

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

In the Matter of)	
)	
Review of the Section 251 Unbundling)	CC Docket No. 01-338
Obligations of Incumbent Local)	
Exchange Carriers)	
)	
Petition for Forbearance of Verizon)	
Telephone Companies)	
Pursuant to 47 U.S.C. §160(c))	
)	
)	

COMMENTS OF SBC COMMUNICATIONS INC.

Pursuant to the Public Notice (DA 02-1884) released in this proceeding by the Wireline Competition Bureau on August 1, 2002, SBC Communications Inc. (“SBC”) submits these Comments in support of the Petition for Forbearance Pursuant to 47 U.S.C. §160(c) (“Petition”) filed by the Verizon Telephone Companies (“Verizon”) on July 29, 2002. SBC requests that the Commission grant the Petition with respect to all Bell Operating Companies.

Section 10 of the Act requires the Commission to forbear from applying any provision of Section 271, as long as the Commission determines that such provision has been “fully implemented,” and

- enforcement of the provision is not necessary to ensure that the charges, practices, classifications, or regulations of a telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- enforcement of the provision is not necessary for the protection of consumers; and
- forbearance from applying the provision is in the public interest.

47 U.S.C. §§ 160(d) and (a). In its Petition and in its Comments in the *Triennial Review* proceeding, Verizon demonstrates that, if a network element does not meet the standard under Section 251(d)(2) for mandatory unbundling, the requirements of Section 10 are satisfied for—and the Commission should forbear from applying—any provision of Section 271 corresponding to that element.¹ Specifically, as the comments in the Commission’s *Triennial Review* confirm, competitors are not impaired without access to: (1) certain loops, (2) dedicated transport, (3) switching, or (4) signaling.² Accordingly, these elements should no longer be made subject to mandatory unbundling under Section 251. And, as Verizon demonstrates, the Commission should forbear from applying the checklist items of Section 271 corresponding to these elements.

The purpose of the Section 271 checklist, as Verizon notes, is to demonstrate that a Bell Operating Company’s local market is open to competition. A determination that competitors are not impaired without access to an element is necessarily preceded by a finding of such competition. In particular, a finding of no impairment necessarily proceeds from the fact that an element is competitively available, either through third-party suppliers or self-provisioning.

¹ SBC agrees with Verizon that the Act allows the Commission to interpret Section 271 so as to conclude that checklist items are satisfied if the Commission has affirmatively determined that the facilities referenced in those items do not meet the requirements for mandatory unbundling under Section 251(d)(2). By granting the Petition, and thus determining the meaning of “fully implemented” as set forth in Section 10, the Commission effectively achieves the same result.

² See *Petition* at 3-4. In its Comments and Reply Comments in the *Triennial Review*, SBC similarly demonstrated that competitors are not impaired without access to high capacity loops, switching, dedicated transport, or signaling.

Thus, a determination that an element should not be unbundled clearly demonstrates that any Section 271 checklist item corresponding to that element has been fully implemented.

Similarly, a determination that competitors are not impaired without access to an unbundled element demonstrates that such element need not be made available to assure just, reasonable and non-discriminatory rates and practices or to protect consumers. Competition is the best mechanism for providing such consumer protections.³ A determination of competitive availability of an element thus establishes that mandatory provision of that element—under any section of the Act—is not necessary to simulate the protections afforded by a competitive marketplace. Competition, not regulation, best ensures that consumers receive quality goods and services at reasonable prices. There is no need to layer any additional legal requirements—statutory or regulatory—on the provision of a network element once it is determined that such element is competitively available.

Indeed, once a determination is made that a network element is competitively available, the public interest requires the elimination of all regulatory mandates to provide that element. Mandatory unbundling imposes costs on society, and the level of societal cost imposed by mandatory unbundling is directly proportional to the amount of such mandatory unbundling. It is precisely for this reason that the Supreme Court and the United States Court of Appeals for the D.C. Circuit have rejected the “more unbundling is better” approach to the Act.

In his concurring opinion in *Iowa Utilities Board*, Justice Breyer wrote that “the statute’s unbundling requirements, read in light of the Act’s basic purposes, require balance. Regulatory rules that go too far, expanding the definition of what must be shared beyond that which is essential to that which merely proves advantageous to a single competitor, risks costs that, in

³ See *Petition* at 3.

terms of the Act's objectives, may make the game not worth the candle."⁴ The D.C. Circuit made the same point about the costs of too much unbundling and the need to balance those costs against any prospective benefits:

Each unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities. At the same time – the plus that the Commission focuses on single-mindedly – a broad mandate can facilitate competition by eliminating the need for separate construction of facilities where such construction would be wasteful. Justice Breyer concluded that fulfillment of the Act's purposes therefore called for "balance" between these competing concerns.⁵

Continued mandatory provision of an element once it becomes competitively available upsets this balance. It stifles the incentives for competitors to invest in facilities and suppresses ILEC investment in their own networks.⁶ It thus retards the central de-regulatory objective of the Act to promote facilities-based competition. The public interest requires that an element not subject to mandatory unbundling under Section 251 should not be required under any other provision of the Act, including Section 271.⁷

⁴ *Iowa Utils. Bd.*, 525 U.S. at 429-30 (Breyer, J., concurring in part and dissenting in part).

⁵ *USTA*, 290 F.3d at 427 (citations omitted).

⁶ SBC discussed the societal costs imposed by mandatory unbundling requirements in its Comments and Reply Comments in the Commission's *Triennial Review* proceeding.

⁷ Basic fairness and the principle of coherent statutory construction also compel this conclusion. For example, if switching is not subject to mandatory unbundling under Section 251, it would be irrational to continue to require SBC to provide switching in Dayton, Ohio under Section 271, while leaving Cincinnati Bell under no obligation to provide switching in neighboring Cincinnati.

For the foregoing reasons, SBC requests that the Commission determine that any element not subject to mandatory unbundling under Section 251 of the Act should not be required under any other section of the Act. Specifically, SBC requests that the Commission grant Verizon's forbearance request with respect to all Regional Bell Operating Companies.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Anisa A. Latif, do hereby certify that a copy of **Comments of SBC Communications Inc.** has been served on the parties below via first class mail – postage prepaid on this 3rd day of September 2002.

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