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

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In the Matter of

Application by SBC Communications Inc.,	)	
Southwestern Bell Telephone Company, and	)	
Southwestern Bell Communications Services, Inc.	)	CC Docket No. 97-121
d/b/a Southwestern Bell Long Distance	)	
for Provision of In-Region,	)	
InterLATA Services in Oklahoma	)	

To: The Commission

REPLY COMMENTS OF BELLSOUTH CORPORATION IN SUPPORT OF APPLICATION BY SOUTHWESTERN BELL FOR PROVISION OF IN-REGION, INTERLATA SERVICES IN OKLAHOMA

BellSouth Corporation submits these reply comments in further support of Southwestern Bell's application for permission to provide interLATA services in Oklahoma. In particular, BellSouth will take this opportunity to respond to the "evaluation" submitted by the United States Department of Justice ("DOJ"). By venturing into areas in which it has no expertise and by establishing vague standards that are inconsistent with congressional design, DOJ has effectively abdicated its responsibility under section 271 and delegated to the BOCs' competitors in the local market the decision whether BOCs may enter the in-region, long distance market. The Commission owes no deference at all to an evaluation that is contrary to the meaning of the Act and that is grounded in policy preferences concerning matters that lie well beyond the antitrust expertise and MFJ experience of the DOJ.

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Under section 271(d)(2)(A), the DOJ is required to provide to the Commission "an evaluation of the application using any standard the Attorney General considers appropriate." But it is clear — both as a matter of legislative history and common sense — that the role Congress established for the DOJ in the section 271 process was limited to the DOJ's special expertise concerning the impact that BOC entry into the interLATA arena would have on competition. Yet, the DOJ has gone well beyond its limited role of ensuring that BOC entry into the interLATA market would not have anticompetitive effects by offering its opinions concerning the availability of Track A and Track B under section 271; by accepting, without any independent inquiry or analysis, the complaints of competitors concerning the sufficiency of Southwestern Bell's provision of physical collocation, interim number portability, and OSS access; and, finally, by second-guessing Congress's determination of the minimum requirements for entry into the interLATA market and substituting its own, subjective standard for measuring and managing competition in the local marketplace. For these reasons, the Commission should give the DOJ's evaluation "substantial weight" only to the extent that DOJ has evaluated the antitrust implications of Southwestern Bell's entry into long distance; otherwise, the Commission should give the evaluation only the weight it deserves — that is, little or no weight at all.

1. The DOJ's role under section 271(d)(2)(A) is limited to an analysis of the competitive impact of BOC entry into the in-region, interLATA market.[1] Indeed, Congress gave examples of

[1] Indeed, DOJ appears, at least in theory, to concede as much. See DOJ Evaluation at 8 (describing Department's role as performing "a competitive evaluation of the application"); see also id. at 37 ("Section 271 contemplates a substantial competitive analysis by the Department"); id. at 39 n.46 (legislative history "clearly indicates that Congress contemplated that the

the kinds of inquiries that the DOJ might appropriately pursue.[2] These examples include such antitrust-based questions as whether a BOC's entry into the in-region, interLATA market would create a dangerous probability that the BOC would successfully use market power substantially to impede competition in the interLATA market or whether there is a substantial possibility that the BOC could use its power in the local market to impede competition in the interLATA market.

Myriad floor statements confirm that Congress intended for the Commission to give "substantial weight" only to an evaluation grounded in the DOJ's expertise in antitrust matters.[3] As the Chairman of the House Judiciary Committee explained, section 271 provides that the "Department of Justice will apply any antitrust standard it considers appropriate . . ."; by requiring that the FCC give substantial weight to the views of the DOJ, "the conferees acknowledge the long experience and considerable expertise it has developed in this field. Under this approach, the FCC will have the benefit of a DOJ antitrust analysis before the Bell companies are allowed to enter the long distance market."[4]

Department would be undertaking a substantial competition-oriented analysis of Section 271 applications"; "a competition analysis would be performed by the Department drawing upon its special expertise"). This is also consistent with how DOJ described its proper role to Congress. See Statement of Anne K. Bingaman, Assistant Attorney General, Antitrust Division, Before the House Judiciary Committee on Telecommunications Reform Legislation, May 9, 1995, at 4 ("it is . . . critical that the test the DOJ applies be suited to achieving the fundamental purpose of DOJ review: protecting competition in long distance and equipment manufacturing").

[2] Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 104-230, at 149 (1996) ("Conference Report").

[3] See, e.g., 142 Cong. Rec. H1176; 142 Cong. Rec. H1178 ("FCC's reliance on the Justice Department is limited to antitrust related matters") (statement of Rep. Sensenbrenner).

[4] 142 Cong. Rec. H1157 (statement of Rep. Hyde) (emphasis added).

The DOJ lobbied strenuously for veto power over BOC entry into long distance, yet Congress consistently and explicitly rejected attempts to expand the DOJ's authority in this area. For example, the so-called Thurmond second-degree amendment, which would have required the Attorney General's approval before any BOC could provide in-region, interLATA service,[5] was defeated precisely because it would have expanded the authority of the DOJ beyond the limited role to which it had been assigned.[6]

Therefore, the DOJ's evaluation is not dispositive and does not excuse the Commission from fully assessing the evidence put forward by the BOC. DOJ's views are entitled to "substantial weight" only to the extent that they are based on an analysis of the competitive impact that BOC entry into long distance will have on relevant markets. On that very question, the DOJ evaluation supports Southwestern Bell's application. "InterLATA markets remain highly concentrated and imperfectly competitive, . . . and it is reasonable to conclude that additional entry, particularly by firms with the competitive assets of the BOCs, is likely to provide additional competitive benefits."[7] Professor Marius Schwartz, who was hired by the DOJ to analyze the

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[5] See 141 Cong. Rec. S8145-46.

[6] Just moments before the final vote on the Thurmond amendment, Senator Kerry, who supported the amendment, presented the issue to his colleagues as follows: "[T]he choice before Members on the tabling motion will be: Trust the 14-point checklist, basically, that the committee has offered as an indication; or do we want, in a parallel process, the Department to make a determination as to whether or not competition exists at the local level. That is all we are discussing and debating. I believe we want the Department of Justice to make that determination. I do not have the confidence in the 14-point checklist that others do. It is as simple as that." 141 Cong. Rec. S8224 (remarks of Sen. Kerry). The amendment was defeated 57 to 43. Id. at S8225.

[7] DOJ Evaluation at 3-4.

economic conditions under which BOC entry into the in-region, interLATA market would be consistent with the public interest in competition, identified several "significant benefits" that could result if BOCs were authorized to compete in the market, including (1) reductions in retailing costs enabled by joint provision of local and long-distance service; (2) offering consumers valuable new options (e.g., the convenience of "one-stop shopping"); and (3) increasing the degree of competition in long-distance services.[8] Thus, on the only matter as to which the Commission is to give the DOJ's view "substantial weight" — the impact that BOC entry will have on competition in relevant markets — the DOJ concluded that BOC entry would likely have beneficial competitive effects.

2. The Commission owes no deference whatsoever to DOJ's opinion with respect to whether Southwestern Bell is entitled to enter the in-region, interLATA market through either Track A (§ 271(c)(1)(A)) or Track B (§ 271(c)(1)(B)). That is a legal question, and the DOJ's views are no more important than anyone else's. This is particularly so in light of the fact that Congress clearly assigned to this Commission — and not to DOJ — the task of interpreting the legal requirements of the Telecommunications Act, subject to the views of the relevant State commission and to judicial review.[9] As the Chairman of the Senate Commerce Committee stated

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[8] Affidavit of Marius Schwartz ¶ 7 (May 14, 1997) (attached as Exhibit C to DOJ Evaluation).

[9] See, e.g., Martin v. OSHRC, 499 U.S. 144, 154 (1991) ("[b]ecause historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court, we presume here that Congress intended to invest interpretive power in the administrative actor in the best position to develop these attributes" (citations omitted)).

when Congress was debating the appropriate role for the DOJ in this process, "[t]he Department of Justice has one duty: to enforce the antitrust laws. It should not be allowed to become the police officer, judge, and jury for the telecommunications industry."[10] This is precisely what DOJ would become if the Commission gives "substantial weight" to DOJ's views on the availability of Tracks A or B.

The truth is that BellSouth agrees with the DOJ's conclusions with respect to some of the most critical legal questions concerning the availability of Track A and/or Track B.[11] But such questions are for the Commission to answer, not the DOJ. For the reasons presented in BellSouth's original comments and in its comments on ALTS' motion to dismiss Southwestern Bell's application, the Commission should conclude that only a timely request from a competing local exchange carrier that actually qualifies under Track A is sufficient to foreclose BOC entry under Track B. Otherwise, either Track A or Track B is available. DOJ's conclusion on this particular question is entitled to no deference, for this Commission is perfectly capable of reaching its own, independent interpretation of the statutory text.

3. For the same reason, the Commission is not required to give any weight at all to the DOJ's reinterpretation of the checklist requirements. Congress established the minimum requirements for local competition in the 14-point "competitive checklist" contained in section

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[10] 141 Cong. Rec. S8007 (statement of Sen. Pressler).

[11] See, e.g., DOJ Evaluation at 9-10 ("each qualifying facilities-based provider need not be serving both types of customers [i.e., both residential and business] if the BOC is relying on multiple providers").

271(c)(2)(B). A BOC's compliance with this checklist is a matter of concern for both this Commission in its final determination and the State commission, to which this Commission is supposed to look in verifying the BOC's compliance with the checklist. 47 U.S.C. § 271(d)(2)(B). It is not a matter of concern for the DOJ, for as discussed above, Congress intended the DOJ's role to be limited to a review of the competitive impact of BOC entry, not to duplicate the FCC's inquiry.

DOJ is quite obviously ill suited to play the role of evaluating compliance with the checklist. As Congress recognized, the DOJ's Antitrust Division is beyond its expertise when assessing the details of network operations.[12] As if to prove this point, the DOJ has taken the incredible step of accepting complaints made by Southwestern Bell's competitors as evidence that checklist items have not been satisfied. DOJ has provided no indication that it made any independent investigation into issues such as physical collocation or interim number portability. This confirms the wisdom of Congress's decision to leave factual review of and conclusions regarding compliance with the checklist to the State commissions, whose conclusions would then form the basis for the FCC's consultation under section 271(d)(2)(B).[13]

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[12] See 141 Cong. Rec. S8007 ("In transportation, energy, financial services, and other regulated businesses, Congress has delegated decisionmaking authority for approval of transactions that could have competitive implications with the agency of expertise, and typically has directed the agency to consider factors broader than simply the impact upon competition in making its determinations. This approach has worked well. It contrasts with the role Justice seeks with regard to telephony.") (remarks of Sen. Pressler).

[13] Congress was keenly aware of the DOJ's failings as administrator of the MFJ, and it had no interest in making the mistake of placing control of BOC entry into long distance into the hands of the DOJ's Antitrust Division. See, e.g., 141 Cong. Rec. S8006 ("The Justice track record in fulfilling its obligations under the MFJ is poor. Why would Congress wish to give the

4. Finally, the DOJ has misinterpreted the meaning of the "public interest" under section 271(d)(3)(C) by focusing its inquiry exclusively on the extent of competition in the local market. In its section analyzing the "public interest requirement," the DOJ entirely ignores the positive effect that BOC entry would have on competition in the interLATA market.[14] Furthermore, in setting out its public interest standard, the DOJ has effectively urged the Commission to ignore section 271(d)(4), which prohibits the Commission from limiting or extending "the terms used in the competitive checklist set forth in subsection (c)(2)(B)." According to the DOJ, the proper test for the existence of local competition under the Act is not compliance with the checklist — as Congress would have it — but is, instead, "whether the BOC has demonstrated that the local market has been irreversibly opened to competition."[15]

The DOJ's "irreversibly opened" standard is entirely incoherent. Under the guise of the public interest, the DOJ has created an "actual competition" test that is not based on any antitrust standard and that no one (except possibly the DOJ itself) understands. In doing so, it has sought to trump the checklist, which represents the exclusive test for the sufficiency of local competition

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Department an unprecedented role that they do not have under the existing MFJ? . . . . There is no reason why two federal entities should have independent authority over determining whether the very clear congressional policy has been met.") (remarks of Sen. Pressler); 141 Cong. Rec. H8463 ("The Justice Department is in good part responsible for the unfair situation which this country confronts in telecommunications. The Justice Department and a gaggle of AT&T lawyers have been administering pricing and all other matters relative to telecommunications by both the Baby Bells and by AT&T. So if there are things that are wrong now, it is Justice which has presided.") (remarks of Rep. Dingell).

[14] See DOJ Evaluation at 37-42.

[15] DOJ Evaluation at 41.

under section 271. Because the DOJ has effectively extended the terms of the checklist in violation of section 274(d)(4), this Commission may not, as a matter of law, give this local competition standard any weight, much less the "substantial weight" DOJ is claiming for it.

Moreover, DOJ's standard is simply no standard at all. Whereas the checklist sets out specific criteria that can be verified by the FCC and State commissions through an examination of the agreements, statements of generally available terms, and evidence of actual operations, the DOJ's standard requiring "[t]he presence of commercial competition, at a nontrivial level"[16] is nothing but an "I know it when I see it" test.[17] DOJ evidently believes that by setting a standard that no one else can apply, it can ensure itself the very role of approving BOC entry into long distance that Congress explicitly withheld from it. And by reserving to itself boundless discretion to decide when commercial competition has reached an undisclosed level of sufficiency, the DOJ has at the same time allowed the BOCs' competitors to decide when the BOCs should be permitted to compete in the long distance markets.

Finally, the DOJ's standard, if adopted, would have disastrous consequences. It would encourage local competitors to tailor their local entry to the DOJ test, thereby slowing genuine facilities-based entry. The DOJ's standard also would delay competition in long-distance markets at precisely the time when Congress determined that competition is desirable. In less than 21 months, AT&T, MCI, and Sprint will be permitted under the Act to market their long-distance

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[16] DOJ Evaluation at 42.

[17] See Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

services with resold local services.[18] Unless BOCs are granted 271 relief, these companies will be virtually alone in offering "one-stop shopping," creating a competitive imbalance that will be devastating not just for Bell companies, but also for consumers and healthy competition. This is a far cry from Congress's goal of "opening all telecommunications markets to competition."[19]

CONCLUSION

For the foregoing reasons, and for the reasons discussed in its initial comments, its comments on ALTS' motion to dismiss, and in the comments of other parties supporting Southwestern Bell's application, BellSouth urges the Commission not to give substantial weight to the DOJ's evaluation except to the extent that the DOJ has properly fulfilled its role in reviewing the antitrust implications of Southwestern Bell's entry into long distance. Finally, BellSouth urges the Commission to grant Southwestern Bell's application.

Respectfully submitted,

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[18] 47 U.S.C. § 271(e)(1).

[19] Conference Report at 113.

CERTIFICATE OF SERVICE
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I Brett Kilbourne certify that a copy of the foregoing REPLY COMMENTS OF BELLSOUTH CORPORATION IN SUPPORT OF APPLICATION BY SOUTHWESTERN BELL FOR PROVISION OF IN-REGION, INTERLATA SERVICES IN OKLAHOMA was served on the following parties via First Class mail on this 27th day of May, 1997.

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