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November 10, 2004

RECEIVED
NOV 1 0 2004
PUBLIC SERVICE COMMISSION

Elizabeth O' Donnell, Esquire
Kentucky Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, Kentucky 40601

Re: Petition Of Dieca Communications, Inc. d/b/a Covad Communications Company For Arbitration Of Interconnection Agreement Amendment With Bellsouth Telecommunications Inc. Pursuant To Section 252(B) Of The Telecommunications Act Of 1996
Case No. 2004-00259

Dear Ms. O'Donnell:

Enclosed for filing in the above-referenced case are an original and ten (10) copies of DIECA Communications d/b/a Covad Communications Company ("Covad") Motion for Reconsideration. Please indicate receipt of this filing by placing your file-stamp on the extra copy and returning to me in the enclosed, self-addressed, stamped envelope.

Sincerely,

C. Kent Hatfield

C. Kent Hatfield
Counsel for Covad Communications Company

CKH:jms

Enc.

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED
NOV 1 0 2004
PUBLIC SERVICE COMMISSION

In the Matter of:

Petition of DIECA Communications, Inc. d/b/a Covad Communications Company For Arbitration of Interconnection Agreement Amendment With BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996	)))))))	Case No. 2004-00259

COVAD COMMUNICATIONS COMPANY'S MOTION FOR RECONSIDERATION

DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad"), pursuant to KRS 278.400, hereby submits to the Kentucky Public Service Commission ("Commission") this Motion for Reconsideration ("Motion"). In light of new evidence from the Federal Communications Commission ("FCC"), Covad respectfully asks that the Commission reconsider its determination, contained in its Order[1] in this docket, dated October 18, 2004, that line sharing is not a section 271 obligation because "local loop transmission" can mean nothing other than a whole "loop".

I. SUMMARY OF ARGUMENT

[1] Order, *In the Matter of: Petition of DIECA Communications, Inc. d/b/a Covad Communications Company For Arbitration of Interconnection Agreement Amendment With BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Case No. 2004-00259, dated October 18, 2004, p. 5.

In connection with a recent Order issued by the FCC,[2] Michael K. Powell, Chairman of the FCC, expressly clarified[3] that the FCC's Forbearance Order relieves "271 unbundling obligations for fiber-based technologies – and ***not*** copper based technologies such as line sharing".[4] The concurring statement of Commissioner Martin acknowledges that the FCC's Order does not address line sharing, but asserts that the Forbearance Order, nevertheless, granted forbearance for line sharing 271 obligations. Although these two statements are at odds with each other, they have one thing in common: Both statements are based on the fact that line sharing is a 271 obligation. These statements, therefore, demonstrate that – at least in the opinions of the Chairman of the FCC and one other FCC Commissioner – Covad has always been correct in asserting that line sharing is a statutory obligation under 271 which applies to BellSouth unless the FCC forbears from enforcing the obligation. With this premise newly confirmed, the Kentucky Commission's determination that based on the definition of "local loop transmission" line sharing *could not be* a 271 obligation is incorrect as a matter of law.

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[2] Memorandum and Order, *Re: Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c), Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket Nos. 01-338, 03-235, -3-260, 04-48, released October 27, 2004 ("Forbearance Order") (attached hereto as Exhibit A).

[3] The Chairman issued a revised statement (Exhibit B) following the release of a statement from Commissioner Martin, (attached as Exhibit C) expressing Commissioner Martin's belief that the Forbearance Order, through its silence, granted forbearance as to line sharing. As will be shown below, Commissioner Martin's assertions are wrong as a matter of law.

[4] Statement of Michael K. Powell, *Re: Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c), Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket Nos. 01-338, 03-235, -3-260, 04-48, released October 27, 2004 (emphasis added) ("Chairman Powell's Statement") (attached hereto as Exhibit B).

This Commission should, accordingly, reconsider its determination in light of recent events, and order the status quo pending clarification from the FCC.

II. ARGUMENT AND CITATION TO AUTHORITY

A. The Statements of Chairman Powell and Commissioner Martin Make it Clear that Line Sharing is a 271 Element.

The warring statements of Commissioner Martin and Chairman Powell did make one thing clear: Line sharing is a 271 obligation. Chairman Powell's statement says the FCC did not remove 271 obligations for line sharing[5], and Commissioner Martin's statement—though manifestly incorrect as will be shown below—does get at least one thing right: it assumes, as did Chairman Powell, that line sharing is a 271 obligation of ongoing force unless and until the FCC grants a petition for forbearance should one ever be filed. If, as this Commission stated in its Order, line sharing never was a 271 element, there would be no 271 obligation to forbear from nor any need to clarify that the FCC was not "removing 271 unbundling obligations" for line sharing.

The statements of Chairman Powell and Commissioner Martin demonstrate that BellSouth's position, adopted by this Commission, is—and has always been—wrong: there is indeed a continuing RBOC obligation to provide CLECs with line sharing in accordance with Section 271 of the Telecommunications Act. It is now clear that BellSouth led the Commission down the wrong path. The Commission should reverse course and wait for clarity from the FCC.

5 Chairman Powell's Statement, attached as Exhibit B.

B. The FCC Did Not Grant Forbearance from BellSouth's 271 Obligation to Provide Access to Line Sharing.

Unlike the Kentucky Commission, the Georgia Public Service Commission has ordered BellSouth to continue providing line sharing for CLECs while it completes an existing generic proceeding.[6] BellSouth has filed for reconsideration of the Georgia decision, arguing that the FCC accidentally granted forbearance from line sharing. The FCC did not grant – by implication or otherwise – forbearance from line sharing because forbearance from line sharing was **never** requested. BellSouth has represented in Georgia that the "FCC has held that it will forbear from enforcement of any 271 obligation with respect to line sharing."[7] That representation is false. The FCC held no such thing. The Order repeatedly provides a list of the elements from which the FCC is forbearing and line sharing is ***not*** on the list:

> In this Order, we forbear from enforcing the requirements of section 271, for all four petitioners (the Bell Operating Companies (BOCs)), with regard to the broadband elements that the Commission, on a national basis, relieved from unbundling in the Triennial Review Order and subsequent reconsideration orders (collectively, the 'Triennial Review' proceeding'). These elements are fiber –to-the home loops (FTTH loops), fiber-to-the-curb loops (FTTC loops), the packetized functionality of hybrid loops, and packet switching (collectively, broadband elements).
>
> * * *
>
> For the reasons described below, we grant all BOCs forbearance from section 271's independent access obligations with regard to the broadband elements the Commission, on a national basis, relived from unbundling under section 251: FTTH loops, FTTC loops, the packetized functionality of hybrid loops, and packet switching.

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6 Order, *In the Matter of: Petition of DIECA Communications, Inc. d/b/a Covad Communications Company For Arbitration of Interconnection Agreement Amendment With BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 19144-U, dated October 18, 2004, p. 4.

7 Motion for Reconsideration at 3.

> * * *
>
> As discussed below, we find that the BOCs have demonstrated that they satisfy the criteria set forth in section 10 with respect to the broadband elements for which the Commission provided unbundling relief on a national basis in the Triennial Review proceeding: FTTH loops, FTTC loops, the packetized functionality of hybrid loops, and packet switching.
>
> * * *
>
> Moreover, we find that section 10(a)'s three-pronged test for forbearance has been met with respect to section 271(c)(1)(B)'s independent access obligation for FTTH loops, FTTC loops, the packetized functionality of hybrid loops, and packet switching for all of the affected BOCs to the extent such broadband elements were relieved of unbundling on a national basis under section 251(c).[8]

Moreover, the FCC repeatedly explains – as it is statutorily obliged[9] to – that it is granting forbearance to encourage the RBOCs to build next-generation fiber facilities.[10] There is no mention in the Order of any considerations related to legacy copper networks carrying line sharing. Thus the Chairman's Statement: "By removing 271 unbundling obligations for fiber-based technologies – and not copper based technologies such as line sharing . . . ".[11] Additionally, on November 5 – more than one week <u>after</u> Commissioner Martin expressed his "belief" that the FCC granted forbearance from line sharing – the FCC released an Order <u>*again stating*</u> that "On October 27, 2004, the Commission released an order granting SBC's petition to the extent that it requested forbearance with respect to broadband network elements, specifically fiber-to-the-home loops, fiber-to-the-

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[8] Forbearance Order, ¶¶ 1, 12, 19, and 37, attached as Exhibit A.

[9] 47 U.S.C. § 160 (c) ("The Commission . . . shall explain its decision in writing.").

[10] Order on Forbearance, ¶¶ 6, 12, 20, 21, 24, 25, 27, 31 and 34, attached as Exhibit A.

[11] Statement of Michael K. Powell, attached as Exhibit B.

curb loops, the packetized functionality of hybrid loops, and packet switching."[12] Once again, line sharing is not on the list of "broadband element" for which the FCC granted forbearance. Accordingly, the express language of the Order, the substance of the Order, a follow-on Order, and the Chairman himself, all make it clear that the Forbearance Order only addresses fiber based technologies – and not line sharing. As absurd as it is in the face of a clear order, and in the face of a statement from the Chairman of the FCC to the contrary, BellSouth, nevertheless, insists that the FCC granted forbearance from line sharing <u>by omission, rather than commission</u>.

C. BellSouth's Assertion that the FCC Accidentally Granted Forbearance for Line Sharing is Preposterous.

BellSouth **<u>never asked the FCC to forbear from line sharing</u>** and cannot now claim that the grant of its Petition for Forbearance implicitly granted an implied request. Both BellSouth and Commissioner Martin base their claim that the FCC implicitly granted forbearance for line sharing (despite the Chairman's statement to the contrary) based on one incorrect premise: that there was a request for forbearance from line sharing in Verizon's petition. This is a bold claim when the words "line sharing" <u>never appear in either Verizon's Petition</u>[13], which actually lists the elements for which it is seeking forbearance (which – not coincidentally – is the same list the FCC granted), <u>or BellSouth's Petition</u>.[14] It is important to note in this context that a standard canon of

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[12] Order, *In the Matter of SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. §160(c) from Application of Section 271*, WC Docket No. 03-235, DA 04-3532, Released November 5, 2004, ¶ 2.

[13] Letter from Susanne A. Guyer, Senior Vice President, Federal Regulatory Affairs, Verizon, to Michael Powell, Chairman, and Kathleen Abernathy, Kevin Martin, Michael Copps and Jonathan Adelstein, Commissioners, FCC, CC Docket No. 01-338 (filed October 24, 2003) ("Verizon Petition") (attached hereto as Exhibit D).

[14] BellSouth Telecommunications, Inc. *Petition for Forbearance*, WC Docket No. 04-48 (filed March 1, 2004) ("BellSouth Petition") (attached hereto as Exhibit E).

statutory construction holds that when a legislative body or agency provides a list of items to which an order or statute applies—as the FCC did in its Forbearance Order—that list is presumed to be exclusive.[15]

BellSouth's Petition does not identify any elements at all, but expressly adopts Verizon's Petition, stating, "Through this Petition, BellSouth is seeking the same relief requested by Verizon in its Petition for Forbearance filed October 24, 2003."[16] The Verizon Petition specifically lists the "broadband elements" for which it is seeking forbearance: "fiber-to-the-premises loops, the packet-switched features, functions and capabilities of hybrid loops, and packet switching."[17] If that looks like a familiar list, it should. It is same the list of elements the FCC granted forbearance from enforcing as 271 obligations in its Forbearance Order.[18]

BellSouth relies on its obscure request for forbearance from "broadband elements" to support its contention that it requested (by inference) forbearance from its line sharing obligations, however, this argument is inconsistent with BellSouth's express adoption of Verizon's requested relief (which did not include line sharing). Commissioner Martin, however, expressly says that there was a request for forbearance from line sharing, but the citation he provides to the Verizon Petition is conspicuously missing any page reference.[19] Why? Because **the Verizon Petition never mentions line sharing**. As a consequence, BellSouth is left to argue that it should be implied that it

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15 *See, e.g., Settlement Funding, LLC v. Jamestown Life Ins. Co.* 78 F.Supp.2d 1349, 1358 (N.D.Ga.,1999).

16 BellSouth Petition at 1 (citing to the Verizon Petition), attached hereto as Exhibit E.

17 Verizon Petition at 1, attached hereto as Exhibit D.

18 Forbearance Order, ¶¶ 1, 12, 19, and 37, attached hereto as Exhibit A.

19 Commissioner Martin Statement, attached hereto as Exhibit C.

asked for forbearance from line sharing and that it should <u>also be implied</u> that the FCC granted that request. But either line sharing is a 271 obligation, and the FCC may grant forbearance from that obligation, or, alternately, line sharing is not a 271 obligation, and there is no need for the FCC to forbear. Both cannot be true. For BellSouth to make the forbearance argument at all is to concede that line sharing is an element under checklist item 4.If access to line sharing over legacy copper facilities were substantially equivalent to access to new fiber facilities, an argument for "implicit" relief might fall slightly short of absurd. But they have nothing to do with each other, and the rationale for forbearing with respect to fiber facilities – providing incentive for new investment – has no applicability to access to existing legacy copper plant. If the FCC had actually made policy in the way BellSouth suggests, it would be the height of arbitrary and capricious decision-making.

In any case, this Commission should refuse to accept such a spurious argument because this Commission is the wrong place to bring it. If BellSouth thinks the FCC's Forbearance Order granted forbearance for line sharing – despite the clear language of the Order and the Chairman's statement to the contrary – then <u>BellSouth should file a Motion for Clarification ***at the FCC***</u>. Thereafter, BellSouth is free to bring any FCC-clarified order to this Commission.

III. CONCLUSION

No matter how the debate over the FCC's Forbearance Order comes out at the FCC, there would be no debate if this Commission's Order were correct. But it is now clear that the Commission could not have been correct – FCC Chairman Powell's and Commissioner Martin's statements prove the competitive checklist term "local loop transmission" does encompass line sharing, making line sharing a 271 element subject to possible forbearance. The purpose of Reconsideration is to fix errors in Commission orders when new evidence comes to light, and this is one of those times. Consequently, Covad respectfully requests that the Commission reconsider its, now demonstrably incorrect, determination that line sharing never was a 271 element, and order the status quo (subject to appropriate true-up) until the FCC issues its new rules or clarifies is Forbearance Order.

Respectfully submitted this 10th day of November, 2004

C. Kent Hatfield

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COUNSEL FOR COVAD COMMUNICATIONS COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Covad's Motion for Reconsideration been furnished by U.S. Mail this 10th day of November, 2004 to the following:

C. Kent Hatfield

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Dorothy J. Chambers, Esquire
BellSouth Telecommunications, Inc.
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Exhibit A

Memorandum and Order, *Re: Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c), Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket Nos. 01-338, 03-235, -3-260, 04-48, released October 27, 2004.

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

In the Matters of	)	
Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)	)	WC Docket No. 01-338
SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c)	)	WC Docket No. 03-235
Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)	)	WC Docket No. 03-260
BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)	)	WC Docket No. 04-48

MEMORANDUM OPINION AND ORDER

Adopted: October 22, 2004 **Released:** October 27, 2004

By the Commission: Chairman Powell, Commissioners Abernathy, and Martin issuing separate statements; Commission Adelstein concurring in part, dissenting in part and issuing a statement; Commissioner Copps dissenting and issuing a statement.

I. INTRODUCTION

1. In this Order, we forbear from enforcing the requirements of section 271, for all four petitioners (the Bell Operating Companies (BOCs)), with regard to the broadband elements that the Commission, on a national basis, relieved from unbundling in the *Triennial Review Order* and subsequent reconsideration orders (collectively, the "*Triennial Review* proceeding"). These elements are fiber-to-the-home loops (FTTH loops), fiber-to-the-curb loops (FTTC loops), the packetized functionality of hybrid loops, and packet switching (collectively, broadband elements).[1] We therefore grant the Verizon Petition[2] and BellSouth Petition,[3] and grant in part the SBC Petition[4] and Qwest Petition.[5]

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[1]These elements are defined in our *Triennial Review Order*, *Triennial Review MDU Reconsideration Order*, and *Triennial Review FTTC Reconsideration Order*. *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of (continued….)

2. In its petition, Verizon requests that the Commission forbear from applying the independent section 271 unbundling obligations enumerated in the *Triennial Review* proceeding to the broadband elements the Commission removed from unbundling under section 251.[6] BellSouth seeks "the same relief requested by Verizon in its Petition for Forbearance."[7] The SBC and Qwest petitions request broader relief, essentially asking the Commission to forbear from applying the independent access obligations of section 271 to all network elements that the Commission determined need not be unbundled under section 251.

II. BACKGROUND

3. *Statutory Requirements*. The Telecommunications Act of 1996[8] requires that incumbent local exchange carriers (incumbent LECs) provide unbundled network elements (UNEs) to other

(Continued from previous page)
Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (*Triennial Review Order*), *corrected by* Errata, 18 FCC Rcd 19020 (2003) (*Triennial Review Order Errata*), *vacated and remanded in part, aff'd in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*); Order on Reconsideration, FCC 04-191 (rel. Aug. 9, 2004) (*Triennial Review MDU Reconsideration Order*); Order on Reconsideration, FCC 04-248 (rel. Oct. 18, 2004) (*Triennial Review FTTC Reconsideration Order*). In response to the D.C. Circuit's vacatur of certain *Triennial Review Order* unbundling rules, the Commission issued an *Interim Order and NPRM*, setting forth a six-month interim unbundling framework with respect to those network elements, and seeking comment on permanent unbundling rules that would respond to the *USTA II* decision. *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179 (rel. Aug. 20, 2004) (*Interim Order and NPRM*).

[2] *See* Letter from Susanne A. Guyer, Senior Vice President, Federal Regulatory Affairs, Verizon, to Michael Powell, Chairman, and Kathleen Abernathy, Kevin Martin, Michael Copps and Jonathan Adelstein, Commissioners, FCC, CC Docket No. 01-338 (filed Oct. 24, 2003) (Verizon Oct. 24 *Ex Parte* Letter or Verizon Revised Petition); *Commission Establishes Comment Cycle for New Verizon Petition Requesting Forbearance from Application of Section 271*, Public Notice, 18 FCC Rcd 22795 (2003) (subsequent history omitted) (Verizon Revised Petition Public Notice).

[3] *BellSouth Telecommunications, Inc. Petition for Forbearance*, WC Docket No. 04-48 (filed Mar. 1, 2004) (BellSouth Petition).

[4] *SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 03-235 (filed Nov. 6, 2003) (SBC Petition).

[5] *Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 03-260 (filed Dec. 18, 2003) (Qwest Petition).

[6] Although Verizon's Petition was ambiguous with regard to the exact scope of the relief requested, later submissions by Verizon clarify that Verizon is requesting forbearance relief only with respect to those broadband elements for which the Commission made a national finding relieving incumbent LECs from unbundling under section 251(c). *See* Verizon Revised Petition; Letter from Dee May, Vice President – Federal Regulatory, Verizon to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-337, 01-338, 02-33, 02-52, Attach. at 1-8 (filed Mar. 26, 2004) (Verizon Mar. 26 *Ex Parte* Letter).

[7] BellSouth Petition at 1.

[8] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. The 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* We refer to these Acts collectively as the "1996 Act" or the "Act."

telecommunications carriers. In particular, section 251(c)(3) requires incumbent LECs to provide to requesting telecommunications carriers "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with ... the requirements of this section and section 252."[9] Section 251(d)(2) of the Act describes two standards that the Commission should use in determining which network elements must be made available to requesting telecommunications carriers.[10] For network elements that are not proprietary in nature, section 251(d)(2)(B) requires the Commission to determine "at a minimum, whether ... the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[11] The Commission has determined that most network elements (including the elements at issue) are nonproprietary in nature, and are thus governed by the section 251(d)(2)(B) "impair" standard.

4. Section 271 establishes both the procedures by which a BOC may apply to provide interLATA services in its in-region states and the substantive standards by which that application must be judged. In particular, section 271(c)(2)(B) of the Act requires the BOCs to satisfy a fourteen point "competitive checklist" of access and interconnection requirements demonstrating that the local market is open to competition before they are permitted to provide in-region, interLATA services.[12] The section 251(c) obligations are referenced and incorporated as obligations of the BOCs under checklist item number two.[13] Four of the other checklist items require BOCs to provide competitors with "unbundled" access to specific network elements.[14] Specifically, item four of the competitive checklist requires the BOCs to provide competitive providers with access to local loop transmission from the central office to the customer's premises.[15] Item five requires the BOCs to provide access to local transport from the trunk side of a wireline local exchange carrier switch.[16] Item six requires the BOCs to provide access to local switching[17] and item ten requires the BOCs to provide nondiscriminatory access to databases and associated signaling.[18]

5. *Triennial Review Proceeding*. The Commission last year released the *Triennial Review Order*,[19] which reexamined the issues presented in implementing the unbundling requirements of section 251 of the Act. The Commission redefined the "impair" standard governing which nonproprietary network

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[9]47 U.S.C. § 251(c)(3).

[10]47 U.S.C. § 251(d)(2).

[11]47 U.S.C. § 251(d)(2)(B).

[12]47 U.S.C. § 271(c)(2)(B).

[13]47 U.S.C. § 271(c)(2)(B)(ii).

[14]47 U.S.C. § 271(c)(2)(B)(iv), (v), (vi), (x).

[15]47 U.S.C. § 271(c)(2)(B)(iv).

[16]47 U.S.C. § 271(c)(2)(B)(v).

[17]47 U.S.C. § 271(c)(2)(B)(vi).

[18]47 U.S.C. § 271(c)(2)(B)(x).

[19]*See generally Triennial Review Order*, 18 FCC Rcd 16978.

elements the incumbent LECs should be required to unbundle under section 251(c)(3).[20] The Commission concluded that a requesting telecommunications carrier is impaired when lack of access to an incumbent LEC network element poses barriers to entry, including operational and economic barriers that are likely to make entry into a market uneconomic.[21] In considering whether the sum of the barriers to entry was likely to make entry uneconomic, the Commission made clear that it is necessary to take into account any countervailing advantages that a requesting carrier may have.[22] With regard to loops, transport, switching and signaling/databases, the Commission, while limiting access to certain aspects of the elements, did find varying degrees of impairment and continued to require some unbundling of all of the elements at issue.[23]

6. The Commission distinguished new fiber networks used to provide broadband services for the purposes of its unbundling analysis. Specifically, the Commission determined, on a national basis, that incumbent LECs do not have to unbundle certain broadband elements, including FTTH loops in greenfield situations, broadband services over FTTH loops in overbuild situations, the packetized portion of hybrid loops, and packet switching.[24] The Commission based its determinations with regard to these

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[20] *Triennial Review Order*, 18 FCC Rcd at 17021-85, paras. 61-169, *corrected by Triennial Review Order Errata,* 18 FCC Rcd at 19020, paras. 5-6.

[21] *Triennial Review Order*, 18 FCC Rcd at 17035, para. 84.

[22] *Id.*

[23] Regarding loops for mass market customers, the Commission held that incumbent LECs are required to offer unbundled access to stand-alone copper loops, line splitting and subloops for the provision of narrowband and broadband services. *Triennial Review Order*, 18 FCC Rcd at 17128-32, paras. 248-54, *corrected by Triennial Review Order Errata*, 18 FCC Rcd at 19020-21, paras. 9-10. The Commission also required incumbent LECs to offer unbundled access to hybrid/copper loops for narrowband services. *Id.* at 17153-54, paras. 296-97. For enterprise customer loops, the Commission required incumbent LECs to offer unbundled access to dark fiber loops, DS3 loops and DS1 loops subject to more granular reviews by the state commissions. *Id.* at 17155-83, paras. 298-342, *corrected by Triennial Review Order Errata*, 18 FCC Rcd at 19021, paras. 12-13. The Commission further ruled that incumbent LECs must provide unbundled access to dark fiber, DS3 and DS1 dedicated transport subject to more granular reviews by state commissions. *Id.* at 17199-237, paras. 359-418, *corrected by Triennial Review Order Errata*, 18 FCC Rcd at 19021, para. 15. With regard to switching for mass market customers, the Commission found that competing carriers are impaired without unbundled incumbent LEC local circuit switching because of barriers associated with the incumbent LEC hot cut process. *Id.* at 17265-85, paras. 464-85, *corrected by Triennial Review Order Errata*, 18 FCC Rcd at 19021, paras. 17-18. The Commission therefore asked the state commissions to approve loop cut-over processes that accommodate high volume cut-overs, or make detailed findings demonstrating that such a process is not necessary. *Id.* at 17286-90, paras. 487-92. The state commissions were also asked to determine whether there is any other impairment in a particular market and whether such impairment can be cured by requiring unbundled switching on a rolling basis, rather than making unbundled switching available for an indefinite period of time. *Id.* at 17310-12, paras. 521-24. The Commission determined that both unbundled signaling and call-related databases must be unbundled for competitive carriers that are purchasing the incumbent LEC's local circuit switching. *Id.* at 17323-34, paras. 542-60.

[24] For FTTH loops, the Commission relieved incumbent LECs from unbundling FTTH loops in greenfield situations. In overbuild circumstances, the Commission required incumbent LECs to either keep the existing copper loop for competitive use, or provide unbundled access to a 64 kbps transmission path. However, incumbent LECs are relieved from any requirement to unbundle broadband services over overbuild FTTH loops. *Id.* at 17142-45, paras. 273-77. As discussed below, the Commission extended the FTTH unbundling relief initially to FTTH loops serving predominantly residential MDUs, and then to FTTC loop facilities, as well. *See infra* nn. 27-28 and accompanying text. The Commission also relieved incumbent LECs from the requirement to unbundle the next generation, (continued….)

elements on the impairment standard and the requirement of section 706 of the 1996 Act to provide incentives for all carriers, including the incumbent LECs, to invest in broadband facilities.[25] The Commission concluded that although it was relying on its impairment standard in determining whether these elements should be subject to unbundling, it had discretion under its section 251(d)(2) "at a minimum" authority to consider other factors.[26] Accordingly, the Commission considered the statutory goals outlined in section 706 in concluding that those broadband elements would not be subject to unbundling nationwide. In the *Triennial Review MDU Reconsideration Order*, the Commission determined that these same section 706 considerations justified extending the *Triennial Review Order*'s FTTH unbundling relief to encompass FTTH loops serving predominantly residential multiple dwelling units (MDUs).[27] In the subsequent *Triennial Review FTTC Reconsideration Order*, the Commission found that the FTTH analysis applied to FTTC loops, as well, and granted the same unbundling relief to FTTC as applied to FTTH.[28]

7. The Commission also considered the relationship between sections 251 and 271 of the Act. Specifically, the Commission considered the relationship between checklist item two (which references section 251) and checklist items four through six and ten (which do not). The Commission concluded that checklist items four through six and ten constitute a distinct statutory basis for the requirement that BOCs provide competitors with access to certain network elements that does not necessarily hinge on whether those elements are included among those subject to section 251(c)(3)'s unbundling requirements.[29] Accordingly, the Commission stated that even if it concluded that requesting telecommunications carriers are not "impaired" without access to one of those elements under section 251, section 271 would still require the BOC to provide access.[30] However, under that circumstance, the pricing standard would not be determined under section 252(d)(1), but would be governed by the "just and reasonable" standard established under sections 201 and 202.[31]

8. The United States Court of the Appeals for the District of Columbia Circuit recently reviewed the Commission's conclusions in the *Triennial Review Order*.[32] Although the court vacated and remanded many of the Commission's impairment findings, including those relating to mass market

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packetized capabilities of their hybrid loops for the provision of broadband services to the mass market. *Id.* at 17149-53, paras. 288-95. Finally, the Commission found that competitive LECs were not impaired without unbundled access to packet switching, and declined to require the incumbent LECs to unbundle such facilities. *Id.* at 17321-23, paras. 537-41, *corrected by Triennial Review Order Errata*, 18 FCC Rcd at 19022, para. 26.

[25] *Triennial Review Order*, 18 FCC Rcd at 17125-27, paras. 242-44.

[26] *Id.* at 17121, para. 234.

[27] *Triennial Review MDU Reconsideration Order*, paras. 7-9.

[28] *Triennial Review FTTC Reconsideration Order*, paras. 9-19.

[29] *Triennial Review Order*, 18 FCC Rcd at 17382-91, paras. 649-67, *corrected by Triennial Review Errata*, 19 FCC Rcd at 19022, paras. 30-33.

[30] *Id.* at 17384, para. 653.

[31] *Id.* at 17386-89, paras 656-64, *corrected by Triennial Review Order Errata*, 18 FCC Rcd at 19022, paras. 32-33.

[32] *See generally USTA II*, 359 F.3d 554.

switching and local transport, the court affirmed the Commission's decisions to relieve incumbent LECs from broadband unbundling obligations.[33] The court also affirmed the Commission's conclusions related to the section 271 obligations.[34]

9. *Petitions for Forbearance.* During the pendency of the *Triennial Review* proceeding described above, Verizon filed a petition requesting that the Commission forbear from applying items four through six and ten of the section 271 checklist once the corresponding elements no longer need to be unbundled under section 251(d)(2).[35] Immediately prior to the Commission's statutory deadline to rule on its petition, Verizon submitted a letter requesting that the Commission limit the pending forbearance petition to the broadband elements that the Commission found on a national basis in the *Triennial Review* proceeding do not have to be unbundled under section 251.[36] The Commission denied that petition,[37] and Verizon sought judicial review of the Commission's order. In an opinion released in July 2004, the Court of Appeals for the D.C. Circuit found that the Commission had failed adequately to explain its decision not to grant Verizon's original petition, and remanded the matter to the Commission.[38]

10. BellSouth, SBC and Qwest then filed petitions seeking similar relief to that sought by Verizon. While BellSouth seeks forbearance from the same broadband elements as sought by Verizon,[39] SBC and Qwest request forbearance from the section 271 independent access obligation for all elements—both narrowband and broadband—that are not required to be unbundled under section 251(d)(2).[40] SBC and Qwest argue that once an element no longer meets the section 251(d)(2) standard for unbundling, forbearance with respect to the parallel checklist item is required by section 10.[41] SBC and Qwest further maintain that the rationale for forbearance is especially persuasive with regard to the broadband elements the Commission relieved from unbundling in the *Triennial Review* proceeding.[42]

11. *Forbearance Standard.* The goal of the Telecommunications Act of 1996 is to establish "a pro-competitive, de-regulatory national policy framework."[43] An integral part of this framework is the requirement, set forth in section 10 of the 1996 Act, that the Commission forbear from applying any

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[33] *Id.* at 578-85.

[34] *Id.* at 588-90.

[35] *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, CC Docket No. 01-338 (filed July 29, 2002).

[36] Verizon Revised Petition.

[37] Verizon Revised Petition Public Notice.

[38] *Verizon Telephone Companies v. FCC*, 374 F.3d 1229 (D.C. Cir. 2004).

[39] BellSouth Petition at 1.

[40] SBC Petition at 4-8; Qwest Petition at 3-14.

[41] SBC Petition at 5-6; Qwest Petition at 11-13.

[42] SBC Petition at 8-14; Qwest Petition at 14-15.

[43] Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996).

provision of the Act, or any of the Commission's regulations, if the Commission makes certain specified findings with respect to such provisions or regulations.[44] Specifically, the Commission is required to forbear from any statutory provision or regulation if it determines that: (1) enforcement of the regulation is not necessary to ensure that charges and practices are just and reasonable, and are not unjustly or unreasonably discriminatory; (2) enforcement of the regulation is not necessary to protect consumers; and (3) forbearance is consistent with the public interest.[45] In making such determinations, the Commission must also consider pursuant to section 10(b) "whether forbearance from enforcing the provision or regulation will promote competitive market conditions." Section 10(d) specifies, however, that "[e]xcept as provided in section 251(f), the Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those requirements have been fully implemented."[46]

III. DISCUSSION

12. For the reasons described below, we grant all BOCs forbearance from section 271's independent access obligations with regard to the broadband elements the Commission, on a national basis, relieved from unbundling under section 251: FTTH loops, FTTC loops, the packetized functionality of hybrid loops, and packet switching. As required by section 10, we forbear from applying the section 271 access obligations to those broadband elements to the same extent that the Commission relieved those elements from unbundling under section 251(c)(3) in the *Triennial Review* proceeding.[47] In arriving at this determination, we find that the checklist portion of section 271 has been "fully implemented" in all states, and that the three-pronged forbearance test has been met with respect to these broadband elements. With regard to SBC's and Qwest's broader forbearance requests, we decline to address those issues in this Order.[48]

A. "Fully Implemented"

13. As a threshold matter, we must consider whether section 10(d) prohibits the forbearance sought by the BOCs in this proceeding. As stated above, section 10(d) prohibits the Commission from forbearing from the requirements of section 271 until it determines that those requirements have been "fully implemented."[49] In our recent order denying Verizon's forbearance petition from the separate operating, installation, and maintenance functions of section 272 (*OI&M Order*),[50] the Commission

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[44] 47 U.S.C. § 160(a).

[45] 47 U.S.C. § 160.

[46] 47 U.S.C. § 160(d).

[47] The forbearance relief granted in this Order in no way modifies the obligations of the BOCs under section 251(c) to continue to provide access to UNEs as specified in the *Triennial Review Order*. For example, in the *Interim Order and NPRM*, the Commission established six-month, interim unbundling rules. *Interim Order and NPRM*, paras. 18-29.

[48] We note that the one-year statutory period for considering these requests runs to November 5, 2004 with respect to SBC, and December 17, 2004 with respect to Qwest.

[49] 47 U.S.C. § 160(d).

[50] *See Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, CC Docket No. 96-149, Memorandum Opinion (continued....)

concluded that the section 272 separate affiliate requirements, which are referenced in section 271(d), are not "fully implemented" until three years after a BOC has obtained section 271 authority to provide in-region interLATA services in a particular state.[51] In arriving at that conclusion, the Commission noted that section 272 specifically requires that the BOCs maintain the separate affiliate structure for at least three years after grant of a section 271 application in a particular state.[52]

14. AT&T argues that the *OI&M Order* prohibits the Commission from finding that section 271 is fully implemented until a minimum of three years after long distance authority has been granted in a particular state.[53] Other commenters have argued that the Commission should adopt a market-based test and only find section 271 "fully implemented" when markets are deemed competitive.[54] The BOCs counter that the checklist of section 271 has already been determined to be "fully implemented" because the BOCs have received section 271 authority in all of their states.[55]

15. We find that the checklist portion of section 271(c) is "fully implemented" once section 271 authority is obtained in a particular state. Accordingly, because the BOCs have obtained section 271 authority in all of their states, we find that the checklist requirements of section 271(c) are "fully implemented" for purposes of section 10(d) throughout the United States.

16. This interpretation is the most reasonable reading of the statute. Once the checklist requirements have been met and the BOC is granted authority to provide interLATA services under section 271(d), there is nothing further the Commission or the BOC needs to do in order to implement the checklist. Certainly, the Commission continues to have enforcement authority under section 271(d)(6), but this assumes that the checklist has been implemented and that the BOC has received section 271 authority in a given state. This determination is consistent with the language in section 271(d)(3)(A)(i) stating that a BOC has met the requirements of section 271(c)(1) if among other obligations it has "fully implemented" the competitive checklist.[56] It is the most logical interpretation that the words "fully implemented" would have the same meaning when used in section 271, as when referring to section 10(d)'s requirement that section 271 be "fully implemented" prior to forbearance.

17. Accordingly, we reject suggestions by commenters that section 271(c)(1)(B) is only "fully implemented" once a certain competitive threshold in the market has been met. By interpreting the "fully implemented" language to include competitive thresholds, we would be creating inquiries redundant with those forbearance requirements, since section 10(b) of the Act already requires the Commission to

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and Order, 18 FCC Rcd 23525 (2003) (*OI&M Order*).

[51] *OI&M Order*, 18 FCC Rcd at 23530, para. 7. The Commission also initiated a rulemaking regarding the "operate independently" requirement of section 272. *See Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates*, WC Docket No. 03-228, Notice of Proposed Rulemaking, 18 FCC Rcd 23538 (2003).

[52] *OI&M Order*, 18 FCC Rcd at 23529-30, para. 6.

[53] *See, e.g.*, AT&T Comments at 11 (Verizon Petition).

[54] *See, e.g.*, MCI Comments at 18 (Verizon Petition); PACE Coalition Comments at 5 (Verizon Petition); Sprint Comments at 8-9 (Verizon Petition); Covad Comments at 6 (Verizon Petition).

[55] Verizon Reply at 26-29; SBC Petition at 8; Qwest Petition at 17-18.

[56] *See* 47 U.S.C. § 271(d)(3)(A)(i).

consider the competitive market conditions, including whether a grant of forbearance will enhance competition in making its determination.[57] Instead, we believe section 10(d) is reasonably interpreted as a threshold standard, limiting the Commission from granting forbearance until it has determined that the BOC satisfies the section 271(c) competitive checklist.

18. Our finding in the *OI&M Order* regarding application of section 10(d) to section 272 in no way prevents us from reaching this conclusion. Indeed, the Commission specifically stated in the *OI&M Order* that its determination with regard to section 272 does not address whether any other part of section 271, such as the section 271(c) competitive checklist, is "fully implemented."[58] The "fully implemented" language of section 10(d) must be read in light of the particular requirements at issue, and section 272 requirements are distinct from the other requirements of section 271: the separate affiliate obligations of section 272 continue for at least a three-year period after the BOC is authorized to provide interLATA telecommunications services under section 271(d), while the section 271(c) competitive checklist lacks any such statutorily mandated timeframe. Accordingly, we conclude that the "fully implemented" standard that we have applied to section 272 should not be applied to the checklist obligation of section 271(c).

B. Forbearance from Section 271 Independent Access Obligations for Broadband Elements

19. As discussed below, we find that the BOCs have demonstrated that they satisfy the criteria set forth in section 10 with respect to the broadband elements for which the Commission provided unbundling relief on a national basis in the *Triennial Review* proceeding: FTTH loops, FTTC loops, the packetized functionality of hybrid loops, and packet switching. Therefore, as required by section 10, we forbear from applying the section 271 access obligations to those broadband elements to the same extent that the Commission relieved those elements from unbundling under section 251(c)(3).

20. We apply our section 10 analysis in light of the Act's overall goals of promoting local competition and encouraging broadband deployment.[59] Indeed, the Commission previously has considered "the statutory language, the framework of the 1996 Act, its legislative history, and Congress' policy objectives," and concluded that the Act "directs us to use, among other authority, our forbearance authority under section 10(a) to encourage the deployment of advanced services."[60] The analysis below is informed by that congressional direction, and we believe that our conclusions are faithful to Congress's intent.

[57] 47 U.S.C. § 160(b).

[58] *OI&M Order*, 18 FCC Rcd at 23529-30, para. 6.

[59] Telecommunications Act of 1996, Pub. L. No. 104-04, purpose statement, 110 Stat. 56, 56 (1996) (1996 Act Preamble); Pub. L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157 (Section 706).

[60] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24047, para. 77 (1998) (*Advanced Services Order and NPRM*) (subsequent history omitted) (discussing the relationship between section 10 and section 706).

1. Just and Reasonable Charges and Practices

21. Section 10(a)(1) requires that we determine whether applying the independent section 271 unbundling obligation to the broadband elements of the BOCs is necessary to ensure that the "charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory."[61] Although in other forbearance orders, the Commission placed emphasis on the wholesale aspect of the 10(a)(1) prong,[62] we find that, under the particular circumstances relevant to the instant analysis, it is appropriate to consider the wholesale market in conjunction with competitive conditions in the downstream retail broadband market. Specifically, the developing nature of the broadband market at both the wholesale and retail levels, including the ongoing introduction of new services and deployment of new facilities, leads us to conclude that the contribution of section 271 unbundling requirements to ensuring just and reasonable charges and practices is relatively modest—particularly at the retail level—and outweighed by the greater competitive pressure that would be brought to bear on all providers if the section 271 unbundling requirements were lifted.[63] We are mindful of the disincentive effects of unbundling on BOC investment, and believe that the beneficial effect of unbundling is small given the particular characteristics of this retail market. Accordingly, our section 10(a)(1) analysis considers the effects of forbearance from section 271's broadband unbundling requirements on the BOCs' rates and practices, considering the overall state of competition in the developing broadband market and the investment disincentives associated with unbundling obligations. For the following reasons, we agree with the BOCs' petitions that their relative position in the emerging broadband market would not lead to unreasonable or discriminatory practices in the absence of a section 271 obligation to unbundle their broadband facilities.[64]

22. The broadband market is still an emerging and changing market, where, as the Commission previously has concluded, the preconditions for monopoly are not present.[65] In particular, actual and

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[61]47 U.S.C. § 160(a)(1).

[62]*See, e.g., Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Memorandum Opinion and Order, 17 FCC Rcd 27000, 27009-13, paras. 17-22 (2002).

[63]*Cf. Application of WorldCom, Inc., and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18065-68, paras. 67-71 (*WorldCom/MCI Order*) (finding loss of wholesale market of concern only to the extent that it had negative effects in the retail market).

[64]*See* Verizon Reply at 7-9; BellSouth Petition at 7; SBC Petition at 13-14; Qwest Petition at 15-16.

[65]*See, e.g., Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, 2423-24, para. 48 (1999) ("The preconditions for monopoly appear absent . . . . [W]e see the potential for this market to accommodate different technologies such as DSL, cable modems, utility fiber to the home, satellite and terrestrial radio."); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, Third Report, 17 FCC Rcd 2844, paras. 79-88 (2002) (*Section 706 Third Report*) (describing development of intermodal competition in broadband market); *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745, 22747-48, para. 5 (2001) ("[T]he one-wire world for customer access appears to no longer be the norm in broadband services markets as the result of the development of intermodal competition among multiple platforms, including DSL, cable modem service, satellite broadband service, and terrestrial and mobile wireless services."); *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket No. 92-297, Third Report and Order (continued....)

potential intermodal competition informs rational competitors' decisions concerning next-generation broadband technologies.[66] From the BOCs' perspective, cable providers play an especially significant role in the emerging broadband market. The Commission's most recent High Speed Services Report, as well as other data in the record of this proceeding, indicates that cable modem providers control a majority of all residential and small-business high-speed lines.[67] The record demonstrates that cable operators have had success in acquiring not only residential and small-business broadband customers, but increasingly large business customers as well.[68] Further, in the *Triennial Review Order*, the Commission observed that "[t]here appear to be a number of promising access technologies on the horizon and we expect intermodal platforms to become increasingly a substitute for . . . wireline broadband service."[69] The Commission recognized in the *Triennial Review Order* the "important broadband potential of other

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and Memorandum Opinion and Order, 15 FCC Rcd 11857, 11864, 11865, paras. 17, 19 (2000) (noting with approval "a continuing increase in consumer broadband choices within and among the various delivery technologies," which indicates that "no group of firms or technology will likely be able to dominate the provision of broadband services"); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 99-251, Memorandum Opinion and Order, 15 FCC Rcd 9816, 9867, para. 116 (2000) (finding that cable operators, despite having a commanding share of the broadband market, face "significant actual and potential competition from . . . alternative broadband providers").

[66]*See generally United States v. General Dynamics Corp*., 415 U.S. 486, 498 (1974) (market share is imperfect measure of competitive constraints and must be examined in light of access to alternative supplies); *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1134 (D.C. Cir. 2001) (stating, in discussing competition to cable systems, that "normally a company's ability to exercise market power depends not only on its share of the market, but also on the elasticities of supply and demand, which in turn are determined by the *availability* of competition"); *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3308, para. 68 (1995) ("market share alone is not necessarily a reliable measure of competition, particularly in markets with high supply and demand elasticities") (quoting *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Order, 6 FCC Rcd 5880, 5890, para. 51 (1991)).

[67]Industry Analysis and Technology Division, Wireline Competition Bureau,, *High-Speed Services for Internet Access: Status as of June 30, 2003* at Tables 3 & 4 (Dec. 2003) (*High-Speed Services Report Dec. 2003*); Verizon Mar. 26 *Ex Parte* Letter, Attach. at 1-8 (citing broadband market data through "the second half of 2003"); Letter from Dee May, Vice President – Federal Regulatory, Verizon to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-337, 01-338, 02-33, 02-52 at 9 (filed May 3, 2004) (Verizon May 3 *Ex Parte* Letter) (same).

[68]*See* Verizon Mar. 26 *Ex Parte* Letter at 24-25 & Attach. We note that AT&T argues that forbearance should not be granted because cable providers tend not to serve business customers, allowing the BOCs to retain monopoly power for those services. *See* Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, WC Docket Nos. 03-235, 03-260, at 1-5 (filed May 12, 2004) (AT&T May 12 *Ex Parte* Letter). In response, Verizon cites evidence that cable providers are currently serving some small business customers and are increasingly offering services to such customers. Letter from Dee May, Vice President – Federal Regulatory, Verizon to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 (filed May 17, 2004) (Verizon May 17 *Ex Parte* Letter). However, the availability of intermodal competition specifically from cable operators is only part of our analysis. Because competitive LECs can still obtain access to network elements under section 251 to serve business customers, and because of actual and potential intermodal competition from other services, we find that forbearance from section 271 is warranted, notwithstanding that the evidence regarding cable competition for business customers is not as powerful as residential customers. *See infra* para. 26. We therefore reject AT&T's argument.

[69]*Triennial Review Order*, 18 FCC Rcd at 17127, para. 246.

platforms and technologies, such as third generation wireless, satellite, and power lines."[70] Ku-band satellite service and fixed wireless service are available to provide high-speed Internet access across large parts of the country, and the Commission has a pending proceeding addressing broadband over power lines and has also created a task force on wireless broadband.[71] The record here likewise demonstrates the existence of numerous emerging broadband competitors.[72]

23. We also note that, in the *USTA II* decision, the D.C. Circuit upheld the Commission's findings in the *Triennial Review Order* that it was appropriate to relieve the BOCs from unbundling obligations on a national basis for the broadband elements at issue.[73] In affirming these findings, the court noted the presence of robust intermodal competition from cable operators and concluded that the Commission was correct to take into account the BOCs' lesser penetration of the broadband market when compared with cable broadband providers.[74] The D.C. Circuit further agreed with the Commission that the emerging nature of the broadband market, along with the availability of alternative loop facilities,[75] mitigated any potential harm from removing access to these facilities.[76]

24. Given the importance of competition in ensuring just, reasonable, and nondiscriminatory charges and practices for broadband services, we also weigh the value of the BOCs' own competitive role in the emerging broadband market as part of our overall section 10(a)(1) analysis.[77] As the Commission previously has found in the context of its section 10(a)(1) analysis, "competition is the most effective means of ensuring that . . . charges, practices, classifications, and regulations . . . are just and reasonable, and not unreasonably discriminatory."[78] The section 271 unbundled access obligations for broadband have the effect of discouraging BOC investment in this emerging market, diminishing their potential effectiveness as competitors today and in the future, to the detriment of the goals of section 10(a)(1). We

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[70] *Id.* at 17136, para. 263.

[71] *Section 706 Third Report*, 17 FCC Rcd at 2875, 2877, paras. 72, 78; *Carrier Current Systems, including Broadband Over Power Line Systems*, ET Docket Nos. 03-104, 04-37, Notice of Proposed Rulemaking, 19 FCC Rcd 3335 (2004); *FCC Chairman Michael K. Powell Announces Formation of Wireless Broadband Access Task Force* (rel. May 5, 2004), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-246852A1.pdf.

[72] *See, e.g.*, Verizon Mar. 26 *Ex Parte* Letter, Attach. (describing existing and potential competition from cable modem providers, power lines, fixed wireless, 3G mobile wireless, and satellite).

[73] *See USTA II*, 359 F.3d at 578-85.

[74] *Id.* at 582.

[75] In the *Triennial Review Order*, the Commission found that competitive LECs could deploy FTTH loops, had widely deployed their own packet switches, and continued to have access to other elements of the incumbent LECs' network. *Triennial Review Order*, 18 FCC Rcd at 17143, 17151, 17321-22, paras. 275, 291, 538.

[76] *USTA II*, 359 F.3d at 581-82.

[77] In addition, the investment disincentives associated with broadband unbundling obligations also are a factor in our more general analysis of consumer protection, as discussed below. *See infra* para. 32.

[78] *Petition of U S WEST Communications Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, CC Docket No. 97-172, *Petition of U S WEST Communications, Inc., for Forbearance*, CC Docket No. 97-172, *The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, CC Docket No. 92-105, Memorandum Opinion and Order, 14 FCC Rcd 16252, 16270, para. 31 (1999).

recognized when we relieved the incumbent LECs from unbundling obligations under section 251(c) that the elements used to provide access to next-generation networks are more recently developed technologies, and generally represent upgrades to incumbent LECs' loop plant.[79] Indeed, by granting relief from the similar broadband unbundling obligations of section 251, the Commission's intention was to encourage the deployment of new fiber technologies by incumbent LECs and their competitors alike, and increase the broadband services being offered to consumers in the near future.[80]

25. We conclude that investment disincentives also arise from section 271 unbundled access requirements. Those disincentives are attributable to not only the prospect that regulated unbundling will diminish the compensation BOCs receive from users of their broadband facilities, but also the costs of constructing BOC broadband facilities in a fashion that will allow the BOC to satisfy whatever access requirements might foreseeably be imposed under section 271, as well as the significant costs that can be associated with regulatory proceedings themselves.[81] In light of the competitive benefit of the BOCs' continued investment in fiber-based broadband facilities, the disincentives associated with regulated broadband unbundling under section 271 support our decision to grant forbearance from those requirements. We conclude that removing those disincentives will promote just and reasonable charges and practices through the operation of market forces.

26. With regard to the potential impact of forbearance specifically on the wholesale broadband market, as raised by certain competitive LEC commenters,[82] the evidence currently before us, taken as a whole, leads us to conclude that competition from multiple sources and technologies in the retail broadband market, most notably from cable modem broadband providers, will pressure the BOCs to utilize wholesale customers to grow their share of the broadband markets and thus the BOCs will offer such customers reasonable rates and terms in order to retain their business. Verizon plausibly claims that because the BOCs face intense intermodal competition, even in the absence of section 271 unbundling they will need to find ways to keep traffic "on-net," which we conclude would likely include the provision of wholesale offerings.[83] Although we acknowledge that the question is not entirely susceptible to resolution with evidentiary proof, and a degree of informed prediction is required, we conclude in light of the evidence before us that even if the BOCs were not required to provide competitors unbundled access to the broadband elements at issue under section 271, competitive LECs would still be able to access other network elements to compete in the broadband market or take

[79] *Triennial Review Order*, 18 FCC Rcd at 17126, para. 243.

[80] *Id.* at 17141, para. 272.

[81] *See Id.* at 17127, 17145, 17153, paras. 244, 278, 295. We note that, even if we were not correct about the disincentive effects of unbundling requirements under section 271, that would not necessarily suggest that forbearance is inappropriate under section 10(a). If section 271 did not discourage investment, the most obvious reason would be that competitive forces impose equivalent (or more severe) constraints on BOC pricing and offerings. In that situation, application of the section 10(a) criteria likely would lead to the same conclusion that forbearance is required.

[82] *See, e.g.,* Sprint Comments at 14 (Verizon Petition); AT&T Comments at 21 (Verizon Petition); Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, WC Docket Nos. 03-235, 03-260, at 9 (filed Mar. 3, 2004) (AT&T Mar. 3 *Ex Parte* Letter).

[83] Verizon March 26 *Ex Parte* Letter at 15.

advantage of the opportunities presented by the developing market situation to build their own facilities or obtain access to facilities from other suppliers.[84]

27. We also note that, where section 271 unbundling obligations discourage the BOCs from building next generation networks in the first place, competitive LECs derive no access benefit from those obligations. Competitive LECs cannot provide broadband services using a BOC network that is unable to support broadband services. Moreover, as discussed above, we take into account the effect that terminating wholesale access under section 271 would have on retail customers.[85] Given our analysis of the characteristics of the retail broadband market, coupled with the potential for section 271 unbundling obligations to deter the BOCs from becoming more vibrant broadband competitors (and thereby spurring other providers as well), we find that the requirements of section 10(a)(1) are satisfied here.[86]

28. We reject the arguments of competitive LECs that a fully competitive wholesale market is a mandatory precursor to a finding that section 10(a)(1) is satisfied, regardless of the state of intermodal competition in the retail market and the effects on incumbent LEC investments.[87] Forbearance need not await the development of a fully competitive market when the section 10 criteria are otherwise satisfied.[88] Furthermore, the competitive LECs' reading of section 10 conflicts with the D.C. Circuit's

[84]We note that our judgment here is based on our determination that because the broadband market is a developing market, we should not presume, nor do we have any evidence, that the BOCs will act in an unreasonable or unreasonably discriminatory manner without evidence of such actions. To the extent our predictions about the broadband market and the BOCs' actions are incorrect, carriers can file appropriate petitions with the Commission and, of course, the Commission has the option of reconsidering this forbearance ruling. *See CellNet Communications, Inc. v. FCC*, 149 F.3d 429, 442 (6th Cir. 1998); *see also Petition of SBC Communications Inc. For Forbearance From Structural Separation Requirements of Section 272 of the Communications Act of 1934, As Amended, and Request For Relief to Provide International Directory Assistance Services*, CC Docket No. 97-172, Memorandum Opinion and Order, 19 FCC Rcd 5211, 5223-24, para. 19 n.66 (2004) (*International Directory Assistance Order*). For these reasons and the reasons given in the text, we reject the premise of AT&T's argument that granting the forbearance authority at issue here involves an impermissible "'trade off' between short-term consumer harms and longer-term policy benefits." AT&T May 12, 2004 *Ex Parte* at 2. We conclude, instead, that market forces and regulatory safeguards will adequately protect against the short-term consumer harms AT&T hypothesizes in the absence of section 271 unbundling requirements for certain broadband elements.

[85]*See WorldCom/MCI Order*, 13 FCC Rcd at 18065, para. 68.

[86]This situation has parallels to the one the Commission recently addressed in the *International Directory Assistance Order,* in which the Commission concluded that because the BOCs would be new entrants into the international directory assistance market, and would face competition from interexchange carriers, they would be unable to impose unjust, unreasonable, or unjustly or unreasonably discriminatory charges or practices on other carriers. *See International Directory Assistance Order*, 19 FCC Rcd at 5221-23, paras. 15-19.

[87]For instance AT&T argues that because the BOCs allegedly have monopolistic power in the broadband markets, forbearance from the access obligations of section 271 would permit them to either charge supracompetitive prices for wholesale access to their broadband facilities, or deny access altogether. *See, e.g.,* AT&T Mar. 3 *Ex Parte* Letter; Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, WC Docket Nos. 03-235, 03-260, at 1-5 (filed Apr. 15, 2004) (AT&T Apr. 15 *Ex Parte* Letter).

[88]*See Implementation of Sections 3(N) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1467-68, 1470-72, paras. 138, 146-54 (1994) (concluding that market need not be "fully competitive" to permit forbearance under section 332(c)(1)(A) and describing constraints on anti-competitive practices by duopoly providers).

USTA II decision which held, in the section 251 context, that "the Commission cannot ignore intermodal alternatives" when evaluating wholesale unbundling obligations.[89] The D.C. Circuit likewise required a "confrontation of the issue [of investment disincentives] and some effort to make reasonable trade-offs" when considering unbundling pursuant to section 251.[90] We disagree with commenters who argue that the Commission is precluded under our forbearance authority from considering factors relating to unbundling policy pursuant to section 271 that we are required to consider pursuant to section 251. If section 10(a)(1) were read as the competitive LECs propose, no amount of intermodal retail competition or investment disincentives could ever warrant forbearance if there was not also a fully competitive wholesale market that would continue in the absence of unbundling.

29. Finally, and consistent with the foregoing analysis, we specifically reject the assertions of competitive carriers that forbearance should be denied because the BOCs either are not subject to competition with respect to their broadband offerings, or are constrained only by a duopolistic relationship with cable operators.[91] Again, we refuse to take the static view suggested by some competitors of this dynamic broadband market, thus leveling the terms of competition, providing real competitive choice, and furthering the goal of ensuring just, reasonable and nondiscriminatory rates, terms and conditions for these services. As explained above, broadband technologies are developing and we expect intermodal competition to become increasingly robust, including providers using platforms such as satellite, power lines and fixed and mobile wireless in addition to the cable providers and BOCs. We expect forbearance from section 271 unbundling will encourage the BOCs to become full competitors in this emerging industry and at the same time substantially enhance the competitive forces that will prevent the BOCs from engaging in unjust and unreasonable practices at any level of the broadband market.

2. Protection of Consumers

30. Section 10(a)(2) of the forbearance analysis requires us to determine whether the independent section 271 access obligation for broadband elements is necessary to protect consumers.[92] For reasons similar to those that persuade us that the independent section 271 unbundling obligation for the broadband elements is not necessary within the meaning of section 10(a)(1), we also determine that the obligation is not necessary for the protection of consumers. As we concluded above, the BOCs have limited competitive advantages with regard to the broadband elements, given their position with respect to cable modem providers and others in the emerging broadband market. BOCs are not even the largest

[89] *USTA II*, 359 F.3d at 572-73.

[90] *USTA v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002) (*USTA I*).

[91] *See* AT&T Mar. 3 *Ex Parte* Letter at 11-12; *see also* CLEC Coalition Comments at 6-7 (Verizon Petition). AT&T also incorrectly focuses on the existence of competition with respect to particular facilities, such as hybrid loops. AT&T Mar. 3 *Ex Parte* Letter at 9. We need not evaluate competition separately with respect to each type of facility in the BOCs' networks that can be used to offer broadband services when, as discussed above, there is both existing and potential competition in the emerging broadband market from a wide range of facilities and platforms (including incumbent LEC facilities that must be unbundled under section 251).

[92] 47 U.S.C.§ 160(a)(2).

provider of broadband services to consumers—many more consumers receive broadband through cable modem services.[93]

31. Therefore, as discussed above, we believe that forbearance from these requirements will provide an increased incentive for the BOCs to deploy broadband services and compete with cable providers, which will in turn increase competition and benefit consumers.[94] As the Commission stated in the *Triennial Review Order*, relieving the incumbent LECs from the section 251 unbundling requirements for broadband elements will benefit consumers "from this race to build next generation networks and the increased competition in the delivery of broadband services."[95] The *USTA II* decision recently upheld the Commission's approach, finding that the Commission lawfully may focus on future consumer benefits anticipated by its current policy decisions.[96] We believe that forbearance from the section 271 independent unbundling obligations for the broadband elements is consistent with these findings and will further this result.

32. Accordingly, we reject the arguments of competitive LECs that the section 271 independent access obligation is necessary under section 10(a)(2) to ensure that competitive LECs will also have the ability to provide broadband services, thereby offering consumers additional choices.[97] We believe this argument is faulty because in this context forbearance provides competitive carriers as well as BOCs with increased incentives to invest in the broadband market. As we concluded in the *Triennial Review Order*, removing unbundling obligations for broadband services will result in increased choices for consumers in two ways. First, once incumbent LECs are certain that their broadband networks will be free from unbundling requirements, we expect that they will expand their deployment of these networks, and provide increased choices to consumers.[98] Second, we expect that competitive LECs will seek "innovative network access options" to continue to provide broadband services to consumers and to compete with the incumbent LECs.[99]

3. Public Interest

33. With respect to the third criterion for forbearance, we conclude that relieving the BOCs from the section 271(c) access obligation for the broadband elements is in the public interest. Section 10(b) directs the Commission to consider whether forbearance "will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services," and states that such a determination may be the basis for finding that forbearance is in the public interest and thus meets section 10(c).[100] As we concluded above, given that

[93] *High Speed Services Report Dec. 2003* at Table 2.

[94] *See* Verizon Petition at 7-10; SBC Petition at 8-10; Qwest Petition at 10-11.

[95] *Triennial Review Order*, 18 FCC Rcd at 17141-42, para. 272.

[96] *USTA II*, 359 F.3d at 581.

[97] *See, e.g.*, AT&T Comments at 23-25 (Verizon Petition); Sprint Comments at 15-17 (Verizon Petition).

[98] *Triennial Review Order*, 18 FCC Rcd at 17141-42, para. 272.

[99] *Id.*

[100] 47 U.S.C. § 160(b).

these broadband elements generally involve new network investment on the BOCs' part, and that the BOCs are subject to significant intermodal competition in providing broadband services, relieving the BOCs of unbundling obligations will encourage BOCs to further invest in, and deploy broadband technologies. In turn, we believe these investments will promote increased competition in the market for broadband services.

34. Our analysis of the public interest is informed by section 706 of the 1996 Act, which – as noted above – directs us to promote the timely and comprehensive deployment of broadband facilities. Moreover, we take note of the BOCs' arguments that the unbundling obligation of section 271 imposes a costly requirement of designing the broadband network to create access points for the various components.[101] The Commission intended that its determinations in the *Triennial Review* proceeding would relieve incumbent LECs of such substantial costs and obligations, and encourage them to invest in next-generation technologies and provide broadband services to consumers. We see no reason why our analysis should be different when the unbundling obligation is imposed on the BOCs under section 271 rather than section 251(c) of the Act.[102]

35. In making these determinations, we reject the arguments of certain competitive carriers that section 271(d)(4), which provides that "[t]he Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B) of this section," precludes the relief the BOCs seek here.[103] Such a reading is inconsistent with the plain terms of the statute. As an initial matter, as we have found above, the competitive checklist of section 271 is "fully implemented" when a BOC receives authorization to provide interLATA service under section 271. Subsequent forbearance from the checklist cannot thus be considered to "limit or extend" its terms: the Commission applied the checklist when it completed its section 271 inquiry and may then exercise forbearance, consistent with its obligations under section 10. Indeed, the opposite reading would place entirely too much weight on section 271(d)(4), to the detriment of the clear statutory directive in section 10. Forbearance neither limits nor extends the terms of any statutory provision. Rather, the decision to forbear represents the conclusion that under the statute, we are prohibited from applying a particular provision at all to specific telecommunications carriers or services. Granting forbearance in this circumstance, therefore, would not alter the terms used in the checklist, but instead suspend their ongoing enforcement in a discrete set of circumstances. Had Congress intended the prohibition on "limit[ing] or extend[ing]" the checklist to bar forbearance as well, it would have addressed that specific statutory procedure in section 271(d)(4).[104]

[101] *See, e.g.,* Verizon Petition at 9-10.

[102] We disagree with MCI's argument that Verizon's offering competitive carriers access to transmission services as part of its Packet at the Remote Terminal Services (PARTS) proves that the unbundling difficulties that Verizon and the other BOCs present do not exist. MCI Comments at 13-14 (Verizon Petition). As Verizon explained in its reply comments, the PARTS service was designed to provide competitive LECs access to xDSL service over hybrid facilities and does not contemplate unbundling of full fiber networks. Verizon Reply at 13.

[103] *See, e.g.*, AT&T Comments at 8 (Verizon Petition); Sprint Comments at 6-7 (Verizon Petition).

[104] *See, e.g., Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452 (2002) ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotations and citations omitted).

36. The BOCs have therefore satisfied section 10(a)'s three-pronged test with regard to section 271(c)(2)(B)'s independent access obligations for the particular broadband elements at issue in this decision. Accordingly, we forbear from enforcing those requirements.

IV. CONCLUSION

37. Based on the foregoing discussion, we conclude that section 271(c)(1)(B) has been fully implemented for all of the BOCs in all of the states in which they are providing service. Moreover, we find that section 10(a)'s three-pronged test for forbearance has been met with respect to section 271(c)(1)(B)'s independent access obligation for FTTH loops, FTTC loops, the packetized functionality of hybrid loops, and packet switching for all of the affected BOCs to the extent such broadband elements were relieved of unbundling on a national basis under section 251(c). Accordingly, we grant Verizon's and BellSouth's petitions for forbearance, and we grant in part the SBC and Qwest petitions.

V. EFFECTIVE DATE

38. Consistent with section 10 of the Act and our rules, the Commission's forbearance decision shall be effective on Friday, October 22, 2004.[105] The time for appeal shall run from the release date of this order.[106]

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[105] *See* 47 U.S.C. § 160(c) (deeming the petition granted as of the forbearance deadline if the Commission does not deny the petition within the time period specified in the statute), and 47 C.F.R. § 1.103(a).

[106] *See* 47 C.F.R. §§ 1.4 and 1.13.

VI. ORDERING CLAUSES

39. Accordingly, IT IS ORDERED that, pursuant to section 160 of the Communications Act of 1934, as amended, 47 U.S.C. § 160(d), Verizon Telephone Companies' Revised Petition for Forbearance IS GRANTED.

40. IT IS FURTHER ORDERED that, pursuant to section 160 of the Communications Act of 1934, as amended, 47 U.S.C. § 160(d), SBC Communications Inc.'s Petition for Forbearance IS GRANTED to the extent described herein.

41. IT IS FURTHER ORDERED that, pursuant to section 160 of the Communications Act of 1934, as amended, 47 U.S.C. § 160(d), Qwest Communications International Inc.'s Petition for Forbearance IS GRANTED to the extent described herein.

42. IT IS FURTHER ORDERED that, pursuant to section 160 of the Communications Act of 1934, as amended, 47 U.S.C. § 160(d), BellSouth's Petition for Forbearance IS GRANTED.

43. IT IS FURTHER ORDERED that, pursuant to section 10 of the Communications Act of 1934, 47 U.S.C. 160, and section 1.103(a), that the Commission's forbearance decision SHALL BE EFFECTIVE on October 22, 2004. Pursuant to sections 1.4 and 1.13 of the Commission's rules, 47 C.F.R. 1.4 and 1.13, the time for appeal shall run from the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

STATEMENT OF
CHAIRMAN MICHAEL K. POWELL

Re: Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c), Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), WC Docket Nos. 01-338, 03-235, 03-260, 04-48

In my separate statement to the *Triennial Review Order* and in countless other statements during my seven years at the Commission, I have emphasized that "[b]roadband deployment is the most central communications policy objective of our day." Today, we take another important step forward to realize this objective.

By removing 271 unbundling obligations for fiber-based technologies - and not copper based technologies such as line sharing - today's decision holds great promise for consumers, the telecommunications sector and the American economy. The item eliminates barriers to companies that provide customers with an assortment of new services and applications including interactive educational content, improved telecommuting, life saving telemedicine applications, real-time two-way sign language conversations with people with disabilities, and enhanced video-on-demand services in competition with cable operators.

This Commission has a comprehensive approach to bringing faster broadband connections to consumers. Many have complained that the United States ranks 11th in the world. Today's action represents an effort to close that gap. The networks we are considering in this item offer speeds of up to 100 Mbs and exist largely where no provider has undertaken the expense and risk of pulling fiber all the way to a home. And companies are responding to the Commission's efforts to create a stable regulatory environment for new investment. For example, just this week Verizon announced its plans to double its fiber-to-the-premises (FTTP) deployment rate next year, bringing FTTP to 2 million additional locations. This represents a 566 percent increase over the number of existing FTTP subscribers. SBC has committed to serve 300,000 households with a FTTH network while BellSouth has deployed a deep fiber network to approximately 1 million homes. Other carriers are taking similar actions. And there are important ancillary benefits to this activity. It is estimated that Verizon's efforts will generate between 3,000 and 5,000 new jobs. These are positive developments for consumers and our nation's economy. All of these facts demonstrate that the Commission has a clear plan that has generated clear results.

My mission is to continue to stimulate investment in next generation architectures, apply a light hand and let entrepreneurs bring the future to the people. This item demonstrates that we are one step further along.

STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c), Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), WC Docket Nos. 01-338, 03-235, 03-260, 04-48

In the Triennial Review Order and subsequent reconsideration orders, the Commission took the bold step of fencing off next-generation broadband facilities from unbundling obligations. This forbearance decision is an important component of that deregulatory policy, and it will help deliver the promise of broadband networks and IP-enabled services to Americans throughout all parts of the country.

The Commission declined to subject broadband facilities to unbundling obligations under section 251 to encourage greater investment in deep-fiber networks — investment that is massive in scope and carries no assurance of profit. While curtailing unbundling requirements undeniably creates challenges for wireline competitors, the Commission was rightly concerned that new broadband investment would be severely chilled if incumbents were required to share the fruits of their labors on terms and conditions set by regulators. Moreover, in a broadband marketplace where cable operators enjoy a significant lead over wireline incumbents, it is difficult to justify saddling the less-dominant platform — but not the market leader — with unbundling obligations.

Forbearance from unbundling obligations imposed under section 271 is necessary to ensure that the Commission's broadband relief has its intended effect. The Commission has determined that the costs of unbundling outweigh its benefits in the broadband context, and that determination warrants relief from unbundling irrespective of which statutory provision it arises under. While access obligations under section 271 have been argued to be less burdensome than those imposed under section 251 (because the TELRIC standard is inapplicable under section 271), unbundling in all events "spread[s] the disincentive to invest in innovation and create[s] complex issues of managing shared facilities." *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002).

Notably, the Commission retains regulatory authority to ensure that consumers will be protected if robust broadband competition fails to live up to its potential. I do not expect such an outcome, but the Commission stands ready to act if a market failure occurs. In addition, this grant of forbearance is without prejudice to our ongoing proceeding regarding the *Computer Inquiry* nondiscrimination provisions, so the Commission will have a full opportunity to determine the extent to which those separate requirements remain necessary.

DISSENTING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re: *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c), Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c),* Memorandum Opinion and Order (WC Docket Nos. 01-338, 03-235, 03-260 & 04-48)

The mismatch between the Commission's broadband rhetoric and reality reaches new heights with today's decision. The reality is that the International Telecommunications Union reports that the United States is now ***thirteenth*** in the world in broadband penetration. This is a fall even from our sobering perch at eleven that the Commission reported just a few months ago. It's an ominous trend when we recall that just two-and-a-half years ago the Commission reported that the United States ranked number four in the world in broadband penetration.

While the country experiences broadband freefall, the Commission has embarked on a policy of closing off competitive access to last mile bottleneck facilities. In the *Triennial Review*, the majority restricted access to fiber-to-the-home loops. Last summer, the majority extended this exemption from competition to facilities serving "primarily residential" buildings, an action that clouded the line between mass market and small business customers. The result: millions of small businesses located in buildings where there are also residential units are shut off from the benefits of having competitive broadband options. Last week brought another onslaught when the majority insulated fiber-to-the-curb architectures from competition. This action further restricted broadband choice for residential consumers and further tightened the noose on small businesses seeking competitive broadband services.

Today, the majority pounds another nail into the coffin it is building for competition. In all prior decisions, the majority used Section 251 to restrict access to last mile facilities. But to ensure at least the possibility of access and the possibility of competition—even though it might be at higher prices—the Commission unanimously required continued access to these facilities under the less stringent requirements of Section 271. In *USTA II*, the D.C. Circuit upheld this approach. But in today's decision, the majority casts aside the court's holding and moves on to slash even the residual bare requirements of Section 271 access. As a result, there is now absolutely no obligation to provide competitive access to any broadband facilities—from fiber-to-the-home to fiber-to-the curb to packetized functions of hybrid loops to packetized switching capabilities—at just and reasonable rates. The majority accomplishes this final feat using the Commission's Section 10 forbearance authority to shut off any obligation to provide fair access to last mile bottleneck facilities. In doing so, they replace their will for that of Congress, finding that competition is not required for just and reasonable charges or for the protection of consumers. They conclude that the public interest is served by retreating to a policy of non-competition and last mile monopoly control. I cannot support such conclusions nor the underlying analysis.

The majority attempts to assure us that today's action is part of an effort to promote local competition. They contend that in the broadband market preconditions for dominance are not present because promising technologies are flooding the marketplace. But broad rhetoric about the power of competition does not make it happen. And choosing to ignore the Commission's own data does not help the weak analytical structure on which this decision is built.

The facts are clear. This Commission's most recent report on high-speed services shows that the residential and small business market is a duopoly. Our data show that new satellite and wireless technologies—exciting though they are—together serve only 1.3 percent of this market. Broadband over powerline does not yet even register. Yet the majority chooses to ignore the Commission's statistics, preferring instead sweeping rhetoric about regulatory relief and broadband competition.

One problem here is that the majority gets so carried away with its vision of the country's telecom future that they act like it is already here, that competition is everywhere flourishing, and that intermodal competition is already ubiquitous reality. But their cheerful blindness to stubborn market reality actually pushes farther into the future the kind of competitive telecom world they say they want.

The lack of analysis in this proceeding—and in the Commission's approach to broadband generally—amounts to a regulatory policy of crossing our fingers and hoping competition will somehow magically burst forth. With the international economy increasingly dependent on broadband facilities, faith-based approaches to advanced telecommunications are insufficient. We cannot afford to wait. As *Business Week* recently made clear: "If the U.S. is not to lose out in the global race of the next-generation Internet and the new businesses it can spawn, change is needed. The country must create vigorous competition to drive the low prices and high speeds that can usher in a prosperous broadband economy." I agree. There may not be a "one-sized-fits-all" competition policy out there, but if we want to enter the brave new world of broadband, we need to move away from our current course. The facts show we are headed in the wrong direction at warp speed. I dissent.

STATEMENT OF
COMMISSIONER KEVIN J. MARTIN

Re: Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. Sec. 160(c); SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. Sec. 160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. Sec. 160(c); BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. Sec. 160(c)

For the past year, I have called on the Commission to take quick action to clarify that the section 271 rules do not trump the regulatory relief we provided in our recent broadband decisions. I am pleased that today's action continues the commitment not to saddle next-generation broadband networks and facilities with unbundling obligations established for legacy networks. This decision should encourage the rapid deployment of new investment in the high-speed broadband networks and facilities that will provide American consumers with more 21st century advanced services.

I join my colleagues in support of today's decision to forbear from enforcing the requirements of section 271, with regard to all the broadband elements that the Commission, on a national basis, relieved from unbundling in the *Triennial Review Order* and subsequent broadband decisions. The elements are fiber-to-the-home loops, fiber-to-the-curb loops, the packetized functionality of hybrid loops, packet switching, and line-sharing.

While the Commission did not specifically address line sharing in today's decision, the Bell Operating Companies had included a request in their petitions that we forbear from enforcing the requirements of section 271 with respect to line sharing.[1] Since line-sharing was included in their request for broadband relief and we affirmatively grant their request, I believe today's order also forbears from any section 271 obligation with respect to line-sharing. Regardless of whether it was affirmatively granted, because the Commission's decision fails to deny the requested forbearance relief with respect to line sharing, it is therefore deemed granted by default under the statute.

[1] *See, e.g., Verizon Petition for Forbearance*, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Dkt No. 01-338.

STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN CONCURRING IN PART, DISSENTING IN PART

Re Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c), Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), CC Docket No. 01-338, WC Docket Nos. 03-235, 03-260, 04-48

I concur in part and dissent in part to this decision to relieve the Bell Operating Companies from the unbundling requirements of Section 271 for high-speed fiber loops capable of delivering advanced data, video and voice service to the mass market. I am disappointed, however, that this expert agency fails to back up many of the assertions in this item with hard data and in-depth analysis. With the U.S. ranked 13th in the world in broadband penetration, this Order should be based on a careful, comprehensive and independent analysis of the broadband marketplace. Unfortunately, this Order makes bold predictions about broadband competition but fails to apply the careful and thorough analysis requisite to our delicate forbearance authority.

Particularly with respect to the capital-intensive investments required to deploy new fiber networks to customers' premises, I have taken the view that we should carefully balance the costs and benefits of unbundling, a view affirmed recently by the D.C. Circuit Court of Appeals.[1] In past Orders, that approach has led me to support measured unbundling relief for broadband investment in so-called "greenfield areas," where there is no existing loop plant and competitors and incumbents stand on equal footing.

For similar reasons, I again support the lifting of unbundling requirements for greenfield deployments of fiber-to-the-home facilities used to serve mass market customers.[2] In reaching this decision, I acknowledge the extraordinary investment required to bring high-speed fiber to mass market customers' premises and the consumer benefits that will result, including the potential for new competition in the video marketplace. Given these benefits, granting providers additional incentives to build these next generation networks through targeted unbundling relief is warranted.

I can only concur in my support, however, because I believe that this Order falls far short in providing the careful market analysis required under the statute and Commission precedent.[3] Under current case law, we must presume that the petitioners exercise market power in their provision of

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[1] *See United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

[2] In past Orders, I have supported relief for the deployment of functionally equivalent facilities, such as fiber to the curb and fiber to multi-dwelling units, to serve mass market customers in greenfield areas. My support for the unbundling relief in this Order extends similarly to these investments.

[3] *See* 47 U.S.C. § 160 (enumerating forbearance criteria and directing the Commission to consider "competitive market conditions"); *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket 01-337, FCC 01-360 (2001) (describing the Commission's approach to market definition and market power analysis).

advanced services, in the absence of a finding of non-dominance.[4] In previous Orders, the Commission has carefully considered the ability of such carriers to use market power to affect the reasonableness of rates for consumers. Yet, the Commission makes little serious attempt in this Order to evaluate specific product or geographic markets, the competitive market conditions in all areas of the country, or the petitioners' abilities to exercise market power for broadband services. In my view, the Commission should have conducted the requisite market analysis first.[5] The Commission could have then lifted unbundling requirements in markets in which we determined the carrier does not exercise market power. This sort of careful review would help allay concern about the impact of Section 10 forbearance on the ability of State commissions to ensure just and reasonable wholesale rates where competitive alternatives are lacking.

A decision based on the statutory forbearance criteria requires us to make reasoned judgments to ensure the protection of consumers and competition consistent with the public interest. This undertaking requires a comprehensive and rigorous review to ensure that we do not inadvertently harm the very communities and burgeoning competition that we are trying to protect. Despite the Order's lack of in-depth market analysis, I must nonetheless make a determination on the petitioners' forbearance requests based on the best information available. My support for measured unbundling relief here recognizes that the petitioners currently have less market share than the leading provider in the rapidly developing, but still emerging, market for mass market broadband services, albeit on a national basis. Should we find in the future that circumstances are changed, the Commission's approach here may well need to change.

My support for targeted relief here does not signal that the Commission need not remain vigilant about the evolution of this marketplace to ensure that consumers continue to gain the benefits of lower prices and increased bandwidth offerings. Similarly, the Commission should move to address distinctions between the mass market and the enterprise market, given the importance of competitive choice to small businesses throughout the nation.

I note that my support for this Order does not speak to the different context of access to networks provided to information service providers under our rules. Any reconsideration of those rules, which have served to ensure the open character of the Internet, may involve a very different set of considerations than those faced here.

For these reasons, I concur in part and dissent in part.

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[4] *See Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Memorandum Opinion and Order, FCC 02-340, CC Docket 01-337 (2002) (*Advanced Services Forbearance Order*).

[5] I note that the Commission opened an as-yet-uncompleted proceeding to conduct precisely this sort of market analysis almost three years ago. *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket 01-337, FCC 01-360 (2001).

Exhibit B

Statement of Michael K. Powell, *Re: Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c), Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket Nos. 01-338, 03-235, -3-260, 04-48, released October 27, 2004

SEPARATE STATEMENT OF
CHAIRMAN MICHAEL K. POWELL

Re: Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c), Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), WC Docket Nos. 01-338, 03-235, 03-260, 04-48 (adopted Oct. 22, 2004).

In my separate statement to the *Triennial Review Order* and in countless other statements during my seven years at the Commission, I have emphasized that "[b]roadband deployment is the most central communications policy objective of our day." Today, we take another important step forward to realize this objective.

By removing 271 unbundling obligations for fiber-based technologies - and not copper based technologies such as line sharing - today's decision holds great promise for consumers, the telecommunications sector and the American economy. The item eliminates barriers to companies that provide customers with an assortment of new services and applications including interactive educational content, improved telecommuting, life saving telemedicine applications, real-time two-way sign language conversations with people with disabilities, and enhanced video-on-demand services in competition with cable operators.

This Commission has a comprehensive approach to bringing faster broadband connections to consumers. Many have complained that the United States ranks 11th in the world. Today's action represents an effort to close that gap. The networks we are considering in this item offer speeds of up to 100 Mbs and exist largely where no provider has undertaken the expense and risk of pulling fiber all the way to a home. And companies are responding to the Commission's efforts to create a stable regulatory environment for new investment. For example, just this week Verizon announced its plans to double its fiber-to-the-premises (FTTP) deployment rate next year, bringing FTTP to 2 million additional locations. This represents a 566 percent increase over the number of existing FTTP subscribers. SBC has committed to serve 300,000 households with a FTTH network while BellSouth has deployed a deep fiber network to approximately 1 million homes. Other carriers are taking similar actions. And there are important ancillary benefits to this activity. It is estimated that Verizon's efforts will generate between 3,000 and 5,000 new jobs. These are positive developments for consumers and our nation's economy. All of these facts demonstrate that the Commission has a clear plan that has generated clear results.

My mission is to continue to stimulate investment in next generation architectures, apply a light hand and let entrepreneurs bring the future to the people. This item demonstrates that we are one step further along.

Exhibit C

Statement of Commissioner Kevin J. Martin, *Re: Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c), Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket Nos. 01-338, 03-235, -3-260, 04-48, released October 27, 2004

STATEMENT OF COMMISSIONER KEVIN J. MARTIN

Re: Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. Sec. 160 (c); SBC Communications Inc.'s; SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. Sec. 160 (c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. Sec. 160(c); BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. Sec. 160(c).

For the past year, I have called on the Commission to take quick action to clarify that the section 271 rules do not trump the regulatory relief we provided in our recent broadband decisions. I am pleased that today's action continues the commitment not to saddle next-generation broadband networks and facilities with unbundling obligations established for legacy networks. This decision should encourage the rapid deployment of new investment in the high-speed broadband networks and facilities that will provide American consumers with more 21st century advanced services.

I join my colleagues in support of today's decision to forbear from enforcing the requirements of section 271, with regard to all the broadband elements that the Commission, on a national basis, relieved from unbundling in the *Triennial Review Order* and subsequent broadband decisions. These elements are fiber-to-the home loops, fiber-to-the-curb loops, the packetized functionality of hybrid loops, packet switching, and line-sharing.

While the Commission did not specifically address line sharing in today's decision, the Bell Operating Companies had included a request in their petitions that we forbear from enforcing the requirements of section 271 with respect to line sharing.[1] Since line-sharing was included in their request for broadband relief and we affirmatively grant their request, I believe today's order also forbears from any Section 271 obligation with respect to line-sharing. Regardless of whether it was affirmatively granted, because the Commission's decision fails to deny the requested forbearance relief with respect to line sharing, it is therefore deemed granted by default under the statute.

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[1] See, e.g., *Verizon Petition for Forbearance*, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Dkt No. 01-338.

Exhibit D

Letter from Susanne A. Guyer, Senior Vice President, Federal Regulatory Affairs, Verizon, to Michael Powell, Chairman, and Kathleen Abernathy, Kevin Martin, Michael Copps and Jonathan Adelstein, Commissioners, FCC, CC Docket No. 01-338, filed October 24, 2003

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October 24, 2003

Ex Parte

Chairman Michael Powell
Commissioner Kathleen Abernathy
Commissioner Kevin Martin
Commissioner Michael Copps
Commissioner Jonathan Adelstein
Federal Communications Commission
445 12th Street, SW
Washington, DC 20544

Re: *Verizon Petition for Forbearance, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Dkt No. 01-338

Dear Chairman Powell and Commissioners:

Verizon's petition for forbearance from any separate unbundling obligation that section 271 may be read to impose for elements that do not have to be unbundled under section 251 is critical to Verizon's design, deployment and efficient operation of next generation broadband networks.

The need for forbearance *now* with respect to broadband elements is especially crucial because Verizon is today designing, testing and planning the next-generation broadband networks that will be deployed beginning in early 2004. Indeed, although Verizon's petition originally requested forbearance with respect to *all* elements that do not have to be unbundled under section 251, the broadband issue is sufficiently urgent that we hereby withdraw our request for forbearance with respect to any narrowband elements that do not have to be unbundled under section 251.

Specifically, the portion of the forbearance petition that remains pending relates to the broadband elements that the Commission has found do not have to be unbundled under section 251, including fiber-to-the-premises loops, the packet-switched features, functions and capabilities of hybrid loops, and packet switching.

We trust that narrowing and simplifying the range of issues so that the Commission can focus on the issues uniquely affecting broadband will facilitate prompt approval of the forbearance request with respect to broadband elements. Indeed, the Commission already made the findings in the *Triennial Review Order* that warrant forbearance with respect to any residual obligations that section 271 may be read to impose for broadband.

In its *Triennial Review Order*, the Commission expressly found that imposing unbundling obligations on broadband facilities is both unnecessary, because competing providers do not need access to those facilities, and affirmatively harmful, because it would "undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology," *Order* ¶ 3. The Commission also found that "relieving incumbent LECs from unbundling requirements for those networks will promote investment in, and deployment of, next-generation networks," and "[t]he end result is that consumers will benefit from this race to build next generation networks and the increased competition in the delivery of broadband services." *Id.* ¶ 272.

These same findings warrant forbearance from any separate unbundling obligations that may apply under section 271 of the Act. As the accompanying paper explains at greater length, imposing unbundling obligations under either section 251 or 271 would have all the same negative effects on broadband deployment. And, of course, granting forbearance also is consistent with the specific statutory mandate in section 706 to encourage deployment of and remove barriers to investment in broadband facilities, including through the exercise of the Commission's "regulatory forbearance" authority.

Consequently, the Commission should promptly grant Verizon's petition for forbearance from any unbundling obligations that section 271 might be read to impose with respect to broadband elements.

Sincerely,

Susanne Guyer

Attachment

cc: Bryan Tramont
Chris Libertelli
Matt Brill
Dan Gonzalez
Jessica Rosenworcel
Lisa Zaina
Bill Maher

THE COMMISSION SHOULD FORBEAR FROM IMPOSING ANY SECTION 271 UNBUNDLING OBLIGATIONS ON BROADBAND

EXECUTIVE SUMMARY

On July 29, 2002, Verizon filed a petition for forbearance seeking relief from any unbundling obligations that section 271 may impose for elements that the Commission has separately removed from the list of elements subject to unbundling under section 251. This paper discusses the particularly pressing need to forbear from any such obligations for *broadband* elements.

The *Triennial Review Order* provided simply that ILECs "do not have to offer unbundled access" to broadband facilities such as fiber to the premises loops, the packetized functionality of hybrid loops, and packet switching.[1] The Commission's resolution of the issue was appropriately straightforward, and was based both on its conclusion that unbundling broadband facilities is *unnecessary* because competing providers do not need access to those broadband facilities and that it is affirmatively *harmful* because it would deter deployment by all providers. And those conclusions were further reinforced by the separate injunction in section 706 to encourage deployment of and remove barriers to investment in broadband facilities. Nothing in the *Order* suggests that its conclusions with respect to broadband facilities were somehow compromised by a continuing need to unbundle these same facilities under some different provision of the Act.

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[1] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and FNPRM, CC Dkt. No. 01-338, FCC 03-36 ¶¶ 7, 273 (rel. Aug. 21, 2003) ("*Triennial Review Order*").

Nevertheless, a different section of the *Order* does construe section 271 of the Act to impose unbundling obligations that are independent of those under section 251 and that continue to apply when particular elements do not meet the unbundling standard under section 251. In discussing the relationship between sections 251 and 271, the *Order* did not even mention broadband issues, much less suggest that the Commission had made an affirmative determination that broadband facilities should be subject to a continuing unbundling obligation that the Commission has rightly found would thwart "incentive[s] to deploy fiber (and associated next-generation network equipment, such as packet switches and DLC systems) and develop new broadband offerings[.]" *Triennial Review Order* ¶ 290.

The Commission should act promptly to remove the present uncertainty on this issue by forbearing from any stand-alone obligation under section 271 to provide unbundled access to broadband elements. Indeed, imposing unbundling obligations under section 271 would have the same negative effects on broadband deployment that the Commission correctly concluded would result from an unbundling requirement under section 251. For example, construing section 271 to require unbundled access to loops, switching and transport would require a significant redesign of integrated fiber network architectures to create new and artificial points of access to individual components of the network architecture. Likewise, it would require the design and development of costly new systems to manage access at these new access points and development of new operations practices to correspond. Experience also has shown that any unbundling obligation evolves over time as it is further defined and interpreted, which would add yet another new layer of uncertainty and financial risk that would only add to the cost and delay associated with the need to redesign the network and accompanying systems. And, of course, these costs, risks, uncertainties and delays would apply solely to the Bell companies—and not to their cable competitors that currently dominate the broadband market. Forbearance is especially appropriate with respect to broadband facilities because the Commission has already established the complete legal and factual predicate that warrants forbearance.

First, the *Triennial Review Order* finds that mandated unbundling of new broadband elements disserves the public interest by thwarting the incentives of ILECs and CLECs alike to incur the enormous fixed costs of deploying next-generation networks. That finding is more than enough to show, for purposes of section 10(a)(1)-(3), that such regulation is "not necessary" and that "forbearance . . . is consistent with the public interest." 47 U.S.C. § 160(a)(1)-(3). Section 706(a) provides still further support by singling out broadband for special attention and by "direct[ing] the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage the deployment of advanced services." *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, ¶ 69 (1998) ("*Advanced Services Order*").

Second, section 10(d) expressly authorizes forbearance from section 271's requirements where "those requirements have been fully implemented," 47 U.S.C. § 160(d), and the Commission has already found, in approving section 271 applications for 49 states and the District of Columbia, that the Bell companies have in fact "fully implemented the competitive checklist." 47 U.S.C. § 271(d)(3)(A)(i). A phrase is presumed to mean the same thing when it appears in two different provisions of a statute—particularly where, as here, one of those provisions (section 10(b)) explicitly cross-references the other (section 271). The Commission's determination that the checklist has been "fully implemented" for purposes of section 271 thus necessarily meets the requirement under section 10(d) that the checklist be "fully implemented" before forbearing from those same checklist requirements.

This does *not* mean that the Bell companies are now free to ignore whatever checklist provisions they please. But it does mean that *the Commission* has authority to forbear where it finds that section 10's forbearance standard is met, and that it can and should forbear from particular checklist requirements to the extent they do more harm than good. Forbearance as to *broadband* elements is particularly appropriate, both (i) because the enormous fixed costs of investing in a next-generation network present the most compelling need for deregulatory certainty and (ii) because the purpose of section 271 is to require the Bell companies to open their historical legacy voice networks and markets to competition, not to regulate their investments in the advanced technology they need to compete in the broadband markets that *other* firms dominate.

Finally, forbearance is all the more appropriate here because, as this Commission has recognized in prior section 271 orders, checklist items 4 through 6 are, in any event, reasonably construed not to require the unbundling of broadband loop or switching elements excluded from the section 251 unbundling list. That is why, for example, the Commission granted several section 271 applications over objections that the Bell companies should have provided greater access to the packet switching element than was required by the Commission's section 251 rules.

In any event, the Commission can and should eliminate any continuing uncertainty on this score by granting Verizon's petition to forbear from any separate unbundling requirement that may apply to the broadband facilities that the Commission has concluded need not be unbundled under section 251.

ARGUMENT

I. The Commission Should Forbear From Any Stand-Alone Unbundling Obligation That Section 271 Might Be Construed To Impose For Broadband Elements.

A. If the *Triennial Review Order* makes one point clear, it is the importance of freeing the ILECs from any unbundling requirement that would dampen "incentive[s] to deploy fiber (and associated next-generation network equipment, such as packet switches and DLC systems) and develop new broadband offerings[.]" *Triennial Review Order* ¶ 290. As the Commission found, "excessive network unbundling requirements tend to undermine the incentives of *both* incumbent LECs *and* new entrants to invest in new facilities and deploy new technology." *Id.* ¶ 3 (emphasis added).

As an initial matter, "incumbent LECs are unlikely to make the enormous investment required [by broadband deployment] if their competitors can share in the benefits of these facilities without participating in the risk inherent to such large scale capital investment." *Id.* Accordingly, "relieving incumbent LECs from unbundling requirements for those networks will promote investment in, and the deployment of, next-generation networks." *Id.*, ¶ 272. In addition, elimination of such unbundling requirements is also necessary to give CLECs incentives of their own to invest in advanced network technologies. This it true because, "with the knowledge that incumbent LEC next-generation networks will not be available on an unbundled basis, competitive LECs will need to continue to seek innovative network access options to serve end users and to fully compete against incumbent LECs in the mass market." *Id.* As the Commission correctly concluded, "[t]he end result is that consumers will benefit from this race to build next generation networks and the increased competition in the delivery of broadband services". *Id.*

Accordingly, the *Triennial Review Order* "eliminate[s] most unbundling requirements for broadband, making it easier for companies to invest in new equipment and deploy the high-speed services that consumers desire." *Id.*, ¶ 4. In their separate statements, all three members of the Commission majority stressed the centrality of that policy judgment to the *Order* as a whole and to the future of the industry.[2]

That policy judgment provides the predicate for forbearing from any stand-alone obligation under section 271 to unbundle broadband elements that the Commission has exempted from unbundling requirements under section 251. Imposing such obligations through the back door of section 271 (particularly after section 271 authorization has been granted) is just as inimical to the prospects for long-term competition as imposing those same obligations through the front door of section 251. Moreover, the

[2] *See, e.g.*, Press Statement of Commissioner Abernathy at 1 (Feb. 20, 2003) ("I strongly support the Commission's decision to exempt new broadband investment from unbundling obligations"); Press Statement of Commissioner Martin at 1 (Feb. 20, 2003) ("[t]he action we take today provides sweeping regulatory relief for broadband and new investments," including "unbundling requirements on all newly deployed fiber to the home"); Response of Commissioner Martin to Questions from Rep. Eshoo at 1 ("The Order freed incumbent LECs from unbundling requirements on next-generation facilities and equipment like FTTH and equipment used to provide packet switching services"); Response of Chairman Powell to Questions for the Record at 9 ("The Commission's *Order* relieves incumbent local exchange carriers ('ILECs') from unbundling requirements on next-generation facilities and equipment like fiber-to-the-home ('FTTH') and equipment used to provide packet-based services").

consequences of unwarranted unbundling are especially pernicious in the broadband context, where, as discussed below, ILECs need the greatest assurance of a stable deregulatory environment to justify the massive fixed investments required for a next-generation network. And, although the *Triennial Review Order* discusses the relationship between sections 251 and 271 at some length, *see* ¶¶ 649-67, nowhere does it mention broadband at all, let alone confront the special need to protect broadband investment incentives from any unbundling obligations that might persist under section 271 even after the Commission has sought to end them, as anti-consumer, under section 251.

The acute need to confront that issue head-on arises not just from sound policy considerations, but from a specific statutory mandate. In section 706(a), Congress directed the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability" through "regulatory forbearance" and "other regulating methods that remove barriers to infrastructure investment." For the most part, the *Triennial Review Order* recognizes the appropriately central role that section 706 should play in any unbundling decision affecting broadband elements. As the Commission found, the application of unbundling obligations "to these next-generation network elements would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, *in direct opposition to the express statutory goals authorized in section 706*." *Triennial Review Order* ¶ 288 (emphasis added).

But section 706(a) requires the Commission to employ all of the statutory tools at its disposal, and not just the "impairment" standard of section 251(d)(2), to "encourage deployment of advanced telecommunications capability" (*id.* ¶ 290). In particular, although the Commission has declined to view section 706 as an independent source of forbearance authority, it has nonetheless made clear that the mandate of section 706 to promote broadband investment through "regulatory forbearance" weighs heavily in favor of forbearing under section 10 from unnecessary *broadband* regulation. *Advanced Services Order*, ¶ 69 ("section 706(a) directs the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage the deployment of advanced services").

Section 706(a) all but compels forbearance from any stand-alone 271 unbundling obligations in this context, because (i) it singles out *broadband* facilities for special protection from excessive regulation, and (ii) the Commission has *already determined* under section 251(d)(2) that compelled unbundling of these facilities would do little to advance, and much to undermine, the roll-out of broadband services. For that matter, the standards of section 10(a) would be met even without the extra statutory guidance of section 706. The Commission eliminated broadband obligations on the grounds that such obligations would be both *unnecessary* (because ILECs generally are running well behind other carriers in the broadband rollout) and affirmatively *harmful* (because overzealous regulation would thwart the incentives of ILECs and CLECs alike to invest in broadband infrastructure). Those determinations are equivalent to the three core findings required for forbearance under section 10(a): continued unbundling is unnecessary for the protection of either consumers or other carriers (47 U.S.C. § 160(a)(1), (2)), and forbearance is plainly in the public interest (47 U.S.C. § 160(a)(3)). And, as discussed below, section 10(d), which conditions forbearance on a finding that section 271 has been "fully implemented," poses no obstacle to forbearance from competitively harmful over regulation of next-generation broadband facilities.

Indeed, it is difficult to conceive of any circumstance in which sections 10 and 706 more forcefully support relief from unwarranted regulation. The D.C. Circuit has made clear that section 251(d)(2) embodies a congressional policy judgment that "unbundling is not an unqualified good" and that it often hurts, rather than helps, the cause of genuine long-term competition. *USTA v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002). Although any unbundling obligation can impose significant "cost[s], including disincentives to research and development by both ILECs and CLECs and the tangled management inherent in shared use of a common resource," *id.*, those costs are a matter of greatest concern where next-generation technology is at issue. That is the context in which the fixed costs of "research and development" are particularly enormous, and where the "tangled management" challenges of hammering out the details of the "shared use of a common resource" would be most vexing.

It is no answer to say that unbundling obligations arising solely from section 271 will be somewhat less onerous than those arising under section 251. On the contrary, imposing an unbundling obligation under section 271 would merely recreate the same investment disincentives the Commission sought to eliminate. This is so for several reasons.

First, any obligation to provide access separately to the various components of an integrated broadband network architecture necessarily would impose significant redesign requirements, result in suboptimal technology, and add cost, inefficiency and delay that deters deployment of these already risky new technologies in the first place. Although it has been efficient to compartmentalize legacy circuit-switched networks into highly distinct "loop," "switching," and "transport" elements, the same is often not true of next-generation packet-switched networks. For example, an analog unbundled loop has a dedicated path or channel that can be routed directly to a CLEC's collocated facility. In a broadband system, the efficiency of the packetized technology derives in part from the fact that the packets from various end users flow over virtual channels, undifferentiated until they reach the destination packet switch. Consequently, imposing an obligation to provide access to individual components of a next-generation network architecture would require a costly redesign of the network to create access points for those various components. For example, in order to provide an unbundled loop that is directed to a competitor's facilities, Verizon would have to redesign the network and insert additional equipment in the local office that is capable of performing an intermediate packet-switching function and direct the packets to another carrier. Likewise, efficiencies in packet switching are often created, not by having a single switching unit in the local office that can be simply unbundled from the rest of the network, but rather by using a softswitch, where many features (which formerly existed in the switch) actually reside in remote computer-like servers that are distributed across the network. To have a single device that could serve as an "unbundled" switching element, the incumbent would have to redesign the network and eliminate many of the inherent efficiencies that help drive broadband deployment.

Second, there obviously is much more to the deployment of next generation networks than laying fiber or deploying packet switches, though those are obviously enormous tasks standing alone. One particularly critical aspect is the development and deployment of the new systems necessary to operate these new networks. These systems are critical to provide services as efficiently and at as high a quality as possible to benefit customers, and also are one of the major cost components of deploying these new networks. Imposing an unbundling obligation under section 271 obviously would require the design and development of still new systems to cope with the complex requirements of unbundled access to piece parts of next-generation technology—with all the attendant costs of "the tangled management inherent in shared use of a common resource." 290 F.3d at 429. If unbundling were required, these systems would have to provision, track, bill, accept orders, and provide maintenance access for multiple providers using these various individual broadband elements. Verizon alone already has spent hundreds of millions of dollars in modifying existing OSSs to handle unbundling requirements for narrowband network elements. For broadband, the requirements would both increase the costs of new systems and reduce their benefit by sacrificing efficiency and quality, all of which further undermines the incentives to deploy.

Third, experience has proven that unbundling obligations evolve over time as they are further defined and interpreted. Indeed, in the case of both narrowband and broadband facilities, ILECs have been subject to a constantly shifting range of requirements implementing the section 251 unbundling requirements, and there is no reason to believe that any section 271 obligations would be different in this respect. These changing requirements add still further costs and complexities as ILECs are forced to modify both their underlying networks and the accompanying network operations and support systems to comply. Transferring this experience to broadband would add yet another layer of uncertainty and financial risk that would undermine deployment.

Fourth, although the Commission clarified in the *Triennial Review Order* that the TELRIC rules do not apply to elements unbundled under section 271 alone, the potential for intrusive regulatory involvement in the pricing of these elements remains. Indeed, parties have already argued to state regulators that they have a right to oversee these federal obligations. *See* Summary of TRIP Triennial Review Meeting Discussions, Washington, D.C. at 2 (Oct. 10, 2003), available at http://www.naruc.org/programs/trip/summaryoct03.pdf ("CLECs say states do have a role" in "setting prices under §§ 201 and 202 for UNEs required under § 271"). While that argument is misplaced because any remaining obligation under section 271 is a purely federal requirement, it nonetheless makes clear the pricing of any elements under section 271 will remain the subject of additional rounds of investment-deterring litigation. Moreover, even under a purely federal standard, there is significant uncertainty as to how the pricing obligation would be applied. While the Commission has made clear that negotiated, market-based rates will satisfy the section 201 pricing standard, experience has shown that other parties will nonetheless try to game the regulatory process, either to pre-empt the negotiations entirely or to obtain extra leverage. And that is all the more true given their past experience, even under section 201 pricing standards. *See, e.g., Verizon Telephone Companies Tariff FCC Nos. 1 & 11, Transmittal No. 232 (PARTS)*, 17 FCC Rcd 23598, • •8 (2002) (requiring Verizon to offer proof why it should not have a "UNE pricing methodology" imposed on a broadband service being evaluated under a section 201 standard). In short, the prospect of rate regulation even under sections 201 and 202 pricing standards will generate substantial uncertainty and further pointless litigation so long as the underlying unbundling obligations remain in place.

B. Section 10(d) is no barrier to forbearance because that provision expressly authorizes forbearance from "the requirements of section . . . 271" where "those requirements have been fully implemented." 47 U.S.C. § 160(d). Here, the Commission has already made that very finding. The "requirements" at issue are those of the competitive checklist. The Commission can grant section 271 authorization—as it has now done for 49 states and the District of Columbia—only after expressly determining that a Bell company has in fact "*fully implemented* the competitive checklist" 47 U.S.C. § 271(d)(3)(A)(i) (emphasis added). It is not mere coincidence that Congress used the exact same term in both section 10(d) and section 271 to describe the conditions for deregulatory relief. The "normal rule of statutory construction" is "that identical words used in different parts of the same act are intended to have the same meaning." *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996) (quoting *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990)). There is no getting around that rule here, since section 10(d) not only coexists in the same legislative enactment as section 271, but explicitly *cross-references* section 271 in the very forbearance limitation at issue. It is inconceivable that Congress used the same language to mean two contrary things in these two interrelated sections of the 1996 Act.

This is *not* to say that the Bell companies are free to ignore all of the checklist requirements the minute they receive section 271 authorization in a given state. Those requirements remain in effect until the Commission exercises its forbearance authority, which it may do where (as here) the "public interest" and the other forbearance standards of section 10(a)(1)-(3) are met. And so long as particular requirements remain in effect, the Commission obviously retains authority to enforce those requirements. 47 U.S.C. § 271(d)(6). But the grant of a section 271 application does remove any hurdle that section 10(d) might pose to the *Commission's* authority under section 10(a) to forbear from any separate obligation to unbundled broadband facilities under section 271.

It is particularly appropriate to exercise that authority to forbear from any stand-alone broadband unbundling obligations under section 271—not just because (as discussed) unnecessary unbundling obligations are particularly counterproductive in the broadband context, but also because the section 271 checklist was never designed to interfere with the Bell companies' deployment of next-generation packet-switched networks. Instead, as discussed below, the checklist was designed to open up the local market by requiring the Bell companies to provide access to elements of the legacy circuit-switched networks, prior to entering the long distance business, a concern that does even not arise here. Again, if there were any doubt on either score, section 706 would resolve it by compelling an interpretation of section 10 that "encourage[s] the deployment on a reasonable and timely basis of advanced telecommunications capability" through "regulatory forbearance."[3]

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[3] AT&T recently espoused a new rationale for opposing forbearance from any aspect of section 271: the notion that any separate obligation under the section 271 checklist cannot be "fully implemented" until after the separate affiliate obligations of section 272 have sunset. That argument is misplaced, because section 272 is designed to safeguard competition in local markets *after* they have been opened and *after* the Commission has determined, under section 271(d)(3)(A)(i), that the substantive marketing-opening provisions of the checklist have themselves been "fully implemented." Section 272 does not *itself* "implement" those provisions; indeed, if it did, section 271(d)(3)(A)(i) could never be satisfied. In all events, any role that section 272 may play after a section 271 application is granted has no logical or legal bearing on

II. Granting Forbearance To Eliminate Uncertainty Is Especially Warranted Here Because Checklist Items 4-6 Should Not Be Read To Require The Unbundling Of Broadband Elements In The First Place.

Forbearance is all the more appropriate here because any separate obligation which may exist under section 271 is properly read to not extend to the broadband elements of the network, and forbearance will remove any doubt on that score.

A. Both the Commission and the courts have recognized that each checklist item draws its content from the evolving nature of the Commission's local competition rules at any given time. As the Commission has explained, "[o]ur rules vary with time, redefining the statutory obligations that govern the market. Just as our long-standing approach to the procedural framework for section 271 applications focuses our factual inquiry on a BOC's performance at the time of its application, so too may we fix at that same point the local competition obligations against which the BOC's performance is generally measured for purposes of deciding whether to grant the application." *Application by SBC Communications Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354, ¶ 27 (2000) ("*Texas 271 Order*"); *see also AT&T Corp. v. FCC*, 220 F.3d 607, 628-32 (D.C. Cir. 2000).

The precise substance of these checklist obligations is largely derivative of the underlying section 251 obligations precisely because, standing alone, they contain very little determinate content. For example, checklist item 4 requires a Bell company to

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any unbundling obligations the checklist imposes, much less the *broadband* unbundling obligations at issue here.

provide "[l]ocal loop transmission" as a precondition to obtaining section 271 authorization, but it does not specify the manner in which the Bell company may discharge that obligation. Thus, in addressing claims that the ineffective provisioning of DSL loops amounts to a more general failure to meet loop provisioning obligations, the D.C. Circuit has observed that "[s]ection 271 does not say that an applicant must show that it provides nondiscriminatory access to *each category* of loop or to *every single* loop." *AT&T Corp.*, 220 F.3d at 624 (emphasis added). Instead, the court observed, it is "reasonably interpreted . . . to allow assessment of an applicant's *overall* provisioning of loops."[4] Checklist item 4 has never been understood—and could not sensibly be understood—to require a Bell company to provide CLECs with any requested form of "transmission" over every facility in its network that could qualify as a "loop."

Similarly, checklist item 6 does not require a Bell company to provide access to every *switch* in its network. Indeed, the Commission has rejected arguments in section 271 proceedings that the Bell company applicants have somehow violated checklist item 6 because they have denied access to their packet switching facilities. In each case, the Commission reasoned that a CLEC's rights of access to the packet switching element under checklist item 6 are limited to the very narrow circumstances in which, in the *UNE Remand Order*, the Commission required all ILECs to make that element available for purposes of sections 251(c)(3) and 251(d)(2). For example, in the *Texas 271 Order*, the

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[4] *Id.* (emphasis added); *see also Texas 271 Order*, at ¶¶ 28-33 (tying scope of section 271 unbundling obligations to effective date of new section 251 unbundling obligations under the *UNE Remand Order*); *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, 4080 ¶ 236 & n.756 (1999), *aff'd sub nom AT&T v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

Commission rejected AT&T's complaints about denial of access to SWBT's splitters on the ground that, insofar as a splitter is "part of the packet switching element[,] . . . we declined to exercise our rulemaking authority under section 251(d)(2) to require incumbent LECs to provide access to the packet switching element."[5]

In sum, although the checklist does require access to "local loop transmission" and "local switching," the Commission has always judged satisfaction of those requirements at an appropriately high level of generality. And, as the cited examples reveal, the Commission has repeatedly construed these checklist items *not* to require access to *broadband-related* categories of the loop and switching elements except where the Commission has independently "exercise[d] [its] rulemaking authority under section 251(d)(2) to require incumbent LECs to provide access." *Texas 271 Order* at ¶ 327.

B. A review of section 271's basic objectives confirms the same conclusion. In opposing Verizon's pending forbearance petition, AT&T itself argues that checklist

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[5] *Texas 271 Order* at ¶ 327; *accord Application by Qwest Communications Int'l, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado et al.*, 17 FCC Rcd 26303, ¶ 358 (2002) (rejecting AT&T's challenge under checklist item 6 on the ground, among others, that "Qwest offers competitive LECs unbundled packet switching in a nondiscriminatory manner when the conditions established by the Commission in the *UNE Remand Order* are met"); *Application of Verizon New England Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988, Appx. B., ¶ 1 (2001) ("[t]o satisfy its obligations under this subsection, an applicant must demonstrate compliance with the Commission rules effective as of the date of the application relating to unbundled local switching . . . . In the *UNE Remand Order*, the Commission required that incumbent LECs need not provide access on an unbundled basis to packet switching except in certain limited circumstances."); *Joint Application by SBC Communications Inc. et al. to Provide In-Region, InterLATA Services in Arkansas and Missouri*, 16 FCC Rcd 20719, ¶ 105 (2001) ("To the extent that AT&T and WorldCom in fact seek to expand SWBT's obligations to unbundle packet switching, this issue is the subject of proceedings currently pending before the Commission").

items 4-6 independently "establish[] a 'safety net'" that, unlike section 251(c), "requires only access to a specific core group of elements." AT&T Opposition, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, CC Dkt. No. 01-338, at 6 (filed Sept. 3, 2002). That safety net is needed, AT&T says, to deal with the "enormous monopoly power that the [BOCs] had accumulated over their local markets during the preceding several decades." AT&T Reply, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, CC Dkt. No. 01-338, at 3 (filed Sept. 18, 2002). But that could be a rationale for retaining (if anything) only those section 271 unbundling obligations that relate to "core" *legacy* elements. It cannot remotely justify retaining any stand-alone obligation under section 271 to unbundle *broadband* elements.

AT&T suggests that the basic purpose of section 271 is to preclude the BOCs from leveraging their traditional dominance in local exchange markets to obtain an undue advantage in the long distance market. The chosen means was to force "the BOCs to open their local markets to competition before allowing them to enter the long distance services market in-region, because, due to the unique infrastructure controlled by the BOCs, they could exercise monopoly power." *BellSouth Corp. v. FCC*, 162 F.3d 678, 689-90 (D.C. Cir 1998). Such market-leveraging concerns do not even arise with respect to *new* elements that are used in the provision of the *broadband* services at issue here because, among other considerations, the Bell companies are not remotely dominant in the market for those services.

To begin with, it is the cable companies that currently dominate the separate market for broadband services, and ILECs are the insurgent competitors deploying new facilities to challenge the dominant incumbents. But even beyond this key fact, as the Commission explained in the *Triennial Review Order* (at ¶ 278), CLECs are just as capable as the BOCs of building new fiber facilities out to customer locations—and, in fact, "are leading in the deployment of FTTH." To take another example, CLECs cannot claim to have suffered any anticompetitive disadvantage from denial of access to the new packetized capabilities of "hybrid" loops, particularly if they retain general access to existing copper subloops or legacy TDM transmission capabilities. *Id.* ¶¶ 285-97. More generally, new broadband elements are not remotely part of any "specific core group of elements" to which Congress could have wanted to guarantee CLECs access in the interests of fair long distance competition.

In short, the statutory language of checklist items 4 through 6 is properly read not to impose unbundling obligations for broadband facilities that the Commission has removed from the scope of section 251 unbundling obligations. At a minimum, the Commission has very broad discretion to adopt that construction as a means of reconciling sections 251, 271, and 706.

In order to remove any doubt on that score, however, the Commission should promptly forbear from any stand-alone unbundling obligations for broadband elements to the extent that section 271 is ultimately construed to contain them so that ILECs can get on with the business of designing and deploying next generation broadband networks in a rational and efficient matter. As the Commission itself previously found, consumers will be the ultimate beneficiaries.

Exhibit E

BellSouth Telecommunications, Inc. *Petition for Forbearance*, WC Docket No. 04-48, filed March 1, 2004

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

BellSouth Telecommunications, Inc.	)	
Petition for Forbearance	)	**WC Docket No.** 04-48
Under 47 U.S.C. § 160(c)	)	
	)	

PETITION FOR FORBEARANCE

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Dated· March 1, 2004

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Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

BellSouth Telecommunications, Inc.	)	
Petition for Forbearance	)	**WC Docket No.** ____________
Under 47 U.S.C. § 160(c)	)	
	)	

PETITION FOR FORBEARANCE

I. Introduction and Summary

Pursuant to 47 U S C § 160 (c) and 47 C.F.R. § 1.53, BellSouth Telecommunications, Inc. ("BellSouth") requests that to the extent the Commission determines § 271(c)(2)(B) to impose the same unbundling obligations on BOCs as established by § 251(c) that the Commission forbear from applying any stand-alone unbundling obligations on broadband elements. While BellSouth believes that no such obligations exist, it files this Petition in an abundance of caution to ensure that the Commission does not impose such obligations where there is ample evidence to demonstrate that the unbundling obligations required by § 251 are unnecessary to meet the purposes of § 271 Through this Petition, BellSouth is seeking the same relief requested by Verizon in its Petition for Forbearance filed October 24, 2003.[1]

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[1] *See* Letter from Susanne A. Guyer, Senior Vice President, Federal Regulatory Affairs, Verizon, to Chairman Michael Powell, Commissioner Kathleen Abernathy, Commissioner Kevin Martin, Commissioner Michael Copps and Commissioner Jonathan Adelstein, CC Docket No. 01-338 (filed Oct. 24, 2003), and *Commission Establishes Comment Cycle for New Verizon Petition Requesting Forbearance from Application of Section 271*, CC Docket No. 01-338, *Public Notice*, FCC 03-263 (rel. Oct. 27, 2003) (noting that the Verizon October 24 letter will be treated as a new forbearance petition and establishing comment cycle for same).

In the *Triennial Review Order*,[2] the Commission, pursuant to its obligations under § 251(d)(2), established an impairment analysis to determine when an incumbent local exchange carrier ("ILEC") must provide access to an unbundled network element ("UNE"). Through this analysis, once a competitive local exchange carrier ("CLEC") is no longer impaired without access to the network element, the ILEC no longer has an obligation to provide access to the element on an unbundled basis. In the same *Order*, however, the Commission indicated that § 271 of the Act establishes an independent unbundling obligation on ILECs to provide unbundled access to network elements, even where the Commission has found that access to such elements is no longer necessary under the statutory impairment standard. This position cannot be reconciled with the other portions of the *Triennial Review Order* or the Commission's own decisions under § 271 or in the context of the D.C. Circuit's decision in *USTA*.[3]

BellSouth believes any language in the *Triennial Review Order* that could be conceived as establishing an independent § 251-type unbundling obligation under § 271 is incorrect and filed a Petition for Reconsideration ("PFR") of this matter.[4] BellSouth is confident that the Commission will clarify its finding on this matter and find that once an UNE is removed from the list of UNEs that an ILEC must provide, then the ILEC is also free from unbundling obligations, if any, that exist under § 271. Regardless of when the Commission rules on

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2 In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98 & 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("Triennial Review Order" or "TRO")

3 *United States Telecom Ass'n v FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*").

4 *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No 01-338, *et al.*, BellSouth Petition for Clarification and/or Partial Reconsideration (filed Oct 2, 2003)

BellSouth's PFR, or even if it retains its initial decision in the *TRO*, the Commission should forbear from applying unbundling obligations, if any, that an ILEC has under § 271. ILECs should have no stand-alone unbundling obligation for broadband network elements that no longer meets the § 251(d)(2) standard, as determined by the Commission in the *Triennial Review Order* or any subsequent review order [5]

As the Commission recognized in the *Triennial Review Order*, "broadband deployment is a critical policy objective that is necessary to ensure that consumers are able to fully reap the benefits of the information age."[6] To assure that this objective is realized, the Commission decided to "refrain from unbundling incumbent LEC next-generation networks,"[7] explaining that "applying section 251(c) unbundling obligations to these next-generation network elements would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, in direct opposition to the express statutory goals authorized in section 706."[8]

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5 BellSouth does not believe that § 271 places any unbundling obligations on RBOCs over what the RBOCs offer through their tariffed wholesale services. Section 271 is very specific regarding the elements that a BOC must provide unbundled from other elements. There is no broad "any technically feasible point" standard. For example, in checklist item 4 the statute specifically states that access is limited to a "local loop transmission from the central office to the customer's premises, unbundled from local switching or other services " This specific access element cannot be expanded to include all of the sub-loop elements that the Commission requires under § 251. Any attempt by the Commission to impose § 251-type unbundling obligations on BOCs would be an extension of the "terms used in the competitive checklist." *See* 47 U.S.C. § 271(d)(4) Without waiving any rights regarding this position, BellSouth files this Petition seeking forbearance from any § 251-type unbundling obligations the Commission appears to indicate RBOCs may have.

6 *Triennial Review Order*, 18 FCC Rcd at 17125, ¶ 241.

7 *Id* at 17141, ¶ 272.

8 *Id* at 17149, ¶ 288; *see also id* at 17145, 17150, 17323, ¶¶ 278 (excluding fiber to the home from unbundling "will promote [the] deployment of the network infrastructure necessary

All of the policy reasons that led to the sound conclusion not to require unbundling of broadband in the § 251 context compel the Commission to forbear from unbundling obligations, if any, that the Commission considers to be required under § 271 The Commission could not rationally conclude that unbundling under § 251 would "blunt the deployment of advanced telecommunications infrastructure," but that unbundling under § 271 would not have this pernicious effect Any forced unbundling at potentially regulated rates would undermine incentives to deploy next-generation networks by forcing the BOC to share with its competitors the potential benefits of a risky investment. Moreover, such compulsory unbundling would force BOCs to redesign their networks in order to accommodate requests from competitors for individual piece-parts Such re-design imposes considerable inefficiencies and added costs, precluding the BOC, which, like all competitors, has a finite supply of capital, from deploying broadband as extensively and efficiently as it otherwise could.

Broadband services are provided in a highly competitive market, and access arrangements should be left to commercial negotiations in order to assure that all providers operate according to appropriate economic incentives which in turn will result in consumers reaping the benefits of the "race to build next generation networks and the increased competition in the delivery of broadband services"[9] that the Commission sought to unleash by excluding broadband from unbundling. The Commission should therefore forbear from applying unbundling obligations, if any, that apply to facilities – especially broadband facilities – under § 271 where such facilities have been delisted under § 251.

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to provide broadband services to the mass market"), 290 (limiting the unbundling obligation for hybrid loops "promotes our section 706 goals"), 541 (same for packet switching).

9 *Id* at 17142, ¶ 272.

Interpreting § 271 unbundling to be the same as unbundling under § 251 flies in the face of applicable case law as well as statutory construction. In *USTA*, the D. C. Circuit held that unbundling should not be required in the absence of impairment because "[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities."[10] Moreover, the court explained that Congress did not wish to perpetuate the "completely synthetic competition"[11] resulting from overbroad reliance on UNEs Requiring that BOCs provide unbundling in perpetuity under § 271 defies the Act's deregulatory imperative; overrides Congress' and the Supreme Court's direction that access to unbundled elements should be subject to limits; and blatantly disserves the Act's fundamental goal of promoting facilities-based competition.

Clearly, § 271 cannot be read to require unbundling in perpetuity. It is nonsensical to suggest that Congress, recognizing the harmful effect of unbundling on investment, would have imposed strict limits on forced access to UNEs in the provision that establishes the unbundling obligation, only to exclude carriers serving more than 80 percent of the nation's access lines from those limits in another section of the Act Although the Commission suggests that disparate treatment of the BOCs is not illogical because § 271 reflects Congress' finding that the BOCs should face additional hurdles before being allowed to provide interLATA services, that rationale cannot support a requirement of perpetual unbundling. Section 271 should be read to give meaning to all the subparts of that section. A better reading of § 271 – one that acknowledges the fact that items 4-6 and 10 must have meaning separate from item 2, but does not do violence to the statute – is that the former checklist items reflect Congress' minimum

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10 *USTA*, 290 F.3d at 427.

11 *Id.* at 424.

expectations at the time the Act was passed, in case § 271 applications were filed before the Commission adopted rules implementing § 251. Unlike the logic in the *Triennial Review Order*, that interpretation respects cardinal principles of statutory construction by furthering rather than undermining, Congress' intent.

For these reasons the Commission should grant BellSouth's PFR and eliminate any indication that § 251-type unbundling obligations are required under § 271. As BellSouth explained in its PFR, this decision is wrong and cannot be squared with the findings of *Triennial Review Order*, especially as it relates to broadband If the Commission does not amend its decision in the *Triennial Review Order*, it must, pursuant to its obligations under the forbearance statute, forbear from applying § 251-type unbundling obligations for broadband elements, if any, under § 271. The factors of § 10 are met; the Commission must forbear from applying such unbundling obligations.

II. The Commission Should Forbear from Requiring Unbundling Under § 271 of Elements Delisted Under § 251

Section 10 of the Communications Act of 1934 provides that the Commission "shall forbear from applying any regulation or any provision of," the Communications Act "to a telecommunications carrier or telecommunications service," if "(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers, and (3) forbearance from applying such provision or regulation is consistent with the public interest."[12]

12 47 U S C. § 160(a).

There can be no question that these three tests have been met regarding unbundling requirements in § 271 where the Commission has found a CLEC no longer to be impaired without access to that element pursuant to § 251(c). Any other finding cannot be squared with the statute

III. The Conditions of § 160(c) Are Satisfied

A. Continued § 251-Type Unbundling Obligations Under § 271 Are Not Necessary to Ensure That Charges, Practices, Classifications, or Regulations are Just and Reasonable and Are Not Unjustly or Unreasonably Discriminatory

There is no need to require § 251-type unbundling obligations through § 271 in order to ensure that charges, practices, classifications, or regulations are just and reasonable and are not unjustly or unreasonably discriminatory. The Commission's determination that CLECs are not impaired without access to a network element, and, thus, unbundling is not required under § 251, concludes that the provision of that element is competitive. This was recognized by the Commission[13] and the D.C Circuit in the *USTA* decision.[14] Once the provision of an element is competitive, there can be no argument that continued unbundling of that element is necessary in order for a competitor to provide a telecommunications service using that element.

B. Continued § 251-Type Unbundling Obligations are Not Necessary for the Protection of Consumers

Clearly, once a competitor is no longer deemed to be impaired without access to an element, unbundling is not necessary "for the protection of consumers." The fact that a CLEC is not impaired without access to an element fully demonstrates that consumers are protected by

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[13] *See Triennial Review Order*, 18 FCC Rcd at 17035, ¶ 84 (the conclusion that CLECs are not impaired without access to a network element reflects the Commission's determination that "lack of access" to that element does not "pose[] a barrier or barriers to entry . . . likely to make entry into a market uneconomic").

[14] The Court found that a Commission conclusion that CLECs are not impaired without access to a network element reflects the Commission's determination that the element is capable of "competitive supply" *USTA*, 290 F 3d at 427.

competition Forced unbundling when there is no impairment, however, has very damaging affects on consumers through neglected investment. If CLECs are allowed to obtain § 251-type unbundling of elements without impairment, then the incentive for all carriers to innovate and to deploy new facilities will be significantly reduced.[15] Indeed, the Commission recognized this very point in finding that CLECs were not impaired in next-generation network elements and, thus, declined to unbundle them under § 251 To the extent unbundling obligations exist under § 271, the same analysis applies. More importantly, consumers will benefit from the rivalry and competition among facilities-based competitors that would otherwise be muted by continued unbundling.

C. Forbearance from Applying Continued § 251-Type Unbundling Obligations is Consistent with the Public Interest

Forbearance from § 251-type unbundling obligations under § 271 is consistent with the public interest when CLECs are no longer impaired without access to an element. Section 10 provides that in making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the

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15 *See Triennial Review Order*, 18 FCC Rcd at 17141, ¶ 272 ("[t]hus, we conclude that relieving incumbent LECs from unbundling requirements for [fiber and packet-based] networks will promote investment in, and deployment of, next-generation networks").

public interest.[16] As discussed above, a determination that a CLEC is no longer impaired for an element under § 251 means that the market for that element is competitive

The D C Circuit found that the Act does not provide the Commission "a license . . . to inflict on the economy" the costs of unbundling "under conditions where it had no reason to think doing so would bring on a significant enhancement of competition."[17] Just as the Act does not provide the Commission a license to impose unbundling costs under § 251, it equally does not have such a license under § 271. Indeed, it would completely contradict the court's finding for the Commission to conclude that a CLEC is no longer impaired without access to an element under § 251, thus finding that the element is being provided on a competitive basis, yet find that there would continue to be a "significant enhancement to competition" to continue to require the element to be unbundled under § 271. These conclusions are mutually exclusive and would lead to excessive unbundling that the court warned against[18]

Accordingly, continued § 251-type unbundling under § 271 will produce the same ill effects of "disincentives to research and development by both ILECs and CLECs and the tangled management inherent in shared use of a common resource"[19] and create "synthetic competition"[20] In light of the Court's clear findings in *USTA*, application of § 271 unbundling would plainly be contrary to the public interest.

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16 47 U.S C. § 160(b)

17 *USTA*, 290 F.3d at 429.

18 *Id* (as the Supreme Court recognized in *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 428-29 (1999), "unbundling is not an unqualified good").

19 *Id*

20 *Id* at 424.

That is especially true considering the Commission' obligation to consider whether forbearance would "promote competitive market conditions."[21] Any regulatory regime that distorts the incentive to invest in new facilities because of the ability of competitors to obtain those facilities on an unbundled basis does not promote competition within that market. When CLECs are not impaired without access to a particular element, forced unbundling of that element will not "bring on a significant enhancement of competition," and will instead undermine competitive market conditions. Considering this outcome, forbearance of § 271 unbundling obligations, if any, is consistent with the public interest.

D. The Requirements of § 271 Have Been Fully Implemented

Section 10 provides that the Commission may not forbear from applying the requirements of § 251(c) or § 271 until it determines that those requirements have been fully implemented.[22] The best reading of the Act is that "fully implemented" should be read consistently with the use of the same term in § 271(d): a provision of the Act has been "fully implemented" once the Commission determines that a BOC has met the criteria for grant of its § 271 applications[23] and the Commission has determined not to impose the particular unbundling obligation under § 251(d)(2). The Commission cannot find that BellSouth has fully implemented § 271 for approval purposes in obtaining interLATA relief but has not "fully implemented" § 271 for forbearance purposes. Because BellSouth now has obtained § 271 authority throughout its

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[21] 47 U.S.C. § 160(b).

[22] 47 U.S.C. § 160(d).

[23] 47 U.S.C. § 271(d)(3)(A)(i)

region, it must be considered to have "fully implemented" the requirements of § 271 in its entire nine (9) state service territory [24]

Respectfully submitted,

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24 *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc for Provision of In-Region. InterLATA Services in Georgia and Louisiana*, CC Docket No. 02-35, *Memorandum Opinion and Order*, 17 FCC Rcd 9018 (2002), *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc for Provision of In-Region. InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, WC Docket No. 02-150, *Memorandum Opinion and Order*, 17 FCC Rcd 17595 (2002); *In the Matter of Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Authorization To Provide In-Region, InterLATA Services in Florida and Tennessee.* WC Docket No. 02-307, *Memorandum Opinion and Order*. 17 FCC Rcd 25828 (2002)

CERTIFICATE OF SERVICE

I do hereby certify that I have this 1st day of March 2004 served a copy of the foregoing **Petition for Forbearance** via hand delivery or electronic mail to the following parties:

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I hereby certify that I have this day served a copy of the foregoing Brief of DEICA Communications, Inc. d/b/a Covad Communications Company by depositing same in the United States mail in a properly addressed envelope with adequate postage thereon to insure delivery to the following parties:

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