

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

In the Matter of	)	
	)	
Petition for Forbearance of the Verizon	)	CC Docket No. 01-338
Telephone Companies Pursuant to	)	
47 U.S.C. § 160(c)	)	

**AT&T Reply**

Pursuant to the Commission’s August 1, 2002 Public Notice, AT&T Corp. (“AT&T”) submits the following reply to Verizon’s petition for forbearance from certain requirements of section 271(c)(2)(B) pursuant to section 10 of the Act, 47 U.S.C. § 160.

**Introduction and Summary**

Verizon asks the Commission to forbear from enforcing sections 271(c)(2)(B)(iv) (loops), (v) (transport), (vi) (switching) & (x) (signaling and databases) of the competitive checklist if the Commission finds in the ongoing *Triennial Review* that such network elements need not be unbundled pursuant to section 251(d)(2). The comments clearly show that Verizon’s Petition fails on all counts. The Petition is not only moot because it is based on a set of highly disputed -- and ultimately unsupportable -- factual premises, it also founders as a matter of law, because it:

- ignores the special historical purpose of section 271 as the successor to the Modified Final Judgment (“MFJ”) and incorrectly assumes that subsections (iv), (v), (vi) and (x) of the competitive checklist -- which only apply to BOCs that seek to offer in-region interLATA services -- is merely duplicative of the general unbundling requirements of section 251;

- does not comply with the procompetitive requirements for forbearance embodied in section 10(a)(1)-(3); and
- completely fails to demonstrate that a Commission decision under section 251(d)(2) not to require incumbent LECs generally to unbundle a specific element represents “full implementation” of section 271, which is the mandatory threshold for any Commission forbearance from enforcing that section.

**I. The Petition Should Be Dismissed Because It Lacks a Factual Basis.**

As a threshold matter, the comments show that Verizon’s petition is premature and based on unsubstantiated factual premises.<sup>1</sup> Moreover, the facts underlying the Petition are not presented in the Petition itself but in the ongoing *Triennial Review*, where the comments from AT&T and others, particularly State commissions, demonstrate in detail that new entrants would be significantly impaired without access to the very network elements for which Verizon seeks forbearance here.<sup>2</sup> Thus, the necessary factual basis for Verizon’s Petition is utterly lacking and the Commission should dismiss it as moot.

**II. Verizon’s Petition is Baseless as a Matter of Law.**

But the fundamental flaws in Verizon’s Petition go much deeper, because Verizon’s request is also baseless as a matter of law. First, as many commenters show, the Petition proceeds from the erroneous assumption that the general unbundling requirements of section 251(c)(3), as implemented by application of section 251(d)(2),

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<sup>1</sup> AT&T at 3-5; Covad at 2-3; PacWest at 9-10; Sprint at 2, 4-5.

<sup>2</sup> AT&T at 3; PACE at 3-6.

are identical to the specific competitive checklist requirements from which Verizon seeks forbearance.<sup>3</sup> Verizon’s assumption is wrong because sections 251 and 271 arise from very different historical contexts and serve different purposes. Moreover, black letter principles of statutory construction preclude the relief Verizon seeks, because it would read key portions of section 271 out of the Act, including the specific post-entry monitoring and enforcement provisions of section 271(d)(6). Second, Verizon has failed to demonstrate that forbearance is permissible under the statutory standards of section 10, especially section 10(d), which forbids the Commission to forbear from enforcing any portion of section 271 until the requirements of that section have been “fully implemented.”

**A. Sections 251(c)(3) and 271(c)(2)(B) Are Not Duplicative; They Establish Separate and Independent Legal Obligations.**

Verizon’s Petition completely ignores the fact that section 251(c)(3) and the referenced portions of the competitive checklist have different historical backgrounds and purposes. Section 251(c)(3) is part of Congress’ plan to open all local markets to competition and applies to all incumbent LECs generally, irrespective of whether they seek to provide in-region interLATA service. By contrast, section 271 is the successor to the MFJ, the antitrust decree that broke up the Bell System and placed limits on the enormous monopoly power that the Bell Operating Companies (“BOCs”) had accumulated over their local markets during the preceding several decades. Thus, unlike the general provisions of section 251, section 271(c)(2)(B) provides *specific* requirements that apply *only* to BOCs and *only* in connection with their provision of in-region interLATA services, in order to provide assurance that the BOCs do not extend their

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<sup>3</sup> See, e.g., AT&T at 6-7; PacWest at 2-3; WorldCom at 1-3; Z-Tel at 5.

extensive monopoly power over local services into other markets.<sup>4</sup> Accordingly, despite Verizon’s suggestion that there is a need to reconcile sections 251(c)(3) and 271(c)(2)(B) “to avoid setting [those sections] in conflict with one another,”<sup>5</sup> there is no need to do so at all.<sup>6</sup>

In fact, Congress has already resolved this very issue. Section 271(c)(2)(B)(ii) of the checklist contains a *separate* cross-reference to section 251(c)(3) and directly requires a BOC seeking to provide in-region interLATA services to provide access to all of the network elements that must be unbundled pursuant to the latter section. Thus, the existence of the *independent* provisions in sections 271(c)(2)(B)(iv), (v), (vi) & (x) show that Congress *affirmatively intended* the BOCs to continue to provide access to the elements referenced in the latter subsections even if the Commission were to decide that some of them need not be unbundled pursuant to section 251(c)(3).<sup>7</sup>

Moreover, the comments show that black letter principles of statutory construction prohibit the Commission from ignoring the differences between these two

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<sup>4</sup> *E.g.*, WorldCom at 3-6; AT&T at 6; PacWest at 2-3; PACE at 9; Z-Tel at 2. *See also Verizon Communications, Inc. v. FCC*, 122 S.Ct. 1646, 1662 (2002) (noting that incumbents such as the BOCs “have an almost insurmountable competitive advantage not only in routing calls within the [local] exchange, but, through its control of this local market, in the markets for terminal equipment and long distance calling as well”).

<sup>5</sup> Petition at 6.

<sup>6</sup> *See, e.g.*, AT&T at 6; Z-Tel at 5; Sprint at 11-13.

<sup>7</sup> AT&T at 6; *see also* WorldCom at 3; Covad at 4-5; PacWest at 4-6 (noting that the Commission has already recognized the independence of sections 251 and 271 in the *UNE Remand Order* and numerous Section 271 decisions); Sprint at 14 (same); WorldCom at 7; Z-Tel at 7-8.

different statutory provisions. As AT&T (at 7) and others<sup>8</sup> demonstrate, it is an elementary rule of statutory construction that agencies and courts must strive to give meaning to every provision of a congressional statute. Eliminating key (and explicit) provisions of the competitive checklist -- which are applicable only to BOCs that enter the in-region interexchange market -- merely because the Commission finds, under a different section, that a network element does not need to be provided *generally* would have exactly the opposite effect.

Furthermore, this reading is necessary to give appropriate meaning to section 271(d)(6)'s enforcement provisions, which specifically charge the Commission with monitoring a BOC's *post-entry* behavior pursuant to the checklist.<sup>9</sup> The Commission has often recognized the importance of its obligation under this section to insure that local markets remain open to competition after a BOC receives interLATA relief.<sup>10</sup> Verizon's proposed statutory interpretation, in contrast, would read section 271(d)(6)'s enforcement provisions out of the Act.<sup>11</sup>

Notably, the comments also show that Verizon's (and other ILECs') arguments on this issue are inconsistent. The ILECs have vociferously argued in the *Triennial Review* that the Commission should decline, for policy reasons, to require ILECs to unbundle certain network elements under section 251(d)(2) *even if* new entrants would be impaired without access to such elements. In particular, they have strongly urged the Commission

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<sup>8</sup> *E.g.*, Z-Tel at 6; WorldCom at 3.

<sup>9</sup> PACE at 9; PacWest at ii; Sprint at 10-11.

<sup>10</sup> *E.g.*, Covad at 4.

<sup>11</sup> AT&T at 7; Z-Tel at 10.

to base section 251(d)(2) unbundling decisions on factors such as whether unbundling would reduce incentives to invest in new facilities.<sup>12</sup> Therefore, Verizon and its supporters (SBC at 3; USTA at 3) cannot reasonably claim that a Commission decision not to require unbundling of a particular element under section 251(d)(2) necessarily means that there is a fully open local market in general, or that there is a competitive market for a specific network element.

In sum, the comments demonstrate that Verizon's proposed statutory interpretation is incoherent and must be rejected.

**B. Verizon Has Failed to Demonstrate that Forbearance Would Meet the Requirements of Sections 10(a)&(d).**

Verizon has also failed to comply with the statutory criteria for forbearance under sections 10(a) and 10(d). As a threshold matter, Verizon's Petition fails because section 271(d)(4) makes clear that the Commission "may not," either by rule "or otherwise," limit the terms of the competitive checklist. 47 U.S.C. §271(d)(4). Accordingly, notwithstanding its general forbearance authority, the Commission "may not" use forbearance to limit the terms of the competitive checklist, which is indisputably what Verizon seeks in its Petition.<sup>13</sup>

Furthermore, many commenters support AT&T's showing (at 8-11) that Verizon has not complied with the basic requirements of section 10(a), *i.e.*, that the statutory provision is not necessary to assure that Verizon's charges and practices are just and reasonable and are not unreasonably discriminatory; that the provision is not necessary to

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<sup>12</sup> See Petition at 5 ("overbroad unbundling creates profound disincentives for investment"); WorldCom at 6.

<sup>13</sup> AT&T at 8; PacWest at 6; WorldCom at 3.

protect consumers; and that forbearance would serve the public interest.<sup>14</sup> In particular, there is no showing that the complete withdrawal of loops, transport, switching or signaling and databases – which would be permitted by forbearance – would be just and reasonable and would promote the competition the Act seeks to establish. Indeed, the likely result would be just the opposite.<sup>15</sup>

Just as critically, Verizon utterly fails to demonstrate that its Petition complies with section 10(d), which expressly *prohibits* the Commission from forbearing under section 271 until that section has been “fully implemented.” As many commenters show, a Commission decision not to require unbundling of a particular element pursuant to section 251(d)(2) – the lynchpin of Verizon’s position – does not and cannot demonstrate that section 271 has been “fully implemented.” Indeed, given the special history of section 271, the commenters correctly argue that such a showing cannot be made until a BOC shows that its ability to wield market power with respect to a specific network element has been eliminated in a particular geographic area and there is a flourishing

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<sup>14</sup> See, e.g., PACE at 10-11; PacWest at 11-16; Sprint at 17-21.

<sup>15</sup> In this regard, AT&T supports WorldCom’s statement (at 8) that the Commission should apply TELRIC pricing to elements that must be unbundled under section 271 but not section 251, because “it would have been pointless for Congress to have required unbundling under section 271 if the BOCs could be charged monopoly prices for the unbundled elements.” See also PACE at 11; PacWest at 19; Sprint at 15. Moreover, WorldCom (*id.*) correctly states—and the BOCs affirmatively argue (*see* discussion at 5-6 above) -- that decisions under section 251(d)(2) may be based on factors other than CLEC impairment, so that an element could be withdrawn even though CLECs would be impaired without access to it. Therefore, WorldCom (at 9) is correct that the appropriate pricing methodology for individual elements provided under section 271 (but not section 251) should be determined on the basis of whether “there is a robust competitive market for the element in question.”

competitive wholesale market for that element.<sup>16</sup> Verizon has not made the slightest effort to show that such a circumstance exists anywhere.

Moreover, as WorldCom (at 13-15) recognizes, rulings on such critical issues – rulings that would effectively repeal Congressional requirements – cannot be decided in the gross manner that Verizon suggests. Rather, given Congress’ special concern for the BOCs’ enormous market power, such rulings should only be made on the basis of specific facts about individual product and geographic markets, not on the across-the-board basis that the Petition suggests. Thus, Verizon’s failure to present any specific evidence regarding specific product and geographic markets provides a separate basis for the Commission to dismiss Verizon’s petition.

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<sup>16</sup> PACE at 11-13; WorldCom at 11-12; Z-Tel at 18-22.

**Conclusion**

For the reasons stated above and in AT&T's initial comments, Verizon's Petition should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Theresa Donatiello Neidich, do hereby certify that on this 18<sup>th</sup> day of September, 2002, a copy of the foregoing AT&T Reply. was served by US first class mail, postage prepaid, on the parties named on the attached service list.

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