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1501 K STREET, N.W.
WASHINGTON, D.C. 20005
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711
www.sidley.com
FOUNDED 1866

LOS ANGELES
NEW YORK
SAN FRANCISCO
SHANGHAI
SINGAPORE
TOKYO
WASHINGTON, D.C.

WRITER'S DIRECT NUMBER
(202) 736-8224

WRITER'S E-MAIL ADDRESS
cbeckner@sidley.com

October 21, 2003

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

Re: *CC Docket No. 96-149, WC Docket Nos. 02-200, 03-157, 03-187*

Dear Ms. Dortch:

In am filing this letter on behalf of AT&T Corp. in response to the petitions filed by the Bell operating companies in the above-referenced proceedings seeking “forbearance” from Commission rules that implement “requirements” of section 251(c) and section 271. Section 10(d) of the Communications Act categorically forbids the Commission from forbearing from the requirements of those statutes until the Commission “determines that those requirements have been fully implemented.” Specifically, the general forbearance provision and procedure set forth in section 10(a) – (c) have been expressly qualified by section 10(d) when a carrier seeks forbearance from the application of the requirements of section 251(c) or 271. Thus, although a petition for forbearance under section 10(c) is “deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it,” no such default “deeming” takes place under section 10(d). To the contrary, the plain language of section 10(d) makes clear that the Commission cannot simply permit the Bells’ petitions to be “deemed” granted by expressly *forbidding* the Commission to forbear unless and until “it determines that th[e] requirements [of sections 251(c) and 271] have been fully implemented.” The plain meaning of section 10(d) is reinforced by the statutory structure: All parts of section 10 were enacted in the Telecommunications Act of 1996, and the distinct treatment of petitions for forbearance from sections 251(c) and 271 – *viz.*, the heightened substantive and procedural standards – was clearly deliberate.¹

¹ Indeed, even under section 10(c) – when the petition is deemed granted by the Commission’s failure to act within a year – the Commission must eventually issue a written decision explaining
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It is also clear that the Commission must make an express finding of “full implementation” before there can be forbearance from a requirement of sections 251(c) or 271. Congress in section 10(d) unambiguously requires that the Commission “*determine*” that the “requirements” of section 251(c) and section 271 have *in fact* “been fully implemented” before forbearance from a requirement of those provisions be granted, whether expressly granted by Commission action under section 10(a) or “deemed” granted by Commission’s inaction under section 10(c).

This conclusion is reinforced by the requirements of the Administrative Procedure Act (“APA”) designed to ensure meaningful judicial review of agency action. Under section 706(2)(A) of the APA, a court must “hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” It is well established that a court cannot apply section 706(2)(A) on review of agency action, such as the Commission’s action on a forbearance petition, without knowing why the agency acted as it did. *See, e.g., SEC v. Chenery*, 318 U.S. 80, 94 (1947) (“[t]he grounds upon which an administrative action must be judged are those upon which the record discloses that its action was based”); *SEC v. Chenery*, 332 U.S. 194, 196-97 (“a reviewing court must judge the propriety of such action solely by the grounds invoked by the agency” and “that basis must be set forth with such clarity as to be understandable”). The Supreme Court has made clear, accordingly, section 706(2)(A) of that APA imposes a general procedural requirement by mandating that an agency take whatever steps are necessary to provide an explanation that will enable the court to evaluate the agency’s rationale at the time of the decision. *See Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402-420-421 (1971); *PBGC v. LTV Corp.*, 496 U.S. 633, 640 (1990). Obviously, there can be no meaningful judicial review of the granting of a petition seeking forbearance from the requirements of section 251(c) or section 271 without a written Commission finding explaining the basis for its “determination” that these provisions have been “fully implemented.”

Finally, as AT&T explained in greater detail in WC Docket No. 03-157, there can be no finding here that sections 251(c) and section 271 have been “fully implemented.” (Copies of the Comments and Reply Comments of AT&T Corp. filed in WC Docket No. 03-157 are attached hereto). The “fully implemented” standard requires the incumbent carrier to show that it is no longer dominant in the provision of the network elements and telecommunications services that entrants require to enter and compete effectively with the incumbent – a standard that the Bells do not even attempt to meet. “Full implementation” likewise cannot be found because significant additional work by the states, the carriers, the Commission and by reviewing courts must occur to “implement” section 251(c) and other UNE-related provisions. State commissions have not even had the opportunity to ensure that the Commission’s new unbundling

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its forbearance determination. This is made clear by section 10(c)’s requirement that “[t]he Commission *shall* explain its decision in writing.” (Emphasis supplied.)

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rules are fully reflected in the relevant interconnection agreements that govern incumbent-competitive carrier relationships or to ascertain whether the Bells have complied with those rules.

Please contact me if you have any questions regarding this matter.

Sincerely,

/s/ C. Frederick Beckner III

C. Frederick Beckner III

Counsel for AT&T Corp.

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