

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

_____)	
In the Matter of)	
Review of the Section 251 Unbundling)	
Obligations for Incumbent Local Exchange Carriers)	CC Docket No. 01-338
Implementation of the Local Competition)	
Provisions of the Telecommunications Act of 1996)	CC Docket No. 96-98
Deployment of Wireline Services Offering)	
Advanced Telecommunications Capability)	CC Docket No. 98-147
_____)	

OPPOSITION OF Z-TEL COMMUNICATIONS, INC.

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Pursuant to the Commission’s *Public Notice*, Z-Tel Communications, Inc. (“Z-Tel”) respectfully submits this Opposition to Verizon’s “new” forbearance petition, which asks the Federal Communications Commission (the “Commission”) to forbear under section 10 of the Communications Act of 1934 (the “Act”)¹ from “compelling access to broadband functionalities pursuant to section 271 as a result of the Commission’s analysis in the *Triennial Review Order*.”²

INTRODUCTION AND SUMMARY

Verizon’s new petition asks the Commission to forbear from all broadband access obligations – including those continuing obligations imposed by section 271 – based on: (1) the Commission’s finding of non-impairment for certain broadband facilities; and (2) the

¹ See 47 U.S.C. § 160.

² *Commission Establishes Comment Cycle for New Verizon Petition Requesting Forbearance From Application of Section 271*, Public Notice, CC Docket No. 01-338 at 2 (rel. Oct. 27, 2003) (“*Public Notice*”).

Commission's determination that imposing unbundling requirements could delay broadband deployment.³ In reality, however, Verizon's new petition does nothing more than repackage old, losing arguments from the *Triennial Review* proceeding. As such, it should promptly be dismissed.

First, Verizon merely reargues an issue upon which the incumbent local exchange carriers ("ILECs") lost in the *TRO* when it asserts that the Bell Operating Companies ("BOCs") should not be subject to broadband access obligations under section 271 given the Commission's non-impairment finding under section 251. With the benefit of extensive comment by both sides, the Commission properly found that the ILECs' reading of section 271 would be inconsistent with the plain statutory text, would violate the cardinal interpretive rule against rendering portions of a statute "surplusage," and would contravene the core market-opening purpose of the provision. Recycling this argument in a section 10 forbearance petition cannot remedy these failings.

Second, Verizon's imaginative claim that section 271 somehow elides unbundling of network elements used to provide broadband services is flatly inconsistent with the statute's plain language. Section 271(c)(2)(B)(iv) is technology neutral and states in no uncertain terms that the BOCs must provide competitors "[l]ocal loop transmission from the central office to the customer's premises," making no distinction between broadband and narrowband loops. Likewise, section 271(c)(2)(B)(vi) requires the BOCs to provide competitors "[l]ocal switching," without regard to whether it is provided using circuit- or packet-switching technology.

Third, Verizon's assertion that section 271 is "fully implemented" as soon as a BOC has complied with the competitive checklist in section 271(c)(2)(B) is simply wrong, and does not

³ *See id.*

satisfy section 10(d). Congress made clear in section 271(d)(6) that the BOCs must keep their markets open by continuing to fulfill the requirements of the competitive checklist after obtaining authorization to provide interLATA long-distance service. Verizon's argument that a BOC may stop taking the steps necessary to permit competition to develop after obtaining section 271 authorization is plainly contrary to the terms of section 271(d)(6) and defies common sense.

Fourth, Verizon has failed to show that it has satisfied the requirements of sections 10(a) and 10(b). Verizon merely continues to incant its mantra that imposing *any* form of regulation on its broadband facilities – including the limited access obligations required by section 271 – will impede its broadband deployment efforts, to the detriment of consumers. Verizon thus appears poised to renege on its commitment to willingly negotiate access to “wholesale services” across its fiber facilities. More importantly, Verizon's forbearance request would, if granted, not only harm broadband deployment, but would also hinder the efforts of competitors to transition to their own facilities. In short, the Commission should promptly deny Verizon's forbearance request. Affirming that Verizon and its fellow BOCs are required to provide access to their broadband facilities under section 271(c)(2)(B) is necessary to protect customers (section 10(a)(2)), as well as to promote the public interest (section 10(a)(3)) and to foster competition (section 10(b)).

I. BOCs HAVE AN ONGOING OBLIGATION TO UNBUNDLE BROADBAND AND NARROWBAND FACILITIES UNDER SECTION 271.

A. BOCs Are Required to Provide Loops and Switching, Independent of Section 251.

Previously, 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.”⁴ In the *TRO*, the Commission rejected Verizon’s argument that the unbundling obligations of section 271 are co-extensive with those imposed under section 251, finding instead that “the plain language and the structure of section 271(c)(2)(B) establishes that BOCs have an independent and ongoing access obligation under section 271”.⁵

Checklist items 4, 5, 6, and 10 separately impose access requirements regarding loop, transport, switching, and signaling, without mentioning section 251. Had Congress intended to have these later checklist items subject to section 251, it would have explicitly done so⁶

Having lost in the *TRO*, Verizon recasts its “old” argument as a “new” request for forbearance. Now, Verizon asserts that it is entitled to forbearance under section 10 because imposing broadband access obligations “through the back door of section 271 . . . is just as inimical to the prospects for long-term competition as imposing those same obligations through the front door of section 251.”⁷ As discussed above, however, the Commission has already declared that a finding of non-impairment for certain broadband facilities has *no* effect on the BOCs broadband access obligations, because under section 271 BOCs must continue to “provide

⁴ Letter from Susanne A. Guyer, Senior Vice President, Federal Regulatory Affairs, Verizon, to Michael Powell, Chairman, and Kathleen Abernathy, Kevin Martin, Michael Copps and Jonathan Adelstein, Commissioners, Federal Communications Commission, CC Docket No. 01-338, Attachment at 1 (filed Oct. 24 2003) (“*Verizon Petition*”) (citing *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, CC Docket No. 01-338 (filed July 29, 2002)).

⁵ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 2003 FCC LEXIS 4697, ¶ 654 (rel. Aug. 21, 2003) (“*TRO*”) as modified by Errata, 2003 FCC LEXIS 5066 (rel. Sept. 17, 2003) (“*Errata*”).

⁶ *Id.*

⁷ *Verizon Petition* at 6.

access to loops, switching, transport and signaling *regardless of any unbundling analysis under section 251.*”⁸ Thus, the Commission’s decision that ILECs do not have to unbundle certain broadband facilities under section 251 provides no legal or policy justification for the forbearance relief sought by Verizon.

Likewise, the *TRO* makes clear that section 706 of the Act – which directs the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability” – is not relevant to the BOCs’ ongoing obligation to provide loops, switching and transport under section 271.⁹ Verizon claims that “Section 706(a) all but compels forbearance from any stand-alone 271 unbundling obligations” because the Commission relied on section 706 to refrain from unbundling certain network elements under section 251.¹⁰ This argument ignores the fact that the Commission held that section 251(d)(2)’s “at a minimum” language allowed it “to take Congress’s goals into account” – including the impact of unbundling on broadband facilities – in deciding which network elements must be unbundled.¹¹ Section 271, by contrast, includes no such “balancing” language; rather, the competitive checklist in section 271(c)(2)(B) explicitly specifies the elements that the BOCs must unbundle and expressly prohibits the Commission from “limit[ing] or extend[ing] the terms used in the competitive checklist set forth in subsection (c)(2)(B).”¹²

⁸ *TRO*, 2003 FCC LEXIS at ¶ 653 (emphasis added).

⁹ 47 U.S.C. § 157 nt.

¹⁰ *Verizon Petition* at 8.

¹¹ *TRO*, 2003 FCC LEXIS at ¶ 176. Z-Tel does not agree with the Commission’s reliance on section 706 to limit ILEC unbundling obligations for certain UNEs under section 251. Regardless, it is clear from the plain language of the Act that the Commission cannot use section 706 to limit the BOCs’ obligations under section 271.

¹² 47 U.S.C. § 271(d)(4).

Finally, the D.C. Circuit’s decision in *United States Telecommunications Ass’n v. FCC*,¹³ which Verizon asserts “ma[kes] clear that section 251(d)(2) embodies a congressional policy judgment that ‘unbundling is not an unqualified good,’” is irrelevant here.¹⁴ In *USTA*, the D.C. Circuit rejected the Commission’s “uniform national rule”¹⁵ implementing the “impairment” standard of section 251(d)(2) on the ground that the Supreme Court’s *Iowa Utilities Board* decision requires “a more nuanced concept of impairment” than one “detached from any specific markets or market categories.”¹⁶ The Court also cautioned that impairment analysis under section 251(d)(2) may not be predicated on “cost comparisons . . . devoid of any interest in whether the cost characteristics of an ‘element’ render it at all unsuitable for competitive supply.”¹⁷ But the Court did not construe in any way the unbundling obligations imposed on BOCs by the section 271 checklist, or consider whether the BOCs’ section 271 responsibilities go beyond those imposed on all incumbent local exchange carriers (“ILECs”) under sections 251. Thus, like the *TRO* and section 706, the *USTA* decision presents no warrant for departing from the plain language of the section 271.

In short, the Commission’s decision to eliminate unbundling requirements for certain broadband facilities under section 251 provides no basis for lifting the BOCs’ broadband access obligations under section 271. The Commission should therefore dismiss Verizon’s forbearance petition – which is nothing more than a late-filed Petition for Reconsideration of the

¹³ 290 F.3d 415 (D.C. Cir. 2002) (“*USTA*”).

¹⁴ *Verizon Petition* at 9 (citing *USTA*, 290 F.3d at 429).

¹⁵ *USTA*, 290 F.3d at 422.

¹⁶ *Id.* at 426.

¹⁷ *Id.* at 427.

Commission’s construction of section 271 in the *TRO* – and reaffirm that that provision imposes continuing access obligations on the BOCs.

B. Section 271 Clearly Applies to Broadband.

Conceding (as it must) that section 271 imposes unbundling obligations that are independent of those in section 251,¹⁸ Verizon next argues that “section 271 is properly read to not extend to the broadband elements of the network, and forbearance will remove any doubt on the score.”¹⁹ To the contrary, neither clarification nor forbearance is required, because Verizon’s position is flatly inconsistent with both the text of the Act and the Commission’s prior orders.

The section 271(c)(2)(B) checklist states in no uncertain terms that the BOCs must provide competitors unbundled access to loops, transport and switching facilities.²⁰ Importantly, the text of the Act is technology neutral: it does not make distinctions between facilities used to provide broadband services and those used to provide narrowband services. Instead, section 271(d)(4) states that the Commission may not “limit or extend” the terms used in the competitive checklist, making it impossible for the Commission to adopt the technological distinctions proposed by Verizon.

The Commission, in fact, has consistently interpreted section 271(c)(2)(B)(iv)’s straightforward requirement of unbundled “[l]ocal loop transmission” to mandate unbundling of loops used to provide both narrowband and broadband services. Indeed, the Commission’s very first order granting an application under section 271 contained no fewer than 75 paragraphs

¹⁸ See *Verizon Petition* at 2 (“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.”).

¹⁹ *Verizon Petition* at 15.

²⁰ See 47 U.S.C. § 271(c)(2)(B)(iv).

discussing loop unbundling performance by Bell Atlantic (Verizon’s predecessor in interest), and nearly half of that lengthy discussion concerned loops used by competitors to provide broadband services.²¹ The Commission stated that it defined the “loop” under section 271 as “a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the network interface device at the customer premises.”²² The Commission also expressly indicated that this definition “includes different types of loops, including . . . loops that are conditioned to transmit the digital signals needed to provide services such as IDSN, ADSL, HDSL, and DS1-level signals.”²³ Importantly, the Commission’s interpretation of the term “loop” in section 271 has remained the same since the time of the *Bell Atlantic New York Section 271 Order*, and subsequent section 271 orders only underscore the point.²⁴

Verizon mischaracterizes the D.C. Circuit’s decision in *AT&T Corp. v. FCC*²⁵ in an attempt to limit the scope of its obligation to provide loops under section 271. Citing this decision, Verizon asserts that “Checklist item 4 has never been understood . . . to require a Bell

²¹ See *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*, Memorandum Opinion and Order, 15 FCC Rcd 3953, ¶¶ 268-342 (1999) (“*Bell Atlantic New York Section 271 Order*”).

²² *Id.* at ¶ 268 (quoting *Local Competition First Report and Order*, 11 FCC Rcd at 15691).

²³ *Id.*

²⁴ See, e.g., *Application of Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming*, Memorandum Opinion and Order, 17 FCC Rcd 26303, ¶ 335 (2002) (finding that Qwest’s loop unbundling includes, “. . . as in past section 271 orders, voice grade loops, xDSL-capable loops, and high capacity loops.”); *Joint Application by SBC Communications Inc., et al. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri*, Memorandum Opinion and Order, 16 FCC Rcd 20719, ¶¶ 107-109 (2001) (discussing, in great detail, SBC’s performance with regard to “high capacity loops”).

²⁵ 220 F.3d 607 (D.C. Cir. 2000).

company to provide CLECs with any requested form of ‘transmission’ over every facility in its network that could qualify as a loop.”²⁶ In *AT&T v. FCC*, however, the D.C. Circuit considered whether, in approving Bell Atlantic’s section 271 application for the State of New York, the Commission “reasonably interpreted section 271 to allow assessment of an applicant’s overall *provisioning* of loops, as opposed to mandating pass-fail analysis with respect to DSL-capable loops.”²⁷ In other words, the issue presented to the court was the *level of loop provisioning performance* required for Bell Atlantic to comply with checklist item 4, not the type of loops that Bell Atlantic was required to make available. Indeed, Verizon’s proposed limitation on the scope of checklist item 4 is in direct conflict with the D.C. Circuit’s decision: if Bell Atlantic was not required to offer broadband loops, the court would have had no reason to consider whether the Commission properly evaluated Bell Atlantic’s performance in provisioning broadband loops under section 271(c)(2)(B)(iv).

Similarly, the Commission has never excluded packet-switching from the BOCs’ obligation to provide “[l]ocal switching unbundled from transport, local loop transmission, or other services” under section 271(c)(2)(B)(vi). To the contrary, as far back as the *UNE Remand Order*, the Commission held that “packet switching qualifies as a network element because it includes ‘all features, functions and capabilities . . . sufficient . . . for transmission, routing or other provision of a telecommunications service.’”²⁸ Concededly, in the *UNE Remand Order*, the Commission required the ILECs to unbundle packet-switching under sections 251(c)(3) and

²⁶ *Verizon Petition* at 16.

²⁷ 220 F.3d at 624 (emphasis added).

²⁸ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Notice of Proposed Rulemaking, 15 FCC Rcd 3696, ¶ 304 (1999) (“*UNE Remand Order*”).

251(d)(2) only in very narrow circumstances,²⁹ and this requirement was eliminated altogether in the *TRO*.³⁰ However, as the *TRO* makes clear, section 271 imposes an *independent* access obligation on local switching that extends beyond the requirements of section 251. As such, narrowing – or even eliminating – the obligation of all ILECs to unbundle packet switching under section 251 has no impact whatsoever on the BOCs’ obligation to provide access to local switching (regardless of technology) under the broader requirements of checklist item 6.

Verizon makes the strained argument that the Commission’s prior section 271 orders have already determined that checklist item 6 does not require the BOCs to provide access to packet switching. Specifically, Verizon claims that the Commission’s section 271 orders “reject[] arguments ... that the Bell company applicants have somehow violated checklist item 6 because they have denied access to their packet switching facilities.”³¹ That claim, however, is greatly exaggerated – the Commission has never squarely addressed the question whether checklist item 6 requires the BOCs to provide access to packet switching, either in its section 271 orders or anywhere else. To the extent that the Commission’s section 271 orders touch on unbundled packet switching at all, they solely address the CLECs’ argument that ILECs should provide packet switching at TELRIC-based rates, consistent with the CLECs’ understanding of

²⁹ See *TRO*, 2003 FCC LEXIS 4697 at ¶ 535, n. 1642 (citing *UNE Remand Order* at ¶ 313 and 47 C.F.R. § 51.319(c)(5)) (finding that an ILEC must provide access to unbundled packet switching only where the ILEC has (a) deployed digital loop carrier systems or has otherwise deployed fiber optic facilities in the distribution part of the loop; (b) has no spare copper loops capable of providing the XDSL service the requesting carrier seeks to offer; (c) has not permitted the requesting carrier to collocate its own DSLAM at an appropriate subloop point; and (d) has deployed switching for its own use).

³⁰ See *TRO* at ¶¶ 537-541.

³¹ *Verizon Petition* at 16.

section 251(c)(3) and correspondingly, checklist item 2.³² The *TRO* indicates that the BOCs need not generally unbundle packet switching under section 251(c)(3).³³ At the same time, however, the *TRO* also flatly rejects the BOCs' argument that section 271 imposes no access obligations independent of section 251(c)(3).³⁴ Therefore, Verizon's claim that the Commission's prior section 271 orders find that packet switching need not be unbundled at TELRIC-based rates (under checklist item 2) also means that access to packet switching need not be provided under checklist item 6 amounts to a mere restatement of the BOCs' previously rejected argument that section 271's access obligations are redundant with section 251.

Verizon also attempts to justify its request for forbearance on the ground that the Commission simply forgot to carve-out broadband facilities from its discussion of section 271 in the *TRO*: “[A]lthough the *Triennial Review Order* discusses the relationship between sections 251 and 271 at some length ... 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....”³⁵ Clearly, however, if the Commission had meant to exclude broadband from the BOCs' continuing access obligations under section 271, it would have

³² Checklist item 2 requires “[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)” (TRIC pricing). Clearly, to the extent that packet switching were offered as a section 251(c)(3) UNE, the CLEC would be entitled obtain such switching at the TELRIC-based rates mandated by section 252(d)(1). The *UNE Remand Order* made clear, however, that network elements provided under section 271 would be subject only to the pricing constraints imposed by sections 201 and 202 of the Act. *See UNE Remand Order*, 15 FCC Rcd 3905 at ¶ 470. Thus, with respect to packet-switching, the CLECs reasonably focused their opposition to BOC section 271 applications on whether the BOCs were obliged to provide packet switching under checklist item 2 – because the *UNE Remand Order* assured CLECs access to packet switching under checklist item 6, albeit at a potentially discriminatory price.

³³ *See TRO*, 2003 FCC LEXIS 4697 at ¶¶ 537-541.

³⁴ *See supra* at 3-4.

³⁵ *Verizon Petition* at 7.

explicitly said so in the *TRO*, or it would have clarified this issue in its recently released *Errata*. Tellingly, the Commission did neither. In fact, the Commission’s finding in the *TRO* that “the plain language and structure of section 271(c)(2)(B) establish that BOCs have an independent and ongoing” obligation to unbundle loops and local switching is perfectly clear: it plainly means that the BOCs must unbundle “loops” and “switching” as those term have *always* been used in the section 271 context, including facilities used to provide broadband as well as narrowband services.³⁶ As such, there is no “present uncertainty” about the status of broadband access under section 271 that could be addressed by granting Verizon’s forbearance request.³⁷

II. VERIZON’S PETITION FAILS TO FULFILL THE REQUIREMENTS OF SECTION 10(D).

Verizon (yet again) asserts that it has satisfied section 10(d), which only allows the Commission to forbear from the requirements of section 271 where “those requirements have been fully implemented,”³⁸ because “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.”³⁹ Z-Tel⁴⁰ and other CLECs⁴¹ have previously

³⁶ See *TRO*, 2003 FCC LEXIS 4697 at ¶ 654.

³⁷ *Verizon Petition* at 2.

³⁸ 47 U.S.C. § 160(d).

³⁹ *Verizon Petition* at 3. Z-Tel is unsure how Verizon arrived at the conclusion that the Commission has granted section 271 applications for 49 states, given that only 48 states are even eligible for section 271 relief: Alaska and Hawaii are not served by BOCs, and BOCs are the only carriers that are subject to the requirements of section 271. Applications in 47 states and the District of Columbia have been approved.

⁴⁰ See *Joint Petition for Forbearance From the Current Pricing Rules for the Unbundled Network Element Platform*, Opposition of Z-Tel Communications, Inc., WC Docket No. 03-189 at 11-13 (filed Sept. 22, 2003).

⁴¹ See, e.g., *Petition for Forbearance From the Current Pricing Rules for the Unbundled Network Element Platform*, Opposition of AT&T Corp., WC Docket 03-157 at 24-29 (filed Aug. 18, 2002).

explained that Verizon’s interpretation of the Act – which would find that the “fully implemented” requirement in section 10(d) is fulfilled when a BOC satisfies the competitive checklist in section 271(c)(2)(B) – is without merit. In reality, the Commission has *never* determined that section 271 is “fully implemented,” and market realities demonstrate that this requirement has not yet been met. The Commission therefore has no authority to grant the relief sought by Verizon’s new forbearance petition.

As a threshold matter, Verizon asserts that the phrase “fully implemented” must have the same meaning in section 10(d) and section 271(d)(3)(A)(i) because “a phrase is presumed to mean the same thing when it appears in two different provisions of a statute.”⁴² This general approach to statutory construction is far from absolute, however, particularly given that courts interpreting the Act have arrived at the opposition conclusion. *CTIA v. FCC* is one such example.⁴³ In *CTIA*, the court interpreted the term “necessary” in section 10(a) in a manner that was different from prior interpretations of “necessary” in sections 251(c)(6) and 251(d)(2).⁴⁴ Importantly, the court found that different interpretations of the same phrase in the same statute was required in order to avoid “an absurd result.”⁴⁵

In any event, a decision that a BOC had “fully implemented the competitive checklist” pursuant to section 271(d)(3)(A)(i) is plainly different than concluding that the BOC has “fully implemented” section 271 in its entirety, as required by section 10(d). When the Commission finds that a BOC has satisfied the section 271 competitive checklist, it merely determines that the market is sufficiently open to allow competition to take root. Critically, it does not, and cannot,

⁴² *Verizon Petition* at 3-4.

⁴³ *See* 330 F.3d 502 (D.C. Cir. 2003).

⁴⁴ *See id.* at 510-511.

⁴⁵ *Id.* at 511.

make a predictive judgment that lasting competition will develop and thrive – which is the purpose of section 271.

Section 271(d)(6) – which requires continued compliance with the checklist even after it has been “fully implemented” – makes absolutely clear that compliance with the checklist is not the same as compliance with section 271 in its entirety. Section 271(d)(6) provides that the BOCs must continue to take the actions that opened their markets to competition once those markets are deemed sufficiently open to permit BOC entry into the long-distance market. Thus, Verizon is wrong when it argues that section 271 as a whole has been “fully implemented” once the competitive checklist has been “fully implemented.” While the section 271 competitive checklist is an important part of the provisions in section 271, it is merely a part – and implementing a part is not the same as implementing the whole. Congress plainly meant compliance with the checklist to be an ongoing obligation under section 271 in order to permit competition not merely to take root, but to develop and thrive.

Indeed, Verizon’s argument defies common sense. As Z-Tel and others explained to the Commission in the *Triennial Review* proceeding, when Verizon gained entry into the long-distance market under section 271, it usually relied extensively on competition from new entrants using elements provided under the competitive checklist in section 271(c)(2)(B).⁴⁶ If Verizon were able to eliminate CLEC access to switching and loops immediately upon a Commission finding of checklist compliance, Verizon would be able to instantly wipe out the local

⁴⁶ See *Review of Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions in the Local Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Z-Tel Reply Comments, CC Docket Nos. 01-338, 96-98, 98-147 (filed July 17, 2002). See also Letter from Jonathan D. Lee, CompTel, to Marlene H. Dortch, Federal Communications Commission, CC Docket Nos. 01-338, 96-98, 98-147 (filed Dec. 12, 2002).

competition on which its entry into the long-distance market was premised. Such a “bait-and-switch” approach to competition would be an absurd construction of the statute.

Moreover, the very purpose of section 10(d) is to help ensure that markets remain permanently open. That is why Congress limited the Commission’s ability to consider requests for forbearance under sections 251(c) and 271 – the most critical market-opening of the Act – until they were “fully implemented.” Any reading of the statute that calls for forbearance once a section 271 petition has been granted is obviously faulty.

Because Verizon’s “fully implemented” argument rests entirely on the plainly erroneous contentions that section 10(d) is not implicated and, in any event, requires little more than a showing that a section 271 application has been approved, we will not repeat our arguments that forbearance from the requirements of sections 251(c) and 271 is not warranted in a particular geographic market until a vibrant wholesale market has been established.⁴⁷ We do, however, intend to make that showing when the Commission opens its announced proceeding to consider the meaning of “fully implemented” in section 10(d).⁴⁸

III. VERIZON’S PETITION FAILS TO SATISFY THE REQUIREMENTS OF SECTIONS 10(A) AND 10(B).

Section 10(a) requires a showing that, in specific circumstances, a provision: (1) is not necessary to ensure that relevant charges and practices of carriers “are just and reasonable and not unjustly and unreasonably discriminatory,” (2) is not needed “for the protection of consumers,” and (3) can be forborne in a way that is otherwise “consistent with the public

⁴⁷ See *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, Opposition of Z-Tel Communications Inc. to Petition for Forbearance of Verizon, CC Docket No. 01-338 at 18-22 (filed Sept. 3, 2002).

⁴⁸ See *Deletion of Agenda Item from September 10 Open Meeting*, Public Notice (rel. Sept. 9, 2003) (deleting a Notice of Proposed Rulemaking entitled “Section 10(d) Limitation on Forbearance from Sections 251(c) and 271”).

interest.”⁴⁹ Section 10(b) allows the Commission to forbear from enforcing a provision or regulation only “[i]f the Commission determines that such forbearance will promote competition among providers of telecommunications services”⁵⁰ In its new forbearance petition, Verizon provides essentially no evidence that these factors would be satisfied if the Commission were to eliminate Verizon’s ongoing obligation to provide access to broadband facilities under section 271. To the contrary, having evaded unbundling requirements under sections 251(c)(3) and 251(d)(2), Verizon now asks the Commission simply to foreclose access to its network altogether, an outcome that would harm competitors and consumers alike.

A. Verizon Has Failed to Demonstrate that Providing Access under Section 271 Will Delay Broadband Deployment.

Verizon asserts that its forbearance request meets the requirements of sections 10(a) and 10(b), because compelling the BOCs to provide broadband access under section 271 undermines their incentives to deploy next-generation networks.⁵¹ Importantly, the Commission rejected this argument in the *TRO* when it found that notwithstanding its new limitations on unbundling under sections 251/252, ILECs (including, of course, the BOCs) must continue to make wholesale broadband services available at just, reasonable, and non-discriminatory rates, terms, and conditions:

We expect that incumbent LECs will develop wholesale service offerings for access to their fiber feeder to ensure that competitive LECs have access to copper subloops. Of course, the terms and conditions of such access would be subject to sections 201 and 202 of the Act.⁵²

⁴⁹ 47 U.S.C. § 160(a).

⁵⁰ 47 U.S.C. § 160(b).

⁵¹ See *Verizon Petition* at 8.

⁵² *TRO*, 2003 FCC LEXIS 4697 at ¶ 253.

Thus, it is quite clear that the Commission has found that limiting broadband unbundling under sections 251/252, but yet continuing to require such unbundling under section 271 at just and reasonable rates, will not diminish broadband deployment incentives for both incumbents and new entrants. Verizon's arguments to the contrary must be rejected.

Indeed, it is important to remember that in the *Triennial Review* proceeding, Verizon actually represented to the Commission that it would willingly negotiate access to “wholesale broadband service” across its fiber facilities because “such arrangements would make commercial sense.”⁵³ Verizon, apparently, has had a change of heart. Now, Verizon asserts that offering competitors *any* form of access to their broadband facilities would be unduly burdensome, because it would require Verizon to redesign certain network facilities,⁵⁴ develop and implement new systems,⁵⁵ comply with “evolv[ing]” regulatory obligations,⁵⁶ and respond to “intrusive regulatory involvement in the pricing of these elements”⁵⁷ in order to meet its ongoing broadband access obligations under section 271. These claims do nothing more than describe the BOCs' fundamental obligations under section 271. Thus, Verizon's complaints about the “burden” of maintaining open access represent an attempt to renege on the basic bargain that Verizon and the other BOCs struck in the Telecommunications Act of 1996 (the “1996 Act”).

Verizon will be able to recover its costs to undertake these activities – to the extent that they are even incurred – subject only to limitations of sections 201 and 202. Likewise, the terms and conditions on which Verizon offers broadband access will be limited solely by these

⁵³ *Id.* at ¶ 253, n.755 (citing Verizon Comments at 82).

⁵⁴ *See Verizon Petition* at 9-10.

⁵⁵ *See id.* at 10-11.

⁵⁶ *Id.* at 11.

⁵⁷ *Id.* at 12.

provisions of the Act. And Verizon already has in place a significant wholesale organization – including people, processes, and OSS – that provides UNEs and resale services to its competitors; any revisions to accommodate Verizon’s broadband access obligations under section 271 will constitute only an incremental change. Moreover, it is significantly less burdensome to *design* a new architecture to facilitate multi-carrier access than it is to provide such access by retrofitting an older system that was never intended to accommodate multiple carriers. It is therefore hard to comprehend how Verizon’s ongoing obligation to provide broadband access would dampen or delay Verizon’s broadband deployment incentives, especially given that the *TRO* freed Verizon from the obligation to provide broadband access at TELRIC-based rates.

The possibility that state and federal regulators *might* impose unbundling or pricing obligations on Verizon’s broadband facilities with which Verizon disagrees provides no basis to eliminate Verizon’s ongoing duty to provide broadband access under section 271. The Act, like most statutes, is not self-executing, and requires interpretation and implementation by the FCC and state commissions. The Act, by definition, creates a degree of regulatory uncertainty, but it is clearly of the variety that Congress intended and is certainly not limited to provisions of the Act applicable to broadband.⁵⁸ Indeed, there is far less uncertainty surrounding checklist obligations (as opposed to other 251(c)(3) unbundling obligations) because Congress was abundantly clear in checklist items 4, 5, 6 and 10 that it wanted Bells to provide wholesale access

⁵⁸ Indeed, despite the uncertainty created by the fact that the Commission has yet to implement final, unchallenged rules implementing section 251(c) of the Act, there was an estimated \$267 million in additional infrastructure investment from 1996 through 2001, or an average annual increase of 22.3 percent per year. *See The Truth About Telecommunications Investment*, Phoenix Center Policy Bulletin No. 4 at 3 (June 24, 2003) (“*Phoenix Center Investment Report*”) available at <http://www.phoenix-center.org/policyb.html>.

to those network elements if a Bell wanted to provide interLATA services. That said, regulatory uncertainty – standing alone – provides no basis for forbearance, especially since it was *Verizon's* decision to accept ongoing open access responsibilities when it decided to reap the benefits of section 271 relief. Indeed, if the Commission were to accept Verizon's absurd argument, the Commission could forbear under section 10 from any provision in the Act that required interpretation by the FCC or a state commission, either of which could potentially subject a party to a regulatory obligation to which the party objects. Verizon's argument is also blatantly hypocritical: it is *Verizon*, not the FCC or state commissions, that is creating unnecessary regulatory uncertainty with its relentless attacks on the Act and the Commission's orders through unsupported requests for forbearance under section 10.⁵⁹ Verizon's barren section 10 petitions, including the instant filing, waste scare industry and Commission resources – but then, that is the point.

Moreover, the fact that some parties might contest the price or the terms on which Verizon provides broadband access under section 271 does not mean that those parties are “try[ing] to game the regulatory process.”⁶⁰ Verizon has no basis on which to assert such a motive. To the contrary, CLECs will object to Verizon's price or terms if they are not compliant with sections 201 and 202. If anything, Verizon's new forbearance petition makes Verizon's intentions clear: Verizon need only worry about FCC or state commission review of the price or

⁵⁹ See *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, Petition for Forbearance of Verizon, CC Docket No. 01-338 (filed July 29, 2002); *Petition of Verizon for Forbearance From The Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203 of The Commission's Rules*, Petition for Forbearance, CC Docket No. 96-149 (filed Aug. 5, 2002); *Petition for Forbearance From the Current Pricing Rules for the Unbundled Network Element Platform*, Petition for Expedited Forbearance of the Verizon Telephone Companies, WC Docket No. 03-157 (filed July 1, 2003).

⁶⁰ *Verizon Petition* at 12.

terms on which it offers broadband access under section 271 if the price or terms are not compliant with sections 201 and 202. Rather than providing support for its forbearance request, Verizon has instead demonstrated the need for ongoing FCC and state commission oversight.

Verizon has also failed to provide any evidence that the ongoing access obligations imposed by section 271 will have a negative impact on broadband deployment by either the BOCs or new entrants; in fact, actual empirical evidence shows the contrary to be the case. As Z-Tel previously explained to the Commission, the market-opening requirements of the 1996 Act, including the availability of network elements at cost-based rates under sections 251 and 252, are estimated to have generated \$267 million in *additional* infrastructure investment from 1996 through 2001, an average annual increase of 22.3 percent per year.⁶¹ With regard to the UNE platform in particular, a recent study by the Phoenix Center shows that the availability of the UNE platform at TELRIC-based rates has a positive impact on investment, with each UNE-P line increasing BOC net investment by \$759 per year.⁶² By the end of 2002, this generated an estimated increase of \$81.1 billion of additional investment.⁶³ More importantly, however, it should be noted that Verizon – in attempting to refute the Phoenix Center’s findings that the unbundling requirements in sections 251/252 *increased* overall infrastructure investment since

⁶¹ See *Petition for Forbearance From the Current Pricing Rules for the Unbundled Network Element Platform*, Opposition of Z-Tel Communications, Inc., WC Docket No. 03-157 at 39 (filed Aug. 18, 2003) (citing *Phoenix Center Investment Report* at 3).

⁶² See *Competition and Bell Company Investment in Telecommunications Plant: The Effects of UNE-P*, Phoenix Center Policy Bulletin No. 5 at 13 (July 9, 2003) available at <http://www.phoenix-center.org/policyb.html>.

⁶³ See *id.*

passage of the 1996 Act – actually “confirm[ed] that UNE-P competition increases Bell Company investment in local telecommunications plant.”⁶⁴

Accordingly, Z-Tel urges the Commission to reject Verizon’s same tired story – which Verizon now extends to its broadband access obligations under section 271 – that unbundling requirements deter infrastructure investment. As shown by the empirical evidence discussed above, there is absolutely no reason to expect that imposing section 271 access obligations on the BOCs will deter their investment in broadband facilities. This is particularly true given that the BOCs obligations under section 271 are significantly less rigorous than those which are imposed by section 251. Section 251(c)(3), for example, requires that network elements be made available at any technically feasible point and at cost-based rates established under section 252(d)(1). Section 271(c)(2)(B), by contrast, only applies to a more limited set of network elements, and “the applicable prices, terms and conditions for [those] element[s] are determined in accordance with section 201(b) and 202(a).”⁶⁵ For these reasons, Verizon’s erroneous argument that any broadband access obligations under section 271 will deter broadband deployment provides no reasonable basis on which to grant Verizon’s forbearance request.

B. Verizon’s Forbearance Request Would Actually Hinder Broadband Deployment and Stifle the Growth of Facilities-Based Competition.

In fact, if the Commission were to grant Verizon’s forbearance request, it would harm, rather than help, the deployment of broadband services and the transition to facilities-based competition, in direct conflict with sections 10(a) and 10(b), as well as section 706. New soft switches, for example, cannot be used optimally without access to packet transmission

⁶⁴ See *UNE-P Drives Bell Investment: A Synthesis Model*, Phoenix Center Policy Bulletin No. 6 at 1 (Sept. 17, 2003) available at <http://www.phoenix-center.org/policyb.html>.

⁶⁵ *UNE Remand Order*, 15 FCC Rcd 3905 at ¶ 470.

capability. In a typical configuration, an ILEC would offer its own customers such capability by deploying an integrated access device – which can transmit, accept, and manipulate data packets – at the customer premise. This packetized information is then transmitted through fiber-fed remote terminals that terminate into a packet switch in an ILEC central office. Importantly, under this network configuration, a CLEC that wants to provide service to an end user may efficiently obtain loop access by leasing a port on the ILEC’s packet switch, to which the CLEC connects a gateway that is collocated in the central office. The gateway is then connected via a DS1 or DS3 to the CLEC’s own soft switch.

For hybrid loops, however, the Commission has now eliminated most of the ILECs’ section 251/252 broadband unbundling obligations in the *TRO*.⁶⁶ But limiting CLECs to the equivalent of DSO capacity using time division multiplexing technology imposes tremendous inefficiencies on both the ILEC and the CLEC.⁶⁷ Rather than simply leasing the CLEC a port on its central office packet switch, the ILEC must take the packetized data stream from its packet switch and convert it to a pulse code modulated (“PCM”) path, which is then terminated on a traditional ILEC central office distribution frame. The CLEC must buy a traditional cross-connect from the frame to its collocated equipment that would convert the PCM transmission back into packets. The sub-optimality of this configuration is obvious and creates a barrier to entry for the CLEC, because it has to convert the signal from packet to PCM and back again, while its ILEC competitor does not. Moreover, the process introduces additional points of potential network failure at additional cost and substantially degrades the capability of the CLEC’s soft switch, ultimately limiting the service choices available to the end user.

⁶⁶ See *TRO*, 2003 FCC LEXIS 4697 at ¶¶ 285-295.

⁶⁷ See *id.* at ¶ 296, 47 C.F.R. 51.319(a)(2)(iii).

This barrier to entry and potential service degradation can have a sharp impact upon CLEC facilities deployment. Importantly, if a CLEC were provided access to ILEC packet switch ports, there would be no hot cut needed to provision a customer to a CLEC soft switch. In addition, efficient access to packet streams could minimize operational and economic impairment related to interoffice facilities, because it would avoid the need to collocate a remote terminal.⁶⁸ Wholesale access to a packetized bit stream would alleviate many of these impairments. Maintaining such wholesale access – which clearly is required by section 271 of the Act – would not dampen the BOCs’ incentives to provide broadband capability, because CLECs only require access to the limited packetized transmission path, not necessarily the full features and functions of the BOCs’ retail broadband offering.⁶⁹ On the other hand, foreclosing CLEC wholesale access altogether would hinder the transition to facilities-based competition in the short-term and foreclose broadband competition in the long-term. CLECs clearly cannot recreate the ILECs’ loop plant, transport and interoffice switch mesh overnight. Thus, by dramatically limiting the number of loops that a CLEC could potentially serve today, Verizon’s forbearance request would make it impossible for a CLEC to ever achieve the minimum viable

⁶⁸ This, of course, assumes that collocation is possible at the remote terminal. This is not possible in most cases. For example, under SBC’s Project Pronto architecture, copper subloops are hardwired into the DSLAM at the remote terminal, making collocation of a CLEC DSLAM impossible. Indeed, this is why it is critical that CLECs retain access under section 271 to packet transmission capabilities.

⁶⁹ There can be little argument that the CLEC would merely “resell” the BOC’s retail broadband service under these circumstances. Indeed, this limited packetized transmission path would be of little value to the CLEC if it did not deploy its own packet switch, without which it would not be able to develop and market its own innovative retail service offerings, in competition with the BOC. Z-Tel therefore recognizes, but does not support, the Commission’s decision to eliminate the ILECs’ obligation to unbundled the packetized portion of hybrid loops (*TRO*, 2003 FCC LEXIS 4697 at ¶¶ 288-294) and packet switching (*Id.* at ¶¶ 437-541) under sections 251/252. As discussed herein, however, this does not eliminate the BOCs’ obligation to provide these elements under section 271.

scale required to deploy its own facilities for voice and broadband services. The net result is profoundly anticompetitive, and does not satisfy the requirements of section 10(a) and 10(b).

In conclusion, requiring Verizon and its fellow BOCs to provide access to their broadband facilities under section 271(c)(2)(B) is necessary to protect customers (section 10(a)(2)) and the public interest (section 10(a)(3)), as well as promote competition (section 10(b)). Affirming this obligation will help, not harm, the Commission's broadband deployment goals, because empirical evidence shows that unbundling actually promotes infrastructure deployment by incumbents and new entrants alike. Moreover, such access obligations will impose no greater regulatory burden on the BOCs' than the BOCs have already agreed is appropriate in the *TRO*.

CONCLUSION

For the reasons set forth above, the Commission should reject Verizon's petition for forbearance discussed in this Opposition.

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