Sprint

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April 24, 1997

VIA FED EX

Mr. David Waddell
Executive Director
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

RE: BellSouth Telecommunications, Inc.'s Entry Into Long Distance (InterLATA) Service in Tennessee Pursuant to Section 271 of the Telecommunications Act of 1996

Dear Mr. Waddell:

Please find enclosed the original and thirteen (13) copies of the Brief of Sprint Communications Company, L.P., on behalf of Sprint Communications Company, L.P. in the above referenced proceeding.

An extra copy of this transmittal letter is included which I would ask that you please date stamp and return to me for my files in the enclosed self addressed stamped envelope.

Thank you for your cooperation.

Respectfully submitted,

Carolyn Tatum Roddy

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CTR:vw

BEFORE THE

TENNESSEE REGULATORY AUTHORITY

In re:

BellSouth Telecommunications, Inc.'s Entry Into Long Distance (InterLATA) Service in Tennessee Pursuant to Section 271 of the Telecommunications Act of 1996	))))	Docket No. 97-00309

BRIEF OF SPRINT COMMUNICATIONS COMPANY, L.P.

Comes now Sprint Communications Company L.P. ("Sprint") and files this Brief in the above-captioned docket pursuant to the Report and Recommendation of Hearing Officer on April 3, 1997, Status Conference issued on April 18, 1997. In that Report and Recommendation, Hearing Officer Melvin J. Malone directed parties to file briefs on two issues: first, whether BellSouth Telecommunications, Inc. (BellSouth) can assert the "Track B" option under Section 271(c)(1)(B) of the Telecommunications Act of 1996 ("Act") as a basis for interLATA relief; and secondly, whether BellSouth can be granted in-region interLATA authority in Tennessee before the Tennessee Regulatory Authority (TRA) establishes "permanent" cost-based rates. Sprint provides its brief on the respective issues broached by the Hearing Officer as follows:

I. BELLSOUTH CAN NOT ASSERT THE "TRACK B" OPTION UNDER SECTION 271(c)(1)(B) AS A BASIS FOR INTERLATA RELIEF

Section 271(c) establishes two possible "tracks" for Bell Operating Companies ("BOCs") to obtain in-region, interLATA entry, the standards for which are set forth in Section 271(c)(1)(A) (hereinafter "Track A") and Section 271(c)(1)(B) (hereinafter "Track B"). BellSouth has indicated in filings in Georgia[1] that it may pursue Track B in its petition to provide in-region, interLATA relief and provided its rationale for doing so.

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[1] For example, in Georgia, the only state in which 271 hearings have occurred in the BellSouth region, BellSouth acknowledged that they could not satisfy the requirements for a Track A filing and left open the option of taking a Track B petition to the Federal Communications Commission (FCC) as grounds for interLATA relief. Counsel for BellSouth forcefully asserted in oral argument that Track B was appropriate. See Response To The Georgia Commission's January 14, 1997 Order Clarifying Requirement Of Notification Of Intent To File An Application With The FCC, filed January 22, 1997 in Consideration of BellSouth Telecommunications, Inc.'s Entry Into InterLATA Services Pursuant to Section 271 of the Telecommunications Act of 1996, Docket No. 6863-U at 1 (hereafter Response or BellSouth Response). In light of the absence of statements concerning BellSouth's intentions and legal interpretations in Tennessee, this Brief will treat the Georgia statements as indicative of the BellSouth corporate position region-wide.

It is understood that BellSouth has not eliminated the Track B option as grounds for seeking interLATA relief in Tennessee, and has not rejected the reasoning it cited in Georgia earlier. Such an interpretation of Section 271(c)(1)(B) by BellSouth would essentially eviscerates Track A. Whatever virtues this interpretation may hold for BellSouth's shareholders, it suffers from the fatal flaw of having little basis in the language, structure or legislative history of the statute. This Commission should, therefore, adopt the interpretation of Section 271(c)(1), and specifically of Track B, that is suggested below.

A. Track A Provides The Primary Avenue For BOC Compliance With Section 271(c) To Which Track B Is A Limited Exception.

In an apparent effort to expedite its entry into long distance without jeopardizing its dominance in the local market, BellSouth has argued that Congress never intended that checklist compliance would delay BOC Section 271 approval beyond the ten-month "waiting period" established in Section 271(c)(1)(B). Thus, according to BellSouth in other filings, Track A was included in the statute to provide an "expedited route for BOCs to apply for entry into long distance,"[2] but it is essentially irrelevant once the ten month waiting period has passed. BellSouth has it backwards. Section 271(c)(1) and its legislative history demonstrate that the timing of BOC in-region interLATA entry is governed by the fundamental policy of encouraging facilities-based entry under Track A; only where such entry is not possible does Track B apply.

To comply with Track A, a BOC must have entered into one or more State-approved interconnection agreements pursuant to which predominantly facilities-based competitive LECs (hereinafter "CLECs") are providing switched local exchange service to both residential and business customers. As BellSouth correctly observes, Track A requires, at the very least, the presence of a competitor that is providing local service exclusively or predominantly over its own independent network facilities.[3]

BellSouth is incorrect, however, in asserting that Track A cannot be interpreted to delay Section 271 relief. In fact, the presence of facilities-based competition was clearly Congress' preferred method for evaluating BOC compliance with Section 271(c)(1). Section 271(c)(1)(B) specifically states that Track B is available only where Track A is unavailable, an unambiguous indication that Congress intended Track A to take precedence over Track B.

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[2] Id. at 5.

[3] See id. at 4-6. While the scope of the Track A requirement is not directly at issue here, it should be pointed out that, for the provision to make sense, Track A CLECs must do more than provide service to a few residential and business subscribers. Rather, Track A requires that one or more CLECs provide both local business and residential subscribers a meaningful alternative to the incumbent local exchange carrier (ILEC).

The legislative history further supports this interpretation. The overarching goal of the 1996 Act is the development of competition, a goal that is obviously furthered by the competitive local entry contemplated by Track A.[4] Further, Congress explained in the Conference Report that operational facilities-based entry was critical to its statutory plan. Such entry would (1) "assist the appropriate State commission in providing its consultation" with the FCC,[5] (2) assist "in the explicit factual determination by the Commission under new section 271(d)(2)(B) that the requesting BOC has fully implemented the interconnection agreement elements set out in the 'checklist' under new section 271(c)(2),"[6] and (3) provide subsequent entrants an expedited means of entry through Section 252(i).[7] In contrast, Track B entry would make both State and FCC checklist review more difficult and, given the opportunity for ILEC misconduct in the interconnection context, less certain. It would also diminish the utility of Section 252(i), the so-called "most favored nations" provision of the Act.

The legislative history BellSouth cited in Georgia as support of its Track B position does not support a different conclusion. BellSouth previously relied primarily on statements by Congressman Jack Fields, the Chairman of the House Commerce Committee Subcommittee on Telecommunications, which are universally understood to be of less probative value in interpreting the statute than the Conference Report.[8] The statements attributed to Congressman Fields in support of the BellSouth Track B

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[4] Entry into the local market where there is currently virtually no competition serves Congressional intent more effectively than the entry of another firm into the already competitive long distance business. Of course, Track A contemplates that entry into both markets.

[5] S. Con. Rep. No. 230, 104th Cong., 2d Sess. at 148 (1996) (hereinafter "Conference Report").

[6] Id. Both the State commissions and the FCC can, in other words, be far more confident that a BOC has complied with the checklist requirements and competition has been enabled if one or more new entrant is providing competitive service pursuant to an interconnection agreement. As the House Report stated it, the facilities-based entry requirement

> [i]s the integral requirement of the checklist, in that it is the tangible affirmation that the local exchange is indeed open to competition. In the Committee's view, the "openness and accessibility" requirements are truly validated only when an entity offers a competitive local service in reliance on those requirements.

H.R. 204, 104th Cong., 1st Sess. at 77 (1995).

[7] Conference Report at 148.

[8] See Garcia v. United States, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.' We have eschewed reliance on the passing comments of one Member, and casual statements from the floor debates" (citations omitted)); Zuber v. Allen, 396 U.S. 168, 186 (1969) ("A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying legislation. Floor debates reflect at best the understanding of individual Congressmen").

argument are also ambiguous. For example the statement that Track A was designed to "move the deregulated framework even faster than ever imagined" by establishing agreements that others could elect under Section 252(i) makes no reference to the speed with which BOCs should be permitted entry into long distance. If anything, the statement underscores Track A's central role in the statutory scheme.

Furthermore, to view Track A as equal or subordinate to Track B in the statutory plan would lead to absurd results. For example, Congress was careful to ensure that Track A compliance could not be achieved through interconnection with predominant resellers or with facilities-based carriers that it viewed as ineffective competition for the BOCs.[9] Yet Track B approval requires no demonstration of local competition at all. BellSouth's interpretation essentially requires this Commission to believe that Congress was indifferent (at most) to the grounds upon which a BOC would be granted interLATA authority, i.e. whether the BOC 1) was able to show that facilities-based competition had developed or 2) the BOC filed merely an SGAT accompanied by no demonstration of local competitive entry of any kind. Under BellSouth's approach, Congress' insistence under Track A that only adequate facilities-based entry should count would result in resort to Track B, ensuring that competitive entry would not be considered at all in most instances. This is certainly not what Congress intended when it defined the Track A standard, and is certainly not what the competition principles of the 1996 Act establish. BellSouth has, therefore, misunderstood the relative importance of Tracks A and B.

The effective implementation of Congress' statutory plan for the introduction of local competition depends on the requirement that operational interconnection agreements exist before Section 271 approval is granted. This overarching legislative intent should inform this Commission's interpretation of Section 271(c)(1), especially where the specific details of the provision lend themselves to different interpretations.

B. Track B Is Available Only Where A BOC Has Not Received A Timely Interconnection Request Under Section 271(c)(1).

BellSouth would have this Commission believe that Track B is available in any state in which a facilities-based provider is not currently providing competitive local exchange service to both residential and business customers.[10] This assertion rests largely

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[9] See 47 U.S.C. § 271(c)(1)(A) (specifying that "services provided pursuant to subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 et seq) [i.e., cellular services] shall not be considered to be telephone exchange services"); Conference Report at 147 ("With respect to the facilities-based competitor requirement, the presence of a competitor offering the following services specifically does *not* suffice to meet the requirement: (1) exchange access; (2) telephone exchange service offered exclusively through the resale of the BOC's telephone exchange service; and (3) cellular service" (emphasis in original)).

[10] Under BellSouth's interpretation, even if a facilities-based CLEC began providing service after the lapse of the ten month period, the BOC could file for Section 271 approval with the FCC under Track B

on the view that the "no such provider" language in Section 271(c)(1)(B) refers to a carrier that fully complies with the requirements for Track A approval. This is neither a natural nor a logical interpretation of that provision.

Section 271(c)(1)(B) exempts a BOC from the facilities-based competition showing of Track A if, after ten 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."[11] The most sensible reading of this provision is that the "no such provider" refers to a carrier that requests access and interconnection referred to in the first sentence of subparagraph (A). The "such provider" does not need to comply with the Track A requirement that the interconnecting CLEC provide service either predominantly or exclusively over its own independent facilities. Section 271(c)(1)(A) specifically limits the latter requirement to Track A by stating that it only applies "[f]or the purpose of this subparagraph [i.e., subparagraph (A)]." To apply the predominance requirement to Track B would render this qualifying phrase surplusage in violation of the basic canons of statutory interpretation.[12]

Nor is BellSouth correct that a request for access and interconnection would only foreclose Track B as an option when "the competitor [begins] to provide the facilities-based service."[13] On the contrary, subparagraph B specifically states that Track B takes effect if "no such provider has requested the access and interconnection described in subparagraph (A)" (emphasis added). The subparagraph goes on to explain that a BOC shall not have been deemed to have received a "request for access and interconnection" (emphasis added) under certain defined circumstances. Congress could not have more clearly indicated that a request for interconnection, not the provision of service pursuant to an interconnection agreement, forecloses the BOCs' right to pursue Track B.[14]

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within three months of the date the CLEC began to provide service to both residential and business customers. See BellSouth Response at 7.

[11] See 47 U.S.C. § 271(c)(1)(B).

[12] See Pennsylvania. Dept. of Public Welfare v. Davenport, 495 U.S. 552, 562 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment"); Colautti v. Franklin, 439 U.S. 379, 392 (1979) ("[T]he elementary canon of construction [is] that a statute should be interpreted so as not to render one part inoperative"); United States v. Menasche, 348 U.S. 528, 538-39 (1955) ("'The cardinal principle of statutory construction is to save and not to destroy.' It is our duty to 'give effect, if possible, to every clause and word of a statute.'"(citations omitted)).

[13] See BellSouth Response at 10 (emphasis added).

[14] BellSouth's position becomes even more unfathomable when viewed in light of the deadlines for arbitration established in Section 252. Under Section 252(b)(4)(C), State commissions have until nine months after a LEC receives an interconnection request to resolve arbitration disputes. Given the 10 month waiting period in Track B, the BOC could virtually guarantee the availability of Track B under BellSouth's interpretation by forcing all carrier negotiations to arbitration. Assuming the CLEC requested interconnection the day after the legislation was passed, the CLEC would still have as little as one month to

Thus, if a BOC receives a request for access and interconnection, it may only follow Track A in that state. The requirements of Track A have only been met, however, when a CLEC meets the specifications of the second sentence of Section 271(c)(1)(A). This time period must necessarily exist for the statute to make sense. Congress understood that it would take time for CLECs to upgrade or construct networks and to extend service offerings to residential and business customers.[15] While CLECs engage in network construction and expansion of service offerings, it would be senseless to undermine the process (and all its attendant consumer benefits) by granting (far less beneficial) in-region interLATA entry under Track B.

Indeed, Track B itself contains support for the view that Congress specifically contemplated that there would be a lag between the time when a BOC is foreclosed from pursuing Track B and its likely compliance with Track A. Section 271(c)(1)(B) states that a BOC shall be considered not to have received an interconnection request if the CLEC fails to negotiate in good faith or fails to comply within a reasonable period of time with the implementation schedule contained in the agreement.[16] If BOCs were allowed to comply with Track A or B immediately upon expiration of the ten-month waiting period, as BellSouth suggests, there would be no need for Congress to specify that Track B is again available where bad faith or nonperformance is demonstrated.

Support for this interpretation can also be found elsewhere in the statute. Section 271(e)(1) states that the joint marketing restriction applicable to the larger IXCs would expire once a BOC "is authorized . . . to provide interLATA services in the in-region State, or [once] 36 months have passed since the date of enactment of the Telecommunications Act of 1996, whichever is earlier."[17] Thus, Congress expected that it might easily be three years (or longer) before a BOC could make the requisite showings under Section 271. BellSouth ultimately falls back on the position that Sprint's interpretation would "put the timing of opening the long distance market into the hands of potential BOC competitors" and allow CLECs to game the system to keep BellSouth out of the long distance market. But, as BellSouth has previously conceded, the very creation of Track A along with the ten-month Track B waiting period necessarily placed the initial timing of opening the long distance market in the hands of the CLECs. In any case, as Congress well knew, tacit collusion among those CLECs, most of whom are not long

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begin providing service to both business and residential subscribers or else the BOC would be eligible for Track B. Congress could not have intended this result.

[15] This is true of cable companies, whose proposed widespread entry BellSouth relies upon for much of its argument. The one-way, tree and branch network employed for the delivery of cable service requires substantial upgrades before it can support two-way telephone service. It would not have been reasonable, therefore, to expect substantial cable entry into the telephone business before the ten month Track B waiting period expired. The more reasonable approach, and the one adopted by Congress, was to have the Track B option foreclosed by a cable or other CLEC request for interconnection.

[16] See 47 U.S.C. § 271(c)(1)(B)(i),(ii).

[17] 47 U.S.C. § 271(e)(1) (emphasis added).

distance carriers and have no interest in keeping BOCs out of that market, is very unlikely. Nevertheless, just in case an individual CLEC were in the position to intentionally or unintentionally hold up the Track A process, Congress included the bad faith negotiation and nonperformance provisions set forth in Section 271(c)(1)(B)(i) and (ii). Regardless of what BellSouth may think, this Commission is fully capable of enforcing those provisions if it were necessary to do so.

C. A Statement of Generally Available Terms And Conditions May Only Be Used To Comply With The Competitive Checklist Under Track B.

In describing its Statement of Generally Available Terms And Conditions (hereinafter "SGAT") in Georgia, BellSouth asserts that such a statement "can supply the basis for meeting elements of the Competitive Checklist set out in Section 271(c)(2)(B) regardless of whether Track A or B is followed."[18] As with much of BellSouth's interpretation of Tracks A and B, this position has no support (and BellSouth makes no attempt to suggest any) in the statute. The statute makes it clear that SGATs may be used only to comply with the checklist under Track B.

Section 271(c)(2)(B), the provision dealing with checklist compliance, contains two entirely independent means of compliance. Under Track A, the BOC must provide CLECs the checklist items pursuant to interconnection agreements only, while under Track B the BOC must offer the items pursuant to an approved SGAT only. The provision states as follows:

> Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph is such access and interconnection includes each of the following ...[19]

As used in this subparagraph, the term "provided" matches the phrase "is providing" in Sections 271(c)(1)(A) and (c)(2)(A)(i)(I) as well as the term "provided" used in Section 271(d)(3)(A)(i). All of these provisions refer to compliance with Track A. As used in Section 271(c)(2)(B), the phrase "generally offered" matches the use of "generally offers" in Section 271(c)(1)(B), "is generally offering" in Section 271(c)(2)(A)(i)(II) and "generally offered" in Section 271(d)(3)(A)(ii). All of these provisions refer to compliance with Track B. Thus, as stated in Section 271(c)(2)(B), access and interconnection "provided" refers to Track A while the access and interconnection "generally offered" refers to Track B.

The use of the disjunctive "or" in Section 271(c)(2)(B) demonstrates that BellSouth must either comply with the competitive checklist contained in that

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[18] BellSouth Response at 13.

[19] 47 U.S.C. § 271(c)(2)(B) (emphasis added).

subparagraph exclusively through Track A or exclusively through Track B. As the Supreme Court has held, "canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meaning, unless the context dictates otherwise."[20] Far from dictating some other interpretation of the term "or" in Section 271(c)(2)(B), the "context" of Section 271 only reinforces the view that Tracks A and B cannot be used in combination. Every place the two tracks are mentioned in Section 271, they are stated in the disjunctive. For example, Section 271(c)(1) states that a BOC meets the requirements of that paragraph "if it meets the requirements of subparagraph (A) [Track A] or subparagraph (B) [Track B]" (emphasis added). Section 271(c)(2)(A) similarly states that a BOC meets the requirements of that paragraph if, within the state for which the authorization is sought, the company complies with Section 271(c)(1)(A) or Section 271(c)(1)(B). Section 271(c)(2)(B) restates these options in the disjunctive again. Finally, Section 271(d)(3)(A) requires that a BOC has either "fully implemented" the competitive checklist pursuant to Track A or "offers all of the items included in the competitive checklist in subsection (c)(2)(B)" (emphasis added) pursuant to a Track B Statement of Generally Available Terms and Conditions. Section 271(d)(3)(A) again unmistakably shows that the competitive checklist must be fulfilled either entirely pursuant to one or more Track A interconnection agreement or entirely pursuant to a Track B general statement.

BellSouth has complained that since some competitors might not need all of the checklist items or, in some cases, no competitor would need a checklist item, it must be possible for BOCs to satisfy the checklist by combining Tracks A and B.[21] But this is simply a plea to ignore the terms of the statute. The words and phrases of Section 271 clearly demonstrate that Tracks A and B are independent.

Accordingly, Sprint urges this Commission to follow the plain meaning of Section 271(c) of the Act and declare that a Track B route for interLATA relief is not available to BellSouth.

II. BELLSOUTH CAN NOT BE GRANTED IN-REGION INTERLATA AUTHORITY IN TENNESSEE BEFORE THE TENNESSEE REGULATORY AUTHORITY ESTABLISHES COST-BASED RATES.

Section 271 of the Telecommunications Act of 1996 clearly requires that rates be cost-based. Section 271 (c)(2)(B)(i) states that "Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)" is required. Section 252(d)(1) states as follows:

> "Determinations by the State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for

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[20] Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979).

[21] See BellSouth Response at 13.

network elements for purposes of subsection (c)(3) of such section-(A) shall be -(I) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable)..."

It is clear that a cost-based rate is, therefore, required. This interpretation is consistent with the original TRA Staff Draft Report which described the TRA's use of proxy prices where no cost studies were available and its analysis that interconnection, network elements, poles, ducts, conduits and rights-of-way, and reciprocal compensation required the use of proxies in the absence of appropriate cost studies. As the TRA Staff Draft Report stated on page 4 as follows:

> While the proxy rates may be helpful in executing early interconnection activity, the staff believes that the law is quite clear in its intent to have the rates for these 4 checklist items (i.e. 1, 2, 3, and 13) based on cost. For this reason, the staff believes that BellSouth should not be certified as in compliance with these items until the cost studies are complete, and permanent rates set.

Similarly, the Georgia Public Service in its Order Regarding Statement, In re BellSouth Telecommunications, Inc.'s Statement of Generally Available Terms and Conditions Under Section 252(f) of the Telecommunications Act of 1996, Docket No. 7253-U, issued March 20, 1997, rejected BellSouth's SGAT because it was not cost-based.[22] The Georgia Commission noted that it had initiated a docket for the purpose of establishing cost-based rates that will no longer be subject to true-up, and that it had granted BellSouth's requests for an extension of time to file its proposed cost studies and rates in that docket. The Georgia Commission concluded as follows:

> It is unreasonable to expect that this Commission can approve the Statement and pricing arrangements as cost-based, as required by the Act, when the determinations as to a reasonable cost basis have yet to be made. Accordingly, until the Commission has established the cost-based rates for interconnnection including collocation, for unbundled elements, for reciprocal compensation, and for access to poles, ducts, conduits, and rights-of-way, pursuant to Sections 251 and 251(d), which can be used for BellSouth's SGAT, the Commission must reject the SGAT.

Therefore, Sprint requests that the TRA, as initially concluded by its Staff Draft Report and as found by the Georgia Public Service Commission in examining BellSouth's SGAT, adhere to the clear requirement of the Telecommunications Act of 1996 that rates be cost-based.

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[22] Though this examination centered on the adequacy of the BellSouth Statement of Generally Available Terms and Conditions, the standards are the same under the Telecommunications Act. See Section 251 (c)(2)(D) which adopts the cost-based pricing requirements set forth in Section 252(d)(1)(A).

III. CONCLUSION

Based on the foregoing arguments, Sprint Communications Company L.P. requests that the Tennessee Regulatory Authority conclude that BellSouth can not assert the Track B option under Section 271(c)(1)(B) of the Telecommunications Act of 1996 as a basis for interLATA relief and that BellSouth can not be granted in-region interLATA authority in Tennessee before the TRA establishes permanent cost-based rates.

Respectfully submitted,
Sprint Communications Company L.P.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and exact copy of the within and foregoing Brief of Sprint Communications Company, L.P., Docket No. 97-00309, on behalf of Sprint Communication Company, L.P., via United States Mail, first class postage paid and properly addressed to the following:

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