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October 23, 2003

**Ex Parte**

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

*Re: Verizon Petition for Forbearance, CC Docket No. 01-338 and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338*

Dear Ms. Dortch:

Yesterday, Susanne Guyer and Mike Glover of Verizon met with B. Tramont, J. Cody and C. Libertelli of Commissioner Abernathy's office to discuss the above proceedings. The attached document was provided during the meeting. All issues discussed are consistent with Verizon's position in the record. Please let me know if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Ann D. Berkowitz".

Attachment

cc: B. Tramont  
C. Libertelli  
J. Cody  
M. Carey  
J. Carlisle  
W. Maher  
W. Dever  
J. Dygert

# THE COMMISSION SHOULD FORBEAR FROM IMPOSING ANY SECTION 271 UNBUNDLING OBLIGATIONS ON BROADBAND

## EXECUTIVE SUMMARY

On July 29, 2002, Verizon filed a petition for forbearance seeking relief from any unbundling obligations that section 271 may impose for elements that the Commission has separately removed from the list of elements subject to unbundling under section 251. This paper discusses the particularly pressing need to forbear from any such obligations for *broadband* elements.

The *Triennial Review Order* provided simply that ILECs “do not have to offer unbundled access” to broadband facilities such as fiber to the premises loops, the packetized functionality of hybrid loops, and packet switching.<sup>1</sup> The Commission’s resolution of the issue was appropriately straightforward, and was based both on its conclusion that unbundling broadband facilities is *unnecessary* because competing providers do not need access to those broadband facilities and that it is affirmatively *harmful* because it would deter deployment by all providers. And those conclusions were further reinforced by the separate injunction in section 706 to encourage deployment of and remove barriers to investment in broadband facilities. Nothing in the *Order* suggests that its conclusions with respect to broadband facilities were somehow compromised by a continuing need to unbundle these same facilities under some different provision of the Act.

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<sup>1</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and FNPRM, CC Dkt. No. 01-338, FCC 03-36 ¶¶ 7, 273 (rel. Aug. 21, 2003) (“*Triennial Review Order*”).

Nevertheless, a different section of the *Order* does construe section 271 of the Act to impose unbundling obligations that are independent of those under section 251 and that continue to apply when particular elements do not meet the unbundling standard under section 251. In discussing the relationship between sections 251 and 271, the *Order* did not even mention broadband issues, much less suggest that the Commission had made an affirmative determination that broadband facilities should be subject to a continuing unbundling obligation that the Commission has rightly found would thwart “incentive[s] to deploy fiber (and associated next-generation network equipment, such as packet switches and DLC systems) and develop new broadband offerings[.]” *Triennial Review Order* ¶ 290.

The Commission should act promptly to remove the present uncertainty on this issue by forbearing from any stand-alone obligation under section 271 to provide unbundled access to broadband elements. Indeed, imposing unbundling obligations under section 271 would have the same negative effects on broadband deployment that the Commission correctly concluded would result from an unbundling requirement under section 251. For example, construing section 271 to require unbundled access to loops, switching and transport would require a significant redesign of integrated fiber network architectures to create new and artificial points of access to individual components of the network architecture. Likewise, it would require the design and development of costly new systems to manage access at these new access points and development of new operations practices to correspond. Experience also has shown that any unbundling obligation evolves over time as it is further defined and interpreted, which would add yet another new layer of uncertainty and financial risk that would only add to the cost and

delay associated with the need to redesign the network and accompanying systems. And, of course, these costs, risks, uncertainties and delays would apply solely to the Bell companies—and not to their cable competitors that currently dominate the broadband market. Forbearance is especially appropriate with respect to broadband facilities because the Commission has already established the complete legal and factual predicate that warrants forbearance.

First, the *Triennial Review Order* finds that mandated unbundling of new broadband elements disserves the public interest by thwarting the incentives of ILECs and CLECs alike to incur the enormous fixed costs of deploying next-generation networks. That finding is more than enough to show, for purposes of section 10(a)(1)-(3), that such regulation is “not necessary” and that “forbearance . . . is consistent with the public interest.” 47 U.S.C. § 160(a)(1)-(3). Section 706(a) provides still further support by singling out broadband for special attention and by “direct[ing] the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage the deployment of advanced services.” *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, ¶ 69 (1998) (“*Advanced Services Order*”).

Second, section 10(d) expressly authorizes forbearance from section 271’s requirements where “those requirements have been fully implemented,” 47 U.S.C. § 160(d), and the Commission has already found, in approving section 271 applications for 49 states and the District of Columbia, that the Bell companies have in fact “fully implemented the competitive checklist.” 47 U.S.C. § 271(d)(3)(A)(i). A phrase is presumed to mean the same thing when it appears in two different provisions of a

statute—particularly where, as here, one of those provisions (section 10(b)) explicitly cross-references the other (section 271). The Commission’s determination that the checklist has been “fully implemented” for purposes of section 271 thus necessarily meets the requirement under section 10(d) that the checklist be “fully implemented” before forbearing from those same checklist requirements.

This does *not* mean that the Bell companies are now free to ignore whatever checklist provisions they please. But it does mean that *the Commission* has authority to forbear where it finds that section 10’s forbearance standard is met, and that it can and should forbear from particular checklist requirements to the extent they do more harm than good. Forbearance as to *broadband* elements is particularly appropriate, both (i) because the enormous fixed costs of investing in a next-generation network present the most compelling need for deregulatory certainty and (ii) because the purpose of section 271 is to require the Bell companies to open their historical legacy voice networks and markets to competition, not to regulate their investments in the advanced technology they need to compete in the broadband markets that *other* firms dominate.

Finally, forbearance is all the more appropriate here because, as this Commission has recognized in prior section 271 orders, checklist items 4 through 6 are, in any event, reasonably construed not to require the unbundling of broadband loop or switching elements excluded from the section 251 unbundling list. That is why, for example, the Commission granted several section 271 applications over objections that the Bell companies should have provided greater access to the packet switching element than was required by the Commission’s section 251 rules.

In any event, the Commission can and should eliminate any continuing uncertainty on this score by granting Verizon’s petition to forbear from any separate unbundling requirement that may apply to the broadband facilities that the Commission has concluded need not be unbundled under section 251.

## ARGUMENT

### **I. The Commission Should Forbear From Any Stand-Alone Unbundling Obligation That Section 271 Might Be Construed To Impose For Broadband Elements.**

A. If the *Triennial Review Order* makes one point clear, it is the importance of freeing the ILECs from any unbundling requirement that would dampen “incentive[s] to deploy fiber (and associated next-generation network equipment, such as packet switches and DLC systems) and develop new broadband offerings[.]” *Triennial Review Order* ¶ 290. As the Commission found, “excessive network unbundling requirements tend to undermine the incentives of *both* incumbent LECs *and* new entrants to invest in new facilities and deploy new technology.” *Id.* ¶ 3 (emphasis added).

As an initial matter, “incumbent LECs are unlikely to make the enormous investment required [by broadband deployment] if their competitors can share in the benefits of these facilities without participating in the risk inherent to such large scale capital investment.” *Id.* Accordingly, “relieving incumbent LECs from unbundling requirements for those networks will promote investment in, and the deployment of, next-generation networks.” *Id.*, ¶ 272. In addition, elimination of such unbundling requirements is also necessary to give CLECs incentives of their own to invest in advanced network technologies. This is true because, “with the knowledge that incumbent LEC next-generation networks will not be available on an unbundled basis,

competitive LECs will need to continue to seek innovative network access options to serve end users and to fully compete against incumbent LECs in the mass market.” *Id.* As the Commission correctly concluded, “[t]he end result is that consumers will benefit from this race to build next generation networks and the increased competition in the delivery of broadband services”. *Id.*

Accordingly, the *Triennial Review Order* “eliminate[s] most unbundling requirements for broadband, making it easier for companies to invest in new equipment and deploy the high-speed services that consumers desire.” *Id.*, ¶ 4. In their separate statements, all three members of the Commission majority stressed the centrality of that policy judgment to the *Order* as a whole and to the future of the industry.<sup>2</sup>

That policy judgment provides the predicate for forbearing from any stand-alone obligation under section 271 to unbundle broadband elements that the Commission has exempted from unbundling requirements under section 251. Imposing such obligations through the back door of section 271 (particularly after section 271 authorization has been granted) is just as inimical to the prospects for long-term competition as imposing those same obligations through the front door of section 251. Moreover, the

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<sup>2</sup> *See, e.g.*, Press Statement of Commissioner Abernathy at 1 (Feb. 20, 2003) (“I strongly support the Commission’s decision to exempt new broadband investment from unbundling obligations”); Press Statement of Commissioner Martin at 1 (Feb. 20, 2003) (“[t]he action we take today provides sweeping regulatory relief for broadband and new investments,” including “unbundling requirements on all newly deployed fiber to the home”); Response of Commissioner Martin to Questions from Rep. Eshoo at 1 (“The Order freed incumbent LECs from unbundling requirements on next-generation facilities and equipment like FTTH and equipment used to provide packet switching services”); Response of Chairman Powell to Questions for the Record at 9 (“The Commission’s *Order* relieves incumbent local exchange carriers (‘ILECs’) from unbundling requirements on next-generation facilities and equipment like fiber-to-the-home (‘FTTH’) and equipment used to provide packet-based services”).

consequences of unwarranted unbundling are especially pernicious in the broadband context, where, as discussed below, ILECs need the greatest assurance of a stable deregulatory environment to justify the massive fixed investments required for a next-generation network. And, although the *Triennial Review Order* discusses the relationship between sections 251 and 271 at some length, *see* ¶¶ 649-67, nowhere does it mention broadband at all, let alone confront the special need to protect broadband investment incentives from any unbundling obligations that might persist under section 271 even after the Commission has sought to end them, as anti-consumer, under section 251.

The acute need to confront that issue head-on arises not just from sound policy considerations, but from a specific statutory mandate. In section 706(a), Congress directed the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability” through “regulatory forbearance” and “other regulating methods that remove barriers to infrastructure investment.” For the most part, the *Triennial Review Order* recognizes the appropriately central role that section 706 should play in any unbundling decision affecting broadband elements. As the Commission found, the application of unbundling obligations “to these next-generation network elements would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, *in direct opposition to the express statutory goals authorized in section 706.*” *Triennial Review Order* ¶ 288 (emphasis added).

But section 706(a) requires the Commission to employ all of the statutory tools at its disposal, and not just the “impairment” standard of section 251(d)(2), to “encourage deployment of advanced telecommunications capability” (*id.* ¶ 290). In particular,

although the Commission has declined to view section 706 as an independent source of forbearance authority, it has nonetheless made clear that the mandate of section 706 to promote broadband investment through “regulatory forbearance” weighs heavily in favor of forbearing under section 10 from unnecessary *broadband* regulation. *Advanced Services Order*, ¶ 69 (“section 706(a) directs the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage the deployment of advanced services”).

Section 706(a) all but compels forbearance from any stand-alone 271 unbundling obligations in this context, because (i) it singles out *broadband* facilities for special protection from excessive regulation, and (ii) the Commission has *already determined* under section 251(d)(2) that compelled unbundling of these facilities would do little to advance, and much to undermine, the roll-out of broadband services. For that matter, the standards of section 10(a) would be met even without the extra statutory guidance of section 706. The Commission eliminated broadband obligations on the grounds that such obligations would be both *unnecessary* (because ILECs generally are running well behind other carriers in the broadband rollout) and affirmatively *harmful* (because overzealous regulation would thwart the incentives of ILECs and CLECs alike to invest in broadband infrastructure). Those determinations are equivalent to the three core findings required for forbearance under section 10(a): continued unbundling is unnecessary for the protection of either consumers or other carriers (47 U.S.C. § 160(a)(1), (2)), and forbearance is plainly in the public interest (47 U.S.C. § 160(a)(3)). And, as discussed below, section 10(d), which conditions forbearance on a finding that section 271 has been

“fully implemented,” poses no obstacle to forbearance from competitively harmful over regulation of next-generation broadband facilities.

Indeed, it is difficult to conceive of any circumstance in which sections 10 and 706 more forcefully support relief from unwarranted regulation. The D.C. Circuit has made clear that section 251(d)(2) embodies a congressional policy judgment that “unbundling is not an unqualified good” and that it often hurts, rather than helps, the cause of genuine long-term competition. *USTA v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002). Although any unbundling obligation can impose significant “cost[s], including disincentives to research and development by both ILECs and CLECs and the tangled management inherent in shared use of a common resource,” *id.*, those costs are a matter of greatest concern where next-generation technology is at issue. That is the context in which the fixed costs of “research and development” are particularly enormous, and where the “tangled management” challenges of hammering out the details of the “shared use of a common resource” would be most vexing.

It is no answer to say that unbundling obligations arising solely from section 271 will be somewhat less onerous than those arising under section 251. On the contrary, imposing an unbundling obligation under section 271 would merely recreate the same investment disincentives the Commission sought to eliminate. This is so for several reasons.

First, any obligation to provide access separately to the various components of an integrated broadband network architecture necessarily would impose significant redesign requirements, result in suboptimal technology, and add cost, inefficiency and delay that deters deployment of these already risky new technologies in the first place. Although it

has been efficient to compartmentalize legacy circuit-switched networks into highly distinct “loop,” “switching,” and “transport” elements, the same is often not true of next-generation packet-switched networks. For example, an analog unbundled loop has a dedicated path or channel that can be routed directly to a CLEC’s collocated facility. In a broadband system, the efficiency of the packetized technology derives in part from the fact that the packets from various end users flow over virtual channels, undifferentiated until they reach the destination packet switch. Consequently, imposing an obligation to provide access to individual components of a next-generation network architecture would require a costly redesign of the network to create access points for those various components. For example, in order to provide an unbundled loop that is directed to a competitor’s facilities, Verizon would have to redesign the network and insert additional equipment in the local office that is capable of performing an intermediate packet-switching function and direct the packets to another carrier. Likewise, efficiencies in packet switching are often created, not by having a single switching unit in the local office that can be simply unbundled from the rest of the network, but rather by using a softswitch, where many features (which formerly existed in the switch) actually reside in remote computer-like servers that are distributed across the network. To have a single device that could serve as an “unbundled” switching element, the incumbent would have to redesign the network and eliminate many of the inherent efficiencies that help drive broadband deployment.

Second, there obviously is much more to the deployment of next generation networks than laying fiber or deploying packet switches, though those are obviously enormous tasks standing alone. One particularly critical aspect is the development and

deployment of the new systems necessary to operate these new networks. These systems are critical to provide services as efficiently and at as high a quality as possible to benefit customers, and also are one of the major cost components of deploying these new networks. Imposing an unbundling obligation under section 271 obviously would require the design and development of still new systems to cope with the complex requirements of unbundled access to piece parts of next-generation technology—with all the attendant costs of “the tangled management inherent in shared use of a common resource.” 290 F.3d at 429. If unbundling were required, these systems would have to provision, track, bill, accept orders, and provide maintenance access for multiple providers using these various individual broadband elements. Verizon alone already has spent hundreds of millions of dollars in modifying existing OSSs to handle unbundling requirements for narrowband network elements. For broadband, the requirements would both increase the costs of new systems and reduce their benefit by sacrificing efficiency and quality, all of which further undermines the incentives to deploy.

Third, experience has proven that unbundling obligations evolve over time as they are further defined and interpreted. Indeed, in the case of both narrowband and broadband facilities, ILECs have been subject to a constantly shifting range of requirements implementing the section 251 unbundling requirements, and there is no reason to believe that any section 271 obligations would be different in this respect. These changing requirements add still further costs and complexities as ILECs are forced to modify both their underlying networks and the accompanying network operations and support systems to comply. Transferring this experience to broadband would add yet another layer of uncertainty and financial risk that would undermine deployment.

Fourth, although the Commission clarified in the *Triennial Review Order* that the TELRIC rules do not apply to elements unbundled under section 271 alone, the potential for intrusive regulatory involvement in the pricing of these elements remains. Indeed, parties have already argued to state regulators that they have a right to oversee these federal obligations. See Summary of TRIP Triennial Review Meeting Discussions, Washington, D.C. at 2 (Oct. 10, 2003), available at <http://www.naruc.org/programs/trip/summaryoct03.pdf> (“CLECs say states do have a role” in “setting prices under §§ 201 and 202 for UNEs required under § 271”). While that argument is misplaced because any remaining obligation under section 271 is a purely federal requirement, it nonetheless makes clear the pricing of any elements under section 271 will remain the subject of additional rounds of investment-detering litigation. Moreover, even under a purely federal standard, there is significant uncertainty as to how the pricing obligation would be applied. While the Commission has made clear that negotiated, market-based rates will satisfy the section 201 pricing standard, experience has shown that other parties will nonetheless try to game the regulatory process, either to pre-empt the negotiations entirely or to obtain extra leverage. And that is all the more true given their past experience, even under section 201 pricing standards. See, e.g., *Verizon Telephone Companies Tariff* FCC Nos. 1 & 11, *Transmittal No. 232 (PARTS)*, 17 FCC Rcd 23598, & 8 (2002) (requiring Verizon to offer proof why it should not have a “UNE pricing methodology” imposed on a broadband service being evaluated under a section 201 standard). In short, the prospect of rate regulation even under sections 201 and 202 pricing standards will generate substantial

uncertainty and further pointless litigation so long as the underlying unbundling obligations remain in place.

**B.** Section 10(d) is no barrier to forbearance because that provision expressly authorizes forbearance from “the requirements of section . . . 271” where “those requirements have been fully implemented.” 47 U.S.C. § 160(d). Here, the Commission has already made that very finding. The “requirements” at issue are those of the competitive checklist. The Commission can grant section 271 authorization—as it has now done for 49 states and the District of Columbia—only after expressly determining that a Bell company has in fact “*fully implemented* the competitive checklist” 47 U.S.C. § 271(d)(3)(A)(i) (emphasis added). It is not mere coincidence that Congress used the exact same term in both section 10(d) and section 271 to describe the conditions for deregulatory relief. The “normal rule of statutory construction” is “that identical words used in different parts of the same act are intended to have the same meaning.” *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996) (quoting *Sullivan v. Stroup*, 496 U.S. 478, 484 (1990)). There is no getting around that rule here, since section 10(d) not only coexists in the same legislative enactment as section 271, but explicitly *cross-references* section 271 in the very forbearance limitation at issue. It is inconceivable that Congress used the same language to mean two contrary things in these two interrelated sections of the 1996 Act.

This is *not* to say that the Bell companies are free to ignore all of the checklist requirements the minute they receive section 271 authorization in a given state. Those requirements remain in effect until the Commission exercises its forbearance authority, which it may do where (as here) the “public interest” and the other forbearance standards

of section 10(a)(1)-(3) are met. And so long as particular requirements remain in effect, the Commission obviously retains authority to enforce those requirements. 47 U.S.C. § 271(d)(6). But the grant of a section 271 application does remove any hurdle that section 10(d) might pose to the *Commission's* authority under section 10(a) to forbear from any separate obligation to unbundled broadband facilities under section 271.

It is particularly appropriate to exercise that authority to forbear from any stand-alone broadband unbundling obligations under section 271—not just because (as discussed) unnecessary unbundling obligations are particularly counterproductive in the broadband context, but also because the section 271 checklist was never designed to interfere with the Bell companies' deployment of next-generation packet-switched networks. Instead, as discussed below, the checklist was designed to open up the local market by requiring the Bell companies to provide access to elements of the legacy circuit-switched networks, prior to entering the long distance business, a concern that does even not arise here. Again, if there were any doubt on either score, section 706 would resolve it by compelling an interpretation of section 10 that “encourage[s] the deployment on a reasonable and timely basis of advanced telecommunications capability” through “regulatory forbearance.”<sup>3</sup>

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<sup>3</sup> AT&T recently espoused a new rationale for opposing forbearance from any aspect of section 271: the notion that any separate obligation under the section 271 checklist cannot be “fully implemented” until after the separate affiliate obligations of section 272 have sunset. That argument is misplaced, because section 272 is designed to safeguard competition in local markets *after* they have been opened and *after* the Commission has determined, under section 271(d)(3)(A)(i), that the substantive marketing-opening provisions of the checklist have themselves been “fully implemented.” Section 272 does not *itself* “implement” those provisions; indeed, if it did, section 271(d)(3)(A)(i) could never be satisfied. In all events, any role that section 272 may play after a section 271 application is granted has no logical or legal bearing on

**II. Granting Forbearance To Eliminate Uncertainty Is Especially Warranted Here Because Checklist Items 4-6 Should Not Be Read To Require The Unbundling Of Broadband Elements In The First Place.**

Forbearance is all the more appropriate here because any separate obligation which may exist under section 271 is properly read to not extend to the broadband elements of the network, and forbearance will remove any doubt on that score.

A. Both the Commission and the courts have recognized that each checklist item draws its content from the evolving nature of the Commission's local competition rules at any given time. As the Commission has explained, "[o]ur rules vary with time, redefining the statutory obligations that govern the market. Just as our long-standing approach to the procedural framework for section 271 applications focuses our factual inquiry on a BOC's performance at the time of its application, so too may we fix at that same point the local competition obligations against which the BOC's performance is generally measured for purposes of deciding whether to grant the application."

*Application by SBC Communications Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354, ¶ 27 (2000) ("*Texas 271 Order*"); *see also AT&T Corp. v. FCC*, 220 F.3d 607, 628-32 (D.C. Cir. 2000).

The precise substance of these checklist obligations is largely derivative of the underlying section 251 obligations precisely because, standing alone, they contain very little determinate content. For example, checklist item 4 requires a Bell company to

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any unbundling obligations the checklist imposes, much less the *broadband* unbundling obligations at issue here.

provide “[l]ocal loop transmission” as a precondition to obtaining section 271 authorization, but it does not specify the manner in which the Bell company may discharge that obligation. Thus, in addressing claims that the ineffective provisioning of DSL loops amounts to a more general failure to meet loop provisioning obligations, the D.C. Circuit has observed that “[s]ection 271 does not say that an applicant must show that it provides nondiscriminatory access to *each category* of loop or to *every single* loop.” *AT&T Corp.*, 220 F.3d at 624 (emphasis added). Instead, the court observed, it is “reasonably interpreted . . . to allow assessment of an applicant’s *overall* provisioning of loops.”<sup>4</sup> Checklist item 4 has never been understood—and could not sensibly be understood—to require a Bell company to provide CLECs with any requested form of “transmission” over every facility in its network that could qualify as a “loop.”

Similarly, checklist item 6 does not require a Bell company to provide access to every *switch* in its network. Indeed, the Commission has rejected arguments in section 271 proceedings that the Bell company applicants have somehow violated checklist item 6 because they have denied access to their packet switching facilities. In each case, the Commission reasoned that a CLEC’s rights of access to the packet switching element under checklist item 6 are limited to the very narrow circumstances in which, in the *UNE Remand Order*, the Commission required all ILECs to make that element available for purposes of sections 251(c)(3) and 251(d)(2). For example, in the *Texas 271 Order*, the

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<sup>4</sup> *Id.* (emphasis added); see also *Texas 271 Order*, at ¶¶ 28-33 (tying scope of section 271 unbundling obligations to effective date of new section 251 unbundling obligations under the *UNE Remand 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, 4080 ¶ 236 & n.756 (1999), *aff’d sub nom AT&T v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

Commission rejected AT&T's complaints about denial of access to SWBT's splitters on the ground that, insofar as a splitter is "part of the packet switching element[,] . . . we declined to exercise our rulemaking authority under section 251(d)(2) to require incumbent LECs to provide access to the packet switching element."<sup>5</sup>

In sum, although the checklist does require access to "local loop transmission" and "local switching," the Commission has always judged satisfaction of those requirements at an appropriately high level of generality. And, as the cited examples reveal, the Commission has repeatedly construed these checklist items *not* to require access to *broadband-related* categories of the loop and switching elements except where the Commission has independently "exercise[d] [its] rulemaking authority under section 251(d)(2) to require incumbent LECs to provide access." *Texas 271 Order* at ¶ 327.

**B.** A review of section 271's basic objectives confirms the same conclusion. In opposing Verizon's pending forbearance petition, AT&T itself argues that checklist

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<sup>5</sup> *Texas 271 Order* at ¶ 327; accord *Application by Qwest Communications Int'l, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado et al.*, 17 FCC Rcd 26303, ¶ 358 (2002) (rejecting AT&T's challenge under checklist item 6 on the ground, among others, that "Qwest offers competitive LECs unbundled packet switching in a nondiscriminatory manner when the conditions established by the Commission in the *UNE Remand Order* are met"); *Application of Verizon New England Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988, Appx. B., ¶ 1 (2001) ("[t]o satisfy its obligations under this subsection, an applicant must demonstrate compliance with the Commission rules effective as of the date of the application relating to unbundled local switching . . . . In the *UNE Remand Order*, the Commission required that incumbent LECs need not provide access on an unbundled basis to packet switching except in certain limited circumstances."); *Joint Application by SBC Communications Inc. et al. to Provide In-Region, InterLATA Services in Arkansas and Missouri*, 16 FCC Rcd 20719, ¶ 105 (2001) ("To the extent that AT&T and WorldCom in fact seek to expand SWBT's obligations to unbundle packet switching, this issue is the subject of proceedings currently pending before the Commission").

items 4-6 independently “establish[] a ‘safety net’” that, unlike section 251(c), “requires only access to a specific core group of elements.” AT&T Opposition, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, CC Dkt. No. 01-338, at 6 (filed Sept. 3, 2002). That safety net is needed, AT&T says, to deal with the “enormous monopoly power that the [BOCs] had accumulated over their local markets during the preceding several decades.” AT&T Reply, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, CC Dkt. No. 01-338, at 3 (filed Sept. 18, 2002). But that could be a rationale for retaining (if anything) only those section 271 unbundling obligations that relate to “core” *legacy* elements. It cannot remotely justify retaining any stand-alone obligation under section 271 to unbundle *broadband* elements.

AT&T suggests that the basic purpose of section 271 is to preclude the BOCs from leveraging their traditional dominance in local exchange markets to obtain an undue advantage in the long distance market. The chosen means was to force “the BOCs to open their local markets to competition before allowing them to enter the long distance services market in-region, because, due to the unique infrastructure controlled by the BOCs, they could exercise monopoly power.” *BellSouth Corp. v. FCC*, 162 F.3d 678, 689-90 (D.C. Cir 1998). Such market-leveraging concerns do not even arise with respect to *new* elements that are used in the provision of the *broadband* services at issue here because, among other considerations, the Bell companies are not remotely dominant in the market for those services.

To begin with, it is the cable companies that currently dominate the separate market for broadband services, and ILECs are the insurgent competitors deploying new

facilities to challenge the dominant incumbents. But even beyond this key fact, as the Commission explained in the *Triennial Review Order* (at ¶ 278), CLECs are just as capable as the BOCs of building new fiber facilities out to customer locations—and, in fact, “are leading in the deployment of FTTH.” To take another example, CLECs cannot claim to have suffered any anticompetitive disadvantage from denial of access to the new packetized capabilities of “hybrid” loops, particularly if they retain general access to existing copper subloops or legacy TDM transmission capabilities. *Id.* ¶¶ 285-97. More generally, new broadband elements are not remotely part of any “specific core group of elements” to which Congress could have wanted to guarantee CLECs access in the interests of fair long distance competition.

In short, the statutory language of checklist items 4 through 6 is properly read not to impose unbundling obligations for broadband facilities that the Commission has removed from the scope of section 251 unbundling obligations. At a minimum, the Commission has very broad discretion to adopt that construction as a means of reconciling sections 251, 271, and 706.

In order to remove any doubt on that score, however, the Commission should promptly forbear from any stand-alone unbundling obligations for broadband elements to the extent that section 271 is ultimately construed to contain them so that ILECs can get on with the business of designing and deploying next generation broadband networks in a rational and efficient matter. As the Commission itself previously found, consumers will be the ultimate beneficiaries.