

ATTACHMENT 4

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)

Petition for Forbearance of the)
Verizon Telephone Companies)
Pursuant to 47 U.S.C. Section 160(c))

CC Docket No. 01-338

**SPRINT CORPORATION'S
REPLY TO COMMENTS ON
PETITION FOR FORBEARANCE**

**John E. Benedict
H. Richard Juhnke
Jay C. Keithley
401 Ninth Street, NW, Suite 400
Washington, DC 20004
(202) 585-1910**

September 18, 2002

CONTENTS

I.	INTRODUCTION AND SUMMARY	1
II.	THE PETITION SHOULD BE DENIED AS PREMATURE	2
III.	THE PETITION IS BASED ON A FUNDAMENTAL MISINTERPRETATION OF SECTION 271	3
	A. Section 271 Requires BOC Unbundling of Listed Elements, Independent of Section 251 Requirements	3
	B. The Checklist Items Are an Ongoing Requirement for BOCs.....	5
	C. Section 10(d) Prohibits Granting Verizon's Petition.....	7
	D. The Petition Fails to Meet Other Section 10 Requirements.....	9
IV.	COST-BASED PRICING SHOULD APPLY TO SECTION 271 CHECKLIST ELEMENTS.....	12
V.	CONCLUSION.....	13

that the checklist requirements should remain in place until competition in BOC markets is solidly established.

Nine parties commented on the Petition. AT&T, Covad, PACE Coalition, PacWest, Sprint, WorldCom, and Z-Tel — representing CLEC, data LEC, ILEC, and long distance perspectives — all agree that the Petition must be denied. Only SBC and USTA (the BOCs' industry association) bothered to offer any support for Verizon. They submitted cursory statements echoing Verizon's assertions but provided no evidence to support the Petition. The Commission should deny the Petition outright.

II. The Petition Should Be Denied as Premature.

All parties except SBC and USTA agree that the Petition is utterly premature. At best, Covad explains, Verizon is "seeking speculative relief under circumstances which are ... purely hypothetical," because "there is simply nothing for the Commission to forbear from." Covad Opposition at 1, 3. The Commission has not made any determination that the network elements on the Section 271 checklist no longer meet the Section 251(d)(2) impairment test. And although SBC and USTA, like the Petition, imply that the Commission is poised to significantly roll back the UNE Remand and Line Sharing Orders,³ the Commission has no authority to grant the Petition. "[A]s Section 271(d)(4) makes clear, the Commission 'may not,' either by rule 'or otherwise,' limit the

³ Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) ("UNE Remand Order"); Deployment of Wireline Services Offering Advanced Telecommunications Capability, Third Report and Order in CC Docket No. 98-148 — Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912 (1999) ("Line Sharing Order"). Both orders have been remanded by United States Telecom Ass'n v. FCC, 290 F.3d 1646 (D.C. Circuit 2002) ("USTA").

terms of the competitive checklist." AT&T Opposition at 1. See also PacWest Opposition at 6, WorldCom Opposition at 1.

Sprint agrees with Covad that "Verizon's petition represents an extraordinary waste of time and resources both for this Commission and for interested parties" (Covad Opposition at 2), and Sprint supports Covad and AT&T's calls to dismiss the Petition. It is bad precedent for the Commission to entertain forbearance petitions that are "premature and lacking necessary evidentiary support" (WorldCom Opposition at 13), and the Commission should not reward or encourage them by failing to dismiss the present one. Having petitions such as Verizon's pending serves only to exacerbate regulatory uncertainty that discourages investment and prejudices competitive carriers.

III. The Petition is Based on a Fundamental Misinterpretation of Section 271.

A. Section 271 Requires BOC Unbundling of Listed Elements, Independent of Section 251 Requirements.

SBC and USTA support Verizon's claim that Section 271 checklist items (iv) through (vi) and (x) are "automatically satisfied" if the Commission were to remove them from mandatory unbundling under Section 251. SBC Comments at 2; USTA Comments at 3. However, they make no effort to discuss the purpose of Section 271, or why the Commission previously found that Section 271 unbundling requirements are independent from, and in addition to, unbundling requirements implemented by the Commission pursuant to Section 251(d)(2). Sprint Opposition at 2-3; PacWest Opposition at 2, 17; Covad Opposition at 5; PACE Coalition Opposition at 9; AT&T Opposition at 5; Z-Tel Opposition at 7. Like Verizon, SBC and USTA wrongly assume "that Sections 251 and 271 serve identical purposes." WorldCom Opposition at ii-iii.

Sprint and other commenters show that Congress created "two entirely separate sections of the statute, applying to two different categories of entities (ILECs and BOCs),"⁴ and intended BOCs to be subject to "an additional obligation," compared to other ILECs. Covad Opposition at 4. This reflects Congress' decision to require a trade-off for admission to the in-region interLATA long distance market, because "there were particular dangers that warranted more specific market opening requirements for BOCs providing in-region long distance service than for ILECs generally." WorldCom Opposition at i. The Commission itself has acknowledged this in the UNE Remand Order. See Sprint Opposition at 14; PacWest Opposition at 4. Indeed, "[t]hese checklist requirements would have no purpose had Congress wished to require as a precondition to long distance entry only that the BOCs provide access to facilities the Commission unbundled pursuant to section 251." WorldCom Opposition at 3. In fact, as Z-Tel points out, "[i]f the checklist items did not establish independent unbundling obligations, there would be no need for forbearance." Z-Tel Opposition at 7.⁵

SBC claims "basic fairness" and "coherent statutory construction" should "compel" the assumption that BOCs' unbundling obligations must be the same as smaller ILECs. SBC Comments at 4 n.7. But this overlooks the reasons that Congress saw it necessary to impose additional requirements on BOCs — and why the BOCs had been barred from the in-region interLATA long distance market in the first place. See Sprint

⁴ Congress could easily have made the requirements identical had it wanted to; after all, it did so for the second checklist item by cross-referencing the Section 251(d)(3) unbundling requirements. Covad Opposition at 4-5; Sprint Opposition at 8-9 & n.13.

⁵ SBC and USTA's interpretation, like the Petition's, would violate a "cardinal principle" of statutory construction, by rendering these checklist items "mere surplusage." Z-Tel Opposition at 6, quoting Duncan v. Walker, 533 U.S. 167, 174 (2001).

Opposition at 12. Unlike other ILECs, the BOCs have market power in large, multistate service territories and are "capable of using their monopoly power to monopolize long distance markets unless competitors have unfettered access to facilities that connect them to their customers." WorldCom Opposition at 4. The Fifth Circuit recognized:⁶

Because the BOCs' facilities are generally less dispersed than GTE's, they can exercise bottleneck control over both ends of a [long distance] telephone call in a higher fraction of cases than GTE (or any other LECs, for that matter), and it is thus rational to subject them to additional burdens in order to achieve the overall goal of competitive local and long distance services.

Section 251 focuses on opening local markets. The Section 271 checklist focuses on protecting consumers and competitors from BOCs' abuse of their market power in long distance markets, which is why the BOCs — and the BOCs alone — have been excluded from that market.

B. The Checklist Items Are an Ongoing Requirement for BOCs.

SBC and USTA apparently also share Verizon's assumption that the Section 271 checklist is purely a momentary requirement. All other parties recognized that Section 271 imposes on BOCs an *ongoing obligation* to provide the Section 271 unbundled network elements if they wish to offer in-region interLATA long distance services. Otherwise, as Covad explained, "in order to enter interLATA markets, a BOC would simply have to demonstrate its compliance with the checklist provisions of Section 271

⁶ SBC Communications v. FCC, 154 F.3d 226, 243 (5th Cir. 1998), cert. denied, 525 U.S. 1113 (1999), discussed in PacWest Opposition at 3.

for *one brief, shining moment*." Covad Opposition at 3-4 (emphasis added). The Commission cannot assume that "once [a BOC] enters the long distance market in a state by proving that competition is viable through the UNE-based entry scheme contemplated by Congress, the BOC is free to simply end that mode of entry by barring competitors from using the same UNEs upon which entry into the long distance market was conditioned." *Id.* at 4. See also Sprint Opposition at 13; AT&T Opposition at 11.

The legislative history shows that the BOCs' reading of Section 271 is manifestly contrary to Congressional intent. Congress expected the checklist requirements — including BOC unbundling of loops, transport, and switching — would remain in place for the "reasonably foreseeable future."⁷ Z-Tel Opposition at 7-8; PacWest Opposition at 7-8; WorldCom Opposition at 5-6; Sprint Opposition at 12-13. Looking at related provisions of Section 271 reinforces this view. The other checklist requirements include obviously long-term requirements.⁸ Sprint Opposition at 11 n.16. And all the competitive carriers note that Section 271(d)(6) requires that a BOC *remain* in compliance with the Section 271 checklist even after it has received Section 271

⁷ Building on the Modified Final Judgment that created the BOCs, Congress began with the understanding that they would remain "enjoined from providing long distance service until there was 'no substantial possibility' that [they] could use a monopoly over local telephone service to 'impede competition' in the long distance market." WorldCom Opposition at 5, citing *United States v. AT&T*, 524 F. Supp. 1336, 1352-53, 1355-57 (D.D.C. 1981).

⁸ These include, *inter alia*, interconnection consistent with Section 251(c)(2) and 252(d)(1) requirements (item i); nondiscriminatory access to BOC-controlled poles, ducts, conduits, and rights-of-way (item iii); nondiscriminatory access to 911/E911, directory assistance, and operator services (item vii); directory listings (item viii); nondiscriminatory access to such services or information as may be necessary for number assignment, number portability, and dialing parity (items ix, xi-xii); reciprocal compensation arrangements (item xiii); and resale (item xiv).

authority.⁹ In addition, many carriers note that the Commission's approval of performance assurance plans — which monitor, among other things, BOCs' compliance with Section 271 checklist items, including provisioning of unbundled loops, transport, and switching — is a further acknowledgment that checklist obligations do not expire upon a grant of interLATA long distance authority. Sprint Opposition at 13 n.21; PacWest Opposition at 9; Covad Opposition at 6; Z-Tel Opposition at 9-10.

C. Section 10(d) Prohibits Granting Verizon's Petition.

The goals of the Act and the purpose of Section 271 show that Congress intended that BOCs maintain these unbundled network elements until the market is so competitive that they are no longer necessary. Sprint Comments at 13-14. All of the competitive carriers agree that is why Congress incorporated Section 10(d), which expressly prohibits the Commission from forbearing enforcement of Section 271 requirements until "those requirements have been fully implemented." 47 U.S.C. Section 160(d). WorldCom explains why.¹⁰

[T]he fully implemented requirement cannot mean that forbearance authority kicks in the instant a BOC gains section 271 authority. Congress would not have carefully laid out specific prerequisites for long distance authorization and then provided the FCC discretion to refrain from applying those obligations the instant the BOC gained such authority. *It is at that very moment that the obligations become most important.*

Moreover, Congress clearly "intended the standard set forth in Section 10(d) to be extremely stringent." AT&T Opposition at 11.

⁹ PACE Coalition Opposition at 9; WorldCom Opposition at 11; AT&T Opposition at 11; Sprint Opposition at 13; PacWest Opposition at 7-8; Z-Tel Opposition at 9; Covad Opposition at 4.

¹⁰ WorldCom Opposition at 12 (emphasis added).

In contrast, SBC and USTA — like Verizon — ignore Section 10(d). SBC brushes off the requirement in a footnote, merely agreeing with Verizon that the Commission can disregard Section 271 checklist requirements if it removes an element from the Section 251 UNE list. SBC Comments at 2 n.1. USTA does not address Section 10(d) at all. The Commission, however, cannot treat this statutory requirement so dismissively. WorldCom explained, "While the FCC might properly take other matters into consideration in making its judgments about local competition under Section 251, Congress saw fit to require this open access as an unalterable prerequisite necessary to protect long distance competition under section 271." WorldCom Opposition at 4.

At a minimum, the requirements of Section 271 cannot yet be "fully implemented" with respect to any BOC, when none of them has even completed the application process for interLATA authority in all states within its region. Sprint Opposition at 3; WorldCom Opposition at 10; PacWest Opposition at 16. But the Act requires more than *momentary* competition. Whatever the Commission might do with respect to unbundling under Section 251(d)(2), Congress required, as a trade-off for entry into the in-region long distance market, that the BOCs maintain these core unbundled network elements until a competitive wholesale market is established.¹¹

¹¹ WorldCom Opposition at 11 (Commission lacks any "authority to forbear until a flourishing wholesale market exists"); Sprint Opposition at 12-13; PACE Coalition Opposition at 6; Z-Tel Opposition at 10; Covad Opposition at 4.

That obviously has not happened yet.¹² Senators Hollings, Inouye, Stevens, and Burns — who co-sponsored the 1996 Act — showed this by writing to Chairman Powell just last year.¹³

In the 1996 Act, Congress opted for open markets, competition, and deregulation in a carefully balanced framework designed to make local markets competitive and lead to deregulation as competition eroded market power. But the act has not yet succeeded in opening markets and making deregulation possible, largely *because its local market opening provisions have not been fully implemented.*

See PacWest Opposition at 17. Covad rightly concluded, "Verizon has failed to demonstrate that the market-opening conditions of Section 10(d) of the Act have actually been met, a necessary prerequisite for its petition to be granted." Covad Opposition at 1.

D. The Petition Fails to Meet Other Section 10 Requirements.

SBC and USTA also make little effort to show whether the Petition meets the other Section 10 requirements. SBC says that "[c]ompetition is the best mechanism for providing ... consumer protections" (SBC Comments at 2). It is clear, however, that local competition is far from established. Just six years after passage of the 1996 Act, local competition remains in its infancy, with barely a 10% market share, and facing a financial crisis that has seen dozens of carriers driven into bankruptcy. Sprint Opposition at 17-19. See also PacWest Opposition at iii, 12; PACE Coalition Opposition at 8. The

¹² The fact that Verizon is seeking forbearance, and the fact that SBC and USTA endorse its Petition, show that competitive alternatives do not exist and that BOCs retain their market power. Otherwise, Verizon and other BOCs would voluntarily provide these elements, so as to increase their network utilization and lower their costs, just as long distance carriers avidly compete for resellers' traffic. Sprint Opposition at 16-17.

¹³ Letter from Sens. E. Hollings, D. Inouye, T. Stevens, and C. Burns, United States Senate, to Chmn. M. Powell, FCC at 3 (April 17, 2001) (emphasis added).

situation of CLECs has been made worse by the BOCs' continued failure to comply with their statutory obligations. Verizon — indeed all of the BOCs — have been fined *repeatedly* for violations of state and federal laws and orders meant to protect consumers and competitors. Verizon has incurred penalties of over \$300 million; SBC has incurred over \$1 *billion*. See Sprint Opposition at 19-20.

USTA argues that if the Commission removes a network element from the mandatory UNE list, that is "persuasive evidence that the local market *cannot be harmed*" if BOCs are exempted from their separate obligations under Section 271. USTA Comments at 3. Other commenters, however, explained that the BOCs clearly remain dominant by any reasonable measure, and they retain the ability and every incentive to exploit that dominance against a struggling CLEC industry and long distance competitors.¹⁴ PacWest showed that even in Texas — the first state for which the Commission granted a BOC access to the interLATA long distance market — the state commission has found that BOCs retain and exploit their market power.¹⁵

Even today, a year after obtaining 271 authorization in Texas, SWBT retains monopoly control of the residential local market in Texas and has raised prices for local service. CLEC competition ... has faded.... This lack of competition in Texas has permitted SWBT to extend its monopoly into the provision of bundled combinations of local and long distance services, and having established its market power, to raise its price for long distance service.

¹⁴ Even after a decade of ostensible competition in special access services, the BOCs remain dominant and have exploited that dominance to raise prices in those markets where they have received pricing flexibility. Sprint Opposition at 15-16; PacWest Opposition at 12.

¹⁵ PacWest Comments at 16, quoting AT&T's summary of a 2001 report by the Public Utility Commission of Texas in CC Docket No. 01-194, Comments of AT&T at 88-89 (Sept. 10, 2001).

SBC and USTA also repeat Verizon's general policy arguments against unbundling of network elements. SBC asserts that "[m]andatory unbundling imposes costs on society, and the level of societal costs imposed ... is directly proportional to the amount of such mandatory unbundling." SBC Comments at 7. SBC offers no support for this statement, other than noting the USTA panel's skepticism for unbundling. SBC ignores the Supreme Court's more important ruling — that Congress already weighed the costs of unbundling and concluded that they were outweighed by the greater costs of BOC monopolies and offset by the benefits of competition made possible by access to ILEC network elements.¹⁶ Indeed, Congress viewed unbundled access to BOC loops, transport, and switching, and nondiscriminatory access to BOC signaling and call-related databases so central to open markets and local competition that it required any BOC seeking entry into the interLATA long distance market to provide them, separate and apart from any unbundling requirements required of all ILECs by the Commission under Section 251(d)(2).¹⁷

SBC and USTA also repeat tired BOC claims that "the central de-regulatory objective of the Act" is to encourage "facilities-based competition" and that disregarding Section 271 unbundling requirements would further that goal. SBC Comments at 4; see also USTA Comments at 3-4. Again, the Supreme Court dismissed that claim — concluding that it "founders on fact" — and rejected its underlying assumption that UNEs are to be purely temporary. The Court held that mandatory unbundling is not an

¹⁶ Verizon Tel. Cos. v. FCC, 122 S. Ct. 1662, 1664 (2002) ("Verizon").

¹⁷ Sprint Opposition at 2-3; PacWest Opposition at 2, 17; Covad Opposition at 5; PACE Coalition Opposition at 9; AT&T Opposition at 5; Z-Tel Opposition at 7.

"unreasonable way to promote competitive investment in facilities."¹⁸ These BOC arguments are also thoroughly rebutted by the record in the Triennial Review proceeding.¹⁹

Competitive carriers, meanwhile, showed that Verizon fails to demonstrate that the Petition meets the demanding requirements of Section 10. The Petition "would only serve to decrease, not increase, local telecommunications competition" (PACE Coalition Opposition at 8), while increasing the BOCs' ability to leverage their control of bottleneck local exchange and exchange access facilities to undermine long distance competition. Sprint Opposition at 17-21; Z-Tel Opposition at 11. The Petition must be denied.

IV. Cost-Based Pricing Should Apply to Section 271 Checklist Elements.

The competitive carriers agree that unbundled network elements mandated for BOCs by the Section 271 checklist should be provided at cost-based rates. The Commission's conclusion in the UNE Remand Order that TELRIC pricing was unnecessary is mistaken and "at odds with both Commission statements on pricing of network elements and the recent decision of the U.S. Supreme Court in Verizon v. FCC."²⁰ The Commission should reconsider that finding.

¹⁸ Verizon, 122 S. Ct. at 1675-76. See also id. at 1668 n.20 (adding that the Act "depart[s] from traditional 'regulatory' ways that coddled monopolies").

¹⁹ See Sprint Opposition at 5-8.

²⁰ PacWest Opposition at 18, citing Verizon, 122 S. Ct. at 1672. See also Sprint Opposition at 15-16; WorldCom Opposition at 7-9.

The Commission has recognized that "a pricing methodology based on forward looking costs best replicates to the extent possible, the conditions of a competitive market."²¹ It avoids "noncompetitive prices ... [which] could give that BOC an unfair advantage in the provision of long distance or bundled services."²² After all, "[i]t would have been pointless for Congress to have required unbundling under Section 271 if the BOC could charge monopoly prices for the unbundled elements, and Congress did not allow them to do so" (WorldCom Opposition at 8), because checklist item (ii) expressly incorporates Section 252(d)(2)'s requirement that BOCs offer network elements at cost-based rates. 47 U.S.C. Section 271(b)(2)(B)(2)(ii). TELRIC pricing for checklist elements is also consistent with Section 271's goals of promoting competition and open markets, by encouraging efficient market entry and preventing BOCs from engaging in price-cost squeezes on their competitors and from giving their own long distance affiliates unfair advantages. PacWest Opposition at 20; Sprint Opposition at 15-16; WorldCom Opposition at 9; AT&T Opposition at 6.

V. Conclusion

The record shows that Verizon's petition is premature, based on a misreading of the 1996 Act, and lacking any evidentiary support. The BOCs clearly remain dominant, and Section 271 will not be "fully implemented" — and forbearance cannot even be

²¹ PacWest Opposition at 19 and WorldCom Opposition at 8. See also Sprint Opposition at 7.

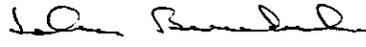
²² Application of Ameritech Mich. Pursuant to § 271 of the Comms. Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Mich., 12 FCC Rcd 20543 at ¶ 287 (1997).

entertained — until BOCs no longer have the ability and the incentive to exploit their dominance in the local and long distance markets. In the meantime, such a petition serves only to exacerbate regulatory uncertainty, discouraging investment and retarding competition. The Commission should deny the Petition outright, and it should do so without delay.

Respectfully submitted,

SPRINT CORPORATION

By



John E. Benedict
H. Richard Juhnke
Jay C. Keithley
401 Ninth Street, NW, Suite 400
Washington, DC 20004
202-585-1910

September 18, 2002

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition to Petition for Forbearance, filed by Sprint Corporation in WC Docket No. 03-235, was sent by First Class Mail, postage prepaid, and/or electronic mail on this the 2nd day of December, 2003 as follows:


Sharon Kirby

By Electronic Comment Filing System

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th St, SW
Room TW-B204
Washington, DC 20554

By Electronic Mail

Janice Myles
Competition Policy Division
Federal Communications Commission
445 12th St, SW
Room 5-C327
Washington, DC 20554

Qualex International
Portals II
445 12th St, SW
Room CY-B402
Washington, DC 20554

By First Class Mail

Gary L. Phillips
Christopher Heimann
SBC Communications Inc.
1401 I Street, NW, 4th Floor
Washington, DC 20005

Geoffrey M. Klineberg
Colin S. Stretch
Kellogg Huber Hansen Todd & Evans
1615 M Street NW
Suite 400
Washington DC 20036