March 1, 2004

BY ELECTRONIC DELIVERY

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

Re: *Written Ex Parte Presentation Regarding the Meaning of "Fully Implemented" for Purposes of the Commission's Forbearance Authority*, Petitions for Forbearance of Verizon, Qwest, SBC and BellSouth, WC Dkt. Nos. 03-260, 03-235, 03-220, 03-157, 03-189 and CC Dkt. No. 01-338

Dear Ms. Dortch:

The Bell Operating Companies ("BOCs") have filed a series of petitions requesting that the FCC forbear pursuant to section 10 of the Communications Act of 1934, as amended ("Act"), from enforcing various aspects of sections 251 and 271 of the Act.[1] Each of those petitions raises the question of whether the Commission currently has the authority to forbear from any of the requirements of sections 251(c) and 271, because section 10(d) provides 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.[2]

The Commission has not yet decided a petition in which it concluded that either section 251(c) or section 271 has been fully implemented. The FCC, however, has shed some light on the scope of its authority to consider a section 271 or 251(c) forbearance

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1 *See Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 03-260 (Dec. 18, 2003) ("Qwest 271 Petition"); *Petition for Forbearance of SBC Communications Inc.*, WC Docket No. 03-235 (Nov. 6, 2003) ("SBC 271 Petition"); *New Petition for Forbearance of the Verizon Telephone Companies*, CC Docket No. 01-338 (Oct. 24, 2003) ("Verizon 271 Petition"); *Petition of BellSouth Telecommunications, Inc. for Forbearance Under 47 U.S.C. § 160(c) From Application of Sections 251(c)(3), (4), and (6) In New-Build, Multi-Premises Developments*, WC Docket No. 03-220 (Oct. 8, 2003) ("BST MPD Petition"); *Petition for Expedited Forbearance of the Verizon Telephone Companies*, WC Docket No. 03-157 (July 1, 2003) ("Verizon TELRIC Petition"); *Joint Petition of Qwest, BellSouth, and SBC for Expedited Forbearance from the Commission's Current Pricing Rules for the Unbundled Network Element Platform*, WC Docket No. 03-189 (July 31, 2003).

2 47 U.S.C. § 160(d).

petition. Specifically, in its recent *OI&M Order*,[3] the Commission held that section 10(d) applies not only to the statutory requirements of sections 271 and 251(c), but also to the FCC's regulations implementing those requirements.[4] In addition, the Commission concluded that, to the extent section 271 or 251(c) incorporates by reference other statutory provisions (in that case, the separate affiliate requirements of section 272), section 10(d) prohibits forbearance from the obligations of those cross-referenced sections (including any implementing regulations) until the Commission determines that the applicable statutory provisions have been fully implemented.[5] Finally, the Commission found that satisfaction of the checklist was insufficient to support a determination that section 271(d)(3)(B) (which cross-references section 272) has been fully implemented.[6]

None of these conclusions, however, describes the circumstances under which the "fully implemented" requirement that applies to section 271 and 251(c) forbearance petitions has been satisfied. In view of the critical importance of those statutory provisions to the Commission's pro-competition policies and rules, it is essential that the FCC exercise its authority under section 10 in a manner that is consistent with those overriding objectives. To that end, the undersigned competitive telecommunications carriers and their trade associations provide this analysis of the showing that an incumbent local exchange carrier ("LEC") in the case of section 251(c) and a BOC in the case of section 271 must satisfy in order to meet the "fully implemented" requirement of section 10(d). Drawing on the Commission's discussion of this issue in its recent *OI&M Order*, the memorandum first describes the most reasonable construction of section 10(d), and then addresses various meritless claims advanced by the BOCs to support their distorted reading of that statutory provision.

I. The Most Reasonable Construction of Section 10(d) Is That It Requires Proof of a Robust, Wholesale Market Prior to Forbearance From Either Section 271 or 251(c)

As noted above, the Commission's decisions analyzing section 10(d) to date have not required the agency to explain its interpretation of "fully implemented" and it has

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3 *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*, 18 FCC Rcd 23525 (2003) ("*OI&M Order*").

4 *Id.* ¶ 8.

5 *Id.* ¶¶ 5-6.

6 *Id.* ¶ 6.

declined to do so.[7] As we now show, the most plausible reading of that provision is the one that is most consistent with the overriding market-opening objectives of sections 251(c) and 271.

Specifically, we believe that the Commission should find that those sections are fully implemented when the pro-competitive requirements imposed by those provisions have led to the establishment of a robust wholesale market in a relevant geographic area that enables competing providers to obtain access to the telecommunications services and facilities they require to enter the market and compete effectively. In those circumstances, there is no longer a need for the Commission to continue to enforce the obligations imposed by sections 251(c) or 271 and forbearance, therefore, is appropriate. Stated differently, the "fully implemented" standard requires a showing that an incumbent LEC in the case of section 251(c) or a BOC in the case of section 271 no longer is dominant in the provision of the network elements and telecommunications services that entrants require to enter and compete effectively with the incumbent LEC or BOC.[8] This reading of section 10(d) is also supported by Senator McCain's statement in the legislative history of the Telecommunications Act of 1996, in which he observed that section 10 would be met "when markets are deemed competitive."[9]

The fact that section 10(d) applies to both section 251(c) and section 271 reinforces this reading of "fully implemented." Both provisions focus on opening local telecommunications markets and ensuring that those markets remain open to entry through interconnection with an incumbent LEC, lease of unbundled network elements, or resale of retail services, or some combination thereof. As the Commission has acknowledged, the long-term goal of the 1996 Act is to "creat[e] robust competition in telecommunications," which it aptly describes as "competition among multiple providers of local service that would drive down prices to competitive levels."[10] In view of the

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7 *Id.*

8 *See, e.g.,* Z-Tel Reply Comments, CC Docket No. 01-338, at 118-24 (July 17, 2002) (citing *Motion of AT&T to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271 (1995)). As Z-Tel has explained, the Commission did not declare AT&T to be non-dominant until after finding that (1) AT&T's competitors could absorb almost two-thirds of AT&T's customers within one year; (2) almost three-quarters of long-distance resellers used facilities other than AT&T's facilities; and (3) AT&T's share of the relevant market had fallen to below 60%.

9 141 Cong. Rec. S. 7942, 7957 (June 8, 1995) (statement of Senator McCain) (quoting from Heritage Foundation letter).

10 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, ¶ 55 (1999).

paramount importance that Congress assigned to fostering the development of competitive local markets, the most reasonable reading of section 10(d) requires the Commission to find that a robust wholesale market for facilities and services exists in a relevant geographic area so that the Commission is assured that forbearing from enforcing the requirements of section 251(c) or section 271 will not lead to the remonopolization of local and long distance services.

Requiring the establishment of a mature wholesale market prior to considering whether to forbear would obligate the Commission, as a practical matter, to determine whether an incumbent LEC in the case of section 251(c) or a BOC in the case of section 271 retains market power in the market for the wholesale provision of the local telecommunications facility or service. If competitors cannot obtain what they need to serve customers from other sources, then the incumbent LECs obviously retain market power. Furthermore, such an inquiry must be conducted on a record that focuses on a specific geographic market or markets. Although it is doubtful that forbearance currently is warranted anywhere, as the Commission recognized in the *UNE Triennial Review Order*, alternative sources of supply of the network elements needed to provide competitive local service will become available in different markets at different times.[11] Accordingly, determining whether a robust wholesale market exists and whether the incumbent LEC in the case of section 251(c) or the BOC in the case of section 271 retains market power is a highly fact-specific inquiry, which must be undertaken before the Commission can conclude that the requirements of section 10(d) have been met.

II. A Commission Finding that a BOC Has Fully Implemented the Competitive Checklist Does Not Establish That the Requirements of Section 10(d) Have Been Satisfied

The pending BOC petitions for forbearance uniformly claim that the requirements of sections 271 and 251(c) have been fully implemented upon satisfaction of the section 271 competitive checklist.[12] This argument rests entirely on their reading of section 271(d)(3)(A)(i), which requires the Commission to find that a BOC "has fully implemented the competitive checklist in [section 271(c)(2)(B)]"[13] prior to granting an application for in-region, interLATA authority.[14] The argument that satisfaction of the

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[11] *See, e.g., Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, *as modified by Errata*, 18 FCC Rcd 19020, ¶¶ 118, 130 (2003) ("*UNE Triennial Review Order*").

[12] Verizon 271 Petition at 3-4; SBC 271 Petition at 7-8; Qwest 271 Petition at 17-18.

[13] 47 U.S.C. § 271(d)(3)(A)(i).

[14] Verizon 271 Petition at 3-4; SBC 271 Petition at 7-8; Qwest 271 Petition at 17-18.

checklist permits the Commission to conclude that either section 271 or 251(c) has been fully implemented is manifestly inconsistent with the Commission's determination in the *OI&M Order* that section 271(d)(3)(B) has not been fully implemented. The Commission there found that Verizon had failed to demonstrate that the section 271 requirement that a BOC's in-region interLATA affiliate operate independently (incorporated by reference from section 272) had been "fully implemented," as mandated by section 10(d),[15] notwithstanding that Verizon had obtained authority under section 271 to offer in-region interLATA service in all of its states. As shown below, courts similarly have found repeatedly that the same phrase may have quite different meanings when used in different contexts. Further, the BOCs' contention that approval of a section 271 application also establishes that a BOC has satisfied the section 10(d) condition for forbearing from enforcement of section 251(c) is even more implausible.

A. Grant of 271 Authority Does Not Demonstrate that Section 271 Has Been Fully Implemented for Purposes of Section 10(d)

The FCC's recent *OI&M Order* unambiguously held that the grant of authority to provide in-region, interLATA services, without more, does not show that a BOC has satisfied the section 10(d) requirement that section 271 must be "fully implemented" before the FCC may consider forbearing from enforcing the obligations imposed by that statutory provision. In that proceeding, the Commission was presented with the question of whether section 10(d) applies to those obligations of section 272 that are incorporated by reference into section 271, and if so, "whether section 271 [has been] 'fully implemented' with respect to the cross-referenced requirements of section 272."[16] After finding that section 10(d) does in fact prohibit forbearance from the incorporated requirements of section 272, the Commission concluded that section 272 could not be deemed "fully implemented" for purposes of section 10(d) until three years after the grant of section 271 authority in a given state.[17] Specifically, the Commission held that:

> [S]ection 10(d) prohibits forbearance from the requirements of section 271, and through incorporation, those requirements of section 272 related to the provision of in-region, interLATA services authorized under section 271(d). This incorporation includes the requirement to maintain the [separate] affiliate structure for at least three years, until "those requirements have been fully implemented." Therefore, we find that, with respect to services that require authorization under section 271(d), section

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15 *OI&M Order* ¶ 6.

16 *Id.*

17 *Id.* ¶ 7.

> 272 cannot be deemed to have been "fully implemented" until this three-year period has passed.[18]

The Commission found that this reading of the statute was the most reasonable "because it gives meaning consistent with the goals of the Act to the term 'fully implemented,' while paralleling the state-by-state section 271 application process and the state-by-state section 272 sunset process."[19]

The Commission's decision in the *OI&M Order* is consistent with numerous court decisions that have held that the same phrase may have very different meanings when used in different sections of a statute. As the Supreme Court has indicated, the general presumption that identical words in an act have the same meaning "is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent."[20] Indeed, in interpreting the Act, the courts and the Commission repeatedly have concluded that the same term used in multiple sections of the Communications Act should be interpreted differently where, as here, the provisions have different purposes. For example, the Commission interpreted the term "provide" in section 271(a) differently from the manner in which it had interpreted the same term in other provisions of the Act.[21] Finding that the term was ambiguous and that the legislative history offered only general guidance, the Commission interpreted "provide" in light of the specific policies and goals underlying section 271.[22] The U.S. Court of Appeals for the D.C. Circuit affirmed the Commission's decision, concluding that it was entirely appropriate for "identical words" to have "different meanings where the subject-

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18 *Id.* ¶ 6.

19 *Id.* ¶ 7.

20 *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932); *see also Martini v. Federal National Mortgage Ass'n*, 178 F.3d 1336, 1343 (D.C. Cir. 1999) ("On numerous occasions, both the Supreme Court and this court have determined, after examining statutory structure, context and legislative history, that identical words within a single act have different meanings.").

21 *AT&T Corp.* v. *Ameritech Corp.*, 13 FCC Rcd 21438 (1998) ("*Ameritech Order*"), *aff'd*, *U S WEST Comm. Inc.* v. *FCC*, 177 F.3d 1057 (D.C. Cir. 1999).

22 *See Ameritech Order* ¶¶ 28-37; *see also id.* ¶ 27 ("As the D.C. Circuit recently noted, '[t]he literal language of a provision taken out of context cannot provide conclusive proof of congressional intent, any more than a word can have meaning without context to illuminate its use.'").

matter to which the words refer is not the same in the several places where they are used, or the conditions are different."[23]

More recently, the D.C. Circuit rejected a similar argument involving section 10(a) of the Act. In that case, the petitioners claimed that the term "necessary" has a plain meaning of "absolutely required," "indispensable," or "essential."[24] The Commission rejected this claim, finding that the term "necessary" is capable of different meanings, depending upon the statutory context, as evidenced by prior court decisions.[25] The court agreed with the Commission, stating that the court did not read prior court decisions addressing the term "necessary" to suggest that it "has precisely the *same* meaning in every statutory context, or that context is irrelevant to the meaning of 'necessary.'"[26] In particular, the court rejected the argument that prior judicial interpretations of the term "necessary" in sections 251(d)(2) and 251(c)(6) supported the petitioners' proposed definition of "necessary" for purposes of section 10(a), finding that neither of those cases involved the application of the forbearance provision of the Act.[27] Rather, as the court explained, those cases involved interpretations of the local competition provisions of the Act,[28] and were based on the particular statutory purposes underlying those sections.[29] The *CTIA* case, by contrast, involved the Commission's interpretation of the term "necessary" as it is used in section 10(a) of the Act. Since that

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23 *U S WEST*, 177 F.3d at 1060.

24 *CTIA* v. *FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003).

25 *CTIA v. FCC*, Case No. 02-1264, FCC Brief at 23-24 (Feb. 3, 2003), *available at:* <http://www.fcc.gov/ogc/briefs/02-1264.pdf>.

26 *CTIA v. FCC*, 330 F.3d at 510-511.

27 *Id.*, 330 F.3d at 510-512 (citing *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 390 & n.11 (1999) (applying "a narrow construction of 'necessary' in reviewing a challenge to the Commission's interpretation of the term in 47 U.S.C. § 251(d)(2)"); *GTE Serv. Corp. v. FCC*, 205 F.3d 416, 423 (D.C. Cir. 2000) (applying a narrow interpretation of "necessary" for purposes of section 251(c)(6)'s collocation requirement)).

28 *See* 47 U.S.C. § 251(d)(2) ("In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether – (A) access to such network elements as are proprietary in nature is *necessary* . . .") (emphasis added); *id.* § 251(c)(6) ("The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment *necessary* for interconnection or access to unbundled network elements at the premises of the local exchange carrier . . .") (emphasis added).

29 *CTIA v. FCC*, 330 F.3d at 510-512.

provision concerns the circumstances under which the FCC is required to forbear from enforcing a particular statutory or regulatory requirement, the court held that the FCC was not required to ascribe the same meaning to the term "necessary," in view of the diverse purposes underlying the different statutory provisions and the fact that doing so would lead to "an absurd result."[30]

Consistent with these decisions, the Commission also should find that section 10(d) has not been satisfied simply because the BOC has obtained interLATA approval under section 271. The Commission frequently has noted that section 271 requires a BOC seeking to obtain in-region, interLATA authority to show only that, as a threshold matter, it has *opened* its local markets to competitive entry by, among other things, fully implementing the competitive checklist.[31] In enacting section 271, however, Congress recognized that, even after a BOC had "fully implemented" the competitive checklist and obtained in-region authority, it would continue to be dominant in local telecommunications markets:

> The competitive checklist in [the bill] only ensures that certain technical and legal barriers to competition . . . have been eliminated prior to the RBOC entry. This checklist does not require that competition actually exist in local markets dominated by the RBOCs before they are able to use their substantial market power to enter long distance markets.[32]

To deter anticompetitive behavior, Congress thus imposed on the Commission pursuant to section 271(d)(6) an ongoing obligation to ensure that the BOC's local market remains open to competition even after the BOC had implemented the checklist and received section 271 approval.[33] These ongoing requirements have not been fully

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30 *Id.* at 511.

31 *See, e.g., Application by SBC Communications Inc., et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354, ¶¶ 1, 419 (2000) ("*Texas 271 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, ¶¶ 1, 15, 426, 428 (1999).

32 141 Cong. Rec. S. 8460, 8470 (1995) (statement of Sen. Feingold).

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

implemented simply because as of a particular date the BOC has satisfied the competitive checklist and received interLATA authority.

Indeed, the requirements of section 271(d)(6) are not incorporated in the competitive checklist. It thus would have been completely irrational for Congress to have permitted the FCC to forbear from enforcing the requirements of 271 as soon as a BOC received interLATA authority, and Congress did not do so. Consequently, to avoid "an absurd result," section 10(d) must be read in a manner that acknowledges that a BOC's satisfaction of the section 271 competitive checklist requirements alone does not support the conclusion that the requirements of section 10(d) have been satisfied.

Sections 271 and 10 also serve different purposes, further supporting a finding that full implementation of the competitive checklist is not sufficient to satisfy section 10(d). As noted, section 271 sets forth the criteria that must be satisfied in order for a BOC to obtain authority to offer in-region, interLATA services, and also imposes ongoing duties to ensure that the BOC continues to comply with those requirements post-approval. In comparison, Congress enacted section 10 to provide the Commission flexibility to forbear from statutory provisions and regulations where markets have become fully competitive and regulatory requirements are no longer necessary.[34] Given the different purposes underlying these two sections, it is apparent that a BOC's showing that it has "fully implemented" the competitive checklist for purposes of offering long distance services falls well short of establishing that the requirements of section 271 have been "fully implemented" for purposes of section 10(d).

B. Grant Of 271 Authority Is Not Equivalent to A Finding that Section 251(c) Has Been Fully Implemented For Purposes of Section 10(d)

Several of the BOCs' pending forbearance petitions make the even more implausible claim that approval of a section 271 application also establishes that the requirements of section 251(c) have been fully implemented.[35] As a threshold matter, section 271 does not require a BOC to show that it has "fully implemented" all of the provisions of section 251(c). More importantly, the BOCs' argument again ignores the fundamental differences between the goals and purposes of the section 271 review

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[34] *See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 14 FCC Rcd 6004, ¶ 6 (1999) ("For more than a decade prior to the 1996 Act, the Commission attempted to forbear from tariff regulation of nondominant IXCs, but was struck down by the courts. Subsequently, the Commission requested, and Congress granted in section 10 of the Act, forbearance authority, with the express understanding that it would be used to effectuate interexchange detariffing.").

[35] BST MPD Petition at 7; Verizon TELRIC Petition at 19 n.38.

process and the obligations imposed on BOCs and other incumbent LECs by section 251(c).

As explained above, the section 271 competitive checklist is a threshold showing used to determine whether a BOC at a particular point in time has opened its markets to competitive entry in accordance with specific statutory requirements. In contrast, section 251(c) imposes on BOCs and all other incumbent LECs a variety of ongoing interconnection and unbundling obligations that are designed to open local markets to competitive entry and to ensure that those markets remain open. Plainly, a finding that a BOC has satisfied its section 271 market-opening obligations as of a specific date says nothing about whether section 251(c) has been "fully implemented" as required by section 10(d).

The BOCs' assertion that receipt of section 271 approval is enough to show that section 251(c) has been fully implemented is simply further evidence, if it be needed, of their fundamental misapprehension of Congress' statutory scheme. The fact that a BOC is able to demonstrate as of a particular date that it has complied with certain of its section 251(c) obligations only shows that it has satisfied its market-opening obligations under section 271. Nowhere did Congress suggest that such a showing was sufficient to permit the BOC to seek relief from its duties under section 251(c). Indeed, it is precisely because Congress recognized that a BOC would continue to possess market power in its in-region local telecommunications markets that section 271 requires a BOC to continue to satisfy its obligations under that provision after it has obtained in-region approval. It is preposterous for the BOCs to claim that Congress intended to permit them to seek release from their market-opening obligations under section 251(c) immediately after a BOC finally had complied with those requirements. The better reading of section 10(d) is that section 251(c) has not been fully implemented until competition has developed such that the market will ensure that competitors can obtain interconnection and access to network elements and resold services in the absence of continued regulatory oversight. In other words, requiring proof of a robust wholesale market will ensure that the BOCs are compelled to comply *voluntarily* with the requirements of section 251(c), even after those requirements have been eliminated, or risk ceding revenues to other firms that are equally capable of providing the wholesale facility or service.

Finally, the BOCs' proposed interpretation of "fully implemented" leads to illogical results. As noted, section 271 imposes *additional* safeguards on the BOCs (above and beyond those imposed on all incumbent LECs) to guard against erosion of competition for long distance services. Equating full implementation of the checklist with full implementation of section 251(c), however, would enable the BOCs to use satisfaction of the 271 checklist to *avoid* the requirements of section 251(c). Given the legislative history of the Act and, in particular, section 271, it is implausible that Congress intended that receipt of section 271 authority would permit the Commission to

relieve the BOCs of their obligations under section 251(c) – even as those duties would continue to be imposed on non-BOC incumbent LECs.

III. Conclusion

As the foregoing analysis confirms, the pending BOC petitions seeking relief from the statutory obligations of section 251(c) and section 271 are premature. As a matter of law, full implementation of the checklist for purposes of section 271 is not sufficient to demonstrate full implementation of the requirements of either section 271 or section 251(c) for purposes of section 10(d), particularly in light of the Commission's *OI&M Order*. Instead, as discussed above, the Commission may not forbear from the requirements of section 251(c) or section 271 until it can conclude that a robust wholesale market for local telecommunications services and facilities has developed. Because none of the BOC petitions pending before the Commission even attempts to satisfy this statutory standard, the petitions must be denied.

Respectfully submitted,

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