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October 1, 2003

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Verizon Petition for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, CC Docket No. 96-149 and *Verizon Petition for Forbearance*, CC Docket No. 01-338; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98*; and Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147

Dear Ms. Dortch:

Today, Dee May and Ed Shakin represented Verizon in a meeting with Chris Libertelli of Chairman Powell's office, during which they discussed the continuing need for the relief requested in the above Petitions. The positions presented by Verizon were consistent with those filed in the record, specifically the attached document represents Verizon's positions in the OI&M Petition.

Also discussed was the Joint Petition for Stay Pending Judicial Review filed by BellSouth, Qwest, SBC, USTA and Verizon filed on September 4, 2003 and the need for clarity with respect to the broadband section of the August 21, 2003 Report and Order and Order on Remand and Further Notice of Proposed Rulemaking in the above proceeding as well as the impact of the EELs decision.

Please feel free to call me if you have any questions.

Sincerely,

Attachment

cc: C. Libertelli
B. Tramont
M. Brill
D. Gonzalez
J. Rosenworcel
L. Zaina
J. Rogovin
J. Dygert
J. Stanley
W. Maher
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M. Carey
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Section 10(d) Does Not Limit the Commission's Authority To Forbear From Its OI&M Regulations

For purposes of convenience, this paper briefly summarizes the several reasons that section 10(d) of the 1996 Act does not bar the Commission from granting Verizon's petition to forbear from applying the rule prohibiting the sharing of operating, installation and maintenance services ("OI&M" rule).

1. First and foremost, section 10(d)'s narrow limitation on the Commission's broad forbearance authority does not apply here because the prohibition against sharing of OI&M services is not required by the Act but is instead a creation of the Commission's own rules.

a. By its terms, section 10(d) temporarily limits the Commission's authority to forbear from applying two specific provisions of the Act, sections 251(c) and 271. While some parties have argued that section 10(d) should be read to also incorporate another provision of the Act *sub silencio* – namely, section 272 – the outcome of that debate is immaterial to the issue presented here. This is so for the simple reason that, however it is construed, section 10(d) limits the Commission's authority to forbear only with respect to "requirements" of the Act itself. And, as the Commission itself has held, the prohibition against sharing of OI&M services is *not* required by section 272 of the Act, but was instead adopted by the Commission in a discretionary exercise of its rulemaking authority.

b. Specifically, the OI&M rule was adopted by the Commission as part of its rules implementing section 272(b)(1), which provides only that a Bell company's long distance affiliate should "operate independently." Both at the time the rule was adopted and since, the Commission has expressly recognized that the general language of section 272(b)(1) does not "require" it to adopt any specific restriction and does not "require" it to prohibit the sharing of

OI&M services in particular. Rather, the Commission has concluded that section 272(b)(1) is ambiguous, and has interpreted that provision to provide the Commission with discretion to adopt rules based on a balancing of competing policy objectives. Accordingly, the OI&M rule simply reflects the Commission's assessment of the proper balance of the risks and benefits that it saw at the time the rule was adopted – an assessment that the Commission can and should revisit now.

As an initial matter, the Commission has expressly held that "there is no plain or ordinary meaning" of section 272(b)(1)'s "operate independently" requirement "that compels us to adopt a particular set of restrictions." *Non-Accounting Safeguards Reconsideration Order* ¶ 14.[1/] On the contrary, the Commission held that the phrase "operate independently" is not "self-executing" but rather is an "ambiguous" phrase that the Commission has full "discretion to interpret." *Id.* Indeed, as the Commission has pointed out, even AT&T and its fellow long distance carriers have conceded as much. *Id.*

Because the statute did not "require" any particular restriction, the Commission decided to exercise its discretionary rulemaking authority by "balancing" competing policy interests underlying section 272 in order to adopt implementing rules. Specifically, the Commission sought to fashion rules that "strike an appropriate balance between allowing the BOCs to achieve

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[1/] Third Order on Reconsideration, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 1999 WL 781649, ¶ 14 (1999) ("*Non-Accounting Safeguards Reconsideration Order*"). The Commission likewise found that "there is no 'precedent' in the Commission's rules that defines the term 'operate independently' as used in section 272(b)." *Id.* ¶ 17.

efficiencies within their corporate structures and protecting ratepayers against improper cost allocation and competitors against discrimination."[2/]

Significantly, in balancing these policy interests, the Commission expressly "decline[d] to read the 'operate independently' requirement to impose a prohibition on all shared services," holding that "the economic benefits to consumers from allowing a BOC and its 272 affiliate to derive the economies of scale and scope inherent in the integration of some services outweigh any potential for competitive harm created thereby." *Non-Accounting Safeguards Order* ¶ 168; *see also Non-Accounting Safeguards Reconsideration Order* ¶ 15. The Commission decided that in many respects this balance tipped in favor of permitting sharing. Thus, for example, the Commission permitted BOCs and their section 272 affiliates to share administrative and marketing services and to engage in joint research and development. *Non-Accounting Safeguards Order* ¶¶ 168-69; *see also* 47 C.F.R. § 53.203(a); *Non-Accounting Safeguards Reconsideration Order* ¶¶ 15, 18.

Likewise, just as the Commission recognized that the statute does not prohibit the sharing of services generally, it also recognized that it does not prohibit the sharing of OI&M services in particular. Accordingly, the Commission's rules expressly permitted OI&M services to be shared under various circumstances. For example, the Commission expressly permitted BOCs to contract with affiliates to perform OI&M services in connection with any unbundled network elements purchased by the affiliate; likewise, it expressly allowed the affiliates to perform OI&M

[2/] First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, ¶ 167 (1996) ("*Non-Accounting Safeguards Order*"); *see also Non-Accounting Safeguards Reconsideration Order* ¶¶ 15-18.

services in connection with any sophisticated equipment that the BOC purchases from the affiliate. *Non-Accounting Safeguards Order* ¶ 164; 47 C.F.R. § 53.203(a).

Moreover, even though the Commission decided to restrict the sharing of OI&M services in other circumstances, it again did *not* conclude that such sharing would itself violate section 272(b)(1). Rather, the Commission found that sharing OI&M services in certain circumstances could create "substantial *opportunities* for improper cost allocation," and that "allowing the sharing of such services would require excessive, costly and burdensome regulatory involvement" to protect against that possibility. *Non-Accounting Safeguards Order* ¶ 163 (emphasis added) (quotation marks and citation omitted). Accordingly, the Commission decided to restrict the further sharing of OI&M services as a way to protect against the possibility that it could result in such significant misallocation of costs as to create "the *opportunity* for . . . substantial integration of operating functions [that could] preclude independent operation." *Non-Accounting Safeguards Order* at 21984 ¶ 163 (emphasis added). Significantly, however, the Commission itself recognized that restricting the sharing of OI&M services was not the *only* way to protect against that possibility, and that other regulatory safeguards also could protect against potential cost misallocations. The Commission simply determined, after balancing what it perceived at the time to be the relative benefits and burdens of the different options, that it preferred the OI&M rule to the alternatives.

c. Seven years of experience with the BOCs' sharing a variety of services with their affiliates now have shown that, whatever the merit of the balance originally struck by the Commission, the OI&M rule is not needed today to safeguard against improper cost allocation or integration of operations by the BOCs. As the Commission recognized even in 1996, "nondiscrimination safeguards, the biennial audit requirement, and other public disclosure requirements imposed by section 272" limit the opportunities for integration, and generally make blanket prohibitions on sharing unnecessary.[3/] *Non-Accounting Safeguards Order* at 21986 ¶ 167. These protections have proven sufficient to prevent improper integration and cost allocation with respect to the services that BOCs have been permitted to share with their affiliates, and they would be equally effective with respect to shared OI&M services.

Further, the passage of time has reduced any risk of cost misallocation, and that decisively tips the balance back in favor of permitting sharing: While, as a general matter, there is little incentive to misallocate costs to regulated accounts under price caps, the Commission severed any remaining links between prices and costs when it eliminated sharing from price caps and when it adopted the CALLS structure. At the same time, the development of competition in all segments of the market limits the BOCs' incentive to raise prices for one service in order to recover the costs of another.

The Commission has recently recognized in a similar context that the passage of time may prove that a protection put in place in anticipation of competitive risks has been rendered unnecessary. As the Commission concluded in its recent order terminating the rulemaking on the implementation of the separate affiliate requirements for BOCs' manufacturing of telephone equipment, "the benefit of hindsight" may prove the Commission's previously articulated concerns "unwarranted because the competitive harms the Commission envisioned simply have

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3/ For example, sections 272(b)(2)-(5) impose structural and transactional restrictions on Verizon's 272 separate affiliate; section 272(c) requires Verizon to comply with specified nondiscrimination safeguards.

not materialized."[4/] Likewise, here, there is no risk that allowing BOCs and their affiliates to share OI&M services would lead to a violation of section 272(b)(1): experience has shown that other regulatory protections eliminate both the incentives and the opportunities to engage in improper cost allocation and integration. The OI&M rule thus not only is not *required* under section 272(b)(1); it also is entirely unnecessary to serve the public interest.

d. AT&T's sole response to this point is to insist that *all* regulations are necessarily "requirements" of the Act. *See* Letter from David Lawson, Sidley Austin Brown & Wood, to Marlene Dortch, Secretary, FCC, at 8 (filed July 9, 2003) ("*AT&T ex parte*"). But the handful of quotes that AT&T cites in support of that assertion fall woefully short. AT&T's citation to section 252(e)(2)(B) shows only that where Congress intended for regulations to be included within a reference to statutory "requirements," it specifically so provided. The provision requires compliance with "the requirements of section 251," and expressly specifies that for that purpose, requirements "includ[e] the regulations prescribed by the Commission pursuant to section 251." 47 U.S.C. § 252(e)(2)(B).[5/] Nor is there any basis for AT&T's suggestion that the Commission "recognized," in the *1998 Biennial Review*,[6/] "that the term 'requirement' in section 10(d) applies to . . . 'implementing regulations.'" *AT&T ex parte* at 8 (citation omitted). To the

4/ Memorandum Opinion and Order, *Implementation of Section 273 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996*, CC Docket No. 96-254, FCC 03-220 ¶ 6 (rel. Sept. 16, 2003).

5/ AT&T's citation to section 251(b)(2) is similarly unavailing. *See AT&T ex parte* at 8. There, Congress referred to "requirements prescribed by the Commission." 47 U.S.C. § 251(b)(2). But this reference to regulatory requirements provides no insight to section 10(d)'s reference to requirements of specific statutes.

6/ Notice of Inquiry, *1998 Biennial Review - Testing New Technology*, 13 FCC Rcd 21879, (1998).

contrary, the Commission simply noted there that it was not proposing to forbear either from the provisions of sections 251 or 271, "or from the regulations implementing" them.[7/] It never suggested that these were the same thing.

2. Second, in addition to the fact that the OI&M rule is not required by section 272 to begin with, the narrow limitation on the Commission's forbearance authority set out in section 10(d) cannot reasonably be read to incorporate *sub silencio* the requirements of section 272.

a. As an initial matter, section 10 was a broad grant of new authority to the Commission that was designed to further the Act's deregulatory purposes.[8/] Congress's adoption of section 10 was in part a response to court decisions limiting the Commission's implicit forbearance authority. *See, e.g., MCI Telecomms. Corp. v. FCC,* 765 F.2d 1186, 1191-96 (D.C. Cir. 1985) (finding that Commission lacked authority to order mandatory detariffing and that authority to depart from the Act in that manner required congressional authorization). Section 10 accordingly gave the Commission explicit and sweeping authority to forbear from most requirements of the Act. In fact, section 10 provides that as a general matter, the Commission *must* forbear, both from its own rules and from requirements of the Act. 47 U.S.C. § 160(a) (providing that the Commission "*shall* forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service" if the conditions for forbearance are satisfied) (emphasis added).

7/ *Id.* ¶ 32.

8/ *See* 141 Cong. Rec. S7787 (1995) (Sen. Pressler's statement that "the 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.").

There is one narrowly defined limitation to the Commission's broad forbearance authority, and even that exception applies only for a limited period of time. Section 10(d) precludes the Commission from forbearing only "from applying the requirements of section 251(c) or 271" -- two provisions of the 1996 Act that are specifically designed to open the previously closed local markets to competition. 47 U.S.C. § 160(d). And even as to these provisions, the limitation on the Commission's forbearance authority applies only for a limited period of time -- namely, "until [the Commission] determines that those requirements have been fully implemented." *Id.*

b. Section 10(d) should be afforded the most natural reading of its plain terms: that the Commission's forbearance authority is limited only with respect to the two provisions expressly identified in that section. The Commission should reject the CLECs' argument that section 10(d) reaches section 272 as well through the reference to section 272 in section 271(d)(3). Such a daisy chain interpretation of section 10(d)'s scope would require reaching out to expand an exception that Congress deliberately drafted narrowly.

Basic principles of statutory construction compel the plain reading of the statute over a contorted one: As the courts have explained, "Rather than adopt a contorted interpretation of crystal clear statutory language," proper statutory interpretation requires "accepting that the legislature means what it says. . . ." *Scott v. Snelling and Snelling, Inc.*, 732 F. Supp. 1034, 1040-41 (N.D. Cal. 1990). Because Congress here specified only two exceptions to the Commission's section 10(a) forbearance authority, the statute on its face precludes the addition of other exceptions. *See United States v. Johnson,* 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, . . . [t]he proper inference, . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth."); *see also Tang v. Reno,* 77

F.3d 1194, 1197 (9th Cir. 1996) (item "omitted from a list of exclusions is presumed not to be excluded") (quotation omitted); *Herzberg v. Finch*, 321 F. Supp. 1367, 1369 (S.D.N.Y. 1971) ("As a general rule, where a statute makes certain specific exceptions to its general provisions, it is generally safe to assume that all other exceptions were intended to be excluded.") (quotation omitted).

Finally, there is no merit to AT&T's argument that the specific sunset instructions for section 272 compel a different reading of section 10(d). AT&T suggests that the sunset provision in section 272(f) illustrates that sunset is the *only* means that Congress provided for eliminating section 272, and thus supports a reading of section 10(d) that would reach section 272 through section 271. *See AT&T ex parte* at 3. But several other provisions of the Act contain sunset provisions, and these clearly are not covered by the section 10(d) limitation. *See, e.g.*, 47 U.S.C. § 274(g)(2) (electronic publishing); 47 U.S.C. § 273(d)(6) (manufacturing safeguards). The sunset provisions in section 272 impose no more of a constraint on the Commission's forbearance authority.

c. Even if there were any ambiguity about the meaning and reach of section 10(d), there are good reasons to interpret it as being limited to sections 251(c) and 271 rather than as sweeping in section 272 or any other provision of the Act. Sections 251 and 271 are designed to open local markets to competition. Section 272, in contrast, comes into play only if and when the markets have been opened. The Commission has always recognized that regulatory safeguards of this type should be pursued through tools that may be adjusted as the market changes, as markets constantly do.[9/] And, as Congress recognized, where there is evidence that

[9/] *See e.g.*, Further Notice of Proposed Rulemaking, *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, 18 FCC Rcd 10914, ¶ 8 (2003) (noting that the

the market can operate and police itself without the blunt instrument of regulation, regulation should be reduced and eliminated. *See, e.g.*, 141 Cong. Rec. H8275 (daily ed. Aug. 2, 1995) (Rep. Paxon) (preferring competition to regulation).

Thus, it makes perfect sense for Congress to provide that, once enforcement of sections 251(c) and 271 has opened local markets to competition, the Commission should forbear from applying any requirements (including section 272) if a forbearance petition meets the multi-part forbearance test under section 10. Of course, the fact that the Commission *may* forbear from section 272 does not mean it *must:* forbearance will turn on whether, under current market conditions, individual section 272 regulations have become unnecessary.

d. Finally, even if it were possible to read section 10(d) to sweep in some type of requirement that is related to section 272, and for the reasons we explain above -- even separate and apart from the fact that the OI&M rule is not required by section 272 to begin with -- it is not, such an incorporation by reference would not preclude the relief requested here. Section 271 requires a BOC to show it will comply with section 272 in its provision of the authorized services, *see* 47 U.S.C. § 271(d)(3)(B), and that showing can only be of section 272 obligations as the Commission has interpreted that provision *at the time of the BOC's application*. Thus, if the Commission amends or forbears from its regulations or any requirements of section 272, a BOC's obligations -- and the necessary showing it would have to make with respect to section 272 -- would be amended accordingly.

Commission's "regulatory response must be guided by a full understanding of the existing market dynamics" and acknowledging significance of "changes in the competitive landscape.").

In each of its states, Verizon made the necessary showing that it did and would comply with section 272 as interpreted by the Commission at the relevant time. That showing included compliance with OI&M rule. If the Commission had amended its section 272 rules *prior* to Verizon's 271 applications so as to eliminate the OI&M rule, Verizon would not have had to make that showing to demonstrate its compliance with the requirements of section 271. Likewise, the Commission can now forbear from the OI&M rules, without affecting the general 271 requirement that BOCs comply with section 272. As the Commission has recognized, compliance with the requirements of section 271 is determined consistent with changes in the law.[10]

3. Third, as noted above, the narrow exception to the Commission's forbearance authority with respect to the requirements of section 271 (however construed) applies only for a limited period. That limitation expires as soon as the Commission "determines that those requirements have been fully implemented." 47 U.S.C. § 160(d).

While the Commission need not reach this issue to resolve the questions presented here, Verizon necessarily has fully implemented the requirements of section 271 given the grant of each of Verizon's section 271 applications for long distance authority. Section 271 allows the grant of an interLATA authorization only if the Commission finds that a BOC has "fully implemented" the section 271 checklist. 47 U.S.C. § 271(d)(3)(A)(i). Thus, while the provisions

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[10] *See, e.g.*, Memorandum Opinion and Order, *Application of SBC Communications Inc. for Authorization to Provide In-Region InterLATA Services in Texas*, 15 FCC Rcd 18354 ¶ 29 (2000) ("*Texas 271 Order*") (for purposes of obtaining section 271 authorization, a BOC must "demonstrate that it is [at the time it files its 271 application,]currently in compliance with the rules in effect on the date of filing."); *id.* ¶ 32; Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act to Provide In-Region, Interlata Service in the State of New York,* 15 FCC Rcd. 3953, ¶ 31 (1999) ("*New York 271 Order*").

of section 271 may be "fully implemented" earlier, a grant of section 271 relief clearly comprises a finding of "full implementation" for purposes of section 10(d). Reading the "fully implemented" language of section 10(d) in conjunction with identical language in section 271 comports with the Supreme Court's "adopt[ion] [of] the premise that [a] term should be construed, if possible, to give it a consistent meaning throughout the Act." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995) (interpreting the term "prospectus" as used in multiple provisions of the Securities Act of 1933). Indeed, if a finding that a BOC has satisfied section 271 does *not* amount to full implementation, it is unclear what *could* qualify, and what rational, achievable meaning section 10(d)'s reference to full implementation possibly could have.[11]

Nor is forbearance from applying the OI&M rule in any way inconsistent with the Commission's authority to continue to enforce the "conditions required for [271] approval" under section 271(d)(6) of the Act. The Commission consistently has recognized that for purposes of obtaining section 271 authorization, a BOC must be in compliance with the law in effect at the time of its application but, once the BOC obtains section 271 authorization, its continued compliance is measured by current statutory and regulatory requirements. *See, e.g., Texas 271 Order* ¶¶ 29, 32; *New York 271 Order* ¶ 31.

Of course, this does not mean that the Commission must forbear from applying section 271 (or section 272) to a BOC at the moment the BOC obtains relief under section 271. Whether forbearance is proper is a distinct question from whether it is permissible. A petitioner must

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[11] *See Rosado v. Wyman*, 397 U.S. 397, 415 (1970) (noting the "basic axiom [ ] that courts should construe all legislative enactments to give them some meaning"); *Qi-Zhuo v. Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995) ("An endlessly reiterated principle of statutory construction is that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage.").

show that its request for forbearance meets the three-pronged test set forth under section 10(a). Implementation of section 271 does not necessarily mean that test is satisfied. But here, Verizon has made a clear showing that the section 10(a) test is fully satisfied.

Conclusion

In sum, the Commission has authority to forbear from applying the OI&M rule to Verizon.