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

<u>OPPOSITION OF AT&T CORP.</u>

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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.

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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.

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[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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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.*

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[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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[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

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[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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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

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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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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

[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

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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.

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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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