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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

(continued . . . .)

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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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(. . . continued)
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.)

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.

CFB:amm

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

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

OPPOSITION OF AT&T CORP.

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August 18, 2003

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

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

OPPOSITION OF AT&T CORP.

Pursuant to the Commission's Notice,[1] AT&T Corp. ("AT&T") hereby respectfully submits this Opposition to the July 1, 2003 Petition for Expedited Forbearance of the Verizon Telephone Companies.

INTRODUCTION AND SUMMARY

Rarely has a request for Commission action come bearing so *many* obvious and fatal defects. Verizon's "forbearance petition" does not seek forbearance, instead it seeks affirmative rulemaking relief that is foreclosed by statutory provisions and Commission and court decisions almost too numerous to list. It is, in truth, more a policy piece than a serious legal petition. Verizon is perfectly aware that the Petition must be denied, but apparently hopes to gain advantages in other proceedings by reminding us that it really, *really* does not like cost-based UNE-P: cost-based UNE-P, after all, forces Verizon to compete for millions of local telephone customers over whom it would otherwise enjoy monopolies, and monopolies are terrible things to lose.

[1] *See* Public Notice, DA 03-2189 (July 3, 2003); Order, WC Docket No. 03-157 (July 15, 2003).

the Commission permitted collection of access charges from UNE purchasers, but only as "a limited, transitional plan to address public policy concerns raised by bypass of access charges." *Local Competition Order* ¶¶ 356, 726.[22]

The Commission's limited authority to act in the face of conflicting – and since-expired – statutory deadlines plainly has no possible application here. On this record, there is no "dilemma" that could permit the Commission to adopt a rule, interim or otherwise, that so squarely violates the Act. Further, unlike the Commission's 1996 rule, which had a fixed and unalterable expiration date in order to "minimize the burden on competitive local service providers seeking to use unbundled network elements" (*Access Charge Reform* ¶ 339), Verizon's request for relief is unbounded. The rulemaking to address TELRIC has not even been initiated, and there is no timetable whatsoever for its completion.

In sum, the Petition must be dismissed as a procedurally and substantively improper attempt to obtain rule changes that are foreclosed by both the APA and the Act itself.

II. VERIZON'S PETITION IS PREMATURE AND CANNOT BE GRANTED, BECAUSE SECTIONS 251 AND 271 ARE NOT "FULLY IMPLEMENTED."

Verizon's petition must also be dismissed as premature. Section 10(d) places an explicit "[l]imitation" on the remainder of section 10, providing that the "Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those requirements have been fully implemented." 47 U.S.C. § 160(d). Because the Commission has never determined that sections 251(c) and 271 have been fully implemented – and plainly could not do so on the record provided here – it has no authority to grant a request that it forbear from

[22] The Commission found that " it is imperative" that this arrangement exist "only for a very limited period" and thus explicitly provided that these charges would end no later than July 30, 1997 and under "no circumstances . . . would be extended further." *Local Competition Order* ¶¶ 724-25.

applying any UNE-related requirements of section 251(c).

Verizon acknowledges this problem only in a footnote, arguing principally that the Petition does not trigger section 10(d). "[N]either TELRIC [n]or UNE-P" is a "requirement" of section 251(c) or 271, Verizon contends, because both are creatures of the Commission's *regulations* implementing those sections of the Act. *See* Pet. at 19 n.38. But the plain text of the Act makes clear that Congress used the term "requirement" broadly to include both the "provisions" of the Act *and* the Commission's implementing "regulations." For example, section 252(e)(2)(B) forbids a state commission from approving an interconnection agreement "if it finds that the agreement does not meet the requirements of section 251 of this title, *including the regulations prescribed by the Commission pursuant to section 251 of this title*." 47 U.S.C. § 252(e)(2)(B) (emphasis added).[23] That result would necessarily follow even in the absence of such a clear statement, however, because the Commission's rules are authoritative interpretations of the *Act*'s requirements. *See, e.g., Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 296-96 (1979) (properly promulgated agency regulations "have the force and effect of law").

Indeed, the Commission has already recognized that the term "requirement" in section 10(d) applies both to "statutory provisions" and to "implementing regulations." Notice of Inquiry, *1998 Biennial Review*, 13 FCC Rcd. 21879, ¶ 32 (1998). In its *1998 Biennial Review*, the Commission stated that its regulations implementing section 251 – including its TELRIC rules, its rules on UNE combinations and UNE-P, and its prohibition against limiting competitive carriers from providing exchange access and other telecommunications services with network

[23] Likewise in section 251(b)(2), local exchange carriers are obligated to provide "number portability in accordance with the requirements prescribed by the Commission." 47 U.S.C. § 251(b)(2).

elements – constitute "requirements" of section 251(c).[24] Thus, any petition seeking forbearance from any of those requirements plainly must first establish the section 10(d) pre-condition that sections 251(c) and 271 have themselves been "fully implemented."[25]

Verizon claims in the alternative that "once a carrier receives long distance authority in a given state, the Commission itself has concluded that th[e] requirements [of section 251(c) and 271] have been fully implemented." Petition at 19 n.38. According to Verizon, the provision of section 271(d)(3)(A)(i) that precludes the Commission from approving a section 271 application until the BOC provides an interconnection agreement that "fully implements" the competitive checklist must also be interpreted as a finding that the BOC has "fully implemented" *all* of sections 251(c) and 271 immediately upon approval of a section 271 application. This is the quintessentially "absurd result" that must be avoided in interpreting every statute. Under Verizon's construction of section 10(d), the Commission could, the very *moment* after granting Verizon long distance authority premised on findings that Verizon's continuing compliance with sections 251(c) and 271 would open local markets up to the possibility of competition, end that

[24] Section 251(c)(3) states that incumbent carriers must provide UNEs at "rates" that are "just, reasonable, and nondiscriminatory" and that are "in accordance with . . . the requirements of this section and section 252." Thus, section 251(c)(3) both expressly provides that "just, reasonable, and nondiscriminatory" network element rates are a requirement of that provision and, by incorporation, that the "cost-based" pricing requirements of section 252 are a requirement of that provision. This express incorporation is likewise reflected in section 252(d)(1). That provision states that it governs "the just and reasonable rate for network elements for *purposes of subsection (c)(3)*." (Emphasis added).

[25] *See also Number Portability Order*, 17 FCC Rcd. 2578, ¶ 61 (2002) ("[T]he Commission has found that section 251(c)(3) requires incumbent LECs to price unbundled network elements under the TELRIC pricing methodology"); *Local Competition Reconsideration Order*, 12 FCC Rcd. 12460, ¶ 47 (1997) ("Section 251(c)(3) requires incumbent LECs to make available unbundled network elements at cost-based rates"); *Local Competition Order* ¶ 15 ("The statute addresses this problem [of incumbent control of bottleneck facilities] by creating an arbitration proceeding in which the new entrant may assert certain rights, including that the incumbent's prices for unbundled network elements must be 'just, reasonable and nondiscriminatory.' We adopt rules herein to implement these requirements of section 251(c)(3)").

possibility and return to the pre-Act "unregulated world" in which Verizon enjoyed an "almost insurmountable competitive advantage." *Verizon*, 535 U.S. at 490-91.

Not surprisingly, Verizon's position cannot be reconciled with section 10(d)'s terms, which require, at a minimum, the ubiquitous availability of cost-based wholesale alternatives to incumbent carriers' bottleneck facilities, such that the incumbent carriers would no longer be deemed dominant in local services markets. The word "implement" means "to carry into effect, fulfill, accomplish" and to "give practical effect to." And the word "fully" means "totally or completely." Webster's New World Dictionary. Sections 251(c) and 271 will be "fully implemented," therefore, when a practical effect results: namely, when ubiquitous and durable local competition *actually exists* and the incumbents no longer control bottleneck facilities. *Cf. Verizon,* 535 U.S. at 532, 538 (upholding Commission rules that interpret the "statutory dut[ies]" of section 251(c) to "reach the result the statute requires" and thereby "get[] a practical result").

The requirements of 251(c) and 271 are not fully implemented, according to the plain meaning of those terms, where, as is the case today, (i) final, unchallenged rules that implement the duties and obligations of section 251(c) are not currently in effect; (ii) the key cost principles that are used to determine prices for network elements and interconnection required to be provided under those sections are to be the subject of an upcoming Commission rulemaking; (iii) state commissions have yet to apply and "implement" any new rules (and, indeed, have not even finished implementing the prior rules); (iv) none of these new rules or pricing principles have been implemented in the interconnection agreements; and (v) local competition remains nascent, with no reason to believe that it could ever become robust if the Commission were now, as Verizon urges, to pull the rug out from under cost-based UNE-P. State commissions' varied regulatory activity confirms that section 10(d) is not satisfied: what are the commissions and

parties before them doing, if not "implementing" section 251(c)'s requirements?[26]

Further, in the same section 271 decisions that Verizon claims the Commission has found the BOCs to have "fully implemented" sections 251(c) and 271 for purposes of section 10(d), the Commission has expressly stated that "obtaining section 271 authorization is *not* the end of the road" and that the "critically important power" in section 271(d)(6) "underscores Congress's concern that BOCs *continue to comply* with the statute."[27] The Commission could not have made these pledges in each of its section 271 orders if it were simultaneously finding that sections 251(c) and 271 have themselves been fully implemented.[28]

Verizon bases its interpretation of section 10(d) entirely on a "canon" of statutory construction that the courts have stressed in this context (and many others) cannot bear the weight that Verizon assigns it – namely, that identical words used in different parts of the same act generally are assumed to have the same meaning.[29] However, in interpreting the Communications Act, the courts and the Commission have on numerous occasions decided that

[26] The Act also manifestly contemplates that the requirements of sections 251(c)(3) and 271 will endure long after a BOC receives section 271 authorization: section 271(d)(6) provides the Commission with a special grant of permanent enforcement authority if the BOC ceases to meet any of the section 271 requirements. That section empowers the Commission to act *sua sponte*, requires the Commission to act within 90 days on any complaint alleging a violation of section 271, and authorizes the Commission to suspend or revoke a BOC's section 271 authority. All of these post-authorization administrative remedies and enforcement powers could be rendered impotent if, as Verizon contends, the Commission's section 271 decisions necessarily must also be deemed to have determined that a BOC has "fully implemented" sections 271 and 251(c)(3) within the meaning of section 10(d).

[27] *New York 271 Order* ¶¶ 448, 453 (emphases added).

[28] Further, Congress provided that section 272, which is designed to protect against the BOCs' use of enduring market power to harm the interLATA market after receipt of section 271 authorization, would endure for a *minimum* of three years after authorization. It is ludicrous to suggest that Congress intended that sections 251(c) and 271, the cornerstones of the Act's provisions to open markets to competition, could be eliminated far earlier.

[29] *See Ex Parte* Letter from Ann Berkowitz, Verizon, to Marlene Dortch, FCC (CC Docket 01-338, July 24, 2003).

the same term used in multiple sections of the Act should be interpreted differently when, as here, there are different purposes underlying the sections in which the term are used. Thus, for example, the Commission refused to interpret the term "provide" in section 271(a) to reflect the construction it had given the same term in section 260(a). *AT&T Corp.* v. *Ameritech Corp.*, 13 FCC Rcd. 21438 (1998), *aff'd*, *U S West Comm. Inc.* v. *FCC*, 177 F.3d 1057 (D.C. Cir. 1999). Finding that the term was ambiguous and that the legislative history was unhelpful, the Commission interpreted "provide" based on the specific policies underlying section 271. The D.C. Circuit affirmed, reasoning that it was entirely appropriate for "identical words" to have "different meanings where the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different." *U S West*, 177 F.3d at 1060.

Likewise, the D.C. Circuit, in recently upholding the Commission's interpretation of the term "necessary" in section 10(a), rejected the argument that the term "has precisely the *same* meaning in every statutory context." *CTIA*, 330 F.3d at 510-11. Previous constructions of the term "necessary" in sections 251(c)(6) and 251(d)(2) adopted by the Supreme Court and by another panel of the D.C. Circuit reflected the particular purposes of those sections, and thus the interpretation of "necessary" in those sections did not need to be imported into a controversy "involv[ing] the application of the forbearance provision of the 1996 Act," particularly where it would lead to "an absurd result."[30] *Id.* at 511.

These same principles apply to the construction of "fully implemented" in section 10(d), because, as described above, construing that term as the Commission construed the same term in section 271(d)(3)(A)(i) would lead to an absurd result and ignore the differing purposes of the

[30] *See also The 2002 Biennial Regulatory Review*, 18 FCC Rcd. 4726, ¶¶ 18-21 (2003) (refusing to construe the term "necessary" in section 11 to mean the same as that term had been interpreted in other sections of the Act).

sections. Section 271(d)(3)(A)(i) requires only that the Commission find that a *BOC* has "fully implemented" the *competitive checklist* with regard to a single facilities-based interconnection agreement. It does *not* require a universal finding that sections 251(c) and 271 have themselves been fully implemented by all relevant parties – the state commissions, the BOCs, competing carriers, the Commission itself and federal courts – as section 10(d) requires. For example, a finding that a BOC has "fully implemented" the checklist for a particular interconnection agreement does not constitute a finding that the BOC will, as required by section 271(d)(3)(B), operate in accordance with the requirements of section 272.[31] Nor does it require a finding, consistent with section 251(c)'s objectives, that enduring local competition has *in fact* developed. Rather, it is a prognosis that the market is sufficiently open to make a predictive judgment that competition *could* take root, not a determination that competition will in fact occur and thrive.

In contrast to section 271(d)(3)(A)(i), section 10(d) is intended to ensure that the very structure of local markets has changed and that they remain open *permanently* by limiting the Commission's ability even to *consider* requests for forbearance from any of the requirements of sections 251(c) and 271, which the Commission has properly found to be the very "cornerstones of the framework Congress established in the 1996 Act to open local markets to competition."[32]

[31] And this is not an academic point: as AT&T and other commenters have explained and as even the inadequate audits of Verizon and other BOCs have demonstrated, the BOCs are flagrantly violating their section 272 obligations.

[32] In this regard, the full implementation language of section 10(d) can be viewed as analogous to the standard for vacatur of an injunction that is intended to serve a particular purpose. In that context, the courts look to see if the purpose of the injunction has been achieved, and will only vacate the injunction if it has in fact been achieved and there is little danger of relapse. For example, in cases involving unlawful restraints on trade, the Supreme Court said that a decree "may not be changed . . . if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved." *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 248 (1968). Likewise, courts have refused to permit an injunction to be vacated if the party subject to the injunction was likely to "return to its former ways" should the injunctive decree be lifted. *Board of Ed. of Okla. City v. Dowell*, 498 U.S. 237 (1991).

Advanced Services Order, 13 FCC Rcd. 24012, ¶ 73 (1998). There has not been, and could not be, any finding that the requirements of sections 251(c) and 271 have been fully implemented in even a single state, and the Petition must, accordingly, be dismissed as premature.

III. THE PETITION DOES NOT EVEN SERIOUSLY TRY TO COMPLY WITH THE SECTION 10(a) FORBEARANCE CRITERIA.

Even if the Commission could entertain Verizon's Petition as a valid invocation of the Commission's section 10(a) forbearance authority, Verizon has not remotely met its burden to prove that its request satisfies the section 10(a) criteria. Because Verizon wants *new* rules and does not identify any specific existing rules from which it seeks forbearance, it obviously does not attempt what is required: to show why non-enforcement of *specific* regulations would satisfy the statutory criteria.

Instead, the Petition speaks abstractly of forbearance from the "current pricing rules for UNE-P." But there are no such rules. Rather, there are Commission rules that the States apply to determine the prices for *individual* UNEs, *see* 47 C.F.R. § 51.501 *et seq.*, and there are entirely separate Commission rules that prohibit Verizon from separating requested UNEs that it currently combines, *see id.* § 51.315. To the extent that Verizon seeks "forbearance" at all, it targets the latter "combinations" rules – which the Petition does not even mention, much less address under the Section 10(a) framework. Verizon must likewise be considered to have defaulted on its "alternative" request for "access charge forbearance" for the use restriction rule that Verizon seeks – *i.e.*, a new rule that would prohibit UNE-P-based entrants from *providing* exchange access services – is in no sense a UNE *pricing* rule.

But Verizon falls far short of its Section 10 burden on many other levels as well. Section 10(a) requires the party seeking forbearance from enforcement of a ratemaking standard to satisfy three demanding criteria. First, the proponent of forbearance must show that enforcement

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

REPLY COMMENTS OF AT&T CORP.

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September 2, 2003

continues to grow and is at an all time high. Indeed, one incumbent, ACS of Anchorage ("ACS"), acknowledges that, despite the presence of cost-based UNE-P, it is facing vigorous competition – which, as Congress intended, has caused it to "cut the fat" from its operations – from facilities-based competitors who continue to invest in bypass facilities.

On this record, there is no possible ground for granting Verizon's Petition. Verizon seeks to alter the "competitive balance originally envisioned by the Congress, the FCC, and the individual states [in implementing the 1996 Act]."[6] Congress authorized the Bells to enter the long distance markets, but only after first opening their local markets to competition. Now that Verizon has eaten the carrot, it asks the Commission to turn the stick on its competitors. The Petition must be denied.[7]

ARGUMENT

I. THE COMMENTS OVERWHELMINGLY CONFIRM THAT VERIZON'S PETITION FAILS TO MAKE THE SHOWINGS REQUIRED BY SECTION 10.

Verizon's Petition should be summarily rejected because it suffers from three independent legal deficiencies. Indeed, the legal problems with Verizon's Petition are so grave

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[6] Comments of New Jersey Board of Public Utilities at 2, WC Docket No. 03-157 (filed August 18, 2003) ("New Jersey BPU").

[7] Verizon will undoubtedly attempt to "reposition" its case on reply. It is inconceivable that any such filing could begin to remedy the numerous and patent deficiencies in its Petition. In any event, the Commission should take this opportunity to make clear that it is too late for Verizon to file another "case in chief." Given the time limits imposed by section 10 when petitioners (unlike Verizon here) properly caption their pleadings – and the spate of forbearance petitions filed by the BOCs – the Commission should clarify that entities seeking forbearance should be required to attach with their petition all the factual information upon which they are relying to demonstrate that the section 10(a) criteria have been met. Forbearance petitioners should not be allowed to move the target by filing one case and, when that is rebutted, filing another in their reply comments.

that the few commenters that support Verizon largely ignore these issues in the vain hope that the Commission will too.

First, what "Verizon seeks is essentially a substantive change in rules, masquerading as a forbearance petition."[8] Granting Verizon's Petition therefore would be a blatant violation of the notice and comment requirements of section 553 of the APA[9] – as the Commission has already expressly recognized in rejecting an attempt (by Verizon's own predecessors) to slip rulemaking requests into a prior forbearance petition.[10]

Second, the comments demonstrate that the particular rules that Verizon urges the Commission to adopt are foreclosed by the Act's plain language.[11] Congress directed that UNE prices "shall" be "based on the cost" of providing them,[12] and Verizon's proposal to use "resale" pricing when UNEs are used in the UNE-P combination is not cost-based. The proposed use restriction – a patently anticompetitive and unlawful rule that would prohibit competitive carriers

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[8] Comments of Covad Comm. Co. at 1, WC Docket No. 03-157 (filed August 18, 2003) ("Covad"). *See also* Opposition of Bridgecom International, Inc. at 3, WC Docket No. 30-157 (filed August 18, 2003) ("Bridgecom"); Response of the California Public Utilities Commission at 13, WC Docket No. 03-157 (filed August 18, 2003) ("California PUC"); Opposition of the Competitive Telecomm. Assoc. at 3, WC Docket No. 03-157 (filed August 18, 2003) ("CompTel"); Opposition of MCI at 3, WC Docket No. 03-157 (filed August 18, 2003) ("MCI"); New Jersey BPU at 1; Opposition of the PACE Coalition at 3-4, WC Docket No. 03-157 (filed August 18, 2003) ("PACE"); Sprint Corp.'s Opposition at 5-8, WC Docket No. 03-157 (filed August 18, 2003) ("Sprint"); Opposition of Z-Tel Comm. Inc. at 4-7, WC Docket No. 03-157 (filed August 18, 2003) ("Z-Tel").

[9] CompTel at 3; MCI at 3; Sprint at 8-11; Z-Tel at 8-13.

[10] Order, *New England Telephone and Telegraph Co. and N.Y. Tel. Co. Petition for Forbearance from Jurisdictional Separations Rules*, 12 FCC Rcd. 2308 (1997).

[11] Covad at 2; Joint Comments of A+ American Discount Telecom, LLC *et. al* in Opposition to Petition for Expedited Forbearance at 8, WC Docket No. 03-157 (filed August 18, 2003) ("Joint Comments"); MCI at 5-7; Z-Tel at 14.

[12] 47 U.S.C. § 252(d)(1).

from using the UNE-P combination of elements to provide exchange access services – is likewise foreclosed by the language of the Act and the Commission's precedents interpreting it.[13] Exchange access services are undeniably telecommunications services. Thus, as the Commission has held, section 251(c)(3)'s commands that Verizon must provide nondiscriminatory access to UNEs "for the provision of a telecommunications service" and that it must do so "in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service"[14] are "plain" and "not ambiguous" in entitling competitive carriers to "purchase unbundled elements for the purpose of offering exchange access service."[15]

If any doubt remained on these issues, it was put to rest by last week's *Triennial Review Order*. There, the Commission again reaffirmed its findings in 1996, 1997, and in 1999 that the plain text of the Act allows requesting carriers to use UNEs to provide exchange access services.[16] Likewise, the Commission confirmed that competitive carriers are entitled to combinations of network elements at TELRIC-based rates, including all of the elements that make up the "UNE-platform."[17]

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[13] Comments of Focal Comm. Corp. *et al.* at 35, WC Docket No. 03-157 (filed August 18, 2003) ("Focal *et al.*"); Joint Comments at 9-10; MCI at 8-11; Z-Tel at 14-15. MCI and the New Jersey RPA also demonstrate that Verizon's proposal violates the CALLS settlement. MCI at 12; Comments of the New Jersey Div. of the Ratepayer Advocate at 32-33, WC Docket No. 03-157 (filed August 18, 2003) ("New Jersey RPA").

[14] 47 U.S.C. § 251(c)(3).

[15] First Report and Order, *Implementation of the Local Competition Provisions in the Telecomm. Act of 1996*, 11 FCC Rcd. 15499, ¶¶ 356, 359 (1996) (*"Local Competition Order"*).

[16] *Triennial Review Order* ¶ 133; 47 C.F.R. § 51.309.

[17] *Triennial Review Order* ¶¶ 573-74.

Third, the Commission cannot grant Verizon's request, because section 10(d) bars the Commission from even applying the section 10(a) forbearance criteria to UNE-related rules until the "requirements" of sections 251(c) and 271 "have been fully implemented."[18] And contrary to the Petition's bare assertions, the "requirements" of sections 251(c) and 271 have *not* been "fully implemented." As MCI explains, the "'fully implemented' standard requires a showing that a BOC no longer is dominant in the provision of the network elements and telecommunications services that entrants require to enter and compete effectively with the BOC."[19]

Moreover, as Z-Tel explains, "*no* set of federal 'unbundling rules' under section 251(c)(3) ha[ve] ... been affirmed by the appellate courts," and state commissions have not even begun the work of reflecting these new rules in the interconnection agreements that govern the relationship between incumbent and competitive carriers.[20] At a minimum, there can be no claim that section 251(c) has been "fully implemented" until the Commission's implementing rules have been upheld by the courts, state commissions have carried out their responsibilities under those rules, the changes have been fully reflected in the relevant interconnection agreements, and a sufficient time has elapsed to determine whether Verizon and the other incumbent LECs have

[18] Opposition of AT&T Corp. at 22-29, WC Docket No. 03-157 (filed August 18, 2003) ("AT&T"); Joint Comments at 9-10; MCI at 21-23; Opposition of Sage Telecomm., Inc. at 4-5. WC Docket No. 03-157 (filed August 18, 2003); Sprint at 17; Opposition of Telscape Comm., Inc. at 3-6, WC Docket No. 03-157 (filed August 18, 2003) ("Telscape"). In its Petition, Verizon argued that its Petition addresses only regulations, which are not "requirements" of the Act. But as AT&T explained, this argument runs afoul of the statute's language, which makes clear that the "requirements of section 251 . . . includ[e] the regulations prescribed by the Commission." 47 U.S.C. § 252(e)(2)(B). The Act could hardly state otherwise, as an implementing rule is inherently an agency's authoritative view of an Act's "requirements." *See* PACE at 7.

[19] MCI at 28; *see also* Sprint at 17.

[20] Z-Tel at 16 (emphasis in original).

fully complied with the law.[21] Critically, this is not just the view of competitive carriers, but also of the state commissions, which have the greatest expertise in competitive conditions within their respective states and ultimate authority for making local competition a reality.[22]

Finally, and in all events, the comments show that "the standards for forbearance" under section 10 "have not been satisfied."[23] Most obviously, Verizon failed to demonstrate that its requested "forbearance" would not harm consumers.[24] Nor could it. The Commission has specifically found,[25] and the Supreme Court has specifically endorsed,[26] that the TELRIC standard best comports with economic efficiency and is most likely to foster effective competition in local telephony.[27] Thus, granting Verizon's Petition would "permit Verizon and other ILECs to impose excessive UNE rates on CLECs," and perpetuate the *status quo* in which Verizon is able to collect "monopol[y] profits" from captive ratepayers.[28]

Likewise, it would hardly "enhance competition among providers of telecommunications services,"[29] to give in to a monopolist's demand that the Commission wipe out what is, in most

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[21] PACE at 7.

[22] California PUC at 12; Letter form Robert B. Nelson, NARUC Resolution, to the Honorable Michael Powell *et al.*, FCC, WC Docket No. 03-157 (filed August 15, 2003).

[23] Comments of the Pennsylvania PUC at 1, WC Docket No. 03-157 (filed August 18, 2003).

[24] 47 U.S.C. § 160(a)(2).

[25] *Local Competition Order* ¶¶ 672, 685.

[26] *Verizon Comm., Inc.* v. *FCC*, 535 U.S. 467, 516-17, 523 (2002) ("*Verizon*").

[27] AT&T at 33-34 (discussing Supreme Court and Commission precedents); *see also* Bridgecom at 15-17; Focal *et al.* at 3-13 (same); New Jersey RPA at 10-12 (same).

[28] Comments of the Assoc. of Comm. Enterprises *et al.* at 25, WC Docket No. 03-157 (filed August 18, 2003) ("ACE"); *see also* Focal *et al.* at 37 ("A just and reasonable rate regime is not meant to protect monopolists' profits.").

[29] 47 U.S.C. § 160(b).

local markets, the *only* significant competitive mass-market alternative to the incumbent. As the Department of Justice explained in the proceedings that led to the adoption of TELRIC, allowing incumbents to set UNE prices in excess of TELRIC – as Verizon's Petition seeks – would allow incumbent carriers to "price squeeze" new entrants and foreclose meaningful competition.[30] Thus, as the state commissions and ratepayer advocates recognize, the relief sought in the Petition would deprive literally *millions* of consumers of their chosen local telephone service and, for most consumers, would put an end to local telephone choice altogether and exact enormous social costs.[31] CompTel, MCI, and Z-Tel show in detail that this competition has resulted in greater quality, lower prices, and innovative new products by competitive and incumbent carriers alike.[32] Overall, CompTel estimates that residential consumers could save over $9 billion as a result of competition enabled by UNE-P priced at TELRIC-based rates.[33]

Nor could Verizon's proposal to end cost-based UNE-P conceivably "ensure that the charges . . . are just and reasonable and not unjustly or unreasonably discriminatory."[34] Congress has directed that the *only* just and reasonable rates in this context are cost-based rates.[35] Likewise, in light of the fact that the Commission has recognized that TELRIC represents the

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[30] Z-Tel at 17-18 (discussing the DOJ's support of TELRIC).

[31] New Jersey BPU at 2; Comments of NASUCA at 18-19, WC Docket No. 03-157 (filed August 18, 2003) ("NASUCA"); New Jersey RPA at 5; *see also* Sprint at 14.

[32] MCI at 15-16; CompTel at 9-10; Z-Tel at 22-23.

[33] CompTel at 9.

[34] 47 U.S.C. § 160(a)(1)

[35] *See id.* § 252(d)(1) ("Determinations by a State commission of the just and reasonable rate[s] . . . shall be . . . based on the cost" of providing requested elements).

cost at which the incumbents' access their networks,[36] allowing incumbents to charge competitive carriers much higher rates is the paradigm of discrimination.[37]

Those incumbents that support Verizon's arguments offer no meaningful response to these arguments. They do not deny that granting Verizon's Petition would allow them to raise UNE rates, choke off nascent and emerging local exchange competition, and maintain existing monopoly profits. Rather, they argue that forbearance is justified because cost-based UNE-P "saps" the incentives of competitive carriers to invest in their own facilities.[38] But even if that were true, such a showing would still be insufficient to satisfy *each* of the demanding requirements of section 10.[39] Thus, Verizon must show that the regulations it challenges are not necessary to "ensure" "just and reasonable" rates,[40] are "not necessary for the protection of consumers,"[41] *and* are not necessary to protect the "public interest."[42] Moreover, and as explained in AT&T's initial comments and immediately below in Part II, there is no factual basis to Verizon's investment incentive argument.

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[36] *Local Competition Order* ¶ 865; *see also id.* ¶ 862.

[37] AT&T at 35 & Att. A, ¶¶ 21-22; PACE at 10; Telscape at 11-12; Z-Tel at 18-19.

[38] Comments of ACS of Anchorage, Inc. at 18-20, WC Docket No. 03-157 (filed August 18, 2003) ("ACS"); Comments of Qwest Corp. at 3-6, WC Docket No. 03-157 (filed August 18, 2003) ("Qwest"); SBC at 7-14.

[39] *See* 47 U.S.C. § 160(a); *Cellular Telecomm. & Internet Ass'n* v. *FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003).

[40] 47 U.S.C. § 160(a)(1)

[41] *Id.* § 160(a)(2).

[42] *Id.* § 160(a)(3).