FLORIDA PUBLIC SERVICE COMMISSION
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M E M O R A N D U M

JULY 2, 1997

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (BARONE)
DIVISION OF COMMUNICATIONS (GREER)

RE: DOCKET NO. [redacted]86-TL - CONSIDERATION OF BELLSOUTH TELECOMMUNICATIONS, INC.'S ENTRY INTO INTRALATA SERVICES PURSUANT TO SECTION 271 OF THE FEDERAL TELECOMMUNICATIONS ACT OF 1996

AGENDA: JULY 15, 1997 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\960786M1.RCM

CASE BACKGROUND

Pursuant to 47 U.S.C. § 271(d)(3), the Federal Communications Commission (FCC) has ninety (90) days to issue a written determination approving or denying a Bell Operating Company's (BOC) application for interLATA authority. Further, the FCC is directed to consult with the applicable State commission before making a determination regarding the BOC's entry into the interLATA market. The Florida Public Service Commission (FPSC) opened this docket to fulfill its consultative role.

On July 19, 1996, the Prehearing Officer in this matter issued Order No. PSC-96-0945-PCO-TL, Initial Order Establishing Procedure. The Order set forth a tentative list of issues to be resolved in this docket. In particular, the list of issues includes the following:

1. Has BellSouth met the requirements of Section 271(c)(1)(A) of the Telecommunications Act of 1996?

(1). Has BellSouth met the requirements of Section 271(c)(1)(B) of the Telecommunications of Act of 1996?

These issues address the avenues for BOC entry into the interLATA market contained in Sections 271(c)(1)(A) and 271(c)(1)(B).

Section 271(c)(1)(A), Presence of Facilities-Based Competitor, provides in pertinent 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 under section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 3(47)(A), but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier...

Section 271(c)(1)(B), Failure to Request Access, provides:

> A Bell operating company meets the requirements of this subparagraph if, after 10 months after the date of enactment of the Telecommunications Act of 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1), and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f). For purposes of this subparagraph, a Bell operating company shall be considered not to have received any request for access and interconnection if the State commission of such State certifies that the only provider or providers making such a request have (i) failed to negotiate in good faith as required by section 252, or (ii) violated the terms of an agreement approved under section 252 by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement.

To date, BellSouth has not indicated whether it is going to seek interLATA authority pursuant to Section 271(C)(1)(A), hereinafter referred to as "Track A", and/or 271(C)(1)(B), hereinafter referred to as "Track B".

On May 27, 1997, the Florida Competitive Carriers Association, Inc. (FCCA), AT&T Communications of the Southern States, Inc. (AT&T) and MCI Telecommunications Corporation (MCI), collectively the Movants, filed a Joint Motion for Advance Ruling on BellSouth's Ineligibility for "Track B" and to Delete a Portion of Issue 1. The Movants also filed a Request for Oral argument on the Motion.

BellSouth filed a timely response in opposition to the Movants' Motion on June 9, 1997. On June 26, 1997, the FCC issued its Memorandum Opinion and Order in CC Docket No. 97-121 (FCC Order) wherein it denied the application of SBC Communications Inc., (SBC) for interLATA authority. The FCC specifically addressed the requirements of Track A and Track B in its Order. On June 30, 1997, the Movants filed a Request for Official Recognition of the FCC's Order.

Staff recommends that the Commission grant the Request for Oral Argument and the Request for Official Recognition, but deny the Motion for Advance Ruling as discussed in detail below.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant the Movants' Request for Oral Argument?

RECOMMENDATION: Yes. The Commission should grant the Movants' Request for Oral Argument. Staff recommends, however, that oral argument be limited to 15 minutes per side. (Barone)

STAFF ANALYSIS: On May 27, 1997, the Movants filed a Request for Oral Argument on their Motion for Advance Ruling on BellSouth's Ineligibility for "Track B" and to Delete Portion of Issue 1. The Movants state that the Commission's ruling on the availability to BellSouth of Track B will have a significant impact on the scope and complexity of the hearing in this docket. The Movants also state that the Commission will benefit from hearing oral argument on this issue and that such argument will assist the Commission in ruling on this question.

Staff believes oral argument will assist the Commission in making its determination on the Motion. Accordingly, staff recommends that the Commission grant the Movants' Request for Oral Argument. Staff recommends, however, that oral argument be limited to 15 minutes per side.

Issue 2: Should the Commission grant the Movants' Request for Official Recognition of Order No. FCC 97-228, released June 26, 1997, in Docket No. 97-121?

RECOMMENDATION: Yes. The Commission should grant the Movants' Request for Official Recognition of Order No. FCC 97-228, released June 26, 1997, in Docket No. 97-121. (Barone)

STAFF ANALYSIS: On June 30, 1997, the Movants filed their Request for Official Recognition of Order No. FCC 97-228 pursuant to Section 120.569(2)(g), Florida Statutes. They state that in the Order the FCC ruled that Track B is unavailable to SBC. They argue that the decision is germane to, and dispositive of the Commission's consideration of the Movants' pending motion, because in its order the FCC rejected the interpretation on which BellSouth relies in its opposition to the motion.

Staff believes the FCC's Order is a document for which the Commission may, in its discretion, take official recognition pursuant to Section 90.202(5) of the Florida Evidence Code. Staff believes the Order is relevant to this proceeding, and, therefore, recommends that the Commission grant the Movants' Request for Official Recognition. Notwithstanding, staff notes that Section 120.569(2)(g), Florida Statutes, provides that parties must be notified and given an opportunity to examine and contest the material. The parties have notice, and a copy of the Order by virtue of the the Movants' filing. Because of the timing of the filing, the parties can use this agenda as their opportunity to contest the material if they so choose.

ISSUE 2: Should the Commission grant the Movants' Motion for Advance Ruling?

RECOMMENDATION: No. The Commission should not grant the Movants' Motion for Advance Ruling. (Barone)

STAFF ANALYSIS: On May 27, 1997, the Movants filed a Joint Motion for Advance Ruling on BellSouth's Ineligibility for "Track B" and to Delete a Portion of Issue 1. BellSouth filed a timely response in opposition to the Motion on June 9, 1997.

Movants' Request

Specifically, the Movants request that the Commission rule that BellSouth is ineligible for Track B as a matter of law, and to enter an order deleting the version of Issue 1 referencing Section 271(c)(1)(B) i.e., "Track B." They assert that comments recently submitted by the U.S. Department of Justice to the FCC make clear that a BOC (Bell Operating Company) must proceed under Track A once it has received interconnection requests from potential competitors. (Citing to Application of SBC Communications, Inc., CC Docket No. 97-121, Evaluation of the United States Department of Justice, filed May 16, 1997).

The Movants argue that BellSouth must proceed under Track A. They state that Track B is only available if no "unaffiliated competing providers of telephone exchange service" have "requested the access and interconnection described in subparagraph (A)" in the relevant time period. They state that this exception they state 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. They argue that 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. The Movants conclude that absent these three related forms of a boycott delineated by Congress, the BOC may not proceed under Track B.

The Movants state that a considerable number of competitors requested access and interconnection more than three months before any date BellSouth may file its application. They also state that 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. According to the Movants, 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. The Movants argue that as a result, Track B is unavailable to BellSouth, and BellSouth must rely on Track A.

The Movants argue that Congress could have stated, but it 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, they assert, Congress stated that Track B is available if "no such provider has requested access and interconnection" by the relevant date.

The Movants argue that interpreting Section 271(c)(1) to permit BellSouth to proceed under Track B would be at odds with the structure and purpose of the statute. They state that 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.

The Movants also argue that interpreting the Act to say BellSouth can follow track B fails to comport with the requirement of full implementation of the fourteen point competitive checklist. They assert that Congress intended the requirement of full implementation to ensure the development of real competitive practices before BOC entry into long distance. This requirement, they state, 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. The Movants argue that 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. They argue that Congress did not impose the important requirement of full implementation only to eliminate that requirement when it is needed most.

Finally, the Movants argue that BellSouth's view of 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. They argue that this interpretation stands the statute on its head. According to the Movants, Congress required that facilities-based local competition develop before, not after, BOC in-region long distance entry, and it structured the Act's incentives accordingly.

The Movants assert that the BOCs have only offered the following policy argument: 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. This concern the Movants state, is overstated and evinces a profound misunderstanding of the Act. They state that there is every reason to expect that facilities-based competition for residential and business customers will develop. MCI, states that it is firmly and publicly committed to providing local service nationwide to both business and residential customers over its own facilities. The Movants argue that the possibility of a conspiracy among many ALECs, many of whom do not provide long distance service, to forgo profits to keep a BOC out of in-region long distance is farfetched. They assert that 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.

The Movants state that 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 are engaged in no blameworthy behavior. They argue that 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.

Thus, the Movants conclude that, 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.

BellSouth's Response

BellSouth's arguments can be summarized as follows: 1) The choice of Tracks is BellSouth's; 2) The decision as to whether the application meets the requirements of Section 271(c) is the FCC's to make and not the applicable state commission; and 3) A driving force behind the Motion is that "much of the inquiry the Movants

seek to have the FPSC abandon concerns whether BellSouth is capable of meeting the Checklist's requirements even if no present demand for them exists."

Procedurally, BellSouth asserts that the Movants' request for a ruling that Track B is not available would have this Commission make a decision that Section 271 placed within the FCC's hands and could potentially leave this Commission unprepared to fulfill its consultative role should BellSouth file a Track B application.

Substantively, BellSouth argues that until a facilities-based competitor is providing telephone exchange service to residential and business subscribers, it can seek interLATA authority under Track B. BellSouth states that the Movants claim that a BOC is foreclosed from Track B if a "potential" competitor simply requests negotiations for access and interconnection with the BOC, even if the competitor has made no investment in facilities to compete on a local basis. At the same time, BellSouth asserts, these carriers argue that Track A also is foreclosed until the potential competitor requesting access actually signs and implements the agreement and begins serving business and residential subscribers. BellSouth argues that the Commission should reject this interpretation, which would only serve to delay full competition in the telecommunications market.

According to BellSouth, adopting the Movants' interpretation of the interplay between Track A and Track B would take the decision on opening the long distance market to competition out of the hands of the FCC, deny this Commission its role in the process, and put the timing of opening the Florida long distance market into the hands of BellSouth's competitors.

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

Florida consumers regardless of whether the local market was open to local competition because both tracks would be closed. BellSouth concludes that such a result runs counter to the language and intent of Congress, which sought to open the long distance market upon the opening of the local market.

BellSouth asserts that the legislative history is clear that the requirements tying Tracks A and B together serve Congress's goal of opening the long distance market to competition by keeping a route open for BOCs to seek long distance authority. BellSouth asserts that the Conference Report makes the point that Track B "is intended to ensure that a BOC is not effectively prevented from seeking entry into the interLATA services market simply because no facilities-based competitor that meets the criteria set out in new section 271(c)(1)(A) has sought to enter the market." Conference Report at 148. BellSouth states that Congress believed that a general statement of terms and conditions subject to state review would be a reliable guarantor of open markets to the same degree that an agreement with a Track A facilities-based competitor would be.

BellSouth argues that the Department of Justice's interpretation of Track A and Track B is not persuasive and should not preclude it from seeking interLATA authority in Florida under Track B. Further, BellSouth argues that the DOJ's comments are wrong and entitled to no weight concerning the statutory interpretation of the Telecommunications Act. According to BellSouth, the DOJ lobbied for an antitrust role in the Section 271 process, and that is what Congress gave them. BellSouth believes the DOJ's opinions as to the meaning of the pertinent portions of Section 271 are entitled to no more weight than those of any other interested party.

BellSouth states that the DOJ claims that Track B is a limited exception for obtaining interLATA relief because, according to the DOJ, "Track A was the only path to approval of in-region interLATA services for the BOCs in the Senate Bill." (Citing to DOJ comments at p. 11). According to BellSouth, however, the Track A/Track B approach came virtually verbatim from the House, not the Senate. (Citing Conference report at pp 147-148.) BellSouth goes on to conclude that the DOJ's reliance upon the Senate Bill in interpreting the legislative history of Track A/Track B is seriously misplaced.

Further, BellSouth argues, the DOJ is simply wrong when it contends that Track B was intended to be a "limited exception" because Congress did not believe that facilities-based competition

would emerge within 10 months of the passage of the 1996 Act. BellSouth asserts that is precisely what Congress thought would happen. According to BellSouth, the legislative history reflects that Track A was enacted upon Congress's belief that cable companies would emerge quickly as facilities-based competitors. Based on representations by cable companies that they intended to be major players in the local market and that some had interconnection agreements in place, Congress reasonably concluded that cable companies would be providing facilities-based local exchange service within 10 months after the passage of the Act.

BellSouth asserts that the quick entry of cable companies also explains the inclusion of the language allowing a BOC to seek interLATA authority under Track B when a competing provider has failed to negotiate in good faith or failed to comply with an implementation schedule in violation of an interconnection agreement.

BellSouth asserts that the DOJ acknowledges Congress' intent that BOC entry into long distance, "not be held hostage indefinitely to the business decisions of the BOC's competitors." (Citing DOJ comments at 7) BellSouth argues that the DOJ, however, plays lip service to such congressional intent, contending that a BOC is foreclosed from seeking interLATA authority under Track B "before there are operational facilities-based competitors in the local exchange market, if there are firms moving toward that goal in a timely fashion." In other words, BellSouth states, according to the DOJ, the term "such provider" in Track B would encompass any potential competitor that is working promptly to build its own local exchange facilities, whether or not the competitor is using or ever intends to use such facilities to serve residence and business customers.

BellSouth argues that the DOJ cites nothing in the statute or legislative history in support of its approach that Track B is foreclosed once a provider has manifested its intent to be a facilities-based competitor and is working toward that goal. Furthermore, it is inconsistent with the DOJ's position that "the term 'such provider' in track B should be interpreted with reference to the type of facilities-based competition that would satisfy Track A." (Citing DOJ comments at 12) According to BellSouth, the only type of "facilities-based competition" that satisfies Track A is the presence of one or more "competing providers of telephone exchange service ... to residential and business subscribers. Thus, BellSouth argues, if the DOJ were consistent, it would have to conclude that the only type of "provider" that forecloses Track B is a facilities-based competitor

providing telephone exchange service to both residential and business customers.

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

BellSouth concludes that the Movants' contention that Track B is closed to BellSouth at this juncture is legally wrong. BellSouth states that the Motion is even more egregiously wrong in the threshold contention that this legal determination should be, or even can be, made at this time. BellSouth asserts that the Act makes clear that the BOC has the ability to select to travel under either a Track A or Track B or both. It is ultimately the role of the FCC to make a determination as to whether the requirements of Section 271 have been met. The Commission's role is consultative. Thus, according to BellSouth, this Commission must consider the facts presented to it and make a recommendation to the FCC as to how to consider the application of BellSouth.

Staff's Recommendation

Staff recommends that the Commission should deny the Movants' request for advance ruling for procedural and substantive reasons. Procedurally, the Act is very clear that the FCC has the ultimate decision-making authority over BOC interLATA applications. Section 271(b)(1), In-Region Services, provides:

> A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating in any of its in-region States (as defined in subsection(i)) if the Commission approves the application of such company for such State under subsection (d)(3).

Section 271(d)(2)(B), Consultation With State Commissions, provides:

> Before making any determination under this subsection, the Commission shall consult with the State commission of any State that is the subject of the application in order to verify the compliance with the requirements of subsection (c).

Staff believes this statutorily imposed process for 271 applications is analogous to those cases where Courts refer certain factual issues to this Commission. The Court looks to the Commission for guidance, but it is the Court that makes the final determination. The Commission is without authority to grant or deny the ultimate relief sought in either case. Further, staff notes that there is nothing in the Telecommunications Act that would prohibit BellSouth from filing a Track B application, notwithstanding a Commission ruling that it could not proceed under Track B. The Commission could recommend to the FCC that BellSouth should not be permitted to proceed under Track B, but it could not prevent BellSouth from filing under Track B.

Substantively, staff notes that on June 26, 1997, the FCC released its Memorandum Opinion and Order in CC Docket No 97-121 wherein it denied the application of SBC Communications, Inc. For interLATA authority. The FCC directly addressed the requirements of Section 271(c)(1)(a), Track A, and Section 271(c)(1)(B), Track B. The FCC found that in order to determine whether SBC could proceed under Track B, it had to determine whether SBC had received a "qualifying request" under Section 271(c)(1)(B). 271 (c)(1)(B) provides in pertinent part:

> A Bell operating company meets the requirements of this subparagraph if, after 10 months after the date of enactment of the Telecommunications Act of 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the company makes its application under subsection (d)(1)...

The FCC concluded that a "qualifying request" under Section 271(c)(1)(B) is:

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

The FCC rejected SBC's interpretation of Section 271(c)(1)(B), that only operational facilities-based competing providers may submit qualifying requests that preclude a BOC from proceeding under Track B. The FCC stated that adoption of this interpretation would create an incentive for a BOC to delay the provision of facilities in order to prevent any new entrants from becoming operational and, thereby, preserve the BOC's ability to seek in-region interLATA entry under Track B. See FCC Order at paras. 27 - 2.

In analyzing the standard for evaluating "qualifying requests", the FCC found that the threshold question is whether Congress has tied the availability of Track B to a request for access and interconnection from a carrier that is already competing in the local exchange market, as SBC (and BellSouth) contends, or whether Congress intended to preclude a BOC from proceeding under Track B upon receipt of a request for access and interconnection from a prospective competing provider of the type of telephone exchange service described in section 271(c)(1)(A). The Commission held that the latter interpretation is the most natural reading of the statute, and the only interpretation consistent with the statutory goal of facilitating competition in the local exchange market. See FCC Order at para. 31

The FCC concluded that Congress intended to preclude a BOC from proceeding under Track B when the BOC receives a request for access and interconnection from a prospective competing provider of telephone exchange service, subject to the exceptions in Section 271(c)(1)(B). According to the FCC, the words "such provider" refer to a potential competing provider of the telephone exchange service described in Section 271(c)(1)(A). See FCC Order at para. 34.

The FCC stated that if it found that only a request from an operational competing facilities-based provider of residential and business service forecloses Track B, this would guarantee that after ten months, the BOC either satisfies the requirements of Section 271(c)(1)(A) or is eligible for Track B. The FCC agreed with the DOJ that such an interpretation would radically alter Congress' scheme, by expanding Track B far beyond its purpose and, for all practical purposes, reading the carefully crafted requirement of Track A out of the statute. FCC Order at para. 47.

The FCC goes on to state that although it rejects SBC's interpretation of "qualifying request," it also rejects the argument that any request from a potential competitor forecloses Track B. The FCC concluded that a "qualifying request" must be one

for access and interconnection to provide the type of telephone exchange service to residential and business subscribers described in Section 271(c)(1)(A). FCC Order at para. 54. The FCC states that it recognizes that the standard it is adopting will require it to, in some cases, engage in a difficult predictive judgment to determine whether a potential competitor's request will lead to the type of telephone exchange service described in Section 271(c)(1)(A). FCC Order at para. 57.

The FCC believes that its standard will not allow potential competitors to delay indefinitely BOC entry by failing to provide the type of telephone exchange service described in Track A. The FCC states:

> Indeed, in some circumstances, there may be a basis for revisiting our decision that Track B is foreclosed in a particular state. For example, if following such a determination a BOC refiles its section 271 application, we may reevaluate whether it is entitled to proceed under Track B in the event relevant facts demonstrate that none of its potential competitors is taking reasonable steps toward implementing its request in a fashion that will satisfy Section 271(c)(1)(A). In addition,..., the exceptions in section 271(c)(1)(B) provide that a BOC will not be deemed to have received a qualifying request if the applicable state commission certifies that the requesting carrier has failed to negotiate in good faith or failed to abide by its implementation schedule... FCC Order at para. 58.

Although the FCC has rejected the BOCs' interpretation of when a BOC is foreclosed from seeking interLATA authority under Section 271(c)(1)(B), staff believes that it is premature to judge whether BellSouth can or cannot proceed under Track B in Florida at this time. As the FCC pointed out, the determination of whether a BOC has received a qualifying request, that forecloses Track B, will be a highly fact-specific one. FCC Order at para. 60. To date, BellSouth has not filed its application and supporting documentation with this Commission. BellSouth is expected to do so, however, on July 7, 1997. Accordingly, staff does not believe that the Commission can make a well-informed decision at this time.

Since BellSouth has not filed an application, we do not know whether it seeks to proceed under Track B, and if so, what evidence it will proffer to support such an application. Without this evidence, staff believes the Commission is unable to recommend to the FCC whether BellSouth should be permitted to proceed under

Track B. The Movants argue that BellSouth has not maintained that any provider negotiated in bad faith or failed to comply with implementation schedules in their interconnection agreements. Staff believes, as stated above, that the Commission cannot render its determination on this issue until BellSouth submits its evidence, and the Movants have had an opportunity to rebut the evidence on this issue. Further, staff believes that the Commission can only consult with the FCC on BellSouth's ability to proceed under Track B, and that it cannot prevent BellSouth from filing an application under Track B with the FCC. Therefore, even if the Commission decides after considering evidence on Track B that BellSouth is ineligible to proceed under Track B according to the FCC's interpretation, BellSouth could still file a Track B application with the FCC. Further, staff notes that although the FCC has articulated standards for a Track B application, this Commission may decide based on the facts of this case that it believes BellSouth may proceed under Track B. Finally, the Commission may want to recommend that the FCC consider a different interpretation of Section 271(c)(1)(B), based on its reading of the law.

Based on the foregoing, staff recommends that the Commission deny the Joint Motion for Advance ruling on BellSouth's Ineligibility for "Track B" and to Delete a Portion of Issue 1 filed by the FCCA, AT&T and MCI.

ISSUE 4: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open pending the evidentiary hearing in this docket scheduled to begin on September 2, 1997. (Barone)

STAFF ANALYSIS: This docket should remain open pending the evidentiary hearing in this docket scheduled to begin on September 2, 1997.