Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition for Forbearance of the Verizon Telephone	)	CC Docket 01-338
Companies Pursuant to 47 U.S.C. § 160(c)	)	

REPLY OF Z-TEL COMMUNICATIONS, INC., IN OPPOSITION TO PETITION FOR FORBEARANCE OF VERIZON

The comments filed on September 3, 2002, included seven oppositions to Verizon's petition for forbearance and two statements in support. The seven oppositions show that Verizon's petition is defective for a host of reasons. The two statements in support – a five-page filing by SBC requesting that forbearance extend to all Bell Operating Companies (BOCs) and a four-page filing by the United States Telecom Association – add nothing to Verizon's sketetal forbearance petition. Z-Tel files these reply comments (1) to support Covad's recommendation that the Commission *immediately* dismiss Verizon's petition as unripe and (2) to show that the Commission should dismiss SBC's "me too" request as well.

1. *Verizon's petition should be dismissed immediately.* The Commission should dismiss Verizon's petition immediately in order to "save itself and the industry from the wasteful exercise for which Verizon's petition calls."[1] Verizon's petition asks the Commission to forbear from enforcement of certain items on the section 271 checklist *if* the Commission determines that the items no longer meet the impairment test of section 251(d)(2). Plainly, that condition precedent has not been established and will not be established (if at all) until the Commission

[1] Covad Comments at 3.

issues its Triennial Review decision. At that time, if appropriate, Verizon may refile a forbearance petition.

There is no good reason for the Commission or the industry to continue to debate whether forbearance would be appropriate if the Commission takes certain actions in the Triennial Review proceeding. On the other hand, there is good reason to wait until a forbearance request is ripe. At that point, the parties may focus their factual arguments on a more limited set of network elements and geographic markets.

Consideration of the relevant legal arguments is likely to benefit from a more concrete setting, as courts applying the judicial ripeness doctrine have concluded. As the Supreme Court has repeatedly stated: "The operation of the statute is better grasped when viewed in light of a particular application. Here, as is often true, 'determination of the scope . . . of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.'"[2] Therefore, "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'"[3] Although an agency is not required to apply the same ripeness test as the courts, it is sensible to do so, particularly with respect to a statutory provision such as section 10 that requires action within a specified time period. Otherwise, the Commission may be required to expend its limited resources on issues that may never require resolution or where the factual setting has changed significantly at the time when resolution is warranted.

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[2] *Texas v. United States*, 523 U.S. 296, 301 (1998), *quoting Longshoremen v. Boyd*, 347 U.S. 222, 224 (1954).

[3] *Texas v. United States*, *supra*, 523 U.S. at 300, *quoting Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581 (1985), *quoting* C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3532, p. 112 (1984).

As Covad stated, "Verizon's petition for forbearance, at present, is simply an extraordinary waste of everyone's time."[4] Although Verizon's forbearance request is skeletal and frivolous, Z-Tel must take it seriously because the relief Verizon seeks potentially threatens Z-Tel's existence and, as long as the request is pending, analysts will note that fact. In addition, Verizon and the other BOCs are likely, if the petition is not denied promptly, to begin an *ex parte* campaign that Z-Tel and other companies will have to monitor and answer. There is no good reason to waste the Commission's time or the limited resources of new entrants like Z-Tel.

2. *SBC's request is defective.* Dismissing Verizon's petition will, of course, have the effect of denying SBC's request that forbearance extend to all of the BOCs. But SBC's request is defective for additional reasons and its defects further illustrate why Verizon's request should be denied.

As we emphasized in our Comments, section 10 plainly requires an inquiry in addition to that called for by other provisions in the Communications Act. Otherwise, contrary to a cardinal principle of statutory construction, it would be superfluous. Moreover, the inquiry required by section 10 is necessarily highly granular: whether competitors have adequate alternative wholesale sources of supply; whether end-users will have a choice of competing providers; whether the public interest is otherwise advanced by forbearance; and whether the relevant provisions of section 271 have been fully implemented require examination of particular geographical and customer markets. But, like Verizon, SBC has not said a single word about particular markets.

In addition, like Verizon's initial forbearance request, SBC's request fails to comply with the regulation requiring forbearance requests to be made in a separate document labeled as a

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[4] Covad Comments at 3.

request for forbearance.[5] SBC's filing is entitled "Comments of SBC," but it plainly must be entitled "Petition for forbearance" in order to trigger section 10. SBC's request should be dismissed for that reason as well.

CONCLUSION

The Commission should save everyone – including itself – unnecessary costs by denying Verizon's forbearance petition immediately. SBC's request should also be denied.

Respectfully submitted,

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[5] 47 C.F.R. § 1.53.