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ATTORNEYS AT LAW

December 2, 2003

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

Re: *Z-Tel Opposition to SBC's Petition for Forbearance from Application of  
Section 271, WC Docket No. 03-235*

Dear Ms. Dortch:

For the same reasons that Z-Tel Communications, Inc., previously urged the Commission to reject Verizon's petition for forbearance from the access obligations imposed by section 271,<sup>1</sup> Z-Tel now urges the Commission to reject SBC's forbearance petition, which is the subject of this docket. The only difference between the SBC and Verizon petitions is the scope of the requested relief. Verizon has "limited" its pending forbearance request to the "broadband" functionalities in its network.<sup>2</sup> SBC, in contrast, has asked the Commission "to forbear from applying the terms of section 271(c)(2)(B) to the extent, if any, those provisions impose unbundling obligations on SBC that [the] Commission has determined should not be imposed on incumbent LECs pursuant to section 251."<sup>3</sup> However, SBC has stated that it will settle for the relief sought by Verizon.<sup>4</sup>

SBC has provided no new legal or empirical basis for its forbearance request, relying instead on the same tired and unsupported arguments that SBC and its fellow BOCs made (and the Commission rejected) in the *Triennial Review Order*,<sup>5</sup> and which Verizon has resurrected in its "new" forbearance petition. Z-Tel urges the Commission to expeditiously reject SBC's

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<sup>1</sup> See *Petition for Forbearance of the Verizon Telephone Companies*, Opposition of Z-Tel Communications, Inc., CC Docket No. 01-338 (filed Nov. 17, 2003) ("*Z-Tel Opposition*").

<sup>2</sup> See *Petition for Forbearance of the Verizon Telephone Companies*, CC Docket No. 01-338 (filed Oct. 24, 2003); see also *Commission Establishes Comment Cycle for New Verizon Petition Requesting Forbearance From Application of Section 271*, Public Notice, CC Docket No. 01-338 (rel. Oct. 27, 2003).

<sup>3</sup> *Pleading Cycle Established for Comments on SBC's Petition for Forbearance From Application of Section 271*, Public Notice, WC Docket No. 03-235 (rel. Nov. 10, 2003).

<sup>4</sup> See *Petition for Forbearance of SBC Communications Inc.*, WC Docket 03-235 at 9 (filed Nov. 6, 2003) ("*SBC Petition*").

<sup>5</sup> See *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) ("*Triennial Review Order*").

petition, for the reasons summarized below. Z-Tel's Opposition to the Verizon petition, which is equally applicable to SBC's petition, provides a longer discussion of those reasons, and we incorporate it by reference.

SBC's petition is deficient for four reasons. *First*, SBC's forbearance request is nothing more than a thinly disguised Petition for Reconsideration of the *Triennial Review Order*, where the Commission determined 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." *Triennial Review Order*, ¶ 654. With extensive comment from both sides, the Commission rejected the BOCs' reading of section 271 – under which the BOCs' unbundling obligations under sections 251 and 271 are co-extensive – because such an interpretation 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 purposes of the provision. In short, the *Triennial Review Order* affirmed that the incumbent LECs' unbundling obligations under section 251 have no bearing whatsoever on the BOCs' ongoing access obligations under section 271. Verizon's criticism of the Commission's straightforward reading of the statute as a "wooden application of section 271"<sup>6</sup> merely confirms that the Commission has given its terms their plain meaning.

*Second*, SBC's contention that section 271 does not, and should not, impose continuing access obligations on the BOCs is wholly without merit. Contrary to SBC's assertion, section 706's mandate that the Commission "encourage the deployment ... of advanced telecommunications capability" is not relevant to the BOCs' ongoing obligation to provide access to the elements listed in the section 271 competitive checklist (codified at 47 U.S.C. § 271(c)(2)(B)). While the Commission found that section 251(d)(2)'s "at a minimum" language allows it to consider the goals of section 706 in deciding which network elements must be unbundled (*see Triennial Review Order*, ¶ 176), section 271 includes no such balancing language. Instead, section 271(c)(2)(B) specifies the network elements to which the BOCs must provide access and expressly prohibits the Commission from "limit[ing] or extend[ing]" these obligations. 47 U.S.C. § 271(d)(4). Moreover, the plain language of section 271(c)(2)(B) is technology neutral, and does not distinguish between broadband and narrowband loops (section 271(c)(2)(B)(iv)) or packet-switching and circuit-switching technology (section 271(c)(2)(B)(vi)). Accordingly, the Commission has properly implemented the competitive checklist on a technology neutral basis in its prior section 271 orders. *See Z-Tel Opposition* at 7-11.

*Third*, SBC's assertion that section 271 is "fully implemented" as soon as a BOC has complied with the competitive checklist is simply wrong. As Z-Tel previously explained, a decision that a BOC has "fully implemented" the competitive checklist – which is merely a part of section 271 – is plainly different than concluding that the BOC has "fully implemented" section 271 in its entirety, as required by section 10(d). *See Z-Tel Opposition* at 12-14. When the Commission finds that a BOC has satisfied the competitive checklist, it decides only that the market is open to allow competition to begin to take root. Section 271(d)(6), by contrast,

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<sup>6</sup> *See Petition for Forbearance of the Verizon Telephone Companies*, Reply Comments of Verizon, CC Docket No. 01-338 at 2 (filed Nov. 26, 2003) ("*Verizon Reply*").

requires compliance with the checklist even after it has been fully implemented, ensuring that competition will *develop and thrive*. It is therefore absolutely clear that compliance with the checklist is not the same as compliance with section 271. In fact, SBC's position to the contrary defies common sense: if a BOC could eliminate access to network elements immediately upon a finding of checklist compliance, the BOC would instantly wipe out the local competition on which its entry into the long-distance market was premised. Indeed, the very purpose of section 10(d) is to ensure that markets remain open. This is why Congress limited the Commission's ability to consider requests for forbearance from sections 251(c) and 271 – the core, market-opening provisions in the Telecommunications Act of 1996 (the "1996 Act") – until those provisions were "fully implemented." Congress also made clear in section 271(d)(6) that compliance with the checklist must continue after a section 271 petition has been granted. Tellingly, although we emphasized this point in our opposition to Verizon's "new" forbearance petition (*see Z-Tel Opposition* at 2-3, 13-15), Verizon's reply contains no response – or even a cite to section 271(d)(6).<sup>7</sup>

Finally, SBC has failed to satisfy the requirements of sections 10(a) and 10(b). SBC continues to incant the BOC mantra that imposing any form of regulation on broadband facilities – including the limited access obligations required by section 271 – will impede broadband deployment efforts, to the detriment of consumers. In truth, SBC is merely trying to renege on its *voluntary* commitment to provide wholesale access across its hybrid fiber/copper loop facilities.<sup>8</sup> Likewise, SBC is attempting to evade the basic bargain of the 1996 Act, which imposed ongoing access responsibilities on the BOCs in return for the benefits of section 271 relief. In any event, the empirical evidence that Z-Tel previously submitted to the Commission demonstrates that unbundling under section 251 has promoted, rather than discouraged, facilities investment by the BOCs and new entrants alike. *See Z-Tel Opposition* at 20-21. The

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<sup>7</sup> Instead, Verizon mistakenly relies on the Commission's recent *OI&M Forbearance Order* to argue that "the 'fully implemented' language of section 10(d) applies on a granular basis to the specific requirements of section 271 from which a Bell company seeks forbearance." *Verizon Reply* at 19, citing *Petition for Forbearance from the Prohibition of Sharing, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, Memorandum Opinion and Order, CC Docket 96-149 (rel. Nov. 4, 2003). There is no merit to that contention. In the course of *denying* Verizon's forbearance petition, the Commission made clear that section 272's sunset rules effectively supersede the forbearance provision such that forbearance from the separate affiliate requirements for long-distance service is not available for three years after a section 271 application is granted, but the sunset of those requirements is appropriate at that point. *See OI&M Forbearance Order*, ¶¶ 6-7. But section 271 contains no sunset provision – to the contrary, it includes section 271(d)(6), which makes clear that the checklist obligations continue in effect after authorization to provide long-distance service has been granted.

<sup>8</sup> Z-Tel reminds the Commission that more than three years ago, SBC *voluntarily* offered wholesale broadband access to its new Project Pronto network architecture. Project Pronto relies on hybrid fiber/copper loop facilities in conjunction with Next Generation Digital Loop Carrier systems installed in remote terminal sites and packet-switching facilities in SBC's central offices. *See Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 241 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, Second Memorandum Opinion and Order, 15 FCC Rcd 17521 (2000); *see also* Letter from Priscilla Hill-Ardoin, SBC, to Magalie Roman Salas, Federal Communications Commission, CC Docket No. 98-141 (filed Aug. 2, 2000) (explaining SBC's revised proposed commitments to offer nondiscriminatory access to Project Pronto). Given SBC's long-standing commitment to provide nondiscriminatory access to its Project Pronto "broadband" facilities, Z-Tel is at a loss to understand how the limited access obligations in section 271 will require "time consuming and expensive re-design of ... network architecture" or "the development of still more operational support systems ... to support CLEC access." *SBC Petition* at 10.

Commission therefore should reject SBC's unsupported argument that the more limited access obligations under section 271 will delay broadband deployment. On the other hand, foreclosing wholesale access altogether would hinder the transition to facilities-based competition in the short-term and broadband competition in the long-term. It is uncontested that new entrants cannot re-create the BOCs' loop plant, transport, and interoffice switch mesh overnight. Thus, by dramatically limiting the number of loops that a new entrant could potentially serve today, SBC's forbearance request, if granted, would make it impossible for a new entrant to ever achieve the minimum viable scale required to deploy its own facilities for voice and broadband services.

In conclusion, the Commission should promptly deny SBC's forbearance petition for the same reasons that it should deny Verizon's similar petition. Affirming that SBC and its fellow BOCs are required to provide access to the elements included on the section 271 competitive checklist – regardless of other incumbent LECs' obligations under section 251 – is necessary to protect consumers (section 10(a)(2)) and the public interest (section 10(a)(3)), as well as to promote competition (sections 10(a)(1) and 10(b)). Indeed, as we have pointed out on numerous occasions, forbearance from the requirements of section 271 is not warranted at least until the factors that led the Commission to conclude that AT&T was no longer dominant in the long-distance market are satisfied.<sup>9</sup> AT&T was not declared non-dominant until competitors had access to a mature wholesale market for interexchange facilities, consumers had access to service from multiple competitors, and it was clear that the availability of a wholesale market and abundant retail alternatives were certain to continue. Indeed, AT&T was not declared non-dominant until three-quarters of long-distance resellers used facilities other than AT&T's and AT&T's retail market share had fallen below 60 percent. Forbearance from the requirements of section 271 will be warranted on a market-by-market basis only after vibrant wholesale alternatives are available to competitors, consumers have numerous retail alternatives, and there is reason to believe the market will remain competitive if section 271's requirements are not enforced.

Sincerely,

/s/

Christopher J. Wright  
Counsel for Z-Tel Communications, Inc.

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<sup>9</sup> See, e.g., Opposition of Z-Tel Communications, Inc., to Petition for Forbearance of Verizon, CC Docket No. 01-338 at 18-22 (filed Sept. 3, 2002), citing *Motion of AT&T to be Reclassified as a Non-dominant Carrier*, 11 FCC Rcd 3271 (1995).