

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

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

REPLY COMMENTS OF AT&T CORP.

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existing Commission and court precedents. And section 10(d) of the Act bars the Commission from even applying the forbearance criteria to UNE-related rules until the “requirements” of sections 251(c) and 271 “have been fully implemented,” a showing that Verizon does not and could not make. Indeed, the Commission’s newly-released *Triennial Review Order*,² which sets forth rules that govern the core market opening requirements of section 251(c)(3), that demonstrates that significant additional work by the states, the carriers, the Commission and by reviewing courts must occur to “implement” section 251(c) and other UNE-related provisions. Because state commissions have not even had the opportunity to ensure that the Commission’s rules are fully reflected in the relevant interconnection agreements that govern incumbent-competitive carrier relationships or to ascertain whether the incumbents have complied with those rules, the nation’s state regulatory commissions urge the Commission summarily to reject Verizon’s Petition.

The comments also show that Verizon has failed to satisfy any of the three specific section 10(a) forbearance criteria. As the commenters explain, it would hardly “enhance competition among providers of telecommunications services,”³ or serve the “public interest,”⁴ to surrender to incumbent monopolists’ demands that the Commission wipe out what is, in most local markets, the *only* significant competitive alternative for mass-market customers. The relief sought in the Petition would deprive millions of consumers of their chosen local telephone service and, for most, would put an end to local telephone choice altogether. And in light of

² Report and Order, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, *et seq.*, FCC 03-36 (Aug. 21, 2003) (“*Triennial Review Order*”).

³ 47 U.S.C. § 10(a)(2).

⁴ *Id.* § 10(a)(3).

Congress' express determination in section 252(d)(1) that the only just and reasonable rate for UNEs is one that is "cost-based," and the Commission's holding in the *Local Competition Order* that UNE rates in excess of TELRIC levels are inherently discriminatory, there can be no finding that ending cost-based UNE-P would "ensure that charges . . . are just and reasonable and not unjustly or unreasonably discriminatory."⁵

The commenters uniformly recognize the numerous shortcomings in Verizon's "statistical" showing that UNE-P has undermined "facilities-based" competition. As the comments demonstrate, Verizon simply *assumed* that, (1) because the TELRIC standard has been enforced with increasing rigor during the past few years and (2) *growth* in new telecommunications investment flows has declined during the same period (unlike *total* investment, which has increased), that (3) the former must have caused the latter. Of course, this "fuzzy math" should be rejected out of hand. Indeed, the comments cite a wealth of econometric evidence, using rigorous and accepted statistical techniques, that empirically demonstrates the *inverse* relation between UNE prices and competitive carrier investment: lower UNE prices tend to encourage facilities-based entry and investment, and higher UNE prices tend to suppress them.

A few other incumbent carriers filed in support of Verizon, but their advocacy is clearly half-hearted. Notably, they offer *no* response to the many fundamental legal deficiencies identified with Verizon's Petition. Instead, they merely proffer their own "me-too" "data" on the alleged impact of "low" UNE prices on investment by competitive carriers in facilities in their regions. As explained below, this "analysis" suffers from exactly the same flaws that infect Verizon's statistics. Moreover, even taken at face value, the incumbents' statistics show that,

⁵ *Id.* § 10(a)(1).

despite adverse economic conditions, overall investment by competitive carriers in facilities continues to grow and is at an all time high. Indeed, one incumbent, ACS of Anchorage (“ACS”), acknowledges that, despite the presence of cost-based UNE-P, it is facing vigorous competition – which, as Congress intended, has caused it to “cut the fat” from its operations – from facilities-based competitors who continue to invest in bypass facilities.

On this record, there is no possible ground for granting Verizon’s Petition. Verizon seeks to alter the “competitive balance originally envisioned by the Congress, the FCC, and the individual states [in implementing the 1996 Act].”⁶ Congress authorized the Bells to enter the long distance markets, but only after first opening their local markets to competition. Now that Verizon has eaten the carrot, it asks the Commission to turn the stick on its competitors. The Petition must be denied.⁷

ARGUMENT

I. THE COMMENTS OVERWHELMINGLY CONFIRM THAT VERIZON’S PETITION FAILS TO MAKE THE SHOWINGS REQUIRED BY SECTION 10.

Verizon’s Petition should be summarily rejected because it suffers from three independent legal deficiencies. Indeed, the legal problems with Verizon’s Petition are so grave

⁶ Comments of New Jersey Board of Public Utilities at 2, WC Docket No. 03-157 (filed August 18, 2003) (“New Jersey BPU”).

⁷ Verizon will undoubtedly attempt to “reposition” its case on reply. It is inconceivable that any such filing could begin to remedy the numerous and patent deficiencies in its Petition. In any event, the Commission should take this opportunity to make clear that it is too late for Verizon to file another “case in chief.” Given the time limits imposed by section 10 when petitioners (unlike Verizon here) properly caption their pleadings – and the spate of forbearance petitions filed by the BOCs – the Commission should clarify that entities seeking forbearance should be required to attach with their petition all the factual information upon which they are relying to demonstrate that the section 10(a) criteria have been met. Forbearance petitioners should not be allowed to move the target by filing one case and, when that is rebutted, filing another in their reply comments.

that the few commenters that support Verizon largely ignore these issues in the vain hope that the Commission will too.

First, what “Verizon seeks is essentially a substantive change in rules, masquerading as a forbearance petition.”⁸ Granting Verizon’s Petition therefore would be a blatant violation of the notice and comment requirements of section 553 of the APA⁹ – as the Commission has already expressly recognized in rejecting an attempt (by Verizon’s own predecessors) to slip rulemaking requests into a prior forbearance petition.¹⁰

Second, the comments demonstrate that the particular rules that Verizon urges the Commission to adopt are foreclosed by the Act’s plain language.¹¹ Congress directed that UNE prices “shall” be “based on the cost” of providing them,¹² and Verizon’s proposal to use “resale” pricing when UNEs are used in the UNE-P combination is not cost-based. The proposed use restriction – a patently anticompetitive and unlawful rule that would prohibit competitive carriers

⁸ Comments of Covad Comm. Co. at 1, WC Docket No. 03-157 (filed August 18, 2003) (“Covad”). *See also* Opposition of Bridgecom International, Inc. at 3, WC Docket No. 30-157 (filed August 18, 2003) (“Bridgecom”); Response of the California Public Utilities Commission at 13, WC Docket No. 03-157 (filed August 18, 2003) (“California PUC”); Opposition of the Competitive Telecomm. Assoc. at 3, WC Docket No. 03-157 (filed August 18, 2003) (“CompTel”); Opposition of MCI at 3, WC Docket No. 03-157 (filed August 18, 2003) (“MCI”); New Jersey BPU at 1; Opposition of the PACE Coalition at 3-4, WC Docket No. 03-157 (filed August 18, 2003) (“PACE”); Sprint Corp.’s Opposition at 5-8, WC Docket No. 03-157 (filed August 18, 2003) (“Sprint”); Opposition of Z-Tel Comm. Inc. at 4-7, WC Docket No. 03-157 (filed August 18, 2003) (“Z-Tel”).

⁹ CompTel at 3; MCI at 3; Sprint at 8-11; Z-Tel at 8-13.

¹⁰ Order, *New England Telephone and Telegraph Co. and N.Y. Tel. Co. Petition for Forbearance from Jurisdictional Separations Rules*, 12 FCC Rcd. 2308 (1997).

¹¹ Covad at 2; Joint Comments of A+ American Discount Telecom, LLC *et. al* in Opposition to Petition for Expedited Forbearance at 8, WC Docket No. 03-157 (filed August 18, 2003) (“Joint Comments”); MCI at 5-7; Z-Tel at 14.

¹² 47 U.S.C. § 252(d)(1).

from using the UNE-P combination of elements to provide exchange access services – is likewise foreclosed by the language of the Act and the Commission’s precedents interpreting it.¹³ Exchange access services are undeniably telecommunications services. Thus, as the Commission has held, section 251(c)(3)’s commands that Verizon must provide nondiscriminatory access to UNEs “for the provision of a telecommunications service” and that it must do so “in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service”¹⁴ are “plain” and “not ambiguous” in entitling competitive carriers to “purchase unbundled elements for the purpose of offering exchange access service.”¹⁵

If any doubt remained on these issues, it was put to rest by last week’s *Triennial Review Order*. There, the Commission again reaffirmed its findings in 1996, 1997, and in 1999 that the plain text of the Act allows requesting carriers to use UNEs to provide exchange access services.¹⁶ Likewise, the Commission confirmed that competitive carriers are entitled to combinations of network elements at TELRIC-based rates, including all of the elements that make up the “UNE-platform.”¹⁷

¹³ Comments of Focal Comm. Corp. *et al.* at 35, WC Docket No. 03-157 (filed August 18, 2003) (“Focal *et al.*”); Joint Comments at 9-10; MCI at 8-11; Z-Tel at 14-15. MCI and the New Jersey RPA also demonstrate that Verizon’s proposal violates the CALLS settlement. MCI at 12; Comments of the New Jersey Div. of the Ratepayer Advocate at 32-33, WC Docket No. 03-157 (filed August 18, 2003) (“New Jersey RPA”).

¹⁴ 47 U.S.C. § 251(c)(3).

¹⁵ First Report and Order, *Implementation of the Local Competition Provisions in the Telecomm. Act of 1996*, 11 FCC Rcd. 15499, ¶¶ 356, 359 (1996) (“*Local Competition Order*”).

¹⁶ *Triennial Review Order* ¶ 133; 47 C.F.R. § 51.309.

¹⁷ *Triennial Review Order* ¶¶ 573-74.

Third, the Commission cannot grant Verizon’s request, because section 10(d) bars the Commission from even applying the section 10(a) forbearance criteria to UNE-related rules until the “requirements” of sections 251(c) and 271 “have been fully implemented.”¹⁸ And contrary to the Petition’s bare assertions, the “requirements” of sections 251(c) and 271 have *not* been “fully implemented.” As MCI explains, the “‘fully implemented’ standard requires a showing that a BOC no longer is dominant in the provision of the network elements and telecommunications services that entrants require to enter and compete effectively with the BOC.”¹⁹

Moreover, as Z-Tel explains, “*no* set of federal ‘unbundling rules’ under section 251(c)(3) ha[ve] ... been affirmed by the appellate courts,” and state commissions have not even begun the work of reflecting these new rules in the interconnection agreements that govern the relationship between incumbent and competitive carriers.²⁰ At a minimum, there can be no claim that section 251(c) has been “fully implemented” until the Commission’s implementing rules have been upheld by the courts, state commissions have carried out their responsibilities under those rules, the changes have been fully reflected in the relevant interconnection agreements, and a sufficient time has elapsed to determine whether Verizon and the other incumbent LECs have

¹⁸ Opposition of AT&T Corp. at 22-29, WC Docket No. 03-157 (filed August 18, 2003) (“AT&T”); Joint Comments at 9-10; MCI at 21-23; Opposition of Sage Telecomm., Inc. at 4-5, WC Docket No. 03-157 (filed August 18, 2003); Sprint at 17; Opposition of Telscape Comm., Inc. at 3-6, WC Docket No. 03-157 (filed August 18, 2003) (“Telscape”). In its Petition, Verizon argued that its Petition addresses only regulations, which are not “requirements” of the Act. But as AT&T explained, this argument runs afoul of the statute’s language, which makes clear that the “requirements of section 251 . . . includ[e] the regulations prescribed by the Commission.” 47 U.S.C. § 252(e)(2)(B). The Act could hardly state otherwise, as an implementing rule is inherently an agency’s authoritative view of an Act’s “requirements.” *See* PACE at 7.

¹⁹ MCI at 28; *see also* Sprint at 17.

²⁰ Z-Tel at 16 (emphasis in original).

fully complied with the law.²¹ Critically, this is not just the view of competitive carriers, but also of the state commissions, which have the greatest expertise in competitive conditions within their respective states and ultimate authority for making local competition a reality.²²

Finally, and in all events, the comments show that “the standards for forbearance” under section 10 “have not been satisfied.”²³ Most obviously, Verizon failed to demonstrate that its requested “forbearance” would not harm consumers.²⁴ Nor could it. The Commission has specifically found,²⁵ and the Supreme Court has specifically endorsed,²⁶ that the TELRIC standard best comports with economic efficiency and is most likely to foster effective competition in local telephony.²⁷ Thus, granting Verizon’s Petition would “permit Verizon and other ILECs to impose excessive UNE rates on CLECs,” and perpetuate the *status quo* in which Verizon is able to collect “monopol[y] profits” from captive ratepayers.²⁸

Likewise, it would hardly “enhance competition among providers of telecommunications services,”²⁹ to give in to a monopolist’s demand that the Commission wipe out what is, in most

²¹ PACE at 7.

²² California PUC at 12; Letter from Robert B. Nelson, NARUC Resolution, to the Honorable Michael Powell *et al.*, FCC, WC Docket No. 03-157 (filed August 15, 2003).

²³ Comments of the Pennsylvania PUC at 1, WC Docket No. 03-157 (filed August 18, 2003).

²⁴ 47 U.S.C. § 160(a)(2).

²⁵ *Local Competition Order* ¶¶ 672, 685.

²⁶ *Verizon Comm., Inc. v. FCC*, 535 U.S. 467, 516-17, 523 (2002) (“*Verizon*”).

²⁷ AT&T at 33-34 (discussing Supreme Court and Commission precedents); *see also* Bridgecom at 15-17; Focal *et al.* at 3-13 (same); New Jersey RPA at 10-12 (same).

²⁸ Comments of the Assoc. of Comm. Enterprises *et al.* at 25, WC Docket No. 03-157 (filed August 18, 2003) (“ACE”); *see also* Focal *et al.* at 37 (“A just and reasonable rate regime is not meant to protect monopolists’ profits.”).

²⁹ 47 U.S.C. § 160(b).

local markets, the *only* significant competitive mass-market alternative to the incumbent. As the Department of Justice explained in the proceedings that led to the adoption of TELRIC, allowing incumbents to set UNE prices in excess of TELRIC – as Verizon’s Petition seeks – would allow incumbent carriers to “price squeeze” new entrants and foreclose meaningful competition.³⁰ Thus, as the state commissions and ratepayer advocates recognize, the relief sought in the Petition would deprive literally *millions* of consumers of their chosen local telephone service and, for most consumers, would put an end to local telephone choice altogether and exact enormous social costs.³¹ CompTel, MCI, and Z-Tel show in detail that this competition has resulted in greater quality, lower prices, and innovative new products by competitive and incumbent carriers alike.³² Overall, CompTel estimates that residential consumers could save over \$9 billion as a result of competition enabled by UNE-P priced at TELRIC-based rates.³³

Nor could Verizon’s proposal to end cost-based UNE-P conceivably “ensure that the charges . . . are just and reasonable and not unjustly or unreasonably discriminatory.”³⁴ Congress has directed that the *only* just and reasonable rates in this context are cost-based rates.³⁵ Likewise, in light of the fact that the Commission has recognized that TELRIC represents the

³⁰ Z-Tel at 17-18 (discussing the DOJ’s support of TELRIC).

³¹ New Jersey BPU at 2; Comments of NASUCA at 18-19, WC Docket No. 03-157 (filed August 18, 2003) (“NASUCA”); New Jersey RPA at 5; *see also* Sprint at 14.

³² MCI at 15-16; CompTel at 9-10; Z-Tel at 22-23.

³³ CompTel at 9.

³⁴ 47 U.S.C. § 160(a)(1)

³⁵ *See id.* § 252(d)(1) (“Determinations by a State commission of the just and reasonable rate[s] . . . shall be . . . based on the cost” of providing requested elements).

cost at which the incumbents' access their networks,³⁶ allowing incumbents to charge competitive carriers much higher rates is the paradigm of discrimination.³⁷

Those incumbents that support Verizon's arguments offer no meaningful response to these arguments. They do not deny that granting Verizon's Petition would allow them to raise UNE rates, choke off nascent and emerging local exchange competition, and maintain existing monopoly profits. Rather, they argue that forbearance is justified because cost-based UNE-P "saps" the incentives of competitive carriers to invest in their own facilities.³⁸ But even if that were true, such a showing would still be insufficient to satisfy *each* of the demanding requirements of section 10.³⁹ Thus, Verizon must show that the regulations it challenges are not necessary to "ensure" "just and reasonable" rates,⁴⁰ are "not necessary for the protection of consumers,"⁴¹ and are not necessary to protect the "public interest."⁴² Moreover, and as explained in AT&T's initial comments and immediately below in Part II, there is no factual basis to Verizon's investment incentive argument.

³⁶ *Local Competition Order* ¶ 865; *see also id.* ¶ 862.

³⁷ AT&T at 35 & Att. A, ¶¶ 21-22; PACE at 10; Telscape at 11-12; Z-Tel at 18-19.

³⁸ Comments of ACS of Anchorage, Inc. at 18-20, WC Docket No. 03-157 (filed August 18, 2003) ("ACS"); Comments of Qwest Corp. at 3-6, WC Docket No. 03-157 (filed August 18, 2003) ("Qwest"); SBC at 7-14.

³⁹ *See* 47 U.S.C. § 160(a); *Cellular Telecomm. & Internet Ass'n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003).

⁴⁰ 47 U.S.C. § 160(a)(1)

⁴¹ *Id.* § 160(a)(2).

⁴² *Id.* § 160(a)(3).

II. THE “DATA” OFFERED BY THE BOC COMMENTERS WOULD FLUNK A REMEDIAL COURSE IN BASIC STATISTICS.

Like Verizon, Qwest and SBC offer a hodgepodge of data supposedly proving that TELRIC-based UNE prices are too low, have led to “excessive” use of UNE-P, and have discouraged efficient facilities-based investment and entry. Specifically, Qwest and Verizon assert that:

- The decline in the average price of unbundled loops or UNE-P in recent years is unjustified by costs.⁴³
- The decline in UNE prices has caused a big upsurge in usage of UNE-P, and has enabled CLECs to engage in “arbitrage” by cherry-picking the incumbent carriers’ most profitable customers.⁴⁴
- The decline in UNE prices has also caused a decline in facilities-based investment and entry.⁴⁵

Each link in this chain is unsupported. Like Verizon, Qwest and SBC offer junk statistics, not credible evidence. Indeed, the “analyses” submitted by Qwest and SBC are even flimsier than Verizon’s.

A. Qwest And SBC Have Failed To Show That The Decline In UNE Prices Is Unwarranted By Costs.

Qwest and SBC are undoubtedly correct that the prices for UNEs in their service territories have generally declined since the first generation of state UNE pricing decisions. Qwest and SBC have not begun to show, however, that the rate reductions were unjustified, or the resulting rates are too low. As with Verizon, the downward trend in UNE prices is evidence

⁴³ Qwest at 3-4; Comments of SBC Comm. Inc. at 8-12 & Att. A, WC Docket No. 03-157 (filed August 18, 2003) (“SBC”).

⁴⁴ Qwest at 4-5; SBC at 12.

⁴⁵ Qwest at 5-7; SBC at 12-13.

that the 1996 Act is beginning to work, not that it has failed. UNE prices have fallen because state commissions have become more skilled at applying the TELRIC standard and excluding the embedded or inefficient costs that ILECs had previously fobbed off as TELRIC-compliant.⁴⁶

Qwest. Qwest does not even assert that the decline in UNE prices in the company's service area reflects any violation of TELRIC pricing rules, or that any of those prices fail to recover Qwest's forward-looking economic costs. Qwest offers only the RBOCs' perennial objection that the TELRIC methodology itself suffers from "inherent flaws" because it relies on "hypothetical" costs. Qwest 4. This claim was considered and rejected by the Commission in the *Local Competition Order* and by the Supreme Court last year in *Verizon*. Nothing in Qwest's comments breathes new life into this dead horse.

Second, in seven of the twelve states where Qwest complains about a downward trend in loop prices, the price reductions were implemented *voluntarily* by Qwest in a successful effort to obtain Section 271 authorization by benchmarking Qwest's rates in other states against its rates in Colorado.⁴⁷ The Commission, in approving Qwest's Section 271 applications for those seven states, specifically found that the benchmarked rates satisfied the TELRIC standard.⁴⁸

⁴⁶ AT&T, Att. B at 3, 7-10; *id.*, Att. C.

⁴⁷ See Qwest at 3 (Table 1) (noting that Qwest's rate reductions in Iowa, Idaho, Montana, North Dakota, Nebraska, New Mexico, South Dakota and Washington were "benchmarked"); *see also, e.g.,* Memorandum Opinion and Order, *Application by Qwest Comm. International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington & Wyoming*, ¶ 228, WC Docket No. 02-314 (filed December 23, 2002) ("*Qwest Colorado et al. 271 Order*") ("In each of the eight benchmark states – Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming – Qwest, until recently, provided UNEs at rates established by the state commission in an arbitration or generic cost proceeding. Shortly before filing its section 271 application with the Commission, Qwest voluntarily reduced its recurring charges for loop and non-loop UNEs in each of the eight states, as well as many of its NRCs. Qwest reduced these rates with the specific intent of passing a benchmark comparison to rates in Colorado."); Memorandum Opinion and Order, *Application by Qwest Comm. International, Inc. for Authorization to Provide In-Region,*

(continued . . .)

Third, the record also belies any notion that Qwest's UNE prices were unduly low in the five states where state commissions ordered rate reductions based directly on cost data. For example, even Qwest has bragged that the UNE rates adopted by the Colorado and Minnesota commissions are well within the range that any reasonable application of TELRIC principles would produce.⁴⁹

If anything, the rates in the thirteen Qwest states are still too high. As AT&T demonstrated in its opposition to Qwest's Section 271 Applications, Qwest's Colorado rates are above TELRIC levels, thus rendering the rates in states that used Colorado as a benchmark equally or even more inflated above TELRIC levels.⁵⁰

(. . . continued)

InterLATA Services in New Mexico, Oregon & South Dakota, ¶ 67, WC Docket No. 03-11 (filed April 15, 2003) ("*Qwest New Mexico et al. 271 Order*") ("Qwest has taken a similar approach to pricing issues as it did in the Qwest 9-State Order in that it made voluntary rate reductions in New Mexico, Oregon and South Dakota prior to filing its section 271 application").

⁴⁸ See, *Qwest Colorado et al. 271 Order* ¶¶ 174-175, 228 (finding "Qwest's current, voluntarily-reduced rates [in Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming] benchmark to the rates in Colorado" and therefore are TELRIC-compliant); *Qwest New Mexico et al. 271 Order* ¶ 67 (finding that Qwest's voluntary rate reductions in New Mexico, Oregon and South Dakota benchmark to Colorado).

⁴⁹ See, e.g., Brief of Quest Comm. International Inc. in Support of Consolidated Application for Authority to Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington & Wyoming at 151, WC Docket No. 02-314 (filed June 12, 2002) ("even if . . . the Commission were to undertake a *de novo* review of the CPUC proceedings, it would find them rigorous and faithful to TELRIC"); Brief of Quest Comm. International Inc. in Support of Application for Authority to Provide In-Region, InterLATA Services in Minnesota at 100, WC Docket No. 03-90 (filed March 28, 2003) ("Qwest's rates for UNEs and other interconnection offerings in Minnesota comply with Section 252(d)(1) of the Act and the Commission's established pricing rules, including Total Element Long Run Incremental Cost ("TELRIC")").

⁵⁰ See, e.g., Comments of AT&T Corp. Opposing Qwest 9-State Application at 69-80, WC Docket No. 02-314 (filed October 15, 2002).

Finally, Qwest limits its discussion of rate reasonableness to unbundled loops, and offers no discussion of the reasonableness of the state-prescribed prices for unbundled *switching*. This is a peculiar omission, for the main area of underinvestment attributed by Qwest to the TELRIC pricing standard is underinvestment in unbundled switching, not unbundled loops. *See, e.g.*, Qwest at 6. In effect, Qwest is implicitly arguing that the most effective way to increase the CLECs' use of unbundled loops is to *increase* unbundled loop rates!

SBC. SBC's comments, like those of Qwest and Verizon, are replete with tables and charts showing that UNE prices have declined, but wholly lacking in evidence that the declines were unwarranted.⁵¹ That is because no such showing could be made.

For example, SBC asserts, with no supporting evidence, that the switching and transport rate reductions ordered by the Illinois Commission reflect a misapplication of TELRIC principles. The record in the Illinois proceedings patently refutes this claim. In 1998, the Illinois commission determined that SBC's UNE rates, including its proposed unbundled switching rates, were inflated above TELRIC levels.⁵² That order required SBC to, among other things, submit new switching and transport cost studies. The order further outlined specific criteria with which the cost studies must comply to be consistent with TELRIC principles⁵³. The Illinois commission, however, allowed SBC to continue charging its inflated switching and transport rates until the new rates were adopted.⁵⁴ SBC finally submitted updated switching and transport

⁵¹ SBC at 8-11 (discussing UNE-P prices in Illinois, Indiana, Wisconsin and California).

⁵² *See* Second Interim Order, *Investigation into Forward Looking Cost Studies and Rates of Ameritech Illinois for Interconnection, Network Elements, Transport and Termination of Traffic; Illinois Bell Telephone Company Proposed Rates, Terms and Conditions for Unbundled Network Elements*, Docket Nos. 96-0486/0569, Consol. (ICC Feb. 17, 1998) ("1998 Order").

⁵³ *Id.*

⁵⁴ *Id.* Although SBC initially appealed the 1998 order, SBC ultimately withdrew that appeal and thus never challenged the Illinois commission's findings regarding the specific criteria that
(continued . . .)

cost studies in October, 2000. However, the Illinois Commission determined that those new cost studies failed to comply with the TELRIC requirements described in the commission's 1998 Order.⁵⁵ Accordingly, based on a vast record – which included expert testimony, hearings and briefing – the Illinois commission corrected SBC's mistakes and, for the first time, adopted TELRIC compliant switching and transport rates. Predictably, these UNE rates were substantially lower than the non-TELRIC UNE rates that SBC was previously permitted to charge. Indeed, the only way that SBC would be able to raise its UNE rates in Illinois is not by proving that the Illinois Commission's determinations are improper under TELRIC, but by unlawfully attempting to eliminate the application of TELRIC entirely.

Likewise, the UNE rate reductions recently adopted by the Indiana and Wisconsin commissions also are fully consistent with TELRIC principles. Indeed, the records in those proceedings fully contradict SBC's empty rhetoric to the contrary. In the most recent Indiana UNE rate case, for example, SBC did not even bother to file switching cost studies, arguing instead that the Indiana Commission should retain the then-existing switching rates.⁵⁶ But as the Indiana state commission recognized, those rates were based on "switching contracts that are now two generations old" and that such data are "stale" and cannot be used as a "reliable basis for establishing costs, especially when much newer data are available."⁵⁷ The Indiana

(. . . continued)

SBC's cost studies must satisfy to comply with TELRIC principles.

⁵⁵ See Order, *Investigation into Tariff Providing Unbundled Local Switching with Shared Transport*, Docket No. 00-0700, at 4-5 (ICC July 10, 2002).

⁵⁶ See Order, *In The Matter Of The Commission Investigation And Generic Proceeding On Ameritech Indiana's Rates For Interconnection, Service, Unbundled Elements, And Transport And Termination Under The Telecommunications Act Of 1996 And Related Indiana*, Cause No. 40611-S1; Phase I, at 113-115 (IURC March 28, 2002).

⁵⁷ *Id.*

Commission went on to explain that reliance on such outdated data would be especially inappropriate here, where there is no question that SBC “itself does not operate under these old contracts, nor will it in the future.”⁵⁸ Moreover, the Indiana state commission explained that SBC’s switching port charge . . . is the product of a cost model that has since been twice replaced by Ameritech.⁵⁹ Using updated cost data and modern cost models, the Indiana Commission ultimately concluded, based on a vast record – including expert testimony, hearings and briefing – that a reduction in SBC’s outdated switching rates would be fully consistent with TELRIC principles. Tellingly, SBC is championing that decision before the Commission as it seeks section 271 approval.⁶⁰

SBC’s complaints about the California rate reductions are similarly misleading. The California state Commission last adopted UNE rates in 1999, but recognized that those rates were “based largely on data that [had] . . . not been updated since 1994” and that there was “evidence that some of these costs may be changing rapidly.”⁶¹ Accordingly, in June 2001, the California Commission opened a proceeding to update those UNE rates. However, “after finding that the inadequacies in [SBC’s] cost filings had resulted in delays and the need to examine competing cost models,” the California Commission was forced to implement interim rate

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Similarly, in Wisconsin, the recently adopted UNE rates update rates that were last set in May 1997 – a proceeding in which most CLECs did not participate and which was based on old SBC cost data and cost models. Not surprisingly, the new cost proceeding – based on new data, modern cost studies, and industry participation – resulted in lower UNE rates than those rammed through by SBC in 1997 immediately after adoption of the Act.

⁶¹ *Interim Decision Setting Final Prices for Network Elements Offered by Pacific Bell*, D. 99-11-050, at 168 (CPUC Nov. 18, 1999).

reductions until it could complete the cost proceeding.⁶² SBC eagerly incorporated those rate reductions into its SGATs and championed them as it sought to gain Section 271 approval, and the Commission itself relied on those rates in determining that SBC's California UNE rate satisfied the requirements of section 271(d)(2) and fell within the range that a reasonable application of TELRIC principles would produce.⁶³

Simply put, SBC offers no credible evidence that these prices – or the prices for UNEs anywhere else in the SBC footprint – are too low. Nor can SBC bridge that deficiency by relying on the “estimate” of Commerce Capital Markets (“CCM”) that “SBC’s average operating costs for the UNE-P are actually greater than \$30.00.”⁶⁴ As an initial matter, no weight should be given to a third party’s estimate of SBC’s “costs” when SBC has full access to that data and could easily provide it to the Commission. In all events, the CCM Report⁶⁵ is fundamentally flawed for several independent reasons.

The CCM Report is, first and foremost, an analysis of *embedded* costs. It attempts to compute average embedded ILEC revenues and costs per “access line,” and to compare these embedded revenues and costs to UNE-P prices. There is, of course, no *a priori* reason why a UNE-P rate should have to exceed appropriately defined and measured embedded costs. If anything, given the historically declining costs in providing telecommunications services, a

⁶² Memorandum Opinion and Order, *Application by SBC Comm. Inc. et al. for Authorization to Provide In-Region, InterLATA Services in California*, ¶ 23, WC Docket No. 02-306 (December 19, 2002).

⁶³ *Id.* ¶¶ 54-65.

⁶⁴ SBC at 11 & n. 28.

⁶⁵ Anna-Maria Kovacs, Gregory Vitale and Wendy Burns, *The Status of 271 and UNE-Platform in the Regional Bells' Territories* (Nov. 8, 2002).

showing that a UNE-P rate is at or above (properly calculated) embedded costs is evidence that the UNE-P rate is probably too high.

Second, the CCM report does not even provide a fair comparison of revenues and costs at the embedded level. UNE-P is used mainly to provide POTS service to residential and small business customers. Thus, UNE-P does not use all the local network facilities (and associated functionalities) deployed by the ILECs. Hence, when looking to see whether UNE-P rates are sufficient, the relevant comparison is to the embedded costs and revenues of those facilities – and only those facilities – leased by a UNE-P customer.

CCM does not make such a comparison. The “embedded revenues and costs” measured in the CCM Report are not those derived from facilities that are used to provide only basic circuit-switched services (and are thus addressable by UNE-P). Rather, the CCM Report’s figures include very substantial revenues and costs attributable to non-circuit switched services, such as special access, dedicated private line services, packet switched data services, and ancillary services such as voicemail. CCM thus compares the revenues earned from UNE-P to the embedded costs and revenues of equipment used to provide capabilities well beyond those provided to a UNE-P customer. Hence, it is unsurprising that CCM’s comparison would lead to the conclusion that existing UNE-P rates are under-compensatory.⁶⁶

Third, the CCM Report also fails to exclude costs that an ILEC avoids when providing a UNE-P. UNE-P is a wholesale service. However, in determining the “costs” of UNE-P, CCM includes costs attributed to ILEC *retail* functions. As this commission and many state commissions have found, ILECs avoid a significant percentage of their retail costs, such as

⁶⁶ CCM’s figures for residential revenues also appear to be completely contrived: CCM simply *assumed* that “average residential revenue for each RBOC” equaled “its break-even cash cost per line, excluding taxes.”

marketing and billing costs, when providing wholesale service.⁶⁷ This error further inflates the embedded costs associated by CCM with the provision of UNE-P.

Correcting these basic mistakes, and comparing UNE-P revenues to embedded costs and revenues on a more consistent basis, shows that existing UNE-P rates are much closer to their corresponding embedded revenues and costs than claimed by CCM. Our only point here is to show that CCM's conclusion that existing UNE-P rates are only about half of embedded costs is a severe exaggeration.

SBC's remaining claim – that TELRIC-based pricing of UNE-P allows competitive carriers to engage in “arbitrage” by “siphon[ing] off the incumbents’ highest revenue customers”⁶⁸ – is an argument for encouraging more UNE-based competition, not less. Whatever “arbitrage” opportunities inhere in the current rate structure result from pervasive disparities between *retail* rates and *retail* costs. Because UNE-P rates are cost-based, UNE-P based competition would make it difficult for an incumbent with gross margins that are out of line with efficient retailing costs to maintain its retail rates at current levels. UNE-based entry would, therefore, have the (intended) beneficial effect of driving supra-competitive retail rates down toward cost and eliminating ILEC monopoly profits.

B. Increased Use Of UNE-P Is Evidence That The TELRIC Standard Is Beginning To Work Properly.

Lacking any evidence that state commissions have misapplied TELRIC, or that TELRIC itself is flawed, SBC and Qwest attack TELRIC pricing on the grounds that it has led to increased UNE-P entry, as if that were a bad thing.⁶⁹ As the Commission has emphasized many

⁶⁷ Typical avoided retail cost percentages exceed 20%.

⁶⁸ SBC at 12.

⁶⁹ SBC at 9; Qwest at 4-5.

times, the central purpose of TELRIC pricing is to ensure UNE-based competitors a meaningful opportunity to compete against the entrenched local monopolists.⁷⁰ Moreover, TELRIC-based pricing of UNEs serves a vital cost-signaling function, encouraging potential entrants to invest in facilities-based entry if, and only if, the forward-looking cost of such entry is expected to be lower than the forward-looking cost of using existing ILEC assets more intensively.⁷¹ The increase in UNE-based entry in the wake of the belated move toward TELRIC-based UNE pricing by state commissions, and the voluntary adoption of lower UNE rates by some RBOCs to gain entry into long-distance, means that the Commission's original purpose in adopting TELRIC is working, not that the TELRIC methodology is flawed. By the perverse logic of Qwest and SBC, a cost-based pricing methodology would be valid only if it prohibited UNE-based entry. That, of course, would be inconsistent with the principles of the Act.⁷²

C. Qwest And SBC Have Failed To Show That TELRIC-Based Pricing Of UNEs Has Caused Underinvestment In Local Networks.

Qwest and SBC's efforts to show that TELRIC-based pricing of UNEs has been responsible for an undesirable decline in facilities-based investment by competitive carriers (and the local telephone industry as a whole) are, like Verizon's similar claims, textbook illustrations of the fallacy of *post hoc ergo propter hoc*.⁷³ The existence of a positive correlation between declining UNE prices and declining growth in investment does not prove that the former has

⁷⁰ See, e.g., *Local Competition Order* ¶¶ 10-15, 630, 672, 679, 705, *aff'd*, *Verizon* 535 U.S. at 490-91, 511-12.

⁷¹ *Local Competition Order* ¶¶ 679, 738, *aff'd on this point*, *Verizon*, 535 U.S. at 509-10.

⁷² See, e.g., 47 U.S.C. § 251(c)(3) & (d)(2).

⁷³ Qwest at 5-7; SBC at 9-11.

caused the latter—let alone caused an undesirable decline in *net* investment levels—without proof of a host of causal links that Verizon, Qwest and SBC simply assume.⁷⁴ In particular:

- The RBOCs make no attempt to reconcile their claims with the massive new capital spending program, comparable to the “construction of the Roman aqueducts,” recently launched by Verizon.⁷⁵
- The RBOCs confuse a decline in the *growth* of investment with a decline in the *absolute* amount of capital stock.⁷⁶
- The RBOCs ignore the other relevant factors that can affect investment levels. These include the boom-and-bust cycle that has occurred after every innovation in a network industry; changes in demand; the underlying costs of telecommunications infrastructure; the effects of other state and federal regulation; the fallout from the WorldCom scandal; the sluggish economy experienced in the United States over the past five years; and the rash of CLEC bankruptcies, which has impaired the ability of both bankrupt and solvent CLECs to obtain credit.⁷⁷
- The RBOCs simply assume, without proof, that more investment in facilities-based entry would have been desirable in recent years.⁷⁸
- The RBOCs ignore the obvious incentive of competitive carriers to deploy their own facilities where economically feasible, and to avoid dependence on the ILEC supplier that is also the CLEC’s main competitor, with a strong incentive to provide inferior service to the CLEC.⁷⁹
- The RBOCs ignore the engineering and economic reasons why self-deployment of switching equipment by CLECs is infeasible in most markets.⁸⁰

⁷⁴ *Accord* ACE at 14-17; Bridgecom at 13-14; CompTel. at 6; Joint Comments at 15-16; MCI 37-50; Focal *et al.* at 18-23; NASUCA at 13-17.

⁷⁵ AT&T at 41; *id.*, Att. B at 27-28; BUSINESS WEEK, Aug. 4, 2003, at 53-55.

⁷⁶ AT&T, Att. B at 17, 24-27.

⁷⁷ AT&T 41-42, Att. A, ¶¶ 30-34, Att. B at 17-18.

⁷⁸ AT&T, Att. B at 28-29.

⁷⁹ AT&T, Att. B at 16.

⁸⁰ AT&T 43-45, Att. A at 5-7; Att. B at 19-21.

The statistical “analyses” offered by Qwest and SBC repeat all of these errors.⁸¹ Indeed, Qwest’s analysis is even cruder than Verizon’s. The data underlying Qwest’s investment comparisons consist of unaudited figures reported by carriers to the FCC, and “Qwest internal data” that Qwest had not produced for inspection or review—or even identified.⁸² Even so, Qwest’s analysis shows on its face that total use of UNE-L has continued to *grow* – even during the six month period selected by Qwest for its comparison.⁸³

There is even less to SBC’s “analysis.” *All* the data underlying SBC’s investment analysis appear to be “internal” SBC data. SBC has neither produced nor even identified them, precluding any meaningful testing or scrutiny by other interested parties.⁸⁴

III. THERE IS NO BASIS FOR GRANTING ACS’S REQUEST TO ELIMINATE UNE-P IN ANCHORAGE.

ACS contends that the Commission “must” grant ACS relief from TELRIC-based rates for combinations of UNEs.⁸⁵ This request should be summarily denied. If ACS believes it has met the conditions for section 10 relief, it should file a petition setting forth the basis for its request, as the Commission’s rules require.⁸⁶ Indeed, the very reason that the Commission

⁸¹ Qwest at 5-7; SBC at 9-11.

⁸² Qwest at 7, Table 2 (list of sources).

⁸³ Qwest at 6-7 (Chart 2 and Table 2).

⁸⁴ SBC at 10-11 (Figures 2 and 3). The simplistic nature of the Bells’ analysis is also demonstrated by the apples and oranges nature of its time series comparison. Its before-and-after analyses of individual states compare different time periods. Thus, May 2002 is the “break point” for the California comparison, while the breakpoint for Michigan is October 2000. *See* SBC 9, Figure 1. This clearly fails to control for other macro economic issues that affect deployment.

⁸⁵ ACS at 8.

⁸⁶ 47 C.F.R. § 1.53.

adopted its rule regarding the captioning of forbearance petitions was to prevent parties from claiming they had invoked the section 10 process merely by asserting “me too” requests in filed comments in other proceedings.⁸⁷

ACS’s “petition” also fails on the merits. Like Verizon, ACS argues that cost-based UNE-P should be junked because the availability of cost-based UNE-P is a “massive disincentive to investment in facilities-based competition.”⁸⁸ But elsewhere, ACS claims that its market power has been broken by the entry of a *facilities-based* competitor, General Communications, Inc. (“GCI”).⁸⁹ Thus, it is clear that UNE-P is doing *nothing* to deter “facilities-based” competition in Anchorage. Indeed, applying the incumbents’ “*post hoc ergo propter hoc*” reasoning, the only inference that can be drawn is that UNE-P has fostered the emergence of facilities-based competition in Anchorage.

Further, even to the extent ACS may ultimately be able to demonstrate that the presence of cable-based competition in Anchorage provides an important constraint on its market power, such a showing by itself would not satisfy section 10. Although ACS disingenuously characterizes the relief it seeks as “modest,” it in fact seeks relief from the Act’s core market opening obligations. And that is why, as explained above, Congress, barred the Commission from even considering such requests on the merits until sections 251(c) and 271 have been “fully implemented.”

Even if true, ACS’s claim that it faces vigorous cable-based competition is facially insufficient to show that section 251(c) has been “fully implemented.” As the Commission

⁸⁷ Rules and Regulations, FCC, 47 C.F.R. Part I, Separate Pleadings for Petitions for Forbearances, 65 Fed Reg. 7460-01 (Feb. 15, 2000).

⁸⁸ ACS at 9-10, 19-20.

⁸⁹ ACS at 14-17.

recognized in Paragraph 98 of the *Triennial Review Order*, cable-based competitors have inherent advantages that other competitive carriers do not. Cable operators were able to deploy last-mile facilities under a monopoly franchise and there are substantial economies of scope in providing cable telephony in addition to core video programming services. Thus, the fact that cable-based competition may be thriving in Anchorage does little to show that ACS's local markets are fully opened to competition, and that new entrant carriers can compete absent combinations of network elements at cost-based rates. And with regard to competition from "intramodal" competitors relying on unbundled network elements, ACS offers no evidence at all that it has fully complied with existing Commission regulations and that carriers are relying on UNEs to compete with ACS.

For these reasons, ACS falls back to the argument that TELRIC-based pricing for combinations of UNEs is not a "requirement" of section 251 and therefore section 10(d) does not apply to its "petition."⁹⁰ As explained above, this claim is wrong on two independent levels. First, even under ACS's narrow (and incorrect) reading of the term "requirement," it is undeniably a "requirement" of section 251(c)(3) that both individual network elements and combinations of elements be available at rates that are "based on costs."⁹¹ ACS is seeking a rule that would allow it to charge non-cost-based rates when requesting carriers employ one particular combination of network elements and, therefore, plainly *is* asking for forbearance from a "requirement" of section 251(c). Second, as AT&T explained, Commission regulations implementing the Act are "requirements" of the Act.⁹²

⁹⁰ ACS at 10.

⁹¹ See 47 U.S.C. § 251(c)(3) (incorporating the "cost-based" requirements of 47 U.S.C. § 252(d)(1)).

⁹² See AT&T at 23-24.

CONCLUSION

For the foregoing reasons, Verizon's Petition for Forbearance should be denied.

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Dated: September 2, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of September, 2003, I caused true and correct copies of the forgoing Reply Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: September 2, 2003
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/s/Yetunde E. Afolabi

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