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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Oklahoma	)	CC Docket No. 97-121

MEMORANDUM OPINION AND ORDER

Adopted: June 25, 1997 **Released: June 26, 1997**

By the Commission: Chairman Hundt issuing a separate statement.

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I. INTRODUCTION

1. On April 11, 1997, SBC Communications Inc. and its subsidiaries, Southwestern Bell Telephone Company and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance, (collectively, SBC) filed an application for authorization under section 271 of the Communications Act of 1934, as amended, to provide in-region interLATA services in the State of Oklahoma.[1] For the reasons set forth below, we conclude that SBC has not demonstrated on this record that it is providing access and interconnection to an unaffiliated, facilities-based competing provider of telephone exchange service to residential and business subscribers, as required by section 271(c)(1)(A) of the statute.[2] We further conclude that, under the circumstances presented in this application, SBC may not obtain authorization to provide in-region interLATA services in Oklahoma pursuant to Track B of the Act at this time because SBC has received, at the very least, several requests for access and interconnection within the meaning of section 271(c)(1)(B).[3]

2. Given our findings that SBC has not satisfied section 271(c)(1)(A) on this record, and may not at this time proceed pursuant to section 271(c)(1)(B), we conclude that SBC has not satisfied the requirements of subsection 271(c)(1). We therefore deny, pursuant to section 271(d)(3), SBC's application to provide in-region interLATA services in Oklahoma.

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[1] *See Comments Requested on Application by SBC Communications, Inc. for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Oklahoma*, Public Notice, DA 97-753 (rel. Apr. 11, 1997). On April 23, 1997, the Association for Local Telecommunications Services (ALTS) filed a motion asking the Commission to dismiss SBC's application and impose sanctions on SBC (ALTS Motion). In response to this motion, the Common Carrier Bureau (Bureau) issued a Public Notice seeking comment from interested third parties. *See ALTS's Motion to Dismiss SBC Communications Inc.'s Application for Section 271 Authorization to Provide In-Region, InterLATA Service in the State of Oklahoma*, Public Notice, DA 97-864 (rel. Apr. 23, 1997) (*April 23rd Public Notice*).

[2] 47 U.S.C. § 271(c)(1)(A).

[3] *Id.* § 271(c)(1)(B). As used in this Order, the term "Track B" includes both the requirements in section 271(c)(1)(B) and the other section 271 requirements that a BOC must satisfy if it relies on a statement of generally available terms and conditions to satisfy section 271, including the requirement that the BOC's statement "offers all of the items included in the competitive checklist in [section 271(c)(2)(B)]." *See Id.* § 271(d)(3)(A)(ii). Similarly, the term "Track A" includes the requirement that, "with respect to access and interconnection provided pursuant to [section 271(c)(1)(A), the BOC] has fully implemented the competitive checklist in [section 271(c)(2)(B)]." *See Id.* § 271(d)(3)(A)(i).

II. STATUTORY FRAMEWORK

3. The Telecommunications Act of 1996[4] conditions Bell Operating Company (BOC)[5] provision of in-region interLATA services on compliance with certain provisions of section 271. BOCs must apply to the Commission for authorization to provide interLATA services originating in any in-region state.[6] The Commission must issue a written determination on each application no later than 90 days after receiving such application.[7] In acting on a BOC's application for authority to provide in-region interLATA services, the Commission must consult with the Attorney General and give substantial weight to the Attorney General's evaluation of the BOC's application.[8] In addition, the Commission must consult with the applicable state commission to verify that the BOC has either a state-approved interconnection agreement or statement of generally available terms and conditions that satisfies the "competitive checklist," as described below.[9]

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[4] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), *codified at* 47 U.S.C. §§ 151 *et seq.* The 1996 Act amended the Communications Act of 1934. We will refer to the Communications Act of 1934, as amended, as "the Communications Act" or "the Act."

[5] For purposes of this proceeding, we adopt the definition of the term "Bell Operating Company" contained in 47 U.S.C. § 153(4).

[6] 47 U.S.C. § 271(d)(1). The Modification of Final Judgment (MFJ), which ended the government's antitrust suit against AT&T, and which resulted in the divestiture of the BOCs from AT&T, prohibited the BOCs from providing interLATA services. *See United States v. Western Elec. Co.*, 552 F. Supp. 131, 226-234 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Western Elec. Co.*, Civil Action No. 82-0192 (D.D.C. Apr. 11, 1996) (vacating the MFJ). For purposes of this proceeding, we adopt the definition of the term "in-region state" that is contained in 47 U.S.C. § 271(i)(1). We note that section 271(j) provides that a BOC's in-region services include 800 service, private line service, or their equivalents that terminate in an in-region state of that BOC and that allow the called party to determine the interLATA carrier, even if such services originate out-of-region. *Id.* § 271(j). The 1996 Act defines "interLATA services" as "telecommunications between a point located in a local access and transport area and a point located outside such area." 47 U.S.C. § 153(21). Under the 1996 Act, a "local access and transport area" (LATA) is "a contiguous geographic area (A) established before the date of enactment of the [1996 Act] by a [BOC] such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or (B) established or modified by a [BOC] after such date of enactment and approved by the Commission." 47 U.S.C. § 153(25). LATAs were created as part of the MFJ's "plan of reorganization." *United States v. Western Elec. Co.*, 569 F. Supp. 1057 (D.D.C. 1983), *aff'd sub nom. California v. United States*, 464 U.S. 1013 (1983). Pursuant to the MFJ, "all BOC territory in the continental United States [was] divided into LATAs, generally centering upon a city or other identifiable community of interest." *United States v. Western Elec. Co.*, 569 F. Supp. 990, 993 (D.D.C. 1983).

[7] 47 U.S.C. § 271(d)(3).

[8] *Id.* § 271(d)(2)(A).

[9] *Id.* § 271(d)(2)(B).

4. Section 271 requires the Commission to make several findings before approving BOC entry. As a preliminary matter, a BOC must show that it satisfies the requirements of either section 271(c)(1)(A) or 271(c)(1)(B).[10] Those sections provide:

> (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 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 3(47)(A), but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier. For the purpose of this subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 et seq.) shall not be considered to be telephone exchange services.
>
> (B) FAILURE TO REQUEST ACCESS.-A Bell operating company meets the requirements of this subparagraph if, after 10 months after the date of enactment of the Telecommunications Act of 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1), and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f). For purposes of this subparagraph, a Bell operating company shall be considered not to have received any request for access and interconnection if the State commission of such State certifies that the only provider or providers making such a request have (i) failed to negotiate in good faith as required by section 252, or (ii) violated the terms of an agreement approved under section 252 by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement.

5. In order to grant a BOC's application, the Commission must also find that: (1) the interconnection agreements or statements approved at the state level under section 252 satisfy the competitive checklist contained in section 271(c)(2)(B);[11] (2) the requested

[10] *Id.* § 271(d)(3)(A).

[11] *Id.* § 271(c)(2)(B).

authorization will be carried out in accordance with the requirements of section 272;[12] and (3) the BOC's entry into the in-region interLATA market is "consistent with the public interest, convenience, and necessity."[13]

III. REQUIREMENTS OF SECTION 271(c)(1)(A)

A. Background

6. In order to satisfy section 271(c)(1)(A), a BOC must demonstrate that it "is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service . . . to *residential and business subscribers*."[14] According to SBC, its "implemented agreement with Brooks Fiber satisfies all the requirements of [section 271(c)(1)(A)]."[15] Because SBC relies exclusively on Brooks Fiber (Brooks) for purposes of satisfying section 271(c)(1)(A), we will focus in this section only on the record evidence concerning Brooks' activities in Oklahoma. A key issue in determining whether SBC has satisfied section 271(c)(1)(A) is whether Brooks is a competing provider of telephone exchange service to both residential and business subscribers.

7. The following facts regarding Brooks' operations in Oklahoma are undisputed. Brooks, a carrier unaffiliated with SBC, has received authority to "operate as a competitive local exchange company . . . , providing all types of intrastate switched services, including switched local exchange (i.e., dial-tone) service" in Oklahoma.[16] Brooks has an effective

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[12] *Id.* § 272. *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*), *on recon.*, FCC 97-52 (rel. Feb. 19, 1997), *further recon. pending, petition for summary review in part denied and motion for voluntary remand granted sub nom., Bell Atlantic v. FCC*, No. 97-1067 (D.C. Cir. filed Mar. 31, 1997), *petition for review pending sub nom., SBC Communications v. FCC*, No. 97-1118 (D.C. Cir. filed Mar. 6, 1997) (held in abeyance pursuant to court order filed May 7, 1997), *Second Order on Reconsideration*, CC Docket No. 96-149, FCC 97-222 (rel. June 24, 1997); *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539 (1996).

[13] 47 U.S.C. § 271(d)(3)(C).

[14] *Id.* § 271(c)(1)(A) (emphasis added).

[15] SBC Brief in Support at 12.

[16] Initial Comments of Brooks Fiber Communications of Oklahoma, Inc., and Brooks Fiber Communications of Tulsa, Inc., Oklahoma Corporation Commission (Oklahoma Commission) Proceeding Cause No. PUD 970000064, at 1 (filed Mar. 11, 1997) (SBC Application, Appendix - Volume IV, Tab 23) (Initial Comments of Brooks Before the Oklahoma Commission).

local exchange tariff in place for the provision of residential and business services.[17] As of March 11, 1997, Brooks was serving twenty business customers in Oklahoma.[18] Of these twenty business customers, one received service via resold SBC ISDN service, while the others received service either via direct on-net connections to Brooks' fiber optic transmission rings or through leased SBC dedicated T-1 facilities.[19] In addition, Brooks has test circuits activated to the residences of four of its Oklahoma employees.[20] These circuits are all provisioned through the resale of SBC's local exchange service.[21] Brooks is not billing the employees involved in the test of these circuits.[22]

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[17] Brooks Fiber Communications of Tulsa, Inc. and Brooks Fiber Communications of Oklahoma, Inc, O.C.C. Tariff No. 2 (SBC Application, Appendix - Volume II, Tab 3).

[18] Initial Comments of Brooks Before the Oklahoma Commission at 2; SBC Apr. 28 Comments at 9.

[19] Initial Comments of Brooks Before the Oklahoma Commission at 2.

[20] *Id.*; Brooks Apr. 28 Comments at 2; Brooks May 1 Comments at 6; *see also* SBC Apr. 28 Comments at 3.

[21] Brooks Apr. 28 Comments at 2; Brooks May 1 Comments at 6 *see also* SBC Brief in Support at 11; SBC Apr. 28 Comments at 3.

[22] ALTS Motion, Affidavit of John C. Shapleigh, Executive Vice President -- Regulatory and Corporate Development, Brooks Fiber Properties, Inc., at 1 (Affidavit of John C. Shapleigh); *see also* SBC Apr. 28 Comments at 9-10 (asserting that for purposes of section 271 the price charged by the competing provider is irrelevant).

B. Positions of the Parties[23]

8. As an initial matter, we note that commenters offer differing views about the showing that SBC must make in order to demonstrate that Brooks is a competing provider that satisfies the requirements of section 271(c)(1)(A).[24] Commenters use various terms (e.g., "serv[e],"[25] "provi[de],"[26] "offer[ ],"[27] "furnish[ ]"[28]) to describe what Brooks must do to meet the competing provider requirement of section 271(c)(1)(A), although commenters often do not define the terms they use.

9. Various commenters assert that SBC does not satisfy the requirements of section 271(c)(1)(A) because Brooks' test of four circuits to the homes of its employees does not constitute residential service for purposes of this section.[29] Brooks states that the sole purpose of its test is to identify and correct any problems in SBC's and Brooks' resale support and ancillary services systems.[30] According to Brooks, it is not billing the employees involved in the test of these circuits.[31] Brooks represents that it "is not now offering

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[23] Given our 90-day statutory deadline to make determinations on BOC section 271 applications, we will treat the opposition to SBC's application filed by the Battle Group, Inc. d/b/a TBG Communications as an *ex parte* submission, rather than a late-filed pleading. We note that this filing falls within the 20-page limit placed on written *ex parte* submissions in our December 6th Public Notice. *See Procedures for Bell Operating Company Applications Under New Section 271 of the Communications Act,* Public Notice, 11 FCC Rcd 19708 (*December 6th Public Notice*).

[24] ALTS Motion at 4; TRA Apr. 28 Comments at 11-12; WorldCom Apr. 28 Comments at 4-5; MCI Apr. 28 Comments at 1-2; LCI Apr. 28 Comments at 2-5.

[25] WorldCom states that "Section 271(c)(1)(A) requires an applicant to show that competitors are *serving* residential (not just business) customers . . . ." WorldCom Apr. 28 Comments at 5 (emphasis added).

[26] TRA states that "an unaffiliated facilities-based competitor [must be] *engaged in the provision* of both residential and business telephone exchange services . . . ." TRA Apr. 28 Comments at 11 (emphasis added).

[27] According to Bell Atlantic, in order to satisfy section 271(c)(1)(A), "the competing provider's local exchange service must be one that is being '*offered*' to residential subscribers . . . ." Bell Atlantic Apr. 28 Comments at 9 n.4 (emphasis added).

[28] SBC asserts that "Brooks Fiber not only 'offer[s]' service over its own network -- thereby fulfilling [the section 271(c)(1)(A)] requirement -- but actually furnishes service to customers exclusively over that network." SBC Brief in Support at 10 (emphasis in original).

[29] Oklahoma AG Apr. 28 Comments 5; ALTS Motion at 3-4; LCI Apr. 28 Comments at 5; NCTA May 1 Comments at 10-11; Sprint Apr. 28 Comments at 2-3; WorldCom Apr. 28 Comments at 4; WorldCom May 1 Comments at 9-10.

[30] Brooks Apr. 28 Comments at 2.

[31] Brooks May 1 Comments at 6 n.3.

residential service in Oklahoma, nor has it ever offered residential service in Oklahoma,"[32] and that it "is not accepting any request in Oklahoma for residential service."[33] According to the Department of Justice, "[t]he provision of service on a test basis does not make Brooks a 'competing provider' of service to residential 'subscribers,' in the absence of any effort on Brooks' part to provide service on a commercial basis."[34] CompTel asserts that "[i]t does not even appear that Brooks' four 'customer' test is a telecommunications service at all, because it is neither available to the public nor offered for a fee."[35] SBC responds that the fact that "Brooks' residential customers are employees served on a 'test' basis . . . is irrelevant to [its] application."[36] According to SBC, section 271 "makes no distinctions based upon the end user's employment, the label a carrier attaches to its local service, or the pricing of the service."[37] In discussing Brooks' service operations generally, SBC also asserts that there is no requirement under section 271(c)(1)(A) that the competing provider serve any minimum number of customers.[38]

10. In asserting that Brooks is a competing provider of residential service for purposes of section 271(c)(1)(A), SBC relies on the fact that Brooks has an effective local exchange tariff in place for residential and business service.[39] SBC also emphasizes that the Oklahoma Corporation Commission (Oklahoma Commission) has determined that Brooks is

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[32] ALTS Motion, Affidavit of John C. Shapleigh at 1.

[33] *Id.*

[34] Department of Justice Evaluation at 21; *see also* WorldCom Reply Comments at 13 (citing Department of Justice Evaluation and stating that "test customers simply do not count under Track A.").

[35] CompTel Apr. 28 Comments at 2 (citing definition of "telecommunications service" at 47 U.S.C. § 153(46)).

[36] SBC Apr. 28 Comments at 9.

[37] *Id.* at 9-10.

[38] SBC Brief in Support at 9-10; SBC Apr. 28 Comments at 9; SBC Reply Comments at 3; *but see* State Attorneys General Reply Comments at 6-7 (arguing that, while there is no metric test showing a specific level of market entry, it is not sufficient for the competing provider to provide service to a handful of subscribers in the state if the competing provider's operations are so limited that no reliable inferences may be drawn about the feasibility of full scale competitive entry); AT&T May 1 Comments at 8 (responding to SBC's claims and asserting that "Congress did not vote down any 'metric' amendments to the facilities-based provider requirement that became law . . .").

[39] SBC Brief in Support at 10 (citing SBC Application, Appendix - Volume II, Tab 3, at §§ 2.1.1 & 4); *see also* Bell Atlantic Apr. 28 Comments at 9 n.4. According to Bell Atlantic, "SBC has an approved agreement with a competitor that is offering service to residential subscribers under an effective tariff (and that is legally obligated to provide service upon demand), and this should be adequate to apply under Track A." *Id.*

providing service to both business and residential subscribers.[40] In addition, both SBC and the Oklahoma Commission suggest that Brooks has certain legal obligations to furnish service to residential subscribers in Oklahoma,[41] and that Brooks has media advertisements seeking to attract residential subscribers.[42] In contrast, the Department of Justice contends that "[a]lthough Brooks plans to offer service to residential subscribers in Oklahoma (and is doing so in other states), and has a tariff on file in Oklahoma under which it could at some point serve residential customers, it is not presently a 'competing provider of telephone exchange services . . . to residential . . . subscribers,' as required by [s]ection 271(c)(1)(A)."[43]

11. Various commenters also contend that SBC does not meet the requirements of section 271(c)(1)(A) because Brooks is not providing facilities-based service to both residential and business subscribers.[44] A number of commenters argue that section 271(c)(1)(A)'s requirement that competing providers offer telephone exchange service either "exclusively" or "predominantly" over their own telephone exchange service facilities should apply independently to both business and residential subscribers.[45] Similarly, CPI asserts that a carrier that serves residential customers solely through resale does not meet the "predominance" test.[46] In contrast, the Department of Justice states that section 271(c)(1)(A) permits an applicant to serve one class of subscribers via resale, so long as the competitor's local exchange services as a whole are provided predominantly over its own facilities.[47] In its

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[40] SBC Reply Comments at 2.

[41] SBC Apr. 28 Comments at 10-11; Oklahoma Commission Reply Comments at 8-9; *but see* AT&T Reply Comments at 26-27 (disputing Oklahoma Commission's finding that section 271(c)(1)(A) is satisfied because Brooks has committed to provide residential service and because Brooks has entered into an interconnection agreement anticipating the provision of such service).

[42] SBC Reply Comments at 4 n.8 and attached Appendix - Volume I, Tab 13, Oklahoma Commission Reply Comments at 8.

[43] Department of Justice Evaluation at 20.

[44] *See* Oklahoma AG Apr. 28 Comments at 5-6; Brooks Apr. 28 Comments at 4; NCTA May 1 Comments at 10-11; WorldCom Apr. 28 Comments at 4-5; WorldCom May 1 Comments at 10; *see also* U S West Apr. 28 Comments at 2-3 (stating that the competing providers must provide "both residence and business service 'predominantly over their own telephone exchange service facilities'"); BellSouth May 1 Comments at 4 (stating that in order to satisfy section 271(c)(1)(A) a competing provider must provide "service to 'residential and business' customers 'exclusively' or 'predominantly' over its own facilities").

[45] Brooks May 1 Comments at 9; Sprint May 1 Comments at 11-13; CompTel Reply Comments at 9-12; ALTS Reply Comments at 3-6; AT&T Reply Comments at 25-30.

[46] CPI May 1 Comments at 2.

[47] Department of Justice May 21 Addendum at 2-4.

reply comments, SBC also asserts that the statute "does not impose any requirement that the CLEC actually serve both business and residential customers over its own facilities."[48]

12. Certain commenters also argue that Brooks does not qualify as a "predominantly" facilities-based carrier with respect to its business subscribers.[49] Many commenters also offer differing interpretations of the phrase "predominantly over their own telephone exchange service facilities," contained in section 271(c)(1)(A).[50]

C. Discussion

13. As noted above, there is considerable dispute in the record of this proceeding about whether SBC has shown that Brooks' residential operations meet the requirements of section 271(c)(1)(A). Consequently, in determining whether SBC has demonstrated compliance with section 271(c)(1)(A), we focus our discussion on whether Brooks is a competing provider of telephone exchange service to residential subscribers.[51] We note that the burden is on SBC[52] to show that Brooks is an "unaffiliated competing provider[ ] of telephone exchange service . . . to residential . . . subscribers."[53] Given our conclusion below that Brooks is not a competing provider of telephone exchange service to *residential* subscribers, we find it unnecessary to reach the issue of whether Brooks is a competing provider of telephone exchange service to *business* subscribers.

14. As summarized above, commenters offer differing views about the showing SBC must make with respect to Brooks' residential service operations (i.e., whether Brooks must serve, provide, offer, or furnish residential service). We need not and do not define the precise scope of the phrase "competing provider[ ] of telephone exchange service" for purposes of this Order. Issues concerning the nature and size of the presence of the

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[48] SBC Reply Comments at 3.

[49] *See, e.g.*, Brooks May 1 Comments at 12-16; AT&T May 1 Comments at 7-9.

[50] *See, e.g.*, SBC Apr. 28 Comments at 13; Sprint May 1 Comments at 10-11; CPI May 1 Comments at 2-3.

[51] Because SBC relies only on one carrier (i.e., Brooks) for demonstrating compliance with section 271(c)(1)(A), we need not determine whether a BOC may rely, for purposes of satisfying section 271(c)(1)(A), on multiple carriers who together provide telephone exchange service to residential and business subscribers. *See* Department of Justice Evaluation at 13 n.18.

[52] *See* 47 U.S.C. § 271(d)(3) (stating that "[t]he Commission shall not approve the authorization requested in an application . . . unless it finds that . . . the petitioning [BOC] has met the requirements of [ ]section (c)(1)").

[53] *Id.* § 271(c)(1)(A).

competing provider require very fact-specific determinations.[54] We anticipate addressing such issues in upcoming applications where facts clearly present the issues and warrant a Commission determination. We do, however, conclude that a "competing provider" cannot mean a carrier such as Brooks that at present has in place at most paper commitments to furnish service. We find that the use of the term "competing provider[ ]" in section 271(c)(1)(A) suggests that there must be an actual commercial alternative to the BOC in order to satisfy section 271(c)(1)(A).[55] Consistent with this interpretation, we note that the Joint Explanatory Statement states that "[t]he requirement that the BOC 'is providing access and interconnection' means that the competitor has implemented the agreement and the competitor is operational."[56]

15. Although SBC emphasizes that the Oklahoma Commission "concluded that [SBC] satisfies the requirements of subsection 271(c)(1)(A) because Brooks Fiber serves both business and residential customers . . . ,"[57] we find that the Oklahoma Commission's determination on this issue is not dispositive. Section 271 requires us to consult with the Oklahoma Commission "in order to verify the compliance of [SBC] with the requirements of [section 271(c)]" before we make any determination on SBC's application under section 271(d).[58] At the same time, as the expert agency charged with implementing section 271, we are required to make an independent determination of the meaning of statutory terms in section 271.

16. Moreover, based on the record before us, we find that it is unclear what standard the Oklahoma Commission applied or what specific facts it relied on in making its determination about Brooks' activities. In its order in the state's section 271 proceeding, the Oklahoma Commission concluded "that Brooks Fiber meets the requirement of [s]ection

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[54] *See* SBC Brief in Support at 9-10 (asserting that there is no requirement under section 271(c)(1)(A) that the competing provider serve any minimum number of customers).

[55] *See* AT&T May 1 Comments at 9. The Webster's Third New International Dictionary defines the verb to "compete" as "to seek or strive for something (as a position, possession, reward) for which others are also contending." Webster's Third New International Dictionary (1971 ed.).

[56] Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 148 (1996) (Joint Explanatory Statement).

[57] SBC Reply Comments at 2. As support for this statement, SBC cites to the Oklahoma Commission's order in its section 271 docket and to the Oklahoma Commission's initial comments filed in this proceeding. *Id.*; *see also 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, Final Order,* Cause No. PUD 970000064, Order No. 411817 at 2 (Oklahoma Commission Final Order), in Oklahoma Commission May 1 Comments, Appendix G at 2 and Oklahoma Commission May 1 Comments at 4-6.

[58] 47 U.S.C. § 271(d)(2)(B).

271(c)(1)(A) of the Act,"[59] but did not provide any basis for its determination. In its initial comments in this proceeding, the Oklahoma Commission asserts that "Brooks is currently providing local service to business customers predominantly over its own facilities and by resale on a test basis to its employees for their residential service."[60] The Oklahoma Commission contends in its reply comments in this proceeding that "[w]ith respect to the Track 'A' versus Track 'B' issue, the [Oklahoma Commission] has determined that Brooks Fiber is providing both business and residential service . . . ."[61] Given the facts in the record before us, the Oklahoma Commission's determination that Brooks "is providing" residential service could be based on, either cumulatively or individually, a range of factors -- e.g., Brooks' provision of circuits to four employees on a test basis, Brooks' effective state tariff, or service obligations that Brooks has under Oklahoma law. None of the Oklahoma Commission's statements, either taken together or individually, specifies whether the Oklahoma Commission has made a finding that Brooks is actually furnishing residential service, or otherwise qualifies as a competing provider of residential service.

17. We conclude that Brooks' provision of local exchange service on a test basis, at no charge, to the homes of four of its employees does not qualify Brooks as a "competing provider[ ] of "telephone exchange service . . . to residential . . . subscribers."[62] The term "subscribers" suggests that persons receiving the service pay a fee.[63] The term "telephone exchange service" also requires that there be payment of a fee.[64] For the purposes of section

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[59] Oklahoma Commission Final Order at 2.

[60] Oklahoma Commission May 1 Comments at 6.

[61] Oklahoma Commission Reply Comments at 8.

[62] 47 U.S.C. § 271(c)(1)(A).

[63] The Webster's Third New International Dictionary defines the verb to "subscribe" as "to agree to take and *pay* for something (as stock) by signing one's name to a formal agreement." A subscriber is defined as "one that subscribes." Webster's Third New International Dictionary (1971 ed.) (emphasis added).

[64] A "telephone exchange service" is a type of "telecommunications service." *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15636 (1996) (*Local Competition Order*) (stating that the "term 'telecommunications service' by definition includes a broader range of services than the terms 'telephone exchange service and exchange access.'"), *motion for stay denied*, 11 FCC Rcd 11754 (1996), *Order on Reconsideration*, 11 FCC Rcd 13042 (1996), *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996), *further recon. pending, appeal pending sub nom. Iowa Util. Bd. v. FCC and consolidated cases*, No. 96-3321 *et al.*, partial stay granted pending review, 109 F.3d 418 (8th Cir. 1996), order lifting stay in part (8th Cir. Nov. 1, 1996), *motion to vacate stay denied*, 117 S. Ct. 429 (1996). The statutory definition of "telecommunications service" requires the offering of service "*for a fee* directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46) (emphasis added). The Commission has previously stated that the phrase "for a fee" in section 153(46) of the Act "means services rendered in exchange for something of value or a monetary payment." *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157, at para. 784 (rel. May 8, 1997), *Erratum*, CC Docket No. 96-45, FCC 97-

271(c)(1)(A), the *competing* provider must actually be in the market, and, therefore, beyond the testing phase.[65] Hence, we agree with the Department of Justice that "[t]he provision of service on a test basis does not make Brooks a 'competing provider' of service to residential 'subscribers,' in the absence of any effort on Brooks' part to provide service on a commercial basis."[66]

18. Nor are we persuaded that Brooks is a competing provider of telephone exchange service to residential and business subscribers merely because it has an effective tariff in place for the provision of both business and residential service in Oklahoma.[67] Like the Department of Justice, we conclude that the existence of an effective local exchange tariff alone is not sufficient to satisfy section 271(c)(1)(A).[68] Brooks represents that it "is not now offering residential service in Oklahoma, nor has it ever offered residential service in Oklahoma,"[69] and that it "is not accepting any request in Oklahoma for residential service."[70] Neither SBC nor any other commenter has presented evidence to show that Brooks is accepting requests for residential service. Thus, SBC has not even made a threshold showing that Brooks is a competing provider that satisfies section 271(c)(1)(A).

19. Given the record in this proceeding, it is unclear whether Brooks is obligated under Oklahoma law to provide residential service. We note that Brooks' Oklahoma tariff provides that "[t]he furnishing of service under this tariff is subject to the availability on a continuing basis of all the necessary facilities . . . ."[71] Brooks suggests that this language

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157 (rel. June 4, 1997). Similarly, an integral part of the definition of "telephone exchange service" is that the service be covered by the "exchange service charge." 47 U.S.C. § 153(47).

[65] As discussed below in Section IV, the term "such provider" as used in section 271(c)(1)(B) refers to a potential competing provider, rather than an operational competing provider.

[66] Department of Justice Evaluation at 21. *See also* Brooks May 1 Comments at 8 (asserting that its four test circuits do not constitute commercial operation of residential service in any recognized business use of that term); TRA Apr. 28 Comments at 11-12 (stating that "it is beyond dispute that the facilities-based competitor must actually be engaged in the provision of commercial service to residential and business accounts in order to satisfy" the standard of section 271(c)(1)(A)).

[67] *See* Oklahoma Commission Reply Comments at 8-9; SBC Brief in Support at 10 (citing SBC Application, Appendix - Volume II, Tab 3, at §§ 2.1.1 & 4); Bell Atlantic Apr. 28 Comments at 9 n.4.

[68] Department of Justice Evaluation at 20.

[69] ALTS Motion, Affidavit of John C. Shapleigh at 1.

[70] *Id.*

[71] *See* SBC Application, Appendix - Volume II, Tab 3 at § 2.1.2.2.

exempts it from providing service under the current circumstances.[72] SBC claims that, notwithstanding Brooks' representations in this proceeding, Brooks is obligated under Oklahoma law to serve residential customers.[73] The Oklahoma Commission states that Brooks' "[Oklahoma Commission]-approved tariff requires" it to provide service to business and residential customers, and that the Oklahoma Commission will "object to any attempt by Brooks Fiber to deviate from providing service to both residential and business customers."[74] The Oklahoma Commission does not, however, address the specific exemption contained in Brooks' tariff.

20. We conclude that the determination of whether Brooks is obligated under state law to provide residential service is not dispositive of the question presented here, because, irrespective of Brooks' state obligations, the key determination for our purposes is whether Brooks is a competing provider of residential telephone exchange service under the Communications Act. We note that notwithstanding all of its claims regarding Brooks' legal obligations, SBC does not rebut Brooks' statement that it "is not accepting any request in Oklahoma for residential service."[75] Thus, as a practical matter, competing telephone exchange service is not available on a commercial basis to any residential subscribers in Oklahoma. Regardless of whatever state obligations a carrier may have, we cannot conclude for purposes of section 271(c)(1)(A) that a carrier is a competing provider of telephone exchange service to residential subscribers if it is not even accepting requests for that service.

21. For similar reasons, we also discount the significance of allegations concerning Brooks' media advertisements. The fact that Brooks has a web site listing certain services that SBC suggests "might be attractive to residential customers" does not contradict Brooks' statement that it currently is not accepting requests for residential service.[76] Similarly, we do not attach significant evidentiary weight to the Oklahoma Commission's unsubstantiated assertion that "Brooks has begun media advertisements seeking to attract both business and residential customers,"[77] without further elaboration on the significance of such advertisements.

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[72] Brooks May 1 Comments at 11 n.8.

[73] SBC contends that "Brooks obtained a certificate of public convenience and necessity to provide local service in Oklahoma by representing that it would offer service to residential customers in its service areas . . . ." SBC Apr. 28 Comments at 10. SBC also claims that a Brooks witness testified before the Oklahoma Commission that Brooks intended to offer residential service. *Id.* at 10-11.

[74] Oklahoma Commission Reply Comments at 8-9.

[75] ALTS Motion, Affidavit of John C. Shapleigh at 1.

[76] SBC Reply Comments at 4 n. 8 and attached Appendix - Volume I, Tab 19.

[77] Oklahoma Commission Reply Comments at 8.

22. As noted above, various commenters have discussed whether section 271(c)(1)(A)'s requirement that competing providers offer telephone exchange service either "exclusively" or "predominantly" over their own telephone exchange service facilities should apply independently to both business and residential subscribers.[78] In addition, certain commenters have raised the issue of how to interpret the "predominantly" requirement of section 271(c)(1)(A). We need not and do not address either of these issues for purposes of SBC's Oklahoma section 271 application, because, as we have concluded above, Brooks does not qualify as a "competing provider of telephone exchange service . . . to residential . . . subscribers" pursuant to section 271(c)(1)(A).

IV. REQUIREMENTS OF SECTION 271(c)(1)(B)

A. Background

23. Section 271(c)(1)(B) of the Act allows a BOC to seek entry under Track B if "no such provider has requested the access and interconnection described in [section 271(c)(1)(A)]" and the BOC's statement of generally available terms and conditions has been approved or permitted to take effect by the applicable state regulatory commission.[79] In its motion to dismiss, ALTS asserts that SBC is precluded from proceeding under Track B because "interconnection requests" have been filed in Oklahoma.[80] In response to this motion, the Bureau invited parties to address in detail their legal theories of when a BOC is permitted to file under section 271(c)(1)(B) and when a BOC is foreclosed from proceeding under section 271(c)(1)(B). The Bureau requested parties to address, among other things, the nature of a "request" that is referred to in section 271(c)(1)(B), which we hereinafter refer to as a "qualifying request," and whether and when SBC has received such a request.[81]

B. Positions of the Parties

24. In its application, SBC contends that it is entitled to proceed under Track B.[82] SBC interprets the phrase "such provider" as used in section 271(c)(1)(B) to refer to an "exclusively" or "predominantly" facilities-based competing provider of telephone exchange

[78] *See supra* para. 11.

[79] 47 U.S.C. § 271(c)(1)(B).

[80] ALTS Motion at 2, 4-5.

[81] *April 23rd Public Notice* at 2.

[82] SBC Brief in Support at 12.

service to residential and business subscribers, as described in section 271(c)(1)(A).[83] Thus, under SBC's reading of the statute, a BOC is entitled to proceed under Track B unless: (1) a competing provider is actually providing telephone exchange service to residential and business subscribers in accordance with the terms of section 271(c)(1)(A); *and* (2) that competing provider has requested access and interconnection more than three months prior to the filing of an application as required by section 271(c)(1)(B).[84] Under this reading, the fact that a carrier has requested access and interconnection but has not yet begun to provide competing service (such as a carrier that is still engaged in negotiations with a BOC) does not foreclose the BOC from proceeding under Track B. Thus, according to SBC, to foreclose Track B, the requesting carrier "may not simply anticipate building facilities and seek interconnection in anticipation of that day. Rather, it must actually be 'such provider' described in [section 271(c)(1)(A)]."[85]

25. A central element of SBC's argument is that a request for access and interconnection does not become a qualifying request that forecloses Track B until the carrier begins providing the type of telephone exchange service to residential and business subscribers described in section 271(c)(1)(A). Specifically, SBC maintains that a request from a prospective competitor "may become" a qualifying request that forecloses Track B "once the carrier starts to provide qualifying, facilities-based service pursuant to its interconnection agreement" with SBC.[86] Accordingly, SBC seems to take the position that, if it has not satisfied the requirements of section 271(c)(1)(A), then it must be eligible to proceed under Track B.[87]

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[83] *Id.* at 14 (citing 141 Cong. Rec. H8425, H8458 (daily ed. Aug. 4, 1995) (statement of Rep. Tauzin)). *See also* SBC Apr. 28 Comments at 14 & n.24 (citing the Joint Explanatory Statement at 148 and 142 Cong. Rec. H1152 (daily ed. Feb. 1, 1996) (statement of Rep. Hastert)).

[84] SBC Brief in Support at 14-15. Pursuant to section 271(c)(1)(B), a BOC may file an application for in-region interLATA entry "if, after 10 months after the date of enactment of the Telecommunications Act of 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1)." 47 U.S.C. § 271(c)(1)(B). SBC argues that, if a BOC "that has an effective statement of terms and conditions also has implemented a state-approved agreement with a qualifying CLEC [competitive local exchange carrier], but that CLEC only qualified, or requested access, within the prior three months, then the [BOC] may apply for interLATA entry under" both Track A and Track B. SBC Brief in Support at 15 n. 15. Because, according to SBC, Brooks commenced its facilities-based provision of telephone exchange service on January 15, 1997, and SBC filed its application for in-region long distance with the Commission on April 11, 1997, SBC concludes that it is therefore eligible to proceed under both Track A and Track B. *Id;* SBC Apr. 28 Comments at 17-18.

[85] SBC Brief in Support at 14.

[86] *See* SBC Apr. 28 Comments at 17.

[87] *See id.* at 9.

26. In their comments on ALTS' motion and on SBC's application generally, BOCs and their potential competitors differ sharply on what constitutes a "qualifying request" that will foreclose Track B. Most potential competitors, trade associations, the Oklahoma Attorney General, and the States Attorneys General generally agree with ALTS and appear to assert that *any* request for access and interconnection is a qualifying request that forecloses Track B.[88] Most BOCs, in contrast, contend that only a request from an already competing facilities-based provider of telephone exchange service to residential and business subscribers can be a qualifying request that precludes a BOC from proceeding under Track B.[89] U S West, CompTel, LCI, and the Department of Justice contend, however, that Track B is available to any BOC that has not received a request for access and interconnection to provide service that would satisfy the requirements of section 271(c)(1)(A).[90] We note that the Oklahoma Commission, in a 2-1 decision, found it was unnecessary to determine whether SBC could proceed under section 271(c)(1)(B) in light of its determination that SBC satisfies the requirements of section 271(c)(1)(A).[91]

C. Discussion

1. Summary

27. All parties appear to agree that, if SBC has received a "qualifying request" for access and interconnection, the statute bars SBC from proceeding under Track B. We agree with this analysis and conclude that, in order to decide whether SBC's application may proceed under Track B, we must determine whether SBC has received a "qualifying request." We conclude that a "qualifying request" under section 271(c)(1)(B) is a request for negotiation to obtain access and interconnection that, if implemented, would satisfy the

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[88] *See, e.g.*, AT&T May 1 Comments at 16-17; Brooks Apr. 28 Comments at 4; CPI Apr. 28 Comments at 2; CPI Reply Comments at 3-4; MCI May 1 Comments at 16; NCTA May 1 Comments at 8; Oklahoma AG Apr. 28 Comments at 7; Sprint Apr. 28 Comments at 11; State Attorneys General Reply Comments at 7; Time Warner May 1 Comments at 32; TRA Apr. 28 Comments at 8-9; TRA May 1 Comments at 13-14.

[89] Ameritech Apr. 28 Comments at 4; Bell Atlantic Apr. 28 Comments at 4-6; BellSouth Apr. 28 Comments at 3; SBC Apr. 28 Comments at 17-18. *See also* NYNEX Apr. 28 Comments at 1-2 (asserting that Track B is available where one or more facilities-based providers have not requested interconnection agreements which include all fourteen items of the competitive checklist).

[90] *See* U S West Apr. 28 Comments at 3 (recognizing that the "Track B alternative is available to the BOC only if it has not received a request . . . that would satisfy Track A"); LCI Apr. 28 Comments at 6 (asserting the Brooks' request was of the type that, once implemented "would provide [SBC] the basis for seeking approval under Track A"); Department of Justice Evaluation at 12; CompTel Reply Comments at 7; *but see* CompTel Apr. 28 at 4 (asserting that, because SBC has received at least "16 requests for access and interconnection," Track B is foreclosed).

[91] Oklahoma Commission May 1 Comments at 6 & Appendix G at 4; *see also id.*, Appendix G at 2, Dissenting Opinion of Commissioner Bob Anthony (asserting "I too agree with those parties that Track B does not apply.").

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

28. We reach this conclusion for several reasons. As a matter of statutory interpretation, we find that our reading, by giving full effect to the meaning of the term "request" in section 271(c)(1)(B), is the one most consistent with the statutory design. In addition, as a matter of policy, we find that our interpretation will best further Congress' goal of introducing competition in the local exchange market by giving BOCs an incentive to cooperate with potential competitors in providing them the facilities they need to fulfill their requests for access and interconnection. Moreover, we find our interpretation to be particularly sound in contrast to the extreme positions set forth by SBC and its potential competitors, as described below.

29. Under SBC's interpretation of section 271(c)(1)(B), only operational facilities-based competing providers may submit qualifying requests that preclude a BOC from proceeding under Track B.[92] Adoption of this interpretation of a qualifying request would create an incentive for a BOC to delay the provision of facilities in order to prevent any new entrants from becoming operational and, thereby, preserve the BOC's ability to seek in-region interLATA entry under Track B.[93] As the Department of Justice observes, this reading of section 271(c)(1)(B) would effectively "reward the BOC that failed to cooperate in implementing an agreement for access and interconnection and thereby prevented its competitor from becoming operational."[94] Opponents of SBC's application offer a radically different -- and, in our view, equally unreasonable -- interpretation of when a qualifying request has been made. These parties claim that *any* request for access and interconnection submitted by a potential new entrant to a BOC is a qualifying request and precludes the BOC from proceeding under Track B. We conclude, however, that this statutory reading could create an incentive for potential competitors to "game" the negotiation process by submitting an interconnection request that would foreclose Track B but, if implemented, would not satisfy the requirements of section 271(c)(1)(A). Such a result would effectively give a

[92] We note that when we refer to SBC's position, we are also referring to the positions advanced by Ameritech, Bell Atlantic, and BellSouth.

[93] *See* AT&T May 1 Comments at 18-19; CompTel at Apr. 28 at 5; NCTA May 1 Comments at 9 (asserting that, under SBC's reading, BOCs would have no incentive to enter into or faithfully execute meaningful interconnection agreements with competitors).

[94] Department of Justice Evaluation at 17. *See also* AT&T May 1 Comments at 19.

BOC's potential competitors in local telecommunications markets the power to deny the BOC entry into the in-region interLATA market.[95]

30. As discussed below, on the basis of the record before us, we find that SBC has received, at the very least, several qualifying requests for access and interconnection that, if implemented, will satisfy the requirements of section 271(c)(1)(A). We therefore conclude that SBC, at this time, may not pursue in-region interLATA entry in Oklahoma under section 271(c)(1)(B).

2. Standard for Evaluating "Qualifying Requests"

31. Section 271(c)(1)(B) provides that a BOC meets the "requirements of [section 271(c)(1)(B)] if . . . no such provider has requested the access and interconnection described in [section 271(c)(1)(A)] . . . ."[96] The threshold question here is whether Congress has tied the availability of Track B to a request for access and interconnection from a carrier that is already competing in the local exchange market, as SBC contends, or whether Congress intended to preclude a BOC from proceeding under Track B upon its receipt of a request for access and interconnection from a prospective competing provider of the type of telephone exchange service described in section 271(c)(1)(A).[97] We find the most natural reading of the statute, and the only interpretation consistent with the statutory goal of facilitating competition in the local exchange market, is the latter interpretation.

32. According to SBC, "such provider" refers to an already operational facilities-based provider of telephone service to residential and business subscribers.[98] Thus, although

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[95] *See* U S West Apr. 28 Comments at 4, 6-7.

[96] 47 U.S.C. § 271(c)(1)(B).

[97] In support of its interpretation, SBC cites a floor statement from Congressman Tauzin indicating that the phrase "such provider" refers to the "exclusively" or "predominantly" facilities-based carrier described in the second sentence in Track A. SBC Brief in Support at 14; SBC Apr. 28 Comments at 14. *See also* Ameritech Apr. 28 Comments at 4; Bell Atlantic Apr. 28 Comments at 5; BellSouth Apr. 28 Comments at 3. In contrast, potential competitors contend that the phrase "such provider" refers to the unaffiliated competing provider described in the first sentence in section 271(c)(1)(A). Thus, according to potential competitors, the "such provider" need not be facilities-based at the time it makes a request for access and interconnection. *See* AT&T May 1 Comments at 18; CompTel Reply Comments at 6-7; MCI Apr. 28 Comments at 2; Sprint Apr. 28 Comments at 8-9. We find the issue of whether the phrase "no such provider" refers to the first or the second sentence in section 271(c)(1)(A) to be immaterial because, as discussed in detail below, the relevant question is whether "such provider" as used in section 271(c)(1)(B) refers to an already competing provider or a potential competing provider.

[98] *See* SBC Brief in Support at 14. *See also* Ameritech Apr. 28 Comments at 4; Bell Atlantic May 1 Comments at 9; BellSouth Apr. 28 Comments at 4.

it has received at least 45 requests for "local interconnection and/or resale" in Oklahoma,[99] SBC claims that none of these requests, with the exception of the one from Brooks, is a qualifying request.[100] With respect to Brooks, SBC claims that Brooks' request was not a qualifying request when it was submitted in March 1996, but rather became a qualifying request on January 15, 1997, because on that date, according to SBC, Brooks became an operational facilities-based provider of telephone service to residential and business subscribers. Since this event occurred within three months of the filing of its section 271 application, however, SBC asserts that its application can proceed under Track B.

33. We find implausible SBC's assertion that Congress tied the availability of Track B to a request for access and interconnection from a carrier that was already competing in the local exchange market. Potential competitors usually request access and interconnection under section 251 in order *to become* operational.[101] Even if a competing provider has a fully redundant network, it would need interconnection from the BOC prior to becoming operational in order to complete calls to, and receive calls originating from, BOC customers. Indeed, SBC does not dispute that Brooks requested access and interconnection from SBC in March 1996 in order to be able to offer local exchange service in competition with SBC. In keeping with its interpretation of the words "such provider," however, SBC maintains that this request was not transformed into a qualifying request for purposes of Track B until ten months later, when SBC began providing access and interconnection to Brooks in January 1997. There is nothing in the text of the statute, or its legislative history, to suggest that a request for access and interconnection must be perfected at some unknown future date before it may become a qualifying request for the purposes of Track B. Nor does SBC provide any support for this assertion. We therefore find SBC's theory of a "post-dated" request to be without merit.

34. We conclude that Congress intended to preclude a BOC from proceeding under Track B when the BOC receives a request for access and interconnection from a prospective

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[99] SBC Application, Appendix-Volume I, Tab 18 at 7.

[100] As described above, SBC argues that, if the Commission does not find Brooks to be a qualifying carrier for purposes of section 271(c)(1)(A), then SBC may proceed under Track B. Even if the Commission does find Brooks to be a qualifying carrier for purposes of section 271(c)(1)(A), however, SBC asserts it is eligible for both Track A and Track B because Brooks' request was made within the three month statutory window under section 271(c)(1)(B).

[101] As we noted in the *Local Competition Order*, to become operational, all new entrants will require interconnection with a BOC in order to complete calls to BOC customers, and most will need access to unbundled network elements and other BOC facilities in order to begin offering service. *See Local Competition Order*, 11 FCC Rcd at 15509-10. *See also* AT&T Reply Comments at 24; CPI May 1 Comments at 9-10; Oklahoma AG Apr. 28 Comments at 7; TRA Apr. 28 Comments at 8. As discussed in detail below, SBC does propose hypothetical scenarios in which carriers would be operational carriers when they requested access and interconnection from the BOC. SBC does not suggest, however, that one of those scenarios is present in the instant proceeding.

competing provider of telephone exchange service, subject to the exceptions in section 271(c)(1)(B) discussed below.[102] Thus, we interpret the words "such provider" as used in section 271(c)(1)(B) to refer to a potential competing provider of the telephone exchange service described in section 271(c)(1)(A). We find it reasonable and consistent with the overall scheme of section 271 to interpret Congress' use of the words "such provider" in section 271(c)(1)(B) to include a potential competing provider. This interpretation is the more natural reading of the statute because, unlike SBC's strained interpretation, it retains the meaning of the term "request." By its terms, Track B only applies where "no such provider *has requested* the access and interconnection described in [section 271(c)(1)(A)]."[103] Under SBC's reading, however, Track B is available to a BOC if it is not already providing access and interconnection to competing carriers, no matter how many *requests* for access and interconnection the BOC has received. To give full effect to the term "request," we therefore interpret the words "such provider" to mean any such potential provider that has requested access and interconnection.

35. Indeed, we note that the phrase "competing provider" is commonly used to refer to both potential and actual competing providers. For example, in our *Local Competition Order*, we frequently referred to potential competitors of local exchange service as "competing providers" despite the fact that they were not yet actually offering service in competition with the incumbent LEC.[104] Similarly, in the instant proceeding, we note that SBC itself consistently uses the terms "competitors" and "CLECs" when referring to potential providers of local exchange service. For example, SBC refers to a "CLEC that wishes to provide local services in Oklahoma," "CLECs' decisions to postpone providing local telephone service," and "competitors [that] can make a business decision whether to enter the local exchange."[105]

36. SBC asserts that, if Congress had meant to refer in section 271(c)(1)(B) to any party *seeking to begin negotiations* for access and interconnection, it would have used the phrase "requesting telecommunications carrier" as it did in section 251(c), rather than the term

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[102] *See infra* at para. 37.

[103] 47 U.S.C. § 271(c)(1)(B) (emphasis added). Indeed, we note that the caption of section 271(c)(1)(B) is entitled "Failure to Request Access." *See* Sprint Apr. 28 Comments at 11.

[104] *See, e.g., Local Competition Order*, 11 FCC Rcd at 15608, 15642, 15692, 15710, 15749, 15767, 15774, 16131, 16163.

[105] *See* SBC Brief in Support at 8; SBC Apr. 28 Comments at 18; SBC Reply Comments at 1; *see also* SBC Apr. 28 Comments at 17 ("Congress ensured that competitors could not strategically block interLATA entry by timing their interconnection requests or introduction of their local services."); SBC Brief in Support at 17 ("[SBC] has satisfied the checklist requirements . . . through its [Oklahoma Commission]-approved agreements with Brooks and other CLECs.") SBC Reply Comments at 14 ("When accepting competitors' allegations as proof of supposed misconduct by [SBC], DOJ never even acknowledges responses that the [Oklahoma Commission] found persuasive . . . .").

"such provider."[106] We find, however, that Congress' use of the phrase "requesting telecommunications carrier" in section 251 provides additional support for our interpretation. A "telecommunications carrier" is defined in section 3(44) of the Act as a "provider of telecommunications services . . . ."[107] Thus, read literally, a "requesting telecommunications carrier" in section 251 is a provider of telecommunications services that requests interconnection or access to unbundled elements. SBC, however, does not assert that the requesting telecommunications carrier in section 251 must be an operational provider of telecommunications services at the time it makes its request. To the contrary, SBC appears to agree that Congress used the term "requesting telecommunications carrier" to refer to a potential entrant seeking to begin negotiations for access and interconnection.[108] In the context of section 271, however, SBC inconsistently rejects the very same interpretation of "such provider" that it has conceded is correct with respect to the term "requesting telecommunications carrier" in the context of section 251. In our view, Congress used the term "requesting telecommunications carrier" in section 251 to refer to a *potential* telecommunications carrier that was requesting access and interconnection and, in the same fashion, used the term "such provider" in section 271(c)(1)(B) to refer to a potential provider that "has requested the access and interconnection [described in section 271(c)(1)(A)]." In fact, to have used the adjective "requesting" before the noun "provider" in section 271(c)(1)(B) would have been superfluous because the sentence already incorporates the concept of a requesting provider by using the verb "requested."

37. Similarly, we find that SBC's interpretation of this provision effectively reads the exceptions in section 271(c)(1)(B) out of the statute. The exceptions provide that the BOC "shall be considered not to have received any request for access and interconnection" if the applicable state regulatory commission certifies that the provider making the request fails to negotiate in good faith or fails to comply, within a reasonable time, with the implementation schedule set forth in the interconnection agreement.[109] These exceptions ensure that, if, after a request for access and interconnection, facilities-based competition does not emerge because the potential competitor fails either to bargain in good faith or to

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[106] SBC Reply Comments at 5 n.10.

[107] 47 U.S.C. § 153(44).

[108] SBC Reply Comments at 5 n.10.

[109] *See* 47 U.S.C. § 271(c)(1)(B). BOCs are free to negotiate implementation schedules for their interconnection agreements. In the *Local Competition Order*, we declined to impose a "bona fide request" process on requesting carriers. We found that incumbent LECs may not require requesting carriers, *as a condition to begin negotiations*, to commit to purchase services or facilities for a specified period of time. *Local Competition Order*, 11 FCC Rcd at 15578. We concluded that forcing carriers to make such a commitment before critical terms, such as price, have been resolved would be likely to impede new entry. We note, however, that nothing in the Commission's rules precludes incumbent LECs from negotiating, or states from imposing in arbitration, schedules for the implementation of the terms and conditions by the parties to the agreement. *See also* 47 U.S.C. § 252(c)(3).

implement its interconnection agreement according to a negotiated or arbitrated schedule, Track B would become available to the BOC. Such certifications by a state commission, in effect, would amount to a determination that the BOC had not received a qualifying request. Under SBC's theory of a "post-dated" request, a qualifying request that forecloses Track B would occur only after the initial request has resulted in a negotiated and implemented interconnection agreement with the BOC. Consequently, there would be virtually no need for exceptions that make Track B available in the event of bad faith negotiations or failure to comply with an implementation schedule.

38. SBC only identifies two scenarios, neither of which is present here, where the exceptions in section 271(c)(1)(B) might come into play under its interpretation: (1) where a competing LEC that is already providing facilities-based telephone exchange service completely over its own network requests access and interconnection from the BOC; or (2) where a competing LEC that has obtained an interconnection agreement prior to the 1996 Act makes such a request.[110] SBC asserts that the exceptions in section 271(c)(1)(B) exist to ensure that a qualifying carrier (i.e., an already competing provider) "cannot foreclose interLATA entry by requesting, but then failing to negotiate or implement, an agreement."[111] As described below, however, we find that these scenarios are extremely rare.[112] It seems implausible that Congress would have created the exceptions in section 271(c)(1)(B) to apply to circumstances that would almost never arise. We conclude therefore that adhering to SBC's interpretation would virtually strip these exceptions of their meaning.

39. We also find unpersuasive the few passages of legislative history on which SBC relies in support of its argument that "such provider" in section 271(c)(1)(B) refers to an operational competing provider. For example, SBC relies on references in the Joint Explanatory Statement to a "qualifying facilities-based competitor," and a "facilities-based competitor that meets the criteria set out in [section 271(c)(1)(A) that] has sought to enter the market."[113] Notably, this latter reference to the Joint Explanatory Statement equally supports our interpretation of "such provider" because it refers to a carrier that "has sought to enter the market."

40. In addition, SBC relies on a floor statement indicating that the phrase "such provider" refers to the facilities-based provider described in the second sentence of section

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[110] *See* SBC Apr. 28 Comments at 16-17.

[111] *Id.* at 15.

[112] *See infra* paras. 48-53.

[113] *See* SBC Apr. 28 Comments at 14 & n.24 (citing Joint Explanatory Statement at 148); *see also* SBC Reply Comments at 5 (citing Joint Explanatory Statement at 147).

271(c)(1)(A).[114] SBC also cites a floor statement stating that a BOC may pursue entry under Track B if it has not received "any request for access and interconnection from a facilities-based carrier that meets the criteria in section 271(c)(1)(A)."[115] We decline to attach the weight to these and other citations to the legislative history that SBC assigns because other passages in the legislative history refer to "would-be" or "potential" competitors. These passages indicate that Congress assumed carriers would not yet be operational competitors when they requested the access and interconnection arrangements necessary to enable them to compete.[116] For example, as discussed below,[117] the Conference Committee emphasized the importance of "*potential* competitors" having the benefit of the Commission's rules implementing section 251.[118] In addition, the House Commerce Committee indicated that Track B would not create an "unreasonable burden on a *would-be* competitor" to request access and interconnection under section 271(c)(1)(A).[119] SBC cites no support for its contention that this language "simply reflects a belief that [competing LECs] would be full competitors in the local market only after they implement interconnection agreements under section 251."[120]

41. Contrary to SBC's claim that its reading of section 271 is supported by legislative history, we conclude that the legislative history surrounding section 271(c)(1)(A) establishes that, consistent with its goal of developing competition, Congress intended Track A to be the primary vehicle for BOC entry in section 271. As discussed below, by tying BOC in-region, interLATA entry to the development of local competition in this manner, Congress expected that there would be a "ramp-up" period during which requests from potential competitors would preclude BOCs from applying under Track B while requesting carriers are in the process of becoming operational competitors. We find, therefore, that the statutory scheme established by Congress supports our conclusion that the term "such

[114] *See* SBC Brief in Support at 14 (citing 141 Cong. Rec. H8425, H8458 (daily ed. Aug. 4, 1995) (statement of Rep. Tauzin)).

[115] *See* SBC Apr. 28 Comments at 14 & n.25 (citing 142 Cong. Rec. H1152 (daily ed. Feb. 1, 1996) (statement of Rep. Hastert)).

[116] *See* Department of Justice Evaluation at 16; AT&T Reply Comments at 24-25.

[117] *See infra* at para. 43.

[118] *See* Joint Explanatory Statement at 148-49 (emphasis added).

[119] *See* H.R. Rep. No. 204, 104th Cong., 1st Sess., pt. 1, at 77-78 (emphasis added) (House Report).

[120] SBC Reply Comments at 6 n.11.

provider" in section 271(c)(1)(B) refers to a potential competitor that is seeking access and interconnection in order to enter the local exchange market.[121]

42. That Congress intended BOCs to obtain approval to enter their in-region interLATA markets primarily by satisfying the requirements of section 271(c)(1)(A) is evidenced not only by the stated purpose of the 1996 Act which was to "open[ ] all telecommunications markets to competition,"[122] but also by statements in the Report of the House Commerce Committee.[123] These statements are particularly relevant because the text of section 271(c)(1) was adopted almost verbatim from the House bill.[124] The House Committee Report states that the existence of a facilities-based competitor that is providing service to residential and business subscribers "is the integral requirement of the checklist, in that it is the tangible affirmation that the local exchange is indeed open to competition."[125] Moreover, that Report observes that "the Committee expects the Commission to determine that a competitive alternative is operational and offering a competitive service somewhere in the State prior to granting a BOC's petition for entry into long distance."[126] Thus, we find that Congress regarded the presence of one or more operational competitors in a BOC's service area as the most reliable evidence that the BOC's local markets are, in fact, open to competitive entry.[127]

43. At the same time, Congress, by intending Track A to be the primary entry vehicle, understood that there would be some delay between the passage of the 1996 Act and actual entry by facilities-based carriers into the local market.[128] For example, it expressly

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[121] *See* TRA Apr. 28 Comments at 8 (contending that Track B's reference to a "provider" describes a potential facilities-based competitor seeking entry into the local exchange market through network access and interconnection); TRA May 1 comments at 14-15; WorldCom Apr. 28 Comments at 8-9.

[122] Joint Explanatory Statement at 1.

[123] *See, e.g.,* ALTS Motion at 6-7; CompTel Apr. 28 Comments at 3-4; NCTA May 1 Comments at 7 n. 12; Sprint Apr. 28 Comments at 5.

[124] The Conference Committee expressly adopted the language contained in section 271(c)(1) from the House bill. *See* Joint Explanatory Statement at 147 (stating that the "test that the conference agreement adopts comes virtually verbatim from the House amendment").

[125] House Report at 76-77.

[126] *Id.* at 77.

[127] *See* CompTel Apr. 28 Comments at 3.

[128] *See* Department of Justice Evaluation at 10; Sprint Apr. 28 Comments at 9; Time Warner May 1 Comments at 10-11. Congress' expectation that section 271 relief may take some time is also evidenced by section 271(e)(1) which states that the joint marketing restriction applicable to larger interexchange carriers would expire once a BOC "is authorized . . . to provide interLATA services in an in-region State, or [once] 36