

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

In the Matter of)	
)	
)	
Petition of the Verizon Telephone Companies For Expedited Forbearance from the Current Pricing Rules The Unbundled Network Element Platform)	WC Docket No. 03-157
)	
)	

**REPLY COMMENTS OF
BRIDGECOM INTERNATIONAL, INC.**

BridgeCom International, Inc. (BridgeCom) through undersigned counsel and pursuant to *Public Notice*, DA 03-2189 (released July 3, 2003) and Order, DA-032333 (released July 15, 2003), hereby replies to the comments submitted in support of the “Petition for Expedited Forbearance from the Current Pricing Rules for the Unbundled Network Element Platform” filed by the Verizon Telephone Companies ("Petitioner") in the captioned proceeding (the "Petition"). Virtually all parties commenting on the Petition, including the National Association of Regulatory Utility Commissioners (“NARUC”), and all four State Commissions,¹ as well as scores of competitive local exchange carriers, urged the Commission to deny the relief sought by Petitioner. Alone among the Commenters, SBC Communications Inc. (“SBC”), Qwest Corporation (“Qwest”), the United States Telephone Association (“USTA”), and ACS of Anchorage, Inc. (“ACS”) supported the Petition (collectively, the “Incumbent LEC

¹ See Comments of NARUC, the California Public Utilities Commission (California PUC”), the Florida Public Service Commission (“Florida PSC”), the New Jersey Board of Public Utilities (New Jersey BPU”) , and the New York State Department of Public Service (“New York DPS”).

Commenters”). The support offered by the Incumbent LEC Commenters, however, serves only to reinforce the myriad fatal flaws in the Petition.

In its Opposition, BridgeCom demonstrated that the forbearance relief sought by Petitioner was precluded by Section 10(d) of the Telecommunications Act of 1996 (“Telecommunications Act”)² because no finding had been made by the Commission that the requirements of Sections 251(c) and 271 of the Communications Act of 1934, as amended (“Communications Act”),³ had been “fully implemented,” and no showing had been made by Petitioner upon which such a finding could be made. BridgeCom further argued that a forbearance analysis could not lawfully be substituted for notice and comment rulemaking proceedings and that a forbearance petition could not be used, as Petitioner had attempted, to launch collateral attacks on the validity of, as opposed to the continuing need for, agency rules. And further with respect to procedural matters, BridgeCom showed that grant of the relief sought by Petitioner would inappropriately prejudice the Commission’s upcoming review of its total element long run incremental cost (“TELRIC”) pricing guidelines. As to substantive matters, BridgeCom demonstrated that Petitioner’s showings under Section 10(a) reflected only “the very broad, unsupported allegations of why the statutory criteria are met” that the Commission has repeatedly made clear are not sufficient to support a forbearance grant.

By simply reiterating, and to a limited extent amplifying, Petitioner’s flawed contentions, the submitted by the ILEC Commenters serve to confirm BridgeCom’s assessments. Among the ILEC Commenters, for example, only ACS

² 47 U.S.C. § 10(d).

³ 47 U.S.C. §§ 251(c), 271.

attempts to defend Petitioner’s prayer for forbearance in the face of Section 10(d)’s prohibition against such action. ACS, however, offers only two new twists, neither of which saves Petitioner’s now discredited forbearance effort. ACS suggests that “Section 10(d)’s ‘fully implemented’ requirement is inapplicable here, because UNE-P is . . . a pricing rule adopted by the Commission in its own discretion pursuant to the general authority of Section 252,” and adds that even “[i]f the Commission nonetheless engages in a Section 10(d) analysis . . . Section 251(c) has been fully implemented in Anchorage.”⁴

As to ACS’s claim that UNE-P is merely a pricing rule adopted pursuant to Section 252(d), the Commission has made abundantly clear that the UNE platform is inextricably linked to Section 251(c) and that the requirement that UNE-P be priced in accordance with TELRIC guidelines is mandated by Section 251(c). The Commission expressly found that (i) “Congress did not intend section 251(c)(3) to be read to contain any requirement that carriers must own or control some of their own local exchange facilities before they can purchase and use unbundled elements to provide a telecommunications service,” (ii) “section 251(c)(3) bars incumbent LECs from separating elements that are ordered in combination . . . [and] requires incumbent LECs, if necessary, to perform the functions necessary to combine requested elements in any technically feasible manner,” and (iii) “prices for . . . unbundled elements pursuant to sections . . . 251(c)(3) and 252(d)(1) should be set at forward-looking long-run economic costs” in order to best facilitate the intent of the Telecommunications Act – *i.e.*, to “encourag[e] competition by removing barriers to entry and providing an opportunity for

⁴ Comments of ACS at 10 – 11.

potential new entrants to purchase unbundled incumbent LEC network elements to compete efficiently to provide local exchange services.”⁵ Hence, ACS’s claims to the contrary notwithstanding, the Commission has concluded that both the UNE platform and the applicability of the TELRIC pricing guidelines to the UNE platform are mandated by Section 251(c)(3), and therefore subject to the limitations imposed on the Commission’s forbearance authority by Section 10(d).

As to ACS’s second point – *i.e.*, the contention that Section 251(c) has been fully implemented in the Anchorage market – while the Commission has yet to determine what constitutes “fully implemented,” it is clear that no determination could be made here that Section 251(c) has been fully implemented. The Commission has just issued its *Triennial Review Order*, which not only concludes that competitive LECs continue to be impaired in the absence of unbundled access to certain network elements, but sets in motion a host of state proceedings which will address the unbundled availability of other network elements.⁶ Moreover, as the Incumbent LEC Commenters acknowledge, the Commission will soon initiate a rulemaking proceeding to fine tune the TELRIC pricing guidelines applicable to unbundled network elements.⁷ Additionally, as BridgeCom pointed out in its Opposition, the Commission continues to pursue ongoing local competition enforcement efforts, which would be unnecessary in the absence of incumbent LEC market power. And, of course, all of the policies and rules promulgated

⁵ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd 15499, ¶¶ 293, 328, 672 (1996) (*subsequent history omitted*).

⁶ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (Report and Order and Order on Remand), CC Docket No. 01-338, FCC 03-36 (released August 21, 2003) (*subsequent history omitted*).

by the Commission have yet to be incorporated into existing interconnection agreements. Whatever may be the unique competitive circumstances in Anchorage, Section 251(c) could not, by the farthest stretch of the imagination, be deemed to be fully implemented at this juncture.

The comments of the Incumbent LEC Commenters also confirm that the Petition constitutes a collateral attack on the UNE platform, challenging the *bona fides* of the Commission rules underlying the UNE platform rather than demonstrating that the need for those rules no longer holds, and that Petitioner is not so much seeking forbearance, but a rule change properly achieved only through notice and comment rulemaking. Thus, SBC opines that “[t]he Commission’s TELRIC pricing rules are fundamentally flawed and have produced UNE and interconnection rates that have undermined competition and retarded the promotion of facilities investment.”⁸ Even more tellingly, SBC attributes “the pernicious economic aspects of UNE-P” to “the fiction that UNE-P is different than resale.”⁹ It is not surprising then that SBC urges the Commission “to determine that purchase of a pre-assembled end-to-end platform of elements in the incumbent’s network is functionally no different than resale and to forbear from applying its TELRIC and access pricing rules to UNE-P.”¹⁰

In other words, SBC is objecting to the Commission’s long-standing conclusion that “sections 251(c)(3) and 251(c)(4) present different opportunities, risks,

⁷ Comments of SBC at 1; Comments of USTA at 2.

⁸ Comments of SBC at 1.

⁹ Id. at 2.

¹⁰ Id. at 20.

and costs in connection with entry into local telephone markets,” “[r]esale, as defined in section 251(b)(1) and 251(c)(4), involv[ing as it does] services, in contrast to section 251(c)(3), which governs sale of network elements.”¹¹ And, based on these objections, SBC, like Petitioner, is urging the Commission not to forbear from application of its rules, but to modify its rules to treat the UNE platform in the same manner as full service resale is currently treated.¹² As the Commission has long recognized, “proposals . . . [which] would, in fact, result in significant changes to . . . rules . . . are appropriately addressed in a rulemaking proceeding through which interested parties have the opportunity to offer constructive comment on how the Commission . . . can best address the needs of all affected parties.”¹³ “[F]orbearance authority [should not be used] as a means of replacing . . . rules with new ones without the notice and comment required by the Administrative Procedure Act.”

That the ILEC Commenters recognize, and, indeed, anticipate, that grant of the Petition would prejudice the Commission’s upcoming review of its TELRIC pricing guidelines is also evident from their comments. USTA, for example, “urges the Commission to expeditiously initiate and move forward with a rulemaking to reform its current TELRIC pricing rules,” but, anticipating the outcome of that proceeding, “urges

¹¹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd 15499 at ¶¶ 331, 980.

¹² Indeed, SBC spends an inordinate number of pages of its Comments attempting to explain why the UNE platform is “the functional equivalent of resale” and how the Commission erred in finding to the contrary. SBC Comments at 3 – 7.

¹³ New England Telephone and Telegraph Company and New York Telephone Company Petition for Forbearance from Jurisdictional Separations Rules (Order), 12 FCC Rcd 2308, ¶¶ 13 (1997) (“We deny NTNEX’s petition for forbearance because the relief requested by NYNEX goes beyond mere forbearance from regulation and instead requests that we substantially amend our . . . rules”).

the Commission to grant the interim relief requested in the Verizon Petition.”¹⁴ SBC, by way of further illustration, declares that “[e]ven as the Commission undertakes TELRIC reform, however, there are additional steps it should take to promote investment and competition . . . specifically . . . the Commission should forbear from applying its pricing rules that permit[] UNE-P carriers to collect access charges from long distance carriers, and the Commission should forbear from applying its TELRIC pricing rules to UNE-P.”¹⁵

As BridgeCom emphasized in its Opposition, agency actions taken in anticipation of the outcome of a proceeding serve to prejudge that outcome. The twin cornerstones of the rulemaking process are the opportunity for full public participation and the assurance of full and fair agency consideration of the issues. SBC and USTA, like Verizon before them, would have the Commission make critical determinations regarding TELRIC and its applicability outside the proceeding initiated to fine tune the TELRIC pricing guidelines, denying rulemaking participants the opportunity to influence such outcomes.

Finally, as to Petitioner’s “showing” that the forbearance it seeks satisfies the Section 10(a) standards, the ILEC Commenters, with one exception, offer in support of the Petition the same inadequate “broad unsupported allegations,” based on conclusions which might reflect correlation, but not necessarily causality, proffered by Verizon. Qwest, for example, cites data purportedly documenting that (i) “UNE-P prices have fallen dramatically” across its region, (ii) “the sharp fall in UNE-P prices has been

¹⁴ Comments of USTA at 2.

¹⁵ Comments of SBC at 1 – 2.

accompanied by an explosion in the use of UNE-P,” and (iii) there has been a decline in the number of UNE-L lines within the Qwest territory.¹⁶ Based on this data, and without more, Qwest attributes what it identifies as “a significant decline in CLEC facilities-based investment” to TELRIC pricing of the UNE platform, announcing that “a clear-cut correlation between increased UNE-P uptake and declining UNE-L investment” exists based solely on a rough correlation in time.¹⁷ SBC, likewise, emphasizes growth in the number of UNE-P lines, the “ratcheting down’ of UNE-P rates,” and a decline in the growth rate of UNE-L lines and derives from this data that “UNE-P has contributed materially to a massive decline in telecommunications investment.”¹⁸

As BridgeCom noted in its Opposition, causality cannot be established simply by identifying events which occurred during roughly the same time frame. A rigorous analysis requires identification of all other potential contributing factors and the elimination of each such factor based on careful consideration of its potential impact before causality can be claimed. Is it possible that declines in telecommunications investment would have been greater but for the investments associated with the increased usage of the UNE platform? Yes! Might the decline in telecommunications investment be attributable to broader economic trends? Yes! Are there not a host of other factors which might have contributed to the decline in telecommunications investment? Of course! It is because of these and other questions left unanswered by the Petition and the

¹⁶ Comments of Qwest at 3 – 5.

¹⁷ Id. at 6 – 7.

¹⁸ Comments of SBC at 7 – 13.

comments supporting it that a forbearance analysis is the wrong vehicle for making critical public policy judgments.

For its part, ACS actually attempts to make a legitimate Section 10(a) showing, but does so with a “twist” that renders its showing meaningless here. ACS argues for forbearance from application of TELRIC pricing guidelines to UNE-P based upon its loss of market share to a facilities-based competitor. As described by ACS, it has lost nearly half of its customer base to an “incumbent cable television operator . . . that has gained this market share in Anchorage completely without use of UNE-P, but rather through a combination of resale, ACS-ANC UNE’s combined with some of its own facilities, and, for nearly a quarter of its customers, exclusively over . . . [its] own telecommunications facilities.”¹⁹ Not only are ACS’s arguments about Anchorage, hence, not relevant to the matters at issue in this proceedings, but they belie the assertions of the other Incumbent LEC Commenters that facilities-based competition cannot flourish so long as TELRIC pricing guidelines are applied to the UNE platform.

¹⁹ Comments of ACS at 2.

By reason of the foregoing, BridgeCom International, Inc. once again urges the Commission to deny the “Petition for Expedited Forbearance from the Current Pricing Rules for the Unbundled Network Element Platform” filed by the Verizon Telephone Companies.

Respectfully submitted,

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September 2, 2003

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CERTIFICATE OF SERVICE

I, Catherine M. Hannan, do hereby certify that a true and correct copy of the foregoing Reply Comments of BridgeCom International, Inc., has been served by U.S. Mail, postage prepaid, on the individuals listed below this 2nd day of September, 2003:

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