

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
SBC Communications Inc.'s Petition for)	
Forbearance Under 47 U.S.C. § 160(c))	WC Docket No. 03-235
_____)	

**OPPOSITION OF MCI
TO SBC'S PETITION FOR FORBEARANCE**

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WorldCom, Inc. ("MCI") hereby submits this Opposition to the petition for forbearance (the "Petition") filed by SBC in the above-referenced proceeding.

I. INTRODUCTION AND SUMMARY

In its Petition, SBC asks the Commission, pursuant to section 10 of the Communications Act of 1934, as amended (the "Act"),¹ to forbear from applying the access requirements of section 271 to those elements that the FCC has determined the Bell Operating Companies ("BOCs") are no longer required to unbundle pursuant to section 251. SBC's Petition, however, does not satisfy section 10 of the Act. First, SBC has not made the kind of fact-specific, market-specific showing that section 10(a) requires. Instead, SBC relies on a theoretical argument that elimination of an unbundling requirement under section 251 compels forbearance from the access requirements of section 271. As the FCC has held in other contexts, the decision to forbear must be based on a record that contains more than broad, unsupported allegations of why the statutory criteria are met.

¹ 47 U.S.C. § 160.

Second, there is no basis for SBC's claim that forbearance is warranted in particular for "broadband" elements. SBC's arguments rely on a mischaracterization of the *UNE Triennial Review Order*,² which not only reaffirmed the independent statutory obligation established by section 271, but also expressly noted that incumbent LECs would make broadband service offerings available in a just, reasonable, and nondiscriminatory manner. SBC also argues that forbearance is warranted because enforcement of the section 271 access requirements would require modifications to its network, and ordering and billing systems. In fact, SBC has agreed in the past as part of its Project Pronto offering to provide the type of bitstream access that section 271 requires. Accordingly, SBC's claims of alleged technical or operational difficulties involved in providing bitstream access are not credible. Moreover, SBC glosses over the fact that the requested relief would have the effect of denying access to copper subloops, for which there are indisputably no alternatives, thereby threatening local competition.

Third, SBC has not demonstrated (nor could it at this time) that the requirements of section 271 have been fully implemented, as required by section 10(d). In short, SBC has not met the statutory test for forbearance under section 10 of the Act. Consistent with Commission precedent, the requested relief must be denied.

SBC argues in the alternative that section 271 does not apply to network facilities used to provide broadband services. In fact, the FCC has previously held that the procompetitive provisions of the 1996 Act, including section 271, apply to advanced services. The plain language of section 271 and past federal court and Commission

² *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, as modified by Errata, 18 FCC Rcd 19020 (2003) ("*UNE Triennial Review Order*").

precedent, including the orders upon which SBC relies, make clear that the checklist applies broadly to all types of loops and switching, including facilities used to provide broadband services. SBC provides neither a legal nor a factual basis for the Commission to interpret section 271 to exclude these facilities, and the Commission should decline to do so.

II. DISCUSSION

A. SBC's Petition Fails to Satisfy the Requirements of Section 10

In order to satisfy the requirements of section 10(a), SBC must make a detailed factual showing that access to checklist items under section 271 is: (1) not necessary to ensure that the charges and practices for those elements are just and reasonable; (2) not needed to protect consumers; and (3) consistent with the public interest.³ SBC has failed to make the factual showing required to support forbearance for any element and the requested relief is, in any case, barred by section 10(d).⁴

1. The Petition Makes No Attempt to Satisfy the Rigorous Requirements of Section 10(a) and (b)

As discussed below, the inquiry required by section 10(a) is highly fact-specific and must be conducted on a market-specific basis.⁵ SBC's skeletal forbearance petition

³ 47 U.S.C. § 160(a). The Commission must deny a petition if it finds that "any one of the three prongs is unsatisfied." *CTIA v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003).

⁴ SBC also asks the Commission to grant BellSouth's petition for reconsideration of the FCC's findings in the *UNE Triennial Review Order* that the competitive checklist imposes unbundling obligations independent from those imposed by section 251. Petition at 1-2, 14. As MCI has explained, BellSouth has provided no legal or factual basis for the Commission to reconsider that determination. *See Opposition of MCI to BellSouth, SureWest and USIIA Petitions for Reconsideration*, CC Docket No. 01-338, at 16-21 (Nov. 6, 2003).

⁵ 47 U.S.C. § 160(a) ("the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications

completely fails to make even a *prima facie* showing that addresses the requirements of section 10. Instead, SBC effectively asks the Commission to use a statutory waiver provision (section 10) to adopt a new rule regarding the unbundling obligations of section 271.

Section 10(a) permits carriers to request that a particular rule or statutory provision not be applied in certain situations – in other words, it authorizes the Commission to waive particular obligations or requirements when the statutory standard has been satisfied. While the rule or provision remains in place, the Commission “forbears” from enforcing it with respect to a particular carrier or class of carriers for a specific geographic market. Section 10 thus does not contemplate the repeal of a statutory provision or regulation in its entirety, but rather more limited relief.

As with other forms of waiver, the inquiry required by section 10 is highly fact-specific, and requires the FCC to consider whether forbearance for a particular carrier or service, or class of carriers or services, “in any or some of its or their geographic markets” is appropriate.⁶ In assessing whether forbearance is justified, the FCC must determine whether competitors have adequate alternative wholesale sources of supply; whether end users will have a choice of competing providers; whether the public interest is otherwise advanced by forbearance; and, as discussed below, whether section 271 has been fully implemented. Under section 10, each of these inquiries requires a case-by-case, fact-specific examination of a particular geographical and/or customer market or markets for which forbearance has been sought.

service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets . . .”).

⁶ *Id.*

In the instant case, however, SBC has not provided a single fact supporting its requested relief. Rather, SBC relies entirely upon theoretical arguments that are completely divorced from any relevant factual analysis.⁷ As the FCC has held in other contexts, “the decision to forbear from enforcing statutes or regulations is not a simple decision, and must be based upon a record that contains more than broad, unsupported allegations of why the statutory criteria are met.”⁸ Where, as here, SBC relies entirely upon such theoretical arguments, its Petition does not make the showing required by section 10 and therefore must be denied.⁹

Although it purports to request forbearance, SBC effectively seeks to induce the Commission to use the statutory waiver provision of section 10 to adopt a new rule that immediately would exempt BOCs from the unbundling obligations of section 271 once the FCC has determined, pursuant to section 251, that competitors are not impaired without access to a specific unbundled network element. The FCC, however, has already determined that the BOCs are obligated to provide access to checklist items pursuant to section 271, independent of any unbundling analysis under section 251.¹⁰ Moreover, the

⁷ See Petition at 5-7.

⁸ *PCIA’s Broadband PCS Alliance’s Petition for Forbearance for Broadband PCS*, Memorandum Opinion and Order, 13 FCC Rcd 16857, ¶ 113 (1998) (citation omitted).

⁹ Indeed, with respect to elements other than those that SBC (and Verizon) have characterized as “broadband,” it is very doubtful that SBC could make the required showing today, as the Commission has made a nationwide finding of impairment for these “narrowband” elements, and section 251 unbundling obligations remain in place.

¹⁰ *UNE Triennial Review Order* ¶¶ 652-654 (rejecting Verizon’s argument that once the FCC finds that “a network element is not necessary under section 251(d)(2), the corresponding checklist item should be construed as being satisfied.”). For purposes of this pleading, MCI takes the decisions made in the *UNE Triennial Review Order* as a given. However, MCI’s reliance on that order should not be interpreted as agreement with the FCC’s analysis. See also *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice

FCC cannot promulgate a rule that would vitiate the statutory language and render section 271's independent requirements a nullity.¹¹ Even if the FCC could adopt such a rule – which it cannot – it would have to do so in accordance with the notice and comment requirements of the Administrative Procedure Act (“APA”).¹²

Regardless, as discussed in detail below, section 10(d) bars the FCC from granting the requested relief until the requirements of section 271 have been “fully implemented.”¹³ Because SBC has not demonstrated that those requirements have been fully implemented in its region, its petition must be denied.

Rather than devoting any of its limited resources to a petition that is deficient on its face, the Commission promptly should dismiss SBC's Petition. To discourage such meritless filings in the future, the FCC's order should make clear that the FCC will

of Proposed Rulemaking, 15 FCC Rcd 3696, ¶¶ 468-471 (1999) (“*UNE Remand Order*”) (finding that section 271 creates an independent unbundling obligation); *Commission Establishes Comment Cycle for New Verizon Petition Requesting Forbearance from Application of Section 271*, CC Docket No. 01-338, Public Notice at 2 (rel. Oct. 27, 2003) (FCC 03-263) (denying Verizon's Petition for Forbearance with respect to any “narrowband elements” that do not have to be unbundled under section 251 in part “because the principal argument for the relief initially requested was rendered moot by the *Triennial Review Order*”).

¹¹ By rendering the checklist “surplusage,” SBC's proposal would violate a cardinal principal of statutory construction: namely, the duty to give effect to every word and every clause of a statute. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001).

¹² *See New England Telephone and Telegraph Co. and New York Telephone Co. Petition for Forbearance from Jurisdictional Separations Rules*, Order, 12 FCC Rcd 2308, ¶¶ 12-13 (1997) (rejecting an attempt to use section 10 “as a means of replacing [existing] rules with new ones without the notice and comment required by the [APA]”); *1998 Biennial Regulatory Review – Review of Accounting and Cost Allocation Requirements*, Report and Order, 14 FCC Rcd 11396, ¶ 25 (1999) (refusing a request for forbearance because it was “asking [the FCC] to change [its] rules, not to forbear from applying the current rules”). To the extent that the Commission desires to consider SBC's request for a new rule, it may issue a notice of proposed rulemaking, consistent with the APA.

¹³ 47 U.S.C. § 160(d).

examine all future petitions to ensure that they present a *prima facie* basis for forbearance and that, absent such a showing, future petitions also will be dismissed summarily.

2. Forbearance Is Not Warranted for “Broadband” Elements

SBC argues in the alternative that, at a minimum, the FCC should forbear from enforcing its section 271 unbundling obligations with respect to broadband elements because the case for forbearance is “particularly strong in the broadband context.”¹⁴ In fact, as explained below, SBC’s Petition fails to satisfy the requirements of section 10(a) for broadband facilities.¹⁵

a. *SBC’s Argument Relies on a Mischaracterization of the UNE Triennial Review Order*

UNE Triennial Review Order. SBC’s principal argument in support of its request for relief is that the FCC could not have intended in the *UNE Triennial Review Order* to require the BOCs to offer access to fiber and hybrid copper-fiber loops pursuant to section 271 because the FCC had just concluded in an earlier section of the same order that requiring the BOCs to unbundle the broadband capabilities of those elements pursuant to section 251(c)(3) would deter investment in next-generation broadband networks.¹⁶ SBC thus urges the FCC to clarify that the “sweeping regulatory relief” it

¹⁴ Petition at 8; *see also id.* at 3.

¹⁵ As an initial matter, in its discussion of broadband, SBC expressly addresses only one of the three requirements of section 10(a) – *i.e.*, the public interest criterion of section 10(a)(3). 47 U.S.C. § 160(a)(3). To prevail, of course, SBC must satisfy all three requirements.

¹⁶ *See* Petition at 3-4, 6, & 8-10. SBC defines “broadband elements” to include “fiber-to-the-premises loops, packet switches, and the packetized capabilities of hybrid copper-fiber loops.” *See id.* at 3.

provided in the *UNE Triennial Review Order* exempted broadband facilities from all unbundling requirements, including those imposed by section 271.¹⁷

Contrary to SBC's claims, the *UNE Triennial Review Order* in no way altered the unbundling requirements of section 271. In that order, the Commission unequivocally concluded that the Act establishes an "independent and ongoing access obligation" for the BOCs to provide access to checklist items under section 271(c)(2)(B) that is separate and distinct from an incumbent LEC's unbundling duties under section 251.¹⁸ In reaching this conclusion, the Commission expressly ruled that under section 271's competitive checklist, the BOCs must continue to "provide access to loops, switching, transport, and signaling *regardless of any unbundling analysis under section 251.*"¹⁹ And the *UNE Triennial Review Order* clearly contemplated that an element that is exempted from unbundling under section 251 would still be available under section 271: "[w]here there is no impairment under section 251 and a network element is no longer subject to unbundling, we look to section 271 and elsewhere in the Act to determine the proper standard for evaluating the terms, conditions, and pricing under which a BOC must provide the checklist network elements."²⁰

The Commission's analysis of this issue is sound and comports fully with Supreme Court precedent. As highlighted in the *UNE Triennial Review Order*, while checklist item number 2 explicitly cross-references section 251, checklist items 4, 5, 6

¹⁷ *Id.* at 2, 8-9.

¹⁸ *UNE Triennial Review Order* ¶ 654. This ruling was consistent with the *UNE Remand Order*, in which the FCC similarly concluded that section 271 created an independent unbundling obligation separate from that imposed under section 251. *UNE Remand Order* ¶¶ 468-471.

¹⁹ *UNE Triennial Review Order* ¶ 653 (emphasis added).

²⁰ *Id.* ¶ 656.

and 10 “separately impose access requirements regarding loop, transport, switching, and signaling, *without mentioning section 251*.”²¹ In order “to give effect, if possible, to every clause and word of a statute,”²² the FCC concluded that there is no link between checklist items 4, 5, 6 and 10 and section 251.²³ Any action by the Commission with respect to an incumbent LEC’s obligation to unbundle access to broadband facilities under section 251 therefore does not affect a BOC’s unbundling obligation with respect to those network elements pursuant to section 271. Despite SBC’s arguments to the contrary, “[t]he short answer is that Congress did not write the statute that way.”²⁴

SBC’s claim that an obligation to offer unbundled access to broadband facilities under section 271 would “fatally undermine” the Commission’s decisions affecting broadband facilities under section 251 is similarly misguided.²⁵ SBC’s view apparently is that the Commission intended in the *UNE Triennial Review Order* to eliminate any incumbent LEC obligation to provide wholesale access to broadband, and that, consequently, SBC should be relieved of its obligation under section 271 to do so. In fact, the plain text of the order refutes this baseless claim.

Indeed, the *UNE Triennial Review Order* expressly observed that after modifying the section 251(c) unbundling obligations with respect to fiber subloops, incumbent LECs

²¹ *Id.* ¶ 654 (emphasis added). For example, checklist item 2 states in its entirety that BOCs must allow for “(ii) Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1).” 47 U.S.C. § 271(c)(2)(B)(ii). By contrast, checklist item 4 in its entirety mandates access to “(iv) Local loop transmission from the central office to the customer’s premises, unbundled from local switching or other services.” 47 U.S.C. § 271(c)(2)(B)(iv).

²² *United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

²³ *UNE Triennial Review Order* ¶ 654.

²⁴ *Russello v. United States*, 464 U.S. 16, 23 (1983).

²⁵ Petition at 9, 11.

would make broadband service offerings available on a wholesale basis on just, reasonable and non-discriminatory 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.²⁶

Thus, the Commission properly saw no inconsistency between its determinations regarding the unbundling of fiber network elements under section 251 and the incumbent LECs' provision of broadband access in accordance with the requirements of sections 201 and 202. Similarly, the FCC's section 251 unbundling conclusions will not be "fatally undermined" by the BOCs' continuing obligation to offer access to broadband pursuant to section 271, subject to the requirements of sections 201 and 202 that rates, terms, and conditions be just, reasonable and not unreasonably discriminatory.²⁷

Statutory Requirements. Indeed, the FCC's determination that competitors are not impaired without access to certain network elements from incumbent LECs under section 251 is entirely consistent with a conclusion that continued access to those same elements from the BOCs is required under section 271. In enacting the "special provisions" of sections 271-272,²⁸ Congress explicitly determined that additional safeguards were necessary to ensure that the BOCs, after obtaining authority to offer in-region interLATA services under section 271, would not be able to use their monopoly power over local facilities to erode competition for interLATA services. As the U.S. Court of Appeals for

²⁶ *UNE Triennial Review Order* ¶ 253; *see also id.* ¶ 253 n.755.

²⁷ 47 U.S.C. §§ 201-202.

²⁸ 47 U.S.C. §§ 271-272; *see also id.* §§ 273-276 (adopting additional "special provisions" applicable only to the BOCs).

the D.C. Circuit has explained, Congress imposed these added safeguards “due to the unique infrastructure controlled by the BOCs” and their special ability to “exercise monopoly power.”²⁹ As the court reiterated, “[b]ecause the BOCs’ facilities are generally less dispersed than [those of other incumbent LECs], they can exercise bottleneck control over both ends of a telephone call in a higher fraction of cases than can [other incumbent LECs].”³⁰ Indeed, then as now, the BOCs provide the vast majority of local telephone service in the United States.³¹ In comparison, section 251’s unbundling duties apply to incumbent LECs in general, a category that is comprised of “[s]everal hundred other carriers [that] provide the balance of local service” in the U.S.³² Accordingly, it was entirely proper for Congress to determine that the unique nature of the BOCs’ control over the local exchange market required additional protections in the form of section 271’s independent access obligation.

The imposition of these special obligations, moreover, demonstrates that Congress intended that forbearance from section 271 would require something more than a showing that the FCC had determined, pursuant to section 251, that incumbent LECs

²⁹ See *BellSouth Corp. v. FCC*, 162 F.3d 678, 689-90 (D.C. Cir. 1998); see also *id.* at 691 (“Congress clearly had a rational basis for singling out the BOCs [for special treatment], *i.e.*, the unique nature of their control over their local exchange areas.”).

³⁰ *BellSouth Corp. v. FCC*, 144 F.3d 58, 67 (D.C. Cir. 1998); 162 F.3d at 689.

³¹ “The seven BOCs provide over 80% of local telephone service in the United States.” Compare 162 F.3d at 689, with *UNE Triennial Review Order* ¶ 660 (“BOCs control 85.9 percent of incumbent LEC local switched access lines”); *Local Telephone Competition: Status as of December 31, 2002*, Table 1 (June 2003), available at: <http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcom0603.pdf> (incumbent LECs serve 86.8 percent of all switched access lines). Those seven BOCs since have merged into four entities that control even larger geographic regions than their predecessors. This fact further counsels against the Commission forbearing from enforcing section 271’s requirements.

³² *BellSouth v. FCC*, 162 F.3d at 689.

need not provide access to a particular element. By arguing that removal of an unbundling obligation under section 251 automatically warrants forbearance under 271, SBC's Petition ignores the special protections afforded by 271, and instead attempts to eliminate those requirements through the back door of section 10(a), in contravention of the plain language of the Act and the FCC's recent decision affirming these independent obligations.

Competition. As the FCC has recognized, "the fundamental objective of the 1996 Act is to bring consumers of telecommunications services in all markets the full benefits of competition."³³ Where, as here, a carrier possesses market power through its control over bottleneck facilities, government regulation that provides for access to those facilities is necessary to protect consumers and competitors from the exercise of that market power, and to ensure that the public interest is served. In the *UNE Triennial Review Order*, the FCC modified certain unbundling obligations with respect to hybrid fiber-copper loops predicated upon the expectation that incumbent LECs would provide wholesale access in a manner that ensures competitors could access copper subloops.³⁴ Without this wholesale access, competitive carriers would be unable to access copper subloops – network elements for which there are indisputably no alternatives.³⁵

SBC's Petition, however, seeks to eliminate its duty under section 271 to provide such access, notwithstanding Commission precedent in analogous situations, in which the FCC repeatedly declined to forbear from access requirements. In the context of nonlocal

³³ See *Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, Memorandum Opinion and Order, 14 FCC Rcd 16252, ¶ 46 (1999) ("NDA Order").

³⁴ See discussion *supra* at 10 & note 26.

³⁵ See *UNE Triennial Review Order* ¶ 253.

directory assistance, for example, the FCC concluded that the BOCs had a competitive advantage that stemmed from their local monopolies with regard to in-region directory listings, and that, absent nondiscriminatory access to those listings, none of the requirements of section 10(a) could be met.³⁶ Similarly, the FCC declined to forbear from the depreciation prescription process, finding that, where forbearance would likely raise prices for bottleneck facilities, the Commission cannot find that forbearance would promote competitive market conditions.³⁷ The Commission has also declined to forbear in circumstances in which forbearance would “bestow[] an enormous competitive advantage” on certain carriers.³⁸ SBC’s request for forbearance from the independent access obligations of section 271, similarly, would impermissibly and “unreasonably deprive other telecommunications carriers [of] the opportunity to compete for a

³⁶ See *NDA Order* ¶¶ 35-37 (“Given that U S WEST’s competitive advantages in the provision of regionwide directory assistance service *stem from its local exchange and exchange access monopolies*, we find that any discrimination between U S WEST and unaffiliated entities with respect to in-region telephone numbers would be unjust and unreasonable within the meaning of section 10(a)(1).”) (emphasis added), ¶¶ 46-47 (relying on continued nondiscriminatory access to find that enforcement of the separate affiliate safeguards of section 272 was not necessary to protect consumers), ¶ 53 (“In evaluating whether forbearance is consistent with the public interest, we take into account the competitive harms caused by U S WEST’s *monopoly control* over the in-region telephone numbers. . . . because of U S WEST’s *dominance in the local market*, it has the ability to charge rates for directory listing information that may make it difficult for competing providers of nonlocal directory assistance service to succeed in the market and, at the same time, give U S WEST a competitive advantage.”) (emphasis added).

³⁷ See *1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers*, Report and Order, 15 FCC Rcd 242, ¶ 63 (1999).

³⁸ *Implementation of the Telecommunications Act of 1996, Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd 14409, ¶ 29 (1999) (“*CPNI Order*”) (denying a request for forbearance from the CPNI requirements); see also *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band*, Third Order on Reconsideration, 13 FCC Rcd 4856, ¶ 109 (1998) (section 10 “recognizes the need to reduce market power by encouraging competitive entry into communications markets”).

customer's business,"³⁹ thereby denying consumers the public interest benefits of customer choice, lower prices, and greater innovation.

Section 706. To bolster its Petition, SBC claims that forbearance for broadband facilities is "especially" apt in light of the Commission's statutory mandate, in section 706 of the 1996 Act, to encourage deployment of "advanced telecommunications capability to all Americans."⁴⁰ Contrary to SBC's claim, however, section 706 is irrelevant to the scope of a BOC's access obligations under section 271 and cannot be used to limit the 271 checklist. In the *UNE Triennial Review Order*, the Commission found that section 706 was relevant to its unbundling analysis under section 251 only because the "at a minimum" clause of section 251(d)(2) granted the FCC authority "to take Congress's goals into account" in deciding which network elements must be unbundled.⁴¹ Section 271, however, does not contain an "at a minimum clause"; in fact, it expressly prohibits the Commission from "limit[ing] or extend[ing] the terms used in the competitive checklist set forth in subsection (c)(2)(B)."⁴² Consequently, the Commission may not rely on section 706 to limit the terms of the competitive checklist.⁴³

³⁹ *CPNI Order* ¶ 29.

⁴⁰ Petition at 12-13; 47 U.S.C. § 157 note.

⁴¹ *UNE Triennial Review Order* ¶ 176.

⁴² 47 U.S.C. § 271(d)(4).

⁴³ MCI disagrees with the Commission's decision in the *UNE Triennial Review Order* to rely on section 706 and the "at a minimum" language in section 251(d)(2) to restrict access to bottleneck loop facilities simply because they include fiber in the loop. Nonetheless, even if that interpretation were permissible under section 251, it is clearly prohibited under section 271.

Consistent with Commission precedent in this area, SBC's Petition must be rejected for failure to show that the requested relief meets the demanding standard of section 10(a).

b. Section 271 Unbundling Requirements Do Not Impose Any Redesign Burdens or Create Any Regulatory Uncertainty That Would Justify Forbearance

SBC repeats Verizon's claims that the "application of section 271 unbundling obligations to broadband facilities would require time-consuming and expensive re-design of integrated fiber network architectures," creating "enormous" regulatory uncertainty.⁴⁴ These arguments are meritless.

Feasibility of Access Pursuant to Section 271. Section 271(c)(2)(B)(iv) requires SBC to provide competitive carriers with unbundled access to local loop transmission from a central office to a customer's premises.⁴⁵ As discussed in more detail below, this obligation applies equally to packet-switched and circuit-switched transmission.⁴⁶ SBC asks the FCC to forbear from enforcing section 271's access requirements with respect to

⁴⁴ Petition at 10 (citing Verizon Petition at 9-10). SBC relies heavily on Verizon's forbearance petition as evidence that application of section 271 unbundling obligations to broadband facilities would be burdensome. See Petition at 10-11 nn.13-17. As MCI has demonstrated, Verizon's arguments there, like SBC's here, are without merit. See generally MCI Opposition, CC Docket No. 01-338 (Nov. 17, 2003).

⁴⁵ 47 U.S.C. § 271(c)(2)(B)(iv).

⁴⁶ See, e.g., *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 (1999) ("*New York 271 Order*") (the loop definition under section 271 "includes different types of loops, including ' . . . loops that are conditioned to transmit the digital signals needed to provide services such as ISDN, ADSL, HDSL and DS1-level signals.'"); *Application by Qwest Communications International, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 26303, ¶ 335 (2002) ("*Qwest Nine-State Order*"); *Joint Application by SBC Communications, Inc., et al. to Provide In-Region, InterLATA Services in Arkansas and Missouri*, Memorandum Opinion and Order, 16 FCC Rcd 20719, ¶ 97 (2001) ("*Arkansas/Missouri 271 Order*").

“broadband facilities,” and argues that requiring access to these facilities would require modifications to its network, and ordering and billing systems.⁴⁷ In truth, however, the statutory obligation to provide access to SBC’s “broadband network” imposes no undue hardship.

As an initial matter, unbundled access pursuant to section 271 does not require SBC to break its network into its constituent parts as SBC claims.⁴⁸ Rather, unbundled access simply requires that the transmission be priced separately, and imposes no “redesign” requirements.⁴⁹ SBC sets up a straw man description of its obligations that bears little relationship to the way in which access would actually be provided. For example, SBC claims it would have to redesign its network and deploy additional operational systems in order to provide competitors access to next-generation technologies, such as next-generation digital loop carrier (“NGDLC”) loops.⁵⁰ Yet, in 2000, SBC committed to providing competing carriers access to its fiber-fed NGDLC architecture as part of its “Project Pronto” broadband offering.⁵¹ Although MCI raised a number of issues with regard to SBC’s Project Pronto broadband offering,⁵² the offering

⁴⁷ Petition at 9-10.

⁴⁸ *See id.* at 10 (section 271 unbundling requires SBC “to create, and then provide access to, artificial sub-components”).

⁴⁹ *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 531 (2002) (“To provide a network element ‘on an unbundled basis’ is to lease the element, however described, to a requesting carrier at a stated price specific to that element.”).

⁵⁰ Petition at 10.

⁵¹ *See generally Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 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) (“*Pronto Waiver Order*”).

⁵² *See* MCI WorldCom Comments, CC Docket No. 98-141 (March 3, 2000).

demonstrates that SBC is already capable of providing the type of unbundled access that MCI is seeking – *i.e.*, a bitstream handoff at the central office, or some other point in the network.⁵³ Moreover, as SBC’s Project Pronto provided, access to a bitstream handoff should be available over stand-alone loop facilities as well as over the same UNE loop facility the competitive LEC is using to provide voice to the end-user customer.⁵⁴ Such access should also be available over a UNE-P arrangement.

Similarly, SBC’s complaints about the costs and difficulty of modifying its network, and ordering and billing systems to accommodate unbundled access are not credible, given that SBC has already developed operational support systems, including a new Graphical User Interface (“GUI”), to support its Project Pronto offering as part of its commitment in the *Pronto Waiver Order*.⁵⁵ Clearly, any necessary modifications or

⁵³ See *Pronto Waiver Order* ¶ 31 (explaining that Project Pronto is a DSL-based service that relies on packet switching to provide a “permanent virtual connection” that could be used to “connect thousands of consumers served by plug-in cards installed in [SBC’s] NGDLC systems . . . to the [competitive carrier’s] advanced services network”); see also *id.* ¶ 42 (Project Pronto will “provide additional classes or qualities of service, other bit rate offerings, different combinations of permanent virtual connections, remote testing, and other features, functions, and capabilities made available by the manufacturer”); SBC-12 State Broadband Service (“BBS”) Stand-Alone Agreement § 4.4.1 (Pronto’s “data service configuration provides CLEC the capability to provision data connectivity from an end user location, through the SBC-12 State [optical concentration device or ATM switch], terminating at the CLEC collocation arrangement in the [serving wire center]”), available at: <http://www.sbc.com/PublicAffairs/PublicPolicy/Regulatory/affdocs/BBS_StandAlone_Agreement_12State_0501.doc>; *Pronto Waiver Order* ¶ 18.

⁵⁴ See *Pronto Waiver Order* ¶ 47 (under Project Pronto, SBC would “provide the integrated voice and data configuration by offering carriers the underlying voice loop over its NGDLC systems delivered directly to the Main Distribution Frame (or a higher-speed frame . . .) in their central offices and combining that loop with the Broadband Offering. The Combined Voice and Data Offering w[ould] provide carriers the ability to use the voice portion of the loop just as they would any other voice loop . . .”).

⁵⁵ *Id.* ¶ 32. The Project Pronto GUI is known as the “Broadband Ordering Profile (BOP) System,” which is used in conjunction with an Access Service Request (“ASR”) to order the service. See Broadband Ordering Profile (BOP) System User Guide (last

upgrades to SBC's network, and ordering and billing systems have already been implemented, and thus cannot form a basis for granting the requested relief.

Investment. In its Petition, SBC insists that relief from the unbundling requirements of both sections 251 and 271 is "critical . . . to support the massive investment that SBC and the other Bell companies are on the verge of making."⁵⁶ This argument ignores several facts. First, all telecommunications networks are capital intensive, whether used for broadband or narrowband. The record in the *UNE Triennial Review* proceeding, moreover, demonstrates that deploying fiber can be a cost-effective strategy.⁵⁷ For example, SBC has long touted the large annual savings it will achieve by deploying its Project Pronto NGDLC platform.⁵⁸ In addition, deploying NGDLC systems allows the BOCs to extend the reach of their DSL service significantly, thereby expanding their subscriber base and increasing their revenue opportunities.⁵⁹

revised Dec. 7, 2002) (system version 1.0.4), available at: <https://clec.sbc.com/clec_documents%5Cunrestr%5Ccsi/BOP_User_Guide_1_0_4.pdf>.

⁵⁶ Petition at 13. SBC also claims that the court in *USTA* has made clear that unbundling necessarily reduces the incentive for investment. Petition at 7 (citing *USTA v. FCC*, 290 F.3d 415, 424, 429 (D.C. Cir. 2002)). SBC's reliance on *USTA* is undercut by the Supreme Court's decision in the *Verizon* case. There, the Court concluded that, under the Commission's unbundling rules, new entrants had "invested in new facilities to the tune of \$55 billion since the passage of the Act (through 2000)." *Verizon v. FCC*, 535 U.S. at 516. Thus, the Court found that the incumbent's claims that the FCC rules had somehow deterred competitive investment could not be squared with such "substantial competitive capital spending over a 4-year period." *Id.* at 517.

⁵⁷ See, e.g., Letter from Kimberly Scardino, WorldCom, to Marlene Dortch, FCC, CC Docket No. 01-338, at 4-5 (Oct. 31, 2002) ("October Letter"); Joint Declaration of Tom Stumbaugh, David Reilly, and William Drake, ¶¶ 13-16, attached to WorldCom Reply Comments, CC Docket No. 01-338 (July 17, 2003) ("MCI Reply Comments").

⁵⁸ See October Letter at 4 (citing SBC's representations to investors that Project Pronto would achieve "annual savings of \$1.5 Billion by 2004").

⁵⁹ See October Letter at 5. To the extent SBC can make the showing that broadband investment is riskier than narrowband investment, and that its cost of capital is greater

Regulatory Uncertainty. SBC claims that application of section 271 unbundling obligations will “interject enormous uncertainty into Bell company efforts to develop and deploy broadband infrastructure.”⁶⁰ There is no uncertainty, however. Section 271 plainly requires SBC to provide requesting carriers with unbundled access to loops, switches, transport and signaling. These obligations have been in place since SBC first received approval for its section 271 applications. To the extent any uncertainty exists, it is solely the product of SBC’s requests to be relieved of its unbundling obligations.

3. SBC’s Petition Is Barred by Section 10(d) of the Act

Even if SBC had shown that it has satisfied section 10(a) (which it has not), section 10(d) bars the requested relief. Section 10(d) of the Act states in relevant part that:

the Commission may not forbear from applying the requirements of section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented.⁶¹

According to SBC, “the Commission has expressly found – and, indeed, was *required* to find – that the Bell Company applicant had ‘*fully implemented* the competitive checklist in [section 271(c)(2)(B)],’” in order to grant an application for in-region interLATA authority in a particular state.⁶² At a minimum, SBC argues, the FCC should determine that section 271’s competitive checklist has been fully implemented “once section 271 has been granted *and* the Commission has determined not to impose the particular

than it would be without the broadband investment, SBC can seek to recover this increased cost of capital through its rates.

⁶⁰ Petition at 10.

⁶¹ 47 U.S.C. § 160(d).

⁶² See Petition at 8 n.11 (emphasis in original) (citing 47 U.S.C. § 271(d)(3)(A)(i)).

unbundling obligation under section 251(d)(2).”⁶³ SBC confuses the showing required to gain in-region interLATA authority with the showing required to satisfy section 10(d).

Contrary to SBC’s claims, the statute does not permit the FCC to forbear from enforcing the requirements of 271 as soon as a BOC has received interLATA authority. As the Commission has concluded, section 271 requires a BOC seeking to obtain in-region interLATA authority to show that it has *opened* its local markets to competitive entry.⁶⁴ But Congress did not require the BOCs to open their markets only to permit the BOCs immediately to close them again. Instead, Congress recognized that even after a BOC had satisfied the 271 checklist requirements and obtained in-region interLATA authority, it would continue to be dominant in local telecommunications markets.⁶⁵ Congress thus imposed on the Commission an ongoing obligation to ensure that a BOC continues to comply with the conditions it is required to satisfy in order to obtain section 271 approval.⁶⁶

⁶³ *Id.* at 8 (emphasis in original).

⁶⁴ *See, e.g., Application by SBC Communications Inc., et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, 15 FCC Rcd 18354, ¶¶ 1, 419 (2000) (“*Texas 271 Order*”); *New York 271 Order* ¶¶ 1, 15, 426, 428.

⁶⁵ “The competitive checklist . . . only ensures that certain technical and legal barriers to competition . . . have been eliminated prior to the RBOC entry. This checklist does not require that competition actually exist in local markets dominated by the RBOCs before they are able to use their substantial market power to enter long distance markets.” 141 Cong. Rec. S. 8460, 8470 (1995) (statement of Sen. Feingold).

⁶⁶ *See* 47 U.S.C. § 271(d)(6); *Texas 271 Order* ¶ 434 (noting that “Section 271 approval is not the end of the road,” that “[t]he statutory regime makes clear that [the BOC] must continue to satisfy the ‘conditions required for . . . approval’ after it begins competing for long distance business,” and discussing “Congress’s recognition that a BOC’s incentives to cooperate with its local service competitors may diminish . . . once the BOC obtains section 271 approval”).

Nor does the fact that both section 10(d) and section 271(d)(3) use the phrase “fully implemented” mean that Congress intended for that phrase to have the same meaning in both provisions. As the District of Columbia Circuit has noted, “[o]n numerous occasions, both the Supreme Court and this court have determined, after examining statutory structure, context and legislative history, that identical words within a single act have different meanings.”⁶⁷ In this case, the same two words appear in different Titles of the Act in provisions that have very different purposes.⁶⁸

SBC’s argument that section 271’s competitive checklist has been fully implemented “once section 271 has been granted *and* the Commission has determined not to impose the particular unbundling obligation under section 251(d)(2)”⁶⁹ is similarly unavailing. As discussed above, section 271’s unbundling obligation is separate and independent from section 251. Notwithstanding SBC’s repeated attempts to conflate the two statutory schemes, the FCC’s impairment analysis under section 251 is not determinative of a finding that section 271 has been fully implemented for purposes of section 10(d).

⁶⁷ *Martini v. Federal National Mortgage Ass’n*, 178 F.3d 1336, 1343 (D.C. Cir. 1999); *see also Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) (presumption that identical words in an act have the same meaning “is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent”).

⁶⁸ Cases in which courts have assigned the same meaning to a word or phrase appearing more than once in a statute typically involve very different circumstances from those presented here. *See, e.g., Sorenson v. Secretary of the Treasury*, 475 U.S. 851 (1986) (concluding that the term “overpayment,” which (1) appeared in different subsections of the same statutory provision, (2) was explicitly defined in the same subchapter in which those subsections appeared, and (3) concerned the same subject matter, namely, treatment of overpayments, should be given the same meaning).

⁶⁹ Petition at 8.

As MCI previously has shown,⁷⁰ the most reasonable construction of the “fully implemented” requirement in section 10(d) is that it is satisfied “when markets are deemed competitive.”⁷¹ Specifically, the Commission should not consider section 10(d) satisfied until it can conclude that in a relevant geographic area, a robust wholesale market exists that enables competing providers to obtain access to the telecommunications services and facilities they require to enter the market without the need for continued enforcement of sections 251(c) or 271. Stated differently, the “fully implemented” standard requires a showing that a BOC no longer is dominant in the provision of the network elements and telecommunications services that entrants require to enter and compete effectively with the BOC.⁷²

The fact that section 10(d) applies to both section 251(c) and section 271 reinforces this reading of “fully implemented.” Both provisions focus on opening local telecommunications markets to entry through interconnection with an incumbent LEC, lease of unbundled network elements, or resale of retail services, or some combination thereof. In view of the paramount importance that Congress assigned to fostering the development of competitive local markets, the most reasonable reading of section 10(d) is to require the Commission to find that a robust wholesale market for facilities and services exists in a relevant geographic area so that it is assured that forbearing from

⁷⁰ See Opposition of MCI, WC Docket No. 03-157, at 27-28 (Aug. 18, 2003).

⁷¹ 141 Cong. Rec. S. 7942, 7956 (June 8, 1995) (statement of Senator McCain) (quoting from Heritage Foundation letter).

⁷² See, e.g., Z-Tel Reply Comments, CC Docket No. 01-338, at 118-23 (July 17, 2002) (citing *Motion of AT&T to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271 (1995)).

enforcing the requirements of section 251(c) or section 271 will not lead promptly to the remonopolization of local and long distance services.

Section 10(d) bars the Commission from forbearing from applying the requirements of section 271 until those requirements have been “fully implemented.”⁷³ SBC’s Petition must therefore be denied.

B. SBC’s Argument that Section 271 Does Not Apply to “Broadband” Loops and Packet Switching Is Without Merit

1. Section 271 Is Not Limited to “Legacy” Voice Networks

SBC asserts – without citing any support – that section 271 “was intended, at most, to ensure that the BOCs provided access to the core legacy systems that make up the traditional local telecommunications network.”⁷⁴ In fact, section 271 applies to all “interLATA services,” which the Act defines to include “telecommunications between a point located in a local access and transport area and a point located outside such area.”⁷⁵ Nothing in the Act suggests that broadband is not included within that definition. Indeed, the FCC has previously confirmed that section 271 extends to all interLATA services, including voice, data, and broadband.⁷⁶

⁷³ 47 U.S.C. § 160(d).

⁷⁴ Petition at 13.

⁷⁵ 47 U.S.C. § 271(b); *id.* § 153(21).

⁷⁶ *See, e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, 13 FCC Rcd 24011, ¶¶ 18, 35 (1998) (“*Advanced Services Order*”) (denying BOCs’ request to establish a “data LATA” because doing so “would be functionally the same as forbearing from section 271 for advanced services and would eviscerate section 271 for those services”; further “conclud[ing] that advanced services are telecommunications services. The Commission has repeatedly held that specific packet-switched services are ‘basic services,’ that is to say, pure transmission services.”).

This conclusion is warranted because broadband services had long been provisioned, and were well known to Congress, when the 1996 Act was debated and enacted. In fact, broadband technologies date back to the 1950s, and fiber optic and digital technologies in particular began to be widely deployed after the AT&T divestiture in 1984.⁷⁷ Moreover, Congress was aware that broadband services existed in 1996 – a fact that is irrefutably proven by section 706, which expressly seeks to promote the timely deployment of “advanced telecommunications capability” – defined in section 706 as “high-speed, switched, *broadband* telecommunications capability.”⁷⁸ Given that broadband existed in 1996 and was known to Congress at that time, Congress easily could have drafted section 271 to indicate that its provisions did not apply to broadband services. Congress chose not to do so for the simple reason that it intended section 271 to apply broadly to all interLATA services – narrowband and broadband alike.

Indeed, nothing in the legislative history of the 1996 Act suggests that Congress intended the competitive checklist to apply only to voice elements, and not to broadband elements. To the contrary, Congress intended key provisions of the 1996 Act not to be limited to traditional voice telephony, and “not [to be] made useless by the replacement

⁷⁷ See, e.g., Anthony Palazzo, “History of the Broadband Industry,” *available at*: <<http://www.broadband-internet.org/history.htm>> (last viewed Dec. 1, 2003); “Broadband, History, Use, Diffusion, and Deployment,” *available at*: <http://www.actonvision.com/broadband/Broadband_History_Use_Diffusion_Deployment.htm> (last viewed Dec. 1, 2003).

⁷⁸ 47 U.S.C. § 157 note (emphasis added); *see also* Statement of Sen. Hollings, 145 Cong. Rec. S. 8085, 8086 (1999) (the BOCs “are wrong” when they argue that Congress did not contemplate the provision of advanced services when it enacted the competitive checklist); *Advanced Services Order* ¶ 49 (“Congress was well aware of the Internet and packet-switched services in 1996, and the statutory terms do not include any exemption for those services.”); *id.* ¶ 49 n.83 (“Congress in the 1996 Act favored ‘the continued development of the Internet,’ which the Act defined as ‘the international computer network of . . . interoperable packet-switched data services.’”) (citing 47 U.S.C. § 230(b)(1), (e)(1) and 47 U.S.C. § 223).

of circuit switched technology with other means – for example packet switches or computer intranets.”⁷⁹

SBC’s interpretation of section 271 is also contrary to the Commission’s finding in the *Advanced Services Order* that the procompetitive provisions of the 1996 Act – above all, sections 251(c) and 271 – “apply equally to advanced services and to circuit-switched voice services.”⁸⁰ As the Commission explained, “in adopting the 1996 Act, Congress consciously did not try to pick winners or losers, or favor one technology over another.”⁸¹ Rather, “Congress made clear that the 1996 Act is technologically neutral and is designed to ensure competition in all telecommunications markets.”⁸² As these findings demonstrate, Congress did not intend to exempt advanced services from the competitive checklist of section 271; rather, Congress intended that the facilities used to provide advanced services, like the facilities used to provide voice services, would be

⁷⁹ Comments of Senators Stevens and Burns at 2 n.1, *Federal-State Board on Universal Service*, CC Docket No. 96-45, Report to Congress (filed Jan. 28, 1998) (discussing Congress’s expansion of the scope of “telephone exchange service” in the 1996 Act); *see also Advanced Services Order* ¶ 49 (“Nothing in the statute or legislative history indicates that [section 251(c)] was intended to apply only to existing technology.”).

⁸⁰ *Advanced Services Order* ¶¶ 11-12 (denying petitions to forbear from applying the requirements of sections 251(c) and 271 to the provision of advanced services); *see also id.* ¶ 21 (“At the core of the Act’s market-opening provisions are sections 251 and 271.”); *id.* ¶ 73 (“Sections 251(c) and 271 are cornerstones of the framework Congress established in the 1996 Act to open local markets to competition.”).

⁸¹ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Fourth Report and Order, 16 FCC Rcd 15435, ¶ 7 (2001) (citing *Advanced Services Order* ¶¶ 2, 11).

⁸² *Advanced Services Order* ¶ 11; *see also Association of Communications Enterprises v. FCC*, 235 F.3d 662, 664 (D.C. Cir. 2001) (citing earlier FCC determinations “that advanced services are telecommunications services like any others”).

treated as network elements that are subject both to the unbundling requirements of section 251(c) and the competitive checklist requirements of section 271.⁸³

There is therefore neither a legal nor a factual basis for the Commission to interpret section 271 as applying only to the “legacy” voice elements of the BOCs’ networks.

2. The Section 271 Checklist Requires SBC to Provide Independent Access to Fiber and Hybrid Loops, Including All Their Features, Functions, and Capabilities

SBC incorrectly claims that the section 271 checklist has been interpreted not to cover broadband loop or packet switching elements that have been excluded from the section 251 unbundling list.⁸⁴ SBC omits, however, any discussion of statutory language. As explained below, the plain language of section 271 makes clear that the checklist applies broadly to all types of loops and switching, including facilities used to provide broadband services.⁸⁵ Moreover, even the precedents cited by SBC confirm that the FCC has found that section 271 requires BOCs to provide access to facilities used to provide broadband services independent of any unbundling analysis under section 251(c)(3).

a. The Plain Language of the Section 271 Checklist Covers Broadband Facilities

In drafting the requirements of the section 271 checklist, Congress chose to use language that applies broadly to all types of loops and switching. There is no suggestion that Congress intended to exempt facilities used to provide broadband services.

⁸³ *Advanced Services Order* ¶ 11 (finding that “the facilities and equipment used by incumbent LECs to provide advanced services are network elements”); *see also id.* ¶ 57.

⁸⁴ Petition at 1-2.

⁸⁵ 47 U.S.C. § 271(c)(2)(B)(iv), (vi).

Checklist item 4, for instance, requires the BOCs to provide access to “[l]ocal loop transmission from the central office to the customer’s premises, unbundled from local switching or other services.”⁸⁶ This definition clearly encompasses fiber and hybrid fiber-copper loops, both of which are means of transmission from the central office to the customer’s premises. Moreover, to the extent that packet-based features, functions, and capabilities exist between the central office and the customer’s premises (*e.g.*, in the remote terminal), the FCC has treated them as features, functions, and capabilities of the loop for purposes of the competitive checklist.⁸⁷

This analysis is consistent with the *UNE Triennial Review Order*, which distinguished between (i) packet-based features, functions, and capabilities located between the central office and the customer’s premises (such as packet switching functionalities used in DLC loop architecture), and (ii) packet switches (such as routers and DSLAMs) located in the central office. The Commission addressed the former category within its discussion of loops, while the latter category was addressed in the discussion of packet switches.⁸⁸

⁸⁶ *Id.* § 271(c)(2)(B)(iv).

⁸⁷ For instance, where DSL-capable fiber-fed NGDLCs are deployed in a BOC’s network, packet switching is a functionality of the local loop for purposes of checklist item 4. *See* MCI Reply Comments at 112.

⁸⁸ *Compare* *UNE Triennial Review Order* ¶¶ 285-97, *with id.* ¶¶ 537-41 & n.1646; *see also* 47 C.F.R. § 51.319(a) (defining local loop as “a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises . . . includ[ing] all features, functions, and capabilities of such transmission facility”).

b. *The Precedents Cited by SBC Are Inapposite*

SBC incorrectly claims that the FCC has recognized that the 271 checklist items do not encompass facilities used to provide broadband services.⁸⁹ In support of that claim, SBC cites four section 271 orders, which it claims demonstrate that the Commission has “consistently held that the scope of the unbundling obligations under the Competitive Checklist is no more extensive than the scope of those same obligations under section 251.”⁹⁰ In fact, the cited portions of these orders (all of which relate to checklist item 6) are consistent with the FCC’s conclusion that access to 271 checklist items, including facilities used to provide broadband services, is independent of any unbundling duties imposed by section 251.⁹¹

SBC first cites the *Qwest Nine-State Order* for the proposition that the FCC has construed the checklist not to include elements used to provide broadband elements.⁹² There, AT&T argued that Qwest was not offering nondiscriminatory access to packet switching under the four-prong packet-switching rule adopted in the *UNE Remand Order*.⁹³ In response, the FCC found it sufficient that Qwest offered competitors access to packet switching at an unspecified bit rate pursuant to section 251(c), and at other

⁸⁹ Petition at 1-2 & n.3.

⁹⁰ *Id.*

⁹¹ There is no legal relevance to the fact that in several of the cited section 271 orders, the Commission noted a BOC’s compliance with the rules adopted in the *UNE Remand Order* in finding that a checklist item had been satisfied. As noted, in the *UNE Remand Order* (as in the *UNE Triennial Review Order*), the Commission found that section 271 imposes an independent unbundling obligation on the BOCs that is separate from the obligations of section 251. *See UNE Remand Order* ¶¶ 468-471. It thus would not make sense to interpret the Commission’s citation of the *UNE Remand Order* as evidence that the FCC had decided to invalidate a key finding of that order.

⁹² Petition at 2 n.3.

⁹³ *See Qwest Nine-State Order* ¶ 358.

types of bit rates pursuant to Qwest's *bona fide* request process.⁹⁴ AT&T's comments never raised the issue of whether Qwest was meeting its independent obligation to provide packet switching under section 271,⁹⁵ and the FCC therefore did not reach that issue.

Likewise, in the *Arkansas/Missouri Order*, the Commission refused to rule on a factual dispute regarding the scope of SWBT's duty to provide unbundled local switching in accord with the *UNE Remand Order*. As the *Arkansas/Missouri Order* makes clear, this dispute arose under section 251 of the Act,⁹⁶ and therefore has no relevance to a BOC's independent duties under checklist item 6 of section 271.

SBC's reliance on the *Massachusetts Order* and the *Kansas/Oklahoma Order* is also misplaced. Although both orders refer to the 4-line switching "carve out" and the four-prong packet switching rules adopted in the *UNE Remand Order*,⁹⁷ the FCC's

⁹⁴ *Id.* The FCC also ruled that Qwest had satisfied checklist item 6 based on the fact that it made available (at market-based rates) density zone 1 switching with four or more lines. If SBC were correct that the unbundling requirements of section 271 are "no more extensive than" those of section 251, Qwest would not have been required to provide access to unbundled zone 1 switching. See Petition at 1-2; *Qwest Nine-State Order* ¶ 359 (referencing Colorado SGAT, Ninth Revision, § 9.11.2.5 (March 4, 2003); Utah SGAT, Seventh Revision, § 9.11.2.5 (Oct. 31, 2002); Washington SGAT, Eighth Revision § 9.11.2.5 (June 25, 2002), available at: <<http://www.qwest.com/about/policy/sgats>> ("*Qwest SGATs*")).

⁹⁵ See AT&T Comments, WC Docket No. 02-189, at 112-114 (Aug. 1, 2002).

⁹⁶ *Arkansas/Missouri Order* ¶ 112-113 & nn. 353, 358 (citing Sage Comments and *UNE Remand Order*); Sage Telecom, Inc.'s Comments Opposing Southwestern Bell Telephone Company's Application for Authorization to Provide In-Region InterLATA Service in Missouri, CC Docket No. 01-194, at 5, 7 (Sep. 10, 2001) (arguing that SWBT's refusal to allow Sage access to certain line class codes in Missouri violates unbundling requirements of section 251(c)(3), and dialing parity requirements of section 251(b)(3)); *UNE Remand Order* ¶ 244 n.475 (defining local switching element under section 251 to include customized routing functions).

⁹⁷ *Application of Verizon New England Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order, 16 FCC

treatment of those issues in the *Qwest Nine-State Order* confirms that it has interpreted item 6 to impose an independent obligation.⁹⁸ Moreover, in the *Kansas/Oklahoma Order*, the FCC explained that the issue of how to treat packet switching that is part of Project Pronto was not ripe for review because (i) no party had yet requested packet switching in Kansas or Oklahoma, and (ii) neither the Kansas nor Oklahoma state commissions had ruled on SBC's interpretation of its obligation with respect to Project Pronto packet switching.⁹⁹

In sum, there is no basis for SBC's claim that section 271 does not apply to facilities used to provide broadband services. Indeed, the plain language of checklist items 4-6 and 10 and past federal and Commission precedent make clear that section 271 requires unbundled access to facilities used to provide both narrowband and broadband services.

Rcd 8988, App. B, ¶ 1 n.3 (2001); *Joint Application by SBC Communications, Inc., et al. for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, Memorandum Opinion and Order, 16 FCC Rcd 6237, ¶ 241 (2001) ("*Kansas/Oklahoma Order*").

⁹⁸ See *supra* note 94.

⁹⁹ *Kansas/Oklahoma Order* ¶¶ 244-45.

III. CONCLUSION

For the foregoing reasons, MCI urges the Commission to deny the relief requested by SBC in its Petition.

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December 2, 2003

Certificate of Service

I, Ruth E. Holder, certify that on this 2d day of December, 2003, I caused true and correct copies of the foregoing Opposition of MCI to SBC's Petition for Forbearance to be mailed to:

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