interconnection agreement with SWBT or, alternatively, to pursue arbitration, Brooks had to weigh the potential for obtaining through the arbitration process more reasonable rates, terms and conditions of interconnection than were being offered in negotiations[26], versus the potentially indefinite delay in commencing even limited commercial operations that is associated with the arbitration process.[27] A negotiated interconnection agreement held the prospect of commencing initial interconnection implementation steps during the Fall of 1996, once an agreement was signed and submitted to the Oklahoma Corporation Commission, with initial commercial operations likely to follow within several months thereafter. To arbitrate, on the other hand, entailed potentially prolonged delay, since SWBT does not commence initial interconnection implementation steps until an interconnection agreement has been signed by both parties.[28] In this

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[26] It has been Brooks' experience across the country – as would be expected -- that virtually all instances more reasonable rates, terms and conditions of interconnection are resulting from arbitration decisions compared with the terms that the Bell company offers to Brooks on a voluntary basis. It has also been Brooks' experience that SWBT and other Bell companies refuse to offer rates, terms and conditions to Brooks on a voluntary basis which are <u>any more favorable than the Bell company's litigation position</u> in its arbitration with AT&T or MCI, even after the arbitration decision is rendered in a particular state.

[27] The decision point for Brooks for arbitrating its interconnection agreement with SWBT in Oklahoma – i.e., 160 days after serving its interconnection request – occurred in the first week of September, 1996. At that point, the Oklahoma Corporation Commission had not yet rendered any arbitration decision between SWBT and any other competing provider.

[28] Brooks' concerns regarding the potential for indefinite delay have proven to be well-founded. In many states the same scenario is playing itself out – competing providers obtain arbitration decisions with the incumbent local

context, the ability of a competing carrier to opt-into an interconnection agreement between an incumbent local exchange carrier and another competing provider plays a key role – i.e., to the extent the competing provider has the statutory or contractual right to opt-into another interconnection agreement (or portions thereof), it has the opportunity to improve in the future otherwise marginal or unfavorable terms contained in its own agreement.[29] Ultimately, Brooks decided to sign a negotiated agreement at rates, terms and conditions that were being offered by SWBT at the time.

This negotiated agreement versus arbitrated agreement dilemma is not unique to Brooks. As demonstrated by the experience across the country, many facility-based competitive local exchange carriers have signed negotiated

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exchange carrier, but months pass without the parties being able to agree to a full interconnection agreement which faithfully incorporates the state commission's arbitration decision. Oklahoma provides a prime example, where the Oklahoma Corporation Commission issued its decision in the AT&T-SWBT arbitration in December, 1996, and more than four months later the parties have failed to agree to contract language based on the arbitration. Indeed, the parties to that arbitration are now proposing a schedule for addressing remaining outstanding issues which anticipates resolution taking several more months. Thus, it appears likely that AT&T will be as much as nearly a full year behind Brooks in terms of beginning interconnection implementation will SWBT in Oklahoma. As a facilities-based new entrant, Brooks could not have sustained such a delay prior to initial interconnection.

[29] The Brooks-SWBT Oklahoma interconnection agreement contains such "more favorable provisions" language, which establishes a contractual right to opt-into various specified categories of provisions of SWBT interconnection agreements with other carriers.

agreements. This is a completely understandable phenomenon, since these carriers are making very substantial, front-end loaded capital investments, such that timely commencement of at least limited local exchange service a business necessity. For purposes of SBC's Application herein, there are several important points regarding the initial round of interconnection agreements which have bearing on the cost-based pricing requirement of the competitive checklist. First, it must be recognized that facility-based competing providers have limited bargaining power to gain truly "just, reasonable, nondiscriminatory and cost-based" rates, terms and conditions in their initial interconnection agreements, since timely market entry is crucial and is completely dependent on concluding these agreements quickly. Second, the competing provider does not necessarily have access to the Bell Company's supporting cost data during the course of its negotiations and prior to having to make a decision whether to pursue arbitration. This was the case for Brooks in its negotiations with SWBT for Oklahoma – Brooks requested access to SWBT's cost information (particularly regarding unbundled loop pricing) during the course of its negotiations during the summer of 1996, and SWBT responded that it did not allow access to its cost data within the negotiation process. As a result, at the time of entering into the negotiated interconnection agreement Brooks had no basis for evaluating SWBT's claim that its proposed prices are cost-based and consistent with the substantive provisions of Section 251 (c) (3) and 252 (d) (1).

Therefore, the mere fact that SWBT has a signed interconnection

agreement with Brooks provides no proof that SWBT has satisfied the requirements of Section 271 (c) (2) (B) (i) and (ii) of the competitive checklist. Nor does the Oklahoma Corporation Commission's order approving the Brooks-SWBT interconnection agreement provide any support for proposition that these competitive checklist requirements have been met. The state commission approval order made no findings or conclusions with respect to whether SWBT's rates are based on cost, but merely approved the agreement under the limited standard of review applicable to negotiated agreements under Section 252(e)(2)(A). (*See*, Order Approving Interconnection Agreement, Oklahoma Corporation Commission Cause No. PVD 9600000256, issued October 22, 1996.) Nor has the Oklahoma Corporation Commission made any determination on the merits regarding SWBT's cost support for its interconnection and access pricing in any other proceeding. With respect to unbundled loop pricing in particular, it should be noted that the OCC declined in the AT&T-SWBT arbitration proceeding to make any substantive determination regarding the adequacy of SWBT's cost support, but instead merely adopted its Administrative Law Judge's decision to use SWBT's proposed prices -- the higher of the competing price proposals – and to make those rates subject to true-up against cost-based rates to be determined in a separate SWBT cost investigation. (*See* Report and Recommendations of the Arbitrator, Oklahoma Corporation Commission Cause No, PVD 9600000218 at 20).)[30]

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[30] The explicit rationale for this approach was that it would be more

Regarding the unbundled loop prices contained in the Brooks-SWBT Oklahoma interconnection agreement, the Commission will recognize the $17.63 rate for the basic unbundled loop as the proxy ceiling rate for Oklahoma which was contained in the Commission's August 8, 1996 Interconnection Order. What is not readily apparent is how that rate came to be included in the interconnection agreement. The fact is that prior to August 8, 1996, Brooks and SWBT had verbally closed out the unbundled loop pricing issue for Oklahoma at a rate several dollars lower than $17.63. However, soon after the issuance of the Commission's August 8, 1996 and prior to reduction of verbal agreements into a comprehensive written interconnection agreement, SWBT informed Brooks that it would not agree to a unbundled loop price in Oklahoma any lower than the Commission's proxy ceiling rate of $17.63.[31] Brooks conveyed a verbal protest to SWBT, but to no avail. Brooks ultimately signed the interconnection agreement which includes the $17.63 rate in order to avoid undue delay in commencing the interconnection implementation process. With respect to SBC's Application,

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explainable to consumers if rates declined rather than increased in the future, and selecting the higher of the unbundled loop rates proposed in the arbitration would increase the likelihood that any future retail adjustment based on the results of the OCC's cost investigation would produce such a decrease in retail rates.

[31] At the time Brooks and SWBT were negotiating an Arkansas interconnection agreement in tandem with the Oklahoma agreement, and SWBT took the same position with respect to unbundled loop rates for Arkansas with a similar result – the "new" unbundled loop rate was higher than what had already been agreed to verbally between the companies.

Brooks would submit that SWBT's willingness to increase its proposed unbundled loop rates immediately in response to the Commission's August 8, 1996 Interconnection Order is an implicit recognition that those rates are significantly above what SWBT believes its true Oklahoma unbundled loop costs to be. This conclusion is warranted since it is reasonable to assume that does not have been willing to agree verbally to offer Brooks below-cost rates prior to the Commission's August 8, 1996 Interconnection Order.

Likewise, there is no basis for concluding that SBC has met the substantive standards of Section 251 (c) (3) and 251 (d) (1) with respect to prices for collocation. SWBT offers collocation in Oklahoma priced an individual case basis – i.e., charges are not contained in a tariff but are developed and presented in the form of a price quote responding to a specific application for collocation space in a particular central office. The price quote constitutes only an estimate of the charges that SWBT will ultimately seek to impose on the competing carrier, with a final price established only after construction is completed. As discussed above, none of Brooks' Oklahoma collocations (beyond the two original virtual collocations under SWBT's interstate expanded interconnection tariff) are currently operational, and SWBT has not yet presented Brooks with a final price for any of those collocations. In the absence of final prices for these collocations, there is no possible basis for SBC to claim that its pricing is in compliance with Sections 251 (c) (3) and 252 (d) (1).

Additionally, Brooks has challenged the quoted prices for each of the collocations being processed with SWBT in Oklahoma. Brooks has paid the respective collocation price quotes under protest, stating its position that the prices are in excess of what Brooks believes is reasonably required to effect the necessary construction in an efficient manner. SWBT will not commence construction of the required space until the competing carrier pays fifty percent of the quoted price, and the competing carrier is allowed access to the collocation cage space only after having paid the remaining fifty percent. Thus, as a business necessity Brooks has had to make these payments under protest in order to avoid indefinite delay in SWBT's construction of the collocations. Brooks retains the right under the interconnection agreement to review SWBT's supporting data for the final price that is presented and to challenge the reasonableness of the charges. At this point, however, Brooks has not been presented any such supporting information and, thus, SWBT has made no demonstration that its collocation prices are reasonable and cost-based. In these circumstances, there is no basis for the Commission to determine that SBC's collocation prices meet the substantive standards of Sections 251 (c) (3) and 252 (d) (1).[32]

Inclusion of the Section 251 (c) (3) and 252 (d) (1) substantive

[32] These comments focus on SWBT 's lack of proof of cost-based pricing for unbundled loops and collocation due to the critical nature of these items to Brooks. However, the same general deficiency exists with respect to all rates and charges contained in the Brooks-SWBT interconnection agreement.

requirements within the competitive checklist evidences an unmistakable Congressional intent and understanding that a Bell Company must be offering an established facilities-based carrier reasonable and cost-based rates as a prerequisite for the type of competition that is essential to impose market place discipline on the incumbent. While limited competition can commence under the prevailing conditions, the foundation for the vigorous, sustainable, facilities-based competition contemplated by Congress as the trigger for in-region, interLATA entry will not be established until cost-based rates are implemented. To date, SBC has neither obtained a finding from the state commission that its rates meet this rigorous substantive standard, nor has SBC provided information to the Commission which would allow for such a finding in the context of this Application. The SBC Application is, therefore, defective in this regard and should be rejected.

III. SBC DOES NOT SATISFY SECTION 271(c) OF THE ACT BY VIRTUE OF ITS STATEMENT OF TERMS AND CONDITIONS.

As an alternative theory to its Track A assertions, SBC contends that in-region interLATA entry in Oklahoma is justified based on its Statement of Terms and Conditions which it filed with the Oklahoma Corporation Commission on January 15, 1997. (See, SBC brief at 6-7, 12-15) This effort is both procedurally improper and substantively deficient.

The Track B portion of SBC's Application is improper because Track B is

deactivated under the circumstances prevailing in Oklahoma. Reasonably construed, the applicable statutory provision – Section 271 (c) (1) (B) -- means that Track B is deactivated once a competing carrier files an interconnection request, where the competing carrier holds the promise of ultimately satisfying the standards of Track A, and where it pursues negotiations and implementation in a reasonably timely manner.[33]

SBC's Statement of Terms and Conditions is substantively deficient because there has been no finding that the rates, terms and conditions contained therein are just, reasonable, nondiscriminatory and cost-based. Pursuant to Section 271 (c) (2) (A), the substantive standards of Section 251 (c) (3) and 252 (d) (1) are equally applicable to access and interconnection offered under a Statement of Terms and Conditions as to access and interconnection actually being provided pursuant to an interconnection agreement. The Oklahoma Corporation Commission has made no findings whatsoever concerning SBC's Statement of Terms and Conditions, and SBC has not otherwise established that the substantive standards of Sections 251 (c) (3) and 252 (d) (1) have been met. For these reasons, the Track B portion of SBC's Application is defective and should be rejected.[34]

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[33] See, Brooks' comments in support of the ALTS Motion to Dismiss and Request for Sanctions for a more extended discussion on this point.

[34] Because SBC has improperly included a Track B request, the Application has been submitted in a procedurally improper fashion, and it should be

IV. SBC's APPLICATION DOES NOT SUPPORT A FINDING THAT A GRANT OF THE REQUESTED AUTHORITY IS CONSISTENT WITH THE PUBLIC INTEREST.

Pursuant to Section 271 (d) (3) (C), the Commission – in addition to finding that the Bell Company is providing access and interconnection in a manner fully implementing the competitive checklist – must also find that "the requested authorization is consistent with the public interest, convenience and necessity." That the public interest test was intended by Congress to be a meaningful and substantive requirement is confirmed by its status as a separate, independent test -- along with the above-described compliance with the competitive checklist of Section 271 (d) (3) (A) and compliance with Section 272. Its significance is further confirmed by the fact that the Commission is required to make an affirmative finding that the requested authorization will promote the public interest, convenience and necessity, in contrast to other provisions of the Act which require a more limited finding that approval is "not inconsistent with" the public interest.[35]

The public interest test must be interpreted consistent with the overall purposes of The Act. Those purposes unquestionably revolve around the fundamental concept of opening telecommunications markets to competition. At

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dismissed in its entirety for the reasons described in the ALTS Motion to Dismiss and Request for Sanctions.

[35] See, e.g., Section 252 (e) (2) (A) (ii) regarding state commission approval of negotiated interconnection agreements.

the same time, however, the Act clearly recognizes the dangers with premature Bell Company entry into the in-region interLATA market – otherwise, Congress would have allowed immediate entry and would not have established the specific facility-based competition and substantive competitive checklist requirements of Section 271 (c). The fact that Congress established those stringent Section 271 (c) requirements evidences an understanding that any potential short-term benefits to consumers of allowing rapid Bell Company entry into the in-region interLATA market must be balanced against the potential endangerment of sustainable competition which would result from premature Bell Company entry.

At this very early stage of local exchange competition, Brooks remains highly dependent upon facilities and systems from SWBT. SWBT facilities (e.g., unbundled loops and collocations) and supporting systems (e.g., operational support systems) remain either completely untested or, as in the case of interim number portability, have proven problematic even under limited demand. In Brooks' view, it should be patently obvious that facility-based competition in Oklahoma does yet approach the point contemplated under the Act as the threshold for Bell Company in-region interLATA entry. Once SBC's Application is granted, its incentive to cooperate with competing providers and to avoid activities which hamper competition will inevitably be reduced. If this occurs so prematurely – when no facilities-based carrier has reached the developmental stage contemplated under the Track A requirements – the prospects for a vigorous competitive local exchange market in Oklahoma will be seriously impaired. The

public interest, convenience and necessity will not be promoted by premature entry and the Commission should reject the Application under Section 271 (d) (3) (C).

V. STATE CONSULTATION

Under Section 271 (d) (2) (B), the Commission is required to consult with the state commission of any state that is the subject of a Bell Company application for in-region interLATA entry. The purpose of such consultation is to verify compliance by the Bell Company with the requirements of Section 271 (c). As discussed above, the Oklahoma Corporation Commission recently held such an investigation, and at its public deliberations on April 25 the OCC voted 2-1 (Commissioner Anthony dissenting) to affirm in part and reverse in part the Report of its Administrative Law Judge and to recommend approval of SBC's Application.[36] Based on statements made by the two majority commissioners at the April 25 deliberations, Brooks believes it is accurate to characterize the OCC decision as being based on a general belief that SBC's entry into the interLATA market in Oklahoma will expand competitive choices and benefit consumers, rather than on a rigorous evaluation of the evidentiary record measured against a close review of the provisions of Section 271 (c).[37] Brooks believes that

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[36] The OCC voted to affirm the ALJ with respect to his finding that Track B is unavailable to SBC in Oklahoma, but to reverse the ALJ's finding that SBC currently fails to meet the requirements of the competitive checklist.

[37] The evidence presented in the state investigation was heard by the ALJ sitting alone, with the OCC acting in the role of an appellate body.

conclusion is overly simplistic, reflecting a fundamental lack of understanding of the realities associated with developing facilities-based competition in the local exchange market.

In any event, in determining the weight to accord the OCC's decision the Commission should closely evaluate the majority's written decision[38], Commissioner Anthony's dissenting opinion[39], and the detailed findings and conclusions of the Oklahoma ALJ to determine the extent to which the OCC majority has succeeded or failed to properly apply the relevant provisions of the Act applied to the facts developed in the record of the state investigation.[40] To the extent the OCC majority failed to properly take into account key provisions of the Act or to consider record evidence relevant to those statutory provisions, properly interpreted, then the OCC majority's recommendation should be discounted.

VI. Conclusion

Measured against any reasonable interpretation of Section 271 (c), SBC's Application is extremely premature. The Commission should unequivocally

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[38] Brooks understands that the OCC's written decision was issued on April 30, 1997 and will be conveyed to the Commission.

[39] Brooks understands that commissioner Anthony has indicated that he will issue a dissenting opinion, which likewise will be conveyed to the Commission.

[40] As Brooks noted in its April 28 comments in support of the ALTS Motion to Dismiss and Request for Sanctions, SWBT went to great lengths to shield its comments from inquiry by opposing parties in the state investigation.

reject the Application with clear and specific directions to SBC to move expeditiously to fully implement the competitive checklist, and to refrain from filing any subsequent Application until it has done so and only after a carrier reaches the point of actually satisfying the strict Track A facility-based standards.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I, Kimberly E. Thomas, do hereby certify that the foregoing **OPPOSITION OF BROOKS FIBER PROPERTIES, INC. TO APPLICATION OF SBC COMMUNICATIONS, INC.** was mailed on this 1st day of May, via first class U.S. mail to the following:

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