

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

In the Matter of

Application by SBC Communications Inc.,
Southwestern Bell Telephone Company,
and Southwestern Bell Communications
Services, Inc. d/b/a Southwestern Bell Long
Distance for Provision of In-Region,
InterLATA Services in Oklahoma

CC Docket No.

97-121

To: The Commission

**APPLICATION BY SBC COMMUNICATIONS INC., SOUTHWESTERN BELL
TELEPHONE COMPANY, AND SOUTHWESTERN BELL LONG DISTANCE FOR
PROVISION OF IN-REGION, INTERLATA SERVICES IN OKLAHOMA**

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OKLAHOMA § 271 APPLICATION**

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**BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA**

**APPLICATION OF ERNEST G. §
JOHNSON, DIRECTOR OF THE §
PUBLIC UTILITY DIVISION, §
OKLAHOMA CORPORATION §
COMMISSION TO EXPLORE §
THE REQUIREMENTS OF §
SECTION 271 OF THE §
TELECOMMUNICATIONS §
ACT OF 1996. §**

Cause No. PUD 97000064

**STATEMENTS FILED ON BEHALF OF
AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.
IN COMPLIANCE WITH ORDER NO. 409904**

Filed: March 11, 1997

FILED

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

MAR 1997
COURT CLERK'S OFFICE - OKC
CORPORATION COMMISSION
OF OKLAHOMA

APPLICATION OF ERNEST G. §
JOHNSON, DIRECTOR OF THE §
PUBLIC UTILITY DIVISION. §
OKLAHOMA CORPORATION §
COMMISSION TO EXPLORE THE §
REQUIREMENTS OF SECTION 271 §
OF THE TELECOMMUNICATIONS §
ACT OF 1996. §

Cause No. PUD 970000064

**AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.
SUBMISSION OF STATEMENTS**

COMES NOW, AT&T Communications of the Southwest, Inc. ("AT&T") and submits the attached Statements related to the Commission's consideration of the above-referenced application to explore the requirements of Section 271 of the Telecommunications Act of 1996 (FTA). AT&T's Statements are filed in compliance with the Commission's Order No. 409904 issued on February 28, 1997.

I.

AT&T supports the Commission's investigation into the requirements of Section 271 of the FTA. The issue of whether Southwestern Bell Telephone Company - Oklahoma (SWBT) has provided credible evidence to support Section 271 application for entry into the interLATA market is of critical importance to the future evolution of local exchange market competition.

To assist the Commission in this investigation, AT&T submits the following Statements:

- Edwin Rutan -- Overview; Requirements of § 271
- Steven R. Turner -- State of Competition
- Phil Gaddy -- Competitive Checklist -- Overview
- Nancy Dalton -- Negotiations; Operations Support; 911, E911, Directory Assistance, Operator Call Completion, White Pages Listings

- Robert V. Falcone/ Steven R. Turner -- Unbundled Network Elements
- Daniel C. Keating, III -- Poles, Ducts, Conduits, and Rights-of-Way

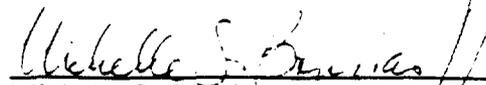
Mark Lancaster -- Number Administration, Local Dialing
Parity, Interim Number Portability;
IntraLATA Toll Dialing Parity
Joe Gillan -- Public Interest
J. Mayo -- Public Interest

AT&T together with MCI also submits the following statement:

Frederick Warren Boulton -- Public Interest

AT&T respectfully requests that after hearing and consideration of the merits, that the Commission find that SWBT has not provided sufficient information and evidence to support findings that it has met the requirements of Section 271; and for any further relief to which AT&T might be entitled.

Respectfully submitted.



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Dated: March 11, 1997

CERTIFICATE OF MAILING

This is to certify that on this 11th day of March, 1997, a true and correct copy of the above and foregoing AT&T Communications of the Southwest, Inc. Submission of Statements was mailed, postage prepaid to:

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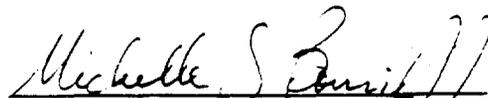
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BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

APPLICATION OF ERNEST G.
JOHNSON, DIRECTOR OF THE
PUBLIC UTILITY DIVISION,
OKLAHOMA CORPORATION
COMMISSION TO EXPLORE THE
REQUIREMENTS OF SECTION 271
OF THE TELECOMMUNICATIONS
ACT OF 1996.

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Cause No. PUD 970000064

STATEMENT OF EDWIN P. RUTAN, II
ON BEHALF OF
AT&T COMMUNICATIONS OF THE SOUTHWEST

I. INTRODUCTION AND QUALIFICATIONS

1. My name is Edwin P. Rutan, II. I am AT&T's Law & Government Affairs Vice President for the Southwest Region, which comprises, in addition to Oklahoma, the states of Texas, Missouri, Kansas and Arkansas. I have offices in Dallas and in Austin, Texas.

2. I received a J.D. degree (cum laude) from Harvard Law School in 1974 and a B.A. degree (cum laude) from Columbia University in 1970, majoring in American History.

3. Prior to my current assignment, which I began in January 1996, I had been a General Attorney supporting AT&T's Consumer Long Distance business unit since 1992. From 1986 to 1992, I was AT&T's lead Regional Attorney for Europe, the Middle East and Africa, based in Brussels, Belgium. From 1983 to 1986, I was an attorney in AT&T's antitrust law group. Prior to that I was a litigation associate specializing in antitrust with the law firm of Debevoise & Plimpton. From 1974 to 1975, I was a law clerk to U.S. District Court Judge Milton Pollack in the Southern District of New York.

4. In its February 28, 1997 Order establishing a Procedural Schedule, this Commission directed all parties to file comments regarding "SWBT's Section 271(c) petition and supporting documentation and issues related thereto." Order at 1.

5. NARUC has promulgated a set of practices for state commissions to use in evaluating Section 271 applications. See NARUC "Best Practices for RBOC Applications to Provide In-Region InterLATA Service" (NARUC). My testimony will discuss each of the five specific types of evidence to be submitted under NARUC. Each of those areas is discussed in general below. More detailed evidence is presented in the comments by other individuals.

A. SWBT Has Not Met the Requirements of Either Section 271(c)(1)(A) (Presence of a Facilities-Based Competitor) or Section 271(c)(1)(B) (Failure to Request Access).

1. The Purpose of Section 271(c)(1)

6. Before assessing the significance of the marketplace evidence, it is important to discuss the purpose of Section 271(c)(1) and the requirements that it imposes to achieve that purpose.

7. Section 271(c)(1)(A) is titled "Presence of a Facilities-Based Competitor." The role of "facilities-based" competition in the Federal Telecommunications Act of 1996 (FTA) is critical. A fundamental premise of the FTA, just as it was in the divestiture decree ordered by Judge Greene, is that local monopoly facilities are a bottleneck and that if a Bell Operating Company is permitted to provide long distance service while it retains that bottleneck control over an essential input to long distance service, it will have both the opportunities and the incentives to use its monopoly to discriminate against long distance carriers. That same monopoly also

means that a Bell Operating Company has the incentive and ability to discriminate against would-be local service competitors by denying them access and interconnection on just, reasonable, and nondiscriminatory terms.

8. Both the FTA and the divestiture decree reflect the conclusion that the dangers presented by the local monopoly bottleneck cannot be adequately protected against by regulatory oversight and accounting safeguards alone. The Modification of Final Judgment (MFJ) addressed this problem by ordering not only that the Bell Operating Companies (BOCs) be divested from the AT&T long distance business, but also that the BOCs be prohibited outright from providing long distance service. The MFJ did provide that long distance entry could be permitted if competitive conditions justified it, but no actions were taken that would lead to the development of the necessary competition. The MFJ also divested the BOCs from Western Electric and equipment manufacturing.

9. The FTA addresses the same problem of monopoly bottleneck by mandating that SWBT and the other BOCs must open their local service monopoly networks to competition. The FTA ultimately does allow SWBT and the other BOCs into long distance, but not unless and until there is facilities-based competition to the local monopoly bottleneck. (Other requirements discussed below also must be met.)

10. As to the standard for facilities-based competition, one thing is clear beyond dispute. Congress "consistently contemplated" that the facilities-based competition required by the FTA must at least be "meaningful." H. Conf. Rep. No. 104-458, 104th Cong., 2d Sess., at

148 (1996) (H. Conf. Rep.) If the facilities-based competition does not provide the necessary check on monopoly bottleneck power, it is not "meaningful" under the FTA.

a. **"Track A"**

11. Section 271(c)(1)(A), generally referred to as Track A, sets up the procedure for ensuring that meaningful facilities-based competition has developed before long distance entry by a BOC, such as SWBT, is authorized. Track A is triggered when a carrier requests negotiations with SWBT in accordance with the requirements in Sections 251 and 252 of the FTA. That carrier and SWBT subsequently enter into a binding interconnection agreement, either through negotiations, or if a fully negotiated agreement is not reached, through arbitration. The interconnection agreement, whether arbitrated or negotiated, must be approved by the Commission. As discussed in greater detail below, SWBT must reach one or more such agreements, the parties must bring them into commercial operation, and the competitive checklist must be fully implemented, before SWBT may be permitted into long distance.

b. **"Track B"**

12. Section 271(c)(1)(B), generally referred to as Track B, was added by Congress to address the Bell companies' concern that the major long distance companies might try to prevent the Bell companies' entry into long distance, despite the BOCs' best efforts, simply by refraining from asking for access and interconnection. Thus, Track B provides that if no carrier requests interconnection, the BOC may 10 months after enactment, proceed with a statement of the terms and conditions that it generally offers for access and interconnection in lieu of an actual agreement.

13. Congress created Track B as an alternative, exception process to be applied for only if no carrier initiated Track A by requesting access and interconnection. Track A is clearly the approach preferred by Congress because it contemplates the facilities-based competition necessary to bring the local monopoly bottleneck into check, which must occur before the local monopolist is allowed into long distance. SWBT is on Track A for Oklahoma.

c. **Track B Is Not Available to SWBT in Oklahoma.**

14. The evidence is undisputed that prior to September 8, 1996 (*i.e.*, three months prior to ten months after adoption of the FTA), *at least* the following companies had requested access and interconnection from SWBT pursuant to Sections 251 and 252 of the FTA: AT&T, Brooks Fiber, Western Oklahoma Long Distance, and U.S. Long Distance, Inc. (USLD). Because AT&T is not privy to SWBT's negotiations with other companies, there may be additional companies who requested access and interconnection from SWBT prior to September 8, 1996.

15. There can be little doubt that SWBT understood that it was on Track A once these requests were received. For example, the agreement negotiated by SWBT and Brooks Fiber Communications of Tulsa, Inc. and Brooks Fiber Communications of Oklahoma, Inc. is accompanied by an affidavit of Robert E. Stafford, SWBT, in which Mr. Stafford averred that Brooks will offer telecommunications services "either exclusively over Brooks' own facilities or predominantly over Brooks' facilities in combination with the resale of SWBT services." Similarly, the agreement between SWBT and USLD recites that "USLD desires to provide local exchange service to residential and business end users predominately over its own telephone exchange service facilities . . ."

16. The words "predominantly over its [their] own telephone exchange service facilities" are taken directly from Section 271(c)(1)(A) of the FTA (*i.e.*, Track A).

17. These facts show that there has not been a "failure to request access" in Oklahoma, and thus Track B is not available to SWBT in Oklahoma. SWBT will likely try to blur the distinction between the beginning of Track A and the completion of Track A by arguing that if no carrier is found to satisfy Track A at the time when Bell Company actually files under Section 271, then SWBT must be eligible for Track B. In fact, Congress quite clearly envisioned a start and a finish to the Track A facilities-based competition requirement. Track A is initiated when a carrier which aspires to provide local service requests access and interconnection. The facilities-based competitor requirement of Track A is satisfied when the aspiring competitor actually builds a network and is providing service to both residential and business customers exclusively, or at least predominantly, using its own facilities.

18. To be sure, Track B provides that SWBT could ask this Commission for a ruling whether the carriers requesting access and interconnection had negotiated in bad faith, or were in breach of their implementation schedule obligations, and if this Commission so ruled, for all carriers that had requested access and interconnection, SWBT could be permitted to pursue Track B. To my knowledge, SWBT has not taken the position that any company requesting access and interconnection has negotiated in bad faith, nor have there been any such findings by this Commission.

2. The Requirements of Track A

19. Track A contains two distinct requirements, each of which SWBT must demonstrate that it satisfies. *First*, SWBT must actually be providing access and interconnection to a predominantly facilities-based, "competing" carrier pursuant to an approved interconnection agreement. *Second*, the access and interconnection must be provided in a manner that "fully implements" what is commonly referred to as the competitive checklist. Each of these requirements is discussed in greater detail below.

a. Actually Providing Access and Interconnection to a Facilities-Based Competitor

20. Section 271(c)(1)(A) of the FTA states that:

(A) Presence of a facilities-based competitor

A Bell operating company meets the requirements of this subparagraph if it has entered into *one or more binding agreements* that have been approved under section 252 of this title *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 153(47)(A) of this title, 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. (emphasis added)

This Section is a very tightly woven set of requirements, each of which links back to the importance of facilities-based competition as a check on the local bottleneck.

(1) **"Is Providing" Access and Interconnection**

21. Until SWBT satisfies this threshold test, it cannot possibly satisfy Track A and its Section 271 application is premature.

22. The precise language chosen by Congress -- "is providing" -- makes it clear that Congress required actual commercial implementation of the agreement. The present tense requirement that SWBT "is providing" access and interconnection is critical. It means that the agreement must actually be commercially operational. Until the provision of access and interconnection has been commercially operationalized, there can be no check on the local monopoly bottleneck. Congress intended that anything less than full commercial operation would not qualify. "The requirement that the BOC 'is providing access and interconnection' means that the competitor has implemented the agreement and the competitor is operational." (H. Conf. Report at 148). Thus, if the provision of access and interconnection is only being tested or "tried" or demonstrated, or is subject to capacity or quality limitations or manual overrides or work arounds, this requirement is not satisfied.

23. The requirement that the access and interconnection be commercially operational is sound policy in three senses:

- *First*, commercial operation provides some assurance that operational problems will not arise that would prevent the access and interconnection from serving as a competitive check.

- *Second*, the commercial operation requirement assures that there will be no misunderstandings between the parties as to exactly what their agreement is.
- *Third*, and perhaps most important, the process of implementing the agreement in commercial detail will unearth any additional charges or other procedures or requirements not contemplated by one party or the other at the time of agreement. Indeed, as discussed in greater detail in the Statement of Nancy Dalton, in the post-arbitration negotiations in Texas, as the parties' discussions have reached deeper implementation issues, SWBT has raised for the first time additional charges which SWBT has not proven to be justified or cost-based. AT&T's post-arbitration negotiations with SWBT have underscored the axiom that the "devil is in the details."

24. The likelihood that commercial operation will surface charges or requirements not anticipated by one party or the other is particularly great for those interconnection agreements negotiated at a high level, which leave to future resolution any disputes over implementation details. The risk is even greater with SWBT's Oklahoma Statement of Terms and Conditions (SGAT), an "agreement" that was neither arbitrated nor negotiated. In the section of the SGAT entitled "Effective Date/Implementation," SWBT replaces specifics on implementation with a "best efforts" clause requiring parties to implement interconnection "as soon as reasonably possible under the circumstances." SGAT, § XXXI.

25. SWBT's agreement with Brooks Fiber in Kansas illustrates why the commercial operation requirement is so important. Physical collocation, for example, was not addressed in detail in that interconnection agreement. As Brooks Fiber has advised the Kansas Commission:

... While deployment of these collocations is still in progress, Brooks can state generally that there are significant differences in opinion between Brooks and SWBT concerning the reasonableness of the collocation prices quoted by SWBT, and regarding the

processing time frames associated with making collocation spaces available. Brooks believes that the collocation prices are excessive and that the time frames required by SWBT to process Brooks' collocation applications have been unreasonably long.

Responses of Brooks Fiber Communications to Kansas Corp. Commission's First Set of Data Requests. Docket No. 97-SWBT-411-GIT. Feb. 21, 1997, at Question J.

26. Differences concerning matters as important as facilities deployment schedules and unanticipated charges for commercial implementation of an agreement could have severe adverse effects on both the timing and extent of competition with SWBT's local monopoly bottleneck. This requirement distinguishes paper promises from real commitments that have actually been furnished to competitors in the marketplace. This is why the "is providing" requirement of Section 271(c)(1)(A) is absolutely critical.

27. Indeed, SWBT recognizes the importance of this requirement in the drafting of the most favored nations clauses. In the Intermedia Communications, Inc. (ICI) agreement with SWBT, for example, SWBT agrees to upgrade terms under the "most favored nations" clause of section 252(I) of the FTA only to the extent the preferred provisions are contained in an "operational interconnection agreement" between SWBT and a company with which SWBT is actually "exchanging local traffic." ICI Agreement, XXII. SWBT clearly is aware of the significance of the difference between an agreement that has simply been executed by obtaining the parties' signatures and an agreement that has become commercially operational.

(2) Complete Agreement

28. If the provision of access and interconnection is subject to additional terms and conditions not stated in the agreement or is materially incomplete, the agreement does not qualify

for long distance relief under Track A. For example, if SWBT subjects or intends to subject the access and interconnection being provided under an agreement to additional charges not stated in the agreement, the agreement would not qualify because the agreement would not "specify the terms and conditions under which the Bell Operating Company is providing access and interconnection." This requirement is important because any unspecified charges or other terms and conditions might not be in compliance with the FTA and could frustrate the ability of the new entrant to compete.

29. Indeed, as discussed in greater detail in the comments of Nancy Dalton, one of AT&T's greatest frustrations in the negotiations with SWBT has been SWBT's propensity to conjure up and seek to impose new additional charges that were never raised by SWBT in the arbitration, which it has not proven are cost-based, coupled with a simultaneous refusal to provide a detailed price list to AT&T for unbundled network elements (UNE).

(3) Predominantly Over Their Own Telephone Exchange Service Facilities in Combination with Resale

30. Interpretation of the phrase "predominantly" over its own facilities "in combination with resale" must begin with the purpose of the facilities-based competition requirement -- to serve as an effective competitive check to the local monopoly bottleneck. The facilities of a new entrant can serve as a competitive check only if they are a meaningful alternative to the local monopoly bottleneck.

31. For the purposes of Section 271(c)(1)(A), the new entrant's "own" facilities do *not* include unbundled network elements obtained from the incumbent monopoly. Section 271(c)(1)(A) plainly contemplates two sets of "network facilities" -- SWBT's and the new

entrant's -- and an agreement through which SWBT provides "access" for the new entrant's facilities to those of SWBT.

32. It is clear from the Conference Report that Congress had in mind alternate facilities that the new entrant had built as the real check on the monopoly bottleneck. Congress had strong reasons for recognizing a substantial difference between the control a new entrant can exercise over facilities it "owns" and the far more limited power it can exercise over unbundled network elements to which it merely obtains "access." So long as SWBT controls the provision of network elements to its competitors, it retains the ability to discriminate against its competitors in myriad ways. The provision of competing service through unbundled network elements obtained from SWBT therefore can never provide a comparably effective check to SWBT's local monopoly bottleneck as would the provision of competing service through facilities the competitor owns itself, which is why Track A requires the existence of truly facilities-based competition. As discussed in greater detail in the statement of Steve Turner, such competition is virtually nonexistent in Oklahoma at this time.

(4) "Competing" Providers

33. Track A also is not satisfied if the new entrant is not an "unaffiliated competing" provider. This requirement has relevance here in three senses. *First*, an entrant that is merely conducting a trial of or "demoing" its services is not yet "competing." *Second*, an entrant which has targeted only limited niches, service-wise or geographically, is not a "competing" provider because there is no "meaningful" competition. *Third*, an affiliated provider cannot satisfy the "competing" provider test. Meaningful competition only exists if the "competing" provider is

operational and has the ability to compete for and serve a substantial portion of SWBT's statewide business and residential monopoly. Stated in more everyday terms, if the complete answer to the question of whether Company x is a "competing provider" to SWBT is "yes, but only . . .", the FTA has not been satisfied.

(5) **"Residential and Business Subscribers"**

34. Congress was quite clear that the benefits of competition should not be limited to business customers. Unless meaningful numbers of both business and residence customers are being served by facilities-based competition, Section 271 is not satisfied.

(6) **"One or More "Binding" Agreements"**

35. If the agreement is subject to contingencies, such as rights of appeal, any terms and conditions subject to appeal may not be binding. In fact, in Texas, the only state in which AT&T has signed an interconnection agreement with SWBT (albeit one that is incomplete and lacking in essential areas such as UNE and operations support systems (OSS)), SWBT added a 200-plus word disclaimer indicating that it "has not voluntarily signed;" it signed "under compulsion of federal and/or state law;" the arbitration/negotiation process was "tainted by the FCC's rules;" and it "reserves its rights regarding all aspects of the document whether reflecting negotiated, stipulated or arbitrated provisions." In addition, several of the negotiated agreements filed in Oklahoma contain reformation clauses, indicating that the agreements contain rates, terms, and conditions which are subject to change based on the outcome of reconsideration, appeals and/or further Commission action related to those appeals. The Sprint agreement in Oklahoma contains rates, terms, and conditions which "will, upon request of either Party, be reformed to

reflect language contained in" the final AT&T/SWBT agreement. With these types of disclaimers, reformation clauses and rates, and terms and conditions "subject to change," it is far from clear that these agreements are "binding" agreements.

b. **Full Implementation of the Competitive Checklist**

36. It is not sufficient for SWBT to have entered into one or more interconnection agreements with a facilities-based carrier serving business and residence customers exclusively or predominantly over its own facilities. Section 271(c)(2)(B) requires that such access and interconnection must satisfy the fourteen point "competitive checklist." "Full implementation" of the checklist is required. FTA, § 271(d)(3)(A)(I). The term "implement" is defined in Merriam Webster's Collegiate Dictionary as follows: "1. CARRY OUT, ACCOMPLISH; *esp*: to give practical effect to and **ensure of actual fulfillment by concrete measures**" (Emphasis added) (Exhibit EPR-1)

37. The role of the competitive checklist in the FTA plan is critical. If the access and interconnection received by a facilities-based carrier does not "fully" meet each and every one of the checklist items, that new entrant will not be able to provide the full degree of competition to the local bottleneck contemplated by Congress. For example, if the local loop rate agreed to by SWBT and a new entrant is \$1.00 above the rate that would be determined to be cost-based under Section 252(d), the price point where Congress intended there to be competition has been raised by \$1.00.

38. SWBT has absolutely not demonstrated that it is providing the checklist items to any telecommunications carrier because as the affidavit of Steve Turner evidences, SWBT is

currently providing only the most limited of access and interconnection to Brooks Fiber. Therefore, whether the provision of such access and interconnection satisfies the competitive checklist is academic. A summary of the numerous ways in which SWBT is failing to satisfy the competitive checklist is contained in the statement of Phil Gaddy. Greater detail on each item of the checklist is provided in the statements of Robert Falcone/Steve Turner, Nancy Dalton, Phil Gaddy, Daniel Keating, and Mark Lancaster. While Track A has been opened by the requests for access and interconnection received by SWBT, none of the approved agreements, singularly or collectively, has brought full implementation of the competitive checklist.

3. SWBT May Not Use A Statement of Generally Accepted Terms and Conditions to Cure Shortcomings in the Commercial Operations of Agreements Under Track A.

39. SWBT and other BOCs have argued that if they have not met the Track A commercial operation requirement for one or more checklist items, they can cure that defect with an SGAT. That argument confounds both the clear structure of the FTA and the policy on which it is based. There is no pick and choose or mix and match between Track A and Track B; they are mutually exclusive alternatives.

40. Track B itself provides that it is only available "if" no request for Track A is received. FTA § 271(c)(1)(B). Beyond that, Section 271 maintains a consistently parallel "either/or" structure throughout between Track A and Track B. Section 271(c)(1) establishes that Track A and Track B are mutually exclusive; a BOC meets this requirement "if it meets the requirements of subparagraph (A) *or* subparagraph (B) of this paragraph" (emphasis added). That distinction is continued throughout the rest of Section 271. Likewise, in Sections 271(c)(2)(A)(I)

and 271(d)(3)(A), the distinction between satisfying Track A "or" Track B is repeated. Congress' consistent use of the disjunctive clearly demonstrates that Track A and Track B are separate and distinct and that Track B is available only as a conditional alternative to Track A, not as a supplement.

41. This approach is sound public policy. If SWBT were permitted to use an SGAT to cure its non-compliance with the checklist, SWBT could frustrate the purpose of the commercial operation requirement by withholding agreement on one or more items on the checklist and using the SGAT to avoid any inquiry into its actual provision of the item. Thus, just as Track B protects the BOCs against their assertion that the long distance companies would hold back, the mutual exclusivity of Track A and Track B protects against the long distance companies' fear that the BOCs would enter the long distance market without actually providing the checklist requirements.

4. Timing of Track A

42. SWBT and the other BOCs have argued in numerous public forums that Congress expected that facilities-based competition that would satisfy Track A would have developed by now and that it would be unfair to require SWBT to wait until it does before they are allowed to enter long distance. That argument not only misstates the expectation of Congress, but also conveniently overlooks the delay in facilities-based competition caused by SWBT's own negotiation tactics.