03-235

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
SUMNER SQUARE
1615 M STREET N W
SUITE 400
WASHINGTON D C 20036-3209

(202) 326 7900
FACSIMILE
(202) 326-7999

DOCKET FILE COPY ORIGINAL

RECEIVED
NOV - 6 2003
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

November 6, 2003

Marlene H Dortch, Secretary
Federal Communications Commission
445 12th Street, S W
Washington, D C 20554

Re *In the Matter of SBC Communication Inc 's Petition for Forbearance Under 47 U S C § 160(c)*

Dear Ms Dortch

On behalf of SBC Communications Inc ("SBC"), and pursuant to 47 C.F R. § 1 53, I am filing the enclosed Petition for Forbearance under 47 U.S C. § 160(c) In accordance with this Commission's rules. SBC is filing an original and four copies of this petition Thank you for your kind assistance in this matter

Sincerely,

Geoffrey M. Klineberg

Enclosures

cc Janice Myles

0+4
WCB
03-355

RECEIVED
NOV - 6 2003
Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

PETITION FOR FORBEARANCE OF SBC COMMUNICATIONS INC.

Pursuant to 47 U S C. § 160(c) and 47 C.F.R. § 1.53, SBC Communications Inc. ("SBC") requests that the Commission forbear from applying the terms of 47 U.S.C. § 271(c)(2)(B) to the extent, if any, those provisions impose unbundling obligations on SBC that this Commission has determined should not be imposed on incumbent local exchange carriers ("ILECs") pursuant to 47 U S C § 251(d)(2).

In its pending petition for reconsideration of the *Triennial Review Order*,[1] BellSouth correctly points out why the Commission was incorrect when it concluded that Bell operating company ("BOC") "obligations under section 271 are not necessarily relieved based on any determination [the Commission] make[s] under the section 251 unbundling analysis." *Triennial Review Order* ¶ 655 [2] In fact, the Commission has consistently held that the scope of the unbundling obligations under the Competitive Checklist is no more extensive than the scope of

[1] *See* BellSouth's Petition for Clarification and/or Partial Reconsideration at 12-15, CC Docket Nos. 01-338, *et al* (FCC filed Oct. 2, 2003) ("*BellSouth Reconsideration Petition*").

[2] 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 Nos 01-338 *et al.*, FCC 03-36 (rel Aug. 21, 2003) ("*Triennial Review Order*"), *petitions for review pending, United States Telecom Ass'n v FCC*, Nos. 03-1310 *et al* (D.C. Cir.).

those same obligations under section 251.[3] That holding, moreover, is faithful both to the letter of section 271 – which, as BellSouth again explains, was intended to provide market-opening requirements in the event an application for section 271 relief *preceded* Commission unbundling rules – and to the intent of Congress – which cannot be thought to have intended that the limits on unbundling in section 251(d)(2) applied *only* to the incumbent LECs that happen not to be Bell operating companies.

In the event the Commission declines to reconsider that point, however – and adheres to its determination that Checklist Items 4, 5, 6, and 10 impose unbundling obligations independent from section 251, *see Triennial Review Order* ¶ 654 – it must forbear from applying those obligations to network elements that the Commission has determined need not be unbundled under section 251. The unambiguous language of the Telecommunications Act of 1996 ("1996 Act") *requires* the Commission to forbear from applying unbundling regulations where they are unnecessary and where doing so is consistent with the public interest. Under the D.C. Circuit's decision in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*"), *cert. denied*, 123 S. Ct. 1571 (2003), where the Commission concludes that competitive LECs

---

[3] *See* 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, 26502-03, ¶¶ 358-359 (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, 6361, ¶ 241 (2001), *aff'd in part and remanded, Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001); Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., et al. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri*, 16 FCC Rcd 20719, 20775, ¶ 113 (2001), *aff'd, AT&T Corp. v. FCC*, No. 01-1511, 2002 WL 31558095 (D.C. Cir. Nov. 18, 2002) (*per curiam*); 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, 9135, App. B, ¶ 1 (2001), *aff'd in part, dismissed in part, and remanded in part, WorldCom, Inc. v. FCC*, 308 F.3d 1 (D.C. Cir. 2002).

("CLECs") are not impaired without access to a particular element, it reflects a determination that the element is suitable for competitive supply. In such circumstances, it is *competition*, not unbundling, that ensures that the functionality is available on just and reasonable terms to the benefit of consumers And, indeed, as the D C. Circuit has held, unbundling in such circumstances is affirmatively harmful – and hence contrary to the public interest – because it imposes substantial costs, including disincentives to invest and the costs associated with managing forced sharing requirements, without any offsetting benefit in the form of a significant enhancement to competition

Forbearance from any section 271 unbundling obligations is particularly appropriate with respect 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* held need not be unbundled under section 251. The core achievement of the *Triennial Review Order* was the Commission's decision not to unbundle broadband facilities. That decision, the Commission explained, is intended to create a "race to build next generation networks," with the result of "increased competition in the delivery of broadband services." *Triennial Review Order* ¶ 272. That race will come about, however, only if there is certainty in the marketplace. Yet, as Verizon has thoroughly explained in its pending petition for forbearance, the application of section 271 unbundling obligations to the same facilities the Commission has said need *not* be unbundled for purposes of section 251 would create massive uncertainty, and would accordingly frustrate the core goal of the *Triennial Review Order* the desire to facilitate the widespread deployment of broadband infrastructure. Already CLECs are filing petitions with state commissions asking those commissions to re-impose broadband unbundling obligations under

the auspices of section 271.[4] The benefits of the Commission's decision to *reject* unbundling of broadband facilities will thus be lost unless the Commission makes clear – either by granting BellSouth's reconsideration petition or through forbearance – that section 271 is not a backdoor through which unbundling obligations that have been eliminated can be reimposed. Any other result would be directly contrary both to the goals outlined in the *Triennial Review Order* itself and to the statutory directive in section 706 of the 1996 Act to facilitate the widespread deployment of broadband technologies

I. The Commission Should Forbear from Requiring a BOC To Unbundle Any Network Element Under Section 271(c)(2)(B) That Does Not Meet the Impairment Standard Under Section 251(d)(2)

Section 10 of the Communications Act of 1934 provides that the Commission "*shall* forbear from applying any regulation or any provision of" the Communications Act "to a telecommunications carrier or telecommunications service," if it determines that: (1) enforcement of the regulation or provision "is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory", (2) "enforcement of such regulation or provision is not necessary for the protection of consumers", and (3) "forbearance from applying such provision or regulation is in the public interest." 47 U.S.C § 160(a) (emphasis added). Where the Commission determines

[4] *See, e g*, Covad and MCI's Brief in Response to Order Nos. 35 and 5, *Complaint of Covad Communications Company, et al, Against Southwestern Bell Telephone Company, et al, for Post-Interconnection Agreement Dispute Resolution and Arbitration Under the Telecommunications Act of 1996 Regarding Rates, Terms, Conditions and Related Arrangements for Line-Sharing, PUC Proceeding for Resolution of Certain Issues Severed from PUC Docket Number 22469*, Docket Nos. 22469 & 22635 (Tex PUC filed Oct. 24, 2003) ("Covad/MCI Texas Brief").

that CLECs are not impaired without access to a network element – such that the element need not be unbundled under section 251 – each of these tests is plainly met, and this Commission is required to forbear from any additional unbundling requirements imposed by section 271.

First, where CLECs are not impaired without access to a network element, it follows that unbundling is not necessary to ensure that the "telecommunications service" the ILEC provides with that element is available on "just and reasonable" – as well as "not unjustly or unreasonably discriminatory" – terms. In light of the D.C Circuit's binding *USTA* decision, where the Commission concludes that CLECs are not impaired without access to a network element, it reflects the Commission's determination that the element is capable of "competitive supply." 290 F.3d at 427. And it is that "competitive supply" – not unbundling – which ensures that the element in question is not a bottleneck, and thus that unbundling of that element is "not necessary" to ensure that the resulting service is itself subject to competition *See Triennial Review Order* ¶ 84 (the conclusion that CLECs are not impaired without access to a network element reflects the Commission's determination that "lack of access" to that element does not "pose[] a barrier or barriers to entry . likely to make entry into a market uneconomic")[5]

Second, in the absence of impairment, unbundling is plainly not necessary "for the protection of consumers " As with the first criterion, the fact that CLECs are not impaired without access to a particular element – and that, accordingly, the element is capable of "competitive supply" – is enough, standing alone, to ensure the protection of consumers. Indeed, the Commission has squarely held, in this precise context, that consumers stand to benefit when

[5] *See also* Memorandum Opinion and Order, *Petition of US West Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, 14 FCC Rcd 16252, 16270, ¶ 31 (1999) ("*NDA Order*") ("*competition* is the most effective means of ensuring" that a service is available on "just and reasonable" and "not unjustly and unreasonably discriminatory terms") (emphasis added).

"competition among providers" is permitted to flourish.[6] Where unbundling is required in the absence of impairment, by contrast, it thwarts competition – and thus the interests of the consumers this provision is intended to protect – by diminishing the incentive for all carriers to innovate and to deploy new facilities.

Third, where CLECs are not impaired without access to an element, it is clear that forbearance from unbundling under section 271 is consistent with the public interest. As the D.C Circuit has made clear, the Commission's impairment analysis under section 251 must strike a balance between the undeniable costs of unbundling – including the "disincentive to invest in innovation and . . . complex issues of managing shared facilities" – and the purported benefits – *i e*, "eliminating the need for separate construction of facilities where such construction would be wasteful " *USTA*, 290 F.3d at 427. Where the Commission has concluded that CLECs are *not* impaired, it thus reflects the Commission's judgment that the costs of unbundling outweigh the benefits – *i e*, that unbundling would be affirmatively harmful to competition Application of section 271 unbundling in the teeth of such a judgment would plainly be contrary to the public interest [7]

That is especially so when the Commission takes into account, as it must, whether forbearance would "promote competitive market conditions." 47 U.S.C. § 160(b).[8] Competitive market conditions require all carriers – CLECs and ILECs alike – to make judgments regarding

---

[6] Memorandum Opinion and Order, *Petition of SBC Communications Inc for Forbearance of Structural Separation Requirements and Request for Immediate Interim Relief in Relation to the Provision of Nonlocal Directory Assistance Services*, 18 FCC Rcd 8134, ¶ 16 (2003)

[7] *See NDA Order*, 14 FCC Rcd at 16277-78, ¶ 46 (Commission's forbearance authority must be exercised in pursuit of "the fundamental objective of the 1996 Act," which "is to bring consumers of telecommunications services in all markets the full benefits of competition").

[8] *See NDA Order*, 14 FCC Rcd at 16277-78, ¶ 46.

whether and the extent to which to invest in particular facilities. Unbundling necessarily distorts those incentives, by "reduc[ing] or eliminat[ing] the incentive for an ILEC to invest in innovation (because it will have to share the rewards with CLECs), and also for a CLEC to innovate (because it can get the element cheaper as a UNE)." *USTA*, 290 F.3d at 424 Where unbundling does not "bring on a significant enhancement of competition," *id* at 429 – which is necessarily the case where CLECs are not impaired without access to the element in question – it follows that these market distortions undermine competitive market conditions, thus reinforcing the view that forbearance from any such unbundling obligations under section 271 furthers the public interest

The mandatory nature of forbearance under the statute – which, again, states that the Commission "shall" forbear where, as here, the statutory requirements are met – is in no way undermined by the fact that the Commission may not forbear from applying specific provisions of section 271 until the provisions in question "have been fully implemented " 47 U.S.C. § 160(d) As this Commission has now made clear in its recent decision not to forbear from applying the OI&M sharing prohibition under section 272(b)(1), it will examine each provision of section 271 separately to determine whether it has been "fully implemented."[9] Whereas the Commission found that section 271(d)(3)(B), which requires the Commission to find that "the requested authorization will be carried out in accordance with the requirements of section 272," will not be "fully implemented" in a particular state until three years after the application is granted for that state, the Commission expressly did "not address whether any other part of

---

[9] *See 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*, Memorandum Opinion and Order, ¶¶ 6-7, CC Docket No 96-149, FCC 03-271 (rel Nov. 4, 2003)

section 271, *such as the section 271(c) competitive checklist*, is 'fully implemented.'"[10] Indeed, with respect to the Competitive Checklist, which has no similar temporal requirement, it is clear that those section 271 requirements have been "fully implemented" once the section 271 application has been granted.[11] Otherwise, it is difficult to see how the "fully implemented" requirement of section 10(d) avoids becoming a complete nullity. At 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).

II. At a Minimum, the Commission Should Forbear from Applying the Section 271 Unbundling Obligations to Those Network Elements Used To Provide Broadband Services

As Verizon recently explained, the case for forbearance from any 271 unbundling obligations is particularly strong in the broadband context.[12] "[B]roadband deployment is a critical policy objective that is necessary to ensure that consumers are able to fully reap the benefits of the information age." *Triennial Review Order* ¶ 241. As the Commission made

---

[10] Id. ¶ 6 (emphasis added)

[11] The Commission has now granted section 271 relief in 47 states and the District of Columbia, including – most importantly for purposes of this petition – all of SBC's in-region states. As this Commission recognized, whether or not the Competitive Checklist requirements are now fully implemented is a different question from whether the obligations of section 272 have been fully implemented. In granting the section 271 applications, the Commission has expressly found – and, indeed, was *required* to find – that the Bell Company applicant had "*fully implemented* the competitive checklist in [section 271(c)(2)(B)]." *Id.* § 271(d)(3)(A)(i) (emphasis added). In light of those findings, and because the requirements of section 10 are met as discussed above, the Commission must forbear from applying any unbundling requirements imposed by the checklist to network elements that the Commission has held do not meet the impairment standard of section 251(d)(2).

[12] *See* New Verizon Petition Requesting Forbearance from Application of Section 271, CC Docket No. 01-338 (FCC filed Oct. 24, 2003) ("*Verizon Broadband Petition*"), *see also* Public Notice, FCC 03-263 (Oct. 27, 2003) (establishing comment cycle).

clear, moreover, in the *Triennial Review* proceeding, its "primary regulatory challenge for broadband [wa]s to determine how [the FCC could] help drive the enormous infrastructure investment required to turn the broadband promise into a reality." *Id* ¶ 212. And the Commission met that challenge by "provid[ing] sweeping regulatory relief for broadband and new investments," including regulatory relief for packet-switching, fiber-to-the-premises loops, and the packet-switched capabilities of "hybrid fiber-copper facilities." *Id* , Separate Statement of Commissioner Martin at 2, *see also id* , Separate Statement of Chairman Powell at 1 (lauding the FCC's efforts "to create a broadband regulatory regime that will stimulate and promote deployment of next-generation infrastructure")

The linchpin of that "sweeping regulatory relief" is the certainty the Commission purported to provide regarding incumbent LEC broadband investments. As the Commission explained, its decision not to unbundle broadband facilities was intended to preserve "incentive[s]" for ILECs "to deploy fiber (and associated next-generation network equipment, such as packet switches and digital loop carrier ("DLC") systems) and develop new broadband offerings " *Triennial Review Order* ¶ 290. By "eliminat[ing] most unbundling requirements for broadband," *id* ¶ 4, the *Triennial Review Order* purports to provide ILECs with "certainty that their fiber optic and packet-based networks will remain free of unbundling requirements," so that they "will have the opportunity to expand their deployment of these networks, enter new lines of business, and reap the rewards of delivering broadband services to the mass market," *id* ¶ 272.

Critically, however, if the Commission concludes that section 271 imposes unbundling obligations independent of section 251, and if it declines to forbear from applying those obligations, the *Triennial Review Order*'s effort to provide "sweeping regulatory relief" for broadband will be for naught As Verizon has demonstrated in detail – with examples that apply

equally to SBC and other Bell companies – the application of section 271 unbundling obligations to broadband facilities would require time-consuming and expensive re-design of integrated fiber network architectures to create, and then provide access to, artificial sub-components (or "elements").[13] In addition, the imposition of such unbundling obligations would require the development of still more operational systems – on top of the comprehensive systems the Bell companies have already spent hundreds of millions of dollars to deploy – to support CLEC access to next-generation technologies that the Commission has held CLECs are equally capable of deploying.[14] Finally, the application of section 271 unbundling obligations, coupled with the history of the last seven years, in which section 251 unbundling obligations have evolved and expanded at every turn, would interject enormous uncertainty into Bell company efforts to develop and deploy broadband infrastructure.[15]

This last consideration – the uncertainty associated with the scope of any unbundling obligations the Commission might seek to enforce under section 271 – takes on added significance in view of the Commission's assertion of jurisdiction over the pricing of elements unbundled under that provision. *See Triennial Review Order* ¶¶ 656-657 (correctly concluding that the Commission's TELRIC rules do not apply to elements that must be unbundled under section 271, but concluding that such elements must be "priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202"). As Verizon properly points out, it is far from clear how the Commission intends to apply that jurisdiction.[16] At the same time, it *is* clear that CLECs will attempt to involve the states in

[13] *See Verizon Broadband Petition* at 9-10.

[14] *See id.* at 10-11.

[15] *See id.* at 11-12.

[16] *See Verizon Broadband Petition* at 12.

setting rates for elements unbundled under section 271, notwithstanding the absence of any statutory basis for such a state role.[17] And, in all events, as the D.C. Circuit has explained, *any* attempt by *any* regulator – state or federal – to exercise jurisdiction over the rates for these elements will necessarily diminish the incentive to invest for CLECs and ILECs alike.[18]

It is accordingly clear that the application of section 271 unbundling obligations to broadband facilities would fatally undermine the Commission's avowed goal of facilitating the widespread deployment of broadband facilities. And it is equally clear that such a result is directly contrary to the 1996 Act. As explained above, the forbearance test articulated in section 10(a) focuses in substantial part on the public interest. "[T]he development of broadband infrastructure," the Commission has explained, "is a fundamental and integral step in ensuring that consumers are able to fully reap the benefits of the information age," and it plainly implicates the public interest. *Triennial Review Order* ¶ 212. Indeed, "more broadly," broadband deployment "is vital to the long-term growth of our economy as well as our country's continued preeminence as the global leader in information and telecommunications technologies." *Id* The devastating effects that section 271 unbundling obligations would have on broadband deployment would thus prevent consumers from "reap[ing] the benefits of the information age," and it would threaten this country's "preeminence" in information and telecommunications technologies. It is difficult to imagine an outcome more directly at odds with the public interest, or – as a result – a case better suited for forbearance.

---

[17] *See id , see also* Covad/MCI Texas Brief.

[18] *See USTA*, 290 F 3d at 424 ("[M]any prices that *seem* to equate to cost [reduce or eliminate incentives to invest for ILECs and CLECs]. Some innovations pan out, others do not If parties who have not shared the risks are able to come in as equal partners on the successes, and avoid payment for the losers, the incentive to invest plainly declines.")

That is especially so, moreover, in light of the Commission's statutory mandate, in section 706 of the 1996 Act, to encourage deployment of "advanced telecommunications capabilit[ies]" by using "methods that remove barriers to infrastructure investment."[19] In the *Triennial Review* proceeding, "[a]ll parties agree[d]" that the broadband technologies at issue here "meet the definition of advanced telecommunications capability" in section 706 *Triennial Review Order* ¶ 278 And, as the Commission made clear, its decision *not* to unbundle those facilities was the best way to fulfill the directive in section 706 to facilitate the deployment of those facilities "particularly in light of a competitive landscape in which competitive LECs are leading the deployment of" many of those facilities, "removing incumbent LEC unbundling obligations . . will promote their deployment of the network infrastructure necessary to provide broadband services to the mass market " *Id* , *see also*, *e.g.*, *id* ¶ 541 ("In order to ensure that both incumbent LECs and competitive LECs retain sufficient incentives to invest in and deploy broadband infrastructure, such as packet switches, we find that requiring no unbundling best serves our statutorily-required goal [under section 706].").

By the same token, section 706 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 Indeed, the Commission recognized more than five years ago that "section 706(a) directs the Commission to use the authority granted in other provisions, *including the forbearance authority under section 10(a)*, to encourage the deployment of advanced services."[20] If section 706 supports the decision not to

---

[19] Telecommunications Act of 1996, Pub L. No. 104-104, § 706(a), 110 Stat 56, 153 (reprinted at 47 U S C § 157 note).

[20] Memorandum Opinion and Order, and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011,

unbundle broadband facilities for purposes of section 251 – and the Commission has unequivocally held that it does – then so too does that section support forbearance from the application of section 271 unbundling obligations to those same facilities. Neither step, standing alone, is sufficient to ensure that consumers benefit from the undeniable benefits of widespread broadband deployment. Rather, both steps are critical to provide the certainty necessary to support the massive investment that SBC and the other Bell companies are on the verge of making in this critically important arena.

Forbearance is also appropriate, moreover, because section 271 itself was intended, at most, to ensure that the BOCs provided access to the core legacy systems that make up the traditional local telecommunications network. The whole point of the Competitive Checklist was to guarantee that, prior to entering the long-distance market, the BOCs provide competitors access to the systems and facilities necessary for new entrants to compete in the provision of local telecommunications services. Although the BOCs' historical control over the circuit-switched networks within their regions may have justified Congress's original purpose in ensuring that the availability of access to those narrowband facilities would be a condition for long-distance relief, there is no similar justification for requiring the unbundling of broadband facilities under section 271 As the Commission recognized, the BOCs enjoy no special advantages with respect to these next-generation networks. For example,

> [w]ith respect to new [fiber-to-the-home ("FTTH")] deployments (*i e* , so-called "greenfield" construction projects), we note that the entry barriers appear to be largely the same for both incumbent and competitive LECs – that is, both incumbent and competitive carriers must negotiate rights-of-way, respond to bid requests for new housing developments, obtain fiber optic cabling and other materials, develop deployment plans, and implement construction programs. Indeed, the record indicates that competitive

---

24044-45, ¶ 69 (1998) (emphasis added)

> LECs are currently leading the overall deployment of FTTH loops after having constructed some two-thirds or more of the FTTH loops throughout the nation

Triennial Review Order ¶ 275 (footnote omitted). In other words, "incumbent LECs do not have a first-mover advantage that would compound any barriers to entry in this situation." *Id* Similarly, this Commission found that "there do not appear to be any barriers to deployment of packet switches that would cause [it] to conclude that requesting carriers are impaired with respect to packet switching " *Id* ¶ 539, *see also id* ¶ 292 (recognizing that cable companies, not the BOCs, are the market leaders in deployment of high-speed Internet access services over broadband facilities). For this reason as well, forbearing from requiring the BOCs to unbundle their facilities for use in the broadband market – a market in which the BOCs, as this Commission has found, are not remotely dominant – is entirely consistent with the purposes of the 1996 Act generally and with section 271 in particular.

CONCLUSION

If the Commission declines to reconsider its decision in the *Triennial Review Order* that the unbundling obligations contained in the section 271 checklist are independent of the unbundling requirements under section 251(d)(2), it should forbear altogether from requiring the unbundling of loops, transport, switching, and signaling under section 271 in a manner inconsistent with the unbundling requirements established by this Commission for those same elements under section 251. At the very least, it should forbear from imposing section 271 unbundling obligations with respect to the BOCs' broadband facilities.

Respectfully submitted,

GEOFFREY M. KLINEBERG
COLIN S. STRETCH
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036-3209
(202) 326-7900

GARY L. PHILLIPS
CHRISTOPHER HEIMANN
SBC COMMUNICATIONS INC
1401 I Street, N.W , 4th Floor
Washington, D C. 20005
(202) 326-8903

November 6, 2003