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March 19, 2004

**Ex Parte**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

**Re: WC Docket Nos. 01-337, 01-338, 02-33 and 02-52**

Dear Ms. Dortch:

Please find attached a white paper that responds to an *ex parte* submission of various CLECs on March 1, 2004 in the WC Docket 01-338 concerning interpretation of the term “fully implemented” as it appears in both section 10(d) and section 271(d)(3)(A)(i) of the Communications Act. The paper explains why their position is without merit. Please let me know if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Ann D. Berkowitz".

Attachment

cc: P. Arluk  
M. Carey  
J. Stanley

## **SECTION 10(d) POSES NO OBSTACLE TO FORBEARANCE FROM STAND-ALONE BROADBAND UNBUNDLING OBLIGATIONS UNDER SECTION 271**

This white paper responds to an *ex parte* submission of various CLECs on March 1, 2004,<sup>1</sup> concerning interpretation of the term “fully implemented” as it appears in both section 10(d) and section 271(d)(3)(A)(i) of the Communications Act. The CLECs claim that Congress assigned this term two mutually inconsistent meanings and that, as used in section 10(d), it bars the Commission from granting Verizon’s petition for forbearance from any independent broadband unbundling obligations arising under section 271.<sup>2</sup> That position is without merit and, if accepted, would sharply curtail the otherwise broad discretion Congress granted the Commission under section 10(a) to forbear from outmoded regulatory requirements as it deems appropriate.

Section 10(d) authorizes forbearance from “the requirements of section . . . 271” where “those requirements have been fully implemented.” 47 U.S.C. § 160(d). As Verizon has explained, the Commission has expressly found that the section 271 requirements at issue here—those of the competitive checklist—have been “fully implemented,” because that finding is an explicit statutory prerequisite to granting any section 271 application. 47 U.S.C. § 271(d)(3)(A)(i). The CLECs do not deny that the “normal rule of statutory construction” is “that identical words used in different parts of the same act are intended to have the same

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<sup>1</sup> Letter from Jonathan Askin, Ass’n for Local Telecomm. Servs., et al., to Marlene H. Dortch, Secretary, FCC, Mar. 1, 2004 (“CLEC Letter”).

<sup>2</sup> The CLECs argue that *all* of “the pending BOC petitions seeking relief from the statutory obligations of section 251(c) and section 271 are premature.” CLEC Letter at 11. Although Verizon disagrees with (and will separately address) the CLECs’ interpretation of section 10(d) as it relates to its other forbearance petitions, Verizon here addresses the CLECs’ letter only as it relates to Verizon’s petition for forbearance from any stand-alone section 271 broadband unbundling requirements pending in this docket.

meaning.” *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996) (quoting *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (internal quotation omitted)). And application of that normal rule is all but compulsory where, as here, the use of identical language cannot be coincidental because one provision (section 10(d)) explicitly cross-references the other (section 271). In response, the CLECs rely, to no avail, on cases in which (i) there was no similarly obvious statutory cross-reference and thus no guarantee against mere coincidence *and* (ii) application of the same-meaning rule would produce “an absurd result” or would otherwise thwart the statutory scheme. *See Cellular Telecomm. & Internet Ass’n v. FCC*, 330 F.3d 502, 511 (D.C. Cir. 2003); *U. S. West Communications, Inc. v. FCC*, 177 F.3d 1057, 1059-61 (D.C. Cir. 1999).

Here, construing the term “fully implemented” as having the same meaning in sections 10 and 271 would produce not an absurd result, but an eminently sensible one. The Commission already has broad authority under Section 10 to forbear. Section 10(d) is a very narrow, time-limited exception to that authority. Allowing that limit to expire by its own terms, upon a finding of checklist compliance, is consistent with the statutory scheme. At bottom, the CLECs are left with the unenviable argument that it is “implausible” (CLEC Letter at 10) that Congress meant to give this Commission greater discretion to remove requirements that harm the public interest. To the contrary, Congress acted prudently in designing section 10(a) to give the Commission wide latitude to remove obsolescent and counterproductive regulations as circumstances warrant. And any residual question about the propriety of forbearance from *broadband* unbundling requirements would be resolved by section 706 of the 1996 Act, which singles out broadband for special attention and “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.” Memorandum Opinion and Order, and Notice of

Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24044-45 ¶ 69 (1998) (“*Advanced Services Order*”).<sup>3</sup>

There is also no policy merit to the CLECs’ arguments against forbearance on the merits. Citing only the general “market-opening objectives” underlying the Act, the CLECs assert that “the ‘fully implemented’ standard requires a showing that . . . a BOC . . . no longer is dominant in the provision of the network elements and telecommunications services that entrants require to enter and compete effectively with the . . . BOC.” CLEC Letter at 3. But this reading of section 10(d)—which has no basis in the text of section 10(d)—gets the policy objectives of the 1996 Act exactly backwards. As the Commission has determined, the greatest impediment to the development of a competitive broadband market is the maintenance of intrusive unbundling obligations that deter ILECs and CLECs alike from building out the infrastructure needed to challenge the dominance of the cable incumbents.<sup>4</sup> As Verizon has explained in its previous

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<sup>3</sup> There is no basis for the CLECs’ claim that their reading of section 10(d) “is . . . 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.’” CLEC Letter at 3 (internal citation omitted). The “Senator McCain statement” quoted by the CLECs was a passage in a Heritage Foundation letter that Senator McCain read into the record. 141 Cong. Rec. S. 7942, 7957 (daily ed. June 8, 1995). The Foundation’s purpose in submitting the letter was to argue for “a more deregulatory approach,” and to that end it called for terminating, among other regulatory burdens, “numerous unnecessary common carrier regulations by requiring mandatory FCC forbearance when markets are deemed competitive.” *Id.* at 7956. Nothing in that Heritage Foundation letter, much less in Senator McCain’s own recorded views, remotely supports the CLECs’ position here. To the contrary, both that letter and the legislative history in general make clear that section 10 directs the FCC “to reduce the regulatory burdens on a carrier when competition develops, or when the FCC determines that relaxed regulation is in the public interest.” 141 Cong. Rec. S7887 (statement of Sen. Pressler); *see also id.* at S7898 (daily ed. Jun. 7, 1995) (statement of Sen. Dole) (section 10 “force[s] the Federal Communications Commission to eliminate outdated regulations, and do so in a timely manner”).

<sup>4</sup> 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*;

submissions, the same pro-investment policy considerations that led the Commission to remove broadband elements from any section 251 unbundling obligations should also lead it to remove those elements from any stand-alone section 271 obligations. In any event, the Commission can evaluate any such competitive concerns in the context of determining whether the criteria of section 10(a) are met. A finding the checklist requirements of section 271 have been “fully implemented” for purposes of both section 271(d)(3)(A)(i) and section 10(d) means only that they fall within the ambit of the FCC’s forbearance authority under section 10(a), not that all such requirements automatically disappear.

Finally, the CLECs push the envelope of permissible advocacy in claiming that Verizon’s construction of section 10(d) “is manifestly inconsistent with the Commission’s determination in the *OI&M Order*.”<sup>5</sup> In that *Order*, the Commission held that section 10(d) barred it from

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*Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 18 FCC Rcd 16978,16983-84 ¶¶ 2-4, 17141-42 ¶ 272, 17151-52 ¶¶ 291-92 & n.839 (2003) (“*Triennial Review Order*”), *aff’d in relevant part*, *USTA v. FCC*, No. 00-1012, 2004 WL 374262, at \*25 (U.S. Mar. 2, 2004) (“the . . . investment disincentives the Commission identified [in the *Triennial Review Order*] are sufficient for us to uphold the reasonableness of the Commission’s determination [that broadband unbundling requirements should be eliminated]”); *see also USTA v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002), *cert. denied sub nom. WorldCom Inc. v. USTA*, 538 U.S. 940 (2003) (No. 02-858) (“Each unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities.”); *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 879 (2004) (“Compelling such firms to share the source of their advantage . . . may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.”).

<sup>5</sup> 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, FCC 03-271 (rel. Nov. 4, 2003) (“*OI&M Forbearance Order*”), *petition for review pending*, *Verizon Telephone Cos. v. FCC*, No. 03-1404 (D.C. Cir. Nov. 10, 2003). Verizon disagrees with, and has appealed, the Commission’s basis for denying forbearance in that proceeding, but it nonetheless agrees with the

forbearing from applying section 272 requirements because those requirements—which the Commission found were incorporated by reference as requirements of section 271—had not been “fully implemented.” *OI&M Forbearance Order* ¶ 5. The Commission noted, however, that “[its] analysis . . . applies only to whether section 271 is ‘fully implemented’ *with respect to the cross-referenced requirements of section 272*, and does not address whether *any other part of section 271, such as the section 271(c) competitive checklist*, is ‘fully implemented.’” *Id.* ¶ 6 (emphasis added). This passage, which the CLECs nowhere acknowledge, is fatal to their reliance here on the *OI&M Order*. So, too, is the statutory structure. Section 271 itself specifies that, when a Bell company’s long-distance application is granted, the requirements of the checklist must be deemed “fully implemented.” That is the exact language that describes the showing that must be made to satisfy section 10(d), which cross-references section 271. The reference to section 272 requirements is not part of the checklist and is instead found in another subsection that does not contain that language; there is not the same direct linkage between that provision and section 10(d) demonstrating that the requirements of section 272 are “fully implemented” for purposes of section 10(d) whenever a section 271 application is granted. *See* 47 U.S.C. § 271(d)(3)(B).

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Commission’s finding that its decision has no bearing on the circumstances in which forbearance from checklist requirements is appropriate.