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June 9, 1997

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

RE: Docket No. 960786-TL

Dear Mrs. Bayo:

Enclosed is an original and fifteen copies of BellSouth's Response and Memorandum In Opposition To Joint Motion For Advance Ruling On BellSouth's Ineligibility For "Track B" and To Delete A Portion Of Issue 1, which we ask that you file in the captioned matter.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served on the parties shown on the attached Certificate of Service.

Sincerely,

J. Phillip Carver (CKE)

J. Phillip Carver

ACK
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Enclosures

cc: All Parties of Record
A. M. Lombardo
R. G. Beatty
W. J. Ellenberg

BEFORE THE

FLORIDA PUBLIC SERVICE COMMISSION

In re: Consideration of BellSouth Telecommunications, Inc.'s entry into InterLATA services pursuant to Section 271 of the Federal Telecommunications Act of 1996	)	Docket No. 960786-TL
	)	Filed: June 9, 1997

BELLSOUTH'S RESPONSE AND MEMORANDUM IN OPPOSITION TO JOINT MOTION FOR ADVANCE RULING ON BELLSOUTH'S INELIGIBILITY FOR "TRACK B" AND TO DELETE A PORTION OF ISSUE 1

BellSouth Telecommunications, Inc. ("BellSouth") hereby files, pursuant to Rule 25-22.037, Florida Administrative Code, its Response and Memorandum in Opposition to Joint Motion For Advance Ruling On BellSouth's Ineligibility For "Track B" And To Delete A Portion Of Issue 1, and states the following:

I. INTRODUCTION

The Florida Competitive Carriers Association, Inc., AT&T Communications of the Southern States, Inc. and MCI Telecommunications Corporation ("Joint Movants", or "Movants") have filed a joint motion to unduly narrow this proceeding. Movants seek to have this Commission make a decision that Section 271 entrusts to the FCC, while hamstringing this Commission's development of a record to prepare it to fulfill its proper role under Section 271 and BellSouth's ability to demonstrate that local markets in Florida are open to competition. Further, Movants claim that granting their ill-conceived motion would save significant

resources is wrong. Regardless of the Track BellSouth pursues, BellSouth's ability to provide checklist items, whether or not those items are actually ever ordered by movants or others, is directly relevant to compliance with Section 271.

II. FCCA'S ARGUMENT

Section 271 provides two tracks for Bell companies to follow to demonstrate that their local market is open to competition, and that they thus qualify for entry into in-region long distance markets.[1] Movants argue for interpreting Section 271 so that both tracks would be effectively closed to BellSouth in Florida. Essentially, their argument is that a request from a "potential" facilities-based competitor to BellSouth shuts Track B, but does not open Track A until the "potential" competitor decides to place sufficient facilities in operation to qualify as a Track A provider. Movants want this Commission to rule that Track B is not available and to restrict the scope of this docket.

Movants' request seeks to have this Commission act outside of its statutory authority under Section 271. Their interpretation of the interplay between Tracks A and B is wrong on the statutory language and directly conflicts with the uncontradicted legislative history that explains how Congress intended Track B to work. Their interpretation is also in direct opposition to Congress's policy that the long distance market should be opened to BellSouth once BellSouth has opened its local market to competition. Movants would essentially read into the statute an

[1] The FCC must also find that the Bell Company will comply with additional safeguards in Section 272 and that entry is in the public interest.

additional requirement that BellSouth's entry into long distance is contingent on their operation of qualifying competitive facilities. Congress did not impose any such requirement for Bell company entry under Section 271. This misreading of Tracks A and B is an attempt to create a veto power for movants over when the long distance market should be opened, a veto that they would exercise by selectively operating facilities and that they would retain regardless of whether the FCC and this Commission found that BellSouth had demonstrated that the local market is open to competition.

III. STATEMENT OF APPLICABLE LAW

A. This Commission's Role under Section 271

Section 271 allows a Bell company to file at the FCC for authority to enter the in-region long distance business under Section 271(c)(1)(A) (Track A) or (c)(1)(B) (Track B). The choice of Tracks to apply under is up to the Bell company. Upon receiving the application, Section 271(d)(2)(B) requires the FCC to consult with the relevant state commission concerning compliance with Section 271(c). Section 271(c) contains the Track A and Track B provisions and the Competitive Checklist. The state commission's role is consultative -- the decision as to whether the application meets the requirements of Section 271(c) is the FCC's to make. Any assessment of compliance with Section 271(c) depends heavily on the relevant market facts existing at the time of filing at the FCC.

Movants' request for a ruling that Track B is closed and to conduct this proceeding as though Track B were not available to BellSouth would have this Commission make a decision that Section 271 placed within the FCC's hands and potentially leave this Commission unprepared to fulfill its consultative role should BellSouth file a Track B application. This is especially true because any such decision is heavily dependent on the facts existing at the time the application is filed, and could be rapidly outpaced by events.

Finally, probably one of the driving forces behind the motion is that much of the inquiry the Movants seek to have this Commission abandon concerns whether BellSouth is capable of meeting the Checklist's requirements even if no present demand for them exists. That is, Movants argue that if Track B is foreclosed, BellSouth must "fully implement" the Checklist rather than be prepared to supply those elements. Joint Motion at 3, 6-7. Movants do not define what they mean by "full implementation" but appear to be trying to contrast it with offering Checklist items through a Statement of Generally Available Terms under Track B. However, even the Department of Justice takes the position that "full implementation" of the checklist through an agreement with one or more Track A providers is not required to meet the Checklist. "A BOC is providing an item, for purposes of checklist compliance, if the item is available both as a legal and practical matter, whether or not any competitors have chosen to use it." "A BOC ... can satisfy the checklist requirement with respect to an item for which there is no present demand." *In re: Application of SBC Communications, Inc. et al. Pursuant to Section 271 of the*

Telecommunications Act of 1996 to Provide In-Region InterLATA Services in the State of Oklahoma, CC Docket No. 97-121 (May 16, 1997) (hereinafter referred to as "DOJ Comments") at 23.

Movants imply in a footnote that the Kentucky Public Service Commission ruled that Track B was not available to BellSouth in Kentucky and narrowed the scope of the proceeding it was conducting concerning BellSouth's entry into the long distance business in Kentucky. Joint Motion n.5 at 9. In fact, the Kentucky Commission recognized that Section 271 did not give to State Commissions the decision on whether Tracks A and B are open. In the Matter of: Investigation Concerning the Propriety of Provision of InterLATA Services by BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996, Case No. 96-608, Order dated April 16, 1997 ("Order"), at 3. The Kentucky Commission recognized that to fulfill its proper Section 271 role it should not limit its inquiry as Movants request here. Order at 3. No state in BellSouth's region has elected to issue rulings on the availability of Track A and Track B or narrow the scope of any proceeding as Movants request.[2]

Narrowing the scope of this inquiry to ignore whether BellSouth can provide Checklist elements for which there is no present demand would leave this Commission without a factual record for a key element of its Section 271 consultation. By denying such a factual record to BellSouth, Movants would also

[2] The Kentucky Commission did offer its opinion, based primarily on local factors regarding the treatment of unbundled network elements and its view of their role under Section 271, that Track A was currently appropriate for BellSouth in Kentucky and that Track B was not, but, again, did not attempt to rule that Track B was not available or that its investigation should be limited.

handicap BellSouth's ability to present its case that the Florida market is open to competition.

B. Overview Of Section 271

Section 271 of the Telecommunications Act of 1996 ("1996 Act") is a critical part of Congress's "pro-competitive, de-regulatory national policy framework" to "open telecommunications markets to competition." S. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996) ("Conference Report"). Section 271 was designed to create head-to-head competition between long distance carriers and the Bell Operating Companies ("BOCs") in both the local and long distance markets by ending the old regime established under the Modification of Final Judgment, which had artificially divided local and long distance markets into two separate spheres. By opening markets, Congress intended to create a situation that would allow "everyone to compete in each other's business," which would bring consumers "low cost integrated service with the convenience of having only one vendor and one bill to deal with." 142 Cong. Rec. S713, S714 (daily ed. Feb. 1, 1996) (statement of Sen. Harkin).

The first step was opening local telecommunications markets. *See* 142 Cong. Rec. S688 (daily ed. Feb. 1, 1996) (statement of Sen. Hollings) (Bell companies must "open their networks to competition prior to their entry into long distance"). Congress set out specific requirements for opening local markets in Sections 251-253 of the Act and made Bell company participation in long distance

under Section 271 conditional upon the companies maintaining compliance with a "Competitive Checklist" set out in Section 271(c)(2)(B). 141 Cong. Rec. S8138 (daily ed. June 12, 1995) (statement of Sen. Kerrey); *see* 141 Cong. Rec. S8152-8153 (daily ed. June 12, 1995) (statement of Sen. Breaux) (BOCs allowed to sell long distance and required the opening of local exchange markets).

Section 271 ensures that opening the local markets would not only allow local competition but would also bring real competition to the "oligopolistic" long distance business through BOC entry. 141 Cong. Rec. S7881 (daily ed. June 7, 1995) (statement of Sen. Pressler); 142 Cong. Rec. S686-87 (daily ed. Feb. 1, 1996) (statement of Sen. Pressler) (Act "will lower prices on long-distance calls through competition"). Section 271 does not require local competition as a predicate to Bell company long distance entry and was *not* enacted to give incumbent interexchange carriers or others the means to postpone such competition once the local market was opened. 141 Cong. Rec. S7881, S7889 (daily ed. June 7, 1995) (statement of Sen. Pressler). As one congressman observed:

> This will tell anyone who studies rates and competition that there is no competition in the long distance market. What is causing the vast objection from AT&T, MCI and Sprint is the fact that they want to continue this cozy undertaking without any competition from the Baby Bells or from anybody else.

141 Cong. Rec. H8463 (daily ed., Aug. 4, 1995) (statement of Rep. Dingell).

C. Tracks A and B

Congress created two tracks for BOCs to seek authority to begin competing for long distance customers. Track A requires the presence of a facilities-based competitor while Track B applies in the absence of such a competitor. Under either route, a BOC can obtain approval for entry into the long distance market if it has shown that its local market is open to competition through compliance with Section 271(c)(2)(B)'s "Competitive Checklist, that entry is in the public interest and that other statutory safeguards will be complied with. Track A allows a BOC to apply for long distance authority immediately upon passage of the Telecommunications Act, while Track B requires that the BOC wait ten months.

1. Track A route

Track A is titled "Presence of a Facilities-Based Competitor," and BellSouth and movants have no dispute that it is predicated on the existence of a operational facilities-based local competitor. Joint Motion fn.2 at 3 (Track A requires "facilities-based competition.") The first sentence of Track A requires BellSouth to be providing access and interconnection for the "network facilities" of one or more "unaffiliated competing providers" of telephone exchange service. The second sentence of Track A requires that these "network facilities" be sufficient to make the competitor "exclusively" or "predominately" facilities based. 47 U.S.C. § 271(c)(1)(A). BellSouth agrees with Movants that Track A requires the presence of an "unaffiliated competing provider." Id.; Joint Motion at 4. It is also clear that this

provider must have network facilities of its own over which it is actually delivering telephone exchange service.[3]

Track A arose from Congress's belief that cable companies would emerge quickly as the facilities-based local market competitors that it envisioned. The Conference Report concluded that "[s]ome of the initial forays of cable companies into the field of local telephony therefore hold the promise of providing the sort of local residential competition that has consistently been contemplated," citing one cable company that already had entered into an interconnection agreement with an incumbent BOC so that it could offer telephone service to 650,000 subscribers. *Conference Report.* at 148.

Because of the possibility that cable companies would emerge quickly as facilities-based competitors to local telephone companies, Congress enacted Track A to permit an expedited route for BOCs to enter the long distance market (unlike Track B which required a ten month waiting period). *See, e.g.*, 142 Cong. Rec. S713 (daily ed. Feb. 1, 1996) (statement of Sen. Breaux) ("In some states these agreements have already been put in place with the approval of state public service commissions ... [i]n those instances, we see no reason why the FCC should not act immediately and favorably on a Bell company's petition to compete"). As one of the key authors of the Act explained:

> And, the biggest surprise to us was when Brian Roberts of Comcast Cable on behalf of the cable industry said that they wanted to be the competitors of the telephone companies in the residential marketplace.

[3] Thus, the facilities-based provider under Track A must have "implemented" the interconnection agreement and must be "operational." Conference Report at 148; *see also* Conference Report at 147 ("[t]he competitor must *offer* telephone exchange service") (emphasis added).

> In fact, the next day, I called Brian and Jerry Levin of Time-Warner to have them reassure me that their intent was to be major players and competitors in the residential marketplace. After that discussion, I told my staff that we needed a checklist that would decompartmentalize cable and competition in a verifiable manner and move the deregulated framework even faster than ever imagined. And we came up with the concept of a facilities-based competitor who was intended to negotiate the loop for all within a State and it has always been within our anticipation that a cable company would in most instances and in all likelihood be that facilities-based competitor in most states.

142 Cong. Rec. H1149 (daily ed., Feb. 1, 1996) (statement of Rep. Fields).

Thus, it was Congress's intention that, under Track A, a facilities-based competitor could "negotiate the loop for all within a State." Because this competitor would have already invested in significant facilities it would have financial incentive to quickly negotiate an interconnection agreement and begin providing service over its facilities rather than drag out the process.[4]

In addition, Track A creates incentives for firms to invest in and operate competitive local facilities by offering those firms a role in the Section 271 process. In return for investing in competitive facilities, those firms could be assured that the local Bell company would be focused on concluding a Section 252 agreement with those firms and making sure it was implemented in order to pursue long distance authority under Track A. Track A also provided incentives to Bell companies to and, in return, gain the ability to seek entry into long distance.

2. Track B route

[4] Congress provided that this competitor's agreement would be available to others within the State under Section 252(i).

Track B is the other route a BOC may follow to demonstrate that its local market is open to competition. By its terms, Track B is available, after a ten month waiting period, if "no such provider has requested the access and interconnection described in subparagraph (A)." 47 U.S.C. § 271(c)(1)(B). One would expect "such provider" to refer to the provider described in the immediately preceding subparagraph (A), and the legislative history is absolutely clear that it does refer to the facilities-based competing provider carefully described in Track A. For example, the Conference Report makes the point that Track B is available if "*no facilities-based competitor that meets the criteria set out in new section 271(c)(1)(A) has sought to enter the market*." Conference Report at 148 (emphasis added)

Congressman Tauzin gave the most detailed explanation of Track B's "no such provider" language during the debates over the Telecommunications Act. He spelled out that "[s]ubparagraph (b) uses the words 'such provider' to refer back to the exclusively or predominantly facilities based provider described in subparagraph (A)." 141 Cong. Rec. H8457, H8458 (daily ed. Aug. 4, 1995) (statement of Rep. Tauzin). He gave several examples of how Track B would apply in practice. Id. According to Congressman Tauzin, a BOC could file under Track B if "no competing provider of telephone exchange service with its own facilities or predominantly its own facilities has requested access and interconnection." *Id.* Congressman Hastert, a member of the Conference Committee and author of the provision which became Section 271(c)(1)(B) affirmed these views. Congressman Hastert stated that Track B remains open until a BOC has received a *"request for access and interconnection*

from a facilities-based competitor that meets the criteria in Section 271(c)(1)(A)." 142 Cong. Rec. H1152 (daily ed., Feb. 1, 1996) (statement of Rep. Hastert) (emphasis added).

III. DISCUSSION

At times, Movants seem to agree with the clear language of the statute and the compelling legislative history concerning the sort of provider that must make a request that closes Track B. For example, they write that "Track B is available only if no 'unaffiliated competing providers of telephone exchange service' have 'requested the access and interconnection described in subparagraph (A)." Joint Motion at 4. Although they selectively quote Section 271(c)(1)(A), leaving out its requirements that the competitor be exclusively or predominately facilities-based, Movants appear to concede that, to close Track B, the request for access and interconnection must come from a presently competing provider of telephone exchange service.

However, Movants feel free to modify their position as it suits them, and, when they wish to argue that Track B is shut, they insert the word "potential" into their more candid assessment quoted above. Thus, in places they simply argue that a request from a "potential" facilities-based competitor shuts Track B, even though they admit that Track A, to which Track B's "such provider" language refers, requires an actual competitor. Joint Motion at 3, 4. Their reading of Tracks A and B, unrestrained by the actual language, reads Track A as requiring an actual facilities-based competitor where it suits them in order to close Track A, but only a

"potential" competitor when it suits them in order to close Track B. Nowhere do Movants explain where "potential" can be found in Track A, Track B or the legislative history or why it can be inserted or deleted from the statute at their whim. They provide no legislative history contradicting the Conference Report and the language from the debates that makes its absolutely clear that Track B is open until an actual (as opposed to a potential) facilities-based Track A competitor makes a request for interconnection.

A. BellSouth Can Seek InterLATA Authority Under Track B.

Until a facilities-based competitor is providing telephone exchange service to residential and business subscribers, BellSouth may proceed under Track B. Those parties with the most to lose from BellSouth's entry into long distance contend that Track B is not an option for BellSouth. Thus, Movants claim that a BOC is foreclosed from Track B if a "potential" competitor simply requests negotiations for access and interconnection with the BOC, even if the competitor has made no investment in facilities to compete on a local basis. At the same time, these carriers argue that Track A also is foreclosed until the potential competitor requesting access actually signs and implements the agreement and begins operating facilities to serve business and residential subscribers.

The Commission should reject this convoluted interpretation, which would only serve to delay full competition in the telecommunications market. Adopting Movants' interpretation of the interplay between Track A and Track B would take

the decision on opening the long distance market to competition out of the hands of the FCC, deny this Commission its role in the process, and put the timing of opening the Florida long distance market into the hands of BellSouth's competitors. These carriers could exploit the artificial no-man's land their interpretation creates by simply making a request to negotiate for access and interconnection (thereby foreclosing Track B under their reading of the statute), and then limiting facilities investments or limiting facilities-based service so as to avoid becoming qualifying competitors under Track A.

Indeed, under their interpretation of Section 271, Movants have every incentive not to deploy such facilities or to qualify as the full-fledged local competitors Congress was seeking and thought it was providing incentives to help create, because the result of doing so would be that BellSouth is allowed to compete for long distance customers. At the very least, they would have an incentive to delay doing so until the restriction on their ability to joint market has lapsed or until new technologies that could be used to bypass the local network -- such as new wireless technology -- have been implemented. In the meantime, they could selectively deploy facilities to skim off BellSouth's profitable business customers, while strategically using the resale provisions of the 1996 Act to serve residential customers. All the while, under Movants' view, the FCC and this Commission could not bring real long distance competition to Florida consumers regardless of whether the local market was open to local competition because both Tracks would be closed.

Such a result runs counter to the language and intent of Congress, which sought to open the long distance market upon the opening of the local market. The legislative history is clear that the requirements tying Tracks A and B together serve Congress's goal of opening the long distance market to competition by keeping a route open for BOCs to seek long distance authority. The Conference Report makes the point that Track 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.*" Conference Report at 148 (emphasis added). That is, Congress believed that a general statement of terms and conditions subject to state review would be a reliable guarantor of open markets to the same degree that an agreement with a Track A facilities-based competitor would be.

Congressmen Tauzin's and Hastert's statements, as well as the language in the Conference Report, make clear that Track B remains open until a "facilities-based competitor" emerges.

B. The Department of Justice's interpretation of Track A/Track B is not persuasive and should not preclude BellSouth from seeking interLATA authority in Florida under Track B.

Movants pretend that comments recently filed by the Department of Justice (DOJ) at the FCC regarding Track A and Track B make it "clear" that their interpretation is right. Joint Motion at 2; *See* Evaluation of the United Statements Department of Justice. *In re: Application of SBC Communications, Inc. et al.*

Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region InterLATA Services in the State of Oklahoma, CC Docket No. 97-121 (May 16, 1997) (hereinafter referred to as "DOJ Comments"). DOJ's comments are wrong and entitled to no weight concerning the statutory interpretation of the Telecommunications Act. DOJ lobbied for an antitrust role in the Section 271 process, and that is what Congress gave them.[5] DOJ's opinions as to the meaning of the pertinent portions of Section 271 are, thus, entitled to no more weight than those of any other interested party.

In its comments filed in opposition to the application of SBC Communications, Inc. for interLATA authority in Oklahoma, the DOJ opines that a BOC may be precluded from applying under Track B, even though "a potential facilities-based carrier" has not satisfied the requirements of Track A when the BOC submits its Section 271 application. The DOJ's view is predicated upon a misunderstanding of the legislative history of the 1996 Act, is internally inconsistent, and should not preclude BellSouth from seeking interLATA authority in Florida under Track B.

In interpreting Track A/Track B, the DOJ claims that Track B is a "limited exception" for obtaining interLATA relief because, according to the DOJ, "Track A was the only path to approval of in-region interLATA services for the BOCs in the Senate bill." (DOJ Comments at 11). However, The Track A/Track B approach

[5] *See, e.g.*, Joint Explanatory Statement of the Committee of conference, S. Conf. Rep. No. 104-230, at 149 (1996)(Conference Report)(discussing antitrust standards Congress envisioned DOJ applying in commenting on Section 271 applications).

came "virtually verbatim from the House," not the Senate. Conference Report at 147-148. In addition, the conditions for BOC entry into the interLATA market under the Senate bill bore little resemblance to the Track A/Track B dichotomy ultimately adopted in the 1996 Act. Under the Senate bill, a BOC could seek interLATA authority once it had reached an interconnection agreement that met and fully implemented the competitive checklist; there was no requirement that the interconnection agreement be with a facilities-based provider or that the facilities-based provider serve both residential and business customers. *See* S. 652, §§ 255(b)(1) & (c)(2)(B), reproduced at S. Rep. 104-23, at 97-99 (1995). Thus, the DOJ's reliance upon the Senate bill in interpreting the legislative history of Track A/Track B is seriously misplaced.

Furthermore, the DOJ is simply wrong when it contends that Track B was intended to be a "limited exception" because Congress did not believe that facilities-based competition would emerge within 10 months of the passage of the 1996 Act. (DOJ Comments at 13-15). On the contrary, that is precisely what Congress thought would happen. The legislative history reflects that Track A was enacted based upon Congress's belief that cable companies would emerge quickly as facilities-based competitors. In discussing Track A, the House Report noted:

> The Committee does not intend that the [Track A] competitor should have to provide a fully redundant facilities-based network to the incumbent telephone company's network, yet it is expected that the facilities necessary for a competitive provider will be present. In this regard, the Committee notes that *the cable industry, which is expected to provide meaningful facilities-based competition, has wired 95% of the local residences in the United States* and thus has a network with the potential of offering this sort of competitive alternative.

House Rep. No. 104-204, pt. 1, 104 Cong., 1st Sess. at 77 (1995). Based on representations by cable companies that they intended to be "major players" in the local market and that some had interconnection agreements in place, Congress reasonably concluded that cable companies would be providing facilities-based local exchange service within 10 months after passage of the Act.

The quick entry of cable companies also explains the inclusion of the language allowing a BOC to seek interLATA authority under Track B when a competing provider has failed to negotiate in good faith or failed to comply with an implementation schedule in violation of an interconnection agreement. Congressman Tauzin offered the following example to illustrate this scenario:

> **Example No. 5:** If a competing provider of telephone exchange service with exclusively or predominantly its own facilities, for example, cable operator, requests access and interconnection, but either has an implementation schedule that albeit reasonable is very long or does not offer the competing service either because of bad faith or a violation of the implementation schedule. Under the circumstances, the criteria in [Track B] has been met ...

141 Cong. Rec. H8457 (daily ed. Aug. 4, 1995). In other words, Congress added this language to Track B so that a provider -- most likely a cable company -- that otherwise met the requirements of Track A could not preclude indefinitely BOC entry into long distance by delaying actual interconnection with the BOC.

The DOJ acknowledges Congress's explicit intent that BOC entry into long distance "not be held hostage indefinitely to the business decisions of the BOCs' competitors." (DOJ Comments at 7). However, the DOJ plays lip service to such congressional intent, contending that a BOC is foreclosed from seeking interLATA

authority under Track B "before there are operational facilities-based competitors in the local exchange market, if there are firms moving toward that goal in a timely fashion." (DOJ Comments at 17-18). In other words, according to the DOJ, the term "such provider" in Track B would encompass any potential competitor that is working promptly to build its own local exchange facilities, whether or not the competitor is using or ever intends to use such facilities to serve residence and business customers.

In SBC's case, the DOJ reasoned that SBC could not seek interLATA authority under Track B because it had received requests for interconnection and access from at least two qualifying providers -- Brooks Fiber ("Brooks") and Cox Communications ("Cox"). Yet, the DOJ's Comments give no indication if or when Brooks or Cox intend to provide facilities-based local exchange service to residence customers in Oklahoma. (DOJ Comments at 18). The DOJ simply noted that Brooks planned to enter the residential market on a resale basis, while Cox had an existing cable television system that could conceivably serve residential customers.

Not surprisingly, the DOJ cites nothing in the statute or the legislative history in support of its approach that Track B is foreclosed once a provider has "manifested" its intent to be a facilities based competitior and is "working toward that goal." Furthermore, it is inconsistent with the DOJ's position that "the term 'such provider' in Track B should be interpreted with reference to the type of facilities-based competition that would satisfy Track A." (DOJ Comments at 12). The only type of "facilities-based competition" that satisfies Track A is the

presence of one or more "competing providers of telephone exchange service ... *to residential and business subscribers.*" 47 U.S.C. § 271(c)(1)(A) (emphasis added). Thus, if the DOJ were consistent, it would have to conclude that the only type of "provider" that forecloses Track B is a facilities-based competitor providing telephone exchange service to both residential and business customers.

The DOJ apparently was persuaded that, eventually, either Brooks or Cox would provide a basis for a Track A application by SBC because, according to the DOJ, neither "stands to benefit from delaying SBC's entry into in-region interexchange markets ...." (DOJ Comments at 19). While that may be true, neither Brooks nor Cox could provide a basis for a Track A application unless and until one of them makes the business decision to use its facilities to serve residential customers -- a fact the DOJ conveniently ignores. Consequently, under the DOJ's interpretation of Track B, SBC's entry into long distance would be "held hostage indefinitely to the business decisions of the BOCs' competitors," contrary to explicit congressional intent.

Notwithstanding the DOJ's view to the contrary, Section 271(c)(1) and its legislative history are clear that Track B is open unless and until a competing provider is actually providing telephone exchange service to residential and business subscribers either exclusively or predominantly over its own telephone exchange service facilities. Thus Track B remains open.

III. CONCLUSION

For all the reasons set forth above, the joint movant's contention that Track B is closed to BellSouth as this juncture is legally wrong. The Motion is even more egregiously wrong in the threshold contention that this legal determination should be, or even can be, made at this time. As set forth above, the Act makes it clear that the BOC has the ability to select to travel under either Track A or Track B (or both). It is ultimately the role of the FCC to make a determination as to whether the requirements of Section 271 have been met. Consistent with this, the role of this Commission is a consultive role. Thus, this Commission must consider the facts presented to it and make a recommendation to the FCC as to how to consider the application of, in this case, BellSouth.

This clear statutory framework notwithstanding, the Movants request that this Commission prejudge the Track A/Track B issue months before the earliest date on which this Commmission could hold the necessary hearing following BellSouth's filing (which has also not occurred). Further, this request is based on nothing more than the unsupported assertion that to prejudge this issue would "save resources". BellSouth submits that, even if the contention that resources would be saved were correct, it is better to thoroughly analyze the facts (when the time comes to do so) and make a deliberate, well-supported decision rather than to do what Movants request, to make a decision that might simplify the case, but do so in a wholly unsupportable manner that violates the applicable legal requirements.

Despite the fact that it is up to BellSouth to determine whether it will file its

FCC application based upon Track A, Track B or both, Movants request that this Commission rule that Track B is foreclosed. Despite the fact that it is up to the FCC to determine whether BellSouth's 271 application should be granted, Movants request that this Commission make a ruling that would prevent the development of any record as to Track B, thereby depriving the FCC of facts upon which to base its decision, and simultaneously abdicating this Commission's consultive role. Finally, the Joint Movants request that all of this be done before BellSouth's application is filed, and months before the hearing at which the facts relating to BellSouth's application should properly be considered. Again, to support this legally untenable request, the Movants offer nothing more than the contention that to do away with all issues relating to Track B would "save resources". The Joint Movants' Motion should be rejected not only because the analysis they offer as to Track A/Track B is wrong, but also because the procedure they advocate by urging the Commission to prejudge this issue in advance of BellSouth's application is contrary to the provisions of the Telecommunications Act, and otherwise legally unsupportable.

WHEREFORE, for the foregoing reasons, the Commission should deny Movants' Joint Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE
DOCKET NO. 960786-TL

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by Federal Express this 9th day of June, 1997 to the following:

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