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Broadband Access

FCC Presentation
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Decision to forbear in order to provide the ILECs' requested relief requires multiple legally problematic findings and rulings

- In order to grant forbearance, the Commission would have to conclude:
  - that just, reasonable, and nondiscriminatory access to loop transmission facilities can be ensured absent a 271 access obligation. Section 10(a)(1).
  - that consumers can be protected even if broadband loop unbundling is eliminated in its entirety, cutting off access to competitive broadband services to consumers. Section 10(a)(2).
  - that the public interest is served by cutting off all competitive access to legacy bottleneck facilities to provide broadband services, reducing competition in broadband. Section 10(a)(3).
- The record on all of these points is skimpy at best, since the BOCs rely almost entirely on legal, not policy arguments.
- The Commission would also have to conclude that section 271 requirements were "fully implemented" at the time the BOCs received Section 271 authorization and remain fully implemented even if the obligations to provide Checklist Item 4 loop access are removed.
  - Removing CLEC access to legacy broadband network elements at the same time BOCs are aggressively bundling broadband and rapidly seizing market share in LD is fundamentally inconsistent with the "quid pro quo" intended by section 271
- The Commission's first decision interpreting forbearance provisions in the context of section 271 has precedential effects far beyond broadband.

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Section 251 and Section 271 serve different purposes and require different analyses

- The BOC petitions simply collapse sections 251 and 271 analysis into one – they argue that if access is eliminated under 251, it must be eliminated under 271 automatically.
  - But the Commission held, and the D.C. Circuit affirmed, that 251 and 271 access obligations *are* different.
  - The Commission's 251 analysis found that CLECs ARE impaired from competing without access to existing broadband-capable loops, but are not impaired for new FTTH.
- Section 10 has a very different legal standard. Forbearance from 271 checklist item four access obligation would require finding that BOCs no longer have market power in hybrid loops and line sharing, which is clearly impossible given the complete lack of alternative wholesale loops.
- As both the FCC and the DC Circuit recognized, Congress addressed a different policy issue in section 271 – balancing BOC entry into long distance versus opening legacy networks to competition

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Clarify, don't forbear

- At bottom, Bell company forbearance petitions argue that they have no incentive to deploy new, fiber-based broadband facilities, because ongoing checklist item 4 obligations offset UNE relief.
- Rather than making sweeping factual and/or legal forbearance findings with respect to all broadband loops, the Commission can simply clarify the parameters of section 271 access obligation to make clear that the obligation does not apply to new, fiber to the home loops.
- Clarification allows quick resolution of BOC requests for clarity without morass of Section 10 interpretation that may unduly hinder future Commission action.
- Adopting a legally questionable decision to achieve a policy objective disserves both competitors and the BOCs as the rules could be changed yet again in a year if the decision is reversed

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Clarification should apply only to new, FTTH loops

- DC Circuit in *USTA II* affirmed FCC conclusion in TRO that 271 checklist is a separate access obligation from section 251.
- At time of each 271 grant, FCC interpreted checklist item four as including, *inter alia*, line sharing and hybrid loops.
- Commission can clarify that 271 grants were "snapshots in time" that interpreted checklist requirements based on access to legacy monopoly networks. Congress intended the FCC to evaluate checklist compliance by ensuring the continued availability of the legacy ILEC network.
- FCC could clarify that at time of 271 grant, the Commission examined the legacy monopoly network, and not new, FTTH loops that were not part of that legacy network, as the basis for approval of application.
  - State and DOJ review were also predicated on access to copper loops (line sharing) and access to hybrid fiber/copper loops, while the record was silent on FTTH loops.
- Both access to copper (line sharing) and hybrid fiber/coax loops clearly involve legacy monopoly loops
  - BOCs have used high capacity feeder plant (fiber/copper) terminating in copper loops for many years. From a policy standpoint, this simply increases the efficiency of the BOC network (and improves the BOCs' bottom line) but does not bring substantial new capabilities to consumers.
- The Commission could more reasonably conclude that Congress only intended to cover legacy loop types in drafting Checklist Item 4, and did not intend to cover new forms of fiber loops.