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

In the Matter of	)	
	)	
Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises	)	
	)	**WC Docket No. 04-242**
Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises	)	

OPPOSITION OF SPRINT CORPORATION

On behalf of its Incumbent Local Exchange Carrier ("ILEC"), competitive LEC ("CLEC")/long distance, and wireless operations, Sprint Corporation ("Sprint") opposes Verizon's Petition for a Declaratory Ruling or, Alternatively, for Interim Waiver with regard to Broadband Services Provided via Fiber to the Premises ("FTTP"). Sprint also opposes Verizon's Conditional Petition for Forbearance under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises.[1] Both the Petition and the Conditional Petition are premature, overbroad, and improper, and both must be denied.

[1] Public Notice, *Pleading Cycle Established for Comments on Verizon's Petition for a Declaratory Ruling, or Alternatively, Interim Wavier and Verizon's Conditional Petition for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises,* DA 04-2006 (rel. July 1, 2004).

As Verizon admits, its Petitions raise issues already before the Commission in three pending rulemaking proceedings.[2] Rather than allow the Commission to complete its work in these three proceedings, as the rest of the industry would be expected to do, Verizon insists it needs immediate relief simply because it claims to be ready to deploy FTTP in some small portion of its network.

> With the first commercial offering of broadband service over an FTTP network targeted to be available in less than two months' time, however, it now seems likely that the Commission will not have ruled on the regulatory treatment of FTTP broadband before these next-generation broadband services become a reality for Verizon customers.[3]

However, to the extent this timing situation is a "problem" for Verizon, it is largely, if not entirely, one of Verizon's own making. A project, such as Verizon's supposed FTTP deployment in Keller, Texas, has undoubtedly been in planning for a very long time, certainly long before Verizon filed its June 28 Petitions.

Verizon has long known of the regulatory status of ILEC broadband services – whether provided via FTTP or otherwise. That knowledge obviously did not prevent it from deciding that now was the time to deploy broadband services via FTTP.

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[2] Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002) ("*Cable Modem Declaratory Ruling*"), *vacated in part*, *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *petitions for certiorari pending*; Notice of Proposed Rulemaking, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services* ("*ILEC Broadband Proceeding*"), 16 FCC Rcd 22745 (2001); and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* 17 FCC Rcd 3019 (2002).

[3] Verizon's Memorandum of Points and Authorities in support of Verizon's Petition for Declaratory Ruling or Interim Waiver and Conditional Petition for Forbearance with Respect to Broadband Services provided via Fiber to the Premises, June 28, 2004 ("Memorandum") at 2.

Accordingly, Verizon's timing "problem" cannot be justification for this Commission setting aside its three pending rulemakings and undertaking to regulate in a piecemeal fashion. Rather, the Commission should promptly deny both Verizon Petitions and instead focus its resources on expeditiously completing the three pending rulemakings and bring regulatory certainty to the provision of broadband services whether over ILEC FTTP, other ILEC wireline facilities, or cable modem platforms.

Additionally, Verizon's Petitions paint with far too broad of a brush, both with respect to the services in question and to the relief requested. As to the services, Verizon speaks very generically about "broadband services" without providing any definition or examples. At the same time, Verizon also frequently points to "cable modem services" with language that implies it is talking only about FTTP broadband services that are comparable to "cable modem services."

> In its *Cable Modem Declaratory Ruling*, the Commission granted both declaratory relief and a waiver to permit cable modem service to be provided without being subject to key aspects of the Commission's common-carrier rules .... As explained in detail in the accompanying memorandum, Verizon plans to offer its FTTP broadband services under circumstances that parallel those at issue in the *Cable Modem Declaratory Ruling*.[4]

If Verizon's Petitions are limited to "cable modem services," as that term was used in the *Cable Modem Declaratory Ruling*,[5] then the only service in question would be high-

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[4] Petition of Verizon for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises at 2 (citations omitted).

[5] *See* Notice of Inquiry, *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, FCC 00-355 (rel. Sept. 18, 2000) at ¶ 1. "In this proceeding the Commission will explore issues surrounding high-speed access to the Internet provided to subscribers over cable infrastructures, so

speed Internet access. Unfortunately, however, Verizon is not at all clear that the services covered by Verizon's Petitions are so limited. In the one limiting statement that Verizon makes, it does not limit itself to high-speed Internet access.

> It is worth emphasizing that the relief sough is limited in scope: waivers are sought here only for broadband transmission (not voice or video services), and only for FTTP, the deployment of which is in its infancy.[6]

Likewise, the relief sought by Verizon is not clearly set forth and appears to be extremely and improperly expansive. In its Conditional Petition, Verizon claims to seek the same relief that was afforded cable modem service: forbearance from enforcing requirements that would prevent Verizon from offering FTTP broadband services on individually negotiated terms, without tariffs or cost justification. In its Memorandum, however, Verizon does not so limit its request. It appears to seek relief from all Title II regulation.

> If necessary, the Commission should grant interim waivers of its requirement to offer a stand-alone broadband transmission service on a common-carrier basis, as well as its tariffing and cost-justification rules or, alternatively, forbear from Title II regulation for FTTP broadband. [7]

Given the lack of specificity as to the services for which relief is sought and, importantly, its ambiguity the relief sought, Verizon's Petitions must be denied.[8]

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called "cable modem service." *See also Cable Modem Declaratory Ruling* at ¶ 1 ("Cable modem service provides high-speed access to the Internet....").

[6] Memorandum at 5.

[7] Id. at 4.

[8] It also should be noted that Verizon's Petitions must fail for lack of specificity as to geographic scope. Presumably, Verizon is seeking some regulatory relief throughout its

The Commission should be particularly concerned by the potential that Verizon seeks relief from all Title II regulation. Among other things, that which would include the ILEC obligations arising from section 251(c) (47 U.S.C. § 251(c)) and the dominant carrier tariff obligations relating to access services, as well as Verizon's obligations as a Bell operating company set out in section 271 (47 U.S.C. § 271). First, as to section 251(c), the Commission will note that in the *TRO*,[9] the Commission found that ILECs continue to have some, albeit limited, UNE loop obligations even with Fiber to the Home ("FTTH"). While Verizon has altered the name to FTTP, as described Verizon's FTTP is the equivalent of the Commission's FTTH and Verizon can certainly not escape its obligations through a name change.[10]

Nor should the Commission grant any forbearance or waivers in this proceeding, for any other reason, from section 251 obligations or all access obligations. As Sprint argued in the *ILEC Broadband Proceeding,* the ILECs are dominant and have bottleneck control of the inputs necessary for intramodal competition, such as the access services that are the necessary inputs to the broadband services ultimately sold to business users. The many grounds for Sprint's opposition to complete regulatory relief from section 251

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territory. However, the only "record" as to the competitive landscape that Verizon makes is with regard to Keller, Texas where Verizon claims it will be competing against an incumbent cable provider that is adding local voice services to its existing video and cable modem services.

[9] 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*, 18 FCC Rcd 16978 (2003) ("*TRO*"), *vacated in part and remanded*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)("*USTA II*").

[10] The Commission's use of the label Fiber to the Home signaled that its application is limited to mass market end-users. Verizon's substitution of Fiber to the Premises is an improper attempt to broaden the scope of FTTH beyond what the *TRO* allowed.

and access obligations are already set forth in detail in Sprint's comments and reply, filed on March 1, 2002 and April 22, 2002, respectively. Rather than burden the Commission with duplicative comments, Sprint incorporates its prior comments here. Copies are attached for the Commission's convenience.[11]

Likewise, eliminating Title II regulation could implicate the Bell operating companies' section 271 obligations. As the FCC just found in the *TRO*,[12] and as confirmed by the D.C. Circuit in *USTA II*,[13] section 271 obligates the Bell operating companies to provide access to loops regardless of the outcome of any unbundling obligation in section 251. The FCC should not, and indeed legally cannot, forbear or waive 271 checklist obligations, such as the provision of loops. Whether the loop in question is FTTP or FTTH, copper or hybrid is irrelevant to this issue. The checklist simply specifies "loop" and does not create any carve-outs based on the facilities or technology used. Furthermore, the express language of section 271(d)(4) precludes the Commission for waiving or allowing forbearance of Verizon's section 271 obligation. Section 271(d)(4) provides 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)."

Sprint's position on section 271(d)(4) and the many grounds for denying any forbearance or waiver of section 271 are set forth in detail in Sprint's opposition and

[11] In the ILEC Broadband Proceeding, while Sprint argued against total regulatory freedom for ILEC broadband services, Sprint argued that intermodal competition was sufficient to warrant some tariff flexibility, specifically allowing one day tariff filings, relief from cost support filing and pricing flexibility, including the ability to offer contract pricing. Sprint still believes that is the appropriate regulatory framework for ILEC broadband services, including Verizon's FTTP services.

[12] *TRO* at ¶ 653.

[13] *USTA II*, 359 F.3d at 558.

reply, filed on November 17 and 26, 2003, respectively, in response to Verizon's New Petition Requesting Forbearance from Application of Section 271.[14] The Verizon New Petition sought forbearance from section 271 for broadband elements and is essentially the identical to the instant Verizon Petitions, except that it not limited to FTTP. However, that limitation does nothing to remove the legal and policy barriers to Verizon's petition. As with that petition, Verizon's request is contrary to the Commission's findings in the *TRO* (upheld by *USTA II*), it is precluded by section 271, and in seeking forbearance it fails to meet the stringent standards of section 10 of the Act (47 U.S.C. § 160(a)-(b)). Rather than burden the Commission with duplicative comments, Sprint incorporates its prior comments here. Copies are attached for the Commission's convenience.

The Commission may fairly ask why Verizon persists in filing groundless petitions that serve chiefly to distract from its more pressing work. Verizon's latest Petitions are premature and improper. The industry would be better served by the Commission establishing rules in this critical broadband service area through its three

[14] In the Matter of New Verizon Petition Requesting Forbearance From Application of Section 271, CC Docket No. 01-338. Verizon's New Petition, as deemed by the Commission in Public Notice FCC 03-263 (rel. Oct. 27, 2003), is an *ex parte* letter dated October 24, 2003. Verizon originally filed an even broader petition, seeking forbearance from all section 271 unbundling obligations, which the Commission denied in the October 27 Public Notice. Last week, the D.C. Circuit directed the Commission to issue a more detailed order providing a decision on Verizon's original petition. Verizon Tel. Cos. v. FCC, slip op. no. 03-1396 (July 16, 2004). The court declined to set any deadline for its issuance, however, because it recognized the Commission now has a much larger record to address, a record that still remains opens. Sprint anticipates that the Commission will address both the original petition and New Petition, and the many arguments against them, in a future order.

pending rulemakings,[15] rather than entertaining piece-meal requests rulings on through petitions for waivers or forbearance that cannot be properly granted in any event. Additionally, the Petitions exhibit a fatal lack of specificity with regard to the services at issue and with regard to the relief requested. Lacking such specificity, these Petitions must be denied on that ground alone. Finally, to the extent the Petitions seek relief from dominant ILEC access obligations, section 251 obligations, and section 271 obligations, they cannot and should not be granted.

Respectfully submitted,
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[15] *See* note 2, *supra.*

ATTACHMENT 1

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

In The Matter of	)	
	)	
Review of Regulatory Requirements	)	CC Docket No. 01-337
For Incumbent LEC Broadband	)	
Telecommunications Services	)	

COMMENTS OF SPRINT CORPORATION

Sprint Corporation, on behalf of its incumbent LEC, competitive LEC, long distance, and wireless divisions, in response to the Notice of Proposed Rulemaking (NPRM) released December 20, 2001 (FCC 01-360), hereby respectfully submits its comments in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

In this NPRM the Commission seeks comments on what "regulatory safeguards and carrier obligations, if any, should apply when a carrier that is dominant in the provision of traditional local exchange and exchange access services provides broadband service."[1] The Commission has also requested comment on SBC Communication's October 3, 2001 Petition for an expedited ruling that it is non-dominant in the provision of broadband services.[2]

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[1] NPRM at para. 1.

[2] *Id.*, at para. 7. Additionally, there are two pending proceedings that could impact, or be impacted by, the ultimate outcome of this proceeding: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-318, NPRM, released November 19, 2001; and *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* CC Docket No. 02-33, NPRM, released February 15, 2002.

Sprint believes that the Commission's traditional view that telecommunications services should be divided between a mass market product market and a larger business product market should apply to broadband services. There is a clear distinction between the services provided these two groups; a distinction that does not easily allow for interchangeability between the services.

It is also evident that in the mass market product market there is sufficient intermodal and intramodal competition to demonstrate that the ILECs do not have significant market power in the provision of broadband services. However, complete regulatory relief cannot be granted. The ILECs continue to maintain bottleneck control over the facilities necessary to provide intramodal competition and thus while some degree of pricing flexibility and tariff filing relief may be warranted, the ILECs must continue to be subject to regulation, specifically to Sections 251 and 252 of the Telecommunications Act.[3]

Likewise, in the larger business product market there appears to be sufficient intramodal competition, but not intermodal, to allow some pricing flexibility and tariff filing relief for the ILECs. However, due to the ILECs' bottleneck control of the necessary facilities, the continued existence of this intramodal competition is dependent upon continuing the ILECs' resale and UNE obligations under Sections 251 and 252.[4]

II. RELEVANT PRODUCT MARKET

In the instant NPRM, the Commission seeks comment on how to define the appropriate product market that includes ILEC broadband services. Specifically, the Commission requests input regarding the bifurcation of the broadband market into two

[3] 47 U.S.C. § 251 and 47 U.S.C. § 252.
[4] *Id.*

distinct markets: the *mass market* broadband market and the *large business* broadband market.[5]

Economists have long held that a "market" is the set of buyers and sellers whose activities have an effect on the price of a product or service.[6] As such, a market is not limited to the supply and demand of any single product but it includes the supply and demand of other products that act as forces on the price of the first. In the case of broadband services, if one service is generally considered a substitute for another, then the two services could be said to operate in the same market. This concept of substitutability is actually key to understanding the proposed bifurcation raised in the NPRM: to the extent that substitutability generally exists *within* the two proposed markets, but not *across* the two markets, the separation is reasonable.

The standard of substitutability often used in anti-trust situations involves the concept of *reasonable interchangeability of use*.[7] Reasonable interchangeability of use does not require that two products be functionally equivalent, only that they satisfy a similar customer demand. It also allows for quality differences among goods and services.

It is clear that many of the services offered in the *mass market* broadband market—xDSL, cable modems, satellite, fixed wireless—are designed to meet the same customer needs, primarily high-speed internet access and (to a lesser degree) remote access for work-at-home applications.[8] It is also clear that these needs are very different

[5] NPRM at para. 20.

[6] Baumol and Blinder, Economics, Harcourt Brace Jovanovich, 1979.

[7] Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

[8] The Commission has requested comment on potential intermodal competition offered by the mobile wireless market. While it is clear that the mobile wireless market, including Sprint PCS, is making significant strides toward providing higher-speed services and applications to the mass market, at this point in time it is premature to make assumptions regarding whether these services will be viewed as *substitutes*

from the needs met by many services offered in the *large business* market: LAN-to-LAN connections, server to server connections, high-capacity backbones for company intranets. It is true that there are instances where the two markets overlap: a small-to-medium business customer could easily view xDSL as a substitute for a remote-to-host connection provided by frame relay, or conversely a small business could purchase a DSL line soley to provide high-speed internet access identical to that purchased by a residential customer. But these areas of overlap represent the exception, rather than the rule.

This exception does not rise to the level of demonstrating interchangeability of broadband services between the mass market and the larger business market. Nor does the exception rise to the level of an additional product market for small-to-medium business customers. Rather, the rule bears out that there are two relevant product markets: mass market broadband and larger business broadband markets.

III. MARKET POWER

In the instant NPRM, the Commission asks for comment as to whether incumbent LECs possess market power in the provision of broadband services.[9] Having established that it is appropriate to bifurcate the overall broadband market into *mass market* broadband and *large business* broadband, Sprint believes it is also correct to address questions of market power with regard to each product market separately, and does so below. However, for the sake of accuracy it is necessary to clarify the definition of "market power" in this context.

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or *complements* to wireline products. As such, the controlling effect that these services may or may not have on market power of wireline providers is impossible to determine.

[9] NPRM at para. 28.

Traditional textbook definitions emphasize *prices in excess of an appropriate cost measure* as evidence of market power, and so are consistent with the Commission's discussion that defines market power as the ability to "raise and sustain prices" by restricting output (a firm's own, or a rival's) or by raising rivals' costs.[10] But in the context of examining the possibility of reduced regulation or de-regulation of broadband services, it is appropriate to expand the issue at hand to address *monopoly power* as well. Monopoly power is "the ability of individuals or firms currently in business to prevent other individuals or firms from entering the same kind of business."[11] Although the two terms are often used interchangeably, it is clear that in many cases a firm's market power is derived from its monopoly power.[12]

The Commission has long acknowledged that the economies of scale inherent in the public switched telephone network have the effect of creating a barrier to entry for many potential competitors.[13] These same economies of scale characterize the provision of wireline-based broadband service, and create just as effective a barrier to entry in many cases. Because the ILEC possesses these economies as a direct result of government-mandated monopoly status, if competitors were not able to avail themselves of the same economies through unbundling and resale, then the ILEC could be said to

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[10] NPRM at para 28. *See also*, for example, Browning and Zupan, Microeconomic Theory and Application (Sixth Edition), Addison-Wesley, 1999.

[11] David C. Colander, Economics, Irwin Publishers, Second Edition, 1995.

[12] Because of the technological constraints that characterize wireline broadband deployment, the first type of market power referred to in the NPRM (a firm's ability to raise prices by restricting its *own* output) is a non-issue for the mass market broadband market. The concept of increasing prices (or profits) by reducing output assumes that only enough of a product is provided so that a subset of customers—those willing to buy at a higher price--actually receives the good. The physical deployment of broadband makes it impossible to provide service only to those customers in a subdivision or in a wire center who are willing to pay a higher price.

[13] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,*CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, released November 5, 1999 (*"UNE Remand Order")*.

possess monopoly power; the costs faced by any potential rival would create an economic burden that would preclude entry into the market.[14] (It is worth noting that the ILEC's chief competitor in the *mass market* broadband market, the cable television company, also possesses entry-inhibiting economies of scale as a result of a government-mandated monopoly and so equally enjoys monopoly power with, currently, freedom from regulation.[15]) However, currently competitors are able to avail themselves of these economies because of ILEC unbundling, collocation, and resale obligations.

The Commission has also clearly established its interest in intermodal competition, and has recognized that intermodal competition can reduce the likelihood of anti-competitive behavior.[16] Sprint welcomes this opportunity to clarify one aspect of the Commission's point: Intermodal competition can (in some cases) reduce the likelihood of anticompetitive behavior with regard to *pricing of output*, but not with regard to other forms of anticompetitive behavior. The economies of scale enjoyed by ILECs that could potentially preclude the introduction of intramodal competition are not affected by the existence of intermodal competition. But intermodal competition can reduce the likelihood of anti-competitive behavior when there is perceived substitutability among

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[14] The actual conditions and circumstances in which a competitor would not be able to replicate the necessary economies of scale will vary from market to market, due to factors such as geographic layout of customers. They will also vary depending on which portions of the network exhibit the needed economies. These various conditions and circumstances will be addressed at length in Sprint's forthcoming comments in the UNE triennial review.

[15] Whether the absence of cable modem regulation should be continued is also the subject of a pending Commission proceeding. The issue of how cable modem service should be classified (and regulated or not) is the subject of Inquiry *Concerning High-Speed Access to the Internet over Cable and Other Facilities*, GN Docket No. 00-185, Notice of Inquiry, 15 FCC Rcd 19287 (2000) (Cable Access Notice) The outcome is critical to the efficacy of the outcome of this docket. Sprint urges the Commission to resolve the Cable Access Notice and the instant proceeding so as to ensure intermodel competitive neutrality, as well as, continuing ILEC UNE, Collocation, and resale obligations to ensure intramodal competitive neutrality.

[16] NPRM paragraph 30.

services on the part of the end-user.[17] And the *extent* to which intermodal competition can control prices depends on how perfectly the substitutability is perceived by customers; if customers perceive there to be significant *product differentiation* among services then the ability of one service to control the price of the other is greatly reduced.[18]

In the case of intermodal competition for mass market broadband services such as xDSL and cable modems, it is obvious that the two are often viewed as substitutes by consumers. This is supported by the fact that advertising in popular media aggressively attempts to emphasize *differences* in the products—when customers already view products as differentiated, firms do not need to spend large amounts pointing out the differences to potential buyers.[19] Therefore it is apparent that even if intermodal competition in the mass market broadband market does not control potential *monopoly* power that ILECs possess, it is somewhat effective at controlling any *market* power the ILECs possess in many cases.

With regard to *large business* broadband, the situation is similar. A service such as frame relay may be provided by an ILEC, a CLEC or an IXC, but in many cases competition can only act as a controlling force on prices because the underlying network asset is available to competitors. As long as this is the case, market power (defined as an ability to raise and sustain prices above competitive levels) is controlled because monopoly power is controlled, and monopoly power is controlled by the availability of network elements.

[17] Indeed, the specific cite reference made in the NPRM taken from Comsat's Petition for Forbearance explicitly refers to this substitutability (NPRM footnote 72).

[18] Browning and Zupan, Microeconomic Theory and Application, Chapter 12.

[19] To turn to a non-telecom example, one sees precious little advertising touting the benefits of a luxury auto over an economy car.

IV. ALTERNATIVE REQUIREMENT

The instant NPRM asks for comment on "alternative requirements" for these broadband services, including de-regulation or reduced regulation.[20] At this point in time it is clear that, while the Commission would be premature in declaring any ILEC non-dominant in the provision of broadband services and essentially de-regulating the services, the existence of intermodal competition and the potential for intramodal competition provide justification for the Commission to examine increased pricing and tariff filing flexibility at the retail level. While Sprint cannot comment on any ILEC serving territory other than its own, it is clear that, in Sprint's local serving territory, these conditions—intermodal competition and availability of network assets—create a situation in which it is likely that prices will successfully be controlled by market forces.[21] Therefore increased pricing and tariff filing flexibility is in order.

However, this increased flexibility is dependent upon continuing the ILECs' Section 251 UNE, collocation, and resale obligations. Sprint agrees with the Commission that the continued existence and enforcement of these Section 251 obligations reduce the need for complete dominant carrier regulation through the grant of increased pricing and tariff filing flexibility.[22]

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[20] NPRM at para. 33.

[21] Sprint estimates that in excess of 113,000 cable modems are in place in Sprint ILECs' territories, representing approximately twice the number of residential DSL lines that Sprint has provisioned. This estimate is based on estimated cable network upgrades and projections of national penetration by cable providers.

[22] NPRM at para. 44.

V. CONCLUSION

The broadband services market should be divided into two relevant product markets -- mass market and larger business. In both of these markets there is a demonstration of existing competition that justifies some degree of pricing flexibility and tariff filing flexibility, but only if the ILEC Section 251 UNE, collocation, and resale obligations continue.

Respectfully submitted,

SPRINT CORPORATION

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March 1, 2002

ATTACHMENT 2

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

In The Matter of	)	
	)	
Review of Regulatory Requirements	)	CC Docket No. 01-337
For Incumbent LEC Broadband	)	
Telecommunications Services	)	

REPLY COMMENTS OF SPRINT CORPORATION

Sprint Corporation, on behalf of its incumbent local, competitive local, long distance and wireless divisions, hereby respectfully submits its reply to comments filed on March 1, 2002 in response to the Notice of Proposed Rulemaking (NPRM) in the above-captioned proceeding

I. Introduction.

In its comments, Sprint argued that ILEC provision of broadband services should be examined in the context of mass market and large business services and that, while market conditions in either segment do not support complete deregulation of ILEC broadband services, competition in both segments justifies a good measure of pricing flexibility and tariff filing relief. While Sprint's positions are more middle of the road than others, the record reflects a significant amount of support for these positions.

Before turning specifically to other parties' comments, it is worthwhile to identify the issues with which this proceeding was designed to deal and those, which it was not. This proceeding, notwithstanding what some parties have argued,[1] is not about UNEs or Section 251 obligations. It is not the purpose of this docket to create or eliminate UNE

[1] *See,* BellSouth Comments at 46 where BellSouth argues the Commission should take this opportunity to eliminate existing unbundled network elements.

obligations; those issues are concurrently before the FCC in the UNE Triennial Review.[2] Nor, as several parties noted,[3] is this proceeding intended to pursue further regulatory relief for traditional ILEC special access services. Finally, this proceeding does not address the provision of wireline broadband Internet access services. Issues involved with the regulation of such services are currently pending before the Commission in the Appropriate Framework for Broadband Access to the Internet over Wireline Facilities docket.[4]

Rather, in the instant NPRM the Commission seeks comments on what "regulatory safeguards and carrier obligations, if any, should apply when a carrier that is dominant in the provision of traditional local exchange and exchange access services provides broadband service."[5]

II. A finding of nondominance is not required to grant some regulatory relief to the ILECs.

By and large, commenters focus on whether ILECs are dominant in the provision of broadband services. Predictably, the RBOCs argue that they have never been dominant in broadband services. Virtually all other parties take the opposite view. Sprint believes that the narrowband world is evolving to a broadband world and that Covad best described the appropriate approach to the dominance issue:

> The goal of this proceeding is to develop a regulatory framework for incumbent LEC provision of broadband telecommunications services

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[2] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Notice of Proposed Rulemaking, FCC 01-361, released December 21, 2001.

[3] *See,* Comments of Time Warner Telecom at p. 1 and NPRM at para. 22, wherein the Commission stated: "We note that we are not considering whether traditional special access services belong in the larger-business market for advanced services as these services are governed by the Commission's pricing flexibility regime."

[4] CC Docket No. 02-33, Notice of Proposed Rulemaking, FCC 02-42, Released February 15, 2002.

[5] NPRM at para. 1.

> that strikes an appropriate balance between creating necessary incentives to deploy such services, to promote competition, and to reduce regulation. Covad submits that, to the extent the Commission determines that any adjustments to its current regulations are necessary, the Commission should utilize its forbearance authority under section 10 of the 1996 Act to provide any targeted regulatory relief for incumbent LEC provision of broadband services that the Commission believes is warranted by the record developed in this proceeding. Section 706 of the 1996 Act specially contemplates that the Commission would utilize its section 10 forbearance authority to promote the deployment of advanced services.
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> Such an approach is preferable to any attempt to define product markets and assess incumbent LEC market power in order to determine whether they are dominant or non-dominant. ... For example, for the reasons discussed below, incumbent LECs should continue to tariff their DSL services. A designation of nondominance may make it difficult to continue (or re-impose) this requirement. This is not to say, however, that tariff filing requirements could not be streamlined, rather than eliminated, through the use of the Commission's forbearance authority. The Commission may consider, for example, permitting tariffs to go into effect on one day's notice and easing certain cost support data requirements.[6]

Again, Covad's position is largely consistent with Sprint's. While the ILECs are still dominant in the provision of the telecommunications services that are the necessary inputs to broadband services, there is sufficient competition in both the mass market and large business market to warrant – without a finding of nondominance -- regulatory relief.[7] Such regulatory relief should include one-day tariff filings, relief from cost support filings, and pricing flexibility, including the ability to offer contract tariff pricing.

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[6] Comments of Covad Communications Company at pp. 4-6.

[7] The record in this proceeding, in particular the filings of the RBOCs and other ILECs, including Sprint's, more than demonstrate that there is competition in the provision of broadband services to both residential and business end users, and Sprint will not take the Commission's time to simply repeat what has already been stated. Additionally, there is ample Commission precedent for relying on competition as a trigger for granting pricing and tariff flexibility for the ILEC provision of services for which the ILECs are still clearly dominant -- special access. *See, e.g.,* In the Matter of Access Charge Reform, CC Docket No. 96-262, 14 FCC Rcd 14221 (1999)(subsequent history omitted). In this regard, the Commission can grant appropriate relief without resort to the forbearance process under §10 that Covad emphasizes.

III. The Commission's broadband analysis should focus on at least two product markets: mass market and large business.

Many commenters argue that dividing broadband into two market segments is not sufficient for regulatory purposes; they argue that there should be three: mass market or residential, smaller businesses and work at home, and larger businesses.[8] As pointed out above and in its Comments, Sprint continues to believe that the use of two product markets—mass market and larger business market -- is appropriate, but Sprint has no objection to the creation of a third market for small business and work at home. Sprint believes the outcome will be the same regardless of whether there are two or three product markets. In Sprint's view, there is sufficient competition to warrant some regulatory relief in all of these market segments.[9]

Earthlink suggests that the Commission's examination of the mass market for broadband services is flawed. Earthlink argues that the ILECs only provide wholesale broadband transport and do not provide any retail services to end-users.[10] Accordingly, Earthlink believes that the Commission cannot, for the mass market, look to the degree of competition from cable modems. While Earthlink's description of how broadband services are sold to end-users may be true for the RBOCs, it is not for all ILECs. Sprint's incumbent LECs' broadband tariffs do not restrict such services to ISPs and carriers; Sprint sells its tariffed DSL services directly to end-users. Moreover, Sprint believes that AT&T has the better argument in this regard:

> ... it is nonetheless useful to examine competition between cable modem services and DSL-based Internet access services, because the RBOCs

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[8] *See e.g.,* Comments of the Ad Hoc Telecommunications Users Committee at pp. 6-10 and Covad at pp. 14-15.

[9] Sprint reiterates, however, that the record does not support a declaration that the ILECs are nondominant in the provision of broadband services. In fact, just the opposite finding is required by the record.

[10] Comments of Earthlink, Inc. at pp. 4-9.

virtually always market their DSL telecommunications services bundled with ISP services (that they claim are being provided by third parties.)[11]

As AT&T recognizes, the existence of cable modem services does impact ILEC provision of DSL services. The underlying DSL service cannot be priced such that the bundled price for the package is noncompetitive with cable modem service. Accordingly, Earthlink is mistaken in suggesting that the Commission ignore the impact of cable modem services on ILEC DSL services in defining product markets in this proceeding. It is entirely appropriate for the FCC to place cable modem service and DSL service in the same product market for the purposes of this proceeding.

IV. The ILECs remain dominant in the provision of broadband services and all of the necessary inputs for such services.

While, in Sprint's view, the record demonstrates the existence of sufficient competition to support pricing flexibility and tariff filing relief for the ILECs, the record clearly does not support complete regulatory relief. The record is replete with evidence to the effect that the ILECs continue to maintain bottleneck control over the facilities necessary for the provision of intramodal competition in all broadband services, mass markets (including smaller business, work at home) and larger businesses.[12] Numerous parties[13] agree with Sprint that the ILECs are still dominant in the provision of broadband

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[11] Comments of AT&T Corp. at p. 38.

[12] If the Commission requires more evidence of ILEC dominance than presented in this proceeding, Sprint invites the Commission's attention to Sprint's Comments filed April 5, 2002 in the UNE Triennial Review, <u>In the matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,</u> CC Docket No. 01-338 and Sprint's Comments filed April 8, 2002 in the Accounting Relief Proceeding, <u>In the Matter of 2000 Biennial Regulatory Review -- Comprehensive Review of the Accounting Requirements and ARMIS Reporting Requirements for Incumbent Local Exchange Carriers: Phase 2,</u> CC Docket No. 00-199.

[13] *See, e.g.,* Comments of the Association for Local Telecommunications Services at pp. 7-8, Comments of Earthlink, Inc. at pp. 21-25, Comments of Time Warner Telecom at pp. 1-2 (dealing with special access services used to provide broadband services to medium and large businesses), and Comments of AT&T Corp. at 19-51.

services, or at least the necessary inputs to these services, and that, as a result, some degree of continued regulation is necessary. This is true in both the mass market, where the services provided by the ILECs are largely DSL services, and in the larger business market, with services such as frame relay and ATM.

As Covad points out with regard to DSL services, "... indeed the Commission's own Report to Congress issued just weeks ago concluded that the incumbent telephone companies collectively control 93% of the nationwide ADSL market."[14] Covad goes on to point out that:

> In terms of regulatory safeguards, Covad submits that a certain level of general Title II regulation remains necessary. It would not be in the public interest, for example, to detariff incumbent LEC xDSL services. Continuation of some tariffing requirements for ILEC xDSL services is particularly important for the wholesale market because ISPs and other entities utilize incumbent LEC xDSL services as inputs. A degree of general Title II regulation is also necessary to ensure that incumbent LECs comply with certain of their section 251 obligations.[15]

BellSouth and Qwest both point to the advent of fixed wireless access to the Internet as further demonstrating their lack of dominance in the mass market.[16] However, the Commission's report to Congress on advanced services drives home the point that fixed wireless is no threat to RBOC dominance in broadband services in the foreseeable future:

> At present, however, technical limitations have constrained the level and breadth of their overall deployment and their effectiveness in certain settings. Moreover, capital market conditions over the past year have slowed deployment. Many of the larger carriers have exited the market or significantly scaled back their operations. At this point,

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[14] Comments of Covad Communications Company at p. 3.
[15] *Id.* at p. 6.
[16] BellSouth Comments at 37-38 *and* Qwest Comments at p. 21.

terrestrial fixed wireless services have been deployed to a lesser extent than the traditional "wired" services, cable-modem and DSL.[17]

Likewise, in the larger business market, the ILECs are clearly still dominant, through their bottleneck control over the access services that are the necessary inputs to the broadband services ultimately sold to business end users. And, as the Section 271 and 272 interLATA restrictions are removed from the RBOCs, it is likely that they will extend their dominance and grow market share significantly.[18] Sprint strongly agrees with AT&T that:

> The only reason why the ILECs do not provide a particularly large share of the large business services on a national basis is that they are still largely confined by § 271 to providing such services on an intraLATA or "local" basis. Thus looking at national or regional shares is not a meaningful way in which to examine the extent of the ILECs' market power. Instead, the focus from a geographic perspective must be on the markets where the ILECs' true power has been allowed to manifest itself. These are the multi-point frame relay and ATM services provided within LATAs, which the ILECs dominate almost to the exclusion of other carriers.
>
> When the legal restrictions on the market presence of the RBOCs are appropriately taken into account, it is clear under even the market-share driven test proposed by SBC, that the ILECs could not justify any across-the-board finding of non-dominance in the provision of data services to large businesses. Although SBC and its witnesses Crandall and Sidak never mention it, the data from the IDC reports on which they rely establishes that a customer desiring an ATM network that crosses LATA boundaries can choose among a number of carriers, none of which has more than a 30% share. But if the customer wants a "local" ATM network, it would ... generally confront a situation in which the RBOC in that area controls 90 to 100% of the service:
>
> ...
>
> As interLATA restrictions are lifted, the dominant carrier and other regulations described below are the only things standing in the way of the [RBOCs' plans] to expand their dominance, first regionally and then nationally. The ILECs will still control essential bottleneck facilities and as a result will still be able to gain an unfair competitive advantage over

[17] In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket 98-146, Third Report, FCC 02-33, released February 6, 2002.

[18] 47 USC § 271 and 47 USC § 272.

their rivals though discriminatory pricing and other discriminatory conduct, just (as discussed below) as they do today in the provision of the intraLATA services they are allowed to provide.[19]

V. The ILECs do not require a finding of nondominance to successfully deploy the facilities necessary for broadband services.

Finally, the RBOCs' purported need for a declaration of nondominance in the provision of broadband service requires scrutiny. The record is filled with RBOC claims that they cannot successfully and economically deploy broadband services unless all of their regulatory obligations and burdens are lifted through a declaration of nondominance.[20] The Sprint incumbent LECs have not found that to be true in their case, and Sprint does not believe it is true in the case of the RBOCs. Earthlink shares Sprint's opinion and convincingly demonstrates the fallacy of the RBOCs' "need" with regard to DSL services:

> Moreover, the available evidence shows that Incumbent LEC ADSL services under existing dominant carrier regulation have been a remarkable success for the Incumbents. The Commission's *Third Report* and the U.S. commerce Department's *A Nation Online* have both convincingly demonstrated that broadband deployment, including that of Incumbent LECs, under the current regulatory regime continues to move forward rapidly. The Commission has noted that Incumbent LECs provide 93% of the ADSL in the market, while the "deregulated" DLECs have only a 7% share, and that "Incumbent LECs added customers at a much faster rate than competitive LECs between the third quarter of 2000 and the third quarter of 2001." Comparing Incumbent LEC ADSL residential and business line growth rates with those of cable, the FCC's data also shows that the Incumbent LECs' growth significantly exceeds that of cable.[21]

[19] Comments of AT&T Corp at pp. 25-26.
[20] *See, e.g.,* BellSouth Comments at pp. 21-27, Comments of SBC Communications, Inc. at pp. 65-67, and Comments of Verizon at pp. 5-8.
[21] Comments of Earthlink, Inc. at pp. 33-34.

VI. Conclusion

For the reasons stated above and in its Comments, Sprint urges the Commission to resist RBOC entreaties to be treated as nondominant in the provision of broadband services. Failing to do so will inevitably lead to the RBOCs leveraging their narrowband local monopoly into the broadband market – local and interexchange. At the same time, the Commission should either issue an order granting ILECs tariffing relief, including permitting one day tariff filings for broadband services, relief from cost support filings for broadband services and pricing flexibility in the provision of broadband services – including the ability to offer contract pricing -- or immediately commence an expedited proceeding to give ILECs such pricing flexibility and tariff filing relief.

Respectfully submitted,

SPRINT CORPORATION

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April 22, 2002

ATTACHMENT 3

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

	)	
In the Matter of	)	
	)	**CC Docket No. 01-338**
New Verizon Petition Requesting	)	
Forbearance From Application of	)	
Section 271	)	
	)	

SPRINT CORPORATION'S OPPOSITION TO PETITION FOR FORBEARANCE

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November 17, 2003

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SUMMARY

Last year, together with its comments in the Triennial Review proceeding, Verizon filed a petition asking the Commission to forbear from enforcing its unbundling obligations under section 271 of the Act in any instance where unbundling is not required after section 251 review. In the Triennial Review Order, the Commission rejected this request. On the eve of the expected denial of that petition, Verizon sought to recast its petition as a request to forbear from unbundling under section 271 of any such elements supporting "broadband" services. The Commission rightly denied the petition but nevertheless deemed Verizon's eleventh-hour request a "new" petition for forbearance. The Commission should reject this new petition as well.

The Triennial Review Order found that section 271 unbundling obligations are independent of section 251 unbundling obligations. This result is consistent with its prior landmark orders. Unbundling of the network elements on the checklist is mandatory for Bell Operating Companies if they choose to enter the interLATA long distance market, as Verizon has done. The Act makes these minimum unbundling requirements permanent, and it would make no sense for the Commission to lift these obligations after a BOC has received the long distance prize.

Regardless, the Commission lacks authority to grant Verizon's new request. Section 271(d)(4) expressly prohibits the Commission from adding or taking away from the minimum network elements Congress included on the checklist, which Verizon's petition fundamentally demands. Section 10(b) is a further legal barrier to Verizon. It

prohibits forbearance of any provision of section 271 until it and section 251(c) have been fully implemented. Contrary to Verizon's claims, that has not yet happened.

Verizon claims section 706 mandates forbearance to promote broadband investment. Section 706, however, is properly irrelevant to section 271 unbundling analysis. Verizon has not shown that forbearance would materially accelerate investment, nor that existing investment is insufficient for "reasonable and timely" deployment of advanced services. Verizon's petition, moreover, is not focused on advanced services at all, but would apply to any broadband services – which shows how far the petition overreaches. The petition also wrongly implies that broadband facilities are distinct from other facilities, when in fact they are one and the same network.

Even apart from its other legal barriers, the petition also fails to meet section 10's mandatory standards for forbearance. Verizon has not shown that section 271 unbundling for broadband services is unnecessary to ensure its charges and terms are just and reasonable and not discriminatory. Its very purpose is to block competitors, exploit its market position, and charge higher prices. Verizon has not shown that section 271 unbundling for broadband services is unnecessary to protect consumers. It claims consumers will benefit from accelerated deployment, but consumers necessarily would be harmed by fewer choices, less innovation, and less competition. Finally, forbearance would be contrary to the public interest and would harm, not enhance, the development of a competitive market. Section 271's statutory requirement of unbundled access to checklist network elements, including when used for broadband services, would in fact promote competition and investment.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	**CC Docket No. 01-338**
New Verizon Petition Requesting Forbearance From Application of Section 271	)	

SPRINT CORPORATION'S
OPPOSITION TO PETITION FOR FORBEARANCE

On behalf of its Incumbent Local Exchange Carrier ("ILEC"), competitive LEC ("CLEC")/long distance, and wireless divisions, Sprint opposes the New Verizon Petition Requesting Forbearance from Application of Section 271,[1] which was attached to the Commission's October 27, 2003 Public Notice FCC 03-263.

I. INTRODUCTION

On July 29, 2002, Verizon filed a petition asking the Commission to forbear, under section 10 of the Telecommunications Act of 1996, from enforcing section 271 for any network element that an incumbent local exchange carrier ("ILEC") might no longer be required to unbundled under section 251(c)(3). Verizon's petition repeated comments

[1] Verizon's new petition, as deemed by the Commission in Public Notice 03-263, includes an *ex parte* letter dated October 24, 2003 ("Verizon Letter") and an accompanying memorandum ("Verizon Memo").

it submitted in the Triennial Review proceeding,[2] where it argued that the Commission should allow Bell Operating Companies ("BOCs") to ignore their obligation to provide unbundled access to network elements on the section 271 checklist if the Commission determined that certain section network elements ("UNEs") would no longer be subject to unbundling under section 251.[3]

Verizon evidently realized that its request to ignore section 271 unbundling obligations could not be squared with the Triennial Review Order. At literally the eleventh hour, on the eve of what would necessarily have been the denial of its petition, Verizon improperly attempted to recast its petition as only "relat[ing] 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." Letter at 1.[4] Verizon wrote, "We hereby withdraw our request for forbearance with respect to any narrowband elements that do not have to be unbundled under section 251." Id.

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[2] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338 ("Triennial Review").

[3] 47 U.S.C. §§ 271(c)(2)(B)(iv)-(vi) and (x). Checklist item (iv) is "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services." Checklist item (v) is "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services." Item (vi) is "[l]ocal switching unbundled from transport, local loop transmission, or other services." Checklist item (x) is "[n]ondiscriminatory access to databases and associated signaling necessary for call routing and completion."

[4] Seventeen CLEC parties understandably complained about "Verizon's attempt to manipulate the statutory deadline for Commission action." *Ex Parte* Letter of Jonathan Askin, ALTS, et al., to Marlene Dortch, FCC (Oct. 27, 2003) at 2.

The Commission could have readily denied Verizon's petition by noting that the Triennial Review Order, issued in the same docket, had decided the issue and that Verizon had failed to meet its burden of proof under section 10. Instead, after explaining that the Triennial Review Order had "rendered moot" Verizon's original petition, the Commission found that Verizon had "abandoned the core legal rationale underlying its Petition and substituted a wholly different argument for forbearance." Public Notice at 2. The Commission "therefore den[ied] the petition" – properly, in Sprint's view – but generously "cho[]se to treat Verizon's October 24 *Ex Parte* Letter as a new forbearance petition."[5]

II. THE COMMISSION HAS ALREADY DETERMINED THAT SECTION 271 REQUIRES BOCS TO UNBUNDLE LOOP, TRANSPORT, AND SWITCHING, INDEPENDENT OF ANY SECTION 251 REQUIREMENTS.

Verizon's chief argument is the claim that forbearance would remove a "present uncertainty" about whether BOCs have a "stand-alone obligation" to provide unbundled

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[5] Verizon has appealed the denial of its original petition to the D.C. Circuit. Verizon Tel. Cos. v. FCC, Case No. 03-1396 (filed Nov. 5, 2003). While Sprint does not here quarrel with the Commission's decision to treat the letter as a new forbearance request, it is worth noting that Verizon's letter submission necessarily does not comport with the requirements of section 1.53 of the Commission's rules, and therefore the one-year deadline for action is inapplicable to the new petition.

> In order to be considered as a petition for forbearance subject to the one-year deadline set forth in 47 U.S.C. 160(c), any petition requesting that the Commission exercise its forbearance authority under 47 U.S.C. 160 shall be filed as a separate pleading and shall be identified in the caption of such pleading as a petition for forbearance under 47 U.S.C. 160(c). Any request which is not in compliance with this rule is deemed not to constitute a petition pursuant to 47 U.S.C. 160(c) and is not subject to the deadline set forth therein.

47 C.F.R. § 1.53 (emphasis added).

access to broadband facilities under section 271. Verizon Memo at 2. There is no uncertainty. In the Triennial Review Order,[6] the Commission squarely rejected Verizon's argument that 271 obligations on particular network elements parallel Commission action under section 251. The Commission reiterated that section 271(c)(2)(B) imposes an "*independent and ongoing* access obligation" for the items identified in the checklist. Triennial Review Order at ¶ 654 (emphasis added). The Commission explained further that

> [T]he 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.*

Id. at ¶ 653 (emphasis added).[7] Indeed, the Public Notice for the new petition flatly states, "[i]n the Triennial Review order ... the Commission *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 network element under section 271." Public Notice at 2, citing Triennial Review Order at ¶¶ 653-55.

[6] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking* (rel. Aug. 21, 2003) ("Triennial Review Order").

[7] The Commission declined to require BOCs to combine network elements under section 271, and noted it had previously found TELRIC pricing need not apply to network elements provided under section 271. Sprint believes both conclusions are unwise and should be revisited.

Verizon argues that the Commission's determination to limit unbundled access under section 251 to certain broadband facilities, "such as fiber to the premises loops, the packetized functionality of hybrid loops, and packet switching" (Verizon Memo at 1) should render section 271 obligations irrelevant. In fact, the existence of the statutory obligation to provide access to broadband elements under section 271 does not "compromise" (id.) the Commission's section 251(c) determinations. The Triennial Review Order anticipates that, notwithstanding the lifting of section 251(c) obligations, BOCs would be obligated to provide competitors with wholesale access to broadband facilities on just, reasonable, and nondiscriminatory terms.[8]

> [W]e 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.

The Commission reached the same conclusion in the UNE Remand Order in November 1999.[9] When the Commission determined not to require unbundling under section 251(c), in certain circumstances, of circuit switching and shared transport, it nevertheless recognized that section 271 would require unbundling independent of section 251. As it explained, "[n]onetheless, providing access and interconnection to these elements remains an obligation for BOCs seeking long distance approval." UNE

[8] Triennial Review Order at ¶ 253.

[9] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd. 3696 (1999) (subsequent history omitted) ("UNE Remand Order").

Remand Order at ¶ 468.[10] The Commission also reinforced this finding by incorporating that determination in every grant of BOC authority to provide in-region interLATA services under section 271.

III. VERIZON'S PETITION IS PRECLUDED BY THE ACT.

A. The Commission Lacks Authority to Grant Verizon's Request.

Verizon's request is precluded by the Act itself. The statute expressly forbids the Commission from adding to or taking away from the mandatory elements subject to unbundling under section 271. In section 271(d)(4), Congress made clear 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). Verizon ignores this provision. The words "by rule or otherwise," however, are plainly broad enough to include action on a petition for forbearance. The Commission should deny the petition immediately on this basis alone.

Verizon opined that section 271 should be "read to not extend to the broadband elements of the network," and suggests that the Commission should "remove any doubt on that score." Verizon Memo at 15. Verizon belittles checklist items (iv) and (vi) as "contain[ing] very little determinate content." Id. The lack of detail in these checklist items, however, shows not that they can be narrowed, but instead that they are intentionally broad. Thus, for example, checklist item (iv) refers to "loop, unbundled

[10] Tellingly, neither Verizon nor any other party appealed that determination, and the D.C. Circuit's ruling in USTA did not affect it. USTA v. FCC, 290 F.3d 415 (D.C. Cir. 2002).

from local switching," without limiting it to copper loop, or narrowband loop, or even to existing plant.

Verizon points to AT&T Corp.[11] to suggest that the FCC has free rein to limit or redefine these checklist items. In fact, the court observed only that, in assessing section 271 long distance applications, the checklist review need not require BOC perfection in its provision of nondiscriminatory access to "local loop transmission." It was not an invitation to exclude whole networks from statutorily-required unbundling. Likewise, Verizon is wrong to claim that unbundling obligations under section 271 can be justified only for "'core' legacy elements." The Act is not limited to facilities, or technology (or competitors, for that matter) that existed as of 1996, or any other time. Verizon can point to nothing in the Act to justify that claim.

Turning to another legal barrier to forbearance, Verizon turns section 10(b) on its head, arguing that "section 10(d) expressly authorizes forbearance from section 271's requirements." Verizon Memo at 4. On the contrary, far from opening the door to forbearance that was already permanently shut by section 271(d)(4), section 10(d) serves only to limit Commission authority further. It provides that, where the statute does not otherwise preclude forbearance, "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).

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[11] AT&T Corp. v. FCC, 220 F.3d 607, 624 (D.C. Cir. 2000) (cited by Verizon Memo at 16).

Verizon asserts that section 271 must have already been "fully implemented," because the Commission granted section 271 authorizations after finding BOCs had "fully implemented the competitive checklist" under section 271(d)(3)(A)(i). Verizon Memo at 13. The full implementation of section 271, however, is obviously a much larger issue than just the momentary implementation of the checklist items. The BOCs were and are dominant in the local exchange and exchange access markets. It would make no sense for Congress to impose the market-opening requirements of section 271 unbundling on BOCs as a condition for entry into the in-region long distance market, only to allow those requirements to be removed. Congress made the permanent opening of BOC markets to be the trade-off for BOC entry into the interLATA long distance market.

Congress intended these obligations to be ongoing, because these core elements are essential to creating a market in which local competition can function.[12] The checklist requirements of section 271(c)(2)(B) – particularly items (iv)-(vii), (x), and (xii) – show that Congress concluded that these most critical network elements must be made available by BOCs on an unbundled basis, whether or not they meet the "necessary" or "impair" tests applicable to all ILECs in section 251(d)(2).[13] Congress required BOCs to provide these elements without regard to the Commission's analysis under section

[12] "[T]he competitive checklist [sets] forth what must *at a minimum* be provided by a Bell Operating Company in any interconnection agreement approved under Section 251 to which the company is a party." Sen. Rep. No. 104-23 at 43 (1995) (emphasis added).

[13] Congress required non-discriminatory access to network elements in accordance with sections 251(c)(3) and 252(d)(1), but also specifically required the BOCs to make available unbundled loops; unbundled transport; unbundled local switching; access to 911/E911 services, directory assistance, and operator services; and access to databases and signaling necessary for call completion and information needed for local dialing parity.

251(d)(2). These obligations are preconditions to in-region long distance entry by the BOCs and continuing obligations after receiving such authority. That is why they are grouped with other, ongoing market opening obligations, including interconnection under section 251(c)(d); nondiscriminatory access to network elements under sections 251(c)(3) and 252(d)(1); nondiscriminatory access to BOC poles, ducts, conduits and rights of way; directory assistance and listings; interim number portability; dialing parity; and resale under sections 251(c)(4) and 252(d)(3).[14] It is for that reason that section 271(d)(6) directs the Commission to revoke long distance authority if a BOC "has ceased to meet any of the conditions required for such approval."

Indeed, Verizon's entire rationale is based on the assumption that section 251(d) – which directs the Commission to undertake its unbundling review of elements subject to section 251(c) – somehow overrides section 271. That assumption is false, whether applied to elements that can support narrow- or broadband services. If Congress intended section 251 analysis to trump the section 271 checklist, it could easily have expressly provided so. But Verizon offers no evidence of that intention. There is not even a cross reference between section 251(d)(2), which instructs the Commission how to determine when and if individual network elements must be unbundled, and items (iv) through (vi) and (x) at section 271(c)(2)(B). That makes sense, both because section 271's "competitive checklist" serves a difference purpose than section 251(d)(2) and because it applies to a different and narrower group of carriers – BOCs, distinct from all other ILECs. The presence of checklist item (ii) – which requires "nondiscriminatory access to

[14] See 47 U.S.C. §§ 271(c)(2)(B)(i)-(iii), (vii)-(Viii), (xi), and (xii-xiv).

network elements in accordance with the requirements of Sections 251(c)(3) and 252(d)(1)" – also shows that sections 251(d)(2) and 271(c)(B) serve different purposes.

B. Section 706 is Irrelevant to Section 271 Unbundling Requirements.

Verizon asserts that section 706[15] of the Act "all but compels forbearance" from its obligations under section 271 to unbundled broadband elements that the Commission has exempted from unbundling under section 251. Verizon Memo at 8. Leaving aside whether the Commission's action in exempting broadband elements from unbundling under section 251 was appropriate from a legal or policy perspective, section 706 is necessarily irrelevant to the scope of a BOC's access obligations under section 271.

In the Triennial Review Order, the Commission concluded that section 706 was relevant to section 251 unbundling analysis only because the "at a minimum" clause of section 251(d)(2) gave the Commission authority "to take Congress's goals into account" in deciding which elements must be unbundled. Triennial Review Order at ¶ 176. Section 271 has no "at a minimum" clause. Instead, section 271(d) expressly prohibits the Commission from altering, "by rule or otherwise," the list of network elements that BOCs must make available.

In any event, Verizon reads section 706 too carelessly. It is not a "specific statutory mandate" (Verizon Memo at 7) to embrace any action that might accelerate expansion of broadband facilities. Rather, it asks the Commission only to "encourage the deployment on a reasonable and timely basis of advanced telecommunications

[15] Section 706 is codified in a footnote to the Act. 47 U.S.C. § 157 nt.

capability." 47 U.S.C. § 157 nt. Sprint believes such investment is already progressing, and will continue to progress, "on a reasonable and timely basis" even with section 271 unbundling requirements in place.[16] If it would not, Congress itself would have provided BOCs the exemption Verizon seeks. But even if one assumed that forbearance would accelerate investment, Verizon has not shown that such forbearance is *necessary* for "reasonable and timely" deployment.

Verizon also conspicuously fails to limit its request to "advanced telecommunications capability," but instead uses the conveniently ambiguous term, "broadband." In RFPs for equipment manufacturers, the BOCs have called for data speeds of 622 mbps downstream and 122 mbps upstream. The Commission has described "advanced communications capability" as encompassing simultaneous voice, high-speed data, and full motion video. Verizon sets no standard at all. It does not even expressly limit its request to the mass market. The petition would stretch section 706 far beyond any allowable bounds.

[16] Despite a difficult economy and all the purported regulatory disincentives of unbundling, in 2002 Verizon alone invested $12 billion to upgrade its networks for higher speed capability, adding 400,000 miles of fiber and extending xDSL capability to 60% of its lines. Verizon 2002 Annual Report at 2, 4. Even before the Triennial Review Order was released, Verizon had announced plans to extend broadband capacity to 80% of its lines by the end of 2003, committing to "aggressive network expansion and in new technologies ... to compete with cable providers. See, e.g., Verizon Investor Relations, "Verizon Supercharges DSL" (May 13, 2003).

IV. THE PETITION FAILS TO MEET SECTION 10'S REQUIREMENTS FOR FORBEARANCE

Under section 10(a) of the Act, the Commission may forbear from applying requirements of the Act of its implementing regulations only if the petitioner proves three criteria are met:

> (a) enforcement is not necessary to ensure that the charges and practices of the carrier are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (b) enforcement is not necessary to protect consumers; and
>
> (c) forbearance is consistent with the public interest.

47 U.S.C. § 160(a). To limit Commission discretion further, section 10(b) requires that, in considering the public interest under section 10(a)(3), "the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will *enhance* competition...." 47 U.S.C. § 160(b) (emphasis added). Where the effect on competition may be harmful, the Commission must deny forbearance even if the individual threshold requirements of section 10(a) arguably have been met. In this case, even apart from the other legal barriers to forbearance,[17] this simply underscores that Verizon's petition cannot be granted.

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[17] Even "a strong public interest showing can not overcome a failure to demonstrate compliance with one or more checklist items. The Commission is specifically barred from 'limit[ing] ... the terms used in the competitive checklist,' or forbearing from requiring compliance with all statutory conditions under section 271." 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 at ¶ 424 (1999) (footnotes omitted, citing 47 U.S.C. §§ 160(d), 271(d)(4)).

A. Verizon has not established that section 271 unbundling for broadband competition is not necessary to ensure just and reasonable charges and practices and to guard against discrimination.

The BOCs remain overwhelmingly dominant in the local exchange and exchange access markets in which they are the ILEC. CLECs hold just 13% of access lines,[18] and IXCs must rely on BOCs for the vast majority of their exchange access.[19] BOCs enjoy vast, contiguous service territories, immense scale, and a huge customer base and network made possible by decades of monopoly status.[20] They also have shown a pattern of resisting competition in violation of the Act's requirements. Together, they have been assessed fines, penalties, and compelled refunds of over $2.1 billion for market misconduct and violations of statutory obligations, merger conditions, and conditions of section 271 approvals.[21] Verizon alone has incurred more than $300 million in such penalties.[22] Verizon has been repeatedly fined, in particular, for its continuing unwillingness to meet wholesale service standards that are essential to local competition. And just this month Verizon was ordered to pay more than $12 million to Starpower – a broadband competitor – for violations of its interconnection agreement and consequent

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[18] Local Competition Status as of Dec. 31, 2002, Industry Analysis Div., Common Carrier Bureau (June 2003) at Tables 1, 2.

[19] See Comments of Sprint Corp., Performance Measurements and Standards for Interstate Special Access Services, CC Docket No. 01-321, at 4 (Jan. 22, 2002); Comments of AT&T Corp., Review of the Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, CC Docket No. 01-337, at 28 (Mar. 1, 2002).

[20] They are also among the largest corporations in the nation. Verizon alone reported $68 billion in revenue last year.

[21] The competition advocacy group, Voices for Choices, maintains a running tally of these penalties. See "Bell Fine Watch" at *http://www.voicesforchoices.com.*

[22] Id.

unlawful failure to provide interconnection on just, reasonable, and nondiscriminatory terms.[23]

The Commission and many state commissions have found these recurrent enforcement measures necessary to protect the competitive marketplace, to protect consumers, and to protect the public interest. They establish that the BOCs have imposed and continue to impose "charges, practices, classifications, or regulations" that are unjustly and unreasonably discriminatory and that Section 271 checklist protections remain necessary for "the protection of consumers" and to promote "the public interest." 47 U.S.C. § 160(a).

The enormous market advantages enjoyed by BOCs, and the risks they pose to the marketplace, apply to broadband just as readily as to narrowband services. By securing this regulatory protection, Verizon would be in a position to exploit its duopoly status in some markets – and its monopoly status in others – to establish retail rates and practices without the full competitive check that the Act clearly intends to bring about.

Verizon asserts that there can be no "market leveraging concerns' because it claims the BOCs "are not remotely dominant in the market for those [broadband] services." Verizon Memo at 18. This view, however, takes a short-term view of the marketplace – one that has no support in the Act. It ignores Verizon's ability to exploit its dominance in the local exchange and exchange access markets to build a dominant position in the broadband market. Congress understood that the BOC monopolies were

[23] Starpower Comms., L.L.C. v. Verizon South, Inc., File EB-00-MD-19, FCC 03-278 (rel. Nov. 7, 2003).

about more than just the "historical legacy voice networks" (Verizon Memo at 4) they owned. The Act was a response to and a replacement for the AT&T Modification of Final Judgment,[24] and, as the Supreme Court explained, its requirements "were intended to eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises…."[25] Congress made competitors' access to BOC networks – and not merely to their legacy plant – the price for their entry into the interLATA long distance market. Section 706, a footnote in the Act, was not intended to trump that fundamental, structural requirement.

B. Verizon has not established that section 271 unbundling for broadband competition is not necessary to protect consumers

Verizon says nothing about the protection of consumer interests. It merely asserts that by protecting BOCs from their statutory unbundling obligations under section 271, they "can get on with the business of designing and deploying next generation broadband networks in a rational and efficient matter [sic]." Verizon Memo at 19. Verizon expects the Commission to accept this assumption of accelerated investment purely on faith. With competitors completely barred from wholesale access to unbundled network elements for broadband services, Verizon says, "consumers will be the ultimate beneficiaries." Id. This, too, Verizon expects the Commission to take on faith.

Remarkably, no consumer representatives have endorsed this BOC view, no matter how eager they may be to see the expansion of broadband services. That makes sense. Even if one assumed, for purposes of argument, that BOC investment in

[24] United States v. American Telephone & Telegraph Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

[25] Verizon Comms. Inc. v. FCC, 122 S. Ct. 1646, 1654 (2002).

broadband facilities would be materially greater (which Sprint disputes), it does not follow that section 271 unbundling is unnecessary to protect consumers. What Verizon seeks, openly, is protection from competition – the ability to exclude competitors and thus largely limit the market, at best, to a duopoly of cable and BOC providers. Although Verizon says "CLECs are just as capable as the BOCs of building new fiber out to customer premises" (Verizon Memo at 19), denying all access to BOC facilities would require competitors seeking to enter the market to build entire networks before having a single broadband customer. Meanwhile, Verizon enjoys a BOC's ability to leverage its huge legacy customer base, gained through decades of monopoly status, by bundling services. Congress recognized that competition is necessary to protect consumers, which is why it incorporated the BOCs' independent unbundling requirement in section 271 and prohibited the Commission from altering it.

Ironically, for a BOC that complained in the Triennial Review about CLECs' potential ability to cherry-pick its most profitable customers, the whole purpose of excluding wholesale access to broadband facilities is to ensure that Verizon can target those customers without the full pressures of competition. Verizon implies that competition with cable TV broadband providers alone is sufficient to ensure that rates and practices are just and reasonable. Verizon Memo at 18. Yet, not only is the cable TV industry making comparatively slow entry into the voice market, it cannot offer the full range of bundled services that the BOCs are deploying, particularly DS3 and higher capacities. With the competitive pressures of unbundling removed, and with only a limited duopoly check, Verizon would have less pressure on its price and services.

Forbearance therefore could only *harm* consumers. It would block new entrants and discourage competition by requiring CLECs to build their own facilities, something Congress did not intend.[26] It would limit consumer choices, chill innovation, and increase costs for consumers. It would grant BOCs a measure of market power that the Act was clearly intended to dilute.

C. Forbearance would be contrary to the public interest and would harm competition.

Verizon claims the need for this protection is "urgent" (Verizon Letter at 1), because "investment disincentives" (Verizon Memo at 10) are preventing it from making adequate investment in broadband and next generation networks. Verizon scarcely needs the anticompetitive protection for broadband that it seeks. Even while the rest of the industry is suffering an extraordinary downturn, the BOCs are already investing in broadband capabilities at a very healthy rate, despite the supposed "uncertainty and financial risk" that Verizon argues currently "undermine[s] deployment." Verizon Memo at 11. The BOCs are rapidly gaining market share and are quickly closing the gap with cable TV companies even in a stand-alone the broadband market, due to their already accelerated investment in xDSL services. Moreover, if the competitive threat posed by cable TV providers is as acute as Verizon implies, the BOCs already have full incentive to invest, without some artificial and anticompetitive subsidy.

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[26] See Verizon, 122 S.Ct. at 1662, 1664 (noting that the Act does not envision or require any threshold investment in facilities by requesting carriers).

The entire argument that the statutory section 271 unbundling requirements somehow unduly discourage investment lacks credibility. There would be no legitimate reason why Verizon should not be happy to provide wholesale access to broadband facilities. The additional revenues, increased utilization, and lowered unit costs would enable it to expand its network, and its market, faster and at lower cost. In drafting the Act, and section 271 in particular, Congress was looking to the model of the long distance market. In that market, carriers were ordered – at a time when AT&T was dominant – to make their services and facilities available for resale to allow competition to develop. Today, IXCs willingly sell to resellers and avidly compete for wholesale business; no IXC is seeking to have this requirement lifted. Unless Verizon has other, anticompetitive objectives, it should be eager to maintain these checklist items indefinitely.

Verizon's rationales for wanting to block access to these elements are weak. Its main argument is that making these networks accessible to competitors would require "costly redesign of networks," introduce "inherent inefficiencies," and require "development of ... systems to cope with the complex requirements of unbundled access." Verizon Memo at 10, 11. However, all ILECs are already subject to these requirements under section 251, in addition to their interconnection obligations generally. And the Commission must realize that broadband and narrowband facilities are not separate from one another. Next generation networks are not built in parallel with narrowband networks, but are upgrades of existing networks. There are no "old wires" and "new wires;" these networks are actually one and the same. Thus, any marginal burden for broadband is surely limited, and surely insufficient to justify such anticompetitive results. Moreover, failing to design accessibility to unbundled network elements for broadband would necessarily mean designing networks to frustrate access to unbundled network elements for non-broadband services. That plainly would be contrary to the Act and to the Triennial Review Order's prohibition against engineering networks to frustrate competitors' access to network elements under sections 251 and 271. Triennial Review Order at ¶ 294.

Verizon next argues that "[e]xperience has proven that unbundling obligations evolve over time as they are further defined and interpreted," with the results that "ILECs have been subject to a constantly shifting range of requirements implementing ... unbundling requirements." Verizon Memo at 11. Verizon has less cause to complain about a shifting regulatory environment than CLECs; new entrants are obviously more vulnerable to changing regulatory winds than the massive BOCs. Verizon also voices fear that "although TELRIC rules do not apply to elements unbundled under section 271 alone, the potential for intrusive regulatory involvement in the pricing of these elements remains." Verizon Memo at 11. Why? Verizon fears "other parties will ... try to game the regulatory process, either to pre-empt the negotiations entirely or to obtain extra leverage." Id. Coming from a BOC that the Enforcement Bureau had just found, in interconnection arbitration, had stonewalled a voice and broadband competitor for years,[27] the argument is as ironic as it is weak.

[27] See n.23, supra.

V. CONCLUSION

The Commission properly denied Verizon's original petition. Narrowing Verizon's request to broadband facilities does not change the result. Verizon's new petition is contrary to the statute, contrary to Congressional goals, contrary to Commission's prior readings of Section 271, and contrary to the stringent standards of Section 10.

Respectfully submitted,

SPRINT CORPORATION

By ______________________

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November 17, 2003

ATTACHMENT 4

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	**CC Docket No. 01-338**
New Verizon Petition Requesting Forbearance From Application of Section 271	)	

SPRINT CORPORATION'S REPLY

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November 26, 2003

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	**CC Docket No. 01-338**
New Verizon Petition Requesting Forbearance From Application of Section 271	)	

SPRINT CORPORATION'S REPLY

Sprint Corporation ("Sprint"), on behalf of its Incumbent Local Exchange carrier ("ILEC"), competitive LEC ("CLEC")/long distance, and wireless divisions, replies to the oppositions and comments filed by other parties in response to the New Verizon Petition Requesting Forbearance from Application of Section 271.[1]

I. INTRODUCTION AND SUMMARY

The petition prompted ten sets of comments. Seven filings – representing 32 competitive carriers – opposed the petition. Three filings – two Bell Operating Companies ("BOCs") and a union claiming to represent BOC employees – supported it. All of the non-BOC parties agree that Verizon's "new" petition must be denied. They

[1] Verizon's new petition, as deemed by the Commission in Public Notice 03-263, was filed October 24, 2003 and attached to the Commission's October 27, 2003 Public Notice FCC 03-263. Oppositions and comments were filed on November 17, 2003.

explain that the Commission has already recognized that section 271 imposes separate and ongoing obligations on BOCs to unbundle listed network elements, whether they support narrow- or broadband services. They also show that forbearance is precluded by the text, objectives, and structure of the Act, and that section 706 is inapplicable and cannot justify Verizon's request in any event. Verizon's few supporters object to BOCs being treated differently from other ILECs, but Congress imposed section 271 as the price for long distance market entry, and did so for good reasons. On the whole, the comments show that Verizon has failed to prove it meets the demanding requirements of section 10. Section 271 unbundling of broadband elements remains necessary to protect the marketplace, consumers, and the public interest.

II. THE COMMISSION HAS ALREADY DETERMINED THAT SECTION 271 IMPOSES A SEPARATE AND ONGOING UNBUNDLING OBLIGATION ON THE BOCS.

Verizon's petition is based on a "false premise" because "[t]he Commission's decision not to require ILECs to unbundled certain broadband network elements under section 251 does not affect Verizon's obligation to make those same network elements under section 271 of the Act." PACE at 7-8. The Commission recognized that "the plain language and structure of section 271(c)(2)(B) establishes that BOCs have an *independent and ongoing access obligation* under section 271." Triennial Review Order at ¶ 654 (emphasis added). "The Commission has spoken unmistakably" on this issue.

Covad at 2. See Triennial Review Order[2] at ¶¶ 253, 653-655; Public Notice at 2; UNE Remand Order[3] at ¶ 468.

Qwest claims that "establishing an independent and ongoing unbundling obligation under section 271 with respect to broadband elements is fundamentally inconsistent with the Act" and "contrary to the Act's objective of stimulating facilities-based competition." Qwest at 2. This is a misstatement of the Act and of Congress's goals. First, it is not the Commission that is "establishing" the obligation to unbundle broadband elements. As the Commission recognized, it is "established" by the Act itself. Triennial Review Order at ¶¶ 653, 654. Second, "the fundamental objective of the 1996 Act" is not investment in BOC facilities but to "bring consumers ... in all markets the full benefits of competition."[4] The Supreme Court observed that the Act, in pursuing that goal, envisions access to unbundled network elements as one means for competition and requires no threshold investment in facilities.[5] Qwest cites USTA and Iowa Utilities

[2] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking* (rel. Aug. 21, 2003) ("Triennial Review Order").

[3] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd. 3696 (1999) (subsequent history omitted) ("UNE Remand Order").

[4] Petition of US West Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance, *Memorandum Opinion and Order*, 14 FCC Rcd 16252 ¶ 46 (1999). See MCI at 9.

[5] Verizon Comms. Inc. v. FCC, 122 S. Ct. 1646, 1662, 1664 (2002).

Board as opposing "open-ended" unbundling.[6] These decisions, however, focused on the Commission's prior section 251 analysis. They did not deal with, and are not relevant to, section 271 obligations.

Indeed, although Qwest claims it is "illogical" to read section 271 as an ongoing obligation for BOCs (Qwest at 11), Congress understood that, in a competitive market, BOCs should be content to provide such wholesale access indefinitely. Congress was looking to the model of the long distance market, in which carriers were ordered make their services and facilities available for resale and today compete vigorously for wholesale business. Sprint at 18. Like Verizon, Qwest simply wants to avoid its section 271 obligations for broadband in order to exploit its dominance in its local exchange markets with bundled services. Even most cable TV broadband providers cannot offer all of the voice, data, and broadband services that a BOC can bundle. Sprint at 16.

SBC claims that "the Commission has consistently held that the scope of the unbundling obligations under the Competitive Checklist is no more extensive than the scope of those same obligations under section 251." SBC Att. at 1-2, citing section 271 application orders. Actually, the orders instead reflect only that the Commission cannot impose additional unbundling requirements as a condition of section 271 authority. That is dictated in part by section 271(d)(4)'s prohibition of any changes – additions or subtractions – to the competitive checklist, including in particular items (iv)-(vi) and (x). Similarly, Qwest is wrong to assert that the Act "contemplates removal of the section 271 unbundling obligation once the corresponding section 251 unbundling obligation has

[6] USTA v. FCC, 290 F.3d 415 (D.C. Cir. 2002) and AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366 (1999), cited by Qwest at 7-8.

been removed," ostensibly because sections 251 and 271 serve a "common purpose." Qwest at 9, 10. The Act imposed ongoing unbundling under section 271 as the price for any BOC that wanted to enter the in-region interLATA long distance market. If unbundling obligations were the same under sections 251 and 271, Congress would have simply stopped the checklist at item (ii). Covad at 4.

SBC and Qwest also join Verizon in some revisionist history. They claim section 271 "was intended to provide market-opening requirements in the event an application for section 271 relief *preceded* Commission unbundling rules" promulgated under section 251. SBC Att. at 2 (emphasis in original); Qwest at 11. The Act does not limit section 271 in this way, and SBC and Qwest offer no evidence to back their claim. Congress surely expected section 251 unbundling rules would precede any grants of section 271. No BOC would be ready to meet all section 271 requirements immediately, and the Commission acted promptly to issue section 251 unbundling rules. Indeed, the first section 271 application was not even filed until nearly six months after the Commission issued its section 251 unbundling rules.[7] The first grant of authority under section 271 issued more than two years after the Commission issued rules implementing section 251.[8]

The competitive carriers effectively rebutted Verizon's claim that section 271 was not meant to apply to "broadband" facilities. MCI at 25-26. See also AT&T at 26-30; Z-

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7 Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd. 15499 (1996) (subsequent history omitted).

8 Ameritech's application for Michigan was filed January 27, 1997, but withdrawn February 11, 1997. The first BOC application was approved – Verizon's for New York – only on December 22, 1999.

Tel at 7-12; PACE at 11, Allegiance at 4. CWA (at 5) claims section 271 "was never designed to interfere with a Bell company's deployment of an advanced ... network," but was intended only "to open up the Bell companies' legacy circuit switched network." See also SBC Att. at 13. But there is no basis in the Act for this claim. The D.C. Circuit has recognized that no exception can be read into the Act for "broadband."[9]

Thus, section 271 is not limited to "core legacy systems that make up the traditional local telecommunications network." SBC Att. at 13. It is not limited to facilities or even technologies that existed in 1996. Indeed, it could not reasonably be so limited, because there are no separate voice and broadband networks – no "old wires" and "new wires." These networks are one and the same. MCI at 20-21; Sprint at 11. Furthermore, the wording of the checklist is broad, and given the market-opening purposes of the Act, intentionally so. By its plain language, competitive "access" certainly encompasses broadband and narrowband facilities, including all features, functions, and capabilities. SBC, Qwest, and CWA -- like Verizon – can point to nothing in the Act that would justify any narrower reading.

[9] ASCENT v. FCC, 235 F.3d 662, 668 (D.C. Cir. 2001) (noting the Commission "concedes" that "Congress did not treat advanced services differently from other telecommunications services.").

III. VERIZON'S PETITION IS PRECLUDED BY THE ACT.

A. The Commission lacks authority to grant Verizon's request.

The competitive carriers emphasized that the Commission lacks authority to grant the forbearance sought by Verizon. AT&T at 7-9; MCI at 11-12; PACE at 23; Sprint at 6. In section 271(d)(4), Congress specifically forbade "the Commission to alter the section 271 checklist – whether "through forbearance or any other means." Covad at 3.

> The 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(c)(2)(B). The language is clear. SBC, Qwest and CWA – like Verizon – simply ignore this statutory requirement.

Even apart from the absolute bar in section 271(d)(4), the competitive carriers show that section 10(d) precludes forbearance because section 271 has not yet been fully implemented. Allegiance at 7-9, AT&T at 9-16; MCI at 16-19; Z-Tel at 12-15; Sprint at 7-9, citing 47 U.S.C. § 160(d). Covad explains (at 5), "Verizon's construction of the statute pays lip service to this requirement, but fails to render it meaningful in any sense." Section 271 sets out the requirements that must be met if a BOC wishes to enter the in-region interLATA long distance market. In Verizon's view, to enter the interLATA markets, "a BOC would simply have to demonstrate its compliance with the checklist provisions of section 271 for one brief, shining moment." Id. SBC and Qwest take the same unsupportable position.

Given the market opening goals of the Act,[10] and the obvious Congressional concern about BOC market dominance, such a construction of section 271 would make no sense. Section 10(d) requires not just that the checklist be "fully implemented" when a BOC submits an application under section 271, as section 271(d)(3)(A)(i) does. It requires that all of section 251(c) and section 271 be "fully implemented" before the Commission may exercise forbearance on any aspect of either section's requirements. Those sections are not yet "fully implemented" simply because a BOC has received long distance authority, whether or not a given network element has been removed from unbundling under section 251(d)(2). Cf. Qwest at 15-16, SBC Att. at 7-8. These sections are "fully implemented" when competitive market conditions are such that they are no longer needed.[11] AT&T at 15-16. That trade-off was the price BOCs were to pay for entry into the interLATA long distance market.

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[10] Sections 251(c) and 271 are "cornerstones of the framework Congress established in the 1996 Act to *open local markets to competition*." Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 FCC Rcd 24012 at ¶ 73 (12998) (subsequent history omitted) (emphasis added).

[11] Consistent with its purpose, section 271 contains no time limit whatever. In denying another Verizon petition, addressing section 272's separate affiliate requirements, the Commission found that section 271 "incorporat[es]" section 272's requirement that a BOC "maintain the affiliate structure for *at least* three years" after receiving section 271 authority in each state. Sprint believes the Commission was mistaken to find these safeguards can be lifted at all, but if "section 272 cannot be deemed to have been 'fully implemented' until this three-year period has passed," then certainly SBC and Qwest cannot fairly argue that section 271 is "fully implemented" immediately upon receiving long distance authority. Petition of Verizon for Forbearance From the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under § 53.203(a)(2) of the Commission's Rules, *Memorandum Opinion and Order*, FCC 03-271 (rel. Nov. 4, 2003) at ¶¶ 6, 7 (emphasis added).

B. Section 706 is irrelevant to section 271 unbundling requirements.

SBC, Qwest, and CWA echo Verizon's assertion that section 706 is a "statutory mandate" to encourage investment in broadband and next-generation facilities. SBC argues that it compels the exercise of ... forbearance authority to ensure that any section 271 unbundling obligations do not undo the Commission's Triennial Review efforts to free broadband from unbundling." SBC Att. at 12.

Sprint and the competitive carriers dispute the contention that forbearance would accelerate BOC investment. By removing competitive pressures, it would just as likely retard investment by CLECs and BOCs alike. Z-Tel at 21. Regardless, however, the Triennial Review Order concluded that section 706 was relevant to section 251 unbundling analysis only because the "at a minimum" clause of section 251(d)(2) gave the Commission authority "to take Congress's goals into account" in deciding which elements must be unbundled. Triennial Review Order at ¶ 176. Section 271 has no "at a minimum" clause. Instead, section 271(d)(4) expressly prohibits the Commission from altering or limiting the list of BOC network elements that requesting carriers may access. Thus, "section 706 does not grant the Commission authority to review 271 unbundling obligations." Allegiance at 9. <u>See</u> <u>also</u> MCI at 11-12; Sprint at 10.

SBC, Qwest, and CWA also read section 706 too expansively. Codified in a footnote to the Act, section 706 does not authorize any action that might bolster BOC investment in broadband facilities. It merely asks the Commission to "encourage the deployment *on a reasonable and timely basis* of advanced telecommunications capability." 47 US.C. § 157 nt. (emphasis added). Forbearance is not "necessary" for "reasonably and timely" deployment, because such investment is already progressing healthily even with section 271 unbundling requirements in place. Like Verizon, SBC and Qwest are already investing vigorously in expanded xDSL facilities, and were doing so long before the Triennial Review concluded.

SBC attempts to justify Verizon's petition (and its own) by pointing to the Commission's determination that BOCs do not have a "first mover advantage in greenfield settings." SBC Att. at 13-14, citing Triennial Review Order at ¶ 275. Rather than bolster the BOCs' position, this simply underscores how Verizon has not limited its own petition to greenfield settings, or to FTTH, or even to the mass market. These BOCs have not even limited their argument to "advanced telecommunications capability." Section 706 could never justify such overreaching.

IV. CONGRESS PROVIDED THAT BOCS MUST BE SUBJECT TO UNBUNDLING OBLIGATIONS UNDER SECTION 271 AS A CONDITION FOR LONG DISTANCE MARKET ENTRY.

SBC and Qwest also repeat the BOCs' lament – previously heard and rejected by the Commission – that having to unbundle any network elements under section 271 unfairly singles out Bell Operating Companies. SBC and Qwest – like Verizon – object to being treated differently than other ILECs. Qwest (at 11-12) argues it would be "irrational ... to remove unbundling obligations for ILECs under section 251, yet keep unbundling obligations in effect for the identical network elements under section 271 for the BOCs, which cover some 80% of all local access lines." But Congress specifically directed that the BOCs must unbundled network elements under section 271 if they chose to enter the in-region interLATA long distance market, as all have done. It would be irrational, and unlawful, for the Commission to attempt to remove these statutory conditions.

Congress explicitly differentiated between BOCs and other ILECs and had obvious and legitimate reasons for doing so. MCI at 8-9. The Act was a response to and a replacement for the AT&T Modification of Final Judgment,[12] and the Supreme Court emphasized that the Act's requirements "were intended to eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises...." Verizon, 122 S. Ct. at 1654. The BOCs nevertheless challenged the Act, and section 271 in particular, on Constitutional grounds. Ultimately, they lost those appeals.[13]

Congress imposed these "separate and ongoing" section 271 unbundling requirements on the BOCs, because it recognized they were and would likely long remain overwhelmingly dominant in the local exchange and exchange access markets in which they are the ILEC.[14] They would have the incentive and the ability to adversely affect long distance competition and to frustrate the development of local competition, a prediction that the last seven years has indeed borne out.[15] Other ILECs, in contrast, do

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[12] United States v. American Telephone & Telegraph Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

[13] See SBC Comms. v. FCC, 154 F.3d 226, 246 (5th Cir. 1998), cert. denied, 525 U.S. 1113 (1999); BellSouth v. FCC, 162 F.3d 678, 691-92 (D.C. Cir. 1998).

[14] See BellSouth Corp. v. FCC, 162 F.3d 678, 691 (D.C. Cir. 1998) ("Congress clearly had a rational basis for singling out the BOCs, *i.e.*, the unique nature of their control over their local exchange areas.").

[15] See Sprint at 13-14.

not have this market power. Because of their much smaller scale and geographically dispersed (and largely rural) local operations, they are not in the same position as the BOCs to adversely affect interexchange competition.[16] For the same reasons, Congress also imposed on the BOC affiliates (including broadband and long distance affiliates) additional express requirements to help protect the development of competition, among them section 272's requirement that BOCs "operate independently" and submit to, publish, and pass biennial audits.

So while SBC claims Congress "cannot be thought to have intended that the limits on unbundling in section 251(d)(2) applied *only* to the incumbent LECs that happen not to be Bell operating companies," in fact Congress applied 251(d)(2) to all ILECs but, for compelling reasons, imposed these additional, ongoing section 271 unbundling obligations on any BOC entering the interLATA long distance market. These include not only "nondiscriminatory access to network elements in accordance with the requirements of section 251(c)(3) and 252 (d)(1)" -- 47 U.S.C. section 271(c)(2)(B)(ii) -- but also unbundled loop, transport, and switching, as well as nondiscriminatory access to signaling and databases for call completion. 47 U.S.C. section 271(c)(2)(B)(iv)-(vi), (x). Indeed, if the BOCs' view were correct, Congress would not have needed to enact those additional, detailed subsections; BOC obligations would have stopped at checklist item (ii). Covad at 4. Nor would Congress have found it necessary to add section 271(d)(4), which imposes an express "limitation on [the] Commission," which provides that "[t]he Commission may not, *by rule or otherwise*, limit or extend" the obligations set out in

[16] See MCI at 8.

subsection (c)(2)(B) for any BOC seeking "entry into interLATA services." 47 U.S.C. section 271.

V. THE PETITION FAILS TO MEET SECTION 10'S REQUIREMENTS FOR FORBEARANCE.

The competitive carriers agree that "Verizon has failed to satisfy the explicit statutory criteria" for forbearance under section 10." PACE at 11. Indeed, Verizon's petition actually "nowhere mentions the effect of the requested forbearance on competition, as the Commission is required to consider under section 10(b)." MCI at 9. SBC and Qwest, moreover, are unable to make up for the petition's deficiencies.

A. Verizon has not established that section 271 unbundling for broadband competition is not necessary to ensure just and reasonable charges and practices and to guard against discrimination.

SBC briefly argues that where the Commission has not required unbundling under section 251(d)(2), "it follows that unbundling is not necessary to ensure that the telecommunications service the ILEC provides with that element is available on just and reasonable as well as not justly or unreasonably discriminatory terms." SBC Att. at 5. See also Qwest at 14. SBC contends that a non-impairment finding necessarily means there is "competitive supply ... which ensures that the element in question is not a bottleneck" and thus "ensures[s] that the resulting service is itself subject to competition." Id., citing Triennial Review Order at ¶ 84. Blocking competitors access to broadband capabilities of BOC networks, however, would require CLECs to build networks before serving a single customer, which would frustrate market entry and allow the BOCs to impose unjust and unreasonable rates. And by definition, denying competitors access to broadband capabilities would necessarily mean BOC discrimination against competitors and in favor of their own broadband affiliates. AT&T at 2-1; Covad at 8. And the record is replete with evidence of the BOCs' abuse of competitors, made possible by the continued market dominance that section 271 was designed to dilute. Sprint at 13-14.

SBC and Qwest point vaguely to availability of cable TV-based broadband services. SBC Att. at 14; Qwest at 14. To begin with, cable systems do not reach all consumers; they commonly do not reach business districts where demand for broadband services is highest. Even where cable-TV systems operate, however, the BOCs would merely create a duopoly – something "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 broadband services." AT&T at 21-22. It is worth noting that the Commission rejected the EchoStar-DirecTV merger on public interest grounds, because "a merger to duopoly ... faces a strong presumption of illegality," not least because such a merger would "inevitably result in less innovation and fewer benefits to consumers."[17]

B. Verizon has not established that section 271 unbundling for broadband competition is not necessary to protect consumers.

SBC and Qwest, like Verizon, naturally say nothing about the need for competition to protect consumers. SBC again simply asserts that a non-impairment

[17] EchoStar-DirecTV Merger Order, 17 FCC Rcd 20559 at ¶ 103 (2002) and Separate Statement of Chairman Powell at 1.

finding under section 251(d)(2) automatically means consumer interests can subsequently be ignored. AT&T, however, explains that "[w]ithout the provisions of section 271 that Verizon seeks to avoid, competition in the provision of broadband and next-generation services will be severely impeded." AT&T at 22. SBC claims that unbundling under section 271 is "plainly unnecessary" to protect consumers, because a non-impairment finding under section 251(d)(2) necessarily means the element is "capable of 'competitive supply.'" SBC Att. at 5. Without access on a wholesale basis to broadband and next-generation capabilities of the BOC networks, however, forbearance would certainly lead to fewer choices and higher rates for consumers. Competitors cannot replicate the BOCs' ubiquitous plant, and SBC's reasoning would require that they build an entire network before they can win even their first customer. For the bundled voice and broadband services that customers increasingly demand, BOCs would be monopoly providers of service. Even in those limited areas where cable TV companies offer combined telephony and broadband services, consumers would be subject, at best, to duopoly. AT&T at 23.

SBC and Qwest repeat Verizon's bold assertion that consumers will benefit from removing section 271 unbundling obligations by the supposed increased BOC incentive to invest in broadband and next-generation facilities. SBC Att. at 9; Qwest at 14. In effect, they argue that section 271 unbundling should be lifted for the same reasons that section 251(c) unbundling was. Their argument makes no sense. The Commission declined to subject checklist items to TELRIC, and instead required only that such section 271 elements be provided in compliance with the "just and reasonable" and "nondiscrimination" requirements of sections 201 and 202. Triennial Review Order at ¶ 663. SBC and Qwest, like Verizon, fail to explain why providing wholesale access under section 271 to broadband elements on these terms would diminish BOC incentives to invest. The BOCs had already promised the Commission that they intend to offer competitors access to broadband network capabilities at market terms. Triennial Review Order at ¶ 253 & n.755. The BOCs also ignore the fact that the petition seeks forbearance from imposing statutory requirements on hybrid loop investment that the BOCs *have already made*, which can hardly affect any future investment incentives. AT&T at 25.[18]

C. Forbearance would be contrary to the public interest and would harm competition.

Covad noted that "it is particularly instructive that the third prong of Congress' forbearance standard explicitly *requires* the Commission pursuant to section 10(b) to determine whether or not forbearance *promotes competition* in its analysis of whether forbearance would be in the public interest." Covad at 8 (emphasis in original). In contrast, Verizon's petition would thwart competition for broadband services.

Like Verizon, SBC and Qwest focus not on the pro-competitive, public interest requirements of the Act, but on supposed burdens of compliance with section 271, now that they have received the interLATA long distance authority for which section 271's independent and ongoing obligations were the price. Qwest at 12; SBC Att. at 10. They

[18] See also AT&T Reply Comments, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, at 79-80 (July 17, 2002).

provide no detail, however, about these supposed "substantial and unjustifiable operating and financial burdens." Qwest at 12.

In fact, the BOCs pretend there is "massive uncertainty" (SBC Att. at 3), but they have long understood that unbundling of these broadband capabilities would be required. Verizon acknowledged its obligation to make next-generation facilities and capabilities available to competitors through its PARTS wholesale tariff offerings. See MCI at 13-14, Att. 1. This obligation did not discourage investment. Even when section 251 unbundling obligations applied to broadband facilities, the BOCs publicly touted their investment in network upgrades and the cost savings they would achieve by deploying next-generation technologies in their networks. See MCI at 15. And since narrowband and broadband services are provided over the same networks, most of the same design requirements and support systems applicable to broadband unbundling under section 271 have already been incurred. Any costs associated with providing access to broadband capabilities under section 271 would be purely marginal, recoverable in wholesale rates, and insufficient to outweigh the obvious "detriment[] to competition." Allegiance at 9.

Like the BOCs, CWA's public interest argument rests solely on the dubious assumption that excusing BOCs from their section 271 unbundling obligations for broadband would "accelerate[] deployment of advanced networks." CWA at 1. CWA and the BOCs do not explain why Verizon would not want the additional revenues, increased utilization, and lowered unit costs that other carriers would bring to its network – or why such wholesale competition would not enable Verizon to expand its network upgrades, and its broadband market, faster and at lower cost. See Sprint at 18. Verizon's petition would not increase investment. It would "hinder broadband deployment and stifle the growth of facilities-based competition." Z-Tel at 21.

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SPRINT CORPORATION

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November 26, 2003

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition of Sprint Corporation, filed in WC Docket No. 04-242, was sent by First Class Mail, postage prepaid, and/or electronic mail on this the 22nd day of July, 2004 as follows:

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