

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

_____)	
In the Matter of)	
)	
Joint Petition for Forbearance)	WC Docket No. 03-189
From the Current Pricing Rules)	
for the Unbundled Network)	
Element Platform)	
)	
Petition for Forbearance From)	WC Docket No. 03-157
The Current Pricing Rules for)	
the Unbundled Network Element)	
Platform)	
_____)	

OPPOSITION OF Z-TEL COMMUNICATIONS, INC.

Thomas M. Koutsky
Z-Tel Communications, Inc.
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036

Christopher J. Wright
Timothy J. Simeone
Maureen K. Flood*
Harris, Wiltshire & Grannis LLP
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
(202) 730-1300

Counsel for Z-Tel Communications, Inc.

September 22, 2003

* Telecom Policy Analyst

TABLE OF CONTENTS

	<u>Page</u>
I. VERIZON AND THE JOINT PETITIONERS FAIL TO MEET THE STATUTORY REQUIREMENTS FOR RELIEF UNDER SECTION 10.....	6
A. Verizon and the Joint Petitioners Seek Rule Changes, Not Forbearance.	6
B. Verizon and the Joint Petitioners Also Fail to Demonstrate Compliance with Section 10(d).....	9
II. THE COMMISSION’S TRIENNIAL REVIEW ORDER CLARIFIES THAT THERE IS NO BASIS FOR THE FORBEARANCE PETITIONS FILED BY VERIZON AND THE JOINT PETITIONERS.	13
III. VERIZON AND THE JOINT PETITIONERS HAVE FAILED TO DEMONSTRATE THAT THE CURRENT TELRIC PRICING RULES DETER INVESTMENT AND HARM FACILITIES-BASED COMPETITION.....	19
A. The Commission Rejected Identical Arguments in the Triennial Review Order.	19
B. Incorporating Verizon’s Proposed Revisions into the Phoenix Center Model Strengthens the Finding that UNE-P Increases BOC Investment.	20
C. Verizon and the Joint Petitioners Fail to Support Their Petitions with Reliable Evidence.	24

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

In the Matter of)	
)	
Petition for Forbearance From)	WC Docket No. 03-189
The Current Pricing Rules for)	
the Unbundled Network Element)	
Platform)	
)	
Petition for Forbearance From)	WC Docket No. 03-157
The Current Pricing Rules for)	
the Unbundled Network Element)	
Platform)	

OPPOSITION OF Z-TEL COMMUNICATIONS, INC.

INTRODUCTION AND SUMMARY

On July 1, 2003, Verizon filed a petition asking the Federal Communications Commission (“Commission”) to forbear under section 10 of the Communications Act of 1934 (the “Act”) from its decision permitting UNE platform carriers to collect per-minute access charges from long distance carriers, and to similarly forbear from applying its current TELRIC pricing rules to the UNE platform.¹ Shortly thereafter, Qwest, BellSouth and SBC (the “Joint Petitioners”) photocopied the Verizon Petition and resubmitted it with a brief, six-page request for “exactly the same relief requested in the *Verizon Petition*.”²

¹ See *Petition for Forbearance from the Current Pricing Rules for the Unbundled Network Element Platform*, Petition for Expedited Forbearance of the Verizon Telephone Companies, WC Docket No. 03-157 (filed July 1, 2003) (hereafter the “Verizon Petition” in the “Verizon Forbearance Proceeding”).

² See *Joint Petition for Forbearance from the Current Pricing Rules for the Unbundled Network Element Platform*, Joint Petition of Qwest Corporation, BellSouth Telecommunications, Inc. and

In this Opposition, we principally respond to arguments advanced by Verizon in reply comments to its own petition.³ This is because the Joint Petitioners provide no additional legal or policy support for the relief sought by Verizon, which forms the basis of their “me, too” petition. To the contrary, the Joint Petitioners merely assert that, “The grounds for the relief sought by Joint Petitioners are essentially identical to those advanced in the *Verizon Petition*.”⁴ Z-Tel already has explained to the Commission the numerous legal and evidentiary shortcomings of the Verizon Petition, and rather than waste scarce Commission and industry resources by restating these arguments, Z-Tel instead resubmits its previously filed Opposition.⁵ And, given that the Joint Petitioners largely rely on the Verizon Petition and seek identical relief, the Commission should consider all comments filed in response to it in the instant proceeding.⁶

The record in that docket makes clear that both Verizon and the Joint Petitioners have failed to satisfy the prerequisites for forbearance under section 10. As a threshold matter, numerous commenters from across the industry – new entrants, large IXC’s, state commissions, and consumer advocates – agree with Z-Tel that the Commission should summarily dismiss the Verizon Petition because it falls outside the scope of section 10. By seeking to revise the rate at which the UNE platform is offered – from the cost-based rates for UNEs in section 252(d)(1) to the wholesale rates for total service resale in section 252(d)(3) – Verizon and, by proxy, the Joint

SBC Communications Inc. for Expedited Forbearance, WC Docket No. 03-189 at 2 (filed July 31, 2003) (“Joint Petition”).

³ See Verizon Forbearance Proceeding, Reply Comments of Verizon Telephone Companies in Support of Petition for Expedited Forbearance (filed Sept. 2, 2003) (“Verizon Reply Comments”).

⁴ Joint Petition at 3.

⁵ See Verizon Forbearance Proceeding, Opposition of Z-Tel Communications, Inc. (filed Aug. 18, 2003) (“Z-Tel Opposition”) (attached as Exhibit 1).

⁶ See generally Verizon Forbearance Proceeding.

Petitioners effectively seek a *change* in the Commission's rules, not forbearance from their application. And, as a number of commenters point out, Verizon should not be able to distort the scope of section 10 to get a head-start in the Commission's recently initiated TELRIC rulemaking, which is the appropriate venue in which to advocate *changes* to the Commission's UNE pricing rules.⁷

The record also shows that Verizon and the Joint Petitioners have failed to satisfy the requirements of section 10(d), which prohibits the Commission from forbearing from the requirements of sections 251(c) and 271 until these statutory provisions are "fully implemented." Verizon's assertion that section 251(c) is "fully implemented" when a Bell Operating Company ("BOC") complies with the 14-point checklist in section 271 provides no additional support. Congress made clear in section 271(d)(6) that the BOCs must keep their markets open by fulfilling the requirements of the checklist after obtaining authorization to provide interLATA long-distance service. The Bell company argument that a BOC may stop taking the steps necessary to permit competition to develop after obtaining section 271 authorization is plainly contrary to the terms of section 271(d)(6) and defies common sense.

Likewise, Verizon and the Joint Petitioners have failed to satisfy the requirements of section 10(a). As one commenter aptly noted, "it would hardly 'enhance competition among providers of telecommunications services' or serve the 'public interest' 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."⁸ Moreover, the

⁷ See *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, Notice of Proposed Rulemaking, WC Docket No. 03-173 (rel. Sept. 15, 2003) ("TELRIC NPRM").

⁸ Verizon Forbearance Proceeding, Opposition of AT&T Corp. at 2 (filed Sept. 2, 2003).

Commission rejected the policy justifications on which the Verizon Petition and the Joint Petition rely in the Triennial Review Order.⁹

In particular, as discussed below, the Commission and courts have rejected the BOCs' argument that the current pricing rules deter investment.¹⁰ The BOCs' simple correlation studies were found unpersuasive in the Triennial Review Order, and they are no more persuasive now: indeed, *post hoc ergo propter hoc* is a classic error. The BOCs' latest study – which merely attempts to rebut the evidence we have presented showing that the availability of the platform spurs investment – does not strengthen their case. In fact, the Phoenix Center, borrowing the sensible portions of the BOCs' critique, has provided a synthesis analysis that shows that availability of the platform has spurred BOC investment. In addition, numerous econometric studies have shown that unbundling and competitive entry have promoted competitive investment. These findings support the unbundling theory of the Telecommunications Act of 1996 (the “1996 Act”): unbundling of incumbent LEC networks is needed for new entrants to compete, because incumbent LECs enjoy economies of scale, scope and density from their ubiquitous networks that are not available to competitors. Without the ability to share in those

⁹ See *Review of Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions in the Local Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order, Order on Remand, and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147 (rel. Aug. 21, 2003) (“Triennial Review Order”).

¹⁰ See *Verizon v. FCC*, 535 U.S. 476, 517 (noting \$51 billion in telecom investment and stating that “a regulatory scheme that can boast such substantial capital spending over a 4-year period is not easily described as an unreasonable way to promote competitive investment.”). Since the Supreme Court made that observation, the Commission observed that an additional \$20 billion of investment has occurred. See TELRIC NPRM at ¶ 3, n.4. As pointed out by Commissioner Copps, with regard to TELRIC, the Commission is “building on solid ground.” *Id.*, Statement of Commissioner Michael J. Copps, Approving in Part and Dissenting in Part (“In adopting TELRIC rules, [w]e did the right thing. The Supreme Court blessed our action – pretty heady stuff for a Commission not always accustomed to such approbations from above.”).

economies of scale, scope and density (and without any restrictions on such access), competitors will not enter local markets and, logically, will not subsequently invest in new networks.¹¹ Of these studies, Beard, Ekelund and Ford (2002) specifically find that increases in UNE rates for unbundled local switching do not generate more entry by competitors using UNE loops in combination with self-provisioned switching (“UNE-L”); this finding suggests that increasing the price for unbundled local switching – as suggested by Verizon and the Joint Petitioners – will not result in more competitive entry via UNE-L.¹²

In short, the substantial record before the Commission illustrates that the Verizon Petition should be dismissed without delay for failure to satisfy the requirements of section 10. And since the Joint Petitioners have done nothing more than piggy-back on the Verizon Petition, their petition should suffer the same fate.

¹¹ See, e.g., T.R. Beard, G.S. Ford and T.M. Koutsky, “Mandated Access and the Make-or-Buy Decision: The Case of Local Telecommunications Competition,” www.telepolicy.com/BKFFinal.pdf (2002) (analyzing relationship between pricing of UNEs and competitive deployment of switches); G.S. Ford and M.D. Pelcovits, “Unbundling and Facilities-Based Entry by CLECs: Two Empirical Tests,” www.telepolicy.com/twotest.pdf (2002) (higher UNE rates reduce facilities-based entry); “An Empirical Examination of the Unbundled Local Switching Restriction,” Z-Tel Policy Paper No. 3, www.telepolicy.com/zpp3.pdf (2002); “Does Unbundling Really Discourage Facilities-Based Entry? An Econometric Examination of the Unbundled Local Switching Restriction,” Z-Tel Policy Paper No. 4, www.telepolicy.com/zpp4.pdf (2002).

¹² See T.R. Beard, R.B. Ekelund Jr., and G.S. Ford, “Pursuing Competition in Local Telephony: The Law and Economics of Unbundling and Impairment,” www.telepolicy.com/befimpair.pdf (2002) (forthcoming in the *Journal of Law, Technology and Policy*, Spring 2004).

I. VERIZON AND THE JOINT PETITIONERS FAIL TO MEET THE STATUTORY REQUIREMENTS FOR RELIEF UNDER SECTION 10.

A. Verizon and the Joint Petitioners Seek Rule Changes, Not Forbearance.

As Z-Tel previously explained in its Opposition to the Verizon Petition, Verizon has sought a change in the Commission's rules, not forbearance from their application, so the Verizon Petition falls outside the scope of section 10 and should be dismissed.¹³ Numerous commenters in that docket agree with Z-Tel.¹⁴ Rather than restating our arguments on this point, Z-Tel will respond instead to Verizon's new characterization of its "forbearance" petition, since Z-Tel expects that this re-characterization could be applied to the Joint Petition as well.¹⁵

As an initial matter, Verizon concedes – as it must, under Commission precedent – that section 10 does not authorize rule changes.¹⁶ Verizon instead argues that its petition "seeks forbearance from two distinct rules, not the creation of new rules that require a notice and

¹³ See Z-Tel Opposition at 4-13.

¹⁴ See Verizon Forbearance Proceeding, Opposition of AT&T Corp. at 10-12; Opposition of MCI at 2-4; Opposition of the PACE Coalition at 3-5; Florida Public Service Commission Comments at 2-3; NARUC Comments at 1-2; New Jersey Board of Public Utilities Comments at 1.

¹⁵ See Verizon Reply Comments at 26.

¹⁶ See *New England Telephone and Telegraph Company and New York Telephone Company Petition for Forbearance From Jurisdictional Separations Rules*, 12 FCC Rcd 2308 (¶¶ 1, 12) (rel. Feb. 19, 1997) and *1998 Biennial Regulatory Review – Review of Accounting and Cost Allocation Requirements; United States Telephone Association Petition for Rulemaking; Implementation of the Telecommunications Act of 1996; Accounting Safeguards under the Telecommunications Act of 1996; Petition for Forbearance of the Independent Telephone & Telecommunications Alliance; Petition for Rulemaking to Amend Part 32 of the Commission's Rules, Uniform System of Accounts for Class A and Class B Telephone Companies, to Adopt the Accounting for Software Required by Statement of Position 98-1*, Report and Order in CC Docket No. 98-81, Order on Reconsideration in CC Docket No. 96-150, Fourth Memorandum Opinion and Order in AAD File No. 98-43, 14 FCC Rcd 11396, 11409 (¶ 25) (rel. June 30, 1999).

comment rulemaking.”¹⁷ Verizon does not deny that, under the Commission’s current rules, competitors seeking to lease network elements, including the platform of network elements, may do so at TELRIC rates and may collect exchange access charges. Verizon instead argues that it is not seeking a rule change because no new rule need be enacted – the Commission may simply find that the resale pricing standard (rather than the network element pricing standard) applies to the UNE platform and that, contrary to the Commission’s prior decisions, competitors using the UNE platform are not entitled to exchange access charges.

Verizon’s argument is pure sophistry. Changing the rule that applies is just as much a rule change as changing the details of a rule. Surely Verizon would contend that the Commission changed a rule if it were to decide that the BOCs are no longer subject to price cap regulation, but are instead subject to rate-of-return regulation. Yet under Verizon’s novel legal theory, that would not be a “rule change” because it would not call for the promulgation of a new rule, but “merely” a decision that one rule applied rather than another.

In addition, it would not make sense to conclude that the relief Verizon requests does not trigger notice and comment rulemaking. For example, there is no question that an adjustment of the rules governing fill factors would require a notice and comment, even if the particular adjustment was likely to have a small effect on rates.¹⁸ Changing the rules so that the resale pricing rule applies or so that new entrants may not collect exchange access charges is likely to have significant effects and such changes need to be undertaken in conformance with the Administrative Procedure Act. As a practical matter, the Commission should comply with the procedural steps Congress has mandated before rules are revised to ensure that sound reasons are

¹⁷ Verizon Reply Comments at 26.

¹⁸ See TELRIC NPRM at ¶¶ 73-75.

provided for any change.

More detailed consideration of Verizon's proposals confirms that Verizon seeks rule changes, not forbearance. In the absence of the TELRIC pricing rules, Verizon argues, the retail-minus-avoided cost standard for resale under section 252(d)(3) would be applicable because the UNE platform "is the functional equivalent of resale."¹⁹ Verizon's proposal skips a critical step, however. In order to avoid a violation of section 252(d)(1), which mandates cost-based rates for network elements, the Commission would have to first find that the UNE platform constitutes total service resale under section 251(c)(4) instead of a combination of network elements under section 251(c)(3). The Commission, of course, recently found the contrary to be the case.²⁰ Moreover, it simply is not possible to conclude that leasing network elements is something other than leasing network elements.

Likewise, the Commission would trigger a change in its rules if, on the same grounds, it forced UNE platform carriers to forfeit exchange access charges. As the Commission has concluded, the TELRIC-based rate for the UNE platform represents full compensation to the incumbent LEC, so allowing Verizon and the Joint Petitioners to recover exchange access charges over and above the revenues they receive from leasing network elements would violate section 252(d)(1)'s cost-based pricing requirement.²¹ While, in our view, no other conclusion is logically possible, at the very least the Commission would have to conduct a rulemaking and explain why it was changing its conclusion before adjusting the rules in the manner Verizon and the Joint Petitioners request. This disqualifies the forbearance petitions submitted by Verizon

¹⁹ Verizon Reply Comments at 26.

²⁰ See Triennial Review Order at ¶ 102, as discussed *infra*.

²¹ See Z-Tel Opposition at 28.

and the Joint Petitioners from consideration under section 10.

Contrary to their assertions, Verizon and the Joint Petitioners do not have a “right” to forbearance just because they filed petitions invoking section 10. Z-Tel does not dispute Verizon’s assertion that the Commission cannot ignore a forbearance request “on the ground that the Commission might someday grant alternative relief through some other procedural vehicle” like a rulemaking.²² A threshold requirement under section 10, however, is that the party actually seek forbearance – not some other form of relief. Thus, because Verizon and the Joint Petitioners seek to change the Commission’s rules – rather than seeking forbearance – they have no right to the benefits conferred by section 10. Z-Tel recommends that Verizon and the Joint Petitioners present their case in the docket concerning the TELRIC NPRM or the section 11 biennial review process because these are the *only* fora, not merely better fora, in which Verizon and the Joint Petitioners can argue for their proposed changes in the Commission’s TELRIC pricing rules.

At bottom, Verizon and the Joint Petitioners do have the right to have their forbearance petitions resolved. But the proper resolution is to dismiss the petitions because they seek rule changes rather than forbearance.

B. Verizon and the Joint Petitioners Also Fail to Demonstrate Compliance with Section 10(d).

Section 10(d) prohibits the Commission from forbearing from the requirements of sections 251(c) and 271 until these provisions are “fully implemented.” As Z-Tel previously explained, the Verizon Petition fails to satisfy this requirement.²³ Now, in defense of its

²² Verizon Reply Comments at 27.

²³ See Z-Tel Opposition at 13-16.

forbearance petition (which merely dropped a footnote stating that section 10(d) of the Act does not apply to its forbearance request), Verizon asserts that “nothing in the Act, much less section 251(c), ‘requires’ either TELRIC or the availability of the UNE platform or the UNE-P access charge pricing rule.”²⁴ According to Verizon, the Commission may therefore consider its forbearance request without worrying about the “fully implemented” requirement in section 10(d).

Verizon fails to respond at all to the key point: the Act requires network elements to be priced at cost.²⁵ In other words, while the Commission retains authority to adjust its pricing rules, whatever standard the Commission chooses must be “based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the ... network element.”²⁶ Verizon and the Joint Petitioners’ proposal, which would change UNE platform rates to the rates for total service resale in section 252(d)(3), therefore violates section 252(d)(1)’s cost-based mandate. This is because the prices for total service resale are, by definition, “determine[d] ... on the basis of retail rates charged to subscribers for the telecommunications service requested.”²⁷

In short, the Act requires network elements to be priced on the basis of the cost of providing the network element, and that requirement is set forth in section 251(c)(3), which obligates an incumbent LEC to provide access to network elements “in accordance with ... the requirements of section 252.” Item two of the section 271 competitive checklist similarly

²⁴ Verizon Reply Comments at 28.

²⁵ See 47 U.S.C. § 252(d)(1).

²⁶ *Id.*

²⁷ 47 U.S.C. § 252(d)(3).

requires cost-based pricing.²⁸ Accordingly, the relief sought by Verizon and the Joint Petitioners requires forbearance from the requirements of sections 251(c)(3) and 271(c)(2)(B)(ii) and therefore implicates the “fully implemented” requirement in section 10(d).

Furthermore, despite Verizon’s assertion to the contrary, the Commission did not determine that Verizon had “fully implemented” the requirements of sections 251(c) or 271 when it found that Verizon satisfied the requirements of the section 271 competitive checklist in Verizon’s in-region states.²⁹ A decision that Verizon had “fully implemented the competitive checklist” is plainly different than concluding that Verizon has “fully implemented” sections 251(c) and section 271. The competitive checklist is an important part of those provisions, but merely a part – and implementing a part is not the same as implementing the whole. Section 271(d)(6) – which requires continued compliance with the checklist even after it has been “fully implemented” – makes absolutely clear that Congress did not intend that the BOCs would be able to cease the actions that opened their markets to competition once those markets were deemed sufficiently open to permit BOC entry into the long-distance market. In short, section 271(d)(6) makes clear that the BOCs are wrong when they argue that section 271 as a whole has been “fully implemented” once the checklist has been “fully implemented.” To the contrary, Congress plainly meant compliance with the checklist to be an ongoing obligation, and a reading of the statute that calls for forbearance once a section 271 petition has been granted is obviously faulty.

²⁸ See 47 U.S.C. § 271(c)(2)(B)(ii) (requiring “Nondiscriminatory access to network elements in accordance with the requirements of section 251(c)(3) and 252(d)(1).”).

²⁹ See Verizon Reply Comments at 29-30. The section 271 competitive checklist is codified at 47 U.S.C. § 271(c)(2)(B).

Moreover, Verizon's position defies common sense. As Z-Tel and other commenters explained to the Commission in the Triennial Review proceeding, when Verizon and the Joint Petitioners gained entry into the long-distance market under section 271, they usually relied extensively on competition from new entrants using unbundled local switching, particularly the UNE platform.³⁰ If Verizon and the Joint Petitioners were then able to eliminate competitive LEC access to unbundled local switching and the UNE platform, or make it uneconomic by raising the price, they would be able to instantly wipe out the local competition on which their entry into the long-distance market was premised. Such a "bait-and-switch" approach to competition is not a permissible construction of the statute.

Because Verizon has hinged its "fully implemented" argument entirely on the contentions that section 10(d) is not implicated and, in any event, requires nothing more than a showing that a section 271 application has been approved, we will not repeat our arguments that forbearance from the requirements of sections 251(c) and 271 is not warranted in a particular geographic market until a vibrant wholesale market has been established.³¹ Moreover, the Commission has announced that it will open a proceeding to consider the meaning of "fully implemented" in section 10(d).³² For present purposes, it is enough that: (1) section 10(d) is plainly implicated

³⁰ See *Review of Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers; and Implementation of the Local Competition Provisions in the Local Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Z-Tel Reply Comments, CC Docket Nos. 01-338, 96-98, 98-147 (filed July 17, 2002). See also Letter from Jonathan D. Lee, Comp Tel, to Marlene H. Dortch, Federal Communications Commission (filed Dec. 12, 2002).

³¹ See *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, Opposition of Z-Tel Communications Inc. to Petition for Forbearance of Verizon, CC Docket No. 01-338 at 18-25 (filed Sept. 3, 2002).

³² See *Deletion of Agenda Item from September 10 Open Meeting*, Public Notice (rel. Sept. 9, 2003) (deleting a Notice of Proposed Rulemaking entitled "Section 10(d) Limitation on Forbearance from Sections 251(c) and 271").

because Verizon and the Joint Petitioners seek forbearance from the cost-based pricing standard required by section 251(c)(3) and item two on the section 271 competitive checklist; and (2) Verizon’s argument that sections 251(c) and 271 are “fully implemented” when the competitive checklist is fully implemented is plainly erroneous.

II. THE COMMISSION’S TRIENNIAL REVIEW ORDER CLARIFIES THAT THERE IS NO BASIS FOR THE FORBEARANCE PETITIONS FILED BY VERIZON AND THE JOINT PETITIONERS.

Verizon and the Joint Petitioners are simply using their forbearance petitions to resurrect two losing arguments from the Commission’s recent Triennial Review proceeding: (1) the UNE platform is synonymous with total service resale, and should be priced accordingly; and (2) TELRIC-based rates for UNEs do not allow the BOCs to recover their costs.³³ These arguments – and the policy rationales supporting them – have been rejected by the Commission. Because the BOCs’ arguments are not persuasive, they would not provide the basis for obtaining forbearance under the standards of section 10(a) even if the petitions sought forbearance and even if Verizon and the Joint Petitioners had demonstrated that section 10(d) is satisfied.

Verizon and the Joint Petitioners have asked the Commission to adopt a rule that would price the UNE platform at the resale rates mandated by Section 252(d)(3). This is because the UNE platform is allegedly “a regulatory construct that is ... largely identical to a resale arrangement.”³⁴ Of course, this request is in direct conflict with the Triennial Review Order, which explicitly rejected arguments that resale of incumbent LEC retail tariff offerings is a substitute for UNEs: “Because the Act contains three modes of entry,” the Commission held that it “cannot find an approach that would so easily remove one mode from the Act would be a

³³ See Triennial Review Order.

³⁴ Verizon Petition at 16.

reasonable reading of Congress' intent."³⁵ Further, substituting resale for UNEs would be "contrary to the Act's requirement that unbundled facilities – facilities without which serving the market becomes uneconomic – should be priced at cost-based rates and our determination that TELRIC is the appropriate methodology for determining those rates – an approach to rates that the Supreme Court has affirmed."³⁶ Thus, notwithstanding the BOCs' unwillingness to accept the fact that UNE-P is *not* the functional equivalent of resale, the Triennial Review Order makes clear that when an incumbent LEC is required to provide the UNE platform, it must be priced at TELRIC.

Likewise, Verizon and the Joint Petitioners argue that a UNE platform carrier, like a carrier using total service resale, should forfeit per-minute charges collected from IXC's for the provision of exchange access.³⁷ Verizon and Joint Petitioners advance this argument because requiring UNE platform carriers to forfeit exchange access charges would make it impossible for new entrants to compete, since "[c]ompetitors now just don't have the [profit] margins."³⁸ Indeed, according to Verizon, "[Competitors] don't get the subsidy we get from the access fees. For them to compete with us just on price is impossible."³⁹ Importantly, however, the Triennial Review Order clarified any open questions about which party should recover the exchange access charges by reaffirming a new entrant's ability to use UNEs to provide exchange access

³⁵ Triennial Review Order at ¶ 102.

³⁶ *Id.*

³⁷ *See* Verizon Petition at 14, Joint Petition at 1, 2.

³⁸ "Florida Goes Dialing For Options On Plan To Boost Phone Rates," *Tampa Tribune* (Sept. 17, 2003), available at <http://news.tbo.com/news/MGABZIFTOKD.html>.

³⁹ *Id.*

services.⁴⁰ Specifically, the Commission found that “once a requesting carrier has obtained access to a UNE to provide qualifying service ... the carrier may use that UNE to provide any additional services, including non-qualifying telecommunications and information services.”⁴¹ A UNE platform carrier like Z-Tel always provides a “qualifying service” because it offers local exchange service, one of the “telecommunications services that have been traditionally within the exclusive or primary domain of the incumbent LECs.”⁴² As such, the UNE platform carrier is entitled to provide *any* additional service – including exchange access – and by definition it may recover its costs from providing those services. Consistent with Z-Tel’s Opposition to the Verizon Petition,⁴³ the Commission also found that a contrary requirement “would hamper a competitive LEC’s ability to provide innovative service packages to customers, a result that would directly undermine the Act’s explicit goal of encouraging innovation.”⁴⁴ Moreover, the Commission found that limiting a competitor’s use of network elements as proposed by Verizon and the Joint Petitioners would be “wasteful” because the network element would “not be put to its maximum use.”⁴⁵

The Triennial Review Order also rejected attempts by the incumbent LECs to evade the TELRIC pricing rules by limiting or eliminating competitive LEC access to UNEs. After noting

⁴⁰ See Verizon Petition at 16 (“[t]he Commission has not explicitly considered whether its access charge conclusion should apply in the case of the UNE platform.”).

⁴¹ Triennial Review Order at ¶ 143.

⁴² *Id.* at ¶ 140.

⁴³ See Z-Tel Opposition at 29-30 (describing how Verizon’s request for forbearance would stifle innovation because it creates an incentive for UNE platform carriers to mirror Verizon’s local service areas, calling plans and technology rather than provide creative new services, such as Z-Tel’s Personal Voice Assistant).

⁴⁴ Triennial Review Order at ¶ 146.

⁴⁵ *Id.* at ¶ 143.

that “the incumbent LECs claim that the TELRIC rates they obtain for UNEs do not, in fact, compensate them for the costs associated with provisioning these UNEs to requesting carriers,” the Commission found that “[t]o the extent that the incumbent LECs’ concerns relate not to the proper interpretation of the section 251(d)(2) standards governing access to UNEs, but rather to the section 252(d)(1) UNE pricing standards, those concerns should be properly addressed in the [upcoming TELRIC proceeding] rather than in this Order.”⁴⁶ The Commission should not permit Verizon and the Joint Petitioners to use section 10 to obtain backdoor relief that they were already denied.

In fact, now that the Commission has released the TELRIC NPRM, Verizon and the Joint Petitioners have a forum in which to raise their concerns about the Commission’s current pricing rules for network elements.⁴⁷ Any concerns about model inputs (*e.g.*, fill factors, new switch discounts, cost of capital)⁴⁸ or even the “hypothetical” network on which TELRIC is based,⁴⁹ are best addressed in this rulemaking of general applicability. This is because the BOCs’ gripes affect *all* network elements and *all* carriers – not just Verizon and the Joint Petitioners, and not just the UNE platform. Z-Tel, for example, plans to argue for changes to the UNE pricing regime necessitated by the Commission’s new unbundling rules.⁵⁰ To the extent that Verizon

⁴⁶ *Id.* at ¶ 450, n. 1374.

⁴⁷ *See* TELRIC NPRM.

⁴⁸ *See* Verizon Reply Comments at 17.

⁴⁹ *See* Verizon Petition at 2; Joint Petition at 2.

⁵⁰ In particular, because the Commission appears to have significantly limited competitors’ access to incumbent LEC “advanced” networks, application of the current UNE pricing rules could result in significant and substantial overcharges to competitors. *See* Letter from H. Russell Frisby, CompTel, to Chairman Michael K. Powell, Federal Communications Commission, WC Docket No. 03-157 (filed Aug. 8, 2003) (describing the ILEC network costs that should not be included in TELRIC rates in the wake of the Commission’s Triennial Review Order, which eliminated CLEC access to fiber loops and fiber-fed loops, in addition to certain other network

and the Joint Petitioners truly require expedited relief, they have always been able to seek review of a State commission's implementation of the existing TELRIC pricing rules in federal district court.⁵¹ Tellingly, however, none of the BOCs have disclosed their record in appealing State commission UNE pricing decisions.

Lastly, in the Triennial Review Order, the Commission rejected incumbent LEC arguments that intermodal competition makes access to the UNE platform at TELRIC-based rates unnecessary. To the contrary, the Commission found that cable telephony is a nascent technology that does not yet provide a third-party an alternative for unbundled local circuit switching.⁵² Similarly, the Commission recognized that few customers have "cut the cord" and switched to wireless service, largely because wireless does not provide comparable service quality and data transmission capabilities.⁵³ The Commission should therefore ignore the recycled argument that intermodal competition will "ensure that incumbents cannot ... exercise 'market power' and raise prices to consumers" in the absence of the Commission's TELRIC pricing rules.⁵⁴ As the Commission found, cable telephony and wireless service are not substitutes for traditional wireline telephony today, and therefore cannot constrain the substantial market power enjoyed by Verizon and the Joint Petitioners. Indeed, the Commission preserved

elements). *See also* TELRIC NPRM at ¶¶ 42-44 (seeking comment on the impact of the Commission's Triennial Review Order on TELRIC rates for UNEs).

⁵¹ *See* 47 U.S.C. § 252(e)(6).

⁵² *See* Triennial Review Order at ¶ 444 ("Ultimately, because retrofitting cable infrastructure to support cable telephony requires substantial investment and modification, and because significant technical and operational issues must still be resolved for those cable operators that have not already augmented their networks to offer cable telephony (which are the majority of the cable networks currently in operation), it is difficult to predict at what point cable telephony will be deployed in a more widespread and ubiquitous basis.").

⁵³ *See id.* at ¶ 445.

⁵⁴ Verizon Reply Comments at 40.

access to unbundled local switching to serve “mass market” customers because “the limited use of intermodal circuit switching alternatives for the mass market is insufficient for us to make a finding of no impairment.”⁵⁵ As such, the Commission has made clear that it is committed to promoting both intermodal and intramodal competition.⁵⁶

Verizon and the Joint Petitioners should not be permitted to squander scarce Commission and industry resources by raising the same, tired arguments again and again, particularly when they are seeking identical relief along parallel tracks; indeed, the BOC petitions are nothing more than requests for rulemaking or reconsideration of the Triennial Review Order dressed up as forbearance.⁵⁷ Accordingly, the petitions should be denied under the standards of section 10(a) if they are not dismissed. The Commission’s conclusions in the Triennial Review Order show that the relief sought by the BOCs will not protect consumers, advance competition, or otherwise serve the public interest. To the contrary, the relief the BOCs request would affirmatively disserve the public interest by denying mass-market consumers access to the one source of competition that has proven effective.

⁵⁵ Triennial Review Order at ¶ 443.

⁵⁶ *See id.*

⁵⁷ Verizon and Joint Petitioners already are seeking review of the Triennial Review Order before the Commission and the courts. *See Review of Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions in the Local Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Joint Petition for Stay Pending Judicial Review, CC Docket Nos. 01-338, 96-98, 98-147 (filed Sept. 4, 2003); *USTA v. FCC*, Petition for a Writ of Mandamus to Enforce the Mandate of This Court, D.C. Circuit Case Nos. 00-1012, 00-1015 (filed by Verizon and BellSouth, Qwest, and SBC on Aug. 28, 2003).

III. VERIZON AND THE JOINT PETITIONERS HAVE FAILED TO DEMONSTRATE THAT THE CURRENT TELRIC PRICING RULES DETER INVESTMENT AND HARM FACILITIES-BASED COMPETITION.

A. The Commission Rejected Identical Arguments in the Triennial Review Order.

The primary justification for the forbearance requests filed by Verizon and the Joint Petitioners is that the availability of the UNE platform at TELRIC-based rates allegedly has led to an overall decline in infrastructure investment by both incumbents and new entrants, and curtailed competitive LEC investment in, and use of, their own facilities.⁵⁸ The Commission, of course, did not accept these arguments in the Triennial Review Order, nor should it here. That further undermines any argument that the standards for forbearance set forth in section 10(a) are satisfied – particularly the requirement that forbearance serve the public interest.

First, with regard to its impairment analysis for unbundled local switching, the Commission found that its “inquiry into unbundling’s impact on investment focuses primarily on the competitive LEC’s incentives to deploy alternate switching facilities,” *not* the incumbent LEC’s incentives, because “the incumbents already operate ubiquitous legacy circuit switching networks.”⁵⁹ Accordingly, the degree to which the investment incentives of Verizon and the Joint Petitioners are affected by the availability of the UNE platform at TELRIC-based rates is not as relevant as the competitive LECs’ investment decisions – although, as we will show, the evidence illustrates that the availability of UNE-P *increases* investment by the incumbents.

Second, with regard to the investment incentives of competitive LECs, the Commission found that it was “unable to conclude that ... the availability of unbundled local circuit switching either

⁵⁸ See Joint Petition at 3-4.

⁵⁹ Triennial Review Order at ¶ 448.

depresses or stimulates infrastructure investment” based on the flaws in the economic studies submitted by both the incumbents and competitors.⁶⁰ Verizon therefore cannot transform the Commission’s general statement that unbundling can have an effect on facilities investment into a finding that the UNE platform has discouraged competitive LEC investment in switching facilities.⁶¹

More importantly, however, the Commission discounted incumbent LEC studies asserting this position as “overly simplified correlation models or state-to-state comparisons lacking adequate explanation of the relevant variables.”⁶² Here, a number of commenters have persuasively shown that the “studies” submitted by Verizon and the Joint Petitioners in support of their forbearance requests provide even less evidentiary support, because they fail to show *any* causal relationship between UNE platform rates and competitive LEC investment in facilities.⁶³

B. Incorporating Verizon’s Proposed Revisions into the Phoenix Center Model Strengthens the Finding that UNE-P Increases BOC Investment.

Responding to opposition to its own forbearance petition, Verizon attacks a Phoenix Center study submitted by Z-Tel and discussed by several other commenting parties that demonstrates that the BOCs have invested more in states with greater levels of competitive entry by means of the UNE platform.⁶⁴ Verizon, with support from three economists, suggests revisions to the model which, if incorporated, will allegedly show that there is “no evidence that

⁶⁰ *Id.* at ¶ 449.

⁶¹ *See* Verizon Reply Comments at 11.

⁶² Triennial Review Order at ¶ 449, n.1373.

⁶³ *See* Verizon Forbearance Proceeding, Opposition of AT&T Corp. at 20-22, MCI Reply Comments at 4-7.

UNE-P causes BOC investment to increase.”⁶⁵

However, noted econometrician Dr. Carter Hill of Louisiana State University has concluded, “I find HHB’s criticisms of the econometric model presented in the Phoenix Center’s Policy Bulletin unpersuasive.... In several cases, HHB’s use of the terminology, tools and techniques of econometrics is incorrect and/or questionable....”⁶⁶ Indeed, Verizon’s economists make fundamental errors, such as comparing R-squared across regressions with different dependent variables and sample sizes, and reporting R-squared for regressions that have no constant term.⁶⁷ Further, while Verizon’s economists contend that Phoenix Center’s results are the consequence of “spurious correlation,” Dr. Hill notes that it is the models of Verizon’s economists that “*invite* spurious results.”⁶⁸ What is most interesting about the Verizon filing is that, as Dr. Hill observes, Verizon’s efforts to discredit the Phoenix Center analysis instead

⁶⁴ See Z-Tel Opposition at 39, *citing* “Competition and Bell Company Investment in Telecommunications Plant: The Effects of UNE-P,” Phoenix Center Policy Bulletin No. 5 at 10-15 (July 9, 2003).

⁶⁵ Verizon Reply Comments, Exhibit 1 (Declaration of Thomas W. Hazlett, Ph.D., Arthur M. Havenner, Ph.D., and Coleman Bazelon, Ph.D., hereafter “HHB”) at 15.

⁶⁶ See Reply Declaration of R. Carter Hill, Ph.D. at 1-2, ¶ 3 (“Hill Declaration”) (attached as Exhibit 2). Dr. Hill is the author of six widely used econometric textbooks.

⁶⁷ See, e.g., HHB, Appendix at 5, ¶ 11; HHB, Appendix at 6, ¶ 16, n.8; HHB, Appendix at 7, ¶ 18, n.10 (“C is the constant divided by the number of access lines in the observation”); HHB, Appendix at 7, Table A3; HHB, Appendix at 9, Table A4. Cf. Hill Declaration at 4-5, ¶ 10 and Damodar Gujarti, *Basic Economics*, 209 (1995) (“It is crucial to note that in comparing two models on the basis of [R-squared], whether adjusted or not, *the sample size n and the dependent variable must be the same.*”). With respect to the R-squared for weighted least squares regressions (as employed and reported by HHB), Pindyck and Rubinfeld conclude “[t]he reported R[-squared] therefore fails to provide a useful measure of goodness of fit.” Robert S. Pindyck and Daniel L. Rubinfeld, *Econometric Models & Economic Forecasts*, 3rd Ed., at 132 (1991).

⁶⁸ Hill Declaration at 3, ¶ 6 (emphasis in original).

“actually affirms the modeling choices made by the Phoenix Center.”⁶⁹

In fact, in an attempt to show that changes in the Phoenix Center model’s specifications lead to different results, Verizon’s economists employ incorrect and questionable econometric analysis. As Dr. Hill observes, Verizon’s economists are unable to show that competition from the UNE platform reduces facilities investment.⁷⁰ Instead, Verizon’s economists have only managed to produce a statistically insignificant relationship between UNE platform and BOC investment.⁷¹ In other words, not even Verizon’s own economists can prove Verizon’s principal policy position – that is, the UNE platform reduces BOC investment.⁷²

Moreover, a recent analysis by the Phoenix Center incorporates many of the suggestions by Verizon’s economists and shows that Verizon’s proposed changes actually “confirm that UNE-P competition increases Bell Company investment in local telecommunications plant.”⁷³

The Phoenix Center analysis estimates twenty different econometric synthesis models based

⁶⁹ *Id.* at 1, ¶ 3.

⁷⁰ As Dr. Hill observes, “It is unsound to contend that statistical insignificance, particularly when based on an invalid model specification, disproves the validity of a model that finds statistical significance using the exact same data.” Hill Declaration at 5, ¶ 12. Moreover, “[T]he finding of an insignificant coefficient in any regression does not imply that there is no relationship between the variables in question; such a conclusion is a classic misinterpretation of hypothesis tests. An insignificant coefficient implies that we ‘cannot reject’ the hypothesis that the underlying parameter is zero. This statement means that there is insufficient information in the data to allow a precise estimation of the parameter in question. It does not mean that the parameter is actually zero, or that no relationship exists.” Hill Declaration at 5, ¶ 13.

⁷¹ *See* HHB at 15.

⁷² *See* HHB at 8. In addition, as discussed above, the effect of unbundling on BOC investment is only one part of the story; a number of econometric studies have shown that restrictions on unbundling or higher prices for UNEs suppresses investment by new entrants. *See* footnotes 11 and 12, *supra*, and accompanying text.

⁷³ *See* “UNE-P Drives Bell Investment: A Synthesis Model,” Phoenix Center Policy Bulletin No. 6 at 1 (Sept. 17, 2003) (“Phoenix Center Policy Bulletin No. 6”) (attached as Exhibit 3).

directly on the suggestions of Verizon’s economists and Dr. Hill.⁷⁴ All twenty synthesis models estimated by the Phoenix Center, most of which closely follow the recommendations of Verizon’s economists, support its earlier conclusion that the UNE platform increases BOC investment by a significant amount.⁷⁵ As the Phoenix Center concludes, “Despite re-specification and different estimation techniques, the measured effect of UNE-P competition on Bell investment remains large and statistically significant (in all models).”⁷⁶ In fact, statistical tests indicate the Phoenix Center’s models are correctly specified (unlike those conducted by Verizon’s economists),⁷⁷ and the consistency of the results across wide disparities in model specification indicate that the estimated relationship between the UNE platform and BOC investment is robust.⁷⁸ Thus, while it probably was not Verizon’s intent to improve the Phoenix Center model, the criticisms and recommendations of Verizon’s own economists have rendered the Phoenix Center’s finding that competition from the UNE platform increases BOC investment even more compelling.

Verizon’s economists also attempt to rebut the Phoenix Center’s finding based on anecdotes and reports by “independent” Wall Street telecom analysts, essentially arguing that because investment decreased and UNE platform lines increased, the former caused the latter.⁷⁹ As the Phoenix Center aptly notes, “This post hoc fallacy line of reasoning is standard Bell

⁷⁴ *See id.*

⁷⁵ *See id.* at 11.

⁷⁶ *Id.*

⁷⁷ *See id.* at 7-10.

⁷⁸ *See id.* at 11-12.

⁷⁹ *See HHB* at 8-12.

Company argument, and brings nothing new to the debate.”⁸⁰ What Verizon’s filing does reveal, however, is that it is unable to find economists capable of rendering any empirical support for its claim that UNE-P reduces investment.

C. Verizon and the Joint Petitioners Fail to Support Their Petitions with Reliable Evidence.

Verizon and the Joint Petitioners also fail to provide any reliable factual evidence upon which the Commission can make a finding about the impact of the UNE platform on facilities investment or the ability of incumbent LECs to recover their costs through TELRIC-based UNE platform rates. Verizon and the Joint Petitioners, as the parties seeking forbearance, have the burden to provide more than “broad, unsupported allegations” to advance their petitions.⁸¹

Verizon, for example, attempts to buttress its petition with a 29-page white paper describing recent UNE rate reductions imposed by State commissions, and various analyses of incumbent LEC investment choices prepared by consulting firms and/or Wall Street telecom analysts.⁸² Notably missing from this report – and from the Verizon Petition, for that matter – is the presentation of any evidence *from Verizon* demonstrating the effect of the UNE rate reductions on Verizon’s ability to recover its “costs” (however costs are defined, *e.g.*, forward-looking, embedded, etc.) and its decision to invest in new facilities. The Joint Petition, which relies on the Verizon Petition, suffers from the same fatal flaw. Despite the BOCs’ constant whining, Z-Tel believes that neither Verizon nor any of the Joint Petitioners have ever brought a

⁸⁰ Phoenix Center Policy Bulletin No. 6 at 2, n.3.

⁸¹ *Hyperion Telecommunications, Inc. Petition Requesting Forbearance; Time Warner Communications Petition for Forbearance; Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 8596, 8607 ¶ 21 (rel. June 19, 1997).

“takings” case against any UNE rate in the seven years since passage of the 1996 Act. Of course, such litigation would require Verizon and the Joint Petitioners to submit actual cost data, not the mere speculations of Wall Street telecom analysts. Surely, Verizon and the Joint Petitioners are better able than a Wall Street telecom analyst to provide and analyze data about their own network costs and investment.⁸³

In the section 271 context, the Commission requires that “[a]ll factual assertions made by an applicant ... must be supported by credible evidence, or they may not be entitled to any weight. Such factual assertions, as well as any expert testimony ... must also be supported by an affidavit or verified statement of a person or persons with personal knowledge thereof.”⁸⁴ Further, a section 271 application, as originally filed, “should include all of the factual evidence on which the applicant asks the Commission to rely in making its findings thereon.”⁸⁵ Given that section 10, like section 271, forces the Commission to engage in an expedited review process,⁸⁶ the Commission should impose analogous evidentiary obligations on a petitioner seeking forbearance under section 10. The failure of Verizon and the Joint Petitioners to provide such evidence should be grounds alone to dismiss their pending forbearance requests.

The Commission has a duty to advance the public interest, not the interest of a select financial elite. As Z-Tel previously noted, the investment analyst research upon which Verizon

⁸² See Verizon Petition, Attachment B, *The Negative Effect of Applying TELRIC Pricing to the UNE Platform on Facilities-Based Competition and Investment*.

⁸³ Indeed, the Commission should take a longer-term view and insist on real evidence, and not simply rely on the quarter-by-quarter (or week-by-week) grumblings from Wall Street.

⁸⁴ *Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, DA 01-734 at 4 (rel. March 23, 2001).

⁸⁵ *Id.* at 5.

⁸⁶ See 47 U.S.C. § 160(c) (requiring the Commission to act on a forbearance petition filed under section 10 within 12 to 15 months).

and the Joint Petitioners rely is not available in the public domain – parties that wish to analyze and respond to this information may do so only by purchasing these reports or opening investment accounts with the right brokerages.⁸⁷ Verizon and the Joint Petitioners should either: (1) file the actual reports cited in their petitions; or (2) describe the assumptions – not just the conclusions – which form the basis of these reports and disclose all of the information provided by Verizon and the Joint Petitioners to the authors. Indeed, to the extent that these Wall Street telecom analysts base their conclusions on data provided by the BOCs, their actual independence is unclear. As the Phoenix Center correctly argues, “investment analysts, for the most part, report to investors what they hear from corporate executives. Consequently, the analysts’ claim that there is a link between UNE-P and investment often is based on little more than the fact a Bell executive told them that such a link existed.”⁸⁸ What is clear is that interested parties should not have to “pay to play” in a Commission proceeding.

Concomitantly, the Commission should ignore Verizon’s assertion that reports by “independent” analysts should be entitled to “greater weight” than the contrary evidence submitted by new entrants.⁸⁹ Indeed, the actual independence of these analysts is uncertain. To the extent that they provide advice from an investor’s point of view, a firm that retains its monopoly power might present an excellent investment opportunity. This is not a reasonable public policy objective, however. Rather than inspiring neutrality and independence, the opportunity to help preserve incumbent LEC market share could instead provide Wall Street

⁸⁷ For example, of the approximately 15 investment analyses and reports cited in the Verizon Reply Comments, Z-Tel was able to locate a single document in the public domain – the Goldman Sachs study cited in footnote 59.

⁸⁸ Phoenix Center Policy Bulletin No. 6 at 2-3, n.3.

⁸⁹ Verizon Reply Comments at 8.

telecom analysts with a “reason to subjectively favor one segment of the industry over another.”⁹⁰ As such, the Commission, an agency charged with advancing the public interest, should give little, if any, weight to their assertions – and certainly not “greater weight” than afforded to other parties.

CONCLUSION

For the foregoing reasons, the Joint Petition should be dismissed or denied.

Respectfully submitted,

Thomas M. Koutsky
Z-Tel Communications, Inc.
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036

By: /s/ Christopher J. Wright
Timothy J. Simeone
Maureen K. Flood*
Harris, Wiltshire & Grannis LLP
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
(202) 730-1300

Counsel for Z-Tel Communications, Inc.

September 22, 2003

* Telecom Policy Analyst

⁹⁰ *Id.*