheme, [by] expanding Track B far beyond its purpose and, for all practical purposes, reading the carefully crafted requirement of Track A out of the statute."[144] For example, under SBC's theory, either a BOC has received a "qualifying request" from a carrier that already satisfies the requirements of section 271(c)(1)(A), or the BOC may proceed under Track B.[145] SBC advocates an interpretation of the statute where the circumstances under which a competing provider may make a "qualifying request" would be so rare that, after December 8, 1996, Track B would be available in any state that lacks a competing provider of the type of telephone exchange service to residential and business subscribers described in section 271(c)(1)(A).[146] As WorldCom

---

[141] *Id.* § 271(d)(3)(A)(ii).

[142] *See infra* at para. 55. *See also* CompTel Apr. 28 Comments at 3; Department of Justice Evaluation at 11; Sprint Apr. 28 Comments at 10-11; TRA Apr. 28 Comments at 4-5.

[143] Or, as SBC alleges in the instant case, a BOC would be eligible to proceed under both Track A and Track B if the qualifying request was made within the three months prior to the filing of the BOC's section 271 application. We recognize, of course, that in order to be eligible for Track B a BOC must also have a statement of generally available terms and conditions that has been approved or permitted to take effect by the applicable state commission. *See* 47 U.S.C. § 271(c)(1)(B).

[144] Department of Justice Evaluation at 13.

[145] *See* MCI Apr. 28 Comments at 3 (claiming that, under SBC's interpretation, Track B would only apply when no facilities-based provider that already has an access and interconnection agreement requests such an agreement); NCTA May 1 Comments at 7 (stating that SBC construes the statute so that after ten months Track B would virtually always apply unless a competitor who already qualifies as a facilities-based competitor to residential and business subscribers requests access three months before the BOC files).

[146] *See* Cox Reply Comments at 16 (asserting that, if the BOCs really believed Track B became available if no operational competing provider requested access and interconnection prior to September 8, 1996, they would have filed their statements of generally available terms by the middle of 1996 and applied for in-region.

maintains, this would lead to the illogical result that BOCs that successfully delay or prevent entry into their local markets by new entrants that have requested access and interconnection under section 251 would be rewarded by being granted the right to pursue in-region interLATA entry through Track B.[147] As a consequence, BOC in-region interLATA entry would, in most states, precede the introduction of local competition.[148] We find it unlikely that Congress intended to eviscerate Track A in this manner. As the Department of Justice contends, there is "no basis for the assumption that Congress intended Track A, the only track included in the bill as originally passed by the Senate, to play such an insignificant role."[149]

48. In addition to its notion of a "post-dated" request, SBC sets forth two other hypothetical scenarios in which the BOC could receive a "qualifying request" from an already operational carrier that forecloses Track B.[150] Although SBC does not argue that either of these hypothetical situations is present here, we briefly describe them to illustrate their limited application. Under one scenario, SBC argues that it could receive a request for access and interconnection from a competing LEC that is already providing facilities-based telephone exchange service to residential and business customers completely over its own network. Alternatively, SBC maintains it could receive a request for access and interconnection from a competing LEC that had negotiated an interconnection agreement prior to the 1996 Act.[151]

49. As an initial matter, we note that SBC appears to set forth a reading of the word "request" in these hypothetical scenarios that is different from the one it uses in characterizing Brooks' request for access and interconnection in the instant application. SBC appears to assert that, for the purposes of the hypothetical scenarios, whether a request for access and interconnection constitutes a qualifying request is determined at the time the request is made. For the purposes of the case at hand, however, SBC claims that Brooks' request for access and interconnection was not qualifying at the time it was made, but subsequently became a qualifying request when Brooks became operational. SBC fails to explain how the

---

interLATA entry on December 8, 1996).

[147] WorldCom Apr. 28 Comments at 13-14; WorldCom May 1 Comments at 20-21; Department of Justice Evaluation at 13 (stating that, if SBC's interpretation of Track B were correct, Track B would no longer be a limited exception applicable where a BOC would otherwise be foreclosed indefinitely from entry into in-region interLATA markets). *See also* AT&T May 1 Comments at 18; NCTA May 1 Comments at 7 (stating that SBC's interpretation of section 271(c)(1)(B) nullifies Track A agreements as a means of stimulating local competition).

[148] WorldCom Reply Comments at 7; TRA Reply Comments at 11-12.

[149] Department of Justice Evaluation at 14. *See also* MCI Reply Comments at 4.

[150] SBC Apr. 28 Comments at 16-17. *See also* BellSouth Apr. 28 Comments at 4-5.

[151] SBC Apr. 28 Comments at 16-17 (citing 142 Cong. Rec. S713 (daily ed. Feb. 1, 1996) (statement of Sen. Breaux)); BellSouth Apr. 28 Comments at 4-5.

meaning of the statutory term "request" can vary according to the operational status of the requestor.

50. In addition, we agree with the Department of Justice that it is implausible that Congress would have adopted Track A solely to deal with situations of such narrowly limited significance as SBC poses in its hypotheticals.[152] SBC's first scenario assumes the presence of a carrier, prior to the 1996 Act, with a completely duplicative, ubiquitous network that provided telephone exchange service to residential and business subscribers in competition with a BOC, but did not yet have an access and interconnection agreement with the BOC.[153] We know of no such carrier.[154] Indeed, the legislative history of the Act reflects Congress' recognition that the existence of such facilities-based competition in local markets in February 1996 was improbable.[155] Similarly, the second scenario assumes the presence of either a facilities-based competing LEC that provided telephone exchange service to both residential and business subscribers under a pre-1996 Act interconnection agreement or a facilities-based competing LEC with a pre-1996 Act interconnection agreement that would be capable of providing such service within the statutory window in section 271(c)(1)(B). If there were such interconnection agreements in place between a BOC and a competing LEC operating within a BOC's service area, we do not know of them.[156]

51. Notably, SBC's primary support for the second scenario is the Joint Explanatory Statement's reference to an interconnection agreement between New York

---

[152] Department of Justice Evaluation at 14.

[153] *See* Oklahoma AG Apr. 28 Comments at 7. As noted above, such a carrier would presumably require interconnection with the BOC if its customers completed calls to, or received originating calls from, BOC customers. *See supra* at para. 33.

[154] Significantly, the Department of Justice asserts that it "is not aware of any provider other than the [incumbent LECs] that had a significant facilities-based telephone local exchange network of its own in the United States, sufficiently ubiquitous to dispense with interconnection with the BOCs, before the 1996 Act was passed." Department of Justice Evaluation at 15 n. 20. *See also* AT&T Reply Comments at 23. We note that neither SBC nor any other commenter has provided any examples of such carriers.

[155] *See* Joint Explanatory Statement at 148 ("it is unlikely that competitors will have a fully redundant network in place when they initially offer local service . . . .").

[156] Although in an *ex parte* statement, SBC cites examples of "facilities-based cable-telephone services being provided or tested during consideration of the [1996 Act]," it is unclear from SBC's representation whether these potential competitors were providing, or planning to provide, telephone exchange service in a BOC's service area *pursuant to a pre 1996-Act interconnection agreement* or, alternatively, whether the new entrants still had to negotiate and execute such agreements. *See* Letter from Dale Robertson, Senior Vice President, SBC, to William F. Caton, Acting Secretary, FCC at 2 (June 24, 1996) (SBC June 24 *Ex Parte*).

Telephone and Cablevision in Long Island, NY.[157] We disagree with SBC that this reference demonstrates that "Congress was aware that, in various markets throughout the country, cable companies and competitive access providers had negotiated interconnection agreements with incumbent LECs prior to the 1996 Act."[158] As the Department of Justice observes, a single reference to only one pre-1996 Act interconnection agreement between an incumbent LEC and a facilities-based provider does not establish that Congress expected such situations to be common.[159] Indeed, it is not obvious from this reference in the legislative history whether Cablevision either actually provided telephone exchange service to both residential and business subscribers on the date of enactment or intended to do so in the future.[160] Based on its experience with the implementation of the 1996 Act nationwide, the Department of Justice notes that only a small minority of states had any local exchange competition before the 1996 Act was passed, and very few providers had become operational.[161] Moreover, the very passage of the 1996 Act -- which was designed to remove impediments to local entry -- indicates that Congress believed that the degree of local telephone competition and interconnection prior to the passage of the 1996 Act was unsatisfactory.

52. Even if there were such facilities-based carriers with pre-1996 Act interconnection agreements, we find that SBC's interpretation would greatly undermine the very incentives that Congress sought to establish in section 271. As mentioned above, section 271 and, in particular, Track A, was established to provide an incentive for BOCs to cooperate in the development of local competition. Under SBC's interpretation of the statute, the BOCs' only incentive would be to cooperate with operational carriers that are already receiving access and interconnection. We find that the incentive to cooperate established by Track A is not limited to only those carriers that are already operational, but instead was designed to ensure that BOCs facilitate the entry of a larger and more significant class of carriers -- *potential* competitors requesting access and interconnection. It would be anomalous for Congress to

---

[157] *See id.*

[158] SBC Apr. 28 Comments at 16.

[159] Department of Justice Evaluation at 15 n.19. *See also* WorldCom Reply Comments at 6-7.

[160] *But see* SBC June 24 *Ex Parte*, Attachment at 1-2 (asserting that by December 1995 "Cablevision had 175 business customers and was preparing to offer residential service on a commercial basis").

[161] Department of Justice Evaluation at 15 n.19. According to the Commission's Common Carrier Competition Report, as of March 21, 1996, competing LECs were operational in only five states. "New competitors [were] small and [were] still experimenting in the market." Common Carrier Competition, CC Report No. 96-9, FCC, Common Carrier Bureau, Spring 1996 at 3-4 (Common Carrier Competition Report). *See also* TRA Reply Comments at 10-11. SBC itself points to only ten potential competitors in five states, one of which is Cablevision, that were planning, testing, or providing telephony services on a limited scale prior to the passage of the 1996 Act. Of these potential competitors, it appears that most of them were merely in the planning or testing stage when the 1996 Act was passed. *See* SBC June 24 *Ex Parte*, Attachment at 1-2.

have adopted Track A solely to provide an incentive to BOCs to cooperate with already competing providers, which do not require the BOCs' cooperation in order to become operational.

53. We note that, if such a competing LEC was not already providing the type of telephone exchange service described in section 271(c)(1)(A) at the time of passage of the 1996 Act and if it chose to obtain a new agreement pursuant to section 252, it would have to engage in negotiations with the BOC, reach an interconnection agreement, obtain state approval of this interconnection agreement under section 252(e)(4),[162] and then begin providing the type of telephone exchange service to residential and business subscribers described in section 271(c)(1)(A) before its request for access and interconnection could be considered qualifying under SBC's interpretation of section 271(c)(1)(B). As the Department of Justice recognizes, in order for the BOC to be precluded from filing under Track B, the competing LEC would have to complete all of this in the first seven months after the date of enactment.[163] Not only is this unlikely, but this scenario assumes that the BOC would be inclined to cooperate with the competing LEC, reach a negotiated agreement quickly, and proceed under the more rigorous Track A standard, rather than attempt to delay the advent of competition by forcing competing LECs to resort to arbitration until Track B becomes available. Under SBC's interpretation, given the nine-month arbitration deadlines established in section 252(b)(4)(C), a BOC could virtually guarantee its eligibility under Track B by placing all carrier negotiations in arbitration.[164] It seems, therefore, that few, if any, potential competitors would be in a position, under this interpretation, to make a "qualifying request" for access and interconnection before a BOC would become eligible to pursue Track B.[165]

54. Although we reject SBC's interpretation of "qualifying request," we also reject the interpretation of those parties who argue that *any* request from a potential competitor forecloses Track B. As the Department of Justice observes, the term "such provider" in section 271(c)(1)(B) should be interpreted with reference to the type of facilities-based

---

[162] Under this section, the state commission has up to 90 days to approve or reject an interconnection agreement. *See* 47 U.S.C. § 252(e)(4).

[163] *See* Department of Justice Evaluation at 14. Pursuant to section 271(c)(1)(B), in order for a BOC to file an application under Track B as soon as it became available, on December 8, 1996, it must not have received a qualifying request prior to September 8, 1996.

[164] 47 U.S.C. § 252(b)(4)(C). *See* Sprint Apr. 28 Comments at 11-12 n.10. *See also* Cox Reply Comments at 15-16. We also note that, after the parties reach an arbitrated agreement, it must be submitted to the applicable state commission for approval. Under section 252(e)(4), the state commission has 30 days in which to approve or deny it. 47 U.S.C. § 252(e)(4).

[165] *See* Department of Justice Evaluation at 14.

competition that would satisfy the requirements of section 271(c)(1)(A).[166] Accordingly, we conclude that the request from a potential competitor must be one that, *if implemented*, will satisfy section 271(c)(1)(A).[167] That is, we find that a "qualifying request" must be one for access and interconnection to provide the type of telephone exchange service to residential and business subscribers described in section 271(c)(1)(A). To find otherwise would not only be contrary to the explicit terms of section 271(c)(1)(B), which states that only a request for "the access and interconnection described in [section 271(c)(1)(A]" can foreclose Track B,[168] but would lead to anomalous results. For example, allowing *any* type of request for negotiation to foreclose Track B could lead to a situation where a BOC is foreclosed from pursuing Track B because there has been a request for negotiation, even though such a request, when implemented, may not satisfy the requirements of section 271(c)(1)(A). As Ameritech observes, under this interpretation, if a BOC receives a request for access and interconnection from a would-be facilities-based provider of telephone exchange service to business, but not residential, subscribers, Track B would be foreclosed, but the BOC would not be able to satisfy section 271(c)(1)(A) because it would not be able to show that residential subscribers are served by a competing provider. Such a result may place a BOC indefinitely in a "no-man's land" where, in effect, neither Track A nor Track B is available to it.[169]

55. According to its legislative history, Track B was adopted by Congress to deal with the possibility that a BOC, through no fault of its own, could find that it is unable to satisfy Track A.[170] The Joint Explanatory Statement explains that section 271(c)(1)(B) is "intended to ensure that a BOC is not effectively prevented from seeking entry into the interLATA services market simply because no facilities-based competitor that meets the criteria set out in new section 271(c)(1)(A) has sought to enter the market."[171] Similarly, the House Committee Report elaborates that, to "the extent that a BOC does not receive a request from a competitor that comports with the criteria [described in section 271(c)(1)(A)], it

---

[166] *Id.* at 12.

[167] *See* LCI Apr. 28 Comments at 6 (stating that SBC's agreement with Brooks "was of the type that once implemented, would provide [SBC] with the basis for seeking approval under Track A.").

[168] 47 U.S.C. § 271(c)(1)(B).

[169] *See also* Department of Justice Evaluation at 11. This assumes, of course, that the BOC is not able to show that the requesting provider failed to negotiate in good faith or violated the terms of the interconnection agreement by failing to comply, within a reasonable period of time, with its implementation schedule. *See* 47 U.S.C. § 271(c)(1)(B).

[170] Department of Justice Evaluation at 12.

[171] Joint Explanatory Statement at 148.

[should] not [be] penalized in terms of its ability to obtain long distance relief."[172] In this manner, Track B appropriately safeguards the BOCs' interests where there is no prospect of local exchange competition that will satisfy the requirements of section 271(c)(1)(A) or in the event competitors purposefully delay entry in the local market in an attempt to prevent a BOC from gaining in-region, interLATA entry.[173] As the Department of Justice observes, however, "Track B does not represent congressional abandonment of the fundamental principle, carefully set forth in Track A, that a BOC may not begin providing in-region interLATA services before there are facilities-based competitors in the local exchange market," provided these competitors are moving toward that goal in a timely fashion.[174]

56. Thus, while SBC's interpretation would ensure that after ten months a BOC either satisfies the requirements of section 271(c)(1)(A) or is eligible to proceed under Track B, the interpretation of the potential competitors could create a situation where the BOC may not be able to pursue either statutory avenue for interLATA relief. In essence, while SBC's interpretation effectively nullifies Track A, the potential competitors' interpretation effectively nullifies Track B. We are keenly aware that adopting the interpretation urged by the potential competitors would necessarily foreclose Track B entry in any state in which a potential competitor has made a request for access and interconnection, regardless whether it is a request that will ever lead to the type of telephone exchange service described in section 271(c)(1)(A).[175] We find that permitting *any* request to foreclose Track B would give potential competitors an incentive to "game" the section 271 process by purposefully requesting interconnection that does not meet the requirements of section 271(c)(1)(A), but prevents the BOCs from using Track B.[176] Such a result would effectively give competing LECs the power to deny BOC entry into the long distance market. This is surely not the result that Congress intended in adopting Track B.

57. We recognize, as several parties point out, that the standard we are adopting will require the Commission, in some cases, to engage in a difficult predictive judgment to determine whether a potential competitor's request will lead to the type of telephone exchange

---

[172] House Report at 77.

[173] Department of Justice Evaluation at 17.

[174] *Id.* at 17-18.

[175] We note that Track B would become available if either of the two exceptions in section 271(c)(1)(B) were applicable. *See also* BellSouth Apr. 28 Comments at 5 (maintaining that adoption of ALTS's "misreading" of section 271(c)(1) would nullify Track B entry).

[176] Ameritech Apr. 28 Comments at 5 n. 3; Bell Atlantic Apr. 28 Comments at 8 (stating that the approach advocated by ALTS would place BOCs at the mercy of their competitors); NYNEX Apr. 28 Comments at 6; U S West Apr. 28 Comments at 5-6.

service described in section 271(c)(1)(A).[177] As discussed above, however, we find that this type of judgment is required by the terms of section 271 and is consistent with the statutory scheme envisioned by Congress. The standard we adopt in this Order is designed to take into account both the BOCs' incentive to delay fulfillment of requests for access and interconnection and the incentive of potential local exchange competitors to delay the BOCs' entry into in-region interLATA services. Upon receipt of a "qualifying request," as we interpret it, the BOC will have an incentive to ensure that the potential competitor's request is quickly fulfilled so that the BOC may pursue entry under Track A.[178] As long as the qualifying request remains unsatisfied, the requirements of section 271(c)(1)(A) would remain unsatisfied, and Track B would remain foreclosed to the BOC.

58. Further, our standard will not allow potential competitors to delay indefinitely BOC entry by failing to provide the type of telephone exchange service described in Track A. Indeed, in some circumstances, there may be a basis for revisiting our decision that Track B is foreclosed in a particular state. For example, if following such a determination a BOC refiles its section 271 application, we may reevaluate whether it is entitled to proceed under Track B in the event relevant facts demonstrate that none of its potential competitors is taking reasonable steps toward implementing its request in a fashion that will satisfy section 271(c)(1)(A). In addition, as discussed above, the exceptions in section 271(c)(1)(B) provide that a BOC will not be deemed to have received a qualifying request if the applicable state commission certifies that the requesting carrier has failed to negotiate in good faith or failed to abide by its implementation schedule. In this manner, these exceptions also provide BOCs a means of protecting themselves against any feared "gamesmanship" on the part of potential competitors, such as the submission of sham requests intended solely to preclude BOC entry. We therefore disagree with Bell Atlantic that our standard will leave the BOCs "hostage to the claims of competitors."[179] Moreover, for the reasons set forth above, we disagree with CPI that concerns about gamesmanship are misplaced.[180] Finally, we note that the Commission is called upon in many contexts to make difficult determinations and has the statutory mandate to

---

[177] CPI Reply Comments at 3; *see also* Bell Atlantic Apr. 28 Comments at 7; BellSouth Apr. 28 Comments at 4; SBC Reply Comments at 6 & Appendix A at 14 n.6.

[178] Thus, as the Department of Justice observes, properly construed, "the statute serves Congress' procompetitive purposes by affording the BOC a strong incentive to cooperate as would-be facilities-based competitors attempt to negotiate agreements and become operational." Department of Justice Evaluation at 17.

[179] *See* Bell Atlantic Reply Comments at 4.

[180] *See supra* at para. 56; CPI Reply Comments at 4-5 (asserting that the assumption that competitors would game the regulatory process in order to prevent BOC entry into long distance does not make economic or marketplace sense).

do so.[181] The fact that a determination, such as the one we must make here, may be complex does not mean the Commission may avoid its statutory duty to undertake it.

59. We also reject NYNEX's argument that Track B is available in any situation where one or more facilities-based providers, as described in section 271(c)(1)(A), have not requested interconnection agreements that include all fourteen items of the competitive checklist.[182] By its terms, Track B is only available in the event the BOC fails to receive a qualifying request for the access and interconnection "described in [section 271(c)(1)(A)]." As discussed above, we have determined that a qualifying request is a request from a potential competitor that, if implemented, will satisfy the requirements of section 271(c)(1)(A). Pursuant to section 271(c)(1)(B), a BOC shall not be considered to have received a qualifying request if the requesting carrier fails to negotiate in good faith or does not abide by the implementation schedule contained in its agreement.[183] We find that section 271(c)(1) and the competitive checklist in section 271(c)(2)(B) establish independent requirements that must be satisfied by a BOC applicant. Thus, the fact that a BOC has received a request for access and interconnection that, if implemented, will satisfy section 271(c)(1)(A), does not mean that the interconnection agreement, when implemented, will necessarily satisfy the competitive checklist. Similarly, we find nothing in the terms of section 271(c)(1)(A) or section 271(c)(1)(B) that suggest that a qualifying request for access and interconnection must be one that contains all fourteen items in the checklist. In rejecting NYNEX's contention, we do not reach the question of whether a potential competitor's interconnection agreement must contain all fourteen items of the competitive checklist in order for a BOC to demonstrate its compliance with the competitive checklist in section 271(c)(2)(B).

3. Existence of Qualifying Requests in Oklahoma

---

[181] *See* 47 U.S.C. § 154(i). In different contexts, the United States Supreme Court has recognized that the Commission must necessarily make difficult predictive judgments in order to implement certain provisions of the Communications Act. *See FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594-96 (1981) (recognizing that the Commission's decisions must sometimes rest on judgment and prediction rather than pure factual determinations) (citing *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775, 813-814 (1978)); *NAACP v. FCC*, 682 F.2d 993 (D.C. Cir. 1982) ("greater discretion is given administrative bodies when their decisions are based upon judgmental or predictive conclusions"). *See also Pub. Util. Comm'n of State of Cal. v. F.E.R.C.*, 24 F.3d 275, 281 (D.C. Cir. 1994) (acknowledging that predictions regarding the actions of regulated entities are the type of judgments that courts routinely leave to administrative agencies). Indeed, we note that determining whether a BOC's section 271 application meets the requirements of the competitive checklist, the requirements of section 272, and is consistent with the public interest, convenience and necessity will require the Commission to engage in highly complex, fact-intensive analyses. *See* 47 U.S.C. § 271(d)(3).

[182] NYNEX Apr. 28 Comments at 1-2. The competitive checklist is contained in 47 U.S.C. § 271(c)(2)(B).

[183] *See* 47 U.S.C. § 271(c)(1)(B).

60. Consistent with the requirements set forth by Congress, SBC's ability to proceed under Track B is not foreclosed unless there has been a timely request for access and interconnection from a potential provider of the type of telephone exchange service described in section 271(c)(1)(A). We note that the determination of whether the BOC has received such a qualifying request will be a highly fact-specific one. At the same time, however, Congress required the Commission to make determinations on a BOC's section 271 application within 90 days. Given the expedited time in which the Commission must review these applications, it is the responsibility of the BOC to submit to the Commission a full and complete record upon which to make determinations on its application.[184] In this regard, we find it of great significance that, in its application, SBC does not argue that none of the requests it has received will lead to the type of telephone exchange service described in section 271(c)(1)(A). Instead, SBC contends that the only relevant determination for the purposes of section 271(c)(1)(B) is whether it has received a request for access and interconnection from an already competing provider of such service. Thus, by declining to argue in the alternative, SBC has not addressed the issue we must resolve here -- whether SBC has received a timely request for access and interconnection that, if implemented, will lead to the type of telephone exchange service described in section 271(c)(1)(A).

61. We expect that if a BOC seeks to proceed under Track B, as SBC does here, it will submit all relevant information reasonably within its control concerning each request for access and interconnection that it has received. Such information should include, but not be limited to, the names of the requesting carriers, the dates the requests were made, the nature of such requests, and whether the requests have resulted in interconnection agreements. Because we have not received this type of extensive information in this proceeding concerning the requests for access and interconnection received by SBC in Oklahoma, we cannot be certain how many qualifying requests it has received. Nonetheless, based on the record presently before us, we find that, at the very least, SBC has received several qualifying requests for access and interconnection that foreclose Track B.

62. As noted above, SBC represents in its application that, as of April 4, 1997, it had received 45 requests for "local interconnection and/or resale" in Oklahoma.[185] SBC did

---

[184] BOCs are required under our rules to maintain "the continuing accuracy and completeness of information" furnished to the Commission. *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*, CC Docket No. 97-1, Order, 12 FCC Rcd 3309, 3323 (1997) (*Ameritech Order*) (citing 47 C.F.R. § 1.65(a) (stating that it is essential that our decision on a section 271 application be based on an accurate current record). *See December 6th Public Notice*.

[185] SBC Application, Appendix-Volume I, Tab 18 at 7, para. 13.

not submit information on many of the 45 requests.[186] Nevertheless, the record indicates that SBC has received requests from potential competitors for negotiation for access and interconnection to SBC's network that, if implemented, will satisfy the requirements of section 271(c)(1)(A). Indeed, we note that SBC has reached negotiated interconnection agreements with at least eight requesting carriers. Seven of these interconnection agreements have been approved by the Oklahoma Commission, two as recently as June 5, 1997.[187] Further, four of the five state-approved interconnection agreements in the record. SBC's agreements with Brooks, Cox, ICG Telecom, and USLD, contain statements signifying the desire of these carriers to provide telephone exchange service to residential and business subscribers "exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier."[188] For example, the SBC-Cox interconnection agreement states that Cox seeks to interconnect with SBC in order to provide telephone exchange service to "residential and business end-users predominantly over [its own] telephone exchange service facilities in Oklahoma."[189]

63. SBC does not allege, nor has the Oklahoma Commission certified, that any of these carriers has negotiated in bad faith or has failed to abide by its implementation schedule, to the extent one is contained in its agreement.[190] Thus, SBC has not availed itself of either of

---

[186] As CPI observes, SBC did not provide the Commission with the full list of carriers that initiated the 45 requests, nor information about these carriers or the type of access and interconnection they requested. CPI Apr. 28 Comments at 5-6. Further, as is evidenced by Cox's comments, although Cox reached a negotiated agreement with SBC on April 10, 1997, SBC did not disclose this fact in its section 271 application filed April 11, 1997, or in its subsequent comment filings. *See* Cox Apr. 28 Comments, Attachment at para. 3.

[187] SBC has state-approved interconnection agreements with the following carriers: Brooks Fiber, approved on October 22, 1996; USLD, approved on December 23, 1996; ICG Telecom Group, Inc. (ICG Telecom) and Sprint, approved on April 3, 1997; and American Communications Services, Inc. (ACSI), Cox, Dobson approved on June 5, 1997. SBC's interconnection agreement with Intermedia Communications has been pending approval since January 23, 1997. Letter from John W. Gray, Senior Staff Attorney, Oklahoma Corporation Commission, to William F. Caton, Acting Secretary, FCC (June 5, 1997).

[188] 47 U.S.C. § 271(c)(1)(A). *See* SBC Application, Appendix-Volume III, Tab 2, SBC-Brooks Agreement at 1; *Id.* at Tab 4, SBC-ICG Telecom Agreement at 1; *Id.* at Tab 7, SBC-USLD Agreement at 1; Letter from Laura H. Phillips, Counsel for Cox, to William F. Caton, Acting Secretary, FCC (May 27, 1997), SBC-Cox Interconnection Agreement at 1 (SBC-Cox Interconnection Agreement). We also note that six of the carriers with which SBC has interconnection agreements, ACSI, Brooks, Cox, Dobson, Sprint, and USLD, have filed for and received certificates of convenience and necessity for the provision of local exchange service and the remaining two, ICG Telecom and Intermedia, have applications pending for such certificates. SBC Application, Appendix-Volume I, Tab 18, Stafford Affidavit at 6-7.

[189] SBC-Cox Interconnection Agreement at 1.

[190] *See, e.g.*, AT&T May 1 Comments at 16 n.6; AT&T Reply Comments at 25; LCI Apr. 28 Comments at 7; MCI Apr. 28 Comments at 3; MCI May 1 Comments at 17; Oklahoma AG Apr. 28 Comments at 7; Time

the exceptions in section 271(c)(1)(B). Moreover, SBC has not presented any evidence to suggest that these agreements will not result in the provision of telephone exchange service to residential and business subscribers described in section 271(c)(1)(A).[191] Indeed, based on the record before us, it appears that at least two carriers -- Brooks and Cox -- have already taken affirmative steps to enter the residential and business local exchange markets.[192] For example, Cox has stated its intention to provide telephone exchange service to residential and business subscribers in Oklahoma City using its upgraded cable television plant before the end of 1997.[193] In addition, as mentioned above, SBC's interconnection agreement with Brooks has already led to the provision of telephone exchange service to business subscribers.[194]

64. We note further that it has been less than seven months since the Cox, ICG Telecom, and USLD interconnection agreements have been approved, and since Brooks has become operational. As discussed above, Congress envisioned there would be a "ramp-up" period during which a competing LEC implements its interconnection agreement.[195] We agree

---

Warner May 1 Comments at 32; WorldCom May 1 Comments at 14.

[191] *See* Cox Apr. 28 Comments at 2 n.3 (asserting that SBC must provide evidence that facilities-based competition is not emerging before it can follow Track B, otherwise it could evade intent of section 271 by stonewalling interconnection negotiations and then claiming there are no facilities-based providers).

[192] *See also* Oklahoma Commission Reply Comments at 3 n.2 (asserting that AT&T has made a verbal commitment to the Oklahoma Commission to be "up and running and providing both residential and business local exchange service in Oklahoma in October 1997.").

[193] *See* Cox Reply Comments at 5. Cox has facilities that pass 95% of all residential customers in Oklahoma City and has installed a local switch that is "operational and internally tested." *See id. See also* Department of Justice Evaluation at 95. According to Cox, its ability to commence commercial operation in Oklahoma is dependent upon SBC's "willingness and cooperation in providing timely physical collocation, adequate numbering resources, interim number portability and necessary OSS functionality." Cox Reply Comments at 5. Cox notes that it plans to begin providing cable-based telecommunications services to residential and business customers in Orange County, CA in June 1997. *Id.* at 5 n.7. *See also* Cox Apr. 28 Comments at 1-2 (stating that it is actively engaged in entering the local market in Oklahoma City and expects to provide a significant facilities-based alternative to SBC for residential customers).

[194] *See supra* at para. 7. Although Brooks asserted in its May 1 comments that it has "no immediate plans" to commence a general offering of local exchange service in Oklahoma to residential customers, in its reply comments, Brooks indicates that it is presently exploring opportunities for providing residential service to multiple dwelling unit locations through direct on-net connections to Brooks' fiber facilities, is examining the use of wireless systems, and is investing approximately $2.8 million in collocation facilities in Oklahoma, in addition to its previous investment in fiber optic transmission equipment and digital switching facilities. *See* Brooks May 1 Comments at 7; Brooks Reply Comments at 4-5 & n.12 ("Brooks will look for opportunities to offer residential local exchange service through whatever facilities-based alternatives may exist in a particular location at any time."). *See also* SBC June 24 *Ex Parte* at 1-2 (asserting that there is no technical reason why Brooks is incapable of service multiple dwelling units located along its networks).

[195] *See supra* at paras. 44-45.

with NCTA, therefore, that the current absence of competing residential service in Oklahoma does not, on the record before us, mean that "no such provider has requested the access and interconnection described in [section 271(c)(1)(A)]."[196] Although SBC maintains that the Commission cannot base "section 271 determinations on the unverifiable, fluctuating plans of parties who have an incentive to color their supposed intentions to block [BOC in-region] interLATA entry,"[197] SBC has provided no evidence to suggest that any of the carriers that have expressed their intent to provide the telephone exchange service described in section 271(c)(1)(A) will not do so.[198] In fact, except for an unsupported assertion that AT&T, MCI, and Sprint plan to delay BOC entry by becoming facilities-based carriers at a "painfully slow pace,"[199] SBC does not maintain that its competitors in Oklahoma are engaging in any "strategic manipulation of local market entry" or have "intentionally delayed implementation" of their interconnection agreements in order to prevent SBC from entering the in-region, interLATA market in Oklahoma.[200] Rather, the record is replete with allegations from competitors such as Brooks and Cox that their efforts to enter the local exchange market have been frustrated by the actions of SBC.[201]

65. Although we find, and SBC has not disputed, that SBC has received several requests for access and interconnection that, if implemented, would satisfy the requirements of section 271(c)(1)(A), we do not today decide the meaning of the facilities-based requirement in section 271(c)(1)(A).[202] Some commenters assert that this requirement applies independently to both business and residential subscribers.[203] The Department of Justice, in contrast,

---

[196] 47 U.S.C. § 271(c)(1)(A). *See* NCTA May 1 Comments at 8.

[197] SBC Reply Comments at 6.

[198] We note that USLD has stated that, although it plans to enter the local exchange market in Oklahoma initially through reselling SBC's local exchange retail services, over the long term, it plans to construct some of its own facilities and to integrate those facilities with SBC's network elements. USLD May 1 Comments at 2.

[199] SBC Reply Comments at 7.

[200] *See* LCI Apr. 28 Comments at 7; TRA May 1 Comments at 14-15. Indeed, SBC's application provides numerous examples of alternative facilities-based networks in Oklahoma that, according to SBC, "could be, are being, or will be used to provide competing local exchange service to end user (retail service) customers, or . . . as alternative sources to [SBC's] wholesale service offerings." SBC Brief in Support, Appendix-Volume I, Tab 20 at 3, para. 5. SBC offers information on the scope of facilities-based service planned by, among others, Brooks, Cox, Multimedia Cablevision, Indian Nations Fiberoptic, ACSI and Tele-Communications Inc. (TCI). *See id.* at Tab 20.

[201] *See, e.g.*, Cox May 1 Comments at 21-23; Brooks Reply Comments 8-10.

[202] *See supra* at para. 22.

[203] Brooks May 1 Comments at 9; Sprint May 1 Comments at 11-13; CompTel Reply Comments at 9-12; ALTS Reply Comments at 3-6; AT&T Reply Comments at 25-30.

contends that this requirement permits a new entrant to serve one class of customers via resale, so long as the competitor's local exchange services as a whole are provided predominantly over its own facilities.[204] We need not and do not decide this issue here because we conclude that, under either interpretation, the facts described above indicate that SBC has received several qualifying requests for access and interconnection. In reaching this conclusion, we find it unnecessary to address SBC's compliance with the competitive checklist requirements set forth in section 271(c)(2)(B). Nonetheless, we recognize that, even if SBC had satisfied the requirements of section 271(c)(1)(A), it would still be required to demonstrate compliance with each and every item of the competitive checklist, including access to physical collocation, cost-based unbundled loops, and reliable OSS functions before it may gain entry under Track A. We leave it to future applications to define the scope of these and other checklist requirements.

V. CONCLUSION

66. We conclude, based on the record submitted in the instant proceeding, that SBC has failed to satisfy the requirements of section 271(c)(1), and we therefore deny SBC's application pursuant to section 271(d)(3). SBC has not demonstrated on this record that it is providing access and interconnection to an unaffiliated, facilities-based competing provider of telephone exchange service to residential and business subscribers, as required by section 271(c)(1)(A).[205] We also conclude, under the circumstances presented in this case, that SBC has not satisfied section 271(c)(1)(B) because it has received several requests for access and interconnection within the meaning of section 271(c)(1)(A).[206] We note, however, that SBC may refile its application in the future and demonstrate that circumstances have changed such that it has satisfied section 271(c)(1)(A) or has become eligible to proceed under section 271(c)(1)(B).[207]

---

[204] Department of Justice May 21 Addendum at 2-4.

[205] 47 U.S.C. § 271(c)(1)(A).

[206] We find it unnecessary to address BellSouth's argument concerning the appropriate deference to give the Department of Justice's interpretation of sections 271(c)(1)(A) and 271(c)(1)(B). *See* BellSouth Reply Comments at 5-6. *See also* SBC Reply Comments at 14-15 (asserting that the Commission should only give substantial weight to the Department of Justice's views on matters within its antitrust expertise). Although we agree with the Department of Justice's evaluation on the issues decided herein, our extensive analysis demonstrates that we arrived at our interpretation of section 271(c)(1) independently. In light of this, we find it unnecessary to consider the circumstances under which "[t]he Commission shall give substantial weight to the Attorney General's evaluation." 47 U.S.C. § 271(d)(2)(A).

[207] *See* LCI Apr. 28 Comments at 8 (asserting that there is no statutory bar to the refiling of a BOC section 271 application).

67. Because we reach the merits of SBC's section 271 application, we dismiss ALTS' motion to dismiss as moot. Further, given the extensive legal analysis contained herein, we disagree with ALTS that SBC's application is so frivolous that it warrants the imposition of sanctions. We therefore deny ALTS' request for sanctions against SBC.

VI. ORDERING CLAUSES

68. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 4(j), and 271 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 154(j), 271, SBC Communications Inc.'s application to provide in-region interLATA service in the State of Oklahoma filed on April 11, 1997, IS DENIED.

69. IT IS FURTHER ORDERED that the motion to dismiss filed by the Association for Local Telecommunications Services on April 23, 1997, IS DISMISSED as moot.

70. IT IS FURTHER ORDERED that the request for sanctions filed by the Association for Local Telecommunications Services on April 23, 1997, IS DENIED.

71. IT IS FURTHER ORDERED that the Motion to Accept Late Filed Pleading by the Battle Group, Inc. d/b/a/ TBG Communications IS DENIED.

APPENDIX

COMMENTERS ON SBC 271 APPLICATION FOR OKLAHOMA

1. Alarm Industry Communications Committee (AICC)
2. Ameritech
3. Association for Local Telecommunications Services (ALTS)
4. AT&T Corp. and AT&T Communications of the Southwest, Inc. (AT&T)
5. Attorneys General of Delaware, Florida, Iowa, Maryland, Massachusetts, Mississippi, Missouri, New York, North Dakota, Oklahoma, Utah, West Virginia and Wisconsin (State Attorneys General)
6. Bell Atlantic
7. BellSouth Corporation (BellSouth)
8. Brooks Fiber Properties, Inc. (Brooks)
9. Competition Policy Institute (CPI)
10. Competitive Telecommunications Association (CompTel)
11. Cox Communications, Inc. (Cox)
12. Dobson Wireless, Inc. (Dobson)
13. LCI International Telecom Corp. (LCI)
14. MCI Telecommunications Corporation (MCI)
15. National Cable Television Association (NCTA)
16. NYNEX Telephone Companies (NYNEX)
17. Oklahoma Attorney General (Oklahoma AG)
18. Oklahoma Corporation Commission (Oklahoma Commission)
19. Paging and Narrowband PCS Alliance of the Personal Communications Industry Association
20. Southwestern Bell Telephone Company (SBC)
21. Sprint Communications Company L.P. (Sprint)
22. Telecommunications Resellers Association (TRA)
23. Texas Association of Long Distance Telephone Companies
24. Time Warner Communications Holdings, Inc. (Time Warner)
25. United States Department of Justice (Department of Justice)
26. U. S. Long Distance (USLD)
27. U S WEST, Inc. (U S West)
28. Valu-Line of Kansas, Inc.
29. WorldCom, Inc. (WorldCom)

Both a Bell Company's failure to open its markets in accordance with the Communications Act, and its combination with its strongest potential competitor, would frustrate the pro-competitive purposes of the Telecommunications Act of 1996 and deny consumers that Act's potential benefits. There is a better way to achieve the consumer benefits of Bell Company entry into long distance, and that is to meet fully the standards Congress set in Section 271.

The power to enter the long distance market lies in the hands of the Bell Companies -- if they have the will, the law makes clear the way. In the present application, SBC has plainly failed to meet the standards set forth in Section 271. For that reason, the application must be denied.

SEPARATE STATEMENT OF CHAIRMAN REED E. HUNDT

RE: *Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Oklahoma*, CC Docket No. 97-121, June 25, 1997

In its application, SBC stresses that "Southwestern Bell can use its brand name, reputation for providing reliable, high-quality telephone service, and network expertise to inject competition into interLATA services in Oklahoma, particularly for the business of ordinary residential callers. . . . Southwestern Bell will be a committed, effective new entrant into the interLATA business in Oklahoma, and Oklahoma consumers will benefit from this new competition for all telecommunications services."[1] Although the Department of Justice did not recommend approval of the SBC application, the Department did note: "InterLATA markets remain highly concentrated and imperfectly competitive . . . and it is reasonable to conclude that additional entry, particularly, by firms with the competitive assets of the [Bell Operating Companies], is likely to provide additional competitive benefits."[2]

I agree strongly that the entry into the long distance market by SBC or a carrier with similar assets would promote competition and benefit consumers. The Commission has previously noted concern about evidence with regard to lock-step increases in basic rates among the three major interexchange carriers that "suggests that there may be tacit price coordination among AT&T, MCI and Sprint."[3]

As SBC itself emphasizes, SBC's assets -- including its network, customer information, brand recognition, and financial strength -- would make it a formidable competitor in the market for long-distance or bundled local-long distance service. The experience of a relatively small incumbent local exchange carrier, Southern New England Telephone, suggests how effective individual Bell Companies will be as interexchange competitors when they choose to do what is necessary to meet the terms of Section 271 of the Communications Act.[4]

---

[1] SBC Brief in Support of its Application for Provision of In-Region InterLATA Services in Oklahoma, at iv (filed Apr. 11, 1997).

[2] Department of Justice Evaluation at 3-4 (filed May 16, 1997).

[3] *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271, 3314 ¶ 82 (1995).

[4] According to reports, Southern New England Telephone has gained a market share of 35% of the access lines in Connecticut. Merrill Lynch, *Telecom Services -- RBOCs & GTE. Fourth Quarter Review: Defying the Bears Once Again, Reported Robust EPS Growth; Regulatory Cloud Beginning to Lift*, at 8 (Feb. 19, 1997). *See also*, Southern New England Tel. Co., *SNET First Quarter EPS $0.70 Before Extraordinary Charge*, Press Release (Apr. 23, 1997).

CERTIFICATE OF SERVICE
DOCKET NO. 960786-TL

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery* or by overnight mail** to the following parties of record, this 31st day of July, 1997.

Monica Barone*
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Marsha Rule, Esq.*
c/o Doris M. Franklin
AT&T Communications of Southern St., Inc.
101 North Monroe St., Suite 700
Tallahassee, FL 32301-1549

Nancy Sims*
BellSouth Telecommunications, Inc.
150 South Monroe St., Suite 40
Tallahassee, FL 32301-1556

Nancy White**
BellSouth Telecommunications, Inc. (Atl.)
675 W. Peachtree St., #4300
Atlanta, GA 30375

Everett Boyd*
Ervin Law Firm
P.O. Drawer 1170
Tallahassee, FL 32302

Vicki Kaufman*
McWhirter Law Firm
117 S. Gadsden St.
Tallahassee, FL 32301

Richard Melson*
Hopping Law Firm
P.O. Box 6526
Tallahassee, FL 32314

Steven Brown**
Intermedia Comm. of Florida, Inc.
3625 Queen Palm Drive
Tampa, FL 33619-1309

Brian Sulmonetti**
LDDS Communications, Inc.
1515 S. Federal Highway, #400
Boca Raton, FL 33432-7404

Martha McMillin**
MCI Telecommunications (Ga.)
780 Johnson Ferry Rd., #700
Atlanta, GA 30342

Floyd Self*
Messer Law Firm
P.O. Box 1876
Tallahassee, FL 32302

Peter Dunbar*
David Swafford
Pennington Law Firm
P.O. Box 10095
Tallahassee, FL 32301

Jeffrey Walker**
Preferred Carrier Services, Inc.
500 Grapevine Highway, #300
Hurst, TX 76054

Kenneth Hoffman*
Rutledge Law Firm
P.O. Box 551
Tallahassee, FL 32302

Benjamin W. Fincher**
Sprint
3100 Cumberland Circle, #802
Atlanta, GA 30339

Paul Kouroupas**
TCG
1133 21st St., NW, #400
Washington, D.C. 20036

Carolyn Marek**
Time Warner Communications
P.O. Box 210706
Nashville, TN 37221

Donna Canzano*
Wiggins Law Firm
P.O. Drawer 1657
Tallahassee, FL 32302

Richard Swindler**
Swidler & Berlin
3000 K St. NW, #300
Washington, D.C. 20007

Andrew Isar**
Telecommunications Resellers Assoc.
P.O. Box 2461
Gig Harbor, WA 98335-4461

Sue Weiske**
Time Warner Communications
160 Inverness Dr. W.
Englewood, CO 80112

Laura L. Wilson

CERTIFICATE OF SERVICE
DOCKET NO. 960786-TL

PACEY

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery* or by overnight mail** to the following parties of record, this 31st day of July, 1997.

Monica Barone*
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Nancy Sims*
BellSouth Telecommunications, Inc.
150 South Monroe St., Suite 40
Tallahassee, FL 32301-1556

Everett Boyd*
Ervin Law Firm
P.O. Drawer 1170
Tallahassee, FL 32302

Richard Melson*
Hopping Law Firm
P.O. Box 6526
Tallahassee, FL 32314

Brian Sulmonetti**
LDDS Communications, Inc.
1515 S. Federal Highway, #400
Boca Raton, FL 33432-7404

Floyd Self*
Messer Law Firm
P.O. Box 1876
Tallahassee, FL 32302

Jeffrey Walker**
Preferred Carrier Services, Inc.
500 Grapevine Highway, #300
Hurst, TX 76054

Marsha Rule, Esq.*
c/o Doris M. Franklin
AT&T Communications of Southern St., Inc.
101 North Monroe St., Suite 700
Tallahassee, FL 32301-1549

Nancy White**
BellSouth Telecommunications, Inc. (Atl.)
675 W. Peachtree St., #4300
Atlanta, GA 30375

Vicki Kaufman*
McWhirter Law Firm
117 S. Gadsden St.
Tallahassee, FL 32301

Steven Brown**
Intermedia Comm. of Florida, Inc.
3625 Queen Palm Drive
Tampa, FL 33619-1309

Martha McMillin**
MCI Telecommunications (Ga.)
780 Johnson Ferry Rd., #700
Atlanta, GA 30342

Peter Dunbar*
David Swafford
Pennington Law Firm
P.O. Box 10095
Tallahassee, FL 32301

Kenneth Hoffman*
Rutledge Law Firm
P.O. Box 551
Tallahassee, FL 32302

DN07733-97
7/31/97

Benjamin W. Fincher**
Sprint
3100 Cumberland Circle, #802
Atlanta, GA 30339

Paul Kouroupas**
TCG
1133 21st St., NW, #400
Washington, D.C. 20036

Carolyn Marek**
Time Warner Communications
P.O. Box 210706
Nashville, TN 37221

Donna Canzano*
Wiggins Law Firm
P.O. Drawer 1657
Tallahassee, FL 32302

Richard Swindler**
Swidler & Berlin
3000 K St. NW, #300
Washington, D.C. 20007

Andrew Isar**
Telecommunications Resellers Assoc.
P.O. Box 2461
Gig Harbor, WA 98335-4461

Sue Weiske**
Time Warner Communications
160 Inverness Dr. W.
Englewood, CO 80112

Laura L. Wilson

PRIOR EXPERIENCE

University of Colorado, College of Business and Administration, Adjunct Professor,1986 through 1992.

Focused on teaching in the areas of managerial economics and finance at both the undergraduate and graduate levels. Continued research activities with colleagues and was a member of the graduate faculty.

University of Colorado, College of Business and Administration and Graduate School of Business Administration, Director of Research Center Programs, May 1985-December 1985.

Responsibilities included conducting feasibility of new University/Industry program. Identified projects for joint faculty and business research endeavors.

University of Colorado System, Economics Professor, August 1977-May 1985.

Teaching responsibilities included microeconomic theory, statistics, econometrics, managerial economics and finance, antitrust and regulated industries economics. Research was focused primarily in demand and marketing analyses in telecommunications, labor and sports industries. As a faculty member, taught initially on the Colorado Springs campus and then the Boulder campus.

Congressional Budget Office, Washington, D.C., Associate Analyst and Adjunct Professor of Economics, George Mason University, 1976-1977.

Responsibilities included providing cost estimates for bills introduced in the U.S. Congress in areas related to manpower training, education, and social security. This position required a substantial degree of liaison work with Congressional committee members and their staffs, as well as the ability to interpret legislation into cost estimates. Also, maintained teaching responsibilities as adjunct professor.

University of Florida J. Hillis Miller Health Center, Office of the Vice President, Assistant for Planning and Budget, Gainesville, Florida, 1973-1976.

Directed the pilot study for the American Association of Medical College cost study. Provided statistical and research analyses to be used as the basis for the Health Center Legislative budget.

JOURNAL ARTICLES AND PUBLICATIONS

"The Political Economy of Deregulation: The Case of Intrastate Long Distance," with D. Kaserman and J. Mayo, ***Journal of Regulatory Economics***, March 1993, Vol. 5, No. 1, 49-63.

"Discounting to Present Value: The Economist's View," ***The Colorado Lawyer***, June 1991, Vol. 20, No. 6, 1211-1217.

"Televising College Football: The Complementarity Between Attendance and Viewing," with W. Kaempfer, ***Social Science Quarterly***, March 1986.

"A Note on Purchased Power Adjustment Clauses," with D. Kaserman and R. Blair, ***Journal of Business***, October 1985, Vol. 58, No. 4, 409-417.

"Cable Television in a Less Regulated Market," ***Journal of Industrial Economics***, September 1985, Vol. 34, 81-92.

"Measures of Economic Loss in the Wrongful Death of a Child," ***The Colorado Lawyer***, March 1985, Vol. 3, 392, 400-402.

"College Football Television: Where are They Going?," with E. Wickham, ***Economic Inquiry***, January 1985, 93-113.

"Local Measured Telephone Service in the USA," with L. Singell, Jr., ***Telecommunications Policy***, September 1984, 249-255.

"The Distribution of Athletic Scholarships Among Women in Intercollegiate Sports," with J. Coakley, in ***Sport and the Sociological Imagination***, ed. by Nancy Pheberger and Peter Donnelly, Champaign, IL, Human Kinetics, June 1984.

"Measures of Economic Loss in Death of a Child," ***Trial Talk***, April 1984, 28-30.

"Long Distance Demand: A Point-To-Point Model," ***Southern Economics Journal***, April 1983, 1094-1107.

"Impact of Deregulation on Point-To-Point Demand in the USA," with S. Berg, ***Telecommunications Policy***, December 1982, 308-314.

"The Courts and College Football: New Playing Rules Off the Field?," ***American Journal of Economics and Sociology***, July 1982, 257-267.

"Equal Opportunity for Women in Intercollegiate Sports: Influences on Participation," ***American Journal of Economics and Sociology***, July 1982, 257-267.

"How Female Athletes Perceive Coaches," with J. Coakley, ***Journal of Physical Education and Recreation***, Vol. 53, No. 2, February 1982, 54-56.

"Cost Studies of the J. Hillis Miller Health Center," pilot study, published and distributed to the Board of Regents and Department of Administration (Florida), presented to National Institute of Health Representative, Summer 1974.

"Projections of Population, Employment and Income, Selected Florida Counties for 1975, 1980, 1990, 2000, published and distributed to selected state agencies by Bureau of Economic and Business Research and the Department of Water Resources, Fall 1973.

"Age Characteristics of Florida's Population, 1970 to 1980," published in ***Population Studies***, March 1973.

"Estimating Personal Income," published in ***Business and Economic Dimensions***, July-August 1972.

CONTRACTS, GRANTS AND CONSULTING REPORTS

Involved in contract and grant activity when a full-time university professor; consulting reports for business clients are generally confidential; recent business clients include Florida Cable Television Association (FCTA), U.S. West, College Football Association (CFA), Mobil, Wendhi, ETTA, Idaho Cattle Producer's Association, among others.

"Dividend Payout and Stock Prices Analysis" consultant for U.S. West, spring 1995.

"Gender Participation Analysis" consultant for College Football Association, fall 1994.

"Valuing an Acquisition" and **"Diversification as Strategy,"** co-consultant for U.S. West, Strategic Marketing Division, summer 1988.

"The Economic Impact of College Football on the Local University Community," studies conducted for member schools in the College Football Association (CFA), 1988 - present.

"Risk and Return Analysis," co-consultant for U.S. West, Strategic Marketing Division, Winter 1986 - 1987.

"Review of the Financial Services Industry," co-consultant for U.S. West, Strategic Marketing Division, 1986.

"Study of Interstate Telecommunications Service in Colorado," with R. W. Beck and Associates for the Colorado Public Utility Company, Fall 1985.

"An Analysis of Television, Money and Attendance in College Football," for the College Football Association, Summer 1985.

"Environmental Assessment - General Power Marketing Criteria and Allocation Criteria for Salt Lake City Area," R. W. Beck and Associates, Fall 1984.

"Economic Appraisal and Financial Evaluation of a College Football Television Package," for the College Football Association, Summer 1983 and Summer 1981.

"Economic Criteria in Utility Rate-Making," for Shell Oil Company, Winter-Spring 1983.

"Econometric Analysis of the Televising of College Football Games and their Impact on In-game Attendance," for the College Football Association, April 1982.

"Micro Modeling and Analysis for Long Distance Users of OCCs," GTE Satellite Corporation (GSAT), March 1982.

"Benefits from a Telecommunications System in Alaskan Villages," with G. Anderson and E. Loehman, SRI, for Alaskom, January 1981.

"Factors Affecting the Participation of Females in Intercollegiate Athletics," grant from National Collegiate Athletic Association, May 1982.

"Impact Fees and Rate Structures," position papers for the Public Utility Research Center at the University of Florida, 1978-79.

Council on Research and Creative Works (CRCW), University of Colorado, for purchase power adjustments, grant, Spring 1981.

Public Utility Research Center, University of Florida, for Telecommunications project, grant, January 1980.

National Collegiate Athletic Association (NCAA), for study on female participation in sports, grant, Summer 1979.

Council on Research and Creative Works (CRCW), University of Colorado, for telecommunications project, grant, Spring 1979.

PRESENTATIONS AND CONFERENCE PARTICIPATION

Various academic seminars as attendee and participant relating to telecommunications, other regulated industries, applied economics and finance matters; AICPA - CPE programs; Sterns-Stewart free cash flow seminars; speaker on or participant in numerous other programs relating to economics including antitrust issues, economic development and lost profits, 1979 - present.

"Evaluating Economic Loss in a Wrongful Death Case," National Institute of Trial Advocacy, Advanced Trial Advocacy Program (NITA), participation in mock trial and breakout sessions, various summers 1987 - 1994.

"Evaluating Economic Loss in a Personal Injury Case," for the International Association of Defense Counsel (IADC) - Defense Counsel Trial Academy (DCTA), participate in presentation and supervise breakout groups, summers 1988 - present.

"Economic Appraisal of Loss," How to Evaluate and Settle Personal Injury Claims in Colorado, sponsored by Professional Education Systems, Inc. (PESI) for Continuing Legal Education (CLE) credits, 1987 - 1992.

"Economic Evaluation of Loss vis-à-vis Fixed Annuity Payments Analysis," presentation to the Governor's Task Force on Medical Malpractice, March 1988.

"Lost Earning Capacity and the West Decision," panel discussion at ReEntry Vocational Service Conference, June 1985.

"A Hedonic Explanation of the TV Nielsen Ratings for College Football," presented at the Western Economic Association, Seattle, July 1983.

"The Switch to Measured Service: Some Observations," with L. Singell, Jr., presented to Mountain Bell, Rates and Tariffs Division, June 1983.

"Economic Efficiency and Broadcast Rights," paper presented at Law and Amateur Sports, Indiana University, School of Law - Bloomington, February 1983.

"The New Profile on Cable Television," presented at the American Public Policy and Management Society, October 1982.

Economic Costs and Incentives for Intercollegiate Female Athletes," presented at Southern Economic Association, Atlanta, November 1980.

PROFESSIONAL ASSOCIATIONS AND ACTIVITIES

Professional Association Memberships

American Economic Association
Western Economic Association
Southern Economic Association
American Association of University Women
Beta Gamma Sigma

Community/Academic Involvement

Governor's Revenue Estimating Advisory Committee
University of Colorado - Boulder, Business Advisory Council
Technical Advisory Committee on Non-Smoking and Health
Referee and reviewer for various academic journals and publishers

EXHIBIT PLP-2

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Oklahoma	)	CC Docket No. 97-121

MEMORANDUM OPINION AND ORDER

Adopted: June 25, 1997 **Released: June 26, 1997**

By the Commission: Chairman Hundt issuing a separate statement.

TABLE OF CONTENTS

I. INTRODUCTION

1. On April 11, 1997, SBC Communications Inc. and its subsidiaries, Southwestern Bell Telephone Company and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance, (collectively, SBC) filed an application for authorization under section 271 of the Communications Act of 1934, as amended, to provide in-region interLATA services in the State of Oklahoma.[1] For the reasons set forth below, we conclude that SBC has not demonstrated on this record that it is providing access and interconnection to an unaffiliated, facilities-based competing provider of telephone exchange service to residential and business subscribers, as required by section 271(c)(1)(A) of the statute.[2] We further conclude that, under the circumstances presented in this application, SBC may not obtain authorization to provide in-region interLATA services in Oklahoma pursuant to Track B of the Act at this time because SBC has received, at the very least, several requests for access and interconnection within the meaning of section 271(c)(1)(B).[3]

2. Given our findings that SBC has not satisfied section 271(c)(1)(A) on this record, and may not at this time proceed pursuant to section 271(c)(1)(B), we conclude that SBC has not satisfied the requirements of subsection 271(c)(1). We therefore deny, pursuant to section 271(d)(3), SBC's application to provide in-region interLATA services in Oklahoma.

---

[1] *See Comments Requested on Application by SBC Communications, Inc. for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Oklahoma*, Public Notice, DA 97-753 (rel. Apr. 11, 1997). On April 23, 1997, the Association for Local Telecommunications Services (ALTS) filed a motion asking the Commission to dismiss SBC's application and impose sanctions on SBC (ALTS Motion). In response to this motion, the Common Carrier Bureau (Bureau) issued a Public Notice seeking comment from interested third parties. *See ALTS's Motion to Dismiss SBC Communications Inc.'s Application for Section 271 Authorization to Provide In-Region, InterLATA Service in the State of Oklahoma*, Public Notice, DA 97-864 (rel. Apr. 23, 1997) (*April 23rd Public Notice*).

[2] 47 U.S.C. § 271(c)(1)(A).

[3] *Id.* § 271(c)(1)(B). As used in this Order, the term "Track B" includes both the requirements in section 271(c)(1)(B) and the other section 271 requirements that a BOC must satisfy if it relies on a statement of generally available terms and conditions to satisfy section 271, including the requirement that the BOC's statement "offers all of the items included in the competitive checklist in [section 271(c)(2)(B)]." *See Id.* § 271(d)(3)(A)(ii). Similarly, the term "Track A" includes the requirement that, "with respect to access and interconnection provided pursuant to [section 271(c)(1)(A), the BOC] has fully implemented the competitive checklist in [section 271(c)(2)(B)]." *See Id.* § 271(d)(3)(A)(i).

II. STATUTORY FRAMEWORK

3. The Telecommunications Act of 1996[4] conditions Bell Operating Company (BOC)[5] provision of in-region interLATA services on compliance with certain provisions of section 271. BOCs must apply to the Commission for authorization to provide interLATA services originating in any in-region state.[6] The Commission must issue a written determination on each application no later than 90 days after receiving such application.[7] In acting on a BOC's application for authority to provide in-region interLATA services, the Commission must consult with the Attorney General and give substantial weight to the Attorney General's evaluation of the BOC's application.[8] In addition, the Commission must consult with the applicable state commission to verify that the BOC has either a state-approved interconnection agreement or statement of generally available terms and conditions that satisfies the "competitive checklist," as described below.[9]

---

[4] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), *codified at* 47 U.S.C. §§ 151 *et seq.* The 1996 Act amended the Communications Act of 1934. We will refer to the Communications Act of 1934, as amended, as "the Communications Act" or "the Act."

[5] For purposes of this proceeding, we adopt the definition of the term "Bell Operating Company" contained in 47 U.S.C. § 153(4).

[6] 47 U.S.C. § 271(d)(1). The Modification of Final Judgment (MFJ), which ended the government's antitrust suit against AT&T, and which resulted in the divestiture of the BOCs from AT&T, prohibited the BOCs from providing interLATA services. *See United States v. Western Elec. Co.*, 552 F. Supp. 131, 226-234 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Western Elec. Co.*, Civil Action No. 82-0192 (D.D.C. Apr. 11, 1996) (vacating the MFJ). For purposes of this proceeding, we adopt the definition of the term "in-region state" that is contained in 47 U.S.C. § 271(i)(1). We note that section 271(j) provides that a BOC's in-region services include 800 service, private line service, or their equivalents that terminate in an in-region state of that BOC and that allow the called party to determine the interLATA carrier, even if such services originate out-of-region. *Id.* § 271(j). The 1996 Act defines "interLATA services" 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). Under the 1996 Act, a "local access and transport area" (LATA) is "a contiguous geographic area (A) established before the date of enactment of the [1996 Act] by a [BOC] such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or (B) established or modified by a [BOC] after such date of enactment and approved by the Commission." 47 U.S.C. § 153(25). LATAs were created as part of the MFJ's "plan of reorganization." *United States v. Western Elec. Co.*, 569 F. Supp. 1057 (D.D.C. 1983), *aff'd sub nom. California v. United States*, 464 U.S. 1013 (1983). Pursuant to the MFJ, "all BOC territory in the continental United States [was] divided into LATAs, generally centering upon a city or other identifiable community of interest." *United States v. Western Elec. Co.*, 569 F. Supp. 990, 993 (D.D.C. 1983).

[7] 47 U.S.C. § 271(d)(3).

[8] *Id.* § 271(d)(2)(A).

[9] *Id.* § 271(d)(2)(B).

4. Section 271 requires the Commission to make several findings before approving BOC entry. As a preliminary matter, a BOC must show that it satisfies the requirements of either section 271(c)(1)(A) or 271(c)(1)(B).[10] Those sections provide:

> (A) PRESENCE OF A FACILITIES-BASED COMPETITOR.-A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 3(47)(A), but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier. For the purpose of this subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 et seq.) shall not be considered to be telephone exchange services.
>
> (B) FAILURE TO REQUEST ACCESS.-A Bell operating company meets the requirements of this subparagraph if, after 10 months after the date of enactment of the Telecommunications Act of 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1), and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f). For purposes of this subparagraph, a Bell operating company shall be considered not to have received any request for access and interconnection if the State commission of such State certifies that the only provider or providers making such a request have (i) failed to negotiate in good faith as required by section 252, or (ii) violated the terms of an agreement approved under section 252 by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement.

5. In order to grant a BOC's application, the Commission must also find that: (1) the interconnection agreements or statements approved at the state level under section 252 satisfy the competitive checklist contained in section 271(c)(2)(B);[11] (2) the requested

---

[10] *Id.* § 271(d)(3)(A).

[11] *Id.* § 271(c)(2)(B).

authorization will be carried out in accordance with the requirements of section 272;[12] and (3) the BOC's entry into the in-region interLATA market is "consistent with the public interest, convenience, and necessity."[13]

III. REQUIREMENTS OF SECTION 271(c)(1)(A)

A. Background

6. In order to satisfy section 271(c)(1)(A), a BOC must demonstrate that it "is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service . . . to *residential and business subscribers*."[14] According to SBC, its "implemented agreement with Brooks Fiber satisfies all the requirements of [section 271(c)(1)(A)]."[15] Because SBC relies exclusively on Brooks Fiber (Brooks) for purposes of satisfying section 271(c)(1)(A), we will focus in this section only on the record evidence concerning Brooks' activities in Oklahoma. A key issue in determining whether SBC has satisfied section 271(c)(1)(A) is whether Brooks is a competing provider of telephone exchange service to both residential and business subscribers.

7. The following facts regarding Brooks' operations in Oklahoma are undisputed. Brooks, a carrier unaffiliated with SBC, has received authority to "operate as a competitive local exchange company . . . , providing all types of intrastate switched services, including switched local exchange (i.e., dial-tone) service" in Oklahoma.[16] Brooks has an effective local

---

[12] *Id.* § 272. *See 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*), *on recon.*, FCC 97-52 (rel. Feb. 19, 1997), *further recon. pending, petition for summary review in part denied and motion for voluntary remand granted sub nom., Bell Atlantic v. FCC*, No. 97-1067 (D.C. Cir. filed Mar. 31, 1997), *petition for review pending sub nom., SBC Communications v. FCC*, No. 97-1118 (D.C. Cir. filed Mar. 6, 1997) (held in abeyance pursuant to court order filed May 7, 1997), *Second Order on Reconsideration*, CC Docket No. 96-149, FCC 97-222 (rel. June 24, 1997); *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539 (1996).

[13] 47 U.S.C. § 271(d)(3)(C).

[14] *Id.* § 271(c)(1)(A) (emphasis added).

[15] SBC Brief in Support at 12.

[16] Initial Comments of Brooks Fiber Communications of Oklahoma, Inc., and Brooks Fiber Communications of Tulsa, Inc., Oklahoma Corporation Commission (Oklahoma Commission) Proceeding Cause No. PUD 970000064, at 1 (filed Mar. 11, 1997) (SBC Application, Appendix - Volume IV, Tab 23) (Initial Comments of Brooks Before the Oklahoma Commission).

exchange tariff in place for the provision of residential and business services.[17] As of March 11, 1997, Brooks was serving twenty business customers in Oklahoma.[18] Of these twenty business customers, one received service via resold SBC ISDN service, while the others received service either via direct on-net connections to Brooks' fiber optic transmission rings or through leased SBC dedicated T-1 facilities.[19] In addition, Brooks has test circuits activated to the residences of four of its Oklahoma employees.[20] These circuits are all provisioned through the resale of SBC's local exchange service.[21] Brooks is not billing the employees involved in the test of these circuits.[22]

[17] Brooks Fiber Communications of Tulsa, Inc. and Brooks Fiber Communications of Oklahoma, Inc, O.C.C. Tariff No. 2 (SBC Application, Appendix - Volume II, Tab 3).

[18] Initial Comments of Brooks Before the Oklahoma Commission at 2; SBC Apr. 28 Comments at 9.

[19] Initial Comments of Brooks Before the Oklahoma Commission at 2.

[20] *Id.*; Brooks Apr. 28 Comments at 2; Brooks May 1 Comments at 6; *see also* SBC Apr. 28 Comments at 3.

[21] Brooks Apr. 28 Comments at 2; Brooks May 1 Comments at 6 *see also* SBC Brief in Support at 11; SBC Apr. 28 Comments at 3.

[22] ALTS Motion, Affidavit of John C. Shapleigh, Executive Vice President -- Regulatory and Corporate Development, Brooks Fiber Properties, Inc., at 1 (Affidavit of John C. Shapleigh); *see also* SBC Apr. 28 Comments at 9-10 (asserting that for purposes of section 271 the price charged by the competing provider is irrelevant).

B. Positions of the Parties[23]

8. As an initial matter, we note that commenters offer differing views about the showing that SBC must make in order to demonstrate that Brooks is a competing provider that satisfies the requirements of section 271(c)(1)(A).[24] Commenters use various terms (e.g., "serv[e],"[25] "provi[de],"[26] "offer[ ],"[27] "furnish[ ]"[28]) to describe what Brooks must do to meet the competing provider requirement of section 271(c)(1)(A), although commenters often do not define the terms they use.

9. Various commenters assert that SBC does not satisfy the requirements of section 271(c)(1)(A) because Brooks' test of four circuits to the homes of its employees does not constitute residential service for purposes of this section.[29] Brooks states that the sole purpose of its test is to identify and correct any problems in SBC's and Brooks' resale support and ancillary services systems.[30] According to Brooks, it is not billing the employees involved in the test of these circuits.[31] Brooks represents that it "is not now offering residential service in

---

[23] Given our 90-day statutory deadline to make determinations on BOC section 271 applications, we will treat the opposition to SBC's application filed by the Battle Group, Inc. d/b/a TBG Communications as an *ex parte* submission, rather than a late-filed pleading. We note that this filing falls within the 20-page limit placed on written *ex parte* submissions in our December 6th Public Notice. *See Procedures for Bell Operating Company Applications Under New Section 271 of the Communications Act*, Public Notice, 11 FCC Rcd 19708 (*December 6th Public Notice*).

[24] ALTS Motion at 4; TRA Apr. 28 Comments at 11-12; WorldCom Apr. 28 Comments at 4-5; MCI Apr. 28 Comments at 1-2; LCI Apr. 28 Comments at 2-5.

[25] WorldCom states that "Section 271(c)(1)(A) requires an applicant to show that competitors are *serving* residential (not just business) customers . . . ." WorldCom Apr. 28 Comments at 5 (emphasis added).

[26] TRA states that "an unaffiliated facilities-based competitor [must be] *engaged in the provision* of both residential and business telephone exchange services . . . ." TRA Apr. 28 Comments at 11 (emphasis added).

[27] According to Bell Atlantic, in order to satisfy section 271(c)(1)(A), "the competing provider's local exchange service must be one that is being '*offered*' to residential subscribers . . . ." Bell Atlantic Apr. 28 Comments at 9 n.4 (emphasis added).

[28] SBC asserts that "Brooks Fiber not only 'offer[s]' service over its own network -- thereby fulfilling [the section 271(c)(1)(A)] requirement -- but actually furnishes service to customers exclusively over that network." SBC Brief in Support at 10 (emphasis in original).

[29] Oklahoma AG Apr. 28 Comments 5; ALTS Motion at 3-4; LCI Apr. 28 Comments at 5; NCTA May 1 Comments at 10-11; Sprint Apr. 28 Comments at 2-3; WorldCom Apr. 28 Comments at 4; WorldCom May 1 Comments at 9-10.

[30] Brooks Apr. 28 Comments at 2.

[31] Brooks May 1 Comments at 6 n.3.

Oklahoma, nor has it ever offered residential service in Oklahoma,"[32] and that it "is not accepting any request in Oklahoma for residential service."[33] According to the Department of Justice, "[t]he provision of service on a test basis does not make Brooks a 'competing provider' of service to residential 'subscribers,' in the absence of any effort on Brooks' part to provide service on a commercial basis."[34] CompTel asserts that "[i]t does not even appear that Brooks' four 'customer' test is a telecommunications service at all, because it is neither available to the public nor offered for a fee."[35] SBC responds that the fact that "Brooks' residential customers are employees served on a 'test' basis . . . is irrelevant to [its] application."[36] According to SBC, section 271 "makes no distinctions based upon the end user's employment, the label a carrier attaches to its local service, or the pricing of the service."[37] In discussing Brooks' service operations generally, SBC also asserts that there is no requirement under section 271(c)(1)(A) that the competing provider serve any minimum number of customers.[38]

10. In asserting that Brooks is a competing provider of residential service for purposes of section 271(c)(1)(A), SBC relies on the fact that Brooks has an effective local exchange tariff in place for residential and business service.[39] SBC also emphasizes that the Oklahoma Corporation Commission (Oklahoma Commission) has determined that Brooks is

---

[32] ALTS Motion, Affidavit of John C. Shapleigh at 1.

[33] *Id.*

[34] Department of Justice Evaluation at 21; *see also* WorldCom Reply Comments at 13 (citing Department of Justice Evaluation and stating that "test customers simply do not count under Track A.").

[35] CompTel Apr. 28 Comments at 2 (citing definition of "telecommunications service" at 47 U.S.C. § 153(46)).

[36] SBC Apr. 28 Comments at 9.

[37] *Id.* at 9-10.

[38] SBC Brief in Support at 9-10; SBC Apr. 28 Comments at 9; SBC Reply Comments at 3; *but see* State Attorneys General Reply Comments at 6-7 (arguing that, while there is no metric test showing a specific level of market entry, it is not sufficient for the competing provider to provide service to a handful of subscribers in the state if the competing provider's operations are so limited that no reliable inferences may be drawn about the feasibility of full scale competitive entry); AT&T May 1 Comments at 8 (responding to SBC's claims and asserting that "Congress did not vote down any 'metric' amendments to the facilities-based provider requirement that became law . . .").

[39] SBC Brief in Support at 10 (citing SBC Application, Appendix - Volume II, Tab 3, at §§ 2.1.1 & 4); *see also* Bell Atlantic Apr. 28 Comments at 9 n.4. According to Bell Atlantic, "SBC has an approved agreement with a competitor that is offering service to residential subscribers under an effective tariff (and that is legally obligated to provide service upon demand), and this should be adequate to apply under Track A." *Id.*

providing service to both business and residential subscribers.[40] In addition, both SBC and the Oklahoma Commission suggest that Brooks has certain legal obligations to furnish service to residential subscribers in Oklahoma,[41] and that Brooks has media advertisements seeking to attract residential subscribers.[42] In contrast, the Department of Justice contends that "[a]lthough Brooks plans to offer service to residential subscribers in Oklahoma (and is doing so in other states), and has a tariff on file in Oklahoma under which it could at some point serve residential customers, it is not presently a 'competing provider of telephone exchange services . . . to residential . . . subscribers,' as required by [s]ection 271(c)(1)(A)."[43]

11. Various commenters also contend that SBC does not meet the requirements of section 271(c)(1)(A) because Brooks is not providing facilities-based service to both residential and business subscribers.[44] A number of commenters argue that section 271(c)(1)(A)'s requirement that competing providers offer telephone exchange service either "exclusively" or "predominantly" over their own telephone exchange service facilities should apply independently to both business and residential subscribers.[45] Similarly, CPI asserts that a carrier that serves residential customers solely through resale does not meet the "predominance" test.[46] In contrast, the Department of Justice states that section 271(c)(1)(A) permits an applicant to serve one class of subscribers via resale, so long as the competitor's local exchange services as a whole are provided predominantly over its own facilities.[47] In its

---

[40] SBC Reply Comments at 2.

[41] SBC Apr. 28 Comments at 10-11; Oklahoma Commission Reply Comments at 8-9; *but see* AT&T Reply Comments at 26-27 (disputing Oklahoma Commission's finding that section 271(c)(1)(A) is satisfied because Brooks has committed to provide residential service and because Brooks has entered into an interconnection agreement anticipating the provision of such service).

[42] SBC Reply Comments at 4 n.8 and attached Appendix - Volume I, Tab 19; Oklahoma Commission Reply Comments at 8.

[43] Department of Justice Evaluation at 20.

[44] *See* Oklahoma AG Apr. 28 Comments at 5-6; Brooks Apr. 28 Comments at 4; NCTA May 1 Comments at 10-11; WorldCom Apr. 28 Comments at 4-5; WorldCom May 1 Comments at 10; *see also* U S West Apr. 28 Comments at 2-3 (stating that the competing providers must provide "both residence and business service 'predominantly over their own telephone exchange service facilities'"); BellSouth May 1 Comments at 4 (stating that in order to satisfy section 271(c)(1)(A) a competing provider must provide "service to 'residential and business' customers 'exclusively' or 'predominantly' over its own facilities").

[45] Brooks May 1 Comments at 9; Sprint May 1 Comments at 11-13; CompTel Reply Comments at 9-12; ALTS Reply Comments at 3-6; AT&T Reply Comments at 25-30.

[46] CPI May 1 Comments at 2.

[47] Department of Justice May 21 Addendum at 2-4.

reply comments, SBC also asserts that the statute "does not impose any requirement that the CLEC actually serve both business and residential customers over its own facilities."[48]

12. Certain commenters also argue that Brooks does not qualify as a "predominantly" facilities-based carrier with respect to its business subscribers.[49] Many commenters also offer differing interpretations of the phrase "predominantly over their own telephone exchange service facilities," contained in section 271(c)(1)(A).[50]

C. Discussion

13. As noted above, there is considerable dispute in the record of this proceeding about whether SBC has shown that Brooks' residential operations meet the requirements of section 271(c)(1)(A). Consequently, in determining whether SBC has demonstrated compliance with section 271(c)(1)(A), we focus our discussion on whether Brooks is a competing provider of telephone exchange service to residential subscribers.[51] We note that the burden is on SBC[52] to show that Brooks is an "unaffiliated competing provider[ ] of telephone exchange service . . . to residential . . . subscribers."[53] Given our conclusion below that Brooks is not a competing provider of telephone exchange service to *residential* subscribers, we find it unnecessary to reach the issue of whether Brooks is a competing provider of telephone exchange service to *business* subscribers.

14. As summarized above, commenters offer differing views about the showing SBC must make with respect to Brooks' residential service operations (i.e., whether Brooks must serve, provide, offer, or furnish residential service). We need not and do not define the precise scope of the phrase "competing provider[ ] of telephone exchange service" for purposes of this Order. Issues concerning the nature and size of the presence of the competing

---

[48] SBC Reply Comments at 3.

[49] *See, e.g.*, Brooks May 1 Comments at 12-16; AT&T May 1 Comments at 7-9.

[50] *See, e.g.*, SBC Apr. 28 Comments at 13; Sprint May 1 Comments at 10-11; CPI May 1 Comments at 2-3.

[51] Because SBC relies only on one carrier (i.e., Brooks) for demonstrating compliance with section 271(c)(1)(A), we need not determine whether a BOC may rely, for purposes of satisfying section 271(c)(1)(A), on multiple carriers who together provide telephone exchange service to residential and business subscribers. *See* Department of Justice Evaluation at 13 n.18.

[52] *See* 47 U.S.C. § 271(d)(3) (stating that "[t]he Commission shall not approve the authorization requested in an application . . . unless it finds that . . . the petitioning [BOC] has met the requirements of [ ]section (c)(1)").

[53] *Id.* § 271(c)(1)(A).

provider require very fact-specific determinations.[54] We anticipate addressing such issues in upcoming applications where facts clearly present the issues and warrant a Commission determination. We do, however, conclude that a "competing provider" cannot mean a carrier such as Brooks that at present has in place at most paper commitments to furnish service. We find 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 in order to satisfy section 271(c)(1)(A).[55] Consistent with this interpretation, we note that the Joint Explanatory Statement states that "[t]he requirement that the BOC 'is providing access and interconnection' means that the competitor has implemented the agreement and the competitor is operational."[56]

15. Although SBC emphasizes that the Oklahoma Commission "concluded that [SBC] satisfies the requirements of subsection 271(c)(1)(A) because Brooks Fiber serves both business and residential customers . . . ,"[57] we find that the Oklahoma Commission's determination on this issue is not dispositive. Section 271 requires us to consult with the Oklahoma Commission "in order to verify the compliance of [SBC] with the requirements of [section 271(c)]" before we make any determination on SBC's application under section 271(d).[58] At the same time, as the expert agency charged with implementing section 271, we are required to make an independent determination of the meaning of statutory terms in section 271.

16. Moreover, based on the record before us, we find that it is unclear what standard the Oklahoma Commission applied or what specific facts it relied on in making its determination about Brooks' activities. In its order in the state's section 271 proceeding, the Oklahoma Commission concluded "that Brooks Fiber meets the requirement of [s]ection

---

[54] *See* SBC Brief in Support at 9-10 (asserting that there is no requirement under section 271(c)(1)(A) that the competing provider serve any minimum number of customers).

[55] *See* AT&T May 1 Comments at 9. The Webster's Third New International Dictionary defines the verb to "compete" as "to seek or strive for something (as a position, possession, reward) for which others are also contending." Webster's Third New International Dictionary (1971 ed.).

[56] Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 148 (1996) (Joint Explanatory Statement).

[57] SBC Reply Comments at 2. As support for this statement, SBC cites to the Oklahoma Commission's order in its section 271 docket and to the Oklahoma Commission's initial comments filed in this proceeding. *Id.*; *see also Application of Ernest G. Johnson, Director of the Public Utility Division, Oklahoma Corporation Commission to Explore the Requirements of Section 271 of the Telecommunications Act of 1996, Final Order*, Cause No. PUD 970000064, Order No. 411817 at 2 (Oklahoma Commission Final Order), in Oklahoma Commission May 1 Comments, Appendix G at 2 and Oklahoma Commission May 1 Comments at 4-6.

[58] 47 U.S.C. § 271(d)(2)(B).

271(c)(1)(A) of the Act,"[59] but did not provide any basis for its determination. In its initial comments in this proceeding, the Oklahoma Commission asserts that "Brooks is currently providing local service to business customers predominantly over its own facilities and by resale on a test basis to its employees for their residential service."[60] The Oklahoma Commission contends in its reply comments in this proceeding that "[w]ith respect to the Track 'A' versus Track 'B' issue, the [Oklahoma Commission] has determined that Brooks Fiber is providing both business and residential service . . . ."[61] Given the facts in the record before us, the Oklahoma Commission's determination that Brooks "is providing" residential service could be based on, either cumulatively or individually, a range of factors -- e.g., Brooks' provision of circuits to four employees on a test basis, Brooks' effective state tariff, or service obligations that Brooks has under Oklahoma law. None of the Oklahoma Commission's statements, either taken together or individually, specifies whether the Oklahoma Commission has made a finding that Brooks is actually furnishing residential service, or otherwise qualifies as a competing provider of residential service.

17. We conclude that Brooks' provision of local exchange service on a test basis, at no charge, to the homes of four of its employees does not qualify Brooks as a "competing provider[ ] of "telephone exchange service . . . to residential . . . subscribers."[62] The term "subscribers" suggests that persons receiving the service pay a fee.[63] The term "telephone exchange service" also requires that there be payment of a fee.[64] For the purposes of section

---

[59] Oklahoma Commission Final Order at 2.

[60] Oklahoma Commission May 1 Comments at 6.

[61] Oklahoma Commission Reply Comments at 8.

[62] 47 U.S.C. § 271(c)(1)(A).

[63] The Webster's Third New International Dictionary defines the verb to "subscribe" as "to agree to take and *pay* for something (as stock) by signing one's name to a formal agreement." A subscriber is defined as "one that subscribes." Webster's Third New International Dictionary (1971 ed.) (emphasis added).

[64] A "telephone exchange service" is a type of "telecommunications service." *See 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, 15636 (1996) (*Local Competition Order*) (stating that the "term 'telecommunications service' by definition includes a broader range of services than the terms 'telephone exchange service and exchange access.'"), *motion for stay denied*, 11 FCC Rcd 11754 (1996), *Order on Reconsideration*, 11 FCC Rcd 13042 (1996), *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996), *further recon. pending, appeal pending sub nom. Iowa Util. Bd. v. FCC and consolidated cases*, No. 96-3321 *et al.*, partial stay granted pending review, 109 F.3d 418 (8th Cir. 1996), order lifting stay in part (8th Cir. Nov. 1, 1996), *motion to vacate stay denied*, 117 S. Ct. 429 (1996). The statutory definition of "telecommunications service" requires the offering of service "*for a fee* directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46) (emphasis added). The Commission has previously stated that the phrase "for a fee" in section 153(46) of the Act "means services rendered in exchange for something of value or a monetary payment." *Federal-State Joint Board on Universal Service*, CC Docket No.

271(c)(1)(A), the *competing* provider must actually be in the market, and, therefore, beyond the testing phase.[65] Hence, we agree with the Department of Justice that "[t]he provision of service on a test basis does not make Brooks a 'competing provider' of service to residential 'subscribers,' in the absence of any effort on Brooks' part to provide service on a commercial basis."[66]

18. Nor are we persuaded that Brooks is a competing provider of telephone exchange service to residential and business subscribers merely because it has an effective tariff in place for the provision of both business and residential service in Oklahoma.[67] Like the Department of Justice, we conclude that the existence of an effective local exchange tariff alone is not sufficient to satisfy section 271(c)(1)(A).[68] Brooks represents that it "is not now offering residential service in Oklahoma, nor has it ever offered residential service in Oklahoma,"[69] and that it "is not accepting any request in Oklahoma for residential service."[70] Neither SBC nor any other commenter has presented evidence to show that Brooks is accepting requests for residential service. Thus, SBC has not even made a threshold showing that Brooks is a competing provider that satisfies section 271(c)(1)(A).

19. Given the record in this proceeding, it is unclear whether Brooks is obligated under Oklahoma law to provide residential service. We note that Brooks' Oklahoma tariff provides that "[t]he furnishing of service under this tariff is subject to the availability on a continuing basis of all the necessary facilities . . . ."[71] Brooks suggests that this language

---

96-45, Report and Order, FCC 97-157, at para. 784 (rel. May 8, 1997), *Erratum*, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997). Similarly, an integral part of the definition of "telephone exchange service" is that the service be covered by the "exchange service charge." 47 U.S.C. § 153(47).

[65] As discussed below in Section IV, the term "such provider" as used in section 271(c)(1)(B) refers to a potential competing provider, rather than an operational competing provider.

[66] Department of Justice Evaluation at 21. *See also* Brooks May 1 Comments at 8 (asserting that its four test circuits do not constitute commercial operation of residential service in any recognized business use of that term); TRA Apr. 28 Comments at 11-12 (stating that "it is beyond dispute that the facilities-based competitor must actually be engaged in the provision of commercial service to residential and business accounts in order to satisfy" the standard of section 271(c)(1)(A)).

[67] *See* Oklahoma Commission Reply Comments at 8-9; SBC Brief in Support at 10 (citing SBC Application, Appendix - Volume II, Tab 3, at §§ 2.1.1 & 4); Bell Atlantic Apr. 28 Comments at 9 n.4.

[68] Department of Justice Evaluation at 20.

[69] ALTS Motion, Affidavit of John C. Shapleigh at 1.

[70] *Id.*

[71] *See* SBC Application, Appendix - Volume II, Tab 3 at § 2.1.2.2.

exempts it from providing service under the current circumstances.[72] SBC claims that, notwithstanding Brooks' representations in this proceeding, Brooks is obligated under Oklahoma law to serve residential customers.[73] The Oklahoma Commission states that Brooks' "[Oklahoma Commission]-approved tariff requires" it to provide service to business and residential customers, and that the Oklahoma Commission will "object to any attempt by Brooks Fiber to deviate from providing service to both residential and business customers."[74] The Oklahoma Commission does not, however, address the specific exemption contained in Brooks' tariff.

20. We conclude that the determination of whether Brooks is obligated under state law to provide residential service is not dispositive of the question presented here, because, irrespective of Brooks' state obligations, the key determination for our purposes is whether Brooks is a competing provider of residential telephone exchange service under the Communications Act. We note that notwithstanding all of its claims regarding Brooks' legal obligations, SBC does not rebut Brooks' statement that it "is not accepting any request in Oklahoma for residential service."[75] Thus, as a practical matter, competing telephone exchange service is not available on a commercial basis to any residential subscribers in Oklahoma. Regardless of whatever state obligations a carrier may have, we cannot conclude for purposes of section 271(c)(1)(A) that a carrier is a competing provider of telephone exchange service to residential subscribers if it is not even accepting requests for that service.

21. For similar reasons, we also discount the significance of allegations concerning Brooks' media advertisements. The fact that Brooks has a web site listing certain services that SBC suggests "might be attractive to residential customers" does not contradict Brooks' statement that it currently is not accepting requests for residential service.[76] Similarly, we do not attach significant evidentiary weight to the Oklahoma Commission's unsubstantiated assertion that "Brooks has begun media advertisements seeking to attract both business and residential customers,"[77] without further elaboration on the significance of such advertisements.

---

[72] Brooks May 1 Comments at 11 n.8.

[73] SBC contends that "Brooks obtained a certificate of public convenience and necessity to provide local service in Oklahoma by representing that it would offer service to residential customers in its service areas . . . ." SBC Apr. 28 Comments at 10. SBC also claims that a Brooks witness testified before the Oklahoma Commission that Brooks intended to offer residential service. *Id.* at 10-11.

[74] Oklahoma Commission Reply Comments at 8-9.

[75] ALTS Motion, Affidavit of John C. Shapleigh at 1.

[76] SBC Reply Comments at 4 n. 8 and attached Appendix - Volume I, Tab 19.

[77] Oklahoma Commission Reply Comments at 8.

22. As noted above, various commenters have discussed whether section 271(c)(1)(A)'s requirement that competing providers offer telephone exchange service either "exclusively" or "predominantly" over their own telephone exchange service facilities should apply independently to both business and residential subscribers.[78] In addition, certain commenters have raised the issue of how to interpret the "predominantly" requirement of section 271(c)(1)(A). We need not and do not address either of these issues for purposes of SBC's Oklahoma section 271 application, because, as we have concluded above, Brooks does not qualify as a "competing provider of telephone exchange service . . . to residential . . . subscribers" pursuant to section 271(c)(1)(A).

IV. REQUIREMENTS OF SECTION 271(c)(1)(B)

A. Background

23. Section 271(c)(1)(B) of the Act allows a BOC to seek entry under Track B if "no such provider has requested the access and interconnection described in [section 271(c)(1)(A)]" and the BOC's statement of generally available terms and conditions has been approved or permitted to take effect by the applicable state regulatory commission.[79] In its motion to dismiss, ALTS asserts that SBC is precluded from proceeding under Track B because "interconnection requests" have been filed in Oklahoma.[80] In response to this motion, the Bureau invited parties to address in detail their legal theories of when a BOC is permitted to file under section 271(c)(1)(B) and when a BOC is foreclosed from proceeding under section 271(c)(1)(B). The Bureau requested parties to address, among other things, the nature of a "request" that is referred to in section 271(c)(1)(B), which we hereinafter refer to as a "qualifying request," and whether and when SBC has received such a request.[81]

B. Positions of the Parties

24. In its application, SBC contends that it is entitled to proceed under Track B.[82] SBC interprets the phrase "such provider" as used in section 271(c)(1)(B) to refer to an "exclusively" or "predominantly" facilities-based competing provider of telephone exchange

---

[78] *See supra* para. 11.

[79] 47 U.S.C. § 271(c)(1)(B).

[80] ALTS Motion at 2, 4-5.

[81] *April 23rd Public Notice* at 2.

[82] SBC Brief in Support at 12.

service to residential and business subscribers, as described in section 271(c)(1)(A).[83] Thus, under SBC's reading of the statute, a BOC is entitled to proceed under Track B unless: (1) a competing provider is actually providing telephone exchange service to residential and business subscribers in accordance with the terms of section 271(c)(1)(A); *and* (2) that competing provider has requested access and interconnection more than three months prior to the filing of an application as required by section 271(c)(1)(B).[84] Under this reading, the fact that a carrier has requested access and interconnection but has not yet begun to provide competing service (such as a carrier that is still engaged in negotiations with a BOC) does not foreclose the BOC from proceeding under Track B. Thus, according to SBC, to foreclose Track B, the requesting carrier "may not simply anticipate building facilities and seek interconnection in anticipation of that day. Rather, it must actually be 'such provider' described in [section 271(c)(1)(A)]."[85]

25. A central element of SBC's argument is that a request for access and interconnection does not become a qualifying request that forecloses Track B until the carrier begins providing the type of telephone exchange service to residential and business subscribers described in section 271(c)(1)(A). Specifically, SBC maintains that a request from a prospective competitor "may become" a qualifying request that forecloses Track B "once the carrier starts to provide qualifying, facilities-based service pursuant to its interconnection agreement" with SBC.[86] Accordingly, SBC seems to take the position that, if it has not satisfied the requirements of section 271(c)(1)(A), then it must be eligible to proceed under Track B.[87]

---

[83] *Id.* at 14 (citing 141 Cong. Rec. H8425, H8458 (daily ed. Aug. 4, 1995) (statement of Rep. Tauzin)). *See also* SBC Apr. 28 Comments at 14 & n.24 (citing the Joint Explanatory Statement at 148 and 142 Cong. Rec. H1152 (daily ed. Feb. 1, 1996) (statement of Rep. Hastert)).

[84] SBC Brief in Support at 14-15. Pursuant to section 271(c)(1)(B), a BOC may file an application for in-region interLATA entry "if, after 10 months after the date of enactment of the Telecommunications Act of 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1)." 47 U.S.C. § 271(c)(1)(B). SBC argues that, if a BOC "that has an effective statement of terms and conditions also has implemented a state-approved agreement with a qualifying CLEC [competitive local exchange carrier], but that CLEC only qualified, or requested access, within the prior three months, then the [BOC] may apply for interLATA entry under" both Track A and Track B. SBC Brief in Support at 15 n. 15. Because, according to SBC, Brooks commenced its facilities-based provision of telephone exchange service on January 15, 1997, and SBC filed its application for in-region long distance with the Commission on April 11, 1997, SBC concludes that it is therefore eligible to proceed under both Track A and Track B. *Id.*; SBC Apr. 28 Comments at 17-18.

[85] SBC Brief in Support at 14.

[86] *See* SBC Apr. 28 Comments at 17.

[87] *See id.* at 9.

26. In their comments on ALTS' motion and on SBC's application generally, BOCs and their potential competitors differ sharply on what constitutes a "qualifying request" that will foreclose Track B. Most potential competitors, trade associations, the Oklahoma Attorney General, and the States Attorneys General generally agree with ALTS and appear to assert that *any* request for access and interconnection is a qualifying request that forecloses Track B.[88] Most BOCs, in contrast, contend that only a request from an already competing facilities-based provider of telephone exchange service to residential and business subscribers can be a qualifying request that precludes a BOC from proceeding under Track B.[89] U S West, CompTel, LCI, and the Department of Justice contend, however, that Track B is available to any BOC that has not received a request for access and interconnection to provide service that would satisfy the requirements of section 271(c)(1)(A).[90] We note that the Oklahoma Commission, in a 2-1 decision, found it was unnecessary to determine whether SBC could proceed under section 271(c)(1)(B) in light of its determination that SBC satisfies the requirements of section 271(c)(1)(A).[91]

C. Discussion

1. Summary

27. All parties appear to agree that, if SBC has received a "qualifying request" for access and interconnection, the statute bars SBC from proceeding under Track B. We agree with this analysis and conclude that, in order to decide whether SBC's application may proceed under Track B, we must determine whether SBC has received a "qualifying request." We conclude that a "qualifying request" under section 271(c)(1)(B) is a request for negotiation

---

[88] *See, e.g.*, AT&T May 1 Comments at 16-17; Brooks Apr. 28 Comments at 4; CPI Apr. 28 Comments at 2; CPI Reply Comments at 3-4; MCI May 1 Comments at 16; NCTA May 1 Comments at 8; Oklahoma AG Apr. 28 Comments at 7; Sprint Apr. 28 Comments at 11; State Attorneys General Reply Comments at 7; Time Warner May 1 Comments at 32; TRA Apr. 28 Comments at 8-9; TRA May 1 Comments at 13-14.

[89] Ameritech Apr. 28 Comments at 4; Bell Atlantic Apr. 28 Comments at 4-6; BellSouth Apr. 28 Comments at 3; SBC Apr. 28 Comments at 17-18. *See also* NYNEX Apr. 28 Comments at 1-2 (asserting that Track B is available where one or more facilities-based providers have not requested interconnection agreements which include all fourteen items of the competitive checklist).

[90] *See* U S West Apr. 28 Comments at 3 (recognizing that the "Track B alternative is available to the BOC only if it has not received a request . . . that would satisfy Track A"); LCI Apr. 28 Comments at 6 (asserting the Brooks' request was of the type that, once implemented "would provide [SBC] the basis for seeking approval under Track A"); Department of Justice Evaluation at 12; CompTel Reply Comments at 7; *but see* CompTel Apr. 28 at 4 (asserting that, because SBC has received at least "16 requests for access and interconnection," Track B is foreclosed).

[91] Oklahoma Commission May 1 Comments at 6 & Appendix G at 4; *see also id.*, Appendix G at 2, Dissenting Opinion of Commissioner Bob Anthony (asserting "I too agree with those parties that Track B does not apply.").

to obtain access and interconnection that, if implemented, would satisfy the requirements of section 271(c)(1)(A). We further conclude that the request for access and interconnection must be from an unaffiliated competing provider that seeks to provide the type of telephone exchange service described in section 271(c)(1)(A). As discussed below, such a request need not be made by an operational competing provider, as some BOCs suggest. Rather, the qualifying request may be submitted by a potential provider of telephone exchange service to residential and business subscribers.

28. We reach this conclusion for several reasons. As a matter of statutory interpretation, we find that our reading, by giving full effect to the meaning of the term "request" in section 271(c)(1)(B), is the one most consistent with the statutory design. In addition, as a matter of policy, we find that our interpretation will best further Congress' goal of introducing competition in the local exchange market by giving BOCs an incentive to cooperate with potential competitors in providing them the facilities they need to fulfill their requests for access and interconnection. Moreover, we find our interpretation to be particularly sound in contrast to the extreme positions set forth by SBC and its potential competitors, as described below.

29. Under SBC's interpretation of section 271(c)(1)(B), only operational facilities-based competing providers may submit qualifying requests that preclude a BOC from proceeding under Track B.[92] Adoption of this interpretation of a qualifying request would create an incentive for a BOC to delay the provision of facilities in order to prevent any new entrants from becoming operational and, thereby, preserve the BOC's ability to seek in-region interLATA entry under Track B.[93] As the Department of Justice observes, this reading of section 271(c)(1)(B) would effectively "reward the BOC that failed to cooperate in implementing an agreement for access and interconnection and thereby prevented its competitor from becoming operational."[94] Opponents of SBC's application offer a radically different -- and, in our view, equally unreasonable -- interpretation of when a qualifying request has been made. These parties claim that *any* request for access and interconnection submitted by a potential new entrant to a BOC is a qualifying request and precludes the BOC from proceeding under Track B. We conclude, however, that this statutory reading could create an incentive for potential competitors to "game" the negotiation process by submitting an interconnection request that would foreclose Track B but, if implemented, would not satisfy the requirements of section 271(c)(1)(A). Such a result would effectively give a BOC's

---

[92] We note that when we refer to SBC's position, we are also referring to the positions advanced by Ameritech, Bell Atlantic, and BellSouth.

[93] *See* AT&T May 1 Comments at 18-19; CompTel at Apr. 28 at 5; NCTA May 1 Comments at 9 (asserting that, under SBC's reading, BOCs would have no incentive to enter into or faithfully execute meaningful interconnection agreements with competitors).

[94] Department of Justice Evaluation at 17. *See also* AT&T May 1 Comments at 19.