ATTACHMENT 3

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	**CC Docket No. 01-338**
Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. Section 160(c)	)	

SPRINT CORPORATION'S OPPOSITION TO PETITION FOR FORBEARANCE

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Sprint Corporation, on behalf of its incumbent local exchange ("ILEC"), competitive LEC ("CLEC")/long distance, and wireless divisions, opposes the Petition for Forbearance of Verizon, filed July 29, 2002 ("Petition").

Verizon's petition is based on the premise – briefly ventured in its comments in the Triennial Review docket[1] – that Bell Operating Companies ("BOCs") may ignore certain items on the Section 271 checklist if the Commission were to determine under Section 251 that certain network elements ("UNEs") need not be unbundled. Realizing that the interpretation offered in its comments (at 66-67) may be difficult for the Commission to swallow – and that its alternative call for forbearance did not comport with FCC rules – Verizon has taken the further step, "in an abundance of caution," of

[1] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338 ("Triennial Review"). In this opposition, references to "Comments" and "Reply Comments" of Sprint and other parties are to that proceeding, filed April 5 and July 17, 2002, respectively. Sprint incorporates its Comments and Reply Comments here by reference.

filing a separate petition.[2] It asks the Commission to disregard its statutory obligation – through forbearance under Section 10 – to apply competitive checklist items (iv) through (vi) and (x) for purposes of its obligations under Section 271.[3]

Verizon is wrong on the law and on the facts, and the petition should be denied.

I. Introduction and Summary

Verizon has let its hostility to local competition get the better of it. At best, its petition is grossly premature and presumes far too much about the outcome of the Triennial Review proceeding. As Sprint explained in its comments, the existing minimum UNE list should be maintained, with only modest changes and clarifications.[4] Local competition remains in its infancy, and (with the minor exception noted in n.4) requesting carriers remain impaired without access to the UNEs identified in the UNE Remand Order. In addition, independently of Section 251, Section 271 imposes on the

[2] Petition at 2 & n.6. The Commission's rules require that a petition for forbearance be filed as a separate pleading. 47 C.F.R. §1.53.

[3] 47 U.S.C. §§ 271(c)(2)(B)(iv)-(vi) and (x). Checklist item (iv) is "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services." Checklist item (v) is "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services." Item (vi) is "[l]ocal switching unbundled from transport, local loop transmission, or other services." Checklist item (x) is "[n]ondiscriminatory access to databases and associated signaling necessary for call routing and completion."

[4] Sprint explained that the Commission should clarify that loops include attached electronics, that ILECs must support packetized loop functionality and a DSL-capability from end to end, and that limited commingling is permissible. The spare copper and remote terminal collocation conditions should be removed, and discrimination based on technology – particularly against CMRS and fixed wireless carriers – should be removed. Sprint also explained that market-specific UNE analysis is unworkable. However, Sprint stated that there are competitive alternatives to signaling and call-related databases, other than those necessary to support 911/E911 services and the UNE platform. See Sprint Comments; Sprint Reply Comments.

BOCs an obligation to unbundle core network elements – including loop (item iv), transport (item v), and switching (item vi) – and to provide nondiscriminatory access to call-related databases and signaling (item x).

The Commission has already concluded, in the UNE Remand Order,[5] that the checklist unbundling obligations are separate and distinct from any UNEs mandated by the Commission's implementation of Section 251. The issue was unaffected by the D.C. Circuit's recent remand of that order,[6] and there is no basis for the Commission to reverse itself now.

Verizon's petition also fails to meet Section 10's specific requirements for forbearance. Additionally, Section 10(d) expressly prohibits the Commission from forbearing to apply "the requirements of Sections 251(c) or 271 ... until it determines that those requirements have been fully implemented." 47 U.S.C. § 160(d). That means forbearance of these checklist items is not possible for BellSouth, Qwest, SBC, or Verizon until, at the earliest, it has received Section 271 authority in all states within its region. In fact, given the competition-enabling objectives of the Act, the Commission should retain these market-opening requirements on BOCs beyond the point at which all Section 271 approvals have been granted. The checklist requirements should remain in place until competition in BOC markets is solidly established, such that the checklist requirements are no longer necessary.

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[5] 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").

[6] United States Telecom Ass'n v. FCC, 290 F.3d 1646 (D.C. Cir. 2002) (petitions for rehearing pending) ("USTA").

We are certainly not there yet. Today, just six years after the Act was passed, local competition in the BOCs' markets is only beginning to develop.[7] The CLEC industry now faces an acute financial crisis. Meanwhile, by any measure, the BOCs remain overwhelmingly dominant in their markets, and they retain their control over bottleneck facilities. They have the ability and incentive to abuse their control – and are doing so in the exchange and exchange access markets. Lifting these market opening requirements from the Act would seriously, perhaps permanently, undermine the Act's goals of promoting market entry and competition. The obvious harm to the public interest precludes granting Verizon's petition.

II. Verizon's Petition is Premature and Prejudges the Outcome of the Triennial Review.

Verizon's petition repeats the BOCs' unfounded allegations about the state of local competition and the effects of unbundled network elements on network investment. The

[7] Although Verizon and the other BOCs pretend that the transition to local competition is complete, the competitive industry has yet to receive a proper measure of regulatory certainty about the obligations of BOCs to open their networks and their markets. Sprint Comments at 4-5; Sprint Reply Comments at 4-5. Ten days after the U.S. Supreme Court issued its order in Verizon, upholding the Commission's TELRIC methodology and confirming the market-opening purposes of the Act (Verizon Comms. Inc. v. FCC, 122 S. Ct. 1646 (2002) ("Verizon")), the D.C. Circuit issued its USTA decision, remanding for further consideration the UNE Remand Order and the Line Sharing Order (Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Third Report and Order in CC Docket No. 98-147 – Fourth Report and Order in Docket No. 96-98*, 14 FCC Rcd 20912 (1999)). Regulatory uncertainty has prejudiced the CLEC industry, and benefited the BOCs by frustrating local competitors even while the BOCs have been continued to receive access to the in-region, interLATA long distance market. See, e.g., CompTel Reply Comments at 4 & Attachments (Decls. of J. Perry, J. Hunt, and P. Claudy). Until the Commission denies Verizon's petition, it will only add to this problem.

petition attached Verizon's comments and reply comments from the UNE Triennial Review proceeding, together with the so-called "UNE Fact Report" that the four BOCs each submitted in that docket. Verizon's fact allegations, however, are contradicted by the record in the Triennial Review.

Sprint established in its comments, as did many other parties, that requesting carriers plainly are impaired without access to unbundled local loop and to unbundled transport. See Sprint Comments at 19-27, 45-49; Sprint Reply Comments at 26-30, 34-39; AT&T Reply Comments at 144-239; WorldCom Reply Comments at 63-75, 122-133; CompTel Reply Comments at 22-23; ALTS Reply Comments at 58-83. Many parties disputed BOC arguments that competitive alternatives are available for local switching. See AT&T Comments at 346-360; AT&T Reply Comments at 300-359; WorldCom Comments at 132-161; CompTel Reply Comments at 17-21. All of the state commenters agreed that the existing UNE list generally should be maintained, if not added to. See, e.g., California PUC Comments at 5 ("[G]iven current market conditions, it may be appropriate to require more, not less, unbundling.").[8] Further, the Commission cannot rely on the BOCs' UNE Fact Report, which Verizon filed with the petition. The self-serving, misleading, and utterly unreliable nature of the UNE Fact Report was solidly

[8] Sprint agrees that there are competitive alternatives to signaling and databases (Sprint Comments at 49-50; Sprint Reply Comments at 39-42), but the Section 271 checklist does not require unbundling of signaling and databases, but only "nondiscriminatory access" to them. 47 U.S.C. § 271(c)(2)(B)(x). Nevertheless, there is no reason why Verizon should object to providing nondiscriminatory access to signaling and call-related databases. After all, Verizon already provides those services at market rates outside its ILEC territories, even though it is not obligated to do so. Sprint Reply Comments at 40.

established by commenters in the Triennial Review proceeding. See, in particular, AT&T Reply Comment at Attachments E (Decl. of M. Lancaster & D. Morgenstern), G (Decl. of C. Pfau), and I (Decl. of D. Willig); WorldCom Reply Comments at Attachments B (Decl. of A. Kelley) and D (Ordover Report). Verizon's declarations accompanying its Reply Comments repeat the same exaggerated, flawed "fact" conclusions as the Report.

Verizon's petition repeats the BOCs' fundamental mischaracterization of the goals of the 1996 Act. Verizon repeats its claim that Congress's principal goal was the creation of facilities-based competition. Petition at 1; Verizon Comments at 25-27, 66. Sprint was among the large majority of commenters that showed in Triennial Review comments that this is a false assumption. Sprint Reply Comments at 12-13. The First Report and Order acknowledged that the Act does not require CLECs to own any facilities, and the Eighth Circuit and the Supreme Court confirmed that ruling.[9] Moreover, there is a damning inconsistency to Verizon's argument. In Section 271 applications, the BOCs have argued consistently that UNE-P carriers are competitors providing their "own telephone exchange service facilities" for purposes of Section 271(c)(1)(A), even though they have not built their own networks, and the Commission has conducted Track A

[9] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *Report and Order*, 11 FCC Rcd 15499 at ¶¶ 328-340 (subsequent history omitted) ("First Report and Order"); Iowa Utilities Bd. v. FCC, 120 F.3d 753, 808-810 (8th Cir. 1997), aff'd in part and rev'd in part, 525 U.S. 366, 392-93 (1999).

analyses on that basis.[10] Yet in the petition, as in the Triennial Review, Verizon argues that such UNE-enabled competition is counterproductive and contrary to the stated objective of the "statutory scheme." Petition at 6. See also Verizon Comments at 23-38 and 69-70; Verizon Reply Comments at 15-28. The Commission need not entertain Verizon's allegation. The Supreme Court expressly dismissed the BOCs' assertion that mandated access to RBOC facilities discourages investment in facilities. In its ruling upholding the Commission's TELRIC pricing requirements, the Supreme Court concluded that this BOC claim "founders on fact," given the extraordinary capital investment undertaken by both new entrants and incumbents.[11]

Likewise, there is no basis for Verizon's argument that Congress intended UNEs to be a temporary, transitional mechanism. Compare Petition at 7 and Verizon Comments at 37 with Sprint Reply Comments at 6, 13-14. Again, the Supreme Court found otherwise, stating:

> Section 251(c) addresses the practical difficulties of fostering local competition by recognizing three strategies that a potential competitor may pursue, and that no threshold investment in facilities is envisioned or required by the Act.

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[10] See, e.g., 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 ¶ 160 (1997); Joint Application by BellSouth Corp., BellSouth Telecoms., Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Ga. and La., 17 FCC Rcd 9018 at ¶¶ 3, 11-15 (2002).

[11] Verizon, 122 S. Ct. at 1675 (rejecting BOC notion that unbundling discourages investment), 1676 (finding that the Commission's unbundling requirements are not an "unreasonable way to promote competitive investment in facilities."), and 1676 n.33 (noting "the commonsense conclusion that" competition enabled by TELRIC rates means "the incumbents will continue to have incentives to invest and to improve their services to hold on to their existing customer base."). See also Sprint Reply Comments at 18.

122 S. Ct. at 1662, 1664.[12] Moreover, the Act is, by its very terms, not time-specific. It does not provide that to have access to UNEs a requesting carrier needed to enter the market in 1996, or by 2002, or by any other date. Sprint Reply Comments at 13. Like UNEs under Section 251(d), Section 271 envisions that the checklist items will remain in place indefinitely.

III. Verizon's Petition is Based on a Fundamental Misinterpretation of Section 271.

Verizon's petition asks the Commission to interpret Section 271 to allow it to conclude that checklist items are "automatically" satisfied if and when the corresponding facility may be removed from the mandatory unbundling list under Section 251(d)(2). Verizon Comments at 66; Petition at 1. If a network element is no longer subject to mandatory unbundling by all ILECs under Section 251(d)(2), Verizon claims that it should be permitted to ignore the fact that Congress imposed on BOCs a similar obligation in the Section 271 competitive checklist as a condition for long distance authority. Verizon Comments at 66-67; Petition at 1-2.

Verizon's argument rests on the invalid assumption that Section 251(d) was intended to somehow override Section 271. If that were true, however, Congress could easily have expressly provided so. But Verizon offers no evidence of that intention. That interpretation is not supported by the text of the statute. There is not even a cross reference between Section 251(d)(2), instructing the Commission how to determine when

[12] In the UNE Remand Order, the Commission reiterated that the Act does not "explicitly express a preference for one particular competitive arrangement" over another. UNE Remand Order at ¶ 6. See also First Report and Order at ¶ 12.

and if individual network elements must be unbundled, and items (iv) through (vi) and (x) at Section 271(c)(2)(B).[13] That makes sense, both because Section 271's "competitive checklist" serves a different purpose than Section 251(d)(2) and because it applies to a different and narrower group of carriers – BOCs, distinct from all other ILECs. The presence of checklist item (ii) – requiring "nondiscriminatory access to network elements in accordance with the requirements of Sections 251(c)(3) and 252(d)(1)" – also underscores that Sections 251(d)(2) and 271(c)(2)(B) serve different purposes.[14]

To make matters clearer, Section 10(d) expressly prohibits the Commission from forbearing from any Section 271 requirements until that section has been "fully implemented." 47 U.S.C. § 160(d). Verizon acknowledges the Section 10(d) restriction, but dismisses it by claiming that it is unclear what it means. Petition at 7; Verizon Comments at 68-69. Verizon nevertheless claims that the Commission somehow has "ample statutory authority" to ignore four out of ten of the Section 271 checklist items that Congress expressly mandated BOCs provide if they are to provide in-region, interLATA long distance services. Petition at 1-2. The Commission, however, cannot simply ignore Congress's instruction in Section 10(d). It is obvious enough that Section 271 has not yet been "fully implemented." Neither BellSouth, Qwest, SBC, nor

[13] In contrast, Congress included specific, individualized cross-references in checklist item entries (i), (ii), and (xii) through (xiv).

[14] Moreover, as the Commission has noted in related proceedings, its review of the Act's provisions must be "based on the principle of statutory construction that a statute should be construed so as to give effect to each of its provisions." Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Comms. Act of 1934, as Amended, *First Report & Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 21905 at ¶ 156 (1996).

Verizon has yet completed the Section 271 approval process in all states within its region, and therefore even with the most lenient reading Section 271 surely cannot be deemed "fully implemented" with respect to any BOC. But even that milestone does not mean that Section 271 has been "fully implemented."

Sprint believes that the checklist provisions of Section 271(c)(2)(B) – specifically items (iv)-(vii), (x), and (xii) – plainly show a legislative conclusion by Congress that these most critical network elements[15] must be made available by BOCs on an unbundled basis, whether or not they meet the "necessary" or "impair" tests applicable to all ILECs in Section 251(d)(2). In the Section 271 checklist, Congress not only required non-discriminatory access to network elements in accordance with Section 251(c)(3) and Section 252(d)(1), but in addition, specifically required the BOCs to make available unbundled loops, unbundled transport, unbundled local switching, access to 911/E911 services directory assistance and operator services, as well as access to databases and signaling needed for call completion, and to information needed for local dialing parity. Congress required BOCs to provide these elements even if the Commission were to find that they did not satisfy the "necessary" and "impair" tests of Section 251(d)(2). These obligations are imposed not only as preconditions to in-region long distance entry by the BOCs, but also as continuing obligations on the BOCs after they receive their entry authority. See Section 271(d)(6) (authorizing the Commission, inter alia, to revoke long

[15] "[T]he competitive checklist … embodies the critical elements of market entry under the Act…." Application by Verizon N.J. Inc., BellAtlantic Comms., Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Co. (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region InterLATA Services in N.J., FCC 02-189 (rel. June 24, 2002).

distance authority if a BOC "has ceased to meet any of the conditions required for such approval....").[16]

Verizon's argument that the statute must be read "as a whole," to avoid a conflict between Section 251(d)(2) and 271 is without merit. Verizon Petition at 6; Comments at 67. Reading it as a whole, however, shows that central to the framework of Section 271 is the notion that BOCs are not to be permitted to enter the long distance market in-region until local competition has been fully enabled.[17] This trade-off between opening local markets and entry into in-region interLATA, interstate long distance markets distinguishes BOCs from other ILECs. Likewise, the BOCs have the additional obligation under Section 271 to provide unbundled loop, switching, and transport and nondiscriminatory access to signaling and databases. The Commission recognized this

[16] It is not coincidental that these requirements are grouped with other, ongoing market opening obligations, including, inter alia, interconnection under section 251(c)(2) and 252(d)(1); nondiscriminatory access to network elements under sections 251(c)(3) and 252(d)(1); nondiscriminatory access to BOC poles, ducts, conduits and rights of way; directory assistance and listings; interim number portability; dialing parity; and resale under Sections 251(c)(4) and 252(d)(3). 47 U.S.C. §§ 271(c)(2)(B)(i)-(iii), (vii)-(viii), (xi), and (xii-xiv).

[17] During debate on the Act, Senator Breaux explained,

> This is extraordinary in the sense of telling private industry that this is what they have to do in order to let the competitors come in and try to beat your economic brains out. It is there on page 823, called a competitive checklist. ... It is kind of almost a jump-start. You can get in my business when I can get into your business. But I will do everything I have to [to] let you into my business, because we used to be a bottleneck; we used to be a monopoly; we used to control everything. Now, this legislation says you will not control much of anything. You will have to allow for nondiscriminatory access on an unbundled basis to the network functions and services of the Bell operating companies network that is at least equal in type, quality, and price to the access [a] Bell operating company affords to itself."

141 Cong. Rec. S8,153 (June 12, 1995).

trade-off from among the very first BOC applications under Section 271.[18] By specifically requiring the BOCs to make available, on an unbundled basis, the most basic elements enumerated in the checklist, it is clear that Congress viewed these elements as essential to creating a market in which local competition could function, quite apart from however the Commission may otherwise have chosen to implement Section 251(c)(3).

The BOCs object to being treated differently from other ILECs, but Congress explicitly differentiated between BOCs and other ILECs and had obvious and legitimate reasons for doing so. The Act was a response to and a replacement for the AT&T Modification of Final Judgment,[19] and the Supreme Court emphasized that the Act's requirements "were intended to eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises...." Verizon, 122 S. Ct. at 1654. The BOCs nevertheless challenged the Act, and Section 271 in particular, on Constitutional grounds. Ultimately, they lost those appeals. See SBC Comms. v. FCC, 154 F.3d 226, 246 (5th Cir. 1998), cert. denied, 525 U.S. 1113 (1999); BellSouth v. FCC, 162 F.3d 678, 691-92 (D.C. Cir. 1998).

Congressional drafters intended "the competitive checklist to set forth what must *at a minimum* be provided by a Bell Operating Company in any interconnection agreement approved under Section 251 to which the company is a party." Sen. Rep. No.

[18] See, e.g., Application of BellSouth Corp., BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in La., 13 FCC Rcd 20599 at ¶ 3 (1998).

[19] United States v. American Telephone & Telegraph Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

104-23 at 43 (1995) (emphasis added). It would make no sense for the Act to require these minimum elements be made available on an unbundled basis, and to allow BOCs to point to UNE-based competition as grounds for granting Section 271 authority, only to remove the underpinnings of competition immediately when such authority is granted. Senator Pressler, a Senate sponsor, explained that the checklist requirements – far from being transitory – would remain in place for "the reasonably foreseeable future."[20] And again, in Section 271(d)(6), Congress authorized the Commission to impose a full array of penalties – including revocation of long distance authority – "[i]f any time after approval" a BOC fails to comply fully with all requirements and conditions of Section 271 approval. 47 U.S.C. § 271(d)(6). The fact that Congress saw it necessary to include this provision – and the fact that the Commission has repeatedly found it necessary to threaten or impose penalties under this section – show that forbearance from enforcing the competitive checklist items cannot reasonably be granted at this time.[21]

Congress clearly intended that BOCs maintain these unbundled network elements until a competitive market is established, such that those requirements are no longer necessary. Clearly the BOCs are not there yet; indeed, this goal probably remains many years away.

[20] 141 Cong. Rec. S8,469 (June 15, 1995).

[21] State commissions have also imposed "performance assurance" programs when BOCs have requested authority to provide in-region long distance service. This shows they too understand that the checklist requirements are not automatically "deemed satisfied" (Verizon Comments at 66; Petition at 1) merely because a section 271 application has been conditionally approved.

IV. The Commission Has Already Determined that Section 271 Requires Unbundling of Loop, Transport, and Switching, Independent of Section 251 Requirements.

In the UNE Remand Order, after considering a complete record, the Commission acknowledged the pro-competitive purpose of the Act and recognized that Section 271 requires unbundling of loop, transport, and switching independent of Section 251's unbundling requirements. Even while declining to unbundle, in certain circumstances, circuit switching and shared transport, the Commission explained, "[n]onetheless, providing access and interconnection to these elements remains an obligation for BOCs seeking long distance approval." UNE Remand Order at ¶ 468. Verizon joined in appeals of the UNE Remand Order, but it did not appeal on this issue. Indeed, no party challenged that determination, and the D.C. Circuit's ruling in USTA did not affect it.

At the time, however, the Commission decided that TELRIC pricing would not be applicable to such elements. The Commission concluded this assuming that "[i]n circumstances where a checklist network element is no longer unbundled, we have determined that a competitor is not impaired in its ability to offer services without access to that element."[22] It continued (id.):

> Such a finding in the case of switching for large volume customers is predicated in large part upon the fact that competitors can acquire switching in the marketplace at a price set by the marketplace. Under these circumstances, it would be counterproductive to mandate that the incumbent offers the element at forward-looking prices. Rather, the market price should prevail, as opposed to a regulated rate which, at best is designed to reflect the pricing of a competitive market.

[22] UNE Remand Order at ¶ 473.

Sprint believes the determination that checklist items that have been removed from the Section 251 UNE list need only be offered at "market" prices is misconceived and should be revisited.[23] Ultimately, the fundamental element of the Commission's reasoning was that taking an element off the Section 251 list means it is available from others at rates that approximate TELRIC pricing. That does not mean that such pricing would prevail once the element is no longer subject to TELRIC requirements. The bare fact that there are alternative providers does not mean that those providers establish the market price. For example, special access rates remain higher than cost-based UNE rates, even though there ostensibly has been special access competition for a decade and even though competition has been deemed sufficient to give the BOCs "pricing flexibility." Rates are not yet down to economic cost because BOCs remain dominant. Competitors therefore tend to price just under a BOC-set price umbrella.[24] Accordingly, Verizon makes a false assumption when it claims that, where a carrier is not impaired without access to a UNE, then "the market must be considered open for purposes of Section 271" and "the purpose of the checklist – to open the market to competition – has been satisfied...." Petition at 7. See also Verizon Comments at 67. Similarly, in those markets where the BOCs received pricing flexibility for special access, prices have risen, not fallen – this despite the rationale that BOCs needed "flexibility" to reduce rates to

[23] The Commission made that determination, the substantive lawfulness of the TELRIC standard was in doubt. The Eighth Circuit had not yet spoken, and the Supreme Court had not yet confirmed, as it did in June, the lawfulness of the TELRIC standard.

[24] The Commission should note, further, that Verizon apparently contends that BOCs should not be subject to "*any* mandatory sharing requirement," whether or not TELRIC pricing applies. Petition at 6 (emphasis altered).

meet competitors' offerings. See Sprint Reply Comments at 24-25; Sprint Comments at 17. These facts show that if BOCs can charge market prices, they can raise prices without substantive check from alternative suppliers, and at those higher prices, local competitors may be impaired. Long distance competition will also be harmed by the BOCs' ability to provide internal pricing for their own affiliates that provide them an unfair competitive advantage.

The merits of the TELRIC vs. market price debate aside, the Commission found in the UNE Remand Order – and for sound reasons, amply supported in the record – that the checklist items must still be available to competitors even if corresponding unbundled elements are removed from the Section 251 mandatory minimum list. That is the key issue, and Verizon has not provided any explanation why that determination should be abandoned, or why the Commission should ignore those four items Congress specifically included on the competitive checklist.

Regardless, even if one assumed all its factual assumptions were correct, there would be no need to exercise forbearance or to grant Verizon's petition. If there were a competitive market for the checklist items, there would be no legitimate reason why a BOC should not be happy to provide these items to competitors to keep up the utilization of its own facilities and to minimize its own unit costs. Congress was looking to the model of the long distance market. In that market, carriers were ordered – at a time when AT&T was dominant – to make their services and facilities available for resale to allow competition to develop. Today, IXCs willingly sell to resellers and avidly compete for wholesale business; no IXC is seeking to have this requirement lifted. Unless Verizon

has other objectives – such as preserving its monopoly power in its local markets – it should be content to maintain these checklist items *indefinitely*. The fact that Verizon is asking for this relief is itself an indication that the marketplace is not yet competitive and that requesting carriers will in fact be impaired without unbundled access to at least some of these items.

V. The Petition Fails to Meet the Requirements of Section 10 for Forbearance.

Even apart from the bar of Section 10(d), discussed above, other provisions of Section 10 condition forbearance on determinations that:

> (a) enforcement is not necessary to ensure that the charges and practices of the carrier are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (b) enforcement is not necessary to protect consumers; and
>
> (c) forbearance is consistent with the public interest.

47 U.S.C. § 160(a). Verizon bears the burden of proving that it meets each of Section 10's requirements individually. The petition fails this showing.

Local competition remains in its infancy. The Act was passed just six years ago. The UNE Remand Order was issued only three years ago, and even now it is under Commission review after being remanded by the D.C. Circuit in USTA. As of December 31, 2001, CLECs served a mere 6.6% of total residential and small business switched access lines.[25] When larger business lines are included, CLECs fare a little better, but they still are serving just 10.2% of total end-user lines. Id. Of those lines,

[25] Local Competition: Status as of Dec. 31, 2001, Industry Analysis Div., Common Carrier Bureau (July 2002) at Table 2.

fewer than one third represent lines owned by CLECs, showing that CLECs remain heavily reliant on BOC facilities, particularly on the unbundled loop, switching, and transport included on the mandatory Section 271 checklist.

The Commission must also realize that CLECs will have difficulty holding onto what little portion of the market that have gained. The CLEC industry is in a seriously troubled, fragile state. Sprint Reply Comments at 3-5. Industry observers estimate that $2 trillion in telecom capitalization has been lost, and the impact has been most severe among CLECs. Dozens of CLECs have gone bankrupt, including carriers that were in the vanguard of the industry: Adelphia Business Solutions, ART, Convergent, Covad, e.spire, ICG Communications, Metropolitan Fiber Networks, McLeodUSA, Mpower, Net2000, Network Plus, NorthPoint, Rhythms, Teleglobe, Teligent, Viatel, Williams Communications Group, WinStar, and XO Communications – as well as the largest and most active CLEC of all, WorldCom. See Sprint Reply Comment at 3-5. Other carriers have significantly curtailed their CLEC investments.[26] CLECs now find the financial markets are closed to them, and what little funding may be available is high-priced. Given the acute financial crisis in the CLEC industry, the few competitive gains of the last six years will be unsustainable if marketplace conditions erode further. In the

[26] Sprint, for example, announced in the fourth quarter of 2001 that it was terminating its pioneering ION CLEC initiative and writing off $1.8 billion in related investments. It also halted expansion of its fixed-wireless operations until technology and market opportunity improve. In the second quarter of 2002, Sprint announced it was curtailing its out-of-region DSL investments. The difficulty of securing reliable, cost-effective access to BOC UNEs contributed to these decisions.

meantime, BOCs can win back – and are winning back[27] – CLEC customers. Indeed, the ability to bundle their monopoly local services with in-region long distance will only facilitate their efforts to take back the limited market share CLECs have gained to date at such high cost.

The Commission should also recognize that competitive gains have been similarly limited in the exchange access market. For its part, as the nation's third largest interexchange carrier, Sprint tries to self-supply and use CLEC facilities whenever feasible. Yet after a decade of ostensible competition in access services, Sprint finds it still must rely on ILECs for fully 93% of its special access needs.[28] Other IXCs face similar experience.

Verizon asserts that "competition will assure that rates and practices are just and reasonable." Petition at 3. The Commission must note that, in fact, the situation for competitive carriers has been made worse by the BOCs' failure to comply fully with their

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[27] A recent SBC report to its investors showed BOCs' success in winning back CLEC customers:

> SBC has enhanced and rescoped its packages to created added value for customers. As a result, in the first quarter, SBC achieved double-digit increases in packages-in-service for both consumer and small-business segments. Winback percentages also were up substantially compared with the first quarter a year ago – more than 30 percent in both consumer and business segments. *In regions where SBC provided long distance, winback percentages in the first quarter were above 50 percent in both consumer and business segments.*

SBC Investor Briefing, No. 229, at 3 (Apr. 18, 2002) (emphasis added).

[28] See Comments of Sprint Corporation at 4 (Jan. 22, 2002) in CC Docket No. 01-321 (Special Access Performance Measurements).

obligations under the Act. To date, the BOCs have been assessed fines and penalties of over $2.1 billion for violations of statutory obligations, merger conditions, and conditions of Section 271 approvals.[29] Verizon alone has incurred more than $300 million in such penalties.[30] Verizon has been repeatedly fined, in particular, for its continuing unwillingness to meet wholesale service standards that are essential to local competition. Indeed, Verizon was compelled to enter a consent decree and pay a further "voluntary contribution to the U.S. Treasury" on August 20 – three weeks after filing the petition.[31]

The Commission, and many state commissions, have found these recurrent enforcement measures necessary to protect the competitive marketplace, to protect consumers, and to protect the public interest. They establish that the BOCs have imposed and continue to impose "charges, practices, classifications, or regulations" that are unjustly and unreasonably discriminatory and that Section 271 checklist protections remain necessary for "the protection of consumers" and to promote "the public interest." 47 U.S.C. § 160(a).

To emphasize the importance of opening the BOC's local markets to competition, Congress added a further instruction to the Commission. Section 10(b) directs the Commission to "weigh the competitive effects" of any potential forbearance. 47 U.S.C.

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[29] The competition advocacy group, Voices for Choices, maintains a running tally of these penalties. See "Bell Fine Watch" at *http://www.voicesforchoices.com.*

[30] Id. The Verizon companies have been fined, ordered to make refunds, or compelled to enter consent decrees nearly 30 times since 1996. Verizon has shown no trend toward improvement, either. It has been fined more than ten times so far in 2002.

[31] Verizon Communications, Inc., DA 02-2017 (rel. Aug. 20, 2002) (consent decree imposing $260,000 penalty and mandating a formal compliance plan to remedy systematic inaccuracies in Verizon's performance measures required under market-opening conditions).

§ 160(b). Where the effect on competition may be harmful, the Commission must deny forbearance even if the individual threshold requirements of Section 10(a) arguably have been met. In this case, that simply underscores why Verizon's petition cannot be granted.

Granting Verizon's petition would harm competition and the public interest by putting at risk proper access by competing carriers to unbundled access to BOC loop, switching, and transport elements and nondiscriminatory access to BOC signaling and call-related databases. Clearly, the BOCs remain dominant by any reasonable measure, and they retain both the ability and the incentive to exploit that dominance against a struggling CLEC industry. Under these circumstances, Verizon's petition simply cannot meet the demanding criteria of Section 10.

VI. Conclusion

Verizon's position on the Section 271 checklist is contrary to the statute, contrary to Congressional goals, contrary to Commission's prior reading of Section 271, and contrary to the stringent standards of Section 10. Its petition should be denied.

Respectfully submitted,

SPRINT CORPORATION

By _____

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September 3, 2002

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

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September 18, 2002

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	**CC Docket No. 01-338**
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SPRINT CORPORATION'S REPLY TO COMMENTS ON PETITION FOR FORBEARANCE

I. Introduction & Summary

Sprint Corporation respectfully submits its Reply, on behalf of its incumbent local exchange ("ILEC"), competitive LEC ("CLEC")/long distance, and wireless divisions, to the comments and oppositions filed in response to Verizon's July 29, 2002 Petition.[1]

In its Opposition, Sprint showed that the Petition is premature, wrongly prejudges the outcome of the Triennial Review proceeding,[2] wrongly assumes that Section 251 preempts the Section 271 checklist, and fails to meet Section 10 requirements for forbearance — particularly since the requirements of Section 271 clearly have not yet been "fully implemented." Given the Act's legislative history and goals, Sprint explained

[1] Petition for Forbearance of Verizon (filed July 29, 2002) ("Petition"). In these Reply Comments, references to "Comments" and "Oppositions" are to filings made September 3, 2002.

[2] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338 ("Triennial Review").

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

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[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.

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[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.

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[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.

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[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.

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