Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Qwest Communications International Inc.	)	WC Docket No. 03-260
Petition for Forbearance	)	
	)	
	)	

OPPOSITION OF AT&T CORP.

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January 20, 2004

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
Qwest Communications International Inc. Petition for Forbearance	)	WC Docket No. 03-260

OPPOSITION OF AT&T CORP.

Pursuant to the Commission's December 23, 2003 *Public Notice*[1] in the above-captioned docket, AT&T Corp. ("AT&T") submits this Opposition to the petition for forbearance ("Petition") filed by Qwest Communications International Inc. ("Qwest").[2]

The Petition should be denied. As Qwest acknowledges,[3] its petition is a "me too" request that is substantively identical to pending forbearance petitions filed by Verizon[4] and SBC.[5] Qwest asks the Commission to "forbear from imposing an independent unbundling obligation pursuant to section 271(c)(2)(B) of the [Communications] Act with respect to narrowband and broadband network elements that no longer are required to be unbundled

[1] *See* Public Notice, WC Docket No. 03-260 (Dec. 23, 2003).

[2] *See Petition for Forbearance of Qwest Communications International Inc.*, WC Docket No. 03-260 (filed Dec. 18, 2003).

[3] Petition at 2-3.

[4] *See Ex Parte* Letter from Susanne A. Guyer, Verizon, to Chairman Michael Powell, et al., FCC, CC Dkt. No. 01-338 (filed Oct. 24, 2003). The Commission has chosen to treat this *ex parte* letter as a forbearance petition.

[5] *See Petition of SBC Communications Inc. for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 03-235 (filed Nov. 6, 2003).

pursuant to section 251(d)(2) of the Act."[6] SBC's forbearance request is identical, while Verizon has limited its forbearance request to broadband elements.

Qwest's request should be denied for the multiple dispositive reasons that AT&T and others stated in their oppositions to Verizon's petition and SBC's petition. Because Qwest's arguments are the same as those made by Verizon and SBC, AT&T is attaching hereto its oppositions to their petitions. *See* Attachment 1 (Opposition of AT&T Corp., *Petition for Forbearance of the Verizon Telephone Companies*, CC Docket No. 01-338 (Nov. 17, 2003)); Attachment 2 (Opposition of AT&T Corp., *SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 03-235 (Dec. 2, 2003)). In those oppositions, AT&T has demonstrated that the relief requested by Qwest (and Verizon and SBC) is foreclosed for three independent reasons.

First, and foremost, the Commission is barred from granting the relief Qwest seeks under section 271(d)(4) of the Communications Act,[7] which expressly states that "[t]he Commission *may not*, by rule *or otherwise*, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)." This specific statutory provision concerning the competitive checklist trumps the more general provisions of section 10 concerning the Commission's forbearance authority. *See, e.g., Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504, 524-26 (1989) (specific statutory provision trumps a more general one). Thus, notwithstanding its general authority to forbear from enforcing provisions of the Act, the Commission "may not" use forbearance to limit the terms of the competitive checklist, which is indisputably what Qwest

[6] Petition at 1.

[7] 47 U.S.C. § 271(d)(4) (emphasis added).

seeks in its Petition. By its plain terms, section 271(d)(4) ensures that, as long as a Bell operating company ("BOC") offers (or intends to offer) in-region interLATA services, it must comply with an irreducible core of network access requirements.

Second, Qwest's Petition is fatally premature. A separate statutory limitation, section 10(d), bars the Commission from even applying the section 10(a) forbearance criteria to the rules targeted by Qwest until the "requirements" of sections 251(c) and 271 "have been fully implemented." Qwest's argument[8] that the mere grant of section 271 authority compels a finding that section 271 requirements have been "fully implemented" has been squarely rejected by the Commission. The Commission has now held that the grant of authority to provide interLATA service does *not* compel a finding that the "fully implemented" requirement is satisfied with respect to *all* of the provisions of sections 251(c) and 271.[9] As reflected in the Commission's decision, the "fully implemented" requirement is much more demanding than Qwest contends. The term's plain meaning demands a finding that the statutory requirements have been "carried into effect" "totally or completely," an impossibility in present circumstances, given ongoing development of and challenges to the relevant requirements, state commissions' ongoing efforts to implement section 251(c), and, most pertinently, the developing state of still-nascent-local competition.

Third, given the Commission's recent pronouncements and marketplace realities, Qwest cannot meet the three specific requirements for forbearance contained in section 10(a), which

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[8] *See* Petition at 17-19.

[9] *See* Memorandum Opinion and Order, *Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, CC Docket No. 96-149 (rel. Nov. 4, 2003).

focus on the protection of consumers and competition. With respect to broadband elements, competitive carriers would be unable to provide broadband services to many consumers without the provisions of section 271 that Qwest seeks to avoid. The result would be, at best, broadband duopolies (and in some areas, broadband monopolies). Moreover, because the BOCs would be the only carriers able to offer consumers bundles of traditional voice and next-generation data services, competition in the provision of *all* services could seriously be impeded. Because Qwest has failed to demonstrate that it is entitled to forbearance relief from the section 271 checklist even for broadband elements, its broader request for forbearance relief from the checklist for narrowband *and* broadband elements is, *a fortiori*, foreclosed. For the reasons stated above, Qwest's broader request cannot satisfy any of the section 10(a) forbearance criteria.

CONCLUSION

For the foregoing reasons, the Commission should deny the Petition.

Respectfully submitted,

/s/ Stephen C. Garavito

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January 20, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 20th of January, 2004, I caused true and correct copies of the forgoing Opposition of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: January 20, 2004
Washington, D.C.

/s/ Peter M. Andros

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Attachment 1

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Petition for Forbearance of the Verizon Telephone Companies	)	CC Docket No. 01-338
	)	

OPPOSITION OF AT&T CORP.

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Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
Petition for Forbearance of the Verizon Telephone Companies	)	CC Docket No. 01-338

OPPOSITION OF AT&T CORP.

Pursuant to the Commission's October 27, 2003 *Public Notice*[1] in the above-captioned docket, AT&T Corp. ("AT&T") submits this Opposition to an October 24, 2003 *ex parte* letter filed by Verizon in the *Triennial Review* docket that the Commission has chosen to treat as a Petition for Forbearance ("Petition").[2]

INTRODUCTION AND SUMMARY

The Petition should be denied. Verizon asks the Commission to "forbear" from applying section 271's competitive checklist to "broadband" elements. According to Verizon, the Commission's decision in the *Triennial Review Order*[3] to limit unbundled access to the broadband capabilities of certain loops leased at TELRIC-based rates pursuant to section 251(c) requires the Commission to lift the section 271 obligations to provide access to broadband

[1] *See* Public Notice, CC Docket No. 01-338 (Oct. 27, 2003).

[2] *See* October 24, 2003 Letter From Susanne A. Guyer, Verizon, to Chairman Michael Powell, et al., FCC (CC Dkt. No. 01-338) ("Verizon Oct. 24, 2003 *Ex Parte*").

[3] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket

(continued . . .)

capabilities of those loops as well. In fact, the opposite is true: granting Verizon's Petition is inconsistent with, and would undermine the Commission's defense of, the *Triennial Review Order* broadband rules. Contrary to Verizon's claim, granting the Petition would also impede broadband (and narrowband) competition in many markets, while doing nothing to promote broadband investment. In all events, the requested forbearance is foreclosed by two separate provisions of the Communications Act.

In the *Triennial Review Order*, the Commission limited the obligation of the Bell operating companies ("BOCs") to provide access to the broadband capabilities of hybrid fiber-copper loops and fiber-to-the-home loops used to serve mass market customers on the grounds that requiring full unbundling at TELRIC-based rates might limit the BOCs' incentives to deploy such facilities. The Commission recognized that competitive carriers could not feasibly build their own hybrid loops. In eliminating section 251(c) unbundling of the broadband capabilities of these loops, the Commission therefore necessarily relied on other regulatory provisions to ensure that competitive carriers could gain access to the broadband capabilities of facilities that they could not themselves build. The Commission reaffirmed its prior findings that the section 271 checklist required the BOCs as a condition of interLATA authority to provide full unbundled access to local loops. *Triennial Review Order* ¶¶ 656-64. Further, the Commission credited the BOCs' promises that they would willingly offer access to their broadband networks at "market" terms. *Id.* ¶ 253 & n.755. At the BOCs' request, the Commission ruled that such broadband offerings, whether provided voluntarily or pursuant to section 271, would be governed by sections 201 and 202 of the Communications Act, rather than the Commission's TELRIC rules.

(. . . continued)
No. 01-338 (rel. Aug. 21, 2003) ("*Triennial Review Order*").

Verizon now claims that *any* unbundling obligation, regardless of its source or the applicable rates, terms and conditions, would destroy its incentives to deploy new broadband facilities. Of course, the Petition primarily seeks relief from obligations to provide unbundled access to its *existing* hybrid loop and other facilities. But even with respect to new facilities, Verizon's claim here cannot be reconciled with its promise in its *Triennial Review* comments that, with respect to its broadband facilities, it did *not* "intend[] to adopt a closed network model." Comments of Verizon, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, at 82 (Apr. 5, 2002) (there can be "significant value in maintaining a wholesale business that allow other providers to reach their customers over our network"); *see also Triennial Review Order* ¶ 253 n.755 (relying on Verizon's promise to "make available wholesale broadband service offerings"). That is because, as noted, the rates, terms and conditions of the voluntary access that Verizon claimed it would provide and of section 271 access that it here seeks to evade would be subject to the very same section 201/202 safeguards. And Verizon does not even attempt to show how granting competitive carriers access to broadband facilities under the flexible "just and reasonable" standard of section 201 would sap Verizon's incentives to deploy broadband facilities.

In any event, the forbearance that Verizon seeks is expressly foreclosed by the Communications Act. First, the Commission is barred from granting the relief Verizon seeks under section 271(d)(4),[4] which provides that the Commission "may not," either by rule "or otherwise," limit the terms of the competitive checklist.

[4] 47 U.S.C. § 271(d)(4).

Verizon's petition is also fatally premature. A separate statutory limitation, section 10(d), bars the Commission from even applying the section 10(a) forbearance criteria to the rules targeted by Verizon until the "requirements" of sections 251(c) and 271 "have been fully implemented." Verizon's unsupported and cursory argument that sections 251(c) and 271 have, indeed, been "fully implemented," because the Commission has granted numerous section 271 applications, has been squarely rejected by the Commission. In a decision involving Verizon issued shortly after Verizon filed this Petition, the Commission held that the grant of authority to provide interLATA service does *not* satisfy the "fully implemented" requirement with respect to *all* of the provisions of sections 251(c) and 271.[5] As reflected in the Commission's decision, the "fully implemented" requirement is much more demanding than Verizon contends. The term's plain meaning demands a finding that the statutory requirements have been "carried into effect" "totally or completely," an impossibility in present circumstances, given ongoing development of and challenges to the relevant requirements, state commissions' ongoing efforts to implement section 251(c), and, most pertinently, the developing state of still-nascent local competition.

In all events, given the Commission's recent pronouncements and marketplace realities, Verizon cannot meet the three specific requirements for forbearance contained in section 10(a), which focus on the protection of consumers and competition. Without the provisions of section 271 that Verizon seeks to avoid, competitive carriers would be unable to provide broadband services to many consumers. The result would be, at best, broadband duopolies (and in some areas, broadband monopolies). Moreover, because the BOCs would be the only carriers able to

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[5] *See* Memorandum Opinion and Order, *Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, CC Docket No. 96-149 (Nov. 4, 2003) ("*Verizon*

(continued . . .)

offer consumers bundles of traditional voice and next-generation data services, competition in the provision of *all* services could seriously be impeded.

Finally, Verizon's suggestion that the section 271 obligations do not even apply to broadband elements is frivolous. The broadband exemption that Verizon posits finds no support in the statutory text or the *Triennial Review Order*. Indeed, the Commission necessarily rejected Verizon's position in the *Public Notice* because it would have had no reason to put Verizon's petition out for notice and comment if there is no broadband unbundling obligation from which the Commission could forbear.

BACKGROUND

The section 251(c)(3) unbundling obligation applies to all incumbent local exchange carriers ("ILECs"). Section 271(d), in contrast, applies only to BOCs that choose to seek long distance authority in an in-region state. As a precondition to obtaining long distance authority, the section 271 competitive checklist requires that BOCs *both* provide UNEs in accordance with section 251(c)(3) (checklist item two) *and* provide access to the specific facilities listed in checklist items four, five, six, and ten, which include loops, transport, switches, signaling and call-related databases. *See* 47 U.S.C. § 271(c)(2)(B)(ii), (iv), (v), (vi), & (x). The Commission has determined that network elements provided under section 271(d) are not subject to the TELRIC rules that govern the pricing of network elements provided under section 251(c). *Triennial Review Order* ¶¶ 656-64. Rather, the "appropriate inquiry" is "to assess whether they

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(. . . continued)
Forbearance Order").

are priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202" of the Communications Act. *Id.* ¶ 656.

In the *Triennial Review* proceeding, Verizon and other BOCs urged the Commission to reverse its "determination in the *UNE Remand Order* that section 271 establishes a separate BOC access obligation for network elements no longer listed under section 251(c)(3)." *Id.* ¶ 652. Specifically, Verizon argued that "once the Commission has determined that a network element is not necessary under section 251(d)(2), the corresponding checklist item should be construed as being satisfied." *Id.* Verizon also filed a Petition asking the Commission to forbear from applying checklist items (4) through (6) and (10) if the Commission found that the corresponding network elements no longer need to be unbundled under section 251(d). *See* Verizon Petition for Forbearance of the Verizon Telephone Companies Pursuant to Section 160(c), CC Docket 01-338 (filed July 29, 2002) ("Verizon July 2002 Forbearance Petition").

In the *Triennial Review Order* (¶¶ 653-655), the Commission squarely rejected the argument that a finding of non-impairment under section 251 necessarily relieves a BOC of the obligation to provide access to the corresponding UNE under section 271. Reaffirming its conclusion in the *UNE Remand Order*, the Commission unequivocally held that section 271 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. *Id.* ¶ 654. 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*." *Id.* ¶ 653 (emphasis added).

On October 24, 2003, the last business day preceding the statutory deadline for Commission action on its July 2002 Forbearance Petition, Verizon abandoned that petition and attempted to substitute a new request. In an *ex parte* letter, Verizon "withdr[e]w" its "request for forbearance with respect to any narrowband elements that do not have to be unbundled under section 251." *See* Verizon Oct. 24, 2003 *Ex Parte*, at 1 (attaching document entitled "The Commission Should Forbear From Imposing Any Section 271 Unbundling Obligations on Broadband" (hereinafter "Verizon Memo")). Verizon asserted that "the portion of the forbearance petition that remains pending relates to the broadband elements that the Commission has found do not have to be unbundled under section 251, including fiber-to-the premises loops, the packet-switched features, functions and capabilities of hybrid loops, and packet switching." Verizon Oct. 24, 2003 *Ex Parte* at 1.

Because Verizon's Oct. 24, 2003 *Ex Parte* Letter "abandoned the core legal rationale underlying its [July 2002 Forbearance] Petition and substituted a wholly different argument for forbearance," *Public Notice* at 2, the Commission "den[ied] Verizon's initial Petition." *Id.* In light of Verizon's attempted "substitution" of a "new theory of relief," the Commission chose "to treat Verizon's October 24 *Ex Parte* Letter as a new forbearance petition" and set that petition for comment. *Id.* For the reasons set forth below, this new forbearance request should be denied as well.

ARGUMENT

I. THE COMMISSION LACKS AUTHORITY TO GRANT THE REQUESTED FORBEARANCE.

The Commission has no legal authority to grant Verizon's request for forbearance, for two independent and legally sufficient reasons. *First*, section 271(d)(4) provides that the

Commission "may not," either by rule "or otherwise," limit the terms of the competitive checklist, which is precisely what Verizon seeks here. 47 U.S.C. § 271(d)(4). *Second*, Congress singled out sections 251(c) and 271 for special protection from forbearance, and expressly provided that "the Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those requirements have been fully implemented." 47 U.S.C. § 160(d). Because Verizon cannot show that sections 251(c) and 271 have been "fully implemented," the Commission has no authority to grant a request that it forbear from applying the section 271 checklist. Accordingly, the Petition must be dismissed.

A. Section 271(d)(4) Bars The Commission From Granting Verizon's Request.

Section 271(d)(4) expressly states that "[t]he Commission *may not*, by rule *or otherwise*, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)." 47 U.S.C. § 271(d)(4) (emphasis added). This specific statutory provision concerning the competitive checklist trumps the more general provisions of section 10 concerning the Commission's forbearance authority. *See, e.g., Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504, 524-26 (1989) (specific statutory provision trumps a more general one). Thus, notwithstanding its general authority to forbear from enforcing provisions of the Act, the Commission "may not" use forbearance to limit the terms of the competitive checklist, which is indisputably what Verizon seeks in its Petition. By its plain terms, section 271(d)(4) ensures that, as long as a BOC offers (or intends to offer) in-region interLATA services, it must comply with an irreducible core of network access requirements.

Verizon does not even mention section 271(d)(4) in its Petition, and certainly makes no attempt to demonstrate that the relief it seeks is permissible under that statute. It is not. Accordingly, the Commission need go no further to resolve Verizon's Petition. Section

271(d)(4) is an insurmountable barrier to Verizon's request, and the Petition therefore must be dismissed.

B. Verizon's Petition Is Premature Because Sections 251 And 271 Are Not Yet "Fully Implemented."

The Petition is also fatally premature. Verizon concedes, as it must, that the Commission is barred from forbearing with respect to provisions of section 271, including section 271's competitive checklist, until the Commission determines that sections 251 and 271 have been "fully implemented" in the relevant Verizon states. Verizon Memo at 13-14. Section 10(d) places an explicit "[l]imitation" on the remainder of Section 10, providing that the "Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those requirements have been fully implemented."[6] The Commission considers section 10(d) as a "threshold matter" in forbearance proceedings, and a petitioner's failure to satisfy its requirements mandates denial of the petition without consideration of its merits.[7]

Verizon claims that the Commission "has already made" the "fully implemented" finding in the course of granting section 271 authorization for 49 states and the District of Columbia, because section 271(d)(3)(A)(i) provides that the Commission can grant section 271 authorization "only after expressly determining that a Bell company has in fact '*fully implemented* the competitive checklist.'" Verizon Memo at 13 (emphasis in original). Verizon contends that it is not "mere coincidence that Congress used the exact same term in both section 10(d) and section 271" and cites the often-misused canon of statutory construction that identical words in different sections of a statute are usually construed to have the same meaning. *Id.*

[6] 47 U.S.C. § 160(d).

Verizon's position is that the Commission's determination that a BOC satisfies section 271's competitive checklist at a particular point in time such that it can obtain authority to offer interLATA service constitutes a determination that *all* of sections 251(c) and 271 have been "fully implemented" and that forbearance from the requirements of section 271 is therefore permissible.

The Commission has already rejected this argument. In its recent decision denying Verizon's petition for forbearance from the requirements of section 271 that obligate a BOC to provide long distance through a "separate affiliate," the Commission expressly held that "the grant of section 271 authority in a state" does *not* mean that all the requirements of section 271 (much less those of section 251(c)) have been "fully implemented." *See Verizon Forbearance Order* ¶¶ 6-7. The Commission also unequivocally rejected Verizon's argument (Verizon Memo at 14 n.3) that section 272 has no bearing on whether section 271 is "fully implemented." *See Verizon Forbearance Order* ¶¶ 6-7 (concluding that "the language of section 271(d)(3)(B) incorporates section 272 requirements" and that "section 272 is 'fully implemented' on a state-by-state basis three years after the grant of section 271 authority in a state").

The logic of the Commission's rejection of Verizon's section 272 forbearance petition establishes that section 271 and section 251 cannot be "fully implemented" for a minimum of three years after long distance authority has been granted in a particular state. The Commission made an express finding that, for purposes of section 10(d), section 271 cannot be "fully implemented" at least until section 272 is "fully implemented." Specifically, the Commission

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(. . . continued)

[7] *Verizon Forbearance Order* ¶¶ 5, 9.

found (1) that section 271 "incorporat[es]" the section 272 requirement that the BOC "maintain the affiliate structure for at least three years," and (2) that "section 272 cannot be deemed to have been 'fully implemented' until this three-year period has passed." *Verizon Forbearance Order* ¶ 6. Accordingly, the Commission concluded that "section 272 is 'fully implemented' on a state-by-state basis three years after the grant of section 271 authority in a state." *Id.* ¶ 7.

The Commission repeatedly has held that section 272 supplies critically important safeguards to address the lingering market power that remains after a BOC is granted section 271 authority,[8] and the Commission's recent section 272 forbearance decision is a recognition that the BOCs continue to have market power for at least three years after long distance authority is granted. This recognition necessarily precludes any finding that sections 271 and 251 – the provisions intended to open local markets to effective competition – have been "fully implemented" before the three-year period has passed.[9]

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[8] *See, e.g.,* First Report and Order, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272*, 11 FCC Rcd. 21905, ¶ 9 (1996) ("In enacting section 272, Congress recognized that the local exchange market will not be fully competitive immediately upon its opening"); Memorandum Opinion and Order*, 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*, 15 FCC Rcd. 18354, ¶ 395 ("compliance with section 272 is 'of crucial importance' because the structural, transactional, and nondiscrimination safeguards of section 272 seek to ensure that BOCs compete on a level playing field") ("*Texas 271 Order*") (quoting Memorandum Opinion and Order, *In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act, as Amended, to Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd. 20543, ¶ 346 (1997)); Memorandum Opinion and Order, *In the Matter of Application by SBC Communications Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services Inc., For Authorization To Provide In-Region, InterLATA Services in California*, 17 FCC Rcd. 25650, ¶ 173 (2002) (the "principal guarantee" under the Act "against improper accounting practices and cross-subsidizations is compliance with the structural and accounting safeguards of § 272").

[9] Although the section 272 obligations have sunset in New York, sections 251 and 271 have not been "fully implemented" for the reasons explained *infra*, pp. 12-16.

Verizon's strained reading of section 10(d) is thus foreclosed, and for good reason, because Verizon's position necessarily would produce anticompetitive and counterintuitive results that run headlong against the goals of the 1996 Act. Under Verizon's construction of Section 10(d), the Commission could, the very *moment* after granting a BOC long distance authority premised on findings that the BOCs' continuing compliance with sections 251(c) and 271 would open local markets up to the possibility of competition, put an end to that possibility and return to the pre-Act "unregulated world" in which the BOCs enjoyed an "almost insurmountable competitive advantage." *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 490-91 (2002).

The objectives and purposes of the Act suggest that the requirements of section 251(c) and 271 will be "fully implemented" when, at a minimum, there is ubiquitous availability of cost-based wholesale alternatives to incumbent carriers' bottleneck facilities, such that the incumbent carriers would no longer be deemed dominant in local services markets. The word "implement" means "to carry into effect, fulfill, accomplish" and to "give practical effect to." And the word "fully" means "totally or completely." Webster's New World Dictionary. Sections 251(c) and 271 will be "fully implemented," therefore, when a practical effect results: namely, when ubiquitous and durable local competition *actually exists* and the incumbents no longer control bottleneck facilities. *Cf. Verizon*, 535 U.S. at 532, 538 (upholding Commission rules that interpret the "statutory dut[ies]" of section 251(c) to "reach the result the statute requires" and thereby "get[] a practical result").

The requirements of sections 251(c) and 271 are not fully implemented, according to the plain meaning of those terms, where, as is the case today, (i) final, unchallenged rules that

implement the duties and obligations of section 251(c) are not currently in effect; (ii) the key cost principles that are used to determine prices for network elements and interconnection required to be provided under those sections are to be the subject of an upcoming Commission rulemaking; (iii) state commissions have yet to apply and "implement" any new rules (and, indeed, have not even finished implementing the prior rules); (iv) none of these new rules or pricing principles have been implemented in interconnection agreements; and (v) local competition remains nascent. State commissions' varied regulatory activity confirms that section 10(d) is not satisfied: what are the commissions and parties before them doing, if not "implementing" section 251(c)'s requirements?[10]

Further, in the same section 271 decisions that Verizon claims the Commission has found the BOCs to have "fully implemented" sections 251(c) and 271 for purposes of section 10(d), the Commission has expressly stated that "obtaining section 271 authorization is *not* the end of the road" and that the "critically important power" in section 271(d)(6) "underscores Congress's concern that BOCs *continue to comply* with the statute."[11] The Commission could not have

[10] The Act contemplates that the requirements of sections 251(c)(3) and 271 will endure long after a BOC receives section 271 authorization: section 271(d)(6) provides the Commission with a special grant of permanent enforcement authority if the BOC ceases to meet any of the section 271 requirements. That section empowers the Commission to act *sua sponte*, requires the Commission to act within 90 days on any complaint alleging a violation of section 271, and authorizes the Commission to suspend or revoke a BOC's section 271 authority. All of these post-authorization administrative remedies and enforcement powers could be rendered impotent if, as Verizon contends, the Commission's section 271 decisions necessarily must also be deemed to have determined that a BOC has "fully implemented" sections 271 and 251(c)(3) within the meaning of section 10(d).

[11] Memorandum Opinion and Order, *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*, 15 FCC Rcd. 3953 ¶¶ 448, 453 (1999) (emphases added).

made these pledges in its section 271 orders if it were simultaneously finding that sections 251(c) and 271 have themselves been fully implemented.

Verizon bases its interpretation of section 10(d) entirely on the "canon" of statutory construction that identical words used in different parts of the same act generally are assumed to have the same meaning. Verizon Memo at 13. This canon, however, cannot bear the weight that Verizon assigns it. In interpreting the Communications Act, the courts and the Commission have on numerous occasions decided that the same term used in multiple sections of the Act should be interpreted differently when, as here, there are different purposes underlying the sections in which the term are used. Thus, for example, the Commission refused to interpret the term "provide" in section 271(a) to reflect the construction it had given the same term in section 260(a). *AT&T Corp.* v. *Ameritech Corp.*, 13 FCC Rcd. 21438 (1998), *aff'd*, *U S West Comm. Inc.* v. *FCC*, 177 F.3d 1057 (D.C. Cir. 1999). Finding that the term was ambiguous and that the legislative history was unhelpful, the Commission interpreted "provide" based on the specific policies underlying section 271. The D.C. Circuit affirmed, reasoning that it was entirely appropriate for "identical words" to have "different meanings where the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different." *U S West*, 177 F.3d at 1060.

Likewise, the D.C. Circuit, in recently upholding the Commission's interpretation of the term "necessary" in section 10(a), rejected the argument that the term "has precisely the *same* meaning in every statutory context." *CTIA* v. *FCC*, 330 F.3d 502, 510-11 (D.C. Cir. 2003). Previous constructions of the term "necessary" in sections 251(c)(6) and 251(d)(2) adopted by the Supreme Court and by another panel of the D.C. Circuit reflected the particular purposes of

those sections, and thus the interpretation of "necessary" in those sections did not need to be imported into a controversy "involv[ing] the application of the forbearance provision of the 1996 Act," particularly where it would lead to "an absurd result."[12] *Id.* at 511.

These same principles apply to the construction of "fully implemented" in section 10(d), because, as described above, construing that term as the Commission construed the same term in section 271(d)(3)(A)(i) would lead to an absurd result and ignore the differing purposes of the sections. Section 271(d)(3)(A)(i) requires only that the Commission find that a *BOC* has "fully implemented" the *competitive checklist* at a particular point in time with regard to a single facilities-based interconnection agreement. It does *not* require a universal finding that sections 251(c) and 271 have themselves been fully and finally implemented by all relevant parties – the state commissions, the BOCs, competing carriers, the Commission itself and federal courts – as section 10(d) requires. For example, a finding that a BOC has satisfied the checklist for a particular interconnection agreement does not constitute a finding that the BOC will, as required by section 271(d)(3)(B), operate in accordance with the requirements of section 272. Nor does it require a finding, consistent with section 251(c)'s objectives, that enduring local competition has *in fact* developed. Rather, it is a prognosis that the market is sufficiently open to make a predictive judgment that competition *could* take root, not a determination that competition will in fact occur and thrive.

In contrast to section 271(d)(3)(A)(i), section 10(d) is intended to ensure that the very structure of local markets has changed and that price-constraining competition that can

[12] *See also* Report, *The 2002 Biennial Regulatory Review*, 18 FCC Rcd. 4726, ¶¶ 18-21 (2003) (refusing to construe the term "necessary" in section 11 to mean the same as that term had been
(continued . . .)

effectively replace consumer-protection regulation has *actually developed* by limiting the Commission's ability even to *consider* requests for forbearance from any of the requirements of sections 251(c) and 271, which the Commission has properly found to be the very "cornerstones of the framework Congress established in the 1996 Act to open local markets to competition."[13] There has not been, and could not be, any finding that the requirements of sections 251(c) and 271 have been fully implemented, and the Petition must, accordingly, be dismissed as premature.

II. THE PETITION DOES NOT SATISFY ANY OF THE SECTION 10(a) FORBEARANCE CRITERIA.

Even if the Commission could entertain Verizon's Petition as a valid invocation of the Commission's section 10(a) forbearance authority, Verizon has not remotely met its burden to prove that its request satisfies the section 10(a) criteria. Under that provision, the proponent of forbearance must make three "conjunctive" showings, and the Commission must "deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied." *CTIA*, 330 F.3d at 509. First, the proponent of forbearance must show that enforcement of the specific regulations at issue "is not necessary to ensure that the charges . . . are just and reasonable and not unjustly or

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(. . . continued)
interpreted in other sections of the Act).

[13] Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 FCC Rcd. 24012, ¶ 73 (1998). In this regard, the full implementation of section 10(d) can be viewed as analogous to the standard for vacatur of an injunction that is intended to serve a particular purpose. In that context, the courts look to see if the purpose of the injunction has been achieved, and will only vacate the injunction if it has in fact been achieved and there is little danger of relapse. For example, in cases involving unlawful restraints on trade, the Supreme Court said that a decree "may not be changed . . . if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved." *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244, 248 (1968). Likewise, courts have refused to permit an injunction to be vacated if the party subject to the injunction was likely to "return to its former ways" should the injunctive decree be lifted. *Board of Ed. of Okla. City* v. *Dowell*, 498 U.S. 237, 247 (1991).

unreasonably discriminatory." 47 U.S.C. § 160(a)(1). Second, it must show that enforcement of those regulations "is not necessary for the protection of consumers." *Id*. § 160(a)(2). And, third, it must show that non-enforcement of those regulations "is consistent with the public interest," *id*. § 160(a)(3), and, in particular, that such non-enforcement will "promote competitive market conditions" and "enhance competition among providers of telecommunications services," *id*. § 160(b).

Verizon makes only a half-hearted attempt to show that it satisfies the three fundamental prerequisites for forbearance. At bottom, Verizon's position is that the Commission intended in the *Triennial Review Order* to eliminate any incumbent LEC obligation to provide wholesale access to broadband and, consequently, Verizon should be relieved of its obligation under section 271 to do so. *See, e.g.*, Verizon Memo at 1 (asserting that its obligation to offer unbundled access to broadband under section 271 somehow "compromise[s]" the Commission's decisions affecting broadband under section 251(c)). In fact, it is Verizon's Petition that would cause a rift with the Commission's reasoning in the *Triennial Review Order*.

In the *Triennial Review Order*, the Commission confirmed that CLECs generally cannot economically duplicate next-generation capabilities of hybrid loops. *Triennial Review Order* ¶ 286. Nonetheless, the Commission limited access under section 251(c) to the broadband capabilities of such loops despite "impairment," finding that the benefits of section 251(c) unbundling were outweighed by benefits of freeing the incumbents from TELRIC regulation that might limit their incentive to deploy such facilities. *Id.*¶¶ 286, 290.

This analysis, of course, cannot be divorced from the other existing, regulatory obligations that limited the potential harm to competitive carriers and competition from limiting

section 251(c) unbundling obligations. Specifically, the Commission confirmed its prior holding in the *UNE Remand Order* that the BOCs must provide access to their local loops pursuant to section 271, regardless of the technology the loops employ. *Triennial Review Order* ¶¶ 654, 656.

Further, the *Triennial Review Order* expressly contemplated that after eliminating the section 251(c) unbundling obligations for "broadband" loops, incumbent LECs 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.

Triennial Review Order ¶ 253. In so stating, the Commission expressly cited Verizon's representations that it intended voluntarily to make available such wholesale broadband offerings. *Id.* n.755.

Thus, the Commission clearly saw no investment-retarding inconsistency between its determination regarding the unbundling of fiber network elements at TELRIC rates under section 251 and the BOCs' continued provision of broadband access in accordance with the requirements of sections 201 and 202. To the contrary, the Commission understandably and necessarily viewed access under the more "generous" requirements of sections 201 and 202 as a safety net that would protect consumers and competition in emerging broadband markets. Similarly, the Commission's section 251 unbundling conclusions plainly are not "compromised" by the BOCs' continuing obligation to offer access to broadband under the same section 201/202

just, reasonable, and non-discriminatory terms, pursuant to section 271.[14] In fact, as noted, the Commission assumed that wholesale service offerings by incumbent LECs would continue even after an item is "de-listed" from section 251(c) requirements, and such service would be governed by these very same provisions.

Verizon nonetheless argues that section 706 of the Act "all but compels forbearance" from any obligation under section 271 to unbundle broadband elements that are exempt from unbundling under section 251. Verizon Memo at 8. To the contrary, section 706 is *irrelevant* to the scope of a BOC's access obligations under section 271. In the *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 Commission authority "to take Congress's goals into account" in deciding which network elements must be unbundled. *Triennial Review Order* ¶ 176. Section 271, however, does not contain an "at a minimum" clause. Indeed, section 271 explicitly prohibits the Commission from "limit[ing] or extend[ing] the terms used in the competitive checklist set forth in subsection (c)(2)(B)." 47 U.S.C. § 271(d)(4). Consequently, in contrast to its assessment of unbundling issues under section 251, the Commission is barred from weighing the goals of section 706 in enforcing a BOC's obligations under the competitive checklist of section 271.[15]

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[14] Reliance on the Commission's rulings in the *Triennial Review Order* should not be interpreted as agreement with that analysis, including the Commission's view that the network elements specifically listed in section 271 are not themselves subject to the cost-based pricing standard of sections 251 and 252.

[15] This discussion should not be read to suggest that AT&T agrees with the Commission's assessment of unbundling issues under section 251 or its treatment of section 706 and 251(d)(2)'s "at a minimum" language. In fact, AT&T believes the Commission erroneously relied solely on section 706 to grant broadband relief, thus disregarding its obligation to balance

(continued . . .)

Moreover, there could be no sustainable finding that the unbundling imposed by section 271 would have a material impact on Verizon's investment incentives. The Commission expressly declined to require the BOCs to provide section 271 checklist items at TELRIC-based rates, and instead mandated only that those elements be governed by the "just and reasonable" requirements of section 201 and the "nondiscrimination" requirement of section 202. *Triennial Review Order* ¶ 663. Verizon has conceded that even "appropriate" TELRIC rates will provide it with sufficient incentive to invest in broadband facilities. Dr. Alfred Kahn, who testified on behalf of Verizon in the *Triennial Review Proceeding*, conceded that "TELRIC can be sufficiently flexible to accommodate investment risks in a way that is approximately correct economically."[16] *A fortiori*, to the extent that the Commission is merely subjecting Verizon to the potentially more flexible rate provisions of sections 201 and 202, there can be no legitimate concern about these obligations materially impairing Verizon's investment incentives.

Given the flawed premises of Verizon's petition, it is not surprising that Verizon's request does not satisfy any of the three statutory prerequisites for forbearance.

A. The Provisions Of The Section 271 Checklist Are Necessary To Ensure That Charges Are Just, Reasonable And Nondiscriminatory.

Verizon cannot show that enforcement of the provisions of the section 271 checklist to broadband elements "is not necessary to ensure that the charges . . . are just and reasonable and not unjustly or unreasonably discriminatory." 47 U.S.C. § 160(a)(1). To the contrary, granting Verizon's request that it be relieved of *any* obligation to provide access to the broadband

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the Act's twin goals of promoting competition and broadband services deployment.

[16] *Kahn-Tardiff Reply Decl.* ¶ 40 n.52 (*citing* Reply Brief for Petitioner FCC in *Verizon* (continued . . .)

capabilities in question would enable Verizon to charge unjust, unreasonable and discriminatory rates at both the wholesale and retail levels.

At the wholesale level, Verizon and the other BOCs generally are *monopoly* suppliers of last-mile broadband and next-generation capabilities in their vast service areas. Cable companies generally do not provide CLECs access to the broadband (or other) capabilities of their last-mile facilities. And the *Triennial Review Order* confirms that CLECs generally cannot economically duplicate those facilities – the Commission limited cost-based access to the next-generation capabilities of hybrid loops, for example, *despite* the existence of "impairment." *Triennial Review Order* ¶ 286. Verizon makes no attempt to argue that "market forces" would, in these circumstances, compel it to provide access to broadband facilities at just and reasonable rates. Nor could it. Indeed, the singular purpose of Verizon's Petition is to enable it to deny access to such facilities even at the "just and reasonable" rates mandated by section 201. The section 201 "just and reasonable" rate protections that accompany section 271 unbundling requirements are thus plainly necessary to ensure that "the charges" CLECs pay for access to broadband capabilities of the BOCs' networks "are just and reasonable and not unjustly or unreasonably discriminatory."

The same is true at the retail level. Verizon trumpets the availability of cable broadband services, but, at best, that demonstrates duopoly conditions that are patently insufficient to establish that the BOCs would be forced to offer access to their broadband facilities at just and reasonable terms and conditions – *i.e.*, that the BOCs lack market power in the provision of

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Communications v. *FCC*).

broadband services. As the Commission made clear in the *EchoStar-DirecTV Merger Order*, 17 FCC Rcd. 20559, ¶ 103 (2002), "existing antitrust doctrine suggests that a merger to duopoly . . . faces *a strong presumption of illegality*." Duopolies "inevitably result in less innovation and fewer benefits to consumers" which "is the antithesis of what the public interest demands." *Id*. (separate statement of Chairman Powell).[17]

B. The Provisions Of The Section 271 Checklist Are Necessary For The Protection Of Consumers.

Verizon also cannot show that continued application of the section 271 checklist to broadband facilities is unnecessary for the protection of consumers.[18] In fact, just the opposite is true. Without the provisions of section 271 that Verizon seeks to avoid, competition in the provision of broadband and next-generation services will be severely impeded.

Significantly, the Commission previously has held that the mere *potential* for reduced competition and ensuing rate increases that might occur as a result of forbearance from enforcing depreciation prescription rules is sufficient to preclude the required finding under section 10(a)(2) that continued enforcement was "not necessary for the protection of consumers":

> Forbearance of the depreciation prescription process could potentially trigger large increases in a carrier's depreciation expenses, which could in turn result in unwarranted increases in consumer rates. These increased depreciation expenses and consumer rates would [be] likely to continue for many years until robust competition curtails the ability of the incumbent LECs to secure these rates from consumers.

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[17] In addition, cable modem services are not generally available in business districts. *See, e.g,*, *Ex Parte* Letter from David Lawson, AT&T, to Marlene Dortch, FCC, CC Docket Nos. 02-33 *et. seq.*, at 7-8 (Dec. 23, 2002); *Ex Parte* Letter from David Lawson, AT&T, to Marlene Dortch, FCC, CC Docket Nos. 02-33 *et. seq.*, at 4-5 (Feb. 4, 2003).

[18] 47 U.S.C. § 160(a)(2).

Report and Order, Memorandum Opinion and Order, *1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers*, 15 FCC Rcd. 242, ¶ 59 (1999) (footnote omitted) ("*1998 Biennial Review Depreciation Requirements*"). The forbearance that Verizon now proposes would make rate increases a near certainty, not just a possibility.

Customers now routinely (and increasingly) demand both traditional and new broadband services over a single line from a single provider. Thus, as the BOCs' economists have recognized,[19] carriers must be able to offer the full bundle of services to consumers in order to compete successfully. Competing carriers, however, would be unable to offer the full range of broadband and next generation services without reasonable access to the broadband and next-generation capabilities of the BOCs' last-mile networks. Accordingly, the forbearance relief that Verizon seeks here would ensure that the BOCs (and, in some areas, cable companies) would generally be the only parties that could offer many services – and thus the only parties that could offer the bundles of services that consumers demand. Monopolization or cable-BOC duopolization are plainly contrary to consumers' interests.

Verizon's suggestion (Verizon Memo at 9-13) that consumers somehow will benefit from elimination of the section 271 checklist unbundling obligations and the loss of broadband competition suffers from numerous flaws. According to Verizon, whatever the loss of competition due to elimination of unbundling obligations is made up for by Verizon's increased

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[19] *See* Reply Comments of Verizon, Kahn-Tardiff Reply Dec. ¶ 39, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338 (July 15, 2002) ("*Kahn-Tardiff Reply Dec.*") (stating that "competitors will need to offer both voice and broadband services" and that they have "long agreed with [AT&T's] position that carriers

(continued . . .)

incentive to invest in broadband facilities. Thus, Verizon argues that the Commission must eliminate section 271 unbundling for the same reasons it eliminated section 251(c) unbundling.

This argument fails for the reasons stated above. Even if Verizon could show that section 251 unbundling at TELRIC-based rates disincents broadband investment, that claim has no force at all in *this* context. The Commission refused to subject checklist items to TELRIC, instead requiring only that those elements be governed by the "just and reasonable" requirements of section 201 and the "nondiscrimination" requirement of section 202. *Triennial Review Order* ¶ 663. Verizon offers no explanation as to why these general provisions would sap its incentive to deploy next generation facilities.

Verizon's whole theory is also internally inconsistent. Verizon has promised the Commission that it intends to offer competitors access to broadband capabilities of its networks at "market" terms. *Triennial Review Order* ¶ 253 & n.755. If Verizon fulfills that promise, then it would, of course, be subject to the very same just and reasonable rate safeguards of sections 201 and 202 – and need to develop the very same competition-enabling OSS systems – that it now claims would drive a stake through the heart of its broadband investment plans. *Id.* ¶ 253. Either Verizon is lying now in suggesting that ordinary section 201/202 oversight somehow poses a threat to broadband investment or it was lying when it told the Commission that it plans voluntarily to offer access to broadband and next-generation capabilities. In either case, this only confirms that the section 271 obligations therefore remain vitally important consumer protections.

(. . . continued)
need to offer packages of services if they are to compete successfully.").

In all events, the notion that section 271 unbundling obligations destroy BOC incentives to invest in broadband is refuted by the hard evidence. Verizon is principally seeking forbearance from application of statutory requirements to hybrid loop investment that it has *already made* and by which it and other BOCs can today use to provide broadband services to the majority of their subscribers.[20]

Finally, Verizon's assertions about the burdens of unbundling from a technical standpoint (Verizon Memo at 9-11) are misplaced here. Congress imposed such obligations in section 271 and the BOCs must comply with them as a condition of obtaining long-distance authority. In any event, Verizon's unsupported speculation about how difficult it might be to unbundle future technologies provides no basis for forbearance today. To the extent that Verizon can document such assertions for particular technologies in the future, it can request targeted forbearance at the appropriate time.

C. Abandoning The Section 271 Checklist For Broadband Facilities Is Inconsistent With The Public Interest.

Section 10(b) directs the Commission, in considering whether forbearance is "consistent with the public interest" under section 10(a)(3), to consider whether forbearance will "promote competitive market conditions" and "enhance competition among providers of telecommunications services." As discussed above, forbearance that is designed to eliminate broadband competition altogether furthers neither public interest criteria.

[20] Reply Comments of AT&T Corp., *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, at 79-80 (July 17, 2002).

Moreover, the Commission has specifically held that forbearance from enforcing price regulation must be denied under the third prong of section 10(a) and 10(b) where "forbearance would be likely to raise prices for interconnection and UNEs (particularly those that may constitute bottleneck facilities), inputs competitors must purchase from incumbent LECs in order to provide competitive local exchange service." *1998 Biennial Review Depreciation Requirements* ¶ 63. When "the result of forbearance would be higher costs for competitive LECs which could impair their ability to enter and compete in local markets," the Commission "cannot find that forbearance would promote competitive market conditions." *Id.* "Because the primary purpose of requiring incumbent LECs to provide interconnection and unbundled network elements is to stimulate competition in the provision of local exchange service, allowing [incumbents] to raise rates for those services . . . could adversely affect competition by raising input prices that competitors pay." *Id.* ¶ 68. Hence, "forbearance would not enhance but, rather, would likely retard competition." *Id.* Verizon's Petition makes "raising prices for interconnection and UNEs" not just a likely side-effect of forbearance, but its very purpose. It has therefore failed to satisfy the requirements of section 10(a)(3).

III. VERIZON'S CLAIM THAT THE SECTION 271 OBLIGATIONS DO NOT APPLY TO BROADBAND ELEMENTS IS FRIVOLOUS.

Buried at the end of Verizon's pleading is the claim that forbearance is "all the more appropriate here" because section 271 does not even grant access to "broadband elements." *See, e.g.*, Verizon Memo at 15 ("any separate obligation which may exist under section 271 is properly read to not extend to the broadband elements of the network"). If that were true, then there would be nothing from which to forbear. Of course, it is not.

As an initial matter, Verizon's claim was necessarily rejected in the Commission's *Public Notice* in this proceeding. After Verizon narrowed its request for forbearance relief to apply only to broadband facilities, the Commission refused to grant even that limited request, instead treating it as a new petition and putting it out for notice and comment.

The Commission was correct to reject Verizon's position. Verizon makes no attempt to cite, much less discuss, the plain text of the relevant section 271 checklist provisions. This is not surprising, because Congress did not in any way qualify the type of loop, switching and transport that BOCs must provide pursuant to the checklist, or draw any distinction between "broadband" elements and "narrowband" elements. There is quite simply *nothing* in the language of the section 271 checklist to suggest that the BOCs' obligations are limited to "narrowband" elements. As the D.C. Circuit stressed in an indistinguishable context, there is no "broadband" exception to the Act's requirements. *See Association of Communications Enterprises* v. *FCC*, 235 F.3d 662, 668 (D.C. Cir. 2001) ("As the Commission concedes, Congress did not treat advanced services differently from other telecommunications services.") (citation omitted). Verizon's argument is made of whole cloth and should be rejected out of hand.

Verizon complains that "[t]he precise substance of [the section 271] checklist obligations is largely derivative of the underlying section 251 obligations." Verizon Memo at 15. This argument ignores the Commission's express finding in the *Triennial Review Order* that "the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling *regardless of any unbundling analysis under section 251*." *Triennial Review Order* ¶ 653 (emphasis added); *see also id.* ¶ 652 ("BOCs have

an independent obligation, under section 271(c)(2)(B), to provide access to certain network elements that are no longer subject to unbundling under section 251").

Nor is Verizon correct that "the Commission has repeatedly construed these checklist items *not* to require access to *broadband-related* categories of the loop and switching elements," except where the Commission has required ILECs to provide access under section 251. Verizon Memo at 17 (emphasis in original). The section 271 orders that Verizon cites did not even purport to hold that the section 271 unbundling obligations are dependent on the section 251 obligations. To the contrary, in each of the orders that Verizon cites the Commission separately analyzed whether the BOC had shown compliance with its section 251(c) unbundling obligation (as embodied in checklist item (ii)) and whether the BOC had shown compliance with its section 271 unbundling obligations (as reflected in checklist items iv-vi). *See generally*, *Texas 271 Order* ¶¶ 91-242, 246-342; Memorandum Opinion and Order, *Joint Application by SBC Communications Inc. et al. to Provide In-Region, InterLATA Services in Arkansas and Missouri*, 16 FCC Rcd. 20719, ¶¶ 15-77, 97-113 (2001); Memorandum Opinion and Order, *Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming*, 17 FCC Rcd. 26303, ¶¶ 33-311, 348-375 (2002). The fact that the Commission found that the BOCs had satisfied their section 271 unbundling obligations based on evidence that they satisfied their analogous section 251 obligations shows only that the substantive scope of the unbundling mandated by both statutes is the same (or similar), not that elimination of section 251(c)(3) unbundling also eliminates section 271 unbundling. This is particularly true given that, in the portions of the section 271 orders cited by Verizon, the parties were only arguing that the BOC applicant had failed to satisfy a particular checklist obligation on

the grounds that the BOC had failed to satisfy a corresponding section 251(c)(3) obligation. Thus, contrary to Verizon's claims, the parties in these proceedings were *not* making, and the Commission's section 271 orders did not address or reject, the argument that section 271(c)(2)(B) imposed even broader unbundling obligations than those imposed by section 251(c)(3).[21]

Verizon also makes the policy argument that its position is consistent with section 271's "basic purpose," which is "to preclude the BOCs from leveraging their traditional dominance in local exchange markets to obtain an undue advantage in the long distance market." Verizon Memo at 18. Verizon contends that "[s]uch market-leveraging concerns do not even arise with respect to *new* elements that are used in the provision of the *broadband* services at issue here because, among other considerations, the Bell companies are not remotely dominant in the market for those services." *Id*. This policy argument is unavailing. As an initial matter, the Commission cannot restrict the section 271 competitive checklist on policy grounds. *See* 47 U.S.C. § 271(d)(4) (the Commission "may not," either by rule "or otherwise," limit the terms of the competitive checklist).

In any event, Verizon's policy argument is baseless. Verizon is primarily asking for the right to refuse to provide even minimal access to the broadband capabilities of hybrid-fiber copper loops (as it has to date deployed no fiber-to-the-home loops). These are part of the

[21] The D.C. Circuit's holding in *AT&T Corp.* v. *FCC*, 220 F.3d 607, 624 (D.C. Cir. 2000), that compliance with checklist item (iv) is based on "overall" loop provisioning hardly supports Verizon's claim that the Court read checklist item (iv) as providing no unbundling obligations with respect to broadband loops. *Cf.* Verizon Memo at 17.

ILECs' "legacy" networks and no one seriously contends that CLECs can self-provide such facilities.

The notion that Congress would not want to preserve access to such facilities to protect long distance competition does not even pass the straight-face test. *Cf. ASCENT*, 235 F.3d at 668 ("As the Commission concedes, Congress did not treat advanced services differently from other telecommunications services.") (citation omitted). Without such access, only the ILECs will be able to offer bundles of local voice, long distance and broadband because broadband and narrowband services are provided over the same wires, and there are clear economies of scope in both production and demand. Offering both voice and DSL service over the same BOC-provided loops may be the best, and perhaps only, means of profitably entering some local markets. At a minimum, denying competitive carriers the ability to offer DSL service forecloses competitive carriers from competing for the growing number of customers that demand voice/data services over a single line from a single provider. Thus, foreclosing reasonable broadband access would have the added benefit to the BOCs of protecting their voice monopolies.

CONCLUSION

For the foregoing reasons, the Commission should deny the Petition.

Respectfully submitted,

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November 17, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November, 2003, I caused true and correct copies of the forgoing Opposition of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: November 17, 2003
Washington, D.C.

/s/ Peter M. Andros

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Attachment 2

Before the
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Washington, DC 20554

In the Matter of	)	
	)	
SBC Communications Inc.'s Petition for Forbearance	)	WC Docket No. 03-235
	)	

OPPOSITION OF AT&T CORP.

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Before the
Federal Communications Commission
Washington, DC 20554

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OPPOSITION OF AT&T CORP.

Pursuant to the Commission's November 10, 2003 *Public Notice*[1] in the above-captioned docket, AT&T Corp. ("AT&T") submits this Opposition to the petition for forbearance ("Petition") filed by SBC Communications Inc. ("SBC").[2]

INTRODUCTION AND SUMMARY

The Petition should be denied. As did Verizon in its earlier forbearance petition, SBC asks the Commission to forbear from applying "any section 271 unbundling obligations" to "the broadband facilities – including fiber-to-the-premises loops, packet switches, and the packetized capabilities of hybrid copper-fiber loops – that the *Triennial Review Order*[3] held need not be unbundled under section 251." Petition at 3 (footnote added). SBC's request should be denied

[1] *See* Public Notice, WC Docket No. 03-235 (Nov. 10, 2003).

[2] *See Petition of SBC Communications Inc. for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 03-235 (filed Nov. 6, 2003).

[3] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338 (rel. Aug. 21, 2003) ("*Triennial Review Order*").

for the multiple dispositive reasons that AT&T and others stated in their oppositions to Verizon's petition (and that AT&T repeats below).

But SBC asks the Commission to go even further and to "forbear" from applying section 271's competitive checklist with respect to *any* facilities or capabilities – whether labeled "narrowband" or "broadband" – for which there are no unbundling obligations "imposed on incumbent local exchange carriers ("ILECs") pursuant to 47 U.S.C. § 251(d)(2)." Petition at 1. As detailed below, this broader request is equally meritless.

As an initial matter, both of SBC's forbearance requests are expressly foreclosed by the Communications Act. First and foremost, the Commission is barred from granting the relief SBC seeks under section 271(d)(4) of the Communications Act,[4] which provides that the Commission "may not," either by rule "or otherwise," limit the terms of the competitive checklist.

SBC's Petition is also fatally premature. A separate statutory limitation, section 10(d), bars the Commission from even applying the section 10(a) forbearance criteria to the rules targeted by SBC until the "requirements" of sections 251(c) and 271 "have been fully implemented." SBC does not even attempt to argue that *all* of the section 251(c) and 271 requirements have been "fully implemented." Nor could it. The term's plain meaning demands a finding that these statutory requirements have been "carried into effect" "totally or completely," an impossibility in present circumstances, given ongoing development of and challenges to the relevant requirements, state commissions' ongoing efforts to implement section

[4] 47 U.S.C. § 271(d)(4).

251(c), and, most pertinently, the developing state of still-nascent local competition. Reading section 10(d) to permit repeal of the core regulation that makes intramodal competition possible long before ubiquitous intermodal competition – the only development that could make the regulation unnecessary – would be wholly illogical.

SBC instead claims that the section 271 checklist – or at least the portions of it that SBC asks the Commission to forbear from enforcing – have been "fully implemented." But, even if such a piecemeal approach could be reconciled with the statutory text, SBC cannot demonstrate that these checklist requirements have been fully implemented. First, SBC's argument that the mere grant of section 271 authority compels a finding that section 271 requirements have been "fully implemented" has been squarely rejected by the Commission. The Commission has now held that the grant of authority to provide interLATA service does *not* compel a finding that the "fully implemented" requirement is satisfied.[5] No other conclusion was possible, because the Commission repeatedly has held that it may grant a request for section 271 authority long before there are actual competitive alternatives to the network elements of the Bell operating companies ("BOCs") so long as there is a record basis for a predictive judgment that the availability of network elements at TELRIC rates opens local markets up to the *possibility* of competition.

Nor could the Commission rationally determine that the particular section 271 checklist requirements that SBC seeks to evade – those that require the BOCs, as a condition to interLATA authority, to provide unbundled access to loops, switching and transport at just,

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[5] *See* Memorandum Opinion and Order, *Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, CC Docket No. 96-149 (Nov. 4, 2003) ("*Verizon Forbearance Order*").

reasonable and nondiscriminatory terms – have been fully implemented. As the Commission recognized in the *Triennial Review Order*, these section 271 unbundling requirements impose obligations on the BOCs that are independent of the section 251 obligations that apply to all incumbent LECs and that are separately incorporated into the checklist. If the unbundling obligations of the section 271 checklist are to have any independent meaning at all, it is as requirements intended to apply to the very circumstances in which SBC seeks to evade them – *i.e.*, to maintain some baseline requirements that these core network facilities continue to be made available on nondiscriminatory terms during the period *after* section 251 unbundling obligations expire but *before* a BOC's substantial market power is sufficiently dissipated. SBC now urges a finding that the section 271 unbundling requirements have been "fully implemented" before they are even allowed to take effect. Any such ruling would be patently arbitrary.

SBC implies that a finding by the Commission under section 251 that competitive local exchange carriers ("CLECs") are not "impaired" without access to a particular network element is a determination that the element is, in fact, competitively supplied, such that the incumbent LEC lacks market power. But that too is plainly wrong. The Commission made clear in the *Triennial Review Order* that a finding of non-impairment does *not* necessarily mean that CLECs are *currently* deploying the network element or that effective competition exists; it can reflect a predictive judgement that deployment by CLECs is merely *possible.* There is no evidence, for example, of *any* competitive supply of the hybrid fiber-copper loops that are the real focus of SBC's forbearance petition. There is accordingly no basis for any finding that section 271 unbundling obligations designed to protect competition and consumers while market power

remains have been fully satisfied, which is what SBC has the burden to prove in requesting that the Commission forbear *immediately* from enforcing the section 271 unbundling obligations.

In all events, the hybrid fiber-copper loops with respect to which SBC seeks to avoid checklist unbundling obligations are *not* elements for which there has been any finding of non-impairment. To the contrary, the Commission expressly recognized in the *Triennial Review Order* that competitive LECs generally cannot duplicate such facilities and limited unbundling only on other policy grounds.

The Commission thus limited obligations to provide access to the broadband capabilities of hybrid fiber-copper loops (and fiber-to-the-home loops) on the grounds that requiring unbundling at TELRIC-based rates may limit incumbent LECs' incentives to deploy such facilities. The Commission made this determination despite recognizing that competitive carriers themselves could not feasibly deploy many such loops.

The Commission made clear, however, that in eliminating section 251(c) unbundling, it was relying on other regulatory provisions that would ensure that competitive carriers could gain access to the broadband capabilities of facilities that they could not themselves build. Specifically, the Commission reaffirmed its prior findings that the section 271 checklist required the BOCs to unbundle access to local loops, without any limitations as to the type of loop that must be unbundled. *Triennial Review Order* ¶¶ 656-64. Further, the Commission credited the BOCs' promises that they would willingly offer access to their broadband networks at "market" terms. *Id.* ¶ 253 & n.755. In both cases, the Commission ruled that these offerings would be governed by sections 201 and 202 of the Communications Act, rather than the Commission's

TELRIC rules, in order to give the BOCs greater flexibility in setting the rates, terms and conditions of the access.

Now, SBC asks that the BOCs be excused altogether from any obligation to provide access to "broadband" facilities pursuant to section 271, claiming that such access too would impair their incentives to deploy broadband. But SBC can only be asking for this relief if it intends to deny access to such facilities altogether. That is because, as noted, the rates, terms and conditions that apply to elements provided under section 271 are the very same rates, terms and conditions that would apply to SBC's proposed "voluntary" offerings.

Granting SBC's Petition would be fatal to the Commission's defense of its newly minted broadband unbundling rules. It would remove the very regulatory predicates that the Commission relied upon to eliminate unbundling obligations even where impairment indisputably exists. If SBC's Petition were granted, the BOCs would have no regulatory obligation whatsoever to provide access to certain broadband capabilities that the Commission has recognized competitive carriers themselves cannot profitably deploy. And eliminating this "intermodal" competition would come with no corresponding benefit as there is no basis for arguing that the general regulatory requirements of sections 201 and 202 sap the BOCs' incentives for deploying broadband facilities.

In all events, SBC cannot meet the three specific requirements for forbearance contained in section 10(a). These requirements understandably focus on the protection of consumers and competition. Without the provisions of section 271 that SBC seeks to avoid, CLECs cannot provide broadband services to many consumers. As a result, there would be no meaningful competition for customers in the broadband market, which is largely a duopoly (and in many

areas, a monopoly). In addition, the BOCs would be the only carriers able to offer consumers bundles of voice and data services. Monopolization of this emerging "market" for bundled services clearly is not in consumers' best interests.

Because SBC has failed to demonstrate that it is entitled to forbearance relief from the section 271 checklist even for broadband elements, its broader request for forbearance relief from the checklist for narrowband *and* broadband elements is, *a fortiori*, foreclosed. In any event, SBC's broader forbearance request is barred by the plain language of the statute, which, as noted, establishes that the unbundling obligations under section 271 are "independent" of the unbundling obligations imposed by section 251. The ruling that SBC seeks – *i.e.*, that section 271 unbundling obligations with respect to particular facilities vanish automatically and immediately upon the expiration of section 251 obligations with respect to those facilities – would strip section 271 of this independence and disregard entirely that the broader section 271 unbundling obligations are based on the unique market power and dangers posed by the BOCs' unmatched geographic reach.

BACKGROUND

The section 251(c)(3) unbundling obligation applies to all incumbent LECs. Section 271(d), in contrast, applies only to BOCs that choose to seek long distance authority in an in-region state. As a precondition to obtaining long distance authority, the section 271 competitive checklist requires that BOCs *both* provide UNEs in accordance with section 251(c)(3) (checklist item two) *and* provide access to the specific facilities listed in checklist items four, five, six, and ten, which include loops, transport, switches, signaling and call-related databases. *See* 47 U.S.C. § 271(c)(2)(B)(ii), (iv), (v), (vi), & (x). The Commission has determined that network elements

provided under section 271(d) are not subject to the TELRIC rules that govern the pricing of network elements provided under section 251(c). *Triennial Review Order* ¶¶ 656-64. Rather, the "appropriate inquiry" is "to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202" of the Act. *Id.* ¶ 656.

In the *Triennial Review* proceeding, SBC and other BOCs urged the Commission to reverse its "determination in the *UNE Remand Order* that section 271 establishes a separate BOC access obligation for network elements no longer listed under section 251(c)(3)." *Id.* ¶ 652. They argued that "once the Commission has determined that a network element is not necessary under section 251(d)(2), the corresponding checklist item should be construed as being satisfied." *Id.* Verizon also filed a Petition asking the Commission to forbear from applying checklist items four through six and ten if the Commission found that the corresponding network elements no longer need to be unbundled under section 251(d). *See* Petition for Forbearance of the Verizon Telephone Companies Pursuant to Section 160(c), CC Docket 01-338 (filed July 29, 2002) ("Verizon July 2002 Forbearance Petition").

In the *Triennial Review Order* (¶¶ 653-55), the Commission squarely rejected the argument that a finding of non-impairment under section 251 necessarily relieves a BOC of the obligation to provide access to the corresponding UNE under section 271. Reaffirming its conclusion in the *UNE Remand Order*, the Commission unequivocally held that section 271 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. *Id.* ¶ 654. 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*." *Id.* ¶ 653 (emphasis added).

On October 24, 2003, the last business day preceding the statutory deadline for Commission action on its July 2002 Forbearance Petition, Verizon abandoned that petition and attempted to substitute a new request seeking relief only from regulation that applies to "broadband" elements. *See* October 24, 2003 Letter From Susanne A. Guyer, Verizon, to Chairman Michael Powell et al., FCC, at 1 (CC Dkt. No. 01-338) ("Verizon Oct. 24, 2003 *Ex Parte*"). The Commission chose to treat Verizon's *ex parte* as a new forbearance petition and set that petition for comment. *Id.* Comments were filed on November 17, 2003 and reply comments were filed on November 26, 2003.

SBC's Petition was filed on the heels of Verizon's *ex parte*. SBC resurrects the forbearance request that Verizon raised in the *Triennial Review* proceeding but abandoned in light of the *Triennial Review Order* – that the Commission forbear from enforcing the section 271 checklist with respect to *all* network elements that do not have to be unbundled under section 251. Alternatively, SBC makes the same forbearance request (and raises substantially the same arguments) that Verizon makes in its *ex parte* – that the Commission forbear from enforcing the section 271 checklist with respect to the broadband elements that the Commission has found do not need to be unbundled under section 251. For the reasons set forth below, both of SBC's forbearance requests should be denied.

ARGUMENT

I. THE COMMISSION LACKS AUTHORITY TO GRANT THE REQUESTED FORBEARANCE.

The Commission has no legal authority to grant either of SBC's requests for forbearance, for two independent and legally sufficient reasons. *First*, section 271(d)(4) provides that the Commission "may not," either by rule "or otherwise," limit the terms of the competitive checklist, which is precisely what SBC seeks here. 47 U.S.C. § 271(d)(4). *Second*, Congress provided that "the Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those requirements have been fully implemented." 47 U.S.C. § 160(d). Because SBC cannot show that these key provisions have been "fully implemented," the Commission has no authority to grant a request that it forbear from applying the section 271 checklist.

A. Section 271(d)(4) Bars The Commission From Granting SBC's Request.

Section 271(d)(4) expressly states that "[t]he Commission *may not*, by rule *or otherwise*, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)." 47 U.S.C. § 271(d)(4) (emphasis added). This specific statutory provision concerning the competitive checklist trumps the more general provisions of section 10 concerning the Commission's forbearance authority. *See, e.g., Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504, 524-26 (1989) (specific statutory provision trumps a more general one). Thus, notwithstanding its general authority to forbear from enforcing provisions of the Act, the Commission "may not" use forbearance to limit the terms of the competitive checklist, which is indisputably what SBC seeks in its Petition. By its plain terms, section 271(d)(4) ensures that, as long as a BOC offers (or intends to offer) in-region interLATA services, it must comply with an irreducible core of network access requirements.

SBC does not even mention section 271(d)(4) in its Petition, and certainly makes no attempt to demonstrate that the relief it seeks is permissible under that statute. It is not. Section 271(d)(4) is an insurmountable barrier to SBC's requests, and the Petition therefore must be dismissed.[6]

B. SBC's Petition Is Premature Because Sections 251 And 271 Are Not Yet "Fully Implemented."

The Petition is also fatally premature. Section 10(d) places an explicit "[l]imitation" on the remainder of Section 10, providing that the "Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those requirements have been fully implemented."[7] The Commission considers section 10(d) as a "threshold matter" in forbearance proceedings, and a petitioner's failure to satisfy its requirements mandates denial of the petition without consideration of its merits.[8]

SBC's analysis of section 10(d) is limited to a single paragraph. Petition at 7-8. SBC first contends that the *Verizon Forbearance Order* established that the Commission "will examine each provision of section 271 separately to determine whether it has been 'fully

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[6] Verizon has argued that section 271(d)(4) does not bar the Commission from forbearing from enforcing the section 271 checklist because section 10 authorizes the Commission to forbear from applying "any provision" of the Act and "also cross-references section 271 explicitly." *See* Reply Comments of Verizon, *Petition for Forbearance of the Verizon Telephone Companies*, CC Docket No. 01-338, at 5, 16-17 (Nov. 26, 2003). This interpretation of the Act would accord no meaning to the unqualified language of section 271(d)(4), which prohibits the Commission from limiting the terms of the competitive checklist "by rule *or otherwise*." In contrast, under AT&T's interpretation of the statutory provisions, the reference in section 10(d) to section 271 can be given independent meaning because section 271(d)(4) only applies to the section 271 checklist. Thus, the Commission can forbear from applying the many other section 271 requirements (such as section 272) once sections 251(c) and 271 are "fully implemented."

[7] 47 U.S.C. § 160(d).

[8] *Verizon Forbearance Order* ¶¶ 5, 9.

implemented'" and that the Commission can forbear from apply "specific provisions of section 271" when "the provisions in question 'have been fully implemented.'" Petition at 7. Such a piecemeal approach, however, cannot be reconciled with the statutory text. The plain language of the statute makes clear that the Commission cannot forbear from applying *any* requirement of section 251(c) or section 271 until *all* of the requirements of section 251(c) and section 271 have been "fully implemented." *See* 47 U.S.C. § 160(d) ("Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that *those requirements* have been fully implemented").

SBC does not even attempt to demonstrate that *all* of the requirements of section 251(c) and section 271 have been "fully implemented." Nor could it. The objectives and purposes of the Act suggest that the requirements of section 251(c) and 271 will be "fully implemented" when, at a minimum, there is ubiquitous availability of cost-based wholesale alternatives to incumbent carriers' bottleneck facilities, such that the incumbent carriers would no longer be deemed dominant in local services markets. The word "implement" means "to carry into effect, fulfill, accomplish" and to "give practical effect to." And the word "fully" means "totally or completely." Webster's New World Dictionary. Sections 251(c) and 271 will be "fully implemented," therefore, when a practical effect results: namely, when ubiquitous and durable local competition *actually exists* and the incumbents no longer control bottleneck facilities. *Cf. Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 532, 538 (2002) (upholding Commission rules that interpret the "statutory dut[ies]" of section 251(c) to "reach the result the statute requires" and thereby "get[] a practical result").

The requirements of sections 251(c) and 271 are not fully implemented, according to the plain meaning of those terms, where, as is the case today, (i) final, unchallenged rules that implement the duties and obligations of section 251(c) are not currently in effect; (ii) the key cost principles that are used to determine prices for network elements and interconnection required to be provided under those sections are to be the subject of an upcoming Commission rulemaking; (iii) state commissions have yet to apply and "implement" any new rules (and, indeed, have not even finished implementing the prior rules); (iv) none of these new rules or pricing principles have been implemented in interconnection agreements; and (v) local competition remains nascent. State commissions' varied regulatory activity confirms that section 10(d) is not satisfied: what are the commissions and parties before them doing, if not "implementing" section 251(c)'s requirements?

But even if full implementation of the section 271 checklist alone could be a sufficient precondition for forbearance under section 10(a), SBC has failed to demonstrate that the section 271 checklist has been "fully implemented." SBC claims that the section 271 checklist has been "fully implemented" in all of its in-region states because its "section 271 application[s] ha[ve] been granted" *Id.* at 8 and n.11. SBC relies on the fact that section 271(d)(3)(A)(i) provides that the Commission can grant section 271 authorization only after expressly determining that the BOC has in fact "fully implemented" the competitive checklist. *Id.*

In the Commission's recent decision denying Verizon's petition for forbearance from the requirements of section 271 that obligate a BOC to provide long distance through a "separate affiliate," the Commission expressly held that "the grant of section 271 authority in a state" does *not* mean that all the requirements of section 271 (much less those of section 251(c)) have been

"fully implemented." *See Verizon Forbearance Order* ¶¶ 6-7. No other conclusion was possible. In the same section 271 decisions that SBC claims the Commission has found the BOCs to have "fully implemented" the competitive checklist for purposes of section 10(d), the Commission has expressly stated that "obtaining section 271 authorization is *not* the end of the road" and that the "critically important power" in section 271(d)(6) "underscores Congress's concern that BOCs *continue to comply* with the statute."[9] The Commission could not have made these pledges in its section 271 orders if it were simultaneously finding that the section 271 checklist has been fully implemented.[10]

Indeed, the logic of the Commission's rejection of Verizon's section 272 forbearance petition establishes that both section 271 and section 251 cannot be "fully implemented" for a minimum of three years after long distance authority has been granted in a particular state. The Commission made an express finding that, for purposes of section 10(d), section 271 is not "fully implemented" until section 272 is "fully implemented." Specifically, the Commission found (1) that section 271 "incorporat[es]" the section 272 requirement that the BOC "maintain the affiliate structure for at least three years," and (2) that "section 272 cannot be deemed to have

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[9] Memorandum Opinion and Order, *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*, 15 FCC Rcd. 3953 ¶¶ 448, 453 (1999) (emphases added).

[10] The Act also manifestly contemplates that the requirements of sections 251(c)(3) and 271 will endure long after a BOC receives section 271 authorization: section 271(d)(6) provides the Commission with a special grant of permanent enforcement authority if the BOC ceases to meet any of the section 271 requirements. That section empowers the Commission to act *sua sponte*, requires the Commission to act within 90 days on any complaint alleging a violation of section 271, and authorizes the Commission to suspend or revoke a BOC's section 271 authority. All of these post-authorization administrative remedies and enforcement powers could be rendered impotent if, as SBC contends, the Commission's section 271 decisions necessarily must also be deemed to have determined that a BOC has "fully implemented" the section 271 checklist within the meaning of section 10(d).

been 'fully implemented' until this three-year period has passed." *Verizon Forbearance Order* ¶ 6. Accordingly, the Commission concluded that "section 272 is 'fully implemented' on a state-by-state basis three years after the grant of section 271 authority in a state." *Id.* ¶ 7.

The Commission's findings with respect to section 272 are significant because of the purposes of section 272. The Commission repeatedly has held that section 272 is a critically important safeguard because BOCs can have lingering market power after section 271 authority is granted.[11] The *Verizon Forbearance Order* acknowledges Congress' determination that market power would linger for at least three years after long distance authority is granted. This recognition necessarily precludes any finding that sections 271 and 251 – the provisions intended to *open* local markets to effective competition – have been "fully implemented" before the three-year period has passed.

SBC's proposed construction of Section 10(d) must also be rejected because it would produce absurd results that Congress could not have intended. Under SBC's proposed construction, the Commission could, the very *moment* after granting a BOC long distance authority premised on findings that the BOCs' continuing compliance with sections 251(c) and 271 would open local markets up to the possibility of competition, put an end to that possibility

[11] *See, e.g.,* First Report and Order, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272*, 11 FCC Rcd. 21905, ¶ 9 (1996) ("In enacting section 272, Congress recognized that the local exchange market will not be fully competitive immediately upon its opening"); Memorandum Opinion and Order*, 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*, 15 FCC Rcd. 18354, ¶ 395 (2002) ("compliance with section 272 is 'of crucial importance' because the structural, transactional, and nondiscrimination safeguards of section 272 seek to ensure that BOCs compete on a level playing field").

and return to the pre-Act "unregulated world" in which the BOCs enjoyed an "almost insurmountable competitive advantage." *Verizon*, 535 U.S. at 490-91.

SBC retreats to the canon of statutory construction that identical words used in different parts of the same act generally are assumed to have the same meaning. Petition at 8 n.11. In interpreting the Communications Act, the courts and the Commission have on numerous occasions decided that the same term used in multiple sections of the Act should be interpreted differently when, as here, there are different purposes underlying the sections in which the term is used. Thus, for example, the Commission refused to interpret the term "provide" in section 271(a) to reflect the construction it had given the same term in section 260(a), instead finding that it should interpret section 271 to advance the specific policies underlying that statute. *AT&T Corp.* v. *Ameritech Corp.*, 13 FCC Rcd. 21438 (1998), *aff'd*, *U S West Comm. Inc.* v. *FCC*, 177 F.3d 1057, 1060 (D.C. Cir. 1999) (it is entirely appropriate for "identical words" to have "different meanings where the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different"). Likewise, the D.C. Circuit, in recently upholding the Commission's interpretation of the term "necessary" in section 10(a), rejected the argument that the term "has precisely the *same* meaning in every statutory context," finding that the Commission reasonably accounted for the different purposes underlying section 10(a) and the other statutes where the term appears. *CTIA* v. *FCC*, 330 F.3d 502, 510-11 (D.C. Cir. 2003).[12]

[12] *See also* Report, *The 2002 Biennial Regulatory Review*, 18 FCC Rcd. 4726, ¶¶ 18-21 (2003) (refusing to construe the term "necessary" in section 11 to mean the same as that term had been interpreted in other sections of the Act).

These same principles apply to the construction of "fully implemented" in section 10(d), because, as described above, construing that term as the Commission construed the same term in section 271(d)(3)(A)(i) would lead to an "absurd result"[13] and ignore the differing purposes of the sections. Section 271(d)(3)(A)(i) requires only that the Commission find that a *BOC* has "fully implemented" the *competitive checklist* with regard to a single facilities-based interconnection agreement. It does *not* require a universal finding that sections 251(c) and 271 have themselves been fully implemented by all relevant parties – the state commissions, the BOCs, competing carriers, the Commission itself and federal courts – as section 10(d) requires. For example, a finding that a BOC has satisfied the checklist for a particular interconnection agreement does not constitute a finding that the BOC will, as required by section 271(d)(3)(B), operate in accordance with the requirements of section 272. Nor does it require a finding, consistent with section 251(c)'s objectives, that enduring local competition has *in fact* developed. Rather, it is a prognosis that the market is sufficiently open to make a predictive judgment that competition *could* take root, not a determination that competition will in fact occur and thrive.

SBC ultimately concedes away its legal position, arguing that "[a]t the very least, it would be reasonable to conclude that the obligations of the Competitive Checklist have 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)." Petition at 8 (emphasis in original). SBC is simply wrong in suggesting that a finding by the Commission under section 251 that CLECs are not "impaired" without access to a particular network element is a determination that actual competition currently exists with respect to that network element, such

[13] *CTIA*, 330 F.3d at 511.

that the competitive checklist should be deemed "fully implemented." The Commission made clear in the *Triennial Review Order* that a finding of nonimpairment does not necessarily mean that CLECs are *currently* deploying the network element, much less that effective competition *currently* exists with respect to the supply of that element. Indeed, the Commission expressly *rejected* that standard as the test for "impairment." *Triennial Review Order* ¶¶ 109-110 ("The purposes of a market power analysis are not the purposes of section 251(d)(2). . . . [T]he Act requires only that network elements be unbundled if competing carriers are impaired without them, regardless of whether the incumbent LEC is exercising market power or the unbundling would eliminate this market power"). The Commission made clear that a finding of nonimpairment can reflect a determination that deployment by CLECs is merely *possible.*[14] In addition, the Commission's rules make clear that unbundling of loops, transport, and switching can be eliminated on the basis of a hypothetical business case that these facilities could *potentially* be economically deployed.[15]

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[14] *See, e.g.*, *Triennial Review Order* ¶ 506 (impairment analysis for local switching must address not only "the existence of *actual* competitive facilities," but also "the *potential* ability of competitive LECs to deploy their own switches") (emphasis in original); *see also id.* ("we expect states to find 'no impairment'" where "self-provisioning of switching is economic notwithstanding the fact that no three carriers have *in fact* provisioned their own switches) (emphasis in original); *id.* ¶ 335 (for enterprise loops, a finding of nonimpairment can reflect a determination that "competitive LECs *could* economically deploy loop transmission facilities at that location") (emphasis in original); *id.* ¶ 410 (for transport, "a state must consider and may also find no impairment on a particular route that it finds is *suitable* for multiple, competitive supply," even if competitive supply does not actually exist) (emphasis added; internal quotation marks omitted).

[15] *See* 47 C.F.R. § 51.319(a)(5)(ii) (potential deployment of enterprise loops); *id.* (d)(5)(iii)(B) (potential deployment of switching); *id.* (e)(2)(B)(ii) (potential deployment of dedicated transport).

The Commission's findings of nonimpairment therefore are not determinations that actual competition currently exists with respect to supply of the network elements at issue or that the affected BOC lacks market power in the provision of those facilities. These determinations therefore provide no basis for any finding that the section 271 obligations designed to protect competition and consumers while market power remains have been fully implemented, which is a precondition to the Commission's authority to exercise its forbearance authority under section 10(d).

Nor could the Commission rationally determine that the particular section 271 checklist requirements that SBC seeks to evade – those that require the BOCs, as a condition to interLATA authority, to provide unbundled access to loops, switching and transport at just, reasonable and nondiscriminatory terms – have been fully implemented. These section 271 unbundling requirements impose obligations on the BOCs that are "independent" of the section 251 obligations that apply to all incumbent LECs and that are separately incorporated into the checklist. *Triennial Review Order* ¶ 653. If the section 271 unbundling obligations are to have independent meaning, it is as requirements intended to apply to the very circumstances in which SBC seeks to evade them – *i.e.*, to maintain some baseline requirements that these core network facilities continue to be made available on nondiscriminatory terms during the period *after* section 251 unbundling obligations expire but *before* a BOC's substantial market power is sufficiently dissipated. In urging that the Commission forbear from applying these section 271 unbundling requirements at the moment section 251 obligations for the same facilities terminate, SBC seeks a finding that the section 271 unbundling requirements have been "fully implemented" before they are even allowed to take effect. Any such ruling would be patently arbitrary.

In all events, the hybrid fiber-copper loops with respect to which SBC seeks to avoid checklist unbundling obligations are *not* elements for which there has been any finding of non-impairment. To the contrary, as discussed at pp. 21-23, *infra*, the Commission expressly recognized in the *Triennial Review Order* that competitive LECs generally cannot duplicate such facilities and limited unbundling only on other policy grounds.

In sum, in contrast to section 271(d)(3)(A)(i), section 10(d) is intended to ensure that the very structure of local markets has changed and that price-constraining competition that can effectively replace consumer-protection regulation has *actually developed* by limiting the Commission's ability even to *consider* requests for forbearance from any of the requirements of sections 251(c) and 271, which the Commission has properly found to be the very "cornerstones of the framework Congress established in the 1996 Act to open local markets to competition."[16] There is no sustainable construction of section 10(d) under which SBC's forbearance requests could be found to satisfy the "fully implemented" requirement, and the Petition must, accordingly, be dismissed as premature.

II. SBC'S BROADBAND FORBEARANCE REQUEST DOES NOT SATISFY ANY OF THE SECTION 10(a) FORBEARANCE CRITERIA.

Even if the Commission could entertain SBC's forbearance requests as a valid invocation of the Commission's section 10(a) forbearance authority, SBC has not remotely met its burden to prove that its request that the Commission forbear from applying section 271's competitive checklist to broadband elements satisfies the section 10(a) criteria. Under that provision, the proponent of forbearance must make three "conjunctive" showings, and the Commission must

[16] Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 FCC Rcd. 24012, ¶ 73 (1998).

"deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied." *CTIA*, 330 F.3d at 509. First, the proponent of forbearance must show that enforcement of the specific regulations at issue "is not necessary to ensure that the charges . . . are just and reasonable and not unjustly or unreasonably discriminatory." 47 U.S.C. § 160(a)(1). Second, it must show that enforcement of those regulations "is not necessary for the protection of consumers." *Id.* § 160(a)(2). And, third, it must show that non-enforcement of those regulations "is consistent with the public interest," *id.* § 160(a)(3), and, in particular, that such non-enforcement will "promote competitive market conditions" and "enhance competition among providers of telecommunications services," *id.* § 160(b).

SBC makes only a half-hearted attempt to show that it satisfies the three fundamental prerequisites for forbearance, largely repeating the same discredited arguments that Verizon makes in its *ex parte*. At bottom, SBC's position is that the Commission intended in the *Triennial Review Order* to eliminate any incumbent LEC obligation to provide wholesale access to broadband and, consequently, SBC should be relieved of its obligation under section 271 to do so. *See, e.g.*, Petition at 9. In fact, it is SBC's Petition that would cause a rift with the Commission's reasoning in the *Triennial Review Order*.

In the *Triennial Review Order*, the Commission confirmed that CLECs generally cannot economically duplicate next-generation capabilities of hybrid loops. *Triennial Review Order* ¶ 286. Nonetheless, the Commission denied access under section 251(c) to the broadband capabilities of such loops despite "impairment," finding that the benefits of section 251(c) unbundling were outweighed by benefits of freeing the incumbents from TELRIC regulation that might limit their incentive to deploy such facilities. *Id.*¶¶ 286, 290.

This analysis, of course, cannot be divorced from the other existing, regulatory obligations that limited the potential harm to competitive carriers and competition from eliminating section 251(c) unbundling obligations. Specifically, the Commission confirmed its prior holding in the *UNE Remand Order* that the BOCs must provide access to their local loops pursuant to section 271, regardless of the technology the loops employ. *Triennial Review Order* ¶¶ 654, 656. Further, the *Triennial Review Order* expressly contemplated that after eliminating the section 251(c) unbundling obligations for "broadband" loops, incumbent LECs 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.

Triennial Review Order ¶ 253. In so stating, the Commission expressly cited Verizon representations that it intended voluntarily to make available such wholesale broadband offerings. *Id.* n.755.

Thus, the Commission clearly saw no investment-retarding inconsistency between its determination regarding the unbundling of fiber network elements at TELRIC rates under section 251 and the BOCs' continued provision of broadband access in accordance with the requirements of sections 201 and 202. To the contrary, the Commission understandably and necessarily viewed access under the more "generous" requirements of sections 201 and 202 as a safety net that would protect consumers and competition in emerging broadband markets. Similarly, the Commission's section 251 unbundling conclusions plainly are not rendered for naught by the BOCs' continuing obligation to offer access to broadband under the same section

201/202 just, reasonable, and non-discriminatory terms, pursuant to section 271.[17] In fact, as noted, the Commission assumed that wholesale service offerings by incumbent LECs would continue even after an item is "de-listed" from section 251(c) requirements, and such service would be governed by these very same provisions.

Therefore, SBC's contention that "the Commission's assertion of jurisdiction over the pricing of elements unbundled under" section 271 would create "uncertainty," particularly where state jurisdiction might exist, is a makeweight. Petition at 10-11. SBC does not – and could not – deny that the voluntary wholesale broadband offerings promised by BOCs would be governed by sections 201 and 202. SBC's contention makes plain that its true objective is to be excused from having to offer such access.

SBC further argues that section 706 of the Act "compels the exercise of the Commission's forbearance authority to ensure that any section 271 unbundling obligations do not undo the Commission's *Triennial Review* efforts to free broadband from unbundling." *Id.* at 12-13. To the contrary, section 706 is *irrelevant* to the scope of a BOC's access obligations under section 271. In the *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 Commission authority "to take Congress's goals into account" in deciding which network elements must be unbundled. *Triennial Review Order* ¶ 176. Section 271, however, does not contain an "at a minimum" clause. Indeed, section 271 explicitly

[17] Reliance on the Commission's rulings in the *Triennial Review Order* should not be interpreted as agreement with that analysis, including the Commission's view that the network elements specifically listed in section 271 are not themselves subject to the cost-based pricing standard of sections 251 and 252.

prohibits the Commission from "limit[ing] or extend[ing] the terms used in the competitive checklist set forth in subsection (c)(2)(B)." 47 U.S.C. § 271(d)(4). Consequently, in contrast to its assessment of unbundling issues under section 251, the Commission is barred from weighing the goals of section 706 in enforcing a BOC's obligations under the competitive checklist of section 271.[18]

Moreover, there could be no sustainable finding that the unbundling imposed by section 271 would have a material impact on SBC's investment incentives. The Commission expressly declined to require the BOCs to provide section 271 checklist items at TELRIC-based rates, and instead mandated only that those elements, to the extent they are used to offer interstate service, be governed by the "just and reasonable" requirements of section 201 and the "nondiscrimination" requirement of section 202. *Triennial Review Order* ¶ 663. Other BOCs have conceded that even "appropriate" TELRIC rates will provide BOCs with sufficient incentive to invest in broadband facilities. Dr. Alfred Kahn, who testified on behalf of Verizon in the *Triennial Review Proceeding*, conceded that "TELRIC can be sufficiently flexible to accommodate investment risks in a way that is approximately correct economically."[19] *A fortiori*, to the extent that the Commission is merely subjecting SBC to the potentially more

[18] This discussion should not be read to suggest that AT&T agrees with the Commission's assessment of unbundling issues under section 251 or its treatment of section 706 and 251(d)(2)'s "at a minimum" language. In fact, AT&T believes the Commission erroneously relied on section 706 to grant broadband relief where impairment exists.

[19] Reply Comments of Verizon, Kahn-Tardiff Reply Decl. ¶ 40 n.52, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338 (July 15, 2002 ("*Kahn-Tardiff Reply Dec.*") (*citing* Reply Brief for Petitioner FCC in *Verizon Communications* v. *FCC*).

flexible rate provisions of sections 201 and 202, there can be no legitimate concern about these obligations materially impairing SBC's investment incentives.

Given the flawed premises of SBC's Petition, it is not surprising that SBC's broadband forbearance request does not satisfy any of the three statutory prerequisites for forbearance.

A. The Provisions Of The Section 271 Checklist Are Necessary To Ensure That Charges Are Just, Reasonable And Nondiscriminatory.

SBC cannot show that enforcement of the provisions of the section 271 checklist to broadband elements "is not necessary to ensure that the charges . . . are just and reasonable and not unjustly or unreasonably discriminatory." 47 U.S.C. § 160(a)(1). To the contrary, granting SBC's request that it be relieved of *any* obligation to provide access to the broadband facilities in question would enable SBC to charge unjust, unreasonable and discriminatory rates at both the wholesale and retail levels.

At the wholesale level, SBC and the other BOCs generally are *monopoly* suppliers of last-mile broadband and next-generation capabilities in their vast service areas. Cable companies generally do not provide CLECs access to the broadband (or other) capabilities of their last-mile facilities. And the *Triennial Review Order* confirms that CLECs generally cannot economically duplicate those facilities – the Commission limited cost-based access to the next-generation capabilities of hybrid loops, for example, *despite* the existence of "impairment." *Triennial Review Order* ¶ 286. SBC makes no attempt to argue that "market forces" would, in these circumstances, compel it to provide access to broadband facilities at just and reasonable rates. Nor could it. Indeed, the singular purpose of SBC's Petition is to enable it to deny access to such facilities even at the "just and reasonable" rates mandated by section 201. The section 201 "just and reasonable" rate protections that accompany section 271 unbundling requirements are thus

plainly necessary to ensure that "the charges" CLECs pay for access to broadband capabilities of the BOCs' networks "are just and reasonable and not unjustly or unreasonably discriminatory."

The same is true at the retail level. SBC trumpets the availability of cable broadband services (Petition at 14), but, at best, that demonstrates duopoly conditions that are patently insufficient to establish that the BOCs would be forced to offer access to their broadband facilities at just and reasonable terms and conditions – *i.e.*, that the BOCs lack market power in the provision of broadband services. As the Commission made clear in the *EchoStar-DirecTV Merger Order*, 17 FCC Rcd. 20559, ¶ 103 (2002), "existing antitrust doctrine suggests that a merger to duopoly . . . faces *a strong presumption of illegality*." Duopolies "inevitably result in less innovation and fewer benefits to consumers" which "is the antithesis of what the public interest demands." *Id*. (separate statement of Chairman Powell).[20]

B. The Provisions Of The Section 271 Checklist Are Necessary For The Protection Of Consumers.

SBC also cannot show that continued application of the section 271 checklist to broadband facilities is unnecessary for the protection of consumers.[21] In fact, just the opposite is true. Without the provisions of section 271 that SBC seeks to avoid, competition in the provision of broadband and next-generation services will be severely impeded.

Significantly, the Commission previously has held that the mere *potential* for reduced competition and ensuing rate increases that might occur as a result of forbearance from enforcing

[20] In addition, cable modem services are not generally available in business districts. *See, e.g., Ex Parte* Letter from David Lawson, AT&T, to Marlene Dortch, FCC, CC Docket Nos. 02-33 *et. seq.*, at 7-8 (Dec. 23, 2002); *Ex Parte* Letter from David Lawson, AT&T, to Marlene Dortch, FCC, CC Docket Nos. 02-33 *et. seq.*, at 4-5 (Feb. 4, 2003).

depreciation prescription rules is sufficient to preclude the required finding under section 10(a)(2) that continued enforcement was "not necessary for the protection of consumers":

> Forbearance of the depreciation prescription process could potentially trigger large increases in a carrier's depreciation expenses, which could in turn result in unwarranted increases in consumer rates. These increased depreciation expenses and consumer rates would [be] likely to continue for many years until robust competition curtails the ability of the incumbent LECs to secure these rates from consumers.

Report and Order, Memorandum Opinion and Order, *1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers*, 15 FCC Rcd. 242, ¶ 59 (1999) (footnote omitted) ("*1998 Biennial Review Depreciation Requirements*"). The forbearance that SBC now proposes would make rate increases a near certainty, not just a possibility.

Customers now routinely (and increasingly) demand both traditional and new broadband services over a single line from a single provider. Thus, as the BOCs' economists have recognized,[22] carriers must be able to offer the full bundle of services to consumers in order to compete successfully. Competing carriers, however, would be unable to offer the full range of broadband and next generation services without reasonable access to the broadband and next-generation capabilities of the BOCs' last-mile networks. Accordingly, the forbearance relief that SBC seeks here would ensure that the BOCs (and, in some areas, cable companies) would generally be the only parties that could offer many services – and thus the only parties that could

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[21] 47 U.S.C. § 160(a)(2).

[22] *See Kahn-Tardiff Reply Dec.* ¶ 39 (stating that "competitors will need to offer both voice and broadband services" and that they have "long agreed with [AT&T's] position that carriers need to offer packages of services if they are to compete successfully.").

offer the bundles of services that consumers demand. Monopolization or cable-BOC duopolization are plainly contrary to consumers' interests.

SBC's suggestion (Petition at 8-11) that consumers somehow will benefit from elimination of the section 271 checklist unbundling obligations and the loss of broadband competition suffers from numerous flaws. According to SBC, whatever the loss of competition due to elimination of unbundling obligations is made up for by SBC's increased incentive to invest in broadband facilities. Thus, SBC argues that the Commission must eliminate section 271 unbundling for the same reasons it eliminated section 251(c) unbundling.

This argument fails for the reasons stated above. Even if SBC could show that section 251 unbundling at TELRIC-based rates disincents broadband investment, that claim has no force at all in *this* context. The Commission refused to subject checklist items to TELRIC, instead requiring only that those elements be governed by the "just and reasonable" requirements of section 201 and the "nondiscrimination" requirement of section 202. *Triennial Review Order* ¶ 663. SBC offers no explanation as to why these general provisions would sap its incentive to deploy next generation facilities.

In all events, the notion that section 271 unbundling obligations destroy BOC incentives to invest in broadband is refuted by the hard evidence. SBC is principally seeking forbearance from application of statutory requirements to hybrid loop investment that it has *already made* and by which it and other BOCs can today use to provide broadband services to the majority of their subscribers.[23]

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[23] Reply Comments of AT&T Corp., *Review of the Section 251 Unbundling Obligations of* (continued . . .)

Finally, SBC's assertions about the burdens of unbundling from a technical standpoint (Petition at 9-10) are misplaced here. Congress imposed such obligations in section 271 and the BOCs must comply with them as a condition of obtaining long-distance authority. In any event, SBC's unsupported speculation about how difficult it might be to unbundle future technologies provides no basis for forbearance today. To the extent that SBC can document such assertions for particular technologies in the future, it can request targeted forbearance at the appropriate time.

C. Abandoning The Section 271 Checklist For Broadband Facilities Is Inconsistent With The Public Interest.

Section 10(b) directs the Commission, in considering whether forbearance is "consistent with the public interest" under section 10(a)(3), to consider whether forbearance will "promote competitive market conditions" and "enhance competition among providers of telecommunications services." As discussed above, forbearance that is designed to eliminate broadband competition altogether furthers neither public interest criteria.

Moreover, the Commission has specifically held that forbearance from enforcing price regulation must be denied under the third prong of section 10(a) and 10(b) where "forbearance would be likely to raise prices for interconnection and UNEs (particularly those that may constitute bottleneck facilities), inputs competitors must purchase from incumbent LECs in order to provide competitive local exchange service." *1998 Biennial Review Depreciation Requirements* ¶ 63. When "the result of forbearance would be higher costs for competitive LECs which could impair their ability to enter and compete in local markets," the Commission "cannot

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Incumbent Local Exchange Carriers, CC Docket No. 01-338, at 79-80 (July 17, 2002).

find that forbearance would promote competitive market conditions." *Id.* "Because the primary purpose of requiring incumbent LECs to provide interconnection and unbundled network elements is to stimulate competition in the provision of local exchange service, allowing [incumbents] to raise rates for those services . . . could adversely affect competition by raising input prices that competitors pay." *Id.* ¶ 68. Hence, "forbearance would not enhance but, rather, would likely retard competition." *Id.* SBC's Petition makes "raising prices for interconnection and UNEs" not just a likely side-effect of forbearance, but its very purpose. It has therefore failed to satisfy the requirements of section 10(a)(3).

III. SBC'S REQUEST THAT THE COMMISSION FORBEAR FROM ENFORCING THE SECTION 271 CHECKLIST WITH RESPECT TO *ALL* NETWORK ELEMENTS THAT DO NOT HAVE TO BE UNBUNDLED UNDER SECTION 251 DOES NOT SATISFY ANY OF THE SECTION 10(a) FORBEARANCE CRITERIA.

Because SBC has failed to demonstrate that it is entitled to forbearance relief from the section 271 checklist even for broadband elements, its broader request for forbearance relief from the checklist for narrowband *and* broadband elements is, *a fortiori*, foreclosed. For the reasons stated in Section II, *supra*, SBC's broader request cannot satisfy any of the section 10(a) forbearance criteria.

SBC's argument here is similar to its "fully implemented" argument under section 10(d). Specifically, SBC argues that "[w]here the Commission determines that CLECs are not impaired without access to a network element – such that the element need not be unbundled under section 251 – each of [the section 10(a) criteria] is plainly met, and this Commission is required to forbear from any additional unbundling requirements imposed by section 271." Petition at 4-5. In particular, SBC contends that a finding by the Commission that CLECs are not impaired without access to a network element "reflects the Commission's determination that the element

is capable of 'competitive supply.'" Petition at 5 (quoting *United States Telecom Association* v. *FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002)). Where there is such "competitive supply," SBC argues, "unbundling of that element is 'not necessary' to ensure that the resulting service is itself subject to competition," and the three section 10(a) forbearance criteria are therefore satisfied. Petition at 5.

This argument suffers from numerous flaws. As an initial matter, SBC's argument is foreclosed by the plain language of the statute. As noted, the Commission has held that the unbundling obligations under section 271 are "independent" of the unbundling obligations imposed by section 251. *Triennial Review Order* ¶¶ 653-54. Reading the statute as SBC proposes would rob the section 271 checklist unbundling requirements of any independent force. In SBC's view, the checklist unbundling obligations must terminate the very moment they would otherwise take effect – *i.e.*, when the section 251 obligations to unbundle at TELRIC rates cease.

Nor is SBC correct 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." Petition at 1-2. The section 271 orders that SBC cites did not purport to hold that the section 271 unbundling obligations are dependent on the section 251 obligations. To the contrary, in each of the orders that SBC cites the Commission separately analyzed whether the BOC had shown compliance with its section 251(c) unbundling obligation (as embodied in checklist time (ii)) and whether the BOC had shown compliance with its section 271 unbundling obligations (as reflected in checklist items iv-vi).[24] The fact that the

[24] *See generally*, Memorandum Opinion and Order, *Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of*
(continued . . .)

Commission found that the BOCs had satisfied their section 271 unbundling obligations based on evidence that they satisfied their analogous section 251 obligations shows only that the substantive scope of the unbundling mandated by both statutes is the same (or similar), not that elimination of section 251(c)(3) unbundling also eliminates section 271 unbundling. This is particularly true given that, in the portions of the section 271 orders cited by SBC, the parties were only arguing that the BOC applicant had failed to satisfy a particular checklist obligation on the grounds that the BOC had failed to satisfy a corresponding section 251(c)(3) obligation. Thus, contrary to SBC's claims, the parties in these proceedings were *not* making, and the Commission's section 271 orders did not address or reject, the argument that section 271(c)(2)(B) imposed even broader unbundling obligations than those imposed by section 251(c)(3).

Moreover, in arguing that the section 271 unbundling obligations should be lifted whenever the section 251 unbundling obligations are lifted, SBC ignores the fundamental differences between ILECs and BOCs and that the section 271 unbundling obligations are based on the unique historical status of the BOCs. The BOCs are the local exchange monopolies that were spun off from AT&T pursuant to the consent decree that settled the antitrust suit brought by the government. The "unique infrastructure controlled by the BOCs" is massive in scope and

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Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming, 17 FCC Rcd. 26303, ¶¶ 33-311, 348-375 (2002); Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., et al., for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd. 6237, ¶¶ 45-176, 177-222, 241-45 (2001); Memorandum Opinion and Order, *Joint Application by SBC Communications Inc. et al. to Provide In-Region, InterLATA Services in Arkansas and Missouri*, 16 FCC Rcd. 20719, ¶¶ 15-77, 97-113 (2001); Memorandum Opinion and Order, *Application of Verizon New England Inc., et al., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd. 8988,
(continued . . .)

enables them to exercise extraordinary "monopoly power." *BellSouth Corporation* v. *Federal Communications Commission*, 162 F.3d 678, 689-90 (D.C. Cir. 1998); *see also* H.R. Rep. No. 104-204, pt. 1, at 49 (1995) (noting that the BOCs "provide over 80% of local telephone service in the United States"). In addition, "because the BOCs' facilities are generally less dispersed than [those of other competitors], they can exercise bottleneck control over both ends of a telephone call in a higher fraction of cases than can [other competitors]." *BellSouth Corporation* v. *Federal Communications Commission*, 144 F.3d 58, 67 (D.C. Cir. 1998).

As the Commission has noted, section 271 recognizes that "to permit the BOCs' immediate entry into the long distance market would allow the BOCs to leverage their bottleneck control in the local market into the long distance market and thus both threaten competition in the long distance market and entrench their monopoly in the local market." *AT&T Corp.* v. *Ameritech Corp.*, ¶ 5. Moreover, Congress recognized that competition would be unlikely to develop in the local exchange and exchange access markets "unless the BOCs had some affirmative incentive to open their local markets to competition." *Id.* Accordingly, "section 271(a) allows a BOC to enter the in-region, interLATA market, and thereby offer a comprehensive package of telecommunications services (*i.e.*, one-stop shopping for local and long distance service), only after it demonstrates, among other things, compliance with the . . . unbundling . . . obligations that are designed to facilitate competition in the local market." *Id.*

SBC simply ignores that the section 271 unbundling obligations are designed to address the BOCs' undeniable market power derived from their unique control over the local

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¶¶ 16-120, 121-81, 207-12 (2001).

telecommunications infrastructure in vast geographic areas. The section 271 unbundling obligations therefore serve distinct purposes from the section 251 unbundling obligations, and the Commission correctly recognized in the *Triennial Review Order* that the two sets of obligations are independent from each other.

SBC's interpretation of the Commission's findings of nonimpairment under section 251 is also fundamentally flawed. SBC contends that a finding that CLECs are not impaired without access to a network element is a determination that the element "is capable of 'competitive supply,'" which means that unbundling is not necessary to ensure that "the resulting service is itself subject to competition." Petition at 5. As demonstrated above, SBC's initial premise is incorrect: the Commission in the *Triennial Review Order* rejected an effective competition test for impairment, instead adopting a standard that is met where deployment by CLECs is merely *possible.*

The Commission's findings of nonimpairment therefore are not determinations that actual competition currently exists with respect to supply of network elements, which is what SBC has the burden to prove in requesting that the Commission forbear *immediately* from enforcing the section 271 unbundling obligations. A request that seeks "the forbearance of dominant carrier regulation under Section 10" demands "a painstaking analysis of market conditions" supported by empirical evidence. *Worldcom, Inc.* v. *FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001); *AT&T Corp.* v. *FCC*, 236 F.3d 729, 735-37 (D.C. Cir. 2001). The Commission cannot, as SBC would have it, simply "assume that, absent" the regulation at issue, "market conditions or any other factor will adequately ensure that charges . . . are just and reasonable and are not unjustly or unreasonably discriminatory." Fifth Memorandum Opinion and Order, *1998 Biennial*

Regulatory Review – Review of ARMIS Reporting Requirements, 14 FCC Rcd. 11443, ¶ 32 (1999). Thus, SBC cannot rely on Commission findings of nonimpairment to satisfy its exacting burden of proof under section 10 because those findings can reflect determinations about *potential* market conditions, rather than *actual* market conditions. Under section 10, findings about market conditions that may (or may not) exist at some unknown point in the future simply cannot provide a basis for immediate forbearance today.[25]

In any event, SBC is talking out of both sides of its mouth in suggesting that CLECs can self-supply the network elements for which it seeks to evade section 271 checklist unbundling obligations. To the extent that competitive conditions are such that competitive LECs now have the potential ability to deploy certain network facilities and bypass the incumbents, then SBC and the other BOCs would have a strong incentive to enter into access arrangements with those competitive LECs. By definition, the BOCs would be better off providing access to competitive LECs at any price above marginal cost than they would if the competitive LECs were to deploy their own facilities such that the BOCs would lose access revenues altogether. Such arrangements, of course, would be subject to the very same provisions of the Act (sections 201 and 202) as access mandated by the section 271 checklist. Given these facts, the only rational reason that SBC could be seeking forbearance is because it knows full well that competitive LECs *cannot* deploy bypass facilities in many instances and forbearance would give SBC the ability to impede competition by denying competitive LECs access to necessary facilities that would otherwise be required by section 271. As such, there can be no finding that section 271

[25] Forbearance relief is a particularly dramatic form of relief because it allows the Commission to erase the statute that Congress enacted. Indeed, because SBC is asking the Commission effectively to nullify Congress's intent, the requested forbearance may be unconstitutional.

has been fully implemented or that forbearance would "promote competitive market conditions."

CONCLUSION

For the foregoing reasons, the Commission should deny the Petition.

Respectfully submitted,

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December 2, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 2003, I caused true and correct copies of the forgoing Opposition of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: December 2, 2003
Washington, D.C.

/s/ Peter M. Andros

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