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

In the Matter of	)	
Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. 160(c) From Application of Sections 251(c)(3), (4), and (6) in New-Build, Multi-Premises Developments	))))	WC Docket No. 03-220

REPLY

BellSouth Telecommunications, Inc. ("BellSouth") hereby responds to the Oppositions to its above-captioned Petition for Forbearance. In the Petition, BellSouth asked the Commission to forbear from applying the unbundling, discounted resale, and collocation provisions of Section 251(c) to facilities used exclusively to serve New-Build, Multi-Premise Developments ("MPDs") and to the services provided over such facilities to users located in such developments. As BellSouth explained, competition to serve MPDs is intense, and ILECs enjoy no advantage in constructing or operating the networks used to serve those locations. To the contrary, by virtue of being saddled with burdensome ILEC regulations, BellSouth is at a significant disadvantage compared to other competitors, since BellSouth bears additional costs and must permit sharing of its network at uneconomic rates.

Numerous CLECs oppose BellSouth's Petition, making the nonsensical argument that ILEC regulation does not diminish BellSouth's competitiveness in the MPD market as well as asserting that Section 10(d) of the Act bars forbearance from Section 251 until BellSouth is subject to some level of robust competition outside of MPDs before relief could be granted for bidding for network installation within MPDs. Because the CLECs provide no support for their factual claims – and the deleterious effects of unnecessary regulation are self-evident – BellSouth will not further address them here. Before explaining why the CLECs' reading of

Section 10(d) lacks merit, however, it is worth noting that some of the CLECs opposing relief for BellSouth themselves compete aggressively (and quite successfully) in serving MPDs and thus would be advantaged if BellSouth remained shackled by regulations that undermine its competitiveness. Many of the other opponents, of course, already have made it plain that they have no intention of building their own facilities and thus will do anything to preserve heavily discounted access to Bellsouth's network.

Regardless of their motivations, the CLECs' reading of Section 10(d) is untenable. In its Petition, BellSouth explained that Section 10(d) of the Act – which authorizes the Commission to forbear from Section 251(c) once the requirements of that subsection have been "fully implemented" – does not limit the Commission's ability to grant the relief from collocation, discounted resale, and unbundling requirements in MPDs. In particular, BellSouth pointed out that "[t]he Commission has previously determined that BellSouth has fully implemented the requirements of section 251, 252 and 271 in its entire nine (9) state service territory," and that "[e]ach of the 9 relevant state commissions has implemented the statutes and Commission regulations in state arbitrations and other proceedings." Petition at 7-8.

The CLECs argue instead that Section 251(c) will not have been "fully implemented" until there are "ubiquitously available, cost-based wholesale alternatives" to BellSouth's network. AT&T at 8; *see also* Allegiance Telecom at 6, 8-9; MCI at 14-15; Cbeyond *et al*. at 2-3. The best reading of the Act, however, is that "fully implemented" should be read consistently with the use of the same term in Section 271(d): a provision of the Act has been "fully implemented" once the Commission determines that a BOC has met the criteria for grant of its Section 271 applications. This is especially true given the breadth and depth of the Section 271 review process.[1] Because BellSouth now has obtained Section 271 authority throughout its region, it must be considered to have "fully implemented" Section 251's collocation requirements (incorporated in checklist item 1), unbundling requirements (incorporated in checklist items 2, 4, 5, 6, and 10), and discounted resale requirements (incorporated in checklist item 14). The CLECs make three counter-arguments, none of which withstands scrutiny.

First, they claim that Section 10(d) establishes a jurisdictional bar to entertaining forbearance petitions until competition has reached some particular level. Section 10(d) includes no such language, and it makes no sense to read a particular competitiveness criterion into that provision. The core forbearance inquiry under Section 10(a) already focuses on whether the need for regulation has been obviated by market forces, and Section 10(b) already instructs the Commission to take competition into account in determining whether forbearance would serve the public interest. Consequently, the CLECs' contention that Section 10(d) establishes some kind of jurisdictional bar or super-competitive threshold for relief where Sections 251(c) and 271 are concerned is insupportable. Accepting BellSouth's interpretation would simply permit the Commission to forbear from the provisions of 251(c) in a state as soon as a 271 application is granted, even if competition has not taken hold. *See, e.g.*, Allegiance at 7. It in no way compels forbearance.

Second, they assert that the Commission, in the recent *Verizon OI&M Forbearance Order*, already has rejected the argument that grant of a Section 271 application establishes that

[1] As part of the 271 process, the Commission, with the assistance of state commissions and the Department of Justice, conducted a searching review of every aspect of the applicant's implementation of Section 251. That review included interconnection agreements and policy, TELRIC pricing, OSS systems and change management, performance measurement systems, and careful study of months of performance data. The Commission also reviewed the results of extremely comprehensive and detailed third-party testing of systems and processes and audits of performance measurement systems and results. In addition, the Commission imposed requirements that went beyond the checklist to further assure that Section 251 was fully implemented, including a requirement that automatic performance penalty plans be in place.

Sections 271 and 251 have been fully implemented. AT&T at 6-7. That claim grossly overstates the Commission's holding. The Commission only decided that the Section 272 obligations incorporated into Section 271 are not fully implemented until three years after grant of an application, based solely on language in Section 272(f) of the Act. Indeed, the Commission expressly noted that nothing in its decision was intended to determine whether the 271 checklist items could be deemed fully implemented upon grant of an application, and it certainly said nothing about Section 251. *See Petition of Verizon for Forbea5rance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.202(a)(2) of the Commission's Rules*, CC Docket No. 96-149, FCC 03-271 (rel. Nov. 4, 2003), ¶ 6 ("Our analysis here applies only to whether section 271 is 'fully implemented' with respect to the cross-referenced requirements of section 272, and does not address whether any other part of section 271, such as the section 271(c) competitive checklist, is 'fully implemented.'").

Third, CLECs contend that the post-grant enforcement provisions of Section 271(d)(6) demonstrate that the checklist items are to remain in existence effectively in perpetuity, preventing the Commission from granting forbearance. *See, e.g.,* AT&T at 8, Cbeyond *et al.* at 3-4. Such a reading cannot be reconciled with Section 10(d), which plainly contemplates that the Commission can forbear from that Section 271, as well as Section 251, once the requirements of those provisions have been "fully implemented." And the Commission, in any event, already effectively has rejected this argument in holding that services "unbundled" only under Section 271 need not be priced at TELRIC rates. *See Triennial Review Order*, ¶¶ 664-667**.**

Confirming that BellSouth's interpretation of "fully implemented" must control, the CLECs point to nothing in the language or legislative history of the Act that even remotely supports their proposed interpretation – that Congress intended "fully implemented" to be equated with a particular market share loss or a finding of non-dominance. Congress, of course, could have explicitly tied eligibility for forbearance to either a particular loss of market share or a finding of non-dominance if it had wished to do so. After all, other sections of the Act refer specifically to market share thresholds, strongly implying that no market share test should be read into Section 10(d). In Section 623, for example, Congress exempted cable rates from regulation where the cable system is subject to "effective competition," which it defined as including, *inter alia*, competition by two unaffiliated multi-channel video programming distributors where the number of households subscribing to an alternative distributor exceeds 15 percent of the households in the franchise area, or *any* provision of multi-channel video programming distribution by a local exchange carrier or a third party using a local exchange carriers' network, other than direct-to-home satellite services. 47 U.S.C. §§ 623(a)(2), (l)(1)(B) & (D). Likewise, Congress must have been well aware of the Commission's competitive carrier framework (including the non-dominance classification), which pre-dated the Act by more than fifteen years, yet it gave no indication that "fully implemented" should be informed by the Commission's non-dominance analysis.

Finally, BellSouth's requested relief would be warranted here even under the CLECs' unrealistic standard. As BellSouth has documented, there is no basis for finding that ILECs have any advantage by virtue of their legacy networks in seeking to serve MPDs – as is borne out by the fact that there are already more than 100 locations throughout BellSouth's region where cable companies or other facilities-based CLECs have been selected by a developer to be the preferred telecommunications provider.

Rather, as BellSouth explained, and as Qwest, SBC, and Verizon confirm, CLECs and ILECs are on an equal footing in seeking to serve such developments; both must negotiate with the developers, both must obtain rights-of-way, both must deploy new facilities, and both must persuade a new base of customers to buy their services. Petition at 4; SBC at 2-4; Verizon at 2-4; Qwest at 5-7. The MPD context, therefore, is akin to the greenfield FTTP situation addressed in the *Triennial Review Order* (¶ 275), where the Commission correctly found that all carriers face similar deployment challenges and enjoy similar revenue opportunities. Indeed, as in the FTTP context, there is every reason to believe that CLECs have cost advantages over ILECs by virtue of their lower labor rates. *Id.* n. 808. Under these circumstances, there is no legitimate argument that BellSouth (or any other carrier) should be treated as an "ILEC" subject to Section 251(c) obligations.[2] Qwest at 4-5, *citing* 47 U.S.C. § 251(h)(1) (defining "incumbent local exchange carrier"). Accordingly, Section 10(d) does not preclude the Commission from granting the relief sought by BellSouth.

BellSouth's Petition promptly should be granted.

Respectfully submitted,

BELLSOUTH

By: /s/ Jonathan B. Banks
Jonathan B. Banks
L. Barbee Ponder IV
Suite 900
1133 21st Street, N.W.
Washington, D.C. 20036-3351

(202) 463-4182

Its Attorneys

November 25, 2003

[2] In fact, as Qwest notes, a careful reading of the Act demonstrates that ILEC legal status does not apply in such areas in the first instance because, by definition, they were not served on the date of enactment of the 1996 Act.

CERTIFICATE OF SERVICE

I, Robin Walker, hereby certify that on this 25th day of November, 2003, I caused copies of the foregoing Reply of BellSouth to be sent via first-class mail to:

Kimberly A. Scardino
Dennis W. Guard
Karen M. Johnson
MCI
1133 19th Street, N.W.
Washington, D.C. 20036

Ruth Milkman
A. Renée Callahan
Richard D. Mallen
Lawler, Metzger & Milkman, LLC
2001 K Street, N.W.
Suite 802
Washington, D.C. 20006

Jason Oxman
Praveen Goyal
Covad Communications
600 14th St., N.W. Suite 750
Washington, D.C. 20005

Teresa Gaugler
Association for Local
Telecommunications Services
888 17th Street, N.W., Suite 1200
Washington, D.C. 20006

Julia O. Strow
Cbeyond Communications
320 Interstate North Parkway, SE
Suite 300
Atlanta, GA 30339

Andrew D. Lipman
Richard M. Rindler
Patrick J. Donovan
Harisha J. Bastiampillai
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W.
Washington, D.C. 20007

Richard Metzger
Focal Communications Corporation
7799 Leesburg Pike
850 North
Falls Church, VA 22043

William Haas
McLeodUSA Telecommunications, Inc.
6400 C Street, S.W.
P.O. Box 3177
Cedar Rapids, IA 52406

David L. Lawson
Paul J. Zidlicky
Joseph R. Palmore
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005

Leonard J. Cali
Lawrence J. Lafaro
Stephen C. Garavito
AT&T Corp.
One AT&T Way
Bedminster, NJ 07921

Michael B. Adams, Jr.
Robert B. McKenna
Qwest Communications Int'l. Inc.
607 14th Street, N.W.
Suite 950
Washington, D.C. 20005

Matthew C. Ames
Miller & Van Eaton, P.L.L.C.
1155 Connecticut Ave., N.W., Suite 100
Washington, D.C. 20036-4306

Roger Platt
Vice President and Counsel
The Real Estate Roundtable
1420 New York Avenue, N.W.
Suite 1100
Washington, D.C. 20005

Reba Raffaelli
National Association of Industrial
& Office Properties
1730 Rhode Island Avenue, N.W.
Suite 510
Washington, D.C. 20036

Tony Edwards
Robert Cohen
National Association of Real Estate
Investment Trusts
1875 Eye Street, N.W., Suite 600
Washington, D.C. 20006

Thomas Jones
Jonathan A. Friedman
Willkie Farr & Gallagher
1875 K Street, N.W.
Washington, D.C. 20006

Joseph M. Sandri, Jr.
Lynne Hewitt Engledow
Winstar Communications, LLC
1850 M Street, N.W.
Suite 300
Washington, D.C. 20036

Michael E. Glover
Edward H. Shakin
Kathleen M. Grillo
Verizon
1515 N. Courthouse Rd.
Suite 500
Arlington, VA 22201

* via email

Jim Lamoureux
Gary Phillips
Paul K. Mancini
SBC Communications, Inc.
1401 I Street, N.W., Suite 400
Washington, D.C. 20005

*Janice Myles
jnice.myles@fcc.gov

*Qualex International
qualexint@aol.com

/s/ Robin Walker
Robin Walker