

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

In the Matter of)	
)	
Petition for Forbearance From)	
The Current Pricing Rules for)	WC Docket No. 03-157
The Unbundled Network Element)	
Platform)	

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

SBC Communications Inc. (“SBC”) respectfully submits this reply to the comments filed with respect to the forbearance petition filed by the Verizon Telephone Companies (“Verizon”) in this docket.

I. INTRODUCTION

The Commission should immediately forbear from applying its UNE pricing rules to UNE-P. The continuously declining UNE-P rates that have resulted from application of the Commission’s UNE pricing rules to UNE-P have seriously distorted the telecommunications market. As Verizon and several commenters supporting Verizon’s petition demonstrated, the application of the Commission’s UNE pricing rules to UNE-P has devalued existing telecommunications investment, discouraged additional investment, and has led to massive regulatory arbitrage. The Commission has full authority, and a duty, to forbear from applying its UNE pricing rules to UNE-P, both with respect to Verizon and the other ILEC petitioners that have filed similar petitions.¹

¹Petition for Expedited Forbearance of the Verizon Telephone Companies, WC Docket No. 03-157 (July 1, 2003); Joint Petition of Qwest Corporation, BellSouth Telecommunications, Inc. and SBC Communications Inc. for Expedited Forbearance, WC Docket No. 03-189 (July 31, 2003).

II. THE UNE-P PRICING RULES SUBSTANTIALLY DISTORT THE TELECOMMUNICATIONS MARKET AND THE COMMISSION SHOULD FORBEAR THEM PROMPTLY

The avalanche of CLEC comments submitted in opposition to Verizon’s petition do not disprove the basic premise that UNE-P TELRIC pricing has had a substantially deleterious effect on investment in our nation’s vital telecommunications infrastructure. AT&T and others try to slough off this slump in wireline telecommunications investment as the product of macroeconomic factors alone. But they cannot explain why wireline carriers have reduced yearly investment by more than \$60 billion between 2000 and 2002.² And the CLECs’ argument that there has been no decline in overall investment, or that UNE-P even increases investment, is utterly at odds with the conclusions of numerous independent investment analysts.

The CLECs’ underlying position is perhaps most clear from their insistence that the Commission should not even be concerned that UNE-P might be reducing facilities investment, because facilities-based competition in the mass market is “inefficient” or “wasteful” or “redundant.”³ But that position is completely inconsistent with the basic premise of the 1996 Act, upon which the Commission has structured its entire wireline competition policy. It also ignores all economic logic. As Justice Breyer has observed, it is only in “the unshared, not in the shared, portions” of the wireline network that consumers can enjoy “meaningful competition.”⁴ The current UNE-P pricing regime may permit AT&T to earn a “gross margin of 45 percent on the local,”⁵ but it does not provide incentives for innovation, facilities investment or differentiation, or any type of true, lasting competition. To the contrary, while CLECs are earning massive margins of the type AT&T touts, investment in the wireline industry in general has floundered. Forbearance is necessary now to correct this situation.

²See Skyline Marketing Group, CapEx Report: 2002 Annual Report, Carrier Data Sheet 1 (June 2003).

³See MCI Comments at 38; AT&T Comments at 46 & Att. B at 28-29.

⁴*AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 429 (1999) (Breyer, J., concurring).

⁵ *Transcript*, Q2 2002 AT&T Earnings Conference Call—Final at 19 (July 23, 2002) (“AT&T Earnings Transcript”).

III. FORBEARANCE IS CONSISTENT WITH SECTION 10 OF THE ACT

Section 10 of the Act was clearly intended to serve as an integral part of a new procompetitive, deregulatory framework for the telecommunications industry. As the D.C. Circuit has emphasized, Section 10 is written “broadly.”⁶ Upon an appropriate factual showing, it *requires* the Commission to forbear from “any regulation or any provision” of the Act, as long as the three criteria set forth in section 10(a) are satisfied. 47 U.S.C. § 160(a). In particular, the Commission must forbear from *any* provision *or* regulation of the Act if that requirement is not necessary to ensure just, reasonable and non-discriminatory rates, is not necessary to protect consumers, and if forbearance would be in the public interest.⁷

Contrary to the CLECs’ arguments, the forbearance relief requested here fully satisfies section 10’s requirements. It is both in the public interest and entirely consistent with the policies and requirements of the Communications Act. Eliminating the current UNE-P pricing regime would eliminate the fiction that UNE-P is different than resale, and it would thus allow the proper application of resale pricing rules to UNE-P. Since Congress and the Commission already have recognized that such compensation is proper when CLECs choose to offer service through resale, it can hardly be described as unjust, unreasonable or discriminatory: to the contrary, the current regime, which permits CLECs to make tremendous profit margins while undercompensating ILECs, is clearly *less* reasonable and just. *See* 47 U.S.C. § 160(a)(1).

Elimination of the current application of UNE pricing rules to UNE-P also will protect consumers and serve the public interest. *See* 47 U.S.C. §§ 160(a)(2)-(3). The correction of market incentives will produce more facilities-based competition, more innovation and true service differentiation, and more redundant networks. Further, the CLECs’ claim that forbearance will eradicate the competition provided by scores of UNE-P carriers rings false.⁸

⁶ *AT&T Corp. v. FCC*, 236 F.3d 729, 738 (D.C. Cir. 2001).

⁷ *See Id.*

⁸ *See* AT&T Comments at 6-7; MCI Comments at 1.

Carriers currently offering UNE-P based services need not cease operations and leave the market as a result of the relief Verizon requests: pricing based on the resale pricing rules will still leave these carriers in a position to provide services in competition with the ILECs, but without the false incentives and cost structure created by current UNE-P pricing.

The CLECs nonetheless argue that forbearance here is foreclosed by the one exception to section 10(a) set forth in section 10(d) of the Act.⁹ But section 10(d) is limited to “the requirements of section 251(c) or 271” of the Act, and only until the Commission “determines that those requirements have been fully implemented.” 47 U.S.C. § 160(d). The CLECs argue that this exception precludes forbearance from application of the Commission’s TELRIC rules to UNE-P providers, because TELRIC pricing is one of the “requirements of section 251(c).”¹⁰

The CLECs, however, confuse what the Commission *must* do under the Act with what the Supreme Court has determined it *may* do in the exercise of its discretion. Both the Commission and the Court have found the TELRIC methodology to be but one permissible way of setting prices for unbundled network elements in compliance with the general requirement of section 252(d)(1) that such prices be based on “cost.”¹¹ The Supreme Court noted that the Act “leaves [pricing] methodology largely subject to [the Commission’s] discretion.”¹² Indeed, the Court’s decision to uphold the TELRIC standard turned on this critical premise of administrative law. As the Court noted, “the word ‘cost’ in § 252(d)(1) . . . is ‘a chameleon,’ a ‘virtually meaningless’ term” that serves to “give ratesetting commissions broad methodological

⁹See AT&T Comments at 21-29; MCI Comments at 19-28; Sprint Comments at 17.

¹⁰ See, e.g., AT&T Comments at 23.

¹¹ See, e.g., First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd. 15499, ¶¶ 630-32 (1996) (“*Local Competition Order*”) (noting that instead of cost-of-service regulation, “the statute contemplates the use of other forms of cost-based price regulation, such as the setting of prices based on forward-looking economic cost methodologies,” and listing the states that have adopted long-run incremental cost methodologies); *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 499-501 (2002).

¹²*Verizon*, 535 U.S. at 501.

leeway.”¹³ Thus, the Court found it reasonable for “the FCC to pick TELRIC over alternative methods,”¹⁴ since “regulatory bodies required to set rates expressed in these terms have ample discretion to choose methodology.”¹⁵ In short, the CLECs’ effort to equate an exercise of *regulatory* discretion with a *statutory* “requirement” is inconsistent not only with the language Congress selected but also with the policies underlying the statute as identified by the Supreme Court.¹⁶

Nor, critically, is UNE-P itself a “requirement” of section 251(c). As Chairman Powell has confirmed, UNE-P “wasn’t in the statute. It was sort of a creative combination of the Commission.”¹⁷ And while the Supreme Court in *AT&T v. Iowa Utilities Board* held that the Commission’s UNE-P combination requirement was not *foreclosed* by the Act, it never held that UNE-P was *required* by the Act.¹⁸ As the Court again made clear in *Verizon Communications*

¹³ *Id.* at 500 (internal citations omitted).

¹⁴ *Id.* at 523.

¹⁵ *Id.* at 500.

¹⁶ Contrary to the CLECs’ extended extrapolation exercise, Section 252(e)(2)(B) of the Act does not support their claims about what Congress meant in section 10(c) of the Act. Section 252 was intended for the wholly independent purpose of ensuring that state commissions comply both with provisions of the Act and with this Commission’s regulations in their review of interconnection agreements; for this reason, it specifically refers *both* to the requirements of section 251 *and* to the related “regulations prescribed by the Commission.” 47 U.S.C. § 252(e)(2)(B). Similarly, AT&T’s assertion that the Commission has equated regulations and requirements in its *1998 Biennial Review NPRM* is a manipulation of the referenced passage. The Commission merely said there that it did not intend to forbear from *either* the statutory requirements or its regulations.

¹⁷ *Powell Defends Stance on Telecom Competition*, Communications Daily, May 22, 2001. *See also Competition Issues in the Telecommunications Industry: Hearings Before the Senate Comm. on Commerce, Science and Transportation*, 108th Cong. (2003): “UNE-P is not a network element, nor does the statute provide for it as a complete entry vehicle. UNE-P is a consequence of previous regulatory decisions”

¹⁸ *Iowa Utils. Bd.*, 525 U.S. at 394 (holding that Commission could reasonably conclude that Act does not require leasing of UNEs in “discrete pieces” and “never in combined form”).

Inc. v. FCC, section 251(c)(3) “leav[es] open” the question of “who should do the work of combination.”¹⁹

Thus, since neither TELRIC nor UNE-P is required by the Act, the application of TELRIC to UNE-P is doubly discretionary. And the Commission’s rule that non-facilities-based CLECs are entitled to receive access charges from IXCs is equally a creation of the Commission that is not required by any provision of the Act, much less section 251(c). In fact, the Commission already once determined that it could forego application of this rule.²⁰

Even if the regulations at issue here were “requirements” of section 251(c), however, section 10(d) only prohibits forbearance until they are “fully implemented.” 47 U.S.C. § 160(d). Where the Commission has approved a BOC’s section 271 application, it has found that the relevant unbundling and pricing requirements were “fully implemented” as part of the competitive checklist. 47 U.S.C. § 271(d)(3)(A)(i). In Texas, for example, the FCC found that SBC’s subsidiary “provides requesting telecommunications carriers with nondiscriminatory access to unbundled network elements,” and then concluded that SBC’s pricing met the requirements of checklist item two as well.²¹ In such circumstances, the Commission discharged its statutory duty under section 271 to determine that the BOC had “fully implemented” the requirements of section 251(c)(3), and it accordingly is authorized to forbear from requirements of section 251(c) *or* 271, and must do so if it finds that section 10(a)’s requirements are satisfied.

The CLECs’ argument to the contrary depends upon a bizarre claim that Congress used the term “fully implemented” in both Section 10(d) and section 271 in different senses -- even though the former expressly cross references the latter. It also would serve to make it impossible for these provisions ever to be “fully implemented,” on the theory that a BOC might “backslide”

¹⁹*Verizon*, 535 U.S. at 534.

²⁰ See *Local Competition Order* ¶¶ 719, 726-27.

²¹ See Memorandum Opinion and Order, *Application by SBC Communications Inc., et al.*, 15 FCC Rcd 18354, ¶¶ 213-42 (2000).

from such implementation (notwithstanding the Commission's panoply of protections in its section 271 orders designed to deter such backsliding). This argument turns a number of well-established doctrines of statutory interpretation on their head, and must be rejected.

IV. THE VERIZON PETITION IS NOT AN IMPROPER REQUEST FOR RULEMAKING

The CLECs also argue that the Commission cannot grant Verizon's petition because it requests a change to Commission rules rather than forbearance from application of such rules.²² But the effect of forbearance from the application of TELRIC pricing rules to UNE-P would not require the creation of any new pricing rules. Rather, it would simply result in the application of the *existing* resale standard -- as to which the Commission already has issued all necessary rules - - to UNE-P. And since UNE-P is the functional equivalent of resale, both Congress (and the Commission) already have concluded that the wholesale discount represents appropriate pricing. Similarly, the Commission need not adopt any new rules to forbear from applying its policy of allowing CLECs to collect access charges when they obtain UNE-P: the Commission already has recognized that ILECs should collect access charges when they provide services for resale. *See* 47 C.F.R. § 51.617(b).

Further, while the Commission has indicated that it soon will initiate a proceeding to reform the TELRIC pricing rules generally, this does not excuse the Commission from its obligation to forbear here. As the D.C. Circuit has held, "Congress has established § 10 as a viable and independent means of seeking forbearance," and the Commission "has no authority to sweep it away by mere reference to another, very different, regulatory mechanism."²³

²²*See* AT&T Comments at 10-13; MCI Comments at 2-4; Sprint Comments at 5-11; Z-Tel Comments at 4-13.

²³ *AT&T Corp. v. FCC*, 236 F.3d at 738.

V. CONCLUSION

For the foregoing reasons, Verizon's petition for forbearance should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Regina Ragucci, do hereby certify that a copy of **Reply Comments of SBC Communications Inc.** has been served on the parties listed on attached sheets via first class mail – postage prepaid on this 2nd day of September 2003.

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