

# ATTACHMENT

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

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In the Matter of )

Joint Petition for Forbearance )  
From the Current Pricing Rules )  
for the Unbundled Network )  
Element Platform )

WC Docket No. 03-189

Petition for Forbearance From )  
The Current Pricing Rules for )  
the Unbundled Network Element )  
Platform )

WC Docket No. 03-157

**OPPOSITION OF Z-TEL COMMUNICATIONS, INC.**

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**TABLE OF CONTENTS**

	<b><u>Page</u></b>
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

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**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.<sup>1</sup> 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*.”<sup>2</sup>

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<sup>1</sup> 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”).

<sup>2</sup> 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.<sup>3</sup> 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*.”<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

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 IXCs, 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

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

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

<sup>4</sup> Joint Petition at 3.

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

<sup>6</sup> 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.<sup>7</sup>

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.”<sup>8</sup> Moreover, the

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<sup>7</sup> 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*”).

<sup>8</sup> 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.<sup>9</sup>

In particular, as discussed below, the Commission and courts have rejected the BOCs' argument that the current pricing rules deter investment.<sup>10</sup> 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

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<sup>9</sup> 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”).

<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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.

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<sup>11</sup> 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/BKFFfinal.pdf](http://www.telepolicy.com/BKFFfinal.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](http://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](http://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](http://www.telepolicy.com/zpp4.pdf) (2002).

<sup>12</sup> 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](http://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.<sup>13</sup> Numerous commenters in that docket agree with Z-Tel.<sup>14</sup> 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.<sup>15</sup>

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

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<sup>13</sup> See Z-Tel Opposition at 4-13.

<sup>14</sup> 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.

<sup>15</sup> See Verizon Reply Comments at 26.

<sup>16</sup> 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.”<sup>17</sup> 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.<sup>18</sup> 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

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<sup>17</sup> Verizon Reply Comments at 26.

<sup>18</sup> 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."<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> 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

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<sup>19</sup> Verizon Reply Comments at 26.

<sup>20</sup> See Triennial Review Order at ¶ 102, as discussed *infra*.

<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup> Now, in defense of its

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<sup>22</sup> Verizon Reply Comments at 27.

<sup>23</sup> 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.”<sup>24</sup> 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.<sup>25</sup> 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.”<sup>26</sup> 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.”<sup>27</sup>

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

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<sup>24</sup> Verizon Reply Comments at 28.

<sup>25</sup> See 47 U.S.C. § 252(d)(1).

<sup>26</sup> *Id.*

<sup>27</sup> 47 U.S.C. § 252(d)(3).

requires cost-based pricing.<sup>28</sup> 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.<sup>29</sup> 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.

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<sup>28</sup> 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).”).

<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup> Moreover, the Commission has announced that it will open a proceeding to consider the meaning of "fully implemented" in section 10(d).<sup>32</sup> For present purposes, it is enough that: (1) section 10(d) is plainly implicated

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<sup>30</sup> 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).

<sup>31</sup> 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).

<sup>32</sup> 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.<sup>33</sup> 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.”<sup>34</sup> 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

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<sup>33</sup> See Triennial Review Order.

<sup>34</sup> Verizon Petition at 16.

reasonable reading of Congress' intent."<sup>35</sup> 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."<sup>36</sup> 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 IXCs for the provision of exchange access.<sup>37</sup> 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."<sup>38</sup> 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."<sup>39</sup> 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

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<sup>35</sup> Triennial Review Order at ¶ 102.

<sup>36</sup> *Id.*

<sup>37</sup> *See* Verizon Petition at 14, Joint Petition at 1, 2.

<sup>38</sup> "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>.

<sup>39</sup> *Id.*

services.<sup>40</sup> 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.”<sup>41</sup> 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.”<sup>42</sup> 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,<sup>43</sup> 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.”<sup>44</sup> 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.”<sup>45</sup>

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

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<sup>40</sup> 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.”).

<sup>41</sup> Triennial Review Order at ¶ 143.

<sup>42</sup> *Id.* at ¶ 140.

<sup>43</sup> 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).

<sup>44</sup> Triennial Review Order at ¶ 146.

<sup>45</sup> *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.”<sup>46</sup> 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.<sup>47</sup> Any concerns about model inputs (*e.g.*, fill factors, new switch discounts, cost of capital)<sup>48</sup> or even the “hypothetical” network on which TELRIC is based,<sup>49</sup> 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.<sup>50</sup> To the extent that Verizon

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<sup>46</sup> *Id.* at ¶ 450, n. 1374.

<sup>47</sup> *See* TELRIC NPRM.

<sup>48</sup> *See* Verizon Reply Comments at 17.

<sup>49</sup> *See* Verizon Petition at 2; Joint Petition at 2.

<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup> 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

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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).

<sup>51</sup> *See* 47 U.S.C. § 252(e)(6).

<sup>52</sup> *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.").

<sup>53</sup> *See id.* at ¶ 445.

<sup>54</sup> 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.”<sup>55</sup> As such, the Commission has made clear that it is committed to promoting both intermodal and intramodal competition.<sup>56</sup>

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.<sup>57</sup> 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.

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<sup>55</sup> Triennial Review Order at ¶ 443.

<sup>56</sup> *See id.*

<sup>57</sup> 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.<sup>58</sup> 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.”<sup>59</sup> 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

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<sup>58</sup> See Joint Petition at 3-4.

<sup>59</sup> 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.<sup>60</sup> 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.<sup>61</sup>

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.”<sup>62</sup> 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.<sup>63</sup>

**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.<sup>64</sup> Verizon, with support from three economists, suggests revisions to the model which, if incorporated, will allegedly show that there is “no evidence that

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<sup>60</sup> *Id.* at ¶ 449.

<sup>61</sup> *See* Verizon Reply Comments at 11.

<sup>62</sup> Triennial Review Order at ¶ 449, n.1373.

<sup>63</sup> *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.”<sup>65</sup>

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....”<sup>66</sup> 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.<sup>67</sup> 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.”<sup>68</sup> What is most interesting about the Verizon filing is that, as Dr. Hill observes, Verizon’s efforts to discredit the Phoenix Center analysis instead

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<sup>64</sup> 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).

<sup>65</sup> 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.

<sup>66</sup> 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.

<sup>67</sup> 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).

<sup>68</sup> Hill Declaration at 3, ¶ 6 (emphasis in original).

“actually affirms the modeling choices made by the Phoenix Center.”<sup>69</sup>

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.<sup>70</sup> Instead, Verizon’s economists have only managed to produce a statistically insignificant relationship between UNE platform and BOC investment.<sup>71</sup> In other words, not even Verizon’s own economists can prove Verizon’s principal policy position – that is, the UNE platform reduces BOC investment.<sup>72</sup>

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.”<sup>73</sup>

The Phoenix Center analysis estimates twenty different econometric synthesis models based

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<sup>69</sup> *Id.* at 1, ¶ 3.

<sup>70</sup> 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.

<sup>71</sup> *See* HHB at 15.

<sup>72</sup> *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.

<sup>73</sup> *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.<sup>74</sup> 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.<sup>75</sup> 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).”<sup>76</sup> In fact, statistical tests indicate the Phoenix Center’s models are correctly specified (unlike those conducted by Verizon’s economists),<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup> As the Phoenix Center aptly notes, “This post hoc fallacy line of reasoning is standard Bell

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<sup>74</sup> *See id.*

<sup>75</sup> *See id.* at 11.

<sup>76</sup> *Id.*

<sup>77</sup> *See id.* at 7-10.

<sup>78</sup> *See id.* at 11-12.

<sup>79</sup> *See* HHB at 8-12.

Company argument, and brings nothing new to the debate.”<sup>80</sup> 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.<sup>81</sup>

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.<sup>82</sup> 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

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<sup>80</sup> Phoenix Center Policy Bulletin No. 6 at 2, n.3.

<sup>81</sup> *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.<sup>83</sup>

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.”<sup>84</sup> 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.”<sup>85</sup> Given that section 10, like section 271, forces the Commission to engage in an expedited review process,<sup>86</sup> 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

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

<sup>83</sup> 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.

<sup>84</sup> *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).

<sup>85</sup> *Id.* at 5.

<sup>86</sup> 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.<sup>87</sup> 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.”<sup>88</sup> 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.<sup>89</sup> 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

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<sup>87</sup> 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.

<sup>88</sup> Phoenix Center Policy Bulletin No. 6 at 2-3, n.3.

<sup>89</sup> Verizon Reply Comments at 8.

telecom analysts with a “reason to subjectively favor one segment of the industry over another.”<sup>90</sup> 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,

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September 22, 2003

\* Telecom Policy Analyst

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<sup>90</sup> *Id.*

# ATTACHMENT

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

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In the Matter of )

Petition for Forbearance From )  
The Current Pricing Rules for )  
the Unbundled Network Element )  
Platform )

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WC Docket No. 03-157

**OPPOSITION OF Z-TEL COMMUNICATIONS, INC.**

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TABLE OF CONTENTS

	<u>Page</u>
<b>INTRODUCTION AND SUMMARY.....</b>	<b>1</b>
<b>I. VERIZON’S PETITION FOR FORBEARANCE FALLS OUTSIDE THE SCOPE OF SECTION 10 AND SHOULD BE DISMISSED.....</b>	<b>4</b>
<b>II. VERIZON’S PETITION DOES NOT SATISFY THE REQUIREMENTS OF SECTION 10. ....</b>	<b>13</b>
<b>A. Verizon’s Petition Does Not Satisfy the Requirements of Section 10(d).....</b>	<b>13</b>
<b>B. Verizon’s Petition Also Fails to Meet the Requirements of Sections 10(a) and 10(b).....</b>	<b>16</b>
<b>1. Verizon’s request that the UNE platform be priced under the resale standard would result in a price squeeze.....</b>	<b>17</b>
<b>2. Verizon’s request that incumbents collect access charges is inconsistent with the law and would result in double recovery.....</b>	<b>23</b>
<b>a) The Commission has properly rejected the argument that incumbents should receive access charges when competitors lease the UNE platform. ....</b>	<b>24</b>
<b>b) Permitting incumbents to receive access charges would harm competition and consumers. ....</b>	<b>27</b>
<b>c) Section 251(g) provides no support for Verizon’s contention that IXCs should pay access charges to incumbents.....</b>	<b>33</b>
<b>d) Conclusion. ....</b>	<b>37</b>
<b>III. THE UNE PLATFORM HAS INCREASED TELECOMMUNICATIONS INDUSTRY INVESTMENT.....</b>	<b>37</b>
<b>CONCLUSION .....</b>	<b>43</b>

**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 Element	)	
Platform	)	

**OPPOSITION OF Z-TEL COMMUNICATIONS, INC.**

**INTRODUCTION AND SUMMARY**

In the guise of a petition for “forbearance,” Verizon resurrects its previously rejected argument that the platform of network elements (“UNE platform”) is equivalent to total service resale and should be priced at resale rates rather than cost-based rates. Verizon also argues that the incumbent, rather than a competitor using the UNE platform, should receive exchange access charges for originating and terminating calls – ostensibly so that the incumbent can make itself “whole” in the face of allegedly below-cost rates for network elements. Verizon’s argument is factually incorrect, and such action by the Commission would be arbitrary and capricious.

Verizon’s petition should be dismissed at the threshold because it falls outside the scope of section 10. Most fundamentally, the petition seeks *amendment* of the Commission’s rules not *forbearance* from those rules: Verizon asks the Commission to *change* its pricing rules so that competitive carriers leasing the UNE platform (a particular combination of network elements) must pay the incumbent according to the pricing rules governing resale, not those governing network elements. That result would violate the nondiscriminatory principles built into sections 251 and 252 of the Communications Act of 1934 (the “Act”), as amended by the

Telecommunications Act of 1996 (the "1996 Act"), as certain purchasers of network elements would pay different rates than other purchasers of the same network elements. Similarly, Verizon seeks to *change* the rules governing receipt of access charges. But amendments must be made either under section 11 of the Act – which authorizes the Commission “to repeal or modify any regulation it determines no longer to be in the public interest” – or in response to a petition for rulemaking pursuant to 47 C.F.R. § 1.401. Verizon should not be allowed to create its own procedural vehicle to circumvent those rules. Clearly, in the present circumstances, Verizon should have waited until the Commission issues its forthcoming notice of proposed rulemaking to review its pricing rules for network elements.

In addition, Verizon’s petition does not even attempt satisfy section 10(d), which prohibits the Commission from forbearing from the provisions of sections 251(c) or 271 until “those requirements have been fully implemented.” Cost-based pricing for network elements is a requirement of section 251(c)(3), which directs network elements to be priced in accordance with the cost-based rule of section 252(d)(1). To the extent that Verizon asks the Commission to replace network element rates (which are based on cost) with resale rates (which are based on the incumbent’s retail rates), Verizon must demonstrate that its forbearance request satisfies the “fully implemented” requirement in section 10(d). Correspondingly, to the extent that Verizon requests double recovery in the form of cost-based rates for leasing network elements *plus* receipt of access charges, that also requires a departure from the cost-based pricing mandate of section 251(c)(3), a departure that cannot be maintained until section 251(c) is “fully implemented.” In addition, both of Verizon’s proposals would allow Verizon to charge UNE platform entrants *more* than entrants that purchase each constituent network element separately, and “nondiscrimination” is a clear requirement of section 251(c).

In this regard, Z-Tel points out the obvious: the FCC has not yet released its *Triennial Review Order*, and that proceeding is the Commission's third effort to write "unbundling" rules that pass muster under appellate review.<sup>1</sup> To even implicitly argue that the Commission has "fully implemented" section 251(c) in the wake of these court reversals is specious. Because Verizon has not made and cannot make the showing required by section 10(d), its petition should be dismissed summarily.

Verizon's petition also fails to meet the requirements of sections 10(a) and 10(b). As this Commission has recognized in the past, allowing rates for network elements to depart from the cost-based statutory standard implemented by TELRIC ("total element long-run incremental cost") would provide incumbents with a significant cost advantage allowing them to "price squeeze" competitors leasing network elements. Both of Verizon's proposals would result in rates for network elements that are higher than the cost to Verizon of providing them. The resale standard is not a cost-based standard, and Verizon favors it only because it believes it will result in prices that are higher than cost-based prices in most cases. Likewise, Verizon's request that the Commission require competitors leasing the UNE platform to forfeit exchange access charges will result in double recovery of the incumbents' costs, which would also make competitors' costs higher than those of the incumbents. That result is inherently discriminatory and clearly violates the requirements of section 10(a), which states that forbearance should not result in "unreasonably discriminatory" charges and practices by carriers such as Verizon.

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<sup>1</sup> *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*, CC Docket Nos. 01-338, 96-98, 98-147 (adopted Feb. 20, 2003) ("*Triennial Review Order*").

Authorizing the incumbents to recover more than the cost to provide network elements by either of these methods clearly would not “enhance competition among providers of telecommunications services” – the standard of section 10(b) for determining whether forbearance would be in the “public interest” within the meaning of section 10(a)(3). Rather, the result would be a price squeeze that would undermine competition. Nor would Verizon’s proposals ensure that rates for the UNE platform are “just and reasonable” or that consumers would be *protected* – the standards of section 10(a)(1) and 10(a)(2). Rather, adoption of Verizon’s proposals would harm consumers, who would no longer enjoy the innovative new service offerings and lower prices resulting from UNE-based competition, and would result in rates that are higher than the cost-based rates that Congress determined are appropriate for network elements.

Finally, Verizon gets the facts wrong when it blames declining investment in the telecommunications industry on competitors leasing the UNE platform. The empirical evidence demonstrates that infrastructure investment has increased since the passage of the 1996 Act and that entry by competitors using the UNE platform in particular has been a catalyst for Bell Operating Company (“BOC”) investment. Further, the capital stock of all telecommunications firms remains above pre-1996 Act levels. In addition, as shown by academic studies, the prices UNE platform entrants like Z-Tel pay are *not* below Verizon’s ARMIS costs. Granting the relief Verizon requests could not reasonably be premised on its erroneous argument that the UNE platform deters investment or that State commissions have incorrectly implemented UNE platform in a way that results in below-cost pricing.

**I. VERIZON’S PETITION FOR FORBEARANCE FALLS OUTSIDE THE SCOPE OF SECTION 10 AND SHOULD BE DISMISSED.**

Verizon’s petition asks the Commission to “forbear” from applying the pricing rules

governing the leasing of network elements when a competitor leases the UNE platform. In reality, however, Verizon asks the Commission to *amend* its pricing rules. First, Verizon asks the Commission to require incumbents to offer the elements of the platform at the resale rates in section 252(d)(3) rather than the cost-based rates of section 252(d)(1). The language of the petition reveals that Verizon seeks to amend the Commission's rules: "the Commission can forbear from applying TELRIC to UNE-P and *say that incumbents should receive compensation for UNE-P that is no less than provided under the resale standard....*"<sup>2</sup> The petition also asks the Commission to "*revise its pricing rules so that UNE rates are set based on the incumbent's actual forward-looking costs.*"<sup>3</sup> Second, Verizon asks the Commission to change "the current regime that entitles UNE-P carriers to collect per-minute access charges from long-distance carriers."<sup>4</sup> Verizon apparently seeks a new subsection in the access charge regulations stating that, contrary to the Commission's prior determination, a competitor providing service by means of the UNE platform is not entitled to collect exchange access charges.<sup>5</sup> Both of these proposals constitute a request for a change in the Commission's rules rather than forbearance from their application.

The Commission should reject Verizon's attempt at "rulemaking by forbearance." Forbearance quite clearly applies to instances in which an entity asks the Commission to decide that a particular rule or statutory provision would be inappropriate to apply in a specific situation.

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<sup>2</sup> *Verizon Petition* at 20 (emphasis added).

<sup>3</sup> *Id.* at 19 (emphasis added).

<sup>4</sup> *Id.* at 20.

<sup>5</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, 15681-15684 (¶¶ 362-364) (rel. Aug. 8, 1996) ("*First Local Competition Order*").

In other words, “forbearance” is a statutory form of “waiver,” a process that the Commission has engaged in, by rule, for decades. What Verizon seeks is something quite different – it wants affirmative and definitive “revis[ions]” to the Commission’s TELRIC rules for a particular form of UNE entry (*i.e.*, the UNE platform) that Verizon finds distasteful and inconvenient. Those requests for rule changes simply do not fall within the scope of section 10.

Congress’s purpose in enacting section 10 in the 1996 Act must be understood in light of the “national policy framework” Congress wanted the Commission to implement as well as other statutory provisions. In particular, section 10 must be distinguished from the biennial review provision, section 11, which Congress simultaneously enacted in 1996. Section 11 requires the Commission “to repeal or modify any regulation it determines to be no longer necessary in the public interest.” Section 11 – *not* section 10 – is thus the provision Congress enacted in 1996 to ensure that the Commission *amends* or *repeals* outmoded regulations. As the concurrent enactment of sections 10 and 11 and suggests, forbearing from applying a regulation of general applicability to a particular circumstance is different from repealing or modifying a regulation. By seeking forbearance, a party asks the Commission not to enforce a regulation in certain circumstances. Indeed, the text of section 10(a) provides for forbearance only with respect to a specific “telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets.” Thus, seeking forbearance is similar to seeking a waiver, and different from requesting a wholesale amendment or change to a regulation.

There is no doubt that what Verizon seeks is a general change or “revis[ion]” to the TELRIC regulations. Indeed, the other three BOCs – SBC, Qwest and BellSouth – could not

wait to literally photocopy Verizon’s petition and file a “me, too” petition of their own.<sup>6</sup>

Moreover, the policy arguments advanced by Verizon and the other BOCs are merely a rehash of pleadings the group made in the *Triennial Review* proceeding, where they argued (without success) that the Commission should ban the UNE platform as a method of entry.

The BOC interpretation of section 10 forbearance would permit a carrier unsatisfied with a particular regulatory regime to take unlimited stabs at changing that regime, all of which would force the Commission to issue a decision within one year. That process would ignore the role that the section 11 “biennial review” process puts in place, a statute that requires the Commission to review *all* of its rules every two years. Permitting carriers to force even more mandatory reviews of Commission rules of general applicability would give carriers the unlimited and unfettered ability to take another “bite at the apple” outside of the already strenuous biennial review process whenever they so please.

Moreover, section 10(a) permits specific carriers to request that specific rules or provisions not be applied in certain situations – the Commission does not change those rules, it only “forbears” from enforcing those rules. The rules themselves remain on the books. Section 10 thus does not contemplate forbearance from enforcement of a regulation altogether – that is a repeal. Rather, forbearance is more limited, as its roots in the detariffing disputes of the 1980s and 1990s suggest.<sup>7</sup> A decision that *no* carrier is subject to a regulatory requirement is a repeal, for which section 11 sets forth the appropriate procedure.

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<sup>6</sup> See Joint Petition of Qwest Corporation, BellSouth Telecommunications, Inc., and SBC Communications Inc. for Expedited Forbearance, *Joint Petition for Forbearance From the Current Pricing Rules for the Unbundled Network Element Platform* (filed July 31, 2003).

<sup>7</sup> The Commission first spoke of “forbearance” – meaning refraining from enforcing existing legal requirements – in the context of detariffing. The detariffing decisions involved the Commission’s attempt to forbear from requiring nondominant carriers (but not dominant

Consideration of the interplay of the requirements of the Administrative Procedure Act (“APA”) and sections 10 and 11 confirms that section 10 forbearance is similar to the statutory process for a waiver, rather than amendment or repeal. Under the APA, of course, an agency may not amend or repeal a regulation without complying with various procedural requirements, including issuing a notice of proposed rulemaking (“NPRM”). In its biennial review proceedings, accordingly, the Commission issues NPRMs when it determines that a regulation should be repealed or modified. Section 10 does not contemplate the issuance of an NPRM. To the contrary, it provides that a forbearance petition is deemed granted if it is not denied within a year. There is no reason to think that Congress intended section 10 implicitly to repeal the APA’s procedural requirements. Rather, Congress plainly saw forbearance as a form of waiver – and, of course, a waiver may be granted without conformance with the rulemaking requirements of the APA.<sup>8</sup>

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carriers) to file tariffs. In holding that the Commission lacked authority to forbear from enforcing the tariffing requirement of section 203 against nondominant carriers, the D.C. Circuit clearly indicated that the issue of “forbearance” concerns the extent of the Commission’s authority to apply specific rules to specific carriers “differently from the way it applies [those rules] to other competing carriers.” *AT&T v. FCC*, 978 F.2d 727, 736 (D.C. Cir. 1992), *aff’d*, *MCI v. AT&T*, 512 U.S. 218 (1994).

<sup>8</sup> Introducing S. 652 (which later became the 1996 Act) for consideration by the Senate, Senator Pressler explained that the provision in the bill requiring biennial review of Commission rules “establishes a process that will require continuing justification for rules and regulations each 2 years” so that if regulations “don’t make sense, there is a process established to terminate them.” 141 Cong. Rec. S7,881, 7,888 (daily ed. June 7, 1995). Shortly thereafter, Senator Pressler responded to the detariffing decisions by explaining that the forbearance provision in the bill “will make it possible for the FCC immediately to forbear from economically regulating each and every competitive long-distance operator” in response to “[t]he Federal courts” which “have ruled that the FCC cannot deregulate.” *Id.* See also *id.* at 7887 (Statement of Senator Pressler: “[T]he legislation permits the FCC to forbear from regulating carriers when forbearance is in the public interest. This will allow the FCC to reduce the regulatory burdens on a carrier when competition develops, or when the FCC determines that relaxed regulation is in the public interest.”) The legislative

Shortly after its enactment, the Commission recognized the distinction between forbearance, on the one hand, and amendment or repeal, on the other hand, in one of its very first decisions implementing section 10. NYNEX asked the Commission to forbear from applying its separations rules and “adopt instead, for each of the ILEC’s study areas, a single, fixed factor to apportion joint and common costs ....”<sup>9</sup> The Commission rejected NYNEX’s request “because the relief requested by NYNEX goes beyond mere forbearance from regulation and instead requests that we substantially amend our Part 36 separations rules.”<sup>10</sup> Similarly, in its 1998 biennial review decision, the Commission denied a request for forbearance by the Independent Telephone and Telecommunications Alliance (“ITTA”) because it was “asking us to change our rules, not to forbear from applying the current rules.”<sup>11</sup>

Thus, as section 10(a) plainly requires, a forbearance petition should ask the Commission to refrain from enforcing a regulation or statutory provision with respect to a particular carrier or service (or carriers or services), perhaps limited to specific geographic markets. Verizon,

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history illustrates the different purposes of sections 10 and 11, and makes clear that forbearance under section 10 is not the same as terminating a regulation under section 11.

<sup>9</sup> *New England Telephone and Telegraph Company and New York Telephone Company Petition for Forbearance From Jurisdictional Separations Rules*, 12 FCC Rcd. 2308 (¶ 1) (rel. Feb. 19, 1997).

<sup>10</sup> *Id.* at 2313 (¶ 12).

<sup>11</sup> *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; Petition for Forbearance of the Independent Telephone & Telecommunications Alliance; Accounting Safeguards under the Telecommunications Act of 1996; 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).

however, wants the Commission to take action of nationwide applicability. Moreover, Verizon makes only oblique references to the regulations that form the basis of its petition for “forbearance,” citing the “current pricing rules for UNE-P”<sup>12</sup> or the “current TELRIC rules,”<sup>13</sup> rather than specifying the applicable rules or the relevant Commission orders.<sup>14</sup> Instead of seeking forbearance, Verizon asks the Commission to amend its pricing rules so that competitors leasing the platform of network elements pay resale rates and may not collect access charges. As in the *NYNEX* and *ITTA* cases, Verizon’s petition should be dismissed.<sup>15</sup>

As a general matter, if a party seeks to change the rules – without waiting for the Commission to invoke section 11 – the proper procedural vehicle is, of course, a petition for rulemaking pursuant to 47 C.F.R. § 1.401. Here, however, as Verizon well knows, the Commission has already announced plans to review its pricing rules for network elements and the industry awaits the Commission’s new unbundling rules in the *Triennial Review* proceeding. The UNE pricing docket will provide Verizon ample opportunity to argue for the rule changes

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<sup>12</sup> See, e.g., *Verizon Petition* at 20.

<sup>13</sup> See, e.g., *id.* at 9.

<sup>14</sup> Importantly, the Commission has found that a party seeking forbearance under section 10 “must support such request with more than broad, unsupported allegations in order for [the Commission] to exercise that statutory authority.” *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 (¶ 21) (1997) (“*Hyperion Order*”). The Commission should immediately dismiss Verizon’s petition because Verizon provides nothing more than “broad, unsupported allegations,” as discussed herein.

<sup>15</sup> To be consistent with *Chenery*, the Commission cannot depart from the policies and interpretation established in *NYNEX* and *ITTA* without public notice and comment. See *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

described in its petition.<sup>16</sup> Accordingly, Z-Tel is left to assume that Verizon filed its petition in an attempt to require the Commission to act within 12 to 15 months, as section 10(c) requires. Because Verizon's request does not properly fall within the scope of section 10, however, Commission action on it is not subject to this statutory deadline.<sup>17</sup> Nonetheless, the Commission should immediately dismiss Verizon's petition rather than permit Verizon to subject it to a schedule that does not apply.<sup>18</sup>

Z-Tel believes that as a response to the spate of BOC forbearance petitions, the Commission should amend section 1.53 of its rules. These amendments may be made without

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<sup>16</sup> That proceeding should allow competitors to argue for changes to the UNE pricing regime necessitated by the *Triennial Review* decision. 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* decision, which eliminated CLEC access to fiber loops and fiber-fed loops, in addition to certain other network elements).

<sup>17</sup> This is not the first time that Verizon has sought a rule change by filing a petition purportedly for "forbearance" under section 10. See Letter from David L. Lawson, Sidley Austin Brown & Wood LLP, to Marlene Dortch, Federal Communications Commission, CC Docket 96-149 (filed July 9, 2003) at 8 (explaining that if Verizon seeks revisions to the Commission's existing interpretation of section 272 in the operations, installation and maintenance rules, it should do so through a notice and comment rulemaking, not a petition for forbearance under section 10).

<sup>18</sup> Even if Verizon's petition fell within the scope of section 10, the statutory period would not begin to run until Verizon filed a petition compliant with 47 C.F.R. § 1.53. That rule requires that "any petition requesting that the Commission exercise its forbearance authority under 47 U.S.C. § 160 shall be filed as a separate pleading and shall be identified in the caption of such pleading as a petition for forbearance under 47 U.S.C. 160(c)." *Id.* Verizon's petition does not do so. The statutory period should not begin until Verizon captions its petition with the required reference to 47 U.S.C. 160(c), as it did last year when it sought forbearance from the requirements of the section 271 checklist. See *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, CC Docket No. 01-338 (filed July 29, 2002).

notice and comment because of its procedural nature, and Z-Tel believes these modifications are necessary in order for the Commission to be consistent with its *NYNEX* and *ITTA* precedent. Just as the Commission previously concluded that parties seeking forbearance must do so in a separate document captioned as a “petition for forbearance under 47 U.S.C. § 160(c),” it should now provide that parties seeking forbearance must provide additional information as well. Specifically, the Commission should require petitioners to specify the rule or statutory provision for which forbearance is sought; the telecommunications carrier (or class of carriers) or telecommunications service (or class of services) for which forbearance is sought; and the geographic markets (by state, LATA, MSA, or density zone, whichever is appropriate) for which forbearance is sought.<sup>19</sup>

Z-Tel suggests these modifications to ensure that petitioners provide the information required by section 10(a) and explain why forbearance – rather than amendment or repeal – is

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<sup>19</sup> Verizon’s petition also fails to provide any credible factual evidence upon which the Commission can making a finding about whether the requirements of section 10 are satisfied. Verizon attempts to buttress its petition with a 29-page white paper describing recent UNE rate reductions imposed by State commissions, and various analyses of ILEC investment choices prepared by consulting firms and/or Wall Street investment analysts. See *Verizon Petition*, Attachment B, *The Negative Effect of Applying TELRIC Pricing to the UNE Platform on Facilities-Based Competition and Investment*. Notably missing from this report – and from Verizon’s 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. Surely, Verizon is better able than a Wall Street analyst to provide and analyze such data. Moreover, the investment analyst research on which Verizon relies is not available in the public domain – parties that wish to analyze and respond to this information may only do so by purchasing these reports. Verizon has the burden to provide more than “broad, unsupported allegations,” to support its forbearance request under section 10. See *Hyperion Order* at 8596 (¶ 21). Thus, Verizon’s reliance on such paltry evidence – which is not even available to parties who seek to comment on Verizon’s petition – demonstrates that Verizon’s petition is nothing more than a bad-faith effort to bully the Commission into resolving the forthcoming TELRIC docket within 12 to 15 months.

warranted. Commission resources are limited. Requiring petitioners to provide the information required by section 10 would discourage the filing of petitions – like the pending petition – that seek amendment or repeal rather than forbearance.

As a final matter, this entire discussion is purely academic. Under the Constitution, only Congress – not the Commission – may provide the relief Verizon seeks. As explained below, if the Commission were to provide such relief, it effectively would be amending the pricing requirements in sections 251(c)(3) and 252(d) of the Act, and the Commission simply lacks authority to amend the statute. Any attempt to provide that relief by means of forbearance would make crystal clear that the forbearance authority was being implemented in a manner that violates the Presentment Clause, which provides that only Congress may amend a statute. The Supreme Court has held that Congress may not delegate its amendment authority to the President, and it necessarily follows that it may not delegate its amendment authority to an administrative agency.<sup>20</sup>

## **II. VERIZON’S PETITION DOES NOT SATISFY THE REQUIREMENTS OF SECTION 10.**

### **A. Verizon’s Petition Does Not Satisfy the Requirements of Section 10(d).**

While Verizon at least attempts to satisfy sections 10(a) and 10(b),<sup>21</sup> it merely states in a

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<sup>20</sup> In *Clinton v. City of New York*, 524 U.S. 417, 438 (1998), the Court struck down the line-item veto because it authorized the President to amend Acts of Congress. The Court held that a statute may be amended only if the requirements of the Presentment Clause, Art. I, § 7, cl. 2, are strictly followed. Of course, that provision does not permit administrative agencies to amend a statute by providing, for example, that the statutory cost-based pricing rule governing network elements does not apply to certain combinations of network elements.

<sup>21</sup> As further set forth *infra* at 16-37, that attempt is unsuccessful.

conclusory footnote that section 10(d) does not apply.<sup>22</sup> That claim is flatly wrong. Section 10(d) specifically provides that “the Commission may not forbear from applying the requirements of section 251(c) and 271 ... until it determines that those requirements have been fully implemented.” Section 10(d) flatly *prohibits* the Commission from forbearing from any requirement of section 251(c) and 271 without that “full implementation” finding. Such a finding has not been made, and Verizon’s petition dismisses section 10(d) out-of-hand as not applying to its petition. For these reasons alone, Verizon’s petition must be dismissed.

The “requirements” of section 251(c) include cost-based pricing and nondiscrimination. Verizon’s petition asks the Commission to abandon these provisions and therefore implicates section 10(d).

Section 251(c)(3) requires network elements to be provided under the standard of section 252(d)(1), which provides that the price for network elements shall be “based on the cost ... of providing the ... network element.” In other words, one of the “requirements” of section 251(c)(3) is the cost-based standard of section 252(d). Whatever discretion the Commission retains to adjust its pricing rules for network elements therefore does not include departing from a cost-based approach. The resale pricing rule advanced by Verizon – set forth in a separate subsection of 47 U.S.C. § 252(d) that does not apply to network elements (section 252(d)(3)) – is plainly *not* a cost-based standard. It is an avoided-cost standard that starts with the incumbent’s retail rate. Similarly, permitting Verizon to collect access charges on top of the rates it charges competitors for leasing network elements would require a departure from cost-based pricing by permitting double recovery of the cost of providing network elements. Verizon thus necessarily

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<sup>22</sup> See *Verizon Petition* at 19 n. 38.

seeks forbearance from section 251(c)(3)'s requirement that rates for network element be set according to the cost-based standard of section 251(d)(1).

In addition, section 251(c)(3) specifically requires that an incumbent provide access to network elements on a “nondiscriminatory” basis. Verizon’s proposals would permit it to charge competitors that purchase the UNE platform a *different* and generally *greater* amount for the constituent network elements than competitors that purchase those network elements separately.<sup>23</sup> Because it would let Verizon charge different competitors different prices for the same network elements, the resulting pricing rules would be discriminatory, and, by definition, would implicate section 251(c)(3)'s “requirement” that incumbents provide network elements in a “nondiscriminatory” manner.

Because Verizon seeks a departure from two clear “requirements” of section 251(c) – cost-based pricing and nondiscrimination – Verizon must demonstrate that section 251(c) has been “fully implemented,” as required by section 10(d). It has not done so. Instead, as noted above, Verizon merely contends in a footnote that section 10(d) does not apply. Because that contention is erroneous – since Verizon necessarily seeks a departure from the cost-based pricing requirement of section 251(c)(3) and that provision’s nondiscrimination requirement – its petition may be dismissed for failure to address the requirements of section 10(d).<sup>24</sup>

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<sup>23</sup> That is, if Verizon’s petition were granted, all of the elements comprising the UNE platform would still be available *individually* at TELRIC rates. For example, a competitor could still purchase a UNE loop or a UNE switch port at a TELRIC rate; only if the competitor bought all of the components of the UNE platform would its price increase. The UNE platform competitor would pay more for the combination of elements than entrants that only bought the individual elements separately.

<sup>24</sup> In the final sentence of its footnote concerning section 10(d), Verizon suggests that the requirements of that provision are satisfied once a BOC has been granted authorization under section 271. *See Verizon Petition* at 19 n. 38. That is not sufficient to raise the issue. In any event, as explained in our filings in response to the petition Verizon filed last year seeking forbearance from the section 271 checklist, there is no merit to Verizon’s argument.

In addition, Z-Tel finds it inconceivable that the “fully implemented” requirement is met. At the time Verizon filed its petition, *no* set of federal “unbundling rules” under section 251(c)(3) had every been affirmed by the appellate courts. The *Triennial Review* decision, adopted in February 2003 and ostensibly responsive to the latest remand of the Commission’s unbundling rules, has not been released. Moreover, with particular regard to unbundled local switching and UNE platform, the Commission’s *Triennial Review Press Release* indicates that State commissions will, over the next nine months, have a large role in determining whether unbundled local switching and the UNE platform should be available in those States.<sup>25</sup> To claim before those State commission implementation proceedings have even begun that section 251(c) has been “fully implemented” with regard to unbundled local switching and the UNE platform is, frankly, nonsense.

**B. Verizon’s Petition Also Fails to Meet the Requirements of Sections 10(a) and 10(b).**

Section 10(a) requires a showing that, in specific circumstances, a provision: (1) is not necessary to ensure that relevant charges and practices of carriers “are just and reasonable and not unjustly and unreasonably discriminatory,” (2) is not needed “for the protection of

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*See* Opposition of Z-Tel Communications, Inc. to Petition for Forbearance of Verizon, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, CC Docket No. 01-338 at 7-11 (filed Sept. 3, 2002). Among other reasons, Verizon’s argument is defective because section 271(d)(6) makes clear beyond dispute that the requirements of the checklist (which incorporate the requirements of section 251(c)) are to remain in effect after a BOC has been authorized to provide long-distance service – and forbearing from those requirements once section 271 authorization has been granted would render that provision a nullity.

<sup>25</sup> *See FCC Adopts New Rules For Network Unbundling Obligations of Incumbent Local Phone Carriers*, Press Release, Attachment at 1 (Feb. 20, 2003) (“*Triennial Review Press Release*”). In addition, the Commission has stated that the forthcoming *Triennial Review* order will “clarify” certain aspects of its existing TELRIC pricing rules, notably depreciation and cost of capital. *See id.* Accordingly, it is inappropriate – if not impossible

consumers,” and (3) can be forborne in a way that is otherwise “consistent with the public interest.” Section 10(b) allows the Commission to forbear from enforcing the provision or regulation only “if the Commission determines that such forbearance will promote competition among providers of telecommunications services ....” Since the incumbents control bottleneck transmission facilities as a result of the decades-long reign as government-sanctioned monopolists, showing that the competition-reinforcing statute that Congress enacted is no longer in the public interest is a heavy burden to carry. Verizon has not come close.

**1. Verizon’s request that the UNE platform be priced under the resale standard would result in a price squeeze.**

Cost-based pricing in accordance with TELRIC is required to ensure that rates for all network elements, including the UNE platform, are “just and reasonable” and “not unjustly discriminatory.” It is clear that competition will not develop if the incumbents’ incremental cost of using their bottleneck facilities is less than what they charge competitors for access to those facilities. The Antitrust Division of the Department of Justice made that point clearly and concisely in its May 1996 comments urging the Commission to adopt a forward-looking pricing regime:

Pricing above forward looking economic cost also would subject competitors to substantial risks of a “price squeeze.” In competing against entrants to sell services to end users, the real cost of an input (i.e., a network element) for the ILEC will be its forward looking economic cost, and it can set its prices to the consumer accordingly. But for the entrant against whom the ILEC competes, the cost of the elements will be the price charged for it by the ILEC. If this price is above economic cost, the entrant is placed at an artificial competitive disadvantages arising from its dependence on, and the ILEC’s exploitation of, the incumbent’s market power. If the difference between the element’s price and its

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– to act on Verizon’s proposal to amend the Commission’s current TELRIC pricing rules when the substance of those rules is uncertain.

true cost is sufficiently large, the ILEC could engineer a “price squeeze” that could be fatal to the entrant’s ability to compete.<sup>26</sup>

In enacting the TELRIC pricing rules, the Commission endorsed the Antitrust Division’s views.<sup>27</sup>

Shortly after the Eighth Circuit invalidated TELRIC (and before the Supreme Court approved TELRIC) five former chief economists of the Antitrust Division – four who served in Republican administrations and one who served in a Democratic administration – urged the Commission “to stand by the Commission’s original decision,” noting that “there is a large body of intellectual capital behind that decision.”<sup>28</sup> The former chief economists specifically stated that competitive efficiency would not be promoted if “competitive providers ... have to pay more than the incumbent local exchange carriers have to pay for these same inputs.”<sup>29</sup>

Verizon, on the other hand, asserts that “incumbents should receive compensation for UNE-P that is no less than provided under the resale standard, thereby restoring the balance that Congress originally struck.”<sup>30</sup> Verizon’s proposal will instead lead to an *imbalance* between

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<sup>26</sup> Comments of the United States Department of Justice, CC Docket 96-98 at 31 (May 16, 1996).

<sup>27</sup> *First Local Competition Order* at 15821 (¶ 635) (summarizing the Antitrust Division’s views), 15846 (¶ 679) (adopting a methodology designed to establish prices for network elements “based on costs similar to those incurred by the incumbents”).

<sup>28</sup> Letter from Bruce Owen *et. al.* to Hon. Reed E. Hundt, CC Docket 96-98 at 2 (Dec. 2, 1996).

<sup>29</sup> *Id.* The former chief economists added: “The incumbent local exchange carriers complain that if the prices for unbundled elements and interconnection are based on TELRIC, they will be unable to recover full costs and thus unable to make new investments. The opposite is true. *Id.* They explained that by permitting the ILECs to recover their forward-looking costs, including the cost of capital, the Commission had preserved their incentive to invest, while an historic cost pricing regime would result in inefficiencies that would distort incentives. *See id.*”

<sup>30</sup> *Verizon Petition* at 20.

incumbents and new entrants, and it will not ensure that rates for the UNE platform will be just, reasonable and nondiscriminatory in conformance with section 10(a)(1).

As noted above, resale rates under section 252(d)(3) are not cost-based, by definition. Instead, they are indexed to the ILECs' retail rates, which were calculated in response to a number of public policy concerns, such as desire to create cross-subsidies between residence and business customers, and rural and urban customers. As a result, rates for the UNE platform under the resale pricing standard in section 252(d)(3) would not be based on the incumbents' costs. That, in turn, will subject competitors to the price squeeze described by the Antitrust Division when resale rates are higher than cost-based rates. Such an outcome is not just, reasonable and nondiscriminatory.

In addition, adoption of Verizon's proposal would harm consumers by limiting their choices. As far back as the *First Local Competition Order*, the Commission recognized the significant distinction between leasing network elements under section 251(c)(3) and reselling incumbent services under section 251(c)(4). Unlike a reseller, "a carrier offering services solely by recombining unbundled elements can offer services that differ from those offered by an incumbent."<sup>31</sup> While "[t]he ability of a reseller to differentiate its products based on price is limited ... by the margin between the retail and the wholesale price of the product,"<sup>32</sup> network elements priced at TELRIC provide new entrants with an opportunity to compete on price. And "carriers using unbundled elements can bundle services that incumbent LECs sell as distinct tariff offerings, as well as services that incumbent LECs have the capability to offer, but do not,

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<sup>31</sup> *First Local Competition Order* at 15668 (¶ 333).

<sup>32</sup> *Id.* (¶ 332).

and can market them as a bundle with a single price.”<sup>33</sup> All of these opportunities – which are only available by leasing network elements and not by reselling the incumbent’s retail services – ultimately benefit consumers.

Verizon’s assertion that competitors using the UNE platform will simply have smaller profit margins under the resale pricing standard misses the fundamental distinction between leasing network elements and reselling the incumbent’s retail services. The 1996 Act permits a competitor to buy network elements at cost-based rates because network elements can be used for the provision of multiple telecommunications services, including those that are not offered by the incumbent. With the purchase of network elements, however, comes the “risk that end-user customers will not demand a sufficient number of services using that facility for the carrier to recoup its cost.”<sup>34</sup> With that risk comes the opportunity to invent and put into practice entirely new telecommunications services and offerings. An entrant that relies upon resale does not face that risk but also does not have the commensurate opportunity to develop and deploy new service offerings.

As a result, resale has a role in local entry, but it is a limited one and different than UNE-based entry. The Commission stated that Congress included resale in the 1996 Act because

[S]ome markets may never support new entry through the use of unbundled elements because new entrants seeking to offer services in such markets will be unable to stimulate sufficient demand to recoup their investment in unbundled elements. Accordingly, in these markets carriers will enter through resale of the incumbent LEC services, irrespective of the fact that they could enter exclusively through the use of unbundled elements.<sup>35</sup>

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<sup>33</sup> *Id.* (¶ 333).

<sup>34</sup> *Id.* (¶ 334).

<sup>35</sup> *Id.* at 15668-15669 (¶ 334).

In other words, entry “exclusively through the use of unbundled elements” and resale are complementary entry strategies. Resale gives a competitor an option to offer service (if it so chooses) in those markets where it is uneconomic to serve a customer through network elements priced at TELRIC.<sup>36</sup> Indeed, there are several areas where the UNE platform rate exceeds the resale rate. Interestingly, even in such markets, local entrants (including Z-Tel) oftentimes *still* opt to provide service via the UNE platform rather than obtain service from the incumbent at the lower resale rate. Those companies have clearly decided that the opportunity for innovation and service differentiation offered by the UNE platform outweighs the higher price UNE platform cost in those areas.

The greater market opportunities offered by UNE platform were well-documented by Z-Tel and other entrants in the *Triennial Review* proceeding. Z-Tel utilizes the UNE platform to offer residential and small business customers nationwide new products like its “Personal Voice Assistant” (“PVA”), which combines the functionality of dialtone, e-mail, voicemail, on-line personal organizers, and voice recognition software. Z-Tel is no more a “reseller” of incumbent LEC local telephone service than JetBlue Airways is a “reseller” of airplanes. JetBlue leases

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<sup>36</sup> Thus, the resale pricing rule was needed because the incumbents repeatedly argued to Congress (and the Commission and the courts) that, in some markets (such as rural residential markets), their retail rates were required by State commissions to be below their costs. In such a circumstance, the resale rule established by Congress would permit competitive entry – while entry by means of network elements would not. As the Commission told the Supreme Court in defending the rule permitting competitors to choose between entry by means of resale and entry by means of the platform of network elements, “the different pricing regimes for these two entry options ensure that resale will be a more attractive entry option than network elements for new entrants seeking to recruit customers who (according to the incumbents) are currently served below cost ....” Reply Brief for the Federal Petitioners, *FCC v. Iowa Utilities Board*, No. 97-826 at 40 n. 27 (June 1998). The resale pricing rule, in other words, was added by Congress because, as the Commission also told the Supreme Court, “it would be particularly important in the near term” – that is, until universal service reform eliminated the system of implicit subsidies that might lead to below-cost retail rates. *Id.* at 36, 40 n. 27.

most of its commercial jets, yet no one claims that it is not a legitimate “airline.” Operating an airline is more than simply flying planes – it involves schedules, ticketing, gate operations, customer service, and a host of other factors of production. Running a telephone and enhanced messaging software services business is similarly complex and competition over those additional factors of production provides substantial consumer benefits. Verizon’s petition ignores this complexity completely.

Under section 10(a), the Commission does not have that luxury to ignore consumer benefits from this competitive entry. Indeed, consumers’ positive response to competition by new entrants using the UNE platform shatters Verizon’s assertion that “forbearance will affirmatively further consumer interests by encouraging the development of facilities-based competition and by promoting the kind of innovation and meaningful consumer choice that only real, as opposed to merely ‘synthetic,’ competition can produce.”<sup>37</sup> More than 12 million consumers currently receive local telephone service from a competitors using the UNE platform.<sup>38</sup> Z-Tel's Personal Voice Assistant is available to residential and small business customers in 47 states today, and each and every day, Z-Tel processes approximately 3.8 million messages, transactions and voice-recognition calls through its Z-Node servers. And, a recent J.D. Power and Associates Study found that in the Mid-Atlantic region, MCI – one of the nation’s largest entrants employing the UNE platform – “ranks highest among four carriers,

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<sup>37</sup> *Verizon Petition* at 20.

<sup>38</sup> *See* PACE Coalition, *UNE-P Fact Report: July 2003*.

outperforming its competitors in performance and reliability, billing and image factors.”<sup>39</sup>

Competition using the UNE platform obviously feels altogether real to consumers. And it is the interest of consumers, not incumbents, that the Commission must consider under section 10(a)(2).

For the foregoing reasons, forbearance from the cost-based pricing standard – and its replacement with the resale pricing standard – is not warranted under the standards of sections 10(a) and 10(b). Verizon’s proposal would place new entrants like Z-Tel, which are both Verizon’s competitors and customers, at a significant cost disadvantage that makes it impossible to compete on price. Such an outcome will not “promote competition among providers of telecommunications services,” as required by section 10(b), and would harm consumers.

**2. Verizon’s request that incumbents collect access charges is inconsistent with the law and would result in double recovery.**

Verizon’s petition also asks the Commission to forbear from its current rule that carriers using the UNE platform are entitled to collect per-minute access charges from interexchange carriers (“IXCs”) for the provision of exchange access service. Notably, this stale request was rejected by the Commission more than seven years ago, and Verizon’s petition describes no change in conditions that would justify a revision to the Commission’s prior, well-reasoned decision. In fact, Verizon’s forbearance request looks like a petition for reconsideration filed seven years too late. In any event, Verizon’s request fails the standards of sections 10(a) and 10(b) because it would result in double recovery for the incumbents. In addition, contrary to Verizon’s arguments, section 251(g) provides no support for its contention that incumbents should collect access charges when competitors lease the platform of network elements.

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<sup>39</sup> *J.D. Power and Associates Reports: Household Switching of Local Service Carriers Increases as New Players Enter the Local Telephone Service Market*, Press Release at 2

Finally, Verizon makes no argument whatsoever to show that per-minute access charges are in any way correlated with the amount of money it believes it needs to “recoup” for the ostensibly “below cost” UNE rates it complains about. Per-minute access charges vary throughout Verizon’s territories, and Verizon does not even bother to list what those charges are and what impact transferring those sums directly from competitor’s to Verizon’s pockets would have. Without a linkage between the amounts Verizon claims the current rules cause it to “lose” and Verizon’s proposed remedy (collection of per-minute access charges), Verizon’s request amounts to no more than a request for the Commission to place a surcharge of some unspecified but arbitrary amount upon UNE platform elements. That decision would contravene and undermine the section 252(d) UNE rate-setting process.

- a) **The Commission has properly rejected the argument that incumbents should receive access charges when competitors lease the UNE platform.**

Verizon asserts that “the Commission has not explicitly considered whether its access charge conclusion should apply in the case of the UNE platform ....”<sup>40</sup> But the Commission has already found that section 251(c)(3) requires incumbents to provide new entrants with access to network elements so the competitor can provide telecommunications services *including* exchange access.<sup>41</sup> The Commission held that “section 251(c)(3) does not impose restrictions on the ability of requesting carriers ‘to *combine* such elements in order to provide such telecommunications service[s].”<sup>42</sup> Verizon’s assertion is therefore incorrect: the Commission

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(July 15, 2003).

<sup>40</sup> *Verizon Petition* at 16.

<sup>41</sup> *See First Local Competition Order* at 15679 (¶ 356).

<sup>42</sup> *Id.*

has considered whether competitors may request combinations of network elements for the provision of exchange access and concluded that they may.

The Commission also has rejected Verizon’s argument that the UNE platform is “regulatory fiction,” that “deprive[s] the incumbent of the access charges it would receive under a standard resale arrangement.”<sup>43</sup> To the contrary, the Commission has found that exchange access provided via network elements under section 251(c)(3) is not interchangeable with resale under section 251(c)(4). Rejecting incumbent arguments that competitors using network elements should *pay* exchange access charges, the Commission was “unpersuaded by suggestions that . . . provision of competitive service by rebundling the same network elements used by the incumbent LEC to provide access is equivalent to resale of a retail service.”<sup>44</sup> Leasing network elements, unlike reselling incumbent services, provides competitors with “the flexibility to offer all telecommunications services made possible by using network elements,” including exchange access.<sup>45</sup> The same reasoning defeats Verizon’s argument that competitors should *forfeit* exchange access charges to the ILEC. Competitive carriers uses the UNE platform to provide a variety of telecommunications services – including exchange access – unlike a reseller, which is limited to the incumbent’s retail offerings. Thus, it is sound regulatory policy to permit such UNE-based entrants to recover the costs of originating and terminating calls for IXCs through exchange access charges.

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<sup>43</sup> *Verizon Petition* at 16.

<sup>44</sup> *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, First Report and Order, 12 FCC Rcd. 15982 (¶ 340) (rel. May 16, 1997) (“*Access Charge Reform Order*”).

<sup>45</sup> *Id.*

In the end, it is Verizon’s proposal that creates a “regulatory fiction,”<sup>46</sup> not the UNE platform. In fact, the UNE platform was entirely contemplated by Congress when it passed section 271. As Z-Tel previously explained,<sup>47</sup> section 271 requires loops, transport, switching, and signaling – the network elements comprising the UNE platform – to be provided to competitors on an unbundled basis for “the reasonably foreseeable future.”<sup>48</sup> Section 271 was a bargain at the core of the 1996 Act: if BOCs wanted to offer long-distance services, they had to provide access to their *entire local network*, without regard to any “impairment” inquiry. The parity accorded by that deal is logical and was well-known in Congress. The Supreme Court, in fact, relied on Senator Breaux’s description of the specific checklist items (including switching) in rejecting Verizon’s challenge to the Commission’s pricing methodology and unbundling rules.<sup>49</sup> Senator Breaux, “a leading backer of the Act in the Senate,” instructed the BOCs that, “you will not control much of anything,” but instead “will have to allow for nondiscriminatory access on an unbundled basis to the network functions and services of the Bell operating companies network that is at least equal in type, quality, and price to the access [a] Bell operating company affords to itself.”<sup>50</sup> Almost immediately after telling the BOCs, “you will not control much of anything,” Senator Breaux listed three of the competitive checklist items at issue: “local loop transmission from the central office to the customer’s premises, unbundled from local switching or other services; and next, local transport from the trunk side of local

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<sup>46</sup> *Verizon Petition* at 16.

<sup>47</sup> *See* Opposition of Z-Tel Communications, Inc. to Petition for Forbearance of Verizon, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, CC Docket No. 01-338 at 7-11 (filed Sept. 3, 2002).

<sup>48</sup> 141 Cong. Rec. S8,469 (daily ed. June 15, 1995) (statement of Sen. Pressler).

<sup>49</sup> *See Verizon v. FCC*, 535 U.S. 467, 488 (2002) (“*Verizon*”).

<sup>50</sup> *Id.*

exchange carrier switch, unbundled from switching or other services. Finally, local switching unbundled from transport, local loop transmission, or other services.”<sup>51</sup> Those components, listed by Congress in section 271(c)(2)(B)(iv), (v), (vi) and (x) respectively, constitute the key components of the UNE platform. Congress, in fact, cared so much about those requirements that it specifically limited the Commission’s ability to forbear from those items in section 10(d). Verizon is now peddling a “pulp fiction” account of Congress’ mandate that ignores entirely the clear statutory requirements of the section 271 “competitive checklist.”

Verizon appears to persist in arguing that providing network elements on an “unbundled” basis means “physically separated.” That argument was flatly rejected by the Supreme Court. It held that “unbundled” means “priced separately,” and its decision leaves no room for change – the Court noted that “the only definition” for “unbundled” is “to give separate prices for equipment and supporting services.”<sup>52</sup> In short, the section 271 checklist requires BOCs with authorization to provide long-distance service to provide access to the platform of network elements. Verizon’s attacks on UNE platform are an attack on the statute, not a “regulatory fiction.”

**b) Permitting incumbents to receive access charges would harm competition and consumers.**

The Commission has already found that allowing incumbents to charge TELRIC-based rates for leasing the UNE platform and recover exchange access charges for calls would constitute double recovery of the incumbents’ costs. Specifically, when competitors using the UNE platform charge IXCs for exchange access, “the incumbent LEC may not assess exchange access charges to such IXCs because the new entrants, rather than the incumbents, will be

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<sup>51</sup> 141 Cong. Rec. S8,134, 8,153 (daily ed. June 12, 1995) (statement of Sen. Breaux).

<sup>52</sup> *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 394 (1999).

providing exchange access services, and to allow otherwise would permit incumbent LECs to receive compensation in excess of network costs.”<sup>53</sup> This is because the TELRIC-based rate for the UNE platform “represents full compensation to the incumbent LEC for the use of the network elements that telecommunications carriers purchase.”<sup>54</sup> Compensating the incumbents above and beyond the revenue they receive from leasing network elements would thus be “inconsistent with the pricing standard for unbundled elements set forth in section 252(d)(1),”<sup>55</sup> which requires ILECs to charge rates for network elements based on the “cost ... of providing ... element[s].”

In fact, paying, billing, and collecting intercarrier compensation is an important component of offering facilities-based telecommunications services, and having the responsibility and ability to manage this process gives an entrant the ability to develop and deploy entirely new services. Z-Tel (and, no doubt, other UNE platform entrants) has an extensive intercarrier payment, billing, and collections unit that manages the payment and receipt of these access charges. Once Verizon sells a UNE platform line to Z-Tel, Verizon no longer has to perform those functions – a cost savings that Verizon conveniently ignores in its regulatory

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<sup>53</sup> *First Local Competition Order* at 15682 (¶ 363, n.772).

<sup>54</sup> *Id.* at 15864 (¶ 721).

<sup>55</sup> *Id.* at 15862 (¶ 363, n.772).

pleadings.<sup>56</sup> Taking on the costs and revenues of exchange access permits an entrant to develop new products and services differentiated from the incumbent. These products and services would not be possible if the entrant were locked-in to the incumbent's access charge regime.

For example, Z-Tel's Personal Voice Assistant permits a customer to place calls utilizing voice-recognition software. *All* of Z-Tel's PVA voice recognition calls today are routed through Z-Tel's servers in Tampa, Florida; as a result, if a realtor in Silver Spring, Maryland placed a PVA voice-recognition call to the mortgage broker in College Park, Maryland, the call would be routed through Tampa. If Z-Tel provided local service to both the realtor and the mortgage broker, terminating access charges become essentially irrelevant to this product. Z-Tel believes that growing use of these types of new and innovative services are a crucial part of its competitive advantage, which ultimately generates the service innovation benefits that consumers receive from UNE platform entry.

If Verizon's petition were granted, however, Z-Tel would potentially owe Verizon terminating access charges for that call, even though it is a "local" call from the perspective of the realtor and mortgage broker. Such access charges would apply because Z-Tel chose to insert additional and enhanced functionality into POTS by routing voice-recognition calls through Tampa. In other words, Verizon's proposal would punish Z-Tel for offering its enhanced PVA functionality to its customers. If Z-Tel were to remove its PVA voice-recognition service from the equation entirely and simply provide "mere UNE platform service" to the two customers, the call from the realtor to the mortgage broker would be regarded by Verizon as a "local" call and Z-Tel would not owe Verizon per-minute access charges on either end. In other words, Verizon's per-minute access charge proposal would appear to *increase* Z-Tel's cost of doing

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<sup>56</sup> For example, Z-Tel takes on the risk of bad debt in case an interexchange carrier does not

business when Z-Tel provides new and innovative services. Verizon's proposal is, in fact, anti-innovation because it creates an incentive for UNE platform entrants to copy Verizon's local service areas, calling plans and technology. While that might make it easier for Verizon to compete, it is certainly not in the interest of consumers and the public.

Verizon does not really attack the logic of the Commission's prior decisions concluding that the incumbents' would obtain double recovery if they both charged competitors for leasing network elements and collected access charges as well, but instead principally argues that the statutory cost-based standard has been applied erroneously by the Commission and the State commissions. If Verizon feels that it has been "wronged" by the State commissions, it has several avenues available to it, most notably the statutory appeal process in section 252(e)(6). Such appeals are generally heard *de novo*, which would accord Verizon the complete ability to make its case to the federal district court. Notably, Verizon's petition does not discuss Verizon's won-loss record on federal appeals of TELRIC pricing decisions.

Verizon's attached "study" only shows that Verizon seems to be in the midst of a startling "losing streak" with regard to State commission TELRIC decisions. There is a good reason for Verizon's TELRIC losing streak – Verizon has consistently proposed inflated rates for UNEs that bear no relation to the Commission's TELRIC pricing rules. For example, Verizon's proposed rate models invariably include a factor called the "forward-looking-to-current cost factor," or "FLC." The forward-looking-to-current cost factor does precisely what it says: it converts Verizon's "forward-looking" operating costs into "current" operating costs, despite the clear Commission rule that requires that UNE rates be set by reference to "forward-looking" costs. The Maryland Public Service Commission saw through this charade. The Maryland

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pay its terminating access bill; Verizon does not take on this cost.

Staff characterized the FLC as “designed to recover Verizon's predetermined costs rather than actual forward-looking costs.” Staff regarded the FLC as a “make-whole” provision that is “based on embedded data” whose purpose is to “maintain operating expenses at current levels,” not forward-looking levels. In its order that eliminated the FLC, the Maryland Commission agreed, finding that Staff's position was “particularly persuasive” and noting that Verizon's factor constituted a “highly speculative adjustment.”<sup>57</sup>

The Maryland Commission also struck several other of Verizon's proposed charges. For instance, Verizon sought to include in UNE rates “marketing expenses” that are “necessary to advertise UNEs to CLECs, and to create brand awareness.”<sup>58</sup> The Commission found that since Verizon is the only provider of UNEs in Maryland, “Verizon's need for UNE marketing is not apparent.”<sup>59</sup>

It is also important to note that the speculative and inflated FLC factor Verizon habitually proposes affects the rates of virtually *all* UNEs, not simply the UNE platform.<sup>60</sup> Indeed, state-to-state variations in the price of the UNE loop explain 40 percent of the variability of UNE platform costs among states, according to data published by Commerce Capital Markets.<sup>61</sup> Therefore, if Verizon has a problem with the TELRIC methodology itself, those problems would

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<sup>57</sup> *In the Matter of the Investigation into Rates for Unbundled Network Elements Pursuant to the Telecommunications Act of 1996*, Case No. 8879, Maryland Public Service Commission, Order No. 78552, 33-34 (June 30, 2003).

<sup>58</sup> *Id.* at 35.

<sup>59</sup> *Id.* at 36.

<sup>60</sup> *See id.* at 34.

<sup>61</sup> Analysis is based upon partial r-squares computed utilizing Commerce Capital Market data contained in Anna-Maria Kovacs, Kristin L. Burns, and Gregory S. Vitale, *The Status of 271 and UNE-Platform in the Regional Bells' Territories*, Commerce Capital Markets

not be limited to UNE platform and would be applicable to all network elements. As a result, those concerns are best addressed in the Commission's upcoming TELRIC rulemaking proceeding.<sup>62</sup>

The Commission should not grant Verizon this extreme form of relief without evaluating whether State commission-mandated rates for leasing network elements do, in fact, prevent Verizon from recovering its costs. Without such analysis, it is likely that granting the relief Verizon requests will result in double recovery for Verizon, to the detriment of competitors and consumers. In fact, Verizon has provided no "tie" whatsoever between the exchange access charges it wants to collect and the amount by which UNE platform rates are "below cost." Verizon does not even enumerate the specific exchange access charges it seeks to collect, let alone attempt to show the relationship between exchange access charges and its ostensible "under-recovery." Without any such relationship or showing, a Commission action that imposes a new charge on entrants on top of a State commission-approved UNE rate is clearly arbitrary and capricious and contravenes the section 252(d) rate-setting process.

Verizon also asserts that incumbents should be entitled to recover exchange access

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Equity Research (August 22, 2002). For a description of this analysis, see Adrian C. Darnell, *A Dictionary of Econometrics* 302-03 (1994).

<sup>62</sup> As discussed above, changes may be needed to TELRIC because the Commission has (improperly) limited competitor access to the incumbents' networks. See *Triennial Review Press Release*, Attachment at 2 (eliminating competitor access to fiber loops and fiber-fed loops on an unbundled basis pursuant to section 251(c)(3)). As a result, pricing network elements as if competitors had access to the full "features, functions and capabilities" of the ILEC local network when competitors do not in fact have such full access is no longer warranted. Alas, such a change to TELRIC would result in lower UNE rates, a change Verizon might disapprove of but which the Commission must examine in its entirety.

charges because they were designed to help recover the incumbents' infrastructure costs.<sup>63</sup> Of course, this argument also has already been rejected by the Commission, which “disagree[d] with suggestions ... [that] cost-based rates for such elements would not recover universal service support subsidies built into the access charge regime.”<sup>64</sup> In addition, Verizon makes no showing of the level of the “difference” between its ostensible “infrastructure costs” and UNE platform rates, nor does Verizon show that allowing it to collect per-minute access charges would magically fix that apparent shortfall (if it exists). If the Commission has real concerns about the incumbents' ability to sustain their infrastructure in the absence of per-minute access charges, the Commission may impose a universal service obligation upon all carriers – including those that lease network elements. Indeed, the Commission has done so and incumbents now collect millions of dollars per year from the federal Universal Service Fund (“USF”). Under section 254, however, the Commission must collect universal service support from carriers in a “nondiscriminatory” manner; placing a special USF assessment upon carriers simply because they lease network elements would violate that nondiscrimination principle.<sup>65</sup>

**c) Section 251(g) provides no support for Verizon's contention that IXCs should pay access charges to incumbents.**

Verizon argues that requiring IXCs to pay access charges to the incumbent when competitors provide service via the UNE platform “is consistent with the expressed intent of Congress that the 1996 Act should not disrupt the pre-existing access charge regime that helped

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<sup>63</sup> See *Verizon Petition* at 14.

<sup>64</sup> *Access Charge Reform Order* at 16130 (¶ 338).

<sup>65</sup> See 47 U.S.C. § 254(b)(4) (“All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.”).

pay for the local network.”<sup>66</sup> In fact, the Commission rejected Verizon’s interpretation of section 251(g) in the *First Local Competition Order*:

We disagree with the incumbent LECs which argue that section 251(g) requires requesting carriers using unbundled elements to continue to pay federal and state access charges indefinitely. Section 251(g) provides that the federal and state equal access rules applicable before enactment, including the “receipt of compensation,” will continue to apply after enactment, “until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment.” We believe this provision does not apply to the exchange access “services” requesting carriers may provide themselves or others after purchasing unbundled elements. Rather, the primary purpose of section 251(g) is to preserve the right of interexchange carriers to order and receive exchange access services if such carriers elect not to obtain exchange access through their own facilities or by means of unbundled elements purchased from an incumbent.<sup>67</sup>

Verizon cannot reasonably rely on section 251(g) to argue that it is entitled to exchange access charges – whether those changes are paid by a competitive carrier or the IXC that originates and terminate calls – simply because Verizon received exchange access charges prior to the implementation of the 1996 Act. Instead, section 251(g) ensures that IXCs can obtain nondiscriminatory LEC-provided exchange access services, a relevant concern given the greater incentives for discrimination created by the BOCs’ new opportunities to enter the interLATA long distance market. Further, section 251(g) is a limited, transitional device that allowed the Commission to preserve pre-1996 Act regulations *until* it could implement the provisions of the

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<sup>66</sup> *Verizon Petition* at 15.

<sup>67</sup> *First Local Competition Order* at 15681-15682 ( ¶ 362) (internal citations omitted). *See also Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385, 407 (¶ 47) (1999) (finding that sections 251(g) “is a transitional enforcement mechanism that obligates the incumbent LECs to continue to abide by equal access and nondiscriminatory interconnection requirements of the MFJ when such carriers ‘provide exchange access, information access and exchange services for such access to interexchange carriers and information service providers ....’”).

1996 Act. Clearly, then, section 251(g) does not preserve incumbents' access charge revenues on an indefinite basis, as Verizon has argued.

Verizon similarly misreads the D.C. Circuit's remand of the Commission's *Intercarrier Compensation Order*, which relied on section 251(g) to "carve out" calls made to ISPs from the provisions of section 251(b)(5).<sup>68</sup> Verizon argues the D.C. Circuit's holding does not apply to exchange access, because the Court only criticized the Commission's application of section 251(g) on the grounds that "there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic."<sup>69</sup> The mere fact that IXCs were required to pay ILECs exchange access charges prior to passage of the 1996 Act does not give the Commission authority to revive this obligation seven years later. To the contrary, "251(g) appears to provide simply for the 'continued enforcement' of certain pre-Act regulatory 'interconnection restrictions and obligations' ... *until they are superceded by Commission action implementing the Act.*"<sup>70</sup> The *First Local Competition Order*'s requirement that IXCs pay exchange access charges to the CLEC, not the ILEC, constitutes such a superceding action by the Commission. As described above, this rule change was necessary to ensure that incumbents provide network elements at cost-based rates in conformance with section 252(d)(1), and to prevent the incumbents from double-recovering their costs through UNE rates and exchange access charges. Section 251(g) therefore provides no basis to resurrect regulatory obligations that are in direct conflict with the provisions of the 1996 Act.

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<sup>68</sup> *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) ("*WorldCom*").

<sup>69</sup> *Verizon Petition* at 15, *citing WorldCom* at 433.

<sup>70</sup> *WorldCom* at ¶ 432 (emphasis added).

On one occasion, the Commission used section 251(g) to require competitors purchasing unbundled local switching to pay certain carrier access charges to the incumbents. In the *First Local Competition Order*, the Commission ordered carriers using the UNE platform to pay 75 percent of the Transport Interconnection Charge (“TIC”) and 100 percent of the Carrier Common Line Charge (“CCLC”) through June 30, 1997 to provide the industry with “sufficient time to plan for and adjust to potential shifts that may results from competitive entry.”<sup>71</sup> Notably, this was a “one time only” decision on the Commission’s part, and it provides no support for Verizon’s pending forbearance request. The Commission recognized, for example, “that to comply with the 1996 Act, the rates that states establish for interconnection and network elements may not include non-cost-based amounts or subsidies” like those embedded in carrier access charges.<sup>72</sup> Further, the Commission affirmed its earlier finding that “section 251(g) does not require that incumbent LECs continue to receive access charge revenues when telecommunications carriers use unbundled incumbent LEC network elements to originate and terminate interstate traffic.”<sup>73</sup> And the Commission only “create[d] a limited-duration mechanism” in response to “the extraordinary upheaval in the industry’s structure set in motion by the 1996 Act.”<sup>74</sup> The Eighth Circuit upheld this provision of the *First Local Competition Order* only because it “d[id] not think it contrary to the Act to institute access charges with a fixed expiration date, even though such charges on their face appear to violate the statute, in

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<sup>71</sup> *First Local Competition Order* at 15866 (¶ 725).

<sup>72</sup> *Id.* at 15867 (¶ 726).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

order to effectuate another part of the Act.”<sup>75</sup> Verizon would have competitive carriers using the UNE platform – and only those carriers – forfeit exchange access charges indefinitely.

**d) Conclusion.**

Permitting Verizon to collect exchange access charges for UNE platform lines would do nothing more than allow Verizon to line its pockets. Verizon’s proposal would simply result in double recovery for incumbents because, under law, the price for constituent elements of the UNE platform must be based upon Verizon’s costs. Verizon’s gripe seems to be with the TELRIC pricing rules: but that gripe relates to *all* network elements (not simply the UNE platform) and it is clearly better addressed in a rulemaking of general applicability, not a forbearance proceeding. Moreover, Verizon’s proposed remedy bears no relationship at all to the harm it is ostensibly suffering and would amount to no more than an arbitrary surcharge imposed by the Commission in a discriminatory manner upon one mode of entry.

The result would plainly undermine competition. As explained with respect to Verizon’s other contention, it would result in a price squeeze because competitors’ costs would be higher than the incumbents’ costs. The resulting damage to competition would injure rather than protect consumers. For those reasons, Verizon’s access charge proposal plainly fails to fulfill the requirements of sections 10(a) and 10(b).

**III. THE UNE PLATFORM HAS INCREASED TELECOMMUNICATIONS INDUSTRY INVESTMENT.**

Verizon’s petition claims that the Commission’s current TELRIC pricing rules harm both the telecommunications industry and the economy as a whole. Specifically, Verizon argues that the Commission’s rules “have produced UNE-P prices that fail to compensate the incumbents

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<sup>75</sup> *CompTel v. FCC*, 117 F.3d 1068, 1074 (8<sup>th</sup> Cir. 1997).

fairly for the use of their networks and that deter, rather than promote investment in competing telephone networks and services.”<sup>76</sup>

Of course, the Supreme Court soundly rejected these arguments in *Verizon v. FCC*, finding that it “suffices to say that a regulatory scheme that can boost such substantial competitive capital spending over a 4-year period is not easily described as an unreasonable way to promote competitive investment in facilities.”<sup>77</sup> Further, actual empirical evidence – unlike the investment analyst estimates and *Wall Street Journal* articles cited in Verizon’s petition – prove that Verizon’s assertions about the economic harms caused by TELRIC pricing are simply incorrect. While Verizon claims that application of the TELRIC rules to the UNE platform has “devalued existing investments by incumbents and newer entrants alike in the nation’s telecommunications infrastructure,”<sup>78</sup> “contributed to a massive decline in telecommunications industry investment,”<sup>79</sup> and “precluded development of a rational wholesale market,”<sup>80</sup> the opposite is true. In reality, network elements priced at TELRIC-based rates – including the UNE platform – have increased the value of capital stock in the telecommunications industry and increased total infrastructure investment since the passage of the 1996 Act.

*First*, the Commission’s TELRIC pricing rules have not led to the decline in telecommunications industry investment. While Verizon warns that overall infrastructure investment declined by more than \$60 million between 2000 and 2002 “as previously prescribed

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<sup>76</sup> *Verizon Petition* at 5.

<sup>77</sup> *Verizon* at 516.

<sup>78</sup> *Verizon Petition* at 5.

<sup>79</sup> *Id.* at 6.

<sup>80</sup> *Id.* at 11.

TELRIC rates were further slashed,”<sup>81</sup> declining investment is better explained by factors outside the Commission’s control, such as the sluggish economy and the ability of firms to acquire assets from bankrupt carriers at “fire sale” prices.<sup>82</sup>

In fact, the market-opening requirements of the 1996 Act, including the availability of network elements at cost-based rates, are estimated to have generated \$267 billion in additional infrastructure investment from 1996 through 2001, or an average annual increase of 22.3 percent per year.<sup>83</sup> With regard to the UNE platform in particular, the evidence demonstrates that the BOCs have invested more in states with greater levels of competitive entry by means of the UNE platform.<sup>84</sup> A recent study shows that the availability of the UNE platform at TELRIC-based rates has a positive impact on investment, with each UNE-P line increasing BOC net investment by \$759 per year.<sup>85</sup> By the end of 2002, this generated an estimated increase of \$81.1 billion of additional investment.<sup>86</sup> Notably, the same study found that two alternative forms of entry – UNE-L (*i.e.*, UNE loops purchased without switching and transport) and total service resale – “do not stimulate investment by the BOCs.”<sup>87</sup>

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<sup>81</sup> *Id.* at 7.

<sup>82</sup> *See Competition and Bell Company Investment in Telecommunications Plant: The Effects of UNE-P*, Phoenix Center Policy Bulletin No. 5 (July 9, 2003) (“*UNE-P Investment Report*”), attached as Exhibit A.

<sup>83</sup> *See The Truth About Telecommunications Investment*, Phoenix Center Policy Bulletin No. 4 at 3 (June 24, 2003) (“*Investment Report*”), attached as Exhibit B.

<sup>84</sup> *See UNE-P Investment Report* at 10-15.

<sup>85</sup> *See id.* at 13.

<sup>86</sup> *See id.*

<sup>87</sup> *Id.* at 13-14.

Competition from the UNE platform also mitigated the effects of declining BOC infrastructure investment. While BOC net plant investment fell by seven percent in 2002, the expected total decline would have been 13 percent if the BOCs had not increased investment in response to the UNE platform.<sup>88</sup> Further, no investment growth would have been realized in 2001 absent UNE-based competition.<sup>89</sup>

Regardless, the Commission should not be concerned about declining investment. It is reasonable to assume that immediately after the passage of the 1996 Act, investment would increase sharply as new entrants built the capital stock required to provide telecommunications services. These extraordinary increases in investment are not sustainable in the long run, however, nor are they an appropriate policy goal. In fact, “A sensible expectation of the effects of the 1996 Act on investment is ... an immediate rise in investment and capital stock and the eventual decline in investment once new network construction nears completion, with capital stock remaining above pre-Act levels.”<sup>90</sup> Declining capital expenditures by telecommunications firms therefore provide no basis for changing the Commission’s TELRIC pricing rules. Society is better off when firms operate more efficiently, producing constant or increased levels of output with *less* investment. Indeed, a recent study of the Commission’s deregulation of special access services correctly argued that, “the current Commission’s preoccupation with maximizing industry inputs (*e.g.*, jobs and the sales of equipment from vendors) rather than the efficient production and distribution of equipment (*i.e.*, leading to declining prices, more innovation) is

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<sup>88</sup> *See id.* at 13.

<sup>89</sup> *See id.*

<sup>90</sup> *Id.* at 7.

misplaced.”<sup>91</sup> Economic efficiency, not investment, is the ruler against which the Commission should measure the success of its policies. The Commission’s current TELRIC pricing rules, as implemented by the state commissions, measure up well against this ruler.

*Second*, contrary to Verizon’s assertions, the Commission’s TELRIC pricing rules have not devalued investment and the pricing rules are not inherently deflationary.<sup>92</sup> Instead, the availability of network elements at TELRIC-based rates has *increased* the capital stock of telecommunications firms by increasing overall investment. After passage of the 1996 Act, the capital stock of telecommunications firms grew on average by 7.9 percent annually – a significant increase over the 3 percent average annual growth rate prior to the passage of this landmark legislation.<sup>93</sup> This equaled a \$194 billion increase in the capital stock of telecommunications firms by the end of 2001.<sup>94</sup> Rather than devaluing the investments of either incumbents or new entrants,<sup>95</sup> “capital stock remains substantially above trend” as a result of the market-opening requirements of the 1996 Act, including the availability of the UNE platform at TELRIC-based rates.<sup>96</sup>

*Third*, while it is correct that (allegedly) “independent analysts have concluded that the result [of the Commission’s TELRIC pricing rules] is to produce artificially low rates that are

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<sup>91</sup> George S. Ford, Ph. D., and Lawrence G. Spiwak, Esq., *Set It and Forget It? Market Power and the Consequences of Premature Deregulation in Telecommunications Markets*, Phoenix Center Policy Paper Number 18 at 7 (July 23, 2003) available at <http://www.phoenixcenter.org/pcpp/PCPP18.pdf>.

<sup>92</sup> See *Verizon Petition* at 5-6.

<sup>93</sup> See *Investment Report* at 5.

<sup>94</sup> See *id.* at 5.

<sup>95</sup> See *Verizon Petition* at 6.

<sup>96</sup> *Investment Report* at 5.

well below any realistic measure of the incumbent's costs,"<sup>97</sup> this statement should be taken with a grain of salt. A recent paper subjected many of the studies on which Verizon's petition relies to a rigorous review, and found that they are "largely without merit" based on "errors in both the calculation of unbundled element revenues, and in the wholesale costs of providing unbundled elements."<sup>98</sup> To the contrary, using the BOCs' publicly filed ARMIS data and revenue estimates provided by a sample CLEC, this paper found that "positive gross and net margins are the rule when costs and revenues are aggregated to the level of the BOC. Even the inclusion of depreciation and a return on capital does not materially alter this conclusion – UNE-P is *profitable* to the BOCs."<sup>99</sup>

For those reasons, Verizon's erroneous argument that the UNE platform has deterred investment provides no reasonable basis on which to amend the Commission's rules in the manner Verizon proposes.

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<sup>97</sup> *Verizon Petition* at 3. Indeed, the actual independence of these analysts is unclear. 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, however, would not be a reasonable public policy objective.

<sup>98</sup> See T. Randolph Beard, George S. Ford, and Christopher C. Klein, "The Financial Implications of the UNE-Platform: A Review of the Evidence." Forthcoming in *Journal of Communications Law and Policy* (Fall/Winter 2003) at 25, attached as Exhibit C.

<sup>99</sup> *Id.*

## CONCLUSION

For the foregoing reasons, Verizon's petition should be denied.

Respectfully submitted,

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August 18, 2003

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# ATTACHMENT

3

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of )  
 )  
Petition for Forbearance of the Verizon Telephone ) CC Docket 01-338  
Companies Pursuant to 47 U.S.C. § 160(c) )

**REPLY OF Z-TEL COMMUNICATIONS, INC., IN OPPOSITION  
TO PETITION FOR FORBEARANCE OF VERIZON**

The comments filed on September 3, 2002, included seven oppositions to Verizon's petition for forbearance and two statements in support. The seven oppositions show that Verizon's petition is defective for a host of reasons. The two statements in support – a five-page filing by SBC requesting that forbearance extend to all Bell Operating Companies (BOCs) and a four-page filing by the United States Telecom Association – add nothing to Verizon's skeletal forbearance petition. Z-Tel files these reply comments (1) to support Covad's recommendation that the Commission *immediately* dismiss Verizon's petition as unripe and (2) to show that the Commission should dismiss SBC's "me too" request as well.

1. *Verizon's petition should be dismissed immediately.* The Commission should dismiss Verizon's petition immediately in order to "save itself and the industry from the wasteful exercise for which Verizon's petition calls."<sup>1</sup> Verizon's petition asks the Commission to forbear from enforcement of certain items on the section 271 checklist *if* the Commission determines that the items no longer meet the impairment test of section 251(d)(2). Plainly, that condition precedent has not been established and will not be established (if at all) until the Commission

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<sup>1</sup> Covad Comments at 3.

issues its Triennial Review decision. At that time, if appropriate, Verizon may refile a forbearance petition.

There is no good reason for the Commission or the industry to continue to debate whether forbearance would be appropriate if the Commission takes certain actions in the Triennial Review proceeding. On the other hand, there is good reason to wait until a forbearance request is ripe. At that point, the parties may focus their factual arguments on a more limited set of network elements and geographic markets.

Consideration of the relevant legal arguments is likely to benefit from a more concrete setting, as courts applying the judicial ripeness doctrine have concluded. As the Supreme Court has repeatedly stated: “The operation of the statute is better grasped when viewed in light of a particular application. Here, as is often true, ‘determination of the scope . . . of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.’”<sup>2</sup> Therefore, “[a] claim is not ripe for adjudication if it rests upon ‘contingent future events that may not occur as anticipated, or indeed may not occur at all.’”<sup>3</sup> Although an agency is not required to apply the same ripeness test as the courts, it is sensible to do so, particularly with respect to a statutory provision such as section 10 that requires action within a specified time period. Otherwise, the Commission may be required to expend its limited resources on issues that may never require resolution or where the factual setting has changed significantly at the time when resolution is warranted.

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<sup>2</sup> *Texas v. United States*, 523 U.S. 296, 301 (1998), quoting *Longshoremen v. Boyd*, 347 U.S. 222, 224 (1954).

<sup>3</sup> *Texas v. United States*, *supra*, 523 U.S. at 300, quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581 (1985), quoting C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3532, p. 112 (1984).

As Covad stated, “Verizon’s petition for forbearance, at present, is simply an extraordinary waste of everyone’s time.”<sup>4</sup> Although Verizon’s forbearance request is skeletal and frivolous, Z-Tel must take it seriously because the relief Verizon seeks potentially threatens Z-Tel’s existence and, as long as the request is pending, analysts will note that fact. In addition, Verizon and the other BOCs are likely, if the petition is not denied promptly, to begin an *ex parte* campaign that Z-Tel and other companies will have to monitor and answer. There is no good reason to waste the Commission’s time or the limited resources of new entrants like Z-Tel.

2. *SBC’s request is defective.* Dismissing Verizon’s petition will, of course, have the effect of denying SBC’s request that forbearance extend to all of the BOCs. But SBC’s request is defective for additional reasons and its defects further illustrate why Verizon’s request should be denied.

As we emphasized in our Comments, section 10 plainly requires an inquiry in addition to that called for by other provisions in the Communications Act. Otherwise, contrary to a cardinal principle of statutory construction, it would be superfluous. Moreover, the inquiry required by section 10 is necessarily highly granular: whether competitors have adequate alternative wholesale sources of supply; whether end-users will have a choice of competing providers; whether the public interest is otherwise advanced by forbearance; and whether the relevant provisions of section 271 have been fully implemented require examination of particular geographical and customer markets. But, like Verizon, SBC has not said a single word about particular markets.

In addition, like Verizon’s initial forbearance request, SBC’s request fails to comply with the regulation requiring forbearance requests to be made in a separate document labeled as a

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<sup>4</sup> Covad Comments at 3.

request for forbearance.<sup>5</sup> SBC's filing is entitled "Comments of SBC," but it plainly must be entitled "Petition for forbearance" in order to trigger section 10. SBC's request should be dismissed for that reason as well.

### CONCLUSION

The Commission should save everyone – including itself – unnecessary costs by denying Verizon's forbearance petition immediately. SBC's request should also be denied.

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September 18, 2002

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<sup>5</sup> 47 C.F.R. § 1.53.

# ATTACHMENT

4

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of )  
 )  
Petition for Forbearance of the Verizon Telephone )  
Companies Pursuant to 47 U.S.C. § 160(c) )

CC Docket 01-338

**OPPOSITION OF Z-TEL COMMUNICATIONS, INC.  
TO PETITION FOR FORBEARANCE OF VERIZON**

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September 3, 2002

**TABLE OF CONTENTS**

	<u>Page</u>
I. VERIZON’S ARGUMENT THAT THE CHECKLIST ITEMS AT ISSUE CEASE TO APPLY IF THE COMMISSION REMOVES THE CORRESPONDING ELEMENT FROM THE LIST PROMULGATED UNDER SECTION 251(D)(2) LACKS MERIT. ....	3
A. The Section 271 Checklist Establishes Unbundling Obligations In Addition To Those Of Section 251. ....	3
B. Congress Made Very Clear That The BOCs Must Provide Access To The Items Comprising The Platform Of Unbundled Network Elements. ....	7
II. VERIZON HAS NOT DEMONSTRATED THAT THE STANDARDS OF SECTION 10 HAVE BEEN SATISFIED. ....	11
A. Verizon’s Forbearance Argument Merely Repeats Its Erroneous Statutory Argument. ....	11
B. Forbearing From Enforcement Of The Provisions Of Section 271 At Issue In This Case Would Raise Serious Constitutional Issues. ....	13
C. Forbearance From Enforcement Of The Checklist Provisions At Issue Is Appropriate Only After A Wholesale Market Has Developed For The Relevant Network Element. ....	18
CONCLUSION.....	23

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of )  
 )  
Petition for Forbearance of the Verizon Telephone ) CC Docket 01-338  
Companies Pursuant to 47 U.S.C. § 160(c) )

**OPPOSITION OF Z-TEL COMMUNICATIONS, INC.  
TO PETITION FOR FORBEARANCE OF VERIZON**

Verizon’s petition for forbearance principally reargues its contention that the section 271 checklist does not establish independent unbundling obligations applicable to Bell Operating Companies (BOCs). Instead, Verizon argues, BOCs need not unbundle an element listed on the checklist if the Commission determines under section 251(d)(2) that competitors are not impaired without access to the element.

That is not a plausible construction of the statute because it renders the checklist items Verizon challenges superfluous. The second item on the section 271 checklist requires BOCs to unbundle network elements that the Commission determines should be unbundled under the standards of section 251. The four checklist items for which Verizon petitions for forbearance specifically require BOCs to unbundle particular elements – loops, transport, switching, and signaling – and the items do so without qualification. Those checklist items have no meaning if they have no effect once an element is not required to be unbundled under section 251. For that reason, Verizon’s proposed construction of the statute effectively reads the checklist items at issue out of the statute, contrary to fundamental principles of statutory construction.

Verizon’s cursory discussion of the requirements of section 10 similarly amounts to nothing more than an argument that once the requirements of section 251(d)(2) are satisfied, so

too are the requirements of section 10. That argument suffers from the same defect as the first argument: if Congress meant that to be the case, it would not have adopted the checklist items specifically requiring BOCs to provide unbundled access to certain network elements. But it adopted those items, and it did so for good reason. Both the drafters of the market-opening provisions of the 1996 Telecommunications Act and the Supreme Court recognized the advantages the BOCs derived from their long-standing monopolies, and specifically recognized that continuing access to the network elements at issue in this proceeding would be needed to allow competition to flourish.

Verizon's construction of section 10 raises serious constitutional issues. The Constitution does not authorize administrative agencies to sweep away legislative acts, and therefore any exercise of forbearance authority may be unconstitutional under the Presentment Clause and separation of powers principles. In order to avoid such challenges and challenges alleging that section 10 violates delegation principles, the Commission should be careful to construe section 10 to establish significant limits on its authority to overturn statutory provisions that were adopted by Congress and signed into law by the President.

Section 10 should be read to require, with respect to the network elements listed in the section 271 checklist, that forbearance is not warranted until a wholesale market has developed for those elements. That is the most sensible reading of the provision, and its adoption limits the risk that the provision will be held unconstitutional. However, it is not necessary to reach the issue of how section 10 should be construed in order to reject Verizon's petition. As stated above, that petition is based entirely on the argument that Congress' listing of specific network elements in the checklist means nothing, a contention that is plainly wrong.

**I. VERIZON’S ARGUMENT THAT THE CHECKLIST ITEMS AT ISSUE CEASE TO APPLY IF THE COMMISSION REMOVES THE CORRESPONDING ELEMENT FROM THE LIST PROMULGATED UNDER SECTION 251(d)(2) LACKS MERIT.**

**A. The Section 271 Checklist Establishes Unbundling Obligations In Addition To Those Of Section 251.**

Section 251(c)(3) (entitled “unbundled access”) requires all incumbent local exchange carriers (ILECs) to provide unbundled access to network elements if the Commission determines that unbundling is warranted pursuant to the standards set forth in section 251(d)(2) (entitled “access standards”). The second item on the section 271 checklist requires BOCs to provide “[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1).” Therefore, if the Commission requires unbundling of an element under section 251, item two on the checklist requires BOCs to provide unbundled access to that network element (and to do so at the price set pursuant to the standard set forth in section 252) in order to obtain authorization to provide long-distance service.

Verizon “ask[s] the Commission to forbear from applying items four through six and ten of the Section 271 competitive checklist once the corresponding elements no longer need to be unbundled under Section 251(d)(2).”<sup>1</sup> Those checklist items require BOCs to provide:

(iv) Local loop transmission from the central office to the customer’s premises, unbundled from local switching or other services.

(v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

(vi) Local switching unbundled from transport, local loop transmission, or other services.

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<sup>1</sup> Verizon Petition at 3.

(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and transmission.

These items plainly require BOCs to provide loops, transport, and switching on an unbundled basis and to provide nondiscriminatory access to signaling as well. The items (which are set forth above in full) are not qualified by any cross-reference to section 251.<sup>2</sup>

Verizon nevertheless argues that if the Commission decides that a network element need not be unbundled by all ILECs under section 251(d)(2), “the only way to reconcile” sections 251 and 271 is to conclude that, “once an element no longer meets the statutory standard for mandatory unbundling, the corresponding checklist item is satisfied.”<sup>3</sup> That is simply not so. By its nature, section 271 singles out the BOCs for special treatment, as the BOCs previously emphasized in challenging the provision on the grounds that it is a bill of attainder and violates the constitutional guarantee of equal protection. If Congress had wished to apply the same rules to BOCs that it applied to other ILECs, it would not have enacted section 271. But Congress did enact additional rules governing BOCs, and therefore it would be contrary to the basic structure of the statute to construe those additional requirements applicable to BOCs to require nothing more than is required of other ILECs.

If the BOCs continue to believe that Congress should not have treated them differently than other ILECs, they may renew their equal protection challenge or their bill of attainder challenge to section 271. But the D.C. Circuit correctly held that “[b]y no stretch of the imagination can it be found that § 271 violates equal protection,” even though Congress treated

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<sup>2</sup> We noted in our Comments in the Triennial Review proceeding that it was not clear that Congress considered signaling and certain other items on the checklist to be “network elements.” Z-Tel Comments, CC Docket 01-338 *et al* (April 5, 2002), at 10 n.14. However, Verizon does not distinguish between signaling and loops, transport, and switching – which Congress clearly considered to be network elements.

<sup>3</sup> Verizon Petition at 7.

the BOCs differently than other ILECs.<sup>4</sup> The court similarly concluded that “it is hard to imagine how § 271 inflicts injury” on the BOCs – a prerequisite to succeeding on a bill of attainder claim.<sup>5</sup> The BOCs’ imaginative challenges to section 271 do not pass muster “as a matter of constitutional law . . . or as a matter of common sense.”<sup>6</sup> This Commission should not accept those recycled arguments, which it previously rejected and successfully opposed in court.

Because section 271 imposes obligations on the BOCs in addition to those imposed on other ILECs, the conclusion that BOCs must unbundle network elements listed on the section 271 checklist is entirely consistent with section 251, whether or not *all* ILECs must provide unbundled access to those elements under section 251(d)(2). Section 251(d)(2) is a general provision relating to all ILECs and network elements, while the checklist items at issue impose specific duties on BOCs with respect to some network elements in addition to those imposed on other ILECs. General provisions do not override specific ones, and therefore section 251 cannot reasonably be construed to trump the checklist’s specific commands governing one subset of ILECs (BOCs) and one subset of network elements (loops, transport, switching, and signaling).

Thus, there is no need to “reconcile” section 251(d)(2) and the section 271 checklist. Even if an element is removed from the list promulgated under section 251(d)(2), BOCs must still provide unbundled access to the element if it is listed on the section 271 checklist. That is how the Commission read these provisions in the *UNE Remand Order*, and that proper construction of the statute was not challenged.<sup>7</sup>

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<sup>4</sup> *BellSouth Corp. v. FCC*, 162 F.3d 678, 692 (D.C. Cir. 1998).

<sup>5</sup> *Id.* at 691.

<sup>6</sup> *Id.*

<sup>7</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 (UNE Remand Order)*, 15 FCC Rcd 3696 (1999), ¶ 468 (“In this Order, we conclude that circuit switching and shared transport need not be unbundled in certain circumstances. Nonetheless, providing access and interconnection to these elements remains an obligation for BOCs seeking long distance approval.”)

Indeed, construing the checklist to require only what section 251(d)(2) requires would violate what the Supreme Court has termed a “cardinal principle” of statutory construction: it would render those items “surplusage.”<sup>8</sup> The four checklist items at issue have meaning only if BOCs are required to unbundle the elements they list even after those items are not required to be unbundled pursuant to the standards of section 251. As noted above, the second checklist item requires BOCs to unbundle network elements that must be unbundled pursuant to section 251. The checklist items at issue would serve no purpose if they did not continue to have effect after an element was not required to be unbundled pursuant to the standards of section 251(d)(2). Accordingly, not giving the checklist items their plain meaning – that the BOCs must provide unbundled access to those elements, without qualification – would violate one of the most basic and long-standing principles of statutory construction.

Verizon’s proposed “reconciliation” of sections 251(d)(2) and 271 therefore is deeply flawed, as a matter of statutory construction: the plain language of the provisions at issue calls for unbundling of the elements they list without qualification; section 271 was not meant to be “reconciled” with section 251 because Congress intended to impose requirements on the BOCs that it did not impose on other ILECs; and the reading Verizon proposes in order to “reconcile” the checklist with section 271 would deprive the checklist provisions at issue of meaning.

In addition, even though the bulk of Verizon’s petition for forbearance is devoted to its statutory construction argument, the argument that the checklist items must be “reconciled” with

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<sup>8</sup> As the Supreme Court stated last year in *Duncan v. Walker*, 533 U.S. 167, 174 (2001): “‘It is our duty ‘to give effect, if possible, to every clause and word of a statute.’”” *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); see also *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a ‘cardinal principle of statutory construction’); *Market Co. v. Hoffman*, 101 U.S. 112 (1879) (‘As early as in Bacon’s Abridgment, sect. 2, it was said that “a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant”). We are thus ‘reluctant to treat statutory terms as

section 251(d)(2) is not a forbearance issue. Verizon seems to recognize this fact in the final sentence of its petition, which states that the Commission “should grant the instant forbearance petition” *if* it “concludes that the checklist items establish independent unbundling obligations.”<sup>9</sup> If the checklist items did not establish independent unbundling obligations, there would be no need for forbearance. But if the checklist items establish unbundling obligations in addition to those required by section 251(d)(2), it necessarily follows that satisfaction of the requirements of section 251(d)(2) is not sufficient to justify forbearance. Otherwise, the checklist items would not, in fact, establish obligations in addition to those established by section 251, but instead would not be enforced as soon as the relevant unbundling obligation is no longer required under section 251.

**B. Congress Made Very Clear That The BOCs Must Provide Access To The Items Comprising The Platform Of Unbundled Network Elements.**

In addition to having no merit as a matter of statutory construction, Verizon’s proposed interpretation is contrary to the purposes of the Act as explained by its drafters and the Supreme Court. The drafters of the checklist made clear on the Senate floor that BOCs would have to provide the elements comprising the platform for “the reasonably foreseeable future.”<sup>10</sup> Senator Pressler, the sponsor of the Senate bill and the Chair of the Senate Commerce Committee, explained the purpose of the checklist as including “those things that a telecommunications carrier would need from a Bell operating company in order to provide a service such as

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Continued . . .  
surplusage’ in any setting. *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687 (1995).”

<sup>9</sup> Verizon Petition at 7.

<sup>10</sup> 141 Cong. Rec. S8,469 (daily ed. June 15, 1995) (statement of Sen. Pressler).

telephone exchange service or exchange access service in competition with the Bell operating company. This competitive checklist could best be described as a snapshot of what is required for these competitive services now and in the reasonably foreseeable future.”<sup>11</sup> It is therefore clear that Congress correctly anticipated that competition in local telephone services for residential and small business customers would not develop overnight – and it took care to ensure that the key elements of the BOCs’ technological stranglehold over such competition would be unbundled for “the reasonably foreseeable future.”<sup>12</sup>

Senator Breaux, a “leading backer of the Act in the Senate,”<sup>13</sup> put it more colloquially. He told the BOCs: “Now, this legislation says you will not control much of anything,” but instead “will have to allow for nondiscriminatory access on an unbundled basis to the network functions and services of the Bell operating companies network.”<sup>14</sup> Almost immediately after telling the BOCs “you will not control much of anything,” Senator Breaux listed three of the

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<sup>11</sup> *Id.*; see also Telecommunications Competition and Deregulation Act of 1995, S. 652, 104<sup>th</sup> Cong. § 151 (1995), as codified at 47 U.S.C. § 271(c)(2)(B)(iv-vi).

<sup>12</sup> During debate on the 1996 Act, Senator Kerrey observed that “[t]here is much in this legislation . . . that will benefit the American consumer, and that will benefit the American household. But let no one be mistaken . . . . It may take 9 or 10 years, which is what happened with divestiture. It took us 10 years before people began to say, ‘Wait a minute. This is working. Competition is bringing the price down. The quality is going up.’” 141 Cong. Rec. S7,909 (daily ed. June 7, 1995) (statement of Sen. Kerrey). Unfortunately, six years after passage of the Act, so little local exchange competition has emerged for the “American household” that Senator Kerrey’s nine- or ten-year time frame now looks optimistic. An important reason for the delay, as the Fifth Circuit concluded, was that “potential entrants were stymied . . . by the uncertainty over the FCC’s jurisdiction to implement its local competition order” until the Supreme Court issued its 1999 decision. *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 436 n.78 (1999), *cert. granted*, 530 U.S. 1213 (2000), *cert. pet. dismissed*, 531 U.S. 975 (2000). Further uncertainty retarded competitive entry until the Supreme Court rejected the ILECs’ challenges to the Commission’s pricing rules in the *Verizon* decision. The D.C. Circuit’s decision in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), may have upset the certainty that prevailed for ten days following the Supreme Court’s decision.

<sup>13</sup> *Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646, 1662 (2002).

<sup>14</sup> 141 Cong. Rec. at S8,153 (daily ed. June 12, 1995) (statement of Sen. Breaux).

checklist items at issue: “local loop transmission from the central office to the customer’s premises, unbundled from local switching or other services; and next, local transport from the trunk side of local exchange carrier switch, unbundled from switching or other services. Finally, local switching unbundled from transport, local loop transmission, or other services.”<sup>15</sup>

The Supreme Court relied on Senator Breaux’s explanation in rejecting the BOC’s challenge to the Commission’s pricing methodology and unbundling rules.<sup>16</sup> As the Court explained, the incumbent LECs own a vast network of bottleneck facilities – including loops, switches, and transport facilities – as a result of their prior status as franchised monopolists.<sup>17</sup> They also controlled, until recently, nearly 100 percent of the customers in their markets, and telecommunications markets are characterized by “network effects,” where the value of service is highly dependent on being able to reach large numbers of other subscribers. As the Supreme Court stated: “It is easy to see why a company that owns a local exchange . . . would have an almost insurmountable competitive advantage.”<sup>18</sup> The Court concluded that Congress gave “aspiring competitors every possible incentive to enter local retail telephone markets,” including the right to lease network elements at cost-based rates.<sup>19</sup>

Moreover, Congress made very clear in the anti-backsliding provision in section 271 that the BOCs’ obligations to provide access to the network elements listed in the checklist continue after a section 271 application has been authorized. The state commissions understand that

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<sup>15</sup> *Id.*

<sup>16</sup> *Verizon, supra*, 122 S. Ct. at 1661.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1662.

<sup>19</sup> *Id.* at 1661.

section 271 imposes continuing obligations on the BOCs: each state commission for which a section 271 application has been granted has adopted a “performance assurance plan” “to protect against backsliding after BOC entry in the long distance market.”<sup>20</sup> The Commission routinely applauds those efforts, as it did recently with respect to Vermont.<sup>21</sup> And the Commission recognizes its own duty to prevent backsliding.<sup>22</sup> So even though the grant of a section 271 application shows that a BOC has opened its market to competition, it is clear that BOCs must continue to provide unbundled access to network elements. That, of course, makes perfect sense: if the BOCs do not continue to take the steps necessary to open their markets until robust competition has been irreversibly established, those markets will close.

Analysis of the purposes of section 271 thus confirms the conclusion that flows from the analysis of its terms: Congress clearly intended the checklist to impose continuing obligations on BOCs in addition to those imposed on other ILECs. It therefore is clear that Congress did not intend the items at issue to be “reconciled” into surplusage, as Verizon contends. Rather, analysis of Congress’ actions and statements concerning the checklist should cause the Commission to hesitate before it concludes that new entrants are not impaired without access to any of the items singled out for special treatment in the checklist. Congress plainly viewed those

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<sup>20</sup> *Application by Verizon New England for Authorization to Provide In-Region InterLATA Services in Vermont*, FCC No. 02-118 (2002) (*Vermont 271 Decision*) at ¶ 74 n.256.

<sup>21</sup> *Id.* at ¶ 3 (“[B]y diligently and actively conducting proceedings beginning in 1997 to . . . develop a Performance Assurance Plan . . . the Vermont Board has laid the necessary foundation for our review and approval.”).

<sup>22</sup> “Working in concert with the Vermont Board, we intend to monitor closely Verizon’s post-approval compliance for Vermont to ensure that Verizon does not ‘cease[ ] to meet any of the conditions required for [section 271] approval.’” *Id.* at ¶ 81 (quoting section 271(d)(6)). The Commission made the same point in its order granting BellSouth’s applications for Georgia and Louisiana. *See Georgia and Louisiana 271 Decision* at ¶ 307.

elements as the minimum necessary “to provide a service such as telephone exchange service or exchange access service in competition” with an incumbent.<sup>23</sup>

**II. VERIZON HAS NOT DEMONSTRATED THAT THE STANDARDS OF SECTION 10 HAVE BEEN SATISFIED.**

**A. Verizon’s Forbearance Argument Merely Repeats Its Erroneous Statutory Argument.**

Other than two sentences that simply parrot some of section 10’s language,<sup>24</sup> Verizon completely ignores the structure and importance of the forbearance provision. Section 10(a) requires a showing that a provision: (1) is not necessary to ensure that the charges and practices of carriers “are just and reasonable and not unjustly and unreasonably discriminatory;” (2) is not needed “for the protection of consumers;” and (3) can be forborne in a way that is otherwise “consistent with the public interest.”<sup>25</sup> Since the incumbents control bottleneck facilities in an industry characterized by network effects by virtue of their relatively recent status as government-sanctioned and protected monopolies,<sup>26</sup> a great deal is needed to protect competitors and consumers and otherwise to show that enforcement of the statute Congress enacted is no longer in the public interest. In addition, section 10(d) specifically provides that “the Commission may not forbear from applying the requirements of section 251(c) and 271 ... until it determines that those requirements have been fully implemented.” Section 10(d) thus imposes a test for those two provisions, above and beyond the three requirements for forbearance that

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<sup>23</sup> 141 Cong. Rec. S8,469 (daily ed. June 15, 1995) (statement of Sen. Pressler).

<sup>24</sup> See Verizon Petition at 3.

<sup>25</sup> 47 U.S.C. § 160(a). In section 10(b), Congress instructed the Commission that the public interest inquiry under section 10(a)(3) should focus on whether forbearance “will enhance competition among providers of telecommunications services.”

<sup>26</sup> *UNE Remand Order*, *supra*, ¶ 86.

apply to every other provision of the Act. That is appropriate, because those are the two key market-opening provisions of the Act.

Even though forbearance from enforcement of a statutory provision enacted by Congress and signed into law by the President is an unusual power for which Congress established appropriately rigorous standards – and then set an even higher standard for forbearance from enforcement of the items at issue – Verizon does not even try to offer a meaningful construction of those standards. It instead simply repeats its argument that section 251(d)(2) needs to be reconciled with section 271 so that BOCs do not need to provide unbundled access to a network element if other ILECs do not have to unbundle the element. “Where an element no longer meets the Section 251(d)(2) standard for unbundling, forbearance with respect to the parallel checklist item is required by Section 10,” Verizon blithely asserts.<sup>27</sup> With respect to the “fully implemented” requirement of section 10(d), Verizon asserts that “the checklist items must be deemed fully implemented even prior to receipt of Section 271 authority, as long as the relevant elements no longer meet the Section 251(d)(2) standard.”<sup>28</sup>

Thus, the entirety of Verizon’s claim for forbearance depends on its statutory argument that section 271 does not impose unbundling obligations on BOCs in addition to those required of all ILECs by section 251. That is obviously faulty: if the section 271 checklist establishes obligations on BOCs beyond those established by section 251(d)(2) – and there is no need for a forbearance inquiry otherwise – then Congress plainly meant for more to be shown to justify forbearance from the requirements of the checklist than satisfaction of the section 251(d)(2) requirements. If not – if satisfaction of the section 251(d)(2) standards justifies forbearance from

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<sup>27</sup> Verizon Petition at 3.

<sup>28</sup> Verizon Petition at 7.

the checklist, as Verizon contends – then the checklist items have no meaning, contrary to a cardinal principle of statutory construction. Verizon’s forbearance argument thus adds nothing to its faulty statutory construction argument. Its petition may – and should – be rejected on that basis alone.<sup>29</sup>

**B. Forbearing From Enforcement Of The Provisions Of Section 271 At Issue In This Case Would Raise Serious Constitutional Issues.**

The forbearance provision is an unprecedented delegation from Congress to the Commission of authority to repeal portions of the Communications Act of 1934, as amended. As the Chairman has stated, there is “something disquieting about Congress delegating broad authority to an independent agency to sweep away a legislative act.”<sup>30</sup> In fact, it is likely that a court reviewing an exercise of the Commission’s forbearance authority in this case would find a constitutional violation. That risk would be increased if the forbearance provision is given the meaningless construction urged by Verizon.

After the Commission forbears from enforcement of a provision under the authority granted by section 10, it is as if the provision has been repealed. Of course, the Commission cannot then enforce the statutory provision, and Congress specified in section 10(e) that “[a] state commission may not continue to apply or enforce any provision of this Act that the Commission has determined to forbear from applying.” Thus, once the Commission decides to forbear from enforcement of a provision of the Communications Act, it has no force or effect.

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<sup>29</sup> Verizon repeats a number of erroneous arguments from its Triennial Review filings in its forbearance petition, such as arguments that new entrants are not impaired without access to unbundled switching and that the availability of unbundled network elements was authorized by Congress merely a transitional mechanism to full facilities-based competition. We responded to those arguments in our Triennial Review Comments, and will not repeat those arguments here.

<sup>30</sup> *In re Petition of Ameritech Corp. for Forbearance*, 15 FCC Rcd 7066, 7075 (Commissioner Powell, dissenting).

The forbearance provision therefore is similar in critical respects to the line-item veto overturned by the Supreme Court.<sup>31</sup> The line-item veto authorized the President to cancel three categories of statutory provisions within five days after signing a bill into law. Thus, the line-item veto authorized the President to sign a bill but then, in effect, to veto a part of it. The Supreme Court struck down the line-item veto authorization because it altered the procedure set forth in the Presentment Clause.<sup>32</sup> That Clause provides that a bill becomes law if it has passed the House of Representatives and the Senate and is then signed by the President. That Clause authorizes the President to veto a bill, but not to veto parts of a bill.

The Court noted that the Presentment Clause “is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes,” but held that “[t]here are powerful reasons for construing constitutional silence on this issue as equivalent to an express prohibition.”<sup>33</sup> Because, as a result of the exercise of line-item veto authority, “[i]n both legal and practical effect the President has amended two Acts of Congress by repealing a portion of each,” and that process is not specifically authorized by the Presentment Clause, the Court struck down the line-item veto.<sup>34</sup>

Of course, the Presentment Clause does not authorize the Commission to amend Acts of Congress either. Yet the result of the exercise of forbearance authority in this case would be a truncated version of section 271 in which the four items on the section 271 checklist would have no force or effect, just as what emerged in the line-item veto case after the President used his

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<sup>31</sup> *Clinton v. City of New York*, 524 U.S. 417 (1998).

<sup>32</sup> Art. I, § 7, cl. 2.

<sup>33</sup> *Clinton*, *supra*, 524 U.S. at 439.

<sup>34</sup> *Id.* at 438.

authority were “truncated versions of two bills that passed both Houses of Congress.”<sup>35</sup> To the extent there are differences, it appears that the forbearance provision is more clearly in violation of the Presentment Clause than was the line-item veto. First, the line-item veto involved a delegation of a form of veto power to the President, who has constitutional authority to exercise another form of veto power. The Commission, of course, has no veto power of any sort. The line-item veto provision also required the President to exercise his authority within five days and established a special procedure for Congress to override a line-item veto. The forbearance provision, in contrast, authorizes the Commission, at any time, to exercise authority to sweep away a portion of an Act passed by both Houses of Congress and signed by the President, and the only way for Congress to overturn an exercise of forbearance authority is to enact another law from scratch.

In the Chairman’s discussion of constitutional problems raised by the forbearance provision – in a case that did not involve a Presentment Clause challenge, but instead a challenge to the forbearance provision as an unconstitutional delegation of congressional authority – his separate statement observed “if section 10 is constitutionally suspect on this basis, many of the other standards presently applied to justify our regulatory actions are as well.”<sup>36</sup> Whatever the merits of that argument in a delegation case, the Court considered and rejected a similar challenge in the line-item veto case. Specifically, the Court noted the Government’s argument “that the President’s authority to cancel new direct spending and tax benefit items is no greater than his traditional authority to decline to spend appropriated funds.”<sup>37</sup> But the line-item veto

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<sup>35</sup> *Id.* at 440.

<sup>36</sup> *Separate Statement of Commissioner Powell, supra*, 15 FCC Rcd at 7076.

<sup>37</sup> *Clinton, supra*, 524 U.S. at 446.

was different, the Court held, because it “gives the President the unilateral power to change the text of duly enacted statutes.”<sup>38</sup>

The forbearance provision gives the Commission the same unilateral power. Thus, even though the standards governing the exercise of forbearance authority may be no broader than the standards governing the exercise of rulemaking authority, the Court has drawn a constitutional line prohibiting the effective repeal of Acts of Congress by any method other than that specified in the Presentment Clause. An exercise of forbearance authority in this case therefore likely would result in the invalidation of the forbearance provision under the Presentment Clause.

Because it held the line-item veto provision unconstitutional under the Presentment Clause, the Supreme Court did not reach the more general separation of powers issue presented in that case. But the lower court had struck down the line-item veto on that ground as well. As that court held, “The lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity.”<sup>39</sup> The Commission is not Congress. Because the power to enact legislation is not delegable, the only permissible method by which a statutory provision may be amended is by another Act of Congress. It may not be amended by agency action. Accordingly, a substantial constitutional challenge to any exercise of forbearance authority also would arise under separation of powers principles.

Presentment Clause and separation of powers challenges are different than delegation challenges. Under the rules governing delegations of rulemaking authority, agency action is permissible as long as Congress has adopted an “intelligible principle” to channel agency

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<sup>38</sup> *Id.* at 447.

<sup>39</sup> *City of New York v. Clinton*, 985 F. Supp. 168, 180 (D.D.C. 1998), quoting *Loving v. United States*, 517 U.S. 748 (1996).

action.<sup>40</sup> While delegation challenges are usually rejected by the courts, “the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.”<sup>41</sup> Therefore, a broad grant of discretion may be permissible to justify routine regulatory actions, but a broad grant will not be acceptable to justify more critical agency action. Because the authority to sweep away a provision enacted by Congress falls into the latter category, the courts are likely to demand more definite standards to justify forbearance than they would in cases involving routine exercises of agency authority. And while an agency cannot cure a defective statute by devising an acceptable intelligible principle on its own,<sup>42</sup> an agency can compound the risk that a provision will be held to be an unconstitutional delegation of congressional authority by exercising its ability to construe ambiguous statutory provisions to grant broad authority rather than narrow authority.

In this case, acceptance of Verizon’s standardless position could render section 10 unconstitutional on delegation grounds. Verizon argues that the forbearance provision ought to be construed to *favor* exercise of the unprecedented power to sweep away statutory provisions on the ground that less regulation is good, even less regulation of a former monopolist that continues to exercise market power. Other than that, Verizon has offered no principle at all to channel the Commission’s discretion under section 10. The “standard” proposed by Verizon – more forbearance is better – does not amount to the sort of intelligible principle needed in a delegation case involving an important exercise of agency authority. Acceptance of Verizon’s position therefore would increase the Commission’s litigation risk considerably.

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<sup>40</sup> *Whitman v. American Trucking Associations*, 531 U.S. 457, 474 (2000).

<sup>41</sup> *Id.* at 475.

<sup>42</sup> *Id.*

In short, it is likely that the courts would invalidate any exercise of forbearance authority in this case under the Presentment Clause. The authority to “sweep away a legislative act” is not merely “disquieting,”<sup>43</sup> but contrary to the exclusive procedure set forth in the Constitution to govern the repeal of Acts of Congress. Of course, no such challenge would arise in this case if the Commission declines to exercise its forbearance authority. Any exercise of forbearance authority also would be subject to serious challenge on separation of powers and delegation grounds. The latter sort of challenge would be more likely to succeed if the Commission adopts the standardless interpretation of section 10 urged by Verizon. In contrast, a delegation challenge would be less likely to succeed if the Commission adopted an interpretation of the standards of section 10 that channeled its authority, such as the interpretation provided below.

**C. Forbearance From Enforcement Of The Checklist Provisions At Issue Is Appropriate Only After A Wholesale Market Has Developed For The Relevant Network Element.**

The Commission has not yet had to grapple with application of the standards of section 10(a) to the requirements set forth in the section 271 checklist or with the precise meaning of “fully implemented” in section 10(d). There is no need to do so at this time, since Verizon’s forbearance request is grossly premature.

Should the Commission desire to begin to consider what is necessary for forbearance from the checklist requirements, the AT&T non-dominance proceeding provides relevant guidance.<sup>44</sup> As Z-Tel explained in our *Triennial Review* Reply Comments, AT&T was declared to be non-dominant only after the Commission found that AT&T’s competitors could absorb almost two-thirds of AT&T’s customers within one year; that almost three-quarters of long-

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<sup>43</sup> *In re Petition of Ameritech Corp. for Forbearance*, 15 FCC Rcd 7066, 7075 (Commissioner Powell, dissenting).

<sup>44</sup> *In re Motion of AT&T to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271 (1995) (“*AT&T Non-Dominance Order*”).

distance resellers used facilities other than AT&T facilities; and that AT&T's share of the relevant market had fallen to below 60%.<sup>45</sup> In contrast, new entrants can absorb nowhere near two-thirds of ILEC residential and small-business customers (particularly if they are forced to rely on manual hot cuts); they have no alternative to using ILEC facilities to provide local service to mass market customers; and ILECs today *still* control about 91% of the local exchange market and an even higher percentage of the residential and small-business market. The Telecommunications Act is only six years old, and the local bottleneck is much more difficult to open to competition than was the long-distance market.

Moreover, the AT&T non-dominance proceeding examined factors that align with a section 10(a) inquiry, focusing on carrier protection, consumer protection, and the general public interest. That is, the Commission made sure, before declaring AT&T non-dominant, that competitors had alternative methods of serving customers other than using AT&T's facilities; that customers had adequate alternatives to service from AT&T; and that those competitive alternatives were firmly established. Significantly, however, Congress – which enacted the 1996 Act shortly after AT&T was declared non-dominant, and thus was likely aware of the Commission's analysis – required more before the Commission could forbear from enforcement of sections 251(c)(3) and 271. With respect to those two provisions, Congress also required a showing that they had been “fully implemented.” Accordingly, the Commission must construe the forbearance provision to require that *more* needs to be shown to forbear from enforcement of sections 251(c)(3) and 271 than must be shown to justify forbearance from other provisions of the Communications Act.<sup>46</sup>

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<sup>45</sup> See Z-Tel *Triennial Review* Reply Comments at 118-21.

<sup>46</sup> See note 8, *supra*.

In our view, sections 251(c) and 271 should not be considered “fully implemented” in a geographic area until there is a mature wholesale market in which competitors may obtain what they need to serve end-users and there is some assurance that the wholesale market will continue to function. A mature wholesale market not only will protect consumers and other competitors, but also will ensure that each mode of entry that Congress authorized in sections 251(c) and 271 – interconnecting facilities, leasing network elements, and reselling retail services – will continue to be viable in the absence of enforcement of that provision.

Requiring a mature wholesale market prior to forbearance from the requirements of sections 251(c) and 271 would call for an inquiry into whether a BOC retains market power in the market for the wholesale provision of the network elements needed to provide competitive local service. If competitors cannot obtain what they need to serve customers from other sources, then the BOCs retain market power. Moreover, new entrants must be able to obtain network elements of comparable quality at prices similar to those the BOCs impute to themselves – that is, cost-based prices – and be able to obtain those elements quickly. Moreover, as we demonstrated in our Triennial Review Comments, new entrants seeking to serve mass market customers need access to the platform of network elements, not just individual elements.

Furthermore, such an inquiry must be conducted on a record that focuses on a specific geographic market. Although it is doubtful that forbearance currently is warranted anywhere, it seems clear that alternative sources of supply of the network elements needed to provide competitive local service will become available in different markets at different times.

Accordingly, determining whether a mature wholesale market exists and whether the BOC retains market power is a highly fact-specific inquiry. Verizon, of course, has completely failed to make the sort of granular inquiry that is necessary in its skeletal forbearance petition.

The conclusion that a mature wholesale market should exist prior to forbearance from the requirements of sections 251(c) and 271 follows from the terms of the provision. The ability of competitors to lease network elements at cost-based rates is set forth – indeed, reiterated – in those two provisions.<sup>47</sup> So are interconnection and resale rights.<sup>48</sup> Thus, the common denominator between the two provisions that Congress singled out for heightened forbearance scrutiny is their repeated emphasis on the availability of each of the three modes of competitive entry. As a matter of textual analysis, it therefore makes sense to conclude that those provisions have not been fully implemented until competition has taken root so that the market will provide for entry by each mode in the absence of regulatory oversight.

As a matter of policy, our construction of section 10(d) also makes sense. The Commission has described the long-term goal of the Telecommunications Act as “creating robust competition in telecommunications,” which it aptly described as “competition among multiple providers of local service that would drive down prices to competitive levels.”<sup>49</sup> It would be contrary to that goal to deregulate carriers that continue to possess market power. Indeed, deregulation of carriers with market power is wholly inconsistent with section 10’s statutory prerequisites. As the Supreme Court recently explained, the Act is deregulatory “in the intended sense of departing from traditional ‘regulatory’ ways that coddled monopolies.”<sup>50</sup> It would go beyond coddling to forbear from the requirements of sections 251(c) and 271 at this time, when

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<sup>47</sup> Section 251(c)(3) requires ILECs to provide unbundled access to network elements on nondiscriminatory terms and in accordance with the requirements of section 252. Section 271(c)(2)(B)(ii), (iv), (v), & (vi) require BOCs to provide unbundled access to loops, transport, and switching at cost-based rates in accordance with the pricing rules in section 252(d)(1).

<sup>48</sup> Interconnection rights are established in section 251(c)(2) and section 271(c)(2)(B)(i). Resale rights are established in section 251(c)(4) and section 271(c)(2)(B)(xiv).

<sup>49</sup> *UNE Remand Order*, *supra*, at ¶ 55.

<sup>50</sup> *Verizon*, 122 S. Ct. at 1668 n.20.

the BOCs continue to possess market power. Congress instead mandated full implementation of sections 251(c)(3) and 271 prior to forbearance from enforcement of those provisions.

The existence of an established wholesale market will ensure that deregulation will not have the effect of reinstating the incumbents' market dominance. It instead will ensure that competition is irreversibly established. It also will create parity with respect to entry into the local and interexchange markets. A mature wholesale market currently exists in the interexchange market, so new entrants to that market such as Z-Tel and Verizon may quickly obtain the capacity they need for the interexchange component of their offerings. The purpose of section 271, of course, was to create parity: "You can get in my business when I can get in your business."<sup>51</sup> At present, new entrants may enter the local market on account of the availability of the platform of network elements. But if the platform were not available, the parity that justifies the grant of a section 271 petition would no longer exist.<sup>52</sup>

Accordingly, the Commission should conclude that the unbundling provisions in sections 251(c)(3) and 271 have been "fully implemented" within the meaning of section 10(d) when new entrants to the local exchange and exchange access markets may rely on wholesale markets to obtain the network elements they need to compete. Although Verizon has cured the procedural defect to its request for forbearance, on the merits its request remains defective by failing even to attempt to grapple with the requirements of section 10.

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<sup>51</sup> 141 Cong. Rec. S8,153 (daily ed. June 12, 1995 (statement of Sen. Breaux)).

<sup>52</sup> The Commission has consistently relied on the existence of competition from companies using the platform of network elements, including Z-Tel, to satisfy the "Track A" requirement that the BOC face competition from a "facilities-based" competitor. *See, e.g., Vermont 271 Decision, supra*, at ¶ 11.

## CONCLUSION

The Petition for Forbearance should be denied.

Respectfully submitted,

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