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May 27, 1997

Ms. Blanca S. Bayó
Director, Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket Nos. 960786-TL

Dear Ms. Bayó:

On behalf of the Florida Competitive Carriers Association, Inc., AT&T Communications of The Southern States, Inc. and MCI Telecommunications Corporation enclosed for filing in the above docket are the original and 15 copies of:

(a) their Joint Motion for Advanced Ruling on BellSouth's Ineligibility for "Track B" and to Delete a Portion of Issue 1; and

(b) their Request for Oral Argument.

By copy of this letter these documents have been provided to the parties on the attached service list.

Very truly yours,

Richard D. Melson

RDM/cc
Enclosures
cc: Parties of Record

ACK
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Joint Motion

Request for OA

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: May 27, 1997

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

The Florida Competitive Carriers Association, Inc. (FCCA), AT&T Communications of the Southern States, Inc. (AT&T) and MCI Telecommunications Corporation (MCI) (collectively, Movants) hereby move the Florida Public Service Commission (a) to rule, prior to the scheduled hearing in this docket, that BellSouth Telecommunications, Inc. (BellSouth) is ineligible to seek interLATA authority in Florida pursuant to Section 271(c)(1)(B) of the Telecommunications Act of 1996 (Act), and (b) to delete the portion of Issue 1 which deals with BellSouth's compliance with that subsection of the Act. As grounds for this motion, the Movants state:

I. INTRODUCTION

The Commission opened this docket in June, 1996, to provide the vehicle to consider an application by BellSouth under Section 271(c) of the Act for entry into the interLATA long distance market in Florida. Section 271(c) establishes two routes for the Bell Operating Companies (BOCs) to enter the in-region interLATA market, one under Section 271(c)(1)(A) and the other under Section 271(c)(1)(B). These are commonly referred to as "Track A" and "Track

B" as a short-hand reference to the particular subparagraph of Section 271(c)(1) at issue.

On July 19, 1996, the Commission entered its Initial Order Establishing Procedure (Order No. PSC-96-0945-PCO-TL) in this docket. The issue list attached as Appendix A to that Order identified two alternative versions of Issue 1. The first version of the issue deals with BellSouth's compliance with Section 271(c)(1)(A) of the Act (Track A), while the second version of the issue deals with BellSouth's compliance with Section 271(c)(1)(B) of the Act (Track B). To date, BellSouth has declined to identify which subsection of the Act it intends to rely upon when it files its application for interLATA authority in Florida.

Movants submit that BellSouth is no longer eligible to seek interLATA authority in Florida under Track B. Indeed, comments recently submitted by the U.S. Department of Justice to the FCC make clear that a BOC must proceed under Track A once it has received interconnection requests from potential competitors.[1] In order to simplify the issues in this case, and to avoid the necessity for the Commission and the parties to spend precious time and resources dealing with unnecessary issues, Movants ask the Commission to rule that BellSouth is ineligible for Track B as a matter of law, and to enter an order deleting the version of Issue 1 which deals with BellSouth's compliance with Section 271(c)(1)(B).

II. BELLSOUTH MUST PROCEED UNDER TRACK A

Track A describes the normal requirements for BOC in-region long distance entry. It provides in relevant part:

> A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved

[1] Application of SBC Communications, Inc., CC Docket No. 97-121, Evaluation of the United States Department of Justice (filed May 16, 1997). A copy of this filing is attached hereto as Attachment A.

> 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...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 facilities in combination with the resale of the telecommunications services of another carrier.[2]

It requires the BOC to "provide" and "fully implement" each of the fourteen checklist items. § 271(c)(1)(A); 271(c)(2)(B). It also requires the development of facilities-based competition serving business and residential customers. § 271(c)(1)(A). These requirements fulfill Congress's goal of ensuring that there is significant, objective evidence that the local market is open to competition before allowing RBOC entry into the long distance market.

Track B is a limited exception to the normal entry requirements of Track A. Track B enables a BOC to apply for long-distance entry based on a qualified Statement of Generally Available Terms and Conditions ("SGAT"), if the BOC has not received a request for access and interconnection by potential facilities-based competitors. Track B is available only in narrow circumstances, because it provides significantly less assurance of the openness of the local market

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[2]In total, the Act provides four requirements that a BOC must satisfy before it may enter its in-region interLATA market under Track A: (1) there must be facilities-based competition with one or more interconnection providers that have entered into agreements that have been approved under Section 252 and that specify the terms under which the BOC is providing access and interconnection to its network facilities to one or more unaffiliated competing providers [Section 271 (c)(1)(A)]; (2) the BOC must be providing access and interconnection pursuant to one or more such agreements, and the access and interconnection provided must meet the requirements of the 14-point competitive checklist set forth under Section 271(c)(2)(B); (3) the requested authorization for the BOC to provide in-region interLATA services must be set up to comply with the separate subsidiary and nondiscrimination requirements of Section 272 [Section 271(d)(3)(B)]; and (4) the requested authorization is consistent with the public interest, convenience, and necessity [Section 271(d)(3)(C)].

than does Track A, and is because it increases the likelihood of post-approval "gaming" by the BOC via technical disputes and implementation problems.

Congress adopted the limited exception of Track B because it was concerned that potential competitors might themselves "game" Track A by collectively deciding *not* to compete with a BOC for local business, in an effort to keep the BOC out of the long-distance market. To foreclose such a strategy, Congress determined that a BOC could apply for long-distance entry based on an approved SGAT if "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)." § 271(c)(1)(B). The language "no such provider" in this sentence refers back to the "unaffiliated competing providers" delineated in the first sentence of § 271(c)(1)(A). Indeed, the next sentence in Section 271 (c)(1)(A) refers to these providers as "*such* competing providers." This reference to "such competing providers" is simply repeated when the first sentence of 271(c)(1)(b) again refers to "such providers."

As a result, Track B is available only if no "unaffiliated competing providers of telephone exchange service" have "requested the access and interconnection described in subparagraph (A)" in the relevant time period. This exception could not be more simple, or more simply stated: if potential competitors boycott the BOC and refuse to request interconnection agreements, then the BOC may proceed under Track B. Reinforcing the conclusion that Track B is aimed specifically at a boycott that results effectively in a refusal to negotiate, Section 271(c)(1)(B) also allows BOCS to rely on Track B if competitors accomplish a boycott by negotiating in bad faith or unduly delaying implementation of their agreements. Absent these three related forms of a boycott delineated by Congress, the BOC may not proceed under Track B.

These conditions are not present in Florida. Instead, the opposite is true: a considerable number of competitors requested access and interconnection more than three months before any date BellSouth may file its application. Numerous interconnection agreements have been approved in Florida, and the Commission has ordered the execution and filing of arbitrated agreements with AT&T and MCI. There is no claim that *any* such provider -- let alone *all* such providers -- negotiated in bad faith or failed to comply with implementation schedules in their interconnection agreements. As a result, Track B is unavailable to BellSouth, and BellSouth must rely on Track A instead.

To allow BellSouth to proceed under Track B under the circumstances would turn the statutory scheme on its head. BellSouth's attempt to preserve Track B as an option would undermine the safeguards Congress built into Track A, rendering those safeguards inapplicable even when many carriers, which intend to become predominantly facilities-based competitors serving business and residential customers, are actively seeking to compete. If Congress had intended a result so at odds with the statutory scheme, it could and would have said so in clear terms.

Congress could have stated -- but did not -- that Track B is available if "*subparagraph (A) is not satisfied* before the date which is 3 months before the date the company makes its application under subsection (d)(1)." Instead, Congress stated that Track B is available if "no such provider has requested access and interconnection" by the relevant date.

Interpreting Section 271(c)(1) in a way which allows Track B to be available to BellSouth in Florida today would be at odds with the structure and purpose of the statute. Among the key requirements of Section 271, Section 271(c)(1)(A) requires that, as a general rule, a BOC cannot

enter the interexchange market unless and until it is actually providing interconnection and access to a facilities-based competitor that in turn is providing service to residential and business customers. In fact, in describing the predecessor to Section 271(c)(1)(A), the House Report on H.R. 1555 emphasized that the existence of such a competitor "is *the integral requirement of the checklist*, in that it is the tangible affirmation that the local exchange is indeed open to competition." *Id.* at 77 (emphasis added). This "integral requirement" should not be read out of the statute. Under BellSouth's erroneous interpretation, the failure to meet this "requirement" does not preclude the BOC from long-distance entry. It simply places the BOC on Track B -- thus, actually making it *easier* for the BOC to gain entry into in-region long distance. But Congress did not enact the requirement of facilities-based competition in order to reduce the prerequisites for BOC entry into long distance.

Interpreting the Act to say BellSouth can follow Track B also fails to make sense of the requirement of full implementation of the fourteen point competitive checklist. Congress intended the requirement of full implementation to ensure the development of real competitive practices prior to BOC entry into long distance. This requirement is especially important when many ALECs are attempting to compete but all remain largely dependent on the BOC to provide resold services and unbundled elements. Indeed, full implementation is one way of enabling those non-facilities based competitors to become strong enough to wean themselves from their dependence on the BOC and become facilities-based. In maintaining that it can follow Track B, BellSouth's position would render the full implementation requirement inapplicable in just such a situation. Under BellSouth's position, when no facilities based supplier of business and residential service already exists, the BOC does not have to fully implement the competitive checklist even with

respect to non-facilities based competitors. This makes no sense. Congress did not impose the important requirement of full implementation only to eliminate that requirement when it is needed most.

Finally, adopting BellSouth's reading of the statute would create perverse incentives for the BOCs. Under BellSouth's view, Track B would create an incentive for a BOC to apply to enter long distance quickly, *before* any local facilities-based competition has developed, and, therefore, before the BOC would have to satisfy the Track A entry requirements. This stands the statute on its head -- Congress required that facilities-based local competition develop *before*, not after, BOC in-region long distance entry, and it structured the Act's incentives to accomplish just this purpose.[3]

BellSouth cannot deny that all of these perverse consequences flow from its reading of the statute. Only one policy argument has been offered by BOCs in favor of such a strained reading of the statute : Track B must apply whenever the requirements of Track A have not been met; otherwise, there will be times that a BOC is denied entry into long distance through no fault of its own.[4] This concern, however, is both vastly overstated and evinces a profound misunderstanding

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[3]BellSouth's interpretation not only creates an incentive for BOCs to file their Section 271 applications prior to the development of facilities-based business and residential competition, but also creates an incentive for BOCs to prevent the development of such competitors at all, thus ensuring the BOCs the opportunity to file under Track B. For example, beginning from the date of adoption of the Telecommunications Act, the BOC could demand prices that make it unrealistic to provide residential service, or it could delay implementation of adequate operations support systems. At the same time, the BOC could file an SGAT promising to correct these problems and then, once the SGAT was approved, it could immediately file a Section 271 application. The RBOC could thus rely on the very limitations on competition for which it was responsible, such as the absence of a predominantly facilities-based competitor, as a justification for filing a Section 271 application under the less rigorous standards of Track B.

[4]Congressman Tauzin complained in a dissenting statement that Congress should have

of the Act.

There is every reason to expect that facilities-based competition for residential and business customers will develop. MCI, for one, is firmly and publicly committed to providing local service nationwide to both business and residential customers over its own facilities. The possibility of a conspiracy among many ALECs -- *many of whom do not even provide long distance service* -- to forego profits in order to keep a BOC out of in-region long distance is far-fetched. To distort a statute beyond recognition to account for a hypothetical problem that has not arisen, and is not likely to arise, makes no sense, even assuming the legitimacy of creating statutory exceptions Congress did not enact.

Equally to the point, it was not the judgment of Congress that the BOCs had a right to immediate in-region long distance entry, so long as they engaged in no blameworthy behavior. The objective status of local competition, as measured by compliance with the competitive checklist and the requirements of the public interest, is the relevant statutory consideration for BOC entry -- not the BOC's or its competitors' "good faith." The only exception to this objective test is found in the alternate route of Track B, which is not, as BellSouth would have it, triggered by BOC good behavior, but by proof of bad behavior of boycotting competitors. Absent evidence of such misbehavior, Congress mandated interconnections fully implementing the fourteen point competitive checklist as a prerequisite for BOC in-region entry.

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passed a different law, allowing the BOCs easier access to Track B. In the law as passed, he complained, Track A was too difficult to meet and "each of the Bell Companies may have to wait to apply for long distance relief until some competitor has duplicated the Bell Company's network" or that it might prove "impossible" for the BOCs to enter long distance. *See* H.R. Rep. No. 204, 104th Cong., 1st Sess. 210, 212 (1995) ("Additional Views" of Reps. Dingell, Tauzin, Boucher, Stupak).

Thus, on the Track A/Track B legal issue, the Commission should conclude that: (1) for purposes of a Section 271 application, Track B is not available to BellSouth; and (2) any Section 271 application filed by BellSouth must be filed under Track A.[5]

III. CONCLUSION

It is important for the Commission to consider this fundamental legal issue at an early stage in this proceeding. There is no need for the parties and the Commission to undertake a time-consuming, exhaustive examination of the many issues presented by a 271 application filed in whole or in part under Track B, when on its face, Track B is not available to BellSouth as a matter of law.

RESPECTFULLY SUBMITTED this 27th day of May, 1997.

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[5] The Kentucky Public Service Commission recently reached a similar conclusion for that state, determining that Track A, not Track B, is the avenue which BellSouth must use for purposes of any Section 271 application. Order dated April 16, 1997 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.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U.S. Mail, to the following parties this 27th day of May, 1997.

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

In the Matter of	)	
	)	
Application of SBC Communications	)	
Inc. et al. Pursuant to Section 271 of the	)	
Telecommunications Act of 1996 to	)	CC Docket No. 97-121
Provide In-Region, InterLATA	)	
Services in the State of Oklahoma	)	
	)	

EVALUATION OF THE UNITED STATES DEPARTMENT OF JUSTICE

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May 16, 1997

ATTACHMENT A

TABLE OF CONTENTS

Summary of Evaluation

SBC Communications Inc.'s application to provide in-region interLATA service in Oklahoma should be denied because SBC has failed to satisfy the requirements of Section 271 of the Telecommunications Act of 1996.

In enacting the Telecommunications Act of 1996, Congress sought to open all telecommunications markets to competition. This objective is particularly important in local markets, which historically have been monopolies. At present, the Bell Operating Companies control about three-quarters of all local exchange and access traffic in the United States.

Section 271 of the 1996 Act conditions Bell Operating Company ("BOC") entry into in-region interLATA service on a showing that the BOC's local market is open to competition. Specifically, the 1996 Act requires that before a BOC may be authorized to provide in-region interLATA services, the Federal Communications Commission must find that a BOC: (1) has fully implemented approved access and interconnection agreements with one or more facilities-based local competitors serving business and residential subscribers, or, in certain limited circumstances, has an approved or effective statement of generally available terms; (2) provides or generally offers the fourteen items on the statutory "competitive checklist"; (3) satisfies the requirements of Section 272, including the establishment of a separate long distance subsidiary and the satisfaction of nondiscrimination conditions; and (4) has demonstrated that in-region interLATA entry would be in the public interest. The 1996 Act further requires that, in making this determination, the FCC consult with the Department of Justice and give "substantial weight"

to its assessment of the BOC's application for in-region interLATA entry.

SBC's application for interLATA authority in Oklahoma falls short on several grounds, a point underscored by the lack of competitive entry into that state, despite the interest of potential competitors in entering the local telephone markets. As a threshold matter, SBC fails to meet the prerequisites of Section 271(c)(1) so as to be able to satisfy either of the two alternative statutory entry tracks. Having received requests for access and interconnection by qualifying potential facilities-based competitors, SBC cannot proceed under Track B. Although these requests require that SBC's application be evaluated under the standards of Track A, SBC cannot presently satisfy Track A because SBC is not "providing access and interconnection" to any facilities-based carrier competing with it for both business and residential customers.

Even if SBC were entitled to proceed under either Track A or Track B, it still could not obtain approval under Section 271 because it also has not fully satisfied the competitive checklist. Specifically, SBC has failed to: (1) provide adequate wholesale support processes, which enable a competitor to obtain and maintain required checklist items such as resale services and access to unbundled elements; and (2) provide (a) physical collocation, and (b) adequate interim number portability.

Finally, granting SBC's entry would not be consistent with the public interest. In evaluating an application in this regard, the Department seeks to determine whether the BOC's local markets have been irreversibly opened to competition. The Department believes that the most probative indicator of whether a local market is open to competition is the history of actual

commercial entry. This does not mean that BOC interLATA entry must be delayed until local competition is sufficiently vigorous to discipline the BOC's market power. Actual local entry with successful commercial usage of the BOC's wholesale support systems may be sufficient to demonstrate that the inputs competitors need are commercially available. Such entry also permits the formulation of performance benchmarks that will enable regulators and competitors to detect and constrain potential BOC backsliding and competitive misconduct after long distance entry. As of yet, however, there is no sufficient history of such entry in Oklahoma and our inquiry suggests that several significant obstacles to such competitive entry remain in place.

Based on our assessment of the market conditions in Oklahoma, we conclude that the current lack of entry does not reflect an absence of demand for new entrants or a lack of interest on the part of those planning to enter into the local markets in Oklahoma; numerous potential competitors -- facilities-based and otherwise -- have sought access and interconnection agreements with SBC. Rather, our assessment of market conditions reveals that competitors are being denied the opportunities for entry required and contemplated by the 1996 Act, in large part due to SBC's failure to provide what potential competitors have requested and need for effective entry. Accordingly, granting SBC's application for interLATA authority at this time -- before SBC has done its part to remove remaining obstacles to local competition and the necessary steps are taken to ensure that competition has the opportunity to develop -- would not be in the public interest.

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

In the Matter of	)	
	)	
Application of SBC Communications	)	
Inc. et al. Pursuant to Section 271 of the	)	
Telecommunications Act of 1996 to	)	CC Docket No. 97-121
Provide In-Region, InterLATA	)	
Services in the State of Oklahoma	)	
	)	

EVALUATION OF THE UNITED STATES DEPARTMENT OF JUSTICE

Introduction

The United States Department of Justice, pursuant to Section 271(d)(2)(A) of the Telecommunications Act ("1996 Act" or "Telecommunications Act"),[1] submits this evaluation of the application filed by SBC Communications Inc. ("SBC") on April 11, 1997 to provide in-region interLATA telecommunications services in the state of Oklahoma.[2] Congress granted the United States Department of Justice ("the Department"), the Executive Branch agency primarily

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[1] Pub. L. No. 104-104, 110 Stat. 56 (1996)(codified at 47 U.S.C. § 151 et seq.).

[2] Section 271(d)(2)(A) requires the Commission to consult the Attorney General on any Bell Operating Company ("BOC") application to provide in-region interLATA services under Section 271(c)(1) of the Telecommunications Act and also requires that the Commission give any written evaluation by the Attorney General "substantial weight" in its decision.

responsible for protecting competition,[3] a significant statutory role in overseeing the BOC interLATA entry process under the Telecommunications Act and helping to ensure that the timing of BOC interLATA entry furthers, and does not impede, the competition in all telecommunications markets that the 1996 Act seeks to promote.

SBC's application fails to satisfy the requirements of Section 271. Stated simply, SBC's application for interLATA authority in Oklahoma does not satisfy the statutory criteria and the Act's underlying objective of ensuring that local markets are open to competition. SBC's application, therefore, is premature.

In Part I of this evaluation, the Department describes the statutory framework of the 1996 Act. In Part II, the Department explains why SBC has failed to comply with either of the two entry tracks established in Section 271(c)(1). Part III then discusses several areas in which SBC has failed to satisfy the competitive checklist. Finally, Part IV reviews SBC's application under the public interest standard, focusing on the competitive environment in local telecommunications in Oklahoma and the reasons why competition has not yet developed there.[4]

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[3] The submission of this evaluation does not affect the independent enforcement responsibilities of the Department under the antitrust laws. See, e.g., United States v. R.C.A., 358 U.S. 334, 350 n.18 (1959). See also Section 601(b) of the 1996 Act, 110 Stat. 143.

[4] The Department's discussion of particular areas of noncompliance in this evaluation does not necessarily mean that we believe that those requirements not discussed have been satisfied.

I. The Requirements of Section 271 and the Competitive Objectives of the Telecommunications Act

Congress' objective in the 1996 Act was to truly and fully open all telecommunications markets to competition. Through Sections 251, 252, and 253, among others, Congress sought to remove the legal and economic barriers to competition in local exchange and access markets. In Section 271, Congress set forth the conditions under which the Bell Operating Companies ("BOCs") would be permitted to provide in-region interLATA services.

Section 271 reflects a Congressional judgment that competition in interLATA markets could be enhanced by allowing the BOCs to enter those markets. The significant growth in long distance competition since the breakup of the integrated Bell system has produced greater service innovation, improvements in quality, and downward pressure on prices.[5] InterLATA markets

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[5] The Commission has found that interLATA markets are sufficiently competitive to permit substantial deregulation. The Commission concluded in 1995 that "most major segments of the interexchange market are subject to substantial competition today, and the vast majority of interexchange services and transactions are subject to substantial competition." Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, Order, 11 FCC Rcd 3271, 3288, at ¶ 26 (rel. Oct. 23, 1995). It has repeated the conclusion that the market for interLATA telecommunications services is "substantially competitive" in decisions subsequent to the passage of the Telecommunications Act. Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order, CC Docket No. 96-149, FCC 96-489 ("Non-Accounting Safeguards Order"), at ¶ 62 (rel. Dec. 24, 1996); Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, Second Report and Order, CC Docket No. 96-61, FCC 96-424, at ¶¶ 21-22 (rel. Oct. 31, 1996). The Commission has found that "market forces will generally ensure that the rates, practices and

remain highly concentrated and imperfectly competitive, however, and it is reasonable to conclude that additional entry, particularly by firms with the competitive assets of the BOCs, is likely to provide additional competitive benefits.[6] See Affidavit of Dr. Marius Schwartz ("Schwartz Aff.") ¶¶ 7, 35, 90-98, Exhibit C to this Evaluation.

But Section 271 reflects Congressional judgments about the importance of opening local telecommunications markets competition as well. The incumbent local exchange carriers ("LECs"), broadly viewed, still have virtual monopolies in local exchange services and switched access, and dominate other local markets as well.[7] Taken together, the BOCs have some three-

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classifications [of interexchange carriers] are just and reasonable and not unjustly and unreasonably discriminatory." Policy and Rules Concerning the Interstate, Interexchange Market, Implementation of Section 254(g) of the Communications Act of 1934, as amended, Second Report and Order, CC Docket No. 96-61, FCC 96-424, at ¶ 21 (rel. Oct. 31, 1996). The Commission has also rejected arguments that "current levels of competition are inadequate to constrain AT&T's prices," finding that "AT&T cannot unilaterally exercise market power." Id. at ¶ 12. See also Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, Order, 11 FCC Rcd 3271 (1995).

[6] In 1995, according to the Commission's long distance market share statistics, AT&T had a market share of 53%, MCI 17.8%, Sprint 10%, LDDS 5%, and all other long distance carriers 14% (each individually about 1% or less) based on revenues. Federal Communications Commission, Statistics of Communications Common Carriers ("FCC 1996 Common Carriers Statistics"), at Table 1.4 (1996). Based on these shares, the Herfindahl-Herschman Index (HHI) for aggregated interLATA services nationwide was approximately 3272 in 1995, placing it well within the concentrated range. See U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, § 1.5 (1992). The HHI has dropped very substantially from its level of 8130 at the time of divestiture of the Bell System in 1984.

[7] The Commission's most recent analysis for 1995 estimates that LECs nationwide have 99.6% of local exchange services, 97% of local private line, and 97.5% of other local services, as well as 98.5% of interstate and intrastate access services. Federal Communications Commission, Telecommunications Industry Revenue: TRS Fund Worksheet Data ("FCC 1996 TRS Data"), at Table 2 (Dec. 1996). The Commission noted in its Notice of Proposed

quarters of all local revenues nationwide, and their revenues in their local markets are twice as large as the net interLATA market revenues in their service areas.[3] Accordingly, more

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Rulemaking in Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 14171, ¶ 6, n.13 (rel. Apr. 19, 1996), that the competitive access provider revenues of $1.15 billion in 1995 still represented "a de minimis portion of the market." While the evidence available to the Department indicates that there has been more competitive entry and growth of existing competitors at the local level in 1996, thanks largely to the Telecommunications Act, it also indicates that the overall local market share of the BOCs and other incumbent LECs has not changed over the past year to any competitively significant extent. Total revenues of competitive local exchange carriers (CLECs) and competitive access providers (CAPs) in 1996 have been estimated at only $2.2 billion, about 2% of the total revenues of the BOCs and other LECs. Competitors in local exchange services and switched access still have nationwide revenue shares of well under 1%. In dedicated access services, competitors' nationwide revenue share has been estimated at about 10%, though this is concentrated heavily in urban areas. In intraLATA toll, the LECs have lost about 25% of total revenues nationwide to competitors, primarily interexchange carriers. This competition has been stimulated by the introduction of 1+ dialing parity in sixteen states, but is very uneven on a state-by-state basis. See Schwartz Aff. ¶¶ 30-34, 38-39, 89 and Table 1.

[3] According to the Commission's common carrier statistics, in 1995 gross long distance revenues were $72.45 billion, but long distance revenues net of the $22.55 billion in access charges paid to reporting local carriers were $49.9 billion. In contrast, according to the same statistics, in 1995 all reporting incumbent local exchange carriers ("LECs), including the BOCs, had a total of (1) $46 billion in local exchange service revenues, including basic switched and private line revenues and some vertical services (of which over $37 billion was accounted for by BOCs), (2) $29 billion in exchange access revenues (of which over $22 billion was accounted for by the BOCs), (3) $10.7 billion in intraLATA toll and miscellaneous long distance revenues (of which over $8.1 billion was accounted for by the BOCs), and (4) $10.2 billion in miscellaneous revenues ($7.2 billion for the BOCs), most of which came from directory services, carrier billing and collection and nonregulated activities. The reporting LECs had $95.6 billion in gross revenues, of which $86 billion came from the three most important broad categories of local services they provide. The BOCs' gross revenues were over $74.8 billion, of which the great majority, over $67 billion, came from local exchange services, access and intraLATA toll. FCC 1996 Common Carrier Statistics at Table 2.9. The Commission's estimates of the LECs' revenues are slightly higher in another analysis, which includes the smaller LECs and puts total LEC revenues in excess of $100 billion. FCC 1996 TRS Data at Tables 18 and 19. For an analysis of local and long distance revenues in 1995, see Schwartz Aff. Table 1.

considerable benefits could be realized by fully opening these local markets to competition. See Schwartz Aff. ¶¶ 38-39. Moreover, we anticipate that there will be significant benefits from enabling not only the BOCs, but also interexchange carriers and other firms all to be able to realize the full advantages of vertical integration into all markets, as the Commission also has recognized, and the 1996 Act is designed to make such integration possible.[9] See Schwartz Aff. ¶¶ 7, 82-88.

Section 271 reflects Congress' recognition that the BOCs' cooperation would be necessary, at least in the short run, to the development of meaningful local exchange competition, and that so long as a BOC continued to control local exchange markets, it would have the natural economic incentive to withhold such cooperation and to discriminate against its competitors. Accordingly, Congress conditioned BOC entry on completion of a variety of steps designed to facilitate entry and foster competition in local markets. These statutory prerequisites to interLATA entry ensure that the BOCs have appropriate incentives to take the steps needed to open their monopoly markets, while reducing their incentives and opportunities to abuse their position in the market, i.e., disadvantaging competitors who are dependent on non-discriminatory access to the local exchange network, both for local services and for integrated local and long

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[9] Non-Accounting Safeguards Order at ¶ 7; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket Nos. 96-98 and 95-185, FCC 96-325, at ¶ 4 (rel. Aug. 8, 1996) ("Local Competition Order")("under the 1996 Act, the opening of one of the last monopoly bottleneck strongholds in telecommunications -- the local exchange and exchange access markets -- to competition is intended to pave the way for enhanced competition in *all* telecommunications markets, by allowing all providers to enter all markets").

distance services. In particular, Congress carefully structured the four, inter-related prerequisites for BOC entry to ensure both (1) that the BOCs would have appropriate incentives to cooperate with competitors who wished to enter local markets, and (2) that BOC entry into interLATA markets would not be held hostage indefinitely to the business decisions of the BOCs' competitors. Thus, rather than allowing for immediate entry or entry at a date certain, Congress chose to accept some delay in achieving the benefits of BOC interLATA entry in order to achieve the more important opening of local markets to competition.

Section 271 establishes four basic requirements for long distance entry.[10] The first three such requirements -- satisfaction of the requirements of Section 271(c)(1)(A) ("Track A") or Section 271(c)(1)(B) ("Track B"), the competitive checklist, and Section 272 -- establish specific, minimum criteria that a BOC must satisfy in all cases before an application may be granted. In

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[10] Specifically, Congress required a BOC to show that:

(A) the petitioning Bell operating company has met the requirements of subsection (c)(1) of this section and -

(i) with respect to access and interconnection provided pursuant to subsection (c)(1)(A) of this section, has fully implemented the competitive checklist in subsection (c)(2)(B)of this section; or

(ii) with respect to access and interconnection generally offered pursuant to a statement under subsection (c)(1)(B) of this section, such statement offers all of the items included in the competitive checklist in subsection (c)(2)(B) of this section;

(B) the requested authorization will be carried out in accordance with the requirements of section 272 of this title; and

(C) the requested authorization is consistent with the public interest, convenience, and necessity.

47 U.S.C. § 271 (d)(3)(1997).

has failed to *satisfy* Track A's entry requirements, SBC's application should be denied.

A. The Standards of Track A Govern SBC's Application

Track A reflects Congress' judgment that, in most circumstances, a BOC should not be permitted to provide in-region interLATA service until it "is providing access and interconnection," pursuant to binding agreements approved under Section 252, to "one or more unaffiliated competing providers of telephone exchange service ... to residential and business subscribers."[12] Section 271(c)(1)(A). As the Conference Report makes clear, the access and interconnection agreements must have been implemented, and the competing provider(s) must be "operational." H.R. Conf. Rep. No. 104-458, at 148 (1996). Both residential and business customers must be served by one or more facilities-based providers[13] in order for the BOC to satisfy Track A's entry requirements. While each qualifying facilities-based provider need not be

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the purpose of foreclosing a Track B application." Report and Recommendations of the Administrative Law Judge, OCC Cause No. PUD 97-64, at 35 (Apr. 21, 1997) ("ALJ Report") (emphasis added). Similarly, the Oklahoma Attorney General concluded that Track B has been foreclosed. See Comments of the Oklahoma Attorney General Regarding the Issues raised in ALTS' Motion to Dismiss, CC Docket No. 97-121, at 6-8 (Apr. 23, 1997). One OCC Commissioner reached the same conclusion, while the other two refrained from deciding the issue.

[12] An exchange access provider, exchange service reseller, or cellular carrier does not satisfy Track A. H.R. Conf. Rep. No. 104-458, at 148 (1996).

[13] "For the purpose of this subparagraph [Track A], 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." Section 271(c)(1)(A).

serving both types of customers if the BOC is relying on multiple providers, it necessarily follows that if the BOC is relying on a single provider it would have to be competing to serve both business and residential customers.

Congress understood that requiring operational facilities-based competition pursuant to binding agreements approved under Section 252 would impose some delay on BOC entry into in-region interLATA services. But 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. See S. Rep. No. 104-23, at 5 (1995). The approach of Track A, making the BOCs' ability to provide interLATA services dependent on the presence of an implemented agreement with an operational competitor, serves Congress' purpose of fostering local exchange competition by providing a strong incentive for the BOC to work with potential competitors to facilitate their entry. And, as the Conference Report notes, the presence of an operational competitor actually using the checklist elements is important in assisting the state commission and the FCC in determining, for purposes of Section 271(d)(2)(B), that the BOC has fully implemented the checklist elements set out in the Section 271(c)(2) checklist. H.R. Conf. Rep. No. 104-458, at 148 (1996).[14]

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[14] As SBC notes in its Opposition to ALTS' Motion to Dismiss, Congress rejected proposals to require the BOCs to wait until various "metric" tests of the substantiality of the competition were satisfied. Opposition of Southwestern Bell to ALTS' Motion to Dismiss and Request for Sanctions, CC Docket No. 97-121 ("SBC Opposition to ALTS' Motion"), at 5-7 (Apr. 28, 1997). But Congress was clear that there must be some operational facilities-based competition for business and residential subscribers under Track A.

addition, Congress imposed a fourth requirement, calling for the exercise of discretion by the Department of Justice and the Commission. The Department is to perform a competitive evaluation of the application, "using any standard the Attorney General considers appropriate." 47 U.S.C. § 271(d)(2)(A)(1997) (emphasis added). And, in order to approve the application, the Commission must find that "the requested authorization is consistent with the public interest, convenience, and necessity." 47 U.S.C. § 271(d)(3)(C)(1997). In reaching its conclusion on a particular application, the Commission is required to give "substantial weight to the Attorney General's evaluation." 47 U.S.C. § 271(d)(2)(A)(1997).

II. SBC's Application Does Not Satisfy the Preconditions of Section 271(c)(1)(A) or (B)

Section 271(c)(1) of the 1996 Act requires the BOC seeking authority to provide in-region interLATA services to meet the requirements of subparagraph (A) ("Track A") or subparagraph (B) ("Track B"). SBC contends that it meets the standards of both tracks. It claims to have satisfied Track A based on an approved interconnection agreement with a facilities-based operational provider, Brooks Fiber. At the same time, SBC claims that it has satisfied Track B on the basis of its Statement of Generally Available Terms ("SGAT"), which the Oklahoma Corporation Commission ("OCC") allowed to take effect by lapse of time for review under the 1996 Act, without approving it. In our view, based on the facts presented, SBC's application can *qualify* only for Track A consideration, not Track B.[11] Further, as SBC

[11] Or, as OCC Administrative Law Judge Goldfield put it, even though Brooks Fiber, the one provider relied on by SBC under Track A, was not yet furnishing facilities-based residential service in Oklahoma, it was a "qualifying, facilities-based carrier under subsection (c)(1)(A) for

The approach that is now embodied in Track A was the only path to approval of in-region interLATA services for the BOCs in the Senate bill.[15] The House Committee's Report confirms its concurrence in this approach, emphasizing that "[t]he 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." H.R. Rep. No. 104-204, pt. 1, at 77 (1995).

The House, however, added a new provision, which ultimately became Track B.[16] The Conference Report explains that this provision was designed "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 [Track A] has sought to enter the market." H.R. Conf. Rep. No. 104-458, at 148 (1996). For, if Track A were the only entry path available, a BOC could find itself permanently barred from providing in-region interLATA services simply because no competitor wished to provide the kind of facilities-based business and residential competition that would satisfy Track A.

In short, Track B provides a limited exception to the Track A requirement of operational competition under an approved and implemented agreement "if, after 10 months after enactment of the Act no such provider has requested the access and interconnection described in

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[15] See Sections 255(b)(1) and (c)(2)(B) of S. 652, reproduced at S. Rep. 104-23, at 97-99 (1995).

[16] See Section 245(a)(2) of H.R. 1555, reproduced at H.R. Rep. No. 104-204, pt. 1, at 7 (1995).

subparagraph (A) before the date which is three months before the date [of the BOC application]." Section 271(c)(1)(B). A BOC may also proceed under Track B if the State commission certifies that the only such providers requesting access and interconnection have unreasonably delayed the process by failing to negotiate in good faith as required by Section 252, or by failing to comply, "within a reasonable period of time," with the implementation schedule contained in an agreement approved under Section 252. Id. To satisfy Track B's entry requirements, the BOC must provide "a statement of terms and conditions that [the BOC] generally offers to provide such access and interconnection" (the "SGAT"), which must be "approved or permitted to take effect by the State commission under section 252(f)" in lieu of the binding and implemented agreements required by Track A.

Because Track B was added to deal with the possibility that a BOC, through no fault of its own, could find itself barred indefinitely from satisfying Track A, the term "such provider" in Track B should be interpreted with reference to the type of facilities-based competition that would satisfy Track A. Accordingly, we do not agree with the suggestion by the Telecommunications Resellers Association[17] that a BOC is foreclosed from proceeding under Track B if it has received requests for access and interconnection but only from firms seeking to provide services that would not satisfy Track A, such as a carrier that does not plan to provide

[17] In its Comments on ALTS' motion to dismiss SBC's application, the Telecommunications Resellers Association stated that a request by a competing carrier can preclude entry under Track B even if that carrier does not intend "to provide services 'either exclusively . . . or predominantly over . . . [its] own telephone exchange facilities." Comments of the Telecommunications Resellers Association, CC Docket No. 97-121, at 7 (Apr. 28, 1997).

service either exclusively or predominantly over its own facilities. See H.R. Rep. No. 104-204, pt. 1, at 77 (1995).[18]

But, contrary to SBC's contention, a BOC is not entitled to proceed under Track B simply because firms requesting interconnection and access for the purpose of providing services that would satisfy the requirements of Track A are not already providing those services at the time of the request. Such an interpretation of Section 271 would radically alter Congress' scheme, expanding Track B far beyond its purpose and, for all practical purposes, reading the carefully crafted requirements of Track A out of the statute. Similarly, as discussed below, a requesting potential facilities-based carrier need not even have fulfilled all of Track A's requirements at the time of the BOC's Section 271 application to foreclose the BOC from proceeding under Track B, as Congress understood that some time would be necessary before an agreement would be fully implemented and a provider would become operational.

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. Rather, Track B would become the standard path, allowing BOCs to seek authorization to provide in-region interLATA services even if no Section 252 agreement to

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[18] Since Track A, contrary to ALTS' suggestion, does not require each separate facilities-based competitor to be providing both residential and business service as long as both residential and business subscribers are being served by some facilities-based provider, it also follows that Track B can be foreclosed even if each separate provider requesting access and interconnection does not intend to provide both residential and business services, if the requesting providers as a group satisfy that requirement.

provide access and interconnection to the local network had been successfully implemented, despite would-be facilities-based competitors' timely efforts. To accept SBC's position, one would have to assume that Congress enacted Track A solely to deal with two situations of narrowly limited significance: (1) where a BOC application is filed less than ten months after enactment; or (2) where a competitor has managed to begin providing facilities-based local exchange services to residential and business customers more than three months before the BOC applies under Track B, which the BOC may do as early as ten months after enactment of the statute. 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.

On the contrary, Congress well understood that few, if any, would-be facilities-based competitors to the BOCs would be likely to negotiate, obtain state approval, and fully implement agreements providing for access and interconnection, and begin offering services satisfying Track A, all in the seven months (ten months less the three-month window) immediately following enactment of the statute. Indeed, Congress expected that many potential competitors would not even make their requests until the FCC's implementing rules were promulgated, within six months of enactment. See H.R. Conf. Rep. No. 104-458, at 148-49 (1996). Congress allowed state commissions 90 days to review and approve negotiated agreements, while allotting nine months for completion of arbitrations, and a further 30 days for review and approval of an arbitrated agreement. For a potential competitor merely to have an approved agreement in hand would have taken at least the full ten months after passage of the 1996 Act if arbitration were

necessary, even if the potential competitor had made its request promptly after the 1996 Act became law. Moreover, implementation of such an agreement is far from automatic; even if the BOC and competing provider cooperate fully, technical issues will inevitably impose some delay to full implementation.[19]

Nor is there reason to believe that Congress expected that any significant number of facilities-based competitors would be providing service to residential and business customers without an implemented agreement for interconnection and access. To the contrary, the 1996 Act was premised on Congress' understanding that, at least in the short run, such agreements will normally be an essential prerequisite to effective local exchange service competition.[20] Or, as the Wisconsin Public Utilities Commission aptly put it, "[i]t is not logical to expect facilities-based

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[19] SBC argues that a facilities-based competitor might have negotiated an interconnection agreement with the incumbent BOC and become operational prior to enactment of the 1996 Act. Such a competitor could request interconnection under the 1996 Act, "thereby allowing 'immediate' interLATA entry by the Bell company under the A Track." SBC Opposition to ALTS' Motion at 16. SBC provides no reason to believe that Congress expected such situations to be common, however. Based on the Department's experience with the implementation of the Telecommunications Act nationwide, only a small minority of states had any local exchange competition before the 1996 Act was passed, and very few providers had become operational. Indeed, the Conference Report cites only one facilities-based provider that had obtained an interconnection agreement to provide local services before the 1996 Act was passed, Cablevision in New York. H.R. Conf. Rep. No. 104-458, at 148 (1996).

[20] SBC suggests that a facilities-based competitor might have provided "limited types of local service to business and residential customers completely over its own network" before requesting interconnection. SBC Opposition to ALTS' Motion at 17. Once again, it suggests no reason to believe that Congress thought that this would often be the case. The Department is not aware of any provider other than the ILECs 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.

competition prior to interconnection being available." Findings of Fact, Conclusions of Law and Order, Matters Relating to Satisfaction of Conditions for Offering InterLATA Service (Wisconsin Bell Inc. d/b/a Ameritech Wisconsin), Wisconsin Public Service Commission, Docket No. 6720-TI-120 at 15 (Dec. 12, 1996). In sum, reading the phrase "such provider" in Track B to require not only that the firm be seeking to provide services that would satisfy Track A, but also that it already be providing them, would essentially read Track A out of the statute.

The legislative history confirms that Congress intended no such result. To the contrary, Congress assumed that firms would not yet be operational competitors when they requested the interconnection and access arrangements necessary to enable them to compete. Thus, for example, the Conference Committee described Track B as ensuring that a BOC is not foreclosed from seeking entry "simply because no facilities-based provider that meets the criteria set out in new section 271(c)(1)(A) has sought to enter..." H.R. Conf. Rep. No. 104-458, at 148 (1996) (emphasis added). It emphasized the importance of the FCC promulgating rules implementing Section 251 within six months of the statute's enactment precisely 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." Id. at 148-49 (emphasis added). Accord, H.R. Rep. No. 104-204, pt. 1, at 77-78 (1995) (The bill would "not create an unreasonable burden on a would-be competitor to step forward and request access and

interconnection" (emphasis added)).[21]

Congress fully appreciated the procompetitive potential of permitting the BOCs to provide in-region interLATA services, and it was sensitive to the BOCs' concerns that such entry not be unreasonably delayed. But Congress was also concerned with fostering local exchange competition. Under SBC's interpretation, Section 271(c)(1)(B) would reward the BOC that failed to cooperate in implementing an agreement for access and interconnection and thereby prevented its competitor from becoming operational. Properly construed, however, 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.

Track B appropriately safeguards the BOCs' interests where there is no prospect of facilities-based competition that satisfies Track A, either because no competitor desires to provide it or because competitors cannot or will not move toward full implementation of a Section 252 agreement in a timely fashion. But 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 operational facilities-based competitors in the local exchange market, if there are firms moving toward that goal in a timely

[21] The legislative history that SBC cites in its Opposition to ALTS' Motion to Dismiss, at 14-15, is most reasonably understood as relating to the question whether the provider or providers requesting interconnection and access must be seeking to provide services that would qualify under Track A or whether, as ALTS argues, "such provider" may include firms seeking to provide pure resale or other services that could not ever be used to satisfy Track A.

fashion.

Given the sensible relationship between Track A and B set out above, SBC is clearly not entitled to proceed under Track B because it has received requests for interconnection and access from at least two qualifying providers, and the state commission has not certified that either delayed the negotiation or implementation process. Brooks Fiber ("Brooks") made its initial request for access and interconnection with SWBT in March 1996, and Cox Communications ("Cox") made its request on October 23, 1996, substantially more than three months before SBC's application was filed.[22]

Both Brooks and Cox have manifested their intent to be facilities-based competitors and are working toward that goal.[23] Both have substantial telecommunications facilities in place in one or both of the major metropolitan areas in Oklahoma, including switches and installed fiber, that they could use to provide service to business and residential consumers. Brooks is already providing facilities-based service to business customers in Oklahoma City and Tulsa, and its intent to enter the residential market is reflected by its tariff and ongoing internal test of residential resale. As SBC itself has noted, Brooks has already invested substantial resources,

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[22] Comments of Brooks Fiber Properties, Inc., in Support of Motion to Dismiss and Request for Sanctions by the Association for Local Telecommunications Services, CC Docket No. 97-121 ("Brooks ALTS' Motion Comments"), at 4-5 (Apr. 28, 1997); Comments of Cox Communications, Inc., CC Docket No. 97-121 ("Cox FCC Comments"), at 1 (May 1, 1997) and Declaration of Carrington Phillip ("Phillip Decl.") ¶3, attached to Cox FCC Comments.

[23] Brooks ALTS' Motion Comments at 4 n.7; Comments of Cox Communications, Inc. on Motion to Dismiss, CC Docket No. 97-121 ("Cox ALTS' Motion Comments"), at 1-2 (Apr. 28, 1997).

and it plans to invest substantially more to become a facilities-based provider in Oklahoma.[24] And Cox, with an existing cable television system in Oklahoma City, is precisely the type of provider that Congress envisioned as providing meaningful facilities-based competition. See H.R. Conf. Rep. No. 104-458, at 148 (1996).[25]

There is no reason to believe that Brooks or Cox would wish to delay becoming operational as facilities-based competitors. Neither stands to benefit from delaying SBC's entry into in-region interexchange markets because neither has significant interexchange business in Oklahoma, and Brooks' substantial investments will yield no return until it begins to serve customers. Moreover, SBC's complaints that waiting for Brooks and/or Cox to become operational would unduly delay its entry into in-region interLATA service ignore the evidence that SBC has failed to cooperate fully in that process.[26] And, in any event, if SBC can establish

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[24] See Affidavit of Gregory J. Wheeler ("Wheeler Aff.") ¶7, attached to Brief in Support of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Long Distance for Provision of In-Region InterLATA Services in Oklahoma, CC Docket No. 97-121 ("SBC Brief") (Apr. 11, 1997).

[25] There are also other potential competitors in Oklahoma that have installed or are constructing facilities, and have entered into agreements with SWBT; they also may provide a basis for a Track A application once they have fully implemented agreements and they have become operational. For example, SBC's application notes that the competitive access provider ACSI already has facilities in Tulsa, and that Sprint, which has an approved agreement, is constructing PCS facilities in Tulsa. SBC Brief at 93-94.

[26] In particular, to the Department's knowledge, SBC has provided no working physical collocation in Oklahoma. Brooks Fiber requested collocation in SWBT's central offices in Tulsa in June, 1996, but, as of the date of SBC's application, still had not received collocation. Initial Comments of Brooks Fiber Communications of Oklahoma Inc. and Brooks Fiber Communications of Tulsa Inc., OCC Cause No. PUD 97-64 ("Brooks OCC Comments"), at 3-4 (Mar. 11, 1997). Brooks has also complained that it cannot order unbundled loops because it has

that both Brooks and Cox have "violated the terms of an agreement approved under Section 252" by failing "to comply, within a reasonable period of time, with the implementation schedule contained in such agreement," it has a remedy under Section 271(c)(1)(B).

Because SBC has received timely requests for interconnection and access from potential facilities-based carriers triggering the requirements of Track A (and has not obtained a certification that the requesting carriers have failed to negotiate in good faith or have failed to implement their agreements within a reasonable period of time), it is not eligible to proceed under Track B.

B. SBC's Application Does Not Meet the Requirements of Track A Because No Operational Facilities-Based Provider Serves Residential Customers

SBC's claim that it has satisfied Track A rests on its provision of interconnection and access to Brooks Fiber, the only new operational local exchange provider in Oklahoma with whom SBC has an approved access and interconnection agreement. Although 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 Section 271(c)(1)(A). It is undisputed that Brooks' only residential services are provided by resale of SBC services to four Brooks employees who are participating in a very limited trial, in order to test whether such resale would work well enough to be offered

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no working interconnection arrangements with SWBT. See infra Part III.C.2.

commercially.[27] The 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. Therefore, SBC does not satisfy the requirements of Track A.

III. SBC Has Failed to Show that It Has Satisfied the Competitive Checklist Requirements

A. SBC Must Provide Each of the Checklist Items in a Manner that Will Enable Its Competitors to Operate Effectively

Section 271(c)(2)(A) requires that a BOC proceeding under Track A provide access and interconnection that meets the requirements of the fourteen-point "competitive checklist" set

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[27] See Brooks OCC Comments at 2. Administrative Law Judge Goldfield determined in the OCC's Section 271 proceeding, on the basis of the uncontroverted evidence, that "all four of the [Brooks] residential customers are provided through resale of SWBT service and on a test-basis." ALJ Report at 14, 35. In addition, the affidavit of John C. Shapleigh, Brooks' Executive Vice President-Regulatory and Corporate Development, submitted to the Commission with ALTS' motion to dismiss this application, plainly states that "Brooks is not now offering residential service in Oklahoma, nor has it ever offered residential service in Oklahoma." Mr. Shapleigh explains that Brooks' local exchange service tariffs in Oklahoma are subject to the "availability on a continuing basis of all the necessary facilities," and because "necessary facilities are not yet available, Brooks is not accepting any request in Oklahoma for residential service." Brooks' four employees testing the resold SWBT service, Mr. Shapleigh states, do not pay for the service, and the test is "in no way a general offering of residential service." Brooks according to Mr. Shapleigh, "has made no decision yet as to the timing of an offering of residential service in Oklahoma," and has not yet gained enough experience with SWBT's resale systems "to determine whether Brooks can effectively use them on even an ancillary basis" to its planned use of SWBT's unbundled loops when those become available. Affidavit of John C. Shapleigh ("Shapleigh Aff.") ¶¶ 3-6, attached to Motion to Dismiss and Request for Sanctions by the Association for Local Telecommunications Services, CC Docket No. 97-121 ("ALTS' Motion") (Apr. 21, 1997).

forth in Section 271(c)(2)(B), pursuant to "one or more agreements."[28] The competitive checklist specifies a minimum set of facilities, services, and capabilities that must always be made available to competitors, thereby ensuring that a wide range of entry strategies will be available.[29]

Because the statute allows the BOC to provide access and interconnection pursuant to "one or more agreements," it does not matter whether any single competitor requests or uses all fourteen checklist items, so long as the BOC is providing each element to at least one facilities-based competitor. Moreover, that requirement may be satisfied, at least in some instances, through the use of "most favored nation" clauses which readily allow provisions of other approved interconnection agreements to be imported into agreements with qualifying Track A competitors. Since different competitors may need different checklist items, depending on their individual business plans, such flexibility furthers the Congressional purpose of maximizing the options available to new entrants, without foreclosing BOC long distance entry simply because its competitors choose not to use all of the options.

For the same reason, we believe that, under some circumstances, a BOC may be

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[28] A BOC proceeding under Track B must be "generally offering" such access and interconnection.

[29] Many of the checklist items expressly require "nondiscriminatory" provision, and in addition the "nondiscriminatory" terms and conditions required by Section 251 apply both to the LECs' treatment of other competitors and to the LECs' treatment of their own affiliates, so that the LECs must provide unbundled elements at the same level of quality as they do for themselves, to the extent technically feasible. Local Competition Order at ¶¶ 217-18 (footnotes omitted).

"providing" a checklist item under an agreement even though competitors are not actually using that item, at least where no competitor is actually requesting and experiencing difficulty obtaining that item. 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. If a BOC has approved agreements that set forth complete prices and other terms and conditions for a checklist item, and if it demonstrates that it is willing and able promptly to satisfy requests for such quantities of the item as may reasonably be demanded by providers, at acceptable levels of quality, it still can satisfy the checklist requirement with respect to an item for which there is no present demand.

By the same token, however, an agreement that does not set forth complete rates and terms for a checklist item, but merely invites further negotiation at some later time, falls short of "providing" the item as required by Section 271, as does a mere "paper commitment" to provide a checklist item, i.e., one unaccompanied by any showing of the actual ability to provide the item on demand.[30] Nor does an offer to provide a checklist item at some time in the future constitute "providing" it, if the item is not presently available. In sum, a BOC is "providing" a checklist item only if it has a concrete and specific legal obligation to provide it, is presently ready to

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[30] In arguing that it is "providing" checklist items even though competitors are not actually using such items, SBC analogizes the provision of items under the checklist to a dinner party, contending that the host has "provided" hors d'oeuvres even if no one chooses to partake. SBC Brief at 16 n.17. We agree with SBC that it may "provide" checklist items in this sense, but only if the provided food is edible, available in adequate quantities, and if the guests are allowed access to it.

furnish it, and makes it available as a practical, as well as formal, matter.[31]

The 1996 Act provides an opportunity for state commissions to evaluate a BOC's compliance with the checklist but, as the 1996 Act makes plain, the final determination of compliance rests with the FCC. Section 271(d)(3) requires the Commission to deny BOC applications unless "it" finds that the statutory requirements have been satisfied. Similarly, Section 271(d)(2)(B) requires the FCC to "consult with the State commission . . . in order to verify the compliance" of an applicant with the checklist requirements, language which clearly indicates that verification is ultimately the FCC's responsibility.

B. The Oklahoma Corporation Commission's Opinion that SBC Satisfies the Checklist Reflects Its Erroneous Legal Interpretations

SBC has failed to demonstrate compliance with the competitive checklist requirements in Oklahoma.[32] We reach this conclusion, and believe the Commission should as well, despite the contrary conclusion of the majority in the Oklahoma Corporation Commission's split 2-1 decision.

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[31] Several state commissions and state officials have followed a similar approach to dealing with SGAT approval and checklist compliance in their Section 271 compliance proceedings. See, e.g., Hearing Examiner's Proposed Order, Investigation concerning Illinois Bell Telephone Company's Compliance with Section 271(c) of the Telecommunications Act of 1996, Illinois Commerce Commission, Docket No. 96-0404 ("ICC HEPO"), at 6-8 (Mar. 6, 1997); Order Regarding Statement, BellSouth Telecommunications, Inc.'s Statement of Generally Available Terms and Conditions Under Section 252(f) of the Telecommunications Act of 1996, Georgia Public Service Commission, Docket No. 7253-U ("GA PSC Order"), at 6-7 (Mar. 20, 1997).

[32] In light of the other clear deficiencies, this evaluation address only some of the substantial checklist issues raised by SBC's application.

We assume that the FCC will carefully weigh the views of state commissions, as the Department does. In this case, however, the OCC majority did not adopt detailed factual findings concerning checklist compliance issues, and their conclusions appear to rest, in large part, on what we believe to be an incorrect legal interpretation of the checklist. The OCC majority determined that all of the requisite checklist items "are either provided to or generally offered to competitors by SBC, and also noted the absence of any filed complaint regarding provision of service, asserting that lack of entry was "not due to SWBT's failure to make available" checklist items.[33] The OCC majority, however, made no findings concerning the practical availability of checklist items.

In contrast to the OCC's limited view of what the checklist requires, the Administrative Law Judge, who presided over the OCC's Section 271 proceeding, understood Section 271 to mean that "all checklist items must be easily and equally accessible, on commercially operational terms and on equal terms as to all." He concluded that this standard had not been satisfied with respect to several checklist items, including OSS, interim number portability, collocation, and directory assistance, finding that "the evidence in this case is that SWBT does not currently provide all checklist items in such a manner." Accordingly, the ALJ determined that "[t]he evidence in this case indicates that there are currently impediments and blockades to local competition in Oklahoma."[34] The dissenting OCC Commissioner, as well as the Oklahoma

[33] Final Order, OCC Cause No. PUD 97-64, Order No. 411817 ("OCC Final Order"), at 2-3 (Apr. 30, 1997).

[34] ALJ Report at 35-36.

Attorney General and the OCC staff, agreed with the ALJ's finding that the checklist had not been satisfied.[35] The Department concurs with their conclusions on this issue.

C. SBC Has Failed to Provide Several Checklist Items

1. SBC Has Failed to Show that Competitors Can Effectively Obtain and Maintain Resale Services and Unbundled Elements

The competitive checklist of Section 271(c)(2)(B) requires a BOC proceeding under Track A to "provide" resale services and access to unbundled elements, among other items, pursuant to Section 251. A CLEC using these items will have to engage in multiple transactions with the BOC for each customer or access line the CLEC wins in competition with the BOC. Because each BOC has *millions* of access lines, meaningful compliance with the requirement that the BOC make available resale services and access to unbundled elements demands that the BOC put in place efficient processes, both electronic and human, by which a CLEC can obtain and maintain these items in competitively-significant numbers. The checklist requirements of providing resale services and access to unbundled elements would be hollow indeed if the efficiency of -- or deficiencies in -- these "wholesale support processes," rather than the dictates of the marketplace, determined the number or quality of such items available to competing carriers.[36]

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[35] Dissenting Opinion of Commissioner Bob Anthony, OCC Cause No. PUD 97-04 ("Anthony Dissenting Op."), at 1-3 (Apr. 30, 1997).

[36] AT&T alone has provided SBC with forecasts of over one hundred thousand resale orders per month in SBC's region. Attachment 21 to the affidavit of Nancy Dalton ("Dalton Aff."), attached to Comments of AT&T in Opposition to SBC's Section 271 Application for Oklahoma, CC Docket No. 97-121 ("AT&T FCC Comments") (May 1, 1997). Automated

A key component of the wholesale support processes necessary to provide adequate resale service and unbundled elements is the electronic access to the operations support system (OSS) functions that BOCs must provide under the Commission's rules. In its Local Competition Order, the Commission required BOCs to provide access to their OSSs—systems originally designed to facilitate practicable provision of retail services—as an independent network element under Section 251(c)(3) that the BOCs must provide under item (ii) of the checklist,[37] as well as a term or condition of providing access to other network elements under the checklist. In evaluating checklist compliance with regard to a BOC's OSS systems, the Department will evaluate (1) the functions BOCs make available; and (2) the likelihood that such systems will fail under significant commercial usage. Overall, the Department will consider whether a BOC has made resale services and unbundled elements, as well as other checklist items, practicably available by providing them via wholesale support processes that (1) provide needed functionality; and (2) operate in a reliable, nondiscriminatory manner that provides entrants a meaningful opportunity to compete.[38]

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ordering interfaces can take many months to develop, and several BOCs have encountered problems that extended such development over a year. Allegedly "providing" such resale services without the current capability to furnish competitively-significant numbers of such services falls short of satisfying a BOC's obligations under Section 271(c).

[37] Local Competition Order at ¶ 517. Because the Commission interpreted access to OSS as a term or condition of providing resale services and access to other elements in general, this requirement is also embodied in, among other items, checklist items (iv), (v), (vi), and (xiv).

[38] Section 251(c)(3), referenced in item (ii) of the checklist and implicated in many others, obligates an incumbent LEC to provide access to unbundled elements (OSS functions and other elements), upon request, that is "nondiscriminatory," and on rates, terms, and conditions that are

a. Checklist Compliance Requires Automated Support Systems

Under Section 271, an applicant must demonstrate that it can practicably provide checklist items by means of efficient wholesale support processes, including access to OSS functions. These processes must allow CLECs to perform ordering, maintenance, billing, and other functions at parity with the BOC's retail operations. Further, a BOC's wholesale support processes must offer a level of functionality sufficient to provide CLECs with a meaningful opportunity to compete using resale services and unbundled elements. Thus, in general, to satisfy the checklist wholesale support processes must be automated if the volume of transactions would, in the absence of such automation, cause considerable inefficiencies and significantly impede competitive entry. Appendix A describes in more detail the types of automated systems that, in the Department's experience, are likely to be necessary to provide adequate wholesale support processes.

"just, reasonable, and nondiscriminatory." Finding that "just [and] reasonable . . . terms and conditions" are those that "should serve to promote fair and efficient competition," the Commission properly has required BOCs to provide unbundled elements and resale services under "terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete." Local Competition Order at ¶ 315; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Second Order on Reconsideration, CC Docket Nos. 96-98 and 95-185 ("2nd Recon Order"), at ¶ 9 (specifically discussing access to operations support systems). Separately, the Commission interpreted Congress' use of the term "nondiscriminatory" in Section 251, and in particular with regard to "nondiscriminatory access" to unbundled elements, as requiring a comparison between a BOC's access to elements and the access provided CLECs (in addition to a comparison between the access afforded different CLECs). This interpretation establishes a parity requirement where a meaningful comparison can be made between a BOC's and a CLEC's access to the BOC's network elements. The Commission required such a comparison "where applicable." 2nd Recon Order at ¶ 9; Local Competition Order at ¶ 315.

b. A BOC Must Demonstrate that Its Wholesale Support Processes Work Effectively

A BOC's paper promise to provide the necessary (e.g., automated) wholesale support processes is a first step. A BOC must also, however, demonstrate that the process works in practice. Specifically, a BOC must demonstrate that its electronic interfaces and processes, when combined with any necessary manual processing, allow competitors to serve customers throughout a state and in reasonably foreseeable quantities, or that its wholesale support processes are scalable to such quantities as demand increases. By "reasonably foreseeable," we mean those quantities that competitors collectively would ultimately demand in a competitive market where the level of competition was not constrained by any limitations of the BOC's interfaces or processes, or by other factors the BOC may influence.[39]

In determining whether a BOC's wholesale support processes can provide the necessary functionality, the Department will view internal testing by a BOC as substantially less persuasive evidence of operability than testing with other carriers, and testing in either manner as less

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[39] See, e.g., Comments of the Wisconsin Department of Justice Telecommunications Advocate in Response to Second Notice and Request for Comments, Wisconsin Public Service Commission, Docket No. 6720-TI-120, at 7 (Jan. 27, 1997):

> In order for the systems to be considered operational, they must satisfy at least two tests. First, Ameritech must demonstrate that the systems incorporate sufficient capacity to be able to handle the volumes of service anticipated when local competition has reached a reasonably mature state. . . . In addition, the systems must have been proven adequate in fact to handle the burdens placed upon them as local competition first takes root.

persuasive evidence than commercial operation. In general, the Department will consider testing evidence alone only if the more compelling evidence that can be derived from commercial operation is not available. Where such commercial operation is limited (*e.g.*, below reasonably foreseeable levels, limited to certain geographic regions, or limited to certain functions) or not expected, the Department will carefully examine the circumstances to determine whether factors under the BOC's control are responsible for the absence of significant commercial use. This approach is based on the findings and comments of states, industry organizations, experts, CLECs, and BOCs, alike, all of which reflect specific experiences in the local telecommunications industry to date, in addition to general experience in this and other industries.

c. SBC's Provision of Resale Services and Access to Unbundled Elements Fails The Statutory Checklist Standard

As Appendix A describes in detail, SBC has not demonstrated that its wholesale support processes are sufficient to make resale services and unbundled elements practicably available when requested by a competitor, as required by the checklist. Indeed, there is evidence in the record to suggest that SBC has thwarted CLEC attempts to test and commercially use the wholesale support processes SBC claims to provide, as discussed in Part IV. Most critically, however, the Department finds that SBC has failed to demonstrate even through internal testing the operation of its automated processes for making resale services and unbundled elements meaningfully available.

2. Interconnection: SBC Has Failed to Provide Requested Physical Collocation

"Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)" is part of the statutory competitive checklist in Section 271(c)(2)(B)(i). Section 251(c)(6) of the 1996 Act imposes a specific duty to provide physical collocation unless the incumbent LEC demonstrates to the state commission that this is not practical due to technical limitations or lack of space on the LEC's premises. Applying this requirement, the Commission has ruled that a requesting carrier may choose any technically feasible means of obtaining interconnection, including physical collocation.[40] 47 C.F.R. §§ 51.321(b)(1), 51.323 (1997). Accordingly, the failure to provide physical collocation upon request constitutes a failure to provide interconnection as required by the checklist, unless the BOC has demonstrated that one of the exemptions applies. The availability of physical collocation is critical to a competing local providers' ability to interconnect and to serve local exchange customers through the use of unbundled elements.

Although SBC has provisions in its SGAT and some of its agreements relating to collocation, and claims to generally offer physical collocation as an interconnection alternative, it has failed to provide adequately the physical collocation requested by Brooks, among others.[41] In

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[40] Local Competition Order at ¶¶ 549-551.

[41] The Department is aware of no working physical collocation arrangement in any SWBT central office in Oklahoma, and very few in other SBC states. In SBC's Opposition to the ALTS' Motion to Dismiss in this docket, SBC asserts, in the affidavit of Deanna Sheffield, that it had completed and turned over four collocation cages to Brooks, as of April 25, 1997. SBC acknowledges, however, that these arrangements are not working, because Brooks has not yet

June, 1996, Brooks Fiber requested collocation in SWBT's central offices in Tulsa and Oklahoma, but, as of the date of SBC's application, Brooks still had not received collocation. Brooks OCC Comments at 3-4. SWBT's failure to provide physical collocation, which would enable CLECs to use unbundled elements and to test the OSS interfaces which support these elements, appears to be a region-wide problem.

SBC's Opposition to ALTS' Motion to Dismiss asserts, through the affidavit of William Deere, that Brooks' current virtual collocation arrangements provide access to all functions requested in the interconnection agreement, including the ability to use unbundled loops. Affidavit of William Deere ("Deere Aff."), ¶ 2, attached to SBC Opposition to ALTS' Motion. SBC, however, does not effectively respond to Brooks' position in its OCC Comments that its current virtual collocation arrangements do not give Brooks the same technically and economically feasible access to unbundled elements that its negotiated physical collocation

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had an opportunity to place and test equipment. Affidavit of Deanna Sheffield ("Sheffield Aff."), ¶¶ 2-3, attached to SBC Opposition to ALTS' Motion. Similarly, in the Public Utility Commission of Texas' investigation into SWBT's entry into the interLATA market, SWBT's response to a Request for Information on April 24, 1997, indicated that it had delivered only four working physical collocations out of 59 requests in Texas. Two of the offices were delivered to Metro Access Networks, which is currently in arbitration with SWBT on the physical collocation pricing issue, and, thus, does not have an interconnection agreement with SWBT. Response of SWBT to Request for Information, Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market, Public Utility Commission of Texas, Docket No. 16251 ("Texas RFI Response"), Request No. 18-JE (Attachment E to this Evaluation. Some parts of the Texas RFI Response were submitted under claim of confidentiality by SWBT. The Department has not had access to the confidential portions of SWBT's responses and the responses offered in this attachment were not submitted under claim of confidentiality).

arrangements would provide. Brooks explains that, "[w]ith tariffed virtual collocation, the point of interconnection normally is outside of the central office, deployment of remote switching equipment is not permitted, and the interconnector designates but does not own the transmission equipment . . . This type of virtual collocation is not usable by Brooks for unbundled loop access due to both network and economic feasibility considerations." Brooks OCC Comments at 3 n.6. In its comments in this docket, Brooks continues to assert that its current tariffed virtual collocation arrangements do not technically or economically support the use of unbundled loops and, as a result, they have had to use less effective alternatives than the use of unbundled loops. Opposition of Brooks Fiber Properties, Inc., to Application of SBC Communications Inc., CC Docket No. 97-121 ("Brooks FCC Comments"), at 10 n. 6 (May 1, 1997).

In any event, regardless of the adequacy of virtual collocation, CLECs are entitled to physical collocation under the 1996 Act, and SBC must provide it when requested. The fact that potential facilities based competitors other than Brooks have requested physical collocation in Oklahoma and have yet to receive it from SWBT strongly suggests that the problems experienced are attributable to SBC rather than to any particular competitor. Cox Communications made its initial request for physical collocation in October of 1996 and it does not expect even to be able to begin placing equipment until July of 1997.[42] Dobson Wireless ("Dobson"), in its Comments in Support of Motion to Dismiss, filed in this docket on April 28, also cites the difficulty of obtaining physical collocation from SWBT as an impediment to timely entry in Oklahoma.

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[42] See Affidavit of Jeff Storey ("Storey Aff."), ¶6, attached to Cox FCC Comments.

Dobson, despite having initially requested interconnection negotiations on December 13, 1996, is still in "negotiations" with SWBT over terms for physical collocation in SWBT's tandem central office in Oklahoma City. See Comments of Dobson Wireless, Inc., In Support of Motion to Dismiss, CC Docket No. 97-121 ("Dobson ALTS' Motion Comments") at 1-3 (Apr. 28, 1997). Thus, on the present record, it cannot be said that SWBT is either providing physical collocation or making it generally available in Oklahoma.[43]

3. Interim Number Portability: Experience Has Shown that SBC Is Not Yet Able to Provide this Checklist Item Adequately and at Parity with Its Own Retail Services

SBC has failed to provide adequate interim number portability as required by the competitive checklist. Section 271(c)(2)(B)(xi) requires that the BOC's access and interconnection agreements or statement of terms include "[u]ntil the date by which the Commission issues regulations pursuant to section 251 to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing

[43]SBC's efforts to comply with this checklist item have not been expeditious. In Oklahoma, there is no statewide tariff for physical collocation and no prices for physical collocation are listed in the SGAT. In Texas, SWBT was ordered to file a physical collocation tariff as part of implementing an arbitration award involving AT&T, MCI, TCG, MFS, and ACSI. The tariff that was filed listed many central offices as not suitable for tariffing, meaning that they would have to be negotiated on an individual case basis, and the "tariff" was only available to those three parties who specifically requested physical collocation in the arbitration proceeding. See Letter from Metropolitan Access Networks (MAN) to Donald Russell of 3/5/97 at 9 (Attachment F to this Evaluation). The problem with making physical collocation "available" on an individual case basis, as SWBT does in its Oklahoma SGAT and the Brooks agreement, is that all SBC is really providing is an invitation to do more negotiating on price and terms. This can cause further delay and may lead to more arbitration. Id. at 3-4.

trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability and convenience as possible. After that date, full compliance with such regulations." Lack of number portability or inferior quality of number portability when switching from the BOC to a competitor would constitute a major disincentive for customers to change their local exchange provider. Thus, SBC's failure to provide adequate, non-discriminatory number portability constitutes a significant barrier to the development of local competition in Oklahoma.

SBC has provisions in its SGAT and a number of its agreements with competitors purporting to provide interim number portability. This is, in fact, one of the few provisions of SBC's agreements that any competitor has had the opportunity to use in market conditions in Oklahoma, and the experience is not encouraging. Brooks, the only operational local competitor in Oklahoma, has sought to port some numbers from SWBT, but Brooks' experience in Oklahoma refutes SBC's assertion that it is providing interim number portability on a nondiscriminatory basis in accordance with the requirements of the 1996 Act.

At the time of SBC's application with the Commission, Brooks' customers had experienced delays of up to several hours between the disconnection (for billing purposes) and the reconnection of the customer's line with remote call forwarding. See Brooks Response to AT&T Request for Information, OCC Cause No. PUD 97-64, at 2 (Apr. 9, 1997). Moreover, SBC has not clearly demonstrated the ability to provision interim number portability ("INP") in a "non-discriminatory" manner such that a competitor using INP would be able to provide the same level of service to its customers that SWBT provides its own retail customers. Failures of this

sort can be very disruptive to users, especially business customers, and may discourage them from switching providers. SWBT has asserted, and Brooks acknowledges, that some recent INP conversions have been implemented without any major service disruptions, but there continue to be implementation problems for many Brooks customers. See Brooks FCC Comments at 23-24. Even if SBC were able to improve its provisioning of INP to satisfactory levels given Brooks' current level of demand, the information before the Commission would not yet justify the conclusion that SWBT has the processes or resources in place to handle a commercial quantity of INP orders in an efficient manner, once Brooks or others actually have access to unbundled elements and their demand for INP becomes significantly greater.

IV. SBC Has Failed to Meet the Public Interest Standard as its Local Markets in Oklahoma are Not Open to Competition

The public interest in opening local telecommunications markets to competition also requires that the Commission deny SBC's interLATA entry application. SBC does not presently face any substantial local competition in Oklahoma, despite the potential for such competition and the expressed desire of numerous providers, including some with their own facilities, to enter the local markets. The evidence discussed in Part III (and in Appendix A) indicates that SBC's failure to provide adequate facilities, services and capabilities for local competition is in large part responsible for the absence of substantial competitive entry. If SBC were to be permitted interLATA entry at this time, its incentives to cooperate in removing the remaining obstacles to entry would be sharply diminished, thereby undermining the objectives of the 1996 Act. Finally,

without observing commercial use or testing of SBC's wholesale support processes to ensure their adequacy and ability to meet specified performance measures, the Department cannot conclude that regulation can safeguard against any future abuse or neglect by SBC, i.e., to prevent it from taking advantage of its dominant position in the market. Accordingly, as the local market in Oklahoma has not been irreversibly opened to competition, it would not be in the public interest to grant SBC's application for interLATA authority.

A. The Public Interest Requirement and the Department of Justice's Competitive Assessment

Congress supplemented the threshold requirements of Section 271, discussed in Parts II and III above, with a further requirement of pragmatic, real world assessments of the competitive circumstances by the Department of Justice and the Commission. Section 271 contemplates a substantial competitive analysis by the Department, "using any standard the Attorney General considers appropriate." 47 U.S.C. § 271(d)(2)(A)(1997). The Commission, in turn, must find before approving an application that "the requested authorization is consistent with the public interest, convenience, and necessity," 47 U.S.C. § 271(d)(3)(C)(1997), and, in so doing, must "give substantial weight to the Attorney General's evaluation." 47 U.S.C. § 271(d)(2)(A)(1997). The Commission's "public interest" inquiry and the Department's evaluation thus serve to complement the other statutory minimum requirements, but are not limited by them.[44] As we

[44] Congress' desire not to limit the Department's and the Commission's review to a mechanical approval process is consistent with the proviso in Section 271(d)(4) of the 1996 Act, which states that "The Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)." This provision by its express terms

explain below, the requirement of a DOJ evaluation under "any standard" and a "public interest" finding by the Commission both reflect a Congressional judgment that Section 271 applications should be granted only if the BOC's entry at the time it is sought is consistent with Congress' goal of opening local telecommunications markets to competition.

In vesting the Department and the Commission with additional discretionary authority, Congress addressed the significant concern that the statutory entry tracks and competitive checklist could prove inadequate to open fully the local telephone markets. Although some had suggested that Congress adopt additional fixed criteria -- which could have needlessly blocked procompetitive BOC entry -- to accomplish this objective, Congress instead chose to rely on the Commission's and the Department's expertise and discretion. To underscore this decision, Congress made satisfaction of the "public interest" criterion a minimum statutory precondition for relief under Section 271.[45] Consequently, it is the Department's responsibility to provide a

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limits the Commission's actions only with regard to the competitive checklist. It does not limit the Commission's authority or responsibility to carry out its other responsibility under Section 271, i.e., to consider whether Section 272 requirements have been satisfied and to conduct its public interest inquiry, giving substantial weight to the evaluation of the Attorney General. Section 271(d)(4), in other words, prohibits the Commission from promulgating additional inflexible and mandatory access and interconnection requirements as prerequisites for approval of applications under Section 271, or from ignoring noncompliance with any of the requirements of the checklist. The Commission is not restricted, however, in determining whether particular access and interconnection arrangements are consistent with the requirements of Section 272, or in weighing public interest factors or the Attorney General's recommendations. Section 271(d)(4) encourages the exercise of such discretionary judgments by limiting the Commission's authority to impose or reduce the non-discretionary requirements of Section 271.

[45] It is a basic rule of statutory construction that every provision is to be given meaning. See e.g., Dep't of Revenue of Oregon v. ACF Industries, 510 U.S. 332, 340-341 (1994). Thus, while the Commission may have greater discretion to interpret the public interest requirement

practical evaluation of the degree to which the local telephone markets in a particular state have been opened to competition,[46] and it is the Commission's responsibility to give that evaluation substantial weight in applying the statutory public interest standard.

As the Supreme Court has made clear, the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare, but "the words take meaning from the purposes of the regulatory legislation." NAACP v. Fed. Power Comm'n, 425 U.S. 662, 669 (1976). The term "public interest" in Section 271(d)(3) of the 1996 Act must derive its "content and meaning" from "the purposes" for which it was "adopted." Id. The "public interest" standard under the Communications Act is well understood as giving the Commission the authority to consider a broad range of factors,[47] and the courts have repeatedly recognized that competition is an important aspect of that standard under federal telecommunications law.[48] The 1996 Act reinforces the central importance of competitive

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than the other statutory minimums, it may not fail to apply it.

[46] The legislative history of the Telecommunications Act clearly indicates that Congress contemplated that the Department would be undertaking a substantial competition-oriented analysis of Section 271 applications, not limited to compliance with checklist requirements, for which the Commission is separately required to consult with the state regulatory authorities. The illustrative examples of possible standards mentioned by Congress all were drawn from the antitrust laws and antitrust consent decrees, under which such a competition analysis would be performed by the Department drawing upon its special expertise. H.R. Conf. Rep. No. 104-458 at 149 (1996).

[47] See, e.g., FCC v. WNCN Listeners Guild, 450 U.S. 582 (1982).

[48] FCC v. RCA Communications, Inc., 346 U.S. 86, 94 (1953) ("there can be no doubt that competition is a relevant factor in weighing the public interest"); United States v. FCC, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (en banc) ("competitive considerations are an important elemen[illegible]

analysis, for its core purpose, as explicitly stated in the House Conference Report, is "opening all telecommunications markets to competition."[49] Highlighting its focus on promoting competition in telecommunications, Congress as well as the President envisioned a substantial role for the Department's expert evaluations, based on the competitive consequences of granting or denying a BOC's application.[50]

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of the public interest standard"). Where a term has been authoritatively construed in a parallel statute before enactment of legislation, as with the previously existing "public interest" standard in the Communications Act, it is ordinarily presumed that Congress knew of the prior construction and intended for the term to have the same meaning in the new legislation. See Cannon v. University of Chicago, 441 U.S. 677, 696-98 (1979). In fact, Congress explicitly intended to preserve the preexisting public interest standard, as explained in the Committee report on the Senate bill, from which the public interest standard in Section 271 of the 1996 Act was taken. S. Rep. 104-23, at 43-44 (1995).

The Commission has specifically considered the openness of related vertical foreign telecommunications markets in determining whether it would be in the public interest to permit entry by the vertically integrated provider into U.S. long distance telecommunications markets. Sprint Corporation Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) and the Public Interest Requirements of the Communications Act of 1934, as amended, Declaratory Ruling and Order, 11 FCC Rcd 1850 (1996) (FCC found "critical component" of granting approval under the public interest standard was commitment of French and German governments to open their telecommunications markets to full competition, and that additional conditions would be necessary to prevent anticompetitive conduct and protect against risk that liberalization would not occur on schedule); MCI Communications Corporation British Telecommunications plc Joint Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) of the Communications Act of 1934, as amended, Declaratory Ruling and Order, 9 FCC Rcd 3960 (1994) (considering liberalization of United Kingdom telecommunications market and balance of anticompetitive risks and competitive benefits from transaction, without the specific comparable market openness criteria later adopted in the Sprint decision).

[49] H.R. Conf. Rep. No. 104-458, at 1 (1996). This purpose to "promote competition" is also acknowledged in the caption of the statute itself. 110 Stat. 56.

[50] See, e.g., 142 Cong. Rec. H.1152 (daily ed. Feb. 1, 1996) (statement of Congressman Hastert) ("the FCC must give substantial weight to comments from the Department of Justice about possible competitive concerns when BOCs provide long-distance service"); 142 Cong.

which competitors are entering the market. The presence of commercial competition, at a nontrivial level, both (1) suggests that the market is open; and (2) provides an opportunity to benchmark the BOC's performance so that regulation will be more effective. See Schwartz Aff. ¶¶ 20, 170-178. If such commercial entry has not occurred, the Department will then consider whether the lack of entry reflects the continued existence of significant barriers to competition, or results from the independent business decisions of competitors not to enter the market.

B. Issues that Should be Considered in Determining whether Markets Are Open

1. Each of the Three Entry Paths Created by Congress Must be Available to Competitors

As the Commission has recognized, the 1996 Act is designed to facilitate entry into local exchange and exchange access markets -- along the entry paths of facilities-based services, the use of unbundled elements, and resale services -- by mandating that the most significant economic, as well as legal, impediments to efficient entry into the monopolized local market be removed.[51] Since the three entry paths serve distinct and complementary purposes, local markets

[51] "The incumbent LECs have economies of density, connectivity, and scale . . . The local competition provisions of the Act require that these economies be shared with entrants . . . in a way that permits the incumbent LECs to maintain operating efficiency to further fair competition, and to enable the entrants to share the economic benefits of that efficiency in the form of cost-based prices. . . . The Act contemplates three paths of entry into the local market -- the construction of new networks, the use of unbundled elements of the incumbent's network, and resale. The 1996 Act requires us to implement rules that eliminate statutory and regulatory barriers and remove economic impediments to each . . .Section 251 neither explicitly nor implicitly expresses a preference for one particular entry strategy. Moreover, given the likelihood that entrants will combine or alter entry strategies over time, an attempt to indicate such a preference . . . may have unintended and undesirable results. Rather, our obligation is

In performing its competitive analysis, the Department seeks to determine whether the BOC has demonstrated that the local market has been irreversibly opened to competition. To satisfy this standard, a BOC must establish that the local markets in the relevant state are fully and irreversibly open to the various types of competition contemplated by the 1996 Act -- the construction of new networks, the use of unbundled elements of the BOC's network, and resale of the BOC's services. If this standard is satisfied, local entry will be constrained only by technological limits and the inherent capabilities and resources of the potential competitors, and not by artificial barriers. In applying this standard, the Department will look first to the extent to

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Rec. H.1165 (daily ed. Feb. 1, 1996) (statement of Rep. Berman) ("requirement designed to ensure that the FCC gives proper regard to the Justice Department's special expertise in competition matters and in making judgments regarding the likely marketplace effects of RBOC entry into the competitive long distance markets . . . acknowledging the importance of the antitrust concerns raised by such entry and to check any possible abuses of RBOC market power, the bill specifically provides that the FCC accord substantial weight to the DOJ's views on these issues "); 141 Cong. Rec. S.7970 (daily ed. June 8, 1995) (statement of Sen. Kerrey) ("I have one final test [the public interest test] that, by the way, has been litigated many, many times over the course of time. The Supreme Court has spoken many times on this issue.... This is an effort to make certain that in fact we do get competition at the local level."); 141 Cong. Rec. S.8224 (daily ed. of June 13, 1995) (statement of Sen. Thurmond) ("FCC consideration of the public interest includes antitrust analysis, as indicated by the courts and reiterated by FCC Chairman Hundt in testimony last month before the Congress"). The President also recognized in his statement issued upon signing the Telecommunications Act that "the FCC must evaluate any application for entry into the long distance business in light of the public interest test, which gives the FCC discretion to consider a broad range of issues, such as the adequacy of interconnection agreements to permit vigorous competition . . . the FCC must accord 'substantial weight' to the views of the Attorney General. This special legal standard, which I consider essential, ensures that the FCC and the courts will accord full weight to the special competition expertise of the Justice Department's Antitrust Division -- especially its expertise in making predictive judgments about the effect that entry by a Bell company into long distance may have on competition in local and long distance markets." Statement at 2 (Feb. 8, 1996).

which competitors are entering the market. The presence of commercial competition, at a nontrivial level, both (1) suggests that the market is open; and (2) provides an opportunity to benchmark the BOC's performance so that regulation will be more effective. See Schwartz Aff. ¶¶ 20, 170-178. If such commercial entry has not occurred, the Department will then consider whether the lack of entry reflects the continued existence of significant barriers to competition, or results from the independent business decisions of competitors not to enter the market.

B. Issues that Should be Considered in Determining whether Markets Are Open

1. Each of the Three Entry Paths Created by Congress Must be Available to Competitors

As the Commission has recognized, the 1996 Act is designed to facilitate entry into local exchange and exchange access markets -- along the entry paths of facilities-based services, the use of unbundled elements, and resale services -- by mandating that the most significant economic, as well as legal, impediments to efficient entry into the monopolized local market be removed.[51] Since the three entry paths serve distinct and complementary purposes, local markets

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should not be considered to be practicably open to competition unless each of these paths is fully available to local entrants.

2. The Existence or Lack of Actual Competition

a. Significant Competitive Entry Suggests that the Market Is Open

In evaluating whether the necessary market-opening steps have been accomplished, the Department will look, first and foremost, to the nature and extent of actual local competition. If actual, broad-based entry through each of the entry paths contemplated by Congress is occurring in a state, this will provide invaluable evidence supporting a strong presumption that the BOC's markets have been opened. See Schwartz Aff. ¶¶ 24, 170-182. The lack of competitive entry into local markets, however, suggests that local markets are not yet fully open, and it will be necessary to ask why entry is not occurring. If practical opportunities are available for resale, the use of unbundled elements, and full facilities-based competition, the decisions of competitors not to adopt particular strategies in a state for certain areas or groups of customers should not preclude long distance entry by a BOC in that state, provided that all of the minimum requirements of Section 271 have been satisfied.[52] But if the BOC's failure to provide what is needed, or other artificial and significant barriers to entry, are wholly or partly responsible for the

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to establish rules that will ensure that all pro-competitive entry strategies may be explored. Local Competition Order at ¶¶ 11, 12.

[52] Entry under Section 271(c)(1)(A), for example, requires the presence of one or more competitors serving both business and residential customers which "exclusively . . . or predominantly" use "their own" facilities.

lack of entry, the Department would view a BOC's interLATA entry as contrary to the public interest.

Actual evidence of competition is much more persuasive and informative than theoretical claims that markets are open to entry, for there have been erroneous predictions of the imminence of local competition ever since the AT&T divestiture. Important legal issues affecting how competition will develop remain unsettled, while local exchange and switched access competition today remains in a nascent stage. On a nationwide basis, most customers still lack any alternative to the incumbent LEC for local exchange or switched access services. Most potential new local entrants are still in the process of preparing to compete on a significant scale, rather than actually doing so, and many of the arbitrated agreements under Section 252 of the 1996 Act have not yet been implemented. This does not mean that it is necessary for BOC interLATA entry to wait until local competition has become fully effective.[53] As Dr. Schwartz explains in his affidavit, the economic balance of benefits and harms from BOC interLATA entry strongly favors withholding such entry until the BOC's local markets are "irreversibly opened to local competition," but not postponing BOC entry into interLATA markets until local competition has become fully effective. Schwartz Aff. ¶¶ 19, 149-169.

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[53] Although Congress required that local markets be open to competition before BOC long distance entry, some of the provisions of the 1996 Act indicate that Congress envisioned a transitional period after entry before local competition became fully effective. The protections of Section 272, which must be retained for at least three years after long distance entry, would have been unnecessary if Congress had wished to require fully competitive local markets as a precondition to long distance entry.

b. Competitive Entry Is Important to Setting Basic Performance Standards

Conversely, initial entry efforts may reveal that in spite of paper assurances, the BOC is unable or unwilling to provide the inputs needed by competitors in a timely and reliable manner in the quantities needed to permit effective competition. In such a case, the Department would oppose a BOC's long distance entry. If entry were permitted under those circumstances, the BOC would have significantly diminished incentive thereafter to further improve or more fully implement access for competitors to their wholesale support processes, and indeed could have substantial incentives to discriminate, for example by delaying the full development and implementation of support system functions.[54] See Schwartz Aff. ¶¶ 149-197. In such a case, it would surely be difficult for the Commission, or state regulators, to compel adequate wholesale support processes to be developed on an efficient and nondiscriminatory basis through regulation alone.[55] Regulatory and judicial proceedings over claims of discrimination and failure to provide

[54] The Telecommunications Act requires incumbent LECs to provide facilities and services to their competitors at prices lower than the monopoly price of those facilities and services. Competitors can use these inputs to compete against the incumbent LECs in providing services (e.g., interLATA toll, intraLATA toll, and bundles of local and long distance service) that are much less stringently regulated than are these inputs. By discriminating in the quality of the inputs provided to competitors, e.g., by providing inferior operations support systems, the LECs can better protect supracompetitive pricing in the retail markets in which they face competition. See Schwartz Aff. ¶¶ 101-103, 115-117, 119-120.

[55] In this context, "non-discriminatory" provision of access will be dependent on the BOC's development and implementation of complex technology that differs in important respects from anything done before, and does not merely involve the provision of simple, well-established services that have been operating for some time. The BOCs have already experienced substantial problems making access to wholesale support systems available and have repeatedly had to delay their entry plans due to these difficulties. After a BOC enters the

access can be drawn out for years by BOCs unwilling to cooperate with competitive entry into their local markets. The difficulty of effectively regulating against discrimination in this context is well documented in practice,[56] and in economic literature.[57] In contrast, regulation has better

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interLATA market, however, the burden will shift in practice to the competitors and regulators, who will find it very problematic to prove whether a BOC's failure to develop and implement such technology is due to the inherent difficulty of the project or to a failure of the BOC legitimately to use its best efforts to do so. And if regulators conclude that the latter has occurred, their ability to provide effective remedies against such discrimination, i.e., effectively to require best efforts, will be limited if adequate benchmarks have not already been established before BOC interLATA entry.

[56] For example, BOCs and other LECs were able to delay significantly or prevent the option of 1+ dialing parity for intraLATA toll services in most states before the passage of the 1996 Act, thereby preserving a discriminatory advantage and a dominant market position for their own intraLATA toll services. See Schwartz Aff. ¶¶ 141-144.

The difficulty of opening networks to competition through the regulatory process alone is well illustrated by the Commission's efforts over several years to achieve network unbundling through "Open Network Architecture" (ONA) for enhanced services, which fell well short of the original objective. See Schwartz Aff. ¶¶ 145-148. Beginning in the mid-1980s, the Commission sought to require the BOCs to provide unbundled service 'building blocks' for competitors, including a wide range of capabilities. See Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Report and Order, 104 FCC 2d 958 (1986), on reconsideration, 2 FCC Rcd 3072 (1987), vacated, 905 F.2d 1217 (9th Cir. 1990). But the BOC's ONA plans, even after being amended, only offered part (60%, according to the Commission's estimate) of the interconnection arrangements and transmission facilities that competitors had requested, and the Commission accepted the BOCs' claims that it was not feasible to provide the requested unbundling and declined to require "fundamental unbundling" prior to eliminating structural separation, instead treating ONA as a "long-term" goal. Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1, at 42, 200 (1988); Filing and Review of Open Network Architecture Plans, 5 FCC Rcd 3103, at 3116, 3122 (1990), aff'd California v. FCC, 4 F.3d 1505 (9th Cir. 1993). Ten years after ONA was first ordered, it has still not been fully implemented, as made clear by the appellate decisions finding that the Commission's lifting of structural separation requirements to have been arbitrary and capricious due in part to the failure of the BOCs to unbundle their networks. See California v. FCC, 905 F. 2d 1217, 1232-38 (9th Cir. 1990) (FCC decision to abandon structural separation in favor of accounting safeguards was arbitrary and capricious); California v. FCC, 4 F.3d 1505, 1509-10 (9th Cir. 1993); California v. FCC, 39 F.3d 919, 929 (9th Cir. 1994).

prospects of providing effective constraints on competitive misconduct and backsliding by the incumbent LEC where stable arrangements with competitors are already in place and performance measures have been established based on competitive experience. See Schwartz Aff. ¶¶ 77, 127-136, 175.

The establishment of such performance measures will ensure the continued availability of functional and operable wholesale support processes and signal to competitors and regulators that the market has been irreversibly opened to competition. With clear performance benchmarks in place, both competitors and regulators will be better able to detect and remedy any shortcomings in the BOC's delivery of wholesale support services to its competitors. Although checklist compliance only requires a demonstration that a BOC's wholesale support processes provide adequate functionality and operability,[58] a record of performance benchmarks measured in an objective fashion -- and, if possible, commitments to maintain such standards -- is key to preventing the BOC from backsliding relative to its pre-entry performance. Without such benchmarks in place, competitors and regulators will have considerable difficulty in detecting

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In addition, the Department understands from prior investigations and interviews that cellular telephone companies experienced years of problems obtaining satisfactory interconnection with the BOCs. These problems were only resolved by the early 1990s.

[57] See, e.g., Jean Jacques Laffont and Jean Tirole, A Theory of Incentives in Procurement and Regulation (The MIT Press 1993).

[58] Even if the Commission were to interpret the checklist as requiring a showing less than the "meaningfully available" inquiry set forth in Part III, *supra*, we believe that, for the same reasons outlined above with respect to the establishment of basic performance standards, such an inquiry would still be a necessary part of a competitive assessment and public interest determination.

deterioration of wholesale support processes after the incentive of long distance entry is removed.[59] As Dr. Schwartz explains in his affidavit, it is difficult for competitors and regulators to detect BOC discrimination against competitors in *developing* new processes, such as automated wholesale support processes, because the development of the necessary processes is entirely within the BOCs' control and there is little precedent to indicate what is appropriate. Schwartz Aff. ¶¶ 134-136, 155-156, 180-182. In contrast, competitors and regulators are better able to detect active BOC discrimination against competitors in the *operation* of such processes by reference to established performance benchmarks. Thus, the Department will pay close attention to the adequacy of a BOC's established performance measures.[60]

c. The Department's Inquiry In the Absence of Significant Competitive Entry

Where a BOC seeks to provide interLATA service despite the absence of successful entry, it will be necessary to take a much harder look at the record to determine whether it has cooperated fully and done everything needed to make entry possible, or whether any barriers to entry still exist. Section 271 does not foreclose the possibility of BOC interLATA entry, even if the BOC faces no significant local competition in a state. That possibility, however, is properly limited to situations in which the lack of entry is not attributable in any significant part to the

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[59] See generally Affidavit of Michael J. Friduss ("Friduss Aff. "), Exhibit D to this Evaluation.

[60] Another factor that is relevant to this showing is whether the BOC has entered into, or is subject to, clear penalties for failing to meet basic performance benchmarks, e.g., a time interval for provisioning unbundled loops.

BOC's failures to provision needed facilities, services and capabilities as the 1996 Act requires, or to other legal or artificial economic barriers. From the Department's observations, the enactment of the 1996 Act has spurred efforts by a large number of firms to enter a large number and wide variety of local markets. In light of those efforts, the absence of successful entry in a state reasonably gives rise to the inference that the state's local markets are not yet open to competition, just as successful entry of all types would give rise to the inference that the markets have been successfully opened.

In many situations, there may be some local entry occurring in a state at the time the BOC applies for interLATA entry authority, but not enough actual entry to suggest that the markets are fully open to competition. Although the Department looks for evidence that significant commercial entry has occurred, we do not mean to suggest that such competition must be ubiquitous, involve any particular number or type of entrants or result in any particular market share. Rather, we ask only that such competition have some real value in demonstrating that the "pipeline can carry gas," without, of course, experiencing significant leakage. Under some circumstances, even entry on a small scale may be sufficient to demonstrate that entrants will be able to obtain the cooperation needed from the BOC in order to compete successfully.

A key component of the demonstration that markets are open, particularly where actual competition is still limited, will be proof that the complex systems needed to support the provisioning and maintenance of resale services and unbundled elements are sufficiently functional and operable, as those concepts are described in Section III and Appendix A of this

evaluation, and that appropriate performance measures have been established. If so (depending on the facts in a given case, of course), the Department may well conclude that these systems will permit competitors to expand their operations in response to foreseeable demand levels, and that there are sufficient benchmarks to enable regulators and competitors to protect against "backsliding" by the BOC after long distance entry is obtained, when the BOC's incentives to cooperate with local competitors will be diminished.

To the extent that any facilities based, resale, or unbundled element competition is lacking in a state, the Department will attempt in its evaluation to determine why such entry is not occurring. We will seek to determine if the BOC's wholesale support processes are sufficiently functional and operable, and measurable in performance, to support competitive entry. We will also seek to determine whether the prices for relevant facilities and services that entrants must obtain from the BOC have been established and will remain available at appropriate cost-based levels, so as to provide the opportunity for economically efficient entry. And we will ask whether other entry barriers have been created by anticompetitive BOC behavior or by state laws or regulatory policies that may be inconsistent with the 1996 Act's requirements. On the other hand, if the absence or limited nature of local entry appears to result from potential competitors' choices not to enter -- either for strategic reasons relating to the Section 271 process, or simply because of decisions to invest elsewhere that do not arise from the BOC's compliance failures or barriers to entry in the state -- this should not defeat long distance entry by a BOC which has done its part to open the market.

This Department's approach to evaluating Section 271 applications has been reviewed by Dr. Schwartz, who has concluded that "[b]y far the best test of whether the local market has been opened to competition is whether meaningful local competition emerges," and that where such competitive evidence is lacking, "insist[ing] on offsetting evidence that the market indeed has been irreversibly opened" would be necessary and greater caution would be called for in approving any BOC entry. Dr. Schwartz also has concluded based on his economic analysis that the Department's standard "strikes a good balance between properly addressing the competitive concerns raised by BOC entry, and realizing the benefits from such entry as rapidly as can be justified in light of those concerns," and "serves the public interest in competition." Schwartz Aff. ¶¶ 20, 24, 192.

C. SBC Has a De Facto Monopoly in Local Exchange Telecommunications in Oklahoma and Dominates Exchange Access and IntraLATA Toll

Although the Oklahoma Corporation Commission took steps to establish a legal framework for local competition in Oklahoma in March 1996, shortly after the passage of the 1996 Act,[61] SBC still faces no real competition in local exchange services in Oklahoma today.

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[61] OCC, Telephone Rules, Okla. Admin. Code Section 165:55-17 (1996). Oklahoma's rules dealing with interconnection, unbundled elements and resale, OAC 165:55-17-5, substantially parallel Section 251 of the 1996 Act. All incumbent local telecommunications carriers in Oklahoma, including SWBT, still have their retail rates set by rate of return regulation, but this could change as a result of a pending Oklahoma Corporation Commission rulemaking proceeding on alternative price cap, regulation. Pending legislation, Okla. H.B. 1815, could eliminate the regulation of prices for SWBT and other LECs for all products (except basic local, which is capped for 2 years), in any exchange where a competitive local exchange carrier is

more than a year later. Its local exchange market share in Oklahoma is so near 100% as to be practically indistinguishable from a complete monopoly. Indeed, SBC's revenues are continuing to increase and have not been significantly affected by competition in any of its major regulated service categories in Oklahoma, including exchange access and intraLATA toll.[62] SWBT is the

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certificated, regardless of whether any actual competition exists. Id. at Section 7D. This could give SBC relative freedom in pricing intrastate access to interexchange carrier competitors. For possible competitive consequences, see Schwartz Aff. ¶ 100, 103, 123.

[62] SBC's total revenues in Oklahoma were $852,387,000 in 1995 and $1,074,510,000 in 1996, about 10% of SBC's total revenues in its region. FCC Report 43-01, ARMIS Annual Report for Southwestern Bell Telephone Co., 1995 and 1996. SWBT's basic local revenues in Oklahoma were $447,604,000 in 1995 and $480,375,000 in 1996. Id. This continued growth, according to SBC's 1996 annual report, comes from a combination of increases in access lines and sales of vertical services.

SWBT's Oklahoma access revenues were $254,528,000 in 1995 and $264,573,000 in 1996, 8% of the total for the SBC region. Id. Oklahoma is the third most significant SWBT state in interLATA traffic, after Texas and Missouri (and not counting SBC's recently acquired PacTel states). In 1995 5,356,983,000 interLATA long distance access minutes originated and terminated in Oklahoma, .97% of such minutes in the U.S. and 8.7% of such minutes in the SWBT region. FCC 1996 Common Carriers Statistics at Table 2.6. SBC's average interstate access charge per minute (originating or terminating) was 2.6 cents in 1995 (around the national average), declining to 2.5 cents in 1996 under price caps. In Oklahoma, SBC's intrastate interLATA charges mirror the federal ones, for a total of 5 cents per minute (originating and terminating). This contrasts with the situation in all of SWBT's other states, where SWBT's intrastate interLATA access charges are higher than the interstate ones, and indeed SBC has the highest average intrastate interLATA access charges of any of the BOCs other than US West. Id. SWBT's intraLATA access charge in Oklahoma is higher than the interLATA one, at 7 cents per minute (combining both ends). See Statement of Steven E. Turner on Behalf of AT&T Communications of the Southwest, OCC Cause No. PUD 97-64, at ¶ 16 (Mar. 6, 1997).

SWBT's intraLATA toll revenues in Oklahoma were $77,021,000 in 1995 and $173,641,000 in 1996. FCC Report 43-01, ARMIS Annual Report for Southwestern Bell Telephone Co., 1995 and 1996. This large increase was mainly attributable to a one-time adjustment, but unlike several of the other BOCs, SBC's regionwide intraLATA toll revenues actually grew between 1995 and 1996, by 7.4% according to its 1996 annual report. SBC states that intraLATA revenues regionwide would have "decreased slightly" between 1995 and 1996 due to intraLATA competition were it not for special revenue adjustments in Oklahoma and

principal provider of local exchange and access services in Oklahoma, serving approximately 92% of the access lines in the state, 1,421,357 million (389,005 business, 1,032,353 residential) out of the total of 1,543,696 switched access lines as of 1995, and 1,470,000 as of 1996.[63] The remaining customers are served by independent LECs in separate geographic areas, such as GTE.

Only one local exchange competitor, Brooks Fiber, is operational in Oklahoma. Brooks is serving a very small number of business customers over its facilities, 20 as of the most recent information available when SBC filed this application. All of these customers are located in the two metropolitan areas in Oklahoma, Tulsa and Oklahoma City. While SBC claims that Brooks also serves residential customers, those "customers" are merely four employees of Brooks using resold SBC local service on a trial basis. No CLEC is actively competing for local residential customers in Oklahoma today, using either facilities or resale. SBC has so far provided no unbundled loops to any entrant, in sharp contrast with most of the other BOCs including Ameritech, PacTel, NYNEX, BellSouth and Bell Atlantic. SBC had 253 local switches installed throughout the state in 1996,[64] while local competitors in total have only three local switches based on the most current information. Brooks has one switch each in Oklahoma City and Tulsa, and Cox has one switch in Oklahoma City that is not yet operational. See Appendix B.

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elsewhere. 1996 10-K Annual Report for Southwestern Bell Telephone Company. Oklahoma does not yet have intraLATA toll dialing parity and could not require it before SBC provides interLATA services due to the Telecommunications Act's restriction in Section 271(e)(2).

[63] FCC 1996 Common Carriers Statistics at Table 2.4; ARMIS 4305, Annual Service Quality Report, Southwestern Bell Telephone Company, 1995 and 1996.

[64] ARMIS 4305, Annual Service Quality Report, Southwestern Bell Telephone Co., 1996.

In sum, none of the three entry paths specified by the 1996 Act are receiving any significant use for local competitive entry in Oklahoma today. Important categories of customers -- residential subscribers statewide, and all users outside the two major metropolitan areas -- have no real competitive choices. These circumstances give rise to the inference that the local markets served by SBC are not yet fully open to competition in Oklahoma.

D. The Absence of Local Competition in Oklahoma Can in Large Part Be Attributed to SBC's Failure to Provide What Competitors Need to Enter the Market

1. Potential Competitors Are Seeking to Enter Local Markets in Oklahoma But Have Not Yet Been Able to Do So

SWBT states in its application that it has approved, negotiated interconnection agreements with Brooks Fiber, Dobson Wireless, IntelCom Group (ICG), Sprint, U.S. Long Distance, and Western Oklahoma Long Distance. In addition, 10 other agreements have been signed but are not yet approved. In total, so far SBC has 17 agreements, including its most recent one with Cox (which was reached after SBC prepared this application), of which 6 are interconnection and 11 are purely resale agreements. Zamora Aff. ¶24 ; Phillip Decl. ¶ 3. The experiences and business decisions of these potential competitors illuminate the prospects for local competition in Oklahoma. In summary, of its 16 agreements as of the time SBC prepared its filing, SBC has 4 OCC approved interconnection agreements, and 2 OCC approved "resale agreements. SBC Brief at 4; Zamora Aff. ¶24. SBC has filed three other interconnection agreements, with ACSI, Intermedia Communications and Cox Communications, that are

awaiting approval from the OCC. Other carriers have made requests but have not yet been able to reach interconnection agreements with SWBT, which states that requests for negotiations to date in Oklahoma have the potential to produce 44 agreements. Zamora Aff. ¶ 22. Of all the providers who have sought or received agreements, only one, Brooks Fiber, is operational and serving any local customers. AT&T is the only provider that has completed an arbitration, but this has not yet led to a signed agreement, so it is unclear when AT&T will be in a position to compete with SWBT. The five providers apart from Brooks who have approved interconnection agreements with SWBT in Oklahoma are either not ready to begin operations in the state and so do not know whether SWBT can actually provision services and elements, or are involved in disputes with SWBT on the application of certain charges and provisions of their agreements. See Appendix B.

2. Reasons Why Significant Entry Has Not Taken Place in Oklahoma

The present lack of competition in Oklahoma does not mean that the demographics of the state make efficient facilities-based local competition implausible. The places most likely to attract facilities based entry in Oklahoma are the state's two metropolitan areas, Tulsa and Oklahoma City, both of which are in SWBT's service area, and each of which is the core of one of the two separate LATAs SBC serves.[65] 67.7% of Oklahoma's population of 3.2 million live in metropolitan areas, based on U.S. census data. SWBT has said that 55% of its Oklahoma local

[65] The third LATA in Oklahoma, in the panhandle, overlaps the state border and is mostly in Texas. SWBT has no local service territories in the Oklahoma part of this LATA.

exchange service revenues come from Oklahoma City and Tulsa.[66] Since about 68% of the access lines in SWBT's service area in Oklahoma are in the metropolitan areas, some two-thirds of customers in the SWBT service area could potentially be served by facilities-based local telephone competitors even if facilities-based competition were only to prove feasible in metropolitan areas.[67]

There appear to be two reasons that local competition has not yet developed in Oklahoma. One is the time needed to secure an agreement with SBC, and then to fully implement it and become an operational provider. Notwithstanding SBC's suggestions that the competitors have only themselves to blame, the Oklahoma Corporation Commission has not found, and SBC has not even tried to prove, that any particular competitor has negotiated in bad faith or unreasonably delayed in implementing its agreement. The other reason is that, as the Department's analysis in Part III and Appendix A of this evaluation and the comments of other parties demonstrate, SWBT has failed to provide adequate, nondiscriminatory access to essential checklist items that potential competitors have requested. If competitors cannot even get over the first hurdles with SBC, it is not surprising that they are not ordering the remaining services and facilities that they

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[66] Wheeler Aff. ¶ 6.

[67] SBC had 1,047,000 residential and 423,000 business access lines in Oklahoma as of 1996, of which 699,000 residential lines and 303,000 business lines were in metropolitan areas (MSAs), a total of 1,002,000 metropolitan access lines. ARMIS 4305, Annual Service Quality Report, Southwestern Bell Telephone Co., 1996. In 1995, there were 407,000 residence and 154,000 business lines in Oklahoma City, and 284,000 residence and 126,000 business lines in Tulsa, giving these two cities in combination 971,000 access lines. "Southwestern Bell Territory Local Competition Review," AT&T Presentation to the Department of Justice (Aug. 13, 1996) (based on ARMIS data).

would need to compete effectively.

SBC evidently agrees that facilities-based competition could happen in Oklahoma, and its own evidence refutes any claim that if it were not allowed in now, its interLATA entry would be deferred indefinitely for want of facilities-based competition. SBC affiant Michael L. Montgomery asserts that large numbers of SWBT business and residential customers are at risk to competitive providers, based on his estimates of the numbers of customers within 500 and 1000 feet of "competitive" providers' facilities in Oklahoma City and Tulsa. Using just information on Brooks, Montgomery asserts that 40% of SWBT's business lines are within 500 feet of Brooks' fiber facilities and that 56% of SWBT's Tulsa business lines are within 1000 feet of Brooks' facilities in Tulsa. Similar analysis was done for residential customers in Tulsa and both business and residential customers in Oklahoma City.[68] SBC also notes the large amount of resources that Brooks has already invested and plans to invest in Oklahoma as a facilities based local provider.[69] Yet it is uncontroverted that Brooks has only a handful of local exchange customers, raising the obvious question of why local competition has not yet begun to develop

Brooks' very limited entry into business markets to date, and its lack of entry into

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[68] Affidavit of Michael L. Montgomery on Behalf of Southwestern Bell Telephone Company ("Montgomery Aff.") ¶¶4-5, 8, attached to SBC Brief. Two of the "competitive" providers Montgomery cites as having facilities near current SWBT customers (Cox and ACSI) do not currently have approved interconnection agreements.

[69] Wheeler Aff. ¶ 7, citing The Sunday Oklahoman (3/20/95), notes that Brooks plans to spend an additional $20 million over the next 10 years to upgrade its Oklahoma network from 50 fiber optic route miles to 88. This is in addition to the unknown amount already invested in a 200 fiber optic route mile network in Tulsa. Wheeler ¶14, citing Tulsa World (8/29/96).

residential markets, can be attributed to SBC's lack of full implementation of its interconnection agreement with Brooks. Brooks' witness Ed Cadieux cogently explained at the OCC's Section 271 hearing why, in spite of having facilities in such close proximity to substantial numbers of residential customers, Brooks is serving no residential customers on a facilities basis:

> . . . Brooks has never intended to be in the resale business on any pervasive, broad sense. As a result of that, our primary methods of accessing customers are either connecting customers directly to our fiber or connecting customers through the use of unbundled loops. We are not serving customers currently through use of unbundled loops for reasons that I described in my testimony because we have not completed the collocations as yet.

Transcript of Proceedings, OCC Cause No. PUC 97-64 ("OCC Transcripts, Apr. 14, 1997"), at 66 (Apr. 14, 1997). For both Tulsa and Oklahoma City, Brooks facilities do appear to pass near a large number of customers, but that does not mean that Brooks could actually serve all of those customers directly without key unbundled elements from SWBT, such as local loops to connect the fiber rings to customer premises. It is not the desire of CLECs to refuse to use their own facilities that has lead to SBC's current inability to demonstrate checklist compliance on many items.[70]

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[70] During the Oklahoma 271 hearings, SWBT attorney Roger Toppin questioned Cadieux as to why Brooks was not offering local service to residential retail customers, in spite of the tariff Brooks had filed. Cadieux explained, "We have indicated all along that we do not intend to provide service on a resale basis to any significant extent. If we were to try to get into residential service on any broad scale immediately, we would have to do it on a resale basis because we don't have the availability of what is our preferred method of operation, the unbundled loop availability." OCC Transcript, Apr. 14, 1997, at 69. The affidavit of Liz Ham, SBC's OSS affiant, makes no mention made of Brooks' use of any SBC OSS interface. This is not surprising, given the unavailability of Brooks' preferred entry vehicle--unbundled loops.

. The suggestion, arising from the absence of local competition, that SBC's local markets are not fully open to competition in Oklahoma, is confirmed by the experiences of the potential local competitors in dealing with SBC. SBC has failed to overcome the substantial evidence, introduced in comments in the Oklahoma Section 271 proceeding and before the Commission, that its own failure to provide adequate physical collocation, interim number portability, and wholesale support systems are, in large part, responsible for the current lack of local competition in Oklahoma. Moreover, there is significant evidence in the record to suggest that SBC has actively thwarted competitor attempts to develop and test interfaces to SBC's OSSs. SBC has refused to allow MCI to submit test orders to SBC interfaces until MCI both signed interconnection agreements and was certified in SBC states.[71] MCI, AT&T, and Sprint, the last being the one carrier with whom SBC is currently testing an application-to-application interface (DataGate), have complained of significant delays in SBC's provision of information needed to begin development of CLEC interfaces to SBC.[72] Sprint contends that SBC has failed to provide adequate documentation on operational interfaces and service availability in each of SBC's local switches, information Sprint will need to build an interface to SBC and market to consumers.[73]

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[71] Affidavit of Samuel L. King ("King Aff."), ¶35, attached to Comments of MCI Telecommunications Corporation, CC Docket No. 97-121 ("MCI FCC Comments") (May 1, 1997).

[72] Id. at ¶36; Dalton Aff. ¶8; Affidavit of Cynthia Meyer ("Meyer Aff."), ¶32, attached to Sprint Communications Company Petition to Deny, CC Docket No. 97-121 (May 1, 1997).

[73] Meyer Aff. ¶32.

Further, according to AT&T, with whom SBC is scheduled to begin testing of its EDI interface, SBC "is still in the process of clarifying and supplementing its own interface specifications."[74] Finally, one small carrier has stated that it was not even apprised of the availability of SBC's systems despite repeated requests over the course of a five month negotiation.[75]

Related to SBC's resistance to conducting carrier-to-carrier testing is its resistance to adopting a set of performance measures to ensure the continued, reliable performance of its wholesale support processes. Because none of SBC's automated wholesale support processes are operational -- commercially or otherwise -- SBC cannot make a demonstration of reliable performance and establish performance measures to ensure reliable support services post-entry behavior. More importantly, even if SBC's processes were operating at some level, SBC has not established a sufficiently comprehensive set of performance standards, nor supplied its own retail performance information, to permit such a comparison.

As discussed more fully in Michael Friduss' affidavit, SBC has not agreed to report its performance in several areas critical to CLEC competitive entry. Mr. Friduss finds, for example, that SBC has not included critical performance standards with which to compare SBC's retail and wholesale installation intervals, repair frequency and intervals, and the percentage of orders flowing through SBC OSSs without human intervention. Mr. Friduss' affidavit reveals serious deficiencies in SBC's proposed standards that would substantially undermine competitors' and

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[74] Dalton Aff. ¶8.

[75] Letter from Valu-Line of Kansas President Rick Tidwell to the Department of Justice of 5/8/97 at 1, Attachment G to this Evaluation.

regulators' ability to determine performance parity and adequacy either before or after interLATA entry.

Even if the issue related to SBC's support processes were adequately addressed, there could still be other obstacles to competitive entry in Oklahoma, which competitors would have to confront if they are ever able to cross the initial thresholds. For example, SBC has failed to show that its rates for unbundled elements, as established in the AT&T arbitration and used in its SGAT, are consistent with its underlying costs.[76] The Oklahoma Corporation Commission has never found SBC's SGAT rates for unbundled elements and interconnection, or the interim arbitrated rates from which they were derived, to be cost-based. The OCC arbitrator's decision on the AT&T application did not recommend "any particular methodology or cost study be adopted at this time," and the OCC did not even review cost studies in the arbitration to determine the interim rates. Rather, the arbitrator simply decided to "adopt SWBT's proposed rates on the basis that if a true-up is needed in the future it would be easier to explain to customers rather than trying to explain a lower price being trued-up to a higher price."[77] The

[76] If SBC relies on the rates for unbundled elements in its agreement with Brooks, which are lower than those in the AT&T arbitration or the SGAT, as its basis for showing checklist compliance, it must demonstrate that those rates are available on a nondiscriminatory basis to satisfy Section 271(d)(2)(B)(i). It is hard to see how SBC could do so, having put forward the SGAT rates as its generally available terms. Other providers that have entered into agreements since the AT&T arbitration, such as Sprint, have had to take the higher arbitrated interim rates rather than the Brooks prices.

[77] Report and Recommendations of the Arbitrator, Application of AT&T Communications of the Southwest, Inc. for a Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to Section 252 of the Telecommunications Act of 1996, OCC Cause No. PUD 96-218 ("OCC Arbitration Decision"), at 19-20 (Nov. 13, 1996).

OCC's proceeding to examine SBC's costs and set final prices will not even commence until later this summer, and it is not clear when this proceeding will be completed. Since it is not yet known what the final Oklahoma prices will be or how they will be determined, the provision for a true-up is hardly sufficient assurance that competitors will in fact be charged cost-based prices now or later.

There are serious disputes between SBC and some potential competitors in Oklahoma, as in other states throughout the SBC region, as to what would constitute cost-based wholesale rates.[78] There is also some reason to suspect that SBC's SGAT prices in Oklahoma exceed its true costs, given the history of how loop prices were negotiated and the interim rates determined.[79] These interim rates also are higher than loop rates set so far in the few states that

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[78] See, e.g., Affidavits of Daniel P. Rhinehart and Steven E. Turner, attached to AT&T FCC Comments.

[79] Brooks states in its comments that it had reached closure with SBC on a loop price lower than the Commission's Oklahoma loop proxy of $17.63 before the Commission's decision was issued. Following the Commission's decision, SBC increased its price offer in the final Brooks agreement to the full proxy "ceiling" level, before executing the agreement. Brooks OCC Comments at n.7. After reaching its agreement with Brooks, and after the pricing provisions of the Commission's August 8 Local Competition Order were stayed, SBC then pressed for still higher loop prices beyond the proxy "ceiling" in its arbitration with AT&T. These rates, which were uniformly higher than the geographically averaged recurring loop price in the Brooks agreement submitted for OCC approval, and were 17% above the averaged proxy level for even the cheapest deaveraged urban loop at $20.70, were set on an interim basis in the arbitration award, and used in SBC's SGAT.

have completed cost proceedings.[80] Though no state in the SBC region has yet completed its final pricing proceedings to determine cost-based rates, there is substantial variation between the interim rates adopted in Missouri and Texas for unbundled elements, which were more in line with what competitors proposed or were an average of SBC's and competitors' proposals, and those in the SGATs in Oklahoma and Kansas, which simply followed SBC's proposals.[81] SBC has not presented an adequate evidentiary record here from which the Commission could determine if the interim arbitrated and SGAT rates in Oklahoma are cost-based, even assuming that the Commission were willing to engage in that inquiry now rather than awaiting the results of the final Oklahoma pricing proceeding.[82]

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[80] For example, New York, which used two density zones for loop prices, has set the prices at $12.49 and $19.24.

[81] To illustrate, the three deaveraged zone rates for a two-wire analog loop in the Oklahoma SGAT are $20.70, $27.75, and $49.30. The lowest of these rates is above the FCC's averaged proxy price of $17.63. In SBC's Kansas SGAT, the three deaveraged zone rates for the same loop are $19.65, $26.55, and $70.30, putting the lowest of these rates slightly below the FCC's averaged proxy price of $19.85, while the others are above it. In contrast, in Missouri, the three deaveraged zone rates for the same loop set in arbitration by the state commission (and challenged by SBC on appeal) are $9.99, $16.41, and $27.12, putting two of the three zones below the FCC's averaged proxy rate of $18.32. In Texas, the deaveraged rates for the same loop in the ICG agreement are $15.50, $17.30, and $23.10, compared with the FCC averaged proxy of $15.49, about the same as the lowest zone. These rates only reflect recurring monthly charges, and not the additional interim nonrecurring charges that also apply in each SBC state, and vary substantially among the states as well.

[82] In the AT&T arbitration in Oklahoma, SBC presented supplemental testimony through one witness, Eugene Springfield, but SBC has not made the cost study underlying his testimony part of its filing in this proceeding. Some of SBC's proposed interim rates were not even claimed to be based on a cost study, but were derived from previous tariffs or contracts. OCC Arbitration Decision at 20. SBC has not presented any affidavit by Mr. Springfield in this

There are also serious concerns about SBC's limitations on the availability of unbundled elements in its SGAT, which requires parties interested in taking unbundled elements to provide indemnification for any infringement of intellectual property rights that may result from combining or using services or equipment provided by SWBT. SGAT, § XV, ¶ A. 7, at 19. In order to assure SWBT that it has no liability for intellectual property claims, users of unbundled elements will have to obtain licenses from approximately 40 equipment vendors, resulting in delay and additional expense. Id. ¶ A. 6, at 18. SWBT has told AT&T that it will not provide any unbundled element for which it believes a license is required, until AT&T obtains such a license or a certification that a license is not required from the third party owner. Affidavit of Thomas C. Pelto ("Pelto Aff.") ¶ 3, attached to AT&T FCC Comments. Additionally, if SBC's competitor is sued by a third party over the use of this intellectual property, the SGAT provides that "SWBT shall undertake and control the defense and settlement of any such claim or suit and LSP [Local Service Provider] shall cooperate fully with SWBT in connection herewith." SGAT, ¶ A. 7.

It is far from clear that there are legitimate third party intellectual property rights that

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proceeding, and it offered no witnesses for cross-examination in the state Section 271 proceeding in Oklahoma. With this application, SBC has presented only a summary affidavit by J. Michael Moore, purporting to describe in general terms some parameters and assumptions of SBC's cost studies, but not actually disclosing the underlying studies themselves, and simply asserting the conclusion that "the costs provided by SWBT meet the requirements of the Act" and the Commission's regulation and "provide a suitable basis for rates." See Affidavit of J. Michael Moore, attached to SBC Brief. AT&T has an alternative cost study which concludes that SBC's prices significantly exceed costs.

would be affected by the sale of an unbundled network element functionality.[83] But whether there are such rights or not, SBC's use of the claim of such rights to place burdens on parties seeking access to unbundled elements has unreasonable consequences, potentially delaying and increasing the expense of entry. The Commission has already articulated procedures, in its Order implementing the infrastructure sharing obligations imposed by Section 259 of the Act,[84] by which an ILEC, CLEC, and third party vendor could work together, in the case of legitimate third-party claims of intellectual property rights, to assure that the vendor's rights are protected and that the CLEC gets the non-discriminatory access required under the Act. The Commission has stated, "[i]n the ordinary course . . . . we fully anticipate that such licensing will not be necessary," Infrastructure Sharing Order ¶69, but that in any event, the providing incumbent LEC

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[83] Pelto Aff. ¶¶ 30-34. AT&T presents arguments which support the view that, because most intellectual property rights are extinguished with the first sale of the product containing the intellectual property, and given that, in providing the unbundled elements the ILEC never relinquishes control of the element, it is unlikely that any real violations of a third party's intellectual property rights are at issue. AT&T and MCI have both challenged the legality of SBC's position requiring interconnectors to secure intellectual property licences from third party vendors under the Act. AT&T has challenged this requirement in federal district court in Texas. AT&T Communications of the Southwest, Inc. v. Southwestern Bell Telephone Co. and the Commissioners of the Public Utility Commission of Texas, Civ. Action No. A 97CA 029 (W.D. Tex. filed Jan. 10, 1997). MCI has filed a Petition for a Declaratory Ruling at the Commission. In the Matter of Petition of MCI for Declaratory Ruling, CCBPol 97-4, (filed Mar. 11, 1997). Various vendors have raised doubts about the applicability of third-party licensing rights to unbundled elements in most situations where the CLEC is not using the unbundled elements in a different manner than the ILEC. See, e.g., Comments of Northern Telecom Inc., In the Matter of Petition of MCI for Declaratory Ruling, CC Docket No. 96-98, CCBPol 97-4, at 5-6 (filed Apr. 15, 1997); Comments of Lucent Technologies Inc., CCB Pol 97-4, at 2 (Apr. 15, 1997).

[84] Report and Order, Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996, ("Infrastructure Sharing Order"), CC Docket 96-237 (rel. Feb. 7, 1997).

must not impose "inappropriate burdens on qualifying carriers," and if a license is required, "the providing incumbent LEC will be required to secure such licensing by negotiating with the relevant third party directly." Id. ¶ 70. SBC's handling of this issue, in contrast, puts the burdens and the risk on the CLEC seeking to use its unbundled elements. Pelto Aff.; ¶¶ 8-12.

At this time, given the lack of competition in Oklahoma and the various obstacles SBC has placed in the path of competitive entry, SBC's in-region interLATA entry in Oklahoma would not be consistent with the public interest.

Conclusion

Based on the foregoing evaluation, the application of SBC Communications Inc. et al. to provide in-region interLATA service in the state of Oklahoma should be denied. This application fails to comply with the requirements of Section 271 of the Act. It does not satisfy either of the two entry tracks set forth in Section 271(c)(1)(A) or (B), fails to comply with the statutory competitive checklist, and would not be consistent with the public interest in competition.

Respectfully submitted,

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