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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

CC Docket No. 97-121

In The Matter of

APPLICATION OF SBC  
COMMUNICATIONS, INC. FOR  
AUTHORIZATION UNDER SECTION  
271 OF THE COMMUNICATIONS ACT  
TO PROVIDE IN-REGION, INTERLATA  
SERVICE IN THE STATE OF OKLAHOMA

COMMENTS  
OF THE  
TELECOMMUNICATIONS RESELLERS ASSOCIATION

TELECOMMUNICATIONS  
RESELLERS ASSOCIATION

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## **SUMMARY**

The Telecommunications Resellers Association ("TRA"), a trade association representing more than 500 entities engaged in, or providing products and services in support of, telecommunications resale, concurs with the Association for Local Telecommunications Services that a Bell Operating Company may not demonstrate compliance with Section 271(c)(1) in reliance upon a so-call "Track B" Statement of Generally Available Terms and Conditions once an entity seeks to interconnect its network facilities to those of the BOC for purposes of providing a competitive local exchange service and that a BOC's failure to demonstrate that a facilities-based competitor is providing commercial telephone exchange service to both residential and business subscribers renders its "Track A" application fatally deficient. Accordingly, TRA joins with ALTS in urging the Commission to immediately dismiss the Southwestern Bell Section 271 Application and to impose legal sanctions on Southwestern Bell for filing a Section 271 application with the Commission which it knew or should have known lacked the requisite factual foundation.

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**CC Docket No. 97-121**

**COMMENTS OF THE  
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"),<sup>1</sup> through undersigned counsel and pursuant to Public Notice, DA 97-864 (released April 23, 1997), hereby submits the following comments in support of the "Motion to Dismiss and Request for Sanctions" ("Motion

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<sup>1</sup> A trade association, TRA represents more than 500 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. Although initially engaged almost exclusively in the provision of domestic interexchange telecommunications services, TRA's resale carrier members have aggressively entered new markets and are now actively reselling international, wireless, enhanced and internet services. TRA's resale carrier members are also among the many new market entrants that are, or will soon be, offering local exchange and/or exchange access services, generally through traditional "total service" resale of incumbent local exchange carrier ("LEC") or competitive LEC retail service offerings or by recombining unbundled network elements obtained from incumbent LECs, often with their own switching facilities, to create "virtual local exchange networks." TRA's resale carrier members, accordingly, will not only be direct competitors of Southwestern Bell in both the local exchange, long distance and other markets, but will be reliant upon Southwestern Bell as an incumbent LEC for wholesale services and access to unbundled network elements, as well as for exchange access services.

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to Dismiss) filed by the Association for Local Telecommunications Services ("ALTS") in the captioned docket on April 23, 1997. In its Motion to Dismiss, ALTS urges the Commission to dismiss the application filed by SBC Communications, Inc. ("SBC"), Southwestern Bell Telephone Company ("SWBTC"), and Southwestern Bell Long Distance ("SWBLD") (collectively, "Southwestern Bell") seeking authority for SWBLD to provide interLATA services "originating" within the SWBTC "in-region State" of Oklahoma ("Section 271 Application"). As the basis for the relief it requests, ALTS cites Southwestern Bell's failure to make the statutorily-mandated showings that either (i) SWBTC is providing, pursuant to a binding agreement approved under Section 252 of the Communications Act of 1934 ("Communications Act"),<sup>2</sup> as amended by Section 151 of the Telecommunications Act of 1996 ("1996 Act"),<sup>3</sup> network access and interconnection to an unaffiliated facilities-based provider engaged in the provision of telephone exchange services to both residential and business subscribers ("Track A"), or (ii) that no potential facilities-based competitor has requested network access and interconnection and that as a result, SWBT is making network access and interconnection available pursuant to a statement of generally available terms and conditions ("SGATC") approved or permitted to take effect by the Oklahoma Corporation Commission ("OCC") ("Track B").

TRA concurs with ALTS that a BOC may not rely upon the so-call "Track B" SGATC showing once an entity seeks to interconnect its network facilities to those of the BOC for purposes of providing competitive local exchange service and that a BOC's failure to demonstrate that a facilities-based competitor is providing commercial telephone exchange service

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<sup>2</sup> 47 U.S.C. § 252.

<sup>3</sup> Pub. L. No. 104-104, 110 Stat. 56, § 101 (1996).

to both residential and business subscribers renders its "Track A" application fatally deficient. Accordingly, TRA joins with ALTS in urging the Commission to immediately dismiss the Southwestern Bell Section 271 Application and to impose legal sanctions on Southwestern Bell for filing a Section 271 application with the Commission which it knew or should have known lacked the requisite factual foundation.

**I. Southwestern Bell Cannot Rely Upon a "Track B" Showing to Satisfy the Requirements of Section 272(c) for "In-region" InterLATA Authority for the State of Oklahoma**

Under Section 272(d)(3) of the 1996 Act, the Commission may not grant a BOC application for "in-region," interLATA authority unless it makes an affirmative determination that the applying BOC has, among other things, met the requirements of Section 271(c)(1) for the State for which authorization is sought, including: (i) a showing that either it is providing, pursuant to a binding agreement approved under Section 252, network access and interconnection to an unaffiliated facilities-based provider engaged in the provision of telephone exchange services to both residential and business subscribers, or if no potential facilities-based competitor has requested network access and interconnection, that it is offering to provide network access and interconnection pursuant to an approved or effective SGATC.<sup>4</sup> In so structuring the Commission's evaluative parameters, the Congress made two points abundantly clear: First, a BOC seeking "in-region," interLATA authority may proceed under either "Track A" or "Track

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<sup>4</sup> 47 U.S.C. § 271(d)(3)(A).

B", but not both.<sup>5</sup> Second, a BOC may proceed under "Track B", only if "Track A" is unavailable to it. It is the latter statutory mandate that is pertinent here.

By its express terms, Section 271(c) makes clear that a BOC may proceed under "Track B" if and only if no new market entrant has sought to interconnect its network facilities to the network facilities of the BOC within ten months following enactment of the 1996 Act. The only exceptions recognized by Section 271(c) are instances in which such a request has been made but the requesting entity thereafter has failed to negotiate in good faith or has failed to comply with the implementation schedule incorporated into its Section 252 network access/interconnection agreement with the BOC. In other words, the Congress sought to ensure that the BOCs would not be denied "in-region," interLATA authority through strategic manipulation of local market entry procedures, providing the BOCs with a viable market entry vehicle in the event that the largest interexchange carriers ("IXCs") elected to forego the opportunity to provide local service in order to keep the BOCs out of the long distance market or sought to delay such BOC market entry through bad faith negotiating or operational stratagems. As described in the Joint Explanatory Statement, "[n]ew section 271(c)(1)(B) . . . is intended to ensure that a BOC

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<sup>5</sup> Section 271(c) makes express use of the disjunctive "or" in setting forth the alternative showings upon which a BOC may rely in satisfying the requirements of subsection "(1)." The disjunctive "or" is also used in Section 271(c)(2)(A) and again in Section 271(d)(3)(A) in referring to "Track A" and "Track B." 47 U.S.C. §§ 271(c)(2)(A), 271(d)(3)(A). Likewise, the Conference Committee made clear that a BOC must rely on either "Track A" or "Track B," not both:

a BOC must satisfy the "in-region" test by virtue of the presence of a facilities-based competitor or competitors under new section 271(c)(1)(A), *or* by the failure of a facilities-based competitor to request access or interconnection (under new section 251) as required under new section 271(c)(1)(B).

S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 147 (1996) ("Joint Explanatory Statement") (emphasis added).

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."<sup>6</sup> In other words, Section 271(c)(1)(B) is a narrowly-crafted exception incorporated into the 1996 Act to protect BOCs, not a market-entry vehicle co-equal with Section 271(c)(1)(A).

Treating Section 271(c) as anything other than such a narrowly-crafted exception would essentially deny subsection "(A)" a role in the Commission's evaluation of BOC Section 271 applications. Under the more expansive reading of Section 271(c) advocated by the BOCs, a BOC would legitimately be able to apply for authorization to provide "in-region," interLATA service a short ten months following the enactment of the 1996 Act even if it had not negotiated network access/interconnection arrangements in good faith or had engaged in other dilatory tactics. As the Commission has recognized, such anticompetitive conduct should be anticipated, particularly if good faith negotiations are not required to satisfy requirements for grant of "in-region," interLATA authority:

We find that incumbent LECs have no economic incentive, *independent of the incentives set forth in sections 271 and 274 of the 1996 Act*, to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services. Negotiations between incumbent LECs and new entrants are not analogous to traditional commercial negotiations in which each party owns or controls something the other party desires. Under section 251, monopoly providers are required to

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<sup>6</sup> Joint Explanatory Statement at 148.

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make available their facilities and services to requesting carriers that intend to compete directly with the incumbent LEC for its customers and its control of the local market.<sup>7</sup>

Moreover, reading Section 272(c) to allow a BOC to proceed under "Track B" even if a network access/interconnection request had been received from a potential facilities-based competitor would create a thematic conflict with other telephony provisions of the 1996 Act. The Congressional preference that network access/interconnection should generally be achieved through negotiation is made clear by the dual statutory requirements (i) that incumbent LECs "negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in [both subsections '(b)' and '(c)' of Section 251]," and (ii) that the incumbent LEC and the telecommunications carrier requesting network access/interconnection must engage in voluntary negotiations for at least 135 days prior to petitioning a State commission for arbitration of any remaining disputes. Arbitrations and SGATCs come into play only when negotiations have not been initiated or, once commenced, have broken down.

In addition, the Congress clearly recognized that the local exchange/exchange access market will only become truly competitive once alternative physical networks have been deployed. Thus, "Track A" anticipates agreements authorizing "access and interconnection to [the BOC's] network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service" providing service "either exclusively . . . or

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<sup>7</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, ¶ 55 (released August 8, 1996), *pet. for rev. pending sub nom. Iowa Utilities Board v. FCC*, Case No. 96-3321 (8th Cir. Sept. 5, 1996), *recon.* FCC 96-394 (Sept. 27, 1996), *further recon.* FCC 96-476 (Dec. 13, 1996), *further recon. pending* ("Local Competition First Report and Order") (emphasis added).

predominantly over their own telephone exchange service facilities."<sup>8</sup> And as the Joint Explanatory Statement confirms, the non-facilities-based resale offering of local exchange service by itself does not constitute competition sufficient to justify the grant of "in-region," interLATA authority to a BOC.<sup>9</sup> Accordingly, while "Track B" protects BOCs from strategic manipulation of the local entry process, "Track A" is designed to increase the likelihood that viable competition will emerge in the local exchange/exchange access market. Certainly, it would make no sense for the Congress to expressly require the presence of a "facilities-based competitor" under "Track A," but allow the BOCs to avoid this requirement altogether simply by waiting a mere ten months to file their Section 271 applications.

Once a request for network access/interconnection has been received by a BOC, the sole remaining issue in determining whether a BOC may proceed under "Track B" is whether the request has been made by an "unaffiliated competing provider of telephone exchange service" which is seeking "access and interconnection to [the BOC's] network facilities for . . . [its] network facilities."<sup>10</sup> It is indisputable that in order to preclude use of "Track B," the requesting carrier must be unaffiliated with the serving BOC and must intend to use some of its own facilities in the provision of a competitive local exchange service. It need not, however, intend to provide service "either exclusively . . . or predominantly over . . . [its] own telephone exchange service facilities." This additional specification was expressly included solely "for the purpose of . . . [applying] subparagraph [(A)]." It, therefore, defines the "Track A" compliance

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<sup>8</sup> 47 U.S.C. § 271(c)(1).

<sup>9</sup> Joint Explanatory Statement at 148.

<sup>10</sup> 47 U.S.C. § 271(c)(1)(A).

threshold without expanding the limited role of "Track B." Hence, a BOC cannot avail itself of the "Track B" alternative showing once a request has been received from a new market entrant to interconnect trunking facilities, a switch or any other network facilities.

Certainly, in order to preclude BOC use of "Track B," the requesting carrier need not be actually providing local exchange service either when it requests network access/interconnection, when the BOC's SGATC is filed or becomes effective, or when the BOC files its Section 271 application. Section 271(c)(1)(B)'s reference to "a provider" does not require the actual provision of local exchange service; rather it describes a potential facilities-based competitor seeking entrance into the local exchange market through network access/interconnection. This view is confirmed by the second exception recognized by Section 271 (c)(1)(B) -- *i.e.*, "failure to comply, within a reasonable period of time, with the implementation schedule contained in . . . [a network access/interconnection] agreement." Given that it is impossible to provide a viable facilities-based local exchange service in a market without interconnecting with the serving BOC's network, the Congress' identification of a new market entrant's failure to meet an interconnection implementation schedule as an effective negation of a network access/interconnection request can only be read to mean that the new market entrant need only be planning to provide a facilities-based competitive local exchange service when it requests interconnection in order to preclude further BOC reliance upon "Track B." The BOC is protected from any gamesmanship in which new market entrants might attempt to engage by the treatment of a requesting party's failure to comply with an agreed upon implementation schedule as such an effective negation of its network access/interconnection request.

If in order to preclude BOC use of "Track B," the requesting carrier would need to be actually providing a competitive local exchange service utilizing its own facilities at the time it requested network access/interconnection or when the BOC filed its SGATC or Section 271 application, all BOCs would enter the "in-region," interLATA market under "Track B." As the Commission is aware, virtually no local exchange competition existed prior to passage of the 1996 Act<sup>11</sup> and the BOC would be in a position to assure that no such competition took root prior to the filing (or approval) of its SGATC or its Section 271 application under "Track B." Simply by blocking market entry by any facilities-based competitor through delay and bad faith negotiating tactics, the BOCs could secure entry into the "in-region," interLATA market through the "Track B backdoor" without having to open their local exchange/exchange access markets to facilities-based competition. Thus, a requirement that a requesting carrier be providing facilities-based local exchange/exchange access service both before and after it requests network access/interconnection or even before the completion of an agreed upon implementation schedule would not only be nonsensical, but bad public policy.

In short, a BOC may not proceed under "Track B" once a request has been received by an entity seeking the right to interconnect its network facilities to the network facilities of the BOC for purposes of providing a competitive local exchange service offering. The submission of the network access/interconnection request itself is the determinative act and the import of this action is not impacted by the timing or the manner of the new market entrant's initiation of service. The requesting entity need not be a full or even a predominately facilities-based provider; it must only propose to utilize some of its own network facilities. Moreover, the

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<sup>11</sup> See, e.g., Common Carrier Bureau, "Common Carrier Competition" (Spring, 1996).

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requesting entity need not be providing a competitive local exchange service offering when the network access/ interconnection request is made or at any given time thereafter; it must only negotiate in good faith and comply with agreed upon service implementation schedules.

Applying this analysis to Southwestern Bell's application, Southwestern Bell may only proceed under "Track A" in seeking "in-region," interLATA authority for the State of Oklahoma. Included among the dozens of entities which have requested network access/interconnection from SWBTC are AT&T Communications of the Southwest, Inc. ("AT&T"), Brooks Fiber Communications of Tulsa, Inc. and Brooks Fiber Communications of Tulsa, Inc. (collectively, "Brooks Fiber"), Sprint Communications ("Sprint"), US Long Distance, Inc. ("US Long Distance), and ICG Telecom Group, Inc. ("ICG").<sup>12</sup> Many of these requests -- which were made over the past year -- have resulted in agreements which have been approved by the OCC;<sup>13</sup> all of these requests anticipate partial reliance by the new market entrants on their on network facilities. The Brooks Fiber Agreement upon which Southwestern Bell chiefly relies, for example, was executed last summer and approved by the OCC last fall; indeed, Brooks Fiber has initiated the commercial provision of local exchange service in the State of Oklahoma.<sup>14</sup> As described by Southwestern Bell, "Brooks Fiber will provide telephone exchange service using its own fiber optic cable and switching facilities. . . . Brooks Fiber's local network in Tulsa includes

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<sup>12</sup> 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, filed April 11, 1997, at 4 - 6 ("Southwestern Bell Brief in Support").

<sup>13</sup> Id.

<sup>14</sup> Id. at 4 - 6, 9 - 12.

221 miles of fiber and a Lucent 5ESS central office switch. . . . In Oklahoma City, Brooks Fiber owns and operates a 44-mile network and a second Lucent 5ESS switch."<sup>15</sup>

Southwestern Bell has thus received numerous requests to interconnect its network facilities with those of prospective providers of competitive local exchange/exchange access services. "Track B" was no longer available to it as a means of satisfying Section 271(c) following the receipt of the first of these requests. It is irrelevant that it has not finalized its network access/interconnection agreement with AT&T; it is no more pertinent that Brooks Fiber did not commence commercial operations until January of this year. The submission by AT&T, Brooks Fiber and a host of other potential competitors of network access/interconnection requests, without more, foreclosed use of "Track B" by Southwestern Bell.

**II. Southwestern Bell Cannot Rely Upon Its Network Access/Interconnection Agreement with Brooks Fiber to Satisfy the Requirements of Section 271(c)(1)(A)**

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Section 271(c)(1)(A) requires a filing BOC to demonstrate that it is providing, pursuant to a binding agreement approved under Section 252, network access and interconnection to an unaffiliated facilities-based competitor engaged in the provision of both residential and business telephone exchange services exclusively or predominantly over its own facilities. While issues will undoubtedly arise in the context of the Commission's review of BOC Section 271 applications regarding the quantity, the mix and the geographic range of the residential and business accounts a facilities-based competitor must serve in order to be found to be providing "telephone exchange service . . . to residential and business subscribers," it is beyond dispute that

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<sup>15</sup> Id. at 10.

the facilities-based competitor must actually be engaged in the provision of commercial service to residential and business accounts in order to satisfy this standard. As succinctly stated in the Joint Explanatory Statement:

the BOC must have entered into one or more binding agreements under which it is providing access and interconnection to one or more competitors *providing telephone exchange service to residential and business subscribers*.<sup>16</sup>

As noted above, Southwestern Bell identifies Brooks Fiber as the sole facilities-based competitor that is purportedly providing "telephone exchange service . . . to residential and business subscribers" within the State of Oklahoma.<sup>17</sup> However, as demonstrated by ALTS in its Motion to Dismiss, Brooks Fiber is not providing local exchange service to residential customers within the State of Oklahoma on a commercial basis. Indeed, as attested to by John C. Shapleigh, Executive Vice President - Regulatory and Corporate Development, Brooks Fiber Properties, Inc., "Brooks is not now offering residential service in Oklahoma, nor has it ever offered residential service in Oklahoma."<sup>18</sup> Indeed, Mr. Shapleigh explains that "Brooks is not accepting any requests in Oklahoma for residential service" because "necessary facilities are not yet available."<sup>19</sup> While "Brooks is currently testing resale systems offered by SBC by running test circuits into the homes of four Brooks employees in Oklahoma," Mr. Shapleigh continues, "[t]he employees involved do not pay for the test circuit 'service'."<sup>20</sup>

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<sup>16</sup> Joint Explanatory Statement at 148.

<sup>17</sup> Southwestern Bell Brief in Support at 8 - 12.

<sup>18</sup> ALTS Motion to Dismiss, Shapleigh Affidavit at 1.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

Because Southwestern Bell is unable to identify a single unaffiliated facilities-based competitor engaged in the provision of both residential and business telephone exchange services exclusively or predominantly over its own facilities, its Section 271 Application facially fails to satisfy Section 271(c)(1) and, accordingly, must be denied.

**III. Sanctions May be the Only Effective Means by Which to Prevent Further Filings by BOCs of Facially Deficient Section 271 Applications**

An applicant that comes before the Commission seeking authority to engage in an activity overseen by the Commission has certain responsibilities, both to the Commission and to the public, including competitors, as well as consumers. Chief among these duties is the responsibility to ensure that information submitted to the Commission as part of an application for Commission authority is -- and remains -- complete, accurate and up to date.<sup>21</sup> A serious commitment on the part of applicants for Commission authority to confirm the accuracy and completeness of their applications is critical to the Commission's ability to engage in reasoned decision-making; reasoned decision-making is obviously undermined if agency actions are predicated on flawed or deficient records.<sup>22</sup> And just as Commission analysis would be hindered by incomplete, inaccurate or stale data, so too would the rights of the industry and the consuming public to participate in the Commission's decisional processes be seriously undermined.<sup>23</sup>

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<sup>21</sup> See, e.g., 47 C.F.R. § 1.65; Application by Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-1, FCC 97-40, ¶ 24 (Feb. 7, 1997) ("Ameritech Michigan Strike Order").

<sup>22</sup> Ameritech Michigan Strike Order at ¶ 24.

<sup>23</sup> Id. at ¶ 19.

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It belabors the obvious to suggest that the Commission's actions with respect to the initial BOC applications for "in-region," interLATA authority will be precedent setting. Accordingly, the manner in which the Commission treats the Southwestern Bell Section 271 Application is critical not only with respect to the Southwestern Bell Application, but for the other 50 or so BOC Section 271 applications that will eventually follow. Whatever rules and guidelines are established with respect to the Southwestern Bell Application will guide other BOCs in the preparation and prosecution of their Section 271 applications for "in-region," interLATA authority. The message here that something less than full compliance with the requirements of Section 271 will suffice will be heard loud and clear and, indeed, will haunt the Commission for the remainder of the "in-region," interLATA certification process. No less telling will be the message that a full and complete showing is absolutely necessary.

In critical respects, it is the integrity of the Commission's processes that is at play here. The Southwestern Bell Section 271 Application is an extraordinarily high visibility matter. Allowances made for inaccurate, incomplete or out-dated evidentiary showings will cast doubt on the *bona fides* of the entire Section 271 review process. The Commission should not permit actions by Southwestern Bell, whether inadvertent or intentional, to subvert its evaluative processes. Accordingly, TRA agrees with ALTS that the Commission should consider the imposition of sanctions on Southwestern Bell for filing a Section 271 application with the Commission which it knew or should have known lacked the requisite factual foundation..

**III. Conclusion**

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to grant the pending "Motion to Dismiss and Request for Sanctions" filed by ALTS and dismiss the application filed by Southwestern Bell seeking authority for SWBLD to provide interLATA services "originating" within the Southwestern Bell "in-region State" of Oklahoma for failure to make the statutorily-mandated showings that either (i) SWBT is providing, pursuant to a binding agreement approved under Section 252, network access and interconnection to an unaffiliated facilities-based competitor engaged in the provision of telephone exchange services to both residential and business subscribers, or (ii) that no potential facilities-based competitor has requested network access and interconnection and that as a result, SWBT is making network access and interconnection available pursuant to an approved SGATC.

Respectfully submitted,

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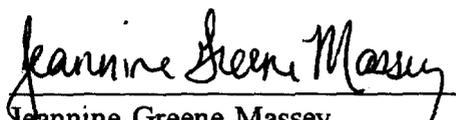
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## CERTIFICATE OF SERVICE

I, Jeannine Greene Massey, hereby certify that copies of the foregoing document were mailed this 28th day of April, 1997, by United Parcel Service , postage prepaid, to the following:

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