

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

In the Matter of:)
)
Petition of Qwest Corporation for Forbearance) WC Docket No. 04-223
Pursuant to 47 U.S.C. § 160(c) in the)
Omaha Metropolitan Statistical Area)

REPLY COMMENTS OF VERIZON¹

In opposing Qwest's forbearance petition,² several of Qwest's competitors argue that (1) the Commission may not forbear from applying any separate unbundling requirements that the section 271 checklist is interpreted to impose, and (2) forbearance is unwarranted because the "wholesale market" for telecommunications services supposedly is not fully competitive.³ Neither claim can be reconciled with the Act and Commission precedent. The Commission has authority to forbear from applying the unbundling requirements of section 271 once a carrier has obtained in-region, interLATA authority in the relevant state. As a purely legal matter, therefore, none of the opponents of Qwest's petition has identified any legal barrier to granting forbearance.

1. Under the terms of the Act, the Commission is expressly authorized to forbear from the requirements of the competitive checklist where those requirements have been fully implemented, as they have once a Bell operating company has received long distance authority.

¹ The Verizon Telephone Companies ("Verizon") are listed on Attachment A.

² Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, WC Docket No. 04-233 (filed June 21, 2004) ("Petition") (requesting forbearance from the requirements of sections 251(c), certain requirements of the section 271 checklist, and dominant-provider regulations in the Omaha, Nebraska MSA).

³ Many commenters also attack Qwest's demonstration of competitive conditions. Qwest is best positioned to respond to those attacks. Verizon files these reply comments to highlight the fundamental legal flaws in the opponents' comments.

Specifically, Section 10(d) of the Communications Act authorizes forbearance from “the requirements of section...271” where “those requirements have been fully implemented.” 47 U.S.C. § 160(d). Similarly, section 271 provides that the Commission shall not approve an authorization to provide interLATA services unless the petitioning Bell operating company has “fully implemented” the requirements of the competitive checklist contained in section 271. 47 C.F.R. § 271(d)(3)(A)(i). Thus, section 271 authority may only be granted once the checklist has been fully implemented – and, once such authority has been granted, section 10(d) no longer bars forbearance.

The “normal rule of statutory construction” is “that identical words used in different parts of the same act are intended to have the same meaning.” *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996) (quoting *Sullivan v. Stroup*, 496 U.S. 478, 484 (1990) (internal quotation omitted)). Application of that normal rule is all but compulsory where, as here, the use of identical language cannot be coincidental because one provision (section 10(d)) explicitly cross-references the other (section 271).⁴

Moreover, construing the term “fully implemented” as having the same meaning in sections 10 and 271 produces an eminently reasonable result, which gives full meaning to all relevant sections of the statute. The Commission has broad authority under section 10 to forbear. Section 10(d) is a narrow, time-limited exception to that authority. Allowing that limit to expire by its own terms, upon a finding of checklist compliance, is consistent with the statutory scheme. Indeed, in designing section 10(a), Congress gave the Commission wide latitude to remove obsolescent and counter-productive regulations as circumstances warrant.

⁴ Similarly, the same-meaning rule should be applied unless application would produce “an absurd result” or would otherwise thwart the statutory scheme, neither of which holds true here. See *Cellular Telecomm. & Internet Ass’n v. FCC*, 330 F.3d 502, 511 (D.C. Cir. 2003); *U.S. West Communications, Inc. v. FCC*, 177 F.3d 1057, 1059-61 (D.C. Cir. 1999).

Several commenters nevertheless assert that a finding of “full implementation” under section 271 does not necessitate a finding of “full implementation” under section 10(d). *See, e.g.,* MCI at 18-20; McLeodUSA at 11-12. Instead, these commenters claim that, in the *OI&M Forbearance Order*, “the Commission expressly rejected the notion that the grant of section 271 authority in a state means that all of the requirements of section 271, including the incorporated requirements of section 272, have been ‘fully implemented.’”⁵ This contention is facially inconsistent with the Commission’s decision in that case. The *OI&M Forbearance Order* held that section 10(d) barred forbearance with respect to certain section 272 separation requirements, which Congress provided would apply for three years from grant of section 271 authority. *OI&M Forbearance Order* ¶ 5. The Commission cautioned, however, that “[its] analysis...applies only to whether section 271 is ‘fully implemented’ *with respect to the cross-referenced requirements of section 272*, and does not address whether *any other part of section 271, such as the section 271(c) competitive checklist*, is ‘fully implemented.’” *Id.* ¶ 6 (emphasis added).

The structure of the Act likewise undermines the opponents’ related claim that the Commission cannot forbear from checklist requirements for three years after the grant of section 271 authority. *See* Comptel/ASCENT at 5-8. As noted above, section 271(d)(3)(A)(i) specifies that, in order to approve a Bell company’s long distance application, the Commission must find that the requirements of the checklist have been “fully implemented.” That is also the exact

⁵ AT&T at 28-29 (referencing Memorandum Opinion and Order, *Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission’s Rules*, 18 FCC Rcd 23525, ¶ 7 (2003) (“*OI&M Forbearance Order*”), *petition for review pending, Verizon Telephone Cos. v. FCC*, No. 03-1404 (D.C. Cir. filed Nov. 10, 2003)). Verizon disagrees with, and has appealed, the Commission’s basis for denying forbearance in that proceeding, but it nonetheless agrees with the Commission’s finding that its decision has no bearing on the circumstances in which forbearance from checklist requirements is appropriate.

language that describes the showing that must be made to satisfy section 10(d), which cross-references section 271. The reference to section 272, in contrast, is found in subsection (d)(3)(B), which does not contain the “fully implemented” language. Consequently, there is not the same direct linkage between that provision and section 10(d). *See* 47 U.S.C. § 271(d)(3)(B).

Taking things to an even greater extreme, several commenters urge that the Commission can *never* forbear from enforcing section 271’s checklist because section 271(d)(4) states that the Commission “may not, by rule or otherwise, limit or extend the terms used in the competitive checklist.” *See, e.g.,* McLeodUSA at 2-3. These parties badly misread the Act. Read in context, Section 271(d)(4) bars the Commission from altering the checklist *prior to ascertaining whether an applicant for section 271 authority has complied* with its requirements. 47 U.S.C. § 271(d)(4). Section 271(d) establishes the processes for reviewing applications for interLATA authority and enforcing conditions on entry, and its various subsections proceed chronologically. Thus, Section 271(d)(1) provides for the filing of an application, (d)(2) instructs the FCC to consult with the Justice Department and state commission when reviewing an application, (d)(3) directs the FCC to consider whether the application demonstrates that the BOC has “fully implemented” the competitive checklist and complied with the other preconditions to entry, and (d)(4) prohibits the Commission from limiting or extending the terms of the checklist. Then, (d)(5) states that the Commission shall publish its determination on the application in the Federal Register, and (d)(6) provides for post-entry enforcement.

Consequently, Section (d)(4) does not limit the Commission’s authority *after* an application has been granted, and it does not and could not eviscerate the specific grant of authority in section 10(d), which empowers the Commission to forbear from enforcing section 271 once that section has been fully implemented. 47 U.S.C. § 160(d). Section 10(d) is not a

mere “general provision,” as McLeodUSA asserts; it is a specific authorization that must be given independent meaning.

2. Where the retail market is competitive, and that competition does not depend on unbundled elements, there is no reason to deny forbearance from the checklist’s unbundling requirements regardless of the potential effect on the wholesale segment. Arguments to the contrary by AT&T (at 29-34) and Comptel/ASCENT (at 10-12) are misplaced.

Congress enacted Section 10 to provide a mechanism for eliminating unnecessary statutory provisions and rules while assuring that consumers would not be harmed by doing so. To that end, Section 10 focuses on how forbearance will affect *end users* of telecommunications services. Section 10’s focus on consumers is evident from the three-prong analysis set forth in the statute:

Section 10(a)(1) instructs the Commission to determine whether enforcement of the relevant regulation or statutory provision “is not necessary to ensure that charges, practices, classifications, or regulations...are just and reasonable and are not unjustly or unreasonably discriminatory.” 47 U.S.C. § 160(a)(1). Although the statute does not specify which “charges” and “practices” are at issue, the obvious concern is for the interests of consumers. After all, consistent with the very theory of regulation, the purpose of the Communications Act is to make available to “*the people* of the United States...communication service with adequate facilities at reasonable charges...” *Id.* § 151 (emphasis added).

In this respect, Section 10(a)(1) reflects the basic antitrust principle that government should intervene in the marketplace only “for the ‘protection of competition, not competitors.’” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). The Commission has long considered that same

principle to underlie the 1996 Act, holding, for example, that its local competition rules should be, as “Congress intended, pro-competition” rather than “pro-competitor.” *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 618 (1996).⁶ As one of the principal drafters of the 1996 Act explained, section 10 is intended “to allow the FCC to reduce the regulatory burdens on a carrier when competition develops, or when the FCC determines that relaxed regulation is in the public interest.” 141 Cong. Rec. S7887 (daily ed. June 7, 1995) (statement of Sen. Pressler). Requests that the Commission transform the forbearance inquiry into a tool for protecting the business plans of individual competitors must be rejected.

Section 10(a)(2) focuses on consumers by its plain terms: it directs the Commission to “forbear from applying any regulation...to a telecommunications carrier...if the Commission determines that...enforcement of such regulation...is not necessary *for the protection of consumers.*” 47 U.S.C. § 160(a)(2) (emphasis added).⁷ And the statute requires the Commission, in determining whether forbearance is consistent with the “public interest” under Section 10(a)(3), to consider whether forbearance will promote “competitive market conditions.”

⁶ See also Recommended Decision, *Federal-State Joint Board on Universal Service*, 16 FCC Rcd 6153, 6195 (2000) (“Consumers are and should be the ultimate beneficiary of the 1996 Act”).

⁷ Certainly, the term “consumer” in Section 10 does not directly include competitors. The Act does not define “consumer,” and “in the absence of such a definition, [an agency must] construe [the] statutory term in accordance with its ordinary or natural meaning.” *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). The ordinary definition of “consumer” is “a person who buys goods or services for personal, family, or household use, with no intention of resale” or “a natural person who uses products for personal rather than business purposes.” *Black’s Law Dictionary*, 335 (8th ed. 2004); see also *Wynn Oil Co. v. American Way Service Corp.*, 736 F. Supp. 746, 757 (E.D. Mich. 1990). The opponents of forbearance offer no evidence that Congress intended a more expansive reading of “consumer” that includes competitors and resellers, particularly when intermodal retail competition is vibrant enough to assure just and reasonable rates and protect consumers.

Id. § 160(b). Once again, therefore, the issue is competition for the business of consumers, not the interests of particular competitors.

This focus on the end user impact of forbearance is fully consistent with Commission precedent in the forbearance context. For example, in 2002, the Commission granted a petition for forbearance from the \$ 0.0095 per minute ATS rate set for low-density price cap local exchange carriers in part because it found that “any increase in its access charges would have a *de minimis* impact on the interstate interexchange rates charged to individual consumers.” *Petition for Forbearance of Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom Pursuant to 47 U.S.C. § 160(c) from the Deadline for Price Cap Carriers to Elect Interstate Access Rates Based on the CALLS Order or a Forward Looking Cost Study*, 17 FCC Rcd 24319, ¶ 19 (2002). Notably, the Commission forbore from enforcing this regulation despite the somewhat more substantial impact the access charge increase would have on interexchange carriers. *Id.*

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THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications, Inc. These are:

Contel of the South, Inc. d/b/a/ Verizon Mid-States
GTE Midwest Incorporated d/b/a/ Verizon Midwest
GTE Southwest Incorporated d/b/a/ Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.